LAND USE LAW, HOUSING AND SOCIAL AND TERRITORIAL COHESION

Juli Ponce Solé,
Editor, Translator

A Symposium on
Social and Territorial Cohesion and Public Policies in
Land Use Law, Urban Planning, and Housing
Barcelona, Spain

The Rocky Mountain Land Use Institute

Sturm College of Law, University of Denver

Published by The Rocky Mountain Land Use Institute
Sturm Collage of Law, University of Denver
2255 East Evans Avenue, Suite 404
Denver, CO 80208
http://www.law.du.edu.edu/rmlui

Library of Congress Cataloging-in-Publication Data

Symposium on Social and Territorial Cohesion and Public Policies in Land Use Law, Urban Planning, and Housing (2004: Barcelona, Spain)
Land use law, housing, and social and territorial cohesion / Juli Ponce Solé, editor, translator.
p. cm.
ISBN 0-9770148-4-3 (alk. paper)
1. Housing–Law and legislation--Europe. 2. Housing policy--Europe. 3. City planning and redevelopment law--Europe. 4. Housing--Law and legislation--United States. 5. Housing policy--United States. 6. City planning and redevelopment law--United States. I. Ponce Solé, Juli. II. Institut de Dret Públic. III. Title.
K3550.A6S96 2004
346.04'5--dc22
2006035930

Table of Contents

Preface

The Rocky Mountain Land Use Institute is pleased and privileged to publish in English the entire proceedings of the symposium on Social and Territorial Cohesion and Public Policies in Land Use Law, Urban Planning, and Housing held in Barcelona, Spain on December 16 and 17, 2004. In making these important discussions available to our professional colleagues in the United States and Canada we expand the dialogue and enhance our own understanding of critical community planning, land use regulation and housing programs for the North American context.

Citations and bibliographic notes have been preserved in the style of the respective countries of origin and have only been edited for formatting consistency. Additionally, colloquial phrases, idioms, and word choices of the authors and the translator have been preserved in their original form.

We are grateful to Edward Ziegler, Professor of Law, of the Sturm College of Law, for providing this opportunity for publication in English and for providing editorial comments. We offer thanks to Erin Lieberman, a student at the Sturm College of Law, who assisted in compiling, editing and formatting the text.

James van Hemert
Executive Director,
The Rocky Mountain Land Use Institute
Denver, November 7, 2006

About the Institute

Our mission is to serve the public as the leading interdisciplinary, non-partisan forum for research and education on the legal and public policy dimensions of development, growth management and the environment.

Established in 1992 for the purpose of undertaking education and research programs on legal and public policy issues related to land use and development, the Institute is widely recognized for its conferences, workshops, research projects, and nationally marketed publications. The first annual land use conference was held in 1992, and by 1999 had become the largest land use law conference in the country. The first environmental conference was held in 1998 and has been followed by a variety of specialized conferences and symposia held throughout the Rocky Mountain West.

The Institute operates under the guidance of both regional and national advisory boards, the members of which are leading academics and practitioners in the fields of law, planning, development and design.

Introduction : A Brief General Reflection

Juli Ponce Solé

The articles in this book are the result of a symposium titled *Social and Territorial Cohesion and Public Policies in Land Use Law, Urban Planning, and Housing* that took place in Barcelona, Spain on December 16 and 17, 2004. The symposium was held at the Science Park of Barcelona and sponsored by the Institute of Public Law at the University of Barcelona Law School. I served as coordinator for this symposium which was financed by the government of Spain through the Research Project "Land Use Law and Social Exclusion: The Legal Fight Against Urban Ghettos" *(ref. BJU2003-09694-C02-02).* The conference programme of the symposium is printed in the Appendix to this book.

To facilitate the planning of the symposium and the later writing of the articles for this book, I initially proposed a conceptual framework for analysis of possible issues related to the topic of the symposium. This proposed analytical framework is reproduced in the Appendix. The goal was to suggest a number of potential issues that might be common to the different legal and social systems covered in the articles and to provide the speakers with some idea of the general scope of the symposium.

This framework for analysis provided some common threads linking the speakers' presentations and their reflections on several important concepts. These concepts included the notions of sustainable development and social and territorial cohesion, and the ideas of social inclusion and exclusion. These concepts initially arose out of different science backgrounds but today all these concepts have a relevant legal association and context.

As regards *sustainable development*, here we are faced with a true legal principle, included in several regional legal frameworks concerning territorial planning and urban development in Spain. This is the case, for example, of the legal regulations in the Madrid region, particularly art. 3.2. b of Law 9/2001, 17 July concerning Land. This principle presents three well-known aspects: economics, environment and social, with the latter being the one on which most attention will be focused in this book.[1]

Secondly, the concept of social cohesion is used in connection with the concepts of economic and territorial cohesion, social integration and inclusion or social exclusion. Despite the fact that these concepts are complex and sometimes problematic in different contexts (social, political, legal...), the basic meanings of these concepts as used in this work perhaps should be briefly discussed.

Social cohesion refers to a concept close to the idea of solidarity, which plays an important role in France. The concept of solidarity is important in Duguit's thinking and in his conception of this idea as a relevant element of the notion of public service (*service publique*), referred to under the heading of social interdependence.[2] This idea in French legal thinking may be seen in the important

---

[1] On the concept of sustainable development in the sphere of urban development, see in the Spanish jurisprudence Menéndez Reixach, A., *Urbanismo sostenible, clasificación del suelo y criterios indemnizatorios: estado de la cuestión y algunas propuestas*, RDUyMA, 200, March 2003, p. 135 and generally.

[2] According to Duguit, public service is "all those activities whose compliance must be regulated, guaranteed and controlled by those governing, since it is indispensable for conducting and developing social interdependence and since it is of such a nature that it cannot be entirely guaranteed unless it is provided by the intervention of the governing force", in LA TRANSFORMACIÓN DEL ESTADO, FRANCISCO BELTRÁN, undated, p. 64 and generally and p.

French Law titled *Solidarité et renouvellement urbains* of 13 December 2000, which is analyzed in professor Brouant's work. Social cohesion is a concept focused on relationships between the members of a group or community and includes the processes by which social ties are established in connection with the interaction of people from different social groups who are members of the same larger community. Generally, the idea of solidarity or the sense of community may be considered an indispensable tool for promoting social cohesion.[3]

From a theoretical viewpoint, Harvey, in a classic work based on Rawls' ideas, noted how problems of spatial localization have been traditionally based on the concept of efficiency, in accordance with Pareto's optimum.[4] This type of economic analysis of the geography of land development has led to the fact that, traditionally, problems related to population distribution in urban areas often have not been considered in social and legal analysis. However, the inclusion of concerns such as solidarity, social cohesion, and community may cause analysis of land use and urban development issues to evolve towards outlooks linked to social justice in urban population patterns. The distribution of income, for example, should provide for the needs of citizens inside each territory or urban subregion, for allocating the right resources to maximize interregional multiplying effects and for investing extra resources to overcome special difficulties in the social and physical environment. These ideas may lead to the important issue of affirmative action in public resource financing.[5] Institutional, organisational, political and economic programs may attempt to provide for better social and economic development of the less privileged territories and urban regions.[6]

From an economic viewpoint, Muñoz De Bustillo Llorente approaches the issue of whether the existence of an imbalance in the distribution of incomes in terms of space is worrying, i.e., whether territorial cohesion should concern us or not. He thinks it should, since the absence of such cohesion leads to a concentration of poverty, thus preventing economic growth in the area, causing companies to avoid the area, leading to emigration and, lastly, social divisions. That cohesion is relevant for society does not imply, however, as this writer so rightly highlights, that pubic intervention has to exist, since society itself is the result of political decisions which, equally, could decide to leave the achievement of assistance in the hands of the private market.[7]

Since the early 1980s, the concern about social justice when regulating the use of land has led to a movement being formed in the US called "environmental justice." The name is a mistake, though: this movement is not only engaged in environmental concerns but also in social concerns, with implications in constitutional rights such as equality. This movement is concerned with the disproportionate concentration of undesirable land uses (contaminating industries, waste treatment plants, prisons, social housing...) in certain areas, which in the US usually coincide with

---

119 and generally.

[3] REAL FERRER, G., "La solidaridad en el derecho administrativo", *RAP*, 161, 2003, p. 123 and generally.

[4] HARVEY, D., *Urbanismo Y Desigualdad Social*, first edition 1973, the Spanish edition is available from Siglo XXI de España, sixth edition from 1992. As regards Pareto's optimum, he mentions on page 97 how Pareto focuses his idea on "no individual may be moved without the advantages derived from such a movement being offset by some loss for another individual."

[5] KIRSZBAUM, T., "La discrimination positive territoriale: de l'egalité des chances a la mixité urbaine", *Pouvoirs*, 111, 2004, p. 101 and generally.

[6] HARVEY, D., *Urbanismo y..., op.cit.*, page 119.

[7] MUÑOZ DE BUSTILLO LLORENTE, R., "La cohesión territorial: unión europea y fondos estructurales", en Jiménez, J.C. (Ed.), *Economía y Territorio: una nueva relación*, Civitas, 2002, p. 45 and generally.

economically disadvantaged areas where there is a concentration of minorities. There have been several empirical studies which prove this unfair distribution of "wrongs" in urban areas.[8]

The *EPA* (*Environmental Protection Agency*) set up a work group to study environmental equality in the early 1990s. This group conducted a study in 1992 (*Environmental Equality: Reducing Risk for all Communities*). In 1994, President Clinton passed the *Executive Order 12898*, which set up a work group bringing together several agencies related to environmental justice with the aim of coordinating them. The *Executive Order* required every federal agency to consider the various aspects of environmental justice and the impact of federal public policies on minorities and the poor, underlining the important role of citizen participation in decision-making on such issues. The *EPA* has prepared several documents or guides setting out how it will bear in mind the aspects of environmental justice. Other agencies have incorporated this subject into their considerations prior to making decisions.[9]

It must be highlighted that in the Spanish case the Constitution of 1978 not only considers social and territorial cohesion as a *relevant objective*, but furthermore *requires public intervention* to achieve this, just like other constitutions such as, for example, the Italian constitution.[10] The idea of solidarity is implicit in the constitutional text: this is the case of art. 31 EC[11] or art. 33 EC, with its reference to the social function of property, which must be linked, furthermore, to the prohibition contained in art. 7.2 of the Civil Code concerning the abusive or antisocial exercising of laws.[12] But it also mentions several precepts explicitly. This is the case of solidarity between public powers (art. 2, art. 138, art. 156, art. 158[13]), and also solidarity among citizens (art. 45 EC, referring to the indispensable collective solidarity).[14] This solidarity must be attained in part by means of active public intervention, shown, for example, in art. 40 EC, which establishes a mandate for public powers to promote favourable conditions for "a fairer distribution of regional and personal income." Along these lines, the role of urban and territorial planning seems especially relevant as regards the constitutional obligation of seeking social and territorial cohesion, above all in metropolitan areas.[15].

---

[8] See, for example, ARNOLD, C.A., "Planning Miracles: Environmental Justice and Land Use Regulation", *Denver University Law Review*, no. 76, 1998, p. 3 and generally, or Kaswan, A., "Distributive Justice and the Environment", *North Carolina Law Review*, no. 81, March 2003, p. 1031 and generally.

[9] For those interested in the subject, the web page of *EPA* may be visited at: http://www.epa.gov/compliance/environmentaljustice/index.html (last visited, Mar. 20, 2006).

[10] *See for example*, the rulings made by the *Corte Costituzionale* in Italy no. 217 and 404 in 1988, which highlighted that social solidarity had to exist, and which was included in the Italian Constitution, showing a link between the shape of the social state and implying the recognition of a social right to housing, situated among the inviolable rights of man, which is a fundamental social right.

[11] In the duty to contribute to sustaining public expenses (art. 31 EC), from STC no. 182, 1997, 28 October, FJ 6, pointed out that "there exists a duty to pay the tax in accordance with one's financial capability, in the way, conditions and quantity set down by Law; but there exists, correlatively, a right under which this *contribution of solidarity* is outlined in each case by the legislator according to the capability."

[12] On the social function of property, it is worth recalling STC 37/1987. As regards the link between solidarity and abusive or antisocial exercising of a right, see Vidal Gil, E.J., *Los Derechos De Solidaridad En El Ordenamiento Jurídico Español*, Tirant Lo Blanch, Valencia, 2002, p. 323 and generally.

[13] Principle from which the Constitutional Tribunal has taken the requirement of institutional loyalty, now described as a relationship principle between Administrations in art. 4.1 LRJPAC.

[14] VAQUER CABALLERÍA, M., *La Acción Social*, Tirant lo Blanch, 2002, p. 65 and generally.

[15] Bear in mind now the articles I-3, I-14, III-220, III-234 of the Treaty which sets out a Constitution for Europe. On this concept of territorial cohesion, see FALUDI, A., "Territorial Cohesion: Old (French) Wine in New Bottles?", *Urban Studies*, Vol. 41, no. 7, June 2004, p. 1349 and generally. Also bear in mind the legal level of the Catalan Law 2/2004 concerning neighbourhoods in difficulties which introduces the principle of "territorial balance" or the Catalan

At a legal level, we can use as an example the Spanish case, taking into account the current art. 3 of Catalan Law 1/2005, 26 July, concerning urban planning, which highlights social cohesion as a guideline to be pursued in public urban planning actions. Likewise, the Catalan Decree 454/2004, dated 14 December, concerning the deployment of the Plan for the Right to Housing also refers to this (for example, art. 10). Furthermore, articles 4 and 38 of the Law *in Castilla y León* 5/1999, 8 April must be considered, which mentions among its aims concerning public urban planning action "social cohesion of citizens." So we are faced with a legal-type concept in the sphere of the Spanish legal system.

An analysis of some of these issues from the viewpoint of an already built-up area, as is the case of consolidated urban land, may be found in the work by professor Sibina. Also, professor Ball gave us a view of the English legal measures aimed at avoiding social exclusion by using housing – in a legal system which lacks a constitutional right to housing, but this does not mean that there are no real legal and judicial obligations for Public Administrations – she outlined, among other points, the legal system set up by the important *Housing Act* of 1996, which provides clearly subjective rights to accommodation for certain citizens in certain circumstances.

The opposite of social cohesion would be social division, linked to social lines of limits or separating social groups, and related to the notion of social exclusion.[16]

By social exclusion we mean, according to works by the European Commission, a dynamic notion, and by setting out processes and results, which are broader than the notion of poverty (the poor are generally excluded, though not always), and this has a multidimensional nature as regards the mechanisms by which individuals and groups are rejected by the spheres of the social system (economic, political, cultural). Social exclusion bears a territorial stamp: urban segregation.[17]

Various studies and reports highlight how this phenomenon is associated with growing globalization and worsening urban problems, such as urban economic segregation and, in the worst and most serious cases, a rising number of social ghettos. These ghettos are spatial areas inhabited by people from a homogeneous background (ethnic, cultural, economic) thus setting them apart from the rest.

In the particular Spanish case which we can use as an example, factors such as the cost of housing, immigration and the urban pattern of dispersed growth (urban sprawl), highlight the process of segregation which endangers social cohesion and increases the risk of future social divisions. This dynamic of geographic social division results in poor ghettos and affluent "gated communities."

> a) As regards *underprivileged neighbourhoods*, an official study published in 2000 estimated that between 4 and 5 million people in Spain live in difficult neighbourhoods, i.e., 12% of the total population.[18] This alarming situation has even reached the State Parliament. The Mixed Parliamentary Group presented an urgent appeal on "the situation of underprivileged

---

Law 1/2005, which refers to municipal solidarity in art. 56.1 and territorial cohesion in art. 85, regarding regional control over municipal planning. Also interesting is the Law of *Castilla y León* 5/1999, 8 April, whose art. 4 sets out as one of the legal aims "to establish an urban planning regulation for the municipalities in *Castilla y León* which favours sustainable, balanced development, quality of life and social cohesion of its citizens, protecting he environment and natural and cultural heritage and in particular to pursue the constitutional right to enjoy decent housing."

[16] ESTIVILL, J. (Comp.), *Pobreza y exclusión en Europa*, Hacer, 2004.

[17] MADANIPOUR, A., "Social Exclusion and Space", in MADANIPOUR, A, CARS, G. I ALLEN, J. (Eds.), *Social exclusion in European Cities: Processes, Experiences, and Responses*, London, 1996.

[18] MINISTERIO DE FOMENTO, *La Desigualdad Urbana En España*, Madrid, 2000. Freely available at http://habitat.aq.upm.es/due/ (last visited, Mar.20, 2006).

pockets of people and social exclusion in large cities and policies and tools to correct these", which gave rise in 2002 to an important parliamentary debate on these particular problems in certain neighbourhoods in Spain, such as Lavapiés in Madrid, La Mina in Barcelona, La Palmilla in Málaga or the neighbourhood of Martínez Montañés in the South Industrial Estate (Polígono Sur) in Sevilla.

b) *As regards gated communities*, this refers to spatial segregation, though completely opposite to poorer neighbourhoods. This refers to fenced- or walled-off urban areas or closed-off by other means, with controlled access and private security. These types of communities exist not only in America (in particular USA, where over eight million people live in 20,000 residential areas of this type, which are constantly growing in number – eight in every ten new residential developments in urban areas are gated), and in Europe, where there are already signs of this residential type in Spain. In a study on Madrid, Canosa Zamora identified 21 high quality closed-off private residential areas, amounting to some 8,000 dwellings with some 30,000 residents.[19]

Both the existence of ghettos and gated communities "for the rich" show, in terms of territory, a growing urban segregation, which is linked to less personal interchanges: certain persons who would like to have such an interchange cannot do so as they see their lives circumscribed in homogeneous "down market" urban areas, while other persons do not wish to mix with people who are different from them, thus they do not look for such an interchange and so *segregate themselves* in "up market" homogeneous urban areas.

In sum, separations, whether desired or not, give rise to gradual degradation of coexistence, social contact (in public spaces, schools located in homogeneous urban areas, etc.) and, in short, social contrast, affected by the "fear of diversity."[20]

What do regulating territory, urban planning and housing have to do with this phenomenon? Certain land practices in law entail urban segregation and discrimination of land use, whether actively (where certain public buildings, for example places of worship, are located; the requirement of a disproportionately large minimum size of plots; segregation of areas with public housing...) or passively (absence or insufficient foresight regarding social housing...). On this point, studies on the case in America by professors Ziegler and Kushner highlight the interesting links between public regulatory actions which generate segregation (*exclusionary zoning*) and the role of the principle of equality, which has inspired land law use aimed at social balance (*inclusionary zoning*) or at least providing some housing for needed but low income workers.

If we cross the Atlantic Ocean, in the Treaty establishing a Constitution for Europe, an explanation is included of the relationship between housing and social exclusion, particularly in art. II-94-3, based on the EU's Charter of Fundamental Rights:

> With the aim of fighting social exclusion and poverty, the Union recognises and respects the right to social and housing aid to guarantee a decent life for those who do not have enough resources, in accordance with the kinds established by EU Law and by national legal systems and practices.

---

[19] CANOSA, E., "Las Urbanizaciones Cerradas De Lujo En Madrid. Una Nueva Fórmula De Propiedad Y Organización Territorial", *Ciudad y Territorio-Estudios Territoriales*, no. 133-134, 2002, pages 563-578.

[20] FRUG, G.E., *City Making. Building Communities without Building Walls*, Princeton University Press, 1999, p.149.

In the specific Spanish case, the aforementioned Catalan Decree 454/2004 refers to residential social exclusion in article 30, through which it also deals with a legal-like concept. Equally, for example, the Law of Navarra 35/2002, 20 December concerning the regulation of Territory and urban planning, in art. 51, which establishes criteria for developing the General Municipal Plan mentions that "it will set out its own measures and collaborate with other policies to avoid problems of uprooting, segregation and social imbalances."

Finally, the references to social integration or inclusion are made bearing in mind the concept is opposite to social exclusion and one possible way to achieve social cohesion. Taking again the Spanish example, some Spanish legislation on housing has already explicitly incorporated the relationship between housing and social integration. This is the case of the Valencia housing Law 8/2004, 20 October, in articles 39, 59 or 61.[21]

As regards the relationships between housing, social integration or inclusion and immigration, the question inevitably arises about the pattern of managing diversity which is used, with a basic comparison between a pattern of assimilation or a pluralist, multicultural or intercultural pattern, which has practical effects when developing or avoiding specific positive actions, which is wrongly called positive discrimination. As regards immigration, the idea of social integration does *not* have to equal assimilation, this is understood as the process by which a person or group joins another culture (usually the dominating one), learning its language, values, rules and identity traits while abandoning their own cultural background.[22] Assimilation-like ways are only *one* of the means to achieve cultural uniformity or homogenization and only *one* of the possible patterns of managing diversity, as opposed generally to the *pluralist, interculturalist* or *multiculturalist* pattern of managing this

---

[21] Highlighted by these articles is the following:

> *Article 39. Powers of the Valencia regional Government (the Generalitat).*
> The Generalitat may establish its own housing plans or measure to deploy these which are complemented by basic state legislation in these matters; with this aim and to achieve feasibility it may underwrite agreements with any type of public body, non profit or private organisations and with financial or loan organisations, with conditions which will be determined, in accordance with the current legislation. These measures must be aimed at making the constitutional right to decent and suitable housing effective *by means of integration policies and social inclusion which include access to housing*, and must pay particular attention to the first time house hunters, providing persons with disabilities, both physical and psychological and impairments, with the possibility of offering them the use of housing for families and persons with few economic resources, integrating immigrants and groups that are particularly in need or with specific problems. In these aims, the specific lines of action may be treated from the viewpoint of individual need and from a wide angle as regards the need to act in a certain environment guaranteeing full social integration.
>
> Chapter IV of this Law is titled Specific Actions of *social integration* in matters of housing:
>
> *Article 59. Concept.*
> Specific actions towards social integration in matters of housing are understood as those in which this regulation is applicable and from the most underprivileged social groups as regards economic, personal or social circumstances. These actions include support action aimed at stamping out causes of social exclusion."
>
> *Article 61. Measures of inclusion and social sustainability*
> The Generalitat, within the framework of housing plans where reference is made in article 39 of this Law or as a complement to these plans, may establish specific lines of action to allow compliance with the *policies of social inclusion and sustainability*, and can promote, among other measures, agreements with other public or private organisations which provide a guarantee to achieve the aim of the constitutional mandate.

[22] SOLÉ, C. *et al* "El Concepto De Integración Desde La Sociología De Las Migraciones," *Migraciones*, 12, 2002, p. 9 and generally.

diversity which, with several subtle differences depending upon the theoretical pattern, respects or even promotes it and which could form part, in fact, of the pattern sought by the treaty by which a Constitution for Europe has been established, whose art. II-82 points out that the EU respects cultural, religious and linguistic diversity.

Concerning the latter, the works by professors Urbani, Civitarese and Gardini provide us with, among other matters, an Italian approach to relationships between city, housing and immigration.

However, it is not the aim of this book to discuss the way diversity can be managed in relation to the phenomenon of immigration. The undeniable change, in the case of Spain and other European societies, not an issue of valuation but an empirical issue, from a monoculture society to one with many cultures where various theories on the way to face this new complexity have arisen, starting from the aforementioned unreal theoretical and ideal models, which are usually associated with specific countries (i.e. here as an oversimplification, assimilation in France and plural societies, for example, in Anglo Saxon countries). As far as this analysis is concerned, we are aware of the need to deal seriously with this debate, but now is not the time to do so, despite the fact that some of the issues, which will be discussed herein concerning, for example, the right to equality and affirmative actions, bear a certain relationship.

As explained earlier, the works contained herein reflect these issues and are achieved by means of an interdisciplinary and international approach to the issues. On the one hand, contributions from several sciences have been used, although most of the articles herein have been provided by specialists in law, a study provided by Montserrat Pareja Eastaway and Montse Simó Solsona has also been included based on an Economic and Sociological viewpoint. This interdisciplinary approach has allowed us, to quote a sentence used by professor Delmas-Marty in a book on regulatory integration, "to respond to the perplexity, without reducing diversity and learning in the complexity."[23] Furthermore, within the legal approaches herein, different approaches may be seen which correspond both to Public Law (constitutional and administrative) and Private Law.

Allow me to mention a further thought on Law regarding these issues. There are, I think, at least three legal questions that need to be addressed: Must Law be concerned about all the problems mentioned? Can Law play a role in resolving these problems? And if so, by means of what legal techniques?

While the second and third questions are developed in the studies herein, allow me to say something regarding the first question, which is crucial, as a negative answer would leave this work practically without any meaning at all. The answer to this, therefore, obviously must be affirmative, from an anti-formalist, realist and functionalist understanding of Law.

Only if we understand that Law is not a system closed in its own world and based on mere formal deductive logic that can and must have a function of allowing and accompanying social change, it makes sense to consider the issues discussed here and use the contributions provided by other sciences.

From the viewpoint that we shall consciously adopt, Law does not only have a function of managing disputes once these have arisen (an area where criminal law is particularly relevant) but also a function of preventing disputes and promoting social integration, acting as a tool of social change.

However, this is not a uniformly accepted approach in Legal Science and particularly in Land Use Law in Europe. Several paradigms have influenced the way things are legislated, in the way

[23] Preface to the work directed by herself, *Critique de L'intégration Normative: L'apport du Droit Comparé a L'harmonisation des Droits*, PUF, 2004, page 22.

legislation is applied by all those involved in legal matters in the Administration and judicial power and in the way which their work is developed by scientific doctrine (subjects of theses, articles, special reports, lines of research...). Among these is worth mentioning the almost exclusive obsession for protecting private property, inherited from the liberal State, the historical disassociation between urban planning, territorial regulations and housing or the economist-like approach to housing, which above all prizes the aspects of quantities (units of houses built) and much less other qualitative and territorial aspects (are there enough affordable houses? where are they located? does their location raise territorial discrimination or who can afford them? is there a commitment to social and territorial cohesion).

Incidentally, this is not only a Spanish problem. Moderne has underlined similar problems in French Land Law, which is attempting to react by using modern laws and modern doctrine, as we shall have the chance to see in Brouant's work included in this book[24]. Equally, we will see how the Anglo-Saxon legal approach, both English and American, is based on less formalist approaches and more linked to the social reality at which it is aimed.

The reconstruction of the whole system must lead us to search for constitutional bases of Land Use Law. The starting point must be the consideration of modern European States as Social States (e.g. art. 1.1 Spanish Constitution, establishing Spain's as a social and democratic State, subject to the Rule of Law). The internalization of the social State's radiation leads to a certain concept of the Land Use Law and the legal method in this field. As regards Land Use Law in a social State, following the line of comments on relationships between social policies and law, and along the same lines of Calvo García and Susín Bertrán, it may be said that the orientation of legal intervention towards social integration, or the use of law as a means to reach such aims, implies two important consequences. The first, regarding quantity, the tendency towards a rise in regulations, with the establishment of regulations which attempt to cover all possible situations in fact and to provide them with a use. The second is of quality, since this legalization of all aspects of social life implies a process of "juridification", i.e., "colonization of the civil society," on the one hand; and also, a new type of law, an "administerised" law which has been called "useful or regulative law" and means a type of common Law in the social State model. As Teubner points out what concerns this new way which is imposed by understanding the legal side, legalization does not mean simply "proliferation" of Law, but indicates a process in which the social State produces a new type of Law: regulative Law. This may be defined in its functions as a pre-arranged Law made due to requirements of guiding the social State, and in its structure, as a Law leaning towards private law, with a teleological orientation and firmly dependent on aid from social sciences."[25] Which, we may add, is not limited to guaranteeing areas exempt from public incidence, but also to guaranteeing, affirmatively, that public intervention, when faced with defects in the market will be effective by guaranteeing other rights at stake.

In all, based on the references made to issues such as the promotional function, the introduction of techniques concerning affirmative penalties, to others such as laws as incentives, to 'useful' or 'regulative' law or to the most general issues reflected in tendencies in the aforementioned

---

[24] MODERNE, F., "Problemas Actuales Del Urbanismo En Francia", in Land Law Regulations. Critical Assessment and Future Outlook (International Meeting of land Use Law). Santiago de Compostela, 2 - 3 July 1998), Marcial Pons, 1998, p. 365 and 384.

[25] CALVO GARCÍA, M., "Paradojas Regulativas: las Contradicciones del Derecho en el Estado Intervencionista", in AÑON, M.J.,BERGALLI,R., CALVO, M., CASANOVAS, M. (Co-ord.), *Derecho y Sociedad*, Tirant Lo Blanch, Valencia, 1998, p. 99 and generally, SUSÍN BERTRÁN, R., "Derecho y Cambio Social", *at* www.iustel.com (last visited, Mar. 20, 2006).

evolution of law, the aim now is to highlight the use of the legal-judicial tools when actively promoting social change. In other words, the aim is to show how modern Law, "is available as an independent power", i.e., it is shown as the real tool of the modern State.

To sum up, social reality and the contribution of other social sciences towards its diffusion (economics, sociology, anthropology...) play an important role both in drafting land use law and the way to interpret it (incidentally in accordance with art. 3.1 of the Spanish Civil Code, which mentions "social reality" as one of the possible criteria to use for legal interpretation). They should also have this in scientific doctrine, which, together with historical approaches, whose use and usefulness are widely accepted in teaching, should bear in mind also, aspects provided by other social sciences to avoid formalist approaches to the aims of the study.

Whatever the case may be, and whatever one's understanding on the role of Law may be, what is true is that in several current legal systems references have already been made to social and territorial cohesion, as we have seen, and thus these are already legally relevant, without an ounce of doubt, which alone justifies the interest of the articles contained herein.

This book also provides an international approach which, although uncommon, does not make it less interesting. If we take into account the phenomena of globalization taking place it will not surprise us to discover, perhaps, that the problems and solutions are not so essentially different (they are in their technical specification, of course, depending on the country). As Spanish professor García De Enterría pointed out, in the subject of urban planning, comparative analysis of urban patterns is likely to prove beneficial.[26] The purpose of this publication is to contribute to a debate which may be of interest in different countries with similar problems and to promote the search for legal techniques that may help to address these problems.

In the contributions included in this book, we have both American and European viewpoints, which complement each other, and I think make it therefore unusual and interesting. As regards Europe there are legal analyses from France, England, Italy and Spain, already mentioned in this introduction. This European approach may be surprising for the American reader. Although each national legal system in Europe has its own rules and institutions, the American reader probably will find some familiar contact points. The contrast among the four countries also shows different solutions to similar problems in a partially common territorial, political, legal and economic framework. I hope that may perhaps provide some useful ideas in the American urban context.

In sum, it gives me a sense of personal satisfaction to finally see the articles published here, all of which are probing and insightful. I hope the articles bear fruit in stimulating interest in the further discussion of these urban problems and in the formulation of possible remedies and public policies related to better securing social cohesion in our cities.

[26] GARCÍA DE ENTERRÍA, E., "El Derecho Urbanístico Española A La Vista Del Siglo XXI", *REDA*, 99, 1998.

New Urbanism: Urban Development and Ethnic Integration in Europe and the United States

James A. Kushner*

Introduction

Worldwide ethnic and class-based segregation in residential areas is increasing.[1] Based on a survey of strategies throughout the world designed to ameliorate such segregation, this chapter describes a range of policies: those that have proven effective and those that appear to be ineffective. Rather than evaluating the full range of strategies, this study will focus on the strategy of New Urbanism and assess its potential for segregation mitigation. In the United States, until the second half of the last century, the nation pursued a policy of racial apartheid.[2] Despite the elimination of the legally-mandated structure that established and maintained that segregation, private behavior patterns have continued to reflect racial bias in housing as well as in employment, schools, and other aspects of life.[3] Although efforts to remedy segregation in schools and public housing were undertaken,[4] those efforts were pyrrhic as "white flight" to the newly developing suburbs frustrated remedies. Private choice and limited court desegregation remedies generated wider patterns of racial isolation. As population increased in affluent suburban towns, housing prices increased leading to improvements in the quality of education and the prestige of the towns, all of which established even more impenetrable barriers to integration. While segregation was installed by government policy, it is today maintained through exclusionary zoning, housing cost-inflating land use controls, and the invisible hand of freedom of choice.

The introduction will describe and briefly discuss alternative strategies implemented both within the United States and in other nations to reverse or prevent apartheid. The strategies include: (1) a system of privately enforceable housing discrimination laws, (2) a system of government-administered enforcement of housing discrimination laws, (3) inclusionary land use and housing policies, (4) subsidized supply through new housing production, (5) subsidized housing access

---

*Professor of Law, Southwestern University School of Law, Los Angeles, California, U.S.A. E-mail: jkushner@swlaw.edu. This paper was prepared for the conference "Derecho Urbanístico y Exclusíon Social: La Lucha Jurídica Contra Los Guetos Urbanos ("Land Use Law and Social Exclusion: The Legal Fight Against Urban Ghettos"), Barcelona, Spain, December 16-17, 2004. This research was funded by the Ministerio de Ciencia y Tecnologia (Ministry of Science and Technology of The Spanish Government).

[1] *See generally* CITIES OF EUROPE: CHANGING CONTEXTS, LOCAL ARRANGEMENTS, AND THE CHALLENGE TO URBAN COHESION (Yuri Kazepov ed. 2004); INTERNATIONAL LAW AND THE RISE OF NATIONS : THE STATE SYSTEM AND THE CHALLENGE OF ETHNIC GROUPS (Robert J. Beck & Thomas Ambrosio eds. 2002); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993); Studies IN SEGREGATION AND DESEGREGATION (Izhak Schnell ed. 2002); C. Hamnett, Social Polarisation in Global Cities: Theory and Evidence,. 31 URB. STUD. 31 (1994); Ronald van Kempen & A. Sule Ozuekren, *Ethnic Segregation in Cities: New Forms and Explanations in a Dynamic World,* 35 URB. STUD. 1631 (1998).

[2] JAMES A. KUSHNER, APARTHEID IN AMERICA (1980), also published as James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L. J. 547 (1979); C. VANN WOODWARD, THE STRANGE CAREER OF JIM CROW (1957).

[3] *See generally* JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION: EQUAL PROTECTION LAW AND LITIGATION (2004).

[4] *Id.* Ch. 9.

through demand subsidies, (6) affirmative action integration policies, and (7) New Urbanism planning design policies.

1. Privately Enforceable Housing Discrimination Law

Since 1968 the United States has had national laws prohibiting discrimination in housing and planning on the basis of race.[5] In addition to national laws, the states and many local jurisdictions have enacted statutes and ordinances prohibiting racial discrimination in housing.[6] Although the federal statute offered a private remedy for victims of acts of discrimination and was strengthened in 1988 by the Fair Housing Amendments Act,[7] the law has primarily benefited the affluent homeseeker.[8] The affluent have access to legal services and are often willing to pursue the enforcement of matters of principle. In the search for housing, the less affluent are often traumatically pressured to efficiently satisfy the immediate quest for replacement housing while continuing to provide for their families. In addition, the targets of housing bias are typically unaware that they have been victims of discrimination. Should they suspect they have been victims of bias, rarely do they have the time or convenient access to agencies or legal resources to pursue litigation or administrative enforcement. Even lawyers specializing in civil rights are often unaware of fair housing laws and are often not inclined to engage in such disputes. Additionally, housing discrimination enforcement has suffered from an extremely weak movement of activists battling an extremely powerful industry of real estate and banks.[9]

In 1988, the Federal Fair Housing Act was expanded to prohibit discrimination based on family status—extending protection to families with children and to the disability community.[10] These populations have greatly benefited by the modification of housing marketing and land use regulation practices as well as from the availability of judicially enforceable remedies. Unfortunately, those of lower income have generally not been able to gain access to integrated housing opportunities using the legal system.[11] Therefore, the laws have not lessened racial or economic isolation.[12] In addition to the laws failing to ameliorate segregation, the laws have also had little effect on deterring discrimination in the private market.[13] Enforcement is simply too infrequent to deter market-driven

---

[5] 42 U.S.C. §§ 3601-3619, 3631 (1968 & Supp. IV 1992).

[6] JAMES A. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION (2d ed. 1995 Shepard's McGraw-Hill & Supp. 2000 West Group).

[7] Fair Housing Amendments Act of 1988, PUB. L. NO. 100-430, 102 STAT. 1619 (1988). *See generally* James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049 (1989). Title VIII was subsequently amended by the Housing for Older Persons Act of 1995, PUB. L. NO. 104-76, 109 STAT. 787 (1995) (partial deregulation of senior citizen housing exemption).

[8] James A. Kushner, *A Comparative Vision of the Convergence of Ecology, Empowerment, and the Quest for a Just Society*, 52 U. MIAMI L. REV. 931, 932 (1998).

[9] MARA S. SIDNEY, UNFAIR HOUSING: HOW NATIONAL POLICY SHAPES COMMUNITY ACTION 152-53 (2003).

[10] Fair Housing Amendments Act of 1988, PUB. L. NO. 100-430, 102 STAT. 1619 (1988).

[11] MARA S. SIDNEY, UNFAIR HOUSING: HOW NATIONAL POLICY SHAPES COMMUNITY ACTION 33 (2003) (rhetoric of fair housing movement always appealed to the free market with an image of middle class blacks as the target group); James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1105-1106 (1989).

