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"Robinhoodian" courts' decisions on mortgage law in Spain

Sergio Nasarre Aznar

Abstract. The purpose of this paper is to examine the response of the Spanish courts to the effects of the 2007 financial crisis for residential mortgage borrowers in the absence of any equivalent intervention by the legislature. The paper also explores the potential risks that recent court decisions might pose for the Spanish mortgage and banking systems. The paper uses a combination of doctrinal and comparative methodology. It undertakes an analysis of decided judicial cases in Spain and compares these to international courts' decisions and to national and international legislation with a view to exploring their originality in the field of mortgage-related consumer protection. The reviewed cases demonstrate the need to consider legislative reforms in order to increase the protection of consumers in relation to mortgages. Some reforms took place in 2013, but these were not perceived as sufficient by the judiciary. The paper also highlights the legal uncertainty that has followed these decisions and its negative impact on the credibility of the Spanish financial and legal systems. The cases discussed are exceptional in the context of the general "normal" or "traditional" application of contractual, procedural and mortgage legislation by the rest of the judiciary. However they are relevant enough to detect a trend, and the need for the revision of affected statutes. This paper provides the first systematic critical analysis of these cases. It is of particular significance as they collectively represent a distortion of the civil law principles that provide the basis of Spanish mortgage law and therefore of the wider financial system.

Keywords: housing, mortgage, distortion, equity, human rights, swaps, eviction, consumers.

1. Introduction

The economic crisis in Spain began in 2007, as a combination of the international mortgage and financial implosion and indigenous national problems. The liquidity crisis of Spanish banks caused the collapse of the Spanish economy, and lines of credit to property investors and developers, retailers and consumers were stopped. This in turn triggered a dilution of the already weak welfare state[1] and a

[1] Spain has recently postponed the retirement age up to 67 years (by art. 4 Act 27/2011) and reduced the public expenditure on public health (by RDL 16/2012; see also EUROPEAN FOUNDATION FOR IMPROVEMENT OF LIVING AND WORKING CONDITIONS (Eurofound), *Access to healthcare in times of crisis*, Publications Office of the European Union, Luxemburg, 2014, pp. 12, 23, 38, 61) and education (by RDL 14/2012, 20 April), while retirement pensions are constantly under question in the media (SÁNCHEZ SILVA, C. "Pensiones nuevas para problemas viejos" en *El País* de 30 de enero de 2011; available: http://elpais.com/diario/2011/01/30/negocio/1296396865_850215.html; visited 04/11/2014). According to Eurostat (http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/File:At-risk-of_poverty_or_social_exclusion_rate,_2011_and_2012.png; visited 6-11-2014) Spain ranks in 2011 and 2012 amongst those Western European countries (Greece, Italy, Ireland, Cyprus, Portugal) with highest rate of at-risk-of poverty or social exclusion.

dramatic rise in unemployment rates by the end of 2014[2], from 8.26% in 2006 to 23.7% (and 51.4% youth). There was also a marked increase in social tension[3], a significant part of which was due to the 285,000 residential evictions (mortgagors and tenants) that took place between 2010 and 2013 and the increase of incidences of homelessness. In this context, courts ended up inundated with crisis-related cases (eg. corporation insolvencies and worker dismissals), and in particular, property-related cases, especially evictions. The reaction of the Spanish courts to these property-related cases has been interesting.

Even when the devastating effects of the current crisis became evident in 2008, the legislator (law maker), however, did not take any immediate measures to protect homeownership and tenancy markets, and particularly the weakest elements of them (mortgagors and tenants' homes).[4] In fact, the traditional Spanish legislative approach to the concept of 'home' (home = shelter + *x* factor[5]) has been cautious and conservative. The concept of 'home' had traditionally been taken into account either through family law (the 'family home') or else in the context of facilitating homeownership, the latter often being regarded as a vehicle for boosting the Spanish economy. Reformation of the notion of 'home' has therefore been a relatively recent process and falls under several headings: the improvement of construction quality[6] (2006); reforms in the law of leases and mortgages (2013); the alleviation of overindebtedness (2011); and the introduction of a 'fresh start' system for insolvents (2015).

It is safe to say that Spanish legislation has not based existing law or reformation related to housing on the 'endowment effect'[7] i.e. that the one who possesses the property attaches more value to it than the one that does not. This has been particularly true for consumers with mortgages (who increasingly suffer faster mortgage enforcements, special rules for the facilitation of mortgage enforcements within an insolvency process since 2003, a "super devastation claim"[8] since 1981 only repealed in 2013, and latent risks in reverse mortgages only introduced in 2007[9], etc.), and for tenants (e.g. through a new 'even more express' eviction process since 2009)[10].

[2] See the statistics at INE (http://www.ine.es/dyngs/INEbase/es/operacion.htm?c=Estadistica_C&cid=1254736176918&menu=ultiDatos&idp=1254735976595; visited 5-2-2015).

[3] See the early popular reaction of the 15-M movement (http://www.movimiento15m.org; visited 5-2-2015) and its consequences.

[4] See a discussion of the measures at NASARRE AZNAR, S. (2014), "A legal perspective of the origin and the globalization of the current financial crisis and the resulting reforms in Spain", in Kenna, P. (Ed.), *Contemporary Housing Issues in a Globalized World*, Ashgate Publishing, 2014, pp. 37-72.

[5] FOX, L. (2007), *Conceptualising Home: Theories, Law and Policies*, Hart Publishing, pp. 132-180.

[6] NASARRE-AZNAR, S. (2014), "La vivienda en propiedad como causa y víctima de la crisis hipotecaria", *Teoría y Derecho*, 16/2014, pp. 19 and 20.

[7] FOX, L. (2007), p. 281 ff.

[8] Mortgagors should either increase guarantees or early repay the full debt in the event the value of the charged propery fell more than 20% of the original assessed value, regardless the cause, according to the original art. 5.3 Mortgage Market Act 2/1981.

[9] It is a mortgage loan that provides cash payments based on home equity. While borrowers think that they do not incur in any obligations, extra costs or adverse consequences (just the right to receive the monthly payment), the fact is that they are already being used in the US to reduce or to be disqualified to get public aids (e.g. Medicaid or Supplemental Security Income), borrowers use to be more vulnerable (ie. they are usually older than 62-65 years old) especially in pre-contractual phase, they incur in several extra expenses such as taxes or creation fees, they are not allowed to sell the property, they have to live in it and interest rates are usually higher than for regular mortgages.

[10] For a complete discussion of this, see NASARRE-AZNAR, S. (2014 2), pp. 18-37.

Ironically, whilst the prolonged possession of a home (for 20 to 30 years) has since Roman times enabled access to homeownership through *usucapio* (i.e. adverse possession[11]),[12] *squatting* is punishable with a six-month to two-year prison term (art. 202 Spanish Criminal Code 1995). This highlights a contradiction in the Spanish legal system: to own a property through possession, you have to first start possessing it without title; however, if you do this, you can be found guilty of a criminal offence. This is but one example of the continual conflict between the one that 'possesses' (e.g. consumers) and the one that 'owns' (e.g. landlords), or who has a strong proprietary right (i.e. mortgage) over the property.

