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HOMELESSNESS AND RESIDENTIAL EXCLUSION. CONTROL, SOCIAL SERVICES AND HOUSING POLICIES*

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Abstract

Traditionally, homelessness has been addressed by the basic municipal social services, that provide limited-stay residential services which, in many cases, have been replaced with economic benefits to fund places in hostels or similar centres. The social services have been considered to be a mechanism completing the welfare state and filling the gaps left by other social protection systems such as housing. It is therefore necessary to better delimit the function of the social services, which should focus on attending to and caring for people, and, at the same time, establish housing policies with the involvement of all the competent administrations, thus providing a residential response to homelessness. Although local authorities can play an important role in this respect, the attribution of new competences must be accompanied by adequate funding, and should not be limited to general mechanisms, but rather supported by specific funds and budget allocations which ensure the viability of the system. An overview of the various types of residential exclusion is also needed, in order to establish preventive and not just reactive measures. Finally, the use of the public space by the homeless should be considered from the perspective of the right to the city. Historically, homelessness has been subject to repression and invisibility, through police control measures aimed at removing people in this situation from the public space. The claim to this space means that local bylaws cannot forbid begging in a generalised manner. At the same time, the right to the city is incompatible with hostile design or architecture.

Keywords: homelessness; social services; right to housing; right to the city; public space; aporophobia; hostile architecture.

EL SENSELLARISME I L'EXCLUSIÓ RESIDENCIAL. ENTRE EL CONTROL, ELS SERVEIS SOCIALS I LES POLÍTIQUES D'HABITATGE

Resum

Tradicionalment, el sensellarisme ha estat abordat des dels serveis socials bàsics, de competència municipal, mitjançant serveis residencials d'estada limitada que, en molts casos, han estat substituïts per prestacions econòmiques per finançar places en albergs o centres anàlegs. Els serveis socials han estat considerats un mecanisme de tancament de l'estat del benestar que supleix les deficiències d'altres sistemes de protecció social, com és el cas de l'habitatge. Resulta necessària, per tant, una delimitació millor de la funció dels serveis socials, que haurien de centrar-se en l'atenció i la cura a les persones, i construir, al mateix temps, polítiques d'habitatge amb la implicació de totes les administracions competents, per donar respostes de caràcter residencial al sensellarisme. Si bé les entitats locals poden tenir un paper rellevant en aquest àmbit, l'atribució de noves competències ha d'anar acompanyada d'un finançament adequat, i no s'ha de limitar a la remissió dels mecanismes generals, sinó que s'ha d'acompanyar de fons específics i preassignacions pressupostàries que garanteixin la viabilitat del sistema. Cal, a més, una visió general de les diverses situacions d'exclusió residencial per articular mesures preventives i no solament d'atenció. Finalment, es planteja que l'ús de l'espai públic per part de les persones en situació de sensellarisme es consideri des del dret a la ciutat. Històricament, el sensellarisme ha estat objecte de repressió i invisibilització, a través de mesures de control policial dirigides a apartar de l'espai públic les persones en aquesta situació. La reivindicació d'aquest espai comporta que les ordenances locals no puguin prohibir de forma generalitzada la mendicitat; alhora, el dret a la ciutat resulta incompatible amb el disseny o l'arquitectura hostil.

Paraules clau: sensellarisme; serveis socials; dret a l'habitatge; dret a la ciutat; espai públic; aporofòbia; arquitectura hostil.

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Contents

1 Homelessness: general approach[1]

Homelessness is undoubtedly one of the most serious forms of exclusion suffered by individuals in a clearly hostile context. According to verified studies, living in the street considerably reduces life expectancy compared with the rest of the population, depending on the age and gender of the group analysed (Calvo García et al., 2021). People living in the street are also in a serious situation of vulnerability, being exposed as victims to unjustified criminal attacks undertaken by individuals who express their hatred or rejection of poor people, a phenomenon that has been called *aporophobia* (Cortina Orts, 2017). The creation of stereotypes concerning homelessness, such as "uncleanliness, danger and deviant behaviour" (Sales Campos, 2021, p. 207), contributes to the dehumanisation of these people and converts them into an easy target for these types of attacks. Homelessness leads to potential victims being more exposed and to the belief that these crimes will be subject to less social disapproval or even impunity on not being reported (Puente Guerrero, 2021, p. 282).

Homelessness has complex and diverse causes. It results, on the one hand, from having exhausted all personal and social resources and, on the other hand, from the accumulation of a series of social exclusion factors (Sales Campos, 2016, p. 16). It is, in any case, a structural problem on which society has turned its back many times and for which the public administrations have established timid and insufficient responses. In view of this situation, third sector organisations have had to play a decisive role, both to attend to people in this situation and to raise public awareness about the size of the problem. In many cases, they have had to fill the void left by the lack of an administrative response, and they have been overwhelmed due to the lack of resources to apply measures that the public administrations should be implementing. For its part, society has often turned its back and ignored these life situations present on the streets of our cities.

The third sector has developed a European Typology on Homelessness and Housing Exclusion (ETHOS), with a view to identifying the situations of the individuals affected. This typology was produced by the European Federation of National Organisations Working with the Homeless (FEANTSA) to be able to take the necessary measures. Specifically, there are four main categories: a) *roofless*; b) *houseless*; c) *insecure housing*; d) *inadequate housing*. In turn, these categories are divided into others, making a total of 13.[2] On specifying the different situations, we obtain an overview of the phenomenon, allowing us to foresee preventive measures to avoid the most extreme situations, rather than being restricted to carrying out assistance actions once people are already in these situations. This also makes it easier to identify the profiles of public policy targets.

