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## Reframing Housing: Incorporating Public Law Principles Into Private Law

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# REFRAMING HOUSING: INCORPORATING PUBLIC LAW PRINCIPLES INTO PRIVATE LAW

KRISTEN BARNES\*

*A new public-private law paradigm is developing with respect to the relationship of the state to private contracts. The paradigm melds private law concepts like unconscionability, good faith, and fair dealing with the public human rights principles of dignity and vulnerability. I trace this paradigm shift in the context of the housing law of Spain, where several rich cultural and legal resources have inspired a new sensibility with regard to residential mortgage loan contracts, rental agreements, and the overall duties and obligations of governments to address the citizenry’s housing needs. Although this reorientation reflects decisions from the European Court of Justice and from the United Nations Committee on Economic, Social, and Cultural Rights, it is equally driven by an organic transformation in our understanding of housing markets and redistributive justice. Rather than receive the new paradigm with myopic trepidation, observers should herald it as the beginning of a much-needed dialogue between the public, human rights discourse, private business interests, and economic markets.*

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## I. INTRODUCTION

In some quarters, human shelter is a market good. Access to housing is determined by contract law and thus allocated on the basis of ability to pay and individual preferences. As a market good, access to housing is often limited by such terms as fraud, duress, unconscionability, good faith, and fair dealing. In other quarters, human shelter is considered a basic foundation of

human flourishing and capacity and thus comparable to a right. The market view and the human rights view seem to inhabit two different realms, maintained by scholars who typically do not dialogue with each other. One view inhabits the world of private law; the other the realm of distributive justice.<sup>1</sup> Markets allocate housing on the basis of contract; shelter is provided to the most vulnerable by the state.

In this article, I challenge the dichotomy between markets and rights and suggest a new synthesis in both language and practice to delineate a model that is both market and rights-oriented.<sup>2</sup> I accomplish this through a case study of the evolution of approaches to housing markets in Spain. In particular, a confluence of forces has begun to reshape the public regulation of private financing and other private order agreements. Although the process has by no means resulted in a complete integration of private and public law, it has produced a repositioning on how Spanish courts evaluate housing contracts and the actions they may take with regard to unfair contracts. Some of the forces are the widespread disillusionment regarding financial housing instruments following the global economic crisis of 2008, the disastrous impact of the terms of existing financial instruments, widespread domestic protests prompted by human suffering, and the external forces of the European Union (EU) and international social impacts. The result is a reorientation toward consumer protection in housing that integrates concepts of unconscionability, good faith, vulnerability, and human dignity into the previously private regulation of housing contracts.

I draw several major lessons from my analysis. First, the development of national policy in a country like Spain results from an iterative process that reflects the relationship between international human rights law, private ordering in the central sector of housing, and EU law. Second, the European Court of Justice (ECJ)<sup>3</sup> and the United Nations Committee on Economic, Social, and Cultural Rights (ESCR Committee) have been instrumental in reshaping how private housing contracts are treated and in articulating a

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1. See Alain Supiot, *The Public-Private Relation in the Context of Today's Re-feudalization*, 11 INT'L J. CONST. L. 129, 129 (2013) (noting the historical distinction between public and private law). Supiot maintains that it is the "subordination of private to public" that "makes the structure of law intelligible and dependable." *Id.* at 130; see also Hugh Collins, *Private Law, Fundamental Rights, and the Rule of Law*, 121 W. VA. L. REV. 1 (2018).

2. Michel Rosenfeld, *Rethinking the Boundaries Between Public Law and Private Law for the Twenty First Century: An Introduction*, 11 INT'L J. CONST. L. 125 (2013).

3. *Court of Justice of the European Union (CJEU)*, EUROPA, [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en) (last visited Sept. 7, 2020). The ECJ is the Court of Justice for the European Union. *Id.* Based in Luxembourg, the ECJ "interprets EU law to make sure it is applied in the same way in all EU countries and settles legal disputes between national governments and EU institutions." *Id.*

baseline of procedural fairness due to contractual parties.<sup>4</sup> Furthermore, they have influenced the development of a new approach in borrowing, consolidating, and interpreting concepts across theoretical frames of public and private law.<sup>5</sup> Third, governments within the EU and ESCR treaty orbit bear significant responsibilities. They must ensure that individuals are accorded meaningful due process in hearings concerning owned and rented housing and provide services or resources where the market fails to do so. Fourth, human rights obligations, as interpreted by the ESCR Committee, compel governments to satisfy substantive housing needs even when resources are constrained.

This article is organized as follows: Part I introduces the project. Part II then examines the centrality of housing in the global economy, the origins of Spain's housing crisis, and policies that heavily favored banks, to the detriment of precarious property owners<sup>6</sup> and non-owners. Part III provides a background on the protests that arose in the midst of Spain's economic recession and their contribution to the paradigm shift. Part IV summarizes germane international and national legal mechanisms that impact the housing sector and related legal claims. Part V examines rulings of the ECJ and the ESCR Committee to elucidate how consumer protection applies to mortgage loan borrowers and renters. I also highlight moments of inter-judicial dialogue, which have contributed to reframing housing transactions, along with Spain's legislative responses. Part VI addresses critiques of private and public law scholars and interrogates the concepts of unconscionability, good faith, fairness, vulnerability, and human dignity. Part VII discusses progressive changes in housing laws and rules that are beneficial to consumers. Part VIII includes recommendations for constructing equitable and stable housing markets. Part IX concludes the Article.

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4. Admittedly, procedural and substantive fairness are distinct. Nonetheless, procedural fairness can be a pathway to achieving substantive fairness.

5. The ECJ and the ESCR Committee have different competencies. The ECJ is charged with interpreting EU law, including the directives and the EU Charter on Fundamental Rights and Freedoms. The ESCR Committee is authorized to interpret the ESCR treaty.

6. Here, I am drawing upon the concept of the precariat, popularized by Guy Standing. *See generally* GUY STANDING, *THE PRECARIAT: THE NEW DANGEROUS CLASS* (2016). The "precariat" refers to "[p]eople whose employment and income are insecure, especially when considered as a class." *Precariat*, LEXICO, <https://en.oxforddictionaries.com/definition/precariat>. I am using the term to refer to individuals who hold the title as the owners of mortgaged real property but whose circumstances with respect to their lenders, debt load, and, perhaps, fragile employment status, mean that they are in imminent danger of losing their property through default and foreclosure.

## II. THE HOUSE THAT SPAIN BUILT: FINANCIALIZATION, REPOSSESSIONS, EVICTIONS, AND GHOST TOWNS

Spain, like other democracies, remains challenged by matters of housing insecurity and over-indebtedness. To understand the evolving approach towards housing contracts in private law and public law, it is necessary to examine the conditions that precipitated Spain's housing crisis. Economic devastation remains imprinted on the country's landscape, despite economic forecasts of growth and declarations that the nation's descent into financial austerity is at an end.<sup>7</sup> Unfinished business remains. Therefore, it is necessary to analyze the housing sector, a primary vehicle through which the destruction unfolded.

On January 1, 1986, the EU welcomed Spain into the fold.<sup>8</sup> Prior to its acceptance, Spain's pre-1986 policies laid the foundation for the economic crisis that emerged in 2008. General Francisco Franco<sup>9</sup> anointed housing as a strategy for national economic development and prosperity in the latter years of his reign.<sup>10</sup> Under Franco's regime, the nation transformed from a country of renters into one fixated on homeowners,<sup>11</sup> creating approximately thirty-five million new consumers.<sup>12</sup> Privileging homeownership over affordable rental housing continued as a standard government practice even

7. Peter S. Goodman, *Spain's Long Economic Nightmare is Finally Over*, N.Y. TIMES (July 28, 2017), <https://www.nytimes.com/2017/07/28/business/spain-europe-economy-recovery-unemployment.html>. The Organization for Economic Cooperation and Development provides the following economic forecast summary:

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.

103 OECD, OECD Economic Outlook 221 (2018).

8. *Spain*, EUROPA, [https://europa.eu/european-union/about-eu/countries/member-countries/spain\\_en](https://europa.eu/european-union/about-eu/countries/member-countries/spain_en) (last visited Sept. 7, 2020).

9. General Francisco Franco was a dictator who ruled Spain from 1939–1975. STANLEY G. PAYNE & JESÚS PALACIOS, *FRANCO: A PERSONAL AND POLITICAL BIOGRAPHY* (2014).

10. José María Cardesín, *City, Housing and Welfare in Spain, from the Civil War to Present Times*, 43 URB. HIST. 285, 288 (2016) (noting that this period is defined as “desarrollismo” or “policy of development at all costs”).

11. See Dan Galluppi, *Country Case Studies and Links: Spain*, EUR. WELFARE ST., [https://www.pitt.edu/~heinisch/ca\\_spai.html](https://www.pitt.edu/~heinisch/ca_spai.html) (last visited Sept. 7, 2020); 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 45 (Jeffrey Hou & Sabine Knierbein eds., 2017) (explaining that more than fifty percent of Spain's inhabitants were renters in 1950).

12. Eric Solsten & Sandra W. Meditz, *Spain: A Country Study—Population*, COUNTRY STUD., <http://countrystudies.us/spain/34.htm> (last visited Sept. 7, 2020) (referring to 1975 figures).

after the transition to parliamentary democracy.<sup>13</sup> In the period covering 1950 to 2001, “the percentage of privately owned main homes rose from 46.7 percent to 88 percent whilst the number of rented homes fell from 3.2 million to 1.6 million.”<sup>14</sup> Rather than creating an economy in which all residents shared in the country’s wealth, this narrow growth policy, combined with archaic mortgage laws and global economic pressures, ploughed the way for financial disaster.<sup>15</sup> Advancing into the twenty-first century, financialization proved to be an attractive approach for Spain.<sup>16</sup> Financialization refers to a conceptualization of a system in terms of profiteering and revenue. It privileges shortsighted wealth accumulation. Typically, only those select few who are in dominant economic or political positions reap the benefits. Rather than alleviating inequality, financialization deepens it.<sup>17</sup> Unsound lending practices in Spain flourished under the financialization ethic.<sup>18</sup> The

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13. See *Spain*, U.S. NEWS & WORLD REP., <https://www.usnews.com/news/best-countries/spain> (last visited Sept. 7, 2020).

14. Cardesín, *supra* note 10, at 300. For additional information on changes in homeownership rates, see JUDITH SUNDERLAND, HUMAN RIGHTS WATCH, SHATTERED DREAMS: IMPACT OF SPAIN’S HOUSING CRISIS ON VULNERABLE GROUPS 5 (2014).

15. Cardesín, *supra* note 10, 300–04.

16. See generally MANUEL B. AALBERS, THE FINANCIALIZATION OF HOUSING (2017) (providing an extensive discussion on financialization).

17. Mike Collins, *Wall Street and the Financialization of the Economy*, FORBES (Feb. 4, 2015, 11:25 PM), <https://www.forbes.com/sites/mikecollins/2015/02/04/wall-street-and-the-financialization-of-the-economy/#31224d3f5783>; Thomas I. Palley, *Financialization: What It Is and Why It Matters* (Levy Econ. Inst. of Bard College, Working Paper No. 525, 2007), [http://www.levyinstitute.org/pubs/wp\\_525.pdf](http://www.levyinstitute.org/pubs/wp_525.pdf). Commenting 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.

*The Pitfalls of the ‘Financialization’ of American Business*, KNOWLEDGE @ WHARTON: FINANCE (June 28, 2016), <http://knowledge.wharton.upenn.edu/article/pitfalls-financialization-american-business/>.

18. JULIA GUMY, CIVIC CONSULTING OF THE CONSUMER POLICY EVALUATION CONSORTIUM, THE OVER-INDEBTEDNESS OF EUROPEAN HOUSEHOLDS: UPDATED MAPPING OF THE SITUATION, NATURE AND CAUSES, EFFECTS AND INITIATIVES FOR ALLEVIATING ITS IMPACT—PART 2: COUNTRY REPORTS 459–61 (2013); Cardesín, *supra* note 10, at 299 (“Mass access to housing ownership was achieved through over-indebtedness [in Spain]. National mortgage debt increased twelvefold, and household indebtedness soared from sixty-two percent of disposable income (1995) to 130% (2008). By the end of this period, forty percent of privately-owned main homes were mortgaged.”); Vicente Salas & Jesús Saurina, *Deregulation, Market Power and Risk Behavior in Spanish Banks*, 47 EUR. ECON. REV. 1061, 1061 (2003); Pablo Martín-Aceña, Maria A. Pons, & Concepción Betrán, *150 Years of Financial Regulation in Spain. What Can We Learn?*, 43 J. EUR. ECON. HIST. 35, 66 (2014) (describing the removal of certain regulatory requirements thereby allowing more entrants to the lending industry); BANCO DE ESPAÑA, REPORT ON THE FINANCIAL AND BANKING CRISIS IN SPAIN, 2008-2014 30–35 (2017) (discussing the liberal granting of credit by lenders for residential home purchases and unrealistic expectations regarding future increases in home value as contributing to the real estate bubble of the Great Recession).

lending practices pursued included: overvaluation of residential properties, extending excessive credit, placing unsuspecting and inadequately protected individuals on loans as guarantors, sometimes listing them on several mortgages through a technique known as “crossed” or “chained” mortgages,<sup>19</sup> and targeting undercapitalized and marginalized groups for residential mortgage loans with unfavorable terms.<sup>20</sup>

In the pre-2008 global recession years of wishful expansion, Spain created a permissive environment for banks, promoting economic growth and homeownership over consumer protection.<sup>21</sup> Courts enforced the terms of private lending contracts dictated by the banking industry; the national laws offered little relief from harsh residential mortgage contracts.<sup>22</sup> Unlike the United States, all residential mortgage loans in Spain, unless negotiated to be otherwise, are recourse loans.<sup>23</sup> Under a recourse loan, if a homeowner defaults on the loan, the bank can still hold him personally liable for any remaining difference between the value of the house and the outstanding loan amount after foreclosure.<sup>24</sup> Personal debt remains after the initial auction “even after the bank has sold the house for a higher value of the awarding

19. SUNDERLAND, *supra* note 14, at 3.

20. Fiona Ortiz, *Insight: Spain’s Jobless Immigrants Take on Banks over Mortgages*, REUTERS (Mar. 26, 2012, 3:44 AM), <https://www.reuters.com/article/uk-spain-evictions/insight-spains-jobless-immigrants-take-on-banks-over-mortgages-idUKBRE82P0DL20120326>; OBSERVATORIO & PLATFORMA DE AFECTADOS POR LA HIPOTECA, HOUSING EMERGENCY IN SPAIN: THE CRISIS OF FORECLOSURES AND EVICTIONS FROM A HUMAN RIGHTS PERSPECTIVE 11 (2013).

21. Leslie Crawford, *Boomtime Spain Waits for the Bubble to Burst*, FIN. TIMES (June 8, 2006, 3:00 PM), <http://www.afi.es/EO/ftimes%20080606.pdf>.

22. GUMY, *supra* note 18, at 466 (noting the absence of legal protections for defaulted borrowers in connection with debt collection); Ciaran Giles, *European Court Says Spanish Eviction Laws Illegal*, SAN DIEGO TRIB. (Mar. 14, 2013, 5:02 AM), <https://www.sandiegouniontribune.com/sdut-european-court-says-spanish-eviction-laws-illegal-2013mar14-story.html>; Ilan Brat & Christopher Bjork, *Spain Aims to Ease Foreclosure Laws*, WALL ST. J. (Nov. 11, 2012), <https://www.wsj.com/articles/SB10001424127887324073504578113070533092166>; Stephanie Bodoni, *Spain Too Fast to Evict in Mortgage Disputes, EU Court Rules*, BLOOMBERG (Mar. 14, 2013, 12:44 PM), <https://www.bloomberg.com/news/articles/2013-03-14/spain-too-fast-to-evict-in-mortgage-disputes-eu-court-rules-1->.

23. Art. 1911 C.C. (Spain) (“The debtor is liable for the performance of his obligations with all present and future authority.”).

24. This outcome is grounded in the “unlimited personal liability” principle. Pablo Gutiérrez de Cabiedes and Marta Cantero Gamito explained that:

Article 1911 of [the] Civil Code establishes [this rule] as an absolute principle, in a categorical and solemn way: ‘The debtor is liable for the performance of his obligations with all his assets, present and future.’ And according to Article 105 of Mortgage Law, enacted in 1946, ‘The mortgage . . . will not alter the unlimited personal liability of the debtor provided in Article 1911 of the Civil Code.’

Pablo Gutiérrez de Cabiedes & Marta Cantero Gamito, *Country Report Spain*, in CONSUMER DEBT AND SOCIAL EXCLUSION IN EUROPE 67, 74 n.43 (Hans-W. Micklitz & Irina Domurath eds., 2015); Suzanne Daley, *In Spain, Homes Are Taken but Debt Stays*, N.Y. TIMES (Oct. 27, 2010), <https://www.nytimes.com/2010/10/28/world/europe/28spain.html>.



price.”<sup>25</sup> Following the foreclosure sale, through which either the lender repossesses the property or a third party purchases it, if there is a remaining mortgage debt balance, the lender may obtain a judgment and pursue the foreclosed borrower for the deficiency amount.<sup>26</sup> The borrower may be subject to wage garnishment to satisfy the debt.<sup>27</sup> This practice has left many defaulted and evicted borrowers in debt without any prospect of repayment. Further, because residential mortgage debt is not contained within the purview of Spain’s insolvency law,<sup>28</sup> personal bankruptcy does not offer a viable option.<sup>29</sup>

Prior to the Great Recession, expensive housing was readily available<sup>30</sup> in contrast to the insufficient availability of affordable rental options.<sup>31</sup> Rental housing composed a mere eleven percent of Spain’s housing inventory in 2014.<sup>32</sup> People were induced to buy rather than rent, not only because of low-income rental inventory shortages, but also because of the comparative costs.<sup>33</sup> In the years leading up to the 2008 recession, rental

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25. Gutiérrez de Cabiedes & Gamito, *supra* note 24, at 74.

26. See Inés Benitez, *Spain’s New Eviction Law “Protects Banks,”* INTER PRESS SERV. NEWS AGENCY (Apr. 23, 2013), <http://www.ipsnews.net/2013/04/spains-new-evictions-law-protects-banks> (explaining that under Spanish law, people are required to pay off mortgage, interests, and late fees even after they have been evicted and their home has been repossessed).

27. Due to the recourse nature of Spain’s residential loans, the real estate does not serve as the only security for the loan. Borrowers are personally liable for the debt. The personal liability aspect of the loan means that, with a court order, lenders can pursue a borrower’s other assets, including income. Manuel Castilla Cubillas, *Non-Recourse Mortgages and the Prevention of Housing Bubbles—A Proposal for a Change in the Default Rule on Mortgage Liability in Spain*, 25 HOUSE FIN. INT’L 15, paras. 2.1, 3.5, 17 (2011) (discussing the recourse character of Spain’s residential loans and the personal liability of the debtor); SUNDERLAND, *supra* note 14, at 3, 58, 61.

28. Gutiérrez de Cabiedes & Gamito, *supra* note 24, at 83.

29. *Id.* at 78.

30. From 1997 to 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 forty-three percent of the nation’s GDP.” SUNDERLAND, *supra* note 14, at 14 (citation omitted); see also WILLIAM CHISLETT, *A NEW COURSE FOR SPAIN: BEYOND THE CRISIS* 118–19 (2016) (discussing the quick increase and plummet of construction in real estate).

31. See generally Miloon Kothari (Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living), *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development—Addendum: Mission to Spain*, 7–9, U.N. Doc. A/HRC/7/16/Add.2 (Feb. 7, 2008) (identifying that Spain has a constitutional right to adequate housing but that there are factors that negatively impact the right); Asunción Blanco-Romero et al., *Barcelona, Housing Rent Bubble in a Tourist City. Social Responses and Local Policies*, 10 SUSTAINABILITY 4, 6 (2018).

32. SUNDERLAND, *supra* note 14; Joris Hoekstra et al., *Recent Changes in Spanish Housing Policies: Subsidized Owner-Occupancy Dwellings as a New Tenure Sector?*, 25 J. HOUS. AND THE BUILT ENVIRON. 125, 125 (2010).

33. It is important to note that housing prices from 2000 to 2008 dramatically increased relative to income. Hoekstra, et al., *supra* note 32, at 126, 128–29 (commenting that in certain years preceding the recession, Spain experienced “a declining interest rate, better and easier access to mortgages, longer

rates, in some instances, exceeded the initial costs of a mortgage.<sup>34</sup> For those in need of more affordable options or government subsidies, the state and the market were largely unresponsive.<sup>35</sup> Public housing, also known as social housing, accounted for “two percent of the total housing stock,” according to 2014 figures.<sup>36</sup> Thus, financed ownership was a logical alternative to relatively high rental rates.<sup>37</sup> The government’s emphasis on home sales imposed significant costs on the quality of life for Spain’s residents. According to one estimate, 39.4% of workers’ income was allocated towards paying down housing loans.<sup>38</sup> High unemployment rates, topping off at twenty-five percent, also complicated matters.<sup>39</sup> For those inclined to rent, the transitory nature of employment made it difficult, if not impossible, to secure rental apartments.

Over-indebtedness, difficulties in managing debt, and unemployment prompted massive loan defaults.<sup>40</sup> Over-indebtedness refers to a condition in which the cost of debt related to housing, credit cards, food, health expenses,

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mortgage terms and an increasing share of households with two wage-earners.”) If one considers the availability of mortgage loans along with the pricing rate, tax incentives, and opportunity to build equity as compared to paying rent, purchasing a home for some appeared to be the more attractive option. See Montserrat Pareja-Eastaway & María Teresa Sánchez-Martínez, *Spain*, in PRIVATE RENTAL HOUSING: COMPARATIVE PERSPECTIVES 89–90 (Tony Crook & Peter Kemp eds., 2014); see also Nayla Fuster et al., *From a Culture of Homeownership to Generation Rent: Housing Discourses of Young Adults in Spain*, 22 J. YOUTH STUD. 585, 588 (2019).

34. SUNDERLAND, *supra* note 14, at 3 (describing how banks marketed mortgages of 100 percent or more of the cost of property, making it more attractive than renting for high prices).

35. See generally Montserrat Pareja Eastaway & Ignacio San Martín Varo, *The Tenure Imbalance in Spain: The Need for Social Housing Policy*, 39 URB. STUD. 283 (2002) (discussing how the rental sector in Spain evolved into a highly liberalized market that has failed to address the limited availability of rental housing).

36. SUNDERLAND, *supra* note 14, at 5.

37. See Kothari, *supra* note 31, at 10–12 (discussing how families have benefitted from financial help for housing).

38. Gutiérrez de Cabiedes & Gamito, *supra* note 24, at 69.

39. See Daley, *supra* note 24 (reporting that Spain had the highest unemployment rate in the euro zone in 2010 while real estate prices simultaneously were dropping); see generally SUNDERLAND, *supra* note 14 (explaining the impact of unemployment on renting and mortgages).

