Limiting Mortgagors' Liability and Questioning the Obligation to Repay

Vindictory Approaches to Housing Justice

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Abstract: This article addresses different approaches to the spate of home repossessions experienced in Spain after the burst of the housing bubble in 2008. It considers the diverging ways in which various involved actors – legislators setting regulatory frameworks, debt advisors from governmental and non-governmental agencies, judges ruling on repossession procedures, anti-repossession movements advocating debt refusal and the ‘self-defence’ of the right to housing – have reacted to the housing crisis. Drawing on ethnographic fieldwork developed in the Barcelona metropolitan area, the article considers that a vindictory approach, one that incorporates moral ideas of justice, informed some of these diverging reactions over and against the orthodox stance that the obligation to repay is absolute. The vindictory understanding of justice advocates favouring debtors by taking into account their new circumstances and repairing the social harm inflicted on them.

Keywords: debt advice, home repossessions, housing rights, illegitimate debts, mortgages, self-defence of rights, Spain, vindication

There's a period when you prioritise the mortgage over anything else, and that's a total mistake because anyway you are going to default, but you keep thinking, 'this is not gonna last, this is gonna go by'. I keep telling people, 'some days ago a guy who came weeping, "will you be able to repay [the full loan]?" "No, I won't." "Then, stop repaying now. Don't give a single dime to the bank any more, it's not worth it. The bank doesn't care whether you owe them €110,285 or €110,000. They don't care, and you will be able to eat that month, or to buy some sneakers for your children."

In the above vignette, Esmeralda, a mortgagor facing repossession due to her inability to keep up with repayments, draws on her experience to advise first-timers at meetings of the *Plataforma de Afectados por la Hipoteca* (PAH),¹ the social movement which emerged in Spain as a reaction to the repossession crisis. In PAH meetings, a recurrent

scene took place: first-time attendants would express their reluctance to assume the condition of mortgage defaulter – an extremely stigmatised label – and stated their will to keep up with repayments despite the financial difficulties they were experiencing. The first strategy they embraced was the negotiation of a solution with their bank, one that made mortgage repayments sustainable for them. This was often at the expense of higher costs and longer repayment periods, and sometimes in the hope of recovering their previous, better-off financial situation. This attitude was often received with scepticism by more experienced PAH participants who had already assumed default as an unavoidable fate and as the starting point for their struggle against perpetual indebtedness. Fellow participants tried to tell their new *compañeros* that, under certain circumstances, a debt *should not* be repaid. They endeavoured to make newcomers understand that only after that idea had been accepted could debt cancellation be conceived as a valid decision and fought for as a legitimate claim made by distressed borrowers facing *unpayable* debts.

Throughout this article, diverse understandings of debtors' financial commitments will be considered. This will be done on the basis of the social embeddedness of debt, that is to say, acknowledging that debt does not only consist of an economic obligation, but also of social and moral ones (Graeber 2011). Such obligations are inscribed within creditor–debtor asymmetrical power relations, entail specific forms of subjectivation and experience, and are ambiguously connected to both subjugation and emancipation prospects. The 'socio-economy of debt' conceptualised by Isabelle Guérin and Govindan Venkatasubramanian (2020) to tackle this complexity will also inform this article's approach.

Interventions in creditor–debtor relations when mortgage default emerges, or it threatens to do so, can differ depending on how debt relations are interpreted: either as immutable obligations that can only be fulfilled through full repayment, even if this entails an enormous sacrifice and even a threat to the satisfaction of other basic needs, or as a commitment that may – and should – be reappraised in the event of a drastic change of a debtor's circumstances. Different actors contrastingly understand key aspects of mortgage default. These include the rights acknowledged and responsibilities attributed to lenders and borrowers; whether the legitimacy of the debt could be questioned or not; whether defaulting debtors should be approached as particular cases or as a unitary collective actor; what strategies are built to address the situation (applying laws and protocols, opening 'discreet' negotiations, generating an open conflict through civil disobedience); and whether

housing is understood as a need to be satisfied and as a right, or as a commodity and a financial asset.

Mortgagors' wish to fulfil their obligation to repay their debt is both about not abandoning their home-ownership projects and about avoiding a self-image as defaulters. For the most part of my fieldwork period (2012–2015), the Spanish legislation did not provide any bankruptcy procedure or debt cancellation mechanisms for natural persons, even if they could prove their insolvency situation. The new legislation that filled this gap² did not arrive until the worst part of the repossession crisis was over in early 2015. As for the Mortgage Act in force until 2019, it stipulated that properties could be repossessed, at the request of creditors, after three months' arrears. Up to now, and as a peculiarity of the Spanish case, debtors remain liable for the outstanding part of their debt after the auction of the property, which means that *datio in solutum* (the legal operation that settles the debt in exchange for the property) is not granted by default, but depends on the creditor's will.

Throughout the repossession crisis, orthodox approaches to mortgage default, such as the ones inspiring legislative changes that did not question the liability of debtors in hardship, have only mildly attenuated the relentlessness of repossession procedures. The interventions made by 'mediation' services (institutions providing individual advice to debtors) have not challenged the status quo either: the obligation to repay debts remains untouched, and therefore the interests of creditors tend to prevail, regardless of how dramatic the circumstances of debtors are. This is in sharp contrast with the claims made by anti-repossession movements, who adopt a moral approach when they collectively react to the housing crisis, practise the self-defence³ of the right to housing, challenge the construction of debtors' liability and advocate for debt refusal as a legitimate path towards the cancellation of unpayable debts. They do so by contextualising individual cases in which unequal relations favour credit institutions over mortgagors in the framework of the financialisation of housing (Aalbers 2008).

