

## ARTICLES

### TERRITORY, CITIZENSHIP AND RIGHTS

# PUBLIC SPACE AND THE PUBLIC THAT FREQUENTS IT: DILEMMAS OF THE HUMAN RIGHTS TO WATER AND SANITATION

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#### Abstract

*The human rights to water and sanitation were officially recognized by the United Nations in 2010. Despite this, these rights have not been explicitly recognized as basic rights in Brazilian legislation and their interpretation in law comes from the concept of universal access. However, little is discussed regarding the universalization of this access in spaces beyond the household, particularly in public spaces, serving people in socio-spatial vulnerability and who need urban furniture such as drinking fountains and toilets, either because they work or live there. It is in public spaces that homeless people, street vendors, women and girls, people with disabilities and transgender people are neglected, given the lack of access to water and public toilets. Thus, this work has sought to understand the possibilities of interpreting public sanitation policy in Brazil from the definitions of “universal access” and “household” using content analysis when reading these documents. It was concluded that the Law excludes public spaces, neglecting the aforementioned groups.*

#### Keywords

*Public Toilets; Public Drinking Fountains; Human Rights; Water and Sanitation.*

## O ESPAÇO PÚBLICO E O PÚBLICO QUE O FREQUENTA: DILEMAS DOS DIREITOS HUMANOS À ÁGUA E AO SANEAMENTO

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### Resumo

*Os direitos humanos à água e ao saneamento foram reconhecidos oficialmente pela Organização das Nações Unidas em 2010. Apesar disso, eles não são explicitamente reconhecidos como direitos fundamentais na legislação brasileira, e sua interpretação em lei advém do conceito de universalização do acesso. No entanto, pouco se discute a respeito da universalização desse acesso em espaços além do domiciliar, sobretudo em espaços públicos, a fim de atender pessoas em situação de vulnerabilidade socioespacial e que necessitam de mobiliários como bebedouros e banheiros, em razão de trabalharem ou residirem em tais lugares. É nos espaços públicos que a população em situação de rua, comerciantes de rua, mulheres e meninas, pessoas com deficiência e pessoas transgênero são negligenciadas, tendo em vista a falta de acesso a água e a banheiros. Dessa forma, este trabalho buscou compreender as possibilidades de interpretação da política pública de saneamento no Brasil com base nas definições de “universalização do acesso” e “domicílio”, usando análise de conteúdo na leitura desses documentos. A conclusão a que se chegou foi de que a lei é excludente para os espaços públicos, ao negligenciar os grupos supracitados.*

### Palavras-chave

*Banheiros Públicos; Bebedouros Públicos; Direitos Humanos; Saneamento Básico.*

# **PUBLIC SPACE AND THE PUBLIC THAT FREQUENTS IT: DILEMMAS OF THE HUMAN RIGHTS TO WATER AND SANITATION<sup>1</sup>**

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## Introduction

The universalization of water and sanitation services proposed by the National Basic Sanitation Law, Law No. 11,445 (BRASIL, 2007), mainly concerns conventional households. Although it is of undeniable importance, considering the deficit of sanitation services in Brazil, the universalization of attending to households excludes many other situations in which access to services is essential, such as in public spaces where many people work, live, transit and/or use for leisure (HELLER, 2019). In these places, access to water and sanitation is made available through the services of public toilets and drinking fountains.

In 2019, almost ten years after recognizing the right to water and sanitation as human rights (Human Rights to Water and Sanitation, HRWS), the United Nations (UN) issued a report presenting the perspective of spheres of life beyond the household, into which public spaces are inserted (HELLER, 2019). The report thus highlights a subject that has yet to be explored in the context of science and technology and public policy. Therefore, major challenges need to be faced, such as raising the awareness of society regarding the importance of these services in guaranteeing the HRWS; instrumentalizing the management guidelines of the service; guaranteeing that urban furniture complies with the normative standards of the HRWS; and regulating public toilets and drinking fountains.

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However, public sanitation policies in Brazil make no mention of these specific services, even though they are related to the rights to water and sanitation, nor is there any correlated information system (MOREIRA, F. D., 2021). There is therefore a certain urgency for discussing this issue, since inequality in access to sanitation services in the spheres of life beyond the household reinforces the social inequalities that keep people living and working on the streets.

