

< [The physical limits and rights implications of Ownership](#) | [Contents](#) | [Numerus clausus](#) >

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Developing a Hohfeldian theory of Real Rights to support LADM modelling

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Defining ownership

The chief attribute of property is the right of deriving from land and its accessories all the uses and services of which they are capable.

This right may be considered:

- *in relation to others as "exclusive"; or*
- *in relation to the subject as "absolute". (s939)*

Ownership as absolute - a conceptual view

- Once you *own the land* you have **absolute dominium**
 - The right to do anything

really?

Except by the Jurisdiction, ownership of land is never absolute as described by the [Dutch Civil Code \(CC\)](#) (art. 5:1, par. 1 and 2):

Ownership is the most comprehensive property right that a person, the 'owner', can have to (in) a thing.

*The owner is free to use the item to the exclusion of anyone, **provided this use does not conflict with the rights of others and the restrictions based on statutory regulations and rules of unwritten law are observed.***

Ownership as absolute - the reality

- Once you *own the land* you effectively have **absolute dominium**
 - *Effective absolute dominium*: The right to do anything (subject to social norms and legal restrictions)
 - Legal restrictions reflect the power of the legislature to hold rights over owned land (through common law or statute).

Ownership as exclusive

- Once you *own the land* you have **exclusivity over the owned land**
 - Trespassers and others who interfere with this exclusivity may be restrained.
 - Exclusivity is "*good against the world*" (*in rem*).

The right to property itself is the right that correlates to the duty in rem that all others have to exclude themselves from the property of others

(, p.71).

An owner also has the discretionary *power* **not to exclude** people from their land by providing them with rights.

By varying this exclusivity the owner can actually confer rights on others by licensing them to use his property (Penner, 2000, p. 75).

Ownership as power to vary

Property is like a gate, not a wall, because the owner may open the gate, selectively allowing particular persons to enter, while at the same time leaving everyone else who is outside in the same position as before

(, p.76).

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What rights are registerable?

The types of *registerable right* are defined by a legislative framework and delivered using *legal instruments*.

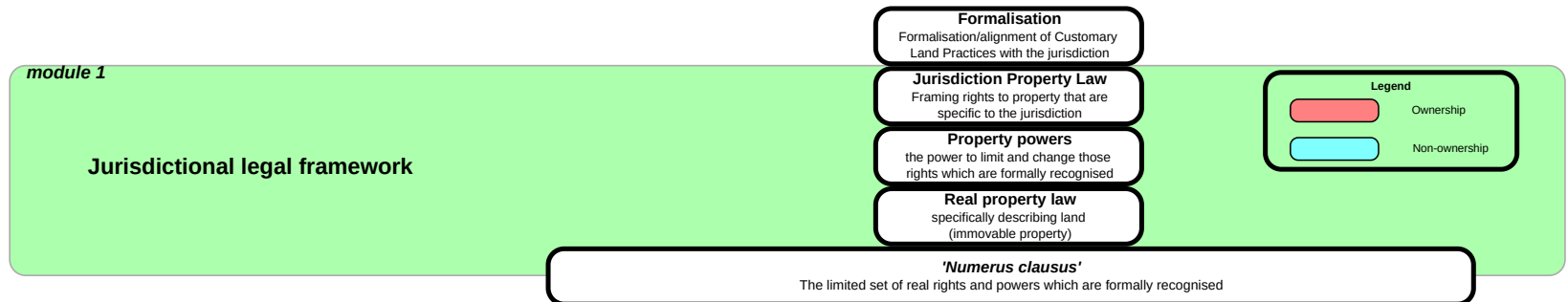
This is referred as *numerus clausus*)

The numerus clausus principle posits that the universe of property forms is closed and should remain so because of the high information costs that would be imposed if parties were free to create just any kind of property interest they might desire.

(, pp. 70-71)

