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## **The Mexican Crowdfunding Regulation: Friend or Foe of the Human Right to Housing?**

Rafael Ibarra Garza & Raúl Morales de Alba

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# The Mexican Crowdfunding Regulation: Friend or Foe of the Human Right to Housing?

Rafael Ibarra Garza\* and Raúl Morales de Alba\*\*

*Article 4 of the Mexican Constitution recognizes housing as a human right; obligating the government to facilitate its availability. To fulfill this obligation, the federal legislature enacted the Housing Act. Unfortunately, millions of Mexicans still lack adequate housing. Most of the population lacks the resources to become homeowners, and they do not have access to institutional loans. Even when available, institutional loans are expensive. A possible solution is crowdfunding, compiling small contributions from a large number of people. Two crowdfunding models can provide housing. First, it is possible to finance housing projects via donations (this model may also be used to improve housing on social property). Second, crowdlending can finance housing projects where the loans may be secured through a mortgage. In 2018, Mexico regulated crowdfunding with the Fintech Act, making it legally possible to finance housing projects through that mechanism. In fact, there are special rules on real estate crowdfunding. This Article analyzes whether the legal techniques established in the Mexican crowdfunding law facilitate access to housing. Unfortunately, there are more reasons to conclude that crowdfunding regulation is more a foe than a friend to the right of housing.*

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I.	Introduction .....	177
II.	Crowdfunding as a Mean of Accessing Adequate Housing .....	179
	A. Crowdfunding and its Models .....	179
	B. Adequate Housing .....	181
III.	Mexican Crowdfunding Regulation in Line with the Right to Housing .....	182
	A. Building Trust .....	184
	B. Potential for the Real Estate Sector .....	186
	C. Implications from International Law and Roles for the Private Sector .....	186
	D. Housing Act and National Housing Agencies.....	187
IV.	Mexican Crowdfunding Regulation against the Right to Housing .....	191
	A. Disregard of Donation-Based Crowdfunding.....	192
	B. Heavy Regulation.....	194
	C. Relation to the Housing Act.....	195
V.	Conclusion .....	196

## I. Introduction

Although Mexican law<sup>1</sup> recognizes the right to housing,<sup>2</sup> a 2018 diagnostic study demonstrated that the right had not yet been fully guaranteed.<sup>3</sup> Millions of Mexicans lack adequate housing. Of the country's 31.5 million living spaces,

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<sup>1</sup> Mexican Constitution, art. 4; Mexican Housing Law. For more information about adequate housing in Mexican legislation, see Víctor Martínez Bullé Goyri, 'El Derecho a la Vivienda Digna' (1991) 18 Cuadernos del Instituto de Investigaciones Jurídicas. Aspectos Jurídicos de la Vivienda 411ff.

<sup>2</sup> "The right to adequate housing should be understood as the right to live in conditions deemed adequate on the grounds of security of tenure; availability of basic services, building materials, facilities and infrastructure; affordability; habitability; accessibility; location; cultural adequacy and contemplates criteria for the prevention of disasters and the physical protection of natural elements" (UN, *The Right to Adequate Housing*, General Assembly, Note by the Secretary-General A/67/286, August 10th, 2012, 22). For a similar definition in Mexican Law, see article 2 of the *Ley de Vivienda* (Housing Law). For more information about adequate housing, see UNGA, 'Informe de la Relatora Especial Sobre una Vivienda Adecuada como Elemento Integrante del Derecho a un Nivel de Vida Adecuado y sobre el Derecho de No Discriminación a Este Respetto' UN GAOR, Note by the Secretary-General (18 January 2017) UN Doc. A/HRC/34/51; UNGA, 'Informe de la Relatora Especial Sobre una Vivienda Adecuada Como Elemento Integrante del Derecho a un Nivel de Vida Adecuado y Sobre el Derecho de No Discriminación a Este Respetto' UN GAOR, Note by the Secretary-General (15 January 2018) UN Doc. A/HRC/37/53; UNGA 'Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, GAOR, Note by the Secretary-General (19 September 2018) UN Doc. A/73/310/Rev.1 6ff; Antonio Azuela, 'Vivienda y propiedad privada' (1995) *Revista Mexicana de Sociología* 1/95, 35; Gerardo Pisarello, 'Vivienda para Todos: Derecho de Construcción' in Armando Soto Flores (ed) *Derecho Procesal Constitucional* (2004) 259ff; Angélica del Rosario Araujo Lara, 'Casa para Todos: Derecho Humano y Constitucional, Congreso de la Unión' (2013) 35ff.

<sup>3</sup> Consejo Nacional de Evaluación de la Política de Desarrollo Social (CONEVAL), 'Estudio Diagnóstico del Derecho a la Vivienda Digna y Decorosa 2018.' See also Guadalupe González Hernández, 'La Paradoja del Derecho a la Vivienda en México: Vivienda Urbana Nueva Deshabitada, 1990-2010' (2013) 34 *Semina: Ciências Sociais e Humanas*, Londrina 61ff.