The aim of this article is to answer whether, in the legal field, there are any elements that may guarantee an interpretation of the obligation to provide sanitation services in public spaces and to extract central questions from the discussion in order to guide a reconfiguration of public sanitation policies with a view to meeting these social rights. Hence, important conceptual aspects will be highlighted (rights and public space/the public that frequents it) so as to interpret the conditions for the population that works and lives on the streets to access public toilets. In addition, critical points that prevent the population in focus from achieving their HRWS will be lifted from the Brazilian legislation that deals with the issue of sanitation, in light of the definitions of universalization and household.

## 2. Water and sanitation as rights

Recognizing the right to safe drinking water and sanitation as being essential human rights for the full enjoyment of life along with other rights occurred in 2010, during the UN General Assembly, through Resolution A/RES/64/292 (UNGA, 2010). Five normative components were applied to the human right to water: (i) availability, (ii) accessibility, (iii) affordability, (iv) safety and (v) acceptability. In turn, to the human right to sanitation, are added the components of guaranteeing privacy and dignity (UNGA, 2010; ALBUQUERQUE, 2014; HELLER, 2015). In addition to the normative content of the HRWS, the fundamental principles of human rights – i.e., equality and non-discrimination; participation and inclusion; responsibility and accountability; progressive reach and maximum use of available resources – must also be strictly observed.

The process of recognizing water and sanitation as rights has proved to be similar to other rights enshrined in the Brazilian constitution. According to Ribeiro (2015), the right is first recognized on an international level and, as Brazilian society begins to understand its scope and importance, it must be expressly recognized by the constitutional order or, alternatively, by ordinary legislation. There is no doubt that, on an international level, access to water and sanitation services is clearly recognized as part of human rights. With regard to the national sphere, there have been attempts by the Brazilian Parliament to include them as fundamental rights in the 1988 Federal Constitution (CF/88) (BRASIL, 1988).

Since 2001, Amendment Proposals for the Constitution (PECs) have been presented with the aim of including sanitation in Art. 6 of CF/88, in the list of social rights (PEC No. 398/2001; PEC No. 7/2010; PEC No. 93/2015; PEC No. 425/2018; BRASIL, 2001, 2010, 2015, 2018, respectively). There is also PEC No 6, from 2021, which aimed to include in Art. 5 that “access to drinking water in adequate quantities is guaranteed to everyone in order to enable livelihoods, well-being and socioeconomic development”.<sup>2</sup> This last proposal is more advanced in terms of the processing procedures, since it has obtained approval in the Senate and is now moving through the Chamber of Deputies. However, the inclusion of sanitation in this article, that of civil and political rights, and not in Art 6, related to social rights, has raised discussions and questions from specialists in the area.

To introduce the debate, the social rights established in Article 6 of the CF/88 (BRASIL, 1988) have been retrieved: “education, health, food, work, housing, transportation, leisure, security, social security, maternity and childhood protection, benefits for the homeless”. Häberle (2013) describes that social rights are those that ensure “individuals a minimum of material goods without which they could not, in practice, make their freedom real”.

According to Piovesan (1996), civil and political rights must be ensured by the State, with neither excuse nor delay – through so-called self-enforcement –; social, economic and cultural rights, in turn, under the terms in which they were conceived and agreed upon, present progressive realization. This definition derives from the understanding that social rights are a positive obligation of the State, i.e., implemented through public policies (RIBEIRO, 2015). Thus, it is understood that sanitation is a social right, since it depends on State action via public policies to be progressively implemented.

It should be noted, however, that, given the fact that sanitation has its own regulatory framework in Brazil (Law No. 11,445/2007, revised by Law No. in Art. 14.026/2020) and given that the obligation to promote sanitation is already established in Art. 23 of CF/88, Silva and Mandarinó (2017) saw no real advantage, from a legal standpoint, of including sanitation in the list of social rights, with regard to implementing sanitation policies. The authors recognized that, although the measures envisaged by the UN and Congress placed sanitation in more prominent position, by attracting the attention of public managers, such an effect is political and symbolic, although, from a legal standpoint, would result in redundancy. This is a controversial position, since the explicitness of the rights to water and sanitation, in CF/88, in addition to its important symbolic effect, subordinates the Judiciary more strongly in its sentences related to access to services.

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2. This and all other non-English citations hereafter have been translated by the authors.

It should be noted, however, that Art. 23, item IX of the Federal Constitution (BRASIL, 1988) defines the common competence of the Union, the states, the Federal District and the municipalities as being “to promote housing construction programs and improve housing conditions and basic sanitation”. By interpreting the article, however, improvements related to housing are explicit, although it is not evident, in turn, that the improvements in basic sanitation cover the entire population, such as the public who access water and sanitation services in spheres of life beyond the household.

