Faculteit Rechten

The right to housing in Flanders-Belgium: international human rights law and concepts as stepping stones to more effectiveness

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Introduction: Building on strong foundations: law, challenges and research questions

§ 1.Foundations of the research and the right to housing

A. International acknowledgment of the importance of housing

1. Research into the effectiveness of the right to housing concerns research into one of the most basic needs of human beings. For a lot of households, the cost of housing (together with food and water) is not only a considerable share of their budget expenditure, it is also their primary concern. This is especially the case with regard to people who have trouble making ends meet.[1] Little is worse than running the risk of being evicted and, in a worst case scenario, having to live on the streets.[2] But adequate housing is more than mere protection from the elements, more than a roof above one's head.[3] Not only can a subpar housing situation have a negative impact on a person's health, it can also influence people's performances (work, school) and be a burden on one's social life.[4] With regard to the latter one should not neglect how housing is part of our self-image and is an outward sign of status. For all these reasons, having a decent accommodation at one's disposal is a fundamental necessity to be able to achieve one's full potential as a human being.[5] It is the epicentre of one's personal, family and community life and is therefore the central setting that allows us to fully enjoy all other human rights.

[1] L. VAN THIELEN and B. STORMS, *Het maximum uit het minimum halen. Overlevingsstrategieën van mensen die moeten rondkomen met een te beperkt inkomen*, Geel, CEBUD, 2013, 43; E. KEMPSON, A. BRYSON and K. ROWLINGSON, *Hard times? How poor families make ends meet*, London, Policy Studies Institute, 1994, 305 p.

[2] G. VAN MENXEL, H. BLOW and A. DE WACKER, "Thuisloosheid schaadt de gezondheid", in J. VRANKEN, G. CAMPAERT, K. DE BOYSER and D. DIERCKX (eds.), *Armoede en sociale uitsluiting. Jaarboek 2007*, Leuven, Acco, 2007, 221-239.

[3] For more views on the concept of home, see e.g.: L. FOX, *Conceptualising home. Theories, laws and policies*, Oxford, Hart Publishing, 2007, 131-180; R.M. RAKOFF, "Ideology in everyday life: the meaning of the home", *Politics and Society* 1977, vol. 7, no. 1, 85-104; G. TESTER and A.H. WINGFIELD, "Moving past picket fences: the meaning of 'home' for public housing residents", *Sociological Forum* 2013, vol. 28, no. 1, 70-83.

[4] R.G. BRATT, M.E. STONE and C.W. HARTMAN, "Why a right to housing is needed and makes sense", in R.B. BRATT, M.E. STONE and C.W. HARTMAN (eds.), *A right to housing. Foundation for a new social agenda*, Philadelphia, Temple University Press, 2006, 2-3; G. CAMPAERT, "De onderkant van de woonmarkt", in J. VRANKEN, G. CAMPAERT, K. DE BOYSER and D. DIERCKX (eds.), *Armoede en sociale uitsluiting. Jaarboek 2007*, Leuven, Acco, (99) 99.

[5] T. BYRNE and D.P. CULHANE, "The right to housing: an effective means for addressing homelessness?", *Univ. of Pennsylvania Journal of Law and Social Change* 2011, vol. 14, (379) 381; C. HARTMAN, "The case for a right to housing", *Housing Policy Debate* 1998, vol. 9, no. 2, (223) 228-229; J. WALDRON, "Homelessness and the issue of freedom", in J. WALDRON (ed.), *Liberal rights: collected papers 1981-1991*, Cambridge, Cambridge University Press, 1993, (309) 338.

2. In short, the impact of adequate housing on life in general is difficult to underestimate. Accordingly, most countries worldwide have acknowledged the need for at least a right to housing on paper, incorporating it into their Constitution or elsewhere.[6] Since long, the international community has formally acknowledged its importance by incorporating housing into covenants and charters as a fundamental right too.[7] A common starting point for such an overview is obviously the Universal Declaration of Human Rights. Article 25 (1) of the Declaration recognizes the necessity of housing as part of everyone's right to an adequate standard of living:

> "*Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control*."

This principle was translated into law in Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR):

> "*The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions (...)*"

3. The content of the right to housing has been further specified in General Comment no. 4 of the UN Committee on Economic, Social and Cultural Rights (CESCR). It enumerates seven fundamental elements of adequate housing: legal security of tenure; availability of services, materials, facilities and infrastructure; affordability; habitability; accessibility; location; and cultural adequacy.[8] Legal security of tenure was later discussed more extensively in General Comment no. 7 on forced evictions. In addition to the ICESCR, several other core

[6] M. OREN, R. ALTERMAN and Y. ZILBERSHATS, "Housing rights in constitutional legislation: a conceptual classification", in P. KENNA (ed.), *Contemporary housing issues in a globalized world*, Farnham, Ashgate, 2014, 141-158.
[7] S. LECKIE, *Towards an International Convention on Housing Rights at Habitat II*, Washington, The American Society of International Law, 1994, 14-15.
[8] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 4: The right to adequate housing (art. 11 (1) of the Covenant)*, 13 December 1991, par. 8 (hereafter General Comment No. 4).

conventions on human rights also feature the right to housing in a more subject-specific context.[9,10]

4. The right to housing is widely protected at the regional level as well. Regional human rights systems worldwide have recognised the right to housing. Considering our Belgian/Flemish point of view and the discussion of European jurisprudence later in this research, we will confine ourselves to European legislation.[11] Here, the fundamental right is recognised by law in both the Council of Europe and the European Union. While some rights protected by the European Convention on Human Rights (ECHR) can be tied in with aspects of the right to housing (infra, part II), the ECHR concerns civil and political rights. For an explicit right to housing within the context of the Council of Europe one must look at article 31 of the Revised European Social Charter (RESC):

> "*With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:*
> 1. *to promote access to housing of an adequate standard;*
> 2. *to prevent and reduce homelessness with a view to its gradual elimination;*
> 3. *to make the price of housing accessible to those without adequate resources.*"

In addition, the RESC mentions housing as an essential element in different contexts: persons with disabilities (article 15), family life (article 16), elderly persons (article 23) and protection against poverty (article 30).

5. Finally and also most recently, the European Union has included a right to housing assistance in article 34 of its Charter of Fundamental Rights:

> "*In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all*

[9] Article 14 International Convention on the Elimination of all Forms of Racial Discrimination; Article 14 (2)(h) of the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); Article 27 of the Covention on the Rights of the Child (CRC).
[10] In August 1994, Special Rapporteur on Adequate Housing Rajindar Sachar even proposed a draft International Convention on Housing Rights: UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The right to adequate housing. Second Progress Report submitted by Mr. Rajindar Sachar, Special Rapporteur*, 21 June 1994, E/CN.4/Sub.2/1994/20.
[11] The right to housing has of course been protected in other regional human rights systems too. For more information, see: J. HOHMANN, *The right to housing. Law, concepts, possibilities*, Oxford, Hart Publishing, 2013, 75-91.

those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices."

Since the entry into force of the Lisbon Treaty back in 2009, the Charter of Fundamental Rights of the European Union has become binding upon the national governments. As we will see further on, the provision has had little impact up to now. The EU Charter remains nonetheless another testament of the undisputed consensus concerning the importance of protecting housing as a fundamental right.

B. The Belgian right to housing as starting point and illustration

6. The foundations for the right to housing are laid down in law, but as with building a real house, foundations alone do not suffice. It is one thing to acknowledge the importance of housing as an international community or as a national government, it is a different and much more difficult thing to make adequate housing a reality for everyone. This research looks into a selection of stumbling blocks, essential concepts and legal options that have or may have an impact on the realization of this fundamental right. We will do so against the background and with the application of the Belgian right to housing, guaranteed in article 23 of the Constitution, and its concretization in Flemish legislation. While the focus shall thus undeniably be on Belgian/Flemish housing legislation and policies, the research does attempt to present a bigger picture. The questions it evokes and the options it provides stem from and/or are tested against and applied to the Belgian context, but can be relevant and valid for other states as well, especially with regard to domestic law systems that have also incorporated the right to housing into their Constitution.

7. For a good understanding of what follows however, it is necessary to start with a short overview of firstly the legal consequences of article 23 and subsequently how the Belgian/Flemish legislator and government have tried to improve and provide the essential elements of adequate housing. Since we will return to many of those components somewhere else in the text, this introduction is by no means exhaustive. We should also mention that in line with the rest of the research, our main focus here will be on the (regulation of the) rental market, where most of the problems related to the right to housing occur. Since the 1980s, the percentage of home owners from the lowest income quintile has always been significantly

lower than that from the other income groups.[12] Additionally, research has shown that between 2005 and 2013 the share of homeownership in that income group (as well as in the second lowest) has decreased quite drastically with around 10 per cent.[13] Consequently, many socially weaker households are relegated to either the social or the private rental market.[14] And since article 23 (as well as the Flemish Housing Code) is particularly preoccupied with those who experience difficulties on the housing market, the primary focus on the rental market is fully justified.[15]

§ 2. The Belgian and Flemish right to adequate housing

A. The working of article 23 of the Belgian Constitution

8. Since 1994, the right to adequate housing is anchored in the Belgian Constitution. Article 23, the crux of our research, reads as follows:

> "*Everyone has the right to lead a life in keeping with human dignity.*
> *To this end, the law, federate laws and rules referred to in article 134*[16] *guarantee economic, social and cultural rights, taking into account corresponding obligations, and determine the conditions for exercising them.*
> *These rights include among others:*
> *(…) 4° the right to adequate housing.*"

9. It is often stated that the rights guaranteed in article 23 of the Belgian Constitution and therefore the right to adequate housing have no direct effect. Not only can we deduce this

[12] Still fluctuating around 55 percent, but nonetheless significantly less than the average of 66 to 74 percent between 1975 and 2005; K. HEYLEN and S. WINTERS, *Evolutie van eigenaarschap en woningcomfort in Vlaanderen*, Heverlee, Steunpunt Ruimte en Wonen, 2010, https://steunpuntwonen.be/Documenten/Publicaties_steunpunt_ruimte_en_wonen_2007-2011/2010/2010-04-evolutie-eigenaarschap-en-woningcomfort.pdf, 9.
[13] S. WINTERS et al., *Wonen in Vlaanderen anno 2013. De bevindingen uit het Grote Woononderzoek 2013 gebundeld*, Antwerpen, Garant, 2015, 32.
[14] This has been described as the residualisation of the rental sector: P. DE DECKER and V. GEURTS, "Wonen. Residualiseert de huursector?", in J. VRANKEN, D. GELDOF and G. VAN MENXEL (eds.), *Armoede en sociale uitsluiting. Jaarboek 2000*, Leuven, Acco, 193-204; S. WINTERS, "Wat is er mis met huren", *Bank Fin.* 2013, no. 6, (480) 484-485; This process had been described earlier with regard to the UK: P. MALPASS and A. MURIE, *Housing policy and practice*, London, Macmillan, 1982, 174.
[15] Art. 4 Decree 15 July 1997 concerning the Flemish Housing Code, *BS* 19 August 1997 (hereafter Flemish Housing Code); Explanatory Memorandum to the draft of Decree concerning the Flemish Housing Code, *Parl. St.* Vl. Parl. 1996-97, no. 654/1, 4-5.
[16] This refers to the legislation by the regions, i.e. the decrees by the Flemish and Walloon government and the ordinances in the Brussels-Capital Region.

from the adopted text drafted by the Senate[17], it is also a recurrent principle (or at least a starting point) according to the legal doctrine.[18] Several judgments by higher and lower courts have clearly stated accordingly as well.[19] While it might be up to the competent legislators to further concretize this fundamental right[20], the constitutional provision does have some legal consequences. Some of the case law on socio-economic rights and the right to housing in particular sheds a different light on the matter of direct effect. On this basis, one could definitely argue that the assumption that article 23 has no direct effect should be put in perspective.[21]

10. A first application of article 23 by the judiciary occurs in scenarios where certain legislation is interpretable in different ways or when it concerns vague and open legal norms.[22] The judge is then obliged to opt for an interpretation in conformity with the Constitution.[23] This is not different with regard to the right to housing.[24] On a couple of occasions, judges have explicitly mentioned the interpretative function of the constitutional provision.[25] Against the background of article 23, the Peace Court of Ukkel for example considered the annulment of a rental contract due to rent arrears inappropriate and granted the

[17] Explanatory Memorandum of the proposal by Mr. Stroobant and Mr. Taminiaux, *Parl.St.* Senaat BZ 1991-92, no. 100-2/3°, 11; Report on behalf of the Commission for the review of the Constitution and the reform of the institutions released by Mr. Arts and Ms. Nelis, *Parl.St.* Senaat BZ 1991-92, no.100-2/4°, 84-91.

[18] E.g.: A. ALEN, J. CLEMENT, W. PAS, P. PEETERS and J. VAN NIEUWENHOVE, "Het federale België in de gecoördineerde Grondwet van 17 februari 1994, *RW* 1993-94, (1345) 1346; M. VERDUSSEN and A. NOËL, "Les droits fondamentaux et la réforme constitutionnelle de 1993", *APT* 1994, (127) 131.

[19] Council of State 3 July 1995, no. 54.196, Beerts, *TBP* 1996, 118-119; Council of State 24 March 2005, no. 142.620, 3.2.3; Peace Court Verviers 30 June 2000, *Echos log.* 2000, note L. THOLOMÉ; Court of Appeal Antwerpen (6th Chamber) 28 June 2005, RW 2007-08, no. 33, 1374; Court of Appeal Luik (12th Chamber) 9 January 2015, *JLMB* 2015, no. 23, 1076; Peace Court Leuven 16 April 1996, *T. Huur* 1996, 80, note C. VAN DER ELST.

[20] In this context we should note that the legislators are allowed to delegate the execution of legislative measures to the executive branch. The exact scope of the legality principle has however been a longstanding topic of debate, sparked by an inconsistent jurisprudence by the Constitutional Court. For a good overview of the whole discussion, see: H. BORTELS and P. HEYVAERT, "Het legaliteitsbeginsel in de rechtspraak van het Grondwettelijk Hof: een variërende intensiteit van de toetsing", *TBP* 2011, no. 6, 334-364.

[21] J. FIERENS, "L'article 23 de la Constitution : une arme contre la misère ?", *Dr.Q.M.* 1994, no. 3, 9; On the indecisiveness of the judicial branch with regard to the exact working of article 23, see: H. FUNCK, "L'article 23 de la Constitution, à travers la jurisprudence des ours et tribunaux (1994-2008): un droit en arrière-fond ou l'ultime recours du juge", in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, 69-111.

[22] M. JAMOULLE, "L'article 23 de la Constitution belge dans ses relations avec les droits fondamentaux, le droit au travail et la sécurité sociale", in G. VAN LIMBERGHEN and K. SALOMEZ (eds.), *Sociale grondrechten als bakens voor een vernieuwd sociaal recht – Liber amicorum professor Maxime Stroobant*, Gent, Mys & Breesch, 2001, (121) 146.

[23] J. VANDE LANOTTE and G. GOEDERTIER, *Overzicht publiekrecht*, Brugge, Die Keure, 2008, 429-431; Court of Cassation 20 April 1950, *Arr.Cass.* 1950, 517; Peace Court Marche-en-Famenne 21 February 1995, *JLMB* 1995 (summary), 1301, note M. COPPETIERS.

[24] Peace Court Grâce-Hollogne 1 October 1999, *JLMB* 2000, 900; Peace Court Antwerpen (2nd Chamber) 23 December 2014, *RW* 2015-16, no. 3, 119.

[25] E.g.: Peace Court Halle 11 April 2007, *T. Huur* 2008, no. 4, 212-214.

tenant a payment plan instead.[26] Elsewhere article 23 has been applied to condemn an energy distribution company for shutting off electricity supplies as part of their execution of the *exceptio non adempleti contractus*.[27,28]

11. A judge often invokes the constitutional right to housing in balancing the interests of letter and tenant (private and social).[29] Most of the time, these cases revolve around the consequences of rent arrears[30] or the appropriateness of an eviction.[31] Article 23 is then used as an extra argument backing the interests of the tenant, but it is not always easy to distinguish whether it still functions as a constitutional interpreter of common legislation. One could therefore argue that the provision has also acquired the function of a direct and negative protection right, a right that protects persons from interference.[32]

12. No matter the classification however, an interpretation in conformity with the constitutional right to housing does not have to imply a decision that is entirely in favour of the tenant. The provision has its boundaries.[33] Contemplating on the possibilities of prolonging a rental agreement due to exceptional circumstances[34], the Peace Judge of Halle referred to the constitutionally conform interpretation of article 23 to protect the tenants, but

[26] Peace Court Ukkel 15 February 1995, *T.Vred.* 1997, 164
[27] K.G. Court of First Instance Charleroi 19 January 2000, *TBBR* 2000, 590, note J. FIERENS.
[28] In case of severe shortcomings to the main obligations of an agreement, the other party can opt to temporarily suspend the contract and as such also suspend its own contractual obligations. The exception or ENAC has repeatedly been recognised by the Court of Cassation as a general principle of law, e.g.: Court of Cassation 24 April 1947, *Arr.Cass.* 1947, 133; Court of Cassation Cass. 2 November 1995, *Arr.Cass*. 1995, 946. For more information on this topic, see e.g.: C. CAUFFMAN, "Opschortingsrechten bij niet-nakoming", in J. SMITS and S. STIJNS (eds.), *Remedies in het Belgisch en Nederlands contractenrecht*, Antwerpen, Intersentia, 2000, 141-171; It also applies to rental contracts: S. STIJNS, S. JANSEN and F. PEERAER, "Schorsing en beëindiging van de huurovereenkomst naar gemeen recht", in M. DAMBRE, B. HUBEAU and S. STIJNS (eds.), *Handboek algemeen huurrecht*, Brugge, Die Keure, 2015, (685) 685-710.
[29] M. DAMBRE, "De (relatieve) doorwerking van het grondrecht op wonen in de rechtspraktijk, inzonderheid in de jurisprudentie in België", in B. HUBEAU and R. DE LANGE (eds.), *Het grondrecht op wonen. De grondwettelijk erkenning van het recht op huisvesting in België en Nederland*, Antwerpen, Maklu, 1995, 105-112; A. VANDEBURIE, *L'article 23 de la Constitution. Coquille vide ou boîte aux trésors?*, Brussel, La Charte, 2008, 128-129.
[30] E.g.: Peace Court Grâce-Hollogne 27 March 2001, *Echos log.* 2002, no. 1, 26; Peace Court Roeselare 1 March 1996, *RW* 1997-98, 1504; Peace Court Elsene (2nd Chamber) 27 April 1994, *T.Vred*. 1997, 122, note B. HUBEAU..
[31] E.g.: Peace Court Elsene (2nd Chamber) 3 December 1997, *Act.jur.baux* 1998, 57; Voorz. Rb. Namen 11 May 1994, *Dr.Q.M*. 1995, no. 7, 54, note J. FIERENS; Peace Court Elsene 6 March 1995, *TBBR* 1996, 296, note B. HUBEAU.
[32] G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerpen, Intersentia, 2003, 459-460 and 479-483.
[33] E.g.: Correctional Court. Dendermonde 14 June 2004, *TMR* 2005, no. 6, 711; Peace Court Etterbeek 4 October 2013,*T.Vred*. 2015, no. 5-6, 240.
[34] This possibility is legally provided in article 11, par. 1 Housing Rent Act, *BS* 22 February 1991.

also concluded that the relevant case law often gives preference to the interests of the letter.[35] Ultimately, the date by which the tenant had to leave the premises was postponed only by a couple of months (instead of the requested nine months).[36]

13. We should also mention that in many of the decisions and judgments that have incorporated article 23 in the ways just set out, specific mention is made of human dignity, which appears at the very top of the relevant constitutional provision.[37] This has led some legal scholars[38] as well as judges[39] to declare that the first paragraph of article 23 does indeed create a directly applicable (even subjective) right.

14. Furthermore, article 23 compels the legislative and executive branch to respect the right to housing. In objective litigation ('*objectief contentieux*'), the judge – Constitutional Court or Council of State – will be able to assess the legality of a legal norm or policy measure in relation to the constitutional right to housing. A different but somewhat connected legal consequence that is also regularly discussed in the context of article 23 is the standstill principle. Considering that we will thoroughly expound on this topic later in this research, we choose to confine ourselves at this point to the essentials. The standstill principle entails that the existing level of protection provided by the constitutional provision cannot be decreased. The government would in other words not be allowed to take any measures that might initiate such a reduction. While recognised (in case law and legal doctrine) in the context of some of

[35] The judge cited: A. VAN OEVELEN, "Kroniek van het woninghuurrecht (1998-2005)", *RW* 2005-06, (1521) 1533.
[36] Peace Court Halle 11 April 2007, *T. Huur* 2008, no. 4, 212-214.
[37] E.g.: Peace Court Fontaine-L'Evêque 15 October 2009, *T.Vred.* 2012, no.5-6, 306, note J. FIERENS; Peace Court Grâce-Hollogne 27 March 2001, *Echos log.* 2002, no. 1, 26; Peace Court Elsene 3 December 1997, *Act.jur.baux* 1998, 57.
[38] E.g.: J. FIERENS, "La dignité humaine, limite à l'application de l'exception d'inexécution", *TBBR* 2000, 594-601; A. VANDEBURIE, "Coupures d'eau, de gaz et d'électricité : ça suffit ! L'article 23 de la Constitution à la rescousse des besoins énergétiques fondamentaux" (note under Peace Court Moeskroen 24 May 2004), *TBBR* 2008, 274-282; M. RIGAUX, "Algemene conclusie: artikel 23 GW, het recht om een menswaardig leven te leiden, zoals gewaarborgd door art.23 GW, hoeksteen van een adequate rechtsbescherming van de kansarme?" in Centrum voor Beroepsvolmaking in de Rechten (ed.), *Arm Recht? Kansarmoede en Recht*, Antwerpen, Maklu, 1997, (439) 442; P. MARTENS, "La commune et les droits économiques et sociaux", *Rev. dr. commun.* 1996, no. 4-5, (206) 207.
[39] Peace Court Verviers (2th Chamber) 30 June 2000, *Echos log*. 2000, 119, note L. THOLOME; Peace Court Brussels (4th Chamber) 26 May 2009, *TBBR* 2009, no. 10, 508, note N. BERNARD.

the rights enlisted in article 23[40], things are much less clear with regard to the application of the standstill principle in the context of the right to housing.[41]

15. In sum, the case law illustrates that the functioning of article 23 requires nuance, even if (some of) its legal consequences remain dependent upon case-by-case assessments. From here on, whenever we return to the original proposition that the right to adequate housing has no direct effect, we do not neglect these (potential) legal effects. But the overall limited level of enforceability of course does have its impact on realizing the right to adequate housing, which is what we do focus on in the course of this research.

B. Protection of the essential housing elements in the Flemish Housing Code

1) Article 3 of the Flemish Housing Code

16. As said, article 23 of the Belgian Constitution imposes a duty on the competent legislators to further guarantee the right to adequate housing. Despite the fact that housing has been a regional competence since 1980[42], important elements very much related to housing have remained with the federal legislator. This includes civil law (general contract law) as well as other branches of law (penal law[43], procedural law[44]). With the Sixth Belgian State Reform however, an important aspect has now been transferred to the regions. The contractual relationship between tenant and letter is no longer a residual competence of the federal legislator, which should enhance the coherency and transparency of housing legislation and policy.[45] While a Flemish Housing Rent Act is thus expected in the not too distant future, federal law still applies at this moment and will therefore be studied in this research.

17. Just as the Walloon and Brussels-Capital Region, the Flemish Region has utilized its long-acquired housing competences to develop a Housing Code, a "constitution" on housing as one

[40] Rimanque however opposes the idea of a standstill principle applicable to article 23 in its entirety: K. RIMANQUE, "Algemene situering van de sociale grondrechten in de Belgische rechtsorde", in B. HUBEAU and R. DE LANGE (eds.), *Het grondrecht op wonen. De grondwettelijke erkenning van het recht op huisvesting in Nederland en België*, Antwerpen, Maklu, 1995, (37) 45.
[41] We choose to distinguish the way in which the Constitutional Court has conducted a proportionality test in relation to the right to housing (as explained in the previous paragraph) from the application of the standstill principle.
[42] Art. 6, §1 IV Special law 8 August 1980 for the reform of institutions, *BS* 15 August 1980.
[43] E.g.: Art. 433 decies Belgian Penal Code.
[44] E.g.: Art. 1344 bis-septies Belgian Judicial Code.
[45] Art. 15 Special law 6 January 2014 concerning the sixth state reform, *BS* 31 January 2014 juncto article 6, §1 IV Special law 8 August 1980 for the reform of institutions, *BS* 15 August 1980; B. HUBEAU and D. VERMEIR, *Regionalisering van de federale huurwetgeving*, Leuven, Steunpunt Wonen, 2013, 118 p.

might call it.[46] As the most important provision, article 3 of the Flemish Housing Code specifies (the protection of) the right to housing in article 23 of the Belgian Constitution as follows:

> "*Everyone has a right to decent housing.*
> *To this end, the disposition of housing adjusted to one's personal needs, of good quality, in a decent living environment, for an affordable price and with housing security has to be promoted.*"

18. The key elements of adequate housing described by the Flemish Housing Code and explained more comprehensively in the explanatory memorandum[47] are very similar to the ones set out in the Fourth General Comment of the CESCR: the disposition/availability of housing for everyone, how housing should be accessible and therefore adjusted to the needs and possibilities of the residents, the quality of housing, its affordability and the security of tenure. A final overlapping element involves the location of housing, the need for a decent living environment. This could however easily resort under the more general housing quality requirement. Considering the urbanized Flemish landscape, the proximity of employment options, healthcare services and schooling opportunities[48], indicative of the social aspect of the right to housing, is already largely accommodated. Yet, that social component is still given particular attention in the Flemish housing policy. For example, candidate-tenants that qualify for social housing have the possibility to list their preferences regarding the location of the social dwelling.

19. In a moment we will take a look at the four main elements of housing and how they are legally protected and/or fulfilled by Belgian and Flemish legislation. Before doing so however, we should shortly address the one aspect put forward by the CESCR that we have not yet mentioned: cultural adequacy. In Belgium, the relevance of this element is mostly limited to caravan dwellers.[49] Approximately around one thousand households are living in caravans in Flanders and Brussels and several thousands are assumed to be forced by circumstances to

[46] Decree Flemish Government of 15 July 1997 concerning the Flemish Housing Code, *BS* 19 August 1997.
[47] Explanatory Memorandum to the draft of Decree concerning the Flemish Housing Code, *Parl. St.* Vl. Parl. 1996-97, no. 654/1, 11.
[48] CESCR, General Comment No. 4, par. 8 (f).
[49] For more information, see: N. BERNARD, "Quel droit au logement pour les gens du voyage?", *Echos log.* 2012, no. 1, 3-18.

live in a house.[50] This housing aspect is less visible in article 3 of the Flemish Housing Code, even though one could still connect the topic with the words "adjusted to one's personal needs". The Housing Code does however provide specific attention to alternative forms of housing and people living in caravans in other provisions.[51] Despite of this, back in 2012 the European Committee of Social Rights considered the protection of travellers' rights in the context of housing insufficient and concluded to several violations of the RESC.[52] There is little reason to believe that the situation has sufficiently improved in practice over the last couple of years.[53]

2) Availability/Accessibility

20. For everyone to even be able to dispose of adequate housing, a positive answer would have to be necessary to the following two questions. Firstly, is the supply of housing sufficient to house everyone according to his/her possibilities and needs (availability)? And secondly, does everyone have access to housing in practice (accessibility)?