Further, the rigidity of repossession legislation and procedures is at odds with the attitude of some progressive members of the judiciary, who, as they have revealed in interviews, considered defaulters' particular situations of vulnerability and defencelessness in order to try and mitigate the harms inflicted on them by repossessions, the loss of their home and indebtedness for life being the most prominent among them. My data show that such judicial approaches in practice supported a certain degree of vindication that connects with the claims made by activists. Both actors share a certain vindication attitude as

it has been conceptualised by Ignasi Terradas (2022). The vindictory justice paradigm, as Terradas notes, leaves scope to contextualise debtor–creditor relations in an imbalanced distribution of power, and supports interventions aimed at addressing this imbalance. Also, from a vindictory perspective, moral implications beyond individual responsibility are acknowledged, collective interest is privileged over individual interest, contextual circumstances and power imbalances are taken into account, and procedures are reoriented towards the reparation of the harm inflicted. This all is made possible on the basis of the resignification of unpayable debts in terms of illegitimacy and social injustice.

Addressing the repossession crisis in Barcelona

The article draws on the results of ethnographic fieldwork carried out in the metropolitan area of Barcelona between 2012 and 2015. It was based on participant observation in PAH activities, interviews and the collection and analysis of secondary data such as legislation and press articles. Among research participants,⁴ there were PAH members and professionals in debt advice services,⁵ as well as lawyers, a notary, bank employees and public servants in the local administration (namely in housing and social services offices). Two judges familiar with repossession cases – one of them who I will call Bernat Ferrer, well-known in activist circles because of his sympathy with the cause of housing rights, and the other one, who I call Darío Gómez, lacking such a public profile but being an active member of a progressive judiciary association – were also contacted and interviewed in order to explore their conception of the administration of justice in such cases.

There is an extensive literature on mortgage debt and the spate of repossessions which occurred in Spain after 2008.⁶ The phenomenon has been approached by social scientists either with a focus on its inscription within the political economy of the crisis (Buendía 2020; Naredo 2009), on its impacts on household economies (Sabaté 2018), or on the popular reactions against it. This crisis crystallised in the emergence of the PAH (García Lamarca 2017; Mangot 2013; Mir et al. 2013; Parcerisa 2014; Sabaté 2019; Suárez 2017). Contrary to what has happened in other countries like the United Kingdom (Davey 2017), little attention has been paid to the role played by debt advice agencies in mortgage default cases. Similarly, the action of judges or judicial personnel has rarely been researched.⁷

The specific insights provided by the experience of the Spanish housing crisis are being examined in the light of a conception of social justice that includes both its redistribution (Harvey 1973) and recognition (Fraser 2007) dimensions. Terradas' (2022) conceptualisation of vindicatory justice is also two-fold in this sense, as it includes mechanisms for the reparation of both material and moral offences, two aspects of the social harm provoked by the crisis as an economic phenomenon (Ruggiero 2015). This points to the potential of the vindicatory approach to address the tensions between legal systems and moral legitimacy; it is an approach that allows one to identify the directions of potential legal change signalled by such tensions (Terradas 2022).

The Spanish home repossession crisis and orthodox reactions to it

The dynamics described above relate to a wider process that includes histories of predatory lending which led to household over-indebtedness and that is implicated in the collapse of the real estate bubble (López and Rodríguez 2011; Naredo 2009), which led to economic crisis and widespread unemployment. During 1997–2007, unprecedented figures of home repossessions due to mortgage default were achieved in Spain.⁸ Adverse circumstances such as job loss, decreased income, divorce and illness made thousands of households unable to make their monthly instalments. Many lost their homes to banks, and, in most cases, were forced to seek alternative accommodations, not only renouncing their aspiration to home ownership as a secure form of tenure and a token of social attainment and distinction (Allen et al. 2004), but also remaining indebted for the outstanding amount of their loans after the auctions of their properties, which entails a particularity of the Spanish case.⁹

The vulnerable sectors of the population, such as young people and the most precarious fractions of the working class, as well as newly arrived migrants who had managed to acquire flats through risky loans, were the first to be negatively impacted (Bernat 2014; López and Rodríguez 2011). This situation was greatly exacerbated by deliberate predatory practices put in place by credit institutions and mortgage brokers, as well as by the emergence of sub-prime mortgage markets (López and Rodríguez 2011; Nasarre 2011; Palomera 2013; Terrones 2013; Zunzunegui 2013). However, as the economic crisis persisted, the dimension of the problem extended beyond these already vulnerable

groups. Thus, many members of the middle class also suffered the consequences of the burst of the housing bubble, as they were increasingly affected by the high rates of unemployment¹⁰ and by other circumstances that may cut down a household's income – and thus undermine the ability to repay debts.

As the worst years of the crisis advanced, home repossessions and the consequent violation of the right to housing caused a widespread sense of injustice (García Lamarca 2017; Sabaté 2016, 2018; Suárez 2017), with considerable consensus overall in Spain. My data show that this sense of injustice prompted activism by various social organisations, forced legislators to respond with law changes (however ineffective), inspired the implementation of debt advice services, and led some judges to consider debtors' individual circumstances more explicitly. Some of these reactions entail an orthodox application of the legal framework, while others reveal a vindictory attitude, as I will contend below.

