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Numerus Clausus of Real Rights: Current Value and Practical Issues

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This paper deals with the numerus clausus of the limited property rights of enjoyment of someone else's property. It examines the historical and ideological development of the numerus clausus principle by identifying the legal and regulatory framework. The paper explores how Courts apply civil law rules and how the concept of numerus clausus differs from that of typicality. Then the survey explores how a-typicality can find room in this field. How the protection of third parties and, at the same time, the evolution of the system can be conciliated? Which is the role of judges and notaries towards the new real rights introduced by the legislator, with doubt law qualification in term of real or personal (i.e. obligational) nature? What about those rights, not regulated by law and introduced by commercial practice? This paper also considers the semi-clausus principle and how it has been elaborated by current doctrine. Numerus clausus is of remarkable relevance in the Italian context because in December 2019 the Second Section of the Court of Cassation remitted to the United Sections the issue of the qualification of the right of exclusive use in condominium. The right of "exclusive use" on res of common property is often negotiated, but its legal qualification is not clear. Awaiting the Supreme Court's response provides the opportunity to revisit the well-known dogma of private law and reflect on some possible solutions.

Keywords: *Real rights; numerus clausus; rationale; legal certainty; public order; political economics; contractual autonomy; right of exclusive use.*

A Definition of *Real Right*

Despite the Greek and Austrian experience[1] defining real rights, there is no definition of *real* right in the Italian legal system. Instead, it is a theoretical notion, well-known and accepted by jurists, who summarise a determined series of subjective rights, with common characteristics, whose regulatory discipline has remained unchanged over time and which today is confronted with the new problems raised by the progress of needs and ways to use the goods[2].

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[1] A definition of *real* rights is found in Art. 973 of the Greek Αστικόκώδικα (Civil Code), according to which *real* rights are those rights *which guarantee, directly and against anyone, a lordship over the thing* («Δικαιώματα που παρέχουν εξουσία άμεση και εναντίον όλων πάνω στο πράγμα») and in §. 307 of the Austrian ABGB which defines *Rechte dingliche* all those rights, which *belong to a person over the thing, having no regard to certain people* («*Rechte, welcheeiner Person über eine Sache ohne Rücksicht auf gewisse Personen zustehen, warden dingliche Rechte genannt*»).

[2] Natucci (1988) at 143, n. 49.

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The adjective *real*, etymologically deriving from the Latin *regalis* and the ancient French *reial*, evokes the idea of the "King's" right, suggesting an ontological connection with the paradigm of sovereignty and, therefore, of territoriality. However, reference to the Latin word *res*, also reveals that at the conceptual basis there are the Roman schemes, albeit shaped and modelled by generations of jurists[3].

The category of limited *real* rights is constructed and interpreted through constant reference to its main axis given by property; the existence of *real* right in fact postulates the ownership of others, as it is historically expressed in the well-known brocardo *nemini res sua servit,* which indicates the legal impossibility of the existence of a *real* right on what is of the same owner[4]. *Real* right is opposed to *credit* right on the basis of an antithesis rooted in the Roman law and precisely in the dichotomy *actio in rem –action in personam*. It is a procedural dichotomy that emerged substantially in the medieval age with the elaborations of the Glossators and Commentators. Specifically, Ugo Donello and the French Dogmatic School are the authors of the incorporation of *iura in re aliena* and *dominium* into a single category[5].

What are the characteristics of *real* rights? *Real* rights are absolute (since asserted in conditions of independence from a dimension of legal relationship), immediate (not implying the necessary collaboration of other obliged parties), typical (as *ius in re, real* rights are only those required by law), inherent to *res* (the right is guaranteed even if the property has passed into the ownership of a third party and also in the context of bankruptcy proceedings), as well as susceptible to possession and accompanied by specific protection (of a dual, petitory and possessory, nature).

The Dogma of Numerus Clausus

A traditional principle of Western legal culture is that the Legislator reserves the possibility to create *real* situations through foreclosure, in order for privates to create new types and the Courts to provide a creative contribution in this field[6].

Numerus clausus and typicality constitute the two faces of the same dogma, which implies both the inadmissibility of different *real* rights with respect to the figures envisaged in the system and the non-configurability of a negotiating discipline that affects the content of each typical *real* right[7].

The principle of the *numerus clausus* of real rights was already present in the classical Roman law, not as a ban for private individuals, but as *real* rights corresponding to the types established by the system which contemplated a few fundamental figures among which the property –*dominium* was the most important.

[3]Arces (2019) at 4 et seq.
[4]Biondi (1967) at 50.
[5]Donello (1841) at 1273.
[6]Natucci (1988) at 143; Comporti (2011) at 217 et seq.; Baralis (2009) at 180 et seq.; Burdese (1983) at 236 et seq.; Bianca (1999) at 133 et seq.
[7]Akkermanns (2008) at 245.

