

General Property Law

Laws-2041

Introduction to Property Law

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Why talk about property?

- Why should we be concerned about property? Why should we talk/be obsessed about it? The obsession with property is clearly observable in a number of areas of societal life:
 - Property a subject matter of study in different disciplines. We can mention, for example: economics; political science; sociology; anthropology; psychology; law, etc.
 - Most of the activities of the State relate to property:
 - ✓ look at the institutions (ministries, agencies, etc.) – many of them have to do with property.
 - ✓ Look also at the various laws being enacted from time to time – most of them have to do with property.
 - ✓ In fact, one of the fundamental functions of government is said to be protecting property interests of individuals (John Locke, Adam Smith).
 - Customary norms and institutions for their most part deal with property: who should own/have access to property? What types of rights for the community members on different classes of property – for the community leader(s), for community as a whole, for individuals? When there is infringement of such rules – what is the remedy? Who should adjudicate?
 - Look also at the international order:
 - ✓ The institutions: WB, IMF, WIPO, WTO, regional and sub-regional economic organizations
 - ✓ The international legal regime: international water law, international trade law, international air and space law, international intellectual property law.

Why talk about property? Ctd.

➤ So, why this obsession with property?

- ☞ Because, property is essential for human beings, individually as well as a society.
- ☞ Can we think human life without property? No, human life without property is unthinkable!
- ☞ Even the most anti-materialist person or those who do not fully control their mind do not live life without property – look at monks; kids; schizophrenic persons; the senile, etc. are somehow in possession of something.
 - property is vital for survival as a living being;
 - some objects have sentimental value;
 - some objects of property determine social status;
 - Property endows power and privilege

Why talk about property? Ctd.

- Because of these importance attached to property by man, human life as an individual or society is very much related to/affected by property.
 - Look at your individual life – what is your aspiration?
 - Look at the buzz in town – the activities in trade, services, manufacturing, production, etc.
 - As a political group – the allocation of resources is a thorny issue.
 - Look at all the activities of government – promoting investment, property registration, etc.
 - Internationally – the idea of property has a central role in world history. Note the epic moments in human history:-
 1. The transformation of human way of life: hunter-gatherer → Developing tools → controlling fields for hunting/gathering → agriculture and sedentary life → surplus production → trade in goods

Why talk about property? Ctd.

2. Ideologies of property ownership/control & administration. By ideology we mean perspectives or theoretical positions about who should control what property? What property rights for individuals? It is about the most productive and beneficial (for society) of property resources.

- the slave owning system
- the feudal system
- the capitalist system
- socialism/communism

3. Historical events triggered by property concerns

- Explorers - Christopher Columbus & Vasco Degema
- colonial expansion of Europeans
- Revolutions (socialist)
- The Cold War
- Industrial Revolution

The *Raison d'être* for 'Property Law'

- So, why do we (society) need to have 'Property Law'? What is the rationale for having body of law called 'property law'?
 - Because, given the centrality of property for man/society, life without a set of norms/rules governing matters of property would be difficult.
- 1. A law governing relations among humans concerning property is important for the **maintenance of law & order**.
 - In the absence of law governing relations among humans in respect of property anarchy and chaos will prevail. Imagine a world where nobody can identify who controls what object and the rules that govern property vary from person to person!
 - Property law system helps to avoid this kind of situation by providing rules concerning the manner of acquisition, enjoyment, transfer and extinction of property rights & setting up the institutions that enforce the rules and adjudicate when disputes/allegations of rights violation arise.

The *Raison d'être* for 'Property Law' ...*ctd.*

2. Property law lays the foundations for the creation and reaction of wealth – which means improvement/advancement in quality of human life. Property law helps to achieve this by:

- providing security of rights – certainty about who has what rights over a given object will ensure security of transactions – the free flow of goods and ideas, the foundation for market-based economy.
- Security of rights encourages the taking of risk by entrepreneurs which is essential for wealth creation.
- Security in property rights encourages innovation:- making constant improvements on the methods and means of production with a view to increase productivity, hence wealth creation. Ex. Trademark law
- Security in property spurs inventions – if it were not for the protection of property interest of inventors in their inventions the world would not have been in the technological and entertainment advancement that it is in now.
Eg. Patent law – for all the inventions that improved human life;
Copyright law – for the amazing productions of the entertainment industry

The *Raison d'être* for 'Property Law' ...ctd.