Policy and implementation measures have traditionally been foreseen by the social services, given the high cost involved in promoting housing policies. The importance of the phenomenon, bearing in mind its seriousness and intensity, raises the question of whether these measures should be specific or general. The advantage of specific treatment is that it raises the visibility of the phenomenon and entails the design of public policies directly intended to resolve these situations, the downside being that it may stigmatise the people affected. It is therefore necessary to focus on the situations and measures to be undertaken, and to create a legal framework of public service which legitimises the rights of people through specific provisions, preventing them from being singled out and marked. This can also be an effective way of responding, especially to the most extreme cases.

2 The evolution of administrative action in relation to homelessness: from the police and administrative control to public service

The evolution of how the phenomenon of homelessness has been addressed allows us to ascertain the current determinants and assess the effectiveness of how it must be tackled. In the 19th century, the homeless were covered by the 1822 and 1849 charitable legislation, conceived as a moral obligation (Aguado i Cudolà, 2020). Although some authors believe that public services in this field began with these laws (Aznar López, 1996), strictly speaking we cannot talk about the existence of a legal regime of provisions which recognises the rights of users to demand benefits and services (Aguado i Cudolà, 2002).

1 This publication is part of the RDI project Shared administration and common property: law and public policies through collaborative governance, PID2020-114735GB-I00, funded by MCIN/ AEI/10.13039/501100011033/, of which I am the principal investigator. The basic details of this project can be found on the website of the GREC research data management application.

2 A list of these categories can be found on the website of FEANTSA.

At that time, a police view prevailed, examples being the Royal Order of 8 June 1912, which gave instructions to repress begging in Spain. This prohibition implied that it was necessary to arrest travelling beggars and take them to the corresponding charitable centres. These included disinfection camps, hostels for passers-by and the deposits of beggars, the function of which was more to control and remove them from the public space than to provide assistance (Rubio Martín, 2016 and 2022).

Along similar lines, the Second Spanish Republic passed the Law on tramps and malefactors (Ley relativa a vagos y maleantes). This law had a clear police-related content, foreseeing security measures such as those for "habitual tramps" and "professional beggars". As regards municipal competences, the Law of 17 July 1945, on the basis of local government (Ley de 17 de julio de 1945 de Bases de Régimen Local), indicated that municipal activity was mainly, although not exclusively, aimed at achieving the following goals: "Charity, protection of minors, prevention and repression of begging; improvement of customs; social care; *hostels for passers-by*" [emphasis added]. In the city of Barcelona, control was assigned to the Urban Police (Guàrdia Urbana) through the Charity Commissioner (Comissaria de Beneficència) (Matulič Domandzič et al., 2016). Toward the end of the Franco regime, we also find Law 16/1970, of 4 August, on dangers and social rehabilitation (Ley 16/1970, de 4 de agosto, sobre peligrosidad y rehabilitación social), which envisaged security measures such as internment in a work centre or the obligation to declare one's residence or reside in a specific place and submission to the surveillance of the representatives.

In relation to housing, the measures focused on establishing long-term rental agreements, which caused a "destruction of the rental market" (Betran Abadia, 2002). This market was liberalised by Decree Law 2/1985, of 30 April, on economic policy measures (Real Decreto-ley 2/1985, de 30 d'abril, sobre Medidas de Política Económica), promoted by the socialist minister M. Boyer Salvador. Public housing was also promoted by the Housing Ministry, with a view to fighting against the phenomenon of shanty towns and slums.

In Spain, competences concerning social services and housing have been attributed to the regional autonomous communities. The autonomous communities have been a fundamental driving force of the welfare state (Aguado i Cudolà, 2009a). As regards the social services, the obsolete view of charity to deal with poverty based on graciousness has been overcome in favour of a system of protection based on the tendency toward universality, the combination of personal situations and the progressive establishment of subjective rights and guaranteed benefits (Aguado i Cudolà, 2008, 2009b, 2012). In relation to housing, the simple view of administrative intervention in the property market has given way to new measures concerning the right to decent housing and the social function of property.

3 Public policies and competences in relation to homelessness: between the social services and housing

3.1 Traditional approach: the social services

As already mentioned, public policies to tackle homelessness have traditionally been implemented by the social services. The reason for this is the "function of completing the social protection system" which is established in the legislation and the doctrine from the 1960s, according to which the social services were intended to fill the void left by other subsystems such as education, health, employment and housing (Pemán Gavín, 2011, p. 27). In practice, the social services thus bore "subsidiary responsibility for the failure of the rest of the protection and social welfare system" (Sales Campos, 2022, p. 46).

Back in 2008, the report of the special rapporteur of the United Nations, Mr. Miloon Kothari,[3] on adequate housing as a component of the right to an adequate standard of living already warned about the homeless. The report considers that "homelessness should not only be dealt with by the social services, but that housing departments should also take part in managing the problem. Thus the allocation of housing resources for the homeless should be recognised in the State Housing Plan, as should flats for young workers". It has likewise been mentioned that "the eradication of homelessness should be included in the goals of housing policies, and not only in those of social services policies" (Fernández Gensana, 2022, p. 64).

3 Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, Miloon Kothari. Addendum. Mission to Spain. United Nations. General Assembly.

In general, homelessness has been regulated through social services legislation. In particular, Law 12/2007, of 11 October, on social services (Llei 12/2007, d'11 d'octubre, de serveis socials), includes in its catalogue of benefits some specifically intended to deal with these situations. Thus, basic social services envisage limited-stay residential services (1.1.3), which include emergency residential shelter services (1.1.3.1), and temporary residence services for adults in a situation of marginalisation (1.1.3.2). They also include soup kitchen services (1.1.4). This catalogue is implemented in the Charter of Social Services (Cartera de Serveis Socials) 2010-2011, approved by Decree 142/2010, of 11 October, which specifies the benefits included and defines their nature: those which are guaranteed and those which are subject to the available budgetary provisions. In particular, the Charter of Social Services considers the emergency residential services as guaranteed benefits (Aguado i Cudolà, 2012).