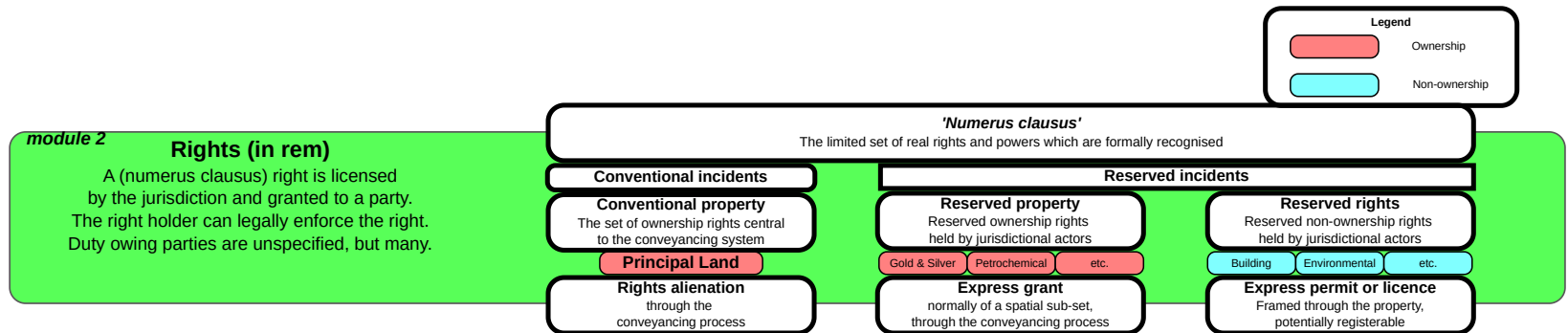
The legal framework

Absolute dominium is held by the jurisdiction in a legal framework



Separating and reserving rights and powers by the jurisdiction

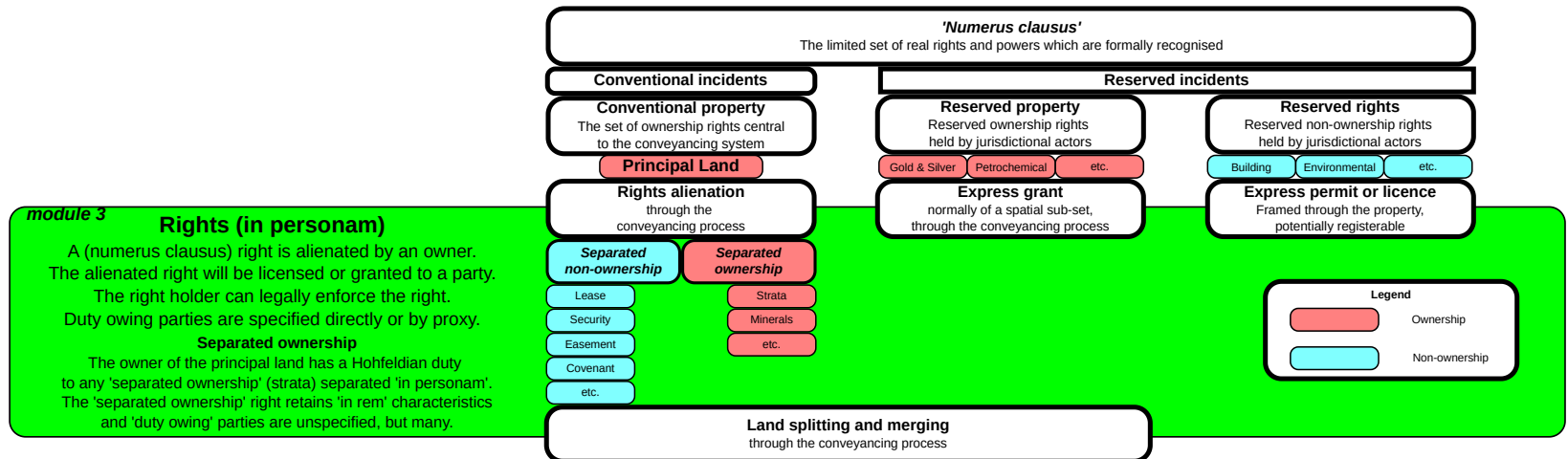
The Jurisdiction has powers to reserve both ownership and non-ownership rights over land.



- **Reserved incidents:** rights and powers reserved by the jurisdiction - defined by legal instruments
 - **Reserved property:** ownership rights reserved by the jurisdiction
 - these can be made available to private parties using an express grant
 - **Restricted rights:** non-ownership rights reserved by the jurisdiction acting as restrictions on owners/possessors (described as **Public Law Restrictions** by (, p. 3).
 - restrictions can be, temporarily, eased by the granting of a licence or permit.
- **Conventional incidents:** private property and abstractable rights and powers available through the conveyancing process.
 - **Conventional property:** private ownership - the nearest thing to absolute ownership of land by private parties.

Separating and reserving rights and powers by conveyancing

Principal land and expressly granted reserved property can be varied using the private conveyancing process



