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Barbara Mikołajczyk

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EDITORIAL

Welcome to the third issue of the *Silesian Journal of Legal Studies* (SJLS).

Previous volumes have proven that legal discourse over borders is not only possible, but also desired. We have observed a significant interest in our journal in Poland and in other countries. Therefore we intend to continue the idea of overcoming frontiers and obstacles in spreading ideas, opinions, analyses and information on law and legal systems.

The present volume contains articles written by experts in various branches of law who come from Poland, Spain and the United Kingdom. The authors present topics on administrative, civil, financial, criminal, and canon law, as well as on economics.

It is worth mentioning that for the first time we have included an article in Spanish: *La eficacia civil de las resoluciones canónicas de nulidad y disolución del matrimonio en el sistema jurídico español*, written by Piotr Rygula, and in French: *L'humanisme en criminologie et dans la lutte contre la criminalité* by Leon Chełmicki – Tyszkiwicz. We hope that this will encourage authors native to Romanic languages to contribute to our journal, which may then interest an even wider range of readers.

The articles published in this volume examine not only general and the European issues, like the above mentioned article on the idea of humanism in criminology, the concept of sector-specific regulations or the mortgage markets in Europe but also very specialized matters, as for example the remission of taxes in Poland, the regulation of commonholds in England and marriage law in Spain. This volume also contains two book reviews, one concerning the administrative law and the other – land law.

In this issue we have also included a special element. The volume contains a list of selected monographs published in 2009 and 2010 by the researchers from the Faculty of Law and Administration and a list of conferences organised or co – organised by our Faculty and our foundation Facultas Iuridica. We believe that researchers from other faculties and countries will find it interesting to learn about the scientific fields which are explored by their colleagues from the University of Silesia. This idea is fully justified because according to the Polish Minister of Science and Higher Education, in 2010 our Faculty took the first place among all Polish law faculties in the field of conducted scientific research.

Thank you for your interest in this issue. I hope that you find its contents interesting and useful. As always, we invite researchers from Polish and foreign universities to contribute to our Journal (find us at: www.sjls.us.edu.pl).

Barbara Mikołajczyk

ARTICLES

Ewa Przeszło, dr hab. Rafal Blicharz
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ACQUISITION OF REAL ESTATE BY FOREIGNERS IN POLAND. PRINCIPLES AND PROCEDURE

Acquisition of real estate by foreigners in Poland is governed by Act of 24th March 1920. This Act, owing to the fact that Poland joined the European Community, and thereby was obliged to adjust the Polish legislation to European standards of legal regulations, was fundamentally amended, so its present form can be found in Journal of Laws from 2004, no 167, item 1758 (further called the Act).

The real estate in Poland comprise ground estate (including agricultural), buildings permanently related to ground or parts of such buildings, if special regulations state that they constitute separate from the ground subject of the right of ownership (Article 46 and later of the Civil Code, Journal of Laws from 23rd April 1964, no 16, item 93 with further amendments). The ground estate is a part of the Earth surface constituting separate subject of ownership, whereas the agricultural estate is the estate which is or may be used for purposes of production activity in agriculture in the field of plant and animal production (including gardening, orcharding, fishing).

For acquisition of real estate in Poland, regardless whether it is acquired by a Pole or a foreigner, it is always necessary to do it in the form of a notarial act, otherwise the legal activity of acquisition of real estate will be void. In practice it means that any such acquisition must be concluded before a notary in order to be valid. According to the Act, the acquisition of real estate is any legal event from which results in acquisition of the right of ownership or perpetual usufruct, because these two rights are legally similar. Considering the archaism of legal construction of perpetual usufruct, the Polish legislation is slowly moving away from it replacing it with the right of ownership, which is fuller.

In the meaning of the Act the foreigners are:

1) a natural person not possessing Polish citizenship,
2) legal persons having their seat abroad,
3) companies not being a legal person, of persons provided for in items 1 or 2, having their seat abroad, established in compliance with the legislation of foreign states,
4) legal persons and commercial partnerships not being a legal person, having their seat on the territory of the Republic of Poland, controlled directly or indirectly by persons or companies provided for in items 1, 2 and 3. The controlled commercial partnership is the partnership in which a foreigner or foreigners directly or indirectly possess over 50% of votes at the partners assembly or a general assembly, also as gagee, user or upon the basis of agreements with other persons, or having dominating status in the meaning of the Act from 15th September 2000 – Code of Commercial Partnerships (Code of Commercial Partnerships, Journal of Laws no 94, item 1037 with further amendments).

According to Article 4 §1 item 4 a dominant partnership is the partnership which:

1) possesses directly or indirectly the majority of votes at the partners assembly or general assembly also as gagee or user, or in the management of other capital partnership (dependent partnership), also on the basis of agreements with other persons, or
2) is entitled to appoint or dismiss the majority of members of board of another capital partnership (dependent partnership) or cooperative (dependent cooperative), also on the basis of agreements with other persons, or
3) is entitled to appoint or dismiss the majority of members of board of supervisors of another capital partnership (dependent partnership) or cooperative (dependent cooperative), also on the basis of agreements with other persons, or
4) members of its board or board of supervisors constitute more than a half of members of board of capital partnership (dependent partnership) or cooperative (dependent cooperative), or
5) it possesses directly or indirectly the majority of votes in personal dependent partnership or in the general assembly of a dependent cooperative, also based on agreements with other persons, or
6) has a significant influence on the activity of a capital dependent partnership or a dependent cooperative, particularly based on agreements constituting holding constructions.

Acquisition of real estate by a foreigner in Poland requires permit, which is issued by the Minister of Internal Affairs and Administration. Without this permit, as a rule, a foreigner may not successfully legally acquire real estate in Poland – such acquisition is void. In order to obtain an adequate permit, a foreigner should file a motion in the ministry. Filing a motion for issuance of the permit initiates the administrative procedure. The motion should contain the determination of foreigner (his/her name, surname, company, address of residence or seat) and his legal status, the determination of the real estate which is to be acquired, the determination of the seller, description of a legal form of acquisition of the real estate and also the information concerning the purpose and ability of acquiring the real estate. A foreigner should also enclose to the motion documents confirming the data included in the motion (in case of natural persons – a copy of pages of the valid passport or identity card, legal persons or organizational units not being a legal person – a copy from the adequate register, in which the foreigner is registered), and also other documents which may confirm his bonds with the Republic of Poland (for example possessing Polish nationality or Polish origin, solemnizing marriage to a Polish citizen, performing business or agricultural activities in Poland in compliance with the provisions of Polish legislation. Presenting to the minister other documents, which may be helpful in establishing the correctness of acquisition of real estate by a foreigner (for example extract from chain of title, extract from the register of grounds together with a sketch of the map from files, statement from the commune concerning the destiny of the real estate according to the spatial development plan for the area) will definitely accelerate the procedure of acquiring the real estate by him. The Minister of Internal Affairs and Administration prior to issuance of permit may demand to present evidence and information necessary for considering the motion and may check that the acquisition of real estate by a foreigner will not pose threat to the defensiveness, national security or public order and whether it is in accordance with the state's interest. In this field he may also consult other public administration organs or professional organizations, in order to establish whether a foreigner fulfils the legal conditions. However, the opinion or information obtained this

way are not binding for the minister. They only help him make the decision taking into account all significant circumstances of the case.

Administrative matters in Poland should be taken care of without delay. It particularly concerns the matters which may be considered on the basis of evidence provided by a party together with the demand to initiate the procedure, or on the basis of facts and evidence commonly known to the administrative organ. If the explanation of the matter requires conducting administrative trial, such a matter should be handled within a month, and in particularly complicated cases – two months. These time limits are of instructive character, which means that they may be both shortened as well as prolonged by the organ handling a specific matter. In the latter case, the organ is, however, obliged to state the reason of such prolongation of the procedure and determine the expected time of handling the matter to the party. Relating to permit for acquisition of real estate by a foreigner, the legislator assumes that the procedure should be complete within two months. In practice this procedure takes longer, depending on how complicated the case is (concerns mainly the cases when a foreigner applying for the permit is not a natural person). Only in case when a foreigner wants to acquire real estate located on the territory of a Special Economic Zone, the procedure should take a little shorter. The Act requires the decision to be taken within no longer than one month, however, even this time limit may be prolonged. The permit is issued in the form of an administrative decision. However, prior to its issuance, the Minister of Internal Affairs and Administration addresses the Minister of Defense, and if the acquisition concerns agricultural estate, also to the minister competent in the country development, with the enquiry in order to make sure that they do not have any reservations as for acquisition of the specific real estate by a foreigner applying for an adequate permit. If they have any reservations in this aspect, they may raise an objection within 14 days from the date of enquiry by the Minister of Internal Affairs (in justified cases the time limit for raising an objection may be prolonged to 2 months to enquire the minister mentioned above). Addressing the above mentioned ministers is a standard procedure and does not determine the content of the future decision. However, if the Minister of Internal Affairs and Administration intends to issue the refusal, he may act independently, i.e. he does not have to address the motion to mentioned ministers.

The permit to acquire real estate by a foreigner is issued when the acquisition of real estate by a foreigner does not pose threat to the defensiveness, national security or public order, and is not in opposition with social policy and public health considerations, and moreover, he proves that there arise circumstances confirming his bonds with Poland. The permit determines, first of all, the person of a buyer and seller, the real estate to be acquired, factual and legal justification and the so-called special conditions. Special conditions may concern only the buyer (foreigner) and they most often refer to the ability to enter into agreement by a foreigner, and not to its content. However, they play an important role, since if they were determined, and the foreigner is not able to present an official confirmation that they were fulfilled, the foreigner may not legally successfully acquire real estate in Poland. Considering the state's security, the Minister of Internal Affairs and Administration may not justify his decision concerning the permit. The permit is valid for the period of two years from the date of its issuance.

The foreigner who intends to acquire real estate in Poland, but is not yet sure if he will finally decide to perform this legal activity may take advantage of the promise. The prom-

ise of the permit is particularly useful for foreigners who are legal persons or other organizational units (founders) having a seat abroad or in Poland, but controlled by them (so, in the meaning of Polish legislation, also foreigners) at the stage of their creation. In such a case, already at the stage of creation of the given subject, they can be certain that they will obtain a permit to acquire a given real estate in the future. The procedure to obtain a promise is the same as in case of applying for the permit itself, because the result of obtaining a promise is a legal status where the foreigner is certain that if he applies for a permit within the period of time of validity of the promise (i.e. one year from the date of obtaining a promise), he will obtain it unless during this time the actual state relevant to the decision concerning the case, i.e. obtaining the permit, changes.

In case of refusal, concerning both the promise and the permit, a foreigner may file a motion to reconsider the case to the Minister of Internal Affair and Administration. Then, the minister is obliged to reconsider the motion and he may, but does not have to, change his mind and issue a positive decision.

Initiation of administrative procedure to obtain a permit for acquisition of real estate by a foreigner does not mean that the foreigner may not change his mind about acquiring the real estate till the end of the procedure. If he or the seller state that he does not intend to buy (and in case of the seller – sell) the given real estate, the Minister of Internal Affairs and Administration discontinues the procedure.

Considering the peculiarity of commercial companies, the acquisition and taking shares and stocks (or performing other legal activities concerning them) in commercial companies which have a seat in Poland, by foreigners, also requires obtaining the permit from the Minister of Internal Affairs and Administration, if in the result of such activities, the company which is an owner or perpetual usufruct of the real estate located in Poland becomes a controlled company. Moreover, the acquisition, or taking shares or stocks in such a company by a foreigner, also requires the permit by a minister competent in the internal affairs, if such a company is a controlled company, and if shares and stocks are acquired or taken by a foreigner who is not a shareholder of the company. The procedure is conducted according to the same rules as in case of applying for the permit by a foreigner who is a natural person but the motion for obtaining the permit (taking or performing other legal activity concerning shares or stocks) should, apart from the above mention data, also include:

1) determination of the company whose shares (stocks) are acquired, taken or are subject to other legal activity;
2) determination of the company which will become a controlled company in the result of acquiring, taking shares (stocks) or other legal activity concerning shares (stocks) of other commercial company;
3) determination of real estate which is owned or in perpetual usufructuary of a company which is to become a controlled company or whose shares (stocks) are acquired or taken by foreigners;
4) determination of the way of acquiring or taking shares (stocks) or other legal activity concerning shares (stocks) in a company in the result of which the company who is an owner or a perpetual usufruct of real estate on the territory of the Republic of Poland will become a controlled company.

If shares of the above mentioned companies have been admitted to public trading, or the company is the owner or perpetual usufructuary of the real estate, the acquisi-

tion of which does not require the permit, the foreigner does not have to apply for the permit to acquire, take or perform other legal activity concerning it.

The permit is also not required in case of transforming a commercial company and acquiring a real estate by inheriting by persons entitled to statutory succession (in the meaning of native law of the deceased person leaving inheritance, and in case there is no such regulation in the law of the deceased person, the Polish law is applied – it means that entitled to statutory succession in the first order are children and a spouse of the deceased person, and in the second order also his parents and brothers and sisters – see art. 931 and 932 of the Civil Code). However, if a foreigner is to acquire the right of ownership or perpetual usufructuary of real estate located in Poland by testamentary inheritance, he should file a motion to the Minister of Internal Affairs and Administration for an adequate permit within two years from the death of the person leaving inheritance. In this course he is obliged to obtain the permit. However, if he does not obtain the permit, the right of ownership to this real estate or the right for perpetual usufructuary is acquired by persons who would be entitled to statutory succession. The same applies to the situation when a foreigner acquires shares or stocks of a commercial company which is the owner or perpetual user of real estates in the territory of the Republic of Poland which are part of the inheritance. Then, if the foreigner is to inherit the above mentioned shares or stocks in the course of statutory succession, the permit is not necessary.

The Act concerning acquisition of real estate in Poland by foreigners also determines lots of other circumstances, which do not require a foreigner to obtain the permit. They are the following:

1) acquisition of separate living accommodation,
2) acquisition of separate business premises destined for garages or share in such premises, if it relates to providing for the living needs of the purchaser or owner of the real estate or separate living accommodation,
3) acquisition of real estate by a foreigner residing in the Republic of Poland for at least 5 years following the granting of a permit to settle thereto,
4) acquisition by a foreigner, being the spouse of a Polish citizen and residing in the Republic of Poland for at least 2 years following the granting of a permit to settle thereto, of real estate that as a result of acquisition shall constitute marital estate of the spouses,
5) acquisition of real estate by a foreigner, if on the day of acquisition they are entitled to statutory succession from real estate transferor, and the real estate transferor has been the owner or perpetual usufructuary thereof for at least 5 years,
6) acquisition by a legal person or commercial partnership having its seat in Poland and controlled directly or indirectly by foreigners for its statutory purposes, of undeveloped real estate that the total area whereof in the whole of the country does not exceed 0,4 ha within cities,
7) acquisition of real estate by a foreigner, being a bank and simultaneously mortgagee, through the seizure of real estate for ownership due to unsuccessful auction in execution proceedings,
8) acquisition or seizure by a bank directly or indirectly controlled by foreigners, shares or stocks in the company which will in the result of such acquisition become controlled by foreigners, due to the bank's claims resulting from performed banking actions.

These exemptions do not apply to real estate located in border area and agricultural real estate of area exceeding 1ha. The foreigner wanting to acquire real estate in the border area or agricultural real estate exceeding the area of 1ha will have to obtain the permit regardless of the exemptions defined by the Act.

Since it is necessary to adjust Polish legislation to legal standards of Member States of the European Union, i.e. to enable free flow of people, capital, goods and services, the Polish Act on acquisition of real estate by foreigners does not require obtaining the permit to acquire the real estate by foreigners who are citizens or entrepreneurs of the Member States of the European Economic Area. This rule does not apply to acquisition of agricultural and forest real estate and the so-called second house. By acquisition of the second house they mean acquisition by a foreigner of the real estate designed for building accommodation or for recreational purposes, which will not constitute the permanent place of residence of the foreigner (it does not apply to acquisition of a separate living accommodation).

Acquisition of agricultural and forest real estates by foreigners will require obtaining the permit for the period of 12 years since joining the European Union by Poland and the acquisition of the second house for the period of 5 years. However, these co-called protective periods as regards agricultural real estate (It means that no foreigner shall be able to acquire forest real estate in Poland for the period of 12 years from the date when Poland joined European Union), do not concern the foreigners who for over 7 (on agricultural real estate located in the following voivodeships: the dolnośląskie, kojawsko-pomorskie, lubuskie, opolskie, pomorskie, warmińsko-mazurskie, wielkopolskie, zachodniopomorskie) and 3 (on agricultural real estate located in the following voivodeships: the lubelskie, łódzkie, małopolskie, mazowieckie, podkarpackie, podlaskie, śląskie, świętokrzyskie) years since the date of concluding an agreement of lease with stated date have been performing agricultural activity on this real estate in person and have been legally dwelling on the territory of the Republic of Poland. Citizens of Member States of the European Economic Area who were, on the day when Poland became a member of the European Union, shareholders of commercial companies with seats on the territory of the Republic of Poland, may include in the period of lease the period of lease of the agricultural real estate by the company if during this period, being shareholders of the company, they performed in person agricultural activity on this real estate and legally dwelled on the territory of the Republic of Poland. As regards the acquisition of the second house, despite the protective period, a foreigner may acquire a real estate without the permit if he has been residing legally and continuously for at least 4 years on the territory of the Republic of Poland, or he wants to acquire it in order to perform business activity consisting in tourist services.

The Act on acquisition of real estate by foreigners in Poland also introduces a general rule that the surface of the real estate acquired by a foreigner in order to satisfy his living needs can not exceed 0,5ha, and in case of acquiring real estate for performing business or agricultural activity, its surface should be justified by real needs resulting from the kind of activity performed.

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L' HUMANISME EN CRIMINOLOGIE ET DANS LA LUTTE CONTRE LA CRIMINALITÉ

1. NOTION D'HUMANISME

L' humanisme c' est une grande idée qui a joué un rôle important dans l' histoire de notre civilisation. Il serait vain d' analyser ici les différentes significations du mot «humanisme». Nous nous bornerons à fixer que par l' humanisme nous allons entendre dans le texte qui suit : 1. une vision réelle de l' être humain avec l' accent sur sa spécificité et 2. un postulat de traiter l' homme avec le respect de tous ses droits. La première de ces deux significations, d' ailleurs réciproquement liées, est surtout importante dans les recherches scientifiques, la seconde trouve son application avant tout dans la pratique de la vie sociale.

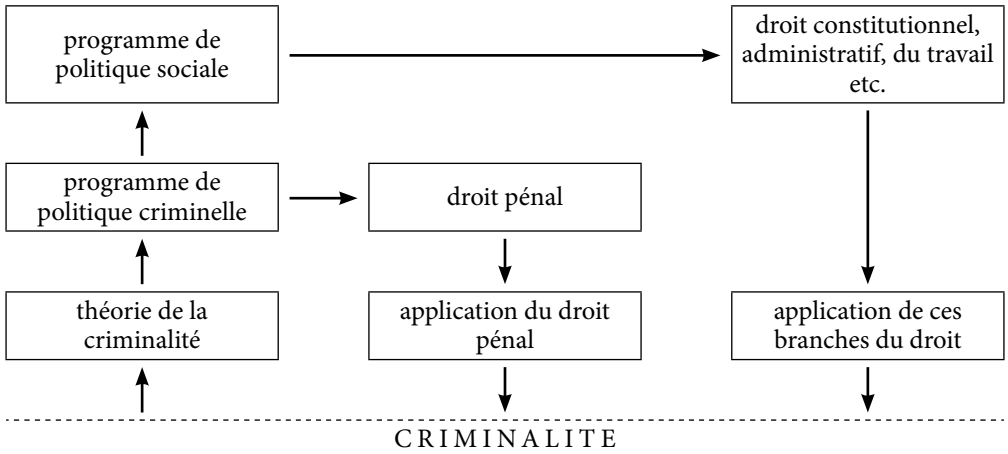
2. LA STRUCTURE DE LA LUTTE CONTRE LA CRIMINALITÉ

La lutte contre la criminalité analysée dans sa complexité comprend pincipalement quatre niveaux : 1. la théorie de la criminalié, 2. un programme élaboré par la politique criminelle, 3. le droit pénal, 4. l' application du droit pénal sur le plan des poursuites, de la juridiction et de l' exécution. Cette structure doit être complétée par l' observation que la politique criminelle ne conduit pas toujours uniquement au droit pénal mais suggère souvent aussi un plan de politique sociale largement conçue qui à son tour fait promouvoir des moyens d' action sociale extra-pénaux localisés dans différentes branches du droit. On peut le voir sur le dessin nº 1.

Les éléments présentés sur ce dessin sont liés entre eux. L' élément suivant est en principe basé sur l' élément précédent. Mais c' est une liaison plutôt théorique que pleinement réelle. Or par exemple le droit pénal devrait être fondé sur un programme de politique criminelle préparé avec la coopération des spécialistes. Il l' est parfois, mais le législateur, étant autonome, peut avoir une vue différente qui trouvera son expression dans la loi adoptée. Le droit pénal de son côté détermine la pratique de son application, mais ce droit laisse toujours aux organes compétents une certaine liberté dont ils peuvent profiter de différentes manières pas toujours tout à fait d' accord avec la lettre et l' esprit de la loi.

Conscients de ces liens plutôt délicats entre les éléments de la lutte contre la criminalité nous devons formuler un postulat catégorique demandant que l' idée d' humanisme soit observée à tous ces niveaux indépendamment l' un de l' autre et que ce soit le devoir de chacun qui agit sur n' importe quel niveau – car comme on peut le déduire de ce qu' on a dit plus haut – un programme de politique criminelle humaniste peut ne pas faire naître un droit pénal humaniste et un droit pénal humaniste peut ne pas créer une administration de la justice pleinement humaniste.

Dessin nº 1. Structure de la lutte contre la criminalité



Nous allons présenter brièvement les problèmes d' humanisation des niveaux distingués ci-dessus.

3. L' HUMANISME EN CRIMINOLOGIE

Le développement moderne de la méthodologie générale des sciences mène aujourd' hui à la constatation qu' il est impossible de réaliser des recherches scientifiques et de construire des théories sans accepter d' une manière souvent tacite des prémisses philosophiques.

S' il s' agit de la criminologie il faut observer qu' elle est toujours fondée sur une théorie de l' homme, autrement dit sur une anthropologie philosophique. Pendant longtemps à la base de la criminologie est restée une vision de l' homme positiviste et naturaliste dont l' idée clef est le déterminisme qui voit l' homme assujetti à des régularités plutôt strictes de la nature. La criminologie pendant plus d' un siècle a fait tout son possible pour découvrir ces régularités. On sait très bien que ces efforts n' ont pas abouti à des résultats satisfaisants. Il se peut que ces lacunes soient dues à une fausse image de l' homme qu' acceptent ceux qui veulent trouver les causes de chaque crime. Il est utile d' examiner les problèmes de la criminologie sous l' angle d' une vision de l' homme différente que l' on peut nommer humaniste. Cette vision, d' ailleurs fort difficile à tracer dans les détails, doit mettre en relief la liberté de l' homme qui s' exprime dans une certaine autonomie de sa volonté.

La vision que je propose d' accepter c' est l' idée de l' homme « choisissant » (homo eligens) que je présente d' une manière plus détaillée ailleurs (Tyszkiewicz, 1991 et 1997). Selon cette idée l' homme est conçu comme un être qui dispose en principe d' une sphère de liberté de ses décisions. Cette liberté est naturellement limitée par un réseau des facteurs biologiques, psychologiques, sociaux et économiques, mais ces facteurs, ayant selon le cas une intensité d' influence variable, n' enlèvent pas à l' homme la possibilité de choix plus ou moins libre entre les alternatives de son comportement, surtout dans le domaine des actes à qualification morale.

En analysant le comportement des gens on peut parler d' un continuum dont les limites sont constituées par une pleine liberté d' un côté et un déterminisme poussé de l' autre côté. Sur ce continuum on peut placer les actes de l' homme en évaluant le degré de la liberté par la constatation du nombre et de la nature des facteurs déterminants, entre autre criminogènes, qui se sont manifestés dans les différents cas. On voit alors que les jeunes délinquants sont plus souvent soumis à des facteurs criminogènes que les délinquants adultes et parmi ces derniers les multirécidivistes sont dans leur activité criminelle plus influencés par des facteurs criminogènes que par exemple les délinquants « en col blanc ». Tout cela coïncide avec les données de la recherche criminologique qui nous montre un ample réseau des facteurs criminogènes caractéristiques pour les délinquants mineurs tandis que les recherches sur les délinquants adultes n' aboutissent pas à des conclusions aussi nettes. On peut interpréter ces résultats en disant que les faits criminels de ces derniers sont « moins déterminés » et par conséquent « plus libres » que les délits des premiers.

C' est la tâche d' un examen médico-psychologique et social des délinquants de fixer – naturellement d' une manière plus ou moins approximative – le degré et la spécificité de la détermination d' un fait criminel concret.

Il serait erroné d' estimer que la théorie humaniste de l' homme voie seulement l' individu et qu' elle fasse abstraction de la société. L' homme doit être toujours considéré dans un cadre social, dans une interaction avec ses semblables. Dans cette interaction l' actif et le passif se combinent intégralement et c' est de nouveau une énigme de la nature humaine qui se manifeste dans le fait que l' homme est d' un côté un élément actif de la société, un élément qui contribue à son existence et à son fonctionnement et de l' autre – il est soumis dans une large mesure à une forte influence de cette société qui agit sur lui par de nombreux individus avec lesquels il entre en contact (n' étant souvent pas une partie dominante), ainsi que par les moyens de diffusion de masse et les produits de la civilisation (science, littérature etc.). Il faut ajouter que certains besoins de l' homme ne peuvent être satisfaits sans participation d' une autre personne: tutelle parentale durant l' enfance, besoin de contact émotionnel, besoin d' être accepté.

L' adoption d' une vision humaniste de l' homme en criminologie a des antécédents dans l' histoire de cette science et elle correspond à des tendances semblables en psychologie et en sociologie (Tyszkiewicz, 1991).

La vision de l' homme choisissant doit etre acceptée en criminologie comme hypothèse. Il faut se servir ici de la méthode hypothético-déductive propagée par le grand philosophe du XX^{e} siècle, postpositiviste, Karl R. Popper (Popper, 1977) et appliquer le critère de la falsification. Pour le moment rien ne semble annoncer cette falsification.

Il faut mettre encore en évidence que l' introduction de cette hypothèse dans le système de la criminologie ne désactualise en rien les résultats des recherches empiriques obtenus jusqu' ici à l' aide d' une méthodologie satisfaisante. En outre elle rend la criminologie plus proche des opinions sur la responsabilité des gens courant dans la société ce qui n' est pas indifférent pour la prosperité de la lutte contre la criminalité.

S' il s'agit de la méthode scientifique, l' adoption de la vision humaniste de l' homme en criminologie, outre l' examen médico-psychologique et social dont on a parlé plus haut, rend importante une biographie du délinquant présentée par lui-même et le « Verstehen » bien connu dans l' histoire de la méthodologie des sciences de l' homme. Comprendre l' homme par l' exploration de son point de vue personnel et ses motivations

c' est un des fondements de l' humanisme aussi bien dans la recherche scientifique que dans toute action sociale.

En conclusion de ce qu' on vient de dire il faut constater la nécessité d' introduire dans le champs de la criminologie un paradigme humaniste qui met en relief le rôle important de la liberté de l' être humain et concentre les recherches sur sa vie psychique et ses conditions d' existence qui ont une certaine influence sur ses décisions. Ce paradigme peut aider à surmonter les difficultés que rencontre jusqu' aujourd' hui la criminologie explicative (Tyszkiewicz, 2010).

4. L' HUMANISME ET POLITIQUE CRIMINELLE

Une criminologie humaniste mène à des conclusions importantes pour le programme de politique criminelle réalisée post delictum. Ce programme doit être complexe. Il y a ici de la place aussi bien pour l' idée de répression que pour l' idée de resocialisation qui malgré les critiques soulevées contre elle doit garder son importance. Ces deux idées, qui d' ailleurs possèdent des liens entre elles, ont leurs propres champs de fonctionnement. La resocialisation est appliquée au délinquant dont l' acte est conditionné par des facteurs criminogènes, de son côté la répression est mise en oeuvre quand l' acte est plutôt le résultat de l' emploi par l' homme de sa liberté.

La resocialisation est conçue ici comme une activité qui vise à obtenir un fonctionnement normal de l' individu dans la société, fonctionnement satisfaisant aussi bien l' individu que la société. Cette activité peut se produire – selon les exigences du cas – dans les directions suivantes: 1. éducation, 2. assurance d' un milieu social favorisant une socialisation positive, 3. traitement médical, 4. traitement psychologique, 5. réhabilitation et 6. aide à résoudre les problèmes de la vie quotidienne. La forme concrète de l' activité resocialisante dépend des facteurs criminogènes qui ont contribué à la perpétration du délit en cause. Ces facteurs analysés dans leurs interaction et évolution et situés dans le curriculum vitae du délinquant participent à la criminogénèse qui donne une image synthétique du conditionnement de l' infraction. Ce sont ces facteurs qui sont décisifs pour les directions de la resocialisation.

Si dans la genèse de l' infraction on n' a pas pu constater de facteurs criminogènes et cet acte semble être le résultat d' une décision pleinement libre c' est alors la répression qui trouve uniquement son application. Dans l' idée de la répression il faut voir avant tout l' expression de la désapprobation sociale de l' acte du délinquant qui doit être ressentie par lui. Cette désapprobation est materialisée dans un mal infligé à l' auteur de l' infraction. Ce mal augmente avec la gravité de cette infraction y compris le degré de culpabilité révélé à son occasion. L' homme a la possibilité de réaliser sa volonté en violant les lois de la société, mais cette société a le droit et l' obligation d' exprimer d' une manière résolue sa désapprobation qui prend la forme d' une souffrance causée au délinquant. L' humanisme ne peut pas contester ce mécanisme de l' action contre le crime, il postule seulement que la souffrance infligée à titre de répression ne depasse pas le niveau de la peine proportionnelle à la gravité du délit commis et ne bloque pas les besoins de l' homme dans une mesure qui lui porterait un dommage trop grand et produirait des facteurs criminogènes. Il postule aussi que la réalisation de la répression ne soit pas la source d' expériences sociales négatives qui – elles aussi – peuvent être des facteurs criminogènes. Il s' agit ici surtout des contacts démoralisants avec les autres

criminels dans les établissements pénitentiaires. Du point de vue humaniste il faut critiquer certaines peines, avant tout naturellement la peine de mort, mais aussi l' abus de la peine d' emprisonnement.

Dans le cadre de la répression la souffrance infligée à l' auteur de l' infraction est voulue. Ce n' est pas le cas s' il s' agit de la resocialisation. Mais il ne faut pas perdre de vue le fait qu' ici aussi une certaine souffrance est causée quoiqu' elle ne découle pas de l' intention de celui qui l' administre. A vrai dire – tous le moyens employés en droit pénal sont par nature liés avec un ennui nécessairement occasionné par le fait qu' ils sont tous appliqués forcément. Il faut donc postuler que les moyens de resocialisation aient aussi leur limite qui ne devrait pas être dépassée. On pourrait voir cette mesure dans la quantité de souffrance proportionnelle à la gravité de l' infraction commise par le sujet soumis à la resocialisation.

La théorie humaniste de l' homme que nous plaçons à la base de la criminologie et par conséquent de la politique criminelle nous conduit à voir dans la plupart des actes de l' homme un mélange du « déterminé » et du « libre ». L' homme peut être plongé dans des déterminismes mais il lui reste le plus souvent au moins un petit îlot du « moi » autonome. Cela oblige à combiner les moyens de resocialisation avec les moyens de répression. D' un côté il faut promouvoir une action de resocialisation pour anéantir ou réduire les facteurs criminogènes aperçus dans le cas jugé, de l' autre – une certaine peine, étant l' expression de la désapprobation sociale, est justifiée par le quantum de liberté dont l' auteur de l' infraction a mal profité. Cette constatation nous montre qu' il est faux d' opposer en pratique deux modèles de droit pénal – l' un fondé sur l' idée de resocialisation ou de traitement et l' autre basé sur l' idée de répression, ou d' osciller entre eux. Ces modèles doivent être intégrés selon une règle précise formulée plus haut.

Nous nous rapprochons ici de ces tendances en politique criminelle qui tâchent de trouver une voie intermédiaire entre le classicisme et le positivisme. Nous sommes particulièrement voisins des thèses du mouvement de défense sociale qui s' est à juste titre appelé « mouvement de politique criminelle humaniste » (Tyszkiewicz,1968). Nous sommes surtout proches du programme modéré de la « défense sociale nouvelle » représenté par Marc Ancel (Ancel, 1981). Ce programme, tout en mettant l' accent sur la resocialisation, n' a pas écarté tout à fait le rôle des peines que Filippo Gramatica voulait éliminer d' une manière radicale. Le programme de F.Gramatica conséquemment construit sur l' idée de resocialisation et pour cette raison très intéressant du point de vue théorique ne tenait – peut-être – pas suffisamment compte de la complexité de la nature humaine. L' élément de liberté qui doit y être reconnu (à côté d' un élément de détermination) justifie une désapprobation sociale qui – à notre avis – constitue le sens de la peine. Dès lors la resocialisation c' est-à-dire l' aide prêtée au délinquant et répression doivent être appliquées simultanément avec l' accent sur l' une ou sur l' autre selon la spécificité du cas.