This paper therefore looks at some of the more controversial property-related cases since 2010 when, often without legal basis, Spanish courts started to protect those whom they regarded as 'weak' in property-related cases, in the face of what they saw as inaction on the part of the legislators in the context of high economic and social distress. Some of those courts decisions were simply distorting the civil law system to favour the weak but some others added fresh arguments from a consumer and human rights perspective that have helped to re-balance those legal relationships.

2. The role of the Spanish judiciary in the application of the law

Since the beginning of the current systemic crisis in 2007 Spanish courts have therefore reacted faster than law makers in attempting to contain negative side-effects for consumers, by either applying the law or occasionally by contravening it, in order to 'protect the weak' against the abuses of credit institutions. It is a sort of a 'Robin Hood' approach to justice, and different to the duties normally expected of judges under Spanish law. These cases, however, bear no relation to the thousands of other judgments which regularly and properly invalidated passive mortgage-related products (such as interest rate swaps and caps) due to vices of consent (error) and consumer protection rules.[13]

According to art. 5 *Ley Orgánica del Poder Judicial* (LOPJ) and art. 1.1 and 1.6 Spanish Civil Code (CC), judges must apply the law and interpret it, but not create or alter it.[14] In addition, they cannot solve cases solely on the ground of equity (art. 3.2 CC[15]), but are bound to follow and use the law together with its sources (other legislation, custom and general principles of law).[16] As STS 8 March 1982[17] held, the use of equity is so limited to "avoid those dangers that could be derived in the interpretation of the law due to an excessive use of this general clause of equity, which could lead [...] to the creation of an alternative law, different from the one derived from the law".[18]

Moreover, any interpretation of a law that goes against its wording, spirit and goal (*interpretatio contra legem*) is rendered void (art. 3.1 CC). The CC establishes a clear hierarchy within the sources of law,

[11] Arts. 460.4, 464 and 1940 Spanish Civil Code.
[12] But the foundation of *usucapio* is not necessarily the endowment effect, but the legal certainty for the whole legal system: after 20 years of undisturbed possession of a non-owner, it is more efficient for the system to give him (and those that have arranged contracts on the property with him) rights instead to the careless landlord. Otherwise there is a risk of voidance of dozens of arrangements and rights on the property.
[13] See below.
[14] See also the consideration of the jurisprudence within the Spanish system of sources of law as a "complement" of the legal system in Decree 1836/1974, 31 May (BOE no. 163, 9-7-1974), but not a source of law in itself. However, the recurrent resolutions of the Spanish Supreme Court about the same situation may have a sort of "normative effect".
[15] Equity can be used as a source of law only in exceptional cases, that is, when the law expressly allows it, such as the case of arbitrages agreed to be resolved in equity (art. 34 Act 60/2003, 23 December, BOE no. 309, 26-12-2003, p. 46097).
[16] See Spanish Supreme Court resolutions (STS) 10 October 1986 (RJ 1986\5511) and 23 December 2002 (RJ 2003\636), among many others.
[17] RJ 1982\1290.
[18] See also STS 10 December 1997 (RJ 1997\8968), and all those quoted there. It strongly forbids the application of equity when a clear legal disposition exists to resolve the case.

so no custom can be applied if there is existing legislation on the matter. And general principles of law are only applied if there is no custom and no legislation on the subject, although they serve to supplement the whole legal system (arts. 1.3 and 1.4 CC). Article 1.7 CC clearly states that judges and courts should rule according to this system.

In the recent history of decisions relating to consumers affected by mortgage loans, two periods can be differentiated: from 2010 to 2013 several courts simply bypassed the civil law rules (essentially, mortgage and mortgage enforcement procedural law) with rudimentary arguments. During the second period from 2013 onwards, more elaborate decisions, based on consumer law or even on human rights, helped to soften or even to ignore civil law rules that did not favour mortgaged consumers.

3. The first period (2010-2013): an improper distortion of contract and property laws

During this period, some judges and courts did not take into consideration the rules of sources of law and their application. In many cases they resolved a particular case in equity or by making reference to general principles of law, regardless of the existence of clearly enacted legal dispositions or the wording, spirit or intention of the relevant legal provisions.

These judicial resolutions brought both legal uncertainty into the Spanish mortgage system, as well as mistrust by national and international real estate and financial professionals (e.g. mortgage lenders and investors).[19] These judgments were clearly intended to protect the debtor and/or their family, claiming that situations of economic vulnerability warranted "special" solutions.

This has been particularly true for the list of court decisions[20] based on the pioneering Spanish Court of Appeal order ((AAP) Navarre 17 December 2010 (2nd Section))[21], which accepted the consignment of the mortgaged property in payment of the debt (without any previous agreement between the parties on this; i.e. forced *datio in solutum*), thus impeding the lender to continue the enforcement of the mortgage against the rest of the borrower's estate. This goes against many legal dispositions, including art. 1911 CC (universal liability of any debtor) and arts. 666, 671 and 579 Spanish Civil Procedural Act 2000 (LEC) and 140 Spanish Mortgage Act 1946 (LH). It also runs contrary the (universal) principle *pacta sunt servanda* (agreements must be kept).

The court's final judgment is based on art. 7.1 CC, on the general doctrine of 'not going against one's own acts'[22], without analysing whether in that particular case all requirements were fulfilled to apply it (see, among others, the STS 28 January 2000[23]). Other 'legal sources' used by the court were announcements by the Prime Minister of Spain and President Obama of America, whilst other decisions condemned *inter alia* the "morally reprehensible" attitude of the banks and the "mismanagement the financial system". Articles 1911 CC and 579 LEC were clearly interpreted *contra legem*. Possibly as a consequence of this reckless argumentation and the subsequent tremors it created

[19] The liquidity crisis of the Spanish banks that begun in 2006 and is still ongoing in 2014 and which is the basis for many current problems in Spanish society (unemployment, territorial tensions), is largely due to the lack of confidence of foreign investors and, therefore, the changes that occur in the legislation or, in this case, in courts' decision, should not affect the credibility, stability, legal certainty, predictability that markets expect. Otherwise, the whole system is at risk.
[20] See a list of them at http://www.observatoridesc.org/es/sentencias-dacion-hipoteca, accessed 1 March 2013.
[21] AC 2011\1.
[22] If the lender granted the loan secured by that mortgage over that particular property, this property, regardless its value at the time of the enforcement, should be enough for him to get repaid, without the possibility for him of having further recourse to the debtor's other assets if the property value is less that the outstanding debt.
[23] RJ 2000\455.

within the legal system, another Section of the same Navarre Court of Appeal (at AAP Navarre 28 January 2011[24]) reverted immediately to the regular application of the relevant procedural and civil laws and in this subsequent case, with the same facts as the previous one, it was confirmed that a mortgage borrower is liable for the remaining debt, with all his assets, for life.

However, several other courts decided to follow the lead of the AAP (Navarre 17 December 2010) decision and added other grounds on which banks were impeded from seizing other assets of the debtor when the value of the mortgaged property would not satisfy the debt. The AAP (Girona 16 September 2011[25]), for instance, considered that the bank's foreclosure of the debt beyond the mortgaged property itself (even if this is clearly and statutory foreseen) would have constituted an abuse of law (art. 7.2 CC), since whilst it was the bank itself that fixed the value of the property when the loan was granted, the bank could not say that it was insufficient in covering the debt.

