Coming 'Home': the right to housing, between redistributive and recognitive justice

Marie-Pierre Granger

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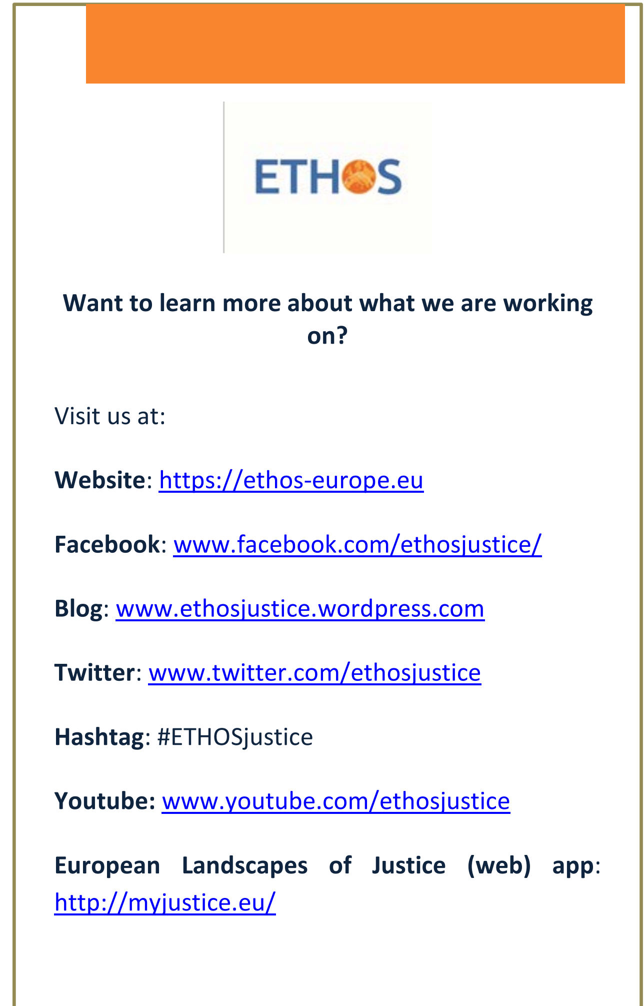

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About ETHOS

ETHOS - Towards a European THeory Of juStice and fairness, is a European Commission Horizon 2020 research project that seeks to provide building blocks for the development of an empirically informed European theory of justice and fairness. The project seeks to do so by:

a) refining and deepening the knowledge on the European foundations of justice - both historically based and contemporary envisaged;
b) enhancing awareness of mechanisms that impede the realisation of justice ideals as they are lived in contemporary Europe;
c) advancing the understanding of the process of drawing and re-drawing of the boundaries of justice (fault lines); and
d) providing guidance to politicians, policy makers, advocacies and other stakeholders on how to design and implement policies to reserve inequalities and prevent injustice.

ETHOS does not merely understand justice as an abstract moral ideal, that is universal and worth striving for. Rather, it is understood as a re-enacted and re-constructed "lived" experience. The experience is embedded in firm legal, political, moral, social, economic and cultural institutions that are geared to giving members of society what is their due.

In the ETHOS project, justice is studied as an interdependent relationship between the ideal of justice, and its real manifestation – as set in the highly complex institutions of modern European societies. The relationship between the normative and practical, the formal and informal, is acknowledged and critically assessed through a multi-disciplinary approach.

To enhance the formulation of an empirically-based theory of justice and fairness, ETHOS will explore the normative (ideal) underpinnings of justice and its practical realisation in four heuristically defined domains of justice - social justice, economic justice, political justice, and civil and symbolic justice. These domains are revealed in several spheres:

a) philosophical and political tradition,
b) legal framework,
c) daily (bureaucratic) practice,
d) current public debates, and
e) the accounts of the vulnerable populations in six European countries (the Netherlands, the UK, Hungary, Austria, Portugal and Turkey).

The question of drawing boundaries and redrawing the fault-lines of justice permeates the entire investigation.

Alongside Utrecht University in the Netherlands who coordinate the project, five further research institutions cooperate. They are based in Austria (European Training and Research Centre for Human Rights and Democracy), Hungary (Central European University), Portugal (Centre for Social Studies), Turkey (Boğaziçi University), and the UK (University of Bristol). The research project lasts from January 2017 to December 2019

Executive Summary

This synthetic comparative report, based on *six country reports* (published as working papers on the ETHOS website) covering five EU member states (Austria, Hungary, the Netherlands, Portugal, the United Kingdom) and one candidate country (Turkey), identifies and analyses the conceptions of justice which are institutionalized in legal frameworks in Europe, focusing on redistributive justice in the context of housing. More specifically, it investigates how access, retention and arrangements of one's home are regulated under domestic law, whether domestic legal rules on the matter are influenced by European (and international) legal instruments and mechanisms, and which conceptions of justice legal arrangements explicitly or implicitly support.

The report first addresses key conceptual and methodological issues, before exposing relevant features of housing situations and policies in Europe. It then assesses whether international and European legal frameworks, analysed in ETHOS deliverable 3.3, exert any influence on the institutionalization of particular conceptions of redistributive justice in the selected countries. It continues with examining whether national constitutional frameworks endorse particular notions of redistributive justice. Finally, the report compares the domestic regulations of access to social housing and benefits on the one hand, and protection from eviction on the other. For each, it pays particular attention to the way legal frameworks cater for the particular needs of vulnerable groups, such as persons with disabilities, members of ethnic minorities, refugees, asylum-seekers, and undocumented migrants. It concludes on identifying key trends in the institutionalization of justice claims in laws in the context of access to housing in Europe.

The analysis reveals that the institutionalization of justice in, and through, law, and the institutional recognition of housing justice claims, in particular through legal rights and duties, carries out implications for the 'what', 'who' and 'how' of justice. First, the increased relevance of international legal instruments, when combined with restrictions in public resources, enhances prioritarian approaches to distributive justice, at the expense of universalistic, egalitarian or sufficientarian variants. Second, the dynamics of prioritization leverage elements of recognitive justice in defining the personal scope of redistributive justice, with notions of deservingness regularly superseding needs, in a manner that favours certain vulnerable groups (eg persons with physical disabilities) and exclude others (eg mentally disabled persons, irregular migrants). Third, increasingly, access to social housing or benefits is regulated at local level, which contributes to excluding mobile individuals (more often than not foreigners or marginalised groups) from the scope of redistributive justice schemes. Moreover, legal regulations fail to capture, and address, injustices created in informal housing relations, which, here again, tend to affect more marginalized groups. Finally, legal and judicial mechanisms tend to focus on

providing procedural justice mechanisms, reinforcing but rarely challenging 'political' commitments made to particular visions of redistributive or recognitive justice.

Table of Contents

Acknowledgments* ... *ii

Executive Summary* ... *2

Table of Contents* ... *3

List of Abbreviations* ... *5

1) Introduction* ... *6

2) Conceptual and methodological issues: challenges for the study of law and the institutionalization of justice in housing* ... *7

2) Housing situation and policies, and the legal institutionalization of justice claims* ... *12

3) The right to housing – the challenges of translating redistributive justice claims into 'superior' legal rights* ... *17

3.1 International and European instruments and the right to housing ... 18

3.1.1 The 'right to adequate housing' under international law ... 18

3.1.2 The 'right to housing' under the European Social Charter and Revised European Social Charter ... 24

3.1.3 The ECHR and the development of 'the right to one's home' ... 26

3.1.4 EU law market law and the 'right to social housing assistance' and 'right to accommodation' ... 31

3.2 The right to housing in national constitutional law: a timid presence ... 38

4) National regulatory frameworks and access, retention and maintenance of one's home* ... *43

4.1 The national regulation of social housing and housing benefits ... 44

4.1.1 Access to social housing and the allocation of housing benefits under national law ... 46

4.1.2 Access to social housing and the allocation of housing benefits for persons with disabilities..................51

4.1.3 Access to social housing and the allocation of housing benefits for other vulnerable groups 54

4.2 Eviction in national law – moving the weight of redistributive justice 58

4.2.1 General rules 59

4.2.2 Eviction law and vulnerability – lack of explicit acknowledgment? 65

5) Conclusions: prioritizing justice through law, between redistribution and recognition 66

List of Abbreviations

CERD	Convention on the Elimination of all forms of Racial Discrimination (UN)
CESCR	Committee on Economic, Social and Cultural Rights (UN)
CESCR-OP	Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (UN)
CFR	Charter pf Fundamental Rights (of the European Union)
CJEU	The Court of Justice of the European Union
CRC	Convention on the Rights of the Child (UN)
CRPD	Convention on the Rights of Persons with Disabilities (UN)/Committee on the Rights of Persons with Disabilities
CRPD-OP	Optional Protocol to the Convention on the Rights of Persons with Disabilities
COE	Council of Europe
EEA	European Economic Area
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ETHOS	Towards to a European Theory of Justice and fairness (H2020 EU funded project)
ECtHR	European Court of Human Rights
ECSR	European Committee on Social Rights
EU	European Union
FRA	Fundamental Rights Agency of the European Union
ICCPR	International Covenant on Civil and Political Rights (UN)
ICESCR	International Covenant on Economic, Social and Cultural Rights (UN)
IHR	International Human Rights
RESC	Revised European Social Charter
TEU	Treaty on the European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights (UN)
UPR	Universal Periodic Review

1) Introduction

This comparative report, entitled ‘Coming “Home”: the right to housing, between redistributive and recognitive justice?’ seeks to identify and analyse which conceptions of justice are *institutionalized in legal frameworks in Europe*, focusing on *redistributive* justice in the context of *housing*. More and more people in Europe, in particular those on lower income or marginalized, are finding it hard to secure suitable and affordable accommodation. States’ gradual disengagement from the direct provision of social housing and housing benefits, and speculative and exploitative practices, push many into housing poverty, and even severe forms of deprivation, such as homelessness. This makes housing a particularly relevant context for exploring the capacity of legal frameworks to recognise and address injustices of maldistribution, and assess which vision(s) of distributive justice (if any) informs them.

The report builds, first, on a *conceptual background paper* (ETHOS Deliverable 3.3 ‘Justice in Europe Institutionalization: Legal Complexity and the Rights of Vulnerable Persons’), [1] which included an analysis of international and European legal frameworks relevant to core aspects of housing policies and, second, on *six country reports* (five EU member states, Austria, Hungary, the Netherlands, Portugal, the United Kingdom;[2] and one candidate country, Turkey), prepared for the purpose of this particular research task. [3] Each country report addressed a set of targeted questions,[4] which aimed at gathering information on how *access, retention and arrangements of one’s home were regulated under domestic law*, whether *domestic legal rules and policies* on the matter were *influenced by European (and international) legal instruments and mechanisms* and *which conceptions of justice national law explicitly or implicitly support*. As the legal frameworks affecting *access, retention and arrangements of one’s home* are very complex, and operate in very varied housing policy contexts, the questions focused on two aspects of housing which are particularly relevant from the perspective of redistributive justice, *access to social housing and housing benefits* on one hand, and *eviction* on the other. All six country reports paid particular attention to the situation of disabled persons and their housing needs, whilst each country report

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[1] Marie-Pierre Granger, Barbara Oomen, Orsolya Sálat, Tom Theuns and Alexandra Timmers, ‘Justice in Europe Institutionalization: Legal Complexity and the Rights of Vulnerable Persons’ (ETHOS deliverable 3.3, June 2018).

[2] With regard to the United Kingdom, bearing in mind that it includes different legal systems, the focus will be on the law applicable to England.

[3] Available as working papers on the ETHOS website (https://ethos-europe.eu/), Veronika Apostolovski and Markus Möstl, ‘Right to housing – National report – Austria’ (8 February 2018); Orsolya Sálat, ‘Right to housing – national report for Hungary’ (February 2019); Laura M. Henderson ‘Right to housing – National report - Netherlands’ (February 2018); Jessica Morris and Laura Brito ‘Right to Housing - National report Portugal’ (February 2019); Pier-Luc Dupont, ‘The Right to housing for disabled persons and refugees: UK report’ (February 2019); Ulas Karan ‘Right to housing – National Report Turkey’ (February 2019).

[4] See questionnaire in Annex to Granger et al. 2018, n 1, Annex 2, 158.

focused, in addition, on another group identified as particularly vulnerable in that particular national and policy context. These were refugees, asylum-seekers and irregular migrants in Austria, the Netherlands, the United Kingdom, and Turkey, and members of ethnic minorities in Hungary and Portugal. The analysis reveals that *the institutionaliziation of justice in, and through, law, carries out implications for the 'what', 'who' and 'how' of justice*.

The report first addresses key conceptual and methodological issues pertaining to studying law with a view to teasing out the conceptions of justice that are diffused in legal institutions in Europe, before exposing selected features of housing situations and policies in Europe which are particularly important for assessing the contextual relevance of particular legal instruments. It then reviews core feature of international and European legal frameworks, drawing on Deliverable 3.3, assessing the extent to which these 'external' instruments influence, or not, the legal institutionalization of particular conceptions of redistributive justice in the context of housing in the six selected countries. It also examines whether national constitutional frameworks endorse particular notions of redistributive justice, through a constitutional 'right to housing' or 'right to a home' or equivalent. Finally, in the last two sections, the report compares the domestic regulations of access to social housing and benefits on the one hand, and protection from eviction on the other. For each, it pays particular attention to the way legal frameworks cater for the needs of certain vulnerable populations, such as persons with disabilities, as well as members of ethnic minorities, refugees, asylum-seekers, and undocumented migrants. It concludes on identifying key trends in the institutionalization of justice claims in laws regulating access, retention and maintenance of one's home in Europe.

2) Conceptual and methodological issues: challenges for the study of law and the institutionalization of justice in housing

This synthetic report, like the country reports, focuses on *legal rules and practices.* These, for the purpose of this particular research task, refer essentially to *legal interpretative practices* which contribute to identifying what the relevant law is and what it means. They include the judicial interpretation and application of, for example, Treaty, constitutional or legislative provisions by courts and tribunals in concrete cases (i.e. case law); the development of legal rules and principles by courts themselves, based on the doctrine of precedent, or precedent-like practice (e.g. CJEU's '*jurisprudence constante*'); and clarifications provided by non-judicial bodies endowed with interpretative functions and authority (e.g. national human rights bodies, non-discrimination authorities, ombudsperson, UN committees, etc.). In other words, this report, like the country reports which serve as its

empirical basis, scrutinizes what one could call the *'law-in-books'.* It does not investigate whether laws are actually enforced through policy instruments, or applied and respected in practice, and what implications this has for assessing whether law *de facto* contributes to a more just society. For the purpose of this research task, we take the view that law, irrespective of whether it is applied or not, is *the mode of 'institutionalization' par excellence*. 'Turning something into law' *formally embeds particular beliefs, norms, or values* for a given society. Our point is therefore that looking at *the law itself* can tell us something about *a society's 'official' projection of justice*. We are conscious of the fact that it may be one held, and even imposed, by only a minority of society's members, or its governing elite, or that it may serve instrumental purposes, whether internal (to please certain influential domestic constituencies) or external (to secure international recognition or agreement). Yet, it remains an important formal expression of a particular society's vision of justice, and as such, deserves attention of its own, and independently of its practical impact.

Although focused on 'the law-in-books', this report does not offer a traditional doctrinal ('black letter law') analysis, concerned mostly with describing and evaluating the nature and quality of legal norms and reasoning. Rather, it takes an *external* stance, which consists in *analysing law and legal interpretative practices* through a *justice perspective*, informed by *political philosophy and sociological approaches,* as explored in various ETHOS deliverables, and inspired by Fraser's tripartite conception of justice as *(re)distribution, recognition* and *representation*.[5] By critically examining, through justice lenses, specific components of the law, or rather how legal systems regulates certain aspects of life in society, we hope to gain *a better understanding of what a particular society projects as being just or unjust, and which kind of injustices it formally recognises and commits to address and remedy*.[6] In the process, we also hope to *uncover 'institutionalized obstacles' to justice* which may 'prevent some people from participating on a par with others, as full partner in social interactions'.[7]

The focus in this report is on domestic law, since relevant international and European legal frameworks have already been identified and analysed in Deliverable 3.3. This report nonetheless regularly refers to International and European legal instruments, to the extent that they affect domestic legal frameworks, and pays

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[5] This report relies mostly on her conception as exposed in Nancy Fraser, *Scales of Justice: reimagining Political Space in a Globalizing World* (Columbia University Press, 2009).
[6] This is not to say that it will always translate into practice, or that it even truly reflects the views of a particular society, or a majority of its members, or even that of its government or elites. Indeed, legal norms may well, at times, divert significantly from a society's dominant moral views or culture. Law may even serve instrumental purposes, by projecting a 'false' image of society, with the view to achieve specific goals (for example, a country may sign up to an international instrument for the protection of human rights, or include a particular right in their constitution, or adopt legislation affording enhanced protection to a defined right, in order to gain membership to a particular organization, or secure a trade agreement).
[7] Fraser 2009 n 5, 16

particular attention to *competing visions of justice encapsulated in*, respectively, *international human rights treaties, European legal instruments, and national constitutional provisions*, and how these are resolved through legal mechanisms (for instance, by resorting to legal devices, such as the doctrines of supremacy, direct effect, consistent interpretation, constitutional identity exception, margin of appreciation, proportionality test, and so on). The report also points to instances where *national and international/European law are mutually reinforcing in projecting a specific understanding of justice*, which may, at times, *not be shared or supported by a significant part of the population, or by central or local governments*, and how law deals with these *contradictions* (for instance, by allowing or, on the contrary, restricting judicial review of administrative, executive or legislative acts or omissions).[8] This analysis directly relates to the *'how'* of justice, and notably *the interactions between formal institutions and civil society*, and the need to rethink the *structures of governance*, including those that aim at debating the 'what', and determining the 'who' of justice .[9]

This comparative report scrutinizes *domestic legal rules and 'interpretative' practices* on *the 'right to housing',* through the *lenses of (re)distributive justice*. The main idea is to explore whether law seeks to redress injustices through some form of 'reallocation' of resources to ensure that all members of society have 'access to the resources they need in order to interact with others as peers'.[10] A range of domestic and international legal frameworks and mechanisms intersect in a manner, which affect access, retention and arrangement of one's home, and they cannot be comprehensively addressed in this report. Here, we chose to focus on two which we have identified as particularly relevant to assessing distributive justice, that is the legal rules which *define and determine access to social housing and/or housing-related benefits* and those which *regulate eviction and expulsion from one's home*. The first explores whether, and how, society as a whole endorses the redistributive burden and define its scope (collective responsibility), whilst the second examines how particular (private) actors' freedom may be restricted as part of a redistributive effort (individual responsibility). Regularly, the redistributive dimension of justice, as institutionalized in legal rules, comes into close *contact with justice as recognition*, in that cultural norms, and the *status* assigned to certain individuals or groups in society, *impact on the priorities and boundaries of the individual and collective redistributive effort*. The connections and tensions between these two facets of justice, well addressed and documented in scholarship on justice, and notably Fraser herself,[11] receive special attention.

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[8] For more on this, refer to Granger et al. 2018, n 1.
[9] Fraser 2009 n 5, 67.
[10] Fraser 2009 n 5, 7.
[11] Fraser 2009 n 5.