45% are in need of substantial improvements;<sup>4</sup> 19.3% lack access to basic services, which increases to 53.1% in rural communities.<sup>5</sup> Moreover, 13% of owners do not have legal documents that prove their ownership. In rental housing, 59% of occupiers lack a lease. Therefore, a large segment of the Mexican population is at risk of being forced out of their living spaces.<sup>6</sup> These are just some examples; the list goes on.

The Mexican government has not been able to guarantee the right to housing. Therefore, we must be more proactive and help others to obtain adequate housing. One helpful option is the use of crowdfunding. Part II of this Article demonstrates how crowdfunding could be a useful mechanism for accessing the right to housing. We discuss several crowdfunding models to show how they could help realize the human right to adequate housing. In Part III, when studying the Mexican crowdfunding regulation, mainly the Fintech Act,<sup>7</sup> we highlight the rules that help realize the right to adequate housing. In contrast, Part IV demonstrates that certain rules of the Mexican crowdfunding law prevent crowdfunding from reaching its highest potential for realizing the right to adequate housing. Through the analytical-synthetic method, we analyze the pros and cons of the Mexican crowdfunding law and conclude that the regulation is a foe to the human right to housing.

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<sup>4</sup> For example, changing dirt floors for other material such as concrete so habitants can live in a healthier environment (3.3 %); changing walls and ceilings in need of stronger materials so the habitants have a safer house (2.9%); CONEVAL, 'Medición de la Pobreza en México 2016' (2017).

<sup>5</sup> CONEVAL (n 4) 133.

<sup>6</sup> CONEVAL (n 4) 29.

<sup>7</sup> Better known as Fintech Act, which was passed March 8, 2018 and the General dispositions on March 10, 2018.

## II. Crowdfunding as a Mean of Accessing Adequate Housing

In this Part, we define crowdfunding and examine how it might help procure adequate housing. After that, we list the four main crowdfunding models and explain why the donation and credit-based models are best suited to promote housing. Finally, we identify what adequate housing means in Mexico, as understood by the Housing Act and the United Nations.

### A. *Crowdfunding and its Models*

What is crowdfunding? When a person or a group of people (campaign creators) need money for the realization of a project, they create a fundraising campaign via an online crowdfunding platform.<sup>8</sup> This campaign enables many people (campaign funders) to transfer relatively small amounts of money to fund the project. Therefore, crowdfunding is a collective finance mechanism where a large group of people individually transfer small contributions to fund initiatives of others via internet platforms.<sup>9</sup>

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<sup>8</sup> Examples of Mexican crowdfunding platforms:

1. Credit: Prestadero (prestadero.com), Doopla (doopla.mx);
2. Equity: Vakita Capital, Trébol Capital (trebolcapital.com);
3. Reward: Mi Cochinito (miconchinito.com), Hagamos la vaca (hagamoslavaca.mx);
4. Donation: Ideame (idea.me); Fondeadora (fondeadora.com).

<sup>9</sup> World Bank, 'Crowdfunding's Potential for the Developing World,' (infoDev, Finance and Private Development Department, 2013); Cory Baker, 'Real Estate Crowdfunding—Modern Trend or Restructured Investment Model?: Have the SEC's Proposed Rules on Crowdfunding Created a Closed-market System?' (2016) 9 J Bus. Entrepreneurship & L 21. For more information about how crowdfunding changes financial systems see, Jason Best, Sherwood Neiss, and Davis Jones, 'How Crowdfund Investing Helps Solve Three Pressing Socioeconomic Challenges, (Crowdfund Capital Advisors 2013) 9ff; Denis Schweizer and Tingyu Zhou, 'Do Principles Pay in Real Estate Crowdfunding?' (John Molson School of Business, 2014) 10ff; Esther Hernández Sainz, 'El Crowdfunding Inmobiliario Mediante

Creating adequate housing requires economic resources. Crowdfunding helps to provide these resources by being an alternative finance mechanism. Thus, funds can be raised for an individual or group of individuals that do not have adequate housing as a result of the government's failure to guarantee that right, the lack of individual's resources, or the lack of access to institutional loans.

Globally, the crowdfunding industry generates billions of dollars a year. In 2011, the crowdfunding industry generated \$1 billion and it is projected that in 2025 it will be a \$100 billion a year industry.<sup>10</sup> If a small percentage of that is distributed to projects that provide adequate housing, millions of people could obtain adequate housing.

Another aspect of crowdfunding in developing countries is the element of diaspora. Immigrants have strong concerns of their home country; for this reason, it has been written: "Crowdfunding may provide a financial outlet for diaspora members' emotional desires to strengthen their community or population of origin."<sup>11</sup>

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Contratos de Cuentas en Participación: una Fórmula de Inversión Participativa ¿Alegal o Prohibida? 70 *Revista de Estudios Europeos* (2017) 129ff; Olena Havrylchuk, *Regulatory Framework on the Loan-Based Crowdfunding Platforms*, (Economics Department Working Papers No. 1513, OECD, 2018) 10ff.

