

May 2019

## Mortgage Law Developments in the European Union

Padraic Kenna

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Recommended citation: Padraic Kenna, *Mortgage Law Developments in the European Union*, 4 J. L. PROP. & SOC'Y 45 (2019), <https://www.alps-law.org/alps-law-journal/JLPS-2019-Kenna.pdf>.

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# **Journal of Law, Property, and Society**

ISSN 2373-5856

A publication of the Association for Law, Property and Society

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# Mortgage Law Developments in the European Union

Padraic Kenna\*

*Property law is able to absorb many values, from liberal legal autonomy approaches, to property as homes-with-mortgages, to regimes which emphasise the social function of property. In Europe, legal developments towards creating a single market in financial services, and the need for banking and financial stability, are impacting indirectly on property law, particularly mortgage law. After, the property market crash of 2008, a new impetus is evident, with a variety of public law regulatory measures, which amount to intervention in private contract and property law domains. This could potentially lead to the development of a distinct European property and mortgage law, incorporating more modern and person-centred values.*

I.	Introduction .....	46
II.	Changing Nature of Property Law.....	47
	A. Property as Homes with Mortgages – A Global Development .....	50
	B. European Law Developments.....	55
III.	After the Crash .....	58
	A. Financial Crisis in Europe.....	58
	B. Regulatory Transformation and Non-Performing Mortgages .....	63
	C. Mortgage Credit Directive 2014.....	66
	D. Unfair Contract Terms Directive in Mortgage Law and the Link with Fundamental Fights .....	69
	E. Relational Contracts and Life Time Contracts.....	74
IV.	Conclusion .....	77

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## I. Introduction

Property and land law are primarily national institutions, but international dimensions impact on their application and content. Across Europe, property law systems are being altered by European Union (EU) financial market harmonization and regulation. EU law increasingly pervades areas hitherto regarded as private law in Member States – often blanching any clear lines of demarcation between public and private law principles. National curial procedural autonomy is being limited by EU law principles of effectiveness and equivalence – particularly in EU consumer law. In the new EU legal order mortgage credit (and associated legalities) is increasingly understood as part of the legal consumer law framework.<sup>1</sup> This presents challenges for nineteenth century property law norms, including the principle of autonomy in legal relationships.

This Article seeks to chart some of the developments in mortgage law in Europe – an integral part of property law. First, it outlines the changing nature of property law generally, incrementally being applied to dwellings with mortgages, as homeloan mortgages are integrated with global capital flows. Second, it explores the aftermath of the financial crash of 2008, particularly its effect on EU homeloan mortgage arrears. This spurred the creation of a unique EU regulatory system of supervision of the main mortgage lenders, and EU-wide measures on outstanding non-performing loans (NPLs) – a third of which are home loan mortgages. The Mortgage Credit Directive (MCD) of 2014 created an EU law harmonizing measure to ensure the sustainability of future mortgage lending, as well as

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<sup>1</sup> Domurath, I. (2017) *Consumer Vulnerability and Welfare in Mortgage Contracts* (Oxford: Hart.) p. 11.

measures dealing with mortgage arrears. The increasing recognition of consumer rights by the Court of Justice of the European Union (CJEU) in mortgage repossession cases is considered, as well as the emergence of human rights jurisprudence on mortgage-related repossessions. Finally, the Article examines the development of new normative approach to mortgages, and in particular the potential for curial treatment of mortgages as relational rather than spot contracts. This approach could inform the developing human rights jurisprudence of the CJEU in mortgage consumer cases. While the essential legal private law character of mortgages remains the same, the social and institutional basis for enforcing the security is changed utterly.

## II. Changing Nature of Property Law

In the past century, the biggest transformation in property law has been its application to dwellings as a form of property, within a changing dynamic of global influences. Property law systems seek to provide certainty, security, autonomy, and stability – buttressing ownership norms in society<sup>2</sup> and protecting property owners from political, criminal, or arbitrary loss of wealth.<sup>3</sup> Of course, the fundamental and ontological power relationships implicit in property law are not normally part of this discourse.<sup>4</sup> English and European property law has been marshalled in the past to justify the appropriation

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<sup>2</sup> A range of theorists on property law emphasize the personal rights, and alternately the social function, of property. See John Locke (1690) *The Second Treatise of Civil Government*, chapter V. of Property; Radin, M.J. Property and Personhood, 34 *Stan. L. Rev.* 957 (1982); Alexander, G.S. 'Pluralism and Property,' *Fordham Law Review*, Volume 80, Issue 3, 1017-1052.

<sup>3</sup> See Harrington, B. (2016) *Wealth without Borders* (Cambridge Mass.: Harvard University Press).

<sup>4</sup> See Cohen, M. R. Property and Sovereignty, 13 *Cornell L. Rev.* 8 (1927).

of native peoples' rights in colonized societies, somewhat undermining the objectivity of many revered Lockean tenets of established English-speaking property law.<sup>5</sup>

But traditional (nineteenth century) liberal legal property law models are changing, or becoming outdated, in the context of ubiquitous home and property ownership, mass consumerisation and industrialization of credit, and concentration of mortgage lenders. In all industrialized economies, there are societal and political expectations of the universal enjoyment of the goods and services necessary for an adequate standard of living.<sup>6</sup> The rise of human rights, the end of the Cold War, socialist and social democratic states' shifts towards market economies, globalized investment in residential property, and technological advances in legal and finance systems, have all contributed to a substantial body of contemporary property law that blends public law and private law concepts.<sup>7</sup> This has implications for legal writing.

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<sup>5</sup> Edgeworth, B. (2017) *Butt's Land Law*, (7th ed), (Thomson Reuters, Sydney); Crepelle, A. & Block, W.E. 'Property Rights and Freedom: The Keys to Improving Life in Indian Territory' 23 *Washington and Lee Journal of Civil Rights and Social Justice*, 315 (2017). Available at <https://scholarlycommons.law.wlu.edu/crsj/vol23/iss2/3>.

<sup>6</sup> The Universal Declaration of Human Rights (1948) adopted by all States in the world states at Article 25 (1) 'Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.' See <https://www.ohchr.org/EN/UDHR/Pages/Exhibit.aspx>.

<sup>7</sup> Sprankling, J.G. (2014) *The International Law of Property* (OUP) p. 4; Kenna, P. (2008), "Globalization and Housing Rights," *Indiana Journal of Global Legal Studies*, Vol. 15, Issue, 2, 397-469. See Domurath, I. (2017) *Consumer Vulnerability and Welfare in Mortgage Contracts* (Oxford: Hart.) p. 9., where she points out that the retreat of the welfare state from housing in social democratic and socialist States since the 1980s has impacted on access to housing for large sections of the population and

Perhaps a more contentious proposition is that Western academic legal culture tends to adopt the standpoints of sovereigns, rulers, legislators, judges, officials and elites, without much regard for the points of view of users, consumers, victims, litigants, and other subjects. Insofar as this is a fair characterisation, such 'top-down' perspectives are being persistently challenged by bottom-up perspectives that range from Holmes' Bad Man to user theory or restorative justice. . . . Suffice to say that "globalisation" has given a stimulus to re-considering law from different points of view.<sup>8</sup>

The effects of globalization have been shown to penetrate and transform national property law.<sup>9</sup> The global impact of de Soto's treatise on land registration systems has been enormous, although some compare this with earlier manifestations of colonialism.<sup>10</sup> Today, the development of blockchain technology within land/property registration and exchange systems demonstrates the continuing impact of globalization on property law.<sup>11</sup> But the most significant

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when combined with low interest rates and an explosion of credit globally, created a major risk for households who are vulnerable to loss of home.

<sup>8</sup> Twining, W. (2009) *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press) p. 15.

<sup>9</sup> Graziadei, M. & Smith, L. (2017), *Comparative Property Law: Global Perspectives*, (Cheltenham, Edward Elgar Publishing); Sprankling, J.G. (2014) *The International Law of Property* (OUP) Chapter 9. Toward the Global Right to Property.

<sup>10</sup> De Soto, H. (2000) *The Mystery of Capital* (London, Black Swan); Andreasson S. (2006) Stand and Deliver: Private Property and the Politics of Global Dispossession, *Political Studies*, Vol 34, 3-22.

