Magdalena Ossowska
University of Warsaw, Poland

THE NUMERUS CLAUSUS ISSUE IN PROPERTY LAW – EUROPEAN PRIVATE LAW AND THE POLISH PERSPECTIVE

1. INTRODUCTION

The *numerus clausus* is a fundamental principle of property law in Europe. It presupposes the existence of a closed catalogue of property rights. Consequently, it is impossible to freely create new property rights which are not recognized by statute. In this way, the state consciously limits the activity of the parties in this regard, indicating the socially and legally acceptable types of property rights they can use.[1]

It can be easily observed that such a solution, which is commonly accepted in virtually every modern European legislation (including Poland),[2] undermines the parties' autonomy – after all, the actors on the market are to a great extent deprived of the freedom to customize the content of a given property right, and their choice is restricted to a closed 'menu' approved by the authorities. This freedom, in turn, is after all a hallmark of the law of obligations, the cornerstone of modern, globalized market economy.[3]

If that is so, is the centuries-old principle of *numerus clausus* justified nowadays? With the advancing unification of private law in Europe,[4] a closer look

[1] See B. Akkermans, *The Numerus Clausus of Property Rights*, (in:) M. Graziadei, L. Smith (eds.) *Comparative Property Law. Global Perspectives*, Cheltenham–Northampton 2017, pp. 100–120; *idem*, *The Principle of Numerus Clausus in European Property Law*, Antwerp–Oxford 2008, s. 6 et seq.; S. van Erp, *A Numerus Quasi-Clausus of Property Rights as a Constitutive Element of a Future European Property Law*, "Electronic Journal of Comparative Law" 2003, 7/2.

[2] P. Machnikowski, *Ogólne wiadomości o prawie rzeczowym*, (in:) E. Gniewek (ed.), *System Prawa Prywatnego. Tom 3. Prawo rzeczowe*, Warszawa 2013; E. Drozd, *„Numerus clausus" praw rzeczowych*, (in:) S. Sołtysiński (ed.), *Problemy kodyfikacji prawa cywilnego (studia i rozprawy). Księga pamiątkowa ku czci profesora Zbigniewa Radwańskiego*, Poznań 1990, pp. 257–269.

[3] S. van Erp, *A Numerus*...

[4] B. Akkermans, *The Principle*..., p. 7 et seq.; S. van Erp, *European Property Law: A Methodology for the Future*, (in:) R. Schulze, H. Schulze-Nölke (eds.), *European Private Law – Current Status and Perspectives*, Munich 2011, p. 227 et seq.

at this issue seems to be necessary. However, it is difficult to arrive at one right solution due to the dissimilarities between various European legislations. A recipe for overcoming these difficulties might be, in my opinion, to take an insightful look at the development and explanation of this principle over the centuries and now. In this broad context, it would be worthwhile to investigate the Polish legal solutions more precisely. It will give us a fresh approach to the problem of the *numerus clausus* in Polish property law, which will have to, sooner or later, participate in the process of law unification on the European continent.

The present article discusses the dogmatic basis of the concept of *numerus clausus* (II) and outlines its history and economic reasoning behind it (III). Then, the main models of the *numerus clausus* in European legal orders (IV) as well as the functioning of this principle in Polish property law (V) are presented. Subsequently, the strengths and weaknesses of the *numerus clausus* are examined (VI). This provides us with general conclusions concerning the harmonization of this area of private law (VII).

2. THE CONCENPT OF *NUMERUS CLAUSUS*

At the very beginning, it would be useful to make some remarks on the differences between property rights and other subjective rights, especially obligations. It is obvious for the legal doctrine that the relation of a right with a material object cannot serve as a defining feature because other rights can relate to a thing, as well.[5]

Generally, property rights can be distinguished from other rights according to the criterion of 'absoluteness', i.e. their enforceability against third parties (*erga omnes*).[6] Third persons take the role of a passive audience which is obliged not to do anything that could infringe these rights.[7] Naturally, 'the audience' has to be properly informed about the existence of such extremely effective rights – in the case of immovable property, this purpose is served by registration systems (such as land and mortgage registers in Poland). When it comes to movable property, it is presumed that the possessor is the owner.[8]

---

[5] E. Drozd, „*Numerus clausus" praw rzeczowych*..., p. 259. It is worth noting that property rights usually refer to material objects. Nevertheless, e.g. in Polish law, a right can be the object of a usufruct or a pledge, as well.

[6] B. Akkermans, *The Numerus Clausus*..., p. 102. This enforceability against third parties makes these rights much stronger than personal rights, which are effective only between the parties to a legal relationship.

[7] M. Pyziak-Szafnicka, *Prawo podmiotowe*, (in:) M. Safjan (ed.), *System Prawa Prywatnego. Tom 1. Prawo cywilne – część ogólna*, Warszawa 2012.

[8] S. van Erp, *A Numerus*...

