5. The *numerus clausus* of property rights

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1. INTRODUCTION

The *numerus clausus* of property rights is one of the fundamental principles of property law (van Erp, 2006a; Akkermans, 2008). It refers to the idea that both the number and content of property rights is limited and is traditionally placed in contrast to party autonomy, which reigns in contract law. Property rights are special rights because they have effect against third parties, usually against everybody else. The holder of such a right is therefore in a more powerful position than the holder of a personal right, which is a right that is only valid between two, or at least a limited category, of persons.

Strongly connected to the effect of property rights is the role of property law itself. Property law in many perspectives is transactional law and deals with the way in which property rights can be created, transferred and destroyed (van Erp and Akkermans, 2012). These rules are mandatory rules and can therefore not be deviated from by the parties creating, transferring or terminating property rights.

However, there is an inherent tension in these mandatory rules, regarding both property rights themselves as well as the transactional rules that govern them. This tension exists in the way in which property law operates. In almost all cases, to start applying property law, an initiating legal act in another field of law is needed. Most of the time this is contract law, where contracts of sale provide the seller with an obligation to transfer his or her property right, or where a contract between the parties aims to establish a property right. Alternatively, the initiating act lies in the law of marriage or succession, where either property rights become jointly held, or pass to heirs or legatees. All of these areas – contract, marital property law and succession law – are characterised by the possibility for parties to give content to their legal relationship. Party autonomy therefore enables contracting parties to provide conditions and make special arrangements in terms of the functioning of property law: spouses can make a marriage contract governing the property relations between them, and through a will, anyone can determine, within the limits of the applicable succession law, what happens to his or her property after he or she passes away.

For centuries, therefore, parties have sought to introduce flexibility into property law to mirror the flexibility they enjoy in contract, marital property law and succession law. However, the rules of property law, especially due to the principle of *numerus clausus*, which prescribes the available property rights and their content, prevent such flexibility.

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The reasons provided for this spring directly from the nature of the closed system of property rights and are therefore worth considering. Moreover, approaching *numerus clausus* from this perspective also sheds light on the limitations of property law and explains the rise of contract law to a considerable degree.

This chapter will focus on the origins of *numerus clausus* (Section 2) and its scope (Section 3), before turning its attention to different academic perspectives on *numerus clausus*, such as legal doctrine and law and economics (Section 4). At the end of this section the focus will be on the future of property law and the role *numerus clausus* can play in this respect.

2. *NUMERUS CLAUSUS* OF PROPERTY RIGHTS

A. *Numerus Clausus* as a 'Legal Phenomenon'

One of the early questions *numerus clausus* scholars tackled is the origin of the term *numerus clausus* and the origins of the principle. The term *numerus clausus* originates in the early 20th-century German legal literature where German scholars used existing terminology to describe what they found in property law (Struycken, 2007; Akkermans, 2008; Sparkes, 2012). *Numerus clausus* here refers to the system used by universities, especially medical faculties, to limit the number of students they admit (Struycken, 2007). The same inspiration seems to have been used to describe the restricted types of limited liability companies or the types of disposal of property in succession law (Laukemann, 2014). In relation to property law, early mentions of the term *numerus clausus* include von Gierke's design for a German civil code (von Gierke, 1889), as well as handbooks by Örtmann (1899) and Heck (1930). These authors refer to *numerus clausus* to describe a rule in German law that only legislation, especially the German Civil Code, can describe what is a property right and what the content of such a property right may be.

Other legal systems use a less stringent approach to these aspects of property law. For example, the French *Cour de cassation* ruled in 1834 that the description of property rights by the Civil Code is not exhaustive, meaning that, as the Court held in that case, there are other property rights than those that the legislature prescribes. In fact, in 1858 and in 2012, the Court created new types of property rights (the right of *superficies* in 1858 and a perpetual right to use in 2012) (see Akkermans, 2008; Akkermans, 2013a).[1] Similarly, in English law, the House of Lords (now Supreme Court), also in 1834, decided negatively on the classification of a right to have boats on a nearby river as a property right.[2] However, in other cases, such as the famous *Tulk v Moxhay*,[3] English courts have recognised new types of property rights, in that case restrictive covenants. Also in the United States various new property forms, such as

[1] Cass civ, 18 May 1858, S. 58.1.661; Cass civ 3e, 23 May 2012, 11-13.202, (2002) D Jur 1934 note 2-1 D'Avout, B. Mallet-Bricout and N. Reboul-Maupin, (2012) D 2128, Thierry Revet (2012) RTD Civ 553. Confirmed once more in Cass civ 3e, 28 January 2015, 14-10.013.

[2] *Keppel v Bailey* (1834) 2 Myl & K 517, 39 Eng Rep 1042.

[3] (1848) 2 Ph 774.

Common Interest Communities (CICs) and digital servitudes have arisen in the last decades (Di Robiliant, 2014).

Some legal systems, most famously Spanish law and South African law, claim to not recognise a *numerus clausus* of property rights and therefore allow the creation of new types of property rights. However, and I will return to this below in Section 3, there have been not been many new types of property rights created. In South African law the courts have recognised a specific property right to take minerals from someone else's land, but in Spain there have been no new types of property rights thus far. These countries also impose requirements for the recognition of new types of property rights. In that respect it can equally be argued that these 'open systems' do adhere to the idea of *numerus clausus* of property rights. This is a matter of definition of what is *numerus clausus* (Sparkes, 2012).

B. *Numerus Clausus* as a Constitutional Property Law Principle

Much of the debate surrounding *numerus clausus* comes down to a discussion of two elements: (1) the nature of property rights versus the nature of personal rights and (2) the question of competence or authority to create and recognise new types of property rights (Struycken, 2007). These elements relate more to the structure of private law and property law than to the transactional property law rules and hence could be considered as 'constitutional property rules' in the wide sense of the term, as they deal with the constitution of property law in the same way as constitutional law deals with the constitution of a state (Singer, 2014; Smith, 2014).

