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Shared ownership and temporal ownership in Catalan Law

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Abstract. The global economic crisis and the housing bubble meltdown have had a significant impact on the Spanish property market. As a result, the homeownership-tenancy dichotomy has become a matter of discussion, and efforts are made to discover formulas that provide affordable, stable and flexible housing access. Taking this background into account, the Catalan lawmaker has implemented the so-called “intermediate tenures” (temporal ownership and shared ownership) into the Catalan Civil Code, which are conceived as a middle ground between ownership and renting. Indeed, temporal ownership (*propietat temporal*), which confers on the titleholder, the domain of an asset (movable or immovable) for a specifically defined period of time, does not conform with the right of ownership as it is currently conceived in continental European legal systems, given that it is based on the English leasehold; and shared ownership (*propietat compartida*), which confers on the buyer a property share in the thing (movable or immovable), entitling him to the full possession, use and exclusive enjoyment of the thing, and to gradually acquire the remaining share, is based on the English shared ownership scheme. This paper explores how these “intermediate tenures” work, as regulated in Act 19/2015.

Keywords: intermediate tenures, temporal ownership, shared ownership, housing access, Catalan law

1. Introduction

Homeownership and tenancy are by far the most common land tenures in Spain (the former is widespread -78.2%- , whereas the latter seems to play a minor role -it accounts for 21.8%- , Eurostat, 2016). However, this dichotomy has been called into question in Spain due to the international economic crisis and the bursting of the Spanish housing bubble (2000-2007), which has had a significant impact on the Spanish property market, leading to (Nasarre Aznar, 2011, *in toto* & Vinuesa Angulo, 2013, *in toto* & Gentier A., 2012, pp. 342 ff.): a sizeable drop in housing prices (more than 40% since 2007¹); a sharp reduction in the number of mortgage loans granted²; a gradual increase in the number of evictions³ (as a result of massive unemployment⁴ and high levels of household over-

¹ Source: Spanish National Statistics Institute (www.ine.es).

² Only 32% of housing acquisitions were financed through a mortgage loan in January 2013; in contrast, more than 60% of real estate purchases were financed in that way in 2006 (source: Spanish National Statistics Institute; www.ine.es).

³ More than 400,000 mortgage enforcement proceedings have taken place since 2008 according to the General Council of the Judiciary, despite no distinction being made between primary and secondary residences (source: <http://www.poderjudicial.es/>).

⁴ The unemployment rate started below 12% between 2000 and 2007, but it rose to 20.33% in 2010 (source: Spanish National Statistics Institute, www.ine.es).

indebtedness, Banco de España, 2013⁵), vacant dwellings (Spanish National Statistics Institute, 2013)⁶, a raising poverty rate and social exclusion (FOESSA, 2014) and increased difficulties for vulnerable groups, such as children or immigrants (Human Rights Watch, 2014). As a result, access to homeownership has been hampered, and the supposed alternative, tenancy (other alternatives, such as cooperatives, are not significant enough), is not a real alternative to homeownership. Whereas the original wording of the Spanish Urban Leases Act 1994⁷ (the rule governing Spanish tenancy contracts) aimed to strike a balance between tenant and landlord interests, the measures introduced in 2013 (Act 4/2013, dated 4th of June) have reduced tenants' stability and security: e.g. reducing the minimum duration of the contract and abrogating the enforceability of the tenancy contract before third parties in the event of a sale ("*emptio non tollit locatum*" principle) (Nasarre-Aznar, Olinda Garcia, Xerri and Simón-Moreno, 2016).

In this context, where neither homeownership nor tenancy seem to meet the current needs of a segment of Spanish households (i.e. those who cannot buy a house but who do not deem tenancy as a real alternative (Fotocasa, 2016⁸), there exists the need to find new options that can make housing access more affordable. The Catalan lawmaker took a very strong interest in solving this issue and, after intensive pre-legislative work⁹, Act 19/2015, dated 29th of July¹⁰, was passed¹¹. Accordingly, the so-called "intermediate tenures", i.e. temporal ownership (*propietat temporal*) and shared ownership (*propietat compartida*), were introduced into the Catalan Civil Code (hereinafter, CCC), aiming at widening the spectrum of land tenures available for -but not limited to- housing purposes. Both were forms of land ownership unknown in the Catalan and Spanish legal systems.

2. The Catalan "intermediate tenures" in the European context

2.1. Shared ownership scheme

The concept used to describe both temporal and shared ownership in Catalonia ("intermediate tenures") is not new in terms of housing policies. England (and later Ireland) has been the major driver of these land tenures (Whitehead and Monk, 2011, pp. 326 ff.), such as the shared ownership scheme. Broadly speaking, this scheme allows low-income households to buy an affordable portion of the value of the home in the beginning (the minimum share to be acquired is usually 25%, the remaining share being owned by a housing association, to which the buyer pays a rent in proportion to the value of the property which he/she does not own), with the chance of attaining the outright ownership of the property in a phased manner. The Irish "shared ownership lease" scheme also took the same approach (Maddox, 2010, pp. 63 ff.)¹².

