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# Universal Rights but Not for Everyone: The Right to Emergency Accommodation in France and EU Equality Law

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➤ **Abstract\_** *In the context of the refugee crisis that started in 2014 in Europe, many have denounced restrictions imposed on migrants' fundamental rights. This article explores the striking example of the right to emergency accommodation in France, and puts these developments into question in the framework of European equality law, asking whether and how they may contradict the prohibition of discrimination on the ground of race and ethnic origin under EU law. The apparent incapacity of the current EU equality framework to effectively question discriminatory aspects of this recent phenomenon is dangerous, and calls for an urgent common reflection. In light of critical legal studies, it poses a threat to the consistency and effectiveness of the anti-discrimination legal framework in Europe, on the one hand, and of the very nature of fundamental rights, on the other hand. What is at stake is the tackling by the law of phenomena that may be seen as pertaining to institutional and structural racism, at national and European levels.*

## Introduction

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Much ink has been spilled on the consequences of the refugee crisis that started in 2014 in terms of people's rights. These consequences are now also denounced as a housing policy issue in an increasing number of European countries,<sup>1</sup> and the EU Commission's Social Policy Network has recently published a report on the fight against homelessness, demonstrating attention to this issue and openly recognising the specific obstacles faced by the migrant homeless (Baptista and Marlier, 2019).

Using the right to emergency accommodation in France as a case study, from the perspective of the consequences of its denial for homeless migrant women, men and children on the ground, this article aims to make the scope of the problem more visible in relation to EU anti-discrimination law. Focusing on justiciability rather than policy guidelines, it tackles the gap between European and EU law, describing how the absence of a clear and consistent European legal framework aiming to tackle migrant<sup>2</sup> homelessness translates in the recent case law, at regional and national levels.

The article begins by recalling the international and European human rights legal framework relating to housing rights, in order to show how the right to accommodation stems out of it. Part III goes on with the translation of this right into French law in the aftermath of the European migrant crisis. The use of the notion of vulnerability by French courts and its control by the European Court of Human Rights, taken together, lead to contradict the very notion of universality that an internationally recognised human right is supposed to entail. Part VI departs from this deficient European framework in order to examine how EU law may cover such situations, making the point that these legal developments hurt the EU equality law framework, and in turn the perceived reliability of EU law as a social tool more generally. In the context of a deficient European human rights framework, EU law has no solution to offer in terms of justiciability, despite the broad scope of its race equality Directive. This is considered a crucial problem, EU institutions being accountable for the provision of a consistent legal system. Therefore, Part V calls for a common reflection on the institutional and conceptual tools available in order to find solutions to this problem, basing on multi-level governance and on the necessity of a more critical reading from contemporary academic scholarship.

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<sup>1</sup> Most recently, see British NGOs Refugee Action and NACCOM, *Missing the Safety Net* (September 2019).

<sup>2</sup> Both documented and undocumented migrants are concerned. I interchangeably use the notion of migrants or foreigner, as covering economic migrants, asylum seekers and refugees indistinctly, in an attempt to start from the perspective of the common needs of all persons covered by these categories as observed on the ground.

## **International and European Human Right Protection of the Right to Accommodation**

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### ***The international protection of housing rights***

Although the efficiency and binding legal effects of international human rights instruments of protection of housing rights remain debated, their merits are clear (Kenna, 2010; Kenna, 2014). Notably on the basis of Article 25(1) of the 1948 United Nations Universal Declaration on Human Rights and Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, their development have marked a historical legal shift from charity-based approaches towards the idea that poverty is not necessarily an individual failure, but rather a structural economic and social problem, requiring to consider collective responsibility as a source of potential solution. They point out the unlimited personal scope of the right to housing of all natural persons, and underline its meaning more than the right to a mere shelter (“secure home”), expressly relating housing to the notion of human dignity (Boccardo and De Schutter, 2005). Moreover, they proclaim the right to housing as being more than a right to shelter: it consists of a negative dimension, protecting against evictions and forcing displacements, and a positive dimension, an access to housing – or at least to a shelter – for all, hence the relevance of the plural “housing rights”.

It is also clear that the UN legal order has made this right a duty, at a minimum for states authorities that have ratified the Covenant (UNHCR 1994a; UNHCR 1994b). Most UN international instruments referring to the right to housing include complaint mechanisms. UN mechanisms have also created well-informed administrative bodies in charge of reporting compliance with housing rights standards to the United Nations. As a result, housing rights norms have received more attention and scrutiny since the late 1980s and tend to be increasingly monitored at regional level: by the African Union, the Organization of American States, the Council of Europe and the European Union (notably the European Commission’s Social Inclusion Programme).

### *The European right to emergency accommodation*

In line with these international developments, housing rights are also protected as human rights by the Council of Europe, through the European Convention on Human Rights<sup>3</sup> and the Revised Social Charter.<sup>4</sup> This has given rise to the protection of the right to emergency accommodation.

### **European Social Charter protection of the universal right to shelter<sup>5</sup>**

Article 31 Part 1 of the Revised European Social Charter (RESC), into force since 1996,<sup>6</sup> expressly states that “Every person has the right to housing.”<sup>7</sup> Article 31 Part 2 of the Charter provides more details on the related obligations of the states: “promote access to housing of an adequate standard”, and take measures designed to “prevent and reduce homelessness with a view to its gradual elimination”, as well as to “make the price of housing accessible to those without adequate resources.”<sup>8</sup> The 48 complaints brought before the European Committee of Social Rights (ECSR) responsible for the Charter’s enforcement allowed the Committee to clarify the implications of the right to housing under the Charter in terms of states obligations, sometimes explicitly referring to General Comments 4 and 7 of the UN CESCR.<sup>9</sup>

<sup>3</sup> This treaty applies to residents of all Council of Europe countries at present (Council of Europe website <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures> -last accessed on 10.05.2020).