N.B.:-

First, It should be noted that there is no one set of prescriptions of property law rules;

- There are variations from one country to another as to the exact nature/content of the rules.
- There are different ideologies/approaches to setting the precise content of the rules. Different approaches as to the best way of administering property resources.

Second, the setting of the rules (rules considered the best) alone is not enough to realize the benefits of having property law; there has to be effective enforcement.

What is 'Property'?

➤ So, what is property, anyway?

❖ In common parlance (everyday conversation), the term is used to refer to material things/objects:

- Possession/control of thing;
- Things/objects one has control over;
- Real estate;
- Ownership;
- Wealth

❖ In legal term, the term is used in different senses:

❑ Property as 'wealth' – anything with economic value. BUT, property is not the same thing as wealth; there is property without economic value and economic value without property.

❑ Property as the relationship between a person and a thing. But this is not, true; Because,

- 1) Material things are not the only objects of property; non-material/non-physical things (such as shares, patent, copyright, etc.) can be objects of property.
- 2) This definition depicts property as a relationship between a person and a thing, which is not true. Property is not a relationship between a person and a thing

What is 'Property'? *ctd.*

- Property as the collection of all legal rights of a person, including his/her human rights/rights of personality and proprietary rights. Salmond, Locke, Hobbes, Madison.
 - they seem to equate property with every rights a person has, including his fundamental rights.
 - This is too broad and doesn't help us understand property. Understanding this, Salmond has refined his definition/theory of what 'property' is as the totality of proprietary rights of a person.

What is 'Property'? *ctd.*

- ❑ 'Property' as *in rem* (real) rights:- rights which can be asserted against everyone in the world in respect of a determinate thing, be it corporeal (tangible) or incorporeal (intangible).
 - So, property is proprietary rights in rem (over a thing, be it corporeal or incorporeal); proprietary rights in personam (interests arising from contractual obligations or from extra-contractual relations) are not property;
 - Proprietary *rights in personam* are in personam rights arising from in personam relationships; not from *real relationship* (i.e., relationship of a person with all persons in the world as regards the exercise of a right in respect of a thing).

The conception of 'Property' & Terminology in the Civil Code

➤ The conception of 'Property' under the Civil Code.

- A cursory reading of the Civil Code reveals that property is conceived by the Civil Code as *in rem right* (proprietary right in/over corporeal/incorporeal goods that are valid against all persons in the world):
 - Title VIII, Book III of the Code uses the term '*rights in rem*'
 - Article 1204 defines ownership 'as the widest *right* that may be had *over a thing*'.
- On terminology in the Civil Code: 'property', 'good' & 'thing' are used interchangeably.

Attributes of *in rem* rights (property)

1. Should be obtained through legitimate means, i.e., means recognized by law.

Trying to acquire property through illegitimate ways prohibited by law is not protected by law:
E.g.: theft, violence, fraud, and other improper means such as corruption and embezzlement.

Attributes of *in rem* rights (property) ctd.

2. Types of *in rem* rights/property limited:- the menu of rights called property/*in rem* rights are close-ended, i.e., the doctrine of *numerus clausus*.

- ✓ Ownership
- ✓ Usufruct
- ✓ Use
- ✓ Servitude
- ✓ Mortgage
- ✓ Pledge
- ✓ Antichresis
- ✓ Right of recovery
- ✓ Right of pre-emption
- ✓ Promise of sale
- ✓ In connection with private use of land, *possessory/leasehold right* (usufruct?)

Attributes of *in rem* rights (property) ctd.

2. In rem rights confer on the holder of the right boundless powers ranging from using(not using) $\longleftrightarrow$ abandoning /destroying it.

- Of course there is a qualification to this assertion
 - ✓ The powers and privileges that come with *in rem rights*/a property depend on the type of property right (eg. ownership, usufruct, use, etc.).
 - ✓ Further, the *in rem rights* that are available are not absolute; exceptions/limitations are provided in the exercise of the rights, particularly when the object/resource is of common interest for society.

