# Ageing Cities

## Local Law and Policymaking to protect and care for the elderly

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# Defining and mapping elderly policies

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## 1. INTRODUCTION. THE COMPLEXITY IN DEFINING ELDERLY POLICIES

Ageing is mainly evidenced by the increase in the population aged 65 and older ("older adults" or "seniors"). However, the economic and social impact of population ageing also depends on other demographic aspects (lower birth rates, smaller families, depopulation, lower mortality rates and higher life expectancy). The simultaneous occurrence of these demographic trends gives rise to a social structure that differs from that on which the modern State−and some of its distinct features like welfare regimes−was based.[1]

Traditionally, ageing-related policymaking has focused on two main challenges posed by older adults. First, older adults cease to be part of a country's working-age population, thereby reducing employment income. Second, becoming an older adult often entails a greater demand for care services, particularly health care. Implementing pension and health care systems has thus been states' traditional approach to ageing-related challenges. Since they both require extensive financial and human resources, this approach has sparked debate about the very sustainability of welfare systems in light of the increased ageing process.

The debate on welfare systems' sustainability revolves around the imbalance created on the working-age population by the said demographic trends. This active or working-age population is affected by lower birth rates and a growing dependent population in greater need for social services and welfare benefits. The imbalance has increased as a result of demographic projections, thus justifying the modification of pension systems to (i) increase the number of workers (contributors); (ii) foster private pension schemes through tax incentives; or (iii) raise the retirement age.[2]

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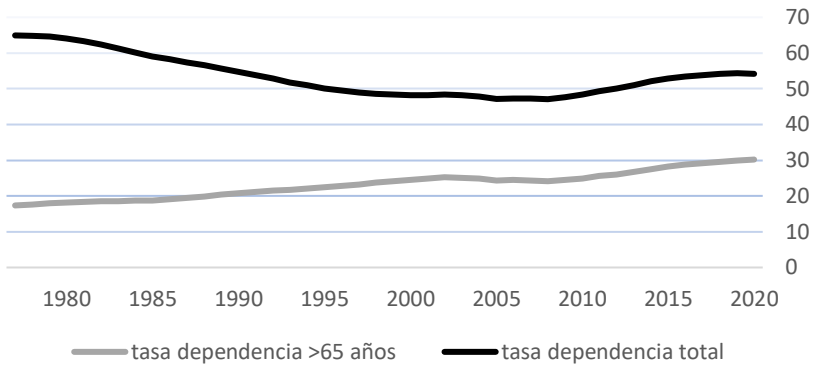
[1] Esping-Andersen, G. (1990). *The three worlds of welfare capitalism*. Princeton University Press. Esping-Andersen, G. (1996). After the golden age? Welfare state dilemmas in a global economy. *Welfare states in transition: National adaptations in global economies*, 1-31. Powell, M., & Barrientos, A. (2004). Welfare regimes and the welfare mix. *European journal of political research*, *43*(1), 83-105.

[2] Aysan, M. F., & Beaujot, R. (2009). Welfare regimes for ageing populations: no single path for reform. *Population and Development Review*, *35*(4), 701-720.

In Spain, the development of the overall dependency ratio and the dependency ratio for older adults aged 65 and older[3] show contrasting trends until recently (see Figure 1 below). The rate of dependent persons out of the overall working-age population had a downward trend that reversed in 2010. From that year, there was an increase in both the overall dependency ratio and that of older adults. This trend intensifies the debate over the impact of population ageing. There is a pressing need for measures ensuring the welfare model's sustainability.

**Figure 1. Development of dependency ratios (1978-2020). Expressed as a percentage.**




Source: Spanish National Statistics Institute (INE). Own elaboration

With limited resource availability, an assessment of the ageing process revolving around the gap between young and older adults inevitably leads to an analysis of the most appropriate public policies from the perspective of intergenerational justice. In other words, when it comes to making decisions about ageing-related matters, we should wonder whether (and to what extent) it is fair to detract resources from young adults largely allocating them to seniors instead.

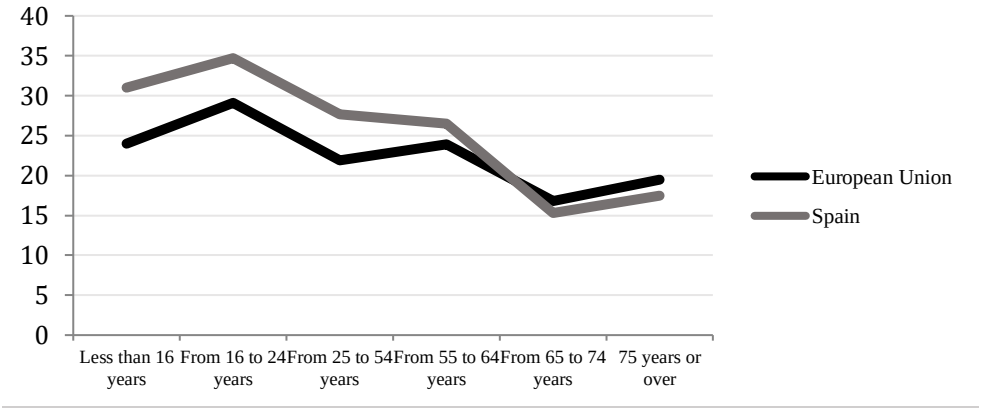
Nevertheless, this could be an overly simplistic approach. Using dependency ratios as the guiding principle for public policymaking can conceal the fact that age and productivity (i.e., working-age and dependent population groups) do not always match. On the one hand, part of the working-age population segment, aged 16-64, might not be economically active for various reasons (they may be receiving education and training, they could be unemployed or disabled). On the other, some adults over 65 are still working beyond pension age, mostly in less physically demanding jobs or under flexible retirement schemes. Additionally, there are major differences in the economic contributions within the working-age population, depending on (i) temporary employment; (ii) salaries; and (iii) job stability. These aspects further complicate the relationship between working-age and dependent population, making it hard to design public policies exclusively based on the share of persons in each age group.

[3] The dependency ratio equals the population under the age of 16 and over 64 over those aged 16-64. The dependency ratio of adults aged 65 and older equals the share of population below 16 over the population aged 16-64.

Furthermore, empirical studies are inconclusive regarding the relationship between ageing and key economic indicators. Ageing processes seem to have a negative impact on the economy. Such negative impact would be triggered by: (i) a reduction in working-age population; (ii) reduced productivity; (iii) an increase in the demand for social services; and (iv) increased public spending on pensions and health care. However, there is no linear relationship between ageing and the economic indicators. In fact, France or Italy have high ageing ratios and remain two of the world's leading economies. Note that health care expenditure is not always associated with ageing. It may also be associated with other factors such as the cost of medical products and services. Indeed, although its population is less aged than many other OECD countries', the US spends more on health care than European countries with considerably older citizens.[4]

As a result of the 2008 economic crisis, the risk of poverty or social exclusion for older adults changed significantly. Between 2008 and 2012, the at-risk-of-poverty rate for persons aged 65 and older decreased by 10 percentage points and became the lowest overall (including all age groups).[5] We find this trend both in Europe and Spain, hinting at lower at-risk-of-poverty-and-social-exclusion rates for older age groups (Figure 2).

**Figure 2. EU-Spain comparison: People at risk of poverty or social exclusion (2017).**




Source: Eurostat. Own elaboration

This parameter's development also shows that it depends on economic cycles. In Spain, the downward trend of the at-risk-of-poverty rates for older adults in 2008-2012 reverses from 2015 onwards.[6] This suggests that the declines in poverty rates are also due to cyclical reasons and the overall worsening of economic contexts, and not only to political action specifically addressed to prevent these risks.

[4] Gusmano, M. K., & Okma, K. G. (2018). Population ageing and the sustainability of the welfare state. *Hastings Center Report*, *48*, S57-S61.

[5] Abellán García, A., Ayala García, A., & Pujol Rodríguez, R. (2017). Un perfil de las personas mayores en España, 2017. Indicadores estadísticos básicos.

[6] García, A. A. and Rodríguez, R. P. (2019). Un perfil de las personas mayores en España, 2019. Indicadores estadísticos básicos. *Consejo Superior de Investigaciones Científicas (CSIC). Centro de Ciencias Humanas y Sociales (CCHS). Envejecimiento en red. ISSN: INFORMES envejecimiento*.

Coming up with political responses to ageing-related matters is hard due to (i) the complex impact of population ageing on the socioeconomic system; and (ii) the ties between ageing and other demographic trends. Regarding elderly policies, public authorities rely on identifying and balancing any ageing-related risks and opportunities at stake in each national context. Public authorities' interpretation of ageing processes is also essential. Although decision-making authorities have construed gradual population ageing as a threat to welfare systems, they have also seen ageing as an opportunity to develop a new market tied to the provision of services for seniors; hence the notion of "silver economy."[7]

Ageing policies currently fall within an intense transformation of social structures . This transformation is affecting one of the decisive elements in the delivery of services for seniors, i.e., family structures, mostly in Southern European countries' welfare regimes. In 2016, in Europe, two-thirds of the households were made up of 1 or 2 people. From 2007 to 2016, 1-2 person households went from 60.1% to 63.7%, whereas 4-person households decreased the most (by 1.7 percentage points). Single-member households made up of over 65s amounted to 39% of all one-person households.[8] This scenario suggests that families are decreasingly able to provide a context for (i) intergenerational solidarity; and (ii) the exchange of assistance and benefits supplementing care services provided by public authorities, the third sector, or private entities.

Given the complex relationships between ageing and *socioeconomics*, it is questionable that elderly or ageing policies should only rely on age. If elderly policies are solely based on age, they would only cover measures addressed to adults aged 65 and older. However, ageing-related strategic plans and guidelines are increasingly broadening their scope: the core of these policies used to be pensions and health care, but it is now extending to a broader range of policy areas where age is not always the decisive criterion to determine the recipients or addressees of actions and programmes. These policy areas include urban planning, infrastructures and environmental aspects, as well as social and political participation.

In this scenario, the definition of ageing policies and thus the allocation of powers to the various government levels is not always clear cut. This chapter aims to further clarify this definition with a twofold purpose. The chapter (i) examines the contents of elderly policies; and (ii) delves into these contents in connection with the allocation of powers considering Spain's distribution of power between the State and the Autonomous Regions.

[7] The so-called "silver economy" is one of the economic sectors with the greatest growth potential. It is also tied to innovative technology. The European Commission has launched several programmes along these lines (*Active and Assisted Living Joint programme, eHealth Action Plan, European Innovation Partnership on Active and HealthyAgeing, Horizon 2020 Societal Challenge 1 on Health, Well being and Active Ageing*).

[8] European Commission (2017). *People in the EU: who are we and how do we live?*

The chapter is divided into four sections. Section 2 examines the contents of elderly policies focusing on the broadening of their scope, i.e., on how they are not currently covering only welfare matters, but also increasingly more policy areas. This section lays down the positive and negative dimensions found when defining the contents of elderly policies. Section 3 examines various regional legal frameworks regarding elderly policies, focusing on the core or basic rules that lay the foundations for administrative action, i.e., *Estatutos de autonomía* (often referred to as "regional constitutions") and pieces of regional legislation on Welfare Services and the elderly. Section 3 also provides a categorization of regional legal frameworks based on whether social services and benefits qualify as individual rights. Additionally, this section discusses the relationship between regional implementation and enforcement (through implementing provisions) and national authorities' powers to set out the basic conditions to ensure that such individual rights are exercised on an equal footing. Finally, section 3 examines a potential correlation between the actual provision of benefits and services for the elderly (coverage) and the existing legal frameworks. Section 4 summarizes the concluding remarks of this study and outlines the main trends found in both (i) elderly policymaking and (ii) the allocation of elderly policies to the various government levels.

## 2. CONTENTS OF ELDERLY POLICIES

Currently, the scope of elderly policies extends to various fields of administrative and legislative action that often overlap. These administrative and legislative actions address the risk of having senior citizens losing purchasing power after retirement, as well as seniors' needs for social assistance and health care. But also, decision-makers and lawmakers seek to guarantee citizens' lifetime well-being by engaging them in the economic, social and political structures. What ultimately defines elderly policies is the purpose of ensuring individuals' full autonomy during their adult lives.

Public authorities seek to guarantee that individuals enjoy their rights throughout their lives, and they do so in a twofold manner. There is a negative dimension: public authorities try to prevent age-based discrimination. There is also a positive dimension, covering individual rights and different benefits aimed at ensuring older adults' autonomy and well-being. Both dimensions together define the contents of elderly policies. Article 14 of the Spanish Constitution (*Constitución Española*, CE) provides the principle of equality, thereby banning discrimination on the basis of age. Accordingly, age (i) provides grounds to identify social groups requiring special protection; (ii) is a guiding factor for socioeconomic policymaking (Art. 50 CE). The implementation of public policies catering to older adults based on the aforesaid dimensions has not been steady. Partly, due to the differences in public authorities' priorities and resource availability.

### 2.1. Non-discrimination on the basis of age

Elderly policies do not evolve only through welfare assistance and integration programs. The constitutional requirement of non-discrimination on grounds of age also impacts the scope of these policies. The Spanish Constitutional Court (*Tribunal Constitucional*, TC) found that age is included in the non-discrimination clause of Art. 14 CE. In Judgment no. 75/1983, of 3 August, the TC argued that "*Article 14 does not provide an exhaustive list of grounds of non-discrimination. Therefore, it does not matter that age is not expressly listed, because Art. 14 does prohibit any form of discrimination on the basis of 'any other personal or social condition', clearly including age*." Extensively interpreting the personal circumstances that cannot undermine equality is consistent with the prevailing line of case law on the European Convention on Human Rights (ECHR).[9]

Also within the European framework, both the Charter of Fundamental Rights of the European Union (CFREU)[10] and the Court of Justice (CJEU) case law[11] expressly prohibit age-based discrimination. Indeed, the CJEU found that non-discrimination on the basis of personal conditions was a general principle of EU law. As a result, this principle has been included into Union primary law and is thus one of the legal standards available to the Court of Justice to review and interpret legal acts within the EU. The general principle of non-discrimination is across EU provisions in many fields other than welfare. See, for instance, Council Directive 2000/78/CE, of 27 November 2000, establishing a general framework for equal treatment in employment and occupation (Arts. 2 and 6).

Nevertheless, as clarified by Constitutional Court Judgment (STC) no. 66/2015, of 13 April,[12] non-discrimination on grounds of age is sometimes unclear (pun intended). One must not assess age-based discrimination in the abstract, but based on the specific circumstances of the case. Discriminatory treatment on the basis of age often comes along with other forms of discrimination (on grounds of sex or disability). Therefore, it is complicated to autonomously define and distinctly apply the principle of non-discrimination on the basis of age. Furthermore, sometimes there are other rights at stake, requiring courts of justice to weigh and strike a fair balance. In this connection, the Constitutional Court ruled as follows: "(…) *unlike the general principle of equality, which does not require equal treatment as an aim but rather that any differentiation or*

[9] Judgments of 10 June 2010, *Schwizgebel v. Switzerland*, and of 15 September 2016, *British Gurkha Welfare Society and others v. The United Kingdom*.

[10] Article 21(1) of the Charter of Fundamental Rights of the European Union (CFREU), which is binding under Art. 6 of the Treaty on European Union (TEU), expressly bans any form of discrimination, including on grounds of age.

[11] Judgments of 13 November 2014 (preliminary ruling, C-416/13, Case *Mario Vital Pérez v. Municipality de Oviedo*) and of 15 November 2016 (preliminary ruling, C-258/15, Case *Gorka Salaberria Sorondo v. Academia Vasca de Policía y Emergencias*); Judgment of the Court (Grand Chamber), of 19 January 2010, C-555/07, Case *Kücükdeveci v. Swedex GmbH*, legal basis 21.

[12] Legal bases 3 and 4.

*unequal treatment be justified, non-discrimination under Art. 14 CE does require to strictly assess whether the unequal treatment was reasonable and fair, thereby generally establishing that equal treatment be achieved (i.e., that it be an aim). Consequently, Art. 14 provides for a much more strict constitutional assessment, using more stringent standards (STC no. 126/1997, of 3 July, legal basis 8, referring to Constitutional Court Judgments no. 229/1992, of 14 December, legal basis 4; no. 75/1983, of 3 August, legal bases 6 and 7; and no. 209/1988, of 10 November, legal basis 6)* (…)."

In sum, in age-based discrimination cases, the burden of proving that any differentiation or unequal treatment is fair and reasonable is on whoever makes the decision that could qualify as discriminatory. This aspect does not raise major interpretative concerns. It entails that any rule or decision should include, in addition to the age-based differentiation, a justification related to the ultimate aim pursued thereby. It is a mostly formal criterion, but it can create some evidentiary hurdles, since any justification for unequal treatment must be based on the rule's or decision's ultimate purpose. Assessing proportionality raises even more concerns, because proportionality is more closely tied to the factual background of the case. The Constitutional Court's findings show the importance of two aspects in order for decisions or measures to be deemed justified or reasonable: (i) minimizing the burdens on the elderly; and (ii) providing for appropriate compensation or relief for this age group. In its ruling of 13 April (STC no. 66/2015), the Constitutional Court found that dismissing the oldest−and thus closest to retirement−employees did not qualify as age-based discrimination. The Court argued that the employer did not breach the applicable legal framework and paid the legally established compensation.[13]

Bringing this line of case law into the legislative framework does not mean that persons cannot be afforded greater protection based on their age or vulnerability (see STC no. 190/2005, of 7 July, regarding the protection of underage victims). In fact, this principle of non-discrimination must be read together with the protective provisions for vulnerable groups and governing principles laid down in Chapter 3 of Title 1 of the Spanish Constitution. However, the principle of non-discrimination does prevent that access to services or activities be made dependent on age (STC no. 161/2011, of 19 October). Whereas relying on the retirement age is in line with the equality principle, preventing access to services or the performance of certain activities on grounds of age does violate the principle of non-discrimination. This evidences that decisions based on age must meet more stringent requirements in terms of justification, reasonableness and proportionality

[13] In particular, STC no. 66/2015 noted that "[r]*egarding collective dismissals (i) involving companies not subject to insolvency proceedings and (ii) including employees aged 55 and older who did not qualify as unemployment insurance recipients by 1 January 1967, companies must pay additional compensation to finance a special insurance scheme for these employees*" (legal basis 6).

to fulfill the principle of non-discrimination than to abide by the general equality principle.[14]

The prohibition of age-based discrimination gives rise to some sort of "universal" protection of individuals. However, the implementation of elderly policies in accordance with the guiding socioeconomic principles (Art. 50 CE) does not always result in a homogeneous protective framework. Firstly, the implementation of elderly policies varies depending on the different fields, which range from a core of pension and health care services, to citizens' participation in social and political structures, or seniors' engagement in economic activity. Secondly, regarding social assistance, the allocation of powers can affect the scope and coverage of elderly policies.

### 2.2. The social core of elderly policies

Elderly policies have usually been assistance-oriented, aimed at addressing risks related to retirement and the worsening of older adults' physical health. At first, protective mechanisms mostly revolved around State aid and charity. Social assistance then became a sophisticated system of benefits and rights, provided in statutory provisions and requiring a complex administrative structure involving various government levels.

Elderly policies essentially revolve around social services aimed at preventing or addressing risks, meeting needs and ensuring citizens' well-being. Among other guiding socioeconomic principles, Art. 50 of the Spanish Constitutions requires public authorities to ensure seniors' well-being and that they have sufficient economic resources, particularly addressing health, housing, culture and leisure. Regarding the availability of economic resources, Art. 50 provides for the establishment of an appropriate pension system that should be periodically updated to fulfill its purpose.

In line with their social welfare powers (Art. 148(1)(20) CE), regional governments must establish social service systems implementing the social or assistance-based core of elderly policies. When implementing elderly policies, regional authorities can provide welfare services at different levels. It will depend on (i) the type of benefits and (ii) citizens' ability to claim welfare benefits from the relevant public bodies. Regarding (ii), regional rules and regulations have one of two approaches. Some frameworks provide for benefits and services as long as there is sufficient budget allocation. Other provide for these benefits as individual rights, thereby guaranteeing (i) that citizens are entitled to them and can claim them and (ii) that there be sufficient budget allocation. Under the second approach, services and benefits for the elderly qualify as social rights that are

[14] The justification must be in line with the provision's underlying purpose. For instance, in its Judgment no. 2016/2699−ruling on Madrid Regional Order no. 1363/1997 on the application procedure and eligibility requirements for public care facilities for persons with intellectual disabilities−the Constitutional Court found that the Order provided no justification whatsoever for only accepting applicants "[a]ged 18 to 60."

always enforceable vis-à-vis the competent public authorities and before the courts of justice, where sufficient budget allocation must always be guaranteed.[15]

As further discussed below, at a regional level, the allocation of powers regarding social care has given rise to different frameworks in terms of enforceability and guarantees. But there are some common foundations mostly provided by Act 39/2006, of 14 December, on the Promotion of Personal Autonomy and Care for dependent persons (*Ley 39/2006, de 14 de diciembre, de Promoción de la Autonomía Personal y Atención a las personas en situación de dependencia*, LAPAD). This Act allowed to advance the social core of elderly policies from a benefit-provision sphere to the field of individual rights and entitlements. It therefore reinforced public authorities' commitment to ensuring the delivery of social services. As a result of the LAPAD, regional governments updated and modified their welfare frameworks, which then provided for social services and benefits as individual rights,[16] no longer dependent on financial resource availability.

As for the LAPAD, note that "dependency" is not only associated with ageing. "Dependent" means a person who relies on another person or entity for support in his/her daily lives. The cause for dependency may be ageing, as well as any other circumstances undermining individual autonomy (including illnesses, impairments or disabilities). However, the LAPAD's preamble mentions that the dependency ratio is a lot higher for older adults than for the rest of the population (32% versus 3%).

The set of benefits and rights aimed at addressing dependency fall within regional authorities' scope of powers. Therefore, the ties between elderly policies and social services generates interactions−and sometimes clashes−between national and regional lawmakers. Indeed, the very adoption of the LAPAD (passed by the national legislature) stirred debate about who was entitled, under the Constitution, to pass such a piece of legislation, depending on whether it was considered a social security provision, a social service provision or a health care provision, since these fields are allocated to different government levels.[17] In Judgment no. 18/2016, of 4 February, the Constitutional Court

[15] Regarding the consideration of welfare rights as fundamental rights, see Sanchís, L. P. (1995). Los derechos sociales y el principio de igualdad sustancial. *Revista del centro de estudios constitucionales*, (22), 9-57, Marcos, J. I. C. (2017). La vis expansiva de los derechos fundamentales y su incidencia en la configuración y exigibilidad de los derechos sociales. *Revista Española de Derecho Constitucional*, (110), 105-140. Castro, J. L. C. (2009). Derechos sociales. *Cuadernos de Derecho Público*.

[16] The LAAD's scope of application was not only the elderly, but its preamble did emphasize that addressing population ageing was one of the Act's purposes. The preamble is worded as follows: "*Demographic and social changes in Spain are triggering steady increases in the percentage of dependent population. First, note that the population over 65 has doubled over the last 30 years. It has gone from 3.3 million in 1970 (9.7% of the overall population) to more than 6.6 million in 2000 (16.6% overall). On top of that, there is the so-called 'ageing of ageing' demographic trend, i.e., the increase of seniors aged 80 and older, which have doubled in only 20 years.*"

[17] Bracho, C. A., & Seco, J. M. A. (2017). Las prestaciones de atención a la dependencia y su consideración como derechos sociales. *Revista de Derecho Político*, *1*(100), 987-1025.

ruled that the LAPAD qualified as a social assistance provision, outside the scope of social security matters (allocated to the national legislature under Art. 149(1)(17) CE). However, the national legislature claimed that its legal basis to pass the LAPAD was Art. 149(1) CE. Under this article, national authorities (i.e., the national government level as opposed to regional authorities) have exclusive competence over any matters regarding the exercise of rights on an equal footing. In sum: the debate about the constitutional allocation of powers encourages authorities to arrange dependency-related social benefits and services as a set of fundamental rights. Because such an approach allows to consider that national lawmaking in this field is exercising the national authorities' competences over the equal exercise of rights.

Arranging the social core of elderly policies as a set of individual rights to ensure equality in the exercise of rights does not only guarantee the enjoyment of rights by individuals. This rights-based arrangement also has an impact on the relationships between national and regional authorities regarding the definition of social services. If the content of social services and benefits qualifies as an individual right, the competent authorities must ensure that there are sufficient budget funds available for the provision thereof. The passage of the LAPAD was a turning point for the definition of elderly policies' social core. As a result of the LAPAD, subsequent regional legislation on Welfare Services provided for the notion of "individual rights," thereby transforming the essence of social services and welfare benefits, which used to depend on budget funds (public spending) and regional authorities' discretion.

Considering the prohibition of age-based discrimination discussed above, the implementation of elderly policies at regional level is subject to two clear boundaries: (i) at the foundations, there are fundamental equality requirements laid down by national authorities; and (ii) there is also an upper limit, i.e., compliance with the principle of non-discrimination on grounds of age reviewed by judicial bodies.

### 2.3. Elderly policies are all-encompassing

The allocation of elderly policymaking to the existing government levels is not the only aspect affecting the contents of elderly policies. Elderly policies tend to be all-encompassing, extending across the public policies covered thereby. This is due to several reasons. First, it is hard to identify the actual relation between ageing and the main socioeconomic indicators (including GDP and productivity rates). Second, elderly policies are often implemented through guidelines and similar instruments endorsed by international organizations' plans. Third, in multilevel government countries, like Spain, the various government levels involved implement public policies based on their areas of competence. As a result, elderly policies and guidelines have a wide array of priorities

depending on the government level actually implementing the actual age-related policies.[18]

The National Elderly Council's *National Strategy for active ageing and good care for the elderly 2018-2021* (the National Strategy, *Estrategia nacional de personas mayores para un envejecimiento activo y para su buen trato 2018-2021*) aptly exemplifies the guideline-oriented and all-encompassing nature of elderly policies. This strategic plan is aimed at promoting active ageing, improving the living conditions of older adults and addressing the needs of dependents. Elderly policies are guideline-oriented, as shown by (i) the outlining of broad goals without focusing too much on the means; (ii) the various fields of action covered by these policies; and (iii) the coordination between government levels required by the myriad of policy areas involved.[19]

Healthy ageing seeks to render effective older adults' individual rights in the economic, political and legal spheres. The healthy ageing agenda mostly aims at preventing age-based discrimination. But it is also driven by another goal: forcing public authorities, along with all social, economic and political stakeholders, to lay the groundwork allowing ageing not to undermine older adults' functional ability.

Most actions included in the National Strategy relate to economic and financial aspects, clearly showing that the social core of elderly policies is all-encompassing and tends to expand to other policy areas. The National Strategy puts forward the need to adapt professional careers and working conditions to workers' needs as they age: (i) avoiding, for instance, that workers over the age of 50 disappear from the job market and (ii) meeting the specific needs triggered by retirement both in rural and urban environments. The Strategy includes tax-related measures (including measures related to tax benefit schemes) to achieve these goals, as well as training programs and adjustments to the workers' roles and responsibilities throughout their professional careers.

Identifying the goals, namely the promotion of active and healthy ageing, does not predetermine the specific actions and approaches to achieve them. However, these government strategies and plans being non-binding guidelines by no means diminishes the efforts put into them to define elderly policies. Quite the opposite: setting elderly policy goals through these guidelines and plans has a twofold impact. On the one hand, the setting of goals and priorities determines the size of the older adults target. On the

[18] Regarding the national and Madrid regional plans adopted in 2017 (*National Strategy for active ageing and good care for the elderly 2018-2021* and the *Madrid Regional Strategy to care for the elderly 2017-2021*), see Egea, A. and C. Navarro 2018. Mayores. Análisis comparado de políticas locales de mayores en municipios de la Comunidad de Madrid. Madrid: UAM-IDL.

[19] The Strategy advocates "healthy ageing," which means ensuring functional ability, health and equal rights and opportunities for everyone at all stages of life, preserving older people's well-being. This approach to ageing stems from the World Health Organization. In 2016, the 69th World Health Assembly adopted "The Global strategy and action plan on ageing and health (2016-2010)" and the "Decade of Healthy Ageing (2020-2030)."

other, this goal-oriented approach creates a different balance regarding public bodies' involvement depending on the constitutional allocation of powers and legal bases.

For example, the development of the so-called Silver Economy Strategy by the European Commission (EC) would require the transformation of an assistance-oriented Administration focused on addressing age-related needs and risks into a more dynamic one, advancing a framework where ageing provides new economic and employment opportunities.[20] This focus on an old age economy would require to reshift assistance-based elderly policymaking to age-friendly policies providing appropriate market conditions to develop innovative services meeting the needs and demands of an increasingly ageing population. Accordingly, reshifting the focus of elderly policies from social assistance to economic development gives rise to a new scenario in the national-regional government levels' relationships and interactions.

Finally, advancing elderly policies towards areas other than pensions and benefits lessens the importance of age as a criterion to determine the addressees of elderly policies.

## 3. MAPPING ELDERLY POLICIES IN SPAIN'S GOVERNMENT LEVELS

Elderly policymaking is not a distinct area clearly allocated to a government level. Traditionally, the contents of this policy area mainly revolve around social assistance and welfare benefits, giving rise to overlaps between the powers of all three government levels (national, regional and local authorities). On the one hand, the content of social benefits (social assistance matters) falls within the competence of regional authorities under Art. 148(1)(20) of the Spanish Constitution (CE). On the other, any matters related to the pension system or dependency fall within the exclusive scope of national authorities. For instance, solely national authorities are entitled to pass social security legislation under Art. 149(1)(17) CE or to regulate the conditions ensuring equality in the exercise of rights (Art. 149(1)(1). Also, regardless of the regional provisions on local government, the Spanish Local Government Act (*Ley de Bases del Régimen Local*, LBRL) empowers municipalities with a population over 20,000 to (i) assess and report social needs and (ii) provide immediate care for persons at risk of poverty or social exclusion.

Given the all-encompassing nature of elderly policies, defining their core impacts the relationship between government levels. Accordingly, the ties of elderly policies with retirement pensions and social security benefits shifts the spotlight onto national authorities. Conversely, a broader, more open-ended approach to elderly policies, and

[20] Silver Economy Report 2018. Oxford Economics & Technopolis. European Commission. Available at https://op.europa.eu/s/n8n0. According to this study, in 2015, the share of European population aged 50 and older was 39%, and accounted for 40.6% of private consumption. However, the authors expect this age group to increase to 42.9% of the total population by 2025, estimating that the Silver Economy's share of private consumption will increase to 44.3% in 2025.

particularly to the provision of social services and benefits, reorients the focus of policymaking to regional and local governments.

Aside from the formal allocation of powers, the actual implementation of elderly policies leads to clashes between different government levels. The Spanish Constitutional Court (TC) has ruled on the competences of national and regional authorities over social services. Broadly, the CE seems to empower national lawmakers in this policy area. This may be due to various reasons, including that the State (i) seems better prepared to protect the general interest or to ensure equality and (ii) has more financial resources. Nonetheless, the TC noted that the national Government's budgetary and fund-related decision-making does not empower the Government to overreach in other policy areas allocated to regional and/or local authorities: "[…] *in case of distinct social issues requiring a global approach, national authorities can be involved, including the use of guidelines and implementing measures, but respecting at all times the competences allocated to regional authorities* […]" (STC no. 146/1986, of 25 November, legal basis 5).

We recently noticed that the conflicts between government levels can also arise from the formal empowerment of government levels and authorities. See, for instance, the Act on Streamlining and Enhancing the Sustainability of public authorities (*Ley de Racionalización y Sostenibilidad de la Administración*, LRSAL). This Act's second transitional provision empowered regional authorities in the area of social services, requiring regional authorities to take on the powers from municipalities, provincial councils and other local bodies in the field of social services and social reintegration. Broadly, the provision allocated social service powers to regional authorities, regardless of how regional governments could subsequently deal with these competences.[21]

In the area of elderly welfare, the clashes between national and regional authorities evidence how hard it is to strike a balance between (i) laying the foundations for an equal exercise of rights and (ii) the regional powers in the field of social assistance. Therefore, the key is to determine the meaning of "basic conditions" or foundations ensuring equality in age-related matters. The passage of the LAPAD forced the Constitutional Court to take a stance ruling on constitutional appeals (*recursos de inconstitucionalidad*) arising from the clash between national provisions and regional powers.

The Constitutional Court is assuming that laying the basic conditions to ensure the equal exercise of rights qualifies as purpose-driven guidance, thus not intended to homogenize

[21] The Constitutional Court declared unconstitutional the aforesaid second transitional provision, and other LRSAL articles, in Judgment no. 41/2016, of 3 March. The Court ruled that "*the State* [national authorities] *can only allocate specific local powers, or prevent them from being implemented at a local level, if it has specific competences over the relevant matters or policy area. As for policy areas under the competence of regional authorities, only these authorities can allocate local powers or prevent local authorities from exercising them, subject to the Constitution (Arts. 103(1), 135, 137, 140 and 141 CE), the basic local government rules under Art. 149(1)(18) and, where appropriate, the* Estatutos de Autonomía *or regional constitutions*" (legal basis 12).

regional legislation. As a result, this duty or power to ensure equality allocated to national authorities under Art. 149(1)(1) CE has no substance and does not give rise to any core or homogenizing legislation.[22] Admittedly, regardless of its purpose, the exercise of this power by national lawmakers does restrict territorial diversity. The purpose of this restriction is not quite to achieve homogeneity, but to ensure that there are common foundations that render effective the equal exercise of constitutional rights.[23]

These "basic conditions" comprise essential prerogatives and limits framing individual rights.[24] Therefore, regarding the social core of elderly policies, these basic conditions allow to arrange a system made up of individual rights and entitlements to the provision of dependency-related benefits.[25] Note that social benefits and services usually lack the essential or non-derogable nature of individual rights. Rather, they tend to depend on resource availability and public spending priorities. As a result, requiring regional authorities to abide by these "basic conditions," as well as providing for cooperation mechanisms between government levels, is indispensable to ensure an equal exercise of social rights. Equality does not mean homogeneity. Aside from a common foundation provided in the LAPAD, the regional legislative frameworks on social assistance are specific to each Autonomous Region.

In other words, arranging social assistance as an individual right based on the LAPAD has required to adapt regional social service legislation to enable social services to qualify as individual rights in dependency-related situations. However, regional authorities have subsequently exercised their powers and adopted implementing frameworks in areas such as funding, enforcement of rights or the delivery of social benefits and services.[26]

### 3.1. Regional implementing provisions

Within the constitutional allocation of powers, an extensive approach to elderly policymaking would require regional lawmakers to use various legal bases: urban planning and housing (Art. 148(1)(3) CE), economic development (Art. 148(1)(13) CE),

[22] See Constitutional Court Judgments (SSTC) no. 37/1987, of 26 March, and 61/1997, of 20 March.

[23] See STC no. 13/1992, of 3 March, on social assistance pensions.

[24] See STC no. 27/2017, of 16 February, and the cited case law.

[25] See STC no. 18/2016, of 4 February.

[26] The rights' core or essential content thus refers to the non-derogability of rights for decision-making bodies, not really to the way of managing or funding the benefits and services arising from such rights. Art. 33 LAAD lays down the conditions governing the various copayment schemes, but there is no provision preventing users or recipients from funding the actual services. This article requires users or recipients to copay for care services to meet dependency-related needs, in accordance with Art. 31(1) of the Spanish Constitution. In order for this management and funding system to be compatible with the universality of rights, the LAAD (Art. 33(1)) points out that "*recipients of dependency-related benefits should contribute to the funding thereof. The amount of copayment will depend on the type of benefit, its cost, and the recipient's income*." However, Art. 33(4) LAAD also provides that "*all citizens will be eligible for these benefits regardless of income*."

culture (Art. 148(1)(17) CE), leisure (Art. 148(1)(19) CE), social assistance (Art. 148(1)(20) CE), or health care (Art. 148(1)(21) CE). Also, under Art. 149(3), regional authorities can exercise additional powers not expressly allocated to national bodies. However, national authorities will have competences by default, i.e., over any matters not expressly allocated to regional authorities under the relevant *Estatutos de autonomía*.

This distribution of powers between the various government levels can generate differences in the making and implementation of elderly policies. See below an overview of the regional framework for elderly policies. It mostly covers the *Estatutos de autonomía*, legal provisions on the elderly and regional social service legislation.[27]

### *3.1.1.* Estatutos de autonomía *and elderly provisions*

Most *Estatutos de autonomía* mention age-related and elderly policies.[28] References to the elderly are largely in two sections. First, these *Estatutos* or regional constitutions refer to the elderly regarding the distribution of powers, and particularly concerning whether each Autonomous Region has taken on competences in social matters.[29] Second, those sections including governing principles for welfare and economic policies also refer to the elderly. The *Estatutos* have something in common: they require public authorities to ensure older people's autonomy, with a focus on fostering social integration and enabling their engagement. Aside from autonomy and engagement, the *Estatutos* underline various goals, such as fostering active ageing or intergeneration relations as key elements to achieve those goals.[30]

The way *Estatutos de Autonomía* define elderly policymaking (i) confirms that these policies have a social core and (ii) requires public authorities to pass implementing provisions in the field in order to achieve full autonomy for the elderly. A few Autonomous Regions provide for specific age-related provisions to implement elderly policies, including the Canary Islands (Act 3/1996, of July 11, on the engagement of older adults and intergenerational solidarity), Andalusia (Act 6/1999, of 7 July, on Care and

[27] Obviously, there is more legislation on the elderly exceeding the scope of this study. However, in order to identify the relationships between government levels, the provisions we picked reflect both differences (divergence) and similarities or overlaps (convergence) between the regional frameworks implementing elderly policies.

[28] See a list of references to the elderly in regional *Estatutos*, broken down by Autonomous Regions, in Annex 1.

[29] This section of the *Estatutos* addresses the elderly and elderly care along with other age groups, e.g., children, younger adults. More specifically, elderly care is closely tied to welfare, although the competence over the elderly is sometimes connected with community or local development matters (Basque Country, Castilla y León, Cantabria, La Rioja). Some Autonomous Regions' *Estatutos* (Catalonia, Galicia, Asturias and Andalusia) provide no specific reference to the elderly in the provisions allocating social assistance and welfare competences.

[30] Arts. 40 and 37 of the Catalonia and Andalusia *Estatutos* respectively.

Protection for the elderly) and Castilla y León (Act 5/2003, of 3 April, on the Care and Protection for the elderly in Castilla y León).

These pieces of regional legislation on the elderly are mere guiding frameworks. However, they do show certain differences regarding the recipients of benefits or those eligible for, or entitled to, social rights (i.e., the right holders). As for the Canary Islands, the regional provision is addressed to (i) locals aged 60 and older; (ii) locals under the age of 60 who are over the retirement age due to their job; and (iii) pensioners over 50 with physical, mental or sensory disabilities, as long as their personal or social conditions make them eligible for social benefits. In contrast, the legislation passed in Andalusia and Castilla y León covers seniors aged 65 and older.

The purpose of these provisions is preventing the ageing process from undermining older adults' autonomy and full integration in the social, political and economic system. Nevertheless, there are few measures aimed at achieving this goal. Regional lawmakers tend to simply provide a general framework laying down the priority areas to ensure older adults' well-being: health care, promoting leisure and cultural activities and, particularly, housing, clearly resembling the constitutional framework. As for housing, regional provisions on the elderly require that residential facilities have internal rules of procedure previously adopted by the competent regional body.[31]

### *3.1.2. Regional provisions on Welfare Services*

Whereas the *Estatutos de autonomía* and the regional provisions on the elderly basically set out the governing principles for socioeconomic policies in general or elderly-related measures in particular, regional social service legislation further specifies the types of benefits and services comprised by such policies and measures. After the passage of the Act on the Promotion of Personal Autonomy and Care for dependent persons (LAPAD), this legal framework has been updated by regional legislatures and authorities. Under the current updated legal framework, these benefits and services now qualify as a set of individual rights.[32]

Despite the impact of the LAPAD, the resulting frameworks are not homogeneous between Regions. Differences are twofold. First, social service provisions differ in terms of coverage and type of benefits. Second, they also differ in how services and benefits are

[31] As for Andalusia, the regional provision defines the rights of the elderly in greater detail: (i) privacy and non-disclosure of personal data stored in any files or records; (ii) physical and moral integrity and a dignified treatment; (iii) non-discrimination on grounds of personal or social conditions; (iv) the right to information (the residential homes' internal rules of procedure) and participation; (v) the right to individualized care; (vi) health care, medical care and medicinal products, technical-scientific and assistance-based treatments; and (vii) interpersonal relationships; (viii) voluntary commitment; (ix) protection of the residents' assets (Arts. 21 and 22 of Act 6/1999).

[32] Castro Argüelles, M. A. (2017). La nueva ley de servicios sociales de Andalucía: Una presentación. *FORO. Revista de Ciencias Jurídicas y Sociales, Nueva Época, 19*(2) doi:10.5209/FORO.55376.

arranged as individual rights, the difference being (i) the extent to which they are secured or guaranteed and (ii) the degree of enforceability vis-à-vis competent authorities.

As for the extent to which services and benefits are guaranteed (i.e., the level of assurance regarding the entitlements), the differences between Autonomous Regions are not mainly about the content or actual wording of the provisions. Rather, the most remarkable differences relate to the subsequent implementation of the services and benefits through the regulatory and soft law instruments framing elderly policies. As for the regulatory instruments, the regional social service framework is implemented through "social service packages" adopted by regional governments. These packages provide a comprehensive definition of the benefits, programs and actions covered by the regional social services and their regime. In broad terms, these packages specify the type of benefit (technical services, economic benefits, technological assistance), eligibility requirements and, most importantly, whether these benefits and services are guaranteed. These are multi-year packages, and they allow to clearly determine if the benefits and services qualify as individual rights. Therefore, these packages include (i) *guaranteed benefits*, which differ from the so-called (ii) *ancillary* or *non-guaranteed benefits*. The eligibility and provision for (ii) above depends on the availability of budget funds and political decision-making.

There are also "social service maps" supplementing these implementing provisions. Social service maps arrange benefits and services operationally and on a territorial basis (geographically). Generally, services are arranged based on whether they are basic or specialized. The latter are more complex from a technical standpoint and require more resources. Furthermore, the territorial arrangement or organization (i) allows for "zoning" the provision of services and (ii) provides for the various territorial units used to manage the resources involved in regional social service systems.[33]

Finally, regarding soft law instruments, regional social service legislation also provides for the adoption of strategic plans framing the implementation of public policies by (i) setting out management principles and objectives; (ii) providing quality instruments; (iii) promoting coordination between government levels and administrative units; and (iv) agreeing on an action plan ensuring the effective enjoyment of rights enshrined in regional provisions.

[33] The territorial arrangement of social services is central for the regional government level. Despite the principles of devolution of powers and proximity, there are noticeable differences between Autonomous Regions regarding territorial arrangements. The regional mapping of social services is based on basic areas or zones, which can be municipalities, counties, districts or municipal areas with a given number of residents. Although it may have an impact on the way social services are provided, a thorough analysis of this territorial structure would exceed the scope of this work.

### 3.2. Categorization of regional legal frameworks for elderly services

Self-evidently, the formal acknowledgment or enshrinement of individual rights does not necessarily entail that the right holders effectively enjoy them. Also, keep in mind that bringing judicial proceedings to claim any guaranteed services and benefits can be too expensive or burdensome for eligible individuals, and that judicial review may be late. Note that this has a particularly significant impact on older adults. Thus, the aforesaid regulatory and guiding instruments in the field of social services are essential to assess the level of assurance provided by the regional framework for elderly services. These supplementing instruments, however, are not homogeneously developed. Not all Autonomous Regions have provided for social service packages or strategic plans. Indeed, some regional governments have failed to update their legal frameworks after the passage of the LAPAD.[34] The circumstances discussed above on the varying level of assurance of elderly-related rights (or, in other words, the extent to which these acknowledged rights are actually secured for right holders to exercise them) give rise to a threefold categorization of regional social services.

*Category I. Acknowledgment of individual rights in regional provisions plus regulatory and guiding instruments (Aragón, Illes Balears, Castilla y León, Castilla-La Mancha, Catalonia, Comunitat Valenciana, Basque Country, La Rioja and Navarre).*

This category covers all Autonomous Regions that either expressly provide elderly rights (e.g., rights and obligations of care center and nursing home residents) or include elderly-related actions (regarding home care, remote assistance or housing) in the list of elderly-related benefits and services. Additionally, the regions falling under this category have all adopted provisions to implement the social service system (service packages, organizational maps and strategic plans).

This implementation of regional social service legislation through guidelines and implementing provisions plays a major role in age-related matters for three reasons. First, the content of social rights set out in regional provisions does not always target the elderly as a group requiring special protection or with special needs.[35] Second, regional provisions refer to social rights, but they do so generically and without specifying any actions or eligibility requirements. Accordingly, listing various rights in social service provisions does not always entail that potential recipients or right holders may actually enforce them or claim those rights and benefits vis-à-vis public authorities. Third,

[34] See each Autonomous Region's main social service framework in Annex 2.

[35] Aragón Regional Act 5/2009, of 30 June, on Welfare Services, provides several generic benefits that, despite being generic, can help implement elderly policies (the right of access to information, analysis, diagnostic and guidance services, as well as to home care services and support for carers or caregivers (Art. 36)). Other Regions, like Catalonia, also provide for the rights and obligations of the elderly in a more individualized and thorough way, providing for the rights of day care service recipients and nursing home residents (Arts. 12 and 13 of Act 12/2007, of 11 October, on Welfare Services). See, along these lines, Illes Balears Regional Act 4/2009, of 11 June, on Welfare Services, specifically providing for day care and night care services along with home care, technological assistance and remote assistance (Arts. 21 and 23).

regional social service legislation expressly refers to social service packages. These packages or *carteras/catálogos de servicios sociales* must determine the specific actions to be conducted by public authorities arising from an acknowledged right. But, primarily, they must define whether the relevant services and benefits qualify as individual rights or otherwise remain subject to regional governments' discretion and resource availability.[36]

In elderly-related matters, the social rights provided in regional legislation refer both to (i) services allowing to identify specific needs (right to information, analysis, diagnostic and guidance or advisory services, as well as the right to be aware of the services and benefits included in the system) and (ii) the actual provision of basic services (home care, remote assistance, day care and residential care or assisted living). In most regional provisions, these benefits and services qualify as individual rights or essential benefits and services, i.e., enforceable entitlements by anyone fulfilling the eligibility requirements and with sufficient budget allocation to secure them. Concerning budget funds, regional legislation provides that any budget allocation to social services may be extended.[37]

The fact that social services be considered essential does not determine that they should be free. Social services will not be free unless the recipient is a dependent person, despite that there may be more potential recipients. Moreover, co-payment schemes are widely applied to some of these services, like residential care or nursing homes.[38]

Regarding the content of benefits and services, it is worth underlining that many packages or *carteras/catálogos* include a new independent category: services aimed at promoting active ageing and preventing old-age dependency. The benefits and services related to active ageing are mostly ancillary, non-secured services.[39] Also, the most recent provisions include services targeted not only to users or recipients, but also to care professionals within the public welfare system.[40]

In terms of content, the implementation of social services is not homogeneous. However, the actions required from public authorities are provided in detail, as well as the procedure

[36] There are various wordings to designate the benefits and services qualifying as individual rights both in regional legislation and social service packages, including "secured" or "guaranteed benefits," "fundamental benefits" or "essential benefits and services." All of these designations contrast with the so-called "ancillary benefits" or "*prestaciones complementarias*."

[37] Art. 60 of Catalonia Regional Act 12/2007, of 11 October, on Welfare Services. Art. 32 of the Comunitat Valenciana Regional Act 3/2019, of 18 February, on Inclusive Social Services.

[38] See Aragón Regional Decree 143/2011, of 14 June, enacting the Aragón Social Service Package or *Catálogo de Servicios Sociales de la Comunidad Autónoma de Aragón* and Illes Balears Decree 66/2016, of 18 November 2016, adopting the Illes Balears Social Service Package for 2017-2020 or *Cartera Básica de Servicios Sociales 2017-2020*.

[39] See the Castilla y León social service package or *Catálogo de servicios* (Decree 58/2014, of 11 December).

[40] Comunitat Valenciana Regional Act 3/2019, of 18 February, on Inclusive Social Services (Arts. 12 and 13).

to require their provision (i.e., enforce them) and the need for allocating sufficient budget funds, thereby further securing the exercise of social rights for the elderly.

*Category II. Acknowledgment of individual rights in regional provisions but no implementing or guiding instruments (Andalusia, Cantabria, Canary Islands, Asturias, Extremadura, Galicia)*

This category covers those regions whose social service acts acknowledge certain elderly benefits as "essential" but still have not adopted a social service package (in Spanish, *cartera* or *catálogo*). The formal acknowledgment of individual rights in regional social service provisions requires that the subsequent service packages take into account that some social rights need to be secured. However, the provisions acknowledging these rights fail to specify the minimum content or scope of actions included in the acknowledged rights. In any case, there is a specific and elderly-related content provided for these services (rights and obligations of residential care users, the right to home care and remote assistance), indicating that elderly needs require special protection under Category II frameworks.

The limited scope and coverage of social rights acknowledged in Category II frameworks is due to the reference included in regional provisions. These provisions call for the adoption of a social service package, which must specify the eligibility requirements, management approaches and whether the relevant benefits and services are essential or ancillary. Within Category II, regional legislation on social rights makes a distinction between guaranteed or secured benefits and ancillary benefits, subject to the availability of budget funds. Nevertheless, all of these entitlements require a more comprehensive regulation in the service packages. In the absence of this comprehensive regulation, the specific political actions securing these social entitlements will depend on the prevailing political and economic circumstances.

Just like Category I frameworks discussed above, regional legislation under Category II provides as individual rights a set of services mostly relating to the access to the welfare system and diagnostic services, in order for individuals to subsequently pick a "social service itinerary" within the regional system.[41] In this connection, specifying the actions covered or entailed by social services could be considered essential to render effective the rights of access to the system.

There are major overlaps between Category II regional frameworks regarding elderly-related social rights: remote assistance services, home care, preventive services, integral care for persons at risk of social exclusion or care services in day centers and nursing

[41] Arts. 9 and 10 of Andalusia Regional Act 9/2016, of 27 December, on Welfare Benefits; Art. 6 of Cantabria Regional Act 2/2007, of 27 March, on Social Rights and Services.

homes.[42] On top of that, Category II social service acts often include a set of specific rights and obligations for nursing home residents and users of residential facilities.[43]

*Category III. No acknowledgment of individual rights in regional provisions and no implementing or guiding instruments (Madrid, Murcia).*

Category III frameworks apparently provide the lowest level of assurance regarding the exercise and enforcement of elderly-related social rights. This is because (i) the legal frameworks were adopted before the passage of the LAPAD; and (ii) the absence of a service package or *catálogo* like the ones provided in regional frameworks under Category I. With regard to (i) above, the LAPAD entailed a transformation regarding the acknowledgment as individual rights of certain services and benefits for dependent persons. The LAPAD approach had a tremendous and noticeable impact on all the subsequent pieces of regional legislation. Regional acts have replicated the "rights acknowledgment approach" giving rise to secured benefits and services. However, note that the level of assurance can be lower in legal frameworks only made up of social service provisions, i.e., frameworks with no implementing instruments like service packages and social service maps. Category III regional legislation on Welfare Services does not formally acknowledge social service rights. It neither expressly requires to allocate budget funds to enable the effective enjoyment of rights and entitlements by right holders and recipients.[44]

Regarding elderly services, Category III frameworks provide elderly care as a governing principle of welfare policymaking.[45] The aims of elderly care under this category are, yet again, promoting older adults' well-being and ensuring their full social integration. However, this "non-acknowledgment approach" suggests that, not being guaranteed as individual rights, benefits and services depend on economic cycles and political decision-making.

The varying regulatory density between regional social service frameworks (i.e., the differences in terms of comprehensiveness and level of assurance) could suggest that the effective exercise of social rights is secured to different extents in the various Autonomous Regions. Nevertheless, from a critical standpoint, one could argue that the existing differences between regional frameworks can be merely formal and not

[42] Art. 42 of Andalusia Regional Act 9/2016, of 27 December, on Welfare Services. Art. 6 of Cantabria Regional Act 2/2007, of 27 March, on Social Rights and Services.

[43] Art. 11 of Canary Islands Regional Act 16/2019, of 2 May, on Welfare Services. Art. 11 Andalusia Regional Act 9/2016, of 27 December, on Welfare Services.

[44] Art. 19 of Madrid Regional Act 11/2003, of 27 March, on Welfare Services (LSSMAD) provides for a steady allocation of funds to achieve universal welfare coverage. Also, Art. 37 of Región de Murcia Regional Act 3/2003, of 10 April, on the Social Service System (LSSMUR) mentions that any funds should be used to enable the exercise of regional powers.

[45] Art. 12 LSSMUR is worded as follows: "Elderly-specific services will be aimed at achieving the greatest possible well-being for older adults as well as their full autonomy and social integration." Art. 23 LSSMAD provides the main lines of action for social services.

substantial. If so, they would not necessarily give rise to differences in the actual delivery of social services by regional and local authorities. As stated above, listing social rights in specific "social service packages" or *catálogos* further secured the rights. But these packages may very well adopt a restrictive approach to the delivery of the service, its coverage or its scope. Additionally, regional legislation on Welfare Services allows for amending these packages before the end of their 4-year period of validity. Therefore, the legal framework's impact on the elderly policies ultimately implemented at the various government levels could be called into question. In other words: if the "social service packages" can (i) provide for a restrictive provision of services and (ii) be amended, the legal framework could have a lesser impact on the actual policies.

