

The Subjective Right to Housing and the Social Function of Property: Old and (Not So) New Perspectives.

Round table: social function of property and the right to housing. Constitutional Perspective and International Treaties.

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It is crucial to distinguish and avoid confusion **between the ideological and legislative policy implications of the social function of property and the implications of mere legal technique**, which are the ones that are addressed in this Congress. **As pointed out by the [Constitutional Court Ruling 89/1994](#)**, it is up to the legislator to define the social function of urban property "with greater or lesser success, according to the different economic theories", a success that is not for the Constitutional Court to judge, since "it is also a jurisdictional body and must operate, therefore, not in accordance with the criteria of opportunity characteristic of political decisions, but in accordance with normative canons".

Regarding the implications of legal technique, it should be noted that there are currently **a plurality of property statutes**, both **depending on the type of property and the type of owner**, taking into account that art. 348 of the Civil Code, drafted in the midst of the liberal era of *laissez faire, laissez passer*, **it is a precept of a norm with the rank of law, which must be applied within the framework of laws enacted subsequently and interpreted in accordance with the EC, within the framework of a social and democratic State of Law (art. 1 CE), in accordance with art. 5 LOPJ** (which states, let us remember, that "The Constitution is the supreme norm of the legal system, and binds all Judges and Courts, who shall interpret and apply the laws and regulations in accordance with the constitutional precepts and principles, in accordance with the interpretation thereof resulting from the resolutions issued by the Constitutional Court in all types of proceedings").

In the **case of housing property**, whose social function legally includes the effective use of the property as a residence for people, **the legislation distinguishes**, depending on the owner, **between large holders who actually carry out an economic activity** and the rest, extracting a different property statute, which has been declared constitutionally acceptable by the Constitutional Court ([STC 79/2024 and 26/2025](#)).

In the case of the city of **Barcelona**, [objective analyses of the reality](#) show that habitual rental housing in the hands of natural or legal persons with more than 10 rental homes in 2021 **would represent 36% of the city's habitual rental housing stock**. This percentage would increase to 37% if we took into account homes that would be in other forms of rental (tourist, ceded, other uses, etc.). In terms of the type of owners, owners with 10 or more homes who are legal entities become predominant, with 77.3%.

[Civio has carried out a study at the state level](#), concluding that large holders represent a minority (approximately 1.08% of the total). Despite the low proportion, **large holders control around 8.5% of the available housing in Spain**. Large landlords have a significant presence in regions such as the Canary Islands (14.6% of available housing), Madrid (13.7%) and Catalonia (11.5%). **In Spain there are at least 737 private companies that are landlords of 50 or more homes**. These mega-holders, **mostly foreign investment funds, monopolize more than 178,000 rented homes**.

On the other hand, **housing is a fundamental right**, linked to art. 7 of the CEFEU, in accordance with the CJEU Judgment of 10 September 2014 and **an overriding reason of general interest for urban planning regulation delimiting the right of ownership over it** ([Constitutional Court Ruling 64/2025 on tourist use of housing, citing CJEU case law](#)).

Likewise, [the STC 79/2024, of 21 May, FJ 3 B A ii points out that art. 47 enshrines a right](#) ("Spain's international commitments in the field of human rights endorse the existence of a right to housing, also recognised in several statutes of autonomy and whose effectiveness is precisely what is entrusted to all public authorities in art. 47 CE), **on which the need to protect him through the remedy of amparo could be considered**.

This means **that the social function of the right (not fundamental, art. 33 CE) to property in relation to housing, implies that the social function is a "structural element of the very definition of the right to private property... social function**

understood not as a mere external limit to its definition and exercise, but as an integral part of the right itself" (STC 37/1987). All this, taking into account, art. 128. 1 CE, that "All the wealth of the country in its different forms and whatever its ownership is subordinated to the general interest". Or as Article 14 of the **German Constitution states, "property obliges**. Its use must at the same time serve the common good."

Among the measures arbitrated by the 2023 state law on the right to housing **in line with the law of the EU and neighbouring countries** (and now leaving aside the coercive and promotional measures of regional legislation, all of which are dealt with in my contribution to [the Housing Law Treaty, published by the BOE in 2025](#)), the following can be highlighted: **the duty to allocate it to residential use** (art. 1, art. 11), the action on **empty housing** as a breach of the social function of property, **the legally mandatory reserves for protected housing** by urban planning (including consolidated urban land, as pointed out by the TC in its judgment 16/2021) or the statute of the property in the **Stressed Residential Market Zones**.

All these measures are used in neighbouring European countries, have been considered in accordance with European Union law, the ECHR and the EC, whether you like it or not, in accordance with SSTC 79/2024 and 26/2025, which **have been aligned with the jurisprudence of the ECtHR and decisions of European courts** (on rent price limits, French Council of State of 10 May 2022, no. 454450 and of the German Constitutional Court of 18 July 2019, 1 BvL 1/18, 1 BvL 4/18, 1 BvR 1595/18.).