In turn, the Spanish Court of Appeal resolution (SAP) (Ciudad Real 17 January 2011[26]) added the unjust enrichment argument (for the bank) if the forced *datio in solutum* were not accepted. This decision, however, contravenes the doctrine of the Spanish Supreme Court at STS 21 October 2005[27], which forbids the application of the unjust enrichment principle in cases where a legal disposition would govern the situation, which is precisely the case here with the mortgage enforcement procedure foreseen in the statutes. The SAP (Ciudad Real 17 January 2011) also raises the argument of 'disloyal delay' when the lender is claiming the rest of the debtor's outstanding debt some 14 years after the enforcement of the mortgage. A more recent decision along the same line of reasoning, is the AAP Córdoba (1 February 2012[28]) judgment.

It should be noted that these resolutions are exceptions, as the vast majority of courts have been following the prevalent interpretation backed by express legal dispositions, first amongst all art. 1911 CC, which encompasses a 'natural obligation', being the obligation of a debtor to return all his outstanding debts (i.e. regardless the value of the enforced property) to the creditor at all times.

Another group of resolutions deal with the possibility of a 'fresh start' for certain debtors. Spain, unlike many EU countries and unlike its treament of legal persons (e.g. corporations), did not provide for personal bankruptcy (art. 1.1 Spanish Insolvency Act 2003, LC) until February 2015 (by RDL 1/2015[29]) and this was limited to 'good' insolvent debtors (natural persons). This meant that even after the enforcement of all his estate, he would still be liable for any remaining debts (art. 178.2 LC). Furthermore, art. 1156 CC does not allow bankruptcy as a way of extinguishing obligations.

Regardless of all these clear legal dispositions that do not allow room for interpretation (except the *contra legem*), the Spanish (first instance) Commercial Court judgment (SJM) no. 3 Barcelona 26 October 2010[30] cancelled the remaining debts of two retirees following an unsuccessful insolvency process. The 'legal grounds' used in this case was that of sparing the debtors the liability of paying their debts twice over. The judge relied on the lessons from Sisyphus, the king of Ephyra, as portrayed in Homer's Odyssey[31].

[24] AC\2011\40.
[25] AC 2011\2172.
[26] JUR 2011\119331.
[27] RJ 2005, 8274.
[28] AC 2012\315.
[29] BOE 28-2-2015, no. 51, p. 19058.
[30] AC 2010\1828.
[31] As a punishment for his trickery, King Sisyphus was compelled by Zeus to endlessly roll a huge boulder up a steep hill.

Some judges have even attempted to use economic or financial law reasonings and arguments that would, in any case, be either inapplicable to the case or else simply wrong. This is the case of several court decisions in relation to 'floor clauses'[32]. The first one was the SJM no. 2 (Seville 30 September 2010[33]), a case which inspired some others (see, for example, also SAP, Barcelona 13 March 2013[34]). In essence, these judgments state that floor clauses of interest rates in mortgage loan contracts are abusive and therefore should be rendered void because they are asymmetric in relation to a purported correlative cap clause[35], with the former being about 3.5% and the latter about 15%. With relatively foreseeable market conditions, the floor clause will most of the time cover the bank's interest risk (as has been the case since 2008; Euribor - the index to which the vast majority of Spanish mortgages are referenced - has remained below that 3.5% since then and still is as of January 2015), thus obliging the debtor to pay the bank that 3.5% anyway, regardless of the Euribor rate. However, this rarely works the other way around, as the Euribor has never reached 15% since its introduction (its maximum was about 6% in 2006-2007) and in the future this possibility is also very remote due to the economic externalities that it would cause across Europe (e.g. the generalised rise of the cost of mortgage loans, with consequent massive defaults).

This 'economic' argument used by some courts is wrong, as one clause (floor) and the other (cap) are independent and do not need to be symmetric; moreover, they are part of the price and cannot be rendered abusive (this would be a case of price control, which cannot be permitted in a capitalist system and in the Spanish Constitution (art. 38 CE). As I advanced elsewhere[36], the problem was of how these clauses were commercialised i.e. the type and amount of pre-contractual information was delivered to consumers. This line of reasoning has been confirmed by the STS 9 May 2013[37] which has (correctly) discarded the 'asymmentrical' argument.

These 'floor clause' decisions based on asymmetry, contrast with those judgments related to bad banking practices and interest rate swaps with consumers and retail clients, which were very often linked to mortgage loans in order to make the stream of cash that banks receive from variable rate mortgages (linked to Euribor) more certain and also, at least theoretically, one that is paid by borrowers. The result has been that since 2008 tens of thousands of families and retail clients have been paying a monthly compensation to the banks for the low Euribor rate, along with the regular monthly mortgage instalments. As a consequence, more than 4,000 court decisions since the burst of the mortgage bubble have declared those swap contracts with consumers and retail clients void. These decisions are firmly grounded and justified in several legal dispositions that deal with vices of consent of borrowers, retail clients and consumers (see arts. 1265 to 1267 CC concerning mistakes and dolus, and arts. 2 and 79bis *Ley del Mercado de Valores*, concerning reforms implemented thanks to the MiFID Directive,[38] which acknowledge the financial complexity of this product (see, for example, the SAP Tarragona 2 April 2012[39]).

[32] These clauses in variable-interest mortgage deeds (such as more 90% of Spanish ones that are referenced to Euribor) prevents those interest rates go below a predetermined rate (floor) if the agreed variable rate goes below the floor.
[33] AC 2010\1550.
[34] AC 2013\944.
[35] These clauses in variable-interest mortgage deeds prevents those interest rates go above a predetermined rate (cap) if the agreed variable rate goes above the cap.
[36] NASARRE AZNAR, S. (2011), "Malas prácticas bancarias en la actividad hipotecaria", *Revista Crítica de Derecho Inmobiliario*, No. 727, pp. 2678 ff.
[37] RJ 2013\3088.
[38] Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC.
[39] AC\2012\1265.

All of those unfounded court decisions (forced *datio in solutum*, debtor's 'fresh start' and 'floor clauses') have several issues in common:

a) they usually refer to the economic situation of debtors as a reason for the special treatment they deserve from the judge;
b) they use paralegal sources as grounds of justification of the decision; and
c) they use as legal grounds general principles of law that, under the Spanish judical system rank behind law or even custom, without properly justifying why specific statutory rules would not be applicable to the case.

These court decisions therefore fail to give a proper legal explanation for their special resolutions, and in so ommitting such explanations, bring uncertainty to the system. For example, are national or international investors really ready to accept that Spanish rules regarding immovable securities or on insolvency can change, either retrospectively or on an ongoing basis, depending on the judge or the economic situation of the debtor? What cost would this uncertainty involve, for instance, in the pricing of new mortgages? What impact does this have on international credibility and the solvency of Spanish lending institutions, which are also directly linked to their funding needs? To which extent has this been influenced by social movements and distress? To what extent have these judgments contributed to the renewed interest of the EU Commission in mortgage consumers' rights through Directive 2014/17/EU[40]?

