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The *Numerus Clausus* and the Governance of Property Law: A Comparative Approach to German, English and American Legal Reasoning

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Abstract

Relying on a micro-comparative analysis, mainstream comparative scholarship tends to be of the view that most modern legal systems place limits on both the number and the content of the property rights private parties can create. This paper takes a different angle, arguing that such conclusion, although correct and meaningful, is essentially incomplete, as it does not take account of the implications this '*numerus clausus* principle' has for the institutional governance of legal systems. Adopting a macro-comparative approach, the paper analyses this principle from the perspective of its impact on the role of courts and their legal reasoning in modern Germany, England and the US. It concludes that the *numerus clausus* principle has materially different 'systemic effects' in each of these jurisdictions and that this has important implications both for the understanding of the principle and the development of property law more broadly.

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Keywords

comparative property law – *numerus clausus* of property rights – comparative legal reasoning – judicial development of private law – legal change – legal interpretation – gap filling – governance of property law

1 Introduction

Over the last 20 years, many common law jurisdictions have adopted the civilian terminology of *numerus clausus* to account for the broad idea that private parties cannot freely create new types of property rights. This has provoked an intense debate amongst scholars as to whether the doctrines coined under the same name in both traditions are *actually* the same. This debate has mainly approached this question from the perspective of private law. Relying on micro-comparative research, this literature mostly concludes that both versions of the doctrine broadly fulfil the same function.

This paper takes a different approach, arguing that these previous findings, although correct and meaningful, are essentially incomplete, as they do not fully account for the implications that the principle of *numerus clausus* has for the institutional design of the wider legal system. It puts the case that when this principle is approached from a macro-comparative perspective, this is, considering its impact on the sources of law and the style of legal reasoning of different jurisdictions, then a new and unexpected picture emerges: the principle has relatively little impact in Germany, where its governance effects are essentially absorbed by the civilian doctrine of separation of powers; it has a significant systemic impact in the US, where it functions as a self-limitation on the inherent law-making competence of courts; and in England, despite it being a common law jurisdiction, its systemic effects resemble those of Germany. The paper concludes that these findings have important implications for the ongoing comparative and theoretical debate on the *numerus clausus*: in the US, the existence of the principle requires a strong justification, while in Germany and England, what demands explanation are cases in which courts have deviated from it. This has significant repercussions for normative questions regarding the distribution of law-making competence to design and reform property law. Furthermore, it also suggests that comparative lawyers should be warned that legal institutions that fulfil a similar function within their specific field, might have quite different institutional implications.

The paper is structured in three main sections. Section 2 accounts for the need for a macro-comparative approach to the principle of *numerus clausus*

that considers its impact on the sources of law and legal method of different jurisdictions. Section 3 deals with German law and Section 4 discusses the principle in England and the US. The paper then concludes.

2 Sources of Law: The Institutional Starting Point

2.1 *The Numerus Clausus in Comparative Property Law*

Property law has traditionally been the least explored area of comparative private law.[2] The main explanation for this is the challenge[3] created by the well-known doctrinal differences of property rights across jurisdictions.[4] However, over the last two decades, this field has been on the rise.[5] This has led to a massive increase in our knowledge regarding the differences, similarities and relations between the property laws of different jurisdictions.[6] Nonetheless, comparative property law remains underdeveloped.[7] One key gap, recently highlighted by Michele Graziadei and Lionel Smith, is the meagre comparative research done on conceptual aspects of property law.[8] In this context, the *numerus clausus* of property rights has been suggested as one of the most promising research lines to bring the different national ontologies of property law into conversation.[9]

2 See S. van Erp, 'Comparative Property Law', in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: OUP, 2nd edn, 2019) p. 1032; J. Smits, *The Making of European Private Law* (Antwerp, Intersentia, 2002) p. 245.

3 See U. Mattei, *Basic Principles of Property Law. A Comparative Legal and Economic Introduction* (Westport: Greenwood Press, 2000) p. 21.

4 J. M. Milo, 'Property and Real Rights', in J. M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2nd edn, 2012) p. 727; van Erp, *supra* n 2, p. 1032.

5 See M. Graziadei and L. Smith, 'Preface', in M. Graziadei and L- Smith (eds), *Comparative property law: global perspectives* (Cheltenham: Edward Elgar, 2017) p. x; van Erp, *supra* n 2, pp. 1034, 1036.

6 E.g., see Mattei, *supra* n 3; S. van Erp and B. Akkermans (eds), *Cases, Materials and Text on Property Law* (Oxford, Hart, 2012); C. von Bar, *Gemeineuropäisches Sachenrecht Band 1: Grundlagen, Gegenstände Sachenrechtlichen Rechtsschutzes, Arten Und Erscheinungsformen Subjektiver Sachenrechte* (Munich: CH Beck, 2015); M. Graziadei and L. Smith (eds), *Comparative Property Law: Global Perspectives* (Cheltenham: Edward Elgar, 2017); Y. Emerich, *Droit Commun Des Biens: Perspective Transsystémique* (Cowansville: Éditions Yvon Blais, 2017).

7 See van Erp, *supra* n 2, p. 1036; Graziadei and Smith, *supra* n 5, p. x; Milo, *supra* n 4, p. 727.

8 Graziadei and Smith, *supra* n 5, p. xi.

9 See M. Graziadei, 'The Structure of Property Ownership and the Common Law/Civil Law Divide', in M. Graziadei and L. Smith (eds), *Comparative Property Law: Global Perspectives* (Cheltenham: Edward Elgar, 2017) p. 78. In a similar line, referring to the *numerus clausus* discussion as a 'branching point' across European jurisdictions, P. Sparkes, 'Certainty of Property: Numerus Clausus or the Rule with No Name?', 20 Euro Rev Priv L (2012) pp. 769–804, p. 771.

The contemporary interest in the *numerus clausus* did not emerge in comparative law, but in a puzzle presented by economic thinking to property law, first addressed in the Anglo-American context.[10] From there, this principle, previously virtually unknown to common law lawyers, has become pervasive in Anglo-American legal theory[11] and doctrine.[12] This interest has been matched with growing comparative research, boosted by the process of harmonization of European private law.[13] The main finding of this literature is that, in almost all modern legal systems, the number and content of property rights are limited by the law.[14] Hence, only legal interests that conform to one of a closed number of standardised forms are enforced as property rights by courts.[15]

The existing literature also highlights that the *numerus clausus* has a different status across jurisdictions.[16] Most civilian systems, especially Germany, have long been conscious of this phenomenon, formally embodying it in the *numerus clausus* principle of property law.[17] However, the extent to which different civilian systems actually follow the principle varies. For example, Bram Akkermans[18] and Christian von Bar[19] report that the *numerus clausus*

10 See especially, B. Rudden, 'Economic Theory v. Property Law: The Numerus Clausus Problem', in John Eekelaar and John Bell (eds), *Oxford Essays in Jurisprudence. Third Series* (Oxford: Clarendon Press, 1987) p. 239 and T. W. Merrill and H. E. Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle', 110 Yale LJ (2000) pp. 1–70.

11 E.g., Henry Hansmann and Reinier Kraakman, 'Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights', 31 JLS (2002) pp. 373–420.

12 E.g. B. McFarlane, 'Keppell v Bailey (1834); Hill v Tupper (1863): The Numerus Clausus and the Common Law', in N. Gravells (ed), *Landmark Cases in Land Law* (Oxford: Hart 2013), pp. 1–32.

13 E.g., see S. van Erp, 'A Numerus Quasi-Clausus of Property Rights as a Constitutive Element of a Future European Property Law', 7 EJC (2003) L; B. Akkermans, *The Principle of Numerus Clausus in European Property Law* (Antwerp: Intersentia, 2008); Ch von Bar, 'The Numerus Clausus of Property Rights: A European Principle?', in L. Gullifer and S. Vogenauer (eds), *English and European Perspectives on Contract and Commercial Law: Essays in Honour of Hugh Beale* (Oxford: Hart, 2014); Sparkes, *supra* n 9, p. 772.

14 Rudden, *supra* n 10, pp. 241–243, 260; Merrill and Smith, *supra* n 10, p. 68; von Bar, *supra* n 13, p. 442; B. Akkermans, 'The Numerus Clausus of Property Rights', in M. Graziadei and L. Smith (eds), *Comparative Property Law: Global Perspectives* (Cheltenham: Edward Elgar, 2017) p. 100.

15 Merrill and Smith, *supra* n 10, p. 3; B. McFarlane, 'The Numerus Clausus Principle and Covenants Relating to Land', in Susan Bright (ed), *Modern Studies in Property Law*, vol 6 (Oxford: Hart, 2011) p. 308; Akkermans, *supra* n 14, p. 100.

16 von Bar, *supra* n 13, p. 454; Akkermans, *supra* n 14, p. 105.