In regard to the first element, the presumption is that all private law systems adhere to a distinction between personal rights, which have effect between a select number of individuals, and property rights, which have third party effect, sometimes even against the whole world (*erga omnes*). A system adhering, either explicitly or implicitly, to a separation between these types of rights needs criteria to establish when a right can have third party effect and be recognised as a property right. This is especially relevant in relation to the division between contract law and property law. Although contract law can be studied without property law, property law needs contract law to function. A contract for the provision of services does not require a discussion of property law, but any creation, transfer or termination of property rights requires a legal act, usually a contract, to work.[4] A contract creating a right therefore gives rise to a personal right, but also, under specific circumstances, gives rise to a property right.

Depending on the approach with which property rights are created, this is a complicated matter (Akkermans, 2010; van Vliet, 2012). In systems adhering to a 'consensual' approach, the conclusion of a contract (*solo consensu*) is sufficient to create or transfer a property right. Thus in French law, the conclusion of a contract of sale of a movable thing brings about the immediate transfer of ownership of the thing, without the need for delivery. By contrast, in systems adhering to a 'tradition' or 'delivery' approach, a contract alone is not sufficient and a 'real agreement' is necessary to give rise to effects in property law (van Vliet, 2000).

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[4] Alternatively, such legal act may arise in other areas, such as succession law or the law relating to marriage, civil unions or other regulated partnerships.

These different approaches bring complexity to the second element, the question of authority to create new types of property rights. Generally there are three options. (1) A new type of property right – meaning a right that was not previously recognised – must be recognised by the legislature in either a civil code or by specific legislation, (2) a new type of property right can be recognised by a court decision, and (3) private parties can create new types of property rights themselves.

Generally, the third option is rejected or brought under the second option where a court recognises the right the parties have created and only upon that court recognition is the property right accepted as such. An example of this is provided in French law by a recent decision of the *Cour de cassation* in which it allowed the creation of a perpetual right to use, creating a new type of property right (Akkermans, 2013a).[5] The second option is also followed in countries adhering to an 'open system' of property rights such as Spanish or South African law. Although in those jurisdictions private parties are entitled to create new types of property rights on land, the land registry has an important gate-keeper function. The land registrar will generally refuse a right he or she does not know (to avoid liability for making a mistake) and hence the parties will refer the case to a court for a decision. In South African law this has led to the case-made criterion of the 'subtraction from the *dominium'* test (De Waal, 2000). This 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*. Also in South African law, therefore, the question of authority surfaces (De Waal, 2000; Akkermans, 2010).

The most stringent approach in this respect is taken by German law, which adheres to the first model, where courts are not supposed to recognise new types of property rights (Akkermans, 2008). However, German law courts have stepped in to remedy some of the harsh effects of the application of German private law. These situations arise, for example, in relation to retention of title clauses and land registration. When parties include a retention of title clause (or reservation of ownership clause in civil law terminology), the seller retains his title to goods (ownership) until the buyer has paid the purchase price. In a regular business practice, however, the agreement will generally contain an 'all sums' clause, meaning that title to goods is retained until all outstanding debt is paid by the buyer. As a result therefore, the buyer will hardly ever become owner of the materials he bought, as there will always be outstanding debt. The buyer has an expectation right of acquiring ownership, which in a system adhering to a strict separation between property law and contract law is only a personal right (Akkermans, 2008).

However, even in the early 20th century German courts began to recognise the expectation right of a buyer under a retention of title clause as a separate right, called *Anwartschaftsrecht*, or acquisition right (Baur et al., 2009). This right, the courts hold, is a quasi-property right, as a special situation exists in which the seller can no longer affect the right. It can be transferred or burdened with another property right, such as a security right, providing it with some important property characteristics. A similar approach exists in relation to the expectation right of a buyer of a parcel of land where

[5] Cass civ 3e, 31 October 2012, 11-16.304, D 2012, 39 (Annotation Antoine Tadros).

the notarial formalities for transfer have been fulfilled and the land registry is checking the information it was supplied with. Also in this situation the seller can no longer affect the property right and the buyer will become owner upon registration of the notarial deed (called *Auflassung* in German). Due to the title land registration system in German law this can take a few weeks or even months. In the period between sending the deed and registration, German courts recognise an *Auflassungsanwartschaftsrecht* (an expectation right) as a quasi-property right. German doctrine classifies these acquisition rights as quasi-property rights as only the legislature is considered authorised to create new types of property rights (see Section 2C below), but they function as property rights in all respects (van Erp, 2006a; Akkermans, 2008; Baur et al., 2009).

A very interesting question therefore is whether *numerus clausus* can be considered as a principle of constitutional law. This refers not only to the question of authority to create new types of property rights, but also to the important organisational characteristics of the principle. To a considerable degree, property law is mandatory law. The traditional justification for the limitation on party autonomy is that property law regulates the creation, transfer and termination (or destruction) of property rights. Property rights are rights with third party effect, usually against the world (*erga omnes*). Hence, two parties have the possibility to bind not only themselves, but also potentially everybody else. This power is limited by restricting the available types of property rights and their content as well as by mandatory rules on how these rights must be created, transferred and terminated. Closely connected to this is the principle of transparency (van Erp, 2006a), which requires that the subject matter of a property right must be ascertainable (specificity) and that the existence of a property right on that specified subject matter must be known to the outside world (publicity). In the combination of these two principles, i.e. *numerus clausus* and transparency, lies the essence of legal certainty.

Legal certainty is about foreseeability and predictability, much needed to foster trade. *Numerus clausus* connects to two other fundamental principles of property law: freedom of ownership and free circulation of goods (Akkermans, 2013b; Akkermans, 2015). Any free market economy, of whatever type, is built on the premise that anyone is entitled to hold property and is able to trade this property with another free from restrictions. *Numerus clausus* is essential in this respect as it prescribes which property rights can be held and hence which rights can be traded or, if necessary, which rights can be protected. The fact that the types of property rights are known in advance in a legal system offers foreseeability and predictability, not only for the parties involved, but also for those dealing with the property right in the market place.

