

***The Rights We Live In: Protecting the Right to Housing in Spain Through Fair Trial,
Private and Family Life and Non-Retrogressive Measures***

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Abstract:

This article offers a two-line strategic approach to tackle the housing crisis in Spain from a human rights perspective. First, it advocates changes to the mortgage possession procedure based on the principles of proportionality and reasonableness of the right to private and family life. And secondly, it operationalises the meaning of the general prohibition of retrogressive measures on economic, social and cultural rights by looking at five policy measures adopted in recent years. These measures and their consequences show that social austerity is incompatible with states' obligation to respect, protect and fulfil the right to housing.

Keywords:

Right to housing, Private and family life, Non-retrogressive measures, Spain, Mortgage evictions, Justiciability

*'Housing is not simply about bricks and mortar, nor is it simply a financial asset. Housing includes a sense of community, trust and bonds built between neighbors over time; the schools which educate the children; and the businesses which support the local economy and provide needed goods and services.'*¹

Introduction

Between the late-1990s and 2008, construction boosted the economy and reduced unemployment in Spain. GDP grew by 3-4% per year, above EU average, and unemployment halved to 8%. During this time, as observed by the UN Special Rapporteur on the Right to

1 Special Rapporteur on the Right to Housing, Raquel Rolnik, *Report on USA*, 2010, para. 81, UN doc. A/HRC/13/20/Add.4.

Housing, tax deductions, credit growth and other policies in favor of home-ownership contributed to a considerable rise in prices: Between 1998 and 2005, the price of land increased five-fold, the price of housing by 150% and the total value of mortgages multiplied by ten.² Yet, economy was booming and the cost seemed affordable at the time.

Due to its dependence on construction and non-diversified property investments, the credit crunch of 2007-2008 provoked an economic and a housing crisis. According to the information provided by the General Judicial Council (CGPJ), nearly 600,000 foreclosure procedures were initiated between 2008 and 2014.³ Up to 2012, there was no information about the number of first homes affected by evictions as a result of mortgage possessions, but based on information gathered from financial entities, the Bank of Spain reported more than 98,000 evictions of first homes between January 2012 and June 2014, 52,000 of which were the result of a judicial procedure.⁴

The Committee of Ministers of the Council of Europe appeared to understand the general problem when in 2007 it observed that *'over-indebtedness of individuals and families has become an increasingly widespread problem in most member states, which frequently leads to social and health problems and social exclusion of families and may put children's basic needs at risk'*.⁵ The UN Committee on Economic, Social and Cultural Rights, the Human Rights Commissioner of the Council of Europe and the Special Procedure mandate holders

2 Special Rapporteur on the Right to Housing, Miloon Kothari, *Report on Spain*, 2008, para. 40-44, UN doc. A/HRC/7/16/Add.2.

3 Consejo General del Poder Judicial (11 December 2014): "Datos sobre el efecto de la crisis en los órganos judiciales - Datos desde 2007 hasta tercer trimestre de 2014" (<http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Informes-estadisticos/Informes-periodicos/Datos-sobre-el-efecto-de-la-crisis-en-los-organos-judiciales---Datos-desde-2007-hasta-tercer-trimestre-de-2014>). All websites were last accessed on 8 March 2015.

4 Bank of Spain, press releases of 19 May 2014 (http://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/NotasInformativas/Briefing_notes/es/notabe190514.pdf) and 13 November 2014 (http://www.bde.es/f/webbde/GAP/Secciones/SalaPrensa/NotasInformativas/Briefing_notes/es/notabe131114.pdf).

5 Recommendation CM/Rec(2007)8 on legal solutions to debt problems, June 2007.

on Housing, Extreme Poverty and Human Rights, and Foreign Debt and Human Rights, have all expressed concerns about the impact of mortgage evictions on the enjoyment of human rights in Spain, and in particular, economic, social and cultural rights.⁶ However, attempting to tackle mortgage evictions from a human rights perspective faces the challenge of setting limits to the right to private property, which defines the European liberal tradition of human rights and is ingrained in international human rights law, not the least in the First Article of the First Protocol to the European Convention on Human Rights. Furthermore, the legal institution of mortgage is fully accommodated in most if not all legal regimes and has its roots in Ancient Roman Law. Not in vain, long before Locke and the American and French Revolutions, Cicero had already announced that the '*right of ownership is inalienable*'.⁷

In spite of some remarkable contributions to provide a human rights answer to the problems derived from over-indebtedness and the financialisation of home-ownership,⁸ the human rights community has not yet found an effective and fair balance between lenders' right to property and borrowers' right to housing.

Together with mortgage possessions, the ongoing housing crisis in Spain has a second dimension: The retrogression in the enjoyment of the right to housing as a result of austerity-led policies. Human rights groups and organisations of the third sector have compellingly documented that, in order to avoid absolute homelessness, households affected by mortgage possessions depend on the so-called '*colchón familiar*' ('family mattress'). Relatives and

6 CESCR, *Concluding Observations: Spain*, 2012, para. 21, UN doc. E/C.12/ESP/CO/5; Commissioner for Human Rights, *CommDH(2013)18. Report on Spain*, para. 28; Letter by three Special Procedure mandate holders to the Government of Spain (Ref. ESP 5/2013), 15 November 2013.

