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Special Issue: Strategic Litigation in EU Law

Mobilizing the Rights of Homeless EU Citizens in the Netherlands

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Abstract

This Article explores, from a participatory perspective of an engaged legal scholar, the case of homeless EU citizens in the Netherlands and the mobilization of their rights. By marking them as so-called *niet-rechthebbenden* (“non-rightholders”), Dutch municipalities have systematically denied homeless EU citizens access to overnight shelters and general homelessness services on equal footing as Dutch citizens. This legal and practical deadlock—a classic case of non-compliance through “law in action”—has most probably led to a denial of rights to EU citizens entitled to shelter as permanent residents, (former) workers, or otherwise legally residing EU citizens. The contribution explores the context and motivations that led a broad coalition of actors—ranging from homelessness organizations, advocacy groups, a public interest litigation organization and legal experts—to join efforts and consider strategic litigation a credible avenue to protect the interests of the most vulnerable under EU law within a national and local context. The case demonstrates, however, how strategic litigation is not considered the most effective or preferred strategy when other avenues for legal mobilization open up.

Keywords Homeless; eu citizen; EU law; shelter; mobilization; litigation

A. Introduction

The free movement of persons is supposed to improve the living and working conditions and social advancement of European Union (“EU”) citizens. Yet the reality is quite different for many. A significant part of the people experiencing homelessness in European cities are nationals from other EU Member States. In the Netherlands, estimates suggest a very rapid rise in the number of homeless EU citizens: From around 2,500–3,000 nationwide in 2021¹ to at least 6,000 in Autumn 2023.² What is more, EU citizens are clearly overrepresented amongst people who experience the most destitute and often fatal form of homelessness—namely rough sleeping in public spaces. Forming only 3.6% of the general population in the Netherlands,³ EU citizens represent

¹Valente en Dokters van de Wereld waarschuwen voor risico’s na sluiting noodopvang voor ‘niet rechthebbende’ dak- en thuislozen, RODE KRUIS [RED CROSS] (June 1, 2021), <https://www.rodekruis.nl/persberichten/risicos-na-sluiting-noodopvang-voor-dak-en-thuislozen/>.

²Jan Douwe Krist, *Veel meer dakloze arbeidsmigranten dan gedacht: zeker 6000*, RTL NIEUWS (Dec. 4, 2023), <https://www.rtl.nl/nieuws/rtl-z/artikel/5422029/arbeidsmigranten-dakloos-op-straat-gezet>.

³*Migrantenmonitor 2021 en 2022*, Centraal Bureau voor de Statistiek (Nov. 16, 2023), <https://www.cbs.nl/nl-nl/maatwerk/2023/46/migrantenmonitor-2021-en-2022>.

approximately 75% of the rough sleepers in Rotterdam⁴ and around 80% in Amsterdam.⁵ While having access to various daytime facilities, a majority of Dutch municipalities systematically denies homeless EU citizens access to overnight shelters and general homelessness services, denying them equal footing with Dutch citizens. Unless EU citizens can prove permanent residence status, Dutch municipalities consider them “non-entitled homeless persons” (*niet-rechthebbende dakloze mensen*).⁶ This qualification has likely led to the denial of rights of EU citizens who might have been able to rely on their right to equal treatment as permanent residents, (former) workers, or otherwise legally residing EU citizens.

In this Article, I describe the national context and motivations that led a broad coalition of actors in the Netherlands—ranging from homelessness organizations, advocacy groups, a public interest litigation organization, and legal experts—to join efforts in mobilizing EU law to advance the interests of homeless EU citizens. This social process is treated as a case of legal mobilization in the particular situation of Member State non-compliance through the “law in action”: The law “on the books” does not translate into concrete policy and administrative practices “on the ground” and individual legal protection is largely defunct. In such situations, mobilization by civil society actors has been hypothesized to be critical for social change.⁷ Therefore, this Article explores how advocacy groups have used various strategies from the toolkit of legal mobilization—broadly defined as the use of law and courts to press for social change.⁸ I distinguish between (1) strategic litigation⁹, (2) administrative action directed at the executive at various levels of government, and (3) public advocacy and campaigning geared towards political institutions and the broader public. The case of legal mobilization for the rights of homeless EU citizens in the Netherlands demonstrates how strategic litigation is not considered the most effective or preferred strategy when other avenues for legal mobilization open up.

