Classification
of
real property rights

- A comparative study of real property rights in Germany, Ireland, the Netherlands and Sweden

Jesper M. Paasch

Real Estate Planning and Land Law
Department of Real Estate and Construction Management
School of Architecture and the Built Environment
KTH Royal Institute of Technology
Stockholm, Sweden
Author: Jesper M. Paasch
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Real Estate Planning and Land Law
Department of Real Estate and Construction Management
School of Architecture and the Built Environment
KTH Royal Institute of Technology
Stockholm, Sweden
Abstract
This report is part of my on-going research at KTH Royal Institute of Technology, Department of Real Estate and Construction Management, Stockholm, Sweden. The aim of this study is to investigate to what extent real property rights registered in national real property information systems - and originating from different legal systems - can be classified according to a theoretical model, the Legal Cadastral Domain Model. A terminological framework for classification of real property rights will further the comparison of real property rights easier and further the cross-border transfer of real property information.

The result of the case-studies is that it to a high degree is possible to classify the investigated rights according to the existing model. However, minor modification have to be implemented into the model to make it able to classify all investigated rights. The case-studies also showed that the model could benefit from other minor changes, such as changing parts of the terminology used in the model.

Keywords
Real property rights, land management, land administration, real property ownership, standardization, legal modelling, terminology
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1 Introduction

1.1 Background

This report is part of the author’s research creating a terminological framework for classification of real property rights and public regulations, called the Legal Cadastral Domain Model (hereafter even referred to as LCDM).¹

Real property rights are part of a nation’s legal framework and are connections between the real property right holders and interests in land.² Probably every nation has some sort of formal or informal rights regulating interests in land.³ These rights are vital tools in land management and an instrument of conflict resolution between land owners and others with interests in the same piece of land.

Rights in real property, even by some authors called real rights, are rights beneficial and/or limiting the use of real property.⁴ The model is based on this author’s hypothesis that it is possible to classify and structure real property rights in accordance to their characteristics and influence on real property ownership.

1.2 Scope and delimitation

It must be noted that the author deliberately does not make any use of already existing classification systems like e.g. the Roman law classifications of “right in rem” (i.e. the right “follows the land”) and “right in personam”

¹ See Paasch (2005b); presentation of the LCDM, and Paasch (2008); a description of the LCDM incl. the characteristics and definitions of real property rights and public regulations.
² See e.g. UNECE (2004) for a collection of national rights regulating the use of real property. The term “land” is here defined as “the surface of the Earth, the materials beneath, the air above and all things fixed to the soil” (UNECE, 2004, p. 58). Water for example, plays an important role in many countries, e.g. being the subject for fishing or watering rights.
³ The author’s assumption.
⁴ A real right is “[a] right that is connected with a thing rather that a person. Real rights include ownership, use habitation, usufruct, predial servitude, pledge, and real mortgage” (Garner, 1891). See also Kleyn and Boraine (1975, pp. 43-62) and Hohfeld (1917 and 1913) for an introduction to theories concerning the legal nature of a real right.
The chosen approach is no judgement against existing classification systems or legal traditions, but an attempt to create a “neutral” way of structuring rights in order to further a terminological framework for cost-effective cross-border transactions of real property information.

1.2.1 Scope

The main scope is through case-studies on registered real property rights in Germany, Ireland, the Netherlands and Sweden to test whether it is possible to classify the rights according the classification in the LCDM and thereby confirm, reject or develop the model. The report even contains suggestions for improvements of the LCDM based on the result of the case-studies and experiences gathered during the testing phases.

The case-studies described in this report are complementing existing case-studies done by this author and others. A preliminary case-study was conducted on the Dutch real property legislation in 2005, studies on the Danish, Swedish, Norwegian, Icelandic and Finnish real property legislations were conducted in 2007 and a study on Portuguese real property legislation (incl. public regulations) were conducted in 2009. The Dutch and Swedish case-studies in this report are complementing and expanding the Dutch and Swedish studies made in 2005 and 2007.

National legislations consist of, among other things, a number of different rights of which some are more frequently used and vital for land management than others. Each right is the result of a need for a relation to land, executed through a legal process based on different legal, cultural and historical traditions. Each right can therefore be subject for very detailed and comprehensive research analysing any possible aspect depending on the nature of the study. However, this study does not claim to provide an insight in all

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5 Note that there has been some scholarly discussions concerning the concept of these rights and how to describe the expressions right in rem and right in personam. These discussions are however beyond the scope of this report. See Hohfeld (1917 and 1913) for an introduction to these discussions.

6 The Netherlands, see Paasch (2005a). Denmark, Sweden, Norway, Iceland and Finland, see Pálsson and Svensson (2007). Portugal, see Hespanha et al. (2009).
aspects, but focus on whether the investigated rights can be classified according to the LCDM.

The author has through his work at Lantmäteriet [The Swedish Mapping, Cadastre and Land Registration Authority] access to more detailed information about Swedish real property rights than rights in the other countries studied in this report. However, it has been the intention to describe all analysed rights on the “same level” to enable a comparison. The results of the four case-studies would otherwise be difficult to compare and analyse.

1.2.2 Delimitation

It is not within the scope of this study to conduct a complete survey of all real property related rights. The multitude of different existing rights is the result of a large body of laws and regulations. The case-studies are delimited to only include registered rights in the selected nation’s real property registration system(s) (land register).

Each right does in reality often also include obligations of some sort, e.g. the obligation to maintain a road since the right holder has the right to use it or to pay the owner an annual fee for being allowed to harvest products of the real property. The nature of those “return” obligations are not dealt with in detail in this study since it would expand the study to investigate individual rights and what agreement the individual real property owner has with the individual right holder.

The case-studies are as mentioned earlier limited to four European countries. They are each representing one of four main legal families: Germany (the Germanistic family), Ireland (the British family), the Netherlands (the Napoleonic family) and Sweden (the Scandinavian family). Germany, the Netherlands and Sweden belong to the so-called continental Civil Law tradition, whereas Ireland belongs to the British Common Law tradition. Ireland has been chosen partly because the legal tradition is different from the other and partly because there is an ongoing debate whether the Civil Law and Common Law traditions can be compared since they are made up of different concepts and, according to one scholar, contain “irreducible diffe-

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rences”. However, the modern Irish legal system, while still retaining Common Law traditions and concept of ownership, is today largely based on statute law. This has by this author not been seen as excluding Ireland as a suitable case-study candidate since the legislation has its roots in the Common Law tradition.

European legal systems has had a huge impact on other legislation in the rest of the world due to the fact that local law often was replaced or mixed with the laws of the European colonisers, or by voluntarily borrowing suitable sections from European law and incorporating them into a country’s own national legislation. The reason for not including the former East European legal family in the case studies is that the so-called “socialist” legal family to a large extent disappeared after the fall of the Iron Curtain and the revised legislations in the former socialist countries has been influenced by other European legal systems. Religious legal systems are also omitted since they do not fit the criteria of the studies to focus on major rights in formal legal systems and registered in the surveyed nation’s real property register(s).

A further delimitation is that the case-studies only deal with the rights part of the LCDM. The Public regulation and Public advantage parts of the model will be subject for a separate study.

As mentioned earlier, the purpose of the case-studies are to confirm, reject or develop the author’s hypothesis regarding the classification of real property rights. An investigation of the legal and administrative processes leading to the establishment of the national rights, including the procedures in regard of transfer or inheritance of the rights is not part of this report.

It is also beyond the scope of this report to discuss the theoretical classifications of legal families and the structures and differences of private and public law. The focus is on placing real property rights in a theoretical framework regardless of which legal system they belong to.

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8 Legrand (1996).
11 The type of the registers are not described or defined in this report. They can be e.g. land registers, land managements systems, cadastral systems, etc.
1.3 Report structure

Chapter 1 provides an introduction to the background of the case-studies together with the scope and delimitation, followed by a description of the research methodology and information concerning the used English legal terminology and the notations used in the diagrams. Chapter 2 briefly describes the field of comparative law and provides a brief insight into principles regarding how legal systems can be classified and thus providing a background and explanation for the selection of the four nations as subjects for the case studies. Chapter 3 provides an introduction and explanation to the hypothesis tested in this report. Chapter 4 contains an introduction to the concept of ownership in general and forms of ownership within the field of real property. Chapter 5 provides an introduction to the concept of real property ownership in the countries selected for the case-studies. Chapter 6 contains descriptions of the registered rights found in the case-studies. The rights are structured according to the classification in the LCDM. Chapter 7 contains a comparative analysis of the investigated rights. Chapter 8 contains the conclusion regarding the validation of the LCDM, suggestions for modifications and an updated version based on the modifications. A Swedish language summary is located in chapter 9. Literature and other references are placed in chapter 10. Appendix 1 contains the updated class descriptions of the LCDM.

1.4 Research methodology

The case-studies were initiated after the publication of the before mentioned hypothesis and the theoretical, legal framework in 2005 and 2008. The Dutch case-study was the first to be started and the Irish case-study was the last, due to an ongoing revision of Irish land law legislation, resulting in the Land and Conveyancing Law Reform Act of 2009.

The case-studies have primarily been conducted through research in the national legal codes and acts, supplemented with literature research and interviews with key persons in the field of real property rights in each country. A standard template with questions has not been used due to the complexity of

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12 Paasch (2008 and 2005b). Parallel activities were performed during 2005-2008, e.g. the before mentioned preliminary Dutch case-study on rights (Paasch, 2005a) due to the author’s involvement in the EU COST G9 project, resulting in a study visit at Delft University, the Netherlands, during October 2005, and the supervision of a Swedish masters degree thesis in land management about the classification of rights in the Nordic countries (Pålsson and Svensson, 2007).
rights in the different legislations. However, introductions to the research project were given to the key persons before the interviews.

All findings and questions were followed up with either additional personal meetings and/or e-mail communication. The case-studies were completed during May 2011. Any later changes in legislation, etc. have not been considered.

1.5 Translations and notation

The national legal acts have been studied in their native languages, except the Dutch Civil Code, where an English translation has been used, unless otherwise noted. It has not been possible to locate English translations of all used German, Dutch and Swedish legal terms, in which case an “as close as possible” translation has been provided by the author or the national legal term is used, if judged to be more appropriate.13

The diagrams in this report are intended to be as illustrative and accessible as possible, avoiding the use of specific notations, such as UML (Unified Modelling Language).

1.6 Terminology

During the conduction of the case studies the English translations of national legislations have been subject of some speculation and concern for this author. An example is that the terms “common” and “joint” are not always used in the same way in different translations of legislations and the studied English literature. For example a “common property” can have the same characteristics as a “joint property”. They are just sometimes translated differently.

Another example is the use of the terms “easement” and “servitude”, which are not standardized. An easement is described as “a right enjoyed by one

13 The translation of the German legal terms is taken from an on-line English version of the German Civil Code, http://www.gesetze-im-internet.de/englisch_bgb/ unless otherwise noted. The translation has been recommended by Mr. Volker Strehl, German Ministry of Justice, by e-mail communication on March 24th 2010. The translations of the Dutch Civil Code are taken from Haanappel and Mackaay (1990) unless otherwise noted. The Swedish terms are taken from Mattssson and Österberg (2007) unless otherwise noted.

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real property (the dominant tenement) over that of another (the servient tenement) for instance a right of access or for the passage of water or electricity”¹⁴ and ”[a]n interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose (such as to cross the land to access a public road).”¹⁵ Servitude is described as “an easement or right of one real property over another”¹⁶ and ”[a]n encumbrance consisting in a right to the limited use of a piece of land or other immovable property without the possession of it; a charge or burden on an estate for another’s benefit […] the easement by necessity is an equitable servitude […]. Servitudes include easements, irrevocable licenses, profits and real covenants.”¹⁷ These examples show that servitude is a wider term than easement in English land management terminology.

The emphasis is on using the English terms most commonly used in the translations and literature. However, this author has made one exception. The translation of the Dutch legislation uses “servitude”, but this author has chosen to use “easement” throughout this report since the right described is functioning as an easement (i.e. a real properties right in another real property). Translations of the German and Swedish legislations use “easement” for the same type of right.

It must also be noted that ISO¹⁸ currently is working on producing an international standard for (real property related) land administration called the Land Administration Domain Model, LADM. However, the terminology in the LADM has not been used in the Legal Cadastral Domain Model since the LADM standard is still under development and changes may yet occur.¹⁹

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¹⁵ Garner (1891, p. 431).
¹⁶ UNECE (2004, p. 61).
¹⁷ Garner (1891, p. 1138).
¹⁸ International Organization for Standardization.
¹⁹ ISO/TC211 (2011). The draft LADM standard is currently in the review and voting phase among ISO’s member nations and expected to be accepted as an international standard in July 2012.
2 Legal systems

We sometimes speak of the legal system – as if there existed one single, unitary system of law. However, there is no such thing as a “natural” or universal form of law. All forms of law reflect the aspects of the culture and values of the society to which they belong. Every nation has its own legal statutes describing which rights can be created in order to improve the use of land. Needless to say, there are a multitude of different rights in existence throughout the world, which make it difficult and time consuming to compare them when they e.g. are subject for cross border real property transactions. Even if systems might have emerged from common legal roots, as e.g. the legal systems of continental Europe, which - to a large extent - have their origin in ancient Roman law, there is no such thing as two identical legal systems.

Legal systems can however be divided into legal cultures or “families”, based on factors depending on the perspective of the researcher, looking at e.g. the cultural and historical heritage, the use of legislation in a specific geographical area or by size, how many who are governed by a specific legislation, etc. A division of law can also be made in the private law and public law families. Real property rights are part of the private law domain, whereas e.g. real property regulations (e.g. zoning plans etc.) are part of the public law domain.

The classification of legal systems is a subject for debate among legal scholars and several classifications exist. One example is the classification produced by Zweigert and Kötz, who are grouping legal systems into 6 major families: a Germanic family, a Romanistic family, an Anglo-American family, a Nordic legal family, law in the Far East, and the religious legal systems. A legal system might be the result of different legal influences, even if some influences may be more dominant than others, depending on the nature of interaction. Any classification may therefore be influenced by what

23 Private law is “law relating to individual persons and private property” (Oxford 1995, p. 1151) and public law is “[…] the law of relations between individuals and the state” (Oxford 1995, p. 1167).
24 Zweigert and Kötz (1998). Other examples are the Civil Law system, the Common Law system, the system of Socialist Law, Islamic Law, Hindu Law and African law (David et al., 1974). See also Legrand (1999) and Hoecke and Warrington (1998) for an introduction to the classification of legal systems.
part of the legislation that has to be classified, e.g. family law, contractual law or real property law.

There is no universal language to express law. Within any community which speaks a particular natural language, there are likely to be narrower groups which differ from each other in the particular ways in which they use their professional language(s). These specialised professional languages may even differ within themselves and one legal area may use different expressions and vocabulary than another area within the same professional domain. We therefore have to find out to what extent the words used in the compared legal systems bear the same meaning.\textsuperscript{25} The correct understanding of the use of words is vital when comparing different legal systems in the field of comparative law.

Regardless of choice of comparative method, the use of ontological and epistemological approaches cannot be over-estimated.\textsuperscript{26} We need to know what we are talking about and the legal terms need to be analysed for their specific content based on their cultural and historical context. It has been stated that “[o]ne can speak of comparative law only if there are specific comparative reflections on the problem to which the work is devoted.”\textsuperscript{27} Furthermore, it has been noted that “[h]idden understandings are uncovered when we try to find out why foreign legal rules, approaches and the like are different from ours.”\textsuperscript{28} Some of those “hidden understandings” can be discovered by investigating the characteristics which lie behind the legal terms and legal rules. It is the characteristics that describe them and make them what they are.

\textsuperscript{25} See Jackson (1995) for a discussion of the use of language within the legal domain.
\textsuperscript{26} A discussion of the value of ontology and terminology in comparative law has been addressed by several legal scholars, e.g. Hoecke (2004).
\textsuperscript{27} Zweigert and Kötz (1998, p. 6).
\textsuperscript{28} Hoecke and Warrington (1998, p. 497).
3 Classification of real property rights

This chapter only provides a brief introduction to the Legal Cadastral Domain Model. The model is based on the author’s hypothesis claiming that it is possible to classify real property rights and public regulations regardless of their origin within a legal system or family.

3.1 Legal Cadastral Domain Model

Ownership is the “main” right in the model and is creating a relation between a person, i.e. the property owner, and land. However, ownership can be influenced by other interests in land; e.g. use rights allowing others right of way over your property or a pre-emption right to buy a piece of land when it is put up for sale, or in other ways regulating the present or future use of a real property.