[12] Kushner, *supra* note 11 at 1061-1068. *See also* James A. Kushner, *A Comparative Vision of the Convergence of Ecology, Empowerment, and the Quest for a Just Society*, 52 U. MIAMI L. REV. 931 (1998).

[13] James A. Kushner, *A Comparative Vision of the Convergence of Ecology, Empowerment, and the Quest for a Just Society*, 52 U. MIAMI L. REV. 931, 933-937 (1998).

behavior. Although the national legislature intended the laws to generate racial integration,[14] that goal has simply not been achieved.

2. Government-Administered Enforcement of Housing Discrimination Laws

Although the national, state, and local fair housing anti-discrimination laws in the United States established government enforcement agencies to carry out the intent of the legislatures,[15] state efforts have been largely ineffective in eliminating housing discrimination in both the public[16] and private[17] sectors of the housing market. Agencies face both funding limitations and a dependency on victims that are willing to come forward and prosecute claims. Government-administered enforcement of housing discrimination laws has thoroughly failed to achieve integrated communities.[18]

3. Inclusionary Land Use and Housing Policies

"Exclusionary zoning" is a reference to the land use regulatory scheme employed to render the suburbs prestigious and costly.[19] The existence of zoning that requires that large homes be built on large lots and served by expensive infrastructure has led to counter-balancing policies or "inclusionary zoning" aimed at reversing the impacts of "snob" zoning. Inclusionary land use and housing policies reflect the judicial and legislative policies of states in the United States to overcome class-based exclusion; that is, the states use inclusionary zoning as an antidote to suburban exclusionary zoning and housing regulatory policies.[20] As a result of an array of discriminatory policies such as large lot zoning,[21] the exclusion of apartments,[22] and subdivision and growth

---

[14] For a collection of the legislative history, see JAMES A. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION § 1.05 (2d ed. 1995 & Supp. 2000).

[15] James A. Kushner, *Federal Enforcement and Judicial Review of the Fair Housing Amendments Act of 1988*, 3 HOUS. POL'Y DEBATE 537 (1992). *See generally* JAMES A. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION §§ 8.29-8.35 (2d ed. 1995 & Supp. 2000).

[16] *See generally* MARA S. SIDNEY, UNFAIR HOUSING: HOW NATIONAL POLICY SHAPES COMMUNITY ACTION 140 (2003); James A. Kushner, *An Unfinished Agenda: The Federal Fair Housing Enforcement Effort*, 6 YALE L. & POL'Y REV. 348 (1988), *reprinted in* THE FAIR HOUSING ACT AFTER TWENTY YEARS (R. Schwemm ed. 1989); James A. Kushner, *Federal Enforcement and Judicial Review of the Fair Housing Amendments Act of 1988*, 3 HOUS. POL'Y DEBATE 537 (1992). For literature on HUD subsidized and public housing site selection bias, see JAMES A. KUSHNER, FAIR HOUSING: DISCRIMINATION IN REAL ESTATE, COMMUNITY DEVELOPMENT AND REVITALIZATION § 7.02 (2d ed. 1995 & Supp. 2000).

[17] ROBERT E. WIENK ET AL. HOUSING DISCRIMINATION STUDY: SYNTHESIS (1991). *See also* JOHN YINGER, CLOSED DOORS, OPPORTUNITIES LOST: THE CONTINUING COSTS OF HOUSING DISCRIMINATION (1995); James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1052-60 (1989).

[18] JAMES A. KUSHNER, APARTHEID IN AMERICA (1980), also published as James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 HOW. L. J. 547 (1979); James A. Kushner, *A Comparative Vision of the Convergence of Ecology, Empowerment, and the Quest for a Just Society*, 52 U. MIAMI L. REV. 931, 937-39 (1998). *See also* DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1993).

[19] Annette B. Kolis, *Citidels of Privilege: Exclusionary Land Use Regulations and the Presumption of Constitutional Validity*, 8 HASTINGS CONST. L.Q. 585 (1981).

[20] *See generally* 1 JAMES A. KUSHNER, SUBDIVISION LAW AND GROWTH MANAGEMENT §§ 3:8 - 3:19 (2d ed. 2001 & Supp. 2004).

[21] *E.g.* National Land & Inv. Co. v. Kohn, 215 A.2d 597 (Pa. 1965) (invalidating four-acre minimum lots).

management policies, which help to maintain low density and high-cost housing,[23] the cities of the United States have developed in a pattern of the poor residing in central city and older "first ring" suburbs surrounded by communities of the affluent, largely white population.[24]

Creative judges[25] and legislatures[26] in the more urbanized states have generated a range of potential strategies which aim to include affordable housing within the newly developed communities and traditionally exclusive suburbs. The strategies include the mandatory inclusion of a set minimum percentage of affordable housing,[27] incentives such as beneficial tax treatment,[28] higher permissible densities to developers who include affordable housing in larger residential developments,[29] modest deregulation of land use to permit factory-built housing or mobile homes,[30] and the development of apartments or more modest homes on smaller parcels of land.[31] Most of the inclusionary strategies were premised on the continued availability of generous state or national housing subsidies that would provide financing to support affordable housing. Unfortunately, political support for most forms of subsidy has waned[32] and local communities have had to rely upon limited federal tax credits[33] and innovative local programs such as tax[34] or development exaction-generated[35] redevelopment as a few progressive communities have done. An example of locally subsidized development is housing trust funds. These trust funds are created by cities and funded by charges to developers of unsubsidized commercial, industrial, or residential housing.[36] Although these initiatives are responsible for increasing the supply of affordable housing in non-traditional locations, often the resulting affordable housing has been segregated within the community replicating traditional class and racial segregation in microcosm.[37]

---

[22] *E.g.* Fernley v. Board of Supervisors, 502 A.2d 585 (Pa. 1985) (total exclusion per se invalid even in non-growth area).

[23] *See generally* JAMES A. KUSHNER, APARTHEID IN AMERICA 44-52 (1980)

[24] James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1061-68 (1989). *See generally* James A. Kushner, Apartheid in America 1-5, 20-30, 44-52 (1980).

[25] Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (1975), *appeal dismissed*, 423 U.S. 808 (1975).

[26] CAL. GOV'T CODE §§ 65302(c), 65580 (West 1997 & Supp. 2004) (requiring housing elements providing planning for housing market segments and economic groups within mandatory comprehensive plans).

[27] Home Builders Ass'n v. City of Napa, 108 Cal. Rptr. 2d 60 (Ct. App. 2001), *cert. denied*, 535 U.S. 954 (2002).

[28] *E.g.* Iowa Code Ann. § 15E.193B (West Supp. 2004) (credits and refunds).

[29] *E.g.* Cameron v. Zoning Agent, 260 N.E.2d 143 (1970).

[30] Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390, 450-51 (1983).

[31] *E.g. In re* Adoption of Amendments to N.J.A.C., 772 A.2d 9 (N.J. Super. Ct. App. Div. 2001).

[32] Peter Dreier, *The New Politics of Housing*, 63 63 J. AM. PLAN. ASS'N 5 (1997); Robert W. Burchell & David Listokin, *Influences on United States Housing Policy*, 6 HOUS. POL'Y DEBATE 559 (1995); Deborah Kenn, *One Nation's Dream, Another's Reality: Housing Justice in Sweden*, 22 BROOKLYN J. INT'L L. 63 (1996); Peter Salins, *Toward a Permanent Housing Problem*, 85 PUB. INT. 22 (1986); James E. Wallace, *Financing Affordable Housing in the United States*, 6 HOUS. POL'Y DEBATE 785 (1995).

[33] David Philip Cohen, *Improving the Supply of Affordable Housing: The Role of the Low-Income Housing Tax Credit*, 6 J.L. & POL'Y 537 (1998); Allison D. Christians, *Breaking the Subsidy Cycle: A Proposal for Affordable Housing*, 32 COLUM. J.L. & SOC. PROBS. 131 (1999).

[34] Craig v. City of Poway, 28 Cal. App. 4th 319, 33 Cal. Rptr. 2d 528 (1994) (applying requirement that 20 percent of taxes allocated under state-authorized tax increment-financed redevelopment be targeted for low and moderate income housing).

[35] Janet E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011 (1991).

[36] Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991).

[37] *See e.g.* Josh Getlin, *Home is Where the Hurt Was: After a Bruising Legal Fight, an Affluent New Jersey Town has Housing for the Poor. But it's Still a Struggle to Keep Doors of Acceptance Open*, L.A. TIMES, Nov. 5, 2004, at A1, col. 1 (describing how Mount Laurel finally developed an affordable housing project, but one that is a virtual all-minority "project" segregated from the now exclusive highly affluent suburban community).

Even where inclusionary programs have been most successful, they have failed to generate ethnic or racial integration. Indeed, providing affordable housing for majority ethnic populations in the suburbs may simply exacerbate regional patterns of racial segregation as the central city population is composed increasingly of poor, minority ethnic populations. Although a few northeastern U.S. states have judicially established a remedy for organizations or developers to challenge exclusionary zoning,[38] and an increasing number of states legislatively mandate comprehensive planning that includes adequate housing for those of lower income,[39] no initiatives have generated an adequate and accessible supply of affordable housing. Most of the affordable housing generated through inclusionary initiatives has been developed in a racially or ethnically segregated land use pattern. The impact, if any, has been to further generate urban sprawl—the automobile-dominated land use pattern[40]—and the exacerbation of urban ethnic segregation.

4. Subsidized Supply through New Housing Production

Although subsidies for housing production have been largely eliminated in the United States, the experience of the last quarter century is that just as housing production alone does not reduce housing costs,[41] housing production alone will not generate racial and ethnic or class-based residential integration.[42] Housing opportunities developed in the affluent suburbs tend to be marketed to non-minority home seekers and central city housing development in the United States tends to be occupied by ethnic minority group members. This is generally the European experience as well since social housing units in most countries have become marked as housing for ethnic immigrants. European cities might reduce ethnic isolation through developing housing for more affluent households in what have become traditional minority-dominated neighborhoods.

5. Subsidized Housing Access through Demand Subsidies

Over the last two decades, American housing subsidies have changed from the public and subsidized production programs to voucher programs. The voucher programs give lower income families rent subsidies that support their access to the private rental market. However, these programs rarely resulte in ethnic integration.[43] Suburban landlords fail to participate in the program and participating housing providers are often located in districts stigmatized by poverty and ethnic

---

[38] *See generally* 1 JAMES A. KUSHNER, SUBDIVISION LAW AND GROWTH MANAGEMENT §§ 3:8 - 3:19 (2d ed. 2001 & Supp. 2004).

[39] *Id.*

[40] *See generally* DOM NOZZI, ROAD TO RUIN: AN INTRODUCTION TO SPRAWL AND HOW TO CURE IT (2003). *See also* JAMES A. KUSHNER, THE POST-AUTOMOBILE CITY (2004).

[41] Juli Ponce, *Land Use Law, Liberalization, and Social Cohesion Through Affordable Housing in Europe: The Spanish Case*, 36 URB. LAW. 317 (2004). *See also* HARVARD JOINT CENTER FOR HOUSING STUDIES, THE STATE OF THE NATION'S HOUSING, 2004 (2004, *available at* www.jchs.harvard.edu, reported at *Housing Boom Hasn't Solved Affordability Problem for Low-Income Households, Harvard Study Says*, [CURRENT DEVELOPMENTS] 32 HOUS. & DEV. REP. (WEST) 356 (Jun. 7, 2004).

[42] But cf. Richard H. Sander, *Housing Segregation and Housing Integration: The Diverging Paths of Urban America*, 52 U. MIAMI L. REV. 977 (1998) (reporting entrenched patterns of racial segregation in cities with stagnant housing markets). *See also* Reynolds Farley & William H. Frey, *Changes in the Segregation of Whites from Blacks During the 1980s: Small Steps Toward a More Integrated Society*, 59 AM. SOC. REV. 23 (1994).

[43] *Chicago Study Finds Economic, Racial Segregation in Voucher Use*, [CURRENT DEVELOPMENTS] 32 HOUS. & DEV. REP. (WEST) 746 (Nov. 22, 2004) (reporting study of the Chicago Fair Housing Alliance, PUTTING THE CHOICE IN HOUSING CHOICE VOUCHERS, *available at* www.cafha.org. *See also* James A. Kushner & W. Dennis Keating, *The Kansas City Housing Allowance Experience: Subsidies For the Real Estate Industry and Palliatives For the Poor*, 7 URB. LAW. 239 (1975).

segregation. There have been a few highly publicized efforts, such as in Chicago,[44] to locate affordable housing for minority public housing tenant families in United States suburbs. For example, Chicago has carried out such a "mobility" program as a remedy for segregating its public housing through discriminatory site selection and tenant assignment policies.[45] These demonstrations are promising but have not been widely replicated.[46]

6. Affirmative Action Integration Policies

Although the United States Supreme Court has previously endorsed integration in housing[47] and schools,[48] its subsequent rulings have eliminated the possibility of judicial or legislative-driven integration in housing,[49] secondary[50] and higher education.[51] The death knell for integration policies in housing came from the United States Court of Appeals for the Second Circuit in *United States v. Starrett City Associates*,[52] in which the court invalidated the use of racial quotas designed to achieve or maintain an integrated housing settlement. The U.S. courts have adopted a virtually "colorblind" policy that prohibits considering race when providing education,[53] employment,[54] or economic opportunities.[55] Thus, any racial or ethnic integration must be fortuitous and coincidental rather than the result of government or private policy. Despite the statement by a prominent proponent of the law that Title VIII, the Fair Housing Act, was designed to replace ghettos with "truly integrated

---

[44] James E. Rosenbaum, *Changing the Geography of Opportunity by Expanding Residential Choice: Lessons from the* Gautreaux *Program*, 6 HOUS. POL'Y DEBATE 231 (1995).

[45] Janet K. Levit, *Rewriting Beginnings: The Lessons of* Gautreaux, 28 J. MARSHALL L. REV. 57 (1994); Leonard S. Rubinowitz, *Metropolitan Public Housing Desegregation Remedies: Chicago's Privatization Program*, 12 N. ILL. U.L. REV. 589 (1992). *See* Hills v. Gautreaux, 425 U.S. 284 (1976).

[46] Dolores Acevedo-Garcia *et al.*, *Does Housing Mobility Policy Improve Health?*, 15 HOUS. POL'Y DEBATE 49 (2004).

[47] Shelley v. Kraemer, 344 U.S. 1 (1948) (invalidating enforcement of racially restrictive covenants excluding integrated housing occupancy). *See also* Huntington Branch NAACP v. Town of Huntington, 488 U.S. 15 (1988) (affirming per curium ruling of suburban racially discriminatory exclusion of proposed integrated apartments); Havens Realty Corp. v. Coleman, 455 U.S. 363 (1982) (finding standing for neighbors and housing discrimination testers to challenge housing discrimination under federal housing discrimination statute).

[48] Brown v. Board of Educ., 347 U.S. 483 (1954) (invalidating state mandated school segregation). *See also* Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971) (ordering aggressive affirmative action in remedying intentional school desegregation in constructing integration plans).

[49] Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977) (requiring proof of intentional discrimination as a prerequisite to finding a constitutional violation allowing a desegregation remedy in the virtually all-white suburbs).

[50] Milliken v. Bradley, 418 U.S. 717 (1974) (refusing to approve desegregation between virtually all-minority central cities and virtually all-white suburbs absent extremely burdensome proof of a virtual conspiracy).

[51] *Compare* Grutter v. Bollinger, 539 U.S. 306 (2003) (permitting modest affirmative action, allowing race to be a slight factor in admissions to law school) *with* Gratz v. Bollinger, 539 U.S. 244 (2003) (invalidating program offering an advantage to minority applicants to higher education).

[52] 840 F.2d 1096 (2d Cir. 1988), *cert. denied*, 488 U.S. 946 (1988).

[53] *E.g.* Eisenberg v. Montgomery County Pub. Schools, 197 F.3d 123 (4th Cir. 1999), *cert. denied*, 529 U.S. 1019 (2000) (invalidating high school diversity transfer program); Tuttle v. Arlington Cty. School Bd., 195 F.3d 698 (4th Cir. 1999) (per curiam), *cert. dismissed*, 529 U.S. 1050 (2000) (invalidating kindergarten diversity program).

[54] Washington v. Davis, 426 U.S. 229 (1976) (requiring proof of intent to challenge public employment policies as discriminatory under the equal protection clause); People Who Care v. Rockford Bd. of Educ., 111 F.3d 528 (7th Cir. 1997) (invalidating minority teacher consent decree hiring goals).

[55] City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (invalidating public works minority contract set-aside program).

and balanced living patterns,"[56] judicial interpretation of the law has established Title VIII as a virtually insurmountable barrier to attaining an integrated neighborhood or housing settlement let alone full realization of an integrated society.[57]

Although the United States courts and legislatures ironically have blocked integration programs as being discriminatory, Singapore has effectively utilized integration quotas in its housing allocation program to successfully achieve ethnic residential integration.[58] In Vienna, where non-discrimination laws have not been adopted, some private housing associations have dedicated their efforts toward integrating settlements by designing projects around diverse occupancy and particularly integrating European and Turkish residents. Affirmative action integration efforts, whether administered on a wide scale such as in Singapore or on a small scale such as those innovative efforts in particular cities or housing projects such as in Vienna, provide the greatest promise for achieving residential housing integration; however, legal and political opposition make such policies unavailable.

Even though the most effective integration strategies are constrained by legal and political limitations, modest affirmative action housing marketing plans are nevertheless available and constitute valuable integration tools. Specific examples of these marketing strategies include advertising, recruiting, and the making of agency referrals.[59]

7. New Urbanism Planning Design Policies

New Urbanism reflects the United States' version of the European compact city. The concept is a mixing of shops and residences in the urban center designed to generate city life and attract pedestrians toward a higher density, less automobile-dominated community.[60] New Urbanist neighborhoods, both in cities and in suburbs, are increasing housing supply and reducing exclusion by generating more multi-family, subsidized and affordable housing.[61] Where New Urbanism is linked with public transport such as light rail, what I refer to as "Smart New Urbanism," even modest increases in housing prices are partially offset by lower commuting, energy, and

---

[56] 114 CONG. REC. 3422 (1968) (statement of Senator Mondale), *quoted with approval in* Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205, 211 (1972) (finding generous standing of litigants to challenge acts of discrimination through Title VIII).

[57] James A. Kushner, *The Fair Housing Amendments Act of 1988: The Second Generation of Fair Housing*, 42 VAND. L. REV. 1049, 1113-19 (1989).

[58] Aya Gruber, Recent Development, *Public Housing in Singapore: The Use of Ends-Based Reasoning in the Quest for a Workable System*, 38 HARV. INT'L L.J. 236 (1997).

[59] South-Suburban Housing Center v. Greater South Suburban Bd. Of Realtors, 935 F.2d 868 (7th Cir. 1991). *See generally* Comment, *Fair Housing and the Constitutionality of Government Measures Affecting Community Ethnicity*, 55 U. CHI. L. REV. 1229 (1988).

[60] James A. Kushner, *Smart Growth, New Urbanism, and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations*, 21 UCLA J. ENVTL L. & POL'Y 45, 52, 61-65 (2002/2003). *See generally* PETER CALTHORPE, THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY, AND THE AMERICAN DREAM (1993); PETER CALTHORPE & WILLIAM FULTON, THE REGIONAL CITY (2001); MICHAEL N. CORBETT, A BETTER PLACE TO LIVE: NEW DESIGNS FOR TOMORROW'S COMMUNITIES (1981); ANDRÉS DUANY ET AL., SUBURBAN NATION (2000); PETER KATZ, THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY (1994); Eric M. Braun, *Growth Management and New Urbanism: Legal Implications*, 31 URB. LAW. 817 (1999).

[61] ARTHUR C. NELSON, ET AL, THE LINK BETWEEN GROWTH MANAGEMENT AND HOUSING AFFORDABILITY: THE ACADEMIC EVIDENCE (Brookings Institution discussion paper 2002) (reporting on Portland studies).

infrastructure costs: such as the reduced need to extend utilities and roads, or construct parking facilities.[62]

Conclusion

This paper has reviewed seven possible strategies to achieve ethnic and income-minority residential integration and reduce residential segregation including (1) a system of privately enforceable housing discrimination laws, (2) a system of government-administrated enforcement of housing discrimination laws, (3) inclusionary land use and housing policies, (4) subsidized housing supply through new housing production, (5) subsidized housing access through demand subsidies, (6) affirmative action integration policies, and (7) New Urbanism planning design policies. Each of these strategies offers some hope for mitigation of the problem of residential segregation. Realistically, each of the strategies should be simultaneously implemented to achieve the maximum integration effect. None of the strategies implemented alone are likely to significantly reduce or reverse the worldwide pattern of worsening ethnic and class-based residential segregation. The public and private enforcement of anti-discrimination laws are too haphazard, inclusionary zoning and planning initiatives too rarely and minimally enacted, new construction of subsidized housing opportunities too expensive, and the use of housing vouchers too segregative to generate meaningful integration. Only affirmative action integration policies and New Urbanism planning design policies offer a realistic hope of significant mitigation. Yet, for most nations and communities, either due to legal impediments or political realities, affirmative action integration policies implemented on a broad scale are unrealistic. Thus, the strategy of New Urbanism emerges as the one strategy that is the most politically feasible and effective in the pursuit of residential integration.

---

[62] James A. Kushner, *Smart Growth, New Urbanism, and Diversity: Progressive Planning Movements in America and Their Impact on Poor and Minority Ethnic Populations*, 21 UCLA J. ENVTL L. & POL'Y 45, 54-55, *64* (2002/2003).

Urban Sprawl, Social Cohesion and Zoning Discrimination in the United States*

Edward H. Ziegler**

I. Introduction: Sprawl, Housing and the Urban Poor

The dominant pattern of growth and land development in the United States continues to be one of ever expanding urban sprawl.[1] The term "sprawl" is here defined as low-density suburban and exurban growth that expands in an unlimited and noncontinuous (leapfrog) manner outward from the built-up core of a metropolitan area. This pattern of development is associated with the automobile-dominated "hypersprawl: landscape that emerged during the latter half of the twentieth century in the United States.[2]

Most major metropolitan areas throughout the industrialized world, of course, experienced some form of this sprawling outward growth during the latter half of the twentieth century.[3] In the United States, however, the densities of this sprawling development pattern are generally so low that by a worldwide standard the resulting built environment can appropriately by called "hypersprawl."[4] European development densities, for example, are generally about ten times greater than

** Professor of Law, University of Denver Sturm College of Law. The author extends his appreciation to Ms. Christina Robertson, a student at the Sturm College of Law, for her helpful assistance in the preparation of this article.

[1] Architect and urban historian Witold Rybczynski points out that American cities generally have not been, nor were they ever planned to be, developed in the form of European cities. WITOLD RYBCZYNSKI, CITY LIFE 51-83 (1995). He notes that based on the observations of the French visitor, Alexis DeTocqueville, as early as the 1830s, cities and towns in America generally had no distinct urban boundaries. He also comments on the prevalence of detached small homes on large lots during this time period. *Id.* at 88. Rybczynski points out that by the time the Frenchman LeCorbusier visited America in the 1930s, the development pattern of expanding decentralized cities linked with garden suburbs had been occurring for more than a century. *Id.* at 175.

[2] This low-density automobile-dependent pattern of land development is seen by some urban policy analysts as working a paradigm shift in the growth pattern of metropolitan areas in industrial societies. See ANTHONY DOWNS, NEW VISIONS FOR METROPOLITAN AMERICA 206-07 (1994). ("Specifically the view of urban life as center focused is giving way to the view of urban societies as low-density networks.") *Id.* at 206. See generally JONATHAN BARNETT, THE FRACTURED METROPOLIS (1995); ANTHONY DOWNS, STUCK IN TRAFFIC (1992); KENNETH T. JACKSON, THE CRABGRASS FRONTIER (1985). For a critical discussion of America's love affair with the automobile, see KATIE ALVORD, DIVORCE YOUR CAR (2000); JAMES H. KUNSTLER, HOME FROM NOWHERE 58-79 (1996).

[3] *See* MOSHE SAFDIE, THE CITY AFTER THE AUTOMOBILE 3 (Lynne Missen ed., 1997). Is there a common denominator to the ailments of cities of the industrialized West and of the populous Third World, in the North and in the Tropics - of New York and Mexico City, Jakarta and Hong Kong, Toronto and Copenhagen? Despite distinct differences of scale and resources, of climate and history, there is, indeed, a universal pattern. Everywhere in the world we find examples of expanded regional cities-cities that in recent decades have burst out of their traditional boundaries, urbanizing and suburbanizing entire regions, and housing close to a third of the world's population. *Id.*

[4] ROBERT BURCHELL, ET AL., THE COSTS OF SPRAWL--REVISITED 6 (1998) (TRANSIT COOPERATIVE RESEARCH PROGRAM REPORT 39).

development densities in the United States.[5] Suburban residential densities in some developing areas in America may fall below twenty residential dwellings per square mile.[6]

The hypersprawl built environment consists largely of isolated pods of development connected by major arterial roads and highways. Its landscape is totally shaped and dominated by the automobile.[7] Today, most people live, work, shop and play outside central cities in automobile-designed suburban and exurban areas that may be five, ten or even thirty or more miles from the urban core of major metropolitan areas.[8]

Distances, of course, must be traveled, and, in this hypersprawl landscape, the automobile reigns supreme. The average American driver travels twice the miles driven by the average European driver.[9] As the noted author Bill Bryson recently stated, "In many places in America now, it is not actually possible to be a pedestrian, even if you want to be."[10]

A number of private market forces contribute to urban sprawl in the United States. Americans have a strong preference for detached single-family homes on relatively large lots.[11] This preference is made a reality by America's tremendous economic growth and rising household incomes. Government tax policies also play a role in contributing to sprawl. The mortgage interest tax deduction and the protection of capital gains from the sale of a primary residence, promote the sale of very large homes - the bigger the better - and Americans are willing to "drive until they qualify" to buy the largest house they can afford which is typically located in outlying suburban areas.[12] Because of capital appreciation in the market value of housing, people in the United States think of housing as not just "a nice place to live" but as an economic investment in a large bulk commodity. Again,

---

[5] *Id.*

[6] This calculation is based on an allowed residential density limit of one residential unit per thirty-five acres of land - a density restriction found in some developing suburban areas. Boulder County, Colorado, for example, imposes this density restriction in its agricultural zones, some of which are directly in the path of suburban development northwest of Denver.

[7] The design of this landscape is, in fact, also largely shaped by high rates of automobile ownership and usage. *See* MATTEI DOGAN & JOHN D. KASARDA, INTRODUCTION TO THE METROPOLIS ERA: VOLUME 2, MEGA-CITIES 14 (Mattei Dogan & John D. Kasarda eds., 1988), "In cities where there is a high proportion of households owning an automobile, like American cities, the density of people is necessarily reduced accordingly. That cars require a substantial amount of space at a variety of locations is an important, but frequently overlooked, basic fact in comparative studies of urban density." *Id.* The authors further postulate a sequential model describing the decay of urban core areas as a result of increasing automobile ownership and usage in metropolitan areas. *Id.* at 16.

On the possibility of changing this urban landscape, see MOSHE SAFDIE, THE CITY AFTER THE AUTOMOBILE (Lynne Missen ed., 1997); PETER NEWMAN & JEFFREY KENWORTHY, SUSTAINABILITY AND CITIES: OVERCOMING AUTOMOBILE DEPENDENCE (Heather Boyer ed., 1999); PETER CALTHORPE, THE NEXT AMERICAN METROPOLIS (Chris Dresser & Doug Foster eds., 1993); PETER KATZ, THE NEW URBANISM: TOWARD AN ARCHITECTURE OF COMMUNITY (Joel Stein ed., 1994).

[8] *See* JAMES KUNSTLER, THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE 10 (1993); *see generally* ANDRES DUANY ET AL., SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM 4 (2000); ROBERT FISHMAN, BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA 16-17 (1987); PETER CALTHORPE, THE NEXT AMERICAN METROPOLIS: ECOLOGY, COMMUNITY AND THE AMERICAN DREAM 9 (1995).

[9] KUNSTLER, *supra* note 2, at 67.

[10] BILL BRYSON, A WALK IN THE WOODS 129 (1998).

[11] *See generally* Robert W. Burchell, *The Evolution of the Sprawl Debate in the United States*, 5 HASTING W.-N.W. J. ENVTL L. & POL'Y 137, 149 (1999)(pointing out that surveys show that 80% of Americans prefer a detached single-family home with a yard, and to afford it, would rather live further out than take a second job).

[12] The present supersized version of the American dream is the "McMansion," a large home by world standards and located in a low-density sprawling subdivision.

the bigger the better, even if this means one or two adults living alone in a 4,000 square foot McMansion on four acres of land.[13]

This desire to "move up" in housing fuels new residential development and urban sprawl. There is a prevailing tendency of Americans to "move out" away from urban core areas when they "move up" in housing rather than "moving in." This tendency is the result of the fact that most new homes tend to be built out away from urban core areas.[14] This tendency to move out virtually guarantees the decline of urban core areas and aggravates social parities between neighborhoods and jurisdictions.[15]

Other dynamics have contributed to the magnitude and pace of this dispersal of population outward from central cities, including decentralizing technological changes in commercial transportation, telecommunications, and information systems.[16] Also, high crime rates, poor schools, a paucity of amenities and deteriorating neighborhood conditions in the core areas of most major cities have encouraged this out-migration.[17] The high taxes, crime and poor services of cities have been widely rejected in favor of the amenities, services, and security provided by privately-funded homeowner associations in the suburbs.[18]

Sprawl is not just a result of the deterioration of urban core areas. Often overlooked is the fact that sprawl is also a primary cause of urban core deterioration and decline. The movement to the suburbs continues to be largely composed of upper-income households.[19] The poor and less wealthy are left behind in decaying and high-crime neighborhoods and schools.[20] Sprawl, in this way, contributes to the deteriorating economic viability and social livability of the core areas of most major cities and towns. Deteriorating conditions in central cities, in turn, discourage economically viable households and businesses from moving to these areas.[21] This cycle of outward expansion

---

[13] DAVID BROOKS, ACQUIRED TASTE, in THE NEW GILDED AGE 426, 431 (2000). Duany et al., *supra* note 8, at 41.

[14] The desire of people to "move up" in housing is a significant factor in the "movement out" from urban core areas where a supply of desirable higher-cost housing is not available "closer in" to an urban area. "Most movers would still go out instead of in, but the absence of the opportunity to move up and in guarantees the decline of the core, it guarantees that real estate in many if not most older places will filter down in use and value, it guarantees that the income level of residents in those places will drop, and
it guarantees aggravated economic and social disparities between neighborhoods and jurisdictions." Thomas Bier, *Moving Up, Filtering Down: Metropolitan Housing Dynamics and Public Policy*, Sept. 2001, *cited in Moving Up and Farther Out*, GROWTH/NO GROWTH, Oct. 2001, 2, 6.

[15] *See* DOWNS, *supra* note 2, at 204.

[16] Christopher B.V. Leinberger & Charles Lockwood, *How Business Is Reshaping America*, THE ATLANTIC MONTHLY, Oct. 1986, at 43.

[17] *See*, e.g., DOGAN et al., *supra* note 7, at 87 (pointing out the inverse relationship between crime rate and distance from the central city in American cities of every size); DOWNS, *supra* note 2, at 217 (interpreting data as demonstrating that people and businesses fleeing cities are likely trying to get away from poverty and adverse social conditions more than costly local fiscal policies).

[18] *See generally* EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT (1994).

[19] Between 1990 and 1997, there were a total of 1.2 million new residents in low-density metropolitan counties in the United States and over 40% of these new residents had annual incomes of $60,000 or more. Only 24% of the households in America's major cities had annual incomes that high. See *The State of the Nation's Housing 2000*, Harvard University Joint Center for Housing Studies, discussed in GROWTH/NO GROWTH, Aug. 2000, at 2.

[20] Richard Moe, *Growing Smarter: Fighting Sprawl and Restoring Community in America*, ENVT'L. & URB. ISSUES, Winter 1997, *at* 15. Therein he notes that, "Sprawl has drained the life out of thousands of traditional downtowns and inner-city neighborhoods, and we've learned that we can't hope to revitalize these communities without doing something to control the sprawl that keeps pushing further and further out from the center." *Id.*

[21] *See* OLIVER BYRUM, OLD PROBLEMS IN NEW TIMES: URBAN STRATEGIES FOR THE 1990S (Planners Press 1992).

and inner deterioration now characterizes older suburban areas.[22] As a result, many less affluent and urban poor households may now be unable to afford a reliable automobile yet be miles away from most new jobs which are increasingly located in distant suburban locations that often are not well served by mass transit systems.[23]

II. Exclusionary Zoning and Growth Management Programs: Sprawl, Housing, and the Urban Poor

The urban poor and less affluent households often find that affordable housing is not available in outlying suburban areas.[24] Due to America's local tax and public fiscal structure, residential development, particularly higher-density and more affordable residential development, does not pay its own way and must be subsidized by local government expenditures for supporting infrastructure and services.[25] The result is that in many developing suburbs, the only type of residential development generally allowed by local zoning will be detached single-family homes on relatively large lots, and local governments will strongly compete for the sales taxes and other revenues generated by commercial and office development.[26] This type of exclusionary "fiscal zoning" is now a widely recognized phenomenon among those who have studied local growth management programs.[27] As it promotes low density zoning, fiscal zoning also contributes to suburban sprawl throughout a metropolitan area and significantly limits the supply of affordable housing.[28]

In addition to fiscal reasons for low density zoning, local zoning and growth management programs often are dominated by the political pressures of "built environment" NIMBYISM (Not In My Back Yard).[29] This type of "snob zoning" seeks to exclude development, particularly high density and more affordable housing, from a neighborhood or community.[30] The goal of built environment NIMBYISM is simply to protect already developed residential and recreational areas from new development. This type of "snob zoning" NIMBYISM may be motivated by a desire to protect the aesthetics and property values of established areas or by economic class bias or racial discrimination.[31]

---

[22] *See* WILLIAM LUCY & DAVID PHILLIPS, CONFRONTING SUBURBAN DECLINE (Island Press 2000).

[23] *See generally* DOWNS, *supra* note 2; John Brennan & Edward W. Hill, *Where Are The Jobs? Cities, Suburbs, and the Competition for Employment*, THE BROOKINGS INSTITUTION SURVEY SERIES (CENTER ON URBAN & METROPOLITAN POLICY 1999); Bruce Katz & Katherine Allen, *Help Wanted: Connecting Inner-city Job Seekers with Suburban Jobs*, THE BROOKINGS REVIEW, Vol. 17, No. 4 31-35 (Fall 1999); Margaret Pugh, *Barriers To Work: The Spatial Divide Between Jobs And Welfare Recipients*, THE BROOKINGS INSTITUTION (July 1998).

[24] *See generally* "Not In My Back Yard": Removing Barriers to Affordable Housing (1997) (Advisory Commission on Regulatory Barriers to Affordable Housing: U.S. Department of Housing and Urban Development).

[25] Robert Burchell, *The State of the Cities and Sprawl*, in BRIDGING THE DIVIDE-MAKING REGIONS WORK FOR EVERYONE 3, 10 (1999) (U.S. Department of Housing and Urban Development).

[26] ROBERT FREILICH, FROM SPRAWL TO SMART GROWTH 5 (1999).

[27] James A. Kushner, *Smart Growth: Urban Growth Management and Land-Use Regulation Law in America*, 32 URB. LAW. 211; 228 (2000).

[28] *See* DOWNS *supra* note 2, 39-40.

[29] *See* note 24 *supra*.

[30] *Id.*

[31] *Id.* And *see* Florence Wagman Roisman, *Sustainable Development in Suburbs and Their Cities: The Environmental and Financial Imperatives of Racial, Ethnic, and Economic Inclusion*, 3 WIDENER L. SYMP. 87, 98-107 (1998); Oliver A. Pollard, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L. J. 247, 280 (2000) (pointing out that "people may support the concept of more compact development in order to curb the loss of open space, yet strenuously oppose infill and higher density in their own neighborhoods"). *See generally* LARRY KEATING, RACE, CLASS AND URBAN EXPANSION (2003).

This type of exclusionary local zoning severely restricts housing opportunities for low- and moderate-income persons. Through a wide range of techniques, such as requiring large lots and minimum floor areas, excluding apartment and mobile home development, and demanding costly developer exactions, municipal regulations drive up the cost of housing. These regulations have the necessary effect of excluding from the community persons of moderate means, even as the municipality purposely attracts businesses that might employ these same people.[32] This type of exclusionary zoning has often been found to be a significant cause of housing affordability problems in the United States.[33]

The Supreme Court's early *Village of Euclid* decision,[34] which held that a city could properly regulate the use and development of land to avoid mixing business and residential uses and to protect low-density, detached single-family homes from higher-density apartments,[35] has largely operated throughout the twentieth century to constitutionalize low-density restrictive zoning and related local governmental actions directed at excluding less affluent housing from entire neighborhoods and suburban communities.[36] Later Supreme Court and state court decisions have replaced the rather harsh "public nuisance/parasite" rhetoric of *Village of Euclid*[37] with the more politically correct themes of allowing local communities to avoid "urban blight" by protecting the charm and aesthetic character of their neighborhoods.[38] This, of course, allows communities to engage in restrictive zoning to provide suburban neighborhoods of single-family homes "where yards are wide" and "people few."[39] Recently, court decisions have allowed local communities to severely restrict land use and development to promote preservation of the natural environment.[40]

Local zoning and growth management programs may impose restrictions not only on land use, height, and setback, but also on lot size, floor area, yards, exterior appearance, fences, landscaping, signs, and parking. To enhance the flexibility of zoning as a regulatory tool, many local communities

---

[32] EDWARD H. ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING §§ 22.7-22.8 (4th ed. 2002).