In light of this Special Issue, this Article is not a traditional academic work but rather a practitioner’s perspective. This means that I mostly draw on my own participatory perspective as an engaged legal scholar. In order to complement my subjective perspective and fill some of the gaps in my observations, I also conducted five semi-structured background interviews with the relevant actors within the civil service and civil society organizations. I start by briefly explaining the relevant rights homeless EU citizens enjoy—Section B—and continue by describing the national context in which the mobilization of EU law emerged in Section C. After explaining my positionality and participation in this process—Section D—the final section focuses on the legal mobilization that would “change the terms of debate” and might eventually lead to systematic reform—Section E.

⁴LISAN JANSEN LORKEERS, ELSKE WITS, MARGRIET LENKENS, SIMONE ’T HOOFT AND GERA NAGELHOUT, MIDDEN- EN OOST-EUROPESE WERKNEMERS IN KWETSBARE POSITIES: HANDVATTEN VOOR PREVENTIE EN TERUGDRINGEN VAN DAKLOOSHEID EN VERSLAVING 21 (June 2022), <https://ivo.nl/publicaties/midden-en-oost-europese-werknemers-in-kwetzbare-positities-handvatten-voor-preventie-en-terugdringen-van-dakloosheid-en-verslaving/> (presenting a research report completed in association with the IVO research institute).

⁵Ronald Olsthoorn & Lotte Rigter, *Overal daling dakloosheid, niet in Amsterdam: “Dweilen voor een kraan die ergens anders open staat”*, AT5 (Oct. 4, 2023), <https://www.at5.nl/artikelen/222794/geen-daling-van-daklozen-amsterdam>.

⁶Jochem van Staalduine, *De Gemeente als Uitsmijter*, DE GROENE AMSTERDAMMER (Apr. 20, 2022), <https://www.groene.nl/artikel/de-gemeente-als-uitsmijter>.

⁷See generally Lisa Conant, *Compliance and What EU Member States Make of It*, in COMPLIANCE AND THE ENFORCEMENT OF EU LAW (Marise Cremona ed., 2012).

⁸Pola Cebulak, *Scholarly Activism for the Rule of Law in the EU*, 4 J. ILLIBERALISM STUD. 45, 45–46 (2024).

⁹Pola Cebulak, Marta Morvillo, Stefan Salomon, *Strategic litigation in EU law: Who does it empower?*, 25(6) GERMAN L.J. 800 (2024) (in this Issue).

B. The Promise of EU Law—And Its Limits

EU citizenship is not a panacea for resolving the question of homelessness among EU citizens in European cities. Far from it. EU citizenship, largely,¹⁰ works through the principle of equal treatment and, as of yet,¹¹ there is little support for reading a substantive minimum floor of social rights within the status of EU citizenship.¹² Equal treatment means that EU citizens who find themselves in comparable situations as national citizens cannot be treated differently and should therefore receive the same level of support or be subjected to the same eligibility conditions.¹³ Therefore, if a Member State offers only limited or selective homelessness support to its own citizens, the legal status of EU citizenship will not be of much help to EU citizens experiencing homelessness in that Member State. In the Netherlands, for example, the law provides that municipalities can refuse “customized” homelessness support to residents who are considered “self-supportive” and expect them to rely on their own ability, network, and resources to find a way out of homelessness.¹⁴ This leaves many so-called “economically homeless” persons struggling for shelter and other support services.¹⁵

Additionally, it is crucial to mention that a significant portion of homeless EU citizens might not be able to rely on the right to equal treatment under EU law in the first place. Free movement rights are not unconditional, and the EU legislator has formulated requirements and exceptions that are meant to defy the phantom of “social tourism.” After the first three months of residence, EU citizens either need to perform more than marginal work or be financially self-sufficient in order to have a continued right of residence in another Member State.¹⁶ Over the past decade, the Court has backtracked from its earlier aspirational citizenship judgments¹⁷ by emphasizing that EU citizens can claim equal access to social benefits only when they comply with these so-called residence conditions under the Citizenship Directive.¹⁸ As a homeless EU citizen in the Netherlands found out in the case of *FS*, non-compliance with those conditions can also result in expulsion.¹⁹ Only those who earn permanent resident status—typically after five years of lawful residence—no longer have to fear discrimination or expulsion for reasons of socio-economic circumstances.²⁰

