PARALLEL REASONING BY RATIO LEGIS IN CONTEMPORARY JURISPRUDENCE. ELEMENTS FOR A DIALOGICAL APPROACH

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Abstract: Nowadays, there is a quite considerable amount of literature on the use of analogy or more generally of inferences by parallel reasoning in contemporary legal reasoning, and particularly so within Common Law. These studies are often motivated by researches in artificial intelligence seeking to develop suitable software-support for legal reasoning. Recently; Rahman/Iqbal/Soufi (2020) developed a dialogical approach in the framework of Constructive Type Theory to what in Islamic Jurisprudence was called *qiyās* or *correlational inferences*. In their last chapter the authors suggested that such an approach contributes to the study of patterns of reasoning by precedent cases within contemporary common Law. In the present paper we will further motivate the deployment within Civil and Common Law of the dialogical framework developed in Rahman/Iqbal/Soufi (2020). After a presentation of Scott Brewer's take on analogy within Common Law, that has striking structural similarities to reasoning by precedent case rooted in *ratio legis* (known in Islamic Jurisprudence as *qiyās al-'illa* or correlational inference by the *occasioning factor*), we will illustrate the implementation of the framework with a brief discussion of some cases of legal reasoning based in Spanish Civil Law but where the accent is put in the emerging ruling rather than in the existing of a case as in Common Law. Moreover; quite surprisingly, the case under study suggests that even cases of Law-interpretation fit the argumentation pattern of *qiyās al-'illa*. A caveat: in the present paper we will focus mainly in discussing the dynamics of the meaning constitution involved rather than in setting the rules of the underlying dialogical framework, the latter is the subject of a follow-up paper.

I Introduction

Nowadays, there is a quite considerable of literature on the use of analogy or more generally of *inferences by parallel reasoning*[1] in contemporary legal reasoning, and particularly so within Common Law. These studies, many of them based on argumentation-based frameworks, are often motivated by researches in artificial intelligence seeking to develop suitable software-support for legal reasoning.[2]

Recently, Rahman/Iqbal/Soufi (2020) developed a dialogical approach in the framework of Constructive Type Theory to what in Islamic Jurisprudence was called *qiyās* or *correlational inferences*.[3] In their last chapter, inspired by Wael B. Hallaq's (1985) seminal article "The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and Common Law", the authors suggested that such an approach contributes to the study of patterns of reasoning by precedent cases within contemporary common Law.

[1] The term *inference by parallel reasoning* stemms from Paul Bartha (2010).
[2] Cf. Rissland/Ashley (1987, 1989), Posner (1992), Hage/Leenes/Lodder (1994), Prakken (1995), Prakken/Sartor (1996), Brewer (1996), Kloosterhuis (2000). Some reject logical approaches such as Weinreb (2005), and Woods (2015) – despite the fact that the latter, as pointed out by Rahman/Iqbal/Soufi (2020, pp. 240-246) is closer as expected to the logical approach of Brewer.
[3] Cf. Young (2017).

Indeed, the aim of correlational inferences within Islamic Law is to provide a rational ground for the application of a juridical ruling to a given case not yet considered by the original juridical sources. It proceeds by combining heuristic (and/or hermeneutic) moves with logical inferences.[4] The simplest form follows the following pattern:

- In order to establish if a given juridical ruling applies or not to a given case, called the *branch-case*, *al-farʿ*, we look for a case we already know from the sources that falls under that ruling – the so-called *root-case, al-aṣl*. Then we search for the property or set of properties upon which the application of the ruling to the root-case is grounded (the *ratio legis* or *legal cause* for that juridical decision).

  If that grounding property (or set of them) is known, it is examined if that property can also be asserted of the new case. In the case of an affirmative answer, it is inferred that the new case also falls under the juridical ruling at stake, and so the range of its application is extended. When the legal cause is explicitly known (by the sources) or made explicit by specifying a relevant set of properties, we are in presence of an inference by *qiyās al-ʿilla* or correlational inference by the *occasioning factor*.

  When the grounds behind a given juridical ruling are neither explicit nor can they be made explicit we are in presence of correlational inferences by indication (*qiyās al-dalāla*) or by resemblance (*qiyās al-shabah*). Whereas the former are based on pinpointing at specific relevant parallelisms between rulings (*qiyās al-dalāla*) shared by both the root-case and the branch-case, the latter are based on asserting the resemblance of root-case and branch-case in relation to a set of (relevant) properties (*qiyās al-shabah*).

Thus, *qiyās al-dalāla* and *qiyās al-shabah,* sometimes broadly referred as arguments by analogy (or better by the Latin denomination arguments *a pari*) are put into action when there is absence of knowledge of the occasioning factor grounding the application of a given ruling. The plausibility of a conclusion attained by **parallelism between rulings** (*qiyās al-dalāla*) is considered to be of a higher epistemic degree than the conclusion obtained by **resemblance of the branch-case and the root-case in relation to some set of (relevant) properties** (*qiyās al-shabah*). Conclusions obtained by either *qiyās al-dalāla* or *qiyās al-shabah*, have a lower degree of epistemic plausibility as conclusions inferred by the deployment of *qiyās al-ʿilla,* where the **occasioning factor** can be pinpointed.[5]

Not unlike to present rejections of logical approaches to legal reasoning,[6] during Classical Islam there was a long and deep controversy concerning the pertinence of logic and epistemology within Law. The main objections can perhaps be summarized as follows[7]:

1. Within the legal sources one very rarely finds attempts to deduce a general rule from the specific rule for each legal act. What we actually find in the legal writings more often than not, are **specific rules**.[8]

[4] The theory of *qiyās* was mainly developped by the Shāfiʿī-school of jurisprudence (*uṣūl al-fiqh*), and particularly so by Abū Isḥāq al-Shīrāzī (393H/1003-476H/1083CE), who rendered one of the most influential systems of legal reasoning – see al-Shīrāzī (1987, 2003, 2016). For a comprehensive study see Young (2017).
[5] Cf. Young (2017, pp. 108-128).
[6] Cf. Weinreb (2005) and Woods (2015).
[7] For a thorough discussion on these points see Zysow (2013, pp. 160-191).
[8] Like in contemporary Common Law.

2. Finding out the general rules by abduction or induction and **setting them as fixed norms** leads to ground legal normativity on uncertainty. This casts doubt on even *qiyās al-ʻilla*, purported to provide the most certain conclusion attained by legal reasoning.
3. Understanding the general norm behind a specific juridical ruling requires the deployment of an **interpretative** process rather than of a dubious epistemological argument purported to identify a relevant property featuring the cause of the Law.