The notion of *justice as representation* is not systematically explored, and rarely comes up in an explicit manner. In relation to housing, it essentially materializes in terms of the allocation of *policy competences across levels of governance.* Rules concerning access to social housing or housing benefits are often made at regional or even local level. This may result in inequalities across regions or cities, in terms of resources and entitlements. This is not to say that the *political dimension,* which underlies justice as representation, is missing though. Rather, it is diffused across the analysis, and contributes to developing an *understanding of the 'how' of justice.*

The institutionalization of justice in, and through, law, carries out implications for the what, who and how of justice. In relation to the *what* of justice, *certain justice claims are, for instance, more amenable to legal translation that others*. Law can be a tight suit, and not all justice claims can be easily fitted in legal terms, or effectively remedied through legal rules and processes.[12] Where they can, they may still require a substantial rethinking of legal concepts or methods, or even paradigmatic change in legal frameworks. For instance, the legal formulation of justice in housing matters - the right to housing - is often, like many other so-called socio-economic rights, classified as a 'second-generation' right, as opposed to political and civil rights, labelled 'first generation' rights. Many of these so-called second generation rights, even when given legal recognition, are still generally thought of as not creating 'substantive' rights for individuals, but as serving programmatic functions, leaving it to states to take 'positive' measures towards their realisation. This classical typology, and implicit hierarchy (or sequencing) between rights, is contested and flies in the face of the principle of indivisibility of human rights; yet, it remains influential, and has an impact on the reach and leverage of the right to housing in domestic settings, including in its capacity to affect the (re)allocation of resources. The general reluctance to recognise the 'justiciability' of the right to housing (for instance, by denying it direct effect, where it is recognised as a right in international law),[13] suggests that many legal systems are still ill-equipped to deal with redistributive demands framed as social rights, whilst they are – or have become – more receptive to recognitive claims, which fit better the individualised approach and liberal orientationswhich increasingly characterizes them.

In relation to the *who* of justice, framing redistributive justice as legal entitlements (ie a 'right to…') necessarily engage, but also challenge, traditional 'frames'. In legal terms, these often translate in terms of 'jurisdictions', which can be determined by the subject-matter of the claim (material), the territory on which a claim arises (territorial) or the time when a claim is made (temporal), but also related to the identity of the

[12] For a similar point, see Dominique Clément, 'Human rights or social justice? The problem of rights' inflation' (2018) 22:2 *The International Journal of Human Rights* 155-169.
[13] E.g. in Austria (see Apostolovski and Möstl 2019 n 3, 2.

claimant (personal). Legalized justice claims play with jurisdictional lines, in a manner which can contribute to include or exclude certain individuals or groups. For instance, under national law, a foreigner living in EU member state X may not be eligible for housing subsidies; however, if she brings herself under the jurisdiction of EU law, for instance by the virtue of being a worker from another EU member state Y, she would be entitled to such benefits on an equal basis with nationals. [14]

Finally, in relation to the *how* of justice, and closely tied to the political dimension, it is important to realise that *framing justice claims as legal claims* has an *enabling* effect for certain actors, but may *disable* others. Indeed, the reliance on law and legal mechanisms to enshrine and pursue certain visions of justice obviously empowers those who can make and change law, that is governments and legislators, whether at central or local levels, but also courts, and those bodies and personnel that are responsible for implementing and applying it (e.g. ministries, agencies, social services, civil servants, etc.). It also gives a special influence to a defined professional group, or 'élite', namely lawyers, and those who can mobilise them.[15] Law, conversely, tends to marginalizes actors who are not - or do not have easy access to - law-makers, interpreters and enforcers, and legal advice and support. It is also particularly irrelevant to those who operate 'informally'. For instance, laws on eviction matter little for tenants in countries where an important part of the housing market is 'undeclared' (such as in Hungary). [16] Moreover, whilst law can make, and protect, space for a broad range of representative and participatory processes (eg consultations, protests, litigation, etc.), it may also work to the opposite. In that sense, it can constrain certain actors of justice such as social movements, or civil society organizations, or more informal modes of conflict resolution. [17] Legal norms and mechanisms also favours certain modes of interests' representation, such as (strategic) litigation, as opposed to more political representative processes. These follow different dynamics, which is not without an impact on substantive justice outcomes.

In line with the purpose of the ETHOS project, the main research objective, at least initially, was to understand whether there is *any common, or dominant, conception of justice as (re)distribution across European*

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[14] See Granger et al. 2018 n 1.

[15] For a reference text, see Marc Galanter 'Why the haves come out ahead: Speculations on the limits of legal change.' (1974) 9 *Law & Society Rev.* p. 95. On the dynamics of legal mobilization in Europe, see Lisa Conant, Lisa, et al. 'Mobilizing European law'(2018) 25:9 *Journal of European Public Policy* pp. 1376-1389.

[16] Nóra Teller and Eszter Somogyi (with the contribution of Nóra Tosics) 'Social context, evictions and prevention measures in Hungary' in Padraic Kenna, Sergio Nasarre-Aznar, Peter Sparkes, and Christoph U. Schmid (eds), *Loss of homes and evictions across Europe* (Edward Elgar, 2018) 141-161.

[17] Fraser 2009 n 5, 68-70.

legal systems in housing matters, and identify any *trend*, which could serve as *an empirical foundation for rethinking justice in Europe*. As previous studies and the empirical research make clear, the three dimension of justice identified by Fraser*, (re)distribution, recognition and representation,* are intertwined, and interact, and it is difficult to keep them analytically separate in a watertight fashion. Moreover, these facets of justice do not neatly align with the way law traditionally conceptualises justice.[18] Indeed, as alluded to above, legal systems tend to formulated justice claims as legal rights (for instance, the 'right to affordable housing') and corresponding legal duties (such as the duty of the state to provide social housing, or subsidies to secure housing at an affordable cost on the private rental market, or the duty to regulate rent-increase or levels). Moreover, they follow different organizational logics. For instance, legal systems tend to distinguish between *procedural* and *substantive justice*, or between the *admissibility* of legal actions and arguments on the *merits*. They, furthermore, organise legal norms into particular *hierarchies* and *relationships*.[19] The *dichotomy* between the *legal* and *illegal*, which does not necessarily match the just and unjust, also constitutes a fundamental feature of legal systems, which affect the framing and representation of justice claims, as well as their legitimacy. For instance, when the law defines 'squatting' or 'homelessness', or certain forms of 'immigration' as illegal, or even criminal, it makes it more difficult to those affected to articulate legitimate justice claims. Legal systems are structured and organized in ways which are, at least in part, idiosyncratic, self-referential and autopoetic.[20] Paying attention to these legal peculiarities is essential in order to *understand what institutionalization through law does to justice claims and the fight against injustices.*

2) Housing situation and policies, and the legal institutionalization of justice claims

Social policies, including housing policies, are matters that are primarily determined at national or even increasingly at regional or municipal level, taking into consideration the specificities of the 'local' housing situation and justice demands and expectations. In the countries covered in ETHOS, some aspects of access, loss and retention of one's home are more generally decided and regulated at national level (eg general framework for housing benefits entitlements, conditions for eviction or expulsion), whilst others, such as access to, and the

[18] For more on this, see Orsólya Sálat , 'A theoretical review of the conceptualization and articulation of justice in legal theory contributing to task 2.3'(2018), ETHOS deliverable 3.1.
[19] For more on this, see Granger et al. 2018, n 1, pp. 29-38.
[20] For the reference text, see Gunther Teubner, *Law as an autopoietic system* (Oxford/Cambridge, Blackwell Publishers, 1993).

allocation of, social housing or housing benefits, tend to be local responsibilities and more specifically regulated at the provincial (*Länder*) level in federal states (like in Austria), or even the municipal (city) level. International and European organizations, have very limited regulatory powers in this policy area, but they set certain parameters, restricting the options of national and local policy- and law-makers (eg allocation of state aid to housing associations, tax benefits for investors to develop social housing units, etc.) [21], or providing for specific opportunities (eg access to European funds, possibility to invest capital in properties abroad, prohibition to discriminate based on race in access to housing, etc).[22]

These international and European legal frameworks interact with *very different housing situations* across countries and regions, and *diverse national and local social housing policy* approaches, and thus will have a *differentiated impact on national and local situations*. It is beyond the scope of this paper to offer a comprehensive comparative overview of national and local housing situations and policies. [23] However, a few important characteristics, which are particularly relevant in terms of distributive justice considerations, are worth introducing here.

An important feature, for the purpose of identifying relevant legal frameworks, is *housing tenure*.[24] There is, indeed, little point in examining in detail rules on access to social housing where it is quasi-inexistent, or rules on evictions related to mortgage foreclosure where the vast majority of the population lives in rented (social) housing, or occupy accommodation on an informal basis. Some countries, like Hungary, Portugal, or Turkey, are characterised by very high owner occupancy rates.[25] Both the United Kingdom and the Netherlands had relatively strong rental market, including a solid social housing rental park, but since the 1980s, have sought to promote home ownership. In the United Kingdom, it was achieved through deregulation of the private rental sector and

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[21] Granger et al. 2018 n 1, 89-90; Henderson 2019 n 3, 24-25.

[22] For more on this, see Granger et al. 2018 n 1, 43-47, 52-58, 73-94.

[23] For a relatively comprehensive survey, see Housing Europe, The Housing Europe Review 2012 - The nuts and bolts of European social housing system (2012) at http://www.housingeurope.eu/resource-105/the-housing-europe-review-2012 and 'The State of Housing in the EU' (Brussels, Housing Europe Observatory, 2017), http://www.housingeurope.eu/resource-1000/the-state-of-housing-in-the-eu-2017 (accessed on 23 April 2019).

[24] For a comparative table including three of the ETHOS countries (UK, Netherlands, Hungary), see P. Kenna, 'Introduction', in Padraic Kenna, Sergio Nasarre-Aznar, Peter Sparkes, and Christoph U. Schmid (eds), *Loss of homes and evictions across Europe* (Edward Elgar, 2018) 1-65, 18; see also http://eprints.lse.ac.uk/62938/1/Fernandez_Social%20housing%20in%20Europe_2015.pdf (accessed on 23 April 2019)

[25] See Morris and Brito 2019 n 3, p. 11; Karan 2019, n 3; Housing Europe, 'The State of Housing in the EU' (Brussels, Housing Europe Observatory, 2017), available at http://www.housingeurope.eu/resource-1000/the-state-of-housing-in-the-eu-2017 (accessed on 23 April 2019).

mortgage lending, combined with privatization of municipal housing stocks and limited investment in social housing,[26] whilst in the Netherlands, is what realised primarily through offering mortgage guarantees towards home acquisitions, whilst preserving a social rental stock. [27] Both resulted in significantly increase in owner occupancy rates to around 60%.[28] In the Netherlands, most (3/4) of the remaining rented accommodation units consist of social housing, whilst in the United Kingdom, the share of the rented social housing park has significantly shrunk (less than half of the rental market), and is insufficient to cater to the increased demand for affordable housing, as house shortage and speculative practices have rendered the private rental market inaccessible for a growing part of the population.[29] Finally, in some countries, like in Austria, tenant-occupancy remains strong (closed to half of all accommodation units), in particular in the capital city Vienna.[30]

In *owner-occupancy countries*, housing support by public authorities (i.e. state, regional or local) , where it exists, consists primarily *in incentivizing the construction and renovation of low-cost housing units* (eg Turkey, United-Kingdom recently),[31] or providing for *credit support* for property acquisition (eg low interests, or interest-free mortgage in Turkey and Hungary, mortgage rescue scheme in Hungary, or mortgage guarantee in the Netherlands). Public authorities may also offer *housing benefits which help towards housing related costs* (including utilities) to lower income households (eg United Kingdom, Hungary, nationally until 2015; determined locally since).[32] The advent of the economic crisis contributed to highlighting the vulnerability of certain mortgage borrowers to the loss of their home, as a result of risky lending and borrowing practices, combined with the reduction of income caused by unemployment (eg Portugal).[33] Studies of predatory lending reveal that those primarily affected were low-income households from marginalised groups.[34]

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[26] Nicolas Pleace and Caroline Hunter, 'Evictions in the UK: causes, consequences and management', in Padraic Kenna, Sergio Nasarre-Aznar, Peter Sparkes, and Christoph U. Schmid (eds), *Loss of homes and evictions across Europe* (Edward Elgar, 2018) 333-359, 333-335.

[27] Michels Vols, 'Evictions in the Netherlands' in Padraic Kenna, Sergio Nasarre-Aznar, Peter Sparkes, and Christoph U. Schmid (eds), *Loss of homes and evictions across Europe* (Edward Elgar, 2018) 214-238, pp. 214-215.

[28] Kenna 2018 n 24, 18.

[29] Pleace and Hunter 2018 n 26, 335.

[30] Apostolovski and Möstl 2019 n 3.

[31] J. Doward, 'Housing crisis drives more than 1 million deeper into poverty' (21 September 2018), at https://www.theguardian.com/society/2018/sep/22/housing-crisis-drives-million-deeper-into-poverty-social-housing-universal-credit (accessed on 23 April 2019)

[32] Karan 2019 n 3, 11-12; Sálat 2019 n 3, 12, 20, 22; Vols 2018 n 27, 214-215; Pleace and Hunter n 26.

[33] Morris and Brito 2019 n 3.

[34] D. Cowan. 'Housing and property' in P. Cane and H. Kritzer (eds) *Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 331-352, 336-337.

In countries where *owner occupation rates* are traditionally *lower*, and where more people rent, like in Austria, but also to some extend in the Netherlands and the United Kingdom, public policies and regulations are more focused on *developing, maintaining and rationalizing access to the social rental park*, or *financially supporting rent on the private rental market through housing or other social benefits*.[35]

Within the rental market, there is significant variation in the share of persons living in privately rented accommodation, whether subsidized or not, and those living in 'social rentals'. In Portugal, as well in in Hungary, only a very small percentage of tenants live in social housing units.[36] In Hungary, these are usually in very poor state of maintenance and are occupied by very socio-economically disadvantaged persons,[37] whilst across the border, in Vienna (Austria), 60 % of the inhabitants, including middle income earners, live in social housing.[38]

The trend across Europe seems to be moving *away from structural public investment in the development and improvement of social housing stock, towards individualized subsidy schemes facilitating rental on the private market* .[39] There is also a growing preference for *market-based solutions,* consisting in various *incentives schemes* (eg tax rebates, special loan facilities, etc) *or advantageous regulatory frameworks for private actors* (e.g. investors, developers, or landlords, banks and mortgage providers) incentivizing them to improve access to affordable4 housing solutions (e.g. Portugal, Netherlands, Turkey). In terms of redistributive justice, these later trends, whilst they free up public budget, also favour those who have capital to invest, by maintaining or increasing their ability to generate income from property ownership.

Another important factor, at least in terms of the relevance of the legal institutional framework, is the *formal or informal nature* of the housing market. The existence of a significant informal market, like in Hungary, where most rented flats are not declared, to avoid paying taxes,[40] undermine the normative and practical effect of any regulatory frameworks, and related justice objectives, as these can only capture situations (eg entitlements to housing benefits, eviction) which concern declared units. The development of online flat-sharing platforms, too, challenge social regulations which were designed around 'traditional' forms of tenancy. These trail behind

[35] Apostolovski and Möstl 2019 n 3.
[36] Kenna 2018 n 24, 18; see also http://eprints.lse.ac.uk/62938/1/Fernandez_Social%20housing%20in%20Europe_2015.pdf (accessed on 23 April 2019), p. 18; Sálat 2019, n 3 p10; Morris and Brito 2019 n 3, p. 11.
[37] Sálat 2019 n 3, p. 10-11.
[38] Apostolovski and Möstl 2019 n 3.
[39] See Apostolovski and Möstl 2019 n 3; see also Housing Europe report.
[40] Teller and Somogyi 2018 n 16.

technological and societal developments, and struggle to temper the speculative practices and gentrification dynamics produced by these trending forms of investments and accommodation supply.[41]

A further important characteristic concerns the level at which the regulatory framework is designed and operates. *The development and maintenance of affordable housing solutions*, whether through the direct building or renovation of cheap housing for social rental, subsidizing housing associations or offering tax benefits for the construction, maintaining and management of affordable housing units, as well as the provision of housing loans or subsidies, increasingly takes place at the *local* level, whether provincial or municipal. As also noted by Housing Europe, *cities* have become the main reference point, and where most relevant (and interesting) policies are developed.[42] This local devolvement of housing policy responsibilities results in significant disparities in terms of access to affordable housing across regions and cities within the same country. The situation in Austria illustrates particularly well the importance of local housing governance, and its implications. [43] The transfer to local authorities of some of the most acute social policy responsibilities, which is part of a broader trend across Europe, is often justified by subsidiarity arguments, and the need to better adjust policies to local needs, as well as democratic considerations, and are associated with a general distrust of the central state's capacity to to deliver on social justice. [44] This 'localism' may however also amplify territorial inequalities and socio-spatial segregation, as well as undermine social inclusion and cohesion. It may also generate patterns of inclusion and exclusion, which follow local territorial boundaries. Indeed, many regulations on social housing and housing subsidies impose a sufficient 'local connection' (usually defined as length of residence, or economic contribution, within the relevant territorial unit), as eligibility criteria (eg Austria, Turkey, United Kingdom).[45] Such requirements exclude mobile individuals and families from the benefit of those schemes, in a manner which disproportionality affects foreigners, marginalised communities, and younger people, as well as those in less stable job situations.

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[41] For a comparative local perspective, see Guttentag, D. (2015). Airbnb: Disruptive innovation and the rise of an informal tourism accommodation sector. *18*(12) *Current Issues in Tourism*, 1192–1217.

[42] Housing Europe, 'The State of Housing in Europe' (2017), http://www.housingeurope.eu/resource-1000/the-state-of-housing-in-the-eu-2017 (accessed on 23 April 2019)

[43] Apostolovski and Möstl 2019 n 3.

[44] On localism and housing policy in the UK, see Duncan Maclennan & Anthony O'Sullivan (2013) 'Localism, Devolution and Housing Policies, (2013) 28:4 *Housing Studies* 599-615.

[45] Karan 2019 n 3, 12,

National and local housing policies are complex and the result of unique historical development and socio-economic conditions, which defy a synthetic presentation within this report. To the extent that further aspects are relevant to the analysis, they will be presented throughout the sections of the report.

3) The right to housing – the challenges of translating redistributive justice claims into 'superior' legal rights

Redistributive justice comes in different shapes and forms. Most liberal-egalitarian theories require that resources such as housing are 'redistributed in a manner that realizes some standard of equality', but vary in terms of the effort expected from individuals (deservingness). [46] Other theories, labelled 'sufficientarian' or 'limitarian', only demand that basic minima (basic needs) are met. As for more 'libertarian' approaches, they generally reject the idea that states should subsidize housing at all, or interfere beyond guaranteeing freedom of contract. [47] European legal systems, and the rules they produce, when evaluated along these various visions of redistributive justice, display certain dominant trends, but also reveal tensions between competing visions of what constitutes 'just' redistribution in housing matters. This is visible, first of all, in the formulation of a 'right to housing' (or the absence thereof), as well as the definition of its nature and scope, and its relation to the protection of the home. Does the superior law of the land require that public authorities should *promote access to affordable and decent housing for all*, or *prioritise the allocation of (increasingly) scarce resources to fulfilling the most basic needs of those identified as the most 'vulnerable'*? *What duties does it impose on the public authorities or private actors* (such as landlords, or mortgage lenders) towards individuals and families who cannot – or can no longer - afford a roof above their heads, or have particular needs which they cannot cover? Do individuals have a right to a home at all, and if so, how can they go about claiming it?

In deliverable 3.3, we already analysed in detail how international and European law conceive and protect the *right to housing*. In the words of the Human Rights Committee (HRC), it consists in '*the right to live somewhere in security, peace and dignity'*.[48] It may be formulated as a free standing right, but is also closely associated with other core human rights, such as the *right to family life and privacy, the freedom from torture and inhuman and degrading treatment, and the principle of human dignity, as well as due process rights*. It also has a direct connection with other socio-economic rights, such as *the right to social security protection*. Some international

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[46] Granger et al. 2018 n 1.
[47] Granger et al. 2018 n 1.
[48] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4*, para. 7.

instruments treat the right to housing as imposing *minimum obligations* on state actors and private parties, some of which could potentially be enforceable in domestic and international courts. However, this leveraging of international instruments depends on the status and authority recognized to them under domestic law, which is for the national (constitutional) level to decide. National legal orders differ in their approach to international and European instruments and related case law which protect elements of the housing. Moreover, these 'compete', but also at times come to complement or flesh out another set of primary legal sources which often claim superior, if not higher, authority in domestic legal settings, namely constitutional provisions and their interpretation by relevant bodies (primarily, although not only, constitutional courts). As the analysis reveal, national constitutional norms exhibit variations in their constitutional recognition of a right to housing.

