

# Major Misunderstandings and Theoretical Clarifications Regarding the Division Between Creditor's Rights and Real Rights in the Civil Code Era—A Discussion With Professor Chang Yun-chien

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A creditor's right, when conceived as a relational right, is properly comparable to a real right conceived similarly. Conversely, a real right as a proprietary right is comparable to a creditor's right viewed in the same light. Creditor's rights as relationships and real rights as property rights do not belong to the same category and should not be compared. Hohfeld's theory of rights analysis provides a tool for jurisprudence akin to analytic geometry. However, considering the cost of theoretical implementation, this theory cannot replace the historically accumulated typological structure of property rights divided into obligation and property. The relationship of real rights is primarily manifested as the right holder's direct control over a tangible object, and secondarily as the legal relationship between individuals arising from such direct control. Based on the fundamental principle of autonomy of will in civil law, it is impermissible to bypass direct control over objects and reduce the relationship of real rights directly to that of creditor's rights. Creditor's rights as property rights also possess attributes of "control" and "exclusivity". However, this "control" differs from the direct control over objects in real rights; rather, it refers to the creditor's freedom to dispose of the right without interference from others. This "exclusivity" does not pertain to the internal relationship of the right but relates to the attribution of the right, falling under the external relationship of the right. Dichotomizing property rights based on exclusivity cannot replace the fundamental structure of property rights divided into obligation and property, as the latter holds unique morphological significance.

*Keywords:* creditor's right real right, Hohfeld, obligations in rem, right of control, civil law culture

## Introduction: Is the System of Division Between Creditor's Rights and Real Rights in Jeopardy?

In civil law systems, the renowned German Civil Code (Bürgerliches Gesetzbuch) and French Civil Code (Code Civil) are derived from Justinian's Digesta (Pandekten) and Institutionum respectively. The prevailing doctrines in both German and French civil law clearly distinguish between rights in rem (real rights) and rights

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in personam (creditors' rights), regarding them as rights of fundamentally different natures that do not intersect with one another. The civil law theory of the division between creditor's rights and real rights defines creditor's rights as relative claims and real rights as absolute rights of dominion.<sup>1</sup> However, some scholars (such as Professor Chang Yun-chien) argue that the traditional concept of real rights is insufficient to explain complex relationships concerning objects, that Hohfeld's theory of legal relations, which reduces legal relations to four groups of eight concepts ("claim-duty", "privilege-no right", "power-liability", "immunity-disability"), is superior, and advocate for the abandonment of the division between creditor's rights and real rights, asserting that real rights are essentially interpersonal relationships (Chang, 2020; 2023).

This article aims to refute the above views, clarify the connotations of the division, and explore: (1) the criteria for distinguishing real rights from creditor's rights, and whether Hohfeld's theory can replace the division; (2) whether real rights can be entirely reduced to contracts or claims; (3) creditor's rights as an embodiment of property rights, and whether the division is a classification or typology that can adapt to social reality.

### **The Rationale for the Division Between Creditor's Rights and Real Rights**

When distinguishing creditor's rights from real rights, the key lies in applying a uniform standard of comparison, avoiding the confusion of comparing the content of creditor's rights with the effects of real rights. The appropriate approach is to compare and distinguish between creditor's rights and real rights either at the level of content or at the level of effect.

### **Different Perspectives for Distinguishing Creditor's Rights and Real Rights**

Initially, the division aimed to distinguish real rights as property rights from creditor's rights as relational rights, with creditor's rights being the means to acquire real rights. Real rights are absolute rights of dominion over corporeal things, while creditor's rights are relative rights to demand specific acts (Jin, 2005). From this perspective, the very purpose of a creditor's right is to be extinguished. Through the process from its creation to its extinction, real rights are transferred. This process facilitates the optimal use of resources and the realization of economic gains. As a typical part of the law of obligations, contract law is, in nature, a law of transactions and the circulation of property (or goods). In contrast, property law primarily governs the attribution of ownership (Han, 2022).

A typical example of implementing the division between creditor's rights and real rights in legislation is the German Civil Code. Its Book 2 stipulates the law of obligations, titled "Recht der Schuldverhältnisse (The Law of Obligations)", while Book 3 regulates real right, titled "Sachenrecht (Real Right)". These titles are not arbitrarily assigned. From a symmetrical perspective, it would seem more appropriate for Book 2 to be named "Creditors' Right", creating a parallel with Book 3's "Real Right". Alternatively, Book 3 could be titled "Law of Real Relations", mirroring Book 2's "Law of Obligations". However, the legislators prioritized the accurate reflection of each book's substantive content over formal symmetry. Both the German Civil Code and German civil law doctrine treat the division between creditor's rights and real rights by juxtaposing creditor's rights as

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<sup>1</sup> Article 114, Paragraph 2 of the Civil Code of the People's Republic of China defines a real right as a right that entitles the right-holder to directly control a specific thing and to exclude others from interfering with it, in accordance with law. Article 118, Paragraph 2 of the Civil Code of the People's Republic of China defines a creditor's right as a right that entitles the right-holder to demand that a specific obligor perform or refrain from performing a specific act, which arises from a contract, a tort, negotiorum gestio, unjust enrichment, or any other cause specified by law.

relations with real rights as property rights, even though German scholars also emphasize that creditor's rights are a form of property rights (Klunzinger, 2013).