The central LCDM classes are the appurtenance, encumbrance, public advantage and public regulation classes. The encumbrance and appurtenance classes contain privately imposed rights affecting the ownership of real property by being either limiting or beneficial to ownership. The public regulation and public advantage classes contain publicly imposed regulations being either limiting or beneficial to ownership.

The encumbrance and appurtenance classes can be divided into 5 subclasses, named after the type of rights they contain: common right, containing relations to land legally attached to two or more real properties; real property right, containing rights executed by a real property in another real property; personal right, containing rights executed by a person in a real property; latent right, containing rights not yet executed, and lien, containing financial securities in real property. The rights classes are described in chapter 6.

The public regulation class contains publicly imposed regulations, e.g. regional- and municipal zoning plans, which, among other things, regulate the use and appearance of specific areas. An example is a municipal planning regulation where and how to build in a specific area or protecting environmentally important biotopes from damage. The public advantage class consists of public advantages granted to specific real property owners. They are allowed to do something others are not allowed to, for example by being

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granted a dispensation from a public regulation which is regulating the neighbouring areas, thereby creating an advantage for the real property obtaining the dispensation.

Figure 3.1. The Legal Cadastral Domain Model.  

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30 The LCDM is in Paasch (2005b, p. 132) described using UML-notation. The presentation of the LCDM has in report been simplified due to pedagogic reasons.
4 Ownership

This chapter does not provide any universal definition of ownership, but briefly illustrates the concept of ownership in general and provides an introduction to the concept of ownership of real property.

4.1 What is ownership?

We are all surrounded by material and immaterial objects we call our own, e.g. our clothes, a car, maybe a copyright to a piece of music or a piece of land which we call home. Ownership is seen as a fundamental right in many societies and society as we know it would not function without it.

A common definition of ownership does not exist, even if the concept has been discussed by philosophers and legal scholars for centuries. However, it has been argued that ownership is based on prevailing rules and conventions and if there were no rules there would be nothing like owning, buying, selling, stealing, etc. There would, in other words, be no property to own. Everyone would, in theory, have access to and part of a common possession of everything. However, this idealistic concept does not exist in our western society where the general rule is that objects are owned by someone and where ownership plays an important role in the social, legal and economic aspects of society. Objects can be owned by individuals, organisations or States and combinations thereof. However, this idealistic concept does not exist in our western society where the general rule is that objects are owned by someone and where ownership plays an important role in the social, legal and economic aspects of society. Objects can be owned by individuals, organisations or States and combinations thereof. There is probably not a thing or a place on Earth where ownership is not regulated by national rules or international conventions, even if the object is not traditionally thought of as owned by anyone. Even Antarctica, which has no permanent population, is regulated by a treaty, which, among other things, denies any (new) territorial claims to the continent.

31 See Hohfeld (1917 and 1913) for a detailed discussion concerning the nature and classification of a right, incl. the right of ownership.
32 Snare (1972, p. 25).
33 The special case where animals might be made owner of property in certain countries, e.g. through inheritance, is not covered in this report.
34 Excerpt from the Antarctic Treaty, article 4, section 2: “No new claim, or enlargement of an existing claim to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.”
Sometimes, legal scholars speak about “absolute ownership” as the strongest right in an object.\textsuperscript{35} However, the term is in this author’s opinion not well chosen since there rarely is an executable right called “absolute ownership”.

It has been noted that “absolute” is “[…] probably the most slippery word met in discussions of ownership. Sometimes it is used to deny the “temporary” (in-transmissible or determinate) character of an interest, […] sometimes to deny its feasible character […], sometimes to emphasize its exemption from social control”.\textsuperscript{36} Even if it is doubtful that ownership can be absolute, it can be claimed that ownership is the greatest possible interest in a thing which a mature system of law recognizes.\textsuperscript{37} However, this author is of the opinion that the concept of absolute ownership at the same time is a good starting point for the analysis presented in this report.

This “greatest possible interest” is subject to legislation. For example, even if someone has bought a car and the person is the owner, he is probably in most legal systems not allowed to drive it until he is both old enough and have obtained a driving license. Other restrictions might also apply, e.g. he cannot use certain medication or enjoy alcohols prior to or when he drives. He is in other words restricted by a web of legislation limiting his actions towards the object he owns and executed the major interest in. These relations are of different nature and solving different needs making society work.

However, even if there might be a multitude of different needs, the concept of ownership has been said to be of a homogeneous nature. It has been noted that “[…] the standard incidents of ownership do not vary from system to system in the erratic way implied by some writers. On the contrary, they have a tendency to remain constant from place to place, and even from age to age.”\textsuperscript{38}

These “incidents” can be compromised to a combination of rights.\textsuperscript{39} The common nominator for these rights is that they exist for an unlimited time span. The right of unlimited possession in time is the core of the concept of ownership and means that the owner executes his right until he decides to part with his property. When he dies, the property is either inherited by his

\textsuperscript{35} E.g. Wegen et al. (1998, p. 213).
\textsuperscript{36} Honoré (1987, pp. 189-190).
\textsuperscript{37} Honoré (1987).
\textsuperscript{38} Honoré (1987, p. 162).
\textsuperscript{39} The ownership rights listed in this report are based on Honoré (1987), Snare (1972), Bergström (1956) and Hohfeld (1917 and 1913).
family or others according to national legislation. Even if an owner owns his property “forever”, it can be made subject for national intervention like a forced sale, typically an expropriation, in which case the owner normally is compensated financially according to national law. The right of unlimited possession in time can be said to be a combination of the following rights.

The right to use, manage and exclude
The right to use, the right to manage and the right to exclude are rights that overlap, depending on the interpretation of the rights. The right to use is the right to use the property to any (legal) purpose the owner wants. The right to use does not imply that the owner has to be the actual, physical user of the property. The owner can have transferred some specific use rights, e.g. by a lease, to others for a specific period of time. However, the use right goes back to the owner when the contract ends. The right to manage is the right to decide how and by whom the object shall be used. The owner can decide which conditions that may apply to e.g. a rent. The owner has the right to exclude anyone using his property. An example is that a real property owner can exclude others from entering his real property, if they are not entitled thereto according to legislation.

The right to added value
The owner has the right to the added value / financial income of his property, e.g. by collecting a rent or by harvesting the fruits and crops growing on his land. The type of income, e.g. monetary or physical services rendered to the owner depends on the nature and use of the property.

The right of transfer
The right of transfer is the right to transfer the property according to the owner’s choice. The property can be given away without compensation, sold or inherited.

Ownership is a combination of the above mentioned relations between person(s) (subject), i.e. the owner, and the entities (object) in question. See figure 4.1.

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The collection of rights described above is of course subject to national legislation. If for example an object, e.g. a gun, is confiscated by the police due to the fact that the owner did not have a license, the ownership is transferred to the State by confiscation of the gun. The owner’s right to transfer is in this case not executed voluntarily by him, but has been taken over by the State due to his failure to comply with certain regulations.\footnote{This report does not discuss that it could be argued that he, in theory, did not actually own the gun, since he could not legally execute the rights described above, necessary to be titled the owner of the object.}

The right of ownership does not automatically mean that the owner is forced to execute all use rights himself in the object in question. The rights can individually be transferred to others by the owner for a shorter or longer period of time due to national legislation, regulating the access and use of land, and thereby reducing the owners own actual use rights on his property. Examples are to allow someone to use a specific part of the property for certain activities and/or to benefit from any financial income generated by the property. However, these rights are often limited in time and do not constitute any claim of ownership. The right reverts back to the owner when the agreement with the right holder ends.

4.2 Ownership in real property

The ownership principles stated above also apply to ownership in real property. The object is in the case of real property ownership a piece of land, including water and space (air), depending on national legislation.
Ownership right in land can be regarded as a part of the “bundle of rights”\textsuperscript{42} or “web of interests”\textsuperscript{43} regulating the use of a real property and can be considered the major right in the “bundle”. See figure 4.2.

\begin{figure}[h]
\centering
\includegraphics[width=0.5\textwidth]{Ownership.png}
\caption{The concept of ownership in land.\textsuperscript{44}}
\end{figure}

Ownership can be executed through a number of national legal instruments and in different ownership constellations. Examples are by owning the real property individually, joint ownership by e.g. husband and wife together, ownership through different forms of shareholder solutions, etc.\textsuperscript{45} Ownership may also be combined with separate use rights in the same real property or building. An example is areal property commonly owned by a group of people (or company or owners association) where an individual co-owner have designated areas (typically condominiums) assigned to him.

\textsuperscript{42} The term is used by Garner (1891, p. 933).
\textsuperscript{43} Meinzen-Dick and Mwangi (2008).
\textsuperscript{44} Based on Henssen (1995).
\textsuperscript{45} There is a distinction between ownership in common and joint ownership. Ownership in common is, in the Anglo-American legal tradition, described as “[o]wnership shared by two or more persons whose interests are divisible. Typically an owner’s interest, at death, passes to the dead owner’s heirs or successors” (Garner, 1891, p. 934). Joint ownership is a sub-class of ownership in common and has been described as “[u]ndivided ownership shared by two or more persons. Typically, an owner’s interest, at death, passes to the surviving owner or owners by virtue of the right of survivorship” (Garner, 1891, p. 934). The typical case might be when husband and wife own 50% each of the property. When one of them dies, his/her share is transferred to/inherited by the surviving part. The number of owners is reduced, in opposite to common ownership, where the number is constant (or even expanding if someone decides to divide his share and sell them separately).
5 National concepts of ownership and real property in the studied countries

It is in this report not possible to give a detailed account of the legal concepts of ownership and real property in the selected countries, being pillar-stones in land management. This chapter therefore only provides an introduction to the concepts of ownership in the studied countries before addressing the registered national real property rights in chapter 6.

5.1 Germany

The German legal system belongs to the Civil Law tradition and the Germanistic legal family. The country consists of 16 self governed regions [Bundesländer] with local legislative power and a federal national government responsible for national politics and legislation. The legislation about ownership [Eigentum] and real property is to a huge extent federal and the main body is the German Civil Code [Bürgerliches Gesetzbuch] (hereafter referred to as BGB) which, among other things, is regulating ownership and general provisions on interests in land and other land related rights. Other acts and provisions regulating the use of land are e.g. The Land Register Act [Grundbuchordnung, GBO], the Condominium Ownership Act [Wohnungseigentumsgesetz, WEG] and the Regulation on Building Leases [Verordnung über das Erbbaurecht].

Property is classified into moveable things [bewegliche Sachen] and immovable things [unbewegliche Sachen]. Movable property is property that is not real property [Grundstück] or property fixture [Grundstücksbestandteile], which is regarded immovable property.

The BGB states that “only physical objects are, in the concept of the law, things.” However, these things does

46 BGB, sections 90-103 (things and animals), BGB, sections 873-902 (general provisions on rights in land) and sections 985-1007 (claims arising from ownership). See Herrmann (2008a, 2008b and 2008c) for an overview of the concept of ownership in Germany.
47 Author’s translation.
48 Author’s translation.
49 Müller (1988, p. 15). "Grundstück“ is in the BGB, section 1031, translated as "a plot of land.”
50 In German: “Sachen, im Sinne des Gesetzes, sind nur körperliche Gegenstände.” BGB, section 90.
include certain rights in rights like usufructs in rights and pledge in rights. The BGB also states that the owner can use his property at his pleasure, within the limitations given by legislation.

A real property is described as a piece of the surface of the Earth registered in the German Land Register [Grundbuch]. Components of a real property are the things connected to the plot of land, especially buildings and plants. A real property consist of one or more separate parcels [Flurstücke] which has to be registered in the Land Register, as stated in the Land Register Act. Most real property is of the so-called traditional two-dimensional type, however three-dimensional real property also exist.

Real property ownership is executed in different forms; individual ownership, joint ownership and ownership in common; a person can own a real property through individual ownership. Joint ownership exists when a group of heirs or husband and wife or registered partners can own a real property together through joint ownership [Gesamthandgemeinschaft]. There are three sorts of joint ownership in Germany; Civil Law partnership, joint marital property and joint estate ownership. Each person does not own a specific (but often more imaginary) share, but shares the whole property with the other owners.

There also exists an old and rather special right of joint ownership called Haurecht, with additional specific rights attached to it. The right allows a real property to own shares in a designated area, called a Hauberg. The right holders are required to be a member of the Hauberg ownership association [Hauberggemeinschaft], giving its members the right to extract timber and

52 BGB, section 903.
53 Land Register Act.
55 See Ahrens (2004) for a description of real property. However, publicly owned real property, rivers, public roads, etc. are only registered in the land register if desired by the owner or right holder. Land Register Act, section 3, part 2.
56 BGB, section 1419.
57 BGB, sections 718-719 (Civil Law partnership), BGB sections 1408 and 1415 (marital property) and BGB section 2023 (joint estate ownership of coheirs). The term “joint ownership” is used in Wegen et al. (1998).
58 BGB, section 2040.
59 The name may derive from the German words “hauen” [to cut] and “Recht” [right].
60 E-mail communication with Dr. Markus Seifert, January 21st 2011.
other related goods from the forest. They are, however, not in the centre of German land management today.

The concept of ownership in common differs from joint ownership in the sense that ownership in common is executed through fractional shares [Bruchteilseigentum (Miteigentum nach Bruchteilen)]. The owners have a share in the whole property and constitute an ownership association [Bruchteilsgemeinschaft].

The ownership of condominiums [Eigentumswohnungen] is also based on ownership in common through shares. The ownership is granted in a localised part of the otherwise common property [Sondereigentum]. The common part(s) of the building and land are jointly owned. Non-structurally delimited jointly owned areas, e.g. a garden area, can be designated to the use of specific individuals through an agreement with the other co-owners by creating a use right [Sondernutzungsrecht]. The different shares are recorded in a separate plan [Aufteilungsplan], which is registered the land register. A further type of condominium ownership exist which is know as Building property [Gebäudeeigentum]. The right was in the former German Democratic Republic (DDR) for the construction or use of a building, but is still present in the real property register today.

Another concept of ownership in common are areas owned by e.g. a village or parish for common use for farmers for e.g. grazing of domestic animals or collecting wood [Allmende]. These areas are often the remains of medieval or pre-medieval land management laws and have survived until today.

61 Hilf (1938) and Hausrath (1982, pp. 187-188). An example of a Hauberg ownership association is the association for the Dill and Oberwesterwald areas in Prussia. The membership right has historically only been granted by inheritance or occasionally by the purchase of a farm with already had a membership share. However, it is today possible to acquire a share in a Hauberg through normal purchase. The Hauberg areas are (in Hessia) part of the so-called commonly owned forests [Gemeinschaftswald]. Schwarz (2005) and e-mail communication with Mr. Ralf Schmidt, August 10th 2009.
62 BGB, sections 1008-1011.
63 BGB, sections 741-758.
64 Paulsson (2007, pp. 112-113).
65 Apartment Ownership Act. See Paulsson (2007 p. 36 and pp. 95-135) for a survey of German condominium ownership.
A special type of property is the so-called neighbouring real property [Anliegerflurstück], which is land being part of two or more real other real properties.

Real property is affected by a number of different rights allowing others the use or access to the property or use it as a security for e.g. a loan. The rights regulating the use and access to real property are with a general name called use rights [Nutzungsrechte] in German. Rights in a thing itself are called “dingliche Rechte”, and i.e. claims in a thing itself are called “dingliche Ansprüche”. The names are not used in the BGB itself, but mean that the right lies on the “thing” itself, and not on the person who owns it. These rights are not restricted to the field of real property but are also implied on ownership in general. Ownership is one example of a “dingliches Recht” and a right in a real property is an example of “dinglicher Anspruch”. It is not possible to provide a list of the multitude of different purposes for use rights registered in the Land Register.

5.2 Ireland

The Irish legal system has its roots in the Common Law legal tradition and the British legal family. It is one of the results of the Norman Conquest of Ireland in the 12th century by King Henry II of England, which lasted until the early 20th century, except for Northern Ireland, which still is part of the United Kingdom today. The laws regulating land ownership and conveyancing has been developed and added to during the centuries, resulting in a very complex body, comprising a large number of statutes and court decisions making it difficult to implement in an effective manner in a modern society. The modern Irish legal system, while still retaining Common Law principles, is today however largely based on statute law, e.g. the Land and Conveyancing Law Reform Act (hereafter referred to as the Reform Act).