In medieval juridical experience there is a fragmentation of property and a multiplicity of figures of limited *real* rights, concurring on the same *res* several rights and forms of enjoyment with the overlapping of private and public rules originating from the feudal lord[8]. During medieval times, the principle of the typicality of *real* rights was renowned, as res deriving and originating not from private conventions, but from customary sources[9]. Medieval property was surrounded by constraints, restrictions and charges that severely limited the owner's freedom and evidently affected the economic development, representing a limit for the full use of resources and wealth. It can be noted that the principle of the closed number of *real* rights, in the modern sense, was affirmed only in the 19th century with the French Revolution when the feudal structure of *real* situations reflecting the noble privileges was abolished in order to grant full enjoyment and availability of assets. This principle configured weight-free property and minor *real* rights as rigidly typed rights, existing in a limited number, exceptional and temporary, to grant full enjoyment and availability of assets (*i.e.* land) to their owners. It incorporated the liberal ideology, soul of the French Revolution, aimed at abandoning a political approach to goods in favour of a markedly economic system, as evidenced in the famous expression of Portalis «*au citoyen appartient la propriété, et au souverain l'empire*».

However, starting from the Napoleonic codification, private property (specifically of real estate) gradually becomes the cornerstone of the bourgeois economy according to the paradigms of individualism, which recognises the owner both the absolute power of enjoyment of his goods and the role of citizen. At the beginning of the 19th century Benjamin Constant affirmed that «*la propriété seule rend les hommes capables de l'exercice des droits politiques*», warning against possible legislative interventions on the property beyond what was already foreseen in the code: «*The arbitraire sur la propriété est bientôt suivi de arbitraire sur les persone: premièrement, parce que arbitraire est contagieux; In second lieu, parce que la violation de la propriété provoque nécessairement la résistance*»[10].

Code Napoléon takes apart medieval dogmas and restrictions postulated by Enlightenment and property right is reconstructed as a form of individual and exclusive belonging, formally and potentially accessible to every citizen. The *Code Napoléon* transposes liberal ideologies on the normative level and expresses the victory of individualism against the feudal power expressed in the constraints imposed on *dominium*[11].The 19th century property was absolute, leaving the *dominus*, *ie* total freedom to decide on the use of the goods, including the same option for inaction or total disinterest, in terms of *jus utendi ac abutendi*[12].The dogma of the *numerus clausus* of *real* rights obtains formal recognition in the French *Code civil* (Art. 543), according to which *real* rights are considered rigidly typed: only the law is empowered to give rise to limitations and burdens on the

[8]Grossi (1992) at 104 et seq.
[9]Natucci (1988) at 30.
[10]Constant (1872) at 55, 116.
[11]Giuffrè (1992) at 56; Coco (1965) at 56; Mannino (2005) at 46.
[12]Iannarelli (2018) at 75.

property, thereby erasing the medieval relevance of custom[13]. In addition to the historical arguments, there are also philosophical reasons, considering property as a *personal* value and therefore viewing every limitation of it as an attack on freedom itself. This is reminiscent of the dogma of the autonomy of the will[14]. The acceptance of the *numerus clausus* reflects the abolition of the feudal system (with the pluralism of the situations of belonging typical of the *Ancien régime*) and the related intent to protect the owner's individual freedom, with the legislator reserving the power to place limitations on property[15].

Current Value of the Principle

Unlike the French *Code Civil*, in the Italian legal system the principle of the *numerus clausus* of *real* rights had not an express formulation[16]. It was obtained only indirectly based on Art. 1130 of Italian *Codice Civile* (1865), according to which, except in the cases established by law, the relationships deriving from the contract have limited efficacy to the contracting parties.

Instead, in the current system the principle finds specific normative basis given primarily by Art. 42, paragraph 2, of the Constitution, which, in addition to formalizing the recognition and guarantee of the right of ownership in the system (against limitations deriving from public authorities), states that the methods of purchase, enjoyment and limits of ownership are regulated by law[17]. In the *Codice Civile*, there is Art. 832 to establish that the limits and obligations placed on property are set by law. The Code also provides for the possibility of creating atypical figures only in contract area (Art. 1322, paragraph 2)[18] and it clarifies that the contract is effective towards third parties only in the cases provided for by law (Art. 1372, paragraph 2). In fact, the latter regulates the normative power of private individuals, by limiting their effectiveness only to the contracting parties[19].

The characteristic of limited *real* rights is that they are effective *erga omnes*. The problem of *ultra partes* efficacy then arises only for the so-called atypical real

[13]Caterini (2005) at 70.

[14]We can remember that Art. 87 of the French Constitution of 1791 included the right of property among the natural and imprescriptible rights of man, together with freedom and security, as an expression of personal freedom and subjectivity. As for the controversial relationship between property and freedom, see: Mattei (2014) who defines property as an institution against freedom itself and (at the same) emancipation, solidarity and citizenship, since behind it there is a depriving power, which institutionalises the extraction and exploitation of man and nature and which is the very enemy of freedom. In argument see also the anthology of Rodotà (2013), at 16 et seq.; Quarta (2016) at 36 et seq.; Struycken (2010) at 70.

[15]Demolombe (1861) at 374 et seq.

