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MEAN STREETS

A REPORT ON THE CRIMINALISATION OF HOMELESSNESS IN EUROPE

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

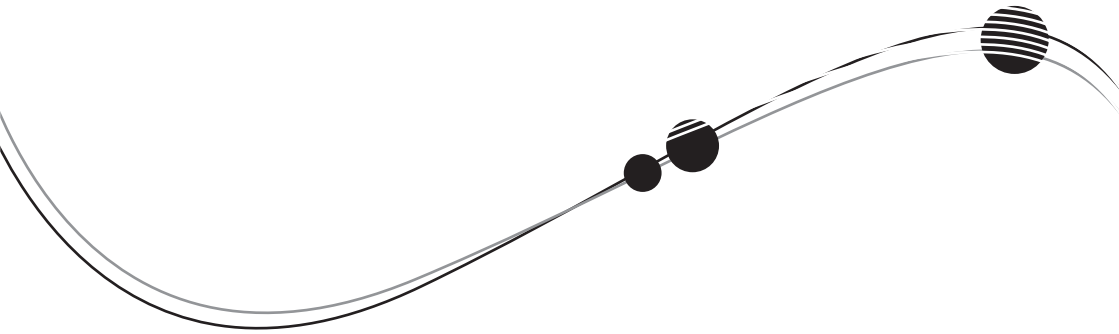
Fondation Abbé Pierre
FEANTSA
HOUSING RIGHTS WATCH

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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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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