We can consider basic social services from the perspective of the rights of individuals, from the viewpoint of the distribution of competences, and also in relation to funding. As regards rights, this means that the entitlement covers all individuals, irrespective of their administrative situation (Art. 14.3 of Organic Law 4/2000, of 11 January, on rights and freedoms of foreigners in Spain and their social integration). Basic services thus include citizens with Spanish nationality, European citizens and those with similar rights, and third-country nationals. They are universal services, intended for the general population. In relation to the competences, these are attributed to municipalities with a minimum population of 20,000 inhabitants or, otherwise, to the regional councils (Art. 31 of the Law on social services). As for funding, the basic social services are funded by the budget of the Generalitat, in accordance with the Social Services Strategic Plan (Pla Estratègic de Serveis Socials) and the Charter of Social Services (Cartera de Serveis Socials). They are paid by means of a four-yearly agreement with the local government in charge of the basic social services area (which can be the local or regional council, depending on the number of inhabitants). This agreement establishes the specific percentage to be contributed by the Generalitat. The commitment fixed by law is that this contribution cannot, under any circumstance, be lower than 66% of the cost of the basic social services teams, of the programmes and projects, and of the home help and tele-assistance services that the Plan and the Charter establish for the geographic region.

The practical application of the Charter of Social Services for municipalities as regards limited-stay residential services shows that in general they do not choose to offer the material provision of the service, but rather replace it with a social emergency economic benefit pursuant to Law 13/2006, of 27 July, on economic social benefits (Art. 30). This means that local policies focus on funding places in boarding houses or hostels, instead of creating residential resources. It also involves failing to fulfil the service provisions foreseen in the Charter which would be subject to judicial control (Ponce i Solé & Fernández Evangelista, 2010, p. 65). The social services thus become managers of economic benefits rather than offering care based on the needs of individuals and support for their personal autonomy.

Autonomous community legislation has gradually led the social services to respond to situations which affect or worsen social inclusion (Fantova Azcoaga, 2022). According to the Catalan Law on social services, their purpose is to "ensure the right of people to live with dignity at all stages of life by covering their basic personal and social needs, in the framework of social justice and the welfare of individuals". It is therefore a question of meeting these needs, which are divided into basic needs (subsistence and quality of life) and social needs (personal autonomy and support for dependency; better quality of personal, family and group life; interpersonal and social relations, and the welfare of the community). The emergence of increasingly complex social problems has led to a certain ambiguity and confusion concerning the profiles and outlines of the social services (Fantova Azcoaga, 2022), which include a wide array of diverse provisions intended to reach heterogeneous users in very different situations. The social services therefore face the problem of continuing to cover the void left by other social protection subsystems, housing being a particularly relevant example, or choosing to redefine their purpose and focus on care for people, "such as [...] the functional autonomy of individuals for daily life decisions and activities or their primary family and community relations" [own translation] (Fantova, 2022). This can be seen clearly in the case of homelessness. In these cases, the social services could focus on attending to individuals, providing them with tools permitting them to carry out their day-to-day activities with functional autonomy and to re-establish social networks which have been broken and have led them to live in the street, or to join these networks. Instead, the housing services could provide instruments to find residential solutions.

3.2 Homelessness and the housing services

Homelessness is an issue that needs to be tackled through housing policies. The 1978 Spanish Constitution (Constitución Española or CE) recognised the right to decent housing as one of the principles of social and economic policy, at the same time as establishing the mandate for promoting the necessary conditions and creating the relevant rules to ensure the realisation of this right, regulating land use in accordance with the general interest to prevent speculation (Art. 47). Subsequently, in relation to housing rights, the 2006 Statute of Catalonia (Art. 26) specifically mentions the people who do not have sufficient resources and indicates that a system of resources should be established by law to guarantee this right, with the conditions determined by the laws.

Housing policies have traditionally been implemented from a more economic perspective, intervening in the housing market through promotional rather than social measures. In the face of the chronic difficulties to create a public housing stock, the Spanish autonomous communities have taken measures to regulate this right. In this respect, Catalan Law 18/2007, of 28 December, on the right to housing (Llei 18/2007, de 28 de desembre, del dret a l'habitatge), represented an important turning point, in so far as it starts from the social function of property and establishes a series of measures to facilitate the creation of a public housing stock. It also takes other measures against empty housing. Furthermore, it specifically mentions the homeless,[4] and foresees the establishment of integration housing.[5]

Complementary legislation has subsequently been passed. There is Law 24/2015, of 29 July, on urgent measures to deal with the emergency regarding housing and energy poverty (Llei 24/2015, de 29 de juliol, de mesures urgents per afrontar l'emergència en l'àmbit de l'habitatge i la pobresa energètica), and also Law 4/2016, of 23 December, on measures to protect the right to housing for people at risk of residential exclusion (Llei 4/2016, de 23 de desembre, de mesures de protecció del dret a l'habitatge de les persones en risc d'exclusió residencial), which represents a change and focuses on the situation rather than on the individual. This legislation defines the situation of residential exclusion based on the loss of housing, whether owned or possessed, and the lack of alternative housing and sufficient income to obtain decent and adequate housing.

