

# A RIGHTS-BASED APPROACH TO AFFORDABLE HOUSING PROGRAMMES AND LAND-USE

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## Housing Policy Shift during the Neoliberal Period

1. Transfer of responsibility for housing provision to the market
2. View that homeownership was the solution for all
3. Reduction in public housing
4. Revision of tenant-protection legislation | tenures typically associated with lower-income households

R. Rolnik, Late Neoliberalism: The Financialization of Homeownership and Housing Rights, *International Journal of Urban and Regional Research*, 2013:37.3, p. 1061-1062

“The belief that markets could regulate the allocation of housing as the most rational means of resource distribution ... has led public policymaking towards the abandonment of the conceptual meaning of housing as a social good”

“society of entrepreneurs and consumers”

R. Rolnik, Late Neoliberalism: The Financialization of Homeownership and Housing Rights, *International Journal of Urban and Regional Research*, 2013:37.3, p. 1059, 1060

“houses are effectively assets”

H. Schwartz & L. Seabrook, Varieties of Residential Capitalism in the International Political Economy: Old Welfare States and the New Politics of Housing, *Comparative European Politics*, 2008:6, p. 257

What are the solutions?

“A **tenure-neutral housing policy** would only be a first, significant step towards a better housing policy ... we could actually **invest more in social rented housing** and shift fiscal support from mortgage loans to building and maintaining social housing.

Furthermore, we could promote alternative forms of housing, including limited equity cooperatives, community land trusts [and] mutual housing associations ...

This approach prioritises **housing as a social good over housing as a commodified or financial asset**, which is exactly the opposite of the neoliberal or financial perspective on housing, which by definition subordinates use value to exchange value.”

M.B. Aalbers, *The Financialization of Housing: A political economy approach*, (Abdingdon, New York: Routledge, 2016), p. 146.



International  
Covenant on  
Economic,  
Social and  
Cultural Rights

National Constitution

European  
Social Charter

European  
Union Law

European  
Court of Human  
Rights

## National Constitutions



26. (1) Everyone has the right to have access to adequate housing.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right.

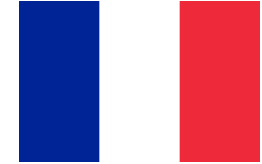
(3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.

Government of the Republic of South Africa and Others v Grootboom and Others (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 (4 October 2000)

[95] Neither section 26 nor section 28 entitles the respondents to claim shelter or housing immediately upon demand. The High Court order ought therefore not to have been made. However, section 26 does oblige the state to devise and implement a coherent, coordinated programme designed to meet its section 26 obligations. The programme that has been adopted and was in force in the Cape Metro at the time that this application was brought, fell short of the obligations imposed upon the state by section 26(2) in that it failed to provide for any form of relief to those desperately in need of access to housing.

[96] In the light of the conclusions I have reached, it is necessary and appropriate to make a declaratory order. The order requires the state to act to meet the obligation imposed upon it by section 26(2) of the Constitution. This includes the obligation to devise, fund, implement and supervise measures to provide relief to those in desperate need.

## National Legislation:



### Code de la construction et de l'habitation

**Article L300-1** Le droit à un logement décent et indépendant, mentionné à l'article 1er de la loi n° 90-449 du 31 mai 1990 visant à la mise en oeuvre du droit au logement, est garanti par l'Etat à toute personne qui, résidant sur le territoire français de façon régulière et dans des conditions de permanence définies par décret en Conseil d'Etat, n'est pas en mesure d'y accéder par ses propres moyens ou de s'y maintenir. Ce droit s'exerce par un recours amiable puis, le cas échéant, par un recours contentieux dans les conditions et selon les modalités fixées par le présent article et les articles L. 441-2-3 et L. 441-2-3-1.