The Reform Act is the result of a recent major reform making the Irish land

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69 E-mail communication with Dr. Markus Seifert, March 30th 2009.
70 “Conveyance” includes an appointment, assent, assignment, charge, disclaimer, lease, mortgage, release, surrender, transfer, vesting certificate, vesting declaration, vesting order and every other assurance by way of instrument except a will […]”. Reform Act, part 1, section 3.
laws and conveyancing processes suitable for modern conveyancing (eConveyancing).\textsuperscript{71}

Property is classified into moveable property and immovable property. Land has earlier been defined in a number of different statutes. The Reform Act adopts these definitions, which state that land includes any estate or interest in or over land, mines, minerals and other substances, land covered by water, buildings and structures of any kind, but takes the expanded meaning that land also includes both the airspace above and the substratum below.\textsuperscript{72} The Reform Act continues the principle that what is owned is not the physical entity, i.e. the land, but “[…] rather some estate (giving substantial rights in respect of the land such as the right to occupy it) or interest (giving less substantial rights such as the limited use given by an easement comprising, for example, a right of way over a road on the land, or a profit à prendre comprising a right to cut and take away turf) in the land.”\textsuperscript{73}

The Reform Act abolishes the last remains of medieval, feudal land holding, going back to the Norman times. However, the country will (still) be dominated by so-called freehold and leasehold estates, which both are categorised as legal estates in the Reform Act.\textsuperscript{74} Freehold is still the highest estate or interest and closest to the concept of ownership in land that exists in Civil Law countries. Leasehold is a concept allowing (an often very long term) exclusive use right of a piece of land.\textsuperscript{75} The right of leasehold can be almost as strong as freehold.\textsuperscript{76} Other forms of freehold, like fee farm grant fee tail and life estate cannot be granted anymore.\textsuperscript{77} Fee farm grant involved, in essence, a “[…] grant of a freehold estate (a fee simple) subject to (potentially) a perpetual rent (i.e. one that would be payable so long as the fee simple […] lasted).”\textsuperscript{78} Fee tail means, in short, an estate which is passed down through generations in one family. Leases for lives were fairly common but are now obsolete. The few ones existing are being allowed to continue until they end.

\textsuperscript{71} See Brennan and Casey (2000) for an introduction to the law revision work.
\textsuperscript{72} Reform Act, part 1, section 3.
\textsuperscript{73} Explanatory Memorandum of the Reform Act, pp. 3-11.
\textsuperscript{74} E-mail communication with Mr. Fergus Hayden, October 15\textsuperscript{th} 2010.
\textsuperscript{75} The term leasehold is derived from “less”, i.e. less than freehold. Personal communication with Mr. Fergus Hayden, May 18\textsuperscript{th} 2009.
\textsuperscript{76} Reform Act, part 2, section 11, subsection 3. See also Brennan and Casey (2000) and Keane (1998) for descriptions of the Irish concepts of ownership, freehold and leasehold.
\textsuperscript{77} Reform Act, part 2, sections 12-14 and Explanatory Memorandum of the Reform Act, pp. 3-11.
\textsuperscript{78} Explanatory Memorandum of the Reform Act, p. 4.
Most existing fee tail will be converted into fee simple freehold.\textsuperscript{79} Existing fee farm grants are not affected by the Reform Act.

Real property ownership is executed in different forms; individual ownership, joint ownership and ownership in common; A person can own a real property through individual ownership. Joint ownership exists when group of heirs or husband and wife or registered partners own a real property together. The key feature of joint ownership is that the land is inherited by the other joint owners, in contrast to ownership in common, where the owners have distinct, but undivided, shares which can be inherited by others.\textsuperscript{80}

Condominium ownership is common in Ireland. The most frequent case is that the persons own their apartments, but the common areas such as staircases, etc. are owned by a management company.\textsuperscript{81}

### 5.3 The Netherlands

The Dutch legal system belongs to the Civil Law tradition and the Napoleonic legal family. Ownership and real property is dealt with in the main legislative body, the Civil Code [Nieuw Nederlands Burgerlijk Wetboek Het Vermogensrecht].\textsuperscript{82} Other legislations regulating real property ownership and rights are e.g. the Hire-purchase Act [Wet van 21 juni 1973, houdende tijdelijke regeling betreffende huurkoop van onroerend goed] and The Municipal Pre-emption Rights Act [Wet Voorkeursrecht Gemeenten, WVG].

Ownership [eigendom] is the most comprehensive right a person can have in a thing [zaak]. The Dutch legislation makes a difference between movable [roerend] property and immovable [onroerend] property.\textsuperscript{83}

\textsuperscript{79} Only “special” fee tail are allowed to exist until they are extinguished by the death of the right holder. See the Explanatory Memorandum of the Reform Act, pp. 10-11, for details.
\textsuperscript{80} Reform Act, part 7, sections 30-32, and the Explanatory Memorandum of the Reform Act, pp. 19-21.
\textsuperscript{81} Other apartment ownership constructions also exist. See LRC (2008) for details.
\textsuperscript{82} See also Nieper and Ploeger (1999), Ploeger, Velten and Zevenbergen (2005), Slangen and Wiggers (1998) and Witt and Tomlow (2002) for descriptions of Dutch ownership and real property.
\textsuperscript{83} Civil Code, Book 5 article 1 to 3 (ownership in general) and article 20 to 36 (ownership of immovable things).
Real property is described as “[…] land, unextracted minerals, plants attached to land, buildings and works durably united with land, either directly or through incorporation with other buildings or works.”\(^84\) The ownership of land comprises “the surface; the layers of soil under the surface; subsoil water which has surfaced by means of a spring, well or pump; water which is on the land and not in direct connection with water on the land of another person; buildings and works durably united with the land, either directly or through incorporation with other buildings or works, to the extent that they are not component parts of an immovable thing of another person; and plants united with the land” and “the right of the owner of land to use it includes the right to use what is above and below the surface” and “[o]ther persons may use what is above and below the surface if this takes place so high above or so deep below the surface that the owner has no interest to object hereto.”\(^85\) Most real property are of the so-called traditional two-dimensional type, however three-dimensional real property also exist. The concept of real property also includes ships and airplanes.

Real property ownership is executed in different forms; individual ownership and ownership in common. A person can own a real property through individual ownership. When to or more persons acquire a real property they own the property in common. The real property is not divided into separate parts and the owners own equal shares in the property.\(^86\)

Condominium ownership also exists in the Netherlands. The owners are considered co-owners of the whole complex: land, building, common areas and all apartment units.\(^87\) The individual right holder(s) are considered the owners of their apartments.\(^88\) Each owner holder has an exclusive right [appartmentsrecht] to use one (or more) apartment units. The owners association [vereniging van eigenaren] does not own the common parts of the complex, which are owned by the co-owners, but is responsible for the daily management. The concept of condominium ownership has been known in the Netherlands since 1951. Before 1951 experiments with another form of more contractual ownership were in use and some of those old apartment ownership substitutes can still be found.\(^89\)

\(^{84}\) Civil Code, Book 3, article 3.  
\(^{85}\) Civil Code, Book 5, article 21, sections 1 and 2.  
\(^{87}\) Civil Code, Book 5, articles 106 to 147.  
\(^{88}\) Civil Code, Book 5, article 106, section 3.  
\(^{89}\) The substitutes are where there are apartment owners associations. The structure differs from the new ownership construction and it is similar to a registered company. Personal communication with Dr. Hendrik Ploeger, October 3\(^{rd}\) 2005.
5.4 Sweden

The Swedish legal system belongs to the Civil Law tradition and the Scandinavian legal family. The central provisions regarding ownership and use of land are the Swedish Land Code [Jordabalken] and the Real Property Formation Act [Fastighetsbildningslagen].

The concept of ownership [äganderätt] is divided into movable property [lös egendom] and immovable (real) property [fast egendom]. A real property unit [fastighet] is described as land in the Land Code which states that “Real property is land. This is divided into property units.”

Ownership in real property is executed in different forms; individual ownership, ownership in common and indirect ownership. A person can own a real property through individual ownership. When two or more persons acquire a real property they own the property in common.

A rather uncommon type of real property is a type existing only as shares in one or more so-called joint property units (see chapter 6, section 6.1), i.e. the real property unit does not have any physical extension itself, but exist only as a share in a joint property unit without any land of its own.

A real property can include land, water, buildings, utilities, fences and other facilities constructed within the real property unit intended for permanent use, standing trees and other vegetation and natural manure.

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90 Zweigert and Kötz (1998, pp. 276-285). Zweigert and Kötz argues “that it would be right to attribute the Nordic laws to Civil Law, even although, by reason of their close relationship and their common “stylistic” hallmarks, they must undoubtedly be admitted to form a special legal family, alongside the Romanistic and German legal families” (Zweigert and Kötz, 1998, p. 277).
91 Other provisions are e.g. the Utility Easements Act and Joint Facilities Act.
92 Malmström and Agell (2001), Bergström (1956).
93 Land Code, chapter 1, section 1. The Land Code does not exclude water or air within the concept of land. There have been some earlier attempts to define real property, but no definition has been implemented in Swedish legislation. However, the basis for the Swedish concept of real property is found in the Land Code (Julstad, 2003, p. 87).
94 This type of property does not have a specific name in legislation today, but is sometimes called “andelsfastighet” in Swedish literature, e.g. in Julstad (2006, pp. 458-459).
Most real property is of the so-called traditional two-dimensional type, however three types of three-dimensional real property also exist: three-dimensional property unit [tredimensionell fastighet], which is a real property unit delimited both horizontally and vertically,\textsuperscript{96} three-dimensional property space [tredimensionellt fastighetsutrymme], which is a space included in a real property unit other than a three-dimensional real property unit and delimited both horizontally and vertically,\textsuperscript{97} and condominium ownership [ägarlägenhet] which is a three-dimensional real property unit not intended for other purposes than containing a single dwelling flat.\textsuperscript{98}

Indirect ownership is a form of common ownership right executed through a dwelling tenant ownership right [bostadsrätt].\textsuperscript{99} The right holder is co-owner of the land and building(s) in which he executes a use right in a specific part of a building for dwelling purposes. All owners are members the tenant ownership association [bostandsrättsförening] (a kind of co-operative), who legally owns the building(s). The right does not give full ownership to the flat, but a dwelling right to a specific flat within the building(s). The right consists of two rights: a shared ownership right in the real property and a tenant dwelling right to a specific part or parts of the building(s).\textsuperscript{100}

Another type of real property unit is the sole and exclusive right to fish in certain waters. The title to the fishing right can, even if it is uncommon, be separated from the title of the land and can be part of another real property unit or exist as a real property in itself. The property is a deviation from the principle of undivided property units in Sweden.\textsuperscript{101} Other uncommon types of real property exist and are often remains of older legislation.\textsuperscript{102}

\textsuperscript{96} Real Property Formation Act, chapter1, section 1a.
\textsuperscript{97} Real Property Formation Act, chapter1, section 1a.
\textsuperscript{98} Real Property Formation Act, chapter1, section 1a. See also Paulsson (2007) for a detailed description of Swedish three-dimensional real property.
\textsuperscript{99} The author is aware that the English term tenant ownership in some legislations contain much more than the right to use an apartment, e.g., farming rights as a tenant farmer. This is why the term dwelling tenant ownership is used in this report.
\textsuperscript{100} Dwelling Tenant Ownership Act. See also Paulsson (2007, pp. 39-42).
\textsuperscript{101} This real property unit does not have a specific name in Swedish legislation, but is today sometimes named “fishing property” [fiskefastighet]. Julstad (2006, p. 459). Author’s translation.
\textsuperscript{102} An example is older fishing rights not connected to the title of the land, e.g. the so-called jordeboksiske, see Julstad (2006, p. 459 and 2003, pp. 88-89).
6 Investigated rights

This chapter presents the results of the four national case-studies. The investigated rights are classified according to the Legal Cadastral Domain Model, LCDM. The classification of the rights according to the LCDM is the first part of the analysis aiming at testing the model. Chapter 7 contains the second, comparative, part of the analysis.

All investigated rights could be placed in one of the LCDM classes. The case-studies have however shown that the characteristics of a few rights allow them to be placed in more than one class. These rights are here placed and described in both classes.

6.1 Common right

A common right is in the LCDM defined as a “[p]art right in a part of common land owned and shared by several real properties”. Each real property owns a share of the common land. The common land is legally attached to the real properties themselves, not to the owners of the properties. When one of the real properties is sold, its share in the legally attached land follows with it. The class does not describe the situation where two or more persons own a piece of land together in common ownership. The common right is in other words a relation between two or more real properties and land legally attached to the properties:

- An executed right by two or more real properties in land owned by the properties.
- The right is transferred together with a real property when the property is sold or otherwise transferred.
- The right is similar to ownership right, but executed by real properties, not persons.
- The right can be beneficial or encumbering to ownership.

\(^{103}\) Paasch (2008, p. 124).

\(^{104}\) Paasch (2008, p. 124).

\(^{105}\) A common right is beneficial to ownership since it allows the owners an income from the land, but can also be encumbering (i.e. limiting) to ownership if the owners have to contribute to the maintenance or management of the legally attached common land.
6.1.1 Germany

**Neighbouring real property**

A so-called neighbouring real property [Anliegerflurstück] is a relation between real properties and land, executed by two or more real properties legally attached to the land. A neighbouring real property can typically be a path, road or ditch intended for common use by the shareholder properties.\(^{106}\) If one of the shareholder properties is sold, the share in the neighbouring real property unit follows with the sale.

A neighbouring real property is beneficial to ownership as it allow the use and outcome of land not accessible to others than the shareholder real properties. However, the right can also at the same time be seen as limiting to ownership since the participating real properties have to contribute to the maintenance and management of the commonly owned property.

6.1.2 Ireland

There has not been identified any common rights in the Irish legal system according to the definition in this chapter.

6.1.3 The Netherlands

**Co-ownership**

The Dutch case-study has identified one type of common right, the so-called common ownership [mandeligheid],\(^{107}\) which is a relation between two or more real properties in land and “[…] a parcel of land (e.g. a common way out) attached to the ownership of neighbouring properties.”\(^{108}\) Other examples are a dividing wall, a fence or a hedge held in common. The right has

\(^{106}\) ALKIS (2007). This type of commonly owned real property is sometimes called Anliegergrundstück in German. The land is not registered in the Land Register as a real property, but only in the Cadastral Index Map (Liegenschaftskataster), thus obtaining a quasi status of a real property unit (Grundstück). E-mail communication with Dr. Markus Seifert, February 8th, 2011.

\(^{107}\) Civil Code, Book 5, articles 60-69. Ploeger, Velten and Zevenbergen (2005, section 1.3.1) translates mandeligheid as joint ownership. Haanappel and Mackaay (1990, p. 179) translates mandeligheid as common ownership, but mention in footnote 1 that the Dutch term is hard to translate and that another term, “mitoyennity” is sometimes used in English. Mitoyennity is a term of French origin, meaning adjoining / common /attached to.

\(^{108}\) Ploeger, Velten and Zevenbergen (2005, section 1.3.1).
prior to 1992 only dealt with common features like walls, but has since “been expanded to all other cases of co-ownership where the ownership is inseparable from the ownership of a (nearby) parcel, e.g. a parking lot or even a whole golf course”. If one of the shareholder properties is sold, the share in the commonly owned real property follows with the sale.

A mandeligheid is beneficial to ownership as it allows the use and outcome of land not accessible to others than the shareholder properties. However, the right can also at the same time be seen as limiting to ownership since the participating real properties may have to contribute to the maintenance and management of the legally attached land.

6.1.4 Sweden

Joint property unit
A joint property unit [samfällighet] is land legally attached to two or more real property units. A joint property unit can e.g. be used for grazing domestic animals or extracting natural resources, like timber or fish. The shares are attached to the involved real properties, not their owners. If one of the shareholder properties is sold, the share in the joint property unit follows with the sale.

A joint property unit is beneficial to ownership for the shareholder real properties as it allows the use and outcome of common land not accessible to others than the shareholders. However, the right can also at the same time be seen as limiting to ownership of the shareholder real properties since they have to contribute to the maintenance and management of the land.