40. See Iain Ramsay, *Two Cheers for Europe: Austerity, Mortgage Foreclosures and Personal Insolvency Policy in the EU*, in CONSUMER DEBT AND SOCIAL EXCLUSION IN EUROPE, *supra* note 24, at 189, 215 (exploring EU credit and over-indebtedness regulation); Francisco Carballo-Cruz, *Causes and Consequences of the Spanish Economic Crisis: Why the Recovery is Taken so Long?*, 3 PANOECONOMICUS 309, 316 (2011) (discussing the role of the real estate and banking sector in the Spanish housing crisis); Ozlem Akin et. al., *The Real Estate and Credit Bubble: Evidence from Spain*, 5 SERIES 223, 226, 239–40 (2014) (identifying both bank agency problems and behavioral motives as drivers of the housing bubble); see also GUMY, *supra* note 18, at 458–71 (discussing the level, nature, and drivers of over-indebtedness in Spain); BANCO DE ESPAÑA, *supra* note 18, at 85–86, 93 (discussing the increase in “nonperforming loans” for households from 2008 to 2011).

and other items, exceeds income and asset levels.<sup>41</sup> Because a substantial portion of the household's available income is earmarked for paying the debt, there is no expendable income. While many found themselves in this situation, it failed to elicit sympathetic responses from banks active in the Spanish market. Assisted by rigid national mortgage procedural laws and lender-friendly mortgage contracts, banks aggressively initiated foreclosure proceedings. From 2007 to 2012, lenders repossessed over 400,000 homes.<sup>42</sup> By 2017, in the wreckage of rental and mortgage-based evictions, "nearly two million Spaniards [could not] afford a decent place to live"<sup>43</sup> and, according to a non-governmental organization's ("NGO") 2014 report on Spain, there were an estimated "40,000 homeless people and [an] additional 1.5 million families living in shelters."<sup>44</sup> Although thousands were unhoused and destitute during the crisis,<sup>45</sup> "3.5 million residences – or 13.7 percent of

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41. CIVIC CONSULTING OF THE CONSUMER POLICY EVALUATION CONSORTIUM, THE OVER-INDEBTEDNESS OF EUROPEAN HOUSEHOLDS: UPDATED MAPPING OF THE SITUATION, NATURE AND CAUSES, EFFECTS AND INITIATIVES FOR ALLEVIATING ITS IMPACT—PART I: SYNTHESIS OF FINDINGS 3–4 (2013); see also GUMY, *supra* note 18, at 458–71.

42. 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.

SUNDERLAND, *supra* note 14, at 16 (citation omitted).

43. Sam Edwards, *Homelessness in Spain Is on the Rise, and Owners Are Getting Rough as They Try to Get Squatters Out*, NEWSWEEK (June 19, 2017, 10:24 AM), <https://www.newsweek.com/homeless-spain-squatting-owners-getting-creative-627190>.

44. *Global Homelessness Statistics*, HOMELESS WORLD CUP FOUND., <https://homelessworldcup.org/homelessness-statistics/> (last visited Oct. 12, 2020); see Francisco Lirola, *A Night on the Street with Madrid's Homeless*, HUFFPOST (July 27, 2016, 1:11 P.M.), [https://www.huffingtonpost.com/entry/madrid-homeless\\_us\\_5798c7e6e4b01180b5310c2f](https://www.huffingtonpost.com/entry/madrid-homeless_us_5798c7e6e4b01180b5310c2f) (discussing homelessness in Spain as a growing problem); see also Inés Benitez, *The Invisible Reality of Spain's Homeless*, INTER PRESS SERV. NEWS AGENCY (Oct. 28, 2014), <http://www.ipsnews.net/2014/10/the-invisible-reality-of-spains-homeless/> (discussing Spain's citizens that live in poverty or are homeless).

45. See, e.g., Kate Abbey-Lambertz, *There's a Lesson in Spain's Surreal, Unfinished Cities*, HUFFPOST (Feb. 11, 2016, 5:11 AM), [https://www.huffingtonpost.com/entry/spain-empty-cities\\_us\\_56ba6221e4b0b40245c47dff](https://www.huffingtonpost.com/entry/spain-empty-cities_us_56ba6221e4b0b40245c47dff) (explaining the abandonment of development projects after the housing bubble burst); Lauren Frayer, *In Spain Entire Villages Are up for Sale—And They Are Going Cheap*, NPR: MARKETS (Aug. 23, 2015, 7:58 AM), <https://www.npr.org/sections/parallels/2015/08/23/433228503/in-spain-entire-villages-are-up-for-sale-and-theyre-going-cheap> (describing the increase in abandoned villages); Barry Keith, *A Symbol of Spain's Housing Crisis Finds a Community*, BLOOMBERG CITYLAB (Aug. 9, 2017, 10:46 AM), <https://www.citylab.com/equity/2017/08/a-symbol-of-spains-housing-crisis-finds-a-community/536280/> (detailing how in 2008 only twenty percent of apartments were sold in a housing complex in El Quiñón); Nick Whigham, *This Is What it Looks Like When a Credit Fueled Housing Bubble Bursts*, NEWS.COM.AU (Apr. 25, 2018, 11:34 AM), <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> (discussing the collapse of Spain's housing market and the remaining abandoned real estate projects as a result).

the total housing stock” remained vacant.<sup>46</sup> Ghost towns in search of foreign investors sprang up.<sup>47</sup> In the wake of this stark reality, a squatters’ movement was born—squatters “reclaimed” property that they viewed as having been illegitimately taken from them by the banks and government.<sup>48</sup>

The socio-economic devastation pointed to the government’s misalignment of incentives and public interest goals. Spain needed to develop comprehensive and effective housing policies. The seriousness of having the fourth largest economy in the EU enthralled in economic disaster became evident.<sup>49</sup> Spain was long overdue for housing law reforms. The harsh response from the financial sector and the government set the stage for change, forged an agenda, and pushed thousands of bodies out onto the street in protest.<sup>50</sup>

### III. INNOVATIVE ACTIVISM—THE LANGUAGE AND ACTION OF PROTEST

Renters, squatters, the homeless, and debtors besieged the streets with entreaties that the state respond to their suffering. “H for Housing,” “Homes not Hotels,” and “Stop the Displacements” signs filled the space of the urban commons expressing the drama of Spain’s cataclysm of housing and homelessness.<sup>51</sup> The imaginations of international institutions were stirred to

46. SUNDERLAND, *supra* note 14, at 14; Cardesin, *supra* note 10, at 298 (“Spain was the second country in the EU in terms of the percentage of empty houses and second homes.”).

47. *See* Frayer, *supra* note 45.

48. *See* Edwards, *supra* note 43.

49. The first decades of this century with respect to the global economy have been characterized by uncertainty. The fragility of the EU is at the forefront of discussion. Brexit is a major source of anxiety. Without a coherent 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. This is also a time of reflection regarding the various nations that comprise the EU and their significance to its survival and economic welfare. Peter S. Goodman, *Preparing for ‘Brexit,’ Britons Face Economic Pinch at Home*, N.Y. TIMES (June 11, 2017), <https://www.nytimes.com/2017/06/11/business/economy/britain-economy-election-brexit.html>.

50. *See generally* ADA COLAU & ADRIÀ ALEMANY, MORTGAGED LIVES: FROM THE HOUSING BUBBLE TO THE RIGHT TO HOUSING (Michelle Teran & Jessica Fuquay trans., 2012) (analyzing the housing crisis and right to housing movement in Spain). The protests continued in later years in response to budget restrictions and Spain’s high unemployment rate. Paul Day, *Tens of Thousands in Spain Protest Economic Policy, Corruption*, REUTERS (Feb. 23, 2013, 3:21 PM), <https://www.reuters.com/article/us-spain-protests/tens-of-thousands-in-spain-protest-economic-policy-corruption-idUSBRE91M0E220130223>.

51. *See generally* García-Lamarca, *supra* note 11 (discussing the “H for Housing” group and their efforts to mobilize for accessible housing); Benitez, *supra* note 26 (detailing the Platform for Mortgage Victims movement and its responses to the housing crisis); Holly Ellyatt, *Spain Politicians to be Fenced off from Evictions Protesters*, CNBC (Apr. 11, 2013, 1:33 AM), <https://www.cnbc.com/2013/04/11/spain-politicians-to-be-fenced-off-from-evictions-protesters.html> (“Spanish police will erect barriers around politicians’ residences to shield them from protests over the growing number of home evictions

respond to a state in crisis.<sup>52</sup> Their responses altered the legal landscape of private contracts in the housing sector. Activists' appeals were clothed in the language of human rights and legal rights<sup>53</sup> conferred by Spain's Constitution, EU laws, and international conventions. The rallying cry, "dación en pago" (deed in lieu of foreclosure), emerged.<sup>54</sup> The protestors'

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and to call for changes to mortgage laws."); Tom Burrige, *Spanish Protest Movement Fights Housing Evictions*, BBC NEWS (Feb. 17, 2012), <https://www.bbc.com/news/world-europe-17067246> (discussing ongoing protests for housing in response to banks repossessing homes); Lauren Frayer, *Spaniards Take to Streets to Block Home Evictions*, NPR: EUROPE (Nov. 13, 2012, 1:30 PM), <https://www.npr.org/2012/11/13/165025717/spaniards-take-to-streets-to-block-home-evictions> (discussing the lengths protestors and people losing their homes will go to keep their homes and have better access to housing); Gerry Hadden & Marco Werman, *After Public Outcry, Spain Reviews Eviction Laws*, WORLD (Nov. 12, 2012, 12:50 PM), <https://www.pri.org/stories/2012-11-12/after-public-outcry-spain-reviews-eviction-laws> (discussing the growth of eviction protests throughout cities in Spain that have largely been ignored by politicians); *Spanish Activists Protest at Eviction Laws*, DAILYMOTION (July 21, 2011), <https://www.dailymotion.com/video/xk162m>.

52. See generally Stephanie Boudon, *Spain Too Fast to Evict in Mortgage Disputes, EU Court Rules*, BLOOMBERG (Mar. 14, 2013, 12:44 PM), <https://www.bloomberg.com/news/articles/2013-03-14/spain-too-fast-to-evict-in-mortgage-disputes-eu-court-rules-1> (explaining that courts must be allowed to ask for eviction cases to be halted pending a determination on the validity of underlying loan agreements); Ilan Brat & Christopher Bjork, *Spain Aims to Ease Foreclosure Laws*, WALL ST. J. (Nov. 11, 2012), <https://www.wsj.com/articles/SB10001424127887324073504578113070533092166> (highlighting how Spain had aimed to ease the penalties from foreclosure laws); Ilan Brat & Gabriele Steinhauser, *EU Court Rules Against Spanish Mortgage Laws*, WALL ST. J. (Mar. 14, 2013, 3:19 PM), <https://www.wsj.com/articles/SB10001424127887324077704578360271750843386> (noting that EU court rulings have made it more difficult for Spain to ease the burden of foreclosure); Tobias Buck, *EU Court Strikes Down Spain's Eviction Law*, FIN. TIMES (Mar. 15, 2013), <https://www.ft.com/content/16e37aca-8ca5-11e2-8ee0-00144feabdc0> (detailing how Spanish eviction law improperly precludes the application of EU law); *European Court Rules Against Spanish Eviction Laws*, BBC NEWS (Mar. 14, 2013), <https://www.bbc.com/news/world-europe-21789650>.

53. Human rights organizations were heavily involved in delineating the issues of the moment and the root causes of the problems. Their work is interconnected with the activism that emerged in the unfolding and aftermath of the 2008 recession. Leaders of social movements have been instrumental in shaping the language of activists' demands. Ada Colau's role in the development of PAH connects activism and legal discourse. Colau was trained as a human rights lawyer. In June 2015, she was elected as the Mayor of Barcelona. Raphael Minder, *Spain's Local Election Results Reshape Political Landscape*, N.Y. TIMES (May 25, 2015), <https://www.nytimes.com/2015/05/26/world/europe/spains-local-election-results-reshape-political-landscape.html>; Dan Hancox, *Is This the World's Most Radical Mayor?*, GUARDIAN (May 26, 2016, 1:00 AM), <https://www.theguardian.com/world/2016/may/26/ada-colau-barcelona-most-radical-mayor-in-the-world>. In her writings, Colau publicized the plight of embattled borrowers and the homeless. Notably, she, along with Adrià Alemany, published *Mortgaged Lives*, which chronicles the government decisions and other factors leading to Spain's housing crisis as well as PAH's genesis. Colau's new position symbolizes a crossing of boundaries between the various realms of protest, public, and private. Her new status grants her a privileged platform from which she can wield power to realize the fundamental changes in economic policy and housing that she advocated for as a PAH leader. Another example of the relationship between activism and human rights organizations is the work of Housing Rights Watch ("HRW"). HRW conducts workshops on housing to inform people of their rights and provides a venue for brainstorming strategies. See Samara Jones, *Editorial*, NEWSLETTER (Hous. Rights Watch, Brussels, Belg.), Oct. 2014, at 1.

54. José Coy, founder of one of the branches of PAH writes, "Even pronouncing *dación en pago* without tripping up my tongue was a challenge. These days, it's difficult to find someone in Spain who

tactics of resistance illustrate Robert Cover's point that "an act signifies something new and powerful when we understand that the act is in reference to a norm."<sup>55</sup> Spain's civil procedure laws, as discussed in Part V, were structured to protect lenders. Spanish courts treated private mortgage and rental contracts as sacrosanct, even if they inflicted substantial harm on individuals. Residents, rather than banks, were asked to cover the national excesses as part of Spain's compliance with the austerity measures imposed by the EU<sup>56</sup>; the government was not transparent regarding its interests in the housing sector leading to rising land costs, affordable housing shortages, which in turn resulted in higher housing costs, evictions, and homelessness.<sup>57</sup> Activists decried the norms that prioritized corporate and government interests over social welfare. Gathering in public spaces, filing lawsuits,<sup>58</sup> sit-ins in financial institutions,<sup>59</sup> physically blocking evictions, mobilizing bank customers to assemble on bank property to destroy their credit cards and close their accounts,<sup>60</sup> and squatting, were techniques that activists deployed to vocalize their demands for changes in housing laws and the

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doesn't know what it means, and it has turned into a permanent in the political and social agenda." José Coy, *Prologue to COLAU & ALEMANY*, *supra* note 50, at 19, 21.

55. Robert M. Cover, *Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 8 (1983).

56. See Interview by Christopher Alessi with Megan Greene, Senior Fellow at the Mossavar-Rahmani Center for Business and Government at Harvard Kennedy School (Sept. 28, 2012), <https://www.cfr.org/interview/spain-doubles-down-austerity> (explaining how Spain's austerity measures pushed new taxes on individuals); see also Day, *supra* note 50 (explaining that wide spread protests broke out in response to the Spanish government's austerity measures); Raphael Minder, *Despite Public Protests, Spain's 2013 Budget Plan Includes More Austerity*, N.Y. TIMES (Sept. 27, 2012), <https://www.nytimes.com/2012/09/28/business/global/spain-unveils-sweeping-budget-cuts.html> (highlighting the removal of tax breaks for home purchases and an increase in the tax on lottery winnings).

57. Kothari, *supra* note 31, at 15–17, 27–29; Cardesin, *supra* note 10, at 300–01; U.N., Econ. & Soc. Council, Comm. on Econ. Soc. and Cultural Rts., Views Adopted by the Committee Under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights with Regard to Communication No. 5/2015, U.N. Doc. E/C.12/61/D/5/2015 (June 20, 2017) [hereinafter MBD].

58. See e.g., *Ceesay Ceesay v. Spain*, App. No. 62688/13, Eur. Ct. H.R. (2013). This case, known as the "Bloc Salt case," involved forty homeless individuals, organized by PAH, who took over an abandoned building, located in a town called Salt in Catalan Spain. The European Court of Human Rights decided that the government could not summarily remove the squatters without having created a post-eviction plan for housing them. To evict the squatters without providing for a contingency plan would violate the ECHR, specifically Article 3, which prohibits "inhuman or degrading treatment and punishment," and Article 8, which recognizes the right to "respect for privacy and family life." Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 3, 8, *opened for signature* Apr. 11, 1950, E.T.S. No. 005 [hereinafter ECHR] (entered into force Mar. 9, 1953).

59. See Rafael Carmona & Sonia Olea Ferreras, *Feature Interview: Plataforma de Afectados por la Hipoteca: A New Social Movement for Housing Rights*, NEWSLETTER (Hous. Rights Watch, Brussels, Belg.), Oct. 2014, at 6.

60. See *Spain's 'Indignados' Protest Foreclosures by Closing Their Bank Accounts*, THE OBSERVERS (May 15, 2012, 6:12 PM) [hereinafter *Spain's 'Indignados'*] <http://observers.france24.com/en/20120515-spain-indignados-protest-foreclosures-closing-bank-accounts-bankia-madrid-home-housing-crisis-loans-debt> (detailing the protests to government inaction over evictions).

government's austerity policies. As Cover argues, regarding the interconnectedness of social protest and norms, "this characteristic of certain lawbreaking . . . gives rise to special claims of civil disobedience."<sup>61</sup> The protestors' engagement with government policies infused their political action with legitimacy;<sup>62</sup> however, political action through protest is at once productive and confining in that boundaries are imposed on the demands by pre-existing legal structures and language. Public protests illuminated Spain's deficiencies in fulfilling the housing needs of its citizens. They also drew attention to Spain's outstanding obligations as an EU Member: the mandate to comply with the UCT Directive.

Cover's insight regarding the signifying power of law is illustrated by both the activists and government. Cover notes that law may function as "a resource in signification that allows us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate, or dignify."<sup>63</sup> The protestors, in part, drew upon legal language to articulate their struggle. The government's action of drafting legislation to reform mortgage laws worked to validate that struggle. Validation is an act of conferring dignity. Human dignity moves from abstraction to embodiment (i.e. the lived experience) when people experience actions and conditions that do not offend their sensibilities as human beings and when a level of existential decency becomes the norm. One manifestation of human dignity occurs when the law provides individuals with protections from more powerful parties.

Widespread evictions spurred the mobilization of groups such as "Platform for those Affected by Mortgages" (PAH). After several highly publicized suicides of debtors,<sup>64</sup> PAH and other activists called for government intervention.<sup>65</sup> PAH and "H for Housing" emerged as critical

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61. Cover, *supra* note 55, at 8.

62. For example, squatters maintained that they were homeless because of the government's failure to designate sufficient subsidized housing. Melissa García-Lamarca describes PAH's housing reclamation project:

Obra Social seizes the social function of housing, ensuring that families engaged with the PAH who are facing eviction and have exhausted all housing options are not left living in the street, and pressures the public administration at different levels to guarantee the universal right to housing. In both collective and individual occupations, the aim is to regularize a family's situation by negotiating a social rent with the bank, ideally in the same flat/building.

García-Lamarca, *supra* note 11, at 50.

63. Cover, *supra* note 55, at 8.

64. Sonya Dowsett, *Insight: In Spain, Banks Buck Calls for Mortgage Law Reform*, REUTERS (Feb. 26, 2013, 7:36 AM), <https://www.reuters.com/article/us-spain-mortgage-reform/insight-in-spain-banks-buck-calls-for-mortgage-law-reform-idUSBRE91P09Q20130226>.

65. See OBSERVATORIO & PLATFOMA DE AFECTADOS POR LA HIPOTECA, *supra* note 20, at 13–15.

voices demanding changes in Spain's housing laws.<sup>66</sup> Barcelona in 2009 was the site of PAH's genesis.<sup>67</sup> The organization initially trained its attention on the harmful practices of banks and the inadequacies of Spain's laws regarding protection for mortgage consumers.<sup>68</sup> As PAH grew in political influence, it broadened its concerns to other social issues including rental evictions, the lack of affordable housing, and unemployment.<sup>69</sup> PAH is self-described as:

a non-partisan's citizens movement comprising more than 190 nodes across the Spanish state . . . tak[ing] action in many forms—from the emotional to the political; media-facing, legal, public communication and beyond - to seek changes in the law that respond to the human rights violations suffered by those affected; and . . . [to] propose solutions that make the right to housing a reality for everyone.<sup>70</sup>

Housing organizations, like PAH, remolded individual complaints “into collective public concerns.”<sup>71</sup> They gave expression to the harms that individuals experienced in their private transactions and delivered those issues, newly reimagined, to the public in a transformative manner. Rather than dismissing individual foreclosures and evictions as discrete tête-à-têtes between borrowers and lenders, or landlords and tenants—which would remain largely shuttered to the public's eye—activists characterized the private actions as national existential threats.<sup>72</sup> Recasting the private as public was essential to persuading the government and lending institutions to view the problems as national and global concerns, rather than as individual private transactions.<sup>73</sup> Publicizing the private harms served another function, as well: individuals realized the commonality of their

66. 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.

67. García-Lamarca, *supra* note 11, at 45.

68. THE PLATFORM FOR PEOPLE AFFECTED BY MORTG., *THE PAH'S GREEN BOOK: A BASIC GUIDE TO THE PAH 5* (2016).

69. Carmona & Ferreras, *supra* note 59, at 6.

70. See THE PLATFORM FOR PEOPLE AFFECTED BY MORTG., *supra* note 68.

71. García-Lamarca, *supra* note 11, at 45.

72. See COLAU & ALEMANY, *supra* note 50, at 85–89 (explaining how the *V de Vivienda* movement's capacity to connect with public opinion was driven by its “direct, communicative campaigns” and how the movement blossomed into the PAH); see also Raquel Castillo Lopez, *Protests Become Way of Life in Spanish Recession*, REUTERS (Jan. 21, 2013, 9:21 AM), <https://www.reuters.com/article/uk-spain-protests/protests-become-way-of-life-in-spanish-recession-idUKBRE90K0JB20130121> (describing Spanish protests to rent payments); Lauren Frayer, *Spaniards Protest High Rate of Foreclosures, Debt*, VOICE OF AM. (July 26, 2011, 8:00 PM), [voanews.com/Europe/Spaniards-protest-high-rate-foreclosures-debt](http://voanews.com/Europe/Spaniards-protest-high-rate-foreclosures-debt) (discussing protests in Madrid); Andy Robinson, *The Deepening Spanish Debt Crisis*, NATION (July 3, 2012), <https://www.thenation.com/article/archive/deepening-spanish-debt-crisis/> (discussing protests in Andalusia).

73. COLAU & ALEMANY, *supra* note 50.



housing and debt problems, which worked to uplift them psychologically.<sup>74</sup> Rather than being resigned to solitary struggle, individuals were empowered in knowing that they were part of a movement for systemic change.<sup>75</sup> Characterizing the private as public also allowed the international community to draw other connections. Not only do evictions imperil Spain's future, they also impact the sustainability of the EU—having fiscally healthy consumers is relevant to the success of the EU, which benefits from reliable markets.<sup>76</sup>

The various government responses to PAH's litigiousness and activists' campaigns illustrate the dynamic exchanges between public and private sectors. PAH's Citizens Legislative Initiative was a significant campaign that led to the Government's adoption of Law 1/2013,<sup>77</sup> which reformed Spain's mortgage system. Because of gaps and ambiguities, which were highlighted by activists and clarified by the ECJ, the government revised Law 1/2013 and crafted new ones.<sup>78</sup>

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74. *Id.* at 49.

75. *Id.*

76. The Preamble of the UCT makes express the relationship between the welfare of consumers within Member States and the EU:

Whereas, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States other than its own, it is essential to remove unfair terms from those contracts.