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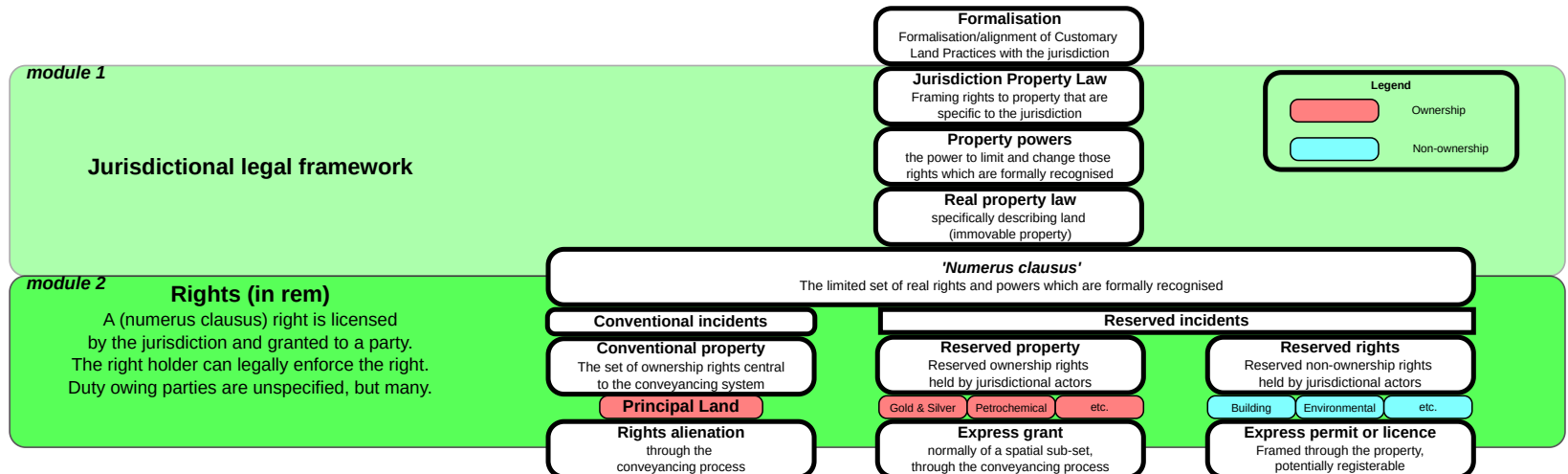
Rights *in rem*

*Rights in rem are characterized as those **rights which bind 'all the world'**, that is, **rights which must be respected by all**, or virtually all, of the subjects of the legal system;*

***everybody** must refrain from trespassing on my land.*

(, p.23)

in rem rights



- Everybody has a duty, *in rem*, not to trespass on *owned Land*
- Land owners have a duty, *in rem*, to abide by planning and environmental regulations

These universal duties are broadcast to the world from the thing itself.

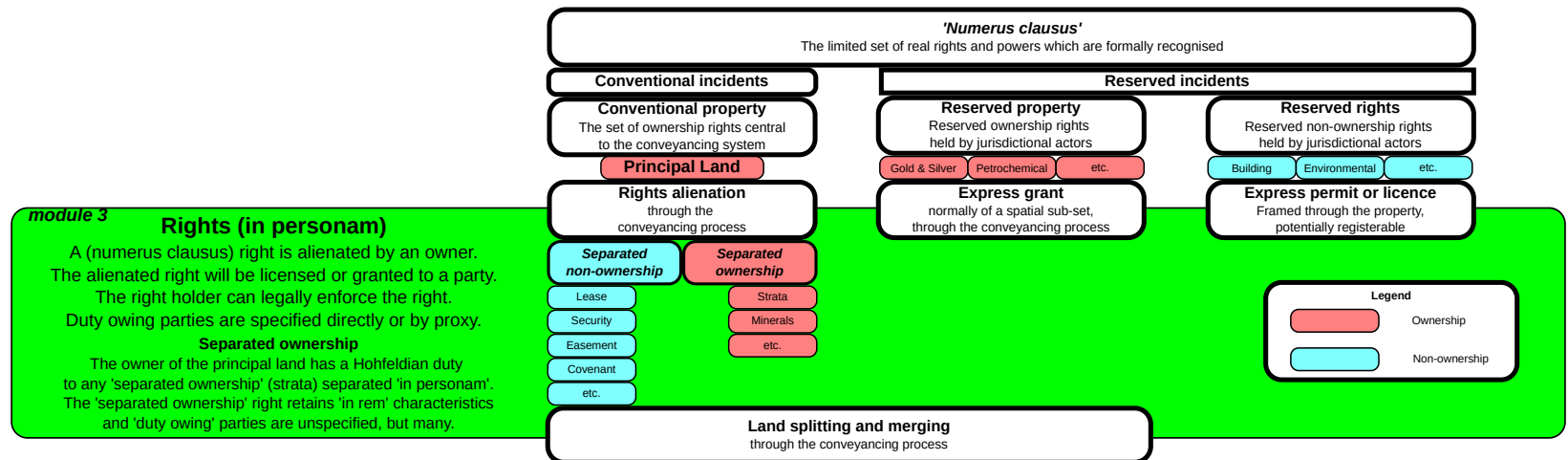
There is no formalised contract between the owner and the duty holder.

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Separating and reserving rights and powers by conveyancing

Principal land and expressly granted reserved property can be varied using the private conveyancing process



Contract law and conveyancing

Contract law and conveyancing is used to legally transfer private and reserved property.

