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Conceptual and Practical Concerns for the Effectiveness of the Right to Housing

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Abstract

Anno 2014, it is rather an exception to the rule that a state does not have a set of fundamental social rights incorporated into its constitution. Unfortunately however, this does not mean by far that social rights have consistently been given the same kind of treatment as other constitutional rights. A large discrepancy between the wide recognition of these rights in theory on the one hand and its influence in practice on particularly the more disadvantaged people in society is still very noticeable. The apparent failure to adequately implement fundamental social rights and their limited practical impact raise questions regarding their effectiveness. Evidently, the same applies with specific regard to the right to housing. Here, the question has been raised whether the right to housing ought to be approached as a so called obligation of result. To what extent might such a modification enhance the practical significance of such a right?

Keywords

Social Rights; human rights; housing; human dignity; effectiveness of law

Resumen

Año 2014, se puede considerar una excepción a la regla de que un Estado no tiene una serie de derechos sociales fundamentales incorporados en su constitución. Sin embargo, lamentablemente, esto no quiere decir en absoluto que a los derechos sociales se les haya dado de forma consistente el mismo tratamiento que a otros derechos constitucionales. Todavía se aprecia una amplia discrepancia entre el amplio reconocimiento de estos derechos en la teoría, por un lado, y su influencia en la práctica, en particular entre las personas más desfavorecidas de la sociedad. El aparente fracaso para implementar adecuadamente los derechos sociales fundamentales y su impacto limitado en la práctica plantean cuestiones en cuanto a su eficacia. Evidentemente, ocurre lo mismo en lo que respecta concretamente al derecho a la vivienda. Aquí, se plantea la cuestión de si el derecho a la vivienda debe ser abordada como una denominada compromiso de resultado. ¿En qué medida podría esta modificación fomentar la importancia práctica de ese derecho?

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Palabras clave

Derechos sociales; derechos humanos; vivienda; dignidad humana; efectividad del derecho

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1. Introduction

How can fundamental social rights and the right to adequate housing in particular, be given the capacity to make a difference in the lives of those who are most severely affected by the inadequacy of the current conceptualisation of these rights? Despite the fact that anno 2015, most (civil law) countries have at least some fundamental social rights incorporated into its Constitution, these rights have not yet consistently been given the same kind of treatment as other constitutional rights. A large discrepancy between the wide recognition of these rights in theory on the one hand and its influence in practice on particularly the more disadvantaged people in society is still very noticeable. The apparent failure to adequately implement fundamental social rights and their limited practical impact raise questions regarding their effectiveness. The same applies with specific regard to the right to housing. Moreover, the housing market is a dynamic environment. In Western Europe in particular, houses are becoming increasingly less affordable, particularly in the private rental market, where the characteristics of both tenants and landlords are evolving negatively.

As we will see, we should be aware of these kind of societal developments in order to establish a more effective, more successful right to housing. In this context, the question has been raised whether the right to housing ought to be approached as a so called obligation of result, enabling a state to be held accountable for not realising this right. We explore to what extent such a modification might enhance the practical significance of such a right. Furthermore, we discuss the usefulness of a concept often used in a housing rights context: human dignity. What role can such an overarching value play in making a fundamental right more effective? Is it not primarily applied as a *deus ex machine* and if so, is it not too susceptible to very different interpretations? For a better understanding of the paper as a whole, we start however with a short overview of the Belgian recognition of the right to housing and its anchoring in international human rights law.

2. Recognition and conceptualisation

The Belgian constitutional provision on fundamental social rights is the outcome of a long-term process. Although the first initiatives date back to four decades earlier, it was only in the late 80s / early 90s that there was sufficient political and legal backing to try and incorporate certain fundamental social rights into the constitution. After five years of negotiations, article 23 finally came into force early 1994. The provision starts off by recognising that "*everybody has a right to lead a life in conformity with human dignity*", a notion which we will discuss more extensively further on. For this overarching right to be effective, the provision dictates that the relevant legislation must guarantee the right to social, medical and legal assistance, the right to a healthy living environment, the right to cultural and social development and the right to adequate housing.

It follows from article 23 that the competent lawmakers have an obligation to further clarify and secure these fundamental rights. Due to the division of competences across different tiers of government however, these fundamental rights are drawn up not only at the federal, but also at the regional and local level. This may and should happen in different ways, depending on the criterion of the 'individualisability of the allocation of the goods governed by fundamental social rights' (Rimanque 1995). One should therefore take due account of how the fundamental right is defined (general versus specific) and the nature of the 'good' that is protected. The right to adequate housing, for example, is situated in between non-individualisable care for employment and the individualisable right to legal assistance.

Both the recognition and the conceptualisation of these fundamental rights in the Belgian constitution have tied in with international trends. At the dawn of international human rights law back in the 50s, western delegations strongly

opposed the idea to present economic, social and cultural rights with strict and enforceable obligations. Consequently, a dichotomy was created between these so called second generation rights and civil and political rights, the rights of the first generation.