[33] *See supra* note 24: Snob zoning may be closely related in some areas to housing affordability problems. *See* Arthur C. Nelson, *Exclusionary Practices and Urban Sprawl in Metropolitan Atlanta*, 17 GA. ST. U. L. REV. 1087, 1087-1088 (2001) (discussing the example of the city of Powder Springs, Georgia); *In Santa Cruz, Concerns Over High Housing Prices Trump Slow Growth Efforts,* GROWTH/NO GROWTH, Feb. 2002, at 6, (discussing the fact that in Santa Cruz County, California, only six percent of the homes are affordable to a family earning the county's median income). Even for allowed residential uses, the cost of land and housing is significantly affected by intensive land use regulation. *See, e.g.*, Sternlieb & Sagalyn, ZONING AND HOUSING COSTS (1972); U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT HOUSING COST REDUCTION DEMONSTRATION, in URBAN LAND INSTITUTE, HOUSING SUPPLY AND AFFORDABILITY 213, 216 (Frank Schnidman & Jane A. Silverman eds. 1983) (price of new home reduced by as much as 33% through minor changes in restrictions, innovative design, and rapid processing of development applications).

[34] Village of Euclid v. Amber Realty Co., 272 U.S. 365 (1926).

[35] *Id.* at 394-95.

[36] *Id.* at 394.

[37] Id. at 394. See Melvyn R. Durchslag, *Village of Euclid v. Amble Realty Co., Seventy-Five Years Later: This Is Not Your Father's Zoning Ordinance*, 51 CASE W. RES. L. REV. 645 (2001).

[38] *E.g.*, Berman v. Parker, 348 U.S. 26, 32-33 (1954) (Douglas J.) (allowing government-sponsored demolition of urban neighborhoods, and describing the blight of disreputable housing: "They may also be an ugly sore, a blight on the community which robs it of its charm, which makes it a place from which men turn. The misery of housing may despoil a community as an open sewer may ruin a river.").

[39] *E.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974) (upholding the constitutionality of a suburban zoning restriction on household composition as a method of limiting density in areas of detached single-family homes based on the rationale that zoning might properly plan for neighborhoods "where yards are wide" and "people few").

[40] *E.g.*, Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 10118-19 (1992) (ruling that environmental restrictions on land use and development protect the general welfare and that such restrictions generally will be held to constitute a "taking" of private property for public use only where the restriction as applied denies an owner all economically viable use of the land).

have greatly increased the number of zoning districts, tailoring district restrictions to ever smaller land areas. Also, modern zoning codes may contain any number of special or overlay zoning districts, which typically impose a supplementary set of restrictions on land within these districts, often to protect features of the natural environment.[41]

Modern zoning and growth management programs may provide for extensive site plan review and for the imposition of site-specific conditions on development permits.[42] Today, "smart growth" zoning codes may require environmental or other impact assessment studies, tree and vegetation protection, protection of wildlife habitat and migration and riparian areas, protection of historic structures and scenic views, provide for architectural and design review, development impact fees and for transfer of development rights. Local regulatory programs may also impose growth caps or concurrency infrastructure requirements on new development within a community.[43]

Not every call to environmental action by land use activists properly invokes a "public interest" banner. Today, zoning restrictions on the development of "open space" and on other "environmentally sensitive" areas are the hallmark of any well-drafted snob or smart growth "Gucci" or "Birkenstock" sprawl zoning code.[44] Robert Freilich, a leading proponent of "smart growth" acknowledges that local zoning and urban planning programs tend to be dominated by "local values" and "based upon parochial" and "local protectionist" considerations.[45] Smart growth and environmental protection rhetoric in modern zoning codes may mask some of the worst possible forms of local avarice and self-interest.[46]

Snob zoning and exclusionary development codes have enormous environmental and human costs.[47] Janice Griffith has commented on the environmental harm of low density sprawl:

---

[41] *See* Edward H. Ziegler, *Shaping Megalopolis: The Transformation of Euclidean Zoning by Special Zoning Districts and Site-Specific Development Review Techniques*, 15 ZONING & PLAN. L. REP. 57-58 (1992).

[42] *Id.*

[43] *See generally* James A. Kushner, *Smart Growth: Urban Growth Management and Land-Use Regulation Law in America*, 32 URB. LAW. 211 (2000); Stuart Meck, *Highlights of the American Planning Association's Growing Smart Project: New Tools for Planning and Management of Development*, 25 ZONING & PLAN. L. REP. 49(2002); JOHN NOLON, WELL GROUNDED: USING LOCAL LAND USE AUTHORITY TO ACHIEVE SMART GROWTH (2001).

[44] This type of environmental NIMBYism is now frequently evident in court decisions challenging zoning and development restrictions. *See, e.g.*, City of Cuyahoga Falls v. Buckeye Cmty. Hope Found. 123 S.Ct. 1389, 1394-95 (2003) (holding that substantive due process is not violated by application of a voter referendum process to revoke an ordinance granting site-plan approval for a proposed high-density affordable apartment development); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 721 (1999) (affirming jury verdict in favor of an owner that a regulatory taking occurred when the owner's proposed residential development was denied since the denial was not substantially related to the city's alleged environmental concerns); Pheasant Bridge Corp. v. Township of Warner, 169 N.J. 282, 293- 294, 777 A.2d 334, 341 (2001) (holding increase in minimum lot size unreasonable as applied to owner's land since alleged supporting environmental concerns would be unaffected by development).

[45] *See* ROBERT FREILICH, FROM SPRAWL TO SMART GROWTH 4-5 (1999).

[46] *See* Durchslag, *supra* note 37, at 647.

[47] *See, e.g.*, Robert W. Burchell, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-N.W. J. ENVT'L L. & POL'Y 137 (1999); Francesca Ortiz, *Biodiversity, The City and Sprawl*, 82 B.U. L. REV. 145 (2002); Patrick Gallagher, *The Environmental, Social and Cultural Impacts of Sprawl,*
15 Nat. Resources & Env't. 219 (2001); Michael Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 Marq. L. Rev. 301 (2000). *See generally,* MARK BALDASSARE, TROUBLE IN PARADISE: THE SUBURBAN TRANSFORMATION IN AMERICA (1986); F. KAID BENFIELD ET AL., ONCE THERE WERE GREENFIELDS: HOW URBAN SPRAWL IS UNDERMINING AMERICA'S ENVIRONMENT, ECONOMY AND SOCIAL FABRIC (1999); ANDRES DUANY ET AL., THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM (2000).

> The sprawling expansion of the nation's mega cities into outer rings of further development depletes land in a natural state and increases air and water pollution. To sustain long-term growth, a metropolitan area must make major investments in its transportation, sewer, water supply, and wastewater infrastructures to diminish growth related environmental harms. Transportation, land use, and water policy decisions must be coordinated throughout a metropolitan area to ensure that each locality assumes its fair share of growth related costs and does not resort to cheaper solutions that lack environmental sensitivity.[48]

The human costs of exclusionary zoning and low density sprawl are also significant. Robert Bullard has noted in this regard:

> All communities are not created equal. Apartheid-type employment, housing, and development policies have resulted in limited mobility and reduced neighborhood options, decreased residential choices, and diminished job opportunities for African Americans and other people of color. American cities continue to be racially separate and unequal. Residential apartheid is the dominant housing pattern for most African-Americans – the most racially segregated group in America. Nowhere is this separate society contrast more apparent than in the nation's large metropolitan areas.[49]

In theory, modern "smart growth" zoning codes should combine selective protection of scenic vistas, important open space areas and environmentally sensitive lands with significant zoning designations of land for growth areas that allow more compact, higher-density, mixed-use and pedestrian friendly developments – sometimes referred to as "New Urbanist" development.[50] The reality, though, is that many modern zoning codes too often contain the former protective environmental restrictions but generally reject the more generous, affordable and higher density development provisions.[51] Unless zoning and land development codes are changed to allow, or

---

[48] *See* Janice C. Griffith, *Smart Governance for Smart Growth: The Need for Regional Governments*, 17 GA. ST. U. L. REV. 1019, 1019 (2001).

[49] *See also* Robert D. Bullard et al., *The Costs and Consequences of Suburban Sprawl: The Case of Metro Atlanta*, 17 GA. ST. L. REV. 935, 938(2001).

[50] *See* John Nolon, *Local Land Use Controls That Achieve Smart Growth*, 31ENVTL. L. REP. 11025 (2001):

> Smart Growth admits of no clear definition. It provides a popular label for a growth strategy that addresses current concerns about traffic congestion, disappearing open space, nonpoint source pollution, the high cost of housing, increasing local property taxes, longer commutes, and the diminishing quality of community life. To accomplish smart growth, government must take two related actions. The first is the designation of discrete geographical areas into which private market growth pressures are directed. The second is the designation of other areas for recreation, conservation, and environmental protection. This reduces a complicated subject to its two most essential features and leaves much for further discussion.

See also NAT'L ASS'N OF HOME BUILDERS, SMART GROWTH: BUILDING BETTER PLACES TO LIVE WORK AND PLAY 10 (1999).

[51] *See* Philip Langdon, *Zoning Reform Advances Against Sprawl and Inertia*, NEW URB. NEWS, Jan./Feb. 2003, at 1 (describing the need to reform zoning codes as the number one priority of the New Urbanism movement); Edward Ziegler & Greg Byrne, Zoning, *New Urbanist Development, and the Fort Collins Plan*, ZONING NEWS, Sept. 1998, at 1 ("existing zoning and development codes still prohibit new urbanist development or strongly favor conventional low-density development in regulatory approval procedures").

actually require, this type of mixed-use, higher-density residential development in both infill and greenfield areas, New Urbanism may prove to be just a form of New Suburbanism – low-density sprawl with front porches.[52]

Exclusionary zoning and growth management programs are strongly associated with high rates of home ownership, high home values, high income levels, and white population size.[53] It should not be surprising that local zoning and growth management programs often are not so much designed to provide sustainable communities with economic and housing opportunities for both the rich and the poor but are designed largely to protect and enhance the property values of existing homeowners.[54] Anthony Downs has commented on this political dynamic: "[N]onpoor people have what are to them cogent social, economic, and personal security reasons to remain physically and socially separated from poorer people. These motives are reinforced by the social and ethnic differentiation of suburbs from central cities, wide-spread racial discrimination and intolerance, and constant media reporting of adverse conditions in central cities."[55]

The resulting political dynamic involved in the adoption of exclusionary zoning programs is described by Melvyn Durchslag as follows: "Elected representatives . . . maximize their desires by getting re-elected. And they do that by responding to the wishes of their constituents. Thus, if residents of a small suburban or ex-urban community feel their lifestyle being threatened by a large

---

[52] *See* WILLIAM FULTON, THE NEW URBANISM 3 (1996) (Lincoln Institute of Land Policy Report). New Urbanism, as a development concept, is usually characterized as a more compact, higher-density mixed-use and integrated development design, with a range of housing types (including affordable housing) and a pedestrian friendly neighborhood, sometimes, in concept, linked with mass transit and high density nodes of transit-oriented development. Its potential design benefits have been highly touted at land use conferences throughout the United States and in the literature promoting this development concept. Whether New Urbanism actually will have any significant impact on our low-density, automobile-dominated landscape remains to be seen. Other than some upscale and nostalgic greenfield boutique developments, there appear to be a number of problematic market and regulatory issues that seem likely to curtail widespread implementation of this development design, particularly with respect to infill and redevelopment in urban core areas. Ultimately, the potential benefits of New Urbanism may well be garnered only by the force of government mandate and substantial public incentives and subsidies. The political feasibility of this outcome (in this age of environmental NIMBYism), though, is by no means clear in the foreseeable future. *See* Ziegler & Byrne, *supra* note 51, at 1(relating the report in the January 1998 issue of New Urban News that for every dollar invested in new urbanist projects, an estimated $1,400 is invested in conventional sprawl development); Jeremy R. Meredith, *Sprawl and the New Urbanist Solution*, 89 VA. L. REV. 447, 487-95 (2003) (discussing a number of market and regulatory impediments to implementing New Urbanism as an antidote to conventional sprawl development); Mark Fina & Leonard Shabman, *Some Unconventional Thoughts on Sprawl*, 23 WM. & MARY ENVTL. L. & POL'Y REV. 801 (1999) (discussing problematic market issues related to implementing more compact and contiguous development); *see also* Eric M. Braun, *Growth Management and New Urbanism: Legal Implications*, 31 URB. LAW. 817, 819-20 (1999).

[53] *See* James C. Clingermayer, *Quasi-Judicial Decision-Making and Exclusionary Zoning*, 31 URB. AFFAIRS REV. 544 (1996).

[54] *See generally* MARK BALDASSARE, TROUBLE IN PARADISE: THE SUBURBAN TRANSFORMATION IN AMERICA (1986), at 99-100:

> The findings of this study suggest that suburbs may turn more frequently to restrictive policies. Growth and its related problems will be found in many communities. Fiscal austerity will fuel the need for policies to curb growth. The growing number of fiscal conservatives will point to the costs of growth. The environmentalists will note the erosion of the small-town atmosphere. Average citizens will wonder if the decline in services and community quality can be reversed if growth is halted. The inability of suburban government to solve problems, and influence events around it, may raise louder calls for action.

[55] DOWNS, *supra* note 2, at 204.

new housing development or a new shopping mall, they will demand that their elected officials do everything possible within the boundaries of their legislative capacities to stop or limit the development proposals."[56] The end result of this dynamic often will be the adoption of zoning programs dominated by "built environment" NIMBYISM.[57] Largely as a result of development restrictions imposed by exclusionary NIMBY zoning codes, the demand for new homes in the United States is now estimated to far exceed available supply, further increasing the cost of housing.[58]

III. Towards a Conclusion: Sprawl, Housing, and the Urban Poor

Local zoning and growth management programs, including so called "Smart Growth" programs, often embrace some of our worse impulses and ignore the costs of the economic and housing opportunities that they deny less affluent households and the urban poor.[59] This is the result of a land use control system which, in this society, allows each community to solve its own problems and plan its own future completely without regard to the general needs and wants of people in the nearby metropolitan region.[60] To a significant degree, this exclusionary growth management system is, at once, both a reflection of and a cause of the failure of "social cohesion" in

---

[56] *See* Durchslag, *supra* note 37, at 654.

[57] E.g., Woodwind Estate Ltd. v. Gretkowski, 205 F.3d 118, 125 (3d Cir. 2000) (holding that developer's substantive due process rights would be violated where proposed development of 100 affordable-home subdivision was denied based largely on neighbors' concerns about socioeconomic background and income level of potential residents). *See* Michael Burger, *Building Blues*, L.A. DAILY JOUR., May 3, 2001, at 7 reporting on this case as follows:

> While trying to develop affordable homes and bring the American dream of homeownership to an expanded class of citizens, Woodwind Estates ran smack into the NIMBY (not-in-my-back yard) syndrome. Neighbors of the proposed project didn't like the idea, at least, not in their neighborhood. Banding together (as such groups always do), and adopting a group name (as they always do), the Concerned Neighbors of Woodwind Estates (a name with no useful acronym, quite out of character for NIMBY groups generally) sought to stop the project by peppering the Stroud Township Planning Commission with euphemisms. They were concerned about the income level of potential residents, as well as their socioeconomic background. Fretting about the effect of such people on local property values, they urged project denial simply because they were opposed to low-income residents moving into their community.

[58] *See* Michael Brush, *Insiders Are Bailing on Home-Builder Stocks*, MSN Money-Company Focus, Sept. 3, 2003, *available at* http://www.moneycentral.msn.com/content/p58043.asp:

> It's natural to want to halt nearby home construction the second you buy a house, so politicians have created thickets of local building regulations in communities around the country. In some areas, this has doubled the time it takes to get approval for new units, compared to a few years ago. 'You have an artificial cap created by government regulation across the country that keeps supply down,' says Joel Rassman, the chief financial officer at Toll Brothers. Demand, meanwhile, marches on, thanks to immigration, the desire for second homes, the aging of the population and other mega trends. Rassman puts what he calls the natural demand for new homes at 1.8 million to 2.1 million per year. (That's on top of existing home sales.) But building authorities are issuing 1.5 million permits per year on average.

[59] *See* William W. Buzbee, *Sprawl's Dynamics: A Comparative Institutional Analysis Critique*, 35 WAKE FOREST L. REV. 528, 528 (2000); Robert Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 494-98 (1977).

[60] *See* Griffith, *supra* note 48, at 1019.

the United States. As Anthony Downs notes in this regard: "The failure of most nonpoor suburban residents to develop strong feelings of, or rational commitments to, social and political solidarity with central cities has severe consequences. It causes the nonpoor to resist any transfer of decision-making powers over land use, transportation, and local fiscal policies to a regional level. Yet without such transfers, metropolitan areas cannot cope effectively with growth-related problems, which are all basically regional."[61] To address this situation, state laws governing local city zoning and growth management programs will need to be changed.

Regional urban planning for metropolitan areas needs to be established in order to implement more compact and infill development policies.[62] Modern zoning codes need to be reformed (probably by state mandate) to not just allow, but actually require, more compact and higher-density residential development and to provide a greater range of choice in the types and cost of housing available.[63] These changes though, need to be accompanied by changes in federal and state public policies that now promote hypersprawl development and support the adoption of low density NIMBY zoning codes. Unless local zoning and growth management policies result in more affordable housing choices and direct funds to existing infrastructure and services in urban core areas, increasing investment and jobs, and improving the quality of life in these areas, they offer little promise of social and economic equity.

Livable neighborhoods in city core areas and older suburbs, of course, need to be better maintained and protected. Central cities will have to be much more concerned about improving the conveniences, amenities and security of neighborhood life, so as to promote more residential infill and redevelopment by the middle class. Also, housing subsidies for the middle class, tied to urban core areas, should be considered.

State law reforms involving regional "fair share" affordable housing zoning programs[64] or providing for stricter review of exclusionary zoning programs by the judicial branch of government have been modestly successful in some states.[65] Also, inclusionary zoning programs requiring the provision of some affordable (below market value) housing units in certain types of development projects and development impact fee systems to finance new affordable housing development have had some success in places where they have been adopted.[66]

There are likely no easy answers to the problems involving "social cohesion" and exclusionary local zoning and growth management programs. Peter Calthrope has commented on the difficulty of making the needed changes to provide higher density developments and more affordable housing options:

---

[61] DOWNS, *supra* note 2, at 204.

[62] *See, e.g.*, PETER CALTHORPE & WILLIAM FULTON, THE REGIONAL CITY 17-22 (2000); Griffith, *supra* note 48, at 1019; Douglas R. Porter, *Reforming Growth Management in the 21st Century: The Metropolitan Imperative*, 12 U. FLA. J.L. & PUB. POL'Y 335 (2001); Philip Weinberg, *Control of Suburban Sprawl Requires Regional Coordination Not Provided by Local Zoning Laws*, 72 N.Y. ST. B.J. 44 (2000).

[63] *See* note 24, herein.

[64] The New Jersey state "fair share" zoning law requirements and court decisions are discussed in 2 EDWARD H. ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING § 22.17 (4th ed. 2005).

[65] For a discussion of statutory administrative and judicial remedies under so-called anti-snob zoning legislation in the states: Connecticut, Massachusetts, and Rhode Island, *see* 2 EDWARD H. ZIEGLER, RATHKOPF'S THE LAW OF ZONING AND PLANNING §§ 22.20.50 - 22.20.53 (Supp. 2005).

[66] *See generally*, Nicholas Brunick, *The Inclusionary Housing Debate: The Effectiveness of Mandatory Programs Over Voluntary Programs*, 21 ZONING PRACTICE No. 9, 2 (2004); Nicholas Brunick, *Inclusionary Housing: Proven Success in Large Cities*, 21 ZONING PRACTICE No. 10, 2 (2004). *See also* Lynn Ross, *Zoning Affordability: The Challenge of Inclusionary Housing*, ZONING NEWS Sept. 2003, at 1. And *see* Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990) (upholding impact fees for low income housing).

> Such a major reordering of government policies and subsidies will take a powerful political coalition. The coalition against such integrated planning can be large: localities looking for growth and tax base regardless of development quality or regional implications; developers looking for opportunities to repeat past successes without regard for changing times or consequences; neighborhood groups hoping to preserve and enhance property values by exclusionary practices; and people (i.e. voters) simply afraid of the unknown or a loss of control. The forces for the status quo are powerful drives that are self-reinforcing.[67]

Similarly, Janice Griffith has noted in this regard: "North Americans value independence and freedom from public regulation. Before they are willing to adopt more compact living, they must come to believe that the benefits of smart growth outweigh the detriments of sprawl. Greater density living will not be palatable until the harms caused by sprawl – congested highways, air pollution, diminished water quality, and loss of open space – are viewed as unsolved without the use of more smart growth techniques."[68]

Major changes in this governmental system promoting greater "social equity" may even be perceived as undermining "social cohesion".[69] Some degree of class conflict seems inevitable in this process. As a recent report on metropolitan issues observes: "To the poor, municipal expenditures on health, education and welfare are among the few rays of light in an otherwise dismal environment." To the new urban elite groups, these are extraneous expenditures. In their place are rather environment-enhancing – and real estate price-increasing – investments in parks, recreational facilities, libraries, and the like. The yin-yang of this conflict dominates budget meetings in every major city in America."[70] The risk is that common interests will be obscured if both genuine (at least in the short term) and perceived conflicts between the urban poor and nonpoor are aggravated rather than mediated in the face of competing constituent preferences. This type of significant change in attitudes and behavior will likely require some substantially expanded sense of community responsibility – beyond our immediate neighborhoods. Ultimately, this challenge is the difficult one of finding ways to promote greater social cohesion by bridging the gap between the worlds of the affluent suburban class and our less affluent households and urban poor.[71]

---

[67] CALTHORPE, *see* note 7, at 35-36.

[68] *See* Griffith, *supra* note 48, at 1024.

[69] *See* Buzbee, *supra* note 59, at 528.

[70] DOGAN, et al., *supra* note 7, at 28.

[71] *See generally* PETER HALL, CITIES OF TOMORROW 405 (updated ed. 1996) (describing the widening gap between the worlds of an "information-rich majority and an information-poor minority, between what Robert Reich calls the symbolic analysts and the casualized service workers").

Urban Periphery Renewal in Spain: a Neighbourhood Approach

Montserrat Pareja Eastaway† and Montse Simó Solsona*

I. Introduction

This chapter analyses the process of neighbourhood renewal in Spain by undertaking case studies in two barrios of the city of Madrid (Orcasitas and Simancas) and two in the province of Barcelona (Trinitat Nova and Sant Roc).[1] The writing of this chapter has been made possible thanks to the work conducted over a three-year period in the RESTATE project – *Restructuring Large Housing Estates in Europe*, a project financed by the Fifth European Union Framework Programme.[2] The primary aim of this project has been to identify good practices of neighbourhood renewal by studying neighbourhood renewal programmes in the housing estates of ten European cities.

The chapter is divided in three sections: first, we briefly compare and contrast the four Spanish barrios (neighbourhood housing estates) that are the object of study here. Second, we examine the main characteristics of the processes of intervention in these barrios and the elements that are of greatest relevance to this study. In addition, we evaluate the policies, programmes and actions that have been implemented in the four neighbourhoods and, finally, we present the residents' perceptions of their barrio and of the changes that are being made to it. To conclude, we identify the elements that are instrumental to the success or failure of a given policy of intervention.

1. Peripheral barrios in Spain

The construction of vast housing estates in the urban periphery characterised the urban development of the major European cities in the post-war years.

In Spain this phenomenon occurred in a similar fashion but the underlying motives differed. The shortage of housing arose primarily out of the need to offer shelter to those who were migrating from rural areas to the big cities, motivated in the main by the search for work and better living conditions. The proliferation of deteriorated areas in the city suburbs meant, in certain cases, that the *chabolismo* (shanty towns) had to be replaced by what has been called "*barraquismo vertical*" (vertical shanty housing),[3] thereby creating high densities of housing around the urban nucleus.

The housing estates built in Europe between the 40s and 50s present a diversity of origin, size, design and typology of resident. However, in all of them there exists a certain similarity in terms of the problems and situation they face.[4] Within Spain, these housing estates do not respond to the cities' natural growth patterns, rather they are autonomous entities which over time have been

† Department of Economic Theory, University of Barcelona (mpareja@ub.edu).

* Department of Sociology and Organisational Analysis, University of Barcelona (msimo@ub.edu).

[1] *See* Appendix to this chapter for a brief description of the four large housing estates.

[2] The authors of this chapter would like to thank the other members of the RESTATE team, in particular the Spanish members: Teresa Tapada Beteli, Brechtje van Boxmeer and Lidia García Ferrando.

[3] EARHA (2003) *Infrahabitatge a Catalunya.* Diputació de Barcelona, Barcelona.

[4] Murie, A.; Knorr-Siedor, T. and Van Kempen, R. (2003) *Large Housing Estates in Europe. General Developments and Theoretical Backgrounds.* RESTATE report 1. Utrecht: Urban and Regional Research Centre, Faculty of Geosciences, Utrecht University.

gradually incorporated within the urban continuum and which have in most cases been privatised, even when originally built as social housing.

Photo 1. Trinitat Nova - a block of housing with severe structural weaknesses (*aluminosis)* (Photo: Montserrat Pareja Eastaway, 2003)

Since the 1980's, in Spain as well as in the rest of Europe, state-wide concern over issues such as the deterioration and aestethic depletion of neighbourhoods, overpopulation and the precarious nature of the social composition of nieghbourhood residents are some of the reasons that led to the development of specific programmes and policies to renew these neighbourhoods. The context of each barrio can be defined by examining aspects of its life as detected through the course of its demographic, social, political and economic evolution. It is virtually impossible to establish a single typology of barrio; the composition of the population, structural typology of the buildings and predominant economic activities make each barrio unique.

And yet, the urban periphery in general shows more dramatically some of the most pressing problems afflicting Spanish society:[5] ageing population, high unemployment rates, limited job opportunities for those with few qualifications and the concentration of marginal groups, among others. Furthermore, the grave deterioration of the housing and communal areas, the neglect of public zones and the lack of economic activity in the barrio create a space in need of restructuring.

In these barrios the general policies of the welfare state converge (i.e. health, education and housing) and their shortcomings are made even more evident.[6] Families who reside in the Spanish barrios[7] cannot be included in the demand in the rest of the City. The urban periphery plays an indisputable role in supplying accommodations for certain social groups, the composition of which

[5] *See* Pareja et al., (2004) *Large Housing Estates in Spain: Overview of developments and problems in Madrid and Barcelona.* RESTATE report 2h. Utrecht: Urban and Regional Research Centre, Faculty of Geosciences, Utrecht University, for an exhaustive analysis of the barrios of Trinitat Nova and Sant Roc in Catalonia and Orcasitas and Simancas in Madrid.

[6] Pareja Eastaway, M. and Turmo Garuz, J. (2004) " Las políticas de vivienda y el estado del bienestar" en Díaz Orueta F. and Lourés Seoane, M.L (eds) (2004) Desigualdad social y vivienda. Editorial Club Universitario. pp. 11-30.

[7] The housing market in these barrios is often considered closed since there are no opportunities for residential mobility: all the estate is occupied, most of the properties being owned.

has changed over the years: from the unskilled workers that came seeking jobs in the 1950's to the surging immigrant population in the 1990's to the present day.

In the case of Catalonia there occurred a simultaneous phenomenon of rapid structural deterioration, the appearance in the 1990's of the first problems related to the use of weakened concrete (*aluminosis*) during the period of the massive construction of housing, which made public action an urgent priority[8] and the initiation of the redevelopment programmes which occurred shortly after the detection of this structural problems. At first, the barrios with the most urgent structural problems were provided with the necessary tools to begin replacing the housing; Sant Roc and Trinitat Nova were part of this first group. The situation in Madrid differed significantly because it was the strength of the neighbourhood groups, not government sponsored redevelopment programmes, which led to the initiatation of a programme known as "Redeveloping the barrios of Madrid".

Some experts examine a link between the barrios and certain "macro-events." For example, in *Large Housing Estates in Europe, General Developments and Theoretical Backgrounds*,[9] the authors point out that:

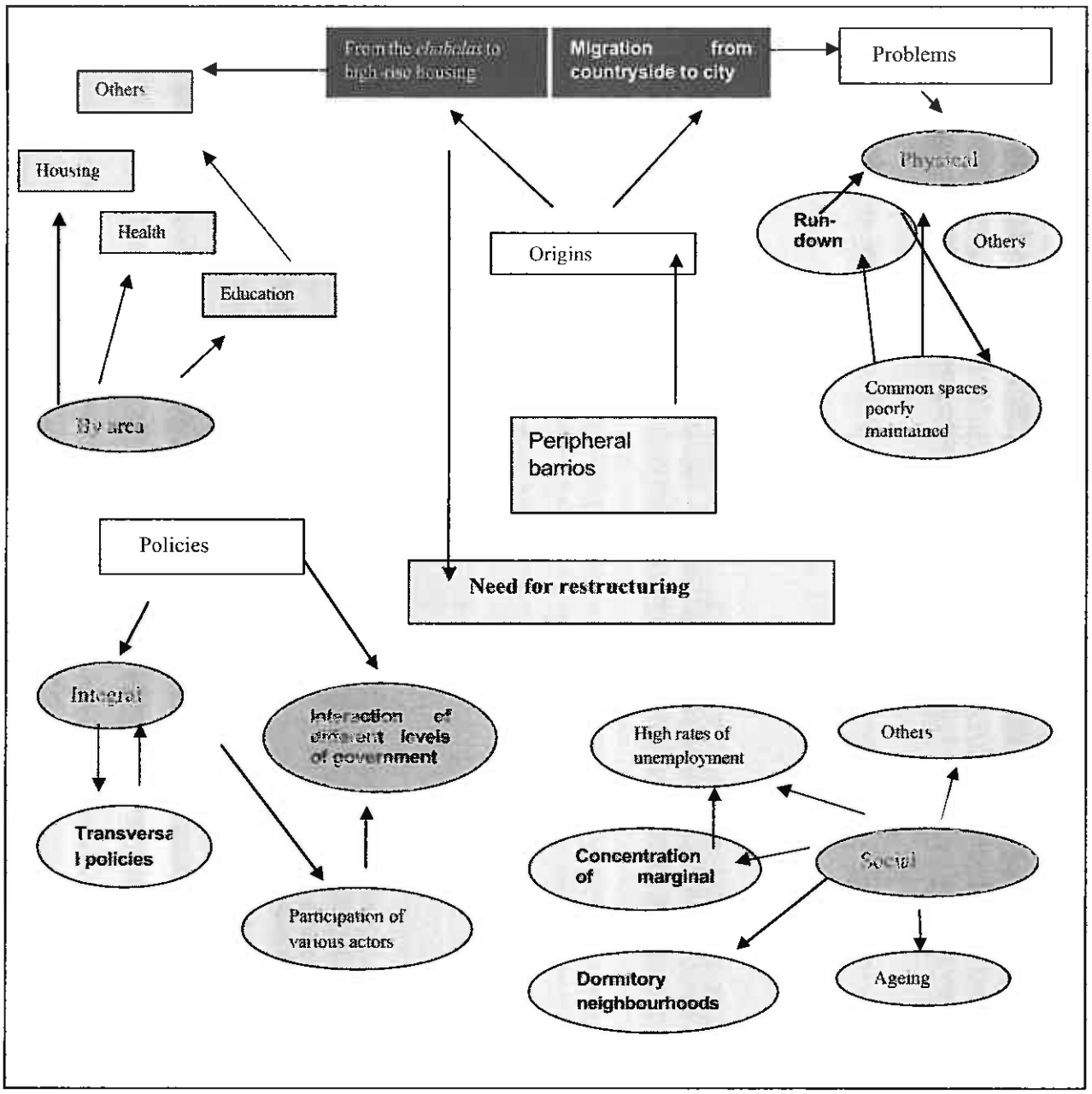
> [t]he situations in these neighbourhoods is influenced by the economic, demographic, socio-cultural and political events that occur at the urban, regional, national, European and even global scale. Each neighbourhood is situated within (or near to) a city, in a region, in a country and is influenced by a specific combination of "macro-events.

Any detailed analysis of the Spanish barrios cannot ignore the spatial, temporal, social, political and economic relationship of these events within the specific context.

[8] In 1990 the first block of houses fell in the barrio of Turó de la Peira in Barcelona.

[9] Murie, A.; Knorr-Siedor, T. and van Kempen, R. (2003) *Large Housing Estates in Europe. General Developments and Theoretical Backgrounds.* RESTATE report 1. Pp: 45. Utrecht: Urban and Regional Research Centre, Faculty of Geosciences, Utrecht University.

Figure 1. Peripheral barrios: their state and the need for intervention.



2. The process of neighbourhood intervention

Today neighbourhood redevelopment, restructuring, regeneration or rehabilitation is on most of the political manifestos in Spain. While the original focus was on policies aimed at improving access to housing the focus is now on the implementation of measures to improve the built environment. The transition in focus is found not only in Spain but throughout most European cities as the most pressing problems in the eyes of the public authorities include, for example, the concentration of marginal groups and the deterioration of community zones.

2.1 General characteristics of neighbourhood restructuring in Spain

The restructuring of neighbourhoods in Spain does not follow a general model. The powers concerning intervention in the neighbourhoods are divided between the central government (which assumes responsibility for their general and/or special regulation, but does not promote housing), the government of the autonomous community (which assumes responsibility for most of the powers, in particular the construction of housing) and the local government (who is responsible basically for planning and public spaces). Unlike other housing policies neighbourhood renewal does not follow a pattern that has been clearly defined by central government. Often, the governments of the autonomous communities have been given the role of designing, where they exist, the policies of intervention in the urban periphery, often with the participation of the town halls and other local corporations. The absence of a centralized policy and the assumption of responsibilities by the regional and local governments mean that the regeneration and redevelopment of the barrios adopt a distinct format according to the roles of the various government bodies in each particular case.[10]

Photo 2. Sant Roc - old and new housing (Photo: Montserrat Pareja Eastaway)

[10] *See* Pareja *et al.*, (2004) *Large Housing Estates in Spain. Policies and practices.* RESTATE report 3h. Utrecht: Urban and Regional Research Centre, Faculty of Geosciences, Utrecht University, for an exhaustive study of the policies, programmes and actions undertaken in the four barrios.

The absence of autonomous regulations means that the interventions differ in procedure. In Catalonia, for example, the financing of such measures are governed in accordance with the so-called "agreements," typically signed by the three administrative bodies that participate in the territory. Even so, as Pere Serra points out: "[t]he main problem in neighbourhood renewal is not so much money as the coordination between the different levels of government, between the various political parties and between different ways of finding solutions to the problems."[11]

Generally speaking, there is considerable fragmentation and a lack of continuity in the conversion of the philosophies that underpin the policies and instruments typifying neighbourhood renewal. Whereas most levels of government agree on the main ideas that should impregnate their policies whether it is restructuring (area-based) or another approach (health, education, etc.), the transformation of these ideas in specific policies and tools proves much more complicated. In this sense, the existence of a relatively young democratic system - albeit that the transition to democracy is a process that was completed some years ago - gives rise to some difficulties in those areas in which more than one level of government participates. The barrios, and in particular the policies implemented in its territorial sphere, are subject to fluctuations in the successive changes of the legislature. This is symptomatic of a certain immaturity in the political arena and in the process of the transformation of political philosophy into specific measures.

In most cases, the fact that many public actors are involved means that there is not only a need for coordination but also a need for a clear division of responsibilities. In Spain, the great weight of the regional governments, together with the on-going decentralisation of policies and sources of finance, generates a certain degree of uncertainty when a particular policy is implemented.[12] Parallel to this, Spain has experienced, as have most European countries, a process of decentralisation of power from the central authorities to the local level. What has been called "urban governance" is also represented in some of the processes of urban renewal.[13] In particular, examples of the new methods of intervention based on the idea of urban governance such as "collaborative planning"[14] include the *Plans Comunitaris* (Community Plans) in Catalonia and the Investment Plans in Madrid. This approach opens up new dialogues in different areas (i.e. urban planning, social services, education) and involves different levels of society (i.e. politicians, technicians, residents) with the aim of establishing objectives and strategies that are agreed on by all the agents involved.

Traditional interventions in the barrios broadly follow two approaches: physical intervention in the environment including improvements to housing, buildings, community spaces and intervention in the social fabric of the neighbourhoods including schools, job-finding programmes and healthcare. There are, therefore, many policies that can be used to improve the citizens' living conditions.