However, with the development of a commodity economy, this understanding faces challenges. Logically, one should compare rights within the same category (e.g., creditor's rights and real rights both as relational rights, or both as property rights). In judicial practice, the division often emphasizes the distinction between the legal effects of obligatory contracts and the transfer of real rights.<sup>2</sup>

In reality, creditor's rights and real rights can only be effectively distinguished within the context of internal legal relationships or as property rights. At the level of internal legal relationships, a creditor's right is the right of a specific subject to demand performance from another specific subject; a real right is the relationship of dominion of a specific subject over a corporeal thing and the legal relationships arising therefrom. In the sense of property rights, creditor's rights and real rights are the two pillars of property law.<sup>3</sup> In modern society, creditor's rights have themselves become common objects of transaction and are transferable property rights.

The core distinction between the law of obligations and the law of real rights lies in the difference in content between these two typical types of property rights: Creditor's rights manifest as the creditor's indirect dominion over the debtor's act of performance, while property rights manifest as the right-holder's direct dominion over a corporeal thing.

### **Reasons Why Hohfeld's Analytical Theory Cannot Replace the Division Between Creditor's Rights and Real Rights**

Hohfeld's framework of legal relations is a powerful tool, but it is not a panacea, and its implementation entails high costs.

Furthermore, the view that property relations are necessarily relationships between persons is problematic, as it confuses basic legal relations with concrete civil legal relations. Basic legal relations are the duties of mutual respect between persons, which are the premise for the existence of civil law; concrete civil legal relations are relationships of rights and duties formed between specific subjects. Hohfeld's theory fails to distinguish these.

Finally, Professor Chang Yun-chien's definition of real rights as legal relationships between persons not only conflates the concepts of rights and legal relationships but also violates the logical rules of concept formation. Hohfeld's theory does not distinguish between rights and legal relationships. Even if real rights are considered relationships between persons, if the pivotal element of the right-holder's direct dominion over the thing is bypassed, the fundamental distinction between real rights and creditor's rights is erased. Professor Chang Yun-chien emphasizes that real rights are legal relationships between persons mediated by things, but this does not differ essentially from traditional civil law's emphasis on the real-right-holder's direct dominion over the thing, which consequently produces exclusive effects.

### **Real Rights as Relationships Have Long Been Neglected**

The core characteristic of property rights is that the right-holder can directly dominate a corporeal thing,

<sup>2</sup> See Civil Ruling (2024) Chuan Min Shen No. 2419, High People's Court of Sichuan Province; Civil Judgment (2024) Yue Min Zhong No. 1727, High People's Court of Guangdong Province; Civil Ruling (2024) Chuan Min Shen No. 2419, High People's Court of Sichuan Province.

<sup>3</sup> "According to the principle of division between real rights and creditor's rights, real rights and creditor's rights are two independent and coequal categories of rights" (Civil Judgment (2023) Gan 0102 Min Chu No. 15489 People's Court of Chengguan District, Lanzhou City, Gansu Province).

excluding interference by others. However, overemphasis on dominion, exclusivity, and attribution has led to the patrimonial aspect of real rights being overvalued, while real rights as relationships have been neglected. The pursuit effect and exclusive effect of real rights embody real rights as relationships; they originate from the right-holder's legal relationship to the thing, based on the autonomy of will regarding the thing (Sun, 2018). This legal relationship to the thing cannot be bypassed to reduce real relations to obligatory relations.

### **The Pursuit and Exclusive Effects of Real Rights Originate From the Legal Relationship to the Thing**

The pursuit effect of real rights is a manifestation of the internal relationship of real rights, i.e., property rights as relationships. The internal relationship of real rights is the legal relationship to the thing arising from the direct dominion of a person over a corporeal thing; the absolute (*erga omnes*) nature of property rights stems from this.

The exclusive effect of real rights, i.e., the right-holder's ability to demand that anyone refrain from hindering the exercise of the right, also originates from the civil law's protection of the right-holder's direct dominion over the thing. Direct dominion over the thing is the core feature distinguishing property rights from creditor's rights and other rights of dominion.

### **Rights of Dominion Based on the Legal Relationship to the Thing**

Both Chinese and German civil law doctrine recognize real rights as rights of dominion. The concept of a right of dominion is more general than real rights, also encompassing personality rights, rights of dominion in family relations, intellectual property rights, etc. However, grouping these absolute rights together as rights of dominion may overlook significant differences between real rights and other absolute rights—property rights embody the direct dominion of a person over a thing.

Personality rights and real rights differ significantly in terms of legal permissions for dominion; personality rights cannot be waived, transferred, or inherited. The absolute and exclusive nature of parental authority and guardianship rights stems from their legally protected ethical attributes. The dominionial nature of intellectual property rights stems from the intervention of state power; they are essentially limited monopoly rights.