See below a correlation analysis between the aforesaid legal framework categories and some basic metrics related to the social core of elderly policies. This social core can be used as a point of comparison, since it includes overlapping services and benefits between the various framework categories (remote assistance, home care and residential care). Table 1 shows the average coverage ratios[46] for each category.

**Table 1. Coverage ratio of social benefits and services for the elderly (2018).**

| CATEGORY | | REMOTE ASSISTANCE | HOME HELP | DAY CARE CENTERS (number of places out of adults over 65) | NURSING HOMES (number of places out of adults over 65) |
|---|---|---|---|---|---|
| CATEGORY I | Average | **8.4** | **4.5** | **.96** | **5.2** |
| | N | 9 | 9 | 9 | 9 |
| | Standard deviation | 4 | 1.9 | .24 | 1.6 |
| CATEGORY II | Average | **5.4** | **3.9** | **1.4** | **4.3** |
| | N | 6 | 6 | 6 | 6 |
| | Standard deviation | 5.9 | 1.6 | .81 | 1.5 |
| CATEGORY III | Average | **10.7** | **5.7** | **1.1** | **2.9** |
| | N | 2 | 2 | 2 | 2 |
| | Standard deviation | 7.4 | 4.9 | .16 | 2.1 |
| Total | Average | **7.6** | **4.4** | **1.1** | **4.6** |
| | N | 17 | 17 | 16 | 17 |

[46] The coverage ratio represents the ratio between older adults aged 65 and older receiving the benefit or service and the total population in each Autonomous Region. The data relating to the demographic variables (demographic indicators) have been obtained from the National Statistics Institute (INE). The data relating to coverage ratios have been obtained from the Institute for the Elderly and Social Services (IMSERSO). See *Servicios Sociales dirigidos a personas mayores en España*. December 2018.

| | | | | | |
|---|---|---|---|---|---|
| | Standard deviation | 5.1 | 2.1 | .51 | 1.7 |

Note: N represents the number of cases. Source: Institute for the Elderly and Social Services (IMSERSO). Own elaboration

We found considerable diversity regarding social service coverage at a regional level. However, note that the varying coverage ratios are not always associated with a different regulatory density or level of assurance examined in the threefold categorization discussed above. Broadly, Category I regions provide slightly greater coverage than those under Category II, except for the number of places in day care centers (0.96 in Category I regions). Note that regions under Categories I and II do not always provide greater coverage than Category III frameworks. Remarkably, the coverage ratio for remote assistance services is significantly higher in Category III regions. The reason for this could be the outlying remote assistance value for the Region of Madrid (15.97%).

We should also focus on the diversity results within each category. Standard deviation figures reflect the heterogeneity within each category. We found lower heterogeneity between Autonomous Regions under Category I compared to the other two categories except for the metrics on day care centers. In sum: those regions where social rights are more densely regulated have less internal variability. Thus, greater regulatory density suggests lesser differences between regions regarding the delivered social services.

As discussed before, more regulation does not mean greater homogeneity in the rules governing the provision of social services. Table 2 below includes information on social service users' contributions, thereby allowing to examine potential relationships between the categorization of legal frameworks and recipients' eligibility requirements and access conditions.

**Table 2. Indicators for the provision of social services to the elderly (2018).**

| CATEGORY | | REMOTE ASSISTANCE (cost per recipient in €) | S.A.D. (% contribution per recipient) | NURSING HOMES (coverage ratio of public places) |
|---|---|---|---|---|
| CATEGORY I | Average | **153.7** | **19** | **3.1** |
| | N | 9 | 8 | 9 |
| | Standard deviation | 46.6 | .06 | 1.4 |
| CATEGORY II | Average | **207.1** | **31** | **2.5** |
| | N | 6 | 5 | 6 |
| | Standard deviation | 55.7 | 0.35 | 1.6 |
| CATEGORY III | Average | **190.1** | **21** | **1.6** |
| | N | 2 | 2 | 2 |
| | Standard deviation | 27 | .13 | .3 |

| | | | | |
|---|---|---|---|---|
| Total | Average | 176.8 | 23 | 2.7 |
| | N | 17 | 15 | 17 |
| | Standard deviation | 52.7 | .2 | 1.4 |

Note: N represents the number of cases. Source: Institute for the Elderly and Social Services (IMSERSO). Own elaboration

Our findings and results allow to further qualify some of our previous remarks. Although Category I regions had a lower coverage ratio in remote assistance and home care services, they require the lowest contribution from users or recipients (EUR 153.7 per recipient and 19% of the social service cost, respectively). Furthermore, regions under Categories I and II also offer more public places or open spots than Category III regions. The results might be due to the fact that these benefits qualify as essential services under Categories I and II frameworks, and thus funded by regional budgets, mostly in Category I regions. However, note that many times, benefits only qualify as essential and free if, prior to the provision of the benefit, recipients are acknowledged as dependent persons.

The previous findings suggest that the differences in social services between Autonomous Regions are due to varying regulatory densities. Nonetheless, keep in mind that the analysis covers a very limited time span, so we must be cautious when interpreting the results as trends. We found that greater coverage is not always correlated with a more comprehensive regulation of social rights. We did find, however, that the more regulatory density, the greater homogeneity in governments' actions and the lesser contribution from users or recipients to the cost of social services. Our results also indicate that, despite the overlaps and common wordings between guiding principles for elderly policies, both (i) the actual benefits and services guaranteed by public authorities; and (ii) their actual impact on the elderly show major differences depending on the region.

## 4. CONCLUDING REMARKS

Traditionally, elderly policies have been made up of an assistance-based core of benefits and services provided by national authorities. The basis for this was that the elderly faced greater risks and thus needed greater protection. On the one hand, older adults lose purchasing power because they retire. On the other, they tend to require greater care and assistance, which has defined the needs of the group altogether and the content of elderly policies.

However, the growing ageing process, and its complex interactions with other demographic and economic trends, has encouraged authorities and scholars to re-examine the content of elderly policies. The all-encompassing nature of elderly policies is mostly due to institutional aspects. Allocating elderly policymaking powers to government levels other than national authorities (i.e., local and regional bodies) has invigorated and extended the contents of elderly policies. First, international organizations advance programs−e.g., active ageing and silver economy initiatives−that exceed the traditional,

assistance-based core of elderly and age-related policies. Second, the allocation of social welfare powers to Autonomous Regions have given rise to a myriad of regional rulemaking bodies and authorities. At a regional level, the passage of social service legislation and its subsequent implementation through social service packages creates (i) a complex scenario from a legal standpoint (regarding, for instance, the enforceability of benefits and services); and (ii) a heterogeneous context for the outcomes of policymaking (e.g., regarding the acknowledgment of individual rights or coverage ratios).

Ultimately, the allocation of elderly policymaking powers to the various government levels has an impact on the content of the actual policies. The exercise of social welfare powers by Autonomous Regions has given rise to various legal frameworks. There are similarities between regions regarding both the enactment of these frameworks and the results thereof. As for the results, regional social service legislation is implemented by providing that benefits and services should qualify as individual rights, thus securing the effective exercise thereof by users or recipients. First, citizens are entitled to require competent authorities to deliver the services, even by bringing judicial proceedings. Second, welfare benefits are secured both financially, by allocating sufficient budget funds, and from an organizational standpoint, relying on the necessary cooperation and coordination between public authorities to secure the exercise of rights.

With regard to the enactment of these frameworks, the steady transformation of benefits and services into individual rights could be construed as a regional governments' reaction to the national lawmakers' decision to arrange dependency-related services as individual rights (after the passage of the LAPAD). Defining social services as individual rights is a natural expression of national authorities' powers to set out the basic conditions to ensure that rights are exercised on an equal footing; defining social services and benefits as individual rights is a way of ensuring that a minimum core of these benefits and rights is actually enforceable. This approach by regional lawmakers can be interpreted as an attempt to define the scope of regional powers in the field of social assistance. The Spanish Constitutional Court ruled that neither the funding nor the legal definition of welfare benefits can affect the scope of regional powers. However, when regional lawmakers define the specific benefits and services provided by regional authorities as individual rights, they are obviously trying to inextricably link the social core of elderly policies to regional governments. By doing so, regional governments seek to prevent potential advances or overreaches from national lawmakers that ultimately affect the substance of welfare policymaking by regional authorities.

Therefore, regional rulemaking runs between two boundaries. First, the national lawmaker's definition of the basic conditions required to ensure that welfare and elderly rights are exercised on an equal footing. Second, a ceiling, i.e., judicial review ensuring compliance with the principle of non-discrimination on the basis of personal or social conditions, particularly age. As discussed before, this principle requires public authorities to justify any differentiation or unequal treatment based on age whilst providing for any necessary compensation. Regional policymaking regarding the elderly runs between

these two limits. Regional authorities define and strengthen their own scope of welfare powers by arranging and qualifying social benefits and services as individual rights.

In spite of these "rights acknowledgment approaches," elderly policies do not give rise to homogeneous results between regions. There are significant differences regarding (i) the specific actions to be taken within the sphere of social services, as well as concerning (ii) whether such services qualify as essential or as dependent on resource availability. Although the most important elderly services are provided with similar wordings (the provisions refer to home care, day care centers and nursing homes or remote assistance), there are major differences between regions regarding the specific implementation and delivery of these services as well as the coverage thereof.

Our findings suggest that the implementation of social service legislation through packages providing for secured benefits is associated with greater homogeneity in the application of elderly policies. Additionally, this comprehensive implementation is correlated with a lesser payment from users and recipients. Defining the benefits as essential or ancillary does not pre-determine that they be free or subject to co-payment schemes. But the requirement that essential welfare benefits have guaranteed funding can have an impact on this. Still, the coverage ratio results greatly differ between regions, and they do not seem linearly correlated with a more or less comprehensive implementation of social service packages or *catálogos*. Consequently, adopting a "rights acknowledgment approach" does not ensure the same outcome in the application of elderly policies throughout the various regions.

In sum, the allocation of elderly policymaking powers to one government level or the other does have an impact on the policies' contents. After examining how these policies are defined, we found factors giving rise to both similarities or overlaps (convergence) and differences (divergence) regarding the outcomes of the relevant policies. Remarkably, there are similarities arising from (i) the establishment of basic conditions to ensure that the relevant rights are exercised on an equal footing; (ii) the principle of non-discrimination on grounds of age; and (iii) the incentive to provide that social benefits and services qualify as individual rights. The following are the most significant differentiating factors: (i) the actual implementation of elderly policies; and (ii) heterogeneity in each region's implementation and application of elderly policies due to the complex interactions between the ageing process and the socioeconomic system.

**Annex 1. References to the elderly in *Estatutos de autonomía***

| REGION | FUNDAMENTAL RIGHTS | ALLOCATION OF POWERS | GUIDING PRINCIPLES FOR POLICYMAKING |
|---|---|---|---|
| CATALONIA | Article 18. | | Article 40. |
| ANDALUSIA | Articles 14 and 19. | | Article 37. |
| ARAGÓN | | Article 71. | Article 24. |
| CASTILLA-LA MANCHA | | Article 31. | |
| CANARY ISLANDS | | | |
| EXTREMADURA | | Article 9. | Article 7. |
| ILLES BALEARS | | Article 30. | Article 16. |
| COMUNIDAD DE MADRID | | Article 26. | |
| CASTILLA Y LEÓN | | Article 70. | |
| BASQUE COUNTRY | | Article 10. | |
| GALICIA | | | |
| ASTURIAS | | | |
| CANTABRIA | | Article 24. | |
| LA RIOJA | | Article 8(1). | |
| MURCIA | | Article 10(1). | |
| COMUNITAT VALENCIANA | | Article 49. | Articles 10(3) and 13(3) |
| NAVARRE | | Article 44. | |

**Annex 2. Implementation of regional frameworks on Welfare Services[47]**

| REGION | SOCIAL SERVICE ACT | SOCIAL SERVICE PACKAGE | IMPLEMENTING INSTRUMENTS |
|---|---|---|---|
| ANDALUSIA | Regional Act 9/2016, of 27 December, on Welfare Services | | Order, of 5 April 2019, regulating and adopting the Andalusia Social Service Map |
| ARAGÓN | Regional Act 5/2009, of 30 June, on Welfare Services | Decree 143/2011, of 14 June, adopting the Aragón Social Service Package | Decree 55/2017, de 11 de abril, adopting the Aragón Social Service Map |
| ASTURIAS | Regional Act 1/2003, of 24 February, on Welfare Services | | Decree 108/2005, of 27 October, adopting the Asturias Social Service Map |
| ILLES BALEARS | Regional Act 4/2009, of 11 June, on Welfare Services | Decree 66/2016, of 18 November 2016, adopting the Illes Balears Social Service Package for 2017-2020 | |
| CANTABRIA | Regional Act 2/2007, of 27 March, on Social Rights and Services | | Order EMP/51/2009, of 15 May, adopting the Cantabria Social Service Map |
| CANARY ISLANDS | Regional Act 16/2019, of 2 May, on Welfare Services | | |
| CASTILLA-LA MANCHA | Regional Act 14/2010, of 16 December, on Welfare Services | Decree 3/2016, of 26 January, establishing the Castilla-La Mancha Service and Benefit Package for the Dependency Welfare System | |
| CASTILLA Y LEÓN | Regional Act 16/2010, of 20 December, on Welfare Services | Decree 58/2014, of 11 December, adopting the Castilla y León Social Service Package | |

[47] Table 2 does not include any "packages" that have not been adopted by the competent body or lacking minimum references to whether the benefits and services qualify as essential or ancillary. Table 2 neither includes "packages" that are mere references to the LAAD (national provision) or lists of services that simply disclose or report the service but fail to legally define it.

| | | | |
|---|---|---|---|
| CATALONIA | Regional Act 12/2007, of October, on Welfare Services | Decree 42/2010, of 11 October, adopting the Social Service Package | |
| COMUNITAT VALENCIANA | Regional Act 3/2019, of 18 February, on Inclusive Social Services | Decree 59/2019, of 12 April, establishing the Valencia Social Service System | |
| EXTREMADURA | Regional Act 14/2015, of 9 April, on Welfare Services | | |
| GALICIA | Regional Act 13/2008, of 3 December, on Welfare Services | | |
| COMUNIDAD DE MADRID | Regional Act 11/2003, of 27 March, on Welfare Services | | |
| REGIÓN DE MURCIA | Regional Act 3/2003, of 10 April, adopting the Social Service System | | |
| NAVARRE | Regional Act 15/2006, of 14 December, on Welfare Services | Decree 30/2019, of 20 March, amending Decree 69/2008, of 17 June, adopting the General Social Service Package | Decree 32/2013, of 22 May, adopting the implementing provisions for the Act on Welfare Services regarding the Programs and Funding of Basic Social Services |
| BASQUE COUNTRY | Regional Act 12/2008, of 5 December, on Welfare Services | Decree 185/2015, of 6 October, adopting the Basque Social Service Package | Social Service Strategic Plan for the Basque Country 2016-2019 |
| LA RIOJA | Regional Act 7/2009, of 18 February, on Welfare Services | Decree 31/2011, of 29 April, adopting the La Rioja Social Service and Benefit Package | |

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# Welfare for the elderly (during ordinary and extraordinary times): a shared power between local and regional governments

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## 1. LOCAL SERVICES FOR THE ELDERLY: THE GATEWAY TO THE ADMINISTRATION

Article 50 of the Spanish Constitution (*Constitución Española*, CE) in Chapter 3 of Title I lays down the "governing principles of welfare and economic policymaking." This provision requires public authorities to promote older adults' well-being "through a welfare system meeting their specific health care, housing, culture and leisure needs." Note that this governing principle is binding on public authorities[48] at all government levels.

There is no doubt that local governments have a lot of welfare provision to do in order to meet the growing demand after the health care and social crisis resulting from COVID-19. In particular, they have a lot of work in the field of elderly care.[49] Undoubtedly, older adults have been the hardest-hit group by the COVID-19 pandemic, both in terms of health care (see illness and mortality rates) and urgent social care. On top of being at higher risk, the situation of the older population worsens during lockdown: they (i) become increasingly dependent; (ii) lose some of their carers (due to illness or because they are actually on lockdown); (iii) become more isolated and lonely; (iii) suffer a psychological impact (insecurity, fear, uncertainty...); (iv) are affected by day care and leisure center shutdowns; and (v) are prevented from seeing their relatives in nursing homes. Also, keep in mind that nursing homes and assisted living communities (some of them run by local authorities) have been severely affected by COVID-19. Right now, the only evidence is that thousands of

[48] Rodríguez de Santiago, J. M., (2007), *La Administración del Estado social*, Marcial Pons, Madrid, p. 44.

[49] On COVID-19's social impact in Spain, see Presno Linera, M. (2020), "Estado de alarma por Coronavirus y protección jurídica de los grupos vulnerables," *El Cronista del Estado Social y Democrático de Derecho*, no. 86-87, March-April 2020, p. 54 to 65.

people have died in nursing homes in unknown circumstances, and most of them have died alone.[50]

During the hardest times of the health care crisis (March-June 2020), local governments have been, broadly speaking, the safety net against COVID-19 or, better said, the first port of call. In particular, within local governments, the "social safety net" has been the provision of welfare services. Just like hospitals, they have been stretched beyond their capacity and yet have remained essential for citizens.

The Spanish Association of Municipalities and Provinces (*Federación Española de municipios y provincias*, FEMP) issued a statement on 20 April. The FEMP claims that, during the pandemic, all local government authorities have been "in the front line of battle against COVID-19," supporting health care professionals and people on lockdown, as well as assisting in cleaning and disinfection works, and providing isolated accommodation to possible positive cases. The FEMP also planned local government action during this stage of the pandemic, including tax measures, care or lockdown support for vulnerable people (e.g., children or gender violence victims), and it stated that it will "play an active role" to meet the needs of "47 million people."[51]

The reason for this is fairly obvious: local governments are the closest to the people in terms of proximity and accessibility. In fact, citizens contact local governments first to claim benefits or make requests even if the actual benefits or requests fall outside local authorities' scope of power.

To address these extraordinary circumstances, Spanish legislation provides for extraordinary proceedings. Article 21(1)(m) of the Spanish Local Government Act (*Ley de Bases del Régimen Local*, LBRL) is worded as follows: "In case of public emergencies or severe risk thereof, mayors may adopt any appropriate measures, (i) reporting and being accountable to the local council; and (ii) being held individually liable for such measures." In large municipalities, governed by Title X LBRL, mayors are also entitled "to adopt any appropriate and necessary measures in case of urgent need, immediately reporting to the local council" (Art. 124(4)(h)). There are significant differences between both provisions. First, Art. 124 fails to mention "accountability" and "individual liability" (only Article 21(1)(m) does). Second, the situations allowing mayors to adopt these "appropriate and necessary" measures are not described in the same way. Whereas Art. 21 refers to "public emergencies," Article 124 mentions "urgent need" regarding large municipalities.

[50]Jiménez Asensio, R. (2020), "Pandemia, vulnerabilidad social y Administración Pública," 25 May 2020, https://hayderecho.expansion.com/2020/05/25/pandemia-vulnerabilidad-social-y-administracion-publica/.

[51] "Los Gobiernos Locales jugarán un papel central en la desescalada y la reconstrucción social y económica" http://www.femp.es/comunicacion/noticias/los-gobiernos-locales-jugaran-un-papel-central-en-la-desescalada-y-la.

In addition, Article 6 of Royal Decree 463/2020, of 14 March, declaring the state of emergency to manage the public health crisis caused by COVID-19 (RD 463/2020) provides that municipalities must "manage their services ordinarily." Also, the First Final Provision of RD 463/2020 embraces and ratifies any pandemic-related measures adopted by regional authorities, providing that these measures will remain effective as long as they abide by RD 463/2020.

Under Royal Decree-Law 10/2020, of 29 March, on recoverable paid leave for employees that do not provide essential services, to reduce population mobility in the fight against COVID-19 (RD-L 10/2020), the following qualify as essential services (regarding the local provision of welfare services for the elderly): home care, remote assistance, care for gender violence victims, social services (citizen assistance and care for vulnerable people) and, in connection with this, telephone and online care. In particular, RD-L 10/2020 defines the following as essential services: social services and home care (covering 450,000 people, in addition to 100,000 that no longer receive assistance in day care centers), nursing homes and health centers, care for homeless people, assistance to victims of gender violence and itinerant trade.[52]

However, following the state of emergency and those early stages of the COVID-19 health crisis, local governments will continue to be the first port of call to face the social and economic crisis currently hitting Spain. This situation, and its development over the next few months, will place a strain on local authorities; it will be hard for them to meet citizens'−and particularly older adults'−needs. Keep in mind that the elderly will probably be most in need. Therefore, it is necessary to clarify the powers allocated to local authorities specifying the role that the LBRL and welfare legislation (namely regional provisions) provide for local governments.

## 2. LOCAL GOVERNMENT POWERS FOR WELFARE PROVISION

The Spanish Local Government Act (LBRL) was amended by Act 27/2013 on the Streamlining and Sustainability of Local Government (*Ley de Racionalización y Sostenibilidad de la Administración Local*, LRSAL). In particular, the LRSAL significantly modified the LBRL's general provisions on the regional-local allocation of powers in the field of welfare services. This reform triggered several conflicts of rules and, consequently, various scholarly debates.[53] The Constitutional Court settled these debates−even invalidating

[52] According to the formal statement issued by the FEMP on April 2, 2020 ("*Queremos participar de la construcción de este nuevo futuro*"), http://www.femp.es/sites/default/files/multimedia/np-declaracion_institucional_femp_COVID-19_1.pdf

[53] On this matter, see Font i Llovet, T. (2020), "Gestión de servicios sociales en el ámbito local. Nuevos planteamientos sobre la ciudad y la contratación pública," in L. TOLIVAR ALAS and M. CUETO PÉREZ (Dir.), *La*

some of the conflicting provisions−delivering a set of rulings, the most remarkable being Constitutional Court Judgment (STC) no. 41/2016.

The passage of the LRSAL drastically modified local governments' powers, and particularly the core of local powers in the field of welfare and health care. In a nutshell, the purpose of the LRSAL reform was to narrow the scope of local governments' power in welfare provision. In fact, some scholars define this far-reaching reform as a "constitutional mutation."[54] The thinning of local power was aimed at avoiding overlaps between existing governments and authorities (as stated by the LRSAL's Preamble), subject to the principles of administrative efficiency, cost-effectiveness, budgetary austerity and public spending control.

Due to the preceding economic crisis and the forecasts, there was a cut in the resources and infrastructure available to local authorities to deliver elderly-related services. However, data show that this decreased resource availability for the elderly slowly recovered starting in 2014. In 2014, local governments' spending in ageing-related policies only increased by 27.8%, whereas in 2016 it rose by 50.6%.[55]

As for the so-called "core local powers," Article 25(2) LBRL was re-worded, and the scope of local powers was narrowed. As a result of the reform, regarding welfare, local governments would now be responsible solely for (i) "assessing and reporting" duties and (ii) "providing immediate care to people at risk of social exclusion" (Art. 25(2)(e) LBRL).

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*prestación de servicios sociosanitarios. Nuevo marco de la contratación pública*, Tirant lo Blanch, 2020, p. 21-45; Arias Martínez, M.A. (2014), "Las competencias locales en materia de servicios sociales tras la aprobación de la ley 27/2013, de 27 de diciembre, de racionalización y sostenibilidad de la administración local," *Revista de Administración Pública*, no. 194, Madrid, p. 373-410; Almeida Cerreda, M. (2014), "El incierto futuro de los servicios sociales municipales," *Anuario Derecho Municipal*, 2013, IDL-UAM 2014, p. 93-120; Salvador Crespo, M. (2015), "Los servicios sociales como paradigma de los cambios operados en el sistema competencial al amparo de la Ley 27/2013, de racionalización y sostenibilidad de la administración local," *Costes y beneficios de la descentralización política en un contexto de crisis:el caso español*, coordinated by J. Tudela, M. Kölling, p. 105-145; Jiménez Asensio, R. (2016), "¿Quién prestará los servicios sociales el 1 de enero de 2016?" (http://rafaeljimenezasensio.com/2015/11/08/quien-prestara-los-servicios-sociales-el-1-de-enero-de-2016/); Toscano Gil, F. (2014), "El nuevo sistema de competencias municipales tras la Ley de racionalización y sostenibilidad de la administración local: competencias propias y competencias distintas de las propias y de las atribuidas por delegación," *Revista Española de Derecho Administrativo*, p. 285-320. More recently, see the work by García Rubio, F. (2020), *El Derecho local tras la "racionalización." Entre la transparencia, la remunicipalización y el ajuste presupuestario*, Tirant lo Blanch, p. 53-65.

[54] See Font i Llovet (2020: 23-24). See also Font i Llovet, T. and Galán Galán, A. (2014), "La reordenación de las competencias municipales: ¿una mutación constitucional?," *Anuario del Gobierno Local 2013*, p. 11-45).

[55] These data can be found in Astier, C., Errasti, A., and Tejada, L. (2018:81), "Políticas públicas municipales de personas mayores: gestionando el envejecimiento de las ciudades y municipios para una sociedad para todas las edades," in *Retos científicos, jurídicos y sociales relacionados con el envejecimiento en Cataluña y en España*, Transjus Working Papers Publications, Working Paper no. 6/2018.

Note, however, that removing powers from the list of Art. 25(2) LBRL only means that these *Ley de Bases* no longer requires to pass national or regional legislation allocating the relevant powers to local authorities. In other words: certain fields, including welfare, do not necessarily (not anymore) fall within the scope of powers of municipalities as allocated by regional or national bodies.[56] This general statutory provision passed by the national legislature is not binding on regional lawmakers. However, regional legislatures may embrace and implement this reduction of local power or even extend the scope of local governments' competences regardless if they are listed on Art. 25(2) LBRL. Otherwise, the national legislature would go from being the very gatekeeper of local self-government (or local autonomy) vis-à-vis Autonomous Regions to a true watchdog preventing regional lawmakers from extending the scope of local power.[57]

Accordingly, reducing local powers in the field of "welfare services" under Art. 25(2) LBRL had no impact on regional welfare legislation, which has traditionally allocated a great deal of power in the field of welfare provision to municipalities−broader powers, in fact, than those currently provided in subparagraph (e) of Art. 25(2). Therefore, except in this specific field, where sector-specific provisions should allocate powers to local governments, devolution of power will be the only way for municipalities to regain the power they used to exercise. This entails that local governments will exercise their powers subject to Article 27 LBRL, i.e., monitored by the relevant public authority ultimately holding and retaining the power devolved to local bodies. As a result, local self-government is severely undermined by the reform, which (i) narrows the scope of powers to be allocated to local governments under the re-worded Art. 25(2); and (ii) apparently encourages the devolution of power. In this connection, the Constitutional Court emerged as the gatekeeper of local self-government and delivered a judgment (STC no. 41/2016) stating that (i) narrowing the scope of local power does affect the constitutional principle of local self-government; although clarifying

[56] It is worth recalling that Supreme Court Judgment (STS) no. 115/2004 found that the allocation of powers to local bodies (in the case at hand, to authorize indirect discharges of pollutants into groundwater) had to be implemented through a "formal statutory provision" under Art. 25(3) LBRL.

[57]Velasco Caballero, F. (2017), "Juicio constitucional sobre la LRSAL: punto final," *Anuario de Derecho Municipal 2016*, no. 10, IDL-UAM, Marcial Pons, p. 42. See Zafra Víctor, M. (2014), "Doble inconstitucionalidad del Proyecto de Ley de Racionalización y Sostenibilidad de la Autonomía Local," *¿Un nuevo modelo de gobierno local? municipios, diputaciones y Estado autonómico*, Fundación Democracia y Gobierno Local, p. 26. See also Cidoncha Martín, A. (2017), "La garantía constitucional de la autonomía local y las competencias locales: un balance de la jurisprudencia del Tribunal Constitucional," *Cuadernos de Derecho Local*, no. 45, 2017, p. 59 citing scholars claiming that the list provided in Art. 25(2) is a closed or exhaustive list (*numerus clausus*) that cannot be extended or modified by the central or regional governments. See also Ortega Bernardo, J. (2014), *Derechos fundamentales y ordenanzas locales*, Marcial Pons, p. 336. This matter has been settled by the Constitutional Court. See Judgment (STC) no. 41/2016.

that (ii) municipalities are not stripped of their local autonomy because they are not deprived of all the powers that could be removed therefrom.[58.]

Regional governments have powers in the field of welfare services. Therefore, they are responsible for (i) planning, arranging and administering all services and benefits; and (ii) determining the role of local governments in welfare provision.[59]

The new wording of Art. 26 LBRL has not drastically modified the category of "minimum required services," i.e., services that must be provided by local bodies, but it has removed some of them or reduced their scope. Remarkably, under Art. 26(1)(c) LBRL, municipalities with a population over 20,000 will no longer be required to "deliver welfare services," and this requirement turns into the obligation of "assessing and reporting social needs as well as providing immediate care to people at risk of social exclusion." Therefore, local authorities are no longer required to provide a service. Rather, now they must only identify social or health care needs. This reduction does not necessarily entail that municipalities cease to deliver these services, since sector-specific legislation (both at regional and national levels) can still provide as required local services some of the services removed by Art. 26.[60] In addition to listing services that must be delivered by local authorities, regional legislation may modify, increase or extend these minimum required services.[61] In conclusion, the reform implemented by the LRSAL does not quite narrow the scope of local powers (except for the fields expressly left outside the scope of local governments because they are directly allocated to regional authorities under the first, second and third transitional provisions LRSAL), but rather redrafts local authority and powers for the sake of sustainability and economic efficiency.[62]

Finally, the reform repealed Article 28 LBRL, which provided for several supplementing powers. These supplementing powers had allowed to create and implement various welfare services at the local governments' discretion (that are currently in place) to meet citizens'

[58] In this vein, see Arias Martínez, M.A. (2014: p. 402-403). See a comprehensive case law analysis in Font i Llovet (2020: 25); Velasco Caballero (2017); and Cidoncha Martín, A. (2017).

[59] Almeida Cerreda, M. (2011), "Las competencias de los municipios en materia de servicios sociales," in S. Muñoz Machado (Dir.), *Tratado de Derecho Municipal*, volume 3, Madrid, Iustel, p. 2701 *et seq.*; Ramos Gallarín, J. A. (2010), "Los municipios en el Sistema para la Autonomía y la Atención a la Dependencia," *Anuario de Derecho Municipal 2009*, no. 3, p. 195-220, p. 209.

[60]Velasco Caballero, F. (2013), "Nuevo régimen de competencias municipales en el Anteproyecto de Racionalización y Sostenibilidad de la Administración Local," *Anuario de Derecho Municipal 2012*, no. 6, IDL-UAM, Marcial Pons, p. 39.

[61]Rivero Ysern, J.L. (2014), *Manual de Derecho Local*, 7th edition, Thomson-Cívitas, p. 226; and Ortega Álvarez, L. (2000), "Las competencias como paradigma de la autonomía local," *Justicia Administrativa*, special issue, p. 48.

[62] Ortega Bernardo, J. (2014: 48).

needs.[63] The reason for repealing this provision is that the ancillary or supplementary powers laid down in Art. 28 were considered to create overlaps.

The supplementary powers were repealed, but Art. 7(4) LBRL currently provides for the so-called "competences other than the core powers." These powers entail that there are general or open-ended provisions that entitle local governments to carry out activities (i.e., exercise powers) to meet each community's specific needs and interests. Accordingly, there is a legal basis for a wide array of local actions and activities that are not provided in sector-specific legislation. Self-evidently, these non-specific broad local powers include (or may include) the same powers and scope of action previously allowed under formerly applicable and now repealed Art. 28 LBRL. These powers include, *inter alia*: development cooperation, kindergartens, immigrant integration programs, drug dependence care and assistance programs for women.[64] In fact, there were few activities based on the supplementary powers of former Article 28 LBRL. Indeed, local authorities very rarely relied on this provision exclusively in judicial proceedings. In other words: they needed additional provisions to support their claims. Almost always, the powers allocated or devolved to local authorities and thus their activities stem from: (i) required services under Art. 26(1) LBRL; (ii) powers directly allocated by national or regional sector-specific legislation; or (iii) powers listed as covering matters or services "in the local interest" under Art. 25(2) LBRL.[65]

Art. 7(4) LBRL provides for these "non-specifically allocated" powers or *competencias impropias*. Under this article, local authorities can only exercise "powers outside the scope of the core of local powers or non-devolved powers" as long as "(i) the financial sustainability of the local treasury not be at risk under the budgetary and financial stability requirements; and (ii) the powers or services not be simultaneously exercised or delivered by other authorities." As for the implementation of these *competencias impropias*, Art. 7(4) LBRL requires "prior binding reports issued by (i) the competent authorities stating that there are no overlaps; and (ii) the authorities responsible for the financial oversight of the new powers."

The Constitutional Court (STC no. 41/2016, legal basis 11) found that the Government was entitled to set certain pre-requirements on the exercise of local powers under Article 7(4) LBRL. The Constitutional Court requires that municipalities be involved in the *ex ante* review performed by regional or national authorities (who issue the aforesaid binding reports on financial sustainability and the absence of overlaps). In the Court's view, these requirements are aimed at defining the scope of local power. However, they do not qualify

[63] Font i Llovet (2020: 24).

[64] (Velasco Caballero (2013: 42); and Font i Llovet (2020: 24).

[65] Prieto Romero, C. (2012), "Las competencias municipales. Las competencias impropias y los servicios duplicados en la ciudad de Madrid," *Anuario de Derecho Municipal 2011*, no. 9, IDL-UAM, Marcial Pons, p. 102; (Velasco Caballero (2013: 42).

as instruments allowing for regional or national overreach. In STC no. 1017/2017, legal basis 3, the Court claims that "technically, these are not administrative review mechanisms." In STC no. 154/2015, legal basis 7, the Court found that a similar instrument did not qualify as a review mechanism, but rather as an instrument to reconcile overlapping or partially conflicting regional and local powers. The Constitutional Court has added that this *ex ante* review is not by any means a form of oversight or a way of steering "local power," which must be freely and autonomously exercised. Art. 7(4) limits but not necessarily infringes the principle of local self-government. Regional authorities could unlawfully interfere with local self-government if they actually prevented significant local action in core local matters. Such interference should be (i) assessed on a case-by-case basis; and (ii) subject to judicial review by judicial administrative courts.

According to STC no. 107/2017, as for areas exceeding the scope of local interests (i.e., "supralocal interests" or "supramunicipal matters"), statutory provisions may empower regional authorities to limit local self-government, although "specifying and carefully defining the content and scope of these restrictive powers" (legal basis 3). The Court noted that Art. 7(4) LBRL could provide for interventions that unduly restrict local self-government because "some aspects regarding such restrictive interventions have not been sufficiently defined." Despite this bold statement, however, the Court concluded that Art. 7(4) (i) fulfills the requirements applicable to "ground rules" or "general statutory provisions" under Spanish law; and (ii) could not have provided for a more comprehensive definition of local powers because otherwise it could have encroached upon local self-government.[66]

The current LBRL's wording changes the meaning and substance of the traditional devolution of powers from regional/national authorities to local bodies. Art. 27's prior wording provided for devolved powers as a way of expanding local authority in areas where there were significant "core local interests" on top of matters with a regional or national scope. These were matters where public action could be streamlined and brought closer to citizens−under the principle of proximity−in line with Article 4(1) of the European Charter of Local Self-Government. Note that the LBRL refers to "matters related to the core of [local] interests," as long as "it allows for enhancing and streamlining public management and increasing citizen participation."

As currently worded, Article 27 LBRL is an instrument to reduce costs in the arrangement of regional and national powers, i.e., a way of efficiently managing regional and national powers. The LBRL no longer refers to streamlining public action or increasing citizen participation. Art. 27(3) LBRL is now worded as follows: "The aims are (i) preventing overlaps; (ii) increasing the transparency of public services; and (iii) generally streamlining public action to save costs." Along these lines, Art. 27(1) provides that "[a]ny devolution of

[66] See this analysis in Cidoncha Martín, A. (2017: 71).

powers should seek to (i) increase the efficiency of public management; (ii) remove administrative overlaps; and (iii) meet the goals laid down by budgetary stability and financial sustainability legislation."

This entails that the municipality to which power is devolved reports to another public authority and acts under that authority's direction and oversight. In broad terms, this arrangement would qualify as "some sort of indirect administration and exercise" of regional powers (STC no. 41/2016, legal basis 11). The devolving authority "instructs and oversees" the recipient of devolved powers (i.e., the municipality). Note that any actions by the municipality are subject to appeal before the devolving authority's competent bodies (Art. 27(4) LBRL); as a result, the municipality's decisions could be repealed. Additionally, the devolving authority is entitled to issue "general instructions or specifications" or to require information on the locally exercised power and local management anytime. In case of non-fulfillment of any applicable guidelines or requirements, or if the municipality refuses to provide the requested information, the devolving authority will be entitled to reverse devolution or restore all powers to the devolving authority (see Art. 27(4) LBRL).

In the Constitutional Court's view, insofar as the devolution of powers must be accepted by municipalities, there can hardly be an infringement of the constitutional principle of self-government. The Court considers that there is a qualitative difference between (i) the original powers subject to devolution under the previous wording of the LBRL; and (ii) powers that can be devolved under Art. 27 LBRL. Current Art. 27 LBRL governs devolution of powers as a form of "indirectly managing regional powers" (see STC no. 41/2016, legal basis 11).[67]

In addition, it is unclear that the legal framework promotes devolution. In fact, it seems like quite the opposite.[68] First, because the devolving authority closely oversees the local body, thus making it hard for the local body to accept devolution. The same applies to financing, since any devolution of powers will be invalid unless "sufficient resources are allocated" from the devolving authority's budget for each financial year (Art. 27(6) LBRL). Moreover, this is a less flexible framework. The LBRL's prior wording allowed for a traditional devolution of powers as well as for a mandatory statutory devolution. In its current wording, Article 27(5) only allows for an agreed devolution of powers: "The devolution of powers shall only be effective upon acceptance by the affected municipality."

Finally, the second transitional provision of Act 27/2013 on the Streamlining and Sustainability of Local Government (LRSAL) also has an impact on welfare provision. Under the heading "empowerment of regional authorities in the field of welfare provision," it directly transferred to regional bodies a set of powers often exercised at a local government

[67] On the regulation of devolved local powers after the LRSAL and its interpretation by the Constitutional Court, see García Rubio (2020: 70-78), including an analysis of regional regulation (67-70).
[68] Velasco Caballero (2013: 46).

level if so decided or allowed by regional authorities or the Government (see Art. 149(1)(18) of the Spanish Constitution). The Constitutional Court (see STC no. 41/2016, legal basis 13) found the LRSAL provision unconstitutional because it covered regional powers that could not be affected by national statutory provisions. The judgment added that the national legislature could not force regional authorities to hold welfare-related powers (taking them from municipalities) thereby preventing regional authorities from choosing to devolve certain powers to local authorities.

## 3. THE CLASH BETWEEN REGIONAL AND LOCAL POWERS IN WELFARE PROVISION

The *Estatutos de autonomía* (often referred to as "regional constitutions") embrace social welfare powers as allowed by Art. 148(1)(20) CE. Some Autonomous Regions even include in their *Estatutos* certain rights related to elderly care.[69] At a statutory (non-constitutional) level, these powers are further implemented in (i) regional welfare legislation; and (ii) specific pieces of legislation on elderly care, where local governments retain a prominent role when it comes to delivering these services.[70]

A significant share of benefits for the elderly fall within Act 39/2006, of 14 December, on the Promotion of Personal Autonomy and Care for dependent persons (*Ley 39/2006, de 14 de diciembre, de Promoción de la Autonomía Personal y Atención a las personas en situación de dependencia*, LAPAD). Thus, the LAPAD is a key element in the framework for elderly services and benefits. Under the framework arising from the LAPAD, all public actors at all levels−national, regional and local government authorities−must be involved in securing the eligible dependent persons' individual rights to receive benefits. However, this does not mean that the LAPAD framework exhaust the scope of elderly services. Many potential recipients are not covered by the LAPAD framework and are still entitled to benefits delivered by local governments.[71]

In practice, the LBRL and regional legislation result in municipalities' welfare-related action being some sort of indirect administration by the regional government handling devolved powers. Under this distribution of powers, local governments do not quite qualify as

[69] See Articles 10(3) and 13(3) of the Valencia *Estatuto*; Art. 18 of the Catalonia *Estatuto*; Art. 16(3) of the Balearic Islands *Estatuto*; Art. 19 of the Andalusia *Estatuto*; Art. 24(g) of the Aragón *Estatuto*; Art. 13(5) of the Castilla y León *Estatuto*; Art. 7(14) of the Extremadura *Estatuto* and Art. 15 of the Canary Islands *Estatuto*.
[70] As in Andalusia Act 6/1999, of 7 July, on Care and Protection for the Elderly; and Act 5/2003, of 3 April, on the Care and Protection for the elderly in Castilla y León. See Díez Sastre, S. (2020), "Los servicios municipales para mayores en el entorno rural y urbano," *Istituzioni del Federalismo*.
[71] *Ibidem*. Although not all dependent persons are older adults, the ratio is really high in this age group (in the EU, the dependency ratio for older adults in 2018 was 30.5%).

autonomous bodies (as should be under the Constitution) exercising their own powers. In fact, regional welfare provisions−and sometimes regional *Estatutos* like the Catalonian *Estatuto* in Art. 84(2)(m)−have transferred powers to municipalities that were originally held by regional governments. By doing so, they have significantly altered the position of local bodies, both municipalities and provinces. Since regional governments define local welfare frameworks as networks of benefit-and-service-providing actors, both municipalities and provinces now fall within an organizational and administration framework led and defined by regional authorities, thus being foreign to local bodies. As a result, the scope of powers on which local autonomy is substantiated or founded has been significantly diminished. This thinning of local power may not be all quantitative (i.e., they may not have lost actual "matters" to regulate) but it is most certainly qualitative (i.e., the substance and quality of their powers has thinned).[72] Note that these are broad statements. Some qualifications and nuances could be made considering municipalities' varying sizes and their ability to deliver welfare services. Regional lawmakers take into account the heterogeneity of municipalities in terms of size and benefit-providing capacity. Therefore, regional legislation does allow for welfare powers to be exercised either by local governments themselves or relying on public-public partnerships at a local level. If needed, these partnerships between public bodies could involve supralocal authorities such as counties (*comarcas* in Spanish), provinces, or even regional authorities in case of municipalities with little benefit-providing capacity.[73]

Within this organizational framework, instruments for public-public relationships become increasingly important, which shows in the national and regional strategies for elderly policymaking. In spite of this, in practice, regional bodies provide major financial and technical support to municipalities. Also, although national (i.e., state) authorities are bound by Art. 50 CE−requiring that national authorities secure welfare for the elderly and families−they can also grant subsidies or financial aid to local governments for various purposes (e.g., building nursing homes or promoting social assistance for the elderly).[74]

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[72] Arroyo Jiménez, L. and Domínguez Martín, M. (2012: 81), "Municipios y comunidades autónomas en la gestión del sistema de autonomía y atención a la dependencia," in J. Mª. Rodríguez de Santiago and S. Díez Sastre (coords.), *La Administración de la Ley de Dependencia*, Marcial Pons; Velasco Caballero, F. (2012), "Convenios administrativos en el sistema de promoción de la autonomía personal y atención a la dependencia," in J.Mª. Rodríguez de Santiago and S. Díez Sastre (coords.), *La Administración de la Ley de Dependencia*, Marcial Pons, p. 110-111; Ramos Gallarín (2010: 197-198, 202-203).

[73]Arroyo Jiménez and Domínguez Martín (2012: 80-81), examining and referring to regional legislation of Castilla-La Mancha, Catalonia and Madrid. The impact of municipalities' size, along with their socioeconomic and demographic diversity is also examined in Ramos Gallarín (2010: 203-206, 208-209, 212-213).

[74] The empirical analysis by Egea, A. and Navarro, C. (2019), *Mayores. Análisis comparado de políticas de mayores en municipios de la Comunidad de Madrid*, Instituto de Derecho Local, UAM, Madrid, p. 71, shows that 76% of local governments claim that receive no support whatsoever from higher government levels (EU authorities and the national Government).

This whole framework is a network made up of public authorities with their own powers regarding care for dependent persons,. where the arrangement and management thereof involves all three government levels as well as private stakeholders. Consequently, it must necessarily rely on cooperation and coordination mechanisms. The main coordination mechanisms laid down in regional welfare legislation relate to (i) the establishment of coordination bodies; and (ii) welfare planning. Regional provisions also refer to voluntary public-public cooperation mechanisms to perform the various tasks involved in managing the public welfare framework, including agreements for the joint management of welfare services and the establishment of managing bodies through consortia, local government partnerships and other partnerships allowed by law. The most remarkable and commonly used cooperation mechanisms are administrative agreements. Regional and local governments often enter into a standard welfare agreement (*convenio ordinario de servicios sociales*) governing financial aspects, since these services are jointly financed by regional and local governments (as long as the latter are responsible for delivering the social services). These welfare agreements are usually concluded on the basis of the municipality's population and leave broad scope of discretion to the local government, who will make the spending decisions (e.g., extending home care or hiring additional staff).[75]

## 4. LOCAL ACTION FOR THE ELDERLY: ORDINARY AND EXTRAORDINARY SERVICES

Welfare is a broad category, comprising (i) economic or financial benefits and (ii) technical benefits or services. Some regional welfare provisions rely on this categorization. However, other pieces of regional legislation provide for a threefold classification including (i) technical benefits; (ii) economic or financial benefits; and (iii) technological benefits; or, sometimes, (i) technical; (ii) economic; and (iii) factual (non-formal) benefits. These provisions often state that economic or financial benefits cannot be privately managed, but they allow for the private management of services or factual benefits. See, for instance, nursing homes. They can be held or owned by public bodies (local or, in most cases, regional authorities) but also by private stakeholders, although subject to public oversight, often by regional bodies. Oversight will be more or less stringent depending on regional legislation. Note that privately owned nursing facilities are included within the public network for elderly care. Finally, there are also "fully private" nursing homes, i.e., owned and managed by

[75] See an analysis of public-public relationships and their regulation in regional legislation in Arroyo Jiménez and Domínguez Martín (2012: 195-219). See also an analysis of how these services are financed. Finally, on the agreements, see Velasco Caballero (2012: 42).

private entities. These facilities are not included in the public network for elderly care nor they assist public authorities in the provision of elderly services.[76]

Local action regarding the elderly can be further categorized as "care" or "development" activities. At a local level, authorities focus on care, trying to enhance living conditions, more than on welfare development. However, welfare development activities by local bodies are on the rise.[77]

Aside from the specific management approaches (public management or private-public partnerships), see below the specific benefits provided by municipalities to the elderly.

As noted above, regional-to-local devolution in the field of welfare includes few powers and has a narrow scope. There are two reasons for such limited devolution of powers to local governments. First, because powers are sometimes allocated on a joint basis, i.e., they are shared by regional and local bodies. Second, because of regional oversight (standards, controls and regional intervention); lists of benefits; mapping of services (establishing "core areas" for primary care); "general standards and intervention approaches;" and rulemaking powers.[78]

So, the powers allocated to municipalities regarding primary care are limited to the management of the relevant services. In other words, local bodies arrange the benefits and deliver them, whilst regional authorities retain rulemaking and planning powers, thus conducting stringent oversight on local bodies. Therefore, regional governments are able to thoroughly schedule and oversee local action in this field. Keep in mind that regional governments (i) decide on the assessment procedures for welfare delivery, including the scope of local action; and (ii) plan and regulate the specific welfare benefits to be provided by local bodies.[79]

The aforesaid framework is aptly exemplified by the proceedings and steps implemented to assess dependency and determine eligibility for dependency care or benefits, the most remarkable being the drafting of a welfare report by primary care professionals and teams. Other than this report-drafting, local governments play no role in assessing dependency or eligibility. This makes sense, since these activities are beyond the scope of local power under regional welfare legislation. Local authorities could be more involved in the dependency framework. For instance, in Catalonia, there are joint regional-local consortia responsible for assessment duties. Also, certain regions may devolve powers to municipalities with benefit-

[76] Castillo Abella, J. (2020: 460), "Tipología y régimen jurídico de los sujetos gestores de residencias de mayores," *InDret, Revista para el Análisis del Derecho*, no. 2, citing regional provisions.

[77] These data can be found in Astier, Errasti and Tejada (2018:82).

[78] Along these lines, see Velasco Caballero (2012: 110-111). These insights can also be found in Arroyo Jiménez and Domínguez Martín (2012: 80).

[79] Arroyo Jiménez and Domínguez Martín (2012: 80).

providing capacity, under general local government provisions (i.e., national legislation), under regional welfare legislation or subject to devolution-of-power rules for municipalities with a specific legal status (Barcelona or Madrid).[80]

As for the specific benefits, local bodies are generally responsible for delivering basic or primary care services. However, specialty care remains within the scope of regional authorities, who may enter into agreements or other cooperation arrangements with specific municipalities for the latter to create and maintain specialty care facilities.

Primary care comprises information, orientation, advice, counseling, prevention and diagnostic activities for those in need, along with two services provided both within and outside the dependency framework: home care and remote assistance, under Art. 12 LAPAD, providing that local bodies "shall be involved in the delivery of dependency care services subject to the applicable regional legislation and within their scope of powers."

The most widely used services are home care and remote assistance.[81] They are both focused on assisting the elderly at home, helping them to carry out their day-to-day activities as normally as possible. There are additional home care services such as laundry, podiatry or food delivery. Generally, these primary care services are focused on allowing the elderly to stay at home, trying to implement "ageing in place" policies.[82] Broadly, "ageing in place" does not necessarily translate into "ageing at home." Ageing can be in a home other than the original one, but it has to be in the lifetime urban and social environment (i.e., "lifetime neighborhoods"), where the social environment remains the same adding appropriate elderly care services and a friendly urban environment.[83]

As a result of "ageing in place" policies, urban development must fulfill three requirements: (i) the home must be functional and friendly; (ii) there must be age-friendly and open urban areas and environments; and (iii) there must be elderly care facilities.[84]

Home care services are aimed at meeting daily life needs (Art. 23 LAPAD). Home care in Spain is rather social or welfare-oriented, whereas other countries take more of a health-

[80] *Ibidem.*

[81] In Spain, in 2018, 69% of dependency service recipients were older than 80. Remote assistance is the second most demanded service, and 67.4% of users in 2018 were 80 or older. See the report "*Servicios sociales dirigidos a las personas mayores en España*" prepared by the Ministry of Health and Welfare; 5 February 2019 (available on line at imserso.es), p. 1-41, p. 12 and p. 9. See also Díez Sastre, S. (2020).

[82] This is a well-known expression used to refer to this kind of measures or public policies. See Maragall Garrigosa (2018), "Envejecimiento: modelos de vivienda y convivencia en el contexto demográfico actual," in *Retos científicos, jurídicos y sociales relacionados con el envejecimiento en Cataluña y en España*, Transjus Working Papers Publications, Working Paper no. 6/2018, p. 35 and the definition in p. 36.

[83] Velasco Caballero, F. (2018), "Derecho urbanístico y envejecimiento demográfico," InDret 4/2018, p. 6-7.

[84] Velasco Caballero (2018: 11).

based approach. Home care programs in Spain target vulnerable older adults living on their own who are slightly dependent to perform daily activities and be functional.[85]

The remote assistance programs rely on communication technologies, IT and human resources to help recipients who are in emergency situations, unsafe, alone or isolated (see Art. 22 LAPAD).

Keep in mind, however, that "ageing at home" policies are not always feasible. Eighty and ninety-year-olds can hardly live on their own, even with assistance. Therefore, in order to meet elderly needs we often need part-time nursing homes (i.e., day or night care centers) so older adults can be treated as required (oxygen, medical care, etc.) or more intense care−for longer time periods−that cannot be provided solely relying on the home care or remote assistance programs. The ultimate purpose is to provide comprehensive care during the day or at night to maximize older adults' personal autonomy and support relatives or caregivers (Art. 24(1) LAPAD). Although recipients of these services often suffer from dementia and there are specialized dementia care centers, most of these facilities take care of older adults with and without dementia.[86]

The so-called "senior citizen facilities" have a different purpose. They are intended as places for older adults to meet, interact and engage in physical activity, social relationships and leisure activities. These senior citizen facilities include additional services aimed at meeting certain needs out of home: restaurants, hairdressing salons or podiatry care. These facilities can rely on public or private equipment and qualify as "hybrid care," combining strict assistance and the delivery of services falling within the scope of active ageing programs and healthy ageing initiatives. At a national level, on 30 November 2017, the National Elderly Council passed the *National Strategy for active ageing and good care for the elderly 2018-2021* (the National Strategy, *Estrategia nacional de personas mayores para un envejecimiento activo y para su buen trato 2018-2021*) covering the notion of "healthy ageing." The National Strategy provides for more ambitious objectives and extends its target recipients, insofar as it is aimed at securing functional ability, health and well-being, and equal rights and opportunities for the elderly throughout their lifetime in order to ensure healthy ageing. This approach to ageing stems from the World Health Organization. In 2016, the 69th World Health Assembly adopted "The Global strategy and action plan on ageing and health (2016-2010)" and the "Decade of Healthy Ageing (2020-2030)." Elderly care has also become a top priority for the European Union. Indeed, the EU seeks societies with active senior citizens, and it also promotes active ageing in order to reduce health care spending in

[85] Iglesias Souto, P., Real Deus, J. E., Mayo País, M. E., and Taboada Ares, E. M. (2018), "Asignación de servicios sociales a personas mayores: revisión y modelo de toma de decisiones," *Cuadernos de Trabajo Social*, Vol. 31, no. 2, p. 419.

