

The UN Committee on Economic, Social and Cultural Rights' Decision in *I.D.G. v. Spain*: the right to housing and mortgage foreclosures

La décision du Comité des droits économiques, sociaux et culturels de l'ONU dans l'affaire *I.D.G. c. Espagne*: droit au logement et saisie hypothécaire

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Abstract

In October 2015, the UN Committee on Economic, Social and Cultural Rights delivered its first decision under the communication procedure foreseen in the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. The Optional Protocol, adopted in December 2008, creates an individual complaint mechanism against alleged violations of economic, social and cultural rights by the States party to it. This very first case, I.D.G. v. Spain, concerns the right to judicial protection in the context of the right to adequate housing in mortgage foreclosure proceedings. This article provides a legal analysis thereof, building on the right to adequate housing as interpreted by the Committee and its interactions with the Spanish system of fundamental rights protection.

Résumé

En octobre 2015, le Comité des droits économiques, sociaux et culturels des Nations Unies a rendu sa première décision dans le cadre de la procédure de présentation de communications instaurée par le Protocole facultatif se rapportant au Pacte international relatif aux droits économiques, sociaux et culturels. Le Protocole facultatif, adopté en décembre 2008, prévoit un mécanisme de plaintes permettant à des individus de dénoncer d'éventuelles violations des droits économiques, sociaux et culturels par les États parties. Cette affaire pionnière, I.D.G. c. Espagne, concerne le droit à la protection juridictionnelle dans le cadre du droit à un logement convenable face aux procédures de saisie hypothécaire. Notre article présente une analyse juridique de cette décision, mettant l'accent sur le droit à un logement convenable tel qu'il a été interprété par le Comité et ses interactions avec le système espagnol de protection des droits de l'homme.

I. Introduction

On 10 December 2008, sixty years after the proclamation of the Universal Declaration of Human Rights, the General Assembly of the United Nations adopted the Optional Protocol (OP) to the International Covenant on Economic,

Social and Cultural Rights (ICESCR.) This Optional Protocol creates a communication procedure for individual complaints against alleged violations of the economic, social and cultural rights set forth in the ICESCR by a State Party. The Committee on Economic, Social and Cultural Rights (CESCR) is tasked with examining these communications and rendering its decision ("views") on whether a violation has taken place.

The adoption of this Optional Protocol sought to overcome the asymmetry in the international monitoring of civil and political rights, on the one hand, and economic, social and cultural rights, on the other hand. Whilst the International Covenant on Civil and Political Rights was reinforced by a communication procedure in 1966, its sister treaty, the International Covenant on Economic, Social and Cultural Rights, lacked such a review mechanism. This distinction was at odds with the proclaimed universality, indivisibility, interdependence and interrelatedness of all human rights and fundamental freedoms.

On 13 October 2015, the Committee on Economic, Social and Cultural Rights delivered its first decision under the new communication procedure. Communication No. 2/2014, *I.D.G. v. Spain*,¹ concerns an alleged violation of the right to housing by Spain in the context of the judicial protection for individuals and families against mortgage foreclosure proceedings. The author, I.D.G., was inadequately notified of the court's order authorising a foreclosure of the mortgaged apartment where she had established her primary residence, and became aware of the proceedings against her only after the court had convened an auction of the property. She claims that the court's failure to adequately notify deprived her of an effective remedy to protect her right to housing, in contravention of Article 11(1) of the International Covenant on Economic, Social and Cultural Rights.

II. The Optional Protocol to The ICESCR and the Right to Housing

A. THE OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights² vests in the Committee on Economic, Social and Cultural Rights the competence to receive and consider communications against alleged violations of the rights set forth in the ICESCR by the States Parties to it, provided

¹ Committee ESCR, *I.D.G. v. Spain*, Communication No. 2/2014, 13 October 2015 (E/C12/55/D/2/2014).

² See further, on the drafting process, C. DE ALBUQUERQUE, "Chronicle of an Announced Birth: The Coming into Life of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights – The Missing Piece of the International Bill of Human Rights", *HRQ* vol. 32, n° 1, 2010, p. 144; A. VANDENBOGAERDE and W. VANDENHOLE, "The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An *Ex Ante* Assessment of its Effectiveness in Light of the Drafting Process", *HLRL* vol. 10, n° 2, 2010, p. 207.

that the concrete State Party has ratified the Optional Protocol. Communications may be submitted by or on behalf of individuals or groups of individuals under the jurisdiction of a State Party; in the case of collective communications, the consent of each of the individuals concerned will normally be required.³

The Optional Protocol contains several admissibility criteria, such as the proviso that the facts must have occurred prior to the entry into force of the Protocol for the State Party concerned or the absence of *lis pendens*.⁴ Communications must be submitted within one year after domestic remedies have been exhausted, and the Committee may decline to consider a communication “where it does not reveal that the author has suffered a clear disadvantage, unless the Committee considers that the communication raises a serious issue of general importance.”⁵ After examining a communication, the Committee transmits its *views* together with its recommendations, if any, to the parties concerned. The State Party involved shall then give “due consideration” to these views. The choice of language emphasises the fact that the Committee is not a judicial body, and that the State Party remains solely responsible to remedy the violations found.⁶

By means of this quasi-judicial mechanism, the Committee does not solely decide on the compatibility of the States Party’s conduct with the economic, social and cultural rights enshrined in the Covenant, but it also develops an authoritative interpretation of these rights whereby their content, limits and scope can be clarified and nuanced.⁷ When adjudicating in a particular case, the Committee is drawn to explore the contours of the economic, social or cultural rights at stake, elaborating on the guarantees surrounding them and offering guidance to domestic and regional authorities. It is expected that the “coherent body of jurisprudence” so developed will enhance legal certainty, which in turn reinforces and increases the legitimacy of the international human rights system and of the ICESCR system in particular.⁸ This process has been referred to as the “transformative potential” of the Optional Protocol.⁹

³ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (10 December 2008) (UNGA Res. A/RES/63/117), Art. 1-2.