Without intending to exhaust the debate, lastly, and in agreement with Ribeiro (2015), it is understood that basic sanitation, as it appears in the CF/88, is not yet considered, in se, a fundamental right, but just a public policy, i.e., it has no status as an instrument that promotes other rights, such as health, food, an ecologically balanced environment, duly constitutionalized rights.

The lack of an interpretation for access to water as a right, for example, is one of the factors that has legitimized situations such as that which occurred in Minas Gerais, where a 34-year-old woman, mother of a 5-year-old child, was taken into custody and detained for five months for violating the seal of the Sanitation Company of Minas Gerais (Copasa), in the Alto Paranaíba Mesoregion. The arrest was revoked only in November 2021, by habeas corpus of the Federal Supreme Court (STF) (DELGADO, 2021). According to Fonseca and Araújo (2021), the punitive solution for water theft becomes even more concerning for two reasons: (i) if the problem is a lack of access to public goods, the solution should come through assistance and the guarantee of rights, to enable a dignified, healthy life. On the other hand, it is (ii) contradictory that the penalty for stealing water from the concessionaire is deprivation of liberty, since access to some sanitation services in Brazilian prisons is somewhat questionable.

### 3. Water and sanitation in public spaces

There are disparities in the implementation of water supply and sanitation services because national sanitation policies tend to be limited to aspects of conventional households, thereby neglecting groups of individuals who depend on solutions in other environments. Little is known, however, about the situation of sanitation in non-domestic spaces, since studies and information systems on the subject are still rare and incipient (CRONK; SLAYMAKER; BARTRAM, 2015; MOREIRA; REZENDE; PASSOS, 2021).

Among the spheres beyond households, it is important to emphasize public spaces, which have also been the stage for international discussions in the context of the right to the city, mainly through the UN-Habitat agency. This agency has

programs to promote public spaces based on the 2030 Agenda and monitors indicators related to SDG 11 – Sustainable Cities and Communities. In the 2030 Agenda, it is established that goal 11.7 will: “By 2030, provide universal access to safe, inclusive, accessible and green and public spaces, in particular for women, children and older persons and persons with disabilities” (ONU-BR, 2015).

For UN-Habitat (2018), public Spaces must be seen as:

[...] multi-functional areas for social interaction, economic exchange and cultural expression among a wide diversity of people and should be designed and managed to ensure human development, building peaceful and democratic societies and promoting cultural diversity.

Public space constitutes a scenario for carrying out numerous activities, from holding festivities through to activities specifically for the commercial sphere, as well as for the movement of people and the provision of infrastructure and means of subsistence for those who are subjected to urban poverty (the homeless, street vendors or recyclable waste collectors). Thus, it should provide benefits for all types of local activities, both formal and informal. Investment in infrastructure in these spaces enables better access to markets, work and public services, especially in developing countries, where more than half of the workforce works in the informal sector. In addition, to ensure that spaces are safe for everyone, design aspects of the space should also be considered, including the provision of infrastructure such as power, water and communication (UN-Habitat, 2015).

Within the scope of Brazilian legislation, it is interesting to highlight some of the norms that address issues related to public spaces. The Civil Code (BRASIL, 2002), in Chapter III – Public Goods in Art. 99, defines these goods as:

- I – those of common use by all members of society, such as rivers, seas, roads, streets and squares;
- II – those of special use, such as buildings or land intended for the service or establishment of the federal, state, territorial or municipal administration, including those of their autarchies;
- III – those which constitute the patrimony of legal entities governed by public law, as the object of either the personal or real right of each of these entities.

Nohara (2019), supported by the interpretation of administrative law, explained that common goods may be enjoyed by everyone, without the need for consent or distinction, since they cover places open to public use and for people to enjoy. The use of public goods may be considered normal – that in accordance with the main purpose of the good – or abnormal – when it serves different purposes,

sometimes in contradiction to the main activity (DI PIETRO, 2014). This author cites the example of a street open to free movement, which would configure its normal use, while the abnormal use would be the holding of parades and celebrations. For administrative law, the latter should only be consented when it is compatible with the main use, without causing prejudice to the normal use of the good.

Faced with these definitions of public spaces, it may be stated that they are contained in public goods for the common use of members of society. Such goods, from items I and II, according to the Civil Code (BRASIL, 2002), are inalienable as long as they retain their qualification. As a result of inalienability, public goods are also imprescriptible, unseizable and impossible to encumber (DI PIETRO, 2014). Furthermore, according to Art. 103 of this Code, the common use of public goods may be free or remunerated in accordance with that which is established by the administrative entity, by means of a law. In addition, these goods are subject to the State's police power, including inspection, regulated use and application of coercive measures to achieve the double objective of protecting the user and preserving public property.