[86] Iglesias Souto, Real Deus, Mayo País and Taboada Ares (2018: 419); Velasco Caballero (2018: 7).

the future, since longevity does not mean quality of life, but it most certainly increases the demand for (extremely expensive) welfare benefits and services.[87]

In fact, age-related policymaking at a local level is based on active ageing and focuses on ensuring and increasing individual autonomy at later life stages. Based on this paradigm, local governments promote and manage a wide variety of services (ranging from leisure and culture activities to home care) to avoid that ageing may (i) keep older adults from participating in society; or (ii) limit their decisions in essential aspects like choosing where to live or engaging in economic activity. Under this approach, active ageing is widely accepted by institutions and bodies worldwide since the WHO brought it to the forefront in the 1990s. However, there are some indications that certain demographic and socioeconomic aspects could require to review the basis of elderly-related policies based on the active ageing paradigm. First, because these active ageing policies can be aimed at preserving the *status quo* rather than at tackling exclusion or dependency situations. This phenomenon is inherent to demographic shifts and can be generally found in Europe, although there is a downward trend of the at-risk-of-poverty rates for older adults. This situation could give rise to a generational clash or conflict regarding the allocation of costs and benefits of elderly policies.[88] Actually, it seems like this generational conflict has arisen, or at least intensified, during the COVID-19 crisis.[89]

Finally, it is worth discussing the various elderly care options for older adults who are forced to leave their home. We will be dealing with nursing homes, intended to meet the residential needs of senior citizens who, in addition to having functional and cognitive shortcomings, lack sufficient social or family support and habitable housing.[90] Nursing homes allow elders to live an aged community with others who have the same needs and capacities. Nursing homes can be both public (i.e., fully within each region's welfare network) or private (i.e., set up by private entities or stemming from social initiatives). Note that private nursing homes

[87] Lauroba Lacasa, M. E. (2018), *"*Escuchar a las personas mayores como elemento clave para garantizar un envejecimiento activo," in *Retos científicos, jurídicos y sociales relacionados con el envejecimiento en Cataluña y en España*, Transjus Working Papers Publications, Working Paper no. 6/2018, p. 50. On the active ageing program, see Astier, Errasti and Tejada (2018:76-78).

[88] See a more comprehensive study in Egea and Navarro (2019: 15-18). They point out that this approach to elderly policies, based on securing personal autonomy or freedom of choice and promoting the so-called "silver economy," can stem from the financial situation of older adults. Recent empirical research has estimated the impact of ageing on economic growth. This study found that a 10% increase of individuals aged 60 and older leads to a 5.5% decrease in GDP *per capita*, there being a correlation between the increase in older adults and lesser productivity. Nevertheless, other analyses have found that ageing either has a lesser impact on productivity or that there is a more complex relationship between both variables.

[89] In the view of Jiménez Asensio (2020), "Pandemia, vulnerabilidad social y Administración Pública," op. cit., who discusses *gerontophobia*.

[90] Iglesias Souto, Real Deus, Mayo País and Taboada Ares (2018: 423).

are steadily becoming more common.[91] Nursing homes are typically a public service mostly provided by Autonomous Regions or subject to their control, although privately held residential facilities are becoming widespread. Although this remains fairly uncommon, in over the last few years there is a growing number of locally managed nursing homes (i.e., held by public authorities) in rural areas.

Traditional nursing homes are no longer the only response to older adults' residential needs. Slowly but surely other alternatives are gaining ground, such as those promoting *age-friendly communities* (AFCIs), or *senior cohousing*, since cohousing does promote social involvement and a certain degree of personal autonomy. Obviously, these facilities must provide residents with a room for private use. Otherwise, the fundamental right to privacy would not be secured.[92] However, some other rooms can be shared by all residents.

These initiatives are aptly exemplified[93] by the 32-apartment project developed by Navarre-based company "Nasuvinsa" in downtown Pamplona. These apartments are for rent by adults aged 65 and older. They are all accessible, friendly and flexible. In fact, they can be 1-bedroom or 2-bedroom homes depending on the tenants' needs. The terraces or yards on all five floors allow for having a small vegetable garden or orchard with an outside corridor giving access to all apartments. Thus, there is room for social interaction and coliving spaces that prevent isolation. Remarkably, this housing unit is downtown, within an urban area with many urban spaces and services. There is another advantage to it: we have social housing at the heart of the city, thereby avoiding gentrification and securing the right to housing downtown, in the city.[94]

On top of this, there are some municipalities implementing "social action plans." Some of them have a fairly general scope, whereas others are specifically addressed to protect the elderly. Obviously, these local actions differ depending on the size and needs of the relevant municipalities, but they have some common features.

[91] Velasco Caballero (2018: 8).

[92] Vaquer Caballería, M. (2015), "El derecho a la vivienda en su relación con los derechos a la ciudad y al medio ambiente," *Asamblea: Revista Parlamentaria de la Asamblea de Madrid*, no. 32, p. 130, is open to this possibility arguing that it could not be a fundamental right violation. However, according to him, it should be both exceptional and temporary, unless expressly accepted by the resident. On this approach to elderly housing, see also Velasco Caballero (2018: 7 and 8).

[93] As aptly stated in Chinchilla Peinado, J.A., Domínguez Martín, M., and Rodríguez Chaves, B. (2020), "Dignidad y adecuación de las viviendas sociales para las personas en riesgo de exclusión. Un elemento en la construcción del derecho a la ciudad," *Actas del Congreso de la AEPDA*, 2020. See additional examples and experiences in Maragall Garrigosa (2018: 40-43).

[94] Chinchilla Peinado, Domínguez Martín and Rodríguez Chaves (2020). See an analysis of these mechanisms in Maragall Garrigosa (2018: 35-36 and 37-40).

As for the extraordinary measures taken during the COVID-19 health crisis, we should keep in mind that the elderly have been one of the targets of local welfare: vulnerable elders isolated at home. For many of them, their day care centers shut down or the relatives or caregivers that were assisting them no longer can (due to illness or death or because the caregiver is no longer able to provide the service). Therefore, on top of all the older adults that already required care, a large number of senior citizens that were not receiving welfare benefits started to need them during lockdown. They demand food, home care and psychological assistance—to mitigate the fear and loneliness they suddenly suffer as a result of COVID-19.[95]

In addition to the delivery of food, there was a significant increase in telephone assistance and helplines, including awareness-raising and information campaigns and psychological assistance to tackle loneliness, gender violence,[96] issues related to the use of new technologies, information regarding COVID-19 (and COVID-related hygienic and other preventive measures), legal counsel and local service information. Some of the problems are old, but the COVID-19 crisis has given rise to new challenges, some of which are yet to surface.

Additionally, during the health crisis, local governments have been forced to deal with a change in the criteria governing the allocation of welfare. In some of the applications, authorities could not only consider the applicant's financial situation. Whether the applicant was actually in need, regardless of other economic criteria, is essential to make a decision.

Local authorities have also been forced to work together and coordinate donations, charity, volunteer work and other initiatives from the non-profit sector (also known as the "third sector") in order to take advantage of these initiatives.[97] An appropriate alliance with not-for-profit entities prevents overlaps and allows for getting the aid to the most vulnerable groups, thereby leaving no one unprotected. The effectiveness of the local aid network needs suitable information channels and funding the third sector.

To the extent possible, local governments have tried to enforce and keep in place the existing welfare provision agreements, although adjusting them to fit the new circumstances. When they have been unable to do so, they have launched tender procedures to procure the services within the context of modifications of public procurement legislation matching the COVID-19 context. These tender procedures were aimed at providing an immediate response and

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[95] *Edición Especial Carta Local sobre la COVID, Revista de la FEMP*, http://www.femp.es/comunicacion/noticias/edicion-especial-de-carta-local-COVID-19, p. 12.

[96] *Edición Especial Carta Local sobre la COVID, Revista de la FEMP*, http://www.femp.es/comunicacion/noticias/edicion-especial-de-carta-local-COVID-19, p. 12.

[97] Navarro Gómez, C. (2020), "Los gobiernos locales ante la crisis de la COVID: innovación y resiliencia," *Blog IDL-UAM*, 21 May 2020, claims that local authorities have created fora, committees and working groups to come up with recovery plans.

finding new (non-contractual) ways allowed by public procurement law to deliver welfare services to individuals and, more specifically, to vulnerable groups.[98] Also, keep in mind that many of the companies that had been awarded a public contract before COVID-19 had serious issues resulting from all the additional expenses arising from the COVID security and protection standards and requirements.

The same applies to local services. In fact, local entities had to deal with unexpected expenses as they were required to provide public employees with protective equipment and to clean and disinfect public buildings, facilities and roadways.

Finally, local bodies suffered a serious impact regarding their staff (i.e., they were forced to restructure or hire new employees) to meet the growing and changing demand for services, although some of these services were indirectly provided. It would be untenable that local services collapsed given an increased demand for welfare. The sudden stop or discontinuance of administrative procedures during the state of emergency, along with the difficulties encountered by local authorities to continue delivering essential public services (since authorities lacked appropriate e-administration and remote working mechanisms) creates a bottleneck. If we add a growing demand for welfare benefits, the whole social service network can collapse, thereby risking that people in need could be left out of the welfare system.[99]

With regard to the funds for these new and increased demand for elderly welfare, local authorities added to their own resources some extraordinary economic aid for the most vulnerable groups (particularly for elderly services). This financial aid was either directly granted to local governments or allocated thereto through regional bodies. This extraordinary aid−specially that provided in RD-L 8/2020 implementing urgent measures to mitigate the economic and social impact of COVID-19−gave local governments "windfall income." On top of that, they were allowed to exceed their spending limits as long as they used the funds for welfare investments (a nursing home, for instance) or to finance locally-provided welfare benefits, such as ensuring the appropriate provision of home care and remote assistance for dependent persons, hiring more employees in social service facilities or purchasing protective equipment. Also, under Articles 1(2) and 3 of RD-L 8/2020, municipalities could exceed

[98] See a more detailed analysis in Domínguez Martín, M. (2018), "Impacto de las directivas de contratos y de la ley 9/2017 de contratos del sector público sobre la contratación en el ámbito sanitario," in Jiménez de Cisneros Cid, F. J. (Dir.) *Homenaje al Profesor Ángel Menéndez Rexach*, Dickinson, 2018; and in Domínguez Martín, M. (2020), "La acción concertada de los servicios a las personas en la Ley de Contratos del Sector Público y en la legislación autonómica: ¿instrumentos no contractuales para la prestación de servicios públicos destinados a satisfacer necesidades de carácter social?," *La prestación de servicios socio-sanitarios: nuevo marco de la contratación pública*, Tirant lo Blanch.

[99] Martínez Gutiérrez, R. (2020), "Carácter esencial y consolidación de la e-Administración en los ayuntamientos en tiempos de la COVID-19," *El Consultor de los ayuntamientos*, no. 6, Local policy section.

their spending limits to implement "any measures deemed essential by regional and local authorities to take care of persons qualifying as particularly vulnerable as a result of the COVID-19 crisis." Obviously, these expenditure items were mostly addressed to the elderly. Furthermore, regional governments launched extraordinary packages, subject to extraordinary agreements supplementing the standard agreements for the joint financing of welfare services between regional and local bodies,[100] to mitigate the effects of the COVID-19 health crisis.

## 5. CONCLUDING REMARKS

As shown above, welfare powers are mostly devolved to the Autonomous Regions. However, under this national-to-regional devolution, regional governments remain closely connected with local authorities. In fact, aside from the actual wording of the applicable legal provisions, local bodies enjoy a somewhat broad discretion, i.e., local governments have a scope of action that results from reality itself and actual social demand.

As a result, local authorities retain a prominent role in welfare provision for the elderly. Their role revolves around delivering services and not quite around policymaking. Indeed, either relying on their own powers (under Art. 25(2) LBRL), devolved powers from Autonomous Regions, or based on "non-specifically allocated" powers or *competencias impropias*, local governments are still significant actors for welfare recipients, including the elderly, by delivering a wide array of benefits and services through their local authorities. Given their prominent role, local bodies must have sufficient resources and mechanisms to continue providing welfare for older adults, since elderly welfare has become a distinct sphere of local action.

This has become more evident during the COVID-19 health crisis, where municipalities have faced challenges and demands other than those usually encountered when caring for the most vulnerable groups, particularly the elderly. This has forced them to rearrange both the local administration itself and the very provision of welfare services.[101] They needed to extend the scope of existing services whilst providing new ones too meet the needs of older adults, who clearly qualify as one of the most vulnerable groups. Such an extensive role for local governments has most certainly tested the responsiveness of local social services.

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[100] A more detailed analysis of this state and regional aid can be found in Domínguez Martín, M. (2020), "La acción social municipal en la gestión de la emergencia sanitaria producida por la COVID-19 y en el proceso de salida de la crisis sanitaria y social" (*pending publication in Cuadernos de Derecho Local*, June 2020); and Martínez Sánchez, C. (2020), "Las corporaciones locales podrán emplear su superávit en ayudas sociales," *Blog IDL-UAM*, 1 April 2020. Martínez Sánchez, C. (2020), "Las corporaciones locales podrán emplear su superávit en ayudas sociales," *Blog IDL-UAM*, 1 April 2020.

[101] In this regard, see Navarro Gómez (2020).

From an ethical standpoint, and considering the existing priorities in public policies, it is worth noting certain age-based discrimination (evidenced by hospitals prioritizing younger patients over older patients, the inactivity of public authorities, or reckless and selfish behaviors by younger adults who did not feel at risk) evidencing a *gerontophobic* trend,[102] or, at least, a generational conflict. Also, within a highly aged society (which will be even more so in the next few years) this vision shakes the existing social foundations, based on cohesion and solidarity, there being a blatant and public disregard for the so-called "ethics of care," particularly regarding the elderly, who have been left unprotected.[103]

This health and social crisis is not going to make us stronger and has definitely caused serious damage. However, we should learn a twofold lesson for the future allowing us to prioritize the allocation of sufficient and suitable resources for social policies; and that such policies be defined effectively and, to the extent possible, by the actors who are best suited to implement them. Perhaps we will be on the right track if we get local governments involved in welfare policymaking.

The variety, intensity and immediate enforcement of local action in the face of social needs shows that local authorities are extremely adaptable. In fact, it has always been considered that local bodies have a greater innovative capacity than regional and national authorities.[104]

In sum, it seems reasonably to implement the provisions on policymaking laid down in the various national and regional guidelines and strategies, where public-public cooperation and partnerships (including municipalities) play a major role. Thus, local authorities should be given a prominent role in policymaking. In other words: they should not solely responsible for delivering or providing the relevant benefits.[105] In fact, municipalities should not only be

[102] On age-based discrimination, see Astier, Errasti and Tejada (2018: 79-81).

[103] See these insights in greater detail and more boldly worded in Jiménez Asensio (2020). Graphically, this line of reasoning is summarized in the sentence taken from this work "¿La salud de quien estamos defendiendo? Desigualdades sociales y sanitarias en tiempo de pandemia, AAVV," *Grupo de trabajo ÉTICA Y COVID (Euskadi)* http://www.asociacionbioetica.com/blog/la-salud-de-quien-estamos-defendiendo-desigualdades-sociales-y-sanitarias-en-tiempo-de-pandemia http://www.asociacionbioetica.com/blog/la-salud-de-quien-estamos-defendiendo-desigualdades-sociales-y-sanitarias-en-tiempo-de-pandemia: "The situation experienced by the most vulnerable persons during the pandemic evidences a major crisis in terms of care and responsibility, as well as a clear violation of the so-called *intergenerational care covenant*, which can give rise to significant risks of damage and ill-treatment."

[104] Navarro Gómez (2020).

[105] A step in this direction can be found in the statement of 20 April issued by the Spanish Association of Municipalities and Provinces (*Federación Española de municipios y provincias*, FEMP) entitled "*Los Gobiernos Locales jugarán un papel central en la desescalada y la reconstrucción social y económica*" available at http://www.femp.es/comunicacion/noticias/los-gobiernos-locales-jugaran-un-papel-central-en-la-desescalada-y-la). The FEMP claims that local governments will be involved in the de-escalation and social and economic reconstruction process to be implemented in Spain after the COVID-19 crisis. These meetings

heard regarding their scope of action, i.e., their local sphere, but also concerning the definition of public policies at a regional and even national level.[106]

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and agreements place local governments "where they should be and where they wanted to be, i.e., having a say in national policymaking."

[106] See, in this regard, Font i Llovet (2020: 28-30). According to him, the role of municipalities in the near future should move beyond the traditional role of local governments. Welfare services for individuals will also attain such urban dimension. European institutions like the Council of Europe are also concerned about this whole process. See Recommendation 429 (2019) issued by the Congress of Local and Regional Authorities of the Council of Europe, pointing out that the time of 19th and 20th century nation-states has passed, and that the city must go back to being a place to congregate and exercise fundamental rights. Also, the 2016 Urban Agenda for the EU claims that European cities must be involved in policymaking related to major social services, starting with already ongoing pilot plans regarding immigrant integration, housing policy, urban poverty or climate change.

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# The interconnection between welfare services and the market in the United States with a focus on the elderly: the application of antitrust law to nonprofits

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## 1. BACKGROUND AND INTRODUCTION*

It is widely acknowledged that the US welfare system evolved differently from other industrialized countries' welfare regimes. From a neutral standpoint, scholarly works evidence that the US social service framework cannot be compared to the welfare states implemented in Western Europe over the 20th century−which remain in place. This is due to the different approaches to welfare objectives.[107] The prominent role of private organizations and nonprofits is one of the US system's defining features, although public authorities' action (or, better said, government intervention) has not been set aside completely.

The underlying rationale of the US welfare system largely relies on two premises: first, welfare benefits qualify as commodities that can be delivered by private entities (i) operating in the market; and thus (ii) able to meet the existing demand. Second, social service recipients or, where appropriate, welfare officials, have somewhat free choice to a certain extent regarding the services, which, also, would be available to anyone.

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[107] Reisch, M. (2009), Chapter 14, "United States: Social Welfare Policy and Privatization in Post-industrial Society" in Powell, J. L, Hendricks, J. *The Welfare State in Post-Industrial Society*, p. 253 – 270, p. 253.

However, note that these ideas regarding the efficient operation of social service markets might not be true in practice.[108] In fact, often there are market failures, i.e., the price, quantity or quality of the delivered social services may be unsuitable or simply not enough to meet society's needs. The most common market failures in the field of social services, although not the only ones, are the so-called "informational market failures" or information asymmetries.[109] If they lack information, welfare recipients can hardly assess the quality and value for money of welfare services. Ultimately, users are unable to choose correctly between services.[110] These and other market failures trigger government intervention, which relies on two instruments: (i) regulation; and (ii) antitrust law. As for (ii), it is worth noting that it qualifies as a paramount example of indirect economic regulation.[111] In the United States, the scope of antitrust law covers a wide range of social services, insofar as their provision is totally or partially subject to market conditions. By fining anticompetitive practices and behaviors, public authorities indirectly enhance the system, since the fines have a positive impact on the price and quality of services.

Within the field of US welfare, public action has been somewhat superseded by private entities' initiatives (including both companies and nonprofits) and market-based management. This poses several challenges and concerns. Does the protection provided by antitrust law cover the activity of non-profit organizations? We will answer this question below. This paper examines (i) the development of strictly assistance-based services or benefits in the US (section 2.1); (ii) their current legal framework (section 2.2) with regards to other social services, particularly those catering to older adults (section 2.3); and (iv) the positive and negative outcomes (section 3.1) and oversight (section 3.2) of private initiatives, including not-for-profit action (section 3.3).

## 2. OVERVIEW OF WELFARE SERVICES IN THE UNITED STATES AND THE PROVISION THEREOF BY PUBLIC AND PRIVATE ENTITIES

The history of welfare in the US is a tale of overlaps and supplementary relationships between government intervention and the private provision of social services to tackle socioeconomic issues, including elderly-related matters. From the outset, private initiatives seem to prevail over publicly delivered social services. The US welfare system has two additional distinct

[108] See a critical outlook on both the current context and prior stages in REISCH (2009: 253 *et seq.*).

[109] Wilder R. P. (2014) "Regulation and Antitrust Policy in Health Care," in Jacobs, P., Rapoport, J., *The Economics of health and Medical Care*. 5th Ed., p. 351.

[110] *Ibidem.*

[111] Indirect regulation refers to regulatory activities that affect price, quantity or quality by enforcing the competitive behavior of companies or by changing the market structure. Direct regulation refers to intervention in markets by regulatory agencies to control, *inter alia*, price, professional licensure requirements or professional qualifications, or the specific quality of services. Wilder (2014: 350 *et seq.*).

features: (i) decentralization,[112] i.e., public authority was successively devolved to lower level governments and private organizations; and (ii) non-universal nature, meaning that welfare is not universally provided; rather, it is made up of benefits specifically addressed to recipients in need of social care.

Political and administrative decentralization becomes evident particularly when discussed from a historical perspective. The close interdependencies between federal, state and local power in the provision of social benefits and services is highly noticeable.[113]

Scholarly works have recently reframed the history of welfare, discussing and chronicling the evolution of welfare in the United States from an unprecedented perspective.[114] Scholars highlight that the development of welfare benefits has been affected by the establishment of some kind of welfare-administrative state. This is evidenced by the implementation of an administrative framework at the three government levels, i.e., federal, state and local, as well as by steady (and major) social justice achievements. This progress becomes even more apparent considering that the starting point was lack of equity, discrimination and unreasonableness regarding welfare and social matters.

### 2.1. References to the historical development of social services

In the early American state, most social benefits and services were provided by local institutions in cooperation with charity organizations like churches, religious communities or the so-called benevolent societies. Subsequently, over the 19th century, privately initiated social movements (e.g., scientific charity and settlement houses) started to provide aid to the underprivileged.[115]

A public-administrative welfare system above local governments slowly gained ground throughout the 20th century. Taking care of children in need was the first priority, mostly through home relief. State legislation on the eligibility of mothers for pension schemes (i.e., the so-called "mothers' pension statutes") formed the basis for the first relief program enacted in 1935–the federal Aid to Dependent Children (ADC) program–later replaced by the 1960s AFWDC–Aid to Families With Dependent Children–and subsequently superseded by the currently applicable program called PRWORA (the Personal Responsibility and Work Opportunity Reconciliation Act of 1996).

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[112]. Katz, M. B. (1996) *In the Shadow of the Poorhouse: a social history of Welfare in America* (10th ed. 1996), p. 247.

[113] Tani, K. (2016), *States of Dependency. Welfare, Rights, and American Governance, 1935-1972.*

[114] Tani, (2016: 189 *et seq.*).

[115] Estrin Gilman, M. (2001) "Legal accountability in an era of privatized Welfare," *California Law Review*, Volume 89, Issue 3, p. 581.

The first program for children in need (the ADC program) falls under the 1930s set of welfare reforms to address the 1929 stock market crash and the depression that followed, known as the New Deal. In order for the New Deal measures not to be temporary, the Social Security Act was passed in 1935, providing old-age insurance at federal level (i.e., social security in the strict sense), unemployment assistance provided through state and local authorities, and direct cash assistance for adults aged 65 and older,[116] dependent children in single-parent families, disabled children, and the blind.[117]

Social service developments during the early 20th century slowly but surely allowed to move towards a federal welfare system for those in need. Within this new system, resource allocation was increasingly more equal, fair, lawful, rational and objective. However, it was not all progress. After World War II, the economic reconstruction process gave rise to a boom, where some thought that poverty would be reduced almost automatically. Nonetheless, social assistance resources had to be increased at even higher rates than social security funds.[118] The need for public assistance and welfare benefits soared to the point that public authorities were forced to adopt many legal and administrative measures during the 1950s, aimed at reducing the growing number of welfare recipients. As a result, eligibility requirements and procedures became more stringent, thereby broadening states' scope of discretion in running their welfare programs and regulating eligibility.

The situation worsened in the 1960s. Demographic shifts–including the flow of rural populations into the cities–significantly increased the number of persons in need of public assistance. This scenario triggered a myriad of grassroots social, civil rights and human rights movements pushing for reforms across the board to mitigate poverty. Consequently, over the following decades, the American society became more aware of inequities and social justice issues. The prevailing strategy was based on reducing poverty by providing the poor with services to gain employment (i.e., encouraging people on public assistance to seek job opportunities). This "service strategy" was set forth in the Economic Opportunity Act of 1964, and the Federal Office of Economic Opportunity was entrusted the application and administrative implementation of this statutory provision. However, in line with US tradition, the actual enforcement of the Economic Opportunity Act was carried out by a vast network of private social service providers and local agencies. The funds came from the federal Government, but state and local authorities were responsible for administering these federal resources, which they did rather loosely. During this time period, the role of the federal

[116] According to the estimates, social security is the main source of income for retired workers (9 out of 10 adults aged 65 and older receive social security benefits, which account for at least 90% of the income for 23% of married older adults and 46% of single seniors. Brisk, W.J., Whitney A.A., (2013), "Exploring the future of Elder and special needs law," *NAELA (National Academy of Elder Law Attorneys) Journal*, No. 5, p. 16.

[117] Estrin Gilman, (2001: p. 584-585).

[118] Estrin Gilman, (2001: 585-586).

Government and private initiatives expanded greatly and simultaneously. Regarding the latter, private entities developed both as nonprofits and for-profit organizations and business-like entities.[119]

The lack of oversight, as well as budget cuts largely resulting from Vietnam War spending, shook the foundations of these programs, (i) fueling the social and civil rights movements; (ii) giving rise to a generation of pro-reform officials within government bodies;[120] and (iii) further consolidating the interdependence between government and administrative structures and private service providers, which remains in place nowadays.[121]

In spite of the prevailing anti-welfare political rhetoric, government spending on social welfare programs considerably increased and poverty decreased during the 1970s.[122]

During that time period, the importance of affording legal protection to welfare recipients became more apparent.[123] More specifically, welfare recipients were granted constitutional rights, namely due process rights, in case of due process violations and breaches of rights related to the delivery of welfare benefits and social services. Other fundamental rights were further secured. Courts began to find rights violations when the allocation and provision of welfare benefits failed to fulfill the principle of non-discrimination on grounds of territory, residence or race. In parallel, some legal principles were reinforced through measures fostering a more impartial, equitable and fair allocation of welfare benefits.

It is worth noting that this was not automatic. There was a lot of pressure and much political and legal struggle, often resulting in court proceedings and claims. There was also strong disagreement within benefit-providing bodies and authorities. All of these clashes arose from the regulation and exercise of public power in the various states and, particularly, from the development of administrative decision-making procedures. Keep in mind that administrative decisions often changed and evolved, not only as a result of amended state statutes, but also because administrative precedents kept changing and being reinterpreted in light of the state authorities' evolving interpretations subject to federal statutes that would remain applicable−and unchanged−for years.

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[119] *Ibidem.*

[120] Tani (2016: 190 *et seq.*).

[121] Estrin Gilman (2001: 588). As in any other field, a historical review underscoring positive aspects of welfare history is just one possible approach to the facts. Other scholars–e.g., Reisch (2009: 253)−see the glass as half empty and consider that New Deal welfare reforms or the post-World War II reconstruction measures were "modest." According to this approach, the few achievements in the field of social services result from the nation's Calvinist roots and emphasis on individualism, as well as from the absence of left-wing, socialist-leaning, working class political parties. Still under this critical outlook, all of this has led to the stigmatization of certain population segments, thereby rationalizing institutional racism and sexism and the effects thereof.

[122] Estrin Gilman (2001: 587).

[123] See Tani, (2016: 212 *et seq.*).

Throughout this historical evolution, there was a landmark conflict. In the summer of 1960, Louisiana amended its Aid to Dependent Children Law (ADCL) known as "The Louisiana suitable home." The debate revolved around whether this piece of legislation was compatible with federal law, specifically with the Social Security Act. Although there were serious concerns as to whether ADCL abided by federal law, it was neither repealed nor amended, stirring strong reactions and protests regarding its implementation and enforcement. Ultimately, the problem was that Louisiana amended its ADCL to prohibit payments to African-American women who had a child out of wedlock, excluding them in a rather *Scarlet Letter* fashion.[124]

After this welfare state blossoming, a small-government, more individualistic trend expanded in the late 20th century. Its advocates rejected government intervention and overreach. During this time period, a "big government" was considered a threat to individual freedom. This approach, along with the influence of prominent economists (Hayek, 1949; Friedman, 1962), gave rise to an alternative view of the welfare state that became mainstream, according to which the market had enough self-correcting or self-regulation mechanisms.[125] This neoliberal (small-government) outlook plainly underlined the market's ability to correct or make up for social gaps. As a result, the share of poor population increased again. There are various sociological reasons for this. Aside from demographic shifts and population increases, divorces and out-of-wedlock births grew significantly.[126]

The next major shift or, better said, backlash in welfare policy occurred in the 1980s with President Reagan. His term is famous for the cuts to social spending. As a result, the poverty rate began growing again, and in 1983 it was the highest it had been for decades. In 1988, the Family Support Act was enacted. This provision implemented the so-called Job Opportunities and Basic Skills (JOBS) program, although it was not very successful after its application at state level. In this context, welfare policymaking in the late 20th century linked welfare benefits to job promotion, as well as to specific achievements regarding social programs and targets. For instance, mothers would receive benefits if they married ("wedfare"), just like families with children who missed school or failed to get their vaccines would stop being eligible for aid.[127]

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[124] Tani (2016: 212 *et seq.*).

[125] REISCH (2009).

[126] Estrin Gilman (2001: 588). This social and political framework has also drawn strong criticism. See Reich, M. (2009), claiming that welfare public policies are disruptive, lacking and negative for business and entrepreneurial activities, since they discourage innovation, reduce the role of volunteer work and, generally, diminish civil society. Additionally, Reich argues that welfare policies make recipients highly dependent thereon.

[127]Estrin Gilman (2001: 588).

## 2.2. Defining current welfare regulation

During the last decades of the 20th century, welfare policies were mostly aimed at turning private entities into social service providers through the so-called "privatization of social services." This updated privatization process took place after President Clinton signed a major federal statute: the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 or PRWORA.[128] Note that the PRWORA falls within a set of reforms including the Government Management Reform Act of 1994. These provisions set forth several measures encouraging the government to (i) adopt modern management methods and meaningful program performance indicators; and (ii) increase workforce incentives and flexibility increasing individual and corporate responsibility through accountability.[129] These new developments did not trigger heavy criticism in Congress of PRWORA's wording. Rather, the spotlight was on certain coercive measures included in this piece of legislation. It is worth recalling that American culture permeates welfare programs and the provision of welfare benefits, thus not being free for recipients. Therefore, benefits are provided "in exchange for consideration" by working-age recipients, who are required to work part time, to perform community service or, at least, to enroll in job placement programs.

There is no doubt that 1996 legislation, currently in force, implemented major reforms. In particular, it amended the welfare benefits that had been applicable so far. It set forth a program listing the various forms of assistance and benefits, i.e., the Temporary Assistance to Needy Families (TANF). Under the TANF, the federal Government guaranteed that, regardless of their place of residence, citizens receive minimum benefits. The purpose was to help families overcome the financial distress through direct cash payments, food benefits ("food stamps"), financial aid to pay for housing or utilities, child care benefits, as well as support regarding education or job training.[130]

As a result of PRWORA, states regained a prominent role in the field of social services. PRWORA had a clearly devolving or decentralizing effect, to the extent that states were

[128] Pub. *L. No. 104-93, 110 Stat. 2105 (1996).*

[129]Smith Nightingale, D. Pindus, N.M. (1997), *Privatization of Public Social Services*. *A Background Paper*. Urban Institute for U.S. Department of Labor, Office of the Assistant Secretary for Policy.

[130] As stated by Reisch, M. (2009), it is commonly believed that the Temporary Assistance to Needy Families (TANF) program was fairly successful at first, since it increased the number of recipients first and then gave rise to a drop in the nation's welfare caseload, tying welfare to job search and economic independence. The main criticism of this program is twofold (i) TANF recipients mostly concentrated in urban areas and had specific racial origins (thus preventing other racial groups from receiving TANF benefits); and (ii) despite the quantitative indicators of success, little attention was paid to the program's impact on the living standards of low income households.

entitled to make spending and resource allocation decisions as long as they met the requirements laid down by federal law (42 US Code, Sec 602, 603 (a) (1)).[131]

The applicable legal framework does not provide for exclusive powers in the field of welfare benefits. Both the US Congress and state legislatures have lawmaking powers in this regard. The federal Government first held exclusive powers solely regarding social security. Over time, we witnessed a slowly expanding federal role, providing for new benefits and thereby extending its lawmaking powers. This increasingly prominent role ran parallel to increased federal funding for welfare benefits.[132]

In contrast, states have been given flexibility to fashion their own welfare policy, operate their own programs and increase or upgrade the benefits that could be received by social service users, as long as they do not spend state dollars (42 U.S.C. Sec. 666(f) and Sec. 601).[133] In fact, after the enactment of the 1996 federal piece of legislation, states had to timely submit their own assistance programs. State assistance programs had to meet the relevant federal requirements, aimed at reducing welfare spending. These requirements include, *inter alia*, that recipients engage in "work activity" within 2 years of getting benefits, and that such assistance have a five-year lifetime limit on the receipt of benefits. On top of that, the federal Government requires, e.g., that state programs (i) increase marital stability and reduce domestic violence and child abuse; (ii) provide for an effective system to collect food benefits received by non-custodial parents; and (iii) promote the financial independence of low income families through job placement measures for adults (42 US Code, sec 602, 603).

Having fulfilled the relevant federal requirements, states enjoy broad discretion to determine eligibility requirements within the TANF program.[134] Accordingly, states have rulemaking powers to supplement, interpret or clarify federal regulations.[135] Also, much of the authority over administering welfare and implementing and delivering benefits is devolved from the federal Government to the states.

In a nutshell: since the 1990s, the federal Government has devolved much of the power in the field of welfare services to the states, i.e., there has been a decentralization. Even more important than this federal-to-state devolution of powers is the discretion granted to states to delegate authority to local governments and private entities (whether profit-seeking or

[131] After the passage of the federal legislation, states had to submit their assistance program within a given time limit.

[132] O'Neill Murray, K. Gesiriech, S. (2004) *A Brief Legislative History of the Child Welfare System,* THE PEW CHARITABLE TRUSTS 1.

[133] Gais, T., Weaver, R. K. (2002), "State Policy Choices Under Welfare Reform," *Policy Brief* No. 21, April . *Welfare Reform and Beyond*, The Brooklings institution, Washington, DC.

[134] Estrin Gilman (2001: 578).

[135] *Ibidem.*

nonprofits). If welfare administration is placed in the hands of public authorities, they can manage welfare benefits through local bodies, like California counties.

The California model is useful, since it (i) is one of the states with the most welfare benefits in the US (having the largest share of adults and seniors)[136]–although the age average is a lot lower than other states'–and (ii) has high immigration rates.[137]

The most remarkable welfare benefit is the cash aid from the California Work Opportunity and Responsibility to Kids (CalWORKS) program. This program falls under the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), and it provides cash aid, food stamps, employment services and health insurance to qualified families in need with children under 18 when one or both parents is absent, disabled, deceased or unemployed. Only children that are 17 or younger or adults enrolled in job placement or welfare-to-work programs are eligible, and adults will only be entitled to temporary benefits. CalWORKS also includes "Temporary Homeless Assistance" and "Permanent Homeless Assistance." The latter program provides cash aid to pay (i) for a hotel or similar forms of temporary shelter while recipients find permanent accommodation; and (ii) last month's rent and security deposits if these payments are reasonable conditions of securing a residence.

California also adopted a state General Assistance program regulated, funded and administered by the counties. It is a county-funded loan program for eligible or potentially qualified persons for a social security disability pension, although unemployed or low income adults (below certain thresholds) are also eligible. CalWORKS also includes a Supplemental Nutrition Assistance Program.

As for elderly care and assistance, most benefits solely include social security pensions under the US Department of Health and Human Services or DHHS. It is worth highlighting the disability and retirement pensions (see section 2.3 below). Supplementing these pensions there are General Assistance programs for recipients aged 64 and older who are not entitled to a retirement pension. See also the Refugee Cash Assistance Program for eligible refugees and humanitarian immigrants over 64, the Cash Assistance Program for Immigrants covering adults aged 64 and older, as well as the Supplemental Nutrition Assistance Program for recipients over 60. All of these programs, in contrast with other ones, have less stringent financial eligibility requirements. Working-age, non-disabled recipients must work for a minimum number of hours on a monthly basis or should be actively looking for a job.

[136] https://datosmacro.expansion.com/demografia/poblacion/usa-estados

[137] Due to its high immigration rates, California has implemented two programs addressed to foreigners. First, see the Refugee Cash Assistance Program, providing cash assistance to eligible refugees and other humanitarian immigrants; both individual adults and refugees' families can be eligible. Second, see the Cash Assistance Program for Immigrants, involving cash benefits to aged, blind, and disabled non-citizens over 64 years old, legally residing in California, who are otherwise ineligible for pensions due to their immigrant status. It is a county-administered program, implemented, funded and regulated by the State of California.

However, there are certain exceptions subject to time limits or extraordinary economic circumstances.

### 2.3. Regulation of elderly care: figures and references

Regarding the provision of social services for the elderly, note that private providers and market dynamics are involved. However, government intervention has intensified lately. First, the United States is experiencing a "Silver Tsunami." According to some studies and projections, the share of adults over 65 increases and will increase (at least until 2030) at a daily rate of 10,000.[138] Also, keep in mind that publicly managed welfare services are focused on caring for the elderly. In fact, some federal welfare programs are specifically addressed to senior citizens. See, for instance, the welfare benefits laid down in the federal Social Security Act. These are publicly funded and privately provided services including two types of health care (discussed in detail in section 2.3.1 below). First, services for low income and needy population under Medicaid (a joint federal and state program providing health coverage to low income individuals, including seniors).[139] Second, there is Medicare,[140] a publicly funded program providing health insurance for Americans aged 65 and older. Finally, it is worth examining certain affordable or social housing programs (see section 2.3.2 below).

With regards to demographic data (according to the United States Census Bureau), note that the US population aged 65 and older amounts to 54 million, i.e., 16.5% of the total population.[141] In 2016,[142] some studies found that long-term care service providers served over 8.3 million people in the United States by means of 4.600 adult day service centers (half of them managed by nonprofits[143]), 12,200 home health agencies, 4,300 hospices, 15,600 nursing homes and 28,900 assisted living and similar residential care communities, many of which are established as retirement communities (see a more detailed analysis in section 2.3.4 below).

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[138] Pew researcher Center, *Baby boomers Retire* (29 December 2010) https://www.pewresearch.org/fact-tank/2010/12/29/baby-boomers-retire/, last accessed on 20 June 2020.

[139] This program, along with Medicare, was passed by Congress in 1965. Fogg, R. (2011) *Introduction to Federal Nursing Home Regulations. Nursing home Regulations Manual.*

[140] https://www.medicare.gov/

[141] https://www.census.gov/

[142] Harris-Kojetin L., Sengupta M., Lendon J.P., Rome V., Valverde R., Caffrey C. (2019) Long-term care providers and services users in the United States, 2015–2016." National Center for Health Statistics. *Vital Health Stat 3*(43).

[143] Harris-Kojetin L., Sengupta M., Lendon J.P., Rome V., Valverde R., Caffrey, C (2019:8).

### *2.3.1. Health care services*

Health care services in the US are mostly privately provided. Since there is no universal health coverage, health care is, to a large extent, privately funded (54% of the overall spending comes from private dollars according to data from financial year 2018).[144] Health care is provided by companies (through health insurance plans for employees) and families. There is also public funding, where federal expenditure amounts to 28% and state and local governments' expenditure equals 17%.[145]

Commonly, scholars argue that the United States does not have universal health coverage due to cultural reasons. Compared to Europeans, the American society can be thought to be more diverse, individualistic and pro-small government.[146] There are also political and economic reasons involved: certain interest groups are against universal health care, blocking the various political attempts in this direction.[147] On top of that, the US Constitution fails to provide for the right to health, neither as an individual right nor as a governing principle.[148]

Public funding relies on (i) Medicare which, as noted above, is a federal program providing health coverage to adults aged 65 and older; and (ii) Medicaid, a federally funded health care program for low income individuals. They are publicly funded programs including private insurance and private service providers. All of this helps to establish a market-oriented system where government intervention regulates access to the market by setting forth (i) licensing requirements for health care professionals; and (ii) the Food and Drug Administration (FDA) approval requirements for drugs and medical products. Hospitals are also subject to a somewhat stringent regulation[149] via a policing or law enforcement approach. Among others, there are certification requirements regarding hospitals' ability to set up an infrastructure covering certain population groups and cities. Price and quality standards are regulated indirectly, subject to antitrust law. According to OECD information,[150] the United States has the highest *per capita* health expenditure among all

[144] *National Health Expenditures 2018 Highlights. Center for Medicare and Medicaid Services.* Available at: https://www.cms.gov/research-statistics-data-and-systems/statistics-trends-and-reports/nationalhealthexpenddata/nationalhealthaccountshistorical

[145] *Ibidem*

[146] Mitra, M. (2018) "Free universal health care system in United States," Vol I, I, *Journal of Political Science and International Relation*, Volume 1 Issue, p. 16-17.

[147] Mitra, M. (2018:16-17).

[148] On the effects of legally or constitutionally acknowledging this right on the quality of health worldwide, see Kavanagh M. (2016) "The Right to Health: Institutional Effects of Constitutional Provisions on Health Outcomes," *Studies in Comparative International Development* Vol, 51, p. 364 *et seq.*

[149] Phelan, M.E. (2019), *Nonprofit Organizations: Law and Taxation, Chapter § 21: Hospitals.*

[150] *Health at a Glance 2019 OECD Indicators*.

OECD countries[151] (health spending amounts to 18% of the US GDP).[152] However, this does not entail that health care is better or that spending is efficiently allocated.[153] In fact, 2013 data[154] evidence that roughly 7% of Americans (22.3 million people) did not receive health care benefits due to the excessive cost.

### *2.3.2. Access to affordable housing*

Affordable or social housing development, construction and rehabilitation in the US mainly relies on public policies, and particularly on federal financial aid.[155] This type of financial aid is ultimately addressed to low income households that are otherwise unable to afford housing in the private market (i.e., who cannot purchase or rent a house at market prices). There are numerous programs pursuing this objective,[156] seeking to fill the gap between income and housing prices.[157] Low income housing markets' dynamics are shaped by these subsidies and financial aid, which are determined based on the average income of residents qualifying for affordable housing.[158]

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[151] On average, health spending in the US represented roughly USD 4,000 *per capita* (at purchasing power parities). The United States spends more on health care than any other OECD country, by a significant difference of over USD 10,000 per resident, as provided in *Health at a Glance 2019 OECD Indicators*.

[152] Mitra (2018:16).

[153] Mitra (2018:16).

[154] *National Health Interview Survey, 2014* data. http://www.cdc.gov/nchs/nhis.htm.

[155] A different issue altogether is promoting access to housing through urban planning or territorial development policies. In this regard, the greatest barrier to providing fair housing is the local governments' use of zoning policies to contain or restrict high density and urban developments providing housing for multiple families. Admittedly, many governments since the 1970s have required developers to include affordable units. *Cfr*. Salsich, P. (2011) "State sources of housing finance," CHAPTER 10, in Iglesias, T., Lento, R.E. (Eds.) *The legal Guide to Affordable Housing Development*. 2nd Ed.

[156] See an overview of these programs in Salsich, P. (2011).

[157] These are diverse federal programs revolving around debt structuring instruments such as tax-exempt bonds, tax increment financing or low income tax credit. There are additional available resources, like the federal Community Development Block Grant (CDBG) and the formula grants provided by the HOME Investment Partnerships Program (HOME) given to state and local agencies for them to subsequently contribute additional funds and allocate them all. Charitable contributions are also an option. These are complex programs that sometimes provide households in need with financial aid to meet their housing needs. SALSICH (2011).

[158] Salsich (2011). Based on the information provided by this scholar, the housing affordability formula is based on the household income–e.g., think of a household made up of two full-time workers with a minimum income of USD 15,000 each and USD 30,000 overall where income be lower than 50% of the metropolitan area's median income. For most public housing affordability programs, households spending 30% or more of their pre-tax income on housing are viewed as having an excessive housing cost burden. In the above example, this would amount to USD 500 per month. If we add further spending on furniture, appliances, utilities, and other expenses for household operation, the available income for housing would be USD 200 per month. Accordingly, from the developer's perspective, the mortgage would be USD 40,000 to 50,000, depending on interest rates

*2.3.2.1. The federal Low income Housing Tax Credit program (LIHTC)*

The most significant and stable affordable housing program is the federal Low income Housing Tax Credit program (LIHTC) created in 1986.[159] It has been modified several times since its entry into force.[160] The LIHTC is the primary tool to impact the affordable rental market.

This program's annual application revolves around indirect economic aid to access affordable housing, encouraging investment and development of affordable rental units. It is meant for developers, providing them with funds through a competitive tender where the awarding authority is a state body. Developers may (i) use the tax credits to offset construction costs or (ii) sell them to outside investors in exchange for equity as long as the latter use them for development projects reserving a fraction of units that are rent-restricted and for lower-income households. This allows to reduce the financing developers would otherwise have to secure, increasing the funds (upfront financing) for the construction and rehabilitation of housing units addressed to lower-income households.[161]

The program's execution begins at the federal level with each state receiving an annual LIHTC allocation in accordance with federal law.[162] Each state's housing finance agency (HFA) allocates credits to developers of rental housing according to federally required, but state-created, allocation plans. The developers applying for the credits range from companies,

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and other expenses. If the actual cost of each housing unit ranges between USD 75,000 and 100,000, there is a major gap between the actual cost and the housing expenses affordable in each case.

[159] Through the Tax Reform Act of 1986 (P.L. 99514). The LIHTC database, created by the Department of Housing and Urban Development (HUD) and available to the public since 1997, contains information on 48,672 projects and 3.23 million housing units placed in service between 1987 and 2018. LIHTC program gives State and local LIHTC-allocating agencies the equivalent of approximately USD 8 billion in annual budget authority to issue tax credits for the acquisition, rehabilitation, or new construction of rental housing targeted to lower-income households. The database shows the territorial distribution and the characteristics of households residing in LIHTC properties. See https://www.huduser.gov/portal/datasets/lihtc.html.

[160] It is worth highlighting the legal reforms implemented by the Bush (2008) and Obama (2009) Administrations: the Housing an Economic Recovery Act of 2008 (HERA) and the American Recovery and Reinvestment Act of 2009 (ARRA). In late 2017 the Internal Revenue Code (P.L. 115-97) was amended. Although it did not have a direct impact on the program, it did significantly affect the federal tax system. See the Congressional Research Service, (2019), *An introduction to the Low income Housing Tax Credi*t, p. 2.

[161] See a comprehensive explanation of the LIHTC program in Lento, R. E. Graceffa, D. (2011) "Federal sources of Financing," CHAPTER 9, in Iglesias, T., Lento, R.E. (Eds.) *The legal Guide to Affordable Housing Development.* 2nd Ed., p. 249 *et seq*.

[162] Federal law requires to prioritize any projects that serve the lowest-income households and that remain affordable for the longest time.

corporations, associations or even nonprofits. In order to be awarded LIHTC, owners or developers must pass an income test regarding future tenants.[163]

LIHTCs or tax credits are granted to projects expected to last up to 10 years. Also, the property must remain occupied by low income households for at least 15 years.[164] Any LIHTCs not allocated by states after a 2-year period are added to a national pool and then redistributed to states that apply for the excess credits. This is a nudge for states to allocate all their credits among their applicants right away.

Federal law restricts the types of housing units eligible for LIHTC. These tax credits cannot be allocated for student residences, nursing homes or any other housing units other than the main residence. However, a given project may still use its housing units for a specific demographic segment, e.g., the elderly.[165]

There are additional financial instruments regarding affordable housing other than LIHTCs, like the Community Development Block Grant program (CDBG). The CDBG is aimed at preventing or eliminating slums or blight that can pose a serious threat to a community's well-being and suitable living environment. The CDBG allows for more diverse uses, since it can be applied to enhancing urban areas, by providing decent housing but also by enhancing street lighting, sidewalks, etc. There are also tax-exempt bonds issued by state or local governments aimed at funding projects subject to the same eligibility requirements as the LIHTC program. These bonds supplement LIHTCs.[166]

#### *2.3.2.2. Housing for the elderly*

Section 202 of the 1959 Housing Act provides funds for elderly housing. The US Department of Housing and Urban Development (HUD) makes capital grants (i.e., provides capital in advance) to non-profit developers or groups of sponsors or consumers within the framework of a Project Rental Assistance Contrat or PRAC concluded between the HUD and the owner. The capital advances are secured through a mortgage with HUD and they do not (i) accrue

[163] First, at least 20% of the project's units should be occupied by tenants with an income of 50% or less of the area's median income adjusted for family size (AMI). Second, at least 40% of the units must be occupied by tenants with an income of 60% or less of AMI. Over the last few years, there have been some additional eligibility requirements for these credits. See HousingFinance.com, "Corporate Investment and the Future of Tax Credits: What Should You Expect," at http://www.housingfinance.com/news/corporate-investment-and-the-future-of-tax-credits-what-should-you-expect_o, 1 January, 2011.

[164] *Ibidem.*

[165] Lento, Graceffa (2011:259 *et seq.*).

[166] Lento, Graceffa (2011:271 *et seq.*).

interest or (ii) require repayment as long as the properties are made available to very low income elderly households for at least 40 years.[167]

The advance funds granted by the HUD can be used to build and rehabilitate properties under the Federal Deposit Insurance Corporation (FDIC). The FDIC is an independent agency created by Congress due to the impact of the Great Depression to maintain stability and public confidence in the nation's financial system. To accomplish this mission, the FDIC insures deposits guaranteeing that no depositors lose a penny in case of bankruptcy.

### *2.3.3. Nursing homes*

In spite of the steady ageing process in the US, the nursing home resident rate has decreased.[168] Between 1990 and 2000, the share of older adults living in care facilities increased by 3 percentage points (from 5% to 8%). However, in the early 21st century, the nursing home population fell significantly. Unsurprisingly, most residents are older than 80.[169] Also, according to the estimates, in 2006 there were 1.8 million licensed beds available nationwide only serving 1.5 million residents.[170] By 2011, many of the older adults living in nursing homes were dependent and required intensive care.[171] Almost all facilities are privately owned, and 23.3% are held by nonprofits.[172] Approximately 95% of the existing care facilities are Medicare-and-Medicaid-approved or licensed.[173]

The Centers for Medicare and Medicaid Services (CMS) are under the US Department of Health and Human Services (DHHS), which is responsible for monitoring nursing home services. CMS provide funding to nursing homes, since these care facilities actually serve older adults and persons with disabilities qualifying as Medicare or Medicaid beneficiaries.[174] Furthermore, state agencies enter into agreements with CMS to identify, survey, and inspect provider and supplier facilities and institutions providing publicly funded services. In order to deliver these services, nursing homes must apply for a state license or certification. Federal Congress lays down the eligibility requirements, generally set forth in the Social Security Act. According to this Act, the DHHS Secretary is responsible for monitoring compliance with and applying these requirements. The aforesaid Centers for Medicare and Medicaid

[167] For further information on these programs, see HUD's website: www.hud.gov.

[168] Brisk, Whitney (2013:10).

[169] Brisk, Whitney (2013:17).

[170] According to the American Health Care Association (2006) "The State Long-Term Health Care Sector 2005: Characteristics, Utilization, and Government Funding."

[171] According to the findings from the first nationally representative survey of assisted living/residential care facilities. National Center for Assisted Living, *Assisted Living State Regulatory Review 2012*.

[172] Harris-Kojetin, Sengupta, Lendon, Rome, Valverde, Caffrey (2019:8).

[173] Fogg, (2011).

[174] www.medicare.gov.

Services (CMS) are entitled to develop regulations and protocols to enforce these requirements.[175] In fact, this regulatory and enforcement approach is somewhat recent. It can be traced back to the 1990s, following the passage of the landmark Nursing home Reform Act in 1987.[176] This legislative provision was enacted after a heated debate on the shortcomings of public supervision of care facilities and residents' rights, shifting federal oversight of nursing home quality. After 2000, given the continuing issues, the abovementioned CMS[177] were put in place.

### *2.3.4. Continuing care retirement communities or CCRCs*

Continuing care retirement communities (CCRCs), also known as life plan communities, are a long-term care option for older adults in the US, i.e., a specific type of retirement community. CCRCs provide a wide range of services to residents, including housing, health and social care, allowing them to live independently (to the extent possible) increasing social engagement with other seniors. As necessary, CCRCs enable a subsequent transition to assisted living, providing medical care and daily assistance. Residents live in an area with various residential options with approximately 100 people. Whereas in the mid-1980s the US had roughly 275 CCRCs,[178] in 2014 there were more than 2,000.[179] Almost half of them are in Western states,[180] and 17.7% of the entities administering these CCRCs are not-for-profit organizations.[181]

Each of these CCRCs has distinct features, offering diverse leisure activities, services, quality standards or arrangements. Most of them allow residents to engage in leisure activities, as well as to have lunch and dinner together and to receive care according to their preferences and needs. These life plan communities or CCRCs are self-financed through users' fees,[182]

[175] www.medicare.gov.