3.1 International and European instruments and the right to housing – direct and indirect recognition

International and European instruments vary in whether, how and to what extent they define and guarantee a right to housing, which has implications for the institionalization of redistributive (and other dimensions) of justice in Europe. These have already been analysed in deliverable 3.3, but are repeated here to support the identification and assessment of applicable legal frameworks.

3.1.1 The 'right to adequate housing' under international law

At international level, Article 11.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), recognizes *the right of everyone* to an *adequate standard of living* …including *adequate* … *housing*…'. The UN Committee on Economic, Social and Cultural Rights (CESRC) clarified that it includes *freedoms,* such as a protection from forced eviction and arbitrary interference, as well as *entitlements,* such as the security of tenure and equal and non-discriminatory access to adequate housing. [49] States parties *commit to working progressively towards the full realization* of that right (art. 2.1) *without discrimination* (art. 2.2). Many of the Covenant's rights are

[49] UN Committee on Economic, Social and Cultural Rights (CESRC), *General Comment No. 4: The Right to Adequate Housing* (Art. 11 (1) of the Covenant), adopted at the Sixth Session of the CESCR on 13 December 1991 (Contained in Document E/1992/23) and *General Comment No. 7: The right to adequate housing* (art. 11.1 of the Covenant): forced evictions (Sixteenth session, 1997). See UN Habitat, *The Right to Adequate Housing*, Fact Sheet No. 21/Rev.1, (OHCHR Geneva 2009).

programmatic in nature but entail *'minimum core obligations'*.[50] The CESRC instructs state parties to focus effort on vulnerable groups, specifying that the right to housing imposed on the state a duty to protect tenants from eviction and to target (scarce) states' resources to particularly vulnerable groups, such as women, children, older persons, persons with disabilities and other persons or groups in situation of vulnerability, or victim of systematic discrimination.[51]

A range of international instruments also provide *for specific housing entitlements and duties in relation to particular groups,* explicitly or implicitly identified as vulnerable. For instance, the 1951 Refugee Convention, ratified by all countries covered in this project, lays down the *right to access housing benefits on the same basis as other non-nationals* (arts. 15, 21 and 22). [52] The Convention on the Rights of Persons with Disabilities (CRPD), also ratified by all countries covered in ETHOS, as well as the EU, does not only restate the rights laid down in the ICESC but also demands that states *commit to the progressive realization of the right of persons with disabilities to access social housing programs* (art. 28). The Convention on the Rights of the Child (CRC),[53] which sets the 'best interest' of the child as a core objective (art. 3), grants *the right to an adequate standard of living, with states having to provide material assistance and support programmes, particularly with regard to housing* (art. 27).

Whilst international instruments undeniably recognize the right to housing, in its various components, and offer reinforced protection in relation to particularly vulnerable groups, and particularly persons with disability, children, and refugees, they leave it to state parties to take the appropriate and necessary measures to implement it, and usually provide for only *soft monitoring mechanisms*.[54] These regularly point to *gaps between international treaties' expectations in housing justice, and domestic laws and policies*.

The CESCR - the committee monitoring compliance with the ICESCR-, was critical of the Dutch policy and regulations which linked access to housing benefits to a legal residency status, thus excluding irregular migrants

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[50] F. Coomans and F. Van Hoof F, *The Right to Complain about Economic, Social and Cultural Rights* (SIM 1995); F. Coomans *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia & Maastricht Centre for Human Rights 2006).
[51] CESCR, *Mohamed Ben Djazia and Naouel Bellili v. Spain,* CESCR, Communication No. 5/2015, UN Doc. E/C.12/61/D/5/2015 (20 June 2017)
[52] UN Convention Relating to the Status of Refugees of 28 July 1951.
[53] United Nations General Assembly, Convention on the Rights of the Child, Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989, entry into force 2 September 1990, in accordance with article 49.
[54] See Granger et al. 2018 n 1.

from its cope.[55] The UN Special Rapporteurs on extreme poverty and human rights, adequate housing, and the human rights of migrants also expressed concerned about the failure of the Netherlands to provide emergency assistance (shelter) to undocumented homeless persons.[56]

The CESCR criticized the disproportionate impact of the UK benefit caps and sanctions, and the 'bedroom tax', on persons with disabilities; it called for a review of entitlement conditions and a reversal of budgetary cuts in social security benefits, and for more data and evaluation of the impact of the reform.[57] The Committee on the Rights of the Child (CRC), for its part, expressed concern about the benefit cap and 'bedroom tax' in the UK and called on further measures to reduce homelessness and guarantee children stable access to adequate housing, including for disabled children.[58] The CRPD committee was particularly concerned about the impact of austerity measures in the UK on persons with disability, as a result of reductions in Universal Credit payments, limited compensation for additional disability housing expenses, and change in eligibility criteria which brought down the number of disability related benefit recipients.[59] It called on the UK to assess the cumulative impact of social protection reforms on persons with disabilities, and to ensure that eligibility criteria and claim evaluations are in line with the human rights model of disability endorsed by the CRPD. [60] The UN special rapporteur on adequate housing, an expert appointed by the Human Rights Council to monitor the housing situations in state parties to UN instruments,[61] described how austerity reform in the UK have left disabled persons 'between a rock and a hard place: downsizing or facing rent arrears and eviction', and reduced well-being for persons with disabilities.[62]

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[55] CESCR, Concluding observations, Netherlands, E/C.12/NLD/CO/4-5, 19 November 2010, para 25 and Concluding observations, E/C.12/NLD/CO/6, 23 June 2017, para 38-39.

[56] Letter from the UN Special Rapporteurs on extreme poverty and human rights, adequate housing, and the human rights of migrants, reference OL NLD 1/2016, 25 Feb 2018, o. 18, cited in Henderson 2019 n 3, 22.

[57] CESCR (2016), Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, E/C.12/GBR/CO/6, para 40, Dupont 2019 n 3, 35.

[58] Committee on the Rights of the Child (CRC) Concluding Observations on the fifth periodic report of the United Kingdom of Great Britain and Northern Ireland, 2016, CRC/C/GBR/CO/5, para 70-71, cited in Dupont 2019 n 3, 34.

[59] CRPD (2017) Concluding Observations on the initial report of the United Kingdom of Great Britain and Northern Ireland, CRPD/C/GBR/CO/1*, para 60-61, cited in Dupont 2019 n 3, 35.

[60] CRPD, Initial report by Turkey under Article 35 of the Convention CRPD/C/TUR/1, 04.10.2017, cited in Karan 2019, n 3, p. 28

[61] UN Human Rights Office, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, available at https://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx (accessed on 23 April 2019).

[62] Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to nn-discrimination in this context, Raquel Rolnik. Mission to the United Kingdom of Great Britain and Norther Ireland, A/HRC/25/54/Add.2, para 65, cited in Dupont 2019 n 3, 35.

The CESCR requested that Portugal adjust its legal frameworks to deal with mortgage and rent arrears, and provide for legal aid in disputes with credit institutions, to ensure individuals' right to housing and to dedicate resources to increasing the supply of social housing. [63] The UN special rapporteur also called on Portugal to improve its support for indebted mortgage borrowers and its social housing stock.[64] The Universal Periodic Review (UPR), carried out by the UN Human Rights Council, also pointed to failures of Portugal's laws and policies to address the housing needs of Roma, domestic violence victims, and 'street children', and made recommendations in that respect.[65] The Committee on the Elimination of Racial Discrimination, monitoring compliance with the Convention on Racial Discrimination, called for improvement in access to adequate housing for Roma in Portugal.[66] The CRC requested the Portuguese authority to provide evidence of measures in place to ensure that children of immigrants and ethnic minorities, in particular people of African descent and Roma, are not discriminated against in access to housing. [67] The CESCR called on Portugal to ensure greater access to social housing, and adequate accommodation for Roma, and the allocation of sufficient resources to meet their housing needs.[68]

The CESCR was critical of the shortage in affordable and adequate housing in Turkey, and their (in)accessibility to persons with disabilities,[69] as well as the severe housing deprivation of Roma and evictions practices against them.[70] Whilst monitoring of the Turkish situation by the CRPD committee is ongoing, one observed a significant adjustment of the legal framework to bring it in line with CRPD requirements (eg redefinition of disability in line with the human rights' approach).

These monitoring mechanisms exert some pressure for adjustment of domestic laws and policies, towards certain redistributive-recognitive justice goals, informed by prioritarian/sufficientarian visions, and these matter

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[63] CESCR, Concluding observations on the Fourth Periodic Report of Portugal' (2014) para 16, cited in Morris and Brito 2019 n 3, 20.
[64] Morris and Brito 2019 n 320-21.
[65] Universal Periodic Review (UPR) working group – *Portugal 'Human Rights Council Working Group on the Universal Periodic Review* Nineteenth session 28 (2014), cited in Morris and Brito 2019 n 3, 18.
[66] Committee on the Elimination of Racial Discrimination (CERD), Çonsideration of reports submitted by State Parties under Article 9 of the Convention' (2012) para 19, cited in Morris and Brito 2019 n 3, 19.
[67] Committee on the Rights of the Child (CRC), Concluding Observations on the Combined Third and Fourth Periodic reports of Portugal (CRC/C/PRT/3-4) (2013) para 3, cited in Morris and Brito 2019 n 3, 19.
[68] CESCR, Concluding observations on the Fourth Periodic Report of Portugal' (2014) para 15, cited in Morris and Brito 2019 n 3, 20.
[69] CESCR, Concluding observations of the CESRC, Turkey, E/C.12/TUR/CO/1, 12.07.2011, para 28; cited in Karan 2019 n 3, 28.
[70] E/C.12/HUN/CO/3, 16 Jan 2008.

in terms of institutionalization of justice claims, even where these do not translate into concrete policies. For instance, in Portugal, the adoption of the 'First Right – Access to Housing Support Program' targeting people in precarious situations was apparently the direct consequences of UN reports. [71]

The capacity of international instruments and the right to housing that they enshrine to contribute to (re)defining applicable legal requirements depends to some extent on the ability of affected individuals and groups to leverage them against problematic domestic measures. This, in turn, varies depending on whether domestic legal arrangements allows them to turn to international monitoring mechanisms (ratification of protocols providing for individual complaint procedure) or to invoke international law provisions before domestic courts, through the application of doctrines such as direct effect or consistent interpretation. The states covered in ETHOS did not, apparently, make reservations to UN treaty provisions which confer housing rights,[72] but most limit their enforceability. For instance, only Portugal ratified the optional protocol (CESCR-OP) which provides for the right of individual complaints concerning the ICESCR. In contrast, all but the Netherlands ratified the CRPD protocol which enables individuals to direct their complaint to the monitoring committee (CRPD-OP). [73] When it comes litigation before domestic courts, some legal systems are particularly 'closed' to the influence of international human rights instruments, whilst others are more open. Countries that follow of monist constitutional tradition tend to be structurally more reactive to international instruments, although that varies across areas and instruments.

Most states' legal systems remain primarily centred on their own constitutional and legislative instruments, and limit possibilities for invoking international treaties against national measures. This is the case in Austria, a dualist country, in which the implementation of the relevant international treaties must be 'conducted through national laws'.[74] Austrian courts recall that international instruments, such as the ICESC and the CRPD, do not create subjective rights, and can therefore not be invoked in court against national measures. [75]

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[71] Morris and Brito 2019 n 3, 20-21.

[72] Turkey or Hungary, not otherwise famous for their spotless human rights record in the recent years, have ratified the ICESCR and the CRPD without reservations.

[73] Search on ratification status: https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=123&Lang=EN (accessed on 23 April 2019)

[74] Apostolovski and Möstl 2019 n 3, 27.

[75] Apostolovski and Möstl 2019 n 3, 27. This position was confirmed by recent cases concerning the CRPD before the Supreme Court, *Oberster Gerichtshof* 5Ob183/17y, 21 December 2017 and *Oberster Gerichtshof* 10ObS16/18 b. Austrian courts have however recognized the direct effect of CAT and CEDAW. See Apostolovski and Möstl 2019 n 3, 27-28.

The Netherlands follows a monist tradition, and its constitution (Article 93) confirms that duly ratified international treaties are legally binding upon ratification. Interestingly, whilst national courts cannot review acts of parliament for compatibility with the Dutch Constitution (Article 120 of the Constitution), they can set them aside if they conflict with international treaties (Article 94 of the Constitution), a feature which generally enhances the relevance of international (human rights) instruments in the Dutch legal system. [76] However, the legislator did not ratify the Optional Protocols to the CRPD and the ICESCR on the individual complaint mechanism, and Dutch courts have ruled that their provisions do not have direct effect. These restrictions therefore limit the ability of domestic actors to leverage those international instruments to challenge national measures which restrict access to housing or housing support. Turkey accepts that self-executing provisions of international treaties prevail over domestic law and are directly applicable, whilst non self-executing provisions (which we presume include the right to housing related ones) should inform the interpretation of national rules (Article 90 of the Turkish Constitution). [77] However, even in countries which give primacy and direct effect to international instruments protecting the right to housing, this does not necessarily produce housing litigation, as many barriers exists to the legal mobilization of international human rights.[78] It is, indeed, symptomatic, that none of the six country reports could identify domestic litigation in housing matters which involved UN instruments. This state of affairs probably explains why the current UN Special rapporteur on human rights targets her effort on *'how international human rights norms on the right to housing can be transformed into domestic law and policy'* with *'particular attention' given to the 'most vulnerable populations'*.[79] She also insists on *procedural justice issues*, and notably on *access to justice* for the right to housing, as an important dimension which has been so far neglected and assesses it as central to the effective realization of the right to housing.[80]

[76] For a review of domestic litigation based on international law, see A. Stuppers, A. Tseichvili and B. Wallage, 'Bed, bad en brood: Rijk en gemeente op weg naar een sluitend opvangbeleid'[2017] NTM/NJCM – Bull. 504, Henderson 2019 n 3, 20.
[77] Karan 2019 n 3, 27.
[78] On the dynamics of legal mobilization, see Conant et al 2018 n 15.
[79] UN Human Rights Office, Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, available at https://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx (accessed on 23 April 2019).
[80] UN Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context, Access to Justice for the Right to Housing (2019), A/HRC/40/61, https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/007/29/PDF/G1900729.pdf?OpenElement (accessed on 23 April 2019).

3.1.2 The 'right to housing' under the European Social Charter and Revised European Social Charter

The European Social Charter (ESC) did not include an explicit right to housing, but the Revised European Social Charter (RESC) formally recognised such right in its Article 31, which provides that 'with a view to ensuring the e*ffective exercise of the right to housing*, the Parties undertake to take measures designed: (1) to *promote access to housing of an adequate standard*;(2) to *prevent and reduce homelessness with a view to its gradual elimination*; and (3) to *make the price of housing accessible to those without adequate resources*.'

The European Committee on Social Rights (ECSR), the relevant monitoring body, addressed under the collective complain mechanisms, further specified states' obligations under this right. In the case *FEANTSA v France*, it clarified that article 31 'cannot be interpreted as imposing on states an obligation of "results" [but that] … the rights recognised in the Social Charter must take *a practical and effective, rather than purely theoretical, form.'* State parties must therefore

> (a) adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter; (b) maintain meaningful statistics on needs, resources and results; (c) undertake regular reviews of the impact of the strategies adopted; (d) establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage; (e) pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable' (paras 53-54). [81]

The Committee has, on a number of occasions, found states in violation of the right to housing, as well as the connected right to social assistance, and the principle of non-discrimination, and in the process fleshed out state obligations to provide adequate and accessible housing.[82]

Clarifications of applicable European housing standards signal a vision of redistributive justice that seems to adhere to a sufficientarian coupled with prioritarian vision of redistributive justice housing, and does not seem to strive towards an egalitarian one. The focus is on ensuring access to *minimum standard housing for low income households*, and providing for the *specific needs of particular groups*, such as persons with disabilities, families and children, women, Roma, internally displaced persons and migrant workers, and not to equalise housing

[81] *FEANTSA v. France*, Complaint no. 39/2006, Decision of 5 December 2007.
[82] Council of Europe, Digest of the Case Law of the European Committee of Social Rights, 1 September 2008. https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168049159f

conditions across Europe.[83] There is also an important emphasize on *procedural components,* with requirements for adoption of legal and policy frameworks, regular reporting, data collection and (dis)aggregation, or impact assessments.

Here again, similar to other international law instruments, the domestic influence of the RESC depends on the authority and effect recognised to it in domestic law. Some states, like Turkey, recognise Article 31 RESC, without reservations.[84] Others, like Austria, or Hungary, do not recognise that provision.[85] However, even when states have signed up to Article 31 RESC, they tend to limit access to monitoring and enforcement mechanisms. For example, Turkey and Hungary did not ratify the additional protocol on the collective complain mechanism, which means that the only monitoring of compliance with the RESC right to housing consists in reporting (every second year).[86] Austrian courts consistently refuse to recognise that international human rights instruments such as RESC create rights for individuals or impose obligations on states, which could be invoked and enforced before domestic courts.[87]

European level monitoring, where it exists, reveals that national legal frameworks are not always aligned with the RESC requirements in terms for housing. Where the collective complaints mechanism is accepted by state parties, scrutiny is often triggered by civil and religious organizations, illustrating the important role played by those actors in mobilizing and (re)defining the legal framework of housing rights. The ECSR found that Dutch laws and policies excluding undocumented migrants, including children,[88] from unconditional access to emergency shelter was contrary to Article 31(2) RESC.[89] In the context of the collective complaint brought by the European Roma Rights Centre, the ECSR stated that Portugal had a positive obligation to take the particularly disadvantaged situation of Roma, who tend to live in substandard accommodation, into account and to develop 'integrated' housing policies, prioritizing their urgent and specific housing needs, and that in failing to do so, it violated Articles 16 (Right of the Family to Social, legal and economic protection), Article 30 (Right to protection against poverty and social exclusion), Article 31 (Right to housing) and Article E (non discrimination) RESC.[90] Portugal however

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[83] Recommendation of the Human Rights Commissioner on the implementation of the right to housing, 30 June 2009, CommDH(2009)5
[84] Karan 2019 n 3, 29
[85] Apostolovski and Möstl 2019 n 3, 28, Sálat 2019 n 3, 19.
[86] Karan 2019 n 3, 30, Sálat 2019 n 3, 19.
[87] Apostolovski and Möstl 2019, n 3, 28
[88] ECSR, *Defense for Children International v the Netherlands,* 20 October 2009, Number 47/2008.
[89] ECSR *Conference of European Churches v the Netherlands*, 1 July 2014, No 90/2013, cited in Henderson 2019 n 3, 22.
[90] *European Roma Rights Center v Portugal*, No 61/2010, cited in Morris and Brito 2019 n 3, 22-23.

failed to adjust its policies, which led to further resolutions.[91] The ECSR also found that Turkish law was in violation of Article 31(1), in that it failed to provide for a definition of adequate housing, did not impose on landlords that their dwellings meet adequate standards, and did not ensure sufficient procedural safeguards to ensure adequate housing. It also concluded that Turkey was in breach of Article 31(2) in that its law did not provide for adequate shelter for children unlawfully present on the territory.[92] Finally, in relation to Article 31(3), it called on Turkey to ensure a right to housing benefits for at least low-income and disadvantaged sections of society, and for judicial remedies to challenge refusal, in particular for vulnerable groups.[93] With regard to Article 15(3) RESC, it found that Turkish law was not clear enough as to whether non-discrimination rules applied to all fields covered by it.[94] These findings and recommendations are, apparently, ignored by the Turkish authorities.[95]

3.1.3 The ECHR and the development of 'the right to one's home'

The European Convention on Human Rights (ECHR), a liberal instrument centred on civil and political rights and liberties, does not directly engage with notions of (re)distributive justice. Unlike the other international law instruments already reviewed, it does not include an explicit right to housing, but the European Court of Human Rights (ECtHR) has read certain Convention's provisions as protecting specific aspects of housing. *Article 8* (the right to private and family life), in particular, has been interpreted as including a *right to respect of the home.* The ECtHR defines 'home' broadly, as '*the place, the physically defined area, where private and family life develops*,'[96] and includes caravans[97] or mobile homes,[98] to take into account diverse lifestyles, such as those of travellers and Roma. Speaking directly to the idea of redistributive justice, the Court explained that Article 8 does *not 'guarantee the right to have one's housing problem solved by the authorities'*, but imposes *positive obligations to ensure the*