Council Directive 93/13/EEC, 1993 O.J. (L 95) 29, 29 [hereinafter Council Directive 93/13].

77. Gutiérrez de Cabiedes & Gamito, *supra* note 24, at 78.

78. While the interaction between the State and public has yielded certain positive outcomes, it is important to recognize that the government has not always been receptive to activism. In some instances, when individuals have gathered to peaceably protest the inordinate power of banks and their negative consumer policies, they have met police action. For example, when some protesters assembled to close their bank accounts, the police apprehended them, recording their names and other identifying information, so that fines could later be imposed for engaging in "unauthorized protests." *Spain's 'Indignados'*, *supra* note 60; *see also* COLAU & ALEMANY, *supra* note 50, at 21 (noting that the media and state reacted coldly to initial popular movements for reform). A more aggressive government response was crystallized in the infamous gag law of 2015, known as The Citizen's Security Law. Prime Minister Mariano Rajoy was in power when Spain's parliament passed the law. Maria Roson, *Restoring Freedom of Expression in Spain: End the 'Gag Law'*, EDRI (June 27, 2018), <https://edri.org/restoring-freedom-of-expression-in-spain-end-the-gag-law/>. The new law had the effect of outlawing protests altogether. The law subjects "protesters [to] . . . a range of punishments, depending on the circumstances. They include a possible fine of 30,000 euros (\$31,800) for protesting in front of the Congress or other parliament buildings." Jethro Mullen, *Virtual Protest: Demonstrators Challenge New Law with Holograms*, CNN (Apr. 12, 2015, 5:58 AM), <https://www.cnn.com/2015/04/12/europe/spain-hologram-protest/index.html/>. Not to be deterred, individuals protested by projecting holograms against a house of the lower parliament. The activists projected themselves in specters of undefeated resistance, daring the State to arrest them. *Id.* The text of the law can be accessed here: Disposiciones Generales (B.O.E. 2015, 77) (Spain), [http://www.congreso.es/constitucion/ficheros/leyes\\_espa/lo\\_004\\_2015.pdf](http://www.congreso.es/constitucion/ficheros/leyes_espa/lo_004_2015.pdf).

#### IV. STRUCTURING HOUSING CLAIMS THROUGH LEGAL INSTRUMENTS

Many legal avenues availed themselves for the expression of protesters' demands. The activists sought equitable treatment in their housing contracts, flexibility towards late payments, and government responsiveness to their housing needs, including debt forgiveness and affordable housing.<sup>79</sup> As a prelude to my analysis of the paradigmatic cases, the following provides an overview of the legal instruments available to litigants for housing claims.<sup>80</sup> This sheds light on the structuring of the cases and the legal entities that will probably private housing transactions.

The cases examined herein are primarily grounded in the UCT Directive and in the ESCR treaty, rather than Spain's constitutional right to housing, the EU Charter of Fundamental Rights (EU Charter or Charter),<sup>81</sup> or the European Convention on Human Rights (ECHR). Nonetheless, it is important to be cognizant of the alternative resources that support conceptualizing government social welfare obligations, in relation to consumer protection and redistribution. While all the aforementioned legal instruments furnish protections to individuals with respect to housing, the extent of the protection varies depending upon the adjudicating entity (i.e. whether they are regional supranational tribunals or international committees), the ostensible goals and purposes of the legal instruments invoked, and their judicial interpretations.

##### A. Protections at the National Level: The Spanish Constitution

Spain's right to housing is enshrined in Article 47 of the national constitution. Article 47 declares the government's responsibility to provide services and protect its citizenry from socio-economic harms. Although its scope remains unclear, the right sets out what the state must provide to its populace in declaring that, "[a]ll Spaniards are entitled to enjoy decent and

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79. OBSERVATORIO & PLATFOMA DE AFECTADOS POR LA HIPOTECA, *supra* note 20, at 13–15.

80. For a summary of relevant legal instruments for European housing claims, see FEANTSA, HOUSING-RELATED BINDING OBLIGATIONS ON STATES FROM EUROPEAN AND INTERNATIONAL CASE LAW 1–16 (2016).

81. *Sánchez Morcillo v. Banco Bilbao* and *Naranjo v. Cajasur Banco SAU* are notable exceptions. There, the applicants relied upon the EU Charter of Fundamental Rights and the Directive. However, their reference to the Charter was based upon the guarantee in Article 47 of an effective remedy, as opposed to the right to housing in Article 34.3 or the right to "private and family life, home, and communications" contained in Article 7. See cases cited *infra* note 97 and note 200. *Kušinova v. Smart Capital a.s.* also resorts to the EU Charter. See case cited *infra* note 268. Like *Sánchez Morcillo* and *Naranjo*, *Kušinova* does not invoke the article on housing, but rather draws upon Article 38, which ensures a certain degree of consumer protection. See Charter of Fundamental Rights of the European Union, art. 38, 2012 O.J. (C 326) 403 [hereinafter EU Charter].

adequate housing.”<sup>82</sup> It imposes governmental obligations to fulfill the right by requiring, “public authorities” to “promote the necessary conditions and . . . establish appropriate standards in order to make this right effective, regulating land use in accordance with the general interest in order to prevent speculation.”<sup>83</sup> The constitutional right incorporates a pledge that the “community shall participate in the benefits accruing from the urban policies of the public bodies.”<sup>84</sup> It affirms the government’s obligation to remain mindful of its duties to the public in administering housing and other matters and in designing land use planning and policies. At the time the cases discussed herein were decided, Spain’s constitutional court had not interpreted Article 47 as covering residential mortgages and remedies for defaulted borrowers. According to Housing Rights Watch: “It is precisely because of the lack of powerful tools in domestic law to adequately protect the right to housing, that lawyers have been forced to use the existing judicial instruments and tools at [the] European and international level[s].”<sup>85</sup>

## B. Protections at the Transnational European Level

### 1. UCT Directive and Private Contracts

For EU mortgage consumers,<sup>86</sup> the UCT Directive is the logical instrument to remedy their claims regarding unfairness in mortgage loan contracts, predation, and procedurally biased processes weighted in favor of lenders.<sup>87</sup> In part, plaintiffs’ counsel was inspired to bring the cases discussed herein because Spain’s government had yet to fully incorporate the UCT Directive into the legal fabric of domestic law, despite the Directive having been in effect since 1993.<sup>88</sup> The UCT Directive is aimed at a variety of private contracts, including debt instruments.<sup>89</sup> With some exceptions, it

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82. CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, Dec. 29, 1978 (Spain).

83. *Id.*

84. *Id.*

85. *State of Housing Rights in Spain*, E-NEWSLETTER (Hous. Rights Watch, Brussels, Belg.), Apr. 11, 2018.

86. Note that the term “mortgage consumers” is intended to include borrowers and guarantors.

87. A recent addition to the consumer protection framework that has a direct bearing on the conduct of lenders is the EU Mortgage Credit Directive (sometimes “MCD”) which became effective in 2016. Council Directive 2014/17/EU, 2014 O.J. (L 60) 34 [hereinafter Council Directive 2014/17/EU]. To ensure the implementation of MCD’s reforms, the European Commission threatened to bring Spain, and several other countries, before the ECJ. See ACN, *Brussels to Take Spain to Court if It Fails “to Enact Rules on Mortgage Credit,”* CATALAN NEWS (Nov. 17, 2016, 6:23 PM), <https://www.catalannews.com/politics/item/brussels-to-take-spain-to-court-if-it-fails-to-enact-eu-rules-on-mortgage-credit>.

88. Coy, *supra* note 54.

89. Council Commission Notice: Guidance on the Interpretation and Application of Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts, 2019 O.J. (C 323) 5–10 [hereinafter

covers consumers, sellers, and suppliers operating within the EU orbit.<sup>90</sup> A primary rationale informing the Directive is that the removal of unfair contract terms facilitates well-functioning markets.<sup>91</sup> The Directive insists on a uniform baseline level of treatment for parties in the negotiation and enforcement of debt transactions and other consumer contracts.<sup>92</sup> It accomplishes this in several ways: articulating conditions under which unfairness arises; focusing attention on whether the consumer is impacted negatively as a sign that unfairness exists; offering exemplars of unfairness; and furnishing a sample list of unfair terms.<sup>93</sup>

The nomenclature, “consumer citizen,”<sup>94</sup> is of particular significance in the parlance of EU legislation.<sup>95</sup> Here, the consumer citizen is a citizen of the EU, of a nation state, and of the global market. The Directive defines “consumer” as “any natural person who, in contracts covered by . . . [the UCT Directive], is acting for purposes which are outside his trade, business, or profession.”<sup>96</sup> The Directive and the ECJ’s jurisprudence are mechanisms for intervening in private law transactions and undoing contracts in the name of consumer protection. Both recognize that, “the consumer is in a weak position vis-à-vis the seller or supplier, as regards to both his bargaining power and his level of knowledge.”<sup>97</sup> Focusing on the well-being of consumers opens the door for reimagining rules which ultimately serves the redistributive goal of protecting the vulnerable. This reframing also serves efficiency goals in that the costs of protection are spread throughout the market rather than placed disproportionately on those least able to shoulder them.

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Council Commission Notice 93/13/EEC] (listing some of the varied contracts to which the UCT Directive pertains).

90. Council Directive 93/13, *supra* note 76 (holding that Spain, as a member of the EU, is subject to the Directive).

91. Council Commission Notice 93/13/EEC, *supra* note 89, at 5.

92. *Id.*

93. Council Directive 93/13, *supra* note 76.

94. Michelle Everson & Christian Joerges, *Consumer Citizen in Postnational Constellations?* 10 (EUI Working Paper Law No. 200647, 2006) (theorizing about consumer interaction with law in the moment of post-nationalism by examining a WTO Report on genetically modified organisms).

95. The Preamble to the UCT Directive states:

Whereas, in order to facilitate the establishment of the internal market and to safeguard the citizen in his role as consumer when acquiring goods and services under contracts which are governed by the laws of Member States, other than his own, it is essential to remove unfair terms from those contracts.

Council Directive 93/13, *supra* note 76, pmbl. (emphasis added). The Preamble further speaks in terms of “[c]ommunity citizens as consumers.” *Id.*

96. *Id.* at 29–30, art. 2(b).

97. Case C-169/14, *Sánchez Morcillo v. Banco Bilbao Vizcaya Argentaria, S.A.*, 2014 ECLI:EU:C:2014:2099, para. 22 (July 17, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=155118&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=18291823>.

In contrast to the emergent political and economic conditions preparing the way for new national housing policies, the legislative and judicial pathways were less well-defined. Although the European Union adopted the UCT Directive as early as 1993, the ECJ had yet to weigh in on its meaning for housing contracts. Numerous Member States, like Spain, were slow in fully implementing the EU legislation within their national legal frameworks, even as late as 2013, the date of the *Aziz* decision. Also, there were lingering questions about how best to address the homeless and other populations in need of additional governmental support, such as immigrants without established supportive familial networks. The cases analyzed in the following section illustrate how rules for mortgage and housing markets emerged out of governmental interactions with international institutions such as the ECJ and the ESCR Committee. I further claim that public activism instigated and informed the cases. The multiplicity of discursive regimes means the individual, who is more than a consumer citizen,<sup>98</sup> can bring several claims.

## 2. European Union Charter

The EU Charter offers another avenue to bring housing claims. The Charter pertains to EU Member States and institutions.<sup>99</sup> It expressly articulates human rights laws and ideals,<sup>100</sup> although it is influenced by the ECHR.<sup>101</sup> Article 34.3 of the EU Charter states: “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.”<sup>102</sup> The Charter contains

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98. The term “consumer” has a duality to it. On the one hand it underscores the fundamental significance of individuals as purchasers within a global economy. On the other hand, the term is limiting in that it empties out the humanity of individuals and defines them in terms of specific narrow roles that are played out in economic markets: accumulator and exchanges of currency.

99. The EU Charter “draws on the European Convention of Human Rights (ECHR), the European Social Charter and other human rights conventions, the constitutional conventions common to EU Member States, and the [ECJ]’s case law.” FRANCESCA FERRARO & JÉSUS CARMONA, *FUNDAMENTAL RIGHTS IN THE EUROPEAN UNION: THE ROLE OF THE CHARTER AFTER THE LISBON TREATY 3* (2015).

100. Note that EU Members are also obligated to adhere to the ECHR. However, the interpretation of the Convention is within the competency of the ECtHR, not that of the ECJ. The ECJ is authorized to interpret and apply the Charter. With the entry into force of the Lisbon Treaty on December 1, 2009, the Charter was recognized by EU Member States as having legally binding effect.

101. FERRARO & CARMONA, *supra* note 99.

102. The full text of Article 34 paragraph 3 states:

In order to combat social exclusion and poverty, 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, in accordance with the rules laid down by Community law and national laws and practices.

EU Charter, *supra* note 81, art. 34. Other EU-grounded international legal instruments relevant to housing rights include: The Treaty of the EU, Anti-discrimination Legislation, and the EU Agency for

other rights related to housing: the right to “respect for private and family life, home and communications”;<sup>103</sup> the consumer protection right;<sup>104</sup> the protection of family life;<sup>105</sup> and the right to access of services of general economic interest.<sup>106</sup>

While the Charter incorporates a right to housing, the right, as formulated, does not clearly state that it pertains to mortgage loan contracts or that its scope is broad enough to provide relief to overindebted defaulted borrowers. However, if the right is to be meaningful and effective, one should be able to rely upon the language, the “right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources,” to make the case that it encompasses: access to affordable properties for rent and purchase; government protection from predatory loans and predatory landlords; relief from procedurally unfair foreclosures and evictions; the procurement of reasonably priced mortgages with clearly disclosed terms; opportunities to modify housing contracts when necessary; and the ability to be released from the terms of a mortgage upon the return of the collateral.

Whether the ECJ will interpret the Charter to include the interests of overindebted or defaulted borrowers remains unresolved. There is some basis for extending that protection if the Court looks to Article 38, which requires that “Union policies . . . ensure a high level of consumer protection.”<sup>107</sup> It is also unclear how the ECJ will analyze claims grounded in the Charter in conjunction with (or apart from) those grounded in the UCT Directive. In other words, whether new cases in which the ECJ expressly engages with Charter-based rights to housing claims will contribute to the new public-private housing law framework, or whether the Court’s rulings will focus solely on the human rights obligations of governments, essentially preserving a separation between private and public law matters. Regardless, it is important to recognize that interpreting the Charter is within the competency of the ECJ and there will likely be future cases in which the Court has opportunities to further bridge the realm of private residential housing contracts with public social justice concerns that are, in part, encapsulated by the right to housing. It is probable that, in terms of influence within the EU, the Charter may serve as a more formidable connector to the

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Fundamental Rights. See *EU Housing Rights*, HOUSING RIGHTS WATCH, (Oct. 10, 2013), <http://www.housingrightswatch.org/page/eu-housing-rights>.

103. EU Charter, *supra* note 81, art. 7.

104. *Id.* art. 38.

105. *Id.* art. 33.

106. *Id.* art. 36.

107. *Id.* art. 38.

private law realm than the rulings of the ESCR Committee.<sup>108</sup> This is because the Charter “enjoys a higher degree of legitimacy, thanks to its ratification by all Member States on behalf of their citizens[.] . . . [T]he EU Charter can be described as the outcome of a pan-European political consensus which should frame both the activity of the EU legislature and EU judges.”<sup>109</sup>

### 3. European Court of Human Rights

While the European Court of Human Rights (ECtHR) has addressed matters concerning human rights related to housing,<sup>110</sup> and has a broader constituency,<sup>111</sup> its case law is not the focus of this study for several reasons. First, there is no express right to housing in the Convention. Instead, complainants may draw upon a cluster of rights that the Court has interpreted as affording some protection to individuals with respect to housing in cases alleging that human rights have been compromised due to forced evictions or a government’s failure to furnish public housing.<sup>112</sup> Notably, Article 8

108. From the standpoint of having a direct effect on government action, Spain is unlikely to view the UNESCR Committee as carrying the same degree of weight as the ECJ. Nonetheless, the purpose of including the international committee cases in this analysis is to underscore the contribution the Committee makes to the conversation regarding the appropriate scope of housing protections. There is an ongoing dialogue concerning the public/private divide and the proper regulatory frame for dealing with banks, governments, landlords, etc. Infractions of international human rights norms always carry with them the threat of reputational harm. In terms of compliance, Spain is more likely to comply with ECJ decisions because of the EU’s enforcement mechanisms and because publicity concerning its failure to adhere may be construed as a rejection of its EU obligations.

109. FERRARO & CARMONA, *supra* note 99, at 10.

110. See *Tchokontio Happi v. France*, App. No. 65829/12 Eur. Ct. H. R. (2015), <http://hudoc.echr.coe.int/eng?i=001-153911> (holding that France was in violation of the Convention in that it had failed to comply with a final judgment of the Paris Administrative Court and ordering that the applicant be re-housed in satisfactory accommodations, as required by the national law known as DALO). The Court specifically noted that France could not circumvent compliance by way of “a State authority . . . cit[ing] the lack of funds or other resources as an excuse for not honoring, for instance, a judgment debt.” *Id.* at 12. The ECtHR held that France’s procrastination was a violation of Article 6 §1 (right to a fair trial) of the Convention. *Id.* The *Happi* decision is notably different from South Africa’s landmark case, *Government of The Republic of South Africa v. Grootboom*. 2000 (11) BCLR 1169 (CC) (S. Afr.). If adopted, under the *Happi* framework, South Africa could arguably be required to redistribute land to achieve substantive equality. See also *V.M. v. Belgium*, App. No. 61025/11 Eur. Ct. H.R. (2016), <http://hudoc.echr.coe.int/fre?i=001-169047> (concerning whether degrading living conditions led to the death of applicant’s daughter); *Winterstein v. France*, App. No. 27013/07 Eur. Ct. H.R. (2016), <http://hudoc.echr.coe.int/eng?i=001-162215> (finding a violation of Article 8). The ECtHR has made clear in cases such as *Moldavan v. Romania* that the quality of housing matters. Press Release, Registrar of Eur. Ct. H.R., Chamber Judgment Moldovan and Others v. Romania No. 2 (Dec. 7, 2005), <http://hudoc.echr.coe.int/eng-press?i=003-1393399-1454825>.

111. The ECtHR is responsible for interpreting the Convention for the Council of Europe’s forty-seven members. See *47 Member States*, COUNCIL OF EUR., <https://www.coe.int/en/web/portal/47-members-states> (last updated Sept. 3, 2020).

112. See, e.g., *F.J.M. v. The United Kingdom*, App. No. 76202/16 Eur. Ct. H.R. (2018), <http://hudoc.echr.coe.int/eng?i=001-188124> (discussing the application of Article 8). See also *Council of Europe Housing Rights*, HOUSING RTS. WATCH, <http://www.housingrightswatch.org/page/council>

recognizes, “[e]veryone has a right to respect for private life, his home and his correspondence.”<sup>113</sup> Second, ECtHR cases operate under a different framework.<sup>114</sup> The ECtHR has not developed jurisprudence expressly contemplating how mortgage loan debt instruments intersect with housing rights.<sup>115</sup> While cases grounded in Convention rights involving private loan or rental contracts could be configured, the current ECtHR housing jurisprudence is substantively different. Notwithstanding these differences, the ECtHR will become a more visible part of the new paradigm because of the size of its membership and influence.<sup>116</sup> As the ECJ continues to expand its jurisprudence on the UCT Directive—incorporating reasoning informed by human rights ideals—it is likely to consider decisions of the ECtHR in interpreting the right to housing. The legal instruments that the ECJ will be ruling on, however, will be the UCT Directive and the Charter.

### C. Protections at the International Level: ICESCR

The international human right to housing, enshrined in Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and further addressed in General Comments 4 and 7, recognizes that individuals are entitled to housing as essential to their basic dignity.<sup>117</sup> Spain, as a ratifying member of the treaty since 1977, is obligated to incorporate the right within its domestic legal system to meet its international obligations.<sup>118</sup> Spain’s consent to the Optional Protocol means that it

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europe-housing-rights (last visited Sept. 12, 2020) (“The right to housing is enshrined in numerous concrete legal norms . . . right to life, prohibition of torture or inhuman or degrading treatment, right to a fair trial, right to respect for private and family life, right to an effective remedy, prohibition of discrimination, protection of property.”); EUR. COURT OF HUMAN RIGHTS., COUNCIL OF EUR., GUIDE ON ARTICLE 8: RIGHT TO RESPECT FOR PRIVATE AND FAMILY LIFE, HOME AND CORRESPONDENCE (2020) (explaining Article 8 and analyzing its case law).

113. ECHR, *supra* note 58, art. 8.

114. The limited number of ECtHR decisions addressing housing do not concern the realm of financial debt instruments. Both are central to my analysis. The extension of the conceptualization of public protections into the private, by way of private contracts of debt or leasing, and the importation of private law concepts into the public sphere, are primary subjects of this Article.

115. It is also not clear that the right to housing helps the homeless in that it may be interpreted to protect only those who are property owners or tenants. See *Council of Europe Housing Rights*, *supra* note 112 (explaining that the right to housing is not explicitly provided for in the ECHR, but rather enshrined in legal norms).

116. See European Social Charter (Revised), paras. 16–17, 30, 31, May 3, 1996, E.T.S. No. 163 (detailing the rights of family and children, the right to social protections, and enshrining the right to housing).

117. International Covenant on Economic, Social and Cultural Rights, art. 11, para. 1, Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

118. Spain initially signed the treaty on September 28, 1976. It then ratified it on April 27, 1977. 3. *International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY



acknowledges the competence of the ESCR Committee to hear individual claims grounded in treaty rights.<sup>119</sup> Individuals have prevailed upon the Committee to resolve housing rights matters. As the analysis in the following section demonstrates, the Committee's rulings are crucial to the conceptual move towards incorporating public law principles into private arrangements.

## V. HOUSING CONTRACTS THROUGH THE LENSES OF PUBLIC AND PRIVATE LAW

### A. The ECJ and Consumer Protection in Private Housing

Mapping the relevant terrain of private and public law is necessary to my analysis: examining the specific judicial and legislative action that constitutes the reframing, intervening in the scholarly debates on the necessity of public and private law boundaries, and highlighting the new approach to housing markets. With respect to the first objective, the ECJ decisions and those of the UN ESCR Committee are essential resources not only for identifying the dominant private and public law concepts at play but also for providing contextual examples to give insight to the interfusion.

#### 1. *Aziz*: Beginning to Reframe Private Housing

*Aziz v. Caixa d'Estalvis de Catalunya*<sup>120</sup> is essential to the jurisprudential reframing of private housing transactions in Europe. The ECJ ruled that some of Spain's procedural rules regarding mortgage contracts conflicted with the UCT Directive's goal of protecting consumers.<sup>121</sup> Where consumers seek a ruling challenging the fairness of their contractual terms, courts hearing such challenges must be able "to grant interim relief, including, in particular, the staying of those enforcement proceedings, where the grant of such relief is necessary to guarantee the full effectiveness of [their] final decision[s]."<sup>122</sup> Rather than providing a definitive statement on the characteristics of an unfair term or ruling on whether the terms of the contract in *Aziz* were unfair, the ECJ offered guidance on evaluating a term's

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COLLECTION, [https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg\\_no=IV-3&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-3&chapter=4&clang=en) (last visited Sept. 13, 2020).