At the time of drafting this paper, the Spanish Parliament is processing a bill on the right to housing.[6] This bill defines homelessness as the impossibility of a person to access adequate housing in a community environment, forcing them to live in the street or in other unsuitable spaces, or to use alternative institutionalised collective housing facilities belonging to the different public administrations or to non-for-profit organisations. This bill (Art. 14.3) contains a mandate for the public administrations to "plan specific measures to address and promote the full inclusion of the homeless in a comprehensive and cross-cutting manner".

Although legislation on housing is beginning to consider homelessness as one of the challenges to be faced, the measures adopted so far are still insufficient. It would be necessary to convert the housing services into true public services and deploy financial and material resources, at the same time going beyond the traditional dynamics that focus solutions on the sphere of the social services. Article 47 of the Constitution establishes a series of optimisation mandates which go *beyond regulation, including* both negative (respect and non-infringement) and positive (protection, guarantee and promotion) obligations (Ponce i Solé & Fernández Evangelista, 2010, p. 54). In any case, the right to housing establishes mandates which the competent

4 In this text we specifically find a definition of a homeless individual: "The person or the cohabitation unit with a clear lack of decent and adequate housing, since they do not have a domicile, live in the street or in a space not suitable as housing, in accordance with the provisions of this law, and they suffer from effective social exclusion due to social barriers or personal difficulties to live autonomously. People who have been subject to an eviction process caused by the proven impossibility to pay the rent are also considered homeless".

5 According to the Law 18/2007, this is "the housing managed by public authorities or by non-profit organisations which, either rented or under other forms of occupation, is intended for people who require special attention" [own translation]. This housing is regulated by Article 70 of the same law, which establishes mandates such as that the Catalan government must ensure that the municipal social services and non-profit organisations have sufficient housing to meet the needs in each municipality. It also indicates that, in the framework of social integration programmes and under the terms of the social services regulations, they must adopt specific actions to provide this housing to the homeless. It does, however, foresee financial aid to subsidise the cost of managing this housing.

6 See BOCG (Official Journal of the Spanish Parliament). Congrés dels Diputats. XIV Legislatura Sèrie A: Projectes de Ley, 18 February 2022, no.89-1, p. 1.

administrations have to respect, including the right to shelter, already considered in other countries, in which it has been subject to the protection of the courts.[7] The establishment in autonomous community legislation of a right to shelter or, taking it one step further, a "right to a decent residential space", in which the provision is specified by minimum conditions that must be met, would represent significant progress as regards requirements and court protection, even by means of an appeal against the inaction of the public administration (Art. 29 of Law 29/1998, of 13 July, on the Contentious-Administrative jurisdiction).

It is a question of going beyond the so-called staircase system or linear residential treatment, according to which the person goes from the street to a hostel, then to temporary and finally to permanent accommodation. Traditionally, the person has to pass a series of provisional steps before obtaining housing, always with the possibility of returning to the public space. This *hostel-based system* is clearly ineffective: New York City is the paradigm of the failure of these policies. There, while the number of places to receive the homeless did not stop growing, the number of people living outside or who were in these hostels without the possibility of accessing decent housing has also continued to increase (Sales Campos, 2016, p. 11).

In view of this situation, S. Tsemberis created the organisation Pathways to Housing in New York in 1992, where he developed the housing first model with the aim of going beyond the gradual system and providing the individual with direct access to housing without having to pass the intermediate steps or requirements such as abandoning substance abuse or undergoing certain types of medical treatment. This represents differentiating between access to housing and access to treatment (Panadero Herrero et al.). These models, which have been successful in some countries, may become a benchmark when implementing housing policies.

4 From general to specific regulation, from soft law to regulation

The regulation currently addressing homelessness comes under general legislation, especially in the laws on social services and, to a lesser extent, in the laws on housing. This approach considers housing to be one more basic need of individuals, situating it in a general context. This avoids marking and stigmatising people. However, this legal framework can become insufficient, dispersed and fragmented, and be inefficient as a solution.

The need for a specific treatment of homelessness has been highlighted in documents by various levels of government and public administrations, which implement ad hoc strategies of action. These documents demonstrate that it is a problem with a European dimension, unfit for an advanced 21st-century society, like a scourge which needs to be eradicated. Although the responsibility lies with the States, in particular the regional bodies, this does not prevent the European institutions from developing public policies in this field. Indeed, they should do this. For the moment, an action plan against homelessness has been organised on an electronic platform with the collaboration of the Member States.[8] This type of document has also been created on state, regional and local levels,[9] highlighting the necessary involvement of all these bodies. The advantages of this specific approach are that it identifies needs, diagnoses weaknesses and areas for improvement, detects strong and weak points, sets goals, makes recommendations, and foresees measures. It does not, however, establish legally binding obligations. Nor does it recognise enforceable rights. Since they are not binding, these are soft law documents that guide and direct the action of the public administrations.

7 In the United States the attorney R. Hayes brought a class action lawsuit on behalf of all homeless people before the New York State Supreme Court, based on Article 17 of the Constitution of that state, according to which "The aid, care and support of the needy are public concerns and shall be provided by the state and by […] its subdivisions". The Supreme Court of this state, in a ruling on 5 December 1979 (Callahan *v.* Carey) ordered New York City and State to provide shelter for the homeless, based on this constitutional article. See Coalition for the Homeless for the jurisprudential evolution. With a less precise article than the Spanish text, this key ruling was capable of forcing the authorities to give shelter to the homeless.

8 See Governance, work programme and way forward for the European platform on combating homelessness 2022-2024.

9 Comprehensive national strategy for homeless persons 2015-2020, approved by the Council of Ministers of 6 November 2015; Basque strategy for homeless persons; Comprehensive Catalan strategy to tackle homelessness in Catalonia.