Comme on le voit – nous tendons à établir sur le plan théorique un équilibre entre la resocialisation et la répression ne favorisant ni l' une ni l' autre. C' est ce qui nous diffère aussi bien du néoclassicisme qui reconnaît la priorité de la répression sur la resocialisation, que de la défense sociale qui fait le contraire. Ce qui nous place tout de même plus près de la défense sociale nouvelle c' est le postulat d' une meilleure connaissance du délinquant au moment du jugement. Le néoclassicisme se contente de cette connaissance à l' étape de l' exécution des peines dans les établissements pénitentiaires.

La vision humaniste de l' homme nous conduit à une thèse importante sur l' efficacité de la politique criminelle. A la lumière de cette vision il faut constater que les moyens

employés dans la lutte contre la criminalité ne peuvent jamais assurer une pleine efficacité. Un certain degré de leur manque de résultat est tout à fait normal. Même la meilleure connaissance des facteurs criminogènes et une parfaite contraction engagée à les éliminer ne peuvent pas garantir le plein succès, naturellement si l' on laisse à l' homme la possibilité d' agir à son gré ce qui est normal dans le système démocratique. Il faut observer encore que les moyens appelés à resocialiser sont plus spécifiquement orientés vers l' efficacité, tandis que les peines, qui – comme on l' a dit plusieurs fois – avant tout expriment la désapprobation sociale des actes libres de l' homme, sont beaucoup moins susceptibles d' être évaluées selon le critère de l' efficacité.

L' humanisme interprété comme postulat de traiter l' homme avec le respect de tous ses droits doit s' intéresser spécialement à la quantité de souffrance que l' on applique à l' auteur de l' infraction dans le cadre de la lutte contre la criminalité. On a parlé déjà des limites de ces souffrances. Maintenant il faut seulement accentuer le désir que l' évolution de la politique criminelle s' oriente vers la restriction de l' application de la souffrance par la diminution du catalogue des actes pénalisés et l' atténuation des peines. L' humanisme demande que toute intervention dans les libertés humaines soit réduite au minimum nécessaire. Naturellement l' évaluation de ce qui est nécessaire ou non est souvent dans une certaine mesure subjective. Il faut reconnaître ici la compétence du législateur et du juge qui appartiennent aux sujets appelés en première ligne à réaliser les principes de l' humanisme. Dans cette action ils auront des obstacles à surmonter parmi lesquels il faut citer une maxime douteuse mais largement acceptée suivant laquelle l' efficacité de la lutte contre la criminalité dépend seulement de l' accroissement de la sévérité des peines et une attitude pour la plupart trop répressive de la société.

La tendance de la politique criminelle humaniste de s' orienter vers une certaine restriction du droit pénal a naturellement ses limites liées avec l' intérêt social. Elle n' accepte pas une dépénalisation abolitionniste ni une pratique qui réduit la réponse au délit à des gestes plutôt symboliques en abusant par exemple du sursis simple.

5. L' HUMANISME ET DROIT PÉNAL

Les principes de la politique criminelle humaniste doivent être intégrés dans un système de droit pénal, de procédure pénale et de droit pénal exécutif. Ce système doit être rédigé d' une manière qui établirait une protection efficace de l' individu contre une intervention non justifiée. Ce sont surtout les dispositions réglant la procédure pénale qui remplissent cette tâche.

S' il s' agit du droit pénal il doit dresser un catalogue – dans la mesure du possible – large et différencié des moyens appropriés à réaliser les fonctions typiques pour la resocialisation et pour la répression. Ce droit doit aussi formuler les règles d' application de tous ces moyens et ne pas se borner aux règles de fixation des peines. Il faut donner au juge des directives génerales en lui laissant la possibilité de choisir librement les mesures les plus adéquates dans les cas jugés et les combiner entre elles si c' est nécessaire. Comme on l' a dit plus haut – le juge doit poursuivre deux buts : il doit appliquer des mesures de resocialisation pour réagir contre les facteurs criminogènes qui ont contribué à conduire le délinquant à l' infraction, d' autre coté il doit choisir une mesure répressive pour exprimer la désapprobation sociale de cette infraction. Si aucun facteur criminogène n' a été constaté on se borne à une mesure répressive, dans le cas contraire

– quand les facteurs criminogènes sont si intensifs qu' ils excluent pratiquement une décision libre – on applique seulement une mesure de resocialisation, par exemple le placement dans un hôpital psychiatrique. Dans les situations intermédiaires on combine les deux catégories de mesures en tenant compte du fait que les mesures de resocialisation produisent aussi une souffrance pour la personne jugée. Pour tous les moyens aussi bien resocialisants que répressifs, cumulés ou non, il faut fixer une limite d' intensité commune qui ne peut pas etre dépassée. Cette limite est constituée par la dose de souffrance proportionnelle à la gravité de l' infraction commise.

Cette dernière règle pourrait être acceptée avec une exception: la multirécidive. Ici on pourrait appliquer les moyens de resocialisation dont l' intensité dépasserait la limite formulée plus haut. Cette exception serait actuelle dans ces cas où l' infraction commise par le multirécidiviste serait de moindre gravité. Dans le cas contraire la gravité de l' infraction justifierait les moyens adéquats à la situation. Cette solution ressemble à celle qui a été adoptée par le droit des délinquants mineurs.

Notre vision humaniste de l' homme que nous avons admise comme base de la criminologie et de la politique criminelle ne nous permet pas d' accepter une catégorie de « criminels incorrigibles ». Chaque homme peut changer sa conduite et chaque homme peut se montrer réfractaire aux influences extérieures.C' est ici qu' il faut reconnaître un certain rôle de sa volonté. S' il y a des circonstances spécifiques qui l' engagent dans une direction plutôt que dans une autre on peut tâcher de les changer. C' est justement le but de la resocialisation. Mais on ne peut jamais prévoir d' une manière sûre l' effet positif ou négatif de celle-ci. La fameuse classification de Franz von Liszt doit etre modifiée. On peut accepter seulement deux groupes de criminels : ceux qui sont aptes à être resocialisés et ceux qui n' en ont pas besoin. Pour les incorrigibles on ne trouve pas de place ici, car ils n' existent pas.

Il n' est pas possible de présenter ici en détails un système pénal fondé sur les principes formulés plus haut. Il ne sera, certes, pas très différent des systèmes actuellement en vigueur dans les pays civilisés. Il va seulement disposer d' une liste plus riche des mesures qui seront appliquées d' une manière plus souple et – selon les exigences du cas – cumulées plus librement. On aura une meilleure possibilité de réaliser en même temps la répression et la resocialisation en évitant la confusion de ces deux sphères d' agir. Par exemple on pourra cumuler une amende qui a un caractère uniquement répréssif avec des mesures resocialisantes comme l' obligation de se soumettre à une cure antialcoolique (sans hospitalisation), ou de fréquenter un centre de traitement psychologique ou bien encore de suivre un enseignement professionnel. L' idée de concevoir la répression et la resocialisation comme directions d' agir nettement différentes mais en même temps complémentaires serait surtout utile dans ces systèmes pénaux qui font un large emploi des peines pécuniaires. Une mesure pénale qui présente une bonne conciliation de la répression et de la resocialisation est le sursis partiel de la peine accompagné de la mise à l' épreuve, institution réglée par le code pénal français de l' année 1992 et approuvée largement par les juges.

Le droit pénal humaniste, comme d' ailleurs chaque droit pénal, rencontre un problème qu' on ne peut pas négliger. Il s' agit du consentement du délinquant à l' exécution de certaines mesures de resocialisation comme le traitement médical ou psychologique.On ne peut pas renoncer à ce consentement car – abstraction faite des droits de l' homme – son absence rend douteuse l' efficacité de ces mesures.

C' est tout à fait naturel que le droit pénal humaniste doive être appliqué conformément aux postulats de l' humanisme. Mais la réalisation des normes de ce droit doit être

constamment controlée sous l' angle de l' observation des exigences de l' humanisme, puisque – comme on l' a dit au début de notre article – un programme de politique criminelle humaniste et un droit pénal humaniste ne suffisent pas à garantir l' humanisme du fonctionnement réel du système pénal. On sait bien que les déclarations sont assez souvent en désaccord avec les faits.

6. L' HUMANISME DANS LA LUTTE CONTRE LA CRIMINALITÉ ET POLITIQUE SOCIALE

La criminologie a démontré qu' il y avait toute une liste des facteurs criminogènes fonctionnant dans un domaine supraindividuel et plus ou moins généraux. Il s' agit ici surtout de certains phénomènes sociaux négatifs comme l' alcoolisme, la toxicomanie, la marginalité sociale, le chômage, la misère etc. La théorie humaniste de l' homme expose ses besoins et l' humanisme postule la nécessité de satisfaire à ces besoins. La politique criminelle orientée vers l' ensemble des problèmes de la criminalité doit dépasser le cadre du droit pénal et tendre à promouvoir une politique sociale dirigée vers l' amélioration de la situation vitale des couches sociales moins aisées et de ces milieux sociaux qui sont le plus souvent représentés parmi les délinquants. Il serait aussi désirable d' améliorer toutes les institutions de la société qui fonctionnent mal, y compris les institutions politiques. C' est la criminologie du conflit qui a touché le problème du caractère criminogène et pathogène du système social en proposant tout de même parfois des solutions qui, par leur libéralisme exagéré (Taylor, Walton, Young, 1973), mènent à l' anarchisme qui n' est pas beaucoup moins dangereux pour les droits de l' homme que le système totalitaire. Sur le plan politique l' humanisme demande les institutions démocratiques avec un pouvoir exécutif efficacement contrôlé par les citoyens, mais ayant la possibilié d' agir avec fermeté.

7.L' HUMANISME ET VICTIMOLOGIE

Presque tout ce qu' on a dit jusqu' ici envisageait les problèmes de l' humanisme du point de vue de l' auteur de l' infraction. C' est certainement l' aspect dominant ici car les problèmes de l' humanisme surgissent en général là où l' individu se rencontre avec ceux qui exercent le pouvoir au nom de la société. C' est alors qu' il risque d' être écrasé par une action intentée pour réaliser un intérêt social ou prétendue telle. La victime de l' infraction se trouve dans une situation évidemment meilleure. Elle est protégée par le droit pénal et par les organes qui sont appelés à l' appliquer. Mais – comme on le constate sans cesse – le rôle accordé à la victime de l' infraction dans le procès pénal ne garantit pas suffisamment ses intérets. Il s ' agit surtout du dédommagement réel dont la victime est trop souvent dépourvue. C' est aussi à l' humanisme qu' incombe la tâche de tendre à améliorer la position de l' homme-victime lésé par l' homme-malfaiteur. L' humanisme ne peut être l' humanisme que pour tous.

L' article présente un système de thèses cohérentes, presque complètes et inspirées par une axiologie certainement juste. Mais puisque les actes de l' homme ne sont jamais idéals il doit être soumis à la critique. J' invite à la discussion.

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THE TITLE COVERED BY THE EXCLUSIVE RIGHT AS THE SUBJECT OF LEGAL PROTECTION UNDER POLISH INDUSTRIAL PROPERTY LAW

1. INTRODUCTION

Intellectual property is often defined as "knowledge which may be transformed into value". Nowadays, the importance of knowledge is steadily growing in the economic system. Today, not only material goods decide the value of enterprise, but also intellectual property which becomes more and more important. Thus, the management of intellectual property is particularly significant in the growing standard of enterprise. Consequently, in terms of the functioning of business entities it is crucial to register markers as trademarks. Granting the protective right as the exclusive law on trademarks gives possibility to use trademarks in an earning and professional way in the whole area of the Republic of Poland and consequently add many benefits to Polish traders. In this study the author quotes several judgements delivered under the Act of Trademarks of 31 January 1985 (Journal of Polish State Law 1985, No. 5, item 17), which, however, keeps the whole novelty under the currently obtained Act of Industrial Property Law [i.p.l.] of 30 June 2000 (Journal of Polish State Law 2001, No 49, item 508; consolidated act Journal of Polish State Law 2003, No. 119, item 1117). This study aims to present the protection of the title in the light of the Industrial Property Law.

2. PREMISES

The title "as such" is a word which is used to identify a concrete literary or scientific book, novel, article, magazine, film, musical or even theatrical play (Słownik języka polskiego, 1981). It does not need to have a general character or refer to the whole item but it can also be a headline of any part of the work. The title functions as an identifier, which is not a distinguishing marker in the classic sense of the word. Generally, the aim of the classic distinguishing markers as trademarks, *enterpreneurs'* markers and geographical indications is to identify the traders with the products or services they offer on the market (Skubisz, 1997: p. 13). In theory of literature it is assumed that the title performs two functions: it identifies intellectual literary work (identification function) and introduces the readers into the literary work (initial metastatement function) (Tylec, 2006: p. 30).

Titles can be protected under the Polish copyright law (Journal of Polish State Law 1994, No. 24, item 83) but only when the title fulfills the prerequisites contained in the Polish copyright law in Article 1, especially in the provision saying that it has to be creative. Thus, titles can be divided into ones which are creative and can be protected by

legal measures contained in the Polish copyright act (they are called original in French literature and strong in German) or ones which are not creative and cannot be protected (banal or weak). Polish doctrine divides titles in a different way which is patterned after the French and German considerations. There are original titles characterized by a high intellectual and emotional charge like *Faust, Diaboliad etc*., trivial titles which present only the content of the work like *The Peasants, Revenge, The Wedding, The Little Match Girl, The Ugly Duckling etc*., and titles which do not extend beyond specifying the genre *Tales, Poems, Sculptures etc.* (Tylec, 2006: p. 29).

A trademark is an intangible asset, which is regulated under Article 120 (1) of The Act of Industrial Property Law (further: i.p.l.). A trademark is *"any sign capable of being represented graphically […], provided that such signs are capable of distinguishing the goods of one undertaking from those of other undertakings"*. A trademark is a word, number, a phrase, a symbol or a design, or a combination of words, phrases, symbols or designs or colours, a three-dimensional shape of goods or of their packaging, as well as melodies or other acoustic signals used by an individual, a business organization or other legal entity to identify uniquely the source of its products and/or services to consumers, and to distinguish its products or services from those of other entities. It can be said that a trademark is connected with the source of origin, which means with the enterprise understood as the entrepreneur (the subject approach). That exemplary catalogue of markers which can be treated as trademarks is presented in Article 120 (2) of the Act of Industrial Property Law. However, even if a marker is included in that list, it does not automatically mean that the protection is granted. A trademark is registrable if it is able to distinguish the goods or services of a party and thus not to confuse consumers about the relationship between one party and another, and consequently not to mislead consumers with respect to the qualities of the product. This point of view is also represented and underlined in the jurisdiction (see the case of the three-dimensional sign „TUBA", of 6 July 2004, 6 II SA 1617/03, unpublished judgement adjudication, see Orzecznictwo sądów administracyjnych. Własność przemysłowa, 2007: p. 49).

The owner of a registered trademark is the subject who can authorise his exclusive rights (the right of protection), it can be the creator of the marker/the sign or the person who is not the creator but the applicant. There are many kinds of trademarks, for example an individual trademark which can be submitted by a natural or legal person even if they are not an entrepreneur in the meaning of the industrial property law. In case of entities lacking legal personality, a right of protection may only be granted on behalf of a legal person, of which the entity is member, or on behalf of a natural person or persons running that entity on their behalf. Besides, the Act provides for a registration of a individual trademark which can be used by several traders who have jointly applied for the protection. It is the so called joint right of protection. It is important to underline that such use cannot be contrary to public interests and not intended to mislead the public, in particular as to the nature, intended purpose, quality, properties or origin of the goods (art. 122 i.p.l.).

The legislator regulated the possibility to register also a collective mark, which can be divided into two groups. An ordinary collective trademark (art. 136 i.p.l.) which can be granted to *"any organisation enjoying the status of legal entity and created in order to represent the interests of the undertakings"*. It can be used in the course of trade by that organisation and the entities grouped therein. The principles of the use of a trademark should be determined by the regulations adopted by that organisation. A collective guar-

antee mark (art. 137 i.p.l.), which is given for compliance with defined common standards for all goods and services. That trademark can be granted to an incorparated organisation (enjoying the status of legal entity), but its aim is not to concentrate on a representativeness of traders' interests, because the only entitled person to use a trademark is the entrepreneur not an organisation. The conditions of using a trademark should be specified in special regulations (Du Vall, Nowińska, Promińska, 2007: p. 215–221).

3. THE CAPABILITY OF DISTINCTIVENESS AND THE CAPABILITY OF DISTINGUISHING – THE SO CALLED ABSTRACT CAPABILITY OF DISTINGUISHING AND CONCRETE CAPABILITY OF DISTINGUISHING

The Polish definition of trademark rests on the fundamental function which trademarks should perform. The constitutive condition of a trademark is not an individual/original/imaginative feature, as it is the case in the copyright law, but only its capability to distinguish goods and services in terms of origin (Błeszyńska-Wysocka, 2008: p. 13). This is the so called abstract prerequisite, which is used to rate a mark as trademark in a potential way. It means that the mark has to be distinctive *in abstracto,* in spite of a concrete good or service. Firstly, it is important to analyse if a mark fulfills the following conditions: it has to be perceivable by human sense, it has to be uniform and independent (self-dependent) against other goods, further it has to be capable to be represented graphically. According to such research, if a concrete sign fulfills the above-mentioned terms it means that it has a potential capability to be conceded as a trademark. At this point it is necessary to underline that it does not automatically mean that the protection is granted. A required prerequisite is the so called sufficient distinctive character, otherwise the concrete capability of distinguishing. The sign has to be researched in relation of concrete goods or services, *in concreto.* It is crucial to consider if a mark is capable to individualise the good or service on the market among other goods or services which derive from the same brand, though from other entrepreneurs (Du Vall, Nowińska, Promińska, 2007: p. 185–186; Skubisz, 1997: p. 55; see e.g. the judgement WSA VI SA/Wa 1765/2006).

Trademark as a special kind of sign is characterised by functional and structural elements. The first one was already reviewed in the first part, in turn it is important to concentrate on the second one – a structural topic pertain to the external construction of the mark, because the perception of the shape/layout of the symbol is the most prominent manner for the potential customers (Koczanowski, 1976: p. 19 and subsequent pages).

4. THE CAPABILITY OF DISTINCTIVENESS OF TITLES – PREMISES

In accordance to the above-named capabilities in the literature it is possible to distinguish two categories of marks: marks which have the capability of distinctiveness and – marks which have the capability of distinguishing.

Marks which are simultaneously perceived by a human sense, are uniform and independent (self-dependent) and are capable to be represented graphically, are marks which can fulfill the function of the trademark, because they have the so called capability of distinctiveness.

4.1. PERCEIVING BY HUMAN SENSES

Perceiving by the human senses is the prerequisite, which was described by the doctrine. It means that anything can be distinctive, if it can be perceived by human senses. The fundamental are visual, auditory and touch modality. In the literature there are voices for including the so called new forms of trademarks, by regulations of the Industrial Property Law. It is said that even if marks cannot be visually perceived they can be trademarks. The olfactory and gustatory modality was the issue of some judgments of the European Court of Justice. It was underlined that the mark can be considered trademark even if it is not possible to perceive it by visual sense, provided that the sign is represented graphically in the clear, accurate, complete, easy, approachable, understandable, tenacious and objective way (see the case C-273/00 Sieckmann vs Deutches Patent- und Markenamt, TE 2002 p. I-11737). Nowadays, the problem is very contemporary, because the technology is unpredictable.

4.2. THE GRAPHICAL REPRESENTABILITY

The graphical capability refers to presentation of the mark in a graphical way. That prerequisite was entered into Polish system of Industrial Property Law pursuant to the First Council Directive 89/104/EEC 21st December 1988 to approximate the laws of the Member States relating to trade marks (OJ 1989 L 40, s. 1) and Council Regulation (EC) No 40/94 of 20th December 1993 on the Community trademark (OJ 1994 L 11, p. 1).

That expression is not so obvious as it may seem at the first glance, particularly because of the interpretation of registration of the marks perceived in a different way than by means of visual, auditory and tactile modality (see the case of the smell of the fresh cut grass, OHIM 2nd Board of Appeal, of 11 February 1999, R 156/1998-2). The arguments for that condition are connected with undoubted reflection and ascertainment of a demanding protection and the exclusive right. Besides, the technical aspects, such as registration and publication applications need the representation of the marks in the graphical manner. It is said that, that term should not be interpreted in the absolute remedy, because the melody or other acoustic signals can be presented by the indirect graphical form as a notation (Włodarczyk, 2001: p. 56).

The remedies used in the graphical representation depend on technical progress. In the literature can be found some thesis, according to which the trademark applied to registration should be presented in such way in which the subject (the consumer/recipient) sees it (Du Vall, Nowińska, Promińska, 2007: p. 188; the case MIXEŁKO/MIXEŁKO ŁACIATE the verdict of the Supreme Court of 22 February 2007, III CSK 300/2006).

4.3. THE UNIFORMITY

The potential recipient should command the whole sign during one visual act of cognition. To this end the sign should be characterised by conciseness and clarity (Koc-

zanowski, 1976: p. 19–22). Conciseness ensures immediate perception of the sign, the more laconic the sign the easier it is to remember. Clarity of the trademark allows to communicate in a minimal graphical structure the maximum of the content. The trademark should be simple and concise, so the protection can be granted to titles which are not very long and catchy. It is not possible to register a sign which is very long and thus not easy in sensual reception (see the verdict of the Supreme Administrative Court NSA of 8 June 2005, II GSK 65/2005). The sign has to be a link among the society, which is the quintessence of the uniformity of the mark. If the sign does not fulfil this term the decision should be negative under Article 129 (1) i.p.l. (Włodarczyk, 2001: p. 77–78).

4.4. INDEPENDENCE

This prerequisite is the fundamental criterion of the capability of distinctiveness of the trademark. It is also called in the doctrine separateness or independence of the trademark in respect of goods or services. The mark ought to be a distinguishing and independent instrument, which is not imposed by the nature of the good. In that point of view independence does not mean that the mark is physically separate from the good. The customer links the sign with the product, but simultaneously has the awareness that the mark exists independently, it means that it can function without a physical link with the good in the economic circulation (Skubisz, 1997: p. 30; Włodarczyk, 2001: p. 59).

Independence is specified by Article 131 (2) (vi) i.p.l. There are circumstances which are exceptions: a form which is dictated exclusively by the nature (the required feature), a form which is necessary to achieve a technical result (the functional/utility feature) and a form which gives substantial value to the goods (the valuable feature) (Włodarczyk, 2001: pp. 62–64).

4.5. SUMMARY

If the title of the work fulfils all the above-mentioned prerequisites thereby it has the capability of distinctiveness, that means that according to the rule of liberty of choice of the trademark, every configuration of the matter can be included in the legal status of the trademarks if the special regulations do not constitute something else, i.e. the sign will distinguish by sufficient distinctive character (Włodarczyk, 2001: p. 51). It is crucial to remember that the capability of distinctiveness is curiously significant in accordance with granting the right of protection for the trademark. The signs which are not self-dependent against the goods and services, do not fulfill the features of uniform or may not be presented graphically, therefore they may not be capable of being the trademark *in abstracto* and fulfill the main important function – distinguishing the goods and services of particular entrepreneurs. Thus, the right of protection for that kind of signs will not be granted under Article 129 (1) (i) i.p.l., besides, the legal basis for denial can be found in Article 131 (2) (vi) i.p.l.

5. THE CAPABILITY OF DISTINGUISHING OF TITLES – PREMISES

The capability of distinguishing has got the sign, which fulfils all the above-mentioned prerequisites: perceiving by human senses, uniformity and self-contain against goods, and being capable to represent graphically**,** but simultaneously it cannot be the not-distinctive sign, descriptive and customary (Włodarczyk, 2001: p. 66). If the signs have the capability of distinguishing the protection can be granted under the provisions of Industrial Property Law. As it was already underlined in the judgements, the trademark will fulfill the capability of distinguishing, if it is represented graphically in the clear, strict, self-sufficient, easily available, comprehensible, tenacious and objective manner (see the verdict of WSA of 3 November 2006, VI SA/Wa 693/2006). In accordance with that the sign has to be made in such a way, that it will be consolidated by the customers in their memories and further will be read by them in the strict and desirable remedy. If the sign is not specified, does not appear in the same structure, it will not have the sufficient distinctive character (see the verdict of NSA of 23 November 2004, GSK 864/2004).

5.1. TITLES NOT HAVING THE CAPABILITY OF DISTINGUISHING – THE SO CALLED NON-DISTINGUISHING TITLES

The Industrial Property Law in Article 129 (1) (ii) articulates the Polish notion formed in the doctrine that the protection will not be granted if the sign lacks its sufficient distinctive character. There are also specified circumstances when the marker will be indistinctive, under Article 129 (2): the markers deprived of the capability of distinguishing *sensu stricto* (not distinctive signs), the descriptive signs and the free signs (Funka, 2006: p. 35).

5.1.1. TITLE AS THE MARKER NOT DISTINCTIVE SENSU STRICTO VERBALLY AND GRAPHICALLY

In terms of the markers not distinguishing in the trade the legislator presented this problem in Article 129 (2) (i) i.p.l. Such signs *"are not capable of distinguishing, in trade, the goods for which they have been applied"*. They are also called markers deprived of the capability of distinguishing or deprived of the character of distinguishing (Włodarczyk, 2001: p. 68).

5.1.1.1. RULES OF ESTIMATING THE NON-DISTINCTIVENESS

The non-distinctiveness of the marker means that the sign does not perform the function of distinguishing (the function of identification and communication) the submitted goods and services. In Article 129 (1) (ii) i.p.l. signs which do not have the sufficient distinctive character may not be trademarks. Thus it is enough to present any of the distinctive points of the marker, even to a minimum degree.

Refusal to grant the protection should be admitted only when the sign in the obvious way cannot be used as a distinguishing marker of goods and services (the rule of obvious indistinctiveness). Article 130 i.p.l. is a stepping-stone to the non-distinctiveness of a sign under Article 129 (2) (i) i.p.l. W. Włodarczyk indicates that such circumstances should be taken into consideration as a kind of sign, a nature of goods and services

to which the mark referred to, typical conditions in the trade that goods and services, and the character of recipients. The rule of concrete non-distinctiveness – the assessment of the distinctive character is made according to the concrete goods and services which are marked by the sign. The rule of the overall consideration of the whole sign not its individual elements. In accordance with that, sometimes even if the elements of the sign are not distinctive, the sign will be the trademark because as a whole it has the capability of distinguishing. Finally, we should take into consideration the rule of the avarage recipient's attitude to the submitted goods and services in the ordinary market conditions This entity is the recipient who is fairly well-informed and fairly reasonable. (Włodarczyk, 2001: pp. 72–75).

5.1.1.2. TITLE AS A TRADITIONAL VERBAL TRADEMARK

From the point of view of titles the most important are the verbal and graphical trademarks (hereinafter referred to as verbal-visual). These so called traditional trademarks are mostly subject to the registration in the Polish Patent Office. The legislator has given them implied priority by placing them in the first position in the exemplary enumeration of signs which are trademarks under the Industrial Property Law (Article 120 (2) i.p.l.).

The verbal markers are signs which are expressed by means of a word or a combination of words, a misspelt word, onomatopoeias, and also sentences, texts, letters, syllables and even figures or numbers or mathematical symbols. J. Koczanowski distinguished among the collective category of verbal trademarks some subgroups: a verbal mark *sensu stricto,* a number mark, a letter mark and a slogan (Koczanowski, 1976: p. 25). Under the judgement of Polish judges a sign being a number can be a trademark, if it does not indicate directly the feature of the good, its quantity, quality, weight etc. (see the case of the verbal trademark "495" of 27 February 2004, II SA 1828/2002).

Among the titles we can distinguish those which are expressed by a colloquial, imaginative, quasi-imaginative, descriptive or quasi-descriptive word. Colloquial words are ones which are included in a Polish dictionary. These can be everyday words, banal, ordinary, without any originality. In the category of the colloquial words we can distinguish groups of quasi-imaginative and imaginative words. The former in their nature are not imaginative words as such, but in their recipients' minds they appear imaginative only when associated with the specific goods and services. In turn the essence of the fancy words is connected with their originality and novelty. Their creative character can manifest itself in making up a word, making a colloquial word strange, not banal or out of the ordinary. For example W. Pielewin's *"Empire V"*, which is the effect of a wordplay and hiding the word vampire, W.Gombrowicz's *"Ferdydurke",* M. Bulgakov's *"Diaboliad",* W. Wharton's *"Birdy "* etc. In the scope of the verbal words it is worth emphasising the non-distinctiveness of the so called quasi-descriptive words (a kind of imaginative words) and descriptive ones. The idea of the former boils down to the reception of the sign as descriptive by average customer even if the word is used as fancy. These seconds are used to describe applied goods and services under the meaning in Article 129 (2) (ii) i.p.l. (Włodarczyk, 2001: pp. 78–82).

Incidentally, it should be noted that when referring to professional terms (medical, pharmaceutical) we have to realise that generally such terms in the expectations of average recipients will appear imaginative but in reality they will be only descriptive phrases in their nature. Accordingly, a negative decision should be made under Article 129 (2) (ii) i.p.l. (Włodarczyk, 2001: p. 82).

5.1.1.3. THE TITLE AS THE TRADITIONAL GRAPHICAL TRADEMARK (VERBAL-VISUAL)

This kind of trademarks are also very popular in the Polish Patent Office. The visual signs can adopt various forms of expression. Particularly it can be a drawing presenting concrete subjects or abstract composition, a punch, a stigma, a label etc. The graphical signs as well as the verbal signs have to be characterised by the graphical representativeness, uniformity and independence. That kind of signs are obviously presented in a graphic form – the shape, colour, pattern etc. They are uniform if the structure is not so sophisticated, and self reliant if it is independent of goods and services. The verbal titles can be presented in a graphical manner, as the visual-verbal. It has to be underlined that under Article 129 (1) (ii) i.p.l. it cannot be denied the protection because of the non-distinctiveness in the meaning of Article 129 (2) (i) i.p.l. only because the verbal element of the sign is not distinctive or the graphical part is not distinctive. This approach is rooted in the rule of the overall consideration of the sign (Włodarczyk, 2001: p. 106).

5.1.1.4. SUMMARY

In fact the verbal signs are generally presented in such a way that they can fulfill the abstract capability of distinguishing in spite of the contents, which they expressed. According to J. Koczanowski trademarks are considered "as such", if a word, letter or number included in the normalised form indicates trademarks' individuality. Even if they are included in some artistic forms, they will be still considered verbal signs if the graphical setting is only an esthetic and non-distinctive element of the marker. This is the difference between the verbal and the compartment signs, in which the most prominent part of the mark is the artistic composition (Koczanowski, 1976: p. 29).

5.1.2. TITLE AS A DESCRIPTIVE MARKER

Trademarks which are descriptive markers are the second group of the non-distinctive signs. The protection may not be granted under Article 129 (1) (ii) icw Article 129 (2) (ii) i.p.l. The descriptive sign is a marker which consists only of the elements included in Article 129 (2) (ii) i.p.l. which are used on the market as signs confering information about the features of goods and services.

This group of signs is indistinctive because of a few factors. Firstly, a trademark "as such" has to be an information carrier, which states the source of origin of the goods and services. Secondly, as a result of granting the exclusive right on the trademark, it is not possible to lead to such situation, when the capability of informing the consumers about features of the goods is limited (Du Vall, Nowińska, Promińska, 2007: p. 193).

The descriptive signs are also called the signs of the features of goods and services. In this category of signs a group of named signs can be distinguished such as: markers of kind, origin, quality, quantity, value, intended purpose, manufacturing process, composition, function or usefulness, which are included in the open catalogue of descriptive signs, and there is also another group of unnamed signs to designate any other features of goods and services (Włodarczyk, 2001: p. 161).

Under Article 129 (2) (ii) i.p.l. the legislator stipulated the most typical descriptive signs. They include the so called signs of kind (the generic terms). Within this group we can distinguish: names of goods and services, which generally mean goods or services or even their genres, e.g. "a book" for books, "a dictionary" for dictionaries, "a guide" for guides etc., names of components, scientific names of chemical elements, scientif-

ic names of therapeutic plants. Furthermore, the generic terms are also signs of manufacturing process which indicates the method of producing the good. Among the descriptive markers we can distinguish the signs of origin, directly indicating the source of origin of the good. The quality and quantity markers may present accordingly the features of the good and its weight and number, etc. The value markers, which can show the value of goods or services, e.g. a cheap book. The signs of intended purpose, which shows the aim of the good and service. The composition markers may serve the purpose of informing on the ingredients of the good. The signs of function and usefulness are markers which complete the list. (Włodarczyk, 2001: pp. 196–212).

5.1.2.1. RULES OF ASSESSING THE DESCRIPTIVENESS

The descriptive or informative character of the sign is a feature which shows not the abstract but the concrete capability of distinguishing of the trademark (see the case "SUPERMARKET", the verdict of the Supreme Administrative Court of 8 June 2005, II GSK 65/05). The prohibition of granting the protection on descriptive signs has its source in the principle of freedom of communication in the scope of description of goods and services (Włodarczyk, 2001: p.165 and the following).

As it was already underlined, the sign is indistinctive if its elements are only descriptive and have a dominant character – the rule of exclusive description (Włodarczyk, 2001: p. 161; see the case "MISS" verdict of the Supreme Court of 1 February 2001, I CKN 1128/98, and see also Stefanicki 2002: p. 83). The above-mentioned rule is closely connected with the rule of the overall consideration of the sign (see the case "MIĘTA C.FIX" verdict of the Supreme Court of 11 March 1999, III RN 136/98; see the case "100 PANORAMICZNYCH" verdict of the Supreme Court of 4 December 2002, III RN 218/2001). Furthermore, we should take into account the rule of the approaching of the average recipients, which manifests itself in free access to all signs informing about the name or features of the goods or services (see the case "WAWELSKIE" verdict of the Supreme Court of 10 December 1996, III RN 50/96). Finally, any circumstances connected with the usage of the goods in trade must be taken into consideration. The prohibition of granting the right of protection to the descriptive markers is perceived as a restriction of the rule of the freedom of choice of the trademark, and for this respect such descriptiveness should be current, concrete and direct (Włodarczyk, 2001: p. 169).

