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Reframing Spain: International Public and Private Law Configurations of Housing for Protecting Borrowers, Dwellers, and the Homeless¹

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Abstract

This Article examines the state of housing policies and mortgage laws in relationship to Spain by analyzing material from several rich cultural and legal sources. The language of protest marshaled in support of reforming the country’s laws to provide more extensive social services and to restrain financial institutions in their interaction with individual residential borrowers is the beginning place for the analysis. The relationships between the various regimes of the domestic sphere of Spain, the private law realm of mortgage contracts, as shaped by the European Union Directive on unfair terms, and the international human right to housing, as articulated in the treaty on economic, social and cultural rights are explored. The paper argues that there is a meaningful connection between the international human right to housing and EU-based protective mortgage consumer laws. The moments in which the various legal conceptions of individual protection are in dialogue with each other are highlighted as a way of understanding the emergence of a consumer protective culture. The limitations of conceptualizing housing needs and protections from the consumerist framework are also assessed. Finally, the Article evaluates whether housing rights and protections are better cast in the language of private law in comparison to international human rights law and the extent to which both conceptions align with the demands arising out of protest.

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I. Introduction

“H for Housing,” “Homes Not Hotels” and “Stop the Displacements” signs fill the space of the urban commons. The drama of Spain’s crisis of housing and homelessness caught the world’s attention. The imagination of international courts and human rights organizations were stirred to respond to a state in crisis. This Article examines the state of Spain’s housing crisis, the national policies and laws that contributed to its unfolding, the banking sector, European Union (“EU”) mortgage consumer protection laws, social protest movements mobilized around housing issues, and international human rights laws. The objective is to understand how these regimes operate in relation to each other and their roles in remediating or entrenching economic inequality.

The boundaries between EU private and public law are becoming less defined in the housing area. This is a new paradigm. It is a positive development from the standpoint of consumer protection. A vocal contingent of scholars has greeted the softening of the boundaries with apprehension. They argue that the blurring of regimes creates confusion in the law and deprives private law actors of their freedom to shape the rules, laws, and practices that will govern their action. In short, they maintain that the expertise of private law, which can furnish the detail necessary to the intricacies of the various deals at issue, is being undermined by the overlay of international human rights ideals. This Article reflects on the positives and negatives of the phenomenon marked by the melding of the private, public, protest domains. It offers suggestions for the participants in these realms (e.g., protestors, courts, borrowers, lenders) regarding proceeding forward in this direction.

This Article examines the right to housing, as expressed in international human rights law through the International Covenant on Economic Social and Cultural Rights, as interpreted by the UN Committee on Economic Social and Cultural Rights (ESCR Committee).³ It compares the protections afforded to individuals in relation to their housing needs in the human rights sphere to those conferred upon financial consumers of mortgage loans through the European Union Council Directive 93/13/EEC of April 5, 1993 on unfair terms in consumer contracts (“UCT Directive” or “Unfair Contract Terms Directive”), drawing upon European Court of Justice (“ECJ”) decisions and ESCR Committee decisions as source material.⁴ The courts and committees issuing the rulings have different competencies and procedural processes. Those differences are not disregarded by this analysis, rather the point is to consider how the issues and solutions are brought together under the heading of housing. Although the European Court of Human Rights (ECtHR) is a court with a broader constituency and more influence, responsible for interpreting the European Convention of Human Rights (ECHR) for the Council of Europe’s forty-seven members, its case law is not the focus of this study for

³ MBD v. Spain (CESCR 2015).

⁴ *Aziz v. Caixa d’Estalvis de Catalunya* (2013); *Sánchez Morcillo and Garcia v. Banco Bilbao* (ECJ First Chamber 2014); *Hidalgo et al. v. Caixabank, et al.* (Advocate General Wahl October 2014) (ECJ first chamber preliminary ruling January 2015); *Naranjo v. Cajatur Banco S.A.U.* (Advocate General July 2016) (ECJ issued in December 2016)

several reasons. While the ECtHR has addressed matters concerning human rights that relate to housing,⁵ there is no express right to housing stated in the convention. Complainants and the ECtHR have referenced a combination of rights in certain matters in order to furnish protection to individuals who allege that their human rights have been compromised due to forced evictions or a government’s failure to furnish public housing. Notably, Article 8(1) of the convention provides: “Everyone has the right to respect for his private and family life, his home and his correspondence.”⁶ The limited number of ECtHR decisions addressing housing do not concern the realm of financial instruments and debt. Both are central to the analysis herein. The extension of the public realm into the private by way of private contracts of debt is primary subject.

Exploring the potential expanse of the right to housing and its substance and rigor as a basis for stimulating remediating actions on the part of the state, brings these seemingly disparate worlds together. The centrality of housing in many European economies allows for a consideration of how it is treated across spaces, disciplines, regulatory frameworks, and courts. Housing is a common vehicle through which the government organizes individuals. The government, through the law, constructs the typologies of homeowner, tenant, landlord, and the homeless. It further divides these categories of homeowners and tenants into those in need of subsidizing, etc. Housing figures in the imaginary of individuals where it is often linked to conceptions of family and flourishing.⁷ Housing refers not only to structures for sale but also for rent. The conflicting interests of lenders, borrowers, property owners, non-owners, landlords, and tenants, present substantial challenges for Spain.

One of the key objectives in juxtaposing these various realms is to theorize about how they relate to each other. This paper charts the occurrence of fundamental rights concepts seeping into the private law realm, as well as moments of the appropriation of

⁵ See e.g., *Case of V.M. and Others v. Belgium*, Application no. 61025/11 (Grand Chamber) (November 17, 2016), <http://hudoc.echr.coe.int/fre?i=001-169047>; *Winterstein and Others v. France*, Application 27013/07, (July 28, 2016), <http://hudoc.echr.coe.int/eng?i=001-162215>.

⁶ The remaining section of Article 8 provides:

“2. There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

European Convention on Human Rights, as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13 and 16.

⁷ See Margaret Radin, “Property and Personhood” 34 *STAN. L. REV.* (1982) (linking home ownership with identity formation within American society). See also, Stephanie M. Stern, “Residential Protectionism and the Legal Mythology of Home” 107 *MICH. L. REV.* 1093 (2009). Stern critiques fundamental assumptions that have led to foregrounding and rewarding homeownership in the United States. Although her analysis is focused on the U.S., her insights have relevance for other Western economies.

constitutional right and private law concepts by protest groups to make claims against the State. The Article reflects on whether one regime is superior to another for accomplishing the multiple goals of: consumer protection, provision of housing, fostering and preserving business relationships, ensuring that fairness and equity are infused in financial transactions between professional and nonprofessional parties. It does, however, articulate the risks and benefits to this sharing of protections.

From the standpoint of the global economy, the first decades of the 2000s have been characterized by uncertainty. The fragility of the EU is at the forefront of discussion. Brexit is a major source of anxiety.⁸ Without a blueprint for disentangling the UK from an integrated market and for post-Brexit EU, there is reason for concern about what the impending divorce portends.⁹ This period is also a time of reflection on the various nations that comprise the EU and their significance to its survival and economic welfare.

Pushed over the brink of desperation and crisis, Spain is both a microcosm to test the questions of government responsiveness to disempowered citizens and a place for the ECJ and the ESCR United Nations Committee to explore their authority, as supranational actors, to borrow, consolidate and interpret concepts across theoretical frames of public and private law.¹⁰ An unfolding drama is occurring between the public and private. Spain has emerged as a central point of interest in discussions within international legal, political communities, and activist communities (as a potential model of activism). Spain is an important power with respect to the future and stability of the EU. It is not merely because of the orientation of key legal institutions towards Spain that motivates this Article, but also the opportunity for comparing and contrasting the approaches of independent and interdependent legal regimes to mortgage consumer protection and the right to housing. In this sense, the Article exceeds the geographical frame of Spain.

Spain presents an interesting object of study not only because of its economic status and relevance for the EU, but because the government’s formal legalistic turn to housing offers an opportunity to examine how the construction of a consumer protective culture unfolds and how it may be obstructed. With the layer of the ECJ’s intervention, it also offers invaluable information regarding the mechanics of implementing EU policy. It sheds light on the difficulties of translating an EU directive into domestic policy and considers the prospects of harmonization. Spain is also interesting because of the ongoing political protest activity that had some catalytic effects on the government. Where traces

⁸ Insert cite.

⁹ Peter S. Goodman, “Preparing for ‘Brexit’ Britons Face Economic Pinch at Home in THE NEW YORK TIMES (June 11, 2017), <https://www.nytimes.com/2017/06/11/business/economy/britain-economy-election-brexit.html?action=click&contentCollection=Business%20Day&module=RelatedCoverage®ion=EndOfArticle&pgtype=article>.

¹⁰ I recognize that the ECJ has a particular charge from the EU Council to _____.
https://curia.europa.eu/jcms/jcms/Jo2_6999/en/

of protest language can be discerned in the subsequent policies and laws adopted and in the related court decisions, they are highlighted.

The Article is structured: Part II explains the comparative method adopted. Part III explores the origins of Spain’s housing crisis and the contributing factors of debt and the structuring of transactions in the market. Part IV provides background on the protests that arose in the midst of Spain’s dire economic situation. Part V discusses the centrality of housing in the global economy. It highlights how housing functions as an important organizing mechanism and identifies two essential legal tools that are designed to address inequities in housing. These are: the EU UCT Directive and the IESCR right to housing. Part VI highlights the key rulings of the ECJ and the ESCR Committee that form the basis of the Article’s analysis. The section examines how consumer protection for mortgage loan borrowers and renters is constructed. Part VII analyzes the cases and identifies moments of overlap between the regimes. It also teases out the important concepts of unconscionability and vulnerability, exploring their utility and parameters. Part VIII explores the new paradigm and the relevance of the hybrid protections. Part IX concludes the Article.

II. Method

This is a comparative project that engages in policy analysis. It is comparative in several respects. The paper entails an examination of several legal regimes with regard to probing the meaning of the right to housing and giving it content. To a limited extent, United States mortgage and bankruptcy law is one reference point used to analyze the protections afforded to borrowers and lenders under Spain’s civil law system. Because Spain is a civil law nation, the mere transplanting of American responses to insolvency matters would not be easily accomplished. Highlights include how Spain’s mortgage laws treat the concept of property redemption, property valuation in foreclosure, and discharge of personal mortgage indebtedness when there is a remaining monetary deficiency after repossession and eviction. This Article also examines and compares the utility of the terms that are foregrounded by each realm. For example, private law offers the concept of unconscionability to redress dysfunctions, inequities, and harms perpetrated in business transactions. Human rights law and constitutional law offer the concept of vulnerability. Are these sufficient to accomplish protecting citizens in their housing affairs?

Konrad Zweigert and Hein Kotz propose that one of the primary functions of comparative law is “the discovery of models for preventing and resolving conflicts.”¹¹ Zweigert and Kotz continue on to elaborate other positives associated with the discipline of comparative, three of which have particular relevance for this project. These three include: “comparative law as a tool of construction,” “comparative law as a contribution to the systematic unification of law,” and comparative law as facilitating “the

¹¹ Konrad Zweigert and Hein Kotz, Chapter 2 “The Function and Aims of Comparative Law” in AN INTRODUCTION TO COMPARATIVE LAW (3rd ed. Oxford University Press, 1998), trans. Tony Weir, 15.

development of a private law common to the whole of Europe.”¹² With respect to the first category the ECJ and the ESCR Committee are engaging in their own comparisons in interpreting the relevant laws and documents (mortgages, rental contracts) before them. In analyzing their decisions, my article is comparing interpretations and approaches in several spheres as a way of conceptualizing the paradigm shift and noting commonalities and differences. The second category is relevant to this work in several respects. The EU UCT can be viewed as bestowing a right to EU Members to be protected from unfair contract terms. The right to housing, as stated in the ICESCR covenant, offers some detail on the scope of that rights. This paper argues that, there are moments of when there is overlap between these two rights --- which in the international human rights realm is resolved in the right to housing and which in the EU realm is resolved in the UCT right (which subsumes unconscionability ____ and good faith obligations). Can we view what is occurring as a unification of concepts across spheres? This is a different kind of unification because rather than arriving at “best” solutions and practices by comparing approaches to issues within a discrete realm (private law, contract law), this Article examines different approaches across the fields of public and private law. The EU guidelines are already a product of comparison of various approaches to issues.¹³ The third category [Develop].

Zweigert and Kotz’s recommendations regarding teaching comparative law are useful for elucidating the value of comparison. They write that textbooks should “lay out the different approaches to a problem, state the critical arguments which illuminate and enliven it, and then indicate which is the best solution here and now.”¹⁴

This project engages in policy analysis by outlining the strengths and shortcomings of Spain’s current economic policies that hinge the successful development of the country on housing construction and “neoliberal” banking policies to the detriment of the populace. It examines the extent to which Spain’s present policies and laws in the areas of housing and residential mortgages exacerbate the societal ills of poverty and homelessness, ultimately, destabilizing the country. Finally, the piece draws conclusions about the effectiveness of private law concepts as compared to public human rights law to protect individuals in their relationships to housing (including states of homelessness) and “consumption” of housing.

¹² Konrad Zweigert and Hein Kotz, Chapter 2 “The Function and Aims of Comparative Law” in AN INTRODUCTION TO COMPARATIVE LAW (3rd ed. Oxford University Press, 1998), trans. Tony Weir, 16.

¹³ Konrad Zweigert and Hein Kotz, Chapter 2 “The Function and Aims of Comparative Law” in AN INTRODUCTION TO COMPARATIVE LAW (3rd ed. Oxford University Press, 1998), trans. Tony Weir, 24.

¹⁴ Konrad Zweigert and Hein Kotz, Chapter 2 “The Function and Aims of Comparative Law” in AN INTRODUCTION TO COMPARATIVE LAW (3rd ed. Oxford University Press, 1998), trans. Tony Weir, 23.

III. Falling Down – The House that Spain Built: Financialization, Repossessions and Evictions

Spain is consumed with matters of housing instability and over-indebtedness. Economic devastation remains imprinted on the landscape despite some economists’ cautious forecasts of growth and their declarations that the nation’s spectacular descent into financial austerity and social upheaval,¹⁵ is at an end. There is unfinished business, making it necessary to analyze a primary vehicle of the country’s woes during this period: Housing. Critical examination of the government policies and legal contributors that structurally fomented the crisis and the various components that are facilitating the rise out of it, is also urgently needed. Reflection is warranted in order to avoid, or more likely, be better prepared, for the future economic emergency.¹⁶ Moreover, careful analysis is required in order to identify the effective social, political, and legal constructs that will be protective of people, that will enhance their quality of life, and foster their development as human beings. This focus is in contrast to the economic metrics and language that are often used in the mainstream to describe the country’s restoration to purported equanimity:

“The sense of revival is palpable along the Barcelona waterfront, where stevedores work the arms of giant cranes hoisting containers full of factory wares onto giant vessels bound for points across Europe and Asia.”¹⁷

¹⁵ Peter S. Goodman, “Spain’s Long Economic Nightmare Is Over” in THE NEW YORK TIMES, (July 28, 2017), <https://www.nytimes.com/2017/07/28/business/spain-europe-economy-recovery-unemployment.html>.

¹⁶ Spain is contending with the Catalonia’s threatened secession, which would have a tremendous detrimental impact on its national economy.

¹⁷ The Organisation for Economic Cooperation and Development provides the following economic forecast summary for Spain:

“After expanding at over 3% in the past three years, the economy is projected to grow at a robust, but more moderate, pace in 2018 and 2019. Favourable financial conditions and strong job creation will continue to support private domestic demand. Net exports will also contribute positively to GDP growth. Inflation will remain moderate as unemployment remains high.

Public debt is gradually declining, but remains high. As the recovery continues, public debt is projected to fall in relation to GDP, but the government will have to ensure further significant declines in the years ahead, by further improving its fiscal position and introducing additional reforms to strengthen long-term growth. The implementation of the pension reform will be key to ensure long-term fiscal sustainability. More effective labour market policies and re-skilling are needed to further reduce unemployment and inequalities, and make growth more inclusive.”

Organisation for Economic Co-operation and Development (May 2018), <http://www.oecd.org/eo/outlook/spain-economic-forecast-summary.htm>.

Rather than treat Spain’s polity as a secondary component in the mix of ingredients necessary for a successful global market, this work visualizes the case study of Spain, beyond the frame of consumer citizens and economic growth. The people are of paramount concern. The lessons are for all democracies.

Spain entered into the EU on January 1, 1986.¹⁸ Its movement into the EU fold was treated with _____. Prior to its EU acceptance, the government’s policies were laying the conditions for the economic crisis that emerged in 2008. General Francisco Franco, in the latter years of his reign,¹⁹ anointed housing, as a strategy for national economic development and prosperity. His regime transformed Spain from a nation of renters into one fixated on homeownership.²⁰ A country of approximately 35 million in 1974,²¹ was enticing as a pool of potential new borrowers and home owners for profit-focused financial institutions and the government. Privileging homeownership over the development and subsidization of affordable housing continued as the standard government practice even after the transition to a parliamentary democracy and constitutional monarchy. By 2014, Spain had an 85% rate of homeownership.²² Rather than lead to a vibrant healthy economy in which all residents were able share in the country’s wealth, this narrowly tailored growth policy, combined with archaic mortgage laws, and global economy pressures created the conditions for collapse financial disaster.²³

At the time the crisis was raging, housing options were severely limited. Plenty of overvalued housing for purchase was available in contrast to other choices.²⁴ Rental

See, Peter S. Goodman, “Spain’s Long Economic Nightmare Is Over” in THE NEW YORK TIMES, 2 (July 28, 2017), <https://www.nytimes.com/2017/07/28/business/spain-europe-economy-recovery-unemployment.html>.

¹⁸ Spain – EUROPA European Union, https://europa.eu/european-union/about-eu/countries/member-countries/spain_en.

¹⁹ General Franco was a dictator who ruled the country from 1936 to 1975. See <https://www.britannica.com/biography/Francisco-Franco>.

²⁰ More than fifty percent of Spain’s inhabitants were renters in 1950. Melissa García-Lamarca, “Reconfiguring the Public Through Housing Rights Struggles in Spain” in CITY UNSILENCED: URBAN RESISTANCE AND PUBLIC SPACE IN THE AGE OF SHRINKING DEMOCRACY, JEFFREY HOU AND SABINE KNIERBEIN, EDS. (Routledge 2017), 44 – 55, 45

²¹ Eric Solsten and Sandra W. Meditz, Spain: A Country Study, Washington GPO for the U.S. Library of Congress (1988), <http://countrystudies.us/spain/34.htm>. For 1975, the Country Study lists “an estimated base population of about 35.5 million.”

²² Judith Sunderland, SHATTERED DREAMS: IMPACT OF SPAIN’S HOUSING CRISIS ON VULNERABLE GROUPS” Human Rights Watch, 2014, 5.