[91] For details, see Morris and Brito 2019 n 3, 23.
[92] ECSR Conclusions 2017, Turkey, Article 31-1, 2017/def/TUR/31/1/EN and ECSR Conclusions 2017, Turkey, Article 31-1, 2017/def/TUR/31/2/EN, cited in Karan 2019 n 3, 30
[93] ECSR Conclusions 2017, Turkey, Article 31-1, 2017/def/TUR/31/3/EN cited in Karan 2019 n 3, 31.
[94] ECSR Conclusions 2017, Turkey, Article 31-1, 2017/def/TUR/15/3/EN cited in Karan 2019 n 3, 31.
[95] Karan 2019 n 3, 32.
[96] *Moreno Gómez v. Spain*, Application No 4143/02, 16 November 2004, para 52.
[97] *Niemietz v. Germany*, Application No 13710/88, 16 December 1992.
[98] *Chapman v. the United Kingdom*, Application No. 27238/95, 18 January 2001, paras 71-74.

protection of private life. [99] The Convention also prohibits *discrimination* in housing matters, promoting the recognitive element of housing justice. [100]

In the 2013 *Winterstein v France* case, the ECtHR, making substantial references to the findings of the ECSR clarified the manner in which *the right to respect of the home is protected* under article 8.[101] Whilst recognising that in the *area of housing*, national authorities enjoy a '*wide margin of appreciation*', it nonetheless explained that this *narrowed* 'where the right at stake is *crucial to the individual's effective enjoyment of fundamental or "intimate" right's",* such as the right to respect for one's home. It emphasized that the right includes *both procedural and substantive elements*, thus requiring *appropriate procedural guarantees* and a *proportionality assessment* of state measures. Stressing that 'the *loss of one's home is a most extreme form of interference* with the *right …to respect for one's home',* anyone under such risk it entitled to having the *proportionality* of the measure *reviewed by independent court*, under Article 8. The Court went on to explain how the *principle of proportionality* should apply in relation to an *eviction* measure. For instance, the fact that the *home was lawfully established* should play against eviction, but the fact that an individual does not have a right to occupation, whilst it weakens its position, will not necessarily result in lawful eviction. The Court considers that where there is no alternative accommodation, the interference is more serious than where there is. It also instructed national authorities that, in evaluating the *suitability* of alternative accommodation, they should take into account both the '*particular needs'* of the individual concerned and '*the rights of the local community to environmental protection'.* Moreover, the Court ruled that *the special needs of vulnerable minorities* should inform state measures, such as expulsion and eviction.[102] Finally, the Court also stated that '*the vulnerable position of Roma and travellers as a minority* means that some *special consideration* should be given *to their needs and their different lifestyle* both in the relevant regulatory planning framework and in reaching decisions in particular cases' and thus found a '*positive obligation* imposed on the Contracting States by virtue of Article 8 to *facilitate the way of life of the Roma and travellers'*.[103]

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[99] *Marzari v Italy*, Application No 36448/97, 4 May 1994, 28 EHRR CD 175.
[100] *Vrountou v Cyprus*, Application No 3631/06 13 October 2015.
[101] *Winterstein and Others v France*, Application No 27013/07, 17 October 2013. For a detailed presentation, see Granger et al. 2018 n 1, 53-54.
[102] *Chapman v. the United Kingdom*, Application No. 27238/95, 18 January 2001, paras 71-74, *Connors v UK*, App No 66746/01, 27 May 2004.
[103] *Winterstein and Others v France*, Application No 27013/07, 17 October 2013, para 148.

The Court's interpretation of *the right to property* allows *limitations* of the property rights of landlords, such as rent caps, [104] or restrictions on evictions, [105] where they seek *to achieve reasonable and legitimate housing policy objectives*, recognising there a wide margin of appreciation to state parties.

Interesting, where *domestic law consider the right to (social) housing as a justiciable right,* then the Court, logically, interprets Article 1 Protocol 1 of the ECHR and Article 6 (right to fair trial) as conferring an enforceable entitlement to social housing, [106] and rejects state's argument advancing resources or housing shortage.[107]

As exposed in the case law, the ECtHR does not explicitly impose particular redistributive justice obligations upon states, in the sense of requiring them to provide social housing or housing subsidies; however, when state parties make such *redistributive justice* commitments by their own, the Court then demands that they *live up to them*, relying on *due process considerations.* This is part of the fleshing out the *how dimension of justice*, but also plays into *political representation and participation*. Indeed, in bringing cases to the courts, which test the boundaries of Article 8 in relation to housing, litigants and those who support them (NGOs and lawyers) not only challenge restrictive state practices, but also contribute to the definition of the content of the right to respect of one's home, and the notion of justice which lies at its heart. The ECHR case law expects that states, when determining the respective rights of landlords (whether public or private) and tenants/occupiers, ensure that individuals do not lose their home too easily, in particular where they do not have alternative accommodation and would risk homelessness, and that the needs and lifestyle of particularly vulnerable minorities are duly taken into account. This approach reveals that ECHR justice in housing matters works to support whatever notions of redistributive justice infuses domestic laws and policies, by boosting procedural protection of substantive commitments, whilst also imposing a particular recognitive justice frameworks on the allocation of resources, which requires to take into account the special needs and lifestyle of vulnerable minorities, such as Roma, or the (re)balancing of landlords and tenants/occupiers' rights and obligations.

All countries covered by ETHOS are parties to the ECHR, as it is a condition for Council of Europe membership. That means that individuals ('victims') under their jurisdiction can bring a case before the ECtHR, once they have exhausted domestic remedies. Moreover, in many countries, ECHR provisions can be invoked before domestic

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[104] *Mellacher and others v Austria*, Application No 10522/83; 11011/84; 11070/84, 19 December 1989; *Hutten-Czapska v Poland* [GC], Application No 35014/97, 19 June 2006.
[105] *Velosa Barreto v. Portugal*, Application No 18072/91, 21 November 1995.
[106] *Tchokontio Happi v France*, Application No 65829/12, 9 April 2015.
[107] *Telyatyeva v Russia*, Application No 18762/06, judgment of 12 July 2007, para 14.

courts, which can set aside contrary domestic measures, or at least develop ECHR compatible interpretation. These features grant the Convention more leverage than other European and international instruments for which compliance is monitored only through softer instruments. Housing issues in the states covered by ETHOS have made their way to Strasbourg and generated a few relevant decisions. For instance, the poor conditions of detention in 'repatriation' centres in Turkey have been assessed under the prohibition of torture and inhuman and degrading treatment.[108] In 2016, the ECtHR however found that the Dutch regulations conditioning access to shelter for irregular migrants to cooperation in their deportation did not violate Article 3 ECHR, since the Netherlands provided for alternatives for undocumented migrants to avoid extreme precarity (eg possibility to apply for no-fault residence permit, admission in restricted centres, deferral of deportation on medical grounds, special support schemes such as the Bed, Bath, Bread, etc) . [109]

Beyond the few cases submitted to Strasbourg, which represent the tip of the iceberg, the daily application and enforcement of the Convention is carried out at domestic level, by national authorities, including courts. The influence of the ECHR on national legal rules and practices thus primarily depends on its authority and effect on domestic law and practices. In some countries, its provisions can be directly invoked before domestic courts against national measures, whilst in others, it must be incorporated into domestic law, through a legislative act for instance, and may have more limited legal effects. In Austria, the ECHR has been granted constitutional status, and produces direct effect. Whilst it is often invoked in human rights litigation, it has, so far, had little influence in the context of housing. [110]In the Netherlands, where the ECHR is de facto a main point of reference for human rights protection, national courts have relied on it to call for adjustment of domestic laws and policies. The Dutch Supreme Court, referring to the case law of the ECtHR, held that *eviction constitutes a serious interference with the inviolability of the home*, and that everyone at risk of eviction had the right to have the *proportionality* of the measure assessed.[111] Furthermore, in relation to the Dutch policy mentioned above which conditioned access to shelter for irregular migrants to cooperation with their own removal, some Dutch courts initially interpreted the Convention as requiring municipalities to offer shelter to undocumented migrants.[112] However, following the

[108] Karan 2019 n 3, 29.
[109] *Hunde v Netherlands*, Application No 17931/16, 28 July 2016, para 59.
[110] Apostolovski and Möstl 2019 n 3, 28.
[111] Hoge Raad 28 October 2011, *Nedelandse Jurisprudentie* 2013, 153, cited in Vols 2018 n 27, 218.
[112] Central Appeals Tribunal, 17 Dec 2014, Number ECLI:NL:CRVB:2014:4178 and District Court Amsterdam, 8 May 2015, Number ECLI:NL:RBAMS:2015:2651; cited in Henderson 2019 n 3, 24.

ECtHR decision which found the Dutch policy compatible with the Convention, the appeal and supreme courts adjusted their positions, and cleared the Dutch arrangements.[113]

In the United Kingdom, the Convention becomes operative through its incorporation under the 1998 Human Rights Act. The act, which gives effect to the ECHR provisions, can be relied on to review executive or administrative measures. The principle of parliamentary sovereignty prevents courts from setting aside or invalidating legislative provisions which are incompatible with Convention rights, instead requiring them to interpret those in the light of the Convention, or, when that is not possible, to issue a declaration of incompatibility, which the parliament should then address by legislative means. This is not to say that the Convention bears no influence on the legal framework of housing in the United Kingdom. In fact, the Convention was invoked, with some success, by disabled claimants against regulations defining the allocation of UK housing benefits system. For instance, invoking Article 14 ECHR (non-discrimination), they successfully challenged rules which did not enable them to access support for separate bedrooms as necessitated by their disability, or an additional room for an overnight carer.[114] Disabled tenants also litigated against the so-called 'bedroom tax', which penalizes claimants who have dwellings with more rooms than they 'theoretically' need, arguing that the state had ignored their specific housing needs and that it constituted discrimination in breach of Article 14 ECHR (non-discrimination), combined with Article 8 ECHR and Article 1 Protocol 1. They were not always successful though. For instance, a person affected by obsessive compulsive disorder which led him to accumulate papers, or a father living with their disabled (step) female child, and requiring an additional room for special equipment, failed to convinced the British courts that they needed a three bedroom flat. [115] These cases reveal the limits of redistributive efforts in recognising the particular needs of (certain) disabled persons, and addressing their special vulnerability. It is worth noting that in a number of these cases, the UK Equality and Human Rights Commission intervened on behalf of the disabled claimants, highlighting the contribution of such bodies in pushing for the transformation of the legal systems, and the political and representative elements of institutionalization through litigation.

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[113] Council of State, 26 Nov 2015, Number ECLI:NL:RVS:2015:3415; Central Appeal Tribunal, 26 Nov 2015, Number ECLI:NL:CRVB:2015:3803 and ECLI:NL:CRVB:2015:3834, cited in Henderson 2019 n 3, 24.

[114] Eg *Burnip v Birmingham City Council* [2012] EWCA Civ 629; Dupont 2019 n 3 33-34.

[115] eg *R (Carmichael and Rourke) v Secretary of State for Work and Pensions* [2016] UKSC 58.

3.1.4 EU law market law and the 'right to social housing assistance' and 'right to accommodation'

Rights contained in EU law generally benefit from an enhanced status in domestic hierarchy of legal norms, only challenged by ('core') national constitutional norms, an authority which is reinforced by leveraging an (allegedly) 'complete' system of effective judicial domestic and European remedies.[116] This has significant implications for the what, who and how of justice.

Originally centered on market integration, EU law now regulates a broad range of policy areas and activities. Its impact on domestic legal systems in its 28 member states is more significant than other international and European legal orders, in great part due to the development, by what it now known as the Court of Justice of the European Union (CJEU), of 'constitutional doctrines' such as supremacy, [117] direct effect, [118] consistent interpretation, [119] effective judicial protection[120] or State liability for violations of EU law. [121] Indeed, these doctrines, generally accepted by national courts (although not without some resistance and at times subject to conditions), require that *they give effect and priority to rights contained in binding EU legal norms*, such as the Treaty on the European Union (TEU), Treaty on the Functioning of the European Union (TFEU), EU Directives, Regulations and Decisions, and other EU acts producing legal effects (such as EU Memorandum of Understanding?), thereby *displacing conflicting national legal norms*. [122] More concretely, that means that *where the visions of justice contained in EU law differs from those that underline national law,* and that they cannot be 'reconciled' by means of interpretation, *those enshrined in EU law would technically prevail,* by the operation of these legal doctrines, *unless national courts can rely on recognised exceptions or limitations to the principle of supremacy* (such as the concept of 'national constitutional identity', laid down in Article 4(2)TEU).

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[116] See Granger et al (2018) n 1, 64-66.
[117] Case 6/64 *Flaminio Costa v E.N.E.L* ECLI:EU:C:1964:66
[118] Article 288 TFEU (direct applicability of Regulations); Cases 26/52 *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Netherlands Inland Revenue Administration* ECLI:EU:C:1963:1 (direct effect of Treaty provisions); 41/74 *Yvonne van Duyn v Home Office* ECLI:EU:C:1974:133; 148/78 *Criminal proceedings against Tullio Ratti* ECLI:EU:C:1979:110 (direct effect of Directives).
[119] Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion* SA ECLI:EU:C:1990:395.
[120] Now codified in Article 19(1) TFEU and Article 47 CFR, C. 64/16 *Associação Sindical dos Juízes Portugueses v Tribunal de Contas* ECLI:EU:C:2018:117
[121] C-6/90 and 9/90 *Andrea Francovich and Danila Bonifaci and others v Italian Republic* ECLI:EU:C:1991:428; C-46/93 and 48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte: Factortame Ltd and others* ECLI:EU:C:1996:79.
[122] C- 258/14 *Eugenia Florescu and Others v Casa Judeţeană de Pensii Sibiu and Others* ECLI:EU:C:2017:448. For more on all these doctrines, see Granger et al (2018) pp. 33-38 and 64-66.

This explains the special attention dedicated to EU law in the background paper (deliverable 3.3), as well as in this report, and this even though social policies, of which (social) housing is part, and the regulation of property ownership, remain national competences, over which the EU only performs a coordinating role (Article 5 TEU) and does not have explicit legislative competence. EU law-making activities in other policy areas over which it has explicit regulatory competence, such as EU non-discrimination law, EU citizenship and free movement law, EU immigration and refugee law, EU internal market law, EU competition and state aid law, EU public procurement law, EU consumer protection Law, EU funding regulations, EU tax law and Economic and Monetary Union law, which all pursue their own distinct policy objectives, affect the legal framework that determines access to, loss and arrangements of one's home. This complex EU legal patchwork, described in detail in the background paper, is replete with contradictions and tensions, in a manner which is particularly illustrative of the way *legal dynamics impact on the institutionalization of justice claims*.[123]

In addition to *imposing its own norms,* EU law can *harness the powers of national authorities, including national courts, for the purpose of its own enforcement,* a capacity which domestic law does not always recognise to other international law instruments, as exposed above. Where national courts are in doubt concerning the validity and interpretation of EU law, and its implications for domestic laws and policies, they can refer questions to the CJEU, via the preliminary reference procedure (Article 267 TFEU). These questions often raise issues of compliance of national measures with EU law, under the (dis)guise of interpretation, thus providing for an *effective decentralized enforcement system*. Domestic implementation through national courts is complemented by a *centralised compliance* mechanism in the form of the i*nfringement procedure,* whereby the Commission can challenge states which are allegedly in breach of their EU commitments, if needs be by bringing them before the CJEU, and having fines or penalty payments imposed on them (Articles 258-260 TFEU). Moreover, when member states engage in systemic violations of common European values listed in Article 2 TEU, and which include respect for human rights, they expose themselves to political sanctions (Article 7 TEU), even if the political and substantive thresholds for activating this mechanism limit its effectiveness.

These EU rules and mechanisms contribute to *altering the governance framework of justice* in Europe, what Fraser refers to as the 'how' of justice. They create opportunities for certain actors, but also impose new constraints on other. These, in turn, play in favour of certain conceptions or dimensions of justice, and against others. For instance, international corporate investors or 'peer to peer' flat sharing-platform (such as AirBnB) have sought to leverage EU internal market, competition and state aid rules, to challenge aspects of national (social)

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[123] For a detailed analysis, Granger et al. 2018 n 1, 73-94.

housing policies before EU institutions. For example, private developers in the Netherlands mobilised the European Commission, invoking EU law against the Dutch social housing scheme subsidizing housing associations. [124] The Commission and the Dutch government entered in negotiations, which resulted in an adjustment of the Dutch scheme, refocusing housing support towards more disadvantaged citizens. [125] This modification of the national scheme under EU pressure led to a long litigation saga, the so-called Dutch case, which pitted on one side housing associations, supported by international NGOs, and the other the Commission and real estate investors associations. The housing association and NGOs contested, inter alia, the EU definition of social housing. Throughout the cases, the EU courts appeared indeed willing to uphold housing policies which were more precisely aimed at low-income households, therefore endorsing a sufficientarian or prioritarian approach to redistributive justice, but appeared reluctant to exonerate more equalitarian, and less targeted, policies from the full application of internal market and states ruled. [126] In the latest decision, the EU courts seem to endorse a definition of the goal of social housing as being to *procure housing to economically disadvantaged persons or to vulnerable social groups, who cannot afford and therefore cannot find housing under market conditions*.[127] In a different vein, EU consumer protection law empowered struggling mortgage borrowers to challenge unfair terms imposed on them by lending institutions (banks), and (temporarily) prevented their eviction. This other litigation saga contributed to *rebalancing the respective responsibilities of lenders and borrowers in housing repossession procedures*.[128]

The EU has its own human rights standards, initially developed through case law but now codified in the EU Charter of Fundamental Rights (CFR), which has primary law status (Article 6(1) TEU) and which should *guide EU institutions, including in their legislative and regulatory activities, as well as member states, when they implement EU law* (Article 51(1) CFR). [129] Furthermore, EU law, with its enhanced status and institutional enforcement apparatus, can act as a 'transmission belt' for parts of international and European human rights instruments which

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[124] Henderson 2019 n 3, 24.
[125] Henderson 2019 n 3, 25.
[126] Granger et al. 2018 n 1, 86-92.
[127] Cases T-202/10 RENV II, *Stichting Woonlinie et al v European Commission* ECLI:EU:T:2015:287 and T-202/10 RENV II, *Stichting Woonpunt v European Commission* ECLI:EU:T:2015:286.
[128] Granger et al. 2018 n 1, 84-86.
[129] The case law on the scope of application of EU law and the Charter is complex and not completely consistent. See C-617/10 *Åkerberg Fransson* ECLI:EU:C:2013:105; C-198/13 *Víctor Manuel Julian Hernández and Others v Reino de España (Subdelegación del Gobierno de España en Alicante) and Others* ECLI:EU:C:2014:2055

recognise housing rights, in particular where it explicitly refers to them, as with the ECHR (Article 6(3) TEU), or the Geneva Convention on Refugees (Article 78 TFEU), or where it is a party to the treaty, such as withthe CRPD.[130]

The EU Charter of Fundamental Rights provides that the EU '*in order to combat social exclusion and poverty* [....] recognises and respects *the right to* social and *housing assistance* so as to *ensure a decent existence* for *all those who lack sufficient resources*, in accordance with the rules laid down by European Union law and national laws and practices (Article 34(3) CFR).[131] It also states that '*everyone* is *entitled* to social security benefits and *social benefits* [including, allegedly, housing benefits], in accordance with EU law and national laws and practices' (Article 34(2) CFR). Note however that *the right to housing assistance* is categorized as a *'principle'*, which, in the context of the EU Charter, only has a *programmatic* value. These principles are meant to guide legislative and policy action and judicial interpretation, but *do not grant subjective rights, which could be enforced in court* (Article 52(5) CFR). The relevant legal provision specifies that any entitlements to housing assistance are subordinated to existing EU and national schemes. Therefore, like the ECHR, the EU Charter espouses national redistributive justice schemes, rather than impose its own. The limited EU capacity to generate resources through taxation, as well as the application of the principle of conferred competences, which prevents the EU from interfering in social policy, except in circumscribed areas, and from operating economic and social transfers, except through EU structural and cohesion funds, goes some way in explaining the Charter's conditional redistributive justice commitments. The official explanations, which must be relied on when interpreting and applying the Charter (Article 52(7) CFR), offer some guiding principles principle. [132] Indeed, they refer to Articles 13 ESR and 30 and 31 RESC, as well as to Point 10 of the Community Charter of Fundamental Social Rights (an instrument adopted by EU member states in 1989 with a declaratory status).[133] It is worth reminding that Article 31 RESC goes beyond a right to housing assistance for those without sufficient resources to include a right to decent and affordable housing for those without adequate resources.