<sup>11</sup> Murphy, S. & Kenna P. (2019) *eConveyancing and Title Registration* (Dublin, Clarus Press). See also Perzanowski, A. and Schultz, J. (2016) *The End of Ownership: Personal Property in the Digital Economy* (MIT Press), with accompanying website: <http://www.theendofownership.com>.

development (and not always satisfactory) has been the application of property law to homes with mortgages.<sup>12</sup>

*A. Property as Homes with Mortgages –  
A Global Development*

Traditional property law principles developed from landed wealth based on agricultural land (and in some areas on slavery). Of course, the feudal system of landowning in Europe was abolished in countries that adopted republican models of society after the French Revolution, with their Napoleonic civil codes.<sup>13</sup> But all European property systems have encompassed dwellings in the past two centuries, essentially recognizing housing wealth as the basis for a lexicon of property law rights.<sup>14</sup> In this context, the mortgage of real property has provided one of the most remarkable engines of wealth creation in the modern world. The mortgage – a loan secured on property – has transformed the supply of housing – similar to what the internal combustion engine has done for transport. It enables people to access housing worth many times their annual income, at the beginning of their working lives, and at relatively low interest rates. Dixon points out that it is the duality of the mortgage, partak-

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<sup>12</sup> Fox, L, (2007) *Conceptualising Home; Theories, Laws and Policies*. (Oxford, Hart) where she points out that as yet, there is no coherent concept of home in law. Indeed, in many ways “home-type” interests are anathema to legal reasoning, especially as “home” is seen as essentially a subjective phenomenon – and is poorly integrated into mortgage creditor/debtor law.

<sup>13</sup> See Swadling, W. and Akkermans, B. ‘Types of Property Rights: Immovables and Movables’ in S van Erp and B Akkermans (eds), *Ius Commune Casebooks for the Common Law of Europe, Cases, Materials and Text on National, Supranational and International Property Law* (Hart Publishing 2012), 211. Only Britain and Ireland retain the common law legal system.

<sup>14</sup> Piketty, T. (2014) *Capital in the Twenty-first Century* (Harvard University Press), p. 117.

ing as it does from both the law of contract and the law of real property, which makes the mortgage an economic and efficient mechanism to turn an immovable asset into a liquid one.<sup>15</sup>

Thus, property law has extended almost seamlessly into the arena of homeownership, magnified through national housing policies, organized around mortgage lending from 1900s, and boosted again through subsequent expansion of mortgage lending and privatization of public housing following financial deregulation and the collapse of socialist systems from the 1980s.<sup>16</sup> The process of commodification and financialisation of housing has been enormous, giving property law a universal acceptance as a corollary to global mortgage lending.<sup>17</sup> This growth of homeownership, or, as Lord Diplock put it, “the emergence of a property-owning, particularly a real property-mortgaged-to-a-building-society-owning, democracy,”<sup>18</sup> has led to significant statutory and regulatory protection for mortgagors. This also created new avenues of redress other than the courts, in Britain and Ireland, for aggrieved mortgagors as consumers, and there are growing public interest obligations on mortgagees.<sup>19</sup>

English and Irish property law has been built on the common law and equitable treatment of the mortgage transaction from the earliest

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<sup>15</sup> Dixon, M. (2012) *Modern Land Law*, 8th edn (Oxford: Routledge), p. 391.

<sup>16</sup> Ronald, R. (2008) *The Ideology of Home Ownership: Homeowner Societies and the Role of Housing* (Palgrave Macmillian).

<sup>17</sup> The term “financialisation of housing” has been defined as “the increasing dominance of financial actors, markets, practices, measurements and narratives, at various scales, resulting in a structural transformation of economies, firms (including financial institutions), states and households,” see Aalbers, M.B. “The variegated financialization of housing – Symposium,” (2017) *IJURR*, 41(4), pp. 544 *et seq.*; Aalbers M B, (2016) *The Financialization of Housing* (Oxford, Routledge).

<sup>18</sup> See *Williams & Glyn's Bank Ltd. v Boland* [1981] AC 487.

<sup>19</sup> Kenna, P. & Lynch-Shally, (2014) ‘Comparing Mortgage Law in England and Ireland’ *The Conveyancer and Property Lawyer*, 78 (3) 294-316.

interventions of the courts to protect impecunious landowners from unscrupulous moneylenders, through to the development of the “equity of redemption,” where equity subjugated the sanctity of freedom of contract.<sup>20</sup> In the twentieth century, as changing patterns of property ownership, particularly residential property with mortgages, became prevalent, the emphasis of English property law shifted again, towards upholding the contractually agreed terms of the mortgage.<sup>21</sup>

But, while the principles of property law, such as autonomy, personhood, freedom, and stability are routinely applied to the political benefits of mass homeownership, there are fundamentally transformative changes taking place which in many ways, are contrary to these principles. For instance, the traditional judicial model of home-loan mortgages issued by lenders from the deposits of savers is no longer appropriate.<sup>22</sup> In the past fifty years, home-loan mortgages

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<sup>20</sup> Exemplified in the words of Lord Henley LC in *Vernon v Bethell* 28 E.R. 838 at 839; (1762) 2 Eden 110 Ct of Ch. at 113—“Necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose on them.”

<sup>21</sup> See Oldham, M. (2002) “Mortgages” in Louise Tee (ed.), *Land Law: Issues, Debates, Policy* (Cullompton, Devon: Willan).

<sup>22</sup> For a contemporary analysis of the regulation of mortgage lending in today’s world, see Hockett, R.C. and Omarava, S.T. (2017) ‘The Finance Franchise,’ 102 *Cornell Law Review Issue 5*. 1143 - “A common view of banks and other financial institutions is that they function primarily as intermediaries, managing flows of scarce funds from those who have accumulated them to those who have need of them and are ready to pay for their use. This view of finance is routinely stated in treatises, textbooks, learned journals, and the popular media... This understanding of finance is a pernicious and costly myth... The intermediated-scarce-private-capital orthodoxy is a myth, in turn, because it profoundly misrepresents the reality of modern financial systems.”1144-1146.

have been transformed from an industry dominated by local building societies and savings banks in industrialized countries, to one dominated by global corporate banking and securitization.<sup>23</sup>

In this context, the existence of the autonomous property owner or mortgagor is increasingly difficult to decipher as a theoretically formally equal legal party, within financial services industry standardisation of procedures for mortgage lending, standard legal documents, and complete absence of bargaining power by the mortgagor. In a similar way to which Gilmore<sup>24</sup> suggests that contract law was largely the product of the Industrial Revolution, mortgage law is proving to be the product of large-scale home ownership combined with industrialised mortgage lending. This is set to be truly globalized, with McKinsey Global Institute estimates of mortgage issuance of \$3-400 bn. p.a. globally being needed by 2025, to fund purchases of new affordable housing across the developing world.<sup>25</sup> Indeed, this is in line with the UN Sustainable Development Goals,<sup>26</sup> with Goal 11: *Sustainable cities and communities*: stating that “making cities safe and sustainable means ensuring access to safe and affordable housing, and upgrading slum settlements.” Housing and mortgage law is at the centre of the Sustainable Development Goals.<sup>27</sup> Of

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<sup>23</sup> Madden, D. & Marcuse, P. (2016) *In Defence of Housing* (London: Verso), p. 32.

<sup>24</sup> Gilmore, G. (1974)(2<sup>nd</sup> ed.) *The Death of Contract*. (The Ohio State University Press).

<sup>25</sup> McKinsey Global Institute (2014) *A blueprint for addressing the global affordable housing challenge* [https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Urbanization/Tackling%20the%20worlds%20affordable%20housing%20challenge/MGI\\_Affordable\\_housing\\_Full%20Report\\_October%202014.ashx](https://www.mckinsey.com/~media/McKinsey/Featured%20Insights/Urbanization/Tackling%20the%20worlds%20affordable%20housing%20challenge/MGI_Affordable_housing_Full%20Report_October%202014.ashx)

<sup>26</sup> UN Sustainable Development Goals (SDG) – <http://www.sdgfund.org/mdgs-sdgs>; Also <http://www.undp.org/content/undp/en/home/sustainable-development-goals/resources/>

<sup>27</sup> UN Doc. A/RES/71/256. Habitat II New Urban Agenda; Resolution adopted by UN September 2016. <http://habitat3.org/wp-content/uploads/New-Urban->

course, this requirement for mortgage funding could potentially represent another bonanza for mortgage lenders comparable to the years 2000-2007, with all the risks that entails, and the need for regulatory intervention into private law spheres is clear.

