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Foreword

This report is the result of a Short Term Scientific Mission (STSM), sponsored by COST, action G9, Modelling Real Property Transactions. This STMS was carried out at Delft University of Technology, the Netherlands. The host for the mission was Dr. Jaap Zevenbergen. This STSM has reference number COST-STSM-G9-1613.

The purpose of the STSM has been to analyse Dutch rights and restrictions regulating the ownership of real property. The rights and restrictions have been analysed on the basis of a theoretical model of real property rights and restrictions produced by the author (Paasch 2005). An extract of model was presented at the COST G9 / FIG workshop in Bamberg 2004 (Paasch 2004). A short description of the theoretical model is placed in appendix 1 in this report.

A better understanding of the complexity of real property rights and restrictions and the need for a (standardized) model describing real property rights and restrictions are important for achieving more cost-effective real property transactions and gaining a better understanding of the ontology of real property.

The research methods have been research in the Dutch Civil code and other acts, literature research in English and German literature describing the Dutch legal system and translations of the Civil Code, supplemented with interviews with Dr. Jaap Zevenbergen and Dr. Hendrik Ploeger, Delft University of technology. I also had meetings with Professor Peter van Oosterom discussing the future development of the Cadastral Core Model and with Vladimir Stromcek discussing his research project modelling the cadastral domain.

The STSM is part of my Ph.D. research focussing on standardization of real property rights. My research incorporates a case-study part containing analysing rights and restrictions regulating real property ownership in four selected countries within the European Union; Sweden, the Netherlands, Ireland and Germany. The countries are chosen due to their different legal and cadastral traditions and backgrounds. The conclusions of the STSM will be incorporated and analysed further in my Ph.D. thesis.

I would like to thank my host Dr. Jaap Zevebergen, Dr. Hendrik Ploeger, Professor Peter van Oosterom, Vladimir Stromcek and their colleagues for their generous help and support, making my stay in Delft an enjoyable and learning experience.

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Brief history of the Dutch legal s ystem.

The Dutch legal system has its most important roots in the Napoleonic civil code and Roman-Dutch law. The Napoleonic civil code was introduced in the Netherlands in the early 19th century, when the country was incorporated into the French Empire by Napoleon Bonaparte. An attempt to replace the Napoleonic civil code with a national code was made after Napoleons defeat at Waterloo in 1814. However, due to internal discussions, several drafts were made but not introduced into the new established Dutch kingdom, which also incorporated present day Belgium, After the independence from Belgium (in 1830), a new and successful attempt was made to create a Dutch Civil Code. This Code, for a large part based on the text of the Napoleonic civil code, was finally enacted in 1838 [1].

After World War II Prof. Meijers got the task to draft a new Dutch Civil Code (*Nieuw Nederlands Burgerlijk Wetboek Het Vermogensrecht*)[2]. The main part, dealing with property rights, was finally enacted in 1992. The legislation in the new Civil Code is divided into separate chapters (Books), depending on the character of the legislation. After the introduction of Book 1 (personal- and family right) in 1970 and book 2 (legal persons) in 1976 and Book 8 (Transport right) in 1991 in the Civil Code, the common part of property right complex was introduced in Book 3 (the common part), Book 5 (rights related to ownership) and Book 6 (contracts), making up the core of the Civil Code[3]. Book 3 (Asset law) contain the "common" part of the legislation, Book 5 contain most of the rights related to real property ownership and Book 6 and 7 contain contract right. However, even is the Civil Code is to be regarded as the cornerstone of Dutch legislation; there are other acts of importance for regulating ownership, e.g. the Planning act.

The Netherlands pursues a deeds registration system with compulsory involvement of the Latin notary profession. This means that the parties in the Dutch real property market deal with the notary only. These professionals take care of the whole transfer procedure of real property. A deed is needed for registration of real property ownership or another real property right.

