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Public places and the criminalisation of homelessness from a human rights perspective

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Various concepts of homelessness are used simultaneously in Europe, and they influence the design of the public policies that aim to eradicate it. Various European countries are developing comprehensive national strategies for homeless people, while coercive, repressive approaches against some types of homelessness proliferate. The penalisation of homelessness is a process that involves the criminalisation of homeless people's everyday subsistence activities in public places; their access to the temporary accommodation system and exercising their right to housing is hampered or they are expelled from or concealed in certain areas of the city, and if they are foreigners, they are even arrested or deported to their countries of origin. This article argues that we are faced with the neoliberal approach to homelessness, based more on criminalisation than on satisfying these people's needs from a perspective of human rights.

1. Homeless people and public places

Public places are an essential part of homeless people's daily lives, especially for people who spend their nights on the street or in temporary accommodation and therefore have to spend much of their time in those places. People need an adequate, safe and stable physical space to develop and carry out our basic functions, such as sleeping, washing and socialising. In western societies, housing plays an essential role in guaranteeing human development, and therefore the right to housing is fundamental for exercising other rights and satisfying basic needs. Not having access to decent housing, or being able to keep it, forces homeless people to use public places as a way of satisfying their needs.

Since the beginning of the 21st century in Europe, at both local and national levels, regulations have been passed in order to regulate and penalise behaviour such as begging, sleeping and washing in public places. There has consequently been a tendency to criminalise activities that help homeless people survive on the street.

From a historical perspective, the European Observatory on Homelessness (EOH) affirms that these coercive measures are nothing new; but rather that there is a weak regulatory trend for public places (O'Sullivan, 2007) that has varied in its structure and justifications in accordance with every regulatory cycle (Baker, 2009). For example, in the Middle Ages, "alms" was considered to

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be a means of saving "powerful people's" souls and balancing out their sins (Geremek, 1989), while in modern times, the criminalisation of begging and vagrancy has become established, because poverty is no longer a divine decision, but depends on an individual's morality and efforts to find work (Morell, 2002). The ideas expounded by Luther in 1520 laid the foundations for the model of assistance available at that time, such as the abolition of begging and helping only deserving poor people (those not fit for work) from the city concerned ("no strange beggars"), provided that they were not helped more than necessary, but "just enough so they do not die of hunger or cold". Today, we know that not all homeless people are beggars and that not all beggars are homeless (Cabrera *et al.*, 2003). However, the regulation of public places penalises and criminalises begging, with the justification of maintaining public order and avoiding antisocial behaviour (Baker, 2009).

The expansion of neo-liberal thinking since the 1970s and 1980s began a new phase for regulations concerning public places, which, due to their gradual privatisation and conversion into consumer environments, would play an essential role in economic growth and the accumulation of private capital, making it necessary to increase the vigilance and control of excluded populations that have a lower capacity as consumers (Brenner *et al.*, 2009).

The EOH produced a report on the conflicts and use of public places by homeless people (Meert *et al.*, 2006), which affirmed that public places are not uniform areas, but that, in accordance with the categories proposed by Carmona (2003), they could be differentiated into external public places (squares, parks, streets, etc.), internal public places (public institutions such as libraries and museums) and quasi-public places, i.e. places that are legally private, but which everyone has the right to enter because they are public domain (e.g. shopping centres, airports and train stations). The report stated that governance in Europe, under the influence of neoliberal thinking, has given rise to the privatisation of public places and an increase in quasi-public places which has had a major impact on the lives and rights of homeless people, as their ability to access or stay in these places is conflictive and a threat to the development of economic activities.

For that reason, the most common conflict situation for homeless people living on the street is with private and public security forces (Meert *et al.*, 2006). One of the examples cited in the EOH report is the impact of remodelling railway lines in Germany and Italy. Railway stations had traditionally been places that provided homeless people with opportunities for subsistence: people were able to beg, wash in toilet facilities free of charge, get food, rest and sleep on benches, leave their belongings in lockers and socialise with passengers and railway employees. However, as Busch-Geertsema explains (2006), in Germany, part of the Deutsche Bahn modernisation programme consisted of turning the railways into a more profitable business (for later privatisation). The redevelopment focused on central train stations, making them shopping centres owned by big companies or global-brand franchises. The 3-S-Programme (Service, Sicherheit und Sauberkeit, i.e. service, security and cleaning) was the fundamental Deutsche Bahn strategy for improving the image of its stations. The regulations imposed on railway stations prohibited begging, sorting through rubbish, excessive consumption of alcohol and sitting or lying on the ground, stairways or at station entrances. Tosi and Petrillo (2006) reveal similar measures in the case of Italy, while adding new motivations based on security measures against international terrorism, as a consequence of the attacks in New York (2001), Madrid (2004) and London (2005).

The main conclusion arising from the various investigations carried out by EOH members on the criminalisation of homeless people in public places (Meert *et al.*, 2006; Tosi, 2007; and Doherty *et al.*, 2008) found that homeless people were not the explicit targets of the regulations for controlling these places, but that they were disproportionally affected by them, because they depended on these places for their everyday activities. Conversely, in most European countries, immigrants and especially the Gypsy or Roma community, are usually the target population for the discursive mechanisms of criminalisation and coercive policies against poverty (Tosi, 2007).

2. Trends in European criminal policies and penal system

In order to understand the relationships between public places and homeless people, policies concerning crime and the eradication of homelessness must be analysed together. The process of regulating the use of public places under neoliberalism involves an increasing use of the penal system as an instrument for managing the social problems caused by processes of deregulation, privatisation and cuts to the social welfare system (Wacquant, 2003 and 2009). Since the beginning of the 21st century, academics, social movements and human-rights activists in the United States have denounced an increase in punitive responses to homelessness. The process of regulation and privatisation of public-place uses makes it increasingly difficult to survive on the street without contravening regulations, and as a consequence, there is now a disproportionately high number of homeless people in the penal system (Blower *et al.*, 2012). The origins of this trend are to be found in the development of the Criminology of Intolerance (Young, 1999), which synthesises criminal policies based on zero tolerance and the persecution of petty offences. By-laws for the regulation of public places, civic behaviour and peaceful coexistence were drafted, detailing the range of actions that would become punishable, based on the assumption that if petty crimes are not ruthlessly punished, this will result in more serious crimes. Punishments would be increasingly severe for reoffenders.