⁵ More than 85% of mortgage loans concluded in 2007 or earlier could not be paid in 2014.

⁶ They amount to 13.7% of the total housing stock (25,208,623 dwellings).

⁷ BOE (Spanish Official Gazette) 25 November 1994, no 282, p. 36129.

⁸ According to Fotocasa, a well-known estate agency in Spain, 68% of those interviewed prefer being homeowners than tenants.

⁹ The Housing Chair of the Rovira i Virgili University (housing.urv.cat) drafted a first set of rules thanks to an agreement concluded with the Catalan Government. This text was later discussed before the approval of the Act 19/2015.

¹⁰ BOE 8 September 2015, no 215, p. 79039.

¹¹ The Spanish Constitution lays down a *system by which the areas of responsibility assigned to the State and the seventeen Self-governing Communities are distributed*. In this sense, article 148.1.8 of the Spanish Constitution states that these Communities may assume responsibility for civil legislation. Accordingly, Catalonia has enacted its own Catalan civil law rules on several topics, such as property rights (see http://justicia.gencat.cat/ca/ambits/dret_civil_catala/).

¹² It was introduced by the Housing (Miscellaneous Provisions) Act 1992, but it was abolished by the Housing (Miscellaneous Provisions) Act 2009. This scheme had the following features: it was granted for a term more than 20 years but less than 100 years, and the sum of money to be paid upfront was not less than 40 per cent and not more than 50 per cent if it was granted by an approved body, and in other cases not less than 25 per cent and not more than 35 per cent.

With 8,194 shared ownership sales across England in 2013/14 (Sinn and David 2015, pp. 11 ff.), with a median market value of £169,259, it accounts for 0.8 per cent of households in England and it is deemed to be a way to either aspire to staircase up to full ownership or to have more control and security (almost 50 per cent of those who enter the regime were previously tenants). In spite of the challenges shared ownership currently faces (Council of Mortgage Lenders, 2014)¹³, the fact is that it offers an affordable alternative to private renting (more affordable than buying outright and renting privately in all regions except the North East)¹⁴, broadens the land tenures available, offers the opportunity to move into full home ownership, provides security of tenure and supports community stability (Sinn and David, 2015, p. 14).

Other European countries following the civil law tradition have regulated a sort of “intermediate tenures” (Whitehead and Scanlon, 2007, p. 144; Elsinga Janneke and Doling 2007, p. 318; and Nasarre Aznar, 2014), e.g. the Netherlands regulates what is known as “*Koopgarant*”, a sort of restricted ownership that entitles the purchaser to buy a dwelling from a housing association at a discount of 25-30% (in return for which, profits or losses are shared between the homeowner and the housing association when the property is sold afterwards). However, only Catalan law has adapted joint ownership rules¹⁵ so as to implement the English shared ownership scheme as such into a continental legal system.

2.2. Temporal ownership in continental legal systems

The Spanish and Catalan systems of property law (articles 348 of the Spanish Civil Code and 541-1 CCC) take as a starting point the concept of ownership adopted by the French Civil Code 1804: they conceive property as the absolute right to dispose of a thing without further limitations than those contained in the law¹⁶. Other European legal systems have also followed this concept of property since then, such as Germany (§ 903 *Bürgerliches Gesetzbuch* 1899), thanks to the influence of The German *Historical School of Law*, Italy (article 832 *Codi Civile* 1942) or the Netherlands (article 1 Book 5 *Burgerlijk Wetboek* 1992) (Simón-Moreno, 2011, pp. 579 ff.).

This means, in practice, that the right of ownership is deemed to be absolute, i.e. the right of ownership “cannot be fragmented into two types of ownership” (Van Erp and Akkermans, 2010, p. 34); and most importantly, that the right of ownership is perpetual by nature, i.e. the duration of the right is marked by the economic or physical permanence of the object. As a result, there has been a general reluctance to fragment the right of ownership in continental legal systems, and notwithstanding the limitations the right has been subjected to during the last two centuries, e.g. by the abuse of legal doctrine or by the social function of the property¹⁷, and the fact that some ownership-like tenures may be found in

¹³ For instance, the restrictions on sale, the limited re-sale market for shared ownership properties and the valuation fees payable when buying shares.

¹⁴ Intermediate affordable housing, in which shared ownership may be included, is deemed to be in UK housing at prices and rents above those of social rent but below market price or rents, and which meet the criteria as set out in the definition for affordable housing. This definition is provided by the Homes & Communities Agency (1 April 2014–31 March 2015), *Homes and Communities Agency Housing Statistics*, p. 17, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435136/Housing_Statistics_June_2015.pdf (accessed 4 July 2016).

¹⁵ The Housing Act of Galicia (Act 8/2012, of 29 July, on Housing. BOE 8 September 2012, no 217) regulates a similar type of “shared ownership”, but with different characteristics and limited to social housing purposes.