17 Milo, *supra* n 4, p. 734; van Erp, *supra* n 2, p. 1042; Merrill and Smith, *supra* n 10, p. 4.

18 Akkermans, *supra* n 14, pp. 105–106.

19 von Bar, *supra* n 13, pp. 444–445.

is relatively weak in France, where courts enforce it as loose 'principle,' while, in Germany, it is applied as a stringent 'rule'. Nonetheless, this literature also accounts for the fact that German courts have still stepped-in to remedy some harsh effects of the strict application of the principle, enforcing some rights that are not part of the *numerus clausus* in manners that resemble property rights.[20]

By contrast, mainstream scholarship holds that the *numerus clausus* principle has historically received little attention in the common law tradition.[21] For a long time, no formal name was attached to the principle[22] and, as a result, it is also harder to identify.[23] Nonetheless, comparative research acknowledges that, thanks to the Law & Economics movements,[24] the *numerus clausus* has also been addressed as such in common law scholarship over the last years.[25] This research[26] links the English version of the principle to 19th century common law[27] and the 1925 Law of Property Act (LPA 1925).[28] The status of the principle in the US has been less studied from a comparative perspective, but in the context of the Law & Economics movement, the American version of the principle has been said to be better explained as a matter of judicial self-restraint,[29] and comparative research has adopted such conclusion.[30] Consistent with this difference, comparative research tends to argue that the tendency in the common law has been to the growing awareness and formal recognition of the principle, while in civilian systems the trend is to test its flexibility.[31]

To what extent the civilian and the common law version of the principle are actually comparable is open to discussion. In England, some commentators have been sceptical regarding the enthusiasm with which some common law lawyers have assumed the existence of the principle in their own tradition.[32] In

20 See van Erp, *supra* n 2, pp. 1038, 1042–1043; Milo, *supra* n 4, pp. 737, 740; Akkermans, *supra* n 14, pp. 103–104; Akkermans, *supra* n 13, pp. 186–189.
21 Merrill and Smith, *supra* n 10, pp. 4–5; Hansmann and Kraakman, *supra* n 11, pp. 373–374.
22 Merrill and Smith, *supra* n 10, p. 69.
23 Milo, *supra* n 4, p. 734.
24 Specially, the work of Merrill and Smith, *supra* n 10.
25 E.g., Milo, *supra* n 4, p. 734; van Erp, *supra* n 2, p. 1050.
26 E.g., van Erp and Akkermans, *supra* n 6, p. 101; van Erp, *supra* n 2, p. 1050.
27 See *Keppel v Bailey* (1834) 2 My & K 517, 535 and *Hill v Tupper* (1863) 2 H & C 121, 159 ER 51.
28 See s. 1(1) (2) (3) and 4(1).
29 Merrill and Smith, *supra* n 10, p. 9. Although this authors would propably regard themsleves as part of the 'New Private Law Movement'.
30 E.g., see Milo, *supra* n 4, p. 734.
31 *ibid*, p. 735.
32 E.g., M. Merry, 'Landmark Cases in Land Law (Review)', 5 Conv (2013) 455–462, pp. 455–456.

this line, some authors argue that the convergence identified by comparative scholars only exist at a very abstract level, namely, in the broad idea that the law imposes limits on the property rights parties can create, but that this 'rule with no name' is applied differently in both traditions.[33]

2.2 *The Numerus Clausus as Constitutional Rule of Property Law*

From a theoretical perspective, the contemporary interest in the *numerus clausus* has mostly developed around two connected topics: its justification (i.e., why should private autonomy be curtailed) and, to a lesser extent, its implications for the development of property law (i.e., its restriction on the creation of new property rights). In this second context, the *numerus clausus* has been described as a 'constitutional'[34] or 'organizational'[35] rule of property law, because it implies an institutional choice in favour of the legislator and against courts as the competent authority to develop new property rights.

The core of the comparative discussion of the *numerus clausus* has been essentially concerned with discussing the doctrinal aspects of the first question from a micro-comparative perspective: to what extent the classic civilian version of the principle that restricts the right of private parties to create new types of property rights is comparable to the doctrine that Anglo-American scholars have coined under the same name over the last twenty years. This paper focusses on the second problem, discussing an issue raised by Bram Akkermans[36] that remains underexplored: to what extent are the civilian and common law versions of the *numerus clausus* principle comparable from a macro-comparative perspective? On the one hand, Akkermans links the more 'stringent' version of the principle found in some civilian systems, including Germany, to the continental doctrine of separation of powers.[37] On the other, he reports that, in common law systems, including England, the judiciary holds the 'prime position' to develop most areas of property law.[38] However, Akkermans does not develop the deeper implications of this for civilian legal reasoning nor how this differs from the Anglo-American approach to the authority of courts. Filling this gap requires stepping back and taking a macro-comparative perspective that assesses the functioning of this principle in the

33 Sparkes, *supra* n 9, pp. 772–773, 788–791, 799, 803–804.
34 Akkermans, *supra* n 14, p. 102; Akkermans, *supra* n 13, p. 407.
35 T Struycken, *De Numerus Clausus in Het Goederenrecht* (Deventer: Kluwer, 2007) pp. 350–356, referring to Dutch law.
36 Akkermans, *supra* n 14, p. 103; Akkermans, *supra* n 13, p. 407.
37 Akkermans, *supra* n 14, pp. 103–106.
38 Akkermans, *supra* n 13, p. 407.

wider context of the sources of law and legal method of each jurisdiction.[39] This will lead to some unexpected conclusions, including that (contrary to Akkermans' assumptions) English courts do not have the prime position to develop the property system.

Addressing the impact of the *numerus clausus* in the sources of law and legal method of different jurisdictions entails challenges of its own. The idea of 'sources of law' is a metaphor, not a formal concept. As such, even in the context of a single jurisdiction, the meaning of this term can be ambiguous. Depending on the context, 'sources of law' can refer to the bodies with power to create law (e.g., Parliament, courts, the Government etc), how law is created (by legislation, judicial decision making, custom, etc), the material factors considered in this process (e.g., the opinion of a certain scholar), the product of this process (acts, rulings, regulations), etc. However, to avoid distortions, comparatists must apply these sources in the same manner lawyers in the chosen system would.[40] Therefore, this paper approaches each of the reviewed jurisdictions mainly through domestic materials, emphasising the economic, social and ideological forces that lead to their modern sources of law, with emphasis on the competence of courts.

In turn, to which extent sources of law have an actual impact on shaping legal outcomes depends on how these sources are applied, this is, on the relevant 'legal method' or 'legal reasoning'. This creates further complexity for comparative inquiries: there can be substantive differences between how people talk and think about the law and how they *actually* go about it. Thus, comparative lawyers cannot simply rely on official statements about sources of law but must look beyond and develop a sensitivity as to what is regarded as a source of law in each jurisdiction and how they interact.[41] This paper does this by discussing the actual trends followed by domestic courts applying private law, in general, and property law, in particular. The outcome is reflected in the different style of the sections reviewing each jurisdiction: while the part on Germany has the abstract and dry conceptual flavour of its 'juridical method', the English and American sections have the looser and more pragmatic style of these jurisdictions.[42]

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39 On macro-comparative law, sources of law and legal method, K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Tony Weir tr, Oxford: OUP, 3rd edn, 1998) p. 5.

40 S. Vogenauer, 'Sources of Law and Legal Method in Comparative Law' in M. Reimann and R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (Oxford: OUP, 2nd edn, 2019) pp. 879, 884–886.

41 *ibid*, pp. 878, 889, 894.

42 See Zweigert and Kötz, *supra* n 39, pp. 144, 181, 259; U. Kischel, *Comparative Law* (Andrew Hammel tr, Oxford: OUP, 2019) pp. 183–184. On the differences between England and the US, see section 4 *infra*.

According to recent comparative scholarship, the sources of law and the legal methods of each tradition are at the core of the civil-common law divide. On the one hand, modern civilian systems are based on the Enlightenment idea of having abstract and systematic self-contained codes that anticipate future problems as completely as possible, thereby enforcing a strict separation of powers and preventing judicial law making, which is currently seen as underpinned by a democratic law-making rationale.[43] In the common law, on the other hand, case law is seen as having a central role as courts are not only tasked with solving individual conflicts, but with developing the law 'from below',[44] with statutes principally serving to flesh out details of case law on specific points or to overturn individual decisions.[45] Even if contemporary comparative scholarship has relativized these differences[46] and domestic scholarship, at least in England, now sees legislation as having a much wider role,[47] the different approach to the sources of law across traditions is still a defining starting point to understand them: while the common law is seen as evolving gradually through judicial inductive reasoning, shaped by the rationale of individual decisions that give relevant attention to policy concerns and arguments from economics and other social sciences; the civil law is deemed as essentially made of legislative law, applied in a (more or less) positivistic and mechanical manner by judges aiming to interpret statutory law in an impersonal, rational and predictable manner by 'subsuming' individual facts into general rules, through the use of syllogisms.[48]

Regardless of the weight of converging trends, due to the different starting point that statutory and case law have as sources of law in both traditions, the institutional choice of the *numerus clausus* in favour of the legislator as the competent authority to develop new property rights cannot simply be assumed to have the same meaning across legal systems. If civilian codifications were not only an effort to unify and systemize the law of the emerging national States, but a part of a political agenda including a strict separation of the judicial, executive and legislative powers,[49] in principle, the exclusive authority of the legislator to modify the existing property forms and create new ones seems a

43 M. Siems, *Comparative Law* (Cambridge: CUP, 2nd edn, 2018) pp. 52–53; Kischel, *supra* n 42, pp. 361, 364–367.

44 Siems, *supra* n 43, p. 55.

45 Kischel, *supra* n 42, p. 242.

46 For an up-dated discussion, *ibid*, pp. 619–630.

47 D. Kelly, *Slapper and Kelly's English Legal System* (Abingdon: Routledge, 19th edn, 2020) p. 92.

48 Siems, *supra* n 43, pp. 55–56; Kischel, *supra* n 42, pp. 229–232, 361–362, 371–374, 392–397, 412–416.

49 Smits, *supra* n 2, p. 77; Zweigert and Kötz, *supra* n 39, p. 89.

necessary consequence of the institutional arrangement in which the modern civilian systems came into existence. By contrast, if case law is the main source of private law in common law systems, in such tradition, the *numerus clausus* principle seems to remove inherent lawmaking powers from the courts, radically altering the structure of its sources of law. The following sections will discuss these differences by analysing what the *numerus clausus* implies for the wider context of German, English and American law. For this, the focus will be on the roles of legislators and judges, and the style of their legal reasoning. In other words, the rest of the paper, will look at the *numerus clausus* 'beyond property law'.

