Bringing justice to the disadvantaged

A commentary on CESCR’s decision in IDG v Spain

(Communication No. 2/2014)

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Introduction

This is the first decision of the Committee on International Covenant on Economic, Social and Cultural Rights (CESCR) after the entry into force of the Optional Protocol to the Covenant on Economic, Social and Cultural Rights in May 2013. The Optional Protocol was adopted in 2008 to allow for individual communication to the CESCR. It is believed that individual access to the CESCR will not only strengthen accountability mechanism to realize socio-economic rights, but will also give hope to the hopeless (Chenwi: 2010).

The applicant brought an action against the government of Spain to challenge the procedure adopted to enforce a mortgagee transaction, which did not ensure proper services of court notices, as constituting a violation of her right to adequate housing as guaranteed under article 11 of the Covenant. The facts of the case relate to a homeowner, Ms. I.D.G, whose home was auctioned when she fell behind on payments during the economic crisis in Spain. Ms. I.D.G only became aware of the case against her after a judgment was handed down, when the sheriff delivered a letter notifying her of the impending auction of her home. When she took the matter to the Spanish Constitutional Court as a housing rights violation, her case was dismissed. She then took the matter to the CESCR. The Committee found that state parties must ensure effective remedies for homeowners who have defaulted on mortgage payments, and must ensure that appropriate measures are taken to ensure personal notification of foreclosure proceedings.

Deconstructing the right to adequate housing

It is of great interest to note that the first case the CESCR will have to adjudicate on deals with the very complex and controversial issue of a mortgage transaction. The relationship between a mortgagor and a mortgagee is often viewed as strictly contractual in nature and as such is outside the scrutiny of human rights principles and standards. This is so despite the power imbalances existing between the mortgagor and mortgagee as the former is nearly always at the receiving end, without avenues for redress. The CESCR notes that while this case raises some procedural issues, its main focus is to examine the human rights issues that arise from the way and manner in which the process for the enforcement of the mortgage transaction was carried out. In the CESCR’s view, the major question was whether the applicant’s right to adequate housing was violated as a result of a mortgage enforcement process that did not afford the applicant adequate opportunity to defend the case. In determining this issue, the CESCR explores the meaning and content of the right to adequate housing under article 11 of the Covenant. Its explanation was guided by its earlier General Comments Nos. 4 and 7. According to the CESCR, appropriate and due process constitute essential elements of all human rights, particularly in relation to forced eviction.

More importantly, the CESCR notes that procedural protection should include provision by the state of adequate and reasonable notice for all affected persons prior to eviction and in addition the provision of legal aid for their defence. This is a broad interpretation of the right to housing which has not been accorded much attention. While attention has been given to the issue of state sponsored evictions by national courts and regional human rights bodies, the same cannot be said of individual displacements as a result of enforcing mortgage transactions. Therefore, the Committee can be said to be breathing fresh air into the conceptualization of the right to adequate housing.

In the case involving Ms. I.D.G, the CESCR notes that states have the obligation to take reasonable measures with a view to ensuring that service of notice of the most important acts and orders in any administrative or judicial process is properly and effectively carried out, so that the affected person is given an opportunity to participate in the process. While the CESCR observes that public posting of a notice may be an acceptable way of notifying a party of a legal action, such a procedure should be used as a means of last resort in cases involving violations of the right to adequate housing. In some Common Law jurisdictions, proper service of court notices is sine qua non to assuming jurisdiction by the court. Where evidence abounds to show that services have not been properly carried out, the court will decline jurisdiction. For instance, the Nigerian Supreme Court in Skenconsult Ltd. v Godwin Ukey (1981) noted that failure to properly serve a party court notices goes to the root of the case and would render the court incompetent to assume jurisdiction of the case.

In arriving at its decision, the CESCR made reference to decisions of national courts and regional human rights bodies on this issue. In particular it was influenced by the decision of the South African Constitutional Court in cases
such as *Gundwana v Steko Development* (2011), where the Court held that there must be judicial oversight over cases of foreclosure against residential property; and *Kubyana v Standard Bank of South Africa Ltd* (CCT 2014), where the Constitutional Court found that banks must make every reasonable effort to ensure that a debtor is properly notified about his/her default in payment before execution of judgment.