¹⁶ This article entitled the owner to use, enjoy and dispose of the right, see Pothier, **R.-J. (1846), *Traité du domaine de propriété, ici dans la version des Oeuvres de Pothier par M. Bugnet (9)***, p. 103.

¹⁷ About the evolution of the limitation of property rights in France and Italy on the basis of general interests, see Praduroux, S. (2013), *The protection of Property Rights in Comparative Perspective*, European Studies in Private Law (Book 6),

European legal systems (e.g. Poland regulates a perpetual usufruct, which is still present on state or municipal urban land¹⁸), the truth is, however, that its significant distinguishing features –such as the perpetual nature– have remained unchanged, at least so far.

Indeed, the Catalan lawmaker has fragmented the right of ownership by allowing parties to create a right of ownership for a definite period of time, thus breaking with the long-standing conception of this right. This temporal ownership resembles the Anglo-American leasehold, the most important estate in land in English law along with the freehold¹⁹. The main difference between the full right of ownership and temporal ownership in Catalan law is the length of the right, as well as the existence of a successive owner (to whom the temporal ownership will revert once it comes to an end).

The main features of both Catalan shared and temporal ownership are analysed below.

3. Catalan shared ownership

3.1. Concept and regulation

The Catalan shared ownership scheme, in the same way as the English one, enables the gradual acquisition of homeownership (known as staircasing)²⁰ as follows: the buyer (referred to as the material owner) starts acquiring a property share from the seller (referred to as the formal owner), who retains the remaining property share. The Explanatory Memorandum of Act 19/2015 establishes an ideal model concerning the constitution of shared ownership: the acquisition of 25% of the property by the buyer, 5% of which is paid using his own resources and 20% is paid by means of external financing. Due to the fact that the material owner has the exclusive use and enjoyment of the good (see below), the law entitles the formal owner to claim an economic compensation from the material one (see figure 1).

Europa Law Publishing, pp. 123 ff.

¹⁸ It is deemed to be a very strong (99 years) long ownership-like tenure to land, regarded as post-communist survival, connected with the separate ownership of buildings and/or separate apartment ownerships, according to Katarzyna Królikowska, *4th International Workshop on Housing: Spain - Poland – Israel* (22 January 2016), University Rovira i Virgili. See also more interests short of the paradigm of ownership in Directorate General For Internal Policies Policy Department C: Citizens' Rights And Constitutional Affairs (2016), *Cross Border Acquisitions of Residential Property in the EU: Problems Encountered by Citizens*, European Union, Brussels, 81 ff.

¹⁹ Section 1 Law of Property Act 1925 Chapter 20.

²⁰ Garcia Teruel, Lambea Llop and Molina Roig, 2015.

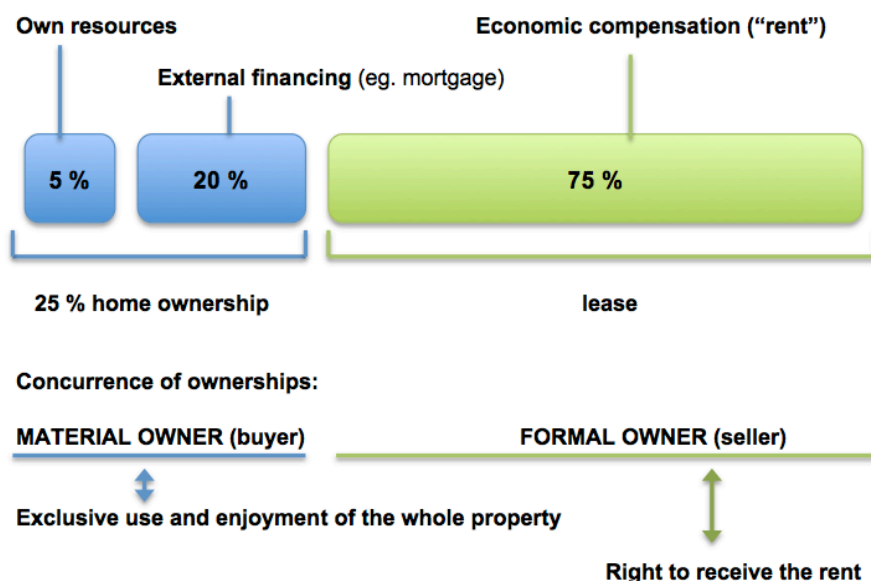


Figure 1. Catalan shared ownership scheme. **Source:** Garcia Teruel, Lamba Llop and Molina Roig, 2015.

Taking into account such “concurrent” and “joint” ownership (Del Pozo et. al., 2016, p. 206), this scheme has been introduced in Title V of the Fifth Book of the CCC (art. 556-1 to 556-12), i.e. where community situations are regulated. Regarding the rules governing the scheme, a preference is given to the will of the parties, following the freedom of contract principle (art. 111-6 CCC). Therefore, this scheme is mainly governed, firstly, by the provisions agreed in the acquisition title, secondly, by the legal regime provided by law (arts. 556-1 to 556-12 CCC), and thirdly, by the provisions of joint ownership²¹ and acquisitions rights in the CCC, provided that they are compatible with the shared ownership scheme (art. 556-3 CCC). Consumer law (RDL 1/2007²² and Consumer Code of Catalonia²³) shall be applied concerning contractual terms and pre-contractual information as long as there is a business to consumer relationship (Third Additional Provision of Act 19/2015). Notwithstanding such freedom of contract, the core elements of the scheme shall be contemplated in the acquisition title (see below).