[176] Fogg, (2011).

[177] *Ibidem.*

[178] Winklevoss, H.E. Powell, A.V. (1984) Continu*ing Care Retirement Communities. An Empirical, Financial, and Legal Analysis Pension* Research Council of the Wharton School University of Pennsylvania.

[179] Span P. (2014) "In many states, few legal rights for C.C.R.C. Residents," published on the New York Times online edition on 21 March 2014. See mylifesite.net (a specialized website providing comprehensive information) for a comparison between the existing communities in terms of occupancy rates, services and prices: mylifesite.net

[180] Harris-Kojetin, Sengupta, Lendon, Rome, Valverde, Caffrey, (2019: p. 7-8).

[181] Harris-Kojetin, Sengupta, Lendon, Rome, Valverde, Caffrey, (2019: p. 8).

[182] Winklevoss, Powell, (1984:XI).

paid by users themselves or through insurance plans (65.7%), including Medicare insurance (22.6%), Medicaid (29.6%) or private insurance plans (10.1%).[183]

CCRCs are often organizations managed by private companies or nonprofits operating subject to state legislation. There being no consistency from state to state, and in the absence of harmonizing federal legislation, the varying degree of assurance of residents' rights has given rise to certain concerns. Depending on where the CCRC would be located, residents' rights would be more or less secured. This has given rise to various claims and to a national residents' "bill of rights" for CCRCs.

Some could argue that these senior facilities could be considered as some sort of segregated area. In addition to that, CCRCs raise financial concerns. The 2008 economic crisis had a very significant impact on them. Many CCRCs faced economic hardship and were shut down. As a result, the affected residents did not receive their upfront and monthly fees back.

## 3. PRIVATE PROVISION OF WELFARE IN THE UNITED STATES

As noted above, private organizations have often provided social services in the United States.[184] It is also worth noting that private provision of welfare has continued to increase after the most recent reforms of the US welfare state.

As for assistance and care services, up until 1960 private entities had solely provided discrete services such as job training or child care. Subject to 1990s legislation, private organizations steadily gained a much more prominent role, which they still have nowadays. Private entities are even allowed to run entire welfare offices, i.e., public offices responsible for administering the services. Thus, these entities can draft the local and state governments' welfare programs, thereby performing eligibility determinations and sanctioning recipients for non-compliance with program requirements.[185]

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[183] These data also include information from nursing care facilities: Table 15- Nursing care facilities and Continuing Care retirement Communities Expenditures; levels, percent change, and percent distribution, by source of funds: Selected Calendar Years 1970-2018. Harris-Kojetin, Sengupta, Lendon, Rome, Valverde, Caffrey, (2019).

[184] Nilsen, S. R. (2002) "Welfare Reform: Federal Oversight of State and Local Contracting Can Be Strengthened. Report to Congressional Requesters." *General Accounting Office, Washington*, DC-Welfare Reform McConnell, S., Burnwick, A, Perez-Johnson, I. and Winston, P. (2003), "Privatization in Practice: Case Studies of Contracting for TANF Case Management," *Final Report prepared by Mathematica Policy Research Inc. for the Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services*, Washington DC. See also, Sanger, M. B. (2001) "When the Private Sector Competes," *Reform Watch*, No. 3, The Brookings Institution, Washington DC.

[185] Estrin Gilman, (2001: 670).

Currently, the provision of social services through public authorities, usually local bodies, does not prevent public authorities from contracting out their welfare services to private entities (42 US Code, sec 604a). The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA) allows for contracting out all social services to nonprofits if they fulfill certain general interest requirements (charities).[186] The available information, however, shows that there were few states that chose to contract out "all" social services. This remains true considering both actual service delivery and the drafting and administration of welfare programs. Within the Spanish legal system, these "drafting and administration" activities (i.e., shaping the welfare services) would be considered the "public dimension" of welfare, i.e., the dimension of services where public bodies actually exercise public authority (within the meaning of Article 85(3) of the Spanish Local Government Act, which bans "indirect administration of welfare" thereby preventing private entities to administer these services[187]). Examining this dimension of welfare, privatization would be more limited, both in California and in most states. Government authorities do not remain responsible for actually providing the service, but they do retain decision-making powers regarding the shaping and administration of welfare and social assistance. Many counties (although not all) often contract out the training programs for welfare officials to private entities.[188]

As discussed before, after the amendments to assistance services by the aforesaid 1996 federal piece of legislation (PRWORA), the role of private organizations has even increased with respect to previous time periods (see sections 2.1 and 2.2 above). In addition to the increasingly prominent role of private initiatives regarding welfare, there was a noteworthy federal-to-state devolution of powers and states vastly increased their discretion to award social benefits. The provision of welfare assistance does not solely depend on the fulfillment of the objective eligibility requirements, but also on the recipients' willingness to work and cease to be dependent. Accordingly, the provision of benefits also depends−to a certain extent−on the outcomes expected by the benefit providers, after the relevant assessment to be conducted by their workers and welfare officials.

By (i) broadening the scope of discretion in the provision and award of social assistance; and (ii) devolving to entities (some of which are private) eligibility determinations, it becomes increasingly important to decide on welfare planning: how is welfare going to be provided? what about its scope or coverage? Therefore, it also becomes essential to come up with new

[186] See Finn, D. (2007) "Contracting out welfare to work in the USA: delivery lessons." *Department for Work and Pensions. Research Report* No. 466, and the bibliography therein.

[187] Article 85(3) of the Spanish Local Government Act: "Any public services that entail the exercise of *public authority* shall not be contracted out or otherwise provided through indirect means or by a company even if its entire share capital is held by local government authorities."

[188] Finn (2007).

control and accountability mechanisms applicable to these entities, regardless if they are nonprofits or profit-seeking organizations.[189]

As discussed before (see section 2.3 above), the role and presence of private entities and nonprofits regarding social services for the elderly (including health care and housing, whether private, nursing homes or retirement communities) is even greater than in the field of social assistance.

### 3.1. Advantages and disadvantages of private provision of welfare

Scholarly works emphasize the challenges posed by the role of private organizations, businesses and nonprofits in welfare provision. Moreover, scholars warn of the risk that recipients fail to receive the social service appropriately (considering that recipients are already seen as "clients") or that the recipients' rights be breached within the provision of benefits.[190] Consequently, it is probably a top priority to implement the necessary legal mechanisms to hold private welfare providers accountable.

The main arguments in favor of privatizing and contracting out the provision of welfare relate to cost savings and maximizing efficiency and flexibility.

Some authors reject this stance,[191] claiming that such approach ignores the many ways in which the government bears the social costs of private enterprises and the efficiency of government bureaucracy, like the social security administration. According to Reisch, these "privatization advocates" also seem to ignore the historic role played by the government in (i) supporting the efficiency (i.e., profitability) of the for-profit sector through capital formation, grants, and contracts for research; and (ii) expanding and protecting markets through antitrust law.

Reisch concludes by saying that the said stance also disregards that the goods produced by government services have qualitative characteristics that are not easily subjected to standard cost-benefit analysis. Also, this approach overlooks the fact that most of the efficiencies achieved by privatization have occurred by lowering workers' wages, reducing services, or diminishing the quality, quantity and accessibility thereof.[192]

In sum: keep in mind that privatization is not inherently good or bad. Rather, it depends on the actors involved. There is no clear evidence as to whether private services are more

[189] Estrin Gilman, (2001: 569).

[190] Finn (2007).

[191] Reisch (2009).

[192] See a critical view in Hammer, P., (2005), "Medical Code Blue or blue light special: Where is the market for indigent care? *Journal of Law in Society* 82. The author argues that encouraging competition in health care services has led to unmet demand and lower quality care.

efficient than publicly provided services, since they both have advantages and disadvantages. There are both success stories and failures on both sides. Within United States law, the key is that government authorities are responsible for ensuring the effectiveness of welfare services, regardless if they are privately or publicly delivered.[193]

Broadly, the common belief is that the public sector tends to be better at policy management, regulation, ensuring equity, preventing discrimination or exploitation, ensuring continuity and stability of services, and guaranteeing social cohesion. In contrast, businesses or the market tends to be better at performing economic tasks, innovating, replicating successful experiments, adapting to rapid change, abandoning unsuccessful or obsolete activities, and performing complex or technical tasks. It is also a widely spread opinion that the non-profit sector (also known as the "third sector") tends to be best at performing tasks that (i) demand compassion and commitment to individuals; (ii) require extensive trust on the part of clients; and (iii) involve the enforcement of moral codes and individual responsibility.[194]

Along these lines, note that the private provision of welfare assistance (see sections 2.1 and 2.2 above) revolves around the drafting of the contracting schemes between government authorities and private providers, particularly if the latter qualify as profit-seeking companies. Obviously, the overall balance of the contracting scheme will trigger different incentives for the companies and other benefit-providing organizations (including nonprofits). There are some welfare contracts entered into with private providers including a set fee regardless of the specific benefits to be provided. In these cases, the more money the provider saves in the welfare benefit, the more profit it gets to keep. In other words: these contracting schemes raise incentives for profit-seeking organizations to implement cost-savings measures that can impact the quality of service. But, if the parties agree on a price depending on the services provided, the provision of welfare can also be distorted, there being incentives to help only those persons most easily helped through the welfare service. Thus, any contracting schemes between government authorities and companies or private providers must seek that the incentives triggered by the contract clauses not be in conflict with recipients' needs and, in case of a clash, that welfare recipients have enforceable rights against welfare providers.[195]

Generally, empirical case studies in the US are slightly pro-private provision of welfare, without overlooking the risks entailed thereby (corruption, hindered access for

[193]Smith Nightingale, Pindus (1997).

[194] Osborne, D., Gaebler, T. (1992). *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector*. Reading, Mass.: Addison-Wesley Publishing Co., Inc.

[195] Estrin Gilman (2001: 592).

underprivileged citizens) and some highly common harmful effects, such as the loss of public employees or the opposition of public officials' associations. [196]

As for fully contracting out or privatizing welfare assistance, experience shows that it is really hard to come up with contracting schemes appropriately reflecting the complexity of the subject-matter.

Keep in mind that the rule-based and bureaucratic welfare model implemented in the mid-20th century, where assistance was provided subject to a rigid general framework, has been superseded by a completely different model. Under this new model, any decisions regarding the type of service and its scope are discretionary, progressive, flexible and made on a case-by-case basis. Decision-making in this regard rests on those who develop and actually provide the benefit.[197] As a result, welfare recipients can now enforce their rights through less rule-based and strict procedures.[198] Within this context, the role of public authorities focuses more on steering the system as a whole than on regulating: they have a holistic approach, focusing on training, on the appropriate use of economic incentives nudging private providers in the right direction, on shaping the benefits and on providing assessment and evaluation mechanisms. If the relevant benefit involves advising, informing or counseling the recipient, formal hearing processes are useless to address irregularities or due process issues such as unfair or unequal treatment. Indeed, some studies claim that African-American and Caucasian beneficiaries are treated differently.[199]

This is how the last major welfare reform occurs, a public-private partnership where planning the provision of benefits becomes more flexible and less strict and rule-based. This new, less structured approach has certain advantages, but it could also fragment the system, pulling it apart and giving rise to significant differences in service quality depending on the provider.

### 3.2. Oversight and accountability

Assuming some degree of private involvement in welfare provision, it is worth focusing on the need for government authorities to monitor and oversee private providers, the key factor being clear accountability for results and clearly laid down objectives.

Accordingly, public authorities that enter into welfare contracts, thus becoming a party thereto–this is the case with welfare assistance–must strictly oversee the contracting process,

[196] National Commission for Employment Policy. Annual Report (1989/1990). United States.
[197] Tani (2016:141).
[198] In this connection, and regarding the legal arrangement of welfare benefits as non-conditional final programs in Spanish law, see Rodríguez de Santiago, J.M., (2007) *La Administración del Estado social.*
[199] Tani (2016:195).

from the contract award until performance. Government authorities are also responsible for ensuring compliance with antitrust law.[200]

There are various remedies and mechanisms to enforce accountability of private welfare providers, including due process rights of welfare recipients. Considering that welfare benefits qualify as entitlements, welfare recipients may bring judicial proceedings relying, e.g., on the "state action doctrine." Under this classic legal doctrine in US law, claimants (plaintiffs) can sue over a law being violated, claiming that there has been a breach of constitutional provisions, demonstrating that the government (local, state, or federal), was responsible for the violation, rather than a private actor. In order for this doctrine to apply, the action of private welfare providers must have the status of "government action." Otherwise, the state action doctrine would not apply.

Some scholars criticize private involvement in welfare provision, arguing that agencies conducting independent oversight lack sufficient resources and capacity to perform their role.[201] They add that the transformation of the US welfare system gives rise to conflicts within organizations and between them, triggering ethical dilemmas related to (i) overlaps in reporting and loyalty; (ii) confidentiality; (iii) informed consent; or (iv) recipients' free choice.

There are also mechanisms to increase private welfare providers' accountability, including that representatives of stakeholders engage in decision-making processes and more comprehensive oversight aside from statistics−e.g., surveys with welfare officials and benefit recipients allowing to individually assess the benefits.

Another measure can entail introducing competition between the actors involved to increase efficiency, reduce costs, and improve quality and customer satisfaction. Within this context, competition means public-public competition, public-private competition, competition between public-private ventures and public-nonprofit competition. Allegedly, competition makes welfare provision more efficient, saves costs and improves quality and the satisfaction of end users.[202]

### 3.3. Nonprofits as welfare providers

The importance of nonprofits, including the so-called "charities," is intensifying in the United States across the board. The intense third sector's activity, also regarding welfare services, is largely due to the tax support it receives. Nonprofits, charities and other third sector

[200] Smith Nightingale, Pindus (1997).
[201] Finn (2007).
[202] Smith Nightingale, Pindus (1997).

organizations are encouraged through financial aid provided by the government in the form of tax benefits and deductions.

From a comparative perspective, in contrast with other legal systems,[203] the US regulatory approach to nonprofits revolves around taxation (or lack thereof) and tax incentives.[204] Tax policy is not only significant for nonprofits, but also constitutes the loose public oversight of these organizations. Note that section 501(c)(3) of the Tax Code exempts nonprofits from the federal income taxation. Section 170 of the Code also allows individuals who make contributions to those organizations (i.e., donors) to deduct some or all of their contribution on their federal income tax return. This option is only available for nonprofits established as "charities." These entities must have "charitable purposes," i.e., selfless or altruistic goals, such as improving the community's well-being. This draws a distinction between them and other nonprofits not qualifying as "charities" ("noncharitable" organizations), many of which are also exempt from income taxation and are entitled to additional tax benefits subject to federal and state law.

Theoretically speaking, the rationale for welfare provision by private (non-government) entities is market failure. Put differently, the need to supply public goods that would otherwise be underproduced by companies or profit-seeking organizations in the private market.[205] However, there is an issue here: these same market failures constitute the traditional basis of the economic rationale for government intervention (at least regarding benefit-providing and developing activities). US scholars draw a boundary between charity and government arguing that government meets only the needs of the majority, whereas charity can offer a wide array of services for all segments of society. Charities allow (i) services to be more pluralistic, tailored to society's needs and more specific; and (ii) to channel creativity and innovation in society.[206]

These advantages are often considered inherent to the provision of services by not-for-profit organizations, but they are not necessarily present in all cases. And, above all, one could argue that a federal Government precisely serves heterogeneous interests, where the majority does not always prevail. The federal Government is actually designed to be responsive to

[203] Dirusso, A.A. (2011), "American Nonprofit Law in Comparative Perspective," *Washington University Global Studies Law Review* No. 10, p. 82.

[204] Regarding the third sector, the US has regulation at both the state and federal levels. In spite of the myriad of state regulations, they broadly govern how charitable organizations may be created, the form they may take, the fiduciary duties of their leaders, and operational aspects. The oversight of these nonprofits is carried out by individuals, managers, trustees, donors and benefit recipients, but state judicial authorities have power over these nonprofits: Dirusso, A.A. (2011: 60 *et seq*.).

[205] Galle, B. (2012), "The Role of Charity in a Federal System," *William & Mary Law Review* No. 53, p. 785-786.

[206] Gergen, M. P. (1988), "The Case for a Charitable Contributions Deduction," *William & Mary Law Review* p. 1399.

society's demands, as well as to provide a wide array of different services. Theorists claim that multilevel or multi-tier government models offer flexibility, responsiveness and the ability to meet social needs. This is why some scholars challenge such strong encouragement of nonprofits in the US, considering that the various government and public authorities (particularly local bodies) could intensely produce public goods and services by themselves.[207] In line with these insights, we should wonder if, in fact, government authorities are better equipped than charities to deliver public goods and services,[208] particularly considering that governments usually enjoy economies of scale and scope compared to charity, being funded through progressive and redistributive taxation.

There is a long-standing debate in the US about whether public services should be (i) directly tax-funded or rather (ii) publicly funded (through indirect subsidies, tax exemptions, exempting donors from income taxation...) but privately provided by nonprofits. Both approaches have strengths and weaknesses, and each model is better suited for some services or the others.[209] Admittedly, mixing service provision by public authorities (local governments in particular) with charities tends to render the latter unnecessary (or reduces the need for charity to fill in), and it can also lead to overlaps and inefficiencies. These shortcomings are nonetheless a minor problem for society compared to the elimination of services (high quality services in certain sectors) delivered by charities.[210]

## 4. THE APPLICATION OF ANTITRUST LAW TO NONPROFITS FOR OVERSIGHT PURPOSES

### 4.1. The application of antitrust law to welfare services: an overview of the objectives

As is well known, antitrust law is primarily intended to protect companies and their business activities. It is also government authorities' gateway into welfare markets in the United States,[211] provided that antitrust law does not only protect entrepreneurs. Rather, it also safeguards the general interest.[212]

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[207] Galle, B. (2012: 782 *et seq.*).

[208] *Ibidem.*

[209] Galle, B. (2012:781-782)

[210] Galle, B. (2012:783)

[211] The United States is the birthplace of antitrust law. The 1890 Sherman Act was the foundational statute of antitrust law; it first banned cartels and monopolies. The 1914 Clayton Act condemns mergers that risk substantially lessening competition. These are the two major antitrust provisions in the United States, and they are both still in force.

[212] Does the fact that antitrust law safeguards the general interest (or public interests) turn it into public law? Find an answer in Velasco Caballero F. (2014) *Derecho público más Derecho privado*. Keep in mind that, in the US, antitrust law may very well be statutory, but it remains primarily common law, including civil and criminal law provisions.

Within free market economies, a competitive marketplace is based on two main premises. First, "competition secures individual freedom in any sectors where goods and services are delivered by providers and received by consumers." Second, "competition ensures the productive system's efficiency, thereby fulfilling many objectives to increase social well-being."[213] Self-evidently, antitrust law ultimately protects individuals demanding goods and services. Additionally, safeguarding free competition and preserving a competitive marketplace allows to also provide protection to society as a whole by making essential goods (such as social services and welfare assistance) accessible to the public and particularly to those in need.[214]

By protecting everyone's freedom, antitrust law enforcement can also be an indirect mechanism−not the only one−to protect the underprivileged. This is the case as long as antitrust law safeguards the efficiency of the productive system,[215] since this would entail that the supplied goods and services are accessible to the public. In other words: the main role of competition is to allow for meeting social needs at the lowest possible cost, assuming that such needs have been expressed by the individuals' willingness to pay for the relevant goods or services.[216] Therefore, the more competitive the marketplace, the cheaper the goods or services and, thus, the more accessible for low income consumers that need them the most.

Indeed, the legal interest protected by antitrust law is competition between suppliers of products meeting the same demands from a specific group of consumers within a given location. Consequently, from the perspective of antitrust law, the applicable legal provisions condemn the behavior of any suppliers providing goods that meet social needs when such behavior restricts, distorts or eliminates competition.

### 4.2. The scope of application of antitrust law within the US welfare system

The most harmful behaviors precluded by antitrust law are cartels, i.e., collusive arrangements entered into by a group of competitors agreeing not to compete against each other to increase profit. Although to a lesser extent, abusive monopolies (the acquisition or

[213] As aptly stated by Alfaro Águila-Real, J. (2017) "La libertad de competencia y el Derecho de la competencia." https://almacendederecho.org/la-libertad-competencia-derecho-la-competencia. He concludes that "[c]ompetition ultimately encourages suppliers to find out and meet consumers' demands at a lower cost than their competitors. Competition makes all individual suppliers powerless, who will be unable to pass on the costs to consumers because the latter can obtain the same good from a competitor. As Hayek explained, competition allows to coordinate consumers and suppliers by gathering all the available information scattered within society."

[214] Leslie, C.R. (2012) "Antitrust law as public interest law" in *UC Irvine Law Review*, 2 p. 885 *et seq.*

[215] Achieving efficiency is considered as the only actual goal pursued by antitrust law. See Posner, R.A., *Antirust Law*, 2nd Ed. (2001).

[216] Alfaro Águila-Real (2017).

maintenance of monopoly power relying on competitive practices) and unfair or anticompetitive mergers are also harmful. All of these behaviors entail distorting competition by reducing supply and generating shortages, thereby preventing access by consumers to certain goods and services (or raising the prices thereof dramatically), which clearly worsens consumers' situation.[217]

If we look for examples of anticompetitive behaviors and price-fixing contrary to antitrust law within the welfare sector, we will mostly find them in the US health care market.

### *4.2.1. Cartels*

Within the context of essential social needs, courts have applied Section 1 of the Sherman Act largely to condemn price-fixing agreements among competitors. One of the largest and most harmful price-fixing cartels was the vitamins cartel, which operated both in the United States and Europe since 1989 until 1999. This cartel caused significant damage to vulnerable population segments such as children, pregnant women, lactating mothers and the elderly, i.e., the groups that purchased supplementary vitamins the most.[218] In another similar cartel, one of the earliest Supreme Court cartel cases, *Am. Med. Ass'n v. United States, 317 U.S. 519, 536 (1943)*, the Supreme Court found the American Medical Association guilty for recommending its members not to work with health maintenance organizations (HMOs), which provided health care at lower costs. Afterwards, there have been unlawful illegal price-fixing arrangements in the dental sector (1992),[219] and involving hospitals. Within the hospital care sector, one of the most harmful cartels (the court ruled on it in 2007) took the form of hospitals coordinating to limit the wages of nurses.[220] Lowering wages could lead to mid-term and long-term nursing shortages, which would clearly prejudice hospital care.

### *4.2.2. Bid rigging: secret agreements and conspiracies between competitors*

Another common unlawful anticompetitive practice is bid-rigging, i.e., conspiracies between competitors agreeing on who will be awarded each contract. Let us recall the legal and administrative framework of social services: government authorities enter into agreements with private providers and nonprofits to deliver the services and provide the benefits as well as to administer them (including eligibility determinations and the award of benefits).

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[217] Leslie (2012).

[218] Connor, J.M. (2008), 2ª Ed., *Global Price Fixing*, p. 252-53.

[219] *United States v. Alston, 974 F.2d 1206 (9th Cir. 1992).*

[220] *United States v. Ariz. Hosp. & Healthcare Ass'n, 2007-2 Trade Cas. (CCH) P75,*869 (D. Ariz. 2007) (Consent Decree and Competitive Impact Statement).

A paramount example of bid-rigging is another United States case: the price of milk for schoolchildren procured through school milk programs had been artificially inflated for decades due to a web of bid-rigging arrangements.[221]

### *4.2.3. Abuse of dominance*

Another example of anticompetitive arrangements are agreements under which various dominant companies (hospitals or health care centers) illegally agree not to treat patients whose payments are covered by certain types of insurance. Obviously, such shortage of supply triggers price increases.[222] Market division has also been found contrary to antitrust law. Under these arrangements, competitors allocate territory to each other or, in a more sophisticated fashion, drive competitors out of the market in exchange for legally required compensation. This was the case regarding certain pharmaceutical companies that alleged patent infringement based on the 1984 Hatch-Waxman Act to preserve their monopolies. They automatically paid compensation to the defendant (usually a generic drug manufacturer) which, as provided in the said legal provision, had to be paid prior to filing the suit. Thus, such payment amounted to compensation for the defendant who, in exchange, would suspend the launching of the new medical product.[223]

### *4.2.4. Anticompetitive mergers*

Illegal monopolies seriously undermine health care markets, where there is growing concentration between health care providers and insurers.[224] As is also the case under EU law, not all forms of monopolization are illegal. Monopolies will only be illegal if the company holding the monopoly abuses its dominant position. For instance, imagine a hospital that only treats patients who enter into agreements including clauses providing for price raises in case the patient receives health care in other hospitals or health care centers. The issue with the health care sector is that market concentrations involving hospitals and insurance providers are tremendously common. This gives rise to significant price increases. Indeed, hospital consolidation during the 1990s increased overall prices by over 40%.[225] All

[221] *Morton's Market, Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823, 826 (11th Cir. 1999) Ohio ex rel. Montgomery v. Louis Trauth Dairy, Inc., 925 F. Sup. 1247, 1249 (S.D. Ohio 1996)*, cited by Leslie (2012: 895-896).

[222] See, for example: *FTC v. Ind. Fed'n of Dentists, 476 U.S. 447, 459 (1986)*. Also cited by Leslie (2012: 896).

[223] Leslie (2012: 898), Leslie, C. R., (2006), "The Anticompetitive Effects of Unenforced Invalid Patents," 91 *Minnesota Law Review.* 101, 148-49.

[224] Glied, S.A., Altman S. H. (2017) "Beyond Antitrust: Health care and Health Insurance market trends and the future of competition." *Health Affairs* 36, No. 9, p. 1572 *et seq.*

[225] Leslie (2012: 907).

of this drives many patients out of the market. If health insurance prices get too high, health insurance will be rejected as compensation for workers in employment contracts. This is why the Federal Trade Commission (FTC) prevents concentrations if it finds that such compensation has anticompetitive effects.

Judicial mistakes in application of antitrust law to mergers and concentrations can be devastating. Failure to stop certain mergers on time can lead prices of certain goods or services to skyrocket (pharmaceutical products, for instance). Let us take, for instance, the 2011 Lundbeck case.[226] After the merger between two major pharmaceutical companies−which had been challenged, although the district court held for the acquiring company in *FTC v. Lundbeck, Inc., 650 F.3d 1236, 1238 (8th Cir. 2011)*−the price of several pharmaceuticals skyrocketed, making them unaffordable. These were pharmaceutical products present in a medicine for newborns affected by heart conditions (roughly 30,000 newborns per year suffered this life-threatening heart condition) that prior to the merger was affordable. It is a heart-breaking case (pun intended) that aptly exemplifies the tremendous impact of misapplying antitrust law.

### 4.3. Welfare services provided by nonprofits do not, on an *a priori* basis, fall outside the scope of antitrust law: "the adoption of the non-profit form does not change human nature"

At first glance, it would seem repugnant to associate nonprofits with antitrust legislation.[227] However, it is a fact that the provision of welfare services by nonprofits has given rise to many antitrust cases. See the landmark case *Hospital Corporation of America versus Federal Trade Commission 1986*, which stemmed from a famous case ruled by the Supreme Court in 1984: *National Collegiate Athletic Association versus Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984). In this case, the Supreme Court upheld the first instance court decisions regarding a national athletic association that breached antitrust law by restricting its members' broadcasting rights for soccer games.

[226] Leslie (2012: 907-908).

[227] Nawalanik, F. J., (1972) "Motives of Non-Profit Organizations and the Antitrust Laws," 21 *Cleveland State Law Review* 97. In this vein, see: Nonprofit Associations Are Subject to Antitrust Liability for the Acts of Their Agents with Apparent Authority: Am*erican Society of Mechanical Engineers v. Hydrolevel Corp*., 102 S. Ct. 1935 (1982), 60 Washington University Q. 1487 (1983).

In the United States, it is well-settled case law that nonprofits do not fall outside the scope of application of antitrust law.[228] US courts do not allow anticompetitive behaviors even if they (i) come from not-for-profit entities; or (ii) occur within the context of welfare provision.[229]

Antitrust law in the US qualifies as a generic and broad framework with little density. It is thus necessary to keep in mind that the aforesaid line of case law relies on a specific understanding of the facts, most certainly shared by antitrust law enforcers in the US, and particularly by the Federal Trade Commission (FTC), whose decisions are upheld by the courts of justice. This institutional connection is aptly illustrated by the 1990 lecture of the (back then) chairman of the FTC "*Federal Antitrust enforcement for non-for-profit organizations*" delivered on 28 June 1990 within the framework of the *Legal Seminar for nonprofit organizations* held in Milwaukee, Wisconsin.

The underlying rationale for this interpretation on the application of antitrust law to nonprofits is that, as any other entity, nonprofits also tend to maximize their income. There is no reason to believe that, within a competitive marketplace, nonprofits do not have the same "income-maximizing drive" as any other actor.[230] It is also worth considering that nonprofits have a growing presence in many goods and services sectors subject to market rules, and their behavior resembles more and more that of businesses and profit-maximizing entities. Along these lines, the FTC tends to consider that nonprofits can have the same willingness to carry out an anticompetitive behavior to maximize income, even if their purposes do not include making a profit for their shareholders or sponsors. Indeed, additional

[228] There have been some rulings contrary to this line of case law that have been heavily criticized by scholars. See, for instance, Richman B.D. "Antitrust and Non-profit Hospital Mergers: a return to basics," *University of Pennsylvania Law Review* No. 156. One of the rulings arguing that there was no antitrust law violation was adopted in *The court's Trade Commission v. Butterworth Health Corp* in 1996, cited by Searing, E. A. M., (2014). "Charitable (Anti) Trust: The Role of Antitrust Regulation in the Nonprofit Sector*." Nonprofit Policy Forum,* No. 5 (2), p. 279. In this case, the court's rationale was that the presence of community leaders on the board would remove anticompetitive effects and restrain price increases. However, as Searing clarifies, nonprofits' charitable purposes and philanthropic aims can perfectly coexist and are not incompatible with profit maximization.

[229] In this regard, see Phelan, (2019). Blanchard, L. D. (2014) "Non profits use of noncompetition agreements: having the best of both worlds." *Golden Gate University Law Review* No. 44 (3), p. 277; Richman, B.D. (2006) "The Corrosive Combination of Nonprofit Monopolies and U.S. Style Health Insurance: Implications for Antitrust and Merger Policy," *Law and Contemporary Problems*; Elikenberry, A. M. Drapal, J. (2004) "The Marketization of the Nonprofit Sector: Civil Society at Risk" *Public Administration Review*, Vol. 64, No. 2; Greaney, T. L., (2004) "Chicago's Procrustean Bed: Applying Antitrust Law in Health Care," 71 *Antitrust Law Journal*. 857.

[230] Searing, E.A.M. (2014:261). In the United Kingdom, antitrust authorities have also fined private schools (registered as nonprofits or charitable organizations) for exchanging specific information regarding future pricing intentions on a regular and systematic basis from 1 March 2001 to 1 June 2003. See http://webarchive.nationalarchives.gov.uk/20140402142426/http:/www.oft.gov.uk/OFTwork/competition-act-and-cartels/ca98/decisions/schools.

income can help nonprofits to remain in operation, to continue performing their activities, to enhance their equipment or facilities, to extend or improve the scope of their charitable initiatives, to increase their institutional standing and reputation, as well as to raise their employee salaries or to improve their working conditions. There is no doubt that all of these factors can lead to anticompetitive behaviors by nonprofits, thereby restraining trade, distorting market operation and causing damage to their competitors or their users and clients. Within this context, it is worth examining former Seventh Circuit Judge Richard Posner's quote,[231] claiming that "the adoption of the non-profit form does not change human nature." Ultimately, the advocates of applying antitrust law to nonprofits assume that individuals tend to be non-competitive, particularly if the ground rules require fair play and that makes it harder to achieve one's own goals. Moreover, courts have even considered that this non-competitive attitude is even more prevalent in non-profit organizations, since they naturally favor cooperation at the expense of competition and rivalry.

Economically speaking, it is considered efficient from a social welfare perspective that antitrust law not differentiate between for-profit and non-profit firms.[232] This conclusion is based on the incontrovertible argument that both types of entities have incentives to distort competition and exploit their market power.

In fact, most anticompetitive behaviors by nonprofits take place within the health care market.[233] Some scholars have argued that the provision of health care services is not subject to classic market dynamics. However, the courts have upheld the application of antitrust law to health care providers.[234]

In practice, there are many antitrust cases within the health care sector because[235] of the geographic dimension of the health care market. In contrast with other sectors, health care services are provided in limited geographic markets where, in most cases, the service cannot be provided elsewhere. Accordingly, there is no single market for the provision of services, but rather many scattered geographic markets. This is inherent to health care services, which

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[231] Provided in the judgment delivered in *Hospital Corporation of America v. FTC, United States*, Court of Appeals for the Seventh Circuit, 12 September 1986.

[232] Philipson, T.J. Posner, R.A. (2006), "Antitrust in the not-for-profit sector*" Working Paper 12132, National Bureau of Economic Research 1050.*

[233] One of the most significant cases was *Federal Trade Commission v. Phoebe Putney Health System, Inc* in 2013. In this case, a non-profit acquisition of a for-profit hospital was blocked on anticompetitive grounds and the acquiring entity challenged the decision. On this matter, see: J.J. Miles, (1999) *Fundamentals of health law*. Chicago Marriott Downtown Chicago. También Hammer, P. J. Sage, R.W.M. (2002), "Antitrust Health Care quality and the courts." *The Columbia Law Review* 102.

[234] This is discussed in Searing (2014), who also refers to previous case law regarding professional associations already declaring that they could breach antitrust rules. For instance, in 1975, the Virginia State Bar was found guilty for anticompetitive practices for setting legal counseling fees (*Goldfarb versus Virginia State Bar*, 1975).

[235] See Hammer, Sage (2002: 571).

constitute customized or individualized care. The relationships between health care providers and patients often occur in specific, delimited locations, where proximity between providers and users is key, as well as the informal dissemination of information about these providers. Ultimately, all of this makes health care services a sector with lower demand but greater geographic concentration and with almost no substitute goods if compared to other services.

Admittedly, antitrust law should not be the only instrument to oversee nonprofits, but there is no doubt that its role is essential to ensure competition in welfare markets. On top of that, empirical analyses show that the various cases in this sector have triggered new lines of case law, allowing courts to include qualitative standards in their economic assessments when deciding on whether to find specific behaviors contrary to antitrust law.

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# Local subsidies for the elderly

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## 1. INTRODUCTION

Local governments can use "subsidies" for policymaking. In other words, they can rely on their spending power to achieve public policy objectives (Requero, 2002; Fernández, 2004). Subsidies are payments made by public authorities to public and private entities and individuals. Subsidies' defining feature is that recipients do not pay any compensation in exchange for the subsidy. This does not mean, however, that subsidies can be defined as mere gifts. In fact, under the applicable legislation, subsidies qualify as (i) goal-oriented forms of financial aid (since they seek to advance the public interest); and (ii) conditional instruments (given that payment of subsidies is subject to the fulfillment of the aim pursued). In this regard, see Spanish Supreme Court Judgment (STS) no. 989/2018, legal basis 4.

Public authorities may grant subsidies regarding any matters falling within their scope of power. Note that public authorities need not be specifically empowered to grant subsidies, since these qualify as ancillary instruments (i.e., forms of financial aid) generally available to public authorities (Pomed, 2010; Aymerich, 221). Therefore, subsidies are one of many tools available to public authorities to address ageing and age-related challenges. This paper examines the use of subsidies by local governments for their elderly policies. We map and classify the various subsidies granted by municipalities in this domain. Our mapping seeks to (i) supplement this book's overview of elderly policies; and (ii) enable a better understanding of subsidy schemes at a local level.

## 2. METHODOLOGY

We take a descriptive and classificatory approach relying on the information available on the National Subsidy Database (NSD). The NSD was created under Act 15/2014, of 16 September, Streamlining the Public Sector. Act 15/2014 modified Articles 18 and 20 of the General Act on Subsidies (*Ley General de Subvenciones*, LGS), requiring all public authorities to report to the NSD their calls for subsidies and final award decisions. Not all the information reported by public authorities ends up being publicly available. However, the NSD does disclose on the National Subsidy Disclosure Portal (NSDP) the key aspects of all

the reported subsidy programs or schemes. The NSDP has been in place since 1 January 2016. It is very useful to learn how public authorities allocate subsidies.

The scope of our study only covers NSD information regarding subsidies called or awarded by municipalities, i.e., we have disregarded the information on subsidies granted by other local authorities, such as provincial councils or *cabildos*. We have not examined national or regional subsidy schemes, even if local governments qualify as recipients or managing entities. Admittedly, the scope of our study entails leaving out some subsidy schemes related to elderly policies. However, we have decided to focus on municipalities, i.e., on local policymaking.

From a substantive standpoint, we have only considered subsidy schemes specifically related to the "elderly" or "older adults" and to "ageing." Therefore, the study covers two types of subsidy programs: (i) subsidy schemes listing "ageing" as the main eligibility requirement, regardless that there may be additional eligibility requirements (e.g., income, wealth, health conditions or disabilities); and (ii) subsidy schemes promoting activities or the provision of services catering to the elderly, even if older adults are not the ultimate subsidy recipients. There was no need to set an age threshold to identify older adults. Instead, we considered all subsidy schemes addressed to "older adults" or "senior citizens," which usually comprised seniors aged 60-65, although in a few cases the lower threshold was 55. We have disregarded all financial aid schemes and incentives for the hiring of employees aged 45 and older, because these schemes target persons who are still active.

As for the time frame, our study considers all subsidy schemes called during 2019, since it is the last year for which there is complete information. We added any subsidy programs called in 2018 to be granted for 2019 activities.

As a result, we came up with 189 subsidies or local subsidy schemes on which we relied to prepare the categorization provided below. Keep in mind that public authorities in general, and municipalities in particular, do not always fulfill their reporting obligations under the LGS (Lanza, 2019). It is difficult to estimate the number of subsidy programs that are either reported late or not reported at all, but there is no doubt that the NSD misses many of them and end up being undisclosed. On top of that, the NSD and the NSDP sometimes inaccurately record the purpose or aim of subsidies, so our search may have missed a few elderly-related subsidy schemes. Consequently, although the subsidies covered by our study reflect most local elderly-related subsidy programs, we cannot be sure that our categorization be comprehensive or completely accurate.

## 3. CATEGORIZATION

To prepare the categorization below, we examined the (i) calls (for subsidies awarded through competitive procedures or tenders); and (ii) agreements or arrangements (for subsidies that were directly granted, i.e., ad-hoc subsidies) posted on the NSD. As for (i), we also looked up the legal bases or rules governing the actual subsidies when these were not included in the call and we needed additional information. Our analysis has allowed to identify each subsidy scheme's main purpose our aim, which was the primary criterion to break down or categorize each subsidy scheme.

Note that the purpose attached to each subsidy scheme does not necessarily match the wording of the calls and agreements posted on the NSD. Public authorities do not always state the aims of the subsidy scheme as clearly and accurately as would be necessary for this kind of categorization. Thus, we have established the subsidy schemes' purposes and paired them with each scheme by examining the aims and programs globally, mostly considering eligibility requirements, the eligible/subsidizable activities and, regarding subsidies awarded through competitive procedures or tenders, the criteria and standards used to rank the applications and allocate the funds.

In doing so we barely had any issues finding the ultimate purpose of each subsidy scheme. However, we had some trouble concerning the following aspects. First, subsidies may pursue several objectives at the same time. For instance, a subsidy aimed at functionally adapting homes of vulnerable older adults can be both an "ageing at home" program and a form of financial aid for disadvantaged citizens regardless of their age. Since our study focuses on elderly policies, we have stuck with the purpose most closely related to elderly policymaking. Second, many calls and agreements/arrangements provide for various "facilities." For example, a single subsidy scheme may include a facility for older adults along with funding for dependent persons. In that case, we separated the facility related to the elderly. Also, the same scheme may provide different ageing-related lines of funding, e.g., (i) housing refurbishment; and (ii) financial aid for elders in need. When this occurred, we picked and examined the facility providing the largest funding.

So we broke down all local subsidies for the elderly in 2019 into four categories: (i) local subsidies aimed at promoting active ageing (130 subsidy schemes, i.e., 68.8% overall); (ii) local subsidies to promote ageing at home (24 schemes accounting for 12.7% of all cases); (iii) local subsidies for financially vulnerable seniors (19 subsidies, i.e., 10% overall); and (iv) other local subsidies mostly aimed at promoting the autonomy and integration of senior citizens (12 schemes, representing 6.3% of all cases).

## 4. LOCAL SUBSIDIES PROMOTING ACTIVE AGEING

The most widely spread local subsidy schemes are, by far, those aimed at promoting leisure and cultural activities, training and therapeutic and sporting activity. These subsidy programs can be categorized together, since they all seek to promote active ageing. These funds are allocated to a myriad of activities, thus being somewhat useless to categorize the subsidies based on that criterion. Also, local subsidy schemes often finance numerous (and diverse) activities. Therefore, it is sometimes complicated to pair every scheme with a single activity.

We have found three types of local subsidies promoting active ageing. First, we included under this category all subsidy schemes aimed at providing financial aid to the activities held at local elderly centers and associations. Second, we also included subsidy schemes providing financial support to the outsourcing agreements concluded by local authorities with third parties providing services and holding activities to promote active ageing at a local level. Finally, this category also comprised aid schemes covering the costs of activities for older adults (e.g., membership fees or monthly payments).

### 4.1. Subsidies for local elderly centers and associations

A large share of local subsidies promoting active ageing are granted to local centers and associations.

The calls and arrangements used to grant or award these subsidies are worded differently. Some of the award decisions or otherwise the resolutions granting the subsidies include detailed and accurate definitions of the eligible activities. For instance, there are many local subsidies partially financing a specific senior trip, a given social event or workshops. In these cases, the total amount of the subsidy is stated as a lump sum and there is a cap on the prices payable by the recipients (i.e., the price paid by the older adults involved is partially subsidized). Usually, the provider is only required to provide proof that the activity actually took place.

**Table 1. Subsidies for local elderly centers and associations - examples**

| NSD | Municipality | Province | Summary | Recipients | Procedure | Funds/ Amount (€) |
|---|---|---|---|---|---|---|
| 453793 | Torrejón de Ardoz | Madrid | "*Telebiblioteca*" ("Remote library") project for home library services | *Fundación INLADE* | Agreement/Arrangement (ad-hoc subsidy) | 4,000 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 453109 | Quart de Poblet | Valencia | Maintaining the *Coral de Mayores* | *Coral de las Personas Mayores* | Agreement/Arrangement (ad-hoc subsidy) | 5,000 |
| 477214 | Sagunto | Valencia | Cultural visit and tour around Monreal del Campo (Teruel) | *Asociación MURBITE* | Agreement/Arrangement (ad-hoc subsidy) | 1,000 |
| 438748 | Pájara | Tenerife | Trip to Lanzarote | *Asociación de Mayores El Jibito* | Agreement/Arrangement (ad-hoc subsidy) | 11,083 |

Source: own elaboration.

There are other cases where the calls and agreements are not related to such specific activities. Indeed, many subsidy schemes are either allocated to active ageing projects previously submitted by elderly centers and associations or subject to the submission of those projects (i.e., the funds are only paid if the relevant center or association submits the project). Either way, the point is to partially or totally finance the local centers' and associations' activities. The calls and arrangements often (i) state the amount of the subsidy as a lump sum; and (ii) establish that the subsidy shall not exceed the cost of the provided activities. Nevertheless, given the broad definition of activities in this context, we highly doubt that there be a close oversight or strict checks in practice.

**Table 2. Subsidies for local elderly centers and associations - examples**

| **NSD** | **Municipality** | **Province** | **Summary** | **Recipients** | **Procedure** | **Funds/ Amount (€)** |
|---|---|---|---|---|---|---|
| 448287 | Alcobendas | Madrid | Programs aimed at promoting involvement of older adults in local communities and social life | Locally-based elderly associations | Competitive procedure/Tender | 50.000 |
| 472066 | Palma de Mallorca | Balearic Islands | Programs, projects and activities aimed at promoting active ageing and intergenerational solidarity | Locally-based elderly associations and groups with a local scope | Competitive procedure/Tender | 17.500 |
| 453506 | Irún | Guipúzcoa | Preventive, cultural and leisure activities along with training for the elderly | Non-profit associations with a local scope | Competitive procedure/Tender | 33.500 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 484020 | Puerto Llano | Ciudad Real | Cultural activities for the elderly | *Asociación Cultural y Recreativa del Centro de Mayores I de Puertollano* | Agreement/Arrangement (ad-hoc subsidy) | 3.000 |
| 482947 | Coslada | Madrid | Sociocultural activities, leisure and trips | Entities and associations cooperating with the Governing Boards of local elderly centers in Coslada | Agreement/Arrangement (ad-hoc subsidy) | 58.000 |

Source: own elaboration.

Finally, certain operating costs or general expenses incurred by recipients can be subsidizable. These subsidies could be assigned to their own category, their purpose being to foster the creation of associations in line with Article 72 of the Spanish Local Government Act (*Ley de Bases del Régimen Local*, LBRL), providing that local governments should foster that local associations be created to safeguard the local residents' interests. This is why these subsidies barely impose any requirements on their recipients. However, we have placed them under this category because these expenses (when subsidized) are ancillary to the subsidy for active-ageing-related activities. Following our line of reasoning, these clauses would be opposite to the subsidies for specific activities, insofar as they qualify as a payment, with barely any requirements, made to elderly associations.

**Tabla 3. Subsidies for local elderly centers and associations - examples**

| **NSD** | **Municipality** | **Province** | **Summary** | **Recipients** | **Procedure** | **Funds/ Amount (€)** |
|---|---|---|---|---|---|---|
| 471654 | Plasencia | Cáceres | Financial aid for the operation of elderly associations | Elderly associations registered in local registries | Competitive procedure/Tender | 2,500 |
| 440056 | Orense | Orense | Rental of premises for elderly associations | Associations and non-profit entities registered in regional and local registries | Competitive procedure/Tender | 27,000 |
| 454595 | Bilbao | Vizcaya | Financial aid for refurbishment and equipment | Bilbao elderly associations | Agreement/Arrangement (ad-hoc subsidy) | 99,000 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 490695 | Cartagena | Murcia | Financial aid to purchase furniture, IT systems and for refurbishment of the association's premises | Senior clubs listed in the annex | Agreement/Arrangement (ad-hoc subsidy) | 25,000 |

Source: own elaboration.

In addition to promoting active ageing at a local level, all of these schemes have in common that they are mostly sources of financial support for local elderly centers and associations. Thus, these schemes qualify as a way of supporting the local network of elderly centers and associations operating within the broader field of ageing-related policymaking. In fact, even for subsidies awarded through competitive procedures, applicants must be locally-based non-profit associations or entities. In smaller municipalities, this kind of clauses almost turn the tenders or competitive procedures into a direct grant of subsidies.

### 4.2. Subsidies for third parties

This second category comprises a set of ancillary subsidies included in broader agreements or arrangements entered into between local governments and specific entities, other than local elderly centers and associations, so that such entities provide active ageing services and activities. Therefore, these are ad-hoc subsidy schemes subject to agreements or arrangements and directly granted to the eligible recipients. The main difference between these schemes and the subsidies examined in section 4.1 above is that the activities funded by these schemes are not connected in any way with the leisure and cultural activities offered by local elderly centers and associations.

This category can comprise a wide variety of programs, the paramount example being the agreements between local governments and universities under which universities offer college courses (either free or at a subsidized price) to local seniors. These arrangements for the establishment of an elderly "university" or "classroom" usually require that local authorities directly grant an ad-hoc subsidy to the relevant university or college. This category could also include subsidy schemes granted to university schools or research groups focused on ageing-related topics, since such schemes cover the design and implementation of active ageing activities in the municipality.

**Table 4. Subsidies for third parties - examples**

| NSD | Municipality | Province | Summary | Recipients | Procedure | Funds/ Amount (€) |
|---|---|---|---|---|---|---|

| | | | | | | |
|---|---|---|---|---|---|---|
| 480606 | Guadalajara | Guadalajara | College Courses for Older Adults (*Programa Universidad de Mayores*) | Universidad de Alcalá | Agreement/Arrangement (ad-hoc subsidy) | 6,000 |
| 438484 | Elche | Alicante | College Courses for Older Adults (*Programa Universidad de Mayores*) | UNED | Agreement/Arrangement (ad-hoc subsidy) | 7,000 |
| 477512 | Almería | Almería | College Courses for Older Adults (*Programa Universidad de Mayores*) | Universidad de Almería | Agreement/Arrangement (ad-hoc subsidy) | 15,000 |
| 443609 | Cabra | Córdoba | College Courses for Older Adults (*Programa Universidad de Mayores*) | Universidad de Córdoba | Agreement/Arrangement (ad-hoc subsidy) | 12,000 |
| 494083 | Móstoles | Madrid | College Courses for Older Adults (*Programa Universidad de Mayores*) | Universidad Rey Juan Carlos | Agreement/Arrangement (ad-hoc subsidy) | 12,000 |

Source: own elaboration.

### 4.3. Subsidies directly granted to the elderly

Finally, there are also local subsidies that qualify as direct payments to the elderly for them to cover the price or fee (or part thereof) of certain active ageing activities. These subsidies are subject to competitive procedures, and their amount is expressed as a percentage of the eligible activity's price or fee. However, these schemes are uncommon. We have only found three.

**Table 5. Subsidies directly granted to the elderly - examples**

| **NSD** | **Municipality** | **Province** | **Summary** | **Recipients/Eligibility requirements** | **Procedure** | **Funds/ Amount (€)** |
|---|---|---|---|---|---|---|
| 458897 | Hoyo de Manzanares | Madrid | Payment of membership or monthly fees for elderly courses and programs provided by the THAM partnership | Seniors over 65 regardless of income | Competitive procedure/Tender | 1.800 |
| 469466 | Guía de Isora | Tenerife | Financial aid for active, cultural and age-friendly trips and senior tours | Seniors over 55 including additional income requirements (i.e., recipients | Competitive procedure/Tender | 60.000 |

| | | | | | | |
|---|---|---|---|---|---|---|
| | | | | must not have an income exceeding a certain amount) | | |
| 476844 | Salamanca | Salamanca | Financial aid for IMSERSO trips and tours | Unemployed or retired seniors and pensioners over 60 | Competitive procedure/Tender | 18.000 |

Source: own elaboration.

## 5. LOCAL SUBSIDIES TO PROMOTE AGEING AT HOME

Although they are not as widespread as the subsidies discussed before, it is worth examining a second type of local schemes, i.e., those aimed at enhancing older adults' housing and living conditions. In particular, the purpose of most local programs included under this category is to allow older adults to stay at home, in line with ageing at home policies. Subsidies seeking that seniors live in nursing homes or similar facilities are far less common. These schemes are usually addressed to very specific social emergencies or critical situations, and thus they are included under the category discussed in section 6 below (subsidies for financially vulnerable seniors).

There are three types of local schemes related to older adults' housing needs. The most common and heavily financed one is the program aimed at covering any remodeling or refurbishment costs to adapt homes to seniors' functional needs. The second scheme seeks to mitigate the costs of housing for older adults and, more specifically, local property taxes. Although the calls do not often specify it, these subsidy schemes could also be considered part of a stay-at-home-policy, since they seek to mitigate older adults' tax burden. Finally, we will also examine a more uncommon type of subsidy: local schemes covering the costs of home assistance for the elderly.

### 5.1. Subsidies (financial aid) for the functional adaptation of elderly housing

The most widespread age-friendly local subsidies are financial aid schemes provided by many municipalities allowing older adults to enhance their homes by making them more functional and accessible. This fosters that senior citizens stay at home even if they have mobility impairments, thus preventing them from going to a nursing home or at least delaying the need to do so.

These subsidies are awarded through competitive procedures or tenders, and the recipients are the eligible seniors. The eligibility requirements are (i) being at least 60, 65 or 70, depending on the scheme; and (ii) having a deed showing that the applicant either owns or

rents the home. Also, most schemes include additional requirements. Applicants (iii) must not exceed a certain level of income or wealth; and (iv) should have certain sensory or mobility impairments. These schemes do not usually require that the applicant have a minimum degree of disability, but it can be an additional criterion to assess or rank the applications. Moreover, note that these subsidies often supplement other programs with a broader scope that provide specific aid schemes for persons with disabilities or mobility impairments regardless of age.

Keep in mind, however, that these schemes do not only cover the expenses incurred to functionally adapt or update the home. They also include additional expenses to purchase special pieces of furniture or specific tools to enhance older adults' mobility (such as wheelchairs or orthopedic equipment). Since this equipment can be used outside of the home, these subsidies could be categorized as aid schemes seeking to foster autonomy of the elderly, thus having a broader scope than the one considered herein.