<sup>10</sup> World Bank (n 9) 43. For more information about crowdfunding progress and potential in the commercial real estate sector, see John Vogel and Benjamin Moll, 'Crowdfunding for Real Estate' (2014) *Real Estate Finance J* 5ff; Jeremy Cohen, 'A Study on the History and Functionality of Real Estate Crowdfunding' (JWS Senior Thesis, University of Pennsylvania 2016); Matt Andrews, 'Getting New Regulatory Policy Done: Crowdfunding Commercial Real Estate in the USA' (Harvard Kennedy School <<https://matthewandrews.typepad.com/files/getting-new-policy-done-draft-case.pdf>> accessed 27 June 2020).

<sup>11</sup> The World Bank (n 9) 35; Also see: Joaquín Domínguez, Manuel Fernandini, Leticia Riquelme & Christian Schneider, *Financiamiento del Mercado de Vivienda en América Latina y el Caribe*, Documento para discusión No. IDB-DP-519, Banco Interamericano de Desarrollo, July 2017, 9; Enrique Moreno Serrano, *La Incidencia del Crowdfunding Inmobiliario en el Desarrollo de las Formas Alternativas de Financiación Colectiva*, 2017, 127ff.



Crowdfunding is mainly classified into four models: donation-based, reward-based, credit-based, and equity-based.<sup>12</sup> The two most appropriate models for housing campaigns are donation- and credit-based.<sup>13</sup> In the donation-based model, campaign funders act altruistically and do not receive anything in return.<sup>14</sup> For example, a nongovernmental organization creates a campaign to obtain donations for the construction of houses for poor indigenous community in the state of Oaxaca. In the credit-based crowdfunding model, campaign supporters loan money to the campaign creators and expect the capital to be refunded with interests.<sup>15</sup> This could be used for example by a family that needs to change the materials of their house because they are a health risk and they campaign for a loan.

### *B. Adequate Housing*

Now that crowdfunding has been defined, it is also useful to understand what qualifies as adequate housing. For housing to be considered adequate, it must include or meet the following criteria: legal security of tenure; availability of services, materials, facilities

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<sup>12</sup> Some platforms include hybrid versions of these models that blur the lines among them. For example, when the reward is just a note of gratitude, or when a loan is made without interest. For additional information about crowdfunding models, see World Bank (n 9) 20; Hernández, E. (n 9) 132.

<sup>13</sup> We exclude the reward- and equity-based models for the following reasons. The reward-based model implies that the individuals that contributed to the project receive a reward for their contribution. This model is used product development. The equity-based model implies the exchange of securities in a private company. Adequate housing projects are analyzed in this Article as individual projects or project of NGOs, and the equity-based model does not apply.

<sup>14</sup> Baker (n 9) 26.

<sup>15</sup> Baker (n 9) 27; For further details on models of real estate crowdfunding, see Enrique Moreno Serrano, 'La Incidencia del Crowdfunding Inmobiliario en el Desarrollo de las Formas Alternativas de Financiación Colectiva' (2017) 5 *Revista Española Capital Riesgo* 119, 132ff.

and infrastructure; affordability (which will be explained further on because it is the aspect most related to crowdfunding); habitability; accessibility; location, and; cultural adequacy.<sup>16</sup> All new housing in Mexico must have at least one bathroom, one kitchen, one dining room, and two bedrooms, and it must comply with minimum health requirements as well as provide its occupants with protection against potentially aggressive natural elements.<sup>17</sup> Therefore, not all housing may be considered adequate, and actions should be taken by both the government and private sector to guarantee that all housing meets the adequacy criteria.

For the right to housing to be fully satisfied, a person must have access to adequate housing; thus, if it is not deemed adequate, then that person's human right to housing hasn't been satisfied.<sup>18</sup> Not all housing permits the realization of the human right to housing. If a person doesn't have the means to realize his or her right to housing, then he or she should be entitled to get assistance from either the public or private sectors.

### III. Mexican Crowdfunding Regulation in Line with the Right to Housing

This Part highlights the positive impact of the crowdfunding regulation, the 2018 Fintech Act, in realizing the right to adequate housing. We analyze the importance of internet in the context of crowdfunding and the rules that create trust in the crowdfunding system: (1) crowdfunding companies must be authorized by

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<sup>16</sup> UNCHR, Committee on Economic, Social and Cultural Rights (13 December 1991) UN Doc E/1992/23. Parr. 8.

<sup>17</sup> Housing Act, art 4.

<sup>18</sup> For more information on the right to adequate housing, as defined by the United Nations, see UN Habitat, Office of the United Nations High Commissioner for Human Rights, *The Right to Adequate Housing*, (2014) Fact Sheet No. 21/Rev. 1; Pisarello (n 2).

financial authorities, (2) they have to provide information to campaign funders, (3) they must abide by the principle of *pacta sunt servanda*, and (4) they must prevent situations that may result in conflicts of interest.

