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MEAN STREETS

A REPORT ON THE CRIMINALISATION
OF HOMELESSNESS IN EUROPE

POVERTY IS NOT A CRIME. IT'S A SCANDAL.





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Table of Contents

	FOREWORD Nils Muižnieks, Council of Europe Commissioner for Human Rights	9
	FOREWORD Raquel Rolnik, United Nations Special Rapporteur on adequate housing, and Maria Magdalena Sepúlveda Carmona, United Nations Special Rapporteur on extreme poverty and human rights	11
	EXECUTIVE SUMMARY	15
PART I:	THEORETICAL FRAMEWORK	
Chapter 1:	Applying Human Rights Based Approach to Homelessness, Dr Padraic Kenna and Guillem Fernández Evangelista	31
Chapter 2:	Penalization of Homelessness, Guillem Fernández Evangelista	53
PART II:	WHAT DOES PENALISING HOMELESSNESS LOOK LIKE?	
Chapter 3:	Penal visions of homelessness and responsabilization in Belgium – Cory Potts and Lucie Martin	75

Chapter 4:	Criminalisation of homelessness in Poland - Łukasz Browarczyk	91
Chapter 5:	Criminalisation of homelessness in Hungary - Balint Missetics	101
Chapter 6:	Penalisation of Homelessness and access to housing - Marc Uhry, Jamie Burton, Dr Padraic Kenna, Samara Jones, Guillem Fernández Evangelista	113
Chapter 7:	Penalisation of Homelessness and prison, Eoin O'Sullivan and Guillem Fernández Evangelista	133
PART III: GOOD PRACTICES POLITICAL MEASURES		
Chapter 8:	Prevention, Homelessness Strategies and Housing Rights in Europe, Guillem Fernández Evangelista	159
Chapter 9:	Homeless people at the Barcelona Airport. A model of Inter-administration coordination - Carme Fortea Busquets	171
LEGAL INITIATIVES		
Chapter 10:	Addressing legal needs of homeless people in Sydney, Australia - The Homeless Persons' Legal Service - Louis Schetzer	181
Chapter 11:	The role of the University in promoting access to legal rights for people living in social exclusion- Antonio Madrid Perez	191
Chapter 12:	Ombudsmen and NGO's: Defending the rights of homeless people - Quim Arrufat and Guillem Fernández Evangelista	203
Chapter 13:	The City is For All from the Human Rights Based Approach - Balint Missetics	213

Chapter 14: NGO's, legal services and strategic litigation.
Fighting against homelessness from a Human
Rights Based Approach, Antonio Madrid Perez
and Guillem Fernandez Evangelista
..... 221

EPILOGUE
Iñaki Rivera Beiras
..... 235



Preface to FEANTSA Report: Penalisation of Homelessness and Human Rights in Europe

A growing number of people across Europe are experiencing a great need for housing. Many have nowhere to live and sleep, in doorways, squats, abandoned buildings, parks and other places unfit for human habitation. Among those facing major difficulties are Roma, victims of domestic violence, street children, people with disabilities, refugees, migrants, internally displaced persons, tenants without security and people in the lowest segments of the labour market.

The penalisation of homelessness reflects deep-rooted prejudices about homeless people and ignorance of the daily deprivation and discrimination they suffer. Being homeless is not an individual choice, but a situation resulting from a variety of disadvantages. Living and sleeping rough in public spaces constitutes a huge risk to one's health, social well-being and security. Everyone, including homeless people, would prefer adequate and safe housing if it were available and affordable.

Laws, regulations and administrative measures penalising homelessness are being introduced during an economic crisis that has resulted in record levels of unemployment and poverty, driving entire families to live on the streets. Such measures are often motivated by the desire to reduce the visibility of homelessness and poverty and hide them as social issues. The criminalisation of begging and migration are part of the same trend. A conscious policy of exclusion is applied to mask the unwillingness of the state to assume its responsibilities for upholding the human rights of all of its residents.

The state has an internationally recognised obligation to ensure everyone's rights to adequate housing and an adequate standard of living. Everyone has the right to live somewhere in security, peace and dignity. The right to adequate housing is also an inseparable condition for the enjoyment of many other human rights. Social, economic and cultural rights, such as the rights to water, food, health, education and work, cannot be fully exercised without a home. The same can also be said about many civil and political rights such as the rights to privacy and family life.

Instead of criminalising homeless persons, governments should work towards the elimination of the conditions that cause and perpetuate poverty and social exclusion. In addition to punishing and stigmatising people without a home, the penalisation of homelessness creates new obstacles to serious efforts to alleviate poverty and deprivation. Repressive laws that specifically target homeless people amount to discrimination on the basis of economic and social status. Rather than raising a fist, the authorities should extend a hand to encourage homeless people to claim the rights they are entitled to.

Nils Muiznieks ■

Council of Europe Commissioner for Human Rights



Foreword

This excellent publication from FEANTSA is extremely timely. As United Nations Special Rapporteurs on extreme poverty and human rights, and on the right to adequate housing and non-discrimination in this context, we have watched with concern in recent years as various States in Europe and beyond have implemented measures penalising or criminalising homeless persons. The contributions to this volume outline many of these alarming measures.

Across Europe, we see homeless persons cast out of city centres and penalised for certain behaviours and actions that they have no choice but to perform in public: sleeping, sitting, lying, littering, lodging, urinating, camping or storing belongings in public spaces.

Individuals who live on the street are increasingly finding that daily life-sustaining activities can result in criminal sanctions and expose them to abuse, harassment, violence, corruption and extortion by both private individuals and law enforcement officials.

These laws, police practices and zoning regulations on the use of public space are being implemented in a context in which the economic and financial crises and subsequent austerity measures have forced a growing number of families on-to the streets. In many cases, people who have been driven out of their homes as a result of irresponsible housing finance policies, are now being penalised once again.

Instead of using public funds to assist these families and protect their human rights, States are instead carrying out costly operations to penalize them for their behaviour. Absurdly, such regulations often impose fines that homeless persons are unable to pay. Criminalization pushes homeless persons further and further into poverty and social exclusion, from which they simply cannot escape without holistic long-term poverty reduction and State homelessness strategies.

These practices bring up a whole series of human rights concerns. In many cases, these measures amount to discrimination against persons on the basis of their socio-economic status, which is clearly prohibited in international human rights law.

With insufficient public infrastructure, services and low-cost housing in place, persons living in poverty and homelessness are left with no viable place to sleep, sit, eat or drink. Not only can this constitute a violation of the right to adequate housing, but these measures may also have serious adverse physical and psychological effects, undermining the right to an adequate standard of physical and mental health. With few resources and no fixed address, persons living in poverty and homelessness are unlikely to be able to seek justice or remedy, or to enjoy equality of arms in any proceeding against them.

Homeless persons should not be deprived of their basic rights to liberty or to privacy, personal security and protection of the family, just because they are poor and need shelter.

Of course, homeless persons would prefer safe, affordable, adequate housing to public parks and bus stations. One does not choose to live in poverty, and therefore should not be punished for that situation.

This also makes economic sense: given the extremely high costs of policing, detention, prosecution and incarceration, available resources would be better spent on devising housing solutions for the homeless community. Moreover, this would be more in line with States' human rights obligations.

It should go without saying that homeless persons are equal in dignity, intrinsic value and in rights to all other members of society. Unfortunately, many policy-makers and public officials need to be reminded of this fact.

We have noted with alarm the rise in stigmatising and hostile language used by politicians and sections of the media to justify discriminatory public policies towards homeless persons and persons living in poverty. Prejudices preclude policy makers from addressing the systemic factors that create poverty and homelessness, and instead paint the most disadvantaged people as authors of their own misfortune and therefore less deserving of respect, rights and public resources.

There is an urgent need to push States to abandon the destructive and unjust path they are pursuing. Therefore, we warmly welcome this insightful and comprehensive volume from FEANTSA, which will contribute significantly towards scholarship, advocacy and public debate on this issue. In providing a detailed overview of not only the penalisation of homelessness, but of also the relevant human rights framework and good practices, the book will be a crucial tool moving forward. As it emphasises, human rights law and standards should guide all public actors towards tackling the root causes of poverty and homelessness, taking into account the needs and views of homeless and inadequately housed persons.

As FEANTSA's campaign slogan says, "Poverty is not a crime, it's a scandal." Indeed, in relatively wealthy European countries, the mere existence of homelessness is a shameful scourge. Furthermore, all European countries have committed to respect, protect and fulfil the right to adequate housing for all persons without discrimination, as parties to the International Covenant on Economic, Social and Cultural Rights, alongside many other relevant obligations in international and regional human rights law. Homeless persons need roofs, not handcuffs; incarceration is not a housing solution. Human rights law, principles and standards must guide us in ending the vicious circle of discrimination, deprivation and social exclusion that homeless persons endure.

Geneva, June 2013



Raquel Rolnik ■

Special Rapporteur on adequate housing
as a component of the right to an adequate standard of living,
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Executive Summary

Criminalising and penalising homeless people for carrying out life-sustaining activities in public because there is nowhere to go is a problem across the EU. Policies and measures, be they at a local, regional or national level, that impose criminal or administrative penalties on homeless people are counterproductive and often violates human rights.

WHAT IS CRIMINALISATION AND PENALISATION OF HOMELESSNESS?

Definitions:

Criminalisation undermines real solutions

Cities, regions and even some countries (e.g. Hungary) across Europe are using the criminal justice system to minimise the visibility of people experiencing homelessness. Some local governments are motivated by the frustrations of business owners, residents and politicians who feel that homelessness puts the safety and livability of their cities and towns at risk. These feelings have prompted governments to establish formal and informal measures and enforcement policies to "limit where individuals who experience homelessness can congregate, and punish those who engage in life-sustaining or natural human activities in public spaces." Examples of such criminalisation strategies include the following:¹

- Legislation that makes it illegal to sleep, sit or store personal belongings in public spaces
- Ordinances that punish people for begging in order to move people who are poor or homeless out of a city or area

1. Searching out solutions – constructive alternatives to the criminalization of homelessness, United States Interagency Council on Homelessness, 2012, retrieved from: http://www.usich.gov/resources/uploads/asset_library/RPT_SoS_March2012.pdf on 7 August 2013

- Local measures that ban or limit food distribution in public places in an attempt to curb the congregation of individuals who are homeless
- Sweeps of areas in which people who are homeless are living in order to drive them out of those areas
- Selective enforcement of neutral laws (e.g. crossing the street against the light, loitering, and public consumption of alcohol) against people who are homeless
- Public health ordinances related to public activities and hygiene (e.g. public urination) regardless of whether public facilities are available
- Prohibition of removing items from rubbish or recycling bins

Another definition of the criminalisation of homelessness comes from Canada: ***the use of laws and practices to restrict the activities and movements of people who are homeless, often with the outcome being fines and/or incarceration.*** This definition also includes the use of security (including private security) to enforce local/regional regulation of public space and activities that go beyond the realm of the criminal justice system.²

THE CONCEPT OF “PENALISATION”

In this report we have chosen to use the concept of “penalisation” to describe the different ways in which homeless people are punished through the criminalising of their everyday activities in public spaces, administrative or legal obstacles blocking their access to basic services and rights, and attempts to rid the public space of visible reminders of poverty by putting homeless people in prisons, banning them from public places and detaining and deporting migrants. This concept of penalisation has been used by authors like Loïc Wacquant (2001) and the UN Special Rapporteur on Extreme Poverty and Human Rights (Sepúlveda, 2011). Wacquant (2011) shows that the management of “dangerous” or “sensitive” populations in Europe is being developed with a dual emphasis on social and penal regulation.

SOCIAL POLICY AND CRIMINAL JUSTICE – INTERLINKED IN PUBLIC POLICY FOR THE POOR

Trends in penal policy cannot be understood without examining social policy and vice-versa. It is not possible to understand crime trends without understanding changes in welfare provision, public housing, foster care, and related state programmes, including the oversight of irregular migration that affects the life options of the populations most susceptible to street crime (as both perpetrators and victims). In

2. Can I See Your ID? The Policing of Youth Homelessness in Toronto, Bill O’Grady, Stephen Geatz and Kristy Buccieri, Street Youth Legal Services, Justice for Children and Youth, and Homeless Hub Press, Toronto, Canada, 2011.

other words, welfare and criminal justice are two modalities of public policy toward the poor, and so they must be analysed—and reformed—together.

There is consensus amongst academics that increased regulation of public spaces and criminalisation of homeless people in Europe is a trend that has crossed the Atlantic from the United States. Where authors differ, is on the pace and intensity of this expansion of repressive policies (Wacquant, 2001; Busch-Geertsema, 2006; Tosi *et al.* 2006; Tosi, 2007). There are also nuances regarding the evolution of the penal and punitive system on both sides of the Atlantic Ocean. Iñaki Rivera (2006) explains how over the last 30 years, two approaches to criminal policy have crossed over in Western Europe and spawned many of the “policies of intolerance” (Young, 1999). The American and Anglo-Saxon tradition of “Law and Order”, which is based on statistics and the “Broken Windows”, “Zero Tolerance” and “Three Strikes and You Are Out” approaches, is discussed by Eoin O’Sullivan in Chapter 7.

A “culture of criminal exceptionality and emergency”, which was developed in the anti-terrorist legislation that restored the concept of the “enemy”, is also now apparent in Europe. In the heady atmosphere following the 2001 terrorist attacks, this “culture” was born to combat a particular phenomenon (terrorism) and it was meant to be temporary. Yet, while the “emergency” has faded over the past decade, the repressive policies and extra police powers remain in force and have been extended to the foreign immigrant, portrayed once again as the enemy. Even more worrying is that these repressive measures and attitudes now extend to other spheres (Aranda *et al.*, 2005) including health care and social policy.

ABOUT THIS REPORT

This is the first European report that examines the extent and nature of criminalisation of homelessness in Europe. We were inspired by the National Law Center on Homelessness, Poverty in the United States that regularly monitors criminalisation of homelessness and advocates for the repeal of criminalising measures and campaigns for human rights for homeless people.³ Housing Rights Watch and FEANTSA wanted to respond to the fears, discussions and questions posed by the specific experiences and problems of homeless people in their everyday lives in the European Union.

FORMAT

This report was coordinated by Guillem Fernández Evangelista who contacted experts across the European Union to contribute to articles. Samara Jones planned and designed the structure of the book and who provided editorial support from

3. Criminalizing Crisis: The Criminalization of Homelessness in U.S. Cities, NLCHP, 2011 <http://www.nlchp.org/content/pubs/11.14.11%20Criminalization%20Report%20%20Advocacy%20Manual,%20FINAL1.pdf>

FEANTSA's office in Brussels. A full list of expert contributors can be found at the beginning of the book. This report brings together articles from academics, activists, lawyers and NGOs on the topic of human rights and penalisation. Divided into three main sections, the report provides an important theoretical and historical background, highlighting examples of penalisation across the EU, and finally suggesting measures and examples for how to redress this dangerous trend.

Several case studies (Chapters 3 to 6) illustrate how homelessness is penalised, including the criminalisation of homeless people's everyday activities in Belgium, Poland and Hungary. Chapter 6 examines how homeless people are penalised, discriminated against and often prevented from accessing social services, social housing and shelters in France, England and The Netherlands.

PENALISATION AS A VIOLATION OF HUMAN RIGHTS

EU Member States have committed themselves to protecting and promoting human rights; the EU has a Charter of Fundamental Rights that reinforces this commitment. All EU Member States have signed on to the UN's International Covenant on Civil and Political Rights (ICCPR) and to the Council of Europe's (Revised) Social Charter, which enshrines economic and social rights.

However, as this report reveals, even when governments work to reduce homelessness (e.g. by implementing integrated homelessness strategies), to protect rights, and to ensure access to rights and justice, their inclusive social policies might be undermined by local, regional or even national policies and rules that criminalise and penalise homeless people.

In fact, these measures often violate international human rights treaties like the International Covenant on Civil and Political Rights (ICCPR) and the European Social Charter. Criminalisation and penalisation policies routinely penalise people for their involuntary status and violate individual's rights to be free from cruel, inhuman and degrading treatment (Article 7 ICCPR), the right to liberty and security of the person (Article 9), the right to privacy (Article 17), the right to the family (Articles 17 and 23), the right to freedom of assembly (Article 21) and voting rights (Article 25). Discrimination against homeless people, based on their poverty and other factors, further entrenches the laws and social norms that allow systematic violations of these rights.⁴

This report reinforces the importance of taking a human rights-based approach when creating and delivering all policies—particularly social policy. The report reviews the history of human rights and the interdependency between economic, social and

4. Cruel, Inhuman and Degrading: Homelessness in the United States under the International Covenant on Civil and Political Rights, National Law Centre on Homelessness and Poverty, August 2013

cultural rights and civil and political rights (Chapter 1). Human rights are universal legal guarantees protecting individuals and groups against actions and omissions that interfere with fundamental freedoms, entitlements and human dignity. Human rights law obliges governments and other duty-bearers to do certain things and prevents them from doing others. So, in order to respect human rights (under a human rights-based approach), homeless policies are anchored in a system of rights and corresponding obligations established by international law.

How can policies be developed and implemented using a human rights-based approach? First of all, the risk factors and immediate, underlying and basic causes of the problems of homelessness must be assessed and all stakeholders brought together to build effective alliances. The strategies for eradicating homelessness should encourage the development of human rights because they must oversee and assess results as well as processes. Therefore, policy targets and goals should be measurable as they are basic components for programming and assessment. In fact, strategies should ensure the accountability of all stakeholders, and include the participation of the people affected by homelessness as both a means and an end. In other words, homeless people should be recognised as the main protagonists of their own development instead of being viewed as passive receivers of products and services. For some governments and service providers this may mean a radical change in the way that policies are developed and put into practice.

One of the findings of this report is that the development of national strategies for eradicating and preventing homelessness are good practices in this respect. The report highlights how homelessness strategies have a direct link to the human rights-based approach. Unfortunately, a country that has a national strategy to eradicate homelessness may still have policies and practices that violate basic human rights. This is why awareness about criminalisation of homelessness is so important. We also found that it is possible for a countries and cities that do not have a national homelessness strategy to develop programmes that respect and promote the human rights of homeless people. Building bonds with the long-term homeless and eschewing repressive or force-based measures are crucial to developing good, effective and successful policies that respect human rights.

Many service providers and NGOs are not used to taking a rights-based approach to their work. For most, including FEANTSA's member organisations, the immediate needs (housing, food, employment, etc.) of a person who is homeless are dealt with first, which means that social workers do not usually have time or, in some cases, the knowledge to consider whether a homeless person's rights have been violated. This report includes interesting examples of collaboration between service providers and social NGOs and legal experts. For example, in Spain, NGOs work closely with university legal clinics to pursue cases and advocate for the rights of homeless people (Chapter 11). In France, Jurislogement brings together lawyers, activists, academics and NGOs to share information and collaborate on strategic litigation. Another valuable resource for NGOs and others working with homeless people are ombuds offices as described in Chapter 12.

FINDINGS

The report set out to assess the broad trends in Europe and found that:

- Europe is experiencing an alarming increase in punitive, coercive and repressive measures to expel homeless people from public spaces, hinder their access to basic rights like housing, and minimise the visibility of people experiencing homelessness through incarceration, detention, expulsion or deportation in the case of migrants. These three forms of penalisation are the result of the surge of criminal policies based on the American and Anglo-Saxon “Law and Order” tradition and the “culture of criminal emergency and exceptionality” in Europe.
- Homelessness is not being explicitly criminalised in Europe. The process is subtle and often almost invisible:
 - The everyday activities of homeless people in their struggle for survival are being criminalised through the expansion of administrative regulations, at the local level and, in some cases, of the criminal code at the national level.
 - There are signs that criminal law is being used as a “symbolic” element at the discursive (political) level to convey a message of “security” to the citizenry, regardless of whether it can be made more or less effective in a generalised way. As a result, a type of “perpetrator” is identified through the criminalization of certain “actions”.
 - Also, criminalisation processes based on introducing new, harsh criminal laws or advocating tougher penalties for existing laws (resurgence of punitivism) are being implemented.
 - Regulations exist that give police and other authorities powers of discretion. This means that police can target homeless people and sanction them disproportionately. For example, homeless people gathering in a public space may be asked to ‘move on’ or sanctioned, whereas other residents or community members would not be targeted by authorities. This discriminatory enforcement increases feelings of fear of authority figures amongst the already vulnerable homeless population and can deter them from seeking help, services and recourse to justice for violation of their human rights.
- A resurgence of the idea of “the enemy” has also emerged in recent years. In the past, homeless people were not usually included as part of these “dangerous” populations; in Europe, immigrants and the Roma and Travellers’ communities have historically been the target of such criminal policies. However, the surge in immigrants among the homeless population and the obstacles to development of housing rights for Roma and Travellers indicate that they (or some of them) are victims of the application of the so-called “criminal law of the enemy”. That is, a criminal policy based on punishment due to the presumed risk of committing a crime depending. This punishment is justified on an “exceptional” basis, with disproportionately high penalties and the reduction or outright suppression of certain procedural guarantees or rights (e.g. access to justice, to appeal, to legal aid, etc.).

- As a result of the transposing of this “exceptionality” to social policy, people are being dealt with not according to their needs and by virtue of their human rights, but according to their residency status in the country. Undocumented migrants face difficulties or are prevented from accessing shelters and social housing, which leads a parallel residential and social system. This two-tiered system weakens the basic foundations of human rights, the right to equality and non-discrimination, and the dignity of people, as it requires that users be treated based on their immigration status rather than their homelessness and respect for their human rights.
- Some local homeless service providers face serious limitations in their efforts to adopt the rights-based approach, given their close ties to government. Other factors include the lack of knowledge of rights and how to promote access to rights. This report found that using a rights-based approach does not simply mean going to court to litigate. Although litigation is essential to change administrative structures, dissemination of the human rights-based approach should include legal advisory services, user and/or civil servant training sessions, the collecting of evidence as grounds for cases and assessing the impact of public policies. For all of this, the joint work (at different levels) of universities, ombudsmen, government administrations, NGOs and social movements is essential.

RECOMMENDATIONS

The findings in this report demonstrate that action needs to be taken at all levels of policy-making to stop the criminalisation and penalisation of homelessness in Europe.

The **European Union**, with its institutions including the **European Commission** and the **European Parliament**, has a clear role in:

- Raising awareness about the criminalisation of homelessness. As guardians of the Treaties and, in particular, as advocates for human rights in the European Union, the EU institutions should ensure that their policies do not violate human rights, and do not explicitly or inadvertently contribute to the criminalisation and penalisation of homelessness.

NATIONAL GOVERNMENTS SHOULD:

- Refrain from developing and implementing policies that criminalise and penalise homelessness. For example, Hungary should remove from its amended constitution the provision that allows for national laws to be passed that will make rough sleeping illegal (again).
- Ensure that all policies are not counterproductive. Many countries have excellent homelessness strategies in place, yet simultaneously allow cities and regions to persecute homeless people for carrying out life-sustaining activities in public

because there are no other housing options available. Social policy should not be carried out by local authorities in the guise of policy and security policies.

- Support the protection of human rights for all, including homeless people, by heeding reports and recommendations from Ombuds offices, National Human Rights Institutes, and NGOs.
- Raise awareness about the negative and highly disruptive impact of criminalisation and penalisation for homeless people who are trying to reintegrate into society.
- Ensure that enough supported permanent housing options are available.

LOCAL GOVERNMENTS SHOULD:

- Refrain from issuing policies that criminalise and penalise homeless people.
- Repeal all policies and measures that criminalise homeless people.
- Work closely with homeless service providers, advocates, academics, police forces and homeless people to ensure that human rights are respected and that homeless people are not punished for carrying out life-sustaining activities in public.
- Ensure access to supported permanent housing options.

Housing Rights Watch and FEANTSA also call on policy-makers to consider the following:

Do not punish people for being poor; poverty is not a crime:

- Bylaws and regulations dealing with civic issues tend to sanction actions, not people, but the actions being sanctioned are directly related to the activities homeless people engage in to survive, thus criminalising their situation. It needs to be assumed that poverty and homelessness are not lifestyle choices. People do not elect to initiate homelessness processes and to live in poverty, so they should not be punished for their situation. The centrality of housing must be taken into account as a key factor in reducing homelessness and re-offending rates.
- It is necessary to put a halt to the tendency to view all social problems from a criminal prism, to the symbolic and demagogic use of criminal law and to the continued increase in types of crimes or levels of punishment to address problems where “non-criminal” intervention would be more effective and less costly. Collaboration between service providers, housing departments, health and social services and police and private agents can help divert individuals experiencing homelessness to programmes that will lead to permanent housing with appropriate supports or, at the very least, to tailored interventions that connect people with housing, services, and treatment and meet the goal of reducing the number of people inhabiting public spaces.

Evictions cannot be a policy tool—long-term, permanent housing solutions are crucial:

- Evicting, sanctioning, repressing or arresting homeless people does not solve the problem; rather, it moves it or postpones it. It is important to take into account

that, regarding long-term homelessness, a bond between the homeless person and the social workers must be established, so that the homeless person can access existing resources voluntarily rather than by force or threat of force. This requires time and also involves skilled human resources as well as financial resources. It is also important for teams to include people with previously experience of homelessness.

- The right to adequate housing includes the right to be protected against forced eviction. This is guaranteed in several international human rights treaties. As a result of these standards, States are under an obligation to ensure that evictions are only carried out as a last resort and with appropriate procedural safeguards. These safeguards include: genuine consultation with those affected, reasonable notice and access to legal remedies. Adequate alternative housing and compensation for all losses must be made available to those affected, regardless of whether they own, occupy or lease the land or housing in question. Evictions must also not render individuals homeless. States are under the obligation to ensure that there is no discrimination against particular groups or segregation in housing. The collective expulsion of aliens is prohibited under ECHR.

All levels of government have an obligation to respect human rights and prevent discrimination:

- The obligation of human rights regulations to guarantee, at least, that an essential minimum standard for all economic, social and cultural rights is met involves the responsibility of guaranteeing an adequate standard of living through basic subsistence, which means providing basic primary health care services, basic housing and basic forms of education. Instead of allocating scarce resources to costly criminalisation measures, States should route the largest possible amount of available resources to initiatives that help people in situation of poverty to enjoy all economic, political, social, civil and cultural rights.
- States should eliminate all forms of direct and indirect discrimination and harassment in all their forms (including social origin) against homeless people, and they should implement all the necessary measures for this. The European Union Agency for Fundamental Rights should pay more attention to the repercussions of extreme poverty and social exclusion on access to fundamental rights, taking into account that enforcing the right to housing is essential for the enjoyment of many other rights, in particular political and social ones.
- No matter how reprehensible certain behaviours may be, the human rights and human dignity of those who behave in such ways are inalienable minimum standards that are inherent to the human condition. The criminal system should strive to achieve a reasonable degree of reassurance and well-being for the majority of the citizens, and it should also strive to cause the least essential discomfort to those who have violated the legal-criminal codes. For many people, it's because they are poor and socially excluded that they end up in jail.

Policy creation based on needs:

- There should be a single criterion for tending to homeless people, which should be based on their need, as well as a respect for, and guaranteeing of, their human

rights. The dualization of the criminal and social system should be avoided. No person should be left destitute in the European Union. There is a need to respect fundamental human rights, regardless of legal or administrative status. In this regard, access to (emergency) shelter should be conditional only on the criterion of need and human rights. Homeless service providers should not be penalised for providing services to people presenting in need. Homeless services must not be systematically used to compensate for inconsistent migration policies that lead people to situations of destitution and homelessness. Neither should access to homeless services be used as a means to regulate migration.

More awareness, more training needed:

- Training and participative exchange spaces in different aspects of human rights and their relationship to homeless people should be promoted, and their size and methods should be conducive to a more in-depth approach to the issues being addressed, provide the greatest possible information about available resources for enforcing fundamental human rights under equal-opportunity conditions, and facilitate access of people whose rights have been violated to resources for making claims against or denouncing such actions. Educational programmes and public awareness campaigns should be developed focusing on the multiple obstacles homeless people face, and the different agents involved in solving the homelessness problem should receive adequate human rights training.
- The implementation of the human rights-based approach should consider empowering homeless people and defining measurable, feasible goals, supporting research and monitoring to assess public policies for eradicating homelessness and their impact on the development of the human rights of the homeless.

Using strategic litigation:

- Strategic litigation is an instrument for the prevention and protection of human rights. This begins at the local level, which is where major litigation efforts must focus. The contribution of international institutions, academics, ombudsmen, NGOs and other mobilisation organisations is evidenced in aspects like advice, support for victims, promoting human rights and performing actions that have a social projection. Strategic litigation should be planned involving public-interest and human rights NGOs and legal clinics. A priority on the agenda is to strengthen valuable instruments like joint actions, alliances and the “amicus curiae”.



Background – Housing Rights Watch

Under the EU Social Inclusion Strategy, FEANTSA (2005) decided to produce a Shadow Report to provide a homeless service provider's perspective on the implementation of social inclusion policies and provided a synthesis of a variety of approaches in the fight against homelessness based on the reports of the national action plans for social inclusion.⁵ These approaches were:

- Evidence-based
- Comprehensive
- Multidimensional
- Rights-based
- Participatory
- Statutory
- Sustainable
- Needs-based
- Pragmatic
- Bottom-up

The intention was not to create a definitive proposal whose policies had to be applied to all European countries. Rather, the idea was that these approaches could be adapted to the national context according to each country's priorities and requirements and to the profile and needs of its homeless population, thus becoming an instrument to facilitate discussion on the development of relevant policies. The report's conclusion was that very few countries have a rights-based approach to homelessness, and even fewer have a legal framework providing an enforceable right to housing for homeless people. Nevertheless, a few countries are increasingly focusing on the enforceable right to housing. Access to rights was among the common objectives of the EU social inclusion strategy. However, the rights aspect of

5. FEANTSA (2005) The Perspective of Organisations Working with the Homeless on the Implementation of Social Inclusion Policies under the EU Social Inclusion Strategy (Brussels: FEANTSA). [http://www.feantsa.org/files/social_inclusion/naps/en_implementation%20\(1\).pdf](http://www.feantsa.org/files/social_inclusion/naps/en_implementation%20(1).pdf)

social inclusion has clearly been neglected in the social inclusion process (FEANTSA, 2005). FEANTSA first showed concern about this and dedicated a special issue of the Homeless in Europe magazine to housing rights as early as 2003.⁶

On 28 October 2005 the General Assembly of FEANTSA adopted its Statement of Values, which demonstrates the importance of rights in its goals, objectives and everyday work.

STATEMENT OF VALUES ADOPTED BY FEANTSA'S GENERAL ASSEMBLY, 28 OCTOBER 2005

- FEANTSA and its members are committed to the advancement of the principles of equality, social justice, solidarity, non-discrimination and the **promotion and respect of fundamental human rights for all**.
- FEANTSA and its members seek to advance the **right of every person to live in dignity** and promote the right of all people to have a **secure, adequate and affordable place to live**.
- FEANTSA and its members are committed to the realisation of internationally recognised **housing rights**.

(...)

- FEANTSA and its members believe people who are homeless are full members of society and consider the following rights as particularly important in this regard:
 - The right to **social inclusion and citizenship**.
 - The right to be treated with **dignity** and respect.
 - The **right to services that are accessible**, provide choice and are of a high quality in order to meet the needs and aspirations of the people who use them.
 - The right to **participate** in decision-making that affects them.
 - The right to **privacy, safety and confidentiality**.

(...)

- FEANTSA and its members recognise that transnational exchanges, information gathering, **advocacy**, and awareness-raising are a valuable resource to impact on public policy.

Established in 2003, FEANTSA's Housing Rights Expert Group focuses on the enforceable right to housing and the interdependence of housing with other rights under international treaties. In 2005, the Housing Rights Expert Group and FEANTSA published "Housing Rights and Human Rights" by Dr. Padraic Kenna (founding member

6. http://www.feantsa.org/files/Month%20Publications/EN/right_to_housing_2003_english.pdf

of HREG), which was also published in French and Spanish. The group co-organized a “Housing Rights in Europe” conference with the Finnish Presidency in 2006, and that same year drafted Collective Complaint 39/2006 -- FEANTSA vs. France -- which charged France with the unsatisfactory application of Article 31 of the Revised European Social Charter. FEANTSA’s Housing Rights Expert Group began publishing information on international housing rights instruments and mechanisms on www.feantsa.org in 2007, and in 2008 launched a database of jurisprudence resulting from decisions of the European Court of Human Rights relating to housing rights.

In 2008, a second successful Collective Complaint (53/2008 FEANTSA vs. Slovenia) was lodged against Slovenia by FEANTSA for unsatisfactory application of Articles 31, 16 and E of the revised European Social Charter and the group coordinated a special issue of *Homeless in Europe*, FEANTSA’s magazine: “The Right to Housing: The Way Forward”. Following reflections on the HREG work-to-date in 2008, the group determined there was a need to encourage strategic litigation at the local, regional and state level. As a result, Housing Rights Watch (HRW), a European network of interdisciplinary groups of associations, lawyers and academics committed to the promotion, protection and fulfilment of the right to housing for all, was founded in 2008 and is supported by FEANTSA and Fondation Abbe Pierre.

Other tools, including an Anti-Discrimination Toolkit and a leaflet, were disseminated to publicize and expand the HRW network. In addition, work continued to develop housing rights through the mechanism of collective claims in other countries. 2010 saw the organization of the “Housing Rights: from Theory to Practice” conference in Barcelona co-organized with the Associació ProHabitatge and Faculty of Law of University of Barcelona. Also, the first two issues of the Housing Rights Watch Newsletter were published, along with a special issue on “Housing Rights of Roma and Travellers Across Europe”. In 2011, HRW held an international conference on “Migration and Housing Rights”, with The Hague University and Federatie Opvang, and published a leaflet campaign to promote the use of the EU’s Charter of Fundamental Rights to access housing rights at the local level. In 2012, the “Contemporary Housing Issues in a Changing Europe” conference was held in Galway with the National University of Ireland, where the third issue of the Housing Rights Watch Newsletter was also distributed.

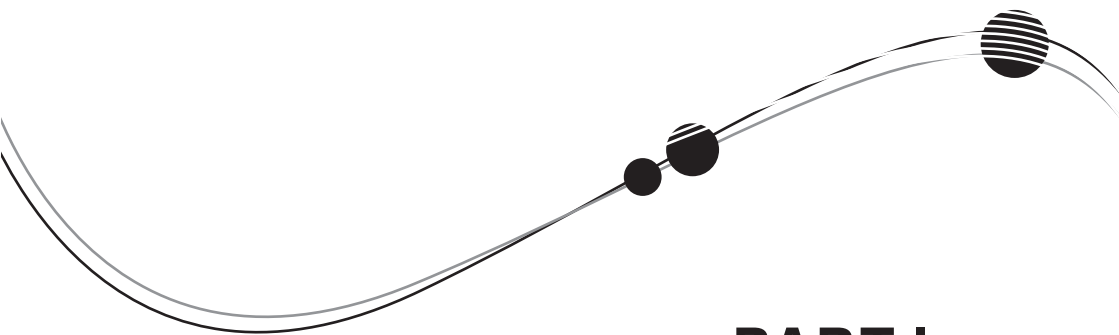
FEANTSA began working on the issue of criminalization of homelessness as early as 2006. In 2008, the Housing Rights Experts Group raised the question of the need to address the defence of the human rights of homeless people who are being criminalised in public spaces in many European cities, as highlighted by the European Observatory on Homelessness in 2006.⁷ HRW denounced these human rights violations in 2010 in statements opposing the draft law restricting the rights of homeless people in Hungary, and another to denounce an action plan to place homeless people in a camp in Prague. HRW became vocal on the issue and joined

7. http://eohw.horus.be/files/freshstart/Thematic%20Reports/Changing%20role%20of%20the%20state/2006_homelessness%20and%20exclusion_regulating%20public%20space.pdf

a March 2011 workshop on Penalisation of People Living in Poverty hosted by the International Council on Human Rights Policy in Geneva, which included human rights experts, academics, civil society and representatives of United Nations entities from all regions, who provided valuable input into the 2011 thematic report of Magdalena Sepúlveda, Special Rapporteur on Extreme Poverty and Human Rights presented at the UN General Assembly in October 2011. HRW also participated in the “Governing Poverty: Risking Rights” media forum project, jointly hosted by ICHRP and OpenDemocracy.net with the article “Geographies of exclusion” (Fernández, 2011).

In 2012, the third issue of the Housing Rights Newsletter focused on the criminalization of poverty, ahead of the official campaign launch for “Poverty is Not a Crime” in June. This European campaign has its own website and was supported by the *Homeless in Europe* magazine edition devoted to “The Geographies of Homelessness”. In this context, FEANTSA and HRW are committed to delve deeper into the theoretical and political debate on the criminalization of homeless people and defend their human rights. This European report, on the criminalisation and penalisation of homelessness in Europe, is FEANTSA’s first comprehensive examination of the issues across Europe and carries the very clear message:

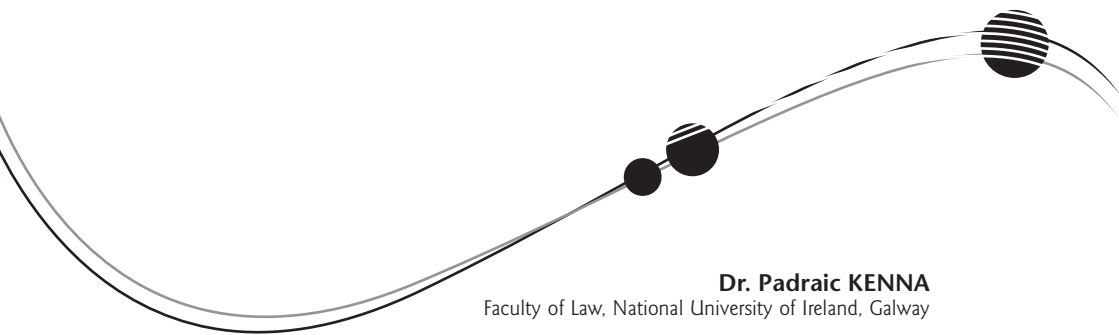
**POVERTY IS NOT A CRIME,
IT’S A SCANDAL!**



PART I
THEORETICAL FRAMEWORK

CHAPTER I

Applying a Human Rights - Based Approach to Homelessness - from Theory to Practice



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*I thought you were a lawyer
I'm a human first, then a lawyer.
It's possible to be both.*

The Street lawyer – John Grisham (1998)

In order to explain what the Law is, it is common to compare the individual within a society with “Robinson Crusoe on his island”. The latter, as he was alone, could not establish any legal relationship because the Law is always related to a society; that is, a plurality of people that are in contact and have to resolve conflicts of interests. Human beings have always fought to improve their well-being and living conditions. This is why they have developed mechanisms for co-existence (determining how they relate to others, how they interact with their environment), and set up instruments guaranteeing their survival and happiness. This set of norms constitutes the (objective) Law; that is, a system of norms establishing and guarding a given organisation of social relations, and it tends to prevent the violation of such norms. Consequently, the norm (Law) organises something and the public authority guarantees the binding effectiveness of such norm. It is worth noting that each of these systems of norms arises in a given political, economic and social context, and that they are imposed by the dominant social groups at a particular moment in history. The achievement and recognition of liberty, dignity, equality, and well-being have been guaranteed by social, political, and even cultural struggles (Castanyer *et al.*, 2009).

Therefore, recognition of “rights” by the State has primarily responded to the struggle (by the community and its organisations) to achieve such rights. Nevertheless, it is worth noting that such recognition by the State has allowed us to “identify responsibilities when it comes to guarantee those rights, generalise their protection, and launch policies and measures tending to achieve their validity in an irreversible way”. It is established that individuals are born with some inherent rights that, as such, are enjoyed even without recognition by a third party (as these rights are not given by anyone, no one can take them away or abolish them). Nonetheless, it is also true that recognition by the State places these rights in three important spheres: guarantee, requirability, and reparation (Graciela *et al.* 2008). The other side of the (objective) Law, understood as the set of rules organising the behaviour of individuals, are (subjective) rights. Rights imply the possibility to act according to the Law; they consist of the capacity (or set of capacities) bestowed on an individual to defend her/his interests in the framework of the general rule. Thus, there is a link between the Law and rights: while the former sets the limits of the power or the capacity to act of individuals, the latter represent the very capacity of action according to the rules (Lacruz, 1998). Therefore, the term “right” designates a capacity of the individual, which generates the legal duty for public authorities to comply: to either do or not do something.

HOW WERE HUMAN RIGHTS BORN?

Human rights have been progressively recognised over history through the evolution of individuals, peoples and communities, and through the evolution of the legal, political and moral ideas in force at any given time. The history of human rights must be considered in their contexts. We tend to see history as an inevitable series of isolated events taking place at a given time; however, history is a process where events are interrelated and form a whole (Graciela *et al.*, 2008). Therefore, social achievements obtained through efforts and struggles can be reversed, or even erased. It is thus of utmost importance to know the reasons behind reversals, as well as the actions that prevent them.

The history of human rights starts in the Modern Ages, because during the Middle Ages there were no true declarations of universal rights, only privileges that monarchs gave to certain social groups. The history of social movements demanding the recognition of “rights” and the end of privilege and arbitrary rule began in England (Magna Carta Libertatum [1215], The Petition of Rights [1628], Habeas corpus [1679], The Bill of Rights [1689]), the United States (the Virginia Declaration of Rights [1776], United States Declaration of Independence [1776]), and France (Declaration of the Rights of Man and of the Citizen [1789]). In the nineteenth century, the Industrial Revolution consolidated inhuman and dangerous labour standards, that instead of dignifying the human condition, in fact aggravated inequalities and enhanced privilege, leading to social conflicts led by the proletariat, which demanded basic rights.

This new scenario showed, among other things, that recognizing human rights was not enough: there was a need to guarantee social rights, and, at the same time, political democracy had to become a social democracy. In addition to the adoption of social rights, during the nineteenth century there was a “formal change” in the recognition of rights, as they were no longer proclaimed in “declarations”, but rather included in the constitutions of states, which was meant to provide rights with the guarantees set up by each constitution. During the twentieth century there was recognition of economic and social rights, which would later be expanded from the second half of the century. After World War I, several declarations of human rights were promulgated, including the Constitution of the United States of Mexico (1917), the Soviet Declaration of the Rights of the Working and Exploited People (1918) in Russia, and the Weimar Constitution (1919) in Germany. The twentieth century witnessed social struggles leading to the recognition of rights such as the fight against racial discrimination, the achievement of women’s suffrage, and the consolidation of the movements for the liberation of women and against their discrimination.

Between the two World Wars, a highly important political development took place: the rise of totalitarian regimes, inherently opposed to the rights of individuals. This is why, immediately following the defeat of such regimes, a movement was created for the recognition and the protection of individual rights from a universal perspective. Thus, 1945 saw the approval of the United Nations Charter, creating this international organisation that, embraced the “respect for human rights and

fundamental freedoms” as one of its fundamental principles. In consequence, in 1948, the Declaration of Human Rights was approved, later to be complemented by the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both approved in 1966.

The United Nations Charter allowed for the existence of regional agreements or bodies, and thus the Council of Europe was born as an intergovernmental organisation aimed at the protection of human rights. The Council of Europe promotes “the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy” (Preamble, Statute of the Council of Europe, 1949). Every Member State must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms (article 3, Statute of the Council of Europe, 1949). The Council of Europe refined the definition and the defence of those fundamental rights and created the European Convention on Human Rights and Fundamental Freedoms in 1950 and the European Social Charter (ESC) in 1961. The European Social Charter includes social and economic rights, while the European Convention on Human Rights focuses on civil and political rights. To develop and protect these rights further, the European Court of Human Rights and the Committee of Social Rights of the Council of Europe have progressively set up positive duties for member states. We can see a change in the perception that the ESC is less important than the Convention. There is increasing pressure for the ESC to become an emblematic expression of the European Law of Social Rights or Social Law of Human Rights, and as the bulwark of the European social democracy (Jimena, 1997).

The establishment of the European Union (EU) has led to the expansion and recognition of fundamental rights. The founding Treaty of the European Community included the recognition of different rights (mainly economic) in the context of the Common Market. Within the Treaty is the commitment to guarantee the free movement of goods, capital, services, and people, which should all be enjoyed free from discrimination based on nationality. A wage equality clause is also part of the EU's commitment to equality. Taking the recognition of these rights as a point of departure, the Court of Justice put forth a wide list of fundamental rights and references to other international treaties and to constitutions of the Member States, which were integrated later, through several reforms, to the community Treaties. The European Economic Community (EEC) and, later the EU had to include fundamental rights in the Treaties, and to respect them in the making and implementation of policies. This was due, to a great extent, to the protective action undertaken by the Court of Justice, even though the community Treaties did not entitle the Court to have this role until the entry into force of the Treaty of Amsterdam (Freixes *et al.*, 2002).

To sum up, the progressive recognition of human rights, understood as a historical process of expansion of the legal content of human dignity, establishes that these rights should not be set as a hierarchy in terms of relevance, implied duties for public authorities, or legal implications. Instead, as per paragraph 5 of the first

part of the *Vienna Declaration and Programme of Action*, approved by the World Conference on Human Rights (1993): “All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis.”

WHAT IS THE HUMAN RIGHTS-BASED APPROACH?

The Human Rights-Based Approach (HRA) is a conceptual framework for the process of human development that, from a normative perspective, is based on the international human rights legislation and, from an operative perspective, is aimed at the enhancement and the protection of human rights. The objectives of this approach lie in the analysis of those inequalities that play a central role in international development policies, and in correcting the discriminatory practices and unfair distribution of power that hinder development (OACDH, 2006). Although the HRA was born in the context of international development policies, the supporting rationale was the conviction that the design, implementation and evaluation of every public policy should incorporate the human rights perspective (Kenna, 2011). Therefore, this approach helps to create policies, laws, regulations and budgets that establish which particular human rights must be dealt with, what must be done, and to what extent; and also contributes to judge who is responsible for their enforcement and to ensure that the necessary capacities and resources are allocated (ACNUDH, 2006). In this sense, the HRA can be understood as a new perspective for the conception and design of public policies in the framework of a consultation process between the State and civil society (Jiménez, 2007). The HRA demonstrates that the goal of public policies is no longer to satisfy needs, but to realise rights. Satisfying a need may be legitimate, but it is not necessarily linked to a duty of the State, while the existence of rights involves deciding who is responsible for their enforcement (ALG, 2010). Rights imply duties, while needs do not. An approach based on human rights identifies rights-holders and what they are entitled to as well as the corresponding duty-bearers and the duties they have to fulfil. Additionally, such an approach tries to strengthen the capacity of rights-holders to claim their rights and the capacity of duty-bearers to fulfil their obligations. Therefore, we can identify significant differences between approaches based on charity, needs, or rights.

TABLE 1:
**Shift in Development Thinking Introduced
by Human Rights-Based Approach**

CHARITY APPROACH	NEEDS APPROACH	RIGHTS-BASED APPROACH
Focus on input and outcome	Focus on input and outcome	Focus on process and outcome
Emphasises increasing charity	Emphasises meeting needs	Emphasises realising rights
Recognises moral responsibility of rich towards poor	Recognises needs as valid claims	Recognises individual and group rights as claims towards legal and moral duty-bearers
Individuals are seen as victims	Individuals are objects of development interventions	Individuals and groups are empowered to claim their rights
Individuals deserve assistance	Individuals deserve assistance	Individuals are entitled to assistance
Focus on manifestation of problems	Focus on immediate causes of problems	Focuses on structural causes and their manifestations

Source: (Kirkemann & Martin, 2007)

The principles guiding the development of the HRA are based on their:

Universality and Inalienability: Human rights are *universal* and *inalienable*. *All people everywhere* in the world are entitled to them. The universality of human rights is encompassed in the words of Article 1 of the *Universal Declaration of Human Rights*: “All human beings are born free and equal in dignity and rights.”

Indivisibility: Human rights are *indivisible*. Whether they relate to civil, cultural, economic, political or social issues, human rights are inherent to the dignity of every human person. Consequently, all human rights have equal status, and cannot be positioned in a hierarchical order. Denial of one right invariably impedes enjoyment of other rights. Thus, the right of everyone to an adequate standard of living cannot be compromised at the expense of other rights, such as the right to health or the right to education.

Interdependence and Interrelatedness: Human rights are *interdependent* and *interrelated*. Each one contributes to the realization of a person’s human dignity through the satisfaction of his or her developmental, physical, psychological and spiritual needs. The fulfilment of one right often depends, wholly or in part, upon the fulfilment of others. For instance, fulfilment of the right to health may depend, in certain circumstances, on fulfilment of the right to development, to education or to information.



Equality and Non-discrimination: All individuals are equal as human beings and by virtue of the inherent dignity of each human person. No one, therefore, should suffer discrimination on the basis of race, colour, ethnicity, gender, age, language, sexual orientation, religion, political or other opinion, national, social or geographical origin, disability, property, birth or other status as established by human rights standards.

Participation and Inclusion: All people have the right to participate in and access information relating to the decision-making processes that affect their lives and well-being. Rights-based approaches require a high degree of participation by communities, civil society, minorities, women, young people, indigenous peoples and other identified groups.

Accountability and Rule of Law: States and other duty-bearers are answerable for the observance of human rights. In this regard, they have to comply with the legal norms and standards enshrined in international human rights instruments. Where they fail to do so, aggrieved rights-holders are entitled to institute proceedings for appropriate redress before a competent court or other adjudicator in accordance with the rules and procedures provided by law. Individuals, the media, civil society and the international community play important roles in holding governments accountable for their obligation to uphold human rights¹.