**Table 6. Subsidies (financial aid) for the functional adaptation of elderly housing - examples**

| NSD | Municipality | Province | Summary | Recipients/Eligibility requirements | Procedure | Funds/Amount (€) |
|---|---|---|---|---|---|---|
| 445141 | Alcorcón | Madrid | Aid for housing refurbishment | Seniors over 65<br>Being a registered resident and having a yearly income not exceeding €18,200 (special rules for families apply) | Competitive procedure/Tender | 40,000.00 |
| 443585 | Moncada | Valencia | Aid for technical equipment (e.g., hearing aid) and for equipment used for the functional adaptation of the home or motor vehicles | Seniors over 60<br>Sensory and mobility impairments. Being a registered resident and actually living in the relevant municipality. | Competitive procedure/Tender | 90,000.00 |
| 446452 | Orihuela | Alicante | Aid to purchase accessibility equipment and for the functional adaptation of the home | Seniors over 60<br>Recipients of retirement pensions, survivors' pensions or permanent disability benefits. Local authorities must certify that applicants are in need. Applicants with permanent disabilities and the spouses if (i) the latter are economically dependent on them and (ii) live in Orihuela | Competitive procedure/Tender | 300,000.00 |

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|---|---|---|---|---|---|---|
| 449257 | Carlet | Valencia | Aid for equipment used for the functional adaptation of the home or motor vehicles | Seniors over 60<br>Sensory or mobility impairments | Competitive procedure/Tender | 140,000.00 |
| 452663 | Fasnia | Tenerife | Aid for housing refurbishment, for purchasing orthopedic equipment and for covering transportation expenses incurred going to health centers and other specialized facilities | Seniors over 60<br>Spanish nationals having been registered as residents for at least 1 year and with an income not exceeding twice the Public Income Indicator (IPREM) | Competitive procedure/Tender | 12,000.00 |
| 440006 | Los Realejos | Tenerife | Aid for food and housing refurbishment and for purchasing equipment to functionally adapt the home. Aid for prosthetic equipment and for transportation as well as aid for additional, non-specified expenses to be assessed by the relevant authority | Seniors over 60<br>Not having any source of income and that the income *per capita* of the family not exceed the minimum wage | Competitive procedure/Tender | 25,000.00 |
| 460199 | Granollers | Barcelona | Aid for elderly housing refurbishment | Seniors over 65<br>Being a registered resident. Persons with mobility impairments or disabilities aged 80 or older living alone and having financial issues will be prioritized | Competitive procedure/Tender | 23,310.00 |
| 474706 | Santpedor | Barcelona | Aid for elderly housing remodeling | Seniors over 65<br>Seniors with a 33% disability or in a vulnerable situation. This eligibility requirement does not apply to seniors aged 80 or older | Competitive procedure/Tender | 16,800 |
| 484556 | San Cristóbal de la Laguna | Tenerife | Aid for housing remodeling and for purchasing furniture and equipment aimed at enhancing older adults' living conditions | Seniors over 65<br>Income not exceeding the IPREM | Competitive procedure/Tender | Not recorded |
| 460385 | Alcobendas | Madrid | Aid for home remodeling and adaptation to facilitate older adults' mobility, communication and personal autonomy | Seniors over 70<br>Having been registered as residents for at least 1 year regardless of income | Competitive procedure/Tender | 100.000,00 |

| | | | | | | |
|---|---|---|---|---|---|---|
| 485572 | Formentera | Balearic Islands | Aid for purchasing, updating and/or installing mobility and security equipment for older adults (e.g., wheelchairs and functional adaptations for the home) | Seniors over 65<br>Monthly income below €880 | Competitive procedure/Tender | 16.000,00 |
| 482961 | El Sauzal | Tenerife | Aid for removing architectural barriers, for purchasing household goods and homeware as well as prosthetic/orthopedic equipment | Seniors over 65<br>Average income is used as an assessment standard or criterion. Older adults aged 70 and older will be priority applicants | Competitive procedure/Tender | Not recorded |
| 464986 | San Andrés y Sauces | La Palma | Aid for remodeling, furniture, prosthetic equipment, glasses, hearing aid and other equipment for personal use | Seniors over 60<br>Income not exceeding the IPREM | Competitive procedure/Tender | 1.500,00 |
| 451574 | El Puig de Santa María | Valencia | Aid for the functional adaptation of homes and vehicles and for purchasing equipment for personal use | Seniors over 60<br>Sensory or mobility impairments | Competitive procedure/Tender | 3.600,00 |

Source: own elaboration.

### 5.2. Subsidies to mitigate the impact of local property taxes for the elderly

Although they are fairly uncommon, financial aid schemes to cover a share of local property taxes for the elderly qualify as a distinct category of subsidies. These subsidies are expressed as a share of the Land Value Tax (in Spanish, *Impuesto sobre Bienes Inmuebles* or IBI) or other local taxes payable by older adults. These aid schemes cover 25%-90% of the payable tax amount.

This study only includes age-related tax aid schemes. However, many municipalities provide additional subsidy schemes aimed at mitigating the local tax burden. These "tax relief subsidies" or, better said, that subsidies be allocated to "pay taxes," may seem ironic to say the least. The point of having them is just to bypass the restrictions imposed on local governments by the Local Tax and Treasury Act (*Ley Reguladora de las Haciendas Locales*) regarding the provision of tax relief and tax benefits. This is why many have argued that the said "tax relief subsidies" are often unlawful (Moreno, 2019).

All of these subsidies posted on the NSD are awarded through competitive procedures to older adults. The eligibility requirements are as follows: being (i) 65 or older (at least this was the case in all the subsidies examined herein); and (ii) subject to the subsidized local tax. Additional eligibility requirements include minimum income levels or being unemployed.

**Table 7. Subsidies to mitigate the impact of local property taxes for the elderly - examples**

| NSD | Municipality | Province | Summary | Recipients/Eligibility requirements | Procedure | Funds/Amount (€) |
|---|---|---|---|---|---|---|
| 484014 | Olot | Gerona | Tax relief for the Land Value Act or IBI | Seniors over 50 that have been unemployed for a long time | Competitive procedure/Tender | 4,000.00 |
| 457022 | Cuervo | Sevilla | Tax relief for the Land Value Act or IBI | Seniors over 65 that do not own any property (other than the eligible one) worth more than €30,000 | Competitive procedure/Tender | 8,000.00 |
| 448353 | Santa Coloma de Gramenet | Barcelona | Tax relief for the Land Value Act or IBI | Seniors over 65 living on their own and having an income not exceeding 1.5 times the IPREM | Competitive procedure/Tender | 25,000.00 |
| 454063 | L'Escala | Gerona | Tax relief for the Land Value Act or IBI | Seniors over 65 being economically or financially vulnerable | Competitive procedure/Tender | 10,000.00 |
| 474399 | Valldecavalls | Barcelona | Tax relief for the Land Value Act or IBI | Seniors over 65 and pensioners with an income not exceeding 1.06 times the minimum wage | Competitive procedure/Tender | 4,000.00 |
| 468735 | Fuengirola | Málaga | Tax relief for the Land Value Act or IBI and the waste management tax | Pensioners | Competitive procedure/Tender | 20,000.00 |
| 438311 | Carlet | Valencia | Financial aid for the waste management tax | Seniors over 65 with a yearly income equal to or greater than €10,000 | Competitive procedure/Tender | 10,000.00 |

Source: own elaboration.

### 5.3. Subsidies for home assistance

Finally, we also found certain local subsidy schemes aimed at covering the cost (partly or in full) of home assistance services for the elderly provided by non-profit organizations. Insofar as the availability of these services enables the elderly to say at home, we can consider that the ultimate purpose of these schemes is the same as that of the previously discussed subsidies.

This category comprises, on the one hand, ad-hoc subsidies directly granted to non-profit organizations and associations to cover part of the cost of the home assistance services provided thereby. As could be expected, these schemes do not provide very detailed descriptions of these services' end users. The actual services entail taking care of and supporting older adults living alone and their caregivers.

On the other hand, this category includes many ancillary aid schemes. The calls for these subsidies usually cover additional aid schemes to cover different expenses, such as the costs of transportation to the health center, food or essential goods.

**Table 8. Subsidies for home assistance - examples**

| NSD | Municipality | Summary | Recipients | Procedure | Funds/Amount (€) |
|---|---|---|---|---|---|
| 462711 | Móstoles | Project for providing emotional support to older adults living alone | *Fundación Amigos de los Mayores* | Agreement/Arrangement (ad-hoc subsidy) | 10,500.00 |
| 455860 | Madrid | Volunteer project to avoid unwanted loneliness of older adults | *Fundación Amigos de los Mayores* | Agreement/Arrangement (ad-hoc subsidy) | 25,000.00 |
| 456892 | Madrid | Volunteer program to prevent abuse and social isolation of older adults | *Fundación Desarrollo y Asistencia* | Agreement/Arrangement (ad-hoc subsidy) | 35,000.00 |
| 452688 | Granada | Project for supporting families taking care of older adults or dependent persons | *Asociación Adultos Cartuja* | Agreement/Arrangement (ad-hoc subsidy) | 30,000.00 |

Source: own elaboration.

## 6. LOCAL SUBSIDIES FOR FINANCIALLY VULNERABLE OLDER ADULTS

Another priority for local subsidy schemes is to meet the special needs of financially vulnerable older adults. One could argue that ageing itself creates vulnerability and thus all local subsidies examined herein could be included under this category. Nonetheless, this category only comprises schemes aimed at addressing challenges affecting older adults

although not related to age. The rationale for implementing these subsidies is that the causes of vulnerability become particularly challenging when combined with the ageing process. Thus, our sample only includes programs specifically targeting elders, and not subsidy schemes catering to the needs of vulnerable groups regardless of age. However, there is still a blurry line between this category and others. Given that the eligibility requirements for other subsidy programs are financial vulnerability or mobility impairments, many of those programs (assigned to other groups) could be listed under this category.

We have found two main types of schemes. Their purpose is to address the issues faced by financially vulnerable older adults, but there is a major difference between them. The first set of subsidies entails payments to the recipients, whereas in the latter type the recipients are associations or entities delivering services to vulnerable seniors or taking care of them. Finally, we also created a miscellaneous category comprising subsidy schemes aimed at addressing non-financial vulnerability needs.

### 6.1. Subsidies (financial aid) that entail payments to financially vulnerable older adults

This category includes local subsidies that entail direct payments to the most disadvantaged or financially vulnerable older adults. All of these aid schemes are subject to the same procedure (a competitive procedure or tender) and have the same eligibility requirements, i.e., age (recipients must be at least 65) and being financially vulnerable (the recipients' income must not exceed a certain amount based on certain standards or benchmarks like the minimum wage or the IPREM). Regarding the income requirements, these subsidies sometimes require that the applicants do not own property worth more than a certain pre-established amount.

Note, however, that the range of eligible or subsidizable expenses is really broad. Some subsidies cover the costs of specific services provided to the elderly−e.g., food expenses at a given nursing home. Other subsidy schemes specify the type of eligible expenses to be subsidized−housing or daily life expenses, for example−without attaching them to a specific center or service provider. In this case, the calls usually require that there be proof of the expenses incurred. This cost breakdown is then used to calculate each recipient's individual payment applying, where appropriate, the relevant references and caps. Finally, there are subsidy schemes where the eligibility requirements are so broadly stated that the actual aid qualifies as a mere transfer of income subject to no conditions or a "non-conditional payment."

**Table 9. Subsidies (financial aid) that entail payments to financially vulnerable older adults - examples**

| NSD | Municipality | Province | Summary | Recipients/Eligibility requirements | Procedure | Funds/Amount (€) |
|---|---|---|---|---|---|---|

| | | | | | | |
|---|---|---|---|---|---|---|
| 440233 | Cambrils | Tarragona | Aid for essential housing expenses | Seniors over 65, pensioners or retired adults with an income not exceeding 1.75 times the minimum wage. The recipient's property must not be worth more than a certain amount | Competitive procedure/Tender | 20.000,00 |
| 459806 | El Paso | La Palma | Aid for enhancing older adults' homes | Seniors over 65 with an income not exceeding 75% of the IPREM | Competitive procedure/Tender | 24.400,00 |
| 469376 | Hermigua | La Gomera | Aid for daily life expenses | Seniors over 65 not receiving social security pensions | Competitive procedure/Tender | 20.000,00 |
| 468812 | Granadilla de Abona | Tenerife | Social aid for older adults | Seniors with an income not exceeding 1.25 times the minimum wage | Competitive procedure/Tender | 40.000,00 |

Source: own elaboration.

## 6.2. Subsidies (financial aid) to meet the residential needs of financially vulnerable older adults

The purpose of these subsidies is to ensure appropriate and dignified housing (nursing homes and residential facilities) for financially vulnerable older adults. To understand these schemes' underlying rationale, one should consider that providing nursing homes and other residential facilities to older adults in need is usually on regional authorities, since regional governments are responsible for managing public nursing homes and overseeing the private network thereof. However, some municipalities implement their own programs to facilitate the access of older adults in need to nursing homes and residential facilities.

These subsidies are mostly granted directly, by concluding an agreement with the associations or non-profit entities managing the relevant nursing homes or residential facilities. Therefore, these residential facilities fall outside the scope of the regional public network. They are owned and managed by charitable organizations or non-profits that either safe certain places for older adults as required by local authorities or use the subsidy payments to cover their expenses and provide their services for free. Nevertheless, there are some programs including subsidies awarded to older adults through competitive procedures seeking to partially cover the cost of a private nursing home for those applicants that have been unable to access a public residential facility.

**Table 10. Subsidies (financial aid) to meet the residential needs of financially vulnerable older adults - examples**

| NSD | Municipality | Province | Summary | Recipients | Procedure | Funds/Amount (€) |
|---|---|---|---|---|---|---|

| | | | | | | |
|---|---|---|---|---|---|---|
| 480507 | Getafe | Madrid | Aid to cover the cost of private residential facilities | Seniors over 65<br>Unable to live at home, with no family support and with an income not exceeding 1.5 times the minimum wage. Applicants should have applied for a Madrid regional nursing home | Competitive procedure/Tender | Not recorded |
| 454021 | Madrid | Madrid | Project to take care of homeless adults that are ineligible for a public nursing home for being younger than 65 | *Asociación edad dorada Mensajeros de la Paz* | Agreement/Arrangement (ad-hoc subsidy) | 240,000.00 |
| 473981 | Molina de Segura | Murcia | Reserving a place at an assisted living facility for the recipient picked by the municipality | *Asociación Hogar Compartido* | Agreement/Arrangement (ad-hoc subsidy) | 20,000.00 |
| 466154 | Valencia | Valencia | Social support program at assisted living facilities for the elderly | *Asociación Hogares Compartidos* | Agreement/Arrangement (ad-hoc subsidy) | 10,000.00 |
| 478881 | Santa Cruz de Tenerife | Tenerife | Maintenance and support for the residential facility for seniors over 65 and/or persons with disabilities over 55 | *Fundación Canaria Hogar Santa Rita* | Agreement/Arrangement (ad-hoc subsidy) | 50,000.00 |
| 437885 | Vandellòs de l'Hospitalet | Tarragona | Aid for older adults to be able to stay at day care centers and nursing homes | Seniors over 65 | Competitive procedure/Tender | 35,000.00 |
| 472614 | Barakaldo | Vizcaya | Aid for older adults to be able to stay at nursing homes | Seniors over 60 that own assets worth less than €6,000 | Competitive procedure/Tender | 131,314.29 |

Source: own elaboration.

### 6.3. Subsidies to meet the needs arising from other causes of vulnerability

Last but not least, we found some subsidy schemes aimed at addressing causes of vulnerability other than financial trouble. This category comprises a wide array of programs, including an aid scheme for LGBT older adults, schemes related to health disorders and a program intended to cover the costs incurred by entities that take care of persons who have been declared legally incompetent that otherwise would be taken care of by local employees. All of the subsidies listed under this category qualify as ad-hoc subsidies granted directly to non-profit associations and foundations.

**Table 11. Subsidies to meet the needs arising from other causes of vulnerability - examples**

| NSD | Municipality | Province | Summary | Recipients | Procedure | Funds/Amount (€) |
|---|---|---|---|---|---|---|
| 486856 | Málaga | Málaga | Memory and dementia workshops for the elderly | *Asociación de Actividades Malagueñas Jabega* | Agreement/Arrangement (ad-hoc subsidy) | 95,000.00 |
| 483079 | Madrid | Madrid | Program to provide psychosocial care to LGBT seniors | *Fundación 26 de diciembre* | Agreement/Arrangement (ad-hoc subsidy) | 85,000.00 |
| 463489 | Rivas Vaciamadrid | Madrid | Project to end stigmatizing behaviors towards mental illnesses | *Fundación Manantial* | Agreement/Arrangement (ad-hoc subsidy) | 200.00 |
| 465313 | Vitoria-Gasteiz | Álava | Healthy ageing program for down syndrome adults: cognitive, emotional, psychological and behavioral intervention | *Asociación Down Araba Isabel Orbe* | Agreement/Arrangement (ad-hoc subsidy) | 10,000.00 |
| 465492 | Palencia | Palencia | Caretaking and guardianship for older adults over 65 that were currently taken care of by local employees | *Fundación Castellano Leonesa para la Tutela de Personas Mayores* | Agreement/Arrangement (ad-hoc subsidy) | 2,000.00 |

Source: own elaboration.

## 7. OTHER LOCAL SUBSIDIES FOR THE ELDERLY

Additionally, see below a miscellaneous category of elderly subsidies that did not fit in any of the previous categories. These schemes have in common that they seek to promote social integration and older adults' personal autonomy. Yet again, these are cross-cutting objectives, also pursued to a certain extent by the subsidies included in the previous groups. However, this miscellaneous category only comprises subsidy schemes whose primary aim is either of the two aforesaid objectives.

This category comprises three types of subsidy programs or schemes. First, there are schemes mostly found in the Autonomous Region of Madrid, namely those used to subsidize (either totally or partially) public transportation costs and fares for the elderly, thereby increasing their autonomy and their ability to move around whilst facilitating their social integration. Second, there are subsidies that, within our sample, (i) are only implemented in two Basque municipalities; and (ii) have very distinct features: aid schemes used to provide subsidized legal counsel for the elderly. Finally, this miscellaneous category also comprises a set of subsidy programs to foster the social integration of older adults. They are applied to senior

citizens, but even more so to the remaining age groups: subsidy schemes to raise awareness about ageing and age-related issues.

### 7.1. Subsidies to cover public transportation costs and fares for the elderly

Subsidies subject to these programs cover part of the cost of regional travel cards. These subsidies are awarded through competitive procedures, and the recipients are older adults, i.e., public transportation users aged over 60 or over 65, depending on each specific program. There are also socioeconomic eligibility requirements, e.g., maximum income levels or, more specifically, being a recipient of a non-contributory pension. In addition, some of these subsidies require that applicants with the lowest income levels be ranked first. We found a subsidy that did not have any of these requirements and another one requiring membership in a local elderly association in order to be eligible.

**Table 12. Subsidies to cover public transportation costs and fares for the elderly - examples**

| DBNS | Municipality | Province | Summary | Recipients | Additional eligibility requirements | Procedure | Funds/Amount (€) |
|---|---|---|---|---|---|---|---|
| 441649 | Móstoles | Madrid | Aid for the 1-year travel card | Seniors over 65 | Being a recipient of a non-contributory pension | Competitive procedure/Tender | 25,000.00 |
| 435545 | Las Rozas | Madrid | Aid for the 1-year travel card | Seniors over 65 | Membership in a local elderly association | Competitive procedure/Tender | 108,375.00 |
| 474147 | Moncada | Valencia | Aid for the 1-year travel card | Pensioners over 60 and retired adults over 65 | Having been a registered resident for at least 1 year | Competitive procedure/Tender | 16,000.00 |
| 475261 | Pozuelo de Alarcón | Madrid | Aid for the 1-year travel card | Seniors over 65 | Maximum income | Competitive procedure/Tender | 40,000.00 |
| 415996 | Pozuelo de Alarcón | Madrid | Aid for the 1-year travel card | Seniors over 65 | Having a yearly income not exceeding €15,039.18 | Competitive procedure/Tender | 47,000.00 |

Source: own elaboration.

### 7.2. Subsidies to provide legal counsel for the elderly

We have only found these subsidies twice. One of them is in place in Vitoria and the other one in Bilbao. They are both ad-hoc subsidies granted to the relevant provincial bar association. The agreements implementing these subsidy schemes require that both bar associations host talks and lectures to raise awareness and explain the legal issues faced by older adults. Also, the Vitoria and Bilbao bar associations must provide legal counsel to seniors over 60 as long as it is legally required that the matter be handled by a lawyer.

**Table 13. Subsidies to provide legal counsel for the elderly - examples**

| NSD | Municipality | Province | Summary | Recipients | Procedure | Funds/Amount (€) |
|---|---|---|---|---|---|---|
| 464268 | Vitoria-Gasteiz | Álava | Legal counsel for the elderly | Álava Bar Association | Agreement/Arrangement (ad-hoc subsidy) | 10,000.00 |
| 458753 | Bilbao | Vizcaya | Legal counsel for the elderly | Vizcaya Bar Association | Agreement/Arrangement (ad-hoc subsidy) | 22,500.00 |

Source: own elaboration.

### 7.3. Subsidies to raise awareness about ageing and age-related issues

This category comprises subsidies seeking to raise awareness towards older adults, ageing and age-related issues. Thus, the eligible (i.e., subsidized) activities covered by the scheme do not specifically or exclusively target the elderly. Rather, they intend to impact society as a whole.

Broadly, this group includes two types of subsidy schemes. On the one hand, several municipalities have an ongoing ad-hoc subsidy scheme funding ageing-related university research projects. Admittedly, these programs pursue other objectives, such as having an impact on policymaking, but they remain under this category because they emphasize awareness-raising and dissemination. These schemes qualify as ad-hoc subsidies and they are directly granted to the universities and colleges carrying out the abovementioned research. On the other hand, this category includes subsidy schemes primarily aimed at closing generational gaps by implementing projects involving younger and older adults. These are also ad-hoc subsidies directly granted to the eligible associations or entities.

**Table 14. Subsidies to raise awareness about ageing and age-related issues - examples**

| NSD | Municipality | Province | Summary | Recipients | Procedure | Funds/Amount (€) |
|---|---|---|---|---|---|---|

| | | | | | | |
|---|---|---|---|---|---|---|
| 487405 | Salamanca | Salamanca | Research program on conditioning, physical activity, muscle reeducation and occupational therapy for the elderly | Universidad de Salamanca | Agreement/Arrangement (ad-hoc subsidy) | 24,670.90 |
| 488588 | Ponferrada | León | Ageing Chair at the Universidad de León | Universidad de León | Agreement/Arrangement (ad-hoc subsidy) | 10,000.00 |
| 439911 | Cardedeu | Barcelona | "*Interactúa*" program to promote intergenerational relationships between younger and older adults | Instituto Pla Marcell | Agreement/Arrangement (ad-hoc subsidy) | 18,700.00 |
| 486120 | Burgos | Burgos | Program to close generational gaps between older adults and university students | Universidad de Burgos | Agreement/Arrangement (ad-hoc subsidy) | 3,000.00 |
| 481871 | Palencia | Palencia | Program to close generational gaps between older adults and university students | Universidad de Valladolid | Agreement/Arrangement (ad-hoc subsidy) | 600.00 |
| 441267 | Segovia | Segovia | Program to close generational gaps between older adults and university students | Universidad de Valladolid | Competitive procedure/Tender | 1,000.00 |

Source: own elaboration.

## 8. CONCLUDING REMARKS

The comprehensive overview and categorization provided in this study evidenced that, regarding elderly policymaking, the main purpose of local subsidies is to promote active ageing. Within this context, subsidies are primarily aimed at allowing local governments to cover the costs (partly or in full) of all leisure and cultural activities carried out by elderly associations at a local level. However, there are certain subsidies included as ancillary schemes in agreements concluded with third parties or non-local entities, such as universities or colleges that agree to offer subsidized activities and training programs for older adults.

It is worth noting that there are also subsidies used to cover elderly associations' operating expenses. These schemes implement the requirement of Art. 72 LBRL that local governments foster the creation of associations, but they are also a useful instrument for age-related policymaking. These subsidies are widespread, and their defining feature is that they barely limit the eligible expenses. The granting of these subsidies is not subject to the performance of specific activities or to the achievement of pre-established objectives. Therefore, they should be considered flexible or "non-interfering" instruments.

Finally, our study has also evidenced that local age-related subsidies are not only aimed at promoting active ageing. There are significant and commonly found subsidy schemes related to housing, financial and social vulnerability of the elderly and the promotion of older adults' autonomy and integration.

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# Ageing cities and active ageing. The elderly: participation and protection

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## 1. BACKGROUND

Over the last few decades, demographic estimates warn of a steady population ageing process due to the increased life expectancies worldwide. According to WHO projections, 22% of the world's population will be aged 60 years or older by 2050.[236] This gradual ageing phenomenon comes along with an unstoppable urbanization process. According to the UN, the share of world population living in cities will be roughly 70%.[237] This figure (i) draws public authorities' attention to cities, forcing policymakers to address new demographic, economic and social challenges; and (ii) triggers a discussion on the urban-rural gap also regarding ageing, due to the major contextual differences.[238]

Older adults are one of the most dependent groups (see the old-age dependency ratio) and thus extremely vulnerable. They often require specific services catering to their needs.[239] Senior citizens' vulnerability has to do with age-related needs and dependencies related to care, housing, assistance, digitalization and social involvement.[240] Public authorities must therefore lay the foundations for the elderly to fully exercise their rights to the extent possible.

[236] WHO (2015), *World Report on Ageing and Health*, available online, p. 3.

[237] UN (2018), *World Urbanization Prospects*, available online. See also, García Ballesteros, A. and Jiménez Blasco, B. C. (2016), "Envejecimiento y urbanización: implicaciones de dos procesos coincidentes," *Investigaciones Geográficas, Boletín del Instituto de Geografía*, no. 89, available online, p. 58-73.

[238] See, in this regard, Wahl, H.-W. *et alia* (2003), "Aging in Context: Socio-Physical Environments," *Annual Review of Gerontology and Geriatrics*, vol. 23, p. 1-33; Monreal Bosch, P., del Valle Gómez, A. and Serda Ferrer, B. (2009), "Los grandes olvidados: las personas mayores en el entorno rural," *Psychosocial Intervention*, vol. 18, no. 3, available online.

[239] Eurostat (2019), *Ageing Europe. Looking at the Lives of Older People in the EU*, available online at ec.europe.eu, p. 1-157, p. 8.

[240] Mattson, T. (2013), "National Ombudsman for the Elderly: A solution for a more responsive welfare state?," *Retfærd: Nordisk juridisk tidsskrift*, no. 36 (3), p. 9-24, p. 18.

If public authorities are responsive to elderly needs, our society can become more resilient towards the inevitable age-related and situation-based dependencies in later life.[241]

A key challenge faced by governments when dealing with the ageing process is the so-called "diversity in older age." Older adults can have very different levels of both physical and mental capacities, as well as varying degrees of dependency. On top of that, note that the societal stereotypes of ageing are now clearly outdated and thus useless to deal with the current needs of older adults.[242] The "new ageing," meaning a contemporary form of ageing within a context of longevity, insecurity and technology, where social security reforms, generational claims and the empowerment of the elderly are reshaping public authorities views' on the ageing process.[243] Along these lines, the new approaches to ageing seem to push for measures and policies encouraging active ageing.[244]

Within local government, there are many initiatives intended to promote active ageing and meet older people's needs. The WHO Global Network for Age-friendly Cities and Communities is made up of local bodies worldwide committed to creating inclusive and accessible urban environments to benefit their ageing populations. This framework allows to implement a wide array of public policies mostly related to the provision of welfare services for the elderly (including both home care and specialized care centers), accessibility or urban design of public and private areas. These topics are regularly discussed by scholars in fields like medicine, sociology or political science.

The legal studies on ageing have primarily focused on (i) the impact of the ageing process on the sustainability of the pension system; (ii) dependency-related issues; and (iii) matters relating to consent. This perspective needs further analysis, particularly concerning the legal dimension of the many active ageing and elderly care policies implemented mostly at a local level. Legal scholarship should not disregard population ageing. Legal scholars must focus on the rights of the elderly, but also on public decision-making and organizational aspects.

Based on the said premises, this work provides a comparative analysis revolving around two indicators related to active ageing and local government action: older people's political participation and personal security/physical safety−note that the latter encompasses the need for the elderly to feel safe (i.e., able to avoid injury) and secure (i.e., able to avoid harm). First, see an empirical approach to the ageing cities map (section 2). We relied on ageing data from EU Member States, major European capitals and the most heavily populated cities in

[241] Albertson Fineman, M. (2012), "Elderly" as vulnerable: Rethinking the Nature of Individual and Societal Responsibility," *Elder Law Journal*, no. 20 (1), p. 71-111, p. 110.

[242] OMS (2015: 11 *et seq.*).

[243] The notion and its definition are taken from Torres-Gil, F. (2002), "The New Ageing: Individual and Societal Responses," *Elder Law Journal*, no. 10 (1), p. 91-117, p. 100.

[244] UNECE and European Commission (2018), *Active Ageing Index (AAI) in non-EU countries and at subnational level. Guidelines*, available online.

Spain. Section 3 examines active ageing cases relying on the aforesaid indicators (political participation and physical safety). In particular, we focus on the impact of these indicators on local government organization. In some cases, these ageing-related aspects have given rise to new *ad hoc* local bodies.

## 2. COMPARATIVE MAP OF AGEING CITIES

Individuals tend to perceive themselves as "old" or "aged" as they turn 70 or older.[245] However, we generally consider that a person has become "old" when he/she exceeds 65 years old−i.e., commonly, the retirement age.[246] Senior citizens aged 80-85 or older make up a sub-group within the elderly: the "super aged" (also known as the "old-old," "super old" or "oldest old"). According to European Union estimates, the number of people over 85 years old will increase from 13.8 million in 2018 to 31.8 million by 2050.[247] In Spain, 40% of adults over 65 will be super aged.[248]

Figure 1 below shows the progressive ageing process undergone by most EU Member States. On average, 18.9% of the population in the European Union (and the UK) is 65 or above. This contrasts with the share of child population (children aged 0-14), amounting to 15.6%. There are upward and downward differences amongst European countries with respect to the aforesaid 18.9% average, ranging from 3 to 5 percentage points. For instance, Italy has the most aged population in Europe (22% are adults over 65), whereas the share of seniors in Ireland only amounts to 13.8%. We can hardly notice a geographical pattern in European ageing. The most aged countries are Italy, Greece and Portugal, Southern countries, but France, Germany, Finland or Sweden are also in the top 10, along with Eastern states such as Bulgaria and Croatia. Accordingly, the country-specific demographic, economic/financial and cultural variables jointly account for an increasingly aged population.

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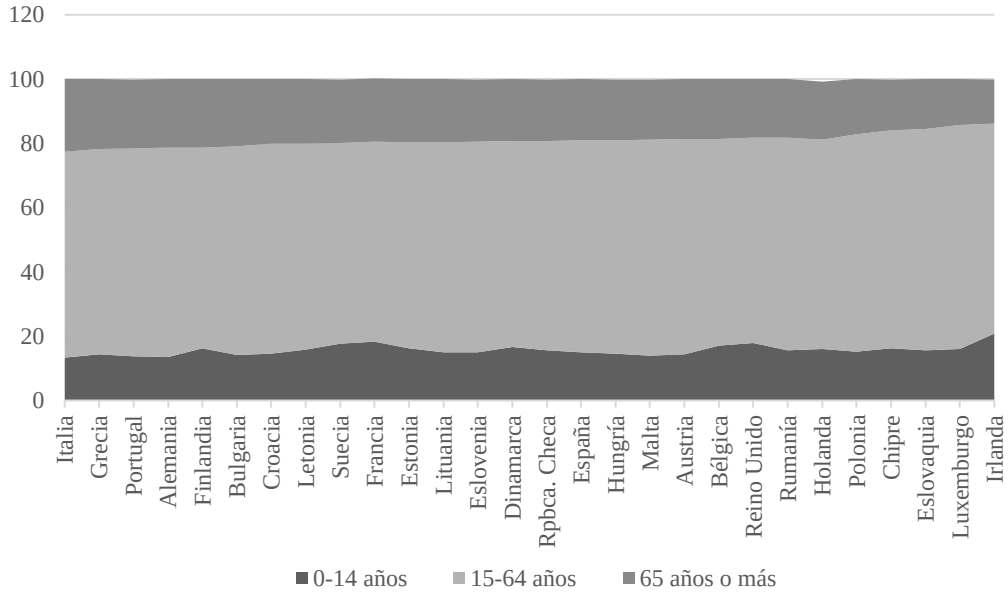
[245] Alemán Bracho, C. (2013), "Políticas sociales para personas mayores," *Gestión y Análisis de Políticas Públicas*, no. 9, p. 1-19, p. 2.

[246] In Spain, some pieces of regional legislation provide that adults over 65 are eligible for elderly welfare. For example, Article 2(1) of Andalusia Act 6/1999, of 7 July, on Care and Protection for the elderly; Art. 23(1) of Madrid Act 11/2003, of 27 March, on Welfare Services; and Art. 2(1) of Act 5/2003, of 3 April, on the Care and Protection for the elderly in Castilla y León. The UN defines the elderly as any adults over 60, and the WHO provides that, in developed countries, citizens qualify as older adults as they turn 65. Eurostat (2019: 8).

[247] Eurostat (2019: 15).

[248] Abellán García, A., Aceituno Nieto, P., Pérez Nieto, J., Ramiro Fariñas, D., Ayala García, A., and Pujol Rodríguez, R. (2019), "Un perfil de las personas mayores en España, 2019. Indicadores estadísticos básicos," *Informes. Envejecimiento en Red*, no. 22, available online, p. 1-36, p. 5.

**Figure 1. Population broken down by age groups in EU Member States and the UK (2018) [expressed as a percentage]**

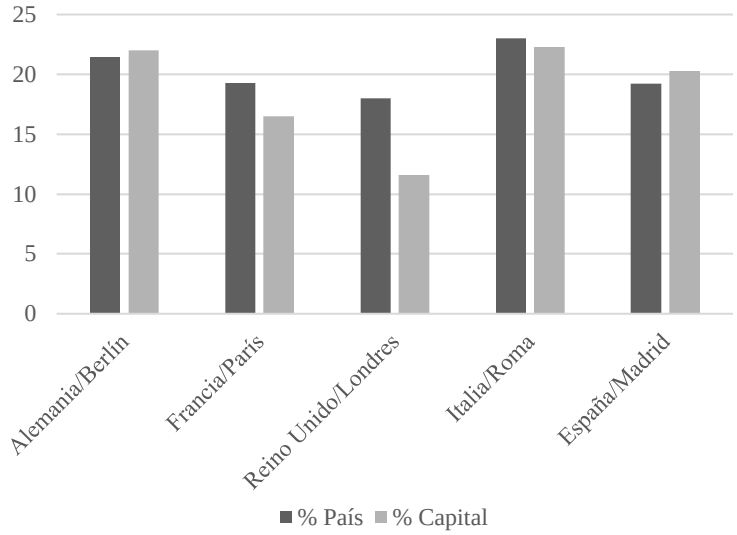



*Source: own elaboration based on Eurostat data.*[249]

Note, however, that old population is not homogeneously distributed amongst the various European countries. At city level, we found that the ageing patterns of the capital cities of the 5 most populated countries in Europe are in line with the country average. Thus, in the most aged countries, including Italy, Germany and Spain, the capital cities also have a larger share of old population, equal to or greater than the national average. In Rome, 22.3% of adults are 65 and over, which is really close to the Italian average. Berlin and Madrid have similar figures, 22% and 20.26% respectively, out of which over one third are super aged (7.29% overall). Countries with younger populations, like France and the UK, have capital cities with a much lower ageing ratio than the rest of the country. Indeed, Paris' share of old population amounts to 16.47% and London's to 11.6%. Self-evidently, capitals have distinct features depending on the country, in terms of size, financials and demographics (particularly the immigration rates), which can explain these differences between the capital cities' figures and national averages. Nevertheless, we have found a remarkable percentage of older adults in the most aged and populated countries' capital cities.

[249] Available online: https://ec.europa.eu/eurostat/statistics-explained/images/b/bd/Population_age_structure_by_major_age_groups%2C_2008_and_2018_%28%25_of_the_total_population%29.png

**Figure 2. Share of older adults in the 5 most populated EU Member States−including the UK−and their capital cities for 2016, 2018 or 2019, depending on the countries' data availability [expressed as a percentage]**




*Source: own elaboration based on each country's official data.*[250]

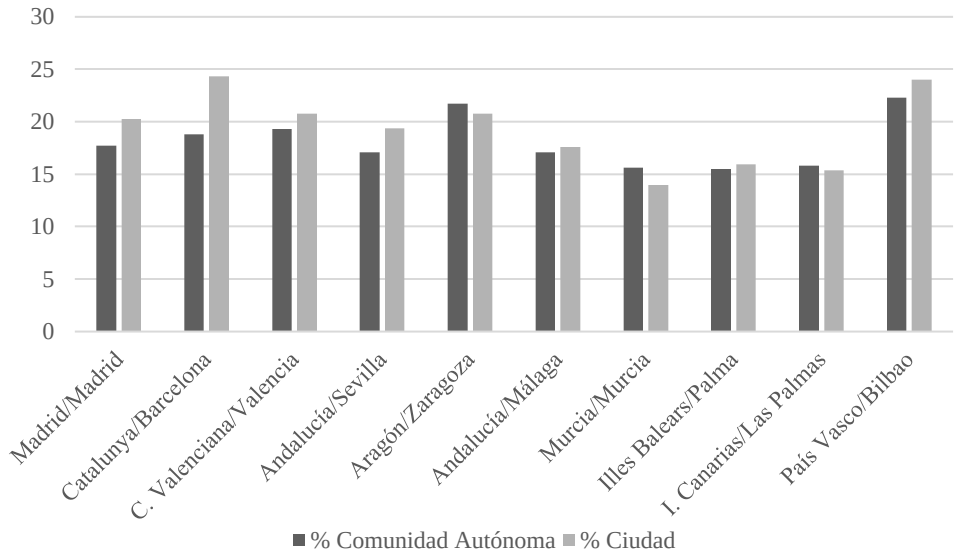
*Note: the information from the UK and France are from 2016; Germany's data are from 2018; and Spain's and Italy's information is from 2019.*

In order to further examine cities' ageing process we can focus on Spain. Figure 3 below provides ageing data on the country's 10 most populated cities. The bar chart compares each city's ageing ratio to that of its region. Note that the 4 largest cities in Spain have an older population than their relevant region's average−roughly 20% of the cities' populations are made up of older adults. We found this same trend in Bilbao: the city's aged population exceeds the regional average (although the Basque Country is one of Spain's most aged Autonomous Regions). Note that the remaining cities' level of population ageing is in line with the region's average. There are several potential explanations for these demographic trends, including the size of the cities and their stage of development−tied to the impact of baby boomers and the "rural-urban exodus" in the 1950s−[251]and each city's rural or urban surroundings.

[250] These data are provided by each country's offices for national statistics: Destatis in Germany; INE in Spain; AdminStat in France; ISTAT in Italy; and ONS in the UK.

[251] See, in this regard, Velasco Caballero, F. (2018), "Derecho urbanístico y envejecimiento demográfico," *Indret*, no. 4, p. 1-55.

**Figure 3. Share of population over 65 years old in the 10 most populated cities in Spain compared to each Autonomous Region's ageing data (2019) [expressed as a percentage]**




*Source: own elaboration based on data from the Laboratorio Envejecimiento en Red, CSIC, and INE.*

Ageing ratios will most likely increase in rural areas, which differ from cities in terms of welfare services and care for the elderly.[252] Various indicators or criteria could be used to categorize settlements as urban or rural. The World Bank provides a broad definition of rural area, using a minimum population size of 10,000 as the threshold for a rural area to be classified as an urban settlement.[253] Spain also uses this statistical standard to define urban areas. Out of the 8,124 municipalities, settlements with less than 2,000 inhabitants qualify as rural; any areas with a population between 2,001 and 10,000 are classified as medium-sized municipalities; and urban areas are designated as such when their population exceeds 10,000.[254] Legally speaking, any settlements located in rural environments with a population size not exceeding 5,000 are categorized as "small-sized urban municipalities."[255] According to this standard, in 2018 there were 6,676 rural towns in Spain, i.e., 82% of all municipalities were categorized as rural. The share of rural population in Spain was 16,2%, although these rural areas covered 84% of the country's territory.

Defining the percentage of rural population allows to examine the area's level of population ageing compared to urban settlements. The data available for Spain in 2019 indicate that rural

[252] See, in this regard, García Sanz, B. (1999), "Mundo rural, envejecimiento y servicios sociales," *Papeles y Memorias de la Real Academia de Ciencias Morales y Políticas*, no. 5, p. 94-109.

[253] As evidenced by the available stats on Spain's population. See datos.bancomundial.org; last accessed on 11 March 2020.

[254] Abellán García, A., Pujol Rodríguez, R, Ramiro Fariñas, D. and Pérez Díaz, J. (2015), "Pirámide rural," on the Blog *Envejecimiento en Red*, 29 April 2015, available online; Abellán García *et alia* (2019: 6).

[255] Art. 3(c) of Act 45/2007, of 13 December, seeking the Sustainable Development of the Rural Environment.

areas have significantly greater ageing ratios than medium-sized and urban settlements. Indeed, 28.5% of the rural population is over 65. However, as shown in Table 1 below, medium-sized and urban municipalities' percentage of older adults is 20% and 18.5% respectively. Note that, the smaller the town, the older the population. In urban settlements not exceeding 100 inhabitants, older adults amount to 40% of the population. However, the share of adults aged 65 and older in municipalities with a population between 100 and 500 drops to 33%. Additionally, the percentage of "super aged" is larger in rural areas.[256]

Spain has one of the largest shares of rural population in Europe, way above Italy, Germany or the UK. There are various potential reasons for this, the most likely being that young adults tend to prefer urban settlements, thereby depopulating rural areas. An additional reason could be that as we age, we tend to return to small towns.[257]

**Table 1. Population ageing in urban and rural areas in Spain (2019) [expressed as a percentage]**

| Type of area (inhabitants) | Older adults (>65 years old) | Adults (16-64 years old) | Children (<16 years old) |
|---|---|---|---|
| **Rural / 0-2.000** | 28.5% | 60.5% | 11% |
| **Medium-sized / 2,001-10,000** | 20% | 64% | 16% |
| **Urban / 10,001 - …** | 18.5% | 65.5% | 16% |

*Source: own elaboration based on data from Pérez Díaz, J., Abellán García, A., Aceituno Nieto, P., and Ramiro Fariñas, D. (2019), "Un perfil de las personas mayores en España, 2020. Indicadores estadísticos básicos," Informes envejecimiento en red, no. 25, p. 1-29, p. 9.*

## 3. ACTIVE AGEING

The increased life expectancies worldwide resulting from scientific development and enhanced living conditions and lifestyle have given rise to a new understanding of the ageing process and the approach thereto: active ageing. Elderly policies in various fields, including urban development or welfare, seek to achieve active ageing goals. In order to offer guidance to Member States on how best to accomplish active ageing objectives, the UN and the

[256] Abellán García *et alia* (2015).

[257] Eurostat (2019: 25-26). Lebrusán Murillo, I. (2018), "Envejecer en casa. ¿Mejor en el pueblo o en la ciudad?, *Observatorio Social La Caixa* (available online: observatoriosociallacaixa.org).

European Commission have prepared the so-called Active Ageing Index (AAI) capturing various aspects and dimensions of active ageing in order to measure how much of older men and women's potential to contribute to the economy and society is used and the extent to which their living environment enables them. In order words, the AAI measures the extent to which active ageing is achieved. The AAI applies to Member States and non-EU countries, as well as to regional and local governments. The AAI covers 4 dimensions or domains: (i) employment; (ii) participation in society or social involvement; (iii) independent, healthy and secure living; and (iv) capacity and enabling environment for active ageing. As shown in Figure 4 below, the AAI includes 22 indicators grouped into the aforesaid 4 domains.[258] These indicators allow for examining the needs of the elderly at a local level, thereby rendering public policies more useful and effective.[259]

**Figure 4. Active Ageing Index: domains and indicators**


*Source: own elaboration based on UNECE's and the European Commission's AAI.*

Below we discuss two specific active ageing indicators at a local level: political participation (within the social involvement domain) and physical safety (within the independent, healthy and secure living domain). These indicators are used to assess certain local government measures intended to encourage active ageing. Sometimes local governments create new *ad hoc* bodies to fulfill these objectives. We will focus on them below. Ultimately, section 3

[258] UNECE and European Commission (2018).

[259] UNECE and European Commission (2019), *Active Ageing Index. Analytical Report*, available online, p. 61 *et seq.*

shows how policies of old age are supplemented by organizational measures implemented by local governments to adapt to population ageing.

### 3.1. Political participation of the elderly

As illustrated by Figure 4 below, social involvement is one of the main domains in active ageing. It includes volunteer work; care to children and grandchildren; care to other elders and disabled; and political participation.[260] Local government is the most fertile ground to promote social involvement of the elderly. Accordingly, the so-called "grey power," stemming from the ageing of baby boomers, can seek (i) equal treatment; and (ii) its very own place in government decision-making, thus triggering major political changes in Western countries.[261]

As for the involvement of older adults in their local communities, we first discuss their participation (voter turnout) in local elections (see section 3.1.1. below), in order to determine the extent to which they engage in local politics. Then, we examine the arrangement and organizational aspects of local seniors councils. Many towns worldwide have put in place these bodies with the aim of getting the elderly involved in decision-making.

#### *3.1.1. Voter turnout in local elections*

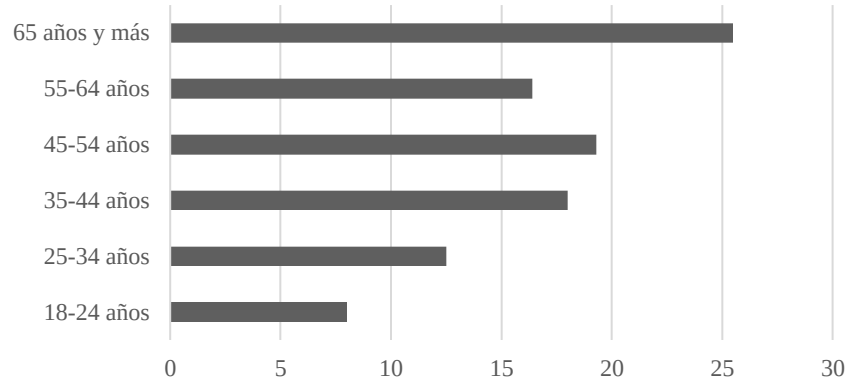
Older voters' turnout is a major field of study, particularly after the generational gap revealed by the Brexit referendum.[262] Indeed, the elderly constitute an increasingly important voting group in Western countries. See, e.g., Spain−with an age structure in line with the Union average−where over 25% of voters in 2019 were aged 65 and older, in contrast with voters aged 18-35, who solely amounted to 20%.

[260] UNECE and European Commission (2018: 6).

[261] This notion, "*poder gris*" in Spanish, is taken from E. Calvo Gil. See, among other works: "El poder gris. Consecuencias culturales y políticas del envejecimiento de la población," *ICE*, no. 815, p. 219-230, p. 228. Concerning the United States and the political changes driven by the ageing of voters, see: Binstock, R. H. (2000), "Older people and voting participation: past and future," *Gerontologist*, no. 40 (1), p. 18-31.

[262] See Alabrese, A., Becker, S. O., Fetzer, T. and Novy, D. (2019), ¿"Who voted for Brexit? Individual and regional data combined," *European Journal of Political Economy*, vol. 56, p. 132-150.

**Figure 5. Share of eligible voters by age in Spain (2019) [expressed as a percentage]**




*Source: own elaboration based on data from INE.*

Studies across European countries evidence that, on a general basis, electoral turnout tends to be high amongst older adults, without prejudice to certain significant differences arising from socioeconomic, educational and cultural aspects, as well as from distinct turnout and political participation experiences, and from the relevant town's or city's population.[263] For instance, in Spain, these aspects have a twofold projection: older adults (i) are significantly dissatisfied with politics; but (ii) turn out to vote in large numbers.[264] In spite of the aforesaid differences, the homogeneous political behavior amongst the elderly can be due to various reasons tied to behavioral and contextual aspects. Thus, the way older adults participate in politics will most likely remain unchanged.[265]

Apparently, the elderly feel more compelled to vote than other age groups.[266] Also, having voted in the past seems to facilitate turning out to vote again, and one could argue that the impact of political decision-making is greater on older adults. Keep in mind that, the older you get, the more you depend on welfare benefits and the wealthier you become.[267]

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[263] See, in this regard, Abad Liñán, J. Mª. (2019), "Cuanto más pequeño es un lugar, más vota la gente," *El País*, 26 May 2019.

[264] In the 2019 local elections, 23.3% of voters were over 65 years old. This is a remarkable figure considering that 25.5% of the eligible voters belonged to that age group: CIS, "Postelectoral elecciones autonómicas y locales 2019," available online. Regarding political dissatisfaction, see IMSERSO, *Informe 2016. Las personas mayores en España*, available online, p. 401 *et seq.*

[265] Goerres, A. (2007), "Why are Older People More Likely to Vote? The Impact of Ageing on Electoral Turnout in Europe," British Journal of Politics & International Relations, no. 9 (1), p. 90-121.

[266] Riesco Vázquez, E. (2014), *La vejez y la política. Participación y potencial político de las personas mayores en España. Del voto cautivo al poder gris*, Doctoral dissertation, Universidad de Salamanca, available online, p. 469 *et seq.*; Zubero Beaskoetxea, I. (2018), "Envejecimiento activo y participación política," *Aula Abierta*, vol. 47, no. 1, p. 21-28, p. 23.

[267] Goerres, A. (2009), *Political Participation of Older People in Europe. The Greying of our Democracies*, Palgrave Macmillan, e-book, p. 40 *et seq.*

If we consider running for local government positions, note that there are few studies on the age profile of local elected officials and on the local policies implemented by older adults in public office.[268] In Spain, a study prepared in 2015 covering cities with more than 10,000 inhabitants evidenced that mayors were, on average, 46 years old (note that the EU average is 52), and 14.6% of them were aged 60 or over.[269] In particular, the average age of mayors seems correlated with the voting system, i.e., it seems to depend on whether there is direct or indirect election of local representatives and mayors. In other words, the average age of local officials has to do with the degree of political professionalization; it will be easier for amateur older candidates (not professional politicians) to run for local office in direct election systems not requiring any political affiliation or running under a specific party's banner.

The relevant scholarly works assume that older adults turn out in large numbers, so that the ways of encouraging electoral turnout are often deprived of a political essence.[270] Admittedly, the elderly are an age group that votes in any kind of election. However, older adults' political participation seems limited to voting. In other words: as a general rule, senior citizens do not commonly engage in politics other than to turn out in elections.[271] Consequently, public authorities foster tools allowing to get older adults involved in local decision-making. See below an analysis of one of these tools: local seniors councils or, in Spanish, *consejos municipales de personas mayores*.

### *3.1.2. Local seniors councils*

A significant indicator of social responsiveness towards ageing is the establishment of political participation mechanisms specifically targeting the elderly. Over the last decades, participation has been encouraged alongside with an enhanced quality of life for older adults, supporting and fostering active ageing. Public authorities can promote involvement in a twofold manner:

a) *Active participation*: the elderly actively engage in decision-making through working groups, task forces or *ad hoc* bodies.

[268] See, in this regard, a recent work on local elected officials in Italy by Alesina, A., Cassidy, T. and Troiano, U. (2019), "Old and Young Politicians," *Economica*, vol. 86, no. 344, p. 689-727.

[269] Navarro Gómez, C., Medir Tejado, L. and Martínez Rivas, R. (2017), "El perfil de los Alcaldes y las Alcaldesas en España. Rasgos y percepciones de los líderes políticos locales en municipios de más de 10.000 habitantes," *Anuario de Derecho Municipal 2016*, no. 10, p. 142-165, p. 144 *et seq.*

[270] Zubero Beaskoetxea (2018: 21).

[271] Dabbagh Rollán, V. O. (2018), "Participación política de las personas mayores. Más allá de ir a votar," *Aposta. Revista de Ciencias Sociales*, no. 79, p. 164-180, p. 170 *et seq.*

b) *Passive participation*: public authorities seek to get the elderly involved by means of anonymous surveys, consultations and similar tools. Note that passive participation does not entail planning and implementing the relevant decisions.[272]

Amongst the existing active participation initiatives, it is worth highlighting the *ad hoc* bodies called seniors councils or *consejos municipales de mayores*. At an EU level, these *consejos* have been in place since the 1970s. In some countries, like Poland, these bodies have increased since 2000. The Polish Local Government Act, amended in 2013, requires public governments to create a seniors council if there is a "local demand" for it, since it is considered helpful for the proper functioning of local governments. These *consejos* have been found effective for a better allocation of public resources to elderly and age-related policies, as well as to encourage participation by older adults in local government.[273]

Many regional provisions in Spain have required local governments to establish active participation bodies, commonly designated as *consejos municipales de personas mayores*.[274] The purpose of these councils is to represent the elderly, advising local authorities and submitting drafts and proposals to local governments.[275] Based on their legal autonomy, local governments are free to choose how to arrange these bodies. In the absence of regional provisions in this regard, seniors councils are created at the request of the relevant local government. The *consejo municipal de personas mayores* has become widespread in Spain, and particularly so in the cities.[276] However, these *consejos* are not as common in smaller towns.[277]

Seniors councils are thus defined in their own deeds of incorporation and provisions as "advisory and counseling bodies." They have a wide array of duties: defining strategic lines

[272] See, in this regard, Ernste, P. and Koeppe, A. (2006), "Schwerpunkte in den Kommunen," in Bertelmann Stiftung (Ed.), *Demographie konkret – Seniorenpolitik in den Kommunen. Mit zwölf vorbildlichen Beispielen aus der Praxis,* Bielefeld, p. 36-48, p. 41.