Because crowdfunding may be used to develop real estate, it can be a means to realize the right to adequate housing in Mexico—a right recognized in the Mexican Constitution and secondary laws, as well as in International Treaties signed by Mexico. Through crowdfunding, the private sector can contribute to the realization of the right to adequate housing, especially important in a country like Mexico where more than half of the population lacks access to traditional loans (granted by the public and private sectors) because they are employed in the informal sector. In the last section of this Part, we discuss how real estate development through crowdfunding could contribute to the realization of other human rights as well.

The fact that Mexico has not forbidden crowdfunding, but on the contrary created a regulatory framework that includes the Fintech Act<sup>19</sup> and its general regulations,<sup>20</sup> is a big achievement. Because this practice is permitted, a segment of the population that does not have access to capital through traditional means will now have access to capital.

Crowdfunding may not be available to everyone though. Because crowdfunding is done via internet, a segment of the Mexican population will not have access to this mechanism. The World Bank established that internet usage is a key factor for facilitating

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<sup>19</sup> 2018 Fintech Act (*Ley para Regular las Instituciones de Tecnología Financiera*)

<sup>20</sup> 2019 General Rules that apply to Fintech Companies (*Disposiciones de carácter generales aplicables a las instituciones de tecnología financiera*)

crowdfunding in developed countries.<sup>21</sup> However, internet use is on the rise. In 2015, only 39.2% of Mexican households had internet. In 2018, that number rose to 52.9%. In 2017, 71.3 million Mexicans above the age of six used internet, representing 63.9% of the population.<sup>22</sup> In addition, the Mexican population is young. In 2017, 22.98% of our population was under twenty-five years old.<sup>23</sup> This means that over time the percentage of digital literacy and the demand of access to the internet will grow. Additionally, third parties can create campaigns for those without internet access. For example, someone could establish a campaign in favor of a poor community in the state of Chiapas for building a sewage system.

### *A. Building Trust*

One of the most important elements of a robust crowdfund investing ecosystem is trust.<sup>24</sup> There must be trust between the campaign creator and the funders, and with the crowdfunding company. This trust, of course, is not limited to crowdfunding campaigns for adequate housing. However, without trust in the Mexican crowdfunding ecosystem, the campaign for adequate housing will not flourish. This Mexican regulation contains various rules to help create trust in the crowdfunding ecosystem.

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<sup>21</sup> World Bank (n 9) 8. Related to problems of funding, see Joaquín Domínguez and others, 'Financiamiento del Mercado de Vivienda en América Latina y el Caribe' (Documento para discusión No. IDB-DP-519, Banco Interamericano de Desarrollo, July 2017) 9, 10ff; CONEVAL (n 4) 148.

<sup>22</sup> INEGI, Encuesta Nacional sobre Disponibilidad y Uso de Tecnologías de Información y la Comunicación en los Hogares, 2015-2017. <[www.inegi.org.mx/temas/ticshogares/default.html#Informacion\\_general](http://www.inegi.org.mx/temas/ticshogares/default.html#Informacion_general)> accessed 27 June 2020.

<sup>23</sup> INEGI, *Población, Encuesta intercensal* 2015, <[www.inegi.org.mx/temas/estructura/](http://www.inegi.org.mx/temas/estructura/)> accessed 27 June 2020.

<sup>24</sup> World Bank (n 9) 50.

First, the Fintech Act establishes that crowdfunding companies must be authorized by financial authorities.<sup>25</sup> Once they are authorized, they will be continuously monitored by those same authorities.<sup>26</sup> The fact that they have to be authorized and monitored establishes a minimum standard of professionalism.

Another way this Act helps build trust is through an obligation to provide certain information to campaign funders. The platform must include information on the criteria of selection of the campaign creators and their projects, as well documents and information analyzed in the decisionmaking process.<sup>27</sup> Additionally, campaign platforms must advise possible campaign funders about the risk of the campaign creators and their projects, as well as the methodology used to evaluate that risk.<sup>28</sup>

These obligations provide transparency in the decisionmaking of the crowdfunding platform and give potential campaign funders valuable information to aid their decisionmaking process regarding which campaign to fund and to what extent.

Because transparency is important for building trust, the Fintech Act establishes other rules. For example: crowdfunding platforms must provide direct communication between the campaign creator and supporter.<sup>29</sup> They must also verify the identity and localization of campaign creators.<sup>30</sup>

Another element that builds trust is the fact that the law, regarding the principle *pacta sunt servanda*—a pact or agreement has to be observed and complied in good faith under its terms—

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<sup>25</sup> For example: National Banking and Securities Commission (*Comisión Nacional Bancaria y de Valores*).

<sup>26</sup> Fintech Act (2018), arts 3 and 11 (MX)

<sup>27</sup> Fintech Act, art 18, fr I

<sup>28</sup> Ibid art 18 fr II.