The bottom line remains however, that EU citizenship continues to offer strong equal treatment rights to broad categories of EU citizens, enabling them—in theory—to claim equal access to homelessness support services in their host Member State. These categories include EU

¹⁰There is still debate whether the material rights accorded to EU citizens on the basis of the “substance of rights test,” as developed by the Court in *Zambrano*, work differently. See Case C-34/09, *Gerardo Ruiz Zambrano v. Office national de l'emploi*, ECLI:EU:C:2011:124, para. 42 (March 8, 2011).

¹¹See, e.g., Dimitry Kochenov, *On Tiles and Pillars: EU Citizenship as a Federal Denominator*, in *EU CITIZENSHIP AND FEDERALISM* 3–82 (Dimitry Kochenov ed., 2017).

¹²For a discussion about such a floor in relation to the *CG* case, see Dion Kramer, *EU Citizenship: A Double-Edged Sword for European Social Security*, in *RESEARCH HANDBOOK ON EUROPEAN SOCIAL SECURITY LAW* 182, 182–203 (Frans Pennings & Gijsbert Vonk eds., 2023).

¹³For sake of brevity, I leave out a possibly lengthy discussion of indirect forms of discrimination against EU citizens, such as “local residence periods” giving advantages to local homeless citizens.

¹⁴Wet Maatschappelijke Ondersteuning [Social Support Act of 2015] 1 januari 2015, Stb. 2014, art. § 1.2.1(c) (Neth.).

¹⁵Jochem Westert & Caroline de Groot, *De zelfredzame dakloze: Over het eigen-kraacht-criterium bij beslissingen over toegang tot maatschappelijke opvang*, 44 *NEDERLANDS JURISTENBLAD* [DUTCH L. J.] 3200, 3200–07 (2017). See also Michelle van Tongerlo, *De zelfredzame dakloze? Die bestaat niet*, *DE CORRESPONDENT* (Sept. 26, 2023), <https://decorrespondent.nl/14818/de-zelfredzame-dakloze-die-bestaat-niet/94fd0496-f1df-004d-047d-7cacefa13ec6>.

¹⁶Directive 2004/38, art. 7, 2004 O.J. (L 158) (EC).

¹⁷ECJ, Case C-184/99, *Grzelczyk v. Centre Public d'Aide Sociale d'Ottignies-Louvain-la-Neuve*, ECLI:EU:C:2001:458 (Sept. 20, 2001), paras 31, 44, <https://curia.europa.eu/juris/liste.jsf?num=C-184/99>.

¹⁸ECJ, Case C-333/13, *Elisabeta Dano v. Jobcenter Leipzig*, ECLI:EU:C:2014:341 (May 20, 2014), para. 69, <http://curia.europa.eu/juris/liste.jsf?num=C-333/13>.

¹⁹ECJ, Case C-719/19, *FS v. Staatssecretaris van Justitie en Veiligheid*, ECLI:EU:C:2021:506 (June 22, 2021), para. 54, <https://curia.europa.eu/juris/liste.jsf?num=C-719/19>.

²⁰Directive 2004/38, *supra* note 16, at art. 16.

citizens and their family members who are working, who are in flexible, part-time or self-employed arrangements,²¹ who involuntarily lose their job,²² who become ill or have a work accident,²³ who have or had sufficient resources²⁴, and who care for school-going children.²⁵ Also, the Court has gone to great lengths to strengthen these rights vis-à-vis the “red tape” oftentimes imposed by reluctant Member State authorities. Particularly important here is the doctrine that the entitlements of EU citizens flow directly from EU law. Therefore, Member State authorities cannot rely on bureaucratic formalities—residence documents, registration procedures, and tax numbers—to deny substantive rights because any other means of proof should suffice.²⁶