Further, the rule of current descriptiveness refers to the phrase used in the act *"may serve, in trade, to designate"* a description of goods and services (Du Vall, Nowińska, Promińska, 2007: p. 194). Thus the signs which were used in the past and nowadays are archaic and no longer used may not be declared as descriptive, e.g. *Bogurodzica*, nor the signs which will gain their descriptive function in the future if there appear special conditions. The rule of concrete descriptiveness means that the sign consists of descriptive elements necessary for the description of the concrete goods and services to which it pertains to. Besides, according to the rule of direct descriptiveness only the signs which explicitly and directly indicate the features of the applied goods or services can be regarded as the signs presented in Article 129 (2) (ii) i.p.l. (Włodarczyk, 2001: pp. 172–182).

5.1.2.2. THE TITLE AS A DESCRIPTIVE VERBAL AND GRAPHICAL SIGN (VERBAL-VISUAL)

In the first instance the descriptive character of the sign such as titles can be a single word informing about a feature or features of the submitted goods, e.g. the work entitled

Comedy, Drama, Musical, Opera, Hit Parade, Sports News etc. Additionally such signs can be represented by a combination of words in one word, e.g. *Telemagazine, Telegrosik, Teleshop* etc. Besides, the titles indicating a function performed by certain works of human intellect, e.g. *Real Player, Quick Play, Photoshop* etc. While considering such cases it is crucial to take into consideration the position expressed by the doctrine, according to which, the very fact of combining two descriptive words into one, does not decide the descriptiveness of the newly formed word. At this point it is worth stressing the fact that it is not justifiable to point out this general argument that that all figures are always quantity markers. When studying the descriptiveness of a given marker, it is important to look at as a whole, not as a specific part, and to pay attention to the goods and services for which the sign is submitted (see the case of verbal trademark "495" of 27 February 2004, II SA 1828/2002). Descriptive signs can be not only verbal markers but also graphical ones (hereinafter verbal-visual). In the case of the combined markers the fixed rule is applied in the judgements according to which the verbal part of the markers has its dominating sense ascribed to its visual layer (Włodarczyk, 2001: pp. 189–190).

5.1.2.3. SUMMARY

The aim of the provisions of Article 129 (1) (ii) icm Article 129 (2) (ii) is to eliminate cases of granting the exclusive right for the descriptive signs, but at this point it is important to underline Article 156 (1) (ii) i.p.l., in which the legislator provided for the limits of the protection for the trademark. The right of protection shall not entitle the right holder to prohibit third parties using, in the course of trade indications concerning, in particular, the features and characteristics of goods, the kind, quantity, quality, intended purpose, origin, the time of production or of expiration of usability period. Summing up this regulation allows to use by unauthorised persons registered signs or signs similar to them in a justifiable way, provided that the sign is used only as the descriptive sign.

5.1.3. THE TITLE AS THE CUSTOMARY MARKER

The third group of the non-distinctive signs includes the so called free trademarks, which are a collective group of markers asserted in the free sign form, it means the sign generally using under meaning of art. 129 (i) (ii) i.p.l. (Włodarczyk, 2001: p. 214 and the following). This group includes the signs which have become in the current language and are used as the name of the good and also the signs, which are used in fair and established business practices. The first group comprises the markers which were original, imaginative and thus were of a distinguishing character (they identified a given good), but as a result of usage they have become commonly applied to indicating and describing the good. Actually they became generic names. The second group of the signs is researched according to the established practices of the trade, which should be understood as commercial usage and commercial custom. Therefore, customary use in a more restricted group than the general public is sufficient to constitute a ground for refusal (Du Vall, Nowińska, Promińska, 2007: p. 195; see the case of "WEISSE SEITEN" of 16 March 2006, T-322/03).

5.1.3.1. RULES OF ESTIMATING THE FREE CHARACTER OF THE MARKER

The rule of specified usage in the past means that the sign will be free under the meaning of Article 129 (i) (iii) i.p.l. if the sign was formerly used as the identification marker

of goods and services, and in time it stopped performing such a function. The rule of national usage means common usage on the territory the Republic of Poland. The rule of regional usage of the sign means that the trademark does not have to be used on the territory of the whole country, it will be enough if it is used in its part. The rule of common usage cannot be identified with the common knowledge, because the very fact of popularization of the marker does not decide the free character of the trademark. The rule of current usage means that free signs can be regarded as signs which are currently and commonly used. The rule of representational reference is not explicitly stated in the act. Not only the fact of a common usage of the sign in the current language or a common usage in fair and established business practices is crucial in order to consider the sign as a free trademark, but also the sign has to be used accordingly to the description of the features of goods or services or to be used as a sign of their identity. Besides, the rule of the overall assessment of the sign and the rule of concrete reference, i.e. the assessment should be made in connection with a concrete good or service, to which the sign was applied (Włodarczyk, 2001: pp. 219–225).

5.1.3.2. SUMMARY

As a result of the lack of activity on the part of the entitled person free trademarks are subject to degeneration or "watering" or "dilution", which means that the content of the information conveyed by the sign is changing in a special way. Instead of the information on the product's origin, the marker conveys information on the good "as such". The process of degeneration of trademarks conducted to change the original function of the distinguishing trademarks and make them only ordinary words, for example a computer, petrolatum, nylon etc. In the doctrine we can distinguish two theories of degeneration of trademarks: the objective theory and the subjective theory. The first one assumed that the transformation of the original trademark to the name of the product is finished when in the opinion of the interested group of customers a given marker lost its distinctive features and is associated only with the product "as such" instead of the origin from a specific enterprise. The second theory underlined the essence of the behaviour of the entitled person. It means that as long as the authorised person demonstrates his interest in retaining the sign as the trademark, despite the common opinion of its degeneration (changing its function into the name of the product), the sign will be the trademark (Wiszniewska, 1992).

6. SUMMARY

In respect of the above presented division of the titles into ones which are creative and can be protected by legal measures contained in the Polish copyright act and ones which are not creative and cannot be protected, this study aimed at drawing attention to the possibility of extending the protection of titles to the protection regulated under the industrial property law. The industrial regulation covers also non-business entities that can be creators.

The category of creators is very wide and includes: literary activity, artistic activity, photography, music etc. Every such entity has the right to give its work a title which includes the quintessence of the work and leads to the theme of the work. Under the industrial property law it is possible to find titles which can be treated as trademarks if

they possess the capability of distinctiveness. Surely this requirement will be fulfilled in the case of titles which are uniform in their substance, i.e. they are laconic and short enough to be memorized by the recipient as a result of one act of perception. The complicated construction of the title, e.g. *The Disintegration of the Persistence of Memory* by Salvador Dali, in the process of analysis of a concrete case can be proved to show the distinguishing or indistinctive character. It is not forbidden to register longer phrases (slogans/catchwords) but it is necessary to prove the distinguishing features. Independence of the title, which is the trademark, in most cases is not so difficult to establish because the title is the author's finished statement which introduces us to the work and differentiates the work from others. Firstly, according to the kind of work and position of the author on the artistic stage, the title's function is to identify the author and secondly to identify the subject matter of the work. Independence is related with independent choice of the title by the author, generally this process is unlimited.

In the case of the imaginative signs the distinguishing function is obvious, but simultaneously it has to be underlined that other words even trivial can be trademarks. The process of assessing the sign and its capability of distinguishing is always conducted *ad casum*, and according to the rule of the overall consideration of the marker and in connection with the goods and services. The description can be surely found in the titles indicating the content of the work, its kind, for example *Poradniki, Przegląd ustawodwstwa, Kroniki etc.,* the feature of the good and service for example Leonardo da Vinci's *Sketches of Horses* or his *Self-portrait.* However, such kind of titles can be registered as graphical trademarks. The non-distinctiveness *sensu stricto* and the descriptive character is not the only goal of the process of study, moreover the free character has to be excluded of the sign under the meaning of Industrial Property Law. It cannot be forgotten the so called secondary distinguishing capability, because even the non-distinctive, descriptive and free marker in some cases can be contained under industrial property law protection.

The trademark, which is the instrument of the market economy has to achieve the goal of increasing the economic position of the entrepreneur on the market stage. The quintessence of the trademarks is concentrated on the identity of the goods and services, cooperated with the advertising and guarantee function of the trademark. Willy Olins underlined, that long time ago *"the appearance of the brand presented and promoted the product"* (Olins, 2004: p.13). Everything that is positive, valuable, with high quality, put in the emotional frame, is behind the visual form of the brand. That whole figure builds the prestige of the product, which is introduced to the market. Although the creator as the artistic subject, is not interested in becoming a entrepreneur, is the representative of the liberal professions. The author builds his position on his own works and in accordance with that the registration of the titles is useless for him. It can be said that the author is a brand of his own. The registration process is expensive and time-consuming, which is the disadvantages for the authors.

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THE INTEGRATION OF THE MORTGAGE MARKETS IN EUROPE[1] (PART 1)[2]

INTRODUCTION

This contribution[3] seeks to depict the Eurohypothec and the Eurotrust as two instruments to achieve an integration of the mortgage market in Europe from the perspective of the EU Commission Green Paper of 19-7-2005[4] and the EU Commission White Paper of 18-12-2007[5] on mortgage credit in the EU, while comparing Eurohypothec's model grade of flexibility and usefulness to the ones of current national mortgage legislations, providing a deeper insight of the Spanish mortgage reform 2007.

It is intended to show that there is a need for the integration of the mortgage market in Europe as this would bring advantages in form of several trans-national mortgage operations that currently are difficult or impossible to structure in many EU countries (which implies disadvantages to European lenders and borrowers), following the EU Comission's Green and White Papers. The Eurohypothec is shown as an optimised instrument to achieve this, especially in a financial crisis context, in which trust, certainty (by law) and legal transparency are more appreciated and even more needed than ever. Some examples of trans-national operations with mortgages are provided in which it is evidenced that a common mortgage instrument would allow many EU countries to engage in those operations in an optimised way.

The topic of the Eurohypothec is older than 60 years now, but it is only recently that it has again assumed prominence on the European Commission's agenda. This recent history of the Eurohypothec began with the release of the Green Paper on the Mortgage Market 2005, which dedicated a whole point of discussion to the idea of the Eurohypothec, quoting a piece of research that contains the model of Eurohypothec that was created by a group of researchers after several years of studying the matter: the Basic Guidelines for a Eurohypothec 2005 (Drewicz-Tulodziecka, 2005). In December 2007, the EC White Paper, which deals with the steps required to advance the integration of EU mortgage markets, was released.

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[1] This contribution falls within the Research Project "Catalan, English and Irish experiences in relation to access to a dwelling" (Res. 21.12.2010; 2010 PBR 00052).

[2] The second part of this article will be published in SJLS no. 4. It will refer, inter alia, to the Eurohypothec and the Eurotrust and the Spanish mortgage reforms of 2007.

[3] This piece of research has its origin in a Working Paper published by the *Zentrum für Europäische Rechtspolitik* at Universität Bremen (ZERP-Diskussionspapier 2/2008), whose Director is Prof. Christoph Schmid.

[4] COM/2005/0327 final.

[5] COM(2007) 807 final.

However, no development has been undertaken since then at EU level[6]. Neither generalist pan-European research projects[7] have paid much attention to the possibility of creating a true European mortgage market, despite its undoubted importance at legal, economical and financial levels.

I. THE EUROHYPOTHEC

1. THE EUROHYPOTHEC AS AN IDEAL MODEL OF A PANEUROPEAN REAL CHARGE

When Eurohypothec researchers tried to achieve a "common mortgage" model for Europe, they searched for an ideal model, in the sense that it was not necessarily a real model, but one which would be as much **useful** as possible for purposes of the main goal: creating a Paneuropean mortgage tool that facilitates the creation of an integrated Paneuropean mortgage market.

Therefore, the currently presented model (the model in the Basic Guidelines 2005[8]) should, in any case, prove to be **more beneficial** than that offered by the current model of transnational mortgage funding (at least 27 types of mortgage systems ruled by the *lex rei sitae*). The typical transnational situation that the Eurohypothec seeks to address refers to the case where the lender is in a different EU country other than the piece of land which is to be used as security for the loan/loans to be granted to a borrower, irrespective of where he is.

This "more beneficial" idea should relate both to the lender and borrower:

a) Lender: the Eurohypothec should be able to facilitate the development of a legal framework for optimal Paneuropean mortgage lending and mortgage funding (active and passive operations of the mortgage market).
b) Borrower: Greater freedom in choosing (and changing) the lender, due to increased competition. According to the 2007 Report of Mercer Oliver & Wyman for the European Mortgage Federation (EMF, Mercer Oliver & Wyman, 2007), a link exists between the decrease in costs of a mortgage and an increase in the concurrence among credit institutions in several European countries in recent years, as illustrated in Germany, Ireland, Greece, France and Belgium. The White Paper 2007 supports the same idea (p. 13).

One important question to be addressed before drafting the model was the impact and the efficacy of the Eurohypothec, that is, what was to be changed in the European mortgage market and when. The resulting decision would not only alter the way in which the model was conceived, but also its scope.

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[6] At the moment of the copy-edit of this article, the Proposal of Directive of the European Parliament and of the Council on credit agreements relating to residential property (31-3-2011, COM(2011) 142 final) has been released. It deals with matters of consumers' protection in the field of mortgage credit agreements but only in relation to the "contractual" or "obligational" part of the agreement, without mentioning anything in relation to the mortgage itself.

[7] As an example, the Draft Common Frame of Reference 2009 does not mention the mortgage at all although deals to real-rights related institutions such as the acquisition and loss of ownsership of goods, proprietary security in movable assets and trusts.

[8] See below.

According to recently obtained results, the Eurohypothec is generating two effects:

1. At an initial stage, it is serving as:

– an inspiration for jurisdictions that do not have a well-functioning mortgage system or that do not have any at all (ie. as is still evidenced in some East-European countries).
– an inspiration to those jurisdictions that already have one, but are reforming it, in order to adapt to modern times and needs. The optimization of national mortgage legislations in Europe is being studied since 2006 by a research group called "Runder Tisch", whose results have been recently updated (Stöcker, Stürner, 2010) and are accordingly quoted thorough this work (Stöcker, Stürner, 2009)[9].
– a popular research topic. Pieces of work of practitioners and researchers worldwide (Baur, Stürner, 2009; Fiorentini, 2009; Scalamogna, 2005; Jardim, 2008; Watt, 2007; Sparkes, 2007; Steven, 2009; Diéguez Oliva, 2009; Van Erp, 2005; Akkermans, 2008; Marthinussen, 2009; Kenna, 2010; Dürr, 2009; Cuestas, 2010; Association of Insurance and Reinsurance of Turkey, 2005)[10] are dealing with core questions in relation to the Eurohypothec, such as its possible implementation in different jurisdictions, its model, its efficacy and efficiency in relation to national mortgages, its role in the harmonisation of European private law, discussions and improvements to the model, etc. Figure 1 shows the impact of the Eurohypothec among researchers in the world, including the so-called "Central-American Hypothec", developed upon the core elements of the Eurohypothec.

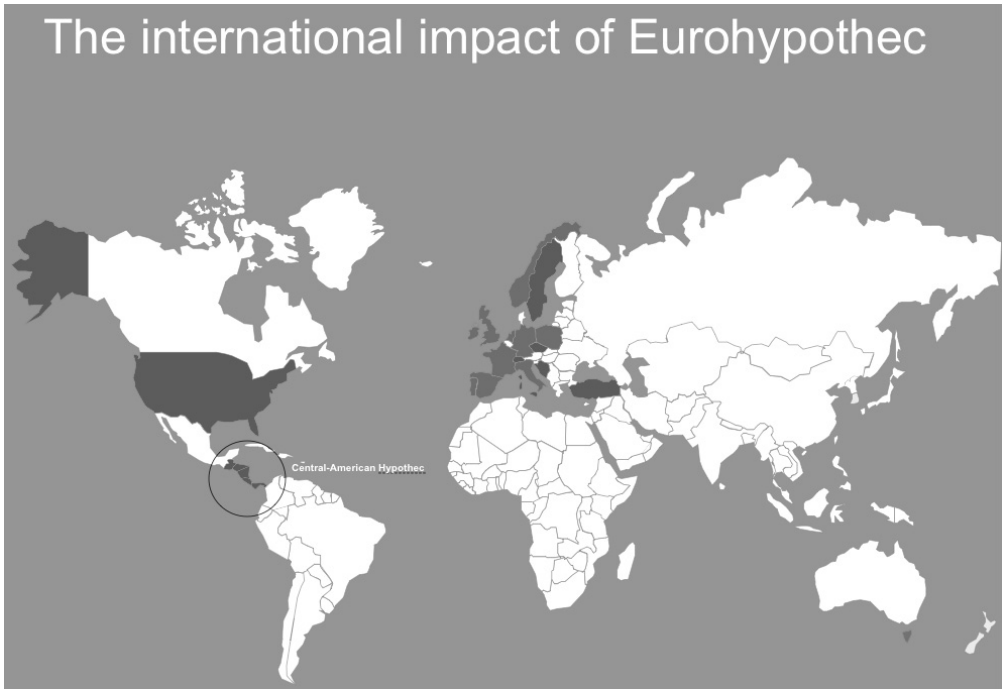

Figure 1. The international impact of the Eurohypothec. Source: own elaboration

[9] Maps used in this work come from this „Runder Tisch" 2009.

[10] Pieces of research of the drafters of the Eurohypothec's model 2005 are not quoted. Check, instead, the web www.eurohypothec.com.

In essence, the Eurohypothec model may indicate the direction to be taken by mortgage law reforms or implementations in national jurisdictions. That is, what challenges are to be achieved in the modern context of law of mortgages in Europe and what the benefits of a cross-border mortgage are.

In fact, following the introduction of the Basic Guidelines 2005, two "traditional" mortgage systems were reformed: the French, through the *Ordinance* 23-3-2006[11] and the Spanish one, through the Act 41/2007[12]. These share something in common: they both consider the flexibility of their mortgage laws, which to a large extent, coincides with the goal of usefulness through the flexibility that governs the Eurohypothec pursuant to the Basic Guidelines. However, neither of them – as we will see more in depth in the Spanish case – has achieved the Eurohypothec's level of flexibility/usefulness.

2. At a second stage. The Eurohypothec should serve as a common instrument for the European mortgage market, thus helping to fulfil the goals of the EU: freedom of people and freedom of capital throughout EU member states. It should be a useful and optimal common transnational mortgage instrument, parallel to the already existing national mortgages. This second stage does not require any changes to the legal framework for mortgages in any national jurisdiction.
3. At a third stage, national jurisdictions should realise the importance of adapting their own legislation to maximise the benefits provided by the Eurohypothec – once it is clear to them, for example, that their enforcement procedures are not timely or that their insolvency law does not sufficiently secure the mortgagee. These – and some other – factors would make the Eurohypothec granted in that particular country to be more expensive (more difficult to be granted, higher interest rate for the borrower) than the same instrument in another jurisdiction with better legal infrastructures, which would in turn cause prejudice amongst its citizens, thus leading to further legislative reforms.

2. WHY TALK ABOUT THE EUROHYPOTHEC?

As mentioned previously, the idea is far from new. Prof. Claudio Segré instigated the concept of creating a common mortgage instrument in the 60s – as commissioned by the EC. His proposed model was the Swiss *Schuldbrief*. Progressive work on the Eurohypothec, was undertaken in the following years by certain institutions such as the International Union of Latin Notaries and by renowned authors (more intensively by Prof. Wehrens (Wehrens, 1992: p. 557) and Dr. Stöcker (Stöcker, 1992)). In 2004, a special research group was set up to study the Eurohypothec (www.eurohypothec.com). This group not only organized several research events, but also took part in seminars that resulted in the redaction of the Basic Guidelines 2005, which also involved the participation of researchers from different groups and backgrounds. A few months later, the Internal Market Affairs Department of the European Commission issued the Green Paper on Mortgage Credit 2005, which at some point addressed a question considered by governments, mortgage market stakeholders and researchers on the usefulness and importance of the Eurohypothec. The response was very positive as can be seen in Table 1.

[11] Ordonnance n°2006-346, 23-3-2006 (JORF 24-3-2006).

[12] See below.

Table 1. Response to the Eurohypothec question as illustrated by the Green Paper on Mortgage Credit in the EU. Source: own elaboration

	IN FAVOR OF THE BASIC GUIDELINES EUROHYPOTHEC MODEL	IN FAVOR OF THE IDEA OF THE EUROHYPOTHEC, BUT WITH ANOTHER MODEL	HAVE DOUBTS/ NEED MORE INFORMATION	AGAINST THE EUROHYPOTHEC IDEA
GOVERNMENTS	CYPRUS POLAND CZECH REPUBLIK IRELAND FINNLAND	HUNGARY SPAIN	SWEDEN	EASTLAND GERMANY AUSTRIA
CORPORATIONS	Citigroup Inc., International SearchFlow, UK Crédit Agricole (CA), FR Halifax Bank of Scotland plc (HBOS), UK Lloyds TSB Group, UK Royal Bank of Scotland Group (RBS), UK	BBVA, ES	Baclays PLC, UK GMAC – RFC Limited, UK HVB Group, DE	ABN AMRO, NL Banca Intesa, IT
EU INSTITUTIONS	European Central Bank — Eurosystem, EU European Economic and Social Committee			

Although a more extensive study of these responses can be found elsewhere (Nasarre-Aznar, 2008), the conclusion to be derived is that most respondents were either in favour of regulating the Eurohypothec, according to the model foreseen in the Basic Guidelines 2005, or proposed another model.

Despite the positive response to the idea, the EU Commission relied only on the European Mortgage Federation to study the feasibility and interest of the institution, which created an ad-hoc group that was surprisingly closed during 2006 without any enthusiastic support for the creation of the Eurohypothec[13].

[13] This outcome ressembles to the one of the Directive Project 14-10-1998 on distant financial services to consumers. Also mortgages were excluded from the Directive 2008/48/EEC (Official Jornal of the European Union 22-5-2008, L 133/66) on credit agreements for consumers.

However, other sub-groups created by the EC Commission for the purpose of investigating other areas of the Green Paper worked more actively and with more enthusiasm towards European convergence in their fields of knowledge. In fact, they seized the opportunity to raise certain issues surrounding the mortgage market that substantially coincide with the features of the Eurohypothec, as foreseen in the Basic Guidelines. The two main reports relating to these issues included those of:

A) *The Mortgage industry consumer dialogue group (MICDG)*[14]. Composed of consumers and lenders, few agreements were concluded because of variations in opinions, which related to important matters. Conclusions in three very relevant areas were however achieved namely:

a) Precontractual information

- When should it be given? The question was related to whether it should be given before or after the customer had provided his details – the latter being the bank's option – and in which timeframe.
- Improvements to the ESIS (European Standardized Information Sheet), that is, whether the ESIS should include more accurate information in relation to the mortgage that the consumer was going to take out.
- Efficacy of the Code of Conduct on mortgages. While today, this is only a matter of voluntary application by some credit institutions in Europe, consumers in the subgroup wanted to make it compulsory, while banks considered that this would lead to more rigidities in mortgage operations[15].

b) Assessment

- INFORMATION (description of the product) should be differentiated from ASSESSMENT (recommendation of the product) and from RISK WARNING (lender should rate the indebtedness capacity of the borrower).

c) Pre-payment rights

- Significant differences exist between this being a contractual right (lenders) or a statutory right (consumers). In addressing country opinions, countries like Spain have granted to consumers a statutory right to enable prepayment of any amounts of the loan at any time – although in Spain, credit institutions are able to charge extra fees to compensate for the losses they may incur (prior to the Mortgage Reform 2007 – which attempts to address the problem – such losses were unduly calculated). The situation in other countries is the opposite: credit institutions and consumers may agree to foresee (more expensive mortgages, that is, worse conditions and higher in-

[14] Many of these issues are addressed in the above mentioned Directive Proposal of 31.3.2011 on credit agreements relating to residential property, such as the right of consumers to be properly informed in the pre-contractual phase (art. 9), the obligation to adapt this information in order to allow the consumer to evaluate if the offered mortgage credit is adapted to his needs and possibilities (art. 11), the obligation for credit institutions to assess the creditworthiness of the consumer and the impossibility to grant him a mortgage credit that he would be unable to repay according to the result of that assessment (art. 14), the obligation to the member states to allow the consumer to legally or contractually prepay the mortgage credit (art. 18) and even a model of a "European Standardised Information Sheet" (ESIS) to provide to consumers with a set of relevant issues of the contract (Annex II).

[15] See more details of the situation of the code of conduct (inspired by the European Mortgage Federation) at http://www.hypo.org/content/default.asp?PageID=224 and at http://www.cml.org.uk/cml/policy/issues/113 (UK Council of mortgage lenders).

terest rates for consumers in exchange of the freedom) or not to foresee (less expensive mortgages) prepayment rights for consumers.

This report was interesting for the Eurohypothec conception process because it made clear the point that the "contractual" aspect of a mortgage loan relationship is one thing, whilst its "real" (right in rem) part is another. The Eurohypothec has not necessarily connection to the contractual aspect of a mortgage loan (the loan contract itself); it is only related to the "right in rem" (security) aspect in the sense that it only deals with a model of security right on real estate, that is, the mode in which the lending contract, which will include all necessary consumer-protection issues, will be secured. Some other issues, like prepayment rights, may have a direct impact on the passive operations of the mortgage market, that is, the "stability" and "foreseeability" of mortgage securities (especially, covered bonds).

B) The *Mortgage funding expert group* (MFEG), composed only of lenders, of course, concluded more agreements. The issue relating to mortgage securities was precisely the central discussion point addressed by the MFEG. These discussions have produced some interesting points:

a) The concept of "**mortgage market**" is a complete one, as it includes both active operations (lending) and passive operations (mortgage funding). It now seems definitely clear that mortgage lending operations cannot be understood without a complete and well-functioning (from a financial and from a legal point of view) mortgage funding system.
b) Need to **integrate the mortgage market passive operations**. The fact that the well known US risk concept of "lending long, borrowing short" may still be a reality in Europe, implies the existence of inefficiency. 60% of all European mortgage loans (long term) are still inadequately funded by deposits (short term), which may cause mismatches, due to liquidity and interest rate changes (risks). As a consequence, only 17.5% are funded through covered/mortgage bonds whilst 10.5% are funded through mortgage-backed securities (MBS).
   - **Larger and more diversified** mortgage pools. The geographical diversification is one of the most important types of diversification that exists within those pools backing both the MBS and covered bonds. This is today, rather too complicated to be achieved at a Paneuropean level due to the low level of foreign mortgages that an EU credit institution has, mainly due to lack of a common mortgage instrument (the Eurohypothec).
   - Greater **diversity of mortgage products**. There are still several jurisdictions that lack specific well-functioning mortgage funding instruments, either covered bonds or MBS or both.
   - What characteristics should this Paneuropean mortgage market possess? **Completeness, competitiveness, efficiency, transparency and stability**. Completeness implies that every EU credit institution should possess the required facilities and capacity for choosing the mode of mortgage funding that it considers most appropriate; competitiveness refers to a subordination of all barriers to facilitate negotiation of cross-border loans with mortgage loans (obviously, the Eurohypothec should play an important role here); efficiency implies greater liquidity and product diversification, forgetting the importation of the US model of the Federal Agencies (Fannie Mae, Ginnie Mae and Freddie Mac), which have recent-

ly (first in 2004 and after then in 2008) been revealed as inadequate for a healthy mortgage market, although there have been some attempts to create the European Mortgage Finance Agency; product diversification in passive operations markets is difficult to achieve in an environment in which there is scarcity of transnational mortgage business; **transparency** infers that mortgage securities' legal and financial structures should be more comprehensible both for investors (both professional and non-professional) and for rating agencies; in fact, this has been one of the most important reasons for the internationalization of mortgage market crisis of Summer 2007: lack of transparency of the real risks that were borne by investors in MBS backed by sub-prime US mortgages, such as European professional investors linked to banks, funds or insurance companies; and stability refers to a process whereby passive operations of mortgage markets should bring about enough risk diversification into the mortgage markets.

- **Active operations**: pre-payment rights? – the same issue that is addressed by the MICDG but this time, due to the lack of consumer's participation in MFEG, clearer goals are achieved-; land valuation standards; flexibility of trans-national transfer of mortgages; efficient Land Register; efficient mortgage enforcement and consumer data protection.
- **Passive operations:** introduction of new legislations on covered bonds, to reduce risk in MBS pools and to create a truly Paneuropean market on mortgage securities. This is, of course, the ideal counterpart in the "passive side" for the Eurohypothec.

Therefore, even if the **White Paper 2007** of the EU Mortgage Credit had not specifically mentioned the Eurohypothec (it did in two Annexes), many of its principles and objectives would already be there. In essence, the creation of a true Paneuropean mortgage market cannot be achieved by addressing only the passive operations side.

Therefore, these are the key points of the White Paper 2007:

a) The mortgage credit market represents 47% of the European Union GDP. Therefore it is an important area, which should be **integrated**. This integration has been calculated to allow for an increase of 0.7 % of the EU GDP.
b) The EU Commission aims to **facilitate the cross-border supply** of mortgages (p. 3; bold is mine).
c) The EU Commission aims to facilitate cross-border funding of mortgage credit. It literally states that: "The existence of differing legal and consumer protection frameworks, fragmented infrastructures (e.g. credit registers), as well as lack of appropriate legal frameworks in some instances (e.g. for mortgage funding), **create legal and economic barriers, which restrict cross-border lending** and prevent the development of cost-efficient, pan-EU funding strategies. The Commission therefore seeks to remove disproportionate barriers, thus reducing the costs of selling mortgage products across the EU" (p. 3; bold is mine). It continues: "However, economic and **legal barriers also exist which prevent mortgage lenders from offering certain products in certain markets** or opting for a given funding strategy" (p. 3; bold is mine).

Therefore, although it does not mention the Eurohypothec, in these three points the White Paper 2007 talks about the same goal that Eurohypothec pursues.

d) As regards mortgage securitisation, it states that "The aim should be to facilitate, and not restrict, the **development of a wide range of mortgage funding instruments**"

(p. 4; bold is mine). As regards the use of pan-European mortgage loans to back covered bonds, it states that "the prohibition of including non-domestic EU mortgage loans in cover pools for covered bonds, which currently exists in some Member States, is compatible with the free movement of capital and the freedom to provide services" (p. 8). It envisages the creation of an Expert Group on Securitisation for 2008 (p. 9). The EU Commission refers to the same things we addressed with Eurosecuritisation and the cross-border transfer of mortgage loans to back covered bonds[16].

e) The EU Commission seeks to **facilitate customers' mobility** "by ensuring that consumers seeking to change mortgage lenders are not prevented or dissuaded from doing so as a result of the presence of unjustifiable legal or economic barriers", thus avoiding "tying" practices (p. 5). See below new restrictions by Spanish Act 41/2007 and the advantages of the Eurohypothec at this point.

f) The EU Commission encourages member states to join **EULIS**, which is commented on below as a good complement to the Eurohypothec: one cannot be fully understood without the other.

g) As conclusion, it draws the following: "To be effective, any proposed measures must demonstrate that they will **create new opportunities for mortgage lenders to access other markets and engage in cross-border activity**. They should also demonstrate the capacity to facilitate a more efficient mortgage lending process, with economies of scale and scope, which should lower costs. The expected benefits should be weighed against the possible costs of these measures" (bold is mine).

h) Finally, the Eurohypothec expressly appears in two Annexes of the White Paper:

– Annex 2: Process (Commission Staff Working Document-Accompanying the White Paper on the Integration of EU Mortgage Credit Markets-Impact Assessment), which states that the Eurohypothec (referred to as "Euromortgage") is a matter of study after the Green Paper 2005 release.

– Annex 3: Impact assessment on specific issues (Commission Staff Working Document-Accompanying the White Paper on the Integration of EU Mortgage Credit Markets-Impact Assessment, pp. 168 and 169), in the field of transfer of mortgage portfolios, a solution would be "to issue a recommendation to Member States […], to issue legislation or to create the '**Eurohypothec'**, as an alternative instrument for securing loans on property to existing national concepts of collateral" (bold is mine) and recommends further research.

3. NEED FOR THE EUROHYPOTHEC

The creation of a complete European mortgage market would not require a common mortgage instrument if the current situation and facilities were conducive for it. However, figures reveal that currently, only 1% of European mortgage lending operations are being undertaken cross-border (Green Paper 2005).

Broadly speaking, the European private law harmonization process has developed several ways of achieving integration but none of them have the capacity and resources required to create a single European mortgage market. Therefore:

[16] See below.

a) **Mutual recognition**. On the basis of the Cassis de Dijon resolution 1979, no barriers can be imposed on free circulation of merchandise if safety control requirements have already been fulfilled in an EU country. Several cases which followed Cassis de Dijon, like the Centros Case, Überseering and Inspire Art, have compelled other Member States to accept other EU states' corporative forms as the European Court of Justice recognises and acknowledges jurisdictions whose attributes make them valid anywhere in Europe. However, the mutual recognition principle applied to the diversity of mortgages in Europe (for sure more than 27) would mean that every national mortgage (each of the at least 27), as they are governed by the *lex rei sitae*, would be valid (should be able to be properly created) in every country, which would be completely chaotic for every jurisdiction (given the difficulty of integrating into one's jurisdiction more than 26 types of foreign mortgages).
b) In the field of **mortgages**, the most renowned case has been the Trummer and Mayer Case[17]. Austria had put in place a prohibition to create mortgages referenced to a foreign currency to avoid the publicity of a not-completely clear value of the mortgage (due to daily currency fluctuations). The European Court of Justice considered this reason as insufficiently strong to prevent the application of free movement of capital. Only if a national mortgage system were affected in such a way that it did not assure the rights of mortgage lenders and third parties, would this measure be acceptable.
c) **Transposition into a minus**. This principle implies that when a foreign right is incorporated into an EU country legislation, it should be applied in such a way that the owner of that right is not improved. However in the field of mortgages, this would mean that as regards a foreign mortgage, the mortgagee's position would be worsened when it was incorporated into a national jurisdiction's legislation.