Ownership

An important feature of the Dutch legislation is how the term ownership is used. Ownership is the most comprehensive right a person can have in a thing (*zaak*). The Dutch legislation differs between movable (*roerend*) property and immovable (*onroerend*) property[4]. Movable and immovable property is well defined in Dutch legislation, based on the definition of immovable property; Property that is not immovable is movable.

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[1] See Nieper and Ploeger (1999); Ploeger, Velten and Zevenbergen (2005); Slangen and Wiggers (1998); Zevenbergen and Jong (2002) and Witt and Tomlow (2002) for introductions to the historical background of the New Dutch Civil Code and descriptions of Dutch rights.

[2] Personal communication with Dr. Hendrik Ploeger.

[3] The other books of the Civil Code are not commented in this study, since they are not vital for the proper understanding of Dutch real property rights and restrictions. See Nieper and Ploeger (1999) for a systematic introduction to the New Dutch Civil Code. I have used a translated English version of the Civil Code published by Haanappel and Mackaay (1990).

[4] The legislation describing ownership is the New Dutch Civil Code, Book 5 article 1 to 3 (describing ownership in general) and article 20 to 36, (describing ownership of immoveable things).

Land is regarded as immovable property, and, to the extent not otherwise provided by law, ownership of land comprises:

- the surface
- the layers of soil under the surface
- subsoil water which has surfaced by means of a spring, well or pump
- water which is on the land and not in direct connection with water on the land of another person
- buildings and works durably united with the land, either directly or through incorporation with other building works, to the extent that they are not component parts of an immovable thing of another person
- plants united with the land

The legislation differs between not registered goods and registered goods. Registered goods (*registergoederen*) are goods for which inscription in the relevant public registers is necessary for their transfer and creation. Registered goods are immovable properties and limited rights in them and booked ships and aircrafts and limited rights in them.

The rights and restrictions described in the following chapter are the core instruments to regulate ownership and land use in the Netherlands. They can be classified according to definitions produced in a theoretical model (Paasch 2005). However, Dutch law operates with a term called ”rights in rem”, which is a term –with origin in Roman law- for different rights regulating the ownership of a real property. The rights have the main characteristic that they follow the property when it is being sold.

Dutch rights and restrictions

A limited right (*beperkt recht*) is a right that is derived from a more encompassing right, which is then burdened by the limited right[5]. With the exception of ownership, all rights listed in the Book 5 Civil Code and usufruct and mortgage fall under this definition (Zevenbergen 2003).

The most important provisions relating to real property law and real property rights and restrictions are found in Book 3, 5 and 6 of the Dutch Civil Code. Other statutes containing rights and restrictions studied in this scientific mission are the pre-emption law (*Voorkeursrecht*), the hire-purchase[6] law (*Huurkoop*), the expropriation law (*Onteigeningswet*) planning legislations, e.g. the Spacial planning act (*Wet op de Ruimtelijke Ordening*).

Vruchtgebruik (usufruct)

Usufruct is a right to use property belonging to another and to enjoy the fruits thereof. Usufruct can be established in favour of one, two or more persons[7]. There are two types of usufruct; “normal” usufruct and “recht van gebruik en bewoning”.

[5] New Dutch Civil Code, Book 3, article 8.
[6] Authors translation.
[7] The New Dutch Civil Code, Book 3, article 201 to 226.

An individual can obtain a usufruct right for the span of his or her lifetime. The right is transferable and can be sold, but expires when the (first) right holder dies. A company can obtain a usufruct for the maximum span of 30 years.

A "normal" usufruct right can be sold or mortgaged. The right can be sold again and again, but when the first seller (which the right is granted to) dies the right exceeds to exist. The right can be granted to private individuals or to companies.

Recht van gebruik en bewoning allows the use of "things" (e.g. land) and the right to use a dwelling. The right is strictly personal, so it cannot be sold or mortgaged. They are considered to be one and the same type of usufruct[8].

Vruchtgebruik is a right in rem, and is classified as a real property right according to Dutch tradition, but should be classified as a personal right according to Paasch (2005).