The barrio is also the setting for the merging of two different types of policy. On the one hand, those that do not have a territorial sphere but which are transferred and adapt to the particular environment, including regional educational or health policy or the central government's housing policy and, on the other, those policies that do have a specific territorial objective, for example, the

---

[11] Paper given by Pere Serra at the congress "Re-viure els barris" at the Escola d'Arquitectura de Barcelona, 2001.

[12] The EARHA team identifies the lack of local finance for renewal as a weak point in the rehabilitation of urban centres in Catalonia. *See* EARHA (2003) *Estudi Dels Mètodes Aplicables A La Política De Rehabilitació De Centres Urbans*. Diputació de Barcelona.

[13] *See for example*, Kearns, A. and Paddison, R. (2000) New Challenges for Urban Governance, *Urban Studies*, 37, no-5-6, pp. 845-850, for a review of the literature on this subject.

[14] *See* Healey, P. (1997) "Collaborative Planning: Shaping places in fragmented societies". Basingstoke: Macmillan for a description and analysis of the concept of "collaborative planning."

substitution of run-down housing or policies aimed at ensuring the peaceful coexistence of different groups in the same area. A feature worth highlighting is the complementary nature that is observed in the neighbourhoods between top-down initiatives, those initiated by the regional and/or local governments, and those that arise spontaneously as part of the social and economic fabric of the barrio (bottom-up).

As with the variability in the neighbourhood typology, the processes of renewal in these Spanish barrios are characterised by their diversity, both in terms of the organisation of the intervention and of the actors involved. A case study approach allows us to identify certain aspects that should be borne in mind when intervening in the barrios.

3.2 Elements that facilitate neighbourhood restructuring

3.2.1 The making of a diagnosis

As outlined above, the reality of the urban periphery in Spain is diverse and manifests a range of contexts in which intervention is necessary. The common starting point in understanding the present state of the barrio is its specific social and political context. An in-depth understanding of the reality and the history that lies behind the present context is fundamental.

The basic aim underpinning such a diagnosis is not solely to compile all available information but also to link this knowledge of the neighbourhood with the process of transformation that is taking place in the territory. Two elements need to be considered in this initial phase: first, the debate and constant feedback between the agents involved in the process (primarily, the neighbours and the government), and second the identification of just who will play a role in subsequent phases and the acceptance of joint-responsibilities during the process of intervention.

3. 2.2 The identification and participation of the actors

The quality of the contributions from all the agents involved in a process of renewal is unique. The public authorities responsible for implementing policy are concerned with both the future of a neighbourhood and also with the associational network formed in the barrio. In short, it is a question of exploiting the synergies that are created between the different participants in the process. To do this, the creation of a strategy of divulgation is required before the intervention so as to make the plan known to all the potential actors and agents.

In this context, aspects such as leadership and accountability acquire fundamental importance. The creation of operational networks that favour the use of various instruments considerably improve results. The generation of consortiums that channel resources and which are able to act as a sole voice in the process of renewal ensures the smooth development of the intervention.

In the case of Trinitat Nova in Barcelona and Orcasitas in Madrid, the neighbourhood associations have played a key role. In the case of the barrio in Barcelona, Rebollo and Blanco[15] identify the association's capacity to be self-critical and recognition of its limits and weaknesses as a key factor. The permeability in both cases to the recommendations of technicians and experts in neighbourhood renewal has favored the results of the process.

3.2.2. Defining a strategy for intervention

[15] Rebollo, O. and Blanco, (2003) El Plan Comunitario de la Trinitat Nova (Barcelona): un referente de la planificación participativa local.

Renewal processes require both a starting point and an end. Often, it is difficult to reach an agreement as to where to begin (i.e. demolition and reconstruction) and how to proceed in the subsequent stages. A prior consensus not only concerning the diagnosis of the problem but also the strategy to be adopted eliminates problems during the process. The diagnosis should be given shape in a renewal plan that follows a clear strategy of intervention.

The urban plan is not the only tool for intervention, both the management of the intervention and the rehousing of the neighbours, including the provision of the necessary facilities, occupy a key place in the strategy design.

3.2.3 The development of integral structures of intervention

The aim of the neighbourhood intervention is to improve the quality of life of the residents. Improving the physical infrastructure of facilities and the housing itself, either by rehabilitation or demolition, and the subsequent rebuilding is insufficient in itself. Social aspects need to be closely linked to an improvement in the physical conditions of the neighbourhood. The design of intervention plans that integrate both elements and which incorporate all the agents involved guarantees the success of the process.

Taking as a model the premises defined by the *Pla Comunitari* (1995) in Trinitat Nova, Barcelona Spain the intervention should be based on the following tenets:

a) a global perception of the neighbourhood and a transversal and integral approach to renewal;

b) the inclusion of the residents; and

c) the agreement and the integration of the public authorities during the process of intervention.

3.2.4 Mixed models of financing: public-private partnership agreements

Clearly the finances available for a project will limit its scope. Neighbourhood renewal has typically been an area of policy which, as it comprises many initiatives and is not assigned to one specific level of government, has suffered significant shortfalls in its financing. The political will behind the implementation of any process of neighbourhood intervention is evident in the funding it receives. In Barcelona, criticisms have been leveled by the ease with which resources were made available for the initiatives taken. Similarly, tensions were eased in Madrid at the beginning of the 1980s with the implementation of "Redeveloping the Barrios of Madrid." The same process, by contrast, encountered great financial difficulties during the same period in the Autonomous Community of Catalonia.[16]

The competition between agents, and even between authorities, to obtain financial resources generates long-term instability. The inability of the public sector to finance the many projects that

[16] Transcription of the debate between the members of the Urban Representatives Committee linked to the RESTATE project.

are associated with neighbourhood renewal on its own requires the creation of public-private partnerships in order to give the necessary stability to the process.

3.2.5 Control over the management of the process

As these processes are often drawn out, a way of eliminating the inefficiencies that inevitably occur is to guarantee control over the management of the process.

The establishment of partnerships, not only financial in nature but also as tools to exploit the positive synergies of the various actors participating in the process, is an increasingly common phenomenon in the strategies of intervention. The unequal distribution of power between the different bodies that participate requires mechanisms that ensure a satisfactory result for all parties.[17]

3. Residents' perception of neighbourhood renewal measures

Between the months of April and May 2004 a survey was conducted in all the neighbourhoods that make up the RESTATE project. The aim of this survey was to identify which residents benefited from the policies implemented in the neighbourhoods and which experienced the most problems.[18]

In broad terms, three aspects of those studied are presented here: first, the opinion held by the residents of their housing and barrio. Second, an analysis of the relationship between the intervention in the barrio and the residents' perception of the policies applied and lastly, the neighbours' assessment of the future of the barrio.

4.1 Residents satisfaction

4.1.1 Housing and barrio

Overall satisfaction with the barrio is high, an average of 6.5 on a scale from 1 to 10, with the highest levels of satisfaction being recorded in Trinitat Nova and Orcasitas, and with the residents in Sant Roc being especially critical (*see* Table 1). This assessment pattern is one that we shall see repeated with other aspects considered in this study.

Although it might be expected that the individual's satisfaction with the neighbourhood would be related to the assessment made of the individual's housing unit - the latter in general being higher (see Table 1) - the data do not allow us to attest to the validity of this assertion in some of the barrios. This discrepancy is once again particularly marked in Sant Roc, where the assessment of the housing is markedly more positive than that of the barrio: 7.2 as opposed to 4.6. In general, the degree of satisfaction is greatest in Orcasitas, both as regards the housing (8.8) and the barrio (7.8).

---

[17] *See* Mugnano, S. *et al* (2006) "Partners for change?: An examination of regeneration practices in European Housing Estates."

[18] Methodologically, the survey was conducted with a virtually random sample in Spain with the introduction of two conditions: the degree of territorial representation of the barrio and whether or not it was affected by redevelopment programmes. Three social groups were identified as being under-represented: immigrants, gypsies and those aged over 65. *See* Pareja, M. et al. (2005) *Large Housing Estates in Spain: Opinions and prospects of inhabitants in Orcasitas, Simancas, Trinitat Nova and Sant Roc.*, Chapter 3, for a detailed methodological description.

Table 1. Degree of satisfaction with the barrio and the housing (Scale from 1 to 10)

	Satisfaction with the housing	*Satisfaction with the neighbourhood*
Sant Roc	7.17	4.60
Trinitat Nova	7.34	7.48
Orcasitas	8.78	7.75
Simancas	6.78	6.23
Total	**7.52**	**6.52**

Source: RESTATE survey, 2004

These results indicate that people tend to place greater value on private spaces, such as the home, and less on spaces shared with the community. This overall tendency, seen in each of the barrios, means that the housing deficiencies remain somewhat hidden. Arguably, private space is more important than public space since the general nature and extent of the community space reduces individual identification. Identity originates in the private space, as it is closest to the individual and only later does it move out into the public, general space.

Table 2. Evolution in the degree of satisfaction from 1999 to the present day (%)

	Sant Roc	*Trinitat Nova*	*Orcasitas*	*San Blas*
Lowest	62.6	20.7	21.2	23.5
Unchanged	24.3	29.7	56.6	50.0
Highest	13.1	49.5	22.1	26.5
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: RESTATE survey, 2004

The degree of satisfaction expressed within each neighbourhood is an indicator of the effectiveness and impact of policies of redevelopment and job creation on public opinion. As Table 2 shows, roughly half the population in two different Madrid neighbourhoods report no change in their degree of satisfaction in this period, with the remaining residents evenly divided (20-25%) between those who are more critical and those who are more positive. The lack of any real interventions in the neighbourhoods in Madrid since the beginning of the 1990s is reflected in the relatively stability in satisfaction.

In contrast, in Barcelona the trend is quite distinct. In Sant Roc, that part of the population who are less satisfied today than in 1999 (62.6%) constitute the majority. Only 13% report an increase in satisfaction over the last five years. This percentage contrasts with those interviewed in Trinitat Nova, where the opinion of half the population has improved, while roughly 30% hold an unchanged view. The difference in opinion is based on factors beyond the urban interventions at the end of the 1990's. Factors include the socio-economic characteristics of these neighbourhoods, as well as the agreements and coordination of the actors involved. For example, Sant Roc has a heterogeneous population, in which many different groups with distinctive historical and cultural backgrounds live side by side, with a weak or non-existent social network and poor coordination between the participating authorities. Arguably these factors have resulted in the general state of dissatisfaction. However, in Trinitat Nova there is a dense social network of highly active neighbourhood associations, which has resulted in a greater identification with the urban measures that have been implemented.

4.1.2 The most and least appreciated features in the barrios

Satisfaction with a neighbourhood is often demonstrated in the perception of infrastructure, facilities and services in each of the barrios. Table 3 shows that the feature most highly appreciated in each of them is access to public services. The exception is Orcasitas, which ranks existence of green zones as the most appreciated aspect. Green zones are also highly valued in Simancas and Sant Roc. In Trinitat Nova, however, the human element, neighbours, are highlighted.

Surprisingly little importance is attached to proximity to the workplace in all of the neighbourhoods. This reflects a much more general tendency towards the separation between the workplace and the place of residence, as long as the transportation network permits it. By contrast, as we shall see below, finding employment is a problem within these barrios and one which has improved little with the implementation of these actions.

Table 3. Aspects that are most appreciated in the neighborhoods (%)

	Sant Roc	*Trinitat Nova*	*Orcasitas*	*Simancas*
Green zones	16.9	15.5	37.9	20.6
Access to public services	52.5	41.4	11.3	29.4
Children's parks	2.5	3.4	7.3	3.2
Proximity to workplace	0.8	2.6	4.0	7.1
Proximity to school	0.0	1.7	0.8	3.2
Quality of neighbourhood schools	1.7	1.7	0.8	3.2
People living in the neighbourhood	3.4	17.2	19.4	12.7
Others	22.0	16.4	17.7	19.8
Nothing	0.0	0.0	0.8	0.8
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: RESTATE survey, 2004.

According to the results shown in Table 4, among the least appreciated aspects are the people the respondents share their barrio with, although the percentages reported vary considerably. This opinion is particularly significant in Sant Roc, where two thirds of the population mention this aspect as being the least satisfactory. In comparision, neighbourhood relations is one of the characteristics most appreciate in Orcasitas, which indicates that it is a question that tends to polarize opinions. In this neighbourhood the residents express a need for better schools and facilities for young people. The strength of the negative opinion expressed among the people of Sant Roc towards their fellow residents means that the rest of the factors are afforded little weight. By contrast, in Trinitat Nova great dissatisfaction is expressed with the lack of green zones and play areas for children. In Simancas, the absence of green zones and facilities for the young are also heavily criticized.

Table 4. Aspects that are least appreciated in the neighborhoods (%)

	Sant Roc	*Trinitat Nova*	*Orcasitas*	*Simancas*
Green zones	5.5	11.6	6.3	11.4
Access to public services	0.9	5.3	7.1	4.4
Children's parks	1.8	10.5	3.6	7.9
Facilities for young people	1.8	6.3	16.1	16.7
Proximity to workplace	0.0	1.1	2.7	4.4
Quality of neighbourhood schools	0.0	2.1	13.4	3.5
People who live in the neighbourhood	67.9	22.1	13.4	32.5
Others	22.0	37.9	35.7	14.9
Lack of concern for keeping streets clean	0.0	2.1	1.8	3.5
Dog/bird excrement	0.0	1.1	0.0	0.0
Vandalism	0.0	0.0	0.0	0.9
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: RESTATE survey, 2004

A final aspect should be expanded on in light of these results--the phenomenon of immigration. Although not the main subject of this study, it should be noted as a transversal phenomenon and one that is present in all the replies given by those interviewed, so that the problems caused by the phenomenon tend to have an impact on the residents' evaluations. Thus, in the neighbourhood of Sant Roc, immigration and its associated conflicts appear as a strong factor, weakening even further the social fabric of the neighbourhood.

Seeking a global image of each neighbourhood is important in deciding the type of measures that are most appropriate. Thus, it is important to know the perception of the residents themselves concerning the aspects that define and construct a neighbourhood image, be it their perception of the reputation of the barrio among their fellow residents or its image in the rest of the city.

4.1.3 Interaction with the neighbours

In all four barrios, those interviewed claim to be on good terms with the other residents (see Table 5). The neighbourhood of Simancas, characterised by the absence of any social and urban interventions, and by past problems of drugs, is the barrio in which this opinion is least shared, leading to a situation that appears to have hindered the quality of relations between residents. Worth highlighting is the fact that 70.6% of the residents in Orcasitas claim that relations between neighbours are good, reflecting the strength of the early community movements in the 70s, and their continuing impact. These results contrast with the replies reported earlier in relation to the aspects that are least appreciated in the barrio. This discrepancy might lie in the subjective nature of the terms *resident* or *neighbour*: depending on the level of proximity and affectivity that the interviewee attaches to the term, he or she might interpret it as meaning either someone that they know or that is close to them, someone with whom they have a personal relationship, or by contrast, it might be someone living in the neighbourhood but with whom no essential type of relationship is maintained. Therefore, it is understandable if the interviewees were to reply that they are on good terms with the residents (those who are close to them) but by contrast, they consider their fellow residents - the people from the barrio that that they do not know, their anonymous neighbours, for whom they feel no sense of personal attachment - as one of the aspects they least like about the neighbourhood.

Table 5. Frequency of interaction among the neighbours (%)

	Sant Roc	*Trinitat Nova*	*Orcasitas*	*Simancas*
Good	68.9	68.0	70.6	55.6
Moderate	27.9	31.1	27.8	40.5
Poor	3.3	0.8	1.6	4.0
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: RESTATE survey, 2004

One of the questions raised concerns the type of network of relations that the residents of the barrio establish. As Table 6 shows, the barrio of Orcasitas has the greatest - 68.3% - network of close relationships composed primarily of friends and family; surprising also is the 17.9% of residents in Trinitat Nova who claim not to have any type of relationships.

Table 6. Type of interaction between neighbours (%)

	Sant Roc	*Trinitat Nova*	*Orcasitas*	*Simancas*
Yes , both (family and friends)	49.2	45.5	68.3	54.3
Yes, but only friends	23.8	26.0	23.8	27.6
Yes, but only family	14.3	10.6	4.0	4.7
No	12.7	17.9	4.0	13.4
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: RESTATE survey, 2004

4.1.4. Interaction between neighbours and social make-up of the neighbourhood

The type of relations, and with whom the residents relate, are significant aspects in explaining the networks of solidarity and reciprocity that are established. Although these aspects have not been examined in detail here, we can affirm that, according to those surveyed, in three of the four neighbourhoods attitudes of solidarity predominate, with the neighbourhood of Simancas showing the lowest levels of solidarity (see Table 7).

Table 7. Interaction in the neighbourhood (%)

	Sant Roc	*Trinitat Nova*	*Orcasitas*	*Simancas*
Help is given	44.9	47.1	48.3	31.1
Help is not given	33.1	23.5	25.8	37.8
It varies	22.0	29.4	25.8	31.1
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: RESTATE survey, 2004

Taking these opinions together, feeling identified with and integrated in the neighbourhood is a way to summarise the previous variables (see Table 8). In this case, the barrios of Trinitat Nova and Orcasitas stand out for the strength of identification with the neighbourhood (78.3% and 75.4% respectively). By contrast, Simancas stands out for being the neighbourhood with the weakest ties.

Table 8. Ties with the barrio (%)

	Sant Roc	*Trinitat Nova*	*Orcasitas*	*Simancas*
Weak	16.0	13.3	7.9	19.8
Neutral	18.4	8.3	16.7	38.1
Strong	65.6	78.3	75.4	42.1
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: RESTATE survey, 2004

The ties with the barrio and the neighbours that live there have the effect of generating a different perception of the neighbourhood's social make-up, as Table 9 shows. Thus, while in Trinitat Nova and Orcasitas, the interviewees think that their barrio is socially homogenous (43.4% and 42.6% respectively), the barrio of Simancas holds a very different vision, with 40.8% of residents reporting that it is moderately mixed, compared to 38.3% who feel it is socially homogenous and 20.8% that it is socially mixed. In Sant Roc, the perceptions are polarised with half the population believing the neighbourhood to be socially mixed (52.8%), and 45.3% believing it to be socially homogenous.

Table 9. Social make-up of the neighbourhood (%)

	Sant Roc	*Trinitat Nova*	*Orcasitas*	*Simancas*
Socially mixed	52.8	32.1	32.0	20.8
Moderately mixed	1.9	24.5	25.4	40.8
Socially homogenous	45.3	43.4	42.6	38.3
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: RESTATE survey, 2004

In fact, the neighbourhoods are highly diverse where people of very different characteristics live side by side. Yet, reality is one thing and the perception as to whether this social mix is positive or negative for the interaction and the peaceful coexistence of neighbours is another. According to the data from the survey recorded in Table 10, 59% of the residents of Sant Roc feel that this mix is not good for the social interaction of the residents. This is a further factor illustrating the lack of social cohesion in this barrio - the problems of peaceful coexistence between a population that arrived in different decades and from different parts of the country, as well as a large immigrant population that has done little to favour the existing situation. Differences of opinion can also be observed in the other barrios, although here they are not quite so at odds with each other: Trinitat Nova and Orcasitas remain predominantly neutral (47% and 45.9% respectively) while in Simancas 39.8% of the residents express a neutral opinion, though 36.3% see the high degree of social mix in the neighbourhood as something positive.

Table 10. Appraisal of the social mix* (%)

	Sant Roc	*Trinitat Nova*	*Orcasitas*	*Simancas*
Good	12.8	28.9	25.2	36.3
Neutral	28.2	47.0	45.9	39.8
Bad	59.0	24.1	28.8	23.9
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: RESTATE survey, 2004

* *Social mix* is understood as being the mix of homes according to levels of income.

4.1.5 The barrio and the city

Up to this juncture, we have been concerned with the social image of the barrio, but from a point of view from within the neighbourhood, examining specific aspects that gradually reveal what the barrios are actually like in their most social version. Now, we turn to examine the reputation of the barrio, the image that it projects to the rest of the city, and how it is perceived by the residents of the neighbourhood itself.

Table 11. Opinion held of the reputation of the barrio in the rest of the city

	Sant Roc	*Trinitat Nova*	*Orcasitas*	*Simancas*
Good	6.5	21.0	16.5	15.7
Moderate	12.1	23.0	16.5	45.5
Poor	81.3	56.0	66.9	38.8
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: RESTATE survey, 2004

The heterogeneity of the opinions is clear from the above table. While Sant Roc is the neighbourhood with the most negative reputation - 81.3%, Simancas is the one which most people feel has a moderately positive reputation. The percentage of people claiming that the neighbourhoods have a good reputation is, however, not high, rising to just 21% in Trinitat Nova. Yet, the interviewees reject the idea that the image of the barrio matches the reality. All the barrios, with the exception of Simancas, express this idea. But it should be remembered that Simancas is the barrio that recorded the lowest negative reputation, which suggests its image is improving, and the opinion that its reputation is moderately positive (45.5%).

Table 12. Degree of agreement with reputation

	Sant Roc	*Trinitat Nova*	*Orcasitas*	*Simancas*
Yes	43.0	47.9	32.5	53.9
No	57.0	52.1	67.5	46.1
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: RESTATE survey, 2004

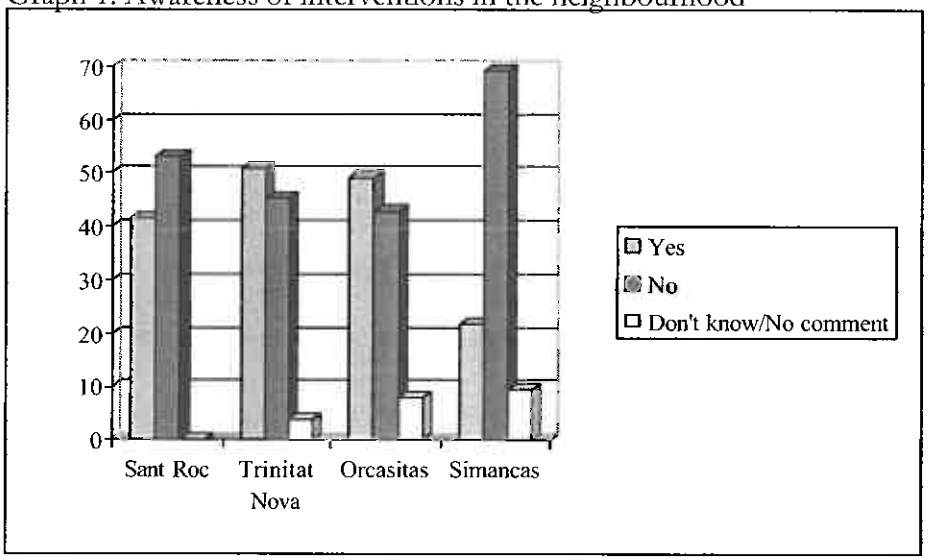
By contrast, Orcasitas is an example of a stigmatised neighbourhood. Its urban situation is relatively privileged and it enjoys access to good infrastructure and services, and its level of social cohesion is high although it faces certain socio-economic problems. Its percentages are somewhat contradictory. On the one hand, a majority of persons believe its reputation to be bad (66.9%), but 67.5%, the highest for all the barrios, do not agree with this image: a small example of the traditional stigmatisation to which the peripheral neighbourhoods of big cities are subjected.

4.2 Intervention and satisfaction

An awareness or otherwise among the residents of the policies or actions being implemented for the development of a neighbourhood is basic in order that these people feel involved in the project. And what is more, it is also basic in order that they are able to perceive which aspects have improved or not, in short, that they might evaluate the interventions made in their territory.

As regards the awareness of the existence of actions and/or policies being implemented in the residents' neighbourhood, the greatest absence of such awareness was recorded in Simancas (69%), followed by Sant Roc (55.6%). The greatest awareness of these policies was reported in Trinitat Nova and Orcasitas, with 45.2% and 42.9% respectively[19].

Graph 1. Awareness of interventions in the neighbourhood



Source: RESTATE survey, 2004

These results are based on a different set of circumstances according to the interventions in each barrio: In Trinitat Nova, the *Pla Comunitari* acts as a catalyst for the regeneration programme, as well as the implementation of partial actions of redevelopment, and the efforts of the neighbourhood associations to make the effects known.

By contrast, Simancas is a barrio that has generally been overlooked by successive governments and this has seeped into the perception of the population, especially that of the younger members of the community[20]. It was a neighbourhood in which the main programme was implemented by the Madrid Housing Institute (IVIMA), which led on the one hand to a sense of dependence among the

[19] The percentage of respondents who did not reply or who said they did not know needs to be added to these results. Although few in number, their position is important in understanding the paucity of information made available to the residents of these barrios. For example, in Simancas, as well as being the barrio with the highest percentage of respondents claiming to have no knowledge of the actions being taken, we need to add a further 9.3% who responded "don't know". This barrio was followed in the respect by Orcasitas (8%) and Trinitat Nova (4%).

[20] 83.33% of the population of this barrio aged between 18 and 30 have no knowledge of the improvement measure being implemented.

population on the public authorities, and on the other, to a concentration of those groups of society with most difficulties to find a house on the market.

In Sant Roc, despite also being a neighbourhood with a *Pla Comunitari*, the neighbours are unaware of the actions that are being undertaken. The in-depth interviews revealed that this situation is due to the fragmentary nature of the actions implemented within a large number of different programmes. This has resulted in the appearance of many authorities, and a consequent lack of visibility of the overall aim and a lack of confidence in the programmes. Furthermore, as in the neighbourhood of Simancas, the agency ADIGSA (Administració, Promoció I Gestió, S.A.) demonstrates a certain paternalism in its dealings with the barrio.

Finally, in Orcasitas, the percentages are similar, except when the age variable is introduced. Thus, among the residents aged between 45 and 54, the majority claim to be aware of the actions being implemented (66.7%). Probably, their involvement in one or other of the neighbourhood's construction processes or their participation in the "Movement for the Dignity of the South", which saw the implementation of the Villaverde-Usera Investments Plan at the end of the nineties, accounts for this percentage of the population with an awareness of the actions.

An awareness of the policies appears to be closely linked to the implication of the group to which the interviewee belongs - an implication which is channelled through the associations that regulate the relations between the people and their problems. It is for this reason that it appears necessary to seek the relationship between the level of awareness of the actions in the neighbourhood and the strength of the neighbourhood associations (see Table 13)

Table 13. Awareness of the intervention according to participation

			Participation in associations for the improvement of the ***neighbourhood***		
			Yes	No	**Total**
Sant Roc	Awareness of actions to improve the neighbourhood	Yes	63.3	37.0	43.4
		No	36.7	63.0	56.6
		Total	**100.0**	**100.0**	**100.0**
Trinitat Nova	Awareness of actions to improve the neighbourhood	Yes	77.8	46.2	53.4
		No	22.2	53.8	46.6
		Total	**100.0**	**100.0**	**100.0**
Orcasitas	Awareness of actions to improve the neighbourhood	Yes	72.2	45.0	53.4
		No	27.8	55.0	46.6
		Total	**100.0**	**100.0**	**100.0**
Simancas	Awareness of actions to improve the neighbourhood	Yes	61.5	19.6	24.3
		No	38.5	80.4	75.7
		Total	**100.0**	**100.0**	**100.0**

Source: RESTATE survey, 2004

As anticipated, residents who participate in a neighbourhood improvement association have a greater awareness of rehabilitation measures. Independent of the barrio in which they reside, all residents who are members of an association claim to be aware in greater numbers than those who are not. Specifically, in the neighbourhoods of Trinitat Nova and Orcasitas, this percentage stands at 77.8% and 72.2% respectively, while in the neighbourhoods of Sant Roc and Simancas, the percentages are also high (63.3% and 61.5%, respectively). By contrast, the tendency is just the

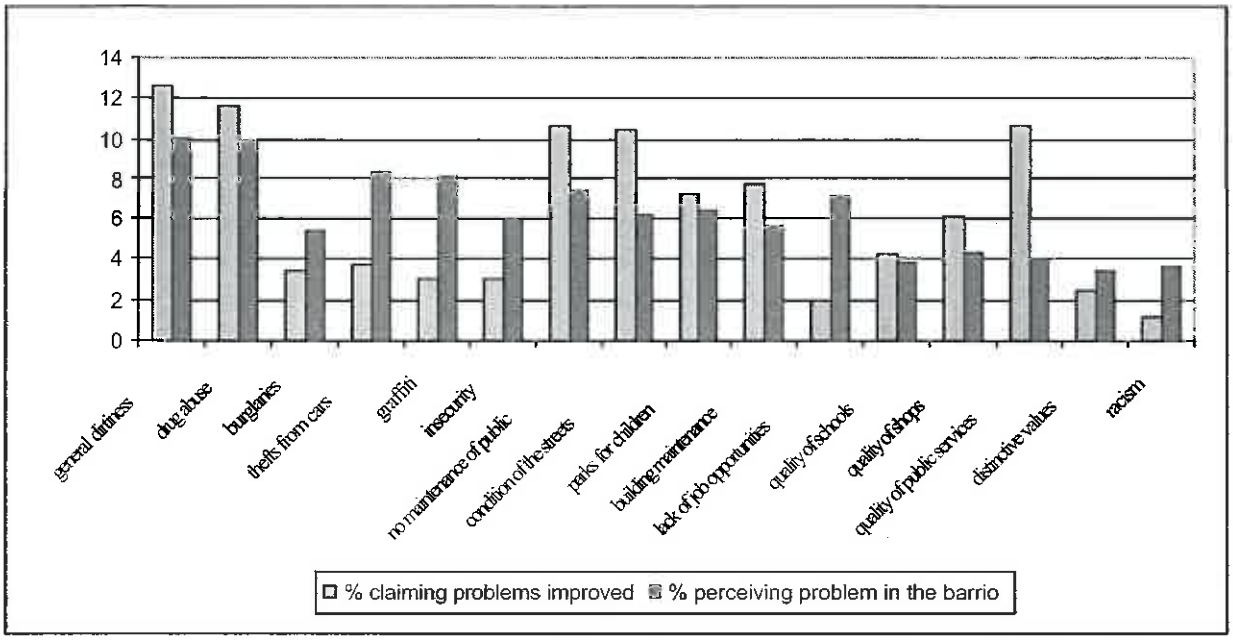
opposite among the population that does not belong to any neighbourhood improvement association. Among these, a lack of awareness of the initiatives to renew the neighbourhood predominates, most notably in Simancas (80.4%), which contrasts with the situation in Orcasitas and Trinitat Nova, where there is an almost even split between those who are aware and those who have no knowledge of the initiatives.

Photo 3. Residents in Sant Roc observing old and new housing blocks.
(Photo: Montserrat Pareja Eastaway, 2005)

As regards the most perceptible effects of these actions, 56.2% of those interviewed reported that they knew of none whatsoever. This was followed by 11.8% who reported the new buildings and construction improvements; improvements to the public spaces (6.3%) and public transport (5.9%). In conclusion, the perception among the residents of the results of the policies is limited.

The problems that have undergone least improvement following the actions taken were found to include racism (4.8% of cases), lack of job opportunities (7.9%) and the absence of values and norms (9.9%). As can be seen in the following graph (Graph 2), these are also perceived by the residents as constituting some of the main problems. However, the graph highlights the differences on occasions between the improvements undergone by a particular problem and the residents' perception of the issue as representing a problem.

Graph 2. Problems undergoing improvement and perceived problems
Source: RESTATE survey, 2004



As we have said above, the Spanish case is distinctive because of the coexistence of different levels of government and governmental powers. The implementation of regeneration policies can result in considerable variation in the identification of the agents and their interests, which has the effect of weakening their leadership. A common feature in all the neighbourhoods is the high percentage of persons who gave no response or who do not know the main actors behind the actions.

Table 14. Perception of the participating agents (%)

	Sant Roc	*Trinitat Nova*	*Orcasitas*	*Simancas*
Central/national government	5.9	3.8	5.2	0.0
Local government	21.2	24.5	6.5	27.8
Property dealer	0.0	0.0	0.0	2.8
Local population	4.7	22.6	70.1	27.8
Others	29.4	17.9	0	5.6
Don't know/no reply given	38.8	31.1	18.2	36.1
Total	**100.0**	**100.0**	**100.0**	**100.0**

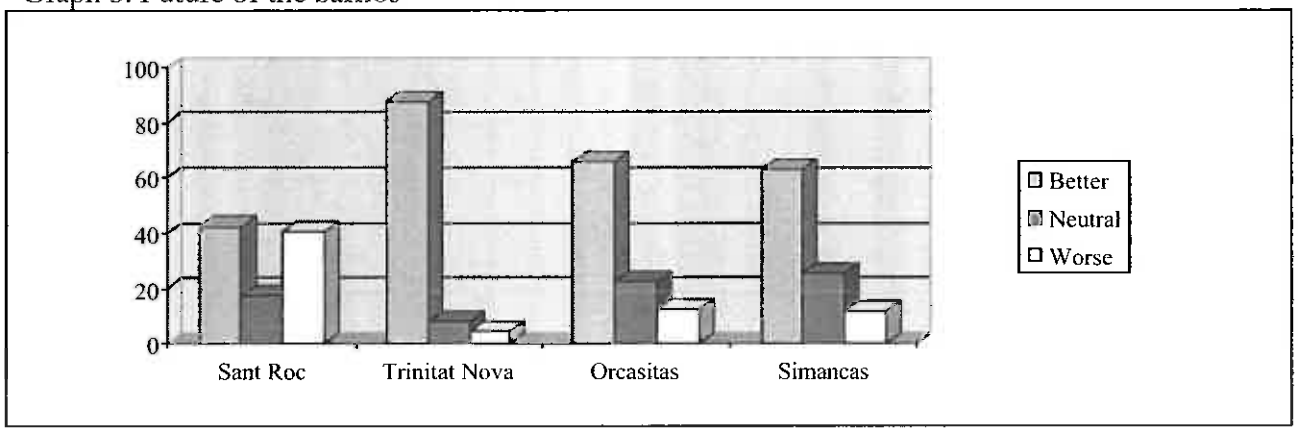
Source: RESTATE survey, 2004

In the two barrios in Barcelona and in Simancas, these percentages rise above 30%. A further common feature is the perception of the participation of the local population: while in Trinitat Nova and Simancas it is perceived as participating by around 25% of respondents (22.6% and 27.8% respectively); distinctive results are reported in the other neighbourhoods: in Orcasitas 70.1% of the respondents perceive it as playing a role while in Sant Roc only 4.7% share this perception. Here again, we see evidence of the diversity of situations in the neighbourhoods: in Sant Roc we recorded high levels of dissatisfaction, an absence of involvement in the barrio, alongside a weak network of associations and the absence of social cohesion; Orcasitas, on the other hand, does not present the same circumstances.

4. 3 The future of the barrios following the intervention

The future of the barrios is not only conditioned by objective factors, such as processes of urban renewal and their effects, it also depends on subjective factors, such as the future perception that the interviewees themselves hold. In this case, the barrio of Trinitat Nova is the one which has the most optimistic outlook, with 87.6% of those being interviewed claiming that the future will be better; they are followed by the barrios in Madrid with percentages around 60%. By contrast, the barrio of Sant Roc is more evenly divided: 42.3% think that it will be better while 40.5% believe it will be worse.

Graph 3. Future of the barrios



Source: RESTATE survey, 2004

However, the people of Sant Roc are dissatisfied with their barrio and are also pessimistic about its future; by contrast, the neighbourhood of Simancas (another of the barrios that reports an average level of satisfaction with the neighbourhood of 6.23, the second lowest) is more optimistic about its future - 63.2% believe it will be better.

These perceptions of the future might be explained by the differences in the situations in which the barrios currently find themselves. Thus, in Trinitat Nova expectations are correlated with the development of the *Plans Comunitaris*, and in Simancas with the expectations caused by the *Plan de Inversiones*. However, in Sant Roc, the negative experiences recorded following the implementation of earlier plans mean that their future expectations are not particularly high.

The first conclusion to be drawn from the responses to the question as to how to improve the neighbourhoods (see Table 15) is that people do not know what should be done: 40.1% of replies. In second position, the suggestions point to improving green zones and public spaces. There is also a group of suggestions reflecting a social response such as greater social control, together with a greater police presence in the streets, and finally, a stronger, more active neighbourhood movement.

Table 15. Aspects for building a better future for the barrio

	% replies
Creation and/or improvement of green zones	3.5
Creation of stronger public/social spirit	5.4
Establishment of dialogue between different cultures	0.4
Improve proportion of buildings	0.8
Decrease uncertainty regarding the process of intervention	0.4
Care for the elderly	0.8
Improve cultural installations	0.4
Improve public spaces	0.8
Improve overall heterogeneity of residents	2.3
More social control	6.5
More security	0.8
More buildings	1.5
Better cooperation between residents and city hall	0.4
Intervention in the drug problem	3.5
Greater police presence in the streets	6.5
Problems with unclean streets	2.7
Fostering of neighbourhood initiatives	1.2
Maintenance of local services	1.9
More green zones	0.8
More attention from the city hall	0.8
More installations for young people	1.9
More commercial installations	1.2
Responding to problems of alcoholism	0.4
Better public transport	0.8
Others	13.8
Don't know/No reply	40.8
Total	**100.0**

Source: RESTATE survey, 2004

The reasons given as to why the future will be better vary from one barrio to another. Predominant in each is the idea that "things cannot get any worse" and that "the natural evolution of life is for things to improve", other ideas are that the effects of the actions and the plans must eventually lead to some improvement. However, and turning now to look at the barrios individually, certain differences were found to exist between the four: in the neighbourhoods of Barcelona the residents highlight the presence of new and redeveloped buildings (second most important factor), while in Sant Roc 21.9% believe that the barrio is now more lively and energetic, and 9.4% believe it is because of the integration of the population. By contrast, in the neighbourhoods of Madrid there is not so much unanimity in the replies of those interviewed: in Orcasitas 53.8% of the responses are classified as others, followed by 13.8% who mention the greater participation of the residents in the neighbourhood, and 10.8% who mention government activities. In Simancas, 15.6% believe that the neighbourhood is more lively and energetic, and that they now have new and redeveloped buildings (14.1%), linked also to the reason of government activities (12.5%).