Therefore, the Eurohypothec is not only fully compliant with the objectives of the White Paper 2007 and the most appropriate instrument to achieve them but also it bypasses the barriers of traditional ways of EU law harmonisation. Moreover, in the current context of international crisis, the Eurohypothec brings also certainty, trust and transparency to all mortgage operations (e.g. for securitisation purposes as establishes a clear-cut system of mortgage conveyance through the Eurotrust), following the intentions of the EU Regulation 1060/2009[18] on rating agencies.

4. IDEA BEHIND THE EUROHYPOTHEC

The Eurohypothec model presented in the Basic Guidelines 2005 was conceived as a **secure**, **flexible Paneuropean** instrument – which corresponds with the foundations of the White Paper 2007 on the integration of EU mortgage credit markets.

a) Security. The common core of all charges on land in Europe that may be used to secure obligations is that they can function as instruments enabling **land to be used as security** with some kind of **preference** – a claim that may be raised by a secured creditor. Apart from this starting point (using the land to secure debts with some kind of privileged right), no further common features may be found among any se-

[17] (C-222/97) ECR 1999, I-1661.

[18] Official Journal of the European Union 17-11-2009, L 302/1.

curing charge on land in Europe. The Eurohypothec should include this starting point in its foundations; however everything that is disconnected from it would appear unfamiliar to one or more legal jurisdictions (e.g. the contractual dependence arising from the secured obligation/s is not familiar to almost every South-European country; the fact that the Eurohypothec is able to secure all types of obligations – including the non-monetary ones – would come as a surprise to many common law lawyers, etc.). However, it would be unreasonable to discontinue with this integration for this reason. The Eurohypothec should be as **minimally intrusive** as possible to national jurisdictions but above every other thing, it should be **as much beneficial** as possible both to lender and borrower (this is its main cornerstone). To be effective, the Eurohypothec should have the same privileged rank in terms of foreclosure anywhere in Europe. However this cannot easily be achieved in the second phase; the above mentioned "third phase" is required, once a model has been agreed upon. This would be the optimal situation; if it is not legally possible, at least it should still have the same rank as other national mortgages (with which it would coexist). Finally, an excellent partner for the Eurohypothec would be a common European Land Register. A first step in this direction would involve the *European Land Information Service* (EULIS) Project (www.eulis.org), which during its first stage (lasting till 2004)[19], included two aspects: an on-line portal to access the already computerized national land registers and the "legal part" that includes definitions of legal institutions (in English) which are required to understand the legal situation of a plot of land (property, land charges, etc.) and their translation from one national language to the other. In its current stage, EULIS is fully operational and 5 national land registers and cadastres can be accessed through EULIS portal. Plans currently exist to extend it to many other registers and cadastres. As currently conceived, EULIS would serve as a useful tool not only to increase transnational land conveyancing, but also for the **registration** of land charges (lenders can easily check from his home country for all legal and physical details of the land that is to be accepted as security for the loan they intend to grant), which should evolve to true European e-conveyancing relating to land in future (in a similar way to what the English Land Registration Act 2002 foresees).

b) Flexibility. In order to be able to employ the Eurohypothec in every business involving mortgages conceivable today (and many others that could be conceived in the future that require a flexible real estate security), it should be "released" from those legal ties which restrict its flexibility: its legal accessoriness to the secured obligations. The Eurohypothec, as a right, should be regarded as an entity (**value**, in economic terms) on its own, disregarding the purpose for which it is being used at a particular point in time: from the passive perspective of being a charge over land, it should evolve to the more active one of making value of land by the mortgagor (who is, at the end of the day, the owner of the Eurohypothec once it is created). Only in such case could the Eurohypothec be assigned (by the lender/mortgagee) separately from the secured loan for funding purposes or would the borrower be able to reuse it for as many times as desired with the same or with a different lender. This should be understood as a general rule, which can be overlooked in some cases for consumer protection purposes (e.g. in the case where the lender assigns the Eurohypothec and

[19] Now EULIS holds a new project called Line (2010) to link EULIS system to the E-Justice programme.

the secured loan separately to two different third parties and both want foreclosure their rights against the borrower; in such a case, the latter should be entitled to invoke the relevant exceptions in order to avoid paying twice; this should be possible on the basis of the principle of unjust enrichment and on grounds of misbehaviour on the part of the lending institution[20]).

c) Paneuropean. This implies that the Eurohypothec should serve as a common instrument, accessible throughout Europe, disregarding any co-existence with other national types of mortgages. Based on what has already been said about its uses, flexibility and function as a security, finding an appropriate model for the Eurohypothec would be of great benefit. These are, broadly speaking, the basic hypothecs models currently in force in Europe:

– The continental accessory mortgage. This is the most widespread model type in Europe and this has led to some authors (Wachter, 1999: p. 49; Gómez Galligo, 2006: p. 927) proposing it as an ideal model for the Eurohypothec. It is present in almost every EU country but has disadvantages in relation to the independent mortgage. These disadvantages are linked to its legal accessoriness with the secured loan. This means that anything which happens to the contractual relationship between lender and borrower would also affect the hypothec (e.g. no hypothec may exist without a securing loan; once the loan is extinguished so is the hypothec; their assignment must take place at the same time etc.). However, authors supporting this idea do not provide any solutions that allow the accessory mortgages to undertake any type of business involving situations whereby the Eurohypothec can be combined with the Eurotrust[21].
– The continental European independent mortgage. It has its origins in Germany (*Sicherungsgrundschuld*) and Switzerland (*Schuldbrief*), but its use is widespread throughout the East-European countries such as Estonia (*Hüpoteek*), Poland (*Dług na nieruchomości*, still a project), Slovenia (*Zemljiszi dolg*) and Hungary (*önálló zálogjog*). Its advantage consists in being able to operate with any type of business and its disadvantage involves the hypothetical reduced protection for the borrower.
– The Scandinavian independent mortgage (Jensen, 2001)[22].
– The common law "mortgage", which is present, within the EU context, in the UK and in Ireland. Although certain features exist that make the common law mortgage as flexible as the continental independent mortgage (ie. its virtue to adapt to any type of loans, the possibility of creating or conveying it in equity, that is, with less requirements than with its legal form), the point is that the mortgage itself belongs to a specific legal environment: the common law and equity. The Anglo-American legal system cannot be exported as such, among other reasons, due to the fact that the mortgage entails a 3,000 year lease – which is still so in its legal nature – cannot be understood abroad; moreover, the fact that the mortgage is, at the same time, a loan and a *right in rem* is also a difficult concept to understand outside Anglo-American systems because civil law countries have a model of *rights in rem* that secure contracts and other obligations; and equitable mortgages (the ones normally used in many mortgage businesses) cannot be created or even understood in civil law juris-

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[20] See below.

[21] See below.

[22] As a general idea, one can agree that the Swede mortgage is an independent (from the loan) one and quite simple (the whole system of registration and dealing) compared to the majority of European models.

dictions. However, the wise use of the trust in combination to mortgage operations, rather common in common-law contexts, can dramatically improve the performance of the Eurohypothec[23].

From these models, it can be concluded that the Eurohypothec model in the Basic Guidelines 2005, has adopted the most appropriate aspects of each of the stated models to achieve the maximum possible level of security and flexibility and it can also be said that the result, the Eurohypothec, is a *tertium genus*. This is explained in the next point.

5. MODEL OF THE EUROHYPOTHEC IN THE BASIC GUIDELINES 2005

Here are the main features that help to build an operative concept of the Eurohypothec, which were incorporated in the Basic Guidelines 2005:

A) Concerning the legal nature

- It is a **real charge**, which confers on its owner a preferential right over a piece of land (i.e. using it as a security for a loan(s)).
- It does not substitute **national mortgages**; it should coexist with them in each national jurisdiction. This is fully in compliance with the aim of the White Paper 2007 of increasing the mortgage products' diversity (p. 4).
- It is **contractually dependent** on the obligations it secures; it may not require any obligation to exist.
- To be used as a security, a **security contract** should exist. It should provide for minimum contents (which obligations to secure, use of the Eurohypothec, conditions for redemption and enforcement). Form: *lex rei sitae* and art. 4.1 (c) Regulation 593/2008 on the law applicable to contractual obligations (Rome I)[24].
- Possibility for **complete redemption** (devolution) or a **partial** one.
- It does not generate interests; its constitution costs should be the same as those of national mortgages; the Eurohypothec extends to chattels and fruits of the land; it can be created in relation to any currency of the EU.

B) Constitution

- Only the **owner** of the land can create it, with or without the intervention of the creditor.
- It must be **registered** in the Land Register to exist (amount, owner and form).
- It can adopt **two forms**: "register Eurohypothec" and "letter Eurohypothec". It can be managed electronically.
- Object: **any land in Europe** and any other, according to *lex rei sitae*.
- **"Trans-national eurohypothecs"** and **"multi-parcel eurohypothecs"**.
- It is possible to hold a Eurohypothec or part of it on **trust** for another.

C) Transfer

- It will **depend** on the way it has been created: if it is a "register" Eurohypothec, transfer will be done through the Land Register; if it is a "letter" Eurohypothec, this will be done only by the delivery of the letter to the transferee.
- The Eurohypothec can be **conveyed independently of the secured obligation** to a different third party.

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[23] See the role of the Eurotrust below.

[24] Official Journal of the European Union 4-7-2008, L 177/6.

- The debtor can **oppose real pleas and objections** of the transferee. Therefore the security contract should affect third parties; if not, torts liability of transferor.

D) Extinction

- It is extinguished through **cancellation** in the Land Register, as a result of an agreement between the owner and, in its case, the creditor.
- **It is not extinguished** through passage of time.
- The **fulfilment** of a secured obligation **does not imply its extinguishment**; its effects will be determined in the security agreement.

E) Soft law: enforcement, registration and implementation

- Its **efficacy** depends on the **process and duration of its enforcement** (max.12 months)
- The Eurohypothec is an **enforceable title** in itself (*lex rei sitae*) + constitutes an enforceable claim against the owner (*Schuldversprechung*) (*lex rei sitae*; that is, only in those jurisdictions in which this is allowed).
- It should end through **sale at a public auction** (interdiction of *the droit de voi parée*).
- In the case of pleas and objections, the **burden of proof** lies with the owner of the Eurohypothec.
- Higher **ranked** rights stand still; those with the same or worse are extinguished; possibility of enforcer's substitution, replacing him and occupying his rank
- **Insolvency**. Same security as in enforcement. Possibility of separate enforcement.
- An **efficient Land Register** is required: public charges, rank and publicity.
- **Implementation**. Model to tend to and regime 28th.

6. QUESTIONS ABOUT THE MODEL

According to our experience and feed-backs we have received, several questions have arisen whenever the model was explained (European Bank for Reconstruction and Development, 2007).

a) Lack of **financial studies**. If the implementation of the Eurohypothec is a rather long and difficult way to walk, some studies should show in advance if it is a worthwhile process, economically speaking. However, working on the assumption that one common single instrument is better than having at least 27 different ones, may be enough. Moreover, the White Paper 2007 (p. 13) requires that any new measures "should demonstrate that they will create new opportunities for mortgage lenders", although it already includes some numbers that illustrate the benefits of mortgage markets' integration (pp. 3 to 5).

b) The proposed "**contractual dependent mortgage**" is **generally unknown** in Europe: this could generate concerns. Moreover, some models of legally dependent mortgages are flexible enough. Two main concerns always arise: the Eurohypothec, as foreseen in the Basic Guidelines 2005, cannot operate in causal jurisdictions, that is, in jurisdictions where the "*causa*" is a relevant requirement to compound a valid *negotium* (*Rechtsgeschäft*); the other one, that a separate transfer of the obligation to a first third party and the mortgage (Eurohypothec) to a second one will place the borrower in a difficult situation, as he would then have to face two different claims. Neither of both statements is true.

– Topic of ***causa* and accessoriness**. Although studied in depth elsewhere, Figure 2 shows those differences which exist between both: the *causa* refers to the obligation to create a security real right (or to use an already existing one) to guarantee

an obligation/s (*pactum de hipothecando*: the obligation of the mortgagor to create or employ a mortgage to guarantee certain obligation/s) while the accessoriness, although there are many types, refers to the link and grade of dependency between the security right and the obligation/s, that is, what happens to the security right when the obligation is transferred, diminished, or extinguished.

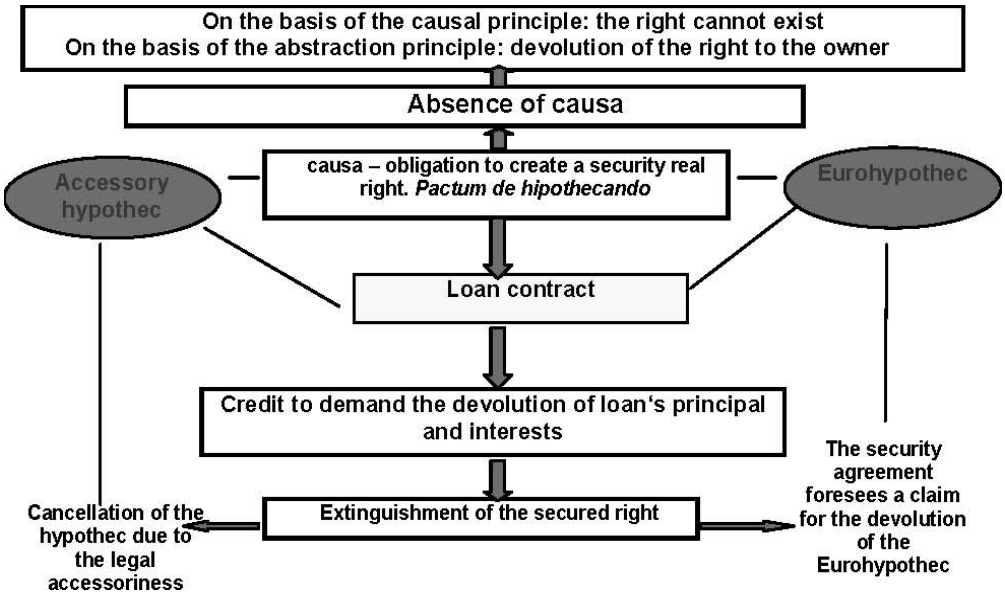

Figure 2. Causa and accessoriness. Source: Sergio Nasarre Aznar and Otmar Stöcker, *Un pas més en la 'mobilització' de la hipoteca: la naturalesa i la configuració jurídica d'una hipoteca independent*, "Revista Catalana de Dret Privat", Vol. I, 2002, p. 63

– On the topic of risk (for the borrowers) of **separate transfer** of mortgage and loan. Although this may be possible only if agreed with the borrower and mortgagor in the security contract, it would be necessary in some way to allow a Euro-securitization process through a Eurotrust[25]: that is, the secured loan alone should be able to be transferred to a Special Purpose Vehicle (SPV) – that which issues the MBS – while the Eurohypothec itself would be held by the originator on trust for the SPV. Therefore the normal case would be that the originator would retain the Eurohypothec and would only transfer the loan for mortgage funding purposes, and this is what would be agreed between the mortgage loan parties. However nothing would prevent the originator from transferring the loan to a first third party and conveying the Eurohypothec to another, thus compelling the mortgagor to face two possible claims (one from the transferee of the claim an the other from the transferee of the Eurohypothec). See the structure in Figure 3.

However, the debtor/mortgagor would be able to use all pleas and exceptions to protect himself, especially, that which states that he has already paid the loan, so he can stop the enforcement of the Eurohypothec. In any case, he would not need to pay twice[26].

[25] See below.

[26] This is the result of the implementation of the new §1192 Ab. (1a) BGB by the Art. 6 of the so-called

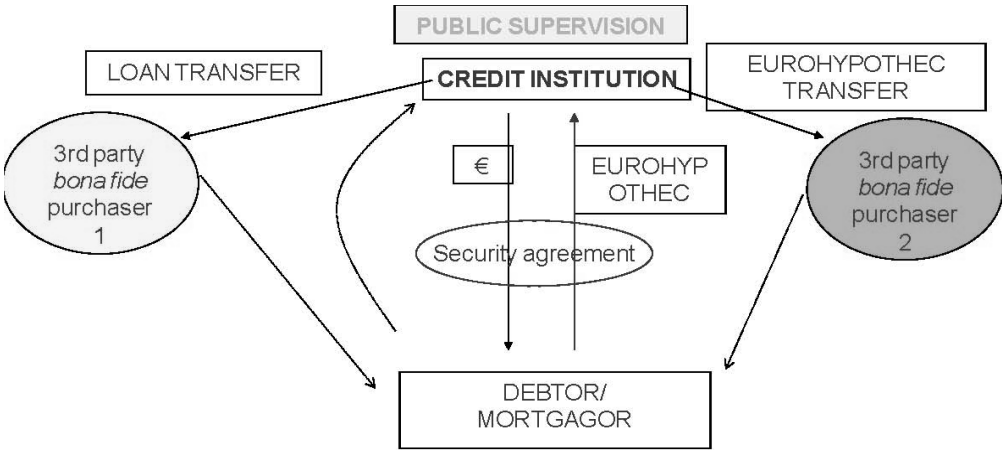

Figure 3. Debtor's risk facing two claims: from the lender and from the mortgagor. Source: own elaboration

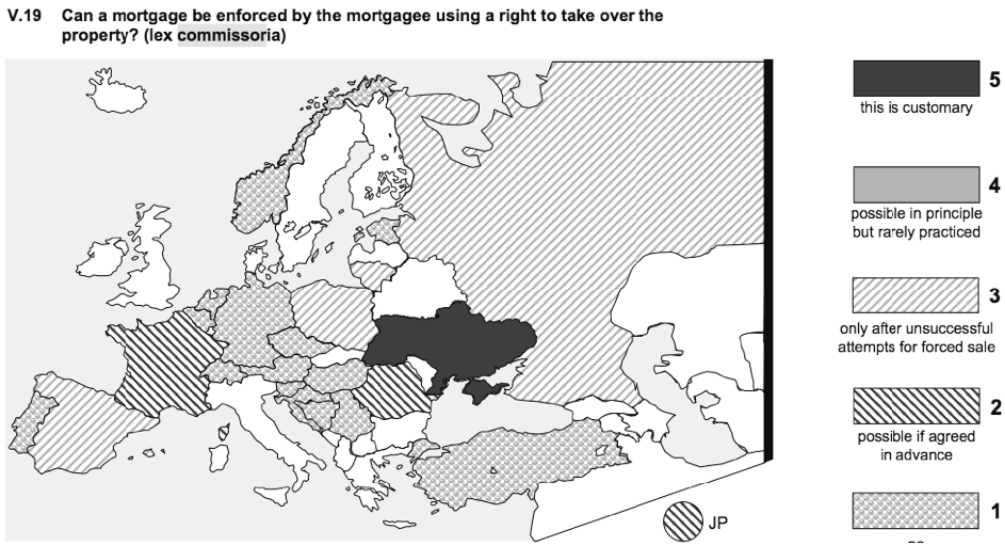

Figure 4. Level of acceptance of *lex commissoria* in Europe. Source: "Runder Tisch", 2009

c) In a third stage, **some fields of law will probably be affected**. However, these changes will be carried out spontaneously by national legislators to improve their Eurohypothecs. If a jurisdiction has a defective enforcement system that prevents speedy full recovery of the borrowed amount to the lender, few or more expensive (higher interest rates and worse conditions) Eurohypothecs would be granted in that coun-

Risikobegrenzungsgesetz 18-8-2008 (BGBl. I S. 1666 (Nr. 36)) by which the third party that acquires the Grundschuld is always affected by the contents of the security agreement, regardless whether he is or he is not a bona fide purchaser for value; thus, all exceptions and pleas –including the already paid premises on the mortgage- can be used by the debtor against him.

try when compared with other jurisdictions with better enforcement procedures. The same would happen with the insolvency context, the efficacy of the Land Register and all "soft law" that has been explained in the previous point, letter E. E.g. See in Figure 4 the significant differences throughout Europe in relation to the grade of acceptance of the *lex commissoria*.

d) **Scope of the Eurohypothec**: Should it be allowed only in the context of international transactions or also in domestic operations? Nothing should restrict the use of the Eurohypothec in domestic operations, if it would produce beneficial results for the parties involved. It should be presented as another option to them, separate from their national security rights on real estate. Should it be applicable only to professional lenders or also to non-professional lenders? This is not surprising to see in several national jurisdictions in which some security rights are only recommended for professional and controlled use (like the *Grundschuld* in Germany) or even legally limited to their use (the new *hipoteca recargable* in Spain).

e) **Competence** of the EU to implement it?
Under primary legislation, it is clear that the Eurohypothec is linked to the free movement of capital and people, which nowadays can only be achieved by an action of the EU, to which it is legitimated by art. 3b.3 EU Treaty. While the reference to free movement of capital is rather clear (trans-national active and passive mortgage operations will result in a Paneuropean movement of capital in relation to real estate), that which refers to people, implies the possibility of people easily financing their houses in another EU country from a national bank, not only for second-residences but also for geographical mobility of workers. They would be able to plan their movements abroad thus contracting with their national banks (theoretically with better conditions) in matters relating to the financing of their new house abroad.
The specific references in the Treaty of the European Union last amended by the Treaty of Lisbon 13-12-2007[27]: Art. 2.2 (freedom of movement and residence), internal market and economic union (arts. 2.3 and 2.4) and art. 6.1 which gives the Charter of Fundamental Rights of the European Union of 7-12-2000[28] last amended on 12-12-2007[29] the same legal value as the Treaties. In fact, it is this Charter that refers to the fundamental rights of property (art. 17.1), familiar, home and private life (art. 7), consumers' protection (Art. 38), help to families (art. 33.1), free movement and residence (art. 45), free movement of workers (art. 15) and, in general, the Charter of Rights seeks the „ free movement of persons, services, goods and capital, and the freedom of establishment" (Preamble).
In order to avoid too much intrusion in national laws, consideration of the application of the Eurohypothec as a "28th regime" seems to be a feasible solution.

f) The role of the **trust** in several civil law contexts is still in doubt. As we will see in the next part, the Eurotrust is an essential complement for the Eurohypothec.

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[27] Official Journal the European Union, 2007/C 306/01, Vol. 50, 17-12-2007.
[28] Official Journal the European Union, C 364/1, 18-12-2000.
[29] Official Journal of the European Union, C 303/15, 14-12-2007.

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THE CONCEPT OF THE SECTOR-SPECIFIC REGULATION UNDER EUROPEAN AND POLISH LEGAL SYSTEMS

INTRODUCTION

The sector-specific regulation aims at the development of common market in network-bound sectors, which is important for the development of the entire market economy. The most important role to achieve the above mentioned goals lies within the independent regulatory authorities. The regulation is focused on effective competition, protection of end-users as well as infrastructural safety. The Polish model of the sector-specific regulation and independent regulatory authorities was created under the influence of European regulations which have forced (or at least accelerated) the process of lifting the legal monopolies within the infrastructure sectors. This paper discusses the essence of the sector-specific regulation and especially points out the main goals of regulation and position and tasks of the Polish regulatory authorities.

The concept of the regulation and regulatory authorities was initiated and developed by the European law. As far as regulation as a legal phenomenon is concerned, we can say that the legislation of activities of the European Union (EU) had to lead to liberalization of the infrastructural sectors and harmonization of the Member States law. The first liberal steps at the European level were made at the end of the 20th century and were related to the telecommunications sector. Nowadays, with some exceptions (in postal sector), demonopolisation processes are complete. However, at the same time, this does not mean that the Commission puts an end to legislation process within the infrastructural sectors. On the contrary, the institutions of the EU still propose and accept new regulatory acts aiming to standardize (through regulations, especially in railway sectors) and harmonize (through directives) the Member States law with reference to infrastructural sectors. They should be means to achieve the main goals of the regulation, effective competition and provide of the services of general interest.

According to foregoing sentences we can say that the European Union law imposed on the Member States the duty of the demonopolisation of the infrastructural sectors. It was necessary because over the years the infrastructural services were carried out under legal monopoly. This means that undertakings providing public services acted under exclusive or special rights. Therefore, the fundamental aim of regulating is to exclude monopoly from network-bound and make the regulatory authorities responsible for proper functioning of competition in the infrastructural sectors.

Opening infrastructural sectors to competition, in most cases, is conducted by means of directives which are adopted under Article 114 (3) of the Treaty on the Functioning of the European Union – the TFEU – (the harmonizatory directives) (Kawka, 2006:

s. 47). The directives show main goals of regulation and oblige Member States to introduce European provision to their national laws (Galewska, 2007: s. 16 and next). It is necessary to say that mentioned directives require Member States to appoint the independent regulatory authorities which are responsibile for regulatory tasks. At the same time, directives do not impose neither form of organization nor composition of regulatory authority. This means that Member States can entrust regulatory tasks to public or private bodies, monocratic or collegial bodies and they can entrust tasks to more that one body.

This paper has been divided into four sections. In the first section, it shows the goals of the regulation which are included in sectoral acts law (both in European and Polish law acts) and which are distinguished by the doctrine of the administrative sciences. These lead to describe two category of regulations: the regulation for competition and the social regulation. In the next one, it presents a general overview of Polish regulation. The third section describes the authorities of public administration in Poland. The fourth one contains consideration about Polish independent regulatory authorities. Describing the public administration in Poland is necessary to understand the essence of the position of Polish regulatory authorities and doubts they produce. The last section describes the tasks of regulatory authorities.

2.THE GOALS OF REGULATION

2.1.THE REGULATION FOR COMPETITION

The effective competition is the most important case in developing economy. It influences reduction of prices, rising of qualities of universal service as well as different technical innovations which are essential in the development of economy and infrastructural sectors, too. Emergence of competition within infrastructural sectors is conditioned by following issues. Firstly, legal monopoly has to be abolished. Secondly, legal basis must exist to make possible the creation and development of effective competition. In principle, with some exceptions, the first condition was already fulfilled. Namely, the EU has abolished purely the exclusive and special rights in telecommunications, electricity and gas sectors as well as in railway sector. Postal sector is an exception because some postal services can be reserved to universal service provider(s) until 31 December 2012 (see further below). With reference to second condition, both European and national law include bases to exist of competition. In this area, the most important role is played by the provisions of the European Union primary law, exactly Articles 101–108 of the TFEU within Articles 101 and 102 determine both European and national competition law. In European Union secondary law, the bases of competition exist, too. In particular, the European regulations create the competition law[1].

The Polish antitrust law is included in the Competition and Consumer Protection Law of 16 February 2007. Besides, the Polish regulatory acts include rules of competition, too. This means that at the national level the issues of competition are divided

[1] See: Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, 2003, L1/1 and Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertaking, 2004, L24/1.

into two branches of law: antitrust law and regulatory law. However, it is good solution because of a few reasons. Firstly, the antitrust law protects competition in sectors in which it exists. However, the competition law in network-bound sectors is not sufficient because competition should be created first and later protected. Secondly, the antitrust law includes rules of prohibition and the regulatory law includes rules of warrants. In other words, the antitrust law shows which activities undertakings should not perform and the regulatory law shows which activities undertakings should perform. Thirdly, the antitrust law is repressive (*ex post* activities) and the regulatory law is preventive (*ex ante* activities) (Skoczny, 2004: s. 12 and next). Foregoing means that inside infrastructural sectors the antitrust law and regulatory law are in force and nowadays their role is irreplaceable. However, according to view of the doctrine of the administrative sciences the antitrust law takes precedence over the regulatory law. So, the tendency heads for limiting regulatory activities on condition that the antitrust law and the activities of the President of the Office of Competition and Consumers Protection (antitrust authority in Poland) are sufficient to protect competition in infrastructural sectors. This means that regulation is treated as temporary phenomenon, if the goals of regulation are achieved, the activities of the President of the Office of Competition and Consumer Protection will be sufficient (Skoczny, 2003: s. 118).

2.2.THE SOCIAL REGULATION

According to liberalization processes, consumers and end-users should be elementary and final beneficiaries of the liberalization process. Even effective competition in infrastructural sectors should contribute to the protection of consumers' interests. In other words, opening up services to competition frequently leads to lower prices and a greater range of choice for consumers. This means that guarantee of maximum benefits for end-users should be the final goal of the regulatory activities. It is worth noting here, that realization of the pro-social part of regulation is included in Polish public interest theory, French conception of public service as well as German concept called *Daseinsvorsorge*. Generally speaking, in accordance to foregoing conceptions, the activities of the enterprises should not be made merely in order to achieve profits.

The concept of the public welfare services has a long tradition in literature. With references to views on doctrine of the administrative sciences, the public welfare services satisfy the basic needs of people and network-bound sectors provide important services without which nations cannot function. Despite, the analysis of the law, both European and national, leads to conclusion that legal acts use the following concepts: 1) the services of general economic interest and 2) the universal services.

The elementary concept, which is the basis to future consideration, is the concept of the services of general economic interest, because this concept is included in the primary legislation, exactly in Articles 14 and 106 (2) of the TFEU. Besides, services of general economic interest find their legal basis in Article 36 of the Charter on Fundamental Rights of the European Union. At the same time, there is no definition of services of general economic interest both in the TFEU and at the level of secondary legislation. This means in particular, that the TFEU gives the Member States a wide freedom to define mission of general economic interest. So, it has to be stressed that the lack of definition of the services of general economic interest in the TFEU is not criticized by doctrine. This solution justifies the changes which still occur within the economy and the con-

cept of the services of general economic interest is a dynamic and fluid one. Thereby, an elementary role to define discussing concept belongs to the European Court of Justice (the Court). However, the Court does not define the concept of the services of the general economic interest generally but, in their judgement, enumerates services which are recognized as the services of general economic interest. In other words, the Court describes the key element of services of general economic interest that is useful to designate them. This means that the Court has not proposed one universal definition of concept of services of general economic interest but the Court shows the extent of the concept by mentioning services which belong to the services of general economic interest (Dudzik, 2002: s. 291). It results from the fact, that in the developmental technology conditions several services which were essential for nations in the past, have now lost their importance. In addition, because of development of technology many services are treated as services of the general economic interest. So, it is worth noting that in general circumstances, the Court creates the concept of the services of the general economic interest. Firstly, in the Court opinion, describing services has to have economic character. This means that they have to be served by enterprises which aim to achieve profits. Secondly, the services have to realize the general interests. This means that the category of the services of the general economic interest does not include services which do not have economic character and which are state duties, for example, guarantee of internal and exterior safety, organization of judicial system, foreign policy as well as executing public power. Within the concept of the services of the general economic interest educational services and social insurance services are also not included.

Apart from the concept of the services of the general economic interest in creating the concept of regulation, the concept of the universal services is necessary, too. The obligation of providing of the universal services may be imposed either on all undertaking active in the market, or on limited number of operators called provider(s) of last resort. Apart from the services of the general economic interest qualities, the universal services have owner qualities. This means that each universal service belongs to the category of the services of the general economic interest but not all services of the general economic interest are the universal services (Szydło, 2005a: s. 134).

The concept of the universal services protects especially non-economic consumers, for example those who have low earnings or live in the largest geographical zone. In other words, the idea of the universal services guarantees access for everyone, whatever the economic, social or geographic situation. So, ubiquitous access is the most important feature of universal services. Hence, in many cases, universal service to mentioned people can be unprofitable for enterprises. So, if they do not offer the universal services, state will impose a duty to service the universal services. It should be emphasized, that in first order the universal services have to be serviced in economical condition. However, if normal function of economy market can not assure access to the universal services, a state will intervene and will impose on undertaking(s) duty to provide the universal services. It is important to note that Member States do not have to intervene or take additional measures if the public interest objectives (such as accessibility, quality and affordability) are ensured by the functioning of the market mechanism alone. However if Member States find the market alone does not ensure the provision of the relevant public goods, market failure, EU law allows Member States to designate (one or several) universal services providers as provider(s) of last resort and compensate them (Piątek, 2003: s. 194).

The idea of the universal services exist within all infrastructural sectors. Despite, only in the telecommunication the concept of the universal services is using by the legislator. In different infrastructural sectors, the concept of the universal services is present but legislator uses different concept, for example public services (in railway sector).

3. REGULATION IN POLAND. GENERAL REMARKS

The shape of Polish regulation is achieved by means of the following laws: The Telecommunications Law of 16 July 2004, The Postal Law of 12 June 2002, The Energy Law of 10 April 1997, The Railway Transport Law of 28 March 2003 and The Water and Sewerage Law of 7 June 2002. The mentioned laws included especially the goals of the regulation, regulatory authorities and their tasks.

The foregoing acts have implemented the provisions of the European sectoral directives. Thereby, it can be said that at the national level the regulation for competition and social regulation can be distinguished. The Polish sectoral acts fulfil the European provision with references to the concept of the services of general economic interest and the universal services. Especially, the extent of the universal services is clearly defined in Polish law. According to European demonopolisation, in Poland the exclusive rights have been abolished, apart from the postal sector. In the sphere of regulating postal sector, the EU has adopted three postal directives. In the first postal directive[2], EU planned to keep a space of the reserved services to universal services provide(s) until 31 December 2004. However, in second postal directive[3], EU postponed the term of opening up postal universal services to competition until to 31 December 2008. Currently, the third postal directive is in force[4] which once again postponed the term of opening up postal universal services to competition by 31 December 2010. At the same tame, Directive 2008/6/EC permitted several Member States to abolish reserved services until 31 December 2012. This means that the market of the universal postal services in some countries cannot open up to competition because it will have an unfavourable influence, especially on the level of their quality and price. Poland belongs to countries which can keep a legal monopoly for service the postal universal services until 31 December 2012. In Poland, postal universal services are provided by *Poczta Polska S. A.* (state-owned: *przedsiębiorstwo państwowe*).