The transition from the first to the second period is represented by the Spanish First Instance Court order (AJPI) no 2 (Sabadell 30 September 2010[41]). The judge sent a pre-judicial constitutionality question to the Constitutional Court (TC) as he was not sure if the inability of a consumer (mortgagor) to raise defects in a loan contract within a mortgage foreclosure judicial procedure (in particular, any possible abusive clause) (arts. 695 and 698 LEC) was or was not contrary to the Spanish Constitution. In my opinion, this question was properly grounded, because any Spanish mortgage is legally dependent (in its existence, including its validity) on the loan it is securing (art. 1857 CC) i.e. if the loan is void (e.g. it has essential void clauses) the mortgage is also necessarily void. Although this issue could not be discussed by the TC (as it was dismissed[42] on formal grounds without any mention of the substantive arguments) the confirmation that this line of reasoning was the correct one derived from the EU Court of Justice through its decision of 14 March 2013[43]. Thus began a second period of national court judgments in Spain.

4. The second period (2013-onwards): the distortion of contractual and property law through human rights

A "second generation" of court decisions since 2007 is based on both EU law as well as human rights. Unsurprisingly, this turning point came from beyond Spanish borders through the aforementioned 14 March 2013 ECJ judgment that eventually held that Spanish mortgage enforcement procedure was not in accordance with EU law, particularly with Directive 93/13/CEE[44]. Essentially, the judgment stated that any abusive clause in the loan contract must be able to be discussed within a mortgage enforcement procedure and this ultimately forced the Spanish government to change the rules for the mortgage enforcement procedure, particularly with respect to properties owned as residences, through Act 1/2013[45].

[40] OJ L 60, 28-2-2014, pp. 34–85.
[41] AC 2010\2018.
[42] ATC 19 July 2011 (RTC 2011\113 AUTO).
[43] Case *Aziz v Catalunya Caixa* (C-415/11).
[44] NASARRE AZNAR S. (2014 1), 56, 59.
[45] Act 1/2013, 14 May, to protect mortgage debtors (BOE 15-5-2013, no 116, p. 36373).

Nevertheless, Act 1/2013 has not been widely accepted as the ultimate judgment re-establishing the balance between the rights and obligations of mortgage consumers and banks. Until the ECJ decision, it was not clear whether the national legislator really wanted to change the rules of the game and Act 1/2013 was perceived as a weak or palliative response given the magnitude of the problem; it was even felt that Act 1/2013 was only passed simply due to the State's EU obligations. This led a Spanish judge, in AJPI no 2 Marchena (Sevilla 16 August 2013[46]), to ask a preliminary question about the compatibility of this new Act with EU law, in particular with the Directive 93/13/CEE. This has only recently been resolved (decision ECJ 21 January 2015[47]) establishing, on the one hand, the compatibility of limiting default interest rates to three times legal interest rate (12% in 2014) with Directive 93/13/CEE, but, also that the judge can consider the clause to be abusive not only if this amount is surpassed but also if interest rates do not reach it, according to the circumstances, and he could proceed to remove it from the mortgage loan contract in either of the two cases[48]. Another example is the SJM no. 3 (Barcelona 5 May 2014[49]) that challenged the application of Act 1/2013 when it held that it is possible to enforce a mortgage after the third monthly installment; in this case, the bank and the consumer agreed, prior to Act 1/2013 (at that time one month's default was sufficient for initiating a mortgage enforcement procedure), to wait for 6 months prior to the start of the procedure. The judge, however, considered this to be abusive towards the consumer as this represented just 2.02% of the total amount owed, thereby rendering the whole mortgage enforcement void.

Some judges and courts therefore continued to go beyond the enacted mortgage-related laws, although this time they used fundamental rights to bypass those rules that they considered to be too favourable to the banks i.e. they distorted civil/private law[50] rules according to human and fundamental rights. The word 'distort' does not necessarily have a negative connotation in this context; it simply implies that private rules, rather than being applied directly, are previously filtered through these human and fundamental rights and reinterpreted accordingly.[51]

This has been done more or less successfully - from a purely legal perspective - depending on the decision. On the one hand, some of the judgments use human and fundamental rights as a rationale for making the entire mortgage relationship void without further arguments; on the other, some courts apply them properly, linking them to the constitutional right to housing (art. 47 CE) and the social function of ownership (art. 33.2 CE), which leads to a new interpretation of contractual and property laws according to those rights.

The most relevant of these judgments include:

a) AJPI no. 4 (Arrecife 8 April 2013[52]). This judgment declared the loan contract, the mortgage that secured it and the procedure itself void, on the sole basis that the agreed default interest rate was too high (19%). This decision breaches all known rules in relation to, firstly, whether a default interest rate clause in a contract can be considered as an abusive clause simply because of the elevated rate

[46] AC 2013\971.
[47] Joined cases C-482/13, C-484/13, C-485/13 and C-487/13.
[48] This basically meant that that rule established by Act 1/2013 did not necessarily had to be followed by judges, making the law in relation to default interest rates uncertain again.
[49] JUR\2014\139100.
[50] The law that regulates the relations among people and people with goods and property. It contrasts with the concept of "public law", in which there is an intervention of the extra powers of the Public Administration towards regular people (sanctioning, stimulating, forcing, etc.).
[51] In relation to the concept of "legal distortion" see SCHWARCZ, S. L. (2010), "Distorting Legal Principles", *The Journal of Corporation Law*, Vol. 35, No 4, p. 697 ff.
[52] CENDOJ (Database of court resolutions of the Spanish Judges' Government Body) 35004420042013200001.

(taking into account for example, that the legal interest was fixed for 2013 at 4%[53]); and, secondly, whether, in the event that that specific clause is declared void, the whole loan contract and consequently the validity of the securing mortgage (art. 1857.1 CC), would also be rendered void. The resolution is full of ungrounded paralegal affirmations[54] to justify its outcome, such as *inter alia*: "it is an immoral abuse [...] that in times of profound crisis, financial institutions continue fixing default interest rates beyond the basic interest rates that govern the mortgage market at any given time"; or that "the vast majority [...] of those who default the mortgage loan payment cannot be blamed in doing so [...], but this is mostly attributable to the lender, that is, to financial institutions, which were the ones that, with their unbounded ambition to increase their business and their benefits, decisively contributed to the current situation of crisis and recession in this country and worldwide". The judge is clearly punishing the specific lender because of the role that international and Spanish lending and financial institutions have played in the generation of the current crisis.[55] In my view, the default interest rate clause is not an essential element under a mortgage loan contract (as it does not characterise it, but is only activated in case of default of the debtor; art. 1740 CC and STS 4 June 2008[56]), which means that its voidness cannot affect the validity of the whole contract or the mortgage itself. This is clearly a decision based on equity aimed at enabling the consumer to hold on to his home.[57] But prior to this, why should a judge (or even the law maker) decide the compensation a lender deserves for a default in the payment of a mortgage loan? There are at least two possible approaches to this:

1. *Considering the default interest rate clause void because it is abusive*. Art. 85.6 Royal Legislative Decree (RDLeg.) 1/2007, 16 November[58] (the Spanish Consumers' Act) includes amongst abusive clauses, those that impose on consumers an "excessively high" compensation for defaulting in their obligations. The problem is identifying what "excessively high" means. In fact, it is only the lender who knows to which extent the default of the debtor affects him negatively (e.g. judicial costs and time; balance/financial issues; cost of opportunity for having invested in a defaulted business; call of mortgage-backed bonds – mortgage-backed securities and covered bonds – in advance due to the sudden extinction of covering mortgages; etc.). The amount of default interest rates has little to do with the regular interest rate; they do not need to be fully equivalent and they do not even need to be proportional because their legal natures as well as their ultimate goal are completely different. Despite this, several court of appeal decisions use this 'equivalency' to state that the compensation is 'excessivly high', such as SAP Barcelona (28 December 2012[59]) (29% in a non-mortgage loan) or at SAP Barcelona (9 November 2012[60]) (where the court only accepted that the default interest rate can be between two and three times the regular one). In my opinion, default interest rates have a hybrid nature that comprise: part current damages (e.g. opportunity and transaction costs incurred due to the unrecovered sum); part loss of profits (what the lender would have earned in case the mortgage loan had been repaid as agreed); and part penalty for the defaulting debtor (to be used as a general deterrent for any future default). In fact, the SSTS 2 October 2001[61] and

[53] By Act 17/2012, 27 December (BOE 28-12-2012, no 312, p. 88156).
[54] Free translation by the author from Spanish.
[55] In my opinion, even the decisions of the TS the judge quotes have nothing to do with the case.
[56] RJ 2008\3196.
[57] The judge himself in the media said a few days later, that he was about to do the same thing with all remaining cases that fulfill the requirements (mortgages with consumers and more than 16% default interest rate ratio). See http://www.elperiodicodearagon.com/noticias/aragon/juan-jose-cobo-anule-hipoteca-en-conciencia-_845770.html (accessed 12 June 2013).
[58] BOE 30 November 2007, no. 287, 49181.
[59] JUR 2013\86785.
[60] JUR 2013\9124.
[61] RJ 2001\7141.

4 June 2009[62] acknowledge this double nature of compensatory and punitive. Therefore, the agreed default interest rate would only be 'execissively high' if the lender failed in evidencing that the sum of his actual damages (current damages, loss of profits plus penalty) were more (or at least the same) than the agreed rate.

2. *Considering the default interest rate clause to be excessively onerous as a penalty clause* (e.g. SAP Castellón (12 January 2007[63])). Art. 1154 CC allows the moderation of any contractual penalty clause[64] if the judge considers it pertinent according to the evidence presented during the course of the trial (e.g. if it is a clear unjust enrichment of the bank). However, the wording of art. 1154 CC and several TS resolutions state that this cannot be of application in cases of default, as at least a partial fulfilment is necessary (and a default interest rate clause only comes into effect precisely in case of default of the borrower). Nevertheless, I find a limit to this non-applicablility: the unjust enrichment i.e. if the bank fails to prove that its loss is not in the order of 29%, let us say (agreed interest rate), but only 18% - in this case, 18% should be the accepted interest rate (otherwise, it should be considered as an unjust enrichment). The ECJ decision of 14 June 2012[65] does not necessarily contradict this,[66] as this has nothing to do with abusive clauses, but it does concern the principles of compensation for damages (*alterum non laedere*), which are present throughout private law rules. Consequently, it would be fair to have a default interest rate of 29% only if the lender proves that this is the real damage that he has incurred.

In reaction to this unclear situation, the legislator has recently altered art. 114.3 *Ley Hipotecaria* (LH) (through Act 1/2013) thus limiting default interest rates to three times the legal interest rate for new mortgages (this legal rate was c.4% in 2013 and 2014, so 12% per annum). For mortgages granted before May 2013, the Transitional Provision 2 Act 1/2013, allows the lender to recalculate the default interest rate, according to that limit (which implicitly means that if a particular former mortgage had a clause establishing more than 12% default interest rate, this clause is not necessarily void, but should be reduced). After the aforementioned decision ECJ 21 January 2015, the remaining question is now whether this limit is a *iuris et de iure* presumption, i.e. that this maximum can never be exceeded, or only a *iuris tantum* one i.e. it is presumed that the maximum allowed is this, but the lender could show the damage suffered was greater in which case this higher amount would be granted. In my opinion, the second option is more acceptable, as this respects the principle of *restitutio in integrum* (which must be always present in any case of damages i.e. as a consequence of the principle of *alterum non laedede*). If not, this would be the first time within Spanish law that this principle is not respected,[67]

[62] RJ 2009\4747. See also the SAP Murcia 31 July 2012 (AC 2012\1536).

[63] JUR 2007\239821.

[64] The clause agreed by the parties where it is stated what happens in case the debtor defaults in the fulfilling of the obligation instead of simply compensating for damages.

[65] Case *Banco Español del Crédito v Joaquín Calderón Camino*, C 618/10.

[66] This resolution even says that for the RCJ it is not its business to deal with whether a default interest rate clause is abusive due to the rate, which is a matter to be decided by national judges. It adds that if a clause is abusive (for whatever reason the national judge decides) it cannot be integrated (a solution that however is foreseen in Spanish law under art. 83 RDLeg. 1/2007) at all within the contract (e.g. cannot be moderated) as it is completely void. As said, the moderation of art. 1154 CC refers to penalty clauses; the integration (e.g. moderation) of art. 83 RDLeg. 1/2007 refers to abusive clauses. And, in my opinion, in a free market economy it is difficult to say how much compensation a bank should receive for a defaulted mortgage loan and, even if it is the case (e.g. rule for consumer credits in relation to the limit of 2.5 times the legal interest rate or the new rule in art. 3 Act 1/2013, limiting them to 3 times legal interest rate) it cannot be considered abusive in the terms of the Directive 93/13, as it is not a matter of rights of the consumer but a matter of damages, of compensation for a loss of equity.

[67] There are two cases that could be discussed. The first, the "Tables system" in damages derived from car accidents (see the whole discussion at NASARRE AZNAR, S. (2008), *Law of Torts-Spain*, International Encyclopedia of Law (Tort law-Suppl. 17), Kluwer Law International, The Hague, p. 162 ff.), where each damaged part of the body is granted a specific amount as compensation. But in this case it is a convention, accepted by the Spanish Constitutional Court, in relation to the "value" of the parts of the body, which has nothing to do with a specifically assessed equity damage (which is the case of financial losses for a bank as a result of a mortgage loan default). The second one is derived from art. 20.4 of the

despite the fact that it is based on *ius naturalis*. In fact, the SJM no2 (Barcelona 2 May 2013[68] - *Aziz*'s final resolution by national court after the ECJ 14 March 2013) mentions that the lender failed to prove the damage suffered by it as a result of Mr. Aziz's default. In STS 19 June 1903, increased compensation was allowed as the lender produced evidence of same, even when nothing had been agreed between the parties and the default rule (i.e. application of the legal interest rate, according to art. 1108 CC) would have been applicable.

