



Right to Housing

National Report - Portugal

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This Working Paper was written within the framework of Work Package 3 “Law as or against justice for all”

November 2018



Funded by the Horizon 2020
Framework Programme of the European Union

Acknowledgements



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This publication has been produced with the financial support of the Horizon 2020 Framework Programme of the European Union. The contents of this publication are the sole responsibility of the authors and can in no way be taken to reflect the views of the European Commission.

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The ETHOS project has received funding from the European Union’s Horizon 2020 research and innovation programme under grant agreement No. 727112

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 deliverable is part of the Work Package 3 “*Law as or against justice for all*”. The objective of WP3 is to investigate theoretically as well as empirically whether and how different conceptions of justice – as redistribution, recognition and representation – are institutionalised in overlapping European human rights regimes. In the case of this specific deliverable, the goal is to understand the legal rules and practices related to the right to housing. That is, the norms regulating access, retention and arrangement of one’s homes, exploring in particular tensions between the right to property and the right to housing. In this case, we will focus on two vulnerable groups: persons living with disabilities and ethnic and religious minorities.

The reports start with an analysis of the Portuguese legal framework, starting by identifying the protection given by the constitutional law and the state obligation. The next step was to identify the policies about social housing and how the access to it is regulated and also, the specific rules targeting the two groups choose for the Portuguese report. This is followed by an analysis of the impact of international and European law in the national rules. Lastly, the report tries to relate the concept of ‘justice as redistribution’ and the ‘right to housing’.

Regarding the access to housing and the vulnerable groups choose for this report, the Portuguese legal framework do not give priority to any of them, since it would violate the principle of equality. However, there are some policies to support persons with disabilities to buy/rent a house and, in the case of Roma, the municipalities tend to take into account their situation when they apply for social housing. Once more, there are little cases in domestic or international court challenging the national norms. It should be noted that there are many reports from European/international organizations informing the housing problems faced both by disabled persons and persons from ethnic minorities.

Having an adequate dwelling is considered a basic human need and difficulties to fulfil this right can affect many others aspect of the life of an individual. Not only having access to housing is important, but also being protected to evictions or enforced relocations. The fear of being dislodged causes additional stress to persons who may have a life situation that is more vulnerable than others. Rules surrounding access to housing and protection against eviction give a good image about distributive justice.

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LIST OF ABBREVIATIONS

BNA – Banco Nacional de Alojamento [National Housing Bank]

CERD – Committee on the Elimination of Racial Discrimination

CESCR – Committee on Economic, Social and Cultural Rights

CRC – Committee on the Rights of the Child

DGAJ – Directorate General of Administration of Justice

ERRC – European Roma Rights Centre

ESCR – European Committee of Social Rights

GDP – Gross Domestic Product

IHRU – Instituto de Habitação e Reabilitação Urbana [Urban Housing and Rehabilitation Institute]

NGO – Non-Governmental Organisations

NRO – National Rent Office

NULL – New Urban Lease Law

UPR – Universal Periodic Review

INTRODUCTION

The right to adequate housing has been recognized by international human rights law in several instruments. The 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights recognized this right as part of the right to an adequate standard of living. This right also includes some freedoms such as: “protection against forced evictions and the arbitrary destruction and demolition of one’s home; the right to be free from arbitrary interference with one’s home, privacy and family; the right to choose one’s residence, to determine where to live and to freedom of movement”¹. Thus, to affirm that a State provides the right to housing contemplates all the previously referred freedoms. However, it is important to note that this right is not absolute and does not mean that the State has to build housing for the entire population.² Even with this caveat, we must emphasize that is the duty of governments to have policies in place to facilitate access to housing for those in need, and to provide housing to all persons irrespective of income or access to economic resources.

Right to Housing in the Portuguese Context

The present report focusses on the right to housing, specifically the ways this right is guaranteed to vulnerable groups, such as persons living with disabilities and ethnic and linguistic minorities. Our interest is to understand how this right and the requirements included in international instruments were incorporated in national Portuguese legislation, and how national legislation protects the groups indicated.

As conceptualized by Nancy Fraser, redistribution is one of the three “facets for theorizing the shape of justice”³ being the other two facets recognition and representation. Redistributive claims (for justice) seek to a “more just redistribution of resources and wealth”⁴ and housing functions here as an example of the resources that a government need to (re)distribute within the population. A just redistribution of (social) housing demands and effort from the State to provide housing and to regulate the access to it, particularly by vulnerable groups. The analysis of how access to housing function in a society is a good way to understand the existent distributive justices and injustices.⁵

Further, considering that human rights are interdependent, indivisible and interrelated, the violation of the right to adequate housing affects the capacity to enjoy other rights – right to work, health, social security, vote, privacy and education. Thus, when someone is discriminated in his/her access to housing due to his/her race, colour, sex, language, religion, political opinion, national or social origin, property, birth or another status, the results can be disastrous and lead to poverty and economic marginalization. In this regard, Portugal guarantees in its Constitution, as it does with other rights, the right to adequate housing for all and also provides that it is the responsibility of the State to guarantee such a right. For example, for persons living with disabilities, the right to housing is granted in the Constitution and after the ratification of the Convention on the Rights of Persons with Disabilities, legislation was created with the objective of enabling disabled persons to have adequate

¹ United Nations Habitat, ‘The Right to Adequate Housing. Fact Sheet No.21/Rev.1.’

² UN Office of the High Commissioner for Human Rights (OHCHR), ‘Fact Sheet No. 21/Rev.1, The Right to Adequate Housing’ (2009).