The securitization of home loan mortgages and the global search for safe assets has generated an unsustainable expansion of global funds into housing, creating a house price boom in many countries – followed by a property market crash.<sup>28</sup> Rather than anchoring wealth in place via property, today, mortgages and national mortgage law facilitate global investment, and the extraction of value from place-bound property, often to offshore registered and controlled private equity funds.<sup>29</sup> The UN has pointed out:

Housing and urban real estate have become the commodity of choice for corporate finance, a “safety deposit box” for the wealthy, a repository of capital and excess liquidity from emerging markets and a convenient place for shell companies to stash their money with very little transparency. In addition, corporate tax havens that generate massive amounts of profit immune from taxation, estimated at 30 per cent of global gross domestic product, are particularly attracted to housing and real estate.<sup>30</sup>

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[Agenda-GA-Adopted-68th-Plenary-N1646655-E.pdf](#); UN Habitat (2015) *Housing at the Centre of the New Urban Agenda* [http://www.unic.org.in/wp-content/uploads/2018/01/Housing\\_at\\_the\\_centre-of-NUA.pdf](http://www.unic.org.in/wp-content/uploads/2018/01/Housing_at_the_centre-of-NUA.pdf)

<sup>28</sup> See Dewilde, C. & Ronald, R. (2017) *Housing Wealth and Welfare* (Cheltenham: Edward Elgar). P. 1.; Tooze, A. 2108) *Crashed: How a Decade of Financial Crises Changed the World* (Allen Lane) chapters 2 & 6.

<sup>29</sup> Madden, D. & Marcuse, P. (2016) *In Defence of Housing* (London: Verso), p. 32.

<sup>30</sup> UN Doc. A/HRC/34/51, Report by UN Special Rapporteur on the Right to Adequate Housing to Human Rights Council, Paras 24/5. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G17/009/56/PDF/G1700956.pdf?OpenElement>.

In Europe, economic developments continue to transform property relations, creating a new basis for property law. Indeed, total outstanding residential loans for the twenty-eight EU countries amounted to some €7 trillion in 2017, amounting to 26% of EU-area GDP.<sup>31</sup> In the euro-zone, homeloan mortgages and real estate loans accounted for more than 50% of bank lending in at least 12 Member States, creating a critical and risky link between banking stability and housing.<sup>32</sup>

### B. European Law Developments

Across Europe, property law is changing, facing challenges from the legal pluralism of EU law primacy and national law measures, as well as the dichotomy between EU ‘soft’ versus ‘hard’ law. The law relating to land and mortgages has been largely excluded from supra-national EU law making, with each European country cherishing its own property law regime, operating on the *lex sitae* principles.<sup>33</sup> National property law systems are very closed, and the development of European harmonized standards has been slow and

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<sup>31</sup> See <https://hypo.org/app/uploads/sites/3/2018/09/HYPOSTAT-2018-FINAL.pdf>, p. 116. According to Hypostat this level of outstanding residential mortgage loans as a percentage of GDP is similar for the US, but different to Australia (67%) and Russia (6%).

<sup>32</sup> Source ECB Supervisory Banking Statistics Third Quarter 2018 available at: [https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorybankingstatistics\\_third\\_quarter\\_2018\\_201901.en.pdf](https://www.bankingsupervision.europa.eu/ecb/pub/pdf/ssm.supervisorybankingstatistics_third_quarter_2018_201901.en.pdf). In Ireland, the figure was almost 70%, creating a nexus between banking stability and the maintenance of high house prices, which are unaffordable to the great majority of emerging new households.

<sup>33</sup> There are significant variations in the level of homeowners with or without mortgages throughout Europe. At one extreme is the Netherlands, where 60% own their home with a mortgage, and on the other is Romania where 96% own their home without having a mortgage –see European Mortgage Federation, *Hypostat 2017 - A Review of Europe's Mortgage and Housing Markets*, available at <https://hypo.org/app/uploads/sites/3/2017/09/HYPOSTAT-2017.pdf>.

indirect.<sup>34</sup> Indeed, Article 345 Treaty on the Functioning of the European Union (TFEU), specifically precludes Treaty law primacy over national systems of property ownership, and the principles of subsidiarity and proportionality are highly significant.<sup>35</sup>

Although national constitutional law protects private property rights, there is an increasing Europeanization of these rights, especially through the jurisprudence around Article 8 and Article 1 of Protocol 1 of the European Convention on Human Rights (ECHR) – both of which create a European standard for State intervention on property rights and a coherent set of limits on the social function of property across Europe.<sup>36</sup> Indeed, both these provisions have been replicated in the EU Charter of Fundamental Rights (EUCFR), which

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<sup>34</sup> Van Erp, S. and Akkermans, B. (2012) *Cases, Materials and Text on Property Law* (Ius Commune Casebooks for the Common Law of Europe) (Oxford, Hart), Ch 10.

<sup>35</sup> Van Erp, S. 'Article 345 TFEU: A framework for European property law' in Jaume Tarabal Bosch, Elena Lauroba Lacasa (coords.), *El derecho de propiedad en la construcción del derecho privado europeo*, (Tirant lo Blanch, 2018).

<sup>36</sup> See <http://conventions.coe.int/treaty/en/Treaties/Html/005.htm>. Article 8 of the Convention provides that: "Everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." Article 1 of Protocol 1 on protection of property states: "(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. (2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties." See *James v UK* [1986] 8 EHRR 123.

has the status of primary EU Treaty law since 2009.<sup>37</sup> EU Treaty provisions on establishing and ensuring the single market are increasingly pervading areas of private law in Member States – sometimes blanching any clear lines of demarcation between public and private law.<sup>38</sup> In this, and other areas engaging EU law, the conventional approach has been that rights are defined in EU law, while procedures are established by national legal orders.<sup>39</sup> But this is changing, and the principle of national curial procedural autonomy is being eroded by the principles of equivalent recognition of EU law norms across Member States and effective judicial protection. These principles have an important impact upon national remedial rules and procedures. European property law expert, van Erp points out that in such multi-level jurisdictions, there will always be a tension as to which level has a particular legal competence.<sup>40</sup> Indeed, this tension is becoming more pronounced in the post 2008 climate of EU financial regulation as EU consumer rights recognition grows.

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<sup>37</sup> Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Charter of Fundamental Rights of the European Union (OJ C 83/13, 30 March 2010).

<sup>38</sup> Micklitz, H. W. (2014), “The EU as a Federal Order of Competences and the Private Law,” in Azoulai, L. (ed.), *The Question of Competence in the European Union*, Oxford University Press, Oxford.

<sup>39</sup> See Cafaggi, F. & Iamiceli, P. ‘The Principles of Effectiveness, Proportionality and Dissuasiveness in the Enforcement of EU Consumer Law: The Impact of a Triad on the Choice of Civil Remedies and Administrative Sanctions’ *European Review of Private Law* 03-2017 (575-618).

<sup>40</sup> van Erp, S. (2018) “Article 345 TFEU: A framework for European property law,” in Jaume Tarabal Bosch; Elena Lauroba Lacasa (Coords.), *El derecho de propiedad en la construcción del derecho privado europeo*, (Tirant lo Blanch).

### III. After the Crash

#### A. Financial Crisis in Europe

The global financial crisis, sparked by the U.S. sub-prime lending for homeownership, following the global financialization of housing, impacted Europe in different ways.<sup>41</sup> The recession after 2008 led to a reduction in wages in the public and private sectors, a reduction in welfare state expenditures, a sharp rise in unemployment rates (reaching dramatic levels in Greece and Spain), collective redundancies, and a rise in part-time and precarious employment.<sup>42</sup> Under such circumstances, households became the “shock absorbers” of the crisis, and many were unable to repay their mortgages.<sup>43</sup> This led to a wave of mortgage arrears and evictions in the peripheral EU Member States—where a mortgage lending and property price boom had taken place.<sup>44</sup> The UN Special Rapporteur on the

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<sup>41</sup> See Kenna, P. (Ed.)(2014), *Contemporary Housing Issues in a Globalised World*, (Farnham: Ashgate) – Introduction; See also Varoufakis Y. (2017) *Adults in the Room* (London: Bodley Head) pp. 23-30. Varoufakis – a former Greek Finance Minister, points out that after the introduction of the euro, French and German bank lending to the peripheral States of Europe was so extensive that when these economies slowed, EU action – known as ‘bailouts,’ was pushed through (outside the normal EU legislative process) whereby the peripheral States accepted public loans to ensure that French and German banks were repaid and did not collapse.