C. The National Context

The legal situation of homeless EU citizens in the Netherlands can credibly be described as one of systemic and institutionalized discrimination. Local differentiation aside, the general image is as follows: While EU citizens have always enjoyed access to so-called “walk-in centers” that operate during the day and temporary overnight shelters that open with freezing temperatures, they have been excluded from access to regular homelessness support services. Over time, some cities have organized special services for EU citizens, but these are parallel to the formal system and typically offer limited and sober facilities.²⁷ Formal access to regular services is occasionally granted to EU citizens who are able to convincingly demonstrate that they have worked continuously for more than five years in the Netherlands or possess a permanent residence card.²⁸

Dutch municipalities and—by extension—large parts of the NGO-based homelessness support sector have for a long time considered homeless EU citizens as so-called *niet-rechthebbenden*. This concept roughly translates to “non-rightsholders” or “those without rights” and denotes a form of “non-entitlement” to homelessness support services. One is easily fooled by the legal appearance of the concept, as the legal basis for this exclusion remains unclear and has never been communicated. Aptly described by the government itself as a “stigma,”²⁹ being *niet-rechthebbend* is rooted in institutional practice and discourse, and seems to classify EU citizens in everyday bureaucratic fashion regardless of their actual legal status under EU and national law. The clearest institutional expression of this stigma can be found in the numerous guidelines published by the Ministry of Health, Welfare and Sport during COVID-19, when all people—regardless of their legal status—were sheltered. In these guidelines, “EU-migrants” are simply listed under the heading *niet-rechthebbende dakloze mensen* (“non-entitled homeless people”) and municipalities are instructed to deny access to shelter or extend access for a month in case they “cooperate” with a return-trajectory to their country of origin or a “return to work.”³⁰

²¹*Id.* at art. 7(1)(a).

²²*Id.* at art. 7(3)(b)-(c). See also ECJ, Case C-483/17, Tarola v. Minister for Social Protection, ECLI:EU:C:2019:309 (Apr. 11, 2019), para. 54, <https://curia.europa.eu/juris/liste.jsf?num=C-483/17>.

²³Directive 2004/38, *supra* note 16, at art. 7(1)(a).

²⁴*Id.* at art. 7(1)(b).

²⁵ECJ, Case C-181/19, Jobcenter Krefeld – Widerspruchsstelle v. JD, ECLI:EU:C:2020:794 (Oct. 6, 2020), para. 37, <https://curia.europa.eu/juris/liste.jsf?num=C-181/19>.

²⁶Directive 2004/38, *supra* note 16, at art. 25.

²⁷For example, AMOC in Amsterdam and De Ontmoeting in Rotterdam, as well as the services of Barka throughout the country.

²⁸Directive 2004/38, *supra* note 16, at art. 16. It should be noted that continuous work for five years is a very narrow—and incorrect—interpretation of the conditions to obtain permanent residence under article 16. *Id.*

²⁹MINISTERIE VAN VOLKSGEZONDHEID WELZIJN EN SPORT, MINISTERIE VAN SOCIALE ZAKEN EN WERKGELEGENHEID, MINISTERIE VAN JUSTITIE EN VEILIGHEID, PLAN VAN AANPAK KWETSBARE DAKLOZE EU-BURGERS [ACTION PLAN FOR VULNERABLE HOMELESS EU CITIZENS] (2022), <https://www.rijksoverheid.nl/documenten/rapporten/2022/09/13/plan-van-aanpak-kwetzbare-dakloze-eu-burgers>.

³⁰*Richtlijn opvang dak- en thuisloze mensen* [Guidelines for the Shelter of Homeless People], RIJKSOVERHEID, (March 12, 2021), <https://www.rijksoverheid.nl/documenten/richtlijnen/2020/11/05/richtlijn-opvang-dak-en-thuisloze-mensen>.

