Essays

The Efficiency Function of the *Numerus Clausus* Principle of Property Rights in Land

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Abstract

This paper seeks to identify a possible justification in terms of economic efficiency of the *numerus clausus* principle of property rights in land. At the outset, the current law in several legal systems is examined to show that this principle appears to be present everywhere.

The two justifications that have been proposed in economic terms to explain this principle are then considered: (1) the information costs rationale according to which the property rights that can be established in a piece of land are limited in order not to excessively increase the information costs that potential buyers need to bear (indeed, property rights in land run with the land) and (2) the anticommons rationale according to which this limitation stems from the need to prevent some lands from becoming inefficient anticommons.

A third theory is then put forward according to which the *numerus clausus* of property rights in land stems from the need to prevent the creation of property rights that may become inefficient over time and cannot be eliminated through the use of a contract because of the high transaction costs due to the existence of a bilateral monopoly. Indeed, the property rights cannot even be eliminated by a unilateral act of the owner of the burdened land since they are protected by means of property rules.

The final section analyzes the benefits that would arise if legal systems provided rights that run with the land but are protected only by means of liability rules and seeks to understand why rights of that kind are not currently a feature of legal systems.

I. Introduction

In this paper, I aim to address a particular issue pertaining to the regulation of property rights in land. The issue consists of the justification in terms of economic efficiency of the so-called 'typicality of property rights' principle, also referred to as the 'numerus clausus of property rights principle'. This principle, which is fairly similar across many legal systems, implies that people are not free to create any kind of real right in property other than those only expressly identified by law or the courts. Thus, the freedom of the parties is limited. Although the existence of a *numerus clausus* of property rights has long been known in civil law legal systems, awareness of the presence of such a limitation on parties' freedom has developed only recently in common law jurisdictions.[1]

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[1] Concerning the presence of the principle of the *numerus clausus* of property rights in various legal systems, see B. Rudden, 'Economic Theory v. Property Law: The Numerus Clausus

In this paper, the analysis is limited to real rights of enjoyment and does not extend to real rights of security, in that it cannot be asserted without a full analysis that the solutions obtained also apply to that latter category of rights. Finally, the analysis focuses exclusively on real rights of enjoyment in land and will not address chattels.

The limitation on the freedom of parties to create property rights in land contrasts with the almost full autonomy enjoyed by persons in creating contractual obligations. While obligations with content freely chosen by the parties may be created in contracts, the parties cannot establish property rights in land through a contract other than those that are provided by law. If a contract provided for a property right other than one established by law, such a right *in rem* would not come into existence or at most could constitute only a right *in personam*.

At the outset, it appears to be necessary to define the term 'property right in land'.

This right is characterized by three aspects:

1. The right is tied to the land. If the owner of the land on which it is established transfers ownership of that land, the property right is not extinguished and must also be respected by the new owner. From this point of view, the property right differs distinctly from a claim because when such a right exists, the obligation of the landowner is not transferred to the purchaser of the land who is therefore free not to respect it.

2. Secondly, a property right is an *erga omnes* right, namely, all persons within the legal system are required to respect it. Thus, if a person possesses land over which a property right exists but does not own the land, that person will still be required to respect the property right. In this regard, too, property rights differ from claims. Indeed, the latter must be respected only by the obligor, and third parties generally have no obligations to do so.

3. Thirdly, a property right is a one protected by means of property rules.2 This concept means that whoever infringes it is liable not only to pay damages for the loss thereby occasioned but must also reinstate the factual situation that existed prior to the violation of the right. In legal systems that allow for injunctions, this concept means that the holder of the property right can have the court issue that type of judicial order against the person who has infringed upon the right. In legal systems that do not allow for injunctions, the holder of the property right may obtain the restoration of the *status quo ante* through the various available legal means.

Problem', in J. Bell and J. Eekelaar eds, *Oxford Essays on Jurisprudence* (Oxford: Oxford University Press, 1987), 239-263. The recognition of this principle in the American legal system is due to T.W. Merrill and H.E. Smith, 'Optimal standardization in the Law of Property: The Numerus Clausus Principle' 110 *The Yale Law Journal*, 10 (2000): 'Yet notwithstanding the absence of compulsion behind the *numerus clausus* in common-law systems, it is reasonably clear that common-law courts behave toward property rights very much like civil-law courts do: They treat previously-recognized forms of property as a closed list that can modified only the Legislature'.

[2] For the concept of property rules and the distinction between property rules and liability rules, see the seminal paper by G. Calabresi and D.A. Melamed, 'Property Rules, Liability Rules, and Inalienability: One View of the Cathedral' 85 *Harvard Law Review*, 1089 (1972).

This last aspect also distinguishes a property right from a claim. Indeed, in many legal systems that kind of right is protected exclusively by liability rules, so the obligor, in the event of an infringement upon the right, is only liable to pay damages.

When compared with a traditional claim, the difference that is most emphasized by legal scholars lies in the fact that while a claim does not run with the land, a property right does. This concept means that if an owner has a personal obligation to behave in a certain way and transfers ownership of the land, this obligation does not transfer to the new owner. Even if the landowner has many contractual obligations inherent in the use of the land *vis-à-vis* various obligees, in the event that the property right in the land is transferred, the new owner will not become subject to these obligations. By contrast, when one or more property rights exist in land, transfer of ownership does not result in the elimination of such rights. Rather, they will remain in place with the consequence that the new owner will have to respect them.

This aspect is also emphasized in the various works written to justify the principle of the typicality of property rights from an economic perspective, and this perspective is where the rationale for this principle should be sought. However, I believe that the identification of the justification in terms of efficiency of the principle of the *numerus clausus* of property rights requires us to also keep in mind the third feature that has been highlighted, namely, that property rights are protected by property rules. This specific feature is not taken into account in some of the literature.

II. Classification of Property Rights in Land

Property rights in land can be divided into two categories.

The first category consists of those property rights that are accessory to ownership of an asset. These property rights therefore cannot be transferred separately from the ownership of benefited land. This type of right accrues to anyone who owns the benefited land as an accessory to his or her ownership right from which it cannot be severed. They may be called 'burdens for the benefit of one who owns land'.

In civil law systems, such rights are referred to as 'predial servitudes' and are distinct from 'personal servitudes', which are defined as rights for the benefit of persons that do not necessarily need to be owners of another asset. In common law systems, these rights take on different names, but they can basically be divided into the three categories: (1) easements, (2) real covenants and (3) equitable servitudes. In civil law systems, the expression personal servitude has fallen into disuse, and when scholars speak of servitude, reference is made to a predial servitude. In common law models, it has been suggested that the three categories may be combined into one that could be called 'servitude'.[3]

[3] The idea that the various categories represented by easements in gross, real covenants,

In this paper, I will refer to servitude as any property right that is necessarily accessory to a right of ownership in land.