Besides, the analysis of the both European and national law leads to conclusion that in electricity and gas sectors the existence of legal monopoly is possible, too. In the

[2] Directive 97/67/EC of the European Parliament and of the Council of 15 December 1997 on common rules for the development of the internal market of Community postal services and the improvement of quality of services, 1998, L 15/14.

[3] Directive 2002/39/EC of the European Parliament and of the Council of 10 June 2002 amending Directive 97/67/EC with regard to the further opening to competition of Community postal services, 2002, L 176/21.

[4] Directive 2008/6/EC of the European Parliament and of the Council of 20 February 2008 amending Directive 97/67/EC with regard to the full accomplishment of the internal market of Community postal services, 2008, L 52/3.

light of Article 3 (8) Electricity Directive[5] and Article 3 (5) Gas Directive[6] the Member States may decide not to apply the provisions, for example, reference to authorization procedure for new capacity (electricity sector) and authorization for the construction or operation of natural gas facilities (gas sector) insofar as their application would obstruct the performance, in law or in fact, of the obligation imposed on electricity or natural gas undertakings in the general economic interest and insofar as the development of trade would not be affected to such an extent as would be contrary to the interests of the EU. The interests of the EU include, among others, competition with regard to eligible customers in accordance with Electricity and Gas Directives as well as Article 106 of the TFEU. The Energy Law does not contain similar regulation on the model of mentioned articles. However, according to provision of the Law on the Freedom of Business Activities (of 2 July 2004), the President of the Energy Regulatory Office can refuse a concession (*koncesja*) to undertakings which want to start a business activity on the electricity and gas market if, earlier, he issued concession, by means of tender, to different undertaking(s) and issuing another concession will disturb the stable conditions of transmission and distribution of energy or gas (Szydło, 2005a: s. 230).

In water and sewerage industry the legal monopoly exists too. Generally, permission (*zezwolenie*) is the precondition to start activity in water and sewerage market. However, the municipal units (*jednostki organizacyjne gminy*) are entitled to act without permission. Furthermore, their activities can lead to refuse permission to undertakings who want to begin activity in water and sewerage market. So, in conclusion, in the case, when municipality executes activity in water and sewerage by their units, in principle, her organs refuse permission for other undertakings and this means that at the level of the territorial self-government, in water and sewerage market, monopoly can exist too.

The most important part of the regulation is the existence of the independent regulatory authorities which are responsible for regulation of infrastructural sectors. So, the Polish regulatory authorities will be described below. However, before the Polish authorities of public administration will be outlined generally. It is necessary to understand many issues connected with position of the regulatory authorities.

4. THE AUTHORITIES OF PUBLIC ADMINISTRATION IN POLAND

The Constitution of the Republic of Poland (PL) states that the structure of PL is based on the division and balance of a legislative, executive and judicial powers. The legislative power belongs to the Seym and the Senate, the executive one to the President of PL as well as to the Council of Ministers and the judicial one to courts (to the High Court, courts of law, administrative courts and military courts) and to tribunals (to the Constitutional Tribunal and the Tribunal of State) (Banaszak, 2005: s. 57).

In the context of the system of separation of powers, public administration is a state activity which is neither legislative nor judicial. Public administration is thus identified

[5] Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, 2003, L 176/3.

[6] Directive 2003/55/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in natural gas and repealing Directive 98/30/EC, 2003, L 176/57.

with executive power. In the Polish doctrine of administrative sciences, organs of public administration are divided into the following groups: chief organs of governmental administration, central organs of governmental administration and organs of territorial self-government (Izdebski, 2006: s. 43 and next).

The following ones belong to the chief organs of governmental administration: the President of PL as well as the Council of Ministers so the Prime Minister and the Vicepresidents of the Council of Ministers, individual ministers and chairmen of committees which are specified in statutory laws. Currently, it is only the Chairman of Committee of the European Integration. The President of PL is the highest representative of PL and guarantees continuity of the power of state. He is elected in a direct election for the period of five years.

The Competences of the Council of Ministers are included both in the Constitution and the Law of the Council of Ministers dated 1996. Individual ministers are appointed in order to manage specific departments of governmental administration. At the same time, the minister has two positions: he is a member of a collegiate body (the Council Ministers) and he manages a specific department. A minister is appointed either with the whole the Council of Ministers or separately. Generally, a minister issues regulations which are executively related to a statutory law and specify provisions of a statutory law.

Creating central organs of governmental administration does not have basis in the Constitution. A partial regulation is included in the Law of the Council of Ministers. Central organs of governmental administration are not members of the Council of Ministers, with the exception of the ones included in a statutory law. They are created by a statutory law, sometimes by lower acts. Their creating and recalling is a continuous process so the number of central organs is not constant. They are generally monocratic organs. In most cases, they are appointed by the Prime Minister. Central organs of governmental administration work under the supervision of the Seym, the Council of Ministers, the Prime Minister and individual ministers. The category of central organs of governmental administration is essential because the regulatory authorities belong to the central organs of governmental administration.

In Poland there are organs of territorial self-government (*samorząd terytorialny*), too. Territorial self-government executes tasks which are not reserved by the Constitution or statutory law for another public power. In Poland territorial self-government can be divided into: local self-government represented by municipalities (*gminy*) and of districts (*powiaty*) and regional self-government represented by the self-government of voivodships (*województwa*). Organs of individual territorial self-government are divided into: legislative organs and executive organs. They issue local law acts which are binding on the territory.

5. THE POLISH INDEPENDENT REGULATORY AUTHORITIES

Independent authorities are a new category of bodies in Poland. The setting up of such regulatory authorities aims at the development of common market in network-bound sectors, which is important for the development of the entire market economy. The appointment of regulatory authorities resulted from Polish membership in the EU and harmonization of Polish law with European law. The existence of the regulatory au-

thorities is an inseparable part of the idea of regulation. EU law includes basic principle which relates to Member States which must ensure that performing regulatory tasks is separate and independent from any operator they regulate. In addition, the European directives directly show legal and real independence of the regulatory authorities. Furthermore, with reference to European law, national regulatory authority can work on the basis of public and private law. Moreover, Member States are free to determine the number of the regulatory authorities and can freely distribute regulatory tasks among regulatory authorities (Hoff, 2005: s. 39). This means that Member States can entrust executing regulatory tasks to more than one authority. In addition, the European law does not provide for explicit calls to separate independent regulatory authorities from the core executive, but it is quite easy to find such calls in the acts of the EU. In other words, independence of the regulatory authorities means that authorities have to be independent from governance and enterprises making their activities in the infrastructural sectors.

Generally, the regulatory tasks are divided into two models. Firstly, the tasks of regulation can belong merely to central bodies of governmental administration. Secondly, they can be divided into two categories of organs, well, central bodies of governmental administration and ministers (chief bodies of governmental administration) (Piątek, 2003: s. 42). In Poland, the second model is representative, which means that regulatory tasks belong to both ministers and central bodies of governmental administration. Admittedly, appointment of central bodies of governmental administration was the Polish answer to European requirement of regulatory authorities and ministers of infrastructural sectors are permanent element of governmental administration. The main difference lies in the fact that central bodies of governmental administration execute their tasks by means of administrative decision and ministers through regulations. Besides, the solution, according to ministers as regulatory authorities, is criticized by the doctrine of the administrative sciences and the institution of the EU.

The following independent regulatory authorities were appointed in network-bound sectors: the President of the Office of Electronic Communications (responsible for both telecommunications and postal sectors), the President of the Energy Regulatory Office (*nota bene* it was first regulatory organ appointed in Poland) and the President of the Office Railways Transport. All of mentioned organs are central bodies of governmental administration clearly exemplified by statutory legislation with reference to infrastructural sectors. They are appointed and recalled by the Prime Minister. The regulatory authorities execute their tasks with the help of relevant offices: the Office of Electronic Communications, the Energy Regulatory Office and the Office Railways Transport. The head offices are located in Warsaw and delegacies are instituted in each province. The structure and tasks of organizational units of the offices are issued by the regulatory presidents. With reference to foregoing, it can be said that in Polish model of regulatory authorities the monocratic bodies which are supported by the offices can still be found functioning.

The administrative procedures are conducted by the regulatory authorities in accordance with the Code of Administrative Procedure of 1960. However, regulatory decisions may be appealed to the Court for Protection of Competition and Consumer, which is competent not only to assess legality of the decision, but may also alter its contents.

In addition, regulatory tasks are executed by bodies of territorial self-government in the water and sewerage industry.

Generally, the tasks of the regulatory authorities are focused on issuing permission which are necessary to begin business activity in infrastructural sectors, ensuring access

to networks and services (tasks on the wholesale markets), guaranteeing basic rights for consumers and minimum levels of availability and affordability (tasks on the retail markets) as well as the regulatory presidents impose fines and resolve disputes between undertakings. Moreover, all regulatory authorities are obliged to cooperate with the European Commission and other regulatory authorities from Member States as well as with the authorities responsible for competition (Szydło, 2005b: s. 210 and next). Below, the most important tasks of the Polish regulatory authority are shown.

The President of Office of Electronic Communications:

- issuing a general authorization in accordance with Article 3 of the Authorization Directive (2002/20/EC)[7]. In this context, at the Polish level telecommunications activity is treated as a regulated sector, which is regulated in detail by the Law of 2 July 2004 in the Freedom of Business Activities. Telecommunications undertakings involved in performing telecommunications activities are required to make an entry into the register, which is maintained by the President of the Office of Electronic Communications. Moreover, issuing permission (*zezwolenie*) or general authorization for postal activity,
- issuing individual permits for the use of frequencies and numbering. Frequencies and numbering are an example of rare resources, therefore the Authorization Directive 2002/20/EC enable Member States to issue individual permits to use their,
- analysis of the telecommunications market and designating the telecommunications undertakings that have a significant market power. According to Directive 2002/21/EC (Framework Directive)[8] and the Telecommunications Law, the President of the Office of Electronic Communications analyzes only relevant markets,
- imposing regulatory obligations referring to access to network and connection between networks (regulatory obligations on the wholesale markets). The President of the Office of Electronic Communications imposes regulatory obligations if, as a result of analysis market, he concludes that the relevant market is not effectively competitive. In this cases, the President of the Office of the Electronics Communications designates undertaking(s) that have a significant power in the market and imposes regulatory obligations,
- imposing regulatory obligations on the retail markets with reference to assuring the services of the general economic interest,
- choosing an operator providing universal services. The President of the Office of the Electronic Communications designates the telecommunications undertakings to provide the universal services on the basis of the lowest cost of providing publicly available telephone services. It is also on the basis of information on the quality of providing such services as specified in the offer submitted by the telecommunications undertaking, with regard to its capability of providing the universal service or individual component services there of. Currently, the President of the Office of Electronic Communications has designated only one undertaking, which is obliged to provide universal services – *Telekomunikacja Polska*,

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[7] Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorization of electronic communications networks and services (Authorization Directive), 2002, L 108/21.

[8] Directive 2002/21.EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), 2002, L 108/33.

- imposing fines in telecommunications and postal sectors (Przybylska, 2008: s. 76 and next).

The President of the Energy Regulatory Office:

- issuing a concession (*koncesja*) for business activity in electricity and gas sectors,
- resolving disputes between undertakings as well as between undertaking and end-users, especially the President of the Energy Regulatory Office decides in cases refusing enter into an agreement with reference to transmission and distribution energy (resolving disputes on the wholesale markets) and with reference to access to network (resolving disputes on the wholesale and retail markets),
- designating, by means of tender, a supplier of last resort which leads to protection of the end-users.

The President of the Office of Railways Transport:

- issuing a licence (*licencja*),
- approving changes for access to railway infrastructure,
- supervising railway security,
- imposing fines.

In this place, several detailed remarks with reference to independence of the regulatory authorities and division of regulatory's tasks between central bodies of governmental administration and ministers, are worth noting. Nowadays, the real independence of the Polish regulatory authorities is doubtful and is under discussion, both within the doctrine of the administrative sciences and institutions of the EU.

Firstly, according to Law 2006, the independence of the regulatory authorities was significantly reduced. The mentioned law removed the statutory provision which guaranteed five years of tenure for the regulatory presidents and enumerated circumstances when they could be dismissed at the end of his tenure[9]. Both the principle of tenure and its period guaranteed the independence of the presidents of the regulatory offices. This means that currently, the principle of the subordination of the Prime Minister is in force because he can dismiss the regulatory presidents anytime. Strictly speaking, the government, which is responsible for state policy, has a large influence on regulation area because the regulatory presidents can be dismissed at any moment and for no clear-cut, definite reasons (Hoff, 2008: s. 199 and next).

Secondly, the position of the regulatory presidents is subject of discussion because they belong to central bodies of governmental administration which means that it is difficult to say about their independence because they are supervised by the ministers who can issue commands. Additionally, the regulatory authorities do not belong to category of organs mentioned in the Constitution. Hence, a change in Polish Constitution and regulation of the position of regulatory organs are more often proposed.

Thirdly, the Commission has reservation about independence of the regulatory authorities. This tendency is clear especially in telecommunications sector. For example, in 12th report on the implementation[10] the Commission has expressed concern for in-

[9] Until 2006, regulatory presidents could be dismissed only in the following circumstances: 1) material infringement of the Law with accordance infrastructural sectors, 2) adjudication prohibiting their from holding managerial positions or performing functions in state authorities related to extraordinary responsibilities, 3) committing an international offence subject to *ex officio* prosecution, confirmed by a legally valid sentence of a court, 4) illness permanently hindering performance of tasks and 5) lodging a resignation.

[10] Communication from the Commission to the European Parliament, the Council, the European Eco-

dependence and impartiality of the President of the Office Electronic Communication in the light of the scope of the government powers of dismissal. In addition, in the newest report (13th report)[11] the Commission confirms its concerns. Apart from concerns included in the mentioned reports, Commission has taken more formal measures. Namely, it has sent reasoned opinion in which it shows incorrect implementation of the Framework Directive 2002/21/EC, especially Article 3 (2,3), and at the same time Commission has opened proceedings under Article 258 of the TFEU[12]. So, according to Law 2008, principles of appointment of the President of Office of Electronic Communications have been changed and now the telecommunications regulatory organ is appointed (for five years) and dismissed by the Seym. It means that the independence of the President of Office of Electronic Communications is stronger that before 2008 year.

Additionally, the amendments of the Polish statutory law have led to abolition of the advisory bodies regulatory authorities. Besides, the regulatory offices are financed with the state budget. The foregoing challenges the principle of the independence of the regulatory authorities, too.

Appendix contains general information about Polish sector-specific regulation.

Regulatory sector	**Regulatory act**	**Regulatory Authority**	**Currently appointment**	**www page of regulatory office**
Telecommunications sector	The Telecommunications Law of 16 July 2004	the President of the Office of Electronic Communications	Anna Streżyńska	uke.gov.pl
Postal sector	The Postal Law of 12 June 2002	the President of the Office of Electronic Communications	Anna Streżyńska	uke.gov.pl
Electricity and Gas sectors	The Energy Law of 10 April 1997	The President of the Energy Regulatory Office	Marek Woszczyk	ure.gov.pl
Railway sector	The Railway Transport Law of 28 March 2003	The President of the Office Railways Transport	Krzysztof Jaroszyński	utk.gov.pl
Water and Sewerage sector	The Water and Sewerage Law of 7 June 2002	Organs of territorial self-government	–	–

nomic and Social Committee of the Region. European Electronic Communications Regulation and Markets 2006 (12th report), COM (2007) 155.

[11] According to the Commission's point: "NRA (national regulatory authorities) independence is a prerequisite for regulatory certainty. Measures to underpin the NRA's independence have been taken or are planned in Latvia and Hungary. However, concerns persist in Bulgaria and Luxembourg, and in particular in Poland in relation to the rules for the removal of the head of the NRA. The Commission has therefore included provision to strengthen the independence of the NRAs in its proposals for revision of the framework". See: Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee of the Region. Progress Report on the Single European Electronic Communications Market 2007 (13th report), COM (2008) 153.

[12] See: MEMO/07/255.

SUMMARY

Nowadays, the regulatory law is very important part of the public law because of various reasons. First of all, a regulatory law refers to competition on infrastructural markets. This means that the whole liberalization process should lead to effective competition between undertakings which provide services of general economic interest. The second reason is related strictly to protection of end-users. In this context, basic rule refers to the concept of the services of general economic interest and universal services. So, alongside the provision guaranteeing and protecting competition (the regulation for competition), provision with reference to guaranteeing consumer's benefis (the social regulation) can be distinguished. Even, when the competition in infrastructural sectors will exist and provisions promoting competition in infrastructural sectors will not be necessary, the idea of the social regulation, will still exist. The third reason is focused on safety of infrastructural sectors, especially energy and railway safety. This fact means that apart from regulatory activities, the regulatory authorities execute typical administrative activities. Finally, in the context of the independent sector regulation, the independent regulatory authorities play the most important role. So, it is necessary, at the national level, to issue regulatory tasks to authorities which are independent.

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LA EFICACIA CIVIL DE LAS RESOLUCIONES CANÓNICAS DE NULIDAD Y DISOLUCIÓN DEL MATRIMONIO EN EL SISTEMA JURÍDICO ESPAÑOL

El matrimonio es, ciertamente, una de las instituciones jurídicas más extensamente examinadas por los especialistas, tanto del Derecho civil como del Derecho canónico. La evolución histórica de la doctrina y la legislación española en la materia se ha visto influida por las corrientes dominantes de la política del país, especialmente en los siglos XIX y XX. La regulación vigente en cuanto a la eficacia civil de las resoluciones canónicas de nulidad y disolución del matrimonio está arraigada en la tradición jurídica española.

1. PERSPECTIVA HISTÓRICA DE LA CUESTIÓN

Desde los principios de la monarquía hispánica de la Edad moderna hasta el siglo XIX el matrimonio civil en la Península Ibérica era una institución prácticamente desconocida (O'Callaghan, 1996: pp. 23–24). Durante siglos la mayoría de la sociedad española era católica, y la forma de casarse prescrita por la Iglesia era universalmente practicada. El predominio o incluso la exclusividad del concepto cristiano de la unión matrimonial era un hecho social reflejado en la legislación de la monarquía española. Después de la Real Cédula de Felipe II de 1564, el único modo de casarse era la forma canónica determinada en los documentos del Concilio de Trento. Conforme a la Real Cédula, la jurisdicción eclesiástica se extendía no solamente al momento constitutivo de la unión matrimonial sino también a su momento extintivo. De este modo, al menos desde el siglo XVI hasta finales del XIX, el ordenamiento español prácticamente no regulaba las cuestiones relacionadas con el matrimonio, remitiéndose al Derecho de la Iglesia católica en dicha materia.

Los motivos para abstenerse de establecer una normativa matrimonial por parte del Estado eran diversos. Uno de los principales era el ya mencionado predominio (o incluso la universalidad) de la imagen del matrimonio cristiano presente en la sociedad española. Hay que mencionar también la inestabilidad social e institucional que se vivió en España en el siglo XIX; situación que aconsejaba una prudencia especial en una materia de tanto impacto social. En estas circunstancias el matrimonio civil tardó más en establecerse en España que en otros países europeos.

Por primera vez se introdujo, con carácter de exclusividad, por medio de la Ley de 18 de junio de 1870[1]. La mayoría de la sociedad española, sin embargo, dio la espalda

[1] *Ley provisional de matrimonio civil*, "Gaceta de Madrid" n.º 172 (21-06-1870), pp. 1–2.

a la Ley, a pesar de que – conforme a la legislación canónica – el legislador estatal consideraba el matrimonio como perpetuo e indisoluble por naturaleza[2]. En estas circunstancias el Decreto de 22 enero de 1875 anunció la inminente revisión del acto jurídico mencionado justificándola por "la incesante clamor de la opinión pública"[3]. La derogación de la Ley y la normativa para su desarrollo no vino sino, en el nuevo contexto político de la Restauración, con el Decreto de 9 de febrero de 1875[4].

Exceptuada la época republicana (1931–1938), el sistema matrimonial establecido en la Restauración perduró durante casi un siglo (1875–1981). Este sistema, centrado en el binomio: matrimonio civil – matrimonio canónico, fue adoptado en 1889 por el Código civil. En todas las redacciones de éste, menos las regulaciones republicanas, el legislador trataba tanto el matrimonio civil como el canónico como una realidad con sustantividad propia, y por consiguiente regulada por regulaciones distintas, propias de las características de cada uno.

En el art. 42 del Código civil se hablaba de "dos formas de matrimonio: el canónico, que deben contraer todos los que profesan la religión católica; y el civil, que se celebrara del modo que determina este Código"[5]. Conforme al art. 80, el reconocimiento de los pleitos sobre nulidad y separación de los matrimonios canónicos correspondía a los Tribunales canónicos. El art. 82 del Código ordenaba inscribir las sentencias de nulidad y separación del matrimonio canónico en el Registro civil y presentarlas "al Tribunal ordinario para solicitar su ejecución en la parte relativa a los efectos civiles"[6]. Así, desde el principio, el sistema del Código fue pluralista al reconocer dos regímenes matrimoniales; regímenes que regulaban no sólo el momento constitutivo de la unión matrimonial, sino también el momento extintivo de ésta.

La reforma republicana del sistema matrimonial empezó con el Decreto de 3 de noviembre de 1931, en que se anunciaba el intento de introducir la ley del divorcio y del matrimonio civil[7]. En el art. 1 del Decreto, el legislador declaraba que los únicos tribunales competentes para conocer, con efectos civiles, las demandas sobre divorcio y nulidad de matrimonio, tanto civil como canónico, son los ordinarios.

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[2] Además del art. 1 de la Ley de 18 de junio de 1870 en que se decía que "El matrimonio es por su naturaleza perpetuo e indisoluble", también la regulación del art. 5 se correspondía con la legislación canónica. Conforme a este artículo "Aun cuando tengan la aptitud expresada en el artículo precedente, no podrán contraer matrimonio: Primero. Los que se hallen ligados con vínculo matrimonial no disuelto legalmente. Segundo. Los católicos que estuvieren ordenados *in sacris* o que hayan profesado en una orden religiosa […] a no ser que unos y otros hayan obtenido la correspondiente licencia canónica". Para comparar la idea del matrimonio civil propuesto en la ley de 1870 con la legislación canónica puede verse la sección primera del capítulo segundo de la citada ley.

[3] *Decreto que sean inscritos en el Registro civil como hijos legítimos los de matrimonio exclusivamente canónico*, Preámbulo. "Gaceta de Madrid" n.º 23 (23-01-1875), p. 188.

[4] *Decreto restableciendo en el matrimonio canónico todos los efectos civiles que lo reconocían las leyes vigentes hasta la promulgación de la provisional de 18 de junio de 1870, y disponiendo su inscripción en el Registro civil*, "Gaceta de Madrid" n.º 41 (10-02-1875), pp. 363–364.

[5] *Texto de la edición del Código civil mandada publicar por el Real Decreto de 24 del corriente en cumplimiento de la Ley de 25 de mayo último*, art. 42. "Gaceta de Madrid" n.º 206 (25-07-1889), p. 250.

[6] Los dos artículos mencionados no hablan de separación sino de divorcio. Sin embargo, en la época de la publicación del Código civil el término "divorcio" significaba no la disolución de la unión conyugal, sino la separación de los cónyuges. Ibídem, p. 251.

[7] *Decreto de 3 de noviembre de 1931*, "Gaceta de Madrid" n.º 308 (4-11-1931), pp. 746–747.

El traspaso de las competencias jurisdiccionales del Estado a los tribunales eclesiásticos se realizó ocho años después. Conforme a la disposición contenida en la Ley de 23 de septiembre de 1939, se reconoció "plena eficacia jurídica en el Fuero civil, desde el momento de su validez y firmeza canónica, a las sentencias firmes de los Tribunales eclesiásticos competentes, declarando la nulidad de un matrimonio"; y a las sentencias dictadas durante la vigencia de la Ley de divorcio[8] o con posterioridad a aquélla. Asimismo, de acuerdo con la Ley de 23 de septiembre de 1939 se reconocía la eficacia jurídica civil de los rescriptos pontificios de disolución de matrimonio rato y no consumado"[9].

Dependiendo de las interpretaciones administrativas y jurisprudenciales del art. 42 del Código que ampliaban o restringían las posibilidades de contraer el matrimonio civil o canónico, a lo largo de casi un siglo (1875–1981) el sistema basado en el binomio: matrimonio civil – matrimonio canónico se inclinaba más hacia un sistema de matrimonio civil subsidiario o facultativo. Independientemente de esto, en cuanto a la extinción del matrimonio, obligaba un principio, según el cual la jurisdicción para conocer las demandas en el caso del matrimonio civil correspondía a los tribunales del Estado, y en el caso del matrimonio canónico – a los tribunales de la Iglesia católica.

2. LA LEGISLACIÓN VIGENTE

Cómo ya se ha escrito, a lo largo de la historia de la legislación española en la materia, predomina el sistema matrimonial latino, en el que el Estado reconoce la relevancia civil de la regulación de la Iglesia, de modo que quien elige la forma canónica para contraer la unión matrimonial, contrae, también desde la perspectiva del Derecho civil. En cambio, el matrimonio contraído por lo civil queda regulado por los preceptos del Derecho estatal. En este sistema, el Estado reconoce no dos formas de contraer matrimonio, sino dos clases de matrimonio, la civil y la religiosa, ya que no sólo se contrae en forma prescrita respectivamente por el ordenamiento estatal o religioso, sino que también se rige por uno de los ordenamientos, incluso en su momento extintivo[10].

2.1. LOS CIMENTOS CONSTITUCIONALES DEL NUEVO SISTEMA MATRIMONIAL

Con la Constitución de 29 de diciembre de 1978 se establecen los cimentos del nuevo sistema matrimonial en España. Su art. 31.1 reconoce el derecho fundamental del hombre y de la mujer a contraer matrimonio en pie de igualdad (Ferrer Ortiz, 1994: p. 908). El art. 32.2 declara que "la ley regulará las formas del matrimonio, la edad y capacidad de contraerlo, los derechos y deberes de los cónyuges, las causas de separación y disolución y sus efectos", delimitando así la materia reservada para el legislador es-

[8] *Ley relativa al divorcio*, "Gaceta de Madrid" n.° 71 (11-03-1932), pp. 1762–1767.

[9] *Ley de 23 de septiembre de 1939 relativa al Divorcio*, disposición transitoria 5, "Gaceta de Madrid" n.º 278 (5-10-1939), p. 5574.

[10] En este momento, por no ser el tema principal del artículo, no se va a analizar las cuestiones debatidas por la doctrina española ¿si el sistema actual reconoce una clase de matrimonio que se contrae en formas distintas o diferentes clases de la unión matrimonial? o que ¿hasta que grado el sistema matrimonial vigente constituye una regulación con características propias y en que es sólo un reflejo del sistema anglosajón o latino?

tatal[11]. Conforme al texto citado, el contenido mínimo de la legislación del Estado sobre el matrimonio abarca, entre otras, la regulación de la separación y disolución de la unión matrimonial también los efectos civiles de la extinción de ella.

El art. 32 de la Constitución debe completarse con los arts. 14 y 16. El primero de ellos, que garantiza a los españoles la igualdad "ante la ley, sin que pueda prevalecer discriminación alguna por razón de […] religión, opinión", aplicado al matrimonio hizo posible la instauración de un sistema matrimonial en el cual junto al matrimonio civil concurriera el matrimonio religioso. El art. 16 hizo viable la instauración de un sistema facultativo, en virtud de los principios de libertad religiosa e ideológica (art. 16.1). Además, al acoger el principio de cooperación del Estado español con la Iglesia católica y las demás confesiones (art. 16.3), el artículo mencionado supuso el reconocimiento de la posibilidad de autodeterminación de las confesiones en cuanto a su *estatus* jurídico civil. Esto, en el derecho matrimonial, implicó la admisión implícita de una pluralidad de matrimonios religiosos y posibilitó la introducción de un sistema matrimonial "compuesto", en el cual junto con el matrimonio civil coexiste el matrimonio religioso; matrimonio reconocido por el Estado como forma de manifestar el consentimiento, o como matrimonio sustantivo, que se rige por sus propias normas en cuanto no contradigan el orden público (Ferrer Ortiz, 1994: pp. 91 y ss.).

2.2. EL MATRIMONIO ACATÓLICO

La Constitución actual, al renunciar al sistema matrimonial latino, desencadenó un proceso de reformas profundas en la materia matrimonial; proceso, que se realizó por medio de la legislación ordinaria y concordada. Una de las cuestiones más novedosas e importantes fue la aparición en la legislación ordinaria del matrimonio religioso acatólico, junto a los matrimonios civil y canónico. La Ley orgánica 7/1980, de 5 de julio, de libertad religiosa, estableció un fundamento jurídico para que otras confesiones, al igual que la Iglesia católica, pudieran firmar acuerdos de cooperación con el Estado y garantizar, de este modo, que los matrimonios celebrados en su propia forma religiosa pudieran ser reconocidos en el orden civil. Sin embargo, a diferencia de los Acuerdos entre España y la Santa Sede, los de 1992 entre el Estado español y las confesiones minoritarias no contienen previsión alguna acerca de la eficacia civil de las resoluciones de los tribunales religiosos sobre separación, nulidad o disolución del matrimonio[12].

Para un entendimiento adecuado de la cuestión es imprescindible tener en cuenta las peculiaridades que presentan cada uno de los matrimonios religiosos implicados

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[11] De modo indirecto el citado texto del art. 32 habla del matrimonio civil disoluble. Lo hace con independencia al matrimonio canónico que continúe siendo indisoluble, o cualquier otro matrimonio religioso que conserva sus propiedades esenciales propios, cuestión que no afecta al legislador estatal.

[12] Ley 24/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Federación de Entidades Religiosas Evangélicas de España. BOE 1992, n.° 272 (de 12 de noviembre), pp. 38209–38211.

Ley 25/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Federación de Comunidades Israelitas de España. BOE 1992, n.° 272 (de 12 de noviembre), s. 38211–38214.

Ley 26/1992, de 10 de noviembre, por la que se aprueba el Acuerdo de Cooperación del Estado con la Comisión Islámica de España. BOE 1992, n.° 272 (de 12 de noviembre), pp. 38214–38217.

y los intereses de los sujetos firmantes de los Acuerdos[13]. Por ahora, no obstante, las normas que rigen el momento crítico del matrimonio de los miembros de las comunidades religiosas minoritarias reconocidas por el Derecho español son exclusivamente las disposiciones civiles de separación, nulidad y disolución, sin perjuicio de la eficacia indirecta de las normas islámicas y judías presentes en otros ordenamientos jurídicos, a través del derecho internacional privado (más sobre el tema: Rodríguez Chacón, 1994).

2.3. LA EFICACIA CIVIL DE LAS RESOLUCIONES CANÓNICAS EN LA LEGISLACIÓN ESPAÑOLA BILATERAL (CONCORDADA)

En cuanto al matrimonio canónico, el fundamento del reconocimiento de la eficacia civil de las resoluciones canónicas en el sistema jurídico actual lo constituye el art. 6 del Acuerdo entre Estado Español y la Santa Sede de 3 de enero de 1979 sobre Asuntos Jurídicos[14]. En el apartado 1º del artículo mencionado "El Estado reconoce los efectos civiles al matrimonio celebrado según las normas del Derecho Canónico". Estos efectos se producen desde el momento de la celebración de la unión matrimonial. No obstante, para el pleno reconocimiento de los mismos se exige la inscripción de la unión matrimonial en el Registro Civil, "que se practicará con la simple presentación de certificación eclesiástica de la existencia del matrimonio"[15].

El apartado 2.º del artículo mencionado configura el cauce legal y las condiciones para el reconocimiento civil de las resoluciones canónicas de nulidad y disolución del matrimonio. Conforme a éste "los contrayentes, a tenor de las disposiciones del Derecho Canónico, podrán acudir a los Tribunales Eclesiásticos solicitando declaración de nulidad o pedir decisión pontificia sobre matrimonio rato y no consumado. A solicitud de cualquiera de las partes, dichas resoluciones eclesiásticas tendrán eficacia en el ordenamiento civil si se declaran ajustadas al Derecho del Estado en resolución dictada por el Tribunal Civil competente".

El texto del art. 6 del acuerdo concordatario demuestra que el modo en que se da relevancia civil a las resoluciones eclesiásticas no responde ya al automatismo propio del sistema anterior. Al mismo tiempo, no obstante, supone la voluntad de integrar en el ordenamiento español algo más que los rituales y ceremonias de la celebración del matrimonio canónico, llevando a algunos de los autores a determinar el sistema matrimonial vigente como de "relativa relevancia sustantiva" en relación a la unión matrimonial canónica (Cañivano, 2005: p. 54).

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[13] Las confesiones protestantes no tienen, de hecho, una jurisdicción propia que conozca los casos de separación, nulidad o disolución del matrimonio, sino que se remiten a la jurisdicción civil. En el caso del matrimonio judío existe un auténtico sistema del Derecho matrimonial con tribunales rabínicos. Estos, sin embargo, no siempre ejercen su jurisdicción con carácter exclusivo. El matrimonio islámico también cuenta con un Derecho matrimonial y tribunales propios. Así que – con la excepción de la separación – institución desconocida en el Derecho islámico – podría haberse planteado la eficacia civil de las resoluciones dadas por los tribunales religiosos de este ordenamiento jurídico. El Estado sin embargo, por ahora, no las reconoce, lo que demuestra el silencio del Acuerdo con la Comisión Islámica de España. Confronte: Ibídem, p. 987–988.