6.2 Real property right

A real property right is in the LCDM defined as a “[r]ight executed by the owner of a real property (the dominant tenement) in another real property (the servient tenement), due to his ownership. The right is transferred together with the real property when the property is sold or otherwise transferred.” It is a right enjoyed by one real property (the dominant tenement) over another (the servient tenement). Examples are the right of access to a

109 E-mail communication with Dr. Jaap Zevenbergen, February 7th 2011.
well on another property, or for the passage of water pipelines or electricity cables. If the property is sold the right follows the property, not the previous owner. The right can be specified to be located on the whole property, to a part of the property or it can be unspecified. An example of an unspecified right is the right to drill and use a well on another property, where the geographical location of the future well is not described.

A real property right is a connection between two real properties and described by the following characteristics:\textsuperscript{112}

- Right executed by the owner of a (i.e. dominant) real property in another (i.e. servient) real property.
- Right executed on the whole real property or a part of the real property.
- The right is transferred together with the real property when the property is sold or otherwise transferred.
- The right can be beneficial or encumbering to ownership right.\textsuperscript{113}

Real property rights are beneficial to ownership for the dominant real property as they allow the use and benefits of the servient real property. However, the right can also at the same time be seen as encumbering (i.e. limiting) to ownership since the participating real properties have to contribute to the maintenance and management of the dominant real property and facilities they use on the real property.

\textit{6.2.1 Germany}

\textit{Easement}

An easement [Grunddienstbarkeit] is a property owner’s right over a specific part of another property which is vested in the owner(s) of the dominant tenement, i.e. the right follows the land when the property is sold or otherwise transferred.

Easements are used for a variety of tasks, e.g. to use the road over a neighbouring property or the right to use a well on another property. The

\textsuperscript{112} Paasch (2008, p. 125).
\textsuperscript{113} A real property right can be beneficial for the property dominant property, i.e. by being allowed access via a road over the servient property, and thus also being limiting for the servient real property.
right holder is the owner of the property which is executing a right (i.e. the dominant tenement) on another property (i.e. the servient tenement).\textsuperscript{114}

The right is transferred together with the real property when the property is sold or otherwise transferred. An easement is beneficial to ownership for the dominant property and limiting to ownership for the servient property to ownership.

\textit{Fishing right}
A fishing right [Fischereirecht] is the right in inland waters to use and cultivate fish, crabs, shells, frogs and other usable water living animals who are not subject of the hunting right.\textsuperscript{115} The right is normally attached to a real property as right for the owner of the property [Eigentümerfischereirecht]. A fishing right can however be sold independently as a so-called independent fishing right [selbstständiges Fischereirecht] to the owner of another real property and then becomes a right attached to the new owner’s real property.\textsuperscript{116}

The right is transferred together with the real property when the property is sold or otherwise transferred. The right can, however, also be transferred to a non-property owner, depending on regional legislation, making it a personal right, which is described in section 6.3.1. A fishing right is when classified as a real property right beneficial to ownership for the dominant property since it enhances the use or value of it and limiting for the servient real property since it limits the owners use of the property.

\textit{Charge on land}
Charge on land [Reallast] is a right vested in the right holder to require recurring acts of performances to be made from the land.\textsuperscript{117} A charge on land is normally created for an individual, but can also be created for the benefit

\textsuperscript{114} BGB, sections 1018-1029, Wegen et al. (1998, pp. 215-216).
\textsuperscript{115} ALKIS (2007).
\textsuperscript{116} Fishing rights are regulated in regional acts in Germany. The description is based on the Saxon Fishing Act, section 9. E-mail communication with Mr. Volker George, December 7\textsuperscript{th} 20009.
\textsuperscript{117} BGB, sections 1105-1112.
of the owner of a real property.\textsuperscript{118} The performance does not necessarily have to involve monetary compensation.\textsuperscript{119}

The right is transferred together with the real property when the property is sold or otherwise transferred. A charge on land is beneficial to ownership for the dominant property and limiting to ownership for the servient property.

6.2.2 Ireland

Easement
An easement is a real property’s (the dominant tenement) right to use a specific part of another real property (the servient tenement) for specific purposes.\textsuperscript{120} Easements are used for a variety of tasks, e.g. to use the road over a neighbouring property or the right to use a well on another property. Some in this author’s opinion peculiar rights have sometimes been claimed and recognised as easements by the Irish courts, e.g. a right to throw quarry refuse on another person’s land or the right to use a blacksmith’s “shoeing stone”\textsuperscript{121}. An easement can even be applied on leasehold estate, i.e. the right is acquired by the lessee, which is acting as an “owner”. The right passes to the landlord when the leasehold ends.\textsuperscript{122}

The right follows the land when the property is sold or otherwise transferred. The right is beneficial to ownership for the dominant property and limiting to ownership for the servient property.

\textsuperscript{118} BGB, sections 1105, part 2.
\textsuperscript{119} The BGB, section 1105, part 1, only mention recurring acts, in German: ”[…] wiederkehrende Leistungen aus dem Grundstück zu entrichten sind (Reallast).“ However, it seems that the normal charges do have some monetary content, since the “provisions governing the interest on a mortgage claim apply with the necessary modifications to the individual payments”, BGB, section 1107. The right is translated as rent charge in Hertel and Wicke (2005, p. 36).
\textsuperscript{120} Reform Act, part 8, sections 33-40.
\textsuperscript{121} However, not every type of beneficiary installation can be classified as an easement. For example, a right to “shade and shelter” from a hedge has not been accepted as an easement by the Irish courts (LRC, 2002, p. 1).
\textsuperscript{122} Reform Act, part 8, sections 35-36.
**Freehold covenant**

A freehold covenant is a covenant affecting freehold land and is a relation between freehold lands, i.e. dominant and servient land.\(^{123}\) It is an agreement restricting the owner’s use and enjoyment of the property to specific purposes or it may impose a duty.\(^{124}\) The covenant imposes in respect of servient land an obligation to do or to refrain from doing any act or thing.\(^{125}\) Examples of covenants are the prohibition of holding dogs on an estate or using a building for specific activities (so-called negative covenant, i.e. not to do something) or to be responsible for certain maintenance on the estate (a so-called positive covenant, i.e. usually to take some action or to spend money).

The freehold covenant is transferred together with the real property when the property is sold or otherwise transferred.

Easements and freehold covenants are quite similar in nature, but whereas an easement exist as a legal right which remains enforceable against any new owner of the servient land, a freehold covenant could under Common Law cease to be enforceable if the servient land had passed to the new owner in good faith without notice of the covenant. The Reform Act has however replaced the Common Law rules on freehold covenants.\(^{126}\) The right is beneficial (for the dominant property) and limiting (for the servient property) to ownership.

**Profit à prendre (including a mining right)**

A profit à prendre is “… [a] right or privilege to take away something of value from its soil or from the products of its soil (as by mining, logging, or hunting).”\(^{127}\) The right can vested in the owner(s) of a real property or a person.\(^{128}\) The right can therefore be classified as a real property right or a personal right depending on its actual content. This duality makes it a candidate for both the Real property right class and the Personal right class, depending on the actual content of the individual right in question.

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123 A covenant includes an agreement, a condition, reservation and stipulation (Reform Act, part 1 and part 8, section 48).
124 Reform Act, section 49, subsection 1. Personal communication with Mr. Fergus Hayden, May 18th 2009 and e-mail communication October 15th 2010.
125 Reform Act, part 8, section 49, subsection 2.
126 LRC (2003, p. 7) and Reform Act.
127 Garner (1891, p. 1013).
128 Personal communication with Mr. Fergus Hayden, May 18th 2009. See also LRC (2003, p. 4, footnote 4).
The right follows the real property when the property is sold or otherwise transferred. The right is, if executed by a real property, beneficial to ownership for the dominant property and limiting for the servient property to ownership.

6.2.3 The Netherlands

Easement
An easement [erfdienstbaarheid] is a real property’s (the dominant tenement) right to use a specific part of another real property (the servient tenement) for specific purposes. Easements are used for a variety of tasks, e.g. to use the road over a neighbouring property or the right to use a well on another property. The right allows the owner of a real property the right to use (part of) another real property for a variety of tasks, e.g. to using a road located on the real property for access to his own property.

The right follows the real property when the property is sold or otherwise transferred. An easement is beneficial to ownership for the dominant property and limiting to ownership for the servient property.

Historical real property rights
Dutch legislation has other real property rights called historical rights, dating from before the introduction of the Civil Code. The rights are considered as strong use rights. They cannot be vested anymore, but can still be transferred. However, numerous of them still exist in parts of the country and are still legally binding. The historical rights are mostly regional and not applied in the entire country. However, a more detailed study is necessary for classifying them individually. This study only provides a general introduction, since the rings are not in the centre of land management today.

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129 Haanappel and Mackaay (1990, p. 185) translate erf dienstbaarheid with servitude. The term is however not used in this report, since easement is deemed a more appropriate term by this author.

130 Civil Code, Book 5, article 70 to 84.

131 Ploeger, Velten and Zevenbergen (2005, section 1.2.1).

132 Some examples of Dutch historical rights are: 1) the right granting the owner of a pro-perty to have a duck trap on another property [recht van eendekooi]. 2) planting rights [pootrecht]. 3) an obligation where the owner of a new subdivided property has to pay a transfer fee to the owner of the land where the property is subdivided from called “right of the 13th penny” [recht van de 13 penning]. 4) the right of wind catchments / right for windmills [recht van windvang / molenrecht], which is a right allowing the owner of a windmill to keep the land around it open due to wind
The rights follow the real property when the property is sold or otherwise transferred. These historical real property rights are as a group classified as real property rights, being beneficial to ownership for the dominant properties and limiting to ownership for the servient properties, judging from the examples in the footnote below.

6.2.4 Sweden

Easement
An easement [servitut] is a real property’s (the dominant tenement) right to use a specific part of another real property (the servient tenement) for specific purposes. Easements are used for a variety of tasks. Examples are the right of way over a neighbouring property or the right to use a well on another property. Easements are used for a variety of tasks, e.g. to use the road over a neighbouring property or the right to use a well on another property. The right allows the owner of a real property the right to use (part of) another real property for a variety of tasks, e.g. to using a road located on the real property for access to his own property.

The right follows the real property when the property is sold or otherwise transferred. An easement is beneficial to ownership for the dominant property and limiting to ownership for the servient property.

Joint facility
A joint facility right [gemensamhetsanläggning] is a right for establishing a joint facility, which is a construction (facility) beneficial for two or more real property units. A joint property unit is regulating the use of land, whereas a joint facility is regulating a construction (facility), hence the name. A joint property unit has to be created if the land shall follow the joint facility. A joint facility can for example be a private road, a bathing jetty or a parking area where the owners of several properties have a mutual interest in using or maintaining the facility. However, even if a joint facility is granted the

movements to the mill. In practice, the right works as an easement. Personal communication with Dr. Hendrik Ploeger, October 3rd 2005 and Dr. Jaap Zevenbergen, May 10th 2008.

133 Land Code, chapter 7 and 14. Other acts also contain statutes regarding the formation and use of easements, e.g. the Real Property Formation Act and the Environmental Code. Julstad (2006 and 2003), Jensen (2005, chapter 1, section 1.3.3) and Nilson and Sjödin (2003).

134 Joint Facilities Act.
physical space in one or several properties like an easement, the participating properties have shares reminding of the share system of a joint property unit or multiple easements in e.g. the same road or parking lot.

The rights follow the real property when the property is sold or otherwise transferred. A joint facility is beneficial and limiting to ownership. It is beneficial since the right benefits the owners of the real properties involved (which is one of the preconditions for creating a joint facility). The right is limiting because the real property owner cannot use that part of his property for other purposes than specified by the joint facility.

The joint facility is in this study classified as a real property right, since in this author’s opinion resembles a right more than the earlier described joint property unit, which is held in common by the participant properties. The space occupied by the joint facility is by this author seen as a form of common easement-like right for the participating properties.

**Utility easement**

A utility easement [ledningsrätt] allows a real property to use a space within a servient property for construction and maintenance of an installation used for the common good, e.g. an electric cable or a pipeline for water supply.\(^\text{135}\) The right is normally regarded as a personal right, but can be executed by a real property.\(^\text{136}\)

The right follows the property when the property is sold or otherwise transferred. The right is, if being executed by a real property, beneficial to ownership for the dominant property and limiting to ownership for the servient property.

**6.3 Personal right**

A personal right is in the LCDM defined as a “[r]ight executed by a person to use, harvest the fruits/material if, rent or lease the real property in whole or in part, including the claim against a person. The right follow the property when it is sold or otherwise transferred.” A personal right can be very strong and be given on a time-limit basis or for life. Theoretically, a personal right

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\(^\text{135}\) Utility Easements Act, section 1 and 2. The Act states that the utility easement shall belong to the right holder’s real property or site-leasehold if requested by the right holder.

might also be inherited. A personal right can be beneficial (by the income of a rent to the property owner) and/or encumbering (i.e. limiting) (by allowing someone else to use one’s real property) to ownership. A personal right is a connection between a person (not the owner of a property) and a real property and described by the following hypothetical characteristics:\(^{137}\)

- A right executed by a person other than the owner in a real property.\(^{138}\)
- The right to use or harvest the fruits/material of a real property, rent or lease the real property in whole or in part.
- The right follows the real property when the property is sold or otherwise transferred.
- The right can be beneficial or encumbering to ownership.

It must be noted that the general personal right of renting an apartment for dwelling or business purposes is not described in this report, even if they are common in all four investigated countries. The reason is that they are by this author seen as contractual agreements which are normally not registered in the nations land registers as separate rights.\(^{139}\)

6.3.1 Germany

Usufruct

German usufructs [Nießbrauch] exist in many forms depending on what area of law it is applied on, e.g. land law, finance, etc. The statutory definition of usufruct in things are; “(1) A thing can be encumbered in such a way that the person for whose benefit the encumbrance is made is entitled to take the emoluments of the thing (usufruct). (2) The usufruct may be restricted by the exclusion of individual emoluments.”\(^{140}\) It is the right for a person to use a property belonging to another to perform certain activities, e.g. to harvest “the fruits of the land”.\(^{141}\) A usufruct is next to ownership the strongest right

\(^{138}\) A person may or may not be a real property owner. He is executing the right as a person, not as the owner of a certain real property.
\(^{139}\) For example, the Swedish rent [hyra] and lease [arrende] can be registered in the Swedish Real Property register, but it is uncommon to do so.
\(^{140}\) BGB, section 1030.
you can have in real property.\textsuperscript{142} A usufruct applied on real property is called Grundstücksnießbrauch in German. The right can be granted for life or for a limited term. It is not allowed to alter the nature of use of the land or to transform existing buildings without permission.

The right follows the real property when the property is sold or otherwise transferred.\textsuperscript{143} A usufruct is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right also becomes beneficial to ownership if the right holder has to give any compensation for the use of the usufruct.

\textit{Restricted personal easement}  
A restricted personal easement \textit{[Beschränkte persönliche Dienstbarkeit, BpD]} is the right for a person to use the real property for personal gain.\textsuperscript{144} A BpD is a right bestowed upon certain individuals and juridical persons and special conditions apply to juridical persons and registered groups of persons.\textsuperscript{145} A BpD is similar to usufruct, but more limited in the way the person can exploit the real property in question.

The right follows the real property when the property is sold or otherwise transferred; however, the right cannot be transferred from one individual to another and expires when he/she dies. A restricted personal easement is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right also becomes beneficial to ownership if the right holder has to give any compensation for the use of the restricted personal easement.

\textit{Permanent dwelling right}  
A permanent dwelling right \textit{[Dauerwohnrecht]}\textsuperscript{146} is a use right for a specific flat on another person’s real property. The right is not to be confused with the right of renting a flat. The right can be granted for the right holder’s lifetime or for a fixed period. The right is executed by a person(s), the tenant(s), other than the owner of the real property. The right might be inherited, transferred or sold.\textsuperscript{147}

\textsuperscript{142} Ahrens (2004, p. 42).
\textsuperscript{143} Wegen et al. (1998, p. 216).
\textsuperscript{144} BGB, section 1090-1093. Wegen et al. (1998, p. 216).
\textsuperscript{145} BGB, section 1092.
\textsuperscript{146} Author’s translation.
\textsuperscript{147} Condominium Ownership Act, section 31. Wegen et al. (1998, p. 216).
The right follows the property when sold or otherwise transferred. A permanent dwelling right is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right also becomes beneficial to ownership if the right holder has to give any compensation for the use of the permanent dwelling right.

**Hereditable building right**

Hereditable building right [Erbbaurecht] is a right which grants the right holder the exclusive right to build, use and occupy a building on a piece of land owned by somebody else. The right is usually granted for a fixed period, e.g. 99 years. The building right is treated as a real property and can be subject to mortgages and other land related charges. When the building right is abolished, the land owner becomes the owner of the building(s) erected by the right holder.