7 M. T. Cicero, *De Officiis*, Book 1, para. 37 (1913) (trans. by Walter Miller).

8 Particularly, the work initiated by the former UN Special Rapporteur on the Right to Housing, Raquel Rolnik (see her report to the General Assembly in 2012, UN doc. A/67/286); R. Rolnik and L. Rabinovich, 'Late-neoliberalism: the financialisation of homeownership and the housing rights of the poor', in *Economic and Social Rights after the Financial Crisis*, ed. by A. Nolan, Cambridge: Cambridge University Press, 2014, 57; C. Ondersma, 'A Human Rights Framework for Debt Relief', *University of Pennsylvania Journal of International Law* (forthcoming).

friends help out not only by hosting affected people after the eviction but also by lending them a hand economically speaking to avoid or delay the default for as long as possible.⁹ Yet, the fact that people do not end up in absolute homelessness thanks to the solidarity of friends, relatives and neighbours does not mean that Spanish public authorities are abiding by their international human rights obligations.

The right to housing is recognised in a number of international treaties, including Article 11(1) of the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), ratified by Spain in 1977.¹⁰ State Parties to the ICESCR must make use of all available resources with a view to achieving progressively the right to housing and the other rights recognised in the Covenant (Article 2(1)). As a corollary of this obligation, authorities are prevented from adopting intentional or deliberate retrogressive measures, which in principle are contrary to the ICESCR and can only be justified by reference to all the rights recognised therein.¹¹ It is true that the ICESCR contains a general limitation clause in Article 4, allowing states to impose limitations on rights *'in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'*. However, the bar has been set rather high, considering that in the *Wall case* the International Court of Justice did not believe Israel had met the conditions laid down in Article 4.¹² If it is not applicable in times of armed conflict and military occupation, *a fortiori* it cannot be applied in case of economic crisis either.

Governments bear the burden to prove that a step back in the protection of any

9 Human Rights Watch, *Shattered Dreams: Impact of Spain's Housing Crisis on Vulnerable Groups*, 2014; Fundación Foessa, *VII Informe sobre Exclusión y Desarrollo Social en España*, 2014.

10 Spain was also the third country in the world and first in Europe to ratify the 2008 Optional Protocol to the ICESCR (in September 2010), which allows individuals to lodge individual complaints for the violation of any right established therein.

11 CESCR, *General Comment No. 3*, 1990, para. 9.

12 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) 2004 ICJ Rep 136, para. 112.

socioeconomic right (such as the right to housing) is necessary in order to improve the general enjoyment of economic, social and cultural rights as a whole.¹³ The UN Committee on Economic, Social and Cultural Rights has made clear that policy adjustments in times of crisis must be limited in time, meet the requirements of necessity and proportionality, respect the principle of non-discrimination, mitigate inequalities and respect the minimum core content of rights or a social protection floor.¹⁴ In fact, Spain had to hear a reminder of this by the Committee in its latest Concluding Observations.¹⁵

However, although the triple obligation to respect, protect and fulfil and the corollary principle of the prohibition of non-retrogressive measures have long been established, key issues remain unaddressed with regards to the articulation of these rules and the monitoring of State compliance with them.¹⁶

This article provides an answer to two closely interrelated challenges. Firstly, it identifies some policy implications of the legal recognition of human rights for the foreclosure procedure and the mortgage regime. And secondly, it contributes to the articulation of the meaning of the prohibition of non-retrogressive measures on economic, social and cultural rights. The first part proposes a number of changes to the foreclosure procedure of mortgage possessions in Spain, not from the perspective of the right to housing but from that of two classic civil rights: The right to private and family life and the right to a fair trial. The second

13 CESCR, *An evaluation of the obligation to take steps to the "maximum available resources" under an Optional Protocol to the Covenant*, 2007, para. 9, UN doc. E/C.12/2007/1.

14 Letter of 16 May 2012 addressed by the Chairperson of the CESCR to States parties to the International Covenant on Economic, Social and Cultural Rights.

15 CESCR, *Concluding Observations: Spain, 2012*, para. 8.

16 A. Nolan and M. Dutschke, 'Article 2(1) ICESCR and States Parties' Obligations: Whither the Budget?', *European Human Rights Law Review*, Vol. 3, 2010, 280; S-A. Way, N. Lusiani and I. Saiz, 'Towards a Human Rights-Centred Economic Policy in Times of Crisis', in *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges*, ed. by E. Riedel *et al*, Oxford: Oxford University Press, 2014, 87; A. Nolan, N. Lusiani and C. Courtis, 'Two steps forward, no steps back? Evolving criteria on the prohibition of retrogression in economic and social rights', in *Economic and Social Rights after the Financial Crisis*, ed. by A. Nolan, Cambridge: Cambridge University Press, 2014.

part explores the prohibition of non-retrogressive measures by looking at five trends in housing policies in two autonomous regions in Spain: the Community of Madrid and Catalonia.