[16]Contrary to what happens in other legal experiences, including for example the Portuguese system which provides for an express ban on giving rise to atypical *real* rights: «*Não é permitida a constituição, com carácter real, de restrições ao direito de propriedade ou de figures parcelares deste direito senão nos casos previstos na lei; toda a restrição resultante de negócio jurídico, que não esteja nestas condições, tem natureza obrigacional*» (Art. 1306, comma 1, *c.c.*).

[17]Caterini (2005) at 85; Iannarelli (2018) at 69 et seq.

[18]Natucci (1988) at 157, 163.

[19]Natucci (1988) at 157 et seq.

rights. Of such rights, the source would be the autonomy of private parties to whom, however, pursuant to Art. 1372, paragraph 2, of the Italian *Codice Civile*, it is forbidden to enter into contracts with efficacy with third parties outside the cases provided for by law[20]. So the freedom to determine the content of the contract finds a limit in the restriction of the effects to the contracting parties: private individuals are free to establish the content of the contract, but the effects of the latter, in the case of atypical rights, will be limited to contracting parties[21] .Thus, in light of these normative rules, individuals are precluded from conforming private property, since the legislator reserves this function[22]. It's up to the latter to define the new classes of *real* rights, if this is required by the overall social and economic evolution of the system[23].The value of the principle is based on specific legal policies: the aim is to protect property, not adding extra burdens than those expressly regulated by law and, at the same time, to protect third parties who enter into relations with the owner (or with the holder of the *real* right) in order to put them in a position to know exactly the extent of their rights[24].

The principle of the *numerus clausus* of limited real rights is one of the many dogmas of private law born and developed in a period in which land was the heart of the private system and the very source of wealth. This dogma(aimed at establishing a strict typicality of such rights) is historically based on the need to prevent atypical limitations on property safeguarding a full availability of the same and the secure circulation of goods[25].

Over time, however, the liberal ideology and the *numerus clausus* have been questioned, due to the dematerialization of ownership, the emergence of new partial rights and the progressive evanescence of the public order. These are reasons that offered a certain rationale to the principle but are now being considered a mere *prejudice*[26].Consequently, the rationale behind the principle of *numerus clausus* is now contested. This is because the original justifying reasons (related essentially to the exploitation of land and to the category of real estate) are less important nowadays[27]. In this sense, there are those who have highlighted the definitive overcoming of the principle since the *real* right would be endowed with the same expansive potential of the contract. From this point of view, the existence of a so-called *numerus clausus* of real rights is no longer justifiable: contract and its rigid content are contradictory terms[28].

The presence of new building and urban planning techniques, the configuration of entirely new negotiating models has led to the creation of new rights and limitations on *res* characterised by the inherence and opposability *erga omnes.* The

[20]Quadri (2018) at 561.
[21]Natucci (1987) at 168.
[22]Natucci (1987) at 171.
[23]Mezzanotte (2017) at 36.
[24]However, it has been shown in doctrine that the constitution of new real rights is not necessarily pernicious for the general economy, being on the contrary useful where it can allow a better use and exploitation of goods. In this sense, see: Giuffrè (1992) at 65.
[25]Mezzanotte (2015) at 17.
[26]Nicolò (1964) at 908.
[27]Roppo (2014) at 170 et seq.
[28]Costanza (1981) at 170.

legal effects typical of *real* rights, although substantially different from their legal models, are deeply embedded in the Italian doctrine, which hypothesises the existence of atypical *real* rights, in contrast with the rule of *numerous clausus* which should govern them[29]. From a speculative point of view, this position shows the need not to sink into dogmatic sleep, in an ahistorical dichotomy between norms and reality, in the awareness (*i*) of the necessary historicity and conventionality of legal concepts and (*ii*) of a renewed elasticity of the property which increasingly renews its content as the *bundle of rights* takes advantage of new methods of exploitation[30].There is, therefore, a debate on the *mobile frontiers of real rights*, due to the constant emergence of new figures with the connotations of reality to implement the legal situations already present in positive law[31].

In this regard, it is imperative to consider the new situations, emerging from the social ridge, as *real* rights, when there is a sort of social categorization of the (unregulated) case in its essential components while filtering economic merit[32]. At a hermeneutic level, the provision of Art. 2645 c.c. with its elastic formulation would allow the transcription of such atypical figures, given the correspondence of the same to efficiency and, therefore, the non-contradiction with the needs of public order, to which the principle of typical *real* rights historically answers. Given the above, the parties would have the power to impose their determinations also on third parties, giving rise to legal situations valid *erga omnes*[33].

However, such option is not accepted by the dominant legal theories which remain consolidated on the affirmation of the current value of the principle of the *numerus clausus*[34]. According to academics and judges, an open attitude towards the creation of atypical *real* rights by contract would force third parties to undergo limitations, outside a legislative provision and in violation of the express reservation placed by Art. 42, paragraph 2, of Italian Constitution[35]. The issue here is related to the need of the parties for information[36], third parties and of all individuals interested in the events concerning the *res* and, therefore, to the standardization of contractual models in order to reduce transaction and information costs in the case of circulation of the *res*[37]. Nowadays the theoretical rationale of the principle of the *numerus clausus* is given (*i*) by the legal reserve set out in Art. 42, paragraph 2, of the Italian Constitution; (*ii*) the requirements of legal certainty (*iii*) and, correlatively, of economic public order(protection of an efficient and secure circulation of goods)[38].