Legislative reforms and the application of the Mortgage Act

The governmental response to the repossession crisis has hardly questioned the entitlement of credit institutions to seize mortgaged properties, leaving debtors homeless, regardless of their socio-economic circumstances. For much of the period of my research, this happened in the absence of an encompassing bankruptcy procedure, transferring to the courts the responsibility to rule on the fate of defaulting mortgagors on a case-to-case basis, and providing judges with very rigid procedures:

Mortgage debtors have very limited causes to object, to defend themselves from the repossession procedure, because, strictly, the repossession [sentence] entails that either you have defaulted, or you have repaid. There is an instalment to be serviced, otherwise the procedure is simple: the property is auctioned, the bank or a third part seizes it and . . . if the outstanding amount is not settled, they can go on against the rest of your assets, which is the most common situation. We usually see this kind of procedures on paper, and very rarely get to meet the repossessed person. (Judge Darío Gómez, 31 July 2014)

When a case arrives at the court, we have to treat it following the principle of legality, even if we know the global situation [of that debtor]. (Judge Bernat Ferrer, 14 May 2015)

As a result, including in sentences the consideration of the situations of need and vulnerability in which debtors found themselves entailed

an effort for judges to establish or seek for legal precedent, to appeal to supra-national courts, to explore the application of a diversity of legal notions, etc. This was an effort that not many of them were ready to make.

At the beginning of the repossession crisis, Spain relied on the 1946 Mortgage Act. The most significant legislative reforms addressing the housing crisis were not passed until 2012, too late and insufficiently as many noted (see also Colau and Alemany 2012; Pisarello 2013), and to a great extent as a result of pressures exerted by European institutions. The activists who participated in my research were not the only ones to share this view about the late and insufficient action of legislators; some judges did too:

It is my impression that Spanish legislators (basically the government, as they have an absolute majority in Parliament) did not want to pass any forceful reform until the restructuring of the banking sector was not over. . . . I think they did not want to pass any retroactive reform that could add uncertainty, affect the markets, [or] aggravate the end of the crisis. (Judge Bernat Ferrer, 14 May 2015)

These first reforms arrived when home repossessions reached their most alarming figures and already affected the weakest among mortgagors. In March of that year, the so-called “Good Practice Protocol” (Código de Buenas Prácticas)¹¹ was passed by the government, containing recommendations for banks concerning the treatment of particularly *vulnerable* debtors. Adherence to it was voluntary for creditors, and it was binding only as regards late payment fees. Then, in November 2012, a moratorium¹² was established for evictions of vulnerable debtors from their first residences, with no alteration of the repossession procedure. This measure was extended several times, and was in force until 2020. Far from having a binding character, both of these measures were rather a set of ‘good practice’ recommendations for financial institutions, which might or might not apply them to individual cases. Also, as a common feature, these measures were based on a very restrictive determination of which debtors were to be protected by law: those who *found themselves under the exclusion threshold*, as stated in the 2012 Good Practice Protocol.¹³ This can be translated into three considerations:

- (1) They must prove that they are in *real need*, meaning that they must fit several criteria, some of which are quite arbitrary.¹⁴ The effect of these restrictions was a drastic reduction of the potential beneficiaries of protection.

- (2) They must have tried to obtain a restructuration of their debt as the first, most desirable 'solution' for their situation, even if this is counter-productive for their financial interest (as more interests are due, and money cannot be allocated to other household expenses), before being eligible for debt cancellation or for *datio in solutum*.
- (3) They must match the 'good faith debtors' disposition, which involves not only their borrowing and repaying practices, but also their moral attitudes and behaviour in other spheres of life, like, for example, the job market. Only those considered 'good faith debtors' are assessed as deserving of debt relief (Sabaté 2020).

It was not until 2015 that Spain established a personal bankruptcy procedure: the Second Opportunity or Over-Indebtedness Act (Ley de Segunda Oportunidad o Sobreendeudamiento).¹⁵ This piece of legislation included the possibility of an off-court agreement consisting of a repayment plan and a potential cancellation of debts. However, as the process is very demanding in terms of time, information and economic resources, among other elements of criticism formulated by anti-repossession movements,¹⁶ its effects have not been as noticeable, contrary to the expectations of the act's advocates,¹⁷ and have fallen short of alleviating the most urgent concerns of defaulting mortgagors, many of whom had already lost their homes and now faced the rising costs of renting a dwelling.¹⁸

Then, as late as in 2019, the Real Estate Credit Act (Ley de Crédito Hipotecario)¹⁹ was passed. This act addressed regulatory changes, among others, in order to remove the legal requirement to pay several expenses and fees which had been imposed by default on debtors. Further, under this new legislation more unpaid instalments were necessary for the bank to trigger the repossession process. But the reform did not invalidate the 'accelerated maturity' clause²⁰ that renders debtors liable for the whole debt as soon as that given number of instalments is reached.²¹

In both of these cases, the 2015 Second Opportunity Act and the 2019 Real Estate Credit Act, the path of litigation was not made available for all debtors threatened by repossessions, as it required the intervention of a lawyer. A considerable proportion of debtors in hardship were not entitled to a public defender, as it was repeatedly evident in PAH meetings.²² In addition, at the time of these laws being passed the figures of home repossessions were already declining – while a growing number of households were being affected by rent evictions and when legislation arrived, PAH meetings were increasingly attended by people

who were not necessarily defaulting mortgagors, but tenants concerned with rising rents or squatters in precarious tenancy situations.