[273] Fraczkiewicz-Wronka, A. *et alia* (2019), "The growing role of seniors councils in health policy-making for older people in Poland," *Health Policy*, no. 123, p. 906-911, p. 910.

[274] Other designations in Spain include, *inter alia*: *consejo sectorial del mayor*, *consejo de personas mayores*, *consejo asesor de las personas mayores*, *consejo municipal de la gente mayor* and *senado municipal del mayor*.

[275] See, among others, Chapter II of Andalusia Act 6/1999, of 7 July, on Care and Protection for the elderly;

[276] See, for example, the following towns and cities: Albacete, Alicante, Ávila, Avilés, Barberá del Vallés, Barcelona, Burgos, Castellón, Chiclana de la Frontera, Córdoba, Cuenca, Elche, El Ejido, Gijón, Granada, La Laguna, Las Palmas, León, Logroño, Madrid, Málaga, Mieres, Mislata, Molina de Segura, Motril, Oviedo, Paeria, Palencia, Pamplona, Plasencia, Ponferrada, Roquetas de Mar, Rubí, Sagunto, Salamanca, San Vicente del Raspeig, Segovia, Sevilla, Talavera de la Reina, Terrassa, Torrelavega, Torrelodones, Torrent, Tres Cantos, Tudela, Valencia, Valladolid, Zamora and Zaragoza.

[277] Nonetheless, there are some examples, including: Alcázar de San Juan (Castilla-La Mancha), Baza (Andalusia), Benavente (Castilla y León), Ejea de los Caballeros (Aragón), Maó (*Illes Balears*), Moncada (Comunidad Valenciana), Loja (Andalusia), Navarrés (Comunidad Valenciana), Pájara (Las Palmas), Puerto Lumbreras (Murcia), Quart de Poblet (Comunidad Valenciana) and Teguise (Canary Islands).

and setting priorities for local elderly-related policies; preparing reports on draft regulations and provisions related to the elderly; being aware of, and advising on, calls for subsidies targeting nonprofits; fostering the creation of older adults' associations and promoting participation of the elderly; encouraging cooperation between public authorities and social organizations; advancing studies and research on the elderly; and representing older adults in local bodies and institutions. Note that the reports drafted by seniors councils will always qualify as non-binding.

As for their structure, it is remarkable that seniors councils often do not include a majority of representatives from major elderly associations and organizations. Rather, these bodies are often made up of local government officials. This must be taken into account when assessing whether the council actually fulfills its purpose.

Usually, the mayor chairs these seniors councils or *consejos municipales de personas mayores*, and the official or local councilor in charge of welfare services will often be the deputy chairman. Sometimes, the council appoints an honorary chair from the elderly representatives. The council's general assembly (i.e., the plenary body) shall include one representative from each local political group. It may also include officials responsible for local elderly-related policies. Seniors councils can also be made up of national and regional government representatives−namely welfare officials−local district representatives, trade union members, neighborhood association representatives, as well as members of local nursing homes, Alzheimer's associations and volunteer organizations. The following may also be included in a seniors council: representatives of external welfare providers and universities under regional authority, along with members of the most representative elderly associations and organizations or of those registered in the *Registro de Participación Ciudadana*.

Certain provisions allow these councils to include elderly associations right away upon fulfillment of certain requirements regarding the council's scope of action, prior registration in the Local Associations Registry and minimum number of members. In other cases, seniors councils can request local governments to include within the council any associations complying with these pre-requirements.

**Figure 6. Sketch of a seniors council at EU level**


*Source: own elaboration.*

However, certain local authorities seek seniors' direct participation and involvement. To this end, seniors councils would (i) be arranged with a clear, stable organizational structure; (ii) have well-defined opening hours to receive any comments or consultations submitted to the council by senior citizens;[278] or (iii) allow for any citizen or social organization members based in the city to request participation in council meetings.[279] Some local councils or *consejos municipales de personas mayores* appoint their members directly (without relying on the existing associations), randomly amongst the requesting parties, seeking equal representation of the municipality's areas or districts.

Note that Berlin is both a city and a region or state (*Stadt-Staat*). In 2006, the Berlin legislature passed an Act to promote participation of older adults.[280] This Act requires to establish local councils to enable older adults' participation in local districts (*bezirkliche Seniorenvertretungen*), whose members make up a single seniors council or body for the whole city-region (*Landesseniorenvertretung*). These members are voted in by older adults. Also, district councils' chairpersons meet with the city's elderly associations' representatives in the *Landesseniorenbeirat Berlin* or City's Senior Board, which qualifies as the local-regional government advisory body. There is a major difference between this and the Spanish

[278] For instance, Granada (Spain).

[279] The city of Valencia, for example.

[280] *Gesetz zur Stärkung der Mitwirkungsrechte der Seniorinnen und Senioren am gesellschaftlichen Leben im Land Berlin (Berliner Seniorenmitwirkungsgesetz -BerlSenG) vom 22. Mai 2006*. Available online.

system: the aforesaid German bodies are solely made up of older adults representing the elderly, not including any other members.

It is hard to evaluate these local bodies' performance, since we are not always sure about their level of activity. Most official websites do not include any records of their reports and opinions. Additionally, not having their own separate budget or a specific budget allocation often makes it difficult for their proposals to succeed.[281]

As for these bodies' composition, the applicable provisions should take into account diversity requirements in order to avoid underrepresentation of women or immigrants. The applicable legislation must also provide for cooperation mechanisms between local councils and any similar regional bodies in order to advance proposals with a supra-local scope.

### 3.2. Protection of the elderly

Along with participation, protecting older people's personal security is another indicator of the Active Ageing Index (AAI) within the independent and secure living domain. It is also central for healthy ageing.[282] Elder abuse, injury and crime, affecting both the older adults' personal and institutional sphere, challenge an older person's security and call for initiatives aimed at guaranteeing it. According to a WHO study based on the best available evidence from 52 studies in 28 countries from diverse regions, in 2017, 15.7% of people aged 60 years and older were subjected to some form of abuse (whether physical, psychological/emotional, sexual, financial or simply intentional or unintentional neglect[283]). On top of that, note that only 1 in 24 cases of elder abuse is reported.[284] Also, keep in mind that, in case of conflicts, the elderly do not always exercise their rights on an equal footing with anyone else due to their greater vulnerability.[285]

Local governments have put in place several initiatives (even modifying the local government structure) to mitigate this abuse and to prevent the elderly from being unprotected. See below two of these initiatives: first, the Ombudsman for the Elderly implemented in many local governments; second, law enforcement officers informing and protecting seniors.

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[281] Fraczkiewicz-Wronka (2019: 909).

[282] WHO (2015: 183 *et seq.*); see also UNECE and European Commission (2018: 6).

[283] See the definition of "abuse" of the 2002 WHO Toronto Declaration on the Global Prevention of Elder Abuse.

[284] WHO (2020), "Maltrato a las personas mayores," available online.

[285] See, in this regard, Sánchez Martos, J. (2001), "En defensa de la figura del defensor del mayor," *Enfermería Científica*, no. 234-235, p. 3-4; Torres Castillo, P. and Claver Turiégano, E. (2018), "El defensor del adulto mayor: los derechos humanos no envejecen," *Familia. Revista de Ciencias y Orientación Familiar*, no. 56, p. 37-43; see also, Mattson (2013: 16).

### *3.2.1. Ombudsman for the Elderly*

Over the last few decades, various countries have created specialized bodies to protect the elderly, based on the Ombudsman or *Defensor del Pueblo*. The scope of the Ombudsman can be national, regional or local. Below we will focus on local ombudsmen for the elderly or, better said, on ombudsmen for the elderly exercising public authority specifically at a local level.

The timing and ultimate purpose of ombudsmen for the elderly has been debated. Some call into question their suitability and use, arguing that senior citizens are such a heterogeneous group that they do not conform to a "standard." In other words, older adults are extremely diverse, and they do not fit into a pattern or stereotypical definition, thus not having common needs. The traditional image of vulnerability, dependency and need turns the elderly into a group subordinated to the ideal liberal individual (portrayed as autonomous and independent), which seems contrary to fact, since it is seniors over 80 who mostly need care.[286] In addition, some claim that creating an *ad hoc* body for the elderly can give rise to generational clashes and gaps. Older adults can even "compete" with other groups (children, for instance) for a share of welfare benefits.[287]

Despite the objections discussed above, many local authorities worldwide have created these *ad hoc* bodies. Local ombudsmen are sometimes under, and report to, supra-local authorities, although exercising their authority at a local level or monitoring local authorities. The point is to make up for the shortcomings of specialized care for the elderly in case of abuse or neglect. See below a summarized comparative law analysis.

In Spain, Valencia created the Ombudsman for the Elderly in 2003, replicating the national and regional Ombudsman or *Defensor del Pueblo*.[288] Ombudsmen for the elderly have the following distinct features: institutional autonomy, free provision of streamlined services and the lack of formal requirements in citizens' applications. The main purpose of local ombudsmen for the elderly is to protect the rights of older adults within municipalities, acting as a liaison between citizens and public authorities, offering advice and care for the elderly. These bodies are also responsible for monitoring and externally assessing older adults' living conditions in the relevant town or city, processing any proposals or comments as they see fit.

[286] As for Spain, see Díez Sastre, S. (2020), "Los servicios municipales para mayores en el entorno rural y urbano," *Istituzioni del Federalismo* (press).

[287] Albertson Fineman (2012: 87); see also, Mattson (2013: 17).

[288] See its regulations here: https://www.inforesidencias.com/resources/public/biblioteca/documentos/envejecimiento/estatutodefensordelmayor.pdf. The municipality of Alcorcón subsequently created a similar figure.

Switzerland has ombudsmen for the elderly in five cantons and two cities:[289] Basel and Bern. There is an Ombudsman for Elderly Affairs in each of them.[290] These ombudsmen are primarily tasked with (i) addressing older adults' concerns or complaints on the local provision of services, particularly regarding payment of the relevant fees and quality standards; and (ii) settling any conflicts involving the elderly seeking to avoid potential judicial proceedings. The ombudsmen thus somehow mediate between the parties to a dispute as long as at least one of the parties be an older adult. This model can also be found in some Swedish municipalities. including Stockholm, Uppsala, Nybro and Linköping.[291] Around May 2020, there was a debate in Milano regarding the creation of a Health Ombudsman for the Elderly. This initiative stemmed from the severe impact of COVID-19 on seniors.[292]

In English-speaking countries, ombudsmen for the elderly do not usually have a local scope. See the Local Government & Social Care Ombudsman (LG&SCO) in the United Kingdom, i.e., a national independent body under the Commission for Local Administration. The LG&SCO's scope of action is beyond the elderly. However, it is primarily tasked with settling complaints filed by older adults involving local authorities or service providers. The LG&SCO is a free service, it processes and decides on complaints in a fair and independent way, and its decisions are posted online.[293]

In the US, every state has its Long-Term Care Ombudsman (LTCO)[294] since the 1970s to address the needs of older adults living in nursing homes, assisted living facilities and other residential care communities. LTCOs fall within the framework of the 2016 Older Americans Act. The Federal Government requires states to create LTCOs, but they are both run and funded by states.[295] LTCOs process complaints filed by the elderly, their relatives, nursing home staff or, for that matter, any citizen having some connection with the provision of services for out-of-home older adults. LTCOs also decide on complaints regarding the exercise of seniors' rights. In several Italian regions there is currently a debate revolving around a similar body: the so-called *garante degli anziani*.

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[289] See further information in (last accessed on 18 June 2020): https://www.reklamationszentrale.ch/2018/02/21/adressen-und-kontakte-von-ombudsstellen-für-patientenschutz-gesundheit-alter-spitex-und-heime/

[290] In Basel: http://ombudsstelle-alter.ch/bs/; in Bern: https://www.ombudsstellebern.ch/dienstleistungen.html

[291] Mattson (2013: 16).

[292] Last accessed on 18 June 2020: https://www.agenzianova.com/a/5ec6c3f17f8458.87473328/2948554/2020-05-21/coronavirus-consiglio-comunale-di-milano-approva-odg-per-istituzione-garante-salute-anziani

[293] https://www.lgo.org.uk

[294] For instance, in New York (https://ageing.ny.gov/long-term-care-ombudsman-program), Pennsylvania (https://www.ageing.pa.gov/organization/advocacy-and-protection/Pages/Ombudsman.aspx) and Washington (https://www.waombudsman.org).

[295] Mattson (2013: 15).

Some of these bodies seem to be running successfully, like in English-speaking countries, where these bodies' main purpose is to protect older residents in public or private facilities. However, there is a lack of transparency regarding some of these bodies' performance, with no reports accounting for their activities. Also, there are not enough studies on their performance allowing to assess their efficiency when it comes to actually protecting older adults. It would be necessary to examine matters such as (i) the available knowledge about their elderly-related activities and services; (ii) the number of complaints they process; (iii) the actual persons appointed as ombudsmen and the safeguards applicable thereto; and (iv) their available resources to perform their duties. Hopefully, there will be further comparative analyses examining successful examples. This could help to set up bodies truly able to meet older adults' needs.

### *3.2.2. Law enforcement and the elderly*

Along with ombudsmen, tasked with preventing conflicts and mediating in disputes, it is worth discussing crime against the elderly. Statistically speaking, the elderly are less likely to be victims of crime due to various reasons. First and foremost, older adults tend to have more fears about crime than younger members of a community, thereby adopting precautionary measures such as spending more time at home.[296]

There are several measures that could be implemented at a local level in order to increase older people's personal safety and the security of their property, e.g., (i) throwing safety into the equation when making urban planning decisions; (ii) designing safe, well-lit and accessible structures and landscapes; or (iii) providing older adults with stronger locks and alarms in order to protect their homes. In this connection, see the SAFE (Security and Advice For the Elderly) project in Nottinghamshire (UK), put in place in 1995. The SAFE project achieved a 93% decrease in residential burglaries among low-income older people who had been provided with stronger locks and other precautionary measures.[297]

There is another strategy focusing on law enforcement. In 1989, US authorities implemented the so-called "Triad program." The Triad program is a partnership between senior citizens and law enforcement aimed at keeping seniors from being victimized by criminals. The term "triad" refers to its three founding organizations: the American Association of Retired Persons; the International Association of Chiefs of Police; and the National Sheriffs'

[296] For further detail, from a psychological standpoint, see Ziegler, R. and Mitchell, D. B. (2003), "Ageing and Fear of Crime: An Experimental Approach to an Apparent Paradox," *Exp Ageing Res*., no. 29 (2), p. 173-187; see also, Kappes, C., Greve, W. and Hellmers, S. (2013), "Fear of Crime in Old Age: Precautious Behaviour and Its Relation to Situational Fear," *Eur J Ageing*, no. 10 (2), p. 111-125.

[297] Fondation Doctor Philippe-Pinel (2004), *The Key to Safer Municipalities*. Quebec, available online, p. 116; OMS (2015: 184).

Association. In particular, the Triad program is based on a partnership agreement between the county's law enforcement (police departments, sheriff offices, etc.) and the community's older adults, with the aim of cooperating to prevent the elderly from being victims of crime and abuse. From an organizational standpoint, many Triads include a Seniors and Law Enforcement Together Council to meet each community's specific needs.

Since 1989, 775 counties have joined the partnership agreement governing the existing Triads. Additionally, 34 states have adhered to these network agreements, allowing for the state Triads to meet periodically to discuss supra-local matters.[298] Triads seem to be working out really well. They have not only increased security, but they have also united the communities by sponsoring crime prevention and engaging the older population.

There is a similar initiative in India praised by the WHO. In 2015, Indian authorities launched a program to facilitate contact between older adults and community police officers in six wards in Sangam Vihar−one of the largest unauthorized settlements in India−covering around 1,800 older adults. Senior citizens met their local police officers and received cards with the phone numbers of all street-patrol police officers. To encourage older adults to use the phone numbers as necessary, they practiced calling their local police officer. Also, police stations prepared a record of older adults living in the area to recognize them if they called, duly registering those living alone to visit their homes periodically.[299] Although there has not been a careful assessment, the program has apparently been successful.

In 2014, Spain implemented a nationwide program called "*Plan Mayor de Seguridad*" (in English, "Elderly Security Program") seeking to prevent older adults from being victimized and to increase their personal safety. Nevertheless, this program lacks a local dimension allowing law enforcement officers to have a closer contact with residents.

Comparative analyses suggest that these law enforcement-older population partnerships are successful. In fact, we could strengthen elderly protection by including police officers in seniors councils to submit proposals in order to meet the community's needs.

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[298] For further detail, see (last accessed on 19 June 2020): https://www.sheriffs.org/programs/national-triad
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# Reasonable accommodation for elderly housing decisions

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## 1. INTRODUCTION

Reasonable accommodation means any support, adjustment or customized assistance provided to persons at risk of exclusion so they can participate on an equal footing in "inclusive" or "friendly" environments. Reasonable accommodation is one of the key elements in the framework for the protection of persons with disabilities. This study examines the applicability of reasonable accommodation when it comes to protecting the elderly as required by Article 50 of the Spanish Constitution (*Constitución Española*, CE). And, more specifically, we focus on the protection of dependent older adults whose housing and living conditions sometimes depend on public authorities' decision-making. First, we will examine reasonable accommodation within its original context: the protection of persons with disabilities (section 2). Then, we discuss public education as provided by public authorities, since, in light of certain judgments and rulings, it seems like an interesting and fruitful context for the applicability of reasonable accommodation (section 3). We will rely on the conclusions of sections 2 and 3 to provide some insights into the application of reasonable accommodation solutions to actually implement and enforce the right of older adults to choose where they live and prevent their isolation (section 4).

## 2. REASONABLE ACCOMMODATION FOR THE PROTECTION OF PERSONS WITH DISABILITIES

### 2.1. The origins of the reasonable accommodation model

The Convention on the Rights of Persons with Disabilities (CRPD), which entered into force on 3 May 2008, is based on the 1990 Americans with Disabilities Act (ADA).[300] The ADA was the first piece of legislation to ever provide a systematic regulation of disability with a

[300] 42 U.S.C. sec. 12101 *et seq.* The ADA and the relevant implementing provisions are available at www.ada.gov.

national (federal) scope. The CRPD's regulatory approach relies on the ADA's rulemaking techniques.[301]

The ADA triggered the shift from the *medical* or *assistance-based model* (targeting those persons with disabilities qualifying as recipients of public benefits) to the *civil rights model*,[302] where persons with disabilities are entitled to a set of rights enforceable *erga omnes*.[303] Under this new civil rights approach, public authorities no longer bear sole responsibility for assisting a disabled senior at a nursing home or children with disabilities in special education schools. Under the civil rights model, these should no longer be separate contexts set apart from "normal" social life, and we should all−both public and private stakeholders−create an inclusive and friendly society removing any barriers preventing those older adults or children from sharing ordinary everyday life with everyone else. Note that this "friendly society" is not only a broad, cross-cutting notion. Rather, it should cover specific areas, such as urban development, education or transportation. We are ultimately *internalizing* or *incorporating* social issues into the context where they arise to solve them therein (e.g., the building where persons with disabilities live or the workplace). To do so, we need everyone's help and financial support, including homeowners, employers or urban development authorities. This entails that any social issues or challenges that may arise are no longer outsourced. In other words, the model no longer relies on special benefits or welfare for persons with disabilities. In fact, such benefits often exclude their recipients and do not achieve integration,[304] in addition to being a heavier burden on public spending.

The keys to ADA's success are (i) its comprehensive and all-embracing nature giving rise to universal access contexts in a myriad of fields: infrastructure and building; transportation; telecommunications and information society; or employment;[305] and (ii) the use of clear yet flexible and open-ended wordings, e.g., defining the notion of reasonable accommodation as a fair and proportionate measure to be taken by employers to achieve accessibility for persons

[301] See, in this regard, Irene Bowen (2013), "The American Experience: What Makes the ADA Works, and What Are the Implications for Implementation of Germany's Accessibility Laws?," in Felix Welti (Ed.), *Rechtliche Instrumente zur Durchsetzung von Barrierefreiheit*, Kassel, p. 79 *et seq.* In particular, see p. 80-81. See also the ties between the ADA and the CRPD in Rafael de Asís, Ana Laura Aiello, Francisco Bariffi, Ignacio Campoy and Agustina Palacios (2007), *Sobre la accesibilidad universal en el Derecho*, Madrid, p. 73.

[302] Replicating a protection framework that had already been applied to groups previously considered as neglected minorities unable to access the "American way of life." The protection framework was thus designed "relying on previous legislation that precluded discrimination based on race, ethnicity and sex;" see Bowen (2013: 81).

[303] On both models, see Bowen (2013: 81); Felix Welti (2013), "Barrierefreiheit als Rechtsbegriff," in Felix Welti (Ed.), *Rechtliche Instrumente zur Durchsetzung von Barrierefreiheit*, Kassel, p. 23 *et seq.* Rafael de Asís *et alia* (2007: 23).

[304] See Welti (2013: 25).

[305] These are the so-called "accessibility spheres" or "accessibility domains;" see Rafael de Asís *et alia* (2007: 9). They are listed in Art. 5 of the Spanish Act on the Rights of Persons with Disabilities (TRLDPD).

with disabilities, providing for reasonable time periods or differentiating between public and private stakeholders.[306] The remaining keys to ADA's success relate to (iii) the close involvement in the lawmaking process of the groups concerned; and (iv) the remarkable outcomes in judicial proceedings (or, alternatively, of mediation and arbitration proceedings) involving individuals, associations and public bodies. Courts often sentenced defendants to take action and implement reasonable accommodation adjustments or to pay punitive damages and compensation. These rulings effectively deterred the parties from breaching disability-related legal standards.[307]

Both the CRPD and the Spanish Act on the Rights of Persons with Disabilities (TRLDPD) embraced this civil rights model. Under this new framework advocating the comprehensive, all-around protection of persons with disabilities, the underlying rationale is that everyone (including public and private stakeholders, i.e., public authorities, employers or homeowners) must "chip in" and do their part to set up a barrier-free society, covering cities and urban development, housing, the workplace, polling stations, schools or hospitals. Removing barriers to achieve true integration is thus a primary aim of welfare States. This aim should have a redistributive effect. It may undermine some actors in the short term, but it will benefit society as a whole in the long term, even if only because we all grow old and demand friendly and accessible environments.

The approach based on "design-for-all" (DfA) or "universal design" and "reasonable accommodation" techniques precludes maximalist stances, which sometimes lead welfare policies to fail. Neither persons with disabilities can require that the job be done "at all costs" (if something is unreasonable it should not be mandatory or compulsory), nor employers, homeowners or public authorities may refuse a request on the grounds that it was not "expressly stated." As long as the requested action solve a problem faced by persons with disabilities and be reasonable, it does not matter whether it had been expressly stated beforehand.

### 2.2. The impact of the CRPD protection framework on fundamental rights of persons with disabilities

The mandatory application of the CRPD as an interpretative standard for domestic fundamental rights (Art. 10(2) CE) has a major legal impact. On the one hand, regarding the *right to equality* (enshrined in Art. 14 CE). On the other, regarding the content of the so-called *substantive* rights (i.e., not formal as the right to equality under Art. 14), including freedom of expression (Art. 20(1) CE), the right to vote and to participate in public affairs

[306] See, for instance, the Third Additional Provision of the TRLDPD on the time periods applicable to enforce basic accessibility requirements.

[307] See Bowen (2013: 88-93).

(Art. 23(1) CE); or the right to education (Art. 27(1) CE). The CRPD states that a group of people is entitled to special protection: persons with disabilities (see Art. 1 CRPD). Using a wording that was acceptable back then, Art. 49 of the 1978 Spanish Constitution did the same, i.e., it provided that protecting "the physically, sensorially and mentally handicapped" was an aim or a public objective of a welfare-oriented Constitution, even if granting such protection entailed favoring certain groups or individuals at the expense of others.[308]

However, the effects that a specific group be granted special protection under Art. 49 CE on the right to equality or other fundamental rights remained unclear, and we could not come up with a meaningful response solely relying on constitutional interpretation.[309] For instance, the Spanish Constitutional Court had found that "*various Chapter III provisions* [guiding principles for social and economic policymaking] *were specifically aimed at defining particularly vulnerable groups entitled to special protection. These vulnerable groups comprised children and mothers (Art. 39 CE), the handicapped (Art. 49 CE) or the elderly (Art. 50). From the perspective of the equality principle, these specific constitutional references to groups of people allow for (and sometimes require) favoring those persons over others without considering that such differential treatment be a violation of Art. 14 CE. This Court has relied on the aforesaid guiding principles identifying groups entitled to special protection as follows: 'maternity, and thus pregnancy and birth, are distinct biological realities to be protected under Art. 39(2) CE. Thus, any advantages or exceptions for women do not qualify as a discrimination against men.' Also, along these lines, it is worth concluding that public employment quotas for persons with disabilities are not contrary to the equality principle of Art. 14 or the equal access to public employment requirements laid down in Art. 23(2).*" Surprisingly, these bold statements by the Spanish Constitutional Court did not quite settle the matter. On another note, obviously, finding that quotas for persons with disabilities are not a violation of the equality principle does not entail (although it currently seems so) that failing to provide for such quotas breaches the said equality principle.

The CRPD clearly defines (a lot more clearly than Art. 49 CE, in my opinion) the impact of its protection framework applied and extended through the right to equality established in Art. 14 CE. See below an overview of the content actually added by the CRPD to the requirements arising from the equality principle (i.e., the right to equality) of Art. 14 CE:

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[308] According to Luis Medina (2016), *Libertad y autoridad en el Derecho administrativo. Derecho subjetivo e interés legítimo: una revisión*, Madrid, p. 230, *passim*, the defining feature of a welfare state compared to a liberal state is that the very existence of government authorities is justified by their ability not only to secure individual freedom, but also to increase well-being according to public interests and policy objectives "even if that requires favoring individuals or groups."

[309] Rafael de Asís *et alia* (2007: 29) jointly interpreted Articles 23(1) and 49 CE concluding that persons with disabilities being unable to access a polling station due to architectural barriers qualifies as a violation of the persons with disabilities' right to vote.

(i) First, it bans any form of discrimination on grounds of disability (Art. 5(1) CRPD). States Parties undertake to abolish "existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities" (Art. 4(1)(b) CRPD). Since 1994,[310] Art. 3(3) of the German *Grundgesetz* also expressly precludes disability-based discrimination, as well as Art. 21(1) of the Charter of Fundamental Rights of the European Union (CFREU).[311]

(ii) The CRPD (Art. 5(4)) goes even further by providing that affirmative action will not be considered discriminatory, e.g., employment quotas for persons with disabilities (Art. 42 TRLDPD).

(iii) Finally, pushing it to the limit with the aim of strengthening the protection of persons with disabilities, it can be inferred from the CRPD that failing to implement reasonable affirmative action measures in favor of specific groups is a discrimination (against the groups entitled to protection) contrary to Art. 14 CE. Failure to remodel in order to allow a person in a wheelchair to access the workplace; or to change working hours to meet persons with disabilities' demands; or to provide appropriate equipment for persons with sight impairments; or to install an elevator in a building for a disabled person qualify as actual forms of discrimination as long as the unfulfilled requirements constitute reasonable accommodation. See, in this regard, Art. 63 TRLDPD.

An in-depth analysis seems to show that a well-settled line of case law is somewhat reversed. According to the Spanish constitutional case law, the right to equality (Art. 14 CE) does not include a fundamental right "to the unequal treatment" of those that are unequal (see, e.g., Constitutional Court Judgments, SSTC, no. 198/2012, of 6 November, legal basis 13; no. 38/2014, of 11 March, legal basis 6; 183/2014, of 6 November 2014, legal basis 3; and no. 56/2016, of 17 March, legal basis 5). For the cases examined herein, the right approach is actually the opposite: failing to treat a disabled person differently qualifies as discrimination.[312]

(iv) The abovementioned examples, along with some others (non-discrimination against persons with disabilities regarding health and life insurance under Art. 25(e) CRPD) show that both public and private counterparties facing persons with disabilities and their fundamental-right-claims to equality are in a similar situation. One would expect public authorities to bear a heavier burden to achieve equality. For example, the time periods for fulfilling accessibility rules are longer−and thus less stringent−for private actors and private property. In any case, there is no doubt that the requirements arising from the right to equality apply vis-à-vis private parties subject to the *Drittwirkung* or horizontal/third-party effect of fundamental rights.

[310] See the constitutional amendment of 27 October 1994.

[311] Which differs from the active requirement that persons with disabilities be integrated under Art. 26 CFREU.

[312] In this vein, see Welti (2013: 27): "Equal treatment means appropriately weighing and assessing inequality."

The impact of the CRPD protection framework on the fundamental rights of persons with disabilities is not restricted to the right to equality. Under the interpretative clause of Art. 10(2) CE, the CRPD protection framework also affects the interpretation of other substantive fundamental rights. On the one hand, *the CRPD turns what had been traditionally considered as freedom rights into benefit-providing rights*. Unquestionably, under Art. 23(1) CE, read jointly with Art. 29(i) CRPD, we should consider that failure to have appropriate, accessible or user-friendly equipment or facilities at the polling stations amounts to a violation of the persons with disabilities' right to vote. Also, Art. 20(1) CE, together with Art. 21 CRPD, lead us to find a freedom of expression violation (a paramount example of a freedom right) if the relevant authorities fail to adopt organizational measures ensuring that benefits or services be provided in sign language, Braille and other accessible formats.

On the other hand, *benefit-providing fundamental rights*, such as the right to education (Art. 27(1) CE) or to an effective legal remedy (Art. 24(1)), *incorporate new contents* specifically applicable to persons with disabilities. Public authorities are not only required to find a place in a special education center for an autistic child. Rather, they must make their best efforts to ensure that the child receives an inclusive education (see Art. 74 of the Spanish Act on Education, LOE). The protection granted to persons with disabilities by the right to an effective legal remedy (Art. 24(1) CE) requires additional relief or redress.[313] This entails that persons with disabilities are entitled to compensation for moral damages even in the absence of financial damage (see Art. 75(2) TRLDPD).

Self-evidently, within the sphere of these substantive fundamental rights, non-performance of a reasonable accommodation affecting the exercise of the relevant fundamental right (a polling station with architectural barriers, for instance) would violate both (i) the right to equality; and (ii) the substantive right at stake.

### 2.3. Organizational and procedural provisions

As discussed above, the protection framework stemming from the 1990 Americans with Disabilities Act (ADA) has succeeded because the rights of persons with disabilities became subject to all-encompassing provisions with a broad scope as well as clear yet open-ended wordings. However, this is not the only reason. Additional keys to ADA's success relate to the close involvement in the lawmaking process of the groups concerned; and the remarkable outcomes in judicial proceedings (or, alternatively, of mediation and arbitration proceedings) involving individuals, associations and public bodies. Courts often sentenced defendants to

[313] On the notions of "additional relief" or "redress," which contrast with the so-called "primary compensation" or *tutela primaria*, see Silvia Díez Sastre (2012), *La tutela de los licitadores en la adjudicación de contratos públicos*, Madrid, p. 69 *et seq.*

take action and implement reasonable accommodation adjustments or to pay punitive damages and compensation.[314]

This extremely successful twofold approach, i.e., (i) regulating the substance of rights (whether fundamental or not) of persons with disabilities; whilst (ii) arranging and setting up friendly organizations, procedures and processes, has been incorporated into the CRPD and the Spanish legislation that implements CRPD requirements and standards. Below we focus on the organizational and procedural Spanish law provisions aimed at protecting persons with disabilities.

Remarkably, the following bodies became national State authorities: the National Disability Board (with an advisory role, under Art. 55 TRLDPD); the Disability Office (which is responsible for handling complaints under Art. 56 TRLDPD); and the National Disability Observatory (tasked with compiling and reporting duties subject to Art. 73 TRLDPD).

The associations representing persons with disabilities and their families play a major role in the making, enforcement, monitoring and evaluation of disability-related policies. This is because the applicable legislation provides that "civil dialogue" (as defined in Art. 2(n) TRLDPD) be the backbone in this field. "Civil dialogue" could be considered a due process requirement or, better said, a procedural standard, requiring that any disability organizations and representative associations be involved in the decision-making processes affecting persons with disabilities,[315] including draft statutory or regulatory provisions (Art. 54(2) TRLDPD) or even the issuance of technical construction reports assessing buildings' universal accessibility (see Art. 30(1) of the Spanish Act on Urban Planning and Remodeling). These participation requirements are already well-known as a means to render public decisions more acceptable by the addressees.[316] For instance, one can check online and see that the Spanish Committee of Representatives of Persons with Disabilities (CERMI) is extremely active. In practice, much of the progress for persons with disabilities is due to CERMI's engagement; it constantly monitors and reports universal accessibility violations in public and private facilities and services.

From a procedural or litigation perspective, the CRPD protection framework relies on instruments, arrangements or techniques that are usually aimed at "tilting the scales" in favor of persons with disabilities. This obviously has another effect for the counterparties: deterring them from violating accessibility requirements. Keep in mind that there are also arbitration proceedings available to persons with disabilities. Submission to their "jurisdiction" is

[314] See Bowen (2013: 88-93).

[315] The notion of "civil dialogue" enshrines in statutory provisions the motto of the Independent Living Movement in the United States: *nothing about us without us*. See Rafael de Asís *et alia* (2007: 72).

[316] See Markus Rebstock (2013), "Barrierefreiheit in der Planungspraxis," in Felix Welti (Ed.), *Rechtliche Instrumente zur Durchsetzung von Barrierefreiheit*, Kassel, p. 63 *et seq.*, particularly p. 69.

voluntary, but the awards are binding and enforceable when deciding on disability-related complaints (Art. 74 TRLDPD). Also, these arbitration proceedings have no "specific formal requirements."[317]

Under their right to an effective legal remedy, persons with disabilities are entitled to primary compensation as well as to additional relief, as explained above. There will be no cap on any compensation arising from the claim, and persons with disabilities may be awarded moral damages even in the absence of financial damage. Damages will be assessed having regard to the circumstances and seriousness of the violation (Art. 75 TRLDPD).

Furthermore, the TRLDPD sets aside the general standard of proof, i.e., the *preponderance of the evidence*,[318] and imposes on the defendant *a stricter or more stringent standard of proof*.[319] In other words, if the claimant provides evidence "reasonably leading to believe" that there was a discriminatory behavior, the defendant must show that it is highly probable or probably certain that there was no discrimination (Art. 77 TRLDPD). See Constitutional Court Judgments no. 144/2006, of 8 May, legal basis 4; and no. 31/2014, of 24 February, legal basis 3.

Finally, with regard to legal standing, persons with disabilities, their families and their representative associations should qualify as "parties concerned" in administrative penalty proceedings,[320] thus being entitled to appeal against any decisions dismissing their complaints (Art. 89 TRLDPD). Also, any entities legally empowered to protect the legitimate interests of the disabled, acting "in the name and on behalf of persons with disabilities," shall also have legal standing (Art. 76).[321]

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[317] See Art. 1(2) of Decree 1417/2006, of 1 December, implementing arbitration proceedings to settle any complaints related to equal opportunity, non-discrimination and accessibility involving persons with disabilities.

[318] See Michele Taruffo (2002), *La prueba de los hechos*, Madrid, p. 289-303.

[319] See Luis Medina (2016), "Los hechos en el Derecho administrativo. Una aproximación," *Revista Española de Derecho Administrativo*, no. 177, p. 103-158 and, more specifically, p. 115-116, *passim*; and José María Rodríguez de Santiago (2016), *Metodología del Derecho administrativo. Reglas de racionalidad para la adopción y el control de la decisión administrativa*, Madrid, p. 38 *et seq.*

[320] As is well-known, the rule departs from a long-standing line of case law that used to be very restrictive regarding the claimant's procedural standing. See Alejandro Nieto (2005), *Derecho administrativo sancionador*, 4th ed., Madrid, p. 141; and Tomás Cano Campos (2011), *Las sanciones de tráfico*, Cizur Menor, p. 448-449.

[321] In contrast with Spanish and US law, the claims brought by official organizations in Germany only allow to seek the enforcement of obligations or requirements qualifying as "objective rights" or "objective entitlements" that cannot give rise to rulings ordering the defendant to take action but only to declaratory judgments. In this vein, see Sabine Schlake (2013), "Verbandsklagen im Umwelt- und Verwaltungsrecht," in Felix Welti (Ed.), *Rechtliche Instrumente zur Durchsetzung von Barrierefreiheit*, Kassel, 2013, p. 99 *et seq.*

### 2.4. Universal accessibility, design-for-all and reasonable accommodation

It is worth defining some of the key concepts inherent to the CRPD protection framework: universal accessibility (or universal access); design-for-all (DfA) or universal design; and reasonable accommodation. *Universal accessibility* means the *end result or state aimed for* within the various real-life contexts governed by the protection framework, e.g., housing, urban development, transportation or education. What ultimately defines this universal accessibility is the absence of barriers to the greatest extent possible.

There is a requirement or, better said, an optimization command, to achieve universal accessibility. Thus, we are dealing with a means-ends relationship relying on two major techniques: DfA or universal design and reasonable accommodation.[322] *DfA* applies at the forefront of the relevant sphere (urban development, building a house, setting up an urban transportation route structure or marketing a new computer), obviously assuming that DfA or universal design requirements must be fulfilled. However, universal design is not aimed at tackling "any accessibility issue that could come to mind." Rather, universal design requirements seek to solve general, abstract problems, i.e., their scope should be "as many people as reasonably possible," covering "specific groups of persons with disabilities." The scope of DfA or universal design need not cover individual cases, which would fall within the scope of reasonable accommodation (see Articles 2 CRPD and 2(l) TRLDPD).

*Reasonable accommodation* (*ajuste razonable* in Spanish and *angemessene Vorkehrung* in German) thus qualifies as a default measure applicable in the absence of DfA or universal design, whether because DfA requirements were not implemented or because they failed to remove the relevant barriers due to the specificity of the concerned person's disability.[323] Reasonable accommodation requires any necessary, suitable and appropriate modifications and adjustments to ensure a person's access within the scope of the protection framework (installing an elevator in a residential building, allowing for flexible work schedules or giving a disabled student extra time to take a test if needed) as long as they do not entail disproportionate or unreasonable burdens (see Articles 2 CRPD and 2(m) TRLDPD).

Obviously, as the effectiveness of universal design decreases, reasonable accommodation becomes more necessary. At the early stages of applying universal design to a specific case,

[322] This means-ends relationship is aptly illustrated by the wording of Art. 3(k) TRLDPD: universal accessibility (as the end state required for environments, processes, goods, products and services...) "assumes that a DfA or universal design strategy be implemented without prejudice to any necessary reasonable accommodation adjustments."

[323] In this connection, see Rafael de Asís (2016), "El eje de la accesibilidad y sus límites," *Anales de Derecho y discapacidad*, no. 1, p. 51-67 and particularly p. 54. A comprehensive overview of reasonable accommodation and its role in German law can be found in Eberhard Eichenhofer (2018), *Angemessene Vorkehrungen als Diskriminierungsdimension im Recht. Menschenrechtliche Forderungen an das Allgemeine Gleichbehandlungsgesetz*, Berlin (available online).

achieving accessibility (i.e., the end result) will almost solely rely on reasonable accommodation. This is still the case regarding elevators in buildings that were not designed for all.

An in-depth analysis shows that reasonable accommodation is, *de facto*, an almost subversive legal institution. Indeed, it is a *counter majoritarian* construct aimed at protecting individuals that, at some point, could resemble the conscientious objection. Any carefully regulated legal relationship (within the scope of the protection framework) ends up being loosened or disrupted by the overriding requirement to secure accessibility for a disabled person through any "necessary, suitable and appropriate modifications and adjustments that do not entail disproportionate or unreasonable burdens." This really sounds like the "inherent risk of loosening legal requirements." The Spanish Constitutional Court warned about this risk and ruled that the right to freedom of thought and conscience (Art. 16 CE) did not suffice to release citizens from constitutional or statutory duties, i.e., that such freedom did not overweigh the said constitutional or statutory obligations (STC no. 160/1987, of 27 October, legal basis 3).[324] This is similar to a police applicant telling the Government "if you allow me to wear a turban instead of a cap, I can be a cop" or telling a company's managing director "if you build an access ramp for me, I can work at your office," assuming that neither claim is expressly regulated. Both examples have in common an underlying idea that could be summarized as follows: "If you move over just a little bit, there will be room for me." Interestingly enough, this loose, often disruptive and undetermined reasoning (which also brings flexibility) is both a risk and a key to success (as evidenced by the US experience) of the protection framework.

Let us think of a welfare system revolving around the care for persons with disabilities at nursing homes. Self-evidently, reasonable accommodation requirements could force to rearrange that welfare provision model as a whole. As discussed below, if we assume that a person with disabilities unwilling to live in a nursing home yet still forced (literally) to do so (because there is no elevator in his building, for instance) is being excluded from society, public authorities will be required to provide welfare services at home (which is where that person wants to live and feels included in the community). These notions are expressly stated in Art. 19 CRPD. Failure to arrange for these home assistance services−unless it be considered unreasonable−would constitute discrimination. Indeed, as shown above, failing to secure reasonable accommodation always qualifies as discriminatory, and it could also be contrary to the right to "living independently and being included in the community."[325] The

[324] Juan Antonio García Amado (2015) http://almacendederecho.org/objecion-de-conciencia-al-hilo-de-la-reciente-sentencia-del-tc-en-el-caso-de-la-pildora-del-dia-siguiente, hace referencia al "casuismo desorbitado y el caos;" Gabriel Doménech (2016) http://almacendederecho.org/las-razones-del-derecho-a-la-objecion-de-conciencia, argues in favor of the conscientious objection on "economic grounds."

[325] See Rafael de Asís (2016: 52).

German initiative *Daheim statt Heim* ("Home, not Nursing Home")[326] socially disseminates these organizational approaches to welfare provision.

It is worth discussing another example (very well-known in universities) of the loose yet flexible nature of reasonable accommodation: even if the college rulebook says nothing about this, reasonable accommodation requires that the professor give extra time on tests to disabled students (see Art. 20(c) TRLDPD). The specific boundaries of this requirement would only have to be defined in case of a dispute, which would only arise if one of the parties acts in bad faith.

There is no doubt that lawmakers may (and probably should to the extent possible) try to clarify any blurred boundaries and further define these loose reasonable accommodation requirements. However, keep in mind that, under Art. 96(1) CE, international treaties (the CRPD) may only be repealed, amended or suspended in the manner provided in the treaties themselves or in accordance with the general rules of international law, so national lawmakers are not entitled to provide for unconvincing restrictions. Let us think of the reasonable accommodation requirement of installing elevators or ramps to secure accessibility in residential buildings. For applicability purposes, Art. 2(5) of the Spanish Act on Urban Planning and Remodeling has listed various criteria to guide the proportionality assessment of such reasonable accommodation: in order to determine whether a burden is reasonable, we should weigh the (i) costs of the measures; (ii) potential discrimination in case of non-fulfillment; (iii) circumstances of the person or entity subject to the reasonable accommodation requirement; and (iv) possibility of receiving some kind of aid. In particular, under Spanish legislation on apartment buildings and co-ownership, the burden will be deemed unreasonable if the yearly cost of the remodeling works−excluding any potential financial aid−exceeds 12 monthly installments of community fees or co-ownership costs.

## 3. REASONABLE ACCOMMODATION IN EDUCATION

### 3.1. Overview

Case law databases apparently indicate that there is little litigation arising from welfare benefits for the elderly,[327] some of which directly affect the decision on where older adults live. However, this is not the case with public education. As opposed to the previous benefits or services, public education is at the core of a fundamental right (see Art. 27 CE) subject to numerous rulings. Below we discuss a few Constitutional Court and Supreme Court judgments regarding the right to education of children with disabilities. These rulings'

[326] See http://www.bi-daheim.de/de/ (last accessed on 15 June 2020).

[327] See, on this matter, José María Rodríguez de Santiago (2007), *La administración del Estado social*, Madrid, p. 146-147, 160.

guiding rationale, i.e., that children with disabilities should be educated in ordinary or normal contexts, can have a bearing on elderly welfare benefits affecting older adults' place of residence.

Accordingly, education for students with disabilities−construed as a welfare service or benefit−intersects with a myriad of fundamental right requirements due to the very nature of the rules governing the provision of education for disabled children.[328] Since there is a constitutional requirement that fundamental rights be interpreted in accordance with international treaties (Art. 10(2) CE), the fundamental rights to education (Art. 27(1) CE) and equality (Art. 14 CE) include specific contents, governed by the CRPD, catering to children with disabilities. As for the (substantive) right to education, the approach of Art. 24 CRPD becomes embedded in the education to be provided by the Government to these children. As for the right to equality, the requirement to promote effective equality (Art. 9(2) CE) and ensure the integration of disabled children (Art. 49 CE) entail that failing to provide any support or adjustment not qualifying as unreasonable (see Art. 2 CRPD) will constitute undue discrimination and thus a violation of Article 14 CE.

Given this regulatory framework, one could argue that Art. 74 of the Spanish Act on Education (LOE) currently provides a fundamental right to receive a benefit. The core content of this fundamental right entails that all general education schools should implement any reasonable measures (i.e., reasonable accommodation) to cater to any students with special education needs. This guarantee also requires whoever decides on special education schooling to give extensive reasons as to why the necessary reasonable accommodation to be performed in the general school should be deemed unfair or disproportionate.[329]

### 3.2. Reasonable accommodation as part of the fundamental right to education: Supreme Court Judgments of 9 May 2011 and 14 December 2017

As can be inferred from the above, reasonable accommodation becomes (i) the defining concept of the fundamental right to education (construed as a right to receive a welfare benefit under Art. 27(1) CE; whilst (ii) providing interpretative guidance to find discriminatory actions or behaviors contrary to the equality principle (Art. 14 CE). Examining the case law,

[328] Regarding this "regulatory framework," see Constitutional Court Judgment (STC) no. 10/2014, of 27 January, legal basis 4; and Supreme Court Judgment (STS) of 14 December 2017 (Roj: 4521/2017, appeal no. 2965/2016), legal basis 3.

[329] The wording of Article 18 of the abovementioned Act on the Rights of Persons with Disabilities (TRLDPD) resembles Art. 74 LOE. In fact, this regulatory overlap gives rise to constitutional concerns. First, because the scope of a standard statutory provision cannot overlap with that of an organic provision (covering specific matters listed in the Constitution). See Art. 81 CE and Art. 28(2) of the Organic Act on the Constitutional Court, whose wording is questionable to say the least. Second, because the matters falling within the scope of organic acts cannot be recast by legislative decrees (see Art. 82(1) CE).

in my view, the Supreme Court case has discovered and defined the importance of reasonable accommodation more accurately than the Constitutional Court.

The Spanish Supreme Court (TS) first ruled on these matters in its judgment of 9 May 2011 (appeal no. 603/2010). The TS heard an appeal brought by the parents of an autistic child. The Valencia Regional Government had done nothing to solve the lack of resources to take care of the student in a public school. The TS upheld the appeal. Although the Supreme Court's reasoning was not very sophisticated yet, it revealed the main fundamental rights issue relying on a very intuitive argument: the aforesaid lack of resources (which was itself contrary to the applicable statutory provisions) fails to fulfill "a qualified constitutional requirement." Accordingly, the TS found "*a violation of the fundamental right to education because public authorities had failed to treat an autistic child as he was entitled to given his unequal point of departure*" (legal basis 8).

Supreme Court Judgment (STS) of 14 December 2017 (appeal no. 2965/2016) further defines this line of case law. In this case, the Head of the Regional Board of Education had authorized that a child with autism spectrum disorder (ASD) be transferred from a general education school's integration program to a special education school against his parents' will. The judgment relies on the regulatory framework discussed above (i.e., Articles 27 and 14 CE; 10(2) CE; 2 and 24 CRPD; and 74 LOE) focusing on the notion of reasonable accommodation. The requirement to provide special education is twofold (legal basis 5). It has (i) a *substantive* dimension; and (ii) *procedural* implications. The substantive dimension requires that public schools use any specific, individualized and effective support, assistance or teaching aids needed to achieve integration within the general education system. The only limit to this dimension would be that such measures and adjustments be deemed an unreasonable burden.

The procedural implications entail that public authorities are required to give comprehensive explanations and arguments justifying their decisions and proving the facts of the case as a result of the protection granted to children with disabilities. This stringent duty to give reasons imposed on public authorities arises from the protective provision's intent to raise the general standard of proof, i.e., the *preponderance of the evidence*. Thus, the procedural dimension of the aforesaid requirement imposes on public authorities *a stricter or more stringent standard of proof* that will only be met if the evidence shows that it is highly probable or probably certain[330] that public authorities did implement any reasonable accommodation adjustments (other than those that were unreasonable or disproportionate) prior to transferring the student to a special education facility. Public authorities must carefully and thoroughly justify−relying on reports that take into account the specificities in

[330] See, again, Luis Medina (2016), "Los hechos en el Derecho administrativo. Una aproximación," *Revista Española de Derecho Administrativo*, no. 177, p. 103-158, particularly p. 115-116, *passim*.

each case−"why the support required by the student cannot be provided through diversity-based measures at general education schools."

Reasonable accommodation becomes so important within this line of reasoning that, in my view, this distinctive version of the right to education is actually the fundamental right to "reasonable accommodation" at general education schools. It follows that failing to deliver such reasonable accommodation qualifies as a discrimination contrary to the right to equality (Art. 14 CE).

Note that the point of the aforesaid duty to give reasons imposed on public authorities is not that they provide a convincing or persuasive justification of how hard it is to integrate autistic children in general classrooms, or how it is necessary that autistic kids enroll in special needs plans. Rather, the duty to (i) give reasons and (ii) provide a comprehensive reasoning should revolve around the concept of reasonable accommodation and its implications.

### 3.3. Reasonable accommodation becomes invisible in Constitutional Court Judgment no. 10/2014 of 27 January

Reasonable accommodation's prominent role is invisibilized in Constitutional Court Judgment (STC) no. 10/2014 of 27 January. The outline of the scholarly doctrine regarding the "constitutional package" governing the fundamental right to education of children with disabilities (legal basis 4) is flawless. However, the application thereof to the case at stake is off target.

The constitutional appeal is brought against the Head of the Regional Board of Education's decision to keep an autistic child in a special education school (against his parents' will) instead of transferring him to a general school. The Constitutional Court (TC) dismissed the appeal basically because the challenged decision "does provide an appropriate justification as to why (i) the student must remain in a special education school; and (ii) there is no need to assess whether the adjustments required by the student can be provided in a general education school" (legal basis 5).

As noted by the dissenting opinion issued against the ruling,[331] this Constitutional Court's decision is off target precisely because it downplays or invisibilizes the importance of reasonable accommodation. As pointed out by the Supreme Court's case law examined above, we should find a violation of these children's fundamental right to education and equality when there is no appropriate justification−duly relying on reports that take into account the specificities of the case−as to "why the support required by the student cannot be provided through diversity-based measures at general education schools."

[331] Issued by Justice Luis Ignacio Ortega Álvarez and endorsed by Justice Juan Antonio Xiol Ríos.

### 3.4. Reasonable accommodation becomes blurred in Supreme Court Judgment of 21 June 2019

The Supreme Court has neither abided by the scholarly approach to reasonable accommodation within the field of special education for children with disabilities. In Supreme Court Judgment of 21 June 2019 (appeal no. 4651/2018) the concept becomes so blurred and out of focus that it ends up being unrecognizable.

This is the first case ruled by the Supreme Court after the 2015 amendment to the so-called cassation appeal in the judicial administrative jurisdiction.[332] This amendment required that there be an "objective interest for the Supreme Court to review the case" in order for any cassation applicants to be granted leave to proceed. In this case, the Head of the Regional Board of Education decided to enroll a disabled child in the special education program at a general education school. His parents agreed that he should go to a special education program, but they preferred a different school, so they challenged the enrollment decision through the special procedure for fundamental rights protection (subject to Articles 114 *et seq*. of the Spanish Act on Judicial Administrative Review). The Judicial Administrative Chamber of the La Rioja High Court rejected the appeal (i.e., not even granting leave to proceed and thus not hearing the merits of the case) on the grounds that choosing one general education school or another−being both general education facilities−was not a constitutional matter but a statutory one, therefore outside the scope of the special appeal. The parents then filed an appeal before the Supreme Court against the High Court's decision. The Supreme Court granted them leave to proceed and heard the merits of the case, arguing that deciding on whether this was a constitutional or a statutory matter did have an "objective interest for the Supreme Court to review the case."

I side with the Supreme Court's case law doctrine in this case: "*We cannot generally consider that the choice of school in a case like the one at hand is a merely statutory matter falling outside the scope of the special procedure for fundamental rights protection*" (legal basis 6). In fact, assuming (as repeatedly stated by the Constitutional Court) that everyone's right to education entails that "*parents be free, on a prima facie basis, to choose a school for their children*,"[333] necessarily entails that a dispute in this regard be settled through the special procedure for fundamental rights protection.

However, the Supreme Court's decision on the merits after reversing the High Court's Judgment is out of focus. The Supreme Court's line of reasoning seems to turn the fundamental right to reasonable accommodation at a general education school into an

[332] See the Third Final Provision of Act 7/2015, of 21 July, amending Act 6/1985 on the Judiciary.