The second category of property rights in land consists of those rights held by a person who does not necessarily need to be the owner of other land. They can be defined as 'burdens for the benefit of one who does not own land'. As stated above, in civil law systems, such rights were usually referred to with the expression personal servitude although that has fallen into disuse mainly due to the fact that the possibility of constituting them is highly limited. In common law systems, they are referred to as 'property rights in gross' and are divided into several subcategories. Among them, 'profits in gross' and 'easements in gross'[4] should be highlighted. In this paper, I too will refer to these rights as property rights in gross.

III. The Typical Property Rights Established in Various Legal Systems

1. Servitudes in Various Legal Systems[5]

a) Anglo-American Law

Servitudes in Anglo-American systems are divided into easements, real covenants and equitable servitudes.

Easements are enforceable in courts of common law as distinguished from courts of equity. It is commonly said that they cannot 'benefit the landowner personally'.[6] In other words, they must 'confer a benefit on the dominant tenant as such'[7] rather than some personal advantage on its owner. Easements can still be enforced against an owner who bought property without knowledge of them.

A real covenant consists of the landowner's right that the owner of the burdened land not perform certain activities. Such a covenant is enforceable only when the parties who originally created it were in a personal relationship to each other, which is termed 'horizontal privity'. In England, they must be landlord and tenant.

Finally, the third category of servitudes is defined as equitable servitudes. An equitable servitude is not subject to the requirement of privity. It is enforceable only

and equitable servitudes in American law can be combined into a single legal category called 'servitude' subject to uniform rules is developed by U. Reichman, 'Toward a Unified Concept of Servitudes' 55 *Southern California Law Review*, 1177 (1982).

[4] Although the expression 'easement in gross' in the United States (US) legal system generally tends to denote certain rights that do not have the characteristic of running with the land, in this article we use that expression in the manner of English jurists who use it to denote rights that instead run with the land: see, by way of example, M.F. Sturley, 'Easements in Gross' 96 *The Law Quarterly Review*, 557 (1980).

[5] The reconstruction of the regulation of property rights in the various legal systems largely follows that proposed in T.J. Gordley and A.T. Von Mehren, *An Introduction to the Comparative Study of Private Law* (Cambridge: Cambridge University Press, 1st ed, 2009), 196-203.

[6] P. Sparkes, *A New Land Law* (London: Bloomsbury Publishing, 1999), 574.

[7] R. Megarry, W. Wade and C. Harpum, *The Law of Real Property* (London: Sweet & Maxwell, 6th ed, 2000), para 18.

against a purchaser who had notice of it. The notice may be actual or it may be constructive. When the required notice is only constructive, the purchaser of the burdened land cannot object on the basis of a lack of actual knowledge of the servitude. Indeed, the purchaser should have known about it by checking public records. The servitude must 'touch and concern' the land, in other words, it must 'benefit or accommodate' the dominant land.[8]

b) French and Italian Law

In the French system, servitudes are governed by Art 637 of the Civil Code, which provides that a 'servitude is a charge imposed on one parcel of land for the use and benefit of the land belonging to another owner'.[9]

The Italian system tends to overlap with the French one in that the Italian Civil Code was drafted using the French one as a model.

Art 1027 of the Italian Civil Code provides that a 'servitude is a charge imposed on one parcel of land for the benefit of the land belonging to another owner'.

c) German Law

Servitudes, which are referred to by the legal term *Grunddienstbarkeit*, are governed in the German Civil Code by Art 1018:

> 'A parcel of land can be burdened in favor of the owner of another parcel of land in such a manner that this owner is allowed to use the parcel I particular ways, or that certain actions cannot be performed on that parcel, or that the exercise of a right is not permitted that belongs to the ownership of the burdened parcel in relation to the other parcel'.[10]

The possible content of a servitude is specified by Art 1019:

> 'A *Grunddienstbarkeit* can be only consist in a burden that advantages the use of the benefited property: The content of such a servitude cannot extend beyond that limit'.[11]

Finally, it should be added that in all legal systems, servitudes can be either time-limited or perpetual.

Taking into consideration the various rules in different legal systems, the characteristics that a right must have in order to exist as a right of servitude should be considered, and it should be pointed out that the rules are quite similar, which bolsters the view that a single rationale behind the limitation of party freedom

[8] K. Gray and S.F. Gray, *Elements of Land Law* (Oxford: Oxford University Press, 3rd ed, 2001), 625.

[9] Translation taken from T.J. Gordley and A.T. Von Mehren, n 5 above, 198.

[10] ibid 199.

[11] Translation taken ibid 199.

in the creation of rights of servitude exists. Considering Anglo-American law first, it was seen that the existence of a right of servitude requires for its existence that it touches and concerns the benefited land.

Although different definitions of this requirement have been developed, it can be said that the courts attribute a meaning to it according to which a right of servitude touches and concerns the benefited land when it is quite likely that through the various transfers of ownership it will retain its value for the holder. In other words, even in the event of a transfer of ownership of the land to which the right of servitude is accessory, this right will have an equal value for the new owner as for the previous owner. In short, servitudes whose value is stable over time even in cases in which a change in ownership occurs are permissible. If the value for the initial holder was greater than the cost to the owner of the burdened land, with the transfer of ownership by the owner of the benefited land the right of servitude continues to have a value for the holder greater than the cost to the owner of the burdened land.

The touch and concern requirement is also expressed by stating that the right should benefit the land rather than the individual owner. This idea seems to indicate that the right that can be created with a servitude must increase the value of the land, that is, lead to an increase in the value that the majority of people attribute to that land and not just the individual owner. A right of servitude that is aimed at satisfying an idiosyncratic preference of the current owner cannot be validly created because it leads to an increase in the value of the land only for the current owner and thus does not benefit the land.

Indeed, this touch and concern requirement is also found in the other legal systems considered here.

With regard to the French Civil Code, Art 637 that states that a servitude 'is a charge imposed on one parcel of land for the use and benefit of the land belonging to another owner'. Thus, reference is made to a benefit attributed to land, and not to a person.

With regard to the Italian Civil Code, the same observation applies. Indeed, Art 1027 provides that a servitude is 'the burden imposed on land for the benefit of other land'.

Finally, with regard to the German Civil Code, Art 1018 introduces the general definition of servitude while Art 1019 takes care to specify that 'it can only consist of a burden that advantages the use of the benefited property'. We return, then, to the principle that the servitude cannot satisfy a particular and idiosyncratic preference of the owner of the dominant land but must attribute an authority to the set of rights that constitutes the ownership of the dominant land that increases its value for all potential owners.