<sup>4</sup> The revised treaty applies to residents of the member countries to the Council of Europe which have ratified the Revised Charter, that is, all Council of Europe countries except Croatia, Czech Republic, Denmark, Iceland, Liechtenstein, Luxemburg, Monaco, Poland, San Marino, Spain, Switzerland and the United Kingdom (Council of Europe website, <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163/signatures> – last accessed on 10.05.2020).

<sup>5</sup> For the purpose of this paper, I interchangeably use the words ‘shelter’ and ‘accommodation’.

<sup>6</sup> Although several articles of the initial 1966 European Social Charter (ETS 035) could be considered as relating to housing, either as a component of other rights or as a component of the protection granted to specific vulnerable groups – most remarkably, the right to social and medical assistance for “anyone without adequate resources”. The overlapping Articles have helped to establish the right to housing for those contracting states that have not ratified Article 31 of the 1996 Revised European Social Charter (ETS 163). In the EU, those states are Austria, Belgium, Bulgaria, Cyprus, Estonia, Hungary, Ireland, Latvia (except para 1), Malta, Romania, Slovakia. On the ECSR case law on housing rights, see Mikkola, 2008, and Kenna, 2011, paras 8-95; for a detailed analysis of the collective complaints system in the context of housing rights, see Kenna and Jordan, 2014.

<sup>7</sup> Article E Part V of the Charter prohibits discrimination in any of the rights protected by the Charter and has also played an important role in the protection of housing rights of migrants and travellers; for example, see decisions on collective complaint 39/2006 *FEANTSA v France European Federation of National Organisations Working with the Homeless (FEANTSA v France)*, 5/12/2007, 159-162 and 33/2006 *International Movement ATD Fourth World v France*, 5/12/2007, 149-170.

<sup>8</sup> See decisions on complaint 33/2006 (above) at 94-99 and 128-133, and on complaint no 39/2006 (above) at 124-129 and 143-147; see also the Committee’s 2003 Conclusions on Sweden.

<sup>9</sup> For example, decision on merits on complaint no 39/2006 (n9).

The Committee made it clear that although not sufficient, the protection of housing rights by national legal orders within a reasonable time<sup>10</sup> was a necessary condition of compliance with Article 31 as an obligation of means, through immediate action by the state in a “practical and effective” form (as opposed to a merely legal, unimplemented form), at local and national levels,<sup>11</sup> which requires effective data collection.<sup>12</sup> Relating to the relationship between the elimination of homelessness (Article 31 Part 1 (2) RESC) and access to adequate housing for migrant people (Part 1 (1)), two decisions on 10 November 2014<sup>13</sup> recall that the right to accommodation is closely linked to the right to life, and crucial to the respect of human dignity, although paradoxically, they also admit a hierarchy in the content of this right, depending on a migrant’s legal status. As a result, temporary accommodation cannot be regarded as a viable solution for documented migrants or migrants working legally on a state’s territory: they must be provided with a housing solution within a reasonable time. As for undocumented migrants, even when they are due to leave the national territory, they have to be provided with an accommodation solution. While differentiating between the scope of undocumented and documented migrants’ housing rights, the Council underlines that the deprivation of such an essential emergency assistance measure as an accommodation solution cannot be part of the dissuasive tools of a country’s migration policy. Accommodation appears as a minimum, fully universal right that obliges States without any other classification than belonging to the human community.

### **An ambiguous protection of housing rights by the European Court of Human Rights**

Although initially a liberal instrument based on the concept of negative rights and property rights, the ECHR has been influenced by the welfare state model: the European Court on Human Rights (ECtHR) has explicitly recognised positive obligations of the states deriving from ECHR provisions (Starmer, 2001). The Court has constantly held that the ECHR does not guarantee a right to housing to all admissible claimants. However, since the 1990s, it has progressively developed a case law that protects housing rights on the basis of the right to respect of one’s home

<sup>10</sup> 53/2008 *FEANTSA v Slovenia*, 8/9/2009; *FEANTSA v France* (n9) at 55-58; see also *ATD Fourth World v France* (n9) at 62.

<sup>11</sup> 27/2004 *ERRC v Italy*, 7/12/2005 at 26, *FEANTSA v France* (n9) at 79.

<sup>12</sup> *Ibid* at 61-64. No comprehensive data on homelessness at national level have been collected in France since 2012.

<sup>13</sup> 86/2012 *FEANTSA v Netherlands*, 2/7/2014 and 90/2013 *Conference of European Churches v Netherlands*, 1/7/2014.