3. Rights exercised against the whole world, including the state

Attributes of *in rem* rights (property) ctd.

4. **The kind of rights and the objects over which the rights may be established vary according to the property rules of a particular jurisdiction.**
 - ✓ The type of rights & the objects/interests/things susceptible for property rights creation vary greatly

Attributes of *in rem* rights (property) ctd.

5. The holder of property (*in rem* rights) can rely on the state to enforce his right.

- ✓ The exercise of the right to the exclusion of all other persons based on state legal machinery; not personal might or positive morality.
- ✓ Remedies available: possessory action, petitory action, self-help, criminal sanction, & extra contractual and unjust enrichment law.

6. *In rem* rights are absolute. In rem rights are not absolute

Property & Patrimony: Relationship & Distinction

- In jurisprudence rights of persons are classified into two:
 - ✓ Patrimonial rights &
 - ✓ Extra-patrimonial rights
- ❖ **Extra-patrimonial rights:** Rights which are not assessable in terms of money;
 - Such rights are:
 - extra-commercium,
 - have no market value/no monetary value,
 - inalienable/personal/perpetual (last for the life-time of the right holder),
 - non-transferable,
 - imprescriptible,
 - unnoticeable (no need to signpost (eg. through registration) or prove being the holder of the right)

Property & Patrimony: Relationship & Distinction ... *ctd.*

➤ These rights include:

- ✓ Rights of personality/fundamental rights and freedoms meant to guarantee the dignity and worth of human beings
- ✓ Right to exercise power over/for others – parental/guardianship powers; persons representing legally incorporated entities.
- ✓ Moral rights of authors

Property & Patrimony: Relationship & Distinction ... *ctd.*

❖ **Patrimonial rights:** rights of a person which are assessable in terms of money

➤ Such rights:-

- are assessable in terms of money,
- have market value,
- are commercium (tradeable),
- prescriptible,
- alienable,
- outlast the life of the right holder/transferable to the next generation,
- noticeable (particularly with regard to property rights)

➤ Patrimonial rights are further classified into: **real rights | *in rem* rights | *iura in rem***

&

personal rights | *in personam* rights | *iura in personam*

➤ So, patrimony refers to the totality/universality of a person's rights and obligations assessable in terms of money.

Property & Patrimony: Relationship & Distinction ... *ctd.*

- So, property is an element/part of the patrimony of a person
- Comparisons:
 - ✓ Patrimony is indivisible; Property is divisible
 - ✓ Patrimony is inalienable (it is transferable only *mortis causa*, not *inter vivos*); Property is alienable

In rem rights vs. *In personam* rights: Similarities & Distinctions

real rights | *iura in rem*
Property

personal rights | *iura in personam*
Creditorship

❖ Similarity

- ✓ Both of them are rights of **proprietary** in nature; they form the **patrimony** of a person

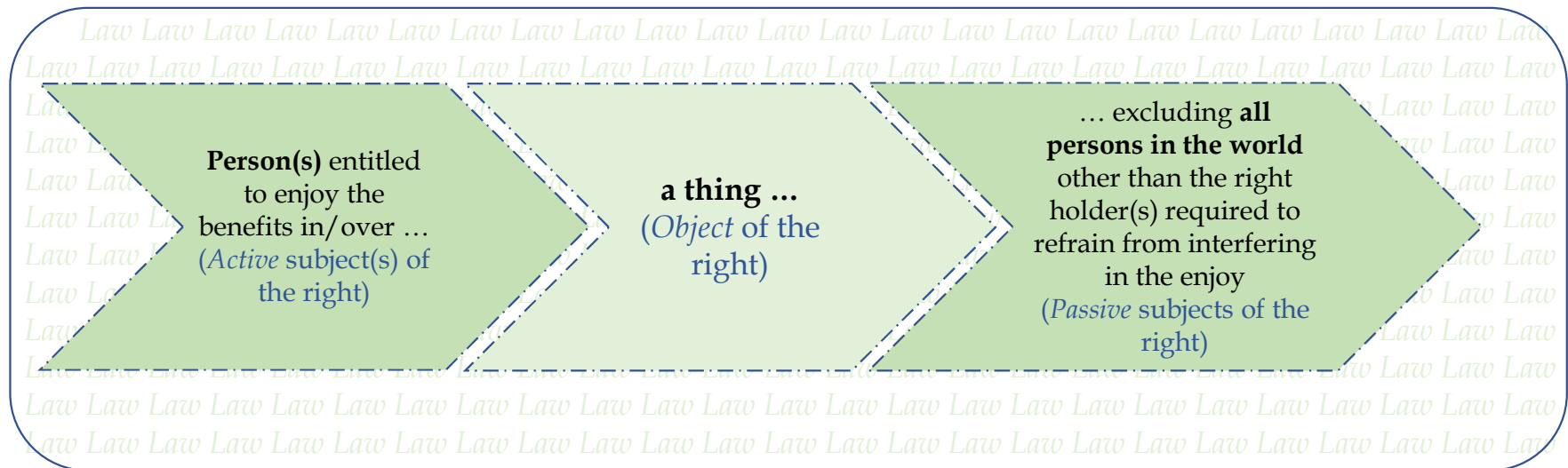
❖ Differences:

1. Sources of the rights: *where do they come from?*

- ***In rem* rights (property)** arise from *in rem* (real) relation: that is, the direct attribution of a thing to a person /the legally protected enjoyment of the benefits of a thing to the exclusion of all other persons in the world.
- So, to say that *there is property*, three elements recognized by law have to exist: person(s) (***active subject(s)***) entitled to enjoy the benefits of a thing (***object***) in exclusion of all other persons in the world (***passive subjects***)
- A critical/enacting factor for the existence of property/*in rem* right is the *law*

In rem rights vs. *In personam rights*: Similarities & Distinctions ...*ctd.*

1. Sources of the rights: *where do they come from? ...ctd.*



In rem rights vs. *In personam rights*: Similarities & Distinctions ...*ctd.*

1. Sources of the rights: *where do they come from?* ...*ctd.*

- *In personam rights* (**creditorship**) arise from *in personam* (personal) relation; that is,
 - the direct *relationship b/n persons* arising from:
 - (1) a *legally* recognized agreement between them (voluntarily/consensually)
 - OR
 - (2) directly *from law* (involuntarily/extra-contractually)



- ↳ for the *performance/satisfaction/fulfillment* of a specified interest (through action/inaction -> to do, to give, or not to do)
- ↳ by one of the persons in the bilateral/*trilateral* relationship - *THE DEBTOR* to the other person in the relationship - *THE CREDITOR*.

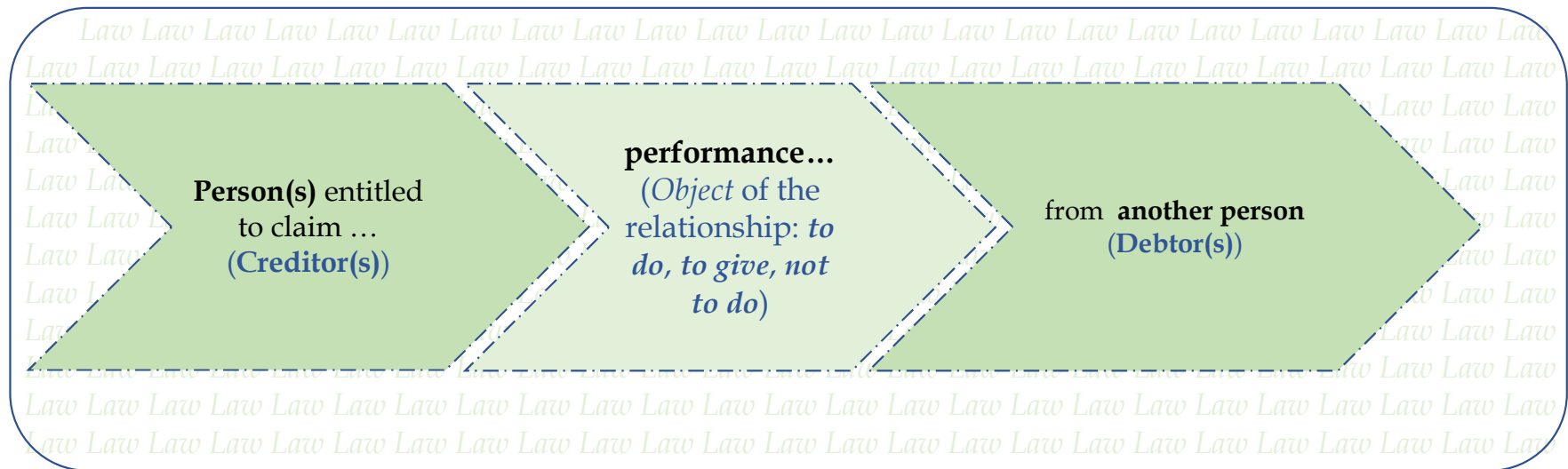
In rem rights vs. *In personam rights*: Similarities & Distinctions ...*ctd.*