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[130] Granger et al. 2018 n 1, 63.

[131] This provisions apply to all those who reside in the EU, and not just nationals of the EU member states and their families. See C-571/10 *Servet Kamberaj v Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others* EU:C:2012:233.

[132] OJ [2007] C 303/17.

[133] Explanations relating to the Charter of Fundamental Rights, [2007] OJ C303/02); available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF (accessed on 23 April 2019)

Like the ECtHR, the CJEU relied on the right to private and family life (Article 7 CFR) to recognise '*the right to accommodation*' as '*a fundamental right* guaranteed under Article 7 CFR', which should inform its interpretation and implementation of EU consumer law in the context of repossession procedure against mortgage borrowers. [134] Again, like their Strasbourg's colelagues, the judges in uxembourg payed particular attention to *procedural aspects*. They ruled that, in a situation involving the risk of losing the family home, Article 47 CFR (right to effective remedies) granted mortgage borrowers *a right to appeal* a judicial decision rejecting an objection to enforcement proceedings.[135] Other provisions of the EU Charter can further support the exercise of the right to housing, such as Article 37 on consumer protection, Article 1 on the right to human dignity, Article 4 prohibiting inhuman and degrading treatment, Article 24 protecting the rights of the child, Article 25 covering the rights of the elderly and Article 26 on the rights of persons with disabilities. The right to property, laid down in Article 17 CFR and framed along the same line as the equivalent ECHR provisions, does not prevent state from limiting the exercise of that right to pursue legitimate public interests, such a reasonable housing policies and the need to protect one's home.[136]

Article 21 CFR prohibits discrimination based on sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation. Like all Charter provisions, it can only be invoked against EU institutions and member states in situations which fall under the scope of EU law, which is not evident in policy areas which have traditionally remained national competences, such as social security and housing policies, unless these can be brought under other the remit of other policy areas which are under the regulatory scope of the EU (eg EU consumer law, EU internal market, etc). Particular relevant EU legal instrument are the Race and Gender Directives, which directly prohibit discrimination in access to goods and services, including access to housing, based on respectively, race and gender grounds.[137] These EU laws contribute to both the redistributive and

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[134] Case C-34/13 *Monika Kušionová v SMART Capital, a.s.* EU:C:2014:2189

[135] C-169/14, *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA* EU:C:2014:2099.

[136] See right to housing in COE instruments in Granger et al n 1, pp. 52-57 and in this report, under 3.1.2 and 3.1.3.

[137] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (Race Equality Directive) [2000] OJ L 180/22; Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services (Gender Goods and Services Directive) [2004] L373/37.

recognitive dimension of justice, in the sense of targeting public and private actors' practices which deny certain vulnerable minorities access to socio-economic resources based on their status.[138]

In contrast with other international and European instruments which guarantee some right to housing, EU law enjoys a special status and authority in domestic law, derived from EU law itself, and generally recognised, although at times under certain conditions, by the legal systems of member states. For example, whilst Austria limits the authority and effects of provisions contained in international human rights instruments, it recognises the supremacy and direct effect of EU law.[139] The Austrian constitutional court also confirmed that national measures which violate the EU Charter of Fundamental Rights can be held invalid (provided they fall within its scope of application, presumably).[140] The authority and direct effect of EU law seems to be recognised across all the member states covered in this report, at least as long as it does not conflict with core constitutional provisions.[141]

An important consideration is what kind of EU law is litigated in domestic courts. Traditionally, internal market legislation which liberalizes trade relations has been invoked by corporate actors in a process which has contributed to legal integration in Europe.[142] Certain social movements or interest groups, in particular women rights groups, have also been able to leverage EU non-discrimination provisions in litigation before national and EU courts to support their own policy objectives, which include both redistributive (eg gender pay gap) and recognitive (e.g. free movement rights of gay couple) justice goals.[143] Spanish mortgage holders at risk of losing their property have been able to successfully invoke EU consumer law, and notably the EU Unfair Terms in Consumer Contracts Directive, together with the EU Charter of Fundamental Rights (Article 47 on the right to an effective remedy) to suspend evictions procedures resulting from mortgage default in the wake of the economic crisis, pending an assessment of the fairness of the mortgage contract. [144] Here again, EU law triggers the procedural justice dimension, in support of relatively minimal substantive justice claims, based on a limited right

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[138] Case C-83/14, *'CHEZ Razpredelenie Bulgaria' AD v. Komisia za zashtita ot diskriminatsia* EU:C:2015:480.
[139] Arty 23a-23k B VG, cited in Apostolovski and Möstl 2019 n 3.
[140] U466/11, cited in Apostolovski and Möstl 2019, n 3, p. 29. On the obligation to refer such matters to the Austrian constitutional court, see C-112/13 *A v B and others* ECLI:EU:C:2014:2195.
[141] Eg Morris and Brito 2019 n 3, 24—25.
[142] Christopher Harding, 'Economic freedom and economic rigths: Direction, significance and ideology' (2018) 24 *European Law Journal* 21-35
[143] Eg Chris Hilson, 'New social movements: the role of legal opportunity'(2002) 9:2 *Journal of European Public Policy* 238-255.
[144] Granger et al. 2018 n 1, 82-84.

to accommodation offering basic protection against the loss of a family home based on Article 7 CFR (right to private and family life), and not any right to housing derived from Article 34(3) CFR. Hungarian mortgage holders similarly sought to rely on EU consumer law in litigation against banks with regard to mortgage contracts denominated in foreign currency, which placed the risk of exchange rates fluctuations unto the borrowers. The CJEU left it on national courts to assess the fairness of these contractual terms, but suggested that an 'average consumer, who is reasonably well informed and reasonably observant and circumspect' should 'be aware of the possibility of a depreciation of the national currency in relation to the foreign currency in which the loan was denominated, but also be able to assess the potentially significant economic consequences of such a term with regard to his financial obligations.' [145] In taking this position, the CJEU maintained a significant dose of responsibility on borrowers, and contributed only in a limited manner in the rebalancing of power and financial risks between lenders (banks) and borrowers (individual homeowners).

With regard to non-member states, such as candidate country Turkey, EU law has no direct authority, but obligations derived from the *EU acquis communautaire* may be included in agreements between the EU and such countries, which condition the relationship of that country with the EU and progress towards accession. [146] In fact, compliance with EU values, listed in Article 2 TEU, and which include, inter alia, equality and respect for human rights, is a condition of EU membership (Article 48 TEU). This contributes to the influence of the so-called 'normative power' Europe, whereby the EU diffuses its own set of norms, including justice norms, on third countries, and (selectively) leverage its (economic) power to impose and secure compliance with them. [147] In the case of candidate countries, monitoring of the implementation of the EU acquis, including compliance with human rights requirements, is carried out by the Commission.[148] However, the capacity of EU law to exert influence on the legal system of the candidate countries in housing matters depends on whether any obligations are included in the terms of the agreement and the scope of the monitoring, and whether there is a desire for closer relations and European integration. In relation to Turkey, the right to housing, including those of refugees and persons with disabilities, which are the focus of this report, is 'not on the agenda of EU-Turkey relations' and is thus not closely

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[145] C-51/17 *OTP Bank Nyrt.and OTP Faktoring Követeléskezelő Zrt. v Teréz Ilyés and Emil Kiss* ECLI:EU:C:2018:750

[146] E.g Ankara (association) agreement and additional protocol, listed in Karan 2019, n 3, p. 33; EU-Turkey Readmission agreement, Karan 2019 n 3, 35.

[147] Ian Manners, 'Normative power Europe reconsidered: beyond the crossroads' (2006) 13:2 *Journal of European public policy*, 182-199.

[148] For the latest report, see https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf (accessed on 23 April 2019).

checked.[149] Moreover, the degradation of EU-Turkey relation over the recent years has affected the willingness of Turkish authorities to implement the *acquis* and to realise progress towards achieving human rights requirements. Finally, as Turkey is not a member states, Turkish courts are not bound by EU law.[150]

3.2 The right to housing in national constitutional law: a timid presence

Only few of the national constitutional legal orders of the six states covered in ETHOS explicitly recognise a right to housing, and usually as a state objective (programmatic nature) and not as a subjective right (e.g. the Netherlands, Hungary, Turkey). Some states indirectly recognise its (quasi) constitutional value by granting superior legal authority and direct effect to some of the international and European instruments which protect components of the right to housing (eg the Netherlands, Turkey with regard to the ECHR, UK with regard to EU law or the ECHR), whilst other restrict or limit international influence on the institutionalization of redistributive justice in the form of legally enforceable right to housing (eg Austria, Hungary, Turkey in relation to the RESC).

The *United Kingdom*, as is well down, does not have a written constitution, and its constitutional norms are 'scattered across a range of sources', including legislative acts, precedent, customs and so on.[151] There is *no explicit constitutional level recognition of any right to housing or corresponding duties*, but *various legislative acts not only protect components of the right to housing* (ie protection from eviction, social protection scheme, or minimum housing standards), but also impose a *'statutory duty on local authorities to provide accommodation to certain groups of homeless persons',* therefore constituting a 'conditional right to housing' subject to eligibility conditions.[152] Furthermore, acts of parliament transpose into domestic law international instruments, as with the European Community Act 1972 and the Human Rights Act 1988, conferring to EU and ECHR law particular authority and legal effect.[153]

The *Austrian* constitution, which was first adopted in the 1920s, does *not include any explicit reference to a right to housing.* There were discussions, in the 1980s, to introduce the right to housing as a state objective, in

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[149] Karan 2019 n 3, p. 35. But the Commission latest report reviews the housing situation of Roma, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/20180417-turkey-report.pdf ((accessed on 23 April 2019), 40.

[150] Karan 2019 n 3, p. 34-35.

[151] Dupont 2019 n 3, p. 1.

[152] Pleace and Hunter 2018 n 26,. 337.

[153] For the specifics, see above p., and Dupont 2019 n 3, 1-2.

line with many national constitutional instruments, but they fell through.[154] Furthermore, Austrian constitutional norms, as noted above, limit the effect of international instruments recognising the right to housing.[155]

Hungary, already showing reluctance towards European instruments comprising an explicit right to housing (RESC), do not include in its constitutional text any right to housing, or corresponding public authorities' duty to provide for housing or shelter. The new Fundamental Law, which came into force in 2012, states that 'Hungary should *strive to ensure decent housing conditions* …' (Article 22), a provision which is only *programmatic* in nature. Controversially, it is supplemented by additional paragraphs, the first one which entrusts state and local authorities with the task of 'creating the conditions of housing worthy of human beings *and the protection of public interest use of public space*' (Article 22(2) and another one which provides that *'using a public space as a habitual dwelling is illegal'* (Article 22(3)).[156] This *constitutional criminalization of homelessness* which further contributes to marginalizing and ostracising poverty, affects disproportionality persons with disability, since roughly half of the urban homeless population in Hungary suffers from some form of disability or long-term illness.[157] As noted by experts, in Hungary, 'economic reasons by themselves seldom lead to homelessness, even in cases of eviction, but only when related to other mental and psychological problems', and a significant number of those sleeping rough became homeless after being release from prison or hospital.[158] This institutional legal framework clearly undermines the claims for recognition and redistribution of persons with disability, caught in a spiral of poverty accelerated by the inability of social policies to provide adequate support for persons with disability.

In contrast, in the *Netherlands,* not only does the *constitutional framework recognise the authority of international and European instruments providing for a right to housing*, but the Dutch constitution also states that 'it should be the *concern of Dutch authorities to promote sufficient living accommodation*' (Article 22(2)). The Parliament apparently intentionally departed from the formulation of the right in international instruments, pointing to the different function which international and constitutional provisions play. According to official

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[154] N. Sonntag, 'Recht auf Wohnen aus verfassungs- and verwaltungsrechtlicher Sicht – eine Bestandsaufnahme, juridikum 2/2013, 223, cited in Apostolovski and Möstl 2019 n 3, 3.
[155] Apostolovski and Möstl 2019 n 3, 27-29.
[156] Teller and Somogyi 2018 n 16, 155; Sálat 2019 n 3, 8.
[157] Péter Breitner, Á hajléktalanság lakástörteneti elözményei' ('Antecedents in the housing pathwats of homelessness) in Gyori Péter and Vida Judith (eds) Valtozó és változatlan arcú hajléktalanság. Otthontalanul…Tégy az embérert! (Budapest, Menhély Alapítvany and BMSZKI 2013), cited in Teller and Somogyi 2018 n 16, 156-157.
[158] Teller and Somogyi 2018 n 16, 155.

explanations, Article 22(2) requires that the authorities provide ‘a sufficient number of houses’, as well as ‘their volume, quality, safety , health, etc’. [159] In 2018, the Dutch human rights body interpreted Article 22 in the light of relevant international instruments as imposing on the state a ‘*duty to ensure sufficient, affordable, qualitatively good and appropriate housing*’, which includes a *‘special duty for attention to specific vulnerable groups’*.[160] This example highlights well the transformative influence of international norms on domestic law through the method of consistent interpretation, where international conceptions of justice come to superpose themselves onto domestic one to reinforce domestic commitment to redistributive justice, with a strong emphasis on a prioritarian dimension.

The current *Turkish* constitution, like its predecessor, *explicitly recognises a right to housing* although not as a subjective individual right but as a state duty, with a mere *programmatic* nature. Its Article 57 indeed reads that ‘the State shall take measures to meet the need for housing within the framework of a plan that takes into account the characteristics of cities and environmental conditions and also support community housing projects.’ [161] Other constitutional provisions clarify the extent of the state duties in housing matters, which should be informed by ‘*the principle of justice and of the social state governed by the rule of law* (Article 5)’, ‘within the capacity of its financial resources, taking into consideration the *priorities* appropriate with the aim of these duties’ and enjoying a wide discretion (Article 65). Article 62(2) further states that the state ‘shall take measures to protect the disabled and secure their integration into community life’, thus imposing duties toward disabled persons in housing matters. In addition, Article 10 prohibits discrimination based on ‘language, race, colour, sex, political opinion, philosophical belief, religion, sect or any such consideration’, including, in theory, in housing matters. Whilst it does not include specific reference to persons with disability, ethnic origin or minority status, the open-ended nature of the list could be interpreted as covering them. Moreover, an amendment to Article 10 allows for positive discrimination in favour of persons with disabilities.[162]

The *Portuguese* constitution, adopted in 1976 after the fall of the dictatorship, and informed by international human rights law and the desire to open ‘a *path to a socialist society*’ (Preamble), includes a remarkably *detailed and socially progressive constitutional provision on housing,* Article 65. Its first paragraph provides that ‘*everyone* has the right for himself and his family to have an *adequately sized dwelling that provides hygienic and*

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[159] Kamerstukken II, 1975/1976, 13873, number 3 p. 14, cited in Henderson 2019 n 3, 7-8
[160] Letter from the Netherlands’ Institute for Human Rights to the Second Chamber, 31 May 2018, number 2018/0089/AvD/LvdH/LR p 2, cited in Henderson 2019 n 3, 9.
[161] Karan 2019 n 3, 8-9.
[162] Karan 2019 n 3, 10.

comfortable conditions and preserves personal and family privacy'. Its second paragraphs specifies the state's duties in the matter, which include:

a) *Programming and implementing a housing policy* that is incorporated into general town and country planning instruments and supported by urbanisation plans that guarantee the existence of an adequate network of transport and social facilities;
b) In cooperation with the autonomous regions and local authorities, *promoting the construction of low-cost and social housing*;
c) *Stimulating both private construction, subject to the general interest,* and access to owned or rented housing;
d) *Encouraging and supporting local community and popular initiatives that work towards the resolution of the respective housing problems and foster the formation of housing and self-building cooperatives*.

Moreover, the provision requires that the state 'adopt a policy that works towards the establishment of a rental system which is compatible with family incomes and provides access to individual housing' (paragraph 3) and for all level of governments (state, autonomous regions and local authorities) to 'define the rules governing the occupancy, use and transformation of urban land…' and guarantees 'participation of the interested parties in the drawing up of urban [and country] planning instruments' (paragraph 4). This participatory element plays into the representative and political dimension of justice, but is also revealing of the tendency of constitutional legal framework to place emphasis on procedural justice to achieve substantive aims, the definition of which are left to political or policy actors. Whilst the Constitution provides for detailed and extensive guarantees, it is not clear to what extent this provision gives rise to any subjective rights which could be invoked in domestic courts, and has apparently not be invoked as a basis for challenging in court problematic aspects of the Portuguese housing situation.[163]

Whenever the 'right' to housing is recognised at constitutional level, it is not always clear, or specific, who is meant to benefit from it. Constitutional provisions are rarely explicit on the matter, suggesting that, potentially, it should apply to both citizens and non-citizens.[164]

Even when the right to housing is not directly and explicitly recognised, aspects of it may be protected by reference to other constitutionally protected fundamental rights, such as the right to private and family life and

[163] Morris and Brito 2019 n 3, 17
[164] Eg Karan 2019 n 3, 10.

respect for human dignity.[165]

Whilst the right to housing is recognised constitutional value, if only indirectly by reference to international law, or as a state objective, it usually has to be balanced, in policy instruments and concrete situations, with the right to property, which receives more systematic constitutional recognition, although with possibilities for the limitation of its exercise to pursue public interest.[166]

The constitutional recognition of the right to housing varies significantly from one state to the other, from a total absence to a detailed outlining of state duties. None of them however seem to go as far as recognising directly a substantive right which can be invoked in court, or impose enforceable duties on the state, and restrict judicial enforcement to substantive rights recognised under ECHR and EU law. Variations in constitutional recognition are influenced by considerations of social justice, either explicitly (eg Turkey, Portugal), or implicitly, but also result from specific historical (eg Austria), socio-economic and ideological contexts (eg Hungary), as well as legal traditions (eg United-Kingdom). Admittedly,

> [e]nsuring access to justice for the right to housing is less a question of the specific constitutional protections in place and more a question of whether courts and Governments are willing to recognize that the right to housing is central to the core human rights values that courts must safeguard and to which Governments must be held accountable.[167]

To the extent that constitutions remain, in most member states, at the apex of legal hierarchies, only tempered by the increased authority of international and European human rights instruments, the constitutional recognition of subjective rights or state duties in housing matters confer a particular normative authority to justice claims which are formally embedded in constitutional instruments. The inclusion of housing rights, or special protection in housing matters for particular vulnerable groups, directly and formally contributes to the institutionalization of those claims in national polities, and places a special normative pressure on public and private actors alike, and this even if, and when, these constitutional requirements are not follow through in regulatory frameworks, policies and practices.

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[165] For instance, in the Netherlands, Article 10 provides protection of private life and Article 12 of the Constitution for the inviolability of the home, and afford some protection against eviction, including a proportionality assessment. Vols 2018 n 27, 217-218.

[166] eg article 35 of the Turkish constitution; Article 62 of the Portuguese constitution.

[167] Human Rights Council, 'Access to Justice for the Right to housing' Report of the special rapporteur on adequate housing, 15 January 2019, available at https://www.hlrn.org.in/documents/SRAH_Access_to_Justice_January_2019.pdf (accessed on 23 April 2019), 5.