21. We start with the second question, which is strongly connected to the topic of discrimination. It is a legitimate question for an owner to ask whether a candidate-tenant will be able to pay the rent, but that does not allow him to for example refuse a candidate-tenant merely because he/she lives on social allowances. Yet, this and other forms of discrimination and racism are still very much a reality on the rental market despite the existing anti-discrimination laws, as we will see later on (infra, part I). Additionally, article 1716 of the Belgian Civil Code states that every official or public communication[54] about the lease of an

[50] Minderhedenforum, *De stem van het Minderhedenforum over woonwagenbewoners*, 2014, www.minderhedenforum.be/download/media/251/brochure-woonwagenbewoners-minderhedenforum.pdf, 8 and 12.
[51] E.g. art. 4, § 1 and article 5, § 3 Flemish Housing Code.
[52] ECSR 21 March 2012, no. 62/2010, *International Federation of Human Rights (FIDH) v. Belgium*. FLEMISH HOUSING COUNCIL, Advice concerning the proposal of a decision by the Flemish Government on the subsidization of the acquisition, the equipment, the renovation and the expansion of the sites for travellers, 15 October 2015, no. 2015/09, www.rwo.be/Portals/126/Vlaamse%20Woonraad/VWR_advies_woonwagens_def.pdf.
[53] Despite a strategic plan developed by the Flemish government, see: Flemish Government, *Strategisch plan woonwagenbewoners 2012-2015*, www.integratiebeleid.be/sites/default/files/bestanden/Strategisch-plan-woonwagenbewoners_0.pdf, 2012; FLEMISH HOUSING COUNCIL, Advice concerning the proposal of a decision by the Flemish Government on the subsidization of the acquisition, the equipment, the renovation and the expansion of the sites for travellers, 15 October 2015, no. 2015/09, www.rwo.be/Portals/126/Vlaamse%20Woonraad/VWR_advies_woonwagens_def.pdf.
[54] With regard to the question which communications are public (e.g. facebook?), see: L. ZIV, "Bronnen van verbod op discriminatie bij particuliere huur", in P. BRULEZ and A.-L. VERBEKE (eds.), *Knelpunten huurrecht: tien perspectieven*, Antwerpen, Intersentia, 2012, (253) 258-260.

accommodation has to contain the rental price.[55] The letter obviously remains in charge of choosing his/her tenant(s), but it at least prevents the price to magically fluctuate from one candidate-tenant to another.[56] The success is however dependent upon the cooperation of the municipalities. They are competent to determine, prosecute and punish violations (article 119bis New Municipality Law), but since the majority of them has not adopted the necessary regulations, the provision has not had its intended impact.[57,58]

22. Access to the social rental market is a wholy different matter. It depends upon the question whether or not the candidate meets the conditions set out in article 3 of the Framework Decision Social Rent ('*Kaderbesluit Sociale Huur*').[59] The provision mainly includes income requirements, which were broadened by the previous legislature to expand the group eligible for social housing. Furthermore, the applicant is not allowed to own any dwelling or building lot[60] and, where necessary, must show willingness to learn the Dutch language and to follow the integration program. These conditions are identical for obtaining public housing from either the social housing companies or the social rental agencies.

23. These two main providers of public housing are differently constructed. Social housing companies buy, build, renovate and subsequently rent out their own housing stock. Social rental agencies on the other hand are basically intermediaries between private letters and social tenants. These agencies rent houses and appartments on the private rental market and put them at the disposal of tenants against social prices, in exchange for considerable guarantees for the owners (*inter alia* assured payment of the rent, fiscal advantages).[61]

[55] Art. 99 Law concerning various provisions (IV) 25 April 2007, *BS* 8 May 2007 juncto Art. 1716 Civil Code; J. COLAES, "Recente wijzigingen in de Huurwet 2006-2007, *Huur* 2007, 143.
[56] Explanatory Memorandum Draft of Decree concerning various provisions, *Parl. St.* Kamer 2006-07, no. 2873/001, 69-70.
[57] G. INSLEGERS, "Graag een volwaardig huurbeleid voor de private huurmarkt", in B. HUBEAU and T. VANDROMME (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013, (309) 312.
[58] Quite on the contrary, tenants across Belgium are now unequally protected against discrimination: N. BERNARD, "La loi du 25 avril 2007 et les nouvelles dispositions en matière de bail à loyer", *JT* 2007, (513) 514.
[59] Article 3 Decision Flemish Government 12 October 2007 concerning the regulation of the social rental system in execution of title VII of the Flemish Housing Code, *BS* 7 December 2007 (hereafter Framework Decision Social Rent juncto article 93 Flemish Housing Code.
[60] There are a few exceptions, for example in case of expropriation, when your property has been declared uninhabitable or unfit, or when it is not equipped for a person with a physical disadventage.
[61] M. VANDEVELDE, "Sociale verhuurkantoren in Vlaanderen", *Huur* 2007, no. 1, (10) 13.

24. While the conditions for candidate-tenants are identical, the difference lies in the order by which both providers assign social housing.[62] They both abide first by the rational occupation of the dwelling and by (their own) priority rules[63], but in contrast to the social housing companies, the social rental agencies apply a point system based on priorities (housing need, children, spendable income, …) before looking at the chronological waiting list. Housing need alone is in other words not always a decisive factor for gaining access to social housing.

25. There is an additional actor that can have an impact on access to housing: municipalities. Municipalities are allowed to apply local allocation rules.[64] This enables them to give priority to certain target groups that experience specific difficulties in finding adequate housing. They can also apply local connection criteria.[65] We already know that location in itself is an element of the right to housing. Local connection can therefore be interpreted as facilitating households with a link to the municipality to obtain a socially desirable location and thereby contributing to housing quality *sensu lato*. At the same time however it can hinder access to housing for others (without a local connection). In other words, these criteria can enhance the social aspect of the right to housing for some, but may thwart the access dimension of this fundamental right for others.[66]

26. Accessibility first of all depends on whether sufficient adequate housing is available, which is not the case in Flanders. This brings us back to the first question. We will elaborate on some figures in more detail later, but an average waiting time of little over three years to get access to social housing from a social housing company is already quite revealing, as are the 120.000 candidate-tenants on that waiting list. With little under 7 per cent of the entire housing stock, the social housing market is conclusively small when compared to the large

[62] A. HANSELAER, "De verhuring van sociale woningen", in B. HUBEAU and T. VANDROMME (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013, (109) 122-124.
[63] Art. 18-20 Framework Decision Social Rent (for social housing companies) cf. art. 21 Framework Decision Social Rent (for social rental agencies).
[64] Art. 27-29 Framework Decision Social Rent juncto art. 95 Flemish Housing Code; T. VANDROMME and B. HUBEAU, "De huur en aankoop van een sociale woning", in X. (ed.), *Het onroerend goed in de praktijk, VII.D.2*, Kluwer, 63-64.
[65] J. VAN POTTELBERGE, "De rol van gemeenten bij sociale huisvesting", *T.Gem.* 2014, no. 1, (33) 47; This priority rule is only applicable after those set out in article 19 and 21 Kaderbesluit Sociale Huur and the municipality rules concerning specific target groups and liveability.
[66] Political reasons are at the core of why municipalities can adopt local connection criteria. The possibility of local connection criteria seeks aims to increase their support and willingness to expand the social housing stock, see: S. WINTERS, M. ELSINGA, M. HAFFNER, K. HEYLEN, K. TRATSAERT, C. VAN DAALEN and B. VAN DAMME, *Op weg naar een nieuw Vlaams sociaal huurstelsel? – Samenvatting*, Brussel, Departement RWO-Woonbeleid, 2007, 106-107.

majority of other Western and Northern European countries.[67] Extra pressure on this already insufficient supply comes from the buying rights of social tenants.[68] Social tenants currently still have the right to buy the dwelling that has been rented out to them for at least five years without interruption and that has been available as a social accommodation for a minimum of fifteen years.[69] The new owner is then obliged to reside there for a period of twenty years.[70] While this is in conformity with the right to property of the social housing companies according to the Constitutional Court[71], the possibility for social tenants to buy the social housing could be seen as an impairment of the right to housing. The revenues have to be reinvested into new social housing, but will normally be insufficient to maintain the housing stock, placing candidate-tenants at a disadvantage.[72] For these reasons, it is positive to see that a change is at large. At the moment of this writing, a draft decree has been submitted that aims to modify the buying rights of social tenants into a pre-emption right. The social housing companies will then be able to decide whether or not to sell a social dwelling if it has served as public rental housing for at least fifteen years. If so, the sitting tenant will be given priority to buy the dwelling.[73]

27. Despite being insufficient, it would be wrong to claim that the social housing stock has not expanded over the years. As a matter of fact, between 1991 and 2014 the stock has

[67] C. WHITEHEAD, S. MONK, S. MARKKANEN and K. SCANLON, *The private rented sector in the new century: a comparative approach*, Copenhagen, Boligøkonomisk Videncenter, 2012, www.lse.ac.uk/geographyAndEnvironment/research/london/pdf/The-Private-Rented-Sector-WEB%5B1%5D.pdf, 24; S. WINTERS et al., *Wonen in Vlaanderen anno 2013. De bevindingen uit het Grote Woononderzoek 2013 gebundeld*, Antwerpen, Garant, 2015, 17.

[68] Article 43 Flemish Housing Code; Decision of the Flemish Government 29 September 2006 concerning the conditions for the transfer of goods by the Flemish Association for Social Housing and de social housing companies in execution of the Flemish Housing Code ('Overdrachtenbesluit'), *BS* 13 November 2006.

[69] Some dwellings are not available for sale: article 43, § 2 Flemish Housing Code.

[70] If the buyer does not abide by this obligation, the social housing company has the right to buy the dwelling back: article 43, § 4 juncto article 84, § 1 Flemish Housing Code.

[71] Constitutional Court 30 June 2004, no. 115/2004, B.3.4, note I. MARTENS, "De verplichte verkoop van sociale huurwoningen: een geoorloofde vorm van ontzetting uit de eigendom?", *RABG* 2005, no. 5, 398-405; A. HANSELAER, "Het kooprecht van de sociale huurder: een quasi-onteigening", *TBO* 2005, 107-109; Constitutional Court 7 March 2007, no. 33/2007, B.4.6 and B.5.3; M. VANDEVELDE, "Het kooprecht van sociale huurders", *Huur* 2007, no. 2, 52-61.

[72] B. HUBEAU, "Het kooprecht van de zittende sociale huurder: juridisch en/of maatschappelijk een maat voor niets?" (note under Constitutional Court 30 June 2004), *RW* 2004-05, (891) 894; T. VANDROMME, "Het recht op wonen: een stand van zaken", in B. HUBEAU and T. VANDROMME (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013, (17) 33.

[73] Draft Decree concerning the modification of various decrees on housing, *Parl.St.* Vl.Parl. 2015-16, no. 814/1; see also *Hand.* Vl.Parl. Commission for Housing, Poverty Policy and Equal Opportunities 2014-2015, 19 March 2015, https://www.vlaamsparlement.be/commissies/commissievergaderingen/964009/verslag/968437. The right to buy the social dwelling one resides in will thus develop into a favour, after it had first evolved in the opposite way: M. VANDEVELDE, "De verkoop van de sociale huurwoning aan de zittende huurder", in A. HANSELAER and B. HUBEAU (eds.), *Sociale huur*, Brugge, Die Keure, 2011, (173) 180-188.

increased with about 36.000 dwellings (with a total of around 150.000).[74] Since 2009, this need for expansion has been captured in the Flemish Decree on Land and Real Estate Policy, which created social objectives to be attained by every municipality by the year 2023.[75] Recently, the overall regional objective for Flanders has been raised to 50.000 units to be available for social rent. The term for this objective has also been postponed to the end of 2025.[76]

28. An increase is also noticeable in the number of housing units provided for by the social rental agencies. This number has increased significantly over the past decade, but even more exponentially over the last couple of years, rendering a total of somewhere between seven and eight thousand units by 2014.[77] Unfortunately, this branch of the social housing sector has to deal with expanding waiting lists too, with more than 25.000 candidate-tenants at the end of 2013.[78]

29. Through both the public management right[79] and the pre-emption right[80], opportunities have been provided to public actors such as the municipalities, the Public Centres for Social Welfare (hereafter OCMW) and the social housing companies to keep as much housing as possible activated and to expand the social housing stock.[81] With the public management right, control can be taken of dwellings that are either inventoried as vacant or have been declared unfit or uninhabitable and have not been remediated by the owner before the provided deadline (infra, housing quality).[82] It is basically a sanction against those owners that refuse to put their property (back) at the disposal of the housing market. Under the public management

[74] L. NOTREDAME, "De nieuwe wooninitiatieven", Brussel, Koning Boudewijnstichting, 1994 (8) 14; *Vr. en Antw.* Vl. Parl., Vr. nr. 29, 12 October 2015 (A. VAN DERMEERSCH); *Vr. en Antw.* Vl. Parl., Vr. nr. 802, 30 June 2015 (M. TAELMAN).
[75] Art. 4.1.2-4.1.3. Decree 27 March 2009 on Land and Real Estate, *BS* 15 May 2009.
[76] Art. 20 Draft Decree concerning the amendment of various decrees on housing.
[77] AGENTSCHAP WONEN-VLAANDEREN, *Jaarverslag 2014*, www.vlaanderen.be/nl/publicaties/detail/wonen-vlaanderen-jaarverslag-2012, 16; A. VAN HAARLEM and J. COENE, "Armoede en sociale uitsluiting ontcijferd", in D. DIERCKX, J. COENE, A. VAN HAARLEM and P. RAEYMAECKERS (eds.), *Armoede en sociale uitsluiting. Jaarboek 2013*, Leuven, Acco, 2013, (357) 399.
[78] *Vr. en Antw.* Vl. Parl., Vr. nr. 406, 2 February 2015 (J. VANDENBROUCKE).
[79] Article 90 Flemish Housing Code; V. TOLLENAERE, "Sociaal beheersrecht", in B. HUBEAU (ed.), *Vijf jaar Vlaamse Wooncode: het woonbeleid (nog) niet op kruissnelheid?*, Brugge, Die Keure, 2002, 267-280.
[80] Article 85 Flemish Housing Code; T. VANDROMME, *Woningkwaliteitsbewaking in het Vlaamse Gewest*, Mechelen, Kluwer, 2008, 97-103.
[81] Additionally, article 134bis New Municipality Law provides the mayor with the possibility to lay claim to vacant buildings to house homeless people, but this is only an exceptional measure for urgent cases, not one that can be employed as part of the housing policy.
[82] Constitutional Court 20 April 2005, no. 69/2005: The Constitutional Court judged that a public management right (in casu with regard to the Walloon Housing Code) is not an unlawful restricgtion of property law.

scheme, the public actor in charge will rent the property for a minimum of nine years under the social rental system.

30. The pre-emption right on the other hand imposes the owner who wants to sell his property to offer it first (and against the same conditions) to the beneficiary of that right. Again, this enables the government to acquire public housing. As with the public management right, this right also mainly applies to unoccupied housing and dwellings that have already been declared unsuitable or uninhabitable: when the public actors agree to take over the necessary renovation works from the owner (infra, housing quality)[83], when the dwelling is not considered apt to renovation works[84] or when the property had been placed on the inventory that has been created for that purpose.[85]

31. While definitely worthwhile for the reasons just set out, these measures do not do away with the existing shortages. A lot of low(er)-income households eligible yet still waiting for social housing are hence forced to enter the private rental market. We have mentioned earlier how the rental market has been inhabited by mostly lower income groups. All of this begs the question whether sufficient privately rented housing is available that is also adequate (i.e. affordable) for these target groups. While the private rental market is recently on the rise again, the expansion does not seem to be situated in the lower segments of the market. Additionally, owners still hold a considerable reticence towards renting out their property too. For many of them, the benefits do not outweigh the maintenance/reparation costs and any potential problems or bad experiences with tenants (e.g.: rent arrears, evictions).[86] The pay-off has simply been found insufficient in order to put the dwelling on the rental market.[87]

32. In this context we should not underestimate the impact of the shortcomings of the social housing sector. Those eligible for social housing will often have to pay (substantially) more

[83] Article 18, § 2 and 90 Flemish Housing Code.
[84] Article 19 Flemish Housing Code.
[85] Article 28 Decree 22 December 1995 concerning the provisions accompanying the budget, *BS* 30 December 1995 ('Heffingsdecreet'): This inventory contains lists of vacant, uninhabitable and neglected buildings and dwellings. When a dwelling is still on that list after one year, the owner will have to pay a yearly fee; A. HANSELAER, "Heffing op leegstand en verkrotting", *NJW* 2005, vol. 124, 1050; S. HUYGHE, "Het nieuwe decreet ter bestrijding van de leegstand en verwaarlozing van woningen en gebouwen", *LRB* 2004, no. 4, 217.
[86] FLEMISH HOUSING COUNCIL, *Aanbodbeleid op de private huurmarkt. Bevragingen van actoren en voorstellen van de Vlaamse Woonraad*, 17 December 2015, no. 2015/14, www.rwo.be/Portals/126/Vlaamse%20Woonraad/VWR_advies_aanbod_private_huur_def.pdf, 21 and 24-26.
[87] P. VANDENBROUCKE, E. BUYST, S. WINTERS, M. ELSINGA, M. HAFFNER and J. HOEKSTRA, *Naar een aanbodbeleid voor de Vlaamse private huurmarkt*, Brussel, Departement RWO-Woonbeleid, 2007, 83-95.

on the private market, which increases the risk of payment problems. Considering that this, as we have just seen, is one of the reasons that withholds private letters from going to or staying on the private rental market, the lack of access to social housing not only directly but also indirectly impacts the availability of privately rented housing.[88] Finally, one can also point the finger to the property-driven Flemish housing policy. The Flemish government has created some financial incentives to invigorate the private rental market[89], but the majority of the stimuli definitely still goes to the acquisition of property (infra, part I, chapter 2).[90]

3) Affordability

33. As with all of these housing elements, affordability cannot be entirely disconnected from the previous section on availability and accessibility. Sufficient and accessible social housing stock is obviously an important part of the protection against large scale affordability problems. Private letters providing housing against social conditions through social rental agencies therefore contribute to this aspect of the right to housing. All the more because there is no general rental price regulation system in place that determines or guides the rental prices on the private market.[91] The contracting parties freely decide on the price before the start of the agreement.[92] The Flemish/Belgian housing policy thereby distinguishes itself from some other Western and Northern European countries: there exists no system of maximum or set prices (rent control) as in Sweden[93], Denmark[94] or the Netherlands[95], not even reference

[88] FLEMISH HOUSING COUNCIL, *Aanbodbeleid op de private huurmarkt. Bevragingen van actoren en voorstellen van de Vlaamse Woonraad*, 17 December 2015, no. 2015/14, www.rwo.be/Portals/126/Vlaamse%20Woonraad/VWR_advies_aanbod_private_huur_def.pdf, 19 and 30.

[89] Take for example the rental guarantee fund which protects letters in case of rent arrears (Decision Flemish Government 4 October 2013 concerning the establishment of a compensation of the Fund for the prevention of evictions, *BS* 25 November 2013).

[90] FLEMISH HOUSING COUNCIL, *Naar een beleid ter ondersteuning van de private huurwoningmarkt*, 30 September 2010, no. 2010/11, www.rwo.be/Portals/100/Vlaamse%20Woonraad/broch_Vl_Woonraad_web.pdf, 13-14.

[91] The only exceptions occur in case of an extension of a short-term contract or consecutive short-term contracts for different tenants.

[92] Article 1728bis, § 3 Belgian Civil Code; M. DAMBRE, *De huurprijs. Analyse van de financiële verbintenissen van de huurder en onderzoek naar de mogelijkheid tot objectivering van de woninghuurprijzen*, Brugge, Die Keure, 2009, 116-118.

[93] TENLAW, *National Report for Sweden*, 2015, www.tenlaw.uni-bremen.de/reports/SwedenReport_18052015.pdf, 78: In Sweden, rents are determined via collective bargaining between tenants unions and the property federations. It should be established at a reasonable amount, which is considered not to be palpably higher (+/- 5%) than the rent for units of equivalent utility value. Before 2011, the municipal housing companies had a normative role for all rents, since their prices set the ceiling for the rents in equivalent private landlord dwellings;

[94] FEANTSA, *The role of housing in pathways into and out of homelessness*, 2008, www.better-housing.org.uk/sites/default/files/consultations/responses/08_European_Report_FEANTSA_Housing_final_EN.pdf, 28: For privately rented buildings constructed before 1991, the rent is set in proportion to running costs. Landlords can also pass on a capital charge (between 7 and 14%), calculated on the basis of the value of the house. There is also a rent control board to see whether the conditions abide by law.

prices as is the case in Germany with the '*mietspiegel*', a database on all rental contracts from a certain area over the past four years containing reference prices for similar dwellings.[96] As ordered by the Flemish Housing Code[97], a web application has made it possible for a tenant or landlord to make an estimation of the rental market price of a certain dwelling in Flanders.[98] In contrast to the German *mietspiegel* however, on the basis of which a rental price cannot be higher than 50 per cent above the market price calculated by the database (or 20 per cent in areas with a housing shortage), in Flanders this remains only indicative. Now that the competence of housing rent has been regionalized though, it would at least theoretically be possible to develop this application further so that it objectifies rental prices and becomes more compulsory.[99]

34. Whereas the Flemish government leaves rental price negotiations in the hands of the market, it does offer several financial compensations that aim to improve the affordability of housing. In the context of ownership, the best known and most discussed one is without a doubt the housing bonus, a tax reduction for people with a mortgage loan.[100] Additionally, social loans (i.e. loans against social conditions) are available to assist lower income households in buying property.[101]

35. On the rental market on the other hand, the Flemish government has seen to a compensation for those candidate-tenants that have been on the waiting list of a social

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[95] S. WINTERS, *Huurprijzen en richthuurprijzen. Deel I: literatuurstudie over richthuurprijzen*, Leuven, Steunpunt Ruimte en Wonen, 2012, 11-12: The rental price regulation in the Netherlands only applies for housing under the so called liberalization limit (2015: 710,68 euro/month). The maximum price for these accommodiations is based on a point system that takes into account the characteristics of the dwelling itself and its environment. The government determines these points.

[96] M. ELSINGA, M. HAFFNER, J. HOEKSTRA, P. VANDENBROUCKE, E. BUYST and S. WINTERS, *Beleid voor de private huur: een vergelijking van zes landen*, Brussel, Departement RWO-Woonbeleid, 2007, https://steunpuntwonen.be/Documenten/Publicaties_steunpunt_ruimte_en_wonen_2007-2011/2007/2007-03-eindrapport-beleid-voor-de-private-huur-ee.pdf, 40-41.

[97] Article 5, § 5 Flemish Housing Code juncto article 7, § 5 Decree 29 March 2013 concerning the amendment of various decrees on housing quality, *BS* 1 August 2013.

[98] www.woninghuurprijzen.be

[99] P. DE SMEDT, E. DE WITTE, R. SLABBINCK and S. VANDAMME, "Administratiefrechtelijke aspecten in het Vlaamse Gewest", in M. DAMBRE, B. HUBEAU and S. STIJNS (eds.), *Handboek algemeen huurrecht*, Brugge, Die Keure, 2015, (145) 166.

[100] Originally a federal competence, the sixth Belgian State Reform in 2014 marked the transition of the housing bonus to the regions, who now have the exclusive competence. The federal regulations still stand in article 145/37-46 Belgian Income Tax Code, but the Flemish government has made several adaptations: art. 64-71 and 108 Decree 19 December 2014 concerning provisions assisting the budget 2015 ('Programmadecreet 2015'), *BS* 30 December 2014; article 81-88 Decree 18 December 2015 concerning provision assisting the budget 2016 ('Programmadecreet 2016'), *BS* 29 December 2015.

[101] Article 78-79 Flemish Housing Code.

housing company for a period of four years.[102] Notwithstanding certain exceptions, an applicant is entitled by way of compensation to a third of the rental price, which cannot be higher than € 580 to start with. The income limits to obtain such a premium are however considerably lower than those for gaining access to the social housing sector, which means that not everyone on the waiting list is eligible for a rental premium. Furthermore, there is also a rent allowance of the same amount (1/3 of the rental price, max. 580 euro, similar income limits) for homeless people moving into adequate housing and households moving into housing provided by a social rental agency.[103] There are obviously maximum income requirements/income ceilings for such a rental price compensation as well.

36. Despite these initiatives, it has been established repeatedly that the Belgian and Flemish housing policy show signs of the Matthew-effect.[104,105] This means that the higher income groups profit relatively more from government's housing expenditures, creating a reversed redistribution effect. It is important though to put this in perspective. According to a study comparing housing allowances in fourteen (Western-)European countries, Belgium actually has the highest percentage share of tenants from the lowest income quintile receiving such allowances.[106] A Flemish study comparing housing allowances to the Netherlands comes to similar conclusions with regard to allowances for the rental sector.[107] Due to the (income)-selective nature of the measures (rent allowances, social housing), tenants from the two highest income quintiles do not receive any of these allowances.

37. How and where then does the Matthew-effect come into play? We have said earlier that the Flemish (and Belgian) housing policy is primarily focused on ownership. The housing allowances for tenants might have a redistributional effect in essence, but they are negligible

[102] Decision Flemish Government 4 May 2012 concerning the establishment of a compensation for candidate-tenants, *BS* 25 May 2012.
[103] Decision Flemish Government 2 February 2007 concerning the installation of a rental price compensation for tenants in housing need, *BS* 9 February 2007.
[104] The Matthew effect was first developped by: R.K. MERTON, "The Matthew effect in science", *Science* 1968, no. 159, 56-63.
[105] H. DELEECK, J. HUYBRECHTS and B. CANTILLON, *Het Matteüseffect. De ongelijke verdeling van de sociale overheidsuitgaven in België*, Antwerpen, Kluwer, 1983, 358;.P. DE DECKER, "Not for the homeless? Housing policy in Flanders: between selectivity and legitimacy", *European Journal Of Homelessness* 2011, vol. 5, no. 2, (129) 132-134; K. HEYLEN, "Nieuwe inzichten in matteüseffect van het woonbeleid", *De Gids* 2013, no. 2, 10-16.
[106] J. GRIGGS and P.A. KEMP, "Housing allowances as income support: comparing European welfare regimes", *International Journal of Housing Policy* 2012, vol. 12, no. 4, (391) 400.
[107] M. HAFFNER and K. HEYLEN, *De verdeling van de woonsubsidies. Vlaanderen en Nederland vergeleken*, Leuven, Steunpunt Wonen, https://steunpuntwonen.be/Documenten/Onderzoek_Werkpakketten/zkc4494-wp7-de-verdeling-van-de-woonsubsidies-eind.pdf, 70-71.

in absolute terms, in the scheme of the whole housing policy. The Flemish Housing Council calculated that in 2013 only 2,1 per cent of the entire tenant population in Flanders received a rent allowance, which is a strikingly low number when compared to the other European countries in the aforementioned comparative study.[108] The total budget for measures aimed at owners or ownership acquisition, with the housing bonus as its main exponent, is also much higher than the budget provided for tenancy-related allowances. When taking into account both Flemish and federal support measures, a study by the Policy Research Centre for Housing (Steunpunt Wonen) from 2012 showed that the budget directed at owners was 5,6 times larger, with owners receiving on average 4,3 times as many housing benefits.[109] The large majority of the fiscal benefits (68%), moreover, ends up with the 40 per cent highest incomes.[110]

38. All allowances summed up, the two highest income quintiles were found to receive almost four per cent more of the total housing allowances budget than the lowest quintile.[111] The same study showed that the difference in budget expenditure for owners and tenants is considerably lower when taking only Flemish allowances into consideration[112], but here we must add that the quantitative data predated the transfer of the housing bonus to the regions. Since the Flemish government decided to only reform[113] and not abolish this fiscal benefit[114], we can reasonably suspect that the role of the Matthew-effect has proportionally increased with regard to the Flemish housing subsidies in particular. Yet, by reducing the maximum amount of benefits considerably, the impact of the housing bonus on the high-income households has already been somewhat tempered.

