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# The *numerus clausus* Principle and the Type Restriction—

## Influence and Expression of These Principles Demonstrated in the Area of Common Ownership and Servitudes

The *numerus clausus* principle and the type restriction are basic principles of property law. These principles pervasively influence the whole of property law. Different from the abstraction principle and from the distinction principle<sup>1</sup>, both the *numerus clausus* principle and the type restriction have not been set forth *expressis verbis* by written provisions of the law. Nevertheless, these principles form a basis for the whole manner of regulation applied in property law. The freedom of contract (as freedom of agreeing on the content of property law rights) is expressly foreseen in specific sections of Estonia's Law of Property Act<sup>2</sup> (LPA) and in other laws that set forth provisions of property law and real rights.

There is a principle in accordance with which the legal order includes only such real rights as are defined by law, and contracting parties themselves can neither create additional, new real rights nor remake or impermissibly further develop the content of existing real rights. This principle seems simple only at first glance. It is usual in conclusion of transactions involving property rights that time and again the following questions, among others, arise: what exactly may belong to the content of a specific real right, how far can the contracting parties go in forming the content of a real right, what is the content of agreements that can be carried forth into the Land Register under a notation and turn them thus into agreements under law of property, etc.? In transactions with real estate, presumably most of these questions arise in conclusion of a notarised transaction but also in carrying of the transaction forward into the Land Register. Also, court actions involving these questions are obviously unavoidable in cases wherein a party presents a claim for altering or deleting an entry in the Land Register because due to the *numerus clausus* principle such real right under the disputed entry could not become into being, or certain real right has been further developed exceeding the type restriction by it. In the first place, the *numerus clausus* principle and the type restriction are important for the reason that in cases of their violation no corresponding real right can arise or no respective legal relationship can acquire the desired character under property law. The result will be an incorrect entry or, in the preferable case, refusal of making an entry. The subject is especially important for reason of arguments that continuously arise as to the permissibility of forming real rights' content. In the

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<sup>1</sup> See the principles expressed in Estonian law in force today, as in §6 (4) of the General Part of the Civil Code Act. Tsviil-seadustiku üldosa seadus. – RT I 2002, 35, 216; RT I, 6.12.2010, 1 (in Estonian).

<sup>2</sup> Asjaõigusseadus. – RT I 1993, 39, 590; RT I, 23.4.2012, 1 (in Estonian).

course of such debates, specialists have exhibited a misunderstanding of why the corresponding principles exist and what the positive influence of these principles is on the legal system and on commerce.

The author of the present article assesses the particular influence of the *numerus clausus* principle and the type restriction exercise in legal commerce.

This article provides an assessment of rigid type restriction: is it necessary and well grounded, or should considerably greater breadth be allowed in ways of forming the content of real rights as far as sales interests are concerned?

Because of the limited length of the article, the influence of the principles mentioned is discussed and demonstrated with the aid of examples of the following valid restrictions: 1) the content of servitudes, 2) the permissibility of supplying real right content for agreements concluded between co-owners, and 3) the permissibility of applying real rights to agreements concluded between flat-owners. In considering similarities in regulations, the author has proceeded from the German, the Swiss, and the Estonian law when assessing the essence, influence, and justification of the *numerus clausus* principle and the type restriction. As there are sufficient similarities between the Estonian real right and the German real right, the standpoints expressed in German court practice and jurisprudence have also been used in addition to the Estonian law in the analyses below.

## 1. Expression and meaning of the principles

### 1.1. Expression of the principles

Every more important discussion that includes treatment or analysis of basic real right principles<sup>3</sup> also touches on the *numerus clausus* principle and the type restriction. Unfortunately, authors usually confine themselves to presenting a laconic definition of the concepts. But the expression of the *numerus clausus* principle and the type restriction and the influence due to them in fitting up of real rights and in determination of the limitations arises with every single real right in all cases wherein the transfer participants are given even the slightest possibility of forming the content of a real right. Therefore, the actual content, influence, and meaning of the *numerus clausus* principle should be looked for with all of the various real rights and not confined to theoretical treatments that include the respective definitions. Thus the influence of the corresponding principles becomes apparent in establishment of a real right, in entry of real rights in the Land Register, and in realisation of rights due to a real right. The principles have especially great meaning in cases in which the legislator has allowed the parties to form the content of a real right but has not precisely described the limits to the content of that formation (for example, forming the content of the servitudes, making co-owners' agreements binding for legal successors, and making agreements between flat-owners).