(Kenna, 2008)<sup>14</sup> and family life<sup>15</sup> under Article 8 ECHR, where sufficient and continuous links between the claimant and a particular place can be established. The notion of home has in turn enabled the Court to extend the protection of property (under Article 1 of the First Protocol to the ECHR) to the protection of occupiers as well as home-owners. In 2012, in *Yordanova v Bulgaria*,<sup>16</sup> it held for the first time that «an obligation to secure shelter to particularly vulnerable individuals may flow from Article 8 of the Convention in exceptional cases».<sup>17</sup> However, following cases relating to a right to mere shelter have also been considered under Article 3 ECHR, which prohibits inhuman and degrading treatment. By not providing persons with particular emergency needs with adequate housing, the State party to the Convention can be held responsible under this provision. Until recently, this Article had been violated in relation to housing rights in cases of violent displacement of Roma people.<sup>18</sup> But over the last few years, the European Court of Human Rights has departed from *Yordanova* and developed what can be seen as a right to accommodation for vulnerable persons, on the basis of Article 3. The Court now requires that States guarantee minimum reception conditions to an asylum-seeker family before sending them back to Italy under the Dublin procedure.<sup>19</sup> Moreover, being a child or in need of medical care prevails on a person's status of irregular migrant.<sup>20</sup>

This is how the ECtHR case law on the reception of migrants under Article 3 ECHR has recently provided the basis for a right to shelter for vulnerable people. Although this case law provides minimum protection against gross violations of the right to a shelter, it does not take all homeless persons as vulnerable *per se*. This implicitly denies the value of the right to a shelter as a universal human right that all persons should enjoy, as human beings. The growing importance of housing rights in global and regional human rights law has also had an impact on national orders.

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<sup>14</sup> At 193, 208, referring to ECtHR, *Airey v Ireland* (1979-1980) 2 EHRR 305, § 26.

<sup>15</sup> Interestingly, Article 8 protects not only the home, but also family rights: in *Wallowa and Walla v Czech Republic* (complaint no 23848/04, 26/10/2006) para 75, the ECtHR held that homeless parents must benefit from all possible measures aiming to reunifying them with their children as long as no mistreatment was observed: children shall not be forcibly taken in care unless mistreatment has occurred.

<sup>16</sup> *Yordanova and others v Bulgaria*, no 25446/06 (ECtHR 24/04/2012).

<sup>17</sup> Other articles have also indirectly contributed to the elaboration of housing rights by the Court: Article 8 can notably be violated in combination with articles 3, 6, 13 and 14 ECHR; Article 8 remains at the core of ECHR housing rights protection before the Court of Strasbourg.

<sup>18</sup> *Moldova and others v Romania*, no 41138/98 and no 64320/01 (ECtHR, 12/07/2005).

<sup>19</sup> *Tarakhel v Switzerland*, no 29217/12 (ECtHR, 4/11/2014) at 122.

<sup>20</sup> *VM v Belgium*, (ECtHR, 7/7/2015) at 138; but some particular types of centres "preparing migrants to their return" are viewed as an admissible reception solution in *Hunde v Netherlands*, no 17931/16 (ECtHR, 5/7/2016).

## Foreigners' Fundamental Right to a Shelter in France

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In this context of international protection of housing rights as human rights at UN and at European levels, and more specifically of the right to shelter as a minimum, France has been restricting its supposedly open understanding of migrants' housing rights, both legally and through state practices.

National laws initially provided a particularly high threshold of protection, guaranteeing to all persons both protection against homelessness, and the right to decent housing conditions. However, recent years have simultaneously witnessed a growing number of homeless migrants, and the progressive restriction of their housing rights (Médecins du Monde and Primo Levy Centre, 2016).

### *French jurisprudential restriction of foreigners' right to housing*

French social law provisions guarantee a universal, opposable right to shelter since 2007, but this written universal right has progressively been restricted by the courts.

### **French fundamental right to accommodation**

Although the right to housing is not expressly protected by the French Constitution, the possibility to access to decent housing conditions has been considered an "objective of constitutional value" by French Constitutional Court in 1995.<sup>21</sup> Furthermore, the right to housing and the definition of decent housing conditions are parts of several national acts, notably since the 1990s.<sup>22</sup> Like Scotland<sup>23</sup>, France has become renowned among European rights advocates for the 2007 adoption of its "Act for a justiciable right to housing" ("DALO" law). This Act gives birth to a justiciable right to both social housing and emergency accommodation, opening a door to state accountability before national courts. Under its provisions, after a certain period of time, a person who applied in vain for temporary accommodation or social housing and has been recognised as being in one of the particular emergency situations defined in the Act can claim against the state that she has a right to be offered a solution. In such cases, the judge will fix a daily (right to accommodation) or monthly (right to housing) fine to be paid by local State authorities until a solution has been offered.

More generally, since 2009, Article L.345-2-2 of French Code on Social Action and Families (CSAF) recognises the right to access accommodation to all persons in distress, unconditionally. Codifying the French notion of access to accommodation, this provision states that emergency accommodation must provide a dwelling,

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<sup>21</sup> Constitutional Council, decision no 94-359 DC, ECLI: FR: CC: 1995: 94.359.DC (19/1/1995).

<sup>22</sup> Art 1 of French Act no 90-449 of 31/5/1990 "aiming to the implementation of the right to housing": "The right to housing constitutes a duty of solidarity of the nation".

<sup>23</sup> Housing (Scotland) Act (1987) as amended by the Homelessness (Scotland) Act (2003).

meals, and hygiene as well as a first medical and social evaluation, and that the person is "(...) to be orientated towards any professional or other structure capable of providing the help that [her] current state requires", referring to several types of structures providing specific additional social services. Hence, in line with UN provisions and the RESC, the right enshrined in French law is clearly more than an access to a mere temporary shelter. Article L.345-2-3 CSAF further enshrines a so-called "continuity principle", meaning that once provided with a shelter, a person or family must receive social counselling and can be orientated towards a more stable accommodation centre, a medical care centre or a viable housing solution, but not be sent back to streets. The right to emergency accommodation seems granted as the implementation of an unconditional, universal right flowing from UN human rights instruments. It should follow that the administrative status of documented (mainly as asylum-seeker or refugee) or undocumented migrant (before the asylum claim is lodged and after it has been rejected) is indifferent to the implementation of one's right to accommodation.