<sup>29</sup> Ibid art 19 fr III.

<sup>30</sup> General Rules that apply to Fintech Companies (2019) art 44 fr II.

prohibits the platforms to change the terms and conditions once the campaign supporter has consented in funding a specific project. However, the supporter has the right to change his mind in funding a specific project before the money is transferred to the campaign creator.<sup>31</sup> A final note on trust is the fact that conflict of interest rules bar participation by crowdfunding companies and certain high level employees.<sup>32</sup>

### *B. Potential for the Real Estate Sector*

Another positive aspect of the Mexican crowdfunding regulation is the possibility of obtaining funds for real estate development. In fact, the concept of real estate crowdfunding is defined as the operation of collective finance where the investors grant a loan to the campaign creator for the realization of real estate development activities and the creator has the obligation to pay back the capital and its accessories.<sup>33</sup>

Now what is considered as real estate development? The law does not define it. Thus, we assume any work realized on an immovable can be considered as such. Therefore, many projects that aim to guarantee the right to housing can be the object of crowdfunding campaigns.

### *C. Implications from International Law and Roles for the Private Sector*

The right to adequate housing in Mexico is a constitutional right. This right also stems from Mexico's international obligations under article 11 of the International Covenant on Economic, Social and

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<sup>31</sup> Fintech Act, art 18 fr VII.

<sup>32</sup> Ibid art 21 fr I and II.

<sup>33</sup> Ibid art 2 fr VII. For more information about the characteristics of real estate crowdfunding, see Vogel and Moll (n 10) 2ff; Schweizer and Zhou (n 9) 5ff.

Cultural Rights and article 27 of the Convention on the Rights of the Child, among others.<sup>34</sup> However, the obligation to provide adequate housing rests entirely on the State. Thus, private corporations, like crowdfunding companies, are not legally obliged to implement measures in favor of housing unless it is expressly mandated by domestic law.

The United Nations Committee on Economic, Social and Cultural Rights stated in General Comment 4 that there is not a country that has fully realized the right to adequate housing.<sup>35</sup> Considering that even the most economically advanced countries have not fully protected this right, nongovernmental entities should participate in securing adequate housing. This is especially true if adequate housing involves affordability, meaning that not only must states grant subsidies where appropriate, but housing credit must also be made available. By having the necessary legal framework to promote crowdfunding, as with the Fintech Act, governments can encourage affordable and adequate housing through private corporations.

#### D. *Housing Act and National Housing Agencies*

To fulfill the right to adequate housing, and to comply with its international obligations, the Mexican Federal Congress enacted the *Ley de Vivienda* (Housing Act). It expressly states that the social and private sectors shall participate with the State in fulfilling the right to adequate housing, in order to correct social inequalities.<sup>36</sup> If

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<sup>34</sup> For example, article XXIII of the American Declaration of the Rights and Duties of Man, article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.

<sup>35</sup> UN Doc E/1992/23 (n 16). Parr. 4.

<sup>36</sup> Article 1 of the Housing Act, in its second paragraph, expressly states “The State shall promote and organize all the activities inherent to the subject [of housing] by itself and with the participation of the social and private sectors, in accordance with the rules set out in this Act.” Furthermore, article 41 states that “the Federal

crowdfunding provides affordable and adequate housing, both public and private sectors contribute to the aforementioned human right. Thus, governmental regulation through the Fintech Act and other legal instruments should promote crowdfunding to facilitate and promote housing, especially to lower income individuals. The crowdfunding models previously discussed are also compatible with the Housing Act because it contemplates both social housing (donation-based crowdfunding), as well as privately funded housing through loans, constituting credit-based crowdfunding<sup>37</sup>.

Although the government has two official institutes (INFONAVIT and FOVISSSTE)<sup>38</sup> that seek to provide affordable housing,<sup>39</sup> they only give loans to formal workers and 56.24% of the active labor force is informal.<sup>40</sup> Mexicans who aren't eligible for an INFONAVIT or FOVISSSTE loan must turn to lesser known government programs with a very limited impact or to private funding, through a bank or through crowdfunding.

In 2012, out of all housing credit, 55% were loans granted by INFONAVIT and FOVISSSTE, 35% were loans by private banks, and

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Executive Power shall promote the participation of the social and private sectors in the implementation of housing programs." Additionally, article 4 of the same Act defines that the social sector corresponds to any person or entity that provides housing without any intent of profit for the provider, whereas the private sector corresponds to any person or entity that provides housing with an intent of profit.

<sup>37</sup> Housing Act (2006), arts 1, 4, 41, 47, 54, 85.

<sup>38</sup> The main difference between INFONAVIT and FOVISSSTE is that FOVISSSTE provides loans exclusively to government workers, while INFONAVIT provides loans to workers in the private sector.