International human rights law traditionally also uses a threefold obligation for states: 'the obligation to respect' (i.e. the obligation on the part of States to refrain from interfering with or curtailing fundamental rights), 'the obligation to protect' (i.e. the positive obligation on the part of States to ensure that fundamental rights are not abused) and 'the obligation to fulfil' (i.e. the obligation of States to actively intervene, in order either to facilitate fundamental rights or to provide means whereby those rights can be realised, including in relation to housing). Although it has been established repeatedly that all human rights encompass these three types of obligations, the idea that fundamental social rights entail mainly obligations to fulfil and more specifically obligations to provide is still present. And it is this type of obligation that is considered to be much more onerous and costly. It is for this practical reason that even today these rights are often regarded as mere obligations of means instead of obligations of result. Despite much (justified) criticism on this distinction uttered in the international doctrine (Sepulveda 2003, Alston and Quinn 1987), the preparatory works and discussions leading up to the incorporation of article 23 in the constitution have shown that this dichotomy just as well lives on at the national level. Accordingly, although legal practice has shown over these last 20 years that the fundamental social rights proclaimed in article 23 of the Belgian constitution might not be mere programmatic rights, the judicial force of this provision still remains rather limited, especially in comparison with other constitutional rights.

3. From statute law to effective law

3.1. Introductory remarks

The perception of the enforceability of fundamental rights has evolved over time. The vertical (i.e. between citizens and the authorities) and horizontal (i.e. mutually between citizens) enforceability of fundamental social rights was once the subject of much debate within legal circles. The key question was how such rights may affect relationships between citizens and the public authorities as well as among private persons, e.g. between tenant and landlord.

However, the focal point has since shifted. Today, the central issues of concern are the effectiveness and the practical application of fundamental rights (Raes and Coene 2008, Vandenhole 2010). There is a degree of 'frustration' with the observed lack of impact of fundamental rights in the real world. In other words, the focus has moved from the question of legal enforceability to that of practical enforceability. Closer attention is now paid to the field of application as such, rather than to the broader legal context. The social effectiveness of the law is presently one of the most topical issues in the sociology of law (Griffiths 1986). It is an area that concerns the tension between 'law in the books' and 'law in action' (Schwitters 2000).

3.2. Judge or law

In general terms, there are two ways of effectively realising fundamental rights. One can either rely on a judge to decide whether or not such rights apply in individual cases, i.e. through individual conflict resolution ('justiciability'), or one can strive to realise such rights through quality of regulation ('invocability'). In other words, in addition to the jurisprudential approach, one can adopt a legislative approach on the enforceability of fundamental rights. This does not in the least imply that both are mutually exclusive. If anything, we argue that both approaches work as communicating vessels. If relevant legislation is lacking in quality or does

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not convey people to comply with it, people will have to put their faith in the hands of a judge. Considering that those who should be most interested in seeing an effective right to housing are the more vulnerable people in society, this can cause problems. As will be pointed out later in this paper, it is these people that often lack practical access to justice. If on the other hand legislation is in place that imposes clear-cut and strong obligations on the responsible actors (both in the public and private sector) that engages them to support this fundamental right, the need for individual conflict resolution will, although obviously still eminent, decrease.

Both approaches have their benefits and drawbacks. The primary advantage of the jurisprudential approach is that it allows very specific 'tailoring' to the case at hand. The main drawback of this approach is that it requires the individual concerned always to take recourse to the law and to bring a case before the judge. This is not self-evident, particularly not for socially weaker groups with a lower degree of 'bureaucratic competence'. Moreover, the effectiveness of the constitutional provision then depends merely on its interpretation by the judge. The most important benefit of the legislative approach on the other hand is that it involves a structural intervention in coping with the issue at hand. The main disadvantage of such an intervention is that questions may arise regarding the effectiveness of regulation designed precisely to ensure the effectiveness of the fundamental right. By highlighting the legislative approach, we revert, as it were, to the primary duty of states with regard to the realization of human rights, which is to design and implement legislation that guarantees the recognised fundamental rights.

3.3. A goal-based approach to effectiveness

When can a legislative measure be considered effective? The simplest and probably most popular answer to this question is whenever the purpose originally intended by the legislator is reached. When we therefore take a look at the preliminary works of article 23, we notice however that despite the clear-cut content of these rights, no real decisive or authoritative statement is made about the envisioned benchmark upon which we could then test the effectiveness of article 23. One could obviously argue that the goals are the full realisation of these rights, e.g. that everyone lives in human dignity and disposes of adequate housing.

Although they have been described as "purposes to strive for", they have also been mentioned as being "principled perspectives" that the competent legislator must realise "in accordance with its capabilities". This highlights both the progressive nature of fundamental social rights as well as the fact that the provision has no direct effect. One could possibly argue from a very narrow, pragmatic perspective that since the realisation of fundamental social rights is in the first place the responsibility of the normal legislators, the purpose of article 23 itself is merely that the competent legislators do take measures with a view of progressively realising these rights, which would also change the effectiveness question. This approach focusses on what can be called the 'direct effects' of legislation and thus distinguishes itself from the 'indirect effects'. The possible interpretation of the effectiveness of article 23 as explained in this paragraph only envisages the direct effect of the provision. Indirect effects on the other hand are the societal consequences of the direct effects and the ones that are considered the real purposes by the legislator (Griffiths 1986). In this case, this obviously concerns the realisation of the rights.

There is one more explanation with regard to the goal of article 23. Considering the progressive nature of socio-economic rights, article 23 is directed at a process which aims at an increasingly higher level of protection covered by the relevant rights. Should we then not have to look into the progress that has been made in order to come to a conclusion with regard to the effectiveness of the provision? There is however no defined, easily applicable benchmark by which we can judge whether sufficient progress has been made in accordance with these capabilities

and resources of the competent legislators and governments since its publication in the Belgian Official Journal now more than twenty years ago. Consequently, the progressive nature of the rights complicates the question of effectiveness even further.