One cardinal feature of the most mature of *qiyās al-ʻilla* that emerged from such a controversy, is the inception of the test of efficiency or *taʾthīr*, that provides the means to verify whether the property $\mathcal{P}$ purported to be relevant for the juridical sanction at stake is indeed so. The test declines into two complementary procedures:

> testing co-extensiveness or *ṭard* (if the property is present then the sanction too), and
>
> testing co-exclusiveness or *ʿaks* (if the property is absent then so is the juridical sanction. While co-extensiveness examines whether sanction $\mathcal{K}$ follows from the verification of the presence of the property $\mathcal{P}$, co-exclusiveness examines whether exemption from the sanction $\mathcal{K}$ follows from the verification of the absence of $\mathcal{P}$.[9]

As pointed out by Zysow (2013, p. 215), the doctrine of efficiency represents an impressive attempt to answer the cardinal questions of those that opposed the deployment of *qiyās.* Notice that the method of efficiency not only tests the relevance but also responds to the point on the legal foundation of the general rules. The fact is that the general schema is both grounded and extracted from specific rulings found in the legal sources. Moreover, by means of *taʾthīr* the occasioning factor is identified as the application of a schema that yields a ruling grounded in the sources

By way of an illustration let us recall the classical example of *qiyās al-ʻilla*. Date liquor intoxicates, just as (grape) wine does, so that it is prohibited like wine. The canonical analysis identifies four elements in such an argument: the branch-case or case under consideration, date liquor; the root-case or case verified by the sources; wine; the character they have in common their power to intoxicate; and their common, legal qualification, prohibition (inferred in the case of date liquor, verified by the sources in the case of wine). The crucial step that underlies this form of argumentation is the identification of the occasioning factor, the *ʻilla*, that lies behind its prohibition by means of the test of efficiency. The point here is that applying the general schema that *drinks that have the power to induce intoxication should be forbidden* to the case of date liquor *occasions* its interdiction, since the presence of intoxication-power of a drink leads to the interdiction of consuming it and the absence of such a power leads to the conclusion that the consumption of that drink is not forbidden

In the present paper, we will further motivate the deployment within contemporary Civil and Common Law of the dialogical framework developed in Rahman/Iqbal/Soufi (2020). More precisely, after a presentation of Scott Brewer's take on analogy within Common Law, that has striking structural similarities to reasoning by precedent case rooted in *ratio legis* (known in Islamic Jurisprudence as *qiyās al-ʻilla* or correlational inference by the *occasioning factor*). We

[9] See Rahman/Iqbal/Soufi (2019, Preface).

will illustrate the implementation of the framework with a brief discussion of some cases of legal reasoning based in Spanish Civil Law but where the accent is put in the emerging ruling rather than in the existing of a case as in Common Law.[10]

Moreover; quite surprisingly, the cases under study suggest that even cases of Law-interpretation fit the argumentation pattern of *qiyās al-ʻilla*. This seems to open a new path for the study of argumentation by parallel reasoning.

A final caveat: in the present paper we will focus mainly in discussing the dynamics of the meaning constitution involved rather than in setting the rules of the underlying dialogical framework, the latter is the subject of a follow-up paper.

II Scott Brewer on Parallel Reasoning.

Scott Brewer (1996, pp. 1003-1017) developed an approach to parallel reasoning based on extracting a general reasoning schema for parallel reasoning from some specific rules. Brewer (1996, p. 1004) speaks of schemas of *exemplary reasoning* (ERS).[11]

The legal context of both Brewer is *reasoning by precedent*, one of the hallmarks of Common Law. So the specific rules the ERS generalize are precedent cases recorded by the legal sources.

In fact, the main aim of Brewer's is to describe the emergence of a legal ruling as the result of generalizing an inferential schema that unifies the cases under consideration. According to Brewer (1996, p. 1004) such a generalization is carried out by means of a specific inference rule called *analogy-warranting rule* (AWR), which makes of the whole argument an instance of the general schema at work (that is why the whole pattern is called *exemplary reasoning schema* – ERS). This deductivist approach, as acknowledged by Brewer (1996, p. 1006) himself; should in principle have problems in dealing with *defeasibility*.

One of Brewer's (1996, pp. 1003-1007) main example is the following:

> […] *valuables were stolen from a passenger's rented steamboat cabin. The issue in that case was whether the steamboat owner was strictly liable to the passenger for the loss (it having been decided below that neither the steamboat owner nor the passenger was negligent). Apparently, only a couple of cases were directly on point: one held that an innkeeper was strictly liable for the theft of boarders' valuables, while another held that a railroad company was not strictly liable to passengers for the theft of their valuables from open-berth sleeping-car trains. One might say that the legal issue was put to Judge O'Brien thus: in the "eyes of the law," was the steamboat sufficiently like an inn, on the one hand, or sufficiently like a railroad, on the other, to receive the same legal treatment?*
>
> > *Reconstructed in accord with the schema presented above, the argument is as follows:*
> > ***Target** (y) = the steamboat owner.*

[10] In fact a landmark in the contemporary studies of analogy in legal reasoning is Alchourrón's (1961) paper *Los Argumentos Jurídicos a Fortiori y a Pari*, which as pointed out by Alchourrón himself was a reaction to Perelmann's mistrust of the use of formal logic within legal reasoning. Alchourron's proposal seems to be closer to patterns of reasoning based on the **resemblance of the branch-case and the root-case in relation to some set of (relevant) properties** (*qiyās al-shabah*), rather than on identifying an occasioning factor. We will not discuss here Alchourron's paper.

[11] We will focus here in Brewer's approach, though as discussed in the last chapter of Rahman/Iqbal/Soufi (2020), Brewer's proposal can be seen to be quite close to the one of John Woods (2013, pp. 273-281), despite the fact that Woods (2015, pp. 275-277) criticizes 'logical' studies such as that of Brewer.

Source *(x) = the innkeeper.*

Shared characteristics*:*
F: has a client who procures a room for specified reasons R (privacy, etc.).
G: has a tempting opportunity for fraud and plundering client.

Inferred characteristic:
H: is strictly liable.

Argument:

1) *y has F and G (target premise);*
2) *x has F and G (source premise);*
3) *x also has H (source premise)*
4) *AWR: if anything has F and G also has H, then everything that has F and G also has H;*
5) *Therefore, y has H.*

In the formulation of an ERS, Brewer deploys the terminology: *shared characteristics*. This might suggest that what is at stake here is the similarity between the target and the source case, as in typical arguments by analogy (such as al-Shīrāzī (2003) *qiyās al-shabah*). However, notice that the argument in the quote above does **not** deploy substitution of identicals.

The logical structure of Brewer's (1996) argument in the ERS quoted is based on the open assumptions *x and y have F, x and y have G,* and the propositional function *x also has H.* The cardinal step is to trigger an inference without assuming an identity relation. In order to do so, Brewer introduces AWR which accomplishes the task of embedding the step *if anything has F and G also has H* into a standard deductive framework, where *any* becomes *every*, that is, a universal quantifier that binds the variables of the open assumptions. Thus, AWR produces logically valid inferences. After all, the ERS do not rely on similarity of cases but in subsuming target- and source-case into a general universal rule.

Let us provide two different reconstructions of

If anything has F and G also has H,

1) *H* and *G* are understood as being linked by a conjunction within an open assumption

$H(x)$ *true* $(x: F \wedge G)$,
that can be glossed as:

x is liable if it instantiates both having a client who rents a room and having a tempting opportunity for fraud and plundering of client.

2) *H* and *G* are understood as being linked by a dependence relation. *Having a tempting opportunity for fraud and plundering of client* is restricted to *having a client who rents a room*

$H(x, y)$ *true* $(x: F, y: G(x))$,
that can be glossed as: *Those x of whom G can be predicated (G(x)) are liable , provided they instantiate F*.

If we wish to have more an expressive structure we can go deeper into the structure:

$H(u,v)$ *true* $(u$: *Individuals*, $v: F(u) \wedge G(u)$

x is liable if it instantiates an individual that is also an instance of those individuals having both F and G.

$H(x,y,z)$ *true* (x: *Individuals*, y: $F(y)$, z: $G(x,y)$)

x is liable if it instantiates an individual that is also an instance of those individuals having G, provided they instantiate F (first).

Notice that even in the simpler version our analysis makes the liability dependent upon *F* and *G*. It is not liability in general, but that liability that is *inferentially* dependent upon *F* and *G*, and thus specific to having these properties.

How does this inferential structure produce actual inferences? Well, by instantiating. The instrument of inference is a method that for any individual that instantiates the premises *F* and *G* takes us to the liability of this individual. The method is obviously a function; i.e., the dependent object that provides instances from open assumptions.

Let us now assume that *a* is an instantiation, then we obtain the following variants of the inference rules within an ERS underlying Brewer's example quoted above.

$$\frac{a: F \wedge G \qquad b(x): H(x) \quad (x: F \wedge G)}{b(a): H(a)} \qquad \frac{a: F, c: G(a) \qquad d(x,y): H(x,y) \quad (x: F, y: G(x)),}{d(a,c): H(a,c)}$$

It is important to keep in mind that if ERS is to be considered a instantiation schema supporting inferences, the inferential structure must be based on open assumptions of the form x: *A* upon which propositional functions are defined. In our case the functions at stakes are:

$b(x)$: $H(x)$ (x: $F \wedge G$) or $d(x,y)$: $H(x)$ *true* (x: F, y: G(x))

Let us deploy the terminology of *qiyās al-ʿilla* in the inference rule, which stresses the *occasioning* or causative force of the function. In other words, let the functions $b(x)$ and $d(x,y)$ stand for the functions that render the *occasioning factor* or *ratio legis* for the rulings $H(x)$ and $H(x,y)$. Accordingly let us deploy the notation *ʿilla*(x) and *ʿilla*(x,y):

ʿilla(x): $H(x)$ (x: $F \wedge G$) or *ʿilla*(x,y): $H(x)$ (x: F, y: G(x)),

The idea is that when the judge delves into the content behind one specific rule that has been acknowledged by the legal sources as setting a precedent, the judge grasps the meaning as constituted by a schema that tightens inferential legal ruling and conditions. In other words, the judge presupposes that the propositional functions

$H(x)$: *prop* (x: $F \wedge G$) or $H(x)$: *prop* (x: F, y: G(x)),

unify some set of cases that constituted a precedent.

Notice that so far we have kept silent on Brewer's deductivist *analogy-warranting rule* AWR. Non-deductivists as John Woods (2015) will certainly take exception to AWR, and if we follow the inferential schema described above we do not seem to need AWR at all.

However, one way to understand the role of this rule is to link it with *taʾthīr,* the possibility of testing if the applied instantiation schema does indeed manage to unify the relevant set of precedent cases put into action. In order to do so, we need to display the inferential structure behind AWR.

Inferentially speaking, the passage from the general schema to the universal quantification is only a step away

$$(x\colon F \wedge G)$$

$$b(x)\colon H(x)$$

$$\lambda x.b(x)\colon (\forall x\colon F \wedge G)\, H(x)$$

This is, in our view, the way to formulate Brewer's (1996, p. 1004) *analogy-warranting rule* AWR as emerging from an instantiation schema.

Nevertheless, this is only half of the story. As observed by Brewer (1996, pp. 1006-1016), AWR should be linked with the possibility of objecting to the relevance of the properties by means of a disanalogy.

Here again, al-Shīrāzī's (1987; 2003; 2016) insights help. As discussed in our introduction, the idea is that *taʾthīr*, the test of efficiency, provides the means to test whether the property, or set of them, purported to be relevant for the juridical sanction at stake is indeed so.

The test declines into two complementary procedures: testing co-extensiveness or *ṭard* (if the property is present then the sanction too) and co-exclusiveness or *ʿaks* (if the property is absent then so is the juridical sanction – the consumption of vinegar is in principle not forbidden).

While co-extensiveness examines whether the legal qualification *H* follows from the verification of the presence of the property or set of properties, co-exclusiveness examines whether exemption from the legal qualification follows from the verification of the absence.

If we formulate AWR as such a kind of testing procedure, we need to have the following expansion of AWR:

> For every *x*, if it instantiates the property *F* (or set of them), then the legal qualification follows, if it does not instantiate *F* then the legal qualification does not apply.

$$\lambda x.c\colon (\forall x\colon F \vee \neg F)\ \{\ [\ (\forall y\colon F)\ left^{\vee}(y) = _{\{F \vee \neg F\}}\ x \supset H(y)\ ] \wedge$$
$$[\ (\forall z\colon \neg F)\ right^{\vee}(z) = _{\{F \vee \neg F\}}\ x \supset \neg H(z)\ ]\ \}.$$

Recall that the point of Brewer (1996, p. 1006) of introducing AWR is to unify some set of precedents specific to a giving ruling *H.* This is also the point of al-Shīrāzī's *taʾthīr*, where the testing amounts to unifying cases *recorded in the legal sources.* This was al-Shīrāzī's way of answering to the antianalogists, a response that Brewer (1996, p. 1006) brings to the context of contemporary legal reasoning.

Accordingly, a disanalogy, that is, a counterexample to the claim that the presence of a property triggers the juridical ruling and its absence the failing of that ruling, can then defeat the use of some specific AWR.

It is here that the dialogical approach comes on the scene: criticism amounts to a game of giving and asking for reasons during a fixed argumentative context though this does not mean that during the procedure the proposed cannot be contested. In our view this is related to the distinction between play level and strategy level. The latter, as claimed in Rahman/Iqbal/Soufi (2020, chapter 2.4), should be understood as a *recapitulation* that settles the matter.

Let us finish this section with the remark that in our framework, instantiating a general schema is the way to *justify* it. Indeed, justifications are, in our framework, instances or tokens of a type. Moreover, *local reasons* or reasons brought forward during a play, should be distinguished from *strategic reasons*, or reasons that constitute (the justification of) a winning strategy either by establishing validity or by establishing the truth of material inferences). Thus, despite the scepticism towards justification of Woods (2015, pp. 263-272) and others approaches, the instantiations at work are, after all, either (local) reasons or justifications, that is, strategic reasons encoding a recapitulation of the process leading to the resulting legal ruling.

Perhaps the problem comes from overseeing both

1. the difference between assertions brought forward to justify other assertions and justifying objects, i.e.; truth-makers or proof-objects, and
2. ignoring the distinction of reasons brought forward in the context of a play (with all its material and temporal restrictions) and strategic reasons yielding logical validity.

Be that as it may, interesting is that some cases of interpretation of Law, fit quite well with our reconstruction of inferences by occasioning factor. This is quite of a surprising result, since in the hermeneutics of law is not in principle assumed to follow the pattern of arguments by precedent cases.

III Parallel Reasoning and the Hermeneutics of Law. Elements for a Case Study

Actually, there are three main cases. However, all of them can be conceived as different plays on deciding about the interpretation of the Law concerning who must pay some particular taxes specific to loans linked to a mortgage (either a mortgage loan or a credit warranted with a mortgage) included in the taxes called *Tax on Documented Legal Acts* (Impuesto sobre Actos Jurídicos Documentados – IAJD). More crucially, they can be seen as different plays concerning the meaning of the concepts of *Mortgage Loan, Right* (to acquire a Mortgage Loan), *Beneficiary of a Mortgage Loan*.

III.1 Three Cases and the Dynamics of Meaning

In the first case, Supreme Court Judgment 9012/2001 – see our appendix, the appellant party, the borrower *Inmobiliaria Manuel Asín, S.A.* (IMA), submits a cassation appeal (an appeal to overturn the previous decision) against the decision that it is, him, the borrower; who is in charge of paying the IAJD taxes involving the mortage loan granted by the *Caja de Ahorros y Monte Piedad de Zaragoza, Aragón y Rioja* (Ibercaja). The argument of the appellant is based on the idea that though a mortgage loan is a loan, one should distinguish the two components. In other words, the point of the appellant is that mortgage loans should be understood in the divided sense – in Islamic Jurisprudence such a move is called **kasr** or breaking apart. The point is that the IAJD tax is linked to the mortgage component, not to the loan as such. In other words, according to the appellant, the property of being a loan is not the occasioning factor for determining who is in charge of the taxes at stake. The Supreme Court dismissed the appeal, based on denying the divided reading of the notion of mortgage loans and stressing the fact that this unity also leads to the unity of beneficiary, namely the borrower:

> […] *it is true that the traditional interpretation of this Chamber [3rd Chamber of the Supreme Court of Spain] has always accepted the premise that the taxable event, mortgage loan, was and is unique, and therefore, to conclude that it is nowadays subject to IAJD is coherent, whatever the legislative tendencies that may consecrate mortgage loan exemption in this particular tax in the near future—*. (p. 3, para. 2)

> […] *In any case, the unity of the taxable event related to the loan, produces the consequence that the only possible beneficiary is the borrower, in accordance with the provision in art. 8º.d)* […]. (p. 3, para. 3), Supreme Court Judgment 9012/2001, see our appendix.