In Catalonia, with a view to obtaining specific legislation, a team of academics proposed a legal text,[10] which has been adopted by various third sector organisations.[11] This text has been presented by the majority of the groups in the Catalan Parliament as the "Bill containing transitional and urgent measures to tackle and eradicate homelessness"[12] (Proposició de llei de mesures transitòries i urgents per a fer front i erradicar el sensellarisme or PLS). The strong points include that it a) focuses on situations of need to avoid stigmatisation of the recipients of the measures; b) includes a specific, cross-cutting vision, recognises rights with the corresponding benefits and establishes protection mechanisms for situations of vulnerability, foreseeing a legal regime of infringements and penalties; c) strengthens the obligation to register in the municipality (Aguado i Cudolà, 2003), established by local basic legislation[13] in so far as it gives access to being considered resident and is the gateway to municipal services; and d) recognises the right to the public space, establishes limits to the bylaws forbidding begging and mechanisms against the phenomenon of hostile architecture, as explained below.

In short, the PLS represents considerable progress, but we should also be aware of the limits of norms to change society (Crozier, 1984). It is essentially a traditional type of intervention, on considering the "decent residential space" to be a basic social service along the lines of prior social services legislation. The new development that it introduces is that it goes beyond the temporary nature, establishes specific conditions and talks about "a covered space, for individual or collective use, with sufficient dimensions and conditions to develop private life with respect for the right to privacy, available to use 24 hours a day, which has at least a bed, light, a comfortable temperature, access to services such as running water, wash basin, toilet and shower, and with a space for personal objects". The fact that the conditions that this space has to meet are specified makes it possible to control and protect it before the courts of justice, with the capacity to impose penalties. The possibility of promoting integration housing is also foreseen, although it would be necessary to create a new law or to amend the current Law on the right to housing in Catalonia for this to be implemented. In my opinion, we need to insist on this last point, and to rethink the delimitation of the role corresponding to the social services.

Centres with low requirements are foreseen for emergency cases and serious circumstances. The PLS also recognises the right to a transport ticket and to storage, laundry and shower services, as well as to free or discounted funeral services. We are thus faced with a wide range of rights, many involving benefits, which establish a series of obligations for the public administrations responsible.

In this respect, it should be taken into account that classifying a social service as basic means that it is the responsibility of the local authorities. To fund these services the PLS simply refers to the funding mechanisms foreseen in general social services legislation. As already seen, basic social services theoretically have 66% of the cost of the teams, programmes and projects guaranteed by the Generalitat, and therefore, in principle, the remaining 44% has to come from the budgets of the local authorities. As regards the rest of the services and activities envisaged by the PLS, it is foreseen that the Generalitat will cover between 40% and 60% of the cost, which will be included in a specific item of the Generalitat's budget.

The political and technical debate concerns the optimal level of provision of services. As we have seen, this is determined by the funding mechanisms, and whether these funding mechanisms are sufficient to meet the needs. We only need to recall the problems to implement Law 39/2006, of 14 December, on the promotion of personal autonomy and attention to situations of dependence (Ley 39/2006, de 14 de diciembre, de Promoción

10 The text was drafted by Antoni Milian Massana (UAB) and Vicenç Aguado i Cudolà (UB), with the collaboration of Raquel Prado Pérez (UB), Almudena González García (UB) and Lídia Pitarch Rodríguez (UAB). See Milian Massana, 2019.

11 The main organisations in question are Arrels Fundació, Sant Joan de Déu Serveis Socials, Comunitat de Sant Egidi, Assís Centre d'Acollida and Càritas Catalunya. The proposal has the support of the Taula d'entitats del Tercer Sector de Catalunya (Committee of third sector organisations in Catalonia); of 35 first, second and third level organisations from the social field, and of five professional associations.

12 The groups from the Catalan Parliament which presented the text drafted by academics were the parliamentary groups of PSC-Units, ERC, JxCat, CUP-NCG, ECP, Cs and the mixed group. This represents almost the entire political spectrum of the 14th legislative term. The document 202-00029/13 can be consulted on the Parliament website.

13 As various administrative decisions interpreting basic state legislation have clarified, this obligation occurs when the individual effectively lives in the municipality, irrespective of whether it is substandard housing or whether they live in the street. See the Decision of the Presidency of the National Statistics Institute and of the General Directorate for Autonomous and Local Cooperation, of 17 February 2020, which issues technical instructions for local councils on the management of the municipal register.

a la Autonomía Personal y Atención a las personas en situación de dependencia) (Correa & Jiménez-Aguilera, 2016). The law was conceived at a time of economic abundance and had to be implemented at a time of financial crisis, with inadequate planning and the autonomous communities having to bear a large part of the cost, leading to a delay in access by many users who, in some cases, were awarded the benefit when it was no longer effective for their situation, by means of procedures and transitional periods foreseen to delay the recognition and effectiveness of the benefits.

The fact that these services are the responsibility of the local authorities should not lead the administration from the autonomous communities to ignore them or undertake low-intensity actions. Nevertheless, we should recall that the Charter of Social Services already foresees limited-stay residential services that the local authorities have replaced, overwhelmed by funding problems, with economic benefits depending on budget availability. It should moreover be borne in mind that some of the basic social services are implemented by the regional councils for municipalities with fewer than 20,000 inhabitants. These councils do not have the power to establish taxes, and therefore their income depends on the Generalitat. In this respect, it would be necessary to undertake a financial study to see whether the municipalities can bear 40% or more of the costs of all these services, or whether lower percentages should be established.