The effectiveness of an absolute right can make itself manifest e.g. against a purchaser who acquires a thing from a person without the right to it or in the course of enforcement proceedings. A classic example of this specific quality is the enhanced protection of property rights against persons who prevent or interfere with the authorized use of a thing. However, this absoluteness is not a constitutive quality,[9] but rather a secondary one. Therefore, it should be stated that property rights are distinguished from other rights according to not conceptual, but normative criteria. A property right is only a right which is expressly recognized as such by the law (an act, a code, a statute…).[10]

Hence, the *numerus clausus* in property law is a catalogue that is closed due to the decision of the legislative body and not necessarily because of a requirement for the right to have specific qualities.[11] Nevertheless, the closed character of this catalogue is not definitive, made once and for all – it can be modified and expanded by the legislature. It is the key point in understanding the *numerus clausus*, for it expresses the principle that it is impossible to impose a duty upon third persons otherwise than by statute. For that reason, the parties' autonomy to modify the content of a property right is limited. On the other hand, such a restriction is not accepted in contract law.[12]

To sum up, the *numerus clausus* of property rights indicates that a mandatory closed catalogue of property rights exists in a given legal system; the content (method of creation, conveyance, expiration) of a right falling within this closed list is strictly specified and cannot be changed by the parties.[13]

3. HISTORY AND SOCIO-ECONOMIC CONTEXT

As it was stressed at the beginning, the concept of limiting the parties' freedom to create new property rights has a centuries-old tradition.[14] Long before the idea of property rights appeared in classical Roman law, a limited number

[9] Situations in which rights traditionally considered 'relative' turn out to be more effective than property rights are described in detail by E. Drozd, *„Numerus clausus" praw rzeczowych*..., pp. 260–263.

[10] E. Drozd, *„Numerus clausus" praw rzeczowych*..., pp. 263–264.

[11] It is worth mentioning, for example, the issue of the 'extended effectiveness of relative rights' – e.g. article 670 of the Polish Civil Code: 'The provisions on the protection of ownership shall apply accordingly to the protection of the lessee's rights to use premises'. Such rights obtain protection typical of property rights, but do not it automatically become property rights – the lease keeps its original, obligative character.

[12] P. Machnikowski, *Ogólne wiadomości o prawie rzeczowym*...

[13] S. van Erp, *A Numerus*...

[14] B. Akkermans, *The Numerus Clausus*..., pp. 101–102; *idem*, *The Principle*..., pp. 19–82; S. van Erp, *A Numerus*...

of proprietary actions existed, i.e. the praetor would give protection to a property relation only in a limited number of situations. Precisely this system of actions can be considered as the first manifestation of the *numerus clausus*.[15] However, a clear distinction between personal and property rights was necessary to establish the principle of *numerus clausus*. The beginnings of the search for this distinction date back to the times of the Glossators; then it was perfected throughout the *ius commune*. Nevertheless, the *numerus clausus* of property rights was not recognized normatively until the Pandectists, who adopted the idea of the so-called 'Hahn's Pentarchy',[16] which had been developed by seventeenth-century legal scholar Heinrich Hahn (1605–1668).[17]

The presence of the *numerus clausus* principle in various legal systems has been strongly connected with the socio-economic circumstances throughout the ages. They have constituted the source of differences between property law in continental legal systems and in English common law.

At this point we can notice some regularity. Closed lists of property rights differ from each other; however, they follow a certain scheme: the main right is ownership, from which other property rights arise.[18] This scheme stems from Roman property law. First of all, the central part of this ancient system was the most complete and uniform right over the thing – ownership. Secondly, individual elements of ownership constituted limited property rights, such as the praedial servitude. With regard to the latter, some kind of application of the *numerus clausus* can be noticed.[19]

The first of the above-mentioned legal institutions forms the basis of contemporary property law, as well. Nevertheless, ownership underwent significant transformations in the feudal system – more precisely, fragmentation. It resulted from a specific model of social hierarchy which was related to the possession of land. Unitary ownership could not exist any longer:[20] such a system (with a functional

[15] 'Especially when the Corpus Iuris Civilis was adopted, the available actions became exclusively those mentioned in a codification of law'. Next to *rei vindicatio*, which was supposed to protect ownership, there were also actions protecting servitude, usufruct, *emphyteusis*, *superficies*, pledge and hypothec. B. Akkermans, *The Principle*..., p. 78 et seq.

[16] 'Hahn's Pentarchy' is an enumeration of five property rights (*dominium*, *pignus*, *servitus*, *possessio* and *hereditas*) which were derived from five actions in Roman law. See B. Akkermans, *The Principle*..., p. 65.

[17] See J. Smits, *The Making of European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System*, Antwerp–Oxford–New York 2002, pp. 251–252.

[18] B. Akkermans, *The Principle*..., pp. 410–413. The author proposes a division: primary law – ownership, lesser laws – derived from the primary law of ownership.

[19] W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa 2009, pp. 348–354, 368–370, 400–412.

