



Justice in Europe Institutionalized: Legal Complexity and the Rights of Vulnerable Persons

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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

Within the context of the wider ETHOS project, deliverable 3.3 examines how the conceptions of justice as representation, redistribution and recognition permeate the European legal order(s) in the rights to vote, housing and education. It seeks to achieve these tasks on the basis of a literature review of relevant theoretical debates and legal desk research in relevant international and European law. It does so in four main sections. First, the paper justifies the analytic choices of assessing European legal justice through how the European legal order(s) institutionalise certain rights, with a particular focus on vulnerable minorities. This first section engages with the philosophical and jurisprudential debates that weigh in on the selection of particular rights (voting, housing and education) and the choice of focusing on particular vulnerable minorities (refugees, disabled persons, and ethnic, religious and linguistic minorities). It is followed by a discussion of the concept of vulnerable minorities in law. The third section proposes an analytic framework that addresses the challenges of the European justice system. It specifies and defends how we conceive of the European legal order, its various components and interactions between them. The focus here is on legal (constitutional) pluralism, the (re)negotiation of rights claims in both formal and substantive terms, and the fluid hierarchy of rights-regimes in overlapping jurisdictions. The next sections offer focused analyses of how the rights to vote, housing and education are actually protected in legal systems which are particularly relevant in Europe, in that they contribute to framing how justice claims can be instantiated in law (in terms of legal rights and duties) in European countries: international human rights law, Council of Europe (COE) instruments, and European Union (EU) law. Along with the questionnaire (annex 2), this focused analysis of the international and European legal frameworks, and the identification of key features and possibly tensions within and between them, will offer the necessary background and serve as a key guideline to partners researching the national and sub-national levels in our six country studies for three in-depth case studies (Deliverables 3.4-3.6).

The overview of the relevant legal frameworks and codifications reveals, first of all, the growing use and relevance of the notion of vulnerability. In addition, there is a rise in relevance of international, European human rights and EU law and their interplay in all legal fields under investigation. The way in which these legal orders interrelate can be considered a complexity challenge, to be understood as a pyramid, a network or otherwise. This complexity is managed by concepts like the ‘the margin of appreciation’ (for the European Court of Human Rights) or subsidiarity, supremacy and constitutional identity (EU law). The tensions and conflicts which inevitably

arise in this complex system reflect competitions between different visions of justice. What the interplay between legal systems means for the substance of a given right, and justice more generally, however, depends on the national context – the focus of deliverables 3.4 -3.6.

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List of Abbreviations

| | | |
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| CERD | : | Convention on the Elimination of all forms of Racial Discrimination (UN) |
| CESCR | : | Committee on Economic, Social and Cultural Rights (UN) |
| CFR | : | Charter of 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) |
| ECHR | : | European Convention for the Protection of Human Rights and Fundamental Freedoms |
| ECtHR | : | European Court of Human 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) |

1) Introduction

How do conceptions of justice as recognition, representation and distribution permeate legal rules, their judicial interpretation and application in Europe? This background paper answers this question on the basis of a literature review of key political and legal theory scholarship and desk research into legal sources. It does so in seven sections. Following the introductory section, the report justifies and circumscribes the choices of assessing European legal justice through how the European legal orders instantiate certain rights for particular vulnerable minorities. That section 2 is focused on the philosophical and jurisprudential debates that weigh in on the selection of particular rights (voting, housing and education) as a heuristic for assessing justice in law, and the choice of focusing on particular vulnerable minorities (refugees, disabled persons, and ethnic and linguistic minorities). It is followed by a discussion of the concept of vulnerable minorities in law. The third section proposes an analytic framework that addresses the challenges of the European justice system. It specifies and defends how we conceive of the European legal order(s), its various components and interactions between them. The focus here is on legal (constitutional) pluralism, the (re)negotiation of rights claims in both formal and substantive terms, and the fluid hierarchy of rights-regimes in overlapping jurisdictions.

Following these theoretical sections, the paper moves on to a detailed exploration of how the rights to vote, housing and education are actually protected in the European legal orders. To this end, the fourth section investigates and reports on the international human rights (IHR) law framework, exploring both the general functioning of IHR in European legal systems, and the relevant instruments of IHR such as the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). The fifth section explores the Council of Europe legal framework, with particular attention paid to the European Convention on Human Rights (ECHR) and the corresponding jurisprudence of the Strasbourg-based European Court of Human Rights (ECtHR). The sixth section engages how the three rights in question are protected and defined by European Union (EU) law. As envisaged in the description of work, this longer section reflects on the extensive influence of this body of law which goes beyond human rights law to include legal provisions for market integration, supranational citizenship, economic and fiscal cooperation, to name but a few, and has acquired a significant authority in the member states of the EU. The seventh section draws preliminary conclusions on how justice appears to be institutionalized in European (human rights) law.

Along with a questionnaire (Annex 2), this focused analysis of the international and European legal frameworks, and the identification of key features and possibly tensions within and between them, offer the necessary background and serve as a key guideline to partners researching the national and sub-national levels in our six country studies (focusing on Austria, Britain, Hungary, the Netherlands, Portugal and Turkey) for three in-depth case studies (Deliverables 3.4-3.6). Five of the countries of these case studies are members of the EU and thus bound by EU law directly. All six countries are members of the Council of Europe and have signed and ratified the ECHR thus tying their national law to it and the jurisprudence of the ECtHR. Finally, all six countries have signed and ratified the main IHR treaties. These international and European law instrument therefore frame how states can institutionalize certain justice claims in their laws, as well as provide opportunities to those who want to challenge justice settlements made at national level. Consequently, the analysis of the most relevant international and European legal instruments and provisions, and their judicial interpretation provide the necessary legal framework against which the exploration of the national legal contexts of the rights to vote, housing and education can take place. Moreover, the juxtaposition of these international and European legal framework on one end (D3.3), and national laws on the other (D3.4-6), can help reveal different understanding of rights and corresponding visions of justice, and understanding how are they addressed in different legal systems. In other words, the theoretical and analytical framework in sections 2 and 3 complement this legal research into the juridification of the three rights in the international and European legal orders to collectively and holistically inform the comparative study of the rights to vote, housing and education at the national and sub-national level.

A first annex provides extracts of relevant international and European legal instruments which researchers working on the case studies (D3.4-6) can use for reference. Finally, the second annex contains a detailed questionnaire for partner researchers, which complements the analytic and theoretical framework, and the legal research into the EU, Council of Europe and International legal contexts to complete the guidelines for the country-reports feeding into the comparative studies in subsequent ETHOS deliverables 3.4-3.6.

The theoretical and analytical framework, together with the questionnaire, ensure that the data gathered in the country reports is sufficiently comparable so that Deliverables 3.4-3.6 can take these country reports as key inputs into the comparative study of the right to vote, housing and education integrating the EU, ECHR and national levels, and provide a sound empirical basis for an empirically driven development of the theory of justice for Europe.

It is worth repeating that the different sections of this report correspond to different disciplinary approaches and different methodologies, moving from the abstract and philosophical to the legal-theoretic and jurisprudential, to end at the specific and characteristically legal analysis concerning the content of legal rights laid down in legal instruments (positive law). This is not accidental. The study of how justice is manifested in European legal orders is situated in a multi-disciplinary study, motivated by inter-disciplinary concerns, and designed to feed into a trans-disciplinary integrated theory of justice in Europe.

Despite this inter-disciplinarity, the bulk of this report takes the form of quintessentially legal research. Like Work Package 3 in general, it is primarily focused on an analysis of 'hard law', and it largely leaves out 'soft-law'. When it comes to mechanisms, it is primarily interested in judicial enforcement, and not softer or more diplomatic-political mechanisms (from self-reporting to monitoring to issuing general commentaries and advisory opinions). This is not to imply that the strictly legal and judicial mechanisms are necessarily more efficient, or that soft law – or (soft) power – is not part of the complexity of the European justice field. It certainly is, and in fact, some of these 'softer' dimensions, and various policy instruments and their implementation, are looked at in other ETHOS work packages. However, what we are interested in is how particular justice claims, translated as specific rights and obligations, are embedded in 'hard law' and 'hard enforcement', as a reflection of the importance of those claims in given national and European contexts, and what legal and judicial changes, and substantive and institutional tensions, tell us about justice in Europe.

Furthermore, the Deliverable primarily deals with 'black letter law' taken to mean legal norms and their authoritative – judicial or quasi-judicial – interpretation (or in other words 'positive law'), and not the actual realization or practice of rights. To put it simply, in the context of this research task, we are firstly concerned with the formal translation (institutionalization) of justice in law; we thus focus on the 'law-in-books', and not the 'law in action' or 'law in practice'. We are fully aware that a wide gap may exist between them, which can affect our assessment of the European justice system, and the actual realisation of justice, or its dealings with injustices. However, different research activities carried out in other ETHOS Work Packages, and which engage sociological methods and empirical studies, are exploring exactly these dimensions.

In Work Package 3, we are primarily concerned, therefore, with whether and how justice *claims* are *institutionalised* in formal law, as revealing at least a certain official commitment (or lack therefore) to particular visions of justice, irrespective of whether these are followed up or followed through at the level of implementation and practical application, and independent of taking a normative stance on the normative validity of these justice

claims. In fact, as detailed in the first report of this working group,¹ a clear intellectual separation between what the law *is* and what the law *should be* is essential to be able to take an appropriately critical perspective on when the law *fails* to institutionalize justice.

2) European legal justice assessed through the rights of vulnerable minorities

This section elaborates on the relationship between rights and justice in general and makes the link between the three rights in focus – the right to housing, education and vote – and the conception of justice as redistribution, recognition and representation respectively.² Further, it motivates the choice of focusing on vulnerable groups, and on disabled persons, refugees, and ethnic and linguistic minorities from a legal perspective³.

Regarding the relationship between the three substantive rights and the tripartite conception of justice, the point is to make the case for the plausibility of these conceptual links in light of theoretical work on justice, not to make an independent case for justice being actualized through these three rights from first principles, which would be a task of political and legal philosophy. The focus will therefore be on engaging a range of literature in political and legal theory that highlights why the focus on, for instance, the right to housing may be an interesting heuristic tool to evaluate justice as redistribution. The empirical findings of Deliverables 3.4-3.6, which will follow from the framework developed here, are thus expected to permit, not constitute, a normative assessment of the degree to which the European legal order(s) formally protect and further particular conceptions of justice for all. Choosing to assess justice in Europe through an analysis of rights nevertheless raises several preliminary questions. Is a rights framework the appropriate one to go about evaluating justice and injustice?

¹ O Salat, 'A theoretical review of the conceptualization and articulation of justice in legal theory contributing to task 2.3' (2018), ETHOS deliverable 3.1.

² This part drew on helpful overviews of the relevant issues and literature in Wenar L. 'Rights'. *Stanford Encyclopedia of Philosophy* (2015, Fall 2015 Edition), Zalta E (ed): <https://plato.stanford.edu/archives/fall2015/entries/rights/>; Nickel J. 'Human Rights'. *Stanford Encyclopedia of Philosophy* (2014, Spring 2017 ed), Zalta E (ed): <https://plato.stanford.edu/archives/spr2017/entries/rights-human/>; Jones P. 'Group Rights'. *Stanford Encyclopedia of Philosophy* (2016, Summer 2017 ed), Zalta E (ed): <https://plato.stanford.edu/archives/sum2016/entries/rights-group> and Iser M. 'Recognition'. *Stanford Encyclopedia of Philosophy* (2013, Fall 2015 Edition), Zalta E (ed): <https://plato.stanford.edu/entries/recognition/>.

³ For a normative analysis of the relevance of vulnerability to justice claims see ETHOS deliverable 2.1, Rippon S, Theuns T, de Maagt S, Zala M, and van den Brink B. 'Report on the European heritage of philosophical theorizing about justice' (2018).

What grounds (human) rights claims from the perspective of justice? The first part of this paper raises these questions and briefly explores them in light of recent jurisprudence literature.

As well as motivating the focus on the right to housing, education, and vote, the choice of focusing on three specific vulnerable groups - refugees, disabled persons, and ethnic, religious and linguistic minorities - must also be explained. We make no claims as to the status of these groups as the 'most vulnerable', but rather motivate the selection in three ways. First, these groups are offered specific legal protections at the international and European level. Second, these groups are expected to be vulnerable in particularly relevant ways in all six country-level case studies, thus permitting a comparative approach. Third, the ways in which these groups are vulnerable differ in philosophically relevant ways. With regard to the more general focus on vulnerability as a useful test of justice, the motivation is grounded on the idea that the alleviation of injustice is more likely to reach a reasonable standard of agreement than a conceptualization of 'perfect' or 'ideal' justice.⁴ The case is therefore made that vulnerable groups are more likely to suffer injustices across different plausible conceptions of justice.

1) Rights and Justice

The Nature of Rights

Before associating the three substantive rights with the three facets of justice in study, a more general question must be broached about the appropriateness of assessing legal justice through the framework of rights in general. First though, what are rights? Rights are a foundational category in moral, legal and political thought. The most prominent analytic tool for describing what is sometimes called the 'molecular structure' of rights is the Hohfeldian system.

Hohfeld categorizes rights into privileges (or liberties), claims (or 'rights'), powers, and immunities.⁵ To have a privilege-right to X means not to be under a duty *not to X*. For example, if Gustav has the privilege to drive (given he has a valid driver's licence), he is not under the duty not to drive. In the absence of a driver's licence, Gustav *would* have the duty not to drive, and would therefore *not* have the privilege-right to drive. To have a claim-right, in contrast, is to be the bearer of *another's duty*. If Mehmet has a claim-right to free primary education this means that someone else is under a duty to provide him with an education. These first two types of rights,

⁴ Sen A. 'What do we want from a theory of justice?' *The Journal of Philosophy* (2006), CIII (5), pp. 215-238.

⁵ Hohfeld W N. 'Some fundamental legal conceptions as applied in judicial reasoning' (1913). *The Yale Law Journal*, 23(1), 16-59.

privilege-rights and claim-rights therefore entail 'correlatives': Since Gustav has a privilege to drive, others *lack* the claim-right to have him not drive (in other words, privileges are correlative to 'no-claims' in others). Since Mehmet has a *claim* to free primary education, someone else has the duty to provide him with this (claims are correlative with duties). This set of four 'Hohfeldian incidents' - privileges, claims, no-claims and duties - exhaust what H.L.A. Hart has called 'primary rules': those rules that govern what people must do or refrain from doing.⁶

The remaining two types of rights, powers and immunities, instead deal with what Hart calls 'secondary rules': rules that govern the creation, modification and annulment of primary rules. A power-right grants the right-holder the ability to alter others' rights (or their own). So for instance, an army sergeant has the power-right to command a private under her command to stand guard-duty. Before the sergeant so commands, the private does not have the duty to stand guard, after the command she does. Power-rights may alter 'secondary rule' rights also: a captain for instance can relieve a sergeant of her command. Before being relieved, the sergeant had the power to command privates to stand guard, after being relieved she no longer had that power-right. Someone who is liable for their rights to be altered by someone else who holds a power-right over them is under a *liability* (i.e. the correlative of a power-right is a liability). Where someone is *not* under a liability to have their rights altered they can be said to have an *immunity-right*, the last of the four Hohfeldian rights. The correlative of an immunity is a disability (the opposite of a power-right, i.e. the absence of the power to alter someone's rights). To refer again to our soldiers, the sergeant's privates have a *disability* with respect to her power-rights over them.

If we conceive of justice in terms of our rights and obligations with respect to others, an analysis of legal rights will be useful in answering to what extent a particular legal system juridifies (in the sense of institutionalising in the form of legal instruments) the demands of justice. This approach would start by identifying what rights ought to be respected as a matter of justice, and then evaluates a particular legal system on the basis of the extent to which that system in fact protects those rights that justice demands ought to be respected. The two most prominent ways of thinking about what moral rights are can be called, following Wenar, 'status theories' and 'instrumental theories'.⁷ They map onto two broad ways of thinking about ethical duties: deontology and consequentialism. In deontological theories, moral duties are conceptualized in terms of law-like predicates that substantively or procedurally define moral agents' duties and obligations. Consequentialist moral theories, in contrast, assess the moral status of an action according to the consequences that action realizes in fact. The most

⁶ Hart H L A. *The Concept of Law* (1961). Oxford University Press.

⁷ Wenar (n 2).

prominent deontic theory in ethics historically is Immanuel Kant's 'metaphysic of morals' which holds that an action is morally right if the actor can will that action to be universal law (the 'categorical imperative').⁸ The most famous consequentialist moral theory is utilitarianism, first systematized by Jeremy Bentham.⁹ Utilitarianism holds that actions are right if and only if they maximize aggregate (general) happiness or utility.

Bentham himself thought that rights were fundamentally a legal concept rather than (also) a tool of moral theory, famously retorting that natural rights were 'nonsense on stilts'; it may be difficult to conceive of a rights-based system when one takes a thoroughly utilitarian approach, as the question of the morality of any particular action will be a function of that action's maximizing – or not – aggregate utility. No special status is awarded to the interests of rights-holders vis-a-vis others, nor are certain rights considered so fundamental that their transgression is not in principle on the table if their transgression were to maximize aggregate utility in any given case. On this view, if utilitarianism – or another consequentialist ethical theory – is correct, then legal human rights would be at best a very rough way to realize the demands of justice, and may in fact impede our being able to achieve justice. Nevertheless, consequentialist justifications of rights are common. Bentham himself listed many rights in his *A General View of a Complete Code of Laws*, and John Stuart Mill developed an early attempt to justify a rights-based structure to moral life grounded in utilitarianism. This approach, usually labelled 'rule-utilitarianism', justifies the systematization of moral privileges, claims and duties into general rights on the premise that aggregate utility would be maximised *overall* if people were to follow more rigid rules of conduct rather than attempting to assess their privileges, claims and duties by calculating the likely effect of their (non)actions on aggregate utility themselves.¹⁰

The rule-utilitarian approach is one of the category Wenar calls 'instrumental theories', but instrumental theories of identification of the content of moral rights need not be strictly-speaking utilitarian.¹¹ Any theory that seeks to distribute advantages in some ideal manner is an instrumental theory. For instance, Amartya Sen thinks the appropriate 'currency' of justice is not utility but capability, and shapes the content of moral rights to the extent that they appropriately further justice as the fair distribution of capabilities.¹² Ronald Dworkin's luck-egalitarianism, in contrast, seeks to ensure that the distribution of resources is exclusively patterned by decisions

⁸ Kant I. *Kant: Groundwork for the Metaphysics of Morals* (2012). Cambridge University Press.

⁹ Bentham J. *An Introduction to the Principles of Morals and Legislation* (1996). Oxford University Press: Clarendon.

¹⁰ Mil, J S. *Utilitarianism* (2002). Hackett.

¹¹ Wenar (n 2).

¹² Sen A. *The Idea of Justice* (2011). Harvard University Press.

people can be considered responsible for, not by any matters of ‘brute’ luck.¹³

From Rights-theory to the Justification of Human Rights

Beyond the general question of whether justice-duties of obligation and forbearance are structured in terms of rights, there is also the question of the status of human rights and of group rights. Some of the legal instruments that will be the object of study in this paper (and in Deliverables 3.4-3.6) belong to the domain of human rights law. Human rights are controversial in philosophy. It is difficult, recognizing the pluralism of different value-systems and conceptions of the good life, to justify a definite list of rights that all humans are supposed to share merely by virtue of their status as human beings. Of course, it is not necessary to ground human rights in moral philosophy – they may merely and simply be those rights that states have agreed people ought to have generally. Many however continue to ground human rights in a universalist moral perspective which, to some philosophers this seems either over, or under-inclusive. On the side of over-inclusivity some argue that ethical behaviour is shaped at the level of culture, and that there may be as many different ethical codes - some of which are incommensurable - as there are cultures;¹⁴ human rights in this sense are not and cannot be universal. More radical scepticism rejects the idea that there are truth values to ethical propositions at all – they may simply be expressions of our disposition when faced with actions we have been habituated to accept or reject.¹⁵ In contrast, on the side of under-inclusivity, some wonder what is so special about humans that they alone are thought to possess certain universal rights. Perhaps some sentient non-human animals ought also to be recognized as rights-holders.¹⁶

In his *The Idea of Human Rights*, Charles Beitz discusses three approaches to justifying human rights: ‘naturalistic’ theories, ‘agreement’ theories, and his own, ‘pragmatic’ approach (2009). Naturalistic theories start from the idea that human rights are moral claims each of us are entitled to by mere virtue of our common humanity.¹⁷ A prominent example is Henry Shue’s idea of human rights as basic rights.¹⁸ Shue builds upon Raz’s idea that rights are interests sufficient to ground a duty. Human rights then (rights we all share), are interests we all share that are sufficient to ground a general duty in others; further, they are interests (or rights) that are necessary as pre-conditions for enjoying other non-basic/non-human rights. Shue uses this idea to argue for the

¹³ Dworkin R. *Sovereign Virtue: The Theory and Practice of Equality* (2002). Harvard University Press.

¹⁴ Mutua M. *Human Rights: a Political and Cultural Critique* (2002). University of Pennsylvania Press.

¹⁵ Ayer AJ. *Language, Truth and Logic* (1971), Harmondsworth: Penguin.

¹⁶ Kymlicka W & Donaldson S. *Zoopolis: A Political Theory of Animal Rights* (2011). Chicago UP.

¹⁷ Beitz C. *The Idea of Human Rights* (2009). Oxford University Press.

¹⁸ Shue H. *Basic Rights* (1980). Princeton University Press.

existence (in moral terms) of a right to subsistence, and to criticize human rights instruments for failing to codify this basic right. The naturalistic approach to justifying the existence of universal and generally binding human claims/right grounded on our common humanity roughly tracks the deontic approach to rights, and to ethics in general.

Charles Beitz's 'pragmatic' approach gives an alternative, more consequentialist approach to justifying human rights, which focuses not on the absolute or 'transcendental' justification of general human rights claims, but on the usefulness and effectiveness of human rights as a legal system. Typical to instrumental theories of rights and duties in general, such an approach requires an 'input' in terms of the evaluative standards one is to use to evaluate the efficacy of the human rights system. Shue's human-rights-as-basic-interests naturalistic account and Beitz's instrumental-pragmatic account demonstrate how an *empirical* assessment of the protection - or absence thereof - of vulnerable minorities through (human) rights protection could feed in as data to a normative evaluation of the respect to which (the) European legal order(s) is/are (un)just.

The Contested Nature of 'Group Rights'

It is also worth pausing on the particular and contested nature of group-rights. The notion 'group rights' covers at least two distinct rights-concepts, both of which relevant to this study. Group-held rights are rights that are held by groups of persons rather than by individuals.¹⁹ The existence of group rights in positive law, including in many of the documents making up the object of this study, is an empirical reality. Whether groups can be bearers of rights in the philosophical sense is a much more controversial question; some authors think that only individuals can be rights-holders (irrespective of whether some of the rights these individuals may hold may be also held by all others members of a particular group of persons exclusively) and that it is thus a category mistake to speak of 'group-held rights'.²⁰

Amongst those who do accept the ontological status of group-held rights, many insist that not *any and all* collections of persons can be considered a group eligible for being a rights-holder²¹. These thinkers differ in which conditions they attach to groups to qualify as the types of groups that can be (moral) rights-holders. Jones, surveying these positions, states that a common presumption is that groups must be 'formally constituted as an

¹⁹ Commentators sometimes use the term 'group rights' to refer to what I will call 'group-held rights' and 'group-differentiated rights' indiscriminately, leading to some confusion.

²⁰ Wellman C H. 'Liberalism, Communitarianism, and Group Rights' (1999), *Law and Philosophy*, 18 (1): 13–40.

²¹ Jones (n 2).

organisation with an internal structure, rules, offices and decision-procedures²²; others argue that it is necessary that members have a strong identitarian attachment to the group,²³ or that it is a requirement that groups possess agency.²⁴ While, naturally, we will not go beyond broaching this issue here, this is highly relevant for the object of study of this article and Deliverables 3.4-3.6 given that some of the groups we consider seem to meet this definition (certain ethnic, religious and linguistic groups) while others seem not to (refugees and disabled persons).

The second notion of group-rights is that of 'group-differentiated' rights. Group differentiated rights are rights that are granted to certain persons as a function of their being a member of a certain group. For example, suppose that a university holds some exams on Saturday. Some Jewish students feel that sitting an exam on a Saturday would be in conflict with their religious duty to rest on the Sabbath, leading to this university to grant an exemption to those students, on the basis of their religion. In this case, the university would be granting Jewish students a group-differentiated right to be exempt from university exams scheduled on Saturdays.

Group-differentiated rights are also the source of quite some controversy, especially in the context of political liberalism and liberal legal and political theory. This is unsurprising, since group-differentiated rights putatively distinguish between classes of persons when allocating certain special legal/moral protections. It is thus an important task to justify why a particular group by virtue of its characteristics as a group generate its members to have some special rights. While, again, no systematic attempt to do this is made from normative theory in this paper, the role of the notion of vulnerability in this regard will be explored in the section motivating the selection of refugees, disabled persons, and ethnic, religious and linguistic minorities.

The Imperfect Relation of Moral Duties to Legal Rights

We have not established that moral duties are structured in terms of rights, but have illustrated that prominent positions in normative legal and political thought from both deontic and consequentialist perspectives do. We ought however to remember the warning of legal positivists that the law itself need not be patterned in terms of

²² Ibid.

²³ Galenkamp M. *Individualism and Collectivism: the Concept of Collective Rights* (1993), Rotterdam: Rotterdamse Filosofische Studies.

²⁴ Preda A; 'Group Rights and Group Agency' (2012), *Journal of Moral Philosophy*, 9 (2): 229-254. I noted above the foundation of Shue's conception of human rights on the Razian concept of rights as interests-sufficient-to-generate-a-duty. The main alternative position to the Razian one is the choice theory of rights, developed by Hart (1982). It would seem that for a choice-theorist, the question of whether groups can have agency would be central to determining if groups can be rights-holding entities (Jones, n 1). For contrasting, explicitly interest-based accounts of group rights see Newman D. *Community and Collective Rights: A Theoretical Framework for Rights held by Groups* (2011), Oxford: Hart Publishing.

moral duties. Some legal positivists insist on the divide between (real, existing) law and moral duty precisely because this allows us to develop a more critical normative evaluation of the content of laws – this position is largely welcome to the task of this paper in that here too the (lack of) justice in the way (the) European legal order(s) juridify the rights of vulnerable minorities is the object of research. There is however another view that it is important to note. Perhaps there are weighty normative reasons not to want our legal systems to juridify our moral duties perfectly. A prominent example of this position is how Kant's moral philosophy and legal philosophy famously part ways, disappointing those commentators who would wish to see his categorical imperative actualized as a test of political legitimacy and obligation.²⁵ More recently, Jeremy Waldron has argued that taking rights seriously requires recognizing a 'right to do wrong'.²⁶ It is thus an open question to what extent justice even *ought* to be perfectly captured by *legal* rights.

Legal rights come under a variety of names in actual legal orders (i.e. in positive law) – such as constitutional, foundational, basic and human rights – in ways that do not always track the normative approaches to understanding and justifying (legal) rights. Legal rights can be 'positive', which can be taken to roughly mean that they correspond to a positive obligation on the part of the state to bring about the realization of something, or 'negative' in the sense that they protect the rights-holder from state interference in a protected sphere of action. In the usual European understanding, such rights are called differently according to their *origin*: constitutional and fundamental rights are those that are guaranteed in the constitution, while human rights are those that are guaranteed in international human rights treaties. Some legal orders differentiate constitutional from *fundamental* rights. In these cases, fundamental (or 'basic') rights are those human rights that are codified in the constitution. While this may imply a sort of 'hierarchy' of rights values, and certainly has an impact on the legal hierarchy of these rights, this separation does not track the distinction between basic rights and other human rights that we find in normative legal philosophy²⁷. Constitutional rights, where the distinction is made between them and foundational or basic rights, are not human rights, but are still in the constitution; an example would be the rights of the members of parliament as representatives in the German basic law. Human rights in the positivist legal sense are the rights included in international treaties, whether at European or at international level, like in the International Covenant of Civil and Political Rights or the European Convention of Human Rights. The European Union, on the other hand, has a Charter of Fundamental Rights, where it uses more classically

²⁵ Ripstein A. *Force and Freedom: Kant's Legal and Political Philosophy* (2009), Harvard University Press.

²⁶ Waldron J. 'A Right to do Wrong' (1981), *Ethics*, 92(1), 21-39.

²⁷ Shue (n 18).

‘statist’ than international language.

In reality, these different sources of legal rights intermingle. Thus, for the purposes of this project, expressions like the ‘right to vote’, the ‘right to housing’ or the ‘right to education’, when used as such, can mean any or all of these layers. At the same time, despite this intermingling, we can see a scale in the way these rights are institutionalized (or ‘concretized’, in the sense of the German ‘*ausgestaltung*’) from the most abstract guarantees regarding a particular right from a universal/international perspective, to increasingly particular concretizations in domestic (national) and regional (sub-national) levels. Furthermore, when examining the right to vote, housing, or education in national legal systems, international and European standards allow a different scope of manoeuvre for national authorities in the concretization of the right. Different sources might be in conflict with one another, or might leave justice concerns unaccounted for in other respects. Therefore, the entirety of these legal sources is worth considering as a unit of inquiry when investigating the institutionalisation of justice in European legal orders.

The injustice associated to various lacunae in rights-protections of vulnerable minorities is, in summary, uncertain. Suffice to say, the European legal order *is* structured in terms of rights claims and – in what is certainly an attempt to mitigate injustice – vulnerable minorities *are* protected in terms of their legal rights (as we will return to below); as such, wherever one stands on the questions of the ontology of justice and its relation to rights, it is valuable to pursue the comparative legal study of how different European jurisdictions (fail to) protect vulnerable minorities’ rights.

Beyond the *fact* of the European legal order pursuing justice in a certain way, there is a further reason for addressing justice in terms of the mitigation of injustice which motivates a focus on (legal) protection for the worst off (see below). Beyond this however, this report is agnostic towards the particular philosophical grounding of (human) rights claims. Indeed, it is a virtue from our perspective that the results of this research will serve, in an ecumenical way, to normative assessments of (in)justice and does not tie its salience to a particular (contested) theory of the relationship between rights and justice.

2) The Rights to Voting, Housing and Education for Vulnerable Minorities as Lenses for Evaluating Justice in Law

The legal analysis, which is only one part of the wider ETHOS research project, focuses on the rights to housing, education and voting as lenses for the evaluation of justice in Europe. These rights are taken to epitomize certain elements of justice as redistribution, recognition and representation²⁸. Irrespective of the controversies on the relation of these facets of justice in philosophical literature, and partly in light of these controversies, we can be confident that they elucidate different aspects of the disparate literature on justice in legal and political philosophy²⁹. Our claim is not that the three rights correspond in an analytically conclusive way to the three facets of justice in view. However, this section argues that the juridification of these rights, and the extent to which vulnerable groups and persons specifically are protected in European legal systems do undoubtedly *implicate* all aspects of justice to some degree. Correspondingly, our view is that zooming in on the right to voting, housing and education is *heuristically useful* for bringing into relief many features of the European legal order that will be relevant in evaluating its merits and demerits with respect to justice and fairness.

Justice as Representation and the Right to Vote

The link between justice as representation and the right to vote is almost self-evident, though the specificities of this core relationship is also fundamentally contested. While Fraser's version of justice as representation as a conceptually separate domain of justice arose in her considerations of the effect of globalization on justice-demands³⁰, our use of the notion is broader, and less committed to a particular theory of representative justice or the relation between this and other strands of justice. Demands for representation, and particularly democratic representation, pervade our social and political world. The idea of justice as representation, unlike most versions of justice as redistribution, is generally a procedural ideal. As such, it is focussed not on realizing particular substantive ends, but rather by ensuring the fairness of political processes used to determine which ends ought

²⁸ This tripartite taxonomy of justice is developed in the work of Nancy Fraser and is adopted as a heuristic framework for approaching justice questions in the entire ETHOS project. An elaboration of Frasers view can be found in ETHOS deliverable 2.1, Rippon et al. (n 3).

²⁹ Ibid.

³⁰ Ibid.

to be adopted, which makes it quintessentially appropriate for legal analysis³¹. It is important to note that representative justice can stand in a tension with more substantive visions of justice.³² Hanna Pitkin's classical definition of representation as 'to make present again', though somewhat reductive, does put this into sharp relief.³³ Political representation is about giving people a voice on the political stage. Of course, this raises a fundamental normative question of *which* people ought to be given a voice and *how* they ought to be given a voice, both of which have generated substantial debate in normative legal and political theory.

Regarding the first question, the standard and broad brush answer in the European legal and political tradition is that, minimally, all adult *citizens* ought to be given a voice. Many recent philosophical analyses however doubt that merely enfranchising (or representing) all citizens would suffice to secure representative justice or democratic legitimacy for reasons of both over and under-inclusivity. On the side of over-inclusivity, some argue that expatriate citizens are not bound in the same way to the laws of the states of whom they are *de jure* citizens; others argue that some resident citizens, such as criminals, or persons lacking legal capacity (eg persons with intellectual or mental disability), should be deprived of representation, as indeed they frequently are.³⁴ On the side of under-inclusivity, many feel that permanent resident non-citizens ought to have their interests represented, or even that all those coerced by a political decision, resident or not, ought to have a stake in the political process.³⁵ The ETHOS study of justice as representation in European legal systems avoids taking a position on these philosophical-normative debates, naturally, but does seek to generate data which would feed into evaluations of European representative justice. We do so by looking at the right to vote for several groups whose putative right has been contested, including (mentally) disabled persons, resident foreigners, non-resident citizens, and criminals.

Regarding the question of *how* people should be given a voice in political processes, a classical debate between Edmund Burke and James Madison in the 18th century has pitted two different models of democratic

³¹ This is elaborated further in Salat O 'A theoretical review of the conceptualization and articulation of justice in legal theory contributing to task 2.3' (2018), ETHOS deliverable 3.1.

³² Thompson S. 'On the circularity of democratic justice' (2009). *Philosophy & Social Criticism*, 35(9), pp.1079-1098.
Waldron J. 'A Right to do Wrong' (1981), *Ethics*, 92(1), 21-39, cf. Shklar J. 'The liberalism of fear', *Political Liberalism: Variations on a Theme*, pp.149-166.

³³ Pitkin H. *The Concept of Representation* (1967), Berkeley: University of California.

³⁴ EU Fundamental Rights Agency, 'Legal capacity for persons with intellectual disabilities and persons with mental health problems (July 2013), <http://fra.europa.eu/en/publication/2013/legal-capacity-persons-intellectual-disabilities-and-persons-mental-health-problems>.

³⁵ Abizadeh A, 'Democratic Theory and Border Coercion' (2008), *Political Theory*, 36 (1): 37-65, cf. Miller D, 'Why Immigration Controls Are Not Coercive: A Reply to Arash Abizadeh' (2009), *Political Theory*, 38 (1): 111-120.

representation. On the one hand, there is the view that elected representatives act as ‘trustees’ of their electorate and, as such, are entirely free to use their judgement in how they choose to fulfil their representative function.³⁶ On the other hand, there is the view that representatives are ‘delegates’ of their electorate and are (or ought to be) given a particular political mandate.³⁷ A question that has more contemporary relevance to the positive evaluation of justice as representation in Europe regards the right to voting in the various representative levels: local or municipal elections, federal or state-level elections, national elections, and supranational elections such as those for European Parliament representation. For this reason, we look at the right to vote in all the above, and the right to vote in referenda, where relevant.

Justice as Redistribution and the Right to Housing

How states organize the distribution and redistribution of benefits in terms of housing clearly impacts an evaluation of the extent to which they meet normative standards demanded by the various theories of distributive justice. Most of the prominent liberal-egalitarian theories will demand that resources in general, of which housing is an important type, ought to be redistributed in a manner that realizes some standard of equality. This egalitarian distribution of resources may be moderated (i.e. made less equal) by an individual’s own efforts, as in luck-egalitarian versions such as Ronald Dworkin’s³⁸ (discussed above). Alternatively, it may be patterned along some threshold, as in ‘sufficientarian’ or ‘limitarian’ theories, which accept all manner of distributions as long as all meet a basic minimum (Frankfurt 1987) or no one surpasses a maximum respectively.³⁹ Of course, there are myriad other theories of distributive justice, some quite opposed to the liberal-egalitarian framework. Robert Nozick’s libertarian approach famously insists that the proper role of the state in ideal theory (the relevant idealization Nozick assumes is an initially just distribution of resources, in the sense that property holdings need to have come about without a history of rights-violations – otherwise the role of the state would also be one of redressing these violations⁴⁰) is merely and barely to enforce free contracts, a perspective that would insist that most attempts by

³⁶ Burke E. *Reflections on the Revolution in France* (1790) [1968], London: Penguin Books.

³⁷ Madison J, Hamilton A & Jay J. *The Federalist Papers* (1787–8) [1987], Isaac Kramnick (ed), Harmondsworth: Penguin, see Pitkin (n 33), pp.191-192, cf. Rehfeld A, 'Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy' (2009), *American Political Science Review*, 103 (2): 214-230.

³⁸ Dworkin R. *Sovereign Virtue: The Theory and Practice of Equality* (2002). Harvard University Press.

³⁹ Robeyns I. 'Having Too Much' (2017), in: *NOMOS LVIII: Wealth*, edited by Knight and Schwartzberg, pp.1-45. New York: NYU Press.