The right to housing in mortgage possessions

Before explaining how the right to fair trial and the right to private and family life may affect the mortgage possession regime, a brief summary of the Spanish foreclosure procedure is mandatory.

According to Article 129 of the 1946 Spanish Mortgage Law, in case of default the creditor can follow any of these three paths: an executive procedure (currently regulated in Articles 681 ff of the 2000 Code of Civil Procedure), a declaratory procedure (Articles 571 ff of the Code of Civil Procedure), or an extra-judicial sale before a notary public, provided this possibility was envisioned in the contract. Since the executive procedure is more expedite, the creditor tends to prefer it to the declaratory one. The extra-judicial sale may be even quicker, but it is normally more expensive, and since May 2013 (Law 1/2013), the notary public will have to refer the case to the judge if the debtor claims unfair terms (*'cláusulas abusivas'*) in the contract.

Neither the executive procedure nor the extra-judicial sale distinguish between first and second residences, between property owned by a natural person or by a legal entity, or even between houses, car parks or any other property. In case of lack of payment, the creditor may lodge a lawsuit, which is notified to the household, who will be asked to satisfy the debt. If the household cannot afford the payment, an auction will be held. Due to the lack of bidders, the auction is often declared void. If it is a first residence, the creditor will acquire the

property of the estate for the 70% of its appraised value. Notwithstanding an agreement between the bank and the household, the latter would lose the house but keep the remaining debt.

Until 2013, households had virtually no defence against a lawsuit for mortgage default. However, in the *Aziz case* the European Court of Justice established that the Code of Civil Procedure had to be modified to allow the possibility of claiming the existence of unfair terms when they are an essential part of the creditor's lawsuit.¹⁷ Only one year and a half later, in the *Sánchez Morcillo case* the European Court of Justice reprimanded Spain again when it concluded that the mortgage regime was not in line with EU Law inasmuch as the *'debtor against whom mortgage enforcement proceedings are brought, may not appeal against a decision dismissing his objection to that enforcement, whereas the (...) creditor seeking enforcement, may bring an appeal against a decision terminating the proceedings or ordering an unfair term to be disapplied'*.¹⁸ While the first decision was based only on the EU 93/13 Directive on consumer's rights, in the second one the Court also found a violation of Article 47 of the Charter of Fundamental Rights of the European Union, which proclaims the right to a fair trial.

In spite of the legal changes imposed by Luxembourg, mortgage possessions are essentially straightforward in Spain. In case of default, the creditor (normally a bank) is free to claim the payment of the remaining debt, which will of course be impossible for the defaulting debtor. When the whole of the debt is not satisfied by the equity (something common in a housing market in crisis), the debt remains. Yet, the execution is a mere procedure. The debtor loses

17 ECJ, Case C-415/11, *Mohamed Aziz v. Catalunya Caixa*, Judgment of 14 March 2013. The Code of Civil Procedure was modified in May 2013 through Law 1/2013.

18 ECJ, Case C-169/14, *Sánchez Morcillo v. BBVA*, Judgment of 17 July 2014. The ruling was incorporated into domestic legislation in September 2014 through Royal Decree-law 11/2014.

the property and, with it, the legal entitlement to remain in the dwelling. It is only a matter of time before the household forcefully or voluntarily vacates the place.

Since November 2012, the Spanish Government has adopted measures to suspend the eviction of households that are deemed to belong to '*especially vulnerable groups*' (Royal Decree-law 27/2012, Law 1/2013 and Royal Decree-law 1/2015). The vulnerability in these cases is determined by their economic situation (level of income, monthly payment, sudden change in income in the last four years...) and their family situation (large families, single-parental families, families with two children, families with a 3-year-old child or younger, families with a family member with a disability of more than 33%...). Insofar as the determination of their vulnerability is established in general terms, it is not difficult to imagine situations of vulnerability equivalent or at least comparable to the ones established in law. For example, a family with a 4-year-old with a health condition would not be considered 'especially vulnerable' and therefore not covered. The law currently draws a clear line between “especially vulnerable groups” and everybody else. The judge does not have the means to consider other situations of vulnerability beyond the specific cases contemplated in the law.

The Code of Civil Procedure takes the right to private property too far and does not provide the means for judges to examine the case carefully and determine the proportionality and reasonableness of the eviction. This is incompatible with the right to private and family life, recognised in Article 18 of the Spanish Constitution, Article 8 of the European Convention of Human Rights (ECHR) and Article 17 of the International Covenant on Civil and Political Rights (ICCPR), both of them ratified by Spain.

The European Court of Human Rights has said that Article 8 ECHR '*concerns rights of*

central importance to the individual's identity, self-determination, physical and mental integrity, maintenance of relationships and a settled and secure place in the community'.¹⁹

The idea of 'home' therefore goes far beyond that of property.