We can conclude from the above that it can be quite a challenge to determine *the* purpose of a legal provision in order to assess its effectiveness. Moreover, we should also stay humble with regard to the possibilities of law as an instrument for social change. One bigger question should therefore be asked: to what extent is any progress that has been made the result of article 23? How would the current housing situation, especially regarding the most disadvantaged groups in society, have looked if the right to adequate housing had not been incorporated into the Constitution? Would we really lag behind the actual current situation? The same (and hypothetically even more creative) regional measures might have been taken without the impetus of article 23. As France shows us with their "*Droit au Logement Opposable*" (infra), a constitutional guarantee is not always necessary to create a successful housing policy, or at least one that is generally perceived to be more successful than its Belgian counterpart. These hypothetical questions are of course difficult if not impossible to answer accurately. Yet, they do illustrate that when assessing effectiveness or trying to make legislation more effective, we should always take into account other impact factors outside the realm of positive law and approach the issue not only from a top-down, but also from a bottom-up perspective. In other words, this comprises the theories of both the social genesis of law as well as the social working of law (Schwitters 2000).

3.4. Influences on a successful right to housing

Inevitably, the conclusion to the previous paragraph brings us back to the notions of 'law in action' and 'living law'. Law is not mere paper rules ('law in the books'), nor do these paper rules in itself provide social change. While Roscoe Pound still referred to official legal rules when talking about 'law in action', albeit applied by judges and other legal practitioners (1910), Eugen Ehrlich's 'living law' is oriented outside legal institutions, nestled deep within the inner orders of society (1913). Both concepts however uncover certain things that are useful and even necessary for an effective right to housing.

A good example of the gap that exists between 'law in the books' and 'law in action' has to do with equality. Pound himself used the unequal treatment of rich and poor people with regard to the handling of crime suspects as an illustration of the distinction. It is relatively easy to enact a law that creates formal equality (i.e. equality before the law). It is however much more difficult for law to also enhance material equality. Take for example a court process between a renter and a landlord. Pro forma, the two are equal. In reality however, the tenant will often experience more obstacles to have access to justice; they are mostly so called one-shotters. In social housing disputes, tenants will have to compete against social housing organisations, which can be considered as repeat-players. While the latter party regularly deals with courts and lawyers, the one-shotter is to a large extent unaware of the intricacies of the legal system. Repeat-players thus have the essential knowledge and useful contacts where one-shotters do not (Galanter 1974). In the Flemish private rental market on the other hand, companies represent only around 5%. While many of those private letters might thus not be repeat-players, it is known that owners do have a stronger socio-economic profile than tenants (Winters et al. 2015). This can impact equal access to justice just as well. Weaker groups in society have to make relatively bigger efforts to enforce their rights, since they are often less acquainted with law and social services than the middle or upper classes (Hubeau 2004). This also pertains to financial burdens and the limit by which each party will resign to the current (problematic) situation. Moreover, the current accessibility to legal assistance for the less fortunate could be jeopardized by the recently proposed reforms of the Flemish justice system, which

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appear to want to limit the number of people with a right to a pro-deo lawyer and implement a system of co-payment.

This division between formal and material equality appears just as well outside the context of legal procedures. Even more so, it forms an important part of the discussion on socio-economic rights. We know that in accordance with article 23 of the Constitution, everyone in Belgium has the right to adequate housing and to live in human dignity (formal equality). Nevertheless, this right does not abrogate or sufficiently reduce the social deprivation of some less advantaged persons and groups in society (material equality). Some blame the institutions in charge for thwarting the transformative potential of rights and consolidating the socio-economic status quo (Pieterse 2007), while others simply point to the overestimation of the instrument law (Terlouw 2011).

Another possible influence are the social rules and norms of conduct that semi-autonomous social fields (SASF) share and maintain by way of social control (Moore 1972). Since the rules of these groups of interconnected people are often more imbedded into a person's life than legal rules, they can and have already influenced the compliance with and effectiveness of law in general and more particularly the right to housing. It has therefore been said that the success rate of a piece of legislation increases as it connects more to social reality (Niemeijer 2011). The prevailing mentality in an SASF can be quite the opposite from that of law or even flat out contradict legal rules. An example of the former is the conception of squatters to value the right to housing higher than the right to property. The latter can be illustrated by the discriminatory approach of landlords and real estate agents and agencies to potential buyers and renters (e.g.: Court of Appeal Ghent 30 November 2005; Court of First Instance Brussels 3 June 2005). Recent numbers show that for example 22% of all renters do not want tenants of foreign origin. No less than 36% of them will wait for a different potential renter when a candidate lives on an income distributed by the public centre of social welfare (Winters et al. 2015). One could however very well make the argument that landlords simply seek financial security and want to prevent or at least reduce the possibility of rent arrears. Consequently, there can be a very thin line between discrimination and freely managing one's own property. On the other hand, the bottom-up approach should and does also influence socio-economic rights in a positive way. The current French *Droit au Logement Opposable* has for a considerable part arisen from civil society. In 2003, a voluntary community created a platform for the enforceable right to housing, while in the summer of 2005, the French public united after the death of 17 inadequately housed people living in converted flat buildings in Paris. Their outrage prompted a new bill on establishing an enforceable right to housing and kept the debate alive.