4) National regulatory frameworks and access, retention and maintenance of one's home

International treaties and national constitutions, as well as their authoritative interpretation by monitoring bodies, offer a *general institutional framework for the realisation of justice in housing matters.* Whilst they set certain *limits for national regulatory and policies instruments*, and *favour some approaches* over others, these generally leave a *wide margin of manoeuver* for domestic policy actors. As often the case, the devil is in the detail, and in order to get a sense of which conception(s) of justice are *actually institutionalized* in housing matters at national and local level, one inevitable must turn to *national and local legislative and regulatory frameworks*. These can be extremely complex and defy a comprehensive and synthetic exposition in the context of this research paper, which thus will be limited to highlighting those features which are particularly relevant for teasing out the conception of justice which those legal framework diffuse, with a focus on the consideration which they give to the specific justice needs of particularly vulnerable groups, such as persons with disabilities, on one hand and disadvantaged ethnic minorities and migrants on the other. For further details, we refer the reader to the six country reports, published as working papers on the ETHOS website, and other relevant comparative work.[168]

Many domestic legal frameworks and mechanisms intersect in a manner which affect access, retention and arrangement of one's home, from civil law rules, to property law, banking rules, social security rules, immigration law, public procurement requirements, and so on. For the purpose of this particular report, we chose to focus on those sets of rules which define and determine *access to social housing and/or housing-related benefits* on one hand, and those which *regulate eviction from one's home*, on the other. The analysis of legal rules and practices which determine the *provision* by *central government* or, more often, *local authorities,* of in-kind or in-cash housing-related support reveals the nature, scope and degree of *collective responsibility* in redistributive justice, and contested nature of the 'frames of justice.[169] The study of legal norms related to *eviction* explores the *tensions between the right to property and the right to a home*, and tells us about the way society formally apportions *individual responsibility* towards the objective of redistributive justice, and notably whether the 'burden' of justice

[168] For a recent comparative analysis of the legal and policy framework of evictions in Europe, see Padraic Kenna, Sergio Nasarre-Aznar, Peter Sparkes, and Christoph U. Schmid (eds), *Loss of homes and evictions across Europe* (Edward Elgar, 2018)
[169] Fraser 2009 n 5, 62-67.

lies primarily with the landlord/lender/owner or the tenant/borrower/occupant, whether it provides for state interference or intervention in support of one or the other, and whether these differ depending on who the 'parties' are, here again exploring the tensions related to the 'who' of justice.[170]

4.1 The national regulation of social housing and housing benefits

In this section, we highlight features of the national legal frameworks, as laid down in legislative, executive or regulatory measures, or other legally binding instruments, as interpreted and applied by relevant authorities, including courts, which determine *entitlement to in-kind benefits* (ie social housing, low-cost home ownership) and various types of *cash benefits* (ie housing or other relevant subsidies, special housing loans, etc.) in the six countries covered in the ETHOS project (Austria, Hungary, the Netherlands, Portugal, United-Kingdom, all EU member states, and Turkey, candidate country). These are complex, and have evolved overtime, but they matter since they put flesh on the bare bones of more general justice commitments, as institutionalized in provisions of international treaties or constitutions, or on the contrary strip them of any substance elements, laying bare institutionalized forms of injustice.

A preliminary question, relevant for defining the scope of enquiry, is the *definition of 'social housing'*. There is no clear, or common, definition, and the term is used across countries to refer to various types of subsidized, more affordable, housing. It may refer to schemes which provide publicly owned or subsidized accommodation for free or at rates which are more advantageous than the private rental market (e.g Austria, Netherlands, United-Kingdom, Hungary, Portugal), or in countries where ownership occupation dominate, the facilitated purchase of affordable housing units (eg Turkey). It includes accommodation owned, and rented, by public authorities, usually municipalities (eg UK, Netherlands, Austria, Hungary, Portugal), or by not-for-profit private actors, such as housing associations (eg UK, Netherlands, Austria). It may also be taken to include 'social rental agencies', which involve NGOs and private landlords in the provision of affordable housing.[171] It covers programs which support access to decent housing for the most deprived or vulnerable (ie 'targeted-residual', like in the United-Kingdom, Hungary, Portugal), but also include those which aim also at segments of the middle class (ie 'targeted-generalist' like in Austria), or even support access to affordable housing for all ('universalistic', like in the Netherlands, until

[170] U.C. Schmid, and R.J. Dinse *Towards a Common Core of Residential Tenancy Law in Europe? The Impact of the European Court of Human Rights on Tenancy Law ZERP Working Paper* 1/2013 (Bremen: Centre of European Law and Politics, 2013).
[171] J. Hegedüs, V. Horváth, and E. Somogyi, ' The potential of social rental agencies within social housing provision in post-socialist countries: The case of Hungary' (2014) 8:2 *European Journal of Homelessness*

recently).[172] A 2013 report for the European Parliament on social housing in Europe adopts a broad characterization with three elements: 'a mission of general interest, the objective of increasing the supply of affordable housing, and the identification of specific targets defined in terms of socio-economic status or the presence of vulnerabilities'.[173]

In this report, we consider different kinds of schemes, to the extent that they help reveal diverse conceptions of social justice, ranging from more prioritarian or sufficientarian visions to more equalitarian approaches. To avoid confusion however, in the analysis below, we reserve the term social housing to publicly subsidized rented housing, at low-cost or provided for free, either by public authorities (usually local) or housing associations. The *availability of social housing*, in that sense, varies dramatically from one state to the other (and also across regions and cities within states), from Turkey where it is inexistent, to Portugal and Hungary, where it is very limited (respectively 2 and 3% of all accommodation), the United Kingdom, where it has significantly shrunk in the last decades, and the Netherlands and Austria, where it continues to constitute an important share of the overall (rental) housing stock, and covers an important part of the population, beyond low income to medium-level income households.[174] These discrepancies depend on state and local resources, but also on allocative policy choices, dominant ideologies and historical legacies. In Portugal, the lack of state resources, and more recently government's ideologies, have limited investment in social housing units.[175] The radically liberal direction taken by Hungary, in the transition years, led to the massive sale of flats owned by municipalities, and the almost complete privatization of the housing supply, with only few and low quality units, remaining as 'social housing' stock.[176] Austria, for its part, has a long tradition of public intervention and support in social housing, which has contributed to the relatively steady development of a social housing stock, at least in some cities and provinces, through various schemes (direct provision by the state and municipalities, or through limited profit housing associations), but is experiencing some reduction in investments in the recent years, and a shift from structural investment into social housing towards individualised benefits.[177] The Netherlands maintained its social housing

[172] See Michela Braga and Pietro Palvarini, Social Housing in the EU (European Parliament, Jan 2013), PE 492.469, http://www.europarl.europa.eu/RegData/etudes/note/join/2013/492469/IPOL-EMPL_NT(2013)492469_EN.pdf (accessed on 23 April 2019), 10-15.
[173] Braga and Palvarini 2013 n 172, 6.
[174] Karan 2019 n 3, 11; Morris and Brito 2019 n 3, 11; Sálat 2019 n 3, 10; Apostolovski and Möstl 2019 n 38.
[175] Morris and Brito n 3, 12.
[176] Sálat 2019 n 3; Teller and Somogyi 2018 n 16.
[177] Apostolovski and Möstl 2019 n 3, 9-11..

stock and development, but under EU pressure, targets it more towards disadvantaged groups than it used to,[178] whilst the UK, under strong (neo)liberal influences since the 1980s, has sold out a large share of its housing stock, keeping only a residual park, aimed at the most socio-economically deprived.[179]

4.1.1 Access to social housing and the allocation of housing benefits under national law

As introduced earlier, the construction and maintenance of *social housing*, and the involvement of public and private actors, varies significantly across the six states covered. The societal importance of rules regulating access to social housing therefore depends on the social housing supply. In countries where social housing supply is very limited, the relevance of laws regulating access to social housing is marginal (eg Hungary, Portugal). As noted earlier, European legal frameworks are not neutral on the development of social housing stock, and may even limit public financial support for social housing, unless it fits within the particular conception of redistributive justice endorsed by European institutions. For instance, the Dutch scheme informed by a universalist approach to social housing, and which supported not-for-profit housing associations in developing the stock of affordable housing, was challenged by real estate investors and the European Commission under EU law. The Commission pressured the Dutch authorities to adjust the scheme, to be more clearly targeted to ‘disadvantaged citizens’ or ‘socially less advantaged’ groups. The prioritarian or sufficientarian perspective which seems to infuse the European Commission’s approach to the public service of housing was (unsuccesfully) contested by housing associations, including before the CJEU. [180]

In most of the countries, the social housing stock is, by design or by default, limited, and public authorities support access to decent and affordable housing on the private rental market, through *individualised subsidies,* either dedicated housing subsidies, or housing related subsidies (eg subsidies for the payment of utilities bills, building or renovation subsidies, etc.) or more general social benefits, which can assist household in covering housing costs. Since the advent of the economic crisis, there seem to have been a contraction in levels of housing subsidies, and a stricter (re)targeting towards the lowest income (particularly disadvantaged) group or particularly vulnerable persons, sometimes carried out through a restructuring of social benefits regimes.[181] For instance, in Austria, there has been a shift, and transfer, of benefits, away from dedicated housing benefits towards a more

[178] Vols 2018 n 27.
[179] Pleace and Hunter 2018 n 26, 337-338.
[180] Henderson 2019 n 3,22.
[181] Braga and Palvarini 2013 n 172, 10-15.

integrated needs-based benefit regime. [182] The UK also followed a similar path, with caps on integrated benefits.[183]

In many countries (eg Austria, United-Kingdom), access to adequate housing involves diverse forms of support which may be extremely complex and difficult to navigate, in particular for vulnerable people (eg foreigners, persons with mental and intellectual disabilities, etc).[184]

In most countries, the general framework for the allocation of social housing and housing benefits is set at national level, through acts of parliament, but detailed *implementation is often left to the local level*,[185] with the consequence that there can be significant differences from one region, or city, to the other, in term of the availability and quality of social housing, eligibility and level of housing benefits, and beneficiaries. [186] In some countries, the allocations of benefits, in the form of social housing, is left to the discretion of private actors involved in the provision of social housing, such as housing associations in Austria (although under state supervision). [187]

State, regions or municipalities usually set *income ceiling* for access to social housing, housing subsidies, or preferential housing loans or low-cost home ownership schemes, sometimes adjusted to local costs of living.[188] These regulations may restrict access to housing related benefits to lower-income households, who cannot afford adequate housing on the private market, but they sometimes extend beyond to middle income earners (eg access to municipal (social) housing in Vienna, interest-free mortgage in Turkey, etc).[189] Many legal regulations also exclude households that already own a property,[190] or have any wealth.[191] Whilst this exclusion appear logical, it may also play against mobile households, in particular those moving from areas where property is cheap and plenty to parts of the country where accommodation is more scarce and pricey.

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[182] Eg in Austria Apostolovski and Möstl 2019 n 3, 11-12.
[183] Dupont 2019 n 3.
[184] Apostolovski and Möstl 2019 n 3, 9; Dupont 2019 n 3.
[185] Although not in Turkey apparently, where access to low-cost housing is centrally controlled by the HAD. Karan 2019 n 3, 11-12.
[186] A typical example in that respect is Austria, see Apostolovski and Möstl 2019 n 3.
[187] Apostolovski and Möstl 2019 n 3, 19.
[188] Eg HAD scheme is Turkey, Karan 2019 n 3, 12; Apostolovski and Möstl 2019 n 3, 12-20, 31.
[189] Karan 2019 n 3, 12; Apostolovski and Möstl 2019 n 3, 19-20 and 30.
[190] Karan 2019 n 3, 12; Apostolovski and Möstl 2019 n 3, 12.
[191] eg in Graz, Austria, Apostolovski and Möstl 2019 n 3, 20.

Some national or local regulations, or schemes, *prioritize* certain categories of persons or households for access to social housing, or housing benefits, either based on *particularly low income level*, and/or *other needs-based criteria*. Across Europe, we observe a refocusing of housing benefits towards particular groups, identified as more vulnerable, and a more needs-based approach (eg Austrian, Netherlands, United-Kingdom, Portugal). In Portugal, a newly adopted program, taking stock of the 'shortcomings with structural housing needs', target the most vulnerable, namely those 'living in precarious conditions' and in a 'situation of financial shortage'. [192] Precarious conditions refer to substandard living conditions (eg homelessness), as well as those living in unhealthy and unsafe, or overcrowded, or unsuitable, conditions. [193] In Vienna, a special form of social housing in Vienna, called SMART flat, with shorter waiting periods, are aimed primarily at young people (up to 30), older people (above 65) and persons with disability needs, as well as families living in accommodation units which are too small for their size.[194] In some countries (e.g. Hungary), housing support schemes (such as access to prefential loans or tax reductions) appear primarily designed to favor middle (upper) class large families ('perverse redistribution').[195]

A feature of almost all legal systems covered in the ETHOS study, in particular where social housing and housing benefits are a local competences and responsibilities, is the requirement of a minimum, but sometimes quite extensive, *'local connection'* as a prerequisite for applying for social housing or housing benefits in a particular area. This condition obviously disadvantages mobile individuals and households, who are most likely to be foreigners, young, single and/or without children. In Vienna (Austria), which has an important municipal (social) housing stock, only those who have resided in Vienna for at least two years can apply for such housing.[196] In Graz or in Innsbruck, they must have lived or work in that city for five years before being able to apply for municipal housing.[197] In Vienna, a newly introduced bonus system for long term inhabitants which shortens the waiting list as points increase, lead to a 'structural' disadvantaged in favor of local residents, and against most recent (foreign) arrivals, including many refugees, who are then forced onto the expensive private, and even exploitative, rental market.[198] Access to assisted housing facilities for persons with disabilities are restricted to disabled persons who have had their center of life in Vienna for at least five years, have resided there for at least two years and are

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[192] Decreto-lei No 37/2018, 2018, cited in Morris and Brito 2019 n 3, 13.
[193] Decreto-lei No 37/2018, 2018, cited in Morris and Brito 2019 n 3, 13.
[194] Apostolovski and Möstl 2019 n 3, 11, 19.
[195] Salat n 3, 22.
[196] Apostolovski and Möstl 2019 n 3, 18-19..
[197] Although based on the report, it is not clear whether this rule applies to Austrian and foreigners, or only foreigners (or third country nationals). See Apostolovski and Möstl 2019 n 3, 20.
[198] Apostolovski and Möstl 2019, n 3, 24-25.

Austrian citizens, or EEA nationals, refugees or long term resident. Tyrol also has geographical connection requirements for access to assisted housing facilities, and also take into account the economic contribution to the province.[199] In the Netherlands, in areas where housing is scarce, prior to looking for social housing, individuals and families must obtain a 'housing permit' from the municipality, the issuance of which is based on 'whether someone has social and economic ties to the municipalities'.[200] Municipalities can however make an exception to this local connection requirement for those who are in 'urgent need of housing', which they determine on a discretionary basis. These are taken to refer to 'socially less advantaged group', and must include those in temporary shelters, victims of domestic violence and those who are in the care of family members, friends or neighbors, [201] and make provisions for refugees. [202] The law authorizes municipalities facing 'serious urban problems' to take extraordinary measures. They may designate particularly deprived areas as 'zones of potential' (*kansenzone*), and condition housing permits to employment or other source of regular incomes, or the lack of criminal record.[203] These are, it is presumed, aimed at promoting social mixity and cohesion, and prevent spatial segregation. In Turkey, only those who have been resident for at least one year in the particular province or district are eligible for low-cost housing projects developed by the Housing Development Administration (HDA).[204] In countries facing (local) labor shortage though, governments are offering special incentives to support work related mobility through special housing benefits. Hungary, for instance, has a special temporary housing support scheme, which is available for those who are unemployed and would need to commute more than 100 km or five hours to take on a job (maximum 12 months). It is significant but attributed on a discretionary basis.[205]

Securing access to low-cost housing may consequently restrict spatial and also social mobility. Indeed, in countries where social housing is particularly desirable and affordable, and where there is no regular, or strict review of whether the conditions of eligibility are still fulfilled by tenants, these may be reluctant to move, including for professional development reasons, for fear of loosing this benefit and not being able to find, or even be entitled to, anything equivalent elsewhere. The Turkish scheme of facilitated access to low-cost property even

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[199] Apostolovski and Möstl 2019, n 3.
[200] Henderson 2019 n 3, 10.
[201] Henderson 2019 n 3, 10.
[202] Housing Act, Article 12(4).
[203] Act on Extraordinary Measures for Urban Problems, Articles 3, 5, 8 and 9.
[204] Karan 2019 n 3, 12.
[205] Sálat 2019 n 3, 22.

prevents mortgage holder from selling their property before having repaid their mortgage, therefore tying them for long time to particular settlements characterised (stigmatised) by low socio-economic developments.[206]

Most commonly, national legislation and regulations, whilst giving instructions on which groups should be prioritise, leave discretion to the public and private authorities in charge of allocating housing benefits in cash or kind. Dutch law, for example, through the Housing Supplement Act, determines the financial support which the government offers to households that rent on the private market and whose rent is under a threshold set out in law. It nonetheless allows municipalities to grant special treatment to specific groups of vulnerable persons.[207] In Hungary, the general housing law framework provides very little guidance, and leaves local authority free to determine which units they offer as social housing, and which ones they rent on a market basis for profit. As most are short of cash, they tend to rent at market rates those in good conditions, and only allocate to social housing those in a poor state of repair.[208] Some local governments, usually those with more 'socialist' orientations, develop programs for the development of affordable housing, but these are rare.[209] Housing benefits are allocated at local level purely on income-related criteria.[210] Support to cover housing costs is also provided in the form of tax benefit to employers who contribute toward their employees' housing costs, a scheme which - obviously - benefit only those in employment.[211]

Access to housing benefits may also be dependent on behavioural conditions, pointing to strong notion of deservingness. National social benefits scheme are increasingly moving towards a workfare model, where people are expected to look for, and take on, work or be stripped of welfare support.[212] In the UK, the integrated Universal Credit Scheme, which seeks to replace previously available housing benefits scheme, makes it a mandatory condition.[213]

Most national laws do not confer a legal right, in the sense of a legal entitlement, to social housing or housing benefits, which the consequence that refusal decisions cannot be challenged in courts. In Austria, for

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[206] Karan 2019 n 3, 14.
[207] Henderson 2019 n 3, 24.
[208] Sálat 2019 n 3, 10-11.
[209] Sálat 2019 n 3, 11.
[210] Sálat 2019 n 3, 12.
[211] Sálat 2019 n 3, 12.
[212] Eg in Hungary, with the public work scheme (see Sara Hungler and Agnes Kende, 'Roma on public work contract case study in Hungary and Young women with caring responsibilities in Hungary' (Hungary: Kozep-Europai Egyetem, 2018; report for deliverable 6.2)
[213] Dupont 2019 n 3, 38.

instance, it is not possible to appeal the refusal to allocate social housing or housing benefits, or their calculation.[214] The same goes in England, except for certain categories of homeless persons, who enjoy what has been called 'conditional right to housing'.[215] These concerns families with dependent children, and vulnerable applicants. Some British courts attempted to narrow the interpretation of the notion of vulnerability,[216] thus limiting the scope of any legal entitlement, but the Supreme Court clarified the concept, explaining that the comparator was not another homeless person, but an 'an ordinary person who is in need of accomodation' and who is 'robust and healthy'. [217] These impose certain *prevention, relief and accomodation duties* on local authorities towards *children and persons with special needs*, who fulfill the other conditions (homelessness, local connection).[218]

4.1.2 Access to social housing and the allocation of housing benefits for persons with disabilities

A first difficulty when it comes to assessing whether laws and regulations take account of the special housing needs of disabled persons is a definitional one. There is *no common definition of disability,* or disabled persons, and definitions and qualifications vary across countries, localities and types of benefits.[219] These definitional differences will obviously determine who benefits from special attention and support. They are, on closer scrutiny, not totally exempt from behavorial considerations, and infused by notions of deservingness, in addition to needs consideration. Whilst they tend to include various forms of physical impediments, as well as most mental illnesses, which affect individuals' ability to carry out daily activities, they vary in the extent to which they recognise certain long term or serious illnesses or those resulting from addictions.[220]

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[214] Apostolovski and Möstl 2019 n 3, 7-8, 26.
[215] Pleace and Hunter 2018 n 26, 337-338. See also Dupont 2019 n 3..
[216] *R v Camden London Borough Council ex p Perreira* [1998] cited in Pleace and Hunter 2018 n 26, 338.
[217] Supreme Court, *Hotak v Southwark LBC* [2015], cited in Pleace and Hunter 2018 n 26, 338.
[218] Prevention and relief duties end when an applicant has secured accomodation for a duration of at least six months, or where she has refused a suitable accomodation offer, refuses to cooperate, or is not longer eligible, whilst the accomodation obligations terminate where the applicant accepts or refuses an suitable offer for social housing or a suitable accommodation on the private rental market with a minimum 12 month tenancy, or refuses a offer for suitable temporary accomodation Dupont 2019 n 3, 18-19.
[219] For an emphasis on this issue, see Apostolovski and Möstl 2019 n 3, 21-22.
[220] For example, statutory guidance documents in the UK clarify that certain disease or infection, like HIV or cancer, qualify as disabilities but not illnesses caused by alcohol, nicotine or drug addiction, or tendencies such as pyromaniac, exhibitionism, etc. Office for Disability Issues*, Equality Act 2010: guidance on matters to be taken into account in determining questions related to the definition of disability',* 2010, p. 8-9, cited in Dupont 2019, n 3, p. 22. In the Netherlands, equal treatment legislation Equal Treatment of Disabled and Chronically Ill People Act, para 6a, prohibits discrimination based on chronic diseases, including in access to housing (Henderson 2019 n 3, p. 16).