It is also necessary to create a specific fund, and to establish budget allocations which can guarantee the viability of the system, along the lines envisaged by Law 7/2021, of 20 May, on climate change and the energy transition (Ley 7/2021, de 20 de mayo, de cambio climático y transición energética) (Ponce Solé, 2022). The budget allocations entail committing part of the budget revenues for this purpose. This would involve, for example, fixing a percentage of the income obtained from certain taxes or else a specific percentage of GDP. Only clear funding mechanisms can avoid litigation, or the frustration of the aims envisaged in the law, at the same time as introducing criteria of transparency as to how all these forecasts are implemented.

5 The right to the city and use of the public space without exclusion

The right to decent and adequate housing (Art. 47 CE) does not only refer to the dwelling space, but also to the "right to a decent and adequate urban environment in which this housing is located" (Ponce i Solé & Fernández Evangelista, 2010, p. 50). These authors therefore conclude that this constitutional precept guarantees the right to the city and allows us to conceive the action of cities from the perspective of people. This right is included in the European Charter for the Safeguarding of Human Rights in the City (Saint-Denis, 2000).

The public space has been conceived from a basically productive perspective with the citizens as agents who contribute with their activity to this vision, excluding non-productive uses. In this respect, both the legal instruments (such as urban planning) and the physical spaces have been designed within these parameters, more rights being granted to those who contribute the most to productivity. A diverse model of city is therefore proposed in which the public space also integrates the non-productive vision, defined as the "caring city" (Chinchilla Moreno, 2020).

The legal system provides the foundations to go beyond the merely mercantilist vision of the public space, and not just in Article 47 of the Constitution. We can also mention Article 9.2 of the same text, which is fundamental in so far as it imposes the mandate to remove the obstacles for the full participation of all citizens in political, economic, cultural and social life. There is also the fundamental right to equality (Art. 14), meaning that the homeless are entitled to the public space on an equal footing with the rest of the citizens.[14] Consistent with this approach, some legislative texts have begun to recognise the right to an adequate and sustainable urban public space, as is the case of Law 2/2016, of 7 April, on local institutions of the Basque Country (Ley 2/2016, de 7 de abril, de Instituciones Locales de Euskadi) (Art. 43.1.c). The right to the public space is not, however, explicitly included among the rights of residents in basic local legislation, unlike what occurs with the right to use municipal public services and community benefits (Art. 18 of Law 7/1985, of 2 April, regulating the foundations of the local government system (Ley 7/1985, de 2 de abril, Reguladora de les Bases del Régimen Local or LRBRL).

14 This is indicated in Article 17 of the PLS.

The fact that this right is not explicitly recognised in local legislation does not prevent other techniques from existing which ensure the uses of public space are guaranteed. It should be recalled that the streets, roads, squares and public spaces, being subject to general use, are public domain goods. The principles affecting these goods include the "effective application to general use or to the public service, the only exceptions being those arising from duly justified public interest reasons" and the "preferential dedication to common use compared with private use" (Art. 6.c and d of Law 33/2003, of 3 November, on public authority property [Ley 33/2003, de 3 de noviembre, del Patrimonio de las Administraciones Públicas]).

Coexistence in the public space is not free from problems. A significant example has been the location of a hostel for homeless people with drug addiction next to a school.[15] This decision was opposed by the parents' association and the local residents' association. These problems, which may be more or less justified, come under a broader phenomenon, known as Not In My Back Yard (NIMBY), according to which people are not opposed to certain facilities or activities in themselves, but rather in view of their location, above all next to where they live or carry out their daily activities. In these cases, adequate planning is required on locating these centres, establishing criteria which allow the inclusion of the beneficiaries of the facilities or activities, at the same time seeking dialogue and the involvement of the different stakeholders.

5.1 The regulation of uses of the public space by local bylaws

At times, the uses of the public space, which result from people exercising rights and freedoms, put citizen coexistence to the test. The intensive use of the street by the homeless, this being where they live and carry out their daily activities, can, in certain situations, lead to rejection by the rest of the population and problems of coexistence with neighbours. This space is intended, conceived and designed for financial profit, which comes into conflict with people who live there without carrying out a productive activity (Sales Campos, 2016, p. 10). These cases include sleeping on street furniture, such as benches or certain covered spaces such as porches, bathing in public fountains, or satisfying their physiological needs on public streets.

This issue has therefore been subject to regulation in local bylaws, traditionally called policing and good governance bylaws and covering the uses and customs of the municipality. It was understood that these types of behaviour breached policing standards, particularly in view of the risks that they represented for public order as regards security, tranquillity and hygiene. Subsequently, although these bylaws now refer to citizenship or citizen coexistence, some continue to include the practice of begging as an administrative offence. This regulation has been described by some authors as the "administrative law for the enemy" (Melero Alonso, 2016).

A general ban on certain activities, such as those mentioned, in the public space by means of local bylaws or other rules, may represent an infringement of rights such as individuals' right to freedom (Art. 17 CE), personal and family privacy (Art. 18 CE), freedom of movement and residence (Art. 19 CE), protection of health (Art. 43 CE) and housing (Art. 47 CE). As we will see from the case analysis, the possibility of establishing limitations or exceptions should be envisaged in a restricted fashion and, in any case, must be subject to proportionality, taking into account the circumstances of each specific case.

These rights should be interpreted in accordance with international treaties on the subject (Art. 10.2 CE), which form part of the internal legal order (Art. 96 CE). In this respect, the European Convention on Human Rights (ECHR) foresees that "everyone has the right to respect for his private and family life, his home and his correspondence" (Art. 8). It is necessary to consider a series of exceptions that should be envisaged in laws and that are required (proportionality test) for the "national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others".[16] The limitations to fundamental rights must, therefore,

15 See the Decision on case Q-01145/2022 (SGC) - 22Q000017-AB and others (SGB), concerning the situation of the Baix Guinardó reception centre for the recovery of homeless people with addictions next to Mas Casanovas School.