<sup>39</sup> Article 3 of the *Ley del Instituto del Fondo Nacional de la Vivienda para los Trabajadores* (INFONAVIT Act) states that the institute has the objective of operating a credit system that allows workers to obtain cheap and sufficient credit to acquire or construct a house. Meanwhile, article 167 of the *Ley del Instituto de Seguridad y Servicios Sociales de los Trabajadores del Estado* (ISSSTE Act) mandates the operation of a financing system that allows government workers to obtain cheap and sufficient credit.

<sup>40</sup> Instituto Nacional de Estadística y Geografía. Encuesta Nacional de Ocupación y Empleo 2019. 4th Trimester.



the remaining 10% corresponded to other governmental credit and subsidy programs.<sup>41</sup> By promoting real estate crowdfunding, the percentage of credits granted by the government may decrease, which could allow the government to focus its housing policy on the population with the lowest income while promoting private credit access for the population that can afford it.<sup>42</sup>

Because 44.69% of the male workforce is employed formally, in contrast to 42.36% of the female workforce,<sup>43</sup> more men qualify for an INFONAVIT and FOVISSSTE loans than women (because formal employment is a *sine qua non* requirement to be eligible for the loan). In practice, this implies that men are more likely to obtain a government loan than women.<sup>44</sup>

However, crowdfunding programs need not consider whether a beneficiary is employed formally. No provision in the Fintech Act require crowdfunding companies to limit their services to formal workers. Therefore, not only does crowdfunding help the realization of adequate housing, it also contributes to gender equality because both men and women have equal access.

In the long run, contributing to the right to adequate housing through crowdfunding may, contribute to fulfilling other human

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<sup>41</sup> Data corresponds to housing credit granted in 2012 in Mexico. INEGI. Sistema de Cuentas Nacionales de México. Cuenta satélite de vivienda de México. 2008-2012. Preliminar. Año base 2008

<sup>42</sup> As is implied in Guillermo Olivera, 'Avances y Limitaciones en la Atención al Problema de la Vivienda y el Suelo Urbano en México. Una Aproximación desde el Marco Jurídico-Institucional' (2011) 24 Territorios 77.

<sup>43</sup> Inegi. Encuesta Nacional de Ocupación y Empleo 2019. 4th Trimester.

<sup>44</sup> Structural discrimination may impede women from realizing their right to housing. For more information, see Anna Kaijser, 'Women and the Right to Adequate Housing: An Introduction to Central Issues' (Habitat International Coalition, 2007).

rights.<sup>45</sup> Thus, a primarily financial Act, such as the Fintech Act, may contribute to the fulfillment of human rights.

Furthermore, due to World Bank policies and principles of efficiency and rentability of loans, in Mexico it becomes harder for low income families to benefit from government programs established to help with the acquisition of housing.<sup>46</sup> Nonetheless, because donation-based crowdfunding does not need to comply with those policies and principles, crowdfunding has the potential to have a greater impact in helping low income families acquire housing, and it can supplement traditional funding—although it may not have an impact on actual housing costs.<sup>47</sup> By allowing donation-based crowdfunding to advance the right to housing, crowdfunding companies may improve the general quality of housing in Mexico because social housing provided through other means currently does not satisfy the basic needs of its inhabitants.<sup>48</sup>

Crowdfunding that provides adequate housing constitutes a step taken toward the progressive realization of the right to adequate

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<sup>45</sup> The UN Committee on Economic, Social and Cultural Rights, in resolution E/1992/23 (n 6) (General Comment 4) expressly stated that “the right to housing is integrally linked to other human rights” (para 7), citing human dignity, non-discrimination, freedom of expression, freedom of association, freedom of residence, public decision making, and the right to not be subjected to arbitrary or unlawful interference (para 9).

<sup>46</sup> For further information on this, see Guillermo Boils, ‘El Banco Mundial y la Política de Vivienda en México’ (2004) *Revista Mexicana de Sociología* 345, 364-365; Ana María Durán Contreras and Judith Villavicencio Blanco, ‘Treinta Años de Vivienda Social en la Ciudad de México: Nuevas Necesidades y Demandas’ (2003) 146 *Revista Electrónica Geografía Ciencias Sociales*.

<sup>47</sup> Il-Horn Hann and Kim Keongtae, ‘Crowdfunding and the Democratization of Access to Capital-An Illusion? Evidence from Housing Prices’ (2019) 30 *Info Sys Res* 276.

<sup>48</sup> Gustavo Hernández and Sergio Velásquez, ‘Housing and Quality of Life. Measuring the Social Habitat in Western Mexico’ (2014) 24 *Bitácora Urbano-Territorial* 149, 164-165.

housing.<sup>49</sup> However, the State must ensure that the legal framework in place, primarily the Fintech Act, does not hinder crowdfunding companies' abilities to provide either credit-based or donation-based funding.