These human rights principles must guide and pervade the development of public policies; that is, this is not about an additional policy, isolated from others, but rather a general orientation common to all policies. For this purpose, it is necessary to set up specific measures aimed at: promoting human rights and raising awareness in the society as a whole and, especially, among the involved actors, capacity-building, to create a sustainable system of human rights enforcement; integrating human rights in the legislation and actually enforcing them; and, of course, supervising these policies and objectives through an effective and participatory system of social monitoring of human rights. In the same fashion, UNESCO (2006) stated that an effective implementation of human rights must integrate four basic elements:²

- Analysis of human rights based on the duties of states.
- Setting clear deadlines for the goals and standards of human rights.
- Action programmes and plans with responsibilities across all levels of government and administration.

1. Source: Human Rights Principles – United Nations: <http://www.unfpa.org/rights/principles.htm> - retrieved, 7 May 2013

2. The text of the UNESCO Strategy on Human Rights is reproduced in its entirety as adopted by the General Conference of UNESCO at the 20th plenary meeting of its 32nd session on 16 October 2003 by 32 C/Resolution 27.

- An effective control of the compliance with and the enforcement of human rights, involving both government authorities and rights-holders.

Therefore, the HRA offers a normative framework for the development and implementation of public policies, as well as for their evaluation according to a wide set of parameters and indicators designed to assess progress beyond the legal and institutional frameworks. The HRA is related to the process and the outcomes of the enforcement of human rights and requires some necessary, specific and unique elements (UNICEF, 2004):

- Assessment and analysis in order to identify the individual human rights claims of rights-holders and the corresponding human rights obligations of duty-bearers, as well as the immediate, underlying, and structural causes when rights are not realized.
- Programmes to assess the capacity of rights-holders to claim their rights and of duty-bearers to fulfil their obligations. Later, they then develop strategies to build these capacities.
- Programmes to monitor and evaluate both outcomes and processes guided by human rights standards and principles.
- Programming is informed by the recommendations of international human rights bodies and mechanisms.

In addition, the following are essential, for the implementation of the human rights-based approach (UNICEF, 2004):

- Situation analysis is used to identify immediate, underlying, and basic causes of development problems. These analyses have to take into account all stakeholders, in order to set up strategic partnerships.
- Strategies enhance the development of human rights because they monitor and evaluate both processes and results. Strategies or programmes must focus on disadvantaged or excluded groups, as the goal is to reduce inequalities. Goals and targets must be measurable, as they are fundamental components of programming and evaluation. In fact, strategies or programmes have to keep themselves accountable vis-à-vis all stakeholders.
- Participation is both a means and a goal. People are recognised as key actors in their own development, rather than passive recipients of commodities and services.

THE HUMAN RIGHTS-BASED APPROACH AND POVERTY

The February 2010 Eurobarometer survey on poverty and social exclusion shows that almost one quarter of Europeans (24%) consider that people are poor if their resources are so limited that they cannot fully participate in our society. An additional 22% define poverty as the inability to pay for the basic goods needed to live, while another 21% define poverty as the need to depend on social benefits or public assistance. A sizeable minority (18%) believes that people are poor if the amount of

money they can spend each month is below the poverty threshold (Eurobarometer, 2010). Nevertheless, the survey did not ask whether being poor was a consequence of a violation of human rights. It is still uncommon to consider poverty from a HRA perspective. Quite to the contrary, it is often seen as something pitiful or even as the poor person's fault. Nonetheless, poverty is both a cause and a product of human rights violations. Poverty violates human rights because it is a condition derived from cumulative social, political and economic processes (caused by shortages and inequalities) that exclude extremely poor people from the real and effective exercise of human rights and fundamental freedoms (IIDH, 2007). Because their freedom of action and choice is restricted, impoverished people cannot enjoy better and desired living standards. On the other hand, poverty is also the expression, the effect and the result of the structures that have chronically violated those rights, inasmuch as the political and socioeconomic systems have concentrated the benefits of economic growth, public policies and public resources but generally not to the benefit of the most disadvantaged. From this perspective, the defence of the human rights of poor people is not only a concern for lawyers and human rights activists, but also for society as a whole, as an essential element in the eradication of poverty (IIDH, 2007). Therefore, the link between human rights and poverty is evident: individuals whose rights are denied are more likely to be poor. Consequently, for a number of years, several initiatives have integrated the human rights-based approach in strategies for the eradication of poverty (OACDH, 2004). As reasserted by the United Nations High Commissioner for Human Rights, extreme poverty and social exclusion constitute a violation of human dignity and, therefore, require the implementation of urgent measures to eradicate these problems at the national and international level (OACDH, 2002). Thus, according to the principles outlined above, the application of the HRA to strategies or programmes for poverty reduction is generally characterised by the following features (OACDH, 2002):

- Identifying the poor
- Recognition of the relevant human rights legislation at the national and international level
- Equality and non-discrimination
- Participation and empowerment
- Progressive realisation of human rights
- Monitoring and accountability

THE HUMAN RIGHTS-BASED APPROACH AND HOMELESSNESS

The above-mentioned Eurobarometer survey also shows that, in many countries, it is believed that poverty is related to high housing costs; 67% of Europeans think that decent housing in their area is too expensive (Eurobarometer, 2010). Furthermore, when poverty is described exclusively in terms of the level of expenses or income, it is taken for granted that acting on these levels would “resolve” the problem. Nevertheless, people who experience poverty do not only suffer hardships, but are also excluded, voiceless, and threatened by violence and insecurity (AI, 2009). Homelessness is increasingly being considered an expression of social exclusion

(Edgar & Doherty, 2001) instead of a situation of economic poverty. This point of view implies accepting that its causes are composed by structural, institutional, personal and relational factors (Edgar *et al.*, 2005).

The concept of “home” contains three areas or domains: having a house (or space) that is adequate to satisfy the needs of an individual and her family (physical domain); enjoying the opportunity to maintain privacy and to entertain social relations (social domain); and enjoying exclusive possession, security of occupation and legal right (legal domain) (Edgar *et al.*, 2005). Thus, the concept of home is an independent concept neither limited to the housing unit nor to the legal right to possession, but implying more than a permanent or temporary housing: it includes the human dimension of life and the relations that life entails (Kenna, 2006). As a summary, we can say that a home is the result of housing plus an X factor representing the social, psychological and cultural values acquired by a physical structure via its use as a housing unit (Fox; 2007).

$$\text{Home} = \text{Housing} + X$$

The United Nations Committee on Economic, Social and Cultural Rights, in its General Comment number 4 on “The right to adequate housing”, established that the concept of adequacy serves to determine which factors must be taken into account in determining whether a housing unit is “adequate” anywhere in the world. Consequently, while adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, it is nevertheless possible to identify certain aspects that must be taken into account in any context. For example, the legal security of tenure; the availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility (physical); location; and cultural adequacy. For Europe, the definition of the “adequacy of housing” was established in Section 31 of the European Social Charter revised in 1996. Article 31 is devoted to the right to housing and establishes that signatory countries must create measures aimed at “[promoting] access to housing of an adequate standard”. The Committee of Social Rights of the Council of Europe judges that “adequate housing” is structurally safe housing, devoid of any health or sanitary risks, not overcrowded, and enjoying a legally sanctioned safe tenure. In the Committee’s opinion, a dwelling is free of risks for health if it provides all the basic features (water, heating and waste disposal; plumbing and sewer systems; electric power; etc.) and that, if affected by specific problems, (such as the presence of lead or asbestos) these are under control (Kenna, 2006).

Homelessness is a dynamic process, not a defining feature of a group of people or a static condition, and therefore it can be described as a continuum of situations of exclusion from adequate housing (Edgar *et al.*, 2005). This understanding is crucial for the application of the HRA to homelessness because, to eradicate homelessness, the focus must be on the promotion, protection, respect and non-violation of the right to adequate housing, understood as a human right and based on the principle of “human dignity”. This understanding is called **housing rights-based approach**, a “sectorial” version of the human rights-based approach which is applied to the struggle against

housing exclusion and homelessness. The interrelation between the right to housing and other rights is evident, because “housing can be seen to help safeguard the rights to privacy, self-determination and the right to development. It facilitates a range of freedoms including freedom of speech, religious practice and other cultural expression [...] [it] allows us security from cruel, inhumane or degrading treatment [...] [it] is a primary means of protecting health and well-being, offering a space to prepare and cook foods hygienically, to shelter from weather, and to store clothing and other substantive possessions connected with our satisfactory functioning [...] [it] is an essential conjunct to the rights of education and work, and it supports a range of other activities necessary for survival — providing a place to eliminate bodily wastes, to sleep and to relax ... The right to adequate housing is a right with far reaching implications for the fulfilment of other rights and therefore our quality of life” (Austin, 1996). Therefore, assuming that “adequate housing” is a human right implies assuming that homelessness “is a violation of fundamental human rights and freedoms, including the right to liberty and security of the person, the right to freedom from discrimination, the right to privacy, the right to freedom of expression, the right to freedom of association, the right to vote, the right to social security, the right to health, and the right to an adequate standard of living” (Lynch & Cole, 2003). So in order to eradicate homelessness, we must overcome the artificial division between economic, social and cultural rights, on the one hand, and the civil and political rights on the other hand, and defend the indivisibility and the interdependence of all human rights.

When people are homeless or face housing exclusion, their fundamental rights to dignity and equality are constantly threatened or violated. In many cases, the social stigmatisation and degraded and dehumanized conditions which are related, for instance, to rooflessness, seriously jeopardise the dignity of persons affected by this situation (Muñoz *et al.*, 2003). Sometimes, emergency services provided to homeless people puts their rights at risk. For example, they may encounter a lack of privacy in shelters, impersonal or derogatory treatment by workers and officials, and many restrictive regulations (Miller & Keys, 2001). Furthermore, many homeless individuals’ rights are violated by public order and security policies, and by aggression or abuse. So we can say that homelessness is a “consequence” of the violation of human rights but, at the same time, it is also a “cause” of further violations of human rights in general. As long as States do not comply with the duty (established in the International Covenant on Economic, Social and Cultural Rights)³ to devote the maximum of their available resources⁴ to achieving

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3. Section.2.1 PIDESC, “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures [...]”.
 4. “To the maximum of their available resources” means that State resources have to be used to make effective each and every right recognised by the ICESC. In this sense, it is important to underline that these resources must be used in an equitable and effective manner, meaning that the priority must always be given to the protection of the most vulnerable members of society. Lack of resources does never justify that a State does not comply its duty to apply the rights enshrined in the ICESC: the State must always be able to prove that it has implemented enough measures to guarantee the universal right to housing in the shortest possible time and using the maximum of its available resources.

progressively⁵, by all appropriate means,⁶ the realisation of the right to housing, individuals experiencing homelessness may suffer a systematic and permanent violation of their rights.

It is important to remember the interdependence and indivisibility of human rights, because while we must defend the political and civil rights of homeless individuals, we cannot be distracted from the need to (given the definition) defend the right to housing. Vivian Rothstein (1996) showed that in the United States, in early and mid 1980s, the main task of the lawyers representing homeless people consisted of identifying housing services covering their needs, litigating for these services, and helping these people to overcome their situation. However, the provision of services was not sufficient, and given the increasing levels of homelessness over the following years, most lawyers started to defend the rights of homeless people to “exist and survive” in public spaces. This development led to the advocacy for “safe zones” for homeless people to live in (marginalised areas), free from persecution, or for the permission to distribute food on the streets, instead of advocating for more beds in shelters (Rothstein, 1996). This development makes it all the more important that we underline the need for an approach to homelessness problems that understands that there are structural, institutional, personal and relational factors which cause this phenomenon (Edgar *et al.*, 2005). Therefore, the advocacy for the rights of homeless people can take place also in each of those spheres. It does not make sense to defend an individual, only in the framework of the civil and political rights, or private law, unless it is combined with a legal struggle in terms of economic, social and cultural rights, or in the field of public and administrative law, either at the local, national, European or international level. Most important, however, is that homeless people have access to the justice system.

ACCESS TO JUSTICE AND HOMELESSNESS

Using the expression “access to rights” does not imply that the most vulnerable groups in society do not have rights, because, as stated above, every human being

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5. “To achieve progressively” should not be interpreted as a duty devoid of content. It has to be noted that it is a mechanism intended to provide the needed flexibility, and that recognises the specificities of each country, as well as the difficulties faced by a government when tries to guarantee the full exercise of rights. The ICESCR requires the states to implement, as quickly and effectively as possible, the measures necessary to guarantee a full attainment of the economic, social and cultural rights. On the other hand, from the Covenant it does appear that if a Member State implements any measure deliberately regressive regarding the exercise of economic, social and cultural rights, it will have to justify and to demonstrate that, on the contrary, it has used all available resources to prevent this from happening.
 6. “By all appropriate means” is related to an immediate duty. After having ratified the Covenant, the states must undertake immediate action. The first action consists in an in-depth review of all the relevant legislation, in order to adapt it to international legal obligations. Nonetheless, it is not enough, as acknowledged by the Committee on Economic, Social and Cultural Rights. Moreover, the expression “by all appropriate means» implies that, in addition to legal measures, it is necessary to implement other policies of an administrative, judicial, economic, social and educative nature. As for the right to housing, this obligation implies that the states have to prepare a strategic housing plan.

has inalienable and indivisible rights. This expression refers to the fact that there are groups of people that cannot fulfil their rights fully or sufficiently (ICHRP, 2004). As pointed out by the United Nations Development Programme (UNDP), lack of resources and failure to protect rights are two mutually reinforcing problems: while poverty actually restricts the access to justice, it is also true that the lack of access to justice perpetuates poverty among those individuals whose rights are not protected. Therefore, access to justice is an instrument for the transformation of power relationships that perpetuate exclusion and poverty (PNUD, 2005). In this way, the concept of “access to justice” does not only refer to the material or logistic means and instruments at the disposal of those who turn to the judiciary system as “users”, it also implies the duty of the State to protect and guarantee the exercise of rights of individuals as “rights-holders”, on equal terms and free of discrimination on the grounds of sex, racial or ethnic origin, age, political ideology or religious beliefs. In addition, it implies that rights-holders can have their claims resolved fairly and within a reasonable period, with impartiality and according to the criteria and procedures set down in law. Therefore, we can find the following restrictions to the access to justice (PNUD, 2004):

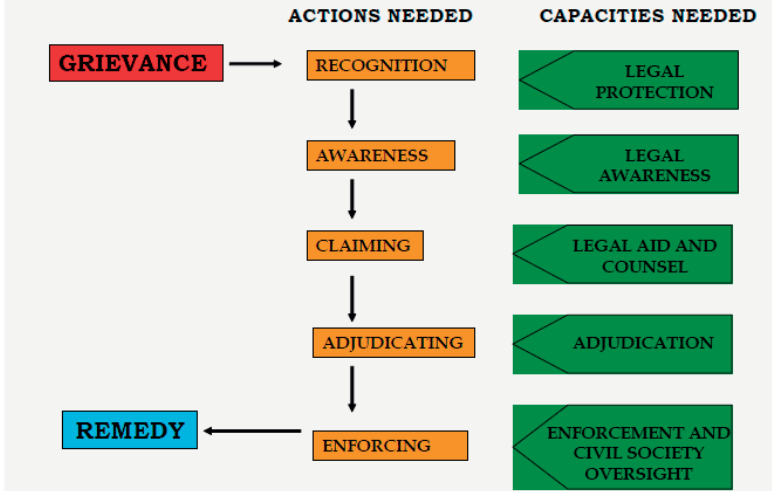
- Long delays; the prohibitive costs of using the system; the lack of available and affordable legal representation that is reliable and has integrity; abuse of authority and powers resulting in unlawful searches, seizures, detention and imprisonment; and weak enforcement of laws, implementation of orders and decrees.
- Severe limitations in existing remedies provided either by law or in practice. Most legal systems fail to provide remedies that are preventive, timely, non-discriminatory, adequate, just and deterrent.
- Gender bias and other barriers in the law and legal systems: inadequacies in existing laws effectively fail to protect women, children, poor and other disadvantaged people, including those with disabilities and low levels of literacy.
- Lack of *de facto* protection, especially for women, children, and men in prisons or centres of detention.
- Lack of adequate information about what is supposed to exist under the law, what prevails in practice, and limited popular knowledge of rights.
- Lack of adequate legal aid systems.
- Limited public participation in reform programmes.
- Excessive number of laws.
- Formalistic and expensive legal procedures (in criminal and civil litigation and in administrative board procedures).
- Avoidance of the legal system due to economic reasons, fear, or a sense of futility of purpose.

Consequently, it could be argued that the human rights-based approach, when applied to homelessness, sheds lights on several restrictions, such as how the social exclusion suffered by homeless people reflects power relationships. Very often, *individuals do not know their rights* (for instance, many immigrants are unaware of housing legislation), *do not know how to exercise their rights* (for example, the problem of evictions and, especially, mortgage foreclosures has revealed individuals’ misunderstanding of the law, and the banks’ abusive

arrogance), *cannot exercise their rights* (for lack of economic resources, or in the case of homeless people with mental conditions or drug addictions), and, finally, (some people) *do not want to exercise their rights* (for example, people reluctant to contact NGOs or lawyers out of distrust for all institutions linked to a State that has oppressed or excluded them).

Several studies (Forell *et al.*, 2005; Mackie, 2008) show that homeless people often have multiple and interrelated legal problems, which, if not dealt with, can exacerbate the process of homelessness. Apparently, the factors leading to homelessness often have, at least partly, legal implications, for example in cases of divorce, domestic violence, evictions and foreclosures, excessive debts, discrimination when accessing housing, or landlord harassment. Legal assistance in these cases may prevent or reduce the risk of homelessness (Forell *et al.*, 2005). At the same time, however, the homelessness process itself puts homeless individuals in a position prone to legal problems, such as being sanctioned for incivility or antisocial behaviour, or being involved (or the victim of) robberies or aggression. In this way, social entities helping homeless people can/should develop legal services to assist individuals in need of help and to empower them. In certain cases (and for different reasons), some of the social entities/organisations that provide services to homeless people are not able to advocate or litigate on their behalf against government policy or legislation. However, there are other means through which homeless people can seek legal aid and support. For this purpose, these organisations should establish links with *pro bono* lawyers, and social entities specialised in the legal defence of human rights (or housing rights and homelessness), and work in networks with ombudsmen or with law schools with legal clinics. The aim of this cooperation is to fight social exclusion in the legal sphere, contributing to and being influential on the development of laws, instead of restricting themselves to service management and political lobbying. It is also worth noting that, in certain cases, the emphasis by human rights advocates on the legal and constitutional framework of human rights has led them to neglect certain forms of action, such as the development of social movements, that sometimes are more likely to motivate and emancipate excluded groups. Part III of this report includes some interesting examples of this. In order to overcome obstacles to the access to justice from the HRA, it is important to identify the grievance that calls for a remedy or redress. A grievance is defined as a gross injury or loss that constitutes a violation of international human rights standards. The capacity and actions needed to achieve access to justice, following a human rights-based approach, are outlined below (UNPD, 2004):

FUNDAMENTAL ELEMENTS OF ACCESS TO JUSTICE



Source: (UNDP, 2004)

In this sense, as explained by the UNDP, legal protection means a recognition of the rights of disadvantaged individuals in the judiciary, and has to involve the right to claim remedies through formal mechanisms. Legal protection for disadvantaged groups can be improved, for instance, via the ratification of treaties and their integration into national law, as well as the recognition and implementation of the constitutional or national legislation. Legal awareness implies capacity-building for individuals, and dissemination of information that can help disadvantaged people to understand that they have the right to obtain reparation through the judiciary, to understand which institutions and authorities should protect their access to justice, and to understand the legal procedures.

On the other hand, for individuals to be able to initiate and pursue legal action, there is a need for legal assistance and advice through public defence systems and pro bono representation, or via laypersons with legal knowledge. Adjudication means developing capacities to determine the most adequate type of redress or compensation. The empowerment of the civil society and the monitoring of policies by the civil society and through parliamentary control are intended to enhance the capacity to enforce court decisions and to institute reasonable appeal procedures against arbitrary actions or rulings, strengthening the overall and collective accountability within the justice system (PNUD, 2004). Suggestions for enhancing the access to rights include the following (ICHRP, 2004):

- Encouraging governments to monitor access and collect disaggregated statistics to measure it; developing indicators for economic and social rights;
- Encouraging participation in decision-making at all levels;

- Developing techniques of budget monitoring and resource allocation to influence government spending priorities;
- Providing immediate services or benefits;
- Looking at issues of accountability;
- Building human rights awareness among the excluded and policy-makers;
- Encouraging strategic networking and issue-based alliances, especially among activists, human rights organisations and organisations with direct contact with excluded individuals and groups;
- Monitoring and supporting arms-length governmental human rights bodies, like national commissions of human rights.

THE HUMAN RIGHTS-BASED APPROACH AND ERADICATING HOMELESSNESS IN EUROPE

Throughout this chapter we have identified the main human rights principles that should guide public policy, as well as the features that should characterise programmes to reduce homelessness according to a human rights-based approach. It is essential to identify the elements shared by the Resolution B7-0475/2011 approved by the European Parliament with the aim to design a European strategy. As stated above, the United Nations High Commissioner for Human Rights believes that extreme poverty and social exclusion constitute a violation of human dignity and urges public authorities to undertake policies to eliminate those problems (OACDH, 2002). Poverty reduction programmes should be characterised by the following features: they identify the target population; they promote the recognition of human rights legislation, respect for equality and non-discrimination; and they contribute to the empowerment of the affected people and the participation of all actors. Moreover, these programmes should progressively realise human rights, a task that involves a series of policies enhancing the stability of actions and that eventually guarantees accountability through monitoring and evaluation of public policy, so measurable targets must be set.

Indeed, the fundamental aspects of the strategies for homeless people (put forth in the European Commission's 2010 joint report on social protection and social inclusion) include many of these features. The European Parliament acknowledges the need to build strategies for the eradication of homelessness, as homelessness entails an unacceptable violation of human dignity and, particularly, of Section 34 of the Charter of Fundamental Rights of the European Union on Social security and social assistance, as well as Section 31 of the Revised European Social Charter on the right to housing. In addition, the resolution urges the European Union Fundamental Rights Agency to pay more attention to the consequences of extreme poverty and social exclusion regarding access to and enjoyment of fundamental rights (considering that respect for the right to housing is essential to the enjoyment of other rights). Consequently, it is important to assign EU structural funds to a progressive development of housing policies targeted at homeless people, to ensure equality and non-discrimination, and to set up instruments to exercise the right to appeal, empowering those people and promoting their participation. For this purpose, the adoption of the ETHOS typology of homelessness and the involvement of Eurostat in the statistical analysis are essential for programming, monitoring and accountability.



POVERTY REDUCTION PROGRAMMES (OACDH, 2002)	EUROPEAN PARLIAMENT RESOLUTION ON AN EU HOMELESSNESS STRATEGY B7-0475/2011
<ul style="list-style-type: none"> ■ Identifying the poor 	<ul style="list-style-type: none"> ■ Taking into account the ETHOS typology ■ Promoting that definition (Social Protection Committee and its “indicators” sub-group) ■ Gathering data on homeless people (Eurostat) ■ Reflecting on changes of the profiles of homeless persons and, in particular, on the impact of migration;
<ul style="list-style-type: none"> ■ Recognizing the relevant legislation in the national and international human rights framework 	<ul style="list-style-type: none"> ■ Having regard for the Charter of Fundamental Rights of the European Union, especially its Article 34, ■ Having regard for the revised European Social Charter of the Council of Europe, especially its Article 31, ■ Homelessness is an unacceptable violation of human dignity; ■ EU Homelessness Strategy should fully respect the Lisbon Treaty, ■ Urges the EU Agency for Fundamental Rights (FRA) to work more on the implications of extreme poverty and social exclusion in terms of access to and enjoyment of fundamental rights, bearing in mind that the fulfilment of the right to housing is critical for the enjoyment of a full range of other rights, including political and social rights;
<ul style="list-style-type: none"> ■ Equality and non-discrimination 	<ul style="list-style-type: none"> ■ EU Homelessness Strategy should be fully compliant with the social housing policy of Member states, which legally enshrines the principle of promoting the social mix and fighting social segregation;
<ul style="list-style-type: none"> ■ Participation and empowerment 	<ul style="list-style-type: none"> ■ Establish a working group for an EU homelessness strategy and to involve all stakeholders in the fight against homelessness, including national, regional and local policy-makers, researchers, NGO homeless service providers, people experiencing homelessness and neighbouring sectors such as housing, employment and health;
<ul style="list-style-type: none"> ■ Progressive realisation of human rights 	<ul style="list-style-type: none"> ■ Envisage a package of activities to support the development and sustainment of effective national and regional homelessness strategies; ■ Call for the development of strong links between the EU homelessness strategy and EU funding streams, especially from the Structural Funds; calls upon the Commission to promote the use of the ERDF financing facility also for housing for marginalised groups to address homelessness in the different EU Member states; ■ Call for a specific focus on “housing-led” approaches;

- Monitoring and accountability

- Call for the design of a framework for monitoring the development of national and regional homelessness strategies, as a central element of the EU homelessness strategy;
- Call for an annual or bi-annual reporting strategy to report on progress;

CONCLUSIONS

This chapter outlined how human rights are, in fact, the result of a historical process of tireless struggles to achieve an expansion of the legal content of human dignity. This is a dynamic and non-linear process with periods of improvement and periods of regression. The human rights-based approach was created to operationalise and expand human rights, on the assumption that the first step towards the empowerment of excluded groups means acknowledging that those individuals have rights that States have to respect and fulfil. The introduction of this concept aims to change the rationale behind policy-making processes so that the point of departure is not the existence of people in need of assistance, but rather that people are entitled to claim their rights. Rights imply duties, and duties need mechanisms making them claimable and enforceable (Abramovich, 2006). Homelessness, which is understood as processes of exclusion from adequate housing, is a violation of human rights. Nevertheless, homelessness, like poverty, is not only a consequence of human rights violations, but also a potential cause for the violation of other rights. Homeless people generally have many interrelated legal problems that, if left untackled, can exacerbate the homelessness process. Legal assistance can transform the law into a preventive tool to reduce the risk of homelessness, as well as an instrument of defence and empowerment. The European Parliament's Resolution on the need for a homelessness eradication strategy in Europe supports the underlying principle of poverty reduction programmes set up by the United Nations and developed according to the human rights-based approach. In these programmes, there has been a general recognition of the importance of empowering excluded and impoverished groups. The human rights-based approach essentially proposes to attain this empowerment through the recognition of rights, so access to justice plays a crucial role. But knowing is not enough. We must be willing, in the words of Ihering (1985), to fight for the Law. And this will to undertake a legal struggle, a legal battle for personal and collective dignity, is not something to be found in the "written Law", but rather in the intention of certain individuals and groups to claim their rights; that is, it is to be found in the "Law in action" (Ponce, 2006).

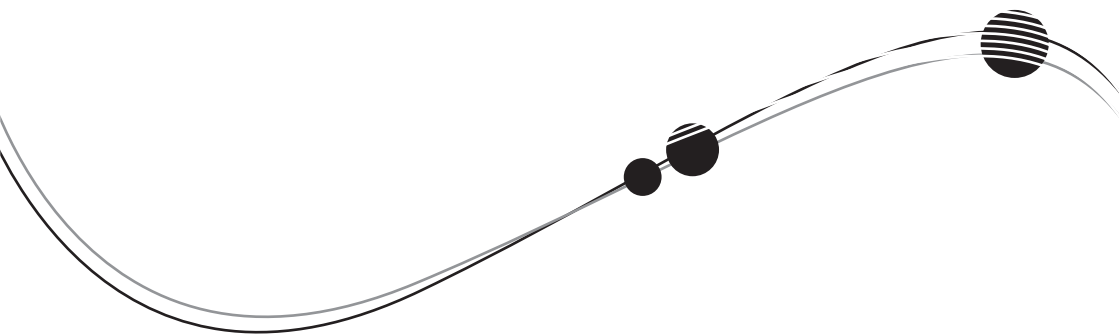
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CHAPTER II

Penalising Homelessness



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*In its majestic equality, the law forbids
rich and poor alike to sleep under bridges,
beg in the streets, and steal loaves of bread.*

Anatole France (1844-1924)

Traditionally, the legal system has responded to “crime” primarily with “punishment”. But this link between crime and punishment breaks when incarceration rates and crime rates are very weakly correlated in virtually all countries for any period in history (González, 2011). Rusche and Kirchheimer (1939) broke with this association of crime and punishment by revisiting the history of how poverty was regulated up to the start of the twentieth century. These authors show how both the amount and type of punishment vary according to economic needs, particularly in terms of the jobs held by those convicted. Piven and Cloward, in their book *Regulating the Poor* (1971), also show that the evolution of social-assistance programs is cyclical, with alternating periods of expansion, when popular unrest and the risk of political crisis is significant, and periods of shrinkage when more labor is required, shifting the beneficiaries of public aid to the job market. These two aspects (breaking the crime-punishment dynamic and linking social and criminal policies) are the basis of Wacquant’s analysis (2009) in a bid to understand the current criminal situation. Wacquant reveals the duality of policies targeting the poor: the mixing of criminal and social policies. In other words, social policy and criminal policy are two sides of the same political coin: managing poverty (González, 2011).

To penalise means to impose a sanction or punishment as a result of the violation of a legal rule, whether it be a law or regulation. The UN Special Rapporteur on extreme poverty and human rights uses the expression “penalisation measures” to refer in general to policies, laws and administrative regulations used to punish, segregate and control people living in poverty. Some of these measures give rise to direct penalisation, with the prosecution and jailing of these people, while others excessively regulate and control different aspects of their lives (Sepúlveda; 2011). That is, a person can be penalised without having committed any violation. For example, simply not having one’s identification papers can, for many immigrants, mean a penalty in terms of access to public services or entitlements, and wearing “dirty clothes” can be enough for someone to be forcibly removed by the police from, say, a metro station. The International Council on Human Rights Policy (ICHRP) published a report, titled *Modes and Patterns of Social Control: Implications for Human Rights Policy*, which highlighted the implications for human rights of contemporary social control patterns; that is, the ways in which laws, policy and administrative regulations define, construct and address people deemed to be “undesirable”, “dangerous”, or whose behavior is defined as criminal or characterized as socially problematic (ICHRP, 2010). One of the main conclusions of the research is that people living in poverty are disproportionately subject to a series of control mechanisms exerted by government as well as private agencies. These mechanisms are framed within a range of legal and administrative policy measures relating,

among others, urban planning, police, social assistance, health care, security and justice. The study underscores the grave consequences that extending surveillance, criminalisation, segregation and incarceration has on the enjoyment of human rights by people living in poverty (ICHRP, 2010). As regards homelessness, there are different cases and experiences of penalisation that focus on the criminalisation that homeless people suffer in the streets as a result of laws against vagrancy and begging that regulate behavior in public spaces, restricting a person's ability to sleep, eat, drink, or wash. In addition, certain homeless people, such as those who have a history of rent arrears or a criminal record, face administrative difficulties when trying to access social housing, for example, those who have a history of rent arrears or a criminal record. These exclusion dynamics can result in the incarceration or banishment of homeless people. Therefore, the grounds of the so-called social constitutionalism in the postwar period, along with the guarantees of rights to due process under the criminal justice system, are gradually being left behind, and defending the human rights acquired through history is now an urgent matter.

In this chapter we will focus on how the forms of penalising and controlling people living in poverty have changed, paying special attention to their impact on homeless people. These cannot be analyzed separately from their context, as they are intricately intertwined (O'Sullivan, 2007). Therefore, it is necessary to bear in mind the impact that dominant neo-liberal thinking has had on the development of criminal law, criminology and its consequences on the penalisation of people living in poverty and, in particular, homeless people.

RECENT CHANGES IN CRIMINAL LAW

In the twentieth century, the interest of criminology lay in providing explanations about the causes of crime, under the assumption that criminals could be transformed by correcting or modifying their behavior to prevent them from committing crimes in the future. This is the "correctional" model, which involves investment by the states in social reinsertion and prevention strategies (De Giorgi, 2005). But the model was bankrupted by the crisis of the social state and the economic and political transformations in the international context of the 1970s and 1980s that translated into a neoconservative offensive, which led to an authoritarian turn in relations between the state and society (Rivera, 2005). Wacquant argues that the generalised increase in the prison populations of developed societies is due to the growing use of the penal system as an instrument for managing problems of social safety, as well as to contain the social disruption created at the base of the social structure caused by neoliberal policies that deregulated and cut back the social welfare system (Wacquant, 2003). The function assigned to the penalty or to criminal law varies substantially due to three simultaneous factors originating in the 1970s and 1980s: the collapse of the rehabilitative ideal, the advent of the risk paradigm and the economic analysis of crime (Del Rosal, 2009).

Thus, first, we see that the "correctional" model is progressively abandoned, as welfare is considered to foment individuals' dependency on the state, which involves

a high economic cost for the state's coffers, and limits and hampers the productivity of the private sector. As Iñaki Rivera (2005) from the University of Barcelona's Penal System and Human Rights Observatory explains, the crisis of the criminal legal system questioned the theorists and meant that those involved in political struggle became aware of the discourse on the reasons and legitimacy of penal punishment. In this context, and under the growing pressure of rising crime rates in the 1960s, the increased fear of crime, and the victimisation of increasingly larger swathes of the American and British middle classes, along with the hardened rhetoric and neoliberal and neoconservative practices of the Reagan and Thatcher governments, campaigns aimed at restoring the lost "law and order" were revived (Lea *et al.* 1993). These campaigns are characterised by their demands for punitive rigor and inflexibility, and capitalised on the "war on crime" rhetoric in the political arena and the media (Rivera, 2005).

Moreover, the "risk society" concept, defined at length by Ulrich Beck (1992), is based on the assumption that, in current societies, social production of wealth is systematically accompanied by a growing social production of risk. Human needs have limits and, once satisfied, some time is required for them to be reactivated. Instead, according to Beck, the ideological imposition of "risk" implies a bottomless well of needs that are never met. In this way, Beck's analysis leads to the assumption that the perception of risk is linked to a need to consume. Therefore, it does not depart in any way from capitalist development, but rather expands it. Consumer goods, income and wealth are distributed as scarce resources that generate gaps between different social groups. The opposite of the appropriation logic, denial, is thus imposed. For this reason, the collateral damages of excess and unsustainable consumption are denied, questioned or censored by the privileged groups that sustain such practices and are finally legitimized by it in the eyes of the entire population (Korstanje, 2010). Thus, in the "risk society", as Gemma Nicolás (2005) explains, criminality is viewed and managed as a non-eradicable risk. The idea that crime exists as a result of certain social deprivations or problems is abandoned. No interest is shown in the causes of crime, or in the conditions in which it is committed, or in the responsibility society may have in it, thus restoring the criminal's responsibility for his own acts (O'Malley, 2004).

Finally, "actuarial criminology" is based on the premises of law and economics, which considers that basic economic concepts, like rationality, maximization, expected costs and profits, institutional arrangements, special interests, property rights, balance and efficiency are also fundamental for understanding, explaining, predicting and effectively combating criminal activity (Roemer, 2002). This economic discourse is founded on the idea that crime is a rational choice. The criminal is a "rational, amoral person" (Roemer, 2002) who chooses crime after a preliminary analysis in which the expected benefit is perceived to be greater than the cost of the crime (the punishment or the victim's resistance). The main goal of the economic theory of crime and punishment is deterring the commission of crimes by changing the "price" to be paid by criminals, whether potential or actual, that is, by imposing harsher sentences (Cooter *et al.*, 1999). Thus, as Gemma Nicolás (2005) explains, "actuarial justice" thinks in terms of risk rather than culpability. The fact that an individual belongs to a specific social group previously classified as "at risk"

is pursued more avidly than the specific conduct or the facts of the crime, but when the crime is committed, the response is implacable. This diffuses the perpetrator's identity, because he/she is no longer viewed only as a person engaging in conduct described by the laws to be criminal, but rather as part of a broader category. This is reflected in the rise in "administrative sanctions", whose goal is to discourage the perpetration of crime or risky conduct by establishing sanctions in the field of civil and administrative law (Nicolás, 2005). Administrative law is viewed as a more efficient and effective means of handling at-risk populations than criminal law. The existence of "almost-criminals" or "almost-crimes" is a hybrid result of administrative and/or criminal violations and sanctions (Rutherford, 2000), and in many cases homeless people are directly affected.

The construction and management of risk categories are in step with social inequalities and certain moral pronouncements regarding dangerous population groups (Nicolás, 2005). A risk category is superimposed onto social class, with the populations at risk being the inhabitants of exclusion zones. The poor are viewed as the new "dangerous class" that generates risks. Social problems appear as criminal matters, while crime is blended with broader problems of risk and safety (Lea, 2004). No attempt is made to reeducate or rehabilitate criminals, or even to eradicate crime, but simply to make it tractable or tolerable, minimizing the harm it can cause society, which means lengthening jail terms or deterring crime through control or fear. Consequently, "actuarial justice" will trend toward reducing environmental circumstances favoring deviating behaviour and trying to set (almost always physical) limits to the groups under surveillance and control. One method of actuarial justice is to alter the environment of potential victims to prevent crime from being committed. This is what some authors call "situational prevention" (De Giorgi, 2004; O'Malley, 2004). The underlying idea is that, if the opportunities for committing crime are reduced, so will the number of criminals. "Actuarial justice" must be seen as credible and legitimate by citizens to allow its widespread use to control crime (Lea, 2004). Furthermore, there is a crucial role for the media to play to assist in the social and cultural construction of the perception of risk by establishing and perpetrating an atmosphere of fear (Nicolás, 2005).

THE CRIMINOLOGY OF INTOLERANCE – FROM BROKEN WINDOWS TO ZERO TOLERANCE

Political-criminal trends that Young (1999) calls "the criminology of intolerance" have spread as a result of the above developments in policy and perception. In 1982, James Q. Wilson and George Kelling published an article called "Broken Windows" about policing and crime prevention. Its impact was notable and immediate, and has been the subject of debate ever since. The "Broken Windows" theory holds that crime increases in areas that are left to deteriorate, where there is more and obvious carelessness, filth and disorder. For example, if a window is broken and remains unrepaired, all the other windows will soon be shattered. If a community shows signs of deterioration and no one seems to care, crime will flourish. If even minor crimes like littering and public drinking go unpunished, more and more serious

crimes will follow. If parks and other deteriorating public spaces are progressively abandoned by most people (who no longer go because they are afraid), these same spaces will be progressively taken over by criminals (Wilson *et al.*, 1982). The “Broken Windows” theory spawned a police-oriented response that established that even the most petty violations, or mere suspicions, must be dealt with in the harshest way to prevent crime from increasing (Rivera, 2004).

In 1994, the mayor of New York, Rudolph Giuliani, implemented a “Zero Tolerance” policy based on this theory. However, it’s not “zero tolerance” against the person committing the crime, but rather “zero tolerance” of the action itself. The strategy set out to create clean, orderly communities and to forbid any transgressions of law and civic-duty rules, thus sparking the “war on poverty” (Rivera, 2004). Beyond the fact that different studies have questioned the success of these penal policies in contrast to other American cities like San Diego, which experienced the same drop in crime under other preventive schemes like community policing (Rivera, 2004), many acknowledge that these policies allowed the censorship and social exclusion of those who refused to submit to responsibilities or who persisted in their “deviant” behavior, with the brunt being borne mostly by the emerging American underclass and blacks or Hispanic immigrants (Hughes, 1998). Finally, the “Three strikes and you’re out” laws seek to ensure that repeat offenders receive the highest possible sentences. Bernardo del Rosal (2009) explains how this expression, in the field of criminal legislation, means that subjects convicted of committing a third crime are liable to prison terms ranging from 25 years to life, depending on the state. The first state to implement these laws was Washington, in 1993, where committing a third violent crime means a life sentence without parole.

The export of the “criminology of intolerance” to Europe is more widely questioned. As Inaki Rivera (2004) explains, exporting American penal strategies to Europe would clash with another particularly worrisome European political-criminal trend. Since the 1970s, Europe had begun to experience its own crisis of the Social State, which in the criminal domain was structured as a “culture of emergency and/or criminal exceptionality” (sic). In short, this line of criminal policy was characterized by abandoning the primary instruments of the democratic European states that emerged after World War Two. The postwar social constitutionalism, built to forestall repetition of the Holocaust by providing criminal guarantees preventing the abuse of power, gave ground to different phenomena of political violence. In terms of prisons, the “culture of emergency and/or criminal exceptionality” started to justify the need for and building of maximum-security prisons, “special” regimes for “special” prisoners, penitentiary isolation practices, dispersing of groups of prisoners or the creation of computer databases, giving rise to the so-called “Criminal Law of the Enemy” (Rivera, 2006), which we will discuss below.

CULTURE OF EMERGENCY AND/OR CRIMINAL EXCEPTIONALITY

Having restored peace, social and democratic states now aspired to the “guaranteeist model” under the rule of law, and thus began to reform in the context of an





international law of human rights. Such a paradigm shift meant that criminal (and procedural) guarantees acquired the dual nature that allows them to be contemplated as citizens' rights on one hand, and/or as a limit to the punitive power of the state (e.g. a state is not permitted to torture its citizens) on the other. The firmament of human rights was thus erected as a substrate of punitive intervention.

Mónica Aranda *et al.* (2005) from Observatory on the Penal System and Human Rights (OSPDH) explains that in this context of social constitutionalism and criminal guaranteeism, in the 1970s most of the countries of Western Europe checked their penitentiary reform processes against principles including "special positive prevention", prohibition of capital punishment and forced labor; principle of legality in fulfilling the penalties, etc. However, the very foundations of these reforms were subverted by events. Indeed, almost simultaneously, the phenomenon of political violence reared its head in several European countries. Ireland, the Federal Republic of Germany, Italy and Spain, to mention the most obvious examples, faced "terrorism" and immediately reacted. Convinced that the ordinary instruments available were not sufficient, States decided to use new and extraordinary tools. Thus arose so-called "emergency legislation" or, more precisely, the "culture of emergency" (Aranda *et al.*, 2005).

The new "emergency" rules began to make headway in Europe three decades ago under two guises: these laws were enacted to combat a special phenomenon (terrorism), and it was stressed that they would only be in force as long as strictly necessary. Now that the phenomenon for which emergency laws were enacted has virtually disappeared, they have not been dismantled and in fact invade many other spheres of ordinary life and criminal legislation. The halo or fetish of efficiency (police, court, penitentiary) became a new discourse used over time to legitimize the expansion of the emergency to new spheres (Aranda *et al.*, 2005).

To end this section, we can say the "emergency" was conceptualized as "a set of measures characterized by:

- basing actions on urgency and exception;
- creating social tension and activating the authoritarian side of social sensitivity;
- implementing restrictive and even repressive measures, which violate fundamental rights and guarantees; and
- altering basic principles of the constitutional order without suppressing them".

It is clear that the more that one resorts to the criminal system — and criminal exceptionality — the more the democratic system and equality in the eyes of the law are affected through the progressive sanctioning of a dual punitive system (Aranda *et al.*, 2005).

SYMBOLIC CRIMINAL LAW, THE RESURGENCE OF PUNITIVISM AND CRIMINAL LAW OF THE ENEMY

From a criminal point of view, the above is directly linked to the recent transformations in the legal systems of countries with developed economies. Although national

contexts can condition many of these changes both quantitatively and qualitatively, there are notable common features and possibly some common underlying explanations for these new legal orientations (Del Rosal, 2009). We can distinguish three types of explanations, though each is closely related to the other: “Symbolic Criminal Law”, the “New Punitivism” and the “Criminal Law of the Enemy”, which arises from the blending of the first two. As noted by Manuel Cancio Meliá (2006), the so-called “Symbolic Criminal Law”, and what can be called the “Resurgence of Punitivism” are two concepts that are not clearly separated in legislative reality, but rather their two lines of evolution are intertwined and end up laying the foundations for the “Criminal Law of the Enemy”. When the concept of “Symbolic Criminal Law” is used, it refers to the fact that certain political agents only pursue the goal of “giving a soothing impression of being an alert, decisive legislator” (Silva, 2001), and criminalisation results irrespective of whether the rule is perhaps totally inadequate to achieve a reasonable level of application. But as Hassemer (1995) notes, those who use “symbolic” elements in relation to the criminal system have no regard whatsoever for the very real and unsymbolic harshness of the experience of those who are arrested, prosecuted, accused, sentenced, and incarcerated. That is, it does not take into account that a specific harm is inflicted by the punishment to achieve rather more than a symbolic effect. But criminal law is not only an instrument for generating reassurance by simply enacting rules that are not enforced, there are also criminalisation processes based on the introduction of new criminal laws aimed at promoting their effective enforcement or harsher sentencing in the case of existing laws, which would entail a “resurgence of Punitivism” (Cancio, 2006). For instance, if radically punitivist legislation on drugs or prostitution is introduced, it has an immediate impact on criminal prosecution statistics. But in spite of this, it is obvious that an essential element motivating legislators to approve such laws lies in the “symbolic” effects by their mere enactment. Conversely, it also appears that regulations that, in principle, should be classified as “merely symbolic”, like laws against begging, can in some countries lead to “real” criminal proceedings (Cancio, 2006).

The truth of the matter is that, in fact, the term “Symbolic Criminal Law” does not refer to a well-defined set of criminal violations characterized by their lack of enforcement or lack of real impact on the “solution”. It only identifies the special importance given by legislators to short-term communication aspects in approving the relevant laws (Cancio, 2006). If people who engage in prostitution or begging cannot pay a fine, this does not matter, because the goal is the message of order and safety sent to society. These effects can even be integrated in strategies for preserving political power. Symbolic Criminal Law not only identifies a certain “deed”, but also (or above all) a specific type of perpetrator of the deed, who is defined not as an equal, but as an “other”. That is, the existence of the criminal rule pursues the construction of a certain image of social identity through defining the perpetrators as “others”, not sharing in this identity. Thus it is important that “begging” becomes “aggressive begging” and that people who rummage through garbage bins looking for food or scavenging materials are part of “organized mafias”. So Symbolic Criminal Law and Punitivism are fraternally related, and the “Criminal Law of the Enemy” arises from these fraternal ties (Cancio, 2006).



THE CRIMINAL LAW OF THE ENEMY

According to Jakobs (2006), the Criminal Law of the Enemy is built on the distinction between Citizen and Enemy (Person and Non-Person). For Jakobs, the status of “person” is a normative social attribution. Human beings, in the physical-psychic, biological sense, are not “people” per se; they are only persons so as long as society attributes this status to them. According to Jakobs, the social attribution of this status, and above all its preservation, depends on the individual’s conduct in a social context. If this conduct is generally aligned with the behavioral models that are judged to be socially acceptable, then the individual preserves his or her status as a “person”. If, however, his or her behavior transgresses these models, either by choice or by the individual’s inability to behave otherwise, he/she loses his/her status as a “person” and is reduced to a “non-person”. Contemporary positive law only recognizes the rights, legitimate interests or judicial guarantees for “persons”. Jakobs’s theory tells us that individuals deprived of their basic normative social dimension are not part of the community of subjects of law, they may only be passive subjects of state regulation depending on the collective interest or that of certain “persons” (Campderrich, 2007). When these individuals represent a “danger” from a factual point of view, that is, when they are a source of “risks” for the survival of the established social order, they should be subjected to the dictates of the “Criminal Law of the Enemy”. That is, there will be a Criminal Law of the Citizen and a Criminal Law of the Enemy. The distinction between the “two criminal laws” explains the existence of particularly dangerous activities that justify an excessive response by the legal system through punishment that manages to deter the violators. Consequently, the main task is to maintain the Criminal Law of the Enemy as the best formula for preserving the Criminal Law of the Citizens (Jakobs, *et al.* 2006).

As noted by Manuel Cancio Meliá (2006), the Criminal Law of the Enemy is characterized by three elements. First, the legal-criminal system becomes prospective (with the point of reference being the possible future deed) instead of retrospective (with the point of reference being the actual deed). Second, the punishment is disproportionately high, and third, certain procedural guarantees are relativised or even suppressed. That is, seeing the “symbolic” process from this perspective, the decisive element is that a certain category of subjects is excluded from the circle of citizens, so that it can be said that, in this regard, the defense against risk is actually the least of problems. In this regard, “punitivism” (the idea of increasing the penalty as the only instrument for controlling crime) is recombined with Symbolic Criminal Law (criminal classification as a mechanism for creating social identity) giving rise to the Criminal Law of the Enemy. Manuel Cancio Meliá (2006) also mentions a second structural characteristic: what lies at the base of the criminal classification is not (only) a certain “deed”, but also other elements, as long as they serve to characterize the perpetrator as belonging to the category of the “enemy”. Therefore, the Criminal Law of the Enemy seeks to “Exclude” rather than “Prevent”; consequently, the Criminal Law of the Enemy is not a Criminal Law based on deeds, but on the perpetrators of such deeds. Manuel Cancio Meliá (2006) concludes that from the perspective of criminal policy, it can be stated that the Criminal Law of the Enemy in current legislations is not the consequence of an external factor (triggered

by an attack or a circumstantial political majority) of the evolution of legal-criminal systems. Rather to the contrary, an analysis of the political-criminal developments and studies prior to the current “Criminal Law of the Enemy” wave in official sources shows that their origins lie in history (Bacigalupo *et al.*, 2005). Also, precisely because it is not a temporary phenomenon and is not due to exogenous factors, the current “Criminal Law of the Enemy” is not simply the return of an authoritarian criminal policy, but rather a new evolutionary stage.