Two final questions should be added to the discussion: a) what if the default interest rate lacks a 'penalising' component because, due to a court decision, the default interest rate would fall below the regular interest rate? How would this affect the whole system? Would this be an incentive for defaulting?; and b) what if the parties had agreed the maximum (three times the legal interest rate), but the borrower succeeds in showing that the real damage for the bank would be inferior to that amount? Would the bank be awarded that maximum by the judge anyway? I do not think so, as this would be considered unfair and unjust enrichment and not in accordance to the aforementioned recent ECJ 21 January 2015. Why, then, shouldn't it be accepted that when the lender proves that he has suffered more damage than the maximum then he should be granted the amount that he was asking for?

b) Order JPI no. 39 (Madrid 6 March 2013[69]). Although this is a first instance decision related to tenancy law, it is a very good example of the change of direction in Spanish jurisprudence relating to the economic obligations of the home user towards a third party (owner of a proprietary right on it). A family was evicted due to a default in the payment of the rent, but the judge declared that there was a higher interest in the children of the family staying in the family home at least until they finished the school year, according to several legal dispositions[70] and the socio-economic situation of the family. Traditional civil law rules (ownership, debt, default, law of leases, procedural law) have been superseded (not reinterpreted) by a new corpus of rules based on human rights. See below some parallelisms with the English cases *Cheltenham & Gloucester Building Society vs Norgan* and *Edwards v LLoyds TSB Bank.*

c) Order of Criminal Court no. 4 (Sabadell 8 May 2013[71]). Technically speaking, this judgment is not entirely relevant, because it is criminal law (not private law) and deals with preliminary measures to be taken in a pending case. However, the legal reasoning of the judge to deny the requested preliminary measure is very relevant. The complainant was Sareb, the Spanish 'bad bank'[72] created *ad*

Consumer Credit Act (Act 16/2011, 24 June, BOE 25-6-2011, no. 151, p. 9370), which is the transposition into Spanish law of Article 3 (d) Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on Credit Agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 22-5-2008, no 133, p. 66). This article establishes a limit of 2.5 times the legal interest of money for interest rates derived from tacit overdrafts. But, in my opinion, this is a limit to the "regular" interest rate, not the default one (the borrower has not defaulted before anyone, as the lender has paid for him to the former's lender – e.g. a shop) but the regular one (this is the "price" of the lender for paying the borrower's creditor instead of doing this himself, as he has no money (overdraft); in my opinion the STS 23 September 2010 (RJ 2010\7296) is mistaken in applying art. 20.4 analogically to the default interest rate limit of a mortgage loan). Moreover in this case the borrower has never accepted a specific interest rate (unlike the cases of default interest rates we are discussing) as it is a case of "tacit credit" (in fact, a survey of the Office of Fair Trading revealed that merely 7% of the UK's current account holders participating in the survey deliberately overdraw their personal current account.; see OFFICE OF FAIR TRADING (2008), *Personal current accounts in the UK. An OFT market study*, available at www.fsa.com). Neither of these two cases are then comparable to the new art. 114.3 LH.

[68] AC 2013\746.

[69] AC 2013\726.

[70] Art. 158 CC (several measures to protect children's needs and interests), Organic Law 1/1996, 15 January, of the children[70], art. 47 CE in relation to the right to housing and the UN International Convention of Children 20 November 1989.

[71] JUR 2013\242758.

[72] See the official webpage of the Sareb at http://www.sareb.es. See my comment on the risks of the Sareb at http://www.tottarragona.cat/ca/opinio/12985-las-contradicciones-del-banco-malo-y-sobre-el-despues-que.html (accessed 12 June 2013).

hoc to help distressed banks (such as Bankia or CatalunyaCaixa) get rid of thousands of unsold properties they had acquired after taking them from developers and consumers unable to repay their mortgages. According to law, Sareb has 15 years to sell all these properties. The respondent (defendant) was a squatter (i.e. he did not hold title to defend his possession of the property). The claimant asked the judge for an eviction of the defendant on the ground that the occupant had no title at all. Surprisingly (or not), the judge dismissed the claim on the basis that Sareb had not fulfilled its obligations in relation to the social function of ownership (art. 33.2 CE), i.e. that Sareb did not take the steps to occupy the dwelling for housing purposes. *Ergo*, if an owner of a dwelling does not effectively occupy and neither does he take the proper steps towards that goal, anyone wanting to live in it would be allowed stay. The situation of Sareb is particularly complicated because, according to arts. 16.3 and 17 Royal Law Decree (RDL) 1559/2012, it is not entitled to exploit or to occupy its properties (although about 5,000 are leased), its single purpose being to sell them at a profit as quickly as possible. Sareb is legally unauthorised to occupy the dwellings, which automatically goes against art. 33.2 CE, thereby authorising any squatter to establish himself/herself since they would be using the property more properly (i.e. for living in) than the Sareb will never do according to art. 33.2 CE. However, it appears that this is going to be changed in the near future, and Sareb will be allowed to rent its properties despite this contrasting with its main goal of selling the properties in 15 years: if it leases them, it will be more difficult to sell them. The reason might be that Sareb had only sold 550 properties in the first three months of its creation.[73]

Finally, and also in relation to Sareb, the European Court of Human Rights (ECHR) has taken a preventive measure on 15 October 2013 (*Ceesay Ceesay and Others v. Spain*) by stopping the eviction of 40 squatters in a building owned by Sareb in the municipality of Salt. According to the ECHR, the Spanish government did not provide enough evidence as to the measures that it was going to take in relation to the squatters, and especially to their children, once they were evicted to prevent violation of arts. 3 (torture and degrading and inhuman treatment) and 8 (private and family life and the home) of the European Convention on Human Rights. The extent to which this decision has had an impact on the Judicial Secretary's resolution of Sant Feliu de Llobregat (27 February 2014) to order squatters' evictions only after the allocation of adequate alternative accommodation (i.e. this requirement to force squatters leaving a property is not foreseen in any legal disposition) is still under discussion.

These decisions' common factor is that civil law rules are not sufficient in guaranteeing fundamental rights of the weak parts under mortgage loans and leases (i.e. mortgagors and tenants, acting as consumers), therefore the application of the former must be subjected to the test of human rights provisions for them to ensure justice. The same notion appears to justify the Common Frame of Reference 2009.[74] This concerns the concept of the consumer and his protection, but goes further: it is not common to find court decisions that check if the defendant fulfils the requirements of being a consumer (held in art. 3 RDLeg. 1/2007), but all of them refer to human or constitutional rights. It seems clear that judges have started to erode the strength of art. 33.1 CE (private ownership) using art. 33.2 CE (social function of ownership) and art. 47 CE (right to housing), particularly when private homeownership is not intended for housing individuals. It is the same trend seen in the former art. 42.6 of the Catalan Housing Act 2007, and a Constitutional Court judgment of the mid-1980s,[75] that clearly preferred the 'utility' aspect of a property to its 'economic value', since its misuse affects the rights, expectations and costs of the community (e.g. leaving a dwelling or thousands of them vacant for 15 years may cause an artificial increase in the value of other properties, and hence that a bubble generated 'by law').

[73] http://www.elmundo.es/elmundo/2013/06/03/suvivienda/1370271145.html (accessed 2 October 2013).
[74] At General 17 it says: "The DCFR itself recognises the overriding nature of this principle. One of the very first Articles provides that the model rules are to be read in the light of any applicable instruments guaranteeing human rights and fundamental freedoms" (*Draft common frame of reference*, Outline Edition, 2009, p. 14)
[75] STC 26 March 1987 (RTC 1987\37).