### 1.2. Meaning of the principles

Real right and disposals are transactions that bring about changes as for real rights. The characteristic qualities of the right concerning these transactions (real right and disposals) are to a considerable extent ensured through the imperative right. By the corresponding regulation we predominantly have got to do with the imperative right. The law of obligations, on principle, influences only the parties to an obligation. Therefore, in the law, the obligation of the parties may be left to the parties to the obligation themselves. However, all persons should accept real rights as valid for themselves, not only parties to the obligation.<sup>4</sup> It is, therefore, understandable that the property law takes into account everybody's interests; i.e., the law proceeds not only from the interests of persons directly connected with the legal relationship in question. The imperative norms are, therefore, created by law. The aim in enacting restrictions to freedom of form-

<sup>3</sup> See, for example, K.H. Schwab, H. Prütting, *Asjaõigus. Õpik* (Property Law. Textbook). Tallinn 1995, p. 5 (in Estonian) or Soergel, *Bürgerliches Gesetzbuch (BGB). Mit Einführungsgesetz und Nebengesetzen*, Vol. 4: Sachenrecht (§§ 854–1296). Wohnungseigentumsgesetz, Erbbaurechtsverordnung, Schiffsrechtsgesetz. Prof. Dr. Fritz Baur (scientific editor of Vol. 4). Stuttgart, Berlin, Cologne, Mainz, Tübingen: W. Kohlhammer Verlag 1968, paragraph 21 of the introduction.

<sup>4</sup> P. Schlechtriem, *Võlaõigus. Üldosa. Teine, ümbertöötatud trükk* (Law of Obligations. General Part. Second, Revised Edition). Tallinn 1999, p. 4 (in Estonian).

ing is also the necessity of ensuring certainty and clarity in application of the law.<sup>\*5</sup> Long-term legal relations that apply to everyone are protected through the simplification of legal relations and avoidance of the permissibility of changes in their content.<sup>\*6</sup> If it were not so, freedom of forming real rights would lead to generation of too many real rights, each with different content, and would thus impair certainty in application of the law. To a certain extent, the aim of the type restriction and the reason for its establishment can be characterised as the legislator's wish to place certain limits on the owner of a thing so that the owner would not be able to go too far in encumbrance with a real right of the ownership belonging to him or her. The imperative character of a real right as normative has results proceeding first of all from two elements: a definitively specified number of real rights and the type restriction. With a specified number of real rights, the participants cannot think up any new real rights. The type restriction means that the interested parties may change real rights only as far as space is left for this by law. Accordingly, it is not possible, for example, to agree that the extinguishment of a claim would not have meaning with respect to continued validity of the accessory right of security. Likewise, is not allowed to exercise a real servitude the content of which falls outside the needs of the dominant immovable.<sup>\*7</sup>

Different from types of contract under the law of obligations, the content of real rights cannot be freely amended through an agreement. Agreements that fall outside the limits of the type catalogue can only be a part of complementary agreements, which cannot amend the real right under property law itself. Such complementary agreements cannot have arbitrary content under property law: the type restriction excludes re-forming the content of the existing real rights to an extent that exceeds the limits set forth by law.