39. Numbers show that efficient affordability measures definitely remain essential. In 2013, more than half of the households on the private rental market spent more than 30 per cent of

[108] E.g.: France (53,3%), United Kingdom (47,5%), Netherlands (34%), Germany (4,8%), for more see: J. GRIGGS and P.A. KEMP, "Housing allowances as income support: comparing European welfare regimes", *International Journal of Housing Policy* 2012, vol. 12, no. 4, (391) 398.
[109] K. HEYLEN and S. WINTERS, *De verdeling van subsidies op vlak van wonen in Vlaanderen*, Leuven, Steunpunt Ruimte en Wonen, 2012, https://steunpuntwonen.be/Documenten/Publicaties_steunpunt-wonen-2012-2015/2012/2012-18-de-verdeling-van-de-woonsubsidies-versie.pdf, 10-11 and 80-81.
[110] K. HEYLEN, "Nieuwe inzichten in matteüseffect van het woonbeleid", *De Gids* 2013, no. 2, (10) 14-15.
[111] K. HEYLEN and S. WINTERS, *De verdeling van subsidies op vlak van wonen in Vlaanderen*, Leuven, Steunpunt Ruimte en Wonen, 2012, https://steunpuntwonen.be/Documenten/Publicaties_steunpunt-wonen-2012-2015/2012/2012-18-de-verdeling-van-de-woonsubsidies-versie.pdf, 86-87.
[112] The ratio between owner- and tenant-focused amounted to a ratio of 60 against 40 %, with owners receiving on average "only" 1,3 times as many housing allowances.
[113] Art. 64-71 and 108 Decree 19 December 2014 concerning provisions assisting the budget 2015 ('*Programmadecreet 2015*'), *BS* 30 December 2014.
[114] P. DE DECKER, "Afbouw woonbonus: nu of nooit", *Samenleving en Politiek* 2014, no. 1, 64-75.

their income on rent, a treshold which is often seen as an indicator for possible affordability problems.[115] This is a significant increase compared to 2005 (39 per cent of households). The situation is also most precarious in the lowest income quintile, with 75 per cent of the private tenants exceeding that 30 per cent benchmark. That does not come as a surprise. Households from this income group are paying 18 per cent more for their privately rented dwellings than back in 2005. Despite the social tariffs, the social housing market is not free from affordibility problems either, with 22,7 per cent of households having to spend more than 30% of their budget (2005: 12,7%). On the basis of the residual income approach, similar conclusions can be drawn. This method works with budget standards that indicate how much a household should have left after the subtraction of housing costs in order to be able to live a dignified life.[116] While the overall results show a similar portion of households below that residual income line in comparison to 2005, the share of private tenants has increased to 30%.[117]

4) Housing quality

40. The data available concerning housing quality show a similar pattern to what we have seen thus far. There are still significant problems on the housing market, especially on the private rental market, and that is no different with regard to housing quality. A screening of 5000 dwellings based on the methodology of the Flemish compliance assessment (i.e. according to the norms of the Flemish Housing Code) has led to the findings that 37 per cent of all dwellings are of inadequate quality[118], 35 per cent of which need structural interventions to remedy these shortcomings sufficiently. The highest share of housing of inadequate quality (47%) can again be found in private rental housing and in the two lowest income quintiles.[119]

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[115] D. HULCHANSKI, "The concept of housing affordability: six contemporary uses of the housing expenditure-to-income ratio", *Housing Studies* 1995, vol. 10, no. 4, 471-491; K. HEYLEN and M. HAFFNER, "Hoe meten we de betaalbaarheid van het wonen?", in S. WINTERS (ed.), *Is wonen in Vlaandere betaalbaar?*, Antwerpen, Garant, 2011, (49) 50-52.

[116] B. STORMS and K. VAN DEN BOSCH, *Wat heeft een gezin minimaal nodig? Een budgetstandaard voor Vlaanderen*, Den Haag, Acco, 2009.

[117] For an overview of these figures and more, see: S. WINTERS et al., *Wonen in Vlaanderen anno 2013. De bevindingen uit het Grote Woononderzoek 2013 gebundeld*, Antwerpen, Garant, 2015, 59-68; K. HEYLEN, "Eigendomsstatuut, woonuitgaven en betaalbaarheid. Evolutie tussen 2005 en 2013", in P. DE DECKER, B. MEEUS, I. PANNECOUCKE, E. SCHILLEBEECKX, J. VERSTRAETE and E. VOLCKAERT (eds.), *Woonnood in Vlaanderen. Feiten / mythen / voorstellen*, Antwerpen, Garant, 2015, (25) 32-38.

[118] This means that the examination of the accommodation revealed shortcomings equal to 15 or more penalty points.

[119] L. VANDERSTRAETEN and M. RYCKEWAERT, *Groot woononderzoek 2013. Deel 3: Technische woningkwaliteit*, Leuven, Steunpunt Wonen, 2015, https://steunpuntwonen.be/Documenten/Onderzoek_Werkpakketten/gwo-volume-2-deel-3-eind.pdf, 76-77 and 85.

41. The Flemish government nonetheless provides incentives to improve housing quality. Social loans for example, to which we have already referred earlier[120], serve not only as a facilitator to buy housing, but can also be requested to finance renovations of (old) dwellings. Then there is the renovation premium, which can be requested by an owner-inhabitant or a letter who rents out the dwelling to a social rental agency for at least nine years. Most importantly, the dwelling must be at least 25 years old (this changes to 30 years for new applications in 2017).[121] A last example is the aforementioned Flemish rent allowance. In addition to what we have said earlier[122], this rental price compensation is also applicable to those who move from a dwelling that is uninhabitable, inadequate or too small to an appropriate dwelling. The compensation aims to encourage those residing in housing of subpar quality to take steps to improve that situation (i.e. start an administrative housing quality procedure (infra)).

42. Housing quality is also extensively regulated, both in federal and regional legislation.[123, 124] Article 2 of the federal Housing Rent Act and article 5 of the Flemish Housing Code both mention how housing has to abide by elementary safety, health and habitability requirements. The Flemish Housing Code further defines these quality conditions, while the concretization at the federal level can be found in the Royal Decree of July 8, 1997. Since both are autonomous from one another, they each have their own legal consequences (infra, part I).[125]

43. The federal Housing Rent Act involves the contractual obligations of the parties, in casu the obligation of the letter to provide in maintenance and repairs. Besides the termination of the agreement, renovation and adjustment works can be ordered in case the elementary quality requirements are not reached.[126] Since the regional quality norms on the other hand do not

[120] See footnote no. 101.
[121] Decision Flemish Government 30 October 2015 concerning the establishment of a compensation for the renovation costs of an existing dwelling or for the realization of a new one, *BS* 12 November 2015.
[122] See footnote no. 103.
[123] Constitutional Court 11 March 2009, no. 47/2009: The Constitutional Court has judged that the Flemish Housing Code does not violate the rules concerning the division of competences because the sanctions only relate to landlord and public authorities.
[124] With the transfer of the housing rent competence to the regions, one could expect this element to become less ambiguous and more straightforward when a Flemish housing rent act is adopted in the future.
[125] M. DAMBRE, "Nietigheid huurcontract bij inbreuk op kwaliteitsnormen: mogelijk, wenselijk en wat zijn de gevolgen?", *TBO* 2012, no. 6, (251) 253-255.
[126] A third option is a renovation rental agreement according to article 8 of the Housing Rent Act. The tenant then legally commits himself to carry out certain tasks that are normally imposed on the letter. In exchange it can be agreed that the rental agreement will not be terminated over a period of maximum 9 years, or that the rental price will be reduced or will not be revised. For more, see: A. VAN OEVELEN, "De staat van de gehuurde

regulate these contractual obligations, this option is not available on the basis of the Flemish Housing Code. Instead, it provides a two-track approach to sanction a letter: an administrative and a penal enforcement method.[127,128]

44. In the administrative procedure, any person with an interest can request a quality investigation of the dwelling by the policy agency Housing-Flanders. Based on their technical report (which is made on the basis of the aforementioned points system), an advice will be drafted and delivered to the mayor. In case the dwelling is found to be unsuitable, uninhabitable or overcrowded[129], all concerned parties will be invited by the mayor and be heard before he takes the ultimate decision. This decision is open to appeal to the minister of housing.[130]

45. The declaration of unsuitability or uninhabitability renders the rental agreement void, regardless of who is (mainly) responsible for the escalation of the situation or the prospect of a renovated dwelling.[131] As long as the dwelling is still considered valuable enough[132], the owner will be obliged to carry out the renovations, for which he could get a compensation on the basis of article 83 of the Flemish Housing Code.[133] If the owner does not commit himself to these renovations voluntarily, he can be forced by public management law (supra, availability of housing).

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woning, de federale, gewestelijke en gemeentelijke woningkwaliteitsnormen en de renovatiehuurovereenkomst", in A. VAN OEVELEN (ed.), *Woninghuur*, Brugge, Die Keure, 2009, (73) 79-82.

[127] For a more comprehensive overview of these procedures, see: T. VANDROMME, *Woningkwaliteitsbewaking in het Vlaamse Gewest*, Mechelen, Kluwer, 2008, 50-67 and 134-160; M. LE ROY and B. VANDEKERCKHOVE, *Evaluatie van het kwaliteitsinstrumentarium. Vanuit het perspectief van de huurder*, Leuven, Steunpunt Ruimte en Wonen, 2011, https://steunpuntwonen.be/Documenten/Publicaties_steunpunt_ruimte_en_wonen_2007-2011/2011/2011-03-kwaliteitsbewaking-huurder--met-bijlage.pdf, 19-23.

[128] In case of acute danger for health or safety of inhabitants or neighbours, the administrative procedure of the Flemish Housing Code might be too slow. Article 135, § 2 New Municipality Law therefore allows the mayor to act much more swiftly when the situation demands it, without the necessity of a preceding advice or the obligation to hear all parties. This possibility is completely unrelated to the approaches described in the Flemish Housing Code: T. VANDROMME, "De gemeentelijke mogelijkheden bij de bewaking van de woningkwaliteit", *T. Gem.* 2014, no. 4, (250) 253-254.

[129] For more on the regulation of overcrowded housing in particular, see: R. TIMMERMANS, "Overbewoning vanuit het gezichtspunt van de huurder en van de verhuurder", *Huur* 2015, no. 1, 3-8.

[130] The whole procedure is described in art. 16-16ter Flemish Housing Code.

[131] M. DAMBRE, B. HUBEAU and S. STIJNS, *Handboek algemeen huurrecht*, Brugge, Die Keure, 2006, 593.

[132] A distinction is made in article 18 and 19 Flemish Housing Code.

[133] Article 18, §1 juncto article 83 Flemish Housing Code; It is also possible to conclude a renovation agreement with the municipality, the public centre for social welfare (OCMW) or a social housing organisation, in exchange for a right on the dwelling or the possibility to rent it against an objectivized rental price for at least 9 years (article 18, § 2 Flemish Housing Code).

46. The penal law procedure on the other hand, which runs completely autonomous from the administrative procedure, is primarily focused on sanctioning the more mischievous landlords. Together with the police forces, the Flemish housing inspector is competent to detect infringements of the regional quality conditions. This can lead to severe penalties (fine and/or prison sentence, possibly increased in case of specific aggravating circumstances), all set out clearly in article 20 of the Flemish Housing Code.[134] Additionally, the penal judge can also order restoration works to match the minimum quality conditions.[135]

47. Finally, we should mention that the quality compliance assessment as we have seen to be part of the administrative procedure does not need to stem from serious quality problems. While often the case, a letter can also request an assessment in the hope of receiving a compliance certificate. This certificate is valid for ten years and attests to the fact that the housing entity abides by the regional safety, health and quality norms.[136] In contrast to the energy performance certificate[137], which is mandatory in case of sale and rent, the quality compliance certificate is not obligatory according to the Flemish Housing Code.[138] In 2011, a legal modification has provided the municipalities with the competence to impose such certificates for all dwellings, but this does not appear to have changed a lot.[139] Neither the municipalities nor the landlords themselves have thus far shown the urge to act upon this housing quality initiative.[140]

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[134] Decree 7 July 2006 concerning the amendment of the decree of 22 December 1995 on provisions accompanying the budget 1996, the decree of 4 February 1997 concerning the quality and safety conditions for rooms and student rooms and the decree of 15 July 1997 concerning the Flemish Housing Code on the reinforcement of the housing quality control instruments, *BS* 5 October 2006: The penalties have been synchronized with article 433decies of the Belgian Penal Code on slumlords. The description of the crime however contains more elements and is therefore more difficult to prove; T. VANDROMME, "Een grotere slagkracht voor de Wooninspectie dankzij wijzigingen aan de Vlaamse Wooncode en het Kamerdecreet", *RW* 2007-08, no. 16, 634-641.

[135] Article 20 and 20 bis Flemish Housing Code; For more information on housing quality protection, see: P. DE SMEDT, "De Vlaamse Wooncode anno 2013: naar een (nog meer) integrale en slagkrachtige woonkwaliteitsbewaking?", in B. HUBEAU and T. VANDROMME (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013, 41-90.

[136] Article 7-14 Flemish Housing Code.

[137] Decision Flemish Government 11 January 2008 concerning the introduction of the energy performance certificate for the sale and rent of residential buildings en the execution of an energy audit, *BS* 8 February 2008; This obligation has been imposed in execution of Directive European Parliament and Council no. 2002/91/EC, 16 December 2002 on the energy performance of buildings, *Pb.L.* 4 January 2003.

[138] The only exception is the housing rented out to a social rental agency.

[139] Article 8 Decree concerning the amendment of various decrees on housing quality protection, *BS* 11 August 2013.

[140] For arguments in favour and against making the quality compliance certificate mandatory, see: B. HUBEAU and D. VERMEIR, *Een evaluatie van het federale woninghuurrecht. Tussentijds rapport inzake duur, opzegging, waarborg en woningkwaliteit*, Leuven, Steunpunt Wonen, 2014, 115-116.

5) Housing security

48. As the final element, housing security deals with the ability to live at a certain place for as long as one wants. Unfortunately, that appears not to be the case for a surprisingly high number of persons. Recent estimates illustrate that about 80 to 250 people are evicted every week in Flanders[141], which means equally as many social dramas and potential traumas.[142]

49. Evictions have a strong connection to the issue of affordability and lack of quality (see below), but housing security in general entails more than that. It is in the first place dependent upon general rules of tenure duration. Obviously this is again relevant to the housing rent system and private rent in particular. A social rental contract is usually one of indefinite duration.[143] At least that is the case at the moment of this writing, because temporary contracts could very well be introduced on short notice. We will elaborate on this proposal later in the research. There is already a trial period of two years, but that does not take anything away from the status as a contract of indefinite duration.[144] This is especially so because the Constitutional Court has nullified the possibility for extra-judicial annulment of the agreement at the end of the trial period.[145] For now, the biggest uncertainty for social housing tenants in Flanders perhaps derives from the competence of the government to modify the regulatory aspects of the social rent contract unilaterally, in contrast to private rental agreements (art. 1134 Civil Code).

50. Private rent agreements on the other hand are considered to have a duration of nine years.[146] After that period, the agreement will be prolonged unless one of the parties has notified otherwise six months in advance. Other durations are also possible.[147] Rent contracts

[141] J. VERSTRAETEN, "Uithuiszettingen in Vlaanderen: veel vragen, weinig antwoorden", *De Gids* 2016, no. 1, (21) 23-24.
[142] Council of State (6th Chamber) 7 April 2006, no. 157.426, *Echos Log.* 2007, 31; N. BERNARD, "Uithuiszettingen: tussen wet en praktijk", in N. BERNARD (ed.), *Les expulsions de logement/Uithuiszettingen*, Brugge, Die Keure, 2011, (43) 43; D.H. BELL, "Providing security of tenure for residential tenants: good faith as a limitation on the landlord's right to terminate", *Ga. L. Rev.* 1985, vol. 19, (483) 530.
[143] Article 98 Flemish Housing Code.
[144] Article 92, 3° Flemish Housing Code; T. VANDROMME, "Begripsomschrijving", in A. HANSELAER and B. HUBEAU (eds.), *Sociale huur*, Brugge, Die Keure, 2011, (1) 24.
[145] Constitutional Court 10 July 2008, no. 101/2008, *RW* 2008-09, 1123, note B. HUBEAU.
[146] Article 3, §1 Housing Rent Act; According to figures from 2010 however, more than half of the rent agreements have a duration shorter than three years (which does not mean that a considerable share of those contracts can convert into a nine year agreement afterwards), see: K. TRATSAERT, *Huurprijzen en richthuurprijzen. Deel II: De registratie van huurcontracten als informatiebron voor de private huurmarkt*, Heverlee, Steunpunt Ruimte en Wonen, 2012, https://steunpuntwonen.be/Documenten/studiedagen/studiedag-private-huurmarkt-15-mei-2012/deel-ii.pdf, 12-16.
[147] Article 3, § 6-8 Housing Rent Act.

can be longer than nine years, even lifelong[148], but they can also be shorter (i.e. up to a maximum of three years). These short term contracts have a three month period of notice for terminating the agreement at the end of the agreed term. If no mention is made before the first day of the third month preceding the end of the agreed duration, the contract will convert to a traditional nine year agreement starting from the date on which the short term contract came into force.[149]

51. We have purposefully skipped social rental agencies when talking about social housing. Since they rent dwellings from private actors to sublet it to social tenants, the rental contract is obviously not for an indefinite period. The agreement with the social tenant is subjected to the duration of the main contract with the owner. When the latter is terminated, the former is too. Consequently, there is no possibility for extension due to exceptional circumstances either. If the social rental agency takes the initiative itself and terminates the main rental contract, there is however a period of notice of three months. When it concerns a nine year contract, a financial compensation worth of three months of rent has to be paid. [150]

52. We can distinguish three main factors that might impact housing security and which we will shortly discuss: the will of the landlord, payment problems and quality defects.[151] The letter has three options to terminate a traditional nine year agreement.[152] If he wants to move in himself (or have relatives up until the third degree move in), he can end the agreement at any time taking into account a six month notice.[153] That is of course if the termination does not imply any abuse of legal rules.[154] On penalty of an 18 month rent compensation, the person who will move in has to do so within a year of the date of notice and reside there for at least two years. The second option concerns the execution of renovation works the price of which exceeds 3 years of rent. This is possible only after the first and second three year period and with a six month notice. The works have to start within a period of two years, otherwise

[148] M. DE MAN, "Civiel en fiscaalrechtelijke aspecten van de levenslange woninghuur", *TEP* 2010, no. 4, 211-240.
[149] Court of Cassation 9 October 2014, AR C.13.0354.F, G.G / C.C.; N. CARETTE and A. QUIRYNEN, "Actuele ontwikkelingen inzake woninghuur en handelshuur", in B. TILLEMAN, A.-L. VERBEKE (eds.), *Bijzondere overeenkomsten*, Brugge, Die Keure, 2015, (35) 49.
[150] A. HANSELAER, "De duur en de beëindiging van de sociale huurovereenkomst", in A. HANSELAER and B. HUBEAU (eds.), *Sociale huur*, Brugge, Die Keure, 2011, (150) 150-151.
[151] We should note that we do not address the consequences of misconduct by tenants that can only be attributed to their own actions.
[152] Article 3, §2 - §5 Housing Rent Act; These possibilities do not exist in case of a short term contract.
[153] If aimed to be used by third-degree relatives, the term of notice is not allowed to have passed before the end of the first three year period.
[154] E.g.: Court of First Instance Brugge 12 September 1991, *TBR* 1993, 17.

an 18 month rent compensation has to be paid to the tenant. Thirdly, the landlord can terminate the contract without any motivation. Regarding timing, the same conditions apply as to the renovation works. Termination after the first three year period will guarantee a nine month rent compensation. That fee is reduced to six months after six years.

53. Despite all these possibilities to make an end to the agreement before it expires and hence put the tenant into housing insecurity, about 70 per cent of Flemish households still feel secure in their rented homes.[155] The tenants can also request an extension in case of exceptional circumstances, which can relate to the difficult situation in which a tenant finds him- or herself (e.g. health, age, sudden unemployment).[156] If no settlement amongst the parties is reached (which might include an increase in rent), the judge can look into the interests of both parties and decide on the requested extension.[157]

54. Besides these three options, there is a fourth scenario in which the will of the landlord more indirectly impacts a tenant's housing security. When the letter decides to sell the rented dwelling, it is important that the rent agreement has been registered. If not, the new owner will be able to terminate the agreement with only three months notice instead of six and does not even have to abide by the agreement at all when the tenants have resided in the dwelling for only six months.[158] In principle, this shold not occur too often in practice, considering that the landlord is under the obligation to register since 2007.[159]

55. A second factor that impacts security of tenure are affordability problems. In order to prevent financial difficulties from leading to an eviction, a fund for the prevention of evictions came into force in 2013. This aims to compensate letters who have joined the fund in the

[155] K. HEYLEN, *Grote Woononderzoek 2013: Deel 5. De private huurmarkt: vraag- en aanbodzijde*, Leuven, Steunpunt Wonen, https://steunpuntwonen.be/Documenten/Onderzoek_Werkpakketten/gwo-volume-2-deel-5-eind.pdf, 28.
[156] N. BERNARD and L. LEMAIRE, *Expulsions de logement, sans-abrisme et relogement*, Brussels, Larcier, 2010, 40-44.
[157] A. VAN OEVELEN, "Woninghuur en kansarmoede: een overzicht en een analyse van de mogelijke huurproblemen van kansarmen", in Centrum voor Beroepsvolmaking in de Rechten (ed.), *Arm recht? Kansarmoede en recht*, Antwerpen, Maklu, 1997, (205) 223-224; M. DAMBRE, *Bijzondere overeenkomsten*, Brugge, Die Keure, 2014, 264-266.
[158] Article 9 Housing Rent Act; S. MARYSSE, "Rechten en verbintenissen van de verhuurder", in M. DAMBRE, B. HUBEAU and S. STIJNS (eds.), *Handboek algemeen huurrecht*, Brugge, Die Keure, 2015, (415) 490.
[159] Article 5 bis Housing Rent Act juncto Article 71-75 Programme Law (I) 27 December 2006, *BS* 28 December 2006.

potential case of rent arrears.[160,161] We will return to this initiative later in the research. The Centres for General Welfare Work (CAW) also play an important preventive role by providing housing guidance and support. Since 2015, this service is no longer confined to the social rental market but has been expanded to private tenants as well.

56. Even though financial problems may be caused by reasons over which the tenant has no real control, payment arrears still amount to a form of contractual misbehavior (article 1741 Civil Code) which can lead to annulment of the agreement. We should mention that this is only one option the letter disposes of. He can also choose not to abide by his own contractual obligations on the basis of the aforementioned *exceptio non adimpleti contractus* or claim the obligatory execution of the contract before court.[162]

57. As with the obligatory execution and for reasons of housing security, the dissolution of the rent agreement can only be established by a court decision.[163] For the same purposes it is not allowed to incorporate an explicit resolutive condition in the rent agreement either (article 1762bis Civil Code).[164] The judge holds a (sovereign) margin of appreciation to assess *in casu* whether the gravity of the shortcoming justifies the contract to be annulled.[165] Even though part of the legal doctrine has become critical of the large scope of the judge's role[166], a couple of conclusions can definitely be drawn for tenants who do not comply with their payment obligations. Temporary difficulties to pay the rent or a couple of months of rent arrears appear

[160] Decision Flemish Government 4 October 2013 concerning the establishment of a compensation of the Fund for the prevention of evictions, *BS* 25 November 2013; T. VANDROMME, "Vlaams Fonds ter bestrijding van de uithuiszettingen van start", *Juristenkrant* 2013, no. 280, 4.

[161] In contrast to tenants, owners can insure themselves for free against a loss of income due to sudden unemployment or a working incapacity, see: Decision Flemish Government 13 June 2008 concerning the insurance guaranteed housing, *BS* 3 March 2009.

[162] The landlord is free to choose between the obligatory execution or the dissolution of the contract. The judge is not competent to assess this choice, only to investigate whether this choice is performed in good faith and not abused, see: Court of Cassation 16 January 1986, *RW* 1987-88, 1470, note A. VAN OEVELEN.

[163] There is however jurisprudence in which extra-judicial annulation of the rental contract by the tenant seems to be accepted, e.g.: Court of First Instance Brussel 10 June 1997, *JT* 1998, 8; Court of First Instance Brussel 19 May 2009, *JT* 2010, 718, note P. WERY; Peace Court Zottegem-Herzele 3 November 2012, *RW* 2012-13, 1427; Peace Court Deurne 26 January 2001, *Huur* 2002, 105.

[164] A. VAN OEVELEN, "Eerbiediging van de grondrechten en het woonrecht", in K. RIMANQUE (ed.), *De toepasselijkheid van de grondrechten in private verhoudingen*, Antwerpen, Kluwer, 1982, (93) 112; B. HUBEAU, "Een analyse van de positiefrechtelijke woonzekerheid", in B. HUBEAU and J. VANDE LANOTTE (eds.), *Wonen in (on)zekerheid. De woonzekerheid in het huur- en huisvestingsbeleid*, Antwerpen, Kluwer, 1988, (175) 204; F. TOLLENAERE, "Uithuiszettingen, Het standpunt van de huurders", in N. BERNARD (ed.), *Les expulsions de logement/Uithuiszettingen*, Brugge, Die Keure, 2010, (161) 165.

[165] E.g.: Court of Cassation 28 October 2013, *Pas*. 2013, 2062; Court of Cassation 24 September 2009, *Arr. Cass*. 2009, 2097.

[166] S. STIJNS, S. JANSEN and F. PEERAER, "Schorsing en beëindiging van de huurovereenkomst naar gemeen recht", in M. DAMBRE, B. HUBEAU and S. STIJNS (eds.), *Handboek algemeen huurrecht*, Brugge, Die Keure, 2015, (685) 723-724 and 733-734.

to be insufficient for the dissolution of the contract, especially if the tenant is in good faith.[167] Judges tend to recognize the impact of the loss of a home and are quite lenient in allowing spread payments or a payment plan.[168] That is at least the case if these problems do not drag on or occur repeatedly. In illustration of the judge's concern for housing security, references to article 23 of the Constitution have been made on several occasions.[169]

58. These same concerns are illustrated by articles 1344 ter-septies of the Belgian Judicial Code, which aim at the humanization of the eviction process. The peace judge is obliged to make a reconciliation effort in the preliminary session.[170] Each eviction claim will also be communicated to the Public Centre for Social Welfare (OCMW), which offers help to the best of its abilities. Finally, the eviction can only be executed one month after the notification of the decision, but can be further postponed in exceptional circumstances (i.e. during winter, due to the limited possibilities for a person to find new housing).[171]

59. As we have seen, social tenants are strongly protected against housing insecurity by the duration of the contract. Yet, severe and persistent shortcomings on the payment of rent can obviously still lead to the termination of the agreement as well, albeit again only by court decision.[172] More so than private letters, social landlords have to take into account the general interests they serve and the socio-economic situation in which their tenants usually find themselves.[173] A contractual sanction should be considered only as a last resort. Moreover, it

[167] E.g.: Court of First Instance Brussel 26 April 2013, *JT* 2013, 527; Peace Court Fontaine-l'Evêque 4 January 2011, *T.Vred.* 2012, 182; Peace Court Grâce-Hollogne 28 January 2003, *JLMB* 2003; Vred. Wolvertem 29 March 2001, *T. Huur* 2001, no. 4, 141; Four months of rent arrears or more have on the other hand been deemed sufficiently severe to allow dissolution of the agreement, see Peace Court Etterbeek 6 April 2010, *T. Vred.* 2012, 133; Court of First Instance Leuven 24 November 1999, *Huur* 2000, 74.