The reforms already in place had affected the interests of credit institutions only in a very slight manner, partly because of the pace of their introduction: the first reforms had been passed when the banking system had already gone through a major restructuring, with mergers and bailouts charged to public budgets. In addition, most of these measures and policies had resulted from the implementation of European directives, after the Spanish legislation was declared incompatible with the protection of consumers by European courts, rather than being derived from initiatives of Spanish legislators, whose narrow scope for action was due to the strong influence of financial industry lobbies on Parliament and within the government. This relative inaction is attributed by activists and debtors taking part in my research to the relative impunity with which political and financial elites have refused to heed society's concerns and demands, as the counter-narrative of the housing crisis built by the PAH points out (Colau and Alemany 2012).

Debt advice and the mitigation of the housing crisis

It has been shown so far that the legislative reforms did not address the structural problems that originated the repossessions, and that they offered little protection to over-indebted mortgagors within a very narrow legal framework that did not allow a reconsideration of their financial liability. As another sort of reaction to the crisis, besides the passing of new legislation, public authorities – mainly on the local scale – allocated some resources in order to deal with mortgage defaults, evictions and homelessness on a case-to-case basis, for example by granting specific benefits to defaulters who met some criteria, or by offering advice to them. This kind of advice, often described as ‘mediation’, was provided not only by public administrations, but also by third sector organisations like the Catholic non-governmental organisation Caritas, sometimes acting independently but often as a service outsourced from public agencies. In these services, counsellors and financial experts often worked on a voluntary basis²³ to intervene in debtor–creditor relations. They often did so by suggesting that debtors make adjustments in their domestic economies that allowed them to keep up with repayments, and by encouraging them to accept debt restructuring schemes resulting in more affordable monthly instalments, trusting that there would be an improvement in their situation by the time increased re-

payments came around. Avoiding arrears and the loss of the home were two goals often mentioned by research participants to people offering these services. One of these counsellors explained their task in this way:

We talk to financial institutions, try to reach an agreement with them, work on the mortgage cases, seeking for more flexible repayments, things that allow people to stay at home, or that give them some time to relocate. . . . There are people who will never be able to pay again what they used to pay, so what we do is to adapt instalments. Let them redeem capital, getting releases or extending repayment periods, or leaving final instalments, things that allow people to pay what they owe. (JS, coordinator of Caritas' Mediation in Housing Service, September 2014)

Thus, debt advisors embraced the argument that it was best for debtors to keep repaying and to stay at home. *Datio in solutum*, a central claim of anti-repossession movements, was seen as a last resort, as it placed families at risk of becoming homeless. One of the counsellors I interviewed depicted it as 'a very personal decision' rather than a desirable collective claim and an all-encompassing basis from which to negotiate alternative housing solutions.

Mortgagors in hardship who resorted to this kind of debt advice services were therefore advised to ask their creditor to have their individual case reconsidered, and mortgage restructuring was the most usual outcome. Thus, as a general feature, debt advisors advocated for individual, 'discreet' forms of debt management through negotiations with credit institutions, which often designated specific members of their staff to deal with default cases and negotiate with debtors or their counsellors. In this way, by granting debt restructuring, banks managed to limit the volume of problem debt. In this sense, debt advisors also invoked – and tried to take advantage of – lenders' own interest in regularising default situations, as these were translated into figures that harmed their balance sheets. In advisors' narratives, debt restructuring was presented as an outcome of rational decision-making and a win–win situation both for the lender and for the borrower, and, as such, it was used as an argument in negotiations. One of the advisors explained his strategy in these terms: 'I always tell banks it is better to get a little from much than much of nothing. Banks are aware of this nowadays' (Jordi, October 2014).²⁴

Such descriptions of negotiations tend to downplay the power asymmetry between mortgage debtors and banks, losing emphasis on mediation mechanisms (Viola Demestre 2018) to become more a search for a 'solution' for the creditor than a protection for vulnerable debtors. The binding nature of loan contracts is not questioned in any event, as it can be noticed in this advisor's depiction of the bank as unable to

modify what is stipulated in a loan contract: ‘Sometimes, it is not the bank’s problem, but the customers’. Depending on how the contract is written, the bank cannot solve it either’ (JS, September 2014).²⁵

Accordingly, and in contrast with what happened in PAH assemblies, in debt advice services debtors were not advised to let themselves default, even in situations where the satisfaction of their other needs was being damaged by their repayment obligations, or despite the fact that, in many cases, as debt advisors themselves concede, debtors in trouble were not taken seriously by the bank to open negotiations until they were in arrears. In contrast to this scenario, anti-repossession movements did and do advocate for debt refusal both as a legitimate strategy and as a political claim, as I will illustrate in the following section.

Questioning debt repayment as an absolute obligation

The actors mentioned so far – public authorities, legislators, and debt advisors – tend to consider the obligation to repay debts as an absolute, unquestionable duty, while others I will focus on next – progressive judges, anti-repossession movements – contend that debt repayment can and should be reconsidered and to some extent contested under certain circumstances when debts can be viewed as abusive or predatory, as an attack on the right to housing, as well as, ultimately, as an attack on social justice. In this way, certain debt obligations are resignified as the result of financial predation, and therefore are a threat to the right to decent housing, as it may be seriously endangering the aspiration of debtors not only to keep their homes, but also to overcome hardship and carry on with their lives. A quote from Salvador, a mortgage debtor facing the repossession of his own flat and that of his parents-in-law, who had acted as guarantors in his loan contract, expresses this aspiration for a second chance in life:

I don’t intend to have the flats for free. No, I give you one of them, but let us stay in the other one, repaying the mortgage at a pace that I can assume. Offer me the conditions I can assume, and I will commit myself. I have a job. I can pay you 300, 350, 400 [Euro per month], but let my family be safe, stable, ok. Don’t try to throw me to the street or to abuse me.