Respondents in the field find it difficult to explain how the “myth”³¹ of “non-entitlement” has become the *modus operandi* for almost everyone working in the homeless sector. This Article is not the place for such explanation, but a first impression—based on the interviews and my participant observations—suggests an interplay between at least three contextual factors that might have enabled it. First, a pertinent lack of capacity and funding in most cities—where long waitlists exist for both homelessness services and access to social housing—might push authorities to exclusive practices. Second, homelessness support in the Netherlands is characterized by a *de facto* absence of administrative law. Municipalities tend not to issue formal decisions and procedures for objection and appeal are difficult to follow in practice.³² Third, until recently, there was a lack of organization among local civil society organization as pertaining to the interests and rights of homeless EU citizens.³³

D. Positionality—The Academic Intervention

In studying the social world, it is inevitable that one becomes part of the very phenomenon one studies. As this Article is written as a practitioner’s perspective, I use this section to explain my positionality as a legal academic towards the mobilization of EU rights in the Netherlands and my participation in the sequence of events described below. While I also consider homelessness to be a violation of the right to human dignity and a grave form of social injustice, my attempts at public intervention are grounded in the duty I feel to speak out publicly and disseminate my research as an academic who has studied the social rights of mobile EU citizens for many years.³⁴ It is important to emphasize that in the context of this Article I limit myself to describing my actions and participation and do not attempt to establish any causality between my intervention and the processes of institutional change—described in the next section—as this would risk underestimating or worse yet overestimating my own role within the complex fabric of society.

While I have been engaged with the topic of homelessness through research since the start of my academic career, I decided to intervene actively during COVID-19, when it became increasingly clear from media reporting that EU citizens were being systematically denied access to homeless shelters. At the beginning of 2022, I published an op-ed in the Dutch newspaper, *NRC*, arguing that EU citizens should normally enjoy access to homeless shelters unless the Immigration Service terminates their right of residence. After this publication, my public engagement with homelessness quickly gained momentum. I taught workshops to homelessness organizations, gave advice on individual cases sent to me, and extensively commented in national and local newspapers and on television. In order to contribute to my faculty’s mission of teaching our students “law in action,” I set up an EU Citizen Rights Corner within the preexisting VU Migration Law Clinic, where I supervised the legal advice students gave to outside organizations. After the government published a national “Action Plan”—described in Section E—I responded critically in the national media³⁵ and published a more extensive academic article on the rights of homeless EU citizens.³⁶ That published article became the basis for parliamentary questions by

³¹In the words of a policy official, interview conducted by author, (March 13, 2024) (on file with author).

³²This could potentially be traced back to homelessness support as an activity organized outside the remit of the governmental sphere, namely carried out by civil society organizations, like church and religious organizations like the Salvation Army.

³³Interview with advocacy group conducted by author (Feb. 26, 2024) (on file with author).

³⁴For a reflection, see Ladan Rahbari, Dion Kramer, Marie Deserno and Tommy Tse, *Activism and Academia: An Interdisciplinary Dialogue on Academic Freedom and Social Engagement*, 46 J. HIGHER EDUC. POL’Y & MGMT. 1, 6-7 (2024).

³⁵Jochem van Staalduine, *Ook in Nieuw Plan Schendt Nederland Rechten Dakloze EU-migranten*, TROUW (Nov. 14, 2022, 10:24 PM), <https://www.trouw.nl/duurzaamheid-economie/ook-in-nieuw-plan-schendt-nederland-rechten-dakloze-eu-migranten~b4904131/?referrer=https://www.google.com/>.

³⁶Dion Kramer, *EU-Burgers zonder (thuis): De Aanpak van Dakloosheid en de Staat van EU-Burgerschap in Nederland*, 2023(5/6) NEDERLANDS TIJDSCHRIFT VOOR EUROPEES RECHT [DUTCH J. EUR. L.] 87 (2023).

D'66 in the national parliament and a “technical session” in the Rotterdam City Council. My activities also opened the doors to relevant ministries, which later invited me to critically comment on the so-called “rights tool” they were developing—further discussed in Section E.