Article 17(1) ICCPR states that '*no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation*'. The UN Human Rights Committee, in charge of monitoring state compliance with the ICCPR, has expressed the view that the introduction of the expression '*arbitrary interference*' in Article 17 ICCPR '*is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances*'.²⁰

Compliance with the procedure regulated in the domestic law is therefore a necessary but not sufficient condition. In order to meet the criteria of the right to private and family life, any interference with the home must also be '*reasonable in the particular circumstances*'.

It is the standing case-law of the European Court of Human Rights that '*the loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined by an independent tribunal*'.²¹ '*Particularly weighty reasons of public interest*' are required in case of serious interference with the right to

¹⁹ ECtHR, *Connors v. the United Kingdom*, no. 66746/01, para. 82, Judgment of 27 May 2004.

²⁰ Human Rights Committee, *General Comment No. 16*, 1988, para. 4, UN doc. U.N. Doc. HRI/GEN/1/Rev.1 at 21.

²¹ ECtHR, *McCann v. UK*, no. 19009/04, para. 50, 2008, *Paulić v. Croatia*, no. 3572/06, para. 43, 2009, *Kay and Others v. UK*, no. 37341/06, para. 68, 2010, *Buckland v. UK*, no. 40060/08, para. 65, 2012, *Rousk v. Sweden*, no. 27183/04, para. 137, 2013. In *Buckland*, Judge de Gaetano argued that the mentioned principle should only apply to publicly owned rental housing. Since no other judge subscribed his separate opinion, and there is no better argument for the contrary, it is to be assumed that the principle must apply to both public and private housing sectors.

private and family life.²²

The interpretation of the right to private and family life by the Human Rights Committee and especially the Strasbourg Court provides human rights advocates with a set of tools to defend the right to housing in case of mortgage possessions.²³ So does the principle of equality of arms, which applies to both civil and criminal cases and it is a central feature of the right to a fair trial (Articles 6 ECHR and 14 ICCPR). The equality of arms essentially means procedural equality between the parties, who must have the opportunity to adduce evidence, to challenge hostile evidence and to present arguments on the matter. It also requires conditions that do not place any party at a substantial disadvantage in relation to the other side.²⁴

Together, in order to comply with the right to a fair trial and with the right to private and family life, states must establish a regulatory framework to protect the right to housing from the interference of third parties, including creditors in mortgage contracts. Evictions derived from mortgage possessions may constitute a serious form of interference not only with the right to housing but also with the right to home and family life. In addition to respecting the legal procedure, the proportionality and reasonableness of the eviction and its impact on people's lives must be carefully examined by independent judges on a case-by-case basis. Hereby, two of the most traditional civil rights (due process and private life) join forces in defence of one of their socioeconomic ugly sisters: The right to housing.

22 ECtHR, *Connors v. UK*, 2004, para. 86.

23 S. Nield and N. Hopkins, 'Human Rights and Mortgage Repossessions: Beyond Property Law Using Article 8', *Legal Studies*, Vol. 33, No. 3, 2013, 431.

24 ECtHR, *Neumeister v. Austria*, Judgment of 27 June 1968, para. 22, Series A no. 8; and *H. v. Belgium*, Judgment of 30 November 1987, para. 53, Series A no. 127-B.

The right to housing and the prohibition of retrogressive measures: The cases of Madrid and Catalonia

As said in the introduction, if households do not end up in homelessness after a mortgage eviction it is basically thanks to the support of friends and relatives, who kindly open the doors of their homes to them. Nevertheless, situations where people live temporarily with friends or family or are forced to squat for lack of alternatives constitute different forms of 'insecure housing', as defined in the ETHOS typology of the European Federation of National Organizations Working with the Homeless (FEANTSA).²⁵

The obligation to achieve progressively the full satisfaction of the right to housing means that public authorities ought to adopt all necessary measures to put an end to insecure housing. One of the consequences is that authorities must be able to show that their policies are best suited to satisfy that end. Another consequence is that regressive measures are in principle inadmissible unless the Government can prove that they will be in force for a limited period of time, that they are proportionate and non-discriminatory, that most disadvantaged people in society are not disproportionately affected by them and that they are necessary in order to improve the general enjoyment of economic, social and cultural rights of the population.

Hereafter, the article will present five measures in housing policies in Catalonia and in the Community of Madrid since the beginning of the economic crisis.²⁶ Together, these five changes show that there has been a clear retrogression in the enjoyment of the right to

²⁵ <http://www.feantsa.org/spip.php?article120>

²⁶ Housing is a decentralised policy area in Spain (Articles 148 and 149 of the Constitution, 1983 Statute of Autonomy of Madrid and 2006 Statute of Autonomy of Catalonia). *The authorities of a territorial entity of the State are public-law institutions which perform the functions assigned to them by the Constitution and the law. In that connection, the Court reiterates that in international law the expression "governmental organization" cannot be held to refer only to the government or the central organs of the State. Where powers are distributed along decentralised lines, it refers to any national authority exercising public functions.* (ECtHR, *Assanidze v. Georgia* (GC), no. 71503/01, para. 148, Judgement of 8 April 2004, ECHR 2004-II).

housing.