For the latter, in fact the security of the buyer on the existing rights and of their content is granted by the principle of *numerus clausus*. Only the existence of

[29]Roppo (2014) at 171.
[30]Baron (2014) at 56 et seq.
[31]Guarneri (2008) at 29 et seq., 61 et seq.
[32]Fusaro (2011) at 517 et seq.
[33]Giuffrè (1992) at 66.
[34]Natucci (1988) at 161-162; Moscati (2013) at 441 et seq.; Giorgianni (1996) at 152.
[35]Natucci (1988) at 140 et seq.; Caterini (2005) at 109.
[36]Mezzanotte (2015) at 44.
[37]Morello (2008) at 67 et seq.; Baralis (2009) at 182.
[38]Galgano (2017) at 170; Magri (2002) at 1434; Natucci (2011) at 319 et seq.; Comporti (2011) at 223; Romano (2014)at 64 et seq.; Morello (2008) at 69, 75.

a set of pre-defined rights allows the parties to have *ex ante* useful information regarding the constraints and legal relationships related to the asset (*numerus clausus* as an 'informational principle'[39]). The principle of legality is central in this field, as it minimises the risk of creating atypical *real* rights by negotiation. Nevertheless, the existence of a regulatory coverage does not solve all application problems. Whenever the legislator has regulated the case in a cryptic manner and without precise indications of legal qualification: we can consider the case of timeshare, building rights, destination deeds and the so called *right of exclusive use* (which will be later examined). In such cases, it will be up to the interpreter to reconstruct the identity of the figure in the light of various factors including the *ratio legis*, its traits and effects and even the systematic location of its regulatory provisions.

At the same time, in practice new legal situations can emerge, without regulatory provisions. At an exegetical level, it will be necessary to proceed, if possible, (*i*) to an assimilation to the typical real rights, as well as (*ii*) to determine a regulatory framework by taking into account also the space for negotiating autonomy given by the atypical content of *real* rights. This is what legal scholars consider a *semi-clausus* principle of *real* rights allowing a *real* qualification for those situations of uncertain nature. In this way, the borders set by traditional dogma are overcome, since *numerus clausus*, «if strictly applied, creates the risk that innovation takes too much time, which might hamper the further development of new categories of property rights that are being developed in legal practice»[40].Also at a European level, in the context of harmonization projects for a future common law of property, the adoption of a *semi-clausu*s number of *real* rights is considered since it can balance the characteristics of clarity and efficiency typical of the closed number with the need for modernization[41].

Contractual Autonomy and Real Rights Typicality

As it has already been pointed out, in principle the possibility of creating new *real* rights by contract is excluded, given the incompatibility between the *inter partes* effectiveness of the contract and the *erga omnes* relevance of *real* rights. A contract from which atypical *real* rights arise, having passed the judgment of merit *ex* Art. 1322, paragraph 2, of the Italian *Codice civile*, will be valid, but ineffective towards third parties. In this sense, the notion of *numerus clausus* is different from that of *typicality*, because while the former concerns the source (the *law* limiting individual autonomy), the second concerns the determination of the content, that is to say, of the "type" of the *real* situation[42].

Nevertheless, there is room for negotiating autonomy with reference to typical *real* rights, in the sense that private individuals could integrate or derogate from the law discipline in compliance with its essential core through the exercise of

[39]Mezzanotte (2017) at 44.
[40]Van Erp (2003) at 11.
[41]*Ibid.*
[42]Comporti (2011) at 225.

their autonomy *secundum legem* and not *praeter legem*[43]. Clearly, the agreements on real estate rights in derogation from the legal discipline, if allowed, will be subject to the written form and will be due to transcription in public registries[44]. In this regard, it is necessary to consider the dualism present in the legal statute of *real* rights: on the one hand, there are mandatory rules that identify the distinctive features of the specific law type; on the other hand, there are provisions, generally not binding, which offer only a model of regulation and exercise of the law situation[45].The existence and identification of a fundamental nucleus, as the essential content of each *real* situation, is crucial since it cannot be modified by contract. On the contrary, the content that does not touch this nucleus, but indicates only rules for the exercise of the *real* type, can be modified by autonomy either interactively (by inserting new provisions where the law allows it) or reductively (derogating from the powers and obligations of the typical scheme)[46].

Investigating the options available for negotiating autonomy, we can see that the elasticity and ductility of the right of servitudes allows a wide use of it (we talk indeed of "atypical" servitudes), being the figure conceivable as a neutral model, in which a very varied content can be allowed, since the law indicates only generic features[47]. In particular, the wideness of its content and its *utilitas* allows to frame different destination restrictions among servitudes and also severe limitations on the owner's disposition faculties (for example, non-building servitudes or limits on the ability to build) that are not susceptible to be fully defined by the legislator even in the presence of a delimitation in its essential profiles of the right of servitudes (present in Art. 1027 c.c.).