“The aim of this law was to drive the construction of suitable and affordable housing”

J. Clauzier, "The DALO law: a step towards making the right to housing a reality", Housing Rights Watch (<http://www.housingrightswatch.org/content/dalo-law-step-towards-making-right-housing-reality>)

Tchokontio Happi v. France, ECHR, 9 April 2015, Application no. 65829/12

Violation of Article 6 § 1

“§50 ... The Court reiterates that, according to its settled case-law, it is not open to a State authority to cite the lack of funds or other resources as an excuse for not honouring, for instance, a judgment debt”

# Main International EU and International Instruments



## 1. International Covenant on Economic Social and Cultural Rights

(Signed in 1968 and ratified by Malta in 1990)

The States Parties to the present Covenant recognize the right of everyone to have an adequate standard of living for himself and his family, **including adequate ... housing.**

## 2. European Social Charter

**16** ... the Parties undertake to promote the economic, legal and social protection of family life by such means as **provision of family housing** ...

**31** ... With a view to ensuring the **effective exercise of the right to housing**, the Parties undertake to take measures designed: 1 to promote **access to housing of an adequate standard**; 2 to **prevent and reduce homelessness** with a view to its gradual elimination; 3 to **make the price of housing accessible to those without adequate resources**

### International Movement ATD Fourth World v. France

Violation of Article 31 §3 on the grounds that: - there was a **clear shortage of social housing at an affordable price for the poorest people**; - the arrangements for allocating social housing to the poorest people and the available remedies in the event of **excessively long waits for housing** were inadequate

## 3. European Convention on Fundamental Rights and Freedoms

Everyone has the **right to respect for ... his home** ...

## 4. EU Charter of Fundamental Human Rights

**Monika Kušionová v SMART Capital a.s.** (CJEU, 10 September 2014)

“Under EU law, the **right to accommodation is a fundamental right** guaranteed under Article 7 of the Charter” (respect for private family life and the home)





Right to Housing



## Jurisprudential evolution of P1-1 (ECHR) in the field of tenancy law



### Mellacher v. Austria (1989)

“The Court observes that, in remedial social legislation and in particular in the field of rent control, which is the subject of the present case, it must be **open to the legislature to take measures affecting the further execution of previously concluded contracts** in order to attain the aim of the policy adopted”

Reduction of up to 80% of the applicant’s potential rental income was held to fall within **the State’s margin of appreciation**

### Hutten-Czapska v. Poland (2006)

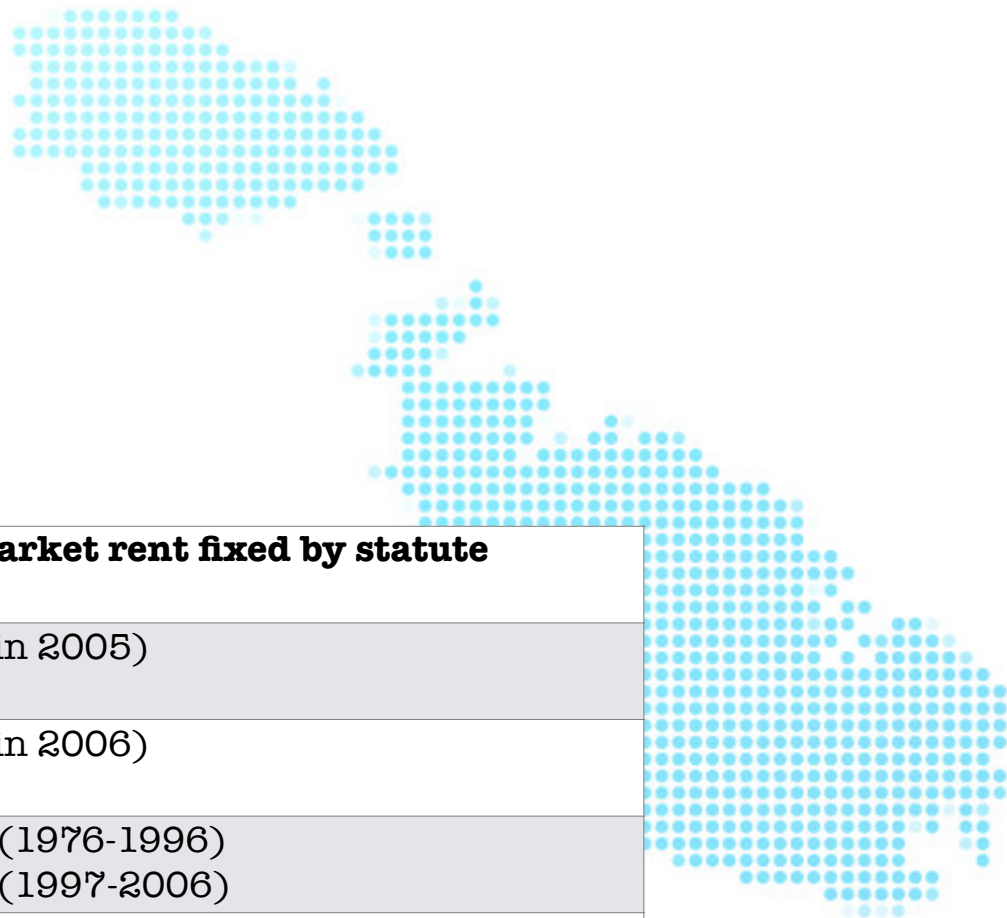
The impossibility of receiving a return that was at least **“reasonably commensurate”** with the general costs of maintenance was found to **“impair the very essence of the applicant’s right of property”**.