Spending cuts on housing

There are around 276,000 social houses in Spain, 250,000 of which are managed by the autonomous communities and 26,000 by large municipalities.²⁷ The last official Population and Housing census (2011) indicates that Spain has 25.2 million dwellings.²⁸ Social housing would therefore be approximately 1.1% of the total housing sector. This proportion is remarkably tiny when compared to the 32% of the Netherlands, 23% of Austria, 18% of the UK or 17% of France. In fact, within the EU-15, only Greece has a lower figure, and that is just because Greece is the only European country that currently does not have a social housing scheme, precisely as a result of the financial bailout this country went through.²⁹

Spain has historically spent less than its European neighbours on social housing, as in other social services. This is partly related to the lack of social investment during Franco-era dictatorship (1939-1975), at a time when other European countries nourished their welfare state. This lies beneath the underdevelopment of public social services in Spain.³⁰

In 2012, the UN Committee on Economic, Social and Cultural Rights recommended Spain to '*work in coordination with the autonomous communities to invest more resources in increasing the social housing stock in order to meet demand*'.³¹ To the contrary, public spending on housing since the beginning of the crisis has only shrunk. General public

27 Some smaller municipalities also have their own stock of social housing. Defensor del Pueblo, *Estudio sobre Viviendas Protegidas Vacías*, 2013.

28 INE, "Population and Housing Censuses 2011: Buildings and dwellings", press release of 18 April 2013.

29 Cecodhas, *The Housing Europe Review*, 2012, 24; *Greek national report for the 2nd period review by the CESCR*, UN doc. E /C.12/GRC/2, 16 December 2013, para. 171.

30 V. Navarro, *El Subdesarrollo Social de España: Causas y Consecuencias*, 2006, Madrid: Anagrama.

31 CESCR, *Concluding Observations: Spain*, 2012, para. 21.

spending on housing halved between 2009 and 2012.³² Housing benefits, for example, went down from €40.95 per person in 2008 to €27.79 in 2012 (at constant 2005 prices). EU average in 2012 was €134.65 per person.³³ In 2013, Catalonia spent €25.74 per person in housing and promotion of residential construction. In 2008 it had spent €47.71 per person. In the Region of Madrid it went from €86.25 in 2008 to €31.76 in 2013.³⁴

Lack of use of all available resources: Empty homes

The 2013 Guiding Principles of security of tenure for the urban poor, drafted by the UN Special Rapporteur on the Right to Housing in consultation with Governments and other stakeholders, reminded states of the social function of private property, and encouraged states to promote access to well-located housing, conduct audits of vacant housing, adopt measures to combat housing speculation, and regulate the private housing market.³⁵

According to the last official Population and Housing census, in 2011 there were 3,44 million empty homes in Spain. The number of empty homes would have gone up by 10.8% in one decade, and 18.5% of the houses built during the construction boom would still be empty. More than 263,000 homes in the Community of Madrid (9.1% of all homes in the region) and more than 448,000 in Catalonia (11.6%) remained empty.³⁶ There is no official statistics on empty homes in Europe, but some estimates speak of 11 million in the whole of the European

32 C. Trilla, 'Desigualdad y Vivienda', *Arquitectura, Ciudad y Entorno*, Vol. 9, No. 26, 2014, 94, at 119.

33 Data from Eurostat: http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=spr_exp_fho&lang=en

34 Fundación Cívica: <http://dondevanmisimpuestos.es/>

35 Special Rapporteur on the Right to Housing, Raquel Rolnik, *Guiding principles on security of tenure for the urban poor*, 2013, para. 4, UN doc. A/HRC/25/54. The social function of private property is also established in Article 33 of the Spanish Constitution.

36 INE, press release of 18 April 2013. A home is considered empty by the INE when it remains unoccupied, it is available for sale or rent, or indeed lying abandoned, and it is not occasionally or seasonally used.

Union.³⁷ If this number is approximately right, it means that more than 30% of the empty homes in Europe are located in Spain.

Four signs suggest that public authorities are not making use of all available resources as regards to empty homes. First, following the example of some other European countries, 2007 Catalan Law on the Right to Housing established the possibility of compulsory renting in the form of temporary dispossession of the usufruct of homes unjustifiably left empty for more than two years. This possibility was repealed by Law 9/2011 before it could be implemented even once.

Second, the 2007 Law still contemplates the possibility of imposing penalties on landlords that keep their homes empty without just cause (Articles 41 and 123). However, except for a handful of municipalities who have initiated penalty procedures, public authorities in Catalonia generally are unwilling to impose penalties on landlords refusing to make their homes available in the rental market.