One way to put the issue of the interpretative contention concerning this case is to focus on the different ways the contenders build the meaning dependence between loan, mortgage and IAJD-duty.

Indeed, whereas the argument of IMA, the appellant party, is based on the following meaning formations, which *break apart* the notions of Mortgage, Loan and the Mortgage-dependent tax duty IAJD:

- *Mortgage*: *prop* *Loan*: *prop* *Bearer-of*-IAJD-*duty*(*x*): *prop* (*x*: *Mortgage*).

  In words, the tax duty IAJD is dependent upon the notion of Mortgage. Accordingly, this duty is independent of the notion of Loan.

The argument of the Supreme Court in favour of Ibercaja is based on the following meaning constitution:

- *Loan*: *prop* *Mortgage*(*x*): *prop* (*x*: *Loan*)

  Beneficiary(*x,y*): *prop* (*x*: *Loan, Mortgage*(*x*))

- *Bearer-of*-IAJD-*duty*(*x y, z*): *prop* (*x*: *Loan, y*: *Mortgage*(*x*), *z*: *Beneficiary*(*x,y*)).

  In words, *Mortgage Loan* is a complex concept, namely it concerns those mortgages dependent upon a loan. Accordingly, the tax duty IAJD is dependent upon the complex

concept Mortgage Loan, they are inseparable the notion of Loan. Moreover, the notion of Beneficiary is made dependent upon the notion of the acquirer of the Mortgage Loan. Thus, strictly speaking, the tax duty IAJD is understood as dependent upon the *Mortgage-Loan-Beneficiary*.

- Notice that defining the beneficiary is defined as the one that benefited of the mortgage loan defines the *Borrower* as the beneficiary.

The second case, Supreme Court Judgment 7141/2006 – see our appendix, also involving mortgage and loan yields the same juridical decision as the precedent case. However, interesting is that the reason brought forward by the Court, stresses as relevant for the decision an aspect of the legal feature of the transaction different to the one occasioning the decision 9012/2001. Indeed, the argument does not contest the unicity of the tax event, the credit opened by the *Caixa d'Estalvis i Pensions de Barcelona* (La Caixa) in favour of *Establecimientos Industriales y Servicios, S.A.* (EISSA, S.A.) and linked with a *mortgage warrant*, nevertheless, it stresses the point that the passive subject of the purchase of the *right*, namely the credit, is the beneficiary, i.e. the borrower. Thus, according to this argument of the Court, the uniqueness of the beneficiary of this kind of transaction; is the relevant feature occasioning the decision that it is the borrower's duty rather than the lender's duty to pay the taxes involving the mortgage. The point is that, according to the Supreme Court, the beneficiary is the beneficiary of the main business or of the purchase of the right, the main business is the loan, the mortgage being a subject of the loan; the beneficiary of the loan is the borrower, namely EISSA; therefore, it is EISSA who has the duty to pay the due taxes:

> […] "*the beneficiary is the purchaser of the good or of the right and, failing that, the persons who request notarial documents, or those in whose interest the documents are issued*"—. (Quoted in the STS 7141/2006, p. 3, para. 3)

> […] *The purchaser of the good or of the right can only be the borrower, not because of an argument such as the unity of the taxable event related to the loan,* […]*, but because the right referred to in the precept is the loan reflected in the notarial document, even if it is guaranteed with a mortgage* […]. (Cf. *Reasoning for the dismissal of appeals*, para. 2, and Supreme Court Judgment 7141/2006, p. 3, para. 3 –see our appendix.

From the meaning constitution point of view, the Supreme Court adds more complexity by squeezing the notion of *right (to acquire a loan)*, between the compound *Mortgage-Loan-Beneficiary* and the IAJD-duty

- *Bearer-of*-IAJD-*duty*(*x*,*y*,*z*,*w*): *prop* (*x*: *Loan, y*: *Mortgage*(*x*), *z*: *Beneficiary*(*x*,*y*), *w*: *Right*(*x y, z*)).

  Under this perspective; the notion of *acquired right* is dependent upon the compound *Mortgage-Loan-Beneficiary*. In other words, the right is the *right acquired by being the Beneficiary of the Loan in any way attached to a Mortgage*, and the duty to the pay the IAJD is then made dependent upon this right.

- Hence, this alternative interpretation, that defines the right as the one acquired by the beneficiary of the loan attached to a mortgage, also leads to identifying the *Borrower* as the one who has to carry the burden of the IAJD.

The last case, of our study, Supreme Court Judgment 3422/2018 – see our appendix, also involving mortgage and loan overturns the juridical decisions of the precedent cases concerning who carries the duty of paying the taxes induced by the mortgage loan. Indeed, the decision 3422/2018 establishes that it is the lender, not the borrower who has to pay the due taxes. Moreover, it explicitly overturns juridical decisions as the ones established by Judgments 9012/200 and 7141/2006. The argument behind the overturning indicates that if, as argued in 7141/2006, it is the case that the main business is the loan, i.e.; the purchasing of a right, this right is not a *real one*, in the sense that for example, it does induce change of ownership. A real right is the one linked to the mortgage, but this is accessory to the right acquired by the beneficiary and in fact the beneficiary of that real right is the lender, not the borrower. Hence, the due taxes must be paid by the direct beneficiary of the mortgage, namely the lender.

> *The Supreme Court held that loans are not registrable,* […], *as they are obviously not a* ***real*** *right, nor does the right have the typical real significance mentioned in the second of these precepts (since they do not modify, now or in the future, several of the rights of ownership over real estate or inherent to real rights). The mortgage, on the other hand, is not only registrable, but it is also the mortgage is a real right.* […].
>
> *The fact that the mortgage is a real right of registry constitution makes it clearly the main business for tax purposes in public deeds in which mortgage loans or loans with mortgage guarantee are documented,* […].
>
> *If we still consider the loan as the main business it does not make much sense to submit to the tax a non-registrable legal business only because there is an accessory real right constituted as a guarantee of compliance with the main one.*
>
> *The Supreme Court held also that:*
>
> > […] *there is no doubt that the beneficiary of the document in question is no other than the creditor, because they (and only they) are qualified to exercise the (privileged) actions that the code offers to the holders of the registered rights. They are the only party interested in the registration of the mortgage (the determining element subject to the tax analysed here), since the mortgage is ineffective if it is not registered in the Property Registry* […].
>
> *Thus, the conclusions were:*
>
> 1. *Based on the previous reasoning, we can now answer the question that we have considered preferential, out of the two questions raised by the First Section (Civil Chamber) of this Chamber (Supreme Court). The beneficiary of a mortgage (by loan over itself or as guarantee of a loan) is the money-lender and not the borrower. Therefore, the tax on documented legal acts –when the document subject to the tax is a public deed of a mortgage (by loan over itself or as guarantee of a loan)– should be paid by the lender and not by the borrower.*
> 2. *In order to comply with the decree of admission, the above statement needs to be completed making it explicit that such a decision involves adoption of a guideline opposite to that supported by the jurisprudence of this Chamber (Third Camber – Contentious-Administrative Chamber– of the Supreme Court) until now, as presented in the judgments, among others [STS 9012/2001 and STS 7141/2006], and therefore modifying the previous jurisprudential doctrine.* Supreme Court Judgment 3422/2018, see our appendix.