⁴⁰ These theories of distributive justice are elaborated in more detail in ETHOS deliverable 2.1, Rippon S *et al.* (n 3).

states to provide some form of support or subsidy with regard to housing would be impermissible.⁴¹ The focus on the particular resource of *housing* need not be accidental either. As a basic human need (along with food, water, etc.) housing/shelter is a particularly sensitive domain for ascertaining many types of distributive *injustice*. Shue, whose views on basic rights were discussed above, therefore places the right to shelter in the category of ‘subsistence rights’ that are especially normatively salient.⁴²

A wide variety of legal forms of protection of private property title and subsidy of housing costs will play a role in assessing how the right to housing for vulnerable groups is articulated in a particular legal system. Two broad approaches suggest themselves. The first focusses on the sorts of benefits the state can regulate with regard to the right to housing, especially for vulnerable groups such as disabled persons and refugees⁴³. Here, foci would include whether the state makes provisions for social housing and, if so, in what ways access to social housing is regulated, but also there are other forms of housing subsidy like tax benefits or rent support which commit state resources. The second approach looks from the opposite angle at the ways in which the legal order in question regulates, moderates and adjudicates conditions for people being evicted from their homes. This will be broadly understood to include, for example the question of camp and shanty-town evictions, including evictions from public property, and enforced relocations for urban regeneration and gentrification projects. It will be in the balance of these two dimensions - if and how vulnerable groups have access to the material housing support and when and how they can be removed from their homes - that an image of the distributive justice or injustice of the legal orders under examination will begin to emerge.

Justice as Recognition and the Right to Education

The link between the right to education for vulnerable groups and an evaluation of European *recognitive* justice is more inconspicuous than that between the right to vote and representative justice. In contrast to justice as redistribution (but not necessarily representation), the normative importance of theories of recognition are unapologetically social. This is grounded in the Hegelian foundations of recognition theory, which see the *interpersonal* relations between persons as of primary importance to their developing personal autonomy and self-awareness. It was also Hegel who made the link between this vision of recognition and the need for

⁴¹ Nozick R. *Anarchy, State and Utopia* (1974). Basic Books.

⁴² Shue (n 18).

⁴³ The next section elaborates a legal definition of vulnerability, including the criteria for inclusion. For a philosophical engagement with the notion of vulnerability, see ETHOS deliverable 2.1, Rippon S *et al.* (n 3).

recognitive justice to be *juridified* (in the *Philosophy of Right*), since only law can guarantee truly mutual recognition given the social and political tensions that conflicting drives to autonomy generate.⁴⁴ One of the reasons that education is an interesting domain in which to investigate recognitive justice is the link that theories of justice as recognition have with psycho-educative development. The theorist perhaps to have developed the most fundamental theory of the importance of recognition (and the injustice of misrecognition), Axel Honneth, grounds it in children's psychological development of children's cognitive functions.⁴⁵ This theory suggests that interpersonal recognition by peers is a necessary step in the development of children's cognitive functions, and is this of crucial normative significance.⁴⁶ While there are certainly many other social and political domains in which claims for recognition will be manifest, the domain of education is thus one that has a special importance to the theoretical underpinnings of justice as recognition.

The ETHOS project looks at the right to education, which is otherwise rather broad, firmly through the prism of recognitive justice. It does so by approaching the right to education for vulnerable minorities from two directions, which correspond to two different streams in the literature on justice as recognition. The first approach looks at the inclusion or exclusion of vulnerable minorities from mainstream, publicly funded, mandatory (primary and secondary) education. The idea here is that it is a matter of misrecognition when vulnerable groups are separated from the dominant group in a manner that symbolically disrespects or disregards them. This approach thus brings into focus the ways in which justice as recognition can play out the right to education in how some are treated differently, which Taylor has articulated through the notion of 'second class citizenship'.⁴⁷ It corresponds more generally to that Hegelian strand in the literature that starts from the idea of the interpersonal mutuality as the foundation of social forms of recognition.

The second approach looks, conversely, at the way justice as recognition and its cognate, unjust misrecognition, can be manifest in *equal* treatment. It does so by looking at the ways in which members of vulnerable groups' right to education may be modulated by the provision, or the absence of provision, of certain accommodations that may be prerequisite to their being able to enjoy their right. One may think here, for instance, of accommodations for religious minorities not to be obliged to attend class on religious holidays or rest days, the right to education for refugees, multi-lingual education for migrant children, or of the provision of

⁴⁴ Iser (n 2).

⁴⁵ Honneth A, *Reification: A New Look at an Old Idea* (2005), New York: Oxford University Press

⁴⁶ (ibid pp.40-44, see also Iser (n 2)).

⁴⁷ Taylor C, "The Politics of Recognition," in *Multiculturalism: Examining the Politics of Recognition*, A. Gutmann (ed) (1992), Princeton University Press, 25–73.

accessibility infrastructure for differently-abled students. This approach corresponds to that which is sometimes called the ‘politics of recognition’, which centres on justice-based demands for recognizing the *differences* between people or groups. This of course brings us back to the debate if such a right to accommodations in education ought to be centred on the individual group member (a group-differentiated right), or is properly speaking a ‘group right’.

We take no theoretical or normative position on this, but instead investigate inductively and positively the way in which European legal orders structure such rights-claims for members of vulnerable groups. In doing so, we first turn to the way in which vulnerability has been understood in (human rights) law, to subsequently discuss the wider legal framework.

3) Vulnerability as a human rights law concept

This section will first briefly discuss how vulnerability can be conceptualized, before outlining how vulnerability has been used in European (human rights) law. The section will close by shortly problematizing the ways in which vulnerability is currently deployed as a legal concept. Vulnerability is universally and inherently part of the human condition. All of us are vulnerable because we are *embodied* and because we are *embedded in social structures*.⁴⁸ We can be bodily hurt through internal processes (eg through aging or illness), but also through outside forces such as accidents or natural disasters. At the same time, all people are part of ‘webs’ of social and institutional relationships,⁴⁹ which affect our well-being. Thus, while vulnerability is universal it is also particular; it depends on our bodies and social positioning.

Conceptualizing vulnerability

Traditionally vulnerability is linked to harm and possible injury, and thus it is understood as something negative. Take for example this definition from the Shorter Oxford English Dictionary: ‘able to be wounded; (of a person)

⁴⁸ M Albertson Fineman, ‘Equality and Difference – The Restrained State’ (2015) 66 *Alabama Law Review* 609, 613; A. Gear, ‘Vulnerability, Advanced Global Capitalism and Co-Symptomatic Injustice: Locating the Vulnerable Subject’, in M. Fineman and A Gear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013), 41, 49-50.

⁴⁹ M Fineman, ‘The Vulnerable Subject and the Responsive State’ (2010), 60 *Emory Law Journal* 251, 269.

able to be physically or emotionally hurt; liable to damage or harm, esp. from aggression or attack, assailable.’⁵⁰ A significant amount of scholarship, however, views vulnerability and its function in human life as something generative. Martha Fineman stresses that vulnerability is what causes humans to bond with each other, and to create institutions.⁵¹ For her the idea of universal vulnerability is the starting point to argue for an active role of the state in mediating vulnerability and providing people with the necessary resources to be resilient. Of course, recognizing that human beings are universally vulnerable is not the same as claiming that people are *equally* vulnerable, as Eva Kittay has pointed out. Certain people or groups of people are especially vulnerable, and Kittay argues that this asymmetry of vulnerability can particular generate duties of justice⁵²

Particularly relevant for the ETHOS project, is that Fineman, Anna Grear and other theorists have drawn on the notion of vulnerability to critique assumptions underpinning the liberal order and the current political economy, and the closures these produce.⁵³ Key targets are the assumptions of neutrality, autonomy and rationality. The archetypical liberal subject is male, disembodied, adult, white, economically active and autonomous.⁵⁴ The vulnerable subject, by contrast, is embodied, has material needs, and is always related to others and to institutions. While several authors have drawn on the notion of vulnerability to reconceptualise central tenets of liberalism such as autonomy,⁵⁵ Fineman and Grear seek a more radical reorientation of the idea of justice. The vulnerable subject, they argue, is a more faithful reflection of real human beings than the liberal subject, and should therefore form the basis of our justice projects.

Vulnerability in the case law of the European Court of Human Rights and in EU law

In both the case law of the European Court of Human Rights (ECtHR) and in EU law vulnerability language is used

⁵⁰ *Shorter Oxford English Dictionary* (6th edn, 2007) at 3557.

⁵¹ M Fineman, ‘The Vulnerable Subject and the Responsive State’, (2010) 60 *Emory Law Journal* 251, 269-270.

⁵² E Kittay, *Love’s Labor: Essays on Women, Equality and Dependency* (Routledge, 1999), especially p. 72, 84.

⁵³ Eg A Grear, ‘Vulnerability, Advanced Global Capitalism and Co-Symptomatic Injustice: Locating the Vulnerable Subject’, in M Fineman and A Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013), 41, 49-50.

⁵⁴ Eg, M Fineman, ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 *Yale Journal of Law and Feminism* 1, 10-11; Grear, *Redirecting Human Rights*; R. Hunter, ‘Contesting the Dominant Paradigm: Feminist Critiques of Liberal Legalism’, in M Davies and V Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013), 13.

⁵⁵ Eg Anderson and Honneth draw on vulnerability to explain that autonomy should be conceptualized in an intersubjective and relational way. J Anderson and A Honneth, ‘Autonomy, Vulnerability, Recognition, and Justice’, in J Christman and J Anderson (eds), *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge University Press, 2005), 127–49.

increasingly often.

The ECtHR refers both to individual ‘vulnerability’⁵⁶ and to ‘vulnerable groups’.⁵⁷ Groups that have been considered vulnerable are the Roma, people with disabilities, asylum seekers and women victims of domestic violence.⁵⁸ When the Court finds that a group is vulnerable, it usually does so either in order to argue why a discrimination claim under Article 14 ECHR needs to be strictly reviewed (what is known as the ‘very weighty reasons’ test) or to explain why the State has enhanced positive obligations to protect that group. Vulnerability reasoning enables a substantive approach to equality:⁵⁹ focusing on the historical disadvantage suffered by certain groups and looking at the context of how people are actually positioned in society, instead of formal (symmetric) equal treatment reasoning.

The EU Treaties do not use vulnerability terminology. However, in EU legislation, vulnerability language is used, most notably in the areas of children’s rights,⁶⁰ criminal proceedings,⁶¹ anti-trafficking,⁶² asylum and immigration,⁶³ consumer protection,⁶⁴ and equal treatment.⁶⁵ In soft law the use of the concept is even more

⁵⁶ A Timmer, ‘A Quiet Revolution: Vulnerability in the Case Law of the European Court of Human Rights’ in M Fineman and A Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation for Law and Politics* (Ashgate, 2013), 147.

⁵⁷ L Peroni and A Timmer, ‘Vulnerable Groups: the Promise of an Emerging Concept in European Human Rights Convention Law’ (2013), 11 *International Journal of Constitutional Law* 1056.

⁵⁸ Idem; and O M Arnardóttir, ‘Vulnerability under Article 14 of the European Convention on Human Rights Innovation or Business as Usual?’ (2017), *Oslo Law Review* 150.

⁵⁹ Idem.

⁶⁰ Eg O.J. 1994, L 216. Directive 94/33 on the protection of young people at work, Art 7 (‘Vulnerability of young people — Prohibition of work’).

⁶¹ Eg O.J. 2012, L 315/7. Directive 12/29 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, OJ L 315/57, Art 22 and 23.

⁶² Eg O.J. 2011 L 101/1. Directive 11/36 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, Recital paras. 12, 22 and 23, and Art 1 (the definition of trafficking). O.J. 2004, L 261. Directive 04/81 also contains some vulnerability language.

⁶³ Eg O.J. 2013, L 180/96. Directive 13/33 laying down standards for the reception of applicants for international protection (recast), Art 21; O.J. 2011, L 337/9. Directive 11/95 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), Art 20(2); O.J. 2013, L 180/60. Directive 13/32 on common procedures for granting and withdrawing international protection (recast), Art 15 and 31; O.J. 2008, L 348/98. Directive 08/115 on common standards and procedures in Member States for returning illegally staying third-country nationals, Art 3, 4, 14 and 16.

⁶⁴ O.J. 2005, L149/22. Directive 05/29 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (‘Unfair Commercial Practices Directive’), Art 5.

⁶⁵ Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding, Recital 14; Directive 2010/41/EU on the

widespread,⁶⁶ including as it does both internal and external action. Compared to EU legislation, EU soft law designates a wider range of people ‘vulnerable’. In particular, Roma and other minorities are absent from legislation but highly visible in internal policy initiatives, EU soft law contains many references to the vulnerability of Roma.⁶⁷ In external action vulnerability language is extensively used in humanitarian aid and development cooperation,⁶⁸ but in human rights policy – in contrast to ECtHR jurisprudence – the popularity of the term has waned in recent years as policy makers from the EU Working Party on Human Rights (COHOM) were of the opinion that the term suggests passiveness and victimhood.⁶⁹

The EU Working Party on Human Rights is right in viewing the concept with caution. The potential of the concept of vulnerability to enable legal justice projects depends on the ways in which it is deployed. Too much focus on ‘vulnerable groups’ instead of the societal factors that construct vulnerability is stigmatizing; it reinforces an identity of victimhood rather than challenges the structural reasons why some people are less resilient and more vulnerable than others.

3) The European justice system as a complexity challenge

Having explored the nature of rights and vulnerability, as well as the (limitations of) the interrelation of justice and rights in the law, this section moves on to explore the complexity of overlapping legal regimes. Making sense of this complexity is crucial preparatory work to the ETHOS comparative studies in Deliverables 3.4-3.6, as each of the countries investigated, as well as the EU and Council of Europe frameworks themselves, are tied in a web of legal commitments in international, European, national and sub-national legal orders. As one would expect of legal orders designed to pursue different purposes, and whose governance structure vary and evolve over time,

application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity, Recital 18.

⁶⁶ See, eg, Joana Abrisketa, Cristina Churruca, Cristina de la Cruz, Laura García, Carmen Márquez, Dolores Morondo, María Nagore, Lorena Sosa, Alexandra Timmer, Human rights priorities in the European Union’s external and internal policies: an assessment of consistency with a special focus on vulnerable groups, FRAME Deliverable 12.2, Available at <http://www.fp7-frame.eu/wp-content/uploads/2016/08/24-Deliverable-12.2.pdf>.

⁶⁷ See, eg, O.J. 2013 C 378. ‘Council recommendation on effective Roma integration measures in the member states’, at 2.

⁶⁸ Eg, O.J. (2008) C25/1. ‘The European consensus on humanitarian aid’.

⁶⁹ A Timmer, B Majtényi, K Häusler and O Salát, ‘Critical Analysis of the EU’s Conceptualisation and Operationalisation of the Concepts of Human Rights, Democracy and Rule of Law’, available at: <http://www.fp7-frame.eu/wp-content/uploads/2016/08/10-Deliverable-3.2.pdf>, at 11.

tensions and conflicts regularly occur between the legal rules produced by the international human rights regime, the EU and Council of Europe frameworks, and the national legal frameworks, as they materialise in concrete situations. A notorious example is the open conflict between the UK legislator and the European Court on Human Rights on the right of prisoners to vote, but confrontations take place every day away from limelight. Understanding the legal terrain on which such confrontations are negotiated is crucial to a meaningful analysis how justice is institutionalised in the rights to vote, housing and education in overlapping European legal orders.

The different legal orders have adjusted and developed mechanisms that aim to minimise the occurrence of open conflicts, and have designed techniques to address and resolve tensions when they occur. In this section, we briefly explore this complexity, and outline some of the key methods that the Council of Europe, EU and national legal orders have devised to manage ‘constitutional’ conflicts. In terms of understanding the complexity, particular attention is given to problematizing a classic ‘image’ of legal orders – the ‘Kelsenian’ pyramid – which gives legal priority to international treaty commitments, then constitutional law (or vice-versa), then other national law, and finally sub-national law. In terms of the relevant mechanisms to manage and negotiate complexity, this section highlights the concept of the ‘margin of appreciation’, the idea of ‘subsidiarity’, the notion of ‘primacy’ or ‘supremacy’, and finally the idea of constitutional or national identity.

1) Representations of complexity

The ways in which justice as representation, redistribution and recognition are institutionalized in human rights law are complex, and formed by a multiplicity of actors, institutions and mechanisms. Depending on one’s normative approach, this complexity can be characterized differently: for instance as overlap, interplay, fragmentation, dialogue, contestation or conflict. It is not the task of this deliverable to take a stance in the normative questions of whether such complexity is beneficial, desirable, and unavoidable, or in other ways ‘correct’ or not. It is however essential to come to a common basic understanding on the empirical nature of this complexity, in order to be able to develop a common view of how justice claims permeate the overlapping European legal orders. This overview therefore takes a primarily descriptive approach, and seeks to sketch out the current set-up, in its more permanent and embedded elements.

Any complex phenomenon can only be ‘described’ within an interpretive framework, and we acknowledge that interpretation irreducibly has some element of normativity. Regarding the European justice system and its immediate context (the international legal regimes, mostly international human rights law) the following constructions or frames of the interaction of the different legal orders can be discerned:

The Kelsenian *pyramid*, which reflects a top-down hierarchy of norms, where lower level norms are application of higher level norms to which they should conform. Analytically, this would be the simplest model. In the context of the European legal orders, one would expect international human rights law to take priority over EU and Council of Europe law, which in turn would take priority over national law, if the Kelsensian pyramid is an accurate representation of how legal orders interact. This is however not the case typically, as legal principles discussed in the next section testify.

Perhaps more mainstream of contemporary legal thinking is the idea of *constitutional pluralism*⁷⁰ or a *network* theory of rights.⁷¹ Constitutional pluralism means there is *no one definite ultimate authority* which trumps every other authority according to a hierarchical structure. Competing centres of power all have some – necessarily partial – sovereignty (or, depending on the use of concepts, no sovereignty at all). If constitutional pluralism, or the ‘network’ approach, is accurate, the task of understanding justice as institutionalized through rights in overlapping European legal orders is more complex. The specific negotiation and, potentially, evolution of legal orders would need to be identified for each right. In a similar vein, one may argue that the coherence or unity of law is to such an extent missing or contested, that it is conceptually better to talk about ‘legal *space*’ rather than ‘law’ at all.⁷² The notion of legal ‘space’ is really so minimalistic that it can accommodate everything, from pyramids to multi-layered or composite sandwiches, networks, webs or even random flying objects, and can give echo to any sound, be it dictates, dialogue or struggle. The problem with this conception might be that it is too thin and underspecified considering the actual complexities and determinations involved in European human rights law.

⁷⁰ Cf Neil Walker, ‘Constitutional Pluralism Revisited’, (2016) *European Law Journal* 23, 333-355.

⁷¹ For instance, along the lines of François Ost and Michel van de Kerchove, *De la pyramide au réseau? Pour une théorie dialectique du droit* (Publications de Faculté Universitaire Saint Louis, Bruxelles 2002). But see Otto Pfersmann, Review of François Ost and Michel van de Kerchove, ‘De la pyramide au réseau? Pour une théorie dialectique du droit’ (2003) *Revue Internationale de Droit Comparé* 3, 730.

⁷² *Mutatis mutandis*, Armin von Bogdandy, ‘The Transformation of European Law: The Reformed Concept and its Quest for Comparison’ (May 24, 2016). Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper No. 2016-14. Available at SSRN: <https://ssrn.com/abstract=2783702> or <http://dx.doi.org/10.2139/ssrn.2783702>.

In any case, both the international and the European legal system – if they are *a* system or a *system* at all – shows irreducible complexity which is indeterminate, and thus, is in need of, open to, and vulnerable to, conflicting interpretations. The multiplicity is furthermore not only present with regard to actors of authority. It is also present in more subtle ways, most notably in a concert or cacophony of different types of mechanisms and institutions, which might be usefully categorized as ‘hard’ and ‘soft law’. Thus, the question of how human rights law handles justice concerns is always intimately tied to the question of the relation of law and politics, the various efficacies (compliance effects and deficiencies) which can be expected from one or the other means, and their different transitory forms.

2) Managing complexity: legal principles and doctrines

As outlined in the previous sub-section, in terms of legal norms, a range of international treaties, both global and regional (in our case European), as well as their implementing measures, together with the corresponding particular mechanisms, constitute the legal context of this report. In this sub-section, we provide a brief overview of important formal-structural characteristics or components of the complex European rights regime. The most important formal-structural characteristics of virtually every transnational legal regime, including the European one, relate to certain principles which are introduced to manage conflicts and tensions arising out of the complex nature of the regime. The following elements are in practice intertwined, and mutually complementary, exhibiting also some of the tensions inherent in the regimes in which they evolved.

Modes of domestic incorporation of international and supranational law

A preliminary question of managing legal complexity is how international and supranational law becomes part of and effective in national law.⁷³ In this regard, ‘monism’ is a doctrine of the incorporation of international law without any additional domestic transformation: when an international treaty becomes valid (through ratification) this means, in monist systems, that the treaty thereby gains national legal validity and effect. ‘Dualism’ is a contrasting approach to incorporation, whereby international legal norms need to be transformed

⁷³ For the actual legal situation in several constitution see Dinah Shelton (ed). *International Law and Domestic Legal Systems. Incorporation, Transformation and Persuasion* (OUP 2012).

into domestic law by domestic legal acts, for instance an act of parliament. Until transformation, international law does not have legal effect in the domestic law of dualist systems; after transformation, it is the transforming (often-identical) domestic legislation which has effect, not the international law directly.

While this is the ‘textbook’ distinction, reality is more complex; many national constitutions apply a mixed system, for instance, being monist with regard to customary law, and being dualist with regard to treaty law. Sometimes it is the constitution, and not legislation, which transforms international law into domestic law; when this is the case, as it is in Germany with regard to customary international law, the national system is still understood to be dualist, although the transformation happens generally and “in advance”. EU law is different from international law in this regard as some of its instruments, Regulations, are directly applicable, and many of the provisions (Treaties, Directives) produce ‘direct effect’ in the domestic legal systems of member states, even where they were not transposed, from the moment that the transposition deadline has passed.⁷⁴

Hierarchies and conflicts

i) Hierarchy of international and domestic norms in constitutional law

A question in theory distinguishable from the ‘mode’ of incorporation (eg monist or dualist) is the ‘rank’ or ‘status’ of international law within domestic norms. A constitution might place international law (i) at the same level as the constitution, (ii) under the constitution, but above ordinary legislation, or (iii) at the same level as ordinary legislation. It also might place rules of customary international law in a different place relative to treaty law. *Ius cogens* is, in accordance with the international doctrine, usually also accepted by domestic constitutional law to be over – or at the same level – as the constitution.⁷⁵ The status is important in case of a conflict between norms of domestic and of international origin. If the hierarchy is fixed, then the higher-ranking norm has to apply, and the lower-ranking norm needs to be set aside. Most national legal systems operate by a principle requiring ‘friendliness’ or ‘openness’ towards international law, and many contain an obligation to interpret domestic law in conformity with international law as much as possible (except where it is *contra legem*, that is, against the *explicit wording* of national law).

⁷⁴ More on this see section 6) below.

⁷⁵ But not universally. See, eg, Shin Hae Bong, ‘Japan’ Ch 14 in Shelton (n 73), 360-382.

*ii) International and European doctrines of conflict management**(1) Margin of appreciation*

The 'margin of appreciation' is a doctrine first developed by the European Court of Human Rights in the very beginning of the operation of the Court. It does not appear in the text of the Convention,⁷⁶ but is a firmly embedded element of the reasoning of the Court. A margin of appreciation might be granted in certain areas of human rights, which means that the Court *renounces jurisdiction* to a(n allegedly) limited extent, and gives – in a sense, 'back' – the ultimate authority to decide on the *conformity with the Convention* to the member state in question. In other words, by acknowledging a margin of appreciation to member states on a particular issue, the ECtHR renounces its own authority to decide, within certain boundaries, what constitutes a breach of the ECHR.

The margin of appreciation is considered a general doctrine by some,⁷⁷ but is elaborated by the Court in a piecemeal, step-by-step fashion. The margin of appreciation is not the same regarding every right and regarding every sub-issue protected by a right. It first came up with regard to emergency situations, and later expanded to freedom rights such as private and family life, religion, expression, assembly, and association (arts 8-11 of the ECHR).

The degree to which the ECtHR renounces their authority to decide what constitutes a breach in a given area is captured with the idea of the 'breadth' of the margin of appreciation. A 'wide' margin corresponds to a large renunciation and, correspondingly, to a wide scope of authority for states to determine the conformity of national legislation with the Convention on that issue. A 'narrow' margin corresponds to a small renunciation by the Court, and a small corresponding scope for states to decide about conformity with the ECHR. One way that the ECtHR has decided to regulate the breadth of the margin of appreciation is that, supposedly, the more a given right relates to the core functioning of democracy, the narrower the margin of appreciation will be. This also applies for different aspects or issues within the scope of a single right. For instance, in the case of political speech, the margin of appreciation granted to the state is very limited, while in cases of questions of morals (eg blasphemous expression) it can be rather broad. Of course, these examples exactly show the very problematic nature of the margin of appreciation doctrine. Good reasons can be brought up in support of the proposition that

⁷⁶ Although will be referred to in Protocol 15, not yet in effect.

⁷⁷ Ignacio de la Rasilla del Moral, 'The Increasingly Marginal Appreciation of the Margin-of-Appreciation Doctrine' (2006), *German Law Journal* 7, no. 6: 611–24: as cited by Andreas Follesdal, 'Appreciating the Margin of Appreciation' in Adam Etinson (ed). *Human Rights: Moral or Political?* OUP 2018, 272.

blasphemy is or can be eminently a form political criticism. The dividing line between questions of morality and tradition on the one hand, and criticism of the powerful on the other, is hardly a very clear one. It can therefore be questioned how coherent the scope of the margin of appreciation as decided by the ECtHR is.

(2) *Subsidiarity*

Subsidiarity is most explicitly a principle of European Union law, although the idea itself is present in many discussions related to the previously-mentioned margin of appreciation doctrine as well, and in relation to 'pluralism'. Subsidiarity is a concept with a long history, and with applications from various theoretical backgrounds, enabling it to be used as a principle around which political philosophies of different (but not all) kinds can be built.⁷⁸ For our purposes, however, and in short, it is an organizational principle according to which decisions ought to be made as closely as possible to those affected by the decision.

In EU law, the notion of subsidiarity was first introduced by the Treaty of Maastricht.⁷⁹ Currently, the principle of subsidiarity is included in Article 5 of the Treaty of the Functioning of the European Union (TFEU):

3. Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. The institutions of the Union shall apply the principle of subsidiarity as laid down in the Protocol on the application of the principles of subsidiarity and proportionality. National Parliaments ensure compliance with the principle of subsidiarity in accordance with the procedure set out in that Protocol.

4. Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties. The institutions of the Union shall apply the principle of proportionality as laid down in the Protocol on the application of the principles of subsidiarity and proportionality.

While subsidiarity is often referred to mainly in debates concerning the relationship between the EU and member states' organs, in law it is a principle with *full vertical application* all the way from the Union level down to nation

⁷⁸ Andreas Follesdal and Victor M. Muñoz Fraticelli, 'The Principle of Subsidiarity as a Constitutional Principle in the EU and Canada' (2015), *Les ateliers de l'éthique*, 10, 89–106.

⁷⁹ Although it appeared in various Community documents much earlier.

state level and on to the regional and local level.⁸⁰ The fact, however, that national parliaments are mandated to control compliance with the principle of subsidiarity weakens the original principle, and reduces the complex considerations behind the subsidiarity paradigm to a reductionist EU-nation state dichotomy.

The Subsidiarity Protocol referred to in Article 5 TFEU requires legislative drafts to be sent to national parliaments, and requires the Commission to prepare impact (including financial) assessments, and annual reports on the respect for the subsidiarity principle.⁸¹ Member States can turn to the European Court of Justice (CJEU) if they feel the principle was not adhered to. In this regard, subsidiarity appears to be strongly institutionalized in the EU. The CJEU, however, has been criticized for confirming the Commission's view on whether subsidiarity was respected too frequently. On the other hand, it remains questionable whether a judicial organ is well equipped to decide on 'what may be a complex socio-economic calculus concerning the most effective level of government for different regulatory tasks.'⁸²

(3) *Supremacy /primacy*

Supremacy or primacy is a concept⁸³ in EU law, developed by the European Court of Justice, about the relation between national law and European Union law. Supremacy is an originally (regular, 'domestic', nation state) constitutional notion, according to which the constitution is considered the supreme law of the land. The upshot of this legal norm domestically is that all other law needs to be in conformity with the constitution, and conflicting 'inferior' law need to be set aside.

As it has to be clear from the previous sections, there is no analogous consensus regarding the supremacy of European Union law over national law; this is one reason why some prefer to use the notion of 'primacy' to refer to their relation. Even the idea that EU law has 'primacy' over national law is contested. This is best shown by the fact that discussions of the primacy of EU law often have a part written from the perspective of the European Court of Justice (unconditional primacy), and another from the perspective of Member States or their

⁸⁰ That is why the Steering Committee on Local and Regional Authorities of the Council of Europe commissioned a report on this issue: DEFINITION AND LIMITS OF THE PRINCIPLE OF SUBSIDIARITY Report prepared for the Steering Committee on Local and Regional Authorities (CDLR) Local and regional authorities in Europe, No. 55.

⁸¹ 12008E/PRO/02, Consolidated version of the Treaty on the Functioning of the European Union - PROTOCOLS - Protocol (No 2) on the application of the principles of subsidiarity and proportionality, *Official Journal* 115, 09/05/2008 P. 0206 – 0209.

⁸² Paul Craig and Grainne de Burca, *EU Law. Texts, Cases, and Materials*, 5th edn, OUP 2011, 99.

⁸³ Or two concepts, see Matej Avbelj, 'Supremacy or Primacy of EU Law – (Why) Does it Matter?' (2011), *European Law Journal* 17, 744.

high courts (conditional primacy).⁸⁴ Without going into the detail of the perhaps longest, most complicated, and continuing discussion in case law and legal scholarship on EU matters, it suffices to note that the CJEU and more federalist-inclined authors claim unquestionable *supremacy* of EU law (in the fields where it is valid law), while others and some constitutional courts sets limits, to prevent what they see as illegitimate stretches of the reach of EU law by the Commission and CJEU alike.⁸⁵

If one national court needs to be mentioned specifically in this context then it is the German Constitutional Court which has for long engaged in (often seen as generally fruitful) conflict with the CJEU on this issue. First, the German Constitutional Court pressed for stronger fundamental rights protection in (then) Community law. A major decision in this context is known as *Solange I*, because the German court decided that it would not renounce its right to check the compatibility of Community law with constitutional rights, as long as – ‘*solange*’ in German – Community law does not have a system of protection of fundamental rights equivalent to the German one.⁸⁶ More than a decade later, the Court largely reversed its position in *Solange II*, acknowledging substantial and institutional development of the protection of fundamental rights in the EU in a decision to cease checking the above compatibility as long as (‘*solange*’) the European Communities *generally* ensure that fundamental rights are adequately protected.⁸⁷ It has however continued to control the limits of ‘sovereignty transfer’ and supervise whether the EU has not stepped over its limited competences.⁸⁸ Thus, the border between EU law and national law look differently depending from ‘which side’ of the border one is looking at it.

In practice, however, these tensions are mitigated as national courts and EU courts have avoided frontal collision, showing restraint and pragmatism when applying these doctrines in concrete cases.⁸⁹

⁸⁴ Paul Craig and Grainne de Burca, *EU Law. Texts, Cases, and Materials*, 5th edn., OUP 2011 or Monica Claes, ‘The Primacy of EU Law in European and National Law’ in Damian Chalmers and Anthony Arnall (eds), *The Oxford Handbook of European Union Law*, OUP 2015.

⁸⁵ Similarly and in detail, explaining other more specific doctrines as well, see Avbelj (n80).

⁸⁶ BVerfGE 37, 271 (1974)

⁸⁷ BVerfGE 73, 339 (1986)

⁸⁸ See, eg, Craig/de Burca (n 91) 272-283.

⁸⁹ For an excellent recent argument on how the legalized and even judicialized focus of these controversies distorted the original problem of democratic legitimacy, see Nik de Boer, ‘The False Promise of Constitutional Pluralism’ (2018), Amsterdam Law School Legal Studies Research Paper No. 2018-05.

(4) *Constitutional or national identity*

A similarly problematic, but more recent concept in 'multi-layered' systems (systems with overlapping legal orders such as the European human rights orders) is constitutional or national identity. The first and foremost feature of this concept is its highly contested nature if not its sheer obscurity:

[Constitutional identity is] an essentially contested concept as there is no agreement over what it means or refers to. Conceptions of constitutional identity range from focus on the actual features and provisions of a constitution – for example, does it establish a presidential or parliamentary system, a unitary or federal state – to the relation between the constitution and the culture in which it operates, and to the relation between the identity of the constitution and other relevant identities, such as national, religious, or ideological identity.⁹⁰

As many interpretive concepts, 'constitutional identity' has appeared in some rather harmless (but not toothless) theorizations of a philosophical nature for some time.⁹¹ At the moment of its legal instantiation in the 1992 Maastricht Treaty (which established the European Union in place of the European Communities), it started to gain force, which was amplified after the concretisations of the Lisbon Treaty.

Article 4 TFEU is the current *legal* version of constitutional identity (the text uses 'national identity', but refers explicitly to constitutional issues):⁹²

4. (2) The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.

As one author put it bluntly, the question posed by constitutional identity in both EU legal discourse (where it is strongest), and in international law discourse, is whether it can ever serve as a justification for a violation of

⁹⁰ Michel Rosenfeld, 'Constitutional Identity', in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (2012). Oxford University Press, Oxford, 756.

⁹¹ For a thoughtful overview, see Monika Polzin, 'Constitutional Identity as a Constructed Reality and a Restless Soul' (2015), *German Law Journal*, Special Issue on Constitutional Identity in the Age of Global Migration, 18, 1595.

⁹² Leonard Besselink, 'National and Constitutional Identity Before and after Lisbon' (2010), *Utrecht Law Review* 6, 37.

(human rights) law.⁹³

Constitutional (or national) identity *in law* is a concept on which states rely to request exception from and reject compliance with otherwise-binding (inter- or supra-national) law. The basic claim of such demands for exemption is that there are certain issues or cases which cannot or should not be homogenized (universalized or ‘Europeanized’), but ought to remain ‘essentially’ particular (national), or at least be subject to further discursive or iterative processes for homogenization to be acceptable.⁹⁴ In other words, while it is possible that in the future we might come to a shared understanding of important issues, for now we are at the point of disagreement, and at best in the process of discussion. Constitutional identity, like the margin of appreciation, is the locus where claims for a greater respect for pluralism in Europe come to the fore.

Currently, some constitutional courts are eager to use the explicit authorization to carve out exceptions and justify reservations of supranational ‘competence creep’ through the constitutional identity provision. They show strongly differing attitudes in the manner they utilize this provision, however, and some of them seem clearly in abuse of the constitutional identity provision.⁹⁵ The CJEU however appears reluctant to devise a ‘complete adjudicative framework’⁹⁶ in this regard, which does not help to resolve the current European crisis.

4) Justice in the Rights to Vote, Housing and Education in International Law

The European justice system, in its legal formulation which focuses on justice as rights protection, is a complex one. It engages different legal orders, notably international human rights law (such as the Refugee Convention or

⁹³ Polzin (n 911) 1597.

⁹⁴ *Mutatis mutandis*, Neil Walker, ‘Universalism and Particularism in Human Rights’, in Cindy Holder & David Reid (eds) *Human Rights: The Hard Questions*, OUP 2013.

⁹⁵ Cf. Kriszta Kovács, ‘The Rise of an Ethnocultural Constitutional Identity in the Jurisprudence of the East Central European Courts’ (2015), *German Law Journal*, Special Issue on Constitutional Identity in the Age of Global Migration, 18, 1703, Zolt Körtvélyesi and Balázs Majtényi, ‘Game of Values: The Threat of Exclusive Constitutional Identity, the EU and Hungary’ (2015), *German Law*, Journal Special Issue on Constitutional Identity in the Age of Global Migration, 18, 1721, Gábor Halmai, ‘Abuse of Constitutional Identity. The Hungarian Constitutional Court on Interpretation of Article E) (2) of the Fundamental Law’ (2018), *Review of Central and East European Law* 43, 23.

⁹⁶ Elke Cloots, *National Identity in EU Law*, OUP 2015, 8-11.

the Convention of the Rights of People with Disability), European human rights law (in particular Council of Europe's instrument such as the European Convention on Human Rights or the Revised European Social Charter), European Union law (notably the EU Charter of Fundamental Rights, but also the EU Treaties and relevant legislative instruments, such as Directives or Regulations), and finally, the national (including regional and local) legal orders, and in particular, constitutions and their Bills of rights, where they exist, as well as legislation. Moreover, these different sources of legal rights evolve overtime, through amendments but also by means of interpretation by those organs and bodies which are endowed with interpretative authority, and primarily the courts attached to each of these legal orders (eg the Strasbourg-based ECtHR for the European Convention on Human Rights, the Luxembourg-based Court of Justice of the European Union (CJEU) for EU law, national constitutional or ordinary courts for national constitutions, and so on).

In the following three sections, we provide an analysis of how the right to housing, education and vote are defined and protected in different relevant international and European (including EU) legal instruments and their judicial interpretation. The review reveals some tensions between, and within, these different legal instruments in how they define and protect those rights, which, in our view, are revealing of the different conceptions of justice which are institutionalised in law. This section identifies and outlines key legal provisions in international law, and their judicial interpretation and elaborates on the – sometimes conflicting – conception of justice they embody.

Let us first turn to international law and consider how the right to vote, to housing and to education have been codified in international law, both for all human beings and for particular groups. Ever since the adoption of the Universal Declaration of Human Rights, as a 'common standard of achievement for all peoples and all nations' in 1948, the rights enshrined in it have increasingly been refined in international law and made their way into regional and national legal orders. This very general catalogue contained rights of direct relevance to this study, like the right to an adequate standard of living that includes housing (art. 25(1), the right to education (art. 26) and the right to vote (art. 21). A key feature of international human rights law is the principle that the rights concerned are universal and inalienable, indivisible, interdependent and interrelated. In the decades after the adoption of this general declaration, these rights were further specified in binding international and regional treaties. Such treaties came with supervisory mechanisms, like the Human Rights Committee for the International Covenant on Civil and Political Rights, or even courts, like the ECtHR overseeing the European Convention on Human Rights. This section, on international law, will first discuss the general working of international law and

the way in which compliance by States is monitored, to subsequently turn to specific treaties and provisions.⁹⁷

1) General working of international law

International law is laid down in treaties, negotiated for instance in the context of the United Nations, by States – the key actors in international law. The United Nations has adopted 9 core human rights instruments, including general treaties like the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic Social and Cultural Rights (ICESCR) and more group based treaties like the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD).⁹⁸ States sign treaties indicating their intention to continue the treaty-making process, and are bound to a treaty once they have ratified it. In general, ratification of an international human rights treaty entails the duty to respect, protect and fulfill the rights codified in the treaty. Often, this means that the State considered should work towards the progressive realization of the right in the treaty, like the right of access to housing. In many cases, treaty ratification creates a subjective right for individuals, meaning that they can invoke the right (like the right to vote) vis-à-vis the State, for instance in a court case.