According to Art. 3, item III, of the City Statute, Law No. 10,257 (BRASIL, 2001), it is incumbent upon the Union:

III – to promote, through its own initiative and in conjunction with the States, the Federal District and the Municipalities, programs for the construction of homes and for the improvement of housing conditions, basic sanitation, *sidewalks, public byways, urban furniture and other spaces of public use*; (Wording provided by Law No. 13,146, of 2015) (emphasis added)

Therefore, public spaces must be included in the initiatives of urban policy. On a municipal level, issues related to public spaces must be included in the Municipal Master Plan, since it must draw up long term plans for the use of land for streets, open spaces and residential purposes (SILVA, J. A., 2010). Lastly, the Accessibility Law, No. 10.098 (BRASIL, 2000) should also receive mention, which, in Art. 1, describes the objective of establishing norms and guidelines for promoting accessibility for those members of society with reduced mobility or people with disabilities, through the removal of barriers in roads and public spaces and other places of collective use.

Despite being places of common use, public spaces are often exclusive, especially for people in vulnerable situations, who make up the group of urban poor and include the homeless and street workers. In this context, it is important to mention the concept of socio-spatial vulnerability, which creates the segregation of people with very low socioeconomic levels, who find it necessary to make the

street their place of residence and/or survival. This concept, advocated by authors such as Henri Acselrad (2006) and Susan Cutter (1996), is in line with the debate on the public groups in the public space, who experience a process of vulnerability, which is a social construction and, in part, the result of social inequalities (CIDADE, 2013). When the urban poor are positioned in places far from where there is a concentration of opportunities, because they spend a long period of time away from home working – often on the streets where they find their means of survival – they are only partially served by basic services, such as water and public toilets. Cases of people sleeping on the streets because they live far from their workplace or to save on fares have been reported for some years now (MIRANDA; VELASCO, 2002; MENDES, 2007; LUCCHESI, 2022).

In addition, the regulation of common spaces is one example of how this vulnerability is reproduced (ACSELRAD, 2006), because, since there is an expectation that public space is the representation of a prosperous city, incorporating elements of harmony and cleanliness, the homeless are often removed and street trading prohibited (COLLINS; SHANTZ, 2009). When the public administration acts to inhibit or prohibit the occupation of these spaces, it stigmatizes this public. Based on this, a portion of the population wants and expects this removal to take place, considering it not only appropriate, but necessary (COLLINS; SHANTZ, 2009; STAEHLI; MITCHELL, 2009), thereby potentializing the situation of vulnerability in which these people already find themselves.

With regard to water and sanitation in public spaces, the homeless population was the object of a study in Belo Horizonte, Minas Gerais, which identified the precarious situation of services provided for this public. This scenario is able to reinforce discrimination due to the lack of hygiene and the search for alternative ways to obtain access to water and toilets in public places. The study highlighted the need to include the homeless population in decision-making regarding the provision of water and toilets, as a means of social transformation (NEVES-SILVA; MARTINS; HELLER, 2018).

In addition to the homeless population, other groups fight for inclusion in the public space, such as street workers, who represent yet another interest group in the discussion on social inequalities, and reinforced by the lack of water and sanitation solutions in these spaces. There are, additionally, relevant intersectional aspects to be considered, such as gender, sex and ability (HELLER, 2019).

Many people depend on informal street work either as the source of their main income or to complement it. In the absence of sanitation solutions, they may suffer health problems and, consequently, economic loss, since many work on a self-employed basis and need to be absent when they are not feeling well (HELLER, 2019). Street vendors on Uruguaiana Street, an important commercial center in

the city of Rio de Janeiro, indicated that the main challenge they faced was the lack of public toilets (MOREIRA, A., 2008). In the city of Porto Alegre, where public toilets are available, the main difficulty reported by street vendors was the lack of hygiene material and having to trust someone to take care of their personal belongs while they use the facilities (AYALA, 2015). In São Paulo, the frequency with which workers in the city center used the public toilets was a cause of concern, since it was less than normal. Of the 360 interviewees in the study, 32% reported using the public toilets up to twice a day – it should be noted that most of them spent more than eleven hours away from home. In addition, there are also reports of people changing their eating habits in order to reduce the number of trips to the toilet (IANAMURA, 2006).