Hypoteek (Mortgages)

The right of pledge and right of hypothec are instruments for security in property[9]. In Dutch law security can be given in unregistered property as a pledge (*pand*) and in registered property (so immovable things, registered ships and airplanes, as well limited rights in registerd property (e.g. a building lease on land) as a mortgage (*hypotheek*).

The right of *hypotheek* is a right in rem, and can be classified as Lien both according to Dutch tradition and to Paasch (2005).

Mandeligheid (common ownership)

Mandeligheid[10] means common ownership of a parcel of land, attached to the ownership of neighbouring properties. *Mandeligheid* is not the same as joint ownership, where two or more persons own a property together. The institute of common ownership derives from older legislation regulating the use of common feature, e.g. a wall between two properties or a common drain or toilets. A broad concept of *mandeligheid* was introduced in the Dutch Civil Law in 1992, making it possible that parties create this kind of common ownership by the registration of a notarial deed, expressing the destination of a joint property to be *mandelig*.

Mandeligheid is a right in rem, and is treated as a real property right according to Dutch tradition. It can classified as a Common right according to Paasch (2005).

Erfdienstbaarheid (servitude)

Erfdienstbaarheid[11] is a servitude and is a charge imposed upon an immovable thing, the servient land, in favour of another immovable thing, the dominant land. It is a right in rem. It gives the owner of a real property the right to use (part of) another real property.

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[8] Personal communication with Dr. Hendrik Ploeger. See also New Dutch Civil Code, Book 3, article 226.
[9] The New Dutch Civil Code, Book 3, article 227 to 259.
[10] The New Dutch Civil Code, Book, 5 article 60 to 69.
[11] The New Dutch Civil Code, Book 5, article 70 to 84.

Erfdienstbaarheid is a right in rem, and is classified as a real property right according to Dutch tradition and Paasch (2005).

Erfpacht (building lease, emphyteusis)

There are two forms of building lease, e*rfpacht* and *opstal* (see below), in the Netherlands, giving the holder the right to use the land of the owner for the construction of buildings. *Erfpacht*[12] is a leasehold executable on all properties. The right was originally indented to further the development wasteland into agricultural land, but after 1900 it gained in popularity for the use of building houses and industrial building. However, the owner of the land is also the owner of all the buildings etc. on the land constructed by the lessee (*erfpachter*), the right of the latter on both land and constructions is considered to be very strong, almost equal to ownership itself. The Dutch municipalities have used e*rfpacht* quite intensively, but it only in limited use nowadays, due to political reasons[13]. *Erfpacht* can be established for a limited time or permanently.

Erfpacht is a right in rem, and is classified as a real property right according to Dutch tradition, but should be classified as a personal right according to Paasch (2005).

Opstal (building lease: superficies)

Opstal[14] is the right to own or to acquire buildings, works or plantations in, on or above an immovable thing belonging to another. The right to own a building on land may be granted as an independent right in rem, but is usually granted in conjunction with the right to use the land under a tenancy agreement. As an independent right it is established when the use rights of the lessee (*opstaller)* regarding the land itself are limited. Examples are pipelines and (underground) cables, antennas and electricity substations.

The main use of *opstal* is together with right of tenancy (*pacht*) of agricultural land to own the buildings, pipes or cables on the land you rent (in opposite to *erfpach*t, where you lease[15] the buildings, see above). The *opstal* right allows the owner of the property to charge a rent from the rightholder, payable due to the conditions mentioned in the contract. *Opstal* can be granted for a fixed or indefinite period and are transferable, unless the deed requires the prior approval of the property owner.

Opstal is a right in rem, and is classified as a real property right according to Dutch tradition, but should be classified as a personal right according to Paasch (2005).