A great deal of (monitoring) compliance with human rights thus takes place by states themselves, for instance by adopting or amending legislation, invoking the rights in court cases and monitoring by national human rights institutes. At the same time, even if there is no ‘World Court’, human rights treaties have their own monitoring mechanisms. The Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), for instance, has a Committee to which every state report on its compliance with convention obligations every four years. In addition, it hears individual cases after remedies at the national level have been exhausted, and issues General Comments, for instance on disabled women, women in political and public life and on women

⁹⁷ Good general reference books are: Buergenthal T, *et al.*, *International human rights in a nutshell* (West Academic Publishing 2017); De Schutter O, *International human rights law: cases, materials, commentary* (Cambridge University Press 2010); Steiner HJ, and Alston P, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press 2008).

⁹⁸ The other core human rights treaties are: the International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families and the International Convention for the Protection of All Persons from Enforced Disappearance.

migrant workers.⁹⁹ All the insights generated by such a treaty monitoring committee do not concern ‘hard law’, but have the status of authoritative statements on the treaty concerned. Next to such ‘treaty-based’ monitoring, the human rights compliance of nation states is also monitored with ‘charter-based’ mechanisms.¹⁰⁰ The most important, here, is the Universal Periodic Review (UPR), a ‘human rights exam’ by the Human Rights Council that every country undergoes once every four years. To offer an example of such a dialogue: in the Austrian UPR of 2015 Slovenia recommended the prevention of closing of bilingual public schools in Carinthia, and improvement of the quality of bilingual education, to which Austria responded that the Carinthian Minorities School Act did allow for a continuous education in German and Slovenian.¹⁰¹

With these structural mechanisms in mind, let us now turn to the way in which the right to vote, to housing and to education have been codified in the UN Bill of Rights, but also in the most relevant ‘group’-based treaties.

3) The UN Bill of Rights

The Universal Declaration of Human Rights formed the basis for two binding Conventions, the ICCPR and the ICESCR both adopted in 1966 and ratified by all of the countries researched in the context of ETHOS.

The ICCPR and the Right to Vote

A key provision in the International Covenant on Civil and Political Rights provides all *citizens* of state parties both active and passive voting rights – the right to vote and to be voted for. This limitation to citizens is a departure from the rest of the rights included in the ICCPR, which are granted to all individuals under the jurisdiction of the state party. More specifically, art. 25 sets out how:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen

⁹⁹ Generally, see: <http://www.ohchr.org/EN/HRBodies/CEDAW/Pages/Recommendations.aspx>. The General Recommendations quoted are no. 18 (1991), no. 23 (1997) and no. 26 (2008).

¹⁰⁰ See Buergenthal (n. 91), 77-151.

¹⁰¹ UNHRC, Report of the Working Group on the Universal Periodic Review, Austria, 22 December 2015, A/HRC/31/12 and UNHRC, Report of the Working Group on the Universal Periodic Review, Austria, 3 March 2016, A/HRC/31/12/Add.1, both under 141.65.

representatives;

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

(c) To have access, on general terms of equality, to public service in his country.

The Human Rights Committee, which monitors the ICCPR, emphasized in its General Comment 25 how closely this right is related to other rights like the right to self-determination and the freedom of expression, assembly and association. It also set out the specific requirements that come with the right, like the fact that limitations are only allowed on the basis of objective and reasonable criteria.¹⁰²

The ICESCR and the Right to Housing and to Education

The International Covenant on Economic, Social and Cultural Rights forms the ‘twin’ treaty to the ICCPR, with its emphasis on economic, social and cultural rights. States that sign the ICESCR commit to working progressively towards the full realization of all the rights included (art. 2.1) and to do so without discrimination (art. 2.2). Whereas many of the rights in the Convention could thus be considered policy objectives, they do entail ‘minimum core obligations’ that are coupled to subjective rights that can be claimed by individuals.¹⁰³ For the purposes of the ETHOS research, two rights are particularly important.

In the first, laid down in art. 11.1 of the Convention, state parties recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and *housing*, and to the *continuous improvement of living conditions*, and commit to taking appropriate steps to ensure the realization of this right. The substance of this right to adequate housing was worked out by the CESCR in two General Comments, on the right to adequate housing and on forced evictions.¹⁰⁴ Here, the Committee set out how the right contains

¹⁰² UNHRC, General Comment 25 (57), General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996).

¹⁰³ Coomans F and Van Hoof F, *The Right to Complain about Economic, Social and Cultural Rights* (SIM 1995); Coomans F, *Justiciability of Economic and Social Rights: Experiences from Domestic Systems* (Intersentia & Maastricht Centre for Human Rights 2006).

¹⁰⁴ UN Committee on Economic, Social and Cultural Rights, General Comment No. 4: The Right to Adequate Housing (Art. 11 (1) of the Covenant) Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, 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).

freedoms (like protection from forced eviction and arbitrary interference) but also entitlements (like security of tenure and equal and non-discriminatory access to adequate housing).¹⁰⁵

The next right that is directly relevant is the *right to education*, as codified in article 13 of the ICESCR. In ratifying the convention, state parties do not only recognize the right of everyone to education, but also on the purpose of education: that it ‘shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms’. One example of a minimum core obligation is enshrined in art. 13.2a: that primary education shall be compulsory and available free to all. Whatever the formal status of a child, this thus entails a subjective right to education.¹⁰⁶ In its General Comment 13, the CESCR set out how the right to education means that education, in all its forms and levels, should be available, accessible, acceptable and adaptable.¹⁰⁷

3) Relevant rights in ‘group’-based international treaties

Next to these general conventions, the United Nations has, over the years, also adopted treaties meant to specify the contents of the general human rights provisions for specific vulnerable groups. Out of these treaties, the most relevant for this inquiry are the Convention on the Rights of the Child (CRC) and the Convention on the Rights of Persons with Disabilities (CRPD). In contrast to the Council of Europe, the UN has not adopted a specific international convention on ethnic, religious and linguistic minorities.¹⁰⁸ The Convention on the Elimination of all forms of Racial Discrimination (CERD) does, however, oblige state parties to eliminate the “distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life” (art. 1). Before

¹⁰⁵ UN Habitat, *The Right to Adequate Housing*, Fact Sheet No. 21/Rev.1, (OHCHR Geneva 2009).

¹⁰⁶ Consider, also, art. 14 of the ICESCR and UN Committee on Economic, Social and Cultural Rights, General Comment No. 11: Plans of Action for Primary Education (Art. 14) Adopted at the Twentieth Session of the Committee on Economic, Social and Cultural Rights, on 10 May 1999 (Contained in Document E/1992/23).

¹⁰⁷ UN Committee on Economic, Social and Cultural Rights, General Comment No. 13: The right to education (article 13 of the Covenant, Adopted at the Twenty-First Session of the Committee on Economic, Social and Cultural Rights, on 15 November-3 December 1999 (Contained in Document E/C.12/1999/10).

¹⁰⁸ Even if the right to culture is enshrined in art. 27 of the UDHR and the UN did adopt a Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (General Assembly resolution 47/135 of 18 December 1992). See also the UNESCO Universal Declaration on Cultural Diversity, 2 November 2001.

turning towards the right to education in the CRC, and the right to vote, to education and to housing in the CRPD, let us however turn to a Convention that is technically not a human rights convention but of crucial importance to one of the vulnerable groups under investigation: the Refugee Convention.

The Refugee Convention

All countries in the ETHOS research ratified the 1951 Refugee Convention that does not only define a refugee but also sets out their obligations towards refugees.¹⁰⁹ A refugee, according to art. 1 of the Convention, is a person who “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”. For refugees, state parties commit to the principle of *non-refoulement*, to not expel or return people to the territories where their lives or freedom are threatened for these reasons (art. 33).

In ratifying the Refugee Convention, state parties also committed to a wide range of other obligations. With respect to *elementary education*, for instance, refugees have to be treated *like nationals* (art. 22). With respect to *the right of association, housing and education higher than elementary*, they have to at least be treated *like other non-nationals* (arts. 15, 21 and 22). There is no specific provision on the right to vote, in spite of recent attempts to interpret the obligation to include this right.¹¹⁰ For all these reasons, the Refugee Convention forms an important foundation for EU and national laws with respect to refugees.

The Convention on the Rights of the Child

Even if the focus of the ETHOS research is not on children as a vulnerable group, the interest in education makes it important to also invoke the relevant provisions in the Convention on the Rights of the Child (CRC).¹¹¹ This Convention has been very influential in stipulating that states should act in the “best interests” of the child (art. 3). Even if the CRC does not set out a right to vote for children, it does set out the right of children to be heard

¹⁰⁹ UN Convention Relating to the Status of Refugees of 28 July 1951 and the Optional Protocol Relating to the Status of Refugees of 31 January 1967 that removed the temporal and geographic restrictions set in 1951. Turkey, however, adopted a geographical limitation, undertaking convention obligations only to people originating from Europe.

¹¹⁰ Ziegler R, *Voting rights of refugees* (Cambridge University Press 2017).

¹¹¹ 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.

and to express views in all matters relating to their lives (art. 12). The Committee on the Rights of the Child emphasized, in a recent General Comment, how states should adopt opportunities for increased political participation and stimulate political engagement.¹¹² As regards housing, the CRC also enshrines the right to an adequate standard of living, with states taking up the obligation to, in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing (art. 27).

A key provision for the purpose of this inquiry is art. 28, that recognizes the right to education and with which state parties agree to make primary education compulsory and available free to all. Here, too, the objectives of education like ‘the development of the child's personality, talents and mental and physical abilities to their fullest potential’ are set out (art. 29). The Committee on the Rights of the Child has stipulated that this article “reflects the rights and inherent dignity of the child” and “insists upon the need for education to be child-centred, child-friendly and empowering”. Next to these general rights, the CRC also protects the rights of children belonging to “ethnic, religious or linguistic minorities or persons of indigenous origin”, stating that such a child shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language (art. 30).

The Convention on the Rights of Persons with Disabilities

Where it concerns the third vulnerable group in the ETHOS inquiry the most recent UN Treaty, the Convention on the Rights of Persons with Disabilities, is of crucial importance. The UN High Commissioner on Human Rights, with many others, noted how this convention constitutes “a ‘paradigm shift’ in attitudes that moves from a view of persons with disabilities as objects of charity, medical treatment and social protection to subjects of rights, able to claim those rights as active members of society”.¹¹³ Guiding principles in the CRPD are autonomy, non-discrimination, inclusion, respect for difference, equality of opportunity, accessibility, equality of men and women and respect for the evolving capacities of children with disabilities. In addition, the CRPD contains a number of provisions of direct relevance to this inquiry.

Where it concerns the right to vote, for instance, the CRPD explicitly protects the rights of persons with disabilities to effectively and fully participate in public and political life, amongst others via accessible and easy

¹¹² UN Committee on the Rights of the Child: General Comment No. 20 on the implementation of the rights of the child during adolescence (Contained in Document CRC/C/GC/20).

¹¹³ Statement by Louise Arbour, UN High Commissioner for Human Rights to the Resumed 8th Session of the Ad Hoc Committee on the Convention on the Rights of Persons with Disabilities, available via: <http://www2.ohchr.org/english/issues/disability/docs/statementhcdec06.doc>, visited 18 May 2018

voting procedures and materials, and actively promoting an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs (art. 29). With respect to housing, the CRPD does not only restate the right to an adequate standard of living for people living with disabilities and their families, “including adequate food, clothing and housing, and to the continuous improvement of living conditions”. State parties also commit to progressive realization of the right of the people concerned to access to social housing programs (art. 28). With respect to the third dimension of justice under review, education, state parties that have ratified the CRPD commit to ensuring an *inclusive education* system at all levels and lifelong learning (art. 24). This means, amongst others, that the people concerned are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability. In addition, the CRPD calls for reasonable accommodation of the individual’s requirements and “effective individualized support measures that maximize academic and social development, consistent with the goal of full inclusion” (art. 24.2e).

In conclusion, a wide variety of UN human rights instruments protect the right to vote, to housing and to education, both in general and for particular groups. For the ETHOS project, however, the European Convention of Human Rights, as the human rights instrument for the whole of the Council of Europe, is just as important. We therefore now turn to this regional instrument and its most relevant provisions.

5) Justice in the Rights to Vote, Housing and Education in Council of Europe Law

The Council of Europe unites the 47 European countries which, as stated in the preamble of the European Convention on Human Rights and Fundamental Freedoms (ECHR) are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law. It is the most important human rights organization in Europe, in which all member states have ratified the ECHR and are subject to the jurisdiction of the ECtHR. How does this Convention, and how do other Council of Europe instruments, institutionalize justice with respect to the three rights under investigation?

The ECHR is under the supervision of the European Court of Human Rights (Art 19 ECHR), responsible for adjudicating cases, and the Committee of Ministers monitoring enforcement of judgments (Art 46). Both member states and individuals can bring complaint against states, in practice however, interstate complaints are very rare. The individual complaints mechanism is regulated in Art 34 of the Convention. Any person, NGO or group of individuals who is a victim of violation of rights can bring a case to the Court after exhausting effective and available domestic remedies, within six months of the last domestic decision. The decision of the Court is declaratory and binding, but not self-executory. The state is under an obligation to remedy the violation, and Committee of Ministers has the competence to supervise compliance.

The pilot judgment mechanism was introduced to rectify systemic violations, whereby the Court selects one or a few of the thousands of possible cases arising out of the same substantial systemic problem in the legal system, and gives detailed instruction on how the state could eliminate the violation. In this case, the decision on the sanction of the violation is set aside, and the state can act – typically change the legislation -- within a certain period of time. Therefore, to some extent, the individual complaint coupled with the pilot judgment procedure might function as systemic or structural corrective device.¹¹⁴

The other Council of Europe instruments do not have (even) such an adjudicating and enforcement mechanism. Enforcement mechanisms are limited to self-reporting by states and monitoring by a treaty body, not adjudication in individual cases by a court.¹¹⁵ An alternative route was taken by the 1995 Additional Protocol to the European Social Charter which introduced a “collective complaints procedure,” allowing trade unions and NGOs with consultative status to present complaints to the European Committee for Social and Economic Rights.¹¹⁶

1) The Right to Vote in Council of Europe Law – Justice as Representation

While various voting rights are mentioned in different Council of Europe documents, it is only the European Court

¹¹⁴ Dominik Haider, *The Pilot Judgment Procedure of the European Court of Human Rights* (Martinus Nijhoff, 2013).

¹¹⁵ For an overview of non-judicial overview mechanisms (ie outside the European Court of Human Rights) of the diverse human rights treaties in Europe see Gauthier de Beco (ed) *Human Rights Monitoring Mechanisms in the Council of Europe* (Routledge, 2012).

¹¹⁶ Olivier de Schutter (ed) *The European Social Charter: A Social Constitution for Europe* (Bruxelles, Bruylant, 2010) and Holly Cullen, ‘The Collective Complaints System of the European Social Charter: Interpretative Methods of the European Committee of Social Rights’ (2009) *Human Rights Law Review*, 9, 61–93.

of Human Rights, interpreting the European Convention of Human Rights, which developed a significant interpretation on the right. Within this jurisprudence, voting rights of vulnerable minorities, including the disabled and the imprisoned, have been at the centre of the jurisprudence of the ECtHR, often accompanied by important controversies.

The text of the provision is different from other rights enshrined in the Convention (especially Articles 8-11) in that it formally only states a state obligation and not a right. Case law still firmly maintains that in fact Article 3 Protocol 1 establishes an individual right,¹¹⁷ which is 'crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.'¹¹⁸ The state however enjoys a wide margin of appreciation in several aspects of the regulation of the right, such as intervals, districting and organizational questions.

As to the right itself, apart from secrecy and reasonable intervals (which are mentioned in the text) the ECtHR requires universal suffrage. Active and passive aspects (ie to elect and to be elected) are both protected.¹¹⁹ While the text does not mention limits (as opposed to paras 2 of Articles 8-11), 'implied limitations' are accepted by the ECtHR.¹²⁰

General principles are summed up the following way in *Hirst v UK*¹²¹ (§§ 56-62):

56. Article 3 of Protocol No. 1 appears at first sight to differ from the other rights guaranteed in the Convention and Protocols as it is phrased in terms of the obligation of the High Contracting Party to hold elections which ensure the free expression of the opinion of the people rather than in terms of a particular right or freedom.

57. However, having regard to the preparatory work to Article 3 of Protocol No. 1 and the interpretation of the provision in the context of the Convention as a whole, the Court has established that it guarantees individual rights, including the right to vote and to stand for election (see *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113, pp. 22-23, §§ 46-51). Indeed, it was considered that the unique phrasing was intended to give greater solemnity to the Contracting States' commitment and to emphasise that this was an area where they were required to take positive measures as opposed to merely refraining from interference (*ibid.*, § 50).

¹¹⁷ *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, Series A no. 113.

¹¹⁸ *Hirst v the United Kingdom (no. 2) [GC]*, App no 74025/01, ECHR 2005-IX.

¹¹⁹ *Mathieu-Mohin*.

¹²⁰ *Mathieu-Mohin*, § 52.

¹²¹ *Hirst v UK*.

58. The Court has had frequent occasion to highlight the importance of democratic principles underlying the interpretation and application of the Convention (see, among other authorities, *United Communist Party of Turkey and Others v. Turkey*, judgment of 30 January 1998, *Reports of Judgments and Decisions* 1998-I, pp. 21-22, § 45), and it would take this opportunity to emphasise that the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see also the importance of these rights as recognised internationally in “Relevant international materials”, paragraphs 26-39 above).

59. As pointed out by the applicant, the right to vote is not a privilege. In the twenty-first century, the presumption in a democratic State must be in favour of inclusion, as may be illustrated, for example, by the parliamentary history of the United Kingdom and other countries where the franchise was gradually extended over the centuries from select individuals, elite groupings or sections of the population approved of by those in power. Universal suffrage has become the basic principle (see *Mathieu-Mohin and Clerfayt*, cited above, p. 23, § 51, citing *X v. Germany*, no. [2728/66](#), Commission decision of 6 October 1967, Collection 25, pp. 38-41).

60. Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere.

61. There has been much discussion of the breadth of this margin in the present case. The Court reaffirms that the margin in this area is wide (see *Mathieu-Mohin and Clerfayt*, cited above, p. 23, § 52, and, more recently, *Matthews v. the United Kingdom*[GC], no. [24833/94](#), § 63, ECHR 1999-I; see also *Labita v. Italy* [GC], no. [26772/95](#), § 201, ECHR 2000-IV, and *Podkolzina v. Latvia*, no. [46726/99](#), § 33, ECHR 2002-II). There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.

62. It is, however, for the Court to determine in the last resort whether the requirements of Article 3 of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate (see *Mathieu-Mohin and Clerfayt*, p. 23, § 52). In particular, any conditions imposed must not thwart the free expression of the people in the choice of the legislature – in other words, they must reflect, or not run counter to, the concern to maintain the integrity and effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage. For example, the imposition of a minimum age may be envisaged with a view to ensuring the maturity of those participating in the electoral process or, in some circumstances, eligibility may be geared to criteria, such as residence, to identify those with sufficiently continuous or close links to, or a stake in, the country concerned (see *Hilbe v.*

Liechtenstein (dec.), no. [31981/96](#), ECHR 1999-VI, and *Melnychenko v. Ukraine*, no. [17707/02](#), § 56, ECHR 2004-X). Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconcilable with the underlying purposes of Article 3 of Protocol No. 1 (see, *mutatis mutandis*, *Aziz v. Cyprus*, no. [69949/01](#), § 28, ECHR 2004-V).

While the margin of appreciation is rather wide in several regards, in a few areas supervision is strict, especially in the ‘proportionality phase’, i.e. when the Court checks whether a certain measure is proportionate to the (admittedly) legitimate aim pursued. Importantly, the margin of appreciation doctrine cannot result in excluding *individuals or groups from taking part in the political life of the country*.¹²² For instance, Turkish-Cypriots’ inability to vote in the Republic of Cyprus amounted to violation of Article Protocol 1 both alone and in conjunction with Article 14 as discrimination. Thus, in case of deprivation of the right to vote, the Court is more attentive and applies a stringent proportionality analysis. Criminal investigation might be a reason for a temporary suspension of voting rights, but not if applied after acquittal,¹²³ or otherwise disproportionately or irrationally.¹²⁴ Deprivation of the right to vote in case of bankruptcy does not pursue a legitimate aim, and is thus not permissible under the Convention.¹²⁵

In contrast, the ECtHR found in the major case of *Alajos Kiss v Hungary* that to ensure that only such persons vote who are able to assess the consequences of their decisions is a legitimate aim. Thus, in principle, the ECtHR agreed that people under partial guardianship could be deprived of the right to vote without this violating the ECHR. The specific judgment still found a violation, since the Hungarian system imposed ‘an automatic, blanket restriction, regardless of the protected person’s actual faculties’ and ‘without any distinction being made between full and partial guardianship’. An individualized assessment by a judge, thus seems to be required to make such measures proportionate in the eyes of the court.¹²⁶

As to the prisoners’ voting rights, the controversy was framed along similar lines. While the Court did not deny that the aim pursued might be legitimate, it often objected to ‘blanket’ bans in this regard, too. In such cases, the default consideration is that prisoners are limited in their right to liberty, but continue to enjoy other rights

¹²² *Aziz v. Cyprus*, no. 69949/01, ECHR 2004-V, § 28; *Tănase v. Moldova* [GC], no. 7/08, ECHR 2010, § 158.

¹²³ *Labita v. Italy* [GC], no. 26772/95, ECHR 2000-IV.

¹²⁴ Such as when the deletion from the voters’ registration started 9 months *after* the start of investigation, and the delay resulting in excluding the applicant from two elections. *Vito Sante Santoro v. Italy*, no. 36681/97, ECHR 2004-VI.

¹²⁵ *Albanese v. Italy*, no. 77924/01, 23 March 2006.

¹²⁶ *Alajos Kiss v. Hungary*, no. 38832/06, 20 May 2010.

guaranteed in the Convention, including the right to vote. In the *Hirst v UK* case, the Grand Chamber emphasized that individualized restrictions have been found justified in the past by both the Commission and the Court, but *automatic and general disenfranchisement of convicted prisoners* is a different matter. As prisoners do not forfeit their voting rights, there is no place ‘under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion.’¹²⁷ This tolerance does not render restrictions on an individual, who, ‘has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations,’ necessarily impermissible, but disenfranchisement is such a severe measure that the Convention ‘requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. The Court noted in this regard the recommendation of the Venice Commission that the withdrawal of political rights should only be carried out by express judicial decision (...). As in other contexts, an independent court, applying an adversarial procedure, provided a strong safeguard against arbitrariness.’¹²⁸ *Frodl v Austria*¹²⁹ specifically requires a judge to decide over disenfranchisement of prisoners.

Later jurisprudence appears to have stepped back somewhat from this categorical formulation. *Scoppola v Italy* (no 3) from the Grand Chamber specifically disagreed with the Frodl-requirement of judicial decision, and allowed a non-blanket voting rights ban survive because the legislation had been carefully drafted and scaled in order to respect proportionality.¹³⁰

2) The Right to Housing in Council of Europe Law – Justice as Redistribution

European Convention of Human Rights

In discussing the way in which the Council of Europe guarantees individuals the right to housing we will focus on both the ECHR and the European Social Charter. It is important to state that the ECHR does not include housing rights. The European Court of Human Rights (ECtHR) still had to address the issue of housing deprivation, which came up in different forms and relating to different Convention rights. Article 8 concerning the right to private

¹²⁷ *Hirst v. the United Kingdom* (no. 2) [GC], no. 74025/01, ECHR 2005-IX, § 70.

¹²⁸ *Hirst v UK*, § 71.

¹²⁹ *Frodl v. Austria*, no. 20201/04, 8 April 2010.

¹³⁰ *Scoppola v. Italy* (no. 3) [GC], no. 126/05, 22 May 2012.

life, including right to respect of the home, was involved in several cases, as well as, on occasion, Article 3 on prohibition of torture and inhuman and degrading treatment, Article 6 on the right to a fair trial, and Article 1 Protocol 1 on the protection of property were invoked.

The *concept of home* was, from early on, defined to be a rather broad one.¹³¹ It covers ‘the place, the physically defined area, where private and family life develops.’¹³² It includes in its scope of protection *not only traditional homes, but caravans and other residences* (eg holiday homes).¹³³ Article 8 does not ‘guarantee the right to have one’s housing problem solved by the authorities,’¹³⁴ although *some positive obligations* might flow from it, if required for the effective protection of private life.

Chapman and others v UK is a seminal UK travellers case, where Roma people were not allowed to live in caravans on their own land.¹³⁵ The Court found no violation of Article 8, but spelled out that *the special needs of vulnerable minorities* such as the Roma might need to be taken into account. In the case of *Connors*, the Court found a similar eviction violated Article 8 for reasons of the *extraordinary harshness* of the measure and the *vulnerability* of the evicted.¹³⁶ In a 2006 case, the Court found that the *separation of children from their families (putting them in institutional care)* for reasons of *inadequate housing* threatening rights of the children violated Article 8. The problem of inadequate housing should have been addressed by less drastic measures, such as for instance providing the family *social housing*.¹³⁷

The evolving case law is summarized in the 2013 case *Winterstein v France*, where 25 French Roma travellers argued that their eviction violated Article 8. An important feature of the decision is the strong referencing of the findings of the *European Committee of Social Rights* in similar issues. The Court sums up the applicable general principles as follows (§§ 147-148)¹³⁸:

147. An interference will be considered ‘necessary in a democratic society’ for a legitimate aim if it answers a ‘pressing social need’ and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are ‘relevant and

¹³¹ *Niemietz v. Germany*, 16 December 1992; Series A No. A251-B.

¹³² *Moreno Gómez v. Spain*, App no 4143/02, ECHR 2004-X, § 52.

¹³³ *Chapman v. the United Kingdom*, App No. 27238/95, §§ 71-74, ECHR 2001-I.

¹³⁴ *Marzari v Italy*, (1999) 28 EHRR CD 175.

¹³⁵ *Chapman v UK*.

¹³⁶ *Connors v UK*, App No 66746/01, judgment of 27 May 2004.

¹³⁷ *Wallova and Walla v. The Czech Republic*, Application no. 23848/04, judgment of October 26, 2006.

¹³⁸ *Winterstein and Others v France*, Application no. [27013/07](#), judgment of 17 October 2013, internal references omitted.

sufficient'. While it is for the national authorities to make the initial assessment in all these respects, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention.

148. A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors, including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference ...The following points emerge from the Court's case-law...:

(α) In spheres involving the application of social or economic policies, including as regards *housing*, the Court affords the *authorities considerable latitude*. In this area it has found that "[i]n so far as the exercise of discretion involving a *multitude of local factors* is inherent in the choice and implementation of planning policies, the national authorities in principle enjoy a *wide margin of appreciation*" ..., although the Court retains the power to find that the authorities have committed a *manifest error of assessment* ...

(β) On the other hand, the *margin of appreciation* left to the authorities will tend to be *narrower where the right at stake is crucial to the individual's effective enjoyment of fundamental or "intimate" rights*. This is the case in particular for *Article 8 rights*, which are *rights of central importance to the individual's identity, self-determination, physical and moral integrity, maintenance of relationships with others and a settled and secure place in the community* ...

(γ) It is appropriate to look at the *procedural safeguards* available to the individual to determine whether the respondent State has not exceeded its margin of appreciation in laying down the regulations. In particular, the Court must examine whether the *decision-making process* leading to measures of interference was *fair* and such as to afford *due respect to the interests* safeguarded to the individual by Article 8 ... The requirement for the interference to be "necessary" raises a question of procedure as well of substance

(δ) Since the *loss of one's home is a most extreme form of interference* with the right under Article 8 to respect for one's home, any person at risk of being a victim thereof should in principle be able to have the *proportionality* of the measure determined by an independent tribunal in the light of the relevant principles under Article 8 of the Convention, notwithstanding that, under domestic law, he has no right of occupation This means, among other things, that where relevant arguments concerning the proportionality of the interference have been raised by the applicant in domestic judicial proceedings, the domestic courts should examine them in detail and provide adequate reasons ...

(ε) When considering whether an *eviction* measure is proportionate, the following considerations should be taken into account in particular. If the *home was lawfully established*, this factor would

weigh against the legitimacy of requiring the individual to move. Conversely, *if the establishment of the home was unlawful*, the position of the individual concerned would be *less strong*. *If no alternative accommodation is available, the interference is more serious than where such accommodation is available*. The evaluation of the *suitability of alternative accommodation* will involve a consideration of, on the one hand, the *particular needs* of the person concerned and, on the other, *the rights of the local community to environmental protection*...

(ζ) Lastly, *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 ...; to this extent, there is thus a *positive obligation* imposed on the Contracting States by virtue of Article 8 to *facilitate the way of life of the Roma and travellers* ...

Thus, the Court does not spell out a state obligation to *provide* housing as such, but it significantly *limits the possibilities of eviction from an already existing 'home'*, whether it is inadequate, in public or a third party's property, burdening the environment, or not. *The sole fact of illegal occupation does not justify eviction*, and the state has to show it respected procedural guarantees, and assessed the substantive interests at stake carefully and in detail, so it conforms to the proportionality requirements. The Court increasingly draws attention to the fact that *alternative housing* (especially provided in consultation and prior to the eviction) is an *important factor* in the assessment of proportionality.¹³⁹

The right to property is also relevant with regard to housing. One branch of case law allows limitation of property rights of landlords with regard to rent control, another relates to property-like protection where social housing is granted as a right. Regarding the first issue, the property rights of owners may be limited significantly in order to realize reasonable housing policy objectives. *Mellacher v Austria*¹⁴⁰ allowed for significant (80%) decrease in rent price by declaring the following guiding principles of interpretation (§ 45):

The second paragraph [of Art 1 Protocol 1] reserves to States the right to enact such laws as they deem necessary to *control the use of property* in accordance with the general interest.

Such laws are especially *called for and usual in the field of housing*, which in our modern societies is a *central concern of social and economic policies*.

In order to implement such policies, the legislature must have a *wide margin of appreciation* both

¹³⁹ Similarly see *Yordanova and Others v. Bulgaria* 24 April 2012 and *Bagdonavicius and Others v. Russia* 11 October 2016. Cf also Adelaide Remiche, 'Yordanova and Others v Bulgaria: The Influence of the Social Right to Adequate Housing on the Interpretation of the Civil Right to Respect for One's Home', *Human Rights Law Review* (2012), 12:4, 787-800.

¹⁴⁰ *Mellacher and others v Austria*, Application no. 10522/83; 11011/84; [11070/84](#), judgment of 19 December 1989.

with regard to the existence of a problem of public concern warranting measures of control and as to the choice of the detailed rules for the implementation of such measures. The Court will respect the legislature's judgment as to what is in the general interest unless that judgment be manifestly without reasonable foundation.

Reasonable foundation, for instance, was found manifestly lacking in a Polish case where the imposed cap on rent prices was below the maintenance costs of the flat,¹⁴¹ but apart from such extreme cases, Article 1 Protocol 1 does not constitute an obstacle in the field of social policy. An illustrative case is *Barreto*, where a middle-class family who lived with parents-in-law could not move into a newly inherited home of their own, because Portuguese law and authorities considered they did not 'need' it, as opposed to tenants living in the property. The ECtHR found the limitation justified.¹⁴²

In cases where domestic law grants the right to (social) housing as a right, the Court considers that Art 1 Protocol 1 of the ECHR applies. Where authorities, despite such domestic obligations (eg despite administrative and judicial decisions confirming the applicant's entitlements to housing), fail to provide suitable housing, the Court has found a violation of Article 6.¹⁴³ Importantly, the Court in such cases *does not accept the State's reference to lack of resources or housing shortage*:¹⁴⁴

... it is not open to a State authority to cite the lack of funds or other resources, such as housing, as an excuse for not honouring a judgment debt Admittedly, a delay in the execution of a judgment may be justified in particular circumstances, but the delay may not be such as to impair the essence of the right protected under Article 6 § 1. The applicant should not be prevented from benefiting from the success of the litigation on the ground of alleged financial difficulties experienced by the State...

European Social Charter and Revised European Social Charter

The Revised European Social Charter includes the right to housing (Article 31). Under the collective complaints mechanism, several complaints were submitted regarding the right to housing. The European Committee on Social

¹⁴¹ *Hutten-Czapska v Poland* [GC], Application no. 35014/97, judgment of 19 June 2006.

¹⁴² *Velosa Barreto v. Portugal*, App no 18072/91, Judgment of 21 November 1995. See Ida Elisabeth Koch, *Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands under the European Convention of Human Rights*, Martinus Nijhoffs Publisher, Leiden-Boston, 2009, 132.

¹⁴³ *Tchokontio Happi v France*, Application no. 65829/12, judgment of 9 April 2015.

¹⁴⁴ § 14, *Telyatyeva v Russia*, Application no. 18762/06, judgment of 12 July 2007.

Rights, the monitoring body of the European Social Charter and the Revised European Social Charter, has often concluded that the right to housing was violated in this context.

In the decision in *FEANTSA v France*,¹⁴⁵ the Committee summarized the principles applicable to Article 31 right to housing in the following way (§§ 53-54):

...the actual wording of Article 31 of the Charter cannot be interpreted as imposing on states an obligation of “results”. However, ... the rights recognised in the Social Charter must take a practical and effective, rather than purely theoretical, form. ...

54. This means that, for the situation to be compatible with the treaty, states party must:

- 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.

On this basis, the Committee found several violations:

- “ -- that insufficient progress as regards the eradication of substandard housing and lack of proper amenities of a large number of households constitute a violation of Article 31§1 of the Revised Charter ;
- that the unsatisfactory implementation of the legislation on the prevention of evictions and the lack of measures to provide rehousing solutions for evicted families constitute a violation of Article 31§2 of the Revised Charter ;
- that the measures currently in place to reduce the number of homeless are insufficient, both in quantitative and qualitative terms, and constitute a violation of Article 31§2 of the Revised Charter;
- that the insufficient supply of social housing accessible to low-income groups constitutes a

¹⁴⁵ *FEANTSA v. France*, Complaint no. 39/2006, Decision of 5 December 2007.

violation of Article 31§3 of the Revised Charter;

– that the malfunctioning of the social housing allocation system, and the related remedies, constitute a violation of Article 31§3 of the Revised Charter;

– that deficient implementation of legislation on stopping places for Travellers constitutes a violation of Article 31§3 of the Revised Charter in conjunction with Article E.”

The Committee often finds states in violation of various provisions (housing, social assistance, and, importantly, discrimination) of the Charter, and provides detailed and extensive interpretation on a wide range of obligations on adequate and accessible housing, the reduction of homelessness and so on.¹⁴⁶

3) The Right to Education in Council of Europe Law – Justice as Recognition

Relevant legal instruments

The right to education in European human rights law is granted in Article 2 of Protocol No 1 of the ECHR. This is the only European human rights provision on the right to education which has a judicial enforcement mechanism. The ECHR sets out, in fact, two rights: the general right to education, enjoyed by everyone, and, specifically for parents, the right of respect from the state to ‘ensure such education and teaching in conformity with their own religious and philosophical convictions.’ Article 5 of the ECHR, which secures the right to liberty, allows in point d) for ‘the detention of a minor by lawful order for the purpose of educational supervision.

The Revised European Social Charter (RESC) is much more detailed and specific on the right to education, nonetheless with a more limited enforcement mechanism (monitoring, and only a collective complaint mechanism). It obliges states to provide free primary and secondary education for children and young people, and to ‘encourage’ regular attendance at schools, in order ‘to encourage the full development of their personality and physical and mental capacities (Article 17). Article 7 prohibits that persons subject to compulsory education be employed. The RESC also grants the right to vocational guidance and training (arts 9-10). Article 15 specifically grants the right to education of persons with disabilities ‘in the framework of general schemes wherever possible or, where this is not possible, through specialized bodies, public or private.’

¹⁴⁶ 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>

The European Charter for Regional and Minority Languages (ECRML) also grants in a long article variable (and elective) degrees of inclusion of regional and minority languages and history and culture from preschool to primary and secondary education, vocational training and university education (Article 8).

The Framework Convention for the Protection of National Minorities (FCPNM) applies weaker language: it grants equal opportunity in accessing education for persons belonging to national minorities (Article 12), their right to operate private instruction (with explicitly not granting a state obligation of financial support in this regard) (Article 13), and the right to learn their own language and 'as far as possible' to receive instruction in their own (minority) language (Article 14).

Relevant case law regarding inclusion and accommodation of vulnerable minorities

Among the mentioned conventions, it is only the ECHR in which an ultimate binding interpretative mechanism was instituted in the form of judicial procedure before the ECtHR. This does not mean the other mentioned treaties are irrelevant, as they are binding international law, and as the ECtHR often refers to them in its interpretation.

The ECtHR has created a rich case law regarding the more specific questions of the ETHOS project, namely the inclusion and exclusion of vulnerable minorities from mainstream, publicly funded, mandatory (primary and secondary) education, and the range and limits of accommodation required under the Convention for them.

As to the inclusion and exclusion, a first general principle is that the Convention does not oblige states to provide any sort of education, but it grants a right to access educational institutions a state chose to establish.¹⁴⁷ The second general principle is that the Convention needs to read as a whole, thus Article 2 Protocol 1 granting the right to education is to be read in conjunction with the other articles. This in our case means especially that states are under an obligation to interpret Article 2 in conjunction with Article 14, prohibiting discrimination with regard to rights enshrined in the Convention.