There is an academic debate concerning the importation of American criminal policies to a European context and their impact on intervention policies for homeless people. Some authors defend the existence of a process of Americanisation of homelessness and its policies, in all post-industrial societies (Von Mahs, 2011). Other authors believe that while there is no doubt about the restrictions on homeless people using public places in all European countries, the scope and depth of the regulatory process for public places is very diverse (Tosi *et al.*, 2006), responding to the particular historical motivations in each European Union country and their intervention policies for people living in poverty (Doherty *et al.*, 2008). Furthermore, Iñaki Rivera (2004) argues that in Europe, since the 1960s and as a reaction to the activities of armed groups, criminal policy is based on penal exceptionality, which justifies the creation of maximum-security prisons, "special status" for "special" prisoners, isolation practices in prisons, the dispersion of groups of prisoners and the creation of special data-base teams. Over time, penal exceptionality (based on its application only in cases of terrorism and for the duration of the phenomenon) has been maintained and extended to other social problems and legal areas (Aranda *et al.*, 2005).

Criminology of intolerance and penal exceptionality have both had a direct impact on the transformation of penal systems in western societies, which, in spite of differences in national contexts, have a range of common characteristics (Del Rosal, 2009). According to Manuel Cancio Meliá (2006), penal systems have evolved along three interconnected lines: symbolic criminal law, new punitiveness and criminal law for the enemy, although the latter is a combination of the previous two. Symbolic criminal law involves the adoption of regulations in order to achieve symbolic effects, although in practice, applying them is unrealistic or difficult to achieve, which is why it is shaped by messages from certain political players, who seek to reassure the population and transmit a sensation of security and control (Silva, 2001). However, forcefulness and severity are introduced into the regulations, leading to a resurgence in punitiveness and producing a perverse effect, as regulations that should in principle be symbolic, or which were introduced with that idea in mind, and for short-term effect, end up having real penal consequences for people (Cancio, 2006). This is the case with by-laws concerning civic behaviour and coexistence. They penalise activities like sleeping in public places and begging, which are related to situations of structural poverty. If homeless people living on the street beg and are then penalised, it does not matter if they cannot pay the fine, because the objective is the message of security and control that is transmitted to society. In addition to classifying a survival activity as a crime, in order to justify the new punitiveness, bellicose or violent rhetoric is used to demand and justify tough punishments; poor people practice "aggressive begging" and people who sort through rubbish containers looking for food or recyclable materials are "organised mafias". This alliance between symbolic criminal law and new punitiveness gives rise to criminal law for the enemy (Cancio, 2006).

In the opinion of Jakobs (2006), criminal law for the enemy is based on the distinction between citizens and the enemy (a person and a non-person). According to the author, the condition of being a person is a regulatory social attribute. Human beings, in a physical-psychological-biological sense, are not people *per se*; they are only people while society attributes that state to them. According to Jakobs, the social attribution of this condition, and above all, its preservation, depends on an individual's behaviour in a social context. If this behaviour is generally in line with behavioural models that are considered to be adequate for social acceptance, then the individual retains the condition of person, without any reservations. However, in cases where an individual's real behaviour transgresses these models, either through choice or because of an individual's inability to behave in any other way, they lose their condition of person and are reduced to non-persons. In that sense, according to Jacobs' theory, only people have rights and legal guarantees, but if these individuals represent a "danger", i.e. if they are a source of risk for the survival of the established social order, they must be subjected to the criminal law for the enemy. Therefore Jakobs (2006) defends the existence of a dual penal system: one being criminal law for citizens and the other criminal law for the enemy.

As Manuel Cancio Meliá (2006) has pointed out, criminal law for the enemy is characterised by three features: firstly, pre-emptive punitiveness, or in other words, it is possible to penalise the risk of committing a crime before it is committed; secondly, a disproportionately severe punishment, and lastly, certain procedural guarantees are played down or even suppressed. The aim of this legislation is therefore to exclude rather than prevent, and in consequence, it is not criminal law based on acts, but on risk groups and the authors of those actions.

All of the above leads us to affirm that criminal law for the enemy is not the result of an improvised response to an external aggression, such as the terrorist attacks of 11 September, nor is it a temporary measure, but the result of a new evolutionary stage for legal and criminal-law systems.

3. Criminalising homelessness

The United Nations Special Rapporteur for extreme poverty and human rights produced a report denouncing that the increasing control of people in a situation of poverty was hindering the exercising of human rights. The Rapporteur used the expression *penalisation measures* to refer to the administrative policies, laws and regulations used to penalise, segregate and control the people living in a situation of poverty. The Rapporteur distinguished between direct penalisation measures, such as the trial and imprisonment of these people, and indirect penalisation measures, aimed at excessively regulating and controlling various aspects of their lives and self-sufficiency (Sepúlveda, 2011). The report “Modes and Patterns of Social Control: Implications for Human Rights Policy” (ICHRP, 2010), was produced with the support of work carried out by the International Council on Human Rights Policy. It found that contemporary public and private control measures, implemented through administrative policies, laws and regulations in the fields of urban planning, social care, health, security and justice were disproportionately affecting the rights of people living in poverty.

In 2013, the book *Mean Streets* (Fernàndez *et al.*, 2013) was published, which develops the framework for the criminalisation of poverty in specific homelessness situations in Europe. The report found an increasing tendency to criminalise everyday survival activities undertaken by homeless people in public places; an increase in obstacles for gaining access to social housing for certain types of homelessness and evidence of measures to segregate homeless people in specific areas of cities, as well as the imprisonment, arrest or expulsion of homeless people to their home countries if they are foreigners.

