

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 authorities⁴⁸ 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.

⁵⁰Jiménez 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).

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 Cerredá, 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 Cerrada, 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 exhausts 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 Catalanian *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

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. M^a. 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.M^a. 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*, Transjuss 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 (2016-2030)” 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 in 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 exemplified⁹³ 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

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.

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 reasonable 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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