

# teoría & derecho

REVISTA DE PENSAMIENTO JURÍDICO

## HIPOTECA Y VIVIENDA

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##### Hipoteca y vivienda

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# HOMEOWNERSHIP AS THE CAUSE AND THE VICTIM OF THE MORTGAGE CRISIS

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## ABSTRACT

Behind the systemic crisis originated in the United States of America in 2007 there are legal issues related to the lack or the inefficiency of the typical elements of a modern system of land credit: effective land register, banking system and mortgage securities. Generalization of homeownership has been identified as one of the causes of the crisis origination and now homeownership is suffering its consequences; that is, that which is changed in its financial aspect, affects also its human right one and vice-versa. The article studies how all this is influencing the way by which housing is perceived in current Spanish private legal system, which traditionally has had not paid much attention to it. Moreover, the article stresses that relying on homeownership as the single type of housing tenure entails certain risks, some coming from institutions such as the reverse mortgage or the externalities it causes to other fields of social reality, such as employment. New intermediate tenures in Catalonia are pointed out as possible alternative housing tenures.

## KEYWORDS

Housing, Crisis, Mortgage market, System of land credit, Securitization, Reverse mortgage, Homeownership, Tenancy, Intermediate tenures

# THE EUROPEAN DIRECTIVE OF MORTGAGE CREDIT

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## ABSTRACT

The development process of the 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 was highly influenced by the current economic crisis. As a result, it became a consumer protection regulation and, above all, a regulation of the creditworthiness of the credit system by means of the so called responsible lending. These circumstances have provided the Directive with innovative profiles which make more difficult its transposition into the national law of the Member States, especially in regards to alternative dispute resolution and to the mandatory assessment of the creditworthiness of the debtors.

## KEYWORDS

Mortgage credit, Consumer protection, Alternative dispute resolution, Responsible lending, Creditworthiness assessment.

# LEGISLATIVE REFORMS IN SPAIN SINCE THE OUTBREAK OF THE ECONOMIC CRISIS

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## ABSTRACT

The aim of this paper is to offer a brief review of the legislative reforms carried out in Spain in the sphere of mortgage, both by Government and Parliament, after the outbreak of the economic crisis. To this goal, the new enacted rules are chronologically described, briefly outlining the measures that each of them introduces in our mortgage regulations. The article concludes with some critical reflections on the measures taken and the effects that they have had so far on the debtors' plight and the financial market.

## KEY WORDS

Mortgage, Eviction, Deed-in lieu of foreclosure option

# POST-CRISIS EVOLUTION OF THE MORTGAGE LEGISLATION. A COMPARATIVE PERSPECTIVE IRELAND-SPAIN"

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## ABSTRACT

Ireland and Spain experienced similar developments in pre-crisis housing and mortgage markets and accordingly, national legislatures and regulatory authorities were faced with similar challenges in the post crisis context. This article examines the evolution of national legislation to respond to the legacy effects of pre-crisis mortgage loan origination and, measures introduced to reform the statutory framework for lending. It identifies the common objective in the various responsive measures and proceeds to highlight the similarities and distinctions in form, effect and scope of national provisions. The article juxtaposes Irish and Spanish measures to assist distressed mortgagors and despite the common focus on loans in respect of the primary residence, a distinction is drawn between the targeted Spanish measures and their broader Irish counterpart. Notwithstanding convergence in the substance of measures regulating current lending practices, there is a fragmentation of applicability evident in Spain which is not replicated in the Irish context. The article highlights the capacity for EU legislation to increase the convergence of national frameworks in respect of this fragmentation whilst also identifying a notable and recent distinction in the impact of EU legislation on existing national frameworks.

## KEYWORDS

Mortgages, Legislation, Consumer Protection, Ireland, Spain.

## WHAT'S WRONG WITH OUR MORTGAGE?

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### ABSTRACT

This work pretends to be a claim in favour of the mortgage, a legal issue with more than two thousand years of existence which has been an important figure in the economic growth. I can't talk about failures in the mortgage because all the problems we have seen hold mainly whether in the economic crisis we are suffering for the last seven years, with a big increase of the unemployment, or in the inappropriate behaviours, either of the debtors as creditors (abusive clauses, bad information, high valuations, the idea about real estates never loose value and so on). My opinion is that "with appropriate legal measures which allow isolate mortgage of the unwise habits it will be an important factor of growth again".