³ Simon; Rippon and others, ‘Report on the European Heritage on Philosophical Theorizing about Justice. [Unpublished]’ (2018).

⁴ Nancy Fraser and Axel Honneth, *Redistribution or Recognition? : A Political-Philosophical Exchange* (Verso 2003) 7.

⁵ Marie-Pierre Granger and others, ‘Justice in Europe Institutionalized : Legal Complexity and the Rights of Vulnerable Persons’ (2018) 22.

housing including laws on non-discrimination. However, the Ombudsperson responsible for the report on the right to adequate housing of persons with disabilities in Portugal, explained that disabled persons face mainly accessibility problems and, living independently is still difficult since the lack of a national strategy to support independent living of this part of the population.⁶ This is reflected in the number of people with disabilities still living with their families or in institutions, even when they don't need the support of another person 100% of the time.

Further, it is imperative to emphasise the negative impact that the austerity measures implemented in Portugal had on economic and social rights, particularly in social programs and in the access to social housing. As seen in this questionnaire, the Portuguese population, particularly the most vulnerable part of the population, was deeply affected by the measures implemented. As discussed, austerity measures were implemented without taking into consideration human rights, the only focus was the central goal – reduce the budget deficit – and the human cost associated with those measures was not regarded prior to their implementation.

Non-recognition of Vulnerable groups and its impact on the right to housing

Although access to rights is not a matter of “who is the more vulnerable”, in this report we focus on a group who has the particularity of not being formally recognized by the Portuguese State as vulnerable – ethnic and linguistic minorities. This non-recognition has a simple explanation: the Portuguese Constitution in its Article 13 (Principle of equality) provides that: “1. All citizens possess the same social dignity and are equal before the law; 2. No one may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty for reasons of ancestry, sex, race, language, territory or origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation”.⁷ Thus, the Constitution prohibits the categorization of individuals and considers as discriminatory, practices that differentiate rights based on any type of individual condition, the Portuguese State does not recognize the existence of official “ethnic minorities”. In fact, the concept “ethnic minority” will appear for the first time in the Program of the XIII Constitutional Government (1996-2000), established by Law-Decree nº296-A/95. This Law-Decree created the “High Commission for Immigration and Ethnic Minorities”, that was later renamed the “High Commission for Migration” removing the term “ethnic minorities” who were not and still are not defined in any kind of legal document.

This non-recognition of the existence of ethnic minorities has a substantial impact on the enjoyment of rights by these minorities. As such, we cannot find in Portugal legislation specific to “ethnic and linguistic minorities”. They are, objectively, protected *against* prejudice in access to housing by legislation prohibiting any kind of discrimination based on ethnicity. Nonetheless, being a State Party of the Framework Convention for the Protection of National Minorities (that entered in force in 1998), the ratification by Portugal was a “sign of political solidarity”.⁸ In 2004, Portugal stated in its first report submitted after the enactment of the convention that: “The Portuguese Republic has

⁶ Leilani Farha and Léo Heller, ‘OHCHR | End of Mission Statement by the Special Rapporteur on the Human Rights to Water and Sanitation and Special Rapporteur on the Right to Adequate Housing’ (2016) <<https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=21014&LangID=E>> accessed 18 September 2018.

⁷ Constitution of the Portuguese Republic Seventh Revision [2005] para 13, available at <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf>, accessed in September 2018.

⁸ Portugal, ‘Report Submitted by Portugal Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities to the Council of Europe. ACFC/SR/ (2004)002’ (2004).

no policy on ‘national minorities’ because the concept of such minorities is unknown in its legal system”. In its second report of January 2009,⁹ Portugal stated that: “Portugal has recognised the existence of one ethnic minority in the country, namely the Roma community”. Indeed, most of the measures created by the Portuguese Government to help a minority access housing are towards Roma. A few years after the report, the country created the National Strategy for the Integration of Roma Community for the years 2013 to 2020 that focuses on education, housing, employment and health for the Roma. This seems to be the only official measure to grant access to housing to any ethnic minority in Portugal. In its report of 2017, the Special Rapporteur on the Right to Adequate Housing¹⁰ indicates that 31% of the Roma in Portugal were living in a vulnerable situation in substandard housing conditions, most of them lived in marginalized neighbourhoods, distant from city centres and without services or access to employment. The Special Rapporteur on the Right to Adequate Housing further referred to the 2014 report of the Committee on Economic, Social and Cultural Rights and their concerns with the waiting list for social housing being too long and the fact that many Roma did not meet the eligibility requirements for social housing under the Special Housing Programme. The “Country Report on Non-Discrimination Portugal”¹¹ published by the European Commission explained that the Roma, like any other Portuguese citizen, benefits from social policy measures with no special quotas for social housing being attributed to them. However, most of the time, municipalities make an effort “in order to ensure that Roma communities benefit from housing policies, in accordance with the principles of equal treatment and non-discrimination, albeit considering their specific culture and lifestyle”.¹² It should also be noted, that the Committee on the Elimination of Racial Discrimination presented their concerns about the racism that Africans and Africans descent were subjected in Portugal, and that there are no programmes especially targeting the concerns of these groups regarding housing, in fact, CERD stated that “despite the long presence of Africans and persons of African descent in Portugal and their contribution to the development of the country, they were still subjected to racism, with no programmes specially targeting their concerns, including with regard to housing.”¹³

Structure of This Report

Although knowing the reality of the vulnerable groups selected for this analysis would be important, this report focusses specifically on the Portuguese “black letter law”. As such, the report is divided in three parts. First, we present the national legal framework; second, we review the ‘impact of international/European law’, and third, we reflect on ‘the right to housing, justice as redistribution and vulnerability’. This report is part of the reflexion of the WP3 “Law as or Against Justice for All” and add the Portuguese context to the discussion of the right to housing as justice as redistribution.