In regard to the criminalisation of activities undertaken by homeless people in order to survive, it highlights the case of Hungary. In 2010, the Hungarian government drafted a strategy to reduce the number of homeless people living in the street, based on a methodology known as *positive zero tolerance*. That same year, Parliament approved a law that authorised municipalities to penalise any use of public places that was not listed in that law. Budapest adopted a city-wide by-

law that prohibited the use of public places as a habitual residence or as a storage space for belongings, actions that carried a fine of €165. In 2012, this by-law became a state-wide law which established that urban public places were not adequate for use as a habitual residence and that this could mean a fine of up to €517, and, in the case of non-payment, being sent to prison as an alternative punishment. If the offence was repeated a third time, it could mean sixty days in prison. The Constitutional Court declared this law to be unconstitutional, as it was a violation of human dignity, but the Government responded by including a specific provision in the Hungarian Constitution that allowed Parliament or a local by-law to declare permanent residency in a specific public area illegal, with the aim of protecting public order, public health and cultural values. This has automatically been interpreted as a ban on homeless people having access to areas that are World Heritage Sites. According to Feantsa (European Federation of National Organisations Working with the Homeless), the first data obtained on this process showed that 2,202 homeless people were detected by the police, 1,037 of them were fined and 24 ended up with prison sentences[3].

With regard to obstacles for gaining access to social housing or the temporary accommodation network in order to satisfy residential needs, *Mean Streets* (Fernàndez, 2013) states that in the UK, for example, there was a reduction of over 70% in the number of homeless people legally applying for accommodation, due to the introduction of the "Housing Options" approach. This process was based on applicants having to go to their local administrations for a formal interview, in order to determine what their housing problems entailed. Depending on the problem detected, they were offered advice on the various means and resources available to them, as well as information on family mediation, the provision of guarantees for rental deposits and resources available for cases involving a risk of gender violence. There were criticisms in some studies that the interviews were geared to prevent homeless people completing a formal application for inclusion in the legislation on homelessness, in order to reduce the statistics for homelessness in the UK (Fernàndez, 2015).

Lastly, the arrest and expulsion of homeless migrants and the Roma community is a reality, and it occurs in various European countries. For example, in 2010, the French government decided to evacuate over three hundred unofficial Roma community and itinerant people's (*gens du voyage*) camps, in order to deport them to Hungary and Romania (Fernàndez, 2011). The reaction of the French president at that time, Nicolas Sarkozy, came after various days of rioting in Saint-Aignan and Grenoble, caused by the killing of two young people at the hands of the French police. From the outset, the French government's position was to state that the young people in question were "illegal" and "criminal", and that they were illegally occupying a public place. However, due to prior collective claims made by Feantsa (39/2006) and the European Roma Rights Centre (51/2008) against France, it was revealed that the legislation introduced in France in 2000, which required municipalities of over five thousand people to provide parking places for itinerant communities, had only been implemented in a minority of cases. The French government recognised the delay in this policy's implementation and estimated a deficit of around 41,800 places. For that reason, the Council of Europe's European Committee of Social Rights estimated that the delay in implementing these measures exposed itinerant communities to an irregular situation and that at no time were they offered alternative accommodation for their members, which included legal Romanian migrant workers. They therefore condemned the mass-deportation policies.

4. Criminalising homelessness in Spain

This section develops the conceptual framework for criminalising homelessness in Spain. In order to do this, we will analyse the main measures for criminalising homelessness, the difficulties faced by homeless people in gaining access to social housing and the measures taken for concealing some types of homelessness in Spain. Due to the wide-ranging nature of the subject matter and

[3] "Feantsa and its Hungarian members concerned by Hungarian Government Stance on Criminalising Homeless People", Press Release, 6 May 2013. http://www.feantsa.org/en/press-release/2013/05/06/press-release-feantsa-and-its-hungarian-members-concerned-by-hungarian-government-stance-on-criminalising-homeless-people?bcParent=27

the specific focus of this publication, we will place special emphasis on the aspects of criminalising homelessness.

4.1. Criminalising homelessness

As a result of the collaboration between the Caritas Española Advocacy Group and the Pontificia Comillas University's Icade Legal Clinic (2015-16 academic year), a joint study was carried out, entitled: "Criminalisation of poverty in administrative law for the enemy: analysis of municipal by-laws concerning coexistence". This study examined Organic Law 4/2015, of 30 March, concerning the protection of public safety (LOPSC), better known as the *ley mordaza* [gagging law], and the standard by-law of the Spanish Federation of Municipalities and Provinces (FEMP). An analysis was also carried out in fifteen Spanish cities on the current situation of municipal by-laws that are based on the criminalisation of poverty and their trends over the last ten years.

In this subsection, we will focus on the specific areas affecting the criminalisation of homelessness, i.e. those everyday activities that homeless people living on the street are forced to undertake in order to survive, and which are penalised by the LOPSC and municipal by-laws.

4.1.1 The gagging law's impact on the criminalisation of homelessness

Since the first draft of the LOPSC, the law has received a number of criticisms from human rights defenders, third sector associations, social movements and even the United Nations. The law is considered to be unnecessary and its adoption does not respond to real social demands. The motives alleged by the Government to justify the need for the law's inclusion in Spanish legislation were of questionable consistency. For example, the alleged antiquity of the regulation it replaces, which dates back to 1992, does not seem to be a convincing argument, given the age of many legal regulations currently in force in our country (good examples being the Civil Code of 1889, the Code of Criminal Procedure of 1882 and the Obligatory Expropriation Act of 1954). Basing the need for a law such as the LOPSC on social changes that have occurred and the new ways of endangering public safety and order in public places also seems misguided, as its enforcement has already shown; it is difficult to find evidence that supports the legislator's position, even in the regulation itself, whose text, and in particular its stated motives, lack any explicit mention of these realities, which are in theory the *raison d'être* of this law.

Apart from the law's suitability, now that it has entered into force, the main criticisms are based on the infringement of fundamental legal principles, especially concerning aspects of the legislative system for penalisation, such as legal protection and proportionality. The law contains an abundance of indeterminate legal concepts, which taken with the arbitrariness which this generates and the preponderance of the subjectivity shown by the authorities in regard to penalising certain activities and in the imposition of the corresponding fines, leads to a significant legal insecurity which directly affects the general public and, especially, people who are living in poverty. The penalties associated with some activities are completely exorbitant and disproportionate. The framework set out in the regulation for imposing fines (the typical penalty in administrative legislation and also, therefore, in the LOPSC) range from €100 to €600 for minor offences, from €601 to €30,000 for serious offences and from €30,001 to €600,000 for very serious offences. For example, the following scenarios are considered as minor offences: occupation of the public highway with an offence that is prescribed by law; the unauthorised occupation of any property, dwelling or building, or staying in them against the will of the owner, tenant or the holder of any other deed pertaining to it, where they do not constitute a criminal offence; or the damage to or wear on moveable or immoveable property pertaining to public use or service. Furthermore, the latter does not require any action or intention and introduces an indeterminate, subjective legal concept: 'wear'. Furthermore, the illegal possession or consumption of drugs, narcotics and psychotropic substances in public places, streets, establishments and collective transport is considered to be a serious offence, even where these substances are not used for dealing, as is leaving the implements and other items used for taking the substances in those places.
Another major criticism of this law, regarding the parallel reform of the Penal Code, is the fact that minor offences have been eliminated from the Penal Code and most of them have been converted

into administrative offences, thereby depriving the alleged offenders of immediate and effective legal protection, the principle of presumption of innocence and other guarantees associated with the penal process. This means that these administrative infractions can result in a penalty that is notably more onerous than those that were previously associated with committing minor criminal offences.