HOMELESSNESS, IMMIGRATION AND CRIMINAL LAW OF THE ENEMY IN EUROPE

We can affirm that the three characteristics of the Criminal Law of the Enemy -- “criminalisation in the prior state”, failure to fulfill the principle of proportionality in penalties and minimisation of procedural guarantees -- are almost always part of legislation in many democratic European states, particularly those with a history of armed struggle. Therefore, the novelty would lie only in the appearance of a doctrinal support backing the need for a law with full guarantees for “Persons” and another law, without the classic rights, for “Non-Persons”. Although a more restrictive criminal and procedural legislation regarding the accused’s rights has traditionally developed in regards to terrorism and drug trafficking, recently this more restrictive approach has spread to include organized groups that traffic with immigrants and sex slaves (Chazarra, 2006). The limits and guarantees of Criminal Law are also being applied more often to vulnerable groups (Chazarra, 2006). The concept of “Enemy” is undetermined, and over time can be extended without limit (Krasmann, 2007). Currently in Europe we are now seeing this category expand to include. Foreigners, migrants, asylum seekers, refugees, terrorism suspects and the Roma population. The labeling of foreigners is an integral part of the State’s construction of individuals and groups as “friend” or “enemy”, usually defined in relation to the “citizen”. Labels divide human migrants into relatively arbitrary categories of “risk” and vulnerability, which do not always resonate with contemporary mobility patterns (Oberoi, 2009).

As Capdevila and Garreta (2010) explain, historically in Europe there has been a dangerous association between immigration and crime. European governments have always put the immigration issue on the public-order agenda, as subject to the ministries of the interior (home affairs), grouped together with issues of police control and European border control. The TREVI group, created in Europe in 1976, is a framework for inter-governmental cooperation set up to work internationally on a series of problems affecting all countries. The acronym stands for the issues covered: Terrorism, Radicalism, Extremism, Violence and Immigration. The association does not merit further commentary (Pajares, 1999). The Maastricht treaty, in Article KI, jointly deals with the issues of immigration and crime. The Tampere agreements ask for immigration policy to be oriented toward regulating the entry and residency of foreign workers, establishing a common framework of rights and duties, inclusion policies for immigrants, common European immigration policies and the fight against illegal immigration (Pinyol, 2005). In 2005, Austria, Belgium, France, Germany, Luxembourg, The Netherlands and Spain signed the Prüm Convention, which seeks





to introduce specific regulations concerning illegal immigration, like the collection of data like DNA, fingerprint information, vehicle use and others (Freixes, 2008).

It is necessary to bear in mind that European countries have significantly expanded their use of detention as a response to the arrival of asylum seekers and irregular migrants (Catarina, 2010). In the United Kingdom, for example, capacity has risen ten-fold since the early 1990s.¹ France's aggregate detention capacity has increased considerably, from 739 in 2003 to 1,724 in 2007.² The Lampedusa detention center in Italy has a capacity of just 800 but in March 2009 it housed 1,800 detainees.³ While the lack of accurate statistics tracking the number of migrants and asylum seekers in detention in all Council of Europe member states has often been criticized, in 2008, the French NGO Cimade documented 235 camps in the European Union, with a total capacity of more than 30,000 people.⁴ But in many European countries an exceptional procedural system is being set up to facilitate the expulsion of foreigners. As Fekete and Webber (2009) explain, if two people commit a crime and one is a foreigner, they both serve the same sentence in prison but the foreigner is then detained for deportation, while the person who is a national of the country can then return to his family. In the debate about crime committed by foreigners, the fact that foreign offenders are treated at least as harshly as a country's own citizens and that deportation is frequently imposed as an additional punishment is generally overlooked. Deportation is, moreover, often a far greater punishment than a period of imprisonment, since it breaks up families and disrupts people's lives, while making rehabilitation in the host country impossible (Fekete *et al.*, 2009). Deportation to a "home country" means having to start again in a society that an individual left years ago, or sometimes never knew. In European countries, the law has changed to establish a new baseline for deportations, resulting in an exponential increase in the number of foreign nationals being expelled following a prison sentence. It comes as no surprise to learn, therefore, that many criminologists suggest that the true purpose of the foreign national crime debate is to use deportation as an instrument to drive down prison numbers. Not only is the number of deportations for criminal offenses increasing, but also the notion of what actually constitutes crime is changing. The extreme Right now campaigns for deportation for the new crime of "failure to integrate"; which they characterise by, for example, failure to find employment, etc. (Fekete *et al.*, 2009).

In this regard, a growing trend in the development of the Criminal Law of the Enemy applied to immigration in Europe can be observed. But can the same be said of the application of the Criminal Law of the Enemy to homeless people? Antonio

1. See www.globaldetentionproject.org.

2. See "Rapport Cimade 2008", www.scribd.com/doc/2662304/Rapport-Cimade-2008; see also, "Memorandum by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to France from 21 to 23 May 2008", CommDH(2008)34, Strasbourg, 20 November 2008, paragraph 93.

3. The centre has since been emptied.

4. Itano N., "Greece plans to lock up illegal migrants. A new Greek law increases the amount of time illegal immigrants can be detained", Global Post, 13 July 2009; See for more information UN High Commissioner for Refugees, *Measuring protection by numbers* (2005), November 2006.

Tosi defends that homeless people are not the explicit target of rules and orders regulating public spaces, but they do suffer the effects disproportionately as a result of their dependence on public spaces to carry out their daily activities (Tosi, 2007). In addition, in many European countries, the most prominent target group of public fear and hence of control measures are migrants. Migrants are subject to similar discursive mechanisms as homeless people, so while the penalisation of poverty has not (yet) represented a dominant factor in European policies and for homeless people even less so, it has increased as regards immigrants (Tosi, 2007). But in recent years, as Nicholas Pleace (2011) explains, migrant homelessness has become increasingly visible in some parts of the EU. Failed asylum seekers and other undocumented migrants were appearing at increasing rates among roofless people and in low-threshold homelessness services. People who had been accepted as refugees and who were awaiting asylum assessments were also appearing in homeless populations (Edgar *et al.*, 2004). Nicholas Pleace (2011) cites different studies that show the existence of three broad concerns that may be identified at EU level with respect to migrant homelessness:

- A growing representation of Accession States (A-105) citizens in the homeless populations of EU-15 member states, particularly people living rough and houseless people using emergency and low-threshold homelessness services.
- Evidence of the presence of refugees, asylum seekers and undocumented migrants among homeless people, again centered on people living rough and using emergency and low-threshold homelessness services.
- Ethnic and cultural minorities who appear to be at a disproportionate risk of homelessness but who are not recent migrants.

So, if on the one hand the immigrant population is subject to a generalized increase in penalisation, in particular with regard to the criminal policy expressed in the Criminal Law of the Enemy, and on the other hand immigrants are increasing in numbers among the homeless population, then we can conclude that we need to reflect on the development of the Criminal Law of the Enemy based on the exclusion of foreigners among homeless people in Europe.

For example, in Bilbao (Basque Country, Spain), the local police and the National Police Force's Aliens' Unit entered an abandoned mortuary where 63 homeless people were sleeping. Forty-four of the people found did not have proper documents and were detained by the Aliens' Unit, which opened proceedings against them for being in the country with an irregular status. Those people without a prior police record were released while their paperwork was completed. The paperwork was an expulsion order and those people who had already received deportation orders were detained in an internment centre and eventually deported. The police intervention was prompted by neighbourhoods complaints about "the presence of indigents who spend the night in the abandoned building or report[ed] fights," and, according to

5. The 2004 A-8 accession states: Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia, plus the 2007 accession states, Bulgaria and Romania.

the city councillors responsible for “Citizens’ Security”, “we know they are there and are aware of the conditions, a situation that is not permissible due to reasons of security” and to “deplorable health conditions”.⁶ The police intervention was thus carried out to eliminate an area that promoted exclusion and unsanitary conditions. The building’s owner was instructed to prevent its possible occupation. Perhaps not coincidentally, three days before the police raided the mortuary, the people living there complained about the inhumane conditions in which they lived to a regional newspaper. “What we have here is a nutritional emergency. Some people have [permission to] eat at the soup kitchen, and sometimes they bring us back leftovers. Other times we ask our countrymen to help us so we can eat, and sometimes they bring us food that is about to expire.” These were the words of Abdulai Wai and Ngoleke Ebeneger, two young Africans affected by the situation, who say they want to “study or work and be integrated in the society. We know that now’s not the best time, with the crisis and all, but we need to find a way out, not having to wonder how we’re going to keep alive one more day...”.⁷ Three days later, the police intervention ended their dream.

Having said this, we consider that while it is not possible to affirm that the Criminal Law of the Enemy is being applied to homeless people in a generalized way, we can say that we are, at the European level, on the verge of a problematic situation in which Symbolic Criminal Law and the resurgence of Punitivism prevail. Therefore, we cannot speak of an exceptional procedural system for homeless people. The crossover between the criminology of intolerance and the culture of emergency and criminal exceptionality are beginning to demonstrate a dismantling of the protective nature of criminal systems inherent to social and democratic states under the rule of law (Rivera, 2004).

Homeless people are over-represented both in arrest rates and in prison populations (Seymour *et al.*, 2005). This should not be taken to mean that homeless people exhibit higher levels of criminal behavior due to their situation, but rather that it is the criminalisation of their “survival strategies” that is making them illegal and punishable. Moreover, as the European Observatory on Homelessness warns, prison is not only the last link in the chain of the exclusion process, it can also be the start of a homelessness process, since a prison stay can result in home loss or eviction. Consequently, the criminalisation of homelessness is an additional stigma that deepens the situation of exclusion and that, moreover, jeopardizes people’s chances of social integration (Busch-Geertsema *et al.*, 2010). Across the EU in recent years, both at national and municipal level, controversial attempts have been made to regulate behaviour in public space. However, the regulation of public space, through ordinances that prohibit certain forms of behavior or exclude people from city areas, may in fact constitute an attack on homeless people. The conflicts over the rights of homeless people arise in both low profitability spaces that are marked

6. <http://www.deia.com/2011/09/15/bizkaia/bilbao/una-operacion-policial-desmantela-el-asentamiento-del-tanatorio-de-basurto>

7. <http://www.deia.com/2011/09/12/bizkaia/bilbao/somos-invisibles-para-la-gente>

for transformation and in high profitability spaces. Eradicating signs of poverty and traces of the poor is often integral to “cleaning up” public spaces and enhancing their value (Fernández, 2011).

It is worrying to see the current practices governing homelessness and public spaces across Europe that are increasing the exclusion, institutionalization and criminalisation of poor and homeless populations, trying to render them invisible rather than addressing the root causes of the problem. Some policies on homelessness may be driven by considerations that are not at all aimed at helping homeless people. The incorporation of homelessness in the European political agenda is being interpreted in some countries and by some sectors to mean that homeless people should not be on the street, and therefore going to a shelter need not be voluntary — they should be physically forced into shelters. Another way of interpreting it is by, for example, removing homeless people from the areas of the city frequented by tourists. The possible legislative development of such measures, together with Symbolic Criminal Law and Punitivism, would be truly dangerous, since (although in some cases under the guise of humanitarian reasons) it can open the door to arbitrary policy action, which can culminate in the Criminal Law of the Enemy. This means criminalizing people before they commit crimes, disproportionate penalties, and minimalist procedural guarantees. Practice will vary country to country since homelessness can be presented as a public order problem associated with drugs, alcohol and crime, or from the perspective of people as victims of exclusion and poverty processes with needs, as shown in the study on “Homelessness in the Written Press: a Discourse Analysis” (Meert *et al.*, 2004). It depends, among other variables, on the opportunistic use (or not) of poverty and exclusion by politicians looking for media attention or seeking to send messages of reassurance or social action to the population. Thus, following the thesis of Symbolic Criminal Law and Punitivism, in many cases the creation of laws and rules that regulate public spaces will not apply in all situations; rather, the framework is set up to be applied based on a political or police decision, and perhaps a subjective one that may have a real effect on people. But we must not lose sight of the fact that poverty and homelessness are not a voluntary lifestyle decision — they are problems associated with social exclusion.

HUMAN RIGHTS AND THE CRIMINAL LAW OF THE ENEMY

Manuel Cancio Meliá (2006) argues that there are no “enemies” under Criminal Law. All human beings are citizens. From this viewpoint, José Ignacio Núñez (2009) employs six arguments against Criminal Law of the Enemy based on Dignity.

One has to be a citizen and a person in order to violate the Criminal Law of the Citizens (Gracia, 2005). The Criminal Law of the Enemy has no real, empirical targets; rather, these targets are created through the application of this criminal law, not before. As a result, the Criminal Law of the Enemy applies to citizens whose condition is degraded by a (usually court or administrative) decision (and therefore not necessarily representative of the people’s will) to subject them to such a set of

rules. Thus, a court decision (not even a legal decision) defines which citizens are “worthy” and which are not. The Criminal Law of the Enemy positivises the source of dignity, as only those subjects who vow to adhere to the applicable law acquire and preserve the status of citizen or person. In this sense, the conditions would only be the result of fulfilling a legal duty. As noted by Gracia Martín (2005), the target of Law -- and especially of its sanctions -- can only be the individual, the human being, a pre-legal, natural entity. It is the person that creates the Law, not the other way around. And to structure itself, this creation must take into account human beings’ attributes, like their responsibility. The latter doubtless stems from an ontological substrate of the human being, otherwise it would be impossible to demand it in the form of laws and regulations. If Laws address humans rather than forces of nature or animals, then the human being’s humanity should be considered first. And the human being’s dignity is precisely at the core of this essence. Hence, denying dignity, in this context, means denying one of the pillars of the legal system.

CONCLUSIONS

As Gerardo Pisarello and Jaume Asens (2012) explain, the discourse of law has become a valuable instrument for those wielding power to explain their actions -- actions that are doubtless legitimate, but also actions that are arbitrary. There is no power, public or private, that does not attempt to use law to legitimise its actions or that fails to present its legal arguments as a substitute for moral discourse. The criminology of intolerance and the culture of exceptionality embody this will. Stating that homeless people are considered to be an “enemy” in Europe might seem exaggerated and without solid evidence at a time when homelessness is not directly criminalised by legislation and where the fight to eradicate homelessness is on the European political agenda. But it is undeniable that the use of different legal and administrative provisions increasing the penalisation of homelessness is spreading as a result of the blending of the criminal policy trends described earlier: the criminalising of their day-to-day activities when they are out on the streets, the penalising of their access to public services and social benefits, and the increased pressure through dynamics like incarceration and deportation. Although homeless people are not explicit targets of these measures, in many European countries, the most prominent target group is migrants, and the increasing number of homeless migrants are also affected by the use of the “Criminal Law of the Enemy”. Other ethnic and cultural groups who were not recent migrants (including Roma) are bearing the brunt of Symbolic Criminal Law and the resurgence of Punitivism. It is crucial to remember that poverty and homelessness are not a voluntary lifestyle decision: they are problems associated with social exclusion.

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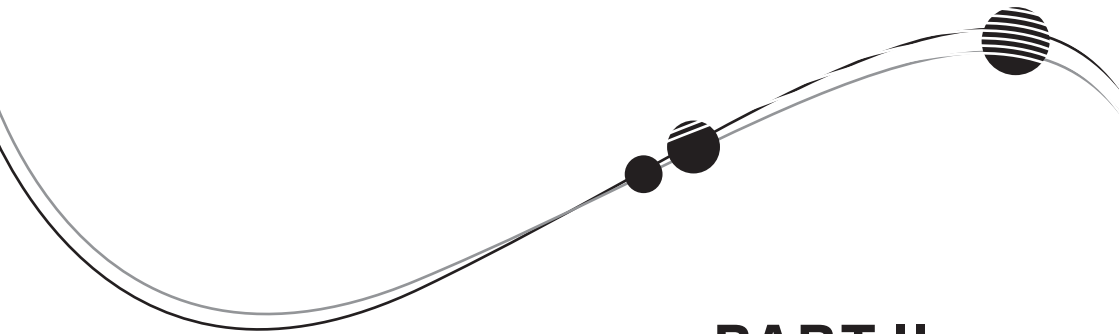
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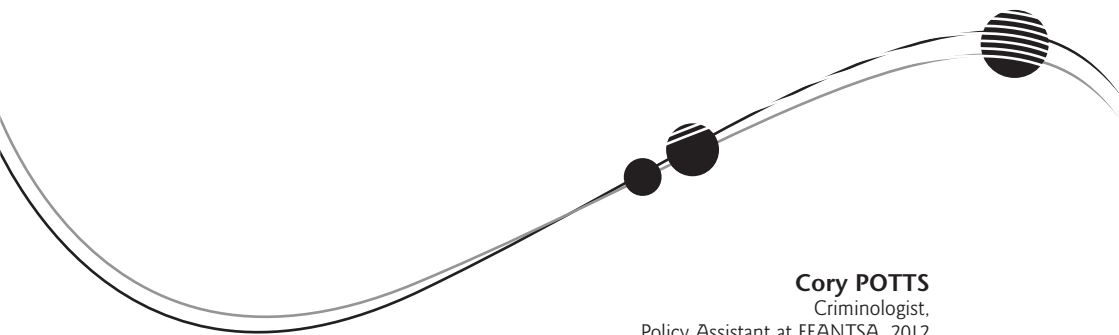


PART II

WHAT DOES PENALISING
HOMELESSNESS LOOK LIKE?

CHAPTER III

Penal Visions of Homelessness and Responsibilisation in Belgium



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In Belgium, the penalisation of homeless people occurs primarily through the application of administrative sanctions, which are non-criminal disciplinary orders that impose a fine or remove a permission granted by local authorities in order to punish individuals who violate ordinances found in what are called *règlements communaux*. In this report, we focus primarily on the ordinances in the *règlements* that regulate behaviour in public spaces. We argue that using sanctions to govern bad behaviour tends to decentralise penal mechanisms while at the same time intensifying the kinds of measures imposed on rule violators. In Belgium, this movement towards localisation and intensification has been best characterized by the New Communal Law (NCL), which was adopted in 1999. Article 119bis of the NCL gives local authorities the power to create rules governing behaviour in public and to punish bad behaviour with administrative sanctions.¹ Application of these administrative sanctions represents the primary means through which the penal apparatus controls the presence and the behaviour of homeless people in public spaces in Belgium. Their use reveals how the treatment of homeless people in Belgium has become, 1) primarily the responsibility of local authorities and 2) an issue submitted, without much hesitation on the part of local authorities, to penal regulation.

LOCAL VARIATIONS AND LOCAL DISCRETION: THE MOVE TOWARDS THE REGULATION OF BEGGING THROUGH ADMINISTRATIVE SANCTIONS

The regulation of begging in Belgian cities illustrates how local authorities have used administrative sanctions to control and punish beggars while at the same time respecting a 1993 law that decriminalised begging. Since 1999 in Liège, for example, a town in the Walloon region on Belgium's eastern border, local ordinances have limited the practice of begging to certain zones and during set hours. Beggars

1. The law of 15 May 1999 created a new article, 119bis in the New Municipal Law, which gives Municipal Councils the authority to punish individuals who violate local rules and regulations with fines. The 1999 law provided that these fines could not apply to behavior already punished by penal laws or other regulations. However, the law of 17 June 2004 extends the sanctioning power of Municipalities by making punishable by administrative sanction all petty crimes or contraventions listed in book II, title X of the Belgian Penal Code in addition to a handful of other more serious infractions, or délits, listed by number in the April 2005 law. Cf. <http://www.avcb-vsgb.be/fr/Publications/nouvelle-loi-communale/texte-coordonne/attributions-art-117-142.html>

are forced to stagger their presence in the city since the zones where begging is permitted rotate throughout the week. The law allows local security officials police officers or security agents to disperse beggars and force them to circulate in the city.² The City of Liège hardened its ordinances by adopting, in May 2012, a rule that allows police to arrest habitual beggars.³ In Charleroi, a town on Belgium's southern border, lawmakers have used the NCL to introduce nuanced restrictions on begging, such that the city's *règlement* forbids begging in narrow passageways less than five meters across, in tunnels and on bridges.⁴ Finally, in Etterbeek, a district (commune) located in the Brussels-Capital region, an ordinance created in May 2012 inspired by the measures taken in Liège against begging prohibits begging in front of stores while also prohibiting more than four beggars to gather on certain commercial streets.⁵

In addition to restrictions on begging, towns that have decided *not* to introduce restrictions on beggars also demonstrate how the regulation of behaviour in public has become decentralised through the NCL. In Namur, for example, a town neighbouring Charleroi, there is no ordinance that specifically mentions begging. What these examples reveal is a regulatory patchwork in which local lawmakers are given a wide margin of discretion to adopt ordinances governing bad/antisocial behaviour. The penal rationale behind the movement to localise is clear: instead of treating homelessness as a social phenomenon caused by factors that exist at regional or national levels, the NCL institutes a practice that allows local authorities to create specific rules responding to specific problems. In this way, ordinances view homelessness as a problem among individuals who must be sanctioned in order to correct for bad behaviour, like begging.

Local ordinances apply the same rationale to a wide range of behaviours in addition to begging. Even though the ordinances do not explicitly mention homelessness, they clearly target behaviour associated with homelessness. Phillip De Craene, speaking for the Daklozen Aktie Komitee, has observed on this point that in Antwerp, "the homeless are being charged with committing infractions under ordinances

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2. According to Liège's communal ordinances, "Règlements Communaux de la Ville de Liège" published in July 2011: "Art. 3: begging is permitted between 8:00AM and 5:00PM from Monday through Friday and from 7:00AM until noon on Saturday. Art. 4 § 1: no more than two beggars are authorized to be in the same place at the same time. §2 No more than four beggars are authorized to be in the arterial road or to be in the same place at the same time. Art. 5 §1: it is forbidden for beggars to block access to public spaces, to businesses or to private domiciles. §2 It is forbidden to beg in street intersections. Art. 6: in order to permit passersby to decide whether or not to give alms, beggars may not solicit passersby nor hold a bowl or a similar accessory. Art. 7: it is forbidden to beg in the company of a minor of less than 16 years old. Art. 8: beggars may not be accompanied by an aggressive animal or an animal at risk of becoming aggressive" (*our translation*).
 3. The procedure leading towards an arrest works according to a series of sanctions that increase in severity, beginning with an official warning issued to the beggar accompanied by a copy of the communal regulations. A second infraction results in a subpoena being issued as well as an intervention by a social worker. A third infraction is considered as a menace to public order and may result in arrest.
 4. Cf "Le règlement de police de Charleroi de 2005, modifié en 2009" which contains 10 procedures concerning begging.
 5. It is surprising to hear Etterbeek's bourgmestre announce in the press, on the subject of begging, that the ordinance concerns only "people who are drunk, who insist on receiving something, people accompanied by aggressive dogs or people who stand near you when you take money out of an ATM" (*La Libre*), even though these specific behaviours are already prohibited by local police ordinances.

that prohibit non-authorized public gatherings, finding themselves responsible for many fines. Sometimes for thousands of euros. They want to chase the homeless from the city” (Warsztacki 2012, *our translation*). By permitting local authorities to regulate “nuisances” without specifying behaviour that constitutes a nuisance, districts and towns (*communes*) are permitted to apply sanctions to behaviour that local lawmakers subjectively consider offensive. For Meershaut *et al.*, the novelty of administrative sanctions exists primarily in the fact that the application of sanctions has ended a previous culture of tolerance.

LOCALISATION AS A PHENOMENON OF RESPONSABILISATION – THE HISTORICAL ORIGINS OF THE PENALISING RATIONALE

If we step away briefly from local regulations, we can put the localisation of penal measures into a theoretical context in order to explain the evolution of a penalising rationale over the last 40 years in Belgium. This rationale is characterised by the premise that the penal system is capable of responding to all social problems, a *prétention à l’aide* as Philippe Mary and Dominique De Fraene describe the rationale in their essay on community sanctions (1997, 43). According to this pretence, the penal system in Belgium acts as if the solution to any conflict exists as a legal solution, primarily in the form of a legal sanction. Although an inherent optimism underlies the premise individuals can improve! the premise lies in the penal system’s belief that it can resolve conflicts by correcting individual behaviour.

So, homelessness is seen as a social failure that the penal system must correct not through the immediate intervention of the full force of the law, but through the application of an expanding number of measures, sanctions, treatments, services, agents and procedures.⁶ In this way, local ordinances in Belgium will not mention “homelessness”, a social phenomenon, but will sanction behaviour stemming from the condition of being homeless. Another way of explaining this treatment of homelessness in Belgium is to point out that the same sanctions that target the manifestations of homelessness also target minor penal infractions, such as petty theft or graffiti. In either case, lawmakers are not calling for an intervention with the full force of the law. Instead, lawmakers use administrative sanctions to seize an opportunity for correction, which the penal system achieves by imposing a process of *responsabilisation*.

At this point we are no longer talking, as above, about the penalisation of homelessness through the perspective of local ordinances that would restore social order through restricting bad behaviour. This is to say, we are approaching the

6. This characterization leaves out the inherent complexity of every legal system, but especially Belgium’s: the country incorporates linguistic divisions, economic inequalities separating its northern and southern regions, as well as cultural and political tensions that are manifest in the struggles for local autonomy against federal power. In this context, “security” has a definite meaning, typically characterized as a “feeling of security,” as well as a political meaning, that is, “security” is the responsibility of local authorities.

penalisation of homelessness without seeing the phenomenon of penalisation as essentially the product of policies that claim to increase “security” or “public order”. At the same time, our goal is not to write security entirely out of our approach. Beginning primarily in the early 1990s, the Belgian penal system’s adoption of an insecurity approach marked a significant reconfiguration of the content, application, and logic of how the system operated (Mary, 1998, 621-23; Cartuyvels, 1996, 156-7).⁷ But while “reducing insecurity” may describe a large and growing number of practices that disproportionately target the poor and homeless people, security alone does not explain the legal mechanisms by which homelessness becomes penalised.

We can see the penalisation of homelessness in Belgium as a result of the Belgian penal system’s tendency to see social failures as penal risks. Equating social failure with penal risk followed the crisis in the Belgian social state in the 1970s, after which a series of liberalised policies adopted through the 1980s and 1990s caused the state to retreat from intervening in economic affairs while increasing the state’s claim to guarantee security. Yves Cartuyvels describes these policy developments as a movement away from positive prevention measures in favour of a penalised “non-neutral” approach to social problems (1996, 166). Philippe Mary pulls fewer punches when he characterises the same process as the invasion of Belgium’s social state by the country’s penal system (1998, 684). Mary demonstrates that since the 1980s, problems that belonged to the social sphere increasingly became problems that the penal system claimed as its own.

The decriminalisation of Belgium’s archaic laws prohibiting vagabondage provides a confounding example of the penal rationale invading the social realm. Begging and vagabondage were criminalized in 1891 in Belgium. The Belgian parliament repealed the 1891 law on 12 January 1993.⁸ In addition to decriminalising vagabondage and begging, the January 1993 law also created “social integration” contracts designed to integrate/push individuals experiencing social exclusion into work, which includes homeless people. For Mejed Hamzaoui, the 1993 law represented a historical shift in how the Belgian state dispersed social aid: instead of providing aid to individuals on the right to work, the January 1993 law made individuals responsible for seeking employment in order to become eligible for social aid (2012, 23).⁹ For homeless people, making aide contingent on demonstrating responsible social behaviour—

7. “Security” became a political and penal priority in Belgium following a period of urban rioting in the Brussels region in May 1991, which elicited, in the November 1991 municipal elections, a surprising number of victories by candidates representing the far right Flemish *Vlaamse Blok* party whose “security platform”, which focused on immigration, youth delinquency and drug addiction, was reproduced in a January 1992 text by Melechoir Wathelet, called “Pari d’une nouvelle citoyenneté” (“Wager for a new citizenship”).

8. The 12 January 1993 law “containing an urgent programme for more solidarity in society” (*contenant un programme d’urgence pour une société plus solidaire*), which decriminalized vagabondage and begging was integrated into a 26 May 2002 law, “concerning the right to social integration” (*concernant le droit à l’intégration sociale*).

9. “These activation measures were inscribed in a framework of opposition to social rights, which served to progressively push the principle of the right to work for all guaranteed by society towards the principle that individuals are responsible for finding work with assistance” (*my translation*).

that is, seeking and maintaining employment--replaced a criminal responsibility with a social responsibility.

Yet by throwing penalisation out the window, the 1993 law let a penalising rationale in through the front door. This penal logic legalised the practice of distinguishing between worthy and unworthy recipients of social aide while at the same time presenting social exclusion as the fault of irresponsible individuals. Following this line of thinking, the penal rationale justifies targeting the irresponsible individual whose refusal to adapt to social norms is seen as a risk. David Garland, describing the history of "penal welfarism" in England, explains how contact between the penal rationale and social institutions forms a continuum that presents social problems as essentially problems of discipline (1981, 35). Following Garland, Mary traces the adoption of penal welfarism in Belgium through the construction of a social/security state in which adhering to norms, whether penal or social, becomes an end in itself--deviating from the norms automatically means a penal sanction (2001, 44). Consequently, problems in society such as unemployment, health problems or the lack of housing--are no longer attributed to social causes but to the failure of individuals to conform to laws. Mary and De Fraene use the term *régionalisation* or fragmentation to describe the mechanism by which the penal apparatus invades the social sphere, a mechanism of responsabilisation. Fragmentation occurs when the penal system isolates risk groups while also fragmenting and localising the justice apparatus (Mary and De Fraene, 1997). Once isolated and placed under the control of a local authority, the risk factors manifested by a group become targets of penal intervention. Yet because they are isolated and fragmented, the risks are no longer social but personal, the fault of the individual at risk.¹⁰

Decriminalisation of homelessness in Belgium follows this pattern of responsabilisation. Social integration contracts were created in 1993 and made it possible to punish the non-conformity of those who refused to agree to the terms set out in the contracts. Next, in line with the government's determined programme to localise its penal apparatus in order to more effectively respond to local problems, legislators and the Minister of the Interior gave local authorities new powers to respond to crime at the local level.¹¹ These measures would be pursued through the 1990s and into 2000. As regards homeless people, the important change came, as we have said, on 13 May 1999 when the NCL gave local authorities the permission to sanction behaviour that had been decriminalised only six years prior. Put more simply, decriminalising homelessness in 1993 made it possible to target the manifestations of homelessness

10. "During the nineties, however [...] dismantling the social state was more and more remarkable for reducing social policies to questions of individual treatment and would assure that the penal became a central institution for the state such that, beyond pretensions to socialisation that the policies may have exhibited, one was able to speak of the penalisation of the social" (Mary, 1998, 686, *my translation*)

11. Melechoir Wathlet, the government's *formateur* in 1992, created local security contracts that would provide aide to municipalities to fund local penal innovations. These innovations, under the control of the commune's *bourmestre* and police chiefs, made it possible to pursue penal objectives through social projects: the contracts installed, for example, SEMJAs (*Service d'Encadrement de Mesures Juridiques Alternatives*), a service responsible for helping petty criminals execute community service orders (*Travaux d'intérêt general*).

in 1999, such as rough sleeping, public urination and loitering, with a new type of penal sanction that no longer “criminalised” homelessness but instead, penalised its manifestations. Indeed, the penal nature of the NCL is visible in the text. Chapter IV(2) notes, for example, that municipalities “are responsible for providing inhabitants with the advantages that come from excellent police, especially in terms of propriety, cleanliness, security and peace in roads, public buildings and public places” (*our translation*) without acknowledging the right of inhabitants to access social services or housing.

We’ve returned now to the two trends mentioned above. The first decentralises power because while the NCL’s penal rationale remains constant, the types of behaviour the municipalities choose to target, the agents employed to target the behaviour and the intensity with which it is targeted are left up to individual municipalities. The second consolidates municipal power around a fully realised penal structure that gives local authorities the power to create new rules targeting bad behaviour, assign agents to sanction that behaviour and eventually, collect fines from the sanctions. Together, the NCL decentralises the desire to punish while at the same time obscuring the means with which the sanctions are applied.

Consider, for example, the regulations enforced by the Ixelles municipality in the Brussels-Capital region. Chapter II of Ixelles’ Municipal Police Ordinance (*Règlement Général de Police d’Ixelles*) concerns propriety and hygiene in public places. Article 10 forbids urinating or defecating in public, spitting in public or discarding cigarette butts in public. Article 12 ambiguously makes it an offense to “dirty” public places, article 20 forbids bathing in public, article 23 forbids bothering neighbours with unpleasant odours and article 24 forbids camping in public for any period longer than 24 hours. Under Chapter III, which concerns public security and public passageways, Article 32 forbids all behaviour that “menaces public security” or blocks the passage of pedestrians or cars on thoroughfares while Article 34 forbids all menacing behaviour. Article 50 bans all activities that would deprive an individual’s access to a public space.¹² Clearly, the day-to-day activities of a person experiencing homelessness would eventually constitute a violation of these rules, while the ambiguity of the laws allows the police a wide margin of discretion in order to target, for example, “menacing” occupiers of public space. A study lead by Karen Meerschaut, Paul De Hert, Serge Gutwirth and Ann Vander Steene focused on this margin of discretion and found that repression has increased under the regimes of the Administrative Sanctions:

...the application of the law on administrative sanctions in the Brussels Region has shown that acts such as wearing a burqa, spitting and urinating in public, the hanging around of homeless people and caravans in public spaces, begging and playing music on public transport either suddenly appear to be punishable acts in police regulations or are

12. *Règlement Général de Police d’Ixelles*: www.elsene.irisnet.be/site/downloads/rgp.pdf.

suddenly prosecuted or are more prosecuted and fined than before the law on administrative sanctions. (2008, 4)

In addition to widening the enforcement net, Smeets notes with concern that since 1993, the overall number of security agents responsible for enforcing municipal sanctions has grown in line with their diversification to the point that their enforcement power appears to increase in inverse proportion to the clarity of their objectives (2005, 205).

These municipal regulations and the penal rationale they convey are the mechanisms that penalise poverty in Belgium today. And they provide more than just a means to reduce insecurity: administrative sanctions give voice to a penal legal system that sees in every conflict the possibility to apply an individualised sanction. That conflicts might have social solutions like increased access to housing, drug treatment programmes, or by simply providing public toilets so that homeless people are not forced to urinate in public figures only partially into this penal rationale. It is more important to maintain the possibility for a penal intervention in the case of misbehaviour by an individual.

Jeremy Waldron draws our attention towards this individualising mechanism in his famous 1991 essay on homelessness. Although Waldron does not use the term “localisation” in his essay, it is the process of localisation that renders the homeless vulnerable. And it is the process of localisation that describes the evolution of Belgium’s penal rationale since the 1970s. This localisation can be found in theory, as a principle of responsabilisation described by Mary and De Fraene, and in practice since the 1990s, when Belgium’s penal structure was fragmented and localised (Mincke *et al.*, 2012, 6).¹³

Another way of tracking the evolution of this rationale is to reach further back in history by returning to the law of 1891 that criminalised homelessness. In 2007, two Belgian legislators proposed a law that would allow police to remove vagabonds and beggars from sidewalks and transport them to a social service provider. What stands out from the law’s motivation is how the legislators deplore the criminalised past of vagabondage and begging, noting that “historically, Belgium has used, in the case of these problems, hard and fast repression,” (Document législatif n° 4-325/1, *our translation*), a history the legislators leave behind as they empower the police to force homeless people into accepting social aid. The desire for more “security” certainly supports the contradiction in this law, in which the lawmakers are able to criticise the history of criminalising homelessness while simultaneously seeking to empower the police to constrain homeless people to accept social aid; indeed, the lawmakers claim in the law’s text that homeless people are contributing to the

13. “More and more often, security policies are based on territorial units represented by neighbourhoods. Their coherence is not called into question, thus favouring a fragmented view of the city and its problems and policies to be implemented, and the phenomena resulting from the overall balance in the city escape analysis.”

rise in feelings of insecurity. Yet the rationale behind this law stretches beyond security concerns. The lawmakers neglect to mention that despite the shameful deplorable history of criminalising homelessness in Belgium, since 1925 in Brussels, police had been ordered to bring those arrested for vagabondage and begging to social service providers instead of putting them in prison (Coumans 2005, 12). That is, although vagabondage and begging were criminalised, the article suggests that police interventions in the past placed social concerns above the need to apply the law strictly. Today, as the 2007 law proposal makes clear, providing social aid to homeless people makes sense only in that it follows a police intervention. If the priority in 1925 ensured access to social aid, the priority in 2007 appears to ensure the right for police to “correct” the bad decisions made by homeless people.

Irony like the kind found in this 2007 proposal can be confounding. In line with Waldron’s 1991 article, we could explain the legislation’s apparent confusion between providing aid and repressing individuals as the product of a contradiction inherent to any liberal policy that would claim to promote the freedom of individuals while at the same time demand the right to repress bad behaviour. As troubling as the proposal may read, and as glaring as the contradictions may seem in theory, their application tells a different story. Our research found that strict enforcement of the letter of the law seldom exists. Rather, it showed that enforcement is discretionary and tends, in the Brussels region, to be a negotiation, not a foregone conclusion.

LOCAL MANAGEMENT: NEGOTIATING SPACES, ASSESSING BEHAVIOURS AND ALLOCATING SANCTIONS

If the local texts regulating public behaviour in Belgium give an image of strict enforcement, interviews with homeless people, police officers and social workers illustrate a more complex situation. These discussions both reinforced the localised character of the management of homeless people in public spaces while also exposing the particularly discretionary character of this management.

Many factors influence how local authorities apply sanctions, such as the quality of personal relationships between homeless individuals and authority figures (police officers, business owners, security guards and landlords, etc.), the amount of time a homeless person remains in a certain place, the observation of certain informal or formal rules, the nature of the place where an infraction occurs (e.g. privately owned, semi-private, or public) and the number of complaints received by community members, to name a few. These practices demonstrate the local management of the behaviour of homeless people in public spaces and its ambivalent character: while homeless people may carry out acts that are formally prohibited and not be sanctioned, police may repress other acts that are not found in local ordinances. For example, it is commonly known that police often tell homeless people to “move along” although they are not in violation of any rule—local ordinances do

not officially authorise the police to issue such a warning.¹⁴ One fact, however, stands above the rest: enforcement of administrative sanctions appears to respond closely to complaints by business owners.¹⁵ More than the physical presence of homeless people, what bothers business owners and other community members, and determines police intervention are the tracks, traces and signs that homeless people leave and which constitute “territorial offenses” (Goffman, 1973) that render their occupation of public space all the more illegitimate.

But the legitimacy of an encampment also depends on the social structure of the neighbourhood where it is located. Homeless people encounter more difficulties in certain neighbourhoods that are “territories in themselves, in the sense that the territory is a community” (Zeneidi-Henry, 2002 :163, *our translation*). Where there are dense social networks, where individuals recognise one another as members of a community and where incivilities are seen as an affront to a pre-existing order are as such no longer public in the minds of community members. Therefore, tolerating homeless people depends on the capacity of homeless people themselves to manage and maintain good relations with community members and residents who occupy the same space. The degree to which the presence of homeless people is legitimate depends on the quality of personal relationships that the homeless have with others who frequently visit the places where they are found.¹⁶

Obviously, this trend—the fact that enforcement of administrative sanctions depends on personal relationships between homeless people and security forces—also governs interactions and interventions in semi-public places. For example, the public transport authority in Brussels, the STIB, has adopted a list of rules concerning prohibited behaviour. The rules include restrictions on eating, smoking, aggressive behaviour, and restrictions on disturbing other passengers with one’s odour, one’s belongings or by one’s presence. In addition, the STIB employs its own security

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14. The example recounted during one interview of a group of people who occupied for a long time the sidewalk in front of a mental health service provider provides an example of a “move along” order: at the request of the service provider, the police arrived on scene to ask the occupiers to leave the sidewalk. While a group may be tolerated for months in the same location, it’s possible that they are suddenly, and unofficially, asked to leave *en masse*. It is difficult to measure the frequency with which police revert to this type of order and what factors impose that the police decide to remove individuals from a place where they had otherwise been tolerated.
 15. For example, in Etterbeek, the recent ban against begging in commercial zones responded to a high number of complaints about the homeless that originated from the same zones. Interviews with police officers that took place before the ban went into effect revealed the extent to which the officers are caught in an awkward position between competing demands, which are the desire to help and the desire to drive them out. Because begging was never formally outlawed, officers could not respond directly to the complaints of storekeepers, who preferred to see the homeless removed entirely. There was no framework in which the police could operate, that responded directly to the storekeeper demands that motivate their intervention. The police were left to “*ménager la chèvre, le chou et le loup*”—in other words, to manage conflicting interests. And yet, if non-offensive begging offers few opportunities for an official police intervention, maintaining good relations in the community required the police to intervene all the same on behalf of the storekeepers.
 16. The homeless sometimes enter into relations where they receive privileged access to places that are “off-limits,” such as access to hygiene facilities or access to restricted subway platforms at night during the winter.

force, which permits the agency to respond quickly to rule violations and apply sanctions. More importantly, since 2007, the STIB's regulations have included a prohibition on begging on STIB property. The agency also played announcements over the network's PA system inciting passengers to refrain from giving alms so as not to encourage begging (STIB, 2011). Yet if this array of measures suggests a willingness to impose sanctions. In fact, STIB security agents only impose sanctions on rule violators infrequently. More likely, violators are simply asked to leave STIB property.¹⁷ The practice of sanctioning then, unlike the rules governing sanctions, demonstrates a margin of tolerance that is the rule rather than an exception.¹⁸ Agents are left to decide according to their own assessment of the situation whether or not to escalate an intervention by issuing a sanction. It is a question of discretionary power in which sanctions play a role in a negotiation, played out on a case-by-base basis, between potential rule breakers and STIB agents.

CONCLUSION: LOCALISED PRACTICES AND DISCRETIONARY INTERVENTIONS, A PATCHWORK

Corresponding to the localisation of rules governing behaviour in public spaces, we find in Belgium a similar trend of decentralisation of power among authority figures, such that the application of local rules is reduced to the assessment of police officers and other security agents. As a result, it is difficult to propose a general conclusion about the rate with which homeless people are penalised in Belgium or the severity of their penalisation. The absence of reports focusing on the application of penal sanctions on homeless people by local authorities further complicates the attempts to fill in the gaps in the patchwork analysis given by this report. We may, however, return to two claims whose validity appears well established. First, the management of “problem” situations that involve homeless people (e.g. where a homeless individual is at risk of receiving a sanction)—is above all—local. Second, the agents responsible for issuing sanctions operate within a significant margin of discretion. Between these two claims, we find that while restrictions and displacements may occur frequently, if not officially, they occur alongside pacts of solidarity between agents and potential violators, a situation that leads to various zones of tolerance within communities.

Nevertheless, the trend of tolerance is threatened by numerous factors that deserve further attention. For example, the proliferation of “semi-public” places in Belgium, characterised by the limited conditions of access that these places impose, allow

17. Among other prohibited behaviors, the STIB forbids improper usage of STIB property (without defining “improper”), to spit or to publicly urinate or defecate, to obstruct a passageway, to trouble the public order or inconvenience other passengers or to be found in a state of intoxication, a state of explicit impropriety whether through undesirable physical contact or by offensive, immoral or menacing acts. Infractions are punished by fines of between 75 and 250 euros.

18. The same measure of tolerance is also found in the treatment of people sleeping overnight on STIB property. Typically, security agents pass each morning and invite campers to leave STIB property before the rush of morning commuters arrives.

general restrictions against homeless people to take place over entire swathes of land while the scope of this repression is invisible to the general public. In a similar manner, renovations of existing public places that render the spaces “defendable” — for example, installing barriers between seats on benches in STIB stations, making it impossible to lie down expose a more insidious practice of rendering the presence of homeless people in public uncomfortable and impossible without any human oversight. In this way, penalising practices are becoming a feature of the geography of public spaces. Also in public spaces, enforcement of municipal ordinances appears to be increasing in severity. Pascal Debruyne, a geography researcher from the University of Ghent, has put together a petition that points out increases in the use of municipal sanctions in towns in Flanders (“Interstedelijke coalitie voor ‘het recht op de stad’”).

Overall, we may expect regulations in Belgium to become more and more explicit as guidelines that target homeless people and other socially marginalised populations. In its May 2012 newsletter, The *Front commun des SDFs* (Common Front of Homeless People) highlighted a sweeping strategy that police were using in the city of Liège. The strategy relied on the enforcement of municipal sanctions concerning trash to sweep Liège’s homeless dwellers all in one night (“A Liège, être sdf ou mancheur deviendra bientôt un crime” 4). Finally, in the Brussels Capital Region in 2009, the *Ligue des Droits de l’Homme* (The League for Human Rights) condemned the transit system, the STIB, for its decision to ban begging on STIB property (“STIB : stop à la chasse aux mendiants!”). In the years to come, it seems—perhaps—that the enforcement of municipal sanctions will catch up to the threat posed by the sanctions in the abstract.

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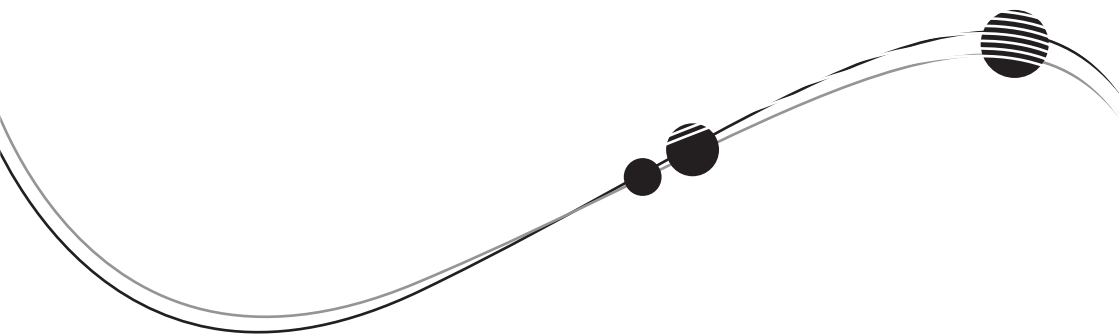
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CHAPTER IV

Criminalisation of Homelessness in Poland



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Social science research on homelessness shows that a number of people sleeping rough have experienced imprisonment. The fact that these instances may be considered causes of homelessness or only short episodes in the lives of people experiencing homelessness is of no significance here. What matters, however, is whether they resulted directly from homelessness. In other words, it is crucial to determine whether homeless people were penalised merely for the fact that they were homeless. In this discussion of the penalisation of homelessness I will first present the legislative aspect of homelessness, followed by a discussion of the public's image of a homeless person and its consequences. Next, I will focus on the policy and methods used by railway stations' authorities towards homeless people on station premises. Finally, I will present the most important aspects of street homelessness and methods used to cope with this problem in Warsaw, the capital of Poland. This should give a clear picture of the issue of homelessness penalisation in Poland.

The fact that one is homeless and stays in public places or sleeps in the streets is not subject to penalty in Poland. However, due to their difficult life situation, homeless people are entitled to state aid, which should be provided by local authorities. Local authorities -- commune entities -- are required to provide shelter, clothing and food to people living in a given commune and homeless people are entitled to this form of support in Poland (Journal of Laws of 15 April 2004, No. 64, item 593). This assistance is largely inadequate.

Homelessness is frequently associated with behaviours that are subject to punishment, rather than with the fact that people do not have a roof over one's head. These behaviours include street drinking, begging or vulgar and obscene behaviour that is subject to penalisation. So the penalisation of homelessness may be considered only in terms of behaviour that is obscene or disturbs public order. This is what is actually happening. A quick review of newspaper headlines using the key words "a homeless person", "a railway station", "a shopping centre", etc. shows that street homelessness is mentioned in the press in the context of littering, disturbing public order or obscene behaviour (Journal of Laws of 25 March 2010 item 275). What does it mean for the homeless individuals? It all depends on the way homeless people occupy public space. And there is penalisation that specifically targets homeless people; that is, finding reasons to justify the intervention of uniformed services in order to remove homeless people from public places.

Now let us focus on the image of street homelessness and the deeply rooted public image of a homeless person. Homelessness is generally associated with physical stereotypes. The image of a homeless person as scruffy and unkempt, smelly,

abusing alcohol, failing to comply with social norms and resorting to begging — this is the stereotypical description of a homeless person (Browarczyk 2010). What seems problematic is the fact that the characteristics mentioned above should sometimes be applied to a group of homeless people (please see FEANTSA's definition of homelessness — ETHOS category 1, i.e. roofless), but it is in fact applied to all homeless people. This stems from the way they look and behave rather than from the fact that they do not have a home. What is more, this approach is frequently associated with value judgements. Scruffy-looking individuals are not only recognised as homeless but also perceived in a negative light — they are seen as drunkards, beggars, scum, bums and petty thieves. They are classified as individuals who should be punished and removed from sight. It should be emphasised that the features attributed to the homeless can be equally applied to describe groups of addicts or beggars who are not homeless and can be classified according to the ETHOS typology as those living in insecure and inadequate housing (categories 8-13).

The following is a description of homeless people found in the press:

"Now we can often stumble over drunk and smelly homeless people lying on the floor at the Central Station." (Torz, 2012).

This short fragment reveals that homelessness is frequently associated with active addiction and a scruffy appearance. Homelessness is often seen not as a social problem but as an aesthetic disturbance which should be removed from view (Browarczyk, 2010). The fact that aesthetic aspects prevail over the state of being homeless leads towards the dehumanisation of homeless people, justification of inhumane methods and solutions to deal with homelessness, as well as acceptance of indifference or violence towards this group. Let us look at a fragment of another article:

"Are the authorities going to act before the Euro 2012 and temporarily remove the unwanted homeless individuals from strategic points in Warsaw or do they think that the homeless are no threat to the organisers' image?" (wp.pl. 2011).