The right follows the real property when the property is sold or otherwise transferred. The right can be sold or inherited. When the right expires the landowner has to compensate the right holder for the building. A specialisation of heritable building lease is the apartment/partial building right [Wohnungs-erbbaurecht/Teilerbbaurecht] which allows the creation of a building right in an apartment or part of a real property. A hereditable building right is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right also becomes beneficial to ownership if the right holder has to give any compensation for the use of the hereditable building right.

**Mining right**

A mining right [Bergwerkseigentum] is a concession to locate and extract stones, minerals, etc on a specific location. The right is very strong and equals land ownership and the content of the BGB concerning real property ownership also applies to the mining right.

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148 Translated in Hertel and Wicke as “building lease” (Hertel and Wicke, 2005, pp. 9-10).
151 Mining act, section 8 and 9. Note: The name Bergwerkseigentum means mining ownership. The term Bergwerkseigentum refers to mining right is used in ALKIS (2007). Author’s translation.
The right follows the real property when the property is sold or otherwise transferred. A mining right is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right also becomes beneficial to ownership if the right holder has to give any compensation for the use of the mining right.

Fishing right
A German fishing right [Fischereirecht] has been classified as a real property right in section 6.2.1, but can even be classified as a personal right if the regional legislation allows it to be sold to a person. A fishing right can be sold independently as a so-called independent fishing right [selbstständiges Fischereirecht] to the owner of another real property (and then becomes a right attached to the new owners real property) or a third party (person). There are however several restrictions in regard to selling to non-property owners. It is the policy (in Saxony) not to create new independent fishing rights and over time to (re)unite the old, personal rights to real properties, thus extinguishing the rights.\footnote{The text is based on Bavarian and Saxon fishing legislations. It is even possible that there exist several fishing rights on a parcel [so-called Koppelfishereirechte], which can be sold separately. E-mail communication with Dr. Markus Seifert, February 7th, 2011, and Mr. Volker George, February 28th, 2011. However, many regional conditions concerning fishing rights exist and are not analysed further in this study.}

The right follows the real property when the property is sold or otherwise transferred. A fishing right is, if executed by a person, limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right also becomes beneficial to ownership if the right holder has to give any compensation for the use of the fishing right.

Right of industry
Right of industry [Realgewerberecht], which is a hereditable use right (but not an obligation) to execute industry belonging to a specified type of business on the real property.\footnote{ALKIS (2007).}

The right follows the real property when the property is sold or otherwise transferred. The right of industry is beneficial to ownership, since it allows the establishing of industry on the right holder’s real property, which might not be allowed on other properties. However, the right also becomes limiting.
to ownership if the right holder has to give any compensation for the use of the right.

Charge on land
Charge on land [Reallast] is a right vested in the right holder to require recurring acts of performances to be made from the land.\textsuperscript{154} A charge on land is normally created for an individual, but can also be created for the benefit of the owner of a real property.\textsuperscript{155} The performance does not necessarily have to involve monetary compensation.\textsuperscript{156}

The right follows the real property when the property is sold or otherwise transferred. A personal charge on land is limiting for the property since the owner of the real property is forced to tolerate certain conditions. However, the right also becomes beneficial to ownership if the right holder has to give any compensation for the charge on land.

North Friesian building right
A North Friesian building right\textsuperscript{157} [Stavenrecht] is a right similar to a hereditable building right and executed in the German North Friesian regions by the North Sea. The right allows the construction and use of buildings on dikes in the marshes and is similar to a hereditable building right.\textsuperscript{158}

The right follows the real property when the property is sold or otherwise transferred. The right is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right also becomes beneficial to ownership if the right holder has to give any compensation for the use of the building right.

\textsuperscript{154} BGB, sections 1105-1112.
\textsuperscript{155} BGB, section 1105, part 2.
\textsuperscript{156} The BGB, section 1105, part 1, only mention recurring acts, in German: ”[…], wiederkehrende Leistungen aus dem Grundstück zu entrichten sind (Reallast).“ However, it seems that the normal charges do have some monetary content, since the “provisions governing the interest on a mortgage claim apply with the necessary modifications to the individual payments”, BGB, section 1107. The right is translated as rent charge in Hertel and Wicke (2005, p. 36).
\textsuperscript{157} Author’s translation.
\textsuperscript{158} Nawotki (2004) and ALKIS (2007). E-mail communication with Dr. Markus Seifert, March 30\textsuperscript{th} 2009. The similarity to a hereditable building right has also been noted in Nawotki (2004).
6.3.2 Ireland

Leasehold
An Irish leasehold estate is, as described in section 5.2.1, part of the concept of a legal estate, together with freehold. However, even if leasehold is treated as a form of real property, it is conceptually to be seen as a right between the owner of property and the lessee, due to the fact that leasehold does not involve the right of unlimited possession in time which is one of the characteristics of ownership as described in section 3.1. Even if the lease is very long, e.g. 999 years, and might in many ways be treated as ownership, the land will return to the owner when the lease ends. Leasehold is therefore in this study considered a personal right.

The right follows the real property when the property is sold or otherwise transferred. The right is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, a lease involves compensation to the real property owner and therefore also beneficial to ownership.

Profit á prendre (including a mining right)
A profit á prendre is, as previously described in section 6.2.2, the right to take away something of value from another person's land. The right can be executed by both a real property or a person and can therefore be classified as belonging to both the real property right class and the personal right class, depending on who is executing the right.

The right follows the real property when the property is sold or otherwise transferred. A profit á prendre is, when being a personal right, limiting to ownership for the real property, which is forced to tolerate certain conditions. However, the right also becomes beneficial to ownership if the right holder has to give any compensation for the profit á prendre.

Wayleave or other right to lay cables, pipes, wires or other conduits
A wayleave or other right to lay cables, pipes, wires or other conduits are rights allowing the erection of certain constructions on a real property. These rights are commonly owned by utility bodies providing services like the supply of electricity, gas and water, but are nonetheless considered easements; even they are listed as a separate group in the Reform Act.\(^{159}\) How-

\(^{159}\) Reform Act, part 2, section 11, and the Explanatory Memorandum of the Reform Act, and personal communication with Mr. Fergus Hayden, May 18th 2009.
ever, they are in this study judged to belong to the personal right class, due to their characteristics.

The rights follow the real property when the property is sold or otherwise transferred. The right is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right also becomes beneficial to ownership if the right holder has to give any compensation for the wayleave, etc.

Rent payable under a tenancy
A rent payable under a tenancy is the rent the lessee has to pay for his tenancy. The right is registered when the tenancy is a lease and created for more than 21 years. The entry in the leasehold register then refers to the rent.

The right follows the real property when the property is sold or otherwise transferred. The right is limiting for the serving real property since the owner is forced to tolerate certain conditions. However, the right is also beneficial to ownership since it generates an income for the owner.

Rentcharge
A rentcharge is any annual or periodic sum charged on or issuing out of land, except a rent payable under a tenancy, see above, and interest. The creation of most new rent charges has been abolished through the introduction of the Reform Act.

The right follows the real property when the property is sold or otherwise transferred. A rentcharge is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. The right is however also beneficial to ownership since it generates an income for the owner.

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160 Registration of Title Act, 1964, section 69.
161 E-mail communication with Mr. Fergus Hayden, April 4th 2011.
162 Reform Act, part 1, chapter 3. Reform Act, section 3, chapter 2, sections 41-42. Note: “Moneys worth” is a value other than cash such as bonds, shares, securities, property, produce of the land, etc. Personal communication with Mr. Fergus Hayden, May 18th 2009.
163 Reform Act, section 12 (abolishing of free farm grants) and section 41 (abolishing of rentcharges). E-mail communication with Fergus Hayden, August 11th 2010.
6.3.3 The Netherlands

Building lease, emphyteusis

A building lease, emphyteusis [erfpacht] is a right allowing the holder of the right to detain and to use the immovable thing of another person. The right was originally intended to further the development of wasteland into agricultural land, but after 1900 it gained in popularity for the use of building houses and industrial buildings. The owner of the land is also the owner of all the buildings etc. constructed by the lessee [erfpachter]. The building lease can be established for a limited time, or for perpetually. The right is still also used for agricultural leasehold. However, the right of the latter on both land and constructions is considered to be very strong, almost equal to ownership itself.

The right follows the real property when the property is sold or otherwise transferred. The right may be transferred to others, however, certain conditions apply. The Dutch municipalities have previously used building lease quite intensively, but it is only in limited use nowadays, due to political reasons. Before 1992 the lessee had to pay a yearly sum, but today the lessee can also pay a lump sum, e.g. for 50-75 years. A building lease is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right is also beneficial to ownership since the right holder has to give compensation for the building lease.

Building lease, superficies

Building lease, superficies [opstal] is another form of building lease giving the right to own or to acquire buildings, works or plantations in, on or above an immovable thing belonging to another. The right to own a building on land may be granted in real property as an independent right, but can also be granted in conjunction with the right to use the land under a leasehold agreement. An opstal is established when the use rights of the lessee (opstaller) regarding the land itself are limited. Examples are pipelines and (underground) cables, antennas and electricity substations. The main use of the right is together with right of tenancy (pacht) of agricultural land to own

164 Civil Code, Book 5 article 85 to 100.
165 See Ploeger, van Velten, and Zevenbergen (2005, section 1.5) and Slangen and Wiggers, E. (1998, p. 359) for descriptions of building lease, emphyteusis.
166 Personal communication with Dr. Jaap Zevenbergen, May 10th 2008.
167 Civil Code, Book 5 article 101 to 105.
168 See Ploeger, van Velten, and Zevenbergen (2005, section 1.5) and Slangen and Wiggers (1998, pp. 361-362) for descriptions of building lease, superficies.
the installations on the land you rent (in opposite to erfpacht, where you lease\textsuperscript{169} the buildings, see above). The opstal right allows the owner of the property to charge a rent from the right holder, payable due to the conditions mentioned in the contract. A building lease can be granted for a fixed or indefinite period and is transferable, unless the deed requires the prior approval of the property owner.

The right follows the real property when the property is sold or otherwise transferred. A building lease, superficies, is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right also is beneficial to ownership since the right holder has to give compensation for the building lease.

\textit{Qualitative obligation}

Qualitative obligation [kwalitatieve verplichting]\textsuperscript{170} is a contract between the owner of a real property and another person, in which the owner takes on an obligation not to do or to tolerate something on his land. The right also covers other registered rights [overig zak. Genotsrecht] of undisturbed possession, which are similar to contractual restriction, in the land register.\textsuperscript{171}

The right follows the real property when the property is sold or otherwise transferred. Qualitative obligation is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right also becomes beneficial to ownership if the right holder has to give compensation for the qualitative obligation.

\textsuperscript{169} It might be discussed if “lease” is the right word to use. However, the lessee is not the owner of the building. In some cases, before 1992, the holder of the \textit{erfpacht} also explicitly got an opstal right, because of the compensation when the right ends. In this case he is the erfpachter of the land and (as opstaller) owner of the building on it. Personal Communication with Dr. Jaap Zevenbergen and Dr. Hendrik Ploeger, October 3rd and 4th 2005.

\textsuperscript{170} Civil Code, Book 6, article 252. The right does not have a specific name, but is called kwalitatieve verplichting in Dutch. The term qualitative obligation is used in Ploeger, van Velten, and Zevenbergen (2005, section 1.3.6).

\textsuperscript{171} E-mail correspondence with Dr. Jaap Zevenbergen, January 12th 2009.
**Usufruct**
A usufruct is a right to use property belonging to another and to enjoy the fruits thereof. There are different types of usufructs; “Normal” usufruct and the right of use and habitation. The “normal” usufruct can be sold or mortgaged. The right can be sold again and again, but when the first seller (which the right is originally granted to) dies, the right ceases to exist. The right of use and habitation is strictly personal and only granted to individuals and cannot be sold or mortgaged. The right allows the use of “things” (e.g. land) and the right to use a dwelling.

The right follows the real property when the property is sold or otherwise transferred. Usufruct is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right also becomes beneficial to ownership if the right holder has to give compensation for the usufruct.

**Beklemrecht**
Beklemrecht is a right to use and enjoy the fruits and profits of the property of another. The right is a so-called old property right with regional occurrence, e.g. the stadsmeierrecht (a kind of lease) issued by the City of Groningen.

The right follows the real property when the property is sold or otherwise transferred. Beklemrecht is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right also becomes beneficial to ownership if the right holder has to give compensation for the beklemrecht.

**Hire-purchase right**
The hire-purchase right is a right where the lessee pays instalments for the property he leases until the ownership is transferred to him. The ownership of the real property is first transferred when the payment is

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172 Civil Code, Book 3, article 201 to 226.
173 Personal communication with Dr. Hendrik Ploeger, October 3rd 2005. See also the Civil Code, Book 3, article 226, and Ploeger, van Velten, and Zeevenbergen (2005, section 1.3.1).
174 E-mail communication with Dr. Hendrik Ploeger, January 21st 2009 and Dr. Jaap Zeevenbergen, January 12th 2009.
175 Hire-purchase Act.
completed. A deed is needed when the last instalment is paid and the ownership is transferred to the new owner.\textsuperscript{176}

A hire-purchase right is by this author judged to be beneficial to ownership, since it gives the real property owner an income until the ownership is transferred to the right holder. The right is however at the same time limiting to ownership, since the owner of the real property is forced to tolerate certain conditions, i.e. not able to sell the property to others. The Dutch hire-purchase right is a hybrid of ownership right and mortgage. The right is in fact a very slow real property transaction and will grow into ownership for the lessee when the payment is completed. The right last until the payment has been completed and the original owner will then have transferred his ownership title.\textsuperscript{177}

The right differs from the personal rights characteristic that a personal right is transferred when the real property is sold or otherwise transferred, since the right seize to exist when the property is sold, i.e. all payments are completed by the right holder, thus becoming the new owner. The right is by this author seen as limiting to ownership, since the owner of the real property is forced to tolerate certain conditions, e.g. not to sell the real property to others. The right is however at the same time beneficial to ownership since it generates an income for the owner until the transaction is completed.

\textit{Right of land rent}

Right of land rent [recht van grondrente] is a right to payment or other performances executed by the owner of the land. The right was abolished in 1992 by the introduction of the Civil Code and cannot be granted anymore, but still exist. The right is a so-called old property right [oud-zakelijk recht] and hardly used any more. It resembles the German charge on land.\textsuperscript{178}

A right of land rent is limiting for the real property since the owner is forced to tolerate certain conditions. However, the right is also beneficial to ownership since the right holder has to give compensation (i.e. a land rent).

\textsuperscript{176} The right does not require registration, but can be registered in public registers specified in the Civil Code, Book 3, article 2. See the Hire-purchase Act, article 2.

\textsuperscript{177} Personal communication with Dr. Jaap Zevenbergen, May 10\textsuperscript{th} 2008.

\textsuperscript{178} E-mail communication with Dr. Hendrik Ploeger, January 21\textsuperscript{st} 2009.
6.3.4 Sweden

Site leasehold
Site leasehold [tomträtt] is a right to use (a specified part of) a real property which by the creation of the site leasehold is owned by the State, a municipality or otherwise in public possession.\(^{179}\) The right is granted for an undefined period of time, but can be cancelled after certain intervals by the property owner if certain conditions apply. Site leasehold is a very strong right, almost equal to ownership and can be sold on the open market. The grantee owns the buildings on the site-leasehold.

The right follows the real property when the property is sold or otherwise transferred. The right expires when the right holder purchases the land covered by the leasehold. Site leasehold is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right holder has to give compensation for the site leasehold to the real property owner, making the right also beneficial to ownership.

Public road right
Public road right [vägrätt] is a right where the road manager (State or municipality) is granted the use of (parts of) real properties for construction and maintenance of public roads.\(^{180}\) The right holder, in principle, takes over (almost) all ownership rights from the property owner. The right holder takes the owners place and may allow certain constructions within the road area.\(^{181}\) The right is granted to ensure control of land occupied or used in the construction and maintenance of public roads.

The right follows the real property when the property is sold or otherwise transferred. A public road right is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right also is beneficial for the real property owner if the right holder has to give any compensation for the right.