The introduction of this scheme into Catalan law primarily aims to offer options and solutions to the problem of access to home-ownership. However, this scheme can be applied either to immovable or movable property, as long as these are long-lasting and non perishable goods that can be entered into an official Registry²⁴. It is worth noting that art. 556-2.2 CCC expressly mentions the possibility of constituting a shared ownership over a good on which a temporal ownership scheme has already been established (art. 547-6.1 CCC). The shared ownership, however, shall not exceed the temporal ownership period, unless the successive owner (see figure 2 below) expressly agrees to it. This option allows for the achievement of access to homeownership in an even more flexible and affordable manner (temporarily and gradually).

²¹ In this scheme, the right of use and enjoyment, the participation in yields, the contribution to the expenses and other responsibilities depend mainly on the share of each co-owner. Co-owners cannot modify the good without the consent of the others, and agreements on the administration of the community are adopted by the majority of co-owners (an unanimity is required for acts of disposal). All co-owners have the inalienable right to ask for the division of the good; a non-division agreement is allowed but only for 10 years (arts. 552-1 to 552-12 CCC).

²² RDL 1/2007, Consolidated Draft of the General Law for the Protection of Consumers and Users. BOE no 287, 30.11.2007.

²³ Act 22/2010, Consumer Code of Catalonia. BOE no 196, 13.08.2010.

²⁴ See footnotes 45 and 46 of this article.

3.2. Core elements

Although the scheme is mainly governed by the principle of freedom of contract, there are some aspects that must be complied with, as they are the elements that define the Catalan shared ownership scheme (Lambea Llop, 2016a):

a) First, the material owner has the right, *ex lege*, to gradually increase his share of the property, which cannot be excluded by contract (Nasarre Aznar, 2015, pp. 789-790). Should the conditions for the exercise of the right be agreed in the contract (such as the acquisition timeframe), the right is transformed into an obligation, and a failure to comply could lead to the termination of the shared ownership scheme (art. 556-11.1.d CCC). If nothing has been agreed upon, the material owner can exercise his right freely²⁵ (shares acquired cannot be less than 10%), with the duration of the scheme being the only limit.

b) Thus, the second core element is the temporal nature of the scheme. Although the duration period can be agreed by the parties, this shall not exceed 99 years; and if nothing is agreed, the default period is 30 years. Once the period (either the agreed or the default one) is passed and the material owner has not acquired 100% of the property, the shared ownership is transformed into a joint ownership (arts. 556-4.3 and 556-11 CCC).

c) The third core element is the unequal distribution of rights and duties of the parties, as the material owner has the inalienable and exclusive right of use and enjoyment of the property (arts. 556-1 and 556-6.1.a CCC)²⁶.

d) Finally, the fourth essential element of this scheme is the prohibition to perform an act of division of the thing owned in common (art. 556-1.2 CCC). This element entails a clear difference between the shared ownership and the joint ownership²⁷. A clear example of the intention of the lawmaker to preserve the shared ownership scheme during the agreed period is that in the event of an enforcement procedure due to non-payment of the mortgage or the rent, the acquirer of the property is subrogated to assume the rights and duties of the previous owner after the sale by auction (see art. 556-12 CCC).

3.3. Main characteristics of the scheme: rights and duties of the parties

The main characteristics of the scheme are the following:

a) Both owners (material and formal) are entitled to freely dispose of their property share; therefore, each of them can transfer, encumber or dispose their share upon their death. The law provides for rights of pre-emption and first refusal for the benefit of both -which can be excluded in the contract- in case one of them transfers his property share for a consideration. Exercise of this right shall lead to the cessation of the shared ownership scheme, as the owner exercising the right becomes the outright owner –i.e. he would own 100% of the property shares (Nasarre Aznar, 2016c).

b) Regarding the powers of the material owner (buyer), the regulation of this scheme intends to see this party as the full owner in practice, even though it consists of a legal situation in which the

²⁵ This freedom gives the material owner the opportunity to acquire a greater property share when his economical/personal situation improves.

²⁶ See more of this right below.