The homeless are described as "unwanted individuals" who are a nuisance and "a threat to the image". These quotes may not illustrate actual penalisation of homeless people, but demonstrate a deeper form of discrimination the symbolic exclusion of homelessness which is frequently associated with aesthetic degradation. For example, homeless people are denied basic human rights and treated as elements that disrupt the aesthetics of a newly renovated railway station. This kind of exclusion may directly lead to applications of laws that serve only to maintain the aesthetics of public space, which includes removing homeless people and keeping them out of sight.

"Suddenly we could smell horrible stench. The homeless, drinking alcohol, eating sandwiches and swearing profusely, were stretching out on benches in their dirty and peed pants." (Osienkiewicz, 2011).

This fragment clearly reveals the disturbance of aesthetics but it also shows inappropriate behaviour of the homeless. But the main aspect used to determine

whether a person is homeless or not is firstly an aesthetic category -- physical appearance -- and secondly behaviour. Whether a person has a home or not is not considered.

"The image we get is appalling: 'the homeless drink, smoke, beg, sleep, defecate and urinate on seats later taken up by travellers and they do everything inside the building. Many find it obnoxious to look at them and to stay among them... Their horrible stench is unbearable!' [...]It may as well be so because in order to be able to stay in the shelter at Strażacka Street they have to be sober. 'And they clearly have a problem with that', say PKP passengers". (Rusek, 2011).

This fragment shows yet another issue associated with street homelessness. Texts mentioned above refer mainly to littering in public space and the fact that the homeless assistance system was developed without considering elements of street reality ("one has to be sober"). This brings us to the national homeless support system. According to government information sources (Ministry of Labour and Social Assistance, Department of Social Security and Social Integration, 2010), facilities for homeless people were able to accommodate 22,529 people in 2010. Despite the lack of credible data on the scale of homelessness in Poland, this number seems accurate. What looks to be inadequate, however, is the structure of facilities offering assistance to the homeless. The number of low-threshold facilities (i.e. those that accept residents under the influence of alcohol) is very low. Shelters (24-hour accommodation) and night-shelters (overnight accommodation) constitute the core of the accommodation system, but both only accept people who meet the required conditions (i.e. they are sober and have been referred to the facilities). Unfortunately, there is no aid programme in Poland for homeless people who are addicted to alcohol or drugs and who stay in public spaces. In other words, there is a shortage of low-threshold facilities (that accept residents under the influence of alcohol) and work with homeless people (outreach programmes are not popular and may be found only in bigger communes). So, because there is no support for homeless people staying in public spaces, this group -- left alone -- uses all available resources to adapt to the existing conditions. In search of places in which it is relatively easy to satisfy their basic needs, homeless people adapt to living at or near railway stations.

Managers of buildings and premises in which the homeless tend to gather consider them to be troublesome and have tried various "solutions". The best solution would undoubtedly be assistance that responds to the needs of this group (i.e. effective social policy), but the managers are not part of the social sector, and their sole responsibility boils down to proper management of their premises. Therefore, they search for solutions that would be effective from their point of view. Solutions frequently adopted include removing homeless people from railway stations and employing uniformed services (border guards, police, railroad guards) and paramilitary organisations, (e.g. security forces), for this purpose.

Attempts to remove people who are considered to be homeless from the premises by the managers of railway stations or shopping centres are not perceived as penalisation of homelessness. These are merely aesthetic changes. They boil down

to the activities taken up in order to remove homeless people from the public space. Managers may have good intentions but this practice is, in fact, a form of punishment imposed on the people who find themselves in the situation that prevents them from leading a socially accepted existence.

There are two types of places where the homeless are not welcome and the managers try to remove them or, to use an euphemism, “ask them to leave”. These include railway, bus stations and shopping centres. Managers frequently employ security firms not only to protect the area but also to remove homeless people from the premises. However, homeless people are not thrown out unless they attract the guards’ attention with their behaviour or in any other way. This is the official version, but very often even the appearance of homeless people is enough for the security services to ask them to leave. Cases of unjustified violence towards homeless people removed from certain places have been noted.

Unfortunately, this issue has not been researched yet. Nobody collects the statistics on the removal of homeless people from public space. Also, there is no research on cases of unjustified violence towards the homeless. This sphere of homelessness has not been researched. There are two sources of information in this respect: press reports and experienced, homeless service providers. Media articles cannot be considered an objective source of information and service providers’ experience is subjective. Due to the shortage of relevant and credible data on homelessness this article is a qualitative analysis rather than a statistical review. Also, the management and security firms clearly have the freedom to choose their own approaches to removing homeless people from their premises. Identification of homelessness on the basis of feelings and experience (some people look homeless and some do not) means that the security guards are left to decide which individual is actually homeless. In other words, a person who works in a specific place makes the decision who should be removed from a given place and what methods to use to do so. Hence, such factors as psycho-physical predispositions of the person employed in a security firm is of key importance here. Their professional approach towards homeless people will be more or less humane depending on the individual’s predispositions. Perception of homeless people (i.e. the extent to which the guards hold negative stereotypes when approaching homeless people) is equally important.

The form of penalisation of the homeless presented here stems, on the one hand, from the absence of work with homeless people staying in the public space and, on the other hand, from the stereotypes on homelessness deeply rooted in society. This is reflected in the articles on homelessness and the scale of hostile and aggressive behaviour towards this group.

Station management provides these formal reasons for removing homeless people from public places:

“When we have the information that homeless people pester the travellers, we intervene immediately. That is why we ask passengers to notify us of any inconvenience. Phone numbers are available in the lounge. The security firm will

react promptly and remove unwanted "visitors". I share the view that a railway station is only for passengers." (Rusek, 2011).

The term "pester" used in the fragment is rather euphemistic. It is difficult to determine explicitly what this term means but it is probably used to refer to begging, drinking alcohol etc.

The aggression of the private security company staff towards homeless people may stem not only from negative stereotypes of homelessness and hostility towards this group but it may result from the lack of laws and regulations that penalise homelessness. Police and municipal police officers say the following:

"We can intervene only when someone commits an offence," says Marek Anioł, spokesman for the Kraków Municipal Police Forces. Unfortunately, it often turns out that even the notification of offence yields little result. When officers reach the area, the homeless no longer violate any regulations." (Osienkiewicz, 2011).

A change in laws and regulations on offences would be a step towards the literal and real penalisation of homelessness, which legislators are trying to avoid. The fact that groups of homeless people are forced to stay in such public places as bus and railway stations for a longer period of time is indeed problematic. Solutions chosen by the managers of these places include employing security companies and closing railway stations for a few hours at night. It not only facilitates maintenance of a "clean and tidy station" but also prevents homeless people from spending the night in one place. This is supposed to discourage homeless people from staying in railway stations. This solution has been applied in most large railway stations in Poland.

So far, the discussion has centred on the problems encountered nationwide. Now let us focus on the specific situation observed in Warsaw. The problem of homelessness in this city has slightly different characteristics than in other cities in Poland. First of all, there is not enough data on the levels of homelessness and frequent attempts made to develop a registry of those who receive institutional aid (shelter) have so far been futile. Secondly, only small-scale projects are in place, which do not go beyond the pilot phase and the issue of monitoring and assesment of non-institutional homelessness has not been resolved. What is more, there is no coherent data on the number of people sleeping rough. Finally, due to the limited scope of cooperation among small and large service providers and little knowledge of the activities conducted by other institutions and organisations, there is no comprehensive source of information on homelessness in Warsaw. The nature of homelessness in the capital of Poland may be a bit different than in other regions (for example, a large number of migrants sleep rough), but methods used to penalise homeless people staying in public places are no different. Uniformed guards and police react only when they see homeless people breaking the law. Security companies vary just like in other cities. Depending on the policy of a given entity and the psycho-social profile of the employees, they are more or less restrictive oppressive towards homeless people.

The following quotation is a good example of a typical practice applied towards homeless people staying at railway stations observed in Warsaw:

“Tramps are frequently seen at railway stations. Now, when it’s snowing and it’s cold outside we can see them more often. Railway authorities have no choice and usually force them to leave. This is mainly because of passengers’ complaints. Warszawa Wschodnia (Warsaw East) train station is no exception here and it also declares war on the homeless.” (Świerżewski, 2012).

“They throw us out because we smell bad”, explains Tutek. “But when it’s freezing cold outside even the police order them to let us inside. Now when it’s warmer we can’t come inside even for a moment. But the security guards say that they remove only those who are drunk and accost passengers. Or they throw us out when passengers ask them to intervene.” And they ask a lot. Take this example: there is a queue in front of the kiosk in the station hall. A homeless woman joins the queue, she wants to buy some crisps. People look at each other. A lady at the front waves her hand and expresses her disgust. A man at the back of the queue swears and leaves. They are angry and blame PKP (Polish Rail) for this situation. “We have to step in.” [...] The PKP spokesman is jittery when asked about homeless people from Warsaw East station. On the one hand passengers complain about the smell and say that railway authorities do not react, and the newspapers say that it is a shameful situation. On the other hand, when they try to do something about the situation, there are opinions that it is cold outside and they are heartless. “PKP is not the institution responsible for care provision to the homeless”, says Kurpiewski. “Passengers do not want the homeless at the station that is why security guards remove them from halls which would otherwise turn into night-shelters. When it’s freezing cold outside, we ask the police and municipal guards to take homeless people staying at the station to shelters or night-shelters where they find protection from cold” (Szymanik, 2012).

Warsaw is no exception when it comes to typical practices and approaches towards homeless people. The fact that a person is homeless is not subject to penalty but when people who are sleeping rough commit an offence, uniformed services ask them to leave the station premises. As mentioned before, security companies are more repressive towards the homeless — security guards execute the regulations and follow the manager’s orders. They focus more on the image and aesthetics of a given place rather than keeping order. Therefore, complaints concerning violence towards homeless people or removing homeless people from public places will be directed to the security firms working at railway stations and shopping centres as it is their responsibility.

The fact that homelessness in the public space is considered problematic is proved not only by such practices as closing railway stations at night or removing homeless people who violate regulations but also by attempts made by the government to reduce the scale of homelessness at railway stations through aid programmes conducted in cooperation with Polish State Railways (Notice of open competition within the programme of the Minister of Labour and Social Policy: “The Programme Supporting the Return of Homeless People to Society”, 2012 Edition, 2012). This

programme is aimed at working with homeless people (streetwork), providing facilities for homeless people near railway stations, etc.

*

The amount of statistical data on homelessness in Warsaw and generally in Poland presented in the article is insignificant, which requires explanation. The topic covered in the article has not been widely researched and there are no statistics on the penalisation of homelessness. As mentioned before, sources of information presented here include press articles analysed according to the quality of the material. Quantitative analysis would not be appropriate here as the results obtained would lack credibility.

CONCLUSION

In conclusion, it should be emphasised that homelessness is not penalised in Polish legislation. There are no regulations according to which homeless people are not allowed to stay in certain places because they have no abode. People cannot be punished for their poverty. However, there are laws prohibiting such behaviour as drinking in public (Journal of Laws of 19 April 2007 item 473) or begging (Journal of Laws of 25 March 2010 item 275). Private security companies who are responsible not only for maintaining order at railway stations or in shopping centres but also for their aesthetics, are the main actors in the penalisation of homelessness. It is not the fact that a person is homeless but it is rather the stereotyped appearance and behaviour associated with homeless people that is punished. These activities result not from the urge to penalise homelessness but from the lack of adequate solutions in the sphere of homeless service provision. One aspect should be emphasised here, namely the relatively high level of awareness among the managers of public space entities:

“Appearance of young people who arrive at our airport at times does not differ much from the one presented by the homeless. But this does not mean that we should remove them from the terminal because they do not look elegant enough,” he adds. (Klimowicz-Sikorska 2012).

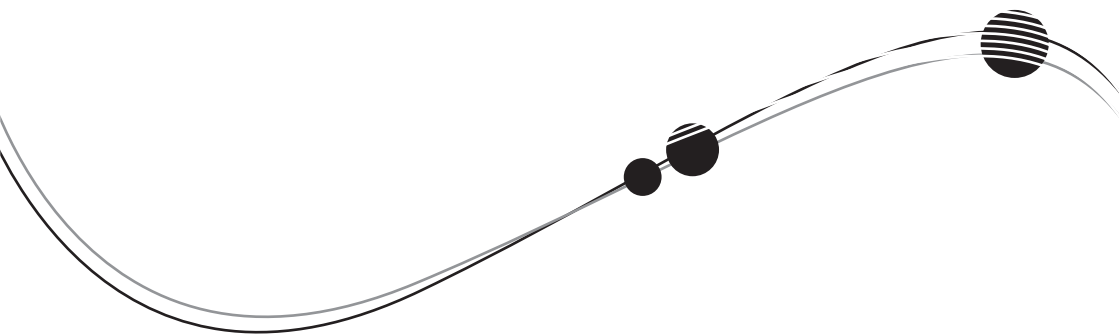
What arises from this opinion is the fact that one’s appearance is not the criterion used to determine whether one is homeless or not and that it is not liable to penalisation. The approach and methods used towards homeless people are similar in Warsaw and in other big cities in Poland. Cases of punishing the homeless for the sheer fact they are homeless are infrequent and there is a clearly ambivalent attitude of the public opinion towards such methods.

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CHAPTER V

The Criminalisation of Homelessness in Hungary



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The following report provides a brief overview of the antecedents and unfolding of the current punitive upsurge that led to the nation-wide criminalisation of street homelessness in Hungary. It will be argued that, whereas the Hungarian government went exceptionally far in criminalising homelessness, the enforcement of the corresponding legislation has been, up to now, limited—partially because of the widespread public criticism of these punitive measures in general, and in particular grassroots mobilisation involving homeless people. The report concludes by underlining the harm that criminalising legislation causes, regardless of whether it is actually enforced, through the exclusionary discourse accompanying it.

ANTECEDENTS

The criminalisation of homelessness intensified, become codified and systematic since 2010. However, the current punitive surge has its antecedents both in the preceding “socialist” regime as well as the two decades following the transition to capitalism and parliamentary democracy in 1989-1990. The official propaganda of the “socialist” regime declared poverty to be non-existent in the 1950s, and prohibited sociological investigations of the problem. From the 1960s onward, full employment and comprehensive welfare provision (e.g. Ringold, 1999) indeed alleviated extreme poverty. Extensive social policies were, however, complemented with punitive measures directed against those “living an idle or alcoholic lifestyle”. According to an ordinance issued in 1985, for example, anyone found homeless in public spaces was to be arrested (Győri, 2009). Homelessness was not abolished — indeed its prevalence was estimated to be between 30,000 to 60,000 people in the 1980s (Utasi, 1987) — but punitive measures, together with state censorship of the press and academia, made much of it invisible to the public, especially in the case of rough sleeping.

With the transition to a market economy, widespread deindustrialisation, the subsequent radical increase in poverty and unemployment, the rapid increase in housing costs and shutting down nearly all the workers’ hostels led to mass homelessness in Hungary (Győri, 1990; Iványi, 1997; Mezei, 1999). At the same time, earlier criminalising measures were abolished, civil rights were formally guaranteed, and an elaborate system of homeless assistance services was developed.

The initial phase of the “post-socialist” era was characterized by informal police harassment of fluctuating intensity (depending on the season, the proximity of

local elections and the prominence of different public spaces) without any attempt to legalise this practice. From the mid 2000s, however, several local authorities criminalised “silent begging”, with important ramifications to people living on the street (regardless of whether or not they were begging). According to national legislation, panhandling with children or in a “harassing/aggressive way” was already prohibited—the latter broadly defined to include anyone “who addresses pedestrians or people in public with the purpose of asking for money”. Thus, this regulation made any form of panhandling other than silent begging (no matter how polite) illegal. Yet several local authorities — including Eger, Hajduszoboszló, Kaposvár, Nagykanizsa, Pécs, Szeged and the 13th district of Budapest — still found it necessary to criminalise non-harassing forms of begging in their downtown area, with the intention — manifested in the rationales put forward by some of the advocates of these ordinances — to push homeless people from these areas. Many of these ordinances included “implied conduct” in their definition of silent begging which is especially worrisome with respect to harassment of homeless people.

More recently, the exclusion of homeless people from public spaces was announced by various politicians, but their rhetoric was not followed by legislative measures. The mayor of the 5th district of Budapest announced the elimination of “homeless islands” (public spaces occupied by homeless people) and promised to ensure the “legal basis for pushing out the homeless and beggars”. He later backed off as a grassroots protest brought his exclusionary intentions onto the evening news. In 2009, the mayor of the 11th district of Budapest announced a policy of “zero tolerance” on homelessness and the designation of “homeless-free zones” from which homeless people would be excluded. Again, the mayor abandoned these plans when media coverage sparked grassroots homeless activism protests.

CHRONOLOGY OF CRIMINALISATION OF ROUGH SLEEPING

The criminalisation of homelessness became systematic through the legislative changes after the change of government in 2010. A more punitive approach to homelessness was manifest in various announcements by the Minister of the Interior and the newly elected mayor of Budapest. The minister promised to “clear the public spaces from beggars and everyone who inconveniences the public”, whereas the mayor argued that “the purpose of the nation’s capital, including the railway stations, the underpasses, and public spaces is not to allow people who have nothing to lose to continuously molest everyone else and to make Budapest unusable”. In his election program, he also promised to “eliminate the spontaneously erected homeless settlements from green areas”.

The criminalisation of homelessness unfolded through the following four steps:

- In November 2010, the parliament passed legislation that defined the purposes of public spaces, and authorised local authorities to pass ordinances prohibiting their usage for any other activity. Notably, the official rationale for the legislation provided by the Ministry of the Interior gave only one example of such other activity: the “habitual residing of homeless people” in public spaces. Furthermore,

the official document argued that the local authorities would be able to prohibit the use of public spaces for non-designated purposes, and again, the only example provided was to “reside” or “sleep” in public spaces.

- In April 2011, the local authority of Budapest passed an ordinance that made it illegal to “use public spaces for habitually residing there” and to store belongings used for such activity (e.g. blankets, mattresses, etc.) in public spaces. The ordinance imposed a fine of up to 50,000 Forints (or 178 Euros) for such activities. Similar ordinances were later passed in the town of Tatabánya as well as in the 6th and 8th districts of Budapest.
- In November 2011, the parliament passed legislation that made it a misdemeanour, punishable with up to 60 days of imprisonment or a fine of 150,000 Forints (534 Euros) to violate any local prohibition on “residing in public spaces” twice within six months. This legislation did not extend criminalisation to the whole country, but it significantly increased the possible sanction of violating the already existing local ordinances by making repeated rough sleeping directly punishable with imprisonment. (Note that fines on the basis of local ordinances were already convertible to sentences in jail or to community service in cases of non-payment.) According to the official rationale attached to the bill, this change was required as “the monetary sanction imposed by local authorities is hard to enforce on the usual perpetrators [sic], and therefore did not have sufficient deterrent effect with respect to recidivism”. According to the law, the above sanction “should not be used if city authorities do not provide the means for assistance for the homeless”. It was not defined anywhere, however, what the required level of assistance is for the sanction to be applicable.
- In December 2011, the parliament passed a new codex of misdemeanours that made “residing in public spaces” illegal in the whole country. Making rough sleeping is punishable by fines of up to 60,000 Forints (213 Euros). After two contraventions (including earlier charges due to rough sleeping) within six months, sleeping rough is punishable with up to 60 days of imprisonment.
- ? In November 2012, Hungary’s Constitutional Court struck down this legislation as unconstitutional. However, the government rapidly responded by adding a new section to its proposed constitutional amendments that essentially allows for laws to be passed that criminalise homelessness and removes the power of the Constitutional Court to review this kind of legislation.

As early as November of 2010, the mayor of Budapest announced his “Program of Social Reconciliation”, which consisted in the expulsion of homeless people from the 12 most prominent underpasses/subways of Budapest. The original announcements included extra financial resources to provide for those 120 people who were found by homeless service providers in these locations. These resources, however, were never delivered; instead, shelters prioritised the placement of those living in the designated public spaces over other homeless people. At that point there was no legal basis for the forceful removal of homeless people from the underpasses. In February 2011, it was revealed that the Ministry of Human Resources was planning to open institutions “which are also suitable for detention, namely in which the placement of homeless persons who were not willing to voluntarily use the services [of shelters] is also possible”. In December 2011, the first homeless shelter with a special room for short-term arrests was opened, though (most likely due to protests

and critical media coverage) this function was later denied by the authorities and was never put into practice.

Throughout the above process, the government received much criticism for the criminalisation of homelessness. At various stages, the criminalisation of homelessness was condemned by the Parliamentary Commissioner for Civil Rights, the most prestigious Hungarian department of social policy and social work (of the Eötvös Loránd University), the Hungarian office of Habitat for Humanity, the Catholic Community of Sant'Egidio, and the national umbrella organization of homeless service providers. The two democratic parties of the parliamentary opposition (LMP and MSZP) also argued and voted against all the criminalising legislation. In November 2011, as the culmination of a long campaign by the grassroots activist group, The City is for All, thirty protesters (including homeless people) staged a sit-in in the office of member of the parliament Máté Kocsis, the leading advocate of the punitive upsurge. In a non-violent civil disobedience undertaking, the activists refused to leave until the politician revoked the draft law about the imprisonment of homeless people repeatedly found sleeping rough. The direct action resulted in the arrest and forceful removal of activists, which increased the public's awareness about the government's plans to incarcerate homeless people.

The European Federation of National Organisations Working with the Homeless (FEANTSA) has issued several press releases on the Hungarian situation.¹ Leading international human rights organizations, Amnesty International² and Human Rights Watch³, also denounced the criminalisation of homelessness in Hungary. It is notable that whereas the European Union remained silent on the issue (in particular, both the Fundamental Rights Agency as well as the European Commissioner for Employment, Social Affairs and Inclusion refused to denounce publicly the punitive measures, despite several requests by Hungarian organisations to do so), two human rights experts of the United Nations took a public stance against criminalisation.⁴

The governing party has a large majority in the parliament as well as the continuing support of much of the electorate, and thus the aforementioned criticisms could not lead to the overt revocation of the punitive policies. Nonetheless, as it will be argued below, the widespread public criticism and grassroots mobilization among homeless people contributed to the lack of widespread aggressive enforcement of criminalising legislation.

THE CRIMINALISATION OF SCAVENGING

Besides the criminalisation of rough sleeping summarised above, another important instance of the criminalisation of poverty is the anti-scamvenging ordinance passed

1. Please see www.feantsa.org;

2. See their 2012 country report on Hungary.

3. See <http://www.hrw.org/news/2012/04/16/hungary-revoke-law-criminalizing-homeless>

4. See <http://www.un.org/apps/news/story.asp?NewsID=41246&Cr=Rapporteur&Cr1>

by the 8th district of Budapest in the fall of 2010. According to local legislation, “taking out garbage from garbage cans placed in public spaces or jointly used by residents” is punishable with a fine of up to 50,000 Forints (or 178 Euros). The 8th district was not the first to criminalise scavenging: a petition to the Constitutional Court compiled by the Hungarian Civil Liberties Union identified 39 local ordinances that contained such regulation. As early as 2001, the Parliamentary Commissioner for the National and Ethnic Minority Rights criticised the anti-scavenging ordinance in Tiszaújváros for being unconstitutional and resulting in indirect discrimination against Roma people (who were more likely to be compelled by extreme poverty to violate the regulation). Nonetheless, it was the anti-scavenging ordinance in the 8th district of Budapest that became a public scandal, due to the fact that it was part of an aggressive anti-homeless campaign by mayor Máté Kocsis (who argued, for example, that “if we do not drive homeless people out, they will drive the residents of the 8th district out”), and to the loud opposition to the punitive measure by homeless service providers, homeless activists, and a group of radical social workers.⁵

In December 2011, the Constitutional Court repealed the anti-scavenging ordinance in Kaposvár. The Court argued that criminalising scavenging is unconstitutional because it restricts general freedom of action without relevant constitutional reason and violates the requirement of equal treatment because it is evidently directed against the poorest and most vulnerable members of society.⁶ Unfortunately, this decision did not apply automatically to other local ordinances. However, in December 2011, the parliament passed legislation removing the power of local authorities to define contraventions in their ordinances, and all such ordinances—including local prohibitions on scavenging and silent begging—were repealed.⁷

ILLEGAL DEMOLITION OF INFORMAL SETTLEMENTS

Besides the aforementioned legislative changes, the increasingly punitive governmental responses to homelessness have also been demonstrated in the attempts of various local authorities to demolish informal settlements of homeless people without due process nor the provision of adequate alternative accommodation. Examples from Budapest include the following:

- In October 2011, the local authority of the 14th district of Budapest demolished the self-built wooden cabins of nine homeless people. The demolition was not preceded by adequate prior notice, not approved by relevant authorities, and

5. The opposition included a civil disobedience action in which participants of the protest were invited to publicly violate the anti-scavenging ordinance by taking out rubbish from waste containers on the street. The protest and the subsequent court case against one of the organisers of the protest received a great deal of public attention.

6. 22/2011. (III. 30.)

7. Local authorities are allowed, however, to prohibit “blatantly anti-social behaviour” in local ordinances and impose administrative fines in cases of the violation. It is yet to be seen whether some of the criminalising measures described above will be attempted to be restored in this new form.

not accompanied with provision for alternative accommodation. A report by the Parliamentary Commissioner for Civil Rights later found that this measure was arbitrary and without authorisation, and the homeless people concerned -- with the help of the Legal Defence Bureau for National and Ethnic Minorities and The City is for All -- sued the local authority for compensation.

- In December 2011, the local authority of the 21st district of Budapest was planning the eviction of approximately thirty homeless people from their self-built wooden shanties in an otherwise largely abandoned green area. Again, requirements of due process were not fulfilled, which would have made the action illegal. Here, grassroots mobilisation and the subsequent early media coverage prevented the implementation of these plans, and there are ongoing negotiations between the homeless people concerned and the authorities on possible solutions.
- In March 2012, seven homeless people were forcefully evicted and their self-built shacks demolished by the local authority of the 9th district of Budapest. These measures, as elsewhere, were illegal as the local authority did not seek court approval. Moreover, those evicted were not officially given prior notice, and many of their belongings were taken and disposed of. Two activists who tried non-violently to prevent the illegal measure -- including the author of this report -- were hand-cuffed and arrested. Later, the corresponding report of the Parliamentary Commissioner for Civil Rights declared once again that such unauthorised demolition of homeless settlements is unacceptable (AJB-3513/2012).
- In June 2012, an informal settlement of around 50 homeless people in a wooded area of the 10th district of Budapest was threatened by illegal demolition. The corresponding decision was made by the committee of public order of the city council (which is not authorized to approve such measures), the residents of the settlement were not given any written notice, and outreach workers were given only two weeks by the local authority to find accommodation for those now displaced. In this case, grassroots mobilisation by homeless activists was again able to prevent the forced evictions, and there are ongoing negotiations with the local authority on possible solutions.

In all of these cases, there is an important discrepancy between the kind of accommodation the authorities tend to be able or willing to provide without consistent additional pressure -- temporary placement in over-crowded shelters -- and the quality of the accommodation that the affected homeless people provide for themselves, in terms of independence, privacy, and permanence. The prevalence of such informal settlements is an important reminder of the inadequacies of both the homeless shelters and municipal housing provision.

Note also that whereas these measures fit into the government's increasingly punitive approach to homelessness, they are not directly related to the enacted criminalising legislation. The misdemeanour of residing in public spaces was never explicitly invoked by the authorities in these cases.

INTENSITY OF ENFORCEMENT AND POLICE HARASSMENT IN BUDAPEST

There is only fragmented and indicative information available about the prevalence of the actual enforcement of criminalising measures. According to the data gathered by the Hungarian Civil Liberties Union, the anti-scavenging ordinance in the 8th district of Budapest led to documented law enforcement 184 times throughout 2011⁸. The vast majority of the cases consisted of the issuance of a formal warning; people were fined in 11 cases, ranging from 5,000 Forints to 25,000 Forints (or 18 to 89 Euros). From the data provided by the local authorities of most of the districts in Budapest, it can be calculated that, from mid May 2011 to the end of that year, at least 800 law enforcement measures were taken against rough sleeping. It is important to note that more than 600 of these occurred in the 8th district of Budapest, where the mayor announced a campaign of law enforcement specifically targeting the presence of homeless people in public spaces, and a new law enforcement office was opened for the sole purpose of handling these cases. There were no other similarly aggressive attempts to enforce the criminalisation of homelessness. Though the police harassment of homeless people did increase over those two years, this increase did not seem to be as radical as the legislative review would suggest.

Everyday experience as well as the preliminary results of an ongoing participatory research project on the discrimination against homeless people⁹ suggest that one of the most crucial instruments of police harassment is frequent identity checks of homeless people, which is not directly related to the criminalisation of rough sleeping, and which was widespread already before the corresponding legislation entered into force. In this study of around 350 homeless people in Budapest, 59 percent of the respondents reported identity checks by the police within a month, and one-third of them reported more than four identity checks. Half of the respondents had been awakened by the authorities (47 percent), mostly when sleeping in a public space. In almost two-thirds of the cases (63 percent), they were awakened for identity checks, and in only a tiny minority of the cases (4 percent) were they awakened because the authorities wanted to offer help (e.g. by warning them about the cold weather). Fifty-seven percent of the respondents thought that homeless people were treated worse than others by the police in case of identity checks.

As far as the criminalisation of street homelessness, the possibility of imprisoning homeless people who are repeatedly found rough sleeping and government plans for establishing homeless shelters into which people would be brought by force, there seems to be an apparent inconsistency between government rhetoric and the actual practice of law enforcement. Besides the operational and financial constraints of the law enforcement agencies, this might also be due to the widespread public criticism of punitive measures in general and, in particular, to the powerful grassroots mobilisation of homeless people and their allies.¹⁰

8. Data kindly provided by Stefánia Kapronczy.

9. *Utca és Jog* [Street and Law] participatory action research project, 2012. Data was kindly provided by Éva Tessa Udvarhelyi.

10. Anecdotal evidence also suggests that law enforcement agencies are not eager to take on the task of arresting homeless people for nothing else than their homelessness, and that they too believe that this issue should be mainly treated as a matter of social policies, not of policing.

CONCLUSION

The criminalisation of homelessness is a matter of crucial significance in itself. Homeless people must be defended from arbitrary measures, humiliating police harassment, penal fines and incarceration just as the principle of equal worth of citizens must be defended from unconstitutional, discriminative legislation. Furthermore, the criminalisation of homelessness can have the dangerous side-effect of forcing homeless people to seek out more hidden places, where it is more difficult for the — often lifesaving — help of concerned citizens or outreach workers to reach them. However, the only end goal truly worthy of embracing by social workers, sociologists, and human rights advocates alike is not to make rough sleeping legal again, but to make it unnecessary.

Criminalisation of homelessness is gravely harmful in this respect as well. The political discourse that accompanies — and attempts to legitimise — punitive measures redefines homelessness as an issue of public order, and therefore diverts attention from the inadequacies of social policies to provide dignified housing for everyone. Punitive measures and the corresponding control of public spaces indicate “a profound change in the social construction of homelessness, which can have serious consequences on policies. Framing homelessness in terms of public order and nuisance subtracts the question of homelessness from social policies” (Tosi, 2007:229). Indeed, an important function of criminalisation is to compensate the deficit in legitimacy suffered by political leaders because of their failure to prevent extreme poverty manifest in rooflessness (Marcuse, 1988; Wacquant, 2001).

Criminalisation can only be legitimised if the public is made to believe that homeless people remain homeless by choice (Mitchell, 2003). This belief cultivates the perception of homeless people as different from the general public (they must be some kind of strange creatures that, for some unknown reason, prefer to remain outside in the cold and dirt), who are to be blamed for their own homelessness.¹¹ As the discourse of criminalisation frequently operates through the dehumanisation, blaming and symbolic exclusion of homeless people, it makes empathy as well as a sense of community and responsibility—the very preconditions of egalitarian reforms necessary to eliminate homelessness—increasingly difficult to develop (Missetics, 2010). Instead of understanding it as a problem of the community, the construction of homelessness as an issue of public order makes it seen as a threat from the outside.¹² It becomes understood as a problem *to* the society instead of a problem *of* the society.

Therefore, the stubborn insistence on the membership of homeless people in the community of citizens of equal worth and the defence of their basic civil rights can be an integral part of working toward the provision of right to housing for all.

11. Outreach workers reported, for example, a perceptible deterioration of the ambulance service workers' attitudes toward homeless people since the onset of the current anti-homeless campaign.

12. Cf. Kawash, 1998. An analysis of the parliamentary discussions on the issue of criminalization reveals frequent references to the interests and rightful claims of “citizens”—a category that not only doesn't include homeless people, but is defined in opposition to them (Ámon, 2012).

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CHAPTER VI

Penalisation of Homelessness in Access to Social Housing and Shelters



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"Tell me whom you legislate for and I'll tell you who you are"
David Fernández and August Gil Matamala (2012)

This chapter examines contemporary developments in relation to access to social housing and shelters across a number of EU States. This is considered within the context of a growing penalisation of homelessness. We examine how the implementation of the culture of exceptionalism in criminal policy (and the criminal law of the enemy), explained in chapter II, is applied in social policies (and homeless policies) based on the administrative status of people and not on the basis of their needs, through the sanctioning of access in a “dual housing system”. The criminalisation of Travellers and Roma in Europe is also explored, as well as the international human rights law relating to minimum core obligations of states. The relevance of Council of Europe housing rights approaches appears to be correctly focused; yet, States are not developing access policies in line with these standards. .

The penalising of poverty and homelessness can take on different forms; one of these is the restriction of access to public services and social benefits. The report on “Extreme Poverty and Human Rights” (2011) by Magdalena Sepúlveda, the United Nations Special Rapporteur, considers that in order to justify these measures, States point to the need to make efficient use of public resources, improve the accuracy of targeting, avoid dependency, eliminate disincentives to work and deter abuse of the system. While these may be valid concerns, the impact of these measures is often disproportionate to the aim they seek to achieve. Support for these measures is not based on strong evidence of their effectiveness and economic efficiency, but rather on discriminatory stigmas and stereotypes, perpetuated by the media, that portray recipients of social benefits as lazy, dishonest and untrustworthy (Sepúlveda, 2011). In addition to the personal obstacles resulting from living in poverty, like not having a fixed address, lacking proof of identity or gaps in education, difficulties with literacy and communication when seeking to comply with often complex and opaque requirements, people living in poverty are also victims of media and political campaigns that stigmatize and influence the public discourse on poverty. For instance, political rhetoric focuses disproportionately on fraud related to social benefits, placing it above tax fraud, which is a far greater burden on the State (Sepúlveda, 2011). One of the most serious forms of penalisation of homelessness is the restriction of access to social housing and shelters. Often, the common criteria used to determine eligibility, which can include years of residence in the country, years of registered residence in a specific municipality, income, credit history, health, diagnosis of certain diseases or dependencies, or having a criminal record can count against people who are in dire need of services like social housing and shelter.

So, while policy goals may be diverse and can be justified more or less from a point of view of political management of poverty, they often represent a violation of human rights. Some examples of how this manifests itself through administration include the following:

- Adapting resources to the needs of certain groups and not of others.
- Restrictive definitions of problems to reduce the target population due to lack of financial resources.
- Reducing or increasing statistical variables to fulfil a political mandate.
- Prioritizing the access of some groups over others.
- Preventing the entry of certain groups to certain areas of a city.
- Making poverty invisible by forcing it to the margins of the city or to unhealthy locations.

These tactics -- whether inadvertent or explicit -- can ultimately cause the poor population or people in irregular administrative situations to leave the country.

The report on “Social Housing Allocation and Homelessness” by the European Observatory on Homelessness shows how, in 13 European countries, social housing only partially meets the housing needs of homeless people. There were six main reasons for this:

- Insufficient supply of social housing relative to all forms of housing need.
- Allocation systems run by social housing providers focused on meeting forms of housing needs other than homelessness.
- The requirement on social housing providers in some countries to balance different roles, including pressures to continue to meet housing needs while also moving towards marketization and social enterprise models.
- Attitudinal and perceptual barriers centred on a belief that homeless people would be “difficult” tenants and neighbours.
- Perceived tensions between avoiding spatial concentrations of poverty and associated negative area effects, and housing significant numbers of homeless people.
- Poor policy coordination between NGOs, social services and social housing providers.

The report points out that allocation systems for social housing did not prioritize some forms of homelessness, concentrating instead on other forms of housing needs. Social housing providers often avoided housing certain groups to which homeless people sometimes belonged. For example, the report highlights that social housing providers in countries including Sweden, Poland, The Netherlands, the UK, Finland, Ireland and Belgium have been known to exclude households with a history of rent arrears, households that had been previously evicted, and households with a history of nuisance or criminal behaviour (Pleace *et al.*, 2011). Also, people living rough were generally not a target group for social housing allocation, nor were the populations living in emergency accommodation and shelters. Living rough was rarely, in itself, enough to secure access to social housing, even in the minority of countries with relatively extensive housing rights legislation (Pleace *et*

al., 2011). For example, despite significant reductions in rough sleeping over the last decade in England, a number of barriers to permanent rehousing remain for the street homeless population, not least the woeful lack of appropriate move-on accommodation (Shelter, 2007). Moreover, the research of the European Observatory on Homelessness showed that there was unequal access to social housing based on presumptions about homelessness among social housing providers. For example, the misperception among social housing providers that all homeless people would create housing management problems, resulted in decisions to block access to social housing for this group. This is an attitudinal barrier because it is based on the incorrect presumption that all homeless people are likely to exhibit challenging behaviour and have high support needs (Pleace *et al.*, 2011).

HOUSING OPTIONS INTERVIEWS AND THE "GATE-KEEPING" DEBATE IN ENGLAND

In England, gate-keeping practices are sometimes used as a means of penalising "undesirable" homeless people and preventing them access to social housing. While in some parts of England, the housing options system -- which involves interviews with the homeless or potentially homeless families -- is very successful, other municipalities use this interview process as an excuse to restrict access to accommodation.

A legislative framework -- the Housing (Homeless Persons) Act 1977 -- has existed for many years in the UK. This framework sets out that local authorities must ensure that accommodation is made available to households that are "eligible" for assistance, "unintentionally homeless", and in "priority need", which are described as "statutory homeless". There has been substantial legislative divergence on homelessness since devolution of legislative powers. The original 1977 Act was subsequently incorporated into separate legislation for England, Wales, Scotland and Northern Ireland. As explained by Wilcox *et al.* (2010) in England, the number of statutory homeless acceptances rose steeply in the late 1990s and early 2000s, as housing affordability deteriorated, squeezing many low-income households out of the market. Since 2003/04, however, there has been an unprecedented reduction in homeless acceptances in England, with the total halving by 2007/08; and in the last quarter of 2012, around 13,570 households were accepted as homeless and in priority need in England, an increase of 6% on the same period in 2011. In Wales, there was a sharp upward trend in homelessness acceptances until 2004/05, but this has since reversed. In Scotland, homelessness acceptances grew steadily up to 2005/06, but have since dropped back slightly; a broadly similar pattern is evident in Northern Ireland (Wilcox *et al.*, 2010). However, it is also clear that the homelessness legislation is by no means perfect. Critical here is the "housing options" approach in England, promoted by Central Government (DCLG, 2006). As explained by Pawson *et al.* (2007), reductions in total "homelessness decisions", probably reflect the success of the renewed emphasis on homelessness prevention, and may in part reflect successful solutions to housing problems as a result of such interventions.

However, one factor that may be relevant here is the way that a housing options approach could potentially have the effect of reducing the number of households for whom a formal homelessness assessment is deemed necessary. Some housing options interviews involving households claiming to be homeless or threatened with homelessness will result in an initial judgment that the authority has no reason to believe that the applicant is or may be homeless or threatened with homelessness. Given that households in these circumstances might otherwise have been subject to a formal homelessness assessment, it may be that the number of formally recorded “decisions” under a housing options regime will be lower than would otherwise be the case (Pawson *et al.*, 2007). Under a housing options system, all households approaching a local authority for assistance with housing are given a formal interview offering advice on their housing options, which may include services such as family mediation or landlord liaison that are designed to prevent the need to make a homelessness application. There is genuine concern that the effective homelessness prevention practiced in some areas of England is being undermined by gate-keeping in others (Shelter, 2007). In some areas, these housing options interviews can represent a barrier to making an official homelessness application with certain local authorities (unlawfully) requiring potential homeless applicants to exhaust all potential preventative avenues before any formal consideration of their statutory homelessness status takes place (Busch-Geertsema *et al.*, 2008).

Once again, the point of litigation was the form in which this misuse of legislation was manifested. The case of *Robinson v Hammersmith & Fulham* (LBC 2006 EWCA Civ 1122) has highlighted the illegality of “gate-keeping” practices: where a local authority delays or postpones Section 184 of the Housing Act 1996 enquiries pending the outcome of homelessness prevention measures (e.g. family mediation). In the light of the reminder provided by this case, local authorities should be reviewing their procedures and practices to ensure that they are complying with their duties under Housing Act 1996 Part 7, in particular their duty to undertake enquiries where they have reason to believe that an applicant for assistance may be homeless or threatened with homelessness (Pawson *et al.*, 2007).

SOCIAL MIX AND DISCRIMINATION IN FRANCE

France uses a different approach when allocating social housing. France’s approach has been criticised by a number of academics, and in 2008 was found to violate Article 31 of the Revised European Social Charter as it failed to ensure the right to housing. There is a compelling argument that the emphasis on “social mix” in social housing in fact reinforces discrimination. Furthermore, the allocation of social housing is neither transparent nor based on formal criteria, which leads to penalisation of certain groups and individuals who are prevented from accessing housing.

In relation to the concentration of poverty in social housing zones and blocks of flats, the report “Social Housing Allocation and Homelessness” notes that although “social mix in social housing” policies have been developed in some countries (France, Sweden, The Netherlands and Germany), these policy interventions were

viewed by some expert respondents as limiting the opportunities to access social housing for various vulnerable and/or poor groups of people, including homeless people (Pleace *et al.*, 2011). For example, in the Collective Complaint 39/2006 FEANTSA vs. France, the European Committee of Social Rights (ECSR), the Council of Europe body responsible for monitoring the implementation of the European Social Charter, reached the unanimous decision that France is in violation of the Charter with regards to housing rights (article 31). The ECSR has ruled that France is not in conformity with Article 31 on six grounds pertaining to: inadequate housing conditions, preventing evictions, reducing homelessness, providing social housing aimed at the most deprived, social housing allocation, and discrimination against Travellers.

In reference to the allocation system for social housing, the Committee considered that although the Anti-Exclusion Act of 1998 represented an effort to improve the system for allocating social rental housing, there was clear evidence that the system still did not work well. Firstly, because a large part of the demand for social housing is not met (only 5-10% of the poorest households were allocated social housing), and secondly, because the average waiting period for allocation continued to be too long (around two years and four months) and in particular, the waiting periods for migrant households were longer than average. The Committee considered that the application of the concept of “social mix” in the 1998 Act, which is often used as the basis for refusing social housing, often leads to discretionary decisions that exclude poor people from access to social housing. The major problem stems from the lack of a clear definition of this concept in the law, and in particular, from the lack of any guidelines on how to implement it in practice. There are indirect forms of discrimination based on the length of residence in the municipality, often preventing migrants from fulfilling this condition. A remedy in the event of discrimination does indeed exist: Article L-225.1 of the Penal Code outlaws any distinction between natural persons on the ground of their origin, gender, etc. Moreover, the Act of 29 July 1998 required social housing providers to inform applicants of the reasons for being refused an allocation, but as this Act also introduced the goal of social mix without specifying how to achieve it, applicants can be turned down without it being possible to discern any discrimination. In practice, discrimination is often very hard to prove. The decision on FEANTSA’s collective complaint against France reinforced social segregation (Aurif 2012, Grand Lyon 2011). The past ten years have seen an intensification and increase in poverty and illiteracy levels, and continued difficulties to access services like healthcare, particularly in areas where these social problems existed. Despite direction by various public bodies and experts (*comités des sages*), the allocation of social housing remains discretionary and is based on informal criteria that is opaque and not available to applicants.

ACCESS TO EMERGENCY SHELTER FOR IRREGULAR MIGRANTS IN THE NETHERLANDS

In The Netherlands, homeless migrants can be barred from accessing emergency shelter. International NGOs like the Platform for International Cooperation on Undocumented Migrants (PICUM) and FEANTSA have challenged this penalisation

of irregular migrants through strategic litigation, including an on-going collective complaint against The Netherlands before the European Committee of Social Rights. Irregular migrants are penalised despite holding rights under the Council of Europe's Charter and other treaties.

A report by PICUM (2004) highlights the major difficulties faced by undocumented immigrants when accessing social housing in Austria, Germany, The Netherlands, Belgium, Italy and Spain. On some rare occasions, local authorities agree to house undocumented migrants in social housing while they work on regularising their situation and due to very vulnerable personal situations. Sometimes asylum seekers are still living in social housing after being rejected from the asylum procedure (during which asylum seekers are sometimes housed in social housing). But undocumented migrants face serious legal obstacles in trying to access social housing (Van Parys *et al.*, 2004). For example, as Christian Perl (2010) explains, in Austria the question of allocation of social housing to migrants, minorities and people of different religious affiliation is politically sensitive and legally unclear for many of the stakeholders involved. For instance, municipalities have established criteria for access to social housing which includes a "sufficient" level of German language skills, and have introduced maximum quotas for migrants. The criteria are designed to appear objective so as to prevent discrimination against socially or ethnically unpopular house-hunters; however, in reality people from different ethnic or religious backgrounds are often denied access to social housing. (Perl, 2010). In general, the housing situation of irregular migrants in Europe is characterized by a high level of mobility (Cholewinski, 2005). PICUM has undertaken a mapping exercise of housing in six European countries and identified five ways in which irregular migrants are housed:

- By homeless services organisations.
- In private housing (although a legal migration status is not always necessary to sign a rental contract, in practice, documents are often requested from irregular migrants).
- In emergency shelters (which usually provide accommodation for one night only and in some places are not open to irregular migrants).
- By NGOs working with irregular migrants.
- With the assistance of families and community networks.

Recent EU measures penalising the provision of assistance in connection with the residence of irregular migrants in the territory of EU Member States are likely to exacerbate the already difficult housing situation of irregular migrants (Cholewinski, 2005). Take, for example, the Netherlands, which in the last few years has embarked on a policy to exclude irregular migrants from most forms of social protection with a dual goal of ensuring that irregular migrants leave its territory and deterring further irregular migration.

In 2006, the four major cities of the Netherlands (Amsterdam, Rotterdam, Utrecht and The Hague, known as the "G4") signed an agreement with the government on addressing homelessness in major cities. Under this agreement, the parties committed

themselves to bringing homelessness to an end over a period of eight years (Kamp, 2010). The first objective was to improve the situation of the initial target group identified as homeless, and the second phase aimed to prevent homelessness amongst a broader group of people identified as vulnerable and to provide suitable support interventions for these people. In the four big cities and in other Dutch cities, the objectives and methods were presented in a so-called “City Compass”. The Compass aims to create an individualised assistance approach, for which interagency agreements are made to meet individual needs. The first phase of the strategy was aimed at the 10,150 rough sleepers in the four main cities in the Netherlands and the second phase will include all 21,800 people who are registered as tenants with social assistance institutions. Such holistic and service-user centred approaches should prevent homeless people, including those with multiple and complex needs, from slipping through the net (FEANTSA, 2010).

As Joris Sprakel (2010) explains, in The Netherlands since the late 1990s, national laws have effectively excluded irregular migrants from any government assistance. On the basis of Article 10 Vw2000, irregular migrants are entitled to some government services such as education, legal aid and emergency medical care. As of 1 January 2010, the situation worsened when local authorities were instructed by the national government to no longer provide emergency shelter to any irregular migrant, including families with children. In the courts’ view, the access to government assistance — including emergency shelter — for irregular migrants would prolong their stay needlessly and “seriously undermine” the migration policy of The Netherlands (Sprakel, 2010). In this regard, the Council of Europe’s European Committee of Social Rights released its October 2009 decision on Collective Complaint 47/2008 brought by Defence for Children International (DCI) v. the Netherlands in February of 2010. In this case, the complaint addressed the situation of children not lawfully present in The Netherlands, who are excluded by law and practice from the right to housing (particularly article 31.1 and 31.2 Revised European Social Charter). DCI states that housing is a prerequisite for the preservation of human dignity and, therefore, that legislation or practice that denies housing to foreign nationals, even if they are on the territory unlawfully, should be considered contrary to the Revised Charter. The Dutch government argued that the collective complaint was groundless because the children whose rights are allegedly violated by the contested Dutch legislation and practice are outside the “*ratione personae*” scope of the Revised Charter, as they do not meet the conditions established in section 1 of the Annex, since they do not reside legally in the country. The Government further argued that the complaint was unfounded since law and practice in The Netherlands allow for the provision of accommodation as “exceptions” exist to the principle that unlawfully present children cannot enjoy entitlements to public provision. The conclusion by the Council of Europe’s European Committee of Social Rights was that The Netherlands had violated article 31.2 — the prevention and reduction of homelessness, and article 17.1.c — the protection and special aid from the state for children and young persons temporarily or definitively deprived of their family’s support. The argument was based on the fact that Member States must provide adequate shelter to children unlawfully present in their territory for as long as they remain in their jurisdiction. Any other solution would run counter to the respect for their human dignity and would not take due account of the particularly vulnerable situation of children.