#### IV. Mexican Crowdfunding Regulation against the Right to Housing

In this Part, we discuss how current regulations may be preventing crowdfunding from achieving its highest potential to provide adequate housing. Although Mexico regulates crowdlending, the law does not apply to donation-based crowdfunding. Without a law on donation-based crowdfunding, we cannot determine the legality of the practice. The lack of legal guidance affects the legal security of the parties involved, making them hesitant to participate. Thus, the donation-based crowdfunding model—which could have a greater impact in the realization of the right to adequate housing in comparison to the loan-based model for the reasons analyzed in this Part—is deterred. Also, heavy regulation of crowdfunding may translate to financial and administrative burdens for crowdfunding companies. The costs involved for crowdfunding companies may then outweigh the benefits, thus discouraging crowdfunding. Finally, the Fintech Act has no provision referring to the Housing Act, so crowdfunding to develop real estate is not promoted by crowdfunding regulation.

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<sup>49</sup> The principle of progressive realization of economic, social, and cultural human rights, as is the case with the right to adequate housing, is stipulated both in Article 1 of the Mexican Constitution, as well as in article 2 of the International Covenant of Economic, Social and Cultural Rights.

### A. *Disregard of Donation-Based Crowdfunding*

Considering the rules that obstruct the crowdfunding mechanism as a means of obtaining the right to adequate housing, one default is the most important. Donation-based crowdfunding models are not regulated. In fact, article 16 of the Fintech Act establishes that the operations that can be realized via crowdfunding platforms are: loans, equity interest purchase, and purchase of royalties.

This failure to list donations leaves us with several questions. First, is donation-based crowdfunding permitted or forbidden? Donation-based crowdfunding platforms currently exist,<sup>50</sup> but it is possible that they will be forbidden in the future. Closure of platforms is possible as the law obligates crowdfunding companies to ask for authorization and once authorized, companies can only perform one of the three above-mentioned operations.

And even if donation-based campaigns persist, the fact that they are not regulated affects the legal security of the parties. For this reason, it is uncertain which rules apply, which are the obligations and rights of the parties, how a campaign funder can assure the fulfillment of the project, what are the effects if it is not fulfilled, etc. This uncertainty has a negative impact on the crowdfunding ecosystem.

Donation-based campaigns via crowdfunding have a significant relevance in the right to housing and should be permitted. A large segment of the population lacks adequate housing and will not be eligible for crowdfunding loans due to their lack of access to technology or lack of sufficient income to pay the loans. In fact, 43.6%

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<sup>50</sup> For example, *mi cochinito*.

of the Mexican population is considered poor.<sup>51</sup> Additionally, many cannot give collateral on the loans given via crowdfunding. Article 45, fr. III of the General Rules that apply to Fintech Companies establishes that in evaluating the risk of loans given for real estate development, the value of the property given as mortgage is taken into account. Yet, many do not own property to mortgage. Many people rent (15.9% of houses) or borrow (14.1% of houses) housing and others live in informal settlements.

Social property title holders also lack collateral.<sup>52</sup> Article 27 of the Mexican Constitution establishes the existence of social property, recognizing the right of population groups to possess and enjoy property in common. Social property is inalienable, unseizable, imprescriptible, and non-transferable.<sup>53</sup> Therefore, it cannot be the object of any security interest and cannot serve as collateral. The negative impact is obvious: 50.8% of Mexico is under social property, which represents approximately 100 million acres and 5.5 million social property title holders.<sup>54</sup>

The World Bank established that “All forms [of crowdfunding] fill a void where funding previously was unavailable.”<sup>55</sup> This is the reason why the lack of regulation of donation-based crowdfunding is a significant obstacle of the Mexican regulation of crowdfunding

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<sup>51</sup> The poverty is measured by the lack of income, nutrition, drinking water, housing, educations, basic services, etc. CONEVAL, ‘Medición Multidimensional de la Pobreza en México: Un Enfoque de Bienestar Económico y de Derechos Sociales’ (2014) 2ff.

<sup>52</sup> In Mexico, this is the case of the *Ejidatarios* and *Comuneros*. SEDATU, ‘Nota Técnica sobre la Propiedad Social’ (Registro Agrario Nacional 2018) 10ff.

<sup>53</sup> See J. Arrambide Montemayor, ‘Programme for the Promotion of Private Investment in Rural Property: the Mexican Experience’ (2012) XVII Unif L Rev 191, 192.

<sup>54</sup> SEDATU (n 52) 3. For more details about social property, see Azuela (n 2) 43ff;

<sup>55</sup> World Bank (n 9) 36.

within the context of the right of housing because it is a great means of funding.

### *B. Heavy Regulation*

All fintech companies must register with financial authorities; crowdfunding companies now need to comply with legal criteria that previously were not required. Thus, the administrative and financial burden on crowdfunding companies has increased,<sup>56</sup> as it usually does when heavy regulation is involved. Of the estimated four hundred companies whose activity fell in the scope of the Fintech Act and that were operating before the Fintech Act rules became legally binding, only eighty-five registered to continue operating in Mexico, and of those, only twenty-five were crowdfunding companies.<sup>57</sup> Crowdfunding companies that did not register with the government were forced to shut down; otherwise, their continued operation was deemed illegal. Fewer crowdfunding companies offering affordable housing than before means fewer people can fulfill their right to adequate housing through crowdfunding.