3 Germany: The Bounded Judge

3.1 *The Dogma of Separation of Powers*

Assessing the significance of the *numerus clausus* within the broader German legal system requires a closer look at how German law understands the role of courts and legislators. In civilian systems, the level of freedom and creativity enjoyed by judges is a permanent matter of controversy.[50] Even though in Germany legislated law (*Gesetz*) is almost always the departure point of private law, the evaluation standards (*Wertungsmaßstäbe*) contained in such statutes can never be complete and need to be laid down by courts in concrete cases,[51] typically by legal interpretation and gap filling. This interaction between law giving and adjudication creates challenges for the civilian idea of separation of powers that are not paralleled in the common law mindset.[52] This tension shapes the way in which the German legal system conceives the role of judges and the nature of their reasoning. Therefore, understanding it is key to assess the impact of the *numerus clausus* in its systems of legal sources.

Following the political ideas of the Enlightenment,[53] the 19th century codification movement adhered to the basic principle that judges should be

50 See Kischel, *supra* n 42, p. 371.

51 D. Schwab and M. Löhnig, *Einführung in Das Zivilrecht* (Heidelberg: CF Müller, 20th edn, 2016) p. 38.

52 Kischel, *supra* n 42, p. 374. For an example, R. Wank, *Die Auslegung von Gesetzen* (Munich: Vahlen, 6th edn, 2015) p. 86.

53 See F. Wieacker, *A History of Private Law In Europe with Particular Reference to Germany* (Tony Weir tr, Oxford: Clarendon Press, 1995) pp. 249–251; RC van Caenegem, *An Historical Introduction to Private Law* (Cambridge: CUP, 1992) pp. 115–117, 122–125.

strictly bound by legislation.[54] The authors of the codified systems inherited from the monarchs of the 18th century the fear that courts might undermine their efforts to enact the 'law of reason'[55] and, thus, aimed to deny all space for judicial creativity.[56] For this purpose, the absolutist regimes developed the dogma that all conflicts shall be decided by exclusive reliance on statutory law, forbidding all resort to precedents and scholarly opinions.[57] Following this doctrine, civilian judges sought to restrict their creativity to the minimum, claiming that disputes could be resolved by mere 'subsumption' of facts into rules.[58] This institutional arrangement was later transferred to democratic systems, which see democratically generated law (*i.e.*, statutory law) as a manifestation of the general will of the nation (*allgemieiner Willen des Volkes*), that shall not be altered in any form by an unelected judiciary.[59] By the same token, they see the prohibition of judicial development of the law as a guarantee of citizens' freedom.[60] In contemporary Germany, this conception of separation of powers (*Gewaltenteilung*), is embodied at a constitutional level as part of the rule of law in Art. 20(2) of the Basic Law (*Grundgesetz*, GG) and, according to Art. 97(1) GG, it implies that judges are (only) bound by legislation.[61]

In this wider context, since early on, continental scholarship developed methodical rules for legal interpretation which aim to avoid the arbitrary application of statutes by courts.[62] Contemporary German authors directly link these rules to the protection of the separation of powers principle and the rule of law.[63] Whether these techniques can fulfil this task has become

54 H. Honsell, 'Einleitung Zum BGB', in D. Kaiser and M. Stoffels (eds), *J. Staudingers Kommentar zum Bürgerlichen Gesetzbuch mit Einführungsgestetz und Nebengesetzen. Eckpfeiler Des Zivilrechts* (Berlin: Sellier & de Gruyter, 6th edn, 2018) p. 90; van Caenegem, *supra* n 53, pp. 122, 130.

55 On the 'law of reason', Wieacker, *supra* n 53, pp. 199–275; van Caenegem, *supra* n 53, pp. 117–121.

56 See Honsell, *supra* n 54, p. 90; Schwab and Löhnig, *supra* n 51, p. 38; Zweigert and Kötz, *supra* n 39, p. 89; Kischel, *supra* n 42, p. 375.

57 Wieacker, *supra* n 53, pp. 258, 265; Schwab and Löhnig, *supra* n 51, p. 38; Kischel, *supra* n 42, p. 375.

58 Zweigert and Kötz, *supra* n 39, pp. 89–90, 258.

59 Schwab and Löhnig, *supra* n 51, p. 38.

60 Honsell, *supra* n 54, p. 90.

61 See C. Bumke and A. Voßkuhle, *Casebook Verfassungsrecht* (Tübingen: Mohr Siebeck, 8th edn, 2020) pp. 357–358, 597; Wank, *supra* n 52, pp. 29, 86.

62 See J. Hage, 'Legal Reasoning', in J. M, Smits (ed), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2nd edn, 2012) p. 531.

63 E.g., B. Rüthers, 'Methodenrealismus in Jurisprudenz Und Justiz'61 JZ (2006) 53–60, p. 53; Wank, *supra* n 52, p. 86.

increasingly doubtful and courts have openly recognized their role in the creation of norms.[64] In practice, '*no civil lawyer believes he is just applying the law in a mechanical and predetermined way*'.[65] Thus, in Germany, nowadays, the general picture is that courts not only interpret law, but also fill its gaps and sometimes correct it.[66] Nonetheless, German legal culture still evidences a deep aversion to unwritten law.[67] As explained in the next subsection, private law is probably the paradigm of this sceptical approach.

3.2 *Judicial Thinking in German Private Law*

The aversion to judge-made law in German private law has clear historical roots. The German Civil Code (*Bürgerliches Gesetzbuch*, BGB) was drafted at a time in which legislative positivism and the dogma of the complete nature of the law were the leading approaches in German scholarship.[68] Savigny's Historical Legal School (*Historische Rechtsschule*), which dominated German legal thinking through most of the 19th century,[69] argued that legal sciences should come exclusively from the Spirit of the People (*Volksgeist*), which he identified with classical Roman Law.[70] Despite being opposed to codified law and more open to acknowledging some role to judges, the Historical School was reluctant to admit a judicial power to develop the law outside this framework.[71] Under this influence, when codification came to be accepted after the 1871 German unification,[72] the scholars in charge of drafting the BGB perpetuated the idea that judges should not have power to develop the law.[73]

Soon after, this strict positivist view came under attack, especially by the Free Law Movement (*Freirechtsbewegung*).[74] One of its central aims was to show that even the most carefully drafted code has countless gaps, arguing in favour of broad judicial freedom to fill them.[75] However, the movement was

64 Schwab and Löhnig, *supra* n 51, p. 43.
65 Kischel, *supra* n 42, p. 365.
66 Schwab and Löhnig, *supra* n 51, p. 44.
67 Kischel, *supra* n 42, p. 364. For a more sceptical view, Rüthers, *supra* n 63.
68 Honsell, *supra* n 54, p. 91.
69 For a brief explanation, N. Foster and S. Sule, *German Legal System and Law* (Oxford: OUP, 4th edn, 2010) pp. 27–29; for an extensive account, Wieacker, *supra* n 53, pp. 279–362.
70 F. C. von Savigny, *Vom Beruf Unserer Zeit Für Gesetzgebung Und Rechtswissenschaft* (Heidelberg: Mohr und Zimmer, 1814).
71 Honsell, *supra* n 54, p. 91.
72 See *ibid*, pp. 2–7; Wieacker, *supra* n 53, pp. 375–376.
73 K. Grechenig and M. Gelter, 'The Transatlantic Divergence in Legal Thought: American Law and Economics vs. German Doctrinalism', 1 Hastings Int'l & Comp L Rev (2008) 295–360, p. 345.
74 In comparative law, the Free Law movement has been presented as a German version of American Legal Realism. See *ibid*, pp. 308, 348–350.
75 Honsell, *supra* n 54, p. 91.