### KEY WORDS

Mortgage, Habitual home, Abusive clause, Consumer, Foreclose procedure, Land register office, Cover bonds market

## "FLOOR" CLAUSE. NULLITY FOR LACK OF TRANSPARENCY AND PROBLEMS OF LEGAL CERTAINTY

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### ABSTRACT

Once published the STS (1st Chamber) of 9 May 2013, the expectations of the consumer associations and those affected have become reduced. The ground clauses are permissible if its transparency allows the consumer to identify the clause as defining the main object of the contract and know the actual distribution of risks of varying rates. But, is it possible to analyze the lack of transparency at the initiative of the judge? Is it respectful with the juridical safety the nullity for lack of transparency of a clause obedient to the regulation on bank transparency? Can this requirement be the basis for collective action? The present article answers negatively to these questions and thinks that the affirmative response on the part of the doctrine of the Supreme Court has provoked a juridical undesirable insecurity for the credit system.

### KEYWORDS

Variable interest rate in mortgage loans, Clause limiting the floor and ceiling of interest, Transparency requirements, Nullity, Legal certainty.



# ASSESSMENT OF THE CREDITWORTHINESS IN THE MORTGAGE LENDING

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## ABSTRACT

This article analyzes the obligation to assess the creditworthiness of the client in the mortgage lending. After identifying the applicable regulation, this article studies the content of this obligation as a better alternative to prevent over-indebtedness of households.

The thesis of this article is that the solvency assessment is a standard of conduct which integrates contract which makes access to mortgage credit. His regime is analogous to MiFID test in providing investment services. It is a new duty of care which breach generates liability for damage caused to the client.

## KEYWORDS

Assessment of creditworthiness, Over-indebtedness, Responsible Lending, Mortgages, Client Protection

# THE JURISPRUDENCE OF THE EUROPEAN COURT OF HUMAN RIGHTS ABOUT HOUSING IN RELATION TO THE SPANISH LAW

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## ABSTRACT

The economic and social crisis in our country has led to a debate about the enforceability of economic, social and cultural rights, particularly the right to housing. Despite it is not deemed to be a subjective right neither by the Spanish Constitution nor by international instruments ratified by Spain, the European Court of Human Rights has dealt with some elements of the right to housing through the interpretation of the civil and political rights enshrined in the European Convention on Human rights. This paper explores to what extent this doctrine may help to achieve greater justiciability of the right to housing in Spanish law and influence the evictions urged by public authorities and individuals.

## KEY WORDS

Human rights, Enforceability of social rights, Right to housing, Evictions, European Court of Human Rights

MAY TENANCIES BE AN EFFECTIVE ALTERNATIVE TO OWNERSHIP AS A WAY TO  
ACCESS TO HOME? A LEGAL COMPARATIVE PORTUGAL-SPAIN-MALTA

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*Kurt Xerri*  
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ABSTRACT

Authors and social sectors defend tenancies as an effective alternative to home ownership. However, ownership entails a range of values, among others, stability, which makes it attractive enough. Quite often, urban leases do not offer the advantages and/or enough guarantees neither for landlords nor for tenants to make them an attractive type of housing tenure. This work analyses tenancies' legal frameworks in Spain, Portugal and Malta, including the last legal modifications towards the increase of the liberalization of the contractual relationship, in order to discuss whether their urban leases, according to their legal configuration, are a true alternative to homeownership.