⁴ *Ibidem*, Art. 3. *Lis pendens* refers here to the situation where the same matter has already been examined by the Committee or has been or is being examined under another procedure of international investigation or settlement.

⁵ *Ibidem*, Art. 4.

⁶ See further B. GRIFFEY, “The ‘Reasonableness’ Test: Assessing Violations of State Obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights”, *HRLR* vol. 11, n° 2, 2011, p. 275.

⁷ See J. HOHMANN, *The Right to Housing: Law, Concepts, Possibilities*, Oxford and Portland, Hart, 2013, p. 30; M. SCHEININ and M. LANGFORD, “Evolution or Revolution? – Extrapolating from the Experience of the Human Rights Committee”, *Nordisk tidsskrift for menneskerettigheter* vol. 27, n° 1, 2009, p. 97.

⁸ See further M. LANGFORD, “Closing the Gap? – An Introduction to the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights”, *Nordisk tidsskrift for menneskerettigheter* vol. 27, n° 1, 2009, p. 1.

⁹ See B. PORTER, “Reasonableness and Article 8(4)”, in M. LANGFORD, B. PORTER, R. BROWN and J. ROSSI (eds), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: A Commentary*, Pretoria, Pretoria University Law Press, forthcoming.

B. THE RIGHT TO ADEQUATE HOUSING UNDER THE COVENANT

The right to adequate housing is of central importance to the enjoyment of other economic, social and cultural rights, as well as civil and political rights. The International Covenant on Economic, Social and Cultural Rights thus protects the right to housing as part of the broader right to an adequate standard of living. According to Article 11(1) thereof:

“The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (...).”

The right to adequate housing has progressively gained a particular status, becoming functionally distinct from the right to an adequate standard of living.¹⁰ This is evidenced by the fact that two of the Committee on Economic, Social and Cultural Rights' General Comments directly concern this right: General Comment No. 4, on the right to adequate housing,¹¹ and General Comment No. 7, focused on forced evictions.¹² Both documents describe the legal configuration of this right: its content, scope and limits; the extent of the protection it affords to individuals and the obligations it creates for States Parties.

First, the Committee states that the right to housing applies to everyone, both individuals and families, and its enjoyment must not be subject to any form of discrimination according to Article 2(2) of the Covenant.¹³ The right to housing is not be equated with a right to shelter, but rather with the right to live somewhere in security, peace and dignity irrespective of income or access to economic resources.¹⁴ Consequently, the reference in Article 11(1) to housing should be construed as a reference to *adequate* housing. The Committee lists in General Comment No. 4 a series of requirements that must be met in order for a particular form of shelter to be qualified as adequate housing. These general conditions are grouped in seven categories: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location and cultural adequacy.¹⁵

Our analysis focuses on the first condition, legal security of tenure, as the decisive element in the case under examination. The statement that adequate housing requires security of tenure implies the right of individuals and families to be

¹⁰ See J. HOHMANN, *op. cit.*, p. 17.

¹¹ CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11(1) of the Covenant (13 December 1991) (E/1992/23)).

¹² CESCR General Comment No. 7: The right to adequate housing (Art. 11(1): forced evictions (20 May 1997) (E/1998/22)).

¹³ General Comment No. 4, *op. cit.*, para. 6.

¹⁴ *Ibidem*, para. 7.

¹⁵ *Ibidem*, para. 8.

protected against forced eviction, discrimination, harassment, withdrawal of services and other similar threats.¹⁶ State Parties shall take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection.¹⁷ The Committee has therefore declared that instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant, and can only be justified in the most exceptional circumstances in accordance with the relevant principles of international law.¹⁸

General Comment No. 7 further elaborates on the extent of the protection afforded to individuals and families against forced evictions. According to paragraph 3 thereof, the term “forced eviction” can be defined as:

“The permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”

The prohibition on forced evictions does not apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.¹⁹ However, removal against their will of an individual or family within the framework of mortgage enforcement proceedings where an appropriate form of judicial protection (i.e. access to an effective remedy) has not been provided will constitute *a priori* a prohibited eviction.

Legal safeguards must be in place to guarantee that appropriate means of redress, or remedies, are available to any individual or family whose right to housing may be threatened by an eviction.²⁰ General Comment No. 7 provides a series of procedural requirements that should be observed by State Parties when carrying out evictions, among which “adequate and reasonable notice for all affected persons prior to the scheduled date of eviction” and “provision of legal remedies.” Lastly, evictions must not render individuals homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State Party must take all appropriate measures to ensure that adequate alternative housing is made available.²¹

¹⁶ Report of the Special Rapporteur on promoting the realisation of the right to adequate housing Mr. Rajindar Sachar on the right to adequate housing: progress report, presented at the forty-fifth session of the Commission on Human Rights (22 June 1993) (E/CN.4/Sub.2/1993/15), para. 70.

¹⁷ General Comment No. 4, *op. cit.*, para. 8.

¹⁸ *Ibidem*, para. 18.

¹⁹ General Comment No. 7, *op. cit.*, para. 3.

²⁰ See CESCR General Comment No. 9: The domestic application of the Covenant (3 December 1998) (E/C12/1998/24), para. 2.

²¹ *Ibidem*, para. 16.

C. THE RIGHT TO HOUSING UNDER THE SPANISH LEGAL FRAMEWORK

Article 47 of the Spanish Constitution enshrines the right to housing in the following terms:

■ “All Spaniards have the right to enjoy decent and adequate housing. The public authorities shall 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 (...).”²² ■

In spite of the language in which this article is presented, the right to housing is located in the Constitution chapter regulating the principles governing economic and social policy; and not, as might be expected, in the one containing the rights and freedoms of Spanish citizens. In practical terms, this categorisation implies that the recognition, respect and protection of the right to housing “shall guide legislation, judicial practice and actions by the public authorities”,²³ but may only be invoked before the ordinary courts “in accordance with the statutory provisions implementing them.”²⁴ The Spanish Constitutional Court has, however, nuanced this conclusion, recognising a certain direct effect to the right to housing through its link to other “justiciable” rights such as the right to a due process and to effective judicial protection.²⁵

The overall housing situation in Spain has been qualified as one of housing emergency.²⁶ According to the 2008 Report of the UN Special Rapporteur on adequate housing, “despite the fact that constitutional provisions recognize housing as a basic right, housing, in practice, is currently considered as a mere commodity to be bought and sold.”²⁷ The Special Rapporteur criticised the disproportionate priority given to the homeownership model through different instruments such as tax policy and public housing, leading to a situation where other tenancy regimes such as rental for lower income sectors are not sufficiently promoted.²⁸ As a consequence, the Spanish housing system has *de facto* marginalised sectors of society that do not have enough means to purchase their homes or who are otherwise at risk of suffering discrimination; including women, low-income households, migrants, young people, the elderly, and the Roma.²⁹

²² Spanish Constitution (29 December 1978). Official translation provided by the Spanish Chamber of Deputies.

²³ *Ibidem*, Art. 53(3).

²⁴ *Ibidem*.

²⁵ See, for instance, Judgment 30/2014, of 24 February 2014, concerning a very similar case to that of Communication No. 2/2014. In this case, the Constitutional Court upheld the right to housing of the applicant in *amparo* building on his right to effective judicial protection.

²⁶ See Observatori DESC and Plataforma de Afectados por la Hipoteca, *Emergencia Habitacional en el Estado Español: La Crisis de las Ejecuciones Hipotecarias y los Desalojos desde una Perspectiva de Derechos Humanos*, 2013.

²⁷ Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living Mr. Miloon Kothari on the promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development: mission to Spain, presented at the seventh session of the Human Rights Council (7 February 2008) (A/HRC/7/16/Add2), para. 86.

²⁸ *Ibidem*, para. 92.

²⁹ *Ibidem*, para. 90.

The primacy of the homeownership model is clearly reflected by the Spanish mortgage foreclosure regulation, which tends to favour the interests of lending institutions to the detriment of borrowers having mortgaged their house. The Spanish Civil Procedure Act³⁰ allows mortgagees to resort to special, privileged distraint proceedings to request payment of debts guaranteed by a pledge or a mortgage. These special proceedings seek the immediate realisation of the mortgaged assets and have a very limited adversarial character, allowing for the mortgagor to challenge enforcement only on a limited number of grounds: the extinction of the security or guaranteed obligation, an error in determining the enforceable amount or the subjection of such assets to another lien, real estate mortgage or attachment previously registered.³¹ Because this is a closed list, the judge is prevented from evaluating in these proceedings, for instance, the circumstances leading to the default or the degree of information offered by the lending institution to the persons affected.

Following a judgment from the Court of Justice of the European Union,³² the Spanish legislator introduced an additional ground of objection relating to the unfairness of a contractual term on which the right to seek enforcement is based. On the other hand, even though ordinary declaratory proceedings remained available for persons affected to challenge the outcome of the special mortgage enforcement proceedings, these could not, prior to 2013, have the effect of staying or terminating enforcement.³³ This situation often led to the irreversible vesting of the property in a third party, without the mortgagor being able to access fully fledged adversarial proceedings to challenge it.

The special distraint procedure envisages a series of complex procedural steps. It starts with an enforcement claim against the debtor and a formal request for payment issued in the form of a court order. The final step of the procedure is the convening of an auction of the mortgaged property and the allocation of the amount obtained to the payment of the mortgage credit. However, if the mortgaged asset is the primary residence of the mortgagor and no bidders take part in the auction, the Civil Procedure Act allows the creditor to seek to have the property awarded to themselves for an amount equivalent to seventy per cent of the property's appraisal value.³⁴ In other words, the lending institution has the possibility to initiate distraint proceedings to enforce the mortgage, seize the property obtaining seventy per cent of its appraisal value and, should this sum not cover the full amount of the loan, proceed against the debtor or its guarantors for the remainder.

³⁰ Law 1/2000, of 7 January, of Civil Procedure [Civil Procedure Act] (BOE-A-2000-323).

³¹ *Ibidem*, Art. 695(1).

³² See Judgment in *Aziz v CatalunyaCaixa*, C-415/11, EU:C:2013:164.

³³ See *ibidem*, para. 59.

³⁴ Civil Procedure Act, *op. cit.*, Art. 671.

III. Communication No. 2/2014, *I.D.G. v. Spain*

A. THE FACTS OF THE CASE

The author of the communication is Ms. I.D.G., a Spanish national born in 1965. In 2007, she applied for a mortgage loan from a lending institution – a bank – in order to purchase an apartment to live in as her primary residence. However, as a result of the serious economic and housing crisis in Spain and of her personal circumstances,³⁵ the author missed several mortgage repayments between 2011 and 2012. Faced with the author's default, the bank, not willing to negotiate, called in the full amount of the loan and brought mortgage enforcement proceedings under the special distraint procedure foreseen in Spanish law.

In June 2012, the court admitted the enforcement claim. According to the Civil Procedure Act, "in the court order whereby the enforcement is authorised and arranged an order shall be given to request payment from the debtor",³⁶ and both the order and the request for payment shall be served at a residence freely specified by the mortgagor. The Madrid Courts Central Notification and Enforcement Service attempted to serve notice at the address specified by the author in the public instrument drawing up the mortgage loan, which was that of the mortgaged property. The record reflects that the server of notice could not find the author at her apartment.³⁷ No attempts were made at other addresses of the author known to the creditor, such as the address of her workplace or that of her mother, nor was the notice left with the nearest neighbour or with the caretaker as permitted under Spanish procedural law.