⁹ ‘Second Report Submitted by Portugal Pursuant to Article 25, Paragraph 1 of the Framework Convention for the Protection of National Minorities. ACFC/SR/II (2009)001’ (2009).

¹⁰ Special Rapporteur on the Right to Adequate Housing, ‘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. A/HRC/34/51/Add.2’ (2017).

¹¹ Ana Maria Guerra Martins, ‘Country Report Non-Discrimination - Portugal - for European Commission’ (2016).

¹² *ibid.*

¹³ Committee on the Elimination of Racial Discrimination, ‘Concluding Observations on the Fifteenth to Seventeenth Periodic Reports of Portugal*’ (2017) para 22.

PART I | NATIONAL LEGAL FRAMEWORK

As referred above, the Portuguese legal framework provides for the right to housing at several levels. It is guaranteed in the Portuguese Constitution and also provided for in national law, policies and programs. In the next sessions, we will review in more detail the different national legal provisions that guarantee the right to access to housing as well as some of the challenges to these provisions, programs and policies.

1.1. CONSTITUTIONAL PROTECTION

The Portuguese Constitution is very detailed in its guarantees to the right to housing. In its article 65 it determines how this right should be protected and promoted. Specifically, article 65 (1) states: “Everyone has the right to have an adequately sized dwelling that provides hygienic and comfortable conditions and preserves personal and family privacy for oneself and one’s family.”¹⁴

In order to guarantee housing rights, the Portuguese Constitution further provides that the State is responsible for:

- 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.

In addition, the Constitution provides for affordable housing by stating that “The state shall adopt a policy that works towards the establishment of a rental system which is compatible with family incomes and provides access to individual housing.” (article 65, 3). Moreover, the Portuguese Constitution recognizes that local authorities must be involved in the planning, enforcement, promotion and protection of the housing rights. As such, in section 4 of Article 65 it provides for a shared reasonability among the different authorities and provides that “The state, the autonomous regions and local authorities shall define the rules governing the occupancy, use and transformation of urban land, particularly by means of planning instruments and within the overall framework of the laws concerning town and country planning and urbanism, and shall expropriate land that proves necessary to the fulfilment of public-interest urbanisation goals.”

Lastly, the Constitution guarantees the right to participation in urban planning, specifically it states that “The participation of the interested parties in the drawing up of urban planning instruments and any other physical town and country planning instruments is guaranteed.” (Article 65 (5)).

¹⁴ Constitution of the Portuguese Republic Seventh Revision [2005] (n 7).

Regarding the right to private property, the Portuguese Constitution also enshrines in its text protection to private property rights in its Article 62 and states that:

1. Everyone is guaranteed the right to private property and to the transmission thereof in life or upon death, in accordance with the Constitution.
2. Requisitions and expropriations in the public interest may only be undertaken on a legal basis and upon payment of just compensation.

As seen, the Portuguese Constitution from 1976 has guaranteed the right to housing balancing it with the right to private property.

1.2. (SOCIAL) HOUSING POLICY

The guarantee to social housing and housing assistance in Portugal has been a problematic particularly in the last decade and particularly after the implementation of austerity measures. At the same time that Portugal “has exceptionally high home ownership rates for the European region (75 per cent of the population) ... between 10 per cent and 12 per cent of units are standing vacant and/or slated for demolition, 3.4% of which are dilapidated and uninhabitable.” Moreover, Portugal “has a limited rental sector (at 20 per cent in 2011) with **only 2 per cent of all housing stock allocated to social housing, one of the lowest in Europe**” (emphasis added). There are only 120,000 units available for social housing, all of them owned and managed by the municipalities except for 15,000 that are managed by the Housing and Urban Rehabilitation Institute (IHRU- Instituto de Habitação e Reabilitação Urbana) and the waitlist for social housing is very long. “IHRU, for example, reports 6,000 people are on their wait lists with wait periods being on average 2 years”¹⁵ and some cities such as the Municipality of Lisbon and Porto, the wait can range from two to seven years. Moreover, “[f]unding for the building and maintenance of social housing in 2014 is just 0.7 per cent of the GDP, representing a very small portion of the GDP, and a retrogression of 0.2 per cent from 2008.”

In their “End of Mission Statement”¹⁶ the United Nations Special Rapporteur on the Human Rights to Water and Sanitation Mr. Léo Heller, and the Special Rapporteur on the Right to Adequate Housing, Ms. Leilani Farha concluded that

The building of new social housing is not on the Government's agenda, nor the agenda of the two municipalities I visited. It seems clear to me that in keeping with the Memorandum of Understanding, the focus of policies and programs of both the National Housing Institute (IHRU) as well as the municipality of Lisbon are on creating private market-based housing options for the working poor. ... in Porto not a single new unit of social housing had been built since the 1990s. This was explained as being related to a lack of available resources.¹⁷

Even though the lack of resources can be blamed for this, as Ms. Farha states, in her “estimation it may also be an ideological position in favour of the liberalization of the housing market,

¹⁵ Farha and Heller (n 6).

¹⁶ *ibid.*

¹⁷ *ibid.*

one of the cornerstones of the Troika Memorandum of Understanding¹⁸ and the most vulnerable populations in Portugal are the most affected by these policies.¹⁹

1.3. GENERAL NATIONAL RULES

In response to the structural problems in the housing sector, Portugal approved, in June 2018, a new decree providing for a new National Housing Strategy. In its preamble, the Decree recognizes some of those structural problems and their negative impact on the access to decent housing.