[333] See Constitutional Court Judgments no. 133/2010, of 2 December, legal basis 5 b); no. 10/2014, of 27 January, legal basis 3; no. 74/2018, of 5 July, legal basis 4 a).

undetermined fundamental right to *particularly sensitive* and *extremely responsive* public authorities regarding requests or applications from parents of children with disabilities, even if such requests do not relate to special education but to other preferences. Keep in mind that inclusive or special education should be provided in either general education school, the one picked by public authorities or the school requested by the parents. The judgment is *vague*, which is quite inappropriate when dealing with fundamental rights, and *vaguely* states that "the key is to assess the point of departure to determine whether there was a fundamental rights violation" (legal basis 8).

Since public authorities were not as responsive as required by the situation (the "point of departure" was a disabled person) regarding the parents' choice of school, the parents' appeal was upheld. Note that reasonable accommodation does not have such a blurred or undetermined aim. In fact, the purpose of reasonable accommodation is a lot more accurate and carefully outlined: public authorities must use any available (and reasonable) resources to ensure that general education schools provide inclusive education prior to enrolling a disabled child in a special education facility.

This is why the judgment is wrong in concluding that public authorities should have provided evidence (when making the enrollment decision) that enrolling the child in the school chosen by the parents was unreasonable or disproportionate (legal basis 8). In my opinion, this argument is clearly wrong. We should not require public authorities to justify that enrolling the child at the school picked by the parents is disproportionate to decide otherwise. In fact, the proportionality assessment inherent to reasonable accommodation has nothing to do with this.

### 3.5. What if parents prefer a special education school?

In all of the judgments discussed above, the appellant parents wanted their disabled children to enroll in general education schools. The parents' choice for their children was in line with the inclusive education approach of Articles 24 CRPD and 74 of the Spanish Act on Education (LOE). This begs an obvious question: what if parents prefer a special education school because it is the best fit for their children? Can the aforesaid inclusive education approach be forced on parents even if they think it is not best for their children?

This question touches on various substantive and meaningful matters. Should we accept that children with disabilities' *fundamental right* to reasonable accommodation at a general education school also *requires* the parents of another disabled child to (i) request reasonable accommodation adjustments that they do not want (prior to enrolling their child in a special education facility); or (ii) be prevented from enrolling their child in the special education school of their choice if the general education school can be reasonably accommodated? Ultimately, the answer to this question should arise from a general analysis (taking a mostly

constitutional perspective) of how we should distribute education decision-making between public authorities and parents.

To solve this issue, we can rely on the constitutional judgments that have settled similar matters. In Judgment no. 133/2010, of 2 December, the Court found that the "compulsory education period during which homeschooling is not allowed" did not violate the freedom dimension of the right to education (i.e., that the parents be able to "freely determine the type of education received by their children") under Art. 27(1) CE. This is not the time or the place to examine this ruling. However, it is worth pointing out the ruling's fair balance struck between (i) the ultimate purpose of education in general as provided in Art. 27(2)−i.e., fully developing one's own personality abiding by democratic principles and fundamental rights and freedoms−and (ii) the aforesaid parents' right. In my view, the Court aptly justifies that such purpose is "more effectively" achieved "when going to school on a daily basis entails interacting with a pluralistic society."

This line of reasoning justifying that the parents' fundamental right be limited seems less powerful in the case at hand. That education's ultimate purposes under Art. 27(2), for children with disabilities, are better achieved at general education schools instead of special education facilities is not as clear as the fact that going to school is better than being homeschooled for citizens to able to live in a pluralistic society. A given disability could very well isolate a child in the most diverse general education school. There should be additional, more meaningful arguments for imposing an inclusive education approach on parents that do not want it having regard to their children's characteristics. To me, it is also obvious that although Art. 74 LOE says absolutely nothing about the parents' opinion (the draft amendment does, however[334]), they should most certainly have a say in this.

We can find a well-balanced response to this issue by relying on two different interpretations of Art. 74(1) LOE: "Children with special needs should only be enrolled in special education schools (...) if their needs cannot be cannot be fulfilled through diversity-based measures and programs at general education schools." If a child's parents seek an inclusive education program for their children, we should interpret the provision in line with Art. 24 CRPD, i.e., we must implement any reasonable accommodation prior to sending a disabled child to a special education school, requiring a stringent standard of evidence on the counterparties, reversing the burden of proof, etc.

[334] See the new wording proposed for Art. 74(4) LOE: "Children's educational needs should be identified and assessed as soon as reasonably possible, by duly qualified professionals and in the manner provided by public education authorities. *It will be mandatory that parents or legal guardians be heard and informed. Education authorities shall regulate any dispute settlement mechanisms taking into account the child's best interest.*" The italicized text indicates the draft amendment not yet included in the provision.

However, if parents consider (having the child's best interests at heart) that he or she would be better off attending a special education facility, the provision should be interpreted differently. The default rule will continue to be that children be enrolled in general education schools. However, this rule may be derogated if the facts preponderantly show that it is more likely than unlikely that the special education school be a better fit for the child. If reasonable accommodation appears as clearly unreasonable in the general education school, there is no need to push it to the limit before enrolling the child at a special education facility. This interpretation is in line with the one discussed above in STC no. 10/2014, although, there, it was wrongly applied to a case where the parents wanted their child to attend a general education school.

In my view, both interpretations are compatible with the wording of Art. 74(1) LOE. There is no doubt that the second interpretation is more of a stretch than the first, but they are both an appropriate reference to weigh the constitutional interests and rights at stake.

## 4. REASONABLE ACCOMMODATION TO EFFECTIVELY ENFORCE THE RIGHT OF THE ELDERLY TO DECIDE WHERE THEY LIVE AND PREVENT THEIR ISOLATION

### 4.1. The application of reasonable accommodation to protect the elderly by systematically interpreting Articles 14 and 50 CE

Let us review the aspects regarding the right to education of persons with disabilities that could be useful to examine the requirements applicable to public authorities when deciding where the elderly should live. Prior to excluding persons with disabilities from an inclusive and friendly environment, public authorities are required to explore all reasonable possibilities of achieving inclusion through any customized assistance or support (i.e., reasonable accommodation).

Within the field of education, this formal requirement is part of a substantive fundamental right: the right to education secured by Article 27(1) of the Spanish Constitution (CE). However, as shown above, misapplying reasonable accommodation measures could qualify as discriminatory and thus violate the right to equality under Art. 14 CE.

Nevertheless, this does not exactly apply to the right of persons with disabilities to an independent living and to not being excluded from the community (Art. 19 CRPD). This CRPD content is not part of any fundamental rights constitutional provision. And, still, a joint interpretation of Articles 14 and 49 CE (requiring that public authorities protect the elderly because they need development and promotion activities); 2 CRPD (under which rejecting reasonable accommodation constitutes discrimination); and 19 CRPD (older adults' right to home assistance to prevent isolation) leads to conclude right away that, failing to

provide (i) reasonable accommodation; and (ii) a careful reasoning as to why an older adult must live in a nursing home, qualify as discriminations contrary to the equality principle under Art. 14 CE.

Can this line of reasoning apply to the elderly? I believe it can. In my opinion, this interpretative approach to Art. 14 CE together with Art. 49 CE (persons with disabilities) could also apply to the systematic interpretation of Art. 14 CE in connection with Art. 50 CE (protection of senior citizens). As noted before, standard statutory provisions (e.g., Spanish legislation on apartment buildings and co-ownership) are actually equating the entitlement to reasonable accommodation of both vulnerable groups subject to public protection: persons with disabilities and seniors over 70. There are very good reasons for transferring this protection framework through Art. 14 CE particularly for dependent older adults. Indeed, dependent older adults are actually the ones subject to *national* authorities' decisions on their place of residence and living arrangement, whereas *regional* authorities are responsible for deciding on their welfare benefits under Act 39/2006, of 14 December, on the Promotion of Personal Autonomy and Care for dependent persons (*Ley 39/2006, de 14 de diciembre, de Promoción de la Autonomía Personal y Atención a las personas en situación de dependencia*, LAPAD) and other regional welfare provisions.

The legal concept of "persons with disabilities" (see Articles 1 CRPD and 4 TRLDPD), which revolves around the barriers potentially preventing persons with disabilities' full and effective participation in society, does not fully match the legal notion of "dependent persons" (see Art. 2(2) LAPAD), which focuses on the need to take care of them for daily life activities. However, aside from the existing overlaps, there is no doubt that there are no grounds justifying that one group be less protected than the other under Art. 14 CE.

### 4.2. Living in a nursing home construed as a "particular living arrangement"

Living in a nursing home (a "particular living arrangement" in the words of Art. 19(a) CRPD) is essentially different from living "outside." Nursing homes' daily routine and operation bring together or bundle several aspects of daily life that are totally apart in "normal life." Persons living "outside" go to work, spend their free time and sleep at completely different places under completely different spheres of authority: the boss', the landlord's and that of the owner of the restaurant or the movie theater where persons go out in their spare time. Accordingly, persons "out on the street" move around, thereby having different companions and spheres of authority. Also, they somewhat freely decide on their schedule to fulfill their obligations and personal desires. In contrast, nursing home residents have all of these aspects

decided for them and scheduled by the nursing home authorities subject to a rational plan imposed on residents.[335]

It is not even necessary to focus on dependent persons requiring assisted living care to acknowledge the differences between living in nursing homes and elsewhere. Older adults in good health condition are also deprived of what probably was their last daily activity: arranging their own life. At nursing homes, this personal, day-to-day task is replaced by a well-designed and comprehensive system carefully arranged to meet all residents' needs.[336]

Self-evidently, nursing home residents become subject to a very intense relationship, based on the provision−and subsequent enjoyment−of welfare benefits and services that can severely affect the residents' spheres of personal self-determination covered by certain fundamental rights. Let us think, for instance, of freedom of movement under Art. 17(1) CE when there are entry/exit times at the relevant nursing homes; or of the impact that living in a nursing home can have on privacy (Art. 18(1) CE).

Broadly, one could argue that a resident's situation in a nursing home regarding the resident's sphere of self-determination (with a fundamental rights impact) is nothing but the fair balance struck between (i) fundamental right requirements; and (ii) the duty of care to be fulfilled by nursing homes and similar residential facilities. The result of this fair balance–defined in the abstract despite that it can only be implemented in practice or at a much less abstract level−is what actually allows to graphically speak of *a general state of well-balanced or weighed freedom*.[337]

### 4.3. Guidelines to interpret standard (i.e., non constitutional) statutory provisions governing dependency-related benefits affecting older adults' place of residence and integration in the community

According to the above, prior to making a decision on older adults' place of residence and way of life, taking them out of their living environment and forcing them into a "particular living arrangement," public authorities must (i) exhaust any possibilities of providing support and assistance within the older adult's environment; and (ii) duly justify why there is no room for the appropriate reasonable accommodation within the context of the remaining benefits.

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[335] Peter Krause (1978), "Empfiehlt es sich, soziale Pflege- und Betreuungsverhältnisse gesetzlich zu regeln?," *Verhandlungen des zweiundfünfzigsten deutschen Juristentages*, Report E, volume 1, Munich, 1978, p. 11 *et seq.*, specifically p. 26.

[336] Krause (1978: p. 31).

[337] On this matter, see José María Rodríguez de Santiago (2012), "Derechos fundamentales en la residencia de mayores," *Revista Española de Derecho Constitucional*, no. 94, p. 117-152. On nursing home management approaches and their impact on nursing home residents, see Jorge Castillo Abella (2020), "Tipología y régimen jurídico de los sujetos gestores de residencias de mayores," *InDret* February 2020, p. 457-507.

Art. 50 CE expressly refers to the welfare service system to meet "specific housing problems" of older adults.

These interpretative guidelines could already be inferred from the LAPAD: dependency-related benefits should be aimed at (i) enabling dependent persons to live their live "as autonomously as possible" (Art. 3(h)); whilst (ii) allowing them, to the extent possible, to stay within their living environment where they can be involved in the community (see Articles 3(i) and 13(a) and (b) LAPAD). However, the driving force of the notion that failure to provide reasonable accommodation constitutes a discrimination contrary to the right to equality (Art. 14 CE) definitely requires a more extensive interpretation of any benefits that allow the elderly to stay within their living environments, e.g., financial support for relatives or non-professional caregivers (Art. 18), remote assistance (Art. 22), home care (Art. 23) or even day care or night care residential facilities (Art. 24).

The burden to justify a decision upholding a benefit that entails estranging an older adult from his or her living environment should focus on persuasively arguing why the decision-maker was unable to reasonably accommodate the relevant benefits in order to help the recipient to stay within his or her living environment avoiding the risk of exclusion. This duty to give reasons will apply to the decision mentioned in Art. 28(3) LAPAD (on eligibility) and to the customized care program governed by Art. 29 LAPAD.

It is questionable if the aforesaid burden to "provide a persuasive justification" or "duly give convincing reasons" is as stringent as the one arising from raising the preponderance of the evidence standard. Because, in my view, it remains unclear whether the rule on raising the general standard of proof in administrative procedures can be directly inferred from Art. 50 CE together with Art. 14 CE. Perhaps, it should be expressly provided as a statutory requirement.

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# The organization of nursing homes as local policymaking

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## 1. BACKGROUND

Local governments are the closest to citizens and the community. Therefore, they are the main actors when it comes to delivering welfare or social services, fulfilling the binding requirement laid down in Art. 50 of the Spanish Constitution (CE). Under this constitutional provision, public authorities must protect and provide for the elderly.[338] To do so, local authorities are duly empowered and have many available instruments and resources. The long list of welfare services and benefits shows that welfare has a broad scope, also evidenced by the wide array of services and benefits provided by local bodies. These aspects have been discussed in this book.

Welfare's broad scope and diversity also affects public policies specifically targeting the elderly, including residential care. Although authorities tend to prioritize active ageing or "ageing in place" policies,[339] nursing homes and other forms of residential care still play a *prominent role* in local welfare provision.[340] This is why we focus on them as one of the cornerstones of local policymaking and, in particular, of elderly-related policies.

Indeed, the importance of this political dimension is often downplayed (and rightly so), or even disregarded altogether, in many legal studies on the arrangement and organization of welfare. Note that this contrasts with political science works. This is obviously not a problem for legal studies, since they actually focus on legal aspects. The analysis thereof could be distorted or tainted by political matters. However, keep in mind that law and politics often run parallel, *influence each other* and overlap, as is the case with other fields such as economics or technology. This is also true for local government, where the political and administrative or decision-making spheres are closely and distinctly intertwined.

[338] Rodríguez de Santiago, J.M. (2007), La Administración del Estado social, Marcial Pons, Madrid, p. 44.
[339] Díez Sastre, S. (2020b), "Los servicios municipales para mayores en el entorno rural y urbano," Istituzioni del Federalismo, 2/2020 (pending publication), p. 441-460 (p. 449).
[340] Egea, A. and Navarro, C. (2019), Mayores. Análisis comparado de políticas locales de mayores en municipios de la Comunidad de Madrid, Instituto de Derecho Local-UAM, Madrid, p. 59.

Consequently, decision-making (including the arrangement and organization of welfare services) relies on a legal and political perspective, particularly considering the democratic legitimacy of local bodies and, particularly, municipalities. For many decisions, this twofold perspective is implemented by *entirely separating* both domains. Accordingly, when public authorities want to implement a local policy, they first carry out a legal assessment to gain an understanding of what is legally feasible or allowed. And, finally, within those legal boundaries, public authorities make a political decision. Let us imagine, for instance, a municipality in need of IT support. It may rely on a private provider or hire new staff. Both organizational decisions are available to the local government, and making one or the other only has an internal dimension, i.e., it has no impact vis-à-vis third parties.

This decision-making outline applies to many local government decisions, where the legal implications of one decision or another do not vary significantly. Nevertheless, there are certain political decisions with a major legal impact. If so, law and politics are no longer entirely separate domains, since political decision-making affects the local policy's legal framework. The legal framework's prominent role is displayed in *two stages*: (i) prior to making the decision, in order to learn the available ways and resources; and also (ii) after the decision has been made, since the legal framework affects many aspects regarding the implementation and enforcement of the decision.

Therefore, at early stages of public policymaking it is often necessary to combine legal and political aspects, particularly considering that the legal effects of many decisions do not only have internal implications, but also effects vis-à-vis third parties. In other words, citizens can be affected by a political decision that *has significant legal implications*, e.g., water supply management decisions. If water supply is directly managed by local authorities, citizens will only be required to pay a public fee, whereas if local governments rely on indirect management approaches citizens will be charged a private price. These decisions are present in the welfare sector, which is characterized by its focus on citizens' living conditions.

The purpose of this chapter is to examine the potential impact of applicable legal frameworks on the organization and arrangement of nursing homes, particularly at a local level. We intend to come up with an *outline* including the various options available verifying their potential implications. This approach to decision-making allows to fine-tune public policy decision-making to find the alternative that best suits the political objective, in order to ensure that such political objective be fulfilled.

## 2. TYPES OF FACILITIES

As is well-known, the map of residential homes for the elderly is defined by its diversity, particularly regarding ownership and management. Although residential facilities are mostly

a public service,[341] there are *privately owned* and *publicly owned* facilities, as well as nursing homes held by non-profit organizations. On top of that, there is a third type of facilities, i.e., *public-private* facilities.

### 2.1. Public facilities

Public facilities are established by public entities that exercise their powers to create them, with no involvement of private parties in management. However, there can be *more than one public entity* involved in public facilities, including local governments.

First, local bodies are entitled to open a nursing home and *manage it directly*, whether setting up publicly-held companies or enterprises under Art. 85(2)(a) of the Spanish Local Government Act (*Ley de Bases del Régimen Local*, LBRL) or not. Such a nursing home will be (i) included in the relevant regional welfare system; and (ii) subject to the applicable regional provisions.

Nevertheless, a public body may open a nursing home and *commission* or *outsource* its management to other entities. This would not qualify as direct management. In these facilities, public authorities would be responsible, i.e., held liable, for the residential services (*Trägerschaft*), whereas the actual provision of the services (*Leistungserbringung*) is commissioned or delegated to a different entity. There are various instruments for this twofold involvement (e.g., commissioning arrangements or *encomiendas de gestión*; transfers or delegations; and agreements), the most remarkable being the so-called *concierto* or public-private arrangement.

### 2.2. Private facilities

These facilities are operated by private entities and public authorities are not accountable for the services provided therein. We refer to private nursing homes, resulting from free enterprise (i.e., the freedom to establish and conduct a business) and subject to public oversight. Private facilities thus play a minor role in the study of nursing homes at a local level, since *there is no public action or public authorities involved* in the establishment or operation thereof. However, it is relevant that there be more or fewer private nursing homes when assessing the various political options, e.g., not opening a public facility because there are already enough private residential homes.

[341] Ortega Bernardo, J. (2017), "Servicios públicos e iniciativa económica local," in Velasco Caballero, F. (Dir.), Tratado de Derecho económico local, Marcial Pons, Madrid, p. 73-104, § 6.

### 2.3. Public-private facilities

These are also called "mixed facilities." Let us recall the aforesaid distinction between accountability for the service and the actual provision thereof. Having that in mind, in public-private facilities, public authorities are still responsible (i.e., held liable) for the service, but the *factual provision* thereof rests on private entities or actors. There are two instruments used to get private entities involved in the provision of nursing home services: concession agreements and the so-called *conciertos* or public-private arrangements.

#### *2.3.1. Facilities subject to public-private arrangements or* centros concertados

Public-private arrangements are one of the most widespread instruments in the organization of welfare services. Typically, they qualify as non-contractual instruments used for organizational purposes (see Art. 3 of Aragón Regional Act 11/2016). However, they can also qualify as a specific type of the formerly applicable contract for the management of public services under Art. 277 of the Spanish Public Procurement Act (TRLCSP). Another defining feature of welfare public-private arrangements is that they allow for the provision of welfare services through entities funded, authorized and overseen by public authorities (Art. 101(1) of the Andalusia Regional Act on Welfare Services). Thus, there are *non-contractual public-private arrangements* and *contractual arrangements*, depending on the applicable regional welfare legislation. In both cases, the subject-matter of the arrangement is usually (i) to reserve public places for the relevant welfare service; or (ii) fully managing the service at a private facility (see Art. 62(1)(a) of the Basque Country Act on Welfare Services or Additional Provision 3(3) of Catalonia Regional Decree 3/2016).

In any case, these public-private arrangements for welfare provision seem to be considered as *organizational instruments or approaches*, which are therefore beyond the classic distinction between direct and indirect management. It remains unclear whether this organizational approach arises from a traditional understanding of direct and indirect management or, rather, from an interpretation of such distinction which is overly based on public procurement law. Indeed, public-private management approaches (also referred to as joint management) often fall outside the scope of the direct-indirect management framework.[342] In any event, there are no grounds to consider public-private arrangements as a *tertium genus* on top of direct and indirect management approaches.[343]

[342] López de Castro García-Morato, L. (2017), "Formas de gestión de los servicios públicos locales," in Velasco Caballero, F. (Dir.), Tratado de Derecho económico local, Marcial Pons, Madrid, p. 105-152, § 28.

[343] Domínguez Martín, M. and Chinchilla Peinado, J.A. (2019), "La acción concertada en la gestión de servicios sanitarios en la Ley 9/2017 de contratos del sector público," Derecho y Salud, no. 29, p. 186-193 (p. 191); Díez Sastre, S. (2020a), "La acción concertada como nueva forma de gestión de los servicios sanitarios," in Agulló

Contractual public-private arrangements or *conciertos* have been traditionally based on the long-standing "contract for the management of public services." However, the 2017 Spanish Public Procurement Act (*Ley de Contratos del Sector Público*, LCSP) removed this type of contract, so now we must determine in which category do these *conciertos* fall. A good starting point could be the 34th Additional Provision of the LCSP, which generically refers to the new service concession contract if there are any references to the contract for the management of public services. Nonetheless, there is only room for this referral as long as this regulation "fit," or "be in line with," the previous one. Self-evidently, such a generic or undetermined referral will not work for all types of public service management contracts, but *only for service concession contracts*, since only these public contracts allow for transferring the operating risk to the contractor. This "risk transfer" is one of the defining features of service concessions (Art. 15(2) LCSP).

Consequently, the successor of the former public-private arrangement in public service management contracts is the *service contract*.[344] Therefore, it would be wrong to consider that contractual arrangements for welfare provision entail transferring the risk (even if only because the demand for public services is guaranteed).

Nevertheless, defining public-private arrangements for welfare provision as a non-contractual instrument raises major concerns from the perspective of public procurement law. There are two public procurement levels, i.e., the EU level and the domestic or national sphere. First, note that the *European notion of public contract* is a functional concept, where neither the *nomen iuris* nor the domestic categorization matter, i.e., it is irrelevant whether national provisions categorize the relevant instrument as a "contract," an "agreement" or otherwise (see CJEU Judgment in Case C-382/05, par. 30). We must begin by verifying if public-private arrangements for welfare provision (*conciertos*) fall under the European concept of public contract. If so, we will check whether EU public procurement directives fully apply thereto. The LCSP transposed the public procurement directives almost word by word, so we will only refer to the LCSP in case there are any significant differences or remarkable aspects.

Under Directive 2014/24/EU of the European Parliament and of the Council, of 26 February 2014, on public procurement and repealing Directive 2004/18/EC (Directive 2014/24), the European notion of public contract has four *distinct features*: parties, subject-matter, remuneration and award requirements or what Directive 2014/24 calls "selectivity." Under EU law, the parties to the contract must be contracting authorities and economic operators.

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Agüero, A. (Dir.) and Marco Peñas, E. (Ed.), Financiación de la sanidad. Tributación, gestión, control del gasto y reparto constitucional del poder financiero, Tirant lo Blanch, Valencia, p. 232-261 (p. 252).

[344] Villar Rojas, F.J. (2018), "El impacto de la nueva Ley de Contratos del Sector Público en la gestión de los servicios públicos locales," Anuario de Derecho Municipal 2017, no. 11, p. 75-101 (p. 86-87).

This poses no issues regarding nursing home arrangements, since a party to the *concierto* is always a public body. The subject-matter raises no concerns either, having regard to the thorough definitions of welfare services in the *Common Procurement Vocabulary*.

Remuneration could create problems, since compensation is not always clear. Some pieces of regional legislation on *conciertos* for welfare provision state that the price or compensation payable to the provider must not exceed the costs incurred thereby to deliver the services, thus not including any profit (see Articles 4(g) of Aragón Regional Act 11/2016 and 87(2)(g) of the Valencia Regional Act on Welfare Services). Many regional provisions prefer non-profits to be parties to these *conciertos*[345] (see Art. 88(1) of the Valencia Regional Act on Welfare Services). That is why they set that cap on remuneration. Note, however, that according to the CJEU, an arrangement or *concierto* cannot fall outside the concept of public contract merely because the remuneration paid to the relevant non-profit organization remains limited to reimbursement of the expenditure incurred to provide the agreed service (see CJEU Judgment in Case C-113/13, par. 37).

It is also worth discussing the award requirements in public-private arrangements or *conciertos*, whether or not they involve non-profit organizations. Article 11(6) LCSP states that welfare provision by private entities falls outside the scope of the LCSP if the contracting authority simply covers the cost of the services or grants unlimited or uncapped permits or authorizations−as long as this whole procedure ensure sufficient advertising and comply with the principles of transparency and non-discrimination. Article 11(6) LCSP is worded just like Recital 114 of Directive 2014/24. From this perspective, only if these *conciertos* were concluded with all the private entities that requested it, there being no actual "selectivity," could they benefit from not being subject to public procurement law, as long as the entities met the pre-established requirements. However, an overview of regional welfare legislation shows that there are *many and extremely detailed criteria* used to select the relevant entity, including quality of the service, territorial presence or experience. In sum, there are indeed award requirements, i.e., an actual selection or "selectivity," and thus public-private arrangements for welfare provision or *conciertos* are subject to EU public procurement directives and to the LCSP.

Articles 74 *et seq.* of Directive 2014/24 allow these *conciertos* for welfare provision to rely on a *simplified framework* for the award requirements applicable thereto (thus falling under the scope of the Directive). The rationale underlying EU legislation is that social or welfare service contracts have a limited cross-border dimension, so that they should only be subject to Directive 2014/24 if they exceed the EUR 750,000 threshold under Art. 4(d) or if they actually have a cross-border dimension. And, if they ended up falling within the scope of the Directive, they would be subject to the applicable specific regime allowing to award the

[345] Díez Sastre (2020a: 244, 257).

contracts directly to eligible entities (see Art. 75 of Directive 2014/24). If the welfare or social service does not exceed that threshold, the LCSP applies. Note that the LCSP provisions resemble those of the Directive for any contracts not exceeding the threshold and thus not subject to the Directive.[346]

In sum, public-private arrangements for welfare provision *must qualify as public contracts*. It is unimportant whether regional legislation defines these *conciertos* as non-contractual organizational instruments if, following a thorough analysis, it is safe to conclude that they have the defining features of a public contract. This has major implications regarding (i) access to the arrangement; and (ii) the selection of the private providers involved therein. On top of that, qualifying these *conciertos* as public contracts has additional legal implications that will be discussed below.

### *2.3.2. Commissioned nursing homes*

Commissioned nursing homes are another type of mixed or public-private facilities. In contrast with facilities subject to public-private arrangements or *centros concertados*, commissioned facilities do not reserve places at public authorities' request. Rather, public authorities commission a private entity to *fully manage* a publicly owned nursing home. Therefore, commissioned facilities supplement *centros concertados*, since the main difference between them is the facility's ultimate owner. Commissioned nursing homes are not as common as the *centros concertados*.

Note that public authorities are entitled to award a service concession to a private entity managing a publicly owned facility provided that the private provider be transferred the operating risk. Furthermore, as pointed out before, it is unlikely that in such a contract (i.e., involving that kind of welfare services) demand not be guaranteed. In any case, we would have to carefully examine the (i) *transfer* or *allocation of risks* in the contract; and (ii) specific circumstances, in order to determine if it qualifies as a service concession or a service contract.

It is worth noting that some Autonomous Regions have passed legislation allowing public authorities to commission the full management and provision of welfare benefits to private entities relying on a "non-contractual organizational instrument" other than the aforesaid public-private arrangement for welfare provision or *concierto*. See, for instance, the so-called "commissioned management" or *gestión delegada* governed by the Third Additional Provision of Catalonia Decree 3/2016. Commissioned management resembles *conciertos*, although there is a significant difference: the relevant welfare or social service is provided in publicly owned facilities. To verify if they are non-contractual instruments, we must rely on

[346] Díez Sastre (2020a: 242).

the criteria provided for the *conciertos sociales*, although it seems unlikely that they qualify as something other than contracts.

### 2.4. Significant relationships and interactions between actors involved

It is worth examining the significant relationships and interactions at each facility. First, in public nursing homes there can be *twofold* relationships: the public authority-resident binomial. If two different public bodies were involved (one of them being held liable and another public entity providing the service), there would be a *threefold* relationship: the accountable public body-public provider-resident trinomial. Public-private facilities, whether commissioned facilities or subject to *conciertos*, also have trinomials with accountable public bodies, public providers and residents. Finally, we only found twofold relationships in private nursing homes, although with no administrative or public roles: the private entity-resident binomial.

In public-private facilities there are threefold interactions and we also found *three distinct legal relationships*. The public body-resident binomial will be referred to as the "basic relationship," where the public body is responsible for guaranteeing that the service be provided. Additionally, public bodies and service providers have a cooperation relationship, whether contractual or non-contractual, depending on the circumstances. Finally, providers and residents have a relationship based on the actual provision of the relevant benefit or service.[347]

## 3. STANDARDS TO COMPARE THE DIFFERENT FACILITIES' LEGAL FRAMEWORKS

The previously discussed framework is sufficiently comprehensive so as to examine nursing homes' legal regimes and their impact on elderly policymaking by local governments. To do so, we relied on a set of *standards* or *benchmarks* that allow to (i) go over major aspects of residential homes' legal framework; and (ii) compare the effects of providing the service one way or another. We relied on the following standards or benchmarks: (i) activities comprised by the service provision; (ii) public oversight of providers; (iii) public authorities' accountability and liability regime; (iv) economic or financial framework; and (v) organizational and staff requirements applicable to providers.[348] These are not the only possible standards, but they most certainly seem the most significant.

[347] Rodríguez de Santiago (2007: 81, 116).

[348] Castillo Abella, J. (2020), "Tipología y régimen jurídico de los sujetos gestores de residencias de mayores," InDret, no. 2/2020, p. 457-507.

### 3.1. Activities comprised by the service provision

First, it is worth determining those factors actually defining the welfare service received by residents. We focus on which elements shape the actual welfare provision and to what extent, relying on the classic duality *legal activity* and *factual (non-formal) activity*. This distinction further clarifies that there are two backbones defining the final service or benefit received by nursing home residents: (i) the previous requirements specifying how to provide the service; and (ii) how the service is actually delivered.

The distinction between legal and factual activity revolves around the activity's actual impact on legal situations and legal status rather than any formal aspects. Therefore, legal activity qualifies as any legal action creating, modifying or terminating legal situations, which contrasts with factual (non-formal) activities.[349] Consequently, administrative acts, administrative rulemaking and administrative contracts or arrangements would qualify as legal activity.

Contrasting legal and factual activity could lead to a misconception, i.e., that factual activity falls outside the scope of the applicable law. This would be a wrong assumption, since both are fully subject to the law, which regulates them and renders them *law*ful or *unlaw*ful.[350] The difference between both forms of activity is that factual action is *not able to modify legal status*. Put differently, factual activity is not binding.[351]

From this perspective, we obviously need the law or legal activity to *define, on an* ex ante *basis*, the relevant welfare service (including residential homes). However, legal regulation is not equally intense or stringent in all facilities. Nursing homes where public authorities are held liable (public and public-private facilities) are more densely regulated than private residential homes.

Interestingly enough, factual activity truly shapes residential home services.[352] Legal provisions cannot get into the actual delivery of the service or benefit, since regulation can only provide how to deliver the service, but it cannot perform it *de facto*. Such *de facto* delivery is entirely left for factual activity.

Factual or *de facto* activity greatly differs depending on whether public authorities are held liable for the service. If so, the service qualifies as a public benefit, and therefore it is mostly

[349] Stober, R. and González-Varas Ibáñez, S. (1995), "Las actuaciones materiales o técnicas," Revista de Estudios de la Administración Local y Autonómica, no. 267, p. 573-590 (p. 574); García de Enterría, E. and Fernández, T.R. (2017), Curso de Derecho Administrativo, Volume I, 18th ed., Thomson Reuters-Civitas, Cizur Menor, p. 867.

[350] García de Enterría and Fernández (2017: 867-868).

[351] Stober and González-Varas Ibáñez (1995: 573-574).

[352] Rodríguez de Santiago (2007: 110).

governed by public law provisions, either directly or indirectly. Performance or delivery rests with public authorities (in public facilities) or private entities commissioned to that end (public-private facilities). Private nursing homes also include strictly private services that cannot qualify as public. Therefore, these services are subject to private law provisions. Yet again, we can see the *varying scopes* of provisions governing residential homes: in public and public-private facilities they seek to regulate as much as possible the delivery of the service or benefit and the quality thereof, whereas the purpose of regulating private nursing homes is solely to ensure a minimum standard.

These preliminary insights already show the impact of this first legal benchmark for residential homes. Having regard to (i) the legal activity's varying scope and intensity; and (ii) the existing differences in the factual activity, it is worth concluding that the *scope of action* is different in each type of facility. There is very little room for action in public nursing homes, but private facilities enjoy the broadest scope of action. As a result of these varying scopes, providers and residents are more or less free to define or shape the services or benefits. In private residential facilities, a resident could agree with the providers that he be placed in a single room or be served specific food. However, this would be very unlikely in nursing homes where public authorities are held liable, since these tend to be highly standardized and strict.

Nevertheless, these varying scopes for action allow for a different interpretation, based on the *public authority's ability to influence* the welfare provision altogether, including both legal and factual activities. Local governments have limited rulemaking power in this field, but we can assess their influence on each facility's residential service as long as they have some connection to it. They have the highest influence on public facilities. Local bodies will control and perform any aspects related to the welfare service to be provided at nursing homes owned thereby. As for residential facilities managed by local bodies (although owned by separate public entities), the managing public authority will mostly influence the *de facto* delivery of the service. Public bodies will have significant power over public-private nursing homes promoted by them, but not as much as in public facilities, because they would not be factually delivering the service. Within the context of public-private residential homes, both the public body's legal activity and oversight of private providers play a major role. Finally, public authorities barely have any influence on private nursing homes. Indeed, public bodies have little leverage on the provision of residential home services other than the oversight and inspections performed before the facility started to operate. And keep in mind that these inspections often relate to other fields of local action, such as urban development or health-related matters.

Accordingly, when it comes to nursing home policymaking, it is worth comparing (i) the scope of action left to residents and providers; and (ii) the relevant public body's loss of influence or leverage over the welfare benefit or service. Thus, we could seek a fair balance

between granting more freedom to private actors and the need to ensure high-quality nursing homes.

### 3.2. Public oversight of providers

The oversight of nursing homes is another significant standard to understand the legal framework applicable thereto. Administrative oversight of nursing homes can be either *ex ante* or *ex post*. Also, as discussed above, oversight does not always have the same purpose: sometimes oversight provides for minimum requirements, whereas other forms of control may be aimed at ensuring compliance with stringent quality standards. In any case, this study only focuses on the requirements specifically applicable to residential homes, regardless of any other requirements (e.g., related to urban development or health).

See below an outline of the oversight conducted on nursing homes.[353] This outline evidences the importance of *ex ante* controls of welfare services, including local nursing homes. Keep in mind that local authorities can be *either the owners of the facility or the providers*. Therefore, they should not only be concerned with obtaining the relevant permits and certificates, but also with making sure that any private entities commissioned to manage public-private nursing homes have them.

#### *3.2.1.* Ex ante *controls*

##### *3.2.1.1. Permits*

The difference between *ex ante* and *ex post* oversight is based on the *start of the activity*. Administrative permits are a paramount example of *ex ante* controls. Permits seek to prevent potential damage arising from the activity to be authorized or mitigate the impact or scope of such activity.[354] Permits will allow to make sure that nursing homes comply with the relevant building, operational, staff and training requirements as well as with any quality standards. Note that such standards must remain in place for as long as the service is being provided (see Art. 85(2) of the Andalusia Regional Act on Welfare Services). There are other oversight instruments (e.g., prior communications).

An in-depth analysis of regional legislation on nursing home permits shows right away that *not all of them* require administrative permits to operate. Generally, the competent regional authority or department must grant a permit for private facilities (See Articles 71(1) of the Catalonia Regional Act on Welfare Services, 55(2) of the Madrid Regional Act on Welfare

[353] Due to their specificity and short duration, this study does not examine the specific provisions on nursing homes passed during the 2020 state of emergency resulting from the COVID-19 health crisis.
[354] Laguna de Paz, J.C. (2006), La autorización administrativa, Thomson-Civitas, Cizur Menor, p. 37.

Services and 59(1) of the Basque Country Regional Act on Welfare Services). Now, do publicly owned facilities require an administrative permit to operate? Some Autonomous Regions, like Valencia, require that all nursing homes (including those owned by local or regional bodies) obtain a permit (see Art. 58(3) of the Valencia Regional Act on Welfare Services, providing that the requirements are the same as the certification requirements imposed on private nursing homes). Other regional governments, like that of the Basque Country, solely require private facilities to apply for a permit (see Art. 59(1) of the Basque Country Regional Act on Welfare Services). In other regions, only those nursing homes owned by regional (not local) bodies are exempt from obtaining a permit (see Art. 4(3) of Castilla y León Decree 2/2016).

Not being required to obtain a permit does not mean that public residential homes need not fulfill the same requirements as private facilities. Most likely, public nursing homes are not required to apply for a permit because it is deemed unnecessary that public authorities grant a permit to themselves, as long as the applicable standards are met. Even if no permits are required, all Autonomous Regions do require a *certification* that the facility meet any applicable requirements. Such certification can be a report, a decision or resolution issued by the head of a regional department or something else.

Interestingly enough, the Basque Country Regional Government requires more than one permit. More specifically, it requires two permits for *different purposes*, i.e., with a different subject-matters: (i) a permit prior to building the facility; and (ii) another permit or authorization before it starts to operate. However, regional authorities (e.g., Madrid, Valencia or Catalonia) usually require just one permit, prior to the start of activity.

#### *3.2.1.2. Certification*

Whereas permits seek to lay down minimum requirements applicable to all residential homes, certificates ensure that such residential homes comply with *stringent quality standards* on top of the aforesaid minimum requirements. Certificates are often required from privately owned facilities where public authorities remain accountable (public-private nursing homes). Accordingly, certification seeks quality assurance, whether the service be provided by public bodies or private entities cooperating therewith.[355] Certification procedures often resemble permit applications, but sometimes they work like some sort of contractual verifications.

Therefore, any facilities that want to participate in competitive procedures or tenders to be awarded public contracts or *conciertos* must previously obtain (and keep) their certification

[355] Fernández Ramos, S. (2008), "Los centros residenciales para personas mayores en el marco del sistema de servicios sociales," in Zurita Martín, I. (Coord.), Responsabilidad derivada del internamiento de personas mayores dependientes en centros residenciales, Bosch, Barcelona, p. 93-156 (p. 119).

(see Articles 84(1) of the Andalusia Act on Welfare Services, 63(1) of the Valencia Act on Welfare Services and 75(2) of the Catalonia Act on Welfare Services). Certificates are thus useful to know about the minimum quality standard provided by each type of facility. Public nursing homes are rarely required to obtain a certificate (i.e., to meet certification requirements) for the same reason they are exempt from applying for permits. In Andalusia, Catalonia or the Basque Country, public facilities are not required to obtain a formal certificate. In Valencia, all residential homes that are not owned by regional authorities must be duly certified. Under Art. 12 of Madrid Regional Act 11/2002, nursing homes based in Madrid will only be subject to certification requirements if they exceed a certain number of residents. Regardless if public nursing homes must obtain a certificate, they are required to meet the same quality standards as facilities subject to certification requirements. This is a way of guaranteeing the *quality of the public nursing home network*. However, this does not mean that a non-certified private facility does not meet the same (or even higher) quality standards, it is just that such private facility is not forced or required to maintain such high standard.

### *3.2.2.* Ex post *controls*

As noted before, there are also controls performed after the residential homes have begun providing their services. Such *ex post* control is conducted by public authorities exercising their *powers of inspection* under the applicable regional welfare legislation. Inspections largely have preventive purposes, although they can also find and correct breaches or certain legal violations.[356]

Under the applicable sector-specific legislation, these powers of inspection are often granted to regional authorities. In fact, regional governments are responsible for (i) the welfare system (including residential homes); and (ii) authorizing the provision of nursing home services. These powers of inspection cover all types of facilities, whether public, public-private or private. Inspections may be conducted on any kind of residential home, but not all inspections will be equally stringent or, better said, subject to the same standards. This will depend on the requirements to be complied with by each facility. Therefore, the reference or standard for inspections may be either the permit requirements or the certification requirements. These are referred to as *general powers of inspection*, governed by generic provisions in the applicable legislation.

Additionally, inspection powers over nursing homes can be based on the specific contract or arrangement for publicly owned facilities with third party providers. Public procurement law

[356] Rivero Ortega, R. (2000), El Estado vigilante, Tecnos, Madrid, p. 79-82; Fernández Ramos, S. (2002), La actividad administrativa de inspección. El régimen jurídico general de la función inspectora, Comares, Granada, p. 21-25.

grants powers of inspection to public authorities so as to oversee and control the appropriate provision of the service by the commissioned provider. Note that these inspection powers have been strengthened by the so-called "monitoring authority" under Art. 62 of the Spanish Public Procurement Act (LCSP). Art. 190(II) LCSP provides that contracting authorities will have general powers of inspection over contractors. Moreover, Art. 287(2) LCSP specifically provides for such inspection powers regarding service concessions, and Art. 312(e) for service contracts when they qualify as public contracts or entail the direct provision of benefits. Considering that these inspection powers are only granted to public authorities depending on how they manage their services, they will be designated as *special powers of inspection*. As for public-private arrangements or *conciertos*, special powers of inspection will be granted as long as (i) the rules specifically governing the *concierto* so provide (see Art. 15 of Extremadura Regional Act 13/2018); or (ii) they be set out in the arrangement itself. Indeed, inspection powers could very well qualify as mandatory content within the *concierto* (Art. 9(e) of Madrid Regional Decree 2/1990).

The general and special powers of inspection are similar but not identical (hence the distinction). General inspection powers are held by regional authorities, whereas special powers of inspection are often granted to the contracting public body, which may not be a regional authority. Also, general powers of inspection cover all facilities, whereas special inspection powers only apply in publicly owned facilities with an outsourced provision of services (i.e., if the owner of the facility and the service provider are different entities). This has a twofold implication for local bodies. On the one hand, they will only be entitled to inspect public-private facilities *established thereby*. On the other, facilities *managed by local authorities* under an arrangement with regional governments may also be subject to inspections.

Accordingly, private nursing homes will only be subject to regional inspections. Public nursing homes as well, unless they be owned by regional authorities and the services be provided by a different public entity, e.g., a local body. Public-private residential homes may be inspected by one or two inspection authorities, depending on whether the contract or arrangement was concluded with a regional body or with a different public authority. This benchmark allows local authorities to verify (i) if they have inspection powers over other facilities; and (ii) the scope of the powers of inspection over their own nursing homes.

### 3.3. Liability

A central aspect of nursing homes' legal frameworks is their liability regime. It is worth clarifying if public authorities will be liable for any damage to residents or third parties arising from the provision of residential home services. First, we could rely on the *summa divisio* (or long-standing separation between public and private law) and argue that public

facilities will be subject to the state liability framework−i.e., liability of public authorities or public tort law−whereas private residential homes will be subject to private tort law. Public-private facilities will have a combined regime. However, this is overly simplistic. See a more thorough analysis below.

First, let us differentiate between two *separate activities* that can give rise to liability: (i) the factual (non-formal) provision of the service or benefit; and (ii) oversight or control of the facilities. This section focuses on these two activities. Although there are more situations that could give rise to liability regarding nursing homes, (i) and (ii) above allow to clarify, for the sake of explanation, the difference between public, public-private and private facilities.

### *3.3.1. Liability arising from the factual provision of the service*

#### *3.3.1.1. Public facilities*

Liability in public nursing homes is governed by the General Act on Public Authorities (LRJSP) and the General Act on Administrative Procedure (LPAC). There is no doubt that public nursing homes provide "public services" within the meaning of Art. 106(2) of the Constitution (CE). It does not really matter whether there is a twofold or a threefold relationship (a binomial or a trinomial) at the public facility, since all actors involved will be public authorities except the residents. The only difference between binomials and trinomials in this case would be that, in threefold relationships, damage could be *attributed to* both public authorities, thus being *both* liable vis-à-vis the injured party, who would claim liability from *both* of them.

As is well-known, Spain's liability framework for public authorities has been for decades a *strict liability* regime. This was confirmed by Constitutional Court Judgment (STC) no. 112/2018. The Court clarified that Art. 106(2) CE provides for a *strict* state liability regime that must remain a *strict* liability framework no matter what, regardless of how the regime be implemented in statutory provisions (legal basis 5). In spite of the Court's bold statements and arguments, whether there is a strict liability standard raises some concerns. In fact, there are many scholarly works expressing these concerns, as well as a bold dissenting opinion issued against STC no. 112/2018 by Justice Andrés Ollero.[357] For now, we will rely on Justice Ollero's dissenting opinion and state the following: public authorities are subject to a strict liability regime, but negligence can also apply as a liability standard within this framework.

[357] See a more comprehensive analysis in Castillo Abella (2020: 478 *et seq.*).

Otherwise, negligence ends up playing a part in liability cases, distorting them and giving rise to elusive lines of reasoning.[358]

#### *3.3.1.2. Private facilities*

At the other end of the spectrum we can find private facilities. The wrongful or harmful provision of services in private nursing homes is only attributable to the managing private entity. Thus, only the private entity managing the facility will be held liable. Private tort law applies to these cases. The major difference between private tort law and the abovementioned strict liability regime is that, under non-strict or negligent-based liability frameworks (private tort law) the defendant will only be held liable if it is *negligent or otherwise at fault* (Articles 1191 and 1902 of the Spanish Civil Code or CC), whereas the strict liability standard requires that the defendant be held liable regardless of its intent or mental state when committing the action.

Liability in private residential homes will be mostly *contractual* (see Articles 1101 *et seq.* CC), since the contract governing the service provision will include additional services such as accommodation, food or medical care. Liability arising from ancillary obligations that have not been expressly provided in the contract will also qualify as *contractual*, since such ancillary obligations are directly related to the contractual obligations.[359] Keep in mind that there are some significant, and applicable, consumer protection provisions (see, for instance, Art. 148 of Decree 1/2007 on the liability for harm to consumers arising from the misuse of health services).

#### *3.3.1.3. Public-private facilities*

Finally, public-private facilities pose two liability-related issues: the applicable *liability standard* and *jurisdiction*. Both are complex and challenging matters that do not allow for indisputable or clear-cut solutions. Rather, we should find reasonable approaches consistent with the legal system as a whole.

Prior to dealing with these two issues, it is worth discussing allocation of liability in different cases. In public procurement, the default rule is that *contractors be held directly liable*, unless the damage arises from a public authority's instruction (see Articles 196, 288(c) and 312(b)

[358] Mir Puigpelat, O. (2000), La responsabilidad patrimonial de la Administración sanitaria. Organización, imputación y causalidad, Civitas, Madrid, p. 68-75; Doménech Pascual, G. (2019), "Sobre el poder explicativo del análisis económico del Derecho. En especial, del Derecho de daños," InDret, no. 2/2019, p. 22-24.

[359] Asúa González, C.I. (2014), "Responsabilidad civil médica," in Reglero Campos, L.F. and Busto Lago, J.M. (coords.), Tratado de responsabilidad civil, 5th ed., Pamplona, Thomson Reuters-Aranzadi, Pamplona, p. 697-815 (p. 729-730).

LCSP). This is in line with the rule that contracts be performed at the risk and expense of the contractor, and it is due to the fact that, generally, there is no causal link between the harm caused to third parties and public action. In the absence of an instruction issued by the relevant public authority, public bodies may only be held liable for oversight-related activities, not for the factual provision of the service.

Therefore, the applicable liability standard in claims for damages at public-private facilities remains unclear. Some argue that private tort law should apply on the grounds that the contractor is a private entity or because the strict liability regime (i.e., for public authorities) should be considered exceptional.[360] However, there are arguments in favor of applying the strict state liability regime governed by the General Act on Public Authorities (LRJSP), remarkably that the service provider's liability standard should be established *objectively*, so that the state liability regime be applicable as long as a public authority remain accountable for the service.

When dealing with public services, the applicable liability standard should not be based solely on a public authority's *organizational decision*.[361] If it did, the service recipients' safeguards would vary depending on the management approach taken by the relevant public authority.[362] This is not a matter of having a more stringent or guarantee-oriented standard. Rather, it is about having the same standard all along for both public authorities and third party providers.

Applying the same standard to public authorities and their service providers avoids certain issues that may arise when *both are liable* vis-á-vis the injured party. A wide variety of liability standards will most likely distort potential subrogation claims or claims for repayment, either because liability is not clearly allocated or because if the other standard had been applicable the counterparty would not be liable for repayment.

A service provider in a public-private nursing home being a private entity does not necessarily entail that it be entirely subject to private law provisions. The liability standard

[360] Galán Galán, A. (2010), "La responsabilidad por los daños causados por la actuación de las entidades privadas colaboradoras de la Administración," in Galán Galán, A. and Prieto Romero, C. (Dirs.), El ejercicio de funciones públicas por entidades privadas colaboradoras de la Administración, Huygens, Barcelona, p. 85-123 (p. 112-115).

[361] Gamero Casado, E. (2018), "Responsabilidad extracontractual de la Administración y del contratista por daños a terceros en la ejecución del contrato," in Gamero Casado, E. and Gallego Córcoles, I. (Dirs.), Tratado de contratos del sector público, Tirant lo Blanch, Valencia, p. 2151-2208 (p. 2174).

[362] Pérez Monguió, J.M. (2008), "La responsabilidad patrimonial de la Administración por los daños causados a personas mayores ingresadas en centros residenciales," in Zurita Martín, I. (Coord.), Responsabilidad derivada del internamiento de personas mayores dependientes en centros residenciales, Bosch, Barcelona, p. 157-179 (p. 174).

in state liability frameworks can be detached from its original target (i.e., public authorities) and be applied to private service providers.[363]

Due to its complexity and broad scope, we will only provide a brief overview of the second liability-related issue, i.e., jurisdiction. There have been several turning points and milestones in public procurement law with regards to jurisdiction. There is extensive case law of the Supreme Court Chamber for Conflicts of Jurisdiction. In its rulings, this Special Chamber argues that judicial administrative courts shall have jurisdiction over claims for damages against private entities involved in public services *only if the public authority accountable for such service* is a co-defendant in the case, i.e., if the claimant brings its claim against both the provider and the relevant public authority (see the Supreme Court Special Chamber Orders no. 5/1998, 30/1998, 19/2000 and 10/2018). Otherwise, if the claim is only brought against the private entity, civil courts will have jurisdiction to hear the case (see Court Orders no. 8/2003 and 9/2019). Both the Civil and Judicial-Administrative Chambers of the Supreme Court have adhered to this line of case law (see Supreme Court Judgment no. 598/2012). Interestingly enough, in Judgment no. 4/2003, the Supreme Court's Special Chamber for Conflicts of Jurisdiction argued that, since the central element of damage had been the public health system's malfunctioning, the case could only be heard by judicial administrative courts. However, this line of reasoning has not been embraced in subsequent rulings.

The previous considerations cannot be applied *tout court* to liability cases in public-private arrangements or *conciertos*. In my opinion, the same rules can apply to both contractual or non-contractual arrangements, since they are *equivalent*. As for non-contractual arrangements, the contractual rules could apply by analogy.[364] In these *conciertos*, public authorities commission a service provision to a third party although remaining accountable for such service (*Trägerschaft*), subject to the same conditions that would apply if the parties were subject to a contract. Consequently, the commissioned provider subject to the arrangement would be held liable for any damages arising from the factual provision of the service, excluding any harm caused as a result of a public authority's instruction. Note, however, that public authorities can be automatically held liable for the harmful outcome (i.e., the resulting damage) at a public-private facility if so stated in the *concierto* (Supreme Court Judgment of 15 June 2011).

### *3.3.2. Liability arising from public oversight*

[363] See Velasco Caballero, F. (2014), Derecho público *más* Derecho privado, Marcial Pons, Madrid, § II.9.

[364] Cano Campos, T. (2002), "La analogía en el Derecho administrativo sancionador," Revista Española de Derecho Administrativo, no. 133, p. 51-88 (p. 56-57).

Public oversight or control over nursing homes can also give rise to liability. Since local authorities do not conduct *ex ante* controls, we will focus on *liability arising from* ex post *oversight*.