16 Notwithstanding this, it should be taken into account that Article 5 of the European Convention on Human Rights foresees that: "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: [...] e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants [my emphasis]". In judgement of the ECHR 2832/66, of 18 June 1971 (cases of Wilde, Ooms and Versyp). This judgement of the ECHR states that the convention does not

be sufficiently justified in relation to these public interests, which must be assessed in accordance with the specific case, without general indiscriminate bans being feasible.

This is the case on which the European Court of Human Rights (ECHR) ruled in relation to Mrs Violeta-Sibianca Lăcătuş, a Romanian citizen of Roma ethnicity, who received various sanctions in application of Article 11 of the Criminal Law of Geneva (Swiss Confederation), which forbade begging in the public space. Judgement of the ECHR no. 14065/15, of 19 January 2021 (Lăcătuş v. Switzerland), held that there had been an infringement of the right to family life in relation to human dignity. On examining the exceptions in Article 8, the European Convention on Human Rights does not exclude the possibility that certain forms of begging, especially those which are aggressive, may endanger passers-by, residents and shopkeepers. The phenomenon of exploiting individuals, and in particular minors, should, for example, be highlighted. However, it considers that, in the case raised in this judgement, these exceptions do not apply, given that the applicant was extremely vulnerable, did not have other means of subsistence and had no other option than to beg in order to live.

In Spain begging has been regulated in local bylaws. These regulations base the power to apply offences and sanctions on title XI of Law 7/1985, of 2 April, regulating the foundations of the local government system, which establishes (Arts. 139, 140 and 141) minimum criteria of illegality, which would give coverage to these bylaws on considering as offences, with the corresponding sanctions, certain types of behaviour which impact the public space or public services, and in which there are a series of factors (prevention of use, intensity of the disturbance, serious or important deterioration, damage caused, etc.).

Some bylaws have established specific limitations, such as begging which is:

> insistent, intrusive or aggressive, as well as organised (whether direct or covert in the form of the provision of small services not requested or any other equivalent formula), or any other form of begging which, directly or indirectly, uses minors as a lure or when minors accompany the person undertaking this activity" (Art. 34.2 of the Bylaw on measures to encourage and ensure citizen coexistence in the public space of Barcelona [Ordenança de mesures per fomentar i garantir la convivència ciutadana a l'espai públic de Barcelona]).

Although these measures may be justified, the corresponding proportionality test should be applied, and the occurrence of these circumstances should be duly accredited, in accordance with the case-law of the ECHR.

In other cases, the bylaws have established general bans on begging, as in the cases of Valladolid (judgement of the High Court of Castile and León (Tribunal Superior de Justicia de Castilla y León) no. 1692/2013, of 8 October) and of Reus (judgement of the High Court of Catalonia (Tribunal Superior de Justícia de Catalunya) no. 714/2019, of 18 September), which has ended up determining their invalidity since the courts consider that Article 139 of the LRBRL does not cover this kind of administrative offence. Unlike the approach of the ECHR in these cases, the basis of the invalidity is not the infringement of fundamental rights, but rather the lack of competences of local authorities to establish these measures.

5.2 The phenomenon of hostile architecture and design

Apart from the administrative offences and sanctions against begging, another measure preventing the use of the public space is the so-called *hostile architecture*, also known as *defensive architecture*, which has been defined as "the design of buildings or public spaces in a way which discourages people from touching, climbing or sitting on them, with the intention of avoiding damage or use for a different purpose" (Maxwell, 2014).[17]

define the term *vagabond*, and refers to internal law (in this case, Belgian). It is concluded that the internment measures adopted do not contravene the European Convention on Human Rights. Subsequently, certain limits are established in judgement of the ECHR 7367/76 of 6 November 1980 (case Guzzardi) [ECHR-31]. It is thus indicated that "The reason why the Convention allows the latter individuals, all of whom are socially maladjusted, to be deprived of their liberty is not only that they have to be considered as occasionally dangerous for public safety but also that their own interests may necessitate their detention. One cannot therefore deduce from the fact that Article 5 (art. 5) authorises the detention of vagrants that the same or even stronger reasons apply to anyone who may be regarded as still more dangerous".

17 The PLS defines it as "that architecture or design of street furniture directly intended to prevent homeless people from being able to shelter in the public space, such as benches with arms in the middle, metal enclosures with spikes on steps and shop windows, or other similar elements".

Just in the city of Barcelona, 170 elements of hostile architecture were located in a campaign undertaken by Arrels Fundació. This represents the opposite of accessible architecture, the aim of which is for people to access public spaces in a safe manner, and to avoid all kinds of barriers and obstacles.

Since local bylaws regulate street furniture, they tend to establish that this furniture should be used according to its nature, intended use and purpose, in any case respecting the rights of others to use and enjoy it. The purpose of avoiding deterioration by vandalism can lead to other actions which exclude, materially and without distinction, certain uses of the public space, including the use of this space by the homeless to rest or sleep.

Some authors have described these measures as an expression of "strategies to criminalise homelessness" (Romero Riquelme, 2019, p. 168). They also break the links of the homeless person with the services, organisations and groups which help them (see Arrels Fundació). The introduction and design of these measures are not regulated, despite the fact that they have a significant impact on the behaviour of people and prevent them from using certain public spaces, thus depriving them of the possibility to exercise their rights. Some countries are therefore passing legislation which forbids these practices. This is the case of Brazil, by means of Law no. 14,489, of 21 December 2022 (the so-called "Father Júlio Lancellotti bill"), which forbids the use of hostile construction techniques in open spaces for public use. This law amends Law no. 10,257, of 10 July 2001, which establishes general urban policy guidelines, and includes:

> The promotion of comfort, housing, rest, well-being and accessibility in the enjoyment of free spaces for public use, their furniture and their interfaces with spaces for private use, and the prohibition of using hostile construction materials, structures, facilities and techniques whose aim or result is to exclude the homeless, elderly, young and other population segments.