In fact, Supreme Court Judgment 3422/2018 concerns the request of the *Empresa Municipal de la Vivienda de Rivas-Vaciamadrid, S.A.* (EMVRivas, S.A.) to be exempted of the

taxes required by the *Public Administration* linked to the mortgage that warranted a loan credited to EMVRivas by a bank entity. Nevertheless, as mentioned above, the decision involves a general judgment on who is the beneficiary of the mortgage linked to a mortgage loan. The argument can again here be put as concerning meaning constitution.

The main point of the Supreme Court's argument is related to distinguishing *real-rights* from those acquired by taking a *loan,* and more crucially, to set as beneficiary, the beneficiary of a real-right. There are several ways to implement these distinctions, but for keeping our framework as simple as possible let us compose *Loan* and *Mortgage* by a conjunction. However, the notion of *Real-Right* will be made dependent upon *Mortgage*, furthermore, *Beneficiary* will be defined as those who acquire a *Real-Right* by registering the *Mortgage* (brought forward as a warrant by the borrower). Accordingly, the *IAJD-duty*, will be defined as the duty of the *R-Beneficiary*, i.e., the *Beneficiary* of the the *Real-Right*.

- *Loan*: *prop*

  Bearer-of-IAJD-*duty*(*x*,*y*,*z*,*w*): *prop* (*x*: *Mortgage*, y: *Real-Right*(*x*,*y*), *w*: *R-Beneficiary*(*x*, *y*, *z*))

In order, to stress the accessory feature of the Mortgage and the dependence of the notion of *R-Beneficiary* upon the concept or *Real-Right*, and the dependence of IAJD-*duty* upon the former we can express all this as the conjunction of *Loan* with the sigma-type (the existential) expressing those dependences :

- *Loan* $\wedge \exists v$: [(*x*: *Mortgage*, y: *Real-Right*(*x*,*y*), *w*: *R-Beneficiary*(*x*, *y*, *z*)) *Bearer-of*-IAJD-*duty*(*v*)]

III.2 Three Plays on the Same Theme

All these cases are in fact cassation appeals and as mentioned above they all amount to say it bluntly to decide who of both borrower or money-lender, is the beneficiary of either a mortgage loan or a credit warranted with a mortgage, if we are prepared (or not) to distinguish the (real) right linked to the mortgage from the right acquired with the loan.

Thus, we can see the three plays as sub-plays of a whole argument. However, for the sake of oversight in the present reconstruction we will present each play by its own, and we will leave for a follow up paper the tasks of integrating all the plays in a whole dialogue were each relevant step is associated to a dialogical move. Moreover, instead of describing each play we will provide the ERS constituting the argumentative core of each play.

In order to keep stress the general structure of each argument we adopt as starting point (the target or branch-case) the point of view of the Supreme Court. In the second and third play the source-case or root-case refer to the precedent plays. Different to Brewer's schema we do not start by setting the target- and source-case with a free variable, that will be bounded with the information of the concrete cases, but we bind them directly. This saves some steps, though admittedly it does not make so manifest that what is at stake is conceptual schema rather than

a concrete case. However, it is closer, we think to the actual legal practice. In any case, transforming one into the other is only one inference step away.

First Play- Supreme Court Judgment 9012/2001: IMA versus Ibercaja

Target or Branch-Case. IMA, the borrower of the Mortgage Loan granted by the Ibercaja, must pay the IAJD-duty.

Source or Root-Case. Precedent-Cases *u*, decided in favour of the creditor concerning the payment of IAJD taxes induced by a mortgage loan granted to *u*.

Shared characteristics*:*
Loan: *prop* *Mortgage*(*x*): *prop* (*x*: *Loan*)
Beneficiary(*x*,*y*): *prop* (*x*: *Loan, Mortgage*(*x*)). The beneficiary of the mortgage loan is the borrower.

Inferred characteristic:
Bearer-of-IAJD-*duty*(*x, y, z*): *prop* (*x*: *Loan, y*: *Mortgage*(*x*), *z*: *Beneficiary*(*x*,*y*)).

Argument:

b^{IMA}*: Beneficiary*(l_i,*mi*)*;* (IMA is the beneficiary *b* of a mortgage loan granted by Ibercaja. Thus, 'b^{IMA}' stands for IMA in its quality as beneficiary).

b^u: *Beneficiary*(l_j,m_j)*;*(precedent cases were *u* was the beneficiary *b* of a mortgage loan granted by a credit entity. Thus, 'b^u' stands for some juridical person of precedent case in its quality as beneficiary of a mortgage loan)

u: *Bearer-of*-IAJD-*duty*(l_j,m_j, b_j); (the tax duty IAJD concerning the mortgage loan credited to *u*, has been set as a payment duty for *u*)

AWR: if the tax duty IAJD has to be paid by whoever is the beneficiary a mortgage loan (i.e., the borrower), then every such a borrower does*;*

Therefore, IMA has to pay the IAJD-duty.

Second Play- Supreme Court Judgment 7141/2006: EISSA versus La Caixa

Target or Branch-Case. The borrower, namely EISSA must pay the IAJD-duty, induced by the Loan – warranted by a Mortgage – granted by La Caixa.

Source or Root-Case. Case s_1 involving the Supreme Court Judgment 9012/2001.

Shared characteristics*:*
Loan: *prop* *Mortgage*(*x*): *prop* (*x*: *Loan*)
Beneficiary(*x*,*y*): *prop* (*x*: *Loan, Mortgage*(*x*)).

Shared inferred characteristic

The borrower is the one who has to pay the IAJD-tax.

Un-Shared inferred characteristic.
Bearer-of-IAJD-*duty*(*x*,*y*,*z*,*w*): *prop* (*x*: *Loan*, *y*: *Mortgage*(*x*), *z*: *Beneficiary*(*x*,*y*), *w*: *Right*(*x y, z*)).
The borrower is the one who acquired the right associated with being the beneficiary of a loan warranted by a mortgage.

In fact, this is the crucial property behind the Supreme Court Judgment 7141/2006, instead of the simpler structure

> *Bearer-of*-IAJD-*duty*(*x y, z*): *prop* (*x*: *Loan*, *y*: *Mortgage*(*x*), *z*: *Beneficiary*(*x*,*y*)).
> The borrower is the beneficiary of a loan warranted by a mortgage.

deployed for the decision involved in the Supreme Court Judgment 9012/2001.

Argument:

> *EISSA: Right*(l_i,*mi*,b_i)*;* (EISSA, acquired the right associated with being the beneficiary of the loan – warranted by a mortgage – granted by La Caixa).
>
> As established by the source case 9012/2001, the tax duty IAJD has to be paid by, the borrower.
>
> *AWR:* If the tax duty IAJD has to be paid by, the borrower, whoever this borrower is – this borrower being the one who acquired the right associated with being the beneficiary of the loan – warranted by a mortgage – granted by the creditor – then every such a borrower does*;*
>
> Therefore, EISSA has to pay the IAJD-duty.

Third Play- Supreme Court Judgment 3422/2018: EMVRivas versus Unnamed Credit Entity

Target or Branch-Case. The money-lender must pay the IAJD-duty, induced by the enregistering of the Mortgage Loan granted to EMVRivas.

