

## Housing Rights Watch newsletter — Issue 1

challenges to the methods used by the State to ratify the international human rights instruments, while others are gradually increasing the protection of people's rights to housing. As they say in *Desperate Housewives*, "not everything works out as people expect it."

(1) This scheme is introduced under the Housing Miscellaneous Provisions) Act 2009.

(2) The Irish Council for Social Housing is working with the Minister for the development of new housing for some of these people.

(3) *The Irish Times*, 25 March 2010.

(4) Council of Europe, The European Convention on Human Rights, ROME 4<sup>th</sup> November 1950. FEANTSA has compiled a database of housing related ECHR cases, available at [www.feantsa.org](http://www.feantsa.org)

(5) See Kenna, "Local Authorities, the European Convention on Human Rights Act and Judicial Review Litigation" in *Irish Human Rights Law Review* (Dublin, Clarus Press, 2010).

(6) *Unreported*, High Court, 8<sup>th</sup> May 2008, Laffoy J.

(7) The decision is being appealed to Supreme Court. For more on *Donegan*, see "*Donegan v DCC and the Attorney General: Summary of Judgment by Ms Justice Mary Laffoy*" (April-June 2008) 18(2) *Flac News* 4. See also *Dublin City Council v Gallagher*, *Unreported*, High Court, 11<sup>th</sup> November 2008, O'Neill J.

(8) *Unreported*, High Court, 13<sup>th</sup> December 2008, Irvine J.

(9) See *Pullen v Dublin City Council* [No. 2] *Unreported*, High

(10) Court, 28<sup>th</sup> May 2009, Irvine J.

(11) The Centre for Housing Research has now published a Legal Briefing for local authorities on the ECHR, available at: <http://www.chr.ie/> [2007] IEHC 204.

(12) In January 2010, there were some 621 "ghost estates," defined as housing estates where more than half of the properties are empty or remain under development, in Ireland. Some 86 of these estates had more than 50 properties. See *The Irish Times*, January 27, 2010. NAMA is the new National Asset Management Agency created in 2009.

(13) The terms are similar to those set out in the Residential Tenancies Act 2004.

(14) See Paper presented by Cormac O' Dulachain SC to the IHRC Conference – Economic, Social and Cultural Rights – making States Accountable, 21 November 2009.

(15) See Free Legal Advice Centres, <http://www.flac.ie/>

(16) Section 96.

(17) The Irish Banking Federation and the State Money Advice and Budgeting Service Operational Protocol: *Working Together to Manage Debt* (June 2009) was a voluntary agreement on dealing with mortgage arrears. The Financial Regulator established a *Consumer Protection Code* in 2006 which applies to all lending, and places significant obligations on lenders to acts with due skill, care and diligence in the best interests of its customers and not to recklessly, negligently or deliberately mislead a customer as to the real or perceived advantages or disadvantages of any product or service.

(18) See *The Irish Times*, 21 November 2009.

(19) S.I. No. 534 of 2008 Article 14(1).

(20) Housing (Miscellaneous Provisions) Act 2009. Part 4.

### Interpretations Regarding the Enforceability of the Rights to Housing in Spain

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When analyzing the right to housing in Spain, *the legal extent of Article 47 of the Spanish Constitution* cannot be disregarded.(2) The necessary starting point is Article 53.3 of the SC that demands the recognition, observance and protection of the principles acknowledged in Chapter III of Title I on the *Guiding Principles of Social and Economic Policy*, adding that such principles "*may be alleged only before ordinary jurisdictions pursuant to the provisions of the laws that develop them*". It has been deemed "*particularly unfortunate*", as it denies its direct legal applicability in the absence of legislative development. In this article, we will argue that this is not the interpretation that should be given to this principle.(3)

In this regard, case law has made both the direct legal effect of Article 47 and the existence of a right very clear. A ruling by the Spanish Supreme Court on 16 June 1998 (Ar. 6149) notes that "*irrespective of the dogmatic difficulties implied in the consideration as 'constitutional rights' of all those that stem from the state's actions consistent with the principles of social and economic policy as enumerated by Chapter III of Title I, it is obvious that the aforementioned Article 47 has a constitutional mandate or guideline that must guide the action of all the public powers*", while a Supreme Court ruling dated 18 February 2002 (Ar. 4826), for its part, highlights that Article 47 "*consecrates a social right or right of performance that consequently demands the State's intervention in the social and economic sphere, and positive action by the public powers to achieve the material equality put forth by Article 9.2 of the Constitution*".