No such burden could be placed on one particular social group “however important the interests of the other group or the community were as a whole”. Even more remarkably, in recommending the mechanism that would be capable of safeguarding the landlords’ interests the Court made reference to their **“entitlement to derive profit from their property”**.

### Ghigo, Edwards v. Malta (2006)

In view of the extremely low return, the length of the requisition order and the restrictions of the landlord’s rights **the State was found to have shifted onto the applicants “most of the social and financial costs of supplying housing accommodation”** to the housing beneficiaries and their families and consequently, it had **failed to strike the requisite fair balance** between the general interests of the community and the protection of the applicants’ right of property.

Despite large margin of appreciation afforded to States they could not subject landlords to **“minimal profits”**.



<b>CASE (v. MALTA)</b>	<b>% of market rent fixed by statute</b>
<b>Ghigo</b>	<b>1.9%</b> (in 2005)
<b>Fleri Soler and Camilleri</b>	<b>1.6%</b> (in 2006)
<b>Edwards</b>	<b>11.6%</b> (1976-1996) <b>11.4%</b> (1997-2006)
<b>Amato Gauci</b>	<b>6.3%</b> (in 2002) although if rent had been challenged in front of RRB it
<b>Aquilina</b>	<b>2.25%</b> (until 2010) <b>6.4%</b> (following reform)
<b>Zammit and Attard Cassar</b>	<b>12.3%</b> (until 2010) <b>15.8%</b> (following reform)
<b>Apap Bologna</b>	<b>16%</b> (in 1987) <b>6.5%</b> (following reform)

## Interpretation of EU Competition Law rules in cases of Social Housing

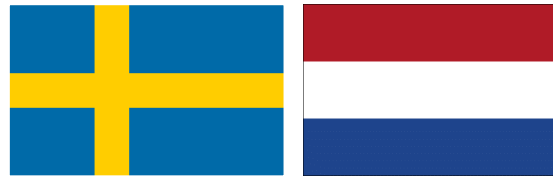
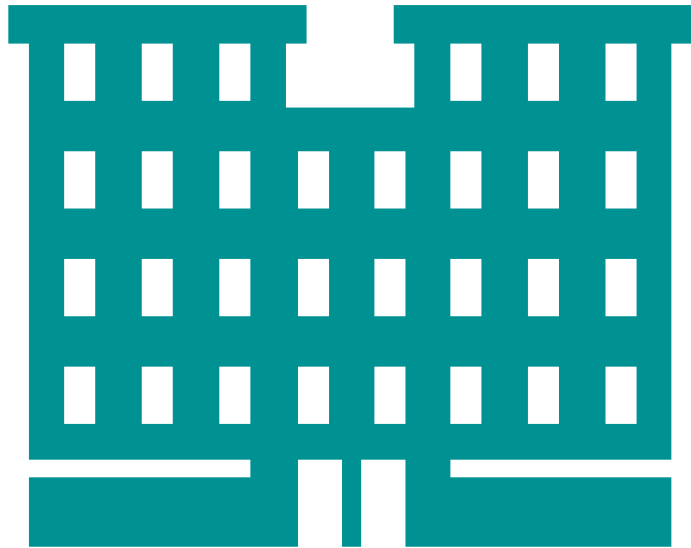
### EU on Housing