However, this does not mean that no freedom of contract exists for real rights. Indeed, with real rights there is no such freedom of contract as seen with the right of obligation, which also involves freedom of forming a contract<sup>\*8</sup>, but freedom of contract as freedom to conclude contracts is, in practical terms, without any limits in the context of real rights. Freedom of contract in the meaning of freedom of re-forming is possible only within the framework of the set types, and it is limited to the choice of types; it does not extend to re-forming the content of a given type. With the right of obligation, one also encounters several types of contracts the content of which is imperatively determined to a great extent because of high social sensitivity and that is why the freedom of contract is there restricted to a considerable extent (examples include a residential lease contract, a contract with model conditions, and also labour law). If one proceeds from this point of view, the difference between freedom of contract as valid with the right of obligation and for real rights is clearly quantitative—regardless of restrictions due to private autonomy, there are considerably more re-forming possibilities with the right of obligation than in cases involving real rights.

### 1.3. Possibilities for giving content in property law to agreements that do not have the content of a real right

There is a preliminary notation in between the rights with a character under property law and the rights related to the right of obligation.<sup>\*9</sup> This should be understood as an instrument securing the creation of a real right with respect to an immovable. With a preliminary notation, the access and definition have been secured through the Land Register entry. The claim securable with a preliminary notation has got the content under the law of obligations. The securing lies in the fact that a preliminary notation brings about nonentity to disposal, which in its turn damages a securable claim. The validity of a preliminary notation as a security depends on the securable claim.<sup>\*10</sup>

<sup>5</sup> O. Palandt. Bürgerliches Gesetzbuch. mit Einführungsgesetz, Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen, Verbraucherkreditgesetz, Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften, Gesetz zur Regelung der Miethöhe (Art. 3, des 2. WKSchG), Produkthaftungsgesetz, Erbbaurechtsverordnung, Wohnungseigentumsgesetz, Ehegesetz, Hausratsverordnung. Bearbeitet von P. Bassenge, W. Edenhofer u.a. 54., neuarbeitete Auflage. München: C.H. Beck'sche Verlagsbuchhandlung 1995, preceding 854, paragraph 3.

<sup>6</sup> Soergel (see Note 3), in paragraph 21 of the introduction.

<sup>7</sup> H. Westermann. Sachenrecht. Ein Lehrbuch. Unveränderter Nachdruck der 5., neu, überarbeitete Ausgabe, 1966. Karlsruhe: Verlag C.F. Müller 1969, pp. 19–20.

<sup>8</sup> H. Köhler. Tsiivilseadustik. Üldosa. Õpik (Civil Code. General Part. Textbook). Tallinn 1998, p. 91 (in Estonian).

<sup>9</sup> For acts of law providing for elements similar to the preliminary notation, see, for example, §883 of BGB. – RGL. S. 195; Schweizerisches Zivilgesetzbuch (ZGB), Art. 961. – AS 24. 233; §63 of LPA.

<sup>10</sup> See §63 (3) and §63<sup>2</sup> (1) of LPA.

The other important option for formation of the content of real rights, whose possibility and its legal permissibility are not discussed or debated, is linking real rights contracts to the condition of changing or postponing or to both of these. In the event of such a construction, the entry into force of a contract under valid property law (or its continuation) depends on the actualisation of the condition established within the framework of the causal transaction, which is the basis of a contract in property law. The application of conditional contracts under property law in this form is no longer debatable at present. Only that contract under property law that is directed to the transfer of ownership of an immovable shall be condition-free (unconditional) (such a requirement in Estonian law results from §120 (2) of the LPA and in German law from §952 (2) of the *Bürgerliches Gesetzbuch*, or BGB).<sup>\*11</sup>

#### 1.4. Justification of the numerus clausus principle and the type restriction

In legal disputes about content permissibility for a real right, people have often pointed out certain knotty issues for parties to a transfer. What is the need for the corresponding principles and restrictions due to those principles, what is the positive effect of restrictions on commerce and on the legal system, and why can't restrictions be treated in a fairly 'lenient' manner? These are the questions most often brought up by critics of the *numerus clausus* principle and the type restriction. In the first place what they refer to is that those principles harm freedom of contract and through that persons' free self-realisation. First of all, it should be stressed that the disposing principle of a thing is mainly characteristic of the right of obligation. A viewpoint has even been expressed in jurisprudence that, in addition to the real right, the contract freedom should be treated in the same restrictive way with respect to all other parts of civil-law rights because the principle of contract freedom has been enshrined in the right of obligation.<sup>\*12</sup> That means that full freedom of contract is not characteristic of the whole of civil law.