Meher and Ghatole (2020) conducted a study with street vendors in India and observed that, of the fifty respondents, 44% presented with symptoms of urinary tract diseases related to the lack of public toilets, especially among women. Alfers (2009) revealed the perspective of street traders and vendors in Ghana, Africa, whose toilets were inadequate and unhygienic, with equipment considered impossible to use. In addition, the vendors also reported the recurrence of diarrhea, related to the poor quality of the water available for consumption.

People with disabilities or reduced mobility, whether they are part of the two previous groups, or not, are also neglected with the lack of public toilets and drinking fountains. If they are part of the vulnerable groups that live or work on the streets, that neglect is even greater. The lack of appropriate solutions for their needs imposes limitations regarding the use of public space and their engagement in social activities (HELLER, 2019). Several obstacles also need to be overcome in urban planning, since the pathways to access public toilets, for example, often contain stairs, steps or narrow spaces, thereby making access impossible for people with physical disabilities, as well as older people, wheelchair users or even parents with prams (GREED, 2003). The Accessibility Law (BRASIL, 2000) states that existing spaces and the corresponding urban furniture must be adapted.

Women and girls are part of another group excluded from public spaces when there is no provision or in situations where there are precarious solutions for public toilets and drinking fountains, since several studies have reported that women use toilets more often than men (HELLER, 2019). Those who work or live on the streets are therefore doubly neglected. The biological need of women and men is different due to the fact that they menstruate and become pregnant, when they urinate more frequently, in addition to frequently taking care of themselves and younger children (GREED, 2016).

Transgender people, by not complying with the heteronormative standard imposed by a binary, sexist tradition, are recurrently excluded from public spaces (MOREIRA, F. D., 2021). In the context of gender plurality, the provision of toilets must be discussed beyond the male/female binary. This highly complex topic calls into question issues that have long been consolidated. Even in academia no consensus has been reached on an appropriate solution (JEFFREYS, 2014; BLUMENTHAL, 2014; ALMAGRO; RODRÍGUEZ, 2016; RAMSTER; GREED; BICHARD, 2018; GREED, 2019). It is a fact that transgender people have frequent narratives regarding the anxiety and fear of using these services, and many of them report that they avoid them (ELLIS; McNEIL; BAILEY, 2014; PLASKOW, 2016; SANDERS; STRYKER, 2016). If these people live or work on the streets, the violation of their rights to water and sanitation is further reinforced.

It is important to state that, although we have shed light onto the most vulnerable groups affected by the lack of public drinking fountains and toilets, the usefulness of this urban furniture goes beyond the notion of serving only the aforementioned groups: they are essential services for the quality of life in the city and for the enjoyment of public spaces by all members of society.

#### 4. Methods

Considering the objective of the study, exploratory research was developed through the document analysis of the National Basic Sanitation Law (LNSB) No. 11.445 (BRASIL, 2007), amended by Law No. 14.026 (BRASIL, 2020), of the National Plan of Basic Sanitation (Plansab) (BRASIL, 2013) and the Proposed Amendments to the Constitution (PEC) No. 2/2016 (BRASIL, 2016) and No. 6/2021 (BRASIL, 2021). In these documents, the search keyword was “universal/universalization”. Other legal documents that address the discussion on households were also analyzed, including the Civil Code (BRASIL, 2002), the Penal Code (BRASIL, 1940) and the City Statute (BRASIL, 2001) in the research corpus, searching with the word “household” with the purpose of identifying the concept of this term in Brazilian legislation. For this, on the website of the Superior Court of Justice (STJ), searches were also carried out on decisions related to the homeless population and the keyword “household”. A monocratic decision was observed that included this criterion (2020/0133878-0; STJ, 2020). A content analysis was used (BARDIN, 1977) based on the absence/presence of the terms of interest (universalization, household, public toilets, public drinking fountains, street dwellers/street population/homeless) and their definitions in the norms analyzed to understand if and how Brazilian public sanitation policy contemplates neglected groups with regard to the lack of water and sanitation services in public spaces.

## 5. Results and discussion

As the provision of drinking fountains and toilets is an intersectoral public service that also encompasses urban policy, other legislation was sought to provide an overview in addition to sanitation, such as the City Statute, Law No. 10,257 (BRASIL, 2001), which provides for the general guidelines of urban policy in Brazil. Art. 2 of the Statute prescribes:

Art. 2 Urban policy aims to organize the full development of the social functions of the city and urban property, through the following general guidelines:

I – to guarantee the right to sustainable cities, understood as the right to urban land, housing, environmental sanitation, urban infrastructure, transportation and public services, work and leisure, for present and future generations; [...]