<sup>42</sup> See Beka, A. ‘The Protection of the Primary Residence of Mortgage Debtors: Embedding a ‘Basic Needs’ Principle in Mortgage Repossession Proceedings’ in Luca Ratti (ed)(2018) *Embedding the Principles of Life Time Contracts* (The Hague; Eleven Publishing).

<sup>43</sup> Ramsay, I. ‘Two Cheers for Europe: Austerity, Mortgage Foreclosures and Personal Insolvency Policy in the EU,’ in Micklitz H. W. & Domurath, I. (Eds.), *Consumer Debt and Social Exclusion in Europe*, (Abingdon Oxon, Routledge, 2015), pp. 189-227, 191.

<sup>44</sup> A European Commission study in 2016 of the legislative and regulatory framework across EU Member States showed that statistics on evictions were not being consistently collated did not record or publish statistics on evictions. National courts did not consistently apply human rights protections. See Kenna, P., Benjaminsen, L., Busch-Geertsema, V. and Nasarre-Aznar, S. *Pilot Project – Promoting*

right to adequate housing described this in 2017:

Financialized housing markets have caused displacement and evictions at an unparalleled scale: in the United States of America over the course of 5 years, over 13 million foreclosures resulted in more than 9 million households being evicted. In Spain, more than half a million foreclosures between 2008 and 2013 resulted in over 300,000 evictions. There were almost 1 million foreclosures between 2009 and 2012 in Hungary. In many countries in the global South, where the majority of households are unlikely to have access to formal credit, the impact of financialization is experienced differently, but with a common theme – the subversion of housing and land as social goods in favour of their value as commodities for the accumulation of wealth, resulting in widespread evictions and displacement. Informal settlements are frequently replaced by luxury residential and high-end commercial real estate.<sup>45</sup>

Property law has accommodated these developments, demonstrating its resilience as an institution. But the pressure on national and local courts to process unprecedented levels of mortgage cases tested to the limits the established notions of the mortgage as a property law construct, based on security over real property.<sup>46</sup> The curial

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*Protection of the Right to Housing – Homelessness Prevention in the Context of Evictions* (VT/2013/056). Final report (2016). European Union: European Commission, Directorate-General Employment, Social Affairs and Inclusion.

<sup>45</sup> See UN Doc. A/67/286, Report by Raquel Rolnik, UN Special Rapporteur on the Right to Adequate Housing (10 August 2012), *The right to adequate housing*, United Nations General Assembly, available at <http://www.ohchr.org/Documents/Issues/Housing/A-67-286.pdf>.

<sup>46</sup> See European Central Bank (June 2017) *Stocktake of National Practices and Legal Frameworks Related to NPLs* (Frankfurt, ECB): ‘The survey continues to show that the vast majority of jurisdictions with high NPL [non-performing loan] levels con-

David v. Goliath encounters between distressed home loan borrowers and globalized corporate mortgage lenders (often offshore registered and controlled private equity funds) seeking to repossess and sell the mortgaged homes, have become public issues.<sup>47</sup> In some countries, such as Spain, the failure of governments to act led to the development of social movements combatting evictions,<sup>48</sup> and also to judicial activism in relation to mortgage enforcement, described as ‘Robinprudence’ in an effort to protect the poor from homelessness.<sup>49</sup>

At the macro-institutional level, the holders of securities (i.e., pillar banks and securitized lenders) received unprecedented levels of State support to protect their “assets” in the face of large-scale collapse of the mortgage system.<sup>50</sup> This political intervention did not

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sider the inefficiencies of the judicial system to be a notable challenge for NPL resolution, mainly owing to the excessive length of proceedings due to the clogging-up of the courts. The inexistence of specialised judges dealing exclusively with insolvency proceedings is also a reason for judicial inefficiencies’ (p. 27).

<sup>47</sup> In Ireland, some 70% of distressed home loan borrowers at risk of losing their homes had no access to legal representation. See Kerna, P. (2018) *Access to Justice and the ECB – A Study of ECB Supervised and other Mortgage Possession Cases in Ireland* (Centre for Housing Law, Rights and Policy, NUI Galway). Available at <https://www.nuigalway.ie/media/housinglawrightsandpolicy/files/Access-to-Justice-and-the-ECB-Report-CHLRP-2018.pdf>.

<sup>48</sup> See Anderson, M. & Simon-Moreno, H. ‘The Spanish Crisis and the Mortgage Credit Directive: Few Changes in Sight’ in Anderson M. and Amayeulas E.A. (eds), *The Impact of the Mortgage Credit Directive in Europe* (Groningen, Europa Law Publishing 2017). p. 55. *Plataforma de Afectados por la Hipoteca* (Platform for People Affected by Mortgages) in Spain was one of these social movements.

<sup>49</sup> For a fuller discussion on these developments see Nasarre Aznar, S. ‘Robinhoodian’ courts’ decisions on mortgage law in Spain’ (2015) 7 (2) *International Journal of Law in the Built Environment* 27–147.

<sup>50</sup> Between 2008 and 2011, European countries spent €4.5tn. or 37% of the European Union’s economic output on financial industry bailouts. See UN Office of the High Commission for Human Rights (2012). *Report on austerity measures and economic and social rights*, p. 7. [https://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82\\_en.pdf](https://www.ohchr.org/Documents/Issues/Development/RightsCrisis/E-2013-82_en.pdf).

focus on individual homeloan mortgagors in distress, although some national governments introduced mitigating measures, such as moratoria on mortgage repossessions.<sup>51</sup>

The European home loan mortgage crisis exposed gaps in the procedural protection of home loan mortgage debtors. It revealed major imbalances in the respective positions of the parties in the contractual and post-signing contractual processes, deeply rooted in the unlimited right of the mortgagee to repossess.<sup>52</sup> While it was obvious that unemployment, relationship breakdown, loss of a family member or illness were the key determinants of mortgage arrears and even eviction, European States did not have a clear idea on how to address the problem.<sup>53</sup>

Domurath deftly defines the various elements of consumer vulnerability in mortgage systems, as encompassing three elements. Firstly, relational vulnerability arises from disadvantages in information, low levels of education, dealing with unfair commercial practices, marginal borrowers, dealing with unfair contract terms and overwhelmed by complex legal enforcement procedures. Secondly, event vulnerability relates to unexpected adverse events

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<sup>51</sup> Ramsay, I. 'Two Cheers for Europe: Austerity, Mortgage Foreclosures and Personal Insolvency Policy in the EU,' in H.W. Micklitz & I. Domurath (Eds.), *Consumer Debt and Social Exclusion in Europe*, Abingdon Oxon, Routledge, 2015, pp. 189-227, 191,

<sup>52</sup> See Beka, A. 'The Protection of the Primary Residence of Mortgage Debtors: Embedding a 'Basic Needs' Principle in Mortgage Repossession Proceedings' in Luca Ratti (ed)(2018) *Embedding the Principles of Life Time Contracts* (The Hague; Eleven Publishing), p. 271.