2. Property Rights in Gross in Various Legal Systems

The regulation of property rights in gross is not as uniform among the various

legal systems as that of servitudes.

In the English legal system, since *Keppel* v *Bailey* (1834)[12] it has been ruled out that easements in gross can be validly established. This principle has remained firm over time. However, the system allows the possibility of creating profits in gross with extensive freedom.[13]

The American legal system has not followed the British system in this matter. In fact, the parties are given the opportunity to establish many forms of easements in gross. As has been stated, 'almost without exception', American courts have held that easements in gross could be established 'for railroads, for telephone and telegraph and electric power lines'.[14] It can be said that in the American system the only easements in gross that cannot be created are 'recreational' easements (easements for hunting, fishing, boating and camping).[15]

In the French and Italian systems, the power of people to create property rights in gross is rather limited.[16] The main and almost only category is usufruct and the corollary categories of use and habitation.

The situation is entirely different in the German legal system, in which people are allowed to create property rights in gross with considerable freedom.

Indeed, Art 1090 of the German Civil Code provides as follows:

> 'A parcel of land can be burdened in such a manner that the person in whose favor the benefit operates is entitled to use the parcel in certain way or possesses the kind of authority that can form the content of a *Grunddienstbarkeit*'.

However, the limitations that the German rule establishes should be noted: the parties are given the power to create property rights in gross but in order to come into existence those rights must have the same content as a servitude might have had.

[12] *Keppell* v *Bailey* [1834], CH 39, [1834] ER 1042.

[13] In order to briefly outline some definitions of these property rights in general, it can be said that an easement in general is a legal right to use someone else's land in a particular way. Common easements are for water, power, and/or access. A profit in gross is a legal right to take natural resources from another person's land. Examples of profits include parts of the lands itself such as sand, peat or minerals, products growing on the land such as grass or timber, and/or wild animals, such as fish or game.

[14] R.R. Powell and M.A. Wolf, *Powell on Real Property* (Albany: Matthew Bender, 2001), para 34.16.

[15] J. Dukeminer and J.E. Krier, *Property* (New York: Aspen Publishing, 5th ed, 2002), 830.

[16] However, it should be highlighted that a jurisprudential strand is developing in France that recognizes the admissibility of property rights in gross other than those expressly codified. On French case-law, see in particular F. Mezzanotte, *La conformazione negoziale delle situazioni di appartenenza* (Napoli: Jovene, 2015), 62-69.

IV. The Rationale of the Principle of Typicality of Property Rights in Land

As the analysis above has shown, in the legal systems considered, the parties are not granted the power to create any property right in land that they desire. Although it has different limits, the *numerus clausus* principle of such rights is present in various legal systems.

Scholars who have searched for the possible economic rationale for the principle of typicality of property rights in land have developed several theories. The most widely embraced theory is that property rights are typified because of information costs.

1. The Information Costs Rationale

According to this justification of the principle of the *numerus clausus* of property rights, since property rights run with the land, to obtain accurate information about the burdens on the land that they intend to purchase, potential buyers must invest resources to acquire that information. This need is especially present in those legal systems that do not provide for any type of real estate records but also exists in others since searching and understanding real estate registries can be costly.[17] The more property rights that can be created, the higher the information costs for third parties. Hence the need to limit the power to create property rights through the introduction of the *numerus clausus* principle.

In the famous English *Keppel* ruling cited above, which established the impossibility for parties to create easements in gross, the court expressly identified the rationale therefor as the need not to impose too many information costs on potential purchasers of burdened land while also preventing the purchaser of the burdened land from discovering that burdens exist on the purchased land only after it is purchased:

> 'No harm can be done by allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer to damages for breaching their obligations. This process creates no problems and is a reasonable liberty to bestow, but great detriment would arise and much confusion of right if parties were allowed to invent new modes of holding and enjoying real property and to impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote. It would hardly be possible to know what rights the acquisition of any parcel conferred or what obligations it imposed'.[18]

[17] The information costs rationale is developed mainly by T.W. Merrill and H.E. Smith, n 1 above; H. Hansmann and R. Kraakman, 'Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights' 31 *The Journal of Legal Studies*, 373 (2002).

[18] *Keppell* v *Bailey* [1834], CH 39, [1834] ER 1042.

Richard Epstein argued that the information costs rationale may be the only reason behind limiting the freedom of the parties in the creation of property rights in land. He concluded that from a *de iure condendo* perspective, in systems in which there is public record system, such freedom should no longer be limited because third parties can acquire information about the existence of such rights through a search at public registries.[19] Therefore, if a real estate records system exists, in Epstein's view the parties should be free to create any property right and the principle of the *numerus clausus* of property rights should be eliminated. However, it is worth pointing out that the problem of the information costs that the parties need to bear in order to be informed about the existence of property rights over a piece of land exists even in systems that have a public record system, since searching the public registries necessarily entails costs. These costs would increase if the parties could devise rights that do not correspond to the types prescribed by law.

However, it should be pointed out that this justification of the principle of the *numerus clausus* of property rights in land, even if it were convincing, would not appear to be entirely comprehensive. Indeed, it cannot offer an explanation of the criteria followed by legal systems to determine which property rights can be created and which cannot. Examining the individual legal systems, the information costs rationale theory fails to fully explain several choices made by the legislature or the courts.

With regard to English law, the principle does not offer a justification for why easements in gross in general cannot be created while profits in gross can.

With reference to the American legal system, the information costs theory does not provide an explanation for the fact that easements in gross in general can normally be established with the exception of those that are exclusively recreational in nature.

With regard to the German legal system, this theory does not explain the particular way in which the issue is regulated in the Civil Code, which permits only property rights in gross with content identical to that which servitudes might have had.

With regard to the two similar legal systems of Italy and France, the information costs theory fails to provide an explanation for the fact that these systems severely limit the ability of people to create property rights in gross despite the fact they have public registry systems, so information costs are somewhat abated.

Finally, and with regard to all of the legal systems that have been considered, the information costs theory fails to explain the need for the touch and concern requirement in order for a right of servitude to come into existence.