²³ Many factors led to the 2008 recession. This Article focuses on those areas related to housing. For an elaboration of additional components, see _____.

²⁴ From the period of 1997 – 2007, “Spain built more houses than the number of new-builds in France, Germany, and the United Kingdom combined, and the real estate and construction constituted as much as

housing inventory was only 11% of the overall available housing in 2014.²⁵ Furthermore, the substantial cost of renting deterred many. In the years leading up to the 2008 recession, rental rates often exceeded the initial costs of a mortgage.²⁶ For those in need of more affordable options or government financial support, the state and the market were unresponsive.²⁷ Social and public housing accounted for a paltry “2 percent of the total housing stock,” according to 2014 figures.²⁸ Homeownership seemed a logical option to achieve the goals of securing a place to live, investment, and wealth accumulation.

Yet the government’s emphasis on homeownership came at a significant cost to the quality of life of those living in Spain. The Rapporteurs of the County Report for Spain state that in 2012, individuals devoted “on average 39.4 per cent of the[ir] earnings” towards paying home mortgage loan debt.²⁹ The unemployment rate which has ranged from ___ - 25%³⁰ has not only made it harder for individuals to satisfy their mortgage loan debt, but also made it more difficult to secure rental housing. Inevitably, the confluence of negative factors led to massive loan defaults. Banks active in the Spanish market were unsympathetic. Assisted by rigid national mortgage procedure laws, and lender-friendly contracts, banks aggressively initiated foreclosure proceedings, repossessing over 400,000 homes during the period of 2007 through 2012.³¹ The

43 percent of the nation’s GDP.” Judith Sunderland, SHATTERED DREAMS: IMPACT OF SPAIN’S HOUSING CRISIS ON VULNERABLE GROUPS” Human Rights Watch, 2014, 14, (citation omitted).

²⁵ Judith Sunderland, SHATTERED DREAMS: IMPACT OF SPAIN’S HOUSING CRISIS ON VULNERABLE GROUPS” Human Rights Watch, 2014, 5.

²⁶ Judith Sunderland, SHATTERED DREAMS: IMPACT OF SPAIN’S HOUSING CRISIS ON VULNERABLE GROUPS” Human Rights Watch, 2014, 5.

²⁷ See Montserrat Peraja Eastaway and Ignacio San Martìn Varo, “The Tenure Imbalance in Spain: The Need for Social Housing Policy” 39 Urban Studies 283 – 295 (2002).

²⁸ Judith Sunderland, SHATTERED DREAMS: IMPACT OF SPAIN’S HOUSING CRISIS ON VULNERABLE GROUPS” Human Rights Watch, 2014, 5.

²⁹ Pablo Guutiérrez de Cabiedes and Marta Cantero Gamito, “Country Report Spain” in CONSUMER DEBT AND SOCIAL EXCLUSION IN EUROPE, Hans-W. Micklitz and Irina Domurath, eds. (Ashgate 2015), 69.

³⁰ See Judith Sunderland, SHATTERED DREAMS: IMPACT OF SPAIN’S HOUSING CRISIS ON VULNERABLE GROUPS, Human Rights Watch 2014. Suzanne Daley, “Foreclosure in Spain Can Mean Lifetime in Debt to the Bank” THE NEW YORK TIMES (October 27, 2010).

³¹ Insert cite. Judith Sunderland drawing from statistics furnished by the Bank of Spain reports:

“In May 2013, the Bank of Spain published its own figures for the first time. These data were updated in January 2014, when the Bank of Spain also provided data on the first half of 2013, suggesting an increase in repossessions by banks. For 2012, the Bank of Spain reported 39,051 repossessions of primary residences. In the first half of 2013, 28,170 primary residences were repossessed.[]”

Judith Sunderland, SHATTERED DREAMS: IMPACT OF SPAIN’S HOUSING CRISIS ON VULNERABLE GROUPS” Human Rights Watch, 2014, 16 (citation omitted).

repossessions and evictions created devastating social and economic problems. Homelessness, due to both rental and mortgage-based evictions, skyrocketed to _____.³²

The unfettered actions of banks and landlords highlighted Spain’s failure to develop comprehensive and effective socio-economic policies. The government had to reckon with the absurdity of having “3.5 million residences – or 13.7 percent of the total housing stock”³³ vacant while thousands _____ people remained unhoused and destitute.³⁴

By _____ Spain’s population had increased to 46 million people. The seriousness of having the fourth largest economy in the EU enthralled in a housing-linked crisis was evident. The social and economic ills forged an agenda for reform: overindebtedness, financialization, predatory lending in general, predatory lending targeted at certain “vulnerable” groups such as women and immigrants, national legal procedural and substantive constraints on debt restructuring and debt relief, and homelessness.

Overindebtedness refers to leveraging one’s assets to the point of where it becomes nearly impossible to meet one’s daily financial obligations based upon one’s monthly income or assets. The costs of debt (e.g., housing, credit cards, etc.), food, health expenses, and other daily living expenses, exceed individual or family income and asset levels. Additionally, a substantial portion of the household’s available income is earmarked for paying the incremental installments necessary to pay off or maintain the debt.

Financialization is the fairly new term used to describe the process, policies, and practices related to conceptualizing a system in terms of profiteering and revenue. There are many significant problems when a government supports this strategy, not the least of which are the social interests of individuals. The sovereign is devoted towards its solvency and profit-making without acknowledging any significant social welfare

³² Francisco Lirola, “A Night on the Street with Madrid’s Homeless” in Huffington Post (July 27, 2016), https://www.huffingtonpost.com/entry/madrid-homeless_us_5798c7e6e4b01180b5310c2f; Inés Benitex, “The Invisible Reality of Spain’s Homeless” Inter Press Service (October 28, 2014), <http://www.ipsnews.net/2014/10/the-invisible-reality-of-spains-homeless/>.

³³ Judith Sunderland, SHATTERED DREAMS: IMPACT OF SPAIN’S HOUSING CRISIS ON VULNERABLE GROUPS” Human Rights Watch, 2014, 14.

³⁴ Nick Whigham, “This is What it Looks Like When A Credit Fueled Housing Bubble Bursts” (April 25, 2018), <https://www.news.com.au/technology/environment/natural-wonders/this-is-what-it-looks-like-when-a-credit-fuelled-housing-bubble-bursts/news-story/b3b877d3012fbeb35b2a7164ad2ec548>; Barry Keith, “A Symbol of Spain’s Housing Crisis Finds A Community” CityLab (August 9, 2017), <https://www.citylab.com/equity/2017/08/a-symbol-of-spains-housing-crisis-finds-a-community/536280/>; Lauren Frayer, “In Spain Entire Villages Are Up For Sale And They Are Going Cheap” NPR (August 23, 2015) <https://www.npr.org/sections/parallels/2015/08/23/433228503/in-spain-entire-villages-are-up-for-sale-and-theyre-going-cheap>; Kate Abbey-Lambertz, “There’s A Lesson in Spain’s Surreal Unfinished Cities” Huff Post (2/11/2016) https://www.huffingtonpost.com/entry/spain-empty-cities_us_56ba6221e4b0b40245c47dff.

responsibilities on its part. From this perspective, laws and practices which facilitate businesses -- understanding of banks will be promoted over those designed to foster individual well-being. Economists and other scholars have critiqued the numerous problems associated with financialization, including its shortsightedness, narrow emphasis, and its role in fostering inequality.³⁵

Predatory lending was rampant through Spain’s economy and that of the United States in the period leading up to bursting of the housing bubble in 2008. Numerous practices fit under the heading predatory lending. Some of these unsavory practices include: Overvaluation of residential properties and extending excessive credit. Predatory lending often involves the targeting by financial institutions of undercapitalized and marginalized groups for residential mortgage loans that have borrower unfriendly terms or are structured in a way to cause defaults and to extract as much capital from the borrowers or guarantors prior to or even after default. Human rights groups and litigants have called into question loans with exorbitantly high interest rates, floor interest rates in excess of the agreed upon index, and hefty default interest rates.³⁶ Immigrants are another critical part of the story. Many of the new consumers for Spain’s housing market, were immigrants.³⁷ According to one human rights group, immigrants “were among the first groups affected by the mortgage crisis and appear to be disproportionately represented among those who have faced foreclosure and eviction.”³⁸ This point is relevant to the discussion of vulnerability, as well. There is evidence that banks specifically targeted

³⁵ See Mike Collins, “Wall Street and the Financialization of the Economy” in FORBES (February 4, 2015), <https://www.forbes.com/sites/mikecollins/2015/02/04/wall-street-and-the-financialization-of-the-economy/#31224d3f5783>; Thomas Palley, “Financialization: What it is and Why it matters” Political Economy Research Institute Working Paper Series, University of Massachusetts Amherst (November 2007).

In a comment on Rana Foroohar’s book, MAKERS AND TAKERS, the Wharton School of business writes:

“Where finance and banking were once the servants of the larger economy, pooling deposits and directing them to productive investment, they have now become the master. The “financialization” of banking, and of business in general, has hampered real growth and innovation while exacerbating inequality.”

Knowledge@Wharton, “The Pitfalls of ‘Financialization’” (June 28, 2016), <http://knowledge.wharton.upenn.edu/article/pitfalls-financialization-american-business/>.

³⁶ See e.g., _____.

³⁷ Human Rights Watch, SHATTERED DREAMS: IMPACT OF SPAIN’S HOUSING CRISIS ON VULNERABLE GROUPS, (2014), 3

³⁸ Human Rights Watch, SHATTERED DREAMS: IMPACT OF SPAIN’S HOUSING CRISIS ON VULNERABLE GROUPS, (2014), 3.

immigrants for problematic loans.³⁹ In _____, the percentage of borrowers that defaulted on mortgages was _____.⁴⁰

Spain has been long overdue for housing and mortgage law reform. The country’s mortgage laws date back over one hundred years.⁴¹ A court order, following repossession of the home, could lead to garnishing the wages of the borrower. The harshness of the response of financial institutions and the government’s ineffectual action, ostensibly lacking in social consciousness, pushed thousands of bodies out onto the street, in protest.

IV. Innovative Activism - The Language of Protest

Renters, squatters, the homeless, and mortgage borrowers besieged the streets of Spain in 2008 with demands that the state respond to their suffering. The demands were at once clothed in the language of human rights and legal rights. At times, they were harder to classify. The massive number of evictions prompted the mobilization of social and political groups such as PAH⁴² demanding that the government intervene.

Platform for those Affected by Mortgages (PAH) and H for Housing have been instrumental in bringing about changes in Spain’s housing laws.⁴³ The plight of homeowners remained unaddressed until social pressures and media coverage of several suicides⁴⁴ motivated the Spanish government to take some action. PAH’s early formations occurred in Barcelona in 2009 in connection with Spain’s severe economic and housing crisis. In their initial formations, the H for Housing group’s aim was broadly defined as an effort to obtain quality affordable housing whereas PAH was focused on addressing the harmful practices of banks and law’s inadequacies regarding protecting mortgage consumers. PAH eventually transitioned from local level groups to the national stage.⁴⁵ PAH has acted in the role of reporter, chronicling the government’s actions that it asserts are in violation of human rights. PAH has engaged in civil disobedience. The civil disobedience includes occupying banks,⁴⁶ public spaces, and foreclosed homes. The

³⁹ Human Rights Watch, SHATTERED DREAMS: IMPACT OF SPAIN’S HOUSING CRISIS ON VULNERABLE GROUPS, (2014), 3 – 4.

⁴⁰ Cite Miloon Kothari Report.

⁴¹ Insert cite.

⁴² The human rights agency, Housing Rights Watch, describes PAH as “a platform of local organizations fighting evictions . . . [that] provides support to thousands of people struggling with the threat or fact of eviction and all the associated complications.” Housing Rights Watch Newsletter 7 (October 2014), 1, http://www.housingrightswatch.org/sites/default/files/2014-10-21%20HRW%20newsletter%20EN_0.pdf.

⁴³ There were important antecedents to these groups, such as the 15-M anti-austerity plaza occupations of May 2011 and #nolevotes (“don’t vote for them”), whose founder was a Spanish lawyer.

⁴⁴ Sonya Dowsett, “Insight: In Spain, banks buck calls for mortgage law reform” REUTERS WORLD NEWS (February 26, 2013).

⁴⁵ Housing Rights Watch Newsletter 7 (October 2014), 6.

⁴⁶ Housing Rights Watch Newsletter 7 (October 2014), 6.

marches are aimed at informing both the public and European institutions. PAH was already framing its demands in legal terms – so there is a convergence at certain moments between the legal real and the protest realm. Robert Cover writes:

“In each case an act signifies something new and powerful when we understand that the act is in reference to a norm. It is this characteristic of certain lawbreaking that gives rise to special claims of civil disobedience. But the capacity of law to imbue action with significance is not limited to resistance or disobedience. Law is a resource in signification that allows us to submit,[] rejoice, struggle,[] pervert, mock, disgrace, humiliate, or dignify.[]”⁴⁷

PAH initiated lawsuits.⁴⁸ One of the main leaders of PAH, Ada Colau, is a human rights lawyer. This critical for assessing the nature of the activists demands. Furthermore, Colau publicized the plight of embattled borrowers and the homeless by writing reports/books, Human Rights Watch conducted workshops on housing to inform people of rights and provide a venue for brainstorming various strategies, including legal ones.⁴⁹ PAH recommended legislative changes to the Spanish government. The Citizens Legislative Initiative was one of its significant campaigns that led to the Government’s adoption of Law 1/2013.⁵⁰ Law 1/2013 reformed Spain’s mortgage system by _____.

[Revise and expand this section]

V. The Multivalent Concept of Housing

Housing is an organizing concept for this analysis. This piece draws upon the concept to unify the regimes and make comparisons across them, even though the private law realm, represented herein by the EU Unfair Contract Terms Directive and related ECJ jurisprudence, does not express claims and remedies in terms of a right to housing. The ECJ and the Directive emphasize the contractual relationship and resort to an alternative lexicon of unconscionability, (un)fairness, and good faith. The social aspects that are associated with the right to housing, in terms of the private law sphere of residential homeownership, has to be interpolated. In the context of the private realm, the right to housing pertains to several ideas. The concept of housing in private law emerges in connection with rules regarding the proper treatment of consumers⁵¹ in the context of residential mortgage or landlord tenant transactions. The rules may be intended, *inter*

⁴⁷ Robert Cover, *Nomos and Narrative*, Vol. 97:4, p. 8 *Harvard Law Review* (footnotes and citations omitted).

⁴⁸ The Bloc Salt case.

⁴⁹ Housing Rights Watch Newsletter 7 (October 2014), 1, http://www.housingrightswatch.org/sites/default/files/2014-10-21%20HRW%20newsletter%20EN_0.pdf

⁵⁰ Pablo Gutiérrez de Cabiedes and Marta Cantero Gamito, “Country Report Spain” in *CONSUMER DEBT AND SOCIAL EXCLUSION IN EUROPE*, Hans-W. Micklitz and Irina Domurath, eds. (Ashgate 2015), 78.

⁵¹ Here, I am drawing a distinction between individuals in consumer transactions as opposed to businesses.

alia, to limit and curtail predation, or govern the resident’s ability to stay in place and extend his tenure or permit borrowers to limit and terminate debt in the event of contractual default.

From the international human rights sector, the Council of Europe⁵² and the United Nations, interposed the concepts of “social inclusion” and “human dignity” into the debates concerning debt and housing.⁵³ Social inclusion is an idea that is aligned with the logic of the market.⁵⁴ It derives from the belief that in order to have a healthy functioning market, it is necessary for individuals to have the resources and desire to participate. People need to be able to secure credit. They need to have assets to pledge and leverage when seeking financing. They need to be motivated to make purchases. Individuals should not be so discouraged by their negative economic plight that they no longer have the will to buy specific products, such as houses. The term “social inclusion” is used by the human rights and business sectors, but for the latter, the notion of economic inclusion is encapsulated. Iain Ramsey, for example, characterizes home ownership as “a form of asset-based welfare” that “may be linked to social mobility and individual identity.”⁵⁵

Human dignity is a foundational concept for international human rights. Human dignity speaks more broadly to the constitution of the individual who is to be accorded respect, a basic level of treatment, and privacy, merely by virtue of being human. As a norm, it extends to individuals certain protections in their person and in how they live. It also places obligations and restrictions on the state (as well as others), in terms of how it should interact with human beings. The right to housing, as constituted in the international treaty on Economic, Social, and Cultural Rights (ICESCR),⁵⁶ the European Charter of Fundamental Rights, and Spain’s 1978 Constitution, manifest aspects of the notion of human dignity.

⁵² The Council of Europe is composed of 47 Member States, as contrasted with the EU Council, which is made up of the heads of the 28 EU Member States.

⁵³ Iain Ramsey, “Two Cheers for Europe: Austerity, Mortgage Foreclosures and Personal Insolvency Policy in the EU” in CONSUMER DEBT AND SOCIAL EXCLUSION IN EUROPE, Hans-W. Micklitz and Irina Domurath, eds. (Ashgate 2015), 196.

⁵⁴ Iain Ramsey, “Two Cheers for Europe: Austerity, Mortgage Foreclosures and Personal Insolvency Policy in the EU” in CONSUMER DEBT AND SOCIAL EXCLUSION IN EUROPE, Hans-W. Micklitz and Irina Domurath, eds. (Ashgate 2015), 196.

⁵⁵ Iain Ramsey, “Two Cheers for Europe: Austerity, Mortgage Foreclosures and Personal Insolvency Policy in the EU” in CONSUMER DEBT AND SOCIAL EXCLUSION IN EUROPE, Hans-W. Micklitz and Irina Domurath, eds. (Ashgate 2015), 205.

⁵⁶ International Covenant on Economic Social and Cultural Rights, Article 11, paragraph 1, adopted and opened for signature, ratification, and accession by General Assembly Resolution 2200A (XXI) of December 16, 1966, entry into force January 3, 1976, in accordance with Article 27, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

The right to housing, enshrined in Article 11(1) of the international treaty on Economic, Social, and Cultural Rights,⁵⁷ recognizes that individuals, as a basic minimum for their dignity, are entitled to some kind of shelter, along with other basic comforts such as clothing and food.⁵⁸ Spain, as a ratifying member of treaty since 1977, is obligated to incorporate the right to housing within its domestic legal system in order to meet its international obligations.⁵⁹ The European Charter of Fundamental Rights offers another avenue of housing protection. Article 34.3 of the EU Charter on Fundamental Rights avers that “... the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources.”⁶⁰ The Charter contains other rights that are related to housing such as the consumer protection right (Article 38), the protection of family life (Article 33), and the right to access of services of general economic interest (Article 39). Spain’s constitutional right to housing, granted in Article 47, sets a floor regarding what the state must provide to its populace in declaring that, “[a]ll Spaniards are entitled to enjoy decent and adequate housing.”⁶¹ It further imposes obligations on what the government must do in order to fulfill the right in requiring, “public authorities” to “promote the necessary conditions and ... establish appropriate standards in order to make this right effective, regulating land

⁵⁷ Article 11(1) of IESCR provides:

“The States Parties to the present covenant the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.”