[20] F. Parisi, *The Fall and Rise of Functional Property*, George Mason Law & Economics Research Paper, No. 05–38, https://ssrn.com/abstract=850565, p. 10 (accessed: 27.07.2018): 'feudal property became quite distinct from the Roman paradigm of property, as feudal grants were always limited by the act of license and title; possessory interests never resided in the same hands.

fragmentation of property) was the most effective way to ensure the maintenance of the army, which was of great importance on account of continual wars.[21]

Yet the fragmentation of the right of ownership was insufficient for non-agricultural areas. The return of the Roman concept of ownership dates back to the times when capitalism emerged in Europe and feudalism was abolished in many parts of the continent. A unitary right of ownership reappeared in the centre of the system of property law, and its fragmentation was achieved by means of appropriate legislation, when the number of property rights was limited to a socially acceptable catalogue. This reasoning is reflected in modern civil codes in Europe. The *numerus clausus* is a manifestation of the pursuit of unity in property as well as of the desire to prevent the return of the feudal system.[22]

The situation unfolded differently in England (and other countries under the influence of English law), where the Revolution did not abolish the feudal system. The system of land law developed precisely on the foundations of feudalism. In such conditions of, in fact, still fragmented property (which was not as uniform as on the continent: all the land belonged to the Crown, and the tenant was entitled to estate), it was impossible to adapt the *numerus clausus* principle.[23] However, as it is indicated in subject literature,[24] the standardization of property rights has already taken place in common law jurisdictions (e.g. in the United States), and the result is conceptually similar to the continental *numerus clausus*.[25]

To summarize, it can be assumed that the principle of a closed catalogue is intended to protect the basis of all property rights – ownership, and therefore it has emerged to be the very foundation of the modern property law. This principle is also present in common law systems.

When it comes to praedial servitudes, the statement that the *numerus clausus* principle has its beginning in Roman law is undue. Indeed, praedial servitudes in times of the Principate usually took forms which were customarily accepted (e.g. *luminum* – the right providing protection against restricting access to light; *altius tollendi* – the right to demand from the neighbour that they tolerate higher

---

Property ownership was neither unlimited nor absolute; interests were not enforceable erga omnes, but rather consisted of a bundle of rights and duties, partially applicable to the whole community and partially determined by the specific contractual relationship between the grantor and the grantee. A complex system of political and social control reinforced this transition from the Roman system to the feudal regime of dispersed ownership (and property fragmentation)'.

[21] *Ibidem*, p. 11.

[22] *Ibidem*, p. 16.

[23] S. van Erp, *A Numerus*...

[24] See T. W. Merrill, H. E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, "The Yale Law Journal" 2000, Vol. 110, No. 1; H. Hansmann, R. Kraakman, *Property*, *Contract*, *and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series 10/2002, paper 388.

[25] Although standardization is not exactly the same as the *numerus clausus*, it may lead to the same results in practice – enhancing legal certainty. See footnote 38.

buildings on adjacent ground) or expressed in the Praetor's Edict (e.g. *oneris ferendi* – the right to use the neighbour's wall to sustain one's own building; communication servitudes, e.g. *iter* – the right to pass or walk, but not to drive a beast of burden through another's land).[26]

Nevertheless, from the times of the last Republic, Roman jurists allowed (by analogy) servitudes which did not fit in the above-mentioned categories. Such servitudes would later be called irregular – *servitutes irregulares*. These included rights that were established for neither agricultural nor construction purposes (unlike rural or urban servitudes; irregular servitudes are conceptually close to the so-called industrial servitudes), e.g. servitude which involved tolerating dunghill set up by the neighbour[27] or fumes from a cheese factory.[28]

What is important, servitudes could not be created freely – as natural forms of limiting the unity of ownership, they were subject to rules of creating and exercising them.[29] Thus, in the case of Roman praedial servitudes, we are dealing not with the *numerus clausus*, but with an open catalogue of typical rights,[30] which was intended to meet the requirements of the then actors on the market. That definitely less rigorous approach to the principle of closing a catalogue of property rights is a common feature of some models of the *numerus clausus*.

4. EUROPEAN MODELS. SOUTH AFRICA

As it has been established above, the principle of *numerus clausus* is omnipresent in European property law. Various classifications of this principle can be applied, for example according to the criterion of how it is expressed by the statute.[31] It could be explicitly stipulated in a legal act that only specific forms of prop-

[26] O. Lenel, *Das Edictum Perpetuum. Ein Versuch zu seiner Wiederherstellung*, Leipzig 1927, pp. 193–194.

[27] D. 8,5,17,2. The English translation of the Latin name of the right as proposed by S. P. Scott (ed. and trans.), *The Civil Law*, Cincinnati 1932; for online access visit: https://droitromain.univ-grenoble-alpes.fr/Anglica/D8_Scott.htm#V (accessed: 27.07.2018).

[28] D. 8,5,8,5. *Ibidem*.

[29] These included: *servitus in faciendo consistere nequit* – servitude cannot consist in action; *servitus servitutis esse non potest* – servitude cannot be encumbered with a servitude; *nemini (nulli) res sua servit* – no one can have a servitude on their own thing; *servitutibus civiliter utendum est* – servitudes are meant to be exercised cautiously; *praedia debent esse vicina* – land proximity requirement; *servitus praedio utilis* – praedial servitude has to be useful for a land, permanent cause (*perpetua causa*) of establishing a servitude is required. See W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie*..., pp. 410–412.

[30] W. Dajczak, T. Giaro, F. Longchamps de Bérier, *Prawo rzymskie*..., p. 403.