Therefore, one cannot deny the existence of the actual right, and the discussion on this issue may be justified only by the marginal attention that the Social State has been given in administrative doctrine and by the interpretation of constitutional principles through "*glasses of a liberal jurist*".(4) It should be noted that, obviously, Article 47 does not guarantee each individual's right to own a house. This is, of course, a cartoonish and maxi-

malist vision of the constitutional text, which to a certain degree seeks to deny the right to housing by using the well-known argument of *reductio ad absurdum*.

The right to housing attributes a true *legal right of means* for the public powers. It is possible to set an analogy with Article 43 of the Spanish Constitution in reference to the right to health: there is no constitutional right to be healthy, but there is a legal duty on the part of the public powers not to jeopardize the health of persons, and to promote it through specific activities. In this regard, Article 47 of the Spanish Constitution establishes three clear legal duties in relation to the right to housing. It demands the establishment of “*relevant regulations*” such as regulation of “*the use of land in accordance with the general interest in order to avoid speculation*”, which entails establishing a regulatory mandate for the competent public authorities. Moreover, this principle demands that “*the necessary conditions*” be promoted, which means taking steps that go beyond merely regulatory measures and justifies the deployment of promotional measures and material services.

In light of the above mentioned, the public powers should not only respect the right to housing (as should any private ones, pursuant to Article 9.1 of the SC), but also protect, guarantee and promote it, either through *regulatory activity* or – concurrently, if need be – through promoting private activity or the provision of services. The right to housing thus involves a set of negative as well as positive mandates: in other words, a series of *don'ts* (not to jeopardize) on one hand, and *do's* (to protect, guarantee and promote) on the other. Its nature, in spite of appearances, does not differ, in this regard, from political or civil rights, and does not call for public expenditure in all cases. Similarly to political or civil rights, the right to housing may require public expenditure, and not merely abstention on the part of the public powers.

The legal duty to provide means in respect of the right to housing involves, according to the terminology of Alexy,<sup>(5)</sup> an *optimization mandate*. Public (and private) powers must respect it, and, in addition, they must take all possible measures to guarantee and promote that all people should have a living space in a decent, adequate and unsegregated urban milieu. And in keeping with the maxim *ubi jus ibi remedium*, the violation of this legal duty by public or private actors either by action or omission, can give rise to the use of relevant judicial resources, either by resorting to the civil or the contentious-administrative jurisdiction, or even to the Constitutional Court.

*From a subjective point of view*, it is worth to note that Article

47 refers to the right of “all Spaniards”. Does this mean that non-Spaniards do not enjoy this right? The question of eligibility on the part of foreigners with regard to the right to housing has prompted regulatory changes in Spain. According to Article 13 of the Constitution and to Constitutional Court doctrine,<sup>(6)</sup> the right to housing under Article 47 is one of those rights that would pertain or not to foreigners as provided for by treaties and laws, and therefore a difference in treatment with Spaniards with regard to the exercising of such a right is thus admissible. This is what is done by the Organic Law 4/2000, dated 11 January, on the rights and freedoms of foreigners in Spain and their social integration, which in the version given by Organic Law 8/2000, dated 22 December, restricts foreigners’ right to housing to those foreigners who are “residents”, who “*are entitled to access the public system of housing aid in the same conditions as Spaniards*”.

However, we believe that a systematic interpretation of this Article 47 SC with other constitutional principles (for instance, Article 10 SC, which refers to the dignity and free development of persons, Article 9.2, in reference to the equality of “individuals”, “groups” or citizens”, or Article 14, which contains the right to equality that is extendable to foreigners, also according to Constitutional Court case law) and its interpretation in accordance with various international treaties could serve as grounds for the conclusion that the right under Article 47 is applicable to all persons – foreigners as well as nationals.

*From an objective point of view*, the right enshrined by Article 47 is not only the right to enjoy a living space, a dwelling, but also the right to a decent and adequate urban milieu. In other words, Article 47 is establishing the right to a decent and adequate *habitat*, that is, a set of physical and social conditions connected to the urban space, with the urban milieu in which such dwelling is situated. Here lies the evident connection between town planning (and town planning law) and housing (and the right to housing).

In addition, the right under Article 47 should be systematically linked to other constitutional precepts, referring to *rights and principles*. *As for the connection of Article 47 with other constitutional rights*, it is necessary to insist on the relationship between the right to housing and rights such as the right to equality (Articles 9.2 and 14, and now Law 62/2003, which has transposed various EU anti-discrimination directives), physical and moral integrity (Article 15), personal and family privacy (Article 18 SC), freedom of residence (Article 19), or education (Article 27 SC), for instance.