shut down by the rise of Nazism, managing only to discredit the most extreme trends of legal formalism.[76] According to contemporary mainstream doctrine, this discussion ended by placing the creative powers of judges somewhere in between both approaches, but clearly closer to the classic positivist paradigm. In this line, the dominating opinion in contemporary German private law is that judges are primarily subject to legislation, either by its text (*Wortlaut*) or its sense (*Sinn*). Only when there is no rule, judges can resort to customary law (*Gewohnheitsrecht*) and, if all fails, they should decide according to the rule that the legislator would have given to the case at hand.[77] Nonetheless, even when intentionally establishing new legal principles that can then be generalized, judges almost universally avoid describing themselves as creators of law.[78]

The way in which German judges have understand their function over time is apparent in the evolution of the 'Theory of the Juridical Method' (*Juristische Methode*).[79] According to Karl Larenz's classic work in this field,[80] and its later updates by Claus-Wilhelm Canaris,[81] the BGB was created in a time dominated by the view that all legal sentences could be logically deduced from concepts (*Begriffe*) contained in a closed and complete system by simply bringing the facts of the case under a general rule laid down *ex ante* by the law,[82] in a process called 'subsumption' (*Subsumtion*).[83] Because in this method legal consequences result from concepts, this doctrine came to be known as 'Conceptual Jurisprudence' (*Begriffsjurisprudenz*).[84] Despite being proven an illusion,[85] its legacy still plays an essential role in German legal thinking.[86]

76 Grechenig and Gelter, *supra* n 73, pp. 348–349.

77 Honsell, *supra* n 54, p. 91. In the same line H Brox and W-D. Walker, *Allgemeiner Teil Des BGB* (Munich: Vahlen, 36th edn, 2012) pp. 33–36.

78 Kischel, *supra* n 42, p. 373.

79 A theory of the application of the law (*Lehre der Rechtsanwendung*) developed by legal theory and legal doctrine. Honsell, *supra* n 54, p. 52.

80 K. Larenz, *Methodenlehre Der Rechtswissenschaft* (Berlin: Springer, 6th edn, 1991).

81 K. Larenz and C.-W. Canaris, *Methodenslehre Der Rechtswissenschaft* (Berlin: Springer, 3rd edn,1996). For simplicity, I occasionally follow a later edition of Larenz's textbook on the General Part of the BGB.

82 See *ibid*, pp. 91–98; Larenz, *supra* n 81, pp. 36–86.

83 Basically, an Aristotelian deductive reasoning based in syllogisms. Honsell, *supra* n 54, p. 52.

84 K. Larenz and M. Wolf, *Allgemeiner Teil Des Bürgerlichen Rechts* (Munich: CH Beck, 9th edn, 2004) p. 73.

85 *ibid*; Schwab and Löhnig, *supra* n 51, p. 38.

86 Larenz and Wolf, *supra* n 84, p. 73; Honsell, *supra* n 54, p. 52. For example, standard textbooks present the 'subusumption' paradigm as the primary approach to legal application. E.g., Brox and Walker, *supra* n 77, pp. 29–33.

The inability of Conceptual Jurisprudence to deal with the ambiguity of language and unforeseen problems soon triggered judicial decisions leading to new legal developments.[87] Besides the Free School, shortly after the entering into force of the BGB, the 'Interest Jurisprudence' (*Interessenjurisprudenz*)[88] argued that the juridical method should not be based on deducing logical outcomes from abstract concepts, but on understanding legal rules as purpose-oriented solutions (*zweckbestimmte Lösungen*).[89] By the mid-20th century this approach was supplemented by the, so called, 'Jurisprudence of Value Judgments' (*Wertungsjurisprudenz*), which brought the values promoted by the law to the foreground, including a view of private law underpinned by an ideal of ethical personalism and, more generally, the respect of the fundamental rights contained in the GG.[90] According to Larenz, both approaches form the basis of the juridical method prevailing in contemporary Germany,[91] and legal theorists often find it difficult to distinguish between them, probably because both share great confidence in the ability of positive law to bind the judge, either by systematic thinking or by resorting to the order of values established in the law and the constitution.[92]

This trend was paralleled by an effort of constitutional doctrine to bring more clarity to the role of judges in the development of the law.[93] As said, Art. 97(1) GG upholds the classic civilian separation of powers principle by stating that judges are only bound by legislation, but Art. 20(3) GG has a slightly different wording, stating that the exercise of jurisdiction (*Rechtsprechung*) is subject to '*Recht und Gesetz'*. This expression cannot be translated into English without losing its grasp.[94] The word '*Recht*' has no equivalent in English, as it embodies, at the same time, the idea of law and of justice or correctness, while '*Gesetz'* is literally only legislative law.[95] In German scholarship, the later provision is normally understood as holding that it is not enough for judges

87 Larenz and Wolf, *supra* n 84, p. 74. The most famous is probably the doctrine of the disturbance of the basis of the contract developed during the hyperinflation of 1923 (*Störung der Geschäftsgrundlage*).

88 See P. Heck, 'Gesetzesauslegung Und Interessenjurisprudenz', 112 AcP (1914), 1–318.

89 Larenz and Wolf, *supra* n 84, p. 74.

90 *ibid*, pp. 75–76.

91 Larenz, *supra* n 81, p. 120. *Kommentare* also speak of a restricted Jurisprudence of Value Judgments, e.g., C. Grüneber, 'Einleitung', *Palandt. Bürgerlicher Gesetzbuch mit Nebengesetzten* (Munich: CH Beck, 80th edn, 2021) p. 8.

92 Grechenig and Gelter, *supra* n 73, pp. 353–355.

93 See Wank, *supra* n 52, p. 86.

94 On this topic, see Kischel, *supra* n 42, pp. 362–363.

95 This idea is lost in the English version of the GG made available by the German government, which translates the passage as 'legislation and the law', https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0111.

to follow the formal content of the law (in the sense of *Gesetz*), as they are also bound by a substantive idea of justice, derived from a natural law ideal. This reading of the constitution is frequently seen as embodying the 'Radbruch formula',[96] as a reaction to the acritical enforcement of Nazi law by the German judiciary during the 1930s and 40s.[97]

Contemporary German constitutional doctrine[98] and theory of the juridical method[99] seem to widely accept that judges are allowed to develop the law to fill gaps in legislation, especially to bring old statutes in step with changing social realities. This view has been endorsed by the Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfG), holding that Art. 20(3) GG authorizes judges to fill gaps in the law (*Lückenfüllung*) and extend it (*Rechtsfortbildung*).[100] A 2011 decision of the BVerfG also established the limits to such power.[101] According to this ruling, *Rechtsfortbildung* does not allow judges to replace the justice conception laid down by the legislator with their own. However, this does not preclude the judicial development of the law: considering the accelerated change in social relations, the limited capability of the legislators to react to new realities and the existence of open-ended legal provisions, the judge has the task of adapting the law in force to new circumstances. Notwithstanding, this power also has clear boundaries: judges cannot free themselves from the 'sense and purpose' (*Sinn and Zweck*) of the law. They must respect the basic decision made by the legislator, implementing the legislative will under the new circumstances.[102] Thus, courts cannot appropriate the role of the legislature by imposing their own policy choices.[103]

The evolution of the German juridical method might suggest that modern German courts have a relatively broad power to develop private law, somehow diluting the restrictive impact of the *numerus clausus* in judicial law making. Nonetheless, German courts are still seen as being under a duty to capture the binding decision made by the legislator and fully apply it to solve the dispute at hand.[104] From the perspective of the juridical method, the Interests Jurisprudence aims the enforce the purpose objectively laid down by the

96 See G. Radbruch, 'Gesetzliches Unrecht Und Übergesetzliches Recht', 1 SJZ (1946) 105–188.
97 Honsell, *supra* n 54, p. 92.
98 See Bumke and Voßkuhle, *supra* n 61, p. 366.
99 See Rüthers, *supra* n 63, p. 59; Wank, *supra* n 52, pp. 35, 83–86.
100 BVerfGE 34, 269, 287.
101 Honsell, *supra* n 54, p. 93.
102 BVerfGE 128, 193, NJW 2011 836.
103 Bumke and Voßkuhle, *supra* n 61, p. 366.
104 Schwab and Löhnig, *supra* n 51, p. 39.

legislator in the statute itself, while the Value Judgment Jurisprudence requires judges to resort to the values embodied in the wider legal system.[105]

As a result, the main gateways for judicial creativity in German private law are narrowed by the need to conform to the political choices either implied in statutory law[106] or resulting from the value system embedded in the fundamental rights laid down by the GG (*Grundrechte als Wertordnung*).[107] Even when judges are not able to interpret the law in accordance with the constitution,[108] they are not expected to change the law themselves, but to refer the problems to the BVerfG (Art. 100 GG; §§ 80 ff *Bundesverfassungsgerichtsgesetz*).[109] Accordingly, deviations from legislative intent have been subject to heavy criticisms by authors arguing that a relaxation in the use of the juridical method risks converting Germany into an '*oligarchical judicial State*'.[110]

The relation between separation of powers and judicial development of the law achieves its maximal level of tension in the doctrine of *Rechtsfortbildung* (extension of the law) and the elusive concept of *Richterrecht* (judge-made law). According to recent commentary literature, *Richerrecht* encompasses all decisions that explicitly or implicitly contain rules that do not correspond to the mere repetition of the abstract rules laid down in statutory law, with some authors distinguishing between immanent (*gesetzesimmanent*), constructive (*gesetzesübersteigend*) judge-made law,[111] and illegitimate judge-made law.[112]