KEYWORDS

Leases, Homeownership, Tenure, Housing, Tenancies, Spain, Portugal, Malta

EQUALITY OF ARMS AND ASYMMETRY PROSECUTION-DEFENCE IN CRIMINAL  
PROCEEDINGS BASED ON THE PRESUMPTION OF INNOCENCE  
(Reference to the Bill of Criminal Procedure of 2011 and the Draft Criminal Procedural Code  
2013)

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ABSTRACT

The eternally postponed comprehensive reform of the Criminal Justice system in Spain should not be approached with the aim of improving the efficiency of the prosecution system, but also —and even primarily— as a chance to adjust the structure and organization of criminal procedures according to a primary purpose to be fulfilled in a democratic society: the protection of fundamental rights and guarantees of citizens facing the exercise of the *ius puniendi* by the state, and all the other participants in the procedure, and in particular, the victims. This requires the overcoming of the old inquiry design and the replacement of the current model for another, which should be truly inspired by the principles of the presumption of innocence and the equality of arms, considering that prosecution and defense entitle different rights. The Bill of Criminal Procedure passed in 2011 and the Draft Criminal Procedural Code published in 2013 have faced this challenge with a different approach and an unequal outcome.

KEY WORDS

Reform of the criminal procedure, Equality of arms, Presumption of innocence, Principle *audi alteram partem*, Inquiry process and prosecution process, Equitative process, Prosecution and defence, Charging judgment, Defendant intervention in the oral proceeding, Second criminal hearing

CINEMA AND LEGAL REASONING: STRATEGIES AND ARGUMENTATIVE AND  
PARA-ARGUMENTATIVE METHODS OF THE JUDICIAL ARGUMENT REGARDING THE  
LITIGATION OF FACTS

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ABSTRACT

Analysis of four films: *In the Name of the Father* (1993), directed by Jim Sheridan; *Julius Caesar* (1957), directed by Joseph L. Mankiewicz; *A Civil Action* (1998), directed by Steven Zaillian, and *Time to Kill* (1996), directed by Joel Schumacher. Sequences selected are those in which litigation about facts show the effects of the discourse and its nature. There are some reflections about the theory of reasoning regarding the matter of facts. Constructive items that characterize the narrative models are shown. Moreover, there are some reflections about the conduct of the witness evidence.

KEYWORDS

Theory of reasoning, rhetoric, procedure, facts as arguments, evidence and narration, impartiality rhetoric, authority argument, consequentialist argument, sacrifice argument, a simile argument, witness and narrative evidence; Para-argumentative slots: interception order, argumentative rhythm, irony, emotivism.

THE ΔΟΓΜΑ AND THE DEFINITION OF LAW IN D.1.3.2. REGARDING  
DEMOSTENES' DEFINITION.

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ABSTRACT

This article aims to contribute to the discussion within legal epistemology, and particularly its dogmatic. Its main focus is the study of the evolutionary setting of the dogma within the Greek resources, and so on, we confirm that, with an approach and an integration of the dogma in the legal framework, this becomes a rule of conduct frequently accepted, which is composed with individual and individualized opinions.

KEYWORDS

Dogma, Evolution, Rule, Individual opinions, Agreement

# THE EUROPEAN COURT OF HUMAN RIGHTS STILL CONSIDERS THE REFORM OF THE MORTGAGE ACT INOPERATIVE

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## ABSTRACT

The crisis in Spain has generated situations of great distress among Spanish people, due to the large number of evictions. The legislator seems to have tried to alleviate the situation through different reforms, all inconsistent and far from the real problem, as the Court of Justice of the European Union has stated in several judgments, urging the Spanish legislator to reform what has been already reformed.

One of the key issues in all foreclosure is the possible opposition of the debtor, which needs to support in one of the causes enumerated in the Civil Procedure Act. Among these, it was not included the existence of abusive clauses in the mortgage contract, and it is in this regard that the Court of Justice has pronounced first of all.

The Spanish legislator has obeyed the mandate and has proceeded to reform what was required, but still gives preference to the creditor in the enforcement procedure since it allows that when a clause is declared as abusive, the creditor can appeal and, nevertheless, if the clause is not declared abusive, the debtor cannot appeal.

Such reform has caused further reaction of the Court, who has given another call for attention to our legislator. This shows that there are many other reforms to undertake if we really do not want to keep on harming the mortgagor.

## KEY WORDS

Debtor, creditor, mortgage, eviction, foreclosure, abusive clauses, opposition to foreclosure, appeal.