In October 2012, the court decided to resort to service through Article 686(3) of the Civil Procedure Act, which provides for the possibility of notice being served by public posting "if the handover of the summons is attempted at the address recorded in the Registry and it is not possible to hand it over to the (recipient)." This method of serving notice implies that:

■ "the Court Clerk (...) shall order notice to be served by attaching the decision or the summons to the bulletin board at the Court Office, safeguarding the rights and interests of minors, as well as other rights and liberties which might be affected by announcing the notices. (...) Only at the request and expense of a party, shall notification be published in the 'Official Gazette'."³⁸ ■

After serving notice by public posting, the proceedings continued. In February 2013, the court ordered the convening of an auction of the mortgaged property. In March, the Madrid Courts Central Notification and Enforcement Service attempted to serve notice of the convening of the auction again at the address of

³⁵ See Communication No. 2/2014, *op. cit.*, para. 2.2.

³⁶ Civil Procedure Act, *op. cit.*, Art. 686.

³⁷ See further Communication No. 2/2014, *op. cit.*, para. 2.4.

³⁸ See Civil Procedure Act, *op. cit.*, Art. 164.

the mortgaged property, unsuccessfully. However, after the second attempt, the server of notice posted on this occasion a message through Ms. I.D.G.'s letterbox, mentioning the possibility for her to collect the notice at a post office. In April, Ms. I.D.G. finally did so by proxy. She claims that it was only then that she was apprised of the court order authorising and arranging the enforcement, of the request for payment and of the imminent auction of her home.

Ms. I.D.G. immediately filed an appeal for reversal (*recurso de reposición*) against the court's order to convene the auction, seeking a declaration of nullity of this order along with that of all procedural acts subsequent to the date of the failed first notification. She claims that, according to the case law of the Spanish Constitutional Court and of the Supreme Court, notification by public posting of notice can only be ordered after having exhausted all measures to serve notice in person, and after having tried to locate the defendant at alternative addresses. The court dismissed her appeal on the grounds that, as a particularity of special mortgage enforcement proceedings, notice is exclusively to be served at the address agreed upon by the parties, immediately resorting to public posting of notice in the event of a failed attempt. It also considered that it had no competence to declare the nullity of procedural acts.

In May 2013, Ms. I.D.G. filed a remedy of *amparo* with the Constitutional Court, claiming that the Court's dismissal of her appeal for reversal violated her right to a fair trial and access to an effective remedy under the Spanish Constitution. This remedy, constitutionally geared towards the immediate judicial protection of fundamental rights, requires in principle that all other remedies before the ordinary jurisdiction be exhausted. In October 2013, the Constitutional Court dismissed the author's application.

Ms. I.D.G. then submitted a communication to the Committee on Economic, Social and Cultural Rights under the Optional Protocol to the ICESCR, claiming that Spain had violated her right to adequate housing under Article 11(1) of the Covenant. According to her submission, she did not in practice have access to effective and timely judicial protection. This prevented her from mounting a judicial response to the proceedings and from protecting her right to housing in court. As a result, she asserted, she found herself in a position of vulnerability, uncertainty and anxiety.³⁹

B. CONSIDERATIONS ON THE ADMISSIBILITY

In accordance with Article 3 of the Optional Protocol, the Committee on Economic, Social and Cultural Rights examines the admissibility of a communication before turning to the merits. It finds the communication to be admissible.⁴⁰ Verification

³⁹ See Communication No. 2/2014, *op. cit.*, para. 10.2.

⁴⁰ *Ibidem*, para. 9.7.

of most of the admissibility criteria (submission within a year after exhaustion of domestic remedies, *lis pendens*, etc.) is straightforward and requires no further examination in the instant case. By contrast, the Committee's interpretation of the criterion contained in Article 3(2)(b) of the Optional Protocol raises some questions. This provision states that the Committee shall declare a communication inadmissible if "the facts that are the subject of the communication occurred prior to the entry into force of the present Protocol for the State Party concerned unless those facts continued after that date."

The Optional Protocol entered into force for Spain on 5 May 2013. Most of the facts giving rise to the violation alleged by Ms. I.D.G. were prior to this date: in particular, the lower court's decision to dismiss the author's appeal for reversal was rendered on 23 April 2013. In our view, it is this date, when the author's right to judicial protection was allegedly violated, that should have been taken as the time reference to verify compliance with the admissibility requirements set out in the Optional Protocol. Indeed, according to the facts of the case, it was in her appeal for reversal that the author sought annulment of that decision and of the entire mortgage enforcement proceedings, given that she had not been notified of the suit at the addresses known to the lending institution, allegedly in violation of her right to effective legal protection.⁴¹

The Committee, on the other hand, considers that its competence *ratione temporis* shall be determined by reference to the decision of the Constitutional Court, rendered on 16 October 2013, which dismissed the author's remedy of *amparo*. According to the Committee, this provided the Constitutional Court with an opportunity to examine the alleged violation of the author's fundamental rights, since the subject of the remedy was not a consideration of purely formal points or errors of law but of possible violations of constitutional rights.⁴²

While this appreciation is factually accurate, the remedy of *amparo* being specifically designed for the judicial protection of fundamental rights, the Committee's conclusion appears to misconceive the ensemble of the Spanish procedural system of fundamental rights protection. As will be argued below, the dismissal of the Constitutional Court was based on the author's failure to file the appropriate procedural remedy, which would have permitted the lower court to examine the alleged violation and, eventually, would have opened the possibility for her to subsequently file a remedy of *amparo*.