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\(^{180}\) Roads Act, sections 1 and 30-32.
Utility easement
Utility easement [ledningsrätt] is a right allowing a person to use a space within the property for construction and maintenance of an installation used for the common good, e.g. an electric cable or a pipeline for water supply. A utility easement is normally executed by a legal person, but the right can also be executed by a real property, thus becoming a real property right. A utility easement can also be executed by site leasehold, i.e. a right is executing a right. In that case we have a right in a right relation, where the site-leasehold substitutes the real property in which the utility easement is granted.

The right follows the real property when the property is sold or otherwise transferred. A utility easement is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right is also beneficial for the real property owner if the right holder has to give any compensation for the right.

Leasehold
Leasehold [arrende] is a use right for the right holder to access (mostly domestic) buildings or (mostly agricultural) land, giving a financial compensation to the owner. Leasehold on land for dwelling can be granted for life. Leasehold can be granted for up to 50 years, unless it is within a planned area or agricultural leasehold, where the leasehold can be granted for no more than 25 years.

The right follows the real property when the property is sold or otherwise transferred. Leasehold is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, leasehold is also beneficial for the real property owner since the right holder has to give compensation for the right.

182 Utility Easements Act.
184 Utility Easements Act, section 1.
185 Land code, chapters 8-10. Julstad (2006, pp. 472-473). The condition is that the rights are protected by registration; otherwise the right may disappear with the sale of the property in good faith. Author’s translation of the leasehold names.
Nature conservation agreement
A nature conservation agreement [naturvårdsavtal] is an agreement between the State or municipality and the property owner, pledging the owner to allow or endure certain natural values (such as plants, etc.) in a described area. The right can be seen as a complement to nature reserves and other nature conserving initiatives. However, the right is seen as a use right by the legislator even if it resembles and complements public regulations such as nature reserves.  

The right follows the real property when the property is sold or otherwise transferred. A nature conservation agreement is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right also becomes beneficial for the real property owner if the right holder has to give any compensation for the right.

Mining concession
A mining concession [undersöknings- och bearbetningskoncession] is a right to search for and exploit a land area for the purpose of mining minerals. The right does not cover the minerals themselves, which are not owned by anyone, but only the right to extract them via investigation and necessary constructions on specific properties. The minerals can e.g. be extracted from mines with tunnels reaching under real properties not covered by the concession.

The right follows the real property when the property is sold or otherwise transferred. An investigation and exploitation concession is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, the right also becomes beneficial for the real property owner if the right holder has to give any compensation for the right.

Historical personal rights
The right to electrical power [rätt till elektrisk kraft] and “avkomsträtt” are older rights not granted anymore. They are called historical rights by this author. The right to electrical power for lightning, etc. is a right granted to a real property. It is in each right specified from which power station the

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186 Land Code, chapter 7, section 3.  
power has to be taken and which real property receiving it.\textsuperscript{189} Avkomsträtt is a right for a person to receive benefits in form of money or goods from a real property. The typical scenario is a son taking over his parent’s farm and granting them the right to stay on the property and/or other services.\textsuperscript{190}

The rights follow the real property when the property is sold or otherwise transferred. The right to produce electrical power is an limiting to ownership since the real property owner has to pay for the service. However, the right is also beneficial to ownership, since the right allows the right holders property to receive specific services (electrical power) from a power station. Avkomsträtt is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, an avkomsträtt also becomes beneficial to ownership if the right holder has to give any compensation, e.g. to perform some duties in exchange for the right.

\textit{6.4 Latent right}

A latent right is in the LCDM defined as “[a] right which is not yet executed on a real property. Regulating the exploitation of a real property by another real property or person. When the real property is sold or otherwise transferred the right normally follows with it. Liens are not considered latent rights.”\textsuperscript{191} A latent right is a common right, a real property right or personal right which is not yet executed on a real property. The right normally follows with the real property when the property is sold or otherwise transferred. Liens are in the LCDM not considered latent rights, according to the definition used in the LCDM.\textsuperscript{192} When executed, the latent right will be classified as e.g. a beneficial or limiting personal right or real property right depending on its characteristics. The right is described by the following characteristics:\textsuperscript{193}

\textsuperscript{189} Land Code, chapter 15, section 1.  
\textsuperscript{190} See Landahl and Nordström (1973, p. 502).  
\textsuperscript{191} Paasch (2008, p. 126). Note: Spelling error in the definition, saying “exploration” instead of “exploitation”. Corrected in this report.  
\textsuperscript{192} Paasch (2008, p. 126).  
\textsuperscript{193} Paasch (2008, p. 126). Note: Spelling error in the characteristics, saying “explo-ration” instead of “exploitation”. Corrected in this report.
A latent right waiting to be executed on or by a real property.

Regulating the exploitation of a real property by another real property or person.

When a real property is sold or otherwise transferred the right normally follows with it.

The right will be classified as a common right, real property right, personal right, public regulation or public advantage when executed, depending on its specific characteristics.

The right can be beneficial or encumbering to ownership.

The right does not contain security for payment and other financial interests, such as mortgage. These rights are placed in the lien class.

6.4.1 Germany

Pre-emption right

A pre-emption right [dingliches Vorkaufsrecht] is a right granted the right holder to purchase a property in question (or a fraction of it) when it is put up for sale. The right can be given as a personal right or to the owner of another real property.

The right normally follows the real property when the property is sold or otherwise transferred, i.e. a pre-emption right still exist when the new owner want to sell the real property. The right is, when executed by a real property, beneficial to ownership of the dominant real property. The right of pre-emption is, when executed by a person, limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. The right may also be limiting the dominant real property if there are transaction costs to be paid in connection with the transfer of ownership based on the pre-emption right.

Depending on the specific characteristics the right will be transformed into a real property right, personal right or lien when executed.

The right of pre-emption is regulated in the BGB, sections 463-473. Right of pre-emption to land is regulated in BGB, sections 1094-1104. Other rights of pre-emption are e.g. 1) municipal pre-emption right [gesetzliches Vorkaufsrecht], 2) public pre-emption right [öffentliches Vorkaufsrecht] and 3) a pre-emption right in a hereditable building right [Vorkaufrecht beim Erbbaurecht]. Note: Right of pre-emption also exists between co-heirs when one of the co-heirs decides to sell his share of the estate (BGB, section 2034). The right is in Wegen et al. (1998, p. 217) translated as right of first refusal, whereas Hertel and Wicke (2005) uses the term pre-emption right.

BGB, section 1094, part 1 (person) and part 2 (real property owner).
6.4.2 Ireland

**Right of entry or of re-entry attached to a legal estate**

The right of entry is “[…]a right to take possession of land or of its income and to retain that possession or income until some obligation is performed”. An example is when “[…] X may grant a fee simple to A, but include a condition that if Dublin ceases to be the capital city of Ireland, X or some other person may exercise a right of entry or re-entry.”

The right of re-entry is a right for a landlord to enter the property due to e.g. mismanagement by the lessee. The exercise of such a right results in the lessee’s interest being forfeited. To avoid breaking laws against forcible entry, both rights are often exercised after a court order has been obtained.

The rights follow the real property when the property is sold or otherwise transferred. The rights of entry or of re-entry […] are beneficial to ownership to ownership, since the owner can execute an access right due to certain conditions. The rights may also be limiting to ownership if there are costs to be paid in connection with the establishment or execution of the access rights based on the court order.

**Possibility of reverter**

A possibility of reverter is a possibility that a freehold estate might revert to a grantor or his successors at some time in the future. It applies to estates known as “determinable fees” and is quite rare. An example is when person A grants freehold land to person B and his successor until Ireland leaves the European Union. When (if) Ireland would do that, the land goes back to person A or his successors. When it is certain that land will revert, it is referred to as a reversion or reversionary interest. The holder of such an interest is the legal owner of a superior interest, into which the other interest will ultimately merge. It is a rather special area and the main rule is that the property goes back to the previous owner when something special happens.

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197 Reform Act, section 3.
198 The example is used in the Explanatory Memorandum of the Reform Act, p. 6.
199 Reform Act, part 1, section 3 and personal communication with Mr. Fergus Hayden, May 18th 2009.
200 Reform Act, part 3, section 15.
201 Personal communication with Mr. Fergus Hayden, May 18th 2009.
202 Example provided by Mr. Fergus Hayden, May 18th 2009.
The right is not considered a personal right in Irish legislation but a possible or contingent interest in land.\textsuperscript{203}

The right follows the real property when the property is sold or otherwise transferred. The right is beneficial to ownership since the owner can execute an access right due to certain conditions. The right may also be limiting to ownership if there are transaction costs to be paid to the owner in connection with the transfer of ownership.

\textbf{6.4.3 The Netherlands}

\textit{Pre-emption right}

A pre-emption right [voorkeursrecht] can be executed in different ways; through municipal pre-emption rights and through private pre-emption agreements based on contracts. A municipal pre-emption right [Wet voorkeursrecht gemeenten] can be executed by a municipality on real property for sale within their boundaries as long as the municipality claims the right (allowed in relation to different planning decisions) before the sale. The right gives the municipality the right to buy a real property regardless of any other potential buyers. A pre-emption is a right not only restricted to the benefit of a municipality, but can also be established by contract between two persons. A personal pre-emption right cannot, in principle, be registered in the public registers. However, some rights can be registered, especially in relation to the municipal pre-emption legislation.\textsuperscript{204}

The right follows the real property when the property is sold or otherwise transferred. The municipal pre-emption right is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. The right may also be beneficial to ownership if there are transaction costs to be paid to the owner in connection with the transfer of ownership.

\textsuperscript{203} Personal communication with Mr. Fergus Hayden, May 18\textsuperscript{th} 2009.

6.4.4 Sweden

Duty to offer for purchase

Duty to offer for purchase [hembudsskyldighet] is an obligation to offer the leaseholder of an agricultural real property the property for purchase before it is sold to others. However, the leaseholder has to announce an interest in the real property.\textsuperscript{205}

The right follows the real property when it is sold or otherwise transferred. The right is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions, i.e. he may not sell the real property to others. The right may also be beneficial to ownership if there are transaction costs to be paid to the owner in connection with the transfer of ownership.

6.5 Lien

A lien is in the LCDM defined as “[a] latent, financial security for payment.”\textsuperscript{206} A general example is a mortgage, which is a financial security granted by an owner of a real property to a person, normally a financial institution.

The liens identified in the case-studies are mostly mortgages and land charges. A mortgage is described as “[a] conveyance of title to property that is given as security for the payment of a debt or the performance of a duty and that will become void upon payment or performance according to the stipulated terms” and “[a] lien against property that is granted to secure an obligation (such as debt) and that is extinguished upon payment or performance according to stipulated terms.”\textsuperscript{207} A (land) charge is described as to impose a lien or claim or charge the land with a tax lien.\textsuperscript{208}

The right holder may in many legal systems authorize a forced sale of the real property if the mortgagee does not fulfil the specified financial obligations. A lien might be seen as a latent right, but is in this model described as a separate class because of its strong financial content. A lien is a connection between a financial right or interest that a creditor has and a real property. Lien is described by the following characteristics.\textsuperscript{209}

\textsuperscript{205} Lessee’s Pre-emption Act.
\textsuperscript{206} Paasch (2008, p. 127).
\textsuperscript{207} Garner (1891, p. 847).
\textsuperscript{208} Garner (1891, p. 192).
\textsuperscript{209} Paasch (2008, pp. 126-127).
• A legal right or interest that a creditor (person or real property) has in another’s real property.
• Lasting usually until a debt or duty that it secures is satisfied.
• A latent, financial security for payment.
• The real property is used as security for payment and can be subject for forced sale.
• When executed, the Lien will be transferred to personal right or real property right depending on the type of creditor.
• The right can be beneficial or encumbering to ownership.

6.5.1 Germany

The general German term for mortgages and land charges is Grundpfandrecht,\(^\text{210}\) which has been translated as “real security on real property”.\(^\text{211}\) These securities can be divided into mortgage, land charge and annuity land charge, which entitle the creditor to enforce payment of a monetary claim with the security in the plot of land.\(^\text{212}\)

**Mortgage**

A mortgage [Hypothek] is an instrument for security real property.\(^\text{213}\) Mortgage is the main type of security in land and loans may be validly created only as security for a specific obligation and is primarily granted by mortgage banks, savings- and commercial banks which grant security in land. Once the debt is repaid the mortgage falls away and cannot be used again for another security in the real property.\(^\text{214}\) However, the mortgage can then be transferred into a land charge, see below, and can be re-used as security for another loan.\(^\text{215}\)

\(^{210}\) Hertel and Wicke (2005, p. 36) and Müller (1988, pp. 382-383).
\(^{211}\) Hertel and Wicke (2005, p. 36).
\(^{213}\) BGB, section 1113.
\(^{214}\) The German term is “akzessorish”, i.e. collateral. See Hertel and Wicke (2005, pp. 36 – 45), Wegen et al. (1998, p. 229) and Müller (1988, p. 382) for descriptions concerning the use of mortgages.
A mortgage is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, a mortgage can also be beneficial to ownership if it generates lower financial costs by using the real property as security instead of obtaining the loan by other means. A security can generate lower interest costs.

**Land charge**

A land charge [Grundschuld] is a right allowing the right holder the payment of a specific sum of money from a piece of land. A land charge works in the same way as a mortgage, but may be created without any specific claim or obligation. The right does not automatically cease to exist when the loan is repaid and can therefore be re-used for another loan or by another creditor who has acquired the land charge. A land charge can be transferred into a mortgage or an annuity land charge.

A land charge is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, if the right holder has to give any compensation for the right, the right also becomes beneficial for the real property owner.

**Annuity land charge**

An annuity land charge [Rentenschuld] is a land charge where the property owner has to make regular payments to the right holder but can choose to pay a lump sum instead. An annuity land charge can be transferred into a land charge.

An annuity land charge is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, if the right holder has to give any compensation for the right, the right also becomes beneficial for the real property owner.

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216 BGB, section 1191.
218 BGB, section 1198 (land charge to mortgage and vice/versa) and BGB, section 1203 (land charge to annuity land charge and vice/versa).
219 BGB, section 1199.
221 BGB, section 1203.
6.5.2 Ireland

Mortgage

Mortgage is an instrument for security in registered real property and certain rights (e.g. a registered lease). The right is intended to provide security against others for a claim for payment of a sum of money, with preference over other creditors. 222

A mortgage is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, a mortgage can also be seen as being beneficial to ownership by generating lower financial costs by using the real property as security instead of financing a loan by other means. A security can generate lower interest costs.

Other lien

Ireland has had different other forms of liens which can be registered.223 Examples are a rentcharge, where an annual sum is paid by the owner of a freehold estate to a person who has no legal interest in the land or any judgment mortgage, recognizance, State bond, inquisition, etc. whether existing before or after the first registration of the land. Furthermore, the creation of so-called free farm rents has been abolished through the introduction of the Reform Act.224

These other liens are limiting to ownership, since the owner of the real property are forced to tolerate certain conditions. However, they can also be seen as being beneficial to ownership if the real property owner receives some benefits from e.g. paying a rentcharge or free farm rent.

6.5.3 The Netherlands

Mortgage

Mortgage [hypotheek]225 is an instrument for security in registered real property and certain rights (e.g. a building lease on land).226 The right intends to

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222 Reform Act, sections 89-111.
223 See the Registration of Title Act, 1964, section 69.
224 Reform Act, section 12 (abolishing of free farm grants) and section 41 (abolishing of rentcharges). E-mail communication with Fergus Hayden, August 11th 2010.
225 The term mortgage is used in Ploeger, Velten, and Zevenbergen (2005) and Slangen and Wiggers (1998), whereas hypotheek is translated as hypotheek in Haanappel and Mackaay (1990, p. 98). However, mortgage has been used in this report since it seems to be the commonly accepted translation.
provide security against others for a claim for payment of a sum of money, with preference over other creditors.\footnote{227}

A mortgage is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, a mortgage can also be seen as being beneficial to ownership by generating lower financial costs by using the real property as security instead of financing a loan by other means. A security can generate lower interest costs.

### 6.5.4 Sweden

**Mortgage lien**

A mortgage lien [panträtt] in an instrument for security in registered real property. The right allows security for loans through mortgaging of real property and certain rights in real property (site-leasehold).\footnote{228} A real property can only be mortgaged as a whole and a joint owner cannot mortgage his single share of the real property.\footnote{229}

A mortgage is limiting to ownership, since the owner of the real property is forced to tolerate certain conditions. However, a mortgage can also be seen as being beneficial to ownership by generating lower financial costs by using the real property as security instead of financing a loan by other means. A security can generate lower interest costs.