<sup>53</sup> Nield, S. 'Secured Consumer Credit in England,' chapter 5, in Anderson & Amaueles (2017) p. 199. "Changes in macro-economic climate in the labour and property market present immediate risk for the mortgage borrower, as do higher divorce rates, and the instability of the modern family. However, evaluating the risks and the prospect of default presents a challenge to economic experts, let alone consumers. A borrower may understand their responsibilities and the risks they face, but is unable to do much about them."

which act to the detriment of the consumer rendering them in breach of mortgage law and subject to enforcement procedures. These include economic downturns, collapse of housing markets, foreign currency fluctuations and interest rate rises. A third category of consumer vulnerability comprises their lack of resilience in particular situations, such as people on low incomes who may become over-indebted – these featured largely in the subprime mortgage lending crisis.<sup>54</sup>

However, in the absence of any developed pro-consumer legal training, courts and legal systems across Europe continued to rely on nineteenth century liberal contract and property law models in relation to the enforcement of the security of mortgages, treating each case as an individual private law contract, and ignoring the systemic, social and institutional context of the dramatic increase in such cases.<sup>55</sup> Even though many European States had already developed complex national law measures to deal with unforeseen problems affecting the weaker contracting party, enabling the terms of the mortgage to be modified post contract, the EU as a legislative institution did not adopt such pro-consumer legislation.<sup>56</sup>

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<sup>54</sup> Domurath, I. (2017) *Consumer Vulnerability and Welfare in Mortgage Contracts* (Oxford: Hart.) Chapter 3.

<sup>55</sup> See Fineman, M.A. “The Vulnerable Subject: Anchoring Equality in the Human Condition” (2008-2009) 20(3) *Yale Journal of Law and Feminism* 1, argues that vulnerability is universal, constant and inherent in the human condition. As a result of this, the “vulnerable subject” should be the focus of State policy rather than the liberal legalist autonomous independent subject.

<sup>56</sup> Domurath I. ‘Mortgage Debt and the Social Function of Contract’ *European Law Journal*, Vol, 22, No. 6, November 2016, pp. 758-771 at 768, has shown that in some continental EU countries unforeseen circumstances could trigger a modification of contract terms – either through re-negotiation or a court ruling, if the change was unforeseen by the parties, and has caused a material change (Germany), an excessive burden or imbalance in the rights and obligations of the parties (excessive onerousness: Italy, Spain), or a ‘radical’ or ‘fundamental’ change in the contractual

In this scenario, alongside EU institutional regulatory changes, the CJEU began to develop some semblance of a European social justice response. Of course, the concept of social justice in EU law is somewhat more complex than traditional approaches, which are based on religiosity, or the dilemma between distributive and commutative justice principles. Micklitz argues that the EU law idea of social justice is new, and distinct from national concepts. It is really “access justice”, whereby the EU grants access to the internal market to those who have difficulties in making use of market freedoms and are excluded from the markets in the essential goods and services. It is not exclusive but co-exists with differing models of social justice, especially in the fields of law where the EU does not have sole legislative competence.<sup>57</sup>

### *B. Regulatory Transformation and Non-Performing Mortgages*

The basis of mortgage law in Europe was changed utterly after the crash. While the essential legal character of mortgages was viewed by courts as liberal property-related contracts, a significant transformation in the fundamental nature of enforcing the security on mortgages took place. Mortgages were now seen as an integral part of the asset base of the significant financial institutions in Europe, the failure of which could collapse the euro and the EU economies. Regulation and supervision of these hitherto national institutions was concentrated in the independent European Central

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equilibrium (France, Belgium), or has the effect that the contract no longer complies with the parties' expectations (Slovenia).

<sup>57</sup> Micklitz, H.W. (2011) 'Social Justice and Access to Private Law', EUI Working Papers LAW 2011/02.

Bank (ECB).<sup>58</sup>

Adopting a systemic approach to the need for banking stability, the ECB directs significant financial institutions to address their Non Performing Loans (NPLs),<sup>59</sup> which comprise one third home loan mortgages (and more in some countries such as Ireland). This EU public law financial institutional regulation approach impacts national mortgage law systems, and consequently national property law.<sup>60</sup> The adoption of EU-wide supervisory imperatives which must be observed for regulatory compliance has exposed the concentrated and industrial nature of mortgage lending, as well as the reliance of the European financial system on the maintenance of the value of house prices. The revelation of mass standardization of mortgage contracts, assumed in legal terms to be individually unique freely negotiated contracts between formally legally equal actors, has prompted a development in legal treatment of home loan mortgages as something more akin to other consumer contracts than nineteenth century textbook liberal models

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<sup>58</sup> See Council Regulation No 1024/2013 of 15 October 2013, conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions (Single Supervisory Mechanism Regulation); Zilioli, C. (2016) "The Independence of the European Central Bank and Its New Banking Supervisory Competences," in Ritleng, D. *Independence and Legitimacy in the Institutional System of the European Union*. Oxford University Press; European Commission, *A Roadmap towards a Banking Union* COM(2012) 510 final 12.9. 2012.

<sup>59</sup> NPLs are defined as loans where the borrower is unable to make the scheduled payments to cover interest or capital reimbursements, when the payments are more than 90 days past due, or the loan is assessed as unlikely to be repaid by the borrower. While there is much supervisory activity in the European peripheral countries where the proportion of NPLs is highest.

<sup>60</sup> See ECB website - *What are non-performing loans (NPLs)?* 12 September 2016. <https://www.bankingsupervision.europa.eu/about/ssmexplained/html/npl.en.html>. "Addressing non-performing loans within the European banking system is one of the key priorities of the ECB's supervisory work."

Through this process, the ECB specifically directs how lenders deal with bundles of individual home-loan mortgages in arrears packaged into portfolios for sale on secondary markets, acquired by shadow banking funds, who direct the enforcement of the security.

The ECB suggests the type of forbearance measures mortgage regulated mortgage lenders should adopt in their enforcement of the security on home loan mortgages.<sup>61</sup> *ECB Guidance to Banks on Non-Performing Loans* sets out a non-exhaustive list of forbearance measures to be undertaken by lenders in the understanding that there are national specificities to which financial institutions of each Member State must mould their system.<sup>62</sup> This recognizes the varying civil law and common law jurisdictions in Europe and the differing legal treatment of mortgages on homes across the EU. At the same time, there is a regulatory and supervisory imperative to adhere to these approaches in dealing with mortgage arrears, as part of an EU-wide approach to reducing non-performing loans and ensure the stability of European banking. Short-term forbearance measures include changing the mortgage to interest-only payments or reduced payments, operating a grace period/payment moratorium, and capitalising arrears within the mortgage.<sup>63</sup> Suggested long-term measures include interest rate reductions, extension of maturity or term, provision of additional security, sale of the secured property

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<sup>61</sup> *ECB Guidance to Banks on Non-Performing Loans* (March 2017). [https://www.bankingsupervision.europa.eu/ecb/pub/pdf/guidance\\_on\\_npl.en.pdf](https://www.bankingsupervision.europa.eu/ecb/pub/pdf/guidance_on_npl.en.pdf).

The key objective of granting forbearance measures is to pave the way for non-performing borrowers to exit their non-performing status, or to prevent performing borrowers from reaching a non-performing status. Forbearance measures should always aim to return the exposure to a situation of sustainable repayment (p. 39).

<sup>62</sup> *Id.* at 43.

<sup>63</sup> *Id.* at 42.

by agreement or assisted sale, rescheduled mortgage payments, conversion of currency in cases of foreign currency mortgages, other alteration of contract conditions or covenants, provision of new credit facilities, debt consolidation, and partial or total debt forgiveness.<sup>64</sup> This latter measure entails a settlement between the parties, whereby the debtor agrees to pay a certain amount of the debt within a given time frame in return for which the creditor waives any legal claim over the remaining amount.<sup>65</sup> While these measures are enforced by the ECB as part of the regulatory framework, their effects can change the existing private law relationship by altering the powers of the mortgagee to enforce the security in the mortgage contract.<sup>66</sup> Yet, another step in the EU mortgage regulation involved legislation on credit agreements relating to residential immovable property.

### C. Mortgage Credit Directive 2014

One of the outcomes of the financial crisis was a conducive political appetite for better mortgage market regulation at the European level. Directive 2014/17/EU<sup>67</sup> established an EU harmonized legal

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<sup>64</sup> *Id.* at 42–43.

<sup>65</sup> This *datio-in-solutum* option is set out in the Art 28(4) MCD: “Member States shall not prevent the parties to a credit agreement from expressly agreeing that return or transfer to the creditor of the security or proceeds from the sale of the security is sufficient to repay the credit.”

<sup>66</sup> Although the *Guidance* is “currently non-binding in nature,” non-compliance could “trigger supervisory measures” as prescribed by the Single Supervisory Mechanism.