[14] Acuerdo entre el Estado Español y la Santa Sede sobre asuntos jurídicos. BOE n.º 300 (15-12-1979), pp. 28781–28782.

[15] Ibídem, art. 6, 1–2.

Conforme al artículo citado, la competencia para conocer de las causas de nulidad se comparte entre los tribunales de la Iglesia católica y los tribunales del Estado, según la elección de los contrayentes. La expresión "a solicitud de cualquiera de las partes" significa que la eficacia civil de la resolución eclesiástica es dispositiva, nunca automática o promovida de oficio. Además, destaca que no se exige que ambas partes, de consuno, insten la actividad jurisdiccional. Basta con que lo haga una de ellas. Independientemente de que lo haga una o las dos, la posibilidad de instar la eficacia civil de las resoluciones canónicas queda limitada a la nulidad del matrimonio y a la dispensa *super rato*, sin ninguna otra decisión de carácter judicial prevista en el sistema canónico.

2.4. LA EFICACIA CIVIL DE LAS RESOLUCIONES CANÓNICAS EN LA LEGISLACIÓN ESPAÑOLA

El art. 80 del Código Civil complementa el requisito concordatario del "ajuste al Derecho del Estado", especificando que este deberá declararse "en resolución dictada por el Juez civil competente conforme a las condiciones a las que se refiere el art. 954 de la Ley de Enjuiciamiento Civil". Así que, para el cumplimiento de las resoluciones canónicas se exige el cumplimiento del artículo mencionado de la Ley de Enjuiciamiento Civil de 1881, que se mantiene vigente por la disposición derogatoria única de la Ley 1/2000, de 7 de enero, hasta que no se promulgue y entre en vigor la Ley sobre cooperación jurídica internacional en materia civil[16].

A la normativa reguladora de la eficacia civil de las resoluciones canónicas en los casos matrimoniales, además de la ya mencionada, hay que añadir los preceptos de legislación registral (art. 265 del Reglamento del Registro civil) y procesal (disposición adicional 2ª de la Ley de 30/1981). Del conjunto de esta normativa se pueden sacar unas conclusiones concretas:

1) El precepto codicial reproduce casi en los mismos términos lo prescrito en el art. 6.2 del Acuerdo sobre Asuntos Jurídicos en cuanto al control civil de las resoluciones eclesiásticas.
2) No se prevé el reconocimiento civil de todas las resoluciones canónicas, es decir: las sentencias canónicas de la separación matrimonial, la disolución a través del procedimiento denominado "privilegio paulino", o las sentencias que, en virtud de los cc. 1643–1644, declaran la validez de un matrimonio, antes considerado por la sentencia "firme" como nulo.
3) La posibilidad de instar a los tribunales eclesiásticos o a los civiles por parte de los contrayentes provoca una situación de competencia compartida para juzgar la nulidad del matrimonio. Los tribunales eclesiásticos son competentes cuando se trata de juzgar las causas canónicas, y los civiles cuando la causa de nulidad está prevista

[16] El art. 954 de la Ley de Enjuiciamiento Civil de 1881 (vigente por ahora) consta:

"Si no estuviere en ninguno de los casos de que hablan los tres artículos que anteceden, las ejecutorias tendrán fuerza en España, si reúnen las circunstancias siguientes:

1.ª Que la ejecutoria haya sido dictada a consecuencia del ejercicio de una acción personal.

2.ª Que no haya sido dictada en rebeldía.

3.ª Que a obligación para cuyo cumplimiento se haya procedido sea lícita en España.

4.ª Que la carta ejecutoria reúna los requisitos necesarios en la nación en que se haya dictado para ser considerada como auténtica, y los que las leyes españolas requieren para que haga fe en España".

por el Código civil, conforme a los conceptos y criterios propios a este cuerpo legal. Sin embargo, a diferencia de la resolución canónica, que puede tener eficacia civil, la resolución de nulidad de un matrimonio contraído según las normas canónicas dada por un tribunal civil carece de todo efecto en el ámbito canónico. De tal manera podemos encontrarnos ante un matrimonio declarado nulo en el fuero civil, pero plenamente válido en el fuero que los contrayentes eligieron libremente a la hora de contraer el matrimonio, es decir, en el canónico.

4) Al hablar de "las decisiones pontificias sobre matrimonio rato y no consumado" el art. 80 del Código civil trata de un supuesto de disolución típicamente canónico sin paralelo en el fuero civil. En el mismo artículo el Estado se compromete a reconocer los efectos civiles de las decisiones mencionadas en los mismos términos que a las sentencias canónicas de nulidad de matrimonio. No lo dice directamente el precepto codicial, pero resulta obvio, que la competencia para dispensar el matrimonio rato y no consumado pertenece exclusivamente a la Iglesia católica e incluso, dentro de ella, sólo corresponde al Romano Pontífice (cc. 1142 y 1698 § 2 del CIC de 1983).

Aparte de estas conclusiones, que parecen obvias, la indeterminación de la normativa constitucional, concordataria y codicial en la materia provocó intenso debate en el momento de su inicial aplicación (Ferrer Ortíz, 1986: pp. 57 y ss.; García Failde, 1982: pp. 207 y ss; Iban, 1980; Jordano Barea, 1981; López Alarcón 1979; Navarro Vals, 1984: pp. 15–20, 65–73; Reina, 1980: pp. 295 y ss.; Suárez Pertierra, 1981; Zapatero Gómez, 1981). Era necesario abordar la cuestión de las técnicas más adecuadas para facilitar la convivencia entre ordenamientos y entre jurisdicciones, que prevé el Acuerdo (Cubillas Recio, 2001: p. 435). La duda más controvertida y, al mismo tiempo decisiva, parece la respuesta a la pregunta: ¿en qué consiste el ajuste al Derecho del Estado?

2.4.1. LA DECLARACIÓN DE AJUSTE

La finalidad del art. 6 de Acuerdo sobre Asuntos Jurídicos, que casi en los mismos términos reproduce el art. 80 del Código civil, es el reconocimiento de la jurisdicción eclesiástica sobre el matrimonio canónico no solamente en su momento constitutivo, sino también en su momento de extinción. No obstante, la relevancia verdadera de la jurisdicción eclesiástica, o enfocándolo de otra manera, el efectivo limite de ésta, depende de las dificultades que se derivan del procedimiento de homologación civil de las resoluciones canónicas.

En los estudios doctrinales sobre la eficacia civil de las resoluciones canónicas de nulidad y disolución del matrimonio rato y no consumado, la llamada declaración de ajuste es una de las figuras jurídicas del actual sistema matrimonial español que plantea mayores dudas; dudas, que continúan sin tener respuesta unívoca en los diversos autores. Lo que está claro – ante la perplejidad que causa la imprecisión del concepto jurídico de la declaración de ajuste al Derecho del Estado – es que dichas declaraciones no pueden suponer una restricción que provoque la ineficacia de lo acordado sobre la eficacia civil de las resoluciones eclesiásticas.

Hay autores, como Luis Mariano Cubillas, quienes entienden el ajuste como una revisión de fondo de las resoluciones canónicas (Cubillas Recio, 1985). Según su opinión, para que una resolución canónica pueda tener eficacia civil, hay que probar la coincidencia de la causa canónica por la que se ha declarado la nulidad con alguna de las causas contenidas en el Código Civil. Se trataría de una coincidencia en el supuesto de hecho

contemplado por la norma y no en el *nomen iuris* concreto contenido en los arts. 73, 85 y complementarios del Código mencionado. Parece, sin embargo, que esta interpretación vacía de contenido el art. 80 del Código aludido, ya que – entre otras razones – dicho artículo menciona la posibilidad de reconocimiento de las dispensas de matrimonio rato y no consumado, que es una institución sin ningún paralelo en el Derecho civil[17].

Otra interpretación presenta Mariano López Alarcón. Sostiene que el ajuste consiste en someter las decisiones canónicas a un juicio de *exequatur*, análogo al contemplado en la Ley de Enjuiciamiento civil para las sentencias dictadas por los tribunales extranjeros. De este modo el Estado español consideraría las decisiones eclesiásticas como si fueran sentencias provenientes de los tribunales de los Estados con los que España ha firmado convenios bilaterales; convenios en los que se excluye expresamente la revisión de fondo de los dictámenes judiciales y reconoce los efectos civiles de éstos solo por ajustarse a los principios del orden público español (López Alarcón, 1978: p. 77). El examen formal de las decisiones canónicas hecho por el Juez civil debería limitarse, pues, a la comprobación de la congruencia de éstas con dichos principios, bajo las condiciones enumeradas en el art. 954 de la Ley de Enjuiciamiento civil (Ferrer Ortiz, 1994: p. 946–947).

La siguiente interpretación del ajuste al Derecho estatal la presenta Carmelo de Diego-Lora. Según su opinión no se trata de un *exequátur* sino de un juicio de verificación previo con el fin de ejecutar la decisión canónica, que es lo que en definitiva pretende el solicitante (Diego-Lora, 1979: pp. 212–214, 223–227). Conforme al art. 6.2 del Acuerdo sobre Asuntos Jurídicos el tribunal civil competente debería comprobar que se trata de una declaración canónica de nulidad, o decisión pontificia sobre un matrimonio rato y no consumado, que tales decisiones eclesiásticas fueron pronunciadas a solicitud de una o de los dos contrayentes, y que las partes (o por lo menos una de ellas) ha solicitado la eficacia de estas decisiones en el fuero civil. Estas exigencias concordatarias deberían ser complementadas por las normas del Derecho civil, procesal o registral dictadas con el fin de adecuar la normativa vigente del Estado a lo acordado bilateralmente (Ferrer Ortiz, 1994: p. 947).

Finalmente, hay que mencionar la opinión de Víctor Reina quien no sólo rechaza la interpretación del ajuste como un juicio de fondo de las resoluciones canónicas, sino también descarta la necesidad de juzgar la congruencia de estas con el orden público o con principios supremos del orden constitucional español, ya que éstos debieron ser tenidos en cuenta a la hora de negociar y fijar definitivamente los preceptos concretos del Acuerdo entre Estado Español y la Santa Sede sobre Asuntos Jurídicos. El efecto primario y principal – subraya Reina – es la desvinculación del matrimonio por vía de una declaración canónica de nulidad o disolución del matrimonio rato y no consumado, respecto de las cuales no hay ninguna razón para considerarlas no ajustadas. No obstante, juntamente con el texto de la disposición judicial por la que se expresa dicho efecto principal, en las resoluciones canónicas suele incorporarse disposiciones de carácter secundario, en las que se trata de cuestiones tales como la prohibición más o menos amplia de contraer ulteriores nupcias, de relaciones paternofiliales o de mala

[17] Al declarar aplicable el Acuerdo sobre Asuntos Jurídicos de 1979 en lo regulado en el art. 6.2, la jurisprudencia ha declarado ajustadas al Derecho del Estado español las resoluciones canónicas de disolución de matrimonio rato y no consumado, considerándolas integrantes de la tradición jurídica del Derecho español. Cfr. la Sentencia del Tribunal Supremo 490/1996 de 17 de junio de 1996 (Sala de lo Civil)

fe de uno de los contrayentes en relación con la invalidez del pacto matrimonial. Estas disposiciones secundarias también pueden ser pretendidas por la parte solicitante a la hora de la ejecución civil de la resolución canónica y, en este caso – afirma Reina – la jurisdicción civil con plena autonomía debería decidir si y en que medida dichas disposiciones se ajustan al Derecho del Estado (Reina, 1980: pp. 379–385).

2.5. LA DOCTRINA JURISPRUDENCIAL EN LA MATERIA

La doctrina científica prácticamente no tiene límite en cuanto a la capacidad de formular preguntas. Sin embargo, no está garantizado que las respuestas dadas por ésta vayan a ser utilizadas como fundamento al formular un dictamen en un litigio concreto. La jurisprudencia del Tribunal Constitucional y del Tribunal Supremo, mientras tanto, constituyen una doctrina que, limitada a los casos concretos, no puede pronunciarse más allá de lo que se le plantea, pero sobre lo que se pronuncia forma una red de precedentes, que supera lo solamente especulativo. Por esta razón, la jurisprudencia de los dos tribunales de mayor rango en España sobre la relación entre los ordenamientos estatal y confesional en materia matrimonial, tiene un gran valor no solamente especulativo, sino también práctico.

2.5.1. LOS PRINCIPIOS CONSTITUCIONALES Y LA EFICACIA CIVIL DE RESOLUCIONES ECLESIÁSTICAS

La sentencia de 26 de enero de 1981 fue el primer pronunciamiento del Tribunal Constitucional sobre la eficacia civil de las resoluciones canónicas en el nuevo marco constitucional. En ella se recordó que en el pasado los tribunales eclesiásticos formaban parte de la estructura jurisdiccional del Estado, cuando el modelo de relaciones Iglesia-Estado estaba precisado por el principio de la confesionalidad sociológica a favor de la Iglesia católica. Conforme a la nueva normativa constitucional, el principio de exclusividad jurisdiccional impone a los tribunales estatales el examen, con plenitud de jurisdicción, de las decisiones matrimoniales canónicas por imperativo del art. 117.3 de la Constitución (FJ 10 de la STC 1/1981).

Un año más tarde, en la sentencia de 12 de noviembre de 1982, refiriéndose al Acuerdo sobre Asuntos Jurídicos de 1979 en el que se trata de los efectos civiles de la jurisprudencia eclesiástica, el Tribunal Constitucional afirmó: "No podemos menos de constar que este Acuerdo del Estado español y la Santa Sede, tiene rango de tratado internacional y, por tanto […] una vez aplicado oficialmente el tratado, forma parte del ordenamiento interno" (FJ 5 de la STC 66/1982). Esta afirmación concierta con la opinión de Víctor Reina quien descarta la necesidad de juzgar la congruencia de las resoluciones canónicas con principios supremos del orden constitucional español en cada caso concreto, ya que la cuestión debiera ser examinada antes de la celebración del tratado internacional aludido[18].

Pero, la sentencia de 12 de noviembre de 1982 es todavía más interesante por vincular el derecho a la eficacia civil de las resoluciones eclesiásticas en materia matrimonial a los principios constitucionales de aconfesionalidad del Estado y de cooperación. El Tribunal Constitucional afirma que "el reconocimiento legal de eficacia en el orden

[18] Conforme al art. 95.1 "La celebración de un tratado internacional que contenga estipulaciones contrarias a la Constitución exigirá la previa revisión constitucional".

civil de las resoluciones dictadas por los Tribunales eclesiásticas sobre nulidad de matrimonio canónico y decisiones pontificias sobre matrimonio rato y no consumado se sustenta, de una parte, en el carácter aconfesional del Estado" declarado en el art. 16.3 de la Constitución, y, de otra, en el mismo párrafo del mismo artículo constitucional "que obliga a los poderes públicos a tener en cuenta las creencias religiosas de la sociedad española y mantener las consiguientes relaciones de cooperación. Pues bien, es este principio cooperativo el que se expresa en el Acuerdo entre el Estado español y la Santa Sede de 3 de enero de 1979, en el que se reconoce a la Iglesia Católica, entre otras, las actividades de jurisdicción; y así, el artículo 6.2 del mismo autoriza a los contrayentes a acudir a los Tribunales eclesiásticos solicitando declaración de nulidad o decisión pontificia sobre matrimonio rato y no consumado, otorgando a dichas decisiones eclesiásticas la eficacia civil si se declaran ajustadas al Derecho del Estado en resolución del Tribunal civil competente" (FJ 2 de la STC 66/1982).

Del principio de cooperación habla también la sentencia de 8 de noviembre de 1983. Al examinarlo en el contexto de la eficacia civil de las resoluciones canónicas, se percibe no tanto como un derecho fundamental de los ciudadanos, sino más bien como un deber del Estado con la Iglesia católica y las demás confesiones religiosas (FJ 5 de STC 93/1983). Del mismo principio trata además el auto de 22 de febrero de 1984, que fundamenta en éste el reconocimiento de la eficacia civil de las resoluciones canónicas (FJ 1 de ATC 119/1984).

Finalmente, en la sentencia de 13 de enero de 1997 el Tribunal Constitucional invoca, entre otras cosas, el principio de exclusividad jurisdiccional y reconoce la competencia exclusiva de los tribunales estatales en la materia matrimonial (FJ 6 de STC 6/1997), exponiendo así la necesidad de un equilibrio prudente entre los dos principios constitucionales alegados en sus declaraciones: primero – de exclusividad jurisdiccional del Estado, y segundo – de cooperación con la Iglesia católica y las demás confesiones.

2.5.2. LA CLÁUSULA DE AJUSTE

En la sentencia de 23 de noviembre de 1995, con el fin de precisar el significado del término "ajuste al Derecho del Estado", el Tribunal Supremo subraya que después de modificar "el sistema anterior de plena Jurisdicción de los Tribunales Eclesiásticos" se estableció "una especie de mecanismo de control atenuado a cargo de los Tribunales ordinarios" para evitar el automatismo que se producía en el sistema anterior "por la inmediata eficacia de las sentencias canónicas o decisiones administrativas pontificias". De este modo el Tribunal Supremo aludió al principio de exclusividad jurisdiccional, subrayado por el Tribunal Constitucional; principio al que, como lo afirma Pérez Álvarez, sería contrario el reconocimiento automático de las sentencias canónicas en España (Pérez Álvarez, 2006: p. 83).

Para conservar el equilibrio mencionado más arriba dentro del binomio de los dos principios constitucionales (exclusividad jurisdiccional y cooperación), en la misma sentencia el Tribunal Supremo alude a la cooperación entre el Estado y las confesiones religiosas. Al entender, que la voluntad inicial de contraer matrimonio canónico con plenos efectos civiles por los particulares se proyecta también sobre el momento extintivo de su matrimonio, el Tribunal Supremo subraya que el régimen jurídico actual debe garantizar la libertad religiosa de las personas que piden este reconocimiento. Los poderes públicos, obligados por mandato constitucional a tener en cuenta las creencias

religiosas de la sociedad española y mantener las consiguientes relaciones de cooperación con la Iglesia católica (art. 16.3 CE), deben tener en consideración la voluntad de los creyentes, tanto en el momento constitutivo del matrimonio, como en él de su extinción. Y lo hacen mediante el reconocimiento de los efectos civiles de las resoluciones canónicas de nulidad y de disolución matrimonial (FJ 1–2 de la STS 5911/1995).

En cuanto a la cláusula de ajuste el Tribunal Supremo afirma: la "identidad total de causas […] ha de ser inmediatamente rechazada […] Lo que no cabe es imponer, conforme los Tratados vigentes, que la Iglesia Católica haya de acomodar su normativa y a sus actos jurídicos a la nuestra positiva. A su vez resultan inaplicables las disposiciones de matrimonio rato y no consumado, dejando en el vacío y en parte ineficaz el artículo 80 del Código Civil, así como inviable el Acuerdo de 1979, que de esta manera no sería debidamente cumplido ni respetado. […] Resulta más adecuado y conforme al sentido de los preceptos y tratados bilaterales vigentes, que no sólo se proceda a la comprobación de la concurrencia de los requisitos formales del artículo 954 de la LECiv […], pues esta actividad por sí sola no satisface la función de examen a cargo de los Tribunales del ajuste legal que el precepto civil 80 impone […] sino que exige determinar si viola o no el orden público interno para denegar la homologación. […] En consecuencia, el ajuste al Derecho del Estado se produce sobre la base de concurrencia de las condiciones formales para el reconocimiento de las sentencias extranjeras, con el plus que presenta su no contradicción a los principios jurídicos públicos y privados de nuestro Ordenamiento de Estado […] y con el cumplimiento necesario de derecho a la tutela judicial que acoge el artículo 24 de la Constitución" (FJ 1 de la STS 5911/1995).

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CONDOMINIUM – IS ENGLISH COMMONHOLD IN DIFFICULTIES?

I. PRELIMINARY COMMENTS

Commonhold, the English version of statutory condominium, is a recent feature, having been brought into existence by section 2(1) of the Commonhold and Leasehold Reform Act 2002, supplemented by the Commonhold Regulations 2004 SI 2004 No 1829, as amended by Commonhold Regualations 2009 No 2363). It confers freehold ownership on unit holders combined with a permanent management structure. This latter is supplied by the commonhold association, of which unit holders are members. Commonhold has not so far taken root, while the long leasehold system, used for apartment schemes from the late nineteenth century, remains active. In Scotland, apartment ownership relies on the tenement system, a long-standing institution which has been reformed by two pieces of legislation, the Tenements (Scotland) Act 2004 and the Title Conditions (Scotland) Act 2003 (Development Management Scheme) Order 2009 SI 2009 No 789 (for a detailed examination of the latter see Xu, 2010: p. 236).

In Ireland, developers rely on the long lease system (Woods, 2003: p. 285). Irish developers normally grant substantial long leases to unit holders, for up to 999 years, which compares favourably with the shorter lease lengths, typically of between 99 to 200 years, on offer in England. The freehold in Irish schemes is in due course transferred by the developer to an owners' management company, while in England the freehold can be retained by him. General satisfaction, as well as familiarity of developers and purchasers of units with the Irish long lease system as a means of developing condominiums, explains why the Law Reform Commission has made no recommendations that Ireland should enact a freehold apartment ownership statutory regime (Consultation Paper, 2006: p. 144), such as is found in many other jurisdictions including England, Germany, and South Africa (not to mention Poland: see generally van der Merwe, Habdas, 2006: p. 165). By contrast to the situation in Ireland, the English long lease system had become discredited, if only due to the modest length of leases of units in apartment schemes. This aspect, coupled with the retention by the developer of the freehold (which can only be overcome by sufficient long lessees buying them out although often at considerable expense) failed to meet the psychological need for home ownership. In Ireland, leases of apartment units are sufficiently long to equate to a freehold interest. An Irish developer will disappear from the picture once the development has been completed (as envisaged by the Multi-Unit Developments Act 2011 sections 3–5).

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This contribution reviews some perceived deficiencies of commonhold, and refers, in the process of commenting on them and of suggesting possible changes, to comparable issues in other legal systems, principally: the German *Wohnungseigentumsgesetz* 1951, the South African Sectional Titles Act No 95 of 1986, and the two statutes affecting the Scottish tenement system. The German statute has proved durable and in need of only modest adjustments, notably by a *Novelle* of 2007. The South African statute shares some principles with the English system (van der Merwe, Habdas, 2006: p. 165). Both owe something to the legislative regime in New South Wales. Under the German and South African models, legislation combines individual ownership of a unit or section with a quota share or participation quota conferring joint ownership of the commonly owned parts of the scheme, and a third aspect, compulsory membership of a *sui generis* owners' body corporate which manages the scheme. In England we find freehold ownership of units but no co-ownership of the common parts of the scheme building. Instead, a commonhold association, governed by general company law, owns the exterior, structure and common parts of the scheme building, with, as already noted, all unit holders being compulsory members of the association (2002 Act, s 34 and 2004 Regulations Sched 2 para 7).

II. ASSESSMENT OF THE ENGLISH CORPORATE MODEL

THE BASIC CORPORATE MODEL

The slow take-up rate of commonhold (it is thought that there may be at most 15 registered schemes) contrasts with the popularity of the tenement institution in Scotland, where there are understood to be some 800,000 tenement properties and Germany, where there are over 5 million apartments subject to the 1951 Law (Bärmann, 2008: p. 29).

However, a problem has been identified in the commonhold system which may not encourage its development. The commonhold association is (section 34(1) of the Commonhold Act 2002 & Commonhold Regulations 2004 as amended Sched 2 para 6) a company limited by guarantee with members' liability not to exceed £1 in the event of the association being wound up. Some factors might justify the choice of this particular corporate model. It renders it easy to transfer one's company share to a new unit purchaser, which takes place automatically when the unit is transferred (see further Davies, 2008: 8–10). The seller ceases, on registration of the new purchaser, to hold company membership and liability to pay future assessments passes on sale of a unit to the purchaser.

The fact that English law uses this nebulous corporate form with regard to the management function of commonhold schemes reflects received wisdom to the extent that the management of the affairs of a condominium must be in the hands of a permanent body which can only be dissolved in wholly exceptional circumstances. In Germany, the management body or *Wohnungseigentümergemeinschaft* is accordingly taken to be part of an indissoluble "three-fold unity" concept, consisting of unit ownership, compulsory membership of the management body, and the holding of a quota share allotted to each unit holder in the common property and the land supporting the building (see Bärmann, 1989: pp. 1058–1059; Niedenführ, et. al., 2010: p. 30). The existence of a body corporate is required to give stability and permanence to the community, irre-

spective of the identity of any unit holder, as the identities of the latter will change from time to time as units are bought and sold.

A SHIELD AGAINST DIRECT ACTION?

In England, the need for an owner-run permanent management body was acknowledged in the first reform programme (Commonhold, Freehold Flats, 1987: para 8.1). The commonhold association's purpose has consistently been seen as being not to trade for profit but to exercise scheme management functions. The fact that it is not a trading company is emphasised in that, while it is a going concern, the commonhold association cannot distribute profits or assets to its members (Commonhold Regulations 2004 Sched 2 para 72). The UK legislator could have opted for a *sui generis* model for the management body, as in Germany, South Africa and Scotland, and as was first recommended (Commonhold, Freehold Flats, 1987: paras 8.12–8.14) but declined to do so. The better view now seems to be that, because the commonhold association is a company with liability limited by guarantee, this aspect offers a total shield to unit holders from a direct personal action by an unpaid third party service supplier or creditor to recover debts owed to them by the scheme, as where the commonhold association lacks the funds to settle them, save in the course of a winding –up of the association (Crabb, 2004: 215; Clarke, 2004: para 22[4]). It further appears that any claim in the latter case would be made the form of additional sums levied by the liquidator in the winding-up process, acting for creditors. At the same time, while the association continues to exist as a "going concern" the registered unit holders are liable to a potentially unlimited extent to pay annual assessments, which the scheme directors are required by law to make, as well as for any additional or emergency assessments levied from time to time (2002 Act s 38(1); Model CCS paras 4.2.1 and 4.2.2). The fact that direct actions against unit holders by unpaid third party creditors, while the commonhold association is solvent, are ruled out by the guarantee principle contrasts to the position in Scotland as noted below. This aspect itself renders the commonhold rule questionable.

This problem is emphasised by the fact that the 2002 Act departs from earlier recommendations (see Commonhold 1990 para 3.14; Commonhold Draft Bill 1996, Lord Chancellor's Department, clause 38(2) and (3) and Sched 10). These in essence envisaged that, in the case of a solvent association, unit holders would have been subject to "restricted liability" (see Crabb, 2004: 216). This would have allowed a claim by any unpaid creditor directly against unit holders' own funds, up to the percentage share of assessments they were required to pay by the commonhold community statement (the commonhold constitution). These proposals built on an earlier one (Commonhold, Freehold Flats, 1987: para 8.10) that if a judgment obtained by a creditor against a commonhold association was not met out of its funds, it would be possible to enforce this claim against unit holders, each of whom would similarly be liable only for the share of the outstanding sum which corresponded to the proportion of charges such unit holders were required to pay as stated in the commonhold community statement. Under the 1990 proposals, while a direct liability notion was retained, as a safeguard, suggested presumably in the interests of fairness to the diligent, a unit holder's direct liability to a creditor could not be increased on account of any failure to pay assessments and levies by other unit holders. In other words, no unit holder would have been required to cover the payments of any persistent defaulter, so encouraging the directors to take

prompt steps to recover arrears from any defaulters. Under these proposals, commonhold associations would have been treated as *sui generis* bodies corporate, much as elsewhere. This may have been because winding-up procedures should entail the end both of the commonhold management and property structure, an event which should be regarded as rare and exceptional given that property ownership is a permanent concept.

It is not easy to see why the UK government changed its mind. One reason may have been that allowing creditors' direct claims while the management body was a going concern would, it was thought, lead to a difference with the position of long lease schemes managed by leaseholders (see Crabb, 2004: 215). On the other hand, commonhold is supposed to represent a clean break with long lease systems – the two systems are formally railed off from each other (see Smith, 2004: 194–195). In any case, if the position with commonhold management bodies is as suggested, it seems hard to see how the position with lessee managed companies can be any different.

Parliament thus, arguably, erred in this aspect of the Commonhold Act of 2002. Importing ordinary company law into apartment ownership masks the fact that this form of ownership is ordinarily perceived as being special in nature (it is referred to as *Sondereigentum* in the German *Wohnungseigentumsgesetz* 1951 § 1 Abs 2). In addition, by analogy with the position in South Africa (see *LAWSA*, 2000, para 317) the primary function of termination rules should be to protect the security of lenders and unit holders, which supports the idea that schemes should be permanent. Only if extreme events, such as the scheme building being destroyed, or becoming obsolete, take place, should it ordinarily be possible to dissolve a scheme (as under Sectional Titles Act No 95 of 1986 s 48(1)). The winding-up of a commonhold association on financial grounds should arguably also have been treated as an exceptional event, which body ought not to have been capable of being wound up while the commonhold scheme to which it is linked continued (Commonhold, Freehold Flats, 1987: para 8.12). In return for the adoption of a principle of permanence of a *sui generis* management body, unit holders can fairly be expected to face the possibility of effective remedies being brought to bear against them if they default with their financial obligations, and one of these should, it is suggested, formally include creditors' direct actions against any of their number for unpaid scheme debts, subject to suitable safeguards.

Unhappily, the commonhold legislation lacks sufficient incentives to unit holders to pay their assessments regularly and on time, such as a priority lien over a unit to induce defaulting unit holders to clear unpaid assessments on pain of the risk of a forced sale of their unit, or a right, vested in the scheme body corporate, following notice, to seek a fine against a unit holder who is in persistent default with their payments (as under section 42(11) of the Singapore Land Titles (Strata) Act Cap 158, 1999 revision). Hence, the risk of an English scheme winding-up taking place due to a commonhold association running out of funds may be greater than in the other systems here noted. The English rules confer, as seen, a financial shield against direct creditor action for unpaid debts, and one might logically expect that in return for this aspect, the legislation would have adopted firm remedies, such as the two just noted, to avert the risk of winding-up. Matters are not improved by the fact that the shield of unit holders from direct liability evidently applies while the commonhold association is only technically a going concern – as where it is short of funds required to meet its annual expenditure in full but is not facing a winding-up. Such a position fails to strike a fair balance between the interests of unit holders as service users and their creditors. It also plac-

es undue reliance on the diligence of commonhold directors despite their duty under general company law to promote the best interests or success of the association (see further Davies, 2008: 506).

At the same time, the English guarantee principle is thought to offer no shield to unit holders from unlimited personal liability to creditors should the association go into a creditors' winding-up process (Wong, 2006: 33). A liquidator's claim can evidently be made on behalf of unpaid creditors who have provided services to the association against the current unit holders for unpaid assessments and sinking fund levies arising while they are association members (Crabb, 2004: 215–216). One example could be where management fees are owed (Wong, 2006: 34), not to mention a large outstanding bill for unpaid insurance premiums or maintenance. While, in the silence of the legislation, there is probably no right of direct action against unit holders by an individual judgment creditor, it also seems that creditors' claims can be pressed by liquidators on their behalf in the form of additional levies up to the percentage allocation of each owner's share of assessments allocated to their unit by the commonhold community statement (Clarke, 2004: para 22[5]). This latter assumption seems justified. As long as the commonhold association continues to exist, its scheme constitution continues to apply to regulate the maximum percentage share of any additional assessments or claims for reserve fund levies (Model CCS Annex 3 paras 1 and 2).

Although the winding-up of a commonhold association is not likely to be a particularly frequent event, the risk of potentially unlimited liability to creditors in the event of an insolvency of the commonhold association might deter some purchasers of commonhold units, especially if they thought that they would be better off under the rules applying to long lessee managed schemes, however questionable such an assumption might be. While a "rescue" provision (CLRA, 2002, s. 51) envisages the dissolution of an insolvent commonhold association and the creation of a successor association, the making of a succession order can be prevented if the court rules that the making of such an order is inappropriate having regard to the circumstances of the insolvent commonhold association (s. 51(4)). In the absence of authority, this test might not be satisfied if the association is significantly out of funds, and in no position to raise further income or capital on any sensible time-scale, as where some of the unit holders are bankrupt (cf Wong, 2006: 33). It is also likely that, after any rescue order is made, the unit holders, as members of the successor association, would be required to settle any outstanding assessments and debts so as to reimburse scheme creditors out of their own pockets, unless any surplus common parts or land could be sold to raise the necessary cash, a process to which, luckily, the formal prohibition on the distribution to members of assets (2004 Regulations para 72) does not seem to apply, as the making of a rescue order is taken to be part of a winding-up process.

Given the contrast between the position of commonhold unit holders where the association is insolvent and where it a going concern, it is instructive to turn to the position in three other jurisdictions, which rely on a *sui generis* body corporate to provide management services to unit owners, but where the rules appear fairly balanced as between unit holders and scheme creditors. This is primarily because these systems do not contemplate a no-liability rule while the management body is still operating. This aspect has the advantage over commonholds that unit holders in these systems are under an incentive to keep the scheme coffers well supplied with money, so as to ward off any danger of creditors' direct actions, not to mention the ultimate risk of destruc-

tion of the management body and the whole ownership structure with it. These legal regimes, particularly the Scottish and South African, define the nature of the potential financial risks facing unit holders, in a manner which the English commonhold legislation fails to do, perhaps due to the fact that it relies on general company law to regulate the position.