Furthermore, we can also deduce some additional influences that centre around the connection between legislative effectiveness and the reason why people obey rules. Firstly, legal rules often lean towards the (moral) convictions and habits of persons. It might however also be the other way around. A certain kind of conduct might become a habit when the relevant law is backed by threats of force for long enough. Consequently, sanctions are also recognised as aspects that influence effectiveness. More accurately would be to speak of the perception of risk, since the impact of weak or rarely carried out sanctions will be limited (Friedman 1975). Take for example the position of slum landlords. Although the Belgian penal code ordains considerable punishments (6 months to 3 years detention and a fine between 500 and 25.000 euro) for selling, renting or providing a property or a room in circumstances contrary to human dignity, their chances of getting caught do not outweigh the benefits. Paradoxically, one of the reasons for this low perception of risk is indirectly mentioned in the article 433 decies of the penal code, which describes a slum landlord as "*he who takes advantage of the vulnerable state in which a person is because of his illegal or precarious administrative status, his*

precarious social situation, (…)". The vulnerability of the victims prevents them from taking steps against these slum landlords.

This cost-benefit analysis is actually a final influence on the compliance with law and effectiveness of law. Personal interest is not only an incentive to obey or infringe the law, it can also render a person's behaviour to be in compliance with the law, but without this behaviour actually being a direct response to this law. We could here repeat a question that we have already put up earlier in the context of article 23: to what extent is the outcome the result of the law? From the point of view of the legislator on the other hand, self-interest can also be used as a factor to enhance the effectiveness of law. An example of this is the rental guarantee fund, which recently entered into force in Flanders and aims to protect the landlord against a loss in rental income due to non-payment by the renter. On the flip side, these renters will be better protected against evictions and are given some additional time to settle their debts.

All these influences, as well as the inner orders of the semi-automatic social fields, must be taken into account if we want law to be a successful mechanism for social change. If not, law can develop side effects or unintended consequences (i.e. "*effets pervers*", Boudon 1977), especially with regard to the most vulnerable groups in society. We can for example think of the detrimental position of weak tenants in the absence of an effective rehousing policy, or the side effects of imposing strict quality requirements on housing (Hubeau 2009, Bernard 2011). Another example relates to the income ceilings that a lot of countries have included into their social welfare system. These ceilings cut people off from assistance or reduce it whenever they cross this limit. An (admittedly older) study by Ikeda *et al.* (1964 cited in Kidder 1983) shows however that income ceilings are not an incentive for families to move from public to private housing. In fact, it is actually the exact opposite. In an experiment where low-income housing projects with income ceilings were compared with one without these ceilings, it turned out that the mobility into private housing was bigger when no limits were introduced. It enabled these people to accumulate sufficient resources before making their move, instead of moving out prematurely and ending up with a considerable net loss. Moreover, they could still share their expertise as good role models to other people in public housing (Kidder 1983).

In sum, the issue of the effectiveness of legislation is closely related to the instrumental function of law: how can it be applied in order to achieve certain goals in society? On the one hand, expectations tend to be very high: one hopes to be able to influence human behaviour by law. On the other, there is evidence of a deteriorated belief in the directional capacity of regulation. That is not to say that we aim to critique the idea of a 'juridification' of housing *in se* (for more on this issue, see Fitzpatrick et al. 2014). In the context of that discussion, one should not forget that essential elements of what such a right to housing entails (e.g. quality conditions) have already been part of most tenancy laws for many years. Above all, the potential of a rights based approach to be beneficial to those who should be primarily favoured by such a right has been demonstrated on the national plane (Fitzpatrick and Stephens 2007). Take Scotland for example. Since devolution at the end of the 1990's, Scotland ambitiously expanded the enforceable right to permanent housing for homeless people, which had initially been established by the UK Housing Homeless Persons Act of 1977. After a gradual expansion of the priority need status, which gave precedence to the most vulnerable groups (including persons with disabilities, the elderly and the mentally ill), this status has now even been abolished. In 2012 alone, the number of homeless people dropped by 12%. The fact that the number of applicants first slightly increased before it started to drop, can also be seen as a sign that the invisible homeless had become more visible and that this legal right has the potential to counter stigmatisation as well (Aldridge 2013).

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So, returning to our starting point from the previous paragraph, this paper does not aim to question *a* right to housing. We do however know that law and its effectiveness have always been impacted by outside influences and that, as we have seen, a fundamental right such as the right to adequate housing is no different in that respect. What we therefore argue is that these influences must be taken into account when aiming to reach the goals the right itself sets out. While a right to housing can certainly fail because of a lack of judicial enforceability, we argue that this can just as well be the case when it is disconnected from society and housing market practices.

4. From obligation of means to obligation of result: foundation or façade?

4.1. Distinctive obligations of the right to housing

We already mentioned that the practical unfeasibility of (certain) socio-economic rights is used as an argument to categorize them as obligations of means (or conduct) and that the traditional dichotomy between both generations of human rights clearly lives on at the national level. It is therefore no surprise that article 23 is also considered to be a mere obligation of means. In pursuit of a more effective right to housing, some legal doctrine has now laid emphasis on the plausibility of switching this fundamental right from the current obligation of means to an obligation of result (Bernard and Hubeau 2013, Van Impe 2012). In this context, references are often made to the aforementioned system in Scotland and the French '*droit au logement opposable*' (DALO), examples which are seen as enabling people to demand suitable housing. DALO creates a tool whereby homeless or inadequately housed individuals are given priority in the allocation – within a certain period of time – of a home suitable to their needs. The law also provides for the allocation of temporary housing. The target groups are persons who have applied for social housing but whose waiting period is exceptionally long, homeless and inadequately housed persons (including through evictions and rehousing), and persons applying for housing adapted specifically to their needs (Lacharme 2013). For the purposes of this part however, we focus not on the intricate workings of these 'foreign' examples as such, but rather on the question of relevancy and usefulness of the concept obligation of result to advance the right to housing.