[31] Ch. Von Bar, *The Numerus Clausus of Property Rights: A European Principle?*, (in:) L. Gullifer, S. Vogenauer (eds.), *English and European Perspectives on Contract and Commercial*

erty rights can be used (e.g. in the Netherlands – Article 3:81(1) of the Dutch Civil Code) or the discussed principle may not be directly provided for in the law, but apply implicitly (witness Austria or England). Another division can be made according to the criterion of the competence to create new types of property rights.[32] There are three possibilities, namely when new rights may be established (a) only by the authorities; (b) by the courts in case law; or (c) by the parties themselves. At the same time, it is indicated that the last option is either rejected or merged with the second option. In the latter case, the legal actions of the parties are subject to the assessment by the court.[33] It is worth having a brief look at several model solutions present in European legal orders.

In Germany, the *numerus clausus* principle is understood very rigorously. Two terms are ordinarily used by the doctrine to describe it: *Typenzwang* and *Typenfixierung*.[34] The first one means that there is a limited number of property rights, while the second entails that the content of these rights is determined by mandatory norms and therefore cannot be modified by the parties. Only the legislature is competent to establish new property rights, and the autonomy of the parties is excluded in this respect.[35]

In France, the concept of a catalogue of property rights is conceived less strictly, with a related controversy existing in the French civil law doctrine.[36] According to the first (and dominant) view, the list of property rights is closed and confined to the rights mentioned in *Code civil* and the rights recognized in the *Cour de cassation*'s case law. In accordance with the second, minority view, the parties are allowed to create new property rights. It is reported[37] that France, despite the fact that the *Cour the cassation* is competent to establish new property rights, has not developed a fully open system.

In turn, English law is an example of the least rigorous approach to the concept of a closed catalogue of property rights. Obviously, one should bear in mind a different historical background, which has resulted in a greater number of property rights as well as in the significant complexity of the system.[38] Subsequently, albeit not directly, it led to the acceptance of this principle.[39]

Naturally, the freedom of the parties to form new property rights is not unlimited. However, owing to the lack of a civil code in England, it does not encounter

---

Law. Essays in Honour of Hugh Beale, Oxford–Portland 2014, p. 441 et seq.; see also B. Akkermans, *The Numerus Clausus…*

[32] *Ibidem*, pp. 6–7.

[33] See section VII of this article.

[34] See J. T. Füller, *Eigenständiges Sachenrecht?*, Tübingen 2006, pp. 370–373.

[35] See B. Akkermans, *The Principle…*, pp. 169–252.

[36] *Ibidem*, p. 167.

[37] *Ibidem*, p. 168.

[38] *Ibidem*, pp. 565–570.

[39] Compare section III of this article.

any major legislative obstacles.[40] An essential factor which determines the shape of property law in England is *duplex ordo* – the coexistence of two legal orders: common law and equity. It is pointed out that the closed character of the catalogue only existed in common law, and in this case the term 'standardization of rights' would be more suitable.[41]

The most radical concept from the viewpoint of the European legal tradition is undoubtedly a complete rejection of the *numerus clausus*. The country in which this principle, so deeply rooted in the minds of European lawyers, is not recognized is a typical example of a mixed jurisdiction – South Africa.[42] Its open catalogue comprises ownership, servitudes (including *servitutes irregulares*, created in respect of a person, not the property itself), 'pandrecht' – pignus, 'verband' – security interest mortgage, emphyteusis, 'huurpag', lease of land, mineral rights (typical for South Africa), hire registered by notarial deed and statutory property rights based on the Sectional Titles Act of 1971.[43]

The parties can establish new property rights, but such actions are subject to supervision by the land registry, which can refuse to register them when the rights do not pass the so-called 'subtraction from the dominium test', which has been developed in case law. According to B. Akkermans, "[t]his test allows the land registry to accept new types of property rights when (a) it is the intention of the parties to bind not only themselves but also their successors in title and (b) the right that the parties create amounts to a subtraction from the dominium".[44] The first criterion means that the new right has to bind any current owner of the land; the second expresses the rule that every property right must be derived from full ownership – it is the only way for a right to obtain a proprietary nature.[45]

Although not many such new rights have been created,[46] the example of South Africa clearly shows that the existence of a legal system without the *numerus clausus* is possible. In addition, it proves that the distinction between personal

[40] '[W]hereas civil law systems with their Civil Codes froze the law as it stood at that moment, enabling the possibility to enumerate the available property rights in a law code, English courts continue to develop property law until they are stopped by legislation'. See B. Akkermans, *The Principle*..., p. 387 et seq.

[41] According to S. van Erp, *A Numerus*...: '[s]tandardisation means that a limited number of categories is used for a practical reasons, but it does not imply that this number is completely closed. Courts may still decide that certain rights, created by two parties and not to be found in the existing categories, bind certain or even all third parties. Standardisation also does not mean that the contents of the various categories is as fixed as it is in the civil law by mandatory rules'. The Law of Property Act of 1925 can serve as an example of standardization of property law in England. Compare B. Akkermans, *The Principle*..., p. 390 et seq.

[42] Similarly Spain, although new property rights have not been recognized there yet. *Ibidem*, pp. 550.