In general, and as Table 16 indicates, the results of the survey show that 20% of those interviewed intend moving in the next two years. Analysing this intention of residential mobility in the different neighbourhoods, we see that it is the residents of Sant Roc and Simanacas who have the strongest intentions of moving (24.2% and 23.2% respectively).

Table 16. Intention of moving

	Sant Roc	*Trinitat Nova*	*Orcasitas*	*Simancas*
Yes	24.2	16.9	16.0	23.4
No	75.8	78.2	80.8	73.4
Don't no/No reply	0.0	4.8	3.2	3.1
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: RESTATE survey, 2004

Among the main reasons for moving (see Table 17) is the desire to move to a different environment, to become a home owner or to acquire a bigger house. The main destination of this residential mobility is the same neighbourhood (especially in Trinitat Nova, with 76.2%) and another place within the same city as the second choice (reply recorded in all the neighbourhoods).

Table 17. Reasons why residents wish to move

	Sant Roc	*Trinitat Nova*	*Orcasitas*	*Simancas*
Housing too small	3.6	5.0	15.8	23.3
Housing too expensive	0.0	5.0	5.3	3.3
Intending to buy home	10.7	10.0	15.8	23.3
Proximity to family and friends	3.6	5.0	10.5	3.3
Quieter neighbourhood	7.1	0.0	10.5	10.0
Saber neighbourhood	10.7	**0.0**	**0.0**	**0.0**
Other reasons	64.3	75.0	42.1	36.7
Total	**100.0**	**100.0**	**100.0**	**100.0**

Source: RESTATE survey, 2004

Those wishing to move are primarily young people (under 30 years of age), except in Sant Roc where there is also a predominance of those aged between 45 and 54 years of age. According to the level of income, in the Barcelona barrios there is a high proportion of population with a high level of income (37.5% in Sant Roc and 33.3% in Trinitat Nova). In the Madrid barrios there is a predominance of population with medium to medium-high income. If we analyse the results according to the year of installation in the barrio, it is those who moved before 1980 who most wish to change neighbourhood, especially high is the percentage in Orcasitas and Simancas (91.9% and 80.5% respectively). And finally, it is the foreigners who report the strongest intention of changing neighbourhood, although this is also the group that shows the greatest indecision regarding its future.

4. Final considerations

The social, economic, political and urban make-up of the peripheral areas in Spain's big cities is highly diverse. Indeed, the four barrios studied in the RESTATE project illustrate four quite distinct situations, each requiring its own particular solutions.

Nonetheless, by adopting the analytical focus that we have presented here, it is possible to draw a number of common conclusions. First, making a preliminary diagnosis before intervening provides a greater understanding of the actual situation within the barrio and of its residents' concerns.

Furthermore, if all the agents that are involved in one way or another with this process of renewal have access to this analysis, then the objectives and priorities can be more readily determined.

Second, when deciding on the processes to adopt in implementing measures, the more global and integral these can be, the better the results. These processes need to extend beyond questions of a purely physical or structural nature, and should include the less visible, more complex social issues, which is essential if the quality of life of the residents is to be improved. Hence, the involvement of the residents throughout the programme means that, as long as all the neighbourhood groups have been represented, they will be able to identify with the results. The joint responsibility of agents from a range of levels means that dialogue must be established between these actors, particularly between the authorities and the neighbours. Similarly, the sharing of responsibilities between different levels of government avoids situations in which the process suffers from an absence of leadership or has no guarantee of continuity.

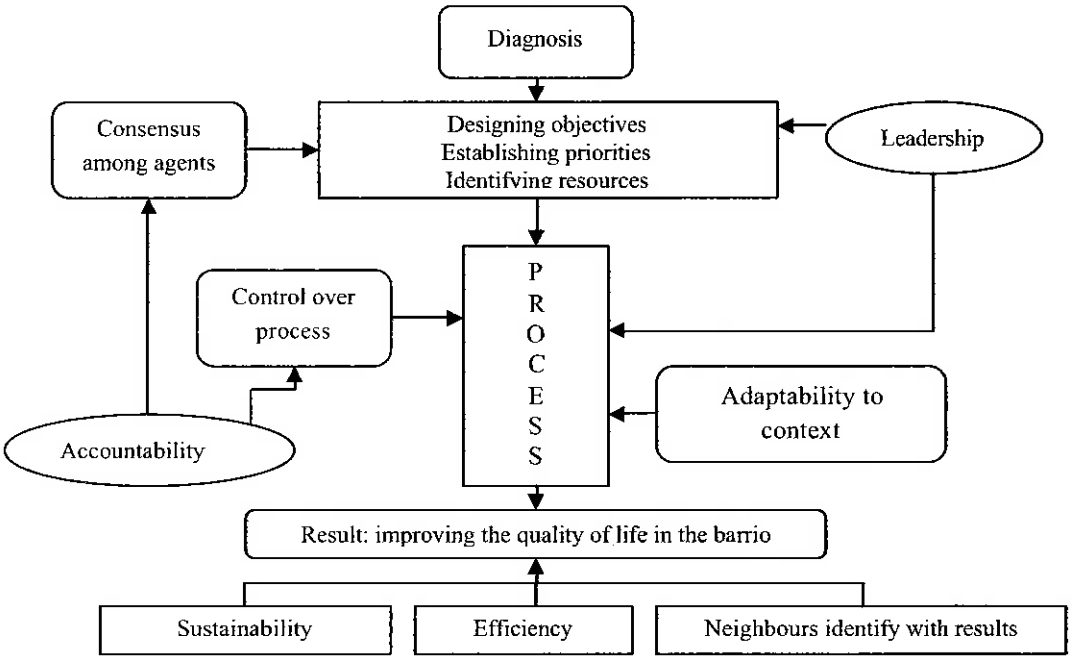
Political will and pressure from the citizens, which may or may not see one or another of the parties taking responsibility for the leadership of the programme, have not only been identified as catalysts for most of the processes adopted, but they also guarantee their continuity. The cost effectiveness of the solutions adopted for improving the urban periphery requires subsequent political controls in order to ensure resource use is maximised.

A task that must be undertaken before proceding is making an accurate diagnosis of the situation in the barrio in order to ensure that the action plan is well organised, establishing clearly beforehand, among other aspects, the objectives, the resources needed and the schedule that is to be adhered to. The objective of these steps is to facilitate the appraisals conducted by the public bodies, enabling them to identify bothsuccesses and failures as well as opportunities and weaknesses so as to be able to improve the design and execution of the project.

The future is uncertain in many respects, particularly in these four barrios, the destination for the current wave of immigration. The social make-up of certain areas makes them extremely vulnerable to many problems and they urgently require special attention. The redevelopment processes cannot ignore the changing structure of the contexts in which they are operating, hence, the importance of the consequent controls throughout the process.

Finally, improving the quality of life of the residents in these barrios is not a short-term process nor is it an easily achievable target. Sustainable redevelopment can be achieved when the residents identify with the objective of the programmes, plans and policies that are implemented in the territory.

Diagram 2. Summary of good practices for neighbourhood redevelopment



5. Bibliography

Blanco, I. and Rebollo, O. (2003) *El Plan Comunitario de la Trinitat Nova (Barcelona): un referente de la planificación participativa local.* Publicado en: http://www.pangea.org/trinova/index1.htm.

Diaz Orueta, F. and Lourés Seoane, M. L (eds) (2004) *Desigualdad social y vivienda.* Alicante: Editorial Club Universitario, ECU.

EARHA (2003) *Infrahabitatge a Catalunya.* Diputació de Barcelona, Barcelona.

EARHA (2003) *Estudi Dels Mètodes Aplicables A La Política De Rehabilitació De Centres Urbans.* Diputació de Barcelona.

Healey, P. (1997) *Collaborative Planning: Shaping Places In Fragmented Societies.* Basingstoke: Macmillan.

Kearns A. and Paddison R. (2000) New Challenges for Urban Governance, *Urban Studies*, 37, no-5-6, pp. 845-850

Mugnano, S. Pareja-Eastaway, M. and Tapada Berteli, T. (2005) *Comparing Spanish And Italian Urban Partnerships: An Analysis Of Actors' Involvement In A Multi-Level Context*, RESTATE Edited Volume, Chapter 7. In press.

Mugnano,S. Pareja-Eastaway, M. and Rowlands, R.(2006) *Partners For Change?: An Examination Of Regeneration Practices In European Housing Estates.* In press.

Murie, A.; Knorr-Siedow, T. and van Kempen, R. (2003) *Large Housing Estates in Europe. General Developments and Theoretical Backgrounds.* RESTATE report 1. Utrecht: Urban and Regional Research Centre, Faculty of Geosciences, Utrecht University.

Pareja Eastaway, M.; Tapada Berteli, T, van Boxmeer, B. y García Ferrando, L. (2003) *Large Housing Estates In Spain. Overview Of Developments And Problems In Madrid And Barcelona.* RESTATE report 2h. Utrecht: Urban and Regional Research Centre, Faculty of Geosciences, Utrecht University.

Pareja Eastaway, M.; Tapada Berteli, T, van Boxmeer, B. and García Ferrando, L. (2004) *Large Housing Estates in Spain. Policies and Practices.* RESTATE report 3h. Utrecht: Urban and Regional Research Centre, Faculty of Geosciences, Utrecht University.

Pareja Eastaway, M.; Tapada Berteli, T, van Boxmeer, B.; García Ferrando, L. and Simó Solsona, M. (2005) *Large Housing Estates in Spain: Opinions and prospects of inhabitants in Orcasitas, Simancas, Trinitat Nova and Sant Roc.* RESTATE report 4h. Utrecht: Urban and Regional Research Centre, Faculty of Geosciences, Utrecht University.

Pareja Eastaway, M. and Turmo Garuz, J. (2004) *Las Políticas De Vivienda Y El Estado Del Bienestar* in Diaz Onrueta, F and Lourés, L (eds) (2004) *Desigualdad Social Y Vivienda*, pp. 11-30.

Appendix[21]

Orcasitas (Madrid)

Date of construction	1974–1976 (Meseta de Orcasitas)		
Distance from the city centre (km)	4		
Most positive feature of barrio	Large buildings in good condition and satisfactory provision of facilities.		
Most negative feature of barrio	Transport services to the centre and the rest of the city. Among the main social problems are the low level of schooling which contributes to the high unemployment rate and the low level of family income.		
Predominant building type	3-, 4- and 8-storey buildings		
No. of inhabitants (1-1-2002 Department of Statistics in Madrid)	Orcasitas 19,518	Madrid 3,043,535	
Age structure of barrio (2001 census)	0-14 years 15-64 years >64 years	Orcasitas 11.3 % 65.1 % 23.6 %	Madrid 12.3 % 68.3 % 19.4 %
Ethnic make-up (Madrid City Hall, 2003)	Native Non-native	Orcasitas 97 % 3 %	Madrid 88.4 % 11.6 %
Percentage of home owners and tenants (1991 census)	Home owners Tenants Others	Orcasitas 91.4 % 0.4 % 3.3 %	Madrid 72.9 % 19.3 % 3.3 %
The first houses and streets on La Meseta de Orcasitas were built by the early migrant themselves. These were replaced by new buildings in the Madrid redevelopment project ('Renewal of the Barrios') at the end of the 70s and throughout the 80s. Today, the Villaverde-Usera Investments Plan is being implemented in the barrio of Orcasitas.			

Simancas (Madrid)

Date of construction	1957-1959		
Distance from the city centre (km)	5.5		
Most positive feature of barrio	The location of the centre of the barrio is a positive feature, as are the public transport services to the city centre (metro, bus)		
Most negative feature of barrio	The failure on the part of the residents to identify with the barrio is a negative aspect of Simancas.		
Predominant building type	3-, 4-, 5-, 6-, and 10-storey buildings		
No. of inhabitants (1-1-2002 Department of Statistics in Madrid)	Simancas 21,681	Madrid 3,043,535	
Age structure of barrio (2001 census)	0-14 years 15-64 years >64 years	Simancas 10.6 % 60.9 % 28.5 %	Madrid 12.3 % 68.3 % 19.4 %
Ethnic make-up (Madrid City Hall, 2003)	Native Non-native	Simancas 86.6 % 13.4 %	Madrid 88.4 % 11.6 %
Percentage of home owners and tenants (1991 census)	Home owners Tenants Others	Simancas 69.8 % 9.9 % 5.1 %	Madrid 72.9 % 19.3 % 3.3 %
Part of the barrio, 'Poblado de Absorción', was redeveloped with the construction of approximately 920 new buildings as part of a social housing scheme (officially protected housing) during the regeneration process initiated at the end of the 70s and into the next decade (today this area is known as San Blas I). Some buildings have been rehabilitated; however, this work has been limited to the facades only. In Simancas no renewal programme has been implemented.			

[21] The information presented in this appendix is a summary of the tables included in Musterd, S. and van Kempen, R. (2005) *Large-Scale Housing Estates In European Cities: Opinions And Prospects Of Inhabitants* (in press).

Trinitat Nova (Barcelona)

Date of construction	1953-1963		
Distance from the city centre (km)	6		
Most positive feature of barrio	Trinitat Nova is built in an upland area, near a natural park and near barrios that enjoy attractive views over the sea and the city.		
Most negative feature of barrio	Most of the buildings are in a poor state of repair, many being affected by a structural pathology (*aluminosis*) caused by the deficient quality of the building materials used.		
Predominant building type	3-,4-,5-,6-storey buildings		
No. of inhabitants (1996 municipal census)	Trinitat Nova 7,686	Barcelona 1,505,325	
Age structure of barrio (2001 census)		Trinitat Nova	Barcelona
	0-14 years	11 %	12 %
	15-24 years	12 %	12 %
	25-64 years	47 %	55 %
	>64 years	30 %	22 %
Ethnic make-up (2001 census)		Trinitat Nova	Barcelona
	Native	98.0 %	95.1 %
	Non-native	2.0 %	4.9 %
Percentage of home owners and tenants (2001 census)		Trinitat Nova	Barcelona
	Home owners	70.8 %	55.0 %
	Tenants	20.0 %	32.4 %
	Others	1.9 %	2.8 %
A redevelopment plan is being implemented and the buildings with structural deficiencies are being demolished (around 870) and new buildings are being constructed (around 1030). In 1996, the neighbours' association set in motion the *Pla Comunitari*, among other measures, to improve the quality of life in the barrio by encouraging the residents to play a more active role.			

Sant Roc (Badalona)

Date of construction	1962-1965		
Distance from the city centre (km)	Approximately 6 km from the centre of Barcelona. Sant Roc is in Badalona, a municipality forming part of the metropolitan area of Barcelona.		
Most positive feature of barrio	The zone's accessibility		
Most negative feature of barrio	Most of the buildings are in a deficient state due to a structural pathology (*aluminosis*). Problems derived from the three different groups residing here: non-gypsy, gypsy and recently arrived immigrants.		
Predominant building type	5-, 8-,10- and 14 storey buildings		
No. of inhabitants (Census 2001)	Sant Roc 12,476	Barcelona 1,505,325	
Age structure of barrio (2001 census)		Sant Roc	Barcelona
	0-14 years	17 %	12 %
	15-24 years	47 %	12 %
	25-64 years	20 %	55 %
	>64 years	17 %	22 %
Ethnic make-up (2001 census)		Sant Roc	Barcelona
	Native	95.7 %	95.1 %
	Non-native	4.3 %	4.9 %
A redevelopment project is underway and more than 900 buildings are being demolished and replaced by new constructions. In addition to improving the structural quality, major efforts are being made to rehouse both gypsy and non-gypsy families in the same blocks, following a policy of integration. Among other measures, a *Pla Comunitari* is also being implemented to improve the quality of life in the neighbourhood by encouraging the residents to play a more active role.			

Social Cohesion and Land Use Law: Is There a Place for Legal Regulation in France?

Jean-Philippe Brouant

In France, the awareness that the concentration of certain social categories within a district lead to a certain number of risks is not recent. We often quote this exchange dated from 1604 between the King Henri IV and François Miron, head of the municipal administration of Paris. The King expressed the wish to build districts for the exclusive use of workmen, and François Miron answered that this should not be the case "*the thin ones are on one side and the big and fat ones on the other, they will surely better be mixed.*" Even if the King complied with this opinion, it is only 400 years later that French land use law is taking into account the objective of fighting against urban segregation. This paper explores two points: the concept of social mix and its place in the French legal order and the various legal obligations which can arise from this objective.

1. The incorporation of the social mix principle into French legal order

The official response by the authorities to the emergence of urban ghettos is almost simultaneous with the sixties and seventies's policy known as the "*Grands ensemble,s*" that created high-rise apartment blocks in large estates to satisfy needs in quantitative terms. A ministerial circular of 1973, without obligatory effect, entitled "*The Fight Against Social Segregation by the Housing Environment*" invites the Prefects, within the framework of the operations of town planning which they carry out, to avoid a too strong concentration of social housing. On this basis, specific actions are to be developed for high-rise apartment blocks on the periphery of towns, the source of a downward spiral of social stigma and physical degradation. It is thus necessary to pause to consider the appearance of the principle of social mix and its legal basis.

1.1 The emergence of the social mix principle

Seventeen percent of French households are accommodated in the public low rent-housing sector. It is in the context of access to social housing controlled by allocation rules laid down by public authorities that the first attack on social segregation appeared in 1986 with the reference in the legal texts to the "*necessary diversity of the social composition of each district*". In particular, the Prefect must base his deliberations on this objective when he defines the local criteria for priority that the social home ownership sector must adhere to for the allocation of housing.

Thereafter, the "Orientation Statute for the city" (Loi d'Orientation pour la Ville - *LOV*) of 1991, sometimes referred to as the "anti-ghetto statute", marks an essential juncture: even if it does not expressly mention the term of "social mix", the statute provides a definition of this new pivotal concept in urban policies. The 1st Article specifies that all public bodies must, within the framework of their responsibilities, guarantee

> or all inhabitants of the cities, housing and living conditions supporting social cohesion and to avoid or to remove the phenomena of segregation. This policy must make it possible to socially integrate each district in the city and to ensure in each conurbation the coexistence of the various social categories.

How consequently can the principle and the legal regulation contribute to the achievement of this objective? Can regulation go against natural or historic logic which gives rise to socially homogeneous urban spaces? The French legislator is aware of the limits of the exercise and does not consider himself as a "social alchemist." Land use law could not create a new housing environment which would ease the "co-lateral damages" of the economic crisis. The essential idea is that the authorities can, by their action in the field of town planning and housing, contribute to the diversification of housing; the underlying logic suggests that the legal framework of the residential units determines the social category of the people who live there.

It is in 1996 that for the first time the term "social mix" appears expressly in normative texts (decrees which authorise deviations from income ceilings for access to social housing). In particular, the "Pact for the Re-launch of the City" statute specifies that the Local Habitat Programme[1] (Programme Local de l'Habitat - PLH) must "*support social mix by ensuring a balanced and diversified distribution of the supply of housing between the districts of the same municipality.*" Thereafter, the statute "for the fight against social exclusions" of 1998 will make this objective an essential principle as regards the allocation of social housing. Finally the urban renewal and solidarity statute (loi Solidarité et Renouvellement Urbains – SRU) of 2000, without bringing in a new definition, refers in a sometimes redundant way to social mix.

At last, the purpose of social mix or of diversity and social balance of the habitat is to ensure, in a given territorial space (building, district, city, conurbation) a balance between the various socio-economic levels of the population.

The social mix principle is based on two elements: balance and diversity. This, from a legal point of view, raises a certain number of questions. On what scale shall the balance be measured? The aim is not to grant freedom of residential choice to groups that are discriminated against, but to disperse them throughout the city. Is it the poverty, which raises problem as such, or the excessively high visibility? Also in France, spatial segregation of ethnic groups is seen as a threat to the republican model. Then the norm of spatial dispersal of immigrants is hidden behind the universal category of social mix or social cohesion. What is also observed is that social mix is a way to avoid concentration in unattractive districts but it is no more a way to allow the discriminated groups to be housed in the "beautiful districts." How can the principle be translated into a right to mobility in the city? The intense operations of urban renewal in the most deprived districts are always conducted with rehousing inhabitants on the same place.

These questions continue to stimulate the French sociologists' debates. However, the political authorities, having chosen to institute this principle, obliges the jurist to wonder.

1. 2 The normative position of the principle

The French constitution, contrary to other European constitutions, does not mention any objective of social or territorial cohesion. It also should be recalled that it does not mention the

[1] This programme defines local goals over six year in an attempt to satisfy housing requirements and favours social cohesion. PLH proceedings consist of: establishing a diagnostic process, evaluating the shortcomings and weaknesses in the area, then elaborating upon housing politics of the whole area community.

word "housing;" however the Constitutional Council, the body charged with ensuring that laws are completely in conformity with the Constitution, has pronounced a constitutional objective which weighs on the legislator: to make it possible for any person to be able to obtain access to a decent home. The Council has stated that the objective of social mix belongs within legislative texts.

Also it judged on several occasions that this principle corresponded to "*an objective of gneral interest*" which legitimates infringements of the right to private property. For example, local authorities can impose the construction of social housing on property owners' land (by the mechanism of the land reserve). It may also permit exceptions to the equality principle, meaning that the social home ownership sector is not subjected to the "tax on vacant homes" when residential units are deliberately left vacant with a view to increasing social diversity in the housing stock.

However, the Constitutional Council took good care not to raise this principle to the rank of the "*objectives of constitutional value*". And it appears clear to us that this principle could tomorrow disappear from the French legal order without criticism from the Constitutional Council. That being so, this assertion must be modest; indeed, one could consider that the social mix principle, in its various manifestations, contributes to the achievement of the constitutional objective of decent housing. Imposing construction of social housing on the municipalities which do not have any social housing certainly contributes to the production of housing. And to act in this way, through the regulation of town planning and land action, such that social housing is not concentrated appears to us to contribute to the "decency" of housing.

But the legal relationship between the "right to housing" and "social mix" is ambiguous. In particular, the principle of social mix can justify the refusal to allocate a social home to an underprivileged person. Under the pretext of avoiding concentration, households are banished to areas with a bad reputation or refused access to social housing altogether. There is furthermore a potential contradiction between these two principles, to the extent that diversity means a dispersal of the disadvantaged, whereas the right to housing implies the opening up of the cheapest segments of the social housing stock to the most deprived people.

The Council of State, the highest administrative jurisdiction, was moved to make a statement on this question and considered that the legislator wished to put these two principles on the same normative level and recognized that it is not possible, a priori, to treat them on a hierarchical basis. It also judged that the possibility for the Prefects to deviate from the income ceilings designed for access to social housing "*responds to the social mix objective, the taking into account of which…must be required in addition to the objective of satisfaction of the needs of low income groups.*"[2]

2. The legal obligations which arise from the social mix principle

Because of its place in the substantive law, the social mix principle cannot be analysed like a simple declaration of intent without legal effects. It imposes obligations both of action by of the proper authorities and prohibitions of some practices.

2.1 Social mix, a norm for action

The legal standard cannot thus be satisfied by a prohibition but can on the contrary institute an obligation of action, an obligation which can have more or less force.

[2] CE 27 juill. 2001, Association Droit au logement, AJDI 2002, p. 54, obs. J.-Ph. Brouant

Incentivising action:

The mechanisms of subsidy and of tax deduction, were generally developed with a view to helping disadvantaged districts. A statute of August 2003, continuing the conduct of urban policy since the end of the eighties, sets up a "National Programme of Urban Restoration" for diversifying housing tenure within the regeneration area to break up concentrations of poverty and create social mix. A private actor, equipped with significant financial means, [3] an *"association foncière logement"* (Association for Housing Land), intervenes in these districts to buy land and buildings and to create unsubsidised housing.

Obligation of means:

The innovative *LOV* statute of 1991 required public bodies to provide for the diversification of the housing environment in their town planning documents. The *SRU* statute December 2000 maintains this requirement since it expressly refers to the objective of "*social mix in the urban housing environment and the rural settlement*" for territorial plans (Directive territoriale d'aménagement – territorial development directive), local authority documentation--the "Schémas de cohérence territoriale" (plans for territorial coherence) for conurbation areas--, and local urban plans-- "Plans locaux d'urbanisme" (PLU- local urban plans) or "Cartes communales" (municipal plans) for the municipal level.

Expressed in the Code of Town Planning as a general principle, the social mix principle is not sufficiently precise to obligate local authorities to produce results. The Constitutional Council, in its decision of December 7, 2000, interpreted these provisions "*as forcing only the authors of the documents of town planning to oblige the appearance of measures tending to achieve the objectives which they state*". It deduced from this that it remains for the administrative judge "*to exert the simple control of imposing an account of the rules fixed by these documents and of the provisions of the Article L 121-1*". The authorities cannot thus accept opposition to change and a town planning document which would not include "measures" could be regarded as unlawful.

To satisfy this obligation, local authorities have a certain number of means.

1. The municipality can authorise deviations from the limits fixed by the local urban plan (PLU) for urban development as regards the volume of construction (going beyond the limit of 20% of the plot ratio[4] to support the social housing construction).
2. The municipality can, through their Local Urban Plan (PLU) and only in the urban zones, reserve a certain number of plots with the aim of realising housing programmes "*having respect for the objectives of social mix*"; this ability can both be used to build social housing in a residential district and to provide available housing in a social housing district. The owners of the plots can put the municipality on notice to buy their ground at a fixed price, a price fixed by mutual agreement, or determined by a judge.

In addition, apart from the city planning, the municipalities can intervene in favour of social rental construction using three categories of tools:

1. direct land intervention: the local authorities can use expropriation or pre-emption rights with a view carrying out social housing;

[3] Part from the «participation des employeurs à l'effort de construction (PEEC – Employer contribution to the construction effort).

[4] Ratio between the floor area and the area of the site.

2. projects or operations of site development (the judge legitimated the possibility of requiring a different contribution from the developer according to the type of housing carried out) ; and
3. land subsidies, in the form of the granting of subsidies to social home ownership sector or for transfers of land at prices lower than the free market.

As the State is responsible for social cohesion, by its supervision and in its various capacities, it will encourage the local authorities; as the State representative, the Prefect will be able to oppose town planning documents that insufficiently address the question or the means for attaining social mix; it also can, under the heading of the procedure for "projects of general interest" (PIG – projet d'intérêt general) impose the taking into account by the local town planning documents of projects intended "*for the reception and the housing of underprivileged people or people of modest resources.*"

Obligation of result:

Whereas the *LOV* statute instituted an obligation of realisation of social housing, the *SRU* statute amplified these obligations considerably: the objective to achieve 20% of social housing in the urban municipalities was validated by the Constitutional Council as a component of a sufficiently precise obligation weighing on the local authorities. The municipalities with a deficit are subjected to an annual levy on their tax resources at least equal to a hundred and fifty euros per missing home - and more for the richest - for as long as they fail to achieve the goal laid down by the law. These sums are transferred within the metropolitan area to the profit of social housing construction.

The municipalities' obligation cannot be satisfied by paying; they must put into effect a triennial correction programme. If at the end of the programme the commitments are not maintained, the Prefect can invoke financial sanctions by raising the tax penalty and at the same time enter an agreement with a low rent-housing builder for the realisation of the necessary residences; the municipality is obligated to contribute financially to the operation.

It is also necessary to indicate that a law passed in 1990 and updated again in 2000 places an obligation on every municipality with more than five thousand inhabitants to construct a site for travellers living in caravans. Furthermore, continued ignorance of their legal obligations after a reasonable time constitutes a fault subject to enforcement of their responsibility.[5] One could, by extension, wonder whether homeless people have the right to enforce the responsibility for a municipality which knowingly ignores its obligations concerning quotas for production of social housing imposed by the statute on urban renewal and solidarity.

1.2 Social mix, a norm for abstention:

For a long time, local land use law, as it appeared in the town planning documents, contributed to urban segregation: with the aim to protect a superior residential area, building rules were very hard to satisfy (for example, by forbidding blocks of flats, imposing a big size of building plot, two parking areas or more, and persnickety rules on building materials). In theory, these practices should be ended by legal supervision in the name of the social mix principle. However, we should not expect a revolution. Before even the legal consecration of the social mix principle, judges could declare such local rules unlawful with regard to the principle of balance. And there has been no decision yet on this point. This can be explained by the fact that citizens or associations (Non-

[5] CAA Nancy, 4 déc. 2003, Municipality de Verdun, req. n°98NC02526

Governmental Organizations NGOs) do not mobilise in favour of this principle. Also it will be difficult for the judge to appreciate if a given territorial space is well-balanced between the various socio-economic levels of the population. On what scale shall the balance be measured? Building? District, City or Metropolitan Area? With which criteria? Nationality, socio-economic level?

Only one existing example illustrates these difficulties. The municipality of Puteaux decided to buy a building in the neighbouring municipality of Gennevilliers intending to create a hostel to accommodate municipal employees of foreign origin. This is a symbol of what we call in France "la politique du coucou" (cuckoo politics), bird which lays his eggs in other bird's nests. The municipality of Gennevilliers decided then to refer the matter to the judge. The Council of State judge of Gennevilliers has *locus standi*[6] to take legal action against the decision of Puteaux on the basis of the risks of aggravation to urban and social imbalances which it suffers. It amounts to saying that irrespective of the socio-economic situation, nationality constitutes a danger to social cohesion. The Council had regard to the specific character of the operation, the low number of people concerned and the respective localations of their places of dwelling and work. Such a decision is not sullied with an obvious error of law and does not ignore either the principle of "social cohesion" as stated in the 1st Article of the statute of July 1991, or the statutory or regulatory provisions intended to implement it.[7] There is no doubt that the social mix principle will be used as an argument to crystallise social situations considered as well-balanced.

When deputies referred the SRU statute to the Constitutional Council, they argued that the social mix principle would be about a "*declaration of political or ideological principle, arising from a sociological observation of the social classes, based on a non-legal construction and subject to very diverse interpretations and to very subjective analyses.*" Thus they asked for the Council to declare that this principle was not normative. The Council has not yet agreed with these opinions but it is clear that the social mix principle can only be analysed as a "legal standard," an indeterminate concept to which judges will give both content and scope with their statements.[8]

---

[6] In french « intérêt à agir » : the right to be heard in court.

[7] CE Nov. 22.2002, *Municipality* de *Gennevilliers, AJDI* 2003, *n°4*, p. 298, *obs.* J-p.*Brouant*

[8] S. Rials, Le juge administratif et la technique du standard ; essai sur le traitement juridictionnel de l'idée de normalité, L.G.D.J., 1980.

UK Housing Rights: Management by Eviction, Re-housing and Possible Incompatibility with Continental Rights

Jane Ball

The United Kingdom ("UK") has strong rights to enable some homeless people to obtain access to a home, but is very poor at preventing eviction. The access to housing is largely intertwined with the reality of eviction, because if vulnerable people can be re-housed then it may be believed that it is less problematic to evict them. In fact, UK governments during the last 20 years have used eviction as a policy instrument for housing management.

As well, the UK does not view the "right to housing" as a programmatic right. Housing objectives are pursued by government policy and the right to housing is not usually mentioned within legislation, or indeed anywhere within the internal statutes, secondary legislation or case law.

However, the policy of the UK is incompatible with continental approaches, where housing policy has often been very concerned with the prevention of eviction. The anti-eviction approach has been supported by the European Social Committee and the UK may be in breach of its obligations.

UK Housing Rights

Traditionally UK lawyers talk about housing rights rather than the right to housing, signifying a fundamental difference between the UK and Europe. A European right may be programmatic. This means that the principle is a norm and the basis for a range of legislation, particularly urban planning legislation, but it does not necessarily give rise to a "remedy."

If an ordinary English person were to be told they have a right to housing, they understand from that that they can go down to their local council and be given a home. If they are not given a home they would expect to apply to their local court and that the court would ensure they were given a home. Thus a "right" in this sense is actually a "remedy" which does not translate easily. A remedy is a solution to a legal wrong whereby the individual can launch a legal action and the court will order what is sought or give recompense.

English lawyers tend to feel that anything that does not give an individual a remedy is not worth having. Thus it is not surprising that the European Convention on Human Rights and Fundamental Freedoms ("ECHR") was incorporated into UK law in a way that gave individuals a remedy for breach of their rights by public bodies; but there is no process for stopping statutes passing through parliament, because they breach these rights.

Remedies are effective because there is a court procedure to enforce them. They are procedural rights and do not need to be based on principle. It is enough that the individual can apply to the court and get what the law says he should have.

In this way, it is also not surprising that the Social and Economic Rights under the 1961 European Social Charter (as well as the Revised Social Charter of 1996) have not been incorporated into UK law. Because of their wide ranging and general nature it is not necessarily clear what an individual can claim.

UK housing lawyers have always talked of housing rights in the plural because there are a specific number of things that are capable of helping an individual obtain and stay in a home. There are multiple remedies and thus multiple rights, such as a housing benefit, the right not to be evicted unlawfully, and the right for particular homeless people to be housed.

Programmatic rights, such as those that provide for housing to be an important consideration in planning towns are different in nature. They are very useful in France and Spain for a framework for planning, but in the UK such planning considerations are not at all considered to be rights.

Housing is in fact an important planning consideration in the UK, but not as a right, rather as a policy consideration and perhaps as one of a number of statutory factors that local councils (municipalities) must consider when granting planning applications. Councils must also review the provision of housing in their area, with regard both to needs and with regard to its condition. This sort of thing is expressed as one of many duties on the council rather than a right in the European sense. "Duty" is a stronger expression than "obligation." The term "duty" has moral implications; implications that the person under a duty should not have a choice about carrying out the duty; unlike a businessman who may choose to pay damages rather than carrying out a contract.

Homelessness Rights in the UK

In England and Wales, local councils have a duty to house certain classes of homeless people. If they do not the homeless person has a right to an internal review of the case. If the review does not find for the homeless, then they may apply to a local court on a point of law.[1] The court may quash the local authority decision or occasionally order the council to house the person. This is based on the Housing Act of 1996.[2] [3] No principle is referred to anywhere in the statute.

Within the homelessness legislation, the term "homeless" includes those who are badly housed, overcrowded or are forced to leave their accommodation for any reason, including threats of domestic violence. The statute asks the question of whether it is reasonable for the person to continue to occupy their previous accommodation. People threatened with homelessness within the next 28 days are also classified as homeless. Someone is also homeless if they occupy "crisis" accommodation such as women's refuges.[4]

The local council is obliged to house a homeless person if they belong to categories of people who are in priority need.[5] This is defined groups such as people with dependent children, pregnant women, or people who are vulnerable by reason of old age, sickness, or mental illness or because they are vulnerable as young people leaving local authority care, people leaving prison or the armed services. People who are in priority need are housed provided they are not homeless intentionally.[6] Someone who is evicted for bad behaviour or who chooses to leave their accommodation is homeless through their own choice or fault and thus homeless intentionally. Someone who refuses to pay their rent will be homeless intentionally, but someone who cannot pay their rent may not be

---

[1] S.205, Housing Act 1996.

[2] Part VII, Housing Act 1996. It is possible to find this statute in the public databases such as www.hmso.gov.uk/acts.htm, but please be aware that these do not update the statutes when they are amended by statute or by subsidiary regulation (and this act is much amended).

[3] First introduced by the Housing (Homeless Persons) Act 1977, which extended existing duties under the National Assistance Act 1948.

[4] *R v London Borough of Ealing, e parte Sidhu* (1983) 2 HLR 45, also applied to Salvation Army (hotel) accommodation *Rv Waveny District Council ex parte Bowers* [1983] 1 QB 238.

[5] S.189 Housing Act 1996 and extended by statutory instrument.

[6] S.191 Housing Act 1996.

homeless intentionally.[7] Roughly a half of all homeless applicants are turned down for housing, perhaps because they are not in priority need, are deemed to be voluntarily homeless or because they turn down an offer of housing.

If it seems that a homeless person is likely to fall in these categories, they must be housed immediately, as soon as they apply.[8] This may well be in temporary accommodation until longer term accommodation is found in either the public or private sector. Unlike in France the homeless person is frequently placed in normal social housing stock rather than having to remain in special intermediate housing stock.

Once there is a finding that that person is homeless this will oblige a local authority to house them, but not necessarily where they want. To some extent this can take the pressure of popular areas. A local authority can refer a homeless person to another local authority elsewhere, if that person has a local connection there, such as having family or employment there.[9] The first local authority still must house that person until another option is available.