Given the above, the *numerus clausus* of *real* rights limits contractual freedom in relation to the structure of the situation, not to the content of the same. Hence, the dispute on the existence or not of the *numerus clausus* in our legal system must consider the possibility for legal operators (and primarily notaries) given by the atypical content of *real* rights. In addition to the case of the so-called atypical servitudes, this possibility works also for the other *real* rights figures in which the owner and of the *real* right titular could conventionally regulate their mutual relations[48].

This is also confirmed by legal scholars since it is assumed that the conformation of the typical *real* rights is not entirely precluded to individuals, given that the system gives wide space to autonomy in the concrete determination of powers, faculties, limits and obligations that make up the content of the various real situations through the packaging of a largely dispositive regulatory framework[49]. As already mentioned, the regulation according to autonomy of *real* rights is admitted until the essential and fundamental content of each situation is

[43]Comporti (2011) at 153; Baralis (2009) at 189 et seq.
[44]Comporti (2011) at 158.
[45]Comporti (2011) at 158.
[46]*Ibid.*
[47]Guerinoni (2011) at 227 et seq.
[48]In argument see for instance the decisions of the Italian Court of Cassation of 15 November 2013, n. 25773, in *De Jure Database*; 12 October 2009, n. 21629, in *De Jure Database*; 11 February 2008, n. 3196, in *Giur. it.*, 2008, p. 2185.
[49]Comporti (2011) at 149; Caterina (2009) at 214.

compromised; thus the interpreter will have to identify - on the basis of the set of interests established by the system and the *ratio* of the regulation - the fundamental core relating to the structure of the legal framework[50], which - only - must be considered intangible. Consequently, non-marginal spaces are opened to private autonomy in conforming the content of *real* rights even if typified by the legislator[51]. There is, therefore, an adaptation of the atypical constraints to the typical *real* schemes allowed by case law when the new figures are compatible with the basic regulatory architecture[52].

In this regard, the presence of the closed number principle in our legal system is still justified and operative, since we cannot accept the idea that the contractual creation of a new *real* right should be considered valid and effective, if its content could be represented by legislator giving birth to a new form of *real* right[53]. It is *erga omnes* efficacy that calls into question the possibility of creating atypical *real* rights: real rights imply an advantageous position for the owner and related disadvantages (limits, charges, obligations) for third parties. The admissibility of atypical *real* situations would undermine the safety of traffic since third parties would not be able to know exactly the constraints affecting the asset, nor its extension.

Third parties who acquire a real right on res will not be required to respect the *real* rights that the law does not provide for and which are contractually created[54]. Therefore, the contracting parties cannot impose or prohibit on third parties, regardless of their consent, powers and faculties that the law allows or forbids, since private subjects have no power over other private individuals, just as the law has[55].

Evidently these themes are connected to the historicity of the concepts and legal institutions, as well as to the issues regarding transcription. The latter is an instrument capable of accepting, for the purpose of supporting the reasons of commercial traffic, all those situations of enjoyment of goods which, on the basis of the law principles, can acquire the characteristics of *reality*, in order to guarantee their *opposability* to third parties[56].Therefore, the link between the closed number of *real* rights and the same principle working in the field of transcription cannot be ignored: the closed number principle is inextricably linked to the real estate publicity system (and for reasons of certainty regarding real estate rights)[57]. Consequently, it is clear why the legal scholars admit the atypical *real* rights on movable property for which transcription does not apply and the nature of the right is set by the parties in the constitutive title pursuant to Art. 1153, paragraph 2, of the Italian *Codice Civile*[58].

[50]Comporti (2011) at 153.
[51]Granelli (2014) at 311.
[52]Spanò (2018) at 1 et seq.
[53]Natucci (2011) at 326.
[54]Struycken (2010) at 81.
[55]Natucci (2011) at 331.
[56]Petrelli (2009) at 689 et seq.
[57]Benatti (2010) at 163.
[58]Gazzoni (2019) at 252.

The foreclosure of giving rise to atypical real rights with a contractual source, therefore, also depends on the protection of the interests of the buyers and, in general, of all third parties interested in knowing clearly and precisely the rights existing on the goods they mean to purchase[59]. Thus, the reasons of economic public order (currently underlying the principle of *numerus clausus*) can be considered solid. They encompass the protection of legal certainty and the efficient and secure movement of goods.

Italian Current Debate about the "Right of Exclusive Use"

The qualification of the *right of exclusive use* of common property in condominium is debated in Italian case law. For example, it's the case of the flat roof used as a terrace and accessible only by the owner of the apartment on the top floor, or the case of garden or courtyard portions for the exclusive use of the owners of the real estate facing them or the case of the condominium land facing the commercial premises and reserved for them.

In principle, characteristic of this figure is that all the condominiums retain the co-ownership of the common *res*, while the condominium titular of the right has the exclusive enjoyment with the only limit of not modifying its intended use[60].The practical utility of the figure is controversial. Sometimes, it is preferable to assign the (otherwise) "common" property in exclusive *ownership* already in the contract, precisely to avoid subsequent conflicts between condominiums. However, the sense of assignment for exclusive use (instead of ownership) lies precisely in the constraint of the intended use that safeguards heterogeneous interests. We can consider the case of a garden assigned for exclusive use: it must remain so even in order to respect the aesthetics of the building and the owner of the *right of exclusive use* will not be able to make those changes incompatible with its destination[61].