<sup>67</sup> Directive 2014/17/EU on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010. OJ L 60, 28.2.2014, p. 34–85.

framework for consumer protection on mortgages on immovable property.<sup>68</sup>

. . . In order to facilitate the emergence of a smoothly functioning internal market with a high level of consumer protection in the area of credit agreements relating to immovable property and in order to ensure that consumers looking for such agreements are able to do so confident in the knowledge that the institutions they interact with act in a professional and responsible manner, an appropriately harmonised Union legal framework needs to be established in a number of areas, taking into account differences in credit agreements arising in particular from differences in national and regional immovable property markets.<sup>69</sup>

Article 28 of the MCD dealing with arrears and foreclosure establishes an EU-wide harmonized approach to the enforcement of security for mortgages on property. This provides that “Member States shall adopt measures to encourage creditors to exercise reasonable forbearance before foreclosure proceedings are initiated.”<sup>70</sup> Following the enactment of the MCD, the European Banking Authority (EBA) published its *Final Report on Guidelines on Arrears and Foreclosure*<sup>71</sup> to assist Member States in complying with their obligations under Article 28 of the MCD.<sup>72</sup> Guideline 4, on the “resolution process,” provides more extensive information on what Article 28 of the

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<sup>68</sup> Directive 2014/17/EU Preamble 4: “A series of problems have been identified in mortgage markets within the Union relating to irresponsible lending and borrowing and the potential scope for irresponsible behaviour by market participants including credit intermediaries and non-credit institutions. . . .”

<sup>69</sup> Directive 2014/17/EU Preamble 5.

<sup>70</sup> Article 28, subsection 1.

<sup>71</sup> EBA/GL/2015/12. The EBA’s authority to issue guidelines stems from Article 16(1) of Regulation (EU) 1093/2010.

<sup>72</sup> Section 3 of the EBA *Final Report on Guidelines on Arrears and Foreclosure* (1 June 2015) EBA/GL/2015/12.

MCD considers “forbearance measures.” This guideline gives a non-exhaustive list of the possible modifications a credit institution should consider when exercising forbearance in the resolution of a credit account in payment difficulties.<sup>73</sup> These modifications include extending the term of the mortgage, changing the type of the mortgage, deferring payment, changing the interest rate, and offering a payment holiday.<sup>74</sup>

The MCD has been in force since 2016 and has been transposed into the national law of many EU Member States.<sup>75</sup> However, it is not universal and the European Commission is taking Infringement procedures against some Member States due to the lack or delay of the notification of national transposition measures or their incompleteness.<sup>76</sup> Criticism of the effectiveness of the MCD has been raised, however, on the grounds that it does not fully oblige mortgage lenders to ensure that the mortgage product is suitable for the borrower, does not extend other housing options (than mortgage borrowing), does not shift the risks to the lender, or does not enhance effective government safety nets against the risk of economic shocks.<sup>77</sup>

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<sup>73</sup> EBA *Final Report on Guidelines on Arrears and Foreclosure* (1 June 2015) EBA/GL/2015/12. The EBA Guidelines appear to suggest that the EBA Guidelines are now applied to all mortgages, as described in Article 3 MCD, rather than just post March 2016 mortgages as set out in Article 28 MCD. See also Sparkes, P. ‘What is mortgage credit?’ Chapter 2, in Anderson M. and Amayeuas E.A. (eds), *The Impact of the Mortgage Credit Directive in Europe* (Groningen, Europa Law Publishing 2017).

<sup>74</sup> EBA/GL/2015/12. Guideline 4.1.2.

<sup>75</sup> See Anderson, M. & Amayeuas, E. A. (2017) (eds) *The Impact of the Mortgage Credit Directive in Europe* (Groningen, Europa Law Publishing).

<sup>76</sup> See [https://ec.europa.eu/info/publications/mortgage-credit-directive-transposition-status\\_en](https://ec.europa.eu/info/publications/mortgage-credit-directive-transposition-status_en); see also Case C-569/17 *Commission v. Spain*.

<sup>77</sup> Nield, S. ‘Secured Consumer Credit in England,’ chapter 5, in Anderson & Amayeuas (2017) pp. 194 -199. The MCD has led to some changes in the rights covered by the UK Consumer Credit Act 1974.

### *D. Unfair Contract Terms Directive in Mortgage Law and the Link with Fundamental Rights*

One of the unique developments in European mortgage law has been the growing integration of EU consumer law with national mortgage law.<sup>78</sup> This largely emanated from a series of Spanish mortgage possession cases referred by Spanish judges to the CJEU for clarification on the compatibility of Spanish mortgage law and procedure with EU consumer law. The Unfair Contract Terms Directive (UCTD),<sup>79</sup> a minimum harmonizing consumer law measure, has now become a significant element in mortgage law jurisprudence in a number of EU Member States.<sup>80</sup> The recitals to the UCTD set out its purpose:

. . . whereas, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than his own, it is essential to remove unfair terms from those contracts.<sup>81</sup>

This purpose is to be achieved by protecting consumers from the abuse of power by the supplier of goods or services, in particular by one-sided standard contracts. The test for unfair terms is set out in *Article 3(1) UCTD*:

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<sup>78</sup> See Beka, A. (2018) *The Active Role of Courts in Consumer Litigation* (Cambridge, Intersentia). Beka highlights the 'active consumer court' doctrine developed in the CJEU which requires national courts to raise of their own motion mandatory rules of EU consumer contract law, notably those relating to unfair terms, resulting in increased procedural protection in mortgage possession proceedings involving the primary family residence of the mortgage debtor, and the development of human rights issues in this context.

<sup>79</sup> Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 095, 21 April 1993.

<sup>80</sup> Micklitz, H.W. & Reich, N. 'The Court and Sleeping Beauty: The Revival of the Unfair Contract Terms Directive,' 51 *CMLR* 2014, pp. 771 - 808 at 800.

<sup>81</sup> Recital 6. UCTD.

A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The test for unfair terms must take account of the nature of the goods or services for which the contract was concluded by referring, at the time of the conclusion of the contract, "to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent."<sup>82</sup>

The UCTD aims to assist individual consumers by ensuring that unfair terms are not enforceable against them, and a dissuasive principle is contained in Article 7(1) and Recital 24 UCTD. Article 7(1) states:

Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

In the iconic *Aziz*<sup>83</sup> case, the CJEU held that the UCTD precluded national legislation (such as that which applied in Spain) that limits the power of the court to stay mortgage enforcement proceedings, pending a decision on whether the mortgage contains unfair terms. In *Aziz*, the court held:

In that context, the Court has already stated on several occasions that the national court is required to assess of its own motion whether a contractual term falling within the scope of the directive is unfair, compensating in this way for the imbalance which exists between

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<sup>82</sup> Article 4(1) UCTD.

<sup>83</sup> Case C-415/11 *Aziz v Caixa d'Estalvis de Catalunya*.

the consumer and the seller or supplier, where it has available to it the legal and factual elements necessary for that task.<sup>84</sup>

This places a requirement for positive action on courts to restore the balance between a mortgagor and mortgagee, both in examining the contract for terms for unfairness, and striking out such terms as unenforceable. Settled CJEU case law makes it clear that national legislation that would not allow courts to exercise such a role would not be compatible with EU law and would jeopardize the practical effect of protective consumer legislation.<sup>85</sup>

The EU law principle of effectiveness requires that national laws or procedures must not make it impossible or excessively difficult for mortgage borrowers to invoke the protection of the UCTD. This created a major crisis for Spanish mortgage law, and new legislation was enacted to enable courts to consider the UCTD within mortgage proceedings.<sup>86</sup> However, the continuing bias in Spanish law in favor of the creditor led to another CJEU decision, which held that the domestic rules still infringed EU law, and particularly the EU Charter of Fundamental Rights (EUCFR) Art 47 on fair procedures, through which the application of the UCTD must be interpreted.<sup>87</sup> Terms in Spanish mortgage contracts that have been examined for compatibility with the UCTD include default interest rates, acceleration clauses, interest rate floors, and ancillary expenses borne by the borrower.<sup>88</sup>

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<sup>84</sup> Case C-415/11, para 46 (citing *Pannon GSM* [2009] E.C.R. I-4713 at [31] and [32], and *Banco Español de Crédito* [2012] 3 C.M.L.R. 25 at [42] and [43]).

