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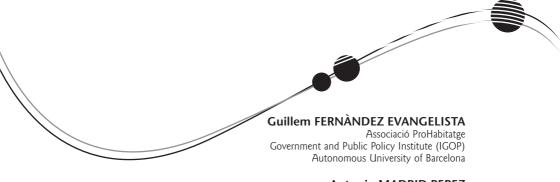
A REPORT ON THE CRIMINALISATION OF HOMELESSNESS IN EUROPE

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





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



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

SOCIAL ORGANISATIONS AND LEGAL SERVICES

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

LEGAL SERVICES PROVIDED BY SOCIAL ORGANISATIONS IN BARCELONA

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

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

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

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

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

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

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

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

THE EXPERIENCE OF THE FRENCH NETWORK JURISLOGEMENT

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

SHELTER: THE HOUSING AND HOMELESSNESS CHARITY

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

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

LEGAL SERVICES AND STRATEGIC LITIGATION

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

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

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

^{3.} http://www.crin.org/resources/infoDetail.asp?ID = 21271

^{4.} http://strategiclitigations.org/category/aboutus/whatisstrategiclitigation/

^{5.} http://www.crin.org/docs/What_is_Strategic_Litigation.pdf

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

It goes without saying that strategic litigation has also risks, as shown in the table below: $^{\rm 6}$

POTENTIAL BENEFITS	POTENTIAL RISKS
OF STRATEGIC LITIGATION	OF STRATEGIC LITIGATION
 Win a desired outcome for the client or group of clients Set important precedent Achieve change for similarly situated people Spark large scale policy changes Empower clients Raise awareness Encourage public debate Highlight the lack of judicial independence or fairness on a given issue Provide an officially-sanctioned platform to speak out on issues when government may be trying to silence voices on that issue 	 Unduly burden client, in terms of pressure or length of time required for the case Political backlash Risk safety of client, especially marginalized groups Privilege political or strategic goals over individual goals Set bad precedent Undermine judiciary by highlighting lack of independence or power on a given issue Expend valuable resources on a case that may be very difficult to win

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

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

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

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

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

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

INSTRUMENTS FOR STRATEGIC LITIGATION

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

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

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

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

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

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

CONCLUSIONS

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

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

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

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Rekosh, E. (2003): "Public Policy Advocacy: Strategic Litigation and International Advocacy". Stanhope ICT Policy Training Programme. 20 August 2003. 234 CHAPTER XIV > Social Organisations, Legal Services and Strategic Litigation: Fighting against Homelessness from a Rights-Based Approach



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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