119. On May 5, 2013, the Protocol entered into force and Spain acceded on September 23, 2010. *3.a Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, UNITED NATIONS TREATY COLLECTION, [https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-3-a&chapter=4](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4) (last visited Sept. 13, 2020).

120. Case C-415/11, *Aziz v. Catalunya*, 2013 EUR-Lex CELEX WL 62011CJ0415 (Mar. 14, 2013).

121. *Id.* ¶ 59.

122. *Id.* ¶¶ 59, 64.

unfairness.<sup>123</sup> The case marks a judicial moment of reflection on the status of mortgage consumers in relation to lenders and the relationship of both parties to domestic procedural laws governing their contractual enforcement rights. *Aziz* ventures into new territory.<sup>124</sup> The ECJ, a supranational court, conceptualized a complex set of rights that pertain to housing from the starting place of private contractual terms in mortgage loan agreements. The decision has ramifications for how interactions between borrowers and lenders are structured and for the obligations it imposes on states to devise fair procedural rules regarding the treatment of residential loan debtors and creditors.

Mr. Mohamed Aziz initiated his case in commercial court (i.e. the Juzgado de lo Mercantil No. 3 de Barcelona) to undo Caixa Bank's mortgage enforcement proceedings against him and to protest the bank's repossession of his home.<sup>125</sup> He took out a loan with Caixa Bank for the principal amount of EUR 138,000.<sup>126</sup> His 33-year loan term ran from August 1, 2007 to July 31, 2040.<sup>127</sup> Aziz initially made payments in compliance with his monthly mortgage obligation,<sup>128</sup> but then missed several installments.<sup>129</sup> In response, Caixa, acting under the authority of the loan terms, accelerated his loan<sup>130</sup> and sought repossession which was granted by a court charged with hearing mortgage enforcement proceedings, known as the Court of First Instance and Instruction No. 5 Martorell.<sup>131</sup> At the Juzgado de lo Mercantil, Mr. Aziz raised questions about the fairness of his mortgage contract. When the commercial court sought guidance in the form of a preliminary ruling<sup>132</sup>

123. *Id.* ¶¶ 65–66.

124. See Irina Domurath & Hans-W. Micklitz, *Introduction*, in CONSUMER DEBT AND SOCIAL EXCLUSION IN EUROPE, *supra* note 24, at 3, 4–5 (highlighting the issuance of the *Aziz* decision as a watershed moment).

125. Case C-415/11, *Aziz v. Catalunyaacaixa*, ECLI:EU:C:2012:700 (Nov. 8, 2012), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=129481&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=18301774>. The enforcement case was initially brought before the Juzgado de Primera Instancia No. 5 de Martorell. *Id.* para. 23.

126. *Id.* para. 12.

127. *Id.* para 13.

128. *Aziz*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶ 23.

129. *Aziz*, ECLI:EU:C:2012:700, para. 18.

130. *Id.* para. 19. 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.

131. *Aziz*, 2013 EUR-Lex CELEX WL. 62011CJ0415, ¶ 26.

132. As the Court of Justice for the European Union explains in its recommendations to national courts:

The reference for a preliminary ruling . . . is a fundamental mechanism of EU law. It is designed to ensure the uniform interpretation and application of that law within the European Union, by offering the courts and tribunals of the Member States a means of bringing before the Court of Justice of the European Union ('the Court') for a preliminary ruling questions concerning the

concerning the interpretation of the directive, the case made its way to the First Chamber of the ECJ.<sup>133</sup> Additionally, the national court prevailed upon the ECJ to assess whether Spain's civil procedural rules, which precluded debtors from raising fairness arguments regarding their mortgage loan terms, contravened the directive<sup>134</sup> and whether certain terms and provisions of Mr. Aziz's contract would be invalidated in light of the ECJ's interpretation.<sup>135</sup>

a. Background

Spanish civil procedure laws severely restrict parties in the arguments and defenses they may assert in an enforcement proceeding.<sup>136</sup> 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.<sup>137</sup> He could assert that the creditor had miscalculated the amount due on the "closing balance" of the account between the two parties.<sup>138</sup> Last, he could maintain that there was another debt with priority over the one being foreclosed.<sup>139</sup> Omitted from the options was an opportunity for Mr. Aziz to challenge the fairness of his mortgage loan's contractual terms.<sup>140</sup> The avenue available for borrowers to initiate this type of challenge at the time was instead through a civil proceeding.<sup>141</sup> That approach was unsatisfactory because if Mr. Aziz disputed the contract in the civil venue, the court would

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interpretation of EU law or the validity of acts adopted by the institutions, bodies, offices or agencies of the Union.

Court of Justice of the European Union, Recommendations to National Courts and Tribunals in Relation to the Initiation of Preliminary Ruling Proceedings, para. 1, 2012 O.J. (C 338) 1, 1. A preliminary ruling by the ICJ is "binding both on the referring court and on all courts in EU countries." *Preliminary Ruling Proceedings—Recommendations to National Courts: Summary of Recommendations to National Courts on the Use of the Preliminary Ruling Procedure Article 267 of the Treaty on the Functioning of the European Union (TFEU)*, EUR-LEX (Oct. 31, 2017), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM%3A114552>.

133. The first stage of the transnational legal process typically involves the issuance of an opinion by an Advocate General (AG). EUR. PARLIAMENT, ROLE OF ADVOCATES GENERAL AT THE CJEU 4–5 (2019). An AG is a member of the ECJ. *Id.* at 1. The AG's opinion typically includes: an introduction to the case, relevant laws and legal context, statement of facts, the reason that the national court is seeking a preliminary ruling, and the AG's well-considered judgment regarding how the matters raised should be resolved. *Id.* at 4–5. Although the ECJ judges are not bound by the AG's opinion, they often influence the ECJ's decisions. *Id.* at 1.

134. *Aziz*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶¶ 31(1), 32.

135. *Id.* ¶ 32.

136. *Id.* ¶ 54 (referencing L.E. Civ., art. 695 (Spain)).

137. *Id.*

138. *Id.*

139. *Id.* ¶¶ 14, 54.

140. *Id.* ¶ 54.

141. L.E. Civ. art. 698(1) (Spain); Case C-415/11, *Aziz v. Catalunyaixa*, ECLI:EU:C:2012:700, para. 25 (Nov. 8, 2012), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=129481&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=18301774>.

lack the authority to stay the mortgage enforcement process.<sup>142</sup> Even if his claim proved meritorious, he risked being permanently dispossessed of the property.<sup>143</sup> When Mr. Aziz complained of the limited nature of the enforcement proceedings, the Juzgado de lo Mercantil referred the matter to the ECJ. As an initial step, the Advocate General made recommendations<sup>144</sup> that were then transmitted to the Court's first chamber for a preliminary ruling.<sup>145</sup>

Aziz's loan was plagued by several detrimental characteristics. The contract precluded any flexibility in the borrower's repayment schedule. Instead, it permitted Caixa to demand payment of the entire loan upon the borrower's failure to timely submit any of the scheduled monthly payments.<sup>146</sup> The contract terms also permitted Caixa, without any input from Mr. Aziz, to state the amount due and owing by providing the court with a certified statement.<sup>147</sup> Although he received notice, Mr. Aziz was not actually entitled to notice of his default under the mortgage documents.<sup>148</sup> The 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%.<sup>149</sup> Because Caixa was allowed to accelerate,<sup>150</sup> it meant that the 18.75% interest rate was applied to the entire outstanding balance, not just to the missed monthly payments.<sup>151</sup> The default interest was "calculated on a daily basis."<sup>152</sup> Following Aziz's failure to make his monthly payment,

142. *Aziz*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶ 55 (referencing L.E. Civ. art. 698 (Spain)).

143. The ECJ noted that:

[U]nder 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 that marginal note.

*Id.* ¶ 57.

144. *Aziz*, ECLI:EU:C:2012:700, paras. 64, 76; see Stina Haglund, *The Role of the Advocate General and the Development of Direct Effect*, ÖREBRO UNIVERSITET: EU CONST. L. BLOG (Aug. 13, 2012), <https://eulaworebro.wordpress.com/2012/08/13/the-role-of-the-advocate-general-and-the-development-of-direct-effect/> ("The role of the Advocate General is to propose an independent legal solution . . . [T]he Court is not obligated to follow the Opinion delivered by the Advocate General.").

145. *Aziz*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶ 30.

146. *Aziz*, ECLI:EU:C:2012:700, paras. 14, 69.

147. *Aziz*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶ 22.

148. According to the facts, the bank did notify Aziz regarding the initiation of the process. *Id.* ¶¶ 14, 20–21.

149. Mr. Aziz's mortgage started at the low "teaser" annual interest rate of 4.87% for a little over a year (17 months). After that, the loan was subject to a variable rate linked to the Euribor (plus 1.10%). *Aziz*, ECLI:EU:C:2012:700, paras. 13, 15.

150. *Aziz*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶ 21.

151. *Aziz*, ECLI:EU:C:2012:700, paras. 15, 81.

152. *Id.* para. 14.

Caixa filed an action seeking to collect the outstanding amount including contractual and default interest.<sup>153</sup> Caixa sent Mr. Aziz notice of the action. When he failed to pay the stated amount, Caixa initiated the enforcement proceeding, which included foreclosure.<sup>154</sup> In order to halt the procedure, Aziz would have needed to pay “the unpaid contractual instal[l]ments at the time of enforcement, plus interest, costs and disbursements relating to those instal[l]ments.”<sup>155</sup>

The absence of any competitive bidders at the public judicial auction foreclosure made it possible for Caixa to assume title of Aziz’s home.<sup>156</sup> Under Spanish mortgage law at the time of the proceeding, banks were permitted to take title to foreclosed homes at fifty percent of their appraised value, assuming the absence of any higher bids at the auction.<sup>157</sup> Taking advantage of this, Caixa assumed ownership of his home for EUR 97,200.<sup>158</sup> This was drastically lower than EUR 194,000, which was Caixa’s valuation of the property at the time Aziz entered into the loan agreement.<sup>159</sup> Because Aziz had a recourse loan and the value credited for the property did not cover the outstanding balance, he continued to owe the bank even after he was evicted.<sup>160</sup> His remaining indebtedness totaled approximately EUR 40,000.<sup>161</sup>

Aziz did not participate in the enforcement proceeding,<sup>162</sup> which was conducted before the Juzgado de Primera Instancia No. 5 de Martorell.<sup>163</sup> Instead, several months after its conclusion, as the court awarded the property to the bank, Aziz filed his case before the Commercial Court No. 3 of Barcelona. He challenged the terms of his loan agreement and sought to annul the proceedings granting the bank his home.<sup>164</sup> Prior to referring the matter to the Advocate General, the commercial court drafted a more extensive list of matters on which it sought guidance.<sup>165</sup>

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153. *Id.* paras. 21–23.

154. *Id.*

155. *Id.* para. 26.

156. *Id.* para. 28.

157. *Id.*; C-415/11, *Aziz v. Catalunya Caixa*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶ 26 (Mar. 14, 2013).

158. *Aziz*, ECLI:EU:C:2012:700, para. 28.

159. *Id.* paras. 12, 17; SUNDERLAND, *supra* note 14, at 49.

160. *Aziz*, ECLI:EU:C:2012:700, para. 28.

161. *Id.* paras. 20, 22, 28.

162. *Id.* para. 26.

163. *Id.* para. 23.

164. *Id.* para. 29; C-415/11, *Aziz v. Catalunya Caixa*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶ 27 (Mar. 14, 2013).

165. *See Aziz*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶ 30.

Reviewing the elements of Mr. Aziz's case establishes a foundation to understand the private contractual and procedural landscape confronting Spain's residential borrowers before the ECJ's interpretation of the UCT Directive. This context is essential to appreciating the difference the Directive makes. Further, the background is necessary to my response to the scholarly debate between private law purists and public law enthusiasts in Part VI.

b. Procedural Ruling

The first part of the ECJ's ruling pertains to procedure. Specifically, Member States cannot both exclude the possibility of challenging the validity of the contractual terms of the mortgage during enforcement proceedings *and* deny any means of relief in an alternative judicial forum.<sup>166</sup> The government must grant borrowers some venue to contest the substance of their loan agreements. The disjuncture between consumer relief and creditor enforcement violates the "principle of effectiveness."<sup>167</sup> The principle is salient to whether the objectives of the Directive can be met or whether they are frustrated by domestic laws. The Court interpreted "effectiveness" to mean that a remedy equal to what the plaintiff is seeking—in this instance, undo the foreclosure so that Aziz could retain his property—was required.<sup>168</sup> A monetary remedy under these circumstances would be insufficient.<sup>169</sup> The Court opined that Member States must establish a judicial process that has the competency to resolve cases that raise unfairness issues with respect to residential mortgage loans.<sup>170</sup> Courts should be able to intervene in or delay enforcement proceedings, where necessary, to provide borrowers with judicial relief where borrowers challenge the substance of the mortgage agreement, including the inequity of its terms.<sup>171</sup> Furthermore, where the national court determines that a contractual term is unfair, there must be a process to ensure removal of the term from future consumer contracts.<sup>172</sup>

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166. *Id.* ¶¶ 64, 77.

167. *Id.* ¶ 63.

168. *Id.* ¶ 60.

169. *Id.* ¶ 63 ("[T]he Spanish legislation at issue . . . makes the application of the protection which the directive seeks to confer on . . . [mortgage] consumers impossible or excessively difficult."); see Fernando Gómez Pomar & Karolina Lyczkowska, *Spanish Courts, the Court of Justice of the European Union, and Consumer Law*, INDRET, Oct. 2014, at 15–16 (Spain) (discussing the effect that the Judgment of 14th March 2013 (Case C-415/11, Aziz) had on Spanish Law).

170. *Aziz*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶¶ 49, 52, 59, 63–64.

171. *Id.* ¶ 64.

172. *Id.* ¶¶ 60, 77.

### c. Substantive Ruling—Test for Unfairness

The second part of the ruling relates to the question of what constitutes an unfair term and provides guidelines for national courts to make that determination.<sup>173</sup> Article 3(1) of the Directive deals with the matter of unfairness and provides:

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.<sup>174</sup>

An initial step towards determining unfairness is assessing the circumstances surrounding the formation of the contract.<sup>175</sup> The question of whether the parties engaged in contractual bargaining to establish the terms of the deal is paramount.<sup>176</sup> Absence of 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.”<sup>177</sup> Although Article 3 does not use the same term, the description provided fits what American law refers to as a contract of adhesion.<sup>178</sup> As in the United States, contracts of adhesion in the EU framework are not necessarily illegal or unconscionable, and, therefore, the legality determination has to be made separately. There are many circumstances under which such contracts or terms will be upheld as valid.<sup>179</sup>

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173. *Id.* ¶ 66.

174. Council Directive 93/13, *supra* note 76. The directive was subsequently amended by Council Directive 2011/83, of the European Parliament and of the Council of 25 October 2011 on Consumer Rights. Council Directive 2011/83, art. 1, 2011 O.J. (L 304) 64, 71.

175. *See Aziz*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶¶ 68, 74, 76–77(2); Council Commission Notice 93/13/EEC, *supra* note 89, at 4, 5–6, 11.

176. *Aziz*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶¶ 68, 74, 76–77(2). Council Commission Notice 93/13/EEC, *supra* note 89, at 5–6, 11.

177. Council Directive 93/13, *supra* note 76, art. 3(2); *see Case C-169/14, Sánchez Morcillo v. Banco Bilbao Vizcaya Argentaria, S.A.*, 2014 ECLI:EU:C:2014:2099, para 5(2) (July 17, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=155118&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=18291823>.

178. Such contracts have generated considerable debate, suspicion, and disdain in the United States. A contract of adhesion is “a take-it-or-leave-it standard form agreement, usually presented to a consumer by a business entity.” Andrew A. Schwartz, *Consumer Contract Exchanges and the Problem of Adhesion*, 28 YALE J. REG. 313, 346 (2011) (footnote omitted); *see also* Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1174 (1983) (“Contracts of adhesion—standard form contracts presented on a take-it-or-leave-it basis—are ubiquitous in modern commercial life . . .”). The UCT Directive is particularly concerned with addressing unilateral boilerplate contracts and “the unfair exclusion of essential rights in contracts.” Council Directive 93/13, *supra* note 76, pmb. (internal quotations omitted). Because of the absence of meaningful choice or ability to bargain on the part of the weaker party, many scholars have heavily criticized this type of agreement.

179. Such contracts have not been declared *per se* illegal because many recognize efficiencies associated with standardization. Schwartz, *supra* note 178, at 354.

The determination of whether the formulation of the contract grew out of unilateral or mutual bargaining sets up further inquiry into contractual unfairness.<sup>180</sup>

The Directive offers some insight into what good faith requires. Where a party is unduly advantaged and the consumer is significantly disadvantaged to the point of inflicting harm on the latter, good faith has not been met. The ECJ strikes a balance between consumer and supplier<sup>181</sup> in ruling that the relevant inquiry 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.”<sup>182</sup> As I argue in Part VI, this test is not an easy one to administer. It not only requires a court’s assessment of what is fair and equitable, but also what would be a reasonable assumption on the part of the seller concerning the contractual terms presented to a consumer.

The Directive uses the phrase “significant imbalance” to evaluate unfairness. The phrase refers to the positioning of the parties. Determining whether a significant imbalance exists “requires an examination as to how a contract term influences the rights and obligations of the parties.”<sup>183</sup> Parties establish and define the terms of their contracts in the first instance. However, as the *Aziz* Court recognized, once a contract is formed, a party may contest the fairness of a term by alleging it causes a significant imbalance; meaning that it unduly burdens the complainant party in his performance.<sup>184</sup> National courts must evaluate the challenged term in relation to national laws to determine 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.<sup>185</sup> For example, if national law requires that borrowers be given sixty days advance notice before filling enforcement proceedings, a contract that suspends with notice or adopts a shorter notice period will be heavily scrutinized. Nonetheless, even though

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180. *Aziz*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶¶ 68, 69, 77(2); Council Commission Notice 93/13/EEC, *supra* note 89, at 5–6, 11.

181. 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.

Council Directive 93/13, *supra* note 76, pmbl.

182. *Aziz*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶¶ 69.

183. Council Commission Notice 93/13/EEC, *supra* note 89, para. 3.4.1.

184. *Aziz*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶¶ 68, 77(2).

185. *Id.*



the contract is unfavorable towards the borrower, it still may fall within legal bounds.<sup>186</sup> It is noteworthy that the Member State is implicated in the assessment of contractual fairness. According to the ECJ, it is necessary to 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.”<sup>187</sup> The Court’s ruling reveals its contemplation of the power differential between consumers, corporations, and governments. Governments, typically, are endowed with greater powers to impose even-handed terms in transactions.

To facilitate a court’s determination of whether unfair terms are present, the Directive includes a list of examples illustrating how unfair terms operate. For example, a term or contractual clause, “enabling the seller or supplier to alter the terms of the contract unilaterally without a valid reason which is specified in the contract,” may be held as unfair.<sup>188</sup> The ECJ ruled that the list 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.”<sup>189</sup> The absence of a term from the list, should not be deemed as dispositive of the issue of whether it is unfair. Once a judicial determination of unfairness has been rendered, the Directive requires that the term or contractual provision be excised from the contract.<sup>190</sup>

*Aziz* highlighted both the acceleration clause, which enabled Caixa to establish the default interest rate, and the clause that permitted Caixa to unilaterally calculate the outstanding balance.<sup>191</sup> Because the domestic court has the initial responsibility to assess the unfairness of contractual terms,<sup>192</sup> the ECJ declined to rule upon the contract’s substance.<sup>193</sup> Instead, the Court imposed guidelines that national courts should consider.<sup>194</sup> National courts must: balance the import of the consumer’s breach with the overall substance and goals of the contract to determine if acceleration is warranted;<sup>195</sup> consult

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186. *Id.* ¶ 77.

187. *Id.* ¶ 77(2).

188. Council Directive 93/13, *supra* note 76, art. 3(3), annex para. (j).

189. *Aziz*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶¶ 70, 77; Council Directive 93/13, *supra* note 76, art. 3(3).

190. *See* Gómez Pomar & Lyczkowska, *supra* note 169 (noting that under Spanish Law a clause must be eliminated after being held unfair and replaced by the applicable default legal regime to fill the gap in the contract).

191. *Aziz*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶ 65.

192. *Id.* ¶¶ 66–67.

193. *Id.* ¶ 66.

194. *Id.*

195. Specifically, the ECJ ruled that the national court must consider:

national law and, in particular, the statutory interest rate to determine whether the challenged interest rate falls within those boundaries;<sup>196</sup> consider whether the term challenged is in the vein of the agreement between the parties or whether there is an apparent conflict between the term and the nature of the agreement that would ultimately impair the consumer's ability to protect himself against the threatened harm.

The relevance of the *Aziz* decision lies in the protective space it carves out for consumers in the domain of housing. The Court articulated a framework for assessing the unfairness of residential mortgage loan terms.<sup>197</sup> The interpretation of the UCT Directive provides litigants with a basis to challenge their contractual terms and the domestic procedural rules pertaining to housing transactions. Member States are also put on notice of their obligations to make domestic procedural rules conform to Directive mandates. Freedom of contract is constrained by the principle of unfairness; unfair contracts will not be enforced.

## 2. Elaborating Principles of Consumer Protection

The ECJ's revisiting of the UCT Directive in *Sánchez Morcillo and Abril García v. Banco Bilbao*,<sup>198</sup> a year later, followed by the cases *Unicaja Banco, S.A. v. Hidalgo Rueda et al.*<sup>199</sup> and *Naranjo v. Cajasur Banco S.A.U.*,<sup>200</sup> confirm that the Court has more than a fleeting interest in addressing inequities in private housing transactions and procedural inequalities accruing to the benefit of corporate and government interests.<sup>201</sup> The following decisions clarify rights, obligations, and duties of Member States and lenders. The cases evidence an ongoing dialogue with Spain, and

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... 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 context 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.

*Id.* ¶ 73 (emphasis added).

196. *Id.* ¶ 74.

197. *Id.*

198. Case C-169/14, *Sánchez Morcillo v. Banco Bilbao Vizcaya Argentaria, S.A.*, 2014 ECLI:EU:C:2014:2099 (July 17, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=155118&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=18291823>.

199. Joined Cases C-482/13, C-484/13, C-485/13 & C-487/13, *Unicaja Banco, SA v. Hidalgo Rueda*, 2015 EUR-Lex CELEX WL 62013CJ0482 (Jan. 21, 2015).

200. Joined Cases C-154/15, C-307/15 & C-308/15, *Gutiérrez Naranjo v. Cajasur Banco SAU*, 2016 EUR-Lex CELEX WL 62015CJ0154 (Dec. 21, 2016).