<sup>85</sup> Beka, A. (2018) *The Active Role of Courts in Consumer Litigation* (Cambridge, Intersentia), p. 339.

<sup>86</sup> Law 1/2013, 14 May 2013.

<sup>87</sup> Case C-169/14 *Sánchez Morcillo and Abril García* [2014] ECLI:EU:C:2014:2099.

<sup>88</sup> See Anderson, M. & Simon-Moreno, H. 'The Spanish Crisis and the Mortgage Credit Directive: Few Changes in Sight' in Anderson M. and Amayuelas E.A. (eds),

In relation to unfair terms in mortgages, the CJEU has held that it was not necessary for a term to have been used by a lender seeking to enforce the security on a mortgage for a national court to declare it to be unfair.<sup>89</sup>

Since then, the CJEU has also scrutinised many European national mortgage law and procedural systems for compatibility with these consumer rights.<sup>90</sup> It has clearly established that implementation of the UCTD requires courts in EU Member States to carry out own motion assessments for unfair terms<sup>91</sup> and this process must also consider the impact of the EUCFR.<sup>92</sup> Article 7 EUCFR states that “Everyone has the right to respect for his or her private and family life, home and communications” and in a Slovakian case referred to the CJEU, it held:

The loss of a family home is not only such as to seriously undermine consumer rights. In that regard, the European Court of Human Rights has held, first, that the loss of a home is one of the most serious breaches

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*The Impact of the Mortgage Credit Directive in Europe* (Groningen, Europa Law Publishing 2017).

<sup>89</sup> Case C-421/14 *Banco Primus SA v Jesús Gutiérrez García*, para 73.

<sup>90</sup> For Spain see Case C-415/11 *Aziz v Caixa d'Estalvis de Catalunya*; Case C-280/13 *Barclays Bank* [2014]; Case C-169/14 *Sánchez Morcillo and Abril García* [2014] ECLI:EU:C:2014:2099; Cases C-482/13, C-484/13, C-485/13; Case C-539/14 *Unicaja Banco and Caixabank*, EU:C:2015:21 [2015]; Case C-8/14 *BBVA* [2015]; Case C-49/14 *Finanmadrid EFC* [2016]; Case C-421/14 *Banco Primus* [2017]; For Slovakia, see: Case C-34/13 *Kušionová*, [2014]; Czech Republic – see case C-377/14 *Radlinger and Radlingerová* [2016]; For Romania see Case C-110/14 *Costea* [2015]; For France, see Case C-96/14: *Van Hove*, [2015] For Hungary see Case C-26/13 *Kásler and Káslerné Rábai* [2014].

<sup>91</sup> Case C-243/08 *Pannon GSM Zrt v Erzsébet Sustikné Győrfi (Pannon GSM)*, paras. 31 and 32.

<sup>92</sup> Case C-169/14 *Sánchez Morcillo and Abril García* [2014] ECLI:EU:C:2014:2099; Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union Charter of Fundamental Rights of the European Union (OJ C 83/13, 30 March 2010).

of the right to respect for the home and, secondly, that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed (see the judgments of the European Court of Human Rights in *McCann v United Kingdom*, application No 19009/04, paragraph 50, ECHR 2008, and *Rousk v Sweden*, application No 27183/04, paragraph 137). Under EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the referring court must take into consideration when implementing Directive 93/13 [Unfair Terms in Consumer Contracts Directive].<sup>93</sup>

National courts have responded in various ways to these consumer and human rights developments in the arena of property, land, or mortgage law.<sup>94</sup>

But there are signs of a nascent European standard, linking mortgage law, consumer law, and human rights law, with the UCTD providing the nexus among all three areas.<sup>95</sup> In this area the principles of relational contracts could be integrated into EU mortgage and consumer law, to further modernize the law of mortgages.

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<sup>93</sup> Case C-34/13 *Kušionová v SMART Capital a.s.* paras 63–65. (internal citations omitted).

<sup>94</sup> Max Plank Institute (2018) An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgments and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law - Report prepared by a Consortium of European Universities led by the MPI Luxembourg for Procedural Law as commissioned by the European Commission. JUST/2014/RCON/PR/CIVI/0082. (Luxembourg: European Commission).

<sup>95</sup> See Beka, A. 'The Protection of the Primary Residence of Mortgage Debtors: Embedding a 'Basic Needs' Principle in Mortgage Repossession Proceedings' in Luca Ratti (ed) *Embedding the Principles of Life Time Contracts* (The Hague, Eleven Publishing 2018).

### *E. Relational Contracts and Life Time Contracts*

In the context of the developing CJEU jurisprudence linking home loan mortgages with consumer and human rights law, there is scope to recognize mortgages as relational contracts. Relational contract theory views contracts on a spectrum from discrete, one-off exchanges (viewed as exceptional), to a more relational contract embedded in an ongoing relationship between the parties, as well as other interconnected parties and transactions.<sup>96</sup> Essentially, this approach recognizes that many types of contracts are only possible within a set of societal arrangements. Rules describing and governing contract formation and interpretation must recognize evolving relationships between the parties, including their continued cooperation—particularly in housing related areas.<sup>97</sup> Relational contract theory ascribes greater importance to solidarity between the parties, good faith, and longer time frames, rather than the notion of a “magical contract-formation instant.”<sup>98</sup> This relational contract approach has been developed in public utility contracts and applied to Life-Time contracts.

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<sup>96</sup> Macneil, I.R. ‘Relational Contract Theory, Challenges and Queries’ 94 N.W.U. L. Rev, 1999 p. 877; Campbel, D. (2004). CDAMS Discussion Paper 04/1E. *Ian Macneil and the Relational Theory of Contract*. <http://alliancecontractingelectroniclawjournal.com/wp-content/uploads/2017/04/Campbell-D.-2004-%E2%80%98Ian-Macneil-and-the-Relational-Theory-of-Contract%E2%80%99.pdf>.

<sup>97</sup> Bargelli, E. ‘Exploring Interfaces Between Social Long-Term Contracts and European Law Through Tenancy Law,’ in Nogler, L. and Reifner, U. (eds)(2014), *Life Time Contracts*, (The Hague; Eleven) 627 ff.

<sup>98</sup> See White, A.M. (2018) ‘Home Mortgage Loans as Life Time Contracts’ in Ratti, L. (ed) *Embedding the Principles of Life Time Contracts* (The Hague: Eleven Publishing) p. 280.

LifeTime contracts are promoted by the European Social Contract Group (EUSoCo),<sup>99</sup> which advocates that the EU should take action to regulate LifeTime contracts, such as in mortgage loans, so as to guarantee a minimum of social dignity and moral values. LifeTime contracts have been defined as:

LifeTime contracts are long-term social relationships providing goods, services and opportunities for work and income-creation. They are essential for the self-realisation of individuals and their participation in society at various stages in their life.<sup>100</sup>

EuSoCo identified common characteristics that revolve around the individual's medium to long-term needs for housing, credit, and work, and determined that such contracts should be reflected in an encompassing set of rules, rights, and principles. LifeTime contracts are essential for human flourishing and should be governed by a number of principles, such as universal access to essential resources and services (without discrimination in terms of the personal and social characteristics of consumers at all stages of the contract), establishment of a fair price, adaptation of the contract to changes over time (to address the needs of the consumer), and protection from unfair or premature termination (it must be transparent, accountable and socially responsible). Proposed new standards would apply to the information and communication rules throughout the life of the contract and to the recognition of collective interests and collective participation in negotiation and administration of the contract.

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<sup>99</sup> On the concept of life time contracts see Nogler and Reifner, "The Contractual Concept of Life Time Contracts under Scrutiny," in Ratti (ed.), *Embedding the Principles of Life Time Contracts* (Eleven International Publishing 2018), pp. 3 et seq. An analysis of mortgage loans as life time contracts may be found in the contribution of White, "Home mortgage loans as life time contracts," pp. 277 et seq.

<sup>100</sup> See <http://www.eusoco.eu/?p=1012>.