Thus the *numerus clausus* principle and the type restrictions are not characteristic of only real rights. Certainty and clarity in application of law should be ensured and protected too, in addition to free self-realisation. If freedom of contract in the sense of freedom to form the content of a contract were allowed for real rights, parties engaging in commerce would determine the content of a certain real right when creating real rights. This would grant innumerable unique real rights that should be valid not only for the initial parties to the legal relationship but also for everybody.<sup>\*13</sup>

In connection with those rights in force for everybody, the courts would most properly then proceed from ascertaining what the contract-makers thought in every individual case instead of assessing what the legislators had in mind when creating certain restricted real rights. It would not be possible to apply unified court practice that clarifies the content of real rights, because every real right would be unique. The rights created by the parties themselves can be protected in the legal relationship between two persons. It would be inconceivable for the lawmaker to oblige third parties to honour the rights created by another third party. These are the reasons for which a firm point of view should be taken on the *numerus clausus* principle. This principle shall be stated to be justified and necessary.

The type restriction can exist only if it is followed strictly and for all real rights. We could not speak about the *numerus clausus* of a real right if the participants could not create any more properly new real rights but could considerably alter the content of existing real rights instead. Accordingly, the restrictive attitude toward forming of real rights' content should be retained, which means that, unless the right to form the content of a real right is not directly provided for by law, it shall be considered inadmissible. Indeed, this is how the type restriction has been treated.<sup>\*14</sup>

<sup>11</sup> F. Quack (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 4: Sachenrecht (§§ 854–1296)*. Wohnungseigentumsgesetz. Erbbaurechtsverordnung. C.H. Beck'sche Verlagsbuchhandlung 1981, specifically Quack's introduction, paragraph 38.

<sup>12</sup> P. Varul, I. Kull, V. Kõve, M. Käerdi, K. Saare. *Tsiviilõiguse üldosa (General Part of Civil Law)*. Tallinn 2012, p. 137 (in Estonian).

<sup>13</sup> Schlechtriem (see Note 4), p. 4.

<sup>14</sup> Schwab, Prütting (see Note 3), p. 5.

## 2. The influence of the numerus clausus principle and the type restriction—examples with certain instruments

### 2.1. Restrictions applied to the content of servitudes

The Estonian and the German law, as well as the Swiss law, know servitudes whose exact content shall be determined by the participants at the moment of the establishment of a servitude.<sup>\*15</sup> In the proper sense of the word, no special restrictions are provided by law as to the content of a servitude. Nevertheless, the law opens the concept of the servitude and sets forth restrictions according to which a servitude shall not oblige an owner of the servient immovable to any kind of act except the acts that have supporting meaning through exercising of a real servitude.<sup>\*16</sup> The law also sets forth a restriction according to which a real servitude entails the right to carry out only those acts that, because of the content of the servitude, are necessary in the interests of the dominant immovable. No exact restrictions are established by law as to the content of a servitude. And yet a stance shall be taken that by establishing a servitude, one cannot agree on whatsoever one wishes as far as the content of the servitude is concerned. The content of the servitude shall not contort the essence of the servitude.

Restrictions set as to the content of a servitude serve the aim of excluding excessively far-reaching restrictions to the owner's rights.<sup>\*17</sup> The type restriction valid with respect to restricted real rights has the following influence in the case of servitudes: only servitudes with certain content are allowed. The questions pertaining to the permissibility of the content may be complicated. Different from the usufruct, the servitude can be directed only to the right of use with certain content or to the toleration obligation. The content of the servitude cannot be such as to prohibit *in toto* the right to use the immovable, the right that the owner of the immovable would otherwise have.