Since the fall of Conceptual Jurisprudence, there is a general agreement that judges can 'extend the law' to fill gaps,[113] but that this power is subject to heavy doctrinal constrains. To start, the concept of 'a gap' (*Lücke*) is restricted. It is not enough that the law is silent on a given issue: there must be an 'unplanned gap in the statute' (*planwidrige Unvollständigkeit des Gesetzes*).[114] For example, the absence of a provision allowing for ownership in separate parts of buildings in the BGB is not such a gap and, thus, could not possibly be overcome by *Rechtsfortbildung*.[115] That is why flat-ownership had to be created by a

105 Larenz and Wolf, *supra* n 84, pp. 75–76.
106 See Schwab and Löhnig, *supra* n 51, pp. 39, 43; Wank, *supra* n 52, pp. 85–86.
107 Larenz and Wolf, *supra* n 84, pp. 86–90; Schwab and Löhnig, *supra* n 51, p. 44; Honsell, *supra* n 54, pp. 69–88.
108 Honsell, *supra* n 54, pp. 69–88.
109 Brox and Walker, *supra* n 77, p. 30.
110 E.g., Rüthers, *supra* n 63, p. 60, my translation.
111 Honsell, *supra* n 54, pp. 89–90.
112 S. Vogenauer, 'Statutory Interpretation', in J. M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar, 2nd edn, 2012) p. 835.
113 Grüneber, *supra* n 91, p. 10.
114 Larenz and Canaris, *supra* n 81, pp. 191, 194; Grüneber, *supra* n 91, p. 10.
115 Larenz and Canaris, *supra* n 81, pp. 191, 194, 196.

special act.[116] Only if a proper statutory gap is identified by using the regular interpretation elements of the juridical method, judges might fill such a gap by 'extending the law'. In this process the judge must first resort to the original plan of the legislator 'immanent' in the statute. If this fails, the judge can fill the gap by constructive extension of the law. The latter does not rely on the original intention of the legislator, but is still governed by and must result from the general principles of the legal system.[117] Thus, when extending the law, judges are bound by legislative intention. Judicial extension that contradicts the text of a statute, has no grounding in it, or is at least, not indirectly allowed by it, amounts to a violation of Art. 20(3) GG.[118]

Following mainstream doctrine,[119] this implies that courts sometimes deviate from statutory law, either because the purpose (*Zweck*) of the law does not match its text (*Wortlaut*) or because, since the enactment of the law, the development of social life and the prevailing views on the law have created new rules. In order to align the text of the law and its purpose, immanent extension allows judges to fill gaps by extending a rule by analogy to a case not covered by the meaning of the text (*Analogie*) or by excluding from its scope cases that are not covered by its purpose (*teleologische Reduktion*).[120] By contrast, constructive judge-made law corresponds to rules developed by courts, either with no statutory support (*praeter legem*) or against a statute (*contra legem*). Such developments are justified by the inevitable needs of legal affairs (*Rechtsverkehr*), 'the nature of things' or the overriding effect of a legal-ethical principle, such as good faith or a constitutional right. Due to this certain relaxation of the subsumption paradigm, German judicial reasoning has opened itself to a (limited) level of consequentialism. However, when doing this, judges remain bounded by legislation, as they can only rely on the consequences intended by the legislator, either by the relevant statute or the legal system in general, especially, by the values laid down in the Constitution.[121]

3.3 *Impact on Property Law*

Despite enjoying only a limited discretion to develop the law, German judges are still credited with having successfully sought to adapt the '*positivist and slightly anachronist nature of the* BGB' to new economic and social realities, especially

116 See n 138 and accompanying text.
117 For all the process, Larenz and Canaris, *supra* n 81, pp. 187–190.
118 Grüneber, *supra* n 91, p. 10.
119 E.g., Larenz and Wolf, *supra* n 84, pp. 93–96.
120 Other textbooks use different terminology. For example, Brox and Walker, *supra* n 77, pp. 36–38.
121 Larenz and Wolf, *supra* n 84, pp. 77–79, 88.

after 1951.[122] Within this broad context, it is now openly acknowledged that the German judiciary has developed a number of private law doctrines with no statutory support via constructive extension.[123] Some of these doctrines were later included in the BGB by the 2002 general reform of the law of obligations,[124] while others remain without positive regulation.[125] However, due to the persistent ideal that, in principle, courts should not develop private law, these doctrines are normally not openly presented as judicial creations, but as conceptually derived from positive law.[126] In the law of obligations, this has frequently worked through the 'escape to open-ended legal provisions' (*Flucht in die Generalklauseln*),[127] remarkably the duty to perform contracts in good faith (§ 242 BGB).[128] However, property law lacks these open-ended legal provisions, forcing judicial creativity to operate within more rigid pre-existing modules.

This is especially apparent in German courts occasionally enforcing rights that are not part of the *numerus clausus* in manners that resemble property rights, especially the anticipation right of the buyer[129] and ownership for security purpose,[130] but – at the same time – refusing to acknowledge them as judicially developed property rights. The approach underpinning these decisions is well reflected in a recent ruling of the BGH, holding that the '*creation of private burdens not acknowledged by the numerus clausus of property law cannot succeed by means of Rechtsfortbildung* [extension of the law]'.[131] As a consequence of this style of judicial reasoning, it is not always apparent when a doctrine qualifies as judge-made law and, if so, whether it is the result of immanent or constructive extension of the law. However, at least

122 Wieacker, *supra* n 53, pp. 409, 416.

123 Larenz and Wolf, *supra* n 84, p. 95.

124 E.g., the doctrines of the disturbance of the foundation of the transaction (*Störung der Geschäftsgrundlage*), of *culpa in contrahendo* and of positive breach of contract (*positive Vertragverletzung*).

125 E.g. the doctrines of apparent power of attorney (*Anscheinsvollmacht*) and of the abusive exercise of a right (*unzulässige Rechtsausübung*). Larenz and Wolf, *supra* n 84, p. 74.

126 See S. Whittaker and R. Zimmermann, 'Good Faith in European Contract Law: Surveying the Legal Land Scape', in R. Zimmermann and S. Whittaker (eds), *Good Faith in European Contract Law* (Cambridge: CUP, 2000) pp. 20–21, discussing the doctrine of the disturbance of the foundation of the transaction.

127 Honsell, *supra* n 54, p. 31.

128 E.g., see the previous footnotes on the fall of the basis of the contract.

129 The BGH has held that this is not a property right and it cannot be asserted against everyone, but it still is a very strong right and a step prior to full ownership, BGHZ 30, 374, 377.

130 See J. Wilhelm, *Sachenrecht* (Berlin: De Gruyter, 5th edn, 2016) p. 12; Marina Wellenhofer, *Sachenrecht* (Munich: CH Beck, 34th edn, 2019) pp. 17–18.

131 BGH 13.9.2013. NJW 2013, 3515, 3518.

the anticipation right of the buyer, has been described by Larenz and Wolf as a case of *praeter legem* constructive legal extension,[132] while Wolfgang Wiegand has seen the development of the ownership for security purpose as an open infraction of the *numerus clausus*.[133]

Nonetheless, the overall relevance of judge-made law in German property law should not be overplayed. According to legal historian Franz Wieaker, the formal structure of the BGB imposes strong limits to what even a modern court can achieve.[134] Despite scholarship frequently highlighting the impact that the constitutional concept of ownership[135] and public law reforms[136] had in modernizing German property law, changes that imply a clear break with the original property rights of the BGB have been achieved by legislative reforms. For example, the strong 'accession principle' established in §§ 94(1) and 93 BGB, which provides for the unity of land and building in a single module of ownership, could only be broken by the legislative expansion of the superficies right in 1919[137] and, more radically, by the legislative creation of 'flat ownership' in 1951.[138]

To conclude this section: the increased flexibility of the German juridical method over the 20th century should not lead to assume that German judges have a massive power to update private law and, especially, the property system. Despite their importance, private law doctrines developed by judge-made law are relatively few and almost all of them fall within the law of obligations. These innovations were almost never presented by courts as freely created doctrines but disguised as logical conclusions from positive law, and frequently criticized by their contemporaries as judicial usurpations of legislative powers.[139] Thus, despite the modern acknowledgment that judicial reasoning cannot be purely mechanical, it is clear that, within the distributions of law-making competences of the German legal systems, the legislator is the one primarily called to develop private law, with courts having only a residual and limited role.[140] Nowhere in German private law is this clearer than in property

132 Larenz and Wolf, *supra* n 84, p. 95.

133 Wolfgang Wiegand, 'Die Entwicklung Des Sachenrechts Im Verhältnis Zum Schuldrecht', 1/2 AcP (1990) 112–138, p. 128.

134 Wieacker, *supra* n 53, p. 419.

135 E.g., F. Quack, *Münchener Kommentar Zum Bürgerlichen Gesetzbuch. Sachenrecht*, vol 6 (Munich: CH Beck, 3rd edn, 1997) pp. 3, 18–19.