The problem of the legal qualification was also raised due to its widespread diffusion and the need to identify a regulatory statute. In this regard, the position of law practitioners is not always the same: sometimes the *right of exclusive use* has been qualified in terms of *real* right[62], sometimes as a *personal* (*i.e.* relative) right of enjoyment, relying on the principle of the closed number of *real* rights[63].At a

[59]Struycken (2010) at 80.

[60]If, for example, the *res* is intended for a garden or terrace, the titular will not be able to create works in contrast with this destination (for example, building a workshop or a swimming pool). The modification of the intended use can be authorised only with a condominium assembly resolution adopted with the joint majority of the 4/5 of both the participants and the value of the condominium (Art. 1117-*ter* of the Italian Civil Code).

[61]Amagliani (2015).

[62]See Italian Court of Cassation, 16 October 2017, n. 24301, in *Riv. not.*, 2018, 6, II, at 1191 et seq. In the same perspective, see: Cass., 10 October 2018, n. 24958, in *Diritto & Giustizia*, 11 October 2018; Cass., 31 may 2019, n. 15021, in *De Jure Database*; Cass., 4 July 2019, n. 18024, *therein*; Cass., 3 September 2019, n. 22059, *therein.*

[63]Cass. 12 November 1966, n. 2755, cit.; Cass., 9 December 1989, n. 5456, in *Giur. it.*, 1990, I, p. 1305; Cass., 26 February 2008, n. 5034, cit.; Cass., 27 April 2012, n. 6582, in *Diritto & Giustizia online,* 2 may 2012; Cass., 15 may 2018, n. 11823, in *Diritto & Giustizia*, 16 may 2018. Due to

hermeneutical level, despite the terminological assonance, it is excluded that the figure corresponds to the right of use (*diritto d'uso*) regulated by Art. 1021 c.c.[64]. First, because the parties are not allowed to restrict the content of the right of use with the exclusion of certain faculties included in it and the attribution to the beneficiary of a special utility[65]. Secondly, the approach is problematic in consideration of the limits of duration, transferability, and methods of extinction of the right of use codified in the current system of *Codice Civile*[66]. Where the contractual title shows the creation of a somehow distorted right of use (restricting the content of the right, with the exclusion of certain faculties naturally included in it and the attribution to the beneficiary of a very special utility), the case law opts for the identification of a *personal* right subject to the 'relativity rule' which is typical of contractual relationships pursuant to Art. 1372 of the Italian *Codice Civile*[67]. Consequently, the obligations assumed with the *right of exclusive use* in favour of the owner of a specific real estate unit would be transferred to the purchaser, only through one of the negotiating tools existing for this purpose (delegation, expropriation, acceptance and assignment of the contract)[68].

At the same time, in praxis, the *exclusive use* is not qualified as 'praedial servitudes' since co-essential to this latter figure is the individuation of given faculties of use or given abstentions indicated in the constitutive title and also because the servitudes can't consist in the total elimination of the faculties of enjoyment of the serving fund, but only in the restriction of some of them[69]. In the latter case, the right is configured as an atypical servitude[70].Furthermore, the attribution of a *right of exclusive use*, as an exception to Art. 1102 of the Italian *Codice Civile*, is seen as a manifestation of private autonomy that conforms the enjoyment of the common *res*, through which the right gets perpetuity and transmissibility to subsequent successors of the real estate[71].Due to these uncertainties, recently the II Section of the Court of Cassation referred the case to the First President for the possible assignment to the United Sections[72].

Some Notes about the Issue

The exclusive right of use is a legal figure expressly codified by Italian law: it can be found in the III book of the civil code under articles 1122, 1123, paragraph 2, 1126. Beyond these few regulatory references, which give legal status to the

these applicative uncertainties, recently the II Section of the Court of Cassation remitted the case to the First President for the assignment to the United Sections (Cass., 2 December 2019, n. 31420, in *Diritto & Giustizia*, 3 December 2019).

[64]Cass., 4 July 2019, n. 18024, cit.; Cass., 3 September 2019, n. 22059, cit.; Cass., 16 October 2017, n. 24301, cit.

[65]Cass., 31 August 2015, n. 17320, in *De Jure Database.*

[66]For all these issues see Bigliazzi Geri (1994) at 11; Caterina (2009) at 175 et seq.

[67]Cass., 2 December 2019, n. 31420, cit.

[68]*Ibidem.*

[69]Cass., 2 December 2019, n. 31420, cit.

[70]Tribunal of Milan, 31 August 2018, in *Condominioelocazione.it*, 30 May 2019.

[71]Cass., 16 October 2017, n. 24301, cit.

[72]See *supra* note 63.

figure, there is no other discipline. We can't find any indications of the legal qualification as a *real* (*i.e.* absolute right) or *personal* (*i.e.* relative) right[73].

This situation is often common to other cases regulated in a cryptic manner by the legislator, for example: building rights (Art. 2643, lett. 2-*bis* c.c.), deeds of destinations (Art. 2645-*ter* c.c.) or timeshare (Art. 69 et seq. Italian consumer code), which are the subject of debate regarding whether or not they can be considered as *real* rights.