Appartmentsrecht (apartment ownership, condominiums)

All apartment right holders are considered as co-owners of the whole complex: land, building, common areas and all apartment units[16]. Each right holder has an exclusive right to use one

[12] The New Dutch Civil Code, Book 5 article 85 to 100.
[13] Personal communication with Dr. Jaap Zevenbergen.
[14] The New Dutch Civil Code, Book 5 article 101 to 105.
[15] It might be discussed if "lease" is the right word to use. However, it is clear that the *erfpachter* is not the owner of the building. In some cases –before 1992- the holder of the *erfpacht* also got explicitly an *opstal* right, because of the compensation when the right ends. In this case he is *erfpachter* of the land and (as *opstaller*) owner of the building on it. Personal discussion with Dr. Jaap Zevenbergen and Dr. Hendrik Ploeger.
[16] The New Dutch Civil Code, Book 5, article 106 to 147.

(or more) apartment units. The association of owners (*vereniging van eigenaren*) does not own the common parts of the complex, but is responsible for the daily management. Houser rules might be applied to the complex, e.g. regulations holding pets.

Appartmentrecht is know in the Netherlands since 1951. Before 1951 experiments with other forms of more contractual co-ownership has been in use and some of those old apartment ownership substitutes can still be found[17]. Those substitutes don't give a right in rem. *Appartmentrecht* is a right in rem, and is classified as a real property right according to Dutch tradition, but should be classified as a personal right according to Paasch (2005).

Kwalitatieve verplichting

Kwalitatieve verplichting is a contract between the owner of a real property and another person, in which the owner takes on him an obligation not to do or to tolerate[18]. The right is a strong encumbrance to ownership, since the owner of the servient real property is forced to tolerate certain conditions. The right does not have a specific name, but is called *kwalitatief verplichting* in Ploeger, et. al. (2005). However, in the way of establishment (by notarial deed and registration) and how it is used resembles the limited right of servitude. It is not a real right, but a contract and is therefore regulated by the general principles of contracts, in Book 6 of the Dutch civil code.

It could from a theoretical point of view (Paasch 2005) be argued that *kwalitatief verplichting* should be classified as a personal right (i.e. a "strengthened" useright). However, the right can be considered a right in rem (in its practical consequence), even if it is not placed in Book 5 in the Civil Code. In Dutch literature, *kwalitatief verplichting* is sometimes referred to as servitude without a dominant property (Ploeger, et.al. 2005).

The right can be compared in use to *Restrictive covenant* in the common law system. In other countries the concept of a "personal servitude" is also known.

It is difficult to classify *kwalitatief verplichting* since it could be argued it could be a real property right or a personal right. However, judging it's practical consequences the right can be considered as a right in rem[19] and classified as a real property right. It should be classified as a personal right according to Paasch (2005).

Huurkoop (Hire-purchase)

Huurkoop right is a right where you pay mortgages for the property you lease, but the ownership of the real property is transferred to you when the payment is completed. The right is not part of the New Dutch Civil Code, but dealt with in a separate act[20]. The right is established by contract and a deed is issued and registered for security. A deed is needed when the right is transferred.

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[17] The substitutes are where you have apartment owners associations. The structure differs from the new ownership construction and it is similar to a registered company. Personal communication with Dr. Hendrik Ploeger.
[18] The New Dutch Civil Code, Book 6, article 252.
[19] Personal communication with Dr. Hendrik Ploeger.
[20] The Dutch name is: Wet van 21 juni 1973, houdende tijdelike regeling betreffende huurkoop van onroerend goed.

It is a personal right according to Dutch tradition[21], but according to Paasch (2005) it should rather be classified as a Lien, since it is a financial agreement between the present owner and the future owner of the property and thus a financial agreement.

Voorkeursrecht (pre-emption right)

Pre-emption rights can be executed due to different laws in the Dutch legal system: through municipal pre-emption rights and through private pre-emption agreements based on contracts. A pre-emption right can be classified as personal right and is an encumbrance to ownership.

Wet Voorkeursrecht Gemeeenten (municipal pre-emption right)
Municipal pre-emption rights can be executed by a municipality on real property for sale within their boundaries. The right gives the municipality the right to buy a real property regardless of any other potential buyers. The right can be classified as a personal right, since a municipality is to be regarded as a legal person.