⁵⁸ International Covenant on Economic Social and Cultural Rights, Article 11, paragraph 1, adopted and opened for signature, ratification, and accession by General Assembly Resolution 2200A (XXI) of December 16, 1966, entry into force January 3, 1976, in accordance with Article 27, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx>.

⁵⁹ Spain initially signed the treaty on September 28, 1976. It then ratified it on April 27, 1977. United Nations Treaty Collection, Chapter IV, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=_en

⁶⁰ The full text of Article 34 paragraph 3 states:

“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 Community law and national laws and practices.”

Article 34(3) of the Charter of the European Union.

Other EU grounded international legal instruments that are relevant to housing rights include, The Treaty of the EU, Anti-discrimination Legislation, and EU Agency for Fundamental Rights. <http://www.housingrightswatch.org/page/eu-housing-rights>.

⁶¹ Article 47 of the Spanish Constitution (1978).

use in accordance with the general interest in order to prevent speculation.”⁶² Finally, the constitutional right incorporates a pledge that the “community shall participate in the benefits accruing from the urban policies of the public bodies.”⁶³ This language addresses the matter of land use planning and policies. It affirms the government’s obligation to remain mindful of its duties to the public in administering housing and other matters.

The cases examined herein are primarily grounded in the EU UCT Directive and in ICESCR rather than the Spanish constitutional right and the EU Charter.⁶⁴ Nonetheless, it is important to be cognizant of all these resources. The national constitutional right is an important backdrop to the housing protests that unfolded in the streets. It is also symbolic of the nation’s pledge of commitment to a housing right that private individuals can draw upon to hold the government accountable and ground their demands for the government to undertake certain actions. The crucial test, however, is the materiality of the right. Materiality, refers to whether the right can be actualized to transform the plaintiff’s demands into practical outcomes of remaining in one’s home or having one’s loan debt canceled.

The first signs of a weakening of the doctrinal partitions between private and public law arose with the ECJ’s interpretation of the UCT Directive in the landmark *Aziz v. Caixa d’Estalvis de Catalunya* case of 2013.

VI. A Softening of the Partitions Between the Domains - The Principle of Mortgage Consumer Protection Articulated in *Aziz v. Caixa d’Estalvis de Catalunya* (March 14, 2013)

Aziz marks the European Court of Justice’s⁶⁵ entry into the turbulent protests over housing and debt. The UCT Directive functioned as the Court’s instrument of intervention. With some exceptions, the Directive covers, consumers, sellers, and suppliers operating

⁶² Article 47 of the Spanish Constitution (1978).

⁶³ Article 47 of the Spanish Constitution (1978). The entire text of Article 47 reads:

“All Spaniards are entitled to enjoy decent and adequate housing. The public authorities shall promote the necessary conditions and shall establish appropriate standards in order to make this right effective, regulating land use in accordance with the general interest in order to prevent speculation.

The community shall participate in the benefits accruing from the urban policies of the public bodies.”

⁶⁴ One exception is the *Sánchez Morcillo and Abril Garcia v. Banco Bilbao* case in which one of the plaintiffs draws upon the EU Charter to make an ineffective remedy claim.

⁶⁵ The ECJ is the Court of Justice of the European Union also known as the European Court of Justice is based in Luxembourg and “encompasses three distinct courts (Court of Justice, General Court, and Civil Service Tribunal) that exercise the judicial functions of the European Union (EU), which aims to achieve greater political and economic integration among EU Member States.”

<http://www.housingrightswatch.org/page/eu-housing-rights>

within the orbit of the EU.⁶⁶ The details of *Aziz* are significant because the turn towards the blending of and borrowing between international public and private law in the housing sphere occurs through the terminology. The Court is instrumental in transporting the certain concepts across doctrinal provinces.

The story of *Aziz* begins with Mr. Mohamed Aziz who initiated his case in commercial court to undo Caixa bank’s mortgage enforcement proceedings and to protest its ultimate repossession of his home.⁶⁷ When the commercial court sought guidance in the form of a preliminary ruling concerning the interpretation of the Directive, the case made its way before the First Chamber of the ECJ.⁶⁸ Additionally, the national court prevailed upon the ECJ to assess whether domestic civil procedural rules, which among other things precluded debtors from raising fairness arguments regarding their mortgage loan terms, contravened the directive⁶⁹ and whether certain terms and provisions of Mr. Aziz’s contract were invalidated in light of the ECJ’s interpretation.⁷⁰

Spanish civil procedure law severely restricts parties in the arguments and defenses they may assert in the contest of an enforcement proceeding. Within the contracted time frame of the proceeding, Mr. Aziz was limited to several arguments. He could argue that the debt sought had previously been paid and retired.⁷¹ He could assert that the creditor had miscalculated the amount due on the “closing balance” of the account between the two parties.⁷² He could maintain that there was another debt with priority over the one being foreclosed.⁷³ Omitted from the options was an opportunity for

⁶⁶ Council Directive 93/13 EEC, Official Journal L095, 21/04/1993, p. 0029 -0034. Spain, as a member of the EU, is subject to the Directive. Spain became a member of the EU on January 1, 1986.

⁶⁷ The enforcement case was initially brought before the Juzgado de Primera Instancia No 5 de Martorell. Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 23.

⁶⁸ “The reference for a preliminary ruling is a procedure exercised before the Court of Justice of the European Union. This procedure enables national courts to question the Court of Justice on the interpretation on the validity of European law. The reference for a preliminary ruling therefore offers a means to guarantee legal certainty by uniform application of EU law.” Summaries of EU Legislation Page concerning: Recommendations to national courts in relation to the initiation of preliminary ruling proceedings. (Official Journal of C 338 of 6.11.2012), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114552>.

⁶⁹ Aziz, ECJ, Judgment of the Court (First Chamber), para. 31(1) and 32.

⁷⁰ Aziz, ECJ, Judgment of the Court (First Chamber), paras. 31(a) – 2(c).

⁷¹ Aziz, ECJ, Judgment of the Court (First Chamber), para. 54.

⁷² Aziz, ECJ, Judgment of the Court (First Chamber), para. 54.

⁷³ Aziz, ECJ, Judgment of the Court (First Chamber) (March 14, 2013), paras. 14 and 54. (referencing Spanish Code of Civil Procedure Article 695, ley de enjuiciamiento civil).

Mr. Aziz to challenge the fairness of his mortgage loan’s contractual terms.⁷⁴ The avenue available for borrowers to initiate this type of challenge, at the time, was through a civil proceeding.⁷⁵ If Mr. Aziz disputed the mortgage contract in the civil venue, however, the court would lack the authority to stay the mortgage enforcement process.⁷⁶ As a consequence, even if the borrower’s claim proved meritorious, the complainant risked the possibility of being permanently dispossessed of the property.⁷⁷ If borrowers were permitted to assert such fairness arguments in enforcement cases, the relevant courts would be able to scrutinize a bank’s lending practices and substantively evaluate lending documents for extreme built-in biases towards financial institutions. Upon Mr. Aziz raising the argument of the limited nature of the enforcement proceedings, the Juzgado de lo Mercantil⁷⁸ referred the matter to the ECJ. As an initial step, the Advocate General of the ECJ made recommendations⁷⁹ that were then transmitted to the Court’s first chamber for a preliminary ruling.⁸⁰

Mr. Aziz took out a loan with Caixa bank for the principal amount of EUR 138,000.⁸¹ His 33-year loan term ran from August 1, 2007 to July 31, 2040.⁸² Aziz

⁷⁴ Aziz, ECJ, Judgment of the Court (First Chamber) (March 14, 2013), para. _____. Opinion of Advocate General Kovott, November 8, 2012, para. 3.

⁷⁵ Article 698(1) of the Ley de Enjuiciamiento Civil; Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 25.

⁷⁶ Aziz, ECJ, Judgment of the Court (First Chamber), para. 55 (referencing Article 698(1) of the Code of Civil Procedure).

⁷⁷ The ECJ noted that:

“ . . . under Spanish rules of procedure, the final vesting of mortgaged property in a third party is always irreversible, even if the unfairness of the term challenged by the consumer before the court hearing the declaratory proceedings results in the annulment of the mortgage enforcement proceedings, except where that consumer made a preliminary registration of the application for annulment of the mortgage before the marginal note.”

Aziz, ECJ, Judgment of the Court (First Chamber) (March 14, 2013), para. 57.

⁷⁸ Juzgado de lo Mercantil No 3 Barcelona (Spain).

⁷⁹ Opinion of Advocate General Kovott, November 8, 2012. According to “The most important work performed by the Advocates General is to deliver a written Opinion, named “reasoned submission”. The role of the Advocate General is to propose an independent legal solution. It is important to note that the Court is not obligated to follow the Opinion delivered by the Advocate General.” Blog by Stina Haglund at <https://eulaworebro.wordpress.com/2012/08/13/the-role-of-the-advocate-general-and-the-development-of-direct-effect/>.

⁸⁰ Aziz, ECJ, Judgment of the Court (First Chamber) (March 14, 2013), para. 30.

⁸¹ Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 12.

⁸² Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 13.

initially made payments in compliance with his monthly mortgage obligation,⁸³ but then missed several installment payments.⁸⁴ In response, Caixa, acting in accordance with the loan terms, accelerated his loan.⁸⁵ Acceleration refers to the lender’s power to demand that the borrower pay off the entire outstanding loan balance upon the borrower’s failure to fulfill certain obligations under the loan agreement. Mr. Aziz’s mortgage loan was plagued by several detrimental characteristics. The loan contract precluded any flexibility in the borrower’s repayment schedule. Rather, it permitted Caixa to demand payment of the entire loan upon the borrower’s failure to timely submit any of the scheduled monthly installment payments.⁸⁶

While the type of loan was not an issue in Mr. Aziz’s case, its structure has caused issues in other contexts. The mortgage was essentially a variable rate or adjustable rate mortgage of the type that banks in the United States made infamous during the recent recession.⁸⁷ These adjustable rate residential mortgage loans have been criticized for their predatory structure, which has led to many defaults.⁸⁸ Mr. Aziz’s mortgage started at the low “teaser” annual interest rate of 4.87% for a little over a year (17 months).⁸⁹ After that, the loan was subject to a variable rate linked to the Euribor⁹⁰ (plus 1.10%).⁹¹ Here,

⁸³ Aziz, ECJ, Judgment of the Court (First Chamber), para. 23. There is a discrepancy between the dates of missed payments the ECJ provides as compared to the Opinion of Advocate General Kovott. Opinion of Advocate General Kovott, November 8, 2012, para. 18.

⁸⁴ Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 18.

⁸⁵ Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 19.

⁸⁶ Aziz, Opinion of Advocate General Kovott, November 8, 2012, paras. 14 and 69.

⁸⁷ Scott Horsley, “Adjustable –Rate Mortgages Fuel Foreclosure Crisis,” National Public Radio, September 6, 2007, <https://www.npr.org/templates/story/story.php?storyId=14218075>. Ed Leefeldt, “A Villain of the housing crash makes a comeback” Money Watch, June 21, 2017, <https://www.cbsnews.com/news/adjustable-rate-mortgages-make-a-comeback/>.

⁸⁸ See Sumit Arguwal, Gene Amromin, Itshak Ben-David, Souphala Chomsisengphet, and Douglas D. Evanoff, *Predatory Lending and the Subprime Crisis*, National Bureau of Economic Research (2013), <http://www.nber.org/papers/w19550.pdf>.

⁸⁹ Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 13.

⁹⁰ According to the Euribor website: “Euribor is short for Euro Interbank Offered Rate. The Euribor rates are based on the interest rates at which a panel of European banks borrow funds from one another. “ (emphasis omitted).

⁹¹ Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 13.

the variable rate appears to have worked in Mr. Aziz’s favor because the Euribor rate was so low during the relevant time period.⁹²

Although he received notice, Aziz was not entitled to notice of his default under the mortgage documents.⁹³ The mortgage agreement also provided that upon default, all amounts due and owing (i.e. principal and interest) would be subject to the hefty default interest rate of 18.75%.⁹⁴ Because Caixa was allowed to accelerate,⁹⁵ it meant that the 18.75% interest rate was applied to the entire outstanding balance not just to Aziz’s missed monthly payments.⁹⁶ The default interest was “calculated on a daily basis.”⁹⁷ Upon the first year anniversary of when Aziz’s initial monthly payment was due, Caixa filed an action seeking to collect the outstanding amount including contractual and default interest.⁹⁸ Caixa sent Aziz notice of the action. When Aziz failed to pay the stated amount, Caixa initiated the enforcement proceeding, which included foreclosure.⁹⁹ In order to halt the procedure, Aziz would have needed to pay “the unpaid contractual install[ment]s at the time of enforcement, plus interest, costs and disbursements relating to those install[ment]s.”¹⁰⁰

The absence of any competitive bidders at the public foreclosure judicial auction made it possible for Caixa to assume title to Mr. Aziz’s home.¹⁰¹ Under Spanish mortgage law at the time of the proceeding, banks were permitted to take title to foreclosed homes at 50% of their appraised value, assuming the absence of any higher bids at the auction.¹⁰² Caixa took advantage of this provision. It assumed ownership of

⁹² During the period from 2007 – 2016 the Euribor rate has fluctuated dramatically but has been lower than the 4.87% rate on the first day of the year for that period. On January 2, 2008, the rate was at 4.666%. See <http://www.euribor-rates.eu/euribor-rate-3-months.asp>.

⁹³ Aziz, ECJ, Judgment of the Court (First Chamber), para. 20. According to the facts, however, the bank did notify Aziz regarding the initiation of the process. Aziz, Opinion of Advocate General Kovott, November 8, 2012, paras. 14 and 21.

⁹⁴ Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 15.

⁹⁵ Aziz, ECJ, Judgment of the Court (First Chamber), para. 21.

⁹⁶ Aziz, Opinion of Advocate General Kovott, November 8, 2012, paras. 15 and 81.

⁹⁷ Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 14.

⁹⁸ Aziz, Opinion of Advocate General Kovott, November 8, 2012, paras. 21 – 23.

⁹⁹ Aziz, Opinion of Advocate General Kovott, November 8, 2012, paras. 21 – 23.

¹⁰⁰ Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 26.

¹⁰¹ Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 28.

¹⁰² Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 28.

Aziz’s home for EUR 97,200.¹⁰³ This figure was drastically lower than EUR 194,000, Caixa’s valuation of the property at the time Aziz entered into the loan agreement,¹⁰⁴ which was just a few years prior. Because the loan was a recourse loan and the value credited for the property did not cover the outstanding balance, Aziz continued to owe the bank even after he was evicted.¹⁰⁵ His remaining indebtedness totaled approximately, EUR 40,000 plus.¹⁰⁶

Aziz did not participate in the enforcement proceeding.¹⁰⁷ Instead, several months later, after the conclusion of the proceeding with the court awarding the property to the bank, Aziz filed his case before the Juzgado de lo Mercantil No 3 de Barcelona (Commercial Court No. 3 of Barcelona). He challenged the terms of his loan agreement and sought to annul the enforcement proceedings.¹⁰⁸ Prior to referring the matter to the Advocate General, the commercial court drafted a more extensive list of matters on which it sought guidance.¹⁰⁹ From there, the case made its way before the First Chamber of the ECJ for a preliminary ruling: (i) on whether Spain’s procedural rules which do not permit raising fairness of mortgage loan terms issues in mortgage enforcement

¹⁰³ Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 28.

¹⁰⁴ Aziz, Opinion of Advocate General Kovott, November 8, 2012, paras. 12 and 17. According to the Shattered Dreams Report:

“The courts award properties to the bank based on a percentage, established by law, of the appraised value of the property at the time the mortgage was taken out. The current market value of the property, in these cases, is not relevant; it is not an issue of negative equity.”

Shattered Dreams, Human Rights Watch 2014, p. 59.

This aspect of the law, which ties the value calculation of the home to the time the borrower purchased the home not to the time of the foreclosure sale, has the potential to cut either way. Spanish law builds in an assumption that the property has substantially decreased in value. The laws in effect at the time of Mr. Aziz’s foreclosure would yield the following outcome: Let’s assume that the property appraised at EUR 150,000 at the time of the borrower’s purchase. If ten years later, the borrower defaults, the lender forecloses, and the lender is the only “bidder” at the foreclosure sale, Spanish law would allow the court to award the lender the property for EUR 75,000, even if the current value of the property is EUR 250,000. Of course, if the property’s appraised value was actually lower than EUR 75,000 at the time of the foreclosure sale, it could work in the borrower’s favor to reduce the amount owed.

¹⁰⁵ Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 28.

¹⁰⁶ Aziz, Opinion of Advocate General Kovott, November 8, 2012, paras. 20, 22, and 28.

¹⁰⁷ Aziz, ECJ, Judgment of the Court (First Chamber) (March 14, 2013), para. 25. Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 26.

¹⁰⁸ Aziz, Opinion of Advocate General Kovott, November 8, 2012, para. 29.

¹⁰⁹ Aziz, ECJ, Judgment of the Court (First Chamber), para. 30; Case C-415/11, Aziz, Opinion of Advocate General Kovott, November 8, 2012

proceedings contravenes the UCT Directive,¹¹⁰ (ii) an interpretation of Article 3 of the Directive particularly as that provision relates to mortgage consumer contracts, and (iii) a preliminary ruling on certain terms and provisions of Mr. Aziz’s contract given the ECJ’s construction of the Directive.¹¹¹

The first part of the Court’s ruling pertained to procedure. The ECJ held that certain of Spain’s procedural rules regarding consumer matters and the enforcement of mortgages conflicted with the goal of protecting consumers.¹¹² Specifically, Member States cannot both exclude the possibility of challenging the validity of the mortgage consumer contractual terms within the context of mortgage enforcement proceedings *and*, at the same time, deny any means of relief in an alternative judicial forum.¹¹³ The government must grant mortgage consumers some venue to contest their loan contracts. The disjuncture between consumer relief and creditor enforcement violates the “principle of effectiveness.”¹¹⁴ The principle is salient to whether the objectives of the EU Directive can be met or whether they are frustrated by the domestic laws being challenged. In *Aziz*, the Court interprets “effectiveness” of the Directive to mean that a remedy equal to what the plaintiff is seeking – undo the annulment so that he can retain his property --- is required.¹¹⁵ It is insufficient then to only allow a monetary remedy. Spain’s procedural rules, which essentially foreclosed the possibility of plaintiff being awarded his preferred remedy, were deemed lacking and in violation of the principle of effectiveness.¹¹⁶

The Court opined that Member States must establish a judicial process that has the competency to resolve cases that raise the issue of unfairness with respect to mortgage loan agreements. Courts should be able to intervene in a mortgage enforcement proceeding or delay that proceeding, where necessary, to provide a borrower with judicial relief where the borrower challenges the substance of the mortgage agreement or the inequity of its terms¹¹⁷ and where the national court determines that a mortgage loan term

¹¹⁰ Aziz, ECJ, Judgment of the Court (First Chamber), para. 31(1).

¹¹¹ Aziz, ECJ, Judgment of the Court (First Chamber), paras. 2(a) – 2(c).

¹¹² Aziz, ECJ, Judgment of the Court (First Chamber), para. 59.

¹¹³ Aziz, ECJ, Judgment of the Court (First Chamber), paras. 64 and 77.

¹¹⁴ Aziz, ECJ, Judgment of the Court (First Chamber), para. 63.

¹¹⁵ Aziz, ECJ, Judgment of the Court (First Chamber), para. 60.

¹¹⁶ Aziz, ECJ, Judgment of the Court (First Chamber), para. 63 (the “Spanish legislation at issue . . . makes the application of the protection which the directive seeks to confer on . . . [mortgage] consumers impossible or excessively difficult.”). For a discussion of the Aziz case, see Fernando Gomez Pomar and Karolina Lycowska, “Spanish Courts, the Court of Justice of the European Union, and Consumer Law” *InDret Revista Para El Analisis Del Derecho*, 14.

¹¹⁷ Aziz, ECJ, Judgment of the Court (First Chamber), para. 64.

is unfair, there must be a process to ensure the removal of the term from future mortgage contracts.¹¹⁸

The second part of the ECJ’s ruling relates to the question of what constitutes an unfair term and the guidelines to which national courts must adhere in making that determination.¹¹⁹ Article 3(1) deals with the matter of unfairness:

“A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.”¹²⁰

In unpacking this definition, the ECJ concentrated on the terms, “good faith,” “significant imbalance,” and “detriment of the consumer,” but noted that while these terms constitute indicia of unfairness they are not the only markers of evaluation.¹²¹ If a term is deemed to be unfair, the UCT Directive requires that it be excised from the contract.¹²² The absence of individual negotiation is signaled by a contract that “has been drafted in advance and the consumer has therefore not been able to influence the substance of the term, particularly in the context of a pre-formulated standard contract.”¹²³ Although Article 3 does not use the same words, the description provided fits with the American legal definition of a contract of adhesion. A contract of adhesion is:

“a standard form contract drafted by one party (usually a business with stronger bargaining power) and signed by the weaker party (usually a consumer in need of goods or services), who must adhere to the contract and therefore does not have the power to negotiate or modify the terms of the contract.”¹²⁴

¹¹⁸ Aziz, ECJ, Judgment of the Court (First Chamber), para. 60 and 77.

¹¹⁹ Aziz, ECJ, Judgment of the Court (First Chamber), para. 66.

¹²⁰ Article 3(1) of the Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29). The directive was subsequently amended by Directive 2011/83/EU of the European Parliament and of the Council of October 25, 2011 (OJ 2011 L304, p. 64).

¹²¹ Aziz, ECJ, Judgment of the Court (First Chamber), para. 67.

¹²² Fernando Gomez Pomar and Karolina Lycowska, “Spanish Courts, the Court of Justice of the European Union, and Consumer Law” *InDret Revista Para El Analisis Del Derecho*, 14.

¹²³ Article 3(2) of the Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts. See *Juan Carolos Sánchez Morcillo and Maria del Carmen Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ July 17, 2014) (First Chamber).

¹²⁴ Legal Information Institution, Cornell University Law School, https://www.law.cornell.edu/wex/adhesion_contract_contract_of_adhesion.

Article 3(1) also suggests that, as in the United States where contracts of adhesion are not necessarily illegal or unconscionable, the legality determination has to be made separately. There are circumstances where such contracts or terms will be held invalid.

When dealing with such contracts, where there is no agreement as to the meaning of the term “significant imbalance,” the national laws must be consulted to evaluate whether “the contract places the consumer in a legal situation less favourable than that provided for by the national law in force,” and if this is the case, to what degree.¹²⁵ Determining the degree is necessary because in some instances even though the contract is unfavorable towards the borrower, it still may fall within acceptable legal bounds.¹²⁶ The court must also consider “the legal situation of that consumer having regard to the means at his disposal, under national law, to prevent continued use of unfair terms.”¹²⁷

Referencing the preamble of the Directive,¹²⁸ the ECJ inserted the consumer’s perspective in the evaluation of whether the seller or supplier was acting in “good faith” by holding that this determination should be made by examining whether “the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations.”¹²⁹ The Court’s concern for the consumer is also evident from its attention to the particular financial circumstances and bargaining positioning of the contracting consumer. The ECJ calls for “an assessment . . . of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.”¹³⁰ In other words, the court must evaluate whether the consumer could actually bargain in its negotiation of the real estate contract.

Another aspect of the ECJ’s analysis was its interpretation of the list of unfair terms and scenarios appended to the Directive in the annex, referenced in Article 3(3).¹³¹

¹²⁵ Aziz, ECJ, Judgment of the Court (First Chamber), paras. 68, and 77(2).

¹²⁶ Aziz, ECJ, Judgment of the Court (First Chamber), para. 77.

¹²⁷ Aziz, ECJ, Judgment of the Court (First Chamber), para. 77(2).

¹²⁸ The UCT Directive Preamble instructs:

“ . . . in making an assessment of good faith, particular regard shall be had to the strength of the bargaining positions of the parties, whether the consumer had an inducement to agree to the term and whether the goods and services were sold or supplied to the special order of the consumer; whereas the requirement of good faith may be satisfied by the seller or supplier where he deals fairly and equitably with the other party whose legitimate interests he has taken into account;”

¹²⁹ Aziz, ECJ, Judgment of the Court (First Chamber), paras. 69 and 77.

¹³⁰ Aziz, ECJ, Judgment of the Court (First Chamber), para. 68.

¹³¹ Article 3(3) states:

Regarding the list, the ECJ ruled that it must be interpreted in the same manner as the Directive describes it. That is, it should be viewed as an “indicative” but “non-exhaustive list of the terms which may be regarded as unfair.”¹³² In other words, the absence of the terms from the list, should not be deemed as dispositive of the issue of whether they are unfair.

In the third part of the ruling, the ECJ focused on how to properly evaluate whether the specific terms in Mr. Aziz’s contract were unfair from the perspective of the Directive. The terms highlighted included the acceleration clause, the provision that enabled Caixa to establish the default interest rate, and the clause that permitted Caixa to unilaterally calculate the outstanding balance.¹³³ While the ECJ concluded that the commercial court had the initial responsibility to assess the unfairness of the terms,¹³⁴ there were some guidelines that the national court should take into consideration.¹³⁵

With respect to acceleration, the Court’s guidance was in the direction of balancing the import of the consumer’s breach against the overall substance and goals of the contract.¹³⁶ Regarding the assessment of the unfairness of the default interest rate, the Court ruled that national law should be consulted and the statutory interest rate should be considered.¹³⁷ Lastly, on the point of the lender’s power to solely determine the outstanding balance for purposes of commencing a mortgage enforcement action, the ECJ

“The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.”

Article 3(3) of the Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts.

¹³² Aziz, ECJ, Judgment of the Court (First Chamber), paras. 70 and 77. Article 3(3) of the Council Directive 93/13 of 5 April 1993 on unfair terms in consumer contracts.

¹³³ Aziz, ECJ, Judgment of the Court (First Chamber), para. 65.

¹³⁴ Aziz, ECJ, Judgment of the Court (First Chamber), paras. 66-67.

¹³⁵ Aziz, ECJ, Judgment of the Court (First Chamber), para. 66.

¹³⁶ Specifically, the ECJ ruled that the national court must consider:

“ . . . whether the right of the seller or supplier to call in the totality of the loan is conditional upon the non-compliance by the consumer with an obligation which is of essential importance in the contest of the contractual relationship in question, whether that right is provided for in cases in which such non-compliance is sufficiently serious in the light of the term and amount of the loan, whether that right derogates from the relevant applicable rules and whether national law provides for adequate and effective means enabling the consumer subject to such a term to remedy the effects of the loan being called in.”

Aziz, ECJ, Judgment of the Court (First Chamber), para. 73

¹³⁷ Aziz, ECJ, Judgment of the Court (First Chamber), para. 74.

ruled that the national court must consider whether the term challenged is in the vein of the agreement between the parties or whether there is an apparent conflict between and the nature of the agreement which ultimately impairs the consumer’s ability to protect himself against the harm imposed.¹³⁸

Left unresolved by the ECJ was the issue of whether there were unfair terms in Mr. Aziz’s contract. Instead, the relevance of the decision lies in the protective space it began to carve out for consumers in the domain of housing. The ruling reminds Member States of their obligations to make domestic procedural rules conform to the mandates of the UCT Directive to ensure its effectiveness in protecting mortgage consumers. It emphasizes unfairness as a limit on the bargaining process in mortgage consumer contracts. The home is recognized as having a privileged status that, if nothing else, warrants careful consideration in evaluating rules pertaining to a mortgage consumer’s ability to select the terms defining the parameters of his mortgage loan transaction, retain possession, and repay debt related to the home purchase.

Deepening its Doctrine Regarding the Protection of the Mortgage Consumer and the Housing Market

The ECJ’s revisiting of the UCT Directive in the case *Sánchez Morcillo and Abril Garcia v. Banco Bilbao*, a year later, followed by the cases, *Hidalgo Rueda et al. v. Caixabank* and *Naranjo v. Cajasur Banco S.A.U.*, confirmed that the Court had more than a fleeting interest in the status of the mortgage consumer. The cases are evidence of an ongoing dialogue with Spain, and the larger EU community, regarding private law contracts and public harm. The cases demonstrate a deepening of the ECJ’s commitment to the notion of protection for mortgage consumers and for the housing market.

The *Sánchez Morcillo and Abril Garcia v. Banco Bilbao* case dealt with the differential treatment accorded to lenders as compared to borrowers under Spain’s procedural laws for the enforcement of mortgages. Spain adopted the laws reviewed by the ECJ contemporaneously with the *Aziz* decision. Spain has been undergoing a painful process of perpetually revising its mortgage laws, since the *Aziz* decision, to bring them in conformity with the UCT Directive.¹³⁹ The Law 1/2013, of March 1 2013 is an

¹³⁸ The Court stated:

“the referring court must in particular assess whether and, if appropriate, to what extent, the term in question derogates from the rules applicable in the absence of agreement between the parties, as to make it more difficult for the consumer, given the procedural means at his disposal, to take legal action and exercise rights of the defence.”

Aziz, ECJ, Judgment of the Court (First Chamber), para. 75.

¹³⁹

example of Spain’s efforts to rewrite old laws and craft new ones in the wake of a developing EU consumer protective regime.¹⁴⁰

The applicants in the underlying *Morcillo* case entered into a mortgage loan on June 9, 2003 with Banco Bilbao for the amount of EUR 300,500.¹⁴¹ The loan provided for a default interest rate in the amount of “19% per annum” in contrast to the statutory interest of “4% per annum.”¹⁴² Some years later in April 15, 2011, after the applicants missed certain of their payments, Banco Bilbao sought to collect the entire loan along with ordinary interest and default interest, and an order for the sale of the mortgaged property.¹⁴³ While the referring court¹⁴⁴ limited its request for a preliminary ruling to questions concerning Spain’s procedural rules and their compliance with Article 7 of the Directive and Article 47 of the EU Charter of Fundamental Rights, it noted that loan terms like *Morcillo*’s default interest rate could be challenged for unfairness.¹⁴⁵ Article 7(1) compels Member States to “ensure that, in the interests of consumers and competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.”¹⁴⁶ Article 47 of the Charter guarantees the “right to an effective remedy before a tribunal.”¹⁴⁷

The subject of the ECJ’s scrutiny was the legality of domestic procedural rules. The rules treated banks (suppliers) differently from borrowers (consumers) in matters of bringing an appeal.¹⁴⁸ Whereas lenders could appeal a decision that dismissed their

¹⁴⁰ *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), pp. 2 and 4. The ECJ issued the *Aziz* decision on March 14, 2013 and the Advocate General issued her opinion less than a year before that on November 8, 2012, providing some indication of the direction the ECJ might take. The *Morcillo* Court references “Chapter III of Law 1/2013, of March 1 2013, laying down measures to strengthen the protection of mortgage debtors, debt restructuring and social rents.” Spain has drafted and revised several transitional laws.

¹⁴¹ *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 3.

¹⁴² *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 3.

¹⁴³ *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 3.

¹⁴⁴ The referring court was the Audiencia Provincial de Castellón. *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 3.

¹⁴⁵ *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 3.

¹⁴⁶ EU UCT Directive, Article 7. Paragraphs 2 and 3 of Article 7 offer examples of how the prevention of unfair terms may be achieved.

¹⁴⁷ Charter of the Fundamental Rights of the European Union (2000/C 364/01), Official Journal of the European Communities, Chapter VI Article 47.

¹⁴⁸ The procedural rule at issue was Article 695(4) of the LEC. *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 3.

enforcement proceedings or that voided a term, borrowers did not enjoy the same procedural latitude. Because borrowers were not permitted to appeal a “judgment at first instance,” they were left without a mechanism to halt their mortgage enforcement proceedings even though there were issues pertaining to the fairness of the underlying mortgage contract that needed to be resolved.¹⁴⁹ The applicants alleged that this divergent treatment violated EU law.

In the ECJ’s ruling, one can discern its embracing of a principle. The principle asserts that even though the economic market may grant a participant a dominant position in its contractual relations with consumers, under certain conditions, the Court may intervene to alter the power imbalance. The Directive and the Court’s jurisprudence recognize that, “the consumer is in a weak position vis-à-vis the seller or supplier, as regards both his bargaining power and his level of knowledge.”¹⁵⁰ In addition to the Directive’s instruction that consumers are not bound by terms the national court determines to be unfair,¹⁵¹ within the meaning of the Directive, the ECJ must evaluate the national rules and laws in question from the principle of effectiveness and equality. Grounding its decision in these two concepts, the ECJ ruled that the laws at issue violated the Directive and the EU Charter.¹⁵² Specifically, the procedural rules which granted different relief from the impact of negative judicial decisions for creditors and debtors, depending upon their status, contravened the equality of arms principle.¹⁵³ The principle requires that parties have an equal opportunity to present their cases before a tribunal.¹⁵⁴ Spain’s law as structured, served to significantly disadvantage the debtor primarily

¹⁴⁹ *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 3.

¹⁵⁰ *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 4.

¹⁵¹ *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 4. The Court explains that the objective of the rule is to “replace the formal balance which the contract establishes between the rights and obligations of the parties with an effective balance which re-establishes equality between them.” *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 4 (citations omitted). In reviewing the case law, the ECJ emphasized that domestic legislation which precludes a mortgage enforcement court from reviewing the unfairness of terms in the debt contract at issue is prohibited by the UCT Directive. *Id.* (citing *Banco Popular Español and Banco de Valencia, C-537/12 and C-116/13, EU:C:2013:759*, paragraph 60).

¹⁵² *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), pp. 6-7.

¹⁵³ The Court characterized the principle of equality of arms as “impl[ying] an obligation to offer each party a reasonable opportunity of presenting its case in conditions that do not place it in a clearly less advantageous position compared with its opponent.” *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 6.

¹⁵⁴ *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 6.

because once the borrower’s house was repossessed by the bank and sold, it could not be undone. The sole remedy left to the consumer would be compensatory damages.

The inequality of the procedures available to consumers as compared to lenders, in the ECJ’s view, was a clear impairment of the effectiveness of the UCT Directive.¹⁵⁵ The Directive and the Charter incorporate “a requirement of judicial protection.”¹⁵⁶ In order to fulfil that mandate, the ECJ deemed it necessary to consider the positioning of borrower and lender as regards the likely progression of a mortgage enforcement proceeding and a claim by the borrower that the contractual terms at issue are unfair. While the borrower would be entitled to a monetary remedy if his claim was sustained, this compensation would be “incomplete and insufficient” under the Directive.¹⁵⁷ Recognizing the irreparable damage of being uprooted from one’s home, the Court reasoned:

“if the consumer’s objection to the enforcement of the mortgage against the property is dismissed, the Spanish procedural system, taken as a whole and in the manner applicable in the proceedings, exposes consumers, and possibly, as in the case in the main proceedings, their family, to the risk of losing their dwelling in an enforced sale, while the enforcing court may have, at most, delivered a rapid assessment of the validity of the contractual clauses upon which the seller or supplier bases his application.”¹⁵⁸

Here, there is an express weighing of the harms. Even though the borrower could pursue its claim regarding inequitable terms in another forum, the damage would be done at the resolution of the mortgage enforcement proceeding in the lender’s favor. The Court’s ruling errs on the side of caution, to the consumer’s benefit. The procedural rules should maintain the consumer in the position he was in prior to the commencement of the enforcement proceedings in the event that the consumer’s claim is held meritorious.¹⁵⁹ This could be accomplished by granting the deciding court, the power of staying the proceedings.

¹⁵⁵ *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 6.

¹⁵⁶ *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 5.

¹⁵⁷ *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 6.

¹⁵⁸ *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), pp. 5-6.

¹⁵⁹ Analyzing the procedural rules at issue, the ECJ reasoned, “even if the scrutiny revealed the existence of an unfair clause, the consumer would not be granted a remedy reflecting the damage he had suffered by restoring him to the situation he was in before the enforcement proceedings against the mortgaged property, but, at best, an award of compensation.” *Sánchez Morcillo and Abril Garcia v. Banco Bilbao Vizcaya Argentaria, SA* (ECJ First Chamber, July 17, 2014), p. 6.

Hidalgo Rueda et al. v. Caixabank, et al. (ECJ first chamber preliminary ruling January 2015)

Rather than highlighting the asymmetrical power relationships between banks and borrowers, in *Hidalgo v. Caxiabank* the ECJ addressed the impact national laws could have on denying consumers the protection the Directive confers upon them.¹⁶⁰ The Court also elaborated on what the unfairness inquiry should entail and the responsibilities of domestic courts concerning fulfilling their Directive obligations when the national law grants the courts more latitude in their treatment of unfair contractual terms. The ECJ’s preliminary ruling was that Spain’s law was not precluded by the Directive as long as courts applied it in conformity with the ECJ’s guidelines regarding making an unfairness determination and the option of removal of the term was not prohibited.¹⁶¹

*Hidalgo*¹⁶² involved several individuals defaulting on their respective mortgage loans which were for amounts covering EUR 47,000 to EUR 249,000.¹⁶³ The Unicaja Banco and Caxiabank, separately, instituted mortgage enforcement proceedings that were later consolidated.¹⁶⁴ The underlying dispute concerned the fairness of default interest clauses. The clauses permitted the lenders to charge interest in varying amounts ranging from 18% - 25% per annum.¹⁶⁵ All the loans contained acceleration clauses.¹⁶⁶ Under the loan terms, the banks were permitted to apply the default interest rate, which was 22.5% for the majority of them,¹⁶⁷ to the entire outstanding loan balance.¹⁶⁸ While evaluating the unfairness of the default rate and the terms of acceleration, the issue of an ostensible conflict between Spain’s domestic law and the UCT Directive arose.