“The profound changes in the livelihoods and socioeconomic conditions of the populations and the effects of the combination of previous housing policies and the paradigm shift in access to the housing market, precipitated by the international economic and financial crisis, generated a combination of shortcomings with structural housing needs to be addressed, while ensuring the balance between the various segments of housing offerings and the overall functionality of the system. This phenomenon was compounded by deficiencies in the quality of the building and gaps in the socio-territorial cohesion, only surmountable through the implementation of social revitalization and urban restructuring dynamics and through the prevention of socio-territorial segregation, gentrification, depopulation of urban centers and peripheral housing.”²⁰

The Decree created a new public program: “1st Right – Access to Housing Support Program”. This Program is aimed at ensuring access to adequate housing for people living in precarious situations and lack the financial means to an adequate housing solution. In its Article 6, the Decree indicates the eligibility requirements:

- 1 - The right to access housing financed with public support under the 1st Right is granted to a person or household that meets the following eligibility requirements:
 - a) Living in precarious conditions;
 - b) Is in a situation of financial shortage; and
 - c) Is a national citizen or, being a foreign citizen, has a certificate of registration of a Community citizen or a valid residence permit in the national territory.
- Since it was recently approved, it is not possible to evaluate its effectiveness.

Regarding eviction, in 2012, a decree was approved, the New Urban Lease Law (NULL), and created a special eviction procedure that allowed for the fast placing of the property in the leasing market.²¹ In effect, this law created a National Rent Office (NRO), a platform that automated the eviction processes, and where tenants were granted a transitional period of five years to update the rent. Moreover, NULL established that rents prior to 1990 would be increased, allowing older rents to be increased through a negotiation process between landlord and tenant or based on 1/15 of the property's fiscal value. It is estimated that between pre-BNA and post-BNA, eviction requests increased

¹⁸ *ibid.*

¹⁹ This topic is addressed in WP 6.2 report (Meneses et al, 2018).

²⁰ Decreto-Lei n.º 37/2018 2018.

²¹ Lei n.º 31/2012 2012.

by 45% and that since NULL came into force, more than seven thousand tenants were evicted.²² As a result of this crisis, the Portuguese Parliament has been revising aspects of NULL since 2017. For example, in June 2018, Parliament approved a temporary suspension of NULL as applied to lease agreements for housing whose renter, on the date of entry into force of the same, resided for more than 15 years in the dwelling and is 65 years old or more, or has shown a proven degree of disability equal to or greater than 60%.²³ Still, most of the measures seeking to address the crisis are still under consideration and discussion in parliament.

1.4. SPECIFIC RULES TARGETING SELECTED GROUPS

As indicated above, Portugal's interpretation of the Constitutional principle of equality in Article 13 of the Constitution prohibited the existence of programs benefiting or targeting selected groups. However, in response to the European Union's call "on the Member States to draw up national strategies for the integration of Roma communities to respond to situations of exclusion which are incompatible with social values or with the European economic model", Portugal approved, in 2013, the National Strategy for the Integration of Roma Communities, nº25/2013.²⁴ Among its 40 stated priorities, the most relevant for housing include:

- Priority 26 - Improve the knowledge of the housing situation of Roma communities.
- Priority 27 - Strengthen, within the framework of housing policies, practices promoting the integration of Roma communities.
- Priority 28 - Adequate housing responses and qualify rehousing spaces.
- Priority 29 - Promote access to the lease / private property market

As for people with disabilities there are some laws that provide some benefits. For example, in 2014 a law was approved providing for subsidized housing credit scheme for people with disabilities.²⁵ Among the main novelties is the fact that the contracting of life insurance by the lender is no longer compulsory. In addition, the legislation also provides that consumers can access this scheme at a later time than when credit has been acquired if they have in the meantime acquired a disability with a degree of total disability equal to or greater than 60%. In regard to evictions of people with disabilities, the Portuguese Parliament approved in 2018 a temporary suspension of NULL (the fast-track eviction process) as applied to lease agreements for housing whose renter, on the date of entry into force of the same, resided for more than 15 years in the dwelling and has shown a proven degree of disability equal to or greater than 60%.²⁶

1.5. CONSTITUTIONAL CHALLENGES

²² 'Pedidos de Despejo Aumentaram 45% Desde 2012' *Expresso* (27 June 2017) <<https://expresso.sapo.pt/revista-de-imprensa/2017-06-27-Pedidos-de-despejo-aumentaram-45-desde-2012#gs.CbbN1cQ>> accessed 18 November 2018; Luisa Pinto, 'Só Em Lisboa e Porto Houve 4300 Acções de Despejo Em Cinco Anos | Arrendamento | PÚBLICO' *Publico* (27 July 2018) <<https://www.publico.pt/2018/07/27/economia/noticia/passaram-menos-de-4500-despejos-pelo-balcao-nacional-de-arrendamento-1839226>> accessed 18 November 2018.

²³ Lei n.º 30/2018 2018.

²⁴ Decreto-Lei n.º 51/2013 2013.

²⁵ Lei nº64/2014 2014 (Diário da República,).

²⁶ Lei n.º 30/2018 (n 22).

Our research did not reveal any cases where legislation regulating access to social housing/housing, benefits or eviction were challenged for incompatibility with national constitutional norms.