With regard to social rights, the use of this typology in international legal doctrine has certainly been abundant but at the same time rather confusing and inconsistent as well. I have discussed elsewhere that this is partly due to the different and even opposite interpretation of these concepts in private law on the one hand and public international law on the other (Moons 2014). In housing related case law, there have also been a couple of instances in which the distinction between both obligations was under scrutiny. In the South-African *Grootboom* case, the Court clarified that the right to housing is not an obligation of result and did not recognise a minimum core of this right. It did however find the state obliged to *act* to achieve the intended result, assessing whether or not the measures taken are reasonable (Davis 2006, Brennan 2009). This is basically the traditional private law interpretation of an obligation of means, where the best efforts obligation is replaced by an in essence very similar and equally open-ended reasonableness test. In *ATD Fourth World v. France*, the European Committee of Social Rights proclaimed that while the right to housing could not be interpreted as imposing an obligation of results, the right must take a practical and effective form, listing five measures that must be carried out to be in conformity with the fundamental right.

A distinction has thus clearly been made between both types of obligations with regard to the right to housing, even if their boundaries have not always been clearly or consistently demarcated. The question is whether a shift from one kind of obligation to the other is a truly fundamental change or merely an inconsequential symbolic gesture. After all, one might suggest that this approach is perception-oriented rather than being geared towards a fundamental reconceptualisation of the

notion of social protection. In that scenario the façade would undergo a facelift, but the foundations may remain weak.

4.2. The questionable content of this shift

It is somewhat problematic and vague to proclaim that a fundamental right should change from an obligation of means to one of result. First of all, this premise begs the question what the current obligation of means then really purports with regard to this fundamental right. Should this not also entail that the government must make its best effort to realize this right and if not, should be held accountable for it (Delperée 1995)? Although the application of the standstill principle is undisputed, it only works in a negative way, merely preventing a government to considerably reduce the protection level of the fundamental right. The liability question on behalf of the government for anything that stretches beyond this is however much more vague (Maes 2010).

Moreover, it raises questions surrounding the scope of the "*corresponding obligations*" of the citizen. In this context, the Belgian Constitutional Court has for example clarified that the Flemish Housing Code only requests applicants for social housing to illustrate a certain willingness to learn Dutch, rendering this language requirement a mere obligation of means (Constitutional Court 10 July 2008, § B.34.2). But what if this right becomes an obligation of result? Would it then be allowed to impose stronger obligations *in correspondence with* the empowered, more enforceable right to housing?

Above all, it is tedious to speak of *the* right to housing as an obligation of conduct or of result. This automatically implies that it is also possible to speak of *the* obligation of the right to housing. As all other fundamental rights however, the right to housing consists of a wide array of specific obligations, spread out over different actors as well as different fields of law. A legal regulation that is intended to contribute to the realisation of the right to housing implies specific responsibilities, some of which, as we will see, are even now already considered as obligations of result. But if the latter is really the case, is the call for a shift of focus then just a call for *more* specific obligations of result? Is it based on a general observation that, irrespective of the exact content of these obligations, the current lack of accountability still allows people's dignity to be infringed? Or might it be that our focus on the shift to obligations of result is somewhat disproportionate and/or even ill-founded?

4.3. The perception of result

Some specific obligations deriving from the right to housing are thus already occasionally considered as obligations of result. A clear-cut example of this relates to the right to social housing. Everyone who meets the admission criteria, is entitled to social housing. Another example that has been hinted by some as an obligation of result is the rehousing obligation by the public government and its agencies with respect to the socially disadvantaged people in society. Some judgments have indeed obliged mayors to propose a rehousing option in case of an imminent eviction. If however no adequate public housing is available at the time, the mayor will have to appeal to the social housing organisations.

But what then is the ultimate result that embodies the mayor's obligation and what has to be achieved before he can be discharged of his responsibility? For an obligation to be an obligation of result, the government should have to be able to be held accountable for the intended result. The only full-fledged result of a rehousing obligation is therefore to actually provide for substitutional housing, but the obligation does not reach that far. Consequently, this obligation is not an obligation of result according to private law theory. The long waiting lists for persons that meet the criteria for obtainment of social housing illustrate the same thing.

Even in France, referenced as an obligation of result, the innovative capacity of the DALO scheme has been called into question, as observers ponder whether it is a gimmick or an instance of 'true social protection'? (Tholomé 2007). For example, people that should be given priority but are not presented with a housing option within a certain period of time, can file a complaint with the administrative court. If however the responsible actor is ultimately fined, this money will have to be paid to a social housing fund. In other words, it goes from one budget line of the government to another. An obligation of result in its private law meaning would allocate a sum to the disadvantaged party. With regard to the Scottish example, one could ask whether the discretionary decision-making by the local authorities could potentially endanger the legal framework. Aldridge for one states that local governance does not wilfully break the law and foresees little problems in that regard (Aldridge 2013). Even if nonetheless a number of legal challenges against these authorities would eventually follow, this does not implicate in itself that no obligation of result is imposed, only that they have not been complied with. But would that not in turn raise the question whether imposing an obligation of result should be the ultimate objective, when it would still necessitate individual conflict resolution, which for reasons given above is not ideal for the most vulnerable?