[43] J. Smits, *The Making of European Private Law*..., p. 257.

[44] B. Akkermans, *The Numerus Clausus*..., p. 103.

[45] J. Smits, *The Making of European Private Law*..., p. 258.

[46] B. Akkermans, *The Principle*..., p. 482.

and property rights can be developed not only by the decision of the legislature but also in practice.[47]

It can be easily seen on the example of above-mentioned countries how differently the *numerus clausus* principle is understood in various legal orders, and hence – how extremely diverse property law is.

5. THE *NUMERUS CLAUSUS* IN POLISH PROPERTY LAW

In Polish civil law, the *numerus clausus* principle is generally recognized. However, two interpretations exist in subject literature. According to the first one, property rights are only those rights that are explicitly mentioned and regulated in the legislation as types of property rights. A competing view adds that the catalogue of property rights includes also those rights of which the thing is the subject and which can be deduced from the provisions of civil law (especially property law). This broad understanding of the *numerus clausus* principle has been criticized in the doctrine – it has been indicated that the authors who support this view generally have problems with specifying the number of rights included in the closed catalogue. Thus, as a more logical solution, the first notion prevails.[48]

The *numerus clausus* principle is expressed in the Polish Civil Code (articles 140, 232 and 244).[49] The catalogue of property rights can be changed only by means of a statute. Hence, the Polish model can be classified as one of the most restrictive systems in Europe.

The rigour in the application of this principle makes itself evident in case law.[50] Nevertheless, the tendencies to soften the *numerus clausus* are becoming

[47] J. Smits, *The Making of European Private Law...*, p. 260.

[48] P. Machnikowski, *Ogólne wiadomości o prawie rzeczowym...*; E. Drozd, *„Numerus clausus" praw rzeczowych...*, pp. 263–264 i 268.

[49] Act of 23 April 1964 – Civil Code (Journal of Laws 1964, No. 16, item 93). The Polish version of this catalogue consist of: **ownership** (articles 140 and following of the Code), **perpetual usufruct** (articles 232 and following of the Code), limited property rights (articles 244 and following of the Code): **usufruct** (articles 252–284 of the Code), **servitudes** (articles 285–305 of the Code), **pledge** [articles 306–335 of the Code and Act of 6 December 1996 on Registered Pledges and the Register of Pledges (Journal of Laws 1996, No. 149, item 703)], **cooperative ownership right to premises** [articles 171 and following of the Act of 15 December 2000 on Housing Cooperatives (Journal of Laws 2001, No. 4, item 27)] and **mortgage** [articles 65 and folowing of the Act of 6 July 1982 on Land and Mortgage Registers and on Mortgage (Journal of Laws 1982, No. 19, item 147)]. As we can see, some of these rights are decodified.

[50] Compare e.g. judgment of the Supreme Court of 3 April 2009, II CSK 470/08 (LEX No. 599755), in which the Supreme Court ruled that it was inadmissible to create obligations which are formally of a relative nature (in fact are real obligations) whose content would correspond with that of a property right (praedial servitude) and bind every owner of the servient land, as it would

ever more frequent. The latest case law of the Polish Supreme Court opens up the possibility of encumbering with transmission easement not only ownership, but also the right of perpetual usufruct.[51] Furthermore, in its decision of 27 October 2004,[52] the Supreme Court created, in fact, a new type of limited property law – the right to a parking space in a multi-station garage. This judgment has received a huge amount of criticism precisely because it violated the *numerus clausus* principle.[53]

This short review of the Polish civil law doctrine and case law shows that the *numerus clausus* principle is understood rigorously in Poland. On the other hand, there are some indications from participants in legal transactions that there is a need to regulate situations unprovided for by the Civil Code and that this need can be satisfied by creating new types of property rights. An analysis of the Supreme Court's case law can serve as a detector of necessary changes. These, in order to obtain the features of property rights, should be expressed directly in the Civil Code – but only in the case of an urgent need and after considering all economic factors.

6. STRENGHTS AND WEAKNESSES OF THE *NUMERUS CLAUSUS*

Subject literature offers various explanations of the existence of the *numerus clausus*. These include, among others, the lack of need to create new rights (those already existing are sufficient), the need to inform third parties about the existence of rights which have effect against them and which shape their duties without their consent (and so to ensure the public character of these rights), and the prevention of pyramiding of obligations, which can happen from when the successive owners

lead to circumvention of the *numerus clausus* principle. Another illustrative example is decision of the Supreme Court of 12 November 1997, I CKN 321/97 (LEX No. 50520) relating to establishing usufruct which is not a personal and inalienable right. The Supreme Court ruled that the parties may establish only rights recognized by statute, taking into account that each of them has strictly defined features which are not subject to modification. The Court unwillingly referred to *Typenzwang* and *Typenfixierung*, widely known in the European private law.