This occurs between a granting party and a grantee party.

All parties within the contract are **known**.

It is thus referred to as *in personam*.

Contract law and conveyancing

.... the better view of contract is that it is the law governing **the power to rearrange or create rights, duties and powers by agreement.**

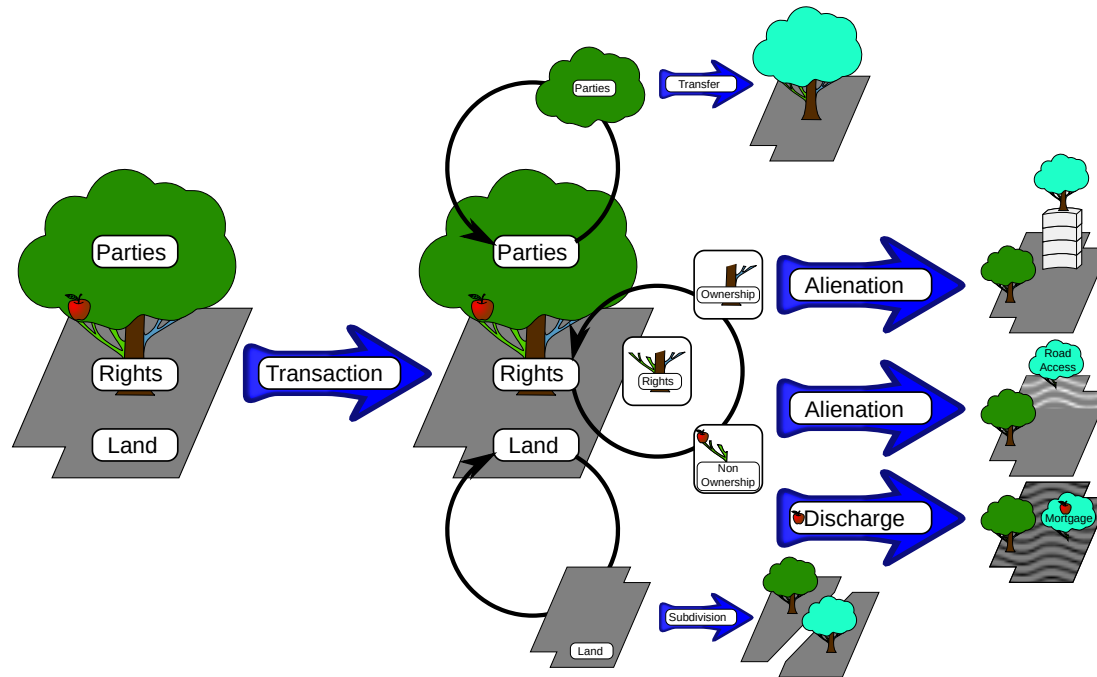
(, p.163).

Owners of conventional property can

- use their powers to alienate the legally permissible '*use and service*' rights
 - as defined in *numerus clausus*
- grant them (*in personam*) to third parties.

The separated real rights can represent *ownership* or *non-ownership* rights.

Private conveyancing transactions



Rights transactions and the Bundle of sticks model

The bundle of sticks model allows us to describe `numerus clausus` rights transactions between parties (`in personam`) with fine granularity.

This specificity is essential for complex governance arrangements (e.g. flats).

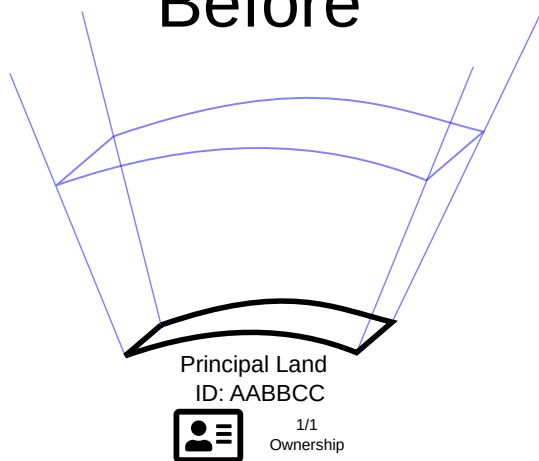
Bundle of sticks model - characteristics

The bundle of sticks can be summarised as follows (after , p. 7 and , p. 10):

- Ownership is the bundle.
 - The owner can distribute sticks from the bundle.
 - The owner can create a new bundle by separating sub-ownership (normally strata (flats) or mineral rights).
- The number and identity of the sticks:
 - varies from -
 - thing to thing,
 - place to place, and
 - person to person.
 - and is determined primarily by the jurisdiction through its laws.
- Sticks can be separated from the bundle and distributed (acquired) in different ways:
 - The sticks can be held for different periods.
 - When the period expires the stick is returned to the bundle.
 - The sticks can be held by different parties.
 - The same stick can be shared by different parties.