Under Spanish civil procedural law, an appeal for reversal against a court's order to convene an auction in mortgage enforcement proceedings can only challenge points of law. The court will then check whether the order is compliant with the requirements set out in the Civil Procedure Act, but is not allowed to rule on other

⁴¹ A terminological precision: it is not the annulment that the author sought from the court but rather a declaration of nullity, which implies that the challenged procedural acts were null and void *ab initio*.

⁴² Communication No. 2/2014, *op. cit.*, para. 9.3.

claims such as potential violations of fundamental rights. Nevertheless, after the court's ruling on the appeal for reversal, the mortgagor has a specific, ordinary procedural remedy available to denounce constitutional rights violations.⁴³ The filing of this remedy, so-called "incident of nullity of procedure", is in some cases a prerequisite for the author to bring *amparo* proceedings, the rationale being to allow the ordinary judiciary to perform a first review of alleged fundamental rights violations before the Constitutional Court is involved.

Several references are made to this remedy in Ms. I.D.G.'s and the State Party's submissions, mostly under the term "interlocutory challenge" or "application to have the order annulled."⁴⁴ Yet, the Committee appears to overlook it in its reasoning. It is submitted that the possibility for the author to have recourse to this incident has profound repercussions not only at the admissibility stage, but also as regards the Committee's findings on the merits.

Article 288 of the Civil Procedure Act sets out the characteristics of the incident of nullity of procedure in the following terms:

■ "Whoever may be a legitimate party or should have been so may seek through a written statement the nullity of any procedures (*sic*) on the grounds of the violation of any of the fundamental rights (...), as long as such violation could not have been denounced before the ruling bringing the proceedings to an end (...). Should the plea for nullity be upheld, the procedures shall be reversed to the stage immediately prior to the defect that gave rise to it and the legally established procedures shall proceed."⁴⁵ ■

Whilst the plea made by Ms. I.D.G. in her appeal for reversal might have been perfectly legitimate, her poor choice of remedy led to the lower court not being able to examine the merits of that claim. Following an appeal for reversal, the court can only adjudicate on the strict legality of procedural acts. By contrast, after the court's ruling dismissing her appeal, the author could have filed an incident of nullity of procedure, where she could have mounted a challenge to enforcement based on the alleged inadequacy of the notification. By not filing this incident, Ms. I.D.G. prevented the Constitutional Court from ruling later on the alleged violation, as there was no previous judicial ruling thereon.

Ms. I.D.G. claims in this respect that, according to the case law of the Constitutional Court, her filing of an incident of nullity of procedure was not a necessary remedy that needed be exhausted. This argument does not withstand scrutiny. In concurrence with the Constitutional Court Organic Act⁴⁶ and with the established case law of the Constitutional Court, the filing of an incident is always required before *amparo* proceedings can be brought if no ordinary court was given

⁴³ See Civil Procedure Act, *op. cit.*, Art. 288.

⁴⁴ See, for instance, *ibidem*, paras. 4.5 and 5.5.

⁴⁵ Civil Procedure Act, *op. cit.*, official translation provided by the Ministry of Justice.

⁴⁶ Organic Law 2/1979, of 3 October, on the Constitutional Court (BOE-A-1979-23709).

the opportunity to examine the alleged violation; in other words, when the applicant has not been able to denounce it prior to a final and unappealable court's ruling. The Constitutional Court thus argued in an analogous case that:

■ "The plea (of a fundamental rights violation) has been formulated here *ex novo* before the constitutional jurisdiction, without the prior exhaustion of the (ordinary) jurisdictional channels required by (the Constitutional Court Organic Act). As we have consistently considered in many other cases, the extraordinary and subsidiary nature of the remedy of *amparo* prevents a *per saltum* access to it, and prohibits examination of any plea that has not been previously entered in the ordinary jurisdiction."⁴⁷ ■

The above considerations call into question the assertion that the alleged violation of Ms. I.D.G.'s rights under the Covenant were the result of the dismissal of the Constitutional Court, rather than the dismissal of the lower court. Arguably, a decision of the Constitutional Court dismissing a remedy of *amparo* cannot entail a further violation of the right to adequate housing of the applicant given that (i) its previous case law was clear to the effect that exhaustion of other remedies is necessary in such cases; and (ii) the applicant did have an appropriate remedy readily available to have her claims examined.

A distinct situation occurs in the case cited by the Committee when examining its competence *ratione temporis*. It refers there to the views of the Committee on the Rights of Persons with Disabilities in the case of *Jungelin v. Sweden*.⁴⁸ However, in this case, concerning a plea of discrimination, the courts of the State Party had not merely been given the opportunity to examine formal aspects or errors of law, but had in fact examined the author's claim of a fundamental rights violation on its merits.⁴⁹ The Committee on the Rights of Persons with Disabilities appears to ground its competence not simply on the fact that the court's ruling was subsequent to the entry into force of the Convention, but rather on the appreciation that the ruling had examined the merits of the claim.

Following this analysis, an alternative conclusion would be that the facts that are the subject of the communication occurred in April 2013, prior to the entry into force of the Optional Protocol for Spain, and that those facts did not continue after that date. The communication should have been declared, according to this reasoning, inadmissible.

⁴⁷ Judgment 73/1989, of 20 April 1989, FJ 8. See also, *inter alia*, Judgment 187/2008, of 30 December 2008, and Order 200/2010, of 21 December 2010.

⁴⁸ Committee on the Rights of Persons with Disabilities, *Jungelin v. Sweden*, Communication No. 5/2011, 2 October 2014 (CRPD/C/12/D/5/2011), para. 7.6.

⁴⁹ *Ibidem*: "The Committee noted that the Labour Court had not merely examined formal aspects or errors of law in the previous decisions of administrative bodies, but had examined the Disability Ombudsman's claim of discrimination on its merits. In the circumstances, the Committee considered the communication to be admissible, since the decision of the Labour Court of 17 February 2010 was issued when the Convention was already in force for the State party and therefore could not be subject to further appeal."