[51] Resolution of the Supreme Court (seven judges) of 16 May 2017, III CZP 101/16 (LEX No. 2284273) and decision of the Supreme Court of 8 June 2017, V CSK 259/16 (LEX No. 2352168). See also J. R. Antoniuk, *Dopuszczalność obciążenia użytkowania wieczystego służebnością przesyłu*, „Opolskie Studia Administracyjno-Prawne" 2017, Vol. XV, issue 1, pp. 9–30. See also A. Grebieniow, *Prawo rzeczowe*, (in:) J. Kosonoga (ed.), *Studia i analizy Sądu Najwyższego. Przegląd orzecznictwa. Rok 2017*, Warszawa 2018 [forthcoming].

[52] IV CK 271/04 (LEX No. 147751).

[53] See M. J. Naworski, *Glosa do postanowienia SN z dnia 27 października 2004 r.*, *IV CK 271/04*, „Rejent" 2005, No. 12, p. 124 oraz S. Rudnicki, *Glosa do postanowienia SN z dnia 27 października 2004 r.*, *IV CK 271/04*, OSP 2005, No. 5, p. 62.

encumber a land with ever new property rights. The desire to prevent a fragmentation of the uniform right of ownership can be added to the list, as well. Above all, the main advantage is that the parties can choose from a set of rights whose creation, transfer and termination are regulated by statute. This provides legal certainty and ensures predictability and simplicity; legal relations are thus stabilized.[54]

Economic reasons for the existence of the discussed principle are, *inter alia*, the desire to ensure the marketability of land (which decreases significantly when ownership is encumbered with numerous third persons' rights), the need to provide lower costs of informing parties about the existence of a given right or its transferability (those costs increase when many unknown forms of such rights are used), and the desire to keep transaction costs and costs of verification low, if the other party knows the content of a given right.[55] Additionally, this principle ensures a better use of property.[56]

By contrast, when the *numerus clausus* is applied too restrictively, it poses a risk of a rather slow evolution of legal institutions. In the times of dynamically developing global economy, rigid adherence to old, fixed solutions may be harmful to the economy, especially in the case of smaller countries.[57]

Furthermore, it is only the legislature which is able to create new property rights, and hence it is responsible for adapting the law to current economic requirements.[58] When the tension becomes too high and the legislature remains inactive, the judicature starts to create new property rights itself. If we consider it in the context of the most inflexible models of the *numerus clausus* (e.g. the German or the Polish one), we will realize that such court activity is *contra legem*, that it undermines legal certainty, and that it should therefore be assessed negatively.

As we can see, the *numerus clausus* has a strong economic background. Its task is to protect the autonomy of legal entities, which – without a particular legal provision or the consent of the authorized persons – cannot be limited.[59]

---

[54] B. Akkermans, *The Numerus Clausus*..., p. 107 et seq. See also B. Rudden, *Economic Theory v. Property Law: The Numerus Clausus Problem*, (in:) J. Bell, J. Eekelaar (eds.), *Oxford Essays on Jurisprudence. Third series*, Oxford 1987, pp. 239–263.

[55] See H. Hansmann, R. Kraakman, *Property*, *Contract*, *and Verification*..., pp. 39–40, where the authors considered this factor to be decisive.

[56] B. Akkermans, *The Numerus Clausus*..., pp. 107–108. The problem of the effective use of property is known in subject literature as the 'tragedy of commons' and the 'tragedy of anti-commons'. See G. Hardin, *The Tragedy of the Commons*, "Science" 1968, Vol. 162, issue 3859, pp. 1243–1248, and M. A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, "Harvard Law Review" 1998, Vol. 111, No. 3, pp. 621–688.

[57] Smaller economies tend to be weaker and therefore should seek to reduce the possible obstacles that can appear in the area of trade. Such a hindrance can be unique legal system which is not congruent with those of other countries. See B. Akkermans, *The Numerus Clausus*..., p. 107 et seq. and the references therein.

[58] S. van Erp, *A Numerus*...

[59] Z. Radwański, *Zagadnienia ogólne czynności prawnych*, (in:) Z. Radwański (ed.), *System Prawa Prywatnego. Tom 2. Prawo cywilne – część ogólna*, Warszawa 2008.

On the other hand, this principle can lead to a 'stiffness' of the legal system, which is not always desirable.

7. UNIFICATION OF PROPERTY LAW IN EUROPE AND THE *NUMERUS CLAUSUS*

In the times of the unification of private law in Europe, property law still remains one of the least harmonized branches of law.[60] The reason lies in its specific nature; as M. C. Mirow puts it: '[l]and does not move across international borders like checks, goods, and the Internet. Land is grounded; it sits in a particular country with particular laws'.[61] The *numerus clausus* emerges as a principle strictly connected with national law – after all, it functions within the borders of a given country, among other areas of private law,[62] such as contract law, inheritance law, family law etc. And although essentially all of the catalogues of property rights follow a similar pattern,[63] lesser rights diverge.[64] This along with the coexistence of two legal families in Europe – civil law and common law – has resulted in the lack of considerable successes in the unification of property law.[65]

In practice, there are situations (especially when international private law applies) that require the choice of legal provisions which are relevant in a given case. It may lead to a situation in which it would be impossible to recognize a specific right as it is unknown to the native legal system – because of either rigidity in applying the *numerus clausus* principle or simply dissimilarity of the property rights' catalogues.[66]

For that reason, the unification is a positive process, for it can help to prevent difficulties in trade between European countries. However, the main problem is which approach to the *numerus clausus* should be adopted. Doctrine identifies several positions.[67]

---

[60] J. Smits, *The Making of European Private Law...*, p. 245.