Rights transactions

Before



Deed
(change)

Deed of Disposition
TORP

The grantor registers the following spatio-right bundle changes to the Grantees.

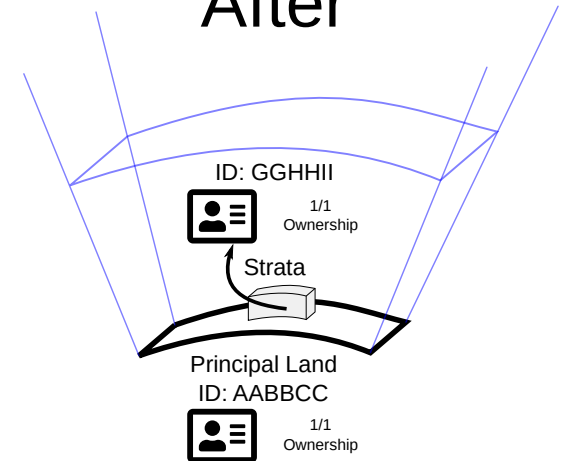
Land	Right	Grantee
ID: AABBC	Strata Ownership	

Spatial Part: Cookie cutter

Granter Witness

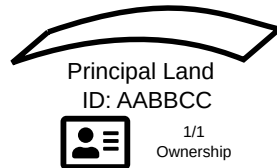
The deed is a document titled 'Deed of Disposition TORP'. It contains a table with three columns: Land, Right, and Grantee. The first row shows Land ID: AABBC, Right: Strata Ownership, and an empty Grantee column. Below the table, it says 'Spatial Part: Cookie cutter' with a cookie cutter icon. At the bottom, there are two signatures labeled 'Granter' and 'Witness'.

After




Rights transactions



Before






Deed
(change)

Deed of Disposition
TORP

 The grantor registers the following spatio-right bundle changes to the Grantees.

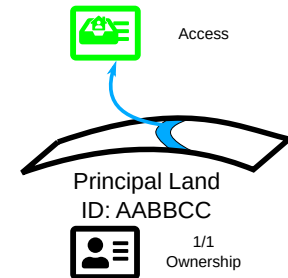
Land	Right	Grantee
ID: AABBC 	Access	

Spatial Part: 

Granter  Witness 

The deed is a document titled 'Deed of Disposition TORP'. It contains a table with three columns: Land, Right, and Grantee. The Land column contains 'ID: AABBC' and a land icon. The Right column contains 'Access'. The Grantee column contains a green icon of a person with a house. Below the table is a 'Spatial Part' section with a blue arrow icon. At the bottom, there are two signatures, one for the Granter and one for the Witness.

After



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Rights represent relationships

Rights are given meaning when used to describe relationships between parties framed through land.

A right is not a relationship between an owner and land.

It is a relationship between an owner and others in relation to land, backed up by the state in the case of legal rights.

Each restriction/responsibility involves a duality that imposes obligations on owners in relation to the land for the benefit of others.

An administrative framework is robust and successful when it takes this duality into account and also identifies the appropriate managing or implementing authority.

(, pp. 88-89)

Rights, Duties

... a person is the bearer of a right when a duty is imposed in order to serve or protect his interest

(, p.13)

If such a position is true then a **right holder** must **invoke a duty** in a *third party*.

This means that:

- For every party that benefits from a *right*
- There must be a different party who holds a corresponding correlative *duty* (, p.71).

In terms of these concepts Land and the owner of Land can benefit from a *right* or be encumbered by a *duty*.

Rights, Duties

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In a seminal paper Wesley Hohfeld formally modelled **rights, duties and power** as reciprocal implications and relationships.

The Form of Rights: The Hohfeldian Analytical System

We will use the interpretation of Hohfeld as used by (pp. 986-987).

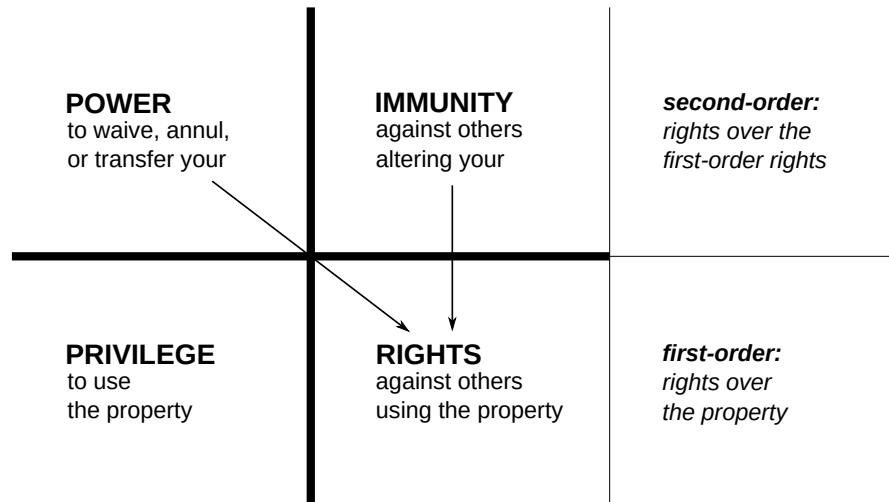
There are eight basic legal '*Hohfeldian incidents*'.