In July 2012, FEANTSA filed a Collective Complaint against The Netherlands (Complaint No. 86/2012) claiming that The Netherlands' legislation, policy and practice regarding sheltering homeless people is not compatible with the relevant provisions of the Revised Social Charter. FEANTSA has identified three issues that are not compatible with the relevant provisions of the Revised Charter:

- Access to (emergency) shelter is conditional on a connection to a municipality -- called a local connection criterion -- or on other criteria, which impacts the rights of homeless persons and (un)lawfully residing migrant(s) (workers).
- The availability and quality of (emergency) shelters is inadequate, negatively impacting women, children, and young persons (i.e. vulnerable persons).
- Due to a lack of coordination between the 43 responsible municipalities, there is a hindrance to the progression in the housing situation of homeless people.

The first point is a clear example of penalisation of homelessness. Out of the 43 municipalities that are responsible for providing (emergency) shelter, a substantial number have introduced a requirement of a (local) connection to the region ("regiobinding") before a person is deemed entitled to emergency shelter. Local connection can be proven if a person can provide documentation that shows evidence of residency within the region over a period of two out of three years. According to FEANTSA's arguments in Complaint No. 86/2012, in practice this proves problematic for a variety of groups:

- Homeless persons, due to the lack of registration in the municipal registry (Gemeentelijke Basisadministratie or GBA). Although alternative proof is accepted (i.e. criminal records, bank statements, etc.), the GBA is the starting point.
- Former addicts who wish to escape their "enablers" (i.e. drug dealers and addicted friends), may have local connection, but may want to live in a different region (this speaks to choice of residence as well).
- Migrants regardless of their legal status, due to the fact that they have not established a local connection over the specified amount of time.
- Roma and other marginalized groups for lack of documentation and, often, lack of proof of identity.

Besides the local connection criterion, the municipalities also apply other criteria in order to determine whether a person should be granted (emergency) shelter, for example having Dutch citizenship or lawful residency under the Aliens Act 2000, being aged 23 years or over, or belonging to the target group to be addressed as defined in the strategy. Thus, if a homeless person has no (serious) mental health issues and/or is capable of finding (usually temporary) solutions to homelessness, he or she is excluded from (emergency) shelter. In the case of EU citizen and other lawful migrant workers, although EU citizens are not excluded from (emergency) shelter according to the law, in practice access to shelter is refused. The Netherlands government argues that if the EU citizen is residing lawfully as a "worker", this means he/she is responsible for his/her own housing. This argument is based on the fact that freedom of movement within the EU is allowed only if the EU citizens concerned can support themselves. The result is that if the EU citizen loses his

or her job, The Netherlands government argues that he/she has to return to their country of origin where he/she would have an entitlement to (emergency) shelter. Besides, the Netherlands government has, by law, prohibited any government or government agency from providing irregular migrants with grants (*verstrekkingen*), provisions (*voorzieningen*) and social benefits (*uitkeringen*). The Aliens Act makes an exception for emergency medical care, schooling of children and legal assistance costs. The aforementioned prohibition was introduced in The Netherlands legal system with the 1998 Benefit Entitlement Act (“Koppelingswet”) with the main purpose of excluding irregular migrants from all public services and denying their entitlement to shelter. FEANTSA believes that the only criterion to decide access to (emergency) is need.

The European Committee on Social Rights has not yet decided on the Collective Complaint (July 2013), but The Netherlands government argued in its submissions that the complaint is not admissible. The government defended its restrictive migration policy as necessary to control immigration and motivate irregular migrants to leave on their own accord. The government submits that it is acting in accordance with international law by denying undocumented migrants access to shelter. In its submissions, the Dutch government refers to possible solutions that the undocumented migrant may have in case of destitution. Option one is voluntary return. This is not an option for all undocumented migrants. It is also a solution with limitations. Firstly, the shelter offered is a form of imprisonment, because the migrant is not free to leave the premises. Secondly, it is limited in duration: if the return is not successful, the provision of shelter is discontinued, leaving the undocumented migrant on the streets. The second option the government describes is that the undocumented migrant turns to churches or other charity organizations for help. However, it is not the charity organizations who signed the Charter. The State has obligations to assess the need for those who turn to them for help. The government cannot shift this responsibility to charity organizations, however well-intentioned. Ultimately, the Charter is an instrument that is intended to create rights for individuals and obligations for the State.

ROMA AND TRAVELLERS IN EUROPE

Roma and Travellers continue to face penalisation, criminalisation and discrimination across the EU, despite important steps to ensure their access to rights. Racism, discrimination, segregation, evictions and expulsions form part of the everyday experience of residential exclusion of Roma and Travellers in Europe. The discrimination they suffer is manifested in many forms. Direct discrimination is manifested, for example, in accommodation advertisements indicating “no gypsies” or in the denial of access to private rental housing on an equal footing with others and in some cases, refusals even to sell housing to Roma (Hammarberg, 2012). Indirect discrimination is manifested, for example, in access to social housing. According to the Fundamental Rights Agency (2009) in some European countries, Roma and Travellers live in social housing in disproportionate numbers compared to their proportion of the population as a whole, but the criteria for the allocation of social housing are often unclear,

too restrictive and, in some cases, reportedly discriminatory. Local authorities deny their access to social housing through measures that are directly or indirectly discriminatory against Roma and Travellers (FRA, 2009). In addition, they are also subject to harassment. As documented by the Commissioner for Human Rights of the Council of Europe, arbitrary seizure of property is reported during police stops on the street or at border controls, during searches when Roma people are begging and during raids on Roma settlements. Large-scale destruction of Roma property, including housing structures, has been documented during police raids on Roma communities (Hammarberg, 2012). In Italy, for example, between November 2006 and May 2009, fourteen different cities adopted “Security Pacts” that empowered officials to target Roma for removal from the areas where they had settled. On 18 May 2007, national and regional-level officials in Milan and Rome signed such pacts and granted municipal authorities special powers to forcibly evict more than 10 000 Roma living on those territories (Hammarberg, 2012).

Denial of access to key goods and services has concrete implications notably for the exercise of the right to freedom of movement in the EU, where the Roma concerned leave one EU Member State and arrive in another, as well as for the ability of Roma from outside the EU to arrive in and settle legally in an EU Member State, or another state in the OSCE region. In addition, anti-Romani sentiment has, in some cases, resulted in an erosion of the right under international law to seek and enjoy asylum from persecution (Cahn *et al.*, 2008).

The rules on the free movement of EU citizens inside the European Union – extensively developed under EU law – are currently set out in Council Directive 2004/38/EC of 29 April 2004, “the Free Movement Directive”. EU Member States, despite these provisions, have also discriminated against Roma EU citizens exercising their right to freedom of movement (Hammarberg, 2012). Travellers in some countries face particular barriers to accessing housing allowances because their chosen accommodation, such as a caravan, does not meet the definition of a house (FRA, 2009). While the right to housing generally includes the right to access to housing (rented – social or private sector – or owned), Travellers, who mostly own their caravans, are looking for a different type of public intervention: the provision of serviced sites. Looking more closely, these places are much less of a “burden” on the authorities than traditional types of assistance (provision of social housing, tax incentives for homebuyers, low-rate mortgages, renovation grants, rent allowances, etc.) yet, paradoxically, seems to create the most problems with the local community (Bernard *et al.*, 2010).

In France, the Internal Security Act of March 2003 permitted police to act within 48 hours (without requesting permission from courts or landowners) against anyone interfering with “law and order, hygiene or public peace and safety”. In August 2010, the Sarkozy government decided to evacuate around 300 illegal Roma and Traveller camps. In August 2012 the new Hollande government evacuated some 200 people from two Roma camps on the outskirts of Lille, in northern France, while some 250 Romanians were put on a charter flight from Lyons to Romania, in what was denounced as “disguised expulsions” or described as “voluntary return”. “Security” reasons were used in the former case, while in the latter the Interior Ministry alleged

“health risks” and insisted on the need to search for alternative accommodation for the displaced people. In both cases, a part of the population has been stigmatised, their human rights violated and other internal laws broken.

FEANTSA’s Collective Complaint (39/2006) against France showed that the legislation introduced in France (5 July 2000) requiring municipalities with over 5,000 residents to set up permanent stopping places for Travellers had only been implemented in a minority of municipalities. The French government acknowledged the delay in implementing this scheme and estimated a deficit of around 41,800 places. The ECSR said this delay forced Travellers to use illegal sites, which exposed them to the risk of eviction under France’s 2003 Act on internal security. The conclusions of the ECSR said “States must make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned, and that alternative accommodation is available”. The ECSR made the same conclusion two years later following a Collective Complaint (51/2008) by the European Roma Rights Centre (ERRC). The ERRC complaint also exposed the poor living conditions at the sites that had been created: not all stopping places met the required sanitary norms and some were created outside urban areas or near electrical transformers or very busy roads, making them difficult — if not dangerous — to use.

MINIMUM CORE OBLIGATIONS AND HOMELESSNESS

We have seen different ways in which homelessness is penalised, in terms of access to emergency shelters and access to space for camps for travelling communities. But are there any obligations for the state to prevent such policies and practices? Economic, social and cultural rights include the right to adequate food, shelter, education, work and an adequate standard of living. All states have committed to the realisation of these rights by ratifying relevant international treaties, such as the UN Charter, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child, the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women. The core aspect of these treaties is best reflected in the ICESCR in which states commit: “to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant, including particularly the adoption of legislative measures.”¹

But it is important to distinguish between the obligation of progressive realization of human rights and the minimum core obligations, which apply to states regardless of their economic circumstances. The minimum core obligation is a minimum threshold approach, below which no person should have to endure. This minimum

1. International Covenant on Economic, Social and Cultural Rights (ICESCR), 19 December 1966, 993 U.N.T.S. 3, Art. 2 (1).

core obligation corresponds to a level of distributive justice assessing how even is the distribution of socially guaranteed minimal levels of certain goods and benefits among individual groups within a country (Skogly, 1990). The concept of the “minimum core” seeks to establish a minimum legal content for the notoriously indeterminate claims of economic and social rights. Recognising the “minimum essential levels” of the rights to food, health, housing and education, reflects a “minimalist” rights strategy, which implies that maximum gains are made by minimizing goals (Young, 2008). But the minimal obligations should be considered a first step, and not the culmination of a process of materialisation of economic, social and cultural rights. The principle is not viewed as involving a minimalist approach. Even in cases of severe resource constraints, “the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programs”. Such vulnerable groups include those excluded on the basis of race, gender, age, disability and other such characteristics, as well as the poor in general. “If a national or international anti-poverty strategy does not reflect this minimum threshold, it is inconsistent with the legally binding obligations of the State party²”.

In its General Observation no. 3, the UN Committee on Economic, Social and Cultural Rights holds that States have “minimum basic obligations” to guarantee an essential level of enjoyment of all economic, social and cultural rights, as otherwise the Covenant would not make any sense: “... the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d’être*.”

For example, Roisin Devlin and Sorcha Mckenna (2009) explain how immigration law and policy in the UK can lead to poverty and homelessness among certain types of migrants. These laws limit, to varying degrees, access to employment, welfare benefits and homelessness assistance to a range of migrants including asylum seekers fleeing violence or persecution. The findings from this investigation confirm that it is disproportionately weighted towards the Government’s aims of regulating migration, paying little regard to the consequences for individual rights. As a result, the legislation excludes homeless and potentially destitute persons from homelessness assistance and welfare benefits, and permits statutory support in very limited circumstances only if necessary to avoid a breach of rights of the European Convention of Human Rights. This represents a negative approach to human rights, taking heed only when it is likely that basic rights are at serious risk of being (or have already been) violated. Instead, the EU should adopt a more positive approach in line with international human rights standards, encouraging state agencies to promote

2. http://www.acpp.org/RBAVerI_0/archives/CESCR%20Statement%20on%20Poverty.htm

rights by ensuring access to homelessness services in a way that ensures destitution does not arise in the first place (Mckenna, 2010).

In January 2000, the Committee of Ministers of the Council of Europe adopted Recommendation No. R (2000)3 on “the right to the satisfaction of basic material needs of persons in situations of extreme hardship”, urging member state governments to put the following five principles into practice:

- Member states should recognise, in their law and practice, a right to the satisfaction of basic material needs of any person in a situation of extreme hardship.
- The right to the satisfaction of basic human material needs should contain, as a minimum, the right to food, clothing, shelter and basic medical care.
- The right to the satisfaction of basic human material needs should be enforceable -- every person in a situation of extreme hardship should be able to invoke it directly before the authorities and, if need be, before the courts.
- The exercise of this right should be open to all citizens and foreigners, whatever the latter’s position under national rules on the status of foreigners, and in the manner determined by national authorities.
- The member states should ensure that the information available on the existence of this right is sufficient.

These principles identify a minimum threshold of treatment below which provision should not fall and which clearly cannot be denied to anyone for reason of their nationality or legal status (Cholewinski, 2005). Padraic Kenna (2010) explains how international housing instruments translate to obligations of immediate result: a requirement to undertake immediate action in relation to ensuring a minimum core obligation in terms of the rights concerned, without discrimination (Chapman and Russell, 2002). In terms of housing rights, the minimum core obligations involve a guarantee that everyone enjoys a right to adequate shelter and a minimum level of housing services without discrimination. Indeed, this concept has been applied to provide determinacy and justifiability to housing and other socioeconomic rights, providing minimum legal obligations, which are easily understood by courts and regulatory bodies (Young, 2008).

In the European context, Kenna (2010) explains how the Council of Europe has developed a range of normative housing rights standards. These relate to social and medical assistance for those without adequate resources; establish housing obligations for physically and mentally disabled persons, migrant workers, children and young persons; and establish rights to social, legal and economic protection for families, those who are poor and socially excluded, homeless people and those unable to afford accommodation (Kenna, 2010). In 2009, the Council of Europe Commissioner for Human Rights further clarified the actual extent of State obligations arising from its housing rights instruments. The European Court of Human Rights is developing housing rights in an indirect and oblique way through its Articles on the prevention of inhuman and degrading treatment, protection of home, family life and correspondence, fair procedures and non-discrimination. The fundamental rights contained in the Treaties and Directives of the European Union

are now addressing housing rights and discrimination on grounds of migrant workers status, race or ethnicity or gender (Kenna, 2010).

According to the Council of Europe's Commissioner for Human Rights (2009), States should eliminate all discrimination against migrant workers from both law and practice, including inappropriate restrictions on ownership, mortgages, access to social housing and eligibility for housing allowances. Migrants often have to wait a long time for their housing allowances. Internationally, wait times of several years has been viewed as acceptable. The ECSR has, nevertheless, stated that the waiting period must not be excessive and pointed out that 1) housing benefit is an individual right, 2) all qualifying households must receive it in practice, and that 3) legal remedies must be available in case of refusal (Hammarberg, 2009). While irregular migrants and temporary residents are, in principle, excluded from the protection of the European Social Charter, anyone in urgent need due to lack of resources, as well as children of undocumented migrants, are required to be supported with temporary measures according to Article 13.4 (ECSR, 2003). As noted by Ryszard Cholewinski (2005), the minimum guarantees for irregular migrants in the field of housing and protection are:

- Housing provision should not be denied to irregular migrants on the grounds of their unauthorized status, particularly given the importance of the right to adequate housing for the enjoyment of other civil, political, economic and social rights.
- While states might be justified in denying long-term housing provision to those irregular migrants who can be removed from the country or rejected asylum seekers who have exhausted their rights of appeal, such migrants must nevertheless be afforded a minimum level of housing assistance commensurate with conditions of human dignity. The provision of assistance in such circumstances should not be interpreted in a way that is tantamount to the detention of irregular migrants.

Moreover, in relation to the Roma and Travellers, the Commissioner for Human Rights of the Council of Europe refers to Recommendation Rec(2005)4 of the Committee of Ministers, which although permitting the establishment of legal standards applying to public services (water, electricity, street cleaning, sewage systems, refuse disposal, and so on) states that these should equally apply to Roma settlements and camp sites, and provides a detailed guide on improving the housing conditions of Roma and Travellers. For example, it proposes that the public authorities should make every effort to resolve the undefined legal status of Roma settlements as a precondition for further improvements. Where Roma camp illegally, public authorities should use a proportionate response. This may be through negotiation or the use of legal action. However, they should seek, where possible, solutions that are acceptable for all parties in order to avoid excluding Roma from access to services and amenities to which they are entitled as citizens of the state. In cases of forced evictions, it explains how States Party must make sure that evictions are justified and are carried out in conditions that respect the dignity of the persons concerned, and that alternative accommodation is available.

It is important to point out that, as noted by the Commissioner for Human Rights of the Council of Europe, the arbitrary destruction of property can violate Article 8 (right to respect for private and family life and home) and Article 1 of Protocol No. 1 (protection of property) to the European Convention on Human Rights. Furthermore, the Committee of Ministers' 20 Guidelines on Forced Return of 2005 provides standards on procedural safeguards that member states should respect when proceeding to forced return, and guideline no. 3 states that "the collective expulsion of aliens is prohibited", while Article 4 of Protocol No. 4 to the ECHR prohibits the collective expulsion of aliens. While the European Convention does not guarantee aliens the right to enter or reside in a given country, the removal of a person from a country where close members of his or her family live may infringe on his or her right to respect for family life as guaranteed by the Convention (Hammarberg, 2012).

CONCLUSION

This chapter had examined different examples of penalisation and criminalisation of homelessness in European countries. We have seen how social policy, which was likely created to prevent or respond to homelessness, can also be used as an instrument for penalisation, segregation and even deportation. There is a gap between international and European law, between national standards and States' commitments to implement the right to housing to eliminate discrimination on the one hand, and national policies concerning homelessness, Roma, Travellers and irregular migrants on the other. States across Europe have made commitments to respect human rights; they should be held responsible for policies and practices that penalise and criminalise homelessness, because these violate human rights. Policies for allocating social housing or shelter space in France, England and The Netherlands must respect human rights and not be used as a means to discriminate against and exclude people who clearly have housing needs. Furthermore, we can conclude that homeless services must not be systematically used to compensate for inconsistent migration policies that lead people to situations of destitution and homelessness when, in fact, in many countries this reality causes tremendous stress on the services, their staff and the local homeless population. Furthermore, access to homeless services should not be used as a means to regulate migration.

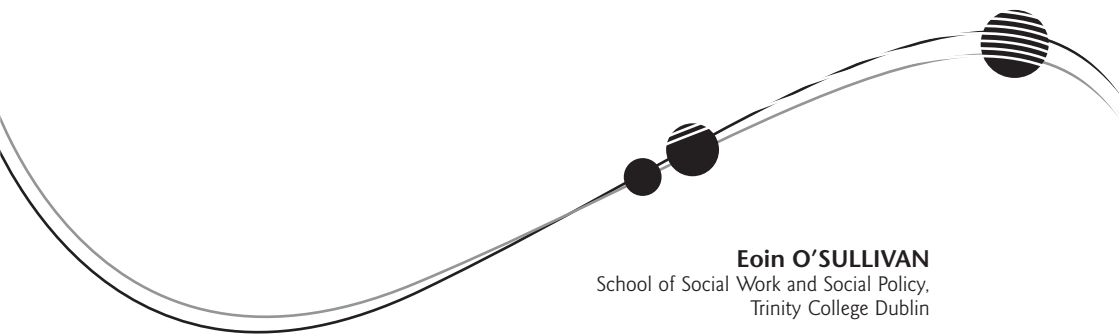
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CHAPTER VII

Penalisation of Homelessness and Prison -- Prison and Inequality



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The tradition of the oppressed teaches us that the state of emergency in which we live is not the exception but the rule

Walter Benjamin (1940)

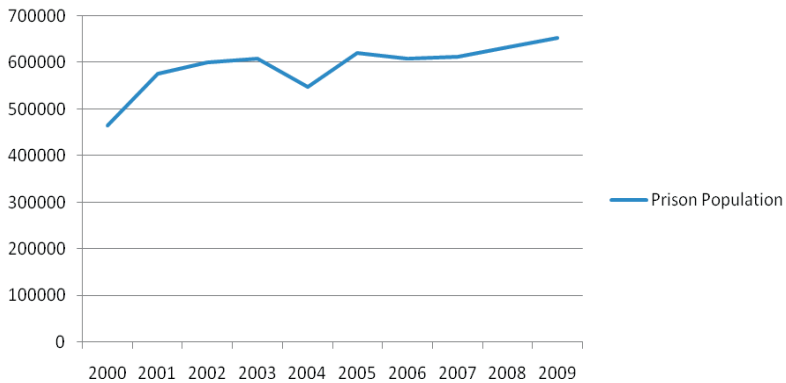
The apparatus of crime control that emerged from the beginning of the twentieth century, what Garland (2001) terms “penal welfarism”, which had at its core the correction and rehabilitation of offenders through reasoned knowledge and professional intervention has been displaced by a broad, but not universal, consensus that offenders require punishment rather than correction. For Garland, these changes need to be seen as part of the broader social and economic changes associated with late-modernity, and he poses the question as to why ‘contemporary crime policies so closely resemble the anti-welfare policies that have grown up over precisely the same period? His answer is that “[b]ecause they share the same assumptions, harbour the same anxieties, deploy the same stereotypes, and utilize the same recipes for the identification risk and the allocation of blame. Like social policy and the system of welfare benefits, crime control functions as an element in a broader system of regulation and ideology that attempts to forge a new social order in the conditions of late modernity” (2001: 201). Garland provides a compelling account of the interlocking social, economic and political changes since the 1970s that have allowed the prison, particularly in the US, where the rate of incarceration rose from 110 prisoners per 100,000 in 1975 to 730 prisoners per 100,000 in 2011, to function “as a kind of reservation, a quarantine zone in which purportedly dangerous individuals are segregated in the name of public safety” (2001: 178).

A crucial dimension in Garland’s account of the transformation of the penal sphere is that, in seeking answers to explain the rise of prison populations, we need to look outside the sphere of the criminal justice system. For example, it is clear that the relationship between rates of crime and rates of incarceration are largely independent of one another. Lappi-Seppälä (2007) highlights this clearly in relation to Scandinavian countries, where from 1950 onwards, Finland, Sweden, Norway and Denmark show very similar crime patterns, but Finland had a very dramatic decline in its imprisonment rates, with the other countries remaining stable. On the other hand, some attribute the extraordinary decline in crime in the United States from the early 1990s to the present to the massive increase in imprisonment over the same period. However, as Zimring (2007) points out, north of the American border in Canada, crime declined at a similar rate over the same period, but while the imprisonment rate tripled between 1980 and 2000 in the United States, it increased only modestly in Canada by 4%. While the relationship between *crime rates* and incarceration appears independent, *crime control strategies* and rates of incarceration are demonstrably linked. Lappi-Seppälä observes a link between welfare systems, their legitimacy (social legitimacy shown by trust on the part of the citizens, and institutional legitimacy, which shows the trust in institutions/political parties) and incarceration rates. According to Lappi-Seppälä, in “less legitimate” societies, the

government seems to have a greater need to resort to “acts of propaganda” in the fight against crime to earn legitimacy among the population. Less trust prompts greater fear, which in turn increases the pressure to punish (Lappi-Seppälä, 2007). So this may be a first indicator that a “punitive shift” is taking place in Europe, because the increase in the prison population responds to criminal policy decisions and is not a reflection of a rise in crime.

There are different judicial and criminal systems in the countries of the EU-27, which means differences in the definitions of crimes as well as in the methods in which crime is reported, recorded and counted. Therefore, it is problematic to compare different types of crimes and their rates across different countries. As a result, it must be recognized that statistics cannot provide a complete description of crime in Europe, and that crime trends noted in statistics may, in fact, reflect the level or focus of police activity in these zones (Tavares *et al.*, 2012). Even so, Eurostat statistics on “crime and criminal justice” show that crime levels have declined systematically in most EU countries and the number of crimes recorded by police in the European Union (EU-27) dropped between 2005 and 2009. Differences exist between countries, however, with Sweden, Denmark, Belgium, Luxembourg, Spain, Portugal, Italy, Slovenia, Romania and Bulgaria reporting increased crime recorded by the police for the period.

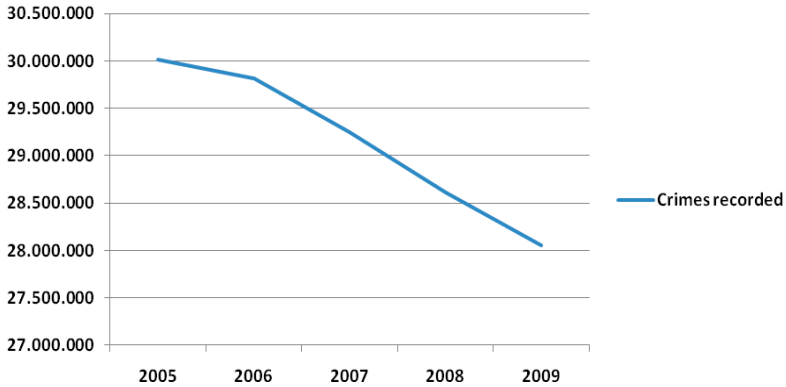
EVOLUTION OF PRISON POPULATION. UE-27. 2000 - 2009



Source: SPACE I - 2009

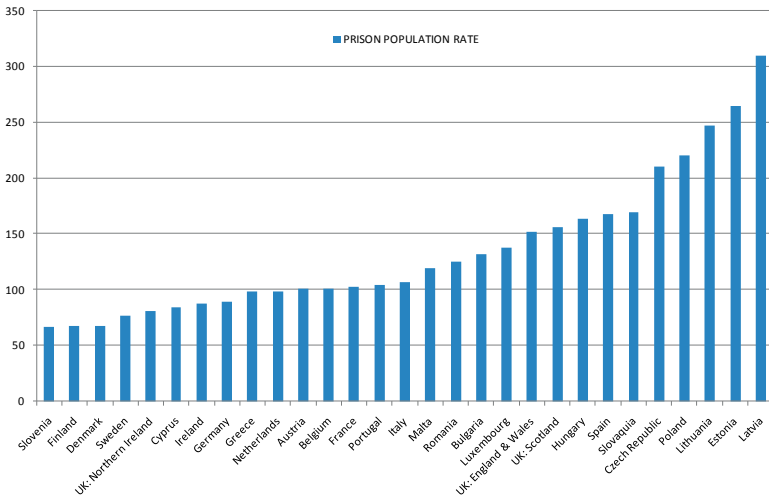
Domestic burglary and drug trafficking stand out among the crimes that have increased in general in the EU-27 during the aforementioned period. The crimes that have declined the most in general in the EU-27 include violent crime, and in particular, homicide. However, the prison population grew to the highest levels of the decade between 2007 and 2009.

CRIMES RECORDED BY THE POLICE. EU-27. 2005 - 2009



Source: Eurostat

PRISON POPULATION RATE PER 100,000 INHABITANTS. UE-27. 2009



Source: SPACE I – 2009

Thus, the disproportionate increase observed in the prison population is not directly related to increased crime, but rather relates to political decisions about how to deal with it.

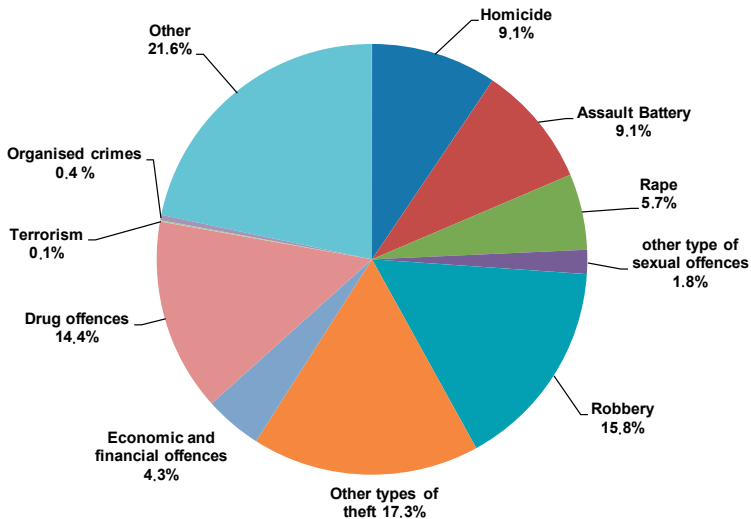
MANAGING POVERTY WITH PRISONS

Loic Wacquant (2009: xxi-xxii) argues that strategies that criminalize homelessness by outlawing begging and regulating the use of public space, aim to eliminate homelessness through incarceration, with prisons operating as “a judicial garbage disposal into which the human refuse of the market society are thrown.” Much of his analysis has focused on what is happening in the United States, but

“harassment of the homeless and immigrants in public space, night curfews and ‘zero tolerance,’ the relentless growth of custodial populations, the disciplinary monitoring of recipients of public assistance: throughout the European Union, governments are surrendering to the temptation to rely on the police, the courts, and the prison to stem the disorders generated by mass unemployment, the generalization of precarious wage labour, and the shrinking of social protection” (Wacquant, 2009).

The development of these policies in the United States and their spreading across the European Union are a consequence of the making and remaking of what Wacquant terms the neoliberal state. In brief, he argues that a combination of workfare and “prisonfare” have provided the means to regulate intensively the poor while simultaneously withdrawing any regulation from the wealthy, resulting in a “centaur state, liberal at the top and paternalistic at the bottom” (2012: 250). As neoliberalism as an ideology, becomes increasingly embedded within transnational

**Breakdown of sentenced prisoners (final sentence)
on 1 September 2009, by main offence**



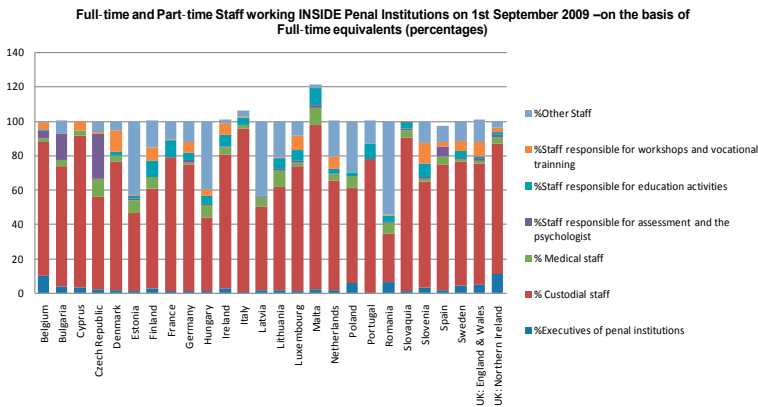
Source; SPACE I – 2009

institutions such as the International Monetary Fund and transmitted via a series of influential think tanks, the penalisation of poverty is increasingly evident across the Member States of the European Union. The emergence of this neoliberal penal state is increasingly displacing the welfare state as the mechanism for governing the poor.

As noted by Fergus McNeill and Richard Sparks (2009), the impact of crime is always unequal, falling disproportionately on the shoulders of the poorest and most vulnerable sectors of the population (ICHRP, 2010). Therefore, the vast majority of imprisoned people in the EU-27 have been imprisoned for crimes against property (theft, robbery) and public health (drug trafficking) and other crimes whose origins are linked to poverty.

PRISONS ARE NOT INSTRUMENTS OF REINTEGRATION

The assumption that prisons are a space for rehabilitation and reform can be questioned, when in the vast majority of European countries more than 50% of the workforce in prisons assigned to prison surveillance and guarding tasks, with a much smaller percentage is assigned to providing medical, psychological or educational rehabilitation or support.

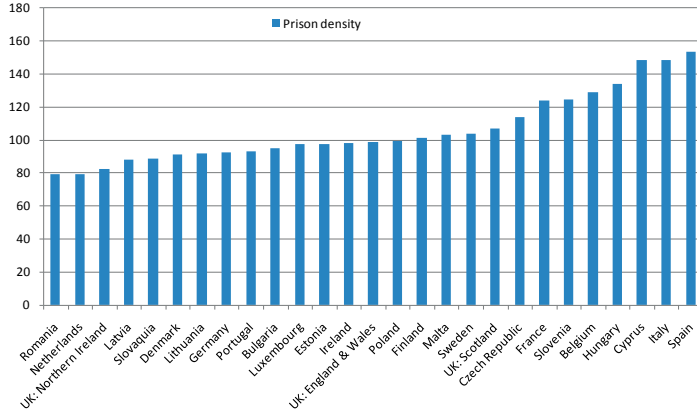


SPACE I – 2009¹

Prisons are not a good place to live. There is overcrowding in jails in many countries of the EU-27, for example in France, Belgium and Slovenia, and in some countries like Spain or Italy, the problem is structural and chronic, with rates of up to 153 and 148 prisoners per 100 places, respectively.

1. The total percentage of staff working inside penal institutions is higher than 100% in: IRELAND, ITALY, and MALTA. Some of these inconsistencies have been explained by the national correspondents of the Council of Europe Annual Penal Statistics – SPACE I – 2009. Strasbourg, 22 March 2011.

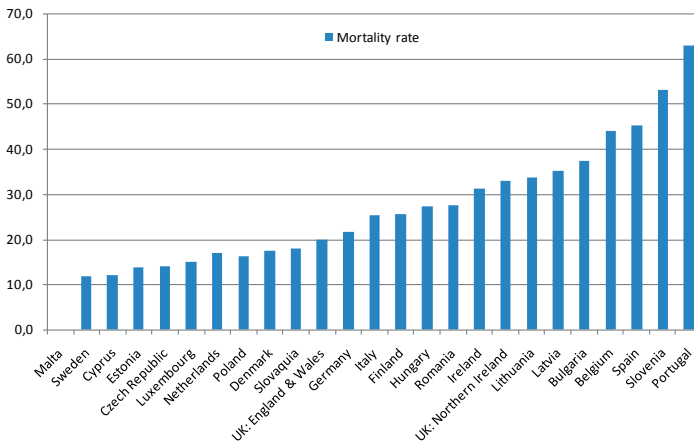
PRISON DENSITY PER 100 PLACES. EU27. 2009



Source: SPACE I – 2009

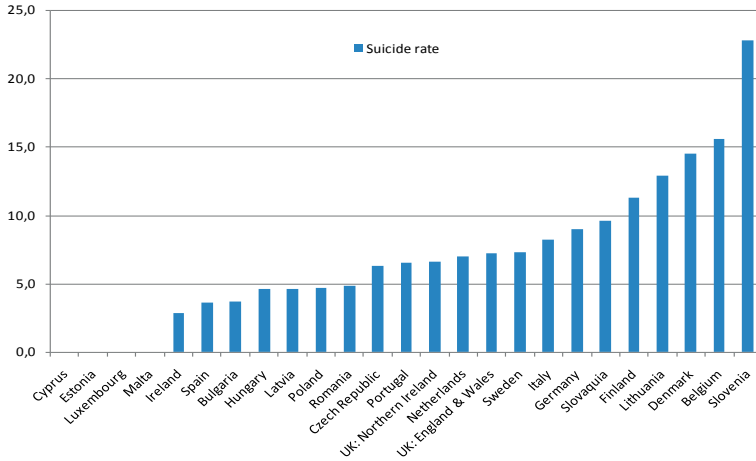
Mortality and suicide rates in EU-27 are substantially higher inside prison walls than outside. In 2008, the prison mortality rate in Sweden, one of the countries with the lowest rates with 7.3 per 10,000 prisoners, was seven times higher than the overall rate for the general population (0.99 per 10,000 inhabitants that same year). In Portugal the numbers are even more dramatic: the mortality rate of the general population in 2008 was 0.98 people per 10,000 inhabitants while there were 62.9 prisoner deaths for every 10,000 prisoners.

MORTALITY RATE PER 10.000 PRISONERS. EU-27.2008



Source: SPACE I – 2009

SUICIDE RATE PER 10.000 PRISONERS. EU-27.2008



Source: SPACE I – 2009

In 2008, statistics showed 1,372 prison deaths in the EU-27, 25.5% of which were suicides. There were 1.02 deaths by suicide per 10,000 inhabitants in the EU-27 in 2008, while in prison the rate was 6.9 suicides for every 10,000 prisoners. Slovenia, at 22.8 per 10,000, or Lithuania (12.9), Denmark (14.5) and Finland (11.3) were well above this average in 2008.

PENALISATION, CRIMINALISATION AND MIGRATION

As noted above, it has been argued that prisons have increasingly abandoned any pretence of providing rehabilitation and support, and instead operate simply to warehouse increasing numbers of the poor, often infused with a racist hue (Simon, 2012). Neoliberalism is, in many cases, the preferred explanation for the increase in the numbers of people who are incarcerated and their characteristics, as prison is viewed as a mechanism for managing the advanced marginality or the social insecurity generated through the systematic dismantling of the welfare state and a veneration of markets. Furthermore, Wacquant (2012: 246-247) has argued that “penalisation takes many forms and is not reducible to incarceration”, while at the same time noting that levels of incarceration have risen; that many European societies utilise the police more than prison to curb social disorder, what he refers to as the front end of the penal chain rather than the backend; and that European societies have simultaneously and contradictorily expanded police intervention and welfare intervention that has “both stimulated and limited the extension of the penal mesh”. It is also of note that migrants/foreigners are substantially over-represented in the prisons of Europe, particularly in the southern and continental member states as shown in table 2 (see Barker, 2012).

**TABLE 2:
FOREIGN PRISONERS AS A PROPORTION
OF THE TOTAL PRISON POPULATION**

Estonia	40.3
Latvia	1.3
Lithuania	1.3
Czech Republic	7.2
Poland	0.7
Slovak Republic	1.8
Hungary	3.4
Slovenia	11.7
<i>Average</i>	8.5

Portugal	20
Spain	34.2
Greece	57.1
Italy	36.2
<i>Average</i>	37

Austria	46.4
France	17.8
Belgium	41.1
Netherlands	26.2
Germany	26.7
Luxembourg	68.7
<i>Average</i>	38

Norway	32.5
Sweden	27.6
Finland	13.3
Denmark	21.7
<i>Average</i>	24

United Kingdom	7.8
Ireland	13.6
<i>Average</i>	11

Source: World Prison Brief www.prisons.org

This overrepresentation had led De Giorgi (2010: 156) to claim that, “when observed from the perspective of those who cannot claim full membership in the EU but

only some form of subordinate inclusion in its flexible labour markets, the picture of European societies as strongholds of penal tolerance and moderation becomes increasingly blurred, leaving room for a reality of selective criminalisation”.

DETENTION CENTRES FOR FOREIGNERS AS AN ALTERNATIVE TYPE OF PRISON

THE SPANISH CASE

In June 2008, the European Parliament approved Directive 2008/115/CE, known as the “Return directive”. This directive consolidates the process of regression of human rights that is taking place in the European Union. During the 1980s, “Alien’s laws” included norms regulating internment and deportation, but after Directive 2001/40/CE this legislation has become a European policy focused on illegal migration and on the expulsion of migrants. Since the approval of Directive 2001/40/CE, the undermining of rights and the exclusion and criminalisation of foreign migrants have become standard throughout Europe (Silveira, 2011). In 2004, 650,000 deportation orders were issued across Europe, 164,000 of which resulted in forced deportations (EMN, 2008). Administrative measures of control and repression of illegal immigration have turned the European countries into “expelling States”, that is, administrative machines bent on internment and expulsion, where foreigners are treated as “lesser persons” and, in the case of irregular immigrants (undocumented or “without papers”), even as “non-persons” (Silveira, 2009).

Detention Centres for Foreigners have become a common instrument in State policies aimed at foreigners. Consequently, CIEs (Detention Centres for Foreigners) have been included in the “special or administrative criminal law” that legislators have established to provide instruments of control and repression of migrants. This special administrative sub-system sets sanctions that are essentially equivalent to prison sentences, thus undermining the fundamental rights and liberties of persons. For instance, regarding internment, European legislation clearly acknowledges that the fundamental right to freedom can be restricted through an administrative order — for migrants. According to section 15.2 of the Return Directive, administrative or judicial authorities are empowered to make decisions. Every year, thousands of migrants are subject to deportation orders in European countries, but many of those orders are not implemented. The orders are not carried out for several reasons, ranging from the lack of a readmission agreement with the migrant’s country of origin to the failure to determine her country of origin, to the lack of sufficient funding to implement all the deportations (although in recent years the European Union has increased funding allocated to deportations or people who return “voluntarily”). Migrants who are subject to deportation orders, who might be interned, must immediately be released if the Administration knows that it will not be able to implement the deportation before the end of the internment period as determined by a judge (Silveira, 2011).

For instance, in Spanish legislation, Héctor Silveira (from the Observatory on the Penal System and Human Rights of the University of Barcelona) explains that detention is a

precautionary measure aimed at the execution of the deportation. This means that, as soon as it is discovered that it is impossible to deport someone, his/her term of detention should end. Nonetheless, this does not imply that once a person has been released from detention that he or she ceases to be subject to an deportation order; indeed, this fact will be the source of serious problems in the future. So, for example, when a foreigner is subject to an infringement procedure that could lead to an deportation order, or is subject to an administrative or judicial deportation order, he or she will not be allowed by the administration to undertake procedures regulated by laws on migrants (“aliens”). The individual is banned from initiating those procedures that are specifically designed to help overcome this situation of illegality. He or she is legally excluded from the legislation and enters into a situation of “administrative extralegality”. This is how a “lesser person” is treated as a “non-person”: the individual is not entitled to rights because he or she is a potentially deportable foreigner. The foreigner, in the words of Dal Lago, becomes a non-person when the law expels him or her from its sphere and ceases to care for the foreigner except to take him or her out of the situation of extra-legality, thus “‘legally’ sanctioning her non-existence, and ejecting him or her” (Dal Lago, 2000). Over the course of eight years in Spain, 439,000 foreign individuals were arrested, with an annual average of 54,875 persons. In four years, 58,466 of these people were put into detention; and 257,699 people were deported (Silveira, 2011).

Moreover, it is important to note that in the 2005 Homeless People Survey conducted by the Spanish National Office for Statistics, 48.2% of homeless people were of foreign origin, while the foreign population accounted for only 8.46% of the total population in the 2005 Census. The 2003 survey of services for homeless people shows how the population group that was most frequently assisted was immigrants, accounting for 58% of the total, while in the 2008 survey of services for homeless people this percentage grew to 62.7%. Of the homeless foreigners in the 2005 INE survey, 43.6% come from Africa, 37.5% from Europe (20.8% from EU25), 14% from South America and 4.6% from Asia. According to the same survey, 59.4% of homeless foreigners have been in Spain for less than three years. In the 2008 night-time count of roofless people, foreigners accounted for 53% of the total in Madrid and for 62.2% in Barcelona (Cabrera *et al.*, 2008). However, the largest groups by nationality were Romanian, Moroccan and Polish in both cities, although in different proportions. Therefore, it could be concluded that there is an increasing number of immigrant people among “roofless” people, thus confirming their exclusion from social resources and their increased risk of being expelled as a consequence of being considered non-persons by the law.

THE DRAMATIC SITUATION OF DETENTION CENTRES FOR FOREIGNERS (CIES) IN SPAIN

In Spain, detention centres for foreigners are directly managed by the Ministry of the Interior. These centres receive, after a report by the public prosecutor’s office and the authorisation by the examining magistrate, foreigners targeted by an administrative deportation procedure, basically because they are living in Spain without proper documents or permits. People can be prosecuted under these administrative procedures because of their failure to obtain an extension of their visa, the lack of a visa, or if their visa has been expired for three or more months. People are not detained because they have committed crimes

under Spanish national law.² According to Organic Law 4/2000, the aim of internment is to prevent the failure to appear of the accused during the handling of her procedures of expulsion. Consequently, imprisonment is meant as “prevention” and is implemented in the framework of an administrative procedure. A foreign individual can be interned in a centre for a maximum of 60 days, which is a 20-day extension on the original wording of Organic Law 4/2000, which respects the limit described in section 16.4 of the European Convention on Extradition of 12 December 1957.³ In 2008, a European Commission directive (Directive 2008/115/CEE of 16 December 2008) — known as the “Directive of shame”, was transposed into Spanish law and allows State to intern foreign people who do not have appropriate documents for six months, with an option to extend this sentence for twelve more months, for a possible total of eighteen months.

Foreigners who are interned have some rights including the following: respect for life, health and physical integrity; they cannot be subject to mistreatment or to physical or verbal abuse; their dignity and privacy shall be preserved; they have the right to receive adequate health and medical care, and to be assisted by social workers at the detention centre; they have the right to receive legal assistance by a lawyer (a *pro bono* lawyer will be provided if needed) and to communicate privately with her/him, even beyond the schedule established by the centre, in case of emergency; they can receive the assistance of an interpreter if they do not understand or speak Castilian (for free if the internee lacks the necessary economic resources) and the right to contact NGOs and national, international and non-governmental immigrant advocacy agencies.⁴

Nevertheless, as noted by Cristina de la Serna and Carlos Villán Durán, members of the Spanish Society for the International Human Rights Law (AEDIDH), several reports denounce the irregularities detected in Spanish CIEs.⁵ Those reports basically focus on the conditions of the facilities; access to health and social services; irregularities regarding procedures and effective legal protection; and alleged torture,

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2. The internment of foreign people in CIEs is regulated by sections 62, 62 bis, and 63 of Organic Law 4/2000 of 11 January on rights and freedoms of aliens in Spain and their social integration (from here, “Organic Law 4/2000”); sections 153 to 155 of the Royal Decree 2393/2004 of 30 December 2004, which lists the regulations of Organic Law 4/2000; and in the Ministerial Order of 22 February 1999, which lists regulations and procedures for detaining foreigners.
 3. Extension to 60 days was introduced by Organic Law 2/2009 of 11 December, reforming Organic Law 4/2000 of 11 January on rights and freedoms of aliens in Spain and their social integration.
 4. Granted under Section 62 bis of Organic Law 4/2000 which establishes that CIEs are “public establishments of a non-penitentiary nature”
 5. – Annual reports by the Spanish ombudsman (Defensor del Pueblo) from years 2007, 2008, and 2009 (the 2010 report has not been published yet);
 - A report prepared by a civil society organisation, the Comisión Española de Ayuda al Refugiado (CEAR), in the framework of the European Civil Society Report on the Administrative Detention of Vulnerable Asylum Seekers and Illegally Staying Third-Country Nationals, DEVAS), started by the Jesuit refugee Services in 2008 with funding by the European Refugee Fund (ERF) of the European Commission. This study, published in December 2009 and headed “Situación de los centros de internamiento para extranjeros en España”, analyses the situation in three of the nine Spanish CIEs: Aluche (Madrid), Zapadores (Valencia), and Capuchinos (Malaga).
 - The report “Voces desde y contra los Centros de Internamiento de Extranjeros” published in October 2009 and jointly prepared by the following civil society organisations: Ferrocarril Clandestino, SOS Racismo Madrid, and Médicos del Mundo Madrid. It analyses the situation in the Aluche CIE (Madrid), the biggest in Spain.

mistreatment and other abuses by security staff. For instance, in his last annual report, the Ombudsman drew attention to the following: the lack of privacy afforded internees in dormitories (separated by railings/bars, rather than walls) and toilets; segregation by gender which prevents families from staying together; deficiencies in the hygiene conditions and cleaning of the premises; overcrowding (from six to eight internees per dormitory); lack of camera surveillance in common areas; and lack of leisure areas. On the other hand, the Comisión Española de Ayuda al Refugiado (CEAR) is concerned about the lack of medical attention for internees with special needs, such as those with withdrawal symptoms or psychiatric conditions. Moreover, about 30% of interviewed internees from the CIEs in Madrid, Malaga and Valencia “report weight loss or weakness, hunger or physical or mental discomfort, which they attribute to a poor diet”, and “about 75%, at some point, feel sad and feel like crying, while 10% report having considered suicide” (Pérez, 2009).

The only available data about the number of foreign people interned in CIEs are provided by the State General Prosecutor (Fiscal General del Estado) in his 2010 annual report (with data from 2009). According to this source, in 2009 in Spain there were 16,590 foreign persons held in CIEs, 8,935 of which were expelled from the country (FGE, 2010). Therefore, if we trust data provided by the report, it should be noted that, in 2009, according to a basic mathematical operation, 7,655 irregular immigrants would have belonged to the group of aliens deprived from their fundamental right to the freedom of movement but, eventually, not actually expelled. Taking into account that detention is aimed at guaranteeing expulsion, the figure of 7,655 people deprived from their freedom of movement but not qualifying for expulsion can only be defined as unjustified and out of proportion (Serna *et al.*, 2011). Cristina Manzanedo (2012), from Centro Pueblos Unidos, explained in the 2012 annual report, that approximately 1,000 foreign persons enter the CIE each month, of which just over half are expelled. In 2012, Centro Pueblos Unidos visited 328 immigrants in the CIE. Only 88 of these were people with criminal records, while the rest (240), hadn't previous criminal records. The criminal records of people in the CIE are usually associated with poverty and very few have a social hazard profile.

Several critics, including the Ombudsman, the State General Prosecutor and NGOs point out that Spain's systematic internment of foreigners is not in line with the law on “foreigners”. Reports on all of the detention centres indicate inhuman conditions; frequent mistreatment and abuse; difficulties and barriers for the internees to access justice, be it a judge, the State's attorney office, lawyers or relatives; or even access to medical assistance. These problems also are proof of the violation of other inalienable human rights, such as the right to moral and physical integrity and the right to an effective remedy (Serna *et al.*, 2011).

Therefore, the widespread internment of foreigners without papers in CIEs is a discriminatory legislative policy and violates their right to freedom and the principle of legal certainty, as established in section 5 of the European Convention on Human Rights. As compared to the State's (legitimate) aim to regulate migration, the measure is absolutely disproportionate, and also violates the general principle of non-discrimination that inspires international human rights law as a whole. The same argument was put

forward by the United Nations Human Rights Council Special Rapporteur on the Human Rights of Migrants: “States should not deprive migrants of their right to liberty because of their migratory status. [...] States should consider and use alternatives to immigration detention in accordance with international law and human rights standards. Detention should not be considered necessary or proportionate if other less restrictive measures to achieve the same legitimate objective have not been considered and assessed”.⁶ The Special Rapporteur proposed some measures as alternatives to internment, such as a registration system for irregular migrants; guaranteeing their presence in court through monitoring systems; the deposit of a financial guarantee; or an obligation to stay at a designated address, an open centre or other special accommodation. In fact, the report by the Special Rapporteur emphasises the effects of the punishment of migration on the protection and the exercise of human rights, and underlines the negative consequences of these policies on groups that should not be assumed to be irregular migrants, such as victims of trafficking in human beings, asylum seekers, and children. This report also provides examples on good practices, such as the adoption of an approach based on the human right to migration, and a management of irregular migration not based on penalties.