In addition, one final aspect of the LOPSC worth mentioning is the provision of a special regime for Ceuta and Melilla, stipulated in the first final provision of the LOPSC, which is especially relevant regarding the question of immigration, borders, refugees and the return of immigrants. This special regime allows the rejection and immediate expulsion of illegal immigrants, without observing any of the guarantees associated by law with this type of procedure, in violation of principles of international law. In other words, summary expulsions are authorised (de facto, without administrative procedures). We will look at the consequences in section 4.3.

4.1.2 The FEMP's standard by-law and its local implementation4

The standard public safety and coexistence by-law proposed by the Spanish Federation of Municipalities and Provinces (FEMP) aims to preserve public areas as places for meeting, coexisting and civic behaviour, where everyone is free to indulge in freedom of movement, leisure and recreation, with complete respect for the dignity and rights of others and the plurality of expressions and ways of life. The importance of this by-law lies in the fact that it constitutes a guideline that will be followed by a majority of city and town councils, as it forms a basis for developing their own by-laws adapted to each municipality's specific circumstances and characteristics.

- Sleeping and camping

Article 84 of the FEMP's standard by-law stipulates regulations for behaviour and prohibits the improper use of public places. These include the explicit prohibition of sleeping in public places during the day or at night or camping in streets and public places. This latter action includes people permanently moving into these places, as well as using any kind of furniture or transport (tents, vehicles, camper vans, etc.), unless they have specific authorisation. Both activities are considered to be minor offences and are penalised with a fine of up to €500. In Bilbao and Barcelona, by-laws establish that sleeping during the day or night in public places and streets is not permitted (Art. 24.2.b OMB and Art. 58.2.a OMB, respectively). In Barcelona, if cases involve people at risk of social exclusion, this is taken into account and, where necessary, municipal social services accompany these people to the appropriate municipal establishment or service, with the aim of helping or supporting them as much as possible. In these cases, the established fine is not imposed (Art. 60.2 OMB). In Badajoz, camping and outdoor overnight stays are prohibited, as well as group camps and camping in the city's public and rural places (Art. 25.2 of the City Police by-law). Málaga prohibits camps and camping on the beach (Art. 10 of the by-law for beaches). In Madrid, sleeping in a vehicle near an area with a street market is considered to be a minor offence (Art. 42.1.c of the municipal by-law regulating street selling). In Tarragona, free camping is also prohibited throughout the municipality, while the use of a vehicle as a living space is also considered to be unauthorised camping and as such, it is also prohibited throughout the municipal territory (Art. 85.2 and 85.3 OMT). In Zaragoza and Valencia, it is established that: "With the exception of places especially adapted for that purpose, camping, erecting tents or vehicles used as living spaces, or becoming settled for achieving any of these ends will not be allowed in green areas nor in any street or public place, whatever the type of permanence (Art. 8.h of the municipal by-law concerning the use of green areas in Zaragoza and Art. 32.f of the municipal by-law for Valencia's parks and gardens).

The fines vary considerably according to the province; with the exception of Valencia, all the other by-laws consider this to be a minor offence. For example, in Bilbao it is a minor offence, with fines

[4] http://www.fempclm.es/Ordenanza-tipo-de-Seguridad-y-Convivencia-Ciudadana_es_288_827_0_318.html (January 2018)

of up to €750, and in Barcelona, of up to €500. In Badajoz, it is a minor offence, carrying a fine of between €200 and €750. In Madrid, *staying overnight in a vehicle* is considered to be a minor offence, with a fine of up to €150, as it is in Zaragoza (fines of between €50 and €250) and Tarragona (between €50 and €750). However, it is considered to be a serious offence in Valencia, with a fine totalling 50% of the legal limit.

- Sitting, reclining or lying down on public furniture

Article 88.4 of the FEMP's standard by-law establishes the prohibition of using benches for any purpose other than their proper use, and it uses a subjective, indeterminate concept, so that reclining or lying on a bench can be considered as an administrative offence if it is thought this is contrary to its proper use.

None of the cities explicitly penalise sitting, reclining or lying on public furniture. However, the act of lying on a bench for the night may be penalised, because most by-laws prohibit any use of public furniture that is contrary to its proper use. The problem is that in many by-laws, the proper use of a particular asset, and what behaviour is contrary to that, are not specified. This gives rise to legal insecurity and may lead to a person being penalised for lying under an awning at night.

Cities that prohibit the use of public benches or seats for any purpose other than their proper use include Barcelona (Art. 58.2.b OMB), Badajoz (Art. 38 of the municipal by-law concerning street cleaning), Bilbao (Art. 24.2.c), Las Palmas (Art. 9 and 10 of the by-law concerning coexistence,), Santander (Art. 2 and 5) and Seville (Art. 11 of the by-law concerning public trees, parks and gardens). Practically all the by-laws studied consider the improper use of public benches as a minor offence.

- Use of parks, gardens and green areas

Article 91 of the FEMP's standard by-law states very briefly that the signposting and opening hours of parks and gardens must be respected, as well as any indications formulated by local police or personnel from the services concerned. This means that anyone who enters or is in a park outside the indicated opening times, with the intention, for example, of sleeping there, may be penalised. All the infringements listed in this article are considered as minor offences. For example, this is the case in San Sebastián (Art. 14.3 OMSS), which specifies: "It is also prohibited to stay inside parks that are subject to regular opening times after they have closed".