These are split in to the four **primary legal incidents**:

- **First order incidents** - that describe the right holder's relationship with the *thing*.
 - **rights** - claims, enforceable by state power, that others act in a certain manner in relation to the rightholder
 - **privileges** - permissions to act in a certain manner without being liable to damages to others and without others being able to summon state powers to prevent those acts.

Molecular rights - first order

An **owner** of property has:



The “first-order” rights are your legal rights directly over your property.

The privilege on this first level entitles you to *use your property*.

The rights correlates to a duty in every other person to *refrain from using your property*.

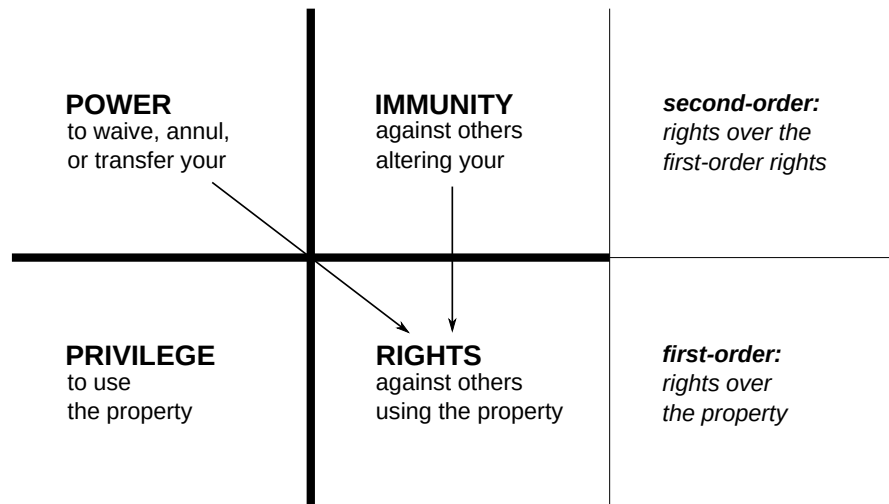
Molecular rights - second order power

The “second order” rights are your legal rights concerning the alteration of these first-order rights.

You have several powers with respect to your claim, you may:

1. waive the claim (*granting others abilities to use your property*),
2. annul the claim (*abandoning the property as yours*), or
3. transfer the claim (*making the property someone else's*).

An **owner** of property has:

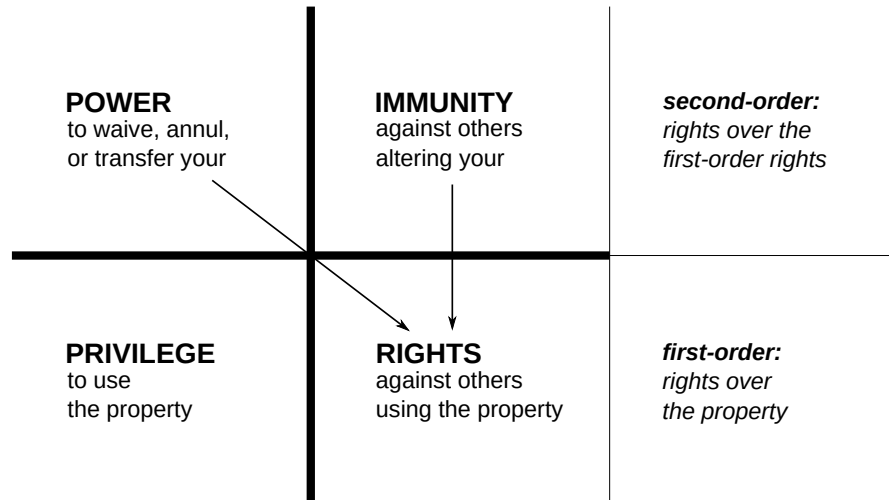


Molecular rights - second order immunity

Also on the second order, your immunity prevents others from altering your first-order claim over your property.

Your immunity **prevents others** from waiving, annulling, or transferring your claim over your property.

An **owner** of property has:



The 4 opposites of the primary legal incidents

There are four negations or opposites of the primary legal incidents:

- **no right** - if one does not have the power to summon the aid of the state to alter or control the behaviour of another.
- **duties** - are obligations to do, or refrain from doing, certain acts (the opposite of a **privilege**)
- **disabilities** - are the absence of power to alter *first-order* incidents.
- **liabilities** - are the absence of immunity from having one's own *first-order* incidents changed by others.