Another important element to consider is that higher operational costs for crowdfunding companies – to comply with the new Fintech Act – may in turn mean lower interest rates for investors or, in some

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<sup>56</sup> A survey conducted by Finnovista and Endeavor found that 46% of crowdfunding companies stated that higher costs of compliance with the Fintech Act would in turn produce inefficiencies; only 25% of the companies surveyed stated that they were 100% compliant with the new regulation of the Fintech Act. Source: <https://www.finnovista.com/radar/el-ecosistema-fintech-mexicano-recupera-el-liderazgo-en-america-latina-y-se-acerca-a-la-barrera-de-las-400-startups/> Retrieved on 02/21/2020.

<sup>57</sup> Comisión Nacional Bancaria y de Valores, Press Release No. 57/2019 (2019).

cases higher interest rates for borrowers<sup>58</sup> with credit-based crowdfunding. Thus, crowdfunding as a means to reach affordable and adequate housing may face a bigger obstacle. Even though, the crowdfunding model reduces funding costs in comparison to a bank, operational costs may nullify the benefits of reduced funding costs.<sup>59</sup> The crowdfunding industry was previously self-regulated. With the introduction of the Fintech Act, it must now comply with governmental regulation, creating a new burden.

For the aforementioned reasons, a comprehensive cost/benefit analysis is required to correctly ascertain the impact of the new Fintech Act in crowdfunding as a way to realize the right to adequate housing. If the law does not help increase access to cost-effective capital,<sup>60</sup> then the law may actually reduce crowdfunding in Mexico. It is no secret that traditional banks, who may have seen crowdfunding as a menace, were some of the actors who showed the most interest in the regulation of the Fintech industry in Mexico.<sup>61</sup>

### *C. Relation to the Housing Act*

Finally, the Fintech Act should have referred to the Housing Act, to ensure that crowdfunding can be used to realize the right to adequate housing that meets the criteria of the Housing Act. Even more, the Housing Act should have provisions that allow the government to supervise that activities implemented in accordance

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<sup>58</sup> See Elizabeth Kananu and Jackson Ireri 'Effects of Operational Costs on Lending Interest Rates of Commercial Banks in Kenya' (2015) 4 J Business, Economics Finance 368.

<sup>59</sup> Antonio Hernández, 'Ley Fintech: Los Bancos Estrenan Rivaless' *El Universal* (Mexico City, 22 September 2019).

<sup>60</sup> David Colgren 'Tech Practices: The Rise of Crowdfunding Social Media, Big Data, Cloud Technologies' (2014) 95 Strategic Finance 56.

<sup>61</sup> Mexican housing policy at times seems to be a policy in support of housing companies and banks that grant credit and not a policy supporting dignified housing. For more information, see González Hernández (n 3).

with the Fintech Act actually contribute to the progressive realization of human rights because when financial activities are involved, human rights may be overlooked. Thus, it is important that both loan and credit-based crowdfunding actually contribute to realize the right to housing, and that crowdfunding companies steer away from purely financial and profit-based goals<sup>62</sup>.

## V. Conclusion

The current Mexican crowdfunding regulation is a foe of the human right to housing. Not only does it fail to regulate the donation-based model, it may forbid it. This single omission impedes the use of crowdfunding by millions of Mexicans. Those most affected by this defect are the people most in need of decent places to live.

While the Fintech Act regulates the credit-based model, lower-income individuals who wish to realize their right to housing cannot easily access it. Hence, increasing crowdfunding costs, may result in the same cost of access to credit as it was before crowdfunding began.

Furthermore, crowdfunding companies must provide access to adequate housing, and not just to housing (that isn't adequate). Given the stakeholders involved, it may be difficult for

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<sup>62</sup> Housing in Mexico is not as aligned with the interests of low-income individuals as it is with the interests of house-constructing companies. For more information, see Carmen Bueno, 'Migración Indígena a la Construcción de Vivienda en la Ciudad de México' (1994) 14 *Nueva Antropología* 7; ; Catherine Paquette Vassalli & Mabel Yescas Sánchez, 'Massive Housing Production in Mexico City: Debating Two Policies' (2009) 3 *Revista Organización Latinoamericana Caribe Centros Históricos* 15; Beatriz García Peralta, 'Vivienda Social en México (1940-1999): Actores Públicos, Económicos y Sociales' (2013) 3 *Cuadernos Vivienda Urbanismo* 34; Brenda Merlos González and Rosalía López Paniagua, 'La Cooperativa para la Vivienda de Interés Social en México' in Alicia Ziccardi & Arsenio González (eds) *Habitabilidad y Política de Vivienda en México*, (UNAM 2015).



crowdfunding companies to provide credit when having to compete with traditional banks, and the government must consider that crowdfunding companies usually don't have the human and financial resources to comply with heavy regulation, as banks do.