136 E.g., Wieacker, *supra* n 53, p. 431.

137 See 1919 *Erbbaurechtsverordnung* (ErbbauVO), now 2007 *Erbbaurechtsgesetz* (ErbbauG).

138 See 1951 *Wohnungseigentumgesetz* (WEG).

139 See Whittaker and Zimmermann, *supra* n 126, pp. 21–22, discussing the doctrine of the disturbance of the foundation of the transaction.

140 For example, the development of the doctrine mentioned in the previous footnote has been attributed to the passiveness of the *Reichstag*, *ibid*, p. 21.

law. In this context, the main impact of the *numerus clausus* seems to be the imposition of stringent doctrinal constraints on the identifications of gaps: if a property right does not exist, in principle, this should not be regarded as a gap, precluding the creation of a new property type through *Rechtsfortbildung*. Beyond that, the *numerus clausus* principle does not seem to take any further powers away from German courts.

This has relevant implication for the comparative and theoretical understanding of the doctrine of *numerus clausus*. In German law the *numerus clausus* should be seen as a doctrine that has the limitation of party autonomy as its primary concern, not the limitation of judicial power. The main theoretical consequence of this is that the justification of the German *numerus clausus* is not problematic and should emerge from the (internal) system of the BGB, the practical goals pursued by it and the values underpinning German private law. By the same token, what demands a special explanation in German law is why courts have occasionally infringed this prohibition.

4 England and the US: Divergent Views on the Role of Judges

4.1 *The Impact of the Numerus Clausus on Stare Decisis*

In common law systems the *numerus clausus* operates in a different institutional context. As in civilian systems, the primary function of common law courts is solving disputes under the existing standards of society.[141] However, in contrast to the civilian separation of powers principle, the *stare decisis* doctrine invests common law judges with an inherent authority to create and develop new legal rules, subject to legislative revision.[142] Thus, in principle, in Anglo-American legal systems, developing the common law is within the province of the courts.[143] This is specially the case in private law, which in England and the US is still broadly made-up of case law, especially in the areas of contracts and torts.[144] As a result, in common law systems, the acknowledgment of a *numerus clausus* of property rights seems to have a deep impact on the basic division of powers between judges and legislators: it takes away from courts the authority to develop a part of private law, placing it under the exclusive power of legislators. This institutional impact might explain the far greater interest of contemporary Anglo-American scholarship in providing a justification for the

141 M. Eisenberg, *The Nature of the Common Law* (Cambridge, MA: Harvard University Press, 1988) p. 4.
142 Merrill and Smith, *supra* n 10, p. 10.
143 Eisenberg, *supra* n 141, p. 1.
144 Merrill and Smith, *supra* n 10, p. 10.

principle. Nonetheless, despite a certain tendency to treat them together, there is great variation between the English and the American common law.[145] This section accounts for these differences, developing on the specific implications of *the numerus clausus* principle for the English and American systems of legal sources.

Despite scholarship frequently highlighting convergence with civilian systems,[146] common law jurisdictions are still normally characterized by the importance of case law, the doctrine of *stare decisis*, the weaker role of statutory law and the less prominent place of academic literature. From this perspective, the main characteristic of common law legal systems is said to be that they develop by judicial decision-making.[147] However, the historical origin of the common law rested in the opposite idea: *stare decisis* was founded in the view that judges did not make law, but only 'declared' it.[148] Indeed, for a long time, judges were said to merely 'discover' the basic principles of the common law,[149] grounded in immemorial custom.[150]

This does not mean that legislation had a prominent role at the time. In contrast to the growing importance that legislation acquired in Europe during the age of the 'law of reason', in England the role of legislation, especially in private law, remained marginal.[151] This only started to change during the 'Age of Reform', due to some procedural reforms[152] and the incorporation of a formal principle of judicial independence.[153] Pushed by Bentham's utilitarian views regarding the rationalization of the law,[154] during the 1830s the historical English writ system was brought to an end,[155] allowing the emergence of a 'substantive common law'.[156] Because the scope of the old writs were limited and judges were now 'deciding cases on the merits', they also started developing

145 Kischel, *supra* n 42, pp. 333, 336, 344–348; Zweigert and Kötz, *supra* n 39, pp. 243–249, 259–265; Siems, *supra* n 43, pp. 75–78.
146 For an up-dated discussion, see Kischel, *supra* n 42, pp. 619–630.
147 See *ibid,* pp. 228–242; Siems, *supra* n 43, pp. 52–57.
148 R. Ward, A. Wragg and RJ Walker, *Walker & Walker's English Legal System* (Oxford: OUP, 10th edn, 2008) p. 78.
149 *ibid*; M. Partington, *Introduction to the English Legal System: 2018–19* (Oxford: OUP, 2018) pp. 48–49.
150 Merrill and Smith, *supra* n 10, p. 10.
151 See van Caenegem, *supra* n 53, pp. 135–136.
152 H. P. Glenn, *Legal Traditions of the World* (Oxford: OUP, 5th edn, 2014) pp. 254–257; Zweigert and Kötz, *supra* n 39, p. 197.
153 Glenn, *supra* n 152, pp. 256–257.
154 See van Caenegem, *supra* n 53, pp. 137–138, 162.
155 J. Baker, *Introduction to English Legal History* (Oxford: OUP, 5th edn, 2019) p. 60.
156 Glenn, *supra* n 152, pp. 254–255. For a brief account of the reforms, van Caenegem, *supra* n 53, pp. 162–165.

the law.[157] These judges were also fiercely independent. Thus, by the mid 19th century, they were *actually* making law,[158] even though this might not have been acknowledged until much later. This phenomenon is well captured in comparing the opinion delivered by Lord Park in 1833, holding that '*the common law system consists in applying* (…) *those rules of law which derive from legal principles and judicial precedents* (…) *and we are not at liberty to reject them*',[159] with a famous speech held by Lord Reid in the early 1970s, acknowledging that the previous view was '*a fairy tale*' that cannot longer be believed.[160]

Following this trend, over the last decades, the English common law has come to accept the idea that judicial activity is inherently creative.[161] To a large extent this seems to result from the many conclusive arguments that militate against the declaratory view of the law. First, due to the impossibility of infinite regress, all rules always have an origin: at some point a court must have made the rule.[162] Second, the judicial establishment of legal rules would occur even if the sole function of courts was to resolve disputes on the base of existing rules: if judges are to explicate the application, meaning and implication of the society's existing standards in new situations, they cannot at the same time by prohibited from formulating rules they have not previously announced. To begin, modern societies are in continuous change, creating a continuous need for new legal rules to resolve unprecedented issues. Because of the inevitability of change, the application of an old rule to a new case may constitute a new rule. Moreover, even when no social change is involved, old rules sometimes need to be discarded because they were wrongly established. Hence, common law courts have an inevitable secondary function of enriching the supply of legal rules.[163] This law-making power cannot be derived from any theory of representative democracy, at least as long judges are not elected. Thus, in England, the legitimacy of courts to develop the common law is closely tied to a doctrine of separation of powers that sees the independence of courts as a form of preventing dictatorial powers from being asserted by any one branch of government.[164]

157 Glenn, *supra* n 152, p. 255.
158 *ibid* pp., 257–258.
159 *Mirehouse v Rennell* (1833) 6 ER 1015 (HL) 1023.
160 Lord Reid, 'The Judge as Law Maker', 12 JALT (New Series) (1972) 22–29, p. 22.
161 See G. Samuel, 'Common Law', in J. M. Smits (ed), *Elgar Encyclopedia of Comparative Law* (Cheltenham: Edward Elgar 2nd edn, 2012) pp. 175–176.
162 Kelly, *supra* n 47, pp. 183–184.
163 Eisenberg, *supra* n 141, pp. 4–5.
164 Partington, *supra* n 149, p. 49.