4.4. Obligations of result put in perspective

If these are examples that comprise the shift from the right to housing as an obligation of means to one of result, then scepticism is indeed understandable. Moreover, the discussed obligations from Belgian and French law are ultimately often prevented from being real obligations of result by the simple fact that they are bound by the shortage of suitable housing.

Nevertheless, it would be a bit short-sighted to immediately portray these obligations as completely ineffective to realizing or at least improving the right to housing. The fact that they are not really obligations of result does not mean that they are rendered useless. Yes, their effect will be limited as long as there is a shortage of adequate housing, but they do impose specific obligations on mayors, public centres for social welfare, social housing organisations, … that are geared towards the end result and along the way expose the deficiencies of the housing policy. If anything, we argue that the call for a shift to obligations of result is in reality subordinate to the question whether measures are of an effective and result-oriented nature, whatever the exact qualification might be.

5. Human dignity

Admittedly, a discussion on the qualification of obligations remains a mostly legal-technical issue. It does not question how fundamental social rights relate to situations of poverty (Bernard and Hubeau 2010). Could human dignity perhaps be an intermediate step and a mediating concept to address that relationship? After all, the distance between the general recognition of a fundamental right and its targeted application to a concrete situation is often too great. The contextualisation of such a fundamental right through the notion of 'human dignity' has proven to be very instructive (Goldewijk et al. 2002). Human dignity, then, may serve as the general referential framework for determining whether or not progress is being made in enhancing the effectiveness of fundamental rights (Bernard and Hubeau 2010). Considering that human dignity is portrayed in article 23 as the overarching characteristic of the realization of fundamental social rights, the Belgian Constitution offers a good opportunity to use the concept to its full extent. It is however important to immediately temper the expectations. Due to the complexity of the concept of human dignity, it appears to be very difficult to apply in practice and can easily be criticized.

5.1. The content of human dignity

The kind of dignity implied in this context differs considerably from for example the meaning given to it in dictionaries, which still connect dignity to a person's status, position or rank, thereby reflecting the classical roman conception of *dignitas hominis.* It was arguably Immanuel Kant who first introduced the idea that dignity is an inherent value equal in all people, an absolute intrinsic and incomparable worth that all human beings possess by virtue of their shared humanity. It is inviolable, constant, inalienable, unconditional and equal for all human beings.

This interpretation has formed the philosophical underpinning for the international human rights system as we know it today. The 1948 Universal Declaration of Human Rights even opens with the "*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family*". Human dignity was used here primarily as a symbolic and theoretical basis for human rights in the absence of any other grounds for consensus. This relationship where human rights are based on and ensue from an inherent human dignity is also reflected in the doctrine, the case law of the European Court of Human Rights (*Pretty v. UK*, 29 April 2002, par.65), and a wide array of other international legislative acts, not in least in the preambles to both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights. They state that the recognition of these fundamental rights "*derive from the inherent dignity of the human person*". Within the Organization of American States (OAS) this link between dignity and both of the "generations" of human rights was explicitly stated in the Additional Protocol to the Convention in the area of Economic, Social and Cultural Rights ("Protocol of San Salvador"): "*Considering the close relationship that exists between economic, social and cultural rights, and civil and political rights, in that the different categories of rights constitute an indivisible whole based on the recognition of the dignity of the human person*, (…)". Consequently, human dignity in this context forms the foundation of both civil and political rights as well as economic, social and cultural rights. That much is also clear from the Vienna Declaration made at the World Conference on Human Rights in 1993, proclaiming that "*all human rights derive from the dignity and worth inherent in the human person*".

Still however, we claim that this is not the meaning we were initially talking about. Article 23 as well as a fair amount of other constitutions and jurisdictions make reference to an actual right to dignity or at least consider it as something that needs to be respected and protected *through* the realisation of human rights. According to this conception then, human dignity is no longer the reason for existence of these rights, but the ultimate result of the fulfilment of these rights. In other words, this approach on dignity reverses the order of things (O'Mahoney 2012). If we focus our attention on article 23 in particular, we can see that there are two main explanations as to how this interpretation is irreconcilable with the view on dignity as an inherent value: the contradictory "*right*" to dignity and the relativity of the statement that "*everyone*" is entitled to a right to human dignity.

At first sight, this latter statement seems to be limitless. In practice however, it does not exclude exceptions to this rule. With regard to foreigners on Belgian soil for example, possible exceptions do have to meet both the equality and the non-discrimination principle. In other words, they have to be based on an objective distinction that is reasonably justified and proportionate with the pursued aim. On this basis, foreigners who illegally reside on Belgian territory can be denied a right to social assistance (with the exception of urgent medical assistance). It is not our intention here to justify or criticise this issue, we only use it to illustrate that in practice, human dignity in the Belgian Constitution has a relative character, which is obviously irreconcilable with the description of an inherent and universal human dignity given in the prominent human rights covenants. Furthermore, we can also consider that if dignity is indeed an inherent feature of the human being, *ergo*

impossible to lose or be denied of, how then can it be respected and protected as a right?