Constitutional principles are about the organisation of the State and about the organisation of the market place. Constitutional property law is about the protection of private property rights from state interference, but also about the organisation of private property law in the service of constitutional law principles (Akkermans, 2013a; Singer, 2014; Akkermans, 2015). The principle of *numerus clausus* can therefore also be considered as a principle of constitutional property law.

C. *Numerus Clausus* as a Principle

The idea of *numerus clausus* finds its place in legal systems in different ways, depending on the nature of the legal system. In many systems, *numerus clausus* is a fundamental principle of property law (van Erp, 2006a) perhaps further elaborated by some specific rules in legislation. In some systems, however, *numerus clausus* is considered a firm rule, enshrined by legislation (Akkermans, 2008) (see below in Section 2D).

Numerus clausus as a principle refers to the idea that private parties must choose from a pre-defined set of property rights of which the content is already pre-established to a considerable degree, and thus are limited in the creation of new types of property rights. In German-developed terminology, property rights are limited in number (*Typenzwang*) and in content (*Typenfixierung*) (Wiegand, 1987). However, the principle of *numerus clausus* does not necessarily militate against the creation of new types of property rights, as long as these new types remain within a set of pre-defined boundaries. It is therefore about *ex ante* control of party autonomy (Sagaert, 2005), rather than *ex post*.

The criteria that establish what can be a property right differ depending on the property rights in question, but there are many similarities between countries. For example, in case of a right of servitude (or easement in common law terminology) legal systems agree that the content of the burden must not force the holder of the servient land to do something active. Civil law systems describe servitudes from the perspective of the servient land and hence have a prohibition on positive burdens, whereas common law systems describe easements from the perspective of the dominant land and hence have a prohibition on negative burdens (Akkermans and Swadling, 2012). However, within these boundaries, parties are generally free to give shape to their legal relation and can create new types of servitudes.[6]

From this perspective also systems such as South African law, which upholds the 'subtraction from the *dominium* test' to establish whether an agreement between parties can become a property right on land, pay lip service to the principle of *numerus clausus* as they also provide an *ex ante* control mechanism. The dividing line between systems adhering to the principle of *numerus clausus* and those adhering to a rule of *numerus clausus* (see Section 2D, below) does not answer to the traditional civil law common law dichotomy. Other legal systems adhering to a principle of *numerus clausus* are England, Scotland, the United States and South Africa, but also French, Belgian and Spanish law (Akkermans, 2008; Sparkes, 2012).

D. *Numerus Clausus* as a Rule

In some legal systems the principle of *numerus clausus* is entrenched in a more stringent regime, usually connected to the nature of a legal system. The rule of *numerus clausus* therefore usually appears in civil law systems where the legislature has

[6] See *Dyce v Lady Hay* (1852) 1 Macq 305 *per* Lord St. Leonard: 'The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind.'

assumed authority to regulate private law. In a strict application of the doctrine of separation of powers, it is for the legislature only and not for the judiciary to recognise new types of property rights. The role of party autonomy is generally not discussed in this perspective, as the legislature decides when and where there is room for parties to make their own agreements.

This approach is strengthened still further when the legislature provides a general part of contract and property regulation that is also employed in the context of other areas of law, such as, *inter alia*, succession, insolvency or commercial law. In those cases these other areas use the general part of contract and property law and offer specific rules on how to deal with these. In that systematic approach, deviations from the general part break the systematic approach and lead to a loss of overview, different applicable rules and thus legal uncertainty.

The role of the judiciary in these systems is traditionally to apply the law and not to create new law, and contrary to other areas such as contract law or tort law, civil law courts have been much more conservative with respect to property law. With the exception of a few French cases, civil law courts generally uphold the legislative monopoly on the recognition of new types of property rights (Akkermans, 2013a).[7] The result is more rigidity in the system, but also a maximum level of legal certainty. Civil law systems such as German law, Austrian law or Dutch law adhere to a rule of *numerus clausus*.

E. *Numerus Clausus* in an Internal and an External Perspective

Numerus clausus, in the form of a principle or of a rule, prescribes the available types of property rights in a given legal system. 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 fulfil the same function (England, France, the Netherlands) (Sagaert, 2012). Such a menu of property rights is the result of an internal balancing exercise, taking into account the way in which property law works together with other areas of law, such as contract law, tort law, insolvency law, company law, family law and succession law.

However, *numerus clausus* also plays a role in private international law settings. Sometimes a legal system comes into contact with the law of another legal system (Akkermans and Ramaekers, 2012), such as in the case of a sale of goods to another country or, for example, a car accident involving a car from another country. In such a situation the property rights on the foreign car come into play. This applies to the right of ownership of the car, but also to any proprietary security rights. In this context, the rules of private international law must determine the applicable law. Because we are dealing with property law relations, the applicable law is determined on the basis of the

[7] See Cass civ 3e, 23 May 2012, 11-13.202, D 2012, Jur 1934, note 7-1 D'Avout, B. Mallet-Bricout and N. Reboul-Maupin, Dalloz, 2012, 2128, Thierry Revet (2012) RTD Civ 553, Cass civ 3e, 31 October 2012, 11-16.304, D 2012, 39 (Annotation Antoine Tadros), Cass civ 3e, 28 January 2015, 14-10.013.

lex rei sitae rule, i.e. the law of the place where the object is situated. When rules of private international law point to the applicable national property law, the national *numerus clausus* of property rights will apply and will not accommodate the foreign property right. Such system will offer an alternative national property right into which the foreign property right can be transformed, in order to provide the right holder with a property right he or she can use. However, sometimes this is not possible due to these national preferences that make up the national *numerus clausus*: a non-possessory limited property security right (such as a right of non-possessory pledge or a charge) will not be transformed into security ownership by the receiving country (Akkermans and Ramaekers, 2013).