Another pre-emption right is the right for agricultural tenants (*pacthers*) to be offered to purchase when the land owner wants to sell the land the tenant is using. The pre-emption right is one of several legal provisions meant to secure the financial future of the tenant[22].

Personal pre-emption right
The use of pre-emption rights is actually not restricted to the municipality, but can also be established by contract between two persons, regulated by the content of Book 7 of the Civil Code. A personal pre-emption right only provides a personal right and cannot, in principle, be registered in the public registers[23]. Some contracts can be registered, especially in relation to the municipal pre-emption legislation[24]. However, a detailed discussion of registration is beyond the scope of this report.

Pre-emption rights are classified as personal rights according to Dutch tradition and Paasch (2005).

Onteigeningswet (expropriation)

The basis can be found in article 14 of the Dutch Constitution, stating that expropriation may take place only in the public interest and on prior assurance of full compensation, in accordance with regulations laid down by or pursuant to Act of Parliament. The latter act is the *Onteigeningswet* (Expropriation Act).

Expropriation is used to force land owners to sell the land to the state or municipality in order to secure the development of society.

Historical rights

The Netherlands have a legal legacy of a number of real property rights dating from before the introduction of the first Civil Code. They date from the pre-Napoleonic era, but are still legally binding rights in the Netherlands today. These rights are collectively named historical

[21] Personal communication with Dr. Hendrik Ploeger.
[22] Personal communication with Dr. Jaap Zevenbergen.
[23] New Dutch Civil Code, Book 3, article 17.
[24] Personal communication with Dr. Jaap Zevenbergen and Dr. Hendrik Ploeger.

rights. These rights cannot be granted anymore, but, however, they exist and can be transferred.

Some of the historical rights are almost as strong as ownership rights and similar to *Erfpacht*. The historical rights are mostly regional and not applied on the hole country. Some of the rights are based on rather peculiar terms of payment which might be based on what happens in you family, e.g. a fee is due when you are getting married or having children. The historical rights are rights in rem and can, according to Dutch tradition and Paasch (2005), be classified as real property rights.

I will not give a detailed description of all historical rights, as this is not the purpose of this study, but only give some representative examples:

Recht van eendekooi, (the right to have a duck trap on another property)
The right grants the owner of a property to have a duck trap on another property. There are lots of these rights throughout the country.

Pootrecht (planting right)
Pootrecht is the right to plant trees along the roads and to cut them down later. The right is granted to the owner of a property.

Het recht van de 13 penning (Right of the 13th penny)
It is an obligation where you have to pay a transfer fee to the owner of the land where your property is subdivided from. The right is a relic from the historic feudal system. However, it is still active in a small, well defined, part of the Netherlands.

Recht van windvang / Molenrecht (Right of wind catchments / Right for windmills)
The right is the right of the owner of the windmill to keep the land around it clear. In practice, the right functions like a servitude.

Planning restrictions

In the general interest, the Dutch government has imposed legal restrictions on land, mainly with regard to its use. These limitations are expressed mainly through the spatial planning act, *Wet op de Ruimtelijke Ordening,* in addition with other laws, e.g. *Monumentenwet*, the Historical Monuments act. They are used to regulate the use and appearance of land and buildings. Planning restrictions can be quite general or specific, e.g. regulating the construction of buildings in urban areas. Many restrictions are not registered yet, but are planned to be registered[25].

Rural and urban planning in the Netherlands is regulated through structure plans and zoning plans. Structure plans are used for large area planning and zoning plans are used for local planning. The use of zoning plans are mandatory for rural areas, but the use is only voluntary for urban areas, but they exist almost everywhere[26]. Planning restrictions are mostly encumbering ownership, but in a certain respect can also be benefiting, e.g. if you are allowed to build something on your property, but your neighbours are not allowed to do it.

[25] See e.g. Zevenbergen and Jong (2002).
[26] Personal communication with Dr. Hendrik Ploeger.

Specific planning restrictions may in also be classified as latent rights, as they are not executed yet.