1.6. RELEVANT INSTITUTIONAL AND PROCEDURAL ASPECTS

The fast-track eviction process is run at the National Rental Office (NRO), an agency under the Directorate General of Administration of Justice (DGAJ) and covering the entire national territory.²⁷ This process is applicable in cases of termination of the contract by agreement (revocation), when the contract expires based on the term fixed in the contract, by termination of the contract by the landlord or the lessee, by resolution based on payment of rent and by resolution based on the opposition of the lessee to the execution of repairs. The party seeking to evict, may file the form at the NRO and pay the taxes. The tenant has 15 days from the notification of the request for eviction to file the opposition electronically. In addition to vacating the property or opposing, when the rent for housing purposes the tenant may request the court, through the NRO, to deny the eviction for social reasons. Once a decision is made by the NRO, the landlord may take the order to re-take the property. As seen above, as of June 2018, this process has been temporary suspended to lease agreements for housing whose renter, on the date of entry into force of the same, resided for more than 15 years in the dwelling and is 65 years old or more, or has shown a proven degree of disability equal to or greater than 60%.

PART II | IMPACT OF INTERNATIONAL/EUROPEAN LAW

2.1. CHALLENGES TO NATIONAL RULES BASED ON INTERNATIONAL INSTRUMENTS

At the level of the United Nations, the Human Rights Council and at least three treaty bodies have evaluated and provided recommendations to Portugal regarding its laws and practices concerning access to housing. Below is a short summary of some of the findings and/or recommendations from each of those international bodies on the access to housing in Portugal.

In 2014, the Universal Periodic Review Group on Portugal submitted its National report to the **Human Rights Council**.²⁸ “The UPR Working Group reviewed the situation in Portugal in December 2009, at its 6th session. Portugal accepted 86 out of the 89 recommendations. Since then, Portugal has made a committed effort to thoroughly implement the recommendations that were accepted.” Amongst its efforts relating to the right to education the report included Portugal’s: (1) adoption of the National Strategy for the Integration of Roma Communities (2013–2020) comprised of 105 measures including the areas of education, and housing²⁹; access to housing priority to domestic violence victims’ as well as the approval of a protocol between the Government and the National Association of Portuguese Municipalities to provide low-cost housing to victims of domestic violence upon leaving the shelter³⁰; creation and implementation of a comprehensive policy to address the

²⁷ ‘BNA - Balcão Nacional Do Arrendamento - Despejo’ <<https://bna.mj.pt/Faq.aspx>> accessed 18 November 2018.

²⁸ UPR Working Group - Portugal, ‘Human Rights Council Working Group on the Universal Periodic Review Nineteenth Session 28 National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21* Portugal’ (2014).

²⁹ *ibid* 23.

³⁰ *ibid* 36.

causes of street children, including by assisting families and addressing concerns related to adequate housing³¹; implementation of programs to ensure access to adequate housing including building rehabilitation and revitalization of degraded areas (“These measures are jointly implemented by central, regional and local authorities and aim to counter discrimination and promote the inclusion of such vulnerable groups as the homeless, persons with disabilities, immigrants and members of ethnic minorities, including the Roma”).³²

In 2012, the **Committee on the Elimination of Racial Discrimination (ERD Committee)** provided its considerations on the report submitted by Portugal under article 9 of the Convention on the Elimination on Racial Discrimination. In particular, the ERD Committee addressed discrimination against the Roma people. The ERD Committee noted Portugal’s launch in December 2011 of the Strategy for Inclusion of the Roma communities in compliance with European Union requirements and public awareness campaigns regarding non-discrimination against Roma communities. However, noted that discrimination against this community is still prevalent, and in fact, it indicated that the Roma are still the most discriminated against and most vulnerable people in Portugal³³ and noted that it is still frequent as it relates to housing. As such, the ERD urged Portugal

to promote the economic, social and cultural rights of the Ciganos and Roma, while respecting their culture in accordance with the principle of equality and ensuring that all actions and policies affecting them are designed, implemented, monitored and evaluated with the full participation of Ciganos, Roma and their organizations, bearing in mind the Committee’s general recommendation No. 27 (2000) on discrimination against Roma. The Committee request[ed] that the State party provide information on the implementation and impact of the Strategy for Inclusion of the Roma communities. In implementing this Strategy, the State party should ensure that concrete measures are taken to improve the living conditions of these communities by improving their access to adequate *housing*, education, health services, employment and public services.³⁴

In 2013, the **Committee on the Rights of the Child (CRC)** requested Portugal to provide information regarding the measures taken to ensure that “children of immigrants and ethnic minorities, including Roma and people of African descent, do not suffer discrimination in access to housing.”³⁵ In 2014, the CRC adopted its “Concluding observations on the combined third and fourth periodic report of Portugal”. In its conclusions, the CRC welcomed Portugal’s measures to address discrimination, particularly noting the National Strategy for Integration of the Roma Communities for the period of 2013-2020. The CRC expressed however, its concern over the fact that the Roma people and people of African descent continue to face discrimination in access to housing.³⁶ In this regard, the CRC recommended Portugal to ensure that all children enjoy equal rights under the Convention without discrimination. As such the CRC recommended Portugal to

³¹ *ibid* 61.

³² *ibid* 106.

³³ Committee on the Elimination of Racial Discrimination, ‘Consideration of Reports Submitted by States Parties under Article 9 of the Convention’ (2012) para 19.

³⁴ *ibid*.

³⁵ Committee on the Rights of the Child, ‘List of Issues in Relation to the Combined Third and Fourth Periodic Reports of Portugal (CRC/C/PRT/3-4)’ (2013) para 3.

³⁶ Committee on the Rights of the Child, ‘Concluding Observations on the Combined Third and Fourth Periodic Report of Portugal’ (2014) para 25.