Asylum seekers and some people from abroad do not qualify for housing under the homelessness legislation. The National Asylum Seekers Support Service,[10] concerns itself with their housing and support, frequently dispersing them around the country. A recent court decision found that the situation of several asylum seekers, who were forced to beg on the street, was contrary to human dignity. The court annulled the decision by NASS not to offer housing support.[11]

If a homeless person is housed their family is housed with them.[12]Around 100,000 individuals are housed, with their families, through the homelessness process every year.[13] If they do not qualify, they are entitled to advice and assistance from the local council or to join the waiting list[14] for social housing through the normal procedure.[15] The normal procedure also takes account of need.

Additional legislation provides for the care of homeless children. The Children Act 1989 stipulates that local councils must house all homeless children in need and not with their parents.[16] This, in combination with the fact that applicants with dependent children are "in priority need," means there are relatively few homeless children in the UK. Those which are homeless are often undetected by social services.

Rights for the homeless have increased in Scottland since the founding of the Scottish parliament in 1999. The Scottish parliament enacted a statute which aims to have all homeless people housed by 2012 even if they are inentionally homeless. There are also moves to give such people a choice of home. The effects of the legislation are already obvious. The categories of homeless people have been increased and all homeless people are temporarily housed, usually for 6

---

[7] For a discussion of this see *Din v Wandsworth Borough Council* [1983] AC 657 This emphasises the need for correct behaviour by the applicant to bring himself or herself within the Act.

[8] S.188, Housing Act 1996.

[9] S.198-201 Housing Act 1996.

[10] *See* http://www.ind.homeoffice.gov.uk/ind/en/home/applying/national_asylum_support.html

[11] *R(on the application of Limbuela) v Secretary of State for the Hone Office* [2004] EWCA CIV 540, [2004] All ER (D) 323 (May), [2004] 3 WLR 561, (Approved judgment).

[12] The definition is concerned with whether it is reasonable that a particular person should live with the applicant, not with the precise relationship, s.176 Housing Act 1996.

[13] Statistics on this and many other UK housing matters are found at http://www.york.ac.uk/inst/chp/ukhr/index.htm. Total people housed is thought in this way per annum I thought to be 350,000 to 450,000.

[14] Asylum seekers cannot do this.

[15] Mainly found in Part VI of the Housing Act 1996.

[16] S.20(1), Children Act 1989.

months. Unfortunately, although the Scottish parliament has committed itself to this policy by statute, the budget needed to do this has not been costed.

Eviction in the UK

There is European discourse which suggests that when it comes to housing, eviction must be avoided at all costs. The French slogan, *Droit au Logement* or "no eviction without re-housing" exemplifies this.[17]

While many European countries criticize eviction, it has been an important plank of UK government policy and a tool for housing management. Eviction is always a management tool to some extent, used to evict those who do not pay or who abuse their tenancy.

In the UK, people object less to eviction perhaps because the poorest people, occupying property of the right size and paying average rent will have the whole of their rent paid by the government, directly to the landlord. Therefore, poverty and the inability to pay is not necessarily the reason for eviction. Change in this approach has been proposed in order to give an incentive to tenants to find a reasonable rent and to pay the tenant directly.

Secondly, some believe that since the evicted are re-housed little harm has been done. Contrary to the belief that tenants should not be evicted, some argue that people should be evicted quickly, for their own benefit, because this means that the debt of rent arrears will not have grown too big for them.

While many European countries worry about families on the streets, this argument carries little weight in the UK. In the UK children and the most vulnerable people tend to be compulsorily housed, and the largest group of homeless are single men (who may not be in "priority need").[18] Therefore, the worry about children is eliminated.

UK governments since 1985 have acted to make short tenancies less secure. The assured shorthold tenancy was introduced by the conservative government in 1988 and now governs the majority of private tenancies in England and Wales. With this it is possible to evict tenants on two months notice (after the first six months) without cause. This can make it difficult for a tenant to insist on repair of their property and complaints about the rent could be similarly dangerous, because they could find themselves evicted.

If a tenant is evicted there is extremely limited information supplied to the tenant about the process itself, which usually takes about five months, but there is an accelerated procedure for eviction for rent arrears in the most common type of tenancy. Many people in process of eviction simply hand in their keys and few contest the eviction proceedings.[19]

There is no obvious effort by the UK government to mitigate the effects of eviction procedure, save that by the Homelessness Act 2002 each local council must now have a homelessness strategy which will include trying to prevent eviction. [20] However, there is no notification of eviction to the local council or social services.

---

[17] *See* DAL (1996) p.30.

[18] *Supra* p.3.

[19] This may well be reasonable given the displacement of the rightful occupants of the home.

[20] Homelessness Act 2002, although the act itself does not mention eviction.

The reduction in security of tenure went hand in hand with a conservative government policy to increase home ownership. Who would want to rent, when conditions were insecure and it was stigmatised? Renting is also still disadvantaged in fiscal terms relative to home ownership. [21]

The policy of reduced security of tenure was continued by the Labor government, because it was thought that reducing the rights of the tenants would attract people into being landlords. The theory was if you can get rid of anti-social tenants or tenants who did not pay easily, there would be reduced cost and risk to owners of rental property. There are proposals to reform the hugely complex UK tenancy law, which may benefit renters by giving them consumer protection and minor concessions, but the provision to terminate tenancies without giving reasons remain.[22]

Private renting currently represents about 10% of the housing stock--being about 9% in 1990--and it is arguable whether the reduction in rights of the tenants has produced more rental property. There was an increase in renting in the 1990 when there was a slump in the housing market and people could not sell their homes. There has been a recent increase in people renting by borrowing quite a high proportion of the property's value, either to speculate on the property to make a profit--which is bad--or to provide themselves with an income on retirement--which could be good. [23]

The second use of eviction in housing management concerns anti-social behaviour. A practice emerged in 1990 concerning tenants who carried out racial abuse. In some areas ethnic minority tenants suffered from vicious vandalism, threats, violence, arson and personal abuse. At that time in the UK local councils directly owned 22% of housing stock. It was formerly the practice in social housing to remove an abused family to another estate. This rewarded racist abusers who wanted an all-white estate.

Under the new practice, the tenancy agreement would include terms for tenants not to carry out racial or other abuse. Thus a family that carried out such abuse would be evicted for breach of contract. They would also not be re-housed because they would be considered to be intentionally homeless. This policy could be difficult because abuse was often carried out by children as young as 12 and it may be difficult for parents to control them, but nonetheless the parents could be evicted without necessarily being re-housed.[24]

The Housing Act 1996 added additional reasons for which social tenants could be evicted: for conduct "likely to be a nuisance" and for serious offences committed in or around the home.[25] In addition, all social landlords were allowed to offer more insecure "introductory" tenancies in the first year to tenants, to ensure that they behaved adequately.[26] This type of practice was used more recently under the Labor government in a general drive against anti-social behaviour. It is part of a policy to improve the quality of neighbourhoods by penalising behaviour such as vandalism, bullying, abuse, drunkenness, and very loud music and thus to reduce the stigmatisation of notorious social housing estates. This was used with "right-to-buy" policy intended to created mixed rental and owner-occupied neighborhoods. [27]

---

[21] Owner-occupancy of a principal home is advantaged in terms of capital gains tax exemption and exemption from income tax on national rent, which does not apply to rented property. *See* Crook (1995)

[22] *See* Ball (2003)

[23] For detailed figures see the UK Housing Review (note 13 supra)

[24] *See Newcastle CC v Morrison (2000) 33 HLR* although in a recent, as yet unreported, case in a lower court a mother was held not to be in control of her teenage sons, and thus not voluntarily homeless.

[25] Amending ground 2 of Schedule 2 of the Housing Act 1985 (for council tenancies "secure tenancies") and ground 14 of Schedule of the Housing Act 1988 (for other social landlords "assured tenancies").

[26] Housing Act 1996 Part V Chapter 1 s.124-130.

[27] For an account of the punitive nature of this and concerning the idea of social control in government policy, *see* Hunter (2001).

There is undoubtedly a problem in some areas with what was described in the press as "neighbours from hell." It has been said that the loss of one's home does not happen to home owners, and it should be questioned whether such a serious sanction should happen to tenants.

In this way it can be seen that in UK discourse a much higher priority is given to housing the homeless, than to preventing eviction.

Preventing Lawful Eviction on the Continent

The expenditure of time and effort to prevent needless eviction, may cause delay and cost to a landlord but it can prevent large social and financial expenditures to the wider community, in terms of costs of social care, health care, and risks of family break up. School aged children of evicted families often miss school and possible employment opportunities because of the distress and difficulty caused.[28] There are many examples of good ideas for preventing eviction on the continent.

In France, eviction is barred during the winter months, November 16th to March 15th,[29] although one does sometimes hear of evictions in breach of this. In addition, the eviction process has specific time periods designed to allow the evictee to seek out assistance. For example there is a three month delay for social evictions during which the social landlords must refer the matter to benefits agencies.[30] The court official serving the eviction papers must also serve information about help available from the *Fonds de Solidarité Logement*, a social agency which may pay rent in arrears or provide social assistance. As the eviction action progresses, the landlord must also notify the *département* of the impending eviction, so that they can take action. In fact when there are no additional resources made available for this, some *departements* simply register the action. Judges have powers to postpone eviction if circumstances warrant it.[31] Every *département* also must have a charter for the prevention of eviction between the different social actors.[32]

Additionally, the *Commission sur le surrendettement*, (Commission on over-indebtedness), can provide negotiated phased payment of debts.

Even when the eviction order is obtained, the landlord has to seek the consent of the central government representative locally, the *préfet*, before the eviction can be carried through by the police. On enquiry, in about 10% of cases this permission is refused upon payment of compensation, often because the property is in an urban area where there is a shortage of accommodation.[33] In the UK, eviction is carried out by court officials with no further court hearing. As a consequence of a lack of prevention efforts in the UK, evictions are substantially higher at all stages than those in France, although recent figures show France catching up.[34]

In May this year in France, the Minister for Social Cohesion, Borloo, announced a freeze on all evictions for arrears of rent in social housing for people acting in good faith. He suggested that by this, money would be saved.[35] This was in fact a temporary measure pending an agreement with the social landlords and a new law on social cohesion.

---

[28] Campaign started in Feburary 2004, see http://england.shelter.org.uk/home/home-624.cfm/pressrelease/44/, also a continuing theme of the Shelter magazine, *Roof*.

[29] *Code de la Construction et de l'Habitation* ("CCH"), Article L.613-3

[30] CCH, article L.613-13

[31] *See* Ball (2005, forthcoming) p.363, also for the *Fonds de Solidarité Logement passim* but particularly p.302.

[32] Article 121 of the *loi contre les exclusions loi* no.98-652 of 29th July 1998.

[33] Ball (2003) p.19.

[34] Ball (2005, forthcoming). p.364.

[35] Reported by Martine Venrnon (2004) *Fin des expulsion de locataires HLM de bonne foi* reported by batiactu.com on 12/5/04.

Similarly, in Italy, to cope with the housing crisis, there were a series of government orders freezing or staggering evictions. This had such an effect on landlords that one individual, Immobiliare Saffi, made an application to the European Court of Human Rights for breach of their rights to property[36] and to a fair trial.[37] This was upheld and damages awarded. The landlord had been trying to evict a tenant from 1983 to 1997, but prevented by government orders or procedures.

As another example of eviction based policy, a German provision requires that social agencies be notified where an eviction is threatened.[38] This is within a framework of flexible and personalized help for housing and other social needs.[39]

In Vienna,Austria, the city supported agency, FAWOS,[40] is engaged to prevent eviction. Local judges often refer eviction cases to this agency. FAWOS is a free service that works with the family threatened with eviction to develop a plan to pay debts and to ensure that all possible benefits are received, or to arrange financing for paying arrears. They also provide information, legal advice and emergency response to homelessness. Sometimes the response may involve people moving to a smaller flat or using the City's large stock of directly owned social housing. FAWOS suggests that the costs of services to the agency amounts to an equivalent seven weeks of housing. At the end of their intervention the rescued family will no longer have any problems, while an evicted family would continue to have a serious problem. Thus, working to prevent eviction has strong attractions for the prevention of unnecessary harm to a family.

There are, however, measures to prevent eviction which may be indirectly problematic for reasons which will be discussed later:

A European Divide?

European countries are mostly unaware of the deep differences on whether housing policy should primarily prevent eviction or whether policy should be focused on re-housing people once they are evicted. The UK is alone in Europe in having housing rights for the homeless which can be enforced before the courts, although many other countries may be in fact good at re-housing. Further, the UK is also almost alone in permitting eviction in winter while in all countries other than Germany it is axiomatic that this should not be possible.[41]

This difference is beginning to show with the development of European housing rights. There are now housing rights in Article 34 of the European Charter of Fundamental Rights governing European Union institutions and in Article 34 of the the new European treaty on housing. Both of these give a right to assistance with housing.

The vagueness of European housing rights is a jurisprudential problem for the enforcement of these rights to housing by individuals, but recent developments have made these more specific. The

---

[36] Article 1 or Protocol 1 European Convention on Human Rights ("ECHR").

[37] Article 6 ECHR.

[38] 1 *BundesSoxialHilfsGesetz* ("BSHG") Paragraph 15a (2).

[39] Article 72 BHGB (Article 72, formerly did provide a right to housing now repealed) provides for emergency help, which may not be based on income. Article 4 of the Order of 24th January 2001, putting into effect Article 72, says "Measures to keep and obtain a home are above all by the appropriate advice and personal support". (with other provisions such as paragraph 55 (5) 5 of Book 9 of the *Sozialgesetzbuch*).

[40] There is a brief web introduction to their work *at* http://members.aon.at/fawos/intro.htm. Information is also available in Italian.

[41] (Avramov, 1995) I understand that eviction in winter is possible in Germany, but it is mitigated by a protective attitude in tenancy law and the flexible social security system. Given the date of the book the new accession countries are not be included.

original European Social Charter of 1961 refers to the provision of family housing in Article 16 and to social welfare in Article 14. It is hoped that this will be superseded by the Revised Social Charter of 1996 which has a much more specific right to housing. The language of Article 31 is as follows:

> With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed to:
>
> 1. promote access to housing of an adequate standard;
> 2. prevent and reduce homelessness with a view to its gradual elimination; and
> 3. make the price of housing accessible to those without adequate resources.

Article 31 was expanded by the European Social Committee. The Committee is an independent body charged with reviewing progress on rights under both social charters and is supposed to deal with collective complaints against national governments by European non-governmental organizations for failure to respect social and economic rights. The collective complaint is possible under the Collective Complaints Protocol of 1995. There is currently a judgement being considered by the European Social Committee on a complaint against Greece from a European Roma organization, concerning housing discrimination.

Existing pronouncements on housing by the European Social Committee are found in a 2003 report, with reports submitted by France, Italy and Bulgaria. The report includes fairly precise statements about the required level of housing protection. There are also statements about the level of affordability to be achieved and concerning housing supply.

Legal protection for person threatened with eviction must include in particular an obligation to consult with the affected parties in order to find alternative solutions to eviction and the obligation to fix a reasonable notice period before eviction. The law must also prohibit evictions carried out at night or during winter and provide legal remedies and offer legal aid to those who are in need to seek redress from the courts. Compensation for illegal eviction must also be provided. When an eviction is justified by the public interest, authorities must adopt measures to re-house or financially assist the person concerned.[42]

The UK has not signed the Revised Social Charter or the Collective Complaints Protocol. It could be argued that the UK is thus not affected by the conclusions of the European Social Committee, particularly those directed to other countries. This may not be so, as the Social Committee itself does not distinguish in its statements between signatories of the old and new charters, and the UK may find itself criticized in similar terms when submitting its usual reports to the Social Committee under the old charter.

It is clear that the UK is seriously in breach of the policy of the European Social Committee, by continuing to evict in winter and by the lack of consistent or national schemes to assist people threatened with eviction.

France on the other hand has ratified the Revised Social Charter and the Collective Complaints Protocol. There is nothing in the Social Policy Committee's statements which conflict with French national policy on eviction implementation. Although France may have trouble meeting the obligation to financially assist or re-house the particular person evicted. There is at present no such obligation which can be enforced by the individual.

---

[42] Council of Europe, European Committee on Social Rights, European Social Charter (revised), *Conclusions 2003* (Bulgaria, France, Italy) Strasbourg, Council of Europe Publishing, p.231.

An economic requirement for the European Union?

It has already been seen that the new EU treaty and the Charter of Fundamental Rights reflect the Revised European Social Charter in having a right to housing, which is rather vague, but which may ultimately reflect the development in social rights already described.[43]

There are good economic reasons why protection from eviction should be standardized at a decent level across the European Union. Mobility of labor will assist in the development of a more homogenous union. In addition there are economic benefits. If people are able to move about from an area where there is work, there is a double benefit to governments in not having to pay benefits and in receiving tax revenues from the work..[44]

Free movement of labor is promoted in the EU, and mobile workers are quite vulnerable to problems in the housing market. The poorest workers may not be able to access homes or homes of adequate quality. Skilled workers may be discouraged from moving by the difficulty and expense of obtaining a home.

The European University Institute has looked at harmonization of tenancy law[45] and Schmidt says: "In straightforward language, it is on account of its strong national and even sub-national nature that harmonization in this field should not be envisaged at all."[46] He suggests a loose method of co-ordination between nations. This conclusion is based on the variable national application of existing EU consumer measures.

It is clear, however, from even the brief information in this article that the level of protection from eviction differs greatly from country to country. It is also clear that the harmonization of tenancy law will have little useful effect unless there is co-ordination of a sensible level of protection from eviction in each country. Thus workers can travel from country to country and commit themselves to rented property confident of the level of protection they will receive.

To prevent eviction or to re-house?

This is an extremely sensitive question in terms of national housing policies. It has been seen that most European countries would chose prevention of eviction while the UK would prefer re-housing. Most people may not be aware that there is any possibility of debate on the question, which is one of firmly acquired rights within individual countries.

The questions must be asked, "If one restricts eviction too much, will this damage the possibility of housing those in need by discouraging landlords from letting?" and "Will the management of housing stock be adversely affected?"

Logically, a complete ban on evictions could mean that people who were homeless, suffering family break-up or domestic violence would suffer because housing would not become vacant for occupation. Blocking the supply chain of housing at one end could cause demand to pile up at the other.

---

[43] *See* Jacques Ziller (undated) *Constitutional Dimensions of Tenancy Lawin the European Union* in the European Tenancy Project of the European University Institute *at* http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/Projects.shtml [accessed 23.11.04].

[44] Feldstein (1997).

[45] *Ibid.*

[46] Schmidt (undated) p.24.

A complete ban on eviction with excessive rent restriction would also discourage landlords from letting as an investment, as they would be unable to evict. They may not be receiving rent (although this can be solved by some subsidy if delays are long) or they and their neighbours may be suffering from a few tenants who may damage the property, may sell drugs, run a brothel or generally harass the neighbours. Of course evicting problem -tenants may well only move the problem elsewhere.

The history of rented property in France and the UK has shown that rent freezes and protection from eviction immediately could lead to a reduction in housing stock, or landlords not receiving sufficient rent to keep property in repair.[47] It is this last factor which most calls for balance in the protection of tenants, coupled with some public support for tenants, where necessary. Thus, some eviction is necessary for the sake of landlords, who become landlord voluntarily.

This is a conundrum which has been addressed in Europe by protection of tenants from eviction. Most of the examples of prevention of eviction above are addressed to preventing eviction, where this can be done. Clearly there are going to be cases where eviction must go through, perhaps to protect people living nearby. But FAWOS, for example, believes that overall it is cheaper in many cases to disperse public funds to help people rather than simply to evict, and allow a family to suffer the devastating social consequences of homelessness.

The consequences of adequate security on the social or private housing market can in part be met by increased housing construction, by contracting private property for social or rental use or by state subsidy where the landlords are adversely affected by a decision not to evict (a consequence of the social obligations of the state, not the social obligations of the landlord). All these things happen in France.[48]

If some eviction is necessary, then a re-housing policy becomes necessary too. It is in this respect that the UK policy is relatively admirable, insofar as re-housing can be claimed as of right by some people. There is a fear that if an individual knows that they will be re-housed, then they will not make an effort to improve their behaviour or pay their rent. This does not apply to the UK homelessness legislation, because a person can be "homeless intentionally" if they behave in this way.

Difficulties in adjustment in the UK?

The UK approach is unique in Europe but could it be threatened? Much social housing has been purchased by tenants under "right-to-buy"[49] provisions and it is not being replaced at the same speed at which it is being lost. Annual Social housing construction in the UK was about 18,000 homes in 2000 and 42,000 in the same year in France. Starts for housing construction in the UK hover under 200,000 homes per annum compared to around 300,000 in France for a similar sized population.[50]

Councils may meet their obligations to house people by placing them in private housing stock, but this depends on a continuing willingness of landlords to let. UK landlords do not usually ask for rent guarantees for tenants as is common practice on the continent. This may be because it is not uncommon for the housing benefit to cover the whole rent and for the rent to be paid directly to

---

[47] *See* Jane Ball and Thomas Knorr-Siedow (2004).

[48] *See* Ball (2003) for an account of this, although landlords receive no payment for restriction of eviction in winter (see *infra* p.12).

[49] Tenants of local councils have had the right to buy their homes at a discount on the value since 1980.

[50] For a fuller comparison see Ball (2005, forthcoming) Chapters 2 and 3.

the landlords. The government plans to change both of these features which would bring us into line with European practice, and it must be asked whether they have sufficiently taken into account the effect this could have on the ability to place homeless people in tenancies.

There is a strong cultural commitment to the housing of the homeless in the UK, which allowed the survival of this rights legislation from 1977[51] to the present day even through 18 years of conservative government,. The UK may also face cultural difficulties in adjusting to European standards of protection from eviction.

To meet the standards of the European Social Committee, the UK government would have to consider altering the policy of eviction to improve the social make-up of neighbourhoods. It may well be that such evictions will have improved the quality of life in some neighbourhoods, but would this have been at the cost of displacing difficult people to other neighbourhoods and not tackling their problems? Hunter (2001) suggests that the threats of eviction are within a tradition of social control of social tenants. In recent times the emphasis of policy in difficult neighbourhoods has emphasized the use of Anti-Social Behaviour Orders[52] to restrict the behaviour of people, particularly young people. These orders impose restrictions on people, breach of which could lead to a criminal conviction.

Perhaps greater policy difficulties would be caused by a change in the law not allowing eviction in winter. Many people have borrowed a good deal of money to buy property to let, and many of them could not support the loss of rent during the winter. (In France there is no compensation for the government ban on evicting in winter). There might have to be some form of compensation, to avoid loss of private rented stock caused directly from this policy or from general discouragement to let. The current tax situation of landlords is unfair relative to owner-occupiers, who would raise rents.[53]

In order to bring the UK into line with the best European methods of preventing eviction, it would be necessary to put a great deal of resources into doing this properly,. To be pessimistic it is difficult to speak of providing extra resources at a time of budgetary restraint and a failure to do this properly could take resources away from the even more essential work of housing the homeless.

There should be no need for such pessimism if the experience of FAWOS in preventing eviction is correct. Actually preventing unnecessary eviction can save money, both by preventing unnecessary burdens on other social services, preventing family break up and distress, maintenance of employment and education continuity, and by arranging manageable payments, rather than displacing a problem elsewhere. What is more, prevention of eviction could reduce the demand for homelessness services, thus reducing costs. In this respect the UK has a good deal to learn from Europe about the prevention of eviction.

The UK government should also be aware that imitating European benefits which do not pay the full rent, whilst at the same time not taking measures to provide or support private or social rented housing, could make the continued support of individual rights difficult.

Eviction policies and policies housing the homeless can and should complement each other.

Conclusion

There is no general awareness that the UK way of dealing with eviction and re-housing is radically different from that of other countries. Its provision of opposable rights for the homeless

[51] By the Housing (Homeless Persons Act) 1977.

[52] From the Crime and Disorder Act 1998.

[53] *See* note 2, p.5.

has attracted comment and enquiry, and indeed it is desirable that homeless people should have such rights elsewhere in Europe. However, the downside of this is the use in the United Kingdom of relatively easy lawful eviction to encourage people to become landlords, and also to try to control anti-social behaviour by threats of eviction.

There is not really sufficient study of eviction processes in other countries which show a wealth of good ideas, such as the notification of authorities in France and Germany for action and the free debts service from FAWOS in Vienna.

Because there is little awareness that countries have strong cultural preferences for re-housing or for protection from eviction, there is no real debate about practices in this area. On preliminary findings, for the UK to meet these standards would necessarily involve some change of existing government policy in using eviction for social management.

Perhaps the new European standards on eviction and re-housing could be regarded as an opportunity to provide integrated protection and identify the best European ideas in both eviction and re-housing. This could increase the happiness and security of many vulnerable households.

Bibliography

Avramov, D (1995), *Les sans-abri dans l'Union Européenne, Quatrième rapport de Recherche de l'Observatoire Européen des Sans-Abri,* Brussels, ,FEANTSA, (also available in English).

Ball, Jane (2003) *Renting Homes, Status and Security in the UK and France - a Comparison in the Light of the Law Commission's Proposals* in "The Conveyancer and Property Lawyer" Vol 67, Jan/February 2003 pp 38-60, London, Sweet & Maxwell.

Ball, Jane and Knorr-Siedow, Thomas (2004) *Housing and Urban Affairs,* chapter in Compston Hugh (ed.) *Handbook of Public Policy in Europe: Britain, France and Germany,* Palgrave.

Ball, Jane, (2005, forthcoming) *Housing People on a Middle to Low Income in France: Planned Bias in the Law,* Sheffield, Sheffield University thesis.

Ball Jane, Brouant Jean-Phillipe, and Ponce Sole, Julio (forthcoming beginning of 2005) now) *Le Droit Au Logement Est-Il Soluble Dans La Territorialisation ? Réflexions Comparatives.* This is a chapter in a book produced by GRIDAUH at the Sorbonne *Mélanges en l'honneur du Professeur Henri Jacquot* (of the same date).

Benguigui F. (1997), *La politique du logement à l'épreuve de la précarité,* Paris, Plan, Construction et Architecture.

Brouant, J-P, and Jégouzo, Y (1998), *La Territorialisation Des Politiques Du Droit De L'habitat Social Les Cahiers Du GRIDAUH No.2 1998,* Paris, GIRDAUH.

Card, Pauline (2001) *Managing Anti-Social Behaviour – Inclusion Or Exclusion?* P.201-220 in Cowan David and Marsh Alex (2001) *Two Steps Forward, Housing Policy Into The Millennium,* Bristol, The Policy Press.

Cowan, David (1999) *Housing Policy and Practice,* Basingstoke, Macmillan.

Crook, Tony (1995), *The Supply of Privately Rented Homes: Today and Tomorrow*, York Josesph Rowntree Foundation.

DAL (1996), *Le Logement un droit pour tous,* series Combien de Divisions? eds. Brochier, J-C, Paris, le Cherche Midi Éditeur, DETR. (2000), *Quality and Choice: A Decent Home for All,* London, Department of the Environment, Transport and the Regions.

Duclaud-Williams, Roger H. (1978) *The Politics of Housing in Britain and France,,* London, Heinemann Educational Books Ltd.

Feldstein, Martin (1997) *The political economy of the European Economic and Monetary Union: Political Souces Of An Economic Liability*, pp. 23-42 in the Journal of Economic Perspectives – Volume 11, Number 4 – Fall 1997.

Hoath, David C. (1985), *Can Cathy Come Home? The Law's Response to 75 Years of Housing Problems* p.15-36 in D.C. Hoath (editor) (1985) *75 Years of Law at Sheffield*, Sheffield, University of Sheffield Printing Unit.

Hughes, David, Dais, Martin, Matthew, Varonica, Smith, Nicholas (2000) *Cases and materials in housing law,* London, Blackstone Press.

Hunter, Caroline (2001) *Anti-Social Behaviour And Housing – Can Law Be The Answer?* Pp. 221-238, in Cowan David and Marsh Alex (2001) *Two Steps Forward, Housing Policy Into the Millennium*, Bristol, The Policy Press.

Lee, P and Murie, A. (1997) *Poverty, Housing Tenure and "Social Exclusion",* Bristol, Policy Press.

Maurel, Elisabeth, and Ballain, René (2000), *Le logement très social – Extension ou fragilisation du droit au logement,* Paris, Plan, Urbanisme, Construction, Architecture.

Nixon. J, Hunter, C. and Shayter, S. (1999) *The use of legal remedies by social landlords to deal with neighbour nuisance,* Sheffield Centre for Regional Econmic and Social Research Paper No. H8, Sheffield Hallam University.

Schmidt, Christophe U, (Undated) *Co-Ordination Problems Between European and National Private Law: A Scenario to be Avoided in the Europeanisation of Tenancy Law* from the European Tenancy Project of the European University Institute, Florence available on http://www.iue.it/LAW/ResearchTeaching/EuropeanPrivateLaw/Projects.shtml [accessed 23.11.04].

Social Exclusion Unit (2000) *Report of Policy Action Team 8: Anti-social behaviour,* London, Social Exclusion Unit.

Stephens, Mark, Burns, Nicky and MacKay, Lisa (2002) *Social Market or Safety Net,* Bristol, The Policy Press.

Tunstall, Rebecca (2003) *"Mixed Tenure" Policy in the UK: Privatisation, Pluralism or Euphemism?* In Housing Theory and Society 2003; 20: 153-159.

Urban Planning Innovations: Urban Change and the Provision of Infrastructure and Services

Paolo Urbani*

1. The transformation of the general context

If we analyse current state and regional legislation in Italy in terms of the system introduced by Law 1150/1942, while the main parameters, such as *public powers, urban planning and ownership rights,* remain unchanged, it is evident that the cultural shift has had an influence on the characterisation of the new legal situation, above all as regards: a) the process of making and acting on public decisions; b) planning techniques and c) the relations generated between the use and enjoyment of private property and planning powers.

In this regard, we should emphasize:

a) The various functions assumed by Local Authorities, following the introduction of the new system of electoral representation (direct election of the mayor-manager or the president of the Province), to the extent that these authorities represent local communities in terms of urban development and welfare. This shift confirms that territorial planning – within the framework of the compatibility of use – is becoming increasingly instrumental and at the service of market forces. In short, at the heart of the municipal presidential policy there is today, more so than in the past, a greater concern for the territory. And it is no coincidence that regional legislation, on dividing the contents of the regulatory plan, should define the operational plan as the "Mayor's plan."

b) The new posture adopted by the administrative authorities, more inclined to a system of "soft regulation" than one based on the unilateral nature of their planning powers:[1] the result of which is the shift from a decision-making urban planning policy to conventional planning.[2] This new manifestation of the administrative authorities has its foundations in Law 241/1990, which allows Public Authorities to enter into agreements together (article 15) and for agreements to be signed between public and private partners (article 11); the latter are being widely used in practice and are expressly recognised by most regional laws.

c) The need to guarantee the efficacy of all planning decisions, instead of the sole stipulation of urban planning regulations, which has led to the division of the urban plan into a structural plan and

* Professor of Administrative Law at the Università degli studi di Chieti-Pescara and in the Law Faculty of the LUISS, Rome.

[1] E.BOSCOLO: *La perequazione urbanistica: un tentativo di superare l'intrinseca discriminatorietà della zonizzazione tra applicazioni pratiche ed innovazioni legislative regionali in attesa della riforma urbanistica* in *L'uso delle aree urbane e la qualità dell'abitato*, Giuffré, 2000, p. 193.

[2] P.URBANI: *Urbanistica consensuale*, Bollati Boringhieri, 2000.

an operative plan (now the case in more than half the regional legal systems) in order to provide greater flexibility, in certain territorial spheres and districts, when deciding on the best use of the territory, contrasting this situation with private interests and guaranteeing that the stipulation of the urban planning regulations respond to the decisions taken. In this way an essential link is established between planning and management functions.

d) The importance given to the private sector as an active rather than as a passive party (in matters of urban planning, as well as in other areas: mention need only be made of the principle of horizontal subsidiarity,[3] introduced by article 118.4 of the Constitutional Law No. 3/2001, among others) enables the sector to take on a planning role, as regards the construction of urban development works, functional to the building of areas of private property.

e) The application, in matters of urban planning, of the principle of distributive justice, characteristic of other sectors of social and economic life (fiscal or tax equilibrium, salaries, etc.), through the increasingly complex techniques of the "*equidistribution*" (*perequazione*) of *urban planning* as opposed to the classic system of *zoning*, where the latter is understood as the organised distribution within the territory of the various urban functions which, however, because of the restrictive nature of the regulations that govern the spaces reserved for community works, produces a certain type of discrimination among owners.

f) The sidelining of expropriation[4] in the ordinary sphere of urban planning because it constitutes too costly and conflictive a procedure, which for a time kept it out of the ambit of private construction, and of preventive remedies to negotiated practices (article 16 Law No. 179/1992, article 11 Law No. 493/1993). This posture has been subsequently corrected as is evident in the particularly marked attribution of powers to the Public Authorities in the complex processes of urban transformation, with recourse to the expropriation of entire areas of patrimony (Urban Transformation Societies, article 120 Revised Text No. 267/2000).

g) The introduction of the principles of free competition and public tender within the legal system governing urban planning, copied from the system used for public work contracts, originates in the close relationship between the provision of infrastructure and services and the urban planning of the territory. This is recognised by the decision of the Court of Justice in July 2001, as well as, in the conflict of powers, provided for under various regional laws,[5] to which the local authorities turn when deciding on the best urban reclassification proposal with respect to the provision of infrastructure and services and quality of life, including even indirect effects within the perimeter of the work area itself. These powers also permit the local authority to determine the abandoned or run-down areas, including *in primis* the owners of the property, but being able, in all cases, to avoid such participation, if considered necessary for the preferential satisfaction of public interests, legitimately represented, proceeding to the expropriation of the property of the owners responsible for the abandonment. Similarly in urban planning project financing, the practise of public tender is

---

[3]Article 118.4 Const.: "The State, the Regions, the Metropolitan Cities, the Provinces, the Municipalities favour the autonomous initiative of each of the citizens or of their associations, for the development of activities of general interest, based on the principle of subsidiary". *See*, U.RESCIGNO: *Principio di sussidiarietà orizzontale, altri principi costituzionali, diritti sociali, stesura provvisoria*, Lecce, 19 October, 2001.

[4] *See also* "indirectly" the Decision of the Constitutional Court n° 179/1999.

[5] In particular the Regional Laws of Emilia-Romagna n° 20/2000 and n° 19/1998.

adopted for works of urban transformation, in accordance with Law No. 166/2002 that regulates the matter (article 19.2 and article 37 a of Law No. 109/1994 of the coordinated version), and which foresees the possibility of unifying in a single procedure the adjudication of the concession for construction and the financial management of public works and public utilities, allowing the "price" to be determined not solely in monetary terms, but also, through the concession of building rights, the cession of public areas, and the possibility of undertaking works that are instrumental to or functional of the main public work.

h) The increasingly more widespread practice of the application of stronger limits on ownership, above all, in relation to the free exercise of the right to enjoy the good, which is conditioned, both by the need to find a consensus among the owners of the property, guaranteeing an even distribution (for example in branches and sectors), as well as by the possibility that the inactivity of one of them might cause the expropriation of lands, in benefit of the absolute majority of owners, in proportion to the absolute value of their property, in all cases of unitary planning (article 27.5 Law 166/2002). A situation that can no longer be defined as one of consensual urban planning, but rather one of *relational urban planning*, in other words, a planning process based, essentially, on "contractual relations" that are established with the recipients of the urban planning regulations, where the authority limits itself to function as a third subject in the execution of planning decisions.

i) Finally, from an analytical perspective, urban planning regulations (provided they have been previously passed by the Municipal Council) can be constituted as a certificate of title for the Public Authorities, allowing it to have an influence over the construction activity control function. We refer to the possible recourse to the Declaration of Environmental Impact, rather than resorting to the procedure of concessionary habilitation, in the case of new constructions (article 1.6 of Law No. 443/2001).

2. Thoughts on the shift from imperative urban planning to consensual urban planning

Having examined the new cultural environment and recent legal trends in urban planning, we now need to concentrate on analysing the most important aspect of these innovations: the introduction of a new General Regulatory Plan, subdivided in *a directive plan and an operative plan*, as provided for in many regional laws (Puglia, Basilicata, Umbria, Toscana, Emilia-Romagna, Calabria, Lazio, Liguria).

The division of the Regulatory Plan in two, not always consecutive, phases highlights a significant element: *the shift from imperative urban planning to one based on consensus*. It is now a well-consolidated assertion that the General Regulatory Plan constitutes one of the functions of the Municipal Authority which, within its discretionary powers, takes those decisions considered as being essential for its territory and decides on the best form plan plan for defining its land use. The administrative action, in this case, responds to the classic canons of Administrative Law, understood as a special law endowed with absolute supremacy. The administrative decision – in the case of the adoption of the General Regulatory Plan – is a unilateral and imperative act of the Public Authority to be implemented immediately. In essence, in defining the interests of the community the Public Authority acts *inaudita altera parte* (the participation of private parties is effectively relegated to the presentation of comments regarding the General Regulatory Plan that has been adopted and constitutes a simple collaboration with no binding effect on the Authority) and the decisions that are

implemented are exclusively imputable to the public power. In short - here lies the foundations of imperative urban planning – the protection of public interests does not allowe the negotiating of the exercise of power, given that the latter cannot be "contracted."