All legal system covered have *non-discrimination* legislation, often adopted under the influence of ECHR and EU law, which prohibit discrimination based disability in access to social housing and housing benefits. [221] Moreover, under the influence (pressure) of the CRPD, most legal systems have adopted positive discrimination measures, in the form of special rules and benefits which seek to *support access to suitable housing for persons with disabilities* and to *accomodate their particular needs,* and offer *financial compensation* for the costs occasioned by additional space, care and accessibility requirements.

In line with legal prohibition on discrimination based on disability, national regulations adjust eligibility criteria for housing benefits to ensure that they do not discriminate against persons with disability, and take into account the implications of disability for participation in paid work, care and treatment needs, mobility contraints and adjustment in accomodation. In the United Kingdom for instance, housing benefits can be granted to support alternative housing when a current or new home needs to be adapted, cover period of temporary absence (eg for therapy when caring for a disabled person), or compensate for the cost of additional room required by the disability or the necessary presence of a carer. Income criteria for means tested benefits, deductions for non-means tested benefits, and benefit-cap are also usually set aside.[222] Disabled persons and their carer can be exempt from work-related requirements under the newly introduced Universal Credit Scheme.[223]

In Turkey, the public authorities administering the low-costs housing ownership scheme (HDA) must prioritize persons with disabilities (with apparently an informal quota of units reserved for them).[224] Access to special benefits, such as care fees, or tax benefits for persons with disability, is nonetheless restricted to those falling below a particular resources threshold (ie income or capital).[225] Other benefits, aimed at persons with severe disability, are reserved for those who cannot rely on family members for care and support, due to their absence or economic or social deprivation,[226] suggesting that *the collectivity (ie the state) only steps in when the family, as the first port of call, can not provide appropriate support.*

The Dutch Housing Supplement Act, which regulates housing benefits allocated to tenants, provides for a higher rent ceiling for people with disabilities,[227] and for additional compensation for expenses generated by

[221] Eg in the Netherlands, the Equal Treatment of Disabled and Chronically Ill People Act, Henderson 2019 n 3, 15.
[222] Dupont 2019 n 3, 25-27.
[223] Dupont 2019 n 3, 27.
[224] Karan 2019 n 3, 12.
[225] Karan 2019 n 3, 20.
[226] Karan 2019 n 3, 22.
[227] Housing Supplement Act, Article 13(1)(a)(2) and 13(2)(a).

special accommodation requirements, [228] whilst the Social Support Act sets the conditions under which municipalities must support those.[229] Moreover, the law allows social housing providers to target particularly vulnerable groups, which include persons who give or receive care from/to family members, an option which can more directly affect persons with disability or serious and chronic illnesses.[230]

In Styria (Austria), persons with reduced mobility can apply for special rent subsidies, if their income falls below a particular threshold, as well as for financial support for living in their own home. Disabled persons also benefits from a more favorable point system in calculating subsidies entitlement.[231] In Portugal, the new 'First Right' program, a support scheme aimed at low-income households, prioritizes access to household in which one person is disabled or aged above 65, and who are living in unsuitable conditions (e.g. architectural barriers for people with impairments or disabilities).[232]

Many national regulations also provide for special schemes to address the specific housing needs of disabled persons, in particular their care, mobility and access needs, and taking into account the limited ability of certain persons with disabilities to engage in (well) paid employment and/or offer guarantees. For example, Portugal provides for a special subsidiszed housing credit scheme for persons with disability, in which life insurance requirement is waived.[233] The UK offers special mobility and care living allowances.[234] Hungary also grants a special allowance for refurbishing home to make it more accessible, but it is very low in comparison to the costs of suitable technical equipment.[235]

Many legal systems also seek to support *community-living* for persons with disabilities, as opposed to them staying in specialized institutions. This is the case in the Netherlands, for instance, where the Social Support Act seeks to promote 'self-sufficiency' and 'participation' of persons with disabilities, and call on municipalities to enable persons with disabilities to live home as long as possible and to provide appropriate support for it.[236] For those who cannot live independently, in particular those suffering from psychological or psychosocial problems,

[228] Housing Supplement Act, Article 21(1)(c)(3).
[229] Social Support Act, Article 2.3.6 and 2.3.7
[230] Henderson 2019 n 3, 10.
[231] Apostolovski and Möstl 2019 n 3, 23..
[232] Decreto-lei No 37/2018, 2018, cited in Morris and Brito 2019 n 3, 13.
[233] Morris and Brito 2019 n 3, 16.
[234] Sections 71 and 72 of the Social Security Contributions and Benefit Acts, cited in Dupont 2019 n 3, 24.
[235] Sálat 2019 n 3, 16.
[236] Social Support Act, Preamble.

the act provides for 'protected living' and temporary shelter.[237] Turkey has also introduced the 'Hope Homes' program, to support community living in apartments in small groups.[238]

Whilst many countries prioritize disabled persons in access to social housing and housing support, very few however go as far as granting persons with disability an entitlement to housing. The UK however comes close, which grants a 'conditional' right to housing to vulnerable homeless persons, who are not 'robust and healthy' (a characteristic most likely to be met by persons with disability and chronic illnesses), have relevant local connections, and are not intentionally homeless.[239] As noted elsewhere, in the UK, persons with disability have also been able to challenge benefits rules related to the number of rooms in the dwellings, as being in breach of domestic non-discrimination legislation and obligations under the ECHR.[240]

Sometimes national legislative frameworks require that local authorities develop strategic planning instruments to ensure appropriate housing support for persons with disabilties, in line with the CRPD goals (e.g Netherlands).[241]

4.1.3 Access to social housing and the allocation of housing benefits for other vulnerable groups

National regulatory frameworks concerning access to social housing and housing benefits or refugees, asylum-seekers and undocumented migrants, and ethnic minorities (eg Roma), the two 'vulnerable' groups on which this part of the study focused, vary quite significantly. Some systems exclude non-citizens, whilst others distinguish between regular migrants, including recognised refugees and registered asylum-seekers, and long term residents, on one hand, who are usually granted some housing support, and irregular migrants (people who entered illegal, those whose visa or residence documents have expired, asylum-seekers whose claim have been rejected, etc), on the other, who tend to be more generally excluded, revealing bare selective notions of *deservingness* which infuse these regulatory frameworks, and displace needs-based considerations.

In the United Kingdom, persons from abroad who are *not habitually resident* cannot apply for housing benefits,; however, refugees are not considered to fall in this category and are therefore entitled to apply for

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[237] Henderson 2019 n 3, 14.
[238] Karan 2019 n 3, 21.
[239] Supreme Court, *Hotak v Southwark LBC [2015],* cited by Pleace and Hunter 2018 n 26, 338.
[240] Dupont 2019 n 3, 32-33.
[241] Social Support Act, Article 2.1.2(2)(h); Henderson 2019 n 3, 14.

housing benefits. [242] Newly recognised refugees can apply for housing benefits starting from the date they registered their application for asylum, therefore providing for retrospective entitlements. For all other claimants, housing claims can only be 'backdated' for a period of one month.[243] Both may however be asked to provide extensive supportive evidence, which may be difficult for them to gather.

UK housing law excludes 'persons from abroad' from emergency housing rights, but here again makes an exception for refugees.[244] The competent local authority should be the one where the refugee lived as an asylum-seeker (local connection requirement).[245] Moreover, under UK immigration legislation, asylum-seekers who are destitute may lodge an application for accommodation and financial support from the Home Office. [246] Accommodation is offered on a no-choice basis, at first in hostel type accommodation, then in more long term accommodation, normally shared flats, located outside of London (according to a 'dispersal' policy), except in case of special medical needs.[247] These accommodation units are offered by private contractors and must take into account various criteria, including the availability of public services and the risk of social tensions. [248] This regulatory framework 'ties [new refugees] to districts in which they were dispersed as asylum-seekers', and to accommodation which may not meet their needs. [249] Moreover, their inability to work as well as low benefits payment means they are not in a position to secure accommodation on the expensive private rental market, which results in them having to resort to (risky) informal housing solutions. In the UK, the notion of vulnerability, as triggering special duty of care and protection in the context of housing (shelter), has started to apply to unaccompanied asylum seeking children and child victim of human trafficking. [250] In the Netherlands, where municipalities make rules for the provision of housing for those in 'urgent needs', they must also stipulate how they provide for refugees.[251]

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[242] Combined reading of Section 10(1) and Section 19(3)(b)(g) of the Housing benefit regulation 2006, cited in Dupont 2019 n 3, 29.
[243] Housing Benefit Regulations 2006, Regulation 10(A) and Schedule A1, cited in Dupont 2019 n 3, 29-30
[244] Housing Benefit Regulations 2006, Regulation 3 (A) cited in Dupont 2019 n 3, 31.
[245] Housing Act, Section 199(6) and (7) cited in Dupont 2019 n 3, 31.
[246] Section 95, Immigration and Asylum Act 1999.
[247] Dupont 2019 n 3, 31.
[248] Dupont 2019 n 3, 32.
[249] John Murphy 'Barriers to migrants accessing public services', (2017) *Free movement,* cited in Dupont 2019 n 3, 33.
[250] S v London Borough of Croydon, cited in Ministry of Housing, Communities and Local government (2018), 61, as report in Dupont 2019 n 3, 39.
[251] Henderson 2019 n 3, 10.

In Austria, asylum-seekers who have been granted refugee status can stay in special centres ran by the federal state for four months after the decision; after that they must find their own accommodation, which may be challenging. Asylum-seekers who have been granted residence on humanitarian grounds must leave those centers within two weeks, and are not entitled to needs-based minimum benefits.[252] Beneficiaries of subsidiary protection may stay in those centres longer. In some Austrian provinces, foreigners with legal residence status have, in theory, access to housing benefits, but in others, they are effectively excluded, due to residence, language or work requirements. In Styria, for instance, benefits, such as the social aid scheme, which replace the previous housing benefit scheme, are accessible to a range of foreigners, including refugees, subsidiary protection status holders, and persons with regular or special residence permits. Similarly, in Vienna, foreigners who have been residing in Austria for at least five years are eligible for a whole range of housing subsidies. [253] However, a bonus system for the allocation of social housing based on length of residence disadvantage most recent (foreign) arrivals, including many refugees.[254] In other regions, eligibility rules de facto exclude refugees. For instance, in Upper Austria , only those who have been legally residing in Austria for at least five years, have 54 months of employment income or employment based social benefits, German language level A2, or five years of compulsory schooling in Austria and positive finalization of German classes are eligible, which excludes many refugees and other foreigners.[255]

In Turkey, access to low costs housing units (under the HAD scheme) is reserved to Turkish citizens, and excludes refugees, asylum-seekers and undocumented migrants[256] In any case, the very narrow definition of refugees, limited to European refugees under Turkish law, restrict the population that could benefit from any benefits conferred to those recognised refugee status, and excludes most of recent waves of immigration.[257] European refugees, Syrian 'refugees' under temporary protection, 'conditional refugees' (awaiting resettlement) and beneficiaries of subsidiary protection must find housing on the private rental market, where they are likely to face exploitative practices, and secure only poor quality and unsafe housing. Applicants for international protection are expected to reside in designated provinces (according to a 'satellite city policy'), and meet their housing needs themselves, although the regulations allow the authorities to establish reception and

[252] Basic Care Agreement (*Grundversorgungsvereinbarung – Art. 15a B-VG)* (AUT), cited in Apostolovski and Möstl 2019 n 3, 22.
[253] Apostolovski and Möstl 2019 n 3, 16.
[254] Apostolovski and Möstl 2019 n 3, 24-25.
[255] Apostolovski and Möstl 2019 n 3, 16.
[256] Karan 2019 n 3, 12.
[257] Karan 2019 n 3, 7, 17.

accommodation centres. In determining access to those centres, the authorities must consider the applicant's demands, family situation and special needs. [258]

Dutch law provides for shelter for asylum-seekers whose application is pending. [259] However, once an application has been denied, Dutch law allows the authorities to condition access to shelter to cooperation in deportation. Individuals that accept to 'cooperate' will be placed in freedom-limiting centres, whilst those with minor children can stay together in special 'family location', but where they have 'fewer rights and privileges' than asylum-seekers. Those who do not cooperate are not entitled to shelter. [260] Furthermore, the combined application of the Dutch Social Support Act, and the so-called Linking act, results in only those who have legal residence status in the Netherlands being entitled to housing benefits. It even prohibits municipalities from distributing housing permits to undocumented persons. [261] The justification for this legislative framework is informed by a particular conception of justice and fairness, where the undocumented migrants' 'interest in having the possibility to move to a house to which a permit is needed does not outweigh the interest of an effective allocation of such scarce (affordable) houses for distribution'.[262] As noted earlier, this regulatory framework which exclude undocumented migrant from access to basic needs, has been condemned by various UN and European monitoring bodies. Some Dutch courts initially reacted by interpreting national law in the light of international instruments as requiring municipalities to offer shelter to undocumented migrants. However, as the ECtHR ruled that the Dutch rules did not violate Articles 3 and 8 ECHR, they let go of it.[263]

In relation to minorities, in both countries examined in that respect, Portugal and Hungary, where international monitoring and reporting have identifying serious shortcomings with the housing situation of Roma communities, the constitutional and legal framework do not allow for differentiation based on ethnic grounds.[264] This results in positive discrimination measures directly and explicitly targeting this particular group impossible. However, whilst the constitutional framework remains unchanged, international commitments, and notably the Framework Convention on the Protection of National Minorities, have contributed to the de facto acceptance of the existence of one ethnic minority in Portugal, Roma. It has led to the adoption in the last decade of a range of

[258] Karan 2019 n 3, 18.
[259] Central Body for the Reception of Asylum Seekers Act, Article 3(1).
[260] Henderson 2019 n 3, 15.
[261] Henderson 2019 n 3, 16.
[262] *Kamerstukken II*, 24 233, number 6, p.66, Henderson 2019 n 3, 23.
[263] Henderson 2019 n 3, 20-21.
[264] Article 13 of the Portuguese Constitution

strategies to address the structural disadvantages faced by this community in Portugal. A report for prepared for the European Commission, for instance, noted that local authorities made an effort in order to ensure access to housing benefits to Roma, and be sensitive to their 'specific cultures and lifestyle'.[265] There is, however, no special attention placed by legal or policy frameworks on African persons, or persons from African descent, and this despite the serious discrimination and disadvantages they face, including in terms of securing decent and affordable housing.[266] In Portugal access to the new support scheme, 'First Right', is accessible to nationals, EEA citizens and foreigners who hold valid residence permit in the country.[267] Looking at it a face value, it should benefit in priority Roma communities, since various reports identify them as particularly affected by housing precarity, often living in informal settlements,[268] but also Africans and persons from African descent, which often live in substandard (informal) accommodation. International monitoring mechanisms had criticise Portuguese prior scheme for it resulted in many Roma not meeting the eligibility requirements and thus being excluded from housing, support.[269]

4.2 Eviction in national law – shifting the weight of redistributive justice

This section critically reviews legal rules related to *eviction*, a process which begins with an occupier being formally asked to leave a property, and eventually results in the forced removal from rented accommodation (including social housing), owner occupied property, or land or property occupied without title (eg squatting, illegal camps and settlements, etc). It may involve a court order or not. Looking at legal rules and procedures on eviction is relevant in terms of redistributive justice. Of particular interest is the way and the extent to which these national laws and regulations place the burden of redistributive justice on landlord/owner/lenders, any 'efforts' expected from the tenant/occupier/borrower (playing into the idea of deservingness), or their special needs, and the role of the state in supporting either side, and whether who the parties are matters. It also illustrates the relevance of the procedural dimension of justice, in addressing injustices which result from socio-economic inequalities (maldistribution), or cultural factors (misrecognition).[270] The focus on eviction is informed by the

[265] Ana Maria Guerra Martins, 'Country report - Non discrimination – Portugal' for the EC (2016), cited in Morris and Brito 2019 n 3, 9.
[266] Morris and Brito 2019 n 3, 9.
[267] Morris and Brito 2019 n 3, 11.
[268] Morris and Brito 2019 n 3, 19-20.
[269] CESR, Concluding Observations on the Fourth Periodic report of Portugal' (2014) para 15, cited in Morris and Brito 2019 n 3, 20.
[270] Kenna 2018 n 24, 10.

severe social and personal consequences of the loss of one's home, which can not only result in the worst form of precariousness, namely homelessness and further marginalization, but also important psychological trauma, in particular for vulnerable persons, and notably children, disabled persons and refugees. [271] This section pays particular attention as to whether the legal framework for eviction take at all into account the needs of particularly vulnerable groups, namely disabled persons on one hand, and refugees, asylum-seekers and undocumented migrants, and ethnic minorities, on the other. [272]

4.2.1 General rules

'UK policy has placed protection of the interests of private landlords and mortgage lenders above that of renters and mortgagors' bluntly state Pleace and Hunter, in their recent studies of eviction laws, policy and practice in the UK.[273] This observation takes home the point that observing laws gives a sense of where the scale of justice tips, in terms of who is to assume the burden of socio-economic injustices, and the role of the state in, eventually, shifting the weights. Whilst the rules on eviction for breach of contract do not necessarily distinguish between social and private rentals, different patterns of tenancy agreements tend to make it more difficult to evict people from social housing, than from privately rented property, although the shift towards private actors (eg housing associations, private landlords under social rental schemes) in the provision of social housing also seems to be accompanied by the multiplication of less secured forms of tenancy, which tend to make eviction easier. In owner-owned markets, particularly exposed to the consequences of the subprime crisis, various regulatory and policy schemes were set up to limit mortgage repossession and consequent evictions.[274] It is, in general, easier to evict or expel persons from land or property occupied without titles. Occupation without title is increasingly, criminalized; however, the triggering and enforcement of an eviction procedure may also depend on whether the owner is a public or private actor, on the vulnerability of the tenants, and any right to home that they may be able to invoke.

The grounds for eviction may be based on expiration of the lease, or termination of the contract on important legitimate reasons, such as the owner needing the property (for herself or family members), or to carry out repair or renovation work.[275] They may, furthermore, involve breach of contractual arrangements such as rent

[271] Kenna 2018 n 24, 4.
[272] Morris and Brito 2019 n 3, 15.
[273] Pleace and Hunter 2018 n 26, 333.
[274] Pleace and Hunter 2018 n 26, 336.
[275] For details, see Karan 2019, n 3, and Apostolovski and Möstl 2019 n 3, 20.

payment default or arrears, disruptive behaviour, nuisance, criminal activities (eg drug related problems), or damage to the property, in the case of tenancy contract, or mortgage payment default in the case of for owner-occupied properties. Rules vary significant concerning the weights attributed of these reasons, when balanced against the right to a home or equivalent norms, and when matters have to be decided in court, as to the discretion which these can exercise in the assessment. The country reports do not always provide relevant details, but based on those which did, and additional sources, we can identify interesting patterns.

