

## Foreclosures, Housing Rights and Prevention of Homelessness in Spain

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Over the last 30 years there have been several speculative bubbles in the Spanish housing sector. The first boom took place in the early 1970s, when 500,000 houses per year were built until the oil crisis of 1973. This growth was not overly excessive, since the “secular shortage” of housing since the post-war period was being addressed, combined with the migratory waves from the rural areas to the cities resulting from industrialization processes and the demographic growth during that period. The second upward cycle in the housing sector occurred in the 1980s. This rise was based on the increase in housing prices and not on production, with less than 400,000 housing starts per year. In the cycle that lasted from 1998 to 2007, however, not only did housing prices skyrocket beyond the housing boom of the 1980s, but the rate of housing starts also exceeded the production levels of the 1970s. Consequently, the latest economic cycle was characterized by spectacular price hikes that surprised everyone not only because of their scale, but also because of the duration of the boom, which lasted almost ten years.<sup>2</sup> This was due to different reasons, including declining interest rates, laxer mortgage lending conditions, real-estate speculation and foreign investment in Spain. Housing starts topped 600,000 units per year in 2001, reaching 800,000 units by 2005. This was more than France, Germany and the UK combined. Nevertheless, in spite of these hair-raising figures, in 2001 the rental market accounted for only 11% compared to 82% who were homeowners. In 2001 a total of 3,106,422 houses were empty, 25.5% more than in 1991. Moreover, social housing in Spain accounts for 11% of the market versus the European average of 16%, but when we speak of social housing for rent, Spain has 3 social housing units for rent per 1,000 inhabitants, while the EU-27 average is 39 per 1,000.

In these residential conditions, the systemic crisis which we are still undergoing began in 2008, and its differentiated impact at the local level has translated, economically speaking, into a cooling off of domestic consumption, total credit restriction, and investment losses (mainly in construction, and particularly in housing construction.

This effect was inevitable, as the economic growth model was unsustainable over time. But more importantly, the social drama resulting from the collapse of the housing market is reaching unprecedented limits. During the years of economic growth, poverty remained at very high levels (around 19%), and is now on the rise, together with unemployment, which now affects nearly 5 million people.

One of the consequences of combining the promotion of a home ownership model and a crisis like the current one is that, according to the General Council of the Spanish Judiciary (*Consejo General del Poder Judicial*), close to 300,000 foreclosure proceedings were begun in Spain between 2007 and the first quarter of 2011. Foreclosures rose from 25,943 in 2007 to 93,636 in 2010, although the growth in these proceedings was very small in 2009 and 2010. Although it is true that there is a statistical problem that makes it impossible to distinguish foreclosures involving families evicted from their regular dwellings from cases of second residences or construction companies, it can indeed be said that we are confronted with an alarming “residential emergency” situation, as had been reported as early as 2006 by the UN Special Rapporteur for the right to adequate housing. These figures do not include data on evictions due to rent non-payment (which is not the subject of this article). Nevertheless, according to a survey of homeless people by the National Statistics Institute, 7.9% of the survey respondents found themselves out on the streets because they had been evicted, 11.4% were unable to continue paying rent, and another 7.9% reported that they were homeless because their rental agreement had expired. This accounts for more than one-fourth of the affected population.

### What role does the law play?

In a country where home ownership is promoted as a priority, a high percentage of the population is saddled with a mortgage that stretches out many years. During the boom, mortgages reaching 120% of the appraisal

2 Naredo, J.M. (2004): “Perspectivas de la Vivienda”. Revista de Economía ICE, no. 815 pp 143-154

value of new houses were financed, with instalments that meant payback could last up to 40 or even 50 years. As a result, bad banking practices proliferated: misleading advertising, incomprehensible contract clauses, granting of “incremental mortgages” that started out with affordable instalments depending on the family unit’s income but quickly doubled, compulsory inclusion in mortgages of virtually useless additional products, establishment of cross-collateral agreements through which family members and friends (and sometimes even total strangers) were made liable not only for their mortgages but also for the others’ mortgages in case of default, etc. In this regard, in a crisis context, many households were unable to meet mortgage payments due to a decline in income. When this happens, Spanish law provides for foreclosure proceedings which not only involve the loss of one’s regular dwelling, but also exposes people to having their salaries and other present or future assets attached. Specifically, under current regulations a bank can take over a dwelling at only 50% of the appraisal value and continue to demand that the family pay the balance plus interest and any court/legal costs. Article 579 of the Code of Civil Procedure specifies that once the mortgaged asset is auctioned, “if the product of the auction is insufficient to cover the credit” (the due balance of the mortgage loan plus interest and costs), the foreclosing bank can demand that the foreclosure proceeding continue. This implies attaching the affected parties’ assets (payroll, vehicles, checking accounts) up to the full amount of the debt. As a result of this procedure, many affected parties are forced to resort to the underground economy to avoid having their income seized.

Courts have started to react to what had, until recently, been an unquestioned mortgage foreclosure system. If the price of the property is trending upwards and there are people interested in purchasing it in an auction, the bank covers the debt with the price obtained from such an operation. But in the present context, this is not a very common occurrence, so the consequences for the debtor are very serious if the bank is awarded the property at 50% of its appraisal value, an amount that usually fails to cover the full debt. In other words, the bank may demand that the debtor pay the balance due and, at the same time, turn a tidy profit by re-selling the asset. If a house was appraised at 200,000 Euros and the debt amounted to 180,000 Euros, the bank can buy back the asset for

100,000 Euros and claim the 80,000-euro balance from the debtor. At the same time, it can put up the house for sale for 150,000 Euros, giving it an added profit of 50,000 Euros.