The commercial tribunal¹⁶⁹ referred the cases to the ECJ for a determination of the proper procedure once a court finds that a term is unfair. The essential inquiry was:

¹⁶⁰ Hidalgo Rueda and Others (ECJ First Chamber 2015), para. 23.

¹⁶¹ Hidalgo Rueda and Others (ECJ First Chamber 2015), paras. 42 – 43.

¹⁶² *Hidalgo* is composed of several consolidated cases. Four different mortgage enforcement cases were part of the underlying dispute. The cases were filed by Unicaja Banco and Caixabank. Hidalgo Rueda and Others (ECJ First Chamber 2015), paras. 2 and 18. The cases were consolidated on October 10, 2013. Hidalgo (Opinion of Advocate General Wahl 2014), para. 18.

¹⁶³ Hidalgo Rueda and Others (ECJ First Chamber 2015), para. 18.

¹⁶⁴ Hidalgo Rueda and Others (ECJ First Chamber 2015), paras. 2 and 18.

¹⁶⁵ Hidalgo (Opinion of Advocate General Wahl 2014), para. 15.

¹⁶⁶ Hidalgo (Opinion of Advocate General Wahl 2014), para. 20.

¹⁶⁷ Hidalgo Rueda and Others (ECJ First Chamber 2015), para. 19.

¹⁶⁸ Hidalgo Rueda and Others (ECJ First Chamber 2015), para. 20.

¹⁶⁹ The referring court was the Juzgado de Primera e Instrucción de Marchena (Spain). Hidalgo (Opinion of Advocate General Wahl 2014), para. 48. See Hidalgo Rueda and Others (ECJ First Chamber 2015), para. 23.

After a finding of unfairness, is the deciding court required to void and excise an unfair term or can it modify the contractual terms to bring them in compliance with the Directive.¹⁷⁰ Spain’s law mandated that the domestic court making the determination of unfairness, “shall” “adjust[]” the contract “in accordance with” provisions of the procedural laws and “the principle of objective good faith” and “shall remedy the contract and enjoy moderating powers with regard to the rights and obligations of the parties.”¹⁷¹ The gist of the law was to preserve the contract at all costs.¹⁷² The national court sought guidance as to whether the compulsory language of the domestic law conflicted with Article 6 of the UCT Directive, and therefore should be deemed invalid.¹⁷³ Article 6 requires Member States to adopt a law declaring that “unfair terms used in a contract concluded with a consumer by a seller or supplier shall . . . not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence.”¹⁷⁴

¹⁷⁰ Hidalgo (Opinion of Advocate General Wahl 2014), paras. 17, 23, and 26.

¹⁷¹ This language is from the codified national law, Article 83 of Royal Legislative Decree No 1/2007 and is part of the General Law for the protection of consumers and users and other supplementary laws. Hidalgo Rueda and Others (ECJ First Chamber 2015), paras. 10 -11. The Second Transitional Provision of Law No. 1/2013 (May 14, 2013) modified Royal Legislative Decree No 1/2007, but the issue regarding compelling the mortgage enforcement court to modify the default interest rate remained. Hidalgo Rueda, para. 23.

Article 83 of Royal Legislative Decree No 1/2007 provides:

- “1. Unfair contract terms shall automatically be void and deemed not to have formed part of the contract.
2. That part of the contract deemed void *shall be adjusted* in accordance with the provisions of Article 1258 of the Civil Code and with the principle of objective good faith.

To that end, the court which rules that such terms are void shall remedy the contract and enjoy moderating powers with regard to the rights and obligations of the parties, where the contract continues in existence, and to the consequences of its being ruled ineffective in the event of significant loss or damage to the consumer or user. Only where the remaining contract terms result in an imbalance in the respective positions of the parties which cannot be remedied may the court rule that the contract is ineffective.”

Hidalgo Rueda and Others (ECJ First Chamber 2015), para. 11 (emphasis added).

¹⁷² This is evident from the last sentence in paragraph 2 of Article 83, which provides: “Only where the remaining contract terms result in an imbalance in the respective positions of the parties which cannot be remedied may the court rule that the contract is ineffective.” Article 83 of Royal Legislative Decree No 1/2007. See Hidalgo Rueda and Others (ECJ First Chamber 2015), para. 11

¹⁷³ Hidalgo Rueda and Others (ECJ First Chamber 2015), para. 26.

¹⁷⁴ Article 6 of the UCT Directive. The full text of Article 6 reads:

- “1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

Hidalgo is instructive because it provides guidance for national courts and governments regarding acceptable actions they may take in working to fulfill their obligations to protect consumers from unfair terms. The UCT Directive does not grant domestic courts the power of revision for contracts.¹⁷⁵ Nothing in the Directive authorizes the national court to reduce a penalty in a contract, once the court determines that the penalty clause is unfair.¹⁷⁶ The Directive only contemplates rendering that term inoperative with respect to the parties.¹⁷⁷ States, however, can confer this authority on themselves with certain restrictions. That is essentially what Spain did with its Second Transitional Law 1/2013 modifying certain of its civil procedure laws. A state may have a law that permits the domestic court hearing the mortgage enforcement proceedings to “adjust the amounts due under a term” downward to be consistent with the statutory rate.¹⁷⁸ If, for example, a mortgage contract provides for a default rate of 50% and the statutory rate imposed by the government is 20%, the reviewing court, can adjust the rate to no more than 20%. The ECJ emphasized that apart from the process, according to which the reviewing court acknowledges that there is an existing national law that restricts the substance of the law in question, the reviewing court must make an independent evaluation of the fairness of the purported unfair term.¹⁷⁹ Furthermore, the court should not allow the existence of the national law to color its determination of whether a mortgage loan provision is unfair. The court should neither be inhibited in evaluating whether the disputed mortgage loan clause complies with the Directive nor be precluded from “removing that clause,” where appropriate.¹⁸⁰ The ECJ counsels that, in determining the unfairness of a contract term, a court should consider: (i) the “nature of

2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.”

Article 6 of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, Official Journal L 095, 21/04/1993, p. 0029 – 0034.

¹⁷⁵ *Hidalgo Rueda and Others* (ECJ First Chamber 2015), para. 28.

¹⁷⁶ *Hidalgo Rueda and Others* (ECJ First Chamber 2015), para. 29.

¹⁷⁷ Article 6(1) states:

“Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

¹⁷⁸ *Hidalgo Rueda and Others* (ECJ First Chamber 2015), para. 42 – 43.

¹⁷⁹ *Hidalgo Rueda and Others* (ECJ First Chamber 2015), para. 42 – 43.

¹⁸⁰ *Hidalgo Rueda and Others* (ECJ First Chamber 2015), para. 42.

the goods and services” that form the basis of the contract,¹⁸¹ (ii) “the consequences of the term under the law applicable to the contract” (i.e. national law),¹⁸² (iii) consistency between the relevant national laws and the Directive,¹⁸³ and (iv) its duty to consider the unfairness of a contract term regardless of the substance of the national law.¹⁸⁴

The Directive envisions that a court could remove an unfair term and the contract could continue on, remaining largely intact.¹⁸⁵ There are circumstances when that is not possible. The ECJ offers guidance for the court’s appropriate course of action when contract preservation is not an option. If removing the unfair term would result in the court nullifying the entire contract to the detriment of the consumer, it may substitute an alternative term provided that certain conditions are met.¹⁸⁶ Provided that, the substitute term is consistent with the Directive and “enables real balance between the rights and obligations of the parties to be restored,” a reviewing court may “substitute a supplementary provision of national law for the unfair term.”¹⁸⁷

Over the course of 2013 – 2015, *Aziz*, *Morcillo*, and *Hidalgo*, built a formidable edifice in the name of consumer protection. A year later, *Naranjo v. Cajasur Banco S.A.U.* following on the heels of *Hidalgo*, deepened the reach of the Court into matters of residential mortgage private contracts.

Naranjo tackled two prickly issues. One concerned the extent to which lenders are able to retain the benefits of their wrongdoing. The other dealt with the power of national courts to restrict the scope of their rulings upon a finding that a contractual term is unfair. *Naranjo* involved three separate lenders¹⁸⁸ and cases that were later consolidated, after referral to the ECJ.¹⁸⁹ The disputed loan term was a floor clause. Floor clauses operate to

¹⁸¹ *Hidalgo Rueda and Others* (ECJ First Chamber 2015), para. 37 (referencing Article 4(1) of the Directive).

¹⁸² *Hidalgo Rueda and Others* (ECJ First Chamber 2015), para. 37.

¹⁸³ *Hidalgo Rueda and Others* (ECJ First Chamber 2015), para. 38.

¹⁸⁴ *Hidalgo Rueda and Others* (ECJ First Chamber 2015), paras. 40 – 41.

¹⁸⁵ See Article 6(1) of the UCT Directive.

¹⁸⁶ *Hidalgo Rueda and Others* (ECJ First Chamber 2015), para. 33.

¹⁸⁷ *Hidalgo Rueda and Others* (ECJ First Chamber 2015), para. 33 (citations omitted).

¹⁸⁸ The individuals filed cases in various national commercial and provincial courts. The banks included Cajasur Banco S.A.U., Banco Bilbao Vizcaya Argentaria SA, Banco Popular Espanol. *Naranjo* (ECJ Grand Chamber 2016), paras. 28, 32, and 37.

¹⁸⁹ *Naranjo* (ECJ Grand Chamber 2016), paras. 43 – 45. The consolidated cases were *Francisco G. Naranjo v. Cajasur Banco S.A.U.* (C-154/15), *Ana Martinez v. Banco Bilbao Vizcaya Argentaria SA* (C-307/15) and *Banco Popular Espanol SA v. Lopez and Teresa T. Andreu* (C-308/15). *Naranjo* (Advocate General 2016), para. 37.

limit the degree to which a mortgagor can benefit from decreases in the interest rate index to which his mortgage is pegged. The clause establishes a base rate of interest that the mortgage consumer would have to pay even when the prevailing mortgage rate is substantially lower. The borrowers sought to have their floor clauses nullified and further demanded reimbursement of the excess amounts they had already paid as a result of the term’s application.¹⁹⁰

In a separate prior collective action, Spain’s Supreme Court (i.e. the Tribunal Supremo) held in a decision, issued on May 9, 2013, that the floor clauses at issue were unfair and void because of the lenders’ failure to inform borrowers of the presence of the clauses in their mortgage contracts and of the meaning and effect of the floor clauses on them.¹⁹¹ The Tribunal concluded, this lack of transparency, violated the Directive’s requirements of “good faith, balance and transparency.”¹⁹² Regarding the question of the retroactive application of the court’s ruling, the Tribunal Supremo grounded its decision on the principle of legal certainty,¹⁹³ holding that, “the invalidity of the floor clauses in question did not affect situations in which final decisions had been made in judgments with the force of *res judicata* or payments made before May 9, 2013, so that only payments made after that date had to be repaid.”¹⁹⁴

The Tribunal Supremo in the *Naranjo* case then extended its ruling regarding retroactivity to individuals. Individual mortgagors who paid amounts in accordance with terms of their contract, later adjudicated to be unfair, could not recuperate all of those past payments, but were, instead, only entitled to reimbursement of payments made after the Tribunal Supremo’s decision of May 9, 2013.¹⁹⁵

¹⁹⁰ *Naranjo* (ECJ Grand Chamber 2016), paras. 28, 31, and 38.

¹⁹¹ *Naranjo* (ECJ Grand Chamber 2016), para. 21.

¹⁹² *Naranjo* (ECJ Grand Chamber 2016), para 21.

¹⁹³ *Naranjo* (ECJ Grand Chamber 2016), para. 25.

¹⁹⁴ *Naranjo* (ECJ Grand Chamber 2016), para. 25.

¹⁹⁵ On May 9, 2013, the Tribunal Supremo published a decision holding that the floor clauses at issue in that collective action were void due to the lenders’ inadequate disclosure of them during the formation of the relevant mortgage contracts. At that time, the court restricted the effect of its ruling to payments made after the court’s decision. *Naranjo* (ECJ Grand Chamber 2016), paras. 21, 25, and 26. The Tribunal Supremo then, in its ruling of March 25, 2015 (Judgment No 139/2015), “extended to individual actions for redress the approach previously upheld in the judgment of 9 May 2013 in respect of collective actions for an injunction.” *Id.* at para. 26. Consequently, individuals seeking recovery for the excess amounts they paid in connection with the floor clauses in their respective contracts were limited to the time period beginning with the March 9, 2013 date, forward. *Id.*

The referring courts prevailed upon the ECJ for a preliminary ruling addressing several matters.¹⁹⁶ At their core, they boiled down to: (i) Whether a domestic court could place a temporal limitation on the effect of its ruling after it declared a contractual term unfair and void without violating the Directive’s mandate to Member States to “prevent the continued use of unfair terms,”¹⁹⁷ to recognize that unfair terms “shall . . . not be binding on the consumer,”¹⁹⁸ and to fulfill the consumers “right to effective judicial protection” under the EU Charter¹⁹⁹ and (ii) In making restitution for sums collected under a term that has been adjudicated as unfair and void, do lenders have to return all the money it received in payment under the unfair term or can the court limit the damages.²⁰⁰

The ECJ’s Grand Chamber ruled that under the Directive, an unfair term “must be regarded, in principle, as never having existed.”²⁰¹ If a court concludes that a contractual term is unfair, the decision must essentially, “restor[e] the consumer to the legal and factual situation that he would have been in if that term had not existed.”²⁰² Therefore, the national courts could not prescribe the scope of their rulings in the manner proposed.²⁰³ Adopting the parameters set in a separate case regarding the effect of ruling that a term is unfair, “would be tantamount to depriving [some consumers] . . . of the right to obtain repayment in full of the amounts overpaid by the consumer to the bank . . .”²⁰⁴ Such an outcome would not be restorative. Instead, it would make consumers worse off than they were pre-contract.²⁰⁵ Here, the ECJ used strong and unequivocal language to highlight that, the finding of unfairness creates “a right to restitution of advantages

¹⁹⁶ Naranjo (ECJ Grand Chamber 2016), para. 1. A preliminary ruling by the ECJ is binding on the court who sought the preliminary ruling and “all of the national courts of the Member States.” Summaries of EU Legislation Page concerning: Recommendations to national courts in relation to the initiation of preliminary ruling proceedings. (Official Journal of C 338 of 6.11.2012), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114552>.

¹⁹⁷ Article 7 of the UCT Directive.

¹⁹⁸ Article 6 of the UCT Directive.

¹⁹⁹ The right is enshrined in Article 47 of the Charter of Fundamental Rights of the European Union. Naranjo (ECJ Grand Chamber 2016), para. 46.

²⁰⁰ Naranjo (ECJ Grand Chamber 2016), para. 42.

²⁰¹ Naranjo (ECJ Grand Chamber 2016), para. 61.

²⁰² Naranjo (ECJ Grand Chamber 2016), para. 61.

²⁰³ Naranjo (ECJ Grand Chamber 2016), paras. 75 and 77.

²⁰⁴ Naranjo (ECJ Grand Chamber 2016), para. 70 – 74.

²⁰⁵ Naranjo (ECJ Grand Chamber 2016), paras. 75 and 77.

wrongly obtained, to the consumer’s detriment, by the seller or supplier on the basis of that unfair term.”²⁰⁶

Definitive Move into the Sphere of Human Rights

One of the ECJ’s most definitive moves towards recognizing fluidity between the spheres of private law and public international human rights arose not in the context of a case concerning Spain or one directly involving a residential mortgage loan transaction. The case, *Monika Kušinova v. SMART Capital, a.s.*,²⁰⁷ provides an important link between the ECJ jurisprudence that grew out of Spain’s interactions with the EU Directive and the international human rights housing cases decided by the International Committee on Economic, Social, and Cultural Rights. *Kušinova* is different from the Spain ECJ cases in several respects. The agreement at issue was a consumer credit agreement and security agreement pledging *Kušinova*’s home. Two EU Directives were at play, the UCT Directive and Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market.²⁰⁸ The *Kušinova* case is an important part of the story documenting private law’s movement closer to human rights because of the central item at issue --- the applicant’s home.²⁰⁹

Ms. *Kušinova* entered into a credit and charge agreement with SMART Capital for 10,000 euros. She offered her home as security for the loan.²¹⁰ *Kušinova* sought to annul the agreements, alleging that they were unfair and the civil procedure law granting creditors certain enforcement powers were in violation of both directives and Article 38 of the EU Charter, which require EU policies to “ensure a high level of consumer protection.”²¹¹ The agreements and civil code permitted creditors to exercise their rights to possess pledged property without supervision by the court.²¹² The domestic court referred the matter to the ECJ to resolve whether Slovakia’s civil code provision complied with the directives given that it precluded judicial assessment of the unfairness of the terms of contracts at issue.

The ECJ formulated its preliminary ruling in terms of the UCT Directive²¹³ and Article 38 and 47 of the EU Charter.²¹⁴ It did not resolve the major question of whether

²⁰⁶ *Naranjo* (ECJ Grand Chamber 2016), para. 66.

²⁰⁷ *Monika Kušinova v. SMART Capital, a.s.* (ECJ Third Chamber 2014), (2014/C 409/09).

²⁰⁸ *Monika Kušinova v. SMART Capital, a.s.* (ECJ Third Chamber 2014), (2014/C 409/09), 1.

²⁰⁹ *Monika Kušinova v. SMART Capital, a.s.* (ECJ Third Chamber 2014), (2014/C 409/09), 6.

²¹⁰ *Monika Kušinova v. SMART Capital, a.s.* (ECJ Third Chamber 2014), (2014/C 409/09), 1.

²¹¹ Fundamental Rights of the European Union, Article 38, 2012 C 326/02.

²¹² *Monika Kušinova v. SMART Capital, a.s.* (ECJ Third Chamber 2014), (2014/C 409/09), 3.

²¹³ *Monika Kušinova v. SMART Capital, a.s.* (ECJ Third Chamber 2014), (2014/C 409/09), 4.

the credit agreements and law at issue operated to deprive Kušinova of her rights and protections under the UCT Directive. Instead, the Court affirmed that it was within the competency of the Member States to make the initial determinations about the compliance of their laws with EU mandates. The ECJ ruled that national laws, such as Slovakia’s, which allow lenders to collect debts without judicial supervision are not *per se* prohibited by the UCT Directive. By way of providing judicial council, the Court reminded Slovakia that it must ensure that the national laws do not prevent consumers from enjoying their rights under the UCT Directive.