Conclusions

This scientific mission has been focussed on the classification of Dutch property rights and restrictions regulating ownership. A classification has been made based on a theoretical model classifying property rights and restrictions based on their relation to real property ownership.

Many rights are, from a Dutch perspective, *rights in rem* and "works against the whole world/everybody" and are therefore classified as real rights, and not personal rights, which are a contract between two parties[27]. These real property rights are considered as *rights in rem* and "follow the land", as they can be transferred with the property in a real property transaction.

The problem of classification arises because ownership is a difficult subject and the definition of ownership is depending of the legislation in each country. The Netherlands does have rights which are so close to ownership that they are considered almost equal to ownership and therefore treated in the same way. This situation is not covered by Paasch, which focus on who is executing the right and not how "strong" it is. The result is that several rights which should be classified as personal rights by Paasch (2005), are classified as real property rights in the Netherlands.

The table below shows the classification of the Dutch rights and restrictions. Where the Dutch tradition differs from Paasch, it is marked with a (D) for Dutch tradition and (P) for the classification according to Paasch. The classification names are taken from Paasch (2005).

[27] See Kleyn and Boraine (1993, p. 43-61). for an introduction to the classical theories about the legal nature of a real right.

Classification (derived from Paasch 2005): Name of right:	**Common right**	**Real property right**	**Personal right**	**Latent right**	**Lien**	**Public restrict-tion**	**Public advantage**
Vruchtgebruik		**E (D)**	**E (P)**				
Hypoteek					**E**		
Mandeligheid	**A**						
Erfdienstbaarheid		**A / E (D)**					
Erfpacht		**E (D)**	**E (P)**				
Opstal		**E (D)**	**E (P)**				
Appartmentsrecht		**A (D)**	**A (P)**				
Kwalitatief verplichting		**E (D)**	**E (P)**				
Huurkoop			**E (D)**		**E (P)**		
Pre-emption right				**E**			
Expropriation				**E**			
Historical rights		**A/E**					
Planning restrictions				**(E) (D)**		**E**	**A**

***Table 1*. An overview of the Dutch real property rights and restrictions regulating ownership and their classification according to Dutch definitions and (Paasch 2005)**

Legend:
A = appurtenance to ownership **(D)= according to the Dutch definition**
E = encumbrance to ownership **(P) = according to the definition produced by Paasch (2005).**

The STSM has shown that there are great similarities with the Dutch rights and restrictions and the theoretical model. Even if the rights as such can be classified into certain categories, it is obvious that the definitions stated by Paasch (2005) are sometimes contradictory to the traditional Dutch interpretations, especially concerning the group that is called personal rights by Paasch.

The purpose of this STSM has been to take a closer look at Dutch rights regulating ownership of real property and research if the rights can be classified according to a theoretical model. The result is that they can be classified according to the theoretical model, but that there is a conflict with the traditional Dutch classification, mostly based on the “right in rem” legacy from the Roman law heritage in the Netherlands.

However, the STSM shows that there is a certain structure in real property rights and restrictions and that the structure can be described according to a mode, even if the selection of a specific class in which a right is to be placed might depend on theory and traditions.

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Legal statutes

Wet Voorkeursrecht Gemeeenten, Municipal pre-emption Law

Monumentenwet, Historical Monuments act

Nieuwe Burgerlijk Wetboek 1992 (New Dutch Civil Code). Translated in Haanappel and Mackaay (1990).

Onteigeningswet (expropriation), article 14 in the Dutch constitution

Wet op de Ruimtelijke Ordening, spatial planning act

Wet van 21 juni 1973, houdende tijdelike regeling betreffende huurkoop van onroerend goed. Hire-purchase legislation.

Appendix 1

This appendix contains a very short introduction to the theoretical model published in Paasch (2005). The model is a theoretical classification of rights and restrictions regulating the ownership of real property.