[168] S. STIJNS, "De uitstelbevoegdheid van de rechter bij de ontbinding van het huurcontract" (note under Peace Court Fontaine-l'Evêque 21 August 2003), *T.Vred*. 2003, 301.

[169] E.g.: Peace Court Elsene 27 April 1994, *T.Vred.* 1997, 122; Peace Court Ukkel 15 February 1995, *T.Vred.* 1997, 164; Peace Court Roeselare 1 March 1996, *RW* 1997-98, no. 31, 1054.

[170] The law initially foresaw an obligatory attempt to amicable settlement outside of the judicial process, but this was changed because tenants would often not show up: Law 18 June 2008 amending the Judicial Code with regard to the procedure concerning certain rental conflicts, *BS* 11 August 2008. For more on this issue, see: D. CASTELEIN, "Knelpunten huurwaarborg en uithuiszettingen", in P. BRULEZ and A.-L. VERBEKE (eds.), *Knelpunten huurrecht: tien perspectieven*, Antwerpen, Intersentia, 2012, (175) 206-208; C. CAUFFMAN, "Hervorming van de verzoeningspoging bij hoofdvorderingen inzake de huur van woningen", *RW* 2008-09, no. 6, 252-254.

[171] M. DAMBRE, *Bijzondere overeenkomsten*, Brugge, Die Keure, 2014, 277-281; N. BERNARD and L. LEMAIRE, *Expulsions de logement, sans-abrisme et relogement*, Brussels, Larcier, 2010, 55-64.

[172] Article 98, § 3 Flemish Housing Code juncto article 33 Framework Decision Social Rent.

[173] Peace Court Grâce-Hollogne 1 October 1999, *JLMB* 2000, 900; Peace Court Grâce-Hollogne 16 May 2000, *JLMB* 2000, 1341; Peace Court Doornik 9 February 1999, *Act.jur.baux* 2000, 78; B. HUBEAU and T. VANDROMME, "Kroniek van de sociale huisvesting (2003-2009)", *RW* 2010-11, no. 16, (642) 648-650 and 658-659.

is possible to terminate the agreement due to insolvency of the tenant only after consulting the OCMW, which still aims at finding a solution to stay in the dwelling in question. If that does not succeed, rehousing options can also be explored during the consultation. These problems are something social housing organisations are assigned to pick up on earlier as well, thereby trying to prevent housing insecurity. They should refer tenants with payment troubles to the OCMW or other specialized welfare instances.[174]

60. Thirdly and finally, there is the scenario of serious housing quality defects. When the mayor decides that the occupancy of the unfit or uninhabitable dwelling has to be stopped, the tenants will have to find a new home. Besides the applicable rent allowance mentioned earlier, article 17 bis of the Flemish Housing Code requires the mayor to try and rehouse those tenants (via the municipality, the OCMW or social housing organisations) who comply with the income and property requirements from the social rental sector.[175] This is not always easy to do so on short notice. In fact, that practical problem has been said to even withhold mayors from declaring a dwelling unfit or uninhabitable altogether.[176] In order to incentivize mayors, the possibility to recover a good part of the rehousing costs from the owner has also been incorporated into the Housing Code.[177]

C. Energy as an element of the right to housing

61. We have given an overview of how the constitutional right to housing functions and how the essential elements of that right have been given shape in the Flemish region. One aspect that we consider to be part of (the right to) housing as well has thus far been left undiscussed: energy. It is difficult to downplay the importance of energy in our everyday lives. It is "*essential to economic and social development and improved quality of life*"[178] and has

[174] Article 29bis, 2° Framework Decision Social Rent; Article 6, §1, 7°-9° Ministrial Decision 21 December 2007 concerning the execution of several provisions of the decision of the Flemish Government of 12 October 2007 on the regulation of the social rental system in execution of title VII of the Flemish Housing Code, *BS* 18 January 2008.
[175] Article 17 Decision Flemish Government 12 July 2013 concerning the quality and safety norms for housing, *BS* 1 August 2013; Additional intitiatives by municipalities can be taken by means of providing transit housing, services via housing shops, cooperation agreements with social housing actors and the OCMW.
[176] F. TOLLENAERE, "Uithuiszettingen. Het standpunt van de huurders", in N. BERNARD (ed.), *Les expulsions de logement/Uithuiszettingen*, Brugge, Die Keure, 2011, (161) 170.
[177] B. HUBEAU, "De uithuiszetting en de herhuisvesting, de Achilleshiel in het sociaal woonbeleid, ook in het Vlaamse Gewest", *PRK* 2010, vol.14, (43) 49-50.
[178] UN Conference on Environment & Development, *Agenda 21*, 3-14 June 1992, https://sustainabledevelopment.un.org/content/documents/Agenda21.pdf, § 9.9; Also note Economic and Social Council, *Report of the Ad Hoc Open-ended Intergovernmental Group of Experts on Energy and Sustainable Development*, 20 March 2001, E/CN.17/2001/15 (2001), 42-43.

therefore a profound impact on the level of enjoyment of many different human rights.[179] Aside from the right to housing, state parties to the ICESCR have dealt with electricity under the right to health, education, social security, work, non-discrimination and self-determination.[180]

62. Due to its undeniable impact, we definitely acknowledge arguments in favour of creating a separate human right to energy[181], and/or to incorporate it in what is after all a non-exhaustive list of socio-economic rights in article 23 of the Belgian Constitution. Although thus far to no avail, a revision of article 23 to include a right to energy on the basis of human dignity has actually been proposed several times in the Belgian Senate.[182,183] Jurisprudence on the other hand only rarely connects access to energy to article 23[184], even when the court does link it to human dignity.[185] Some judgments on access to water nonetheless demonstrate that rights additional to the ones set out in the constitutional provision can be developed on the basis of human dignity.[186]

63. Yet, we believe that the better option is to perceive (the right to) energy as a component within the right to adequate housing.[187] One could make a case that the sheer amount of fundamental rights has reached a certain saturation point (or has passed that point quite some

[179] S. TULLY, "The Contribution of Human Rights to Universal Energy Access", *Nw. J. Int'l Hum. Rts.* 2006, vol. 4, no. 3, (518) 525.
[180] S. TULLY, "Access to Electricity as a Human Right", *Neth. Q. Hum. Rts.* 2006, vol. 24, no. 4, (557) 568 and 573.
[181] *Ibid*., 574-575.
[182] E.g.: Proposal of a declaration (C. FRANSSEN) for revision of article 23 of the Constitution to expand the right to human dignity with the right to an adequate amount of energy and water, *Parl.St.* Senate, 2011-12, no. 5-1336/1; Proposal of revision (B. ANCIAUX) of article 23 of the Constitution to introduce a right to water and energy, *Parl.St.* Senate, 2014-15, no. 6-122/1; N. BERNARD, "Le droit constitutionnel au logement, une source d'inspiration pour le droit à l'énergie", *RBDC* 2012, no. 2, (89) 97-98.
[183] In 1996, the Flemish government adopted a decree that guaranteed a right to a minimum supply of electricity, gas and water. One could argue that the minimum core of a right to energy has therefore already been guaranteed: Decree 20 December 1996 conerning the regulation of the right to a minimum supply of electricity, gas and water, *BS* 8 February 1997; F. HUYBRECHS, S. MEYER and J. VRANKEN, *Energiearmoede in België*, OASeS & CEESE, 2011, http://dev.ulb.ac.be/ceese/CEESE/documents/Energiearmoede_in_Belgie_finaal_verslag.pdf, 47.
[184] KG Court Charleroi 19 January 2000; J. FIERENS, "La dignité humaine, limite à l'application de l'exception d'inexécution", *TBBR* 2000, 594-601.
[185] E.g.: Beslagr. Hoei 22 December 1999, *Jaarboek Kredietrecht* 1999, 331.
[186] Constitutional Court 1 April 1998, no. 36/98, AA 1998, 447, B.4.3; Peace Court Moeskroen 24 May 2004, *TBBR* 2008, no. 5, 273, note A. VANDEBURIE; Vred. Fontaine-l'évêque 15 October 2009, *T.Vred.* 2012, no.5-6, 306, note J. FIERENS.
[187] W. VANDENHOLE, "Het grondrecht op toereikende energie: over wat het is en zou kunnen zijn", in B. HUBEAU and P. JADOUL (eds.), *Vers un droit fondamental à l'énergie? Naar een grondrecht op energie?*, Die Keure, Brugge, 2006, (11) 18.

time ago)[188], but what we think is more important is the observation that energy is critical for the fulfillment of many human needs, rather than it is a basic need in itself.[189] The basic human need to which it is then most closely connected is without a doubt the right to housing, not only practically but also legally, both on the national as well as the international level. The aforementioned General Comment no. 4 of the CESCR for example has accepted energy supply as an element of adequate housing[190], while the Special Rapporteur on adequate housing interprets his/her mandate broadly by frequently referring to the availability of and access to energy.[191] On the national plane, energy is closely connected to the right to housing as well. It is mentioned in the elementary housing quality norms set out in article 5 of the Flemish Housing Code. Not only does energy apply there as a quality norm in the form of heating or lighting, the Housing Code also states that the energy costs have to be affordable.[192] In addition, both elements of housing quality and affordability are taken into account by imposing minimal energetic performances.[193] In that regard, we can recall the obligatory energy performance certificate.

64. All things considered, we believe it is fair to interpret energy as an element of the right to housing, from a practical as well as from a legal standpoint. We mention this not because we will investigate energy policy on a large scale. That topic deserves an extensive research on its own. We do however use some energy-related illustrations along the line. What is after all the practical meaning and relevance of (a right to) housing if you can hardly warm yourself up, take proper care of your hygiene, heat up a meal, etc., which is what living without energy ultimately entails.

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[188] U. BAXI, "Too many, or too few, human rights?", *HRLR* 2001, vol. 1, no. 1, 1-9; P.B. CLITEUR, "De dreigende proliferatie van mensenrechten", in N. HULS (ed.), *Grenzen aan MR*, Leiden, Stichting NJCM-boekerij, 1995, 7-31.

[189] World Summit on Sustainable Development, *A framework for action on energy*, WEHAB Working Group, 2002, http://www.gdrc.org/sustdev/un-desd/wehab_energy.pdf, 7.

[190] CESCR, General Comment No. 4, par. 8 (b): "*All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services*"; par. 8 (d): "*Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health*."

[191] E.g.: UN Commission on Human Rights, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, 1 March 2002, E/CN.4/2002/59, par. 35 and 46(b); art. 7 and 25 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The right to adequate housing. Second Progress Report submitted by Mr. Rajindar Sachar, Special Rapporteur*, 21 June 1994, E/CN.4/Sub.2/1994/20.

[192] Article 5, 3°-5° Flemish Housing Code.

[193] Decree 29 April 2011 concerning the amendment of various decrees on housing, *BS* 4 May 2011; Article 5, 9° Flemish Housing Code.

§ 3. Overview of the research

65. On the basis of the previous sections, one conclusion can undeniably be drawn: the different elements of the right to adequate housing are all, to one extent or another, protected by federal and/or Flemish legislation and part of the governments' housing policy. At the same time though we have seen that sobering figures are available with regard to each one of these housing elements, figures that rightfully raise questions as to what legal stumbling blocks exist to ensure that everyone is adequately housed.

66. Against this background, we could have chosen to conduct research specifically into how housing could be made more affordable, more accessible, etc., to delve deeper into what legal modifications to civil law or the Flemish Housing Code could be useful to achieve this. With the aforementioned transfer of the housing rent to the regions and the opportunity it creates to properly address current shortcomings with a more or less clean slate, these questions have gained renewed relevance. Even though we still address these questions to a certain extent throughout the research, there are two important arguments as to why we chose not to take that particular route.

67. A first argument concerns the bulk of housing related research already produced. Over the last couple of years, the national (socio-)legal doctrine has comprehensively evaluated the existing problems on the Flemish housing market and what could or should be done in order to improve the main elements of the right to housing.[194] An important actor in that regard has been the Policy Research Centre Housing, a partnership between several universities funded by the Flemish government that collects data and conducts scientific analyses that could contribute to a more successful housing policy.[195] Despite the priceless value of such research to enable fine-tuning and make further improvements to housing legislation, we do not want to merely rehash or summarize the findings of other recent work. That would also give this

[194] E.g.: B. HUBEAU and T. VANDROMME (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013; B. HUBEAU and D. VERMEIR, *Een evaluatie van het federale woninghuurrecht. Tussentijds rapport inzake duur, opzegging, waarborg en woningkwaliteit*, Leuven, Steunpunt Wonen, 2014; N. BERNARD, *La réception du droit au logement par la jurisprudence. Quand les juges donnent corps au droit au logement*, Brussel, Larcier, 2011; T. VANDROMME and B. HUBEAU, *De sociale huur als instrument ter verwezenlijking van het grondrecht op wonen*, Antwerpen, Universiteit Antwerpen, 2015; M. DAMBRE, *De huurprijs: analyse van de financiële verbintenissen van de huurder en onderzoek naar de mogelijkheid tot objectivering van de woninghuurprijzen*, Brugge, Die Keure, 2009; P. DE DECKER, B. MEEUS, I. PANNECOUCKE, E. SCHILLEBEECKX, J. VERSTRAETE and E. VOLCKAERT, *Woonnood in Vlaanderen. Feiten / mythen / voorstellen*, Antwerpen, Garant, 2015.

[195] For an overview of their publications, see: https://steunpuntwonen.be/Publicaties.

research a very limited range, which immediately brings us to our second argument. As we have said earlier, this research aims to be relevant for international readers as well. An approach focused merely on the domestic level would not be able to facilitate this. Instead, while we do ask ourselves the question how the right to adequate housing in Belgium and Flanders could be more effective, we will do so with a particular attention to international and European human rights law and concepts. By tackling questions concerning the (lack of) enforceability of a socio-economic right like the right to housing, its progressive realization or the effectiveness of law to attain this objective, we will elaborate on issues that are indispensable to any domestic interpretation and application of this fundamental right. We only approach and illustrate these aspects from a Belgian/Flemish perspective.

68. The research consists of three parts, all of them looking at one or more aspects that can contribute to or have an effect on a more effective right to adequate housing. Part I provides a broader outlook on the research topic. In the first chapter, we look at what influences an effective right to housing. There are more elements to it than merely the letter of the law. The second chapter then scrutinizes the concept of human dignity. As not only a right in itself at the beginning of article 23 of the Belgian Constitution but a frequently recurring element in (socio-economic) human rights law as well, human dignity is a vital component. We chose not to equate it with adequate housing *sensu stricto*, but draw from it a couple of characteristics that help to shape housing policy.

69. In parts II and III, the focus shifts to some legal options and proposals to compel a state to protect and fulfill the right to housing. First we take a look at what (quasi-)jurisprudence of the European Court of Human Rights, the European Committee of Social Rights and, to a lesser extent, the European Court of Justice tells us. Rather than elaborating on individual claims themselves, the focus lies on what a government can, cannot and must do in the context of the right to housing. We have chosen not to discuss the relevant decisions and judgments of these institutions each under a different heading, but rather to show their interrelation, either directly by referencing one another or more indirectly by content. This illustrates how one is or could be influenced by the other, working together towards a more thorough protection of the right to housing. Furthermore, we also explore the potential of lodging a collective complaint against the Belgian state to the European Committee of Social Rights. What is a likely outcome and would it enhance the state's obligation to pursue progress with regard to the right to housing?

70. Finally, part III shifts back to the national plane and departs from the simple question as to how we can develop the right to housing into a stronger obligation for the Belgian state and the Flemish region in particular. In an attempt to answer that question, the first chapter deals with the distinction between obligations of means and obligations of results. It discusses the problems the application of this concept has created over time and how it might not be the most appropriate distinction to make in order to improve the right to housing. Instead we introduce the term result-oriented obligation which is elaborated on in the second chapter. There, we draw on international human rights law and the concept of progressive realisation in order to develop our own proposal. This proposal departs from the question whether progress has been made rather than whether housing rights protection has not decreased. It ultimately aims to incentivize the adoption of measures that are directed towards attaining the full realization of the right to housing.

71. Each of these parts tries to contribute to the right to housing in their own specific way. Their perspective shifts from the scope and content of the fundamental right, the enforceability through European (quasi-)jurisprudence to more structural modifications to strengthen housing legislation and policy. What they all have in common however is that they build on a selection of concepts and options that have thus far been insufficiently elaborated on as possible gateways for the improvement of the right to adequate housing on the domestic level. How can concepts like human dignity, obligations of result and progressive realization or for example the collective complaints procedure before the European Committee of Social Rights be legitimate stepping stones towards a more effective right to housing?

Part I: The realization of the right to housing: beyond legal-technical issues

72. Whereas Part II and III discuss more legal-technical ways to try and strengthen housing rights obligations for states and Belgium/Flanders in particular, we first take a look at what it actually means to strengthen the right to adequate housing. Part I therefore focuses on the scope of the right itself and what should be taken into account when pursuing more effectiveness. It looks beyond the mere legal-technical issues, beyond the functioning of and legal options for further development of this fundamental right which will be discussed in later parts (part III in particular). The first chapter explains why it is important to do so and discusses the influences that (can) have an impact on the effectiveness of a right to housing in society.[196] We thereby approach the matter at hand from a more socio-legal perspective. The second chapter then asks the question what role is here to play for the concept of human dignity. As the crux and aim of article 23 at the same time, it is essential to investigate its content and meaning with regard to the right to housing and how its content should influence effective housing legislation and policy.

Chapter 1: Socio-legal influences on the effectiveness of the right to housing

§ 1. Effective right vs. effective realisation of a fundamental right

A. Law and effectiveness

73. To pursue an effective right to housing, it is important to clarify what should be understood by effectiveness. This fundamental question assumes that law is not effective simply by being what it is and that there is a gap between its content and the realisation of this content. Not every interpretation of law makes such a distinction between the concepts of law and effectiveness (and even efficacy[197]). Enforcement, at the national level or through

[196] See also N. MOONS, "Tenant vs. owner: deriving access to justice from the right to housing", *RdW* 2015, vol. 36, no. 3, (99) 104-109.

[197] Things get even more complicated when we would make a distinction between effectiveness and efficacy. While some equate the terms effectiveness and efficacy when discussing the validity of law (see e.g.: A. GRABOWSKI, *Juristic concept of the validity of statutory law: a critique of contemporary legal nonpositivism*, Heidelberg, Springer, 2013, 334 et al.), others define efficacy as the power or capacity to produce an adequate effect in the real world (see G.J. POSTEMA, "Conformity, custom, and convergence: rethinking the efficacy of law", in M.H. KRAMER, C. GRANT, B. COLBURN and A. HATZISTAVROU (eds.), *The legacy of H.L.A.*

European institutions as we will discuss in part II, is certainly regarded as an important aspect for an effective right to housing.[198] But in contrast, some prominent theorists like Dworkin[199] and Kelsen[200] have considered enforcement to be a necessary condition to law being what it is.[201] Whilst Hoebel linked the transformation from a social to a legal norm with the application of physical force[202], Weber also included psychological coercion.[203] Enforcement of a rule has thus regularly been regarded not as a condition for effective law, but for law in itself. From that perspective, the question of effectiveness is already incorporated into the question of what law actually is.

74. Fuller's internal morality of law is another good example of this. He developed eight principles that describe what a lawmaker must do to enact valid law.[204] Amongst these principles are some that will be touched upon later in the following chapter as influences on effectiveness, such as the complexity and feasibility of the rule. So in essence, regardless of whether or not one makes a terminological distinction, similar criteria appear to arise. Likewise, Raz argued that Fuller's principles of legal validity are in fact principles of effective rule.[205] But even if it appears to be first and foremost a philosophical and semantic debate, from a human rights perspective, we certainly prefer to distinguish both terms. Due to the less enforceable nature of socio-economic rights like the right to housing, both internationally as in article 23 of the Belgian Constitution, a different approach would awkwardly question the validity of this right as law.[206] As Sager said, it is not because parts of

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Hart. Legal, political and moral philosophy, Oxford, Oxford University Press, 2008, (45) 47; J. KLEINFELD, "Enforcement and the concept of law", *Yale Law Journal Online* 2011, vol. 121, (293) 300-301). Only when it does so successfully, it is effective. Efficacy then becomes a necessary prerequisite for effectiveness and enforcement a condition for efficacy, which in turn is a proviso for the validity of law. Following this line of thought however, effectiveness would then again be disconnected from the definition of what law is.

[198] W. CASSIERS, "Les droits sociaux en quête d'effectivité", in V. VAN DER PLANCKE (ed.), *Les droits sociaux fondamentaux dans la lutte contre la pauvreté*, Brussel, Die Keure, 2012, (288) 289; T. BYRNE and D.P. CULHANE, "The right to housing: an effective means for addressing homelessness?", *Univ. of Pennsylvania Journal of Law and Social Change* 2011, vol.14, (379) 385-386.

[199] R. DWORKIN, *Law's empire*, Cambridge, Harvard University Press, 1986, 93.

[200] H. KELSEN, *General theory of law and state*, Cambridge, Harvard University Press, 1949, 21.

[201] J. KLEINFELD, "Enforcement and the concept of law", *Yale Law Journal Online* 2011, vol. 121, (293) 306-307.

[202] E.A. HOEBEL, *The law of primitive man. A study in comparative legal dynamics*, Cambridge, Harvard University Press, 1954, 28.

[203] R.L. KIDDER, *Connecting law and society*, New Jersey, Prentice-Hall, 1983, 24.

[204] L.L. FULLER, *The morality of law*, New Haven, Yale University Press 1969, 33-38; see also J. NADLER, "Hart, Fuller and the connection between law and justice", *Law and Philosophy* 2007, vol.27, (1) 19.

[205] J. RAZ, *The authority of law*, Oxford, Clarendon Press, 1979, 225-226; J. NADLER, "Hart, Fuller and the connection between law and justice", *Law and Philosophy* 2007, vol. 27, (1) 21.

[206] D. KYRITSIS, "Legality, integrity and institutional design", 16-17 (not published, available at: http://lawconf.mcmaster.ca/papers_and_program.html); E.A. POSNER, "Human welfare, not human rights",

a constitution are not or only to a limited extent judicially enforceable that they are not part of the law.[207] We feel, moreover, that the distinction gives more leeway to consider bottom-up influences from society on law. It simplifies visualizing the gap between article 23 and the right to housing on the one hand and problems or delays with regard to their realisation on the other, between the legal implications of article 23 and an actual effectuation of socio-economic rights.

75. We are back then to the question of effectiveness. In common understanding, law will be effective whenever the intended purpose(s) of the legislation is (are) reached. The extent to which the goal of a legislative measure has been attained is certainly a popular criterion for measuring the effectiveness of law and has been used as the foundation for legislative evaluation.[208] In its most extreme form, this goal-based approach assumes a straightforward causal link between legislation and its intended social effects. This is also called the instrumentalist approach, to which we will return in a short while.[209] Of course, any goal-based approach presumes knowledge of the rule's purpose, which is not always as easy as it looks. Legislation can be open for discussion[210], possibly rendering a subjective and distorted perspective of these goals[211], and it can also be reshaped by its users (both citizens and judiciary) and evolve during a rule's life cycle.[212] But as we will see, the legal functioning of law can impact the goal-based effectiveness question just as well.

B. An effective article 23 of the Constitution

76. The elaboration on the goal-based approach leads to the inevitable question as to whether and to what extent article 23 is an adequate instrument to effectively realise the right to

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Columbia Law Review 2008, vol. 108, (1758) 1769; For a short overview of the opinions of some prominent thinkers on this matter, see: R.L. KIDDER, *Connecting law and society*, New Jersey, Prentice-Hall, 1983, 33-34.

[207] L. SAGER, "Material rights, underenforcement and the adjudication thesis", *Boston University Law Review* 2010, vol. 90, 579.

[208] M.M. FEELEY, "The concept of laws in social science: a critique and notes on an expended view", *Law & Society Review* 1975, vol. 10, (497) 498-499; A. ALLOTT, "The effectiveness of law", *Valparaiso University Law Review* 1981, vol. 15, no. 2, (229) 233-234.

[209] J. GRIFFITHS, "De sociale werking van wetgeving", in J. GRIFFITHS and H. WEYERS (eds.), *De sociale werking van recht*, Nijmegen, Ars Aequi, 2005, (467) 471-472.

[210] A. ALLOTT, "The effectiveness of law", *Valparaiso University Law Review* 1981, vol.15, no.2, (229) 233; T.W. WÄLDE, "Non-conventional views on effectiveness: the holy grail of modern international lawyers: the new paradigm? A chimera? Or a brave new world in the global economy?", *Austrian Review of International & European Law* 1999, vol.4, (164) 182; M.M. FEELEY, "The concept of laws in social science: a critique and notes on an expended view", *Law & Society Review* 1975, vol.10, (497) 499-500.

[211] M.M. FEELEY, "The concept of laws in social science: a critique and notes on an expended view", *Law & Society Review* 1975, vol.10, (497) 499-500.