So even if one were to find the idea that the principle of the typicality of

[19] R.A. Epstein, 'Notice and Freedom of Contract in the Law of Servitudes' 55 *Southern California Law Review*, 1353-1354 (1982): 'under a unified theory of servitudes, the only need for public regulation, either judicial or legislative, is to provide notice by recordation of the interests privately created'.

property rights derives from an information costs problem persuasive, it would be necessary to supplement it in order to understand which criteria have been followed by the various legal systems in determining which property rights can be created. At this point, the information costs theory does not appear to be comprehensive. As an example, consider the development of the recognition of equitable servitudes in the English legal system. At first, it was established that equitable servitudes bound the purchaser of burdened land if the latter had received notice of the existence of the encumbrance. However, as early as 1882, beginning with the *London & South W. Ry Co*. ruling,[20] the courts 'made clear that covenants would be enforced against subsequent purchasers only if covenants were made for the protection of other land'.[21] Thus for the transfer of an equitable servitude to the purchaser, it became necessary not only for the purchaser to be given notice of the existence of the burden but also for the equitable servitude to fulfill the touch and concern requirement. The information costs theory does not explain the imposition in the English system of the touch and concern requirement for servitudes although the courts have required the purchaser to be informed of the burden in order to be bound.

Again, as an example, note what Hansmann and Kraakman,[22] two authors who embrace the information costs rationale, state with regard to the regulation of servitudes:

> 'The civil law's *numerus clausus*, after all, limits only the categories of property rights that can be created and not the content of specific rights within those categories. For example, servitude on land, and security interests in chattels are two of the property rights included in the *numerus clausus*. Within these categories, there is substantial freedom to tailor the terms of specific rights. Thus, easements of a potentially infinite variety of types can be created within the permitted category of servitudes on land (…). The common law regulation of property rights (…) likewise operates at the category level'.[23]

When the two authors come to the point of having to justify the need for the touch and concern requirement for a servitude to come into existence, they state:

> 'The law's general requirement that easements and similar servitudes 'touch and concern' neighboring land is, in fact, a familiar example of the relationships between verification rules and forms of property rights. Servitudes that meet the requirement are much easier to verify by physical inspection of the property and its surroundings, which remain an important component of

[20] London & South Western Ry. v Gomm [1882] CHD 20, [1882] 562.

[21] U. Reichman, n 3 above, 1225-1226. The same paper provides a reconstruction of the decisions whereby the English courts came to recognize the admissibility of equitable servitudes, 1225-1226.

[22] H. Hansmann and R. Kraakman, n 17 above.

[23] ibid para 400.

the verification rules employed for them (given the weakness of the recording system)'.[24]

It can be noted that the two authors' reconstruction does not appear to be entirely convincing. First, the touch and concern requirement is also required by legal systems that have a public records system. Consider in particular, the French and Italian legal systems. Second, the explanation of the need for the touch and concern requirement (represented by the need for such a servitude to be verifiable by physical inspection) clashes with the fact that many of the servitudes that meet this requirement are not verifiable by this form of inspection. The attempt by the two authors to provide an overall explanation of the principle of the *numerus clausus* of property rights only on the basis of the information costs rationale does not lead to entirely satisfactory results.

However, on closer inspection, this theory does not appear to be convincing either as very few of the choices of legal systems appear to be consistent with it.

With regard to the English legal system, we have seen that it allows for the establishment of a large number of profits in gross. These rights could be established even before the introduction of the public registry system. There is no doubt that the possibility that there may be a number of profits in gross on a piece of land greatly increases the information costs that need to be borne by potential buyers in order to have adequate knowledge of the burdens on the land. If the information costs problem had inspired the regulation of property rights in land, a greater limitation on the creation of such rights likely would have been necessary and introduced.

With regard to the US legal system, it was pointed out that easements in gross with the most varied content can be created. Such a large number of easements in gross that could potentially be created seems inconsistent with the information costs theory, as the possible existence of these property rights in land greatly increases information costs.

With reference to the Italian and French legal systems, the fact that the property rights in gross that can be created constitute a very narrow category would seem to argue, by contrast, in favor of the theory under consideration. However, this theory is unconvincing in explaining the regulation of servitudes, as we shall see with reference to all of the legal systems examined.

With regard to the German legal system, the information costs theory appears to be conspicuously unconvincing because that system allows for a large number of property rights in land. One need only think of property rights in gross which can exist with the most varied content, leading to a significant increase in information costs for those wishing to acquire property ownership.

Finally, a consideration that relates to rights of servitude in general is worth mentioning. The legal systems reviewed here require that right of servitude to

[24] ibid para 402.

touch and concern the benefited land. Thus, a limitation in the possibility of establishing rights of servitude exists, and this limitation could, at first glance, be justified by the need to lower information costs. However, this requirement may exist in a wide variety of scenarios with the result that multiple rights of servitude may exist on the same land. Information costs can therefore be quite high.

As an example, in the Italian legal system rights of servitude can have the most varied content. It has been pointed out as follows:

> 'There are servitudes of a more distinctly agricultural nature, such as that of drawing water from the nearby land or letting the flock raised on its own land graze there. Others are normally associated with industry: right-of-way for electricity lines, oil pipelines, methane pipelines or railways, the right to discharge debris onto the nearby land or to introduce fumes, noises or shakings exceeding normal tolerability. Still others are of a commercial nature: it is possible, for example, a servitude which forbids the running of a shop or hotel on the serving land in competition with that exercised on the dominant land. Or it can be a question of constraints imposed for the greater convenience or amenity of the dominant land: thus, the building on the serving land can be prohibited, or subjected to special limits as regards the height, the dimensions, the distances, the windows, the architectural features; or the neighboring land may be restricted to exclusively residential use. And the exemplification could continue'.[25] (our translation)

The possibility of multiple rights of servitude existing on the same land, resulting in increased information costs, is also expanded by the fact that the legal systems reviewed here do not expressly establish the requirement of 'proximity' of the potential dominant land to the potential servient land in order for it to create a servitude. Even land that is distant from the servient one can thus become dominant land, increasing the chances that many rights of servitude may exist on the burdened land.

2. The Anticommons Rationale

According to proponents of this theory, party freedom in creating property rights in land is limited to avoid the creation of anticommons.[26] An anticommons is

[25] P. Trimarchi, *Istituzioni di diritto privato* (Milano: Giuffrè, 20th ed, 2018), 496-497.