- Sorting through, handling and collecting rubbish Throwing away rubbish

Article 20.2 of the standard by-law penalises throwing away or depositing waste, scraps or any kind of rubbish and rubble onto public streets and places. However, article 28.13 adds that it is also prohibited to sort through, rummage and extract items deposited in litter bins and containers on public streets. Both activities are considered to be minor offences and carry a fine of up to €750 (Art. 162).

All the cities studied impose a fine on throwing away rubbish on city streets, either in the generic by-law concerning coexistence and the use of public places, or in a specific by-law concerning street cleaning (or even in both of them). Therefore, all the by-laws prohibit throwing away or depositing all kinds of waste and rubbish in city streets and places. Some cities specify the prohibited activities (throwing away chewing gum, cigarette ends, paper, drink containers, etc.), including Tarragona (Art. 122), Valladolid (Art. 14), San Sebastián (Art. 12) and Las Palmas (Art. 37). Other cities achieve this through specific by-laws, such as Badajoz's municipal by-law on street cleaning (Art. 31) and Bilbao's municipal by-law on street cleaning (Art. 10).

However, sorting through or extracting rubbish is hardly ever penalised, with the exception, for example, of Valencia's municipal by-law on street cleaning, which contains a specific article (Art. 29) that penalises sorting through and taking away any waste materials deposited in containers or other places designated as collection points for municipal services.

Penalties can vary according to the degree of intention, reoffending or reiteration, any damage caused and other circumstances. In general, the behaviour of throwing away or dumping rubbish or waste is classified as a minor offence in all cities.

- Begging

Article 59 of FEMP's standard by-law prohibits active begging, i.e. behaviour that, under the appearance of begging or organised activities, involve coercive attitudes or harassment, or intentionally hamper and impede the free transit of city residents in public places. It also specifies that offering any kind of goods or services to people who are inside public or private vehicles will be penalised. This is classified as a minor offence. Cleaning the windscreens of cars waiting at traffic lights or in city streets is considered to be a serious offence. Begging that directly or indirectly involves minors or disabled people is considered to be a very serious offence. Furthermore, it is important to underline that in the case of active begging (without minors or disabled people), it is expressly established that the fine may be substituted by individualised care sessions or courses concerning the possibility of social care, etc.

Approximately half of the cities studied penalise begging, but only when done in an active way. Barcelona (Art. 35) punishes active begging (when it impedes the free transit of city residents) and begging that includes minors or disabled people. In San Sebastián, begging is penalised in a similar fashion (Art. 16). In the cases of Barcelona (Art.35.5) and Granada (Art. 50.5), it is established that, when faced with other types of non-active begging that have a social origin, the authority's officers will contact social services in order to gather information concerning the most appropriate municipal resources for attending the people in that situation. There are a number of cities that penalise begging that is coercive, insistent, aggressive, etc. in a similar fashion. These include Málaga (Art. 36), Santander (Art. 17) and Tarragona (Art. 125).

It is worth mentioning the case of Valladolid, where in 2013, the High Court of Justice in Castilla and León ruled Article 15.1 of the by-law, which penalised any kind of begging in public streets and places, null and void. The sentence repealed the generic prohibition on begging because it violated people's right to freedom, although it clarifies that it is legal to penalise situations of coercion, moral conflict, psychological violence or the nuisance caused to city residents by people begging. The problem lies more in the drafting of this article, as it refers to any kind of begging.

In most of these by-laws, begging is considered to be a minor offence. However, begging is a serious offence when it involves using minors or disabled people, and in these cases, significant penalties are imposed.

The provisions made by certain cities are of special interest. These include Tarragona, where by-laws establish that, in cases of begging (without using minors or disabled people), law enforcement officers will inform the people that this behaviour is prohibited and the corresponding penalty will only be imposed if they continue begging (Art. 127).

- Washing or bathing in public places

Article 93 of FEMP's standard by-law prohibits washing, bathing or cleaning objects of any kind in public fountains or ponds. Furthermore, Article 84 specifies the prohibition on washing clothes in fountains, ponds, showers or similar facilities. Both activities are considered to be minor offences and carry a fine of up to €500 (Art. 162).

Article 67.1 prohibits the carrying out of physical needs, such as defecating, urinating or spitting in any public places. This is considered to be a minor offence, carrying a fine of up to €300. However, if these actions occur in places that are crowded or frequented by minors, or in food markets, monuments or listed or protected buildings, or in the area around them, it is considered to be a serious offence, with fines of between €750 and €1,500.

All the cities include similar measures in their by-laws to those in the standard by-law, either prohibiting the satisfaction of physiological needs (defecating or urinating) in public places, such as in Tarragona (Art. 122.1.b), or the prohibition on washing, bathing or washing clothes in fountains, ponds and similar features, as in Barcelona (Art. 58.2.c and 58.2.d) and Valladolid (Art. 12). The offences are considered to be minor or serious depending on the relevance of the place, the number of people around and the presence of minors.

- Consumption of narcotics and alcoholic beverages

The FEMP's standard by-law does not refer to the consumption of food and drink in the street in general, although it does regulate the sale of food and drink on the street. All the cities have followed this line, with the exception of Valencia, where Article 26 of the by-law concerning parks and gardens prohibits picnics, with the aim of favouring the conservation and maintenance of garden areas. It also prohibits eating on benches in such a way that may leave stains on the furniture.

By contrast, the standard by-law treats the consumption of alcoholic beverages and narcotics in depth. The general rule is set out in Article 70, which prohibits the consumption of alcoholic beverages and other drugs in public places, on the basis of protecting public health, respecting the environment or the right of local residents to peace and quiet.

After analysing the various prohibited activities and their fines in various cities in Spain, it is important to note that most by-laws seek a balance between an inclusive discourse (based on the importance of city residents) and a repressive one (aimed at eradicating "anti-social" behaviour), as well as a more "aesthetic" final objective as opposed to seeking the common good for *all* city residents. Some measures that are more symbolic than effective have been identified, along with a resurgence of punitiveness. One of the fundamental problems observed is the abundance of indeterminate legal concepts, which mean that the penalisation, or not, for certain behaviour depends more on subjective criteria (of the authorities) than objective ones (the facts, what happened). However, it must be stated that the penalties have a clear, defined and quantified framework. Lastly, one positive aspect that is observed in some by-laws, although in a minority, is that they apply cohesive models of society and coexistence and refer to vulnerable or excluded groups, in regard to the municipality's function of social protection.