\footnote{226} Civil Code, Book 3, article 227 to 259.
\footnote{228} Swedish Land Code, chapter 6.
\footnote{229} Julstad (2003, p. 106).
7 Comparative analysis

The purpose of this chapter is to analyse the rights investigated in chapter 6 and thereby verify or falsify the rights part of the Legal Cadastral Domain Model. The analysis focus on rights that not completely match the LCDM characteristics. Most rights fit the characteristics of the LCDM classes and are not dealt with in detail in this analysis. Suggestions for modifications of the model are placed in chapter 8.

7.1 Common right class

The case-studies have shown that the common right class can contain the rights listed in chapter 6, section 6.1 and table 7.1.

Table 7.1. National rights classified according to the LCDM common right class.

<table>
<thead>
<tr>
<th>Common right</th>
<th>Germany</th>
<th>Ireland</th>
<th>The Netherlands</th>
<th>Sweden</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Neighbouring property [Anlieger-flurstück]</td>
<td>None</td>
<td>Co-ownership [Mandeligheid]</td>
<td>Joint property unit [Samfällighet]</td>
</tr>
</tbody>
</table>

The studied common rights function in the same way, i.e. being relations between real properties and land legally attached to two or more real properties. However, there are minor differences worth noticing. While the co-ownership rights in the Netherlands and Germany applies to an adjacent or nearby real property (and in the Dutch case even solid objects like a fence or wall) the Swedish joint property unit applies to adjacent, nearby or -most often- distant land held in common by the real properties. The characteristics of the common right class does, however, not specify any physical distance or type of land between the properties. The distance to land is therefore of no concern for the LCDM.
The relations between person, ownership right and land via a common right are shown in figure 7.1.

Figure 7.1. Common right model showing the relations between property A (person – ownership right – land relation) and property B (person – ownership right – land relation) through a common right.
7.2 Real property right class

The case-studies have shown that the real property right class can contain the rights listed in chapter 6, section 6.2 and table 7.2.

Table 7.2. Rights identified as belonging to the LCDM real property right class.

<table>
<thead>
<tr>
<th>Real property right</th>
<th>Germany</th>
<th>Ireland</th>
<th>The Netherlands</th>
<th>Sweden</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Fishing right [Fischereirecht]</td>
<td>Freehold covenant</td>
<td>Historical real property rights</td>
<td>Joint facility [Gemensamhetsanläggning]</td>
</tr>
<tr>
<td></td>
<td>Charge on land [Reallast]</td>
<td>Profit á prendre (including a mining right)</td>
<td></td>
<td>Utility easement [Ledningsrätt]</td>
</tr>
</tbody>
</table>

The relations between person, ownership right and land via a real property right are illustrated in figure 7.2 below.
However, the Dutch historical rights have in this report been classified as real property rights due to the characteristics of the shown examples. It is however possible that there are some historical rights which are executing e.g. a person to property relation, thereby classifying them as personal rights.  

Some of the rights are however of a “double nature”. The German charge on land, the Irish profit à prendre, and the Swedish utility easement rights can be executed as a property-to-property or person-to-property relation depending on the conditions in the specific right itself which makes the rights candidates for the real property right class and the personal right class. These rights shall be classified as real property rights if they are relations between two properties and classified as personal rights if they are relations between a person and a real property. It is, in other words, not possible to classify the

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230 A deeper analysis of the institute of all registered historical rights in the investigated national legislations is necessary to make a complete classification. This is however judged to be outside the scope of this study, since they are not in the centre of land management today.
rights on a so-called feature type level (i.e. all rights of one type of right), but on the instance level (i.e. a specific right). The content of the actual right in question decides in which class the rights have to be placed.

### 7.3 Personal right class

The case-studies have shown that the real personal right class can contain the rights listed in chapter 6, section 6.3 and table 7.3a and 7.3b, except the Dutch hire-purchase right, see below.

**Table 7.3a. Rights identified as belonging to the LCDM personal right class.**

<table>
<thead>
<tr>
<th>Germany</th>
<th>Ireland</th>
<th>The Netherlands</th>
<th>Sweden</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Personal right</strong></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Usufruct [Nießbrauch]</td>
<td>Leasehold</td>
<td>Building lease, emphyteutis</td>
<td>Site leasehold [Tomträtt]</td>
</tr>
<tr>
<td>Restricted personal easement</td>
<td>Profit á prendre (including a mining right)</td>
<td>Building lease, superficies [Opstal]</td>
<td>Public road right [Vägrätt]</td>
</tr>
<tr>
<td>Permanent dwelling right [Dauerwohnrecht]</td>
<td>Rent payable under a tenancy</td>
<td>Usufruct [Vruchtgebruik]</td>
<td>Leasehold [Arrende]</td>
</tr>
<tr>
<td>Hereditable building right [Erbbaurecht]</td>
<td>Rentcharge</td>
<td>Beklemrecht</td>
<td>Nature conservation agreement [Naturvårdsväten]</td>
</tr>
<tr>
<td>Mining right [Bergwerkseigentum]</td>
<td></td>
<td>Hire-purchase [Huurokoop]</td>
<td>Mining concession [Undersökningar och bearbetningskoncession]</td>
</tr>
<tr>
<td>Fishing right [Fischereirecht]</td>
<td></td>
<td>Right of land rent [Recht van grondrente]</td>
<td>Historical personal rights</td>
</tr>
<tr>
<td>Right of industry [Realgewerberecht]</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Table 7.3b. Rights identified as belonging to the LCDM personal right class.

<table>
<thead>
<tr>
<th>Personal right</th>
<th>Germany</th>
<th>Ireland</th>
<th>The Netherlands</th>
<th>Sweden</th>
</tr>
</thead>
<tbody>
<tr>
<td>Charge on land [Reallast]</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>North Friesian building right [Stavenrecht]</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The case-studies have also shown that not all rights follow the real property when the property is sold or otherwise transferred, even if it is very common that they do. The Dutch hire-purchase right expires when the transfer (purchase) of the real property to the new owner is completed. The right differs from the personal rights characteristic that a personal right is transferred when the real property is sold or otherwise transferred, since the right seize to exist when the property is sold, i.e. all payments are completed by the right holder, thus becoming the new owner.

The relations between personal right holder, person, real property ownership right and land via a personal right are illustrated in figure 7.3 below.

![Figure 7.3. Personal right model, illustrating the relation between a personal right holder and a real property (person – ownership right – land relation) through a personal right.](image-url)
Some of the rights are, as described earlier, of a “double nature”. The German charge in land, the Irish profit à prendre, and the Swedish utility easement rights can be executed as a property-to-property or person-to-property relation depending on the content of the individual right. That makes the right a candidate for both the real property right class and the personal right class. In other words, it is not possible to classify the rights on a feature type level (i.e. all rights of one type), but on the instance level (i.e. a specific right), since it is the content of the actual right in question that decides in which class the rights have to be placed.

7.4 Latent right class

The case-studies have shown that the latent right class can contain the rights listed in chapter 6, section 6.4 and table 7.4. Their characteristics match the characteristics of a latent right.

Table 7.4. Rights identified as belonging to the LCDM latent right class.

<table>
<thead>
<tr>
<th>Latent right</th>
<th>Germany</th>
<th>Ireland</th>
<th>The Netherlands</th>
<th>Sweden</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Pre-emption right [Dingliches Vorkaufsrecht]</td>
<td>Right of entry or re-entry […]</td>
<td>Pre-emption right [Voorkeursrecht]</td>
<td>Duty to offer for purchase [Hembuds-skylighet]</td>
</tr>
<tr>
<td></td>
<td>Possibility of reverter</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The relations between latent right holder, person, real property ownership right and land via a latent right are illustrated in figure 7.4 below.
Figure 7.4. Latent right model, illustrating the relation between a latent right holder and a real property (person – ownership right – land relation) through a latent right.

7.5 Lien class

The case-studies have shown that the lien class can contain the rights listed in chapter 6, section 6.5 and table 7.5. Their characteristics match the characteristics of a lien.

Table 7.5. Rights identified as belonging to the LCDM lien class.

<table>
<thead>
<tr>
<th>Lien</th>
<th>Germany</th>
<th>Ireland</th>
<th>The Netherlands</th>
<th>Sweden</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Land charge [Grundschuld]</td>
<td>Other lien</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Annuity land charge [Rentenschuld]</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The relations between lien right holder, person, real property ownership right and land via a lien are illustrated in figure 7.5 below.
Figure 7.5. Lien model, illustrating the relation between a lien holder and a real property (person – ownership right – land relation) through a lien.
8 Conclusion, model modifications and future research

This report contain the results of four case-studies regarding a classification of real property rights in Germany, Ireland, the Netherlands and Sweden, based on the Legal Cadastral Domain Model, LCDM. 231 The purpose of the case-studies is to test whether the part of the LCDM describing rights influencing ownership of real property is usable for classifying real property rights registered in national registers.

It must be stressed that this report is not a judgement against other existing classification systems, but an attempt aiming at verifying a model providing a “neutral” classification of rights influencing real property ownership.

This chapter is divided into three parts: section 8.1, which contain a conclusion regarding whether the LCDM is valid; section 8.2, which contain suggestions for modifications of the model based on the results of the case-studies and other improvements based on the experiences gathered during the case-studies and section 8.3, which contain suggestions for future research.

8.1 Conclusion

The investigated rights may at first seem to be an inhomogeneous web of interests not suitable for any structured classification. However, the case-studies have shown that the rights to a high degree have the characteristics described in the LCDM and thereby placing them in one of the LCDM rights classes.

It can therefore on the basis of the case-studies be concluded that the LCDM is valid to a high degree. However, the case-studies have shown that some adjustments are necessary to make the LCDM able to encompass all investigated rights, see, section 8.2 below.

The result is also a contribution to the debate whether the Civil Law and Common Law traditions can be compared since they, as earlier described are made up of different concepts and, according to one scholar, contain “irreducible differences”. 232 The case-studies did not encounter any “irreducible differences”, but has show that - at least small areas of - legislation (i.e. re-

\[\text{\textsuperscript{231}}\] Paasch (2008 and 2005).
\[\text{\textsuperscript{232}}\] Legrand (1996).
gistered rights influencing real property ownership) originating from different legal traditions can be compared and analysed.

Another issue to be addressed is that some of the investigated rights are of a “double nature”, i.e. the description of the specific type of right makes them candidates for the real property right class and the personal right class at the same time. It is therefore not possible to classify all rights only on the feature type level (i.e. all rights of one type of right), but only on an instance level (i.e. a specific right), since it is the characteristic of the actual right in question that decides in which class the rights have to be placed. This is however not judged to be of any concern for the LCDM on a conceptual level, but has to be taken into account if the model is used as a concept for developing existing and new real property information systems.

8.2 LCDM modifications

The comparative analysis in chapter 7 has shown that some minor modifications are necessary to make the LCDM capable of describing all investigated rights. During the case-studies the practical use of the theoretical model revealed some descriptions and choice of class names, etc., which could benefit from being modified to improve the understanding of the model.

This section is divided into three parts: section 8.2.1 which contain necessary modifications based on the analysis in chapter 7; section 8.2.2, which contain other modifications based on experiences collected during the case-study work and section 8.2.3 listing changes in the used terminology based on experiences collected during the case-study work. The class descriptions in appendix I have been updated with the changes listed in the sections below.

8.2.1 Necessary modification of LCDM characteristics, definitions, etc.

Personal right class

The case-studies showed that a personal right not always follows the real property when the property is sold or otherwise transferred, even if it most common that they do. The characteristic in chapter 6, section 6.3 stating that the rights follow the real property when sold or otherwise transferred has therefore to be removed and the definition has to be changed in the same way. The suggested changes are listed in table 8.1 below.
Characteristics of rights
Furthermore, the case-studies have shown that a right can be limiting and beneficial to ownership at the same time. It is therefore suggested to change “and” to “and/or”. Furthermore, it would benefit the model if the wording of the characteristics in question would start with the limiting side of the right, e.g. “limiting and/or beneficial”, since the case-studies did not investigate all beneficial aspects of the rights. The suggested changes are listed in table 8.1 below.

Table 8.1. Necessary modifications in the LCDM classes.

<table>
<thead>
<tr>
<th>Current wording</th>
<th>Suggested wording</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Personal right class</strong></td>
<td></td>
</tr>
<tr>
<td>“The right follows the real property when the property is sold or otherwise transferred.”</td>
<td>To be removed.</td>
</tr>
<tr>
<td><strong>Definition:</strong> Right executed by a person to use, harvest the fruits/material of, rent or lease the real property in whole or in part, including the claim against a person. The right follows the property when it is sold or otherwise transferred.</td>
<td><strong>Definition:</strong> Right executed by a person to use, harvest the fruits/material of, rent or lease the real property in whole or in part, including the claim against a person.</td>
</tr>
<tr>
<td><strong>All rights classes</strong></td>
<td></td>
</tr>
<tr>
<td>“beneficial or encumbering”</td>
<td>“limiting and/or beneficial”</td>
</tr>
</tbody>
</table>

8.2.2 Other modifications of characteristics, definitions, etc.
The modifications suggested below do not alter the content of the LCDM as such, but would make the model more easily accessible.

Common right class
The common right characteristics “an executed right by two or more real properties in land owned by the properties” and “the right is similar to ownership right, but executed by real properties, not persons” are unclear and do not clearly state that the right is a real property-to-land relation executed
in land being legally attached to two or more real properties. If the relations had been a traditional common or joint ownership there would be no need for a separate LCDM class. The LCDM could therefore benefit from having them exchanged with a new characteristic and definition emphasising that the common right class is a relation between two or more real properties and land legally attached to them. See the suggested changes in table 8.2a. Furthermore, the term “right” should be exchanged with “common” in the other characteristics, etc. in the LCDM to ensure the same terminology throughout the model.

**Real property right class**
The current definition of the class (“[r]ight executed by the owner of a real property (the dominant tenement) in another real property (the servient tenement), due to his ownership. The right is transferred together with the real property when the property is sold or otherwise transferred”) is longer than the other class definitions and includes the transfer of the right, which is not part of the other LCDM definitions. It is therefore suggested that the definition is shortened to not to include the transfer, since the transfer already is part of the characteristics. Furthermore, the phrases “the dominant tenement” and “the servient tenement” are not necessary for understanding the definition and are terms are limited to the cadastral domain and may be difficult to understand for others and should therefore also be removed. See the suggested changes in table 8.2b.

**Latent right class**
The current definition of the class is very long and includes some of the characteristics; “[a] right which is not yet executed on a real property. Regulating the exploitation of a real property by another real property or person. When the real property is sold or otherwise transferred the right normally follows with it. Liens are not considered latent rights.” It is suggested that the definition is shortened and rephrased not to include the characteristics. See the suggested changes in table 8.2b below.
Table 8.2a. Modifications of the LCDM common right class.

<table>
<thead>
<tr>
<th>Current wording</th>
<th>Suggested wording</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Common right class</strong></td>
<td><strong>Object:</strong> A relation between two or more real properties and land legally attached to them.</td>
</tr>
<tr>
<td><strong>Object:</strong> An ownership relation between two or more real properties.</td>
<td><strong>Object:</strong> A relation between two or more real properties and land legally attached to them.</td>
</tr>
<tr>
<td><strong>Characteristics:</strong></td>
<td><strong>Characteristics:</strong> To be removed</td>
</tr>
<tr>
<td>“An executed right by two or more real properties in land owned by the properties.”</td>
<td>“The right is similar to Ownership right, but executed by real properties, not persons.”</td>
</tr>
<tr>
<td>“The right is transferred together with the real property when the real property is sold or otherwise transferred.”</td>
<td>“The common is transferred together with the real property when the real property is sold or otherwise transferred.”</td>
</tr>
<tr>
<td>“The right can be beneficial or encumbering to ownership”</td>
<td>The common can be limiting and/or beneficial to ownership.</td>
</tr>
<tr>
<td>None.</td>
<td>“Relation between two or more real properties and land legally attached to them.”</td>
</tr>
<tr>
<td><strong>Definition:</strong></td>
<td><strong>Definition:</strong> Real property to land relation executed in land legally attached to two or more real properties. Owners of the participating real properties execute co-ownership rights in the land at issue.</td>
</tr>
<tr>
<td>“Part right in a part of common land owned and shared by several real properties.”</td>
<td></td>
</tr>
</tbody>
</table>
Table 8.2b. Modifications of the LCDM real property right and latent right classes.