[26] The anticommons theory can be found in the works of various authors but was mainly developed by Francesco Parisi. See F. Parisi, 'Entropy in Property' 50 *The American Journal of Comparative Law*, 595 (2002); Id, 'Freedom of Contract and the Laws of Entropy' 10 *Supreme Court Economic Review*, 65 (2003); B. Depoorter and F. Parisi, 'Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes' 3 *Global Jurist*, i-41 (2003). The anticommons rationale is also proposed by E. Baffi, 'Gli anticommons e il problema della tipicità dei diritti reali' *Rivista Critica del Diritto Privato*, 455 (2005). The arguments against the anticommons rationale are listed by F. Mezzanotte, 'The Interrelation Between Intellectual Property Licenses and The Doctrine of Numerus Clausus. A Comparative Legal and Economic Analysis' 3 *Comparative*

an asset for which decisions about its use must be made by a large number of parties, each of which has veto power.[27] It is observed that when more than one property right is created over a piece of land, that property takes on the characteristics of the anticommons, in the sense that the consent of all holders of the various rights is required to change its intended use. Each holder of a property right could veto the change in the intended use of the land. In these cases, coming to an agreement with all parties who must give their consent may be prevented due to behavior usually referred to as 'holding out'.[28]

The need to limit the creation of property rights in land stems from the risk of possible inefficiencies brought about by the anticommons nature of the land on which many property rights exist. It may, in fact, be the case that after the creation of various property rights, the possibility of using the land in a way other than that in which it is used may emerge. That is, it would be more efficient to eliminate all property rights existing on the land in order to use the land for a different purpose. More precisely, such a situation will be inefficient when the increase in the value of the asset would be greater than the sum of the losses incurred by the various holders of the individual if the various property rights were eliminated. In such a situation and in the absence of transaction costs, all parties involved would reach an agreement to extinguish the various property rights. However, in this scenario, transaction costs are quite high, if not prohibitive, due to 'holding out' with the result that an agreement that would benefit all and be socially desirable cannot be reached. The land would thus maintain its former intended use, and an inefficient situation would remain.

The theory that the principle of the *numerus clausus* of property rights is in place in the various legal systems because of the problem of anticommons justifies this limitation on the freedom of the parties with the need to prevent the creation of lands with the characteristics of anticommons. Over the course of time, a piece of land's use could become inefficient due to the emergence of the possibility of using it in a different way but transaction costs would prevent this change in the intended use of the land.

Examining this theory in detail, it is arguable that it would be persuasive if legal systems considerably limited the possibility of multiple property rights existing

Law Review, 1 (2012).

[27] On the concept of anticommons, see M. Heller, 'The Tragedy of the Anticommons: Property in the Transition from Marx to Markets' 111 *Harvard Law Review*, 621 (1998); J.M. Buchanan and Y.J. Yoon, 'Symmetric Tragedies: Commons and Anticommons' 43 *The Journal of Law and Economics*, 1 (2000); F. Parisi, N. Schulz and B. Depoorter, 'Simultaneous and Sequential Anticommons' 17 *European Journal of Law and Economics*, 175 (2004). For a concise introduction see M. Heller, 'The Tragedy of the Anticommons: A Concise Introduction and Lexicon' 76 *The Modern Law Review*, 6 (2013).

[28] With regard to English law, Sturley identifies in the various rulings over time that have prohibited the creation of easements in gross an argument and can be traced back to the anticommons theory that he calls 'clogs on the title argument' along with the 'surcharge concern' and the information costs argument (M.F. Sturley, n 4 above, 564-565).

on the same land. From this point of view, the persuasiveness of the anticommons rationale requires legal systems to have the same limits on party freedom as required by the information costs rationale. In both cases, legal rules should not permit the creation of an excessive number of property rights in land, in one case to avoid the emergence of anticommons and in the other not to cause an excessive increase in information costs. It can then be argued that the anticommons rationale faces the same explanatory difficulties as those identified with regard to the information costs rationale. Indeed, considering the rules in the various legal systems, it was pointed out that they do not prevent the presence of a large number of property rights in the same land. With reference to the information costs theory, it was argued that this aspect makes that theory unconvincing; it seems that the same conclusion must be reached with reference to the anticommons theory.

In fact, the anticommons problem poses a need that legal systems could actually keep in mind when deciding whether or not to give private parties total freedom in the creation of property rights. Situations in which property over which several property rights exist cannot be reunified in order to use it for a different purpose may exist due to the high transaction costs. In such cases, serious situations of inefficiency may remain.

Consider, by way of example, the servitudes that may exist in a condominium against one apartment and for the benefit of the other apartments. The servitude may consist, for example, of prohibiting the burdened apartment from being used for a nonresidential purpose. In the event that a strong need arises to use that apartment for hotel purposes, the owner would need to enter into agreements with each individual unit owner. Transaction costs under this scenario would be prohibitive and the asset would not be put to its new and more efficient use. Since property rights are protected by property rules, if the owner of the burdened apartment proceeded to put the property to its new use without first reaching an agreement with the owners of the other apartments, each owner of the other apartments could appeal to the court for an injunction or specific restitution. The problem arises similarly in common interest communities in which an individual who wishes to remove a burden on his or her property would have to negotiate with the owner of each property in the community.

Therefore, if the possibility of inefficient anticommons coming into existence could concretely justify some form of limitation on party freedom in the creation of property rights in land, it seems reasonable to ask the question as to why this need is not reflected in the legal regulation of property rights. Most likely, the answer could be found in the kind of economy that existed when the rules governing property rights in land were developed. In civil law systems, this regulation derives from Roman law. In common law systems, it appears to have arisen as early as the mid-19th century. It can then be assumed that this regulation developed with reference to an agricultural economy, which is predominantly static in nature. In such an economy, lands are generally used for the same purpose over time, and the need to

release them from the encumbrances existing on them for use for other purposes rarely arises. As a result, legislatures and courts did not feel the need to govern the creation of property rights in land in consideration of the hypothetical but remote risk that inefficient anticommons could emerge. In today's economy, which is characterized by strong dynamism due in part to technological innovation and in which land can with high probability be put to new uses over time, the problem of the existence of inefficient anticommons becomes extremely relevant.

3. The Efficient Property Rights Rationale

A third theory, which appears to be partly structured with regard to servitudes but not with regard to property rights in general and which can be proposed instead with regard to all property rights, holds that the property rights that parties can validly constitute are those that remain efficient over time. When it is said that they remain efficient, this term means that the value that the holder attributes to them remains higher than the cost borne by the owner of the land on which the burden is placed.

It has already been pointed out that the touch and concern requirement can be found in all legal systems considered. The servitude should benefit the benefited land rather than the holder. An economic rationale in prohibiting the establishment of servitudes that meet a highly specific (idiosyncratic) preference of the dominant land exists: indeed, in this case it would be highly likely that with the transfer of ownership of the land, the servitude would become inefficient, resulting in a cost for the owner of the burdened land greater than the benefit for the holder of the servitude. In other words, private harm is greater than private benefit.[29]

It could be argued that the legal system should not be concerned about such inefficiencies as the obligated party could negotiate with the holder of the right of servitude and on that basis eliminate the inefficient burden on the land. However, as many authors have already pointed out,[30] since this is a situation of a bilateral monopoly, the transaction costs can be very high and prevent the agreement from being reached with the consequence that the inefficient servitude would continue to exist. Therefore, by requiring the servitude to benefit the land rather than the right holder, the touch and concern requirement reflects the will of legislatures and

[29] Alexander interprets Posner's thinking about the touch and concern requirement by stating that from it follows 'enforcing promises that, absent transaction costs, would have survived rounds of bargaining among subsequent generations of owners': see G.S. Alexander, 'Freedom, Coercion and The Law of Servitudes' 73 *Cornell Law Review*, 588-589 (1998). The economic rationale of the touch and concern requirement is also identified by U. Reichman, n 3 above, 1132-1133.