At any rate, the original idea of *stare decisis* as a process of discovering the law provided the common law with an inductive-deductive judicial reasoning that seems to stand in contradiction with the nominally deductive style of the German juridical method:[165] in the common law, the judge seeks to induce a rule from a previous decision to later apply it deductively to the case at hand, giving a key importance to the *justification* of the rule. In this scheme, the rules abstracted from individual cases are necessarily broader than the rules applied, as otherwise such rules could not be applied to different facts. Therefore, this inductive process cannot be strictly logical and irrefutable.[166]

Due to the central place that case law enjoys in common law systems, comparative legal research normally describes the role of statutory law as remedial or secondary, arguing that English courts have historically resisted the power of Parliament[167] and seen statutes as necessary evils that disturb the harmony of the common law.[168] In this line, despite the unique supremacy that Parliament enjoys under the British constitution, courts have always managed to retain the power to interpret the law. For example, until recently, English judges did not admit, in any form, parliamentary debates in aid to legal interpretation.[169] Thus, comparative scholars argue that, to confine the power of judges, English statutes are drafted in highly technical, detailed and often opaque terms, which are alien to civilian lawyers.[170]

Despite sharing the same basic systems of legal sources, the extension of the law-making powers of English and American judges is different. Due to their differing understanding of *stare decisis*,[171] and the unique power of the US Supreme Court,[172] American courts generally play a much more decisive role in the process of legal change than English judges,[173] who are much more willing to defer major legal reforms to Parliament.[174] In the US, this view has been intensified by the Law & Economics movement, which is sceptical as to the quality of statutory law, favouring the common law as a more efficient source of legal change.[175] This already points to an important difference between

165 Zweigert and Kötz, *supra* n 39, pp. 69–71; Samuel, *supra* n 161, p. 174.
166 For an analysis in a comparative context, Kischel, *supra* n 42, pp. 229–232.
167 *ibid*, pp. 242–243.
168 Zweigert and Kötz, *supra* n 39, p. 265.
169 See *Pepper v Hart* [1993] AC 593, allowing resort to Hansard in certain cases.
170 Kischel, *supra* n 42, p 243; Samuel, *supra* n 161, p. 178; Zweigert and Kötz, *supra* n 39, p. 267.
171 PS Atiyah and RS Summers, *Form and Substance in Anglo-American Law* (Oxford: Clarendon Press, 1987) pp. 116–117.
172 See Kischel, *supra* n 42, p. 338.
173 Atiyah and Summers, *supra* n 171, p. 134.
174 *ibid* pp. 141–142; Ward, Wragg and Walker, *supra* n 148, p. 5.
175 See R. A. Posner, *Economic Analysis of Law* (New York, NY: Aspen, 7th edn, 2007) pp. 249–253, 562–565.

the status of the *numerus clausus* in England and the US: in the former the *numerus clausus* has been acknowledged by Parliament as part of a major, encompassing and much appreciated reform of land law,[176] while in the latter it normally continues to be seen as a norm of judicial self-restraint.[177] A proper assessment of this divergence requires closer attention to the differences in English and American legal reasoning and its impact on property law.

4.2 *English Judicial Reasoning and its Impact on Property Law*

The way in which English judges exercise their power to change the law is regarded as much more circumscribed than that of American courts.[178] This is largely an outcome of English law adhering to a much stricter and formal doctrine of *stare decisis*.[179] Following an old practice established during the 19th century and reaffirmed in *London Street Tramways Co Ltd v London County Council*,[180] for most of the 20th century, the House of Lords held that it was bound by its own precedents and that reforms of the law were for Parliament.[181] This situation partially changed with the 1966 Practice Statement by which the House of Lords announced that it would, from then on, depart from a previous decision when it appears right to do so.[182] However, the statement also made clear that the House would continue treating former decisions as normally binding and that it would bear in mind the danger of retrospectively disturbing the basis on which contracts and property settlements where entered into. In this line, the use of this prerogative by the House of Lords (now Supreme Court) has normally been very restrictive,[183] while the Court of Appeal is still generally forbidden from departing from its own precedent.[184] Thus, even after

176 The LPA 1925 provides that '*the only*' estates and interests that can subsist or be conveyed or created in law are those listed in s. 1(1) and (2), that any other form of property right will take the form of equitable interest (s. 1(3)) and limits permissible equitable interests to those existing before its coming into force (s. 4(1)). For a broader perspective on this reform, see A. H. Manchester, *A Modern Legal History of England and Wales, 1750–1950* (London: Butterworth, 1980) pp. 324–325.

177 See Merrill and Smith, *supra* n 10, p. 9.

178 For a general comparative view, see Atiyah and Summers, *supra* n 171, pp. 115–156; Kischel, *supra* n 42, pp. 333–348.

179 Atiyah and Summers, *supra* n 171, pp. 116–117.

180 *London Tramways Co v London County Council* [1898] AC 375.

181 Kelly, supra n 47, p. 153.

182 [1966] 1 W.L.R. 1234

183 Atiyah and Summers, *supra* n 171, p. 139; Kischel, *supra* n 42, p. 241.

184 *Davis v Johnson* [1979] AC 264, HL. The Court of Appeal can only depart from its own precedents cases in the cases laid down in *Young v Bristol Aeroplane Company Limited* ([1944] 1 KB 718) and in other specific cases, as when previous law conflicts with the 1998 Human Right Act.

1966, the power of English courts to disregard their own precedents is seen as much weaker than that of American courts.[185]

Consistent with this general approach to the law-making process, in the field of property law, the House of Lords[186] and the Supreme Court[187] tend to defer pressing problems to Parliament. A good example is the reluctance of the House of Lords to change the rule requiring leases to be for a defined term of years in order to be recognized as property rights despite Lord Browne-Wilkinson holding it to be an '*ancient and technical*' rule that produces a '*bizarre outcome*' and has no '*satisfactory rationale*' nor '*useful purpose*', expressing the '*hope that the Law Commission might look at the subject to see whether there is in fact any good reason now for maintaining a rule which operates to defeat contractually agreed arrangements*'.[188] This judicial deference to Parliament is mirrored by the comparative appraisal of English legal thinking, which has been described as far more positivistic, formal and centred in black letter rules than the American.[189] Thus, like the German juridical method, the style of English legal reasoning has been held to be more 'internal' to the law than the American.[190] Richard Posner has even argued that, in this respect, English law has more in common with continental legal systems than with the American common law.[191]

The English reluctance to the judicial development of the law is paralleled by the emergence of Parliament as the dominant force in the British Constitution and legislation becoming the major source of change in English law.[192] As a consequence, in comparative research, the idea of case law being the main sources of contemporary English law has recently been held to be a myth.[193] Similar to what happens in civilian systems, there is not much doubt that, in England, major legal reforms are for Parliament, not for judges.[194] Accordingly, in England legislative reforms are also much easier and frequent than in the US.[195] This is apparent in the development of English property law since the

185 Atiyah and Summers, *supra* n 171, pp. 120–122.
186 E.g., the House of Lords overruling Lord Denning's opinion *National Provincial Bank v Ainsworth.* [1964] Ch 665 (CA); [1965] AC 1175 (HL).
187 E.g., *Arnold v Britton* [2015] 2 WLR 1593, as discussed by Sarah Blandy, Susan Bright and Sarah Nield, 'The Dynamics of Enduring Property Relationships in Land', 81 MLR (2018) 85–113, p. 105.
188 *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386, 396.
189 Kischel, *supra* n 42, pp. 333, 347–348.
190 Grechenig and Gelter, *supra* n 73, p. 303.
191 R. A. Posner, *Law and Legal Theory in England and America* (Oxford: OUP, 1996) p. 20.
192 Ward, Wragg and Walker, *supra* n 148, p. 5; Kelly, *supra* n 47, p. 92.
193 Samuel, *supra* n 161, p. 178.
194 On this, see Zweigert and Kötz, *supra* n 39, p. 271.
195 Atiyah and Summers, *supra* n 171, pp. 140–141.

mid 19th century, especially, after the 1922–1925 Land Law Reform.[196] Even leaving landlord-tenant law aside, over the last half of a century, Parliament has passed a variety of acts aiming to keep property law in step with society, including the Matrimonial Homes Act 1967, the Law of Property (Miscellaneous Provisions) Act 1989, the Trust of Land and Appointment of Trustees Act 1996 and the Land Registration Act 2002, while the Law Commission has more recently proposed others reforms.[197]

In this context, the principle of *numerus clausus* does not seem to imply a major alteration to the way in which modern English law deals with problems of legal change *in general*. Moreover, the embodiment of the principle in the LPA 1925 might be seen as nothing more than a very tangible chapter in the process by which Parliament gradually became the central developer of property law in England. The approach to the law on covenants is a good example. In the early 1830s, the Commissioners of the Law of Real Property stated that the enforcement of freehold covenants against successors in title should be developed by Equity,[198] while, during the early 21st century the Law Commission held that the recognition of positive covenants as new interests in land should occur through statutory recognition.[199] Thus, as in Germany, in England there might be more need to justify the judicial infringement of the principle than its existence.

4.3 *American Judicial Reasoning and its Impact on Property Law*

The American approach to the judicial power to develop the legal system diverges from the English, making the place of the *numerus clausus* in the US different again. This is not only explained by a weaker doctrine of *stare decisis*,[200] but by the central place policy arguments acquired in American legal reasoning during the 20th century.[201] There has been much discussion on the precise place that policy arguments have in American judicial reasoning. However, following Melvin Eisenberg, at the end, social propositions (*i.e.*, policy concerns) seem to always have some role in the American common law, either in the way that rules are first established by courts or in the way in which

196 See Manchester, *supra* n 176, pp. 304, 310–311; W. Cornish and others, *Law and Society in England 1750–1950* (Oxford: Hart, 2nd edn, 2019) pp. 135, 168–170.

197 E.g., see W. Wilson and C. Barton, 'Leasehold and Commonhold Reform' (House of Commons Library 2021) 8047.

198 See B. McFarlane, 'Tulk v Moxhay (1848)', in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Oxford: Hart, 2012) p. 212.

199 See Law Com Consultation Paper No 186 and C. E. Cooke, 'To Restate or Not to Restate? Old Wine, New Wineskins, Old Covenants, New Ideas', Conv (2009), 448–473, p. 460.