[212] A. ALLOTT, "The effectiveness of law", *Valparaiso University Law Review* 1981, vol.15, no.2, (229) 233.

housing. We obviously have to depart again from the intended purpose of this constitutional provision. According to the preparatory works, one of the motivations to insert a provision on socio-economic rights into the Belgian Constitution had to do with the changed relationship between citizens and their fundamental rights. Over several decades, the idea had been growing that one should be entitled to expect a certain positive input by the government in realising his/her rights.[213] Additionally, the presence of socio-economic rights in international legislation and their ratification by the Belgian state had rendered the legislative situation at the national level paradoxical.[214] Consequently, an update of the constitution was necessary. With the update, the ad-hoc Working Group on Economic and Social rights, which could be rightfully considered as the major actor behind the final version of article 23, aimed to inform policy authorities, the judiciary, the public at large as well as neighbouring countries.[215]

77. All of these "purposes" are of course only reasons for introducing the provision rather than real purposes of the rights themselves. The ultimate goal of article 23 should obviously be to realise the socio-economic rights it sets out in its third paragraph, thereby also assuring everyone to live a life in dignity. The preparatory works naturally also refer to these rights as the purposes to strive for.[216] In their proposal, socio-economic rights were described as proclaiming the government to create the conditions that enable everybody to fully develop both morally as well as materially.[217] Their incorporation into the Constitution should render it possible to retain and improve welfare and prosperity. With regard to the right to housing in particular, it says that the government should have to ensure that everyone disposes of the elementary requirement of life that housing is.[218]

78. At the same time however, we know that article 23 is generally perceived as having no direct effect and that the right to housing is not a subjective right. The purposes are therefore described as "principled perspectives" that should (only) be realised in accordance with the abilities of the competent legislator.[219] On this basis, article 23 is also considered to be an

[213] Explanatory Memorandum of the proposal by Mr. Stroobant and Mr. Taminiaux, *Parl.St.* Senaat BZ 1991-92, no. 100-2/3°, 2.
[214] *Ibid*., 3-4.
[215] Report on behalf of the Commission for the review of the Constitution and the reform of the institutions released by Mr. Arts and Ms. Nelis, *Parl.St.* Senaat BZ 1991-92, nr.100-2/4°, 62-63.
[216] *Ibid*., 70.
[217] Explanatory Memorandum of the proposal by Mr. Stroobant and Mr. Taminiaux, *Parl.St.* Senaat BZ 1991-92, no. 100-2/3°, 10 and 15.
[218] *Ibid*.,19-20.
[219] Report on behalf of the Commission for the review of the Constitution and the reform of the institutions released by Mr. Arts and Ms. Nelis, *Parl.St.* Senaat BZ 1991-92, nr.100-2/4°, 70.

instruction norm, a provision with a directional function for the competent legislators.[220] Although explicitly stated otherwise in a 2005 decision by the Court of Appeal in Antwerp[221], the Working Group stresses that the use of the term instruction norm does not mean that article 23 is a mere declaration of principles and has only a programmatic character. According to Van Luytgaarden however, a further distinction needs to be made between programmatic provisions and declarations of principles with regard to their focus. He does nonetheless equate declarations of principles with the notion of instruction norms.[222] While the terminology may obviously be somewhat confusing, what the preparatory works want to clarify is that the instructional function of article 23 does not prevent it from triggering certain effects.[223] We have seen in the introductory part that this is indeed the case. But if its main function is an instructive one (i.e. the second paragraph of the provision), the goal of article 23 is de facto merely that the competent legislators do take measures with a view of progressively realising these rights (infra, part III).[224] As the Working Group cites from academic literature, fundamental social rights are "*directed at a process which aims at an increasingly higher level of protection covered by the relevant rights*".[225] From a goal-based perspective, this also influences the question of effectiveness. The effectiveness of the right to housing as inscribed in article 23 is then quite different from an effective realisation of the right to housing. To a certain extent, the legal working and intricacies of the constitutional provision draw our attention away from the actual purpose of this right, which is the right to a "good"[226] rather than to an act.[227]

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[220] *Ibid*.,13; M. RIGAUX, "Algemene conclusie: artikel 23 GW, het recht om een menswaardig leven te leiden, zoals gewaarborgd door art.23 GW, hoeksteen van een adequate rechtsbescherming van de kansarme?" in Centrum voor Beroepsvolmaking in de Rechten (ed.), *Arm Recht? Kansarmoede en Recht*, Antwerpen, Maklu, 1997, (439) 442; G. MAES, "Het standstillbeginsel in verdragsbepalingen en in art.23 G.W.: progressieve (sociale) grondrechtenbescherming", *RW* 2005-06, no.28, (1081) 1093-1094; T. VANDROMME, "Een aanzet tot een concrete invulling van het grondrecht op wonen", in N. BERNARD and B. HUBEAU (eds.), *Recht op wonen: naar een resultaatsverbintenis?*", Brugge, Die Keure, 2013, (157) 172.

[221] Court of Appeal (6th Chamber) Antwerpen 28 June 2005, *TMR* 2006, no. 3, 349, par. 2.3.4: "*It concerns so called programmatic rights, that only contain a political declaration*."

[222] H.J.L.M. VAN DE LUYTGAARDEN, "Sociale grondrechten "gerenoveerd": het rechtskarakter van sociale grondrechten vanuit juridiseringsperspectief", in A.R.J. GROOT and H.J.L.M. VAN DE LUYTGAARDEN (eds.), *Zonder meer recht*, Zwolle, Tjeenk Willink, 1993, (149) 152-154.

[223] Explanatory Memorandum of the proposal by Mr. Stroobant and Mr. Taminiaux, *Parl.St.* Senaat BZ 1991-92, no. 100-2/3°, 9.

[224] M. STROOBANT, "Sociale en economische grondrechten in de Belgische Grondwet. Wordingsgeschiedenis van artikel 23: het Akkoord van 'Le Ry d'Ave' Rochefort", in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, (19) 42-43.

[225] A.W. HERINGA, *Sociale grondrechten. Hun plaats in de gereedschapskist van de rechter*, Den Haag, Asser Instituut, 1989, 115; Explanatory Memorandum of the proposal by Mr. Stroobant and Mr. Taminiaux, *Parl.St.* Senaat BZ 1991-92, no. 100-2/3°, 6.

[226] I consciously opted for parentheses for the term "good". It refers to what a right to housing should ideally realize, but does not limit itself to the mere material aspect of housing.

79. We wish to stress that this is not a claim that a government should immediately guarantee and provide all aspects of the right to housing. What we do mean is that law and legal language, by focusing more on the sufficiency of efforts undertaken[228], has an impact on the interpretation of what an effective right to housing should entail and constraints it to pertaining only to its legal effects instead of real-life results. Now of course, this is simply inherent to the way constitutional law and in particular socio-economic rights work. In order to improve the realisation of these rights from a legal-technical perspective, it is obviously necessary to abide by these internal rules. That is exactly what we do in part III when we attempt to strengthen the obligations that arise from the right to housing. But for the purposes of this part, we focus on how law and the way in which it functions is not always sufficient on its own to effectively realise something.

80. On the basis of the above, we argue that article 23 has an important symbolic or moral effect when it comes to the effective realisation of the right to housing. For this ultimate purpose, article 23 primarily reflects the social values and ideals that are significant to a society and of which the law is the expression.[229] Although the moral and political responsibility of the legislators is at stake[230], one could also proclaim that "*the rule's symbolic importance is just a rather obscure way of calling attention to the fact that the jury is still out on the question of the rule's effectiveness*".[231] Once again, we emphasize that this does not entail that article 23 itself has no legal effects at all. We merely want to point out the gap between an effective instruction norm that is constitutionally embedded and the effective realisation of this right.

81. For all the reasons above, one could genuinely ask whether the current housing situation on the ground, especially regarding the disadvantaged groups in society, would have been substantially worse if the right to adequate housing had not been incorporated into the

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[227] J. HOHMANN, *The right to housing. Law, concepts, possibilities*, Oxford, Hart Publishing, 2013, 131-133.
[228] *Ibid*., 131-133.
[229] J. GUSFIELD, "Moral passage: the symbolic process in public designations of deviance", *Social Problems* 1967, vol.15, 175; T.W. WÄLDE, "Non-conventional views on effectiveness: the holy grail of modern international lawyers: the new paradigm? A chimera? Or a brave new world in the global economy?", *Austrian Review of International & European Law* 1999, vol.4, (164) 186.
[230] M. RIGAUX, "Algemene conclusie: artikel 23 GW, het recht om een menswaardig leven te leiden, zoals gewaarborgd door art.23 GW, hoeksteen van een adequate rechtsbescherming van de kansarme?" in Centrum voor Beroepsvolmaking in de Rechten (ed.), *Arm Recht? Kansarmoede en Recht*, Antwerpen, Maklu, 1997, (43) 442.
[231] J. GRIFFITHS, "The social working of legal rules", *The Journal of Legal Pluralism and Unofficial Law* 2003, vol.35, no.48, (1) 8.

Constitution.[232] Over the last two decades, housing legislation has used article 23 as an inspiration[233], but that does not aptly answer the question whether we would have really lagged behind the actual current situation? The same (and hypothetically even more creative) regional measures might have been taken without the impetus of article 23.

82. While French case law has acknowledged that the disposition of adequate housing is an '*objectif à valeur constitutionelle*', no explicit right to housing in included in the French Constitution.[234] Yet, France does have an invokable right to housing ('*droit au lodgement opposable*' or in short DALO[235]) which provides a more enforceable guarantee.[236] While we will return to this law at a later stage, what it illustrates for now is that an explicit constitutional guarantee is not necessary to create a successful housing policy, or at least one that is generally perceived to be more successful than its Belgian/Flemish counterpart.

83. We do realise that we have thus far focused only on the effectiveness of article 23. Ultimately, the competent legislators must give shape to the constitutional provision. But even though laws and decrees like the regional housing codes have without a doubt further concretized the right to housing, there is no denying that there is still a considerable gap between some of the content of these rules and the housing situation for the weaker persons and groups in society, between law in the books and law in action (infra). We recall for example how the Flemish Housing Code considers affordability as an essential aspect of the right to housing, but that at the same time more than half of the private tenants (52%) spend more than 30% of their income budget on rent.[237] For more illustrations, we refer back to the housing related rights and problems we have shortly described in the introductory part of this research.

[232] L.M. FRIEDMAN, *The legal system. A social science perspective*, New York, Russell Sage Foundation, 1975, 51; X., "Evaluatie van wetgeving", in J. GRIFFITHS (ed.), *Een kennismaking met de rechtssociologie en rechtsantropologie*, Nijmegen, Ars Aequi, 1992, (281) 281.
[233] B. HUBEAU, "De sociale huur en het grondrecht op behoorlijke huisvesting", in A. HANSELAER and B. HUBEAU (eds.), *Sociale huur*, Brugge, Die Keure, 2011, (55) 72.
[234] Conseil Constitutionel (France) 19 January 1995, no. 94-359 DC, www.legifrance.gouv.fr.
[235] Loi no. 2007-290 (France) 5 March 2007 instituant le droit au logement opposable et portant diverses measures en faveur de la cohesion sociale, *JO* 6 March 2007, www.legifrance.gouv.fr.
[236] N. BERNARD and L. LEMAIRE, *Expulsions de logement, sans-abrisme et relogement*, Brussels, Larcier, 2010, 87-110.
[237] S. WINTERS et al., *Wonen in Vlaanderen anno 2013. De bevindingen uit het Grote Woononderzoek 2013 gebundeld*, Antwerpen, Garant, 2015, 42.

84. We can conclude that even though a constitutional provision is attributed to securing a right to adequate housing and other legal instruments like the housing codes also guarantee a quite elaborate system of rights, for a considerable amount of people they do not seem to rise above that mere legal status. For them, these rules insufficiently contribute to a situation where their guaranteed rights are also translated into real opportunities.[238] While some blame the institutions in charge for thwarting the transformative potential of rights and consolidating the socio-economic status quo[239], others simply point to the overestimation of the instrument of law.[240] Anyway, it has become clear that to address and increase the effectiveness of the right to housing, there is a need to look beyond mere legal-technical issues.[241]

§ 2. Legal instrumentalism and its criticism

85. As already mentioned, the assumption of a straightforward causal link between legislation and its intended social effects is called the instrumentalist approach.[242] As the term suggests, law is then regarded as the dominant instrument to shape the behaviour of individuals. It is rooted in a firm belief in the power of law. Legal instrumentalism considers a piece of legislation to be able to play the role of a social tool (or evidently an instrument) that the government can use to achieve certain (often social) goals and thereby changing society.[243] In other words, this legal theory treats law as the ultimate vaccine.[244] The view arose at the end of the nineteenth century, when it became clear that hard work was not a guaranty for emancipation and well-being. Consequently, law was given a new additional function.[245]

86. With its focus on the strong causal link between rule and intended purpose, a strict instrumentalist view considers law and society to be two completely distinct entities. It does not regard law as a social product, intimately integrated in social processes, but as a unique

[238] J. M. ALEXANDER, "Capabilities, human rights and moral pluralism", *IJHR* 2004, vol.8, no.3, 8.
[239] X. DIJON, "Introduction historique et philosophique", in V. VAN DER PLANCKE (ed.), *Les droits sociaux fondamentaux dans la lutte contre la pauvreté* ? Brussel, Die Keure, 2012, (21) 37; M. PIETERSE, "Eating socioeconomic rights: the usefulness of rights talk in alleviating social hardship revisited", *Human Rights Quarterly* 2007, vol. 29, (796) 797.
[240] A. TERLOUW, "Draagt wetgeving bij aan gelijkheid?", in M. HERTOGH and H. WEIJERS (eds.), *Het recht van onderop. Antwoorden uit de rechtssociologie*, Nijmegen, Ars Aequi, 2011, (349) 369.
[241] Legal-technical issues and how to strengthen obligations in the field of the right to housing will be elaborated on in Part III.
[242] J. GRIFFITHS, "De sociale werking van wetgeving", in J. GRIFFITHS and H. WEYERS (eds.), *De sociale werking van recht*, Nijmegen, Ars Aequi, 2005, (467) 471-472.
[243] R. TOMASIC, *The sociology of law*, London, Sage Publications, 1985, 101 and 104; D. BLACK, *The behaviour of law*, New York, Academic Press, 1976, 120.
[244] R.L. KIDDER, *Connecting law and society*, New Jersey, Prentice-Hall, 1983, 114-115.
[245] R.J.S. SCHWITTERS, *Recht en samenleving in verandering*, Deventer, Kluwer, 2008, 32-33.

social function. [246] Law stands on its own and is therefore thought of as capable to influence behaviour and society. When so much emphasis is laid on the fact that law can be used as a tool, it also implies that there is no distortion present in the relationship between law and society. It presupposes a society dominated by extensive individualism, where the smooth adaptation to a certain rule exemplifies the perfect communication between legislator and individual.[247] Considering the instrumentalist assumption of the resolving force of law, it is not too surprising that legal instrumentalism has also been described as the "*primary cause of the juridification of society*".[248]

87. We know by now that the existence of a right or even an effective right does not necessarily equate to an effective realisation of that right. There are several reasons why this is or is not the case. Hence, it is vital to make a distinction between an instrumentalist point of view, which focuses on the effectiveness of the right itself, and a more pluralistic one, which examines the way in which the relevant right is given shape in society and the reason why it is or is not successful.

88. This does not mean that we should underestimate the law, but from what we have seen above and will see further on, we should above all not overestimate it either.[249] The question whether law can be used as a tool for social change, or in other words whether law can change folkways, a basic instrumentalist assumption, cannot be answered with a simple yes or no. Although some theorists express themselves as pessimistic about the capabilities of law to

[246] R. TOMASIC, *The sociology of law*, London, Sage Publications, 1985, 101 and 104; D. BLACK, *The behaviour of law*, New York, Academic Press, 1976, 101 and 105; M.M. FEELEY, "The concept of laws in social science: a critique and notes on an expended view", *Law & Society Review* 1975, vol.10, (497) 501.

[247] K. VAN AEKEN, "Een rechtssociologische analyse van de juridisering van de samenleving", in B. HUBEAU, S. GIBENS, S. MERCELIS, S. PARMENTIER, P. PONSAERS, K. VAN AEKEN, G. VANDE WALLE and J. VAN HOUTTE (eds.), *Dialogen tussen recht en samenleving*, Leuven, Acco, 2012, (67) 75; R.J.S. SCHWITTERS, *Recht en samenleving in verandering*, Deventer, Kluwer, 2008, 9 and 98; J. GRIFFITHS, "De sociale werking van wetgeving", in J. GRIFFITHS and H. WEYERS (eds.), *De sociale werking van recht*, Nijmegen, Ars Aequi, 2005, (467) 472-473.

[248] K. VAN AEKEN, "Een rechtssociologische analyse van de juridisering van de samenleving", in B. HUBEAU, S. GIBENS, S. MERCELIS, S. PARMENTIER, P. PONSAERS, K. VAN AEKEN, G. VANDE WALLE and J. VAN HOUTTE (eds.), *Dialogen tussen recht en samenleving*, Leuven, Acco, 2012, (67) 74; S. FITZPATRICK, B. BENGTSSON and B. WATTS, "Rights to housing: reviewing the terrain and exploring a way forward", *Housing, Theory and Society* 2014, 31 (4), 447-463.

[249] B. HUBEAU, "De sociale grondrechten na een decennium: hefboom of toekomstdroom in de uitsluiting van sociale uitsluiting", in J. VRANKEN, K. DE BOYSER and D. DIERCKX (eds.), *Armoede en sociale uitsluiting Jaarboek 2003*, Leuven, Acco, 2004, (369) 369 and 379; N. BERNARD and B. HUBEAU, "Poverty and fundamental social and economic rights: on the effectiveness of the right to decent housing", in D. DIERCKX, N. VAN HERCK and J. VRANKEN (eds.), *Poverty in Belgium*, Antwerpen, Acco, 2010, (195) 199.

alter behaviour and social order[250], their explanation and view on law does not deviate much from others who are more optimistic.[251] Both sides acknowledge that law in itself is insufficient and that there is no simple causal link between law and society. It is this consideration that is the main point of criticism against instrumentalism. One should pay attention to the fact that law is only one factor of influence on human behaviour. The possibility of legislation to play a role and to be an instrument of social change is thus not denied as such, only relativized. The criticism thus predominantly focuses not on instrumentalism as such, but on a naive interpretation of it. Not every societal problem is solved simply by initiating a new law.[252] Legal rules are directed at social beings that act in a social context, not at mere atomistic rational individuals. Consequently, the influence of legislation can only be apprehended when we give the social order a prominent position.[253] We will now take a closer look at a selection of these other influences on human behaviour that have to be taken into account when developing new rules or adapting older ones in the realm of the right to housing.

§ 3. A socio-legal perspective

A. Law in the books vs. law in action vs. living law

89. The considerations from the last paragraph indicate not only the mutual relationship between law and society, but also that law *is* part of society.[254] These insights are frequently captured by the notions 'law in action' and 'living law'. Although the authors that first used these terms, Roscoe Pound[255] and Eugen Ehrlich[256] respectively, were both concerned about law being a collection of mere paper rules, their approach was quite different.[257]

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[250] E.g.: W.G. SUMNER, *Folkways: a study of the sociological importance of usages, manners, customs, mores and morals*, Boston, Ginn and Company, 1906, 77; T.W. WÄLDE, "Non-conventional views on effectiveness: the holy grail of modern international lawyers: the new paradigm? A chimera? Or a brave new world in the global economy?", *Austrian Review of International & European Law* 1999, vol.4, (164) .

[251] E.g.: B. KUTCHINSKY, "The legal consciousness: a survey of research and opinion about law", in A. PODGORECKI, W. KAUPEN, J. VAN HOUTTE, P. VINCKE and B. KUTCHINSKY (eds.), *Knowledge and opinion about law*, London, Martin Robertson, 1973, 102; A. PODGORECKI, "Public opinion on law", in A. PODGORECKI, W. KAUPEN, J. VAN HOUTTE, P. VINCKE and B. KUTCHINSKY (eds.), *Knowledge and opinion about law*, London, Martin Robertson, 1973, 66. H. DE SOTO, *The other path: the invisible revolution in the third world*, New York, Basic Books, 1989, 185.

[252] R.J.S. SCHWITTERS, *Recht en samenleving in verandering*, Deventer, Kluwer, 2008, 97.

[253] J. GRIFFITHS, "De sociale werking van wetgeving", in J. GRIFFITHS and H. WEYERS (eds.), *De sociale werking van recht*, Nijmegen, Ars Aequi, 2005, (467) 473-475.

[254] P. EWICK, R.A. KAGAN and A. SARAT, "Legacies of legal realism: social science, social policy and the law", in P. EWICK, R.A. KAGAN and A. SARAT (eds.), *Social science, social policy and the law*, New York, Russel Sage Foundation, 1999, (1) 6-7.

[255] R. POUND, "Law in books and law in action", *American Law Review* 1910, vol.44, no.12, 12-36.

90. As a matter of fact, Pound follows the instrumentalist path by implying similarly that law is a tool of social engineering.[258] He argued that there was a distinction between the rules contained in legal provisions on the one hand ('law in the books') and the law produced by judges and other legal practitioners when they applied it on the other ('law in action').[259] Both "forms of law" still refer to the activities and behaviour of lawmakers and law enforcers and therefore illustrate a top-down approach.[260]

91. In contrast, Ehrlich interprets law as the outcome of social processes and social change, from an obvious bottom-up perspective.[261] For him, the focal point of legal development can be found in society, which exists of many social associations that have their own 'inner order'. These inner orders predate the abstract and general rules of positive law.[262] To use Ehrlich's words, "*it is the law that dominates life itself, even though it has not been printed in legal propositions.*"[263] 'Living law' thus refers to the norms that citizens recognise as obligatory just by being a member of society and its many associations within.[264] This concept of law has been the subject of much criticism, not in the least by legal positivists such as Kelsen[265] and Hart.[266] We are also rather reluctant to call these social norms by inner orders law.

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[256] E. EHRLICH, *Grundlegung der Soziologie des Rechts*, Berlin, Duncker & Humblot, 1913, 409 p.
[257] D. NELKEN, "Law in action or living law? Back to the beginning in sociology of law", *Legal Studies* 1984, vol.4, (157) 178.
[258] S.F. MOORE, "Recht en maatschappelijke verandering: de rol van het 'semi-autonoom social veld'", in J. GRIFFITHS and H. WEYERS (eds.), *De sociale werking van recht*, Nijmegen, Ars Aequi, 2005, (177) 177; M. HERTOGH, "The living *Rechtsstaat*: a bottom-up approach to legal ideas and social reality", in W. VAN DER BURG and S. TAEKEMA (eds.), *The importance of ideals: debating their relevance in law, morality, and politics*, Brussel, P.I.E. Peter-Lang, 2004, (75) 85.
[259] R. POUND, "Law in books and law in action", *American Law Review* 1910, vol.44, no.12, (12) 15; A. BOSCH, *Citizens enforcing the law: The legal and social space for citizen's arrest*, Antwerp, Maklu, 2013, 17.
[260] M. HERTOGH, "The living *Rechtsstaat*: a bottom-up approach to legal ideas and social reality", in W. VAN DER BURG and S. TAEKEMA (eds.), *The importance of ideals: debating their relevance in law, morality, and politics*, Brussel, P.I.E. Peter-Lang, 2004, (75) 85-87; D. NELKEN, "Law in action or living law? Back to the beginning in sociology of law", *Legal Studies* 1984, vol.4, (157) 165.
[261] D. NELKEN, "Law in action or living law? Back to the beginning in sociology of law", *Legal Studies* 1984, vol.4, (157) 162; M. HERTOGH, "Wat weten en vinden burgers van het recht", in M. HERTOGH and H. WEIJERS (eds.), *Het recht van onderop. Antwoorden uit de rechtssociologie*, Nijmegen, Ars Aequi, 2011, (287) 292.
[262] N.O. LITTLEFIELD, "Eugen Ehrlich's fundamental principles of the sociology of law", *Maine Law Review* 1967, vol.19, (1) 3-4.
[263] E. EHRLICH, *Fundamental principles of the sociology of law*, Cambridge, Harvard University Press, 1936, 493.
[264] D. NELKEN, "Law in action or living law? Back to the beginning in sociology of law", *Legal Studies* 1984, vol.4, (157) 175.
[265] B.Z. TAMANAHA, "A vision of social-legal change: rescuing Ehrlich from 'living law'", *Law & Social Inquiry* 2011, vol.36, no.1, (297) 306 and 308; J.-L. HALPÉRIN, "Law in books and law in action: the problem of legal change", *Maine Law Review* 2011, vol.64, no.1, (45) 47-51.
[266] G.J. POSTEMA, "Conformity, custom, and convergence: rethinking the efficacy of law", in M.H. KRAMER, C. GRANT, B. COLBURN and A. HATZISTAVROU (eds.), *The legacy of H.L.A. Hart. Legal, political and moral philosophy*, Oxford, Oxford University Press, 2008, (45) 47.

Nevertheless, the focus should not be on the definition of law. The real merits of Ehrlich's theory lay in his insights about law and society and its reciprocal relationship.[267]

92. As we will see in part II, the European Court of Human Rights interprets the European Convention of Human Rights as a 'living instrument'. This means that the Court's interpretation of a Convention right can evolve over time, an interesting statement in the context of incorporating socio-economic concerns into the protection of what are essentially only civil and political rights. Based on the explanation given above though, this statement is somewhat paradoxical. Despite the used terminology, the concept 'living instrument' is interpreted in a way that resembles much more Pound's 'law in action' than Ehrlich's 'living law'. Just like Pound[268], the European Court of Human Rights considers that law should be interpreted in an updated, evolutionary way to retain its effectiveness[269], whereas Ehrlich's 'living law' is something quite different from the formal legal propositions on the basis of which the ECtHR makes its judgments.[270]

93. To summarise, while 'law in action' in essence still refers to official legal rules, 'living law' is oriented outside legal institutions. They are thus anything but identical.[271] As we will see however in the upcoming paragraphs, both concepts uncover certain things about the effectiveness of law and the right to housing in particular.

B. Equality and dependency

1) Access to justice

94. A good example of the gap that exists between 'law in the books' and 'law in action' has to do with equality.[272] Pound himself used the unequal treatment of rich and poor people with

[267] B. VAN KLINK, "Facts and norms: the unfinished debate between Eugen Ehrlich and Hans Kelsen", in M. HERTOGH (ed.), *Living Law. Reconsidering Eugen Ehrlich*, Oxford, Hart Publishing, 2009, (127) 152-153.
[268] J.-L. HALPÉRIN, "Law in books and law in action: the problem of legal change", *Maine Law Review* 2011, vol.64, no.1, (45) 61.
[269] D. RIETIKER, "The principle of 'effectiveness' in the recent jurisprudence of the European Court of Human Rights: its different dimensions and its consistency with public international law – no need for the concept of treaty *sui generis*", *Nordic Journal of International Law* 2010, vol.79, (245) 260-262.
[270] B.Z. TAMANAHA, "A vision of social-legal change: rescuing Ehrlich from 'living law'", *Law & Social Inquiry* 2011, vol.36, no.1, (297) 306.
[271] Ehrlich uses the term "norms for decision" to encompass most of what Pound meant by 'law in the books' and law in action, see: S. NIMAGA, "Pounding on Ehrlich. Again?", in M. HERTOGH (ed.), *Living Law. Reconsidering Eugen Ehrlich*, Oxford, Hart Publishing, 2009, 157-175.
[272] A. TERLOUW, "Draagt wetgeving bij aan gelijkheid?", in M. HERTOGH and H. WEIJERS (eds.), *Het recht van onderop. Antwoorden uit de rechtssociologie*, Nijmegen, Ars Aequi, 2011, (349) 351.

regard to the handling of crime suspects as an illustration of the distinction.[273] 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 substantive equality. Take for example a court process between a tenant and a landlord. It has long been said that even though tenant and landlord are equal before the law, the latter party has in practice often the advantage of having more experience (which equals knowledge as well as valuable contacts) with courts and lawyers than tenants, who are to a large extent unaware of the intricacies of the legal system.[274] Following Galanter's distinction, the party in the dominant position could then be called the repeat-player, in contrast to the one-shotter (in this case the tenant).[275]

95. While this distinction could easily still apply with regard to professional house renting companies, this share of the Flemish private rental market in Flanders represents only around 5%. Such a simple distinction is however no longer tenable with regard to the tenant's relationship with the individual letter. Sixty-four per cent of these private landlords rent out only one accommodation, while large private letters (more than 10 accommodations) are very rare.[276] These recent figures definitely reshape or at least put in perspective the image of landlords as repeat-players. But even though many of those small private letters may thus not be repeat-players, owners generally do have a stronger socio-economic profile than tenants. This can impact equal access to justice just as well. Weaker groups in society, to which tenants more frequently belong than house owners, 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.[277, 278] Evidently, this also pertains to financial burdens and the limit by which each party will resign to the current (problematic) situation.