It is the reasoning of the ECJ related to its conclusion that the issues Ms. Kušinova raised were within the province of the UCT Directive and EU Charter²¹⁵ and appropriate for the Court to provide guidance on, that is worth quoting at length. Regarding the home, the Court stated:

“With regard to the proportionality of the penalty [levied on the consumer in the event of consumer’s breach] it is necessary to give particular attention to the fact that the property at which the procedure for the extrajudicial enforcement of the charge at issue in the main proceedings is directed is the immovable property forming the consumer’s family home.

The loss of a family home is not only such as to seriously undermine consumer rights, but it also places the family of the consumer concerned in a particularly vulnerable position.

In that regard, the European Court of Human Rights has held, first, that the loss of a home is one of the most serious breaches of the right to respect for the home, and secondly, that any person who risks being the victim of such a breach should be able to have the proportionality of such a measure reviewed.

Under EU law, the right to accommodation is a fundamental right guaranteed under Article 7 of the Charter that the referring Court must take into consideration when implementing Directive 93/13.

With regard to the particular consequences of the eviction of the consumer and his family from the accommodation forming their principal family home, the Court has already emphasized the importance, for the national court, to provide for interim measures by which unlawful mortgage enforcement proceedings may be suspended or terminated where the grant of such measures proves

²¹⁴ Monika Kušinova v. SMART Capital, a.s. (ECJ Third Chamber 2014), (2014/C 409/09), 4 – 5.

²¹⁵ Monika Kušinova v. SMART Capital, a.s. (ECJ Third Chamber 2014), (2014/C 409/09), 4.

necessary in order to ensure the effectiveness of the protection intended by Directive 93/13.”²¹⁶

Not only do the ECJ’s judicial ponderings reveal the Court’s reverence for the dominion of the home, they also offer insight into how the Court is intermixing concepts from the public and private realms to develop protection for the consumer citizen and to carve out a special place for housing. *Kušinova* is part of the lineage of the right to housing incursions into the private law sphere. Given its express references to human rights, *Kušinova* offers an appropriate segue to the jurisprudence emanating from the sphere of human rights on housing.

Picking up the Refrain of the Protestors - the International Covenant on Economic, Social, and Cultural Rights

With *IDG v. Spain*,²¹⁷ the frame of this analysis expands more decisively to the arena of international human rights. In making this transition, it is important to note the change in forum from the European Court of Justice, a judicial entity authorized to interpret European Union Law for its constituency, to the UN Committee on Economic, Social, and Cultural Rights, which is charged with the interpretation of the International Covenant on Economic, Social, and Cultural Rights (ICESCR).²¹⁸ ICESCR is an international treaty that is binding upon members of the global community who have ratified it. Spain is bound by the treaty by virtue of its ratification on April 27, 1977.²¹⁹

IDG presents an opportunity to view how issues similar to the ones presented in *Aziz* (e.g., unfair mortgage terms and national civil procedures) and other ECJ cases have been filtered and processed through the human rights mechanism of the ICESCR treaty and the forum, the ICESCR Committee. While Ms. IDG focuses on the due process procedural concerns of notice for her communication, at the core of her complaint is a

²¹⁶ *Monika Kušinova v. SMART Capital, a.s.* (ECJ Third Chamber 2014), (2014/C 409/09), 6 (citations omitted).

²¹⁷ *IDG v. Spain*, Views of the Committee on Economic, Social, and Cultural Rights under the Optional Protocol to the International Covenant on Economic, Social, and Cultural Rights (fifty-fifth session), concerning Communication No. 2/2014 (June 2015).

²¹⁸ The United Nations Human Rights Office of the Commissioner describes ICESCR:

“the body of 18 independent experts that monitors implementation of the International Covenant on Economic, Social, and Cultural Rights by its States parties. The Committee was established under ECOSOC Resolution 1985/17 of 28 May 1985 to carry out the monitoring functions assigned to the United Nations Economic and Social Council (ECOSOC) in Part IV of Covenant.”

United Nations Human Rights of the Commissioner website,
<http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx>.

²¹⁹ https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&lang=en.

demand for an opportunity to challenge the terms and structuring of her mortgage contract.

Ms. IDG filed a communication for her case before the ESCR Committee on January 28, 2014, one year after *Aziz*.²²⁰ Like *Aziz*, *IDG* concerns the fairness of Spain’s mortgage process and procedures with respect to borrowers. Ms. IDG, a Spanish born national,²²¹ took out financing to purchase her home, appraised at €742, 890.68.²²² After missing several mortgage payments, her lender accelerated the loan and commenced the procedure of enforcement.²²³ The lender sought to collect €381,153.66 (principal), €5,725.80 (ordinary interest), and €856.77 (default interest).²²⁴ Enforcement included auctioning the property.²²⁵ Authorized by the enforcement courts, and at the lender’s request, the state agent made four attempts to hand deliver notification of the auction to IDG without success.²²⁶ The agent then posted the notice on the court house board where the enforcement proceeding was being conducted.²²⁷

As distinguished from *Aziz* wherein the complaint was grounded in the EU UCT Directive, the mortgage-holder in *IDG* relied upon provisions in ICESCR.²²⁸ In particular, Ms. IDG argued that Spain’s mortgage enforcement procedures especially with respect to notice, violated the right to housing, guaranteed by Article 11(1),²²⁹ and

²²⁰ IDG satisfied the exhaustion of remedies requirement in that she initially brought her claims before Spain’s (Madrid) Constitutional Court seeking protection (known as “amparo.”). The Constitutional Court issued a decision in 2013. *IDG v. Spain*, para. 9.5, para. 13.7, p. 10, p.15. IDG filed its communication on January 28, 2014, para. 9.7, p. 11.

²²¹ *IDG*, para. 1, p. 2/16.

²²² *IDG*, para. 2.1, p. 2/16.

²²³ *IDG*, paras. 2.3 and 10.6, pp. 3/16 and 12/16.

²²⁴ *IDG*, para 203, p. 3/16.

²²⁵ *IDG*, para. 2.3, p. 3/16.

²²⁶ *IDG*, para. 2.4, p. 3/16.

²²⁷ *IDG*, para. 2.5, p. 3/16.

²²⁸ IDG satisfied the exhaustion of remedies requirement in that she initially brought her claims before Spain’s (Madrid) Constitutional Court seeking protection (known as “amparo.”). The Constitutional Court issued a decision in 2013 in which it determined that there was no evidence of “violation of any fundamental right covered by amparo, as required by Spain’s constitution. *IDG v. Spain*, paras. 2.10, 9.5, and 13.7, pp. 4/16, 10/16, and 15/16.

²²⁹ Article 11(1) of the ICESCR provides:

“1. The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.”

Article 2(1). The latter provision requires States to accomplish, “progressively,” the “full realization”²³⁰ of the rights enumerated in ICESCR.²³¹ The complainant focused her case on procedure, specifically on the matter of notice. She alleged that because the lender failed to serve her with notice at the two critical stages of initiating the mortgage enforcement proceeding and initiating the auction, the bank was in violation of ICESCR.²³² Notice was critical. Without it, IDG claimed, she was denied “access to effective and timely judicial protection.”²³³ Because she was not apprised of the proceeding and auction, until after a date for the auction had been scheduled, she was deprived of the opportunity to present a solid defense against the bank’s allegations with respect to the purported amounts she owed and regarding any unfair terms in her mortgage contract.²³⁴ IDG targeted Spain’s procedural laws that permitted lenders to proceed with foreclosure actions by using a public notice procedure rather than giving borrowers actual notice.²³⁵

The right to housing, the Committee noted, is a “fundamental right central to the enjoyment of all economic, social and cultural rights[] and is inextricably linked to other human rights . . .”²³⁶ In the matter of “forced evictions,” such as the *IDG* case, extra precautions must be taken by the government in constructing its procedural rules of notice and process to ensure that access to judicial remedy obligations, imposed by Article 2 of ICESCR, are fulfilled.²³⁷ The Committee concentrated on the potential consequences of the lack of timely notice could lead to: The homeowner’s dispossession without any possibility of reacquiring the property with his equity intact.²³⁸

As a general matter, the Committee concluded that, “insufficient notice of an application for mortgage enforcement, such as to prevent the person defending their

²³⁰ Article 2(1) of the ICESCR.

²³¹ IDG, para. 3.5, p. 5/16.

²³² IDG, para. 3.3, p. 4/16.

²³³ IDG v. Spain, para. 10.2, p. 11. See also, para. 3.4 and 3.5, p. 4 – 5 (citation omitted). The citation is to the *Aziz* case. As a remedy, the complainant requested that the mortgage enforcement proceedings be annulled along with the court’s order to auction her property. IDG, para. 2.7, p. 3/16.

²³⁴ IDG, para. 3.4 -3.5, p. 5/16.

²³⁵ IDG, para. 5.2, p. 6/16 (“The author points out that her communication concerning a violation of article 11, paragraph 1, of the Covenant, arose out of the failure to notify her of the mortgage enforcement proceedings in respect of her property, or the Court’s decision to admit the enforcement of the application, which prevented her from defending her right to housing in the courts.”).

²³⁶ IDG, para. 11.1, p. 12/16.

²³⁷ IDG, para. 11.2, p. 12/16. The Committee referenced its General Comment 7 in which it elaborates on this point of sufficient access to judicial process and remedies.

²³⁸ IDG, para. 13.4, p. 14/16.

rights in that procedure, represents a violation of the right to housing.”²³⁹ The Committee clarified that while public posting may be a valid method for serving notice of housing proceedings, it should be used only as a “measure of last resort, particularly when applied to acts that set a procedure in motion.”²⁴⁰

Here, the Committee concluded that the state failed to produce evidence demonstrating that it had “exhausted all available means to serve notice in person.”²⁴¹ There were other methods sanctioned by the civil procedure laws that the state could have availed itself of to leave proper notice for IDG, but it failed to do so.²⁴² The Committee reasoned that, the posting of the public notice did not ensure that IDG could effectively participate in the mortgage enforcement proceedings thereby denying her due process. It noted that, at the time of the posting, the ECJ had not yet issued its ruling in *Aziz* ruling. The state of Spain’s procedural law, in that moment, left IDG without a forum to both contest the terms in her mortgage contract and suspend the enforcement proceeding, pending a decision. Limiting its ruling to IDG’s case, the Committee held that notice with respect to IDG was “inadequate” and in violation of Article 11 and Article 2(1).²⁴³

Djazia and Bellili (CESCR adopted June 20, 2017)

Although the *MBD v. Spain* case²⁴⁴ does not expressly mention *Aziz*, it is relevant to this analysis because under the rubric of housing, the international committee revises notions of what constitutes the public and private spheres. *MBD* not only concerns private leasing arrangements and the right to housing, it implicates the State in the relationship.²⁴⁵ Mr. Djazia and Ms. Bellili resided in a rented apartment in Madrid, paying their rent without incident for several years until they encountered financial difficulties and were no longer able to pay. Shortly after their landlord moved to evict them, they filed suit before the Committee.²⁴⁶ They alleged that their right to “decent and

²³⁹ IDG, para. 12.4, p. 13.

²⁴⁰ IDG, para. 12.3, p. 13.

²⁴¹ IDG, para. 13.3, p. 14/16.

²⁴² IDG, para. 13.3, p. 14/16.

²⁴³ IDG, paras. 13.5 and 15, p. 15/16.

²⁴⁴ The Committee on Economic, Social, and Cultural Rights adopted its views on the case on June 20, 2017. *Djazia and Bellili* (CESCR 2015), para. 3.1.

²⁴⁵ The State alleged that the complaint did not fall within the purview of the Article 11 of the ICESCR. *Djazia and Bellili* (CESCR 2017) (adopted by the Committee on May 29 through June 23, 2017), para. 12.7. The IESCR Committee concludes: “although the Covenant primarily establishes rights and obligations between the State and individuals, the scope of the provisions of the Covenant extends to relations between individuals. An eviction related to a rental contract between individuals can, therefore, involve Covenant rights.” *Id.* at para. 14.2.

²⁴⁶ *Djazia and Bellili* (CESCR 2015), paras. 2.6 and 2.8. The complainants filed suit under Article 11(1) of ICESCR and Articles 3(e) and (f) and Article 4

adequate housing” was violated because the government ignored their repeated requests to be relocated to public rental housing and for subsistence payments.²⁴⁷ As a result, they had insufficient income to pay their rent, which led to their eviction, and, furthermore, the state’s failure to provide alternative housing left them homeless.²⁴⁸ The Committee agreed.²⁴⁹

Recognizing that ICESCR grants broad rights and protections to individuals, the Committee concluded that the guarantees associated with the right to housing under Article 11 extend “to persons living in rental accommodation, whether public or private” and that “such persons should enjoy the right to housing even when the lease expires.”²⁵⁰ Even though in this instance the state was not the primary instigator behind the eviction, the Committee reasoned that, this circumstance does not preclude renters from drawing upon the international legal buffers to prevent forced eviction.²⁵¹ Forced evictions are “prima facie incompatible with the requirements of the Covenant and can be justified only in the most exceptional circumstances, and in accordance with the relevant principles of international law.”²⁵² It is important to note that the right to housing does not preclude private and public landlords from evicting tenants. Instead, it places limitations on the manner and time in which they may do so. Tenant evictions are permissible, provided they are carried out as a “last resort and that the persons concerned have had prior access to an effective judicial remedy” to test the merits of the eviction action.²⁵³

The ruling is revelatory of the State’s duties and obligations to individuals who are facing evictions based upon their private rental contracts. The private nature of eviction actions initiated by private landlords against lessees does not negate the responsibility of the State to ensure that the human rights of the individuals involved are

²⁴⁷ MBD v. Spain (CESCR 2015), paras. 2.11 and 3.1.

²⁴⁸ Djazia and Bellili (CESCR 2015), paras. 2.3, 2.4, 2.8, 2.19.

²⁴⁹ Djazia and Bellili (CESCR 2015), para. 3.1. The Committee concluded:

“All persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment, and other threats.[] This guarantee also applies to persons living in rental accommodation, whether public or private; such persons should enjoy the right to housing even when the lease expires.”

Djazia and Bellili (CESCR 2015), para. 13.2. See General Comment 7, para. 3.

²⁵⁰ MBD - Djazia and Bellili v. Spain (CESCR 2015), para. 13.2.

²⁵¹ Djazia and Bellili (CESCR 2015), para. 13.2.

²⁵² Djazia and Bellili (CESCR 2015), para. 13.3.

²⁵³ Djazia and Bellili (CESCR 2015), para. 15.1.

respected.²⁵⁴ The State “bears the ultimate responsibility.”²⁵⁵ It must ensure that the international right to housing is not transgressed in the administration of the eviction or in the consequences of the eviction (e.g., family and children are left homeless), devising laws necessary to achieve this end.²⁵⁶ Particularly, where minor children are involved, as was the circumstance with Djazia and Bellili, the state has a heightened duty to prevent homelessness.²⁵⁷

If homelessness is the outcome of the eviction and the state fails to offer any support upon request by the evicted persons, then a violation of the treaty may be found.²⁵⁸ States may use any combination of subsidies and laws to meet their obligations, but “any measures adopted must be deliberate, specific and as straightforward as possible to fulfil [the] right as swiftly and efficiently as possible.”²⁵⁹ In evaluating the state’s performance, the Committee found that the laws concerning governing the eviction process did not allow tenants to challenge the substantive basis of the proceedings, but only permitted them to raise the defense that the deficient rent payments were actually paid.²⁶⁰

Taking into consideration the foregoing, the IESCR Committee determined that the state had violated the right to housing and that as a remedy the complainants should be given public housing and paid compensation related to the violation, and for reasonable legal costs related to bringing the action before the Committee.²⁶¹

VII. Analysis of the Cases and Comparing the Legal Regimes

²⁵⁴ The Committee concluded that the State:

“bears the ultimate responsibility to ensure that the rights under the covenant are respected, including the right to housing of lessees . . . the State party has an obligation, inter alia, guarantee that the eviction [doesn’t infringe the rights recognized in the ICESCR].

Djazia and Bellili (CESCR 2015), para. 14.1.

²⁵⁵ Djazia and Bellili (CESCR 2015), para. 14.1.

²⁵⁶ Djazia and Bellili (CESCR 2015), paras. 14.1 and 14.2.

²⁵⁷ Djazia and Bellili (CESCR 2015), para. 16.6.

²⁵⁸ Djazia and Bellili (CESCR 2015), para. 15.2 (“The State party has a duty to take reasonable measures to provide alternative housing to persons who are left homeless as a result of eviction, irrespective of whether the eviction is initiated by its authorities or by an individual such as the lessor.”).

²⁵⁹ MBD v. Spain (CESCR 2015), para. 15.3.

²⁶⁰ Djazia and Bellili (CESCR 2015), para. 16.4. There are similarities between this emphasis on the limitations of the State’s procedures and the claims made in cases before the ECJ in *Aziz*, etc.

²⁶¹ Djazia and Bellili (CESCR 2015), para. 20.

In 2012 and 2013, the Spanish government responded to pressures from the EU and activism by crafting several measures to revise procedures for repossession and establish protections for debtors and paths for eliminating their debt. Banks were pressured to rededicate some of the foreclosed properties towards rental housing. One plan advanced by protestors was to have banks provide the properties to defaulted borrowers at rents more in keeping with their economic level.²⁶²

The *Aziz* case is significant for several reasons. It marks a moment in which the ECJ turned its attention to the mortgage consumer contract and the comparative positioning of lenders and borrowers in Spain.²⁶³ It highlighted the tremendous influence that property, urban planning, and real estate policies have over the health of the national economy. The preliminary ruling is a noteworthy moment in which the international adjudicatory framework became involved in Spain’s severe chronic debt problems. To the extent the preliminary ruling provides sage guidance, it has the potential to reverse the downward economic spiral that government and bank policies have brought upon the country.

The impact of the ECJ’s *Aziz* ruling is substantial.²⁶⁴ First, the good faith test, which the ECJ frames from the perspective of the consumer, is potentially beneficial to mortgage consumers although not an easy one to administer. The test is whether “the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to the term concerned in individual contract negotiations.”²⁶⁵ It is difficult to imagine that if borrowers understood the full import of the unfavorable terms in their loan contract, they would agree to them. Yet, in the United States, courts have adopted a similar approach. When scrutinizing contracts of adhesion, American courts apply the doctrine of reasonable expectations to consider whether the implications of the challenged terms were within the reasonable contemplation of the consumer at the time of entering the contract.²⁶⁶ The other aspect is from the lender’s perspective. It is necessary to consider whether this test too favorable to consumers. Does the test discourage lenders from lending? Second, the *Aziz* decision prompted Spain to amend its mortgage laws by enacting the Law 1/2013 of May 14, 2013. The new law was designed to conform to the ECJ’s decision.²⁶⁷ Specifically, the law permits courts to

²⁶² Judith Sunderland, SHATTERED DREAMS: IMPACT OF SPAIN’S HOUSING CRISIS ON VULNERABLE GROUPS” Human Rights Watch, 2014, 6.