[30] See J.F. Stake, 'Toward an Economic Understanding of Touch and Concern' 1988 *Duke Law Journal* 925, 935-939 (1988). A general analysis of transaction costs that prevent agreement from being reached in a bilateral monopoly situation is made by I. Ayres and E. Talley, 'Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade' 104 *The Yale Law Journal*, 1027 (1995).

the courts for the content of the servitude to be such that a majority of potential purchasers of the land would attribute the same value to the power inherent in the servitude as the selling owner. When this assumption is met, the value that the holder attributes to the right of servitude will remain stable over time. It will also generally be greater than the cost borne by the owner of the burdened land.

Indeed, it should be pointed out that the main instrument for establishing a servitude is a contract. By its very nature, a voluntary act in which each party wins, leading to what one supposes will be an efficient servitude in the sense the party acquiring it will attribute a value to it that is greater than the cost borne by the party granting it. If the servitude meets the touch and concern requirement so that the majority of the potential purchasers of the land attribute to it the same value as the original holder, the servitude will remain efficient in the event of transfer of ownership of the land and the servitude.

This rationale, which seems to underlie the limitation of party freedom in the establishment of servitudes, can also be identified with regard to property rights in gross. Such rights are generally not transferable and, therefore, the concern of legal systems cannot be that they become inefficient because of their transfer from one party to another. Instead, the need of legal systems seems to be for property rights in gross to remain efficient over time even while still remaining in the hands of the same holder. Thus, those property rights in general whose value to the owner is highly likely to remain stable over time and therefore, not decrease, are allowed. Since these rights are primarily constituted through the instrument of a contract, they will be created efficiently, and since their value over time will tend to be stable, they will remain efficient. On the other hand, legal systems do not permit the establishment of property rights in gross whose value to the holder is highly likely to decrease over time with the consequence that they would become inefficient.

Thus, the proposed theory can be summarized by stating that:

- the regulation of servitudes aims to exclude the creation of servitudes that could become inefficient by virtue of a transfer of ownership of the dominant land; and

- the regulation of property rights in gross aims to exclude the creation of rights whose value over time could decrease for the same original holder, thus becoming inefficient.

In short, it can be said that legal systems permit the establishment only of those property rights whose value remains stable over time and is not, therefore, volatile. A logic in this concept can be found in terms of efficiency in that it prevents rights from remaining in existence that produce an inefficiency caused by the fact that the value that the holder attributes to them is less than the cost borne by the owner of the burdened land. To test the validity of this hypothesis, the regulation of property rights in gross in the various legal systems must be examined just as the regulation of servitudes has already been analyzed.

Starting from the English legal system, it was pointed out that this system does not permit the creation of easements in gross in general while it does allow for the establishment of profits in gross in general. This different rule would seem to be justified on the basis of the proposed theory. Profits in gross are defined as rights to extract natural resources from the burdened land. The right to extract these resources from land may have a value for the holder that can be considered stable over time. In fact, the holder may in any case decide to sell the goods taken from the land in the market (consider natural plant products or natural resources such as ferrous materials). Easements in gross, by contrast, consisting of the right to carry out an activity on the burdened land, may have a value that varies over time for the same holder. As an example, an individual may have a right to cross someone else's land, but that right may lose considerable value if the holder's habits change. It can then be argued that while profits in gross tend to remain efficient over time, easements in gross risk becoming inefficient. Hence the choice of the English courts is to make profits in gross permissible in general and instead, to exclude the possibility of creating easements in gross.

Unlike English law, US law authorizes parties to establish easements in gross in general. However, as noted above, recreational easements cannot be granted under modern case-law (such as easements for boating and camping). This limitation introduced by the US courts in the possibility of creating certain easements in gross can be understood in light of the theory put forward. Indeed, recreational easements are rights for which the value that the holder attributes to them can easily change over time, thus becoming inefficient. Thus, by way of example, the desire to go boating or camping may diminish and as a result, the corresponding right would lose value for the holder.

The German legal system has a special provision applicable to property rights in gross. Under Art 1090 of the German Civil Code, property rights in gross may be established, but only those 'that can form the content of a *Grunddienstbarkeit*'[31] are permitted. The interpretation of this provision may be difficult but it could be accomplished on the basis of the theory put forward in this study. The German legislature established this limitation on the creation of property rights in gross with the intention of excluding the creation of rights whose value to the holder can easily change and possibly decrease over time. By establishing that only a right that could be subject to a servitude could also be the subject of property rights in gross, the German legislature seems to have intended to exclude the creation of property rights in gross that reflect a particular, idiosyncratic preference of the potential holder and that could be valued less by such holder over time as the holder's idiosyncratic preference could diminish.[32]

[31] Please recall that this term refers to servitudes.

[32] F. Mezzanotte, *La conformazione negoziale* n 16 above, 75, states that German law does not permit the creation of property rights in gross that satisfy an idiosyncratic preference of the holder. On this topic also see J. Mayer, 'Beschränkte Persönliche Dienstbarkeiten', in *Staudinger Komm. BGB, Buch 3. Sachenrecht* (Berlin: de Gruyter, 2002), paras 108-112.

The French and Italian legal systems strongly circumscribe the possibility of creating property rights in gross. Those that are permissible can be justified on the basis of the theory put forward. Indeed, they are of such a nature that their value for the holder should not change over time, thus remaining efficient (consider usufruct in particular).

To recapitulate, the theory states that legislatures and courts have allowed only those property rights that over time are highly likely not to lose value for the holder and hence will not become inefficient. Rights that may instead become inefficient cannot be established because the resulting deadweight loss cannot be eliminated by negotiation between the parties. When faced with bilateral monopoly situations, the transaction costs can be very high. On the other hand, the owner of the burdened land cannot remove the burden on the land by paying damages, as could be done if property rights were protected by liability rules, but must respect the right since he or she would face an injunction or specific restitution in the event of a violation.

It should be pointed out that the inefficiency that would result in the event that the value of any property right in land decreased depends on the particular form of protection that such rights have. Protection by property rules requires reaching an agreement to eliminate a property right in land, and such an agreement often cannot be reached because of transaction costs. If this is true, it could be argued that if such rights were protected by liability rules (with the consequence that the owner of the burdened land could have a property right extinguished without the need for an agreement), the problem of inefficiency would be solved and limitations on party freedom in the establishment of property rights would no longer be justified. However, legal systems have chosen to protect property rights through the use of property rules and have not contemplated rights that run with the land but are protected only by liability rules.