It is thus clear that there are at least two very different conceptions of human dignity present in fundamental rights law. There are even occasions on which both interpretations are used simultaneously. The South African Constitution for example dictates that "*everyone has inherent dignity*", but proceeds in the same sentence by saying that everyone also has "*the right to have their dignity respected and protected*" (section 10). In a similar vein, the South African Constitutional Court has stated that "*dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected*".

Therefore, in order to make a clear distinction with the philosophical, somewhat transcendent nature of the more classical meaning of human dignity, we prefer to consider human dignity as a protectable right or value as a different kind of dignity, a social dignity. This envisions a right to live a dignified everyday life. It is important to emphasize that "social" here does not refer only to social rights, but must be interpreted *sensu lato*, as "relational" rather than "collective". This eliminates the need for a distinction between "personal" and "social/collective" dignity, that in our opinion once again emphasizes the classical dichotomy of human rights that we mentioned earlier. Social dignity thus goes beyond basic means of subsistence and satisfactory material conditions and the accompanying socio-economic rights. It is more than a minimum standard, more than a safety net. It includes "*a set of conditions that make a person a fully participating member of society*" (Marella 2008). And in our opinion, this also implies the need for civil and political rights, such as the right to vote. Similarly, the Commission of Professors, appointed to assist the Federal Government in elaborating a coordinated version of the constitution back in 1992, proclaimed that "*a dignified life (…) encompasses all values of freedom, equality and solidarity (…). This concept does not only open the door for social, economic and cultural rights, but in reality forms the synthesis of all fundamental rights. For example, a life in dignity also postulates protection of privacy*" (*Gedr. St.* Kamer 1992-93, nr.1092/1, Senaat B.Z. 1991-92, nr.100-46/5°).

Following this idea, social dignity can thus only be attained by both types of fundamental rights. Academic literature has repeatedly mentioned that in the context of human dignity, both autonomy/freedom and well-being, traditionally linked with respectively civil and political rights on the one hand and socio-economic rights on the other, are interdependent and indispensable concepts (E.g.: Pieterse 2007, Wood 2008). Without at least a minimal amount of material needs, unfortunate people will *de facto* also be deprived of their individual freedom and autonomy. As the South African Constitutional Court stated in its famous *Grootboom* decision, "*there can be no doubt that human dignity, freedom and equality (…), are denied (to) those who have no food, clothing or shelter*."

5.2. Applying human dignity

Although human dignity has evolved into a frequently used legal principle across Europe, a comprehensive definition or even an attempt at circumscribing the scope of human dignity is often missing in both legislation as well as jurisdiction. Not only is it a vague concept, it is also a relative concept, both culturally and politically, which gives way to a wide variety of interpretations. In the Omega-case, the European Court of Justice has implicitly stated that even European jurisdictions can possess different perceptions of human dignity.

Taking all this into account, it might not be a surprise that a comprehensive definition is usually missing in legislation. This leads to a wide margin of appreciation on behalf of the judiciary. This could result in a very wide interpretation and thus a very strong protection of the fundamental right in question, but just as well in a very narrow one. When applying dignity to the right

to housing for example, some might equate it with all the generally accepted characteristics of decent housing (adapted housing, good quality, affordable price, decent living environment and housing security), while others might regard it as a minimum core obligation.

While the added value of human dignity may still be in the balance, I believe the judiciary has to be particularly careful in its use of dignity as a restriction on restrictions on the rights set out in article 23. To put it in simpler terms, courts sometimes use dignity as a limit to possible constraints on fundamental rights imposed by legislative measures. The so called "corresponding obligations" of the second paragraph of article 23 must always be in close connection to the general objective of the provision, a life in dignity. Nevertheless, when human dignity is applied as an ultimate limit to these restrictions, it demarcates a concept that might be narrower than the fundamental rights it was set out to represent. Consequently, dignity runs the risk of becoming a minimum core of these rights, while it was intended as the ultimate goal for realizing these fundamental rights. This use could potentially lower its aspirations to that of a *minimum minimorum* and differ significantly from the way we have outlined human dignity above.

Although there is thus always a risk of overusing the vague concept to the detriment of more concrete and precise, everyday terms, it does have the capacity to develop new "derivative rights", as some Belgian judges have already done with regard to a right to energy and water supply. This is actually something article 23 also lends itself to, because the list of socio-economic rights is acknowledged to be non-exhaustive. One could however argue that such a decision on energy and water supply did not really need the input of dignity, given the fact that these aspects are already incorporated into the regional Housing Codes as quality criteria.

In Belgium, judges are not the only actors that need to interpret and use human dignity. When applying for assistance at the Public Centre for Social Welfare (OCMW), this municipal public institution will have to investigate on an individual basis whether this assistance is necessary, in accordance with article 1 of the 1976 OCMW-law, to lead a life in dignity. Although all OCMW's share this same legal basis, they are free to pursue their own policies and to interpret human dignity in their own way. Considering we are already dealing with a very vague concept, there is only "agreement" on some general conditions such as being able to feed yourself, having a place to stay or having access to healthcare. Consequently, this freedom has created some serious discrepancies between different municipalities in similar situations. In other words, the chances of an assistance seeker to receive assistance depend partly on the municipality where this person resides. It has been documented that such differences also even occur within the same OCMW. In its book for starting OCMW council members, the Flemish government also touches upon this ambiguity, but merely as a consequence of local autonomy: "*What human dignity exactly entails is open for interpretation and depending on the spirit of the times, the culture and the ideology. Although the financial resources should not play a part in determining how human dignity is interpreted, yet we observe that in harsh financial and economic times this is a factor in the decision making process*." We notice in particular the reference to ideology. This raises an interesting question: to what extent is human dignity politically malleable? How much influence does the council for public welfare exercise on what dignity entails through the party politics of its members? Although working towards more harmonization and standardization might have an obvious appeal, this should be approached with the utmost care, because such a process may well result in an interpretation of human dignity as a "lowest common denominator".