4.2. Obstacles for access to and realisation of the right to housing

In Spain, the various types of homelessness have traditionally been dealt with by social services. There has always been a well-defined separation between the areas of housing and social services. The former responded to structural problems in housing and the latter responded to the problems of people. One area for the container and the other for the contents. This separation is present in all administrative levels, the state, autonomous communities and municipalities, except for a handful of cases. The concept of homelessness as a problem that should be dealt with by social services has become a question of progressive steps and therefore, homeless people's access to social housing has not been seen as a major, sustainable solution. The lack of administrative coordination and insufficient budgets in both areas has made it difficult to progress through temporary accommodation resources that then lead to people accessing independent, permanent social housing. The main obstacles facing homeless people in their bid to gain access to social housing concern the structure, the model and the concept, in terms of both homelessness and the importance of social housing, as public administrations should facilitate people's access to, support their enjoyment of and defend their right to social housing (Fernàndez, 2015). We would also like to mention some specific obstacles:

- Size of the social housing stock: the structural lack of social housing available in Spain is a problem for the population and, in particular, the main obstacle for the most vulnerable groups, such as homeless people. This chronic lack of housing makes rehousing people due to the loss of their home and providing homeless people with an independent home more difficult or impossible. Furthermore the lack of social housing and insufficient financial aid for housing shifts the

accommodation problem to social services, which take on the problem of resolving situations that go beyond strict cases of homelessness, such as allocating financial aid to pay deposits or other costs that facilitate access to a home in the private rental market.

- Prioritising among vulnerable groups: the lack of social housing and the diverse nature of new accommodation problems lead to the administration being unable to adequately differentiate between situations of sudden residential emergencies and chronic urgent residential problems. Nowadays, a large percentage of social housing is adjudicated directly by municipalities or autonomous communities to meet social-emergency situations, such as the loss of a home through non-payment of rent or mortgage foreclosure. By contrast, social flats for people in a situation of chronic homelessness are scarce and are usually part of specific programmes or pilot schemes. The creation of waiting lists for urgent and emergency situations generates technical, political and social debates on the priority of some vulnerable groups over others when it comes to social housing. This discussion extends to the long waiting lists for members of the general public who are registered for the adjudication procedures of the Social Housing Applicants Register. In certain cases, the lack of social housing leads to problems of "competition" between vulnerable groups and political exploitation.

- Unsuited and contradictory allocation criteria: the criteria used for allocation determine people's eligibility for gaining access to social housing. When the social housing stock is small, these criteria tend to be restrictive. The criteria of having a minimum income and having been registered in the municipality for a certain period of time (months or years) may determine the de facto exclusion from access to social housing for a large number of homeless people Access to social housing should be targeted at the population that cannot access the housing market, but above all, it should focus on residential figures that allow people with little or no income access to social housing, including homeless people, who at the very most, receive minimum benefits. In regard to registration, some municipalities make this easy, even where the person does not have a home, but this process is not always made available. In certain cases, not having help or access to support services when carrying out administrative procedures for homeless people can become an obstacle. The existence of new forms of homelessness and residential exclusion has made it necessary to revise adjudication regulations for social housing, to take into account evictions, mortgage foreclosures and the occupation of dwellings. For example, a common requirement for being adjudicated rented social housing is not being the owner of a residential property. However, in the case of mortgage foreclosures, in order to take preventive action, rehousing must be facilitated before the person legally ceases to be a property owner. Illegal occupations have led to the Administration facing major contradictions when adjudicating the affected person social housing or not. The families or people who have occupied public or private housing, due to need or the Administration’s inability to provide immediate alternative housing, are normally excluded from access to social housing, because, according to the Administration itself, it would be sending the wrong message to society; that of fostering illegal occupation. In any case, their access to social housing, if it occurs, will be determined by priorities provided by reports from municipal social services or a social organisation.

- Administrative coordination: in many cases there is no (or insufficient) coordination among state, autonomic and municipal administrations when defining the concepts of urgent and emergency situations or for agreeing on criteria, procedures and political responses concerning those situations, which would clarify the processes for allocating social housing.

4.3. Concealment and expulsion

In Europe, there is a history of making a dangerous (and false) association between immigration and crime (Capdevila *et al.*, 2010). European governments have always made immigration the responsibility of their interior ministers. The TREVI Group, created in Europe in 1976 as a framework for inter-governmental cooperation, began working on a series of problems that affected all countries. TREVI is an acronym for the treatment of Terrorism, Radicalism, Extremism, Violence and Immigration (Pajares, 1999). Furthermore, Article K1 of the Maastricht Treaty deals with the

problems of immigration and crime together. In 2005, Austria, Belgium, France, Germany, Luxembourg, Netherlands and Spain signed the Prüm Convention, which aimed to introduce specific regulations concerning illegal immigration, as well as the provision of data such as DNA and digital fingerprints for the control and identification of immigrants (Freixes, 2008).

In June 2008, the European Parliament approved Directive 2008/115/EC, known as the *return directive*, which consolidated the regression of human rights taking place in the European Union. Following Directive 2001/40/EC, legislation has focused on illegal migration and the expulsion of migrants. Since its approval, the undermining of rights and the exclusion and criminalisation of foreign immigrants has become standard throughout Europe (Silveira, 2011). Administrative measures for controlling and repressing illegal immigration have turned European countries into expelling states, i.e. administrative machines that intern and expel people, where foreigners are treated as lesser people, or even as non-persons (Silveira, 2009). Detention or internment centres for foreigners (CIE) have become a common instrument in state policies aimed at this group of people, using special and administrative criminal legislation to control and repress migrants.

On 1 April 2015, the first additional provision of the new Organic Law 4/2015, of 30 March, concerning the protection of public safety (referring to the so-called special regime for Ceuta and Melilla and summary expulsions at the border) came into force. This regulation has already begun to have an impact.

According the 2016 annual report from the Jesuit Migrant Service-Spain (SJM-E), 7,597 people were interned at the various CIEs in Spain. Of those internees, 2,110 were expelled and 95 were returned. In other words, 29% of the people interned in the CIE detention centres were forcibly repatriated, expelled. It can therefore be affirmed that 71% of the detained migrants have not been deported. Two out of every three people interned in the CIE detention centres are deprived of their liberty, without being finally expelled. Furthermore, the SJM-E claims that, in 2016, a total of 51 minors were interned in CIE detention centres.