The right to education is especially important, since 'in a democratic society that right is indispensable to the furtherance of human rights and plays a fundamental role.'¹⁴⁸

¹⁴⁷ Belgian Linguistic Case, § 4.

¹⁴⁸ *Velyo Velev v. Bulgaria*, no. [16032/07](#), § 33, ECHR 2014 [extracts], cited by *Cam v Turkey*, § 52.

While education is one of the most important public services in a modern State, the Court acknowledges that it is an activity that is complex to organise and expensive to run, whereas the resources that the authorities can devote to it are necessarily finite. It is also true that in deciding how to regulate access to education, a State must strike a balance between, on the one hand, the educational needs of those under its jurisdiction and, on the other, its limited capacity to accommodate them. However, the Court cannot overlook the fact that, unlike some other public services, education is a right that enjoys direct protection under the Convention.¹⁴⁹

This is a careful exercise of not turning the Convention into a social rights document, but still moving away from an exclusively negatively defined right to education (note that the text of article 2 is technically about a right not to be denied education). Positive obligations to secure education for all are thus present in the ECtHR jurisprudence, which also especially requires national authorities to pay particular attention to the *special needs of vulnerable persons* (be they ethnic or religious minorities, persons living with disabilities, etc).

In the case of persons living with disabilities, the Court essentially developed an ad hoc balance between inclusion and the margin of appreciation, this latter one apparently shrinking as consensus emerging regarding new standards, due also to other international conventions (such as the UN Convention on the Rights of Persons living with Disabilities). Education cannot be denied ‘systematically’ to a person living with a disability, but that does not mean that there always is an obligation to co-teach persons with disabilities together with others (‘inclusive education’). The Court maintains that national authorities might be better placed to judge whether a particular person with a particular disability can be taught with the majority, but there appears to be an emerging European and international consensus that inclusive education is the best means pertaining to the full enjoyment of human rights for all. As summarized in *Çam v Turkey*:¹⁵⁰

...the Convention is intended to guarantee rights that are practical and effective and not theoretical and illusory ... In the context of the present case, the Court also reiterates that it must have regard to the changing conditions of international and European law and respond, for example, to any emerging consensus as to the standards to be achieved ... In that connection, it notes the importance of the fundamental principles of universality and non-discrimination in the exercise of the right to education, which are enshrined in many international texts It further emphasises that those international instruments have recognised inclusive education as the most appropriate means of guaranteeing the aforementioned fundamental principles.

¹⁴⁹ Ibid.

¹⁵⁰ *Çam v. Turkey*, Application no. [51500/08](#), judgment of 26 February 2016. Internal references omitted.

As to ethnic minorities, the jurisprudence has some coincidence with the above-mentioned case law, partly in response to the long tradition in Central and Eastern Europe of sending Roma children in schools for pupils with special needs (*de facto* segregation). In this regard, the Court took a strong stance and ruled that such racial segregation violates Articles 2 and 14 in a series of judgments,¹⁵¹ most importantly in *Horváth and Kiss v Hungary*.¹⁵² It is especially determining that the state had various positive obligations with regard to the right to education which led to the finding of the violation: both procedural and substantive obligations stem from Articles 2 and 14 ECHR in this regard. Accordingly, the state must ensure that:

- (i) parental consent to placement of the child in segregated school is based on informed consent given without any constraint, 153 and that
- (ii) schooling arrangements for Roma children be sufficiently attended by safeguards that would ensure that, in the exercise of its margin of appreciation in the education sphere, the State had sufficient regard to their special needs as members of a disadvantaged group,¹⁵⁴ or that, in a more substantive sense, 155
- (iii) the states have a positive obligation to „undo a history of racial segregation in special schools.”¹⁵⁶

However, according to disability rights groups, the decision is problematic, since it reinforces patterns of prejudices against persons with disability.¹⁵⁷ Accordingly, ‘the present judgement creates the impression that a segregated special education system is justifiable or even adequate for children with a disability, a system which clearly violates provisions of the CRPD.’¹⁵⁸ With more recent jurisprudence (especially *Cam v Turkey* mentioned above) the ECtHR possibly tried to live up to this criticism.

A further relevant issue is the accommodation of minority-specific needs, such as language instruction.

¹⁵¹ *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007-IV, *Oršuš and Others v. Croatia* [GC], no. 15766/03, ECHR 2010.

¹⁵² *Horváth and Kiss v Hungary*, Application no. [11146/11](#) judgment of 29 January 2013.

¹⁵³ *D.H and Others*, § 202.

¹⁵⁴ *Orsus and Others v Croatia*, § 182.

¹⁵⁵ Cf Alexandra Timmer, ‘Horváth and Kiss v Hungary, A strong New Roma School Segregation Case’: <https://strasbourgoobservers.com/2013/02/06/horvath-and-kiss-v-hungary-a-strong-new-roma-school-segregation-case/>.

¹⁵⁶ *Horváth and Kiss v Hungary*, § 127.

¹⁵⁷ Challenging Discrimination at the Expense of Equality, 14 February 2013, Joint statement by [Inclusion International](#), [Inclusion Europe](#) and the [Mental Disability Advocacy Center](#).

<http://www.mdac.info/en/14/02/2013/challenging-discrimination-expense-promoting-equality>

¹⁵⁸ *Idem*.

The Belgian linguistic case¹⁵⁹ clarified early on that there was no right to be taught in one's own language in school under the Convention, even if that happened to be one of official languages of the (federal) country. On the other hand, the Court also maintains that 'the right to education would be meaningless if it did not imply in favour of its beneficiaries, the right to be educated in the national language or in one of the national languages.'¹⁶⁰

Religious accommodation is a more complicated issue which has come up regularly in the jurisprudence of the ECtHR. In this regard, the Court early on noted that religious indoctrination would be contrary to Article 2.¹⁶¹ Knowledge about religion and other such subjects must be ensured to 'be conveyed in an objective, critical and pluralistic manner or whether it had pursued an aim of indoctrination not respecting the applicant parents' religious and philosophical convictions.' Later, the Court confirmed with regard to different religions in different cases (Christianity¹⁶² and Sunni denomination of Islam)¹⁶³ that parents can require that their child be exempted from compulsory religious education. However, exemption from other subjects in the curriculum, such as sex education,¹⁶⁴ or co-educated physical exercise (swimming)¹⁶⁵ is not required under the Convention (and arguably would amount to violation of it).

The other well-known bulk of case law on religion and education concerns not questions of curriculum, but religious expression and symbolism. The Grand Chamber famously reversed an earlier Chamber judgment – which had found that crucifixes in public school classrooms in Italy violated the Convention – in the *Lautsi*-controversy. The Grand Chamber basically argued that the crucifix was a passive cultural symbol whose presence did not amount to indoctrination.¹⁶⁶ Furthermore, the Court has allowed so far for bans in education (from the primary to the university level) of the Islamic veil (and 'other conspicuous religious symbols'), be it for pupils or

¹⁵⁹ Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium, App Nos 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64, Judgment of 23 July 1968.

¹⁶⁰ Recall in this regard that Art 8 of the European Charter for Minority and Regional Languages importantly *requires* that states provide education at least to a substantive extent in the minority language "at least to those pupils whose families so request and whose number is considered sufficient." Thus, the Charter provides for a significantly broader recognition of minority language interests.

¹⁶¹ *Kjeldsen, Busk Madsen and Petersen v Denmark* Application no. 5095/71; 5920/72; [5926/72](#), judgment of 7 December 1976.

¹⁶² *Folgerø and Others v. Norway*, no. 15472/02, ECHR 2007-III.

¹⁶³ *Mansur Yalçın and Others v. Turkey*, no. 21163/11, 16 September 2014.

¹⁶⁴ *Kjeldsen, Busk Madsen and Petersen v Denmark* Application no. 5095/71; 5920/72; [5926/72](#), judgment of 7 December 1976.

¹⁶⁵ *Osmanoğlu and Kocabaş v. Switzerland*, no. 29086/12, ECHR 2017

¹⁶⁶ *Lautsi and Others v. Italy* [GC], no. 30814/06, ECHR 2011

students or for teachers or professors, in granting a wide margin of appreciation.¹⁶⁷

In all, the European Court of Human Rights, with its key role in all legal systems under investigation here (including Turkey) has interpreted the ECHR to very specifically set out the substance of the right to vote, but also the right to education and even the right to housing for individuals throughout Europe. Let us now turn to the European Union.

6) Justice in the Rights to Vote, Housing and Education in European Union Law

This section, which constitutes the bulk of the legal analysis, in line with the ETHOS project description of work, reviews how justice, approached analytically as representation, redistribution and recognition, is institutionalised in relevant European Union (EU) legal instruments and their interpretation by EU courts. It identifies and analyses aspects of EU law which impact on the rights to vote, housing and education, with a particular focus on how they address selected vulnerable groups. The attention dedicated to EU law in this background paper reflects both its substantive reach, over an expanding range of policy areas, but also its relatively constraining force, which goes beyond that of classic international instruments. Moreover, EU law, together with its institutional enforcement apparatus, act as a ‘transmission belt’ for parts of international human rights law reviewed above, and notably the European Convention on Human Rights,¹⁶⁸ the UN Convention on Refugees (‘Geneva Convention’),¹⁶⁹ and the UN Convention on the Rights of Persons with Disabilities (CRPD). The EU does not have direct competence to comprehensively regulate voting, housing and education; however, certain elements of EU law have a significant, and in some cases even quite dramatic, impact on these three rights, and the dimensions of justice which they

¹⁶⁷ *Leyla Şahin v. Turkey* [GC], no. 44774/98, ECHR 2005-XI, *Dahlab v Switzerland* (Application No. 42393/98, ECHR 2001-V), *Köse and Others v. Turkey* (dec.) 26625/02, Decision 24.1.2006, *Dogru v. France* (application no. 27058/05) and *Kervanci v. France* (no. 31645/04), *Aktas v. France* (application no. 43563/08), *Bayrak v. France* (no. 14308/08), *Gamaleddyn v. France* (no. 18527/08), *Ghazal v. France* (no.29134/08), *J. Singh v. France* (no. 25463/08) and *R. Singh v. France* (no. 27561/08).

¹⁶⁸ Article 6(3) TEU.

¹⁶⁹ Article 78 TFEU.

engage. In that sense, EU law plays an important part in the institutionalization of justice through law in Europe.

The analysis that follows focuses primarily on *legally binding EU instruments, and their interpretation by the CJEU*, but also makes reference to EU ‘soft law’ when particularly significant.¹⁷⁰ EU law, for the purpose of this analysis, covers what is often called ‘primary’ EU law, that is the EU Treaties, namely in their current formulation, the Treaty on the European Union (TEU) and the distinct Treaty of the Functioning of the European Union (TFEU), as well as the EU Charter of Fundamental Rights (CFR, or ‘Charter’), which through a Treaty reference achieve the same legal status as the treaties.¹⁷¹ It make occasional references to relevant additional protocols attached to the Treaties, which have the same legal value as the Treaties. The analysis also includes what is labelled ‘secondary’ EU law, that is EU ‘legislation’, such as Directives, Regulations or Decisions (or other acts of equivalent nature, such as Frameworks Decision under the former EU pillar based governance structure), adopted by the EU legislative institutions, essentially the Council of the EU and the European Parliament, following a legislative procedure,¹⁷² as well as ‘regulatory’ measures, such as ‘delegated’ or ‘implementing’ acts, adopted, usually, by the Commission.¹⁷³ Where relevant, it also refers to non-binding, soft law instruments, such as recommendations or other guidance documents.

1) EU law and the protection of human rights: institutional, procedural and substantive considerations.

It is important to note, already as this stage, that EU law provisions, when they fulfil certain conditions (i.e clarity and precision), are *directly effective*, and *prevail over national law, as a matter of EU law* (and not depending on the status and effect recognised by national constitutional law to international law).¹⁷⁴ Concretely, it means that

¹⁷⁰ The interpretation of EU norms by national courts does not fall within the scope of this particular review, and will be covered in the national reports feeding into the right-specific comparative analyses (D-3.4 to D3.6). National cases may however be mentioned and discussed where they are essential to understand the relevance and development of EU law.

¹⁷¹ Article 6 (1) TEU.

¹⁷² Article 189 TFEU.

¹⁷³ Articles 290-291 TFEU.

¹⁷⁴ Case 6/64 *Flaminio Costa v E.N.E.L* ECLI:EU:C:1964:66 (EU law supremacy); 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). For more on this, see I.A.1.b)(3).

directly effective EU law provisions can be invoked by litigants before national courts, which must set aside or disapply conflicting national rules. Domestic judges are also obliged to interpret national law as far as possible in compatibility with EU law.¹⁷⁵ Finally, individuals can claim compensation when they suffer a damage as a result of violation of EU law by national authorities (including legislator, executive, administration, public bodies, local authorities, etc).¹⁷⁶ These features make EU law more 'effective' than international/regional human rights instruments, since the EU legal order can rely on the vigilance of national actors (in the human rights context, essentially individuals and NGOs) to litigate violation of its norms, and enrol national judges in its day-to-day enforcement. In case national courts are in doubt as to the correct interpretation or application of EU law, or if they lack the confidence to enforce it against reluctant national legislators or governments, or higher courts, they can 'hand over' the matter to the Court of Justice of the European Union (CJEU), through the preliminary reference procedure (the so-called 'Article 267 TFEU procedure'). In addition to this decentralised enforcement through private litigation, the EU compliance system also includes direct monitoring by the European Commission, and control of the respect of EU law by the CJEU under the enforcement procedure, which can even involve financial sanctions for states which do not comply with the rulings (Article 268-2017 TFEU). Moreover, when member states commit serious 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), although the political and substantive thresholds for activating this mechanism undermine its effectiveness. To address this shortcoming, EU institutions are developing alternative means, such as the 'Rule of Law Framework', or 'EU fund conditionality', to put pressure on member states to respect core EU values.¹⁷⁷

It is important to note that *individuals and NGOs do not have a direct access to EU court to challenge violations of EU law by member states*. They can petition the European Parliament and send complaints to the Commission, but they cannot force the Commission to begin infringement proceedings against member state for violation of EU law. Moreover, they cannot bring a case against a member state's breach of EU law directly before the CJEU. *They must always start with litigation before domestic courts*, and then ask them to make a reference

¹⁷⁵ Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* ECLI:EU:C:1990:395.

¹⁷⁶ 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.

¹⁷⁷ European Commission, 'Rule of Law Framework', https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework_en; 'EU Budget for the Future': https://ec.europa.eu/commission/sites/beta-political/files/budget-proposals-financial-management-rule-law-may2018_en.pdf

for a *preliminary ruling* to the CJEU. Lower courts are however not obliged to refer questions to the CJEU, and the national courts of last instance, whilst under a ‘duty’ to refer (Article 267 TFEU), may still consider that the interpretation of EU law is clear enough (*‘acte clair’* doctrine), so that they can do away with a reference to CJEU.¹⁷⁸

Moreover, standing rules for challenging EU acts based on violation of higher ranking EU legal norms under the action for annulment (Article 263 TFEU) are quite *demanding*, in particular where individuals or NGOs want to contest EU legislation. Indeed, they must show individual and direct concern, which are interpreted in a restrictive manner by the CJEU.¹⁷⁹ The Treaty of Lisbon has however relaxed the standing conditions in order to challenge EU regulatory measures (post-Lisbon version of Article 263(4) TFEU)¹⁸⁰

On the substantive issues, that is, voting, housing and education, we should highlight that *the EU does not have general legislative competences on human rights*. The EU Treaties however grant certain rights to individuals (e.g Article 20 TFEU on EU citizenship), and also provides for *special legal bases* to adopt some human rights-related legislation, such as Article 19 TFEU (non-discrimination) or Article 16 TFEU (data protection). In 2009, the Lisbon Treaty granted *legally binding effect to the EU Charter of Fundamental Right*, a comprehensive and modern Bill of Rights for the EU, which offers some protection to all three rights examined in this report (vote, housing, education). It is binding on EU institutions, organs and bodies, and also on *member states*, but – and this is important to realise – *only when they implement EU law* (Article 51(1) CFR). That means that the Charter cannot be invoked in any kind of human rights disputes brought before national courts, but only when the case has a sufficient connection with EU law.¹⁸¹

The legal analysis starts with identifying and analysing relevant EU law instruments pertaining to representation with regard to vote, redistribution in relation to housing, and recognition in the context of education, each with a particular emphasis on selected vulnerable groups.

¹⁷⁸ Case 283/81 *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* ECLI:EU:C:1982:335

¹⁷⁹ Case 25/62 *Plaumann & Co. v Commission of the European Economic Community* ECLI:EU:C:1963:17; C-50/00 P *Unión de Pequeños Agricultores v Council of the European Union* ECLI:EU:C:2002:462

¹⁸⁰ C-583/11 P *Inuit Tapiriit Kanatami and Others v European Parliament and Council of the European Union* ECLI:EU:C:2013:625

¹⁸¹ The case law defining the scope of application of EU law and the Charter is not the most 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

2) The right to vote under EU law – Justice as representation

For long, EU law had little influence on the determination of who can vote in what elections in Europe, and thus on the representative dimension of justice. However, since the introduction of the concept of EU citizenship in the EU treaties (Treaty of Maastricht, 1992), and more recently the coming into force of the EU Charter of Fundamental Rights (2009), *EU law is contributing to redefining the contours of electoral franchise in EU member states*. Notably, it makes provisions for *EU citizens to vote in European Parliament elections*, and more controversially, for *non-national EU citizens to vote in municipal elections* in their country of residence, on the same basis as nationals of that state. In doing so, it challenges the trend which limits the right to vote in national elections to nationals, and creates *pressure to extent the right to vote in local elections to other, non-EU, foreign residents*. Furthermore, it create *legal opportunities for challenging a variety of national electoral disenfranchising rules, such as residence requirements, voting ban for those subject to criminal convictions or restrictions imposed on persons with mental disabilities*. Recently, the CJEU case law recognized an autonomous right to vote in European elections, which can be relied on to challenge domestic disenfranchising rules.

EU law and the right to vote in EP and local elections

EU law does not regulate the right to vote in national general (legislative, presidential) elections, but the EU and its member states are *committed* to the respect of *common values*, which include *human rights* (including the right to vote) and *democracy* (Article 2 TEU). EU treaty law provides, moreover, that *EU citizens have the right to vote in EP elections*, and that they have the *right to vote in local elections* in their member state of residence *under the same conditions as nationals of that state* (Articles 20(2)b and 22 TFEU, and Articles 39 and 40 CFR). In some member states, this introduction of political rights for non-nationals required constitutional amendments.

There is still no uniform procedure for EP elections, despite the existence of an explicit legal basis in the Treaty.¹⁸² That means that currently EU law only sets a few basic rules and principles for EP elections, and leaves the rest to be decided at national level, in line with local rules and traditions. The Treaty notably provides that Members of the European Parliaments (MEPs) should be elected by *direct universal suffrage* and *free and secret ballot* for a term of *5 years* (1976 Act on EP Elections, now consolidated in Article 14 (3) TEU).¹⁸³ Since 2002, EP

¹⁸² Now in Article 223 TFEU.

¹⁸³ The direct universal suffrage requirement was introduced by the 20 September 1976 Act on the Direct Elections to the EP.

elections must be based on *proportional representation* and use either the list system or the single transferable vote system.¹⁸⁴ Further elements, and in particular the franchise rule for EP elections, are determined at national level.

EU law and national electoral franchise rules

National law may limit the exercise of the right to vote by imposing conditions related to nationality, residence, criminal behaviour and mental/legal capacity. These rules usually also apply to EP elections. EU Treaty law does not explicitly guarantee any right to vote for all EU citizens in EP elections. However, in the recent *Delvigne* case, the CJEU recognized *an autonomous right of all EU citizens to vote in EP elections*, which can circumscribe national discretion in setting electoral franchise rules.¹⁸⁵

i) Nationality requirements and EU law

EU law requires that the right to vote in local and EP elections is opened to non-national EU citizens, but does not prevent non EU-citizens from voting in EP elections, where national franchise rules apply and non-nationals are allowed to vote in national elections. EU member states, however, tend to limit participation in national elections to their nationals.¹⁸⁶ All EU member states, but the United Kingdom and Ireland, reserve the right to vote in national general (ie legislative or presidential) elections to their own citizens, whilst some member states allow for the participation of certain categories of foreigners in local/municipal elections.¹⁸⁷ The EU Treaties however *require EU member states to allow non-national EU citizens to vote in EP elections and in local elections in their EU country of residence under the same conditions as nationals* (Articles 20(2) and 22 TFEU). Moreover, the non-discrimination principle, which leads to the application of national franchise rules for EP elections, can result in

¹⁸⁴ Article 1 of Decision 2002/772/EC/Euratom.

¹⁸⁵ C-650/13 *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde* EU:C:2015:648.

¹⁸⁶ The determination of who qualifies as a national citizen is a sovereign matter belonging to national competence. EU law does not define the conditions of access to national citizenship (Article 20(1) TFEU), although a member state decision to withdraw national citizenship from an EU citizen must take into account its implications for the rights attached to EU citizenship (including, one assumes, the right to vote in EP elections) and respect the principle of proportionality (C-135/08 *Janko Rottman v Freistaat Bayern* EU:C:2010:104). A group of UK citizens living in the Netherlands have taken to court the question of interpretation of Article 20 TFEU and notable whether the loss of national citizenship automatically entails loss of EU citizenship. The Amsterdam district court decided to refer the case to the CJEU (Lisa O'Caroll, 'British group wins right to take Brexit case to the European Court', *The Guardian*, <https://www.theguardian.com/politics/2018/feb/07/british-group-wins-right-to-take-brexite-case-to-european-court>).

¹⁸⁷ Kees Groenendijk, 'Local Voting Rights for Non-Nationals in Europe: What We Know and What We Need to Learn' (Washington, DC: Migration Policy Institute, 2008).

<https://www.migrationpolicy.org/sites/default/files/publications/Groenendijk-final%5B1%5D.pdf>.

non-EU citizens having the right to vote in EP elections. For instance, in the mid-2000s, the United Kingdom adopted legislation which enabled (non-EU) Commonwealth citizens resident in Gibraltar to vote in EP elections.¹⁸⁸ Spain objected to their inclusion, arguing that the right to vote in EP elections should be restricted to EU citizens.¹⁸⁹ The CJEU stayed clear of the controversy. It held that EU law did not limit the right to vote in EP elections to EU citizens only, and that it was a matter for national law to determine who is included in the franchise for the EP elections. To give another example, as a result of the application of national franchise rules, an estimate one million non-UK (and for some of them non-EU) citizens could vote in the 2016 Brexit referendum.¹⁹⁰

ii) Residence requirements

Some EU member states apply *residence requirements*, which *exclude expatriate, overseas or diaspora members*, as well as *recently arrived EU citizens, or recently returned nationals*. The compatibility of some of these residence conditions with the EU mobility legal framework is contested.¹⁹¹ In the words of Vivienne Reding, former Vice-President of the European Commission and responsible for justice, fundamental rights and citizenship, ‘the exercise of the freedom of movement should not result in losing an important democratic right’.¹⁹² The Commission therefore issued guidance to the member states, inviting them to:

enable their *nationals who make use of their right to free movement in the EU to retain their right to vote in national elections if they demonstrate a continuing interest in the political life of their country*, including by applying to remain on the electoral roll; when allowing nationals resident in another member state to apply to keep their vote, ensure that they can do so *electronically*; *inform* citizens in a *timely and appropriate way* about the conditions and practical arrangements for retaining their right to vote in national elections.¹⁹³

Unsurprisingly, EU citizenship law has been invoked to *challenge some of the residence requirements*. For example, Dutch citizens residing in the overseas territory of Aruba, referred to EU law to contest the refusal to

¹⁸⁸ It did so to comply with an ECtHR ruling condemning the exclusion of UK citizen residents in Gibraltar from elections in the EP (*Matthews v United Kingdom*, Application 24833/94 (1999) 28 EHRR 361.

¹⁸⁹ C-145/04 *Spain v United Kingdom* EU:C:2006:543.

¹⁹⁰ Owen Bowcott, ‘British emigrants lose supreme court EU referendum vote bid’, *The Guardian*, 24 May 2016, <https://www.theguardian.com/politics/2016/may/24/british-emigrants-harry-shindler-jacquelyn-maclennan-eu-referendum-vote-battle-supreme-court>.

¹⁹¹ See EP, ‘Disenfranchisement of EU Citizens resident abroad’. June 2015, [http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/564379/EPRS_IDA\(2015\)564379_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/IDAN/2015/564379/EPRS_IDA(2015)564379_EN.pdf).

¹⁹² European Commission, Factsheet, ‘Promoting your electoral rights’: https://ec.europa.eu/info/sites/info/files/electoral_rights_en.pdf.

¹⁹³ European Commission, ‘Disenfranchisement: Commission acts to defend voting rights of EU citizens abroad’, Press release, 29 January 2014, http://europa.eu/rapid/press-release_IP-14-77_en.htm (emphasis added).

register them on the Hague election register for the EP elections.¹⁹⁴ The Court held that EU law did not grant an explicit right to vote in EP elections, but that in this case the non-discrimination principle was at stake, since nationals resident in Aruba had been treated differently from other non-residents nationals without objective justification.

EU law was also invoked *to challenge the disenfranchisement of expatriates*, including those who reside in another member state of the EU. The United Kingdom, for instance, prohibits its nationals who have been residing abroad for more than 15 years, from voting in national elections.¹⁹⁵ In 2010, Preston, a UK citizen resident in Spain, challenged the 15-year rule by reference to EU law, but his claim was turned down by the High Court and he was denied leave to appeal.¹⁹⁶ Shindler, a British war veteran living in Italy, also sought to rely on European law to challenge his disenfranchisement. He first turned to the ECtHR to contest his exclusion from national elections arguing incompatibility with the ECHR, but his claim was rejected.¹⁹⁷ More recently, in 2016, together with a Brussels-based female solicitor, Mrs Mc Lennan, he challenged before British courts the application of the UK rule which led to the exclusion of 700 000 Britons living in another EU member state for more than 15 years from voting in the Brexit referendum,¹⁹⁸ invoking in support EU citizenship and free movement law.¹⁹⁹ The Appeal Court rejected his appeal, considering, controversially, that the case did not fall under the scope of application of EU law,²⁰⁰ and that even if it did, the 15-year rule did not interfere with free movement rights. The United Kingdom Supreme Court, whilst expressing sympathy for their plight, nonetheless refused them leave to appeal.²⁰¹

¹⁹⁴ C-300/04 *M. G. Eman and O. B. Sevinger v College van burgemeester en wethouders van Den Haag* EU:C:2006:545.

¹⁹⁵ Section 1(3) and (4) of the Representation of the People Act 1985.

¹⁹⁶ *R (Preston) v Lord President of the Council* [2011] EWHC 3174 (Admin) and [2012] EWCA Civ 1379; [2012] QB 687 [PB/E/16].

¹⁹⁷ *Shindler v. the United Kingdom*, Application 19840/09, 7 May 2013.

¹⁹⁸ Section 2 of the EU Referendum Act 2015. On this, see Owen Bowcott, 'British emigrants lose supreme court EU referendum vote bid', *The Guardian*, 24 May 2016,

<https://www.theguardian.com/politics/2016/may/24/british-emigrants-harry-shindler-jacquelyn-maclennan-eu-referendum-vote-battle-supreme-court>.

¹⁹⁹ *Shindler & anr v Chancellor of the Duchy of Lancaster & anr* [2016] EWCA Civ 469.

²⁰⁰ It considered the electoral rules related to the Brexit referendum as falling under the notion of 'own constitutional requirements' mentioned in Article 50 TEU, and thus outside the scope of EU law.

²⁰¹ *R (on the application of Shindler and another) (Appellants) v Chancellor of the Duchy of Lancaster and another (Respondents)* - UKSC 2016/0105.

iii) Criminal convictions

In some member states, prisoners or those subject to past criminal convictions are barred from voting.²⁰² Individuals have sought, unsuccessfully so far, to rely on EU law to *challenge permanent or temporary ban on voting based on past criminal convictions*. These challenges however contributed to the development of a right to vote in EP elections for EU citizens, which is nonetheless not absolute and can be limited.

In the United Kingdom, prisoners are ineligible to vote.²⁰³ This rule also applies to EP elections.²⁰⁴ Numerous prisoners turned to the ECtHR to challenge the British ban on prisoners' vote in both national and EP elections, for incompatibility with the ECHR, and notably Article 3 of Protocol 1.²⁰⁵ The rulings, which found in favour of the applicant, at least in the case of blanket bans, generated strong resistance from British authorities. Other litigants sought instead to invoke EU citizenship law, in an attempt to have national franchise rules set aside. In the *Chester and McGeod* cases,²⁰⁶ before the UK Supreme Court, British prisoners serving life sentences invoked Articles 20(2) and 22 TFEU and Articles 39, 40 and 52 CFR, interpreted in the light of Article 3 of Protocol 1 ECHR. They argued that those provisions of EU law conferred a directly effective right to vote in EP and municipal elections and thus called for the non-application of the disenfranchising national legislation. The Supreme Court rejected their argument, claiming that the CJEU case law reflected a right of EU citizens to be treated equally under national electoral legislation, and not a self-standing right to vote under EU law.

In the recent *Delvigne* case, however, the CJEU appears to take a different position in a case involving a similar issue.²⁰⁷ This decision therefore casts serious doubt as to the compatibility of the United Kingdom's approach with EU law. The case involved a French national living in France who had been permanently deprived of his civic and political rights, including the right to vote, as part of a sentence for a serious crime, by virtue of French criminal law provisions applicable at the time. This prevented him to vote in all elections, including EP elections, and he sought to rely on EU law to challenge the ban. He argued, in particular, that the measure was

²⁰² For a recent comparative overview, see Shai Dothan, 'Comparative Views on the Right to Vote in International Law: The Case of Prisoners' Disenfranchisement', in Anthea Roberts, Paul B Stephan, Pierre-Hugues Verdier, and Mila Versteeg (eds) *Comparative International Law* (Oxford University Press, 2018).

²⁰³ Section 3(1) of the Representation of the People Act 1983.

²⁰⁴ Section 8(2) of the European Parliamentary Elections Act 2002.

²⁰⁵ See *Hirst (n° 2) v. the United Kingdom*, Application [74025/01](#), Grand Chamber, 6 October 2005, *Greens and M.T. v. the United Kingdom*, Application 60041/08 & 60054/08.

²⁰⁶ *R (Chester) v Secretary of State for Justice; R (McGeogh) v The Lord President of the Council and Another (Scotland)* [2013] UKSC 63.

²⁰⁷ C-650/13 *Thierry Delvigne v Commune de Lesparre Médoc and Préfet de la Gironde* EU:C:2015:648.

incompatible with Article 39 CFR. The reasoning and conclusions of the case are worth detailing here. First of all, the Court found that the case fell under the scope of application of EU law and thus that of the Charter by virtue of Article 14(3) TFEU, which provides for the elections of the EP by direct universal suffrage. It then found Article 39(1) CFR inapplicable, given that the case concerned a national challenging the franchise rules of its own member state, but went on to rule that *Article 39(2)* of the Charter constitutes ‘the expression in the Charter of *the right of Union citizens to vote in elections to the European Parliament* in accordance with Article 14(3) TEU and Article 1(3) of the 1976 Act’.²⁰⁸ It considered that the deprivation of the right to vote ‘represent[ed] a *limitation of the exercise of the right* guaranteed in Article 39(2) of the Charter’.²⁰⁹ However, in a classic rights-reasoning approach, it added that ‘*limitations may be imposed on the exercise of rights* such as those set forth in Article 39(2) of the Charter, as long as the limitations are *provided for by law, respect the essence of those rights and freedoms and, subject to the principle of proportionality, are necessary and genuinely meet objectives of general interest recognized by the European Union or the need to protect the rights and freedoms of others*’.²¹⁰ The CJEU, having reviewed the French measure, found it consistent with those requirements. It noted, in particular, that the deprivation resulted from a serious crime conviction and that the applicant had the possibility to apply and obtain the lifting of the additional penalty of loss of civic and political rights leading to the deprivation of his right to vote. It thus ruled that *EU law did not ‘preclude[e] legislation of a Member State...which excludes, by operation of law, from those entitled to vote in elections to the European Parliament persons who... were convicted of a serious crime’*,²¹¹ thus showing a certain deference to national regimes of franchise restrictions based on criminal convictions. Most likely, the Court, when it ruled on the case, was mindful of the reaction provoked in some European quarters, and notably in Britain, of the ECtHR rulings on prisoners’ voting ban.

iv) Mental capacity

A majority of member states (21 out of 28) impose certain restrictions on the right to vote for persons living with (mental) disabilities, notably those who do not have legal capacity.²¹² However, in the light of the *Delvigne* case,

²⁰⁸ Para 44, emphasis added.

²⁰⁹ Para 45.

²¹⁰ Para 46.

²¹¹ Para 58.

²¹² EU Fundamental Rights Agency, ‘The right to political participation for persons with disabilities: human rights indicator’ (2014), <http://fra.europa.eu/en/publication/2014/right-political-participation-persons-disabilities-human-rights-indicators>; FRA, ‘The right to political participation of persons with mental health problems and persons with intellectual disabilities’ (2010): <http://fra.europa.eu/en/publication/2010/right-political-participation-persons-mental-health-problems-and-persons>.

restrictions based on mental capacities which are applicable to EP elections could be *reviewed against the Charter*, notably Article 39 (2) CFR, but also Article 21 CFR which prohibits discrimination based on disability within the scope of application of EU law, and Article 26 CFR which provides for the integration of persons living with disabilities. Moreover, the EU, like its member states, is a party to the UN Convention on the rights of persons with disabilities (CRPD). It must thus ensure respect for its provisions, including its Article 29 which provides that ‘parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others.’

Although not directly regulating the right to vote, EU law, and in particular *the combined reading of the EU treaties citizenship provisions and the EU Charter of Fundamental Rights*, are affecting the rules determining *eligibility to vote*. EU citizenship provisions, by extending the right to vote to foreign nationals who are EU citizens in municipal elections, exerts *pressure on member state to enfranchise, at least for certain elections* (such as local ones) other, non-EU, foreign citizens (eg long term foreign residents). Furthermore, the EP elections context brings within the scope of EU law *restrictive national electoral franchise rules*, such as those which restrict the exercise of the right to vote based on residence, criminal convictions or mental disabilities, and thus offer occasions to *challenge* them based on EU legal instruments. EU law therefore contributes to redefining who should be represented in the political process in Europe, towards a more inclusive approach.

3) Right to housing in EU law - Justice as redistribution

Housing, as an element of redistributive social policies, remains largely determined and regulated at national and even local level, since most aspects of social policy are still within national competences. The EU is largely confined to a coordinating role (Article 5 TFEU), and has limited powers to adopt social legislation, except in designated fields, such as, for example, non-discrimination (Articles 4 TFEU).

Still, despite the absence of dedicated policy competence, various aspects of EU law and substantive policy areas, which pursue distinct objectives, affect the right to housing, creating a composite and, at times, incoherent and inconsistent framework, which can pull in opposite directions. To start with, the EU Charter of Fundamental Rights refers to a (weak) *right to housing assistance*, whilst other Charter rights can serve, but also undermine, the right to housing. Moreover, EU social law and policy, and in particular EU non-discrimination law,

and the recently adopted European Pillar of Social Rights, EU citizenship 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 all affect availability and access to social housing and other housing benefits, and the conditions of eviction, and at times provide for special rules for vulnerable persons (e.g asylum seekers). Their relevance, and potential tensions and conflicts between them, in terms of their contribution to redistributive justice, are highlighted in the analysis that follows.

The EU Charter of Fundamental Rights: a new ‘right to housing assistance’, the derived right to accommodation and other supporting rights

The EU Charter of Fundamental Rights contains a number of provisions which bear relevance for the right to housing, including in its redistributive dimension. It provides explicitly for a right to social housing assistance and can be read to also include a right to accommodation.

The Charter provides that *everyone* in the EU 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). Further, it stipulates 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).²¹³ It is important to note that *the right to housing assistance* is considered a ‘*principle*’, which should guide legislative and policy action, and judicial interpretation. However, *it cannot be enforced in court* (Article 52(5) CFR). The text moreover suggests that entitlements to housing assistance are subordinated to existing EU and national schemes, and must respect the allocation of competences between them. It also signals that this ‘right’ to housing assistance is limited to those who lack ‘sufficient’ resources. However, the official explanations,²¹⁴ which must be relied on when interpreting and applying the Charter (Article 52(7) CFR), seem to point to a broader scope. Indeed, they refer to Article 13 of the European Social Charter and Articles 30 and 31 of the Revised European Social Charter (RESC), and point 10 of the Community Charter of Fundamental Social Rights

²¹³ These 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.

²¹⁴ OJ [2007] C 303/17.

(an instrument adopted by EU member states in 1989 with a declaratory status).²¹⁵ Article 31 RESC, notably, requires from state parties that they ‘promote access to housing of an *adequate standard*’, ‘*prevent and reduce homelessness* with a view to its gradual elimination’ and ‘make the *price of housing accessible to those without adequate resources*.’ They go beyond a right to housing assistance for those without sufficient resources to include a right to decent and affordable housing.

Article 7 CFR (right to private and family life) was, further, interpreted to include a right to accommodation. In a case concerning consumer protection and property foreclosure, the CJEU followed the ECtHR case law, and ruled that a *right to accommodation* can be derived from Article 7 CFR, which must be taken into account when applying EU consumer protection law.²¹⁶

Other provisions of the EU Charter can further support the exercise of the right to housing, such as Article 47 on the right to a fair trial and effective remedies, 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, may set limits to protection against homelessness resulting from eviction. It provides that:

...everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss.