One criterion in coming to a conclusion on the permissibility of the content is the following: the servitude can only be directed to the toleration of something, and it cannot require the owner of the encumbered immovable to do something positive. The content of a servitude may also be the obligation to avoid some kind of activity.<sup>\*18</sup>

As far as restrictions to the content are concerned, the difference between restrictions to the content of the real servitude and the personal servitude are the following: §1019 of the BGB requires that the content of the servitude create advantages for the dominant immovable. This is an additional restriction to the content valid for the real servitude (in Estonian law, the analogous restriction has been enacted in §178 (1) of the LPA). In contrast, the content of the personal servitude may be any protection deserving of the interest of a person entitled thereto in accordance with the servitude or of the interest of another person. To decide on the permissibility of the content of a real servitude, one has to take into account the fact that a real servitude shall be an encumbrance of an immovable; i.e., it has to create restrictions to the use of the immovable. However, the real servitude that is not directly connected with restrictions to use of the immovable cannot create such obligations for the owner of the immovable. The German Supreme Court (BGH) has taken a stance on the servitude: the servitude shall have influence on the actual and immediate use of the immovable.<sup>\*19</sup> The BGH derives from this conclusion the following: the content of the servitude may be prohibition of a certain economic activity (such as avoidance of hotel-keeping or prohibition of petrol-station-keeping), while the content of the servitude shall not be prohibition of selling certain goods or commodities or of selling other goods or commodities than those specified. For example, one may establish a servitude the content of which is prohibition of keeping a petrol station with the encumbered immovable but one may not establish a servitude whose content is prohibition of sale of certain products at a petrol station there. The BGH has found it permissible to establish a servitude the content of which is to prohibit sale of any kind of beer on the immovable, including also sales of bottled beer on said immovable. Should the content proposed for the servitude be a right of claim directed toward some positive activity, this cannot be established

<sup>15</sup> See §1018 of BGB; Articles 730 and 737 of ZGB; §§ 172 and 178 of LPA.

<sup>16</sup> See §1019 of the BGB; Article 730 (2) of ZGB; §172 (2) of LPA.

<sup>17</sup> Münchener Kommentar (see Note 11), specifically §1019, paragraph 1, by Falckenberg.

<sup>18</sup> Section 1018 of BGB; Article 730 of ZGB; §172 of LPA.

<sup>19</sup> Westermann (see Note 7), pp. 606–608.

within the framework of a servitude, so one shall choose another form of the restricted real right—the real encumbrance.<sup>\*20</sup> Such restrictions to the content of servitudes could also be applied in Estonia.

The servitude does not have to increase the objective value of an immovable, but it does have to offer some kind of advantage to a person entitled thereto in accordance with the servitude. We are dealing with an advantage when a benefit or blessing due to the servitude is objectively useful for the entitled person. For example, such aims as restriction of competition, preservation of a peaceful environment, and preservation of certain aesthetic elements (such as the existing surroundings or architectural style) or an interest in preserving free sight have been considered permissible, essential, and objectively useful in the context of the content of a real servitude. In cases involving a real servitude, the separate immovable properties need not be situated directly adjacent to one another, they have to be close enough to each other that one can offer a useful advantage to another. In cases of servitudes setting forth a competition prohibition, some certain advantage for the dominant immovable must result from the prohibition of competition.<sup>\*21</sup>