1. Sources of the rights: *where do they come from?* ...*ctd.*

- So, to say that *there is an in personam right*, three elements recognized by law have to exist: person(s) (*the creditor(s)*) entitled to demand specified *performance* from another person in the relationship (*debtor(s)*).
- Again here, a critical/enacting factor for the existence of *in personam rights* (**creditorship**) is the *law*.

In rem rights vs. *In personam rights*: Similarities & Distinctions ...*ctd.*

1. Sources of the rights: *where do they come from? ...ctd.*



In rem rights vs. *In personam rights*: Similarities & Distinctions ...*ctd.*

1. Sources of the rights: *where do they come from?* ...*ctd.*

❖ So, from the descriptions above we can note the following *similarities* and *differences* in respect of the elements of *in rem rights* and *in personam rights*:

➤ Similarity:

- ✓ Both are rights, i.e., a person's legally protected interest against another person
- ✓ In both cases there are right-bearer person(s); duty-bearer persons; object to which the right relates; and the law (as the constitutive factor)

➤ Differences:

- ✓ the nature of the objects of the rights is different: in case of *in rem* rights (property) -> **thing**; in case of *in personam* rights (credits) -> **performance** by the duty-bearer
- ✓ the nature/scope of protection of the rights is different
 - › *in rem* rights (property) are *erga omnes* or absolute rights; protected against all persons in the world; the duty-bearers are an **identified multitude of persons** – *passive* subjects.
in rem right holder has the legal protection to fully enjoy the sort of benefits he has over the object without any interference from anyone.
 - › *in personam* rights are relative: they are valid *vis-à-vis* a particular person/persons designated as debtor; all persons other than the debtor(s) are not required to respect the interest of the right holder (creditor);
the right is to be demanded from the debtor, i.e., a specific person(s) brought to the relationship by law or contract; *in personam* rights have an **identified active subject** as duty-bearer

In rem rights vs. *In personam rights*: Similarities & Distinctions ...*ctd.*

1. Sources of the rights: *where do they come from?* ...*ctd.*

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➤ Differences

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- ✓ The nature of obligations assumed by the duty-bearers:
 - › in case of *property* -> **negative** (abstention/not interfering in the enjoyment of the fruits of a thing);
 - › in case of *in personam* rights -> **performance (fulfilling the right)** which may require:
 - taking **positive measures** (action):- acting as required under the obligation in force - *doing or giving*
- OR
- **inaction** (negative):- refraining from taking certain measure which she/he otherwise has the right to do);
 - › So, *in rem* rights pose *negative obligation only*; in case of *in personam* rights it could be *positive or negative*
 - › Even the nature of the negative obligations differ in the case of *in rem* rights and *in personam* rights; the obligations in case of *in personam* rights impact the **patrimony of the duty bearer**; the duty to refrain assumed in case of *in rem* rights **doesn't** have effect on the patrimony of the duty bearers

In rem rights vs. *In personam rights*: Similarities & Distinctions ...*ctd.*

1. Sources of the rights: *where do they come from?* ...*ctd.*

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➤ Differences:

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- ✓ The nature of or content/elements of the rights: *in rem* rights create **immediate powers over a thing** (these powers are classified into two: self-regarding & others regarding);
- ✓ *in personam* rights create **immediate power over a person;**
- ✓ even in the case where *in personam* right involves a thing (in the case of obligation to give), access to the **thing is through the debtor**; in case of property, relation with the thing **is direct.**

In rem rights vs. *In personam rights*: Similarities & Distinctions ...*ctd.*

1. Sources of the rights: *where do they come from?* ...*ctd.*

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➤ Differences

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If 'A' is holder of property right (e.g. owner) over bike, then the relationship between 'A' and the object (the bike) is direct; no intermediary person needed.