These international situations create pressure on the national system of property law, which cannot always ensure that its own national rules will prevail. Smaller countries especially must open up their legal systems to facilitate trade and to prevent too many hindrances, because otherwise business will go to other countries. In recent years, therefore, legal systems, especially in Europe, have tended to bring their legal systems into line with each other with respect to certain property-related aspects. This concerns, for example, trusts and trust-like devices, where in recent years systems like French law have introduced trust-like devices to be able to compete with English and German law (Legeais, 2006; Braun and Swadling, 2012). *Numerus clausus* in such an external perspective therefore has a completely different dynamic to the traditional internal legal system perspective, but is equally worth consideration (see below, Section 5).

3. EXPLAINING *NUMERUS CLAUSUS*

A. Legal Reasons

For many property law scholars *numerus clausus* is a manifestation of standardisation, either for legal or for legal-economic reasons. In some legal systems, such as German law, *numerus clausus* was already part of the property debate (Heck, 1930; Baur et al., 2009), but it was Bernard Rudden who brought it into mainstream property discussion (Rudden, 1987). In his paper Rudden offers legal and economic reasons for the existence of *numerus clausus*. Legal reasons Rudden offers are (1) absence of demand, i.e. that the current list offers all the types of property rights that are needed; (2) absence of notice, i.e. third parties will not know about the existence of new rights; (3) absence of consent, i.e. we must be careful when we break privity of contract by awarding third party effect; and (4) pyramiding, meaning that if one owner is allowed to burden his land at his will, his successor in title will expect to be able to do the same and an undesirable pyramid of burdens on the land will result.

Swiss property scholar Bénédict Foëx has added to this that property rights have effect against the world and must therefore be known to the world to justify their existence (Foëx, 1987), that *numerus clausus* offers simplicity and predictability, that the absoluteness of the right of ownership must be protected by not creating too many potential burdens, that the legislature has made its choice and parties should not deviate from this, and that it supports the existence of other principles in property law, such as specificity and publicity (Struycken, 2007; Akkermans, 2008).

Teun Struycken has written extensively on the reasons a rule of *numerus clausus* should exist (Struycken, 2007). First, the rule of *numerus clausus* functions in a system where the legislature has assumed the authority to regulate property law and therefore to recognise new types of property rights. Second, *numerus clausus* determines when the rules of property law apply. After all, if an agreement between two parties does not fulfil the requirements of *numerus clausus* the parties are left with a contractual relationship because property law does not authorise third party effect of their legal relation. Third, the restriction of party autonomy has many positive effects on legal certainty: parties can only shape their property right within the limits set by the legislature, meaning they cannot fragment the right in content, space and time more than was pre-defined, or over-fragment the primary property rights from which they derive their rights (Struycken, 2007; Akkermans, 2010), nor can they provide preference or priority to claims in other ways than the legal system prescribes. German scholar Jens-Thomas Füller has focused attention on the same aspects of the rule of *numerus clausus* (Füller, 2006), although he emphasises that the time has come to let go of the strict separation between property law and contract law in civil law systems (see below).

B. Economic Reasons

Especially in recent decades, law and economics scholars have investigated *numerus clausus*. Many of the arguments made by legal scholars have been repeated and have often been qualified by law and economics scholars. The arguments used by Rudden (1987) have been offered by, *inter alia*, Michael Heller (1998), Thomas Merrill and Henry Smith (2000), and Henry Hansmann and Reinier Kraakman (2002). Rudden (1987) mentions seven economic reasons to justify the existence of *numerus clausus*. First, the marketability of land, by which Rudden means that too many burdens on land would reduce the transferability. Second, the benefits of standardisation, as trading in non-standardised forms will increase costs for other market participants. Third, Rudden mentions the functioning of the market economy, arguing that a limited number of property rights benefits the free circulation of goods (Akkermans, 2015). Fourth, information costs incurred by third parties. Rudden distinguishes two types of costs: costs for market participants to learn which rights are available on the market, and costs for market participants who wish to acquire or directly deal with a certain property right. Standardisation reduces both types of information costs. Fifth, Rudden mentions transaction costs for third parties that have to negotiate the content of their legal relation. Sixth, the efficient development of land is facilitated where there is a limited number of burdens that can exist on the land, and, seventh, the stability of the legal system is improved, as property rights exist for a long period of time and *numerus clausus* thus ensures that there are not too many rights with such a long duration.

On the basis of this research there are three further aspects that have shaped the *numerus clausus* debate. Heller (1998) focused attention on the problem of anti-commons, referring to a paper by Garett Hardin (1968) named ‘The Tragedy of the Commons’. Commons and anti-commons concern fragmentation of entitlement to property. A tragedy of the commons occurs when there are too many people entitled to use property without any of these having a right to exclude others. Hardin argued that

an unfavourable situation arises where too many people have a right to use; they will pursue a maximisation of personal gain leading to over-use of a scarce resource. Of course, such a situation can also be put to good use, for example by providing nearby residents with property interests to use in Central Park in New York City, so that the land will be preserved as a park as these residents will never be inclined to give up their use rights (Parchomovsky and Bell, 2006). Heller (1998) further explored this idea and looked at the situation in which there are too many people with a property entitlement. In that situation the 'tragedy' lies in the fact that there are so many persons with an entitlement, that they cannot come to a decision on what to do with the property. The result is a tragedy of the anti-commons, as the land will be under-used rather than over-used.

In respect of *numerus clausus* this is relevant as the tragedy of the commons or tragedy of the anti-commons suggest that over-fragmentation leads to inefficient use. There should not be too many property rights to use without the power to exclude others and the decision-making power over an object should not be fragmented among too many different right-holders.