## 2.2. Restrictions to the establishment of real rights to agreements on procedures of use between co-owners

The legal relationship between co-owners with respect to exercise of common ownership has been extremely abstractly regulated. At the same time, the law makes it possible to conclude practically unrestricted agreements between co-owners on procedure of use. At least from the literal text of the law<sup>\*22</sup>, it does not follow that the legislator would set any restrictions on the use of common ownership with respect to agreements between co-owners. At the same time, the character of this kind of agreement concluded between co-owners should be evaluated. Inasmuch as an agreement between co-owners is firstly valid only between co-owners and exercises only internal influence, it shall be considered an agreement deriving its character from the law of obligations; i.e., such an agreement is valid only for the parties to the relevant legal relationship. Extending outside the legal relationship between co-owners are every co-owner's owner's rights relative to a third party<sup>\*23</sup>; therefore, agreements between co-owners have no influence with regard to everybody, only with regard to parties to the corresponding agreement. In such a situation, the application of restrictions to the respective agreement under property law is not well-founded. This includes the application of restrictions due to the type restriction or arising from the *numerus clausus* principle. In a situation wherein the agreement among co-owners becomes valid with respect to all of the co-owners, the agreement between the co-owners does, however, acquire content characteristic of a certain real right—i.e., validity with regard to each actual co-owner, including with regard to every individual co-owner's special legal successor.

As far as the law allows, co-owners may specify through the agreement that the use of a thing in common ownership shall take place in a manner totally different from that set forth by law and it is possible to amend such an agreement so as to be valid with respect to all actual co-owners of the thing.<sup>\*24</sup> That is why such an agreement shall be considered to be of the kind that under property law influences the legal share of a common ownership as an object of commerce. Because of the above-mentioned fact, one shall evaluate whether any restrictions pertaining to the content result in the corresponding agreements, stemming from the type restriction or from the *numerus clausus* principle.

Of importance here are those agreements between co-owners with the aid of which the manner of use of a thing or a part of a thing is regulated such that certain conditions are specified: how a thing may not be used or a manner of use of a thing as such. These agreements are important because, with them, one can fundamentally and essentially amend a thing in common ownership as an object of the right under property law—i.e., such that the object corresponding to the right provides considerably fewer or more restricted possibilities of use for the thing in common ownership than those possibilities would be in the case of their regulation by the normative enacted in the law. Also among the aims of the *numerus clausus* principle and the type restriction is to exclude overly far-reaching formation of real rights and also the owner's rights excessively limiting these. Because of this fact, the author of the present article finds that some restrictions

<sup>20</sup> *Ibid.*

<sup>21</sup> Münchener Kommentar (see Note 11), specifically §1019 2)–6), by Falckenberg.

<sup>22</sup> See Article 649a of ZGB and also §79 of LPA.

<sup>23</sup> Section 1011 of BGB; §71 (4) of LPA.

<sup>24</sup> Section 1010 of BGB; Article 649a<sup>2</sup> of ZGB; §79 of LPA.

as to content should also be applicable with regard to agreements of the co-owners on procedure of use in situations wherein these agreements gain an effect in property law—that is, when they are valid with respect to actual co-owners.

### 2.3. Limitations valid with regard to legal successors of agreements concluded between flat-owners

Flat-owners may regulate the legal relations between themselves in a manner departing from the procedure provided by law unless the law directly excludes the conclusion of certain contracts.<sup>\*25</sup> It is possible to enter agreements concluded between flat-owners in the Land Register. As a consequence, they become valid with regard to an actual owner of flat-ownership.<sup>\*26</sup> Flat-owners may regulate with an agreement the physical share of the flat-ownership and the use of the co-ownership. Such agreements too can be entered in the Land Register.

Only the information provided by law is entered in the Land Register. In point of fact, a notation can be entered in the Land Register for only agreements the possibility of whose entry has explicitly been set forth by law.<sup>\*27</sup>

Those agreements whose entry is explicitly set forth as possible by law consist of, first of all, agreements that regulate the use of the flat-ownership (including common ownership as well as physical shares), agreements deviating from the legally specified relationship for flat-owners, and agreements deviating from a relationship that involves bearing of encumbrances and expenses for the flat-ownership. Through entry of corresponding agreements in the Land Register, these agreements acquire validity with regard to actual flat-owners—i.e., certain effect under property law. That is why these agreements are also subordinated to the *numerus clausus* principle and to the type restriction.