V – *to offer urban and community facilities, transport and public services suited to the interests and needs of the population and local characteristics; [...]* (emphasis added).

Although the offer of urban equipment is foreseen in order to guarantee services for a sustainable city, as a right, there is, however, no specification regarding such services – the definition is down to the municipal executive branch. Therefore, on a national level, there is no guideline that encompasses the mandatory provision of public toilets and drinking fountains in municipalities. A recent study (MOREIRA, F. D. et al., 2021) analyzed bills on public toilets in Belo Horizonte and identified that, despite a certain understanding of the importance of this urban furniture, little priority is given to the problem, a logic reinforced by the normative void on both the state and federal levels.

In the field of sanitation, the national guidelines for basic sanitation in Brazil, established under Federal Law No. 11,445 (BRASIL, 2007), put forward fundamental principles that dialogue with the principles of human rights and guarantee the population access, according to their needs. These are safety; quality and regularity; universalization of access; social control and transparency of actions; completeness.

The first version of Plansab, the elaboration of which was foreseen by Law No. 11.445 (BRASIL, 2007), was released in 2013, and revised in 2019, although still without formal approval. One of the established goals for this plan was to achieve universal access to basic sanitation, a factor of crucial importance for economic and human development, and which are linked to the fundamental right of health and urban development (SILVA, B. B., 2017).

Based on the solutions adopted in Brazilian households, Plansab disclosed the characteristics regarding adequacy and the existing deficit in Brazil with regard to basic sanitation. Among the many contributions made by Plansab, one outstanding

feature was the understanding that the lack of access to sanitation in the country was not homogeneously distributed. The greatest lack of services occurs in rural areas and in peripheral regions of large urban centers, places where the low-income population predominates (GALVÃO JUNIOR, 2009; SAIANI, 2007; LEONETI; PRADO; OLIVEIRA, 2011). Although the plan sheds light on vulnerable populations, which largely constitute the deficit of basic sanitation services, there is a gap in guaranteeing services in other spheres of life or in non-conventional household spheres, with an emphasis on public spaces, the object of this study.

Thus, it is important to move forward in the discussion on the universalization of public sanitation services. In the new wording given to Law No. 11,445 (BRASIL, 2007), by Law No. 14,026 (BRASIL, 2020), in its second paragraph, item I, it is stated that one of the fundamental principles on which public sanitation services are based is the “universalization of access and effective provision of the service”. However, ultimately, how may universalization be interpreted, especially with regard to water and sanitation services? According to paragraph 3, item III:

III – universalization: *the progressive expansion of access to basic sanitation for all occupied households*, in all services provided for in item XIV of the caput of this article, including adequate treatment and the final disposal of sewage (emphasis added).

The italics highlight an excerpt that was already in the text of the aforementioned law in 2007. The focus on attending households is reflected both in Plansab and in municipal public policies and their developments, namely, municipal basic sanitation plans. The National Sanitation Information System (SNIS) also focuses on water and sewage services on a household level. With emphasis on households, given by the wording of the law that brings the guidelines for the sector, the basic sanitation that is planned and executed has little scope for water and sanitation services in other spheres of life.

Based on the definition of the universalization of the LNSB services, initially, tends to conclude that public spaces are excluded from basic sanitation services, disregarding vulnerable public groups, such as the homeless and street workers. Therefore, it is important to discuss the concept of household before returning to the subject of universalization.

The concept of household presented by the Human Rights Committee, as a place where a person resides or carries out their usual occupation (UNGA, 2019), may be correlated with the concept of household defined by the Civil Code (BRASIL, 2002) (Art. 70 to 78), which not only includes residences, but also places where people exercise their professions, as well as military bases and prisons. Based on

this interpretation, it would therefore be possible to discuss access to sanitation in some public spaces – such as prisons, schools and conventional workplaces –, since the universalization addressed by Federal Law No. 11,445 (BRASIL, 2007), amended by 14,026 (BRASIL, 2020), is the progressive expansion of access to basic sanitation for all occupied households. However, can all public spaces be legally interpreted as households?

This answer may be found in the Penal Code (BRASIL, 1940) and exemplified with a recent ruling by the Supreme Court of Justice. In the Penal Code, in Art. 150, it is stated that: “entering or staying clandestinely or deviously, expressly or tacitly by someone entitled to it, in any household or on its premises is domestic violation”. Pursuant to paragraphs 4 and 5 of the Penal Code, it is necessary that:

§ 4º – The expression. “household” includes:

I – any inhabited compartment;

II – an occupied room of collective housing;

III – a compartment unopen to the public, where someone exercises a profession or activity.