The fragmentation approach has received some criticism (Merrill and Smith, 2000) as it does not directly addresses the *numerus clausus* problem, but rather the way in which the rights within the list of property rights can be used. Fragmentation of use- or decision-making powers can also occur if there was only one right to use. Although relevant for the composition of rights within the *numerus clausus*, fragmentation theory cannot explain its existence. Merrill and Smith (2000) have offered another approach that does seek to explain the existence of *numerus clausus*. They make a law and economics-based transactional analysis of property law and focus on the third party effect of property rights. Parties dealing with property rights must therefore incur information costs to find out what they will be bound to when they acquire a property right. The more property rights exist, especially when the content of these rights is very open, the higher these information costs will be. Standardisation of property rights is therefore necessary to limit these information costs so that they do not outweigh the benefits of creation or acquisition of a property right. *Numerus clausus* therefore represents the optimal balance between non-standardised property rights and completely uniform property rights (Merrill and Smith, 2000).

Henry Hansmann and Reinier Kraakman have offered another economic explanation of *numerus clausus* (Hansmann and Kraakman, 2002). They agree with Merrill and Smith (2000) that information costs of third parties are relevant, but suggest that the crucial element is that there are rules for third parties to verify property rights.[8] Hansmann and Kraakman therefore focus on verification rules. When two parties are dealing with a potential property right, they need to verify the other party's understanding of that property right. Unlike parties to a contract, who can verify their mutual understanding from each other's consent to the agreement, parties dealing with property rights are not necessarily bound by the rules of privity of contract. Hence, the law must offer additional verification rules to enable such parties to verify their mutual

[8] There is a parallel in the approach of Hansmann and Kraakman to the work of Bénédict Foëx (Foëx, 1987), who also focuses on the verification rules justifying third party effect, but from a legal perspective.

understanding. Property law, in Hansmann's and Kraakman's view, provides rules to decide when a property right will 'run' with an object. If there was only one property right, the verification rules could be simple; however when there is a variety of property rights available, the legal system needs to provide more complex verification rules to enable market participants to deal with these (Hansmann and Kraakman, 2002). New types of property rights should therefore only be allowed when the benefits of creation of such a right outweigh the costs the new type of property right creates for non-users by the introduction of new or extended verification rules.

Finally, Henry Smith has taken the *numerus clausus* debate to its highest level with his work on standardisation and property rights as modular building blocks (Smith, 2011). Smith has brought attention to property rights in a novel way. In his view property law is a dynamic system of law that finds standardisation in the forms property rights take as modular building blocks. Property rules are transactional rules in this respect and the modular building blocks of property law fit together like Lego bricks (Smith, 2011; Akkermans, 2013a). Transactional rules are therefore interface rules.[9] Property rights take this standardised modular form, Smith argues, to reduce information costs for third parties. Property rights take a standardised modular shape, so that they can easily be transferred and interact with each other, while leaving the precise content of the party agreement underlying the modular property right hidden from the outside world (Smith, 2011; Smith, 2014). The best example of this is perhaps a trust in which the complete agreement between the settlor and trustee creating the trust, or the testamentary disposition by which the trust was created, remains hidden to the outside world behind the veil of the trust (Smith, 2011). The exact specifications and conditions under which the trustee holds the trust property are unknown to other market participants, who can deal with the trustee in his capacity as holder of a legal property right. Beneficiaries and their equitable entitlement to the trust property do not have to be revealed to other market participants dealing with the trustee (Smith, 2011). Of course, market participants dealing with one or more beneficiaries under a trust will have to have more knowledge on their equitable interest.

It could be argued on the basis of this analysis that there are actually several types of third parties (Akkermans, 2013a). Besides the parties that give rise to the creation of a property right, who obviously have all the knowledge of the specifics of the right they create, there are (1) successors in title to these original parties, who will acquire the property right through sale or succession, (2) market participants who come into contact with the property rights created by the original parties or their successors in title, and (3) other market participants who have no dealings with the property right at all. Each of these classes of third parties are affected by the existence of the property right and each of these classes of third parties has different information needs. Successors in title will receive most of this information from the original parties themselves, but other parties dealing with a property right, such as potential buyers or creditors, will actively need to look for information. Merrill and Smith (2000) have shown how even market participants that do not have direct dealings with a property right can still be affected by its existence. They use the example of a novel property

[9] See also Eveline Ramaekers (2013), who refers to transactional rules as an operating system (OS).

right, a 'fancy' as it is called after the judgment of Lord Brougham LC in *Keppel v Bailey*.[10] This right, say a 'Monday-right', creates information costs on the market. It creates a high degree of information costs for third parties that wish to acquire the right, as they must find out what its contents are, but also for other market participants on the same market that have no dealings with the right in question. They also suffer increased information costs, as they must now enquire for every property they wish to acquire whether or not this property is – apart from the other recognised set of property rights – subject to a Monday-right. Each of these classes of third parties, but especially the second and third categories, benefit from standardisation of property rights. Standardisation reduces their information costs as finding out which standardised type of property right they are dealing with will already provide a lot of information. Such information can be offered by a land register in case of immovables, but also by possession or other types of publicity systems in the case of movable objects.

Numerus clausus as a standardisation of modular building blocks benefits the original parties and their successors in title, as they work with a module that can easily be transferred or combined, without the need to disclose more information than necessary. Third parties will mostly not need more information than the type of the module they are dealing with, but should they wish to acquire more information they can obtain this from the parties directly involved or, under certain circumstances, from the relevant publicity systems (Chang and Smith, 2015).

Law and economics has therefore done a lot of work explaining the existence of a *numerus clausus* of property rights, and is so significant it has made its way into the work of private law property law scholars (van Erp, 2003; van Erp, 2006b; Sagaert, 2007; Struycken, 2007; Akkermans, 2008; Ramaekers, 2013). However, law and economics mostly does not provide normative criteria to further develop property law, although it does give indications in that direction. There is an increasing group of private law property scholars that does go into this normative question, i.e. the making of (European) property law, in which *numerus clausus* plays a crucial role.