For Salvador, the bank, reclaiming both flats and threatening to leave the two nuclear families homeless, is acting in a predatory way, against what is deemed fairness. According to him, a fairer outcome would be

attained if the circumstances of his family were taken into account. Salvador's view is not isolated, but part of a sense of injustice that is widely shared by different actors, such as activists and progressive judges. It is a sense of injustice that allows for a vindictory attitude that attributes moral responsibility for the crisis to political and financial elites, and that takes into account the defencelessness of debtors in claiming their rights.

Anti-repossession movements and the self-defence of the right to housing

During the repossession crisis, a deep questioning of debt obligations emerged, pointing at the social harms inflicted by market dynamics (Ruggiero 2015) and reacting in self-defence against them (Polanyi 2001). The action of newly emerged social actors that fostered the collective organisation of defaulting mortgagors can be interpreted in this way. A number of anti-repossession movements, the above-mentioned PAH being the most prominent among them, played a two-fold role: (1) politicising the housing crisis by demanding structural, legislative changes; and (2) taking care of particular cases by supporting debtors during negotiations, by putting pressure on banks through public mobilisations at local branches and at various headquarters, and by practising civil disobedience during eviction blockades. Activists in these movements have demanded the introduction of imperative *datio in solutum* in mortgage legislation, for debt cancellation in the case of already evicted debtors, and for the concession of affordable rental contracts to households who have gone through a repossession process. Additionally, many PAH assemblies, as well as those of other housing movements, are promoting the idea that homeless people should squat at the vacant housing that is in the hands of banks or institutional landlords. Through this variety of practices and claims, anti-repossession movements advocate the refusal of illegitimate, unpayable debts, and thereby foster civil disobedience in the face of the obligation to repay mortgage debt. Their everyday actions aim at the 'self-defence' of the right to housing and to a debt-free life.

This approach is opposed to that of debt advisors in political terms: the PAH's collective actions intend to promote a new conscience about the situation as structurally originated, and to build a counter-narrative that blames banks and politicians²⁶ for the spate of home repossessions, thus reversing the usual blaming of defaulting debtors (Colau and

Alemaný 2012; Sabat 2019). It also intends – and has managed to a great extent – to trigger the empowerment of debtors (Mangot 2013; Mir et al. 2013) and to conceptualise a creditor class (Ross 2014) against which the struggle needs to be oriented.

The legitimacy of debts is questioned by the PAH with a variety of arguments: the abusive conditions of contracts (predatory and subprime lending, violation of consumers’ rights);²⁷ the disproportion between households’ economic conditions and the burden represented by debt instalments; the unexpected circumstances (unemployment, illness, marital breakdown) that have changed domestic economies; the existence of more pressing needs and of other responsibilities considered morally superior to the obligations towards the bank; the right to housing as a basic resource; and the right to a second chance in life through debt relief or cancellation. Several of these arguments were contained in the account offered by Esteban, a participant who was trying to obtain the cancellation of his mortgage debt and the possibility to stay at home with an affordable rent contract:

If they [the bank] give us a rent, €300 or €400, you know, that would be a way . . . With my pension, her wage [his wife’s wage], and if I start to work somewhere, and the girls start to be more independent, the eldest at least . . . That’s our hope, of course. Things will be better. But that’s a dream you make up, because [the] future is grim. No future. Nothing. Everything depends on the bank and the government. Both ‘partners’ [the bank and the state] should agree to help. In fact, they are to blame for this mess, not us.

In this way, the delegitimation of mortgage debt becomes the mechanism through which anti-repossession movements articulate an alternative understanding of social and economic justice. The movement’s active promotion of the decision to stop repayments challenges the strong social norms that force borrowers to repay debts and to fulfil contracts, exerting an implicit violence (Graeber 2011) that becomes visible in evictions carried out as a result of default and repossession.

Participant observation carried out during PAH meetings revealed a certain paradox: it was often the most dispossessed among defaulting debtors – those who had no properties, no income, no guarantees or social support networks – who had the biggest potential to become empowered and attain their goals, however modest, in negotiations with creditors. This can be attributed to the fact that they threatened creditors’ interests in a more vigorous manner: they had nothing to lose, the money they borrowed could not possibly be recovered, and no further interest or late payment fees could be charged to them. That was, for instance, Nelson’s case: a father of three and a migrant from Ecuador,

he obtained a *datio in solutum* after being in default for many months, providing proof of his insolvency situation, and after the bank had verified that the guarantor of his mortgage loan contract, a semi-stranger and fellow Ecuadorian who had been involved in a cross-guarantee scheme,²⁸ was also in default with his own flat and about to move back to his home country. In the absence of any possibility to keep on extracting any value from Nelson's household, the bank finally accepted the flat in exchange for debt cancellation.

The cases exposed in PAH assemblies also illustrated how banks tended to avoid negotiations until mortgagors were already in default, forcing them to mobilise any available resources from their social networks in the meantime. Drawing on this accumulated experience, assemblies take the transgression of the obligation to repay what comes to be seen as an illegitimate debt as the starting point of mortgagors' self-defence. By defaulting, debtors open up the possibility to have their financial obligations reconsidered, even in the absence of legal protection.