201. See *Sánchez Morcillo*, ECLI:EU:C:2014:2099, paras. 37, 44–45; see also *Hidalgo Rueda*, 2015 EUR-Lex CELEX WL 62013CJ0482, ¶ 23; *Gutiérrez Naranjo*, 2016 EUR-Lex CELEX WL 62015CJ0154, ¶¶ 28, 30.

the larger EU community, regarding private law contracts and public harm and demonstrate a deepening of the ECJ's commitment to the welfare of housing consumers and housing markets.

a. Expanding Procedural Protections in *Morcillo*

*Morcillo* concerned the differential treatment accorded to lenders as compared to borrowers under new domestic procedural laws pertaining to the enforcement of mortgages.<sup>202</sup> The ECJ scrutinized Spain's procedural rules, which treated banks (suppliers) differently from borrowers (consumers) when bringing an appeal.<sup>203</sup> Whereas lenders could appeal a court's decision dismissing their enforcement proceedings or voiding a term, borrowers did not enjoy the same latitude. Without the ability to appeal a "judgment at first instance,"<sup>204</sup> they had no mechanism to halt their mortgage enforcement proceedings despite underlying fairness issues concerning the mortgage contract.<sup>205</sup> Cases, like *Morcillo*, chronicle the country's fretful process of revising its mortgage laws contemporaneously with the *Aziz* decision in order to bring them in conformity with the UCT Directive. Law 1/2013 is one such example.<sup>206</sup>

In *Morcillo*, the applicants entered into a residential mortgage loan on June 9, 2003 with Banco Bilbao for EUR 300,500.<sup>207</sup> The loan provided for a default interest rate of "19% per annum" in contrast to the statutory interest of "4% per annum."<sup>208</sup> Some years later, after the applicants missed several payments, Banco Bilbao sought to collect the entire loan, including ordinary and default interest, in conjunction with an order for the sale of the mortgaged property.<sup>209</sup> While the referring court<sup>210</sup> limited its request for a

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202. *Sánchez Morcillo*, ECLI:EU:C:2014:2099, para. 19.

203. The procedural rule at issue was L.E. Civ., art. 695 (Spain). *Id.* paras. 37, 44–45.

204. *Id.* para. 17.

205. *Id.* paras. 17, 33, 42.

206. Spain's Law 1/2013 is an expansive law with numerous sections implementing protections for mortgage borrowers and changes to social rents. As various parts have been challenged, Spain has made revisions and adopted transitional legislation. The case *BBVA S.A. v. Pedro Peñalva López* is illustrative of the ongoing exchange between Spain's legislature and the transnational court regarding what constitutes fairness in mortgage transactions. In *BBVA*, the domestic court sought a preliminary ruling regarding the one-month time limit for challenging enforcement of mortgage proceedings, implemented by the transitional law in the wake of the *Aziz* case. The ECJ ruled that Article 6 and 7 of the UCT Directive "preclud[ed] a national transitional provision . . . which . . . imposes a time-limit on consumers calculated from the day following the publication of that law to object to enforcement on the basis of the alleged unfairness of contractual terms." Case C-8/14, *BBVA S.A. v. Peñalva López*, 2015 EUR-Lex CELEX WL 62014CJ0008, ¶ 43 (Oct. 29, 2015).

207. *Sánchez Morcillo*, ECLI:EU:C:2014:2099, para. 13.

208. *Id.* para. 14.

209. *Id.* para. 15.

210. The referring court was the Audiencia Provincial de Castellón. *Id.* para. 16.

preliminary ruling to questions concerning Spain's procedural rules and their compliance with Article 7 of the UCT Directive<sup>211</sup> and Article 47<sup>212</sup> of the EU Charter, it noted that loan terms like Morcillo's default interest rate could be challenged for unfairness.<sup>213</sup>

Grounding its decision in the principles of effectiveness and equality and the Directive's instruction that consumers are not bound by unfair terms,<sup>214</sup> the ECJ ruled that the contested rules violated EU laws.<sup>215</sup> Because they granted creditors and borrowers different relief, the rules contravened the equality of arms principle.<sup>216</sup> This principle requires that parties have an equal opportunity to present their cases before a tribunal.<sup>217</sup> Article 695 of Spain's civil procedure code significantly disadvantaged the debtor in that once his house was repossessed by the bank and sold, in most cases, the sale could not be undone. The sole remedy left to the borrower would be compensatory damages, an unsatisfactory substitute for the debtor's desired remedy of remaining in place.<sup>218</sup> The ECJ further concluded that Spain's rules violated the effectiveness principle and frustrated the requirement of "judicial protection."<sup>219</sup> In weighing the potential harms of delaying any relief due to lenders, as compared to the borrowers' "risk of losing their dwelling in an enforced sale,"<sup>220</sup> the ECJ favored the latter.

From *Morcillo*, one can discern a central principle mandating that even though the economic market grants certain participants a position of dominance in their contractual relations, under limited conditions, the Court may alter the imbalance. An essential restriction on Member States is that

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211. 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." Council Directive 93/13, *supra* note 76, art. 7. Paragraphs 2 and 3 of Article 7 offer examples of how the prevention of unfair terms may be achieved. *Id.*

212. Article 47 of the Charter guarantees the "right to an effective remedy before a tribunal." EU Charter, *supra* note 81, art. 47.

213. *Sánchez Morcillo*, ECLI:EU:C:2014:2099, para. 18.

214. *Id.* para. 50. The Court explained 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." *Id.* para. 23. Domestic legislation precluding a mortgage enforcement court from reviewing the unfairness of terms in the debt contract at issue is prohibited by the UCT Directive. *Id.* paras. 24 and 26.

215. *Id.* para. 52.

216. *See id.* para. 49 ("The principle of equality of arms . . . is no more than a corollary of a fair hearing that implies 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.").

217. *Id.* paras. 36, 38.

218. *Id.* para. 43 (concluding that a monetary remedy would be "incomplete and insufficient").

219. *Id.* paras. 48–50.

220. *Id.* para. 43.

their rules must not undermine or circumvent the protections of the Directive.<sup>221</sup> The procedural rules should maintain the borrower in the position he was in prior to the commencement of the enforcement hearing, in case his claim is deemed meritorious.<sup>222</sup>

b. Remedying Substantively Unfair Agreements in *Hidalgo* and *Naranjo*

i. *Hidalgo*

Rather than highlighting the asymmetrical power relationships between banks and borrowers, in *Unicaja Banco v. Hidalgo*, the ECJ instructed domestic courts on their obligations under the Directive.<sup>223</sup> 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 tribunal<sup>224</sup> 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: after a finding of unfairness, is the deciding court required to void and excise an unfair term or can it modify the term, or substitute another, to bring it into compliance with the Directive?<sup>225</sup>

*Hidalgo*<sup>226</sup> involved several individuals who defaulted on their respective mortgage loans, ranging from EUR 47,000 to EUR 249,000.<sup>227</sup> The Unicaja Banco and Caxiabank, separately, instituted mortgage enforcement proceedings.<sup>228</sup> The dispute concerned the fairness of default

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221. Joined Cases C-154/15, C-307/15 & C-308/15, *Gutiérrez Naranjo v. Cajasur Banco SAU*, 2016 EUR-Lex CELEX WL 62015CJ0154, ¶ 66 (Dec. 21, 2016).

222. See *Sánchez Morcillo*, ECLI:EU:C:2014:2099, paras. 43, 51 (suggesting that the status quo could be accomplished by granting the deciding court the procedural power to stay the mortgage enforcement proceedings).

223. Joined Cases C-482/13, C-484/13, C-485/13 & C-487/13, *Unicaja Banco, S.A. v. Hidalgo Rueda*, 2015 EUR-Lex CELEX WL 62013CJ0482, ¶ 26 (Jan. 15, 2015).

224. The referring court was the Juzgado de Primera e Instrucción de Marchena (Spain). *Hidalgo Rueda*, 2015 EUR-Lex CELEX WL 62013CJ0482, ¶ 23; Joined Cases C-482/13, C-484/13, C-485/13 & C-487/13, *Unicaja Banco, S.A. v. Hidalgo Rueda*, 2014 EUR-Lex CELEX WL 62013CC0482, ¶ 48 (Oct. 16, 2014).

225. *Hidalgo Rueda*, 2014 EUR-Lex CELEX WL 62013CC0482, ¶¶ 17, 23, 26; *Hidalgo Rueda*, 2015 EUR-Lex CELEX WL 62013CJ0482, ¶¶ 23, 26. Article 6 was at the center of the ECJ's analysis. 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." Council Directive 93/13, *supra* note 76, art. 6.

226. *Hidalgo* is composed of four cases filed by Unicaja Banco and Caixabank that were later consolidated. See *id.* ¶ 2.

227. *Id.* ¶ 18.

228. *Id.* ¶¶ 2, 18.

interest clauses.<sup>229</sup> The clauses permitted the lenders to charge interest in varying amounts, from eighteen to twenty-five percent per annum.<sup>230</sup> All the loans contained acceleration clauses.<sup>231</sup> Under the terms, the banks were able to apply the default interest rate, which was 22.5% for the majority of them,<sup>232</sup> to the entire outstanding loan balance.<sup>233</sup> Spain's law mandated that the domestic court should modify the contract by replacing the unfair term with an acceptable one.<sup>234</sup> The gist of the national law was to preserve the contract at all costs.<sup>235</sup> In contrast, the Directive does not authorize courts to substitute contractual terms.<sup>236</sup> Nothing in that instrument grants national courts the power to reduce a contractual penalty once the court determines that the penalty clause is unfair.<sup>237</sup> Instead, it merely dictates that unfair terms are not binding on consumers. Member States must take action to ensure that unfair terms are excised from the contract at issue and from future contracts between suppliers and sellers.<sup>238</sup> The ECJ's ruling clarified matters. Member States can confer this authority to modify with certain restrictions.<sup>239</sup> That is essentially what Spain did with its Second Transitional Law 1/2013, which revised certain parts of its civil procedure laws. The ECJ concluded that a state may adopt a law that permits the domestic court hearing the mortgage enforcement proceeding to "adjust the amounts due under a term" downward so that they are consistent with the statutory rate.<sup>240</sup> If, for example, a mortgage contract provides for a default rate of fifty percent and the statutory rate imposed by the government is twenty percent, the reviewing court can adjust the rate to no more than twenty percent.

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229. *Id.* ¶ 21.

230. *Id.* ¶ 19.

231. *Id.* ¶ 20.

232. *Id.* ¶ 19.

233. *Id.* ¶ 20.

234. *Id.* ¶¶ 10–11. The language is in 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. Approving the Revised Text of the General Law for the Protection of Consumers and Users and Other Complementary Laws art. 83 (R.D.L. 2007, 1). The Second Transitional Provision of Law No 1/2013 enacted May 15, 2013 modified Royal Legislative Decree No 1/2007, but the issue regarding compelling the mortgage enforcement court to modify the default interest rate remained. Second Transitional Provision of Law (B.O.E. 2013, 116).

235. See *Hidalgo Rueda*, 2015 EUR-Lex CELEX WL 62013CJ0482, ¶ 11 (quoting Article 83 of Royal Legislative Decree No. 1/2007) ("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.").

236. *Id.* ¶ 28.

237. *Id.* ¶ 29.

238. Council Directive 93/13, *supra* note 76, arts. 6–7.

239. *Hidalgo Rueda*, 2015 EUR-Lex CELEX WL 62013CJ0482, ¶ 42.

240. *Id.* ¶¶ 42–43.

The ECJ further explained that apart from the process, according to which the reviewing court acknowledges that there is a national law restricting the substance of the law in question, the reviewing court must make an independent evaluation of the fairness of the purported unfair term.<sup>241</sup> Furthermore, the local 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.<sup>242</sup> In assessing the unfairness of a contract term, a court should consider: (i) the “nature of the goods and services” that form the basis of the contract,<sup>243</sup> (ii) “the consequences of the term under the [national] law applicable to the contract,”<sup>244</sup> (iii) consistency between the relevant national laws and the Directive,<sup>245</sup> and (iv) its duty to consider the unfairness of a contract term regardless of the substance of the national law.<sup>246</sup> The Directive envisions that a court could remove an unfair term and the contract could continue on, remaining largely intact.<sup>247</sup> There are circumstances where that is not possible. 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 the substitute term is consistent with the Directive and “enables real balance between the rights and obligations of the parties to be restored.”<sup>248</sup>

*Hidalgo* recognized the latitude of Member States to legislate as they see fit, in compliance with EU law. Spain’s law compelling their courts to modify, rather than excise, the terms of default interest within a mortgage loan contract to bring it into compliance with State law standards was not prohibited by the Directive.<sup>249</sup> From a consumer vantage point, the ruling does not adequately protect consumers from unduly onerous interest when the national law permits suppliers to levy extraordinarily high rates. Instead, the ECJ merely nudges lenders to ensure that the interest rate provisions are in line with prevailing contractual rates permitted by national law. To the extent that interest rate standards are reasonable, meaning not unduly weighted against consumers, the *Hidalgo* case is helpful to borrowers. Lower

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241. *Id.* ¶¶ 42–43.

242. *Id.* ¶ 42.

243. *Id.* ¶ 37 (referencing Article 4(1) of the Directive).

244. *Id.*

245. *Id.* ¶ 38.

246. *Id.* ¶¶ 40–41.

247. See Council Directive 93/13, *supra* note 76, art. 6.

248. *Hidalgo Rueda*, 2015 EUR-Lex CELEX WL 62013CJ0482, ¶ 33.

249. *Id.* ¶¶ 42–43.

interest rates make contracts more affordable and increase the likelihood that borrowers will be able to pay the default interest if their economic situation improves in time, or to recover some of their equity if a foreclosure sale occurs. Limiting what is permitted in the context of bargaining about contractual costs may be read as expressing concern for borrowers, which renders private contracts more humane.

ii. Naranjo

From 2013 to 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.*, deepened the reach of the ECJ into matters of private residential mortgage contracts.<sup>250</sup> *Naranjo* tackled two prickly issues. One concerned the extent to which lenders are able to retain the benefits of their wrongdoing.<sup>251</sup> 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.<sup>252</sup> *Naranjo* involved three separate lenders<sup>253</sup> and cases that were later consolidated, after referral to the ECJ.<sup>254</sup> The disputed loan term was a floor clause. Floor clauses operate to 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 paid, previously, as a result of the unfair term's application.<sup>255</sup>

In a separate prior collective action case, Spain's Supreme Court (i.e. the Tribunal Supremo) held that the floor clauses were unfair and void because of the lenders' failures to inform borrowers that their mortgage contracts contained floor clauses and explain the meaning and effect of such provisions.<sup>256</sup> The Tribunal concluded that the omissions violated the Directive's requirements of "good faith, balance and transparency."<sup>257</sup>

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250. See generally Joined Cases C-154/15, C-307/15 & C-308/15, *Gutiérrez Naranjo v. Cajasur Banco SAU*, 2016 EUR-Lex CELEX WL 62015CJ0154 (Dec. 21, 2016) (analyzing whether floor clauses are permissible in mortgage loans agreements).

251. *Id.* ¶¶ 28, 30.

252. *Id.*

253. The individuals filed cases in various national commercial and provincial courts, against three separate banks: Cajasur Banco S.A.U., Banco Bilbao Vizcaya Argentaria SA, Banco Popular Espanol. *Id.* ¶¶ 27, 31, 37.

254. *Id.* ¶¶ 43–45.

255. *Id.* ¶¶ 28, 31, 38.

256. *Id.* ¶ 21.

257. *Id.*



Emphasizing the importance of consumer knowledge, the *Naranjo* Court reasoned that information concerning “contractual conditions and the consequences of entering into the contract” are essential ingredients to consumer decisions about whether to become a party to the mortgage loan transaction.<sup>258</sup> When lenders conceal such information, the court must take this fact into account when evaluating the unfairness of the terms challenged.<sup>259</sup> Regarding the question of the retroactive application of its ruling, the Tribunal Supremo grounded its decision on the principle of legal certainty,<sup>260</sup> 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.”<sup>261</sup>

In the underlying *Naranjo* case, the Tribunal Supremo 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 their past payments. Instead, they were only entitled to reimbursement of payments made after the Tribunal Supremo’s decision.<sup>262</sup> The referring courts prevailed upon the ECJ for a preliminary ruling addressing several matters.<sup>263</sup> At their core, they concerned: (i) Whether a domestic court can impose a time frame, limiting the effect of its ruling, after it has declared a contractual term unfair and void without violating the Directive’s mandate to Member States to ensure that consumers are not bound by unfair terms and that consumers have the full protection of the EU Charter<sup>264</sup> and (ii) In making restitution for sums collected under a term that has been adjudicated as unfair and void, whether lenders have to return all the money they received in payment under the unfair term or can the court limit the damages.<sup>265</sup>

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258. *Id.* ¶ 51.

259. *Id.* ¶¶ 51–52.

260. *Id.* ¶ 25.

261. *Id.*

262. *Id.* ¶¶ 21, 25–26. On May 9, 2013, the Tribunal Supremo published a decision holding that the floor clauses at issue in the collective action were void due to the lenders’ inadequate disclosure of them during the formation of the relevant mortgage contracts. At the time, the court restricted the effect of its ruling to payments made after the court’s decision. 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.* ¶ 41. 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.* ¶ 26.

263. *Id.* ¶ 1.

264. *Id.* ¶ 46 (citing Articles 6 and 7 of the UCT Directive and Article 47 of the EU Charter).

265. *Id.* ¶¶ 42, 46.

The ECJ's Grand Chamber ruled that national courts may not prescribe their rulings in ways that fail to "restor[e] the consumer to the legal and factual situation that he would have been in" absent that term.<sup>266</sup> Consumers have a right to restitution for all monies wrongly obtained by the supplier through the use of unfair terms.<sup>267</sup>

### 3. Expanding the Scope of Inquiry in *Kušinova*

*Monika Kušinova v. SMART Capital, a.s.*<sup>268</sup> is an important bridge between the ECJ jurisprudence that grew out of Spain's iterative integration process involving the UCT Directive, and the human rights housing cases decided by the UN ESCR Committee. While *Kušinova* differs from the foregoing cases in some respects,<sup>269</sup> it is an essential part of the narrative documenting private law's incorporation of human rights principles where the home is central to the dispute.

Ms. Kušinova entered into a credit and charge agreement with SMART Capital for 10,000 euros. As security for the loan, she pledged her home.<sup>270</sup> Later, Kušinova sought to annul the agreements, alleging that they were unfair and the procedural law granting creditors certain enforcement powers was in violation of both directives and Article 38 of the EU Charter.<sup>271</sup> The agreements and civil code permitted the creditors to possess Kušinova's pledged property without court supervision.<sup>272</sup> The domestic court<sup>273</sup> referred the matter to the ECJ to resolve whether the civil code's restraint on judicial review and the contractual terms of the agreements deprived Kušinova of her rights under the UCT Directive.<sup>274</sup>

Leaving to Slovakia's courts the initial determination of whether the national civil code was compliant with EU mandates,<sup>275</sup> the ECJ concluded

266. *Id.* ¶ 61.

267. *Id.* ¶ 66.

268. See generally Case C-34/13, *Kušionová v. SMART Capital a.s.*, 2014 ECLI:EU:C:2014:2189 (Sept. 10, 2014), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=157486&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=18304392> (providing an interpretation of the "Council Directive 93/13/EEC . . . on unfair terms in consumer contracts" and the "Directive 2005/29/EC of the European Parliament . . . concerning unfair business-to-consumer commercial practices in the internal market.").

269. See *id.* para. 1 (explaining that two EU Directives were at play, the UCT Directive and Directive 2005/29/EC, concerning unfair business-to-consumer commercial practices in the internal market).

270. *Id.* para. 25.

271. See EU Charter, *supra* note 81, art. 38 (discussing how Article 38 requires that the EU adopt policies that "ensure a high level of consumer protection").

272. *Kušinova*, ECLI:EU:C:2014:2189, para 27.

273. *Id.* para. 26 (explaining that the referring court was the Regional Court, Prešov (Krajský súd Prešov)).

274. *Id.* paras. 27–28.

275. *Id.* paras. 79–81.

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.<sup>276</sup> While this aspect of the decision is not particularly pro-consumer, the ECJ's reasoning regarding the significance of the home and the relationship between housing contracts and EU laws is supportive of housing consumers and is worth quoting at length:

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 necessary in order to ensure the effectiveness of the protection intended by Directive 93/13.<sup>277</sup>

There are numerous noteworthy aspects to the *Kušinova* decision. The ECJ connected the human right to housing under the EU Charter to the UCT Directive. The decision emphasized the privileged status accorded to the residential home. The Court recognized that there is a punitive nature to dispossession that requires careful judicial scrutiny of the dispossessing device. Further, the Court instructed that governments must align their domestic procedural rules so that individuals are able to obtain meaningful relief in matters pertaining to their housing tenure. *Kušinova* is part of the lineage of public law incursions into the private housing law sphere. The Court's acknowledgement of the particular "vulnerability" of individuals under threat of eviction opens up possibilities regarding protections that are available notwithstanding the private nature of the transaction at issue. Given the express references to human rights, *Kušinova* offers an appropriate segue from private law to the jurisprudence emanating from the sphere of human rights on housing.

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276. *Id.* para. 68.

277. *Id.* paras. 63–66 (emphasis added) (citations omitted).

## B. ICESCR Decisions Supporting the Right to Housing

With *IDG v. Spain*,<sup>278</sup> the private law mortgage frame expands more decisively into the space of international human rights. The UN ESCR Committee purposefully linked two types of private transactions, lender-based contracts and landlord-based rental agreements, to the public law right to housing.<sup>279</sup> In transitioning to the public law human rights sphere, this analysis moves from the ECJ, a judicial entity authorized to interpret European Union Law for its constituency, to the United Nations Committee on Economic, Social, and Cultural Rights. The Committee interprets the ESCR treaty for UN Members who have acceded to or ratified it.<sup>280</sup>

### 1. Right to Housing as an Independent Basis for Claims in IDG

*IDG* presents an opportunity to analyze how issues similar to those examined in *Aziz* (e.g., unfair mortgage terms and national civil procedures) have been filtered and processed through the human rights legal mechanism of the ESCR Committee. While Ms. IDG focused on the due process procedural concerns of notice, at the core of her complaint was a demand for an opportunity to challenge the terms and structuring of her mortgage loan contract.<sup>281</sup> Ms. IDG filed a communication before the Committee on January 28, 2014, one year after *Aziz*.<sup>282</sup> Like *Aziz*, *IDG* concerned the fairness of Spain's mortgage procedures concerning borrowers. She took out financing to purchase her home, appraised at €742,890.68.<sup>283</sup> After missing several payments, her lender accelerated the loan and commenced enforcement.<sup>284</sup> The lender sought to collect €381,153.66 (principal), €5,725.80 (ordinary interest), and €856.77 (default interest).<sup>285</sup> Enforcement included auctioning the property.<sup>286</sup> Authorized by the enforcement courts, and at the lender's request, a state agent made four attempts to hand-deliver notification of the auction to IDG without

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278. U.N., Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rts., 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, U.N. Doc. E/C.12/55/D/2/2014 (June 2015) [hereinafter *IDG*].

279. *Id.* para. 12.1.

280. Eighteen independent experts who are elected by State parties sit on the ESCR Committee. *Committee on Economic, Social and Cultural Rights*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <http://www.ohchr.org/en/hrbodies/cescr/pages/cescrindex.aspx> (last visited Sept. 20, 2020).

281. *IDG*, *supra* note 278, para. 3.4.

282. *Id.* para. 2.16.

283. *Id.* para. 2.1.