The inflexible nature of the Regulatory Plan, which frequently presents itself as being in opposition to individuals' private interests, as well as, on occasions, as being contrary to the interests of the whole community, is constituted, on the one hand, by the impossibility of contradicting urban planning regulations, and on the other, by the pretension of being able to establish definitively, from the outset and for an indeterminate period, all the urban planning of the entire municipal district, without taking into consideration, the possible economic changes that might occur over time.

The gradual shift of an administrative model based solely on imperative administrative regulation towards a model, which today is well accepted, of conventional administration (in accordance with article 11 of Law No. 241/1990) underlies the far-reaching modifications experienced by the legal techniques of planning, which are not based solely and exclusively on administrative decision but also on contracted agreements. The urban planning powers, therefore, can be recognised – as can other forms of the exercise of power – by a contract with a public purpose.

Article 11 of Law No. 241/1990 establishes that "the Public Authorities can always enter into pacts, without the intervention of third parties and so as to guarantee public interests, with the interested parties to determine the discretional content of the administrative decision". The legal principle applied to urban planning regulations allows the Authorities to adopt, in relation with the general interests of the community, ways of operating that seek to distance themselves from the classic model of governance by administrative decision, in order to reach agreements aimed at the specific definition of the interests of urban planning with the participation of private parties. The recourse to collaboration instead of to the authority of the administrative decision changes the circumstances fundamentally and represents the legal key to the introduction of negotiation with private parties in the exercise of urban planning powers. The foundations, therefore, of consensual urban planning lie in Law No. 241/1990 on Administrative Procedure. It would be a mistake, therefore, to think that the new discipline of urban restructuring and urban planning in the directive plan has been brought about only by market forces and not to consider, above all, the changes that have occurred in administrative activity.

While the directive plan, among other things, only presents general content matter, establishes the invariable rules and accepts the limits imposed by the principal plans, it also ensures the flexibility of building in those areas, within certain territorial spheres, that the planner has considered appropriate for transformation (but that do not as yet correspond to areas defined as homogenous zones). In this way what is achieved is flexibility in urban planning regulations by foreseeing the possibility of relocating (and now no longer the definitive location) all urban activities and functions, and unit volumes, which undoubtedly fluctuate within certain margins, and which can be evaluated in the successive operative plans.

It is in this final operative phase that contracts are entered into with private parties in order that the best decisions can be adopted in the areas subject to transformation, and in which the Authority will evaluate the interests at stake benefiting, specifically, the protection and satisfaction of public interests "contrasting" these with the interests of the private parties. The Regulatory Plan (*or rather* the directive plan) in this case retains its general norms but, in specific places, introduces an element of flexibility *ex ante.* In other words, before the petition of the private party is raised, it joins the urban function with productive development, for which the Municipality as the proponent of the interests of the community bears responsibility. The exchange between the immaterial goods (the

building rights) held by the Authority and the construction services of the private parties materialises in a conventional agreement between the two parties, which forms an integral part of the urban planning regulations. The fact that these urban regulations are presented as the object of a land plan - as an integrated programme of work or as a plan of productive installations--, has no other significance than that of involving the decisions that are the fruit of the conventional agreement within the existing urban planning instruments.

Taking this line it is held by some that the new models described above are the product of a culture best described by the oxymoron "improvised planning," which represents a consensual urban plan lacking regulatory controls, lying outside the norms contractually established, contradicting the very nature of the urban planning principle. By contrast, the definition of territorial spaces, within which the general limits are applied (as regards the dimensions and the functions), presents itself as a criteria of strategic management, operated by the Public Authority, for fixing the general regulations for urban transformation, even, in the case where the urban regulations used fix as a preventive measure the eventual land use. From a different perspective, if we consider that the former Regulatory Plan needed to introduce greater flexibility precisely because it was so rigid, we should also recognise the power of the Authority to limit itself in the preventive emanation of general criteria and directives, leaving plenty of space for cooperation within the general regulations defining urban planning. Apart from that, if we adopt an unprejudiced perspective, the "contract", would be like any other contract (including those within the Civil Code) that has to be entered into within a given context, given that the "myth" of the freedom of negotiation is simply that: a myth. The context in which the contract operates, in terms of territorial management, lies within the objectives of urban planning as a legal discipline, which therefore cannot be abandoned.[6]

3. The new regulations governing urban transformation

The true revolution in municipal planning has been conditioned by economic and social factors, both of which have an influence on the determination of the legal instruments applicable in unbuilt areas as well as in the inheritance of run-down or abandoned areas with a future urban land use, in which the functions of rehabilitation and the reuse of land display increasing urgency.

Since 1992, the Italian regulations have seen the introduction of the integrated work programmes (Law No. 179/1992) from which have subsequently been derived the Programmes for urban re-conversion and rehabilitation, as well as the Programmes of Urban Reclassification and Sustainable Development of the Territory. Although the spatial dimension has changed, the logic applied is the same: devise a new land use for those parts of the territory in which all the public and private actors cooperate, and who are prepared to intervene from the moment in which all the interests involved are made manifest.

The inflexibility of the General Regulatory Plan, as applied through such instruments, logically imposes its very deviation, insofar as it fails to recognise the major changes that occur at all levels of the urban area. In short, it is the same relationship that exists between a French impressionist painting that describes a static reality and a painting of the futuristic school that captures the dynamism of the movement.

The ongoing violations of the virtual territorial plan, the result of an abstract planning that was established in the General Regulatory Plan, have meant that the legislator has had to subdivide this type of plan and to re-establish new points of equilibrium between the planning process and the

---

[6] For further details see P.URBANI: *Urbanistica consensuale, op. cit.*

management of the municipal territory. We still do not know how a system that requires the Regions (and today the Provinces) to exercise continuous and permanent control over modification proposals, introduced in urban planning procedures, could have survived.

Connected to this, the need has been recognised to overcome the mono-functionality of the urban zones in favour of multifunctional uses. Thus, in industrial zones, apart from those activities of an industrial function, other functions, such as the production of goods and services can also be located (Decree of the President of Republic No. 447/1998, modified by the Decree of the President of Republic No. 440/2000). Additionally, the Affordable Social Housing Plan no longer operates as the sole instrument for building low-price homes (conventional or financed), which today can be the object of complex programmes (integrated work programmes).

Following these initial considerations, which have allowed us to outline the context in which the new framework of urban planning operates, we now focus our attention on a number of specific areas of interest to our study here. The regulatory frame of reference continues to comprise the Regulatory Plan, subdivided into its structural and operative phases, to which, in some parts of the territory (as provided for in certain regional legislations), should be added the Urban Planning Regulations for those areas considered by the Municipality to be materially lacking in their possibilities for urban restructuring. It is important that we stop here and analyse the main factors guiding the new legal system of public decision-making.

We believe these can be summarised in the following aspects: *cohesion, competition and regulations*. Territorial policies have to ensure the interaction of these three elements and only thorough an intelligent combination of the three is it possible to obtain the best results for the planning of the territory, on the understanding, however, that in the processes of decision-making, private parties can no longer continue to simply be *recipients* but that they must also be considered as participants in the decision-making process, since in the determination of urban planning as well as in its governance a major step has been taken towards the gradual introduction of private parties in the determination of urban functions. The interaction between these elements falls under the current regulatory framework, in which urban restructuring, or the new planning policy, is a priority.

4. The Principle of Cohesion in Municipal Planning

Here, cohesion is understood as the recognition afforded a community in terms of its urban and cultural values, in the quality of the places in which it lives and works, in short, in its personal and effective services, and in its works of urban development; or, as it might be expressed in urban planning terms, in the infrastructure or in the entire interconnected system of works that play a determining role in the formation or in the reconstruction of the urban fabric, which is lacking in most of these elements.

The importance of a new Plan - with the objective of achieving this cohesion - lies in considering the public works as a whole, both in the context of the land which can be urbanised and that which cannot.

But before analysing this area of planning, we need to reflect on the extent to which our medium-sized and big cities suffer serious shortages of primary, secondary, tertiary and quaternary services, which are responsible for the dynamic relations of the urban spaces. Urban planning standards were only introduced in 1968, although most areas in our cities have yet to experience their effects: until the decade of the eighties at least, urban plans were implemented without respecting these minimum requisites, even in those areas in which processes of restructuring were implemented after the introduction of the Law, given that they only had an effect on the new areas

of urban expansion and not on the land that was already consolidated. Moreover, only with Law No. 10/1977 was the onerous character of urban transformations introduced, together with the application of the principle according to which, all transformations, including those in zones that had already been urbanised, should contribute economic resources in favour of the community, as a form of collective support to make good the gap in terms of services and public spaces.

The processes of urban restructuring of areas without services, and which have a certain importance for the city, constitute an ideal opportunity to combine the concession of building rights with the obligation to satisfy the standards and the provision of these services never before available to the community. It is here that the positive nature of the relationship formed between public and private partners is to be found, the point in which the contribution of the private partner to the public management takes on a new guise.

4.1 How can the requirements of public works and services be satisfied?

The need for works and services can be met today through the following modes: public funds, the contributions of private parties and the adoption of new *equidistributive* planning techniques. We shall examine the first two modes.

Taking for granted the lack of public expenditure, modes of collaboration involving private parties have gained in strength and because there are so many of them and their methods of application so varied, they often require a more detailed study. At the heart of the matter, as always, are the building development services, where the consignment of immaterial goods (building rights) by the Public Authority occurs, but the consideration offered by the private parties varies and might be: a) the urban development of the area; b) works of private initiative, as well as those of urban development through subsequent services; and c) competitive practices among the respective private and public participants, for the definition of the best planning possible of certain areas and properties in which the project initiative and the ownership of the areas do not necessarily coincide.

The critics of this mode claim that the exchange is often unequal, since the concession of the building rights is limited to a necessary, but often inadequate, urban development of the area, which is said to be of zero cost.

The second mode, by contrast, requires the Authority to incorporate the transformations within the triennial Programme of Public Works, in accordance with article 14 of the Law of Public Works, which establishes it as a duty that cannot be waived. Moreover, in this programme the Authority must indicate the basic needs that can be satisfied by undertaking works financed by private capital from the outset. The more complex the building services, the more satisfactory must be the public works that act in a functional manner to rebalance and help overcome the current shortages of works and services.[7] A mode of this type has already been introduced by the Regional Law of

[7] Two examples might serve to illustrate better the innovations made in the public decision-making processes for the redefinition of urban spaces.

First, those of you who have had the opportunity to visit the Rambla of Barcelona and its tourist and commercial port, complete with its bars, businesses and restaurants, some ten thousand palm trees, cycle lanes, and the new space constructed between the city and the sea, etc., will also have seen, at the heart of this development, the construction of two towers that reach up to the sky, in such a way that they seem to converse with the distant Sagrada Familia. The tourist cannot fail to delight in this restructuring, which has spectacularly brought about the rehabilitation of a part of the city that was marginalized, but the more prudent lawyer or city planner will not be able to ignore that instead of a true work of architecture, it is more properly a planning strategy, based fundamentally, in a building exchange since the two towers are the remuneration for the private operator for the complete rehabilitation of the area and for the provision of infrastructure and services for the community.

Emilia-Romagna No. 19/1998. Similarly, it should not be forgotten that the latest generation of programmes of urban restructuring devised by the ministry – the Programmes of Urban Reclassification and Sustainable Development of the Territory – use this mechanism, precisely as a requisite of admissibility.

The essential need for public works is increasingly being satisfied thanks to the active participation of private partners, although the ways in which this participation is organised need to be carefully evaluated.

4.2 The "non-pure" form of project finance applied to urban planning

We now present, in accordance with the provisions to this effect in Law No. 166/2002, the mode known as the *non-pure* form of project finance[8], applicable when the collection for the management (tariff, toll, tax) of the principal public work does not meet the investment of the concessionary (private party granted the rights to build the project); cases in which the legislation establishes numerous forms of negotiable correction to rebalance the costs of the contract for concession.

These can be summarised as follows:

a) Price integration, undertaken by the Public Authority, occurs through the cession of the ownership or the surface right of the goods of the Authority that do not fulfil the functions

---

The second example concerns the opera season in Milán, which this year was transferred to the Teatro degli Arciboldi, the work of the talented architect Gregotti, while la Scala was closed for restoration work. The inauguration of this event would not have been possible, if for the opportune construction of the new theatre, a contract had not been signed between the entrepreneurs and the City of Milan for the redefinition of the urban transformation of the areas of the somewhat antiquated installations of the Ansaldo.

[8] The undertaking of large or medium-sized public works, or those of public utility, has revealed the increasing need to involve private partners in order to overcome the chronic problems of public liquidity, as well as the technical deficiencies in the administrative structure. With the objective of tackling these problems, the legislator introduced among the norms for Public Works – since 1998 through Law n° 415/1998 (known as the "Merloni – *ter*") recently modified by Law n° 166/2002 – the mode of project financing, which constitutes a technique of financing projects and programming structural works that has been developed primarily in the US and the UK. It is a private financing instrument, generally used in projects requiring major capital investment, in which the interested parties cannot operate with their capital alone and for which the direct use of the banking system would represent an excessive aggravation of the public structure debt; thus, the participation of private capital is essential so as to respond to public needs, which as well as being important are also, in certain cases, urgent. Project financing is, essentially a financial instrument for financing public infrastructure and public utilities, where project management represents (or more accurately, should represent) the remuneration for the private capital invested in the operation.
The private party which has to undertake the public work or utility out of its own funds is guaranteed remuneration for the work in the form of the future management of the said work. Legally, within the concession of Public Works, however, the instrument seeks above all to regulate the complex relations entered into between the different parties actively intervening in the operation: the bidder, the adjudicating Public Authority and the concessionary.

In practice, the instrument has revealed a number of "creative" effects – at least in Italy – as regards the typical framework described above. These effects have been principally produced by the "lukewarm" or "cold" nature of the work to be undertaken, in other words, a response derived from the little remuneration generated by the work, which as an objective requisite constitutes a restriction on the use of this mechanism, created primarily for "large-scale works" and generally applied in works of average importance. These "creative" effects manifest themselves above all in the agreement reached over one of the fundamental elements in the contract: the "price". And consequently, the various forms of "price" integration.

of public interest, or which can be linked, or which in a certain manner can be an instrumental part of, the pubic work that is the subject of the project financing instrument (article 19.2), for which the private party might also undertake works of a private nature.

b) Or there exists the possibility that the concessionary might undertake the public works or the works of public utility *and those works that are structurally and directly related.* Thereby, in practice, allowing the concessionary to include within the project financing proposal the possibility of undertaking private works in areas of his ownership (for example, volumetric units that can be placed on the market, through a specific urban planning tool for this purpose). This is the typical case of urban planning works directly related to the object of project financing.

c) The completion of works of public utility or private works for public use (theatres, cinemas, etc.), the construction of which always allows the price of the public work for which the project financing exists to be integrated. In this case, the subjective element is not taken into account but rather the objective of the public utility of the work of economic management.

Clearly, the typologies mentioned above can be combined in a single complete proposal. Therefore the Authority seeking the construction of the public work or public utility should resort to the concession of the building rights that are necessary to maintain the financial balance of the private investment that is the object of management. Many proposals of this kind are increasingly being received in all the Municipalities.

However, the risk that is run is that the works of urban planning – here understood in *sensu lato* – are no longer appropriate for a given urban space, as defined by the planning instruments, which while functional do not meet the requirements of the public work, leading the Authorities to contract the urbanisation of functional areas for the principal work, until they can guarantee the necessary financial equilibrium.

Thus, while it is true that project finance instruments guarantee free competition between the many proposals of the urban planning promoter, it is also evident that the initiatives run the risk of falling outside the general planning system. We could speak therefore of *procedures of public tender for urban transformation* to counteract the *overly secretive mechanism of building exchanges* agreed to by means of urban planning pacts, but the nature of the problem would be the same.

5. The practices of free competition for a better determination of urban planning regulations

Although the provision of public works and services for the community remains the priority, in order to meet these essential needs, procedures and strategies need to be used which, on the one hand, increase the accountability and visibility of the administrative decisions and which, on the other, favour free competition, both for carrying out public works and *for the better use of certain areas or territorial spheres that are subject to reclassification* and in which public works, services, etc. will also be located. In short, it is necessary to divide the territory not only on the basis of the building use of the lands, but also, on the basis of the primary requirements, that is satisfying above all the goods and service requirements of communities in areas that have already been urbanised and which often lack the adequate conditions needed to live and work.

This is no more than the manifestation of the third mode, which was introduced above, and which moves the practices of free competition of public works into the realm of territorial planning. The Authority, in the process of redefining the urban planning programme, is under the obligation

to be the bearer of an initiative that involves the private property owners, but at the same time of being able to ignore it when necessary to satisfy the public interests of the community it represents. This is the case of the lands of the State Railways or of other property whose reclassification cannot be limited to a simple and abstract *conventional relationship between the owners and the Authorities*, nor to being a simple low profile building exchange, since, often, we are dealing with symbolic areas, whose urban planning results can be reflected throughout the municipal territory. To a certain extent, this was the idea underlying the introduction into the system of the Urban Transformation Societies, which are and should continue to be the operative and executive instrument for the redefinition of urban planning.

Only in this way can the *cohesion* to which we referred earlier be achieved, together with the *competition* that should exist among the operators and the urban solutions to be implemented in the territory, now no longer simply incorporated within the economic-financial balance of initiatives but directly linked to this cohesion, understood as the satisfaction of the essential needs of the community.

5.1 The new techniques of equidistributive planning

Both the provision and the effectiveness of the infrastructure and public services can be attained – the third mode – by applying the new techniques of *equidistribution*, which bring up to date the original experience of building activity, according to the provision made to that effect by Law No. 1150/1942.

The technique of *equidistribution* (*perequazione*) involves the assignment of a uniform building value to all the properties that might form part of the urban transformation, in one or more territorial areas, without taking into account the effective existence of a building capacity on the individual properties, nor the imposition of restrictions on building in order to reserve some spaces for the provision of community works.

This means that the owners participate indistinctly and equally in the distribution of the advantages and the costs derived from the urban transformation. Thus, the authorities have access to a sizeable public inheritance of property without having to resort to measures of expropriation (and therefore without having to incur any costs) as a direct result of the application of the "plan of *equidistribution*."

This planning technique, however, not only aims to overcome the discriminatory effects of zoning or to provide free access to public areas of services, it also seeks the coveted *integration* of building functions: in other words, the possibility that different forms of land use can co-exist in the same spaces. The aim is also to overcome the rigid principle of the division based on monofunctional zones (agricultural, residential, productive, etc.) which has often proved to be a major cause of the inflexibility of planning. This integration of functions appears to have been accepted by positive law and jurisprudence alike: it is sufficient to consider the integrated work programme, which in accordance with article 16 of Law No. 179/1992 – although today superseded – was placed within the so-called *mixed zones*; or within the productive areas, which in the norms of de-legislation (Decree of the President of the Republic No. 447/1998, modified by Decree of the President of the Republic No. 440/2000) expressly admitted to locate in these areas activities such as the "production of goods and services, including agricultural, commercial, craft, tourist and hotel activities, banking and financial intermediary services, and those of telecommunications." The possibility of applying the technique of *equidistribution*, however, appears to be restricted to specific

areas of the territory, which can be defined as *transformation zones or spaces* which will be materially identified, delimited and specified by the urban plan.

6. Regulations permitting the access of private parties to the decision-making process and the management of the planning of urban works and services

The parameters of *competition* and *cohesion* are satisfied only if they are incorporated directly within the regulations. Thus we find ourselves back in the field of the determination of the urban planning functions that we outlined at the beginning, whereby the access of private parties occurs gradually. Equally, the separation of municipal planning in two phases - a directive plan and an operative plan - is essential.

Preventively, it is within the different spheres of the directive plan that the regulations on which the transformation is based should be fixed, in accordance with the satisfaction of public works and services needs. In the main, the conditions for the transformation can refer to the undertaking of public works identified individually by the Authority in the Programme of Public Works. In specific cases, the plan confers a minimum amount of building, which can be increased, and therefore rewarded, when the private parties are required to undertake the corresponding part of the quota of public works, proposed by the Authorities; in other cases, the transformation is based on the practices of free competition, with the purpose of attaining the best results for urban spaces and services.

Here, in this specific context, the regulations refer to: a) the modes through which the access of private interests is regulated, in the joint-determination of the urban planning spaces, public works and services; b) the modes through which the planning and management should be specifically coordinated; and c) the regulatory content of the plan, which cannot restrict itself to being just an urban design but which must also be a plan for public services and works.

The encounter between the public subject and the private subject requires that in the directive plan the main rules already be fixed preventively, permitting the Authority and the private parties to agree in the operative phase on the planning decisions to be adopted, through participatory procedures that guarantee greater possibilities of access for all the parties interested in taking and implementing these decisions.

It would appear to be self-evident, that by proceeding in this way the process of public planning undergoes a shift from the unilateral paradigm of *power-zoning-location* towards that of *joint-participation-competition-management.*

The Right to Housing and Fundamental Equality: from the Building of Affordable Social Housing (Edilizia Popolare ed Economica) to Urban Rehabilitation Programmes

Stefano Civitarese Matteucci and Gianluca Gardini

1. The Recognition of the Right to Housing in International Law

During the debate at the 15th session of the Commission on Human Settlements and the Second Preparatory Committee at the Nairobi Conference (April-May 1995), all countries agreed to commit themselves to the promotion of access to adequate housing for all groups of society. At this meeting, many UN member states expressed the view that housing should constitute an essential component of the fundamental rights of every individual ensuring their full participation in the progress and development of society. Without it, individuals would not be able to take advantage of many of the human rights recognised by the international community. In fact, the right to privacy, the right to be free from discrimination, the right to an adequate standard of living, the right to environmental hygiene and the right to the highest attainable level of physical and mental health, among others, depend on access to adequate, safe housing. In other words, the right to housing is a precondition to ensure that every individual can enjoy other fundamental rights, such as freedom of thought and the right to health.

Thus, many countries hold that the right to adequate housing should be included among the list of Human Rights, as has been recognised in a number of international agreements. The need for adequate housing is described in various international human rights instruments, including the Universal Declaration of Human Rights itself (article 25), the International Covenant on Economic, Social and Cultural Rights (article 11), the International Convention on the Elimination of All Forms of Racial Discrimination (article 5), the Convention on the Elimination of All Forms of Discrimination against Women (article 14), the Convention on the Rights of the Child (article 27) and the Declaration on the Right to Development (article 8).

Specifically, the 1948 Universal Declaration of Human Rights states in article 25.1:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing, and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Arguably the strongest international backing for the right to adequate housing is to be found in the 1966 International Covenant on Economic, Social and Cultural Rights, which on 10 December 1995 had been ratified by more than 133 nations. According to the terms of article 11.1:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

In the recent Treaty that establishes the European Constitution, signed in Rome last October, the sole reference to the right to housing is in article II-34. 3, in which it is stated:
In order to fight social exclusion and poverty, the Union recognises and respects the right to social and housing assistance to guarantee a dignified existence for all those with insufficient resources, in accordance with Union Law and national law and practices.

Within the European Union, a number of important initiatives have been taken in the housing sector through the European Regional Development Fund, among which we should highlight those specifically undertaken within the Urban Programme. The funds designated here have enabled the total rehabilitation of the housing in certain urban areas of the cities in which these plans have been applied.

From a political perspective, the fact that these basic values are shared, and that they coincide in common programmes involving countries of distinct cultures and traditions, endows the international acts with an important added value, compared that is to the simple sum of the various articles concerning the protection of the right to housing contained within individual country constitutions. From a legal perspective, however, the internationalisation of Human Rights (and the right to housing in particular) has to overcome a number of basic obstacles, some of which are still far from being resolved. For example, the UN's Declarations of Principles do not constitute a source of autonomous international law with any validity, and therefore, it appears difficult to make them compulsory even when applied internally in the countries that have voted for them. Indeed, there exists no world legislative power in the hands of the UN General Assembly that would allow these declarations to be recognised as legally binding.

According to one of the fundamental principles, article 2 of the Italian Constitution, drafted as an open-ended regulation - thereby permitting the constant adaptation of Fundamental Rights in a changing society - could be a useful instrument for favouring the integration of new rights of international origin within the Italian Constitution, in particular those derived from international declarations. Yet, on the other hand, it has been pointed out that an interpretation of this nature could provoke insurmountable discrepencies between these rules and those of the Constitutional Charter.

A quite different problem is that of the legal efficacy and strength attributed to the pacts and agreements signed between States within the different legal systems, be they European or non-European. Here, we should first mention that these international agreements can acquire efficacy internally following their ratification by means of a national legal instrument, in other words, via a particular procedure that allows the transposition of the agreements signed between different States to national laws. Second, we should stress that the recent reform to Title V of the Italian Constitution introduced by Constitutional Law No. 3/2001, and submitted to a "confirmative" referendum, gives these ratified agreements a constitutional nature, independent of the exact nature of the instrument (for example, ordinary law, presidential decree) via which the transposition of the international ruling to an internal regulation takes place. At present, according to article 117 of the Italian Constitution, the law (state or regional) should respect "the limits set by European Union law

and international obligations", which indicates that the obligations adopted in the international arena represent a constitutional limit on the activity of the ordinary legislator, both at the state and regional levels, and, consequently, they mange to incorporate themselves within the uppermost level of the rules of execution of the agreements between States. Expressed more simply, the laws through which the Italian State ratifies its obligations adopted in the internationally arena have a strength and resistance greater than those of the ordinary laws of the State.

An indirect effect, but nevertheless one that is no less important, of the internationalisation of Human Rights (and, more specifically, the right to housing) is concerned with the violations perpetrated by national governments. The codification of these rights in international agreements and pacts, endowed (indirectly) with importance within the member states, favours the *external* protection of the individual from the violations perpetrated by his state since when faced by these, the national instruments of protection reveal themselves to be quite inadequate, because of the insurmountable contradiction that arises when the roles of the controller and the controlled coincide.

The international legal framework outlined here leads us to conclude that while articles 55 and 56 of the UN Statute – along with many other precedents in International Law – oblige all States to cooperate in the protection and promotion of economic, social and cultural rights, the right to housing is more a concern of the political will of the governments than the effective possibility of guaranteeing housing for any short period of time. In reality, this right depends in large measure on other factors, such as: the availability of sufficient land that is both accessible and for sale at a fair price, as well as, the availability of building materials at affordable prices and whether the people have the right to choose where they wish to live. All these factors, in turn, depend on whether Governments make these conditions possible, guaranteeing legislative, constitutional and financial support which allows firms operating in the industrial and tertiary sectors, non-governmental organisations, communities and families to contribute more effectively to the development of housing.

2. The right to housing in the Italian Constitution

As well as in International Law, the right to housing finds a regulatory framework in certain articles of the Italian Constitutional Charter, which while not exactly recognising to specifically uphold this right, do allow a series of values to be expressed that guarantee a constitutional framework to the individual's pretensions to have their need for housing met.

We should clarify that, in this study, the right to housing will not be analysed as an expression of the right to the ownership of property, that is, those interests that fall within the civil and patrimonial sphere, but rather as

> the individual's claim (significant from the legal point of view) to a 'space' in which he can find adequate expression for his personality, and which translates as the lasting use of a good that possesses the necessary qualities to guarantee, according to the requisites of a given society, the harmonious psychic and physical development of subjects in a housing settlement.[1]

[1] U. BRECCIA: *Il diritto dell'abitazione*, Milan, 1980, p 1-17.

To understand the fundamental difference between the "right to housing" and "civil home ownership", we need only turn to article 47 of the Italian Constitution, which states:

> The Republic promotes and protects savings in all its forms, regulates, coordinates and controls the provision of credit. It encourages the access of savings for the purchase of housing, for worker-owned farms, and for direct or indirect investment in shares of the country's large productive enterprises.

This ruling, with its origins in the preliminary drafts of the Constitution, seeks to favour the investment of the citizens' savings so that certain needs or interests of the small saver might be satisfied. Yet, only the latter, and not all citizens in general, are the actual and true beneficiaries of this constitutional prevision: the citizen that does not save, has no rights in terms of article 47 of the Constitution; on the contrary, the citizen who wishes to save and can, should be helped to acquire his *housing*, using his own savings.[2]

While such a ruling is barely applicable - its application depending on the general economic policy of the State and not on the particular measures introduced by the legislation – of particular interest is that the ruling in question does not refer to the *ownership of the property itself*, nor even to that of a house but rather to the ownership of housing; that is, not to the right over the *thing*, but rather to the *function* that this *thing* fulfils.

In other words, the constitutional *benefit* is not concerned with the ownership of the house as such but rather in the fact that the good is to be used to house the owner; no other use is permitted, solely that of housing the owner.[3] If ownership of this housing is meant to satisfy an essential human need, therefore, the holder of the right should not be able to obtain any speculative gain from the good whatsoever – by buying or selling the property immediately on the renewal of its certificate of habitability, for example – and when the rights to the land on which the construction stands expire, ownership of the housing should pass to the local authority. Continuing with this line of reasoning, an individual should not be able to benefit from the constitutional *favour* when he is the owner of another house, the ownership of which is not to satisfy the need for housing, nor is it related to an essential need of the individual but rather the satisfaction of a different and subsequent interest. Seen from this perspective, as pointed out, article 47 of the Constitution designs a type of legal ownership that is different and unconnected with the ownership established in article 832 of the Civil Code.

The constitutional bases of the right to housing do not terminate with article 47 of the Constitution. There exists a number of constitutional provisions that presuppose or imply the real availability of housing for certain types of person, both citizens and workers, independent of whether they are savers or not. The Italian Constitution, as has been commented by more than one author, is not solely concerned with the real right *over* housing, but also, and predominantly, the fundamental right *to* housing[4].

From this perspective, therefore, many regulations exist whose legal argument is underpinned by the individual's right to housing. To cite a few examples, the inviolability of the personal domicile (article 14), which presupposes essentially the availability of an ideal space that guarantees the right

---

[2] D. SORACE: «A proposito di "proprietà dell'abitazione", "diritto d'abitazione", e "proprietà (civilistica) della casa», in *Riv. Trim. Proc. Civ.*, 1977, p. 1175.

[3] *Ibid.*

[4] T. MARTINES *et al.*: «Il diritto alla casa, en Tecniche giuridiche e sviluppo della persona umana», N. LIPARI (Coordinator), Bari, 1974, p. 392 ff.

not to suffer arbitrary interference in one's private life, family, home, correspondence and the right to privacy. Additionally, we can think of the right of the individual to form a family and to fulfil the duties related with this, for which the Italian Constitution takes a particular interest in protecting: large families (article 31), the duty of the parents to maintain, instruct and educate their children (article 30), and the constitutional protection recognised in favour of the mother and the child (article 37).

Undoubtedly, these are subjective situations that to be fully realised require the availability of a housing unit and impose upon the state the duty of guaranteeing access to such a unit.

Specifically, access to housing - the possibility of having a roof over one's head - represents one of the essential prior conditions for the realisation of a whole set of basic human rights that are related directly with the right/duty to work: here, the existence of housing, at affordable prices, near the place of work is indispensable in order for the right to work to be effective, a right recognised for all citizens (article 4.1); likewise, we need to consider the protection of all forms and conditions of work (article 35.1) including also the protection of the living conditions of the worker and his or her family.

If we change perspective and adopt the deficit form of argument, it can be seen that the absence of housing, a living space for the full development of the individual and the family, constitutes a dangerous limit to the principle of formal and fundamental equality established in the Italian constitutional charter. It is clear that the lack of housing, or the loss of housing, make equality, and the conditions of equality of treatment and social dignity of the citizens before the law, guaranteed by the Constitution without any distinction on the basis of personal or social motives, impossible (article 3.1); similarly, the absence of a roof represents one of the

> ...economic and social obstacles that, by limiting the freedom and equality of citizens, prevent full individual development and the participation of all workers in the political, economic, and social organization of the country and which it is the duty of the Republic to remove (article 3.2).

3. The effectiveness of constitutional principles in the Italian legal system

In common with most present-day legal systems, the Italian also shows a particular interest in satisfying the needs derived from the right to housing of those citizens that belong to the least favoured sectors of society. This is manifest, specifically, by the development of a series of activities aimed at satisfying the need for housing, as well as, by the creation of institutions whose purpose it is to stimulate, direct and oversee the development of these activities.

The most evident manifestation of the right to housing is represented by the construction of state-protected social housing. This has the aim of channelling public activity – directly or indirectly through the concession of financial facilities – to satisfy the needs of access to housing of the most disadvantaged social groups and those that are most vulnerable to the risk of being without shelter. According to the fundamental legal principles, in this way help is given which can be considered as constituting a *public service*, in order to fulfil the specific aim of satisfying a collective or general need of the community.[5] Among man's basic demands, as stressed above, is the need for housing:

[5] M. NIGRO: «L'edilizia Popolare Come Servizio Pubblico», in *Riv. Trim. Dir.Pubbl.*, 1957, p. 118 ff.

therefore, access to and/or the availability of housing at affordable prices for all, is a *service for the basic existence of the common man.*[6]

The building of social housing, as is recognised today, is the fruit of a long process that dates back to the end of the Ninteenth century with the growth in population and the settlement of large groups of workers in industrial zones, and with the expansion of the institutional tasks of the state during the transition from a single to a multi-class state. At first, the public authorities were not in favour of direct intervention in the building of social housing, in adherence to the dictates of the liberal state; this situation changed rapidly after the Second World War, above all because of the growth in social housing needs and because of the acceptance of sate intervention in seeking to rebalance the conditions of inequality, in accordance with the principles laid down in the 1947 Constitution.

The first time that state protected social housing (*Edilizia Residenziale Pubblica,* henceforth ERP) was recognised in the legislation was in the Revised Text No. 1165/1938, which regulated the provision constitutionally, promoting the construction of social residential housing by means of tax exemptions, the financing of urban development and the concession of low-interest loans. It was principally the autonomous regional agency that constructs and manages social housing, *Istituto Autonomo per le Case Popolari* (henceforth, IACPs), organisations created in order to meet the demands of the most disadvantaged citizens, that benefited from these financial incentives. Subsequently, with Law No. 167/1962 the revolutionary instrument of zoning plans for cheap, affordable, social housing (*Edilizia Popolare ed Economica,* henceforth EPE) was introduced, by which an important link was established between the state programming for the construction of housing and ordinary urban planning programmes.[7]

In establishing who should be the beneficiaries of the construction and assignment of the EPE, the Law says that it should take into consideration economic difficulty, or, the position, generic or specific, of the worker, which the interested party holds. This justifies, to a certain extent, the idea initially defined, by part of the fundamental principles, that the Italian legislation had originated two different types of social housing: on the one hand to satisfy the housing needs of those in a position of economic disadvantage, and on the other, those of the workers.[8]

It is in fact incorrect to draw a distinction between these two categories, as it is to keep them completely separate, since the two types of beneficiary tend, in practice, to coincide, given that, those who achieve by the toils of their labor at the service of others their means of subsistence, as a rule, correspond to the same disadvantaged members of society. Furthermore, often the national legislator associates and accumulates the two requisites, placing them together as conditions for participating in the procedure for gaining access to social housing. In order to reduce the distinction between these two categories of beneficiary, it might be as well to consider that "the poor or least favoured members of society, when not actively employed, find themselves in the category of the unemployed or those who are out of work without justifiable reason."[9]

4. The main characteristics of social housing (*Edilizia Residenziale Pubblica*)

The number of actors involved in the sector of affordable social housing has increased during the seventies (Inter-ministerial Committee for Economic Programming - I.C.E.P.), the Ministry of

[6] G. CAPOGRASSI: «Persona E Pianificazione», in *Iustitia,* 1955, p. 160.

[7] N. ASSINI: «Pianificazione Urbanistica Ed Edilizia Residenziale Pubblica», in *L'ufficio tecnico,* 2004, p. 46.

[8] M. NIGRO: «L'edilizia Popolare Come Servizio Pubblico», *op. cit.*

[9] *Ibid.* p. 159.

Public Works, the Residential Housing Construction Committee, the Regions, the IACPs, and the City Halls), and owing to the confusion caused by the publication of so many legal decisions following the introduction of Law No. 865/1971 (Housing Act), the sector has had to work hard in redrafting the definitive norms that regulate it.[10]

Today, the main functions of the sector are set out in articles 59 and 60 of Legislative Decree No. 112/1998, in accordance with which these functions have been decentralized to the regional and local level, thus completing the "first process of regionalisation" brought about thanks to Presidential Decree No. 616/1977.

The Regions and Local Authorities have been given the functions that were not expressly the responsibility of the State, and specifically, those related to the determination of interventionist policies and the fixing of the sector's objectives: the scheduling of the sector's financial resources; the management and the implementation of public interventions, as well as the establishment of the types of intervention, even by means of the well-known "complex urban programmes" (for more on these, see below); the establishment of criteria for access to housing built under ERP programmes, for assistance and the establishment of the corresponding norms.

Within this group of functions, we can distinguish: 1) a regional level, with responsibility for the overall programming and the establishment of access criteria, etc.; 2) a local (municipal) level, concerned with the location of the management activities; and 3) a local (provincial) level, concerned above all with the management of the public patrimony of social housing already in existence, and in which, among others, a number of regional bodies operate (generally defined as "territorial agencies", resulting from the transformation of the former IACPs) and which are public economic entities.