²⁶³ Irina Domurath and Hans-W, Micklitz, Consumer Debt and Social Exclusion in Europe (Introduction), 4 -5 (underscoring the issuance of the *Aziz* decision as a watershed moment).

²⁶⁴ The final paper will include an extensive analysis of the ECJ’s reasoning.

²⁶⁵ *Aziz*, ECJ, Judgment of the Court (First Chamber), para. 77.

²⁶⁶ See Legal Information Institute, Cornell Law School, “Adhesion Contract” https://www.law.cornell.edu/wex/adhesion_contract_contract_of_adhesion.

²⁶⁷ Juana Marco Molina, “Spanish Law in 2010-2012: The influence of European Union Law and the Impact of the Economic Crisis” in *Journal of Civil Studies*, Volume 6 Issue I (Summer 2013), p. 434.

assess whether the terms that the foreclosing party is relying upon are unfair. The law, however, does not go far enough in that it permits a mere thirty days for homeowners who are in the midst of foreclosure actions to initiate their appeal.²⁶⁸ Third, the *Aziz* ruling suggests that the court will look beyond the banks’ defined contractual terms to determine whether the terms are “unfair,” cause a “significant imbalance in the parties’ rights and obligations under the contract,” are not in “good faith,” and impact the consumer in a detrimental way. The ECJ’s orientation, however, is not solely in the direction of the consumer. The sources of interpretation and assessment guidance that the ECJ consults for evaluating the mortgage loan transaction are the banking industry, the consumer credit industry, and the EU community.

The ECJ’s follow-up decisions in the consumer protection vein probe the scope of this category and clarifies the obligations and duties of states and lenders to individuals. For example, while the province of generating rules for the determination of unfairness remains in first with national legal systems, the *Naranjo* Court reminds Member States that there are definite limits on what they are permitted to do. A primary limit is that their rules may not undermine or circumvent the protections of the Directive.²⁶⁹

In the interest of not unduly constraining financial institutions, the ECJ’s rulings, at times, identify what banks are permitted to do in their transactions with residential mortgage consumers. In *Hidalgo*, for example, the Court ruled that the Directive did not preclude a state from having a domestic law authorizing and mandating the national court to modify the terms of default interest within a mortgage loan contract, as provided for under that law.²⁷⁰

The private sector cannot be trusted to establish the appropriate scope of unconscionability if the goal is to protect individuals in their claims to maintaining ownership of property or their tenure as tenants. The private sphere will act in its interests even if those actions are pernicious to the other party to the contracts. The *Aziz* case and its progeny placed lenders on notice that they no longer have free reign in dictating mortgage contract terms. The decision confirmed that such private law contracts were subject to judicial scrutiny at the supranational level and that in carrying out its powers of interpreting EU Directives, the Court was authorized to intervene and remake the contract, where necessary. This is a troubling development from the standpoint of many businesses and private law scholars.

Aziz had a pronounced effect on the crafting of IDG’s complaint as well as on the ESCR Committee’s reasoning assessing the adequacy of the notice given.²⁷¹ The Committee addressed *Aziz* in the context of responding to the references to it by Ms. IDG

²⁶⁸ Judith Sunderland, SHATTERED DREAMS, Human Rights Watch (2014), 6.

²⁶⁹ *Naranjo* (ECJ Grand Chamber 2016), para. 66.

²⁷⁰ *Hidalgo Rueda and Others* (ECJ First Chamber 2015), para. 42.

²⁷¹ See footnote 5, p. 5 and

and Spain.²⁷² It is noteworthy that IDG framed her case in terms of the right to housing, but substantively, her claims pertained to her private mortgage loan contract and the state’s enforcement procedures. The *IDG* case widens the scope of what is encompassed in the right to housing. Ms. IDG imagines the right to housing as touching upon the private sphere of individual business transactions. IDG’s conception of her right to housing is evident from the claims she asserted. The right to housing refers to the right to stay in place in her mortgaged home and to assert all defenses and prevail upon all procedures where necessary to guard her homeownership from being taken away by the lender.²⁷³ IDG’s allusions to the poor state of Spain’s economy and her particular fiscal challenges²⁷⁴ reveal that she was drawing upon a particular image of the state. The imagined state has some responsibility for the health of the economy and the welfare of its residents. Where the state has a hand in _____. The International Network of Economic, Social, and Cultural rights (ESCR-Net) submitted, as a third party, statements that essentially echoed IDG’s views regarding the responsibilities of the state.²⁷⁵

The *IDG* Committee’s ruling is important for several reasons. It provides the Committee’s interpretation of the international human right to adequate housing, as expressed in the UN treaty. It supports the conclusion that the international human right to housing is broad enough to encompass private law matters such as, the enforcement of mortgage loan contracts. The *IDG* decision makes it clear that the right to adequate housing is a “fundamental right . . . inextricably linked to other human rights.”²⁷⁶ The Committee recognized that “security of tenure” is of critical importance to this right and that forced evictions are only legally authorized by international law under “exceptional circumstances.”²⁷⁷ The right to housing encompasses “the right to live somewhere in security, peace, and dignity.”²⁷⁸ The ESCR Committee went further when it purposefully linked two types of private transactions in clarifying that protection from forced evictions is not only relevant in the rental housing context but extends to the mortgage foreclosure context.²⁷⁹ There is a nexus between purchasing and renting from the perspective of the treatment of the law. The public sphere is also implicated in that rental housing includes government subsidized social housing.

²⁷² IDG, para. 13.6, p. 15/16.

²⁷³ IDG, para. 5.2, p. 7.

²⁷⁴ IDG, para. 2.2, p. 3.

²⁷⁵ IDG, para. 6.1 – 6.5, pp. 8 - 9.

²⁷⁶ IDG, para. 11.1, p. 12.

²⁷⁷ IDG, para. 11.2, p. 12.

²⁷⁸ Insert cite.

²⁷⁹ IDG, para. 12.1, p. 13.

Other notable aspects of the Committee’s ruling in *IDG* are the views it expresses regarding eviction and the participation of the individual targeted for such treatment. The Committee underscored that:

“ . . . all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment, and other threats,[] and that instances of forced eviction are prima facie incompatible with the requirements of the International Covenant on Economic, Social, and Cultural Rights and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.”²⁸⁰

This is strong language outlining when evictions will be permitted. Such language signifies that the Committee acknowledges the disruption this practice can cause to individual lives. It also signals that the Committee recognizes that this action is an affront to human dignity. Human dignity is one of the paramount principles of international human rights laws.²⁸¹ -

A significant limitation of *IDG* is that the Committee declined to issue a broad ruling regarding mortgage proceedings and loan terms with respect to the right to housing, and instead, limited the decision to the facts of the case that was immediately before it.²⁸² Furthermore, the *IDG* Committee did not interpret of the mortgage loan document itself. While the ICESCR Committee can make determinations as to whether the process offered to the complainant is a fair one (i.e. whether it complies with the requirements of the UN Covenant), it remains an open question regarding the Committee’s authority to examine the terms of the loan contract and determine that they are unfair as the ECJ did in *Aziz*.

In *Djazia* the ESCR Committee recognized that States have extensive duties to their constituents. Being duty bound means that when individuals are facing impending eviction and they have requested government assistance, the parties must not be made homeless by eviction.²⁸³ Regardless of the private structuring of the relationship between landlords and renters, where that relationship leaves the renting party susceptible to deprivation of the basic resource of housing, the government is required to intervene in some manner to prevent that outcome. This is remarkable. If Spain is held accountable to this standard, it suggests that it may substantially expand its social housing network, which will require land. Spain should be motivated to conduct its land use planning and

²⁸⁰ *IDG*, para. 11.2, p. 12.

²⁸¹ See e.g., Preamble to the Universal Declaration of Human Rights.

²⁸² *IDG*, para. 13.5 , pp. 14 -15 (“Given the specificity of the problem of inadequate notice posed by the author, the Committee is not required, in the context of this communication, to consider whether or not the State party’s internal rules governing mortgage enforcement procedures and the possible auctioning of mortgaged properties, which may be dwellings, are generally consistent with the right to housing.”).

²⁸³ Insert cite.

deals with private developers cautiously. That is, in a manner that deters rather than fosters speculation. Being vigilant in countering land speculation – which harms the populace and can place greater needs on the government to provide social benefits for those renters and buyers who are priced out of the market or removed from their homes upon foreclosure ---- is a mandate of the Spanish Constitution.²⁸⁴ Furthermore, the ICESCR Committee’s ruling incentivizes the government to be more proactive on the side of drafting legislation aimed at protecting tenants. It may also prompt Spain to enlist the help of banks with figuring out alternative housing arrangements for their foreclosed upon borrowers.

The Committee directed states to deal with the “structural causes of the lack of housing.”²⁸⁵ In reaching its decision, the Committee was particularly impressed by the government’s actions that resulted in decreasing desperately needed public housing. Specifically, in 2013 the Madrid Housing Institute “sold 2,935 [public] homes to private companies/investment funds”²⁸⁶ for 201 million euros.²⁸⁷ The government explained that the move was necessary to address budgetary deficits.²⁸⁸ Heavily criticizing the State’s decision, the Committee advised that, [i]n severe economic and financial crisis. All budgetary changes or adjustments, affecting policies must be temporary, necessary, proportional and non-discriminatory.[]²⁸⁹

Two primary concepts emerged from the intermingling of the public and private law spheres: unconscionability and vulnerability.

Unconscionability: Another word for Unfairness

The notion of freedom of contract is predicated on the idea that individuals are autonomous rational beings.²⁹⁰ Private contract law has its principles and doctrines that

²⁸⁴ Article 47 of the Spanish Constitution (1978).

²⁸⁵ Djazia and Bellili (CESCR 2015), para. 15.3.

²⁸⁶ Djazia and Bellili (CESCR 2015), para. 12.4.

²⁸⁷ Djazia and Bellili (CESCR 2015), paras. 5.5 and 12.4.

²⁸⁸ Here, there were at least two ways to define the public interest. In accordance with one perspective, the public interest is served by having the debts of the country reduced so that presumably, the government would have money in the future to expend on resources to benefit the public such as housing, education, and infrastructure. Another perspective would define the public interest as, at a minimum, preserving the level of public housing and finding an alternative way of raising capital to pay down public debt. In this instance, the interests of the public in having government supported housing were severely discounted.

²⁸⁹ Djazia and Bellili (CESCR 2015), para. 17.6 (citation omitted).

²⁹⁰ Thomas Gutmann, “Theories of Contract and the Concept of Autonomy.” Center for Advanced Studies in Bioethics (2013). Florian Rödl, “Contractual Freedom, Contractual Justice, and Contract Law (Theory)” 76 Law and Contemporary Problems, 57 (2013),

are intended to offer protection to parties under certain circumstances. Mistake, fraud, deceit, duress, impossibility, frustration of purpose, illegality, undue influence,²⁹¹ and unconscionability are all concepts that may be drawn upon to provide relief a contractual party.

Zweigert and Kotz comment that:

“The view that general terms of business must be controlled in order to protect the weak and uninitiated against those with practiced power has proved enormously effective in discussions of legal policy. This slogan was embraced by the modern consumer movement and since the beginning of the 1960s the laws enacted by most European countries have been more or less based on the view that the consumer as the ‘weaker’ party must be protected against contractual terms which entrepreneurs force on him by abusing their economic superiority.”²⁹²

The UCT Directive also has this view of a transaction.

Unconscionability is an equitable doctrine that may intervene to restrict the enforcement of a private contract. It derives from the common law.²⁹³ The private law regime has the concept of unconscionability. The potential of unconscionability is tempered by freedom of contract norms. European Courts and American courts rely upon the doctrine, respectively, in European private law transactions and in the United States to address inequities in contracts.²⁹⁴ Unconscionability in the United States is defined as:

“A defense against the enforcement of a contract or a portion of a contract. If a contract is unfair or oppressive to one party in a way that suggests abuses during its formation, a court may find it unconscionable and refuse to enforce

<https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4360&context=lcp>. Hanoch Dagan and Michael Heller, “Autonomy for Contract, Refined” *Law and Contemporary Problems* (2018).

²⁹¹ Konrad Zweigert and Hein Kotz, Chapter 2 “The Function and Aims of Comparative Law” in *AN INTRODUCTION TO COMPARATIVE LAW* (3rd ed. Oxford University Press, 1998), trans. Tony Weir, 330.

²⁹² Konrad Zweigert and Hein Kotz, Chapter 2 “The Function and Aims of Comparative Law” in *AN INTRODUCTION TO COMPARATIVE LAW* (3rd ed. Oxford University Press, 1998), trans. Tony Weir, 330.

²⁹³ Immaculada Barral-Viñais, “Freedom of contract, unequal bargaining power and consumer law on unconscionability” in *UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS: PROTECTING THE VULNERABLE*, MEL KENNY, JAMES DEVENNEY, LORNA FOX O’MAHONY, eds. (Cambridge University Press 2010), 46.

²⁹⁴ See Ulf Bernitz, Xavier Groussot & Felix Schulyck, eds., *GENERAL PRINCIPLES OF EU LAW AND EUROPEAN PRIVATE LAW* (Wolters Kluwer 2013); See “The Rise and Fall of Unconscionability as the ‘Law of the Poor’” 102 *GEO L.J.* 1383 – 1441 (2014).

it. A contract is most likely to be found unconscionable if unfair bargaining and unfair substantive terms are shown. An absence of meaningful choice by the disadvantaged party is often used to prove unfair bargaining.”²⁹⁵

In the European context, unconscionability is a legal invention to address the international law principle of *pacta sunt servanda*.²⁹⁶ The concept mandates that “agreements which are legally binding must be performed.”²⁹⁷ Is unconscionability separate from a good faith requirement in the EU law context or are these ideas essentially collapsed into one another? Application of the unconscionability doctrine invites questions of the extent to which borrowers should be protected.

The UCT Directive and *Aziz* are informed by the concept of unconscionability. Both are replete with notions of equity, fairness, and good faith. It is important to note, however, that the ECJ does not use the term in the cases discussed. In exploring the elasticity of the unconscionability concept, it is necessary to consider the scope of this concept, its purpose, and whether it accomplishes normatively what this Article proposes? Is the concept of unconscionability elastic enough to furnish sufficient protection and support for housing consumers? Does the concept sufficiently restrain lenders? When there is a fairer playing field, some vendors and consumers may feel better about their exchanges and will be willing to continue to engage in financial transactions. That is, they will be willing to continue to participate in the market.

²⁹⁵ See Legal Information Institute, Cornell Law School, “Unconscionability” <https://www.law.cornell.edu/wex/unconscionability>.

²⁹⁶ Cherednychenko defines “an unconscionable financial transaction”:

“a bargain which is (potentially) excessively disadvantageous for the weaker party whose freedom to form an independent judgement about the merits of the contract at the time the contract was made has been impaired because of what the stronger party has done or omitted to do.”

Olha H. Cherednychenko, “Conceptualising unconscionability in the context of risky financial transactions: how to converge public and private law approaches?” in *UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS: PROTECTING THE VULNERABLE*, MEL KENNY, JAMES DEVENNEY, LORNA FOX O’MAHONY, eds. (Cambridge University Press 2010), 248.

²⁹⁷ See definition of “pacta sunt servanda on The Oxford Public International Law website, <http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1449>;

Immaculada Barral-Viñais, “Freedom of contract, unequal bargaining power and consumer law on unconscionability” in *UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS: PROTECTING THE VULNERABLE*, MEL KENNY, JAMES DEVENNEY, LORNA FOX O’MAHONY, eds. (Cambridge University Press 2010), 47.

It is worth exploring: (i) whether this concept essentially could have provided the relief sought by Aziz and (ii) whether the importation of concepts from the realm of human rights, fundamental rights, constitutional rights, undermine the private law regime’s ability to resolve issues concerning housing contracts? Some scholars, such as Olha Cherednychenko, have argued that private law is enough.²⁹⁸ By resorting to a combination of private law norms and European private law regulatory business conduct rules, which may be enacted at the supranational level,²⁹⁹ she argues that a sufficient protection of for the consumer is achieved without undermining the private law regime, which has developed important standards and practices over time. She concludes that “[f]undamental rights . . . do not add anything substantially new to possible ways of resolving this issue [i.e. arriving at the proper balance between freedom of contract and protection of the weaker party], and also do not provide any workable criteria for providing new answers.”³⁰⁰ Nonetheless, she recognizes that “fundamental rights are an important source of core values for the whole legal order; contract law as the source of concepts providing much sharper criteria developed by trial and error over a long period of time for determining whether a particular contract is unconscionable.”³⁰¹

Cherednychenko makes astute points regarding the substantive detail of private law that has developed over time and is likely to provide a more thorough and balanced response to the relationships between sellers and consumers. Her concerns regarding the

²⁹⁸ Cherednychenko argues that German contract law contains within it “general legal concepts such as good faith, good morals or public policy, defects of consent” that could operate to address inequalities in contractual agreements that ultimately harm the weaker party. Cherednychenko, “Conceptualising unconscionability in the context of risky financial transactions: how to converge public and private law approaches?” in *UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS: PROTECTING THE VULNERABLE*, MEL KENNY, JAMES DEVENNEY, LORNA FOX O’MAHONY, eds. (Cambridge University Press 2010), 258 – 259.

²⁹⁹ Examples of supranational business conduct rules include: the Markets in Financial Instruments Directive and the Investment Services Directive. See Cherednychenko, “Conceptualising unconscionability in the context of risky financial transactions: how to converge public and private law approaches?” in *UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS: PROTECTING THE VULNERABLE*, MEL KENNY, JAMES DEVENNEY, LORNA FOX O’MAHONY, eds. (Cambridge University Press 2010), 262 – 274.

³⁰⁰ Cherednychenko, “Conceptualising unconscionability in the context of risky financial transactions: how to converge public and private law approaches?” in *UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS: PROTECTING THE VULNERABLE*, MEL KENNY, JAMES DEVENNEY, LORNA FOX O’MAHONY, eds. (Cambridge University Press 2010), 259.

³⁰¹ Cherednychenko, “Conceptualising unconscionability in the context of risky financial transactions: how to converge public and private law approaches?” in *UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS: PROTECTING THE VULNERABLE*, MEL KENNY, JAMES DEVENNEY, LORNA FOX O’MAHONY, eds. (Cambridge University Press 2010), 260.

disregard of business rules and private law norms without adequate serious contemplation are well-taken. Nonetheless, there is a question of whether private law actors, in particular, the stronger parties in private law transactions are inclined to develop efficacious mechanisms to protect “vulnerable” parties. Was unconscionability working that way in the past? Do the concepts of public law extend the intellectual pool of resources available to adjudicators to fill the lacunae of public law? When there is a mingling of private and public law concepts, does it necessarily result in incoherent standards for private law transactions that are difficult to apply.