Source or Root-Case, case s_1 involving the Supreme Court Judgment 9012/2001.

Shared characteristics*:*
Both of the appellant parties in the target-case and in the source-case were granted a mortgage loan.

Un-Shared inferred characteristic.
Bearer-of-IAJD-*duty*(*x*,*y*,*z*,*w*): *prop* (*x*: *Mortgage*, y: *Real-Right*(*x*,*y*), *w*: *R-Beneficiary*(*x*, *y*, *z*)).

According to the Supreme Court, it is the money-lender, the creditor, who is the beneficiary of the real right acquired by enregistering the mortgage that warrants the loan.

This is the crucial property that overturns the arguments brought forward by precedent cases, among other the Supreme Court Judgments 9012/2001 and 7141/2006.

Argument:

Credit-entity: *Bearer-of*-IAJD-*duty*(*x*,*y*,*z*,*money-lender*)*;* (EMVRivas, is the beneficiary of a mortgage loan granted by unnamed credit entity).

As established by the source case 9012/2001, the tax duty IAJD has to be paid by, the borrower.

AWR: If the tax duty IAJD has to be paid by, the money-lender, whoever this creditor is – this creditor being the one who acquired the real right associated with being the (real) beneficiary of the enregistering of the mortgage linked to the loan granted by this creditor – then every such a creditor does*;*

Therefore, EMVRivas is exempted to pay to the Public Administration the IAJD-duty linked to enregistering the mortgage that warrants the credit granted by the money-lender. The Credit-entity that granted the mortgage loan to EMVRivas is in charge of paying the IAJD.

IV Conclusions

Wael B. Hallaq's (1985) seminal article “The Logic of Legal Reasoning in Religious and Non-Religious Cultures: The Case of Islamic Law and Common Law" proposed comparing contemporary legal reasoning within Common Law with the main concepts of argumentation of Islamic Jurisprudence developed during the Era of Classical Islam. Inspired by this provocative insight of Hallaq and the thorough study of Islamic Jurisprudence by Walter Young (2017), Rahman/Iqbal/Soufi (2020) added a contremporary formal analaysis that should facilitate and extend the comparisson tasks.

The present paper presents a further step in that direction, comparing not only Scott Brewer’s (1996) ERS-schema for the analysis of arguments by precedent cases within Common Law, but we extend it to Civil Law, and quite surprisingly to arguments involving the *interpretation* of legal terms. The advantage of the argumentative stance is that it naturally expresses the dynamics of an argument, and more precisely when disanalogy comes to the fore (as in our second and third plays).

According to our study; whereas from the perspective of Civil Law the point is to settle the emerging Law (who is the one who has to pay the taxes induced by either a mortgage loan or a credit warranted with a mortgage, borrower or creditor?), within Common Law, as stressed by Woods (2015, pp. 279) establishing, a general Law, is not the aim of an argument by precedent cases, despite the fact that the argument as such requires its formulation.

Thus, whereas as in the context of Civil law the concrete specific precedent cases are instrumental to grasp the general Law behind, in the context of Common Law it is the general Schema that is instrumental. Thus, in this respect, some specific argumentation patterns crucial in Civil Law might be closer to the perspective of Islamic Jurisprudence than to the one of Common Law. Perhaps this is not that surprising. After all Islamic Jurisprudence of the Classical Era seems to have shared many insights of Stoic Logic, Roman Law and their interaction.

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Appendix

SUMMARY OF THE SUPREME COURT JUDGMENT 9012/2001 (SENTENCIA DEL TRIBUNAL SUPREMO –STS–9012/2001) DATED 19 NOVEMBER 2001. FULL TEXT IS AVAILABLE IN:
http://www.poderjudicial.es/search/TS/openDocument/3a301e6cd9d857da/20031030

The cassation appeal number 2196/1996 filed before the Supreme Court challenged the dismissed judgment issued by the Second Section of the Contentious-Administrative Chamber of the National Court, dated 23 January 1996, on the contentious-administrative appeal brought by *Inmobiliaria Manuel Asín, S.A.* against the April 23, 1992, judgment of the Central Economic-Administrative Court (Tribunal Económico-Administrativo Central –TEAC), which, at the time had, dismissed the appeal lodged against the judgment of the Regional Court of Aragon, not giving rise to a claim filed against the settlement of 14,901,015 pesetas for the concept of Tax on Documented Legal Acts (Impuesto de Actos Jurídicos Documentados –IAJD). This amount was ordered on the occasion of a mortgage loan of 1,702,000,000 pesetas that had been granted by the *Caja de Ahorros y Monte de Piedad de Zaragoza, Aragón y Rioja* (Ibercaja) which had been implemented by a public deed on May 4, 1989.

The appellant party submits its cassation appeal and articulates its reasons from the common point that in a mortgage loan there are two independent legal conventions or businesses (the loan and the mortgage), which require differentiated tax treatment, but which demand a joint exam.

The first instance judgment emphasises the inapplicability to this case of the tax exemption recognized in art. 48.I.B.19 of the Consolidated Text of the Law of Tax on Property Transfer and Documented Legal Acts (texto refundido de la Ley del Impuesto sobre Transmisiones Patrimoniales y Actos Jurídicos Documentados –LITPAJD, in short, ITPAJD) enacted on December 30, 1980. This judgment also omits any reference to the analysis of the problem of the duality of conventions, which the appellant party claimed as a fundamental argument of its contestation, and of the need, which was also argued, of a differentiated treatment of that situation for tax purposes. In fact, the judgment of the first instance is limited to an appointment of the judgments of this Chamber that reflected the doctrine of the inapplicability of the above mentioned exemption, although without transcribing, even briefly, its argumentation for inapplicability and therefore, it maintained the affirmation that the taxpayer, in a deed of a mortgage loan, is the beneficiary of the main legal business, that is, the borrower.

The Supreme Court Judgment 9012/2001 (STS 9012/2001) maintains that:

> (…) it is true that the traditional interpretation of this Chamber [3rd Chamber of the Supreme Court of Spain] has always accepted the premise that the taxable event, mortgage loan, was and is unique, and therefore, the

> conclusion of its subjection to AJD is, nowadays, coherent, whatever the legislative tendencies may be in the near future, that could consecrate mortgage loan exemption in this particular tax—(p. 3, para. 2)[12]

and that:

> In any case, the unity of the taxable event related to the loan, produces the consequence that the only possible beneficiary is the borrower, in accordance with the provision in art. 8º.d) in relation to 15.1 of the 1980 and 1993 ITPAJD Consolidated Text, and also in relation to art. 18 of its 1981 Regulations, now art. 25 of the current Regulations (enacted on May 29, 1995) which refers already to the constitution of, among others, mortgage rights as guarantee of a loan and not to that of mortgage loans. (p. 3, para. 3)[13]

The Supreme Court Judgment, therefore, **dismissed the appeal.**

SUMMARY OF THE SUPREME COURT JUDGMENT 7141/2006 (SENTENCIA DEL TRIBUNAL SUPREMO –STS– 7141/2006) DATED 31 OCTOBER 2006. FULL TEXT IS AVAILABLE IN:

http://www.poderjudicial.es/search/AN/openDocument/12ebfb21e3676207/20061214

Cassation appeal number 4593/2001 brought by *Establecimientos Industriales y Servicios, S.A.* (*EISSA, S.A.*), against the judgment of the Contentious-Administrative Chamber of the National Court issued in the appeal of the aforesaid jurisdictional order brought by the forenamed commercial entity against the decision of the Central Economic-Administrative Court dated 21 October 1998, which dismissed the appeal raised against the decision of the Regional Court of Catalonia on April 9, 1997, that denied the request for the return of undue income of 49,500,000 pesetas as Documented Legal Acts.