V. New Rights Protected by Liability Rules

The fact that property rights in land are given protection by legal systems in the form of property rules does not preclude that these same systems could also provide rights that have the same characteristics as property rights but with the difference that they are protected by means of liability rules. In such a case, the owner of the burdened land would have the power to have a right existing on his or her land extinguished by engaging in conduct inconsistent with that right or by making a declaration of will, and by paying damages, without therefore having to enter into a contract with the holder of the right. Such rights would have the advantage of not resulting in the survival of inefficient situations due to the inability to reach an agreement, as the owner of the burdened land would not need such an agreement in order for the right to be extinguished.

In the event that a legal system made these particular rights permissible, the

following scenarios could arise:

- Firstly, one could imagine that parties could create rights that run with the land, protected only by liability rules and whose content is identical to that of the property rights in land already envisaged by the legal systems. As an example, a traditional right of way could be replaced by a right that has the same content but is protected exclusively by liability rules. If the parties choose to create such a right instead of a traditional servitude this would indicate that they maximize their aggregate welfare by doing so. On the other hand, the rest of society would also gain since the inefficiencies that traditional property rights can create would not arise.

- Secondly, rights that run with the land, which are protected only by liability rules and whose content is prohibited by traditional property rights, might be considered permissible. As an example, in those legal systems in which the possibility for people to create property rights in gross is very much circumscribed, one might consider it permissible to create rights with the content of those prohibited property rights in gross, which would be protected by liability rules. This idea is particularly true of the French and Italian legal systems, which exclude property rights in gross with rare exceptions. In this way, the concern that inefficient situations would come into existence would not be justified because the owner of the burdened land could have the property right on his or her land extinguished by engaging in a given behavior and paying damages. By way of example, in the Italian legal system, it is certainly impermissible to create a property right in gross entailing the right to park a car on a certain piece of land but that same right backed up by a liability rule could be established.

- Finally, a further possibility is worth mentioning. In some legal systems that have been considered, situations may arise in which the owner of the burdened land with a servitude owes one and the same obligation to owners of different lands, for example in the case of condominiums and common interest communities. Currently, legal scholars and the courts are of the view that servitudes may be created burdening an apartment in a condominium or land falling within the territory of common interest communities to the benefit of each owner of the units forming part of the condominium or the common interest community. In these situations, the owner of the burdened apartment who wishes to extinguish the burden on his or her property would have to come to an agreement with all parties belonging to the condominium or the common interest communities. Problems of holding out, which are particularly important due to the large number of parties with whom one would have to negotiate, along with other problems also related to the existence of transaction costs would generally prevent such arrangements from being implemented and any situation of inefficiency would remain. In the two cases examined here, there would be room for people to exclusively create rights that run with the land but are protected by liability rules and not by property rules, an option not permitted by traditional servitudes protected by property rules. This process would mean that the owner of the burdened land could have the various

encumbrances on his or her land extinguished by engaging in conduct inconsistent with respect for them and by paying damages to the holders of the affected rights. An agreement with all entitled parties would not be necessary.

VI. In Search of a Justification for the Current Impermissibility of Rights in Land Protected by Liability Rules

We have pointed out on the basis of our analysis that it would appear socially desirable for legal systems to empower people to create rights that run with the land protected exclusively by liability rules. However, so far legal systems do not expressly provide for this option (with a partial exception being the Restatement Third on Property). Moreover, to date not even the courts have established this particular type of right. The legal systems examined include rights that run with the land protected by property rules but do not contemplate rights that run with the land protected by liability rules.

One possible justification for this orientation of legal systems could be found in the traditional criticism that is leveled at liability rules. In the presence of a right protected only by liability rules, another person may appropriate or bring about the extinction of that right by paying damages for the loss thereby occasioned. If the function of liability rules is to permit the efficient transfer of a right in cases in which that transfer cannot take place by agreement between the parties because of the transaction costs, this function requires that the compensated sum be no less than the actual loss suffered by the injured party. Indeed, in this manner the benefit for the party that infringed upon the right will be greater than the cost borne by the injured party and thus the right passes from the one who values it less to the one who values it more.

However, this calculation of the loss to be compensated is made by the courts or by law and there is a real possibility that the loss will be underestimated. That can occur in particular when the right satisfies an idiosyncratic preference of the holder who attributes to it a value much higher than that which other people would attribute to it (the market value). The courts or the law may fail to capture exactly what the right is worth for its holder and require the payment of a sum that is actually less than the harm actually suffered by the injured party. In these situations, a possible inefficient transfer could be authorized and take place. On the other hand, the problem of inefficient transfer does not arise when an exchange takes place between the third party and the right holder under a contract, as it will be certain that the right holder will transfer the right for a sum that is higher than the value that it attributes to the right, while the sum that the buyer will pay will be less than the value that it attributes to the right.

Liability rules, in other words, carry the risk of giving rise to inefficient transfers in which the right is transferred from the one who values it more to the one who values it less. This drawback of liability rules has been well described by those

authors who do not consider it socially desirable for legal systems to make frequent use of such forms of protection.[33] In the face of these criticisms of liability rules, it can be argued that their application would be efficient on the whole if one considers a large number of cases because the loss of value that would take place in cases of inefficient transfers would be outweighed by the gains achievable thanks to those efficient transfers that could not have occurred without liability rules in view of the high transaction costs.

The aim here is to put forward a different explanation of why legal systems prefer property rules and why, therefore, those rights that run with the land but are protected by liability rules that have been pointed out in this paper as socially desirable are not found in legal systems. This different justification is based on a particular bias found in individuals that has likely been reflected in the rules of the various legal systems. This bias is represented by loss aversion. Loss aversion is the tendency to prefer avoiding losses to acquiring equivalent gains. If we imagine that the loss aversion of individuals has influenced the formation of legal rules,[34] then it is possible to theorize that because of it legal systems prefer to avoid losses for some people even if it means that other people forgo greater gains.