In Denmark, an NGO called Projekt UDENFOR has witnessed cases of the deportation of homeless migrants from Copenhagen because of certain behaviours (Ohrth Fehler, 2012). In December 2010, 69 homeless migrants were arrested and put in detention for staying overnight in a private low-threshold shelter in Copenhagen; many were later deported. Their arrest and subsequent detention was carried out because they were “guilty” of being foreigners and homeless.

In June 2011, the former Danish government established a new policy on deportation and new guidelines were put into practice. As a result, homeless migrants who are EU citizens cannot be deported simply because they are poor or homeless — that is, lacking the means for subsistence. The means of subsistence is determined to be 350 DKK per day (around €50) and at routine police checks, homeless migrants who could not demonstrate that they have this much money, could, prior to the change in practice, be deported. Between 2009 and mid-2011, 278 EU citizens were deported from Denmark under this policy. The “Report on Homeless Migrants in Copenhagen 2012” estimates that an absolute minimum of 200 EU migrants each day and 500 each year live as homeless people in Copenhagen. About one-fifth of these are what we describe as “particularly vulnerable homeless migrants”.

FROM THE STREET TO JAIL - FROM JAIL TO THE STREET: USING HOUSING TO BREAK THE CYCLE

Homeless people are at increased risk for incarceration and, conversely, release from jail or prison leaves a person particularly vulnerable to an episode of homelessness (Homeless Link, 2010; Social Exclusion Unit, 2002, Seymour, 2006; Metraux *et*

6. Report of the Special Rapporteur on the human rights of migrants, doc. A/65/222, 3 August 2010.

al., 2007). Thus, homelessness can be seen as a cause and/or consequence of incarceration, since release from incarceration, together with eviction and family disintegration, are key causal factors in homelessness processes, but in turn, long periods of incarceration can be the precursor of evictions and the breaking of family or spousal ties (Busch-Geertsema *et al.*, 2010). For example, Hickey (2002) conducted a small-scale study that concludes that there are a number of pathways into homelessness and a variety of complex relationships between homelessness and the committal of a crime, and between release from prison and entering a cycle of homelessness, crime and re-offending behavior. For some, homelessness contributed to their offending behavior through the criminalisation of certain behaviors such as public order offences (like being drunk and disorderly and vagrancy); the adoption of criminal behavior for street survival (such as shoplifting); and their development of addictions to cope with the isolation, insecurity and difficulties of being homeless. For others, it was criminal behavior that led to homelessness, most crucially because the nature of the offences for which they were imprisoned led to a break-up of their relationships and their time in prison led to a loss of accommodation. In addition, both groups had drug and/or alcohol addiction and mental health problems to contend with, and these contributed to and exacerbated their problems of homelessness and, in turn, had an influence on their likelihood of reoffending (Hickey, 2002).

It has been shown that homeless people are overrepresented in both arrest rates and prison population statistics, and the lessons from research (Busch-Geertsema *et al.*, 2010) tell us that one cannot read into arrest and incarceration rates that homeless people have a criminal disposition and that this disposition is a cause of their homelessness. Rather, the objective condition of homelessness is, in itself, defined as criminogenic through the actions of legislators. In addition to criminalization of the status of homelessness by state regulation, the condition of homelessness may result in homeless people engaging in “strategies of survival”, which are often illegal and hence generate higher arrest rates amongst homeless people (Busch-Geertsema *et al.*, 2010). For instance, the Policy Briefing on Criminal Justice from Homeless Link (2009a) includes different studies in England evidencing the following:

- The risk of homelessness increases after having been in prison:
 - 30% of people released from prison will have nowhere to live (Niven *et al.*, 2005).
 - 18% of clients in an average homelessness project are prison leavers (Homeless Link, 2009b).
 - 12,000 prisoners were released with nowhere to go in 2005/06 (Shapps, 2008).

- Finding oneself in a situation of homelessness increases the risk of reoffending.
 - Ex-prisoners who are homeless upon release are twice as likely to reoffend as those with stable accommodation (ODPM/HomeOffice, 2005).
 - 35% of Young Offenders aged 16 to 25 felt a lack of accommodation was the factor most likely to make them re-offend (Prince’s Trust *et al.*, 2008).

- Many people undergo cycles of homelessness and imprisonment:
 - 51% of prisoners had housing problems prior to imprisonment (Home Office, 2003).
 - 5% of prisoners were sleeping rough before they were sent to prison (Niven *et al.*, 2005).

- Prison leavers with complex needs are often more likely to be homeless.
 - The Revolving Doors Agency found that 49% of prisoners with mental health problems had no fixed address on leaving prison (Revolving Doors Agency, 2002).

Therefore, we can see the centrality of housing as a key factor in reducing homelessness and re-offending rates. In Spain, Cabrera indicates that there are 7,000 homeless people in prison, who currently have a roof (the prison roof), but who say they have nowhere to live when they get out. It is essential to ensure their right to housing in order to ensure their quality of life and prevent them from reoffending when they are released from prison (Cabrera, 2011). In England, a study by the Social Exclusion Unit (2002) suggested several key factors which can have a huge impact on the likelihood of prisoners re-offending, one of which is housing. Evidence shows that having stable accommodation reduces the risk of re-offending by 20% as it can provide the stability necessary to enable individuals to address their offending behavior and to access a range of other services such as community mental health services and to gain employment (Crisis, 2011). In New York, supportive housing has been documented to reduce criminal justice involvement drastically, reducing jail incarceration rates by up to 30% and prison incarceration rates by up to 57% (Culhane *et al.*, 2002).

In addition to human reasons, there are also economic reasons justifying the centrality of housing in interventions with homeless people (Pleace, 2011). Numerous studies in different countries show that providing emergency supports such as homeless shelters is more costly than providing the supports to assist homeless people in permanent or regular housing. In Canada, the IBI Group, a multi-disciplinary firm for urban development, estimates that homelessness costs Canadian taxpayers \$1.4 billion (CAD) each year and concludes that financial reasons alone are sufficient to necessitate transition to a homelessness prevention model of service delivery (IBI Group, 2003). Prison and jail are among the most expensive settings to serve people who are homeless in USA: one nine-city study calculated median daily costs for prison and jail at \$59.43 and \$70.00 respectively, compared with \$30.48 for supportive housing (The Lewin Group, 2004). Moreover, the US Housing First model emphasizes placement of homeless individuals in permanent housing, where they have access to services necessary to stabilize them and keep them housed (Tsemberis *et al.*, 2004). Consequently, Housing First users also make less use of emergency shelters, less use of emergency medical services, and are less likely to get arrested than when they were homeless, all of which produce savings for the US Taxpayer (Culhane, 2008; Tsemberis, 2010).

In recent years, many policy-makers and service providers in EU member states have become interested in Housing First concepts. Housing First has been incorporated in

homelessness strategies in Denmark, Finland, Portugal, The Netherlands, Ireland, and France. Pleace (2012) differentiates three basic Housing First approaches in Europe:

- “Pathways Housing First (PHF)”: Following American model closely. PHF is targeted only at chronically homeless people.
- “Communal Housing First (CHF)”: Congregated housing with on-site support, but self-contained and with permanent contract, using harm reduction approach.
- “Housing First Light”: Low-intensity mobile support to formerly and potentially homeless people living in scattered housing; case management/service brokering approach, often focusing on people with lower support needs.

In a recent review of Housing First projects in a number of Europe cities, Busch-Geertsema (2013:7) concluded that it is possible to house homeless persons even with the most complex support needs in independent, scattered housing. It is hard to evaluate the economic cost of each of these models separately, as they vary considerably from one country to another and depend, for example, on whether new buildings have to be built or not. But, Finland, for instance, decided on an approach that involved extensive use of a CHF service model in the context of their strategy to reduce long-term homelessness because, as Kaakinen (2012) says:

- It is a question of ethics: Housing First treats formerly homeless persons as normal citizens rather than as clients or patients.
- It is a question of economy: A survey carried out in a Tampere supported housing unit shows that housing with intensified support halves the use of social and health care services compared to service-use during homelessness. This equates, to 14 000 euros of savings per resident/year. The total annual savings for 15 residents in the unit in question amounted to 220 000 euros. The greatest savings were gained from the decreased use of institutional care and special health care. This housing unit has 22 independent flats and 5 support workers.
- It is a question of customer choice: Many homeless people prefer CHF, because they fear isolation and loneliness in scattered housing.

The robust evidence on the efficacy and cost-effectiveness of Housing First type approaches to ending homelessness clearly demonstrate the viability of inclusionary, rather than exclusionary, responses to homelessness and marginality.

CONCLUSIONS

A number of observations can be drawn from the analysis above. First, the consistent variations in both the growth and scale of incarceration over the past 30 years or so demonstrate that there is no inevitable logic, be it globalisation or neo-liberalism, driving incarceration in an upward direction. Divergence, rather than convergence, remains the dominant feature when comparative penal populations are examined. Second, rates of incarceration and rates of crime are independent of one another. Rising prison populations are the result of a range of political decisions, rather than a reflex response to crime. Third, social policies and criminal justice policies are

both means of managing marginal populations. Social policies, by and large, aim to integrate marginal populations through inclusive strategies, whereas criminal justice policies explicitly exclude marginal populations through banishment, incapacitation and stigma.

It could be concluded that part of the institutions and the administration of the Rule of Law have been transformed into instruments for the control, management, and repression of poverty, homelessness and immigration, especially immigration labelled as “irregular”. “Regular” immigrants, who comply the entry and residence regulations, are temporarily granted certain civil, social and political rights, while “irregular” immigrants are subject to public order regulations, precautionary measures and penalties, such as detention-arrests, internment, fines and expulsions.

The Spanish case shows how people living a normal life can suddenly be caught up in administrative procedures of arrest, detention in internment centres, and deportation from the country (Silveira, 2011). As noted by Cristina Manzanedo and Daniel Izuzquiza (2011), it seems that, regarding concerns over the internment of foreigners, the Spanish government uses this policy as an instrument of control. Nevertheless, empirical data demonstrate that this approach is not even an effective control of irregular migration flows, but is, above all, a means of social control. The government seeks to show Spanish citizens that it exerts tight control over irregular immigrants: it is a message of peace, order and control. And, simultaneously, irregular immigrants receive a message of fear, persecution, harassment and criminalisation.

Finally, we can say that there is evidence to demonstrate how access to housing helps to break the institutional circle, guaranteeing human rights and saving public expenditure.

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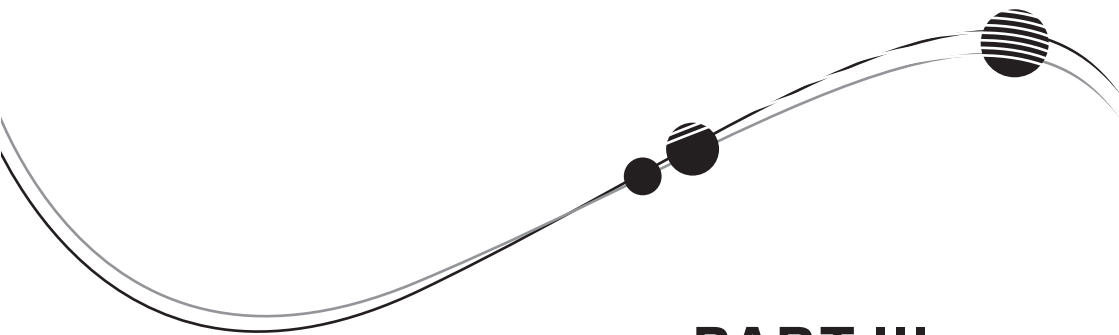
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PART III
GOOD PRACTICES

*"I was rapidly learning that one of the challenges of being
a street lawyer was to be able to listen."*

The Street Lawyer, by John Grisham (1998)

GOOD PRACTICES - POLITICAL MEASURES

The purpose of this part is to show that it is possible to make policy that is respectful of the human rights of homeless people through national strategies for the eradication of homelessness or through specific actions and programmes like interventions in train stations or airports. This chapter will demonstrate that policies that support homeless people to access housing and services are far more effective than banning homeless people from certain areas. A national strategy for eradicating homelessness is the first step, and its implementation is crucial; it should be enacted in a way that fully respects the human rights of homeless people. It is necessary to avoid the “tyranny of numbers” pitfall and not let the goal of statistically reducing the numbers of homeless justify means that, in fact, penalise homeless people. This chapter will also highlight good practices and experiences in countries without integrated homelessness strategies, and point to countries that have both good and bad practices operating in the same cities or regions. Raising awareness about the impact of criminalising and penalising measures on homelessness is an important step to eliminate this policy-making at cross-purposes. The right hand might not know what the left hand is doing; penalising measures are not usually enacted by those who are responsible for social policy, and can often undermine good work that seeks to prevent or end homelessness, by aggravating the situation.

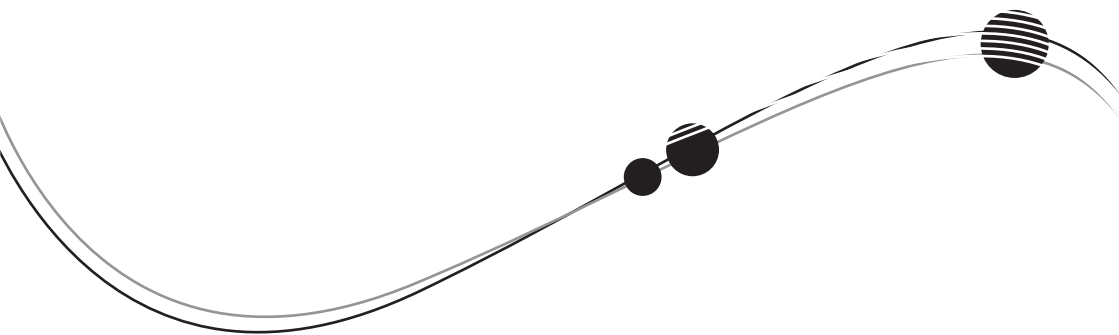
In the analysis we conducted in the first part of Chapter VIII, we tried to highlight the important role of the Human Rights-Based Approach in developing the guidelines for national strategies aimed at eradicating homelessness in Europe. We reviewed the development of case law by the Council of Europe’s Committee on Social Rights specifying the implications of article 31 on the right to housing of the Revised European Social Charter of 1996, and in particular of point 31.2 on the prevention, reduction and eradication of homelessness in Europe.

Chapter XIX highlights how, through the social intervention at Barcelona Airport, actions respecting the human rights of homeless people can be carried out without national homelessness strategies in place. The most important conclusion from this example is that the only thing that evicting, expelling and penalising homeless people does is shift the problem to another place, neighborhood or city, without resolving the problems or meeting the needs of homeless people. The time and form of integration of homeless people and the gradual elimination of homelessness requires daily contact, trust and the will and the capacity of the homeless individuals themselves, as well as a sustained commitment to employing appropriate social policies that include an emphasis on prevention of homelessness as well as respect for the Housing First approach. Politicians should not try to solve the problem of homelessness by penalising it, by punitive and criminalising actions, or by discriminating when it comes to providing resources, because the goal should be eradication of homelessness -- because it is possible.

POLITICAL MEASURES

CHAPTER VIII

Prevention, Homelessness Strategies
and Housing Rights in Europe



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*"A peaceful beggar poses no threat to society.
The beggar has arguably only committed the offense of being needy.
The message one or one hundred beggars sends society can be disturbing.
If some portion of society is offended, the answer is not in criminalizing these
people ... but addressing the root cause of their existence.
The root cause is not served by removing them from sight, however;
society is then just able to pretend they do not exist a little longer".*

U.S. District Court Judge Robert Sweet (1993)

Homelessness affects all the Member States of the European Union. Different countries have adopted strategies to fight homelessness and housing exclusion at the national (Ireland, Norway, Sweden, Denmark, Finland, The Netherlands, France and Portugal) or regional (England, Scotland, Wales, Northern Ireland, and the North Rhine-Westphalia region in Germany, etc.) level. Homelessness is on the European political agenda, which makes it possible to design policies in a coordinated fashion and implement them at the local level, since the important role of the municipalities is acknowledged in most national strategies (Denmark, Sweden, Finland, The Netherlands, Ireland and Scotland). The different national strategies for the eradication of homelessness also show that there is a growing interest in prevention as the most effective and least costly approach (CEC, 2010). Most strategies make explicit reference to the prevention of homelessness (Norway, Sweden, Finland, Ireland, Scotland, England, Wales, Northern Ireland, The Netherlands, France and Portugal), but national distinctions are evident in policy development.

WHAT PREVENTION OF HOMELESSNESS MEAN?

Prevention can be the set of activities aimed at avoiding the occurrence of something, that is, anticipating in order to minimise risks. The terms primary, secondary and tertiary prevention have been used traditionally in the theoretical-practical field of the science of prevention (Cornes *et al.*, 2004). Gerald Caplan published *Principles of Preventive Psychiatry* in 1964, in which he considers that preventive psychiatry is the set of knowledge and skills to reduce, in a specific community, the frequency of mental disorders, the duration of the disorders and the appearance of sequela or the deterioration that some of them involve. Therefore, “primary prevention” seeks to reduce the incidence by promoting health or health education; “secondary prevention” aims to reduce prevalence by means of early diagnosis, effective treatment and accessibility and speed of services; and finally, “tertiary prevention” seeks to reduce sequela and chronic recurrence through rehabilitation and social reinsertion (Vallejo, 2006).

Many public health professions have accepted this division of prevention into three categories was, but others extend it further to include “quaternary prevention”, which would be the set of healthcare activities attenuating or avoiding the consequences of unnecessary or excessive interventions by the healthcare system (Ortún, 2003), while others criticise it, considering, “tertiary prevention” not as prevention in itself, but rather as rehabilitation (Cornes *et al.*, 2004). One can also talk about “universal prevention”, “selective prevention” and “indicated prevention” (Shinn *et al.*, 2001).

The application of the theoretical framework of public health in the social sciences has not been viewed kindly by different authors (Billis, 1981 and Freeman, 1999) who claim that it is impossible to establish causal relationships in the social sciences like in the natural sciences, and that a problem or phenomenon cannot be prevented unless there is an unequivocal and proven causal link between intervention strategies and the specific problem one is seeking to eradicate (Crane and Brannock, 1996). But the importance of the evidence-based prevention approach is spreading, both in the public health sphere (Cornes *et al.*, 2004) and in social policy (Sutcliffe *et al.*, 2005), and particularly in the study of homelessness (Edgar *et al.*, 2000; Shinn *et al.*, 2001; Pawson *et al.*, 2007; Busch-Geertsema *et al.*, 2008 and Culhane *et al.*, 2011). Thus, if we apply Gerald Caplan's classification of prevention measures to homelessness (Busch-Geertsema *et al.*, 2008) we can see the following:

- **Primary prevention:** These are the activities that reduce the risk of a homelessness process starting among the general population or a large part of the population. It is at this level of prevention that the role of general housing policy (supply, access, and affordability) and other policies linked to housing aid and social protection is pivotal.
- **Secondary prevention:** Interventions that focus on people with a potentially high risk of starting a homelessness process due to their characteristics (e.g. having been under the long-term responsibility of institutions like prisons or hospitals) or because they are in crisis situations that lead to homelessness in the very near future (e.g. evictions).
- **Tertiary prevention:** Measures targeting people who have already lived in a situation of homelessness and therefore require quick relocation or attempts at minimising the chances that they will return to a situation of homelessness.

The application of Caplan's definition of homelessness helps us understand prevention as a *continuum* of situations to be prevented and identifies the risk factors and the most practical points of intervention for prevention initiatives (Culhane *et al.*, 2011). However, it is necessary to bear in mind that secondary and tertiary preventive interventions cannot replace general policy measures (or primary prevention) to ensure a sufficient supply of affordable housing (Shinn *et al.*, 2004).

PREVENTION IN STRATEGIES TO COMBAT HOMELESSNESS

In some strategies, prevention can focus more on secondary prevention and tertiary prevention measures (Denmark, Norway, Finland), while others emphasize primary prevention and focus less on the quantitative goals to be achieved in secondary or tertiary prevention (France, Portugal). The primary prevention measures we can find in homelessness strategies refer to housing plans developed in separate documents, but they acknowledge the need to plan and provide more social housing (Ireland), specifying (or not) the type of social rental housing (England) or facilitating access to social housing for homeless people (Wales). Some strategies contemplate facilitating access to the private market (Sweden, France) and others (Finland) make no explicit mention of general measures, because they assume the existence of

secondary prevention measures does not imply abandoning housing policies that are geared toward increasing the social housing stock in order to ensure the reduction of homelessness (Luomanen, 2010).

Secondary prevention measures tend to be initiatives aimed at preventing and reducing the number of evictions (Norway, Sweden, Finland, Ireland, Scotland, Wales, France) and increasing efforts to help people who are leaving prisons, mental health institutions or hospitals after extended stays (de-institutionalisation), so that they can have access to adequate housing (Norway, Sweden, Denmark, Finland, The Netherlands, France). Thus, some countries specify target percentages in the reduction of evictions (Norway, The Netherlands) and others explain the measures in more general terms (France), whereas others do not include prevention and reduction of evictions in their homelessness strategy (Portugal, Denmark).

With regard to tertiary prevention measures, some countries tend to reduce the number of homeless people in their streets, their recurrence and chronic homelessness using strategies that are explicitly based on the “Housing First” approach or “Housing Led Approaches” (Norway, Sweden, Finland, Denmark), while other countries also consider this approach to be important but, at the same time, wish to improve the quality of the network of shelters and housing support services and the fight against sub-standard housing (The Netherlands, France, Portugal). Still other countries stress access by homeless people to health, training, employment and housing services (Ireland, England, Scotland, Wales).

THE HUMAN RIGHTS BASED APPROACH AND STRATEGIES TO TACKLE HOMELESSNESS

Through case law by the European Court of Human Rights and the Social Rights Committee, the Council of Europe has identified the grounds for building strategies aimed at eradicating homelessness in Europe. As we will see below, the case law stemming from article 31 of the Revised European Social Charter in relation to housing, specifies what it understands by “prevention”, “reduction” and “gradual elimination” of homelessness (art. 31.2 rESC).

The European Social Charter (ESC) of 1961 wanted to guarantee and promote social rights in Europe. Together with the European Convention on Human Rights (ECHR), it constitutes the Council of Europe’s platform for human rights issues. The European Social Charter contains social and economic rights, while the European Convention on Human Rights focuses primarily on civil and political rights. Little by little, the perception that the Council of Europe’s ESC is the “poor relative” of the ECHR, stressing the evolution of the European Social Charter as an emblematic manifestation of the European Social Rights Law or Social Human Rights Law and as a bastion of European social democracy, has dissipated (Jimena, 2006). A contributing factor in overcoming this initial perception was the progressive strength gained by the principle of indivisibility of human rights. The European Social Charter was successively updated in different protocols (1988, 1995) and

definitively adapted its contents in the Revised European Social Charter (rESC) of 1996, with the aim of reflecting the social changes that had taken place since the ESC was adopted. The Council of Europe's goal was also to strengthen the role of the Charter as the safeguard of social rights and social security in Europe. As a result, the revision introduced a number of new articles that recognized rights like the right to protection against poverty and social exclusion (art. 30 rESC) and the right to housing (art. 31 rESC), making explicit reference to the problem of homelessness:

“With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:

- to promote access to housing of an adequate standard;
- to prevent and reduce homelessness with a view to its gradual elimination;
- to make the price of housing accessible to those without adequate resources.”

In this regard, the countries that signed and ratified the ESC and the rESC have undertaken to ensure a series of human rights connected with the right to housing, and in the rESC, explicitly so. The Committee of Social Rights (CSR) was created to oversee its application, determining if the countries have abided by the undertakings set out in the ESC and the rESC. As Padraic Kenna explains, the oversight process includes a detailed questionnaire that sets out to clarify the obligations undertaken by the Party States (Kenna, 2006). The 2003 conclusions relative to article 31.2 of the CSR clarify that a “homeless person” is any individual who is not the legal occupant of a dwelling or other type of adequate shelter or accommodation (CDS, 2003). Considering that provisional accommodations, though adequate, cannot be considered to be sufficient, and considering those people living in such conditions who do not wish to do so, they should be provided with adequate housing within a reasonable period of time (Mikkola, 2010).

The fight against homelessness has serious implications for the obligations of the public powers in terms of resources and results. The goals stemming from article 31.2 of the rESC are the “prevention” and the “reduction” of homelessness, with the special requirement of adopting measures toward its “gradual elimination” (Mikkola, 2010). The CSR considers that article 31.2 of the rESC obliges countries to take measures in response to homelessness, which involves the immediate provision of housing and support for homeless people, as well as measures to help these people overcome their difficulties and prevent them from finding themselves once again in a situation of homelessness (Kenna, 2006). In its turn, the Committee considers that the States who have signed the Charter should take measures aimed at providing housing and preventing the loss of such housing, which involves actions preventing certain vulnerable groups from becoming homeless. On the ground, this means that the States should apply a housing policy targeting underprivileged groups of people in order to guarantee access to (social) housing.

As reflected by the Recommendation by the Commissioner for Human Rights of the Council of Europe, the “prevention of homelessness” can include legal protection of tenants against unfair and disproportionate contractual conditions, the indiscriminate

termination of contracts and evictions, as well as having a sufficient rental housing stock to provide housing to vulnerable groups.¹ Moreover, requirements regarding the availability of social housing for rent, selection criteria and waiting periods and lists are also applicable. One should also bear in mind the legal protection of people threatened by eviction, in particular the obligation to consult with the affected parties in order to find alternative solutions to eviction, and the obligation of setting a reasonable advance notice of eviction, and forbidding evictions at night or in the winter period (Mikkola, 2010). In its 2005 Conclusions for Lithuania, Norway, Slovenia and Sweden, the Committee on Social Rights considered that, for the protection against unlawful eviction, States must set up procedures to limit the risk of eviction. The Committee recalls in Conclusions 2011 for Ireland that, in order to comply with the Charter, legal protection for persons threatened by eviction must include the following:

- an obligation to consult the parties affected in order to find alternative solutions to eviction;
- an obligation to fix a reasonable notice period before eviction;
- accessibility to legal remedies;
- accessibility to legal aid;
- compensation in case of illegal eviction.

Obviously, these conclusions are based on the Human Rights Based Approach and are in perfect alignment with General Comment n° 7 of the UN Committee on Economic, Social and Cultural Rights, where it considers that the procedural protections which should be applied in relation to forced evictions should include: (a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise; (g) provision of legal remedies; and (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts. Moreover, evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to provide adequate alternative housing.

The target of “reducing homelessness” implies the introduction of emergency measures and long-term measures, such as supplying housing and providing immediate attention to homeless people, as well as measures to help them overcome

1. Recommendation of the Commissioner for Human Rights on the implementation of the right to housing Strasbourg, 30 June 2009. CommDH(2009)5

their difficulties and avoid being rendered homeless. In this regard it is important to take into account the impact this recommendation can have on public policies to eradicate homelessness based on indiscriminately creating bunk space in traditional shelters in a single space or in large pavilions, as they may conflict with the standards of dignity in articles 2 and 3 of the ECHR relative to the right to life and prohibition of torture and degrading treatment (Mikkola, 2010). As specified by the Recommendation of the Commissioner for Human Rights regarding the right to housing, an individual's dignity must be respected, which means that the dwelling, even temporary shelters, must meet standards of safety, health and hygiene, including basic utilities, drinking water, lighting and heating. The CSR has also pointed out the importance of respecting human dignity and "the greatest possible degree of independence". Thus, "gradually eliminating homelessness" can be understood as a sum of "prevention" and "reduction" measures as people and families with multiple problems should also be able to receive multiple support services to improve their capabilities, and therefore different positive measures should be implemented in risk groups (Mikkola, 2010). In conclusion, in the framework of the EU Social Inclusion Strategy, States should be developing strategies to prevent homelessness, tackle the causes of homelessness, reduce the level of homelessness, reduce the negative effects on homeless people and their families and ensure that formerly homeless people can sustain permanent independent housing (Edgar, 2009).

This argument led to the adoption in Europe of the Housing First approach, which comes from the United States. As noted by Nicholas Pleace (2011), this approach is based on the principle that housing is a basic human right and is characterized by the following:

- Respect, warmth and compassion for service users.
- A commitment to working with service users for as long as they need.
- Scattered site housing using independent apartments (i.e. homeless people should not be housed within dedicated buildings but within ordinary housing).
- Separation of housing from mental health, drug and alcohol services (i.e. housing provision is not conditional on compliance with psychiatric treatment or sobriety).
- Consumer choice and self-determination.
- Recovery orientation (i.e. delivering mental health services with an emphasis on service user choice and control; basing treatment plans around service users' own goals).
- A harm reduction approach (i.e. supporting the minimization of problematic drug/alcohol use but not insisting on total abstinence).

In January of 2012, the European Committee of Social Rights (ECSR) of the Council of Europe, through its monitoring mechanism based on the "Human Rights Based Approach", published its annual conclusions on the compliance of countries with their responsibilities in terms of guaranteeing the right to housing. Six of the eight EU Member States that are obliged to comply with this fundamental right by reason of having ratified article 31 of the Revised European Social Charter failed to fulfil their obligations (France, Italy, Lithuania, The Netherlands, Portugal and Slovenia). The jurisprudence from both collective complaints and the European Court of Human Rights can be brought to bear in these conclusions, and in 2012, the ECSR cited

the Collective Complaint *Autisme Europe v. France* (CC No. 13/2002) in which the Committee established that the measures taken to implement the Charter Articles must meet three criteria:

- A reasonable timeframe.
- A measurable progress.
- A financing consistent with the maximum use of available resources.

In the Collective Complaint *FEANTSA v France* (CC No. 39/2006) added to the jurisprudence, the Committee, following the Human Rights Based Approach, pointed out that the obligation of States in realizing the rights in the Revised European Social Charter must be practical and effective. This means that, for the situation to be compatible with the treaty, States Party must:

- Adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter.
- Maintain meaningful statistics on needs, resources and results.
- Undertake regular reviews of the impact of the strategies adopted.
- Establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage.
- Pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.

Only Finland and Sweden met the requirements of the 2012 (ECSR) conclusions. Both countries have national strategies for eradicating homelessness based on housing as the focal point and the “evidence-based approach” as the mechanism for overseeing clear and measurable objectives. The example of Finland and Sweden shows that it is possible to respect the right to housing. On the other hand, France, in spite of having approved the enforceable right to housing (DALO) in 2007 -- motivated, in part, by FEANTSA's successful collective complaint against them -- still fails to provide access to housing at an adequate level (article 31.1 rESC), has failed to reduce significantly the number of homeless people (article 31.2 rESC) and does not guarantee that housing prices are affordable for people with limited resources (article 31.3 rESC). Moreover, the ECSR condemned France for its eviction policy and found it unacceptable that 91,000 families were threatened with eviction between 2007 and 2009 with no prospects of relocation and no right to housing benefits. This leads one to conclude that the fight for the right to housing and its implementation still has a long way to go in Europe.

CONCLUSION

Policies against homelessness are undergoing a paradigm shift from a model based on alleviation, rehabilitation and stabilization of homelessness to a housing-based model centred on preventing and reducing homelessness. The human rights approach plays an important role in the development of these policies, as it is not limited only to recognizing the right to housing in the constitutions or legislations

of the States, but rather the monitoring of public policy in relation to the principles of human rights is essential for ensuring their proper evolution. In this regard, the evidence-based approach plays an essential role that is complementary to the human rights-based approach, and vice versa. Both approaches are the two sides of a the same coin in the fight against homelessness. Both can be used to hamper the development of human dignity through restrictive policies that penalise poverty and the access to public services and benefits, or by not recognizing, not respecting, not protecting or actually violating human rights.

The different national strategies identify points that can prevent and reduce homelessness (and therefore approach this problem not from the management and penalisation of poverty, but from the perspective of its gradual elimination through the prevention of homelessness) either by offering measures oriented toward people who are leaving institutions (like prisons) or by preventing evictions, putting an end to the more explicit forms of homelessness, reducing the duration of homelessness on the street, reducing the wait time for provision of emergency and temporary shelter and improving the quality of services for homeless people and the supply and suitability of affordable housing.

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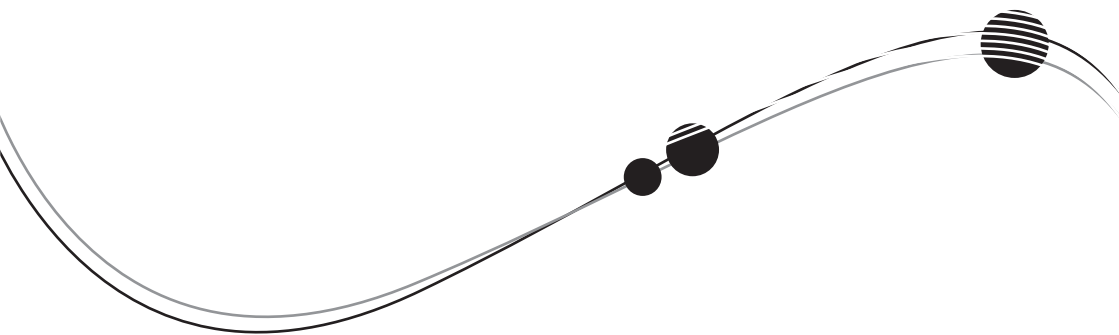
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POLITICAL MEASURES
CHAPTER IX

Homeless People
at the Barcelona Airport

A Model of Inter-Administration
Coordination



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MOTIVES FOR THE ACTION HISTORICAL EVOLUTION

For every person working for homeless people in train or bus stations, or even in airport terminals, it is a well-known fact that these places attract many people who find themselves homeless, who are socially excluded, and who use these spaces as a home. They do so for a variety of reasons: these places provide them with security in the broadest sense of the term, including not only a roof but also safety against aggression; these are also intermediate resting points in the long way that homeless people often have to travel. It is precisely in this widest sense of protection that airports can provide attention and security to extremely vulnerable people; these places are apart from the dynamics of cities and towns and come to shelter the most defenceless individuals.

As for the Barcelona Airport, it satisfies all these protection conditions: a roof, shelter from the winter cold and the summer heat, lavatories for hygiene, food provided by some stores, medical attention if needed, protection from aggressors (thanks to the security staff), etc. Over time, these conditions have developed into an unsustainable situation, both in terms of the increasing number of homeless people and in terms of the unfitness of living conditions. These facts have prompted the need for action to address this situation. It should not be forgotten that both the strategic role of the airport and “image” issues play an important role.

Barcelona Airport (13 km away from the centre of Barcelona, located in the municipality of El Prat), has long been used by homeless people who move there and live permanently on these premises, and it is now structural reality, like in many other international airports. With the opening of a new terminal (T1) and the economic crisis, this situation, identified more than ten years ago, has become worse. While ten years ago the daily average number of people living in the airport was 12, in the new context this average skyrocketed to around 96 in 2010 (57 people in T1 and 39 people in T2). AENA (Aeropuertos Españoles y Navegación Aérea, the agency in charge of the Barcelona Airport) and the Catalan police force (Mossos d'Esquadra) set up joint initiatives to refer some people to the El Prat municipal social services, as well as to offer flights to some of them to help them return to their hometown. Proposal for the night closure of both terminals was even considered.

The difficulties of resolving this problem led AENA to call attention to the complexity of the situation and to alert the Generalitat (Catalan regional government) of the need for an inter-institutional intervention that would involve different administrations

and departments, as well as the collaboration of the most specialised services for people in extreme exclusion.

So, in February 2011 a task force was formed to analyse the situation and to design an Action Plan. This task force, led by the ICASS (Catalan Institute for Social Services, an agency of the Catalan government), included AENA, the management of the Department of Quality of Life, *Sports and Equality*, of the Barcelona City Council, and the Directorate of Social Services of the El Prat City Council.

STAGES OF THE INTERVENTION

The Action Plan was divided in three stages:

- *Stage 1: Social diagnosis.* This stage took place between 14 February and 8 March 2011. It consisted of a social diagnosis on the group of homeless people sleeping in the airport, which would later serve as a point of departure for a comprehensive intervention. This diagnosis was made by the Barcelona City Council's Equip de Gestió de Conflictes (Conflict Management Team), specialised in the management of conflict situations on the streets.
- *Stage 2. Comprehensive intervention.* The diagnosis set the guidelines for the subsequent intervention, which was designed in a second stage of the Action Plan. This second stage took place from 1 April 2011 to 13 August 2011, was divided in two parts and was implemented by a team of professionals specialised in interventions for homeless people. The team was supervised by the Barcelona City Council and the costs were defrayed by AENA and ICASS. As stated above, this stage had two parts:
 - The first part, the Emergency Plan, took place from 1 April to 30 June, and was aimed at working in groups on the problems of the 63 people identified as airport sleepers.
 - The second part, the Maintenance Plan, took place from 1 June to 13 August, and was aimed at tackling the dynamics that cause homeless people to settle in the airport.
- *Stage 3. Monitoring-Prevention.* Started in November 2011 and is ongoing. Given the good results of the first two stages of the Plan, an agreement has been reached to prolong this joint action at the airport in order to help homeless people living there, as well as to undertake actions to prevent the recurrence of the situation that emerged in early 2011. These actions are currently being undertaken by the SIS (Social Integration Service), a team specialised in interventions for homeless people, in the framework of the municipal plan of assistance to homeless people of the Barcelona City Council.

CURRENT MODEL FOR ACTION FOR HOMELESS PEOPLE AT THE BARCELONA AIRPORT - RESULTS

During the first stage of action at the airport (social diagnosis), the team of educators of the Barcelona City Council's Equip de Gestió de Conflictes started to operate at

the airport in order to analyse the situation. In this process they took the following steps:

- Gathering information on the presence and evolution of homeless people at the airport and on the conflict generated.
- Contact with the terminal staff, including personnel devoted to commercial activities or operational tasks (maintenance, private security, local police, Catalan police, transportation, parking management, etc).
- Personalised contact with airport sleepers.
- Definition of the situation and proposals for action.

This task was executed in an intensive manner for one month, working around the clock from Monday to Friday. Sixty-three people were identified, fifty-four of whom were successfully contacted for information interviews (in turn, 20 of these 54 people had already been in touch with the Barcelona municipal social services). Twenty-six of the fifty-four people were located in Terminal 1 and 28 in Terminal 2. It was established that some of them travelled daily to Barcelona and came back to sleep at the airport in the evening; 20% had criminal records and all of them had committed acts of uncivil behaviour (e.g. using toilets for personal hygiene, sleeping on seats in the terminal during the day, accumulating of garbage, asking for food in shops, begging, alcohol consumption, petty robbery in shops, aggressive behaviour, et cetera).

It has been observed that people sleeping in Terminal 1 show a distinctive profile, and tend to be more fragile and vulnerable (with some cases of severe mental problems), while people installed in Terminal 2 have a profile more related to criminal dynamics. This situation may have its origins in the reduced presence of security forces (both private and public) in this terminal, because it is the lesser used of the terminals.

Following this diagnosis stage, the second stage of action began: a comprehensive intervention targeted at the problems identified. This second stage witnessed the creation of the Board of Technical Coordination, which two institutions were invited to join: the Consorci Sanitari (Health Consortium), to address situations of severe health problems, and the Catalan Department of Justice, in order to accelerate judicial proceedings if needed (primarily for people with disabilities). In addition to these institutions, the Board also includes technical staff from ICASS, AENA, Mossos d'Esquadra (airport detachment), El Prat City Council, and Barcelona City Council, as well as technical staff from the SEM (emergency medical services) and the Catalan government Directorate of Mental Health and Drug Abuse. A team of educators, specialised in interventions for homeless people, was hired to work under the supervision of the Barcelona City Council.

In this stage, a new set of rules and/or recommendations was enacted, governing the operation of the airport public spaces, and the airport was closed by night; only passengers with a flight ticket were allowed inside. At this point, the educators helped to disseminate this new protocol of rules both among airport sleepers and in airport shops and services.

Thanks to the presence of the specialised teams and to a higher presence of security personnel (as well as improved coordination with them), the number of people staying overnight in the airport has fallen steeply. Many of these people returned to their places of origin (upon receiving a free flight), while others received assistance from the social services of their respective municipalities. About fifteen people needed comprehensive assistance given the difficulties involved — they did not want to leave the premises and were clearly in a very vulnerable situation. In these cases, professionals with expertise in interventions for homeless people carried out essential coordination with the health agencies, the Generalitat social services, and the security forces.

The most complex cases received close attention from the Board, so that the different administrations involved could find a plausible solution. Consequently, elderly people, substance abusers, undocumented persons, etc. were helped and referred to municipal social services, either from Barcelona or from El Prat or any other town they claimed to have a connection with. By the end of July 2011, the most difficult cases had already been resolved (admission to hospital, admission into a facility for older people, return to his/her family, proceedings for official recognition of a disability, etc.) and there were virtually no people staying overnight in the airport. In mid-August, it was decided to put an end to this kind of intervention, to evaluate it and to study its possible continuation.

In the last stage (monitoring and prevention) in November 2011, given the good results of the policy, it was agreed to continue the coordinated intervention of the different actors involved. However, the intervention was given a new perspective, with an enhanced emphasis on monitoring and prevention, departing from the emergency approach that had characterised the two previous stages. In this fashion, it was agreed to delegate to the Barcelona Town Council (with their SIS team) the social work aspects for people that are known to stay overnight in the airport, and, thus, to manage the airport as a district of the city of Barcelona. All the actors involved agreed to stay in this project of airport monitoring and signed a collaboration agreement.

A team of two educators (who had already taken part in the previous stage of the project) was hired and integrated into the SIS Detecció team (a service specialised in helping homeless people living on the streets) and in the Municipal Support Programme for Homeless People. As compared to the previous stage, the main difference was in the intensity of intervention: these professionals work day and night, in shifts and with schedules allowing them to address any emergency, but not with a permanent presence at the airport.

The general work approach was the same: if a person who has settled in the airport has a connection with other localities, educators will try to rebuild that connection. The spaces of coordination with all the airport actors were maintained, while the educators become a reference point for the daily operating dynamics of the airport. During this stage, educators had an office in the airport.

In this new stage, the Board of Technical Coordination continued and now included social workers from the Barcelona Court (section in charge of disabilities), as well as the medical examiner from the El Prat Court. The rest of collaborators stayed in the project. The EMSE team from Baix Llobregat joined the interventions at the airport, in order to provide psychiatric care in the form of a mobile unit. This is a very relevant development, as it allows this team to intervene at the airport whenever there are psychiatric emergencies, and hence every resource can be activated as swiftly as possible.

From the start of the intervention by the SIS, 64 people received assistance, with a monthly average of 20 people, of whom approximately 10 people received continuous attention. About 50% of the people identified as airport sleepers were not installed on its premises, but were occasional users of the airport as a temporary shelter. As for the rest of people, 20% (12 individuals) had been referred to social services for homeless people, others to services for drug abusers, and others returned to their families or to their hometown. Mental health problems, alcohol consumption and other addictions mark the profiles that were hardest to tackle. We needed to evaluate the evolution of the profiles of homeless people located in the airport and the people receiving assistance, taking into consideration the time required to address the problems and the results obtained.

GOOD PRACTICES A MODEL TO FOLLOW

The good results obtained -- thanks to the active involvement of all the agencies -- highlighted the value of positive attitudes and coordinated action, and also set an example. While this action did not eliminate the problem at hand, it allowed us to address, in an effective and efficient manner, the situation of particular individuals that find themselves in a situation of extreme exclusion, preventing their situation from becoming chronic due to lack of assistance. Inter-administration coordination in a specific and limited space, and with the purpose of resolving situations of need and social emergency, is not a new practice; indeed, this is a practice that, when applied to homeless people, is especially effective and successful from a technical standpoint. These experiences and their dissemination can help to extend this practice and to raise awareness, to help politicians, experts, citizens and excluded individuals themselves to consider the possibility of successful assistance approaches.

*That's justice, that's what street law is all about: Dignity.
The Street Lawyer by John Grisham (1998)*

GOOD PRACTICES - LEGAL STRATEGIES

Juli Ponce (2009) makes an interesting reflection on “Law and Lobbying” where he tells us that regulatory changes to protect the human rights of homeless people should be adopted by public authorities that are democratically legitimate and empowered to do so.¹ Obviously, in a democratic society, keeping these matters on the public policy agenda will also depend on the pressure exerted by the citizens, whether individually or in groups, on their institutions. Also essential, is that the public and private organisations that are familiar with the problem of homelessness and are in a position to understand the needs and possible solutions, be assured the opportunity and responsibility of having their voices heard in formal and informal public decision-making processes. Organisations engaged in lobbying on these issues must have in-depth knowledge of the existing regulatory limits and the legal possibilities that can be developed. Thus, those homelessness organisations that are aware of the needs and have the essential legal know-how can play an important role. Of course, the role of Law does not end in the prevention of conflicts and the oversight of rights through the approval and amendment of legal rules.

Unfortunately, the fight for Law, in the words of the illustrious German jurist Caspar Rudolf von Ihering, sometimes means resorting to the last possible mechanism: legal guardianship. In order for legal guardianship to exist, someone has to ask for it. In other words, the control by courts of public (and sometimes private, for example in the case of discrimination or housing harassment) omissions and activities must be required by a person, or by a group on behalf of that person, who is procedurally empowered to appear before judges and courts and who has the resources (time, money) and the drive to do so. As a result, even if it is theoretically possible, claiming the human rights of homeless people before the courts is very difficult, given the personal circumstances of the homeless people involved, as well as those of the organisations that are trying to help. Homeless and other organisations shy away from taking legal action because of a lack of legal expertise or resources, or because of close ties to the government administration against which such claims are being made. While these reservations are understandable, the failure of public authorities to fulfil their legal obligations, for example, by failing to create appropriate policies to ensure access to rights, is in itself problematic. It is difficult to challenge laws or policies as violating human rights if governments have failed to enact them. It is important to speak out against these omissions, as well as actual laws that violate rights.

1. Ponce, J. (2009): “El Derecho a la Vivienda de las Personas sin Hogar y el Tercer Sector en España: Derecho y Lobbying”. In *¿Derecho a la vivienda? Milhistorias Magazine*. Fundación Rais.

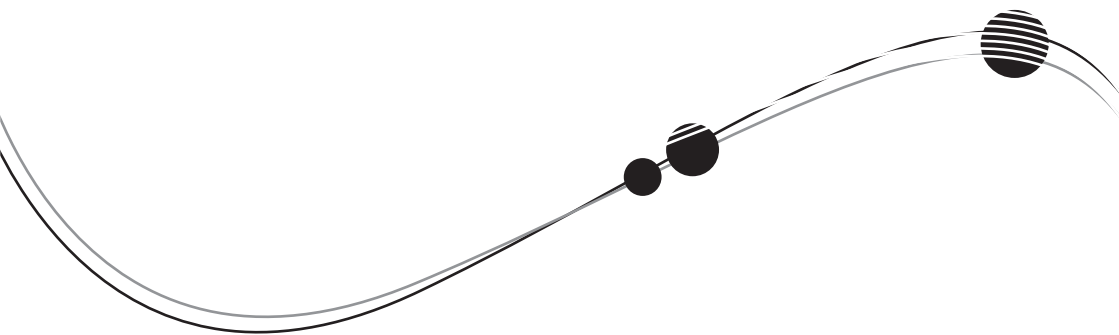


Therefore, the purpose of this chapter is to propose that the lack of legal know-how and/or resources can and should be overcome, through various alternatives. In this chapter we venture to present different experiences to show organisations that work with homeless people to see how they might incorporate or participate in the Human Rights Approach. This chapter examines the experiences of working with pro bono lawyers, consulting with university legal clinics, the existence of organisations specialising in the legal issues of homelessness or the sharing of legal services by various institutions. In addition, the effective networking between social institutions and ombuds-offices, and the experiences of social movements in empowering the homeless as persons entitled to human rights are worth noting. In conclusion, the Law allows homeless people to no longer be considered as a political or merely bureaucratic issue. These examples will show a practical reality that includes the Human Rights Approach in the fight against homelessness from a far broader perspective, as well as reflecting on the strategies of social institutions in the development of the subjective rights and public obligations, with the ultimate goal of expanding the concept of human dignity.

LEGAL STRATEGIES

CHAPTER X

Addressing Legal Needs of Homeless
People in Sydney, Australia
The Homeless Persons' Legal Service



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HOMELESSNESS IN SYDNEY, AUSTRALIA

Based on the most recent Australian Census figures for homelessness, there are over 104,676 people across Australia who identify as being homeless, and over 27,000 people who are homeless in New South Wales (NSW).

The definition of homelessness adopted by the Australian Bureau of Statistics (ABS) is the widely accepted three-part definition of homelessness as devised by social policy researchers Chris Chamberlain and David McKenzie (2003), as follows:

- Primary homelessness: people sleeping rough, on the streets, in parks, under bridges, deserted buildings, etc.
- Secondary homelessness: people moving between various forms of temporary shelter including friends, relatives -- sometimes referred to as 'couch surfing' -- emergency accommodation, youth refuges, hostels and boarding houses.
- Tertiary homelessness: people living in single rooms in private boarding houses without their own bathroom, kitchen and without security of tenure.