[61] M. C. Mirow, *Globalizing Property: Incorporating Comparative and International Law into First-Year Property Classes*, "Journal of Legal Education" 2004, Vol. 54, No. 2, p. 187.

[62] B. Akkermans, *The Numerus Clausus...*

[63] Compare section III of this article.

[64] 'Such a menu of available property rights has come about in the context of a specific legal system, allowing for national preferences. For example, some systems adhere to a transfer of ownership for security purposes (fiducia cum creditore; Germany), whereas other systems recognise non-possessory security rights to fulfill the same function (England, France, The Netherlands)'. See B. Akkermans, *The Numerus Clausus...*, p. 107 et seq.

[65] See B. Akkermans, *The Principle...*, p. 503 et seq.

[66] See B. Akkermans, *The Numerus Clausus...*, p. 107 et seq. and the references therein.

[67] *Idem*, *The Principle...*, pp. 436–488.

The first of them assumes that the *numerus clausus* should be upheld, but the property law system should be rearranged because, in practice, the distinction between property law and contract law is growing weaker. A reconstruction of the system would consist in creating patrimonial law concerning the assets and liabilities of a given entity.[68] J. Smits and V. Sagaert are in favour of blurring the differences between property law and contract law even further. In fact, they propose a system of obligations dominated by bottom-top reasoning, that is a system in which a property right arises not when it is introduced by legislation, but when the parties themselves make it apply against the third parties.[69]

A change in the understanding of the closed catalogue is also declared by Sjef van Erp. He advocates a restriction of this principle and introduces the concept of the *numerus quasi-clausus*. Property law based on this rule would be a more flexible legal system which would allow for e.g. trusts or even the creation of property rights by courts – of course with utmost care and only in special situations. Thanks to this flexibility, property law would be better adapted to the economic circumstances and thus economically less harmful.[70]

8. CONCLUSIONS

Due to its many advantages, the *numerus clausus* turns out to be a central concept throughout the evolution of property law. At the time of its inception, it mainly referred to immovable property and served as a protection from remains of feudalism. Today, its role is changing. The principle of a closed catalogue of property rights is the main element that distinguishes property law from contract law.[71] In view of the above, the question arises: should the *numerus clausus* principle continue to be applicable? How can we reconcile legal orders that are so different in terms of property law? Doctrine states that the approach to this principle should be changed as well as adjusted to the legal and economic realities to a greater or lesser extent.[72] Considering the Polish law, it is interesting how our legal system will behave in the face of these changes – after all, it is one of the legal orders in Europe that respect the *numerus clausus* principle most restrictively.

---

[68] See J. T. Füller, *Eigenständiges Sachenrecht?...*, p. 558 et seq.; B. Akkermans, *The Principle...*, p. 465.

[69] *Ibidem*, pp. 469–473; J. Smits, *The Making of European Private Law...*, pp. 252–254.

[70] S. van Erp, *A Numerus...*; B. Akkermans, *The Principle...*, pp. 467–469.

[71] *Ibidem*, p. 457.

[72] Interesting economic analyses of the application of the *numerus clausus* have been made by T. W. Merrill, H. E. Smith, *Optimal Standardization in the Law of Property...* and H. Hansmann, R. Kraakman, *Property, Contract, and Verification...*

Undoubtedly, the best functioning solutions to the above-mentioned problems lie within our, often discordant, legal traditions. Knowledge of similarities and awareness of differences between them can serve as a powerful tool in the process of unifying property law.

BIBLIOGRAPHY

Akkermans B., *The Numerus Clausus of Property Rights*, (in:) M. Graziadei, L. Smith (eds.), *Comparative Property Law. Global Perspectives*, Cheltenham–Northampton 2017

Akkermans B., *The Principle of Numerus Clausus in European Property Law*, Antwerp–Oxford 2008

Antoniuk J. R., *Dopuszczalność obciążenia użytkowania wieczystego służebnością przesyłu*, „Opolskie Studia Administracyjno-Prawne" 2017, Vol. XV, issue 1

Dajczak W., Giaro T., Longchamps de Bérier F., *Prawo rzymskie. U podstaw prawa prywatnego*, Warszawa 2012

Drozd E., „*Numerus clausus" praw rzeczowych*, (in:) S. Sołtysiński (ed.), *Problemy kodyfikacji prawa cywilnego (studia i rozprawy). Księga pamiątkowa ku czci profesora Zbigniewa Radwańskiego*, Poznań 1990

Füller J. T., *Eigenständiges Sachenrecht?*, Tübingen 2006

Grebieniow A., *Prawo rzeczowe*, (in:) J. Kosonoga (ed.), *Studia i Analizy Sądu Najwyższego. Przegląd Orzecznictwa. Rok 2017*, Warszawa 2018 [forthcoming]

Hansmann H., Kraakman R., *Property*, *Contract*, *and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, Harvard Law School John M. Olin Center for Law, Economics and Business Discussion Paper Series 10/2002, paper 388