Within the relations of a flat-owners' association, agreements may be concluded with which restrictions on use of flat-ownership are established. In a parallel with Estonian law, there is an analogous norm in the German Apartment Ownership Act<sup>\*28</sup> that sets forth the possibility of conclusion of such agreements. Restrictions of use can first and foremost be established by excluding certain manner of use. For example, flat-owners may agree that ownership of flats shall not be used within the framework of economic activity. By means of an agreement, flat-owners may also prohibit playing of music or music-making, for example, during certain hours in daytime or during the night. In principle, flat-owners may also exclude through an agreement the residential letting of flat-ownership. In accordance with §15 of the *Wohnungseigentumsgesetz* (WEG), flat-owners may give, via an agreement, exclusive rights of use to certain flat-owners—for example, with regard to parking places situated outside the building. With an agreement, flat-owners may prohibit keeping pets or raising of animals in the building.<sup>\*29</sup>

Primary restrictions on establishment of a real right to flat-owners' agreements stem from the imperative acts of the law—flat-owners cannot establish a real right to such agreements as are in conflict with the imperative acts of the law. However, agreements pertaining to the procedure of use should be restricted by the aims that have been the grounds for establishment of the type restriction—i.e., the aim to protect the owner from excessive restriction of his or her ownership. It is only natural that flat-owners' agreements shall be in accordance with general principles of civil law.

<sup>25</sup> Gesetz über das Wohnungseigentum und das Dauerwohnrecht (Wohnungseigentumsgesetz) (WEG), §10. – BGBl. I S. 175, ber S. 209; Korteriomandiseadus (Apartment Ownership Act, hereinafter AOA), §8 (1). – RT I 2000, 92, 601; 2006, 43, 326 (in Estonian).

<sup>26</sup> Section 10 of WEG; §8 (2) of AOA.

<sup>27</sup> See §53 of LPA.

<sup>28</sup> See §15 (1) of WEG.

<sup>29</sup> See §15 (1) of WEG.

### 3. Conclusions

The aim of the *numerus clausus* principle and the type restriction is to ensure certainty and clarity in application of the law and thus that participants in commerce not be able to form new real rights or, alternatively, unique restricted ones. The wish of the legislator may be considered also as an attempt to ensure through restrictions that an owner of a thing would not be able to 'give the ownership away' on an impermissibly large scale.

Therefore, it is possible to furnish real rights with content only when this explicitly stems from the law, and it is still not possible to develop real rights further in an unrestricted manner, even in places where this is actually allowed. This means that no further development of real rights is unrestrictedly possible. The furnishing of a real right with content shall hinge on the essence of the real right itself, and it shall not be so far-reaching that the owner of a thing, in essence, gives ownership away excessively. It is possible to establish a real right for different agreements only if such a possibility is directly due to the law.

The legal relationships that cannot be changed under property law that arise from the *numerus clausus* principle and those due to the type duress (compulsion) can be ensured, for example, with the help of a preliminary notation and a conditional real rights contract.

Although again and again people express dissatisfaction with the situation wherein participants in a transfer cannot be as free in forming the content of real rights as they are in concluding contracts under the law of obligations, one should still take the position that the *numerus clausus* principle and the type restriction are justified and important and that they have considerable positive influence on commerce and on the legal system. Subordinating real right to the type restriction creates certainty and clarity in application of the law. It prevents legal disputes. Thanks to these principles, we have not innumerable unique and one-time-only real rights but, instead, a certain small number of real rights. This small number of real rights has been compiled by a legislator. The content of these rights too has been set forth by lawmakers. That is very important in property law, because it is easier for third parties to honour them this way.

Judging by the content of real rights, we can proceed from regulations enacted by law and from the court practice formed in respect of the corresponding real rights.

The *numerus clausus* principle and the type restriction are valid also for those real rights the content of which has to be created by commerce participants themselves. It is thus, for example, for servitudes and agreements concluded between co-owners and between flat-owners. The type restriction is also valid in cases wherein the lawgiver leaves the content of a real right to be determined by the parties themselves. Then the fact shall be taken into account that the content of a real right agreeable to the parties shall not pervert the essence of the law and not restrict the rights of an owner to an inadmissible extent.