My public interventions rested on three arguments that were grounded in my earlier legal research. First, I tried to bust the myth of “non-entitlement” around homeless EU citizens by explaining their rights under EU law as described above. Second, I emphasized the legal status of EU citizens as independent from the bureaucratic barriers erected by local authorities, such as having a valid registration or correct “residence code” in the Personal Records Database. Third, I highlighted the domestic division of competences between Dutch municipalities and the Immigration Service.³⁷ This third argument requires further unpacking. In the Netherlands, the High Administrative Court has decided that municipalities are not competent to exclude EU citizens who claim to have a right of residence for longer than three months under the Citizenship Directive. The assessment of residence rights falls within the exclusive competence of the Immigration Service. Municipalities have to assume lawful residence, grant social assistance or homelessness support on equal terms to national citizens, and await a formal decision by the Immigration Service.³⁸ While this division of competences seems to be respected in relation to social assistance, it is ignored—willingly or unwillingly—in relation to homelessness support.

E. Legal Mobilization

Over the past years, we can witness a gradual change in the policies and discourses around homeless EU citizens. As respondents explain, the “terms of debate have changed.”³⁹ Whereas earlier, EU citizens were simply seen as “non-entitled homeless people,” their rights are now increasingly acknowledged throughout all layers of the public and private homelessness support sector. Additionally, various administrative techniques are developed to do justice to these rights. This process is, and remains, highly contentious as it is likely to imply a major overhaul of established street-level practices, the financial capacity of municipalities to provide homelessness services, the role of NGOs, and the exercise of and respect for domestic competences between institutions.

There are reasons to believe that this process of change would have taken much longer—or might have never occurred in the first place—if it was not for Covid-19. The outbreak of Covid-19 and the subsequent lockdowns created an important momentum that opened various avenues for advocacy by societal actors on the one hand and responsiveness of public institutions on the other. Because of the lockdowns, municipalities were expected by the central government to “take everyone out of the streets,” including homeless persons who were considered *niet-rechthebbend* (“non-entitled”), most of who were EU citizens.⁴⁰ While social workers had obviously been aware of homelessness among EU citizens before, the lockdowns increased awareness amongst other public and private actors. The subsequent closure of the Covid-19 emergency shelters mid-2021, and again in early 2022, led to the question what should happen with the group of “non-entitled EU citizens.” According to the Red Cross and other organizations, sending this group back to the streets would imply irresponsible physical and mental health risks.⁴¹ In light of the rising numbers of homeless EU citizens, deputy mayors and the State Secretary of Health, Welfare and Sports decided in March 2021 to work on a “Plan of Action” that should give guidance to municipalities.⁴²

³⁷See Dion Kramer & Anita Heindlmaier, *Administering the Union Citizen in Need: Between Welfare State Bureaucracy and Migration Control*, 31 J. EUR. SOC. POL'Y 380, 380–94 (2021) (arguing that the material outcomes of EU citizenship rights are fundamentally shaped in relation to domestic bureaucracy and institutional division of competences).

³⁸*Id.*

³⁹Interview with advocacy group, *supra* note 33.

⁴⁰Interview with policy official, *supra* note 31.

⁴¹See Red Cross, *supra* note 1.

⁴²Interview with policy official, *supra* note 31.

Simultaneously, but independently from this process within the administration, a mixed group of national and local civil society organizations offering support to homeless persons and migrants had started to convene to discuss the rights of homeless EU citizens.⁴³ Impetus was provided by *Stichting Landelijk Ongedocumenteerden Steunpunt* (“Stichting LOS”), a foundation normally focusing on offering legal and expert support to organizations working with undocumented migrants. In 2021 and 2022, the organization gathered for four workshops to learn about the rights of EU citizens and exchange experiences by discussing anonymized case material together with experts and practicing lawyers.⁴⁴ This dispersion of knowledge about EU law, reinforced by a regular newsletter on the topic, helped professionals push individual cases forward within the administrative domain. It also led to more collective follow-up actions within the toolkit of legal mobilization. The potential of strategic litigation—by means of civil liability action against the state—⁴⁵ was seriously discussed in cooperation with a public interest litigation foundation. The main conclusion, however, was that state liability was not likely to succeed for procedural reasons, because EU citizens should, in theory, enjoy access to objection and appeal procedures under regular administrative law. While still on the table, the organizations involved considered it more fruitful in the short-term to concentrate efforts on administrative appeal.⁴⁶ This was not unsuccessful. Amsterdam-based organizations managed to win an objection procedure on behalf of a homeless EU citizen, whereby the legal department of the municipality acknowledged that the municipality could not exclude EU citizens from social support for the mere reason of them being registered with “code 30” in the Personal Records Database and that the municipality should presume lawful residence until the Immigration Service decides otherwise.⁴⁷ Other reasons for postponing the decision to pursue state liability were the—rather idiosyncratic—opportunities that arose via political avenues with the local implementation of the Plan of Action, as discussed below.