Another similar situation is that of the "stage right", regulated by the Italian law 26 July 1939, n. 1336, without any explicit normative indications regarding the legal qualification; this was offered by case law through the "typing" technique which is useful since it allows, where compatible, the classification of a new legal figure in known categories already governed by law[74].Thus, pursuant to Art. 1362 of the Italian *Codice Civile*, the examination of the negotiating intent is essential to ascertain whether the parties wished to establish a *personal* (classic hypothesis: a loan) or a *real* situation (which does not exclude gratuity, but implies the *reality* of the right). Problems arise, specifically, where the parties have intended to constitute a *real* right, perpetual, inherent to the *res* and with the characteristic of the ambulatory (*ie* running with the land), given that such *right of exclusive use* does not correspond to the right of use (*diritto di uso*) of referred to in Art. 1021 of the Italian *Codice Civile*, nor to any typical *real* rights. It represents the creation of contractual autonomy supported by limited regulatory clauses in the current code from which we can argue the mere eligibility of the exclusive enjoyment of a common property in a condominium. Therefore, the following question arises: are the parties allowed, by current law, to give birth to a new *real* right to alter the physiognomy of the typical *real* models?

Based on the principle of *numerus clausus* of *real* rights, the answer may be negative since private individuals are not allowed to conform *real* situations, but only debt relationships. The dogma implies both the inadmissibility of different *real* rights with respect to the figures envisaged in the system, and the non-configurability of a negotiating discipline that affects the content of typical *real* models. Far from providing answers, the principle of typicality of *real* rights actually opens up other questions, given that in the Italian law system the figure of exclusive use enjoys express typing (articles 1122, 1123, paragraph 2, 1126 of the civil code) and it is therefore in line with the fundamental principle of legality (Art. 42, paragraph 2 of the Italian Constitution).If the parties have intended to create a *real* situation, it would not be possible to exclude the abstract qualification of the exclusive right of use as *real* right, considering the latter as a nucleus of legal situations sufficiently homogeneous and endowed with their own characteristics[75].

As already stated, the distinctive features of the so-called *iura in re aliena* are the otherness of the thing, the absoluteness, the immediacy, and the inherence of the right to the *res*. The key concept of real rights is the well-known principle of

[73]On the latter, see recently Gigliotti (2018), *passim*.

[74]For the traceability of the stage right to the surface, see: Bologna Court of Appeal, July 28, 2015, in *De Jure Database*; T.A.R., Parma, 10 June 2014, n. 197, *therein*; Cass., 4 February 2004, n. 2100, *therein*.

[75]Pugliese (1964) at 775.

numerus clausus. It may be useful to inquire about the correspondence or not of the *exclusive right of use* to these characters. With regard to the first profile, given by the otherness, it is clear that the *res* is in communion, therefore partially of others; this does not exclude the possibility of the creation of a real right which is instead precluded, on the basis of the *nemini res sua servit* principle, in the case of a single owner[76].Absoluteness, *i.e.* independence from a dimension of legal relationship, can be considered existing because the owner can exercise his right without the need for other people's cooperation. Likewise, the immediacy is reflected in the peculiarity of the subject-object relationship, whereby the interest of the titular is satisfied by immediate power over the *res*. The *exclusive right of use* is certainly inherent in the *res*, being characterised by the real incorporation into the thing, becoming one of its qualities. From this it follows that, burdening the right on the *res*, it is insensitive to the events that concern it. As for the content aspect, it implies (*i*) the exclusive enjoyment in favour of the titular, (*ii*) a related liability for the expenses necessary for the conservation and enjoyment of the *res* (Art. 1123, paragraph 2, c.c.), and (*iii*) the co-ownership of the *res* by all the condominiums. With this figure, we have a right which is distinct from the right of use (referred to in Art. 1021 c.c.) as well as from any other *real* rights, which indicates the ways of enjoyment of the *res communis* on the basis of what agreed by parties.

Perspective of Party Autonomy in Property Law

A margin of operation for party autonomy is admitted, given that private individuals could integrate or derogate from the legal discipline in compliance with the essential mandatory core[77]. Indeed, the overcoming of the basic nucleus would end up giving the figure a new substantial identity by breaking the dogma of typicality and giving rise to *personal* rights.

In this regard, we consider again the dualism present in the legal statute of *real* rights: on the one hand, there are mandatory rules that identify the distinctive features of each model; on the other hand, there are provisions, generally not binding, which offer private individuals a model of regulation aimed at allowing the parties to provide otherwise for the satisfaction of their interests, provided that they do not alter the fundamental content[78]. The principle of typicality of *real* rights implies the prohibition for the parties to alter the essential features of the typical law schemes, so that the effect of those negotiations in contrast with such limit is a requalification of the legal situation with consequent exclusion of *real* effectiveness.