As discussed before, *ex post* controls are to be performed by public authorities with powers of inspection. These inspection powers require that the empowered authority exercise them, in order to make sure that the entities subject to oversight comply with any applicable requirements. Since it is an obligation incumbent upon public authorities, non-fulfillment would be *a breach of proper conduct*,[365] i.e., failure to supervise properly or to exercise due diligence (*in vigilando* liability or fault in supervising). There are two essential requirements to find this breach:

(i) That if the relevant public authority had acted properly, hypothetically it would have avoided the damage,[366] where proper conduct should be defined based on the average service standards;[367] and

(ii) That such proper conduct would have modified the course of action leading to the damage.[368]

In order to find this fault in supervising, the relevant public authority need not be a guarantor. Under the state liability regime, public authorities may be held liable even if they are not specifically placed in the position of ensuring compliance.[369] However, the fact that public authorities be granted certain powers of inspection does not entail that they be required to avoid any potential damage, i.e., public authorities do not provide "universal insurance." Finally, keep in mind that any liability arising from the public authority's fault in supervising will apply together with the liability of the party *actually causing the damage*. They will be jointly and severally liable.[370]

So, local bodies are required to carry out inspections *wherever they have established public-private facilities*, but they only have special powers of inspection (see section 3.2.2 above). The liability standard to find this fault in supervising (i.e., *in vigilando* liability) is very stringent and therefore most claims are dismissed. However, it most certainly opens a new front for public authorities, although only in public-private nursing homes.

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[365] Beladíez Rojo, M. (1997), Responsabilidad e imputación de daños por el funcionamiento de los servicios públicos, Tecnos, Madrid, p. 197; Gallego Córcoles, I. (2008), "Daños derivados de la ejecución de contratos administrativos. La culpa in vigilando como título de imputación," Revista de Administración Pública, no. 177, p. 265-291 (p. 266).

[366] Mir Puigpelat (2000: 243).

[367] Gallego Córcoles (2008: 269).

[368] Beladíez Rojo (1997: 197); Mir Puigpelat (2000: 243-244); Gallego Córcoles (2008: 290).

[369] Gallego Córcoles (2008: 289-290). The counterargument can be found in Mir Puigpelat (2000: 241-244).

[370] Beladíez Rojo (1997: 207).

### 3.4. Economic regime

It is also worth examining the residential homes' economic regime and, more specifically, the regulation of the amounts paid by residents in exchange for the service. Let us recall the long-lasting scholarly debate (also found in the case law) about public fees and private prices (*tasas* and *tarifas* in Spanish) regarding payment for public services. Constitutional Court Judgment (STC) no. 63/2019 has been the last milestone in this debate. In this judgment, the Court ruled on the constitutionality of various LCSP provisions. Note that STC no. 63/2019 found that Art. 289(2) LCSP was constitutional. Article 289(2) provides that any payments received by commissioned providers or concessionaires in exchange for their services (i) must be designated as *tarifas*; and (ii) should be defined as *public payments not qualifying as taxes*. The unconstitutionality appeal brought before the Court argued that there had been a violation of (i) the Constitutional Court's doctrine on Art. 31 CE (since the LCSP amended the legal framework of public fees or *tasas*); and (ii) the *reserva de ley principle*[371] under Art. 31(3) CE, since the principle would not be fulfilled by the loose regulation of Art. 289 LCSP.[372]

The Constitutional Court allows for the cost of public services managed through direct forms of management to be covered by public fees or *tasas*, and for the cost of indirectly managed services to be covered by *tarifas*. The Court assumes that both *tasas* and *tarifas* would be public payments, although only *tasas* would qualify as taxes. Keep in mind that public payments are mandatory contributions (STC no. 185/1995) levied or collected in the public interest (STC no. 182/1997). On top of that, in order to qualify as taxes, they must be aimed at financing public expenditure (see Art. 31(1) CE). Despite this general allocation of *tasas* to direct management and vice versa, we should examine, on a case-by-case basis, whether these public fees and prices meet the applicable requirements according to the Constitutional Court's interpretation of Article 31 CE.

Consequently, public facilities will charge public fees or *tasas* unless payment is voluntary. If so, i.e., if payment is not mandatory, residents would be paying the so-called "public prices." Commissioned facilities will be subject to Art. 289(2), and therefore payments will

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[371] "*Reserva de ley*" has often been translated as "statute reservation," "statutory requirement," "requirement for a statute" or "to be defined by an act of parliament." This notion refers to a principle under which a matter must be regulated by a statutory provision or act of parliament. See http://legalspaintrans.com/legal-translation/how-to-translate-reserva-de-ley-into-english-using-a-descriptive-strategy/ or http://transblawg.eu/2014/12/18/gesetzesvorbehalt/ for further details.

[372] See Castillo Abella (2020: 490 *et seq.*) for a more detailed analysis of Judgment no. 63/2019. See a critical review of the ruling in Martínez Sánchez, C. (2019), "La constitucionalidad de las nuevas prestaciones patrimoniales de carácter público no tributario. Análisis de la STC 63/2019, de 9 de mayo, appeal no. 739/2018," Revista de Contabilidad y Tributación (CEF), no. 441, p. 113-123.

take the form of private prices or *tarifas*. Nonetheless, if payment is not collected compulsorily, residents' payments would still be called *tarifas* although they would not qualify as public payments.[373] There is no provision equivalent to Art. 289 LCSP for facilities subject to service contracts, but payments can also be designated as "public payments not qualifying as taxes," since there is no exhaustive list or a specific category[374] and their defining features tend to be the same as those of *tarifas* paid in concessions. The same applies to residential homes subject to non-contractual arrangements, since defining the payments as public payments and/or taxes is based on Art. 31 CE, not on the rules governing the public-private arrangement (*concierto*).[375] Finally, note that private nursing homes charge private prices, which nonetheless must sometimes be reported in writing to the relevant regional government (see Art. 123 of the Andalusia Regional Act on Welfare Services).

Determining the nature of payments, i.e., qualifying them, is far from unimportant. There are three aspects where the definition of these payments is decisive. First, when determining whether the *reserva de ley* principle applies or not, considering that the regulation of public payments, in general, is subject to such principle (Art. 31(3) CE), as well as the regulation of taxes in particular (see Art. 133(1) CE). Second, when it comes to determining the amounts due or payable by recipients, since *tasas* are subject to the *principle of equivalence in public revenue and expenditure* (applicable to local governments under Art. 24 of the Local Tax and Treasury Act). Finally, there is another aspect: the management and administration of the collected revenue. Collection of payments in private facilities will be subject to private law, whereas *tasas* and public prices can be compulsorily collected through enforcement proceedings. Collection of *tarifas* remains unclear.

Nevertheless, there are some specificities affecting the local government level. First, the *reserva de ley* principle is beginning to be *more loosely applied* regarding local tax regulations, since (i) these are passed by elected bodies (the local council); and (ii) under the Constitution, local bodies are entitled to the so-called local autonomy (see STC no. 233/1999). Thus, we expect local governments to have a broader scope to shape the relevant *tasas* and *tarifas*. Second, the *principle of equivalence in public revenue and expenditure* does not have the exact same implications for local governments as it does for regional or

[373] Tornos Mas, J. (2017), "La tarifa como contraprestación que pagan los usuarios en el contrato de concesión de servicios de la Ley 9/2017 de contratos del Sector Público," La Administración al día (INAP), 12 December 2017 (last accessed on 3 December 2018), p. 11. Available at: http://laadministracionaldia.inap.es/noticia.asp?id=1508103

[374] Villar Rojas (2018: 98).

[375] Art. 112(1) of the Valencia Regional Act on Welfare Services has defined as "*tasas*" or "public fees" any payments made by residents of public and public-private facilities in Valencia provided that the place therein has been assigned through an administrative decision. The purpose of this is to standardize or homogenize the various regimes applicable in both types of facilities, precisely because they are managed differently. However, despite this provision, it is still necessary to define the payment on a case-by-case basis.

national authorities. Article 7 of Act 8/1989 on Public Fees [*tasas*] and Public Prices (applicable to national authorities) provides that *tasas* should be as close as possible to covering the cost of service. However, Art. 24(2) of the Local Tax and Treasury Act sets out that the cost of service should be the *upper limit* or *cap* for local public fees. Hopefully, this slight difference in wording will have no practical implications. The remaining payments (*tarifas*, and public prices) will exceed the overall cost of service. The third specificity for local authorities relates to the *collection* of *tarifas* paid in concessions. Indeed, local bodies are entitled to collect these *tarifas* through enforcement proceedings (see the Decree of 17 June 1955, Articles 128(4)(2), 130 and 155(1)). This provision is probably applicable to *tarifas* charged in nursing homes other than commissioned facilities.

This economic benchmark clearly evidences the implications of management approaches on such significant aspects as residents' payments or the applicability of the *reserva de ley* principle. This is why local bodies should take these factors into account to better align their policy objectives and their results regarding nursing homes.

### 3.5. Organizational and staff requirements

Our last standard or benchmark relates to organizational and staff requirements. Indeed, certain provisions governing nursing homes clearly seek to influence the facility's *organization and staff policy*. This has to do with the abovementioned limits on the legal ability to shape residential home services. It is impossible to pre-determine and solve in advance all the needs and circumstances that may arise during the service provision. Since these situations cannot be anticipated or scheduled, it becomes necessary to implement organizational procedures and techniques allowing for nursing homes' proper functioning.[376]

Accordingly, the applicable rules and regulations provide for similar *organizational requirements*−although they may be more or less stringent−for the various facilities. These provisions refer to (i) creating joint or mixed participation bodies within the nursing home (Articles 57 of the Catalonia Regional Act on Welfare Services, 101 of the Valencia Regional Act on Welfare Services and 41 of the Madrid Regional Act on Welfare Services); and (ii) implementing complaint mechanisms and suggestion boxes for residents (either as an organizational requirement or as rights for residents). See, in this regard, Articles 9(1)(j) of the Basque Country Regional Act on Welfare Services, 4(j) of the Madrid Regional Act on Welfare Services, 10(e) of the Catalonia Regional Act on Welfare Services and 9(e) of the Andalusia Regional Act on Welfare Services.

There is another significant aspect: the major role played by the *person actually providing the service or benefit*, as stated in many pieces of regional legislation (see Articles 43(2) of

[376] Rodríguez de Santiago (2007: 110, 151-154).

the Catalonia Regional Act on Welfare Services and 52 of the Castilla y León Regional Act on Welfare Services). It is key that residents trust the nursing home's staff or that such staff be trained and aware of residents' needs. Otherwise, these residential facilities will not provide a high-quality service tailored to the needs of older adults. This is why sector-specific legislation contains rules particularly governing staff requirements. Certain provisions (i) impose training requirements and mandatory resident-staff ratios (Articles 43(1) of the Catalonia Regional Act on Welfare Services and 59(2) of the Andalusia Regional Act on Welfare Services); (ii) require that training programs be implemented (e.g., Articles 121 of the Valencia Regional Act on Welfare Services, 53 of the Castilla y León Regional Act on Welfare Services or 45(1) of the Catalonia Regional Act on Welfare Services); and (iii) enhancing or regulating working conditions, particularly regarding job stability and social acknowledgment (Art. 43(1) of the Catalonia Regional Act on Welfare Services), work-life balance and the implementation of gender-based perspectives (Art. 64(4) of the Basque Country Regional Act on Welfare Services), or the listing of employees' rights and duties (Articles 63 of the Andalusia Regional Act on Welfare Services, 56 of the Castilla y León Regional Act on Welfare Services and 12 and 13 of the Valencia Regional Act on Welfare Services). These aspects clearly show that even the worker's attitude has a decisive impact on job performance and thus on the service provided to residents.

Not all of these requirements are imposed on every facility. The way of enforcing and ensuring compliance with these requirements are that they be prerequisites to obtain permits or certificates before they begin to operate. The requirements to obtain permits and certificates could be similar or even identical, but certification requirements tend to be more stringent−as could be expected having regard to the ultimate purpose of permits and certificates.

When it comes to assessing nursing home services, local bodies (as any other public authorities) should also consider these aspects. These rules on organization, procedure and staff cannot ensure, by themselves, the best possible service. However, they are suitable proxies for each facility's quality. It is not only a matter of information or figures ensuring a high-quality service. It is also about introducing a human element at the core of the service provision.

## 4. CONCLUDING REMARKS

Throughout the study we provided an analysis of nursing homes focusing on the most salient aspects of their legal framework. We were trying to show that any decisions on the arrangement and management of these residential homes have major implications that go way beyond purely organizational aspects. These implications are clearly noticeable in

significant areas such as liability for damages caused at nursing homes or residents' payments.

Local authorities play a prominent role in the provision of residential home services. They are granted powers in the field and they have a distinct position allowing them to shape the whole nursing home network through local policymaking. These local policies will not only be based on political preferences, but also on legal matters that significantly affect the residential home services enjoyed by residents. Sound decision-making in this area should most certainly take into account the implications of all the available options when it comes to shaping the service. The benchmarks and standards examined herein evidence that, in the abstract or on an *a priori* basis, there are no right or wrong answers. We did find certain trends stemming from the various applicable regulations. Since there is some degree of uncertainty, all the assessments and analyses should be performed on a case-by-case basis in order to make the best possible decisions. These standards and benchmarks should be useful for this.

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# Nursing homes and urban development

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## 1. ELDERLY HOUSING

### 1.1. Data

Demographic research shows that the world's population is ageing, although not at the same rate in all countries. In Spain, the population aged 65 and older ("older adults" or "seniors") amounts to 19.4%, but in 2029 it will increase to 24.9% and in 2066 it will rise to 34.6%.[377] These are very telling data, particularly considering the significant increase in the population *aged 80 or over*. In 2016, 6% of the population were eighty-year-olds. According to the estimates, this percentage will increase to 7% in 2026 and 18% in 2066.[378] Such a demographic trend, related to the so-called "old-old," "oldest old" or "super old," is decisive for housing policymaking and particularly for assisted living facilities and nursing homes.[379] Indeed, the "super old" often lose personal autonomy as they age, thus requiring assisted living care or other forms of assistance or support.

Seniors over 65 usually live at their *lifetime home*. Also, most of them (89.3%) own that home, usually relying on mortgage loans. Persons at *assisted living facilities* only amount to 4% overall.[380] According to 2019 estimates, 322,180 people aged 65 and older were permanently living at nursing homes and similar facilities.[381] Nevertheless, after breaking

[377] Spanish National Statistics Institute (INE), *Proyección de la Población de España 2014–2064* (www.ine.es).
[378] ANTONIO ABELLÁN GARCÍA, ALBA AYALA GARCÍA, ROGELIO PUJOL RODRÍGUEZ (2017), "Un perfil de las personas mayores en España, 2017. Indicadores estadísticos básicos," *Informes envejecimiento en red*, no. 15, p. 29.
[379] FRANCISCO VELASCO CABALLERO (2018), "Envejecimiento demográfico y Derecho urbanístico," *Indret*, no. 4/2018, p. 1-55 (p. 3).
[380] ANTONIO ABELLÁN GARCÍA, ALBA AYALA GARCÍA, ROGELIO PUJOL RODRÍGUEZ (2017), "Un perfil de las personas mayores en España, 2017…," cit., p. 46. In Germany, the average is 7% (*Bundesministerium für Verkehr, Bau und Stadtenwicklung, Wohnen im Alter, Schriftenreihe Forschung*, no. 147, p. 27), which is reasonable, since Germany has a slightly higher share of population aged 65 and older (21%).
[381] ANTONIO ABELLÁN GARCÍA, PILAR ACEITUNO NIETO, ISABEL FERNÁNDEZ MORALES, DIEGO RAMIRO FARIÑAS, ROGELIO PUJOL RODRÍGUEZ (2020), "Una estimación de la población que vive en residencias de mayores," *Envejecimiento en red*, 24 April 2020.

down that figure into age groups, we noticed that most older adults over 80 are institutionalized, i.e., they live permanently at these facilities. Accordingly, within the 65-69 age group, only 4 out of 26 seniors live at nursing homes, whereas in the 85 to 89 segment there are 30 people living at a facility and only 11 who have stayed at their home. These data are further confirmed by the following: on average, 79% of the aged population living at nursing homes or similar facilities (i.e., the institutionalized population) is 80 or older. Thus, it is safe to conclude that, for the "super old," who are more likely to lose personal autonomy, nursing homes are more of *a need* rather than a choice, and they must be considered as such by every municipality's urban development and planning. Finally, note that out of the total number of beds at residential facilities for the elderly, 271,696 are *private*, and only 101,289 are public.[382] This public-private ratio has an impact on urban development law, which must ensure that there be both public use and private use plots to enable this public-private duality regarding elderly care.

### 1.2. Housing

The elderly have specific, and not homogeneous, housing needs and priorities. These needs and priorities vary not only depending on age. Mostly, they differ based on the person's health and degree of dependency. Therefore, housing policies catering to the elderly must be *heterogeneous* or *diverse*. Broadly, there are two alternatives regarding elderly housing and residential needs: (i) *permanence*, i.e., to remain in their home of choice; or (ii) the *break* entailed by moving elsewhere (usually to a nursing home with other older adults).[383] Policymaking in the field of urban development and housing can most certainly help the elderly in staying at their lifetime home. However, urban development and housing policies should not disregard the alternative that seniors move to residential facilities (i.e., the break), particularly for the "super old."

In the 1960s, environmental gerontology studies advocated that the elderly should be re-accommodated in environments other than their original communities better suited for their specific needs.[384] This is the origin of *nursing homes* ("*residencias*" in Spanish or

[382] ANTONIO ABELLÁN GARCÍA, MARÍA DEL PILAR ACEITUNO NIETO, DIEGO RAMIRO FARIÑAS (2019), "Estadísticas sobre residencias. Distribución de centros y plazas residenciales por provincia. Datos de abril de 2019," *Informes Envejecimiento en Red*, no. 24, October 2019, p. 16.

[383] IRENE LEBRUSÁN MURILLO (2019), *La vivienda en la vejez: problemas y estrategias para envejecer en sociedad*, Consejo Superior de Investigaciones Científicas, Madrid, p. 185.

[384] JOSEPH D. TEAFF, M. POWELL LAWTON, LUCILLE NAHEMOW DIANE CARLSON (1978), "Impact of age segregation on the well-being of elderly tenants in public housing," *Journal of Gerontology*, no. 33, p. 130-133; JOHN L. LEWIS Y ARLENE GROH (2016), "It´s About the People…: Senior´s Perspectives on Age-Friendly Communities," in THIBAUD MOULAERT AND SUSANNE GARON (Eds.), *Age-Friendly Cities and Communities in International Comparition, Springer*, New York, p. 81-98, p. 84.

"*Pflegeheime*" in German), usually in the outskirts of cities. These gerontological views changed during the late 20th century. Gerontologists began to have the older adults' *original environment* in greater consideration, thus giving rise to the so-called "ageing in place" approach.[385] Consequently, public policies should focus more on accessibility and safety of the older adults' original homes. Currently, assuming the general "ageing in place" perspective, we emphasize the distinction between the home and the community (the neighborhood), so that the ability to live in one's own environment does not necessarily mean "ageing at home." Ageing "in place" can be in a home other than the original or lifetime one, although the urban and social environment must remain the same ("lifetime neighborhoods"). Ageing in one's own environment mostly refers to the urban space (the neighborhood or the community) where the older adult has led his or her life or part thereof. This is why "ageing in place" can be at homes other than lifetime houses as long as the original social environment remains the same.[386]

In any case, despite that "ageing in place" approaches are widespread and widely accepted, ageing in place policies have some limits. First, there is *choice*, i.e., older adults may decide to live at a nursing home with other seniors or to stay at home living alone. Second, there are *physical needs*: certain impairments can prevent an older adult from living in his or her lifetime home. Third, there could be *income-related* issues: not all seniors have sufficient financial resources available to live independently, otherwise being forced to move to a public residential facility. Consequently, "ageing in place" policies should not be exclusive. Rather, they must leave room for housing alternatives, i.e., moving to a nursing home or an assisted living facility.

In sum, residential homes and facilities for the elderly should never be ruled out as a housing alternative for urban rulemaking, even acknowledging that "ageing in place" should be prioritized. Additionally, decision-makers and rulemakers in the field of urban planning and development should assume that the residential services for the elderly are inherently *diverse*. Nursing homes and facilities do not only vary depending on whether they are public or private. The older adults' degree of functional ability also plays a role. On this basis, we can differentiate between assisted living facilities and nursing homes.

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[385] HANS-WERNER WAHL AND LAURA N. GITLIN (2007), "Environmental gerontology," in JAMES BIRREN (editor), *Encyclopedia of Gerontology: Age, Ageing and the Aged, Elsevier*, Oxford, p. 494-501; JON PYNOOS, CHRISTY M. NISHITA, CAROLINE CICERO, R. CARAVIELLO (2008), "Ageing in Place, Housing and the Law," *The Elder Law Journal*, no. 16, p. 77-105, p. 79; GRACE M.Y. CHAN, VIVIAN W.Q. LOU, LISANNE S.F. KO (2016) "Age-friendly Hong Kong," in THIBAUD MOULAERT AND SUSANNE GARON (EDS.), *Age-Friendly Cities and Communities in International Comparition*, Springer, New York, p. 121-151 (p. 130); IRENE LEBRUSÁN MURILLO (2019), *La vivienda en la vejez*…cit., p. 56.

[386] JOHN L. LEWIS AND ARLENE GROH (2016), "It's About the People…," cit., p. 84.

First, there are *assisted living facilities* or *senior living homes*, i.e., individual or family dwellings *specifically* designed for the elderly. They are accessible and have friendly and suitable spaces, as well as certain forms of assistance or support for the community as a whole. There are many types of senior living providers worldwide. For instance, Germany has the so-called "*Wohngemeinschaften*" and "*Servicewohnungen*."[387] Also, it is worth highlighting the "Green House Project"[388] in the US and the "elderly cohousing" alternatives in the United Kingdom.[389] This housing approach is often considered the best for fairly autonomous elders, since they are granted a broad scope of independence (thus securing their individual dignity).[390] In Spain, "elderly homes" or "*viviendas de mayores*" and "sheltered apartments for the elderly" are on the rise, although there are not too many yet.[391] They are all different: some of them resemble separate/independent apartments with little communal assistance, whereas others could be considered similar to traditional nursing homes.[392]

Second, there are *nursing homes*, where older adults live in a community with other seniors. More often than not, they all have the same or similar needs and abilities. Nursing homes can be publicly owned and managed−fully within the regional welfare system−or private. Note that private facilities are steadily becoming more common.[393]

Keeping in mind all of these nuances and specificities is essential, because they have an impact on housing policies and urban development law. Urban planning provisions should most certainly promote "ageing in place" (indeed, the current policies on urban refurbishment do) but they should also foster communal senior living. In fact, urban development legislation

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[387] See the full categorization of elderly housing in Hamburg (including nursing homes) in the local building and planning guidelines (*Bauordnungen*): Bauprüfdienst 2/2008: "Besondere Wohnformen für Behinderte und ältere Menschen Baufaufsichtliche Anforderungen."

[388] K. DAYTON E ISRAEL DORON (2012), "Municipal Elder Law: A Minnesota Perspective," The Elder Law Journal, no. 20, p. 33-70 (p. 67).

[389] LAURA LÓPEZ DE LA CRUZ (2018), "Las viviendas colaborativas para mayores como modelo habitacional para la promoción del envejecimiento activo. Aspectos sociales y jurídicos," in LAURA LÓPEZ DE LA CRUZ AND JOSÉ ANTONIO SÁNCHEZ MEDINA, *Soluciones habitacionales para el envejecimiento activo: viviendas colaborativas o cohousing*, Tirant Lo Blanch, Valencia, p. 121-159 (p. 137).

[390] ATUL GAWANDE (2014), *Being Mortal. Medicine and What Matters in the End*, Metropolitan Books, New York, p. 79.

[391] In 2003, the city of Madrid only offered 4 buildings including "elderly apartments" (General Directorate for Urban Development Plan Services, *Los equipamientos para mayores en la planificación y gestión urbanística del municipio de Madrid*, 2003, p. 20).

[392] This is the case of "elderly housing" in Castilla La-Mancha, under Articles 10 and 11 of the Order issued by the Regional Welfare Department on 21 May 2001 (Regional Official Gazette, no. 75, 29 June). See LÓPEZ DE LA CRUZ (2018), "Las viviendas colaborativas…," cit, p. 124.

[393] In 2003, the city of Madrid had 210 nursing homes, and only 15% of them were public (General Directorate for Urban Development Plan Services, *Los equipamientos para mayores en la planificación y gestión urbanística del municipio de Madrid*, 2003, p. 22).

and plans seek to advance "ageing in place" whilst allowing for other *housing and residential alternatives*. This mostly revolves around *land use designations* regarding specific plots, in order for nursing homes or assisted living facilities to be built there.

## 2. CONSTITUTIONAL REQUIREMENTS APPLICABLE TO URBAN PLANNING AIMED AT PROMOTING NURSING HOMES

Under Articles 47 and 50 of the Spanish Constitution (CE), when making planning, development and zoning decisions, we must strike a fair balance between (i) the constitutional requirement to seek appropriate housing for the elderly; and (ii) other legal interests at stake to be safeguarded.[394] Consequently, since there are constitutional requirements directly applicable to urban planning, land use regulations *must make available* various housing alternatives for the elderly based on their needs. On top of this constitutional requirement regarding nursing homes and other communal facilities, there are additional obligations arising from welfare and housing legislation.

*Welfare* mostly falls within the scope of regional governments. Regional welfare legislation governs specific, customized services and benefits for eligible recipients in need, including dependent persons. What really defines these benefits and services are the recipients or addressees, which may include the elderly.[395] According to welfare legislation, residential homes for the elderly qualify as welfare assistance.[396] Such legal consideration must be included in *urban development and planning rules*. So, if a regional government passes welfare legislation requiring that there be certain nursing homes or sheltered apartments,[397] the local provisions on urban planning should implement this requirement to the extent possible, making available these supplementary residential facilities and alternative housing approaches.

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[394] JOSE MARÍA RODRÍGUEZ DE SANTIAGO (2007), *La administración del Estado social*, Marcial Pons, Madrid-Barcelona, 2007, p. 49.

[395] Art. 20(1) of Madrid Regional Act 11/2003, of 27 March, on Welfare Services; Act 5/2003, of 3 April, on the Care and Protection for the elderly in Castilla y León; Art. 7(g) of Catalonia Regional Act 12/2007, of 11 October, on Welfare Services; Castilla y León Regional Act 16/2010, of 20 December, on Welfare Services; Art. 20 of Valencia Regional Act 5/1997, of 25 June, on Welfare Services; Andalusia Act 6/1999, of 7 July, on Care and Protection for the Elderly; Articles 25(j) and 58(3) of Andalusia Act 9/2016, of 27 December, on Welfare Services; Articles 22, 45(2) of Basque Country Act 12/2008, of 5 December, on Welfare Services.

[396] Art. 18(2) of Madrid Regional Act 11/2003; Art. 31(3) of Act 5/2003, of 3 April, on the Care and Protection for the elderly in Castilla y León.

[397] Arts. 14 to 18 of Andalusia Act 6/1999, of 7 July, on Care and Protection for the Elderly; Art. 1 of Madrid Regional Decree 72/2001, of 31 May, Art. 31 of Act 5/2003, of 3 April, on the Care and Protection for the elderly in Castilla y León; 2nd Additional Provision, paragraph (h), of Catalonia Regional Act 12/2007, of 11 October, on Welfare Services; Art. 22 of Basque Country Act 12/2008, of 5 December, on Welfare Services.

Welfare legislation also includes the "principle of solidarity" as one of its guiding principles.[398] Although it is a guiding principle and not a true legal provision binding on local authorities, it encourages and legitimizes urban planning promoting that the costs of elderly assistance be *equally borne by the relevant stakeholders*. These costs can be "socialized" through (i) budgetary allocations (i.e., through public spending relying on tax revenue); and (ii) urban planning instruments. For instance, authorities may *allocate public land* to building public nursing homes relying on the relevant overlays or previous transfers of private plots by stakeholders.

Finally, under welfare law, public benefits and private services must be *complementary*, including the for-profit sector and non-profits.[399] This legal principle requires that urban planning decision-makers combine public land uses (allowing to build public nursing homes) with other land use designations allowing to arrange private facilities. Obviously, there will be a different public-private balance depending on each local government's political priorities. However, the bottom line is that welfare legislation requires that land use designations enable this complementary or supplementing relationship.

*General housing law* includes two primary constitutional provisions that (i) supplement each other; and (ii) are decisive for urban planning decisions regarding the elderly. These provisions are the *freedom to choose the place of residence* (Art. 19(1) CE) and the guiding principle that everyone, obviously including older adults, be entitled to *dignified housing* (Art. 47 CE).

On an *a priori* basis, everyone is free to choose where to live when they grow old. This entitlement qualifies as a fundamental right to *choose one's place of residence* or *freedom of residence* enshrined in Art. 19(1) of the Constitution. It should be considered an effective and enforceable right when the right holder (i.e., an older adult) has sufficient financial resources so as to freely make any housing decision. However, this right is not enforceable in practice−i.e., qualifying as a merely formal entitlement−in the absence of sufficient financial resources to choose accommodation. Keep in mind that the provisions governing freedom of residence fail to mention financial aspects, affordability or older adults' financial

[398] Art. 1(g) of Andalusia Act 6/1999, of 7 July, on Care and Protection for the Elderly; Art. 3(e) of Madrid Regional Act 11/2003, of 27 March, on Welfare Services; Art. 2(e) of Act 5/2003, of 3 April, on the Care and Protection for the elderly in Castilla y León; Art. 5(d) Catalonia Regional Act 12/2007, of 11 October, on Welfare Services.

[399] Art. 7 of Andalusia Act 6/1999, of 7 July, on Care and Protection for the Elderly; Art. 3(i) and Articles 55 to 58 of Madrid Regional Act 11/2003, of 27 March, on Welfare Services; Art. 36 of Act 5/2003, of 3 April, on the Care and Protection for the elderly in Castilla y León; Articles 2(1) and 68 to 70 of Catalonia Regional Act 12/2007, of 11 October, on Welfare Services; Articles 34(1)(d) and 35(2) of Basque Country Act 12/2008, of 5 December, on Welfare Services.

situation.[400] Also, general housing law *seeks* that everyone have *dignified housing* or a *dignified home* within the meaning of Art. 47 CE. Having regard to its recent evolution, Art. 47 (construed both as a right and a constitutional principle) comprises *social cohesion* as an inherent aspect of dignified housing,[401] thereby excluding (i) social or subsidized housing *ghettos*; and (ii) the concentration of elderly housing in specific areas of the city. Therefore, even assuming that it qualifies as a guiding principle (not a binding provision), the constitutional dignified housing requirement should preclude any urban planning provisions that directly or indirectly move older adults away from the city or their communities−including land use designations or zoning regulations that provide for moving seniors to nursing homes away from their lifetime environment.

In Spain, traditional housing legislation has relied on *development-oriented* approaches,[402] e.g., financial aid for building and refurbishment works or launching public housing schemes to tackle housing supply or affordability. This remains the essence of Decree 106/2018, of 9 March, governing the National Housing Plan 2018-2021 (*Plan Estatal de Vivienda*, PEV). Note that the PEV expressly states that it will seek to "facilitate appropriate and dignified housing for the elderly (…)." The financial aid scheme includes economic support for (i) establishing and operating nursing homes; (ii) promoting *special* public housing for the elderly on lease (Art. 65 PEV); and (iii) implementing *social housing* programs[403] seeking the social integration of older adults with financial problems.

As shown above, there are major overlaps and interactions between housing law and urban planning. Housing law needs that urban development provisions *make land available* to implement housing programs. Thus, urban plans should (i) designate or allocate suitable plots for the promotion of special elderly housing; and (ii) provide for free transfers of public use land (also known as "land for public interest purposes") allowing to build houses or public nursing homes for the elderly. Housing law does not specifically provide the location of these plots of land. However, welfare legislation does preclude that older adults be *detached or taken away from their communities*. Therefore, it indirectly prevents that public housing

[400] Constitutional Court Judgment (STC) no. 28/1999, legal basis 7; HERMINIO LOSADA (2008), "Comentario al artículo 19," in MARÍA EMILIA CASAS BAAMONDE AND MIGUEL RODRÍGUEZ-PIÑERO Y BRAVO-FERRER, Comentarios a la Constitución Española, Fundación Wolters Kluwer España, Las Rozas, p. 460-470 (p. 466).

[401] MARTÍN BASSOLS COMA (2008), "Estudio introductorio: la ley 18/2007, de 28 de diciembre, del Derecho a la Vivienda en Cataluña," in JULI PONCE SOLÉ AND DOMÉNECH SIBINA TOMÀS (coords.), *El Derecho de la vivienda en el siglo XXI: sus relaciones con la ordenación del territorio y el urbanismo*, Marcial Pons, Madrid-Barcelona-Buenos Aires, p. 21-48 (p. 27).

[402] JULIO CÉSAR TEJEDOR BIELSA (2010), "Régimen jurídico general de la vivienda protegida" in FERNANDO LÓPEZ RAMÓN (Coord.), *Construyendo el derecho a la vivienda*, Marcial Pons, Madrid-Barcelona-Buenos Aires, p. 309-347 (p. 315).

[403] Arts. 81(1) of the LV-SU; 34(3) of TRC-LU; and Annex IV., paragraph I. 2 LCV-OTUP.

programs for the elderly be carried out in new urban areas away from older adults' lifetime communities.

## 3. URBAN PLANNING REGARDING RESIDENTIAL FACILITIES FOR THE ELDERLY

### 3.1. Designation of land uses: public land versus private land

A large share of older adults are unable to remain in their home of choice. Usually, at least in Spain, this is not an economic matter, since 89.3% of seniors own a house. Although there certainly are older adults that cannot stay at their home for financial reasons, most commonly it has to do with their loss of personal autonomy. If so, older adults have several *assisted living* alternatives at their disposal: "elderly homes" or "*viviendas de mayores*," "sheltered apartments for the elderly" and traditional nursing homes. These housing alternatives will actually exist if so provided or allowed by land use regulations and urban plans. Self-evidently, neither legislation nor the plans actually create housing for the elderly, but they can facilitate, and even *encourage* to some extent, the creation of these senior living alternatives. Legislation does so, mostly, by specifically designating and allocating land uses.

Land use designation through urban planning and development rules can either facilitate or hinder that there be residential units for older adults. After examining regional urban planning law, we found that the various pieces of legislation provide non-exhaustive lists of possible land uses, although they barely lay down any rules on the applicability of the existing land uses in each city. Further specifying the applicability of land uses at a local level is left for the cities' local *urban plans*. Broadly, urban development provisions differentiate between "for-profit land uses," e.g., residential plots, and land "for general interest purposes."[404] This distinction is widespread but not accurate, because plots of land "for general interest purposes" can be either public or private and the latter can also be "for profit." Furthermore, the legal boundary between *public* and *private land for general interest purposes* is essential regarding the applicable legal framework for acquiring the land and subsequently allocating building and urbanization costs among landowners within the same area, sector or development unit.

General land use regulation is supplemented, in each municipality, by *land use rules* set out in urban planning provisions (particularly governing the limits on compatible and associated land uses). Finally, each city's general or comprehensive urban plan *allocates* a specific land use to all plots and buildings within the abstract framework provided by the applicable

[404] JUAN JOSÉ GUARDIA HERNÁNDEZ (2015), "Urbanismo y libertad de enseñanza en la LOMCE: a propósito de la concesión de suelo dotacional público para la construcción de un centro concertado," *Revista de Derecho Urbanístico y Medio Ambiente*, no. 297, p. 17-39 (p. 21).

legislation and the plan itself. Cities will be more or less age-friendly depending on the (i) land use regulation in legislation and plans; and (ii) each municipality's specific land use designations and allocations.

Urban planning law loosely regulates residential facilities for the elderly. Urban planning provisions grant broad discretion to local governments, allowing them to decide if they lean towards a predominantly public or private housing model. If a given city or municipality wants to encourage private nursing homes, it should plan for sufficient "*private land for general interest purposes*" so as to allow for these private initiatives. But, if local governments want nursing homes and elderly care to be a *public service*, they should allocate sufficient *public land for general interest purposes*. Therefore, urban planning decisions somehow predetermine or show the basic political alternatives when it comes to assisted living for older adults: either as a public service or a private service in the general interest. The potential coexistence of private nursing home plots and land designated for public services can be peaceful or give rise to disputes. The allocation of land for residential purposes under the applicable plan could *encourage private nursing homes*, thereby reducing the plots allocated for public facilities. So far so good, but keep in mind that some citizens will not be able to live in private nursing homes for financial reasons. Conversely, an excess of public land for general interest purposes available to build public nursing homes can make private facilities (built on plots allocated a "for-profit land use") economically unfeasible due to a lack of demand.

### 3.2. Types of land uses supporting residential facilities for the elderly

Urban plans in place show that there are currently residential homes for the elderly−e.g., assisted living facilities or traditional nursing homes−built on land *for general interest purposes* (whether public or private) and on *residential* plots (allocated a "for-profit" land use). In other words, not every building used for communal senior living facilities qualifies as a "communal facility" for urban development purposes, where "communal facility" means any building for general interest purposes on land specifically allocated for the provision of services for the community, whether by public or private providers.[405]

[405] MARÍA JOSÉ ROMERO ALOY (2012), "Equipamientos, dotaciones y zonas, por una necesaria clarificación conceptual," *Revista de Derecho Urbanístico y Medio Ambiente*, no. 276, p. 13 to 36 (p. 27). The Sole Additional Provision, paragraph d(5) of Castilla y León Decree 22/2004, of 29 January, approving the General Urban Regulation provides a similar definition of "communal facility" although a little more detailed. Other urban development legal frameworks confuse "plots or buildings for general interest purposes" with "communal facilities," since they define as "communal facilities" certain public areas that do not allow to provide services for the community, such as green and open areas (see Art. 36(2)(b)(1) LM-S).

*Nursing homes* can sometimes be on "communal residential land" or on plots that have been allocated for general interest purposes ("communal facilities"), whether public or private.[406] The definition of these two land uses (residential or for general interest purposes) in the plans is fairly vague and allows for allocating different uses to the same nursing home, depending on perspective.

a) Article 7(3)(2)(b) of the 1997 Madrid General Urban Plan (PGM) defines *communal residential land* as "any plots for the accommodation of groups of people, other than families, with religious, social or similar ties," which definitely comprises nursing homes. Also, the 1976 Urban Metropolitan Plan of Barcelona (PGMB) refers to "communal housing, such as nursing homes, retirement homes or senior living facilities" as examples of residential land uses (see Art. 277 PGMB).[407] Article 7(4)(2)(c) of the Valencia General Urban Plan has a very similar wording.

b) The land use for *communal facilities*, however, revolves around the services tied or more closely related to the building. These services include residential care for the elderly. Therefore, land use for communal facilities means "any land designation seeking to provide education, cultural, religious and health services," including residential care for "specific groups (...) like the elderly" (see Articles 7(7)(1)(2)(c); 7(10)(1)(1)(d); and 7(10)(3)(1)(b)(iv) PGM; see also, with a similar wording: Articles 7(8)(3)(d) of the Valencia General Plan; 6(3)(17) PGMB; and 6(6)(2)(2)(c) of the Seville General Plan). The following will also be considered communal facilities: "nursing homes, whether public or private, social or community centers (...)" (Art. 212(1)(b) PGMB). As shown above, both residential land uses and land uses for general interest purposes allow to build nursing homes. Nevertheless, the specific land use designation promotes or facilitates, to a greater or lesser extent, that these nursing homes be built.

### *3.2.1. Residential uses*

Nursing homes or assisted living facilities may be built on plots allocated a *general residential land use* under the local urban plan. So, admittedly, a public or private nursing home can be built on a residential plot, but such specific land use designation is in *economic*

[406] See, for instance, the privately owned "Residencia Fundación Basílica" in Colmenar Viejo (Madrid) built on two adjacent plots with different land use designations: (i) residential use, with a compatible nursing home use; and (ii) private use for general interest purposes, more specifically, "communal health use."

[407] NOEMÍ BLÁZQUEZ ALONSO AND JOAQUÍN HERNÁNDEZ TORNIL (2017), "El régimen urbanístico de las residencias de estudiantes: a propósito de su nueva regulación en Barcelona," *Revista de Derecho Urbanístico y Medio Ambiente*, no. 318, p. 133-151 (p. 139).

*competition* with other residential uses on the same plot.[408] As a result, perhaps (i) there will be no plots actually used to build nursing homes (since it is not the most profitable residential use) or, if nursing homes are built, (ii) it will be at a high opportunity cost that will only be offset by passing it on to the public or private nursing home developers or to the end users of the relevant residential services (i.e., older adults living at assisted living facilities). Both (i) and (ii) above are inefficient options. So, if urban plans intend to promote communal or group housing for the elderly, they should specifically allocate a *more detailed land use* to the plot, e.g., "communal housing (residential use) for the elderly."

Private residential uses for assisted living facilities include *subsidized housing*, i.e., plots specifically allocated for apartment buildings or units with price caps to make them affordable. As pointed out before, the National Housing Plan 2018-2021 (PEV) encourages subsidized and affordable housing for the elderly. From a strictly urban development perspective, promoting subsidized housing requires that local urban plans have previously allocated and specifically designated sufficient land for this use (i.e., residential use for subsidized or affordable housing), since only this land use designation prevents that land be allocated to more profitable uses.

In a nutshell, if local authorities do not reserve plots for subsidized housing (i.e., preventing any other land uses) and land transfers continue to have a limited scope, subsidized housing units–including special housing for the elderly under the PEV−will not be in consolidated areas of the city and they will be located in new urban developments. From the perspective of freedom of residence, offering special subsidized housing for the elderly is already a successful outcome, even if these affordable housing units are in new urban development areas. However, if all subsidized housing is in newly developed areas (as could be expected) there is no actual freedom of residence for the elderly. Rather, they would be forcefully moved away from their community, as if this was the only option for older adults with functional impairments preventing them from staying at their home of choice.

### *3.2.2. Land for general interest purposes*

Designating plots as *land for general interest purposes* makes it easier to locate nursing homes. A "general interest purpose" land use designation under urban plans precludes certain "for profit" land uses right away (e.g., general residential uses or commercial uses). This *facilitates* locating nursing homes, because these specific facilities compete with fewer alternative land uses for the same land plot (they are only in competition with other "general

[408] JORDI VIGUER PONT (2011), "Régimen Jurídico y desarrollo urbanístico de las residencias universitarias," *Actualidad Jurídica Uría Menéndez*, special issue no. 1, p. 155-162 (p. 162).

interest" land uses). As a result, at least hypothetically, the price of the land plot will be passed on to a lesser extent to the final facility or building.

Aside from the land use designation of a plot as "land for general interest purposes," we should also focus on whether the relevant general interest purposes will be *public* or *private*. Currently, there is no doubt that there can be private communal facilities, i.e., private general interest purposes.[409] Designating a general interest plot as public or private is important for various reasons. First, the public or private allocation determines subsequent *ownership*−public or private−of the relevant nursing home. Second, it matters for *urban management and development*,[410] given that (i) *public* plots for general interest purposes (at least if such purposes have a local scope) will be transferred for free to the local government by the co-owners of the relevant urban unit (see Art. 18(1)(a) of the Spanish Act on Land Use, TRLS); whereas (ii) *private* plots for general interest purposes will remain private, will not be transferred to the local government and can have private nursing homes.

Moreover, when land plots are designated as *public land for general interest purposes*, we should pay attention to whether such purpose has a *city-wide* or *zonal* scope. In other words, we should check if the projected nursing home is supposed to provide a service to a specific area or sector of the city or to the city as a whole. This distinction becomes important when determining (i) the way of acquiring the relevant plot for general interest purposes and, ultimately, (ii) how to pay for that land.[411] Indeed, the cost of land plots allocated for *city-wide* general interest purposes will be covered with local government funds. In turn, plots allocated for *zonal* purposes (i.e., for a specific neighborhood or area) should be transferred to the municipality for free by the relevant unit's co-owners. Keep in mind that defining a public plot for general interest purposes as *city-wide* or *zonal* leads to constant disputes,[412]

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[409] ÁNGEL MENÉNDEZ REXACH (2005), "Contra la privatización del dominio público. La naturaleza demanial de los sistemas generales. Comentario a la sentencia del Tribunal Superior de Justicia de Madrid de 6 de octubre de 2004 (Ciudad del Fútbol de Las Rozas)," *Revista Jurídica del Deporte*, no. 13, p. 15-31 (p. 22); FERNANDO LÓPEZ PÉREZ (2013) "Las dotaciones urbanísticas," in FERNANDO LÓPEZ RAMÓN AND VÍCTOR ESCARTÍN ESCUDÉ (Coordinadores), *Bienes públicos, urbanismo y medio ambiente*, Marcial Pons, Madrid-Barcelona-Buenos Aires-Saô Paulo, p. 49-71, 2013 (p. 58). Clearly: Articles 54(2)(e) and 57(2)(e) LV-SU. On this matter, see: ROSARIO GARCÍA MAZA AND JUAN IGNACIO IZETA BERAETXE (2011), *Manual Básico de Derecho Urbanístico Vasco*, IVAP, Oñati, p. 124. See also: Articles 24 and 37 LCV-OTUP.

[410] IÑAKI LASAGABASTER HERRATE (2008), "Dotaciones públicas, sistemas generales y algunas perversiones del sistema urbanístico," *Revista Vasca de Administración Pública*, no. 6, p. 35-53 (p. 40).

[411] PATRICIA VALCÁRCEL (2005), "Introducción a la gestión de las dotaciones públicas, sistemas generales y dotaciones locales: actualidad de la distinción," *Revista de Derecho Urbanístico y Medio Ambiente*, no. 222, p. 31-62 (p. 55); IÑAKI LASAGABASTER HERRATE (2008), "Dotaciones públicas, sistemas generales…," cit., p. 41.

[412] Supreme Court Judgments (3rd Chamber) of 28 January 2003, 16 December 2005 and 24 June 2015; FRANCISCO JAVIER JIMÉNEZ DE CISNEROS AND JORGE AGUDO GONZÁLEZ (2003), *Expropiación y grandes infraestructuras*, Montecorvo, Madrid, p. 24; PATRICIA VALCÁRCEL (2005), "Introducción a la gestión …," cit., p. 45; FERNANDO LÓPEZ PÉREZ (2013) "Las dotaciones urbanísticas," cit., p. 55.

since it depends on a wide variety of aspects, ranging from the plot's and the city's surface area to the public policy objective pursued by the public land allocation. Regarding public nursing homes, due to cities' geographic and demographic diversity, a single facility can suffice to cover the needs and demand of a small city. In this case we would be dealing with a *city-wide* allocation. Nevertheless, nursing homes in larger cities clearly cover specific neighborhoods or areas of the city. Thus, in practice, public elderly facilities will sometimes be subject to *city-wide* allocations and others to *zonal* land use allocations.

Public nursing homes can be built wherever urban plans designate a plot as land for "housing for general interest purposes" (as in the Basque Country urban development provisions); "public housing in the general interest" (as worded in the Catalonia regional legislation); or "permanent housing on lease" (under the Valencia regional provisions). The recipients or addressees of these housing programs are not the elderly *per se*, but older adults in need, whether permanently or temporarily.[413] In any case, this housing is definitely assistance-based, and therefore it should qualify as *public housing* or *public service housing*.[414] The city's public land for general interest purposes can only be used for residential purposes if such residential purposes are assistance-based. These residential units can be built by (i) a *public entity* (a public housing company);[415] or (ii) *private construction companies*, subject to a public works contract or works concession. Note that in the latter case the concessionaire will subsequently manage or operate the elderly care services and assistance provided in such residential facilities (see Art. 14 of the Spanish Public Procurement Act, LCSP). This shows that the specific land use designation as "public land for general interest purposes"–thus suitable for a public assisted living facility for the elderly−does not predetermine the management approach regarding the subsequent public service. Management can be both direct and *indirect*, and subject to a contract (a service contract or a public service concession) or to an arrangement or *concierto*. Accordingly, a contractor (or a non-profit organization) may provide the assistance and care services inherent to "elderly housing for general interest purposes."

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[413] Art. 17 LV-SU and Art. 16 of Basque Country Decree 123/2012, of 3 July, on Urban Development Standards; Art. 3(j) of Catalonia Act 18/2007, of 28 December, on the Right to a Home; section 2(1)(c) of Annex IV of Valencia Act 5/2014, of 25 July, on Territorial Planning and Zoning. Other statutory provisions generally refer to social housing, without further specifying land use designations. See Articles 36(2)(b) 2 LM-S and 38(1)(d) LCL-U.

[414] JULI PONCE SOLÉ (2008), "La provisión de viviendas destinadas a políticas sociales como servicio de interés general. Servicio público y viviendas dotacionales," in JULI PONCE SOLÉ AND DOMÉNECH SIBINA TOMÀS (coords.), *El Derecho de la vivienda en el siglo XXI: sus relaciones con la ordenación del territorio y el urbanismo*, Marcial Pons, Madrid-Barcelona-Buenos Aires, p. 177-216.

[415] As for Albacete, the public housing company build and manages 17 elderly housing units. The 2017-2019 Madrid Action Plan includes, as specific actions to be implemented, "building sheltered housing enabling an autonomous life for as long as possible" (p. 47, section 2.2.3).

### 3.3. Land use flexibility

In broad terms, both public and private nursing homes and assisted living facilities are encouraged through a flexible land use framework[416] and urban development legislation. So, public and private landowners are entitled to have their land re-designated (from "residential," "commercial" or "for general interest purpose" land uses) to "land for nursing homes or elderly facilities" solely subject to (i) a permit issued by local authorities; or (ii) an affidavit or sworn statement. Such land use flexibility *significantly decreases conversion or transformation costs*, thereby incentivizing new locations for new nursing homes. This flexibility can be achieved by assigning many *compatible land uses* under the local urban plan.

General or specific urban plan provisions already enable certain *compatibilities*. Some plans broadly allow for overlays (e.g., replacing a residential land use designation with a general interest purpose designation; see Articles 12(2)(24) and 12(4)(13)(4) of the Seville General Plan), but others are more restrictive. Plans tend to cap compatible uses. These caps are expressed as percentages or ratios of buildable areas that can be allocated compatible uses. For instance, in Madrid or Valencia, "ancillary" compatible uses can cover up to 50% of the plot's built or developed area[417] (Art. 6(6)(4)(k-1) of the Valencia General Plan). There are more stringent restrictions on the so-called "alternative" compatible uses (in Madrid, they cannot exceed 25% of the buildable area). Other plans require that the relevant compatible use apply to a whole building (see Art. 6(28)(4)(h) of the Valencia General Plan). High compatibility ratios encourage to build new nursing homes on urban plots (see Articles 6(3), paragraphs 36 and 37 of the PGMB). For example, they encourage that new nursing homes be located in buildings that were originally conceived for single-family dwellings or apartments. However, the architectural and constructive specificities of nursing homes can make it hard to locate them even where the plan designated a compatible land use.

Promoting nursing homes through a flexible or loose land use framework only makes sense, from an "ageing in place" approach, regarding plots and buildings located in areas designated for *residential buildings*. However, such compatibility will be meaningless if the land is mainly allocated for commercial or industrial purposes. Commercial or industrial land uses create areas with barely any homes or no residential units whatsoever. Thus, flexible land use

[416] It is similar in Germany, regarding § 3.4 *Baunutzungsverordnung-BauNVO* (Land Use Regulation) of 26 June 1962: GERRIT MANSSEN (2013), "Das Recht der Älteren im Planungs- und Baurecht," in ULRICH BECKER AND MARKUS ROTH, (eds.), *Das Recht der Älteren*. De Gruyter, Berlin, p. 495-505 (p. 503).

[417] Article 7(2)(8)(1) of the PGM provides for a maximum buildable area of 15% for a new authorized land use (after the plan has been modified), and requires that the new compatible use "should neither distort nor interfere with the proper operation and safety of the general interest activities conducted therein."

designations (i.e., increasing compatible land uses) could defeat the purpose of elderly-related provisions: it could lead to the moving of older adults to nursing homes located in obsolete and non-profitable commercial areas (which could rely on such land use compatibility to try to make a profit). As stated before, elderly-related welfare legislation promotes ageing *in place*, not elsewhere (and particularly not in new, non-residential locations).

Land use flexibility can also affect plots allocated for *general interest purposes*, whether public or private. Plans allow for these plots or buildings to include additional ancillary or alternative land uses, although subject to stringent restrictions. Currently, *the replacement of land uses* is limited both when the replacement involves two different general interest uses and, particularly, when a general interest use plot is to be re-designated as residential land (see Art. 7(2)(8)(3) PGM).

a) Actually, urban plans *protect general interest designations*, which are in the general interest of residents (pun intended), by restricting the possibility of replacing these general interest designations with other general interest purpose designations. Some urban plans (see Art. 6(6)(2)(2) of the Seville General Plan) do have a broader scope when it comes to alternative land uses, but others only allow replacements involving same-level general interest uses, and sometimes not even for all general interest purposes. For instance, in Madrid it is permitted to fully replace a "sports use" with a "green area designation," but not with "communal facilities" (see Art. 7(7)(4)(2)(a) PGM), which is one of the land use categories allowing to build nursing homes. As residents in certain neighborhoods age, such stringent restrictions on the replacement of general interest uses can make it hard to adapt the city. Let us think, for instance, in land plots designated for school areas. If a neighborhood or area ages a lot, it will be unnecessary to provide for land plots used to build schools, but it will be essential to have nursing homes.

b) The applicable provisions impose even more stringent restrictions when it comes to re-designating a non-residential plot or building allocated for general interest purposes turning it into a *communal residential use* (e.g., for a nursing home). This is (i) because the newly designated land use supplements the original (main) land use designation and therefore cannot cover the whole plot or building for being ancillary; or (ii) because enforcing this new land use designation requires to amend the applicable urban plan. From this perspective, a way of adapting neighborhoods to ageing processes would be to have plans provide for residential land uses fully interchangeable, with no caps, with general interest plots for schools, culture or sport uses.