In short, French provisions provide the basis for a solid protection of the right to accommodation as a universal fundamental right. However, a growing divide between these provisions and recent factual and jurisprudential developments has been denounced over the last few years.

### **Jurisprudential restriction of the notion of vulnerability**

Before the migrant crisis in Europe, French judges progressively narrowed their conception of the scope of the right to emergency accommodation, restricting the definition and scope of the notions of distress or vulnerability. This has been done in contradiction with the notion of an unconditional right to accommodation enshrined in the CSAF.

In 2010, one year after recognising minimum reception conditions for asylum-seekers as a fundamental right following EU law implementation,<sup>24</sup> French "State Council", the supreme jurisdiction in charge of reviewing decisions taken by public authorities, restricted the scope of asylum-seekers' right to a shelter, leaving isolated young men as well as families with young children, sometimes sick, living on the streets (Jurislogement, 2018). In the majority of its rejection decisions, the Council considers that the state fulfilled its obligation when it demonstrated efforts to grow its emergency accommodation capacity and when the saturation of the existing accommodation structures (ordinary ones as well as those dedicated to asylum-seekers and refugees) required the State to book hotel rooms for homeless people. The existence of an effective plan designed by state authorities at local level to viably eliminate homelessness is not even put into question in the Council's

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<sup>24</sup> French State Council, no 330536, no330537, ECLI: FR: CEORD: 2009: 330536.20090806; and no 331950. ECLI: FR: CEORD: 2009: 331950.20090917.



reasoning. Guaranteeing the right to accommodation is made an obligation of means for the State, associated with a low standard of scrutiny, while it was codified in French law as an obligation of results.

In 2012, the Council ambiguously recognised a justiciable state obligation to “implement the right to emergency accommodation recognised by the law to any homeless person in a situation of medical, psychological and social need”, while simultaneously opening a door to a specific emergency judicial procedure for claiming this right before a judge.<sup>25</sup> However, by indicating that a situation of need had to be “medical, psychological and social”, the Council also opened a door to a standard of scrutiny based on the case-by-case analysis of claimants’ competing vulnerability situations.

French tribunals have followed this line and appreciate on a case-by-case basis whether a homeless claimant is in “distress”, or not. In combination with this movement, a person’s “distress” now depends on the supposed legitimacy of her presence in France (Derdek and Uhry, 2016). Two cases in 2013 and 2014 have exacerbated the phenomenon of a judge assessing competing vulnerabilities on a case-by-case basis: the State Council held that people whose asylum claim has been definitely rejected and foreigners under an obligation to leave the French territory must demonstrate extremely “exceptional circumstances” in order to be entitled to temporary accommodation – for example, suffering from severe depression and receiving a treatment for cancer was considered as serious enough in order to be granted the right not to remain homeless.<sup>26</sup>

In other words, the administrative status of a migrant claimant now explicitly determines the scope of her right to accommodation. Taking a political stance on this legal matter, French judges blur the boundaries between the examination of a claim for accommodation and the examination of the legality of stay of a foreigner, despite the two procedures being fully distinct from a rigorous legal perspective. Although they do not fully deny the right to accommodation,<sup>27</sup> the interference of a claimant’s administrative situation with her fundamental right to accommodation contradicts its protection as a universal right. One’s right to a shelter, guaranteed by international

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<sup>25</sup> French State Council, no 356456, ECLI: FR: CEORD: 2012: 356456.20120210.

<sup>26</sup> French State Council, no 372324, ECLI: FR: CEORD: 2013: 372324.20130924 and no 377658. ECLI: FR: CEORD: 2014: 377658.20140417, cited in Jurislogement (n29).

<sup>27</sup> *E.g.* Lille Administrative Tribunal, no 1709774, 7/3/2019, and no 1802830, prohibiting the illegal eviction of a camp, without any possible shelter being offered to its inhabitants. In Paris Administrative Tribunal, no 1704945/3-3, 13/4/2018, the publication of a local vademecum on emergency accommodation centres in Paris by local State authorities was cancelled, for planning the systematic interruption of foreigners’ care in the broad sense where the latter would not have accomplished “all the necessary steps to the implementation of their right to stay”, on the basis of the principle of unconditional accommodation.

and national provisions on the basis of human dignity, now depends on the evolution of immigration law and policy, and on one's migratory status. In 2012, 53% of homeless people in France were foreigners (INSEE, 2013). On 31 May, Paris Mayor stated on Twitter that between 700 and 1 200 'refugees' were sleeping in the streets in the North of Paris, not to mention camps around Calais in Northern France. In the current context of migrant flows to and through France, a significant part of homeless people are vulnerable and homeless because of the very difficulties experienced in relation to their administrative status. As a result, the right to accommodation is made partially ineffective as a tool to eradicate homelessness in practice. Migrants who do not fall under the two categories of refugees or asylum-seekers, either because they have not been informed on how to claim for asylum yet, or because their asylum claim has just been rejected, are left without any dedicated solution, including isolated minors. In addition, despite their status of "regular migrants", asylum-seekers and refugees themselves cannot find a housing solution, due to the saturation of the emergency accommodation system, combined with the lacking capacity of dedicated state accommodation programmes.<sup>28</sup>

### ***Violations of migrants' housing rights in France***

Since the 2010s,<sup>29</sup> living conditions of migrants recently arrived in the country have been subject to a growing number of alarms, be it in Paris, in and around Calais as well as near the Italian border.<sup>30</sup> These alarms came not only from journalists and NGOs working on the ground, but also from the French Ombudsman ("*Rights Defender*" in French) and the European Court of Human Rights. It remains to be seen whether these alarms are vigorous enough for French Courts to hear them.