COMPARISONS WITH GERMAN, SCOTTISH AND SOUTH AFRICAN LAW

Following a ruling of the *Bundesgesetzhof* (BGH, NJW 2005: 2061; and also *Wohnungseigentumsgesetz* 1951 § 10 Abs.6 inserted by *WEG-Novelle* 2007) the *Wohnungseigentümergemeinschaft* is regarded a *sui generis* institution (Abramenko, 2006: pp. 409–411; Maroldt, 2005: p. 363). It thus has an independent capacity to contract with third parties, and can incur debts with contractors on behalf of the unit holders. So far there is a resemblance with the position in England, although this position has only been arrived at recently. However, German unit holders of a solvent body corporate are subject to direct liability for unpaid debts arising when they hold their unit to satisfy such debts, but only, as from 30th June 2007[2], up the value of the registered quota share attached to their unit. The limit is justified (Derleder, Fauser, 2007: p. 2) because no one unit holder should be at risk of being overburdened and threatened with potential financial ruin.

The German limited liability rule (which reverses an earlier no liability principle: see Briesemeister, 2007: 226) confers an independent liability, so that a creditor can evidently make a direct claim against one or more current unit holder's personal funds up to the limit imposed by their registered quota share without, it seems, having first to claim against those of the community (Niedenführ et. al., p. 119). If a similar rule were adopted in England, care would have to be taken to avoid the whole of a debt, say an unpaid repairs bill to the roof of the scheme building, being claimed against just one current unit holder, even if they had paid their assessments to date, as there is no more reason why diligent English unit holders should prop up non-compliant ones than is the case with their German counterparts.

German unit holders are also under a duty (see *WEG* 1951 § 21) to ensure the orderly management of the scheme and thus to keep the management body in sufficient funds to comply with its obligations (Niedenführ et.al., pp. 262 and 267). As a result the body corporate can demand advance payment of annual charges, (Wenzel, 2006: p. 2) which would aim to reduce the likelihood of direct claims against individual unit holders, since the whole sum due can then be claimed by the third party from scheme funds, not a limited sum from each unit holder up their quota share. The current rule in England, arising only if the commonhold is insolvent, fails to address the risk that unit holders are under no formal incentive to supply sufficient funds to the association, thanks to the seductive effect of the guarantee limit. If they fail to supply sufficient funds, as where directors fail over some time to set assessments at a sufficiently high level to cover their actual and anticipated expenditure on services, the current unit holders or their successors in title at some stage face potentially crippling levies from a liquidator, acting solely for the creditors, to cover the payment of sums for maintenance and the like owed by a now penniless association. There is nothing to stop such a levy

[2] Thanks to WEG 1951 art. 10 Abs 8 as amended by the WE *Novelle* of 2007.

being made on only some rather than all of the current unit holders even though none of them can be forced to pay more than their allotted percentage of any extra assessments. Perhaps due to a legislative omission, English law recognises no duty on unit holders to supply their scheme with sufficient funds to avoid the management body being out of funds while a going concern, which would seem to be a logical counterpart of the guarantee shield.

English law also fails to address the unresolved issue of whether any unit holder should have to cover the liability of any other unit holder even where the claim on the first-mentioned person falls within their percentage share of assessments. Take a small scheme with four units. One unit holder has failed to pay assessments for some time. They are now bankrupt. To stave off a possible winding-up, the three diligent unit holders could face, in a special assessment by the current directors, having to cover at least some of the share of the bankrupt, as where the total claimed falls mathematically within the percentage share of assessments of these unit holders, and in any case to avert winding up they may opt voluntarily to pay up the excess sums. Incidentally this aspect emphasises the unfortunate absence of any right by the commonhold association to place a charge and ultimately to sell the unit of a defaulting unit holder so as to recoup some of its losses.

The Scottish Development Management Scheme Regulations 2009 No 729 supply an attractive reform model. They make use of a *sui generis* body corporate, called the owners' association (Schedule 1 Part 2, para 2.2) adopting a method originally proposed for English law (Commonhold: Freehold Flats, 1987: para 8.12). If Scottish contractors are unpaid, they have a statutory right of direct recourse against unit owners, but, as in Germany, only up to the proportion of the service charge attributable to each unit holder. Direct recourse is also possible only if due diligence has been used by the creditor to recover the payment from the owners' association, following a court order, although this requirement does not apply if the unpaid creditor proves that the association does not appear to have any assets which could be reasonably recovered against (2009 Regulations, Part 4: paras 12(2) and (3) and 13). A claim can be made direct by a creditor where the owner's association is solvent, in contrast to the position in England. The Scottish rule is narrower than the German, where unpaid creditors can bring a direct claim against any unit holder's personal funds, up to the limit of their quota share, without, it seems, their first having attempted to secure satisfaction from the body corporate or having to provide proof that payment out of its funds is not reasonably likely to be forthcoming. For these reasons the Scottish approach seems preferable as far as English law is concerned, especially for any unit holders with larger quota share or percentage allocations to cover, and because it applies to both solvent and insolvent associations alike, and further in that the Scottish rules set out the circumstances in which a direct claim can be made, with proper safeguards for individual unit holders.

Thanks to the Sectional Titles Act No 95 of 1986, section 47(1), the position in South Africa is similar to that in Scotland as reformed in 2009, reinforcing doubts about the position in England. An unsatisfied judgment creditor of the body corporate has a right of direct recourse to sectional title owners' funds on a *pro rata* basis in proportion to their respective quota shares – and to that end such a creditor will apply to have the owner joined to the action against the body corporate. Direct recourse is thus only possible as part of recovery proceedings for an ascertained debt. However, an important protection for diligent owners lies in the fact that any sectional title holder who has paid their contributions in respect of the same debt prior to the judgment cannot be joined

as a joint judgment debtor in a recovery action by a judgment creditor (thanks to the 1986 Act, section 47(1) proviso). South African law is no more prepared than the other non-English systems noted to penalise diligent owners by having to make up the financial deficiencies of any other owners – any other rule could be seen as manifestly unfair.

ASSESSMENT

The financial risks to commonhold unit holders for management body debts could justify the fact that assessments are required to be set by directors without any formal recourse to an owners' meeting – the directors need only carry out routine consultations with unit holders (Model CCS, paras 4.2.1–4.2.4). The risks to any unit holder's personal funds entailed in the potentially unlimited exposure in the event of insolvency to any unpaid suppliers' claims (not just judgment creditors as in South Africa) may induce some directors of commonhold associations to set assessments at a high level. This could lead to complaints of overcharging by some unit holders, such as had been detected under the long lease system (Hawkins, 1986: p. 13). For this reason it is disappointing that a restricted liability principle for solvent associations was not adopted in England.

The UK Parliament could have enacted that individual unit holders in an association which is a going concern could be exposed to an unpaid creditor's direct action for unpaid scheme debts, but only if the claimant, holding a court order, had failed, following due diligence, to recover these from the commonhold association in proceedings, unless they proved that the result of such would be fruitless. An explicit limit on the sum to be recovered against any one unit holder to the proportion of the unpaid sum corresponding to the percentage of the assessments each unit holder could be required to pay could be formally set out in legislation, for the sake of clarity. This could be coupled with a further provision that no unit holder could be required, whether the association is solvent or not, to pay any sums to or on account of a third party judgment creditor to make up any financial deficiencies due to the defaults of any other current unit holder, provided the unit holder concerned had duly complied with their financial obligations to date. The fact that there might have to be several defendants to a creditors' direct action should render it an instrument of last, not first resort. This approach seems to strike a fairer balance between the level of risk cast on individual unit holders and the claims of suppliers of services than the current rules achieve. The fact that third party creditors are likely to have more resources than the unit holders (as recognised by the Scottish Law Commission, 1998: para 6.49) also points in favour of a restricted liability rule.

III. FURTHER PROBLEMS WITH COMMONHOLD

PRELIMINARY

Sections 1 and 12 of the Commonhold Act 2002 set out the nature of the ownership conferred on unit holders: they are freehold owners of their units. By section 25 of the 2002 Act and regulation 9 of the 2004 Regulations the commonhold association owns all exterior and structural parts of the building and the common areas of the development.

Developers must prepare a standard-form scheme constitution, called the commonhold community statement. The commonhold association must be constituted as from

registration. The developer applies for registration of the land as commonhold land (as required by the Commonhold Act 2002 section 2). Having checked his application and the attached plans for accuracy, the Land Registry will register the developer with an absolute freehold title (under section 9(1)(a) of the Land Registration Act 2002). The developer will commence sales of units, and on completion of each transfer, the unit purchaser is registered with an absolute freehold title (thanks to section 12 of the Commonhold Act 2002). As from the sale of the first unit, the commonhold association comes into being, thanks to section 7(3)(a) of the Commonhold Act 2002, the object being to ensure that, from the outset, there is a scheme management body for the commonhold concerned. All of this makes good sense but two potential problems arise.

SALES OFF PLAN

So as to encourage developers to make use of commonhold, there is nothing to prevent them from selling units in a building which exists on paper, or "off plan". Sales of this kind carry risks. If a developer, having reserved the right to do so under section 58 of the 2002 Act, fails to complete service provision as described in the plans, as by not providing originally specified garden areas or tennis courts, unit purchasers could end up obtaining units paid for at a potentially high price yet with less extensive facilities when compared to the level envisaged in the plans. In addition, if the developer becomes insolvent, purchasers risk losing the funds they have sunk in their unit purchase, or at least their deposits, if they have not at this stage paid the full purchase price. Thus, the balance of advantage is slanted in favour of developers. The poor take-up rate of commonholds to date suggests that the UK government policy of making life easy for developers has failed to achieve its object.

An idea which could help to protect off-plan commonhold unit purchasers against financial loss is that Irish developers of condominium schemes (which are called "multi-unit developments") must produce to local authorities security bonds to secure against their insolvency, although there is evidence that the sums secured can fall short of those required for complete security (Irish Law Reform Commission, 2006: para 2.32). A similar consumer safeguard might usefully be incorporated into English commonholds. In addition, the commonhold scheme might become more attractive for purchasers of units in developments with more than one building if the law required each planned building to be completed with relevant services in place before any units in it could be sold (as was suggested by Commonhold Freehold Flats, 1987: paras 3.20–3.22). It is regrettable that this useful consumer protection device was not adopted by the UK legislator, seeing there is a rule with a similar aim in South Africa (Alienation of Land Act No 77 of 1981 s 26; see further LAWSA, 2000: para 216). This in essence prevents the receipt by a developer of money for a unit sold off plan before the unit is registrable. The South African rule, by stopping a developer from selling a unit on paper before he has registered it, avoids the risk of loss of a deposit, which an English off-plan unit purchaser has to accept.

MANAGEMENT OF SCHEMES

On the transfer of a unit, the purchaser automatically becomes a member of the commonhold association as from registration as the unit holder (thanks to sections 1(1)

and 34 of the 2002 Act). Similar compulsion in relation to unit holder membership of a scheme body corporate exists in Germany and South Africa (§ 10 of the *WEG* 1951 and section 36(1) of the Sectional Titles Act 1986). This suggests a need to make sure that a permanent management structure is superimposed on the ownership of units. To this extent, at least, the English corporate model has something to commend it. It is also familiar, since it is made use of with regard to lessee-run long lease management bodies. One or two other matters relating to scheme management deserve mention here in re-assessing English law.

QUOTA SHARES

English commonhold adopts a different approach to the mechanics of scheme ownership allocation to those governing the other systems under discussion. German law confers on each unit a quota share which forms an inseparable part of the property or *Sondereigentum* obtained on purchase of a unit (*WEG* §§ 1 Abs 2 and 6). The quota share gives a unit holder co-ownership with other unit holders of the common property (Weitnauer, 2005: p. 39) as well as fixing them with liability for the payment of their proportion of the scheme charges. Special ownership of units and quota-share co-ownership of the common parts also ties all units formally to the land supporting the building, overcoming the effects of the *superficies* rule. Ownership of the common parts of a commonhold scheme is withheld from English unit holders (Regulations 2004, reg 9). This method is unusual, as shown by the fact that it is as much alien to the French as it is to the German system[3]. The French *loi* of 10th July 1965, by articles 1 and 4, confers a quota share on unit or *lot* holders in the scheme common parts so that the unit holders are co-owners owners (*indivision forcée*) of these.

The English method of dealing with the common areas was borrowed from long leaseholds. This aspect reflects tradition, and there appears to be no need to replace it, especially since, thanks to section 205(1)(ix) of the Law of Property Act 1925, any buildings on land form part of the land itself.

However, whether one uses quota share allocation or not, both South Africa and England have provided special rules designed to protect the stability of apartment ownership schemes. In South Africa, at common law, a co-owner of a share in the common property can deal with their share separately from the other co-owners, and can demand partition, breaking up the co-ownership (Silberberg *et. al*., 2006: p. 135). Under the Sectional Titles Act 1986 there are rules requiring that a sectional titles scheme can only be dissolved following the procedure set out in sections 48 and 49. These, in essence, require a unanimous resolution of the body corporate of the sectional titles development or an order of court (see Van der Merwe 16-5 to 16-9). No member of the commonhold association can, similarly, procure the dissolution of the commonhold association and the resultant termination of the commonhold. A voluntary winding-up procedure must be used under CLRA 2002 sections 41–45) which requires at least 80 per cent of association members to vote in favour of an appropriate resolution.

[3] Not to mention South Africa (Sectional Titles Act No 95 of 1986 ss 1 and 32).

EXTENT OF OWNERSHIP

Although commonhold unit holders have no property in the common parts, they control the use and management of these parts through their votes at commonhold association meetings. If there are units of unequal size in a scheme, the developer may, thanks to Model CCS Annex 3, vary the default one vote per unit allocation attached to units so that larger units have more votes than smaller ones, so giving flexibility and also some recognition to the heavier burden of costs falling on larger as opposed to smaller units. There can, however, only be one management association for the whole of a multi-building scheme, with no provision (Baker, Fenn: 2005, p. 17) for sub-associations for each building, even though the needs and character of each building may sometimes differ. This appears to be a further, if relatively minor, *lacuna* in the commonhold system which needs re-consideration.

A useful aspect of commonhold relates to the quality of the ownership of units. They are registered freehold units, and so of indefinite potential duration. A freehold has psychological attractions to unit holders, when compared to long leases, yet developers remain wedded to the long lease system, because they can keep the freehold, which can later be sold at a profit. Long leaseholders are able to buy out the freeholder[4], but must pay him a potentially heavy premium for the freehold interest, whose amount will increase with every year by which the existing leases diminish. It is the freehold aspect of commonhold unit ownership in the English context which had the potential to make this form of property ownership attractive.

IV. OWNERSHIP DELINEATION

COMMON AND OTHER PROPERTY

In relation to commonholds, it was thought important to delineate those areas of the development which fall within the property conferred on the unit holders and those which are within the property of the management company. In this way, the respective liabilities of each to carry out repairs and maintenance could be allotted. Standardisation of documentation has been adopted, so as to combat the variable quality of the drafting of long leases. Standardisation was advocated from the first days of the reform process (Commonhold: Freehold Flats, 1987: para 1.23). The policy should make the transfer of units cheaper than was the case with long leaseholds, where leases of units have to be inspected for special features such as a right in the landlord to enter units and charge unit holders with the cost of repairs carried out on them. Standardisation of scheme documentation is beneficial, if only as a cost-saving measure. A purchaser of a unit in Devon and their counterpart in Cumbria will both be spared detailed and time-consuming inquiries as to differences between the two schemes, save on minor points of detail such as the rate of interest laid down in a "local rule" on assessments in default (Model CCS, Annex 4).

The method adopted to define the respective property in the commonhold association and in unit holders is negative. The legislator refers to what must be excluded from

[4] Under Leasehold Reform, Housing and Urban Development Act 1993 Part I.

the unit, not to that which is to fall within it. The structure and exterior of the building containing the units must thus be excluded from the definition in the commonhold community statement of the units, thanks to regulation 9(1)(a) of the Commonhold Regulations 2004. The expression "structure and exterior" is not defined, so that the English courts might have to make use of the common law. On this basis, the "structure" of the building comprises "those elements of the overall [building] which give it its essential appearance, stability and shape"[5]. Any room for argument about which parts of the property should be structural is reduced by the principle that any element not essential to its construction would not be structural. With regard to the exterior, any part of the building which faces outwards such as the outward face of windows, doors and roof structures would seem to fall within this category, with the inclusion of outward staircases. The uncertainties inherent in the English definitional approach may be contrasted with two approaches in Scotland.

The first approach is minimalist, and applies to schemes within the Tenements (Scotland) Act 2004 (as discussed by Reid, 2007: pp. 147–172). This legislation applies to the extent that any scheme title deeds[6] do not govern the tenement in question. It tidies up anomalies and uncertainties in the existing law. Thus, thanks to section 2(1) of the 2004 Act, the boundary between two adjoining tenements is defined as the median of the structure that separates them. The top floor flat still extends to the roof over the flat, and a bottom floor flat, thanks to section 2(3) and (4) of the Act, includes the *solum* under that flat. Schedule 1 Rule 1 to the 2004 Act also provides a set of management rules for tenement property which, although owned by each tenement owner, is taken for statutory purposes to fall within "scheme property". This definition is made use of in Rules 2 and 3 to set out what parts of the tenement are subject to scheme decisions of the owners with regard to maintenance and repair. As noted (Xu, 2010: pp. 251–254), the 2004 Act separates questions of property ownership and management. In this respect, it operates differently to commonhold, which vests ownership of the parts of the development which the owners' association is liable to maintain in the commonhold association.

By contrast, the recent Development Management Scheme Rules (SI 2009 No 789, notably regulation 20) list the property which is held by the owners' association. "Scheme property" includes all common property of the owners of two or more units, and the ground on which the building is built, not to mention its foundations, external walls and roof. Units include any door, window or skylight. It has proved possible to list the key elements of what is meant by "structure and exterior" and so it is arguable that this method of definition could profitably be made use of in England, so as to reduce the scope of disputes as to the boundary between unit holder's and common property.

PROPERTY WITHIN UNITS

The fact that a commonhold unit holder is conferred a statutory freehold title to their unit on registration is a qualitative improvement on the long lease system. With a view to promoting the process of unit purchases, the physical extent of each commonhold

[5] *Irvine* v *Moran* [1991] 1 EGLR 261, p 262F-H.

[6] Title deeds impose burdens on tenement owners as to maintenance of the tenement building (Robertson, 2010: p. 38).

unit must, under section 11(3)(a) of the 2002 Act, be referred to in a plan. Any property not within the units will be treated as within the common parts and so it will fall within the maintenance, repairing and insurance obligations of the commonhold association. Pipes, cables and other fixed installations serving more than one unit are treated as within the property of the commonhold association (Guidance, 2004: paras 40–46). Provision is made for areas, such as storage areas and garages, which are located outside the main building, to be registered with a separate freehold title. These rules are flexible, and permit such a unit to include the structure and exterior of such units (regulation 9(1)(a) of the 2004 Regulations) whereupon they can be repaired, maintained and insured separately by the unit holders and not the management body.

All in all, although there are some small defects in the English method of demarcating which parts of the property in a commonhold belong to the unit holders and which to the management body, the results of the use of these methods are satisfactory. The method used should be familiar to developers who have experience of the long lease system, where similar demarcation methods are in use. For reasons given earlier, only minor adjustments to these rules appear to be called for, most usefully along the lines of the most recent set of statutory rules in Scotland.

V. LIMITS ON POWERS OF UNIT HOLDERS

In recognition of the fact that condominium owners live in close physical proximity, so that the arrival of an undesirable person into the community may be unwelcome, some condominium legislation places limits on the powers of unit holders to deal as they think fit with their unit, in the common interest. The question arises as to whether any such rules are suitable for export to English law.

SALES OF UNITS

Commonhold was described in clause 1(1) of the Commonhold Draft Bill (1996, Lord Chancellor's Department) as a "new kind of freehold with special statutory attributes". This approach could justify measures limiting the absolute right of unit holders to sell units, such as a legislative rule requiring them to offer a first refusal at the market price to any other member of the scheme, before disposing of the unit elsewhere. However, any limit on the right of disposal would come up against the fact that, as said in *Re Brown*[7], the "instinct of every equity lawyer" is hostile to any restraints on alienation of freehold land. Section 15(2) of the 2002 Act reflects this tradition by negating any term in a commonhold community statement preventing or restricting the transfer of a unit, so ruling out the inclusion in any scheme rules of a right of first refusal. This approach could deprive the members of a small scheme of one method of preserving its character and harmony by precluding access on the part of potentially financially risky or troublemaking individuals. The requirement on any purchaser to pay a market price for the unit would cause no financial loss to the selling unit holder. The potential arrival in a scheme of a troublemaker or person without sufficient funds to pay assessments could also be met by a rule empowering the manager or commonhold di-

[7] [1954] Ch 39 at p 43 (Harman J).

rectors to refuse consent to the sale of a unit to any person, on an important ground, such as their poor financial state, as may be provided for by any German scheme constitution or *Gemeinschaftsordnung* (WEG 1951, § 12). Such a limit, which is currently not present in England, might be useful to smaller communities, where the financial strength and personal qualities of unit holders can affect the value of units (see Riecke, Schmid, 2008: p. 389). This looks like an area where the traditional common law absolute freedom of disposition of a freeholder requires revision in the light of the financially interdependent nature of apartment ownership.

REMEDIES FOR DEFAULT IN PAYMENT OF ASSESSMENTS

If a unit holder defaults in payment of charges or assessments to a significant extent, this can either risk casting an additional financial burden on all other unit holders, or lead to a diminution in the flow of money into the scheme coffers. Assessments may form the primary source of funds for the commonhold association. In England, this thorny issue is addressed as follows. The commonhold directors can bring a personal action to claim arrears against the defaulter, assuming friendly persuasion has failed: they can attempt mediation within an internal disputes procedure. Exceptionally, as such a dispute relates to financial matters, which are recognised as more serious than, say, disputes over keeping a persistently barking dog or too many cats in a unit, the association is not bound to make use of statutory informal dispute resolution procedures (thanks to Model CCS, para 4.11.11) If the unit is being sold, following a notice procedure, the new registered proprietor of the unit can be rendered personally liable, within 14 days of service of a claim notice by the association for unpaid assessments owed by the former unit holder. If the former unit holder requests a certificate from the association, stating the amount of arrears due, it cannot claim more than this sum from the new registered proprietor (Model CCS, paras 4.7.3–4.7.7). To penalise those in arrears, the local rules section of the model commonhold community statement (Annex 4 rule 1) enables a commonhold association to charge interest on unpaid assessments to the current registered unit proprietor, but no provision is made for levying fines or similar penalties on overdue assessments. It is also thought that a charging order could be obtained by a commonhold association on the unit of a defaulting unit holder for unpaid assessments due from them (under Charging Orders Act 1979, s. 1) but as has been pointed out (Crabb, 2002: p. 208) this would not have priority to any prior legal mortage over the unit.

Despite this array of personal remedies, there is no provision for a real remedy against the unit holder's unit, such as exists in France. There, thanks to article 19-1 of the 1965 Law, a lien (or *privilège immobilier*) is imposed so as to recover unpaid assessments in favour of the body corporate, triggered on the sale of the unit, and conferring a preferential claim as against the seller and any lender for the current year and the two previous years, attaching to the sale price. There is also no mechanism, such as under section 15B(3)(a)(i)(aa) of the South African Sectional Titles Act 1986, requiring their land registry to block a unit transfer, pending repayment by the defaulting sectional title owner of certified outstanding levy arrears to the management body. This remedy may, however, be of little use where substantial sums are owed to a mortgage bond holder by the owner in question and they do not have sufficient additional funds after the sale to cover the arrears (van der Merwe, 2007: p. 9-8).

The real remedy remedial *lacuna* in English law is surprising, because recommendations were on to address the problem, as by the conferral of a legal first priority lien on the commonhold body to secure all arrears of unpaid assessments (Commonhold: Freehold Flats, 1987: paras 9.27–9.30), which would have been triggered by default, and not just on a unit sale, so going further than the rule in both France and South Africa. The enforcement of such a lien, perhaps in priority to any mortgage lender, would ultimately have entailed a sale of the unit.

Such a drastic remedy can be justified because the community of apartment owners is seen as permanent. Each unit holder in an indissoluble community depends on the others to pay their dues promptly in the interests of good management of the scheme (see further Riecke, Schmid, 2008: p. 609). Section 31(8) of the Commonhold Act 2002, in outlawing from the commonhold constitution any remedy akin to forfeiture of leases, inaccurately treats statutory liens as equivalent to lease forfeiture, whose effect, if ordered, is to destroy the lease in question. A statutory lien could cover only unpaid arrears of assessments and need not necessarily confer priority over any mortgagee beyond a certain period, say the last six months of unpaid assessments. While any lien would have to be enforced by a sale of the unit, any surplus moneys not owed to the body corporate or to a mortgage lender would, one presumes, belong to the former unit holder, as also appears to be the position in Germany, when a forced disposal and on default of that sale by auction of a unit takes place (*WEG* §§ 18 and 19; see further Weinauer, 2005: pp. 417–427). In any case, the unit holder would not, unless heavily in debt to a mortgage creditor, face losing the whole value of their investment in the unit, as happens where an English long lease is forfeited with relief being refused[8]. The absence of a statutory lien in favour of the commonhold association to secure unpaid assessments is a serious if not lethal flaw in the commonhold legislation, since assessments are the life blood of condominiums, and it is something meriting urgent re-examination in the light of experience elsewhere.

LEASES OF UNITS

A prohibition is imposed, (regulation 11 of the Commonhold Regulations and para 4.7.11 of the Model CCS) on the granting of a lease of the whole or part of commonhold residential unit for a term exceeding seven years. This could be defended in that, in a community of apartment owners, active participation by unit holders in management is desirable (Commonhold: Freehold Flats, 1987: para 1.21). If a unit holder could let their unit for a long term, this policy could be frustrated. The rule, however, suffers from a number of defects whose cumulative effect is to discredit it. A limit on the maximum length of leases of units is not encountered in Germany (see Weinauer, 2005: p. 307 referring to *Veräußerung*) or South Africa, where section 15B(1)(b) of the Sectional Titles Act 1986 simply requires a notarial lease to be registered in the sectional titles register. These aspects suggest that it is unusual formally to restrict the common law power of a commonhold residential unit holder to lease their unit. Without wishing to re-visit the issue in any detail (see further Smith, [2004]: 200–206) the following points may be of interest.

[8] As in *Di Palma v Victoria Square Property Ltd* [1986] Ch 150, where a long lease of a flat was forfeited on account of some £300 in service charge arrears.

It would be of concern to a commonhold association if the rent reserved under a lease of a residential unit were less than that of the market, given that an absentee unit holder's ability to pay assessments can depend on the rent received. Sufficiency of assessment flows can be helped by banning the taking of lump sums or "premiums" on the granting of a lease, preventing most of the rent from being taken at the outset, as has been catered for in regulation 11(1)(a) of the Commonhold Regulations 2004. A right of veto, on reasonable grounds by a scheme manager, on any proposed letting of a unit might enable financially weak potential tenants to be excluded. The letting limit also fails to address cases where a unit holder grants a tenancy for a week or other short period to a person who has no real interest in the community. While no doubt the local rules of any one commonhold can deal with the latter aspect, some general provision might need to be made in the commonhold legislation to ban or restrict such lettings, as such tenants may be more of a problem to the community than a long lessee, who may well have a stake in the well-being of the community. This latter aspect is recognised in France, where, under article 32 of the Law No 84-595 of 12th July 1984, tenants under a lease enabling them to commence acquiring ownership in their unit (*location-accession*) have the right to attend owners' meetings and to vote on maintenance budgets. In order to meet legitimate concerns about too many leases in a commonhold scheme, the English legislator could have borrowed from South Africa, where scheme rules can validly state that only a given proportion of sections can be let any one time (van der Merwe, 2007: p. 10–19).

The fixed limit on the maximum length of leases which can validly be granted over English residential units was inadequately thought out, due to a narrow focus on the issue of lease length, rather than on wider aspects of the relationship between freehold and leasehold in a commonhold. The rule allows residential unit holders to lease their units at any rent, however low, and to a known troublemaker or someone who is not financially reliable, such as a relative of the unit holder, provided the lease does not exceed the prescribed limit and due notice is given to the management body. The rule seems to need some re-casting so as to make commonhold a more attractive form of property investment. After all, experience in South Africa suggests that some owners let their units, having bought them for the purpose of investment (LAWSA, 2000: p. 128). There is no reason to think the position different in England.

The English lease rules could for example be revised to raise the maximum permitted lease length of a residential unit to 21 years certain, giving lessees a substantial stake in the scheme and so inducing responsible behaviour on their part. In addition, leases would have to be granted at a market rent, so that if the rent has to be intercepted by the commonhold association on default in payment of the unit holder's assessments (as envisaged by Model CCS para 4.2.18), there should be a substantial sum to recover. The granting of short term leases (say for less than one year certain) and any licences of residential units should be formally banned.

VI. CONCLUSION

There is no reason why commonhold should not become an established part of the English property landscape, because condominium can be popular. The institution re-

sponds to the aspiration of many for affordable freehold ownership. A number of defects have been noted with the English scheme which it is argued require to be addressed.

A serious problem relates to the financial risks inherent in corporate model chosen for commonhold associations. The maximum £1 limit on unit holder's liability as a shareholder while the association is solvent, if only just, may be deceptive if the association runs out of funds and faces insolvency proceedings at the hands of its unpaid creditors. This nominal limit on liability seems not to, and anyway should not, protect a unit holder from personal liability to contribute to extra assessments for unsatisfied scheme debts levied by the liquidator either if the scheme is being wound up, or as a condition of its being rescued. A general principle of restricted liability to unpaid creditors should be considered, applying while the commonhold is a going concern, as a deterrent to failing to pay assessments in sufficient amounts or at all. Unit holders can be warned when thinking of buying a unit of the risk to their own funds if things go wrong, but with the nature of the risk being legislatively defined and subject to the safeguards mentioned, notably, that of due diligence by claimant creditors if the association.

The hostility of the English legislation to remedies resembling forfeiture has entailed that there are no effective real remedies to hand to a commonhold association to secure the recovery of arrears of assessments, such as a priority lien or a sale blocking mechanism operating against the unit concerned. The contrast with the other systems noted is glaring. The current English hostility to the forced sale of unit on the ground of serious or persistent non-payment of assessments needs to be overcome if the commonhold association is to have a suitably graduated range of remedies at its disposal, ranging from friendly persuasion to a forced unit sale, to secure the flow of money into its coffers. The then UK government failed to appreciate that condominium ownership is special ownership, if only due to the high level of financial interdependence of unit holders. A persistent failure to pay assessments by any unit holder can put the finances of the body corporate at risk, unless the other unit holders are willing to make up any deficits caused by the persistent defaulter, which it is unfair to expect them to do, but that may be the end result of the current position. If the guarantee principle referred to earlier is retained, this re-enforces the need for a battery of effective real remedies to force the hand of persistently defaulting unit holders.

The ban on granting a lease of a residential unit for over seven years is a questionable limit on the freedom of disposition of English unit holders. Short-term tenancies for as little as one week or month can still be granted by any unit holder, unless an individual commonhold community statement plainly rules this out. Tenants holding under this type of tenancy may be disruptive of the peace and quiet of a commonhold and are also likely to be a rapidly fluctuating element in a permanent community, risking tensions within it. There is at present nothing to prevent short-length tenancies being granted by any number of unit holders, so allowing them to transform the nature of a commonhold from a quiet residential freehold-based scheme to a mixed freehold and lease development, which aspect the ban on leases for over seven years of residential units was supposed to preclude. The fourteen-day notification procedure, which is required from the unit holder to the commonhold association from the date a tenancy is granted (Model CCS para 4.7.15) does not apply, possibly thanks to an oversight, to licences, which are an alternative form of agreement for short-term occupation. The ban on granting longer leases may reflect a wish to separate long leases and commonhold (as implied by section 3(1)(b) of the 2002 Act) with insufficient appre-

ciation of the problems which may arise as the result of short-term residential lettings for purposes which may conflict with the long-term character of a residential commonhold scheme, into which unit holders may have bought on the faith of its original character being maintained.

There are many attractive aspects to the commonhold model. Superseding the long lease system is an appealing idea, given the short length of English long leases and the poor management standards often associated with this form of condominium. The manner in which the English legislation approaches the delineation of common and unit holders' property and its rules bringing into existence the scheme management body at an early stage compares well with the other systems under review. The allocation of ownership of the structure and exterior of the scheme building to the commonhold association spares English law technical problems associated with quota share allocation (see van der Merwe, 2007: pp 4.11–4.18). The conferral of registered freehold ownership on unit holders, combined with membership of a management body corporate with separate legal personality to the unit holder, is an essential feature, in the interests of the stability and continuity of commonhold governance. However, the problems which have been unearthed with the institution suggest that further work needs to be done, almost certainly in the form of amending legislation, before commonhold can take its place as a preferred, or attractive means to the long lease system of holding condominiums in England.

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PUBLIC INTEREST AS A PREREQUISITE FOR REMISSION OF TAX OBLIGATIONS

The law of the 29th August 1997 Tax Regulations (1; hereafter: regulations) stipulates a few simplifications, following the example of the law of the 19th December 1980 about tax obligations (2), taking into account, however, the term from chapter 7a – "of tax allowance in the repayment of tax obligations". The expression used in the heading of the chapter constitutes a novelty in relation to the regulations binding before the date of coming into force of the amending of the regulations of the 30th June, 2005 – i.e. before the 1st September 2005 (3,4, p. 461). The regulations of the article 67a inserted in that chapter as well as the regulations that follow, should not thus be associated with the term "allowance' in the sense imposed to it by the regulation of the article 3, pt 6 of the law. "Repayment", of which it is said in the name of the chapter, if to seek for similarities, is rather closer to regulations included in the regulations of the article 204, paragraph 1, as well as 210, paragraph 5, sentence two of the regulations (4, p. 462).