Turkish laws lays down relatively detailed rules, and specify that evictions are justified in case of twice repeated payment defaults or the refusal of a tenant to vacate the property, or where the tenant owns property in the area. Tenants are however protected against unilateral rent increase or termination of the lease by the landlord, unless the latter needs the property for herself or relatives. [276]

The rules regulating eviction in the private rental sector for breach of contractual terms often vary depending on the nature and term of the rental contract, with open-ended contract generally offering stronger protection against eviction that short-term, fixed tenancy contracts. In Austria, the tenancy law, which applies to most contracts, is quite strict and limits the grounds on which contracts can be terminated and tenants evicted; these are largely limited to tenants not paying rents or bringing a significant disadvantage to the flat, and for renovation needs, but in this case an alternative must be provided. In any case, all evictions involve a court decision, which will review those grounds. The court, if it orders eviction, will set a deadline, which can be extended up to nine months, if it does not cause a significant disadvantage for the landlord. When the tenancy law does not apply, the Civil Code provisions apply, which provide for a similar procedure, with similar grounds and court involvement. [277] In the Netherlands, for long, the default rental contract were open-ended contracts, which meant that landlord could only terminate the lease, and request possession and eviction, via a court order.[278] When deciding on the claim for possession, the courts could assess the proportionality of the termination, as well as eviction, which in theory gave stronger guarantees to tenants.[279] Since 2016 however, legislation changed and now provides for fixed term contracts, which allow the landlord to terminate the lease at the end of the term, without going to court (although if the tenant refuses to leave the property, the owner must still seek an eviction order from the

[276] Karan 2019 n 3, 14.
[277] Apostolovski and Möstl 2019 n 3, 20-21.
[278] Vols 2018 n 27, 220.
[279] The judicial committee of district court however issued guidelines on whether to order possession for rent arrears, with a three months arrears normally justifying a possession order. See Vols 2018 n 27, 220.

courts, which can, here again, assess the proportionality of the measure).[280] In the UK, the default has become the shorthold tenancies.[281] These provide for an automatic right to possession, subject to only a two months notice, which creates an incentive for landlords to use these shorter fixed term (ie 6-12 months) tenancy contracts.[282] This result in lessened security for tenants and high turnover. Moreover, shorthold tenancy allow for an accelerated eviction procedure, without a court hearing.[283] In Hungary, there is a difference depending on whether the contract includes an execution clause or not. Where it contains ones, usually when it was verified by a public notary, the landlord may launch a more expedited eviction procedure.[284]

There are, in any case, various *procedural steps* which need to be respected before an eviction is executed. In case of unpaid rent, it usually starts with (multiple) notification of reminders. In Hungary, there are a number of mandatory notices, and an eviction procedure can therefore take two to three years. [285] As noted above, a court decision will often be necessary, and national law usually provide for appeals against court eviction order, which can help prevent or delay eviction.[286] Even when a court order is not required, landlords cannot evict tenants themselves, using force, but must involve an accredited official (eg a bailiff), who follows specific procedures and guarantees, aimed at protecting individuals' right to privacy and a home. [287] However, in some countries, procedural guarantees have been curtailed, through an automatization of the process. For instance, in Portugal, a legislative reform introduced in 2012 created a special (facilitated) eviction procedure, whilst also allowing for rent increase, which resulted in a sharp rise in evictions. The new law set up a special platform which automated the eviction process. If the mortgage arrears are more than two months, or in the case of recurring delay in payments, the landlord can trigger the eviction process by simply making an application to the platform and pay a fee. The tenant is then notified of the eviction request. The tenant may vacate the property and pay her debt. If she does not, the platform can issue an order to vacate the house, with which she must comply within 30 days. The tenant may contest the order, through a lawyer, or ask for delaying the eviction, invoking social reasons (eg unemployment). The order is converted into an eviction request, and the tenant has 30 days to leave and take

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[280] However, courts did not seem to apply an extensive proportionality scrutiny, see Vols 2018 n 27, 230.
[281] Pleace and Hunter 201, n 26, 340.
[282] Pleace and Hunter 2018 n 26, 340.
[283] Pleace and Hunter 2018 n 26, 340.
[284] Teller and Somogyi 2018 n 16, 14.
[285] Teller and Somogyi 2018 n 16.
[286] Vols 2018 n 27, 221.
[287] E.g. Henderson 2019 n 3, 12; Apostolovski and Möstl 2019 n 3, 21.

her belongings. If she does not, the bailiff can request from the court the right to enter the property and forcefully evict the tenant.[288]

Moreover, tenants who are struggling to meet the costs of their rent may avail themselves of various legal and social protection means. These include, primarily, financial support, through for instance application for housing benefits, or other social benefits, such as those presented earlier, or some emergency relief scheme, but which may be too limited in value and scope, at least for certain categories of tenants, or come too late, or be awarded only on a discretionary basis.[289] Moreover, even in countries with developed and performant welfare benefit systems, there is a widening gap between fast growing rent levels and welfare benefits.[290] Sometimes, special schemes are put in place to provide targeted financial support towards housing costs. For instance, in Hungary, the government applied a reduction in utility costs (which however benefited primarily larger consumers, hence the more wealthy households).[291]

Struggling tenants may also seek, and benefit from, assistance from various mortgage or debt management services, as well as counselling, mediation and negotiations schemes, proposed by public agencies (e.g in the UK, and many Austrian cities and provinces) or facilitated by NGOs or faith organizations (eg Hungary).[292] In some countries, like in Austria, courts must inform the municipality of all eviction applications, which may in turn inform social services responsible for homelessness.[293]

In many of the countries studied, the legal frameworks provide for *more secured tenancies in social housing*, thus making it more difficult to evict tenants from social housing for rent arrears or other breach of lease contract. For instance, in the UK, social housing was traditionally provided on the basis of assured tenancy. These could not be terminated without a court order. The procedure involved various notice requirements, and the grounds for eviction had to be laid down, and there were limited situations in which the court was obliged to give possession.[294] In other cases, the court had room for manoeuver, and could decide against eviction. However, over the last two decades, and the handing over of social housing supply to private housing associations, there has been a proliferation of new types of tenancy contracts, which provide less security for tenants, and afford

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[288] Morris and Brito 2019 n 314.
[289] Teller and Somogyi 2018 n 16, 154, 157, Pleace and Hunter 2018 n 26, 352; Apostolovski and Möstl 2019 n 3, 22
[290] Kenna 2018 n 24, 20.
[291] Teller and Somogyi 2018 n 16, 157.
[292] Pleace and Hunter 2018 n 26, 345; Teller and Somogyi 2018 n 16, 158; Apostolovski and Möstl 2019 n 3, 20.
[293] Apostolovski and Möstl 2019 n 3, 22.
[294] Pleace and Hunter 2018 n 26, 341.

limited discretion to court in refusing to issue eviction order. Under the common secured tenancy contract, courts may order repossession for rent arrears and anti-social behaviour, and may even be obliged to do so for certain form of anti-social behaviour.[295] In other new forms of contract, such as 'probationary', 'demoted' or 'flexible' tenancy contracts, courts are obliged to require possession when requested by social landlords against, for instance, 'misbehaving' tenants,[296] although litigation managed to reintroduce some court's discretion in the assessment and their ability to apply a minimal proportionality test.[297]

Even when the legal framework is the same, like in Hungary, social housing maintainers, local authorities or housing associations, may be less likely to start judicial procedures for eviction, despite experiencing relatively high rates of non-payment (eg Hungary). Sometimes, they assume certain duties, which may defy the point of triggering eviction procedures. For instance, in Hungary, in the case of tenants with indefinite tenancy contract, they are obliged to offer alternative accommodation and prevent that the family becomes homeless.[298] In the UK, they are expected not to go to court for repossession due to rent arrears and to offer instead management repayment options.[299]

In relation to *eviction due to mortgage foreclosure*, in the UK, the law tends to favour the lender, which has, technically, the right to repossess the property at any time, although mortgage contracts normally contain a clause that the lender will not seek repossession without default from the mortgagor. [300] Although lenders could repossess the home without going to court in case of payment default, there are incentives for them to seek a court order, in order to avoid violation of criminal or civil law, which results in stronger procedural guarantees for the debtors, in particular as courts have some discretion when deciding on possession, and usually request the lender to make arrangement with the borrowers for repayment of arrears.[301] In contrast, in Turkey, if the payment arrear exceeds two months, the bank can exercise its right, and if the debt is not repaid, can sell the property and evict the occupant.[302]

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[295] Pleace and Hunter 2018 n 26, 342.
[296] Pleace and Hunter 2018 n 26, 342.
[297] David Cowan and Caroline Hunter, ''Yeah but, not but'', or just plain ''no''? Life after Pinnock and Powell'(2012) 15(3) *Journal of Housing Law* 58-62.
[298] Eg Hungary (Teller and Somogyi 2018 n 16, 147)
[299] Pleace and Hunter 2018 n 26, 342.
[300] Pleace and Hunter 2018 n 26, 339.
[301] Pleace and Hunter 2018 n 26, 339.
[302] Karan 2019 n 3, 15.

In the Netherlands, the mortgagee has the right to claim possession without a court order to sell the property at auction. Since 2016, in implementation of the EU European Mortgage Credit Directive, mortgagees (ie banks) are not allowed to immediately sell a mortgage residential property in case of mortgage arrears; they must first notify the mortgage holder and seek a negotiated solution for arrears payment, and cannot proceed to summary execution if there is less than two months arrears and if it is not reasonable. [303] In Hungary, eviction from owner occupied property as a result of mortgage foreclosure follows the same procedural steps as rent arrears related eviction, except that mortgage contract normally include an execution clause.[304] However, the issue became a political priority for the government, which set up a national asset management body. That body took over ownership and the debt of mortgage borrowers and transformed them into 'tenants', with rental contracts, thereby avoiding mortgage related evictions.[305]

Expulsion or eviction from property or land occupied without title is usually easier. Occupation without titles is perceived, and treated, as violating the property rights of public or private owners, and is often criminalized. In the UK, squatting is a criminal offense, and owners can apply for interim possession orders,[306] although there are some procedural safeguards.[307] Moreover, long term occupancy may create acquire title (after 10 years).[308] In Austria, owners can file an action for trespass and the police can remove squatters, in case of disruption to public order or severance interference with the rights of the owner.[309] In Hungary, challenge against an expulsion order from a property over which the occupant does not have a title does not lead to the suspension of the procedure, unlike in the case of eviction for arrears. That results in eviction being executed faster, in less than a year.[310] In the Netherlands, squatters used to enjoyed important legal protection, but a legislative reform adopted in 2010 criminalised squatting and empowers the Public Prosecutor, and the owner, to start proceedings against squatters. These may, however, seek interim relief and request a ban on eviction.[311] The reform was challenged

[303] Vols 2018 n 27, 219.
[304] Teller and Somogyi 2018 n 16, 145.
[305] Teller and Somogyi 2018 n 16, 158.
[306] Pleace and Hunter 2018 n 26, 343.
[307] Dupont 2019 n 3, 36.
[308] Dupont 2019 n 3, 20.
[309] Apostolovski and Möstl 2019 n 3, 21.
[310] Teller and Somogyi 2018 n 16, 148, 152.
[311] Vols 2018 n 27, 221.

in court, invoking Article 8 ECHR, but the Supreme Court found the new Dutch law compatible, given that courts could assess the proportionality of the eviction measure.[312]

Some countries, like Hungary, have *moratorium,* which prevent eviction during the winter months, to reduce risk of death related to cold exposure.[313]

Obviously, as noted earlier, laws and regulations on eviction only matters in relation to declared rental agreements and property. In countries, like in Hungary, where the informal market concerns a significant part of the rental market, they are merely irrelevant, and other 'methods' including harassment and force, may be used to get rid of 'undesirable' tenants. Available data suggests that those who are more likely to be renting on the informal market are migrants, both documented and undocumented, as well as people with disabilities.[314] Other forms of informal occupancy arrangements may also render some legal regulations irrelevant. For instance, in the Netherlands, landlords may allow 'property guardians' to stay in their property, without secured tenancy agreements (but a court order is necessary to evict them).[315]

4.2.2 Eviction law and vulnerability – lack of explicit acknowledgment?

Legal frameworks make little direct reference to special vulnerabilities which landlords seeking to terminate lease contract, or seeking possessions, or courts, when issuing eviction order, should take into consideration. Courts in the Netherlands are expected to assess the proportionality of the measure, but do not always exercise a close scrutiny of the grounds, and often accept the claims of owners based on grounds of rent arrears, problematic behaviour, or illegal occupation. [316] These are likely to affect disproportionately more socially and economically deprived communities, more likely to be of immigrant descents, or persons suffering from mental disability or disorders, sometimes related to drug addiction.

In the UK, special teams are set up to support tenants who have a history of behavioural problems, sometimes caused by mental or intellectual disorders, to prevent eviction or secure housing solutions.[317] However, the evolution of tenancy contracts towards less secured tenancy forms and the pressure they placed on courts to

[312] *Hoge Raad,* 28 October 2011, *Nederlandse Jurisprudentie* 2013, 153.BQ9880, cited in Vols 2018 n 27, 222.
[313] Teller and Somogyi 2018 n 16, 145, Sálat 2019 n 3, 22.
[314] Kenna 2018 n 24, 21.
[315] Vols 2018 n 27, 221-222.
[316] Vols 2018 n 27.
[317] Pleace and Hunter 2018 n 26, 355.

issue possession and eviction for anti-social behaviour may disproportionately affect persons with mental or intellectual disabilities. Moreover, despite an expectation placed on landlords to make reasonable adjustment, after consultation of others affected, [318] the frequent use of shorthold short fixed term contract makes it more tricky for disabled tenants to require landlords to carry out such works.[319]

The Portuguese automated eviction scheme has been criticized, and the Parliament accepted a suspension of its application for tenants who had been residing for more than 15 years in the dwelling and were above 65 years old, as well as for persons with a proven degree of disability.[320]

5) Conclusions: prioritizing justice through law, between redistribution and recognition

It is difficult to synthetize and summarize the complexity of the international, European and domestic legal frameworks which constitute the institutionalized context within housing policies are defined and through which they are implemented. These frameworks, however inevitably affect the normative frames and practices of justice. A few revealing features however emerge from the analysis.

The first one is *the influence of international and European legal instruments* on domestic legal frameworks, and how they protect the right to housing. These, increasingly, for reasons which have to do with legal mobilization and dynamics, and alignment with changing ideological paradigms in human rights and social policies, tend to push domestic law in the direction of conceptions of redistributive justice which are informed by *prioritarianism.* This notion of distributive justice, recall, holds that the moral urgency of redistribution from the well-off to those less well-off increases as the absolute welfare of those less well-off decreases.[321] Prioritarian policies and laws thus displace other conceptions of redistributive justice which until then were more prominent in domestic legal systems, such as universalism (eg in the Netherlands, and to some extent Austria, and Portugal) or sufficientarianism[322] (increasingly dominant in the United Kingdom since the Thatcher era; Turkey), or hybrid

[318] Section 36, Equality Act 2010, cited in Dupont 2019 n 3, 25.
[319] Vols 2018 n 27.
[320] Morris and Brito 2019 n 3, 15.
[321] For an example of a prioritarian approach in moral philosophy, see Derek Parfit (1997) 'Equality and Priority?' *Ratio* 202-221.
[322] Where universalism focuses on equal property rights, sufficientarianism highlights the need to redistribute when those with low levels of welfare are below a threshold, but the absence of any redistributive justice demands above that threshold. For a prominent defense of sufficientarianism see Harry Frankfurt 'Equality as a Moral Ideal' (1987) 98 *Ethics* 21–42

approaches to distributive justice (eg Hungary). Some legal systems, however, oppose more resistance to protect their own vision of housing justice (eg Austria, Hungary).

The second, related, conclusion, points to the relevance of *recognitive justice* in (re) defining the 'who' of *redistributive justice*. Increasingly, claims for recognition of the particular needs of certain vulnerable groups, in particular those of persons with disability, promoted by global human rights frameworks and largely endorsed by European legal actors, interact with *dynamics of prioritisation*. These result, and translate, in status-related criteria, framed as special needs, superseding, or at least operating alongside, socio-economic criteria in the allocation of housing resources. The identification and categorization of disadvantaged and/or vulnerable groups, be it on socio-economic criteria and/or status-related grounds, remain however infused with notion of *deservingness,* alongside, or above, consideration of *needs.* Access to housing benefits and retention of one's home are, indeed, increasingly tied to societal contribution and integration (being employed or actively looking for jobs, being committed to the local community, having children, displaying good behaviour, etc). The exclusion of drug consumption related illnesses and disability, for instance, reveals how legal frameworks exclude from redistributive frames targeting special needs individuals who are to 'blame' for their fate.

This close interaction between vulnerability, prioritization and redistribution however does not benefit all vulnerable groups. The particular needs of ethnic minorities, such as Roma or people of African descent, are rarely directly addressed in the law, sometimes based on, or hiding behind, constitutional legal constraints (eg Portugal, Hungary). These populations only benefit from redistributive schemes to the extent that they fit the socio-economic depravity criteria laid down in legal regulations, and which they may not be able to comply with (eg local connection, formal requirements, etc). Domestic legal frameworks are also at pains to cater for the special needs of refugees, asylum-seekers and undocumented migrants. Indeed, even when they include them in redistributive schemes (social housing and benefits), in line with international legal commitments, the criteria laid down in law to access them de facto exclude them from those benefits. Local residential requirement, in particular, are particularly problematic for refugees, in that it ties them to areas in which they were first dispersed, and may not address their socio-economic and cultural integration needs. The influence of international instruments for the protection of the right of children, as a particular vulnerable group, is however starting to play in favour of minor refugees, asylum-seekers and undocumented migrants, as well as, indirectly their parents, when they are with them.

A third, important, feature of the legal housing framework, and which is particular relevant to the integration of migrants into the frames of redistributive justice is *localism.* Increasingly, across Europe, social housing and housing benefits are distributed at the local (regional/municipal) level, and procedures for eviction

are handle in district (court) level. This not only increases regional disparities in the what of justice (how much is redistributed), but also on the who of justice (who benefits). Indeed, most social housing or housing benefits scheme require a 'local connection', in the form of having lived in the area for a few years, or even having made sufficient economic contribution, which is, inevitably, more difficult to achieve for people who are more mobile, and who are more likely to be foreigners, including (recent) refugees, asylum-seekers and other migrants, as well as, in some countries, ethnic minorities. They are also more likely to discriminate against younger (and single) people. In general, *the legal schemes of housing benefits redistribution do not cater well for contemporary mobility, and migration patterns, which increasingly characterised European societies*.

Fourth, laws works best with *formality*, and fails to address informal housing situations, which are prominent in some countries (eg Hungary, Turkey), but also are developing in other countries (eg Netherlands), including through the use of digital technologies. Quite obviously, such patterns undermine the relevance of legal institutions in regulating justice altogether.

Finally, throughout the report, we find evidence of legal and judicial mechanisms shying away from revisiting redistributive justice commitments made by other actors in the system (eg legislator, government, or international organizations), and focusing on delivering *procedural justice.* It relies on a strongly held assumption that ensuring fair procedures for the allocation of housing benefits, or protection from eviction, will serve substantive justice aims. It may however reinforce *institutionalized maldistribution, or misrecognition*, unless those who resort, or are caught, in legal procedures, can effectively contest the conceptions of justice, and injustices, which infuse legal rules and mechanisms. Case law from the Netherlands, for instance, reveal that more often than not, and despite applying a proportionality test, courts accept landlords' claim for possession. It also shows that housing associations struggled in protecting the universalist approach to social housing, which European Union legal framework directly threatened. [323]Across Europe, *procedural justice appears better at institutionalizing redistributive claims when they intersect with recognitive claims*, as illustrated by relatively successful challenges to limitations on housing benefits by disabled tenants.[324] The insistence of law on procedural justice as a means to (whatever?) ends also infuses international human rights monitoring bodies.[325]

[323] Vols 2018 n 27, Henderson 2019 n 3.
[324] Pleace and Hunter 2018, n 26, Dupont 2019 n 3.
[325] See for instance the recent report by the UN Special rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context 'Access to justice for the right to housing' (15 January 2019), at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/007/29/PDF/G1900729.pdf?OpenElement (accessed on 23 April 2019).