Another element of legal mobilization has been advocacy by means of the media towards political institutions. Especially since COVID-19, national and local media have covered homelessness among EU citizens extensively. Increasingly, media moved from reporting on the increase in homeless EU citizens to reporting on their lack of access to shelter and—importantly—about the dubious legality of such discrimination.⁴⁸ Increased advocacy by interest groups and media attention also triggered responsiveness within “the palace”⁴⁹—meaning the legislative and executive branches of the state at the national and local levels. In the summer of 2023, a member of the national parliament asked questions to the State Secretary for Health, Welfare and Sport about the legal validity of its Plan of Action, as seen below.⁵⁰ In the autumn of 2023, the Rotterdam City Council organized a “technical session” in which city councilors were informed about the rights of EU citizens. This led to various questions and motions in the Council. As the case of *Rotterdam* shows, this can result in incremental changes. Despite strong rhetoric by

⁴³Brief aan de Tweede Kamer over EU migranten, STRAAT CONSULAAT (Dec. 7, 2022), <https://www.straatconsulaat.nl/daklozenopvang-den-haag/ingestuurde-brief-aan-de-tweede-kamer-over-eu-migranten-i-s-m-andere-organisaties/> (providing a good example in the form of a letter that civil society organizations collectively wrote to the national parliament).

⁴⁴Stichting LOS organized two workshops in 2021. One workshop was with Professor Paul Minderhoud. Practicing lawyer, Janusz Dobosz, and I were both involved in two additional workshops held in 2022.

⁴⁵For a brief explanation of this type of litigation, see Otto Spijkers, *Public interest Litigation Before Domestic Courts in the Netherlands on the Basis of International Law: Article 3:305a Dutch Civil Code*, EJIL: TALK! (Mar. 6, 2020), <https://www.ejiltalk.org/public-interest-litigation-before-domestic-courts-in-the-netherlands-on-the-basis-of-international-law-article-3305a-dutch-civil-code/>.

⁴⁶Interview with advocacy group conducted by author (Mar. 12, 2024) (on file with author).

⁴⁷Decision on objection, Municipality of Amsterdam (Nov. 20 2023) (on file with author).

⁴⁸van Staalduine, *supra* note 6.

⁴⁹Cebulak, Morvillo and Salomon, *supra* note 9.

⁵⁰Hülya Kat, *EU-Burgers zonder (t)huis: De Aanpak van Dakloosheid en de Staat van EU-burgerschap in Nederland*, TWEDE KAMER DER STATEN-GENERAAL (Sept. 20, 2023), <https://www.tweedekamer.nl/kamerstukken/kamervragen/detail?did=2023D38079&id=2023Z15562>.

the responsible Deputy Mayor,⁵¹ Rotterdam has revised its access criteria for accessing homelessness support several times in order to align with the substantive rules under EU law. The city has also started to issue written decisions after pressure from local councilors and societal groups.