### **French Ombudsman's reports and decisions**

According to some observers, the judicial weakening of binding state obligations to guarantee migrants' right to accommodation became one of French migration policy's dissuasive tools. In April and May 2018, again, the French Ombudsman denounced the squalid living conditions of migrants including asylum-seekers in camps in Paris and in northern France, as well as the harassment of migrants and aid workers by police forces. Authorities cleared the camps in late May (Paris) and early September (Northern France) respectively, without offering a viable solution to all or planning viable solutions in order to face predictable new flows (French

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<sup>28</sup> For a simple overview of the existing enmeshment of programmes of accommodation facilities dedicated to homeless migrants depending on their administrative situation, see Cimade, 2019.

<sup>29</sup> This has now lasted for more than 7 years: see French Ombudsman decision on police harassment in migrants' camps near Calais, no MDS-2011-113, 13/11/2012, accessible at [http://www.gisti.org/IMG/pdf/jur\\_ddd\\_2012-11-13\\_mds\\_2011-113.pdf](http://www.gisti.org/IMG/pdf/jur_ddd_2012-11-13_mds_2011-113.pdf).

<sup>30</sup> 46000 undocumented migrants were stopped by French police while trying to enter France from Italy in 2017 (French Borders Police website, 12/2017).

Ombudsman, 2015a, 2015b, 2016, 2018). As a result, smaller camps have been constituted in northern France, with weekly dismantlement operations by the police becoming common. In this context, housing rights of undocumented migrants have been mostly protected by the judge— if at all – negatively, through the protection against illegal evictions until a viable solution is offered.<sup>31</sup> In 2016, the Ombudsman denounced numerous human rights violations relating to homeless migrants' camps (French Ombudsman, 2016a) and recalled the necessity for camps' dismantlement to be conditioned to the simultaneous implementation of viable solutions that would not violate fundamental rights. Interestingly, it indicated that positive law allows for the differential treatment of all persons falling into the category of "foreigner" in the legal domain of entry, residence and deportation of aliens. It also recalls that nevertheless, this fact does not give a right to the state to discriminate against foreigners in the implementation of fundamental rights. On the contrary, any differential treatment in the implementation of rights relating to one's everyday life, such as social protection, children's rights, health, or housing, is prohibited. Hence, the Ombudsman noted that, not only illegal state practices, but also some legal provisions themselves, violate people's fundamental rights by differentiating between situations through criteria that impose *de facto* limits to foreigners' access to such rights. *Differentiation* is allowed, but not *discrimination* in the implementation of migrants' fundamental rights.

### **ECHR condemnations**

This context of numerous fundamental rights violations has given rise to several claims before international organs in relation to migrants' housing rights,<sup>32</sup> including the European Court of Human Rights. The Court has recently condemned France for unaccompanied foreign minors' housing rights violations under Article 3 ECHR. However, instead of protecting the right to a shelter as a minimum, universal human right, these decisions reinforce the conception that a vulnerability threshold has to be reached in order to grant an enforceable right to accommodation.<sup>33</sup> In May 2018, the Court ruled on a case concerning a family composed of a mother and her three young children, living on the streets while waiting for the appointment that was necessary to lodge their asylum claim. Given that two of the three children attend kindergarten and that NGOs were otherwise providing help, and that they had been offered one night accommodation by a dwelling centre, the family was not considered

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<sup>31</sup> Lyon Administrative Tribunal, no 1806928, 4/10/2018 (commented online by French housing lawyers group Jurislogement <http://www.jurislogement.org/default-durgence-a-expulser-une-personne-deboutee-de-sa-demande-dasile/>).

<sup>32</sup> For a decision of the European Committee of Social Rights directly relating to migrants' rights to protection against evictions, see complaint no 67/2011, *Médecins du Monde v France*, 11/9/2012.

<sup>33</sup> The status of asylum-seeker seemed to be associated with sufficient vulnerability for the threshold of Article 3 since ECtHR, *MSS v Belgium and Greece*, no 30696/09 (ECtHR, 21/1/2011).

in a situation of sufficient material deprivation to fall under the scope of Article 3 ECHR.<sup>34</sup> Months later, the Court condemns France under the same provision, for failing to provide child care to an eleven-year-old unaccompanied foreign minor who had asked for care and had been living in camps near Calais for months, “in an environment totally unsuitable to his child condition, be it in terms of security, housing, hygiene or access to food and medical care, and in an unacceptable, precarious situation.” Local care services failed to implement a ruling by French children’s judge ordering that the child be placed in care. These circumstances are considered by the Court as a violation of State obligations reaching the threshold of Article 3.<sup>35</sup>

Through the light that such cases cast on dramatic situations, they contribute to show how frequent mistreatments of migrants undermine the universality of the fundamental right to accommodation as a minimum standard. In addition, the judicial notion of vulnerability is used by French and ECtHR judges as a threshold in order to assess whether or not to guarantee the right to accommodation to a claimant, while the very fact of living on streets and asking for help can as such be considered a violation of the principle of human dignity that should not require any further proof of a person’s vulnerability. By abstaining to apply a different threshold or to open the vulnerability threshold, in order to protect the right to accommodation under Article 3 more adequately, French jurisdictions and the ECtHR reject the idea of a universal human right to shelter.