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[273] R. POUND, "Law in books and law in action", *American Law Review* 1910, vol.44, no.12, (12) 16-18.
[274] R.L. KIDDER, *Connecting law and society*, New Jersey, Prentice-Hall, 1983, 75; M. GALANTER, "De duivel schijt altijd op de grote hoop", in J. GRIFFITHS and H. WEYERS (eds.), *De sociale werking van recht*, Nijmegen, Ars Aequi, 2005, (435) 437-439.
[275] M. GALANTER, "De duivel schijt altijd op de grote hoop. Bespiegelingen over de grenzen van rechtshervorming", in J. GRIFFITHS and H. WEYERS (eds.), *De sociale werking van recht*, Nijmegen, Ars Aequi, 2005, (435) 440.
[276] S. WINTERS et al., *Wonen in Vlaanderen anno 2013. De bevindingen uit het Grote Woononderzoek 2013 gebundeld*, Antwerpen, Garant, 2015, 54.
[277] B. HUBEAU, "De sociale grondrechten na een decennium: hefboom of toekomstdroom in de uitsluiting van sociale uitsluiting", in J. VRANKEN, K. DE BOYSER and D. DIERCKX (eds.), *Armoede en sociale uitsluiting. Jaarboek 2003*, Leuven, Acco, 2004, (369) 381; N. BERNARD and B. HUBEAU, "Poverty and fundamental social and economic rights: on the effectiveness of the right to decent housing", in D. DIERCKX, N. VAN HERCK and J. VRANKEN (eds.), *Poverty in Belgium*, Antwerpen, Acco, 2010, (195) 199.
[278] Legal aid through specialized agencies will be discussed in the context of our interpretation of social dignity (Chapter 2).

96. In order to avoid this discrepancy between equality pro forma and equality in practice, it is an open door to advocate the settlement of a rent dispute through reconciliation. The primary advantages, being free of charge and very low on administrative burdens, are elements that do favour tenants in particular. Yet, the advantages are clear as day for letters as well, who can be persuaded by the financial benefits to take action quicker. In theory, a good addition to the Belgian Judicial Code in that respect was the old article 1344 septies.[279] Between 2002 and 2008, this provision imposed that before a letter could introduce a principal claim concerning a rent dispute, the defendant had to be called to attempt an amicable settlement. Unfortunately, the measure did not reach its intended effect, for different reasons. There was disagreement in the jurisprudence and legal doctrine about the sanctions in case the preceding call for reconciliation was not complied with. Some jurisprudence not even considered it obligatory in all circumstances.[280] Regrettably, tenants often did not show up either, rendering the procedure useless. It is primarily the latter one that seems to have triggered the modification of the provision.[281] The legislator wanted to prevent unnecessary delays of the procedure and help peace courts with their already busy schedules. In its current form, the provision still prescribes that a reconciliation attempt should be made by the judge, but no longer is this part of a separate session preceding the introduction of the principal claim. The judge is obliged to see whether an agreement can be reached, but if that is not the case, he can just continue with the procedure. Again however, a sanction in case of non-compliance is not included.[282]

97. The procedural barriers that are generally still more problematic to overcome for tenants than for owners are not the only things that create a wedge between housing law in the books and housing law in action. There is also a different level of dependency between tenant and landlord, that can impact the effective application of the right to housing even before a conflict arises. Even though every tenant is to a certain extent dependent upon their landlord, low-income tenants have obviously less alternatives and are therefore tied even stronger to their current dwelling. With that in mind, it could also prevent them from taking steps in accordance with housing legislation in an attempt to avoid any form of conflict with their letter. In other words, the larger the dependency, the more a tenant's legal status can be

[279] J. NOLF, "Over de helaasheid der huurders", *Juristenkrant* 2010, no. 201, 11.
[280] Peace Court Antwerpen 28 May 2013, *RW* 2003-04, 35; Peace Court Doornik (2nd Chamber) 8 March 2005, *JT* 2006, 512; Peace Court Sint-Gillis 23 September 2004, *T.Vred.* 2005, 295; Peace Court Halle, 15 September 2004, *Huur* 2005, 150.
[281] Law 18 June 2008 amending the Judicial Code with regard to the procedure concerning certain rental conflicts, *BS* 11 August 2008.
[282] C. CAUFFMAN, "Hervorming van de verzoeningspoging bij hoofdvorderingen inzake de huur van woningen", *RW* 2008-09, no. 6, 252-254.

undermined.[283] In contrast, the landlord can have his dependency diffused among other tenants or, if that is not the case, it is at least spread among other potential tenants that could replace the current one.[284]

98. Against this background, it is important to search for initiatives that could prevent court procedures. With regard to housing quality, one could for example expand the current system of conformity certificates to the whole privately rented housing stock. As was said before, such a certificate indicates that a dwelling is habitable and adequate for a period of ten years. Although they do already exist and can be requested by the owner at the municipality, they are not mandatory in a way that they would equal a renting permit. Since 2013, the municipalities do however have the power to make the certificate obligatory.[285] Obviously, when a (prospective-)tenant would be able to demand the proof that the dwelling is in conformity with housing quality regulations, his rights with regard to the quality of housing would be considered complied with.

99. There are nonetheless a couple of problems with this approach. Firstly, implementing further and more rigorous obligations for landlords creates the risk of a vicious circle. It could negatively impact their willingness to stay on or go to the private rental market with their property, which would be a blow to the private rental stock. Additionally, better quality would probably be reflected in higher prices, which would hurt the many low-income private tenants once again. And even if we neglect these economic realities when a quality certificate would become mandatory, there is still a question of legal knowledge amongst tenants. It could very well be that the measure would bring about a stock of rented dwellings that have not been subjected to any quality assessment. The question remains whether tenants would then be sufficiently informed to apply their rights and ascertain themselves of qualitative housing. In comparison, recent numbers show that only 43% of private tenants know about the EPC, the energy performance certificate which has been mandatory for rented housing for more than half a decade now.[286] It is obviously difficult to enforce legal obligations when you are not even aware of them in the first place. To establish such knowledge with regard to housing

[283] Raad voor Maatschappelijke Ontwikkeling, *Toegang tot Recht*, Den Haag, 2004, 56-58.
[284] T.R. VAUGHAN, "The landlord-tenant relationship in low-income area", *Social Problems* 1968, vol. 16, no. 2, (208) 210.
[285] P. DE SMEDT, "De Vlaamse Wooncode anno 2013: naar een (nog meer) integrale en slagkrachtige woonkwaliteitsbewaking?", in B. HUBEAU and T. VANDROMME (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013, (41) 58-64.
[286] S. WINTERS et al., *Wonen in Vlaanderen anno 2013. De bevindingen uit het Grote Woononderzoek 2013 gebundeld*, Antwerpen, Garant, 2015, 104.

quality conformity certificates, the Flemish Housing Code has actually taken a step back since the Integration Decree of 2011.[287] No longer does it contain an obligation on behalf of the letter to inform the tenant of the acquired certificate and to deliver him a copy. And yet, even if they are well-informed on this matter, one can assume somewhat cynically that the weakest tenants, in a position of strong dependency and in search for affordable housing, may ultimately still engage with landlords that provide them with housing of sub-par quality.

2) Landlord preferences and discrimination

100. Another example of how law in action is impacted by a factual imbalance of power and dependency concerns cases of discrimination.[288] Time and again private landlords here and abroad have been found to take a reluctant stance against certain groups in society.[289] With regard to the Flemish private rental market, recent numbers show that for example 22% of all letters 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 provided by the public centre of social welfare.[290] This tendency is additionally incentivized by the imbalance in private rental housing supply and demand and the residualisation of the private rental market. A broad renting potential and a large share of socio-economically weaker tenants impact the selection methods of landlords.

101. Similar figures with regard to discrimination on the private rental market have been arrived at following practical tests: on the basis of a telephone call to the letter, a male candidate-tenant with a Turkish or Moroccan name turned out to have a 14% lower chance of being invited for a visit to the dwelling than a person with a Belgian sounding name, while in one out of eight cases a person entitled to a living wage or receiving a disability benefit will

[287] Decree Flemish Government 29 April 2011 concerning the amendment of various decrees on housing, *BS* 4 May 2011; Article 7 Flemish Housing Code.
[288] J. DE WITTE and I. AENDENBOOM, "Discriminatie en haatmisdrijven: individuele, maar ook collectieve schade", *De orde van de dag* 2011, vol. 54, (49) 52.
[289] E.g.: M. BOSCH, M.A. CARNERO and L. FARRÉ, "Information and discrimination in the rental housing market: evidence from a field experiment", *Regional Science and Urban Economics* 2010, vol. 40, 11-19; N. LAUSTER and A. EASTERBROOK, "No room for new families? A field experiment measuring rental discrimination against same-sex couples and single parents", *Social Problems* 2011, vol. 58, no. 3, 389-409; V.J. ROSCIGNO, D.L. KARAFIN and G. TESTER, "The complexities and processes of racial housing discrimination, *Social Problems* 2009, vol. 56, no. 1, 49-69; K. VAN DER BRACHT and B. VAN DE PUTTE, *Het not-in-my-property-syndroom (NIMPS). Etnische discriminatie*, Gent, Universiteit Gent, 2013.
[290] S. WINTERS et al., *Wonen in Vlaanderen anno 2013. De bevindingen uit het Grote Woononderzoek 2013 gebundeld*, Antwerpen, Garant, 2015, 55.

be treated unfavourably.[291,292] The latter should nonetheless be put in some perspective. Discrimination only occurs when a landlord takes a negative decision on the basis of information gathered about the income type. When the decision is based on the level of income instead, it falls under the heading of selection criteria. It is therefore difficult to draw watertight conclusions. The fact that 60% of the telephoned letters did not ask for any further information to the low-income caller/candidate-tenant does however reinforce the suspicions of discrimination.

102. Legislative and other measures that fit within the broader issue of discrimination are certainly in place. A victim can for example always contact the Interfederal Centre for Equal Opportunities (UNIA), which offers free information and advice.[293] In the introductory part of this research, we have already mentioned the more proactive measure of article 1716 of the Belgian Civil Code, imposing that public rental adverts must always contain the rental price. We have pointed out as well though how this obligation still lacks in impact. In addition, article 7, §1bis (regulating increase in rent prices) and 10 (establishing the possibilities of rental guarantee) of the Housing Rent Act also provide rules that should counter discriminatory conduct on the part of the owner. Most important though remains the specific discrimination regulation itself. Until the transfer of the competence of private housing rent to the regions in 2014, the federal anti-discrimination[294] (ADL) and anti-racism law[295] (ARL) were applicable. Anyone who wishes to put forward a discrimination claim related to the rental market now has to invoke the Flemish equal treatment decree.[296] While similar in *ratione materiae*, the Flemish decree provides civil law sanctions instead of penal ones.

[291] K. VAN DEN BROECK and K. HEYLEN, *Discriminatie en selectie op de private huurmarkt in België*, Leuven, HIVA, 2014, www.unia.be/files/legacy/baro_div_huisvesting_discriminatie_en_selectie_praktijktest.pdf, 22-25 and 30-33.

[292] For a more concrete look on discrimination of people from foreign origin, see: M. MORIS and M. LOOPMANS, "Label: 'allochtoon', middelen: beperkt. Discriminatie-ervaringen en vermijdingsstrategieën van financieel beperkte huurders van buitenlandse origine op de private huurmarkt", in P. DE DECKER, B. MEEUS, I. PANNECOUCKE, E. SCHILLEBEECKX, J. VERSTRAETE and E. VOLCKAERT (eds.), *Woonnood in Vlaanderen. Feiten / mythen / voorstellen*, Antwerpen, Garant, 2015, 297-310.

[293] E. WILLEMS, *Recht op huisvesting: ook voor vreemdelingen?*, Antwerpen, Kluwer, 2012, 7.

[294] Law 10 May 2007 aimed at combating specific forms of discrimination, *BS* 30 May 2007 (hereafter anti-discrimination law).

[295] Law 10 May 2007 on the modification of the law fo 30 July 1981 criminalizing certain acts inspired by racism and xenophobia, *BS* 30 May 2007 (hereafter anti-racism law).

[296] Decree 10 July 2008 concerning a framework for the Flemish equal opportunities and equal treatment policy, *BS* 23 September 2008; L. ZIV, "Bronnen van verbod op discriminatie bij particuliere huur", in P. BRULEZ and A.-L. VERBEKE (eds.), *Knelpunten huurrecht: tien perspectieven*, Antwerpen, Intersentia, 2012, (253) 257-258.

103. As with the federal ADL and ARL[297], the Flemish legislation does not lay the burden of proof exclusively on the victim/claimant. According to article 36, the victim must present facts that raise the suspicion of discrimination. In that case (and only then) will the defendant have to prove the opposite. Even though this has been called a reversal of the burden of proof, it is probably more accurate to speak of a distribution of the burden of proof. [298] This nuance has also been picked up by the Constitutional Court in the context of the ADL, finding a claim that this shift of proof violated the principle of equality and the presumption of innocence unfounded.[299] Despite this distribution of the burden of proof, it is often very difficult to demonstrate that there is a pertinent presumption of discrimination when an owner prefers not to rent someone his dwelling.[300] Since a reversal of proof is obviously no real alternative either (for reasons of presumption of innocence and principle of equality), this is a persistent hindrance for a candidate-tenant's access to justice and a problem that is very hard to address appropriately.

104. With regard to lower income candidate-tenants in particular, a distinction between selection and (indirect) discrimination is difficult but vital. A landlord can examine whether the candidate-tenant is able to pay the rent, but he is not allowed to make a distinction based on the source of that income. Yet, a lot of letters are wary of candidate-tenants who do not generate their income from work, and especially of those who rely for it on the OCMW.[301] As a result, they often adopt different selection strategies to avert this group of candidate-tenants[302], giving way to a very large grey area as to what exactly is discrimination and what is not. [303] Even if partially based on stereotypical and flawed reasoning, it is entirely understandable from a financial security point of view that owners want to prevent or at least reduce the possibility of rent arrears. It has after all been said that one out of every five private landlords has already experienced a conflict with (at least) one of their tenants about timely

[297] Art. 28 Anti-discrimination law and art. 30 Anti-racism law; E. VOLCKAERT, "De weerslag van de anti-discriminatiewetgeving op het afsluiten van een huurovereenkomst", *Huur* 2008, vol.3, 107-113; N. VAN LEUVEN, "De antidiscriminatiewet en de huurovereenkomst", in S. STIJNS and P. WÉRY (eds.), *Antidiscriminatiewet en contracten*, Brugge, Die Keure, 2006, 111-141.
[298] B. SAMYN, "De bewijslast. Rechtsleer getoetst aan tien jaar cassatierechtspraak, *P&B* 2010, (50) 67-68.
[299] Constitutional Court 6 October 2004, no. 157/2004, B.82-B.86; See also Labour Court Mechelen 16 March 2006, *RW* 2007-08, no. 11, 445.
[300] Court of Appeal Gent (13th Chamber) 30 November 2005, *RW* 2006-07, no. 4, 144, note J. KUSTERS.
[301] J. VERSTRAETE and P. DE DECKER, "Discriminatie van financieel kwetsbare huishoudens op de private huurmarkt in België", in D. DIERCKX, J. COENE and P. RAEYMAECKERS (eds.), *Armoede en sociale uitsluiting. Jaarboek 2014*, Leuven, Acco, 2014, (110) 116-117.
[302] *Ibid*., 119-124.
[303] M. LOOPMANS et al., "Onderzoek van de private huisvestingsmarkt in België in het kader van de Diversiteitsbarometer, in Interfederaal Gelijkekansencentrum (UNIA) (ed.), *Diversiteitsbarometer huisvesting*, Brussel, Interfederaal Gelijkekansencentrum, 2014, (134) 156.

rent payments.[304] A popular recurring argument is therefore that an owner should be able to choose freely what he wants to do with his property. But if public opinion does not seem to take stance against refusing a group of candidate-tenants who are generally perceived as being less solvable, the difficult legal assessment as to when exactly discrimination is in play is not the only problem. Such conduct is then considered normal in and by society, which could in turn withhold this group of candidate-tenants from seeking justice via legal instances. Along with the difficulty of providing sufficient evidence, the burdens of a judicial process and the somewhat irrelevant result of a successful outcome (it provides no solution for the applicant's housing search or problems), this is just another influence on a victim's willingness to report alleged discriminatory behaviour.[305]

C. Semi-autonomous social fields

105. Semi-autonomous social fields (SASF) are groups of people that share certain rules of conduct and maintain them by way of social control.[306] These rules develop in any group where people act in an oriented way. And considering that people are actors dependent of and linked with one another, SASFs are everywhere: from families to hospitals, from book clubs to political parties.[307] To a considerable extent, they reflect Ehrlich's 'inner orders', yet without these rules being interpreted as law in itself. Nonetheless, SASFs also create norms by which the people of these groups feel obliged. Changes in society must therefore not automatically be traced back to legislative efforts only. An adequate approach to the effectiveness of law thus also demands a bottom-up perspective, one that departs from the concrete reality of the citizen.[308] To use Griffith's words, "*the influence of legislation on*

[304] K. HEYLEN, *Grote Woononderzoek 2013: Deel 5. De private huurmarkt: vraag- en aanbodzijde*, Leuven, Steunpunt Wonen, 2015, https://steunpuntwonen.be/Documenten/Onderzoek_Werkpakketten/gwo-volume-2-deel-5-eind.pdf, 9.

[305] N. BERNARD, "Les lois anti-discrimination et le secteur du logement (privé et social)", in C. BAYART, S. SOTTIAUX and S. VAN DROOGHENBROECK (eds.), *De nieuwe federale antidiscriminatiewetten*, Brugge, Die Keure, 2008, (797) 815; B. HUBEAU and D. VERMEIR, *Een evaluatie van het woninghuurrecht – Deel II. Bevidingen werkgroepen 'Toegang, selectie en discriminatie', 'Procedure en bemiddeling' en 'Huurprijs', resultaten wegingsoefening en aanbevelingen expertencommissie*, Leuven, Steunpunt Wonen, 2015, 28-31 and 47-48.

[306] The concept was first used by S.F. MOORE, "Law and social change: the semi-autonomous social field as an appropriate subject of study", in *Law & Society Review* 1972, vol.7, no.1, 720-746.

[307] K. VAN AEKEN, "Een rechtssociologische analyse van de juridisering van de samenleving", in B. HUBEAU, S. GIBENS, S. MERCELIS, S. PARMENTIER, P. PONSAERS, K. VAN AEKEN, G. VANDE WALLE and J. VAN HOUTTE (eds.), *Dialogen tussen recht en samenleving*, Leuven, Acco, 2012, (67) 75.

[308] N. HULS, *Actie en reactie. Een inleiding in de rechtssociologie*, Den Haag, Boom Juridische Uitgevers, 2008, 38-39 and 128; R.J.S. SCHWITTERS, *Recht en samenleving in verandering*, Deventer, Kluwer, 2008, 9, 84 and 97-98.

behaviour can only be understood if the social organisation takes center stage".[309] Since the social rules of an SASF are often more imbedded into a person's everyday life than legal rules, they can influence the compliance with and effectiveness of the law. According to Niemeijer, the success rate of a piece of legislation therefore increases as it connects more to social reality.[310]

106. The impact of SASF's should thus not be underestimated, as is also visible in the context of housing. The prevailing mentality in an SASF can be the opposite from that of law or even contradict legal rules, but it can also influence the realization of socio-economic rights positively. The aforementioned DALO for example has in part been the merit of 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.[311]

107. But as mentioned, an SASF can also share a view or approach to justice which differs from or distorts the one embedded in the legal rules. For a first example, we briefly return to the topic of discrimination on the housing market. The landlord is not the only actor involved in cases of discrimination. It has been documented how real estate agencies can be involved in discriminatory treatment of potential buyers and renters as well.[312] Occasionally these types of discrimination reach the news feed, as was the case when a real estate agency had refused to rent a dwelling to a single woman. The online advertisement had explicitly mentioned that the dwelling was "only for families or couples".[313] Research figures show that this is a more common trend than what one might expect. Almost 40% of the Flemish real estate agencies seem willing to discriminate on racial grounds, and more than 50% on the basis of income

[309] J. GRIFFITHS, "De sociale werking van wetgeving", in J. GRIFFITHS and H. WEYERS (eds.), *De sociale werking van recht*, Nijmegen, Ars Aequi, 2005, (467) 475.
[310] B. NIEMEIJER, "Wat leren wetsevaluaties ons over de effectiviteit van wetgeving?", in M. HERTOGH and H. WEIJERS (eds.), *Het recht van onderop. Antwoorden uit de rechtssociologie*, Nijmegen, Ars Aequi, 2011, (41) 48.
[311] N. PACHECO and L. SALES, "From the recognition to the justiciability of housing rights: building the future", *International Journal of Land Law & Agricultural Science* 2011, no.11, (34) 43; M. PIETERSE, "Eating socioeconomic rights: the usefulness of rights talk in alleviating social hardship revisited", *Human Rights Quarterly* 2007, vol. 29, (796) 821.
[312] E.g.: Court of First Instance Brussel (summary procedure) 3 June 2005, no. 05/1289/A, *T.Vreemd*. 2006, no. 1, 42, note J. KUSTERS; De Standaard, "Volt bewijst het: veel immo-kantoren racistisch", 1 April 2010.
[313] De Redactie, "Immokantoor weigert vrouw omdat ze alleenstaand is", 19 October 2015, http://deredactie.be/cm/vrtnieuws/regio/oostvlaanderen/1.2473132 (last accessed 20 June 2016); Het Nieuwsblad, "Alleenstaande vrouw huurwoning weigeren is mogelijk discriminatie", 20 October 2015, http://www.nieuwsblad.be/cnt/dmf20151020_01929309, (last accessed 20 June 2016).

type.[314] Here as well it is possible to speak of a prevailing mentality in a group of connected people that undermines or even contradicts legal rules, influencing the effectiveness of law and in casu the full realisation of the accessibility of housing, one of the main aspects of the right to adequate housing.

108. In the context of our topic, it would be possible to consider squatters as a group that fits this category too. Without discarding the fact that some squatters have criminal motives, a lot of them break into and reside in (empty) buildings they do not possess simply because they need a roof above their head or, a third possibility, to make a principled point on housing policies.[315] Squatting occurs on a small basis, but in a more organised manner just as well.[316] As such, it becomes not only a survival strategy, but also a way to participate in society and a form of self-empowerment (a concept which we will return to in the next chapter), albeit one that is not only developed bottom-up but is also *contra legem*.[317]

109. Without romanticising their actions too much, one could say that they illustrate how squatters value the right to housing higher than the right to property[318] and are willing to break civil (and potentially penal) law to achieve their aims.[319] Squatters in other words depart

[314] The figures are even more significant in Brussels and Wallonia, see:.K. VAN DEN BROECK and K. HEYLEN, *Discriminatie en selectie op de private huurmarkt in België*, Leuven, HIVA, 2014, www.unia.be/files/legacy/baro_div_huisvesting_discriminatie_en_selectie_praktijktest.pdf, 54-55; For more information, see: K. VAN DEN BROECK and K. HEYLEN, "Differential treatment of rental home seekers according to their sociodemographic and economic status by real estate agencies in Belgium", *European Journal of Homelessness* 2015, vol. 9, no. 2, 39-60; B. HUBEAU and D. VERMEIR, *Een evaluatie van het woninghuurrecht – Deel II. Bevidingen werkgroepen 'Toegang, selectie en discriminatie', 'Procedure en bemiddeling' en 'Huurprijs', resultaten wegingsoefening en aanbevelingen expertencommissie*, Leuven, Steunpunt Wonen, 2015, 14.

[315] G. SMAERS, "De strafbaarheid van het kraken van woningen naar Belgisch recht", *RW* 1986-87, 2193.

[316] There are for example websites supporting and helping squatters, giving more weight to the existence of a squatter community as a semi-autonomous social field, see e.g.: https://krakengent.squat.net/?page_id=263; www.squatter.org.uk; The Squatting Europe Kollective, *Squatting in Europe: radical spaces, urban struggles*, New York, Minor Compositions, 2013; J. BALL, "From individual to collective squat: economic, theory and the regulation of squatting in England and France", in P. KENNA (ed.), *Contemporary housing issues in globalized world*, Farnham, Ashgate, 2014, (227) 242-243.

[317] Debruyne et al. describe it as a form of housing first from the grassroots level: P. DEBRUYNE, S. VANDEPUTTE and S. BEUNEN, "Uit de marges van de woonpraktijk: de strijd voor het recht op wonen in de stad Gent", *Ruimte en Maatschappij* 2014, vol. 5, (1) 35-36.

[318] R.J.S. SCHWITTERS, *Recht en samenleving in verandering*, Kluwer, Deventer, 2008, 10; P. DEBRUYNE, S. VANDEPUTTE and S. BEUNEN, "Uit de marges van de woonpraktijk: de strijd voor het recht op wonen in de stad Gent", *Ruimte en Maatschappij* 2014, vol. 5, (1) 17.

[319] Squatting is a violation of one's right to property. The owner can therefore make a claim for the eviction of the squatters. It is possible to claim a compensation for damages on the basis of art. 1382 Civil Code as well. Property is also protected by penal law, but its application is dependent upon whether parts of the property have been destroyed or damaged (art. 521, 534bis-ter and 545-546 Penal Code). Several proposals have over the years been made to make squatting itself a violation of penal law; K. DE GREVE, "Gekraakt leven – processuele actiemogelijkheden in het burgerlijk procesrecht", *Huur* 2014, no. 1, 7-20; It might be problematic though in accordance with the ECHR to develop legislation that enables evictions without a preceding judicial decision: T.

from the idea that emergency breaks law ('*nood breekt wet*') and that social justice will not reach them through a rigid legal system. Consequently, they take matters into their own hand. With the exception of some (nonetheless interesting) cases before the European Court of Human Rights in which they have been the applicants (infra, part II)[320], it is then no surprise that squatters can usually be found on the defendant's bench in eviction cases. The right to housing, their main point of defense, has appeared largely insufficient to prevent an eviction altoghether.[321] It does not provide them with a justification for their actions.[322] At most, the constitutional provision will adopt a softening or corrective role with regard to the application of other legislation. A judge can for example justify the postponement of an eviction in the middle of winter.

D. Other influences

1) Knowledge of law – quality of legislation

110. One of the reasons for a right not being effective is simply that people do not or insufficiently apply it because it is (reasonably) unknown. Research has repeatedly shown that knowledge of basic tenancy law is limited amongst tenants.[323] We have already alluded to this problem with regard to the mandatory EPC certificate. Or take the scenario of a necessary rehousing due to serious quality defects. In that case, the Flemish Housing Code enables the tenant to claim the repayment of moving expenses and even paid rent, but since many tenants are not aware of this option, such claims are only made sporadically.[324]

VANDROMME, "Het kraken van panden bekeken vanuit de grondrechten, het strafrecht en het burgerlijk recht (inclusief het procesrecht)", *RW* 2014-15, no. 35, (1363) 1369-1374.

[320] ECtHR 15 October 2013, Ceesay Ceesay/Spain; ECtHR 6 February 2012, A.M.B/Spain; ECtHR 21 June 2011, no.48833/07, Orlic/Croatia; ECtHR 12 October 2010 (adm. dec.), no. 23516/08, Société Cofinfo/France.

[321] E.g.: Peace Court Zomergem 9 November 2012, no. 12A542, *Huur* 2013, no. 3, 153; Peace Court Waver 2 December 2010, *T.Vred*. 2012, no. 9-10, 463, note K. DE GREVE; Peace Court Gent (2) 5 May 2003, no. 435/2003, *Juristenkrant* 2003, no. 79, 13 (reproduction E. BREMS); Peace Court Gent 26 December 2011, *TGR* 2012, 171.

[322] E. BREMS, "Geen recht op kraken", *Juristenkrant* 2003, no. 79, 13.

[323] J. VAN HOUTTE, W. VAN WAMBEKE and E. DELANOEIJE, *Rechtshulp en rechtsinformatie*, Brussel, Federale Diensten voor Wetenschappelijke, Technische en Culturele Aangelegenheden, 1995; I. PANNECOUCKE, P. DE DECKER and L. GOOSSENS, Onderzoek naar de mogelijkheden voor de integratie van de particuliere huurmarkt in het Vlaams woonbeleid, Antwerpen, OASeS, 2003, www.rwo.be/portals/100/onderzoek/wonen/rapportenadhoc/private%20huur.pdf, 147-149.