[Develop this section and consider - Do the ECJ cases represent the Court’s application of the doctrine of unconscionability that was essentially worked out by private parties? Is it the expansion of the doctrine of unconscionability with the Court infusing it with human rights notions? Is it a new doctrine of consumer protection?]

Vulnerability

Vulnerability has emerged as a term of currency in the world of international law.³⁰² Vulnerability in the form of “weaker party” actually appears in both the private and public law realms. The analysis of cases and international legal instruments herein, however, is not expressly through the lens of vulnerability.³⁰³ Vulnerability may be defined in several ways. Vulnerability refers to the existential condition, positioning, or status of the individual that renders the person susceptible to tactics, practices, and structures of institutions or others, causing detriment. The condition or status of the person suggest that the individual is not functioning as an arms-length bargainer (party). Rather, the individual is impaired in his ability to interact or transact freely with government, business, or other individuals. Their autonomy is compromised or nonexistent.³⁰⁴ A study by Human Rights Watch reports that immigrants, single-mothers, “single-parent households . . . women victims of domestic abuse, and children” suffered “disproportionate” harm related to Spain’s housing crisis, as a result of the lending

³⁰² See e.g., UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS: PROTECTING THE VULNERABLE, MEL KENNY, JAMES DEVENNEY, LORNA FOX O’MAHONY, eds. (Cambridge University Press 2010). Insert more cites.

³⁰³ Domurath has an article – “The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law.” Irina Domurath, *Journal of European Consumer and Market Law* 3: 124-137 (2013). See also, Mel Kenny book – *Unconscionability in European Private Financial Transactions – Protecting the Vulnerable*.

³⁰⁴ See Martha Fineman’s formulation in ___, insert cite. Although Fineman argues that we are all vulnerable, as a starting place.

practices of financial institutions.³⁰⁵ These groups are, according to human rights activists, the most “vulnerable.”³⁰⁶

Some private law scholars have made the pitch for adopting vulnerability as a normative standard in the arena of mortgage consumer law.³⁰⁷ Others have cautiously pondered the wisdom of transporting a concept that is more aligned with the human rights sphere into the private world of contracts.

According to the ESCR Committee, IDG characterized herself as being placed in a position of “vulnerability, uncertainty, and anxiety” as a result of her financial institution availing itself of national procedural rules that favored lenders.³⁰⁸ The use of the word, “vulnerability” is significant.

One can view freedom of contract as recognizing the private autonomy of individuals to enter into agreements and to practice self-determination. Associated with this view, are notions that individuals are rational human beings who will act in their self-interest to strike evenly-balanced fair deals even in the context of contracting with commercial enterprises. Fallacious assumptions ground this conception of freedom of contract. The concept of vulnerability when applied to housing serves to link private law and public law. Vulnerability theory is valuable in that it recognizes that individuals are not rational self-sustaining individuals that the government should leave to defenseless in the name of private autonomy. Martha Fineman posits:

“ . . . The institutions of particular interest are those that are created and maintained under the legitimating authority of the state, since the ultimate objective of vulnerability analysis is to argue that the state must be more responsive to, and responsible for vulnerability.”³⁰⁹

A point of connection between Fineman’s theory of vulnerability and this project’s inquiry into how a contemporary consumer protection culture came into being in Spain is the claim that the ECJ and the ESCR Committee recognized the vulnerability of Spain’s citizenry. It is important to note, however, that the impact of those decisions exceeds the limitations of that country’s national boundaries. Although the ECJ doesn’t use the term

³⁰⁵ Judith Sunderland, SHATTERED DREAMS: IMPACT OF SPAIN’S HOUSING CRISIS ON VULNERABLE GROUPS” Human Rights Watch, 2014, 29.

³⁰⁶ Judith Sunderland, SHATTERED DREAMS: IMPACT OF SPAIN’S HOUSING CRISIS ON VULNERABLE GROUPS” Human Rights Watch, 2014, 29.

³⁰⁷ Irina Domurath, “The Case for Vulnerability as the Normative Standard in European Consumer Credit and Mortgage Law – An Inquiry into the Paradigms of Consumer Law, 3 Journal of European Consumer and Market Law 124 – 137 (2013).

³⁰⁸ IDG, para. 10.2, p. 11.

³⁰⁹ Martha Fineman, “The Vulnerable Subject: Anchoring Equality in the Human Condition” 20 Yale Journal of Law and Feminism 1 (2008), 14.

“vulnerable,” in the cases examined herein, it draws upon the logic of vulnerability theory in recognizing inequities in the status and bargaining power of banks and mortgage consumers. Instead of “vulnerable” the ECJ refers to mortgage consumers as “weaker parties.”³¹⁰ The analysis of whether the mortgage terms are unfair is framed in terms of whether a reasonable person accept the contract and did the consumer have any flexibility with respect to the non-negotiated terms and were the contract terms written in intelligible language.³¹¹ Translated into the lexicon of vulnerability, one would ask were the terms written in a way that a person who was vulnerable because they were not versed in mortgage finance or vulnerable because of their economic circumstances (class) needed capital but their credit rating (which is also a value judgment) did not qualify them to be in a position to bargain over their mortgage terms. The ESCR Committee actually uses the term “vulnerable” in matters concerning residential mortgage loans and rental housing. One can surmise from the Committee’s use of the term that vulnerability is in part signaled by being “subjected to systemic discrimination.”³¹² In *Djazia*, for example, the UN Committee directs States to “ensure that evicted persons have alternative housing, especially in cases involving families, older persons, children and/or other persons in vulnerable situations.”³¹³ The Committee’s use of the term “vulnerability” can be read as an attempt to apprehend and represent the particular experiential aspects of a person’s existence which renders them susceptible to harm from the blanket application of private contracts or public policies.³¹⁴

Both international institutions (i.e. the ECJ and the ESCR Committee) go further in that they distinguish levels of vulnerability (again recognize that the ECJ does not

³¹⁰ Naranjo (ECJ Grand Chamber 2016).

³¹¹ *Aziz*, ECJ, Judgment of the Court (First Chamber).

³¹² *Djazia* and Bellili (CESCR 2015), para. 15.2.

³¹³ *Djazia* (ICESCR 2015), para. 21(c).

³¹⁴ The *Aziz* case involved an individual of Moroccan heritage, whose employment in Spain commenced in December 1993. *Aziz*, ECJ, Judgment of the Court (First Chamber) (March 14, 2013), para. 18. The case does not deal with racial discrimination, however, given the history of discrimination in Spain against Africans and Muslims and his status as a minority, Mr. Aziz’s ethnic background raises a question as to whether his heritage (and possibly, his religion) factored into his experience with Caixa. His story, combined with those of others explored in this paper, invites scrutiny regarding the vulnerability of minority groups with respect to predatory lending practices of banks. While all groups without access to meaningful capital and influence suffer from the power differential that exists between banks and the general public, there are certain groups that banks may more readily target for burdensome and “unscrupulous” lending processes. Some troublesome actions include: inadequate underwriting that approves individuals without adequate assets for loans, precluding refinancing, precluding loan modifications, offering predatory mortgage loan types – adjustable rate mortgages with “usurious” interest rates, and over-securitizing loan by requiring guarantors on residential loans that the bank ordinarily would not insist upon thereby exposing more than one property owner to the risk of losing assets in the event of a default.

invoke this term in these mortgage cases).³¹⁵ At varying times, these entities draw distinctions between the homeless, those facing the threat of eviction (imperiled), and residential as opposed to commercial mortgage consumers. They and other international entities (e.g., UN Special Rapporteur on Housing) also highlight distinctions along gender lines, family (children), age, disability (physically-challenged), and immigrant status (national origin).³¹⁶ Nationality is relevant to the issue of vulnerability. The Algerian nationality of the complainants in Djazia and Bellini is worth closer attention.

The Committee underscored that it is “the State’s duty to grant the greatest and widest possible protection to the family, as the foundation of society.”³¹⁷

[Revise and develop this section]

VIII. Reflections on the New Paradigm

The ECJ, EU Directive, and the ICESCR framework crafted a consumer protective culture, at least in the sphere of housing. The ECJ is part of this endeavor – the carving out of something new. The new project is not free from being completely undone. To the extent that this project imposes unacceptable costs on businesses or the government – it is subject to attack. The ECJ’s contribution is its powers of judicial interpretation and its defining of the scope of the Directive. There are limits to what the Directive can do because it presupposes the existence of a contract to allow for intervention. It pertains to business contracts and seeks to make them more equitable. Nonetheless, it places overall pressure on the government in terms of prompting the conversation of what are its duties and obligations to protect consumers (citizens) by placing restraints on the actions of businesses such as banks. It keeps housing, equity, and fairness at the forefront of the government as it is designing policies for people and for the economy.

In the wake of the ECJ and ESCR decisions, the government has also enacted subsequent amendments,³¹⁸ as it attempts to find the right balance between complying with the EU Directive and not unduly constraining the banking industry to the point of exacerbating an already challenging economic climate. Leading up to the *Aziz* case, the government was undertaking some revisions of Spanish law. For example, the bank can no longer be awarded the foreclosed property for 50% of its appraised value at the time of

³¹⁵ For example, the Committee directs States parties to “pay particular attention to evictions that involve women, children, older persons with disabilities or other vulnerable individuals or groups who are subjected to systemic discrimination.” Djazia and Bellili (CESCR 2015), para. 15.2.

³¹⁶ Miloon Kothari’s Report.

³¹⁷ Djazia and Bellili (CESCR 2015), para. 17.7.

³¹⁸ Insert cite to other laws.

the loan. In July 2011, the percentage amount was increased to 60% and has since then been raised to 70 percent.³¹⁹

While some progress in the mortgage law area has been made, there remains room for changes that would be beneficial to consumers. For example, Spanish banks have largely been resistant to *datio in solutum* (*dación en pago*). *Datio in solutum* is essentially a deed in lieu of foreclosure procedure. In accordance with this procedure, the foreclosing bank accepts the deed and property in exchange for releasing the borrower from his debt obligation. Given the banks’ resistance, it is necessary to scrutinize the purpose of using the home as collateral. If the bank refuses to accept the property in satisfaction of the debt, it suggests that there is a definite clash between the function that the home is serving in the socio-cultural fabric of individuals in their everyday lives and the business culture of banks and the broader economy that they are instrumental in defining. While individuals are focused on the utility of the home, as a place to live, raise their families, and have ingested the narratives that with homeownership comes stability and prosperity, the banks appear to be using the home as a profitmaking mechanism that structures the lives of individuals without fully communicating the associated risks to consumers. When consumers fail uphold their end of the contract y defaulting, they are channeled into a lifelong structure of payment and crushing indebtedness that can only be broken by the acquisition of substantial wealth or by the grace of the lending institutions. The other possibility for disrupting the structure is intervention by the government or by supranational authorities (*e.g.*, treaties and courts). It also suggests that there are fundamental misunderstandings among borrowers regarding the purpose that the house serves in relationship to the bank.

The EU has made additional interventions in this area. Since the *Aziz* case, the EU adopted a Directive on February 4, 2014 on credit agreements relating to residential immovable property. The fact that the EU is being proactive suggests that it recognizes the need to address in a uniform fashion the inequities that consumers experience in mortgage loan contracts.

Beyond the intricacies of the private law of mortgage transactions and housing consumer law, the global economic crisis brought attention to the profound relationship between the rental housing market (*i.e.* the availability of low-income rental housing) and lending practices in the housing ownership market. The combination of easily accessible purchase financing along with high demand and limited supply of rental housing, set the conditions for economic exploitation. Individuals are susceptible to claims that it is easier and cheaper to own than rent. Once they are channeled into a home purchasing framework, they are locked into a system of debt without any hope of escape if they default. In Spain, the need for affordable rental and government subsidized social housing

³¹⁹ Shattered Dreams: Impact of Spain’s Housing Crisis on Vulnerable Groups, Human Rights Watch 2014, p. 59.

was exacerbated by the rise in the immigrant population starting in 2000 forward.³²⁰ Furthermore, as the UN Committee pointed out in *Djazia and Bellili*, Spain, has at times, taken actions that worsened the housing crisis, feeding speculation rather than addressing the needs of its populace.³²¹

Other positive changes have occurred coincident with the *Aziz* case. For example, some lending institutions pledged their commitment to the “European Agreement on a Voluntary Code of Conduct on Pre-Contractual Information for Home Loans.”³²² This optional measure is aimed at addressing the asymmetries in information that exist between banks and their borrowers. It is limited in this respect and does not accomplish the goal of providing comprehensive protections to potential borrowers, borrowers, and guarantors. Furthermore, creation of the voluntary code should not divert the attention away from the European Commission regulating banks in the interest of fostering consumer protection.

Governments and banks have the power to influence the economic wealth of their citizens by manipulating (controlling) rental markets, wage income, marketing propaganda regarding homeownership and responsibility, and loans. The banks have been complicit in limiting the type of housing that is available, initially pushing people towards homeownership (debt) rather than renting. Some of the solutions that the government is exploring include requiring banks to dedicate foreclosed properties towards low-income housing.³²³ Banks then move from being lender to landlord. Borrowers move from being debtors to tenants. Understanding what consumers expect and need from their financial institutions is an important aspect of reforming the laws. The rental amount, according to the government’s stipulations, should be linked to a certain percentage (typically no more than 30%) of the household wage earner’s income. This is a good start but the banks are still in the powerful position of making the decisions of whether to approve individuals for the social rent program.

A central claim of this work is that there is a discernable ongoing exchange between Spain’s housing social movements and that of the domestic and supranational legal realms. The exchange happens at the juridical moment when courts reason and rule, it also happens when activists formulate their grievances. It happens as litigants compose their claims and precedent their cases drawing upon “precedent” from public and private

³²⁰ “Spain Sees Sixfold Increase in Immigrants Over Decade” The Guardian, February 8, 2010, <https://www.theguardian.com/world/2010/feb/08/spain-sixfold-increase-immigrants>. Jason DeParle, “Spain Like U.S. Grapples with Immigration” The New York Times, June 10, 2008.

³²¹ *Djazia and Bellili* (CESCR 2015), paras. 5.5 and 12.4.

³²² See <http://www.ebic.org/Position%20Papers%20Archive/Final%20Joint%20Annual%20Progress%20Report%20-%20-%2014%20March%202003.pdf>

³²³ Judith Sunderland, *Shattered Dreams: Impact of Spain’s Housing Crisis on Vulnerable Groups*, Human Rights Watch 2014, p. 52.

law. I call this exchange _____. The dimensions of activist practice/struggle and legal interpretation/action reshape and reform each other. This dialectical relationship is evident in the ECJ’s interpretation of the Unfair Contracts Term directive in *Aziz v. Caixa* and in subsequent opinions. There is also an ongoing dialogue between housing activists and those entities charged with interpreting the human right to housing, as expressed in certain legal documents, such as the International Covenant on Economic, Social, and Cultural Rights, and Article 47 of Spain’s Constitution, and in recent cases such as the ESCR Committee’s ruling in *IDG v. Spain* and cases concerning squatters and the appropriation of abandoned foreclosed houses.³²⁴ There is interaction, but no one concept from any of the realms, is sufficient to supplant the others. No one concept may subordinate the others, if the dual goals are: protection of individuals at a fundamental/constitutional rights level and maintaining the market is retained.

Homeownership should not be the focal point of government housing campaigns. Instead, the emphasis should be on affordable rental housing. Housing counselors should be available to explain the meaning of rental contract terms and where relevant, mortgage loan contract terms. However, the existence of housing counselors should never be allowed to serve as a proxy to satisfy the test of whether contracts are fair and in good faith. Also, in the realm of mortgage lending, underwriting standards need to be strengthened. A national oversight body regarding lending practices should be established (or strengthened).

It is necessary for Spain to develop an affordable housing network. Network refers to having a system of pairing individuals with housing needs to available apartments, having a sufficient supply of reasonably priced (pegged to lower income levels) housing to accommodate the population, providing subsidies to individuals to help cover housing costs, and perhaps providing incentives to developers to construct more affordable housing or to repurpose existing housing for rental. However, the government (local government entities) will need to be cautious about not giving too many incentives to them at the expense of the goal of serving the public interest.

Spain needs to further develop its laws in the area of discharging debts so that individuals will be able to have a clean start in their lives as consumers. The human rights “fresh start” campaign is a positive step in this direction.

All of the spheres are needed in order to protect individuals. Because of the multiplicity of discursive regimes, the political citizen, who is more than a consumer, can bring several claims.

Enforcement remains a chronic problem in the arena of human rights and with ECJ decisions. As a follow-up to the IESCR Committee decisions, the panel requires a written response detailing the actions it has taken in compliance and that the state publish

³²⁴ Insert cite.

the opinion so that individuals have an opportunity to be informed of the extent of their rights and protections.³²⁵

[Revise and develop this section]

Conclusion

A paradigm shift has occurred in the private law and public law spheres around housing. The design of this project is intended to yield insights regarding how different international regimes work together and borrow from one another in the context of housing. It examines the nascent formation of a consumer culture. It compares its development across the regimes identified. At times, the analysis stretches across the Atlantic to consider those strategies in relation to developments in the United States, primarily with respect to mortgage consumers.

Drawing upon concepts and language from the various discourses of protest, international law, and public and private norms, is necessary to remediate the critical issues of housing instability and over-indebtedness that confront Spain. Housing and mortgage law reforms may serve as the foundation for other social policy reforms addressing low wages, poverty, and homelessness.

Under the heading of housing and mortgage law reform in Spain, the realms of protest, international law, and norms of private and public law intermingle. Protest exposes the neglect and detrimental action of the government and private entities. It amasses the evidence. It lays bare the pain inflicted. Protest furnishes an agenda. Through protest, PAH incentivized individuals to initiate claims against the State and against financial institutions. Some of PAHs protest claims were framed in legal terms – *datio in solutum*, others were not.

Private law sets the parameters of the agreements between lenders, borrowers, and guarantors and between landlords and tenants. Contractual terms are established. The rules of interaction are carved out. The UCT Directive was designed, *inter alia*, to address inequities in power between consumers and banks.³²⁶ Because of the Directive the EU Commission and the ECJ have the power to assess whether the business terms of mortgage contracts meet a minimum standard for fairness and good faith. Where the Court finds the terms to be lacking, it must excise them.

International human rights law also has a stake in rewriting mortgage laws and, more broadly, in shaping housing reforms in Spain. The *Djazia* case clarifies the reach of international human rights law in ruling that human rights are not suspended merely

³²⁵ See e.g., *Djazia and Bellili* (IESCR), para. 22.

³²⁶ *Aziz*, ECJ, Judgment of the Court (First Chamber), para. 44.

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because the matter originates from private ordering arrangements.³²⁷ By virtue of Spain’s ratification of ICESCR, international organs, such as the ESCR Committee, have leverage to weigh in on the private contracts and the policies and practices of the government.

[Revise and develop this section]

³²⁷ Djazia and Bellili (CESCR 2015).