200 See Atiyah and Summers, *supra* n 171, pp. 119–120, 139.

201 See Zweigert and Kötz, *supra* n 39, pp. 246–249.

those rules are then extended, restricted and applied.[202] Consistent with this view, in comparative law, American legal reasoning is generally perceived as much more policy-oriented than its English equivalent.[203]

In contrast to what happens in England (or Germany), this view is accompanied by the perception that the capacity of legislatures to provide the legal rules needed by society is limited and that much of that capacity is dedicated to governmental matters, such as taxation, administrative rules, definition of crimes or regulated industries, and that, in many fields, the flexible form of judicial precedents is preferable to the canonical forms of legislation.[204] In this line, American courts have been described as having an '*inherent policy making authority with respect to private law*'.[205] The Law & Economics movement has endorsed this view with a strong normative support grounded in seeing common law rules as more efficient than legislative law, due to courts not being subject to the political pressures of interest groups with narrow distributional goals.[206] In property law, the faith American law places in judges for keeping property law in step with social needs is apparent in the approach taken by the 2000 'Restatement (Third) of Property: Servitudes', which replaces traditional (English) doctrines controlling servitudes *ex-ante*, by *ex-post* judicial tests based on open-ended terms, such as denying covenants proprietary effects if they are illegal, unconstitutional or against public policy.[207]

Considering that, in practice, the general division of authority between courts and legislators in the American common law gives the judiciary a much more relevant and legitimate role in developing private law than in England or Germany, in the US, the presence of a *numerus clausus* might be seen as placing a much greater limitation on the inherent powers of courts. However, it must also be considered that the American version of *numerus clausus* has also been said to results from judicial self-restraint, not from a straightforward legislative decision, and that the American version of *stare decisis* is also weaker than the English. Probably therefore, the American supporters of the *numerus clausus* have been specially focused on justifying the principle on policy arguments that are consistent with the idea of courts developing an efficient common law, including the control of informational externalities and transaction costs.[208]

202 Eisenberg, *supra* n 141, pp. 2–3.
203 See Hage, *supra* n 62, pp. 533–534.
204 Eisenberg, *supra* n 141, p. 5.
205 Merrill and Smith, *supra* n 10, p. 10.
206 *ibid* p. 60.
207 See S. French, 'Highlights of the New Restatement (Third) of Property: Servitudes', 35 Real Prop Prob & Tr J (2000) 225–242.
208 Especially, Merrill and Smith, *supra* n 10; Hansmann and Kraakman, *supra* n 11.

This stands in marked contrast with England and Germany, where scholars normally give more importance to explaining the doctrinal underpinning of the principle and uncovering its systemic aspects.[209]

The institutional impact of the *numerus clausus* in the US has also led to the development of theories that aim to justify the principle from perspectives other than maximizing micro-economic efficiency regarding dealings over property rights. On the one hand, Merrill and Smith have highlighted several technical advantages of legislative law.[210] To a large extent their ideas relate to Joseph Raz's argument that it is impossible for courts to introduce radical reforms based on individual cases.[211] This has relevant parallels with England and Germany. As to the former, this is why the House of Lords refused to change the certainty of term rule of the lease. As to the latter, this is part of the logic that originally underpinned the development of modern continental legal systems, namely that legislators are simply in a better technical position than courts to develop rational law.

On the other hand, in the context of the 'Democratic Property' movement,[212] authors as Avihay Dorfman have maintained that the justification for *numerus clausus* is political, not functional or technical. In this view, the legislative monopoly over the property system is based on the political legitimacy that the democratic process provides legislative law.[213] Despite raising an interesting point, from the perspective of a common law system, it is hard to see why this argument is specific to property law and not a general criticism to the Anglo-American understanding of the role of courts. By contrast, from the viewpoint of a civilian systems, it does not add anything new, as the democratic delineation of private law is one of its foundational dogmas.

In summary, in this context, the legislative monopoly over property law remains controversial. For example, Hanoch Dagan has recently argued that, except for a limited number of contexts, both technical and legitimacy reasons support the idea that judges *are* and *should* be on equal footing with legislators when it comes to develop the property system, as he sees no difference between

209 E.g., McFarlane, *supra* n 15; W. Wiegand, 'Numerus Clausus Der Dingliche Rechte. Zur Entstehung Und Bedeutung Eines Zentralen Zivilrechtlichen Dogmas' in G. Köbler (ed), *Karl Kroeschell zum 60. Geburtstag dargelegt von Freunden, Schülern und Kollegen* (Frankfurt am Main: Peter Lang 1987) pp. 623–642.

210 Merrill and Smith, *supra* n 10, pp. 61–66.

211 J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979) pp. 200–201.

212 See J. W. Singer, 'Democratic Estates: Property Law in a Free and Democratic Society', 94 Cornell L Rev (2009) 1009–1062, pp. 1046–1047.

213 A. Dorfman, 'Property and Collective Undertaking: The Principle of Numerus Clausus', 61 U Toronto L J(2011) 467–520.

this field and the rest of private law.[214] This suggests that, especially in the he US, the *numerus clausus* has a weaker institutional position than in Germany or England.

5 Concluding Remarks

If, as suggested by Akkermans, the *numerus clausus* principle is to be seen as a 'constitutional rule of property law', it must be understood that the principle does not have the same systemic effects across jurisdictions. The implications of this finding extend beyond Akkermans' argument, which was founded in the greater flexibility of the French version of the principle. Once the American case is introduced into the debate and more attention is given to the impact of the *numerus clausus* principle in the sources of law and the style of legal reasoning which prevail in each jurisdiction, a far more complex picture emerges.

In Germany, the 'institutional' impact of the *numerus clausus* is relatively limited. Because Germany adopts a strong separation of powers dogma, denying courts power to create new property rights does not alter the basic distribution of law-making competence in this jurisdiction. The principle simply involves a doctrinal restriction regarding what qualifies as a gap under the German juridical method, thereby limiting the scope of 'judicial extension of law' (*Rechtsfortbildung*). This is probably why German scholarship tends not to offer up a justification for the legislative monopoly created by the principle. By the same logic, in this context, the most pressing problem is not accounting for the existence of the principle, but for its judicial infringements.

In the US, by contrast, the principle has a more visible institutional impact but also a more uncertain position. On the one hand, the *numerus clausus* implies a radical alteration of the basic law-making institutional arrangement, as it drastically limits the inherent power of courts to develop private law. However, on the other hand, this limitation is institutionally weak, as it is mainly based on a principle of judicial self-restraint. As a result, because the principle does not have clear statutory standing and seems to run counter to the theory of efficient common law, in the US the *numerus clausus* requires much more external normative support, either in the form efficiency, technical or political justifications.

In what might seem an unexpected outcome, the institutional impact of the English version of the *numerus clausus* seems closer to Germany than

214 H. Dagan, *A Liberal Theory of Property Law* (Cambridge: CUP, 2021) pp. 148–161.

the US. Although England follows a different separation of powers principle, as in Germany, reforms of property law are primarily seen as a matter for Parliament. Therefore, English doctrine also tends to justify the principle in elements that can be described as 'internal' to the law. Consistent with this, the main normative challenge for English law is justifying judicial deviations from the principle.

The main implication of this finding is that in Germany and England the natural route for adapting property law to new realities is clearly legislative reform. This is justified by a democratic argument and a technical consideration. In the case of Germany, the legal monopoly over the property system is a direct outcome of the continental separation of powers principle. Nowadays, this principle is justified in the democratic legitimacy of statutory law but is worth remembering that it first emerged as a technical device to avoid the judicial undermining of the rational structure of the legal systems created by the sovereign. In contemporary English law, the central place of statutory law in the property system can also be explained as an outcome of the role achieved by Parliament as lawmaker since the mid 19th century. As in civil law systems, nowadays this might also be justified using democratic and technical arguments. The situation is different in the US. Due to the less clear statutory standing of the principle and the persistent influence of the theory of efficient common law, in this jurisdiction there seems to be more need to provide explicit support for the limitation of judicial power resulting from the *numerus clausus* principle. The core of this justification lies in the inherent efficiency gains derived from the ability of this principle to control externalities and transaction costs, but other routes outside this rationality have also been explored, including technical and democratic considerations that very much resemble the German and the English approach.

This conclusion provokes new questions. The most obvious is to what extent these findings are relevant for other civilian legal systems which have been held to have a more flexible understanding of the *numerus clausus* than Germany, especially France. These conclusions also point to a more general direction: private law doctrines that seem to fulfil a similar function within their direct contexts, might have radically different implications for the wider legal system, and it might be wrong to simply assume that they will be consistent with the civil-common law divide. Connected to this, one issue that seems especially worth exploring is what these findings tell us about the way different legal systems understand the role of the State in developing private law. For example, in this case, the different systemic implications of the *numerus clausus* seem to be ultimately underpinned by divergent perceptions regarding the legitimacy and ability of the political system to develop private law. While England and

Germany appear to have relatively more faith in democratic politics and legislation, the US seems to be rather sceptical, preferring judge-made private law. These differences matter. At a time when the *numerus clausus* faces growing challenges associated with the recognition of new types and objects of property, including property rights in digital data and emission permits,[215] having a better understanding as to *who* should develop property law and *why* is of paramount importance.

215 See van Erp, *supra* n 2, pp. 1051–1052.