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It is obvious that having a decent living space in an adequate urban milieu enables the effective enjoyment of these rights. It is difficult, however, in the absence of a home, to preserve physical and moral integrity, or to enjoy true personal or family privacy: All this requires a prior assumption: having a domicile, that is, a dwelling<sup>(7)</sup>. The absence of a variety of offers in terms of affordable housing in a city or town can seriously compromise the true freedom of choice of a domicile.<sup>(8)</sup> Urban segregation in Spain, and the lack of corrective measures on the part of the public authorities can lead to the “eviction” of persons with low net wages toward the outskirts.

In conclusion, the right to housing is actually a subjective right, enforceable even judicially if need be, recognized at the highest level by the Spanish Constitution. Obviously, this does not impede the fact that it is the legislator’s prerogative (and through their regulatory powers, that of the governments and administrations) to materialize this right and convert constitutional public obligations of means into legal obligations of results, which demand specific public (and private) behavior.

(1)PONCE, J & SIBINA, D (2008): *El Derecho de la vivienda en el siglo XXI: sus relaciones con la ordenación del territorio y el urbanismo*. Marcial Pons, Madrid.

(2)Article 47 SC “*All Spaniards have the right to enjoy decent and adequate housing. The authorities shall promote the necessary conditions and establish appropriate standards in order to give effect to this right, regulating land use in accordance with the general interest in order to prevent speculation. The community shall have a share in the benefits accruing from the town planning policies of public bodies*”

(3)PRIETO, 1990. *Estudios sobre derechos fundamentales*, Debate, Madrid

(4)MUÑOZ, S (2002): prologue to the book by VAQUER M (2002): *La acción social*, Tirant Lo Blanch-IDP

(5)ALEXY, R. (1993): *Teoría de los derechos fundamentales*, Centro de Estudios Constitucionales, Madrid

(6)Constitutional Court Ruling, hereinafter CCR, 107/1984, FJ 3)

(7)see CCR 22/1984, dated 17 February, FJ 2

(8)to which CCR 28/1999, dated 8 March, FJ 7, makes reference

### Downgrading tenant protection declared illegal by the Council of Europe

The wider scope of the Council of Europe decision  
Collective Complaint No. 53/2008 - FEANTSA v. Slovenia

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The European Federation of National Organisations Working with the Homeless (FEANTSA) brought proceedings against Slovenia for diluting the rights of tenants whose homes were returned to their former owners after 1991. Deregulated rents have soared while the grounds for eviction have increased; in short, protection of tenants’ rights has gradually been eroded by changes in legislation and new developments in case law. Several million people in the former people’s democracies that have now become part of the European Union could be at risk of being made homeless. The decision will have repercussions not only in those countries, but right across the EU. The Committee of Social Rights agreed with FEANTSA that rolling back tenants’ rights in this way violated the revised Social Charter.

The first key point is that reducing occupancy rights has been held to violate the right to housing (Article 31.1 and 31.3: promoting access to adequate housing and making the price of housing accessible to those without adequate resources).

Downgrading tenants’ rights is not a policy option, therefore, but a violation of international law.

The decision will affect all social rights protected by the revised Social Charter, such as the right to health, education, working conditions, social protection, and so on. The important point is that the State has not just public policy but also civil law obligations, which it cannot chop and change at will. Freedom of contract, which is central to recent developments in European countries, can only be exercised within a framework that holds the excesses of relations of power and subordination (in this case, landlord/tenant relations) within bounds, and this framework is not to be loosened at the expense of the most vulnerable. And because international law prevails over domestic law, each country’s parliament and constitutional court will have to accommodate this decision when drawing up and checking the compliance of future legislation.

The second key point is that the above-mentioned development has been recognised as discriminatory (article E). Tenants living in homes built during the socialist era have obviously not had to suffer the effects of restitution, but have actually been able to buy their homes for next to nothing. The Council of Europe found that while housing situations may differ, tenants’ social conditions were similar, and differential treatment therefore constitutes discrimination, particularly where any distinction that might justify such differential treatment is “*in no way imputable to them*”. In other words, the reflex being seen across Europe to make deep cuts in accrued social gains (pension reforms hitting first private-sector employees, then public employees, etc.) is *prima facie* unlawful. Again, this important development will have to be incorporated in national regulations. The third lesson is that cutting down tenants’ rights is in itself a violation. Bearing down on the poorest households is enough to violate their rights, let alone its social consequences. The Council of Europe declares that “*insufficient measures for the acquisition or access to a substitute flat, the evolution of the rules on occupancy and the increase in rents (...) are likely to place a significant number of households in a very precarious position, and to prevent them from effectively exercising their right to housing*”. Even if on average