§ 5º – The expression “household” does not include:

I – accommodation, inn or any other collective dwelling, while open, except for the restriction of number II of the previous paragraph;

II – tavern, gaming house and others of the same genre.

Given the definition by the Penal Code (BRASIL, 1940), it may be understood that a public space is not a household space even if people use it as a home or workplace, since it is open to the public. However, Monocratic Decision 2020/0133878-0 offers a broader view of this interpretation, since it establishes that there is no difficulty in recognizing, depending on the case, the protection of inviolability of household in favor of a homeless person who uses a certain street place of residence (STJ, 2020). Despite this specific case, when searching the STJ database related to “household” and “homeless person”, it is noticed that the conclusion regarding most cases is that the homeless population does not have a definite address.

Therefore, in general, the public space on the street, with free access, may not be considered a household. This finding also goes against the concept of household used by the Brazilian Institute of Geography and Statistics (IBGE). Two essential criteria have to be met for a space to be considered a household: separation and independence. Separation in the sense of isolation, with the existence of walls and ceiling, and independence in the sense that access does not need to be made through other households (IBGE, 2010).

Although it may seem an obvious finding, when resuming the discussion on the universalization of sanitation services in the law at a federal level, an impasse is encountered. If public space is not included in the definition of household, it would

not be included in the definition of universalization either. The law, therefore, excludes sanitation services in these spaces where vulnerable groups live and work, and which are also constituted in spaces where there is a huge movement of people moving around for leisure or in transit.

Despite this evident definition in the legislative text, there is an element that may be able to open precedents for the discussion on the possibility of sanitation in public spaces being provided for in the new text as per Law No. 14.026 (BRASIL, 2020), in its Art. 11-B:

Contracts for the provision of public basic sanitation services must define universalization targets that guarantee the provision of drinking water to 99% (*ninety-nine percent*) of the population and to 90% (*ninety percent*) of the population with water collection and sewage treatment by December 31, 2033, as well as quantitative targets for a non-intermittent supply, reduction of losses and the improvement of treatment processes. (emphasis added)

By stating that the contracts for the provision of services to supply water and sewage systems should define the goals for the population to obtain universal access and not for the occupied households, there is a possible interpretation gap for the inclusion of the homeless population, for example, which protects this part of the public. It is strange, however, that the definition of universalization in the same law mentions, on the one hand, occupied households and, on the other, addresses the universalization of access for the general population. However, since there is mention of the term “universalization” in Art. 11-B, and in the same legal framework universalization is related to the household, it must be concluded that this is the population residing in formal housing and, therefore, not characterized as part of the vulnerable groups that live and work on the streets.

Whether this ambiguity in the law was a slip or the intention of the legislator, it is only during the implementation of this policy that the interpretation of this issue will be fully known. The fact is that the “new framework” had the central objective of attracting private capital to the sanitation sector (ARAGÃO; D’OLIVEIRA, 2020). The risks of this conception are also known in relation to recognizing sanitation as a fundamental right, based on three elements: (i) profit maximization, (ii) natural monopoly of services and (iii) power imbalance (HELLER, 2020). Although there are articles in the law that bring elements of economic and social sustainability, as is the case of 48 and 49, which include the prioritization of sanitation services in areas occupied by low-income population, as well as articles 11-A, § 3, and 11-B, § 9, which deal with tariff reasonableness, or numbers 12, 23, 29 and 31, which provide for the institution of subsidies to users, it may not be considered inclusive, since it does

not contemplate vulnerable groups of people deprived of permanent residences. It must be recognized, however, that this omission was already observed in the original Law No. 11,445 (BRASIL, 2007; D'OLIVEIRA, 2020).

With regard to the PECs, in its justification, No. 2/2016 (BRASIL, 2016) highlights the importance of basic sanitation as a condition for guaranteeing universal health and the state's commitment to the subjective rights of citizens to a dignified and healthy life, by placing it side by side with other social rights, such as health, education and food, among others included in Art. 6 of the Federal Constitution (BRASIL, 1988). Thus, if sanitation is included among social rights, the importance of services for the general population and not just those living in households is reinforced, although it is known that the interpretation of the concept of universalization in the sanitation sector essentially prioritizes household access. This PEC is currently in progress in the Federal Senate and, if approved, could be a tool in the fight for the inclusion of sanitation services in public spaces. The PEC No. 6/2021 (BRASIL, 2021) proposes to include the right to drinking water in Art. 5 of the Constitution, which deals with political and civil rights, by granting that drinking water must be guaranteed to all in adequate quantity. Although it does not comprehensively include sanitation services, the State must guarantee the availability of water for all members of society, regardless of whether the population lives in a household or not. If this PEC is approved, then that of No. 2/2016 (BRASIL, 2016) will not be, in view of the fact that the right to water then enters the list of civil and political rights.