Correlatives - supporting duality

Correlatives are inferences against a different right holder (these are important for real right relations):

If A has	then some person B has
a Claim	a Duty
a Privilege	a No-claim
a Power	a Liability
an Immunity	a Disability

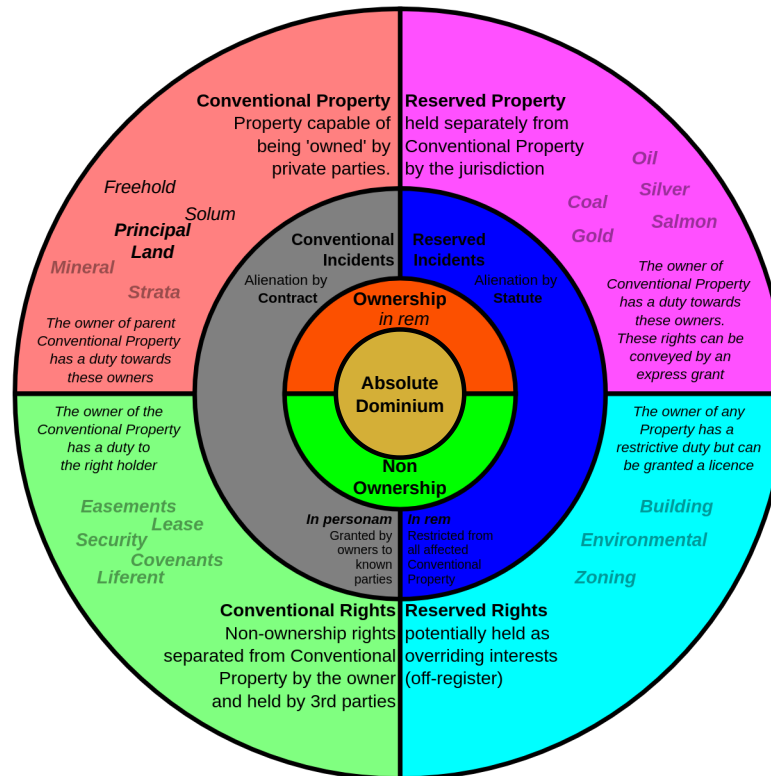
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Rights duality

Rights are given meaning when used to describe relationships between parties framed through land.

Modelling duality: a structured rights relationship



Rights, powers, immunities, and duties

A right holding party has immunities. The principal immunity for an *owning party* is:

- Immunity from transfer - **you can not sell what you do not own** ('*nemo dat*').

A right holding party can expect duties from third-parties. These parties can be:

- named (as part of an *in personam* contract)
- not named (as part of an *in rem* relationship which is 'good against the world')

When a right is alienated/abstracted and granted to a new right holding party.

- These third-parties can expect a duty from the land owner.
- The powers and immunities held by these third-parties may be limited.
 - An easement can not be independently transferred from its dominant land

Encumbering rights: Responsibilities and Restrictions

Two of the core LADM concepts have not really been discussed: *restrictions* and *responsibilities*.

This is principally because *restrictions* and *responsibilities* are, in general, both rights which encumber owned land.

Hence, they represent the impact of a right over owned land.

Responsibility and Restrictions: terminology

LADM defines *restrictions* and *responsibilities* as follows:

- A *restriction* is a: "formal or informal obligation on the land owner to refrain from something"
- A *responsibility* is a: "formal or informal obligation on the land owner to allow or do something"

Modelling *restrictions* and *responsibilities* in this manner frames such encumbrances in terms of:

- their impact on a *land owner*
- rather than a right which is independently registerable so that the right holder can enforce their benefit.

The distinction is subtle but important.

Semantics - Rights: *things a land owner can do*

- the owning party has been granted an ownership right (*in personam*)
 - all ownership rights have *in rem* effects
- the owning party may also have beneficial rights over other land (granted *in personam*):
 - directly (held by the owner) or
 - **praedially** (held by proxy through the owned land)

Semantics - Restrictions: *things a land owner must refrain from doing*

- **the jurisdiction** has a 'reserved incident' with a spatial relationship with the owned land:
 - the owner has an *in rem duty* to abide by the restriction
 - the owner can request a licence to release them from the obligation
- **a third-party** has been granted a right *in personam* over the owned land that provides **exclusivity** (for example a right of **lease**, **liferent** or **sub-ownership**)
 - such rights tend to be time limited and the rights revert back to the owner on expiration