Popular legislative initiatives and the practices of progressive judges

In view of the lack of protection for mortgagors within the Spanish legislative framework – one that disproportionately supports the interests of credit institutions – some organised sectors of civil society promoted Popular Legislative Initiatives (ILPs) in order to pass more protective legislation. However, these initiatives have been systematically rejected in the Spanish Parliament. For instance, in 2013 the PAH and other organisations collected more than 1.5 million signatures supporting legal changes consisting in the regulation of imperative *datio in solutum*, the cancellation of outstanding debts and the setting of affordable rents for evicted families. Despite the huge popular support for the initiative and the great impact of the campaign on public opinion, the initiative was blocked by the parliamentary majority. More recently, in 2015, a new legal text containing five measures – the so-called '*5 de la PAH*' – was proposed, and again it came up against several obstacles, to which the instability of the subsequent Spanish governments and the relative disappearance of the housing crisis from the focus of the media also contributed greatly. In contrast to these failures, popular initiatives have had some success in regional Parliaments, with several acts aiming to alleviate the housing crisis being passed, although the actual enactment

of this legislation has encountered many obstacles as well for political reasons that can be attributed again to the pressures of the banking industry and other actors holding interests in the real estate sector.

The perception that more legal protection for debtors in hardship is needed was shared by the most progressive sector of the judiciary. The judges interviewed reported how, in their seeking for a fairer outcome of repossession demands and procedures, they resorted to EU and international courts and sentences as a strategy to refrain from ordering repossessions in cases where either human rights or consumer rights were endangered. They also engaged in discussions within their professional field about the pertinence of applying certain legal doctrines²⁹ to repossession cases that would alleviate the social harms provoked by the routine implementation of legal procedures against defaulting debtors. More broadly, the judges I interviewed described the legal framework as narrow and hostile to defaulting debtors, and conceded that repossession procedures were ‘too rigid’, as Judge Darío Gómez put it.³⁰ These circumstances forced them to be ‘creative’ in their sentences, in Judge Bernat Ferrer’s words, for instance by using existing court precedent or by appealing to courts beyond the national level in order to counteract the abusive nature of the debtor–creditor relationship. The scope for this ‘creativity’ was limited by their duty to respect the legality principle and to avoid slipping into a perversion of justice. In this sense, Judge Bernat Ferrer emphasised his obligation to apply the law, but also to point at possible aspects of it that may be unconstitutional, or that entail a contradiction with European norms, a contradiction that can be used as an argument in a sentence. He made a clear distinction between ‘creative’ interpretations of the law that observe the principle of legality, which he found desirable and illustrated with his experiences in court, and those that transgress it. More generally, the accounts of the progressive judges I interviewed pointed to the need for legal instruments that would allow a more balanced administration of justice, beyond the discretionary power of particular judges, entailing a more comprehensive protection of vulnerable debtors in repossession cases.

Vindictory aspects of the self-defence of society against illegitimate debts

As I have shown above, the Spanish legislation provides little grounds for the protection of defaulting mortgagors through the justice system. This leaves in the hands of judges the initiative to take into account

factors that would allow them to interpret the situation as abuse and, eventually, to rule in favour of debtors, something that, on a few occasions, has set court precedent, particularly as regards the field of consumer protection. However, the narrow scope for interpretation allowed by the legislation in force, in addition to judges' duty to respect the legality principle, has prevented the limitation of debtors' financial liability on a large scale, despite their hardship situation.

In addition to what has been happening in the courts, in Parliament and in the Cabinet of Ministers, the debt advice services put in place by local authorities and charitable organisations has aimed at case-to-case solutions not entailing debt cancellation, and therefore not questioning the general framework in which indebtedness and default was attained. In this way, a rationale based on the absolute prioritisation of financial obligations over other expenses and commitments is reinforced.

In contrast to all this, the emergence of anti-repossession movements can be seen as a questioning of the obligations imposed on mortgagors in hardship, as well as a push for the transformation of the legal framework and the administration of justice, one that aims to attain social justice – in the form of access to decent housing and the liberation of debt burdens – for debtors. In order to support this new view, several aspects of the anti-repossession movements' approach, illustrated by the discourses and actions of the PAH, will be analysed in the light of the vindicatory approach to (social) justice depicted by Ignasi Terradas (2022).

As I mentioned above, Terradas (2022: 7) describes an *intermingling of moral and legal legitimacy* in vindicatory justice. In this sense, anti-repossession activists struggle to portray debts as immoral on the grounds that they strangle people's basic means of subsistence, and deny them the right to shelter, irrespective of the legality of the contract that was signed by the parties. In addition, the movements' claims for justice are founded on a depiction of home reposessions not merely as legal processes, but as a far more complex phenomenon embedded in the housing crisis. This crisis has an economic nature, but its political and social elements are also unveiled if it is conceptualised as a collective fraud with identifiable, liable authors rather than as a 'spontaneous', uncontrollable macro-economic event. All this reasoning elaborated by anti-repossession movements contributes to the 'de-judicialisation' of home reposessions, in the sense that the situation of debtors should not be solved in court, but through the provision of social protection. It also highlights the mutual dependence of *legal institutions and moral, political, economic and even religious motives* (Terradas 2022: 7). As a

'housing emergency' with great social impact and causing much human suffering, the immediate intervention of the state, which should not remain indifferent, is required. In being attributed the responsibility to intervene, public authorities are not so much asked to *punish the offender*, but to repair the harm already done (*repair the offended*) (2022: 9), and to prevent further social suffering from happening by means of structural reforms.