4. *NUMERUS CLAUSUS* IN LEGAL PRACTICE

A. How Do We Know Whether a *Numerus Clausus* of Property Rights Exists?

The *numerus clausus* is of great relevance to legal practice, although legal practice does not always mirror the theoretical discussions on the principle. Of course *numerus clausus* means that private parties cannot create types of property rights which are not authorised by the state in some form (either by legislation or by case law), but in legal practice there are many ways around this (Mostert and Verstappen, 2015). There are generally two ways in which legal systems express the *numerus clausus* principle (von Bar, 2014).

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[10] (1834) 2 My & K 517 at 520–526, 535–536 *per* Lord Brougham LC.

First, there are those legal systems that explicitly state in legislation that there can only be those property rights that are recognised by law. These include Portugal[11] and the Netherlands[12] (Akkermans, 2008; von Bar, 2014). Another example is the Greek Civil Code, which states, in Article 973, which rights can be property rights. However, such provisions must be handled with great care as it is far from certain that no other property rights can exist. Whether or not this is the case depends on the way in which the civil code or other legislation is used by the judiciary. The French Civil Code, for example, states in Article 543 that '[o]ne can have, on an object, a right of possession, or a right of ownership, or a right of hereditary title, or a right to enjoy fruits, or a right of servitude or a right of pledge or hypothec'. On a black-letter interpretation of the law, Article 543 would suggest these are the only property rights available in the legal system. However, this suggestion is belied both by special legislation, such as the Rural Code (*Code rural*) which deals with the right of *emphyteusis*, and by case law, such as the court decision that created a perpetual right to use.[13] In both Portugal and Greece, the supreme courts have upheld a much more strict interpretation of the respective civil code provisions.

Second, there are those legal systems that do not explicitly mention that there is a *numerus clausus* of property rights, but that behave as if this were the case. Examples of such systems are Italy and Austria, but also England and Wales and most state law in the United States (Smith, 2014; von Bar, 2014). The reasons this is so have been set out above (Sections 2 and 3). Depending on the legal system these arguments can be explicitly dealt with by scholars in the academic literature, but can also be dealt with by the courts.[14] Only occasionally do these judgments explicitly discuss the *numerus clausus* principle. Sometimes a new type of property right is not recognised,[15] and sometimes a specific party agreement is considered not to be part of an existing – recognised – type of property right.[16] The case law is then interpreted by legal scholars again to strengthen the existence of a *numerus clausus* principle.

B. Which Property Rights Can Be in the *Numerus Clausus*?

The *numerus clausus* of property rights limits the number (*Typenzwang*) of types of property rights but also the content of the existing types of rights (*Typenfixierung*). The content of this list differs from legal system to legal system, although there is a core number of property rights that exist in most of these. Based on existing comparative research (Akkermans, 2008; Kieninger, 2009; Graziadei et al., 2009; van Erp and

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[11] Article 1306(1) of the Portugese Civil Code, stating 'not permitted … unless in those cases provided for by law.

[12] Article 3:81(1) of the Dutch Civil Code stating 'he who is entitled … can … create the limited rights that are recognised by law …'.

[13] Cass civ 3e, 31 October 2012, 11-16.304, D 2012, 39 (Annotation Antoine Tadros).

[14] See e.g. Italian Court of Cassation, 29 February 1960, 392. See also *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175.

[15] *Hill v Tupper* (1863) 2 H & C 121 at 159.

[16] See Cass civ 3e, 6 May 1980, (1980) D Jur 78-15.562, rejecting a prohibition against building on a piece of land as a valid servitude in French law.

Akkermans, 2012; van der Merwe and Verbeke, 2012) a standardisation (Smith, 2011; Akkermans, 2013) of property rights results.

Systems of property law are hierarchical systems in which there are primary property rights (van Erp, 2006a; Akkermans, 2013), and a limited list of secondary rights (van Erp, 2006a) or lesser rights (Akkermans, 2008). The primary property right in civil law systems is the right of ownership that can usually be held in respect of land and movable objects. In some legal systems, such as French law, the right of ownership can also be held in respect to intangible (or incorporeal) objects, such as claims. In other legal systems, the right of ownership is restricted to corporeal objects only (van Erp, 2009). In common law systems, where there are generally two systems of property law – land law and personal property law – there are two primary rights. In land law this is the freehold (or fee simple), in personal property law it is title (Swadling, 2013). Although differences between ownership and fee simple and title exist, these rights share their position as the primary property rights in their respective legal systems (Gordley, 2006; Gretton, 2007).

All other property rights are lesser in content than the primary right.[17] There are three categories of these rights: (1) rights to use, (2) rights of security, and (3) acquisition rights. First, in relation to property rights to use, there is a general distinction between rights with a very broad scope, such as the civil law right of usufruct, and rights with a more limited scope, such as a servitude of right of way. Generally, rights to use with a broad scope can exist for a more limited duration of time (e.g. a right of usufruct is created for the life of the holder of the right), whereas rights with a more limited scope can exist for a much longer period (Akkermans, 2008). This category of rights includes the personal servitudes such as usufruct, real servitudes such as easements, apartment rights, building rights and long leases.

The second group of secondary property rights concerns security rights. In most legal systems a distinction is made between proprietary security rights on land (such as hypothecs and mortgages), movable objects (such as pledges or charges) and intangible objects (such as a pledge on claims or a floating charge) (Kieninger, 2009). Generally, proprietary security rights, however they are called, provide the holder of the right with priority in insolvency of the debtor of the claim whose payment the right secures, and also the possibility to act outside of an insolvency proceeding by taking (if possible) possession, selling the subject matter of the security right, transferring the property entitlement of that subject matter to a third party, and applying the proceeds of the sale to the outstanding debt (van Erp, 2006a; van Erp and Akkermans, 2012).