Thirdly, three regional parliaments in Spain have adopted laws attempting to impose temporary dispossessions similar to those prescribed in Catalonia between 2007 and 2011, but focused only on financial institutions: Andalusia (Decree-law 6/2013 and Law 4/2013), Navarra (Law 24/2013) and Canary Islands (Law 2/2014). The Spanish Government nonetheless appealed against these laws at the Constitutional Court, claiming that they pose a *'threat to financial stability'*, and therefore the contested provisions are currently not in force.³⁸

Finally, in 2012 the Spanish Government established the Sareb, an *'asset management*

37 The Guardian, “Scandal of Europe's 11m empty homes”, 23 February 2014.

38 Constitutional Court, Decisions 69/2014, on Navarra, and 115/2014, on Andalucía; Acuerdo de la Comisión Bilateral de Cooperación Administración General del Estado – Comunidad Autónoma de Canarias, 19 September 2014.

company' (also known as 'bad bank'), in application of the Memorandum of Understanding on Financial Sector Conditionality with the European Commission.³⁹ The idea was to set up a separate institution that would purchase toxic assets, particularly in real estate and foreclosed assets, from banks with the goal of realising their long-term value. In exchange of the assets, banks would receive an equity participation in Sareb. In fact, 55 per cent of Sareb's capital came from private financial institutions, but the remaining 45 per cent had to be put in by the state. Through this process of detoxification of assets, Sareb became the owner of 80,000 homes taken from financial institutions which had, in turn, acquired them in mortgage possessions. The Government would have to explain why it missed the opportunity to give Sareb the mandate to use its pool of empty homes to secure the access to housing of the population.

Ever shorter life of social housing

With a few exceptions, most social houses in Spain are qualified or defined as social for a certain period, after which the home moves to the private sector, where the public control over the sale price does not apply anymore.

The 2004-2007 Catalan Plan on the Right to Housing (Decrees 454/2004 and 244/2005) established a period of qualification of 90 years. This limit was reduced to 30 in the 2009-2012 Plan (3rd Transitional Provision of the Decree 13/2010), and the 2013-2016 Plan establishes a graduation between 10 and 30 years of qualification depending on whether the promotion received public aid (Article 47 of the Decree 75/2014).

In the case of Madrid, the qualification lasts between 10 and 15 years, depending on whether

³⁹ European Commission, SEC (2012) final, July 2012, para. 21-22.

it is for rent or for sale (Article 10 of the Decree 74/2009). In other words, in some cases in the Community of Madrid after only ten years a house built on land legally reserved to social housing may be privately and freely exchanged, with no public control of the price or supervision of the needs of the buyer.

Sale of social housing to investment trusts

As said earlier, the social housing pool in Spain is rather limited compared to those of other European countries. Both the UN Special Rapporteur on the Right to Housing and the UN Committee on Economic, Social and Cultural Rights have recommended Spain to increase the stock of social housing. Yet, public authorities in Madrid have done something totally different.

Between July and August 2013, the housing institute of the Government of Madrid (IVIMA) sold 2,935 homes and a number of parking places and storerooms to a real estate investment trust. So did the housing public company of the Council of Madrid (EMVS) with 1,860 of its apartments (more than one third of the whole stock of public housing). In accordance with the law, the Government of Madrid had to issue a statement defending the necessity of the sale considering that the social housing stock did not perform any public function. The statement argues that the sale was necessary to achieve a balanced budget, but it ignores the fact that social housing is an available resource to fulfil the right to housing.⁴⁰ As said earlier, the qualification of social housing for rent in Madrid has a expiry date of 10 years. This means that investment trusts will soon be free to sell the apartments in the private market, if they wish to.

40 The statement is on file with author.

According to the UN Committee on Economic, Social and Cultural Rights, both for-profit and non-for profit private initiatives may constitute enabling strategies to achieve the full realisation of the right to housing; *'in essence, the obligation is to demonstrate that, in aggregate, the measures being taken are sufficient to realise the right for every individual in the shortest possible time in accordance with the maximum of available resources'*.⁴¹ The Community of Madrid and the Municipality of Madrid would have to prove that the sale of social housing to investment trusts is compatible with the need to increase the availability of social housing in Spain in order to satisfy the progressive realisation of the right to housing.

Retrogressive measures on social benefits

Social benefits constitute a social protection system derived from the rights to social security and social services proclaimed in Articles 22 and 25 of the Universal Declaration of Human Rights and in Article 9 of the International Covenant on Economic, Social and Cultural Rights.