This finding must be, however, nuanced. On the one hand, it could appear that such a conclusion is rooted on a rigid, formalistic application of domestic procedural law, affording primacy to form over substance. However, where the internal system of fundamental rights protection affords sufficient prospects of redress, the principle of subsidiarity imposes a degree of deference towards the domestic legal order. When analysing the Committee's considerations on the merits it will be shown that, had the author filed the correct procedural remedy, her chances of success would have been relatively high.

On the other hand, the Committee could have reasonably taken the stance that, in the concrete circumstances of the author, the requirement of a prior incident of nullity of procedure was disproportionate or perhaps that a more elaborate doctrine of "continuing violations" should apply. Yet, in the author's view, if the Committee wanted to take such a stance, it should have further developed its reasoning, clearly setting out the grounds for its decision. This becomes all the more essential considering that Communication No. 2/2014 is the first communication ever examined under the Optional Protocol, and therefore no previous jurisprudence from the Committee is available to this effect.

C. CONSIDERATIONS ON THE MERITS

The Committee's views on the merits of Communication No. 2/2014 likewise raise a number of significant points. The author's submissions, the observations of the State Party and the reasoning developed by the Committee are all underpinned by at least three core legal issues, each of them deserving a separate examination. The first issue refers to the general adequacy of Spanish mortgage law to guarantee that individuals and families facing mortgage foreclosure proceedings are able to defend their right to housing in a court of law. The second issue revolves around whether the notification by public posting of notice in the particular case of the author was appropriate or, on the contrary, impinged on her right to a fair trial and to due process in such a way as to constitute a violation of her right to housing. The third question relates to the availability of other procedural remedies at the domestic level in order to denounce a violation of the author's fundamental rights, in the presence of which remedies the Committee hints that a potential irregularity "might not imply a violation of the right to housing."⁵⁰

Regarding the first issue, that is, the adequacy of Spanish mortgage law to guarantee the judicial protection of individuals and families facing enforcement, Ms. I.D.G. points to a situation of serious social crisis in the State Party. In her submission, the Spanish legislation regulating mortgage enforcement proceedings does not adequately protect people's right to mount a proper legal defence of their homes.⁵¹ Referring to Article 2(1) of the Covenant, Ms. I.D.G. pleads

⁵⁰ Communication No. 2/2014, *op. cit.*, para. 13.4.

⁵¹ *Ibidem*, para. 3.5.

that the State Party has not taken adequate legislative measures to guarantee and achieve the full realisation of the right to housing contained in Article 11(1) of the Covenant.

The third-party intervener in Communication No. 2/2014, the International Network for Economic, Social and Cultural Rights (ESCR-Net), also refers to the serious and widespread housing crisis in the State Party, in the context of an economic recession and high levels of unemployment. It argues that the legislative measures taken by the Spanish legislator are insufficient to resolve the social crisis caused by mortgage foreclosures, since the domestic legal framework continues to favour financial institutions over the interests of the persons affected. According to ESCR-Net, in order to uphold the right to adequate housing enshrined in the Covenant, evictions should only take place in exceptional circumstances, after having weighed up all the possible alternatives and in consultation with the community or individuals concerned. All due process guarantees, such as an adequate and reasonable period of notice or access to an effective remedy, should be afforded, and the State should ensure that an eviction will not leave the person concerned homeless or at risk of other human rights violations.⁵²

The State Party, for its part, argues that the regulation of mortgage enforcement proceedings contained in the Civil Procedure Act fully complies with the obligations arising from the Covenant. With the objective to ensure the effectiveness of the right established in Article 11(1), it claims it has adopted various measures strengthening the legal protection for mortgagors: the Spanish legislative framework would contain a protection scheme providing a remarkable set of guarantees to achieve the full realisation of the right to housing.⁵³

The Committee, in this regard, considers that :

■ “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.”⁵⁴ ■

The position adopted by the Committee appears to be *prima facie* consistent with the *raison d’être* of the individual complaints mechanism envisaged by the Optional Protocol. This instrument provides the Committee with the competence to examine communications submitted by or on behalf of individuals or groups of individuals claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant,⁵⁵ and not to evaluate the States Parties’

⁵² *Ibidem*, para. 6.3.

⁵³ *Ibidem*, para. 8.2.

⁵⁴ *Ibidem*, para. 13.5.

⁵⁵ Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, *op. cit.*, Art. 2.

policies in the abstract. Admittedly, other mechanisms are already in place for this purpose: notably, the Committee's concluding observations in the framework of the States Parties' periodic reporting obligation, as well as, to a certain extent, its general comments.

However, such a restricted approach to the issue at stake appears at best disengaged. Confronted with a notification procedure which may in practice impinge on the right to housing protected by the Covenant, the opportunity could have been seized to set out the safeguards that public posting of notice should include, and this without necessarily addressing specifically "the State party's internal rules governing mortgage enforcement procedures." As noted above, the ultimate objective for the Committee should be to engage in reflection upon the content, scope and limits of economic, social and cultural rights, developing a coherent body of jurisprudence that builds on particular solutions to uphold generalisable standards.