²⁷ Two intentions of the lawmaker are deduced from this element. The first one is to distinguish the nature of the shared ownership scheme from the joint ownership, even though the regulation of the latter applies by default to the shared ownership scheme regarding those aspects not agreed by the parties and not regulated by the shared ownership regulation. And the second one is to preserve the scheme of shared ownership during the agreed period or the one applying by default (Lambea Llop, 2016a). Thus, the shared ownership scheme is presented as a viable economic option, contrary to the joint ownership, which involves an uneconomical situation and that is why it must tend to facilitate the division of the property in common (see this idea in Bercovitz Rodríguez-Cano, 2010, pp. 103-104).

thing is owned in common. That is why the material owner has an exclusive right to fully possess, use and enjoy the movable or immovable good. Also, in the event that the shared ownership is constituted on an immovable subject to a condominium regime, the material owner has all the rights and duties arising from this regime, such as the right to attend and also vote in the condominium meetings or the duty to pay the condominium fee (art. 556-6.3 CCC). There is only one limit to the exclusive right of use and enjoyment: not compromising the integrity or functionality of the thing. In this regard, the formal owner (seller) enjoys a degree of protection as he is entitled to require repair work from the material owner if the subsistence of the thing is jeopardized or if it depreciates by more than a 20%. The lawmaker brings him protection in such circumstances because the formal owner has a direct interest in the value of the good: he owns a share of it, which he can freely dispose of; the value of the good is important when establishing the price of the gradual acquisition of shares from the material owner; and, eventually, the formal owner can end up owning the whole good (either through rights of pre-emption and first refusal or through staircasing down, which is explained below).

c) Concerning the expenses, these are allocated in accordance with the same concept outlined in the preceding paragraph. As the material owner is the full owner “in practice”, he is in charge of meeting the expenses of repair, conservation and maintenance works arising from the ordinary use of the good. However, the payment of the extraordinary expenses is divided between the two owners, according to their property share. This is justified by the aforementioned direct interest in the value of the good held by the formal owner. Also, the formal owner cannot be compelled to pay part of the expenses arising from improvement works undertaken by the material owner voluntarily, as the decision is taken freely and unilaterally by him and he will also be the one enjoying those improvements (Del Pozo et. al., 2016, p. 351)²⁸. Nevertheless, the parties can agree upon a different distribution concerning the expenses.

d) In order to have the exclusive right of use and enjoyment of the good, the material owner might be required to pay an economic compensation to the formal owner; it is like a “rent” for the share of the good he does not own. If nothing is agreed, the amount of this compensation is related to the share not acquired, so the more share the material owner acquires, the less he will pay for the compensation (art. 556-7.b CCC). This is an incentive to the material owner to acquire a larger share of the property in order to reach 100%. However, this economic compensation can be excluded. What cannot be excluded is the right of exclusive use and enjoyment of the material owner.

e) The right of the material owner to gradually acquire a larger share of the property is a core element of the shared ownership scheme. But another possibility, mentioned in the Explanatory Memorandum of the Act 19/2015, is to agree on an inverse acquisition, i.e., the material owner can sell part of his ownership share to the formal owner (staircasing down), for example, in times when the former needs liquidity.

3.4. Potential uses

In general terms, both shared ownership and temporal ownership have been introduced to overcome the owning/renting dichotomy and to offer a greater variety in the type of tenures available, each one adapted to each household’s means and needs (Nasarre Aznar and Simón Moreno, 2013). For example, shared ownership would be a good option for a household that looks for the security and the stability that home-ownership entails but does not have enough economic resources to enter this type of tenure without becoming over-indebted. This formula is also a stepping-stone from one form of tenure to

²⁸ See an extended discussion about the distribution of the expenses between the material owner and the formal owner in Lambea Llop, 2016b.

another: e.g. to go from living with parents or renting to accessing (purchasing it gradually) full homeownership (Sirr, 2016). In general terms, the mortgage loan amount shall be lower (depending on the property share acquired), so it also makes it easier to comply with the limits to credit agreements established by Directive 2014/17/EU²⁹ (e.g. art. 18 on the obligation to assess the creditworthiness of the consumer).

In the field of social housing, shared ownership is included in the Catalan Housing Plan 2013-2016³⁰ as a way to access publicly protected housing (*habitatge de protecció oficial*), which limits the selling price (both in the acquisition of an initial share and the subsequent acquisitions) and also the economic compensation to which the formal owner is entitled. Another potential use of shared ownership worth highlighting is the promotion of the rotation of the Catalan social rental housing stock, which account for merely 2% of the available homes, as affordable access to social homeownership could be offered to social tenants, whose economic/social situation has improved (instead of compelling them to “jump” to the private market). Shared ownership could also be employed as a measure for combating ghettoisation, as it could allow a mixture of different tenures (and different household profiles) in the same neighbourhood or even in the same building (Garcia Teruel et al, 2015, p. 120).

Apart from being introduced as a structural measure in the housing market, the shared ownership scheme is also presented as a measure for overcoming the evictions issue, as already pointed out. This is expressly contemplated in the second paragraph of the First Additional Disposition of Act 19/2015. In the event of a successful mortgage enforcement procedure that leads to the debtor’s eviction, shared ownership may help to prevent the eviction: homeownership can be transformed into a shared ownership scheme. Thus, the homeowner (former material owner) will retain a share of the property equivalent to the amount of the mortgage loan he has already repaid (e.g. if 40% of the mortgage has been repaid, the householder will own a 40% property share in the dwelling) and the credit institution will own the remaining part (in the previous example, a 60% share); the homeowner might be required to pay an economic compensation for the share that he does not own (which will be much less than the former mortgage installments).