The third group, finally, is a newer category of property rights. It concerns rights held to acquire another legal position (van Erp, 2011). This category of rights concerns estate contracts, options to purchase and *Anwartschaftsrechte* (van Erp and Akkermans, 2012). These rights are generally recognised by court decision to answer to a need in legal practice to protect a person acquiring a property right.

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[17] In civil law terminology these rights are referred to as limited property rights.

C. Why Is the List of Property Rights Not the Same?

The three general categories of property rights dealt with above offer some insight into the composition of systems of property law. However, the practice of property law is much more complicated. Property rights are sometimes described as modular building blocks from which private parties can create their own construction (Smith, 2011). In this perspective the *numerus clausus* of property rights is essential to provide modular rights that can easily be combined. Other rules of property law, such as creation and transfer rules, become interface rules that determine if and how these modules can be combined. Especially in common law systems, such as English and US law, there is an almost unlimited number of ways in which property rights can be used. Property rights can be combined by contract, for example by creating apartments which are in turn made subject to other rights to use (such as a rights of usufruct) or to a proprietary security right (such as a mortgage) to enable acquisition of the apartment right. In some legal systems property rights can also be made subject to a trust, which will separate the management of the property right from the benefits. These powers can be held by different persons and allow for new ways to use certain property rights. Security rights, for example, can be held on trust to allow for large syndicated securities in which multiple banks are entitled to a single security right (Graziadei et al., 2009). Depending on the legal system, there is an almost infinite number of ways in which the use of a property right from the *numerus clausus* can be modified. Even in legal systems that do not recognise a trust, freedom of contract will go a long way (Struycken, 2007).

The way in which property rights are applied in practice may be a very good explanation as to why the list of property rights differs between legal systems. New types of property rights will not arise unless there is a need (Di Robiliant, 2014; Mostert and Verstappen, 2015). This would apply, for example in relation to newly created property forms such as CICs, community land trusts and digital servitudes (Di Robiliant, 2014). New property forms are coming under pressure from legal practices where private parties require new ways of sharing property rights (Dyal-Chand, 2013) or new ways to apply property rights to changed circumstances in society (Singer, 2014).

Such developments, where citizens' initiatives call on the legislature or judiciary to intervene and allow for innovation in property law, may also be explained from a law and economics point of view. Property rights create information costs and a system of property law arises where there is an optimal balance between information costs and benefits of creating new types of property rights (see above, Section 3B). Democratic 'drive' to create new property rights may change the way in which the information cost argument is perceived. Legislative intervention can also create room for new property rights. For example, by making the land registry more efficient and reliable, and land registry data more easily available, the information costs for market participants go down and there would be theoretical room for the creation of new property rights. The rise of e-conveyancing and e-registration in many systems might explain why these new property forms are now in the process of being recognised.

5. TOWARDS A LESS RIGID *NUMERUS CLAUSUS*?

Four property law scholars have attempted to develop property law by directly addressing *numerus clausus* (van Erp, 2003; Sagaert, 2005; Füller, 2006; Akkermans, 2008). In 2003 Sjef van Erp made a plea for a more flexible approach to *numerus clausus*, a *numerus quasi-clausus* (van Erp, 2003). Van Erp focuses on the effects of the French Revolution on property law and also on trusts and timeshares. He demonstrates how civil law systems are badly equipped to deal with these challenges. Both trusts and timeshares deal with fragmentation of property entitlements and must therefore be carefully scrutinised as they potentially reduce the efficient use of property rights. Trusts fragment a property right into management and benefit, and timeshares fragment entitlement to a property right in time. Van Erp argues that both trusts and timeshares are innovations that property law is facing and must answer to. *Numerus clausus* ensures economic efficiency, but an excessively strict approach to *numerus clausus* could be economically harmful. A *numerus quasi-clausus*, which would have the ability to encompass new types of property rights, would be a way forward.

In 2006 Jens-Thomas Füller published a thesis on the separation between property law and contract law, which involved some attention to the *numerus clausus* (Füller, 2006). Füller seeks to restructure the law of property to incorporate it as well as contract law into one general system of patrimonial law: the law dealing with assets and debts. In such a system a lot of the tension between property and contract law can be removed as these are no longer competing, but rather complementary. There would still be a fixed number of rights (*Typenzwang*), but the content (*Typenfixierung*) of these rights could be more flexible and adapted to the needs of modern-day property law.

Vincent Sagaert (2005) attempted to bring more dynamics into property law. Sagaert finds these dynamics in the law of obligations, mostly contract law (Smits, 1996). In the current approach there is a top-down model that decides what can and cannot constitute property rights. In the approach that Sagaert proposes the distinction between the law of property and the law of obligations is also surrendered to a system of patrimonial law in which party autonomy becomes the leading principle. Sagaert proposes a new set of four rights which will have effect against third parties. In his analysis any legal relation has an active and a passive side (Ginossar, 1960). The active side is the party that is entitled to the rights, the passive side the party that is bound by the right. Such a right may be in relation to the performance by another party or be in relation to an object, which will require it to transfer with that object to another party if necessary.

In Sagaert's catalogue there is the traditional category of (a) personal rights, (b) property rights with third party effect on both sides, such as servitudes, (c) rights with third party effect on the passive side, such as *superficies* or *emphytheusis*, and (d) rights with third party effect on the active side, such as personal servitudes like the German *beschränkte persönliche Dienstbarkeit* (limited personal servitude; see Akkermans and Swadling, 2012) or the English restrictive covenant (Akkermans, 2008). With respect to *numerus clausus*, Sagaert argues there have been different degrees of attention. With regard to the first and second types, it is relatively clear that personal rights are subject to freedom of contract and do not have third party effect. Property rights are subject to limitation of party autonomy. The third and fourth types of

Sagaert's rights are more complicated. In regard to the third type, especially servitudes, there is generally a less stringent approach as in most systems the rules relating to servitudes are much more relaxed in favour of party autonomy for the parties creating the right. The fourth category, finally, has not received much attention. Sagaert mentions how these rights resemble old feudal duties and hence have not received much attention in the modern-day property debate.