At the time of writing this Article, much of the legal mobilization concentrates at the local implementation of a national “Plan of Action for Vulnerable, Homeless EU citizens.”⁵² Published in September 2022 by the State Secretary of Health, Welfare and Sport, this Plan was supposed to provide authorities with legal tools and policy solutions in order to identify, prevent, and resolve homelessness among vulnerable EU citizens. While the legal discussion of EU citizens’ rights is weak at best,⁵³ the Plan does acknowledge the existence of these rights and promised a so-called *rechtentool* (a “rights tool”)—a document with legal guidance eagerly awaited by municipalities and civil society organizations. The rights tool was contested from the start and took much longer to develop than expected as various ministries, executive authorities—including municipalities and Immigration Service—civil society organizations, and experts had to be involved. The final version of the document, published as a “Checklist Equal Treatment,” offers relatively simple yes-and-no guiding questions enabling municipal civil servants to determine whether EU citizens should be given equal access to homelessness support or not.⁵⁴ When implemented, the rights tool might imply a significant step forward in terms of rights protection because it rejects some of the bureaucratic obstacles that have been place, like “code 30”; this relatively clearly stipulates the rights of EU citizens who have work histories and involves the Immigration Service in the decision-making process.⁵⁵ Legal advocacy by the civil society organizations has been directed at influencing the rights tool during its development and—at the time of writing this Article—verifying its correct implementation at the local level, where municipal authorities work closely together with homeless support organizations.

As of yet, it remains a question whether this momentum will actually generate social change. It might imply—potentially costly—systematic reforms at various levels of government and in the organizations between them. Notably, it is mostly municipalities that push back towards reform, writing collectively in a press release that they are “very concerned about the possible legal obligation to admit homeless EU migrant workers to [homelessness support],” fearing that this would not be “workable” for them.⁵⁶ Probably the largest challenge for legal mobilization in the Netherlands continues to be the type of “pragmatism” that continues to pervade Dutch public administration, in which the law and the judiciary are not always seen as legitimate constraints on the exercise of political or executive power.⁵⁷

F. Conclusion

Exploring from a participatory perspective, this Article analyzed how civil society organizations mobilized EU law to protect the interests of homeless EU citizens in the Netherlands. The context

⁵¹Rotterdam gaat overlast Oost-Europeaanen radicaal aanpakken, NOS (May 10, 2024), <https://nos.nl/nieuwsuur/artikel/2519951-rotterdam-gaat-overlast-oost-europeaanen-radicaal-aanpakken>.

⁵²Directive 2004/38, *supra* note 16, art. 16.

⁵³As extensively discussed, see Kramer, *supra* note 37.

⁵⁴Checklist Recht op Gelijke Behandeling voor de Individuele EU-burger, RIJKSOVERHEID (25 June 2024), <https://www.arbeidsmigratieingoedebannen.nl/binaries/arbeidsmigratie/documenten/publicaties/2024/06/25/checklist-gelijke-behandeling/Checklist+gelijke+behandeling.pdf>.

⁵⁵Dorte Martinsen, Michael Blauberger, Anita Heindlmaier & Jessica Samspon Thierry, *Implementing European Case Law at the Bureaucratic Frontline: How Domestic Signaling Influences the Outcomes of EU Law*, 97 PUB. ADMIN. 814, 814–28 (2019) (illustrating the importance of such direct or internal guidance for compliance “at the frontline”).

⁵⁶Bestaanszekerheid voor EU-arbeidsmigranten onder druk, VNG (Feb. 1, 2024), <https://vng.nl/artikelen/bestaanszekerheid-voor-eu-arbeidsmigranten-onder-druk>.

⁵⁷Frank Hendriks & Pieter Tops, *Local Public Management Reforms in the Netherlands: Fads, Fashions and Winds of Change*, 81 PUB. ADMIN. 201, 320 (2003).

of this struggle for rights was one of institutionalized non-compliance through “law in action” across the public and private homelessness sector. Carrying the stigma of “non-entitled homeless persons,” EU citizens have faced high hurdles to access regular homelessness support services on equal terms as Dutch citizens—a situation that could persist due to tight budgets at the municipal level, a non-functional system of administrative law, and a lack of organization among local advocacy groups. The increased visibility of homeless EU citizens during COVID-19 created momentum for legal mobilization. A national Plan of Action by the government—including the promise of a “rights tool”—in combination with a joining of forces of many different organizations, offered a fruitful ground for the dissemination of knowledge about EU law, enabling civil society groups to advocate for the rights of homeless EU citizens within political and executive institutions and in the media. While strategic litigation via state liability is not entirely off the table, the development of a “rights tool” opened a more effective avenue to push for a correct translation of the law into concrete policy and administrative practice on the ground.

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