Similarly, within PAH assemblies, particular cases were assessed with a great emphasis on their contextual aspects. While taking the floor to introduce themselves and tell other members about their concerns, debtors are granted time to publicly explain their circumstances, how they have reached their desperate situation, how the threat of a repossession is affecting their household, and so on. This contextualisation contributes to building the argument that the mere application of what procedural law establishes for mortgage default cases, disregarding the debtors' personal circumstances, entails an injustice, and that civil disobedience to these laws is therefore a legitimate strategy. The exposition of cases – in front of the assembly and in front of society at large – is thus based on a *contextualisation* of circumstances rather than on *the application of norms* (Terradas 2022: 10), the Mortgage Act in this case. As it has been shown, this also fits the attitude of some judges who, despite acting within the principle of legality, are making great efforts to interpret the law in ways that allow the court to consider the global situation (deep economic crisis, pervasive unemployment, defencelessness of households in front of repossession processes) and to assess to what extent the imbalance of power between creditors and debtors paves the way for abusive lending practices.

The PAH's approach relates to what Terradas (2022: 25) refers to as a *conflict with the individualist ethos of our society*. A great part of the PAH's efforts has been oriented towards the generation of consciousness about the collective nature of the repossessions problem, as well as towards the construction of collective action and negotiations in order to get over the previous isolation of individual debtors and to build their common goals in front of the interests of credit institutions – also acting collectively in influencing government and legislators. In contrast to these efforts, both the judiciary system and the provision of advice for case-to-case negotiation with credit institutions are expressions of an individual approach very much in line with contemporary representations of the contemporary subject, an individual who is the main *unit of responsibility*, very much like Maurizio Lazzarato's (2011) indebted man.

As it has been described above, debt advisors often play a 'neutral', technical role, providing debtors with advice but also supporting the interests of banks, which are in turn interested in unblocking cases that otherwise would be lost and negatively affect their balance sheets. Mediating in these situations entails, therefore, serving – and veiling – the interests of the strongest part of the credit relationship, and therefore *masking injustice* in the framework of *an imbalance of power* (Terradas 2022: 11). To the contrary, the PAH intervenes during negotiations with banks, not as a mere source of juridical knowledge adopting an equidistant position, but firmly supporting debtors and mortgagors, and reminding them that, as a collective, they can exert force themselves so as to have particular cases solved in their favour.

In anti-repossession movements, just as in vindictory forms of the administration of justice, a *social conception of justice works as an inspiration to change the judicial process or by refining laws* (Terradas 2022: 7). It is on the basis of popular senses of justice and injustice that pressure to change legislation is exerted, as it has been shown, through popular legal initiatives. A telling example of this would be the demand for imperative *datio in solutum*, a legal reform that would allow mortgagors to walk away in exchange for their properties. Many people, mortgagors or not, saw this solution as a fair one, as it was expressed through signatures in support of a popular legal initiative in 2013.

Terradas (2022: 8) describes the *juridical relevance of the recognition or acknowledgement of offences*, which is linked to the duality between *the material and the moral suffering* (2022: 9) inflicted. This trait can also be identified in the case studied in this article. Anti-repossession movements not only aim at improving the material situation of defaulting mortgagors, but also at repairing their dignity and social image: from losers and culprits of their own situations, guilty of having lived 'beyond their means' and unable to manage their own household economies, to victims of a collective scam who have been able to overcome their desperation and to empower themselves. In making these claims, they invoke their right to be repaired – either by the credit institution or by public authorities – after the process of dispossession they have gone through. This resonates with a vindictory attitude that becomes very salient in debtors' life trajectories and in the mutual recognition among fellow members of the PAH. Even for those who have managed to solve their cases, *composition* has not only consisted of material aspects, but also of the restitution of their dignity and the discovering of their political agency within the collective.

Conclusion

During the spate of home reposessions experienced in Spain, legislators setting regulatory frameworks, governmental and non-governmental organisations providing debt advice, progressive judges ruling on repossession cases, and anti-repossession movements advocating debt refusal and the self-defence of the right to housing have diverged greatly in their reactions and interventions. While legislators and debt advisors have adopted an orthodox stance and assumed that the obligation to repay is an absolute one that is sanctioned in contracts and cannot be circumvented, anti-repossession movements and, to some extent, progressive judges contend that it should be attenuated by other considerations of a contextual and/or moral nature. The latter stance entails a questioning of the obligation to repay excessive mortgage debts, or, at least, a limitation of debtors' liability under certain circumstances.

As I indicated above, Terradas' (2022) understanding of vindicatory justice has allowed me to identify the intertwining of legal and moral legitimacy in the instances where actors take contextual circumstances as well as imbalances of power into account, and where the intervention in mortgage default situations is oriented towards the reparation of the harm inflicted on debtors by excessive indebtedness. These insights may be idoneous to guide the exploration of possible ways to improve laws and legal procedures on the basis of specific experiences of justice and injustice.

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Notes

1. Platform of People Affected by Mortgages, a movement whose first assembly was created in Barcelona in 2009, and then spread to the rest of the country. Although more details on some activities of the PAH will be offered later in this text, a more complete account has already been provided elsewhere (Sabaté 2020).