However, ‘the use of property may be regulated by law in so far as is necessary for the general interest’. The meaning and scope of rights which, like the right to property, correspond to a right guaranteed by the ECHR, should be interpreted and applied in the same way (Article 52(3) CFR). According to the ECHR, as interpreted by the ECtHR, reasonable housing policies and the need to protect the home may constitute such general interest.²¹⁷ Similarly to the right to property, the right to conduct a business (Article 16 CFR) could also be invoked against social housing policies or the protection from eviction.

²¹⁵Explanations relating to the Charter of Fundamental Rights, [2007] OJ C303/02): <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2007:303:0017:0035:en:PDF>

²¹⁶ Case C-34/13 *Monika Kušionová v SMART Capital, a.s.* EU:C:2014:2189

²¹⁷ See right to housing in COE instruments at 2)

EU primary law, as it stands, only admits a *principle of housing assistance for those who lack resources*, and not recognise *an enforceable right to housing*, or even housing assistance, and *the scope of the derived right to accommodation remains to be clarified*, and the effect of potentially *supporting or conflicting rights* tested in housing-related cases.

Free movement of EU citizens, and equal treatment in access to housing and housing benefits

The law of EU citizenship, and the free movement of persons in particular, contribute to *redefining who is eligible for social housing and housing benefits* in the EU. They favour *deserving economic EU migrants*, potentially to the detriment of local communities.

Since the 1960s, EU legislation guarantees that *EU migrant workers*, and those who have '*retained workers' status*, as well as *their families*, have access to social benefits, including *housing benefits* (in cash or in kind), on the same basis as nationals of their host member state (non-discrimination).²¹⁸ In contrast, *mobile EU citizens who are not economically active*, such as retirees, students, job seekers or unemployed are *not entitled to equal treatment with regard to social assistance and benefits*.²¹⁹ They can be denied access to shelter and social or subsidized housing, as well as housing benefits in the first three months of their stay, and are unlikely to be eligible past the first three months, since member states can condition the granting of social benefits to a '*right to reside*' (i.e. fulfilling the conditions for lawful residence under EU law, and notably the requirement of having sufficient resources).²²⁰ An application for social housing or housing benefits immediately raises a suspicion that the EU citizen does not have sufficient resources, and thus does not have right to reside under EU law, which can disqualify her from being eligible for social assistance and benefits on an equal footing with nationals.²²¹ Here the right to housing assistance (Article 34 CFR) or the prohibition of discrimination based on nationality (Article 18(1)

²¹⁸ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Social Security Coordination Regulation) [1971] OJ L 149/2; Regulation (EU) No 492/2011 on freedom of movement for workers within the Union of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (Workers Regulation) [2011] OJ L 141/1.

²¹⁹ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (EU Citizens Directive) [2004] OJ L 158/77.

²²⁰ For an application by the UK Supreme Court, see *Mirga and Samin v Secretary of State for Work and Pensions & Anor* [2016] UKSC 1.

²²¹ See Cases C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358, C-67/14 *Jobcenter Berlin Neukölln v Nazifa Alimanovic and Others* EU:C:2015:597; C-308/14 *Commission v United Kingdom* EU:C:2016:436.

TFEU and Article 21(2) CFR) cannot be called to the rescue, as the conditions of access to housing benefits do not fall under the scope of EU law. However, older case law suggest that non-economically active citizens *who are sufficiently integrated* in the host society ('real link'), taking into account a range of factors (motivations, family situation, duration of stay, etc.) should be entitled to housing assistance on a non-discriminatory basis,²²² like EU citizens who have acquired *permanent resident* status (after 5 years of lawful residence).

EU free movement rules have come into conflict with *local residence requirements*, or other '*local connection*' conditions, which determine eligibility to rent accommodation or buy property in certain neighbourhoods. These had, apparently, been introduced in some countries or regions to prevent '*gentrification*' processes and community displacement, responding to the phenomena whereby more affluent households move into previously deprived neighbourhoods, and push lower-income families out of these areas, potentially destroying the social fabric of local communities. In the *Libert* case, which concerned measures aiming at preserving the Flemish working-class ring around Brussels from upper-middle class Francophone gentrification, the CJEU ruled that the 'sufficient connection requirement' was a limitation on the exercise by EU citizens of their right to free movement, since it could deter EU citizens from exercising this right if they feared they would, upon return, not be able to buy or rent in their former neighbourhood. The requirement could not, in its view, be justified based on the *otherwise legitimate objective* of '*guaranteeing sufficient housing for low-income or otherwise disadvantaged sections of the local population*', since it did not relate to the socio-economic situation of households and could equally be met by higher income earners.²²³ The case law suggests that *policies aimed at 'preserv[ing] the culture of certain communities [such as linguistic communities]... by preventing gentrification' are not compatible with EU free movement rules, unless they clearly target low-income earners.*²²⁴ This reading seems to endorse a narrow, economically driven, redistributive notion of justice, as well as engages the recognition aspects of justice.

EU legislation and case law affect the scope of redistributive policies across the member states of the EU. EU free movement law limits the room of manoeuvre of public authorities seeking to protect local communities and prevent gentrification, unless these are clearly *targeted to helping low-income earners*, irrespective of their

²²² See cases C- 90/97 *Robin Swaddling v Adjudication Officer* EU:C:1999:96; C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* EU:C:2008:630.

²²³ C-197/11 *Eric Libert and Others v Gouvernement flamand (C-197/11)* and *All Projects & Developments NV and Others v Vlaamse Regering* EU:C:2013:288.

²²⁴ W K Kothals Altes, 'The Single European Market and the demise of Flemish Housing Policy' (2015), 18:2 *International Journal of Housing Policy* 209-222, 213.

nationality or cultural, ethnic or religious identify. Moreover, *mobile EU citizens who contribute to the host member states' economies through income generation can benefit from redistributive policies* (where they exist), but those who do not can be largely excluded from the scope of national solidarity, unless they are sufficiently integrated.

EU immigration and refugee law and access to housing benefits

EU immigration legislation provides for *equal treatment* rules between *certain categories of non-EU citizens and nationals* in *access to housing and housing benefits*. They entitle the so-called *Long Term Resident Third Country Nationals*, as well as *refugees and beneficiaries of subsidiary protection*, to the same housing benefits as nationals (where these exists under national social policy schemes). EU legislation also imposes an obligation on member states to provide *housing assistance to asylum-seekers*.

The Long Term Resident (LTR) Directive entitles *Third Country Nationals*, who are *long term residents* (over five year) of an EU Member State to *equal treatment with nationals in terms of access to a range of benefits*, subject to certain derogations.²²⁵ In *Kamberaj*, the CJEU clarified its scope, with specific regard to housing benefits. Referring to Article 34 CFR, it held that *housing benefits, to the extent that they enable individuals to meet their basic needs and to combat social exclusion and poverty, constitute 'core benefits' which member states must grant to Long Term Resident Third Country Nationals on the same basis as nationals.'*²²⁶

Other aspects of EU immigration law are less generous though. The EU Family Reunification Directive requires that for an application for family reunification, the sponsor, in addition to resources and health insurance, should have also 'accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned' with a view to prevent additional immigration placing an undue burden on member states' assistance systems (Article 7(1)a).²²⁷

Concerning recognized refugees, the recast Qualification Directive provides that they have *access to housing and housing benefits on the same basis as legally resident third country nationals* but that member states

²²⁵ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (Long Term Resident Directive) [2004] OJ L 1/44.

²²⁶ C-571/10 *Servet Kamberaj v Istituto per l'Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others* EU:C:2012:233, para 90-92.

²²⁷ Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12.

can, under certain conditions, limit the social assistance provided to them to ‘core benefits’.²²⁸ However, the *Kamberaj* ruling suggests, by analogy, that member states cannot exclude housing assistance from the ‘core benefits’, and must therefore grant to recognized refugees *the same housing benefits* which they grant to *their own nationals*, where these benefits aim to combat social exclusion and poverty.²²⁹ Moreover, the recast Qualification Directive requires member states to ensure that *refugees are not discriminated against in access to housing*, although it does allow them to adopt *dispersal policies*, with the view to *facilitate refugee integration*. Called to assess *residential conditions* imposed on beneficiaries of subsidiary protection (but not on other TCNs), which required them to live in certain areas in order to receive housing benefits, the CJEU ruled that these were compatible with the Directive, and were not an unjustified interference with the right to free movement, if there were indications that refugees had greater difficulty integrating than other TCNs.²³⁰

Regarding asylum-seekers, the Reception Directive stipulates that member states must ensure that registered *asylum-seekers* who have *filed an application* are *provided with ‘material reception conditions’*, which ensure an *‘adequate standard of living’* and *‘guarantees their subsistence and protects their physical and mental health’*.²³¹ These include housing. The Directive requires that when accommodation is provided in kind, it must consist in either *specific premises* hosting applicants for asylum at the border or in transit zones, and/or *special accommodation centres* guaranteeing an adequate standard of living, or *adapted private houses, flats, hotels or other premises*. When member states do not, or cannot, directly provide accommodation (in kind), they must grant *suitable financial assistance* which enables asylum-seekers to secure accommodation, which *ensures an ‘adequate standard of living’ on the private market*.²³² Moreover, member states, when providing for accommodation, must take into account those with *special needs* (eg persons with disabilities, and minors). They must also preserve family unity and take into account the *best interests of the child*. The Court interpreted these

²²⁸ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (2011] OJ L337/9, in particular Articles 32 and 29.

²²⁹ C-571/10 *Servet Kamberaj v Istituto per l’Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others* EU:C:2012:233.

²³⁰ Joined cases C-443/14 and C-444/14 *Kreis Warendorf v Ibrahim Alo and Amira Osso v and Region Hannover* EU:C:2016:127.

²³¹ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Reception Directive) [2013] OJ L 180/96. Material reception conditions should be provided from the time of filing the application (C-179/11 *Cimade and Groupe d’information et de soutien des immigrés (GISTI) v Ministre de l’Intérieur, de l’Outre-mer, des Collectivités territoriales et de l’Immigration* EU:C:2012:594).

²³² See C-79/13 *Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others* EU:C:2014:103.

requirements as imposing on member states an *obligation to provide for housing in which families of asylum-seekers can live together*, ‘if necessary in private accommodation, even if this means some additional cost or administrative inconvenience for Member States’.²³³

The latest (and currently in force) version of the Dublin Regulation (‘Dublin III’), which is the European mechanism allocating responsibilities between member state for processing asylum applications in the EU (usually the competent country is the one in which the asylum-seeker entered the EU), provides that *member states must refrain from transferring an asylum-seeker* to an otherwise competent member state where ‘there are *substantial grounds for believing that there are systemic flaws ... in the reception conditions* for applicants in that Member State, resulting in a risk of *inhuman or degrading treatment* within the meaning of Article 4 [CFR]’. Therefore, member states must make use of the discretionary clause of the Regulation (Article 17(1)) to refuse the transfer of an asylum-seekers to a member state where she or he would run a *strong risk of becoming homeless or destitute* if returned.²³⁴

To sum up, EU law stretches the limits of national solidarity, *by including within the realm of redistributive policies on housing certain ‘deserving’ foreigners*, who are legally resident in the national territory. In addition to EU migrant workers, non-EU economically active Third Country Nationals who are have settled for some time in EU member states, as well as recognized refugees, have access to core housing benefits on the same basis as nationals. Moreover, EU law imposes on member states *a duty to offer appropriate housing to asylum-seekers*, irrespective of economic circumstances.²³⁵

EU non-discrimination law and access to, maintenance and retention of one’s home

*EU non-discrimination Directives directly prohibit direct and indirect discrimination in access to goods and services, including housing, based on race and sex,*²³⁶ but not on other grounds. However, where particular housing

²³³ Steve Peers, ‘The CJEU secures asylum seekers’ right to family housing’ *EU Law Analysis blog*, (Feb 2014) <http://eulawanalysis.blogspot.hu/2014/02/what-obligations-do-member-states-have.html>.

²³⁴ See *MSS v Belgium and Greece* (Application no. 30696/09); *C-411/10 N. S. v Secretary of State for the Home Department and M. E. and Others* (C-493/10) *v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform* EU:C:2011:865.

²³⁵ *C-79/13 Federaal agentschap voor de opvang van asielzoekers v Selver Saciri and Others* EU:C:2014:103.

²³⁶ 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.

situations are brought within the scope of application of EU law, the Treaty and Charter's protection from discrimination based on a broad range of grounds can be invoked (Article 51(1) CFR).

The relevant EU Directives do not define housing, but for that purpose reference can be made to international and European human rights law,²³⁷ as well as the European Pillar of Social Rights (Principle 19). Moreover, according to the EU Fundamental Rights Agency:

...access to housing would include not just ensuring that there is *equality of treatment* on the part of *public or private landlords and estate agents* in deciding whether to *let or sell properties* to particular individuals. It would also include the right to equal treatment in *the way that housing is allocated* (such as allocation of low-quality or remote housing to particular ethnic groups), *maintained* (such as failing to upkeep properties inhabited by particular groups) and *rented* (such as a lack of security of tenure, or higher rental prices or deposits for those belonging to particular groups).²³⁸

It would also, most likely, include access to financing services for housing purposes, such as mortgage loans, or other public or private financial support instruments (e.g. preferential loans, saving plans, etc).

Whilst non-discrimination rules generally appear to engage more the recognitive dimension of justice, they also partake in its distributive aspect. Indeed, EU non-discrimination legislation can be relied on to *secure equal access to the redistributive policies in the form of social housing and housing benefits for those who actually need it, irrespective of their gender, race or ethnicity*. It also guarantees them access to housing resources available on the free market under *fair conditions*, and protects them against exploitative attempts. More generally, EU non-discrimination legislation can serve to *counter the segregation* of immigrants, ethnic or religious minorities in low(er) quality accommodation, remote from necessary facilities and employment opportunities, notably by requiring more transparent and objective allocation criteria for social housing.

EU non-discrimination provisions can also be invoked against policies and practices which *deprive certain vulnerable groups* from a home. Indeed, they can be activated against camp evacuations, which target particular ethnic or minority groups, such as refugees or Roma, or the systematic termination of rental agreements in areas in which a high concentration of a particular ethnic minority reside, or the absence or shortage of designated mobile-home sites for travellers and Roma. One could also envisage relying on EU non-discrimination legislation

²³⁷ EU Fundamental Rights Agency, *Handbook on European non-discrimination law* (2018 edition), <http://fra.europa.eu/en/publication/2018/handbook-european-law-non-discrimination>, 134.

²³⁸ FRA, *Handbook on European non-discrimination law*, <http://fra.europa.eu/en/publication/2011/handbook-european-non-discrimination-law-2011-edition> (2011 edition) p. 75.

to challenge development projects (ie gentrification plans, and slum clearance) which would deprive particular ethnic or racial minorities from their homes, and destroy their communities. The specific targeting of Roma neighbourhood in matters of utility supplies, which could result in higher utilities costs for Roma people as a result of their inability to check consumption on reachable meters, was found to be discriminatory by the CJEU.²³⁹

The principle of non-discrimination based on nationality (Article 18 TFEU) and Article 21 CFR, which also 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, could also be relied on with regard to access to housing assistance or eviction, but only where the situation is otherwise sufficiently connected to EU.²⁴⁰

EU consumer law and protection against eviction in mortgage enforcement proceedings

The recent financial crisis, which arose partly as a consequence of risky mortgage lending practices, and led to a rise in unemployment and poverty, resulted in a large number of persons being placed in a situation of financial hardship and mortgage owners at risk of losing their home. The number of evictions and foreclosures grew dramatically in a number of member states.²⁴¹ EU consumer law, interpreted in the light of the EU Charter, can help *prevent evictions* in the context of mortgage enforcement proceedings. Its impact on distributive justice resides in its contribution to *re-equilibrating the burden of the crisis between creditors and debtors*.

To start with, various EU instruments seek to avoid the situation where mortgage borrowers agree to contractual terms which place them at a high risk of losing their homes in the first place. The EU Directive on Unfair Commercial Practice (UCP) requires that traders do not mislead consumers. They must operate with professional diligence and offer, in a clear, intelligible and timely manner, information needed for consumers to make an informed decision.²⁴² Moreover, the EU Directive on Unfair Terms in Consumer Contracts (UTC), specifies

²³⁹ Case C-83/14, 'CHEZ Razpredelenie Bulgaria' AD v. Komisija za zashtita ot diskriminatsia EU:C:2015:480.

²⁴⁰ For a failed attempts, see C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* EU:C:2014:2358

²⁴¹ Aleksandra Ivanković Tamamović, *The impact of the crisis on fundamental rights across EU member states* (2015), Study for the LIBE Committee, PE 510/021

[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU\(2015\)510021_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU(2015)510021_EN.pdf), 123-124.

²⁴² Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive') [2005] OJ L 149/22.

that *unfair terms are not binding* on consumers.²⁴³ This legal framework has been recently supplemented by the specifically designed Directive on credit agreements for consumers relating to residential immovable property,²⁴⁴ which should improve responsible mortgage lending and consumer information in the pre-contractual stage and contribute to protecting homebuyers from engaging in risky borrowing operations, thereby preventing default-related evictions in the future.

The UTC Directive can be – and has been – invoked to challenge or stay mortgage enforcement proceedings, including eviction, which are the consequence of unfair terms.²⁴⁵ The CJEU developed substantive criteria to determine the fairness of contractual terms,²⁴⁶ which take into account the weakness of consumers (mortgage borrowers) in relation to the services providers (bank and credit institutions),²⁴⁷ as well as clarified the scope of judicial duties and powers when dealing with unfair terms.²⁴⁸ It notably requires that *judges examine of their own motion the fairness of contractual terms*, even if this matter has not been raised by the parties.²⁴⁹ Moreover, considering that posterior financial compensation was not sufficient to ensure the effectiveness of the protection granted by the Directive against unfair terms, the CJEU ruled that EU law guaranteed to mortgage owners the possibility to engage *judicial procedures to stay mortgage enforcement proceedings, including eviction procedures*, pending an assessment of the fairness of contractual terms.²⁵⁰ In those rulings, the Court was particularly sensitive to the fact that mortgage enforcement proceedings involved the *loss of the family home*.

²⁴³ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29. In an attempt to dissuade providers from including unfair terms in standard contractual clauses, it allows organizations, such as consumer organizations or NGOs, to challenge them.

²⁴⁴ Directive 2014/17/EU of the European Parliament and of the Council of 4 February 2014 on credit agreements for consumers relating to residential immovable property and amending Directives 2008/48/EC and 2013/36/EU and Regulation (EU) No 1093/2010 Text with EEA relevance [2014] OJ L 60/34.

²⁴⁵ This Directive is a minimum harmonization measure, which allows member states to afford greater protection to consumers.

²⁴⁶ C-226/12 *Constructora Principado SA v José Ignacio Menéndez Álvarez* EU:C:2014:10.

²⁴⁷ C-280/13 *Barclays Bank SA v Sara Sánchez García and Alejandro Chacón Barrera* EU:C:2014:279; C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* EU:C:2013:164.

²⁴⁸ C-482/13, C-484/13, C-485/13 & C-487/13 *Unicaja Banco, SA v José Hidalgo Rueda and Others and Caixabank SA v Manuel María Rueda Ledesma and Others* EU:C:2015:21 *Francisco Gutiérrez Naranjo v Cajasur Banco SAU, Ana María Palacios Martínez v Banco Bilbao Vizcaya Argentaria SA (BBVA), Banco Popular Español SA v Emilio Irlés López and Teresa Torres Andreu* EU:C:2016:980, C-26/13 *Árpád Kásler and Hajnalka Káslerné Rábai v OTP Jelzálogbank Zrt* EU:C:2014:282.

²⁴⁹ C-280/13 *Barclays Bank SA v Sara Sánchez García and Alejandro Chacón Barrera* EU:C:2014:279; C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* EU:C:2013:164. *Banco Español de Crédito*, C-618/10, EU:C:2012:349.

²⁵⁰ C-415/11 *Mohamed Aziz v Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa)* EU:C:2013:164, para 64. See also C-537/12 and C-116/13 *Banco Popular Español SA v María Teodolinda Rivas Quichimbo and Wilmar Edgar Cun Pérez and Banco de Valencia SA v Joaquín Valldeperas Tortosa and María Ángeles Miret Jaume* EU:C:2013:759.

Referring to Article 47 CFR (the right to effective remedies), the Court interpreted the Directive as conferring on *mortgage borrowers a right to appeal a judicial decision rejecting an objection to enforcement proceedings on unfair grounds* (where the debtor had such a right to appeal objections to mortgage enforcement).²⁵¹ The Court, in this case, nonetheless dismissed the reference to Article 34(3) CFR, made by the national court, stating that it ‘d[id] not guarantee the right to housing, but rather ‘the right to social and housing assistance’, and was thus not relevant to the case.²⁵² In another case also involving the possibility of the loss of the family home in the context of foreclosure proceedings, the Court recognised ‘*the right to accommodation*’ as ‘*a fundamental right guaranteed under Article 7 CFR*’, which national courts must take into consideration when implementing Directive 93/13.²⁵³

The European Commission, furthermore, released a working paper (‘soft law’) aimed at guiding national authorities and creditors in the context of foreclosure proceedings, in which individuals are at risk of losing their home.²⁵⁴ It brought the attention of creditors to reconciliation and mediation procedures, and the possibility of modification of contractual terms, and minimum delays prior to starting foreclosure procedures, and that of public authorities to rescue schemes, such as public loan guarantees, financial relief for unemployed, temporary tax relief, and the provision of legal advice.

EU consumer law instruments therefore contribute to *redistributive justice*, by *shifting some of the costs of irresponsible lending and borrowing, and the financial consequences of the crisis, away from individual households, and towards the state or lending institutions*. They can *help prevent eviction* as a consequence of payment default, placing certain responsibilities and burdens on financial institutions, and protecting vulnerable borrowers/owners, although only where the threat on the personal home can be reasonably attributed to *irresponsible and abusive commercial practices*.

²⁵¹ C-169/14, *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA* EU:C:2014:2099.

²⁵² Order C-539/14 *Juan Carlos Sánchez Morcillo and María del Carmen Abril García v Banco Bilbao Vizcaya Argentaria SA* EU:C:2015:508.

²⁵³ CJEU, C-34/13.

²⁵⁴ Commission, ‘Staff Working Paper on national measures and practices to avoid foreclosure procedures for residential mortgage loans’ (SEC(2011)357), http://ec.europa.eu/internal_market/finservices-retail/docs/credit/mortgage/sec_2011_357_en.pdf.

EU market regulation and housing: the impact of the EU internal market, competition, state aid and public procurement law

For long the core and main objective of EU economic integration, *market and trade liberalization and competition* comes into *tension with national social housing policies*. In particular, EU law *prohibits measures which restrict access to the national market to foreign service providers and establishments* (unless they can be justified), as well as *state aid that distorts competition*. In domestic contexts, *social housing* may be provided directly by *public authorities* (usually local authorities), or, as more often the case, by *private actors* (for, or not-for profit) or *public-private partnership* schemes. They do so under *special conditions and regulations*, which may *clash with internal market rules on free movement* (Article 26 TFEU, Articles 56-59 TFEU, Articles 49-55 TFEU). Moreover, as social housing is usually provided under schemes which are, at least partly, *subsidized*, in one form or another (eg direct subsidies, tax relief, the sale of land below market price, etc.) by national or local authorities, they may constitute *illegal state aid* (Article 107-109 TFEU).²⁵⁵ *Private property owners, flat sharing-platform, developers and investors* have sought to invoke EU market and state aid rules to *challenge the 'privileged' position of social housing providers*. The Treaty, however, explicitly excludes certain services from the scope of EU market or competition/state aid rules, or provides for special accommodation. A key question was whether, and to what extent, social housing provisions should comply with EU market, competition and state aid rules. The Commission, and the Court, were called to examine a number of social housing schemes in the light of EU market /competition/state aid rules, which led to certain adjustments at the national levels.²⁵⁶ However, problems persist in the *balancing between social objectives and market liberalization*.

As a preliminary remark, it is worth noting that Article 345 TFEU prevents the application of EU law to rules governing the system of property ownership. It means that it neither prescribes, nor prohibits, the nationalisation of undertakings²⁵⁷ or their privatisation.²⁵⁸ In the context of housing, EU law has, on the face of it, no direct incidence on social housing being provided by either public or private entities. However, it does not mean that rules governing the system of property ownership are exempt from EU internal market and

²⁵⁵ Claude Taffin, 'Social housing facing EU law, *Housing Finance International* (December 2008); Vincent Gruys and Marja Elsinga, 'Tensions between social housing and EU Market regulations' (2014) *European State Aid law Quarterly* 463.

²⁵⁶ Vincent Gruis and Marja Elsinga, 'Tensions between social housing and EU Market regulations' (2014) *European State Aid law Quarterly* 463.

²⁵⁷ Case 6/64 *Costa v ENEL* EU:C:1964:66. [1964] ECR 585, at 598.

²⁵⁸ Case C-244/11 *Commission v Greece* EU:C:2012:694, para. 17.

competition/state aid rules.²⁵⁹

*Services of general interests (SGI), which are not economic and not provided for remuneration, fall outside the scope of application of EU market rules. However, social housing, normally provided against remuneration, does not benefit from this exemption. EU law (Article 14 and 106 TFEU, Protocol No 26 and Article 36 CFR) nonetheless allows for a partial exemption for Services of General Economic Interest (SGEI). SGEI are subject to EU rules, and notably non-discrimination and competition/state aid rules, only 'in so far as the application of those rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them' (Article 106(2) TFEU). It is for national authorities to determine what constitute SGEI, taking into account their social needs and traditions.*²⁶⁰ However, in a 2011 communication, the Commission clarified that '*SGEIs are economic activities which deliver outcomes in the overall public good that would not be supplied (or would be supplied under different conditions in terms of quality, safety, affordability, equal treatment or universal access) by the market without public intervention. The Public Service Obligation (PSO) is imposed on the provider by way of an entrustment and based on a general interest criterion, which ensures that the service is provided under conditions allowing it to fulfil its mission.*'²⁶¹ In a 2012 communication, the Commission specified that the service must be '*addressed to citizens or be in the interests of society as a whole*'.²⁶²

EU free movement of capital rules enable EU citizens and EU-based investors to buy properties in other member states (Article 63 to 66 TFEU). It covers '*buy to let*' activities, or *second home acquisitions*, which can contribute to *increased property and rent prices*, and *gentrification* processes, which makes it more difficult for lower income residents to secure affordable housing in proximity of employment sites or basic services (shops, schools, hospitals, etc.). Moreover, sharing platforms such as Airbnb, are invoking the E-commerce Directive and Services Directives against cities' affordable housing policies. Indeed, these introduced measures attempted to regulate and control Airbnb activities, to prevent the expulsion of local, and poorer, residents for lucrative rental purposes and the unsustainable rise in housing costs in touristic cities caused by 'buy-to let' and speculation.²⁶³

²⁵⁹ For an analysis, see Bram Akkermans and Eveline Ramaekers, 'Article 345 TFEU (ex Article 295 EC), Its Meanings and Interpretations' (2010) 16:3 *European Law Journal* 293-314.

²⁶⁰ Leigh Hancher and Woft Sauter, 'Public services and EU law; in Barnard and Peers (eds) *European Union Law* (Oxford University Press, 2014), 539.

²⁶¹ Commission, 'A quality framework for Services of General Economic interests' COM/2011/0900 final.

²⁶² Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] C-8/4, para 50.

²⁶³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') [2001] OJ

These Directives allow platforms to pick the most favourable regulatory regime and operate from there, countering attempts to regulate them through authorization, licensing, or other requirements. The platform successfully lobbied the Commission in support of their cause and threatened to take legal action based on EU law against local authorities' measures.²⁶⁴ As such developments contribute to the unsustainable rise in the costs of living in cities popular with tourists, detached from the financial means of locals, they are likely to result in increased expulsion of poorer residents who cannot afford to pay higher rents on the private market. Consequently, this will place an increased pressure on the social housing stock (where it exists), or even result in homelessness.

The Treaties carve out certain exemptions, in the form of protocols annexed to the primary EU treaties, which seek to protect part of the national housing sector from the reach of EU market rules. For example, to prevent rich neighbouring Germans from buying second homes across the border, Denmark negotiated a protocol which restricts the acquisition of second homes by non-nationals.²⁶⁵ Malta also obtained a similar opt-out,²⁶⁶ whilst Croatia is allowed to impose temporary restrictions on the acquisition of agricultural land.²⁶⁷ Where such opt-outs do not exist however, national authorities have limited room for manoeuvre, as restrictions on buying or using properties (eg rent caps, authorization, etc), which may deter foreign investors, can survive only if they are be justified by an overriding public interest.

In the *Libert* case, in the context of litigation initiated by a more than 30 property developers, the CJEU reviewed the compatibility of the requirement of 'sufficient local connections' with EU free movement of services and capital rules. Since it prevented rental agencies from offering rental properties to any EU citizens, and EU citizens from acquiring properties in certain neighbourhoods, the Court ruled that it interfered with the free movement of services, and was not justified based on the objective of guaranteeing housing for low-income households.²⁶⁸

L178/1; Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market [2006] OJ L 376/ 36.

²⁶⁴ See Corporate Europe Observatory, 'Unfairbnb – How online rental platform use the EU to defeat cities affordable housing measures', <https://corporateeurope.org/sites/default/files/unfairbnb.pdf>.

²⁶⁵ Protocol No 32 to the Treaty on the European Union (TEU), Consolidated version of the Treaty on the European Union [2012] OJ C 326/13.

²⁶⁶ Protocol No. 6 to the Act of Accession 2003, Consolidated version of the Treaty on the European Union [2012] OJ C 326/13.

²⁶⁷ Annex V of the Act of Accession Croatia 2011, [2012] OJ L112/6.

²⁶⁸ C-197/11 *Eric Libert and Others v Gouvernement flamand and All Projects & Developments NV and Others v Vlaamse Regering* EU:C:2013:288. See above.

In the same case, the CJEU also assessed the compatibility with EU law of so-called ‘*inclusionary housing policies*’, which consists in requiring property developers to allocate a share of their developments to social or affordable housing in return for granting permissions.²⁶⁹ The Court found that the national decree which imposed this ‘social obligation’ constituted a restriction on free movement of capital, since it would deter investors from other member states from investing, if they cannot freely use the land they acquire, but could be permissible if it pursued an overriding public interest, for example ‘*to guarantee sufficient housing of the low-income and otherwise disadvantaged sections of the local population*’.²⁷⁰

EU state aid law prohibits aid granted by public authorities or through public resources, which confers an advantage to the recipient, is selective, affects trade between member states, and distorts competition (Article 197(1) TFEU). State aid must be notified to, assessed and approved by the Commission. In the *Altmarkt* case, the CJEU clarified that *state aid rules did not apply in the case of ‘compensation’ offered to service providers who are required to discharge a clearly defined Public Service Obligation (PSO)*, where the parameters of *compensation* are defined in an *objective and transparent manner*, the compensation *does not exceed* what is necessary to discharge the PSO (including a reasonable profit) and, in cases where the undertaking was not chosen via a public procurement process, the level of compensation needed is defined based on the costs of a typical, well-run and adequately resourced undertaking.²⁷¹

State support for social housing may be exempted from the requirement of notification to the Commission, due to its ‘highly local nature’ which ‘limits the risk of distortion to competition’ and the fact that the ‘profits are generally reinvested in building new social housing units’.²⁷² In 2011, the Commission adopted a SGEI package of regulations and communications, which clarified the conditions under which state aid in the form of public service compensation can be considered compatible with the EU rules. Notably, *compensation for SGEIs is exempted from notification if under €15 million, or for those services ‘meeting social needs as regards health and long term care, childcare, access to and reintegration into the labour market, social housing and the care and*

²⁶⁹ W.K. Kothals Altes, ‘The Single European Market and the demise of Flemish Housing Policy’ (2015) 18:2 *International Journal of Housing Policy* 209-222, 213-214.

²⁷⁰ C-197/11 *Eric Libert and Others v Gouvernement flamand and All Projects & Developments NV and Others v Vlaamse Regering* EU:C:2013:288, para 68.

²⁷¹ C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* EU:C:2003:415

²⁷² Vincent Gruis and Marja Elsinga, ‘Tensions between social housing and EU Market regulations’ (2014) *European State Aid Law Quarterly* 463, 464-465.

social inclusion of vulnerable groups’ (regardless of the amount).²⁷³ In *Libert*, the CJEU was asked to assess whether compensation in the form of a tax relief, the guaranteed purchase of housing, and subsidies for servicing social housing plots, to developers who had agreed to allocate a share of the development to social housing, constituted state aid. It applied the *Altmark* criteria to determine whether these constituted compensation for a PSO rather than an advantage, and held that *the compensation did not constitute illegal state aid, if these activities were considered as SGEI*. It left this assessment to the national court to decide.²⁷⁴ In the DFB case, the General Court reviewed *contracts* under which public authorities, in the context of industrial development policy, would purchase a land plot and prepare it for the construction and operation of a private factory building modular homes, and then committed to purchase from that company 1,500 homes to use as social housing. It found it constituted *state aid*, as it exceeded amount that could be granted under existing rules, and should have been notified. It thus concluded it was illegal.²⁷⁵

One of the key challenges is that not all social housing interventions qualify as SGEI. The EU institutions seem to endorse a *narrow vision of social housing*, which is limited to *providing ‘housing for disadvantaged citizens or socially less advantaged groups, which due to solvability constraints are unable to obtain housing at market conditions’*, and *excludes affordable housing to all*.²⁷⁶ The European Economic and Social Committee issued an opinion of their own initiative, calling for defining social housing as a SGEI and for the EU institutions to respect and support *different types of social housing policies*, in order to *ensure affordable housing*.²⁷⁷

A further question is whether social housing providers qualify as ‘bodies governed under public law’ and whether the development of housing unit qualify as ‘public work contracts’, which require compliance with

²⁷³ Commission Decision of 20 December on the application of Article 106(2) of the Treaty on the Functioning of the European Union to State aid in the form of public service compensation granted to certain undertakings entrusted with the operation of services of general economic interest [2012] OJ L7/3; Communication from the Commission, European Union framework for State aid in the form of public service compensation (2001) [2012] OJ C8/ 15; Commission Regulation on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid granted to undertakings providing services of general economic interest [2012] OJ L 114/8.

²⁷⁴ C-197/11 *Eric Libert and Others v Gouvernement flamand and All Projects & Developments NV and Others v Vlaamse Regering* EU:C:2013:288.

²⁷⁵ *Diputación Foral de Bizkaia v Commission*, T-397/12, EU:T:2015:291.

²⁷⁶ Michela Braga and Pietro Palvarini, ‘Social Housing in the European Union’, Note for the European Parliament Employment and Social Affairs Committee, (2013), PE 492.469, p. 39.
[http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-EMPL_NT\(2013\)492469](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-EMPL_NT(2013)492469).

²⁷⁷ Opinion of the European Economic and Social Committee on ‘Issues with defining social housing as a service of general economic interest’ (13 December 2012), TEN/484-EESC-2012-597, <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/issues-defining-social-housing>.

demanding EU public procurement rules. Indeed the administrative requirements and additional costs involved ‘hamper development and ... innovative procurement practices.’²⁷⁸ In *Libert*, the CJEU applied the elements that define such contracts (pecuniary interest, written contract, two contracting parties, the execution of activities or works covered by the relevant EU directives) and suggested that, indeed, these could be considered public work contracts, even when the obligation to allocate part of the development to public work was a result of a decree and not the contract itself. It however left it to the national court to determine the existence of the contractual relationship.²⁷⁹

The application of EU market rules to social housing have generated concerns that it contributes to ‘stigmatization’ and ‘segregation’ by concentrating ‘lower income households’ in the publically subsidized social housing section.²⁸⁰ There is concern that it tends towards a libertarian approach, or at best promotes a sufficientarian vision, which *restricts redistribution efforts towards ‘providing a safety net for the poorest households’ and runs counter to social mixity objectives, and to a more egalitarian, generalist or universalist approach which consists in ‘providing affordable housing for a larger group’.*²⁸¹ There is also a risk that, by subjecting social rental agencies to market rules and expecting them to operate like ordinary businesses, they will be more reluctant to rent their dwellings to ‘less reliable’ tenants, thus *pushing poorer and more vulnerable households, and in particular new immigrants, towards the unregulated ‘black market’.*²⁸² Finally, their status as public authorities requires them to comply with cumbersome and costly EU procurement rules.

EU funding regulation and housing for vulnerable populations

The impact of EU law on housing can be also traced to more technical areas, such as funding regulation. Indeed, in some countries, EU funds contribute substantially to the development and implementation of social policy and infrastructure. The question therefore arises as to whether EU funds can be used to support the construction or

²⁷⁸ Vincent Gruis and Marja Elsinga, ‘Tensions between social housing and EU Market regulations’ (2014) *European State Aid Law Quarterly* 463, 465.

²⁷⁹ C-197/11 *Eric Libert and Others v Gouvernement flamand and All Projects & Developments NV and Others v Vlaamse Regering* EU:C:2013:288.

²⁸⁰ Marja Elsinga and Hans Lind, ‘The effect of EU legislation on rental systems in Sweden and the Netherland’, (2012) 28:7 *Housing Studies* 960.

²⁸¹ Vincent Gruis and Marja Elsinga, ‘Tensions between social housing and EU Market regulations’ (2014) *European State Aid Law Quarterly* 463, 468-469; Marja Elsinga and Hans Lind, ‘The effect of EU legislation on rental systems in Sweden and the Netherland’, (2012) 28:7 *Housing Studies* 960.

²⁸² Marja Elsinga and Hans Lind, ‘The effect of EU legislation on rental systems in Sweden and the Netherland’, (2012) 28:7 *Housing Studies* 960, 964-965.

maintenance of social housing stock. The most relevant EU funding schemes are Structural and Investment Funds, notably the European Regional Development Fund (ERDF) and the European Social Fund (ESF).²⁸³ There are restrictions on the use of those funds towards the development of social housing.