Intensify efforts to ensure the effective elimination of any form of discrimination against children of immigrants, foreigners and ethnic and racial minorities, including the Roma minority and people of African descent, as well as lesbian, gay, bisexual and transgender adolescents through, among other things, awareness-raising campaigns and intercultural dialogue, especially at the community level and in schools.³⁷

In 2017, Portugal filed its report for the fifth and sixth periodic review periods addressing some of the issues raised by the CRC.³⁸ The CRC has not conducted its new review of the country yet; however, it is interesting to point out Portugal's response to one of the issues raised by the CRC in 2014 regarding the right to housing by Roma communities. In its report, Portugal states that "Roma communities benefit, without discrimination, from all measures in place for the general population, including (...) housing programmes."³⁹

In 2014, the **Economic, Social and Cultural Rights Committee (CESCR)** in its Periodic Report of Portugal also expressed its concerns with

the large number of Roma continue to live in substandard housing conditions, often in informal settlements consisting of barracks, shacks or tents, many of them in isolated areas, with little or no public transportation, and without access to basic services, such as safe drinking water or sanitation facilities, electricity or waste disposal facilities.

CESCR is further noted that

the living conditions of Roma in social housing are often inadequate, that waiting lists for social housing are long and that many Roma do not meet the requirements for access to social housing through the Special Rehousing Programme as those eligible were identified through a census of informal Roma settlements conducted in 1993.

As such, CESCR recommended Portugal to

step up its efforts, including in the framework of the National Strategy for the Integration of Roma Communities for the period 2013–2020, to ensure access to adequate housing and basic services for Roma and facilitate their integration with the general population. To that end, the State party should:

- (a) Conduct a new census of informal Roma settlements and revise accordingly the list of those eligible for social housing through the Special Rehousing Programme;
- (b) Provide for resources that are proportionate to the unmet need for social housing, and for appropriate forms of financial housing support, such as rental subsidies.⁴⁰

In terms of evictions, CESCR highlighted the role of the financial and economic crisis in this context, and recommended that

Portugal be guided by human rights standards in tackling the problem of mortgage and rent arrears, with due account for individuals' rights to adequate housing. [Portugal] should ensure that legal aid is available to borrowers in the process of negotiation with

³⁷ *ibid* 26(a).

³⁸ Portugal, 'Fifth and Sixth Periodic Report of Portugal Due in 2017 under Article 44 of the Convention of the Rights of the Child' (2017).

³⁹ *ibid* 56.

⁴⁰ Committee on Economic Social and Cultural Rights, 'Concluding Observations on the Fourth Periodic Report of Portugal' (2014) para 15.

credit institutions and that a possibility for an effective remedy is in place. [Portugal] should also dedicate adequate financial resources, with a view to increasing the social housing stock in order to meet demand.⁴¹

Moreover, in their visit to Portugal in 2016 the **two United Nations Special Rapporteurs, Léo Heller (Special Rapporteur on the Human Rights to Water and Sanitation) and Leilani Farha (Special Rapporteur on the Right to Adequate Housing)**, expressed deep concern about the impact of the economic crisis and the austerity measures on the enjoyment of the rights to housing, water and sanitation. They warned about the situation of people in vulnerable situations, including the “new poor”- those who have been pushed into poverty as a result of the austerity measures. In their Joint Statement after the visit, they urged “the Government to adopt a National Housing Framework Law formulated in consultation with relevant stakeholders and which incorporates international human rights principles.”⁴² While it is not directly stated in the Decree that the “1st Right – Access to Housing Support Program” of June 2018 was a direct result of their report, it seems that this program is an attempt to address some of the concerns raised by the two Rapporteurs. Despite that, the Decree indicates that the program is aimed at ensuring access to adequate housing for people living in precarious situations and which do not have access to a housing solution without proper support.⁴³

2.2. CHALLENGES TO NATIONAL RULES BASED ON EUROPEAN (COUNCIL OF EUROPE INSTRUMENTS)?

Portugal ratified the Revised European Social Charter in 2002, accepting all of its 98 paragraphs, including the Article 31 on the right to housing. It accepted the Additional Protocol providing for a system of collective complaints on in 1998 but has not yet made a declaration enabling national NGOs to submit collective complaints.

We were able to identify one case against Portugal before the European Committee of Social Rights (ECSR), the case of *Collective Complaint n° 61/2010 - European Roma Rights Centre (ERRC) v. Portugal*.⁴⁴ In this case, the ERRC claimed among other things that: (1) the “re-housing programmes have failed to integrate Roma and often, in fact, have resulted in spatial segregation and inadequately sized dwellings in areas with poor infrastructure and limited or no access to public services.”; (2) Portugal “has a positive obligation to improve the deplorable and constantly deteriorating housing conditions for Roma in informal settlements, where dwellings often consist of unprotected tents exposed to inclement weather conditions, makeshift shacks or dilapidated concrete housing blocks”; and (3) “that the approach of the Government to the housing situation of Roma points to, at least, indirect discriminatory practices, which keep Roma excluded and marginalised through residential segregation and substandard quality re-housing.”⁴⁵

In reaching their conclusions, the ECSR noted that

⁴¹ *ibid* 16.

⁴² Farha and Heller (n 6).

⁴³ Decreto-Lei n.º 37/2018 (n 19).

⁴⁴ *European Roma Rights Centre v Portugal Complaint No 61/2010*.