## **In EU law: (II) Legitimate Discrimination on the Ground of Race and Ethnic Origin?**

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The right to accommodation has been partially denied, practically and judicially, for foreign migrants as a category of persons. As a result, people who have often faced other human rights violations in their native country and on the road into exile remain homeless, that is, unable to claim for any of their rights without the help of human rights activists on the ground.<sup>36</sup> Since this phenomenon concerns migrant people who fall under the category of Third Country Nationals under European Union law, the following developments aim to bridge the gap between EU law and ECHR law in this regard, and to examine migrants’ housing rights violations in France in relation to the consistency of EU equality law – as a human rights protection tool.

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<sup>34</sup> *N.T.P. v France*, no 68862/13 (ECtHR, 24/5/2018).

<sup>35</sup> *Khan v France*, no 12267/16 (ECtHR, 28/2/2019).

<sup>36</sup> This article only explores the situation on the French metropolitan territory, although French territories overseas are also much concerned, each at a different scope depending on its own migrant flows and reception conditions.

Despite its primarily economic purposes, the EU has progressively protected fundamental rights, and this movement has partially extended to housing rights,<sup>37</sup> notably through articles 7<sup>38</sup> and 34 of the EU Charter (Kenna, 2013 on the latter provision), EU asylum law,<sup>39</sup> and equality law on the basis of Article 19 TFEU and Article 21(1) EU Charter on Fundamental Right, the material scope of Directives on gender and race discrimination extending to housing assistance and services.

### ***Third Country Nationals' equal rights to housing?***

The so-called 'Race Directive'<sup>40</sup> aims at "putting into effect in the Member States the principle of equal treatment" (Article 1). It has a broad personal and material scope, applying to all persons, private and public, in employment, but also education, social protection, and access to goods and services – the latter category including housing. In the absence of an explicit EU competence relating to housing, it is covered by EU equality provisions either as a good, or as an element of social policy.

In terms of conceptual tools, Article 2 states that '(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'. On the contrary, direct discrimination cannot be justified:<sup>41</sup> '(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'. This means that the EU conception of discrimination goes beyond blindness to perceived race or ethnic origin, and recognises the possibility of apparently neutral provisions or practices to bear a structural or systematic negative impact on discriminated categories of persons.

<sup>37</sup> See the first reference to the inviolability of the home by the European Court of Justice in joined cases C-46/87 and C-227/88, *Hoechst AG*, ECLI: EU: C: 1989: 337.

<sup>38</sup> Explanatory notes to the Charter (document 2007/C 303/02) are clear that Art 7 is similarly worded than Art 8 ECHR and hence, is to be interpreted in relation to the latter.

<sup>39</sup> Art 2, 8, 13(2), Dir 2003/9/EC initially stated that Member States shall provide asylum seekers with minimum reception conditions covering "fundamental needs", including housing in nature or in kind, even in cases of temporary and exceptional saturation of existing services; Art 2, 18, 22 Dir 2013/33/EU still refer to housing and accommodation conditions of asylum seekers. See European Court of Justice, cases C-179/11 *Cimade & Gistidu*, ECLI: EU: C: 2012: 594 §56, and C-79/13 *Saciri*, ECLI: EU: C: 2014: 103 §35; for a critical perspective on the EU asylum system, see e.g. Fekete, 2016 and Carr, 2012.

<sup>40</sup> Council Directive 43/2000/EC implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L180/22.

<sup>41</sup> Positive action and discrimination are two related but distinct concepts, positive action being regulated by Indent 17 and Art 5 of the Directive.

The Race Directive explicitly bases on international human rights protection, hence its broad personal scope. Indent 3 expressly recalls that 'The right to equality before the law and protection against discrimination for all persons constitutes a universal right recognised by the Universal Declaration of Human Rights, the United Nations Convention on the Elimination of all forms of Discrimination Against Women, the International Convention on the Elimination of all forms of Racial Discrimination and the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights and by the European Convention for the Protection of Human Rights and Fundamental Freedoms, to which all Member States are signatories.' The idea of distinct human races is clearly rejected, with explicit references to the universality of fundamental rights and to the objective of combatting 'racism' and 'xenophobia', in indents 5, 6, 7, 10, and 11. Article 3(1) of the Directive underlines its unlimited personal scope: 'this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies'.

But the material scope of the Directive is limited: not only does it apply only 'Within the limits of the powers conferred upon the Community'. Article 3(2) of the Directive also excludes nationality from the notion of discrimination on the ground of race and ethnic origin. Nationality discrimination is prohibited under Article 18 TFEU, but Member states can openly discriminate on the ground of nationality for the purpose of immigration regulation and border control. However, from the perspective of the objective to combat racism, the exclusion of nationality from the material scope of the human rights-based prohibition of discriminations on the ground of race and ethnic origin reveals a problematic contradiction. The same contradiction is clear from Indent 13 of the Directive, confusingly stating that the 'prohibition of discrimination should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation.' Nationality discrimination is allowed for Third Country Nationals (TCNs), as opposed to EU citizens (Benedi Lahuerta, 2009, 2016, 2018).

The category of TCNs is hence likely to be legally impacted by discriminatory practices relating to immigration regulation, despite the Equality Directive's apparently unlimited personal scope. State nationals within one country can come from very different ethnic backgrounds, but presumably, Third Country Nationals are likely to be perceived as coming from a distinct ethnic background. However, the European Court of Justice has not chosen to confront the debate on the articulation

of race and nationality in the effective implementation of the equality principle.<sup>42</sup> This might be one of the reasons why this discrimination ground remains considered as materially under the competence of the ECtHR and only 12 preliminary ruling procedures (Article 267 TFEU) have been handled by the European Court of Justice under the Race Directive so far. As regards French violations of Third Country Nationals' housing rights, while its provisions guarantee equal access to housing, EU law, despite its proclaimed support of human rights, can almost only play a role in the limited area of the Directive 2013/33/EU on the reception conditions of asylum-seekers.<sup>43</sup> This differentiation between race and nationality in EU equality law hence poses a threat to its consistency. The adoption of a legal instrument whose material scope contradicts its very own objectives and, therefore, its proclaimed human rights basis, raises major questions in terms of credibility of the EU project, on the one hand, and of human rights regional protection tools, on the other hand. It is even more problematic with regard to effective human rights implementation following a refugee crisis (Greenhill, 2016; Procaccini, 2009). Because of the exclusion of nationality from the scope of EU equality law, it is made lawful for a Member State to make undocumented Third Country Nationals homeless, and EU provisions do not make it possible to question this phenomenon as a possible case of systemic racism.