Hostile architecture is a more subtle type of intervention not explicitly expressed through administrative acts such as orders, prohibitions or sanctions, but which materially prevents a certain use of the public space. It involves actions which impact the behaviour of people, since they lead them to engage in, - or, on the contrary, prevent - a certain type of behaviour. Architectural elements (for example, the absence of benches or benches for a single person) may shape a certain area as one of passing through, without letting people rest or sleep in these spaces.[18] These measures are often adopted by the public administrations, without a formal procedure (García-Andrade Gómez, 2021) analysing their impact on the behaviour of people. Control elements are therefore required to determine whether or not they are hostile architecture measures, and whether or not they respect individuals' rights. It would therefore be convenient to adopt a cognitive perspective (López Pulido, 2023), in a similar manner to the gender perspective, in behavioural design processes, with reports which examine the reason for measures which may impact public space uses.

The principles of public domain goods include the effective application of general use, the sole exceptions being those arising on duly justified public interest grounds. These limitations should be interpreted in a restrictive manner and according to the proportionality test. The mere installation or design of street furniture for the purpose of preventing its use by the homeless would entail a breach of the principle of the effective application of general use of these goods, and of the proportionality principle. It could also be considered that undertaking public work which includes hostile design infringes fundamental rights, thus determining the invalidity of public sector contracts.[19] There could also be individuals who, in the accesses to garages or buildings that they own or in relation to which they hold another private title which legitimises their use, use these hostile design or architecture elements, which may be authorised or tolerated by the public administrations. With both public and private actions, urban planning is a fundamental instrument to eliminate these elements, and legislation should thus establish that the plans do not allow hostile design and architecture.

18 On behavioural design through architecture, see the article in Ruptiva Arquitectura, "Arquitectura y diseño de conductas".

19 Pursuant to Article 39.1 of Law 9/2017, of 8 November, on public sector contracts, the grounds indicated in Article 47 of Law 39/2015, of 1 October, on the common administrative procedure, are grounds for invalidity under administrative law. The PLS envisages the absolute invalidity of public sector contracts which foresee the contracting of public works or the installation of street furniture which includes hostile architecture or design elements.

6 Conclusions

This paper defends five key ideas as elements to establish a legal framework tackling the phenomenon of homelessness and residential exclusion.

First, that homelessness is an issue essentially concerning the lack of decent housing, associated with a systematic infringement of the rights of individuals. The traditional approach has, however, involved the social services, used as an instrument to fill the void left by other social protection systems. This perspective has limitations and failings. On the one hand, it has overwhelmed the social services in the face of social demands that it has not been possible to adequately meet. On the other hand, it has diverted attention from the need to establish adequate housing services which go beyond a response based on merely temporary accommodation and a staircase or hostel-based system.

Second, that a specific, cross-cutting framework is necessary which tackles homelessness and goes beyond the fragmentation and dispersion of regulations. This legal framework should start from the construction of a public service legal regime, which recognises rights and legitimises the actions of the authorities in relation to benefits, with an adequate delimitation of the spheres of action of the social services, which should essentially be based on care and support for individuals. This also affects the housing services, which are responsible for meeting residential needs. The specification of these rights and benefits, defining their minimum content, is an important point in their control and as regards legal requirements. As well as the content of the provisions, a legal system to protect against aporophobia needs to be established. It is moreover necessary to encourage the active participation of citizens, above all through third-sector organisations, although the functions corresponding to the rest of the public authorities should not be offloaded to these organisations.

Third, that homelessness should be tackled not only with welfare-oriented measures, but also with preventive measures. It is therefore important to study the phenomenon as a whole, as highlighted by the different types indicated by FEANTSA. These types of measures involve the detection and monitoring of cases of residential exclusion which could result in homelessness; a system of economic benefits to prevent the non-payment of rent from leading to the termination of rental agreements and to legal action; adequate management of these benefits with effective and not purely bureaucratic procedures, and measures to foster the rehousing of these people in social housing.

Fourth, that the mere recognition of benefit rights without an adequate funding system can lead to the oversaturation of the public administrations that have these obligations, resulting in the possible failure of the measures and frustration of beneficiaries and organisations. It is necessary to clarify the optimal level of provision of these services, and to prevent local authorities from becoming saturated and collapsed. The autonomous communities should be involved in the coordination of public housing policies, with the support of the central government. The experience of other situations, such as the so-called “dependency bill”, should be taken as a point of reference and an element for reflection. Beyond resorting to the general social services funding mechanisms, it is essential to create specific funds and establish budget allocation mechanisms.

Fifth, that the right to decent housing should be conceived within a broader context that includes the so-called *right to the city*. This approach allows public space to be designed in which the free exercising of rights and freedoms is possible, without any kind of exclusion or discrimination. This right implies that the activities carried out in this space cannot be excluded, removed or concealed merely on productivity grounds or criteria. Local bylaws, which play a fundamental role in regulating public space uses, must respect these criteria, without it being possible to establish general bans on behaviour such as begging, which comes under the right to family life (Art. 8 ECHR) and, in general, the right to freedom (Art. 17 CE) based on the dignity of individuals. The right to the city also entails a vision of the city and the urban public space which is incompatible with the so-called hostile architecture phenomenon. The use of architecture as an element which impacts the behaviour of people requires a behavioural perspective to be adopted, explaining the motivation behind the measures to see whether or not they represent hostile design or architecture.

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