However, this trend towards the *constitutionalisation* of civil law or the direct influence of international human rights on it, distorting its very essential principles, is present in other EU countries in 'equity-friendly' court decisions. Here are four examples of them:

a) *Parabolantenne*[76] (Germany, 9 February 1994). This involved a tenant of Turkish origin who sought to install a satellite dish in order to receive Turkish television channels. According to the lease, he needed the consent of the owner to do this, however, the latter refused. The German Supreme Court denied his petition because the lease did not grant him this right, but the German Constitutional Court, by interpreting good faith as contained by §242 BGB, considered that the ordinary courts had violated the tenant's constitutional right of freedom of information (Art. 5 (1) *Grundgesetz*) and proceeded to order the owner to let his tenant install the antenna.

b) *Bürgschaft*[77] (Germany, 19 October 1993). In this case, a 21-year-old daughter who was poorly educated, low-income earning and unqualified, signed a guarantee for the debts of her father, which amounted to the equivalent of €50,000 today. The bank employee her simply asked her to sign the contract and reassured her that the bank only needed her signature for their own records. At first instance it was held that the bank should have informed her adequately; on appeal stage, the Court decided that a person of adult age should have known what she was signing. The Constitutional Court, however, considered the personal guarantee contract void because it violated her fundamental right to free development of personality and her right to a family: the burden was considered to be so onerous that it threatened the smooth running of the family.

c) *Cheltenham & Gloucester Building Society vs Norgan*[78]. The Court considers that a 'reasonable period' for the payment of the arrears of a default mortgage (it seemed to be a fixed term mortgage with no possibility for early redemption) can be up to the term of years for which it was granted (more than that would be unfair for the lender),[79] because there is no danger of destruction of the property, the defaulting family has been living there for years and because the Council of Mortgage Lenders[80] affirms that: "Lenders seek to take possession only as a last resort. They are in business to help people to buy homes, not to take their homes away from them". The family's right to use the property as a dwelling prevails over the 'home-asset' approach of the lender[81].

d) *Edwards v LLoyds TSB Bank*[82]. According to Fox[83]: "In Edwards, the court refused an application for sale by the bank in the interests of the welfare of the children who occupied the property as their home. The decision in Edwards is significant as (somewhat surprisingly) it is the first reported judgment in which the court explicitly balanced the interests of creditors to capitalise the property against the interests of children to occupy their property as their home. A number of factors persuaded the court to postpone the sale of the property for a period of at least five years".

[76] BVerfGE 90, 27.
[77] Mark BVerfG 19-10-1993, BVerfGE 89, 214 (Bürgschaft).
[78] [1996] 1 WLR 343.
[79] "Then it cannot be wrong or unreasonable to consider what the prospects are of the borrower paying the arrears of interest in full by the end of the term, including interest on interest where that is what the terms of the mortgage require in addition to the contractual instalments of interest"
[80] This is the lobby of lenders in the UK (http://www.cml.org.uk/cml/home).
[81] "The property in question must by definition be a dwelling house which in the present case is occupied as it has been for many years by the appellant and her family. For the respondents, this is one of very many transactions where their interests are financial only. There can be cases, no doubt, where the lender has some other direct interest, for example, where the value of the security may be threatened if the period allowed is unduly long, but this is not such a case. The respondents claim protection for their reasonable financial interests only".
[82] [2004] EWHC 1745.
[83] FOX, L. (2005), "The idea of Home in Law", *Home cultures*, Vol. 2, No. 1, pp. 25 to 49.

All of these 'Robin Hood' decisions could well be seen as social justice: for the first time in years the pendulum of Spanish judges and legislation seems to be on the side of consumers rather than that of the banks. This has been possible due to the favourable pro-consumer context created as a result of the 2007 crisis. However, we should be aware that paralegal or simply illegal decisions or the distortion of the basic pillars of civil law rules might not represent the right path, as they entail other externalities and costs (i.e. the cost of the benefit received by a particular person is paid by others who might be still paying their own obligations regularly).

A recent example of this is SJPI no. 7 Collado Villalba (Madrid 5 September 2013). In this decision, a mortgage foreclosure was dismissed due to the presence of 'a set' of abusive clauses in the mortgage loan contract, which appear not to have been analysed by the judge with the required attentiveness (he did not quote a single judgment of the TS or any other court; no reference to any special laws was made, particularly Act 1/2013 and the general articles of the CC and the LH were only barely used). He nevertheless declared a floor clause to be void without scrutinising whether the borrower had been sufficiently informed; he declared the reference of mortgage interest rate to the IRPH index[84] also to be void because it was more onerous for the borrower than it would have been if it were pegged to Euribor, and he discarded the universal liability of the borrower because he was not informed about the possibility of contracting a non-recourse mortgage through art. 140 LH[85]. He additionally declared that the defaulting borrower's agreed obligation to pay the procedure expenses void since this would have been excessively burdensome for him; that the default interest rates were too high (20%); and that the default in paying one installment of the mortgage to allow its foreclosure was too strict due to the impossibility of determining whether the debtor would have been able to repay the money; and so forth.

A similar case is SJM no. 1 (San Sebastián 2 October 2014[86]) in which a creditor was forced to sue first the mortgage debtor instead the personal guarantor of the obligation (the one that the creditor chose to sue), even if an 'on demand' guarantee had been agreed. The reason behind this decision was the judge's opinion that the personal guarantor was placed in a worse position than the debtor, since it was the borrower who owned the charged property. The 'on demand' clause was thereby rendered void.

[84] The *Índice de Referencia de Préstamos Hipotecarios* (index of mortgage loan rates); see http://www.irph.es.
[85] This statement clearly goes against art. 6.1 CC which states that statutory provisions are public and ignoring them cannot be used as an excuse for not applying or fulfilling them.
[86] TOL4.521.858.

5. Conclusion

Many of these court decisions differ from results that could usually be expected in cases of mortgage foreclosure under Spanish contractual, procedural and property law.

On the one hand, this causes uncertainties and leads to externalities including less international confidence in Spanish banks, which might in turn involve both a deeper liquidity crisis, and consequently a greater public expenditure on their sustainment. This may well lead to stricter requirements for mortgage approval (how would this affect homeownership with its under-developed private rental sector?), or more expensive future mortgage loans for young people, as banks face more risks (more defaults, such as in the US[87]?; or even more difficulties for people hoping to move out of the family home[88]?). In this respect, the EU Commission stated in 2014 that: "The implementation of the law on evictions, and any further action in this field, continues to have an important impact on financial stability at national and regional level. Different legal frameworks on housing across the national and regional levels and legal uncertainty about the rules to be applied could weigh on the value of the mortgage collateral and the stability of financial markets. Moreover, these effects could have subsequent repercussions on the balance sheets and provisioning needs of credit institutions and on the flow of credit to the economy and the functioning of Sareb. Therefore, Spanish authorities at all levels are encouraged to monitor the implementation of the Law on evictions with a view to support financial stability".[89]

On the other hand, however, these decisions have forced the Spanish legislator to act in favour of vulnerable consumers (new legislation from 2013 to 2015), thus altering rules related to mortgages that had remained unchanged for years.

At the end of the day, who bore the costs that the Sheriff of Nottingham incurred chasing Robin Hood?

[87] See NASARRE AZNAR, S. (2014 1), pp. 49-50.