Until 2010, *housing interventions* could apply for ERDF support *only when part of an integrated urban development plan*. That meant that it could not be used to improve the housing situation of deprived *rural* communities, where, incidentally, many Roma live (at least in Central and Eastern Europe). In 2010, a Council decision extended access to ERDF support for *housing interventions for extremely poor and marginalized communities*.²⁸⁴ The ERDF could therefore support *housing renovation programs in deprived areas* that were integrated into a *community building program*, and contributed to social integration, and *explicitly excluding support for the renovation of segregated housing*.²⁸⁵ The regulation has now been repealed and replaced by a new one, which does not make any specific reference to housing interventions for marginalized minorities, but provides for *financial support for various integrated actions* which could improve *housing for the most deprived* (eg support for physical, economic and social regeneration of deprived communities in urban and rural areas).²⁸⁶

In addition to the ERDF, ESF funding can be sought to improve the housing situation of the most vulnerable populations. In that it aims to *'combat poverty, enhance social inclusion, and promote gender equality, non-discrimination and equal opportunities'* and is targeted primarily to *'disadvantaged people such as the long-term unemployed, people with disabilities, migrants, ethnic minorities, marginalized communities and people of all ages facing poverty and social exclusion'*, [these] are eligible *projects which contribute to 'the socio-economic integration of marginalized communities such as the Roma; combating all forms of discrimination and promoting equal opportunities and enhancing access to affordable, sustainable and high-quality services...'*²⁸⁷ Housing

²⁸³ Council Regulation (EC) No 1083/2006 of 11 July 2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and repealing Regulation (EC) No 1260/1999 [2006] OJ L 210/25 (now repealed).

²⁸⁴ Regulation (EU) No 437/2010 of the European Parliament and of the Council of 19 May 2010 amending Regulation (EC) No 1080/2006 on the European Regional Development Fund as regards the eligibility of housing interventions in favour of marginalised communities [2010] OJ L132/1.

²⁸⁵ Commission Regulation (EU) No 832/2010 of 17 September 2010 amending Regulation (EC) No 1828/2006 setting out rules for the implementation of Council Regulation (EC) No 1083/2006 laying down general provisions on the European Regional Development Fund, the European Social Fund and the Cohesion Fund and of Regulation (EC) No 1080/2006 of the European Parliament and of the Council on the European Regional Development Fund [2010] OJ L248/2.

²⁸⁶ Regulation (EU) No 1301/2013 of the European Parliament and of the Council of 17 December 2013 on the European Regional Development Fund and on specific provisions concerning the Investment for growth and jobs goal and repealing Regulation (EC) No 1080/2006 [2013] OJ L 347/ 289.

²⁸⁷ Regulation (EU) No 1304/2013 of 17 December 2013 establishes the missions of the European Social Fund (ESF), including

interventions which contribute to those aims could thus benefit from EU financial support under the ESF.

EU funds can therefore be used for housing interventions that target the most deprived urban and rural communities, if they are part of a broader integration and inclusion program.

EMU and public spending on housing

The law of the Economic and Monetary Union, which have been significantly boosted and revamped since the financial crisis, impose budgetary and fiscal requirements which may restrict access to social housing and benefits.

The Stability and Growth Pact, an agreement based on Article 12 and 126 TFEU, lays down the requirement of a balanced budget (deficit below 3% of GDP), and set limits to the public debt ratio (60% GDP), thereby exerting a constraint on public spending, and consequently on the material ability of public authorities to subsidize housing. Moreover, it includes preventive as well as corrective measures, notably the Excessive Deficit Procedure (EDP), which reinforce the constraining nature of these obligations²⁸⁸

Furthermore, as part of the reforms introduced in the wake of the financial and debt crisis, the EU enhanced economic and fiscal coordination in the context of the European Semester, through a new 'Fiscal Compact',²⁸⁹ and additional legislative measures providing for enhanced fiscal and macro-economic surveillance ('6 pack')²⁹⁰ and budget coordination ('2 pack').²⁹¹ Monitoring was also improved through the facilitated activation of the EDP, and the introduction of a new Macroeconomic Imbalance Procedure (MIP), to address systemic problems before they are able to destabilise member states or the EU economies.²⁹² In relation to

the Youth Employment Initiative (YEI), the scope of its support, specific provisions and the types of expenditure eligible for assistance [2013] OJ L 347/470.

²⁸⁸ Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Council Regulation (EC) No 1466/97 of 7 July 1997 on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies; Article 126 of the Treaty on the Functioning of the European Union.

²⁸⁹ Treaty on stability, coordination and governance in the economic and monetary union, 2 March 2012 (not published on the OJ).

²⁹⁰ Five regulations and one Directive (Council Directive 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States [2011] OJ L306/41).

²⁹¹ Regulation (EU) No 472/2013 of the European Parliament and of the Council of 21 May 2013 on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability [2013] OJ L 140/1; Regulation (EU) No 473/2013 of the European Parliament and of the Council of 21 May 2013 on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the euro area [2013] OJ L140/11 (part of the 6 pack).

²⁹² Article 121 TFEU, Regulation (EU) No 1176/2011 of the European Parliament and of the Council of 16 November 2011 on the prevention and correction of macroeconomic imbalances [2011] OJ L306/25; Regulation (EU) No 1174/2011 of the

housing, it is worth noting that *changes in house prices* and *private sector debt* are two of the eleven indicators used to identify macro-economic imbalances.²⁹³

The effect of EMU law on the right to housing is mostly indirect, as governments have room for manoeuvre in allocating resources. However, countries which are placed under EDP or MIP have less discretion. They must respond to recommendations, present and implement actions plans and programs, and report on progress to the EU institutions. Moreover, countries subject to financial assistance measures under the Troika system are subject to strict conditionality, and must comply with precise plans, laid down in Memorandums of Understanding, on how they intend to reduce public spending. A study commissioned by the European Parliament outlined the adverse impact of austerity measures on the provision of social housing, which particularly affect more vulnerable populations, especially Roma and travellers, and result in reduced accommodation offerings for asylum-seekers. They also note an increase in homelessness.²⁹⁴ EMU rules therefore have an indirect impact on what, and how much is distributed, and to whom.

EU tax law and reduced VAT for housing

The EU has limited competence in tax and fiscal matters, but it does regulate VAT tax. In the context of housing, the relevant EU instrument, the VAT Directive, allows member states to apply a *reduced VAT* to certain goods and services, including for the *provision, construction, renovation and alteration of housing, as part of a social policy*.²⁹⁵

The European Pillar of Social Rights, access to social housing and protection against eviction

The *European Pillar of Social Rights* is a non-binding policy framework, loudly proclaimed in 2017 by the three EU institutions,²⁹⁶ which aims to promote a 'more social' Europe, to accompany deeper economic and fiscal

European Parliament and of the Council of 16 November 2011 on enforcement measures to correct excessive macroeconomic imbalances in the euro area [2011] OJ L306/8.

²⁹³ Macro-economic imbalance procedure scoreboard, at https://ec.europa.eu/info/business-economy-euro/economic-and-fiscal-policy-coordination/eu-economic-governance-monitoring-prevention-correction/macro-economic-imbalance-procedure/scoreboard_en#scoreboard-indicators.

²⁹⁴ Aleksandra Ivanković Tamamović, *The impact of the crisis on fundamental rights across EU member states* (2015), Study for the LIBE Committee, PE 510/021

[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU\(2015\)510021_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU(2015)510021_EN.pdf), 123-124.

²⁹⁵ Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax [2006] OJ L347/1.

²⁹⁶ European Commission, *Interinstitutional Proclamation on the European Pillar of Social Rights*, COM(2017) 251 final, available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-250-F1-EN-MAIN-PART-1.PDF> (last

cooperation, and compensate for the liberal bias of market integration, and its adverse societal impact. Its *principle 19* refers to the ‘right to housing’, which includes: (a) *Access to social housing or housing assistance of good quality for those in need*; (b) *vulnerable people’s right to appropriate assistance and protection against forced eviction*; and c) adequate shelter and services for the homeless in order to promote their social inclusion.

Principle 19 builds upon Article 34(3) CFR on the right to social assistance, but extends beyond those lacking resources to *all those in need*. Moreover, it guarantees *access to social housing to those in needs and guarantees protection against forced eviction to those vulnerable* (including legal aid schemes, and other protection measures, such as debt management programs).²⁹⁷

Whilst the Pillar is not a binding instrument and cannot be invoked in court, it nonetheless offers a policy framework for the adoption of legislation with a *redistributive impact* and provides a *new source of guidance in interpreting EU rules affecting the right to housing* in the EU. Its implementation involves the adoption of EU legislation, where EU competence exists, and is monitored within the European Semester system, based on a *Social Scoreboard*.²⁹⁸ The Social Scoreboard currently does not include housing indicators though.²⁹⁹

The right to housing lies at the cross-roads of different substantive areas of EU law, which pull in different, and at times opposite, directions, including in terms of its contribution to redistributive justice in Europe. This has led policy actors to call for a more comprehensive approach to EU housing policy.³⁰⁰

4) The right to education in EU law – Justice as recognition

Access to elementary and secondary school education and school curricula are primarily national competences

accessed 15 May 2018).

²⁹⁷ Ane, Arangiz, ‘What future for Housing Rights? The Potential of the European Pillar of Social Rights’ (14 September 2017), at <http://www.housingrightswatch.org/content/what-future-housing-rights-potential-european-pillar-social-rights>.

²⁹⁸ European Commission, Social Scoreboard website, <https://composite-indicators.jrc.ec.europa.eu/social-scoreboard/>.

²⁹⁹ Housing Europe, ‘Housing in the European Pillar of Social Rights’, <http://www.housingeurope.eu/resource-930/housing-in-the-european-pillar-of-social-rights>.

³⁰⁰ Karima Delli, Report on social housing in the European Union, 30 April 2013, 2012/2293(INI), PE 504.103v02-00, A7-0155/2013 available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2013-0155+0+DOC+XML+V0//EN>. For a call on a common definition of social housing, see Michela Braga and Pietro Palvarini, Note for the European Parliament Employment and Social Affairs Committee, Social Housing in the European Union (2013), PE 492.469 [http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-EMPL_NT\(2013\)492469](http://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL-EMPL_NT(2013)492469).

and the EU should *respect ‘the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity’* (Article 165(1) TFEU).³⁰¹ The EU has only *supportive, coordinating or supplementary* competences in this area (Article 6(e) TFEU), and should focus its activities on *promoting European education* (including languages), *mobility* and exchanges of staff and students and *cooperation* between establishments (Article 165(2) TFEU). It should strive to support a *high level of education* (Article 9 TFEU). The lack of EU competence however does not mean that it does not have any influence on access to primary and secondary education and its organization. To start with, the mere fact that education is a national competence cannot undermine the realisation of EU policies,³⁰² and *various areas of EU law have a direct or indirect impact on access to primary and secondary education*, and notably for particularly *vulnerable populations*.

For instance, EU free movement and citizenship law guarantees *access to education to children of EU migrants on the same basis as nationals*, although under certain conditions. EU immigration law also grants *access to Third Countries Nationals who are Long Term Residents, recognised refugees and minor or children of asylum seekers*, under certain conditions or subject to certain arrangements. In addition, EU non-discrimination law *protects vulnerable persons, such as members of national or ethnic minorities, from discrimination in access to education* and can help combat school segregation. In addition, EU internal market, competition and state aid law bear *relevance on the form and range of educational offerings*, by facilitating the operation of establishments offering alternative or more inclusive education, whilst EU funds regulations *make financial provision to support access to education*. Beyond hard law measures, the EU institutions regularly issue *recommendations* (‘soft law’), which are not binding. And finally, where the situation fall under the scope of application of EU law, the EU Charter guarantees *the right to education*. Aspects of EU law which are most relevant with regard to guaranteeing access to primary and secondary education, as well as inclusive education, for our identified vulnerable populations, namely refugees, and undocumented migrants, persons with disability, and ethnic and religious minorities, will be exposed below, with the view to assess EU law’s contribution to justice as recognition.

The EU Charter and the EU law right to education and non-discrimination

Within the scope of application of EU law (Article 51(1) CFR), the EU Charter provides for a *right to education for everyone* (Article 14(1) CFR), which includes *a right to ‘free compulsory education’* (Article 14(2) CFR). It also

³⁰¹ Various instruments of EU law regulate access to university education for EU citizens and third countries nationals. However, this report focuses on access to primary and secondary education and excludes post-secondary education.

³⁰² Case 9/74 *Donato Casagrande contre Landeshauptstadt München* EU:C:1974:74

provides a *right to found educational establishment* and *the right of the parents 'to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions'* although' in accordance with the national laws governing the exercise of such freedom and right' (Article 14(3) CFR). According to the official explanations, this provision of the Charter is based on the common constitutional traditions of Member States and Article 2 of the ECHR Protocol 1.³⁰³ The right extends to *vocational training* (in line with point 15 of the Community Charter of the Fundamental Social Rights of Workers and Article 10 of the European Social Charter).

The new right to *free compulsory education* means that 'each child has the possibility of attending an establishment which offers free education' (but not that all educational establishments should provide free education). The right of parents to make choices with regard to their children's education must be interpreted in conjunction with the provisions of Article 24 CFR on the rights of the child (including the right to express their views in accordance with their age and maturity, the right to have their best interest taken into account, and the right to maintain on a regular basis a personal relationship and direct contact with both parents).

Freedom to found public or private educational establishments is guaranteed as one of the aspects of *freedom to conduct a business* (Article 16 CFR), but is limited by respect for democratic principles and must be exercised in accordance with the arrangements defined by national legislation. The Charter, furthermore, 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', in the implementation of EU law (Article 21 CFR).

EU law and access to education for migrant children

Both EU free movement and citizenship law and EU immigration law confer on *migrant children* more or less extensive *rights of access to education*. The scope of this right of access to education depends on the nationality and status of the parent or minor.

Children of EU migrant workers, irrespective of their nationality, have *the right to education in the host member state on the same terms as its nationals*, including during the first three months of stay (Article 10 of the

³⁰³ OJ [2007] C 303/17.

EU Workers Regulation,³⁰⁴ and Article 24(1) of the EU Citizens Directive).³⁰⁵ That includes access to *public or private* educational establishments, *compulsory and non-compulsory education, and apprenticeship and vocational training* courses. It also covers access to *education related benefits*,³⁰⁶ or *other benefits facilitating educational attendance* (eg study grants), without any residence conditions or previous periods of residence in the host Member State.³⁰⁷ The CJEU also confirmed that *children of a former EU migrant worker* who since left the EU territory (and thus relinquished his EU worker status) can remain in the host member state and continue their school education there, without having to establish an autonomous right of residence.³⁰⁸

Beyond equal treatment, an old Directive from the 1970s also provides for *additional special educational benefits for EU migrant workers' children*. It requires that host member state offer *supplementary free language tuition* for children of EU migrant workers *in the language of the host state*, as well as *facilitate the teaching of the language and culture of the home state*, in order to *facilitate their integration*.³⁰⁹ This Directive is however not implemented in most member states, and the EU authorities are apparently not particularly inclined to enforce it.³¹⁰

The children of non-economically active EU citizens (eg retirees, students, and others) who have residence rights, meaning that they have sufficient resources³¹¹ and comprehensive health insurance cover, are *also entitled to access to the national education system of the host state under the same conditions as nationals* (Article 24(1) of the Citizens Directive), but they are *not entitled to maintenance aid* in the form of student grants or loans,

³⁰⁴ Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance [2011] OJ L141/1.

³⁰⁵ Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC [2004] OJ L158/77.

³⁰⁶ Such as enrollment fees, see Case 152/83 *Forcheri* [1983] ECR 2323.

³⁰⁷ Case 9/74 *Donato Casagrande contre Landeshauptstadt München* EU:C:1974:74; C-3/90 *M. J. E. Bernini v Minister van Onderwijs en Wetenschappen* EU:C:1992:89.

³⁰⁸ C-413/99 *Baumbast and R v Secretary of State for the Home Department* EU:C:2002:493; C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* EU:C:2010:83; C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and Secretary of State for the Home Department* EU:C:2010:80.

³⁰⁹ Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers [1977] OJ L 199/32. For an analysis, see B de Witte, 'Educational quality for Community workers and their Families' in B de Witte (ed) *European Community Law of Education* (Nomos Verlagschag, 189) 74.

³¹⁰ COM(84) 54 Final and COM(88) 787 final. See B de Witte, 'The European Communities and its minorities' in C Brolmann, R Lefeber and M Zieck (eds) *People and Minorities in International law* (Kluwer Academic Publishers, 1993) 182.

³¹¹ In the case of students, it is sufficient to make a declaration to that effect.

unless their parents or they have legally resided in the host member state under the conditions laid down by the Directive for at least five years, and acquired *permanent residence status* (Article 24(2) of the Citizens Directive). The children of non-economically active EU citizens who do not fulfil the resources and health insurance conditions are not entitled to equal access to education and education related benefits under EU law, unless they (or rather their parents) are sufficiently integrated,³¹² which may be conditioned to a five-year residence period.³¹³

In addition to guaranteeing access to education and school-benefits to children of EU migrants, under defined conditions, EU law also enables EU pupils to study in another member state, with or without their parents. The CJEU confirmed that minors have an independent right to free movement, which they can use for educational purposes³¹⁴ If they fulfil resources and health insurance³¹⁴ conditions, they have right to reside in another member state to attend school there (eg boarding school), and so do their parents (including TCN parents).³¹⁵

Pupils and/or their parents are also entitled to education-related benefits from their home member states to study in another member state. The CJEU ruled that study grant which required that a student started a course in the home member state before studying in another EU member state was incompatible with EU law,³¹⁶ as well as a rule which limited entitlement to tax deduction to pupils attending private schools only in the member state of nationality.³¹⁷ EU law therefore *extends access to education-related benefits to pupils studying in establishment in other EU member states*.

These EU free movement rules are more likely to benefit middle- and upper class people who are mobile and employable, as well as better off families, than deprived populations.

Beyond EU migrants, EU law also contributes to ensuring *equal access to education* to (children of) *non-EU migrants*. In principle, *the children of Third Country Nationals who have residency rights* under the Long Term Residents Directive can *access national education systems on the same basis as nationals* (Article 11).³¹⁸ However,

³¹² C-209/03 *The Queen, on the application of Dany Bidar v London Borough of Ealing and Secretary of State for Education and Skills* EU:C:2005:169.

³¹³ C-158/07 *Jacqueline Förster v Hoofddirectie van de Informatie Beheer Groep* ECLI:EU:C:2008:630.

³¹⁴ C-200/02 *Kunqian Catherine Zhu and Man Lavette Chen v Secretary of State for the Home Department* EU:C:2004:639.

³¹⁵ Article 12 of Directive 2004/38. See also C-413/99 *Baumbast and R v Secretary of State for the Home Department* EU:C:2002:493; C-480/08 *Maria Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* EU:C:2010:83.

³¹⁶ C-11/06 *Rhiannon Morgan v Bezirksregierung Köln* and C-12/06 *Iris Bucher v Landrat des Kreises Düren* EU:C:2007:626

³¹⁷ C-76/05 *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* EU:C:2007:492.

³¹⁸ Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (Long Term Resident Directive) [2004] OJ L 1/44.

member states can impose *linguistic and residential requirements*, which can limit access of those Long Term Resident children to educational programs in EU member states. It is not clear to what extent *Third Country Nationals* who are Long Term Resident have access to education related benefits, such as study grants. Indeed, under the Directive, member states can restrict access to social assistance to ‘core benefits’. Recital 13 of the Directive cites a range of core benefits, which does not include educational grants but the CJEU ruled that this list is not exhaustive.³¹⁹ Moreover, recital 14 states that ‘the Member States should remain subject to the obligation to afford access for minors to the educational system under conditions similar to those laid down for their nationals’, thus suggesting that children of Long Term Resident Third Country Nationals should have access to educational benefits as well.

The new EU Directive on the residence and movement of TCNs for the purpose of studies and research,³²⁰ which replaces the former Students’ Directive,³²¹ and comes into force in 2018, provides for *facilitated residency and free movement rights for TCN pupils* who take part in a ‘pupil exchange scheme or educational project operated by an education establishment in accordance with national law or administrative practice’ (Article 3(4)), subject to certain conditions, notably that they have sufficient resources and health insurance cover, and are admitted in an educational establishment (Articles 7 and 12).

As regard *refugees and beneficiaries of international protection*, member states must grant ‘full access’ to education to minors (and adult refugees must have access to compulsory education) on the same basis as long term resident TCNs (Article 27 of the refugee Qualification Directive).³²²

Minor asylum-seekers, or the children of asylum-seekers are guaranteed access to ‘similar’ educational opportunities as nationals, from *no later than three months after the lodging* of an application for asylum and for as long as *an expulsion measure against them or their parents is not actually enforced* (Article 14 of the reception

³¹⁹ C-571/10 *Servet Kamberaj v Istituto per l’Edilizia Sociale della Provincia autonoma di Bolzano (IPES) and Others* EU:C:2012:233.

³²⁰ Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing [2016] OJ L132/21.

³²¹ Council Directive 2004/114/EC of 13 December 2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service [2004] OJ L375/12.

³²² Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Recast Qualification Directive) [2011] OJ L 337/9.

Directive).³²³ Member states may nonetheless stipulate that these opportunities are *limited to the public education system*, or that education be provided in *accommodation centres*. They must however offer *special preparation, including languages classes*, to facilitate integration.

All in all, EU law provides for a quite extensive right of access to education to foreigners, both EU and non-EU migrants, although access to free education or educational benefits may be linked to conditions of economic contributions or resources. In that sense, it provides for a more inclusive education system, which contributes to the recognitive dimension of justice, by affording a full place to (children of) foreigners in national schools.

EU non-discrimination law and access to, and more inclusive, education

The EU Racial Equality Directive requires that member states prohibit direct and indirect discrimination, as well as harassment and instructions to discriminate based on race and ethnicity in public and private education (Article 3(1)g).³²⁴

This outlaws direct discriminatory practices of institutional segregation between majority children and children belonging to racial or ethnic minority, such as Roma or descendant of Muslim immigrants. In principle, it also prohibits practices which result in de facto segregation, such as residence-based or competence-based requirements in determining access to particular schools, unless these can be objectively justified as necessary to achieve legitimate objectives. The Race Directive has so far generated limited litigation before domestic and EU courts, and there is so far no CJEU case law on discrimination based on race in access to education,³²⁵ even though empirical research suggests that school segregation de facto exists in various EU states.

A combined reading of EU non-discrimination and the EU Charter could *enhance educational opportunities for ethnical and racial minorities, such as Roma or descendants of immigrants*.³²⁶ Indeed, *any measure which could result in discrimination against members of a particular ethnic and racial community would fall under the scope of EU law, and therefore the application of the Charter*, including Article 14 which provides for free compulsory education and parents' freedom to educate their children according to their own beliefs, and the freedom to set

³²³ Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Reception Directive) [2013] OJ L 180/96.

³²⁴ 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.

³²⁵ But see CJEU critical stance on a case involving utilities companies placing meters high up on poles in Roma neighbourhoods (C-83/14, "*CHEZ Razpredelenie Bulgaria*" AD v. *Komisia za zashtita ot diskriminatsia* EU:C:2015:480).

³²⁶ Note, however that there is no established EU definition of ethnic or racial minority.

up private schools (also Article 16), and Article 21 on non-discrimination (including based on religion). In that sense, rules such as the ban on the wearing of religious clothing could potentially be caught by EU non-discrimination law if they would systematically *restrict access to education to ethnic and racial minorities*.³²⁷ It is also unclear to which extent these provisions could be relied on to promote the *teaching off, and in, minority languages in public schools*.³²⁸

EU internal market, competition and state aid law and diversification of educational offerings

*Public education organized within the national educational system, funded and supervised by the State, and offering pre-school,³²⁹ primary or secondary education,³³⁰ or vocational training,³³¹ where the state does not 'intend to become involved in activities for remuneration, but carries out its task towards its population in the social, cultural and educational areas',³³² is usually considered a *non-economic activity* and *does not fall under the scope of EU internal market and competition and state aid law*.*

This is not the case of private establishments and public institutions which offer educational programs which are paid by the pupils and their parents, which are *subject to EU internal market and competition rules*.³³³ That way, EU law supports the establishment and operation of private schools, which offer alternative schooling to the state education system. In certain cases, these schools can offer more inclusive education, in that they offer schooling in a different language than the official or majority languages of the state, provide religious education, or engage alternative education systems (eg Waldorf, Montessori, etc.). However, the question of access and affordability remains problematic, since they are selective and involve the payment of sometimes important tuition fees, which are not accessible to the most deprived, or even ordinary households, unless the state offers scholarships. In such case, state funding towards education in private schools could be considered state aid, and therefore be caught

³²⁷ Although such a reading is unlikely in the present time, given the CJEU apparent deference to member states' choices in the context of the wearing of religious clothing in the context of employment (*C-157/15 Samira Achbita and Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions NV* EU:C:2017:203; *C-188/15 Asma Bougnaoui and Association de défense des droits de l'homme (ADDH) v Micropole SA* EU:C:2017:204).

³²⁸ G. Guliyeva, 'Education, Languages, and Linguistic Minorities in the EU' (2013) 19:2 *European Law Journal* 219-236.

³²⁹ EFTA Court of 21 February 2008 in Case E-5/07.

³³⁰ Case C-318/05 *Commission of the European Communities v Federal Republic of Germany*. EU:C:2007:495; Case C-76/05 *Herbert Schwarz and Marga Gootjes-Schwarz v Finanzamt Bergisch Gladbach* EU:C:2007:492.

³³¹ Case 263/86 *Belgian State v René Humbel and Marie-Thérèse Edel* EU:C:1988:451.

³³² Case C-318/05 *Commission of the European Communities v Federal Republic of Germany*. EU:C:2007:495, paragraph 68, EFTA Court of 21 February 2008 in Case E-5/07.

³³³ Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C 8/02.

by EU state aid rules (Article 107-109 TFEU).

Finally, schools, or their public owners, as state organs, must comply with EU public procurement law, which creates certain challenges for contracting out works or services, at least those above EU economic threshold, such as the construction and renovations of buildings.³³⁴

EU internal market and competition rules therefore affect the development of educational infrastructures, which indirectly impact on access to education and inclusion.

EMU law, the crisis and the right to education of the most vulnerable

EMU budget and debt rules, already described above in the context of the right to housing, impose constraints on public spending on education.³³⁵ Moreover, countries placed under EU monitoring under the EDP or MIP, must propose and implement measures to reduce public expenditure, whilst those who are recipient of financial assistance under the Troika supervision are subject to strict conditionality requirements, which may involve reducing state support to educational activities. For example, Memorandums of Understanding in both Greece and Cyprus included cuts in education budgets.³³⁶ State spending on education, which is relatively high, has remained largely untouched by austerity measures in most member states.³³⁷ However, such spending fell in one third of OECD countries as a result of the crisis. They resulted in teachers and school staff's dismissal, recruitment freeze, salary cuts, increase staff-student ratio, reduction of subsidies to education, limitations on school budgets, school closure or mergers.³³⁸ These measures can have serious adverse impact on the 'quality, accessibility and affordability' of education, and on equal opportunities objectives. If not compensated, they are likely to have a disproportionate impact on the more vulnerable pupils (eg disabled, Roma and travellers, etc).³³⁹

EU funding law and the right to education

Whilst the EU has few competences to directly regulate access to, and the organization of primary and secondary

³³⁴ Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance [2014] OJ L94/65, Article 13.

³³⁵ See above section on EMU and public spending on housing in part 4.

³³⁶ Aleksandra Ivanković Tamamović, *The impact of the crisis on fundamental rights across EU member states* (2015), Study for the LIBE Committee, PE 510/021:

[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU\(2015\)510021_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/510021/IPOL_STU(2015)510021_EN.pdf), p. 43.

³³⁷ Ibid p. 36-37,

³³⁸ Ibid p. 36-37, 43-48

³³⁹ Ibid, p. 36-37, 43-48

education and the content of curricula, it can influence these through funding.

The EU has a dedicated program to support enhanced mobility in education (ERASMUS, ERASMUS +). Whilst primarily targeted to post-secondary education and traineeship, the programs also include support for secondary educational initiatives. Moreover, education and training is one of the eleven priorities for the EU Cohesion Policy 2014-2020 ('thematic objective 10'). The European Social Fund (ESF) and the European Regional Development Fund (ERDF) provide financial support to activities which contribute to 'modernising education and training systems (including investments in educational infrastructure), reducing early school leaving; promoting better access to good quality education for all, from the primary to the tertiary level; enhancing access to lifelong learning and strengthening vocational education and training systems'.³⁴⁰

EU Soft law and inclusive education

The EU is not competent and therefore does not have binding laws on inclusive education. The EU institutions are however using new modes of governance and 'soft' measures to foster more comprehensive, accessible and inclusive education.³⁴¹ These are not reviewed in this report, but a few can be highlighted to illustrate how the EU can promote justice as recognition through other means that regulation. Notably, it calls for more opportunities and greater quality of early childhood education and care,³⁴² improved educational offerings,³⁴³ special measures

³⁴⁰ European Commission, Education and Training, http://ec.europa.eu/regional_policy/en/policy/themes/education-training/.

³⁴¹ See, for example, the Recommendation of the European Parliament and of the Council of 18 December 2006 on key competences for lifelong learning (2006) L394/10. See also more general measures aimed at youth, such as the Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – An EU Strategy for Youth : Investing and Empowering – A renewed open method of coordination to address youth challenges and opportunities (COM/2009/0200 final), or coordination measures, such as the Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (COM(2008)865 final) of 16 December 2008 on An updated strategic framework for European cooperation in education and training, For a review of some of these measures, see European Commission, 'EU Acquis and policy documents on the rights of the child (2017)', JUST.C2 /MT- TC, https://ec.europa.eu/info/sites/info/files/euacquisandpolicydocumentsontherightsofthechild_update.pdf.

³⁴² Commission Communication (COM(2011)66 final) of 17 February 2011 on Early childhood education and care: providing all our children with the best start for the world of tomorrow; Commission Recommendation of 20 February 2013 Investing in children: breaking the cycle of disadvantage; 2013/112/EU; Council Recommendation of 28 June 2011 on policies to reduce early school leaving (Text with EEA relevance) (OJ 2011 C91 of 1 July 2011).

³⁴³ Commission Communication to the Council and to the European Parliament of 8 September 2006 (COM(2006)481 final) on Equity and efficiency in European education and training systems; Commission Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions (COM(2008)425 final) of 3 July 2008 on Improving competences for the 21st Century: an agenda

for improving education for migrant children,³⁴⁴ or addressing early school dropout.³⁴⁵ In recent years, the EU institutions have sought to more actively promote inclusive education, through a range of measures.³⁴⁶ Following the Paris attack in 2015, EU leaders adopted the Paris Declaration on promoting citizenship and the common values of freedom, tolerance and non-discrimination through education.³⁴⁷ Amongst other measures, they support research initiatives aimed at understanding and promoting inclusive education (eg EURYDICE),³⁴⁸ and developed a Europe Toolkit for Schools to foster inclusive education.³⁴⁹

EU law does not directly regulate primary and secondary education. However, certain areas of EU law, and notably EU free movement and immigration rules, provides for a greater recognition of the place and even particular needs of foreigners and migrants in national educational systems.

5) Conclusions: rights, justice and vulnerable groups in EU law

Whilst EU law to some extent recognises a right to vote, housing and education, it has few direct regulatory powers, which limit its ability to directly regulate exercise of those rights. However, its indirect impact, through regulation of sectors which have connections to the exercise of those rights, is significant, and contributes to reshaping the ‘what’, ‘who’ and ‘how’ of justice. These influences which bear on justice as redistribution, recognition and representation have been highlighted throughout this section, and will be further discussed later

for European cooperation on schools.

³⁴⁴ Council Conclusions on the education of children with a migrant background (26 November 2009); Commission Communication: Action Plan on the Integration of Third-Country Nationals; COM(2016) 377 final; Commission Communication, The protection of children in migration, 12 April 2017, COM(2017) 211 final.

³⁴⁵ Communication of 21 January 2011 from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Tackling early school leaving: a key contribution to the Europe 2020 Agenda (COM(2011)18 final).

³⁴⁶ European Commission, Proposal for a *Council Recommendation on promoting common values, inclusive education and the European dimension of teaching*, 17 Jan 2018, (COM (2018) 23 final).

³⁴⁷ It identifies four key goals: Ensuring that children and young people acquire social, civic and intercultural competences, by promoting democratic values and fundamental rights, social inclusion and non-discrimination, as well as active citizenship; Enhancing critical thinking and media literacy, particularly in the use of the Internet and social media, so as to develop resistance to divisive narratives, polarisation and indoctrination; Fostering the education of disadvantaged children and young people, by ensuring that our education and training systems address their needs; Promoting intercultural dialogue through all forms of learning in cooperation with other relevant policies and stakeholders.

³⁴⁸ EACEA, Welcome to Eurydice. Better knowledge for better education policies, https://eacea.ec.europa.eu/national-policies/eurydice/home_en.

³⁴⁹ ‘Toolkit for Schools’, at <https://www.schooleducationgateway.eu/en/pub/resources/toolkitsforschools.htm>

on, and do not need to be repeated at this point.

As noted earlier, EU treaty law does not address particularly vulnerable individuals or groups, but EU legislation and soft law do identify particularly vulnerable persons.³⁵⁰ Moreover, as highlighted in the various sections of this review of EU law, a number of EU legal instruments are targeted to the particular needs of specific groups, be they more vulnerable or not, with regard to the three rights identified and corresponding dimensions of justice. Notably, EU laws pay particular attention to the needs of two particular groups, *migrants* and *racial and ethnic minorities*.

EU law, centred on the project of an internal market without borders, which ineluctably involves human mobility, quite logically pays particular attention to the needs of *migrants*. It places economically active mobile EU citizens in a privileged position, by guaranteed them almost the full protection afforded by member states' justice regimes to their own nationals, save for representation, which remains limited. Non-economically active EU migrants are less privileged in terms of access to redistributive justice, but those who have sufficient resources and are not a burden on the national welfare systems are granted some representation rights and have access to education on an equal footing with nationals. Non-EU migrants who are sufficiently integrated in member states societies, having lived there for at least five years and economically contributing or self-sufficient, also have access to some form of redistribution, and recognition. EU law, finally, provides for a particularly protective justice framework for refugees, although more limited than for nationals, as well as for asylum-seekers. EU law also recognizes the particular needs of *racial and ethnic minorities*, and provides a protective legal framework which contributes, at least in principle, to improving their access to justice resources, in terms of redistribution (housing) and recognition (education).

EU law does not directly regulate the situation of *disabled persons* with regard to the rights under focus in this report (the EU Framework Employment Directive prohibits discrimination based on disability in the context of employment, but not in other contexts, such as voting, housing or education).³⁵¹ However, to the extent that the EU is competent to regulate certain areas or activities, then it is bound by the EU Charter of Fundamental Rights, which proscribes discrimination based on disability (Article 21 CFR). This could, for example, impact the right to vote of disabled EU citizens in EP elections. Moreover, the EU participated in the drafting, signed and

³⁵⁰ See also, Francesca Ippolito, and Sara Iglesias Sanchez (eds) *Protecting vulnerable groups: the European human rights framework* (Hart, Bloomsbury Publishing, 2015).

³⁵¹ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303/16.

ratified the UN Convention of the Rights of Persons with Disabilities (CRPD), as did (almost) all the member states,³⁵² and therefore is legally committed to CRPD obligations and duties and to respect and promote the rights of persons with disabilities in its policy and legal activities.³⁵³

EU hard law does not directly address the particular needs of other vulnerable groups in relation to the rights and corresponding justice dimension on which this report focuses, saved for a few exceptions already noted (eg children, asylum-seekers). However, policy initiatives, as well as EU soft law instruments, bring attention to the specific challenges faced by particularly vulnerable groups and call on national and local authorities, as well as other policy actors to address those needs.³⁵⁴ *Irregular migrants*, due to their lack of legal status, are in a particularly vulnerable situations, which is not directly dealt with by EU law, except in providing for ‘human’ procedures for their return,³⁵⁵ but is taken into account in EU strategies and policy initiatives.³⁵⁶

More generally, in areas which are regulated by EU law, the Charter potentially applies. It is therefore important to recall that the Charter calls for particular attention to categories de facto identified as particularly vulnerable persons, notably *asylum-seekers and refugees* (Article 18 CFR), *women* (Article 23 CFR), *children* (Article 24 CFR), the *elderly* (Article 25 CFR), *persons with disabilities* (Article 26 CFR), *linguistic and religious minorities* (Article 22 CFR), and *LGBT* (Article 21 CFR).

7) Conclusions

The European justice system, in its legal rendition centred on the confrontation of legal norms devised to offer protection for human rights and promote European integration, is inevitably a complex one, which is prone to tensions and conflicts. This renders any ‘scientific’ assessment of its just or fair nature an illusory task, which can

³⁵² On the status of ratification of the CRPD, see http://www.un.org/disabilities/documents/2016/Map/DESA-Enable_4496R6_May16.jpg.

³⁵³ G. De Búrca, ‘The European Union in the negotiation of the UN Disability Convention’ (2010), 35:2 *European Law Review*, 174-196.

³⁵⁴ Eg European Disability Strategy 2010-2020.

³⁵⁵ Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals [2008] L348/98. For a commentary on its impact on the situation of irregular migrants, see Steve Peers, ‘The EU Return Directive? Does it improve or worsen the lives of irregular migrants?’ *EU law Analysis blog*, 28 March 2004, <http://eulawanalysis.blogspot.hu/2014/03/the-eus-returns-directive-does-it.html>.

³⁵⁶ See European Agenda on Migration, European Agenda on Security, etc.

only fail by over simplification or over complication, if not simple inaccuracy, given the breadth of rules involved and inconsistencies between them. However, a review of the way different legal orders ‘institutionalise’ justice claims, in terms of legal ‘rights’, although not only, can still help identify patterns, which may reveal particular conceptions of justice, and their evolution over time. In these conclusions, we only highlight some of the most evident trends, which will be further explored in the context of Deliverables 3.4-6, and in the final work package research synthesis.