In light of this situation, there have been several significant court rulings. Firstly, an interlocutory (provisional) proceeding before the Provincial Court of Appeals (section two) of Navarra (no. 111/2010, 17 December) understands that the downward difference in actual value of the property obtained through an auction is the direct result of the unstable and speculative management of the economic and financial system, causing a severe decline in the real-estate market, both domestically and abroad. As a result, it takes into account only the value at which the property was originally appraised, and understands that the debtor is fully released from any liability because this value is higher than the debt due. This criterion has been followed by some courts of first instance. However, one month later, another interlocutory (provisional) proceeding before the Provincial Court of Appeals of Navarra (section three – no. 4/2011, 28 January) adopts the opposite solution, understanding (following the rationale of the Supreme Court in a ruling handed down during the economic boom) that the residual debt claim by the bank that had been awarded a property at a value lower than the appraisal value does not constitute misfeasance nor does it involve any form of unfair enrichment by the bank, as it is a right granted by the legal system which the courts are obliged to apply. Another possibility was opened with a challenge of unconstitutionality brought by the court of first instance number 2 of Sabadell (interlocutory proceeding of 30 September 2010), arguing that possible abusive clauses contained in the initial mortgage transaction and circumstances existing at the time it was granted cannot be examined in foreclosure proceedings. Specifically, an unconstitutional issue was brought before the Constitutional Court involving articles 695, 698 and 579 of the Code of Civil Procedure in relation to the fundamental right to effective protection of the court for people subjected to foreclosure proceedings (Article 24 of the Spanish Constitution), the right to housing (Article 47), and the principle of interdiction of abuse of discretion in the action of public authorities (Article 9.3). More rulings to the contrary are expected, so it will be necessary to wait for the Constitutional Court to make a declaration or for a legislative reform that will finally resolve the issue.<sup>3</sup>

3 Molera, J (2011): Morositat hipotecaria. Guia pràctica: alternatives i processos. Transformacions. Publicacions UB

## The administration's response, social movements and housing rights

The Spanish government is reacting very timidly to this scenario and its priority is to rescue the banks before people from the financial crisis. First the amount of land that could not be attached was increased. Changes were then made to the Code of Civil Procedure so that banks could adjudicate housing at 60% rather than 50%. Some autonomous regional governments are making more efforts than others, like Catalonia with its mortgage advisory service called *Ofideute*, which has handled more than 800 enquiries with a 44.3% success rate, where the *Generalitat's* service has triggered a housing mediation process reaching agreements between families with non-payment problems and the financial institutions.<sup>4</sup> But the social movements are one step ahead, through the *Plataforma d'Afectats per la Hipoteca* (PAH – Mortgage Victims' Platform), born in Barcelona in 2009 and now spread all over Spain.<sup>5</sup> On 3 November 2010, PAH launched a campaign called "*Stop desnonaments*" (Stop Evictions), and in one year it stopped more than 100 evictions throughout Spain. The campaign focused on evictions for rent delinquency as well as mortgage foreclosures. As a result of these actions, in some evictions the judge has opted to send riot police, generating serious conflicts<sup>6</sup> and in others to set open eviction dates, preventing protests from being called for a specific date and time. At this point we might recall the United Nations' recommendations on procedural guarantees that must be abided by in evictions: a real opportunity to consult with the affected persons; a sufficient and reasonable notice period for all the affected parties in advance of

the scheduled eviction date, providing all the information relating to scheduled evictions to all the interested parties within a reasonable period of time, the presence of government officials or representatives at the eviction, especially when it affects groups of people, exact identification of all the people involved in carrying out the eviction, not going forward with any eviction during bad weather or at night unless the affected parties give their consent, offering legal resources, offering legal aid whenever possible to people who need to seek redress through the courts. In the Recommendation by the Commissioner for Human Rights of the Council of Europe,<sup>7</sup> "prevention of homelessness" can include legal protection of tenants against unfair and disproportionate contract conditions, the indiscriminate termination of contracts and forceful evictions, and having a sufficient rental housing stock to provide housing to vulnerable groups. In addition, requirements on the availability of social housing for rent, selection criteria and waiting periods and lists are also prevention instruments. It would also be necessary to take into account the legal protection of people threatened with eviction, in particular the obligation to consult with the affected parties to find alternative solutions to eviction and the obligation to set a reasonable advance date or deadline for the eviction, as well as prohibiting evictions at night or in winter<sup>8</sup>. Consequently, we can say that there remains a lot of work to do in Spain in terms of homelessness prevention policy. Currently thousands of people are being evicted from their homes without the right to effective legal protection, all of this without affordable public social rental housing stock to which the administration can relocate affected families.

4 Ofideute: Informe de gestió (Management Report). 30 September 2011. Agència de l'Habitatge de Catalunya. Autonomous Government of Catalonia

5 <http://afectadosporlahipoteca.wordpress.com/>

6 You can see a video shot in the city of Barcelona at <http://www.youtube.com/watch?v=K5fm5baDHik&feature=related>

7 Recommendation of the Commissioner for Human Rights on the implementation of the right to housing Strasbourg, 30 June 2009. CommDH(2009)5

8 Mikkola, M. (2010): Social Human Rights of Europe. Legisactio