284. *Id.* paras. 2.3, 10.6.

285. *Id.* para. 2.3.

286. *Id.*

success.<sup>287</sup> The agent then posted the notice of the enforcement proceeding's location on the courthouse board.<sup>288</sup>

Relying upon ICESCR's provisions, Ms. IDG argued that Spain's mortgage enforcement procedures, especially for notice, violated her right to housing,<sup>289</sup> and her right to a remedy.<sup>290</sup> The latter provision requires States to accomplish, "progressively," the "full realization"<sup>291</sup> of the rights enumerated in ICESCR.<sup>292</sup> Ms. IDG alleged that because the lender failed to serve her with actual notice at the two critical stages of initiating the enforcement proceeding and initiating the auction of her house, she was deprived of the opportunity to present a solid defense against the bank's allegations of purported amounts she owed and regarding any unfair terms in her mortgage contract.<sup>293</sup> The Committee agreed,<sup>294</sup> noting that the right to housing is a "fundamental right central to the enjoyment of all economic, social and cultural rights[]" and is inextricably linked to other human rights . . . ."<sup>295</sup> Under the ICESCR, the right to housing means "the right to live somewhere in security, peace, and dignity."<sup>296</sup> For forced evictions, extra precautions must be taken by the government in constructing its procedural rules of notice and process to ensure access to judicial remedies.<sup>297</sup> Corresponding to housing scholar Matthew Desmond's argument that evictions are a corrosive force within American society, the Committee expressed disdain for the constant uprooting of individuals and families solely for the purpose of serving lenders, landlords, or corporate interests without appropriate legal safeguards and process.<sup>298</sup> If left unregulated, not only do evictions threaten human dignity, they undermine the socio-economic stability of nations. While public posting may be a valid

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287. *Id.* para. 2.4.

288. *Id.* para. 2.5.

289. *See* ICESCR, *supra* note 117.

290. IDG, *supra* note 278, para. 11.4; ICESCR, *supra* note 117, art. 5.

291. ICESCR, *supra* note 117, art. 2 ¶ 1.

292. IDG, *supra* note 278, para. 3.5.

293. *Id.* paras. 3.3–3.5.

294. *Id.* paras. 12.4, 13.5, 15.

295. *Id.* para. 11.1.

296. Off. of the U.N. High Comm'r for Human Rts., The Right to Adequate Housing, Fact Sheet No. 21/Rev., at 1–3 (2014); U.N., Off. of the High Comm'r for Human Rts., CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant), para. 7, U.N. Doc. E/1992/23 (1991) [hereinafter General Comment No. 4].

297. IDG, *supra* note 278, para. 11.2. The Committee referenced its General Comment 7 in which it elaborates on this point of sufficient access to judicial process and remedies.

298. MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY 295–99 (2016); IDG, *supra* note 278, paras. 11.1–11.2, 11.4, 12.1, 12.3, 17(c); General Comment No. 4, *supra* note 296, ¶¶ 8(a), 17–18; U.N., Econ. & Soc. Council, Comm. on Econ., Soc. and Cultural Rts., Rep. on the Sixteenth and Seventeenth Sessions, annex IV, paras. 1, 3, 8, 11–16, U.N. Doc. E/1998/22 (1998).

method for serving notice of housing proceedings, it should be used only as a “measure of last resort,” especially when dealing with evictions.<sup>299</sup>

The Committee’s logic parallels the ECJ’s in *Aziz*.<sup>300</sup> Both adjudicatory entities recognized that the failure to provide borrowers with a meaningful process, where the loss of the claimant’s home is involved, constitutes a violation of the international legal instrument invoked. Notwithstanding the advances *IDG* makes in connecting private law and public human rights, the case has significant limitations. The Committee declined to issue a broad ruling.<sup>301</sup> Furthermore, the Committee did not rule upon the specific terms within Ms. *IDG*’s mortgage loan document. While the ESCR panel can make determinations as to whether a state’s procedural process for enforcing mortgage proceedings is fair and in compliance with the treaty, the question of whether the Committee may properly invalidate the terms of loan contracts based on unfairness remains unresolved. It is clear, however, that while the right to housing may remain the basis of the claim, the sources for determining fairness may not include the UCT Directive, expressly, since the interpretation of the Directive remains outside the competency of the Committee. For a ruling on the unfairness of mortgage terms, Ms. *IDG* will need to return to Spain’s courts. If she can find no proper hearing on substantive issues, she may appear again before the ESCR Committee. If this proves insufficient, she may find herself before the ECtHR or before the ECJ, although the basis of the claims would be different. *IDG* could draw upon the ECHR if she chooses the ECtHR as her forum. If she chooses the ECJ to present a claim, she may rely upon the Charter or any of the relevant EU regulations.

Even in the absence of a substantive ruling on the unfairness of Ms. *IDG*’s mortgage contract terms, the case demonstrates that housing complainants who are participants in other juridical spaces may look across regimes for arguments, inspiration, and paradigms.

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299. *IDG*, *supra* note 278, para. 12.3.

300. At the time of the posting, the ECJ had not yet issued its *Aziz* ruling. The posture of Spain’s procedural law, in that moment, left Ms. *IDG* without a forum to both contest the terms in her mortgage contract and suspend the enforcement proceeding, pending a decision.

301. *IDG*, *supra* note 278, para. 13.5 (“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.”).

## 2. Obligations of the State in *MBD v. Spain*

In *MBD v. Spain*,<sup>302</sup> the International Committee reimagines the boundaries between the public and private law spheres. The Committee develops a policy view on forced evictions and housing-related rights that may be adjudicated by courts. *MBD* not only concerns private leasing arrangements and the right to housing, it implicates the State.<sup>303</sup> In *MBD*, Mr. Djazia and Ms. Bellili resided in a rented apartment in Madrid, paying their rent to a private landlord without significant incident for several years until they encountered financial difficulties. Without sufficient income to continue their rental payments, they were evicted and left homeless.<sup>304</sup> Shortly after their landlord moved to evict them, they filed suit before the Committee, drawing on provisions in the ICESCR.<sup>305</sup> The laws governing the eviction process did not allow tenants to challenge the substantive basis of the rental contract or the landlord's enforcement. They only permitted tenants to raise the defense that the deficient rent payments were actually paid. Djazia and Bellili alleged that this procedure was faulty in that it denied renter due process.<sup>306</sup> They further alleged that Spain violated their right to "decent and adequate housing" in ignoring their repeated requests to be relocated to public rental housing and for subsistence payments.<sup>307</sup> The Committee agreed.<sup>308</sup>

Recognizing that the ICESCR grants broad rights and protections to individuals, the Committee concluded that the guarantees associated with the right to housing 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."<sup>309</sup> Notwithstanding that the State was not the primary instigator behind the eviction, the Committee reasoned that

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302. *MBD*, *supra* note 57. The ESCR Committee adopted its views on the case on June 20, 2017. *Id.* paras. 18–22.

303. The State alleged that the complaint did not fall within the purview of Article 11. *Id.* para. 12.7. The ESCR Committee concluded: "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.* para. 14.2.

304. *Id.* paras. 2.3, 2.4, 2.8, 2.19.

305. *Id.* paras. 1.1, 4.1. The complainants filed suit under Article 11(1) and Article I(e) and (f) and Article 4. *Id.*

306. *Id.* para. 16.4.

307. *Id.* paras. 2.11, 3.1.

308. *Id.* paras. 13.1–13.3, 20. Here, again, although the Committee does not expressly reference *Aziz*, the logic of *Aziz* is apparent from the emphasis on the denial of equitable legal procedures to housing consumers. *See id.* para. 16.4 (noting that the legislation does not provide defendants in juridical eviction proceedings the opportunity to explain the consequences of the eviction). *Cf.* Case C-415/11, *Aziz v. Catalunyaexa*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶ 61 (Mar. 14, 2013).

309. *MBD*, *supra* note 57, para. 13.2.

individuals who lease from private landlords should be able to draw upon international legal buffers to prevent forced eviction.<sup>310</sup> The private nature of a landlord-tenant transaction does not negate the State's responsibilities to ensure that individual human rights are respected in the enforcement of the contract.<sup>311</sup> Because the State "bears the ultimate responsibility,"<sup>312</sup> it must ensure that the right to housing is not transgressed in the administration or outcome of the eviction, and must devise laws to achieve this end.<sup>313</sup> Being duty bound means that when individuals are facing impending eviction and they have requested government assistance, the parties must not be left homeless.<sup>314</sup> 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."<sup>315</sup> This is remarkable.<sup>316</sup> If Spain is held to this standard, it must substantially expand its social housing network. There are limits, however, to the intervention of public law in private transactions. The right to housing does not preclude landlords from evicting tenants. Instead, it restricts the manner in which landlords 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 scrutinize the merits of the eviction action.<sup>317</sup>

The *MBD* ruling permits States to intrude in the individual private ordering of housing contracts. There is a rational link to the functioning of housing markets. Homelessness strains municipal resources and gives rise to

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310. *Id.*

311. *Id.* para. 14.1.

312. *Id.*

313. *Id.* paras. 14.1–14.2. Particularly, where minor children are involved, as was the circumstance in *MBD*, the State has a heightened duty to prevent homelessness. *See id.* paras. 15.2, 16.6 (clarifying that the State has a greater duty to justify why it was unable to uphold the right to housing when children are involved).

314. *IDG*, *supra* note 278, paras. 6.1–6.5.

315. *Id.* para. 11.1.

316. The ESCR Committee ruling advances an important "precedent" in human rights literature. I am referring to *Government of the Republic of South Africa v. Grootboom*. Despite the progressive nature of South Africa's Constitution, the Constitutional Court interpreted the right to housing in a constrained way. It held that the constitutional right to housing, contained in Section 26, is circumscribed by the availability of resources. Neither the government's failures nor the dire circumstances of homelessness entitled the claimants to rely upon the self-help remedy of squatting. On the positive side, the Court held that the State was in violation of the housing right because of the manner in which it evicted squatter-complainants. The Court also weighed in on a longstanding debate concerning whether socio-economic rights are aspirational or concrete. The Court concluded that the Constitution confers real rights that the State has an obligation to realize and protect. *See Government of The Republic of South Africa v. Grootboom*, 2000 (11) BCLR 1169 (CC) (S. Afr.).

317. *MBD*, *supra* note 57, para. 15.1.



health, safety, and welfare issues.<sup>318</sup> A substantial homeless presence raises questions about the socio-economic agendas of municipalities and their ability to serve their populaces fairly and equitably. From a social justice perspective, this is not a problem that is solved by merely cordoning off the displaced. This explains the UN Committee's human rights approach of holding the government liable<sup>319</sup> because governments can act in impactful ways to lessen the frequency of evictions leading to homelessness. Governments can design laws, ordinances, and model landlord-tenant contracts that more evenly balance the protections accorded to each party.<sup>320</sup> One can read the *MBD* decision as incentivizing governments in this direction.<sup>321</sup> The ruling also speaks to those in the law and economics camp by implicitly recognizing that if a significant portion of a nation's market participants are harmed by laws that prevent them from acting as consumers, there is a market failure that needs to be addressed. Where unfettered markets are unable to perform the task, regulations are needed.

The *MBD* decision illustrates how supranational adjudicatory organs can facilitate the realization of human rights principles. Spain's Constitution, for example, contains a mandate that government should deter excessive land speculation, because such speculation ultimately harms individuals and strains government resources.<sup>322</sup> Individuals either end up paying higher rents because of land speculation or are priced out of the market entirely. In those instances, they will seek public assistance to help cover their housing costs. Yet Spain, prior to and during the 2008 economic crisis, contributed to rampant speculation, which exacerbated the nation's housing issues. In 2013, the Madrid Housing Institute "sold 2,935 [public] homes to private

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318. Potentially, a homeless person could bring a claim against the government for failing to provide public housing or, at a minimum, for failing to provide a bed in a public shelter.

319. The ESCR Committee determined that Spain violated the right to housing and that, as a remedy, the complainants should be given public housing and paid compensatory damages related to the violation and for reasonable legal costs related to bringing the action before the Committee. *Id.* para. 20.

320. As the Committee proposed, 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 fulfill [the] right as swiftly and efficiently as possible." *Id.* para. 15.3.

321. The ESCR Committee goes even further in *Albán v. Spain*, 2019, by elaborating on the extensive duties of the government to: "take all appropriate measures to the maximum of its available resources, to ensure that adequate alternate housing, resettlement, or access to public land, as the case may be, is available[], and "resolve . . . structural problems" related to homelessness. *See* U.N., Econ. & Soc. Council, Comm. on Econ. Soc. and Cultural Rts., Views Adopted by the Committee Under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Concerning Communication No. 37/2018, paras. 9.1, 10.2, U.N. Doc. E/C.12/66/D/37/2018 (2019).

322. *See* C.E., *supra* note 82, art. 47 ("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.").

companies/investment funds”<sup>323</sup> for 201 million euros.<sup>324</sup> Madrid brokered this deal at a time when its public housing inventory had already been seriously depleted. The government’s explanation for privatizing desperately needed public housing was that it was necessary to address budgetary deficits.<sup>325</sup> Heavily criticizing Spain’s actions, the ESCR 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. . . .”<sup>326</sup> Privatizing social housing, effectively removing it from the public commons<sup>327</sup> contributes to the “structural causes of the lack of housing”<sup>328</sup> rather than remedying them. The ESCR Committee urged the government to be more proactive on the side of drafting legislation aimed at protecting tenants and those in need of housing, and to refrain from engaging with developers in a manner that fosters reckless unbounded speculation rather than deterring it.

### C. Cases and the New Rules for the Mortgage, Rental Housing, and Subsidized Housing Markets

The cases examined in this section carve out new rules in the mortgage, rental housing, and subsidized housing markets. At the national level, the majority of the claims were styled as attacks on the unfairness of the mortgage loan or rental contract terms. At the supranational level, many claims were transformed into ones concerning the unfairness of domestic legal procedures. With respect to procedure, the cases articulate guidelines and rules about timing, notice, dispossession, and equality in due process and appeals. The meaning of unfairness in housing contractual relations is developed in judicial discourse. Rhetorically, the home is given sacrosanct status. As the ECJ concluded, “[where] the mortgaged property is the family home of the consumer whose rights have been infringed [upon],” appropriate measures must be in place “to prevent the definitive and irreversible loss of

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323. MBD, *supra* note 57, para. 12.4.

324. *Id.* paras. 5.5, 12.4.

325. Public interest may be defined in several ways. According to one view, the public interest is served by having the debts of the country reduced so that, the government has money in the future to expend on resources to benefit the public in matters such as housing, education, and infrastructure. Another perspective defines the public interest as, preserving land already dedicated to public housing for that use and finding alternative ways of raising capital to pay down public debt. In this instance, the ESCR Committee embraced the latter view in holding that the government failed to adequately value the need for affordable and subsidized housing.

326. *Id.* para. 17.6.

327. The “public commons” refers to the collective resources designated for the public good and placed in the care of government for that purpose.

328. *Id.* para. 15.3.

that dwelling” without a proper hearing.<sup>329</sup> Note that the homeowner can still be dispossessed, but, prior to doing so, legitimate justifications must be furnished in accordance with a legally-sanctioned procedure. The ECJ decisions lay a foundation to intersect with the right to housing. The ESCR Committee’s rulings, in part because they are framed as cases against the sovereign state, impose obligations on the government. Nonetheless, they implicate private actors because the government will need to craft laws and regulations pertaining to housing transactions. The reframing on both fronts pushes the private sphere of residential mortgage debt financing and rental contracts towards the public sphere of the human right to housing. The ECJ’s engagement by way of directives and the EU Charter is also a reminder of the broader economic market. The costs exacted by unduly oppressive private housing contracts and legal rules primarily structured to engender profit-making at the expense of basic human interests have implications that exceed domestic boundaries. The EU’s project of the integrated economic market is undermined by market failure, which is evidenced by rampant homelessness, poverty, over-indebtedness, and the widespread inability to meet debt obligations on the part of individuals and government.<sup>330</sup> Supranational courts provide forums in which the market interests of stability, participation, efficiency, and coordination may intermingle with the welfarist ideal of human flourishing.

The concepts of vulnerability and human dignity are also integral to this changing paradigm narrative. Vulnerability has emerged as a term of

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329. See Case C-415/11, *Aziz v. CatalunyaCaixa*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶ 61 (Mar. 14, 2013).

330. Achieving consistency, translatability, and harmonization across markets are among the paramount objectives of the EU Council. See Mauro Bussani & Ugo Mattei, *The Common Core Approach to European Private Law*, 3 COLUM. J. EUR. L. 339 (1997) (discussing translatability in connection with the Common Core Project and distinguishing between the Project and harmonization). Jan M. Smits, *The Principles of European Contract Law and the Harmonization of Private Law in Europe*, in LA TERCERA PARTE DE LOS PRINCIPIOS DE DERECHO CONTRACTUAL EUROPEO, 567–90 (Antoni Vacquer ed., 2005); Martin Gelter, *EU Company Law Harmonization Between Convergence and Varieties of Capitalism* (ECGI, Law Working Paper No. 355/2017, 2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2977500](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2977500).

currency in international law.<sup>331</sup> Cognizance of levels of vulnerability<sup>332</sup> along gender lines, family,<sup>333</sup> age, disability, and immigrant status<sup>334</sup> is apparent in the ECJ and the ESCR Committee decisions.<sup>335</sup> Vulnerability's influence is reflected in the use of the term "weaker party" in both the private and public law realms. 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 suggests that the individual is not functioning as an arms-length bargainer. Rather, he or she is impaired in the ability to interact freely with government, corporations, or other individuals. Individual autonomy is compromised or nonexistent.<sup>336</sup> Under the freedom of contract narrative, individual private actors are framed as rational self-interested human beings

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331. Gutiérrez de Cabiedes & Cantero Gamito, *supra* note 24, at 69. *See, e.g.*, UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS: PROTECTING THE VULNERABLE (Mel Kenny et al. eds., 2010). Spain's government uses the term "vulnerability" in two key national laws, Royal Decree-Law 6/2012 and Royal Decree-Law 27/2012, adopted prior to the *Aziz* decision. The rapporteurs for the Country Report on Spain propose that, in the absence of express language defining this concept, one can nonetheless discern a sense of the meaning from the laws which suggest that aspects of vulnerability include low income, poverty, lack of assets that may be dedicated to paying the mortgage obligation, families under impending threat of foreclosure and eviction, and families with disabled members.

332. *See* MBD, *supra* note 57, para 15.2 ("[P]ay particular attention to evictions that involve women, children, older persons with disabilities or other vulnerable individuals or groups who are subjected to systemic discrimination.").

333. *See id.* para. 17.7 (underscoring that it is "the State's duty to grant the greatest and widest possible protection to the family, as the foundation of society").

334. Kothari, *supra* note 31. A substantial portion of the immigrant community has been impacted negatively by bank foreclosures. *See* García-Lamarca, *supra* note 11, at 44, 47.

335. The *Aziz* case involved an individual of Moroccan heritage, whose employment in Spain commenced in December 1993. The case does not deal with ethnic 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 the 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 (e.g. adjustable rate mortgages with "usurious" interest rates, and over-securitizing loans 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.

336. *See* Martha Albertson Fineman, *Vulnerability and Inevitable Inequality*, 4 OSLO L. REV. 133, 133–49 (2017) (arguing that we are all vulnerable). It is important to note, however, that we are not all equally vulnerable. For example, a study by Human Rights Watch identifies immigrants, single-mothers, "single-parent households . . . women victims of economic abuse, and children" as being the most vulnerable and as having suffered "disproportionate" harm related to Spain's housing crisis. *See* SUNDERLAND, *supra* note 14, at 29.

who should be left to their own resourcefulness to formulate contracts and autonomously determine the contours of their existence in society. Vulnerability theory offers an alternative to the private law autonomous individual vision. Martha Fineman, one of the leading scholars in this area, posits:

... [T]he 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.<sup>337</sup>

Although the ECJ does not always expressly use the term “vulnerable,” 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.<sup>338</sup> The analysis of whether the mortgage terms are unfair is framed in terms of: (i) whether a reasonable person would have accepted the contract; (ii) whether the consumer had any flexibility with respect to the non-negotiated terms; and (iii) whether the contract terms were written in intelligible language.<sup>339</sup> Translated into the lexicon of vulnerability, one would inquire about the effect of the contractual terms and the mortgage process on borrowers who may be vulnerable because of their experience or economic circumstances.<sup>340</sup> The ESCR Committee uses the term “vulnerable” in matters concerning residential mortgage loans and rental housing.<sup>341</sup> Vulnerability, in this context, involves being “subjected to systemic discrimination.”<sup>342</sup> Systemic discrimination indicates that the government is unresponsive to the plight of individuals who are in need of services, resources, and protective mechanisms in order to live in dignity. Complainant IDG characterized herself as being in a position of “vulnerability, uncertainty, and anxiety” as a result of her financial institution availing itself of national procedural rules that favored lenders.<sup>343</sup>

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337. Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *YALE J.L. & FEMINISM* 1, 13 (2008). I draw a distinction between Fineman’s theory and my own in that I recognize that the world is not in a post-identity moment and the utility of strategically claiming identity-positions has not been exhausted, particularly when individuals are routinely identified, engaged, and penalized.

338. Joined Cases C-154/15, C-307/15 & C-308/15, *Gutiérrez Naranjo v. Cajasur Banco SAU*, 2016 EUR-Lex CELEX WL 62015CJ0154, ¶ 56 (Dec. 21, 2016).

339. Case C-415/11, *Aziz v. Catalunyacaixa*, 2013 EUR-Lex CELEX WL 62011CJ0415, ¶¶ 3–4, 69 (Mar. 14, 2013).

340. For example, potential borrowers may be in need of capital, but their credit rating impairs their ability to bargain over loan contract terms.

341. MBD, *supra* note 57, para. 21(c).

342. *Id.* para. 15.2.

343. IDG, *supra* note 278, para. 10.2.

In *MBD*, 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.”<sup>344</sup> Usage of the term “vulnerability” is a nod towards representing the particular experiential aspects of a person’s existence which render him susceptible to harm from the blanket application of private adhesion contracts or public policies weighted in favor of businesses. It reflects a human rights sensibility. Human rights law allows for broader inquiry than the question of whether a contract is unconscionable.

The foregoing discussion analyzes how the reframing of housing markets has unfolded. It explores the emergence of a paradigmatic shift from siloed private and public law regimes to one incorporating both. It also highlights some of the positive attributes of the new approach. In the section that follows, I intervene in the central debate between public and private law scholars regarding the intermingling of these two legal terrains.

## VI. DEBATING THE TERRAINS OF PUBLIC LAW AND PRIVATE LAW

### A. The Public-Private Law Debate

There is an emerging scholarly debate regarding the extent to which public law principles should be enfolded into private law.<sup>345</sup> European private law stalwarts express numerous concerns aimed at maintaining doctrinal boundaries. Public law advocates focus on the historical shortfalls of European Union law in not giving sufficient prominence to social justice objectives. Another approach—which this Article advocates—is a way of conceptualizing what is occurring and what is necessary to accomplish essential objectives of both camps.