The six substantive sections of this report collectively comprise the conceptual background paper that develops an analytical framework to guide the comparative case studies that constitute the next tasks of this ETHOS working group. In line with the general objective for the work package 3, ‘Law as or Against Justice for All?’, the focus is on justice as representation, redistribution and recognition as institutionalised in overlapping European human rights regimes. To this end, we have reviewed and conceptualises the conceptual framing of rights-theory (in Section 2), and explored the juridical content that is given to the rights of vulnerable persons in the overlapping European legal orders (Sections 4-6), with a particular, in-depth focus on the relevant EU level rules and policies (Section 6). Section 3 gives an overview of the complexities of understanding these overlapping legal orders, which is crucial both for interpreting the content of certain rights developed and the inter- and supranational level, and the imminent task of assessing these rights at the national and sub-national level in ETHOS deliverables 3.4-3.6. Complementing the background paper, analytic framework, and in-depth legal analysis, the questionnaire in Annex 2 completes the guidelines for partner researchers writing country reports on the right to vote, housing and education (to feed into the comparative reports).

An interesting development is the growing use, and relevance, of the notion of vulnerability. Developed in the context of human rights law, it is making its way into EU law, especially ‘soft law’. Even if not yet used in explicit Treaty provisions, it increasingly serves as a point of reference for the design of EU policies, and in the interpretation of EU law. One challenge posed by the increasing reference to vulnerability in EU law and ECtHR jurisprudence is that some argue that the term suggests passiveness and victimhood.

The right to vote for citizens is protected by international human rights instruments like the ICCPR, but still very much in the hands of domestic law-makers. Still, both the ECtHR and EU law are increasing pressure for a greater enfranchisement of immigrants, and mentally disabled persons, and for a partial re-enfranchisement of criminals (when these have been subject to exclusionary measures), thereby boosting representation of those

categories. The developing jurisprudence of the ECtHR gives particular weight to the principle of proportionality in assessing electoral exclusions. The CJEU, in its turn, has an increased role in upholding the right to vote since the Treaty of Maastricht (1992) developed the concept of 'EU citizenship'.

The right to housing, in international human rights law, is protected by the ICESCR which presents it as an objective for states to work towards. In the European realm, both access to housing and protection against the loss of one's home (eviction) started from a weak recognition but are gaining ground. European human rights law, and increasingly also EU law, encourage states to provide social housing, providing subsidized suitable housing at least for the most deprived and/or vulnerable (i.e. asylum-seekers, minorities). However, most European legal systems converge in targeting social housing towards the most needy, thus restraining more universality approach which strive towards securing affordable housing to all, which reveal a more liberal and less equalitarian notion of distributive justice. The inclusion of right to (social) housing into legislation triggers consequences for national authorities, who then become liable to deliver, based on the right to a fair trial and effective remedies. Moreover, legal provisions and judicial interpretations appear to place an increased emphasis on the recognitive dimension of the right to housing, which justifies a duty of state intervention and restrictions on private actors' competing rights (the 'loss of one's home' notion).

International and European law also have an increasing influence on the right to education, in terms of access to public/free education for all and inclusiveness, which partake to justice's recognitive dimension. International conventions like the Convention on the Rights of the Child and the Convention on the Rights to Persons with Disabilities put strong emphasis on inclusive education. These conventions, and European law, place some pressure for a greater recognition of migrant and minorities rights, although in more indirect and yet relatively 'timid' ways.

In all, there is a rise in relevance of international, European human rights and EU law in all legal fields under investigation. The way in which these legal orders interrelate can be considered a complexity challenge, to be understood as a pyramid, a network or otherwise. This complexity is managed by concepts like the 'the margin of appreciation' (for the European Court of Human Rights) and subsidiarity, supremacy and constitutional identity (EU law). What the interplay between legal systems means for the substance of a given right, however, depends on the national context – the focus of deliverables 3.4 -3.6.

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Annexes

Annex 1 – Extracts of relevant legal instruments and provisions

International human rights law

Voting

Art. 25 International Covenant on Civil and Political Rights

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

Art. 29: participation on political and public life

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

- a) To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:
 - i. Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;
 - ii. Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;
 - iii. Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;
- b) To promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:
 - i. Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;
 - ii. Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

*Housing***Art. 11.1 International Covenant on Economic, Social and Cultural Rights**

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

Art. 21 Refugee Convention

'As regards housing, the Contracting States, in so far as the matter is regulated by law or regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to aliens generally in the same circumstances.'

Art. 27 Convention on the Rights of the Child

1. States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.
2. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development.
3. States Parties, in accordance with national conditions and within their means, shall take appropriate measures to assist parents and others responsible for the child to implement this right and shall in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing.
4. States Parties shall take all appropriate measures to secure the recovery of maintenance for the child from the parents or other persons having financial responsibility for the child, both within the State Party and from abroad. In particular, where the person having financial responsibility for the child lives in a State different from that of the child, States Parties shall promote the accession to international agreements or the conclusion of such agreements, as well as the making of other appropriate arrangements.

Art. 28 Convention on the Rights of Persons living with Disabilities: Adequate standard of living and social protection

1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability.
2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:
 - a) To ensure equal access by persons with disabilities to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;

- b) To ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;
- c) To ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;
- d) To ensure access by persons with disabilities to public housing programmes;
- e) To ensure equal access by persons with disabilities to retirement benefits and programmes.

Education

Art. 13 International Covenant on Economic, Social and Cultural Rights

1. The States Parties to the present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.
2. The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right:
 - (a) Primary education shall be compulsory and available free to all;
 - (b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
 - (c) Higher education shall be made equally accessible to all, on the basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education;
 - (d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education;
 - (e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.
3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.
4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Art. 22 Refugee Convention

1. The Contracting States shall accord to refugees the same treatment as is accorded to nationals with respect to elementary education.
2. The Contracting States shall accord to refugees treatment as favourable as possible, and, in any event, not less favourable than that accorded to aliens generally in the same circumstances, with respect to education other than elementary education and, in particular, as regards access to studies, the recognition of foreign school certificates, diplomas and degrees, the remission of fees and charges and the award of scholarships.

Article 28 Convention on the Rights of the Child

1. States Parties recognize the right of the child to education, and with a view to achieving this right progressively and on the basis of equal opportunity, they shall, in particular:
 - (a) Make primary education compulsory and available free to all;
 - (b) Encourage the development of different forms of secondary education, including general and vocational education, make them available and accessible to every child, and take appropriate measures such as the introduction of free education and offering financial assistance in case of need;
 - (c) Make higher education accessible to all on the basis of capacity by every appropriate means;
 - (d) Make educational and vocational information and guidance available and accessible to all children;
 - (e) Take measures to encourage regular attendance at schools and the reduction of drop-out rates.
2. States Parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention.
3. States Parties shall promote and encourage international cooperation in matters relating to education, in particular with a view to contributing to the elimination of ignorance and illiteracy throughout the world and facilitating access to scientific and technical knowledge and modern teaching methods. In this regard, particular account shall be taken of the needs of developing countries.

Article 29 Convention on the Rights of the Child

1. States Parties agree that the education of the child shall be directed to:
 - (a) The development of the child's personality, talents and mental and physical abilities to their fullest potential;
 - (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
 - (c) The development of respect for the child's parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own;
 - (d) The preparation of the child for responsible life in a free society, in the spirit of understanding,

peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national and religious groups and persons of indigenous origin;

(e) The development of respect for the natural environment.

2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principle set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

Ethnic, religious or linguistic minorities

Art. 30 Convention on the Rights of the Child

In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language.

Council of Europe instruments

Right to Education

European Convention of Human Rights

ARTICLE 5 Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (d) the detention of a minor by lawful order for the purpose of educational supervision

Protocol 1, ARTICLE 2 Right to education

No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions

Revised European Social Charter

Article 7 – The right of children and young persons to protection

With a view to ensuring the effective exercise of the right of children and young persons to protection, the Parties undertake:

3 to provide that persons who are still subject to compulsory education shall not be employed in such work as would deprive them of the full benefit of their education;

Article 9 – The right to vocational guidance

With a view to ensuring the effective exercise of the right to vocational guidance, the Parties undertake to provide or promote, as necessary, a service which will assist all persons, including the handicapped, to solve problems related

to occupational choice and progress, with due regard to the individual's characteristics and their relation to occupational opportunity: this assistance should be available free of charge, both to young persons, including schoolchildren, and to adults.

Article 10 – The right to vocational training

With a view to ensuring the effective exercise of the right to vocational training, the Parties undertake:

1 to provide or promote, as necessary, the technical and vocational training of all persons, including the handicapped, in consultation with employers' and workers' organisations, and to grant facilities for access to higher technical and university education, based solely on individual aptitude;

2 to provide or promote a system of apprenticeship and other systematic arrangements for training young boys and girls in their various employments; 3 to provide or promote, as necessary: a adequate and readily available training facilities for adult workers; b special facilities for the retraining of adult workers needed as a result of technological development or new trends in employment; 4 to provide or promote, as necessary, special measures for the retraining and reintegration of the long-term unemployed; 5 to encourage the full utilisation of the facilities provided by appropriate measures such as: a reducing or abolishing any fees or charges; b granting financial assistance in appropriate cases; c including in the normal working hours time spent on supplementary training taken by the worker, at the request of his employer, during employment; d ensuring, through adequate supervision, in consultation with the employers' and workers' organisations, the efficiency of apprenticeship and other training arrangements for young workers, and the adequate protection of young workers generally.

Article 15 – The right of persons with disabilities to independence, social integration and participation in the life of the community

With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:

1 to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private;

Article 17 – The right of children and young persons to social, legal and economic protection

With a view to ensuring the effective exercise of the right of children and young persons to grow up in an environment which encourages the full development of their personality and of their physical and mental capacities, the Parties undertake, either directly or in co-operation with public and private organisations, to take all appropriate and necessary measures designed:

1 a to ensure that children and young persons, taking account of the rights and duties of their parents, have the care, the assistance, the education and the training they need, in particular by providing for the establishment or maintenance of institutions and services sufficient and adequate for this purpose;

2 to provide to children and young persons a free primary and secondary education as well as to encourage regular attendance at schools.

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

European Charter for Regional or Minority Languages

Article 8 – Education

- 1 With regard to education, the Parties undertake, within the territory in which such languages are used, according to the situation of each of these languages, and without prejudice to the teaching of the official language(s) of the State:
 - a
 - i to make available pre-school education in the relevant regional or minority languages; or
 - ii to make available a substantial part of pre-school education in the relevant regional or minority languages;
or
 - iii to apply one of the measures provided for under i and ii above at least to those pupils whose families so request and whose number is considered sufficient; or
 - iv if the public authorities have no direct competence in the field of pre-school education, to favour and/or encourage the application of the measures referred to under i to iii above;
 - b
 - i to make available primary education in the relevant regional or minority languages; or
 - ii to make available a substantial part of primary education in the relevant regional or minority languages; or
 - iii to provide, within primary education, for the teaching of the relevant regional or minority languages as an integral part of the curriculum; or
 - iv to apply one of the measures provided for under i to iii above at least to those pupils whose families so request and whose number is considered sufficient;
 - c
 - i to make available secondary education in the relevant regional or minority languages; or
 - ii to make available a substantial part of secondary education in the relevant regional or minority languages;
or
 - iii to provide, within secondary education, for the teaching of the relevant regional or minority languages as an integral part of the curriculum; or
 - iv to apply one of the measures provided for under i to iii above at least to those pupils who, or where appropriate whose families, so wish in a number considered sufficient;
 - d
 - i to make available technical and vocational education in the relevant regional or minority languages; or
 - ii to make available a substantial part of technical and vocational education in the relevant regional or minority languages; or
 - iii to provide, within technical and vocational education, for the teaching of the relevant regional or minority languages as an integral part of the curriculum; or
 - iv to apply one of the measures provided for under i to iii above at least to those pupils who, or where appropriate whose families, so wish in a number considered sufficient;
 - e
 - i to make available university and other higher education in regional or minority languages; or

- ii to provide facilities for the study of these languages as university and higher education subjects; or
 - iii if, by reason of the role of the State in relation to higher education institutions, sub-paragraphs i and ii cannot be applied, to encourage and/or allow the provision of university or other forms of higher education in regional or minority languages or of facilities for the study of these languages as university or higher education subjects;
- f
- i to arrange for the provision of adult and continuing education courses which are taught mainly or wholly in the regional or minority languages; or
 - ii to offer such languages as subjects of adult and continuing education; or
 - iii if the public authorities have no direct competence in the field of adult education, to favour and/or encourage the offering of such languages as subjects of adult and continuing education;
- g to make arrangements to ensure the teaching of the history and the culture which is reflected by the regional or minority language;
- h to provide the basic and further training of the teachers required to implement those of paragraphs a to g accepted by the Party;
- i to set up a supervisory body or bodies responsible for monitoring the measures taken and progress achieved in establishing or developing the teaching of regional or minority languages and for drawing up periodic reports of their findings, which will be made public.
- 2 With regard to education and in respect of territories other than those in which the regional or minority languages are traditionally used, the Parties undertake, if the number of users of a regional or minority language justifies it, to allow, encourage or provide teaching in or of the regional or minority language at all the appropriate stages of education.

Article 14 – Transfrontier exchanges

The Parties undertake:

- a to apply existing bilateral and multilateral agreements which bind them with the States in which the same language is used in identical or similar form, or if necessary to seek to conclude such agreements, in such a way as to foster contacts between the users of the same language in the States concerned in the fields of culture, education, information, vocational training and permanent education;

Framework Convention for the Protection of National Minorities

Article 6

1 The Parties shall encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and co-operation among all persons living on their territory, irrespective of those persons' ethnic, cultural, linguistic or religious identity, in particular in the fields of education, culture and the media.

2 The Parties undertake to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity.

Article 12

1 The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority. 2 In this context the Parties shall inter alia provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities. 3 The Parties undertake to promote equal opportunities for

access to education at all levels for persons belonging to national minorities.

Article 13

1 Within the framework of their education systems, the Parties shall recognise that persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments.

2 The exercise of this right shall not entail any financial obligation for the Parties.

Article 14

1 The Parties undertake to recognise that every person belonging to a national minority has the right to learn his or her minority language.

2 In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there is sufficient demand, the Parties shall endeavour to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.

3 Paragraph 2 of this article shall be implemented without prejudice to the learning of the official language or the teaching in this language.

Right to housing

European Social Charter

Part II

The Contracting Parties undertake, as provided for in Part III, to consider themselves bound by the obligations laid down in the following articles and paragraphs.

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 Contracting 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.

2. Additional Protocol of 1988 to the European Social Charter

Part II

The Parties undertake, as provided for in Part III, to consider themselves bound by the obligations laid down in the following articles:

Article 4 – Right of elderly persons to social protection With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

2. to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of: a. provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;

...

3. to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.

Revised European Social Charter

Part I

The Parties accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the following rights and principles may be effectively realised:

31 Everyone has the right to housing.

Part II

The Parties undertake, as provided for in Part III, to consider themselves bound by the obligations laid down in the following articles and paragraphs.

Article 15 – The right of persons with disabilities to independence, social integration and participation in the life of the community

With a view to ensuring to persons with disabilities, irrespective of age and the nature and origin of their disabilities, the effective exercise of the right to independence, social integration and participation in the life of the community, the Parties undertake, in particular:

- 3 to promote their full social integration and participation in the life of the community in particular through measures, including technical aids, aiming to overcome barriers to communication and mobility and enabling access to transport, housing, cultural activities and leisure.

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 23 – The right of elderly persons to social protection

With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular:

-- to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of:

- a provision of housing suited to their needs and their state of health or of adequate support for adapting their housing;

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;
 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.

Right to vote

European Convention of Human Rights

Article 3 of Protocol No. 1– Right to free elections

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Framework Convention for the Protection of National Minorities

Article 15

The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them.

European Union Law

Housing

EU Charter of Fundamental Rights

Article 7 CFR - Respect for private and family life

Everyone has the right to respect for his or her private and family life, home and communications.

Article 17 CFR – Right to property

Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest....

Article 21 CFR - Non-discrimination

1. *Any discrimination based on any ground such as 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 shall be prohibited.*

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, *any discrimination on grounds of nationality shall be prohibited.*

Article 34 CFR - Social security and social assistance

[...]2. *Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Union law and national laws and practices.*

3. In order to combat social exclusion and poverty, *the Union 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 Union law and national laws and practices.

Article 36 CFR- Access to services of general economic interest

The Union recognises and respects access to services of general economic interest as provided for in national laws and practices, in accordance with the Treaties, in order to promote the social and territorial cohesion of the Union.

Article 38 CFR- Consumer protection

Union policies shall ensure a high level of consumer protection.

Article 51 CFR- Field of application

1. The provisions of this Charter are addressed to the *institutions, bodies, offices and agencies of the Union* with due regard for the principle of subsidiarity and *to the Member States only when they are implementing Union law.*

...

Article 52 CFR- Scope and interpretation of rights and principles

[...] 5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall *be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.*

Treaty on the European Union

Article 3 TEU (ex Article 2 TEU)

[...] 2. The Union shall offer its citizens *an area of freedom, security and justice* without internal frontiers, in which the *free movement of persons* is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime....

Treaty on the Functioning of the European Union

Article 4 TFEU

[...] 2. *Shared competence* between the Union and the Member States applies in the following principal areas:

(a) *internal market;*

(b) *social policy, for the aspects defined in this Treaty;*

(f) *consumer protection*;...

(j) *area of freedom, security and justice*;

Article 6 TFEU

1. *The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.*

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be *interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter*, that set out the sources of those provisions.[...]

3. *Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.*

Article 9 TFEU

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, *the guarantee of adequate social protection, the fight against social exclusion*, and a high level of education, training and protection of human health.

Article 10 TFEU

In defining and implementing its policies and activities, the Union shall aim to *combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*.

Article 14 TFEU

Without prejudice to Article 4 of the Treaty on European Union or to Articles 93, 106 and 107 of this Treaty, and given the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, *the Union and the Member States, each within their respective powers and within the scope of application of the Treaties, shall take care that such services operate on the basis of principles and conditions, particularly economic and financial conditions, which enable them to fulfil their missions*. The European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall establish these principles and set these conditions without prejudice to the competence of Member States, in compliance with the Treaties, to provide, to commission and to fund such services.

Article 18 TFEU

Within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

Article 19 TFEU

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, *may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation*.

Article 20 TFEU

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:

(a) *the right to move and reside freely* within the territory of the Member States;...

Article 26 TFEU

[...] 2. The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.

Article 45 TFEU

1. *Freedom of movement for workers* shall be secured within the Union.(...)

Article 46 TFEU

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, issue directives or make regulations setting out the measures required to bring about freedom of movement for workers, as defined in Article 45, in particular:

(a) by ensuring close cooperation between national employment services;

(b) by abolishing those administrative procedures and practices and those qualifying periods in respect of eligibility for available employment, whether resulting from national legislation or from agreements previously concluded between Member States, the maintenance of which would form an obstacle to liberalisation of the movement of workers;

(c) by abolishing all such qualifying periods and other restrictions provided for either under national legislation or under agreements previously concluded between Member States as imposed on workers of other Member States conditions regarding the free choice of employment other than those imposed on workers of the State concerned;

(d) by setting up appropriate machinery to bring offers of employment into touch with applications for employment and to facilitate the achievement of a balance between supply and demand in the employment market in such a way as to avoid serious threats to the standard of living and level of employment in the various regions and industries.

Article 48 TFEU

The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure, *adopt such measures in the field of social security as are necessary to provide freedom of movement for workers*; to this end, they shall make arrangements to secure for employed and self-employed migrant workers and their dependants:

[...] (b) *payment of benefits* to persons resident in the territories of Member States.

Article 49 TFEU

Within the framework of the provisions set out below, *restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be prohibited. ...*

Freedom of establishment shall include the right to take up and pursue activities as self-employed persons and to set up and manage undertakings... under the conditions laid down for its own nationals by the law of the country where such establishment is effected, subject to the provisions of the Chapter relating to capital.

Article 106 TFEU

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in the Treaties, in particular to those rules provided for in Article 18 and Articles 101 to 109.
2. *Undertakings entrusted with the operation of services of general economic interest* or having the character of a revenue-producing monopoly shall be subject to the rules contained in the Treaties, in particular to the rules on competition, in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. ...

Article 107 TFEU

1. Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.
2. The following shall be compatible with the internal market:
 - (a) *aid having a social character*, granted to individual consumers, provided that such aid is granted without discrimination related to the origin of the products concerned;
 - (b) aid to make good the damage caused by natural disasters or exceptional occurrences;...

Article 151 TFEU

The Union and the Member States, having in mind *fundamental social rights* such as those set out in the *European Social Charter* signed at Turin on 18 October 1961 and in the *1989 Community Charter of the Fundamental Social Rights of Workers*, shall have as their objectives the promotion of employment, *improved living and working conditions*, so as to make possible their harmonisation while the improvement is being maintained, *proper social protection*, dialogue between management and labour, the development of human resources with a view to lasting high employment and the *combating of exclusion*.

To this end the Union and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy....

PROTOCOL (No 26) ON SERVICES OF GENERAL INTEREST

Article 1

The shared values of the Union in respect of services of general economic interest within the meaning of Article 14 of the Treaty on the Functioning of the European Union include in particular:

- the essential role and the wide discretion of national, regional and local authorities in providing, commissioning and organising services of general economic interest as closely as possible to the needs of the users;

- the diversity between various services of general economic interest and the differences in the needs and preferences of users that may result from different geographical, social or cultural situations;
- a high level of quality, safety and affordability, equal treatment and the promotion of universal access and of user rights.

Article 2

The provisions of the Treaties do not affect in any way the competence of Member States to provide, commission and organise non-economic services of general interest.

Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Social Security Coordination Regulation) [1971] OJ L 149/2

Article 3 - Equality of treatment

1. Subject to the special provisions of this Regulation, *persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State...*

Article 4 - Matters covered

(...)2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, ...

Article 90 - Housing allowances and family benefits introduced after the entry into force of this Regulation

Housing allowances ... shall not be granted to persons resident in the territory of a Member State other than the competent State.

Regulation (EU) No 492/2011 on freedom of movement for workers within the Union of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (Workers Regulation) [2011] OJ L 141/1

Article 9

1. A worker who is a national of a Member State and who is employed in the territory of another Member State shall enjoy all the rights and benefits accorded to national workers in matters of housing, including ownership of the housing he needs.

2. A worker referred to in paragraph 1 may, with the same right as nationals, put his name down on the housing lists in the region in which he is employed, where such lists exist, and shall enjoy the resultant benefits and priorities.

If his family has remained in the country whence he came, they shall be considered for this purpose as residing in the said region, where national workers benefit from a similar presumption.

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (EU Citizens Directive) [2004] OJ L 158/77

Article 7 – Right of residence for more than three months

1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:
 - (a) are workers or self-employed persons in the host Member State; or
 - (b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; ...
 - (d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).

2. The right of residence provided for in paragraph 1 shall extend *to family members who are not nationals of a Member State*, accompanying or joining the Union citizen in the host Member State, provided that such Union citizen satisfies the conditions referred to in paragraph 1(a), (b) or (c).

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:
 - (a) he/she is temporarily unable to work as the result of an illness or accident;...

Article 16 - General rule for Union citizens and their family members

1. Union citizens who have resided legally for a continuous period of five years in the host Member State shall have the *right of permanent residence* there. This right shall not be subject to the conditions provided for in Chapter III.

2. Paragraph 1 shall apply *also to family members who are not nationals of a Member State* and have legally resided with the Union citizen in the host Member State for a continuous period of five years.

Article 24 - Equal treatment

1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, *all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty*. The benefit of this right shall be *extended to family members who are not nationals of a Member State* and who have the right of residence or permanent residence.

2. By way of derogation from paragraph 1, the host Member State shall *not be obliged to confer entitlement to social assistance during the first three months of residence* or, where appropriate, the longer period provided for in Article 14(4)(b)...

Article 35 - Abuse of rights

Member States may adopt the necessary measures to refuse, terminate or withdraw any right conferred by this Directive in the case of abuse of rights or fraud, such as marriages of convenience. Any such measure shall be proportionate and subject to the procedural safeguards provided for in Articles 30 and 31.

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (Long Term Resident Directive) [2004] OJ L 1/44

Article 3 - Scope

1. This Directive applies to *third-country nationals residing legally in the territory of a Member State*.
2. This Directive does *not apply* to third-country nationals who:
 - ...(b) are authorised to reside in a Member State on the basis of *temporary protection* or have applied for authorisation to reside on that basis and are awaiting a decision on their status;
 - (c) are authorised to reside in a Member State on the basis of a *subsidiary form of protection* in accordance with international obligations, national legislation or the practice of the Member States or have applied for authorisation to reside on that basis and are awaiting a decision on their status;
 - (d) are *refugees or have applied for recognition as refugees* and whose application has not yet given rise to a final decision;...

Article 4 - Duration of residence

1. Member States shall grant *long-term resident status to third-country nationals who have resided legally and continuously within its territory for five years* immediately prior to the submission of the relevant application.

Article 11 - Equal treatment

1. Long-term residents shall enjoy *equal treatment with nationals* as regards:
 - [...](d) *social security, social assistance and social protection* as defined by national law;
 - (e) *tax benefits*;
 - (f) *access to goods and services* and the supply of goods and services made available to the public and to procedures for obtaining *housing*;
2. With respect to the provisions of paragraph 1, points (b), (d), (e), (f) and (g), the Member State concerned *may restrict equal treatment to cases where the registered or usual place of residence of the long-term resident, or that of family members for whom he/she claims benefits, lies within the territory of the Member State concerned*.
3. Member States may *restrict equal treatment with nationals* in the following cases:
 - [...] 4. Member States may limit equal treatment in respect of social assistance and social protection to *core benefits*.

Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251/12**Article 7**

1. When the application for family reunification is submitted, the Member State concerned may require the person who has submitted the application to provide evidence that the sponsor has:

- (a) accommodation regarded as normal for a comparable family in the same region and which meets the general health and safety standards in force in the Member State concerned;

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Reception Directive) [2013] OJ L 180/96**Article 12 - Families**

Member States shall take appropriate measures to maintain as far as possible *family unity* as present within their territory, if applicants are *provided with housing* by the Member State concerned. Such measures shall be implemented with the applicant's agreement.

Article 17 - General rules on material reception conditions and health care

1. Member States shall ensure that *material reception conditions are available to applicants when they make their application for international protection*.

2. Member States shall ensure that material reception conditions provide an *adequate standard of living* for applicants, which *guarantees their subsistence and protects their physical and mental health*.

Member States shall ensure that that standard of living is met in the *specific situation of vulnerable persons*, in accordance with Article 21, as well as in relation to the situation of persons who are in detention.

3. Member States *may make the provision* of all or some of the material reception conditions and health care *subject to the condition that applicants do not have sufficient means* to have a standard of living adequate for their health and to enable their subsistence.

4. Member States *may require applicants to cover or contribute to the cost of the material reception conditions and of the health care provided for in this Directive*, pursuant to the provision of paragraph 3, if the applicants have sufficient resources, for example if they have been working for a reasonable period of time [...]

5. Where Member States provide material reception conditions in the form of *financial allowances or vouchers*, the amount thereof shall be *determined on the basis* of the level(s) established by the Member State concerned either by law or by the practice *to ensure adequate standards of living for nationals*. Member States *may grant less favourable treatment to applicants* compared with nationals in this respect, in particular where material support is partially provided in kind or *where those level(s), applied for nationals, aim to ensure a standard of living higher than that prescribed for applicants under this Directive*.

Article 18 - Modalities for material reception conditions

1. Where housing is provided in kind, it should take one or a combination of the following forms:

- (a) premises used for the purpose of housing applicants during the examination of an application for international protection made at the border or in transit zones;
 - (b) accommodation centres which guarantee an adequate standard of living;
 - (c) private houses, flats, hotels or other premises adapted for housing applicants.
2. Without prejudice to any specific conditions of detention as provided for in Articles 10 and 11, in relation to housing referred to in paragraph 1(a), (b) and (c) of this Article Member States shall ensure that:
 - (a) applicants are guaranteed protection of their family life;...
3. Member States shall *take into consideration gender and age-specific concerns and the situation of vulnerable persons* in relation to applicants within the premises and accommodation centres referred to in paragraph 1(a) and (b).
4. Member States shall take *appropriate measures to prevent assault and gender-based violence*, including sexual assault and harassment, within the premises and accommodation centres referred to in paragraph 1(a) and (b).
5. Member States shall ensure, as far as possible, that *dependent adult applicants with special reception needs are accommodated together with close adult relatives* who are already present in the same Member State and who are responsible for them whether by law or by the practice of the Member State concerned.
6. Member States shall ensure that *transfers of applicants from one housing facility to another take place only when necessary*. Member States shall provide for the possibility for applicants to inform their legal advisers or counsellors of the transfer and of their new address.
7. Persons working in accommodation centres shall be *adequately trained and shall be bound by the confidentiality rules* provided for in national law in relation to any information they obtain in the course of their work.
8. *Member States may involve applicants in managing the material resources and non-material aspects of life in the centre* through an advisory board or council representing residents.
9. In duly justified cases, Member States may *exceptionally* set modalities for material reception conditions different from those provided for in this Article, for a reasonable period which shall be as short as possible, when:
 - (a) an assessment of the specific needs of the applicant is required, in accordance with Article 22;
 - (b) housing capacities normally available are temporarily exhausted.Such different conditions shall in any event cover basic needs.

Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Dublin III Regulation) [2013] OJ L 180/31.

Article 3 - Access to the procedure for examining an application for international protection

2. ... Where it is impossible to transfer an applicant to the Member State primarily designated as responsible *because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights of the European Union*, the determining Member State shall continue to examine the criteria set out in Chapter III in order to establish whether another Member State can be designated as responsible.

Article 17 - Discretionary clauses

1. By way of derogation from Article 3(1), each Member State may decide to examine an application for international protection lodged with it by a third-country national or a stateless person, even if such examination is not its responsibility under the criteria laid down in this Regulation.

The Member State which decides to examine an application for international protection pursuant to this paragraph shall become the Member State responsible and shall assume the obligations associated with that responsibility.

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Recast Qualification Directive) [2011] OJ L 337/9

Article 32 - Access to accommodation

1. Member States shall ensure that *beneficiaries of international protection have access to accommodation under equivalent conditions as other third-country nationals legally resident* in their territories.

2. While *allowing for national practice of dispersal* of beneficiaries of international protection, Member States shall endeavour to implement policies aimed at preventing discrimination of beneficiaries of international protection and at *ensuring equal opportunities regarding access to accommodation*.

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast);

Article 32:

...beneficiaries of international protection have access to accommodation under 'equivalent conditions as other third-country nationals legally resident in their territories' (**Qualification Directive**) [2011] OJ L 337/9.

Article 32 - Access to accommodation

1. Member States shall ensure that beneficiaries of international protection have access to accommodation under equivalent conditions as other third-country nationals legally resident in their territories.
2. While allowing for national practice of dispersal of beneficiaries of international protection, Member States shall endeavour to implement policies aimed at preventing discrimination of beneficiaries of international protection and at ensuring equal opportunities regarding access to accommodation.

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

Article 2 - Concept of discrimination

1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
2. For the purposes of paragraph 1:
 - (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;
 - (b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.
3. Harassment shall be deemed to be discrimination within the meaning of paragraph 1, when an unwanted conduct related to racial or ethnic origin takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

Article 3 - Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
 - (h) access to and supply of goods and services which are available to the public, including housing.
2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

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 (Access to Goods and Services Gender Equality Directive)[2004] OJ L 373/37

Article 3 - Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply *to all persons who provide goods and services, which are available to the public irrespective of the person concerned as regards both the public and private sectors, including public bodies*, and which are offered outside the area of private and family life and the transactions carried out in this context.
2. This Directive *does not prejudice the individual's freedom to choose a contractual partner as long as an individual's choice of contractual partner is not based on that person's sex.* [...]

Article 4 - Principle of equal treatment

1. For the purposes of this Directive, the principle of equal treatment between men and women shall mean that:
 - (a) there shall be no direct discrimination based on sex, including less favourable treatment of women for reasons of pregnancy and maternity;
 - (b) there shall be no indirect discrimination based on sex.
2. This Directive shall be without prejudice to more favourable provisions concerning the protection of women as regards pregnancy and maternity.
3. Harassment and sexual harassment within the meaning of this Directive shall be deemed to be discrimination on the grounds of sex and therefore prohibited. A person's rejection of, or submission to, such conduct may not be used as a basis for a decision affecting that person.
4. Instruction to direct or indirect discrimination on the grounds of sex shall be deemed to be discrimination within the meaning of this Directive.
5. This Directive shall not preclude differences in treatment, if the provision of the goods and services exclusively or primarily to members of one sex is justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts [1993] OJ L 95/29.

Article 3

1. *A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.*
2. A term shall always be regarded as not individually negotiated where it has been *drafted in advance and the consumer has therefore not been able to influence the substance of the term*, particularly in the context of a pre-formulated standard contract.

The fact that certain aspects of a term or one specific term have been individually negotiated shall not exclude the application of this Article to the rest of a contract if an overall assessment of the contract indicates that it is nevertheless a pre-formulated standard contract.

Where any seller or supplier claims that a standard term has been individually negotiated, the burden of proof in this respect shall be incumbent on him.

3. The Annex shall contain an indicative and non-exhaustive list of the terms which may be regarded as unfair.

Article 4

1. Without prejudice to Article 7, the unfairness of a contractual term shall be assessed, taking into account the nature of the goods or services for which the contract was concluded and by referring, at the time of conclusion of the contract, to all the circumstances attending the conclusion of the contract and to all the other terms of the contract or of another contract on which it is dependent.

2. Assessment of the unfair nature of the terms shall relate neither to the definition of the main subject matter of the contract nor to the adequacy of the price and remuneration, on the one hand, as against the services or goods supplied in exchange, on the other, in so far as these terms are in plain intelligible language.

Article 6

1. Member States shall lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

2. Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.

Article 7

1. Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or suppliers.

2. The means referred to in paragraph 1 shall include provisions whereby persons or organizations, having a legitimate interest under national law in protecting consumers, may take action according to the national law concerned before the courts or before competent administrative bodies for a decision as to whether contractual terms drawn up for general use are unfair, so that they can apply appropriate and effective means to prevent the continued use of such terms.

3. With due regard for national laws, the legal remedies referred to in paragraph 2 may be directed separately or jointly against a number of sellers or suppliers from the same economic sector or their associations which use or recommend the use of the same general contractual terms or similar terms.

European Commission Recommendation, 'Investing in children: breaking the cycle of disadvantage, recommendation 2013/112/EU Brussels' [2013] OJ L59/5

...Provide for adequate living standards through a combination of benefits

— Make it possible for children to enjoy adequate living standards that are compatible with a life in dignity, through an optimal combination of cash and in-kind benefits:

— Support family incomes through adequate, coherent and efficient benefits, including fiscal incentives, family and child benefits, housing benefits and minimum income schemes;

Provide children with a safe, adequate housing and living environment — Allow children to live and grow up in a safe, healthy and child-friendly environment that supports their development and learning needs:

— Make it possible for families with children to live in affordable, quality housing (including social housing), address situations of exposure to environmental hazards, overcrowding and energy poverty;

— Support families and children at risk of homelessness by avoiding evictions, unnecessary moves, separation from families as well as providing temporary shelter and long-term housing solutions;

— Pay attention to children’s best interests in local planning; avoid ‘ghettoisation’ and segregation by promoting a social mix in housing as well as adequate access to public transport;

Reduce children’s harmful exposure to a deteriorating living and social environment to prevent them from falling victim to violence and abuse

Education

EU Charter of Fundamental Rights

Article 14 - Right to Education

1. *Everyone has the right to education and to have access to vocational and continuing training.*
2. This right includes the possibility to receive *free compulsory education*.
3. *The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.*

Article 16 – Right to conduct a business

The freedom to conduct a business in accordance with Community law and national laws and practices is recognised.

Article 21 Non-Discrimination

1. Any discrimination based on any ground such as 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 shall be prohibited.
2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.

Article 24 – Right of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Treaty on the European Union**Article 3 TEU**

The Union shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

Treaty on the Functioning of the European Union**Article 6 TFEU**

The Union shall have competence to carry out actions to support, coordinate or supplement the actions of the Member States. The areas of such action shall, at European level, be: ...

- (e) education, vocational training, youth and sport;...

Article 9 TFEU

In defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training and protection of human health.

Article 19 TFEU

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, *may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.*

Article 165 TFEU

1. The Union shall *contribute to the development of quality education* by encouraging cooperation between Member States and, if necessary, by supporting and supplementing their action, while fully respecting the responsibility of the Member States for the content of teaching and the organisation of education systems and their cultural and linguistic diversity.

The Union shall contribute to the promotion of European sporting issues, while taking account of the specific nature of sport, its structures based on voluntary activity and its social and educational function.

2. Union action shall be aimed at:

- *developing the European dimension* in education, particularly through the teaching and dissemination of the *languages* of the Member States,
- *encouraging mobility* of students and teachers, by encouraging inter alia, the academic recognition of diplomas and periods of study,
- promoting *cooperation between educational establishments*,
- developing *exchanges of information and experience* on issues common to the education systems of the Member States,
- encouraging the development of *youth exchanges and of exchanges of socio-educational instructors*, and encouraging the participation of young people in democratic life in Europe,
- encouraging the *development of distance education*,
- *developing the European dimension in sport*, by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports, and by protecting the physical and moral integrity of sportsmen and sportswomen, especially the youngest sportsmen and sportswomen.

Article 166 TFEU

1. The Union shall implement a vocational training policy which shall support and supplement the action of the Member States, while fully respecting the responsibility of the Member States for the content and organisation of vocational training.
2. Union action shall aim to:
 - facilitate adaptation to industrial changes, in particular through vocational training and retraining,
 - improve initial and continuing vocational training in order to facilitate vocational integration and reintegration into the labour market,
 - *facilitate access to vocational training and encourage mobility of instructors and trainees and particularly young people*,
 - stimulate cooperation on training between educational or training establishments and firms,
 - develop exchanges of information and experience on issues common to the training systems of the Member States.
3. The Union and the Member States shall foster cooperation with third countries and the competent international organisations in the sphere of vocational training.

Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union Text with EEA relevance OJ L 141, 27.5.2011, p. 1–12

Article 10

The children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory.

Member States shall encourage *all efforts to enable such children to attend these courses under the best possible conditions.*

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) OJ L 158, 30.4.2004, p. 77–123

Article 24 - Equal treatment

1. Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy *equal treatment with the nationals of that Member State within the scope of the Treaty*. The benefit of this right shall be extended to *family members who are not nationals* of a Member State and who have the right of residence or permanent residence.
2. By way of derogation from paragraph 1, the host Member State shall *not be obliged to confer entitlement to social assistance during the first three months of residence* or, where appropriate, the longer period provided for in Article 14(4)(b), *nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.*

Council Directive 77/486/EEC of 25 July 1977 on the education of the children of migrant workers [1977] OJ L199/32

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (Long Term Resident Directive) [2004] OJ L 1/44

Article 11 - Equal treatment

1. Long-term residents shall enjoy equal treatment with nationals as regards:
 - ...(b) education and vocational training, including study grants in accordance with national law;...
2. With respect to the provisions of paragraph 1, points (b), (d), (e), (f) and (g), the Member State concerned may *restrict equal treatment to cases where the registered or usual place of residence of the long-term resident, or that of family members for whom he/she claims benefits, lies within the territory of the Member State concerned.*
3. Member States may *restrict equal treatment with nationals* in the following cases: ...
 - (b) Member States may require *proof of appropriate language proficiency* for access to education and training. Access to university may be subject to the fulfilment of *specific educational prerequisites.*
4. Member States may *limit equal treatment in respect of social assistance and social protection to core benefits....*

Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (Recast Qualification Directive) [2011] OJ L 337/9

Article 27 - Access to education

1. Member States shall grant *full access to the education system* to all minors granted international protection, under the same conditions as nationals.
2. Member States shall allow adults granted international protection access to the general education system, further training or retraining, under the same conditions as third-country nationals legally resident.

Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (Reception Directive) [2013] OJ L 180/96

Article 14 - Schooling and education of minors

1. Member States shall grant to *minor children of applicants and to applicants who are minors access to the education system under similar conditions as their own nationals for so long as an expulsion measure against them or their parents is not actually enforced*. Such education may be provided in accommodation centres.

The Member State concerned may stipulate that such access must be *confined to the State education system*.

Member States shall not withdraw secondary education for the sole reason that the minor has reached the age of majority.

2. *Access to the education system shall not be postponed for more than three months from the date on which the application for international protection was lodged by or on behalf of the minor.*

Preparatory classes, including language classes, shall be provided to minors where it is necessary to facilitate their access to and participation in the education system as set out in paragraph 1.

3. Where access to the education system as set out in paragraph 1 is not possible due to the specific situation of the minor, the Member State concerned shall offer *other education arrangements* in accordance with its national law and practice.

Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing [2016] OJ L 132/21.

Article 7

General conditions

1. As regards the admission of a third-country national under this Directive, the applicant shall:

- (a) present a valid travel document, as determined by national law, and, if required, an application for a visa or a valid visa or, where applicable, a valid residence permit or a valid long-stay visa; Member States may require the period of validity of the travel document to cover at least the duration of the planned stay;
 - (b) if the third-country national is a minor under the national law of the Member State concerned, present a parental authorisation or an equivalent document for the planned stay;
 - (c) present evidence that the third-country national has or, if provided for in national law, has applied for sickness insurance for all risks normally covered for nationals of the Member State concerned; the insurance shall be valid for the duration of the planned stay;
 - (d) provide evidence, if the Member State so requires, that the fee for handling the application provided for in Article 36 has been paid;
 - (e) provide the evidence requested by the Member State concerned that during the planned stay the third-country national will have sufficient resources to cover subsistence costs without having recourse to the Member State's social assistance system, and return travel costs. The assessment of the sufficient resources shall be based on an individual examination of the case and shall take into account resources that derive, *inter alia*, from a grant, a scholarship or a fellowship, a valid work contract or a binding job offer or a financial undertaking by a pupil exchange scheme organisation, an entity hosting trainees, a voluntary service scheme organisation, a host family or an organisation mediating *au pairs*.
2. Member States may require the applicant to provide the address of the third-country national concerned in their territory.
- Where the national law of a Member State requires an address to be provided at the time of application and the third-country national concerned does not yet know the future address, Member States shall accept a temporary address. In such a case, the third-country national shall provide his or her permanent address at the latest at the time of the issuance of an authorisation pursuant to Article 17.
3. Member States may indicate a reference amount which they regard as constituting 'sufficient resources' as referred to under point (e) of paragraph (1). The assessment of the sufficient resources shall be based on an individual examination of the case.
4. The application shall be submitted and examined either when the third-country national concerned is residing outside the territory of the Member State to which the third-country national wishes to be admitted or when the third-country national is already residing in that Member State as holder of a valid residence permit or long-stay visa.
- By way of derogation, a Member State may accept, in accordance with its national law, an application submitted when the third-country national concerned is not in possession of a valid residence permit or long-stay visa but is legally present in its territory.
5. Member States shall determine whether applications are to be submitted by the third-country national, by the host entity, or by either of the two.
6. Third-country nationals who are considered to pose a threat to public policy, public security or public health shall not be admitted.

Article 12 -Specific conditions for school pupils

1. In addition to the general conditions laid down in Article 7, as regards the admission of a third-country national for the purpose of a pupil exchange scheme or an educational project, the applicant shall provide evidence:
 - (a) that the third-country national is neither below the minimum nor above the maximum age or grade set by the Member State concerned;
 - (b) of acceptance by an education establishment;
 - (c) of participation in a recognised, state or regional programme of education in the context of a pupil exchange scheme or educational project operated by an education establishment in accordance with national law or administrative practice;
 - (d) that the education establishment, or, insofar as provided for by national law, a third party accepts responsibility for the third-country national throughout the stay in the territory of the Member State concerned, in particular as regards study costs;
 - (e) that the third-country national will be accommodated throughout the stay by a family, in a special accommodation facility within the education establishment or, insofar as provided for by national law, in any other facility meeting the conditions set by the Member State concerned and selected in accordance with the rules of the pupil exchange scheme or educational project in which the third-country national is participating.
2. Member States may limit the admission of school pupils participating in a pupil exchange scheme or educational project to nationals of third countries which offer the same possibility for their own nationals.

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

Article 3 - Scope

1. Within the limits of the powers conferred upon the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
 - (g) education;
2. This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

Communication from the Commission on the application of the European Union State aid rules to compensation granted for the provision of services of general economic interest [2012] OJ C 8/02.

(26) Case-law of the Union has established that public education organised within the national educational system funded and supervised by the State may be considered as a noneconomic activity. ...

27. According to the same case-law, the non-economic nature of public education is in principle not affected by the fact that pupils or their parents sometimes have to pay tuition or enrolment fees which contribute to the operating expenses of the system. Such financial contributions often only cover a fraction of the true costs of the service and can thus not be considered as remuneration for the service provided. They therefore do not alter the non-economic nature of a general education service predominantly funded by the public purse (2). These principles can cover public educational services such as vocational training (...), private and public primary schools (...) and kindergartens (...),

(28) Such public provision of educational services must be distinguished from services financed predominantly by parents or pupils or commercial revenues.....

European Commission Recommendation, 'Investing in children: breaking the cycle of *disadvantage*, recommendation 2013/112/EU Brussels' [2013] OJ L59/5

Intensify efforts to ensure that all families, including those in vulnerable situations and living in disadvantaged areas, have effective access to affordable, quality early childhood education and care;

Complement cash income support schemes with in-kind benefits related in particular to nutrition, childcare, education, health, housing, transport and access to sports or socio-cultural activities;

Reduce inequality at a young age by investing in early childhood education and care — Further develop the social inclusion and development potential of early childhood education and care (ECEC), using it as a social investment to address inequality and challenges faced by disadvantaged children through early intervention:

- Provide access to high-quality, inclusive early childhood education and care; ensure its affordability and adapt provision to the needs of families;
- Incentivise the participation of children from a disadvantaged background (especially those below the age of three years), regardless of their parents' labour market situation, whilst avoiding stigmatisation and segregation;
- Support parents in their role as the main educators of their own children during the early years and encourage ECEC services to work closely with parents and community actors involved in the child's upbringing (such as health and parenting support services);
- Raise parents' awareness of the benefits of participation in ECEC programmes for their children and themselves; Use ECEC as an early-warning system to identify family or school-related physical or psychological problems, special needs or abuse.

Improve education systems' impact on equal opportunities — Increase the capacity of education systems to break the cycle of disadvantage, ensuring that all children can benefit from inclusive high quality education that promotes their emotional, social, cognitive and physical development:

- Provide for the inclusion of all learners, where necessary by targeting resources and opportunities towards the more disadvantaged, and adequately monitor results;
- Recognise and address spatial disparities in the availability and quality of educational provision and in educational outcomes; foster desegregation policies that strengthen comprehensive schooling;
- Create an inclusive learning environment by strengthening the link between schools and parents, and provide if necessary personalised support to compensate for specific disadvantages, through for instance

training for parents of migrant and ethnic minority children;

- Address barriers which stop or seriously hinder children from attending or completing school (such as additional financial fees in compulsory education) by providing targeted educational aid in a supportive learning environment;
- Improve the performance of students with low basic skills by reinforcing the learning of literacy, numeracy and basic maths and science, and ensuring early detection of low achievers;
- Develop and implement comprehensive policies to reduce early school leaving which encompass prevention, intervention and compensation measures; ensure that these policies include measures for those at risk of early school leaving;
- Strengthen equality legislation and guarantee the most marginalised learners the basic right to receive a quality minimum qualification;
- Revise and strengthen the professional profile of all teaching professions and prepare teachers for social diversity; deploy special cultural mediators and role models to facilitate the integration of Roma and children with an immigrant background.

Vote

Treaty on the European Union

Article 10 TEU

1. The functioning of the Union shall be founded on *representative democracy*.
2. Citizens are *directly represented* at Union level in the European Parliament.(...)
3. *Every citizen shall have the right to participate in the democratic life of the Union*. Decisions shall be taken as openly and as closely as possible to the citizen. (...)

Article 14 TEU

- (...) 2. The European Parliament shall be composed of *representatives of the Union's citizens*. ...
3. The members of the European Parliament shall be elected for a term of five years by *direct universal suffrage* in a free and secret ballot.(...)

Treaty on the Functioning of the European Union

Article 20 TFEU

1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia: (...)

(b) the right to vote and to stand as candidates in elections to the European Parliament and in municipal elections *in their Member State of residence*, under the same conditions as nationals of that State;...

Article 22 TFEU

1. Every citizen of the Union residing in a Member State *of which he is not a national* shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 223(1) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State *of which he is not a national* shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously in accordance with a special legislative procedure and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Article 223 TFEU

1. The European Parliament shall draw up a proposal to lay down the provisions necessary for the election of its Members by *direct universal suffrage* in accordance with a *uniform procedure* in all Member States or in accordance with principles common to all Member States....

Article 39 CFR - Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

EU Charter of Fundamental Rights

Article 21 CFR – Non-discrimination

1. Any discrimination based on based on any ground such as 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 shall be prohibited.
2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article 26 CFR - Integration of persons with disabilities

The Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.

Article 39 CFR Right to vote and to stand as a candidate at elections to the European Parliament

1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.

Article 40 CFR - Right to vote and to stand as a candidate at municipal elections

Every citizen of the Union has the right to vote and to stand as a candidate at municipal elections in the Member State in which he or she resides under the same conditions as nationals of that State.

Act of 20 September 1976 concerning the election of the representatives of the Assembly by direct universal suffrage [1976] OJ L 278/5;

Council Decision of 25 June 2002 and 23 September 2002 amending act of 20 September 1976 [2002] OJ L 283/1.

Council Directive 93/109/EC of 6 December 1993 laying down detailed arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals [1993] OJ L 329/x, as amended by **Council Directive 2013/1/EU of 20 December 2012 [2013]** OJ L 26/x

Annex 2 – Questionnaires for Case studies D.3.4 (right to vote), D3.5 (right to housing), D3.6 (right to education)

Practical instructions and methodological issues for all case studies.

The research for this particular deliverable consists primarily in what is known as ‘black-letter’, doctrinal legal research. We are focussed on ‘what the law says’ (the ‘law in books’), and how it is interpreted by those with interpretative authorities (essentially courts) and *not* whether it is applied (or not) in practice, or the kind of impact it has on society. The aim of analysis is to map out how justice is institutionalized in law, through a focus on selected rights/vulnerable groups.

The focus of the research is on hard law, that is legally binding norms (Constitution, legislations, regulations, decrees, authoritative court decisions, etc.), but to the extent that soft law instruments are relevant and influential in guiding practices, it would be important to include them in the review.

Although the focus is on substantive rights, procedural and institutional aspects matters, in particular in terms of understanding who can mobilise law and rights, when and how, in order to pursue justice claims. Therefore, information on ‘admissibility issues’ such as standing rights, judicial procedures and remedies, costs, etc is important. Moreover, any empirical information on who has actively sought to mobilize particular legal instruments in order to achieve justice (eg NGOs particular active in litigating certain rights, etc) is welcome.

To minimise unnecessary research work and focus efforts on looking for information not readily available in English, ‘national rapporteurs’ are encouraged to identify and exploit existing studies, reports, and other synthetic analyses and critical assessments on their country’s performance in relation to the selected right and the selected vulnerable groups or persons, which help address (some of) the questions, as much as possible, appropriately referencing them. Examples include: opinions of the Venice Commission; reports by the EU Fundamental Rights Agency, the European Committee on Social Rights; documents produced in the context of the Universal Period Review (UN Human Rights Council); Country and shadow reports in the context of the CRC, CESCR and CRPD, UN Special Rapporteurs reports; OSCE recommendations; NGOs reports, etc.

Where these do not provide for relevant or up-to-date answers, please try to identify relevant legal rules using legal textbooks and available legal databases/search tools.

Please follow the structure of the questionnaire for the presentation of national report, to make it easier for the task coordinators to understand the relevance of the findings and prepare the national report. Use cross-referencing between answers only when necessary, to avoid undue repetitions.

We do not impose a very strict time frame. The focus should however be on the recent period, and in particular the period starting with the economic and financial crisis (2008-2018), but if there were changes that were particularly significant and important prior to that, please mention them and provide some details.

Please provide lists of references, including a separate bibliography, list of legislation and list of cases (these will be integrated into a database). Use the [OSCOLA](#) reference style.

Special note on Turkey and EU law: As Turkey is not an EU member state, it is not bound by its law. However, in section of the report dedicated to EU law, the rapporteur for Turkey could provide information on whether Turkey has transposed/implemented in domestic law some of the EU instruments and legislation as part of the *acquis communautaire*, in the view of accession or within the context of special EU-Turkey agreements.

Not all country reports are required to focus on all groups of vulnerable persons. All country teams are to focus on the position of the disabled vis-à-vis all three rights (to vote, housing and education). In addition, there is a focus on one additional vulnerable group that is especially relevant (in terms of its vulnerability) for the particular right concerned (to housing, voting and education) in the particular country. This approach allows for a combination of data that is comparative and detailed while giving adequate attention for country-specific manifestations of (in)justice in the law. Collectively, the country reports will need to research each vulnerable group listed in the description of work for each right, so the choice over which vulnerable group to research additionally to disabled persons is not a free choice. Please check with the coordinators if you are unsure which additional vulnerable group you ought to focus on for each right. Please disregard parts of questions that are tailored to a vulnerable group that you are not researching for any particular right.

D3.4. Right to vote: focus on franchise for refugees, asylum-seekers, foreign residents, citizens living abroad, persons with disabilities and criminals/prisoners.

Note: this report focuses on the right to vote, and does not include the right to be elected.

You may want to check:

- United-Nations Universal Period Review on right to vote for your country: <https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>
- Human Rights Committee: Concluding Observations on your latest country report: <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>
- Committee on the Rights of People with Disabilities, Concluding Observations on your latest country report: <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>
- Council of Europe, Committee of Ministers' report on the execution of rulings: <https://www.coe.int/en/web/execution>
- European Court of Human Rights, case law database: https://www.echr.coe.int/Pages/home.aspx?p=caselaw&c=#n14597620384884950241259_pointer
- EU Fundamental Rights Agency, *Children rights to vote* (<http://fra.europa.eu/en/publication/2017/mapping-minimum-age-requirements/right-to-vote>)
- EU Fundamental Rights Agency, *Charterpedia website: national case law on Article 39* (Vote – EP elections) <http://fra.europa.eu/en/charterpedia/article/39-right-vote-and-stand-candidate-elections-european-parliament> and Article 40 TFEU (Vote – local elections): <http://fra.europa.eu/en/charterpedia/article/40-right-vote-and-stand-candidate-municipal-elections>
- EU Fundamental Rights Agency *Right to political participation for persons with disabilities* (2014): HR indicators <http://fra.europa.eu/en/publication/2014/right-political-participation-persons-disabilities-human-rights-indicators>
- EU Fundamental Rights Agency, *Together in the EU - Promoting the participation of migrants and their descendants* (2017) <http://fra.europa.eu/en/publication/2017/migrant-participation>

1. National legal framework

1.1. Constitutional protection?

Does *national constitutional law protect the right to vote*, and if so, in which terms (as elaborated through judicial interpretation, where relevant)? Please report on any corresponding *state obligations* to enable the exercise of the right to vote. If not protected under national constitutional law, which national legal framework (eg legislation, case law) grants protection to the right to vote and lay down any corresponding state positive obligations to enable the right to vote.

1.2 General national rules

Please summarise the *national legal framework* determining *who has the right to vote* (franchise) in which local/state, national/federal (legislative, as well presidential if relevant), and European elections, as well as, where relevant, in referenda, according to national constitutional or legislative/executive/administrative provisions, and relevant judicial interpretation? Please also include any exclusion rules (e.g disenfranchisement, voting bans, etc).

1.3. Specific rules targeting selected groups

Provide details on any *specific rules targeting our selected groups*, namely refugees/asylum-seekers, foreign residents, citizens living abroad, persons living with disabilities (including mental disabilities), and criminals/prisoners. Does national law impose particular obligations on the state in order to guarantee the exercise of the right to vote to those who are entitled to vote? Pay particular attention to measures aiming at guaranteeing the exercise of the right to vote of disabled persons, citizens living abroad, prisoners, older persons, etc.

1.4 Specific rules concerning citizens of former colonies

Are there any specific regimes for citizens of former colonies or current overseas territories?

1.5 Constitutional challenges

Have national/local rules set out in legislation, regulations or other binding legal measures been challenged for incompatibility with national constitutional norms? If so, which ones, and with what effect? [If information is easily accessible, can you also indicate who were the parties challenging those rules? Have certain national rules contested by societal actors but not challenged before courts?]

1.6 Relevant institutional and procedural aspects

If certain institutional aspects (eg judicial review) or procedural rules (eg standing) are important in order to understand how the right to vote is protected under domestic law, please provide relevant details (200 words or a reference to accessible English language material presenting it in a relevant, synthetic and concise manner).

2. Impact of international/European law

2.1 Challenges to national rules based on international instruments

Have rules on the right to vote set out in national constitutional documents, legislation, regulations or other binding legal measures been challenged *by reference to international instruments* (notably the ICCPR and CRPD). With what effect? Please refer to background paper (Deliverable 3.3), Section 4) Justice in the Rights to Vote, Housing and Education in International Law for relevant information.

Have international monitoring bodies adopted opinions/decision on the compatibility of those rules with international law? Did it result in changes in national law?

2.2 Challenges to national rules based on European (Council of Europe) instruments?

Have national rules set out in national constitutional documents, legislation, regulations or other binding legal measures been *challenged by reference to the Council of Europe's law*, in particular ECHR Article 3 Protocol 1, but also other ECHR provisions.

Have any cases concerning the right to vote in your country been taken to/decided upon by the ECtHR? With what effect? Was national law adjusted to comply with the ECtHR decision(s)? Please refer to background paper (Deliverable 3.3), section Please refer to background paper (Deliverable 3.3), section 5) Justice in the Rights to Vote, Housing and Education in Council of Europe Law) for relevant information.) for relevant information.

2.3 Challenges to national rules based on EU law

Has *EU law* (in particular Article 24(3) TEU, Articles 20 and 22(b) TFEU, and Articles 39-40 EU CFR) been invoked before domestic courts to challenge national rules *de lege* or *de facto* disenfranchising certain categories of

persons (disabled, criminals, prisoners, expats, foreign residents, etc).

Has the right to vote in your country been subject to European Commission investigation under Article 268-269 TFEU procedure or a decision of the CJEU? With what effect? Please refer to background paper (Deliverable 3.3), section 6) Justice in the Rights to Vote, Housing and Education in European Union Law for relevant information.

2.4. Relevant institutional and procedural aspects

Please provide necessary information concerning the incorporation and position/authority of international law, Council of Europe's instruments, and EU law in your country, which is of relevant to understand the protection of the right to vote in your country? In particular, does you state follow a monist or dualist approach? Can national courts invalidate/set aside national laws against international, Council of Europe and EU instruments? To what extent are the relevant provisions of international law granted direct effect?

3. Right to vote, justice as representation and vulnerability

3.1 Right to vote and justice as representation

When reviewing the national legal framework and, where relevant, the domestic engagement with international and European norms, could you identify arguments proposing different conceptions of justice as representation. Please specify whether these were part of court's reasoning or parties' arguments, and if the latter, provide any relevant information that could help evaluate who mobilized the law to achieve greater justice (eg NGOs, etc.).

Please refer to background paper (Deliverable 3.3), section 2) Subsection: Justice as Representation and the Right to Vote for relevant information.

3.2 Vulnerability and the right to vote

Does the concept of vulnerability play a role in protecting the right to vote or defining who is entitled to vote and how in your country? Please explain how, and provide some representative illustrations.

Please refer to background paper (Deliverable 3.3), section 3) Vulnerability as a human rights law concept for relevant information.

D3.5. Right to housing: focus on refugees/asylum-seekers, undocumented migrants, persons with disabilities, disabled, ethnics and religious minorities)

This report focuses on **access to social housing/housing benefits** and **protection from eviction**.

Please check:

- United-Nations, Universal Period Review on right to vote for your country: <https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>
- United-Nations Human Rights Committee, Concluding Observations on your latest country report: <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>
- United-Nations Committee on Economic and Social Rights, concluding observation on your last country report: <https://www.ohchr.org/EN/HRBodies/CESCR/pages/cescrindex.aspx>
- United-Nations Committee on the Rights of the Child, last country report: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>
- Committee on the Rights of People with Disabilities, Concluding Observations on your latest country report: <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>
- Committee on elimination of racial discrimination, latest country report: <https://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx>
- Committee against Torture, latest country report: <https://www.ohchr.org/EN/HRBodies/CAT/Pages/CATIndex.aspx>
- Special Rapporteur on the Right to Adequate Housing, report <https://www.ohchr.org/EN/Issues/Housing/Pages/HousingIndex.aspx>
- United-Nations Habitat: Advisory group on forced eviction, documents
- Council of Europe, Committee of Ministers' report on the execution of rulings: <https://www.coe.int/en/web/execution>
- European Court of Human Rights, case law database: https://www.echr.coe.int/Pages/home.aspx?p=caselaw&c=#n14597620384884950241259_pointer
- European Committee on Social Rights, latest country report: <https://www.coe.int/en/web/turin-european-social-charter/european-committee-of-social-rights>
- EU Fundamental Rights Agency, Charterpedia, national case law on Article 34 (social security and assistance) <http://fra.europa.eu/en/charterpedia/article/34-social-security-and-social-assistance> ; Article 37 (Consumer protection) <http://fra.europa.eu/en/charterpedia/article/38-consumer-protection> ; Article 7 (privacy) <http://fra.europa.eu/en/charterpedia/article/7-respect-private-and-family-life>

- EU Fundamental Rights Agency, The situation of Roma citizens moving and settling in other member states, <http://fra.europa.eu/en/publication/2010/situation-roma-eu-citizens-moving-and-settling-other-eu-member-states>
- European Union, European Website on Integration, Analysis of immigrant housing in Europe: <https://ec.europa.eu/migrant-integration/intdossier/ewsi-analysis-immigrant-housing-in-europe>
- European migration network, The organization of reception facilities for asylum seekers in different member states: <https://ec.europa.eu/migrant-integration/librarydoc/the-organisation-of-reception-facilities-for-asylum-seekers-in-different-member-states>

1. National legal framework

1.1. Constitutional protection

Does *national constitutional law protect*, either through explicit textual reference or by means of authoritative interpretation, *any right to (social) housing, or housing assistance, or any other form of protection of the home*. If so, in which terms? If not, how is the right to (social) housing or social assistance protected? Are there any corresponding state obligations of a constitutional nature?

How strong is the protection afforded to the right to property or the right to carry out a business under domestic law? To what extent can it be limited to pursue social objectives (eg affordable housing) or interest, including the protection of one's home?

1.2 (Social) housing policy

Please provide some general information on the provision of social housing/housing assistance in your member state (social housing stock, measures to promote construction and maintenance of social housing stock, social rental agencies, housing benefits, etc), and/or refer to synthetic materials easily available in English.

1.3 General national rules

Does national law provide for an 'enforceable' right to (social) housing? If so, in what terms? Please provide necessary details of its recognition and implementation.

Please summarise the *national (and/or where relevant local/regional) legal framework* determining who

is *entitled to social housing* and under which conditions (including rules related to access but also termination of social housing). Given that social housing comes in limited supply, pay particular attention to ‘priority’ rules and procedural mechanisms.

Please summarise the *national (and/or where relevant local/regional) legal framework* determining who is entitled to housing assistance in the form of housing benefits in cash, tax credits, vouchers, rent support, etc.

Please summarise the *national legal framework* regulating eviction. Pay attention to different ‘types’ of eviction, including eviction from rented properties for unpaid rent/bills, eviction from ‘illegally’ occupied properties (eg squats, camps), eviction from public properties (eg evacuation of Roma or ‘refugee’ camps), eviction from public or private properties for regeneration/beautification projects, gentrification programs, eviction in the context of mortgage foreclosure or housing repossession procedure, etc.

1.4. Specific rules targeting selected groups

Are they *specific rules targeting our selected groups* (refugees, asylum-seekers, undocumented migrants, persons living with disabilities, ethnic and religious minorities) with regard to access to social housing/housing benefits (e.g. priority, special accommodation, etc.), as well as with regard to the protection against the loss of the home (eviction).

1.5 Constitutional challenges

Have national rules set out in legislation, regulations or other binding legal measures regulating access to social housing/housing benefits or eviction been challenged for incompatibility with national constitutional norms? If so, which ones, and with what effect? [If information is easily accessible, can you also indicate who were the parties challenging those rules? Have certain national rules contested by societal actors but not challenged before courts?]

1.6 Relevant institutional and procedural aspects

Please summarise institutional aspects (eg judicial review mechanisms) or procedural rules (eg standing) which

are important in terms of guaranteeing access to social housing/housing benefits and the protection from eviction (200 words or reference to English language presenting it in a relevant, synthetic and concise manner).

2. *Impact of international and European law*

2.1 Challenges to national rules based on international instruments

Have rules on access to housing/housing benefits and/or eviction in national constitutional documents, legislation, regulations or other binding legal measures been challenged *by reference to international instruments* (notably the ICESR, CRPD, CRC, CAT, Refugee Convention, etc). With what effect?

Has the international law protection of the right to property (or other internationally protected rights) be invoked to challenge national rules on access to housing/housing benefits and/or eviction? Please refer to background paper (Deliverable 3.3), section 4) Justice in the Rights to Vote, Housing and Education in International Law for relevant information.

Have international monitoring bodies (HRC, CESR, CRC, CRPD, CAT, CERD, Special Rapporteur on the right to adequate housing, etc) adopted opinions/decision on the compatibility of those rules with international law? Did it produce any effect on national law?

2.2 Challenges to national rules based on European (Council of Europe) instruments?

Have national rules on access to free primary and secondary education and inclusive/institutionalized/segregated education been challenged by reference to Council of Europe's law, in particular Article 2 Protocol 1 ECHR, Article 7, 9-10, 15 and 17 of the RESC, the ECRML (notably Article 8), or the FCPNM (Article 12 and 13).

Have any cases concerning on access to free primary and secondary education and inclusive/institutionalized/segregated education taken to/decided upon by the ECtHR? With what effect? Was national law adjusted to comply with the ECtHR decision(s)? Have ECHR decisions made with respect to other countries had implications in your country (on the basis of the ECHR's *erga omnes* jurisdiction)?

Has the Committee on Economic and Social Rights issued decision against your country for non compliance with the RESC? Was national law adjusted to conform to the RESC?

Please refer to background paper (Deliverable 3.3), section 5) subsection 2) The Right to Housing in Council of Europe Law – Justice as Redistribution for relevant information.

2.3 Challenges to national rules based on EU law

Has *EU law*, in particular EU free movement of workers and EU citizenship rules, EU immigration and refugee law, EU non-discrimination law, EU consumer law, EU internal market (eg free movement of services), EU state aid and competition law, EU public procurement law, EU tax law, EMU law, or the European Pillar of Social Rights, been invoked in domestic courts to challenge national rules concerning access to housing/housing benefits and/or eviction?

Has the European Commission launched enforcement actions against your state for violation by national rules regarding access to housing/housing benefits and/or eviction of EU law? Did the Commission take your state to the CJEU? Was national law adjusted to comply?

Have they been referrals to the CJEU, and decisions, related to a violation of EU law by your member state's rules regarding access to housing/housing benefits and/or eviction? If yes, where they follow by any effect?

Please refer to background paper (Deliverable 3.3), section 6) subsection 3) Right to housing in EU law - Justice as redistribution... for relevant information.

2.4. Relevant institutional and procedural aspects

Please provide necessary information concerning the incorporation and position/authority of international law, Council of Europe's instruments, and EU law in your country, which are of relevant to understand the protection of the right to housing in your country? In particular, does you state follow a monist or dualist approach? Can national courts invalidate/set aside national laws against international, Council of Europe and EU instruments?

3. Right to housing, justice as redistribution and vulnerability

3.1 Right to housing and justice as redistribution

When reviewing the national legal framework and, where relevant, references to International and European norms, could you identify arguments engaging different conceptions of justice as redistribution (refer to 3.3 section -). In particular, pay attention to priority rules or conditions of eligibility in access to housing, or conditions surrounding evictions, and who they identify as main beneficiaries.

Please specify whether these were part of court's reasoning or parties' arguments, and if the later, provide any relevant information that could help evaluate who mobilized the law to achieve greater justice (eg NGOs, etc.). Please refer to background paper (Deliverable 3.3), section 2) subsection 2) Justice as Redistribution and the Right to Housing for relevant information.

3.2 Right to housing and vulnerability

Does the concept of vulnerability play a role in the context of access to social housing/housing benefit or the protection from eviction in your country? Please explain how, and provide some representative illustrations. Please refer to background paper (Deliverable 3.3), section 2) subsection 3) Vulnerability as a human rights law concept for relevant information.

D3.6. Right to education (children with disabilities, children from minority background and third country nationals, refugees, asylum seekers and undocumented children)

This report focuses on the right to free/public/subsidized primary and secondary education and inclusive education.

Indicative list of relevant resources:

- United-Nations, Universal Period Review on right to vote for your country: <https://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx>
- United-Nations Human Rights Committee, Concluding Observations on your latest country report: <https://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx>

- United-Nations Committee on Economic and Social Rights, concluding observation on your last country report: <https://www.ohchr.org/EN/HRBodies/CESCR/pages/cescrindex.aspx>
- United-Nations Committee on the Rights of the Child, last country report: <https://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>
- Committee on the Rights of People with Disabilities, Concluding Observations on your latest country report: <https://www.ohchr.org/EN/HRBodies/CRPD/Pages/CRPDIndex.aspx>
- Committee on elimination of racial discrimination, latest country report: <https://www.ohchr.org/EN/HRBodies/CERD/Pages/CERDIndex.aspx>
- Council of Europe, Committee of Ministers' report on the execution of rulings: <https://www.coe.int/en/web/execution>
- European Court of Human Rights, case law database: https://www.echr.coe.int/Pages/home.aspx?p=caselaw&c=#n14597620384884950241259_pointer
- European Committee on Social Rights, latest country report: <https://www.coe.int/en/web/turin-european-social-charter/european-committee-of-social-rights>
- EU Fundamental Rights Agency, Current migration situation in the EU: education: <http://fra.europa.eu/en/publication/2017/current-migration-situation-eu-education>
- EU Fundamental Rights Agency, Education: The situation of Roma in 11 member states, <http://fra.europa.eu/en/publication/2014/education-situation-roma-11-eu-member-states>
- EU Fundamental Rights Agency, The situation of Roma citizens moving and settling in other member states, <http://fra.europa.eu/en/publication/2010/situation-roma-eu-citizens-moving-and-settling-other-eu-member-states>
- EU Fundamental Rights Agency, Together in the EU - Promoting the participation of migrants and their descendants, report: <http://fra.europa.eu/en/publication/2017/migrant-participation>

1. National legal framework

1.1 Constitutional protection

Does *national constitutional law protect the right to education* and if so, in which terms (as elaborated through judicial interpretation, where relevant). Are there any corresponding state obligations imposed under national constitutional law? If not protected under national constitutional law, which national legal framework (if any) affords protection to the right to education?

1.2 National legal framework

Please summarise the *national legal framework* regulating access to public/free/subsidized primary and

secondary education. As school places may come in short supply, please pay attention to any kind of eligibility or priority criteria (eg residence in the district, performance, etc)

Do national legal rules provide for/allow for inclusive education, special accommodation, etc?

1.3. Special rules targeting selected group

Are there any *specific rules targeting our selected groups* (children with disabilities, children from minority background and third country nationals, 'ethnic and religious minorities, persons with disabilities, refugees, asylum seekers and undocumented migrants) with regard to access to public/free/subsidized primary and secondary education, and in matters of inclusive education? Do they provide for integrated education? Do they provide/require education in special schools or institutions? Do they allow for special accommodation in free/public/subsidized primary and secondary education? (prayer time, food requirements, exemptions from religious classes, mixed sport activities, etc). Do national rules require that the curriculum recognise the participation of selected vulnerable groups in society (eg history of the former colonies, pictures and course materials reflecting social, religious and ethnic composition of the society, etc.).

1.4 Constitutional challenges

Have national rules on access to free/public/subsidized primary education and inclusion/institutionalization/segregation been challenged for incompatibility with national constitutional norms? If so, which ones, and with what effect? [If information is easily accessible, can you also indicate who were the parties challenging those rules? Have certain national rules contested by societal actors but not challenged before courts?]

1.5. Relevant institutional and procedural aspects

Please summarise institutional aspects (eg judicial review mechanisms) or procedural rules (eg standing) which are important in terms of guaranteeing access to social housing/housing benefits and the protection from eviction (200 words or reference to English language presenting it in a relevant, synthetic and concise manner).

2. Impact of international and European law

2.1 Challenges to national rules based on international instruments

Have national rules on access to free primary and secondary education been challenged by reference to *reference to international instruments* (notably the ICESR, CRPD, CRC, CAT, Refugee Convention, etc). If so, with what effect?

Have international monitoring bodies (HRC, CESR, CRC, CAT, CERD) adopted opinions/decision on the compatibility of those rules with international law? Did it produce any effect on national law? Please refer to background paper (Deliverable 3.3), section 4) Justice in the Rights to Vote, Housing and Education in International Law for relevant information.

2.2 Challenges to national rules based on European (Council of Europe) instruments?

Have national rules on access to free primary and secondary education and inclusive/institutionalized/segregated education been challenged by reference to Council of Europe's law, in particular Article 2 Protocol 1 ECHR, Article 7, 9-10, 15 and 17 of the RESC, the ECRML (notably Article 8), the FCPNM (Article 12 and 13).

Have any cases concerning on access to free primary and secondary education and inclusive/institutionalized/segregated education taken to/decided upon by the ECtHR? With what effect? Was national law adjusted to comply with the ECtHR decision(s)?

Has the Committee on Economic and Social Rights issued decision against your country for non compliance with the RESC? Was national law adjusted to conform to the RESC? Please refer to background paper (Deliverable 3.3), section 5 subsection: The Right to Education in Council of Europe Law – Justice as Recognition for relevant information.

2.3 Challenges to national rules based on EU law

Has EU law, in particular the EU Charter (Articles 14 and 24, and also 16), EU free movement of workers and EU

citizenship rules, EU immigration and refugee law, EU non-discrimination law, EU internal market, competition and state aid law, EMU law, the European Pillar of Social Rights or relevant EU soft law), been invoked in domestic courts to challenge national rules concerning access to free primary and secondary education and inclusive/institutionalized/segregated education?

Has the EU Commission launched enforcement actions against your state for violation by national rules concerning access to free primary and secondary education and inclusive/institutionalized/segregated education? Did the Commission take your state to the CJEU? Was national law adjusted to comply?

Have they been referrals to the CJEU, and decisions, related to a violation of EU law by your member state's rules regarding access to free primary and secondary education and inclusive/institutionalized/segregated education? If yes, where they follow by any effect? Please refer to background paper (Deliverable 3.3), section 6) subsection 4) The right to education in EU law – Justice as recognition for relevant information.

3. Right to education, justice as recognition and vulnerability

3.1 Right to education and justice as recognition

When reviewing the national legal framework and, where relevant, references to International and European norms, could you identify arguments engaging different conceptions of justice as recognition. Please specify whether these were part of court's reasoning or parties' arguments, and if the later, provide any relevant information that could help evaluate who mobilized the law to achieve greater justice (eg NGOs, etc.). Please refer to background paper (Deliverable 3.3), section 2) subsection Justice as Recognition and the Right to Education for relevant information.

3.2 Right to education and vulnerability

Does the concept of vulnerability play a role in the context of the right to education? Please explain how, and provide some representative illustrations. Please refer to background paper (Deliverable 3.3), section 2) subsection 3) Vulnerability as a human rights law concept for relevant information.