'A' (owner)  bike

But, if 'A' buys a bike from 'B', there is no direct relationship between 'A' & the bike; 'A' can reach/have access to the bike only via 'B'.

'A' (buyer)  'B' (seller)  bike

So, the role of the duty-bearers is different: in case of *in rem* right, simply leaving the right holder alone; in case of *in personam* rights, fulfilling the right.

In rem rights vs. *In personam rights*: Similarities & Distinctions ...*ctd.*

1. Sources of the rights: *where do they come from?* ...*ctd.*

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➤ Differences

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Based on the above explanation, consider a residential house *leaseholder*:

- It is a right (of proprietary in nature), i.e., there are: right-holder, duty bearer and object.
- But is it an *in rem right (property)* or *in personam rights (creditorship)*?
- Let us look at it in light of the differential elements of the two class of rights:
 - ✓ What is the nature of the right of the leaseholder?
 - ✓ What is the scope of protection of the right/who is the duty-bearer? Is it relative or absolute?
 - ✓ What is the nature of the obligation assumed by the duty-bearer for the leaseholder?
 - ✓ What is the object of the leaseholder's right / the relationship between the leaseholder and the duty-bearer?

What determines the answer to these questions?

In rem rights vs. *In personam rights*: Similarities & Distinctions ...*ctd.*

2. Requirement of a thing

- ✓ *in rem* rights exist only in relation to a thing/ object; property (right *in rem*) cannot exist without **a specific thing**; the thing should **exist in species**
- ✓ *in personam* rights do not necessarily relate with a thing; even if it involves a thing (as in the case of obligation to give), it can relate to a future thing/ non-existing thing; it should only be identified in **genus** (described generally: in terms of quantity and quality)

3. The right to follow the object of the right.

- ✓ *In rem* rights: the right to follow enables to reclaim the object of the right in whoever hand it may be found. An owner, pledgee, usufructuary, ... if the object of his/her right slips and changes hands, he/she can recover it in specie by tracing its whereabouts.
- ✓ *In personam* rights: no right to follow the object of the right. *In personam* rights are protected against specific/identified person(s).

In rem rights vs. *In personam rights*: Similarities & Distinctions ...*ctd.*

4. Preferential treatment of *in rem* right (property) holders over *in personam* right holders.
 - ✓ *In rem* right holders are preferred over *in personam* right holders.
5. Type of rights (list of rights) to be created: the doctrine of *numerus clausus*
 - ✓ *In rem* rights: the doctrine of *numerus clausus* (limited list of rights) is applicable; persons can acquire/have only those rights recognized by the law as *in rem* right (property); individuals cannot mint their own type of *in rem* right(s).
 - ✓ *In personam* rights: the doctrine of *numerus clausus* is not applicable; parties to an *in personam* relationship can create any right(obligation) which they want by observing mandatory provisions of the law; they can create customized rights *in personam* according to their own needs.

In rem rights vs. *In personam rights*: Similarities & Distinctions ...*ctd.*

6. Manner of extinction of rights

- ✓ In rem rights can be extinguished at anytime by abandoning the object of the right;
- ✓ In personam rights: extinguishing the right by the right holder (creditor) requires the consent of the debtor.

7. Enforcement of rights: remedies for violation

- ✓ In case of *in rem* rights (property): three layers of remedies
 - Property law remedies: these are the primary remedies for infringement of in rem right:
 - › Possessory action (Art. 1149 CC.)
 - › Self-help (Art. 1148 CC.)
 - › Petitory action (e.g. in respect of ownership Art. 1206 CC.)
 - Remedies under law of obligations (particularly extracontractual liability and unjust enrichment law)
 - Criminal law remedy, in series cases of breach of property rights
- ✓ In case of *in personam* rights: remedies are available only in the realm of law of obligations; the forms of remedies are: specific performance, cancellation, compensation.