Of the 27,000 people who are homeless in NSW, an estimated 3,500 people sleep rough every night.

Studies in Australia and internationally have consistently documented that people experiencing homelessness report a horrendous and disproportionate level of victimisation, including repeated experiences of childhood abuse, domestic and family violence. Studies have revealed that over 70 percent of young, homeless women and 30 per cent of young, homeless men in Australia can be expected to be survivors of sexual abuse and that over 70 percent of young, homeless men and 30 per cent of young, homeless women in Australia can be expected to be survivors of physical abuse (Thrane, *et al.*, 2006; Whitbeck *et al.*, 2000).

There is also a well-documented relationship between having a mental illness and experiences of homelessness. In 2011, a study of 4,300 homeless people in Melbourne, Australia found that 31 percent of the sample had a mental illness (not including any form of alcohol or drug disorder). According to the ABS, the prevalence of mental illness in the Australian homeless population is three times the prevalence of mental illness amongst people who have never experienced homelessness. Significantly, the study also found that the vast majority of homeless people do not have a mental illness when they become homeless, but acquired their mental illness after becoming homeless (Johnson *et al.*, 2011).

There is also a well-documented relationship between drug and alcohol disorders and homelessness. A 1998 study of 210 homeless people in emergency hostels in inner Sydney reported that 48 percent of the sample had a drug use disorder and 55 percent reported an alcohol disorder. Seventy-five percent of their sample had mental health problems, drug use disorder or alcohol disorder (Hodder *et al.*, 1998).

BACKGROUND TO THE HOMELESS PERSONS' LEGAL SERVICE SYDNEY

The Homeless Persons' Legal Service in Sydney (HPLS) is a highly effective public interest collaboration that brings together 350 lawyers acting *pro bono* from Sydney-based commercial law firms, Legal Aid New South Wales, homelessness service providers and the Public Interest Law Clearing House (PILCH) NSW. HPLS is run, supervised and managed by the Public Interest Advocacy Centre (PIAC).

HPLS provides free legal advice and representation to individuals who are homeless or at risk of homelessness in the Sydney metropolitan area, in relation to a wide range of legal problems. During 2011/12, the service assisted over 700 homeless people. Since its inception in 2004, HPLS has assisted over 5,000 clients who have been homeless or at risk of homelessness.

The primary points of contact between HPLS and its service users are the weekly clinics offered in the inner city of Sydney and three suburban areas. Ten clinics are operated on a roster basis at welfare agencies that provide direct services, such as food and accommodation, to people in housing crises. The clinics are staffed by lawyers acting *pro bono* from Legal Aid and private law firms that are members of PILCH. The staff of the HPLS co-ordinates and supervises all of the work done at the clinics and provides training and support for the *pro bono* solicitors from the partner legal practices.

The most common legal problem presenting at HPLS legal clinics relates to fines and infringement notices, mostly in relation to travelling on public transport without a valid ticket, or for minor offences in public spaces. Other common problems are minor criminal charges (including possession and use of illicit drugs, offences relating to public space, offensive language), compensation applications for being a victim of crime, arbitrary evictions from tenancy, credit and debt matters, and complaints against police.

HPLS CASE STUDY

Nathan suffered traumatic brain injury as a child. This injury, combined with other mental impairment, has meant that Nathan finds it difficult to retain permanent housing, employment or manage his life. He has had a history

of drug abuse, homelessness and imprisonment. He receives the Disability Support Pension.

Over the last 11 years, Nathan has incurred nearly 100 civil and criminal fines totalling almost \$40,000. The vast majority of the infringement fines relate to travelling on a train without a ticket. The criminal fines include offences relating to motor vehicle registration and drug possession.

In 2010, the State Debt Recovery Office (SDRO) issued a warning of the possibility of a Property Seizure Order being made. HPLS succeeded in obtaining a series of extensions to prevent further enforcement being taken against Nathan, as more time was needed to manage his legal affairs, due to his intellectual impairment.

In 2011, the HPLS applied for a full write-off of all of Nathan's debts. The SDRO approved the write-off on two conditions: (1) that the debt would be reinstated if any further fines were referred to the SDRO within the next five years, and (2) that Nathan advise the SDRO if his financial, medical or domestic circumstances changed within the next five years.

Nathan has since incurred more fines. The extent of his intellectual disability and way of life mean that this is likely to keep happening. The principle of deterrence in issuing and enforcing fines has no impact on his behaviour. HPLS believes that in clear and extreme cases such as Nathan's, the SDRO should exercise its discretion by not taking enforcement action on future fines, where it is clear from the client's particular circumstances and disabilities, that there is no prospect of the fines ever being paid.

HPLS CASE STUDY

Peter was assaulted in his sleep while sleeping rough in inner-Sydney. When Peter spoke to HPLS lawyers he was unable to provide specific details about the injuries he sustained as a result of the violent act. He was admitted to hospital following the assault. The hospital records state that a bystander reported that an unknown attacker had kicked and stomped on Peter's head while he was sleeping and had punched him several times. The medical record noted head and facial injuries. However, Peter absconded from hospital before any thorough or extensive testing, so the medical records do not document the extent of his injuries.

HPLS lawyers are continuing to assist Peter in his enquiries, with a view to making an application for criminal victims' compensation.

THE HPLS SOLICITOR ADVOCATE

In 2008, the Service employed a Solicitor Advocate to provide court representation for people who are homeless and charged with minor criminal offences. For people experiencing homelessness, there is too often an entrenched cycle of mental illness, offending and reoffending. This can often lead to vulnerable people spending considerable time in custody, but with little or no benefit to the community if the underlying causes of their offense are untreated. The purpose of the HPLS Solicitor Advocate position is to establish a dedicated point of contact for people who are homeless or at risk of homelessness to access legal representation in minor criminal matters. By diverting homeless clients out of the justice system, HPLS is able to give many an opportunity to seek treatment, with the prospect of better outcomes for all. The HPLS Solicitor Advocate has particular skills and experience in providing legal assistance to people who are homeless. Such experience is often crucial in providing useful legal services to clients who are homeless. The role was established to overcome some of the barriers homeless people face accessing legal services, which are not sufficiently addressed by Legal Aid duty lawyers. From 1 January 2010 to 31 December 2011, the HPLS Solicitor Advocate provided court representation to 179 individual clients. Of these:

- Forty-five percent disclosed that they had a mental illness.
- Sixty percent disclosed that they had drug or alcohol dependency.
- Sixty-nine percent said that they had either a mental illness or drug/alcohol dependency.
- Thirty-five percent disclosed that they had both a mental illness and drug/alcohol dependency.
- Forty-five per cent indicated that they had previously been in prison.

HPLS CASE STUDY

Jonathan was homeless. He was initially found guilty of criminal offences, including offensive language, offensive conduct and goods in custody. His consumption of alcohol and methylated spirits increased. He was charged with wielding a knife in a public place, the ninth such charge on his record since 2001. On many occasions he had received a short jail sentence and then was back on the street. In recent times, his matters had been diverted from the correctional system to address his mental illness issues. However, none of his underlying issues had been addressed.

The HPLS Solicitor Advocate worked with a treatment provider to ensure that a treatment plan for Jonathan was put together that would have an impact on his long-term situation, not just his short-term legal problem. This meant that when Jonathan received a good behaviour bond, he was released, not back to the streets, but straight into long-term accommodation with 24-hour support and medical care.

HPLS CASE STUDY

Leanne was charged with resist police and possession of illicit substance. She was apprehended in Kings Cross (Sydney inner-city suburb). Police released her on bail, on condition that she not go within 1000 metres of Kings Cross railway station. She was subsequently arrested in Kings Cross again sharing needles, and was taken into custody. An application for bail was made before the court, and bail was granted with the same conditions, namely that she not go within 1000 metres of Kings Cross railway station.

The bail condition presented considerable difficulties for Leanne as she needed to enter the Kings Cross area to access her doctor and her methadone clinic. The HPLS Solicitor Advocate made an application for variation of the bail conditions. HPLS lawyers were of the view that the reason for the original condition was to keep her out of the area in order to minimise disruption and annoyance rather than to reduce the risk of reoffending.

Following the variation, Leanne was permitted to go into the Kings Cross area between 9am and 6pm.

HPLS POLICY AND LAW REFORM WORK

HPLS works to identify and reform systemic issues affecting people who are currently or who are at risk of becoming homeless. The policy and law reform work of the HPLS is based on the recognition of the human rights of people who are homeless, including their right to be involved in decision-making processes that directly impact them.

HPLS has been involved in a number of significant law reform initiatives, including being actively involved in advocating for and advising on the reform of the fines enforcement system, to establish a system where homeless people can have their fines debts waived in return for attending drug treatment programmes and educational programmes or by participating in volunteer work programmes.

HPLS has also been active in advocating for reform of the conditions of boarding houses in NSW. Tenants in boarding houses are often living in poor conditions and have inadequate recourse to argue for their rights as tenants. HPLS has been heavily involved in advocating for stronger legislative regulation for boarding house operators.

HPLS has been at the forefront of advocating for legislative recognition of human rights for homeless people, prohibition of discrimination on the basis of criminal history, and improved support and accommodation options for people exiting prison who are at risk of homelessness.

Underlying the policy and law reform work of HPLS is a commitment to ensure the opinions and voices of homeless people are heard in our advocacy. To this end, HPLS has developed various mechanisms to involve homeless consumers in our policy and law reform activity.

INVOLVEMENT OF HOMELESS CONSUMER ADVISERS IN THE WORK OF HPLS

HPLS believes it is essential that those that have experienced homelessness play a central role in its law reform activity. It is a core principle of HPLS that this will lead to the development of more effective policy formed in response to homeless issues as well as being an empowering opportunity for those who participate. HPLS believes that homeless people should be involved in decision-making processes because it is consistent with human rights. The fundamental right of affected people to participate in public affairs is enshrined in Article 25 of the *International Covenant on Civil and Political Rights*.

In mid-2008, HPLS established Street Care, an advisory group consisting entirely of people who had experienced or were currently experiencing homelessness. Such an advisory group of homeless people had never before been established in NSW.

Street Care consists of nine currently and formerly homeless people who are representative of the considerable diversity of experience among homeless people in Sydney and surrounding regions. Street Care members provide advice to government agencies and other groups seeking information about the best methods of consulting with homeless people. Importantly, the group is not a short-cut to hearing from homeless people, but rather a mechanism to provide advice on how best to do so.

HPLS has arranged for Street Care members to receive training in public presentation, media skills, legal information topics such as tenancy law, fines and credit and debt, and law reform and policy advocacy. Street Care members have been actively involved in undertaking consultations with homeless people in relation to problems they encounter with the State Government Housing authority, the experiences of exiting prison into homelessness, and the difficulties encountered by homeless people when approached by police and other law enforcement officers. Members of Street Care are regularly approached to speak at conferences and training forums, as well as being invited to meet with senior politicians and Housing Department officers.

THE WORK OF HPLS IN HUMAN TERMS - JAMIE'S STORY

Jamie (not his real name) is one of the HPLS consumer advisers and also a client of the Homeless Persons' Legal Service. He is now in his 40s.

Jamie first became homeless when he was 14, leaving home to escape from his step-father who subjected him to sexual and physical abuse. He lived on the street, worked

as a sex worker, and was in and out of foster care and juvenile justice institutions. While he was in foster care he was further sexually assaulted. He was also sexually assaulted and physically assaulted in a juvenile correctional training centre.

About 18 months ago, Jamie had finally secured stable accommodation from the State Government public housing authority, Housing NSW, after being on and off priority lists for housing for the previous three years. In the period leading up to that time, he had relied on a number of different accommodation options, including sleeping rough, accessing hostels and homelessness accommodation services for one or two nights at a time, and some periods in unlicensed boarding houses. He was in a methadone treatment program to address his substance abuse problems. He was also in a job-training scheme. Jamie also had an outstanding unpaid fine for travelling on the train without a valid ticket -- one of the most common legal problems to present to HPLS.

Through the fine enforcement system, this unpaid fine resulted in Jamie having his driving licence disqualified for non-payment. While driving his car one night he was pulled over and charged with driving while disqualified. Jamie has a criminal history, and has previously served time in prison and in juvenile detention. At his court hearing he was sentenced to eight months imprisonment. He was released last November after serving the full eight months. He had no job. He had lost his public housing unit and could not get further priority listing because:

- He had an outstanding debt for unpaid rent to Housing NSW.
- Housing NSW regarded that, because he had been in prison, he had been in stable accommodation for the previous six months.

Jamie is currently back on the streets, sometimes in hostels. He has not resumed his methadone treatment.

Jamie's story is an example of systemic failure at several levels -- from the inadequate response to his experiences of childhood abuse, the failure to provide protection when in state care, an excessive, punitive sentencing regime, an inadequate response to his needs upon release from prison, and a bureaucratic inflexibility to provide him with safe, secure, adequate housing.

Jamie's story gives rise to a number of recognised human rights: the rights of the child to a safe and secure environment, the rights of the child to be protected from physical, mental, emotional and sexual abuse, the right of a child in care to special protection from further harm and abuse, the right to adequate housing, the right to adequate health and medical services, and the right to necessary social services. HPLS seeks to respond to homelessness and the legal issues that confront people experiencing homelessness, within a human rights framework. This means confronting the underlying causes of homelessness and housing crisis, and the need to advocate for the right of homeless people to have access to adequate housing, health care, social security, access to support services without discrimination, and the right to participate in policy development and the design of services which seek to assist them.

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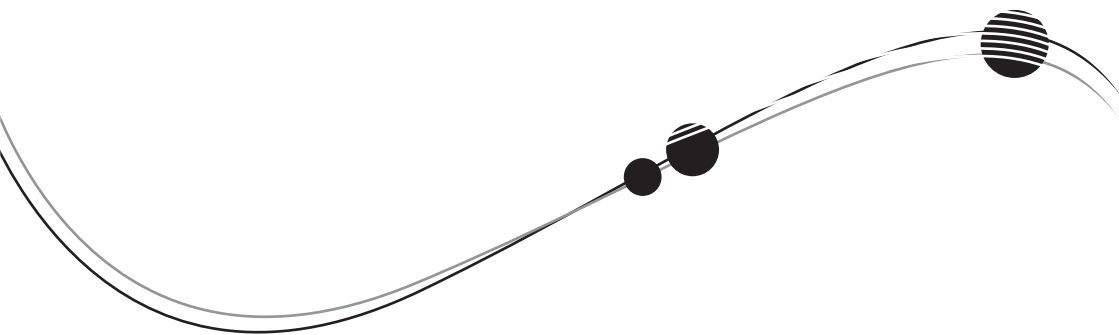
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LEGAL STRATEGIES

CHAPTER XI

The Role of the University
in Promoting Access to Legal Rights
for People Living in Social Exclusion

The Experience from
the “dret al Dret” Project



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I would like to clarify a few points regarding the concept of access to justice and legal rights in order to limit the subject and the analytical approach of this chapter.

- “Access to legal rights” is not a new subject (Cappelletti, 1984). The historical concerns around this topic relate to the tension between the recognition of people’s legal rights and the lawful exercise of those rights. Having rights and being able to exercise them is portrayed as an open debate present within the legal-political reality of the ideas of freedom and equity, as well as within the contemporary democratic system and the rule of law. The research on access to legal rights requires the study of three interrelated aspects:
 - Which rights are recognized and what is their structure?
 - Who is entitled to those rights?
 - Which processes can promote or make their execution possible or, on the contrary, which may hinder or prevent it?

In order to address the latter point (either from the generic perspective of access to legal rights or the double perspective of both having rights and being able to exercise them), it is necessary to combine different study approaches that facilitate the analysis of existing rights and their corresponding effectiveness. In addition, it is important to bear in mind the interconnectedness of the law and, in this sense, the access to legal rights must be understood at least from the perspective of the State and the individuals. The latter focuses on those individuals and social groups that experience the greatest difficulties in gaining access to the instruments and enjoying the conditions required for the effectiveness of their rights.

The expression “access to legal rights” uses the basic functional meaning of gaining access or entry to somewhere. This term was inspired by the image of British and American architecture and urban development since the 1970s. The idea of “access” relates to the concept of freedom of choice and usage which people have the right to exercise, so the principle of equal opportunity can be effectively enforced.

- It is to be noted that both “access to justice” and “access to legal rights” have been mentioned instead of focusing the debate around the access to legal rights only. The first is used to convey the fact that individuals may occupy different starting points with respect to the law. Given that justice itself cannot be reduced to individual rights in the sense of subjective claims supported by the State, it is necessary to recognize that not all individuals (according to a variety of criteria discussed later) will occupy the same position with respect to the law. The second

expression, “access to legal rights”, is used in the strict sense of the recognized rights of individuals. In the same way, the “access to legal rights” determines the “access to justice”; that is, has an impact on the position that individuals may occupy in the legal camp and the effective exercise of their rights.

- The issue of access to legal rights (and by extension, access to justice) entails a historical tension that is still very much alive nowadays: the struggle of groups and individuals for the recognition of their rights and also for the effective exercise of those rights which have already been recognized. Most scholars working in the field of “access to justice” have focused their attention on this second aspect (Cappelletti, *et al.*, 1983). The topic of “access to legal rights” is commonly understood as having access to the courts of justice and to the different legal mechanisms for conflict resolution. That is the reason why the study of the barriers to access to legal rights tends to focus on the difficulties around the effective protection of the courts of justice and the use of conflict resolution mechanisms. This approach is correct but insufficient, as it has been demonstrated that cultural, social and economic factors can have a definite impact on individuals’ exercise of recognized rights. The State law approach can be broadened (at least from a sociological point of view) to include the study of other structural areas and relational fields common to everyday life. In this sense, one must first establish which arenas and relational fields have a bearing on the structure of the legal field before attempting to explain which position is occupied by individuals within that field. If such a broad perspective is adopted, there is room to incorporate multiple components that will end up shaping the legal field. Thus, the interaction of the private domestic arena, the production arena, the market arena and the community arena (different from the citizenship arena) create compelling dynamic regulations that interact with the State law (Boaventura, 2003). This approach includes the recognition that beyond the power of the State other spheres of power coexist that have a bearing on the structure and exercise of the law.
- There are two parts of the question of how to achieve the effective exercise of formally recognized rights: the law won’t change by itself (someone will have to break new ground) and the exercise of rights is unequal. The first aspect aims both at the existing law and at the institutional processes that enable the application of legal provisions. The second aspect requires answering the question of why the recognition of rights does not guarantee by itself their execution, and why some individuals encounter barriers or simply cannot effectively exercise their rights. The interdependence of the law and social inequality, should be the object of special attention when these questions are addressed. Certainly, all legal rights and safeguards can help to overcome existing social inequality; however, the recognized rights (which determine who is legally excluded or included) and the general institutional working practice may reproduce and perpetuate existing social inequality. In this second scenario, neither rights themselves nor having access to legal rights would have any transformative capacity for worse-off people and groups, because their interests and expectations will still not be met. Therefore, one can expect that disadvantaged social groups who are caught up in the legal system would have little interest in making use of institutions that

are alien to them or in exercising a number of legal rights and safeguards that do not favour their interests. Under these circumstances, efforts are directed at the recognition and legal protection of certain social interests striving to achieve a legal-political status (Santos *et al.*, 2007). It is at this level that one can observe a tension between using the law and changing the law.

- Having access to justice and to legal rights is often understood as a technical issue for “experts”. Santos (2007) states that the predominance of this technical and State approach during the last decades has caused a considerable setback for politics as the legislation of an increasing number of social interests has become the object of technically qualified legal experts. This endogenous perspective does not take into account many of the cultural, social and economic issues that might hamper or prevent the use of legal and representative mechanisms. At the same time, it dilutes and masks the political aspect of the problem. Thus, it is necessary to complement the above perspective with one that presents the access to justice and legal rights as a complex socio-political process open to the participation and creative mobilisation of a plurality of actors. This broadened perspective should help to overcome one of the limitations of the interventionist Welfare state: the perception of users of legal assistance services as passive receivers of State support instead of subjects of rights. A complementary and corrective model of the technical and State model should include, among its key objectives, the empowerment of people so that they can be the protagonists of their own lives.

- The contemporary normalisation of the “exception” and the expansion of the “no-law areas” means that the subject of access to justice and to legal rights has changed since the era of interventionist Welfare states in the mid twentieth century. In the current context (Capella, 2007), the legal systems include regulations that increase the criminalisation and vulnerability of the most impoverished sectors of society, also affecting the areas of exceptionality (Portilla, 2002 and 2007). There is a new phenomenon -- a sort of legal apartheid, which has become one of the most relevant legal, political and sociological phenomena of the early twenty-first century. Rights are not only limited in Guantanamo Bay: Western legal systems have gradually limited rights, safeguards and access to rights, which means that we are living in a world that replicates the “in-and-out” and “friend-enemy” dichotomy that prevailed in European legal history. The enactment of enemy penal law could be considered as the clearest expression of this phenomenon. Most important, however, are those legal amendments that reduce people’s legal protections, which makes it possible for the State to act in an arbitrary manner and to restrict the possibilities for collective action.

BARRIERS TO ACCESS TO LEGAL RIGHTS

The barriers to the full exercise of recognized rights can be classified in four main groups: economic, social, cultural and institutional (ICHRP, 2004). They are related at different levels so they can be found in different combinations.

Income inequality has an impact on the inequitable access to rights. People with greater needs (in an economic, social or cultural sense) usually do not know their rights and at the same they experience more difficulties in using the existing mechanisms. This is due to the combination of multiple factors. Firstly, those people with greater needs find it more difficult to recognise the legal dimension of their own problems (due to a lack of legal conscience/understanding), are likely to mistrust the legal system, often have problems in new situations, have difficulty coping with the length of time required by legal processes and have limited or no access to high-quality specialised resources.

In order to have access to legal rights, one needs to have some basic skills such as being able to fill in a questionnaire, clearly explaining a complex situation, speaking the local language or languages, knowing how to submit an application, attending meetings at a police station and personal time management skills including keeping appointments. These are considered basic skills for many people, but can be a real challenge for some people. The above factors are often combined with a lack of trust in the legal system and its professionals, and in the possibility of making a change. Differences in terms of power and status are strongly perceived, and this factor, together with the lack of a rights-demanding culture, impacts on the fact that those with greater needs will experience the greatest difficulties in accessing their rights and in putting forward defence pleas and legal changes.

A social as well as an institutional base to support and accompany the person is necessary for exercising one's rights. Those individuals who live in an environment where only on very rare occasions something is gained through justice, will usually choose different strategies to defend their interests and satisfy their needs (Sarat, 2001). It is quite common that, together with the person's social groups of reference, social organisations become *de facto* social groups that provide support, direction and companionship for the effective exercise of rights. They also become advocates.

There are a number of barriers to access to legal rights that are related to cultural issues, such as a person's educational level, a person's ability in oral and written expression, and having a sufficient level of mobility to access legal services. It may seem strange, but many people experience great mobility problems in urban contexts, especially when they have to enter the premises of an institution that is alien to them (such as a legal office or a court). Cultural understanding can also impact the level of knowledge that people have of their own rights and their awareness of the available means for enforcing them. People with cultural, economic and social handicaps are often taken advantage of, so those in more vulnerable situations are the victims of arbitrary power. Ignorance together with fear is an excellent breeding ground for the abuse of power over those in the lower ranks of society.

Two main groups of difficulties are found at institutional level: those associated with official institutions, which mediate the access to legal rights, and those associated with private professional services, whether lawyers' offices or the legal service of a social organisation. The official institutions can ease the bureaucratic processes by trying to adapt them to the person's abilities; however, they are not required to

do so, and may strictly follow bureaucratic logic, which will make it difficult for a significant proportion of the population to access justice. The overcrowding of services and the perceived scarcity of resources also discourage people from making legal claims and perpetuate distrust in the system. In addition, the staff working in these services might have a tendency to perceive users more like passive receivers of State support rather than subjects of legal rights or clients, as will be the case in the context of a law firm.

Social organisations are an important resource of legal support and advice. Only a minority of private law firms represent disadvantaged people. Institutional barriers to accessing legal rights create and take advantage of a weak legal culture. This happens when a toughening of legal conditions takes place, together with a widespread public discourse of danger and risk to public security. When poor people do not have access to advocates and NGOs are not able to work with lawyers (due to budget constraints, etc.), the public authorities are left unchallenged. Policies and measures might, in fact, violate human rights, but no one is able to challenge them. Without an understanding of how the legal system works, in a sense, a weak “legal culture” among citizens and authorities themselves increases social exclusion and limits access to legal rights. On the contrary, a strong legal culture safeguards culture both in terms of the form and the content. As already stated, the problem we face today is that the legislation currently in force plays a part in shrinking the rights, and the institutional and procedural safeguards of those most vulnerable sectors of society.

LEARNING FROM THE “DRET AL DRET” PROJECT

“Dret al Dret” is a legal action project that started in the Faculty of Law at the University of Barcelona in 2006 (Madrid, 2008). The project’s name, “dret al Dret”, takes its name from a play on words: it means both direct access to justice and having a right -- in the subjective sense -- to justice. This second meaning summarises the aim of the small group of professors that started this project: to improve the defence and the exercise of rights of individuals and groups living in social exclusion. The expression “dret al Dret” refers to a key idea in any democratic society organised from a legal and institutional perspective as a state based on the rule of law: to grant effective access to the legal and social resources that make possible the exercise of rights. There are two other secondary objectives: how to improve students’ learning and legal training and how to strengthen the public service that the University should provide.

The experiences of Clinical Legal Education (Legal Clinics), so common in British, American, Latin American and in some European countries, were used as a reference point.¹ After a period of study and reflection, the project was designed based on the above stated objectives and on the following guiding principles:

1. A extensive bibliography on Clinical Legal Education can be found in www.cleaweb.org/ You can also find in the same web address a list of different legal clinics

- The project has three important agents: the University provides expertise, NGOs work to detect gaps and knowledge about the reality that people face, and the local (public) administration works to identify these gaps or to explain the reasons or limits of their actions.
- Understanding the relationships between theoretical and practical knowledge.
- Promoting the socialisation of knowledge and making the university more accessible.

The first guiding principle refers to a social reality: the collaborative relationships established between the vast majority of social organisations and the public administration. It was felt necessary to add the contribution of the University, in particular, bearing in mind both its institutional relationships with the public administration and the personal relationships of individual teachers with some social organisations.

From the epistemological perspective, the project was based on the assumption that both theory and practice are part of the same reality. In this sense, the hands-on, practical dimension would not only contribute towards improving students' training; in addition, in order not to theorise *in a vacuum*, it was necessary to do some research into the social and legal processes. Thus, this project reintroduced the old, abandoned idea of working in the community, which had only been present in a tangential manner in the curriculum of the Faculty of Law.²

The selected evaluative criteria were the comparative analysis of students' learning progress, the resulting outcomes and the collaborative relationships built. In fact, over these last few years, we have witnessed how a number of students who participated in this project are now young professionals: some of them working in the legal services of the social organisations where they did their placements, others working in private law firms to which they had been introduced by their external tutors (each student participating in the project is supervised by an external tutor and a second tutor at the University). A total of twenty lecturers, researchers and teaching assistants from eight different departments are part of this project.³ The group of participating teachers has been recognized as an innovative teaching group.

The project employed different and successful strategies. First, the founding members of the project were already active members of a number of social organisations. This fact favoured the contact with other organisations and also increased the credibility for the project. Secondly, it was conceived as a faculty-wide project and not as the project of a specific department. Thirdly, the aim was to respect and stimulate the activity of the different working areas involved (such as criminal and penal law, human rights and international law, children's law, social law, real estate law and

2. The setting up of this project came together with the implementation phase of the European Higher Education Area (EHEA). Nevertheless, this project is neither directly nor indirectly related to the implementation of EHEA and least of all with the bureaucratic adoption of the Bologna process.

3. The most numerous group by professional categories were the group of lecturers, followed by researchers and teaching assistants.

residential mediation, women’s law or immigration law, for instance) as smoothly as possible. Last but not least, we tried – within our means – to complement and strengthen the existing legal services of the participating social organisations. A network model was adopted in order to promote both the activities of the organisations and the services offered to students by the University. In this sense, the underlying logic behind this decision was to stimulate those aspects that would contribute to join forces as long as the pre-established objectives were met.

The project faced academic and institutional problems, some of them still not resolved. On the one hand, the academic difficulties are centred around how to recognise the amount of work undertaken by the students in the curriculum and the recognition of the work done by the teaching staff. The first question was solved by combining two practicum (internship experiences) so students can count more hours for hands-on work.⁴ This academic change represented an opportunity to put forward the creation of specialised legal clinics as a common working area for the cooperation among teaching staff, legal professionals and students. The preliminary model is based on the idea of maintaining the collaboration with professionals and the legal services of social organisations, as well as selecting cases for their legal representation according to the model of legal clinic.

In 2012, the Legal Clinic on Real Estate Law and Housing Mediation (ClinHab) was created.⁵ This included a specific service for legal advice and mediation in housing conflicts, such as conflicts between landlords and tenants, neighbours living in the same building, people living in shared-property, eviction and mortgage repossession cases. This service aims to tackle homelessness and housing exclusion, and it operates on the initiative of the teaching staff (who generously share their knowledge for the benefit of the project objectives), the students (who have opted for this interesting teaching and knowledge transfer alternative), the volunteers (who help us with their hands-on experience) and also thanks to the support of organisations such as *Associació ProHabitatge*, *Alter – Servicios Integrales de Mediación* as well as the collaboration of the Catalan Housing Agency. A total of 153 cases have been addressed in one year, most of them related to rental problems and mortgage repossessions. It is hard to believe that this project seemed impossible such a short time ago. It was a hard dream to follow. First, in spite of the initial reservations it has been possible to create a service such as ClinHab. Second, in the short-term it is not possible to reproduce the experience of ClinHab in other legal clinics at the Faculty of Law. The main reasons are the lack of financial resources and the risk of teaching staff burn out.

4. Those students who want to participate in this project will do their practicum either during one term or the whole academic year. Nevertheless, this has changed as a result of the introduction of the new graduate studies in Law, in the context of the convergence of Spanish university degrees in the EHEA. According to the curriculum of the degree in Law, students can take one elective subject (6 credits) and also choose to elaborate a final individual project on a topic related to the practicum (6 credits). This modification places the practicum in a preferential position in the official Masters, especially for those that provide access to legal careers.

5. <http://www.clinicajuridicaimmobiliaria.org/>

On the other hand, the institutional difficulties stem from the conflicting legal, social and political realities that the project faces. We had to consider open questions including whether faculty of law should denounce current violations of rights, and whether? It is necessary to take sides or just pretend to maintain a neutral position. From experience, we know that these questions have complex answers that establish a clear distinction between the theoretical models explained in class and the real world. Should a faculty of law provide resources to and position itself as an advocate for the most vulnerable sectors of society? If the answer is yes, the second question would be how? As the author of this paper, I am personally in favour of thinking about the law and practising the law in a way that recognises the rights of the poor (Ferrajoli, 1999) and it is my understanding that the faculties of law at universities should take up this responsibility. However, one has to recognise that most of the teaching staff working in the faculties of law probably do not share this vision or the same level of commitment. Having said that, it is difficult to figure out what kind of institutional commitments should be assumed by the university, especially when advocating for the most disadvantaged (those who experience the greatest barriers to access to justice and legal rights) it also means generating tensions with the centres of power, including political power.

A university's autonomy should allow different departments to take a safeguarding role; however, their own sociological and institutional reality makes this a much more complex issue. In the first stage of the project, during the discussion of the possibility of opening up information points in the Faculty of Law for the legal orientation and assistance to immigrants, a member of the teaching staff commented, “Sure, so we will end up with the corridors full of black people”. When the local ordinance on civic behaviour was under discussion in the city of Barcelona, a number of legal analytical projects were developed based on the working experience of different organisations, with “dret al Dret” being one of them. The conclusion of the study recommended changing the text of a local municipal ordinance. However, this action resulted in a call from the public authorities who reminded us that we had applied for a grant. This is also the experience of social organisations, hence it is not an isolated case; it illustrates the fact that if the Faculty of Law really wants to play its part in improving access to rights, maybe the only way is to overcome the university's convenient façade of neutrality.

Sometimes, the self-restrictions on the university's promotion and safeguard tasks have their origin in past, current and future agreements signed with the public authorities, which can result in potential contracts and awards. Social groups living in social exclusion can hardly compete on this terrain, for obvious reasons. Nevertheless, it will be possible to establish a relationship between the university and the situations of exclusion and infringement of rights following the example in other countries of a number of pioneer departments, including the faculties of law: through the research of the legal components of the situations of exclusion. In this respect, empirical sociological studies can provide a new theoretical framework that complements the abstract prescriptive models (*deber ser*) that often are mixed up with the different realities that people live in. This could represent a way forward for the faculties of law to relate to the legal conditions faced by the most deprived

individuals and communities in their daily lives: a so-called “Sociology of Legal Exclusion”.

This kind of project cannot be considered as neutral for two fundamental reasons: first, the false neutrality that usually comes to mind when we think about the role of justice does not exist; second, because this project is committed to defend the legal rights and the exercise of rights of those most in need. On the one hand, the results achieved have been remarkable, but on the other hand they have also been quite modest. The consolidation of a project of these characteristics and scope is -- in itself -- a success, especially after a rough start. On the up-side, we must also emphasise the involvement of both students and the academic staff, as well as the warm reception of the project by the social organisations. On the downside, we still have to figure out how to tackle professors' excessive workload. Also, it would be important to promote the elaboration of studies and the design of mechanisms for the transfer of knowledge. In order to pursue the project's aims, that is, contributing towards improving access to legal rights and improving students' training, we undertook a combination of different activities: workshops, practicums, seminars, courses, publications of guidances, research studies, radio programmes, working groups and the setting up of a centre for housing advice and residential mediation. As a concluding remark, this is just a small example of how, from the faculties of law, a number of working synergies coherent with the core objectives of the institution can be generated. The final purpose should be the development of critical consciousness about social reality and injustice in its many forms, and also the engagement of students, professionals and institutions to work toward improving access to justice and to the legal rights of those individuals living in social exclusion.

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LEGAL STRATEGIES

CHAPTER XII

Ombuds Offices and NGO's: Defending the Rights of Homeless People



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The development of citizen's rights in the framework of a state meant to guarantee them has called attention to the right of the population as a whole to a good administration. Nevertheless, the most vulnerable groups, such as homeless people, often find it difficult to undertake legal action against the institution responsible for the violation of (or the failure to defend) their rights.

Regarding the fight for the rights of homeless people, the ombuds-office is an especially interesting institution. An ombudsman can act on behalf of a homeless person on the basis of an official complaint or an application by an interested party. The aim of such complaints can embrace a wide range of themes: from the insufficient capacity of shelters (which forces some people to sleep rough), to reintegration problems of a group of people who have been evicted from a certain area, to specific shelter services in the winter undertaken by public authorities, to the analysis of the supply and demand of social housing.

THE CONCEPT OF GOOD ADMINISTRATION AND THE ROLE OF OMBUDSMEN/OFFICES

The concept of good administration is gaining importance in public management. It is directly related to the increasing penetration of Public Law into this area as an instrument that enables a means of assessing the quality of public management. The right to good administration becomes a guide for public officials' decision-making and, as such, it is an instrument for ombudsmen as monitors of the public administration. The concept of good administration differs from that of good governance, as the former is related exclusively to public administrations, while the latter has its origins in the recognition of the existence of networks, involving public and private actors, where public decisions are made (Ponce, 2007).

At the European Union level, the Charter of Fundamental Rights itself established, in Article 41, the right to a good administration, mainly focused on the defence of the impartiality of the EU institutions vis-à-vis citizens and natural and legal persons. The precise formula of good administration can be based upon several instruments, such as ethical codes, service charters, codes of good governance and good practices, citizen participation mechanisms or, for instance, reports by advisory bodies (Ponce, 2009).

These instruments need someone to enforce them, and this is the task that, among other institutions, ombudsmen are increasingly assuming. The main function of ombudsmen lays in the control of the administration and the defence of fundamental rights. Secondly, ombudsmen have a crucial role in the constant improvement of the concept of good administration, as well as in the enhancement of citizen rights and in the quality of public management.

The Charter of Fundamental Rights of the European Union (Article 43) empowers the European Ombudsman and establishes her functions: "Any citizen of the Union and any natural or legal person residing or having its registered office in a Member State has the right to refer to the Ombudsman of the Union cases of maladministration in the activities of the Community institutions or bodies, with the exception of the Court of Justice and the Court of First Instance acting in their judicial role".

THE OMBUDSMAN'S FRAMEWORK FOR ACTION: SOME EXAMPLES FROM EU MEMBER STATES

The ombudsman is an office designated by the State or the relevant administration to monitor the behaviour of the administration itself. Its functions are limited to issuing (after research and analysis) advice or recommendations to the administrations, involving actions for improvement, restitution, compensation or legislation, or the reconsideration of decisions already made. Nevertheless, the ombudsman cannot replace the functions of ordinary law courts. Consequently, in case of unlawful action or of rights violation by the administrations, the ombudsman must advise citizens to appeal (if possible) before the courts. Generally, ombudsmen provide their public service for free, which makes it a potentially universal appellate authority. Moreover, it is possible to find an ombudsman at each level of the administration: central, regional and local.

In Greece, we can find recent investigations by the Children's Ombudsman, an institution belonging to the so-called "Greek Ombudsman", in charge of investigating violations of children's rights, with the aim of giving advice to the relevant administrations (Moschos, 2010). Beyond describing the typologies of homeless children, the Ombudsman wrote precise recommendations emphasising the duties deriving from Article 21.4 of the Greek Constitution itself and from Article 27 of the UN Covenant on the Rights of the Child. The Greek Children's Ombudsman established a typology of homeless children and different measures to resolve their situation. For instance, for "street children", the Ombudsman recommended procedures other than arrest by the police. For children "in an irregular administrative situation", it was recommended to stop treating them like illegal immigrants and to provide them with public protection as minors in situation of risk. For "children of Roma families living in camps", the intervention of the Ombudsman grants those individuals easier access to public services. In cases of "minors suffering from severe neglect or violence", the Ombudsman noted the lack of resources and tools for the administration to intervene adequately when needed, which forces women

and minors to continue living with their aggressors for fear of becoming homeless (Moschos, 2010).

In 2009, the Irish Ombudsman also ascertained that homeless people and homeless children had serious problems with access to basic state benefits, and, processing several claims, started an investigation. In her conclusions, the Irish Ombudsman ascertained that social workers had severe problems finding suitable housing for homeless children, because of the long waiting lists (OCO, 2009). The Office of the Irish Ombudsman even received applications and complaints from homeless children who had problems finding shelter through social services (Health Service Executive). In 2012, the Office presented the report "Homeless Truths. Children's Experiences of Homelessness in Ireland", which highlighted the children's experiences and perspectives. The intent of the report was to inform the decision-making of those working at both a policy and practice level to develop and improve services and supports for children requiring emergency care and accommodation (OCO, 2012).

Action by ombudsmen can be even bolder, as in the case of the Albanian Ombudsman, who undertook a symbolic action consisting of sheltering 51 Roma people, 25 of them children, in her own offices in the capital city, Tirana, to prevent them from a "possible death" from exposure during a cold spell in February 2012. These people had become homeless after being evicted twice from a property where they had camped with tents. The Albanian Ombudsman, insisted later to the Minister of Labour that a solution had to be sought for homeless people in extreme weather situations like the cold spell of last winter.

In Spain, the Ombudsman office has intervened several times for issues related to decent and adequate housing, not only invoking the right to housing, but also other constitutional requirements such as Article 9.2 of the Spanish Constitution, which establishes that "It is the responsibility of the public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective [...]"; Article 10.1, which states that the dignity of the person, the inviolable rights which are inherent are the foundation of political order and social peace; or Article 39.1, which establishes that "the public authorities ensure social, economic and legal protection of the family". When 1987 was declared "International Year for the Homeless" by the United Nations, the Ombudsman decided to write a report on the situation of homeless people (back then, more commonly known as *transeúntes* ["transients"]). For that purpose, the Autonomous Communities (the governments of Spanish regions) were asked for information regarding available resources (especially shelters), and there was an evaluation of the coverage provided through those resources, and of the existence of practical projects aimed at improving the provided assistance (Múgica, 2009).

More than 20 years later, in April 2012, the Ombudsman exposed, in an annual report in the Congress of Deputies, that the number of homeless people in Spain was estimated at between 30,000 and 50,000 people, and proposed that they be provided housing from the stock of vacant social housing, which, according to the Ombudsman, could amount to hundreds of thousands of housing units (DP, 2012).

In addition, in Spain there are regional (from the autonomous communities) and local ombudsmen that have also reported on the situation of homeless people, the related social services, and housing policies. Remarkably, all of them emphasise that most complaints and reports related to homeless people are routed through NGO's. In fact, the Catalan Ombudsman (Síndic de Greuges) has a social council, formed by the main social organisations of the country, with a general advisory role and that also endorses and contributes to the Ombudsman's reports, including the final recommendations to the relevant administrations.

A report by the Andalusian Ombudsman, commissioned by the regional government itself, showed a detailed diagnosis of this problem, as well as an in-depth and transversal analysis of the laws, regulations, institutions, and administrations that take part (or should take part) in the resolution of these homelessness situations. Some of the recommendations enjoyed a prominent place: the need to have a specific regional legislation (in the autonomous community), as well as a dedicated budget; and creating an observatory on homelessness, in partnership with local councils and social institutions, which helps to prevent duplicities and to clarify the map of public intervention in this area (DPA, 2006). The Basque Ombudsman (Ararteko) also wrote a long report on the social, legal and administrative situation of homeless people in the Basque Country. Contrary to the Andalusian report, the material and motivation for the report came from the Basque Ombudsman, who resolved to give priority to research on the most vulnerable social groups and, consequently, assumed an exemplary autonomy in terms of initiating investigations and issuing recommendations to the regional and local institutions of the Basque Country. The Basque Ombuds' report (Ararteko's report) also includes a list of recommendations for legislative changes. Its main point concerns the clarification of the responsibilities of each administration, as the research concluded that inter-administration confusion is too often used as an excuse to exonerate administrations from assuming responsibilities that, in most cases, involved a jurisdictional conflict. In consequence, the ombudsman calls for comprehensive policies and for a clear leadership. This institution has requested a consistent harmonisation of the legislative framework, from local coexistence ordinances to the regulation of social services and the management of social infrastructures, often in contradiction (Ararteko, 2006). Just like the Andalusian Ombudsman, the Ararteko report is calling for better budget provision for assistance to homeless people, and for an improved coordination and a more comprehensive understanding of this problem.

The Catalan Ombudsman wrote the report "Homelessness in Catalonia. Persons, administrations, organisations". The main conclusions and recommendations of the report were related to the need for an improved coordination between administrations, and a harmonisation of the existing legislation and regulations; the creation of an observatory on homelessness-related problems; increasing the budgetary provisions for awareness-raising of the population; reinforcing the links between labour and housing policies, and policies for the homeless, as well as the cooperation of social entities helping those people (SG, 2005). In the Catalan case, it should also be emphasised that local ombudsmen are showing a growing level of activity, which sometimes involves actions sparked by claims made by social organisations helping homeless people. In 2010 in the municipality of Cornellà, the local Ombudsman wrote a report on the right

to housing. Among other measures, the local Ombudsman demanded that regulations were set up to grant priority access to social housing to people in an emergency situation derived from their loss of a home, and demanded a plan specifically targeted to assist roofless people (SGC, 2010).

In England, an official investigation was started to analyse systematically the enforcement of legislation related to assistance for homeless people at the local administrative level (LOG, 2011). The results of the Ombudsman's research constitute a complete guide for reviewing and improving municipal policies of assistance to homeless people. The point of departure lies in the assumption that the lack of the due responsibility by local governments can have, as a consequence, serious errors in: the prevention of homelessness; the duty to undertake consultations (to analyse the real level of risk faced by applicants); the design and evaluation of applications; and the provision of short-term accommodation. The study made by the Ombudsman (and the ensuing recommendations to town councils) is based on an in-depth analysis of four cases of negligence by the municipal administration with serious consequences for the claimants, whose situation was worsened by an inappropriate response by the administration. It is precisely thanks to such claims by affected people that the Ombudsman decided to analyse the legal framework and its enforcement in practice, and prepared this guide of good administration for municipalities and their management of cases of actual or potential homelessness.

Finally, it is important to note that in a country like Finland, as a true reference regarding housing and homelessness policies, the Ombudsman has also played a role in the set up of a national strategy to reduce long-term homelessness (2008-2011). On two occasions, the parliamentary Ombudsman drew attention to the illegality of denying the individual right to decent housing, which is often replaced by shelters or temporary housing solutions that keep applicants in a situation of marginalisation, without providing them with the resources needed to improve their situation in a sustainable way. The Finnish Ombudsman even investigated a claim by a Roma family that was denied the right to apply for housing, which violated their right to non-discrimination and to equality in access to social housing. The excuse for such denial of rights was that the local mayor felt that this family would cause unrest in the neighbourhood.

CONCLUSIONS

Ombudsmen are institutions empowered by the administration itself to provide their services for free. They are the guardians of the consistency of public policies and administrations. Consequently, they become advocates and attorneys on behalf of the people vis-à-vis the administration. In the early twenty-first century, given the wide range of sectors and issues currently included as public policies, ombudsmen can channel their tasks to many social areas, including issues related to the situation of homeless people and the existing (or not existing) related public policies. However, ombudsmen have no legal power to force councils to follow their recommendations.

These institutions monitoring good government by the administration are driven by claims by citizens. Unfortunately, few vulnerable groups make complaints to ombudsmen. So it is all the more important that the NGOs working daily on behalf of homeless people take their cases of rights violations to ombudsmen so that all cases of irregular administrative action undermining a consistent public policies approach can be analysed by the ombudsmen. Ombudsmen are not policy-makers, but they can and should influence policy with their recommendations and studies on the consistency between those policies and citizen's rights. Consequently, collaboration with ombudsmen is a useful tool for NGOs and an important way forward for improving the situation of helpless homeless persons.

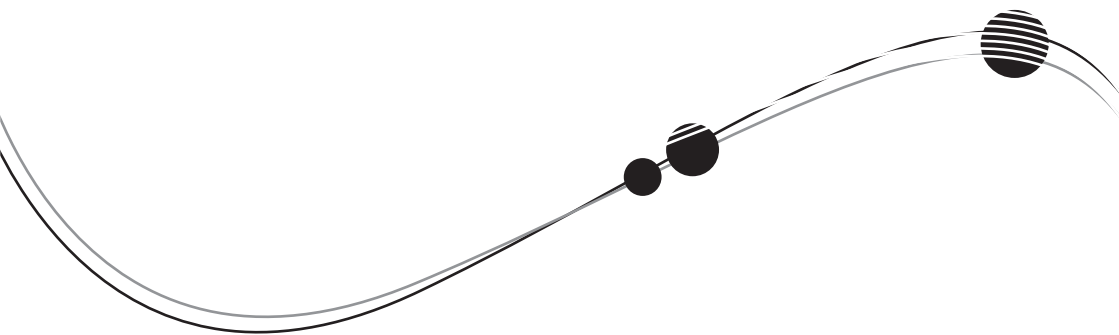
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LEGAL STRATEGIES

CHAPTER XIII

The City is for All from the
“Human Rights-Based” Perspective



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The City is for All is a Hungarian grass roots activist group based in Budapest, working for adequate housing for all and a more equal and just society.¹ The group has been at the forefront of the resistance against the increasing criminalisation of poverty and homelessness in Hungary. The group was founded in the summer of 2009. In part inspired by a Bronx-based community organization “Picture the Homeless”, it was initiated by non-homeless activists with a history of organizing around issues of homelessness, who thought that those genuinely concerned about poverty and social exclusion should work *together with* those directly affected, and not only *on their behalf*. Since the beginning, most of the group’s members have been homeless or formerly homeless people -- including people sleeping rough, squatting, staying in shelters, residing in self-built cabins and in single-room occupancy accommodation.

The group is involved in a wide range of activities from lobbying and advocacy, through participatory research, education and providing free legal advice to homeless people, to direct action and civil disobedience. Its activities are organized through weekly meetings and three major working groups that correspond to the group’s three main areas of action: housing rights, criminalisation and access to public space and advocacy in the area of homeless services. Even though human rights are only one of the frameworks The City is for All is using to shape its activity and demands, the group’s activities, our understanding of homelessness and how it should be overcome fit well within the “Human Rights-Based Approach” as it is elaborated by FEANTSA and Housing Rights Watch.

THE MOST VULNERABLE

The group understands homelessness as a broad phenomenon that includes everyone who lacks secure housing; nonetheless, its focus is clearly on the most vulnerable. We emphasise the equality of our members and try hard not to allow the power inequalities within society between homeless and non-homeless people, rich and poor, educated and non-educated, Roma and white, men and women to be reproduced within our group. Throughout our activities, we try to be as reflective as possible about any exclusionary tendencies that might evolve in our discussions and day-to-day operation. Non-homeless members (or “allies”, which is the preferred

1. For more information, see <http://avarosmindenkie.blog.hu/tags/english>

term in the group), men, and the more experienced, more self-confident members in general are encouraged to be reflective on how they can inadvertently contribute to the marginalisation of others. More educated members are strongly discouraged from the use of foreign or complicated words. To make sure that everyone's opinion counts, the group emphasises deliberation over voting as a process of democratic decision making. Nothing is decided with majority voting, and every member has an effective veto power over strategic decisions. The same self-reflective attitude applies to the delegation of tasks. The goal is to ensure a delicate balance between allowing the experienced and the more talented to utilise their abilities at the same time as facilitating the development of such abilities of the newcomers and those with fewer skills.