### **Real Rights Cannot Be Reduced to Obligatory Relations**

The direct dominion of a person over a thing embodies in real rights, i.e., the autonomy of the right-holder's will in realizing the right, contrasts sharply with the realization of creditor's rights, which requires the debtor's will or action (Meng, 2020). The exclusivity of real rights stems from their dominionial nature; therefore, real rights cannot be reduced to obligatory relations.

First, the owner's claim for cessation of infringement, etc., exists because others have obstructed their direct dominion over the thing. Second, the exclusive effect of ownership and other property rights stems from direct dominion over the thing, not from publicity. Finally, since the core characteristics of real rights are dominion and absoluteness, their internal relationship, besides the person's dominion over the thing, must also include the exclusive effect.

Therefore, the exclusive effect of ownership and other real rights stems from the right-holder's direct dominion over the corporeal thing, meaning the right-holder can enjoy the attributable benefits without the need for the will or action of others. The exclusive effect belongs to the internal relationship of property rights, originating from property rights as relationships.

If an unauthorized possessor destroys the corporeal thing, the property right is extinguished, and the claims for protection of the property right (*rei vindication* and related claims) are also extinguished. In contrast, in

contractual obligations, even if the subject matter is destroyed, the obligatory relationship does not terminate; it is merely transformed into a secondary claim for damages, which maintains identity with the original claim for performance.

Therefore, one cannot bypass the person's dominion over the thing to reduce real rights to legal relationships between persons.

### **Creditor's Rights as Property Rights Are Increasingly Emphasized**

In Anglo-American law and French law, "property" rights are transferable and have effect against the world; contractual rights are generally not considered property rights, but in specific circumstances can be regarded as such. The concept of creditor's rights as property rights emphasized in this article refers to the fact that in modern society, creditor's rights are commonly transferred, and in specific circumstances can have exclusive effect, even receiving protection under tort law.

### **How to Understand the "Dominion" and "Exclusive" Attributes of Creditor's Rights**

Creditor's rights as property rights also possess an exclusive effect. However, creditor's rights as property rights are generally not the protected object of tort liability for damages; infringing a creditor's right requires a high threshold. In exceptional circumstances, creditor's rights as property rights are also protected by tort law. For example, after the assignment of a claim, if the bona fide debtor performs to the assignor, the assignee may not receive full performance due to the assignor's bankruptcy, and may then claim tort damages against the assignor at fault and its managing personnel.

From the perspective of property rights, creditor's rights also possess "dominion" and "exclusive" attributes. But this "dominion" is the creditor's freedom to dispose of the right without interference from others; "exclusivity" relates to the attribution of the right and belongs to the external relationship of the right.

### **The Morphological Significance of the Division Between Creditor's Rights and Real Rights**

A dichotomous classification of patrimonial rights based on whether they possess exclusivity is logically comprehensive and can cover patrimonial rights other than creditor's rights and property rights, but it cannot replace the fundamental structure of patrimonial rights based on the division between creditor's rights and real rights. Creditor's rights and real rights are the two most important types of patrimonial rights and are crucial typological tools for understanding the complex structure of patrimonial rights. They belong to Max Weber's "ideal types". The more sharply and precisely the ideal type has been constructed, thus the more abstract and unrealistic it is in this sense, the better it is able to perform its functions in formulating terminology, classifications, and hypotheses.

A typical application of ideal types in the field of law is the theory of legal families in comparative law. Beyond that, the division between creditor's rights and real rights is also a typical embodiment of ideal types. Constructing these two ideal types of creditor's rights and real rights helps in understanding various patrimonial rights that fall between them, as well as non-patrimonial rights like personality rights.

### **Conclusion: Sublating the German Civil Law System**

Whether the system of dividing creditor's rights and real rights in the German Civil Code and its theoretical explanations are reasonable is worthy of reflection. However, for now, the theoretical framework of the division can still adapt to the development of modern society. Hohfeld's analytical theory provides a tool for precise

conceptual analysis, but it is not a panacea for judicial practice. A more advisable approach is to let Hohfeld's theory and the traditional civil law system of the division advance together, complementing each other's strengths.

Therefore, a complete overturning and surpassing of the German civil law system is not the optimal path forward. A more judicious approach involves a selective sublation (German: Aufhebung)<sup>4</sup> of the German civil law's conceptual system. Chinese civil law system is mainly transplanted from German civil law and represents a concentrated presentation of world private law civilization in the 21st century. Completely starting from scratch and giving traditional civil law concepts new meanings would undoubtedly mean severing ties with the historically accumulated culture of civil law. In the civil code era, the rights architecture of the division between creditor's rights and property rights remains highly significant. This article aims to objectively examine the explanatory power and adaptability of the theory of the division between creditor's rights and real rights and to present the unique value of both it and Hohfeld's analytical theory, as well as the possibility of their mutual reference.

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<sup>4</sup> The term sublation (German: Aufhebung), originating from German philosophy, denotes a dialectical process of negation in which the old is simultaneously preserved, elevated, and transcended through critique and abandonment.