#### Charter of Fundamental Rights of the EU

**34(3)** In order to combat social exclusion and poverty, the Union recognises and respects **the right to social and housing assistance** so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.

No explicit policy on Social Housing.



Sweden and Netherlands characterised by broad models of nonprofit housing.

## **State aid No E 2/2005 and N 642/2009 - The Netherlands Existing and special project aid to housing corporations**

Explicit definition of target group was missing, large size of the Dutch social rented sector, was likely to involve illegal State aid disturbing fair competition on the housing market.

§55. Overall the Commission considers that **provision of social housing may qualify as service of general economic interest if it is restricted to a target group of disadvantaged citizens or socially less advantaged groups**, whilst Member States have a wide margin as regards the size of the target group and the exact modalities of applying the system based on a target group.”

### **Netherlands's response**

Definition of an explicit rent cap for social rental housing

Allocation of at least 90% of social rental dwelling to a target group limited by a maximum income. \*Maximum income of EUR 33,000 per year which will include the lowest-earning 43% of the population\*

Restriction of State support (loan guarantees) to the building and management of social rental dwellings.

“Restriction of the target group and allocation criteria may lead to **concentrations of lower-income households** in the social rental sector.

... there is substantial need for **affordable rental dwellings among middle-income households**, for which there are insufficient opportunities on the private rental and owner-occupied market.

If housing for middle income groups is not provided by commercial providers, there is a market failure, and hence State aid may be allowed since it is not harming a level playing field.

V. Gruis & M. Elsinga, Tensions Between Social Housing and EU Market Regulations,  
European State Aid Law Quarterly, 2014:3, p. 465

Sweden chose to adopt a new law which states that municipal housing companies should act in a '**business-like way**' and charge **a market rate of return** on their capital.

M. Elsinga & H. Lind, The Effect of EU-Legislation on Rental Systems in Sweden and Netherlands, *Housing Studies*, 2013, 28:7, p. 963

Will **this interpretation hinder development of social housing from residualist sector housing the poorest to affordable housing** for a wider class of citizens?

V. Gruis & M. Elsinga, Tensions Between Social Housing and EU Market Regulations, *European State Aid Law Quarterly*, 2014:3, p. 468

The question, however, is where are both countries moving to, what is the final aim? A clear vision on how such a sector should work is lacking; **are both countries moving toward a dual rental model, a safety net outside the market at below market rents?** Or do this businesslike providers become normal market actors leaving the care for affordable housing all to the government by housing allowances and allocation rules? Or just keep the issue from the political agenda? One thing is clear: providing housing to the lowest income groups is never a profitable market activity.

M. Elsinga & H. Lind, The Effect of EU-Legislation on Rental Systems in Sweden and Netherlands, *Housing Studies*, 2013, 28:7, p. 970