Wording of the regulation of the article 67a, paragraph 1 of the regulations justifies, however, the statement, that the objective allowance are legal solutions introduced with that regulation,the use of which results in either a shift in time of tax payment in relation to the generally binding final date for performance or an extinction of the obligation together with possible default interests (4, p. 462).

The content of the appointed regulation allows to quantify the following simplifications in the repayment of tax obligations:

- adjournment of the final date of tax performance
- allowing tax to be paid by instalments
- adjournment of the payment of tax arrears together with interests for delay
- allowing tax arrears to be paid by instalments together with interests for delay
- adjournment of payment of interests stated in the decision,of which it is said in article 53a of the regulations, or allowing the payment of them to be paid by instalments,
- remission of the total or a part of the tax arrears, together with the interests for delay
- remission of the total or a part of interests for delay which are specified in the decision, of which it is said in article 53a of the regulations,
- remission of the total or a part of the prolongation fee.

Not going into details of an analysis of the core and legal tax consequences of the legal solutions in question, which would surpass the frames of issues within the subject of the present work, it is necessary to agree with the view determined in the literature on the subject, that there is a common feature for that type of solutions. Namely, they all cause modification of the individual situation of a taxpayer regards the realization of tax obligation (as well as the other subjects, obliged to pay tax i.e. taxpayers, collec-

tors, successors in right, heirs and third parties) in such way that it diverges from general rules of tax obligations performance (4, p. 462), with the reservation, however, that the remission does not lead to discharging the tax (delay interests prolongation fee), but causes its expiration. From the point of view of the regulation of the article 59 of the regulations such consequence allows to qualify remission as one of the ineffective ways of expiration of tax obligations (5, p. 309).

It is the legal prerequisites which also make the mentioned forms of tax allowance similar and with the prerequisites occurrence, the legislator associates the opportunity of their application, after depositing a formal motion by the obligated person (with the exclusion of remissions applied officially – article 67d of the regulations).

On the ground of the binding wording of the regulations – article 67a paragraph 1, the prerequisites take one of two forms: "the existence of an important interest of a taxpayer" or "the existence of a public interest" – article 22 (6). At this point, it should be noticed,that also the regulations of the law about tax obligations, in the article 31 provided for a possibility of remission of tax arrears as well as the interests for delay, referring to general prerequisites. The remission was thus admissible on the basis of the decision of the tax organ in economically" or "socially" justified cases. The lack of "clarity" in formulating the contents of the mentioned prerequisites forced their quantification in the process of investigating every individual motion (7, p. 47; 8, p. 29).

The subject of considerations taken up in the present work is the second of the mentioned prerequisites the one justifying the application of allowance in the form of remission, i.e. "the existence of public interest". At least, a few arguments weigh in favor of the advisability of undertaking an analysis of the issue. One of the most important of them is the fact, that the institution of remission constitutes a unique reproduction of institution applied in the legal and civil turnover – amortization of a debt (9, p. 71). Moreover, as it has been signalized above, it differs from the remaining reductions,determined by the regulation of the article 67a as well the legal solution introduced by the article 22 of the regulations in the consequence of application,i.e. it is not going to ensure payment of tax performance, i.e. its effective performance, but results in the extinction of debt,though its emergence constitutes the consequence of proper application of the regulations of tax law – articles 51 and 57 of the regulations.

The editing of the regulation of the article 67a paragraph 1 seems to convince also, that the aim of the legislator was to introduce a rule, that the tax organ, making decisions about the remission or rejection of the remission should take into consideration the taxpayer interest, the public interest or both prerequisites inclusively (5, p. 255). This, however might raise a doubt, if the subject regulation does not introduce simultaneously "a competition of prerequisites" preferring one of them. For instance, does the editing of the regulation not justify the statement, that the tax organs, settling motions for remissions. ought not to refer to the prerequisites of an important taxpayer interest only when it does not collide with the public interest.

In the opinion of the author such a view does not find any bases because the linguistic interpretation of the regulation weighs against it, particularly the use of the legislator of the expression "or". Such an argumentation finds support in the literature on the subject, though it should be underlined, that the attributing by the tax organ more importance to public interest in a concrete case can not be excluded, however it should always be unequivocal and convincingly justified (4, p. 471; 10; 11, p. 2).

On the other hand, the semantic areas attributed to the legal prerequisites for remission must lead to a conclusion, that there are serious differences in between them. The most important one constitutes the consequence of the fact that the taxpayer interest is always an individual interest and is limited only to the taxpayer himself. Public interest is a general interest i.e. regards financial situation of a greater group of subjects (12, p. 25).

Decisions of tax organs regards remission or refusal of remission of tax arrears, interests for delay as well as prolongation fees similarly to decisions regards the remaining allowance in tax obligations payment refer to "administrative approval". This signifies, that in the cases of procedures including the participation of these organs, they have at their disposal the possibility of making a choice of legal consequences of the ensuing situation (the found actual state), to which the legal tax norm hypothesis is referred to (4, p. 464).

It should be underlined, that, yet on the ground of the appointed regulation of the article 31 of the law about tax obligations, the vagueness of the lawyers' language regarding the determination of the prerequisites for remission, was justified with the necessity of leaving the tax organ applying the law, a specific " interpretation space". In practice, that was to mean, that in a particular situation the organ was equipped with a possibility of taking into account the specificity of a given case for the aim of settling, but also determined about the fact that, the legislator, using vague notions shifted the burden and the right to make a decision onto the organ. Assumed in advance, a positive evaluation of such practice constituted in turn a consequence of the assumption that, the vagueness of prerequisites should foster the adaptation of law to changing evaluations, referring to particular cases, without the necessity of changes of the binding law (13, p. 163; 14, p. 3).

The basic conclusion, which is suggested by contents of the regulations of article 67a, paragraph 1 of the regulations and the article 31 of the law about tax obligations, leads to a statement, that the tax organ, settling in the case of remission is not obliged to its approval. However, the evaluation made by the tax organ,regards both the question whether there were any legal prerequisites and what their impact on the range of the settled allowance was (total or partial remission). The evaluation is based on the elements of "fairness " nature, getting out of control of the administrative courts (15, p. 274). This position is unanimous with the position of judicature, who generally represents the opinion, that the administrative discretion is not expressed in the freedom of evaluation of existence in actual state of the case, the circumstances corresponding the contents of legal prerequisites, but in the possibility of the settlement of the case, negative for the obligated person, even when there was an important taxpayer interest or a public interest (16; 17, pos. 31; 18, p. 14; 19; 20, p. 47).

The presented view does not signify, obviously, that the administrative discretion on the basis of which the tax organs settle the case, has an unlimited character. Such a view would be in a striking discrepancy with the article 120 of the regulations creating the rule of transparency, but also with the rule of trust for the tax organs as well as convincing the parties – article 121 and 124 of the regulations (21, p. 246; 22, p. 25). In this respect, one should rather concur to the opinion of B. Rutkowski according to whom, the regulations of tax law are resolved by competences of tax organs in a two way manner, i.e. within binding, when the legal norm determines unequivocally the legal consequences of the actual state, forcing an undertaking of activities, as well as,

when the regulations let the tax organs make a choice. Even, however in the latter case the range of competences reserved for tax organs should not be too wide due to the character of tax law (23, p. 27).

The vagueness of the prerequisite " public interest" extorts a multidimensional view of the institution, all the more, that beyond the argument there is its complex character and the way of the interpretation of this prerequisite should be adjusted to circumstances, with the occurrence of which their application is connected (24, p. 701). The ambiguity of the notion " public interest" constitutes the consequence of the fact that, it is frequently associated with national interest, state interest, social or legal interest (25, p. 13).

Summing up that part of considerations, there should be regarded as extremely accurate the view of E. Modliński (26, p. 2), that " public interest" constitutes itself an ambiguous notion and one that is not to be defined by concretes, which fills itself with contents only by juxtaposition with the law of an individual, as a substitute of any community.

A range of concepts differing from one another have been formulated in polish science whose aim is to explain the core of "public interest". And so for instance M. Wyrzykowski believes that it signifies certain tendency towards achieving particular targets, which are to be achieved by the society (27, p. 2 and the next). According to E. Smoktunowicz signifies all that is accordance with law, and which is beneficial for the society as a whole (28, p. 8). Moreover according to J. Łętowski there can not be any public interest, understood as a constant, and depends on the conclusion resulting from the contents of legal regulations a common project circumstances and targets which are to be achieved (29).

In the light of the above, the prerequisite in question should be, similarly to the prerequisite "an important taxpayer interest", treated as a general clause (27, p. 52; 25, p. 13), within which, the tax organ, settling a motion refers also to extra-legal evaluations (30, p. 227), but according to the judicial decisions, that were made in this respect while binding of the law about tax obligations, but preserved its validity in the binding legal regime, this signifies that, the tax organ, referring to the mentioned clause, should indicate the criteria of remission, depending on the circumstances of the particular case, taking into account the moment of making decision about remission (15, p. 273; 20, p. 48). This signifies, that the tax organ basing the settlement on the fact of such prerequisite existence, and the lack of others, does not have a possibility to refer to the absolutely binding legal rules (20, p. 49), including the one, according to which, the public interest might be identified with the protection of fiscal interests of the state. As the result, the motions for the remission can not be settled only or mainly by the prism of defense of budget incomes, which does not change the fact, that this type of allowance constitutes an evident deviation from the rule of universality of tax obligation and should be treated as an exceptional solution (5, p. 247). A different treatment of such directive of proceeding in the cases of remissions,would question the rationality of legal solutions admitted in this respect by the legislator (20, p. 49).

The opinions presented above regarding the possibility of determining general rules, that influence making decisions by tax organs in the cases of remissions can not be, from an objective point of view recognized as inviolable. On the contrary, this view would undergo modification in a situation, if a doctrine or judicature were able to distinguish certain rules of evaluation, referring to values common to whole society, values, the protection and support of which would coincide with the public interest. In other words, values in so far general that, they would have a timeless character.

Directed by such criteria, one should admit, that the court judicature and the doctrine grown up on its base of the financial law have undertaken attempts to catalogue such rules. Quite basic sense in this respect should be attributed to sentences theses of the National Administrative Court of the 12th, Febr., 2003, the III rd Administrative Court 1838/01/31/ as well as of the 6th July 2005, Ist Administrative Court (Bk 134/05/20,49), according to which, the obligation of taking into account the public interest, of which it is spoken in article 67 paragraph 1 (the previous sounding art. 67a paragraph 1) of the regulations signifies the directive of proceeding obliging to have in mind respecting the values common for the whole society, such as justice, safety, trust of citizens for authority organs, ability of action of the state apparatus, or correction of wrong decisions (32, p. 240; 33, p. 148).

As it seems, the indicated directive has found its application in individual court settlements regards motions for remissions or a reproduction in views presented by some representatives of science. To the first category one might undoubtedly number the already passed judgment of the National Administrative Court of the 30th of May 2001, 3rd Administrative Court 830/00 as well as the judgment of National Administrative Court of 31st October, 2000, 3rd Administrative Court 660/99 (20, p. 49). These judicial decisions determine, thus, that " public interest" is not only the need to ensure necessary incomes to the state budget, but also limiting its possible expenses, ex. unemployment allowance, or social care aid (34).

The same group of judgments should include the thesis of the sentence of National Administrative Court of the 24th April 1999, Sa/Sz 850/98 (35; 36), according to which public interest is a situation, when the payment of tax arrears causes the necessity for the taxpayer to for the means of state aid, as he will not be able to fulfill his material needs.

Another type of value of a public character is indicated by thesis of the sentence of National Administrative Court of the 9th of June 2004, III SA 394/03 (37; 38, p. 79; 4, p. 469). Thereby, it is remarked,that in the evaluation of fact of existence or non-existence of the prerequisite of public interest there should be taken into consideration, the rule of proceeding in a way, trustworthy to tax organs. Moreover, one should also consider the ban, resulting from that rule, of loading the taxpayer with consequences of errors and mistakes made by tax organs in the procedures of application of regulations of tax law.

The last of the mentioned factual states has also been perceived by the doctrine, particularly in the shape of the expressed opinion, that the prerequisites of an important interest of taxpayer and public interest occur in situations when the taxpayer adjusted his activities to the contents of tax interpretations issued by appropriate organs in the course of article 14 and the following of the regulations (5, p. 255).

Discussing the point of view of the doctrine regards the application of the prerequisite of public interest as an element of evaluation conditioning the remission of tax obligation there should be underlined the view presented by A.Bartosiewicz and R.Kubacki. Both authors, on the basis of judgment, passed by National Administrative Court, of 16th January 2007, I FSK 477/06 derived and justified the thesis, that public interest can be found also in behaviors aiming at ensuring protection and promotion of rules included in the Constitution of the Republic of Poland (39). Beyond argument is thus the fact, that in a democratic state of law every attempt of realization of constitutional values lies in the public interests. Thus, applying by the tax organ, the competences reserved to it in such a way which might cause the realization of constitutional values by taxpayers themselves, lies in the public interest (20, p. 49).

CONCLUSIONS

Summing up the considerations contained in the present work, it is necessary to admit, that the use of "public interest" as one of the legal prerequisites of the application of allowance in tax obligations payment is justified. This does not change the fact, however, that the prerequisite due to its character is exceptionally ambiguous and not submissive to the attempts of defining. Its application in a considerate and rational way is thus possible only by concretization of individual cases, taking into account simultaneously, the directional targets and values governing the process of tax law application (40, p. 15).

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BOOK REVIEW

KEVIN GRAY AND SUSAN FRANCIS GRAY: *ELEMENTS OF LAND LAW*, 5TH. ED. Oxford University Press, 2009, 1.576 p. ISBN 978-0-19-921972-8, paperback

To a continental lawyer, accustomed to the law of real rights, with its almost clinical sterility and transparency, English land law is a somewhat unnerving experience. The institutions that he has grown used to, like ownership of things and lesser rights, are not perceived in the same way by common law lawyers. Not only is the notion of ownership not a leading concept, but land law does not concern all things, whether movable or immovable. It simply concerns land viewed as a special and unique object of rights. Therefore, a quest into an English land law textbook is often fraught with the need to meticulously search its content in order to find the information needed for comparative studies and to be able to place it in the proper context. This process is difficult due to a different departure point that land law books have when compared to books concerning the law of real rights.

It is, of course, possible to just accept the fact, that the feeling of uneasiness will never go away and that land law textbooks will not provide answers to questions that a continental lawyer is looking for in a foreign legal system. This would be a plausible solution if it weren't for the newest edition of Gray & Gray: *Elements of Land Law*. Although the size of the book and its cover seem to suggest that it is a very comprehensive textbook on land law similar to many others available, even a quick glance at the table of contents proves that such an assumption is unjustified.

The first very noticeable and quite telling element of the table of contents is the title of part three and four of the book, i.e. freehold ownership and leasehold ownership, respectively. Just to see the term ownership mentioned in a land law textbook is shocking, but to actually have it in bold in the table of content is simply unbelievable. Simultaneously, a lot of matters concerning the legal characteristics of freehold and leasehold interests quickly fall into place, since such an approach to these legal estates vividly shows the continental lawyer, that an English lease does not resemble the contractual lease in civil law systems as closely as the term and rules of language translation would suggest. It also becomes clear that both freehold and leasehold are types of ownership, the latter being a term that the continental lawyer can relate to and therefore gain a more precise understanding of the English land law system.

The above are not, however, the only exciting components of the table of contents. Its further examination discloses other very interesting topics such as privacy, access and exclusion (part 10), public regulation of land (part 11), special modes of land acquisition (part 9), which are comfortably discussed alongside typical aspects of land law, such as possession and title (part 2), easements and profits *à prendre* (part 5), security interests in land (part 6), beneficial ownership (part 7), dealings and their effect (part 8). Consequently one is under a very pleasing impression, that finally English land law is somehow shown from a different angle, one that allows for its more complete presentation in a wider, more international context, which results in a better and more comprehensive learning experience.

Land law is discussed not only in terms of its most important institutions such as freehold, leasehold, easements, mortgages and trusts, but also in terms of its connections with certain areas of public law (such as planning, expropriation, environmental concerns) and the law of human rights (protection of human dignity and property). The emerging picture is therefore a means of substituting the usual chaos of legal institutions and their judicial interpretation with a rather intelligible and orderly account of a continuously evolving law concerning land. This evolution is particularly important to appreciate when one considers English law, which has always been distinctly dependent on tradition and practice, rather than a set of imposed, general, theoretical rules, which are then subjected to a test of real life practice.

When reading *Elements of Land Law* it is obvious, that the approach taken by the Authors is unique in the sense, that apart from presenting all the necessary and typical land law information, they include topics which reflect the most contemporary issues concerning property, like ones connected with the function of property, its meaning and new types of property, for example quasi-public property. These new aspects of land law are woven into the discussion of more traditional land law institutions in a way which shows the unity and interdependence of topics that would have once been treated as outside the scope of land law or even outside private law in general.

It would, however, be inappropriate to concentrate on only on the "unconventional" issues explored in *Elements of Land Law*, as even concepts which are far from novel and surprising are examined in a way which stimulates and inspires. The notion of property has always been intensely discussed among scholars but in the era of European Union law and the omnipresent problem of translation of legal terms and their precise understanding it is important to emphasize, as Gray & Gray do, that property cannot be identified with ownership or its object, as it is not a thing, but a power relationship. Moreover, property is a reflection of accepted values, cultural norms, social ethics and political economy, therefore it has its limits. These influence the scope of property and of claims to exclude others, particularly when human rights are taken into account. The important thing is to notice that the protection of property, i.e. the right to possess, exclude others, enjoy privacy also has another aspect which may be referred to as the 'democratisation' of property. The latter is not a return of the Marxist model of socio-economic relation but a realization, that protecting and promoting only property of separate individuals leaves a society incomplete and unable to satisfy the needs of persons who compose that very society (see pp. 86–92).

A continuation of the above may be found in part 10, chapter 7 (see pp. 1344 and the following ones), concerning civic rights of access to land, where the nature of public rights in land is discussed. This is done with reference to a number of various situations, like public right to use the highway, walkway agreements, public right of passage in navigable waters, public right of fishing, rights of recreational access, rights over commons and wastelands, etc. These topics are interesting because they are a combination of what the civil lawyer would classify as public law and private law. Yet it is important to realize, that when considering land, classifications into public, private, tort or contract are not always constructive, as land requires a comprehensive approach. Therefore it is very satisfying to find in *Elements of Land Law* extensive remarks on the public trust and rights of public access. Moreover, it is interesting to contrast this with another very interesting phenomenon, namely private property that is affected by a public interest. This opens up another vast area for discussion concerning the character of

property which is neither completely public, nor private. Gray & Gray show the North American jurisprudence in this area and compare it with European practice, which has not lead to the development of a unified approach to this matter (see pp. 1334–1343). Nevertheless, the topic requires attention also within a European context, since social and economic phenomena present in North America are also present in Europe, so it is not a question of an accepted approach, but a question of time, before private property affected with a public interest will demand more attention and practical solutions.

Showing land law in a comprehensive context can also be proven by the presence of a chapter on trespass (part 10, chapter 1, pp. 1260 and the following ones). Although in common law this is seen as an issue of tort law, for the continental lawyer it is a question of violating ownership, particularly the ownership of immovables. Therefore matters connected with direct trespass or indirect trespass, called emissions, are important to continental lawyers when presenting the legal situation of land and its ownership. It is a very important aspect of neighbor law, but also touches areas of public law, like environmental law. In civil law, trespass is also connected with the vertical boundaries of ownership, as there can be no trespass, if it occurs outside someone's ownership. Consequently, stipulating that trespass and the correlative notion of licensed entry upon land are inextricably woven into the structure of real estate (see p. 1260) is something that a continental lawyer not only appreciates and identifies with, but also needs to fully understand the scope and implications of property in a foreign legal system. Once again, the approach taken in *Elements of Land Law* proves, that this area of law has finally been embraced in a manner that 'overrides' textbook divisions into contract, tort, land law or public and private law. At the same time the essence of traditional land law and its institutions has not been lost or obscured.

Although there are numerous other issues discussed in Elements of Land Law that could be mentioned in this review, it will suffice to note, that matters connected with property as a human right, the effects of planning on property in real estate, environmental requirements and instances in which expropriation is justified have also been dealt with. This has been done not only with reference to English Law, but also with a strong reference to a wider European perspective and the impact of the European Convention of Human Rights (see pp. 1378 and the following ones). Land law is shown on the one hand, as a distinct area of law, but on the other hand, as an area of law strongly linked to other areas of the legal system.

In the light of the above one has to admit that Gray & Gray have kept their promise when they informed the reader that the have "weeded out old material, replacing it (where appropriate) by fresh material which (...) imparts an interesting and self-renewing character to the work as a whole". Indeed, the book is not only interesting to persons well acquainted with English law, but also to ones who are just beginning to discover it, as well as to ones who have discovered it as a part of a foreign legal system and have been struggling to translate it into a structure they can understand. *Elements of Land Law* not only provides a clear and easily understandable account of English land law, but it also goes beyond the traditionally covered topics. As a result it offers access to a very comprehensive analysis of land law presented in a wide context of different branches of law as well as with references to European law and jurisprudence of other common law countries. In fact, calling this publication a textbook is an understatement, since it is full of deliberations and analyses that go beyond a descriptive paradigm of student books. It is a very fulfilling academic piece of work that offers explanations, food for thought

and alternative routes to explore while delving into the subject of land and property. Having read the book one has a sense of completeness but at the same time appreciates the need to continuously expand horizons where land is concerned. Land law, regardless of it common law or civil law connotations, demands an approach that overlooks theoretical divisions and uncovers a clearer picture.

Magdalena Habdas

ANTHONY BRADLEY, KEITH EWING: *CONSTITUTIONAL AND ADMINISTRATIVE LAW*. 15th edition, Longman, 2011 Paperback, p. 880, ISBN 978-1405873505

Written by two experts in the field, *Constitutional and Administrative Law* is highly regarded for its comprehensive and authoritative coverage of this rapidly changing area of the law. *Constitutional and Administrative Law* continues to be the leading text recommended for undergraduate and postgraduate courses in the UK, and is relied on by practising lawyers, politicians, political scientists and public administrators, both in the United Kingdom and beyond. This edition is the product of a long-standing collaboration between its two authors. Anthony Bradley was the Professor of Constitutional Law at the University of Edinburgh before becoming a practising barrister in London. From 2002–2005 he was a legal adviser to the House of Lords Committee on the Constitution. His publications include Janis, Kay and Bradley, *European Human Rights Law: Text and Materials* (3rd edition, 2008). Keith Ewing has been the Professor of Public Law at King's College London since 1989, having taught previously at Edinburgh and Cambridge universities. His books in the field of civil liberties, electoral law and labour law include *The Cost of Democracy* (2007), and *Bonfire of the Liberties* (2010).

The wide-ranging constitutional reforms which have characterised much of the Labour government since 1997 have not slowed since the publication of the previous edition in 2006. In the new fifteenth edition, the authors analyse these changes while maintaining a focus on essential legal principles bringing detailed analysis and illuminating insight to students of constitutional and administrative law.

This new edition of *Constitutional and Administrative Law* maintains its reputation as the leading text in this dynamic area of the law. The book provides an authoritative account of the public law of the United Kingdom, on which depend the powers of the state, the work of government, and the liberties of the individual. The authors focus on essential principles, and throughout adopt a readable and well-illustrated approach. Full references to primary sources, books and scholarly articles provide an invaluable basis for studying the current law and a platform for research.

Since the election of the Labour government in 1997, Britain's constitutional landscape has been characterised by wide ranging reforms. The authors now tackle the task of analysing the many changes that have occurred since 2001, including:

- The Constitutional Reform Act 2005, and its implications for the judges and the structure of justice
- The wave of case law stemming from the Human Rights Act and the European Convention of Human Rights;
- New legislation empowering the government to respond to national emergencies and hold public inquiries into issues of public concern;
- Developments relating to the 'war on terror', and the potential conflict between anti-terrorist legislation and traditional liberties;
- Changes in asylum, extradition and immigration law;

- Developments in the European Union, including expansion of the EU and the EU Charter of Fundamental Rights;

In October 2009, the new Supreme Court of the United Kingdom opened for business, in a building at Westminster that had formerly been the Midddlesex Guildhall but converted and refurbished to provide a fitting home for the most senior court in the land. This, however, did not mark a dramatic change in the constitutional law of the United Kingdom, the appellate jurisdiction of these twelve senior judges remaining essentially the same as when justice was dispensed by them in the House of Lords.

In May 2010, a keenly fought general election produced an outcome which disappointed each of the three main parties. Labour lost the majority in the House of Commons which it had enjoyed for 13 years, the Conservatives failed to win a controlling majority in the Commons, and the Liberal Democrats secured fewer seats than favourable opinion polls had suggested was possible. The result within a week was the formation of the first peace-time coalition government for eighty years, with the presence of two political parties round the Cabinet table and in the corridors of Whitehall making it necessary to reconsider many traditional practices in the fields of government and politics.

These two events (the creation of the Supreme Court and the formation of a coalition government) provide very different illustrations of constitutional change in the United Kingdom: the former being a significant change in law, but with little direct impact on constitutional practice; the latter being a radical change in constitutional and political practice, but without any necessary change in the law. By contrast with both these events, the cataclysmic affair of parliamentary expenses that occurred in the summer of 2009 had profound effects on the law relating to MPs, with the enactment of the Parliamentary Standards Act 2009 and its early amendment in 2010. The affair also led to many changes in the public's attitude to Parliament, and in the conduct of MPs and the political parties.

In this new edition, the authors include material dealing with the most significant developments in the United Kingdom's public law since 2006. The period they cover was intended to last until the end of 2009, but in some chapters they have been able to include an indication of later events that occurred before Parliament was dissolved in April 2010. Developments since 2006 have caused every chapter to be revised and in parts rewritten. These include the continuing interplay between the operation of laws against terrorism and the protection of fundamental rights, the clash between official secrecy and the cause of justice in respect of torture and inhuman treatment, the continuing effects within the United Kingdom of EU law and European human rights law, the strain imposed on the electoral system by the extent to which political parties depend on funding from wealthy individuals, the creation for the first time of a system of tribunals affecting potentially the whole of government, the effects of the financial crisis and the government's forced entry into the business of banking, and changes in the law relating to the armed forces with the introduction of a unified code for the armed services.

The authors' aim, as in previous editions, has been to provide an informed overview of the most significant judicial decisions, new legislation by Parliament, and changing practices in government. They have tried to maintain a balance that reflects the evolution of public law while also bringing recent events into focus. In this edition, it has been given some priority to restricting the strong tendency that the book has of growing longer with every new edition. In some areas the text has been reduced a little

and the amount of detail pruned, in order to ensure that the central purposes of the book remain clear.

As in previous editions, the authors have joint responsibility for the whole book, but chapters 1–7, 11, 15, 20 and 27–32 have been revised by A. Bradley and all other chapters by K. Ewing. *Case references* are where possible to the main Law Reports; for cases since 2001, the footnotes include the neutral case citations. It is worth to draw attention to the Case Navigator system, details of which are given in the inside cover, and which it is hoped may encourage readers of the book to go on the read and analyse the leading decisions of the courts on which much of the law is founded. The aim of the *bibliography* is not to provide a comprehensive list of all publications on the public law of the United Kingdom, but simply to provide a convenient list of published books that are cited in the text: it does not include entries for periodicals or official publications, committee reports etc.

Three related themes underlie this book. First there is the tradition that the unwritten constitution of the UK is uncoordinated and relies on informal practices generated by a circle of 'insiders' selected by the government of the day who can therefore easily be manipulated. This can be set against the claim that a constitution should provide an external framework that constrains the power of temporary administrations. The constitutional reforms that have taken place during the last few years have been spasmodic, uncoordinated and relatively minor. They have not seriously addressed the most fundamental problem of the constitution which is the concentration of power in the executive supported by a network of professional, family and business relationships and with little or no power at local level. Of these reforms the most dynamic and democratic are probably the devolution arrangements for Scotland, Wales and Northern Ireland. The Human Rights Act 1998 is also important (but not necessarily for the better) in that it has to some extent strengthened the loose system of checks and balances that holds the constitution together by encouraging an independent judiciary to enter into the political sphere, combating the 'elective despotism'.

The second theme is the tension between 'legal' (in the sense of decisions made by our relatively independent judiciary) and 'democratic' controls over government. The Human Rights Act has become a platform from which judges sometimes make grand pronouncements about such matters as democracy, freedom, equality and liberalism. All these notions are highly uncertain and controversial and the Human Rights Act has revealed strong ideological differences within the judiciary as evidenced by frequent dissents. Therefore the third theme is the importance in a free society of keeping alive different points of view and not attempting to impose any particular orthodoxy on the people.

Part I (*General Principles of Constitutional Law*) concerns general principles. These include basic constitutional concepts and issues, a broad account of the moral and political ideals that have influenced the constitution and the sources of the constitution (Chapters 1 and 2). Chapter 3 concerns the relationship between the central state, its citizens and the subordinate units of the UK, including legal issues relating to dependent territories. Pervasive legal values and doctrines (parliamentary supremacy and the rule of law) are considered in Chapters 4 to 7 and Chapter 8 outlines the main principles of European Community law as far as they affect the UK constitution.

Part II (*The Institutions of Government*) is concerned with the powers of the central government institutions and the relationship between them (composition and meeting

of Parliament, functions of Parliament, privileges of Parliament, the Crown and the royal prerogative, the Cabinet, government departments and the civil service, public bodies and regulatory agencies, foreign affairs and the Commonwealth, the armed forces, the Treasury, public expenditure and the economy, the courts and the machinery of justice).

Part III (*The Citizen and the State*) consists of Human Rights both generally and in relation to selected topics that particularly relate to the political freedoms that underpin democracy. These include freedom of expression and assembly, secrecy and national security.

Part IV (*Administrative Law*) deals with judicial review of government action, the core of Administrative Law (the nature and development of administrative law, delegated legislation, administrative justice, judicial review of administrative action and liability of public authorities and the Crown).

The classic text, now in its fifteenth edition, provides an authoritative account of a challenging and fastmoving subject – the public law of the United Kingdom. Written in a clear and accessible style, illustrated by examples and supported throughout by references for further reading from a wide range of sources, the book analyses the unwritten constitution, the institutions of government, and the relationship between the citizen and the state.

The new edition deals with numerous developments in public law since the previous edition (the clash between new laws against terrorism and protection of human rights under the Human Rights Act 1998; the impact on the political parties of the Political Parties and Elections Act 2009; changes in the law affecting MPs, following the revelations in 2009 about their expenses; impact of the Lisbon Treaty on national law; creation of the Supreme Court and of a comprehensive system of tribunals; effects of the global financial crisis and the government's entry into the business of banking).

"The text provides a clear, succinet, reliable and authoritative guide to the study of constitutional and administrative law. It helps the diligent student to bring structure and order to the breadth of primary and secondary material, whilst also providing insights for those more experienced in the subject." (Angus Johnston, Senior Lecturer, University of Cambridge).

Joanna Jagoda

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[Conference – "Juvenile delinquency – its shape, causes and counteracting"]
Katowice, 21 April 2009

Konferencja okazji wręczenia Księgi Jubileuszowej Pani Profesor Genowefie Grabowskiej „Prawo międzynarodowe, europejskie i krajowe – granice i wspólne obszary"
[Conference on the occasion of presenting the Jubilee Book "International, European and National Law – Boundaries and Common Areas" to Professor Genowefa Grabowska]
Katowice, 15 May 2009

Konferencja „Zasada proporcjonalności w prawie karnym na płaszczyźnie stanowienia i stosowania prawa"
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Katowice/Sosnowiec, 28–29 September 2009

Konferencja naukowa z okazji 30. rocznicy powstania Konfederacji Polski Niepodległej.
[Scientific conference on the occasion of the 30th anniversary of the foundation of the Connfederation of Independent Poland]
The Faculty of Law and Administration of the University of Silesia in Katowice
Katowice, 14 October 2009

Konferencja międzynarodowa „Międzynarodowe prawo humanitarne – antecedencje i wyzwania współczesności"
[International Conference "International Humanitarian Law. Antecedences and challenges of the present times"]
The conference organized by the Department of International Public Law and European Law and the "Facultas Iuridica" Foundation of the Faculty of Law and Administration of the University of Silesia in Katowice

Under honorary patronage of the Polish Red Cross with financial support of the Swiss Confederation and the Polish Ministry of Foreign Affairs
Katowice, 15–16 October 2009

Konferencja z okazji II Międzynarodowego Dnia Mediacji
[Conference on the occasion of II International Day of Mediation]
Conference organised by the "Facultas Iuridica" Foundation of the Faculty of Law and Administration of the University of Silesia in Katowice
Katowice, 15 October 2009

Międzynarodowa Konferencja „Wokół granic swobody wypowiedzi"
[Around the Freedom of Speech Boundaries]
an international conference organised by the Faculty of Law and Administration, the Department of Literary Theory of the Institute of Polish Literature Science, the Institute of Culture Science of the University of Silesia, the Academy of Music in Katowice and the Education for Future" Association
Katowice, 28–29 October 2009

Konferencja popularnonaukowa „Proces o pacyfikacje śląskich kopalń. Dwie dekady walki o prawdę historii rozjechanej czołgami"
[Popular science conference „The trial on the policing of Silesian coal mines. Two decades of fighting for the truth of history run over by the tanks"]
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Conference organised by the Mediation Centre of the "Facultas Iuridica" Foundation of the Faculty of Law and Administration of the University of Silesia in Katowice
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