Hardin G., *The Tragedy of the Commons*, "Science" 1968, Vol. 162, issue 3859

Heller M. A., *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, "Harvard Law Review" 1998, Vol. 111, No. 3

Lenel O., *Das Edictum Perpetuum. Ein Versuch zu seiner Wiederherstellung*, Leipzig 1927

Machnikowski P., *Ogólne wiadomości o prawie rzeczowym*, (in:) Gniewek E. (ed.), *System Prawa Prywatnego. Tom 3. Prawo rzeczowe*, Warszawa 2013

Merrill T. W., Smith H. E., *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, "The Yale Law Journal" 2000, Vol. 110, No. 1

Mirow M. C., *Globalizing Property: Incorporating Comparative and International Law into First-Year Property Classes*, "Journal of Legal Education" 2004, Vol. 54, No. 2

Naworski M. J., *Glosa do postanowienia SN z dnia 27 października 2004 r., IV CK 271/04*, „Rejent" 2005, No. 12

Parisi F., *The Fall and Rise of Functional Property*, George Mason Law & Economics Research Paper, No. 05-38

Pyziak-Szafnicka M., *Prawo podmiotowe*, (in:) M. Safjan (ed.), *System Prawa Prywatnego. Tom 1. Prawo cywilne – część ogólna*, Warszawa 2012

Radwański Z., *Zagadnienia ogólne czynności prawnych*, (in:) Radwański Z. (ed.), *System Prawa Prywatnego. Tom 2. Prawo cywilne – część ogólna*, Warszawa 2008

Rudden B., *Economic Theory v. Property Law: The Numerus Clausus Problem*, (in:) J. Bell, J. Eekelaar (eds.), Oxford Essays on Jurisprudence. Third series, Oxford 1987
Rudnicki S., *Glosa do postanowienia SN z dnia 27 października 2004 r.*, *IV CK 271/04*, OSP 2005, No. 5
Scott S. P. (ed. and trans.), *The Civil Law*, Cincinnati 1932, https://droitromain.univ-grenoble-alpes.fr/Anglica/D8_Scott.htm (accessed: 27.07.2018)
Smits J., *The Making of European Private Law: Towards a Ius Commune Europaeum as a Mixed Legal System*, Antwerp–Oxford–New York 2002
van Erp S., *A Numerus Quasi-Clausus of Property Rights as a Constitutive Element of a Future European Property Law*, "Electronic Journal of Comparative Law" 2003, 7/2
van Erp S., *European Property Law: A Methodology for the Future*, (in:) R. Schulze, H. Schulze-Nölke, *European Private Law – Current Status and Perspectives*, Munich 2011
Von Bar Ch., *The Numerus Clausus of Property Rights: A European Principle?*, (in:) L. Gullifer, S. Vogenauer (eds.), *English and European Perspectives on Contract and Commercial Law. Essays in Honour of Hugh Beale*, Oxford–Portland 2014

Acts and case law

Act of 6 December 1996 on Registered Pledges and the Register of Pledges (Journal of Laws 1996, No. 149, item 703)
Act of 6 July 1982 on Land and Mortgage Registers and on Mortgage (Journal of Laws 1982, No. 19, item 147)
Act of 15 December 2000 on Housing Cooperatives (Journal of Laws 2001, No. 4, item 27)
Act of 23 April 1964 – Civil Code (Journal of Laws 1964, No. 16, item 93)
Decision of the Supreme Court of 8 June 2017, V CSK 259/16 (LEX No. 2352168)
Decision of the Supreme Court of 12 November 1997, I CKN 321/97 (LEX No. 50520)
Decision of the Supreme Court of 27 October, IV CK 271/04 (LEX No. 147751)
Judgment of the Supreme Court of 3 April 2009, II CSK 470/08 (LEX No. 599755)
Resolution of the Supreme Court (seven judges) of 16 May 2017, III CZP 101/16 (LEX No. 2284273)

THE NUMERUS CLAUSUS ISSUE IN PROPERTY LAW – EUROPEAN PRIVATE LAW AND THE POLISH PERSPECTIVE

Summary

The *numerus clausus* of property rights indicates that a mandatory closed catalogue of property rights exists in a given legal system; the content (method of creation, conveyance, expiration) of a right falling within this closed list is strictly specified and cannot be changed by the parties. In this way, the state consciously limits the activity of the parties in this regard, indicating the socially and legally acceptable types of property rights they can use. An insightful look at the development and explanation

of this principle over the centuries and now seems to be necessary with the advancing unification of private law in Europe.

The present article discusses the dogmatic basis of the concept of *numerus clausus* and outlines its history and economic reasoning behind it. Then, the main models of the *numerus clausus* in European legal orders as well as the functioning of this principle in Polish property law are presented. Subsequently, the strengths and weaknesses of the *numerus clausus* are examined. This provides us with general conclusions concerning the harmonization of this area of private law.

KEYWORDS

numerus clausus, property law, comparative law, European private law, European legal tradition

SŁOWA KLUCZOWE

numerus clausus, prawo rzeczowe, prawo porównawcze, europejskie prawo prywatne, europejska tradycja prawna