4. Catalan temporal ownership

4.1. Concept of temporal ownership

Temporal ownership is the second type of ownership in Catalonia introduced by Act 19/2015 into the CCC (art. 547-1 to 547-10 CCC), but these provisions have been challenged before the Spanish Constitutional Court by the acting Spanish Government on the grounds that the Catalan Government does not have the necessary legal jurisdiction to draw up this legislation³¹.

There are also two parties in the temporal ownership scheme. However, unlike shared ownership, they do not share the ownership at the same time (see figure 2), but successively. Art. 547-1 CCC defines temporal ownership as a right that provides the temporal owner with the ownership for a certain period of time. At the end of the agreed period, the ownership of the good will revert back to the seller (art.

²⁹ 4 February 2014, OJEU no L 60/34, 28-2-2014.

³⁰ Decree 75/2014, 27 May. DOGC no 6633, 29.05.2014.

³¹ See Ruling of the Constitutional Court of 24.05.2016 (BOE no 134, 03.06.2016). However, this lack of jurisdiction is not clear, because Catalonia already has regulations on ownership (arts. 541-1 and ff. CCC) and on types of “temporal ownership”, such as surface rights (art. 564-1 CCC) or donations with a reversal clause (art. 541-19 CCC).

547-10 CCC), referred to as “the successive owner” (*titular successiu*), who may or may not be the initial owner³².

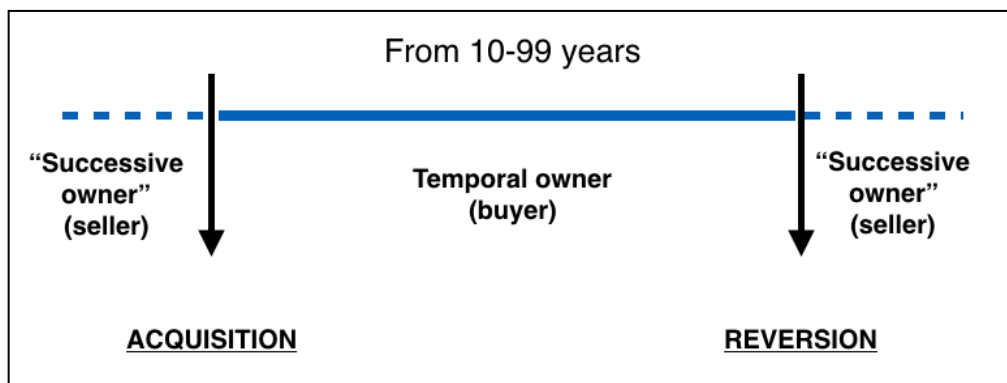


Figure 2. Temporal ownership scheme. Source: Garcia Teruel et. al., 2015.

Temporal ownership has all the elements of ownership but they are limited in time. The concept of time limited ownership has been discussed in relevant legal literature³³, pointing out that this right (either the one regulated in art. 348 Spanish Civil Code³⁴ or in art. 541-1 CCC) must be perpetual, but there exist some schemes in both the Spanish and Catalan legal systems that closely resemble “temporal ownership”. This is in reference to cases such as a donation with a reversal clause (art. 541-19 CCC), surface rights (art. 564-1 CCC), intellectual property rights (art. 26 Act 1/1996)³⁵, etc.³⁶ Be that as it may, CCC now establishes the possibility of having full ownership for a certain period of time. Temporal ownership is “ownership” and it is governed by the title of acquisition (freedom of contract principle, art. 111-6 CCC), by arts. 547-1 to 547-10 CCC and, alternatively, by the provisions of ordinary ownership (art. 541-1 and ff. CCC). As is the case in shared ownership, consumer protection rules shall be applicable to business to consumer relations.

4.2. Characteristics of the scheme

In a temporal ownership scheme, parties have several rights and obligations. Moreover, there are some features that should be included in the contract in order to be considered as “temporal ownership” (i.e. they are deemed to be core elements of the scheme, so they have a mandatory nature) and others that may be freely agreed by both parties without changing the legal nature of this scheme.

4.2.1. Rights and duties of the parties

In this scheme, there exist two parties: the temporal owner (*propietari temporal*) and the successive owner (*titular successiu*)³⁷. The temporal ownership might be acquired in exchange for a lump sum, a rent, or freely through a donation or inheritance (art. 547-4.2 CCC).

³² But not necessarily, because the successive owner may transfer his right to a third party (art. 547-7.1 CCC). In this case, at the end of the agreed period, the ownership of the good will freely go to another person.

³³ The vast majority confirm that ownership is perpetual, as does the Constitutional Court (STC 29.11.1998, RTC 1988, 227). See the analysis in Nasarre Aznar and Simón Moreno, 2013. See also, concerning perpetuity in Civil law countries, specifically in France, Pourquier, 2000.

³⁴ Royal Decree of 24.07.1889, Spanish Civil Code. BOE no 206, 25.07.1889 (hereinafter, SCC).