On June 12, 1992, the *Caixa d'Estalvis i Pensions de Barcelona* (*La Caixa*) opened a credit account in favour of *EISSA, S.A.*, up to a maximum amount of 5,500,000,000 pesetas. This credit account was guaranteed by a mortgage over an estate owned by company *INMA, S.A.* to warrant the resulting balance of the account that *La Caixa* accredited, up to 5,500,000,000 pesetas, of the amounts exceeding the limit granted as a result of interest debts, of late payment interest, as well as a sum for expenses and costs, for a total amount of 9,900,000,000 pesetas. As the estate was valued at 1,169,050, 000 pesetas in case of auction, *EISSA, S.A.* was asked to establish a joint liability clause as guarantee of the credit by Mr Enrique, Mr Jon, Mr Sebastián and the commercial entities *INMA, S.A.*, *HIDRODATA, S.A.* and *Molinos Hidráulicos, S.A.* This deed was accompanied by a self-settlement for Documented Legal Act on a tax base of 9,900,000,000 pesetas. At a rate of 0.50 percent, the debt deposited was 49,500,000 pesetas.

In 1993 *EISSA, S.A.*, impugned the self-settlement and requested the return of the amount deposited, considering the exemption provided in art. 48.I.B.19 of the Consolidated Text of the Law of Tax on Property Transfer and Documented Legal Acts (ITPAJD) enacted on December 30, 1980. This claim was denied by agreement, notified on July 27, 1995.

On July 31, 1995, an economic-administrative claim was filed against the previous agreement, claiming the provenance of the exemption invoked in the process, reason why the refund of the amount deposited was requested; besides, it was pointed out that the tax base taken into consideration was not correct, as it should only be either the value of the mortgaged property, or that of the credit. The Regional Court of Catalonia issued a judgment on April 9, 1997, dismissing the claim because the alleged exemption was considered not applicable, and the tax base set by the financial entity for the self-settlement was considered right.

EISSA, S.A. filed an appeal against the aforementioned judgment of the Economic-Administrative Regional Court of Catalonia (Tribunal Económico-Administrativo Regional –TEAR– de Cataluña), insisting on the allegations made in the first instance, and on the contravention of the Sixth Directive (Sixth European Economic Community Council Directive of 17 May 1977) by requiring another tax, in addition to VAT, for the same operation. The

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[12] Our translation for: *(…) es lo cierto que la interpretación tradicional de esta Sala ha aceptado siempre la premisa de que el hecho imponible, préstamo hipotecario, era y es único, y que, por tanto, la conclusión de su sujeción a AJD, hoy por hoy, es coherente, cualesquiera sean las tendencias legislativas que, en un futuro próximo, pudieran consagrar su exención en esta última modalidad impositiva–.*

[13] Our translation for: *En cualquier caso, la unidad del hecho imponible en torno al préstamo, produce la consecuencia de que el único sujeto pasivo posible es el prestatario, de conformidad con lo establecido en el art. 8º.d), en relación con el 15.1 del Texto Refundido ITP y AJD, y en relación, asimismo, con el art. 18 del Reglamento de 1981, hoy art. 25 del vigente de 29 de Mayo de 1995, que, por cierto, ya se refiere a la constitución de, entre otros, derechos de hipoteca en garantía de un préstamo y no a la de préstamos garantizados con hipoteca.*

Central Economic Administrative Court (TEAC), in a judgment dated 21 October 1998, agreed to dismiss this appeal and confirm the contested judgement.

The Chamber of this Jurisdiction (contentious-administrative) of the National Court issued a judgment dismissing the appeal, and confirming the judgment of the TEAC for complying with the legal system on February 27, 2001.

The juridical representation of *EISSA, S.A.*, brought an cassation appeal to the Supreme Court, requesting for a judgment to quash the one previous one –declaring it null and void–, a declaration of the inadmissibility of taxation for Documented Legal Acts of the deed of credit opening with mortgage guarantee, in recognition of a particular legal situation, and to agree to the return of the unduly deposited for such concept, plus the delay interests, or otherwise, at least a declaration that the maximum taxable base cannot exceed the value of the mortgaged that guarantees the credit.

The Supreme Court **dismissed this cassation appeal** for considering this operation as a dual business: a loan (main business) and a mortgage (subsidiary business). As a loan it has to be fully taxed, and as a mortgage it has to be taxed as a mortgage loan, considering in this case that the mortgage is subject to the loan. Being the loan the main business, the tax base for all concepts (both loan and mortgages taxes) is that of the loan and *not* that of the good that guarantees the loan. The judgment also pointed out that the taxpayer is always the beneficiary of the main legal business, that is, the borrower.

Reasoning behind the dismissal of appeals:

As mentioned in the analysis of the Judgment 9012/2001, the rationale for the dismissal of the appeals is that:

> (…) the traditional interpretation of this Chamber [3rd Chamber of the Supreme Court of Spain] has always accepted the premise that the taxable event, mortgage loan, was and is unique, and therefore, the conclusion of its subjection to AJD is, nowadays, coherent, whatever the legislative tendencies may be in the near future, that could consecrate mortgage loan exemption in this particular tax—. (p. 3, para. 2. See footnote 1 for the original text)

and therefore, "(…) the unity of the taxable event related to the loan, produces the consequence that the only possible beneficiary [taxpayer] is the borrower—" (p. 3, para. 3. See footnote 2 for the original text).

The jurisprudence of this Chamber [3rd Chamber of the Supreme Court of Spain] has repeatedly understood that article 29 (art. 30 in the ITPAJD of 1980) of the 1993 ITPAJD Consolidated Text and article 68 of its 1995 Regulations indicates that, for notarial documents affected by IAJD, "(…) "the beneficiary is the purchaser of the good or of the right and, failing that, the persons who request notarial documents, or those in whose interest the documents are issued"—"[14] (quoted in the STS 7141/2006, p. 3, para. 3). The purchaser of the good or of the right can only be the borrower, *not* because of an argument such as the unity of the taxable event related to the loan, as occurs in the modality of onerous transfers –art. 8º.d) in relation with art. 15.1 of the 1980 and 1993 ITPAJD Consolidated Text, and also in relation with art. 25 of the 1995 Regulations (art. 18 in the Regulations of 1981), but because the *right* referred to in the precept is the loan reflected in the notarial document, even if it is guaranteed with a mortgage and its registration in the Property Registry is the constituent element of warranty. In conclusion, art. 31 of the 1980 and 1993 ITPAJD Consolidated Text demands, among others, the requirement that the deeds or notarial acts which contain acts or contracts inscribable in the Property Registry they pay inseparably for both, the loan and the mortgage.

SUMMARY OF THE SUPREME COURT JUDGMENT 3422/2018 (SENTENCIA DEL TRIBUNAL SUPREMO –STS– 3422/2018) DATED 16 OCTOBER 2018. FULL TEXT IS AVAILABLE IN:

http://www.poderjudicial.es/search/openDocument/979d8e2ccabb7187

Cassation appeal number 5350/2017 brought by the *Empresa Municipal de la Vivienda de Rivas-Vaciamadrid, S.A.* (the Municipal Housing Company of Rivas-Vaciamadrid), against the judgment of the Contentious-Administrative Chamber (Fourth Section) of the Supreme Court of Justice of the Community of Madrid on June 19, 2017, issued in an ordinary procedure no. 501/2016, on the settlement of the tax on documented legal acts of a public deed of formalization of a mortgage loan on several dwellings.

The *Empresa Municipal de la Vivienda de Rivas-Vaciamadrid, S.A.* (EMVRivas, S.A.) filed a tax exempt self-

[14] Our translation for: *"será sujeto pasivo el adquirente del bien o derecho y, en su defecto, las personas que insten o soliciten documentos notariales, o aquellos en cuyo interés se expidan"*

settlement for documented legal acts regarding the public deed of constitution of a mortgage loan. As basis for the exemption, it invoked to article 45.I.B.12 of the 1993 ITPAJD Consolidated Text.

Once the Technical Office for Tax Inspection of the Community of Madrid confirmed that the useful size of the dwellings for which the loan was formalized was less than 90 square meters, the settlement of the taxes for the concept of documented legal acts regarding the mortgage liability of the aforementioned dwellings was charged.

A contentious-administrative appeal was brought by the same party before the Madrid Chamber, in which, in addition to the tax exemption, the quashing of the charged settlement was requested. This appeal was founded on the fact that the borrower is considered *not* liable for the tax on documented legal acts because they are *not* the beneficiary of this business. The Economic-Administrative Regional Court (TEAR) of Madrid rejected the economic-administrative appeal brought by the interested party (in which only the origin of the exemption was defended).

The procedural representation of the plaintiff prepared a cassation appeal in which infringed norms were identified in article 45.I.B.12 of the 1993 ITPAJD Consolidated Text. In their formal claim document, they also claimed the illegality of article 68, paragraph 2, of the 1995 ITPAJD Regulations.

Regarding the issue of the beneficiary, they stated that requiring for the mortgage debtor to pay for the tax is against the protectionist regulations toward mortgage debtors that exist in the European Union. For this purpose, they recalled that the judgment of the Civil Chamber (First Section) of the Supreme Court (STS 5618/2015)[15], dated 23 December 2015 (fallen on appeal 2658/2013), considered that the money-lender is *not* excluded from the taxes that may be accrued due to the commercial operation, but "(…) "at least in regard of the tax on documented legal acts, the lender is the beneficiary for matters referring to the constitution of the right and, in any case, of the issuance of copies, records and appropriate testimonies"—" (quoted in the STS 3422/2018, p. 3, point 2)[16]; so, a clause in which the tax is transferred to the other party –the borrower– is abusive.

On this occasion the Supreme Court understood that the person obligated to pay the tax in such cases was the creditor, subject in whose interest the granted loan and the mortgage established as refund guarantee are publicly documented.

The Supreme Court held that loans are *not* registrable, according to article 2 of the Mortgage Law (Ley Hipotecaria) and article 7 of its Regulations, as they are obviously *not* a real right, *nor* does the right have the typical real significance mentioned in the second of these precepts (since they do not modify, now or in the future, several of the rights of ownership over real estate or inherent to real rights). The mortgage, on the other hand, is *not* only registrable, but it is also the mortgage is a real right. So much so, that article 1875 of the Civil Code strongly states that "(…) it is indispensable, for the mortgage to be validly constituted, that its concluding document be registered in the Property Registry"[17]; article 1280 of the Civil Code corroborates that and the Mortgage Law, in its article 130, specifies that statement when affirming that the procedure for direct execution against mortgaged goods "(…) can only be exercised as realization of a registered mortgage, on the basis of points that are contained in the title and included in its entry"[18].

The fact that *the mortgage is a real right of registry constitution* makes it clearly *the main business for tax purposes in public deeds in which mortgage loans or loans with mortgage guarantee are documented*, since the only reason that makes such complex legal act be submitted to the tax on documented legal acts is that it is registrable; in fact, of the two businesses that make up that act, only the mortgage is registrable.

If we still consider the loan as the main business it does *not* make much sense to submit to the tax a non-registrable legal business only because there is an accessory real right constituted as a guarantee of compliance with the main one.

The Supreme Court held also that:

> (…) there is *no* doubt that the beneficiary of the document in question is *no* other than the creditor, because they (and only they) are qualified to exercise the (privileged) actions that the code offers to the holders of the

[15] Cf. full judgment 5618/2015 in: http://www.poderjudicial.es/search/documento/TS/7580921/Clausulas%20abusivas/20160122

[16] Our translation for: *"al menos en lo que respecta al impuesto sobre actos jurídicos documentados, será sujeto pasivo en lo que se refiere a la constitución del derecho y, en todo caso, la expedición de las copias, actas y testimonios que interese"*

[17] Our translation for art. 1875 of the Civil Code: *(…) es indispensable, para que la hipoteca quede válidamente constituida, que el documento en que se constituya sea inscrito en el Registro de la Propiedad.*

[18] Our translation for art. 130 of Mortgage Law: *(…) sólo podrá ejercitarse como realización de una hipoteca inscrita, sobre la base de aquellos extremos contenidos en el título que se hayan recogido en el asiento respectivo*.

> registered rights. They are the only party interested in the registration of the mortgage (the determining element subject to the tax analysed here), since the mortgage is ineffective if it is *not* registered in the Property Registry [emphasis added] (STS 3422/2018, p. 11, para. 9)[19]

and that:

> Therefore, article 68.2 of the Regulations [ITPAJD Regulations of 1995], does *not* have the interpretative or explanatory quality granted by the jurisprudence that we are now modifying [emphasis added]; on the contrary, it constitutes an obvious regulatory excess that makes the provision contained therein illegal. Such illegality must be declared in the judgment hereby as provided in article 27.3 of the Law of this Jurisdiction [Contentious-Administrative Jurisdiction Law]. (STS 3422/2018, p. 12, para. 1)[20]

Thus, the conclusions were:

1. Based on the previous reasoning, we can now answer the question that we have considered preferential, out of the two questions raised by the First Section (Civil Chamber) of this Chamber (Supreme Court). The beneficiary of a mortgage (by loan over itself or as guarantee of a loan) is the money-lender and *not* the borrower. Therefore, the tax on documented legal acts –when the document subject to the tax is a public deed of a mortgage (by loan over itself or as guarantee of a loan)– should be paid by the lender and *not* by the borrower.
2. In order to comply with the decree of admission, the above statement needs to be completed making it explicit that such a decision involves adoption of a guideline opposite to that supported by the jurisprudence of this Chamber (Third Camber –Contentious-Administrative Chamber– of the Supreme Court) until now, as presented in the judgments, among others [STS 9012/2001 and STS 7141/2006], and therefore modifying the previous jurisprudential doctrine.

Thus, in this case, the Supreme Court understood that the settlement was charged to those who do *not* have the quality of beneficiary, reason why they were *not* the taxable person for this tax. And therefore, **the cassation appeal was deemed** in favour of the *Empresa Municipal de la Vivienda de Rivas-Vaciamadrid, S.A.* **This judgment modified all the previous jurisprudence**.

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[19] Our translation for: *(…) no nos cabe la menor duda de que el beneficiario del documento que nos ocupa no es otro que el acreedor hipotecario, pues él (y solo él) está legitimado para ejercitar las acciones (privilegiadas) que el ordenamiento ofrece a los titulares de los derechos inscritos. Solo a él le interesa la inscripción de la hipoteca (el elemento determinante de la sujeción al impuesto que analizamos), pues ésta carece de eficacia alguna sin la incorporación del título al Registro de la Propiedad*.

[20] Our translation for: *El artículo 68.2 del reglamento, por tanto, no tiene el carácter interpretativo o aclaratorio que le otorga la jurisprudencia que ahora modificamos, sino que constituye un evidente exceso reglamentario que hace ilegal la previsión contenida en el mismo, ilegalidad que debemos declarar en la presente sentencia conforme dispone el artículo 27.3 de la Ley de esta Jurisdicción*.

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