In Figure 1 it is possible to visualize the relationship between the aforementioned laws and the definition of the universalization of sanitation services.

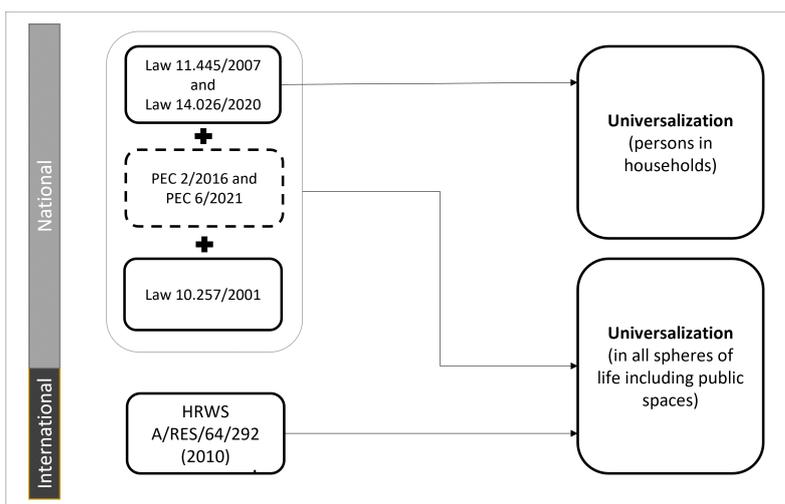


Figure 1. Relationship between the norms studied and the universalization of sanitation

Source: Own elaboration (2023).

It should be noted that the provision of sanitation services and attending to it from the perspective of a right, in public spaces, does not imply an argument for not offering quality housing in cities and/or dignified and dignified work for the population that is living or working precariously on the streets. Guaranteeing the human rights to water and sanitation in the public space goes beyond issues related to vulnerable public groups, which are the object of this study, with benefits for the creation of quality public spaces for the enjoyment of the entire population.

## 6. Final considerations

While water and sanitation services are recognized as human rights on an international level, in Brazil, they are not yet considered a basic right. Among the possibilities discussed, belief is held in the importance of including basic sanitation as a social right, which may contribute to guaranteeing these human rights beyond the household, especially in public spaces.

Such spaces are places where water and sanitation services must also be provided to ensure the quality of life for people who transit, work and live on the streets. Despite this, the Brazilian legal framework referring to the guidelines for sanitation services is exclusive, and considers universalization only for occupied households. Although they have an intersectoral characteristic with urban policy, social assistance and public health, public toilets and drinking fountains are not the target of specific legislation that presents guidelines for these services. No sector, therefore, assumes the fact that they are necessary, and it is up to the municipality to interpret this demand according to local characteristics and convenience.

With no legal guidelines, state and municipal sanitation plans are unlikely to reflect these aspects, much less the reference standards in the regulatory sphere. Thus, the sanitation sector will refrain from providing services in public spaces, mainly because it is a service that requires frequent maintenance, a non-priority discussion in the municipal administration; in addition, there are also issues related to depredation and vandalism. It is interpreted that, among other factors, this viewpoint is due to the lack of legislation that includes these services.

Faced with these dilemmas, some pathways may be visualized: (i) an amendment to the text of Law No. 11,445 (BRASIL, 2007), with a view to including elements of the normative content of the human rights to water and sanitation in public spaces defined by the UN, as well as providing for the most neglected public groups in the absence of these services; (ii) contemplation, by the reference norms edited by the National Water and Basic Sanitation Agency (ANA), for regulatory issues of these services in public spaces; (iii) the creation of a specific guideline for water and sanitation services in public spaces, due to their particularities

and intersectorality. The approval of PEC No. 2/2016 (BRASIL, 2016) and/or No. 6/2021 (BRASIL, 2021) will also be fundamental in formalizing the perspective of water and sanitation as a human right that extends to all people, reinforcing that universalization goes beyond the household level. Regardless of the option followed, which are not mutually exclusive, the normative elements of the HRWS in public spaces must be reflected in all of them, contemplating vulnerable groups and also the general public that enjoys these urban facilities.

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