The explanation offered by the organisation is based on arrests for illegal residence. In 2016, 35,882 people were arrested in Spain for not having their papers in order, while 9,241 people were forcibly repatriated (5,051 people through expulsion orders and 4,190 people were returned), which is 26% of the total number of people detained. Therefore, a large number of people were detained on the street after being asked for identification documents by state police and security forces. It is especially serious that these detentions occur on the street or during operations or raids aimed at identifying migrants. This means the detentions are totally random, without any prior criminal complaint being filed or crime being committed. Of the people the SJM-E visited in the CIE detention centres, 26% had been residents in Spain for over fifteen years.

This is obviously due to the application of criminal law for the enemy on Europe's population of foreigners and migrants. However, can we state that there is a tendency to implement criminal law for the enemy among homeless people?

An example will help us to better understand the situation. In 2011, in Bilbao (Basque Country), local police and the National Police's Foreigners Unit entered an abandoned mortuary where 63 homeless people were sleeping. Forty-four of them did not have their papers in order, and they were arrested by the Foreigners Unit, who opened procedures against them for being in the country illegally[5]. Those that did not have a police record were set free until the process for their expulsion orders was completed; in the other cases, the people were interned in a detention centre for later expulsion. The police intervention was due to complaints from local residents, who reported the "presence of homeless people who spend the night in the abandoned building" and "the constant fighting this causes", which threatened their safety and generated health issues. There was therefore a police intervention in order to prevent security and health problems.

[5] http://medios.mugak.eu/noticias/noticia/291193 (January 2018)

In conclusion, although it is not possible to affirm that criminal law for the enemy is being applied to homeless people across the board, for homeless illegal immigrants the basic characteristics of criminalisation before a crime, the disproportionate nature of the punishment and a reduction in procedural guarantees can be identified. The combination of the criminology of intolerance and criminal exceptionality, symbolic criminal law and new punitiveness is consolidating the extension of criminal law for the enemy to situations of homelessness, painting a worrying picture where the inherent protective nature of criminal systems as part of the rule of law in social and democratic states is being dismantled (Rivera, 2004).

5. Conclusions

This article shows the direct impact that regulation of public places has on the material conditions and rights of homeless people. This phenomenon cannot be analysed without taking into account the wider process of criminalising homelessness. The criminalisation of activities undertaken by homeless people in order to survive on the street and the obstacles they face when trying to access social housing, as well as the measures that aim to conceal homeless people by means of expelling them from certain areas of the city or through their detention and deportation to other countries, are all part of the same process of criminalising homelessness.

We have applied this conceptual framework to Spain, and laws, regulations and policies that penalise homelessness have been exposed. A variety of city by-laws for regulating public places that have been in force for over ten years have been analysed. We have detected policies arising from the criminology of intolerance and criminal exceptionality. Although homeless people are not a specific target for these by-laws, the activities they are forced to undertake in order to survive in the street are. Penalised activities include sleeping, camping, begging, sorting through rubbish and washing in the street. Apart from the obvious fact that it is senseless to fine someone who cannot pay, it can be concluded that, based on these measures, criminal law for the enemy is being applied to homeless people who are illegal immigrants. These are people who, without having committed any crime, apart from their administrative situation, are detained, disproportionately punished and are not provided with full procedural guarantees.

Meanwhile, the coming into force of Organic Law 4/2015, of 30 March, concerning the protection of public safety, has led to a new legal framework that criminalises and penalises the occupation of city streets and authorises summary expulsion at borders without administrative procedures. We will have to see how its implementation affects the new by-laws on civic behaviour and coexistence that are under discussion and the processes for expelling illegal migrants.

Furthermore, due to the undersized social housing stock and the saturation of the rehousing system for eviction cases in Spain, people suffering certain types of extreme homelessness find it very difficult to gain access to social housing.

Due to all of the above, there is a clear, intense process of criminalising homelessness in Spain. The neoliberal management of homelessness implies an economistic perspective of human rights that involves the reduction of standards and minimisation of essential obligations. Recognition of rights is no longer a threat, if it is implemented with restrictive, selective criteria that limit demand and applications. The dualisation of social services, the housing system and the health system leads to "wars among the poor", who are in different administrative situations, but have the same needs that are not being covered. There are types of homelessness that the system no longer tries to resolve, just conceal, move on, imprison or expel. In order to do this, it is essential to control and manage homelessness. In Europe, and in the case of Spain, a dangerous, ambiguous and open legal framework is being created, which can lead to arbitrary application according to who is responding to the situation.

The criminalisation of homelessness is just one example of the neoliberal management of poverty, which occurs in various forms and degrees of intensity in each country. In Spain, the

criminalisation of the everyday activities of homeless people living on the street, hindering their access to the temporary accommodation system and social housing, and the expulsion of homeless migrants because of their irregular situation, are all the result of the neoliberal management of homelessness, and not a strategy for eradicating the problem in accordance with a human rights perspective.

As an alternative way forward, from a criminological perspective, Hillyard (2004) invites us to move on from neoliberal definitions of a crime perpetrated by a rational amoral individual, and instead adopt the perspective of social harm, recuperating social responsibility for crime. Basing himself on global critical criminology, Ferrajoli (2013) suggests adopting the concept of market crimes or system crimes, used for referring to massive crimes against humanity, perpetrated by markets and states, which criminology should read as attacks on human rights and common property. Why not analyse the social harm caused by speculation with basic goods and needs, such as food and housing? Why not draft by-laws concerning the behaviour of the economic players that operate in cities?

We must recuperate social ties with *the other* and tackle homelessness from a human rights perspective that satisfies the needs of people, strengthens their abilities and empowers them.

Bibliography

Aranda, M.; Chaves, G.; Moreno, M.; Posada, J. D.; Rivas, C.; and Rivera, I. *El populismo punitivo. Análisis de las reformas y contrarreformas del Sistema Penal en España (1995-2005)* University of Barcelona's Observatory of the Penal System and Human Rights, 2005.

Baker, D. J. “A Critical Evaluation of the Historical and Contemporary Justifications for Criminalising Begging”. *The Journal of Criminal Law*, 73 (3) (2009), pp. 212-240.