Progress towards a rethinking of private and public law in the European context has been fraught with difficulty.<sup>346</sup> A vocal contingent, of dominant market actors (e.g., banks, real estate entities, landlords, government) and private law scholars, have greeted the softening of boundaries between private and public law with apprehension.<sup>347</sup> First, the critics maintain that

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344. *MBD*, *supra* note 57, para. 21(c).

345. See, e.g., Hugh Collins, *Private Law, Fundamental Rights, and the Rule of Law*, 121 W. VA. L. REV. 1 (2018); Ugo Mattei & Fernanda Nicola, *A ‘Social Dimension’ in European Private Law? The Call for Setting a Progressive Agenda*, 41 NEW ENG. L. REV. 1 (2006).

346. Taking into account the move towards the “constitutionalization of private law” in the United States and foreign jurisdictions, Hugh Collins analyzes and counters several main arguments against the intermixing of private and public law. See Collins, *supra* note 345, at 12–20.

347. See *id.* (articulating a critical treatment of the central arguments); see also Michel Rosenfeld, *Rethinking the Boundaries Between Public Law and Private Law for the Twenty First Century: An*

the juridical-legislative move threatens freedom of contract.<sup>348</sup> They argue that parties should be left to engage in the evaluative process of assessing risk, bargaining, and the structuring of their own deals as they see fit. International courts and conventions add new risks. Privately negotiated contracts will be remade in a way that the parties didn't contemplate. The blending of public and private is, initially, likely to weigh more heavily against corporate actors. Rather than achieving more equality in the market, substantial incursions into private contracting will seriously debilitate businesses, which will ultimately hurt the economy and individuals, from a trickle-down perspective. Higher transaction costs will be passed on to consumers. Access to credit will be decreased because either lenders will conclude that their estimated profit margin on certain loans will be insufficient or consumers will decide that the loans are cost prohibitive. Second, staunch private law supporters have lamented that incorporating public law principles undermines private law's ability to resolve issues concerning housing contracts.<sup>349</sup> They argue that the blurring of regimes creates confusion and deprives actors from shaping the rules, laws, and practices that govern transactions. Excessive mixing of the terrains of private and public law dilutes carefully developed private law principles.<sup>350</sup> Private law furnishes the expertise and detail necessary to manage the intricacies of the various deals at issue. When the overlay of international human rights ideals is added, it threatens the carefully worked out rules and the individual freedom to assess risk and formulate contracts. Olha Cherednychenko, along

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*Introduction*, 11 INT'L J. CONST. L. 125, 125–28 (2013) (discussing the traditional divide between public law and private law).

348. See Jürgen Basedow, *Codification of Private Law in the European Union: The Making of a Hybrid*, 9 EUR. REV. PRIV. L. 35 (2001); Mattei & Nicola, *supra* note 345, at 17 (discussing Jürgen Basedow's arguments expressed in his article, *Codification of Private Law in the European Union: The Making of a Hybrid* regarding the relevance of freedom of contract and its importance to the anchoring of the EU).

349. Recent literature has noted the intersection between private corporate behavior and public human rights. Olha Cherednychenko comments:

[I]n German law in particular, there has been a noticeable change in the extent to which fundamental rights, i.e. human rights embodied in international human rights treaties and constitutional rights enshrined in national constitutions, have begun to have an impact on the relationships between private parties under contract law, i.e. a horizontal effect in contract law.

Olha O. 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, *supra* note 331, at 247. See Michel Rosenfeld, *Rethinking the Boundaries Between Public Law and Private Law for the Twenty First Century: An Introduction*, 11 INT'L J. CONST. L. 125, 125–28 (2013) (noting the existence of the debate).

350. See generally Cherednychenko, *supra* note 349 (analyzing the interplay of public and private law in the context of unconscionability in financial transactions).

with other private law scholars, argues that private law is enough.<sup>351</sup> She maintains that by resorting to a combination of private law norms and European private law regulatory business conduct rules,<sup>352</sup> enacted at the supranational level,<sup>353</sup> sufficient protection for consumers can be achieved without diminishing the authority of the private law regime.<sup>354</sup> Third, the skeptics argue that what is offered in place of contract law's clearly defined rules and doctrines are muddled and ill-defined ad hoc approaches that lead to uncertainty and inconsistency in judicial outcomes.<sup>355</sup>

On the other side of the debate are public law advocates who champion the relevance of human rights to all sectors of life, including private ordering.<sup>356</sup> Legal professionals, such as judges and experts on the ECtHR or the ESCR Committee, are included within this group. They recognize the values expressed in the international instruments they are responsible for interpreting and are committed to the ideal of human rights. There are also advocates who work in organizations dedicated to advancing human rights and human rights scholars within the academy. Their arguments fall along a spectrum. Some recognize that given the human rights international conventions in place,<sup>357</sup> adherence is required in order to be in compliance

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351. According to Cherednychenko, 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. *Id.* at 258–59.

352. See, e.g., Off. of the U.N. High Comm’r for Human Rts., Guiding Principles on Business and Human Rights, U.N. Doc. HR/PUB/11/04 (2011); Eur. Ass’n of Consumers and the Eur. Credit Sector Ass’ns [ECSAs], *European Agreement on a Voluntary code of Conduct on Pre-Contractual Information on Home Loans*, <https://www.eesc.europa.eu/sites/default/files/resources/docs/051-private-act.pdf> (last visited Jan. 1, 2021).

353. Examples of supranational business conduct rules include: Markets in Financial Instruments Directive and the Investment Services Directive. See Cherednychenko, *supra* note 349, at 262–74.

354. Cherednychenko observes that because private law has developed important standards and practices over time, “[f]undamental rights . . . do not add anything substantially new to possible ways of resolving . . . [how to achieve the proper balance between freedom of contract and protecting the weaker party], and also do not provide any workable criteria for providing new answers.” *Id.* at 259. She recognizes that while “fundamental rights are an important source of core values for the whole legal order; contract law as the source of concepts provid[es] much sharper criteria developed by trial and error over a long period of time for determining whether a particular contract is unconscionable.” *Id.* at 260.

355. For an analysis of the differing paths of development of the international human rights regime and international private law, see Paul R. Dubinsky, *Human Rights Law Meets Private Law Harmonization: The Coming Conflict*, 30 *YALE J. INT’L L.* 211, 247–50 (2015). Dubinsky argues that the international human rights regime was late to directly engage projects of international private law, which has exacerbated their incongruence and has created issues concerning bringing the two regimes together. See Mattei & Nicola, *supra* note 348, at 17 (discussing Baseow’s emphasis on the relevance of freedom of contract and its importance to the anchoring of the EU).

356. Chrystin Ondersma, *A Human Rights Framework for Debt Relief*, 36 *U. PA. J. INT’L L.* 269, 269 (2014).

357. E.g., EU Charter, *supra* note 81, arts. 1–54; International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3; International Covenant on Civil and Political Rights, Dec



with treaty obligations. Depending upon the overall objectives of the legal regime, human rights principles are necessary to fulfill those goals.<sup>358</sup> Still other scholars have made a pitch for adopting vulnerability as a normative standard in the arena of consumer law<sup>359</sup> in contrast to a purely freedom of contract model. There are scholars who have pushed the envelope in exploring whether European private law can truly implement a “progressive agenda” more responsive to social needs.<sup>360</sup> Ugo Mattei and Fernanda Nicola, for example, have argued that social justice goals are muted when European Union rules and regulations are constructed solely to serve the economic market.<sup>361</sup> One way of guarding against this narrow conception of European private law is to be cognizant of the role of ideology and politics.<sup>362</sup> Although this Article does not explicitly take up the critique of Mattei and Nicola, their position is an important one to bear in mind if one seeks to hold law accountable to humanity’s needs.

#### 1. Private Law Housing Markets Should Not be Left to Self-Regulation

This subsection develops the argument that the private sector cannot be trusted to self-regulate. Adopting a purely private law framework to resolve the underlying issues in *Aziz*, *Naranjo*, *Hidalgo*, *Morcillo*, *Kušinova*, *IDG*, and *MBD*, for example, leaves aspects of the claims presented unaddressed.<sup>363</sup> State regulation is needed when the objectives include

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16, 1966, T.I.A.S. No. 92-908, 999 U.N.T.S. 171; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

358. Ondersma, *supra* note 356.

359. 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 J. EUR. CONSUMER & MKT. L. 124 (2013). *See generally* Cherednychenko, *supra* note 349 (stressing the importance that private law develop concepts for protecting the vulnerable against unconscionable financial transactions).

360. Mattei & Nicola, *supra* note 345.

361. Mattei and Nicola are skeptical of the possibility of transforming European Law to implement a truly radical progressive agenda. They argue:

While the targets are the Members States’ legal systems, with their incremental development of institutional systems of ‘social’ private law (protective formalism, mandatory law, notarized acts, and measures of contractual justice such as the broad use of ‘unconscionability’ or ‘good faith’), the means are the creation of another industry, the so-called ‘new’ European private law. Because the transformation of scholarly movements into industries precludes critical thinking, the consequence of this move is the incapacity to set an independent agenda and the desire to follow that of corporate-captured Brussels, in the hope of obtaining funding and prestige.

*Id.* at 30.

362. *Id.* at 4.

363. For discussions on potential gaps in consumer protection when the private law regime is charged with the role of handling matters such as residential mortgage loans, Chrystin Ondersma’s work is insightful. She advocates fully embracing human rights principles to enrich private law concepts and

protecting individuals in their claims to maintain property ownership, stabilizing their tenure as tenants, or securing a hearing on the fairness of their contractual terms. Beginning with the arguments of European private law scholars, this section notes that the arguments are well-taken, but do not persuasively establish that public law principles should be partitioned off from the conceptualization and administration of private law matters.

The work of scholars, practitioners, the judiciary, and private businesses in defining private law mechanisms to resolve disputes and establish remedies means that there are nuanced approaches to contractual issues. There are well-settled understandings of terms and concepts that one should not undo by an unthoughtful resort to public human rights law in the effort to provide relief to consumers. Yet for all the sophistication and detail that define the private law sphere, there are gaps. It is unlikely that the stronger parties in private law transactions are inclined to develop efficacious mechanisms to protect vulnerable parties. Thus, in response to the freedom of contract argument, one must query how much freedom individuals typically have in their interactions with corporate or government entities when attempting to secure the basic human staple of housing. Freedom of contract should not translate into the freedom of a powerful party to take advantage of a vulnerable party. In the absence of sufficient protection, the balance is too far weighted in favor of businesses to the repeated detriment of consumers. Without the imposition of external restraints (e.g., human rights obligations, supranational courts), incentives, and obligations, even rationally acting businesses may be shortsighted in assessing their interests and may not operate in a way that contributes to healthy economies overall within the EU. Private law interests, or even state-defined economic interests, are not always in sync with international human rights concerns. That disjuncture may dissuade dominant private actors from incorporating human rights considerations into their transactions. In contrast to public human rights, lender and landlord private actors will operate in their interests even if those actions are pernicious to other contractual parties.

## 2. Public Law Adds Value and Positively Impacts the Housing Markets That Private Law Operates by Stabilizing Outcomes and Clarifying Objectives

In addressing the concern that public law dilutes private law and creates legal uncertainty, it is necessary to consider: (i) the manner in which concepts such as unconscionability and good faith operate in European

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improve the resolution of private law matters from the standpoint of consumer protection. Chrystin D. Ondersma, *A Human Rights Approach to Consumer Credit*, 90 TUL. L. REV. 373, 391 (2015); *see also*, Ondersma, *supra* note 356.

housing markets and (ii) how supranational courts and legal instruments have incorporated human rights principles. Although there have been some challenges to addressing inequalities in housing contracts, the worst fears of private law scholars are unfounded. The UCT Directive formalizes a vision of consumer transactions in which there are power imbalances between seller (the stronger party) and consumer (the weaker party), and in which necessary external mechanisms (e.g., the courts, regulating bodies, legislation) exist to correct the imbalances and infuse equity into the transaction. Within the European Union, there has long been consensus that some protection of consumers is warranted.<sup>364</sup> Konrad Zweigert and Hein Kotz comment:

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.<sup>365</sup>

Private contract law has doctrinal principles that are intended to offer protection to parties under certain circumstances. Mistake, fraud, deceit, duress, impossibility, frustration of purpose, illegality, undue influence, and unconscionability are all concepts that may be drawn upon to provide relief. In exploring the protection that unconscionability lends, it is necessary to consider its scope, its purpose, and whether it accomplishes normatively what this Article proposes. In other words, does unconscionability furnish sufficient protection and support for housing consumers? Does the concept adequately restrain residential lenders and landlords in their contracts with consumers?<sup>366</sup> Does the concept offer any protections for the homeless or those experiencing housing insecurity? Unconscionability is a viable, but incompletely formed doctrine.<sup>367</sup> European legal scholars have documented

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364. KONRAD ZWIEGERT & HEIN KOTZ, *The Function and Aims of Comparative Law*, in FREEDOM OF CONTRACT AND ITS LIMITS 330 (Tony Weir trans., 3d ed. 1998).

365. *Id.*

366. Jacob Hale Russell offers compelling arguments which maintain that unconscionability is expansive enough to provide such protection in the U.S. context. Hale specifically notes the direct influence of the doctrine on the Unfair Trade Practices Act, the Uniform Consumer Sales Practices Act, the Uniform Consumer Credit Code, and the Uniform Residential Landlord Tenant Act. Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 983-84 (2019).

367. This is true in Europe and the United States. In the United States, the Uniform Commercial Code, which applies to commercial transactions, incorporates the doctrines of unconscionability and good faith. See U.C.C. §§ 1-304 (good faith), 2-302 (unconscionability) (AM. LAW. INST. & UNIF. LAW COMM'N 1951). For a development of the discussion of these concepts in connection with the U.C.C., see Carolyn Edwards, *Freedom of Contract and Fundamental Fairness for Individual Parties: The Tug*

that unconscionability continues to operate in different legal circumstances and jurisdictions.<sup>368</sup> However, there is no singular definitive test to mark unconscionability, although consumer directives like the UCT provide guidance. The actions or inactions of contractual parties may produce an unconscionable contract. As discussed below, a court may determine that a contract is unconscionable because good faith was lacking in its formation. This determination may involve a test that is construed differently or inconsistently across jurisdictions.

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*of War Continues*, 77 MARQ. L. REV. 647 (2009); see also, Anne Fleming, *The Rise and Fall of Unconscionability as the 'Law of the Poor,'* 102 GEO. L.J. 1383 (2014). Courts have interpreted section 2-302 of the U.C.C. as pertaining to all types of contracts including those of mortgage loans. Kathleen C. Engel & Patricia A. McCoy, *Tale of Three Markets: The Law and Economics of Predatory Lending*, 80 TEX. L. REV. 1255 (2002) (scoping out the terrain of approaches for addressing predatory lending in the U.S., evaluating them, and highlighting remaining gaps in the regulatory framework); see also, Richard Speidel, *Unconscionability, Assent, and Consumer Protection*, 31 U. PITT. L. REV. 359 (1970).

An obvious omission from the U.C.C. provisions is a definition of “unconscionability.” Thus, even though a United States court may act upon it when it decides unconscionability is present, there is no guided process in the U.C.C. for making the determination. Instead, the section permits parties to present evidence of unconscionability. Section 208 of the Restatement of Contracts also addresses unconscionability and states, “[i]f a contract or a term thereof is unconscionable at the time the contract is made, a court may refuse to enforce the contract or may enforce the remainder of the contract without the unconscionable term.” Further, Section 5 of the proposed new Restatement on Consumer Contracts offers, “a term is unconscionable if it is (1) substantively unconscionable, namely fundamentally unfair or unreasonably one-sided, and (2) procedurally unconscionable . . . .” The detail of when a party transgresses those definitions is left to the courts, but the proposed Restatement requires a party to demonstrate substantive and procedural unconscionability, which is a demanding burden to meet. Two notable American cases that wrestle with defining unconscionability are *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449–50 (D.C. Cir. 1965) and *Commonwealth v. Fremont Inv. & Loan*, 897 N.E.2d 548 (Mass. 2008). Notwithstanding the absence of a definition, the significance of the doctrine being codified in the U.C.C. should not be overlooked. Borrowers and other consumers in the United States continue to draw upon the unconscionability defense, with mixed success, in seeking relief and protection from burdensome and predatory contracts and practices. See, e.g., *McFarland v. Wells Fargo Bank*, 810 F.3d 273, 284–86 (4th Cir. 2016) (awarding summary judgment to the bank and holding that plaintiff’s claim that his contract was unconscionable when entered could not succeed even accepting his allegations regarding the bargaining process as true and remanding on the unconscionable inducement claim). But see *New Mexico ex rel. King v. B & B Inv. Grp., Inc.*, 329 P.3d 658, 670 (N.M. 2014) (“Installment loans bearing interest rates of 1,147.14% to 1,500.00% are substantively unconscionable under common law and the UPA [Unfair Practices Act].”). Legal scholar Jacob Hale Russell provides persuasive evidence that following the global economic crisis of 2008, consumer’s claims of substantive unconscionability have been more successful than in prior years. Russell, *supra* note 366, at 1018.

368. Mel Kenny et al., *Conceptualising Unconscionability in Europe: In the Kaleidoscope of Private and Public Law*, in UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS: PROTECTING THE VULNERABLE, *supra* note 331, at 377–99. American law scholars, such as Anne Fleming and Jacob Hale Russell, separately, have argued that the doctrine of unconscionability continues to be applied in different ways, including in codified forms such as the U.C.C., consumer legislation enacted by Congress and state legislatures, and in state court decisions. Fleming, *supra* note 367, at 1388, 1391, 1436; Russell, *supra* note 366, at 977–78.

Unconscionability is an equitable doctrine, deriving from the common law, that may intervene to restrict the enforcement of a private contract.<sup>369</sup> The potential of unconscionability is tempered by freedom of contract norms.<sup>370</sup> European and American courts rely upon the doctrine to address contractual inequality.<sup>371</sup> In the European context, unconscionability is a legal invention that operates in conjunction with the international law principle of *pacta sunt servanda*.<sup>372</sup> The principle mandates that “agreements which are legally binding must be performed.”<sup>373</sup> Unconscionability allows for the possibility that a contract may be nullified or modified where there are contractual formation or substantive term issues. Without the unconscionability doctrine, private parties would be left to their own devices in structuring agreements. There would be no restrictions on the enforcement of the agreements formed, even if they had extremely harsh consequences for the consumer, as long as they were lawful.

Unconscionability, unfairness, and good faith are interrelated concepts that inform the UCT Directive and the ECJ cases analyzed herein. While the ECJ does not expressly use the term “unconscionability,” its influence is apparent. Good faith, fairness, and unfairness are expressly referenced in the Directive.<sup>374</sup> All bear on the matter of unconscionability. The 93/13 Directive defines “unfairness” primarily by furnishing an inchoate list of unfair terms and scenarios under which unfairness arises. Integral to the assessment of a

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369. Immaculada Barral-Viñais, *Freedom of Contract, Unequal Bargaining Power and Consumer Law on Unconscionability*, in UNCONSCIONABILITY IN EUROPEAN PRIVATE FINANCIAL TRANSACTIONS, *supra* note 331, at 46.

370. Freedom of contract is predicated on the idea that individuals are autonomous rational beings. *See, e.g.*, THOMAS GUTMANN, *THEORIES OF CONTRACT AND THE CONCEPT OF AUTONOMY* (2013); Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined* (Columbia Pub. Law Research Paper, Paper No. 14-598, 2018); Florian Rödl, *Contractual Freedom, Contractual Justice, and Contract Law (Theory)*, 76 L. & CONTEMP. PROBS. 57 (2013).

371. Camilo A. Rodriguez-Yong, *The Doctrines of Unconscionability and Abusive Clauses: A Common Point Between Civil and Common Law Legal Traditions*, OXFORD U COMP. L. F. 1, 5 (2011); Fleming, *supra* note 367; Russell, *supra* note 366. To be clear, I argue that the concept of unconscionability is operative in European and American law; however, the doctrine may be expressed differently depending upon the context. For example, European courts may refer to “unfairness” or “the doctrine of abusive clauses.” Regardless of the name, these concepts have the common purpose of furnishing a legal basis for nullifying or reforming contracts.

372. Cherednychenko defines “an unconscionable financial transaction” as “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.” Cherednychenko, *supra* note 349, at 248.

373. *Pacta Sunt Servanda*, MAX PLANCK ENCYCLOPEDIAS OF INTERNATIONAL LAW (2008); Barral-Viñais, *supra* note 369, at 47.

374. *See, e.g.*, Council Directive 93/13, *supra* note 76, arts. 1–3.

term's unfairness is whether the parties were acting in good faith.<sup>375</sup> The Directive Preamble provides:

whereas 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 to take into account.<sup>376</sup>

Based upon the foregoing, the ECJ articulated a good faith test in *Aziz*. The test is applicable to the terms of the mortgage contract and probes 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.”<sup>377</sup>

In connection with the good faith test, I have three points. First, given the goals of obtaining uniformity, stability, and broad participation in housing markets across jurisdictions, it is necessary to contemplate rules of participation and to adopt a legal framework that helps facilitate those goals. One may count good faith and fairness amongst those rules. Second, while it is difficult to properly structure an intervening mechanism to judicially review disputed contracts, as the *Aziz* good faith test illustrates, the test is aimed at clarifying rather than diluting an already sufficiently developed term. Whereas an unrestrained private contract environment might define terms identified in the annex to the UCT Directive as within the bounds of good faith, the Directive makes clear that they are not. The annex terms and scenarios are influenced by notions of fairness deriving in part from human rights principles. Third, tests like the one articulated in *Aziz* are intended to provide a framework for evaluating whether good faith and fairness (i.e., consideration of the circumstances of the less economically powerful party) are reflected in the agreement. While initial attempts to apply the standard may be awkward, courts should become more adept at application with each case. One can read the *Aziz* test as the ECJ's effort to provide detail to help guide the evaluative moment. The test signals to lenders (and other suppliers) that in order to survive judicial scrutiny they must at least take into account the party they are entering into a relationship with, and not structure the deal in a way that essentially ensures that the consumer-borrower will fail in meeting his contractual obligations. In the future, it will be interesting to

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375. *See id.*

376. *Id.*, pmb., at 1.

377. Case C-415/11, *Aziz v. Catalunya Caixa*, 2013 EUR-Lex CELEX WL 62011CJ0415 ¶ 69 (Mar. 14, 2013).

examine to what extent the test helps to curtail predatory lending.<sup>378</sup> Ideally, the test reflects back on lenders, in the substance of the contracts they prepare, and on governments in terms of the civil procedures they have in place for the adjudication of contract disputes.

### 3. The ECJ's Good Faith Test in Operation

Now, taking a closer look at how the ECJ's good faith test may be applied, the following discussion highlights some issues. The ECJ structures the test by weighting both the seller and the consumer positions. The seller must be fair and even-handed. The consumer must be a reasonable actor in determining whether to enter into the contract or agree to the terms under scrutiny. One wrinkle in this proposed mechanism is that it is difficult to imagine that if borrowers understood the full import of the unfavorable terms in their loan contracts, they would agree to them, unless they were desperate. If they were desperate, it raises the question of whether they should have been permitted to enter into the contract in the first place because desperation, arguably, may be construed as a sign of duress.