⁴⁵ *ibid* 6.

an estimated 16% to 31% of all Roma in Portugal live in precarious housing conditions. When compared to data on the Portuguese population collected by the National Statistics Institute (78,835 persons living in precarious dwellings, representing 0,8% of the resident population), it can be established that the percentage of Roma living in poor housing conditions is far above the national average, and that they are therefore in a different and disadvantaged situation. This difference in their situation triggers a positive obligation of the authorities to take such difference into account and accordingly respond to it with discernment.⁴⁶

Moreover, the ECSR considered some of the principles in the Council of Europe's Recommendation Rec(2005)4 of the Committee of Ministers to member states on improving the housing conditions of Roma and Travellers in Europe of 23 February 2005 including:

“Integrated housing policies

1. Member states should ensure that, within the general framework of housing policies, integrated and appropriate housing policies targeting Roma are developed. Member states should also allocate appropriate means for the implementation of the mentioned policies in order to support national poverty reduction policies.

Principle of non-discrimination

2. Since Roma continue to be among the most disadvantaged population groups in Europe, national housing policies should seek to address their specific problems as a matter of emergency, and in a non-discriminatory way.”⁴⁷

Upon review of the evidence and of Portugal's legal obligations, the ECSR unanimously concluded that Portugal had violated Article E in conjunction with Articles 31§1, 16 and 30 of the Revised European Social Charter (RESC).⁴⁸ Below are excerpts of the relevant articles of the RESC⁴⁹

Article 16 – The right of the family to social, legal and economic protection

With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means.

Article 30 – The right to protection against poverty and social exclusion

With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:

(a) to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance;

⁴⁶ *ibid* 30.

⁴⁷ *ibid* 13.

⁴⁸ *European Roma Rights Centre v. Portugal Complaint No. 61/2010* (n 43).

⁴⁹ European Social Charter (Revised) No. 163 (1996).

(b) to review these measures with a view to their adaptation if necessary.

Article 31 – The right to housing

With a view to ensuring the effective 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;
- (3) to make the price of housing accessible to those without adequate resources.

Article E – Non-discrimination

The enjoyment of the rights set forth in this Charter shall be secured without discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national extraction or social origin, health, association with a national minority, birth or other status.

Portugal failed to comply with the ECSR's decision in this case and in 2013 the **Committee of Ministers** adopted Resolution CM/ResChS(2013)7 against Portugal.⁵⁰ In 2015, the ECSR once again assessed whether the situation had been brought into conformity with the Charter and concluded that it still had not.⁵¹ Further, in an evaluation by the ECSR of the percentage of non-conformity situations with respect to accepted provisions of the RESC or ESC, based on its conclusions, the ECSR found that on the Portugal non-conformity rate was 32.6 %.⁵² Regarding the European Court on Human Rights, there have been no cases before regarding violations of housing rights by Portugal.⁵³

2.3. CHALLENGES TO NATIONAL RULES BASED ON EU LAW

As described above, in 2013, in the case of *Collective Complaint n° 61/2010 - European Roma Rights Centre (ERRC) v. Portugal*, the Committee of Ministers adopted Resolution CM/ResChS(2013)7 based on the country's failure to comply with the European Committee of Social Rights' decision in the case *Collective Complaint No. 61/2010 by the ERRC against Portugal*.⁵⁴ And in 2015, the European Committee of Social Rights assessed whether the situation had been brought into conformity with the Charter and concluded that it still had not.⁵⁵

In terms of the European Court of Justice, there have been no cases brought against Portugal in the past five years by the EU Commission regarding or relating to access to housing/housing benefits and/or eviction.⁵⁶ In regard to domestic cases using European law to challenge national rules

⁵⁰ 'Resolution CM/ResChS(2013)7 Collective Complaint No. 61/2010 by the European Roma Rights Centre (ERRC) against Portugal', vol 1 (2013).

⁵¹ 'European Roma Rights Centre v. Portugal, Complaint No. 61/2010, Assessment 2017' (2014).

⁵² Council of Europe, 'Overview of the Situation Concerning the Legal Protection of Social Rights and Their Enforcement in the Council of Europe Member States (Period 2011-2014)' (2014) <<https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680483a72>> accessed 19 September 2018.

⁵³ European Court on Human Rights, 'Violations by Article and by State - 1959-2017' (2017) <https://www.echr.coe.int/Documents/Stats_violation_1959_2017_ENG.pdf> accessed 11 October 2018.

⁵⁴ 'Resolution CM/ResChS(2013)7 Collective Complaint No. 61/2010 by the European Roma Rights Centre (ERRC) against Portugal' (n 49).

⁵⁵ 'European Roma Rights Centre v. Portugal, Complaint No. 61/2010, Assessment 2017' (n 50).

⁵⁶ European Court of Justice, 'European Court of Justice Case Law - List of Results' <<http://curia.europa.eu/juris/liste.jsf?oqp=&for=&mat=or&lgrc=en&jge=&td=%3BALL&jur=C%2CT%2CF&page=4&dates=>

concerning access to housing/housing benefits and/or eviction in domestic courts, our research did not reveal any cases.