Blower, E.; Donald, K.; and Upadhyay, S. “The Human Rights Implications of Contemporary Patterns of Social Control”. *Journal of Human Rights Practice*, Nº 4 (2) (2012), pp. 197-212.

Brenner, N.; Peck, J.; and Theodore, N. “Urbanismo neoliberal: la ciudad y el imperio de los mercados”. *Sociales*, Nº 66. Santiago de Chile, March 2009.

Busch-Geertsema, V. *Urban Governance, Homelessness and Exclusion. Homelessness and access to space in Germany. National Report for Germany*. Brussels: Working Group 1, European Observatory on Homelessness, Feantsa, 2006.

Cabrera, P.; and Rubio M.ª J. *Personas sin techo en Madrid. Diagnóstico y propuestas de actuación*. Madrid: Pontificia Comillas University, 2003.

Carmona, M.; Heath, T.; Oc, T.; and Tiesdell, S. *Public Spaces: Urban Spaces*. Oxford: Elsevier, 2003.

Cancio, M. “De nuevo: ¿‘Derecho penal’ del enemigo?”. En Jakobs, G.; and Cancio, M. (2006). *Derecho penal del enemigo*, second edition. Madrid: Civitas, 2006.

Capdevila, M.; and Garreta, J. *Los extranjeros en las cárceles catalanas*. Area of

Social and Criminology Research and Training,

University of Lleida (GRID), 2010.

Criminalización de la pobreza en el derecho administrativo del enemigo: análisis de ordenanzas municipales de convivencia. ICADE Law Clinic and the Cáritas Española Legal Support Group. Pontificia Comillas University, 2016.

Del Rosal, B. “¿Hacia el derecho penal de la postmodernidad?”. *Revista Electrónica de Ciencia Penal y Criminología*, 11-08 (2009), pp. 08:1-08:64.

Doherty, J.; Busch-Geertsema, V.; Karpuskiene, V.; Korhonen, J.; O’Sullivan, E.; Sahlin, I.; Tosi, A.; Petrillo, A.; and Wygnańska, J. “Homelessness and Exclusion: Regulating Public Space in European Cities”. *Surveillance & Society*, Nº 5 (3) (2008), pp. 290-314.

Fernàndez, G. “Geographies of exclusion”. In *Governing poverty: risking rights?* Open Democracy, 2011.

Fernàndez, G. (ed.). *Mean Streets. A Report on the Criminalization of Homelessness in Europe*. Brussels: Housing Rights Watch, Feantsa, Foundation Abbé Pierre, 2013.

Fernàndez, G. *El acceso a la vivienda social de las personas sin hogar.. Case Study: Germany, Spain, Finland and the United Kingdom*. Online thesis. Department of Sociology, Autonomous University of Barcelona, 2015.

Ferrajoli, L. “Criminología, crímenes globales y derecho penal: el debate epistemológico en la criminología contemporánea”. *Crítica Penal y Poder*, Nº 4 (2013), p. 224. University of Barcelona's Observatory of the Penal System and Human Rights, 2005.

Freixes, T. “Integración europea y derecho de la inmigración (extranjería y *multilevel constitutionalism* en la Unión Europea)”. En Balado, M. *Inmigración, estado y derecho*. Barcelona: ed. Bosch, 2008.

Geremek, B. *La piedad y la horca: historia de la miseria y de la caridad en Europa*. Madrid: Alianza, 1989.

Hillyard, P.; Pantazis, C.; Tombs, S.; and Dave Gordon (eds.). *Beyond Criminology: Taking Crime Seriously*. London. Pluto Press, 2004.

Jakobs, G.; and Cancio, M. *Derecho penal del enemigo*. Madrid: Civitas, 2006.

Meert, H.; Stuyck, C.; José Cabrera, P.; Dyb, E.; Filipovic, M.; Gyori, P.; Hradecký, I.; Loison, M.; and Maas, R. *The Changing Profiles of the Homeless People: conflict, rooflessness and the use of public space*. Brussels: European Observatory on Homelessness, Feantsa, 2006.

Morell, A. *La legitimación social de la pobreza*. Vol. 33. Rubí (Barcelona): Anthropos Editorial, 2002.

O’Sullivan, E. “Criminalising People who are Homeless?”. *Feantsa Magazine*, summer of 2007.

Pajares, M. *La inmigración en España. Retos y propuestas*. Colección Antrazyt. Barcelona: Icaria, Ministry of Employment and Social Affairs, 1999.

Rivera, I. *Mitologías y discursos sobre el castigo: historia del presente y posibles escenarios*. Barcelona: Anthropos Editorial, University of Barcelona's Observatory of the Penal System and Human Rights, 2004.

Sepúlveda, M. “La extrema pobreza y los derechos humanos”. United Nations General Assembly. A/66/265. 4 August 2011.

CIE Report 2016. Jesuit Migrant Service-Spain (SJM-E), 2017.

Silva, J. M. *La expansión del derecho penal. Aspectos de la política criminal en las sociedades postindustriales*, second edition, revised and extended. Madrid: Civitas, 2001.

Silveira, H. C. “Estados expulsores y semipersonas en la Unión Europea”. *Crítica Penal y Poder*, Nº 1 (2011), pp. 1-21.

Tosi, A.; and Petrillo, A. *Urban governance, homelessness and exclusion in Italy. National Report for Germany*. Brussels: Working Group 1, European Observatory on Homelessness, Feantsa, 2006.

Tosi, A. “Homelessness and the Control of Public Spaces - Criminalising the Poor?”. *European Journal of Homelessness*, Nº 1, pp. 225-236.

Von Mahs, J. “Introduction - An Americanization of Homelessness in Post-Industrial Countries”. *Urban Geography*, Nº 32 (7) (2011), pp. 928-929.

Wacquant, L. “The Penalization of Poverty and the Rise of Neoliberalism”. *Capítulo Criminológico*, vol. 31, Nº 1, January-March 2003, pp. 7-22.

Wacquant, L. *Punishing the Poor: The Neoliberal Government of Social Insecurity*. Durham: Duke University Press, 2009.

Young, J. *The Exclusive Society: Social Exclusion, Crime and Difference in Late Modernity*. London. Sage Publications, 1999.