Social benefits are a necessary tool in order to avoid poverty and social exclusion. In one of its most recent comments, the UN Committee on Economic, Social and Cultural Rights requires states to provide specific protection for disadvantaged individuals and groups. It argues that states must establish protection systems, ensure their sustainability and that the benefits are adequate in amount and duration, and guarantee that the way in which the benefits are provided does not breach the principle of equality and non-discrimination. Eligibility criteria must therefore be reasonable, proportionate and transparent, and states are not allowed to take deliberate retrogressive measures, unless they can prove that they have

41 CESCR, *General Comment No. 4*, 1991, para. 14, UN doc. E/1992/23.

only been introduced after careful consideration of all other alternatives by reference to the totality of economic, social and cultural rights.⁴²

According to Eurostat, Spain spent 26.1% of its GDP in social protection in 2011, 3 points below the EU average.⁴³ The amounts given by autonomous communities in their social benefits schemes (generally known as '*rentas mínimas de inserción*') are low and the European Committee of Social Rights has deemed them insufficient except for two regions: Basque Country and Navarra.⁴⁴ Moreover, official data indicate that it is not only that the amounts given are insufficient, but also that they do not reach far enough to cover the absolute minimum needs of at least two thirds of the more than 700,000 families that have no income whatsoever.⁴⁵

Regional social services are subsidiary to other sources of income, being them from work, pension or unemployment benefits. As such, they are the last available resort for the state to prevent poverty and social exclusion. Due to their pecuniary nature, they could be used by the beneficiaries to provide for themselves and for their families in the private sector. Hence, their relevance for the right to housing and other economic and social rights.

In spite of their potential role in preventing poverty and social exclusion, since the beginning of the economic crisis, social benefits in Catalonia and Madrid have experienced a retrogression.

The Catalan social benefits are regulated by Law 10/1997, which was modified by Law 7/2011. Based on the Catalan median income, which is higher than the Spanish one, 19.8% of

42 CESCR, *General Comment No. 19*, 2008, UN doc. E/C.12/GC/19.

43 Eurostat, "EU28 spent 29.1% of GDP on social protection in 2011", 21 November 2013.

44 ECSR, *Conclusions XX-2 (Spain)*, 2014, 26.

45 Ministerio de Sanidad, Servicios Sociales e Igualdad, *El Sistema Público de Servicios Sociales: Informe de Rentas Mínimas de Inserción – Año 2012, 2013*, 45; Red Emin, *Informe sobre los Sistemas de Rentas Mínimas en España*, 2014.

the Catalan population is at risk of poverty, that is, around 1.5 million people.⁴⁶ With the crisis, the number of beneficiaries went up from 13,700 in 2008 to 30,277 in 2010. However, with the change in the law, the number decreased to 26,182 beneficiaries in 2011 and 23,123 in 2012. The estimate for 2014 is around 25,000 people.⁴⁷

Law 7/2011 introduced a number of important changes to the social benefit regime. The requirement of '*continuous and effective residence*' went from one to two years (new Article 6.1.b of Law 10/1997). In case of lack of response of the administration, the application must be understood as rejected, while before the administrative silence was considered affirmative (Article 11.2). Also, the benefit is now given for a maximum of one year, unless exceptional circumstances require an extension (Article 23.1). Finally, the 2011 reform turned what thus far had been a right into a mere budget item whose extension depends on the Government's discretionary power (3rd Final Provision of Law 10/1997).

Law 15/2001 of RMI in Madrid was modified in 2012 (Law 8/2012). The number of applicants tripled since the beginning of the economic crisis in 2008, but just like in Catalonia after the change in the law, this number went down in 2013, 2.46% less than the previous year (12,908). There are 1,3 million socially excluded people or at risk of being socially excluded in Madrid, 20.4% of the population.⁴⁸ In 2013, only 18,123 households received RMI benefits in Madrid (55,500 people).⁴⁹

The 2012 reform hardened the eligibility criteria as regards to the proof of permanent residence in the Community of Madrid (new Article 6). It also established the immediate

46 Idescat (2013): <http://www.idescat.cat/pub/?id=aec&n=415&lang=es>

47 Taula d'Entitats del Tercer Sector Social de Catalunya, *Nova Pobresa I Renda Mínima d'Inserció*, 2014, 27.

48 EAPN Madrid, *Evolución e Impacto del Riesgo de Pobreza y la Exclusión en la Comunidad de Madrid*, 2014, 6.

49 Dirección General de Servicios Sociales de la Comunidad de Madrid, *Balance de Gestión de la RMI 2013*, 2014, 71.

suspension of the social benefit in case of breach of only one of the beneficiaries' duties (Articles 13 and 27). As a result, the RMI benefit may be suspended for up to three months while the beneficiary provides the evidence required by the administration, a request that in some cases can be too onerous and disproportionate when the household may depend upon the small amounts of the social benefits for the most basic living expenses.

Conclusion

This article has offered a two-line strategic approach to tackle the housing crisis in Spain from a human rights perspective. Firstly, it removes the juices of two classic civil rights, fair trial and private and family life, claiming that these rights require an independent assessment of the proportionality and reasonableness of a mortgage eviction on a case-by-case basis. This interpretation restricts creditors' right to private property but serves the purpose of protecting the right to housing in foreclosure procedures. Secondly, the article operationalises the meaning of the prohibition of retrogressive measures on economic, social and cultural rights by looking at five particular forms of regression in the enjoyment of the right to housing in the context of the economic crisis and the austerity-led policies applied in Spain in recent years.⁵⁰

The article contributes to the scholarly debate about the opportunity and effectiveness of an ESCR-based strategic litigation on socioeconomic rights. Without questioning their justiciability, a number of authors have expressed their doubts about this kind of litigation.⁵¹

50 On the negative impact of austerity on human rights in Europe, see Commissioner for Human Rights, *Safeguarding Human Rights in Times of Economic Crisis*, 2013.