While the test is potentially beneficial to mortgage consumers, it is not easily administered. Applying the test requires the court to conjure up an imagined space in which both actors in the pre-contract "negotiation" are assessed.<sup>379</sup> The test is likely to allow for invalidation of terms where the lender hid them from borrowers (e.g., presented them in small type or buried them in footnotes) or presented them in legalese essentially inscrutable for many consumers. However, the test does not remove the lender's interest from the equation. That is, it requires courts to assess the lender's behavior for whether it meets the fair and equitable standard. It then asks courts to stand in the shoes of the fair and equitable lender and draw conclusions as to the kind of terms a consumer would agree to.<sup>380</sup>

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378. While the definition of "predatory loan" has been the subject of much debate, Kathleen Engel and Patricia McCoy offer a useful way of thinking about this type of contract as exhibiting certain markers. In their words, such contracts are designed "to result in seriously disproportionate net harm to borrowers." Engel & McCoy, *supra* note 367, at 1260–61.

379. The word "negotiation" is placed in quotes to reflect that the parties in the residential mortgage loan contract are often not engaged in the level of bargaining suggested by the use of the term. Typically, the lender or mortgage broker presents the contract, and the potential borrower must decide whether to sign it.

380. It is necessary to ask, "What would inform this assessment?" The court could: examine past behavior of consumers; base its determination on empirical studies of consumers regarding the kind of basic terms they would accept and the penalties to which they would not want to be subjected; make an arbitrary determination of what consumers should not agree to; or balance between a "reasonable" amount of profit a lender should be able to make on a residential mortgage loan transaction, as compared to the hardship the borrower would suffer if the contract is enforced without modification.

#### 4. Resulting Norms and Standards

Despite the difficulties, deploying a test to assess the absence of good faith as a sign of unconscionability is an imperfect but useful approach to producing housing contracts that are more equitable and reflective of human rights values. *Aziz* demonstrates the challenge of devising a workable test. It also suggests that more is needed so that substantive fairness in private housing contracts and the public's indispensable interest in housing can be achieved. Private law actors contribute to the process of devising norms and standards. The difference, under the new paradigm, is that the actions of the dominant participant are subject to considerations of the weaker party. Private law precepts alone, such as freedom of contract, fail to protect weaker parties.<sup>381</sup>

The "more" requires drawing upon human rights principles. Human rights ideals regarding dignity and the significance of the home (rented or owned) to one's psychological and overall well-being are substantive content that can help fill up the concept of unconscionability when courts are prevailed upon to evaluate housing contracts.<sup>382</sup> 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 because of the individual's status as a human being. The focus on dignity requires a reorientation towards the transaction. Normatively, dignity extends to individuals certain protections in their person and in how they live. It places obligations and restrictions on the state and others. Although dignity itself requires further definition,<sup>383</sup> including dignity as a principle changes the frame to be used for the evaluation of whether a contract is so unduly weighted in favor of one party that it must be deemed unconscionable.

With respect to the arguments of public law scholars, the shift towards more equitable contracts, even though characterized by an emphasis on procedural fairness at the supranational level, is noteworthy. Their concern, which I share, is that procedural equality will function as a protective shield

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381. I share Joseph Singer's conclusion:

The American ideals of equality and liberty require laws that regulate market transactions to ensure that we are free from unfair practices and that our economic system is not periodically threatened by the negligent creation of toxic assets. Such regulations do not take away our liberty; they promote liberty. Such regulations do not treat us unequally by giving special protection to the weak; they ensure that we enter the marketplace on equal terms and that we can expect the same treatment that others would want for themselves and their family members.

Joseph William Singer, *Subprime: Why a Free and Democratic Society Needs Law*, 47 HARV. CR.-C.L. L. REV. 141, 167 (2012).

382. Human dignity is a foundational concept for international human rights. The first chapter of the European Charter of Fundamental Rights is titled "Dignity." EU Charter, *supra* note 81, art. 1.

383. See Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. OF INT'L L. 655 (2008).



for businesses and governments, representing an acceptable limit on what is required of businesses and government in their interactions with individuals. The degree to which new laws and rules on housing transactions translate into meaningful change will depend on several factors. It is necessary to monitor whether individuals attain substantial relief from oppressive contractual situations. National courts must adhere to the mandate to remove unfair terms from residential mortgage and rental contracts. Lenders and landlords must be incentivized to write transactional documents in ways that meet the requisites of good faith and conscionability. Lastly, governments must protect their constituents and satisfy their fundamental need for housing.

## VII. PROGRESS FOR HOUSING CONSUMERS

Deep reflections on the meaning of fairness and substantive equality are blossoming in human rights sectors<sup>384</sup> and juridical dialogue.<sup>385</sup> Shifts in the framing of housing are occurring at the municipal, national, and international levels. While enshrining the right to housing is a fundamental step, other legal mechanisms are required for the right to be realized. More specifically, protecting individuals in relation to their housing interests requires an approach that contemplates both human rights values and private law concepts. According to one study, approximately “ten percent of the total population, and twenty-three percent of the households at risk of poverty (with an income below sixty percent of the median), in the European Union struggle with rent arrears or mortgage payments.”<sup>386</sup> The centrality of housing to the human experience weighs in favor of investing the concepts of good faith and unconscionability with the human rights principles of dignity, compassion, and vulnerability.<sup>387</sup> The failure to include a broader,

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384. The Council of Europe Commissioner for Human Rights issued an opinion paper advocating a broad interpretation of the right to housing. See Council of Europe, Comm’r for Human Rts. [CoE], *Housing Rights: The Duty to Ensure Housing for All*, at 1, U.N. Doc. CommDH/IssuePaper(2008)1 (Apr. 25, 2008).

385. Courts can coordinate the mixing of concepts from the two regimes when neither offers a sufficient answer. If reasonableness is usually determined according to industry standards, an application of that norm will likely result in more wins for the seller and less protection for the consumer. In contrast, if what is reasonable is viewed from the standpoint of the consumer, then the court must devote more attention to the consumer’s knowledge and positionality.

386. Anna Kahlmeter et al., *Housing Evictions and Economic Hardship: A Prospective Study*, 34 EUR. SOC. REV. 106, 106 (2018).

387. Sweden offers an approach permitting the state to intervene heavily in affairs of private law with socio-economic policies subsidizing housing. Empiricists Anna Kahlmeter, Olof Bäckman, and Lars Bränström conclude that, “while many European countries were hit hard by the [2007-2010 economic] crises, the consequences in Sweden . . . were comparatively moderate, and there was in fact no increase in the number of executed evictions in the aftermath of the crises.” *Id.* As an EU Member, Sweden is subject to the UCT Directive. See Case C-468/98, Commission of the European Communities v. Sweden,

human-rights informed concept of unconscionability into the calculus operates to extend the precariat class of home owners and renters, leaving them in a vulnerable position.<sup>388</sup> Furthermore, focusing only on reforming mortgage instruments fails to adequately attend to the needs of property users who are not owners in a traditional sense, like those in need of subsidized or low-income rental housing.<sup>389</sup>

Scrutinizing the subject matter of new legislation issued by Spain's government and by EU institutions at the supranational level is one way to detect whether a cross-pollination of the efficiency incentives of private markets and public redistribution goals is occurring. In the aftermath of the 2008 economic crisis, the Spanish government responded to local and international political pressure by crafting several measures revising procedures related to mortgage contracts and protections for debtors, along with paths for eliminating their debt.<sup>390</sup> Spain's mortgage law, which came into effect on March 16, 2019,<sup>391</sup> is a recent example. The law addresses the interest rate floor clause that the ECJ tackled in *Naranjo* and adds other protections for consumers such as building in time for review of the mortgage contract, requiring a notary to participate in contract review prior to signing, and restrictions on when banks may foreclose and evict.<sup>392</sup> At the transnational level, the Mortgage Credit Directive, 2014/17/EU, which, *inter alia*, imposes disclosure and underwriting requirements on lenders, is an important addition to the consumer protection arsenal.<sup>393</sup>

2002 E.C.R. I-04147 (May 7, 2002) (challenging whether Sweden satisfied the requirements of the UCT Directive by not making the non-exhaustive list of terms appended to the UCT Directive available to the public, and holding that Sweden was not in violation of the Directive on this point).

388. See Margaret Radin's caution against approaching the world solely in terms of commodification and failing to appreciate human relationships and concerns. Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987). Acting in the latter manner, begs the question: what is property for? *Id.*

389. Some scholars, such as David Super, have proposed expanding notions of property to encapsulate the interests of those who are usually viewed as non-owners. See David A. Super, *A New Property*, 113 COLUM. L. REV. 1773 (2013).

390. Spain adopted several transitional laws under the encompassing Law 1/2013. These laws were challenged on a piecemeal basis in separate requests to the ECJ for preliminary rulings. See, e.g., Case C-8/14, *BBVA SA v Peñalva López*, 2015 EUR-Lex CELEX WL 62014CC0008 (Oct. 29, 2015) (responding to a request for a preliminary ruling on the Fourth Transitional Law of 1/2013 setting a time period for challenging mortgage enforcement proceedings, and holding that the law was in violation of the UCT Directive).

391. Ley 5/2019, de 16 de Marzo, reguladora de los contratos de crédito inmobiliario (B.O.E. 2019, 3814) (Spain).

392. Some of the mortgage law changes were prompted by the EU Mortgage Credit Directive. Council Directive 2014/17/EU, *supra* note 87, para. 34.

393. *Id.*; *Mortgage Credit*, EUR. COMM'N, [https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/retail-financial-services/credit/mortgage-credit\\_en](https://ec.europa.eu/info/business-economy-euro/banking-and-finance/consumer-finance-and-payments/retail-financial-services/credit/mortgage-credit_en) (last visited Jan. 1, 2021) ("The [Mortgage Credit Directive] applies to all loans made to consumers for the purpose of buying residential property.").

Spain also revisited domestic practices that contributed to the housing insecurity of renters. As a result, Spain's government issued a series of decrees impacting Spain's Tenancy Act<sup>394</sup> and portions of the Civil Code pertaining to rental agreements. These new laws target the primary concerns of renters such as longer rental terms, limiting the rental renewal rate by pegging it to the Consumer Price Index, and a requirement to notify the appropriate government entities in conjunction with evictions.<sup>395</sup> Barcelona, one of Spain's major cities, has begun levying extraordinary fines on landlords who permit their buildings to remain vacant for extensive periods of time while the city is suffering from a shortage of social housing.<sup>396</sup> The city has also been repurposing vacant houses to fulfill social housing needs.<sup>397</sup> Spain has adopted policies intended to address homelessness such as the State Housing Plan (2018–2021)<sup>398</sup> and the Comprehensive National Homelessness Strategy (2015–2020).<sup>399</sup> The back and forth involving the issuance of decrees, congressional ratification or repeal,<sup>400</sup> and court challenges at the local and supranational levels, regarding whether the laws conform to human rights obligations and EU directives, are all testaments to the iterative nature of the process leading to the emergence of the new public-private law paradigm. Although Spain's steps are inchoate and insufficient,<sup>401</sup> they are nonetheless illustrative of the government acting to

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394. In Spanish, the Tenancy Act is known as Ley de Arrendamientos Urbanos (LAU). Ley de Arrendamientos Urbanos (B.O.E. 1994, 282), amended by (B.O.E. 2019) (Spain).

395. José Luis Aranda & José Marcos, *Spain Introduces New Rental Rules with More Safeguards for Tenants*, EL PAÍS (Mar. 6, 2019, 7:00 AM), [https://english.elpais.com/elpais/2019/03/04/inenglish/1551692513\\_394392.html](https://english.elpais.com/elpais/2019/03/04/inenglish/1551692513_394392.html).

396. Notably, Ada Colau, a former PAH activist, is the mayor imposing the Barcelona fines. The monetary penalties are meant to punish and incentivize the investment companies who have opted to hold their properties vacant until the housing market improves or direct them towards more lucrative uses. See Feargus O'Sullivan, *In Need of Housing, Barcelona Fines Landlords for Long-Vacant Buildings*, BLOOMBERG: CITYLAB (Mar. 15, 2019, 10:20 AM), <https://www.citylab.com/equity/2019/03/barcelona-affordable-housing-spain-apartment-rental-fines/584902/>.

397. *Id.*

398. See ANA ARRIBA & GREGORIO RODRÍGUEZ CABRERO, HOUSING PLAN IN SPAIN FOR 2018–2021: ESPN FLASH REPORT 2018/58 (2018) (giving overview of the plan).

399. See GREGORIO RODRÍGUEZ CABRERO & VICENTE MARBÁN GALLEGO, SPAIN'S FIRST COMPREHENSIVE NATIONAL HOMELESSNESS STRATEGY: ESPN FLASH REPORT 2016/25 (2016) (stating the Spanish Government adopted the Comprehensive National Homelessness Strategy 2015–2020 on November 6, 2015).

400. Royal decrees are subject to approval by Congress. See CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, Dec. 29, 1978 (Spain).

401. While Spain has taken encouraging steps in the direction of protecting renters, there are glaring omissions. High rental rates continue to cripple the overall well-being of the country. Contributors to the high rent include speculation, Airbnb rentals, and the lack of a sufficient supply of low-income and social housing. Even though rent levels are spiraling out of the affordability range for the average rental housing consumer, the government has struggled to adequately address this issue. Ana Garcia Valdivia, *Rising Rents in Spain Threaten Low-Income Households*, FORBES (Aug. 8, 2019, 4:43 AM),

devise regulations to render private law contracts more conscious of public values and interests.

While there has been progress in the mortgage law area from the standpoint of consumer protections,<sup>402</sup> space remains for expanding the protective net. One positive change is the voluntary pledge of some lending institutions to abide by the “European Agreement on a Voluntary Code of Conduct on Pre-Contractual Information for Home Loans.”<sup>403</sup> This measure is aimed at rebalancing the existing asymmetries in information between banks and borrowers. Notwithstanding promising aspects of the code, because it is voluntary, it does not provide oversight or enforcement, and does not offer comprehensive protections for all stages of the financing contract; it is insufficient to achieve uniform extensive protection for “weaker” contractual parties. For the most part, Spanish banks have interposed roadblocks to progress. For example, they have largely been resistant to a remedy for mortgage borrowers that would allow them to emerge from debt following a default.<sup>404</sup> The procedure, known as *datio in solutum* (*dación en pago*), essentially equates to a deed in lieu of foreclosure in the United States. In accordance with the procedure, the foreclosing bank accepts the deed and property in exchange for releasing the borrower from his debt obligation. The historical resistance of Spanish banks to accepting the collateral property in full satisfaction of the debt is indicative of the clash between socio-cultural conceptions of the home and conceptions emanating from the private sector and, sometimes, government. Individual homeowners and renters focus on aspects of housing related to dignity: the home is a place to live, raise their families, and accumulate wealth to ensure their financial

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<https://www.forbes.com/sites/anagarciavaldivia/2019/08/08/historic-highs-in-the-rental-market-in-spain-threaten-low-income-households/#730627d21c0c>; Todd White, *Spain is Latest Battleground for Global Affordable Housing*, BLOOMBERG (June 19, 2019, 12:00 AM), <https://www.bloomberg.com/news/articles/2019-06-19/spain-is-latest-battleground-in-global-affordable-housing-fight>.

402. For example, the bank can no longer acquire the foreclosed property for 50% of its appraised value at the time of the loan. In July 2011, the percentage amount was increased to 60% and has since then been raised to 70 percent. The EU has made additional interventions in this area. Since *Aziz*, 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. Council Directive 2014/17/EU, *supra* note 87, para. 34.

403. See European Banking Federation et al., *European Agreement on a Voluntary Code of Conduct on Pre-contractual Information for Home Loans: First Annual Progress Report on Implementation in the European Union by 30<sup>th</sup> September 2002*, at 3 (2002) (reporting “over 3600 credit institutions” in Europe had registered with the Commission’s register).

404. Blanket resistance to deed in lieu deals has been shifting post-recession, as some banks have agreed to this procedure. See Art Patnaude & David Román, *Fall in Spain’s House Prices Steepens*, WALL ST. J. (Dec. 14, 2012, 6:54 PM), <https://www.wsj.com/articles/SB10001424127887323981504578179270357838436>.

well-being; banks rely upon housing as a profitmaking vehicle that structures the lives of individuals without, at times, fully communicating associated risks to borrowers.

### VIII. PROPOSALS FOR EXPANDING HOUSING RIGHTS

The Great Recession teaches that homeownership, without more, should not be the sole focal point of government development strategies. Building affordable housing should be a critical element of governmental policy. Governments should reallocate funds to enlarge the inventory of public housing.<sup>405</sup> Affordability should be measured in relationship to income so that those falling within poverty and low-income categories are able to secure housing. Spain should establish an affordable housing network, a system by which individuals with housing needs are directed to available apartments. Moreover, government should develop affordable housing in urban centers and other places that are within close proximity to employment opportunities, essential social resources, and infrastructure. Having a sufficient supply of reasonably priced and government-funded housing to accommodate the population is essential in economies where there are low wages and high unemployment. Governments should design programs to repurpose existing housing for rental purposes.<sup>406</sup> Programs of this type would work particularly well in economies in which the market is saturated with vacant homes for purchase,<sup>407</sup> and when the vacant housing is centrally-located. In keeping with the mandates of the international human right to housing, social policies should be formulated to subsidize individuals for housing costs. Spain should also enlist the help of banks to create alternative housing arrangements for foreclosed borrowers. However, caution is necessary so that the alternatives do not ultimately prove to be detrimental to housing consumers.<sup>408</sup>

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405. Local government entities should be cautious about not giving too many incentives to developers at the expense of the goal of serving the public interest.

406. This is one of the proposals advanced by Spain's activists. SUNDERLAND, *supra* note 14, at 6, 52.

407. See Abbey-Lambertz, *supra* note 45 (noting that there were three million unoccupied homes in Spain in 2014); Guillem Fernandez Evangelista, *Shrinking Social Housing Stocks as a Barrier to the Eradication of Homelessness: The Cases of Germany, Finland, the United Kingdom and Spain*, 10 EUR. J. HOMELESSNESS 151, 167 (2016) (noting that a lack of resources limits even relatively comprehensive housing programs); Edwards, *supra* note 43 (discussing efforts in Spain to use vacant homes to house homeless citizens); see Keith, *supra* note 45 (discussing how only twenty percent of residential apartments were sold in a complex with 13,500 units in the town of El Quiñón).

408. For example, rent-to-own contracts should not be structured in a predatory way which allows banks to further harm defaulted borrowers who were subjected to the foreclosure process. Further, one of history's lessons is that, with rental rate freezes, Spain must monitor landlords so that they maintain their buildings to meet habitable standards. Otherwise, it could result in a repeat of what happened when there

Finally, Spain needs to further cultivate laws in the area of discharging debts so that individuals will be able to fully re-engage in the socio-economy. The human rights “fresh start” campaign is an affirmative step in this direction.<sup>409</sup> Housing counselors should be available to explain the meaning of contract terms pertaining to housing; however, a counseling requirement should never be allowed to substitute for fairness and good faith. In the realm of mortgage lending, underwriting standards need to be strengthened. The Bank of Spain, as the national oversight body, should perform its regulatory role not only with an eye towards EU compliance, but with an appreciation of the purpose of the consumer-oriented protections.<sup>410</sup>

## IX. CONCLUSION

The early twenty-first century judicial and legislative reforms that have played out on the canvas of Spain have international origins and significance. Moreover, they can be construed in several ways. They signal a conceptual change, an emergence of a protective regime focused on individuals, families, and consumers. The global economic crisis brought attention to the profound relationship between the rental housing market and lending practices in the homeownership market. Governments and banks have the power to influence economic wealth by manipulating housing markets.<sup>411</sup> In Spain, and other countries, the combination of easily accessible purchase financing along with high demand and the insufficient supply of quality affordable rental housing in the years preceding the Great Recession set the conditions for economic exploitation. The case of Spain illustrates that regulation of housing markets is necessary to even the playing field between private actors, the populace, and their governments. Like any sovereign nation, Spain is empowered to rethink its approach to markets without prompting from the international community. The analysis herein, however, chronicles a different path. It highlights Spain in dialogue with supranational organs, private actors, and public activists in reimagining private law contracts. The multi-dimensional reframing of housing is aimed at both reallocating resources and power and achieving fairness in housing transactions. While Spain is only one data point, the role of international institutions in regulating housing markets supports the conclusion that the

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was a rental freeze in the 1940s, which resulted in a proliferation of dilapidated uninhabitable housing. See Cardesín, *supra* note 10, at 290.

409. See SUNDERLAND, *supra* note 14, at 68–69.

410. Spanish banks are subject to EU directives. See Fernando Mínguez & Miguel Sánchez Monjo, *Banking Regulation in Spain*, LEXOLOGY (Apr. 4, 2019), <https://www.lexology.com/library/detail.aspx?g=b027178c-17ea-4b1f-9e76-1066e2d97f49>.

411. See MBD, *supra* note 57, paras. 5.5, 12.4 (chiding Spain for feeding housing speculation rather than addressing the needs of its populace).

lessons are not confined to one country. Housing market rules are not preordained. When markets fail to serve broad social goals, it is imperative to rethink how they are structured and the relevant rules by which they should abide. Shifts and reorientations can and should occur to address basic human needs. With the appropriate rules, markets should be able to operate without political disruptions that are inspired by intolerable conditions, such as summary evictions, homelessness, and extreme socio-economic inequality.<sup>412</sup>

This Article demonstrates the importance of public law to private law. It illustrates how the various sectors of protest, private law, and public law can intermingle, dynamically, to create change. Public activism informs both private law and human rights actors about the needs and concerns of people. Public protest exposes the neglect and detrimental actions of the government and private entities. It amasses the evidence. It lays bare the pain inflicted. Protest furnishes an agenda.<sup>413</sup> Private law sets the parameters of the agreements between lenders, borrowers, and guarantors, and between landlords and tenants. It provides substance that informs the contractual terms established. The rules of interaction are carved out. Courts may interpret the terms and through international legal instruments, such as the UCT Directive, evaluate whether they meet a minimum standard of fairness and good faith. Human rights discourse focuses on the need to secure resources and protections necessary to enhance the quality of life. International human rights law, as exemplified by the ICESCR, has a stake in rewriting mortgage and rental laws and, more broadly, in shaping housing reforms. Human rights are not suspended merely because the matter originates from private ordering arrangements.<sup>414</sup> Whether human rights principles are adhered to expressly in name, or whether they are adhered to in spirit, the essential point is that courts, governing structures, and businesses are cognizant of them and are compelled to act in accordance with them, even if doing so is costly in the short-term.

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412. As property scholar Joseph Singer posits: "Political theory supports the idea of creating a democracy that respects fundamental human rights. This institutional setting forms the background within which the market can operate, not the reverse." Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1054 (2009); see also Suzanne Daley, *Foreclosure Protestors in Spain's Cities Now Go Door to Door*, N.Y. TIMES (July 15, 2011), <https://www.nytimes.com/2011/07/16/world/europe/16spain.html> (discussing Spanish protests of foreclosures and government corruption); Daley, *supra* note 24 (examining the severity of personal liability mortgages in Spain and their impact on individuals).

413. Through protest, PAH incentivized individuals to initiate claims against the states and against financial institutions.

414. MBD, *supra* note 57.