The traditional approach to *numerus clausus* has always been an *ex ante* approach, where parties must fulfil a pre-defined set of criteria to create their right. Sagaert argues that an *ex post* approach may be feasible with this new classification of rights. Sagaert's main criterion is that such a right must not cause damage from an economic point of view. Therefore when, after creation, it becomes apparent that the right does create damage, it should be possible to end it or transform it into a personal right.

I have also previously argued for an *ex post* approach to *numerus clausus* (Akkermans, 2008). Inspired by the approach taken in South African law, which employs a 'subtraction from the *dominium*' test, I proposed criteria on the basis of which property rights can be created. South African law employs a test for the land registrar when new types of property rights are presented for registration (Mostert and Verstappen, 2015). The test comprises two elements: (1) the parties must wish to create a right that binds not only themselves, but also their successors in title, and (2) the right created must result in a subtraction from the *dominium*.[18] The second element is particularly interesting as it presumes that property rights can only exist when the content of the limited property right was once contained in the right from which it was derived. In other words, the 'daughter right' must comprise elements of the 'mother right'. This approach for creation of property rights is known as the subtraction method (Akkermans, 2010).[19] There is an inherent limitation on the types of property rights than can be created in this approach. The mother right is usually a primary right, such as ownership, and will comprise powers to use, enjoy and transfer (*usus, fructus* and *abusus* in Latin terminology). Property rights derived from this can therefore contain a combination of parts (Akkermans, 2008). When employed in an *ex post numerus clausus* setting, such as in South African law, it will therefore not lead to a completely new set of property rights, as most of the traditional types of rights are already the most common combinations of these three elements. However, the South African approach is subject to much criticism (De Waal, 2000; Mostert and Verstappen, 2015), especially due to the unpredictability of the outcome. Some cases have arisen in which the South African courts have – somewhat surprisingly – recognised new property forms.[20]

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[18] *Ex parte Geldenhuys* (1926) OPD 155 at 164 *per* De Villiers JP.

[19] There is also a limitation method, in which the contents of the daughter right are not taken from the mother right, but rather copied, allowing for extensions (Akkermans, 2010).

[20] See *Willow Waters Homeowners Association (Pty) Ltd v Koka NO and Others* (768/2013) (2014) ZASCA 220, which introduced a new type of security right.

6. CONCLUSION

The *numerus clausus* of property rights can be analysed at various levels. For some it is the hard rule that there can be no other property rights than those explicitly recognised by legislation or case law. In this interpretation, the *numerus clausus* is a rule. From this perspective, it is difficult to deal with new types of property rights that are arising in legal practice. Increasingly innovative property forms are being recognised in case law. This creates real difficulties in classifying these new types of rights as quasi-property rights (such as in German law: Akkermans, 2008) in order to keep the rule of *numerus clausus* alive.

For others, it is a matter of degrees of party autonomy, where full freedom of contract is enjoyed in the law of obligations, but restrictions are imposed when it comes to giving third party effect. From that perspective, *numerus clausus* is a principle that can be expressed in legislation or case law. That principle of *numerus clausus* finds its expression, although not always explicitly, in almost all legal systems. Even in systems that adhere to an 'open system' of property rights, there are restrictions on party autonomy and control mechanisms to decide which party agreements can have third party effect.

While property law systems are generally perceived as static systems, there is a dynamic world below the surface, especially due to the influence of party autonomy. If *numerus clausus* is expressed as a principle, there is more room for dynamics. If it is instead expressed as a rule, the property system becomes more static. *Numerus clausus* limits the number and content of property rights. New types of property rights can therefore not simply be created. *Numerus clausus* is therefore both a matter of authority and a matter dealing with the content of property rules. Other rules of property law are interface, operating or transactional rules that deal with how these property rights can be created, transferred and terminated.

Numerus clausus scholarship does not offer the end of the debate, but rather the beginning of an understanding of modern-day property law. It is only after we can establish which property rights can exist that we can discover how these rights can be held – e.g. outright, shared, on trust – and how property rights may be combined with each other. In other words, other rules of property law can also affect our understanding of the function of the *numerus clausus*. Many of the new innovative property forms, such as CICs and community land trusts, are based on shared competences rather than exclusivity (Di Robiliant, 2014) and the property rights involved play a less prominent role in relation to the objective that is pursued.

Much work has been done to discover why *numerus clausus* exists and to explain how it functions. Less work is done on the role of *numerus clausus* in the future of property law. Only now that a better understanding of *numerus clausus* is achieved, both from a legal as well as from an economic view, can we turn our attention to the role of *numerus clausus* in reforming property law. Reform is necessary due to the increased pressure on property law from the law of obligations, but also because property law systems increasingly come into contact with each other. For example, in the internal market of the European Union there are an increasing number of legal systems which have adopted a trust or trust-like device so that parties use their own legal system (Braun and Swadling, 2012). This puts pressure on the existing categories

of property rights that have been made in the context of the internal workings of a legal system. These developments create dynamics to which they cannot easily respond, especially with respect to civil law jurisdictions, which have created a balanced system at the moment of codification of their private law (Di Robiliant, 2014; Singer, 2014). The response must come from a re-evaluation of the role and content of *numerus clausus* in their legal systems.

In fact, *numerus clausus* plays a central role in this debate. The types of property rights, whether or not they should be recognised and by whom, are research questions for the next decade of property law scholarship. With our enhanced understanding of the *numerus clausus* we can move towards a better understanding of property law and its further development to suit the needs of the 21st century. These 21st-century challenges include the increased role of party autonomy, but certainly also new objects of property law – including virtual property (Erlank, 2012; van Erp, 2012), and the further creation of international property law rules (Akkermans et al., 2012; Ramaekers, 2013; Akkermans, 2015).

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