[324] E.g.: Antwerpen (12th Chamber) 23 June 2010, *Huur* 2010, no. 4, 193; T. VANDROMME, *Woningkwaliteitsbewaking in het Vlaamse Gewest*, Mechelen, Kluwer 2008, 73-74; Interview with the author on LegalWorld, "Woningkwaliteitsbewaking werpt zijn vruchten af", 16 March 2009, www.legalworld.be/legalworld/content_jurisdiction.aspx?id=15790&Langtype=2060.

111. This lack of knowledge is not just confined to not being aware of the existence of a certain rule. It can also relate to the lack of knowledge as to when a factual situation can warrant the application of legislation. The Flemish Housing Research of 2013 illustrates that housing occupants severely overrate the objective quality of their dwelling. While home screening revealed that 47% of the private tenants lived in dwellings of insufficient quality, 80 % of those people rated them as (reasonably) good.[325] In other words, tenants often do not realise that they are in a justified position to stand up for their rights. One could say that these tenants have all the keys to open the door to justice, yet are unaware that these keys actually fit that door. In our opinion, this scenario is thus just as much a question of access to justice. A housing quality deficiency might seem less problematic when a tenant does not notice or mind it, but considering that electric defects are the primary problem in housing of insufficient quality and damp problems are also very frequent, the health and safety of that person could be in danger. Generally speaking, this lack of knowledge is an element of the aforementioned underdog position of the tenant.

112. It is on the other hand possible that a lack of knowledge stems from the complexity of legislation itself. In contrast to the other influences discussed in this chapter, this one then becomes more of a top-down influence on an effective right to housing. Difficult wording and complex terminology may indeed hinder a correct and consistent application of legal measures.[326]

113. In the next chapter we will for example illustrate how the concept of human dignity, the crux of article 23, might be just a bit too difficult and vague to be able to use in a more or less consistent manner as a decisive criterion in individual housing conflict resolution. Its intricate content became apparent once more when the Flemish Housing Council presented a very useful policy recommendation entitled '*Towards a strengthened right to housing?*' to the public.[327] It proposed to endow an important role on the concept of human dignity as it was used as the distinguishing factor between priority and non-priority cases for housing. During

[325] S. WINTERS et al., *Wonen in Vlaanderen anno 2013. De bevindingen uit het Grote Woononderzoek 2013 gebundeld*, Antwerpen, Garant, 2015, 52 and 58.
[326] B. NIEMEIJER, "Wat leren wetsevaluaties ons over de effectiviteit van wetgeving?", in M. HERTOGH and H. WEIJERS (eds.), *Het recht van onderop. Antwoorden uit de rechtssociologie*, Nijmegen, Ars Aequi, 2011, (41) 52; V. AUBERT, "Enkele sociale functies van wetgeving", in J. GRIFFITHS (ed.), *De sociale werking van recht*, Nijmegen, Ars Aequi, 1996, (113) 121-124.
[327] FLEMISH HOUSING COUNCIL, *Naar een versterkt recht op wonen? Aanbevelingen van de Vlaamse Woonraad, met pleidooi voor een Vlaamse woonrechtcommissaris*, 19 December 2013, no. 2013/17, rwo.be/Portals/126/Vlaamse%20Woonraad/VWR_advies_versterkt_recht_op_wonen_def_web.pdf.

the presentation however, delegates of the Association of Flemish Cities and Municipalities (VVSG) and the public centres for social welfare (OCMW) both questioned the exact application of that open-ended term. With regard to the latter that is quite remarkable. After all, article 1 of the OCMW-law itself predicates a right to social assistance because everyone should be able to live a life in human dignity.[328] The importance of clarification is in these instances vital for a consistent application. If not thoroughly explained, it could quite possibly stand in the way of this 'strengthened right' in practice.

114. The complexity of legislation as an influence on its appropriate or full-fledged application is obviously not limited to the applied terminology. Let us take another look at the legal possibilities for tenants of dwellings with severe quality issues. According to article 2, §1, 5° of the Housing Rent Act, with regard to a dwelling that does not meet the elementary conditions of safety, health and habitability upon taking possession of the property, the tenant can choose between the execution of the necessary renovation works or the cancellation of the agreement.[329] When the tenant chooses the former option, the judge can allow a reduced rental price in anticipation of the execution of the renovation works. Either way, we are talking about a contractual sanction.

115. The similar housing safety, health and quality norms of article 5 of the Flemish Housing Code broadens the possibilities for tenants to protect their rights. As we have discussed in the introductory part of this research, it enables them to start an administrative procedure to have the dwelling declared unfit or uninhabitable. The regional quality norms also provide a penal law procedure to properly deal with and sanction the most persistent landlors (supra). Considering once again the underdog position which tenants might occupy in court and the barriers that weaker groups in society experience which hinder their court journey (supra), there is one obvious advantage to the administrative procedure for the ordinary tenant. In order to rectify housing quality deficiencies, the first step is not necessarily to take one's landlord to court, while at the same time the procedure still foresees that these tenants will be heard.

116. While there might be quite some options to draw the attention of one's landlord to his responsibilities as a letter, this does not automatically mean that tenants know of these

[328] Art. 1 Law 8 July 1976 concerning the public centres for social welfare, *BS* 5 August 1976.
[329] See also art. 1184 Civil Code.

possibilities in general, let alone know what the consequences of each procedure are. One may obviously seek legal aid, but not being at least somewhat familiar with his or her rights might have an influence on taking this step too. The difference between the various procedures does however matter quite a lot for the everyday life of the tenant. As mentioned earlier, tenants have a choice between the execution of the necessary renovation works or the cancellation of the agreement in case of a breach of the federal Housing Rent Act. The civil law consequences on the other hand of an unsuitable or uninhabitable dwelling according to the Flemish housing quality norms are quite different. Considering their connection to the general interest, they are regarded as norms of public order and thus concern a condition of validity for the rent agreement. In case of a breach of these norms, the absolute nullity of the contract theoretically follows.[330] The tenant is then not given the choice presented by the federal regulations (i.e. either execution of renovation works or annulation of the agreement), thereby possibly rendering the outcome as not the most preferable one for either tenant (in particular the low-income tenant) or landlord.[331]

117. This is the traditional approach. Luckily, both the jurisprudence[332] as well as part of the legal doctrine[333] show tendencies to question the adequacy of this sanctioning system. We can only hope that in the slipstream of the sixth Belgian state reform and the accompanying transfer of the competence of housing rent to the regions, these procedures and their legal consequences will ultimately be streamlined.[334] One thing is certain: when even legal academics and judges are tangled up in the intricacies of the matter[335], what chances do ordinary tenants have to fully grasp the implications of these procedures and use them to their full extent in order to seek justice?

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[330] B. HUBEAU and D. VERMEIR, *Regionalisering van de federale huurwetgeving*, Leuven, Steunpunt Wonen, 2013, 18-20.

[331] M. DAMBRE, "Nietigheid huurcontract bij inbreuk op kwaliteitsnormen: mogelijk, wenselijk en wat zijn de gevolgen?", *TBO* 2012, no. 6, (251) 253-255: according to Dambre, the federal legislator has implicitly acknowledged that the nullity sanction can be inappropriate. By including a reference to the regional quality norms in art. 2 Housing Rent Act (Law 25 April 2007 concerning various provisions (IV), *BS* 8 May 2007), he claims that the nullity sanction should not be applied by a judge.

[332] E.g.: Peace Court Mol 17 September 2002, *T.Vred.* 2004, no. 1-2, 48, note M. DAMBRE; Court of First Instance Leuven (5th Chamber) 19 January 2011, *T.Vred.* 2012, no. 3-4, 187.

[333] E.g. : P. DE SMEDT, B. HUBEAU and E. JANSSENS, *Omzien in verwondering. Terugblik op tien jaar Vlaamse wooncode*, Brugge, Die Keure, 2007; M. DAMBRE and B. HUBEAU, *Woninghuur*, Antwerpen, Kluwer, 2002.

[334] P. DE SMEDT, "De Vlaamse Wooncode anno 2013: naar een (nog meer) integrale en slagkrachtige woonkwaliteitsbewaking?", in B. HUBEAU and T. VANDROMME (ed.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013, (41) 88-89.

[335] For a good overview of the complexities, see: T. VANDROMME, "De gevolgen voor de huurovereenkomst bij inbreuken op de gewestelijke woonkwaliteitsnormen: botst de Vlaamse Wooncode met het gemene huurrecht?", *Huur* 2009, vol.2, 104-108.

2) Cost-benefit analysis

118. The extent to which a piece of legislation is considered effective is also strongly connected to the question why people obey these rules. Firstly, legislation often leans towards the (moral) convictions and habits of persons.[336] It might also be the other way around though. A certain kind of conduct might become a habit when the relevant law is backed by threats of force for long enough.[337] 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.[338]

119. Take for example the position of slumlords. Although the penal code ordains considerable punishments (6 months to 3 years detention and a fine between 500 and 25.000 euro), the severity of those sanctions will only influence the effectiveness of law when the perpetrator believes that there is a reasonable risk that he will be caught. And here, the chances of getting caught do not necessarily outweigh the benefits. Again, the earlier discussed unequal relationship between the two renting parties has its impact, with the tenant being more dependent upon the letter than the other way around. Somewhat paradoxically, one of the reasons for this low perception of risk is indirectly mentioned in the relevant provision of the penal code itself. It describes a slumlord 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,* (…)".[339] The vulnerability of the victims will frequently prevent them from taking steps against these slumlords.

120. On a positive note however, figures illustrate that over the last couple of years slumlords have been convicted to more fines and more money has been collected as a consequence. In 2014 and 2015 more than ten times the amount of non-compliance penalties was collected in

[336] W.G. SUMNER, *Folkways: a study of the sociological importance of usages, manners, customs, mores and morals*, Boston, Ginn and Company, 1906, 77; R.J.S. SCHWITTERS, *Recht en samenleving in verandering*, Deventer, Kluwer, 2008, 82-83; R.L. KIDDER, *Connecting law and society*, New Jersey, Prentice-Hall, 1983, 121-122.
[337] L.M. FRIEDMAN, *The legal system. A social science perspective*, New York, Russell Sage Foundation, 1975, 124.
[338] *Ibid*., 82-83.
[339] Art. 433 decies Sw.

comparison to a couple of years earlier.[340] These fines serve as a compulsion to repair and renovate the concerned dwelling.

121. As illustrated, the cost-benefit analysis to abide by a rule definitely influences compliance with law. Yet, personal interest is not only an incentive to obey or infringe the law[341], it can also render a person's behaviour to be in compliance with the law without his behaviour actually being a direct response to this law.[342] From the point of view of the legislator, self-interest can also be used as a factor to try and enhance the effectiveness of law. We can think for example of financial compensations like the aforementioned renovation premiums. The system of social rental agencies is also beneficial to the realization of the right to housing and at the same time invites owners to engage themselves for reasons of personal interest. It ensures a tenant in housing need a qualitatively sound dwelling against a reasonable rental price, while the private landlord who has signed a contract with an agency will be given certainty about the payment of the rental price (even if the sublessee has not paid), continuity of the rent (even if the dwelling is at the moment not sublet) and control over the maintenance of the dwelling in return.[343] Interviews with the owners have proven how these positive effects are definitely acknowledged and appreciated. For them, it is important that they are no longer confronted with the burdens of a private rent and that is exactly what the social rental agencies have to offer.[344,345]

122. As a final example we make mention of the rental guarantee fund, which entered into force in 2014. It aims to protect the landlord, who pays a fee of 75 euro to the fund, against a loss in rental income due to non-payment by the tenant. At the same time, the tenants will be better protected as well. They are provided with some additional time to settle their debts to

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[340] De Morgen, "Dwangsommen huisjesmelkers vertienvoudigd", 7 April 2016, www.demorgen.be/binnenland/dwangsommen-huisjesmelkers-vertienvoudigd-bef899a2/ (last accessed 20 June 2016).

[341] L.M. FRIEDMAN, *The legal system. A social science perspective*, New York, Russell Sage Foundation, 1975, 63.

[342] R.L. KIDDER, *Connecting law and society*, New Jersey, Prentice-Hall, 1983, 120.

[343] P. DE DECKER, E. VLERICK and M. LE ROY, "Verhuurders beoordelen sociale verhuurkantoren", in P. DE DECKER, B. MEEUS, I. PANNECOUCKE, E. SCHILLEBEECKX, J. VERSTRAETE and E. VOLCKAERT, *Woonnood in Vlaanderen. Feiten / mythen / voorstellen*, Antwerpen, Garant, 2015, (313) 315-316.

[344] *Ibid*., 319-322.

[345] The non-profit interest group for owners calles United Owners (formerly General Owners Syndicate (AES)) is also supportive of social rental agencies: K. D'HAUWERS, "Vijftien jaar Vlaamse Wooncode: standpunt van het AES (algemeen eigenaarssyndicaat)", in B. HUBEAU and T. VANDROMME (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brussel, Die Keure, 2013, (295) 299.

hopefully avoid an otherwise perhaps inevitable eviction.[346] Again, the theoretical strength of this initiative lies exactly in the mutual personal interests. Unfortunately, this initiative has thus far remained unsuccesful. Only 325 letters have joined the fund in the first 17 months of its existence, resulting in only three payments.[347] Of course, that on its own does not say anything about the potential of the initiative. The intended target group might just be un- or underinformed, which we mentioned earlier as another influence on an effective right to housing.

E. Consequences of the influences: a concluding observation

123. The many examples in the previous paragraphs have illustrated how law in action is influenced by a variety of issues and how it can impact the realization of one or more aspects of the right to housing. It is clear that these influences must be taken into account if we want law to be a successful mechanism for the realization of the right to housing.

124. It should be clear by now that if that does not happen, law can shoot right past its intended purpose or not reach it at all. Let us illustrate this with one more example. In order to create more room in the limited public housing stock, a logical suggestion for a lawmaker could be to introduce or increase income ceilings as accessibility conditions. However, an (admittedly older) study by Ikeda *et al.* shows the exact opposite. It concluded that income ceilings are not an incentive for families to move from public to private housing. The comparative experiment proved that the mobility into private housing was bigger when no conditional income ceilings had been 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.[348]

125. We have seen how tenants are often on the losing end of housing law in action. While there is definitely reason to plea for more rights for tenants or stronger obligations for letters, that is not what we should take away from this chapter in the first place. Quite on the contrary since we have focused here on elements that have an impact on an effective realisation of the

[346] Decision of the Flemish Government concerning "de instelling van een tegemoetkoming van het Fonds ter bestrijding van uithuiszettingen", 4 Oktober 2013; R. TIMMERMANS, "Armworstelen met het huurgarantiefonds", *Huur* 2014, vol.1, 21-26.
[347] *Vr. en Antw.* Vl. Parl., Vr. nr. 563, 13 March 2015 (L. PARYS).
[348] R.L. KIDDER, *Connecting law and society*, New Jersey, Prentice-Hall, 1983, 137-138.

right to housing, rather than on the lack of legislation. Moreover, implementing further and more rigorous obligations for landlords creates the risk of a vicious circle. It could discourage them from going to the private rental market with their property or decrease their willingness to stay on it[349], which would then hurt the private tenants once again. This scenario is indeed plausible and can therefore not be neglected. That is also why we have discussed self-interest as a possible factor to try and enhance the effectiveness of the right to housing. Making the provision of for example affordable or qualitative housing beneficial for both parties might enhance its chances of success.

126. Nevertheless, since this approach walks a fine line between luring owners to the private rental market on the one hand and realizing the right to housing on the other, it requires a careful assessment. Whereas the economic reality of the housing market demands to be taken seriously as yet another influence on the impact of housing legislation, it should not allow for an erosion of the protection of this fundamental right either. From a human rights perspective, the argument of a potentially shrinking private rental market creates a difficult bargaining position. And it will remain that way as long as there is a significant shortage of social housing. It is therefore commendable that a measure benefits all concerned parties, but at the same time this argument cannot result in a situation in which landlords create certain expectations with regard to either the extent of their obligations or compensations they should get in return. Elementary housing quality requirements for example should be complied with irrespective of whether compensations are in place. In that regard one could object to the financial compensation an owner-letter can qualify for if he renovates his rented dwelling after it has been declared unfit by the mayor.[350] Who knows how long this underachieving landlord has benefited from rental income while providing unadequate housing, only to be awarded a compensation when these severe shortcomings have eventually surfaced in order to retain the rental market availability of that dwelling.

127. In short, influences on the effectiveness of the right to housing are ample: top-down and bottom-up, driven by the interest of a landlord and the position of a tenant, and dictated by economic interests. Taking all this into account to actually improve/strengthen the right to

[349] K. D'HAUWERS, "Vijftien jaar Vlaamse Wooncode: standpunt van het AES (algemeen eigenaarssyndicaat)", in B. HUBEAU and T. VANDROMME (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brussel, Die Keure, 2013, 295-300; J. COLAES, "Recente wijzigingen in de Huurwet 2006-2007", *Huur* 2007, (141) 156-157.
[350] Article 18 juncto article 83 Flemish Housing Code.

housing is no easy matter. We will look more technically at how this translates (or not) to the democratic decision making process in a later part of the research. First however, we elaborate on what is considered another important stepping stone of the constitutional right to housing: human dignity.

Chapter 2: Human dignity: a guiding principle for a stronger right to housing?

128. The established gap between effective law and effective realization of a right prompts us not only to look at influences on the progress of the right to adequate housing, but also to consider what it is exactly that we must pursue. That brings us to what many consider the central concept of article 23: human dignity. What role is there for this in essence non-legal concept in the bigger picture of realizing the right to housing? On the one hand we have seen in the introductory part to this research how a special legal status can be attributed to the first paragraph of article 23, endowing it with broader legal effects than the specific rights in the third paragraph. But on the other hand the question arises whether it is recommendable to use a vague[351] and interdisciplinary[352] term like human dignity for the protection of fundamental rights?

129. We will start close to the concept itself. What does it traditionally mean and how has it been used in a legal context? We will see how human rights law and article 23 of the Constitution have given human dignity multiple functions. Next, we look at the added value as well as the deficiencies of the concept and propose what in our opinion are the essential aspects of what we by then call social dignity that should have to be taken into account in the pursuit for a more effective right to housing. It is on the basis of this interpretation that we will then look at a couple of housing related issues (housing security, property vs. tenancy, social housing) and how the concept could be a guiding principle in this context.

[351] At the Hobart-conference in Tasmania (2004) a group of interdisciplinary scientists discussed the concept of human dignity, but did not come to a substantive conclusion beyond some generally accepted platitudes; I. CASIER, A. BAUWENS, W. DISTELMANS and S. SNACKEN, "Over het concept menselijke waardigheid", in K. RAES, W. DEBEUCKELAERE, S. GUTWIRTH and M. LAMBRECHTS (eds.), *Ontmoetingen met Koen Raes*, Brugge, die Keure, 2012, (85) 87.

[352] For an impressive overview of different interpretations of human dignity, see: M. DÜWELL, J. BRAARVIG, R. BRONSWORD and D. MIETH (eds.), *The Cambridge handbook of human dignity. Interdisciplinary perspectives*, Cambridge, Cambridge University Press, 2014.

§ 1. Exploring the content of human dignity and its use in a human rights context

A. History of the concept

130. According to the Oxford English Dictionary, dignity means "the quality of being worthy or honorable". It refers to a person's status, position or rank. This definition still reflects the classical Roman conception of *dignitas hominis*, a notion that was ascribed to those people that possessed a certain title or quality within a hierarchically structured society, a characteristic of great men, those meriting special honor or distinction. [353]

131. This interpretation shows obvious differences with the predominant contemporary philosophical ideas of human dignity. It has obtained an absolute and intrinsic character that belongs to every human being regardless of his or her social position. Some authors believe that the current notion of human dignity is "*the product of a different history that ran parallel to the (classical Roman) origins*" [354], while others argue that the *dignitas* conception has simply transformed into a more egalitarian conception and that the respect and status once reserved only for the chosen few has expanded to humanity in its entirety. [355]

132. It is open for discussion as to where the exact roots of the more modern interpretation of human dignity can be found. One could go all the way back to Cicero, [356] but he does seem to focus more on distinguishing human beings from animals than on acknowledging the

[353] N. JACOBSON, "Dignity and health: a review", *Social Science & Medicine* 2007, vol.62, (292) 293; J. DONNELLY, "Human dignity and human rights", www.udhr60.ch/report/donnelly-HumanDignity_0609.pdf, 2009, 16.

[354] L.R. BARROSO, "Here, there and everywhere: human dignity in contemporary law and in the transnational discourse", *Boston College International & Comparative Law Review* 2012, vol.35, (331) 335; Other authors following this strand of thinking: C. McCRUDDEN, "Human dignity and judicial interpretation of human rights", *EJIL* 2008, vol.19, nr.4, (655) 657; T. IGLESIAS, "Bedrock Truths and the Dignity of the Individual", *Logos* 2001, vol.4, 144; D. BEYLEVELD and R. BROWNSWORD, "Human dignity, human rights and human genetics", *Modern Law Review* 1998, (661) 666-667.

[355] J. WALDRON, "Dignity, rights and responsibilities", *New York University Public Law and Legal Theory Research Paper Series* 2010, Working paper no.10-83, http://lsr.nellco.org/cgi/viewcontent.cgi?article=1318&context=nyu_plltwp, 11-12; E.K. WHITE, "There is no such thing as a right to human dignity: a reply to Conor O'Mahony", *Int'l. J. Const. L.* 2012, vol.10 (2), 575-584; J. DONNELLY, "Human dignity and human rights", www.udhr60.ch/report/donnelly-HumanDignity_0609.pdf, 2009, 84 p.: this interesting article on the roots of human dignity in different cultures seems to suggest that there has indeed been a worldwide transition from a status-based dignity to a more shared dignity over the last couple of centuries.

[356] C. McCRUDDEN, "Human dignity and judicial interpretation of human rights", *EJIL* 2008, vol.19, nr.4, (655) 657.

universal character of the concept. [357] This universality is present in the Judean-Christian notion of dignity, but this traditional conception obviously remains deeply hierarchical (i.e. the relation between God and man). [358] In the Middle Ages, these combined ideas were developed into natural law theory by Christian philosophers such as Thomas Aquinas.[359] By late fifteenth century, Pico della Mirandola in his "*Oration on the Dignity of Man*" recognized dignity as the ability of human beings to choose what they want to be. Although the underlying reason for this free choice was still assigned to God[360], della Mirandola was an important figure in broadening the philosophical scope of human dignity.[361]

133. Nonetheless, a specifically person-based idea of human dignity was only first developed during the Enlightenment. Probably the most prominent contributor to the relevant discussion was Immanuel Kant. He distinguished human beings from material objects and other living creatures by stating that both have a different value: "*A human being regarded as a person (…) is exalted above any price; for as a person he is not to be valued merely as a means to the ends of others or even to his own ends, but as an end in himself.*"[362] Human beings possess an absolute intrinsic and incomparable value by virtue of their shared humanity: dignity. It is a value without any equivalence and thus cannot be traded, substituted or replaced.[363] In his view, human dignity is endowed on every human being because he has the capacity as a rational agent for reason and autonomy.[364] It is inviolable, constant, inalienable, unconditional and equal for all human beings.[365]

[357] J. DONNELLY, "Human dignity and human rights", www.udhr60.ch/report/donnelly-HumanDignity_0609.pdf, 2009, 17.
[358] *Ibid*., 19.
[359] E. GRANT, "Dignity and equality", *HRLR* 2007, vol. 7, no. 2, (299) 304.
[360] R.D. GLENSY, "The right to dignity", *Columbia Human Rights Law Review* 2011, (65) 74-75.
[361] C. McCRUDDEN, "Human dignity and judicial interpretation of human rights", *EJIL* 2008, vol.19, nr.4, (655) 659; J. FIERENS, "La dignité humaine comme concept juridique", *JT* 2002, no. 22, (577) 577-578.
[362] I. KANT, *Groundwork for the Metaphysics of Morals*, as translated by A.W. WOOD, New Haven, Yale University Press, 2002, 434-435.
[363] R.D. GLENSY, "The right to dignity", *Columbia Human Rights Law Review* 2011, (65) 76; A. WOOD, "Human dignity, right and the realm of ends", *Acta Juridica* 2008, (47) 49-52.
[364] M.A. LUTZ, "Centering social economics on human dignity", *Review of Social Economy* 1995, vol.53, nr.2, (171) 173; M. WHITE, "Kantian dignity and social economics", *Forum for Social Economics* 2003, vol.32, issue 2, (1) 2.
[365] A. BARBOSA DA SILVA, "Autonomy, dignity and integrity in health care ethics – a moral philosophical perspective", in H. SINDING AASEN, R. HALVORSEN and A. BARBOSA DA SILVA (eds.), *Human rights, dignity and autonomy in health care and social services: Nordic perspectives*, Antwerp,Intersentia, 2009, (13) 22.

B. Human dignity in a human rights context

1) First function: a foundation for human rights

134. While interpretations might have evolved and changed over time, Kant is still frequently regarded as the father of the modern, universal interpretation of human dignity as an inherent worth equal in all people.[366] This particular aspect of his basic conception of human dignity is also noticeable in the international human rights discourse[367] and particularly provides a significant philosophical underpinning for the Universal Declaration of Human Rights: "*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*".[368] Here it serves as a symbolic and theoretical basis for human rights in the absence of any other grounds for consensus.[369] This relationship is even more clearly described in the preambles of the subsequent International Covenants on Economic, Social and Cultural Rights (ICESCR) on the one hand and on Civil and Political Rights (ICCPR) on the other, "*recognizing that*

[366] O. SCHACHTER, "Human dignity as a normative concept", *The American Journal of International Law* 1983, vol.77, no. 4, 848-854; H.C. KELMAN, "The conditions, criteria and dialectics of human dignity: a transnational perspective", *International Studies Quarterly* 1977, vol.21, nr.3, (529) 531; R.E. HOWARD and J. DONNELLY, "Human dignity, human rights and political regimes", *The American Political Science Review* 1986, vol.80, nr.3, (801) 802; A. BARBOSA DA SILVA, "Autonomy, dignity and integrity in health care ethics – a moral philosophical perspective", in H. SINDING AASEN, R. HALVORSEN and A. BARBOSA DA SILVA (eds.), *Human rights, dignity and autonomy in health care and social services: Nordic perspectives*, Antwerp, Intersentia, 2009, (13) 51. There are of course also authors denying the inherent character of human dignity, e.g.: B. MORRIS, "The dignity of man", *Ethics* 1946, vol. 57, no. 1, (57) 63-64; P. SINGER, *Applied Ethics*, Londen, Oxford University Press, 1986, 264p.; D.J. MATTSON and S.G. CLARK, "Human dignity in concept and practice", *Policy Sciences* 2011, vol.44, (303) 305; N. JACOBSON, "Dignity and health: a review", *Social Science & Medicine* 2007, vol.62, (292) 294: This article is based on 150 texts on human dignity and the many references used in it clearly reflect the sheer amount of authors that rely on Kant.