FOCUS ON ROOT CAUSES

The City is for All is a fierce critique of false and superficial solutions to homelessness, such as the dominant government public policy response which essentially consists of large, dormitory-style shelters, street social work and further emergency measures in winter. The group instead emphasises the root causes of homelessness: poverty and social inequality, the lack of affordable housing, the absence of an enforceable right to housing, the lack of an extensive system of social housing, or the underutilisation of the small amount of public housing that exists. Whereas the dominant policy responses have the effect of depoliticising social problems, the group attempts to challenge these tendencies by questioning the adequacy of shelters as a response to homelessness or the fairness of evictions, and by redefining housing as an issue of human rights.² For example, the group evaluated the election platforms of all the relevant parties (with the explicit exception of a far-right wing, racist party) in the most recent parliamentary and municipal elections, to see how they engage with the issue of homelessness and whether they engage with its root causes and propose real solutions. The City is For All activists have addressed the housing subcommittee of the Hungarian parliament several times to explain the inadequacies of homelessness service provision and to argue for egalitarian housing policy.

On another level, the root causes of homelessness, the lack of social housing and the inadequacies of social provision is the effective disenfranchisement of the people living in poverty and deprived of adequate housing. Thus, special emphasis is put by the group on the empowerment of people experiencing homelessness. This includes the inclusionary nature of most of the group's activities as well as our campaign before the most recent parliamentary elections that encouraged homeless people to vote and provided useful information about the ballot.

2. On the roles of shelters in distracting attention from the true causes of, and adequate responses to homelessness, see Volker and Sahlin (2007), Hoch and Slayton (1989) and Lyon-Callo (2004), on the depoliticizing effect of social policies, see e.g. Fraser, 1989.

RIGHTS-HOLDERS AND DUTY-BEARERS

The City is for All uses an explicit human rights framework both in the group's demands for access to adequate housing for all and in our anti-criminalisation campaign. The motto of the group is "A lakhatás alapvető emberi jog", which translates into "Housing is a fundamental human right". Whereas the access to public spaces in the dominant discourse is often framed as an issue of order, aesthetics or the "adequate" use of these spaces (Misetics, 2010), the group stresses the right to equal access to public spaces for everyone. For example, the local authorities are increasing the frequency of their attempts to demolish informal settlements of homeless people (self-built wooden buildings in mostly forested areas of Budapest and other cities). The local authorities also fail to respect the procedures for these evictions, and do not serve people with notice prior to the eviction/destruction of their homes, fail to follow legal procedure and also fail to provide accommodation. The City is For All argued that the right to due process applies to everyone, and that the authorities should respect the rights of all their citizens.

An enforceable right to housing is one of the most frequent political demands of the group. Furthermore, an overarching understanding of how a just society should ensure fundamental human rights and essential human functioning to everyone is actively cultivated throughout our activities. In various statements, press releases and speeches (or in the evaluation of the government's draft strategy on homelessness), the group emphasises that it is a prime duty of the state to ensure that all of its citizens have fair access to adequate housing, and that homelessness cannot be reduced by relying solely on emergency measures, and charitable initiatives. The group organised several workshops or teach-ins in which participants discussed the meaning of social rights in general, and right to housing in particular, including constitutional provisions, relevant cases of judicial review, and Hungary's obligations under international law as well as progressive legislative developments in France and the United Kingdom about the enforceability of such rights.

EMPOWERMENT

The very essence of The City is for All is the empowerment of housing poor and homeless people to make them able to reclaim their dignity and their rights. Homeless members play a dominant role in setting the strategies and goals of the group as well as in its daily operation and in representing the group. Our understanding is that homelessness is an issue of both distribution and recognition: homeless people face exclusion not only from decent housing, from the formal labour market, or from public services, but also exclusion from citizenship, when understood in the broadest possible sense of the term. This moral exclusion -- which manifests itself in the "everyday politics of discriminations instantiated in glances and stances" (Charlesworth, 2005, 300) and in a stigmatising and dehumanising discourse that blames the poor for their poverty -- reinforces the material deprivation of homeless people by legitimising it in the eyes of the rest of the society. This all-pervasive

symbolic violence is often internalised by those subjected to it, which leads to lack of self-esteem and self-depreciation (Bourdieu, 2000).

Therefore, a political and sociological understanding of poverty and social exclusion that is cultivated throughout the activities of the group is a crucial source of empowerment. The self-esteem and dignity that comes from participating in the struggle for social justice is held to be at least as important an achievement as any possible material gains obtained through this struggle. Our conviction is that establishing homeless people "as a full member of society capable of participating on a par with the rest" (Fraser, 2000:103) is an essential goal in itself as well as a precondition for real egalitarian social change with respect to homelessness and housing.³ Nothing else is as effective in countervailing both the dehumanising tendencies of public discourse and the patronising image of the homeless poor cultivated by charity and mainstream social work as homeless people reclaiming their status as citizens of equal standing by speaking up against injustice.

The group is also actively cultivating a sense of community with other marginalised and oppressed groups, an important example of which is the group's participation in the annual "Pride" march for the equality of lesbian, gay, bisexual and transgender people. The City is for All has been also the promoter of a broader alliance of organisations representing various minorities that experience some form of housing deprivation (e.g. the case of large residential institutions for people with disabilities, segregated Roma settlements with substandard, overcrowded housing or green organisations concerned about environmental justice and energy poverty, etc.).

3. See also Lister, 2002 and 2008 on the relationship between poverty and the politics of recognition and respect, and Feldman, 2004 for an application of all this to homelessness.

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LEGAL STRATEGIES

CHAPTER XIV

Social Organisations, Legal Services and Strategic Litigation: Fighting against Homelessness from a Rights-Based Approach



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This paper is structured in two parts. The first tries to shed some light on the problems faced by social NGOs when they try to provide legal assistance to people in situations of social exclusion. The focus will not be on the individuals' access to such assistance, but rather on the organisational perspective. For this purpose, we outline the results of a study on the legal assistance services of 24 social NGOs carried out in Barcelona. We present two examples: the experience of the French network Jurislogement as an example of good practices for social NGOs to overcome restrictions and barriers to the provision of such services; and Shelter, an organisation in England, an example of good practices in terms of independence vis-à-vis the administration and professionalisation of the service. The second part of this paper is devoted to the possibilities of strategic litigation by NGO service providers at an international level — either in the framework of the United Nations or of the Council of Europe — as an instrument for social transformation through struggle in the legal sphere.

SOCIAL ORGANISATIONS AND LEGAL SERVICES

Social organisations are, in many cases, the first channel available for people who are socially excluded to exercise their rights. Consequently, participation of NGOs or non-profit organisations in the setting, development and evaluation of public policies at different levels (international, regional, and local) is an indispensable element. NGOs work to resolve or to improve the situation experienced by socially excluded persons (or those who are at risk of social exclusion). To this end, they assist those people mainly through social work, educational activities, and, to a lesser extent, legal services. Nevertheless, such instruments alone do not have the potential to significantly change the collective situation. Consequently, strategic litigation is a key instrument from a human rights-based approach. If we look for the precise providers of legal counsel and legal services for the most vulnerable groups, the results point to four main kinds of service providers: bar associations organising legal counsel services, law offices providing this kind of service, public administrations (especially local ones) setting up some specialised services, and social organisations. Some organisations work at the international level and others at the national level, while the smallest entities focus on providing services to the members of a local community, in a given neighbourhood, or on tackling targeted problems. There is a huge variety of organisational realities: some organisations will focus on strategic litigation, while others devote their effort to everyday problems, or work at both levels.

LEGAL SERVICES PROVIDED BY SOCIAL ORGANISATIONS IN BARCELONA

In 2008, a study was launched that analysed legal services provided by social organisations in Barcelona. The goal of this study was to collect basic information about who provides the services, and how these are provided and funded.¹ This study, aimed at capturing a general picture of the legal services provided by social organisations, had a second objective: improving the quality and efficacy of the existing legal services, as a way to promote access to those resources and to the rights they are entitled to. The study included 24 social organisations, some of which provide services to homeless people as defined by the European Typology on Homelessness and Housing Exclusion (FEANTSA's ETHOS definition of homelessness). Each organisation was sent a questionnaire that had to be filled by its legal services. In some cases, especially when asked about their funding model, organisations did not provide the required information. Most respondent organisations devoted less than ten hours a week to the provision of legal services. Within this majority group, 41% devoted five hours or less to that task. The rest of the organisations (59%) had a weekly commitment of six to ten hours per week. In most cases, the limited schedule was a consequence of the scarce and stressed resources available to some organisations. Very often, the staff of social organisations, especially in the smaller ones, work part-time contracts (ten or twenty hours per week). Only medium-sized and big organisations could afford to hire one or more lawyers on a full-time basis. In most cases, hiring lawyers depended on funding, mostly from public institutions, which allowed organisations to extend the service provision schedule. Conversely, budget cuts led to a reduction in hours of operation or even to the suspension of the service.

In NGOs, legal services, in general, provided either by paid staff or by volunteers. In absolute terms, and leaving aside the time devoted to these services, the number of paid staff and *pro bono* volunteers, including students working as interns, were similar. The group of paid workers was composed of freelance lawyers, lawyers belonging to the staff, and recent graduates (which was the biggest group; and included mostly law school graduates, but also graduates in social work, physical education, political science, journalism, and psychology). Legal and counselling services were not always provided by practicing lawyers: sometimes this task was carried out by recent law graduates not belonging to a bar association. This is because legal services are seen as a comprehensive service requiring the intervention of a diverse set of professionals, as this service entails a legal-social dimension. Within the group of *pro bono* collaborators, volunteer lawyers stood out. In terms of hours of work, the group devoting more time to these tasks was that of paid recent graduates. The volunteer lawyers, while

1. This is an unpublished study. It involved a working group composed of three lawyers belonging to NGOs, two of whom directed their own organisations (Bea Fernández, Gisela Cardús, and Albert Parés), three university lecturers (Marta Bueno, Ángeles de Palma, and Antonio Madrid), and by members of the Colegio de Abogados (bar association), all of them with responsibilities in the management of the Colegio, the duty solicitor system, the legal council service, or the (legal aid) legal service (Noemí Joaní, Sonia Torras, Macu Martínez, and Juan Merelo-Barberá).

being the largest group, devoted fewer hours to these services. However, it should be recognised that the operation of some legal services are maintained precisely thanks to the efforts of *pro bono* lawyers.

Legal services by social organisations were mainly provided by women, forming a majority both among the paid staff and among *pro bono* collaborators. In social organisations, these services are provided in different ways. Normally, people received assistance on site, provided by the professional staff of the organisation. Occasionally, and depending on the case in question, people were referred to more specialised organisations or to the free legal assistance (legal aid) services held by the Colegio de Abogados de Barcelona (Barcelona Bar Association). This occurred in particular when an individual had to request a duty solicitor (or public defender), the service involved assistance to a person who had been arrested, or a case required judicial review. Some legal services were provided by law firms or by professionals who belonged to a different organisation but worked on site for this specific task. Regarding the development of the services, the organisations were asked about their protocols for how to deal with people asking for their services and about their referral practices (when required). Some organisations did not answer this question. Half of those who responded used protocols and the other half did not. Most organisations that participated in the survey preferred to provide services related to law on foreigners, which then expanded to other spheres of action. Services provided by organisations focused on information about legal and social issues. Frequently, those organisations did a follow-up of the case and disseminated information about the violations that might take place.

Legal defence in court, when required, was rare and it was not often assumed by the legal services of social organisations. In order to get funding for their legal services, social organisations relied primarily on public aid. On the other hand, private funding came from saving banks or foundations that provide funding for certain programmes. It was very unlikely that organisations supported their legal services through fees paid by their members. Such economic dependency on external resources limited their capacity to act, often leading organisations to limit themselves to legal defence on issues that would not collide with the interests of public agencies. Economic dependency drives social organisations towards action strategies that protect them from potential informal sanctions by the public powers. Consequently, when social organisations join platforms to advocate for a certain issue or to denounce something, the action to be undertaken and the reasons for it are explained in advance to the Administration. In this fashion, a bargaining game is initiated where the leaders of social organisations acknowledge that public administrations look for their support for the management of certain conflicts, either in order to legitimise the administration's strategy or because they lack effective resources to act on the spot. The unwritten rule about the relationship between social organisations and some public administrations is that a clear opposition to the social and legal policies promoted by public powers can lead to exclusion from public funding. In practice this is meant to limit polarisation and tame NGOs, but this has not been a completely successful strategy, especially when there are shifts in power or power is in the hands of several political parties, even though the latter determine the agenda. So, regardless of these funding problems, many social organisations are

reluctant to be mere service providers, and keep a problem-centred and politicised perspective of their work.

Therefore, it is important that social organisations can rely on services able to tackle legal problems, either on their own or through other organisations or networks. This kind of service has become a key element in the resolution of certain housing problems and, consequently, in preventing homelessness.

THE EXPERIENCE OF THE FRENCH NETWORK JURISLOGEMENT

As explained by Noria Derdek (2008), France saw the creation of a national network of lawyers promoted by social organisations in order to resolve certain problems and deficiencies regarding assistance to homeless persons. On the one hand, there was evidence that homeless service users have complex problems that may prevent them from accessing appropriate housing. It became clear that professionals working in this field needed legal knowledge to inform homeless people and to defend their interests. At first, in order to tackle this situation, social organisations added lawyers to their teams. These lawyers were often isolated and not able to keep up with relevant jurisprudence and research. On the other hand, lawyers were more accustomed to working with academics and had few contacts with social organisations and public services in the judiciary, and little knowledge of the evolution of legal cases at street level. It was in this context that Jurislogement was created: a national network linking lawyers from social organisations, private practice, and academia. This French network works in different areas, such as housing rights, access to justice, discrimination, squatters, forced evictions, and the criminalisation of poverty. Lawyers in the network build legal strategies based on the exchange of court decisions in the area of housing and related rights. This exchange of information is especially important in the context of the implementation of the DALO (French acronym for “the Enforceable Right to Housing”). Currently, this network has 27 members and meets once every three months, while members keep periodic contact through e-mail. It has recently established working groups on particularly complex issues. The network develops a defined work programme through information-sharing work sessions and joint analyses of different problems. Jurislogement also has a website to link members and share jurisprudence: www.jurislogement.org.

SHELTER: THE HOUSING AND HOMELESSNESS CHARITY

Shelter (England) is a non-profit organisation that was founded in 1966 with the aim to defend the right of every person to have a home. In this sense, Shelter carries out counselling, lobbying and training activities, while its local housing advice centres keep its legal team in touch with what is happening around the country. The local centres are in everyday contact with housing authorities and what is going on in their area. They are a good base from which key emerging issues can be identified. Shelter has taken court cases on issues including priority in homelessness and home

loss payments. The target is to try to get important cases to the Court of Appeal where they can set a precedent. At the campaigning level, for instance, in 2009/10, working in partnership with Crisis, the Chartered Institute of Housing and Citizens Advice, Shelter called for the protection from eviction for private tenants if their landlord is repossessed of his/her property. In April 2010, the Mortgage Repossessions (Protection of Tenants) Act was passed, protecting more than 300,000 households and giving tenants the right to delay possession for up to two months. Also in 2009/10 Shelter won a landmark legal case to help domestic violence victims, when the House of Lords ruled that women staying in temporary refuges after fleeing domestic violence will now be considered homeless and have proper rights to find a permanent home. The same year, in a case brought by Shelter, a family of four were told they could keep the home they had lived in for more than 20 years -- after almost losing it in a repossession "sale and lease back" scam. In a landmark decision, the judge ruled that the family could resume ownership of their home, branding the sale and lease back company "dishonest". The case highlighted a worrying increase in similar schemes that target desperate homeowners. Shelter's services and projects across the country have continued to play a key role in preventing and solving homelessness. In 2009/10 Shelter gave specialist advice to more than 84,000 people. Shelter advice services prevented homelessness for more than 7,000 families and individuals, and enabled another 2,341 to obtain new settled accommodation.²

LEGAL SERVICES AND STRATEGIC LITIGATION

Litigation means taking cases to court. Strategic litigation is much more than simply stating your case before a judge.³ Strategic litigation is a method that can bring about significant changes in the law, practice or public awareness via taking carefully-selected cases to court.⁴ Strategic litigation is very different from many more traditional ideas of legal services. Traditional legal service organisations offer valuable services to individual clients and work diligently to represent and advise those clients in whatever matters they may bring through the door. But because traditional legal services are client-centred and limited by the resources of the providing organisation, there is often no opportunity to look at cases in the bigger picture. Strategic litigation, on the other hand, is focused on changing policies and broader patterns of behaviour.⁵ Strategic litigation uses the justice system to achieve legal and socialisation (Rekosh, 2003) are to:

- Identify gaps in the law.
- Ensure that laws are interpreted and enforced properly.
- Document human rights violations by the judiciary.

2. http://england.shelter.org.uk/__data/assets/pdf_file/0011/216101/Shelter_09-10_Achievements_report.pdf

3. <http://www.crin.org/resources/infoDetail.asp?ID=21271>

4. <http://strategiclitigations.org/category/aboutus/whatisstrategiclitigation/>

5. http://www.crin.org/docs/What_is_Strategic_Litigation.pdf

- Instigate reform of national laws that do not comply with international human rights law.
- Create progressive jurisprudence that advances human rights.
- Enable individuals to seek remedies for human rights violations.

It goes without saying that strategic litigation has also risks, as shown in the table below:⁶

POTENTIAL BENEFITS OF STRATEGIC LITIGATION	POTENTIAL RISKS OF STRATEGIC LITIGATION
<ul style="list-style-type: none"> ■ Win a desired outcome for the client or group of clients ■ Set important precedent ■ Achieve change for similarly situated people ■ Spark large scale policy changes ■ Empower clients ■ Raise awareness ■ Encourage public debate ■ Highlight the lack of judicial independence or fairness on a given issue ■ Provide an officially-sanctioned platform to speak out on issues when government may be trying to silence voices on that issue 	<ul style="list-style-type: none"> ■ Unduly burden client, in terms of pressure or length of time required for the case ■ Political backlash ■ Risk safety of client, especially marginalized groups ■ Privilege political or strategic goals over individual goals ■ Set bad precedent ■ Undermine judiciary by highlighting lack of independence or power on a given issue ■ Expend valuable resources on a case that may be very difficult to win

Administrations do not like that such cases are brought to court, and, in cases that can lead to censure by the court administrations, prefer to resolve cases through bargaining and political agreements. On the other hand, there may also be problems related to the implementation of court orders that eventually distort the strategic litigation strategy (Rekosh, 2003). Therefore, it is better to select cases for strategic litigation on the basis of whether they call attention to a legal problem related to a wider social problem; their decisions have a stronger impact on society and are likely to set a precedent; they are easy for the public and media to understand; they have a claimant who is willing to assume the pressure resulting from the strategy and that there are information sources from within the public administration who are willing to support the case.

6. <http://www.endvawnow.org/en/articles/948-engage-in-strategic-litigation.html>

HOW CAN A STRATEGIC LITIGATION BE INITIATED AT THE LOCAL LEVEL?

It is crucial to start at the local level to achieve real change. Human rights advocacy is both a global and local task. At the local level, it is necessary to raise public awareness, to mobilise the victims, and to litigate in lower courts. Nonetheless, this has to be done in a very precise way, incorporating international and regional human rights legislation and jurisprudence, forging alliances, forcing public debate, and empowering the victims of human rights abuses through the creation of victim support groups. It is essential to facilitate exchanges between lawyers and organisations, on experiences, barriers and legal strategies regarding cases of violations of human rights such as housing rights. Moreover, it is necessary to identify opportunities to litigate for these rights in the relevant cases, as well as to promote understanding and networking among human rights advocates and lawyers, both at the national and at the international level (in order to use regional and international mechanisms). Above all, it is crucial to initiate, at the state level, cases that satisfy the conditions for an international case that could follow in the medium term.

In a paper published by Housing Rights Watch on “Housing Rights of Roma and Travellers Across Europe”, Katerina Hrubá explains the lessons learnt from the local cases of strategic litigation regarding the housing rights of the Roma people. According to Hrubá (2010), in order to survive, local organisations prefer to maintain “good relationships” with the town authorities over providing professional services to their clients. Organisations can feel threatened by the local administrators and politicians, and worry about being able to secure future funding. Strategic legal intervention can only be made by organisations that do not operate directly in the area, have no links to the local authorities and do not feel that they are putting their own organisation and staff at risk.. Moreover, in the Czech Republic, many Roma clients were intimidated when they sued the town. Once the local authorities found out that Romani clients had started legal proceedings against them, they found ways to pressure the clients, for example with threats, insolent remarks or intimidating actions taken by the local authorities.

Strategic litigation on housing at the local level requires the actors to be familiar with all and any relevant circumstances surrounding the client represented in a case of the protection of personal rights. First, housing is associated with almost all aspects of the family and private life (e.g. finance, health, education of the children living in the family, etc.). Second, it is imperative to get to know the client as well as possible, to help support the client throughout the process and to prevent the client from giving up on the case. For example, when preparing the case background, it is necessary to spend some time mapping the life situation of clients, including visits to medical doctors, to schools, to bodies providing social and legal protection of children, and to neighbours. Finally, it is important to establish a strong and unambiguous structure of the claims both in terms of proof and arguments. Gathering and processing the information from various sources is very time-consuming and difficult to manage. However, the outcome of this work may be crucial for the claims (Hrubá, 2010).

From this perspective, alliances between service providing organisations and human rights organisations should be intensified, formally or informally, in defence of the housing rights of excluded and poor people, such as homeless people.

INSTRUMENTS FOR STRATEGIC LITIGATION

At the Council of Europe, for the purpose of improving the effective implementation of the social rights guaranteed by the Revised European Social Charter, an additional Protocol was created, which established a collective complaints procedure (STE n. 158 of 1995). This mechanism allows for the participation of “non-official actors”, such as international NGOs like FEANTSA. The organisations that have lodged complaints have a decisive role to play in disseminating the Committee’s decisions among national decision-makers, as well as among the courts and the general public (Brillat, 2008). What makes this system special is that it allows not only calling a law into question, but also the ensemble of government policies in a particular area. This mechanism is applicable when a state ratifies both the specific articles of the Charter and the protocol on collective complaints. According to Kenna and Uhry (2008), the monitoring system is the most effective human rights assessment of the quality of public policies with regard to progress on social rights. The adjudication process allows for an open debate where both complainant (NGOs and others) and State are represented. This examines policy ambitions, legislation, budgetary measures, and institutional and other measures to assess progress towards realisation of the rights involved. Through these mechanisms, the Council of Europe provides a common legal terminology, which stems from recognised social rights, on which it will be possible to base a civilised or civic debate, and consequently rights-based public policies. The decisions constitute international case law that mark out the landscape and contribute to the establishment of a social safety valve, at both a European and local level. This can provide a template and balance to the various political orientations that are, at times, not very concerned about their collateral effects (Kenna *et al.*, 2008).

At the international level, NGOs have been partners of the United Nations since 1947. In accordance with Article 71 of the UN Charter, NGOs can have consultative status with the United Nations Economic and Social Council (ECOSOC). Their relationship with parts of the United Nations system differs depending on their location and mandate. Numerous local, regional and international NGOs have played an essential role in national rule of law reform processes and at the global and international level.⁷ According to Merry (2003), NGOs can identify problems and pose questions (finding the right information depends on asking the right questions), promote research to back their arguments with policy recommendations (monitoring compliance depends heavily on having accurate information and “Shadow Reports”),

7. http://www.unrol.org/article.aspx?article_id=23

or lobby on issues, observe proceedings, make statements, generate public support for UN norms, press for higher standards and disseminate UN norms.

Paragraph 9 of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986) grants a role to NGOs, because these “can play an important role in promoting the implementation of the Covenant. This role should accordingly be facilitated at the national as well as the international level”. The Maastricht Guidelines on the Violations of Economic, Social and Cultural Rights (1996) introduced several remedies for violations of socioeconomic rights, and in their paragraph 32 on “Documenting and monitoring” of violations of economic, social and cultural rights grant these functions to NGOs, among other actors. For instance, one of the mechanisms of the United Nations Human Rights Council to monitor the compliance with the duties and commitments of the UN member states regarding human rights is the Universal Periodic Review (UPR). This, while being a procedure of inter-state review, allows for the participation of NGOs, which will shed some light on the main reasons for concern regarding human rights in a country that will be examined. Moreover, on 10 December 2008, the United Nations General Assembly ratified the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (OP-ICESCR), which introduced a mechanism of protection of the economic, social and cultural rights that allows victims of violations of such rights to present communications to a Committee formed by independent experts. The Committee analyses the case and issues the relevant recommendations to the state responsible for the aforementioned violations. This mechanism grants access to justice to all victims of violations of the rights to education, health or housing, among others, who did not enjoy an effective protection in their own country; also, it allows for communications to be presented on behalf of individuals or groups (if they give their consent).

The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights is, thus, a new opportunity to claim and enforce economic, social and cultural rights (ESCR) in the international arena. Although it is far from being a magic bullet to address the violations of these rights, this instrument offers a new space for advocacy and pressure for the advance of human rights. Aware of this opportunity, the Working Group on the Enforceability set up by ESCR-Net created a strategic litigation initiative to identify cases that are ready (at the internal level) to receive support, and which could have a positive effect on the jurisprudence springing from the OP-ICESCR. ESCR-Net uses these determining factors: (1) national remedies are exhausted (the top instance of appeal has been reached) or the case is in a very advanced stage but far from success; (2) the case contains legal themes that are new and in need of a deeper interpretation (for instance, how to evaluate the maximum available resources, progressive achievement or reasonability); (3) the case is related to a widespread and systematic violation of the ESCR; and (4) the case enjoys the support of grassroots groups communities social movements.

CONCLUSIONS

This chapter has shown that social organisations providing services for homeless people could and should advocate for respect of the human rights of the socially excluded individuals they work with. There are many ways to advocate. For example, social NGOs can establish legal support services that help to prevent homelessness and problems of housing exclusion. Or, the NGOs can work in partnership with human rights organisations and collaborate in different ways to the development of strategic litigation. These relationships establish important links with people who have local expertise and provide opportunities to work with lawyers and with organisations that can use the jurisprudence to change and implement laws. NGOs can offer direct advice to lawyers, or they can receive off-record advice by lawyers. Lawyers can also provide assistance to users of the NGOs services, representing or supporting them in court.

Some bigger social organisations with a regional or international scope can support lawyers and local organisations to take cases in domestic courts (district courts, appeal courts, constitutional courts, and supreme courts). It is possible to bring individual cases to the European Court of Human Rights, and the European Court of Justice, as well as lodging collective complaints with the Committee of Social Rights of the Council of Europe. Additionally, it is possible to send cases for submission as individual communications to the UN Committee on Economic, Social and Cultural Rights. It is important to build up collective empowerment strategies that allow us to undertake strategic litigation, in order to clarify or to transform regressive laws and legal frameworks, and to monitor compliance with the duty to protect, respect, promote, and observe human rights.

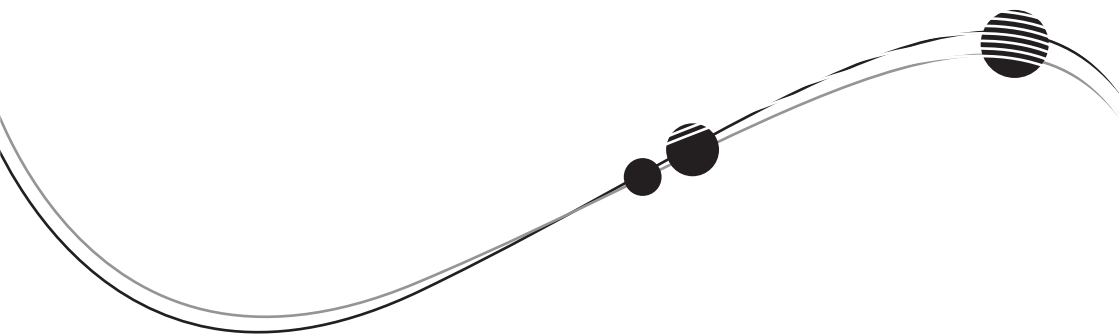
Social entities should contribute to consolidate social movements that advocate for human rights, as the latter have been widely considered the instigators of rights and political development throughout history.

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EPILOGUE

Late Modernity,
Structural Violence and the Collective
Memory: Tools for Understanding
the “Social Harm” of Homelessness



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One of the most important tasks being carried out by the University of Barcelona's Observatory on the Penal System and Human Rights has been to try to open cracks in the orthodox theoretical and epistemological pillars of criminology that have characterised most studies on the "criminal question". Historically, criminology has placed actions institutionally defined as "bad" and violating legal rights squarely in its sights as the focus of study. In this regard, the epilogue of this book wishes to invite criminology to focus its attention not necessarily on actions "officially" defined as crimes, but on actions that cause real harm to society, like violating human rights.

It can be said that the people who sleep outdoors in different European capitals are the visible signs of a systematic violation of human rights, and as a result these situations cause "social harm". We propose the use of concepts like "late modernity", "structural violence" and "collective memory" in order to explain what the "social harm" caused by homelessness is, from a criminological standpoint. We will provide a brief description of these concepts, as they will be the instruments that will allow us to show "criminal control" and require us to place the violation of human rights, "state violence" and other forms of production of "social harm" at the centre of criminological concerns.

I. WHO SHAPES THE PUNITIVE SUBJECTIVITIES OF LATE MODERNITY?

I pointed out several years ago that the study of the so-called "prison question and criminal question" has traditionally been monopolised by legal experts who, generally, have only examined legal rules that seldom penetrate social reality. For instance, the fact that 80% of the prison population is incarcerated for drug- or theft-related crimes is overlooked. The remaining 20% is incarcerated for other crimes. In Spain, for example, European Union statistics showed that currently 94% of people in jail have never killed, raped, injured or hurt anyone. Only 6% of prisoners were incarcerated for such serious crimes. This breaks with the traditional thinking that prisons are full of murderers and rapists, when in fact they are full of prisoners who fit a specific profile: young, immigrant, sick, poor, and having been convicted of crimes against property or drug-related crimes. Doubtless work with these people could be different before, during and after their prison stay. That is the subjectivity on which the criminal justice systems of the so-called late modernity are focused.

In 2004, I also had the pleasure of coordinating the book “Mitologías y discursos sobre el castigo. Historia del presente y posibles escenarios” by the publishers Anthropos, in which we pointed out clear trends for the future as a result of the cross between criminal policy based on the “criminology of intolerance” and the “culture of emergency” or “punitive exceptionality”: punitive management of poverty, increasing criminalisation of dissent, the economic market’s orientation toward deregulation and “flexibilisation”, and the shrinking Welfare State.¹

Ten years later, unfortunately, the consolidation of these trends can be clearly seen in this book on the penalisation of homelessness in Europe. The criminalisation of the everyday activities performed by homeless people precisely because of the fact that they do not have a home or adapted housing solutions, the pressure against, and discrimination of, the Roma population, and the persecution of immigrants show the cruellest side of the neoliberal state that seeks a new space for attraction and expansion of capital in the “public space”. Moreover, penalising access to public services, and particularly housing, spurs the creation of a dual, discriminating and segregatory housing system. Finally, prison, internment centres and group expulsions (deportations) conceal the extent to which a new “barbarism” is being committed in Europe, and how quickly we have forgotten the principles of “social constitutionalism” in the wake of World War II, which no doubt in a not very far future will force us to once again raise the banner of “Never Again”. But these assertions make it necessary to delve deeper into the foundations of such consequences. So let’s take a look at the second concept, the paradigm of the so-called “structural violence”.

2. STRUCTURAL VIOLENCE – AS A FRAME OF REFERENCE

After the barbaric acts of the Shoa and of World War II, studies on peace, war and violence abounded. In 1958, Johan Galtung founded the Institute for Peace Research in Oslo, becoming the world’s highest authority in the aforementioned studies. Galtung described various typologies of violence; here I would like to highlight the one in which he pointed out the existence of various forms. The first, which he called “direct violence”, and which may be either physical or verbal, has visible effects and usually consists of an event. A second, which he called “structural violence”, is verified when “political-economic structures prevent individuals or groups from achieving their actual somatic and mental realisations”. There is a third form of violence, which he termed “cultural”, and which may be exemplified by “(aspects of) religion, public opinion, ideology, language... that can be used to justify or legitimize direct or structural violence”.

Galtung, expanding on the foregoing, and in specific studies about peace, always distinguished the so-called “negative peace”, which is ascertained in the absence of

1. Literal translation: Myths and Discourses on Punishment. History of the Present and Possible Scenarios.

direct violence, as well as "positive peace", a situation that can only be achieved when the most important needs of people can be developed and exercised effectively, that is, when their fundamental rights can be exercised. Hence the assertion that there will not be a situation of complete (or "positive") peace when people are denied access, for instance, to vaccinations, food, housing, health care, education, etc. If, as Galtung said, the political-economic structures prevent individuals or groups from realising their full potential, it is the very structures that are acting violently, in what has come to be known as structural violence.

As we can read throughout the book, homeless people can be confronted with the different expressions of violence defined by Galtung. Direct and structural violence is perpetrated against homeless people through public or private security forces, extreme right-wing groups or bureaucratic barriers to hamper access to public services in an increasingly restricted Welfare State. In this regard, we can assert that homelessness is the visible result of other forms of violence that are not visible.

3. MEMORY AS ANTIDOTE - THE FRANKFURT SCHOOL

The critical theory that emerged from the "Frankfurt School" is based on a painful experience (1944).² Humankind not only no longer progresses on the road to freedom, toward the plenitude of the illustration, it retreats and sinks into a new barbaric genre. The discovery of the first Lager and then, ultimately, the Holocaust, showed the indicated dialect. Understanding the reasons for this drama involves immersing oneself in the "dialect of the Illustration". Retracing the steps down the path that led toward calamity means looking at history through another lens: memory's lens. And, from the Benjaminian (Walter Benjamin) view of the "Angelus Novus", progress as the accumulation of corpses and destruction has above all, meant the spread of oblivion the victims, the great victimisation processes.³ Criminal scholars paid no heed to such processes. The "civilisation" the illustrated project spoke so much about was not for all humankind -- it would only affect certain subjects (male, white, adult, and homeowners) in the Western part of the world (Costa, 1974). The new social contract thus excluded the "others" or "opposites":

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2. It is often pointed out that the illustrated tradition gave birth to modernity like the moment at which "the lights" showed a new era that inaugurated a rationality of progress that was destined to guide humanity toward higher levels of well-being and development. But in opposition to that interpretation there was another, sometimes less well-known view, based on works like "Dialect of the Illustration", in which authors like Horkheimer and Adorno explained the shortcomings and falsehoods of the illustrated project.
 3. http://en.wikipedia.org/wiki/Angelus_Novus - "A Klee painting named Angelus Novus shows an angel looking as though he is about to move away from something he is fixedly contemplating. His eyes are staring, his mouth is open, his wings are spread. This is how one pictures the angel of history. His face is turned toward the past. Where we perceive a chain of events, he sees one single catastrophe which keeps piling wreckage upon wreckage and hurls it in front of his feet. The angel would like to stay, awaken the dead, and make whole what has been smashed. But a storm is blowing from Paradise; it has got caught in his wings with such violence that the angel can no longer close them. The storm irresistibly propels him into the future to which his back is turned, while the pile of debris before him grows skyward. This storm is what we call progress." ▮

women and girls, people of other races, and the dispossessed. Theorisation about otherness, racism and the enemy also surged in early modern times, so does not constitute what is sometimes (mis)interpreted as an event only of the present; rather, social exclusion was designed in that hegemonic and discriminatory legal project that was so well described by Costa (op.cit.).

As noted by Reyes Mate, Benjamin's thesis addresses the opposite face of progress, a rationale that until then (we are speaking of the 1930s and 1940s) had been so unquestionable. Progress was unable to avert catastrophe; what's more, progress has been built on corpses and ruins in its unstoppable march -- progress has been achieved largely through the use of violence. For many people, the ruins, the rubble and the casualties are episodic. They are collateral damage, events with which the fabric of history is woven. For Benjamin, such a way of conceiving history, of thinking in such big terms, is tantamount to trivialising the suffering of those who pay the price of history, that which they call progress.

The first part of this book briefly explains the origin and the struggle for Human Rights. There are some who identify History with what has taken place, as a sum of events, obviously told by those who made it. But there is another way of looking at the past, which pertains to Memory. History and Memory -- both occupy themselves with the past, but the difference can (and should) be radical: the examination must go beyond what happened to include what did not happen. For those who lean toward the first outlook (Benjamin would call them "historicists"), the conquered at most represent the spoils, or the collateral damage, or the price to pay for the victory of the conquerors. But for the latter, the issue goes far beyond and does not limit itself to others' memories. It involves a reconstructive, active task; it means viewing things through the lens of the oppressed and unveiling the permanent state of emergency that constrains the everyday way of life of so many people, where the absence of the minimum requirements for surviving decently is a permanent reality. In this regard, that state of emergency, under this prism, is much more than a temporary, passing or circumstantial suspension of a set of laws. It is truly constitutional, and Memory -- that is, the active presence of its memory -- should be the lens through which reality must be examined. In effect, Benjamin proposes a view of history that finds its constitutional element in Memory: looking at history from the prism of the conquered. Then history would no doubt be written differently -- it would follow another screenplay, have other actors, describe other projects, narrate other dreams... it would thus become clear that "there was" another way.

But I think it is crucial to note that this proposed view is not only useful for contemplating the past, but also for examining the present in its totality, where there "can also be" another way. As for expressions like "state of emergency" and "suspension of a set of laws", I am adopting the type of study proposed by Agamben, who states that, in fact, the "state of emergency" is not a special set of laws (like the laws of war), but rather, by a suspension of the legal order itself, it defines its conceptual threshold or limit. However, this work seeks to go even a bit farther beyond such a conceptualisation. Agamben, as is known, rebuilds history from this concept and links it to the right to resistance (which we will come back

to later). For now, it suffice to say that, as the author states, both in the right to resist and in a state of emergency what is ultimately at play is the problem of the legal meaning "of a sphere of action that in itself is extralegal". But if Agamben's idea is connected to Benjamin's thesis, then, in actuality, the latter's mention of the "tradition of the oppressed" describes a far longer (in time) and more painful (in quality) trajectory that describes an entire social group for which there has never been, *de facto*, a true acknowledgement of rights. The idea of "suspending law", from the point of view of legal and political philosophy, can be understood even better using Benjamin's theses. According to the Benjaminian view, it was clear that for the state of emergency to work or for part of society to be left in a "lawless space" or a "no-law zone" (Pietro Costa), the presence of law is always necessary and indispensable. Like Mate said, "if everything were exceptional, we would be in chaos. And here we're not dealing with a legal system that can be a permanent state of emergency for the oppressed" (Mate, 2003). This is achieved, as Estevez, Capella, Madrid or Gordillo point out, when the "homework" that should be required (both of the state and of the big transnational corporations) is so weak, so light, that it is virtually nonexistent. "There is a correlation between rights and duties, so that they are two faces of the same coin (...). The right of one involves the duty of another. It is the duty of others to satisfy the content of a right" (Estévez Araújo, J. (ed.), Capella, J., Gordillo, J., Campderrich, J., Bravo, A., Giménez Merino, Mercado, P., Cambrón, A. Madrid, A. 2013).

It is the rule of law itself that has left so many people without the protection of laws. Progress is being built on the backs of a large part of humankind, and if there is no law for all, then obviously law itself is negated. I would like to, then, exceedingly important frameworks for analysis, like the one being discussed, whose structural existence I sustain to be far-reaching, should not be so quickly left by the wayside. Of course, we are aware that frameworks for analysis require tweaks and possible updates. We are also aware that this epistemology comes from a long time ago. Indeed, it was the Frankfurters who understood the role of memory very well at the time. Horkheimer himself points out that it allows past injustice to remain alive, to the point that without such remembrance, the past is no longer, and the injustice dissolves. This power of memory is of such magnitude that it should be the central question of philosophy. Perhaps, as Mate points out, the return of and to so much barbarism may be due precisely to the fact that we have neglected to take Memory seriously.

Adorno was perhaps the one who most clearly pointed to the future of the sciences and of political-cultural practice following the Holocaust. Indeed, in Adorno's view, after the Shoa, the categorical Kantian imperative has crumbled. Kant was possibly one of the most lucid philosophers of the Illustration, and, as Tafalla indicates, one of the philosophers who could most afford to be optimistic in affirming universality, rationality, autonomy and humanity as the pillars of civilisation. Adorno's new categorical imperative -- "orienting thinking and action so that Auschwitz can never be repeated, so that nothing like it can ever happen again" -- has clear differences with the one formulated by Kant.

If we wish to use such categories in the present, we should consider, as Estévez Araújo recently pointed out, although without citing Adorno’s categorical imperative, that “for us, the starting point in the struggle against injustice is not a formally rigorous theory of justice. The starting point is indignation against justice. This indignant reaction is as emotional as it is rational. It does not nurture itself of arguments alone. It is necessary for people feeling it to have developed a sensitivity toward injustice that make them rebel against it”.

This is not an easy task when profound social exclusion problems exist, but it is not impossible.

It is known that different analyses fail to contemplate poverty or social exclusion as the object of study. But extending and rescuing the concept of “solidarity” of a society that has encouraged egotistical individualism allows discussion of fundamental values and rights, of social duty. Solidarity, together with liberty, equality and justice, has become a key concept for social progress and for the structural change of society and of international relations. Therefore, solidarity is the key to breaking down the difficulty in raising awareness and mobilising people who are experiencing injustice and human rights violations intrinsic to settings of poverty and social exclusion.

4. THE SOCIAL HARM PARADIGM: TOWARDS (OR BEYOND) A “NEW” CRIMINOLOGY?

Not long ago, Ferrajoli (Ferrajoli, L. 2013) asked what criminology had to say about the innumerable genocides of the last century -- not only about the Holocaust, but also about other innumerable mass murders: about the eight million people exterminated in 1884 by the Belgian colonisation of the Congo, about the million and a half Armenians massacred between 1915 and 1922, about the two or three million exterminated by the Pakistani government in Bangladesh in 1971, about the two million in Cambodia between 1975 and 1979, and then the massacres in the 1990s of the Kurds in Iraq, the Muslims of Bosnia and of the Tutsis in Rwanda. And furthermore, what does criminology have to say about the “humanitarian wars” and the war crimes committed by NATO and the United States in the last twenty years, and more generally about the more than one hundred million dead in the 250 wars fought in the last century? In short, what does criminology have to say about state-sponsored genocide?

We can add that next to these “crimes of state”, the concept of “crimes of market” or “crimes of the system” are finding their way more and more into studies of an overall critical criminology that refers to the “social harmfulness” of the present turmoil, in which people are losing more and more rights, their homes, their jobs, their savings, their life expectancies... unquestionably, if we fail to extend the object of study, a restricted criminology can never deal with these phenomena. That is why we maintain here that social harm is an idea that has been strongly advocated by some scholars in recent years, including Paddy Hillyard (Hillyard, P. with C. Pantazis, S. Tombs and D. Gordon, 2004), developing the idea of *zemiology* (from the Greek

“zemia”, which means harm) to give a final push to that need to transgress the rigid confines of criminological theory and stop talking about crime and punishment, and to focus on study from a perspective of social harm. Its concept of social harm is broader than that of criminology: while the latter measures the harm caused by crimes, it ignores the harm caused by wars, by economic speculation, by the decadent labour system in Europe, by medical errors, by the lack of resources for the subsistence of people with physical or mental disabilities, or by the poisoning of our food. The fact that it favours the social harm perspective does not seek to reform or improve criminological theory, but rather to move beyond it, as it is incapable of breaking the bonds of the definitions of crime and criminality, and must necessarily be developed beyond criminology.

There seems to be little room for doubt that we are governed by powers that, combine the public and private spheres, and the full range of greys that fit between the two extremes under the shelter of economic globalisation. The perverse symbiosis represented, for instance in Spain, by the flow of state money to a banking industry that invests more and more in the business that produces and traffics weapons, at the same time that it has carried on with an eviction policy that affects hundreds of thousands of families, is just one example of how governing the economy comes before the language and practice of politics, rights and needs. How long and how far will this economic-political-military rhetoric go?

5. THE NECESSARY (AND INDISPENSABLE) SOCIAL MOBILISATION

All that has been mentioned makes it inevitable for so many authors' calls for “active vigilance” and a “right to resist”, or claims for “civil disobedience” formulas, or the indispensable discussion among the populace to invent new social practices or similar expressions.

Talking about a policy and a culture of resistance leads us to rethink its origins, like the culture that sought to raise definitive barriers against the “extreme evil” of post-war European social constitutionalism, but nurtured by a tradition that in fact is far older.

The current demonstrations in cities across Europe (e.g. in Spain, Portugal, Greece, Hungary, etc.), which are being described as collective expressions, taking stances, civil disobedience and similar actions, are nothing new; rather, they come from the (old) category known as “the right to resist”. We are dealing, in fact, with a tradition of profound reassessment of democracy, a constitutionalism that is continually “in progress”, and a feeling amongst some people that the repressive measures the public authorities are currently seeking to implement cannot be allowed.

The theme of resistance, which in the past was related to a “right” that could be exercised individually, has changed and broadened to the point of being understood as one more manifestation of collective action. Estévez Araújo, and particularly Roberto Gargarella (Gargarella, R. 2011), clearly stress that subjecting people

to severe deprivation is a form of tyranny, and that this can also occur within a formally democratic regime. The latter thus recognised a right to resist against extreme deprivation, a resistance that can be passive but also active, as in numerous countries (e.g. in Latin America or Africa) where changes have been promoted over the last two decades. Ultimately, resistance represents the most important sociological substantiation of human rights.

In effect, the development of sociological theory had given new substantiation to the process whereby human rights appear and are transformed — that which no longer observes the human being as an abstract and ahistoric entity (perspective of natural law and ethical theories) to perceive it according to the category or social sector to which it belongs: as an old person, a sick person, a child, a woman, a foreigner, an ethnic or religious minority, etc. This process has been called a “specification and multiplication of human rights” (cfr. Ferrari 1989). As a result, international rules and standards addressing the fundamental rights of children, women, the mentally impaired, prisoners, the elderly, etc. came into being. But would legal systems have recognised the social right to work, to housing, education and health if a worker’s movement struggling to conquer such rights had not arisen? Would women’s right to vote, first, and to abortion, later, have been recognised if a feminist movement demanding such rights had not coalesced? Would the right to conscientious objection have been recognised if there had been no anti-militarist movement fighting for such a right? What might be said about the environmental movements and calls for more protection of nature? Clearly, it is the claim-bearing social subjects who have fought for (and achieved) recognition of greater fundamental rights. And these claim-bearing social subjects are the social movements: the true social root of human rights. For this reason, to connect NGOs that are helping homeless people, social movements and the Human Rights-Based Approach is a key issue for the present and the future.

But this establishment of rights as a result of collective struggle (and not of gracious granting by the political powers that be) also shows “the other side of the coin”: when the struggle subsides, the rights can be eroded and lost. This is what has been happening in recent decades, and as a result of so-called globalisation (privatisation, deregulation, etc.), these rights have been severely curtailed without effective opposition and mobilisation coming to the rescue. As indicated by Estévez Araújo (2013), rights are worth as much as their guarantees. In other words, one’s rights involve duties for the other party. And if that other party is fundamentally represented by the state and the transnational corporations that have flagrantly violated their duties, the correlative rights, gained through struggle, are either in serious jeopardy or have been lost for the most part. Only a true “culture of resistance” can legitimately defend fundamental rights. Thus, against the structural violence we face, and in the context of a Welfare State and democratic rule of law, the resurgence of a right to resist, using the proper legal and constitutional channels of the state, to channel the search for effective legal protection of fundamental rights and to promote real and effective roadmaps to such end, is entirely legitimate. Ferrajoli (2001) accurately notes that “the idea that the right to resist is incompatible with the rule of law is a regulatory fallacy, because under the rule of law, power is linked to law and the violation of laws by public bodies are in turn punished by laws.

This idea changes and mistakes what is for what should be the effective operation of the legal system with its regulatory and ideal model". As this book rightly points out, the situation of extreme social exclusion of homeless people sometimes hampers their social mobilization. But solidarity, collective empowerment and the experiences of disobedience and struggle like those taking place with the "City for All" movement in Hungary, or the "Plataforma de Afectados por las Hipotecas" in Spain, shows that Lhering's "fight for the right" is alive and well.

In conclusion, the issue dealt with in this work, no less than the problem of homelessness, should be understood not only as an acute problem of the present, which the author describes brilliantly, but also as a measure of hope, providing us with an action approach when confronted with the violation of human rights that we witness every day in our streets, or that which is concealed from us. The considerations made in this epilogue seek to at least contextualise one of the great dramas of (not only) contemporary social harm from a broader theoretical political perspective.

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Barcelona, May 2013



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MEAN STREETS

A REPORT ON THE CRIMINALISATION
OF HOMELESSNESS IN EUROPE

Criminalising and penalising homeless people for carrying out life-sustaining activities in public because there is no where to go is a problem across the EU. Policies and measures, be they at local, regional or national level, that impose criminal or administrative penalties on homeless people is counterproductive public policy and often violates human rights.

Housing Rights Watch and FEANTSA have published this report to draw attention to this issue. This report brings together articles from academics, activists, lawyers and NGOs on the topic of human rights and penalisation. Divided into three main sections, the report provides an important theoretical and historical background, before highlighting examples of penalisation across the EU, and finally suggesting measures and examples on how to redress this dangerous trend.

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