Semantics - Responsibilities: *things a land owner has to do or allow*

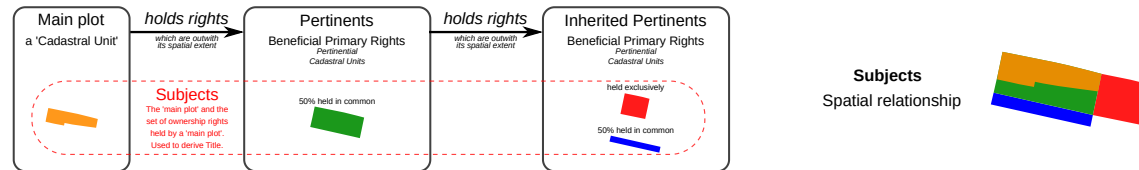
a **third-party** has been granted a right *in personam* over the owned land.

This results in an *owed duty*.

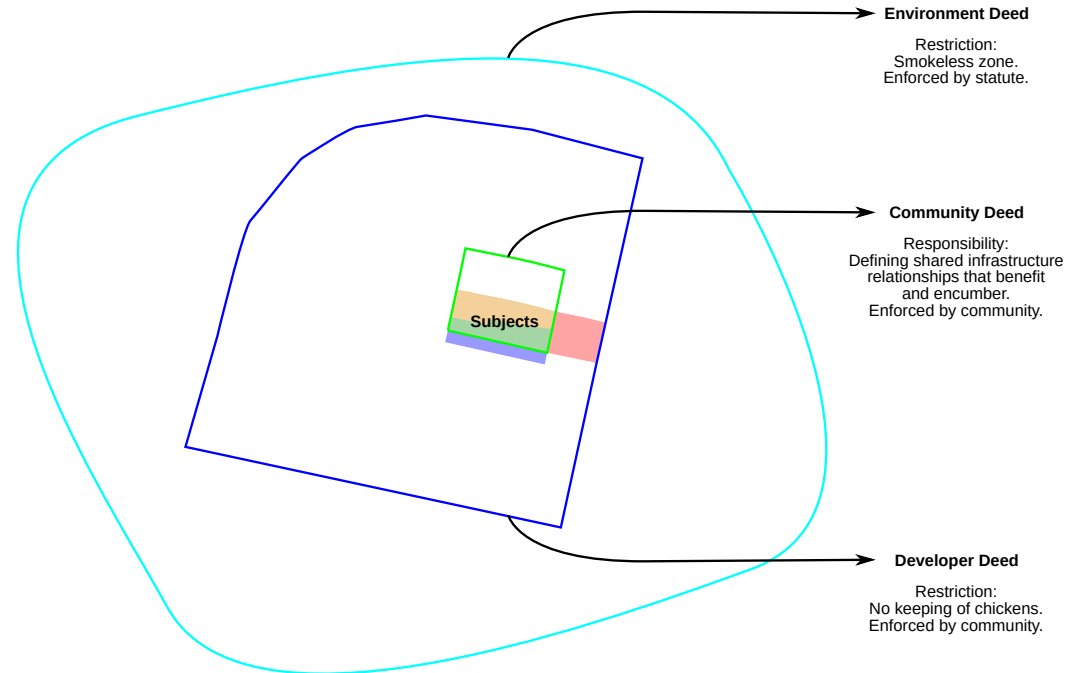
The duty owed by the land owner can be either :

- passive (negative) duties
 - allowing third parties to do things on the owned land (effectively shared use of the land for specific activities)
- active (positive) duties
 - enforcing the owner to do things to or on behalf of the owned land (maintenance, pay fees etc.)

Modelling duality: Party and Spatial indexing



Deriving Encumbrances (a spatially enabled society)



Legal theories, rights and LADM

LADM allows a right holder relationship to be clearly articulated,

- it is less clear about how the right holder-duty owing relationship duality is expressed.
- framing *restrictions* and *responsibilities* in terms of their impact on a land owner does not help.

However, LADM is a general model and should be applicable to the widest range of circumstances.

The LADM *restriction* and *responsibility* concepts will remain important modelling tools for informal, social tenure, models and for those jurisdictions which can not frame their data in the idealised manner represented in this paper.

Wrap up

Smith (2012) argues that, in general, legal property theories are weak.

- This is something the legal community need to improve on.

This paper attempts to provide a background architecture to the representation of *real rights in land*:

- a *bundle of sticks* model for representing *in personam* rights,
- a *law of things* model for representing *in rem* rights.

It should be noted that nothing in this paper requires a change to the LADM architecture.

Such modelling supports automated approaches.

Wrap up

Smith (2012) argues that, in general, legal property theories are weak.

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It should be noted that nothing in this paper requires a change to the LADM architecture.

Such modelling supports automated approaches.

This approach is tentative and would benefit from further formalisation.

It is hoped that it supports new ways to conceptualise and model rights relationships based on core LADM primitives.