2.4. RELEVANT INSTITUTIONAL AND PROCEDURAL ASPECTS

Portugal follows a monist approach regarding the primacy of international law. (Marrana, 2011). In its Article 8 the Portuguese Constitution provides that

1. The norms and principles of general or common international law form an integral part of Portuguese law.
2. The norms contained in duly ratified or approved international conventions come into force in Portuguese internal law once they have been officially published, and remain so for as long as they are internationally binding on the Portuguese state.
3. The norms issued by the competent organs of international organisations to which Portugal belongs come directly into force in Portuguese internal law, on condition that this is laid down in the respective constituent treaties.
4. The provisions of the treaties that govern the European Union and the norms issued by its institutions in the exercise of their respective competences are applicable in Portuguese internal law in accordance with Union law and with respect for the fundamental principles of a democratic state based on the rule of law.⁵⁷

Thus, Article 8 seems to recognize the supra-constitutionality of international norms.⁵⁸ Also, Article 16 (2) of the Constitution provides that “the constitutional precepts concerning fundamental rights must be interpreted and completed in harmony with the Universal Declaration of Human Rights” which exemplifies the superior hierarchic position of some international norms. In the case of customary law, they are in an infra-constitutional position fundamentally due to the judicial review of the customary law.⁵⁹ In the case of law derived from international organizations, Article 8 (3) recognizes the supra-constitutional character of those norms. However, with new rules about the relationship with EU law, the direct application of the norms does not imply its primacy. As Marrana explains, in cases where there is a conflict between the constitution and the international norms, and those are derived from the law of an international organization of which Portugal is member, the court will give primacy to the national law, forcing the political discussion that will lead to the adjustment of the national norms to avoid the same situation in the future.⁶⁰ Lastly, regarding EU Law, as prescribed in Article 4 (4) of the Constitution, the national legislator cannot contradict through internal acts European Union law, treaties and norms as it has in essence transferred its jurisdiction.⁶¹

[%2524type%253Dpro%2524mode%253D5Y%2524from%253D2013.11.13%2524to%253D2018.11.13&pcs=Oor&lg=&parties=portugal%2B&pro=&nat=or&cit=none%252CC%252CCJ%25>](#) accessed 13 November 2018.

⁵⁷ Constitution of the Portuguese Republic Seventh Revision [2005] (n 7).

⁵⁸ Rui Miguel de Sousa Simões Fernandes Marrana, ‘A Articulação Entre o Direito Internacional e o Direito Interno: Enquadramento Teórico e Regime Nacional’ (2015) 0 Lusíada. Direito (Porto) 117 <<http://revistas.lis.ulsiada.pt/index.php/ldp/article/view/2057/2172>> accessed 11 October 2018.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ *ibid.*

PART III | RIGHT TO VOTE, JUSTICE AS REPRESENTATION AND VULNERABILITY

3.1. RIGHT TO VOTE AND JUSTICE AS REPRESENTATION

As seen above, access to housing in Portugal has been problematic. There is a shortage of housing available, “limited rental sector ... with only 2 per cent of all housing stock allocated to social housing, one of the lowest in Europe”, only 120,000 units available for social housing, and the waitlist for social housing can take up to seven years in some areas.⁶² Moreover, there is a shortage of funding for the building and maintenance of social housing.⁶³

In addition to failing to provide adequate social housing and assistance to housing to the most vulnerable parts of the population, in 2012 Portugal implemented policies to fast-track the process of eviction further affecting the most vulnerable parts of the population. As indicated above, after the implementation of this new fast-track model, there was a 45% increase in the number of evictions.

In this context, we can see that the focus of the Portuguese legislation has not been on social housing and towards ensuring housing to those in need. As discussed previously, this is partly because of the interpretation that the principle of equality enshrined in the Portuguese Constitution does not allow for different treatment for those who are in different conditions. In the case of the Roma communities, for example, Portugal did not have any programs tailored to this part of the population until 2013, after different European bodies denounced the structural human rights violations committed against these group. Moreover, regarding people living with disabilities, it was only after the large number of evictions affecting this group that the Portuguese Parliament halted the fast-track eviction policy as applied to those who have resided for more than 15 years in the dwelling and have shown a proven degree of disability equal to or greater than 60%.⁶⁴

Thus, when analysing right to housing and justice as redistribution, we can see that in both ends of the spectrum (i.e. one end would be making provisions for social housing and providing housing subsidies, and the other end regulating, moderating and adjudicating conditions for people being evicted from their homes), Portugal has had policies negatively impacting large parts of the population. However, recently the Portuguese Parliament has been taking steps to address some of these problems. As indicated above, in 2015 a National Housing Strategy was developed to contribute to social inclusion and protection of the most disadvantaged and in 2018 the 1st Right Program was created in to provide public support for the promotion of housing solutions for people living in undignified housing conditions who do not have the financial capacity to afford adequate housing. In the other end of the spectrum, Parliament is currently discussing other strategies to avoid and/or limit evictions. Thus, there seems to be a new legislative attention to the right housing with the focus on justice as distribution.

⁶² Farha and Heller (n 6).

⁶³ *ibid.*

⁶⁴ Lei n.º 30/2018 (n 22).

3.2. VULNERABILITY AND THE RIGHT TO VOTE

The concept of vulnerable people is present in Portugal in the context of social housing. Like the European Court of Human Rights, Portugal legislation has considered vulnerable “the Roma, people with disabilities, asylum seekers and women victims of domestic violence.”⁶⁵ For example, the National Housing Strategy approved in 2015 in the subsection entitled to “Contribute to social inclusion and protection of the most disadvantaged” includes “ensur[ing] access to housing for victims of domestic violence” (Measure 3.1.3), “encourag[ing] the inscrease of housing solutions for the homeless” (3.1.4) and “promot[ing] the integration of ethnic minorities and immigrants and improve their housing conditions” (Measure 3.1.5), which include “a number of immigrant and ethnic minority communities ... especially immigrants from Portuguese-speaking African countries and Roma communities.”⁶⁶ Moreover, Article 10 the 1st Right Program approved in June of 2018, states that the benefits of the decree apply in particular to “vulnerable people including the homeless and victims of domestic violence”.⁶⁷

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⁶⁵ Granger and others (n 5) 26.

⁶⁶ Decreto n.º 62/2015 Estratégia Nacional para a Habitação 2015.

⁶⁷ Decreto-Lei n.º 37/2018 (n 19).

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