### ***Migrants' housing rights violations as a case of discrimination***

Third Country Nationals, as a category, have seen a decrease of effectiveness of the minimum declaration of their right to housing, the right to a shelter. In France, they are directly impacted by national law and practices that make them lose their right to emergency accommodation otherwise guaranteed as a universal right. Through the lens of discrimination law analysis, the first question raised by this situation is whether they can be identified as a category of illegitimately discriminated persons, in relation to housing rights violations.

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<sup>42</sup> In case C-54/07 *Firma Feryn*, ECLI: EU: C: 2008: 397, the ECJ established that a comparator is not required to denounce a discrimination, where public statements on "migrants", hence both implicitly referring to nationality and to race, dissuade application from ethnic minorities, preventing comparison with other groups. Concerning the access to housing and accommodation, this means that a public or private housing provider cannot openly discriminate on the ground a person's perceived status of "immigrant". But the case is solved without the Court grasping this opportunity to articulate race and nationality as discrimination grounds. See also case C-668/15 *Ismar Huskic*, EU: C: 2017: 278, excluding differential treatment on the ground of the country of birth from the notion of race.

<sup>43</sup> For a notable example of an ECJ ruling in relation to the right to accommodation, see *Haqbin v FEDASIL* (C-233/18) ECLI: EU: C: 2019: 956, 19 November 2019.

As seen above, when criticising violations of foreigners' fundamental rights in his 2016 report, the French Ombudsman interestingly distinguishes between two areas of relevant legal provisions and practices. On the one hand, the differential treatment of foreigners is authorised by immigration law and policy. Materially, this differential treatment openly targeting Third Country Nationals, with dramatic to deadly consequences, would amount to direct discrimination. But since the category of "foreigner" is based on nationality, discriminatory treatment is allowed under French law. On the other hand, in an attempt to reconcile human rights protection with immigration policy derogations, the French Ombudsman points out that the legal possibility to treat a category of people differently, namely foreigners, in regard of immigration law, does not extend to the implementation of their fundamental rights. Any "differential treatment in the implementation of all rights relating to foreigners' everyday life" is prohibited: social protection, children's rights, health, or housing (French Ombudsman, 2016a). Not only illegal state practices in France violate this prohibition by rejecting or preventing adult and minor homeless migrants' claims for accommodation (among other essential needs, for example access to water and food, waste management, protection against frequent camps evictions by the police, access to medical care, access to school for minors, etc.), but also, some legal provisions differentiate between situations though criteria that impose limits to Third Country Nationals' access to their fundamental rights. These statements mark an attempt to limit the exclusion of legal areas from the scope of the equality principle. In short, as suggested by the French Ombudsman's 2016 report as well as numerous human rights activist organisations, illegal differential treatment on the basis of nationality, that is, direct discrimination in the implementation of their basic human rights, results from French current immigration law provisions, policy and practices. But the current state of EU equality law does not allow for the effective protection of Third Country Nationals from these discriminations.

### **Critical Race Legal Studies – Making Sense of the Principle of Equality in the EU**

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The European system of human rights protection can be seen as providing much better standards than the international human rights system, the difficulties in the protection of their effectiveness coming mainly from the division of human rights jurisprudence between the ECHR and the EU courts (Tomuschat, 2016, Thym, 2016). However, in the current context of stagnation of EU race equality law, the European level seems incapable of providing an effective human rights framework relating to the violation of migrants' right to a shelter. The current context of rising far right resistance to non-discrimination and international human rights more generally requires examining whether an analysis of EU



equality provisions in light of critical race studies could bring an added value, in the search for the solutions and approaches that would provide a more consistent and effective EU equality framework.

### ***Human rights governance between the EU and the national level***

Alarms have been sounded and solutions conceptualised in order to tackle the lack of effectiveness of the principle of equality as regards Third Country National. The problem denounced above is one of consistency. However, it can also be partially addressed in terms of institutional powers and governance. EU equality law has given rise to national equality bodies in all EU Member States, facing various challenges in their respective state. As shown above, the French Ombudsman has been a pivotal actor in the institutional monitoring of state violations of foreigners' human rights, in connection with the principle of equality. In the emerging global governance system, reinforcing them as a powerful European network of local human rights authorities would contribute to improve the protection of the principle of equality, without the EU directly interfering in Member States legal powers (Kádár, 2018). This would imply strong, harmonised human rights standards of scrutiny and clear, concrete missions in relation to the EU Social Pillar (Benedi Lahuerta and Zbyszewska, 2018), as well as a coherent articulation of ECHR and EU tools of human rights protection.

The good administration principle, enshrined in Article 41 of the EU Charter of Fundamental Rights, could also contribute to the improvement of the effectiveness of the principle of equality. To clarify the content of this still undefined principle in relation to French asylum and immigration law, as an effective guarantee of equal access to state services for all persons, would clearly contribute to tackle difficulties faced by homeless migrants in their human rights claims, including in their attempt to access emergency accommodation (Bousta, 2017). This could also be part of the reinforcement of the missions of EU equality bodies.