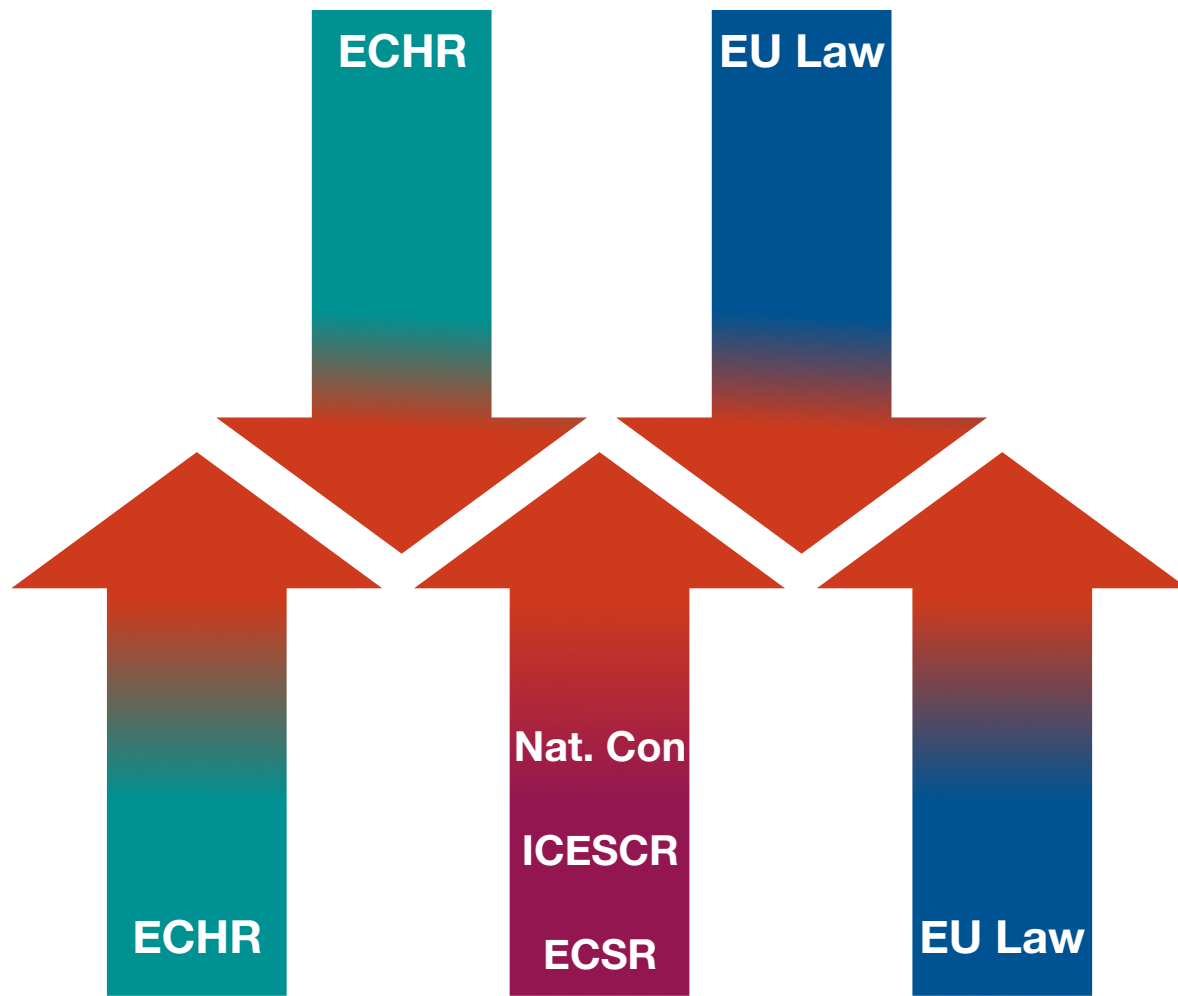
“In its decision-making practices concerning state aid, the European Commission has presently adopted **a restrictive definition of social housing**, which only targets disadvantaged groups. While this definition might be appropriate for residual social housing models, **it does not fit the universalistic model**, where social housing is intended for all citizens with the aim of developing socially mixed neighbourhoods. To meet the requirements of the Treaty and achieve the social inclusion targets of Europe 2020, it appears necessary to extend the current definition of social housing through a democratic process in which the different Member States can bring their own experience to achieve the recognition of their welfare tradition.

The resulting definition [from a wider debate among States] could be much broader than currently adopted in the legislation on competition.