The second of the identified issues is the appropriateness, in the author's specific case, of the court's decision to proceed with the notification by public posting of notice. According to Ms. I.D.G., her right to adequate housing under the Covenant encompasses, *inter alia*, the legal guarantee that reasonable and adequate notice is served in connection with proceedings directly concerning her security of tenure. Yet, in her case, the court ordered the notification by public posting of notice directly after the failed attempt to serve notice in person, without making use of other available forms or methods of serving notice. As a result, she could not mount a legal response to the suit and could not protect her right to housing in court.⁵⁶

The State Party, by contrast, claims that notice was served in strict compliance with the procedure foreseen in the Civil Procedure Act, which is consistent with the obligations deriving from the Covenant. It points out that it was only after several attempts to notify the author in person that the court decided to serve notice by public posting, and adds that notifications cannot be served "at an address chosen arbitrarily by the creditor or the court."⁵⁷

In this connection, the Committee recalls that appropriate procedural protection and due process are essential aspects of all human rights, especially pertinent in relation to forced evictions. Procedural protection requires the provision by the State Party of adequate and reasonable notice for all affected persons prior to the scheduled date of eviction and legal aid for their defence.⁵⁸ In its view, such protection is equally applicable and appropriate in other similar situations which can seriously affect the right to housing, such as mortgage foreclosure proceedings. Authorities should, therefore, take all reasonable measures and make every

⁵⁶ Communication No. 2/2014, *op. cit.*, para. 3.3.

⁵⁷ *Ibidem*, para. 4.3.

⁵⁸ *Ibidem*, para. 12.1.

effort to ensure that the serving of notice of the most important acts and orders in an administrative or judicial procedure is conducted properly and effectively, so that the persons affected have a real opportunity to participate in the proceedings in defence of their rights. Insufficient notice of an application for mortgage enforcement, such as to prevent the person from defending their rights and interests in that procedure, breaches the right to housing.⁵⁹

The Committee goes on to examine whether, in the case under consideration, sufficient notice existed. It affirms that its function here is not to verify whether or not the domestic judicial and administrative procedures were carried out in accordance with domestic law, but simply to consider whether the facts of the communication constitute a violation by the State Party.⁶⁰ Although the Committee recognises the repeated efforts to personally notify the author, it concludes that the court did not exhaust all available means to serve notice in person – for instance, through other channels recognised in the Civil Procedure Act such as posting a note through the author's letterbox or leaving the notice with the caretaker or the nearest neighbour.

The fact that the court did not take all reasonable measures to adequately notify the author of the application for mortgage enforcement, so as to ensure that she was informed of the commencement of proceedings, prevented Ms. I.D.G. from mounting a proper legal defence in court of her right to housing. The Committee therefore concludes that, by failing to fulfil its obligation to provide the author with an effective remedy, the State Party violated her rights under Article 11(1) of the Covenant, read in conjunction with Article 2(1) thereof.⁶¹

In fact, the interpretation of the Committee is fully compatible, and even coincides, with the criteria set out by the Spanish Constitutional Court for the adequacy of notifications by public posting of notice. This case law goes back to decades ago, and the Constitutional Court has consistently applied it to the various cases before it involving public posting of notice. For instance, in its Judgment of 24 July 2006, referring to its previous Judgment of 3 April 1987, the Constitutional Court found that:

■ “Notification by public posting of notice, though constitutionally valid, requires, due to its condition of last resort to serve notice, not only the exhaustion of all other means that provide additional guarantees and formal evidence, but also that the court's order considering the defendant a person of unknown whereabouts be based on reasonableness criteria leading to the certainty of the uselessness of other normal notification means.”⁶² ■

⁵⁹ *Ibidem*, para. 12.4.

⁶⁰ *Ibidem*, para. 13.1.

⁶¹ *Ibidem*, paras. 14–15.

⁶² Judgment 245/2006, of 24 July 2006, FJ 2.

A further example is contained in the Constitutional Court's Judgment of 20 May 2013, concerning a situation similar to that of Ms. I.D.G. In this case, notice of the lower court's order authorising enforcement had also been attempted at the address given by the author in the public instrument drawing up the mortgage loan. In view of the failed attempt to notify him, the lower court ordered notification by public posting of notice. In this regard, the Constitutional Court pointed out that:

■ “Regarding this issue, this Court has pronounced itself repeatedly to the effect that it is necessary for the court to exhaust all means available to notify the defendant of the existence of proceedings in their actual domicile. (...) Consequently, and applying this doctrine to the instant case, it can be concluded that the right to a fair trial and to judicial protection has been violated, in that all means of investigating the real domicile before the notification by public posting of notice were not exhausted.”⁶³ ■

The position of the Committee thus appears as a sensible interpretation of the due process guarantees afforded by the right to adequate housing under the Covenant. It constitutes a step further towards the clarification and precision of the substantive content of the right to housing at the international level. Defining the guarantees surrounding economic, social and cultural rights is essential for the correct interpretation and application thereof at the domestic and regional levels, and this includes highlighting the importance of the right to a fair trial for individuals and families to defend their right to security of tenure.

This innovative or more nuanced jurisprudence of the Committee as regards notification in mortgage foreclosure proceedings is summarised in paragraph 12.3 of its views in the following terms:

■ “Notification by public posting of notice can be an appropriate means of serving judicial notice consistent with the right to effective judicial protection. However, the Committee considers that its use in cases that might involve a violation of human rights such as the right to adequate housing, which require judicial oversight, should be a measure of last resort, particularly when applied to acts that set a procedure in motion. Its use must be strictly limited to situations in which all means of serving notice in person have been exhausted; and must ensure sufficient exposure and long enough notice that the affected person has the opportunity to take full cognizance of the start of the proceedings and can be a party to them.” ■

The third issue refers to the availability of other procedural remedies at the domestic level in order for the author to defend her right to a fair trial. This question, partly examined above, does not only feature in the Committee's considerations on the admissibility, but – crucially – it also forms an integral part of its reasoning on the merits of the communication. The Committee, as will be shown,

⁶³ Judgment 122/2013, of 20 May 2013, FFJJ 2-5.

appears to link the violation of the right to adequate housing by the State Party with the absence of an appropriate remedy. However, it can be argued that an appropriate remedy was, in fact, available to Ms. I.D.G.

The Committee points out in paragraph 13.4 of its views that “such an irregularity in the notice procedure might not imply a violation of the right to housing if it had no significant impact on the author’s right to defend her full enjoyment of her home, *for example because she had some other appropriate procedural mechanism by which to defend her rights and interests* (emphasis added).”