³⁵ See the legal nature of these figures in Nasarre Aznar and Simón Moreno, 2013.

³⁶ As pointed out by Del Pozo et. al., 2016, p. 157, art. 547.3.2 CCC implicitly recognises that those rights are also temporal ownership, but they are governed by other provisions.

³⁷ Since the initial owner may transfer his acquisition right to another party (art. 547-7.1 CCC).

The temporal owner acquires the ownership of a good for a certain period of time. He has the same proprietary rights as the perpetual owner, which are only limited by the agreed term and by the existence of the successive owner (art. 547-6.1 CCC). So, the temporal owner may sell, encumber and transfer the good by inheritance, without the consent of the successive owner (but must inform him³⁸). When selling the good, he may also choose to sell his rights temporarily, in accordance with the temporal ownership scheme, in such a way that a “sub-temporal ownership” is created³⁹. The temporal owner has all the rights and obligations deriving from the good (tax payments, maintenance of the good⁴⁰), even those related to the condominium (he may vote, but he has to pay for the condominium expenses too⁴¹). However, he is not only limited by the term, but also by the general limits of ownership: restrictions put in place by the law and by the social function of ownership (541-2 CCC). Moreover, although he may voluntarily terminate the temporal ownership, this would not affect any property rights encumbering it, because his own waiver cannot harm third party interests (art. 547-9.2 CCC).

Regarding the successive owner, he is not the owner of the good during the temporal ownership, unlike shared ownership (and because of that, he is not obliged to pay taxes and expenses). He has the right to receive the agreed price⁴², if applicable, and the right to recover the good for free once the term expires (it is then a property right⁴³). He may also sell, encumber and transfer by inheritance his rights as the successive owner (art. 547-7.1 CCC) and, in order to protect his right, he may file a claim against the temporal owner, demanding that he carry out repairs and reconstruction work if the value of the good is reduced by more than 50% due to neglect or intentional harm (art. 547-7.3 CCC)⁴⁴. If the temporal owner does not carry out these works, the temporal ownership agreement may be dissolved (art. 547-9.1 CCC).

4.2.2. Compulsory provisions

Temporal ownership, as is the case with shared ownership, must relate to an immovable⁴⁵ asset or to a non perishable⁴⁶, long-lasting movable asset that can be entered into an official Registry, such as cars, ships, jewels, etc⁴⁷. Temporal ownership may be used in the private housing market or in publicly protected housing, since the Catalan Housing Plan 2013-2016 allows for this.

The essential element of temporal ownership is the term (*dies certus, certus quando*) and this is what distinguishes temporal ownership from ordinary ownership. According to art. 547-4.3 CCC, the agreed term must be between 10 and 99 years (in immovable property) or between 1 and 99 years (in movables). Act 19/2015 does not establish an alternative term in the event that this element is omitted,

³⁸ According to art. 547-6.2 CCC, when encumbering or alienating the good, the temporal owner shall inform the successive owner. However, in case of a lack of notice, the legal transaction is still valid, but it may affect the right of first refusal of the successive owner. See Molina Roig, 2016a.

³⁹ And even to create a shared ownership over a temporal ownership.

⁴⁰ Garcia Teruel, Lambea Llop and Molina Roig, 2015.

⁴¹ See an exception *infra* with respect to voluntary provisions.

⁴² This payment may be claimed either with the order for payment procedure (*monitorio*) or with an ordinary proceeding (*declarativo*). See Cerrato, 2015, p. 12.

⁴³ Del Pozo et. al., 2016, p. 158.

⁴⁴ In this case, the good could be considered in “economic ruin” (art. 198.2 Catalan RD 1/2010), which may severely affect the economic value of the right of the successive owner.

⁴⁵ Concerning the concept of movable or immovable property, one should follow art. 511-2 CCC. According to CCC, immovable property is land, water, vegetation, minerals (the three last ones, when they are annexed to land), movables annexed to an immovable and other property rights (surface right, usufruct, etc.).

⁴⁶ According to art. 337 Spanish Civil Code, non perishable goods are those determined and individualised with respect to the other ones of their specie.

⁴⁷ Otherwise, the content of the ownership would be limited, as one of the owners could consume the good.

unlike in the shared ownership scheme (30 years). In this case, the contract must be comprehensively examined, looking for the presence of any reference to the term that the parties intended to establish (Díez Picazo, 1983, p. 524). If this is not possible, the term will be judicially established (art. 1128 SCC), but some literature (Del Pozo et. al., 2016) considers that the alternative thirty-year term set in the shared ownership scheme (art. 556-4.3 CCC), and also in the cases of time-sharing (art. 563-2.3 CCC) and usufruct (art. 561-3.4 CCC) should be applied.

Finally, art. 547-4.4 CCC establishes that, when transmitting the temporal ownership, an inventory must be carried out. This might help parties to claim in case of damages (Molina Roig, 2016b).