Braga/Palvarini, Social housing in the EU, briefing paper, Directorate-general for internal policies, Policy Department A: Economic and Scientific Policy, Brussels, 2013 p. 47

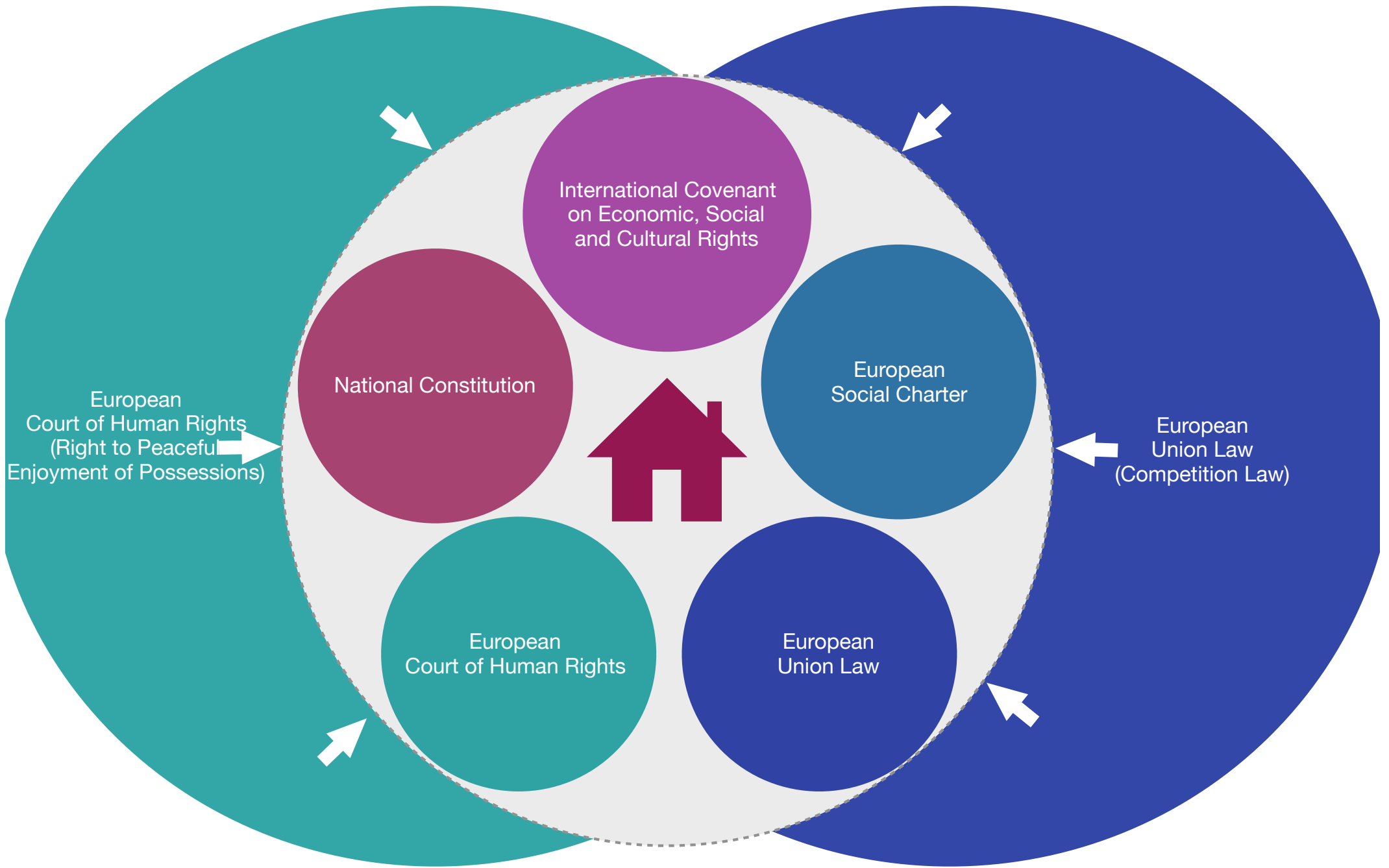


Right to Housing



State's margin of appreciation

Right to Housing



# Mainstream Ideology



International Covenant on Economic, Social and Cultural Rights

National Constitution

European Social Charter

European Union Law (Competition Law)

European Union Law

European Court of Human Rights (Right to Peaceful Enjoyment of Possessions)

European Court of Human Rights