51 J. Cavallaro and E. Schaffer, 'Less as More: Rethinking Supranational Litigation of Economic, Social and Cultural Rights in the Americas', *Hastings Law Journal*, Vol. 56, No. 2, 2004, 217; A. Yamin, 'The Future in the Mirror: Incorporating Strategies for the Defense and Promotion of Economic, Social and Cultural Rights into the Mainstream Human Rights Agenda', *Human Rights Quarterly*, Vol. 27, No. 4, 2005, 1200; V.

Felner, for example, makes the persuasive argument that the excessive judicialisation of these rights is one of the reasons why the element of the progressive realisation has been condemned to obscurity, since judges are often reluctant to deal with issues that have traditionally been considered prerogatives of the Legislative and the Executive.⁵²

Human rights advocates are right to defend the justiciability of socioeconomic rights as a point of principle, because this is probably the longest degree of separation between these rights and the civil and political ones. However, at least in some cases it may be more effective to take advantage of the existing judicial mechanisms for civil and political rights and expand them to provide an answer to an issue like housing, generally seen as a matter purely of socioeconomic rights. This article argues that this is the case of the foreclosure procedure and the right to housing in Spain. This does not mean that the right to housing is not or should not be justiciable. It means only that protecting housing through civil and political rights may sometimes be more effective and therefore preferable.

Rather than focusing so much on fighting the battle of justiciability, human rights advocates should spend more time and resources on holding governments to account for the lack of progressive realisation of economic, social and cultural rights. This requires working at the policy level and understanding the political implications more than the juridical ones. This is likely to impose fundamental changes in the way human rights organisations address the problems and organise themselves. Comprehending the obligation to fulfil entails working on

Abramovich, 'Courses of Action in Economic, Social and Cultural Rights: Instruments and Allies', *Sur – International Journal of Human Rights*, Vol. 2, 2005, 181; M. Pieterse, 'Eating Socioeconomic Rights: The Usefulness of Rights Talk in Alleviating Social Hardship Revisited', *Human Rights Quarterly*, Vol. 29, No. 3, 2007, 796; J. Cavallaro and S. Brewer, 'The Virtue of Following: The Role of Inter-American Litigation in Campaigns for Social Justice', *Sur – International Journal of Human Rights*, Vol. 8, 2008, 85; I. Saiz, 'Rights in Recession? Challenges for Economic and Social Enforcement in Times of Crisis', *Journal of Human Rights Practice*, Vol. 1, No. 2, 2009, 287; O. Ferraz, 'Harming the Poor Through Social Rights Litigation: Lessons from Brazil', *Texas Law Review*, Vol. 89, No. 7, 2011, 1643.

52 E. Felner, 'Closing the "Escape Hatch": A Toolkit to Monitor the Progressive Realization of Economic, Social and Cultural Rights', *Journal of Human Rights Practice*, Vol. 1, No. 3, 2009, 402, at 407.

budget analysis and taxation.⁵³ It also requires coming up with rigorous methods to examine and publicly denounce deliberate retrogressive measures, and naming and shaming not only political actors but also the economic policies that inspire these retrogressive measures.

Much more work is needed in this area, although some important initiatives are moving in this direction.⁵⁴ This article offers five concrete examples of the way in which austerity-led policies applied in the context of the economic crisis constitute steps backwards in the enjoyment of the right to housing in Spain. By bringing civil and political rights back into the game, it also gives shape to the abstract notion of the interdependence of human rights, too often used as a catchline in human rights activism. Human Rights advocates enjoy quoting the famous *Airey case* (1979), when the European Court of Human Rights said that '*there is no water-tight division separating*' socioeconomic rights and civil and political rights.⁵⁵ It is time to act accordingly.

53 R. Balakrishnan and D. Elson, 'Auditing Economic Policy in the Light of Obligations on Economic and Social Rights', *Essex Human Rights Review*, Vol. 5, No. 1, 2008; A. Nolan and M. Dutschke, *op. cit.*, 2010; Queens University of Belfast Budget Analysis Project, *Budgeting for Economic and Social Rights: A Human Rights Framework*, 2010; Center for Women's Global Leadership, *Maximum Available Resources and Human Rights: Analytical Report*, 2011; A. Nolan, 'Budget Analysis and Economic and Social Rights', in *Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges*, ed. by E. Riedel *et al.*, Oxford: Oxford University Press, 2014, 370.

54 The OPERA framework developed by the Center for Economic and Social Rights is a very good contribution: <http://www.cesr.org/section.php?id=179>

55 ECtHR, *Airey v. Ireland*, Judgment of 9 October 1979, para. 26, Series A no. 32.