As regards the situation before 1998, it is important to note the abolition of the national programme drawn up by the Residential Housing Construction Committee, a body which in its turn was suppressed with the transfer of powers to the Regions and Local Authorities. The state limits itself today to the «determination of the principles and goals of a general and unitary nature in the area of social housing (*Edilizia Residenziale Pubblica*), even within the general framework of social policies». Of a more specific nature, however, is the other management function attributed to the state and which concerns the definition of "minimum levels" for access to the housing service as well as with the establishment of the quality standards that should be met by the ERP. A residual - and therefore provisional - power of the housing programme that is rather ambiguous and little used is that which involves the participation of the state, together with the Regions and the Local Authorities in the drafting of programmes of ERP of national interest. Finally, mention should be made of a duty concerned with the acquisition, gathering, presentation, diffusion and evaluation of data describing housing conditions through the creation of a Housing Conditions Watch Group.

It should be pointed out, however, as we shall have the opportunity to verify in more detail below, that the state continues to operate indirectly in the "housing policies" sector, through powers that are apparently unconnected to matters concerning ERP, but which are, however, highly influential, such as "the promotion of *innovation programmes in the urban environment* that require a coordinated intervention among the various state bodies" (article 55.1, letter e) Legislative Decree 112/1998). The experiences of the regional and local spheres in recent years have also been typified by attempts to overcome the mono-functional planning model of affordable housing and by the

[10] En doctrina v. P. URBANI, *Pianificazione urbanistica, edilizia residenziale e interessi ambientali*, Milán, 1988, p. 63-166 and V. DOMENICHELLI, *Dall'edilizia popolare ed economica all'edilizia residenziale pubblica*, Padúa, 1984. Among the more recent works of P. URBANI, «Le politiche della casa», in B. Dente (Co-ordinator) *Le politiche pubbliche in Italia*, Bolonia, 1990, p. 315.

most recent regulatory plans. Similarly, they continue to seek to satisfy the need to construct low-cost housing and to include this typology within the limited ambit of the sector of unitary constructions. Such state programmes, which also include measures in favour of *Edilizia Residenziale Pubblica,* are based, in turn, on the integration of urban planning functions.

Among the programmes of innovation in the urban environment, with particular reference to *Edilizia Residenziale Pubblica,* are: the "Neighbourhood Contracts", as provided for in article 2 of Law No. 662/1996, destined for urban planning projects related to housing; the "Neighbourhood Contracts II", as provided for in Law No. 21/2001; the experimental programme called "Rented housing for the elderly, 2000", promoting the building and rehabilitation of housing for those over the age of sixty-five; the experimental programme for residential housing construction known as "20,000 houses for rent", aimed at increasing the housing offer, at conventional prices, conceded for purposes of habitation, and, so as to put on the market a greater, and more accessible, quantity of houses for rent.

Among the remaining obligations of the state administration are: the drafting, financing, and monitoring of *programmes of urban reclassification and the sustainable development of the territory*, of the URBAN programmes and of the urban innovation programmes aimed at reducing the deterioration of zones adjacent to ports and railway stations and the promotion of policies that offer incentives for the recuperation of the building heritage.

The redistribution of (virtually) all the functions within the regional and local systems saw the Regions take responsibility for, following the prior deliberation of the Inter-ministerial Committee for Economic Programming, all the financial resources provided for in the many laws governing the sector and which were formerly shared out through the national programme for the *Edilizia Residenziale Pubblica* (article 61 of Legislative Decree No. 112/1998).

As we shall see below, once the regions took responsibility for the programming tasks in this sector, even those involving financing, the planning of those areas destined for *Edilizia Residenziale Pubblica* was free to change radically. In the Regional Law of Abruzzo No.. 11/1999, for example, it is foreseen that the identification of the Town Halls which eventually will have to provide affordable social housing (EPE), though not necessarily as part of the zoning plans, should be undertaken in accordance with the regional programming, thereby eliminating the legal obligation (still required in national regulations) derived solely from the geographic size of the Municipality.

5. The origin and eventual disappearance of the "zoning plan"

The *Edilizia Residenziale Pubblica* scheme has been characterised since the sixties by the provision of special urban plans drawn up by the Municipalities. At first, the programmes of *Edilizia Residenziale Pubblica* centred on the drawing up of a *zoning plan* for the construction of affordable social housing (as well as the provision of complementary urban and social services, including public green spaces), which were required for Municipalities with a population of over fifty thousand inhabitants or which were capitals of their Province (today the regional laws are somewhat different); and, on achieving an adequate structural and functional organization of the neighbourhoods designated as being of *Edilizia Residenziale Pubblica*, in order to overcome the sector's typically interventionist model – quite unconnected to any urban planning programmes – and, therefore, a source for the unplanned development of urban areas. From this point of view, the requirements for the preparation of the works of urban planning are quite notable – that is, those defined subsequent to Law No. 847/1964 and today provided for in article 16 of the Revised Text of Construction, the absence of which constitutes, even today, one of the key issues for the quality

of life in the cities. Thus, in the vast majority of cases, these neighbourhoods possessed none of the essential services.

In order to avoid the chaotic and fragmentary development of the *Edilizia Residenziale Pubblica*, characterized by urban concentrations in the peripheral zones and in the most run-down areas of the cities that lacked the necessary structures and services, the Law of *Edilizia Residenziale Pubblica* requires that the zoning plans be incorporated within the general urban planning instrument or in the specific building programme. This represents an attempt to transfer *Edilizia Residenziale Pubblica* into the realm of urban planning, so as to ensure that this type of social housing did not fall outside the general territorial plan.

From the beginning, this general ambition had to come to terms with the fact that the legislative design of urban planning in the sixties had not yet been fully adopted, and therefore, introducing the zoning plans within the general regulatory plans actually meant that the *Edilizia Residenziale Pubblica* programmes could not be drawn up until the general regulatory plans had been passed. This had the obvious effect that in addition to the failure to apply the urban law, there was general discontentment as regards the satisfying of the "right to housing". Faced by this classic conflict between a general requirement (the coordinated and global planning of the territory) and a specific requirement (the building of neighbourhoods of affordable social housing), it was the latter that took precedence. This solution was expressly formulated as a hypothesis, with a certain degree of foresight, by the legislator, in 1962.

Within Italian legislation, the zoning plan, provided by Law No. 167/1962, was the first instrument of functional planning directly linked to a primary interest. This requirement for a quick, effective satisfaction of the right to housing represented from the outset an element of "rupture" with the conception held until that time of the urban planning discipline as being simply a rigid system organised according to successive and interrelated plans. Article 3 of Law No. 167/1962 establishes that the plan for affordable social housing can be passed as a variant of the regulatory plan, in those cases in which it is deemed necessary to find new areas, outside those already designated for *Edilizia Residenziale Pubblica*, within the *general regulatory municipal urban plan*, or when necessary, to make modifications to the general plan. Furthermore, when the Municipality is not in possession of a General Regulatory Plan, the zoning plan can be introduced, becoming in this case a kind of *de facto* "instrument of transition" to the future General Regulatory Plan.

The zoning plan, equivalent in Law to the specific plan, means that the works that are programmed as part of it are declared as being of public utility. The plan initially was to be in force for ten years, though this was subsequently extended, first, to fifteen and, later, to eighteen years. The original version of Law No. 167/1962 specified the obligation of the Town Halls to undertake works of urban development before ceding the areas to the housing constructors, making the latter responsible for these costs (article 10.1). Law No. 865/1971 substantially modified the ways in which these plans were applied, permitting, on the one hand, the expropriation of the areas included within the perimeter of the plan by the Town Halls or the consortia; and, on the other, committing other public and/or private subjects to lend their services and to manage the community infrastructure (church, schools, institutional homes, commercial areas, hospitals, cinemas, municipal offices, offices belonging to the peripheral state organisation) and to organise the open-air areas (streets, green spaces, sports fields).

In practice, the Town Halls almost never proceed pre-emptively with the general expropriation of the areas included within the plan for the building of affordable social housing, but rather they implement the procedural rule established by article 35 of the Law, designating the lands, even before they have bought them, by expropriation. Originally, the regulations provided for the division

of the areas to be ceded as: a surface right, of up to eighty per cent of the expropriated lands, for the construction of affordable social housing and their corresponding services, both for private firms and public authorities; and an ownership right which, ranging from twenty to forty per cent, was assigned to co-operatives and private parties, with preference being given to the expropriated owners, so that the latter might meet the requisites to qualify as beneficiaries of affordable, social housing. The 1997 Finance Act (article 3.63 Law No. 662/1996), however, eliminated all obstacles for the cession of these areas, allowing even the total cession of the corresponding part assigned as right of ownership.

To apply the zoning plan, an agreement is drawn up between the Authorities and the operators in which, among other things, should be stipulated the sum for the remuneration of the urban development works if these are to be undertaken by said Authorities, and adequate financial guarantees should the urban development work be undertaken on account and risk of private partners. The purpose is to guarantee the effective satisfaction of public interests in the construction of housing for the most disadvantaged social groups ensuring that installations meet certain standards of quality. Moreover, while with the introduction of Law No. 167/1962 the need had been affirmed to define within the zoning plans *all* the areas considered useful for the application of affordable social housing *(Edilizia Popolare ed Economica)* programmes, the subsequent evolution of the legislation has tended to lead matters in a different direction. Article 51 of Law No. 865/1971 indeed provides that in Municipalities without a zoning plan, the "building programmes" can be located in those areas as decided by the municipal council within the *ambit of the residential zones* established in the corresponding regulatory plans. The procedure to which the Municipal authorities have frequently turned has the authority of a planning regulation and needs to stipulate – even as a variant to the regulatory plans – "the limits imposed on the density, height and distance between one building and another" as well as the spaces assigned for community use.

An important point of view is that related to the "dimensions" of the zoning plan. Article 2.3 of Law No. 10/1977 establishes, thereby modifying the previous regulation, the *minimum percentage* of the zones corresponding to *Edilizia Popolare ed Economica* that should be included within the General Regulatory Plan when it is being drafted, which should be equal to at least forty per cent of all the needs of the housing construction evaluated over a decade. Article 13 of the Law also provides that within the programmes of application due to run for several years (provisional acts implementing the dispositions of the General Regulatory Plan valid for three or five years), a certain proportionality should be observed – between forty and sixty per cent – between the areas reserved for *Edilizia Popolare ed Economica* and the area for private construction, in general. To implement this it requires that the reserve be respected by all the Town Halls that have to draw up a programme for several years – those with a population of more than 10,000 inhabitants – even though they are under no obligation to draw up a zoning plan.

Even so, the dispositions regarding the required proportions of *Edilizia Residenziale Pubblica* (ERP) with respect to "free" building – each belonging, in *sensu lato* to the programme of ERP and to urban planning in particular – are considered to form part of the regional responsibilities. However, the legal issue is still uncertain, and the subject of much debate. In fact, various Regions have already abolished such quantitative limits in the drawing up of their new Municipal Regulatory Plans.

6. The "crisis" of the zoning plan and alternative policies for the urban peripheral zones

Following the rather disappointing *performance* of the policy based on "zoning plans", and largely ignoring the situation outlined in the previous paragraph, there has been a growing tendency towards the assimilation of *Edilizia Residenziale Pubblica* Schemes and Standard Construction Programmes, through the application, in particular, of a conventional instrument (which makes few deviations from the "free" housing market, related solely with the fixing of housing prices and rents), considered by the legislator as a sufficient tool for integrating the compulsory and necessary *Edilizia Residenziale Pubblica* quota in accordance with Law No. 10/1977.

In essence - though still faced by the shortage of subsidies and facilities for the building of houses, as well as by the shortage of social housing or, *at least, faced by the shortage of housing for the least favoured members of society* – the commitment made by the construction companies of offering low sales prices and rents is on its own considered sufficient for the inclusion of this housing within *Edilizia Residenziale Pubblica* Schemes.

This situation has meant a marked reduction in the building of social housing; in fact, the IACPs (*Istituto Autonomo per le Case Popolari)* are more concerned with the management and reclassification of the property that they already own than with building new housing. The same is true of the Local Authorities (often owners of housing stock constructed in previous decades for certain categories of economically disadvantaged workers). What is more, the tendency of recent legislation is to *renounce* public oversight over construction by selling housing to the "beneficiaries" themselves (resell back) or even on the free market.

Of the three categories (public authorities, building co-operatives and private firms) of builders of social housing, the leading role within the sector is taken by the private firms. The role of the co-operatives (although no accurate data are available) appears to be in decline. As described earlier, it is the private firms that undertake the construction of both ordinary and social housing. The building of the latter type of housing, although destined for a specific category of person, responds, nevertheless, to the fairly demanding qualitative and aesthetic standards of a relatively well-to-do social class. By way of illustration, in certain cases, within the same building, some flats are built as part of the conventional housing construction scheme and others as part of the ordinary system (free market).

A further symptom to the zoning plan crisis is constituted by the urban reclassification and restructuring instruments, defined technically – as well as in some recent regional laws – as *complex programmes*, in which the complexity refers to the plurality of objectives, contents, subjects and modes of application that characterise them. The main normative feature of these "complex programmes" is constituted by the *integrated work programme*, introduced officially in the national regulations by Law No. 179/1992 (article 16), and already present for a number of years, in the shape of an integrated programme of recuperation, in the region of Lombardy (Regional laws No. 22/1986 and No. 23/1990).

Nationally, the integrated programme appears as part of the policies for *Edilizia Residenziale Pubblica* drawn up by the Committee for Social Housing Construction, within the Ministry of Infrastructures and Transports (which, as mentioned earlier, was suppressed by article 62.2 of Legislative Decree No. 112/1998). The first mention of this is to be found in the deliberations of the Inter-ministerial Committee for Economic Programming (CIPE) in relation to the programming of investments for

the sixth biennial of public intervention in housing, in accordance with the provisions to this effect contained in Law No. 457/1978.

The admission for the financing of works proposed by the Town Halls, or by private entities, with the provision of corresponding finance plans to cover the costs of part of the programme, was made subordinate to the presentation of integrated programmes, which were not limited only to the inclusion of traditional works of housing construction, but which also had to incorporate a plurality of uses and integrate a range of urban functions.

Article 16 of Law No. 179/1992 proposes once more, and generalises, an analogous model of urban development works. The main aim of the programme responds to a longstanding requirement, especially in the big cities, of having recourse to a tool for urban planning that might have a decisive influence over whole areas of land - in part, or in their entirety, built upon - within the municipal territory, as well as over areas designated for a new type of building, though for this work to proceed an urban, environmental and building type reclassification must first be made. The location of the programme will not therefore suffer the imposition of any type of limit within the homogenous zones defined by the General Regulatory Plan, since what the integrated programme expressly seeks is to overcome an urban planning model based on the rigid zoning of the territory. This aspect of the integration of functions, in contrast with homogenous zoning, has, in an innovative manner, been considered by the Administrative Judge as being "subsumed within urban planning" and, therefore, is usable in general as a "technical-legal criterion of regional planning", with powers above and beyond those of the instruments that we are examining here.[11] In short, the integrated programme serves to reconvert entire areas of municipal land that are either obsolete or in a deteriorated condition and thus impede emerging urban development – both in the centre and in the periphery – with works of such a dimension that they are able to have an impact on the restructuring of the cities.

The second paragraph of article 16 (Law No. 179/1992) expressly establishes that the integrated programme can incorporate "zones that are completely or partially built upon or destined for new constructions." Thus, a wide variety of building typologies can form part of the programme – complete demolition and rebuilding, the restructuring of entire buildings, the change of use of the buildings, the adaptation of the works of urban planning -both primary and secondary, the construction of new transport routes and commercial centres, as well as new buildings – all these, included naturally within the programme.

The phase involving the procedural initiative requires the intervention of various actors. The law provides that the promotion be undertaken by the City Halls, but it is apparent that works of such a scale require the participation – even during the phase in which urban planning decisions are drawn up – of other subjects, both public and private, who in order to work need to form partnerships or associations (Public Authorities, private firms, private owners), with the legitimate right to present a building proposal to the City Hall. The procedure, therefore, can be initiated by operation of law or application of one party. It can be seen, therefore, beyond the formal perspective of the imputation of the decision, how the regulation implicitly allows for the urban planning regulations to be agreed to, which is why, in the initial phase of the application of the integrated works programme the model is considered an example of "consensual urban planning."

In addition to the notable degree of negotiability and integration between public and private initiatives, a second basic feature of the integrated programme is *the immediate operativeness* of

[11] Decision TAR Emilia Romagna, I, nº. 22, on 14 January 1999.

considerable public - state or regional (subsidised building or with certain facilities granted) - and private financial resources for the implementation of the programme.

In short, in accordance with the national system, the material characteristics of the integrated work programme are the following:

a) the plurality of functions;

b) the integration of different typologies of works, including those of public interest (secondary urbanisation);

c) a direct role in "urban reorganisation"; and

d) the participation of both public and private operators and financial resources.

In summary, the integrated programme is a genuine attempt on the part of the state legislator to combine the traditional aspect of the choice of *land use* (primary planning) with the more obviously operational aspect of *management*, which generally arise at different times and do not always coincide, though from the point of view of the market economy, it is more than evident that they are very closely related. It would be an oversimplification to consider the integrated programme from this perspective as just another type of plan for action operating within the urban planning system. The Constitutional Court has recognised this in indicating that the integrated programme can, at the same time, take on a *programmatic and applicative value*[12] (as is foreseen, for example, in the legislation of the Campania Region).

The redevelopment of entire areas of urban land, applying the plans described above, is a phenomenon that has been slowly consolidated over time in the legislation of other European countries and above all in that of the United States, where it represents the outcome of demands to "redevelop" areas which once formed part of the periphery and which have gradually become – due to the expansion of the cities – strategic urban land within the centre of the urban areas. For this reason, in the English-speaking world the term *gentrification* has been coined to describe the "process by which the middle class move into working-class residential areas, bringing about a change in the social composition of the area in which this phenomenon occurs."[13] Clearly, the change in the class of residents has an impact on the quality and on the use of property, as well as on the urban function of the area. This would seem to confirm what we have been saying about the case in Italy regarding individuation – on the part of the legislator – of the ideal legal instruments for permitting the exercise of all the social and economic potentials of human activities. In this case, the integrated programme – as a planning model – appears to be the response of the system to the new requirements of urban development.

As we have pointed out, the integrated programmes of work take on a strategic role within the framework of state policies of *Edilizia Residenziale Pubblica* which, by adopting these instruments, are moved into a new phase, which brings together the integration of affordable social housing with urban reclassification and the multi-functional nature of building programmes. On this point, it is interesting to note the Decree issued by the Ministry of Public Works (21 December, 1994) which has formalised the deliberations of the Committee for Residential Housing Construction, regarding the modes of finance for the «programmes of urban reclassification» from the funds provided by Law No. 179/1992 (article 2.2), reporting the widening of the aims of the *Edilizia Residenziale Pubblica* sector to include objectives that are purely of an urban planning nature. It is no coincidence that this

[12] Decision of the Constitutional Court, n° 408, 27 July 1995.

[13] COLLINS, *English Dictionary*, London, 1984, p. 607.

Decree establishes as an essential requisite the participation of private resources for the possible financing of these programmes.

This type of urban reclassification programme is not an ulterior form of urban planning, since it is not provided for in any legislative regulations. It is simply the *nomen* given to a particular programme of public financing in which – in accordance with the last part of article 2.2 of Law No. 179/1992 (in which a reserve of 30% of the funds assigned for the Construction are provided for with financing in favour of the work programmes) – the intention has been to subordinate the concession of resources to the undertaking of integrated programmes that fulfil certain criteria. The projects that should be included within such programmes form part of a coordinated and organised set of public and private works undertaken in a system of collaboration between public and private subjects.

The introduction of the "complex programmes" to urban planning has revealed the particular propensity among the interested parties (above all the social operators and public authorities) to shift urban planning policies in the direction of these new instruments that are much more adept for including a range of different prerequisites, such as the malleability of the work, the equitable distribution among the owners through the construction of unit-type housing, the integration of public and private functions and the different land uses, the specific execution of the public part of the plans, in short, the realisation of the urban projects. All this makes inevitable a kind of *self-restraint* that is introduced by the General Regulatory Plan, which so as not to be constantly contradicted by the integrated and operational planning approach needs to assume a less rigid position, more consistent with the recommendations of the strategies and not with the imposition of fixed rules, and in all cases, should guarantee greater flexibility.[14]

As stated, the possibility that the central State might promote the "complex programmes" has been confirmed by Legislative Decree 112/1998, not by means of the financial programming of the Residential Housing Construction, which was transferred to the Regions in accordance with article 60, but rather, within the sphere of the «individuation of the basic lines of national territorial planning», which also extends to include the cities and the metropolitan areas, but above all, by means of the "the promotion of innovation programmes in the urban environment that require a coordinated intervention among the various state bodies" (article 54.1, letter e). Within the sphere of state policies for the promotion of programmes for the reclassification and restructuring of the cities, mention should be made of the initiatives of the Ministry of Public Works, such as the Ministerial Decree No. 1169/1998, for the "promotion of innovation programmes in the urban environment, denominated as programmes of urban reclassification and the sustainable development of the territory" promoted by the City Halls, and selected by the regions, involving different administrative bodies and private operators, whose objective is to experiment with the most effective administrative actions and operational models in order to activate finances in urban planning that will be included in the new community sustainability scheme. More recently article 27 of Law No. 166/2002 has introduced *programmes of urban rehabilitation*, promoted by the Local Authorities, in accordance with all other administrative bodies with powers to undertake building work and territorial planning, aimed at rehabilitating property and local infrastructure and improving urban access and mobility, as well as the re-planning of transport and service infrastructure networks for the mobilization through a national network of motorways for the large urban areas. The criteria and modes applicable for the prevision, evaluation, financing, control and promotion of these programmes are defined in the Decree issued by the Ministry of Infrastructures and Transports,

[14] Decision TAR Emilia Romagna, I, n° 22, on 14 January 1999.

together with the other interested Ministries, in accordance with the unified State, Regions and Local Authorities Conference.

Many Regions have regulated the procedure for the promotion and application of these "complex programmes", by means of specific laws or with regulations that revise their general urban planning, with the aim of introducing them within the ordinary planning system.

7. Social Housing (*Edilizia Residenziale Pubblica*) and New Legal Rights

The origins of many of the international agreements that make mention of the right to housing (see section 1) lie in problems related to the situation of refugees and asylum seekers, in other words, they were signed in response to migratory flows which are increasingly coming to have an impact on the planning of the developed countries, the main destination for immigrants seeking work and a better standard of living.

From this perspective, Italy can today be considered a country of immigration since recently the problems generated by the effects of this phenomenon have made themselves manifest in the country. In particular, the housing problem for non-EU foreign immigrants is drawing widespread attention to the housing demands not only of workers, but also whole nuclear families.

In general, local policies for the acceptance of immigrants are highly varied in their approach, including both integration and welfare support, as well as various measures of control and security. The most widely held posture today is to consider immigrants as a "resource" and, therefore, this posture looks favourably on their inclusion within the productive system, but not on their full integration: in short immigrants are "wanted but not welcome."[15]

The decisions taken by the Italian legislature largely reflect these different postures. In short, the laws regulating immigration derive from two different periods: initially, the first national regulation to consider the phenomenon of immigration and housing policies is Law No. 286/1998, better known as the Turco-Napolitano Act (taking the names of the ministers who introduced the legislation); and subsequently, a new act (Law No. 89/2002, better known as the Bossi-Fini Act, again taking the names of the ministers who proposed the bill) that makes significant changes to the content and spirit of the original legislation.

Law No. 89/2002, as is well known, restricts the access of immigrants to Italy, and generated considerable public stupor. Such was the attention given to the main provisions of the Law that the amendments made to Law No. 286/1998, including the areas of "Immigrant Shelters" and access to housing (see article 40 of Law No. 286/1998), were pushed somewhat into the background. Originally, the Turco-Napolitano Act included a vast typology of housing available for non-EU immigrants, recognising the true and real right of the *holder of the residency permit and in regular residence, included on the employment lists, or who performs a regular activity of subordinate or autonomous work*:

- to have access, in conditions of equality with Italian citizens, to the houses of *Edilizia Residenziale Pubblica*;
- to have access to the financial mediation services provided by local agencies, available at the local level, to favour the granting of low interest loans;
- to have access to loans for the building, rehabilitation, purchase of the main home;

[15] P.L. CROSTA, A. MARIOTTO E A. TOSI: «Immigrati, territorio e politiche urbane. Il caso italiano», *at* http://www.cestim.it/01casa.htm, 2004.

- to have access to the housing made available through regional contributions for works of sanitary reorganisation of property in the Provinces, Municipalities, Syndicates of Municipalities, Public authorities and private parties;
- to have access, paying a considerably lower quota, in conditions of equality with Italian citizens, to the Town Halls' social housing, in the Municipalities with a large population of foreigners, as well as to the housing managed by associations, foundations and other public and private entities, which could serve as temporary shelter, while awaiting permanent housing; and
- to have access to immigrant shelters organised by the Regions in collaboration with the Municipalities, voluntary associations and organisations which provide temporary aid to meet the housing and food needs of foreigners, in order to foster their social integration, and to make them self-sufficient in as short a time as possible.

Law No. 89/2002 has subsequently modified this aspect of the Turco-Napolitano Act, by instigating that the holder of a residency permit must have been in the regular possession of said document for a period of *no less than two years,* with the added requisite that he or she be in regular employment, whereas previously being registered on the employments lists was considered sufficient[16]. In accordance with the 2002 Law, fulfilling these two conditions is necessary before the foreigner can participate in the adjudication procedures for social housing, to which should be added the fulfilment of all the other previsions laid down in the conditions for access to the benefits offered by the *Edilizia Residenziale Pubblica*, among which are being in receipt of a salary, not being the owner of any other property, etc.

In accordance with their powers in the areas of social housing construction and immigration, the Regions have presented their own rulings concerning these regulations. Thus, a recent agreement signed by the region of Emilia-Romagna and the Local Authorities within the region makes the provision of rented housing at below market prices a priority in meeting the specific needs of immigrant, Italian and foreign workers within the most attractive areas available for the workforce. In addition, multi-functional buildings that integrate both services, and the research of innovative solutions, that encourage the saving of energy and environmental sustainability are encouraged.[17] On this matter, the Region of Emilia-Romagna had already taken action through Regional Law No. 14/1990, in which the right of immigrant citizens to receive the benefits from the *Edilizia Residenziale Pubblica* Scheme was recognised and "integration programmes" were promoted for foreign families, giving them access to mortgages with low rates of interest, which are normally only assigned to Italian citizens.

More recently, with Regional Law No. 5/2004 - "Regulations for the Social Integration of Foreign Immigrant Citizens", the Region of Emilia-Romagna has undertaken, together with the Local Authorities within the region, "to promote initiatives aimed at finding a solution to the housing problem in benefit also of foreign immigrant citizens", as well as fostering and upholding: a) the creation of agencies of social housing, including also, rental agencies that are able to manage housing and to provide support and monitoring services to solve housing demands; b) the use and

[16] The employment lists were suppressed by Legislative Decree n° 297/2002 and substituted by a new procedure for recognising that a person is unemployed: those wishing to certify their status as being unemployed need to go to the territorial job offices, and during the month of July declare that they are without work, available to take up employment immediately and actively seeking work through the relevant services.

[17] A protocol signed by the region of Emilia-Romagna, the Local Authorities, social groups and the third sector forum on 18 December 2001. The Protocol seeks to guarantee the equality of access of foreign immigrants, present on a regular basis within the territory, and of their families. to the workplace and the social ambit in Emilia-Romagna.

recovery of the existing, available housing stock, which also involves a system of tax guarantees and benefits, in accordance with the provisions made by law; c) the undertaking of building work that provides rented property and the provision of loans for the purchase and the rehabilitation of the first home, and also by creating specific rotation or guarantee funds (article 10). In particular, in accordance with these regulations, "Foreign immigrant citizens, resident regularly in the Region have the right, in conditions of equality, to *Edilizia Residenziale Pubblica* housing, as well as to have the usufruct of the profits from the purchase, rehabilitation or new construction of their first home": in this regional legislation no mention is made of the two restrictions imposed by the Bossi-Fini Act, namely, that the immigrant citizen be in possession of a residency permit for a period of "*no less than two years*" and that he or she be in regular employment. The decision of the Constitutional Court has yet to be delivered on this regional law, contested by the Government who considers that it violates the state's exclusive power in foreign policy according to the previsions made in article 117.2, letter a) of the Italian Constitution.

8. Brief Concluding Comments

The impression we are left with on examining the rapid disappearance of the zoning plans and the subsequent expansion of the complex programmes and alternative policies for the development of the urban peripheral zones is that beneath this evolution lie efforts to restore the former "harmony", thrown into disruption by the processes of *ghettoisation,* through the seeking of a more rational organisation of the urban space and the reclassification of the cities.

Nonetheless (with the exception of the evaluation of the operability of certain specific measures, such as, the neighbourhood contracts[18]), these programmes have, it can be presumed, focused rather more on supporting economic development and competition between local systems than on instigating a true "social policy" of cohesion and integration of the weakest sectors in the urban fabric of the cities and on an equitable distribution of housing resources.

It is perhaps useful to pose the question as to whether urban planning can adopt the role of the bearer of these values - as perhaps was believed to be the case in the past - and, therefore, free itself from the simply technical role of the organised "design" of the territory. That urban planning can be analysed as a general tool for social harmony is not under discussion; the problem centres on establishing whether urban planning can specifically help the development of social models of integration and social cohesion - a question, by contrast, that generates many more doubts.

[18] The programme of "neighbourhood contracts" are implemented in peripheral or run-down neighbourhoods. According to the Ministry of Infrastructures, the first programme implemented has demonstrated – in light of the number of participants and the quality of the proposals – that in this sphere the commitment of the central government needs to be confirmed, and not only as regards the means of financing. It is essential for the fulfilment of the aims of the programme to ensure the continuity of resources, so that Municipal initiatives can be maintained (in particular in the capitals of the metropolitan areas), and to find spaces suitable for the investment of private partners capable of reducing, with suitable initiatives, the conditions of segregation between installations of this type and the rest of the city. The new programme (2004), 65% of which is financed from state funds and 35% from regional funds, aims at increasing, with the participation of private investors, the provision of infrastructures in the run-down neighbourhoods of the cities with the greatest housing and employment problems. At the same time, it is foreseen that measures will be taken to increase employment, to promote social integration and the improvement of the housing offer. The resources available amount to 1,000 million euros. The proposals presented by the Municipalities have been sent to the Ministry by the regions that have committed themselves financially to the programme. These need then to be evaluated by a mixed commission comprising the State and the Regions, in order to determine the concession of financing.

Obviously, if we adopt a weak definition of the concept, society's respect for the least-favoured members of society (for example, immigrant workers, unemployed youth or those whose jobs are highly vulnerable, etc.) could in itself be considered a factor of social cohesion. On the one hand, we might include the solution to the housing problem (in the most extreme case, in zones not yet "reclassified"), together with the innovation programmes, which very generally speaking seek to satisfy such demands (although in reality there is an absence of specific policies that regulate a period of renewed building of affordable social housing for the "new types of poverty"). And on the other, we should bear in mind the fact that we are not dealing with an urban planning problem as such, but rather with a general welfare problem.

The right to housing, more than any other social right, is "financially conditioned" and it is therefore impossible to guarantee this right if the necessary welfare policies are not implemented, promoted by the various levels of government which make up the national polycentric planning system.

Appendix

IDP
INSTITUT DE DRET PÚBLIC

Parc Científic de Barcelona

Conference On Social And Territorial Cohesion And Policies Of Regional And Urban Planning And Housing[1].

16th and 17th December 2004

Parc Científic de Barcelona
Baldiri Reixac 4-6, 08028 Barcelona
http://www.pcb.ub.es/homePCB/live/ct/p130.asp

Nowadays it is possible to identify increasing phenomena of urban segregation and social exclusion in advanced societies. Those phenomena seem to be linked to ongoing social (e.g. immigration from non EU countries in the European case) and economic changes with obvious territorial impacts and changes of traditional urban models.

The conference´s goal is to reflect social and territorial cohesion with an interdisciplinary (mainly Law and Economics) and international (with American and European collaborations) approach, exchanging experiences about the possible mechanisms to guarantee social cohesion and territorial equilibrium in new scenarios.

[1]This conference is an activity developed under the umbrella of the Research Project "Land Use Law and Social Exclusion: the Legal Fight against Urban Ghettos" (ref. BJU2003-09694-C02-02), backed by the Ministry of Science and Technology.

PROGRAM

(THERE WILL BE TRANSLATION FROM SPANISH TO ENGLISH AND VICEVERSA)

THURSDAY DECEMBER 16

Auditori del Parc Científic de Barcelona
Baldiri Reixac, 4-6
08028 Barcelona

16:00 INAUGURATION

Mr. Joan Bellavista
Commercial Director, Parc Científic de Barcelona

Dr. Tomàs Font
Catedràtic de Dret Administratiu
Institut de Dret Públic

Dr. Juli Ponce
Professor Titular de Dret Administratiu
Research Project's Director

16:30 E. ZIEGLER, *Professor of Law, University of Denver.*

"The New Snob Zoning: Urban Sprawl, Social Cohesion, and Zoning Exclusion and Discrimination in the United States".

17:30 J. KUSHNER, *Professor of Law, Southwestern University School of Law, Los Angeles, California*:

"New Urbanism: Urban Development and Ethnic Integration in Europe and the United States"

18:30 DISCUSSION

FRIDAY DECEMBER 17

Aula Fèlix Serratosa
Administració del Parc Científic de Barcelona

Josep Samitier, 1-5
08028 Barcelona

MORNING

9:30 ROUND-TABLE DISCUSSION:

Sra. Carme Trilla
Directora General d'Habitatge
Generalitat de Catalunya

Sra. Dolors Clavell
Diputada al Parlament de Catalunya

Sra. Montserrat Torrent
Directora OCUC
Plataforma per a un habitatge digne

11:00 BREAK

11:15 D. SIBINA, *Professor Titular E.U. Universitat de Barcelona.*

"Market, Social Cohesion and Urban Renewal"

12:15 M. PAREJA, *Catedràtica E.U. Departament de Teoria Econòmica, Universitat de Barcelona*

"Urban renewal of Spanish Housing Estates: policies, practices and inhabitants´ opinions"

13:15 DISCUSSION

AFTERNOON

16:00 J. BALL, *Solicitor and Lecturer in Law, Law Department, Sheffield University.*

"UK housing rights: Rehousing, management by lawful eviction, and possible incompatibility with continental laws."

16:45 J.P. BROUANT, *Maître de Conférences à l'Université Paris I Panthéon-Sorbonne* :

« Cohésion sociale et aménagement du territoire: quelle place pour la régulation juridique en France? »

17:30 THE ITALIAN PERSPECTIVE: PAOLO URBANI *(Prof. Ordinario di Diritto Urbanistico dell'Università "G. d'Annunzio" di Chieti-Pescara)*, GIANLUCA GARDINI AND STEFANO CIVITARESE *(Prof. di diritto amministrativo dell'Università "G. d'Annunzio" di Chieti-Pescara).*

"The Policies for Urban Development"
Paolo Urbani

"From economic and popular construction to the urban renewal programs"
Stefano Civitarese y Gianluca Gardini.

18:15 DISCUSSION

18:45 CONCLUSIONS: J. PONCE SOLÉ, *Professor Titular de Dret Administratiu, Universitat de Barcelona, Research Project's Director.*

Questionnaire

Research Project "Land Use Law and social exclusion: the Legal Fight against Urban Guettos" (ref. BJU2003-09694-C02-02)

(Outline of possible aspects to be discussed during the development of the project)

1. STARTING CONCEPTS: WHAT DO WE UNDERSTAND BY URBAN SEGREGATION? WHAT DO WE UNDERSTAND BY GUETTO? ARE THOSE PROBLEMS IMPORTANT IN YOUR COUNTRIES? ARE THEY RELEVANT PHENOMENA FOR THE LAW?

2. CONSTITUTIONAL ASPECTS:

a) From a *material* perspective

-Is there a constitutional right to housing in your Constitution?

-Is there a connexion between Land use Law and housing Law and other constitutional rights (e.g. freedom of religion)?

-How international agreements about this issue impact on your Law?

b) From a perspective taking into account *the distribution of public responsabilities.*

-Who has the power to act against urban segregation and in favour of inclusionary mesures? (National level, Regional level, local level...). Is there any kind of collaboration between levels?

3. LEGAL ASPECTS

-Are there specific laws against urban segregation (e.g. American *inclusionary zoning* or French social housing obligations)?

-What kind of public behaviour is developed to fight against urban segregation? Regulation, public aids, direct intervention in economy (public undertakings for urban renewal...).

-What is the role of urban planing and zoning in the fight against urban segregation?

-Are there inclusionary techniques to favour social inclusion (affordable housing...). Are they effective in the real world?

4. CASE-LAW

-Are there leading-cases interpreting constitutional elements in relation to this issue?

-Are there judicial decisions about controlling public decisions and their impact on urban segregation?