2. Real Decreto–ley 1/2015, de 27 de febrero [Royal decree–law 1/2015 of 27 February].

3. The term used in Spanish is *auto-tutela*. An alternative translation would be 'self-protection'.

4. All names of participants are pseudonyms. This way, I could provide them with anonymity.

5. I am referring here to Caritas' Mediation in Housing Service in the Diocese of Barcelona, to the Housing Debts Intermediation Service put in place by the provincial administration in Barcelona [Diputació de Barcelona] and often hosted in local Housing Offices, and to Ofideute, an office run by the Housing Agency of the Catalan government. The similar inspirations of these three services, with differences among them merely consisting on a more legal or more *financial* approach to debts, justifies the use of 'debt advisors' as a term encompassing the three of them for my purposes here.

6. For the relevant statistical information on home reposessions, I consulted the websites of the Consejo General del Poder Judicial (*Estadística sobre los Efectos de la Crisis en los Órganos Judiciales* [Statistics on the effects of the crisis on judicial bodies]. <http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estudios-e-Informes/Efecto-de-la-Crisis-en-los-organos-judiciales/>); and the Instituto Nacional de Estadística (*Hipotecas de viviendas constituidas sobre el total de viviendas* [Mortgages of homes constituted on the total of dwellings]. <https://www.ine.es/uc/5Yv0KZ99>).

7. See Vetta (Forthcoming) for an interesting exploration of repossession trials in Greece.

8. According to the Consejo General del Poder Judicial, 778,606 reposessions were presented to Spanish courts between 2007 and 2018, 151,844 of them in Catalonia and 92,569 of them in the Province of Barcelona (see above, note 6).

9. In contrast to what happens in the United States (Jefferson 2013; Martin and Niedt 2015; Stout 2019), in Spain mortgage debts are not wiped out after the repossession process. Rather, an outstanding debt is still owed even after the eviction and the auction of the property, which, for many mortgage defaulters, constitutes an important burden to be borne indefinitely.

10. In Spain, unemployment rates, according to the Encuesta de Población Activa, remained over 20 per cent between the fourth trimester of 2010 and the second trimester of 2016 (Instituto Nacional de Estadística, *Encuesta de Población Activa* [Labour force survey], https://www.ine.es/prensa/epa_tabla.htm).

11. Real Decreto–ley 6/2012, de 9 de marzo [Royal decree–law 6/2012, of 9 March].

12. Real Decreto–ley 27/2012, de 15 de noviembre [Royal decree–law 27/2012, of 15 November].

13. More precisely, the protocol establishes the following criteria, which debtors must meet in order to benefit from it: "(a) All members of the household lack income from work or economic activities. The household includes the debtor, his/

her non-divorced spouse or *pareja de hecho* (common-law partner), and their co-resident children; (b) mortgage instalments amount to more than 60 per cent of the net income of the whole household; (c) members of the household lack other goods or properties that are sufficient to repay the debt; (d) the mortgaged property is the only housing unit owned by the debtor and the mortgage loan has been taken on for its acquisition; (e) there are no other guarantees (real or personal) on the debt, except for guarantors who are under the circumstances mentioned in (b) and (c); (f) if there are co-debtors who are not part of the household, they are under the circumstances described in (a), (b) and (c)" (my translation).

14. For instance, having children under 3 years of age, as established in the 2012 moratorium.

15. Real Decreto-ley 1/2015, de 27 de febrero [Royal decree-law 1/2015, of 27 February].

16. <https://afectadosporlahipoteca.com/2015/03/04/segunda-oportunidad-no-es-oportunismo-tramposo>

17. For instance, Judge Bernat Ferrer, member of the association Àgora Judicial, interviewed in May 2015.

18. A second wave of dispossession has stricken Spanish dwellers during the contemporary rental market bubble, which was strongly incentivized by legal changes introduced in 2012–2013 (Gil García and Martínez López 2021). Currently, evictions of tenants have become much more frequent than reposessions. Some of them are due to non-payment, but some of them are no-fault evictions (Anzano 2018; Palomera 2018).

19. Ley 5/2019, de 15 de marzo, reguladora de los contratos de crédito inmobiliario [Law 5/2019, of 15 March, regulating real estate credit agreements].

20. In Spanish, *cláusula de vencimiento anticipado*.

21. See the PAH's position on this law at <https://afectadosporlahipoteca.com/2019/06/18/nueva-oportunidad-perdida-la-pah-te-cuenta-en-que-te-afecta-la-nueva-ley-hipotecaria/>.

22. The requirements to be entitled to a public defender are very restrictive in Spain, and, even when debtors are accorded legal representation, such lawyers are not necessarily familiar with this legal field, and often not motivated enough to represent clients facing repossession.

23. Interestingly, many of these 'financial experts' are retired bank employees, who now wish to alleviate the social suffering inflicted by home reposessions.

24. Jordi was a retired bank employee and advisor at the local Housing Office of a city near Barcelona, a service run by Caritas, where he volunteers.

25. JS is the co-ordinator of Caritas' Mediation in Housing Service.

26. Not so much the real estate industry, interestingly.

27. For instance, excessive late repayment fees or the inclusion in contracts of 'ground clauses' (*cláusulas suelo*) establishing minimum interest rates.

28. A common practice during the housing bubble consisted in two people, often only acquaintances, acting as guarantors in each other's mortgage loan contracts. The supervision of Banco de España was circumvented because both operations took place in different banks and almost simultaneously, thus preventing the detection of the total indebtedness assumed by each participant.

29. Such as *rebus sic stantibus*, which would add flexibility to the liability of contracts in the event of changing circumstances for the parties.

30. *La ejecución hipotecaria es un procedimiento muy tasado* [Foreclosure is a very rigid procedure] (Judge Darío Gómez, member of the association Jueces por la Democracia, July 2014).

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