Indeed, this LifeTime contract approach incorporates many of the contemporary methods for the enjoyment of human rights. Across the world, the explosion of credit and debt associated with purchase of essential housing, healthcare, education, and utilities has placed credit at the centre of human rights debates. Nogler and Reifner suggest:

It is worth underlining that credit is the necessary complementary contractual relation in which either income is allocated as and when it is needed (consumer credit, mortgage credit, mortgage loans, private pensions schemes, education finances; bank account and payment services) or in which access to certain services like housing, transportation, water, heat, and electricity are provided in the form of deferred payments or rent.<sup>101</sup>

The integration of consumer and human rights law with the LifeTime contract approach can offer a more comprehensive rhetorical framework and a fundamental floor of protection for European financial and mortgage consumers.<sup>102</sup> The LifeTime Contract model, which is still market based, offers a valuable addition to our study of the law on mortgages, particularly as the avenue for its integration through the EUCFR has been established. The person-centred nature of EU human rights protection set out in the Charter can be informed by essence of LifeTime Contract approaches. Indeed, the integral human needs being addressed in these contracts must be explicitly acknowledged.

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<sup>101</sup> Nogler, L. and Reifner, U. (eds.) (2014) p. 6.

<sup>102</sup> See Ondersma, C. "A Human Rights Approach to Consumer Credit," *Tulane Law Review*, Issue 90, No. 2. See also Benöhr, I. (2013) *EU Consumer Law and Human Rights* (Oxford University Press) suggesting that the inclusion of consumer protection will be pursued as an autonomous social objective of the EU and recent Directive on consumer rights expressly refer to the fundamental rights and principles recognised by the Charter of Fundamental Rights.

At the heart of this class of contracts there is an individual human being, with his or her physiological and ethical requirement, in terms of security, belonging, success and self-fulfillment in other words the existential need to be able to enjoy essential goods (*lebenswichtige Güter*), services, labour opportunities and income opportunities. Satisfaction of such needs is normally an essential pre-condition for the pursuit of a happy life, or self-realization and participation.<sup>103</sup>

All of these ideals are reflected within the human rights established in the EUCFR.

#### IV. Conclusion

The Anglo-American model law of contract enjoys a hegemonic position within contemporary global legal discourse, even in Europe. This approach is premised on notions of a mortgage contract as a one-time offer and acceptance, where performance or breach and remedy stands on a libertarian and individualistic foundation, and a notion of market activity operating with the aid of the Adam Smith's invisible hand, somehow joining individual autonomy with collective welfare. This classical contract theory of mortgages has little room for public or social control over price or terms, protecting consumers from powerful corporate lenders, or any insistence on adaptation and modification of contracts when parties run into difficulties meeting their obligations.<sup>104</sup>

In Europe, the law of mortgages is now subject to many social expectations, consumer rights and major EU-wide regulatory and supervisory measures on corporate lenders to enforce the security,

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<sup>103</sup> Nogler, L. and Reifner, U. (eds.) (2014) p. 6.

<sup>104</sup> See White, A.M. (2018) 'Home Mortgage Loans as Life Time Contracts' in Ratti, L. (ed) *Embedding the Principles of Life Time Contracts* (The Hague: Eleven Publishing) p. 279.

where the mortgage relates to a residential property, or home. Indeed, modern expectations of homeownership and access to credit have become synonymous with mortgages being viewed as a form of public utility in housing. These changes reflect the evolution of the use of mortgage credit as the major vehicle of access to housing for the majority of the population, in the context of the global financialisation of housing.<sup>105</sup>

The developments outlined above would suggest that in Europe, the classical model of mortgage law is changing, mainly as a result of mortgage finance merging with global finance flows. There are significant implications for property law as Sjef van Erp has shown:

. . . the classical model of property law – and not only with regard to ownership, but also regarding other property rights, such as mortgage – no longer functions effectively, efficiently and justly in the world of global financing, with an overall effect on each and every one of us . . . .<sup>106</sup>

The classical model of a mortgage as a contract between two private parties, relating to a loan secured on property, while continuing to provide the legal framework for adjudicating disputes, must be seen in a conceptually different way. Private law has assimilated many characteristics of regulation, which makes EU contract law (including mortgage law) distinct from the understanding of private law developed by nation-states of the nineteenth century.<sup>107</sup> Indeed,

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<sup>105</sup> Aalbers M B, (2016) *The Financialization of Housing* (Oxford, Routledge).

<sup>106</sup> Van Erp, S. 'Fluidity of ownership and the tragedy of hierarchy – A sign of a revolutionary evolution?' EPLJ 2015 Vol 4, Issue 1. 56-80 at 76. See also Akkermans, B. 'Property Law and the Internal Market' in van Erp, S., Salomons, A. & Akkermans, B. (2012) *The Future of European Property Law*, Munich, (Sellier European Law Publishers), 199-246.

<sup>107</sup> Domurath, I. (2017) *Consumer Vulnerability and Welfare in Mortgage Contracts* (Oxford: Hart.) p. 25.

the social function of mortgage law may have outgrown its private law institutional setting—in a manner described by Renner in his iconic examination of this phenomenon.<sup>108</sup> He identified a situation whereby a number of private law institutions, such as ownership in land and movable property, as well as contracts of various types and mortgages and leases, indicate a capacity to remain constant, whilst the social function they serve has undergone radical change. The social function of mortgages—as a means of accessing housing in contemporary market based housing systems, with borrowers regarded as consumers, and mortgages treated as standardized non-negotiable consumer contracts, is indeed now accepted in EU law and adjudicated by the CJEU.

The time has come therefore to recognize that it is no more appropriate for land law to view the mortgagor as an autonomous individual capable of competing on an equal footing with institutional mortgagees than it is to view smoking as a healthy option. Unless and until land law recognizes that both the use and user of mortgage finance have changed, mortgagors will continue to receive less protection than consumers of non-essential goods, a situation that is wholly unjustifiable given the move to a mass home ownership market.<sup>109</sup>

This Article has examined some of the impacts on property law of recent mortgage law and regulation developments in Europe. These can be traced to the impact of changing nature of property law, globalization, and growing (but resisted) integration of EU law. It is

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<sup>108</sup> This phenomenon has been described by Karl Renner (1949) *The Institutions of Private Law and Their Social Functions* (London; Routledge and Kegan Paul Ltd.) as situations where rights of ownership have outgrown the limitations of private law, but society remains stuck with these historical property law rules as there is little imagination to create new ones.

<sup>109</sup> Whitehouse, L. 'The First legal Mortgagor; a Consumer Without Adequate Protection?' *Journal Consumer Policy* (2015) 38; 161-180 at 163.

hardly surprising that new regulatory frameworks and laws set up after the financial crash would be directed at mortgage lending and security, when twenty percent of European banking assets are tied up in home loan mortgages. These public law measures are leading to restructuring of the mortgage contracts, inserting pro-borrower protections, in some cases and exerting supra-national pressure on lenders to enforce the security of the mortgage in cases of arrears, in others. So too with EU consumer law, which obliges courts to strike out any unfair terms in mortgage contracts and interpret their application in the light of consumer and human rights law, where the mortgage relates to a primary residence. These are historical developments in mortgage law, and yet the essential structure and form of mortgage law remains constant. But, as Whitehouse points out, “amidst this flurry of activity, the doctrinal content of the law of mortgage remains central but largely unchanged.”<sup>110</sup> However, emerging proposals to regard mortgages as LifeTime contracts will advance the social function of mortgages. As Twining pointed out, globalization (and perhaps the financialization of housing) has given a stimulus to considering law from new and different points of view – and in the case of property law there is much to view. However, while there are significant developments taking place in the treatment of homeloan mortgages as matters that relate to housing rights, where the enforcement of the security is not just an impersonal operation of the law, human rights concerns about the eviction of people from their homes have yet to make any significant impact on European property law.<sup>111</sup>

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<sup>110</sup> Whitehouse, L. (2010) ‘Making the case for Socio-Legal Research in Land Law: Renner and the Law of Mortgage’ *Journal of Law and Society*, Vol 37; 4; 545-68 at 567.

<sup>111</sup> See Kenna, P., Nasarre-Aznar, S., Sparkes, P. & Schmid, C.U. (2018) *Loss of Homes and Evictions across Europe – A Comparative Legal and Policy Examination* (Cheltenham, Edward Elgar), Introduction.