Two conclusions may be inferred from this statement. Firstly, the Committee appears to suggest that, despite the irregularity in the notification procedure, the fact that the author did not, in its view, have an appropriate procedural mechanism available to defend her rights and interests is determining for its finding of a violation. Had such a procedural mechanism been available, the irregularity in the notice procedure would seemingly not have had a “significant impact” on the author’s right to defend her full enjoyment of her home, or would have somehow “subsequently remedied” this irregularity.⁶⁴ Secondly, the Committee finds no such procedural mechanism available in the case of Ms. I.D.G., what leads to the finding of a violation of Article 11(1) of the Covenant.

It is undisputed, as we have established *supra*, that the mortgagor could, at the relevant time, only challenge enforcement on the basis of a limited number of grounds. On the other hand, ordinary declaratory proceedings, which allowed the debtor to freely mount wide-ranging challenges, could not have the effect of staying or terminating enforcement or an auction of the mortgaged property. This clearly shows that an eventual defence by means of ordinary declaratory proceedings would not suffice to guarantee the right to housing of Ms. I.D.G.

However, even though the Committee reaches a factually accurate conclusion regarding the ordinary declaratory procedure, it seems to obviate the existence of the incident of nullity of procedure, even though both Ms. I.D.G.’s and the State Party’s submissions reference this. As already pointed out in the examination on the admissibility of the procedure, a review on the merits was, in fact, available to Ms. I.D.G. in Spanish law, and would have enabled the court to examine the alleged fundamental rights violation. Had the lower court ruled against the author, she would then have been able to access *amparo* proceedings.

A survey of the Constitutional Court’s case law reveals that a potential ruling in *amparo* in such a case would have probably upheld Ms. I.D.G.’s claim. For instance, in its Judgment of 20 May 2013, cited above,⁶⁵ the Constitutional Court found a violation of the right to judicial protection of a mortgagor who had not been

⁶⁴ Communication No. 2/2014, *op. cit.*, para. 13.7.

⁶⁵ See *supra*, note 63.

correctly notified of a court's order authorising enforcement. In this latter case, the defendant did file an incident of nullity of procedure, which the lower court dismissed. He subsequently filed a remedy of *amparo* with the Constitutional Court. Given that he had not been served notice in his actual domicile, which was known to the mortgagee, the Constitutional Court ruled that the lower court did not exhaust all means to serve notice in person, declared the nullity of the lower court's order dismissing the incident of nullity of procedure and ordered that proceedings be reversed to the stage immediately prior to this irregularity.⁶⁶ This precedent shows not only that an appropriate procedural mechanism was in fact available for Ms. I.D.G. to have the alleged violation of her fundamental rights examined; but that, had she filed the appropriate remedy, her plea would have had a relatively optimistic probability of success.

This should not be read, in any event, as meaning that a poor choice of remedy should relegate the mortgagor to judicial ignominy, but simply as questioning the thoroughness of the Committee's reasoning in this connection. If the Committee considers, as it appears to do, that the availability of a procedural remedy is so significant as to determine its finding of a violation, or as to counterbalance an irregularity in the notification procedure, it should have then developed a full examination of the procedural situation of the author, rather than summarily examining the ordinary declaratory procedure and simply overlooking the existence of the incident of nullity of procedure.

In conclusion, the Committee finds a violation by Spain of Ms. I.D.G.'s rights under Article 11(1) of the Covenant, read in conjunction with Article 2(1) thereof. According to paragraph 14 of its views:

■ "Taking into consideration all the information provided, the Committee considers that the facts before it reveal that the Court did not take all reasonable measures to adequately notify the author of the lending institution's application for mortgage enforcement (...), in order to ensure that the author was informed of the start of the procedure; and, as a consequence, the Court prevented the author from mounting a proper defence, in court, of her right to housing." ■

As part of its general recommendations, the Committee considers that the remedies it may recommend in the context of individual communications can include guarantees of non-repetition. It recalls that the State Party has an obligation to prevent similar violations in the future, and lists a number of possibilities in which to achieve that, namely: (i) ensuring the accessibility of legal remedies for mortgagors; (ii) adopting appropriate legislative or administrative measures to ensure that notification by public posting of notice in mortgage enforcement procedures is limited to situations in which all means of serving notice in person have been exhausted; and (iii) adopting appropriate legislative measures to

⁶⁶ See Judgment 122/2013, *op. cit.*, FJ 6.

ensure that the procedural rules regulating mortgage enforcement proceedings contain appropriate safeguards before proceeding with the auction. Finally, the Committee requests Spain to submit, within a period of six months, a written response, including information on measures taken as follow-up to its views and recommendations.

IV. Conclusion

I.D.G. v. Spain poses crucial questions concerning the material guarantees required by the right to adequate housing under the Covenant, especially as regards the protection against mortgage foreclosure proceedings for individuals and families. The Committee has seized the opportunity and clarified some of these requirements: as stated in its views, the serving of notice of the most important acts and orders in an administrative or judicial procedure must be conducted effectively so that the persons affected have a real opportunity to participate in the proceedings in defence of their rights, and appropriate judicial remedies must be available to this effect.

However, the Committee's reasoning equally raises some doubts and concerns. First of all, it has shown a somehow disengaged approach by circumscribing the inadequacy of the notification to the case at hand, instead of setting out the characteristics that public posting of notice must present in order to respect the right to adequate housing. Secondly, its examination of the procedural situation of the author appears to misconceive the full range of remedies constituting the Spanish system of fundamental rights protection, in that the Committee overlooks the existence of a crucial procedural avenue to which both parties had referred in their submissions. The availability of such remedy seems to alter the premises on which the conclusions reached by the Committee are based, both at the admissibility and the merits stage.

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