Another way to better tackle difficulties resulting from the inconsistent EU race equality framework would be to question mainstream research methods. Most denunciations of the defective implementation of the equality principle by academia seem to fail to address the issue in terms of EU accountability to its people, for not providing the complete and effective human rights framework that it otherwise pretends to promote. This is where critical race studies can prove of unequalled value in order to properly identify the limits of the current race equality framework in relation to housing rights.

### ***The added value of critical race studies***

While the very possibility of any social change to occur through the European Union's equality law framework is being increasingly questioned (Xenidis, 2019), critical race legal studies prove necessary to offer solid foundations to the effective implementation of the principle of equality.

### **Towards a more impact-oriented analysis**

To question the effectiveness of the Race Directive amounts to raise the question of the most adequate institutional level to fight against race discrimination. Critical race theory promotes a race-conscious approach to the law, rooted in the opposition to 'at least three entrenched, mainstream beliefs about racial injustice': that blindness to race will eliminate racism, that racism is not a matter of system but of individual behaviours, and that racism can be fought against distinctly from other forms of injustice (between social classes, or other, often intersectional discrimination grounds – Valdes *et al.*, 2002, pp.1-2). These three points provide a flexible but clearly articulated theoretical framework, making it possible to analyse what is observed on the ground as systemic failures, rather than a succession of individual dysfunctions. Through critical legal studies (Ward, 1996), and more specifically critical race legal studies (Möschel, 2007, 2014, 2016, 2018), the question of how exclusion and inclusion within the EU is intimately bound up with nationality and citizenship is gaining increasing attention. By focusing on the impact of unequal human rights implementation on discriminated populations, critical race theory allows researchers and activists to identify and tackle the gaps in the implementation of the principle of equality in relation to racism in Europe in terms of effectiveness. In addition, by enabling scholars to consider racist phenomena themselves as an evolving phenomenon (Gomez, 2012), critical race studies also facilitate the conceptualisation of legal anti-discrimination tools as evolving processes, without their changing nature in EU law necessarily appearing as a failure. This perspective is necessary in the moving context of European integration and its anti-discrimination law framework.

### **Accountability of EU institutions**

The Race Directive authorises positive action instead of referring to race-blindness as a solution against discrimination. The notion of indirect discrimination defined in the Directive also makes it possible to address systemic dimensions of race discrimination (Mercat-Bruns, 2018). However, without denying the merits of the advanced human rights system built at European level, a closer look at homeless Third Country Nationals' dire living conditions on the ground, demonstrates more than one failure in the equal implementation of their basic human rights. Not only can these failures be denounced politically, as a dissuasive migration policy strategy by the state, that contradicts the very notion of human rights. But in addition, through the distinction between race and nationality and the concept of

EU citizenship, EU equality law established a ‘hierarchy of persons’, clearly providing for more solid equality guarantees for EU citizens than for Third Country Nationals (Lahuerta, 2009).

As shown in this paper in relation to the right to accommodation, European immigration law and policy at national and EU level now has a very concrete impact on disadvantaged Third Country Nationals: human rights violations resulting in squalid living conditions for many, followed by death for some.<sup>44</sup> In light of critical race studies, this result can be considered in terms of structural racism, as partially flowing from the EU equality framework and its inherent blindness to the inconsistency of prohibiting race discrimination, while distinguishing between nationality and race. This is why this approach is needed: in order to empower the people of the EU with appropriate tools of analysis of the dramatic phenomena they are currently witnessing, in terms of accountability of EU institutions for providing a defective human rights framework. Hence, this paper, coming from a law practitioner, calls public policy and law researchers to consider the flaws described, and to further explore how this critical legal perspective can lead towards better housing policies and the implementation of the right to housing for *all* human beings.

## Conclusion

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Exploring the links between the violation of migrants’ right to accommodation in France and the EU equality framework has cast light on the necessity to enlarge the spectrum of methodological tools of analysis that European legal scholars usually adopt, for a more complete, critical reading of the implementation of anti-discrimination law in Europe in relation to its concrete consequences in people’s lives. Given the threat that the rising far right in Europe poses to the universality of human rights, contemporary European human rights law research cannot dispense with a careful examination of possible solutions to reach a credible and solid equality law framework. In this context, critical race theory appears to offer the necessary tools to identify the impact of the current legal system’s inconsistency. Although a few scholars have started to embrace this perspective, the EU’s responsibility for promoting an inconsistent legal system, in a context of rising opposition to the human rights framework itself, has to be further conceptualised. Since the implementation of the EU race equality directive was one of the major elements deemed to characterise a more ‘social Europe’ on the basis of a human rights

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<sup>44</sup> Suicides of minor and adult migrants are regularly reported in France; at the time of writing the first version of this paper, the last one was the recent self-hanging of a young Afghan person, one month after he joined a homeless migrant camp: N. Wilcke, ‘Strasbourg: le suicide d’un jeune Afghan relance le débat sur l’accueil des migrants’ (‘Strasbourg: young Afghan’s suicide triggers the debate on the reception of migrants’), (27/5/2019) *20 Minutes*.

rationale, critical race studies can be of invaluable help to explore the question of the accountability of European institutions for contributing to build a possibly inconsistent legal environment.

These elements are key to the near future of EU law, given the tight link between international migration flows, the heavy difficulties for a homeless person to access any of her rights, and the necessary universality inherent to fundamental rights and freedoms.

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