[88] According to EUROSTAT (2009), *Youth in Europe. A statistical portrait*, young people do not leave their parents house until they are in their 30s and mainly due to economic and housing reasons.

[89] EUROPEAN COMMISSION-DG ECONOMIC AND FINANCIAL AFFAIRS, *European Economy. Financial assistance programme for the recapitalisation of financial institutions in Spain*, 5th Review, Winter 2014, Occasional Papers 170-January 2014, p. 26.

Bibliography

ÁLVAREZ, J. A., *La banca española ante la actual crisis financiera*, "Estabilidad Financiera", 11/2008, November, no. 15, Banco de España.

EUROPEAN FOUNDATION FOR IMPROVEMENT OF LIVING AND WORKING CONDITIONS (Eurofound), *Access to healthcare in times of crisis*, Publications Office of the European Union, Luxemburg, 2014.

EUROSTAT (2009), *Youth in Europe. A statistical portrait*

Draft common frame of reference, Outline Edition, 2009.

EUROPEAN COMMISSION-DG ECONOMIC AND FINANCIAL AFFAIRS, *European Economy. Financial assistance programme for the recapitalisation of financial institutions in Spain*, 5th Review, Winter 2014, Occasional Papers 170-January 2014.

FOX, L. (2005), "The idea of Home in Law", *Home cultures*, Vol. 2, No. 1,

FOX, L. (2007), *Conceptualising Home: Theories, Law and Policies*, Hart Publishing.

NASARRE AZNAR, S. (2008), *Law of Torts-Spain*, International Encyclopedia of Law (Tort law-Suppl. 17), Kluwer Law International, The Hague.

NASARRE AZNAR, S. (2011), "Malas prácticas bancarias en la actividad hipotecaria", *Revista Crítica de Derecho Inmobiliario*, No. 727.

NASARRE AZNAR, S. (2014 1), "A legal perspective of the origin and the globalization of the current financial crisis and the resulting reforms in Spain", in Kenna, P. (Ed.), *Contemporary Housing Issues in a Globalized World*, Ashgate Publishing, 2014.

NASARRE AZNAR, S. (2014 2), "La vivienda en propiedad como causa y víctima de la crisis hipotecaria", *Teoría y Derecho*, 16/2014, pp. 10 to 37.

OFFICE OF FAIR TRADING (2008), *Personal current accounts in the UK. An OFT market study*.

SCHWARCZ, S. L. (2010), "Distorting Legal Principles", *The Journal of Corporation Law*, Vol. 35, No 4.

List of cases (in descending chronological order)

Spanish courts

SJM no. 1 San Sebastián 2 October 2014 (TOL4.521.858).
SJM no. 3 Barcelona 5 May 2014 (JUR\2014\139100).
SJPI no 7 Collado Villalba (Madrid) 5 September 2013
AJPI no 2 Marchena (Sevilla) 16 August 2013 (AC 2013\971)
STS 9 May 2013 (RJ 2013\3088)
Order of Criminal Court no. 4 Sabadell 8 May 2013 (JUR 2013\242758)

SJM no2 Barcelona 2 May 2013 (AC 2013\746)
AJPI no. 4 Arrecife 8 April 2013 (CENDOJ 35004420042013200001)
SAP Barcelona 13 March 2013 (AC 2013\944)
Order JPI no. 39 Madrid 6 March 2013 (AC 2013\726)
SAP Barcelona 28 December 2012 (JUR 2013\86785)
SAP Barcelona 9 November 2012 (JUR 2013\9124)
SAP Murcia 31 July 2012 (AC 2012\1536)
SAP Tarragona 2 April 2012 (AC\2012\1265)
AAP Córdoba 1 February 2012 (AC 2012\315
AAP Girona 16 September 2011 (AC 2011\2172)
ATC 19 July 2011 (RTC 2011\113 AUTO)
AAP Navarra 28 January 2011 (AC\2011\40)
SAP Ciudad Real 17 January 2011 (JUR 2011\119331)
AAP Navarra 17 December 2010 (AC 2011\1)
SJM no. 3 Barcelona 26 October 2010 (AC 2010\1828)
AJPI no 2 Sabadell 30 September 2010 (AC 2010\2018)
SJM no. 2 Sevilla 30 September 2010 (AC 2010\1550)
STS 23 September 2010 (RJ 2010\7296)
STS 4 June 2009 (RJ 2009\4747)
STS 4 June 2008 (RJ 2008\3196)
SAP Castellón 12 January 2007 (JUR 2007\239821)
STS 21 October 2005 (RJ 2005, 8274)
STS 23 December 2002 (RJ 2003\636)
STS 2 October 2001 (RJ 2001\7141)
STS 28 January 2000 (RJ 2000\455)
STS 10 December 1997 (RJ 1997\8968)
STC 26 March 1987 (RTC 1987\37)
STS 10 October 1986 (RJ 1986\5511)
STS 8 March 1982 (RJ 1982\1290)
STS 19 June 1903

Others

ECJ 21 January 2015 (joined cases C-482/13, C-484/13, C-485/13 and C-487/13).
ECJ 14 March 2013 (case *Aziz v Catalunya Caixa,* C-514/11)
ECJ 14 June 2012 (case *Banco Español del Crédito v Joaquín Calderón Camino*, C 618/10)
British *Edwards v LLoyds TSB Bank* case ([2004] EWHC 1745)
British *Cheltenham & Gloucester Building Society vs Norgan* case ([1996] 1 WLR 343)
German *Parabolantenne* case 9 February 1994 (BVerfGE 90, 27)
German *Bürgschaft* case 19 October 1993 (Mark BVerfG 19 October 1993, BVerfGE 89, 214)

List of statutes (in descending chronological order)

a) National legislation (Spain, unless otherwise is stated)

RDL 1/2015 (BOE 28-2-2015, no. 51, p. 19058).
Act 14/2013, 27 September (BOE 28-9-2013, no 233, p. 78787).
Act 4/2013, 4 June (BOE no. 134, 5-6-2013,p. 42244).
Act 1/2013, 14 May, to protect mortgage debtors (BOE 15-5-2013, no 116, p. 36373).
Act 17/2012, 27 December (BOE 28-12-2012, no 312, p. 88156).

Act 16/2011, 24 June, Consumer Credit (BOE 25-6-2011, no. 151, p. 9370).
RDLeg. 1/2007, 16 November (BOE 30 November 2007, no. 287, 49181).
Act 60/2003, 23 December, BOE no. 309, 26-12-2003, p. 46097.
Organic Law 1/1996, 15 January, of the children (BOE 17-1-1996, no 15, p. 1225).
Spanish Criminal Code 1995.
Spanish Constitution (*Constitución española*) 1978.
Decree 1836/1974, 31 May (BOE no. 163, 9-7-1974).
Spanish Mortgage Act (*Ley hipotecaria)* 1946.
Spanish Civil Code *(Código Civil)* 1889.

b) EU law and international instruments

Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 (OJ L 60, 28-2-2014, pp. 34–85).

Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on Credit Agreements for consumers and repealing Council Directive 87/102/EEC (OJ L 22-5-2008, no 133, p. 66).

Directive 2004/39/EC of the European Parliament and the Council of 21 April 2004 on markets in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC (OJ L 145, 30.4.2004, p. 1)