As an example, consider the regulation – very similar in the different legal systems – of commercial impracticability. If an obligor comes to face very high costs to fulfill its obligation, it is released from the obligation. The regulation has an efficiency rationale in that it is not socially desirable for an obligor to bear costs that exceed the benefit that the obligee would obtain. This same logic of efficiency would also militate in favor of the obligor being released in the event that it has the option of using its resources to produce a good or service for a third party that has a higher value than that which the obligor has to produce for its obligee. However, in these cases, the legal theory of commercial impracticability is not applied and the obligor will not be released from the obligation. The influence of loss aversion in the development of the rules of the various legal systems may explain why the regulation of loss for the obligor in the case of intervening excessive onerousness is different from the regulation of windfall gain for the obligor.[35]

It could then be argued that although rights that run with the land protected by liability rules are socially desirable from an efficiency point of view, nevertheless they may result in losses to some people in cases in which there is an underestimation of the harm borne by the person who has had his or her right extinguished (a likely possibility given the limited information of the courts). These losses represent an unacceptable sacrifice because of people's loss aversion that has been reflected in legal rules and, therefore, the legal systems exclude the possibility of creating these

[33] Consider, for example, R.A. Epstein, 'The Clear View of the Cathedral: The Dominance of Property Rules' 106 *The Yale Law Journal*, 2091 (1997).

[34] A comprehensive analysis of the influence of loss aversion bias on legal rules can be found in E. Zamir, 'Loss Aversion and the Law' 65 *Vanderbilt Law Review*, 829 (2012).

[35] This is particularly evident in those legal systems, such as Italy's, in which the creditor can obtain specific performance.

particular rights.[36]

VII. Caveat

Returning to the economic justification of the *numerus clausus* principle of property rights, it is necessary to introduce a caveat. The examination thus far is based on the idea that parties in the absence of this limitation on their freedom to negotiate would create property rights that are destined with a high probability to become inefficient.

However, it could be argued that, when deciding whether to create new property rights in land, the landowner will make choices that maximize the value of the land and that from this point of view are socially desirable.

As Harold Demsetz states:

> 'If a single person owns land, he will attempt to maximize its present value by taking into account alternative future streams of benefits and costs and selecting that one which he believes will maximize the present value of his privately-owned land. We all know that this means that he will attempt to take into account the supply and demand conditions that he thinks will exist after his death'.[37]

Richard Epstein also believes that the choices of the individual owner are always efficient:

> 'Further, it is not possible to justify the touch and concern requirement on economic grounds by arguing that under some independent test of welfare, servitudes fail to promote efficient land use. One objection to this argument is that it does not explain why the original parties cannot take into account future transaction costs and incentive effects in drafting their original agreement. If a seller insists that a personal covenant bind the land even though it works to the disadvantage of the immediate or future purchasers, then the seller will have to accept a reduction in the purchase price to make good his sentiments. If he is prepared to accept that reduction, does there exists an independent theory that measures the strength and worth of his preference – be they for consumption or investment – or that condemns his choice as unwise or irrational?'.[38]

However, it can be assumed that individuals will not take into account how

[36] Addressing the issue of how behavioral economics can explain many legal institutions, C. Jolls et al, 'A Behavioral Approach to Law and Economics' 50 *Stanford Law Review*, 1471 (1998).

[37] H. Demsetz, 'Toward a Theory of Property Rights' 57 *The American Economic Review* 2, 347-359, 355 (1967).

[38] R.A. Epstein, 'Notice and Freedom' n 19 above, 1360.

their land may be used after their death and therefore do not consider these aspects when making choices regarding whether or not to create a new property right. The choice the owner makes could significantly compromise the use of the land after his or her death, causing it to lose much of its value and affecting the efficient use of resources by subsequent generations. If this can be considered possible, one response from the market economic system might be that that land would be bought forward by a third party who intends to consider the value of the land with a longer period of time in mind. But in the real world, not all the markets that would be desirable exist. The efficient allocation of resources among generations requires the existence of forward markets in which an owner of an asset over which he or she would like to create new property rights can sell it forward and in unitary form for a given consideration. Unfortunately, forward markets for many particular goods cover only a very limited period of time, and the market mechanism therefore generally fails in protecting the interests of future generations.[39] Therefore, this permanent impact factor[40] exists in accordance with which the burden can survive even for generations, which justifies limiting the parties' autonomy.[41]

VIII. Conclusion

Thus, the rationale of the principle of typicality of property rights has been identified as the need to prevent people from creating rights that run with the land and could, with a good probability, become inefficient over time. Legal systems only allow for the creation of those property rights whose value remains stable over time.

The identification of such a rationale would seem to take on purely theoretical significance, without any practical repercussions, but in fact this is not the case. In the event that a rule of law covering a category of property rights appears to have uncertain boundaries, recourse to the rationale of the principle of typicality of property rights may be necessary in order to determine these boundaries.

Consider, by way of example, what has happened in the French legal system. Although the French Civil Code seems to clearly enshrine the principle that the property rights in gross that parties can create are rigidly identified in a few categories, the *Cour de cassation*, with its decision in the *Maison de la Poésie* case (2012),[42] essentially held that the principle of typicality of property rights is now outdated, especially for property rights in gross. It established the principle

[39] On this point, see H. Shäfer and C. Ott, *The Economic Analysis of Civil Law* (Cheltenham: Edward Elgar Publishing, 1st ed, 2004), 408; E. Baffi, n 26 above, 474.

[40] This expression is used by U. Mattei, *Basic Principles of Property Law: A Comparative Legal and Economic Introduction* (Westport, Connecticut: Praeger, 2000), 39.

[41] Highlighting the need for party autonomy to be limited in the fragmentation of lands in order to protect subsequent generations, M. Heller, 'The Boundaries of Property Rights' 108 *The Yale Law Journal*, 1163 (1999).

[42] Cour de cassation 31 October 2012, *Sem. Jur. Éd. Gén.*, 2352 (2012), with note by F. X. Testu, 'L'autonomie de la volonté, source de droits réels principaux'.

that the owner, consistent with public order requirements, may establish for the benefit of another party a property right that gives it the benefit of special enjoyment of the property. French legal theory has embraced this new case-law orientation by immediately counting it among the ranks of *grands arrêts*. The decision was partly superseded by subsequent rulings, and thus, and to date, it cannot be said that there has been a definitive expansion in the French legal system of the property rights in gross that parties can create.[43]

It can be argued that should the principle become entrenched, the problem would arise of identifying the limits, if any, on this power of the owner to create new property rights in gross. In this case, recourse should undoubtedly be made to the rationale of the principle of typicality of property rights. If this rationale, as has been argued in this paper, consists of the need to avoid the creation of rights that may become inefficient over time, it would become necessary to limit this power of the owner by granting him or her exclusively the power to create property rights in gross whose value remains stable over time and is therefore not subject to volatility. The creation of property rights in general that satisfy a preference but could easily fade over time would not be permissible.

[43] An account of this event is given by E. Calzolaio, 'La tipicità dei diritti reali: spunto per una comparazione', in Unidroit ed, *Eppur si Muove: The Age of Uniform Law* (Rome: Unidroit, 2016), 1945-1950.