

*Posibilities and limits of the European
Legal System as a multilevel protection
system for Housing Rights*

Spanish case.

Francisco Javier Rubio Gil
Attorney, Centro de Asesoría y Estudios Sociales S Coop Mad (CAES)
2017 April

THREE LEGAL SYSTEMS THAT ARE “THEORETICALLY” INTEGRATED

- Spanish Constitution 1978.
- European Union, Spain joins 1986.
- European Convention of Human Rights, Spain joins 1977.

“Fundamental Rights guaranteed by The European Convention of Human Rights and those resulting from the constitutional traditions common to the Member States will form part of European Union law as General Principles” (art. 6.3 Treaty of Lisbon).

SPANISH CONSTITUTION – CONSTITUTIONAL COURT

All Spaniards have the right to enjoy decent and adequate housing. The public authorities shall promote the necessary conditions and establish the relevant rules to enforce this right, regulating the use of land in accordance with the general interest to prevent speculation. The community will participate in the capital gains generated by the urban development of public entities. (article 47 Constitution)

- In 2010, one Spanish judge asked Constitutional Court about the coherence between the Fundamental Right to Fair Trial (article 24 Spanish Constitution) and the Foreclosure system where no allegation except payment is allowed. (Unconstitutionality question, Guillem Soler 2011, relating fair trial and right to housing, articles 24 y 47 Spanish Constitution).
- Constitutional Court answered 19-7-2011, dismissing it and stating that *“the one who signs a mortgage consents a temporary reduction of his judicial protection”*.
- *“The legislative provision of the right to suspend the launch of the habitual residence to deal only with specific situations of necessity and not to all obeys **the constitutionally legitimate purpose of finding a balance between the protection of mortgage debtors and their right to housing and the proper functioning of the financial system, specifically the mortgage market.**”* (Decision on May the 5th of 2014, rejecting constitutional protection against a family eviction)

EUROPEAN COURT OF HUMAN RIGHTS

- Article 8 of European Convention: 2. *There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*
- *The loss of a home is one of the most serious infringements of the right to respect for the home and that any person at risk of becoming a victim must in principle be able to obtain a review of the proportionality of that measure (McCann v United Kingdom, application No 19009/04, and Rousk v. Sweden, application No 27183/04).*

Preliminary Questions before Court of Justice of European Union (article 267 EUFT)

- To be sent by a national judge/tribunal, in order to interpretate EU Legislation (Directives) that is to be applied in a single case, when that answer will determine the final resolution.
- Accelerated proceeding / ordinary proceeding.
- General Attorney as a party.
- Effects over the whole European Union.
- Parties at the national procedure are not allowed to send any question, buy they are allowed to propose it to the national judge.

Preliminar Questions before Court of Justice of European Union (article 267 EUFT)

- Procedures where propose Preliminar Questions to ensure right of housing by using the Consumer Protection Directive:
 - Execution procedures:
 - Mortgage executions
 - Cash debts executions
 - Extrajudicial mortgage execution
 - Rental contract extinction / rental payment procedures
 - Personal insolvency procedures

MAIN EUROPEAN DECISIONS CONCERNING WITH SPANISH FORECLOSURE SYSTEM

Aziz case, March 14th 2013

- Spanish Foreclosure system not compatible with European Consumer Protection

Morcillo case, July 7th 2014

- Inequality in right to appeal

Unicaja and Caixabank case, January 1st 2015

- Abusive Interest on Delayed Payment should be totally cancelled, not only moderated

Quintano case, June 11th 2015

- Anticipated Expiration Clauses should be totally cancelled, not only moderated

Penalva case, October 29th 2015

- One month to fulfill Opposition against foreclosure is enough but personal notification is due to guarantee consumer right to defense.

Floor Clauses case, December 21st 2016

- Floor clauses, if abusive, should be totally cancelled from the beginning of the contract. Amendment of the previous Spanish Supreme Court Decision on this matter, on May 9th 2013.

Banco Primus case, January 26th 2017

- Anticipated Expiration clauses should be totally cancelled, not only moderated. Judges can evaluate any term of the contract at any time of the process. Res Iudicata cannot be opposed to avoid judicial control on abusive clauses.

Spanish Supreme Court Preliminary Question on Anticipated Expiration Clauses, February 8th 2017

- Main question: "Should Spanish judges reject or annulate mortgage foreclosures that include Anticipated Expiration Clauses to that point where lenders could only sue for unpaid quotes but not for the whole loan?"

DECISION	Nov8th2012 – CJEU Juliane Kotott report on Aziz case	March 2013 - Aziz Decision – Spanish Foreclosure system does not protect consumers	July 2014 – MorcilloDecision – Inequality in right to appeal	January 2015 - Unicaja and Caixabank case. Delay interests	December 2016 – Floor clauses decision	January 2017 – Anticipated Expiration clauses decision. Foreclosures must be rejected.
SPANISH SUPREME COURT		May 2013 Floor clauses are abusive but reimbursement is not posible because can affect system stability		December2015. Anticipated Expiration is abusive but does not mean foreclosures should be rejected.		February 2017. Preliminary question on Anticipated Expiration clauses.
CONTEXT	Nov9th2012 – Women threaten by eviction comitted suicide. PAH Stopevictions campaign	1,5 million signatures come to Parliament demanding stop evictions, debt cancel by losing house and social rentals	Over 400.000 foreclosures initiated since 2009. Over 200.000 houses evicted since 2009.		Up to 2,5 millions of contracts affected by floor clauses. TV & Radio spots.	Regional tribunals start to suspend foreclosures because pending Preliminary Question.
STATE LEVEL LEGAL REFORMS	Nov15th2012 – 1st Eviction suspensión for extreme cases	May2013. Foreclosure system reform – consumers can oppose abusivse clauses. Evction suspension til May2015	September2014 – Appealing system reform	March2015 – eviction suspension for extreme cases extended until May2017	January2017 – Special mediation system on floor clauses	April2017 – eviction suspensión for extreme cases is ampliaded and extended until May2020.
REGIONAL PASSED LAWS ON RIGHT TO HOUSING.	2013 – ANDALUCIA. Suspended by Constitutional Court within Government appeal against regional law.	2013 – NAVARRA. Suspended by Constitutional Court within Government appeal against regional law.	2014 – CANARY ISLANDS. Suspended by Constitutional Court within Government appeal against regional law.	2015 – BASQUE COUNTRY. Suspended by Constitutional Court within Government appeal against regional law.	2016 – CATALUNYA – PAH popular legislative initiative. Suspended by Constitutional Court within Government appeal against regional law.	2016 – VALENCIA, MURCIA, ARAGÓN. 2017 Madrid PAH is collecting 50.000 signatures to promote Regional Housing Right Law.

CJEU Decision, September 10th 2014, Monika Kucionova case.
 Multilevel violation of the European Corpus – Court decision that states inter-dependence of Fundamental & Human Rights.