<table>
<thead>
<tr>
<th>Current wording</th>
<th>Suggested wording</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Real property right class</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Definition:</strong></td>
<td></td>
</tr>
<tr>
<td>&quot;Right executed by the owner of a</td>
<td>“Right executed by the owner of a real property, due to his ownership.”</td>
</tr>
<tr>
<td>real property (the dominant tenement)</td>
<td></td>
</tr>
<tr>
<td>in another real property (the servient tenement), due to his ownership. The right is transferred together with the real property when the property is sold or otherwise transferred.&quot;</td>
<td></td>
</tr>
<tr>
<td><strong>Latent right class</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Definition:</strong></td>
<td></td>
</tr>
<tr>
<td>“A right which is not yet executed on a real property. Regulating the exploitation of a real property by another real property or person. When the real property is sold or otherwise transferred the right normally follows with it. Liens are not considered latent rights.”</td>
<td>“Right not yet executed on a real property.”</td>
</tr>
</tbody>
</table>

8.2.3 Modifications of terminology

There are apart from the additional modifications proposed above other issues to be addressed in order to make the model more accessible. It has in chapter 1, section 1.6, Terminology, been mentioned that the choice of an as correct as possible English terminology has given this author some concern. The case-studies have shown that some terms used in the LCDM are not consistent with their general use in the real property domain and that there are some issues which have to be addressed to make the model more clear and understandable. A proposed change of class names of some of the LCDM classes is described below.
Appurtenance class
The Irish case-study has shown that the legal term appurtenance has a special meaning in Irish legislation and is used for a right that “follows the land” when sold. The term should not therefore be used as general class name. Rights executing a person-to-property relationship are said to be “held in gros”. In English legal literature appurtenance mean “[s]omething that belongs or is attached to something else […]”. It may therefore be wise to rename the appurtenant class to a name not causing misunderstandings. A suggestion is to rename the class “Beneficial right”. See table 8.3 and figure 8.1.

Encumbrance class
Furthermore, the encumbrance class may also need to be renamed in order to make it more accessible to readers with non-English legal backgrounds. A suggestion is to rename the class “Limiting right”. See table 8.3 and figure 8.1.

Common right class
The case-studies have shown that common right is somewhat inappropriate name since the content of the class are not granted rights as in the other LCDM classes, but relations between real properties and land legally attached to them. The relation is not to be seen as a common ownership right as described in chapter 4 and it would be semantically inappropriate to describe the class as real properties owning another real property. A suggestion is to change the class name to “common”. See table 8.3 and figure 8.1.

Real property right class
The name of the class may not be too well chosen. The term is in English literature often collectively used as a common name for rights in real property. To use it as a name for a specific type of right does therefore not seem appropriate. A suggestion is to rename the class “Property to property right”. See table 8.3 and figure 8.1.

233 Personal communication with Mr. Fergus Hayden, May 18th 2009.
234 Garner (1891, p. 84).
235 The somewhat inappropriate use of this general expression as a class name has also been commented on by Dr. Barbro Julstad. E-mail communication, January 13th 2011.
**Personal right class**
The name of the class has not caused any considerations during the case-studies. It might however be renamed “Person to property right”, making it easier to compare with the suggested Property to property right name. See table 8.3 and figure 8.1.

**Lien class**
It has while conducting the case-studies by the author been noticed that the meaning of the term lien was not quite clear to all non-English contributors. The legal term “lien” is in the LCDM used as a term for financial securities, whereas in the Anglo-American legal domain the term is used for a “legal right or interest that a creditor has in another’s property, lasting usually until a debt or duty that it secures is satisfied.”\textsuperscript{236} However, the financial securities analysed in the case-studies does not necessarily end when the e.g. debt is paid back. It may therefore be considered to change the class name to a more neutral term. A suggestion is to rename the class name to “Monetary liability”. See table 8.3 and figure 8.1.

**Relation name**
The author has found that the “restrict” relation between the ownership right and land classes should be changed to “in”, since an ownership right is executed in land. See table 8.3 and figure 8.1.

**Other changes**
The term “encumbering” is used in the LCDM, but can be difficult to understand for non-English readers. It is therefore suggested to exchange encumbering with limiting throughout the LCDM. See table 8.3 and figure 8.1.

\textsuperscript{236} Garner (1891, p. 766).
Table 8.3. Proposed changes in the LCDM terminology.

<table>
<thead>
<tr>
<th>Class name</th>
<th>Proposed change</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appurtenance</td>
<td>Beneficial right</td>
</tr>
<tr>
<td>Encumbrance</td>
<td>Limiting right</td>
</tr>
<tr>
<td>Common right</td>
<td>Common</td>
</tr>
<tr>
<td>Real property right</td>
<td>Property to property right</td>
</tr>
<tr>
<td>Personal right</td>
<td>Person to property right</td>
</tr>
<tr>
<td>Lien</td>
<td>Monetary liability</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Relation name</th>
<th>Proposed change</th>
</tr>
</thead>
<tbody>
<tr>
<td>“restrict”</td>
<td>“in”</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Other changes</th>
<th>Proposed change</th>
</tr>
</thead>
<tbody>
<tr>
<td>“encumbering”</td>
<td>“limiting”</td>
</tr>
</tbody>
</table>

The changes of the class names, etc. have also to be changed in the class descriptions, etc. if referred to.

Apart from the modifications listed above, the definitions etc. of the beneficial right class (i.e. the former appurtenance class) and the limiting right class (i.e. the former encumbrance class) need to be added. The classes are present in the graphic part of model, but have not yet been described in the textual part.\textsuperscript{237} A textual description would improve the readability of the LCDM. See the suggested additions in table 8.4 below.

\textsuperscript{237} Paasch (2008).
Table 8.4. Modifications of the LCDM beneficial right (former appurtenance) and limiting right (former encumbrance) classes.

<table>
<thead>
<tr>
<th>Current wording</th>
<th>Suggested wording</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Beneficial right class</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Object:</strong> None</td>
<td><strong>Object:</strong> Right furthering the use and enjoyment of a real property.</td>
</tr>
<tr>
<td><strong>Characteristics:</strong> None</td>
<td><strong>Characteristics:</strong> Consisting of the beneficial common, property to property right, person to property right, latent right and monetary liability classes.</td>
</tr>
<tr>
<td><strong>Definition:</strong> None</td>
<td><strong>Definition:</strong> Right beneficial for the use and enjoyment of real property.</td>
</tr>
<tr>
<td><strong>Limiting right class</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Object:</strong> None</td>
<td><strong>Object:</strong> Right limiting the use and enjoyment of a real property.</td>
</tr>
<tr>
<td><strong>Characteristics:</strong> None</td>
<td><strong>Characteristics:</strong> Consisting of the beneficial common, property to property right, person to property right, latent right and monetary liability classes.</td>
</tr>
<tr>
<td><strong>Definition:</strong> None</td>
<td><strong>Definition:</strong> Right limiting the use and enjoyment of real property.</td>
</tr>
</tbody>
</table>
The updated LCDM terminology is shown in figure 8.1 below. The updated class names, descriptions, characteristics and definitions can be seen in appendix 1.

![Figure 8.1. Legal Cadastral Domain Model.](image)

8.3 Suggestions for future research

The research presented in this report has aimed at verifying a conceptual model through analysis of rights registered in national registers. However, the case-studies have only covered the major formal legal systems and rights registered in the selected nations registers. The LCDM can be made subject to numerous other research initiatives. Examples are case-studies on other types of rights not being subject for the case-studies in this report, e.g. formal rights not registered in national registers; case-studies on rights from
other legal families, e.g. religious law systems and case-studies on customary rights.

Furthermore, the case-studies presented in this report have dealt with the rights part of the LCDM. There is, however, also a need to analyse and eventually further develop the public regulation parts of the LCDM. A case-study on Swedish public regulations is currently being conducted by the author, but more research on public regulations in different legal systems is needed to test and develop this part of the Legal Cadastral Domain Model further.
9 Swedish summary

Denna rapport är resultatet av författarens inventering och analys av registrerade markreglerande rättigheter i Tyskland, Irland, Nederländarna och Sverige. Rapporten ingår som en del av författarens forskningsprojekt kring klassificering av markreglerande rättigheter och offentligrätsliga regleringar.

Rapporten bygger på två av författaren publicerade artiklar som beskriver en hypotes för att klassificera privata markreglerande rättigheter och offentligrätsliga restriktioner, av författaren kallad Legal Cadastral Domain Model (LCDM).

Syftet med rapporten är att undersöka om den del av LCDM som beskriver markreglerande rättigheter kan bekräftas genom empiriska studier. Rapporten innehåller resultatet från fyra fallstudier av registrerade rättigheter i Tyskland, Irland, Nederländerna och Sverige.

Fallstudierna visar att det är möjligt att klassificera ländernas rättigheter enligt modellen, men undantag av några enstaka rättigheter som inte uppfyllde alla kraven för inplacering i rättighetsgrupperna. Under arbetet har det även framkommit att den använda engelskspråkiga terminologin i vissa fall kan leda till missförstånd eftersom enstaka namn har en lite avvikande mening i den engelska juridiska vokabulären. Dessutom visade det sig att ett enklare språkbruk skulle främja förståelsen av modellen. Modellen är således i behov av mindre kompletteringar. Kompletteringarna finns redovisade i kapitel 8 och appendix 1.

Rapporten beskriver endast markreglerande rättigheter på en övergripande nivå. Författaren anser att det bör bedivas ytterligare forskning kring utvecklingen av modellen grundad på mera detaljerade studier av markreglerande rättigheters innehåll och struktur. Dessutom behövs en validering av de delar av modellen som beskriver offentligrätsliga regleringar, men inte är föremål för fallstudierna i denna rapport. Författaren genomför för tillfället en fallstudie kring svenska offentligrätsliga regleringar, men ytterligare fallstudier i andra legala system behöver genomföras.
10 References

10.1 Books, articles and papers

Literature which to this author’s knowledge only is available on the Internet is marked with Internet document. Non English language texts are marked with e.g. (in German) after the title. All Internet recourses were accessed June 21st 2011.


https://uni.uni-hamburg.de/onTEAM/grafik/1164287680/Paasch.pdf


http://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/TheNetherlands.PDF


### 10.2 Codes, acts and regulations

Including later amendments. The English translations are unofficial.

#### 10.2.1 Germany


English translation, *Internet document*.

URL: [www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf](http://www.gesetze-im-internet.de/englisch_bgb/german_civil_code.pdf)


Hereditable Building Right Act [Gesetz über das Erbbaurechts (Erbbaurechtsgesetz-ErbbauRG)]. 1919. Note: the act was prior to 2007 named Decree on Building Leases [Verordnung über das Erbbaurecht].

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Land Register Act [Grundbuchordnung, GBO]. 1897.


10.2.2 Ireland


Registration of Title Act. 1964.

10.2.3 The Netherlands


Municipal Pre-emption Rights Act (WVG) [Wet Voorkeursrecht Gemeente]. 1981.

10.2.4 Sweden


10.2.5 International

Appendix 1

This appendix contains the descriptions of the classes in the Legal Cadastral Domain Model (LCDM), incl. the modifications described in chapter 8. Old class names are placed in {}.

The descriptions are listed alphabetically.

<table>
<thead>
<tr>
<th>Class</th>
<th>Object</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Beneficial right</strong></td>
<td>Right furthering the use and enjoyment of a real property.</td>
</tr>
<tr>
<td>{Earlier named Appurtenance}</td>
<td></td>
</tr>
</tbody>
</table>

**Characteristics**

Consisting of the beneficial common, property to property right, person to property right, latent right and monetary liability classes.

**Definition**

Right beneficial for the use and enjoyment of real property.
<table>
<thead>
<tr>
<th>Class</th>
<th>Object</th>
</tr>
</thead>
<tbody>
<tr>
<td>Common</td>
<td>A relation between two or more real properties and land legally attached to them.</td>
</tr>
</tbody>
</table>

### Characteristics

Relation between two or more real properties and land legally attached to them.

The common is transferred together with a real property when the property is sold or otherwise transferred.

Owners of the participating real properties execute co-ownership rights in the land at issue.

The common can be limiting and/or beneficial to ownership.

### Definition

Real property to land relation executed in land legally attached to two or more real properties. Owners of the participating real properties execute co-ownership rights in the land at issue.
<table>
<thead>
<tr>
<th>Class</th>
<th>Object</th>
</tr>
</thead>
<tbody>
<tr>
<td>Land</td>
<td>Part of Earth.</td>
</tr>
</tbody>
</table>

**Characteristics**

- Part of the person – ownership right – land connection
- Solid entity.
- A limited part of Earth.
- Can be regulated through legislation.

**Definition**

Part of Earth which is regulated through ownership. Land is the surface of the Earth and the materials beneath.

Note: Water and the air above land might also be considered land in some legislation.\(^{238}\)

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\(^{238}\) Based on UNECE (2004, pp. 58).
<table>
<thead>
<tr>
<th>Class</th>
<th>Object</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Latent right</strong></td>
<td>A connection between a latent right and a real property.</td>
</tr>
</tbody>
</table>

**Characteristics**

- A latent right waiting to be executed on or by a real property.
- Regulating the exploitation of a real property by another real property or person.
- When a real property is sold or otherwise transferred the right normally follows with it.
- The right will be classified as a common, property to property right, person to property right, public regulation or public advantage when executed, depending on its specific characteristics.
- The right can be limiting and/or beneficial to ownership.
- The right does not contain security for payment or other than financial interests, such as mortgage. These rights are placed in the monetary liability class.

**Definition**

- Right not yet executed on a real property.
<table>
<thead>
<tr>
<th>Class</th>
<th>Object</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Limiting right</em> {earlier named Encumbrance}</td>
<td>Right limiting the use and enjoyment of real property.</td>
</tr>
</tbody>
</table>

**Characteristics**

Consisting of the limiting common, property to property right, person to property right, latent right and monetary liability classes.

**Definition**

Right limiting the use and enjoyment of real property.
<table>
<thead>
<tr>
<th>Class</th>
<th>Object</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monetary liability</td>
<td>A connection between a financial right or interest that a creditor has and a real property.</td>
</tr>
</tbody>
</table>

**Characteristics**

- A legal right or interest that a creditor (person or real property) has in another’s real property.
- Lasting usually until a debt or duty that it secures is satisfied.
- A latent, financial security for payment.
- The real property is used as security for payment and can be subject for forced sale.
- When executed, the lien will be transferred as property to property right or a person to property right depending on the type of creditor.
- The right can be limiting and/or beneficial to ownership.

**Definition**

- A latent, financial security for payment.
<table>
<thead>
<tr>
<th>Class</th>
<th>Object</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Ownership right</em></td>
<td>Ownership of real property.</td>
</tr>
</tbody>
</table>

**Characteristics**

- A connection between person and a specific piece of land.
- An executed right to own real property.
- Can be executed by one or more persons.
- Subject to legislation.

**Definition**

Right to own real property according to legislation.
<table>
<thead>
<tr>
<th>Class</th>
<th>Person</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Owner of real property.</td>
</tr>
</tbody>
</table>

**Characteristics**

An entity, i.e. an individual or an incorporated group having certain legal rights and responsibilities.

Can be any physical or legal person (including state, municipalities and other private or governmental authorities).

Owns real property according to legislation.

**Definition**

Human being or legal person, state, municipality and other private or governmental authority who owns real property according to legislation.
<table>
<thead>
<tr>
<th>Class</th>
<th>Object</th>
</tr>
</thead>
</table>
| **Person to property right**  
{earlier named Personal I right} | A connection between a person (not owner) and a real property. |

**Characteristics**

A right executed by a person other than the owner in a real property.

The right to use or harvest the fruits/material of a real property, rent or lease the real property in whole or in part.

The right can be limiting and/or beneficial to ownership.

**Definition**

Right executed by a person to use, harvest the fruits/material of, rent or lease the real property in whole or in part, including the claim against a person.
<table>
<thead>
<tr>
<th>Class</th>
<th>Object</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Property to property right</strong>&lt;br&gt;(earlier named Real property right)</td>
<td>A connection between two real properties.</td>
</tr>
</tbody>
</table>

**Characteristics**

- Right executed by the owner of a (i.e. dominant) real property in another (i.e. servient) real property.
- Right executed on the whole real property or a part of the real property.
- The right is transferred together with the real property when the property is sold or otherwise transferred.
- The right can be beneficial and/or limiting to ownership.

**Definition**

- Right executed by the owner of a real property in another real property, due to his ownership.