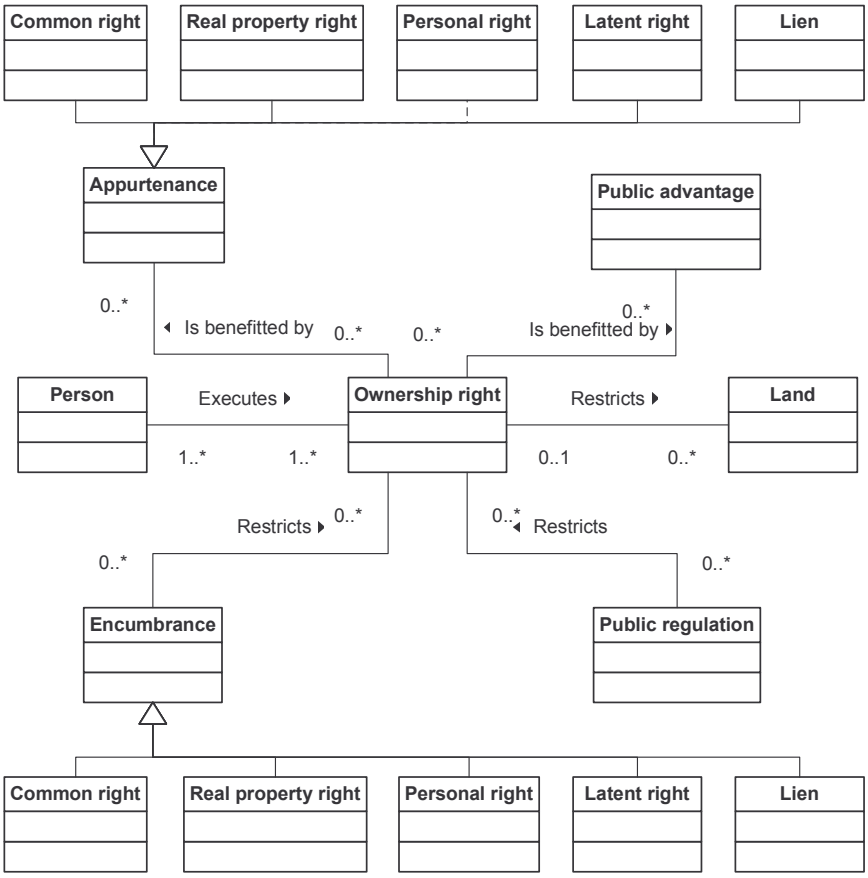

Figure A1 The theoretical approach classifying real property rights and restrictions

The major classes are *Appurtenance* and *Encumbrance,* i.e. what is beneficial (appurtenance) to or burden (encumbrance) a real property, as well as *Public advantage* and *Public restriction*. The appurtenance and encumbrance classes contains 5 sub-classes; *Common right, Real Property Right, Personal Right, Latent Right* and *Lien:*

Common right is an ownership right which is executed a common right in land by two or more real properties. The right belongs to the properties, not the owners. When the common property is sold, the common right follows the property. The class does not describe the situation where several people own a piece of land together.

Real property right is a right that can benefit or restrict an ownership right. It is a real property that is related to another real property through this right, e.g. an easement. If the property is sold the right follows the property, not the previous owner.

Personal right" is a right executed by a person, company or organisation for rent or lease. A personal right can be very strong and e.g. follow the land as an encumbrance when the property is sold.

Latent right is a right or restriction granted but not yet executed, e.g. where the government has given permission for expropriation, or a pre-emption right for a neighbour's property.

Lien is equal to security for payment. Lien is an economical/financial right, which can be executed on real property and thereby regulates the ownership, e.g. a mortgage. Public advantage and Public restriction are granted by governmental authorities, e.g. a zoning plan.

Public advantage and *Public restriction* are officially imposed regulations, e.g. municipal zoning plans, regulating the use of a property. Most regulations are an encumbrance to ownership, but some regulations might be an appurtenance to ownership, allowing you to do something on your property which others might not do on their property. See Paasch (2005) for a detailed description of the model.