By this observation, the CESCR would seem to be expanding states’ obligations to protect the right to adequate housing. In essence, beyond preventing unlawful eviction, states are also obligated to ensure that an individual facing forced eviction as a result of a mortgage transaction has recourse to a fair and just administrative or judicial system. Put another way, forced eviction is not limited to physical acts, but also includes the failure to ensure redress and access to justice for victims of forced eviction. By so holding the CESCR should not be seen as creating additional obligations, but rather as clarifying the nature of obligation imposed in relation to forced eviction whether by state agents or private actors. Given that this case centres around a mortgage transaction between an individual and a bank (a non-state actor), the CESCR would seem to be invoking the due diligence doctrine to hold the government of Spain responsible for its failure to protect its citizen from forced eviction occasioned by the enforcement of a mortgage transaction by a non-state actor. Moreover, the CESCR would seem to hold that the negative obligation imposed in relation to the right to adequate housing can be shared by both states and non-state actors. This would seem to coincide with the reasoning of the South African Constitutional Court in *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* (CCT47/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC), wherein the Court noted that both the state and private parties have a duty not to interfere unjustifiably with any person’s existing access to adequate housing. The Court noted further that any measure that permits a person to be deprived of existing access to adequate housing, unless justified by the law, will amount to a limitation of the rights protected in section 26(1).

The CESCR observed that its duty is not to determine whether domestic procedural rules have been properly complied with but rather to identify socio-economic right violations that might have occurred as a result of improper application of such procedures. Sometimes drawing the line between domestic application of procedural rules and human rights violations is not an easy task. In some jurisdictions, the issue relating to proper service of notice is largely procedural, which is dealt with by applicable domestic rules. Given that this case raises both procedural and human rights issues it becomes difficult to draw the line between the two. Perhaps a plausible explanation could be that if applying domestic procedural rules will lead to manifest injustice, as this case would seem to suggest, then the CESCR is justified to intervene in such a situation.

While the CESCR acknowledges efforts made to personally notify the applicant about the enforcement of the mortgage order, it reasons that other options (such as leaving an advice note in the letter box) could have been explored to put the applicant on notice. It is not clear what the CESCR means here. If a rule of procedure stipulates various ways of notifying a party to a suit and one of such means has been carried out diligently, should that not suffice as proper notice? In some jurisdictions, especially Common Law jurisdictions, if physical service of court processes cannot be achieved the other options recognised include the public posting of a notice (if the suit concerns an individual) and the placing of advertisements in newspapers (if it concerns a corporate or governmental institutions).

The significance of this case is the crucial role played by civil society organizations in making a strong submission to the CESCR. In line with article 8 of the Optional Protocol, the ESCR-Net represented by organizations such as the Center for Economic and Social Rights (CESR), the Global Initiative for Economic, Social and Cultural Rights (GI-ESCR), and the Socio-Economic Rights Institute of South Africa (SERI) were admitted as third-party interveners. The submissions by these organizations would seem to have enriched the quality of the CESCR’s decision. This would seem to suggest that article 8 of the Optional Protocol was properly thought through by its drafter.

Also, this case has shown that the CESCR occupies a pivotal position in not only clarifying the content of the Covenant but also in providing hope and remedy for vulnerable and disadvantaged groups. The CESCR reiterated the indivisibility and interrelatedness of human rights, noting that denial of access to justice and fair administration process is essential to the realisation of socio-economic rights, such as the right to adequate housing.

This case seems to have broadened the meaning of the right to housing under article 11 of the Covenant. By this decision, the CESCR seems to suggest that the right to adequate housing does not merely impose positive and negative obligations on states, but also requires states to ensure effective judicial remedies for vulnerable and marginalized groups in order to assert their socio-economic rights. More importantly, this case seems to imply that non-state actors have the duty to respect the right to housing and that mortgage transactions will be carefully scrutinized so that their enforcement in the event of default will not undermine an individual’s right to adequate housing.

It should be noted that the applicant involved in this case is a woman, which raises the gender dimension of a mortgage foreclosure. In most societies women are histor-
ically disadvantaged and often do not have same access to property or land as their male counterparts (Fareda 2005; Durojaye 2013). Thus, the effect of a mortgage foreclosure for a struggling woman, such as the applicant in this case, can be devastating. Unfortunately, the CESCR omitted to consider the gender dimension to this case. This is a missed opportunity for it to reinforce equality in the enjoyment of socio-economic rights, paying attention to the plight of women who often form part of vulnerable and disadvantaged groups in society. Hopefully, this omission will be corrected in future cases.

It is fair to state that the CESCR has started on a good note in its first decision since the entry into force of the Optional Protocol in 2013. As of August 2015, about 21 countries have ratified the Protocol, including three African countries – Niger, Gabon and Cape Verde – while another 45 countries have signed. Given that the Protocol provides the CESCR with great opportunity to clarify the provisions of the Covenant and ensure accountability in the enjoyment of socio-economic rights at the national level, countries (particularly African countries) that are yet to ratify the Optional Protocol should do so without further delay (African Commission 2012).

References


Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others (CCT74/03) [2004] ZACC 25; 2005 (2) SA 140 (CC); 2005 (1) BCLR 78 (CC).

Gundwana v Steko Development CC and Others (CCT 44/10) [2011] ZACC 14; 2011 (3) SA 608 (CC); 2011 (8) BCLR 792 (CC).

Kubyana v Standard Bank of South Africa Ltd (CCT 65/13) [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC).