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[recenzja]

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Tekst jest udostępniony do wykorzystania w ramach dozwolonego użytku.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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