With reference to the right of servitudes, for example, the mandatory requirement of 'praediality' is recorded with the provision of a weight, on a ('servient') fund for the utility of another ('dominant'), configured as an

[76]Cass., 29 November 2004, n. 22408, in *De Jure Database*; Cass., 15 April 1999, n. 3749, cit.; Cass., 6 August 2019, n. 21020, in *Guida al dir.*, 2019, 46, at 61.
[77]Cass., 4 January 2013, n. 100, in *De Jure Database*.
[78]Comporti (2011) at 153.

inseparable *qualitas* of both assets. At the same time, it is considered admissible, based on the principle of contractual autonomy pursuant to Art. 1322 of the Italian *Codice Civile*, that the will of the parties may give rise to merely 'personal servitudes' with the stipulation of an obligation exclusively for the personal advantage of a beneficiary beyond his/her real estate ownership[79]. With regard to the right of use pursuant to Art. 1021 c.c. we find a figure with a precise legal identity: it confers an *ad personam* asset attribution; whose vocation, in meeting the needs of the user and his/her family, is manifested in the non-transferability provided for under Art. 1024 c.c.[80].

As a result, the possibility of transfer for the *right of use* appears difficult in light of the textual provision of Art. 1021 c.c. [according to which those who have the *right to use* a thing can use it and, if it is fruitful, can reap the fruits according to his/her (own) and his/her family needs], which traces a limit beyond which the autonomy of negotiation would overflow in atypical schemes[81]. However, overcoming the transfer ban pursuant to Art. 1024 of the Italian *Codice Civile*, does not entirely echo public interest reasons (given that it mainly affects a private interest, *i.e.* the proprietary prerogatives), so that it was considered modifiable by an express agreement between the owner-constituent and the holder of the limited *real* right[82].

If the parties have intended to constitute a perpetual right on the common *res*, given the limited duration of the transferor's life (pursuant to Art.1026 of the civil code), the *right of use* (indicated in Art. 1021 c.c.) is not suitable[83]. As already mentioned, even the reference to the right of servitudes is not appropriate where there is a total elimination of the faculties of enjoyment of the serving fund. The interpreters may perhaps match the figure with the category of atypical servitudes, transmissible together with the real estate according to the principle of ambulatory, whenever residences are given any faculties on the *res* (and so they are not entirely excluded from the use of some utility on the property in *exclusive use* of a condominium).

The figure in question is therefore hybrid with traits of the right of use and traits of servitude: it would therefore be a *sui generis real* right, to be framed in the context of Art. 1122 c.c. which presupposes a specific agreement concluded between all condominiums regarding the use of the common *res*. As argued by Cass. n. 24301/2017, the *exclusive right of use* would constitute a regulatory element of the condominium discipline; it would confer unequal rights of enjoyment on the common parts determined by the title itself which attributed the main right of co-ownership to the condominiums[84]. Thus, the figure is the implementation of a conventional allocation of entitlement rights in derogation from what is presumed pursuant to articles 1102 and 1117 c.c.

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[79]Cass., 9 October 2018, n. 24919, in *De Jure Database*.
[80]Cass., 2 March 2006, n. 4599, in *Guida al dir.*, 2006, 16, at 90; Cass., 27 April 2015, n. 8507, in *Giustiziacivile.com*, 1 December 2015.
[81]Spatuzzi (2019) at 31 et seq.; Caterina (2009) at 180.
[82]Cass., 2 March 2006, n. 4599, in *Guida al dir.*, 2006, 16, at 90; Cass., 27 April 2015, n. 8507, in *Giustiziacivile.com*, 1 December 2015.
[83]Cass., 12 October 2012, n. 17491, in *Giust. civ. Mass.*, 2012.
[84]Cass., 16 October 2017, n. 24301, cit.

Art. 1117 c.c., in indicating the common parts of a condominium building, provides, in fact, that this indication is valid unless the opposite is apparent from the title[85].As recently highlighted also by the Court of Cassation, given that the enjoyment of the *res communis*is an intrinsic element of communion, the denial of it to some condominiums can only derive from the establishment of a *real right* in favour of the user, making a modification of the essential content of the co-ownership[86]. In my opinion, the issue must be resolved by considering the *ratio* of the legal discipline and considering the purposes for which the creation of *exclusive use* aims to achieve. The category of *real rights*, inspired by the need to allow the best exploitation of things, is based on the principle of typicality, aimed at avoiding the risk of an arbitrary *deminutio* of the proprietary faculties.

This risk exists if attention is paid on the deprivation of the enjoyment of the common good, for the community of condominiums, by virtue of the establishment of the *right of exclusive use*. From another point of view, we can consider the advantage acquired by the owner with the *right of exclusive use*. This is, however, a matter totally left to negotiating autonomy, on the basis of what decided by the builder (and accepted by the buyers of the real estate units in the notaries' deeds) or unanimously approved by the condominium assembly[87]. In a broader sense, this option indicates how the dogma of *numerus clausus* can be considered ductile and flexible and no longer in contrast with contractual freedom in the frame of a 'regulated party autonomy' which is at the heart of European law[88].

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[85]*Ibidem.*

[86]Cass., 2 December 2019, n. 31420, cit.

[87]Cass., 14 April 2015, n. 7459, in *Guida al diritto*, 2015, 31, at 82.

[88]Mezzanotte (2017) at 45.

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