Although any delimitation of the right to property is not justified , **the principle of proportionality is applied without any difficulty by the Constitutional Court**, which, as is known, consists of its three filters of suitability, necessity and proportionality *strictu sensu*, with wide margins of appreciation that correspond to the democratic legislator, not to the courts.

In the [STC 26/2025](#), specifically, it is pointed out how the delimitation of the right to property in the Stressed Residential Market Zones "falls within a sphere that allows a **wide margin of appreciation to the State**, and its application can often be the cause of significant reductions in the amount of rent to be collected, although manifestly unreasonable results cannot be produced [ECHR of 15 September 2009, Amato Gauci v. Malta, § 62; and of 30 July 2015, Zammit and Attard Cassar v. Malta, § 62]. That canon is respected here, since the Spanish regulation at issue, as has been explained, is very far from the one that was censured in the ECHR of 19 June

2006, Hutten Czapska v. Poland, § 225, or of 28 January 2014, Bittó et al. v. Slovakia, § 115."

What the owners affected by the law are prevented from doing is "demanding rents above certain limits, which are set in accordance with the reality of each housing market, taking into account **that speculation on the same is not protected by Article 33 of the Spanish Constitution and is also contrary to Article 47 of the Spanish Constitution**. there being a constitutional mandate addressed to the public authorities to avoid it (for all, STC 141/2014, of September 11)". In short, "a price limitation is applied to the rent that cannot be considered unjustified or excessively burdensome and therefore does not violate Article 33 of the Spanish Constitution", affecting **"an expectation of economic benefit that does not conform to the essential content of the right to property** and there is a "reasonable relationship" or "fair balance" between the means used and the intended purpose, subjecting the owners of dwellings provided for in the two paragraphs of art. 17.7 LAU to a burden that cannot be considered disproportionate or excessive".

Although it can be stated that the measures adopted in the state housing law and in other regional laws aggravate housing problems, the truth is that this **extra-legal statement** is far from being proven, there are [empirical studies that affirm the opposite](#) (that such a policy does not reduce the size of the rental market and that it contributes to price containment in the case of Catalonia). and that there are factors linked to the housing problem. Thus, we can highlight here, for example: (a) **the abuse and antisocial exercise of the right to property** (e.g. [fraud in cases of seasonal leases](#), which are not in reality and which are used to avoid the application of the law, art. 7 Civil Code), (b) the **absence of sufficient public investment** in Spain, due to the existence of **inadequate taxes** and [only reinvested in a small percentage in housing](#) and (c) the, correlative, **Lack of sufficient public housing** stocks, unlike the European countries around us, which do explain, with empirical data, the housing problem.

If we want to avoid a hypothetical overload of the social function of property in Spain, the alternative is not to avoid the delimitation of this right, but to combine it with other measures that require public intervention and the use of sufficient public funds.

In this context, the [European courts](#), and in the same line the Constitutional Court, **have protected the right to housing through a reasonable ("fair balance" for the**

ECtHR) delimitation of the right to property, which must leave a wide political margin to the democratic legislator of the day. All this on the basis that "the inaction of the authorities, which the Government attributes to the shortage of available housing, lacks valid justification according to its jurisprudence. It reiterates that, in accordance with its consolidated jurisprudence, **a state authority cannot use a lack of funds or other resources as a pretext for non-compliance**", ECHR of 2015 [TCHOKONTIO HAPPI v. FRANCE](#), in relation to the French DALO law.

This is clearly visible in the Spanish case in the **few** autonomous cases (Basque Country, Navarre, Valencia) in which the right to housing includes by law a clear obligation of result. Thus, judicially, the [Valencian case stands out](#), where the STSJ of Valencia 3055/2022 points out that the effectiveness of the right "generates the legal obligation of the Valencian regional administration, to make available to the applicant the stable occupation of an endowment accommodation, of a protected housing [...]".

But, as we have mentioned, public financing of social housing (understood as public housing) in Spain has historically been very low and is well below the EU average: 0.14% of GDP or 34 euros per inhabitant from 2017 to 2021 compared to 0.54% of GDP and 160 euros per year on average in the EU (not to mention 334 euros per inhabitant in Ireland, followed by Denmark (318), France (274) and Finland (246)). Moreover, in recent years public investment in Spain has even suffered decreases.

For all these reasons, bodies such as the *ombudsmen* or the OECD have insisted on the importance of the so-called [budget pre-allocations, already used in Spain in the fight against climate change](#), as a technical legal mechanism to guarantee public financing of social housing, through, for example, the stable dedication of a percentage of GDP to this purpose. to reach the European average, now very distant, which can be complemented with [more appropriate taxes on billionaires in the current context of acute inequality](#).

Likewise, **other measures that do not involve public spending and are based on behavioural contributions and the so-called *nudges*,** already used in neighbouring countries, such as France, for the mobilisation of empty housing, for example, and which, without a doubt, we could use in Spain, [as the Barcelona Chair of Housing Studies has proposed with a specific mechanism in this regard](#), remain to be explored.