There are also other critical voices concerning the large margin of appreciation by the judiciary and the so called "*gouvernement des juges*" which ensues from it. They focus more precisely on how the interpretation of human dignity "*seems constantly oriented to enhancing the dominant values of the community regardless*

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of the individual" (Marella 2008), while it is in fact this subjective experience of dignity that should form the starting point. The rationale behind this criticism is often discussed by means of the Wackenheim case. In this case the French government banned a dwarf tossing competition on the basis that the dignity of the "victim", Manuel Wackenheim, had been violated. Wackenheim on the other hand had consented with the whole competition. He had made new friends and even received a monthly income for it. We could thus easily distinguish his take on dignity (which we call subjective dignity) from the government's (objective dignity), which is more of a perceived dignity, of what society beholds or according to the judge should behold as human dignity.

This case does indeed raise important questions regarding the judicial use of this complicated concept. We could also easily proceed the debate in the context of housing. For example, what about a measure that obliges homeless people, who clearly live in conditions society generally regards as contrary to human dignity, to accept help and temporary shelter even if they object to it? Does this rule infringe (subjective) dignity by taking away a person's autonomy or should this person be summoned for not voluntarily complying with a rule on (objective) dignity?

Although alluring, the use of human dignity in a fundamental rights context should clearly be considered very carefully. As mentioned earlier, autonomy and freedom are indeed important aspects of human dignity. They should therefore always be taken into account when socio-economic policies are developed and carried out. Nevertheless, well-being is the other essential side of the same coin and it is important to seek the right balance between both aspects to respect and protect human dignity or as we have called it social dignity. This is obviously a very difficult task. One might argue that owning property is indispensable for the full development of personal freedom and autonomy (Rose 1995, Hohmann 2013), but what does that mean for social housing? Is this then a risk for social dignity? And where do you draw the line between corresponding obligations that can be justified on grounds that they ultimately enhance a person's level of autonomy and those that lay a disproportionate burden of responsibility on that person (e.g.: language requirements to obtain social housing)? Considering that dignity entails both well-being and autonomy, it could very well be infringed if the balance shifts either too far to one side or the other.

5.3. Dignity and capabilities

The layered approach to (social) dignity offered earlier referred to conditions that make people fully participating members of society. This approach can in our view easily be coupled to Amartya Sen's conceptualisation of an equality based on capabilities (Sen 1980). This capabilities approach is about creating conditions where all citizens can enjoy equal opportunities. The central question is not primarily what a person does, but what this person is in a position to do. Considering however the serious social deprivation of many disadvantaged people in society, these equal opportunities cannot be reached only with formal empowerment and getting people to know, understand and apply their rights. It still implies reducing material inequalities by active (state) intervention (De Beer et al. 2006). If not, the poor's general lack of resources will weaken them further and enhance marginalization in society. Instead of being empowered by law and use it as an incentive for participation, they start viewing it as unfair and unreliable, which in turn can contribute to even further marginalisation. Martha Nussbaum, who took Sen's capabilities approach more concretely into the heartland of human rights law, actually used human dignity as the basis for her list of entitlements that every society should strive for to guarantee to its members (Nussbaum 2006). Several of those entitlements can also be linked to housing (bodily health, bodily integrity, control over one's environment) (Fitzpatrick et al. 2014). Consequently, we argue that despite the illustrated problems, dignity is certainly a worthwhile concept within the context of social rights and social welfare (theory). That is at

least if we look beyond its muddled interpretation in jurisprudence, which is often confined to some sort of *deus ex machina* conflict resolving criterion or a mere standard of value for housing quality. Instead, if human dignity is to play a (more important) role as mediating concept between rights and practice, it should take the possibilities to personal autonomy and development into consideration.

6. Conclusion

The question of the effectiveness of fundamental social rights and the right to housing in particular is both pressing and complex. As discussed above, it has been argued that the right to housing should no longer be seen as giving rise to an obligation of means, but rather to an enforceable obligation of result. But will an obligation of result necessarily impact more heavily on poverty and social exclusion? As we have seen, it might not be of primary importance to focus on whether or not obligations are in fact obligations of result. Human dignity on the other hand was approached as an alternative concept to bridge the gap between rights talk and concrete situations of poverty. It has been mentioned as a useful referential framework to which the realization of fundamental rights could be measured, but this concept has just as well shown its dangers and limitations.

We do acknowledge that this contribution tackles only a couple of issues and concepts that often return in a housing rights context. Many other relevant questions remain, such as: which are the appropriate target groups? Who should be held responsible for the attainment of the envisaged effect? In Belgium at the very least, the tendency has been to decentralise the competences, to regions and communities, but also to the local level. And what about horizontal social rights obligations? In any case, there is a certainly a long way to go in the effective realisation the right to housing. But as Camus was already aware, '*Chaque génération, sans doute, est vouée à refaire le monde*' (Discours de Suède).

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