4.2.3. *Voluntary provisions*

Apart from that, parties may agree on several voluntary provisions provided for in art. 547-5 CCC, provisions that do not change the legal nature of temporal ownership (Nasarre Aznar, 2016a). Specifically:

- a) Method of payment: as mentioned above, the acquisition of temporal ownership may require the payment of a monetary compensation, with the temporal owner having the obligation to pay the seller. The price can be paid either with a lump sum (for example, 50,000€ for a 20-year ownership) or by means of instalments (art. 547-5.1 CCC). This last method seems similar to a tenancy, however the provisions of residential leases (Spanish Urban Leases Act 1994) are not applied (because the temporal owner is an owner, not a tenant). In this case, some studies show that temporal ownership is cheaper than a tenancy contract would be for the same period of time (Sirr, 2016).
- b) The option of extending the term of temporal ownership. Although a specific term shall be declared in the contract, there is no problem in agreeing on an extension, but it cannot be longer than 99 years, since this is a mandatory provision (Nasarre Aznar, 2016a). It may depend, for example, on the circumstances of the temporal owner (such as finding a job, retirement, etc.).
- c) *Pre-emption* rights: if nothing is agreed, parties do not have *pre-emption* rights (right of first refusal). However, they may agree on having a right of first refusal when the other party wants to sell the good. These rights are governed by arts. 568-13 and ff. CCC, and they are only enforceable when the asset is transferred in exchange for financial consideration (art. 568-14.3 CCC).
- d) Purchase option: there exists the possibility of agreeing to give the temporal owner an option to purchase the asset in question (art. 568-1.1 CCC). For example, if at the end of the temporal ownership, the temporal owner wants to acquire the whole good. As happens with tenancy contracts, the price paid by the temporal owner may or may not be discounted from the purchase option price.
- e) The obligation of the successive owner to pay repairs and other works: although the temporal owner has the main obligation to carry out repair works, there is nothing that prevents the parties from implementing an agreement that makes the successive owner liable for this. This may be useful in the case of short- temporal ownerships and when works are undertaken in the last years of the agreed term (because the successive owner is interested in the value of the good, but the temporal owner is not).

4.3. Potential uses

At a private level, temporal ownership may be useful for covering several situations relating to access to housing. For example⁴⁸, a middle-aged person who is going to another city because of work, but who knows that, when he retires, he will come back to his town; or people who own a secondary residence but that do not have enough money to maintain it (for example, an inherited dwelling), may transfer temporal ownership.

Apart from these, the Catalan legislator focuses on two more uses for temporal ownership. The first one is related to social housing. According to art. 54.2 Decree 75/2014, temporal ownership may be used to acquire publicly protected housing (Garcia Teruel, 2016a, p. 119). In this case, the dwelling shall be subjected to public controls and conditions for a minimum term of 20 years and the social temporal owner cannot pay, for the temporal ownership, more than 80-85% of the maximum price for a publicly protected home in a full ownership scheme, established by the Catalan Government depending on the zone where the property is located.

Another use of temporal ownership is to prevent evictions. According to section 2 of the First Additional Provision of Act 19/2015, the Public Administration shall negotiate with banks in case of a mortgage enforcement procedure in order to create a shared or a temporal ownership scheme, taking into account the amounts already repaid⁴⁹. For example, if the consumer has paid 40% of the whole mortgage debt (so, the outstanding debt is 60%), he may retain the temporal ownership of the dwelling for a certain period of time, thus ceding successive ownership rights to the bank. With this novation (art. 1203.1 SCC), the debtor obtains a partial *datio in solutum*, paying off part or the whole debt, but he is allowed to continue living in the dwelling. At the end of the temporal ownership, the bank will obtain the full ownership of the property⁵⁰ (Garcia Teruel, 2016b). This scheme is fairer than a “Mortgage to Rent scheme”, since the debtor does not lose the ownership of the dwelling and it allows him to live for more time there, with more rights and paying less than with the mortgage instalments.

5. Conclusions

The shared ownership and the temporal ownership schemes are intended to facilitate access to housing by combining security of tenure (as both the material owner and the temporal owner are deemed to be owners by law), affordability (being a temporal owner of a dwelling or having a share of it is more affordable) and flexibility (the parties are free to agree on the duration of the scheme), thereby enabling a continuum regarding access to housing.

Indeed, these tenures are conceived as a middle ground between ownership and renting and may be used for a variety of purposes. As a result, the Catalan lawmaker has fragmented the right of ownership on the basis of English law, which is a great breakthrough regarding the long-standing conception of the right of ownership in continental legal systems.

⁴⁸ Nasarre and Simón, 2013.

⁴⁹ This provision recalls the Mortgage Rescue Scheme carried out in Great Britain, which included the Mortgage to Shared Equity scheme (using shared ownership in order to transform the debt) and the Mortgage to Rent, allowing the debtor to live in the property with a shorthold tenancy. See more details about that in: WILCOX, et. al. 2010, p. 55.

⁵⁰ Or not, because they may agree on an option to purchase (547-5 CCC), so the debtor may rebuy the rest of the property if he has better economic conditions.

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