[367] V.B. MONSALVE and J.A. ROMÁN, "Tensions of human dignity : conceptualization and appplication to international human rights law", *IJHR* 2009, vol. 6, no. 11, (39) 41; G. HAARSCHER, "Le droit de mener une vie conforme à la dignité humaine", in R. ERGEC (ed.), *Les droits économiques, sociaux et culturels dans la Constitution: actes du colloque tenu les 21 et 22 décembre 1994*, Brussel, Bruylant, 1995, (133) 134; S. PAREKH, "Resisting 'dull and torpid' assent : returning to the debate over the foundatoins of human rights", *Human Rights Quarterly 2007*, vol. 29, (763) 763; S.J. KERSTEIN, "Kantian dignity: a critique", in M. DÜWELL, J. BRAARVIG, R. BRONSWORD and D. MIETH (eds.), *The Cambridge handbook of human dignity. Interdisciplinary perspectives*, Cambridge, Cambridge University Press, 2014, (220) 224.

[368] Preamble and art. 1 Universal Declaration of Human Rights; Y. ARIELI, "On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights", in D. KRETZMER and E.KLEIN (eds.), *The Concept of Human Dignity in Human Rights Discourse*, The Hague, Kluwer, 2002, (1) 7; E. GRANT, "Dignity and equality", *HRLR* 2007, vol.7, no. 2, (299) 304-305; J. DONNELLY, "Human dignity and human rights", www.udhr60.ch/report/donnelly-HumanDignity_0609.pdf, 2009, 22; G. HUGHES, "The concept of dignity in the Universal Declaration of Human Rights", *Journal of Religious Ethics* 2011, (1) 3; P.B. CLITEUR and R.G.T. VAN WISSEN, "De menselijke waardigheid als grondslag voor mensenrechten: een beschouwing over het werk van Kant en Schopenhauer in relatie tot de filosofische reflective over mensenrechten", in G.A. VAN DER LIST (ed.), *De Rechten van de Mens*, Den Haag, Teldersstichting, 1998, (25) 32 and 34.

[369] J. MORSINK, *The Universal Declaration of Human Rights. Origins, Drafting and Intent*, Philadelphia, University of Pennsylvania Press, 1999, 39-42; D. SHULTZINER, "Human Dignity – Functions and Meanings", *Global Jurist Topics* 2003, vol.5, (1) 5.

these rights derive from the inherent dignity of the human person".[370] It was repeated along the same lines in the Vienna Declaration made at the World Conference on Human Rights in 1993, which says that "*all human rights derive from the dignity and worth inherent in the human person*".[371]

135. 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 (more commonly known as the 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*, (…)".[372] Consequently, human dignity in this context forms the foundation of both civil and political rights as well as economic, social and cultural rights. In short, Gewirth adequately describes the relationship between human dignity and human rights as follows: "*Human rights are based upon or derivative from human dignity. It is because humans have dignity that they have human rights*".[373]

136. Interestingly, neither the European Convention on Human Rights[374] nor the European Social Charter themselves use (inherent) dignity as the foundation for the fundamental rights they protect.[375] Their (quasi-)judicial bodies on the other hand have made similar statements. The European Committee of Social Rights has for example said that "*human dignity is the fundamental value and indeed the core of positive European human rights law – whether under the ESC or under the European Convention on Human Rights*".[376] In comparison

[370] Preambles to the ICESCR and ICCPR.
[371] Preamble UN General Assembly, World Conference on Human Rights, *Vienna Declaration and Programme of Action*, 25 June 1993, A/CONF 157/23.
[372] Preamble Add. Prot. to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", 17 November 1988.
[373] A. GEWIRTH, "Human Dignity as the Basis of Rights", in M. MEYER and W. PARENT (eds.), *The Constitution of Rights: Human Dignity*, Ithaca, Cornell University Press, 1992, (1) 10.
[374] That is if we only take the Convention itself into consideration. The preamble to Protocol no. 13 to the Convention concerning the abolition of the death penalty does refer to inherent dignity.
[375] J. ZAJADLO, "Human dignity and human rights", in R. HANSKI and M. SUSKI (eds.), *An introduction to the international protection of human rights: a textbook*, Turku, Institute for Human Rights, Abo Akademi University, 1999, (15) 21-22.
[376] ECSR 8 September 2004, no. 14/2003, International Federation of Human Rights Leagues (FIDH)/France, par. 31.

though to for example the UN Covenants, these applications of dignity are already closer to the concept's second function in human rights law.[377]

2) Second function: a value/right to protect and guarantee

137. Human dignity has not been confined to the foundational meaning.[378] A fair amount of constitutions and jurisdictions make reference to an actual right to dignity. Even if not always explicitly worded as such, dignity is described as a value that needs to be legally respected and protected.[379] European human rights jurisprudence is also more familiar with this application of dignity.[380] This conception is however irreconcilable with dignity construed as a value inherent in all human beings or as the foundational principle of all human rights.[381] It "*reverses the more commonly accepted order of things by suggesting that dignity is founded on the enjoyment of human rights rather than that human rights are founded on the inherent dignity of every human being*".[382] Article 23 of the Belgian Constitution shows the same pattern: in order for people to live in human dignity, the enlisted socio-economic rights must be guaranteed.[383] The provision can be considered incompatible with the first function because of the contradictory "*right*" to dignity and the relativity of the statement that "*everyone*" is entitled to a right to human dignity.

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[377] The same can be said about the use of human dignity in the EU Charter of Fundamental Rights (preamble vs. art. 1, 25 and 31).

[378] R. BUITENWEG, *Recht op een menswaardig bestaan. Een humanistieke reflectie op sociaal-economische mensenrechten*, Utrecht, de Graaff, 2001, 96.

[379] As such, it deviates from the Kantion notion of inviolable dignity, independent of the external world, see: M. NUSSBAUM, "Human dignity and political entitlements", in President's Council on Bioethics (ed.), *Human dignity and bioethics: essays commissioned by the President's Council on Bioethics*, Washington, 2008, (351) 355-357, available at https://bioethicsarchive.georgetown.edu/pcbe/reports/human_dignity/chapter14.html.

[380] E.g.: ECtHR 28 September 2015, no. 23380/09, Bouyid/Belgium, par. 90; ECtHR 21 January 2011, no. 30696/09, M.S.S./Belgium and Greece, par. 221, 233 and 253; ECSR 18 October 2006, no. 31/2005, ERRC/ Bulgaria, par. 51 and 56; ECSR 5 December 2007, no. 33/2006, ATD Fourth World/France, par. 163; With regard to the European Court of Justice, see also ECJ 9 October 2001, no. C-377/98, Netherlands/Parliament and Council, par. 70: "*It is for the Court of Justice (...) to ensure that the fundamental right to human dignity and integrity is observed*"; For more information on the use of dignity in European jurisprudence, see: L. BURGORGUE-LARSEN (ed.), *La dignité saisie par les juges en Europe*, Brussel, Bruylant, 2010.

[381] J. DAVIS, "Doing justice to dignity in the criminal law", in J. MALPAS and N. LICKISS (eds.), *Perspectives on human dignity: a conversation*, Dordrecht, Springer, 2007, (169) 177; G. DEN HARTOGH, "Is human dignity the ground of human rights?" in M. DÜWELL, J. BRAARVIG, R. BRONSWORD and D. MIETH (eds.), *The Cambridge handbook of human dignity. Interdisciplinary perspectives*, Cambridge, Cambridge University Press, 2014, (200) 200; M. DÜWELL, "Human dignity: concepts, discussions, philosophical perspectives", in M. DÜWELL et al. (eds.), *The Cambridge handbook of human dignity. Interdisciplinary perspectives*, Cambridge, Cambridge University Press, 2014, (23) 42-43.

[382] C. O'MAHONEY, "There is no such thing as a right to dignity", *Int'l. J. Const. L.* 2012, vol. 10, no. 2, (551) 562.

[383] A. VANDEBURIE, *L'article 23 de la Constitution. Coquille vide ou boîte aux trésors?,* Brussel, La Charte, 2008, 162.

138. A dignity from which human rights arise is universal and therefore creates universal rights. The expression from article 23 that everyone is entitled to dignity on the other hand is not limitless. It first of all falls under Title II of the Belgian Constitution, entitled "Belgians and their rights". With regard to foreigners on Belgian soil, exceptions to this right to dignity can be made as long as they are in conformity with both the equality and the non-discrimination principle.[384] In other words, they have to be based on an objective distinction that is reasonably justified and proportionate with the aim pursued.

139. In this context it is also useful to look at the other social rights related application of human dignity in Belgian law. As we mentioned earlier, article 1 of the Law on the Public Centers for Social Welfare (OCMW-law) proclaims a right to social assistance, which it says aims to enable everyone to lead a life in dignity. The Constitutional Court as well as the Court of Cassation have accepted that this right does not preclude the limitations prescribed in article 57, §2 of that same law.[385] This encompasses that foreigners who unlawfully reside on Belgian territory can be denied their right to social assistance, with the exception of urgent medical assistance, which serves as a *minimum minimorum*.[386] The background to these cases was set just before article 23 came into force, so it is not surprising that no reference to this constitutional provision was made.[387] But how do the restrictions from the OCMW-law stack up against that first paragraph of article 23? Vandeburie stated back in 2008 that the Constitutional Court has since turned a blind eye to the compatibility of these restrictions with the constitutional provision: "*(La Cour) a néanmoins confirmé depuis lors à plusieurs reprises la solution de cet arrêt, sans jamais y voir de contradiction avec le droit qu'à chacun de mener une vie conforme à la dignité humaine, même lorsque la violation de l'article 23 de la Constitution lui était expressément déférée*."[388] We do not agree with this statement. With regard to persons whose regularization procedures are still pending, the Constitutional Court

[384] Constitutional Court 14 July 1994, no. 61/94, *BS* 9 August 1994, B.2 and B.3.
[385] Constitutional Court 29 June 1994, no. 51/94, *BS* 14 July 1994; Court of Cassation 13 November 1995, AR S.95.23, Belgian State/Albayrak and OCMW Verviers, *Arr.Cass.* 1995, 1005; W. RAUWS, "Niet de ver-van-mijn-bed-show: sociale grondrechten en de praktijk", in W. VAN EECKHOUTTE and M. RIGAUX (eds.), *Sociaal recht: niets dan uitdagingen*, Gent, Mys & Breesch, 1995, (793) 824-825.
[386] Constitutional Court 29 June 1994, no. 51/94, *BS* 14 July 1994, B.4.3.
[387] Considering that the applicants made an appeal to the principle of respect for human dignity as portrayed in international human rights law, it could be interpreted as though the Court had already countered this argument: *Ibid*., A.2.4.; H. FUNCK, "Le droit à l'aide sociale dans la Constitution: quelle incidence sur le droit de l'aide sociale", *Rev. dr. commun.* 1996, 281.
[388] A. VANDEBURIE, *L'article 23 de la Constitution. Coquille vide ou boîte aux trésors?*, Brussel, La Charte, 2008, 167.

has made repeatedly clear that article 57, § 2 OCMW-law does not violate article 23.[389] Interestingly, it deviates with this opinion from the Court of Cassation, which has considered it only logical in light of article 23 of the Constitution that these persons would remain entitled to social assistance during the procedure.[390,391] Still, considering the route taken by the Constitutional Court and the undisputed application of article 57, § 2 OCMW-law for those illegally present on Belgian territory, it is safe to say that human dignity has a relative character on which basis one person is entitled to extensive assistance and another only to be kept alive.[392] Consequently, it is irreconcilable with the description of an inherent and universal human dignity given above.[393]

140. An even bigger inconsistency occurs when proclaiming a "right" to human dignity. If dignity is indeed an inherent feature of the human being, a right to dignity just does not make much sense, since it is impossible to lose it or to be denied of it, unlike the human rights norms it has triggered itself. In other words, such a notion is existentially contradictory with a foundational, inherent conception of dignity.[394] O'Mahoney concludes from this conundrum that it would be better "*to confine the use of human dignity as a legal concept to that role* (i.e. as a foundational principle) *and not to additionally recognize a right to dignity or to lead a dignified life*".[395] As we will see in the next paragraph, there are indeed reasons for not using dignity in a rights context. However, since it is exactly this form of dignity that constitutions often use and most legal scholars write about when discussing the subject, we prefer not to neglect it, but rather to speak of a different type of dignity, a social dignity. In contrast to the

[389] Constitutional Court 30 October 2001, no. 131/2001; Constitutional Court 21 December 2004, no. 203/2004, 204/2004 and 205/2004.
[390] Court of Cassation 17 June 2000, *NjW* 2002, 527; Court of Cassation 7 June 2004, *RW* 2004-05, 1058; see also Labour Court Gent 7 November 2002, *RW* 2003-04, no. 17, 664; Labour Court Luik 16 September 1997, *JLMB* 1998, 906.
[391] For more information on the debate between the different courts, see: W. RAUWS, "Het recht op maatschappelijke dienstverlening van illegalen die een regularisatieaanvraag indienden: het Hof van Cassatie versus het Arbitragehof" (note under Labour Court Gent 7 November 2002), *RW* 2003-04, no. 17, 664-669; G. MAES, "Grondwetstoetsing of afweerrecht: art. 23 G.W. en het recht op maatschappelijke dienstverlening voor personen die een regularisatieaanvraag indienden" (note under Court of Cassation 7 June 2004), *RW* 2004-05, no. 27, 1058-1063.
[392] W. PAS and J. VAN NIEUWENHOVE, "Het recht een menswaardig leven te leiden", in ICM (ed.), *Jaarboek Mensenrechten 1994*, Antwerpen, Maklu, 1995, (113) 123.
[393] A. VANDEBURIE, *L'article 23 de la Constitution. Coquille vide ou boîte aux trésors*?, Brussel, La Charte, 2008, 164.
[394] A. GEWIRTH, *Self-fulfillment*, Princeton, Princeton University Press, 1998, 163; L.R. BARROSO, "Here, there and everywhere: human dignity in contemporary law and in the transnational discourse", *Boston College International & Comparative Law Review* 2012, vol. 35, (331) 357; D.J. MATTSON and S.G. CLARK, "Human dignity in concept and practice", *Policy Sciences* 2011, vol.44, (303) 306; C. O'MAHONEY, "There is no such thing as a right to dignity", *Int'l. J. Const. L.* 2012, vol. 10 (2), (551) 562-563.
[395] C. O'MAHONEY, "There is no such thing as a right to dignity", *Int'l. J. Const. L.* 2012, vol. 10 (2), (551) 562.

somewhat transcendent nature of the classical meaning of human dignity, social dignity envisions a right to live a dignified everyday life.[396] We will elaborate further on this concept later in this chapter.

141. In the constitutional tradition, human dignity is at least as popular as a social notion (social dignity) than as a transcendent value. The explicit proclamation of a right to dignity however, as is the case in article 23 of the Belgian Constitution, is rather exceptional. Human dignity is often regarded as something that needs to be respected and protected through the realization of human rights.[397] This does not mean that dignity as an inherent and/or foundational principle has no place left in constitutions and legal orders. The Polish Constitution for example predicates that *"the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens"*[398], while the Canadian Supreme Court has said that "*the dignity of the individual is a fundamental value underlying both the common law and the Charter*"[399]. The South African Constitution dictates that "*everyone has inherent dignity (...)*".[400] However, in illustration of the double meaning of dignity, this sentence continues by declaring that everyone also has "*(...) the right to have their dignity respected and protected*".[401] 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*".[402] In Germany, this dual meaning has triggered a longstanding debate among German scholars on the constitutional status of human dignity[403], while the French Constitutional Council has used human dignity (which does not appear in the French Constitution as such) differently in the

[396] M. LEVINET, "Dignité contre dignité. L'épilogue de l'affaire du 'lancer de nains' devant le Comité des droits de l'homme des Nations Unies", *RTDH* 2003, (1024) 1034.
[397] E.g.: art.1 Charter of Fundamental Rights of the European Union: *"Human dignity is inviolable. It must be respected and protected"*; art. 19 Finnish Constitution; art. 7 Swiss Constitution; art. 3 Italian Constitution; art. 13 Portuguese Constitution.
[398] Art. 30 Polish Constitution.
[399] Supreme Court (Canada) 2 February 1995, no. 23581, R./S. (R.J.), *[1995] 1 S.C.R*, 605; For more on the Canadian perspective on human dignity in light of the equality guarantee, see D. ROBITAILLE, "De gerechtelijke opvatting over armoede in Canada: onveranderlijke maatschappelijke positie of gewoon een kwestie van wil?", in Steunpunt tot Bestrijding van Armoede, Bestaansonzekerheid en Sociale Uitsluiting, *Armoede-Waardigheid-Mensenrechten*, Brussel, 2008, www.armoedebestrijding.be/publications/10jaarsamenwerking/10jaarsamenwerking_rapport_NL.pdf, 95-104.
[400] Section 10 South African Constitution.
[401] Section 10 South African Constitution; E. GRANT, "Dignity and equality", *HRLR* 2007, vol.7, no. 2, (299) 310.
[402] Constitutional Court (South Africa) 7 June 2000, CCT 35/99, Dawood et al./Minister of Home Affairs et al.
[403] C. ENDERS, "A right to have rights – The German Constitutional concept of human dignity", *NUJS Law Review* 2010,(253) 255; C. McCRUDDEN, "Human dignity and judicial interpretation of human rights", *EJIL* 2008, vol.19, no. 4, (655) 681.

first two cases in which it discussed the matter.[404] The same duality is even noticeable in the Belgian context. Regardless of the legislator's socially inspired intentions for the use of dignity[405], scholars still make occasional mention of "inherent dignity"[406] and dignity as the basis for socio-economic rights or even for *all* human rights.[407] It is thus evident that both applications still exist side by side and are used interchangeably by courts of even the same country. Human dignity manages to be both source and purpose of fundamental rights.[408]

C. The added value and pitfalls of using human dignity

142. In the introductory part to this research, we have seen how a special (or at least different) legal status is sometimes endowed upon the first paragraph of article 23.[409] We therefore certainly acknowledge the possible added value of this first paragraph from a legal point of view. The somewhat extraordinary functioning of this paragraph is however not the issue of discussion right now. What we investigate here is what exactly the added value is of human dignity *as a concept* for the realization of the right to adequate housing. What are the consequences when dignity is used as a primary assessment criterion?[410]

1) As an equivalent of decent or adequate housing

143. Although human dignity has obviously 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

[404] Conseil Constitutionnel (France) 27 July 1994, no. 94-343/344 DC, www.legifrance.gouv.fr (classic use of human dignity); Conseil Constitutionnel (France) 19 January 1995, no. 94-359 DC, www.legifrance.gouv.fr (social notion of dignity).
[405] For example, by referring to the use of dignity in the OCMW-law as an indication for its constitutional use.
[406] W. PAS and J. VAN NIEUWENHOVE, "Het recht een menswaardig leven te leiden", in ICM (ed.), *Jaarboek Mensenrechten 1994*, Antwerpen, Maklu, 1995, (113) 123.
[407] M. VERDUSSEN and A. NOËL, "Les droits fondamentaux et la réforme constitutionnelle de 1993", *APT* 1994, (127) 1994; E. BREMS and J. VRIELINK, *Menselijke waardigheid in de Nederlandse Grondwet? Voorstudie ten behoeve van de Staatscommissie Grondwet (2009)*, Alphen aan den Rijn, Kluwer, 2010, 23; K. RIMANQUE, "Algemene situering van de grondrechten in de Belgische rechtsorde", in B. HUBEAU and R. DE LANGE (eds.), *Het grondrecht op wonen. De grondwettelijke erkenning van het recht op huisvesting in Nederland en België*, Antwerpen, Maklu, 1995, (37) 39-40; A. VANDEBURIE, *L'article 23 de la Constitution. Coquille vide ou boîte aux trésors*?, Brussel, La Charte, 2008, 160.
[408] G. MAES, "Twintig jaar sociale grondrechten in de Grondwet", in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, (139) 158-159.
[409] E.g.: Vred. Verviers, 30 June 2000, *Echos log.* 2000, no. 4, 119; N. BERNARD and B. HUBEAU, "Poverty and fundamental social and economic rights: on the effectiveness of the right to decent housing", in D. DIERCKX, N. VAN HERCK and J. VRANKEN (eds.), *Poverty in Belgium*, Antwerpen, Acco, 2010, (195) 203.
[410] M. DÜWELL, "Human dignity: concepts, discussions, philosophical perspectives", in M. DÜWELL, J. BRAARVIG, R. BRONSWORD and D. MIETH (eds.), *The Cambridge handbook of human dignity. Interdisciplinary perspectives*, Cambridge, Cambridge University Press, 2014, (23) 28-30.

vague concept, it is also a relative concept, both culturally and politically, which gives way to a wide variety of interpretations.[411] One can find an illustration of that very problem in the *Omega* judgment by the European Court of Justice. Here, the Court implicitly stated that different perceptions of human dignity could even exist between European jurisdictions.[412]

144. Belgian housing legislation remains tacit about the exact meaning of dignity too. Within the framework of the Belgian right to housing, the concept has been further elaborated on scarcely in regional legislation. Article 3 of the Flemish Housing Code and article 2 of the Walloon Housing Code provide certain aspects that are regarded as an essential part of the right to housing in conformity with human dignity, such as "good quality" and "affordable price". Although one could argue that such descriptions merely shift the interpretative dilemma from human dignity to other notions, they are less vague, rooted more firmly in everyday life and are thus easier for a judge to apply. Of course, one could then pose the question what the added value is of using such a heavily loaded term like human dignity, if it is used merely as a synonym for - in this case - decent housing? At least that is what is suggested by this legislation.

145. In the constitutional context, some early proposals for article 23 seem to indicate the same reciprocity. These proposals did not yet contain the general right to a life in dignity, as is now incorporated in the first paragraph. They did however link human dignity directly to the specific rights. Consequently, one of them proclaimed *inter alia* a right to dignified housing ("menswaardig wonen"). Remarkably however, the French version made use of the less exalted "*logement décent*".[413] Based on these considerations, it is very difficult to argue that in this context, human dignity amounts to anything more than a collective noun for the different aspects of decent housing[414]. When interpreted in this way, we argue that there is

[411] W. BRUGGER, "Human rights norms in ethical perspective", *German Yearbook of International Law* 1982 vol. 25, (113) 132; R.E. HOWARD and J. DONNELLY, "Human dignity, human rights and political regimes", *The American Political Science Review* 1986, vol. 80, no. 3, (801) 801-802; H.C. KELMAN, "The conditions, criteria and dialectics of human dignity: a transnational perspective", *International Studies Quarterly* 1977, vol.21, no.3, (529) 544; J. FIERENS, "La dignité humaine comme concept juridique", *JT* 2002, no. 22, (577) 581. M.Y.K. LEE, "Universal Human Dignity: some reflections in the Asian Context", *Asian Journal of Comparative Law* 2008, vol. 3, no. 1, (1) 30.

[412] ECJ 14 October 2004, no. C-36/02, Omega.

[413] W. PAS and J. VAN NIEUWENHOVE, "Het recht een menswaardig leven te leiden", in ICM (ed.), *Jaarboek Mensenrechten 1994*, Antwerpen, Maklu, 1995, (113) 115.

[414] Peace Court Grâce-Hollogne 24 March 2000, *Echos log.* 2000, 62; Peace Court Grâce-Hollogne 10 October 2000, *Echos log*. 2001, 14; Kort Ged. Rb. Charleroi 19 January 2000, *TBBR* 2000, 590, note J. FIERENS; Peace Court Grâce-Hollogne 11 July 2000, *Echos log.* 2000, 123; Vred. Neerpelt 14 August 2007, *T.Vred.* 2008, no. 3-4, 190; This interpretation of dignity has also been used regarding different rights in article 23, see e.g.: Labour

little to no relevance for the use of dignity instead of the material requirements for adequate housing.

2) As an open-ended norm for courts and other institutions

a. A thriving force for other rights

146. Despite the fact that Belgian legislation does seem to equate human dignity with the more specific socio-economic rights at first sight, one could defend that the concept of human dignity still holds an extra significance, an additional value.[415] The combination of both the considerable philosophical weight as well the vagueness of a concept like human dignity enables judges, in theory at least, to use it as a basis for developing new rights and thus for the expansion of the non-exhaustive list of socio-economic rights mentioned in the third paragraph of article 23.

147. Human dignity thus certainly has the ability to lend itself to interpretations beyond the basic content of already existing rights. It can be used as a catalyst for other rights. In the introductory part to the research, we have already seen how courts have judged that shutting down the energy and water supply constitutes a violation of one's (right to) human dignity.[416] As Fierens points out, human dignity can be "*un instrument à la disposition de juge lui permettant d'écarter le jeu habituel des règles au nom d'un principe supérieur*".[417] In these cases however, it is highly questionable whether this decision really needed the input of dignity, given the fact that water and energy supply are already mentioned as quality criteria in both the Flemish[418] and the Walloon Housing Code[419] and the judges could have just as easily concluded on a violation of the right to decent housing in particular. This brings us back to the argument against the extended application of dignity when used as an equivalent of decent housing.

Court of Appeal Luik (department Namen) (13th Chamber) 7 June 2011, no. 2010/AN/219, *Soc.Kron*. 2012, no. 8, 420; Court of Appeal Brussel (8th Chamber) 10 June 2003, no. 2003/KR/44, *RABG* 2004, no. 2, 63, note T. DE GENDT.

[415] G. HUGHES, "The concept of dignity in the Universal Declaration of Human Rights", *Journal of Religious Ethics* 2011, (1) 7-8.

[416] Kort Ged. Rb. Charleroi 19 January 2000, *TBBR* 2000, 590, note J. FIERENS; Vred. Moeskroen 24 May 2004, *TBBR* 2008, no. 5, 273, note A. VANDEBURIE; Court of Appeal Brussel 24 December 1992, *Iuvis* 1994, 203, note P. BOUWENS; Vred. Fontaine-l'Evêque 15 October 2009; J. FIERENS, "Vers un droit à l'eau effectif?" (note under Vred. Fontaine-l'Evêque 15 October 2009), *T.Vred.* 2012, 306-316.

[417] J. FIERENS, La dignité humaine, limite à l'application de l'exception d'inexécution, *TBBR* 2000, (594) 598.

[418] Art. 5 Flemish Housing Code.

[419] Art. 3 Walloon Housing Code.

b. The other side of the coin: a race to the bottom?

148. The previous paragraph showed us that a large margin of interpretation can lead to a broad interpretation. Evidently, the opposite is also very much a possibility. The judiciary can apply the concept as a restriction on restrictions on the rights set out in the third paragraph of article 23. To put it more simply, courts sometimes use dignity as a limit to possible constraints on fundamental rights imposed by legislative measures.[420] 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.[421] Considering the open character of this concept however, when human dignity is applied as an ultimate limit to these restrictions, courts may draw up a concept that might be narrower than the fundamental rights it was set out to represent. With a vague and malleable concept like human dignity, this appears to be possible. Consequently, dignity runs the risk of being severely limited, while it was intended as the ultimate goal for realizing these fundamental rights.[422] This use could potentially lower its aspirations to that of a *minimum minimorum*.

149. These observations are not only relevant to the judiciary. Another significant actor in the everyday interpretation of human dignity is the OCMW. When an individual applies for public assistance, this municipal public institution will have to investigate on a case-to-case basis whether this assistance is necessary to live a life in dignity in accordance with article 1 of the 1976 OCMW-law cited above.[423] Since this provision has been an important source for the constitutional incorporation of dignity, it is indispensable to also look at the concept in this context.[424]

150. Even though all OCMWs share this same legal basis, they are free to pursue their own policies and to interpret human dignity in their own way. Since we are already dealing with a very vague concept, there is only agreement on some general conditions such as being able to

[420] E.g.: Constitutional Court 20 October 2004, no. 160/2004.
[421] E.g.: Constitutional Court 10 July 2008, no. 101/2008, B.33.2.
[422] E. BREMS and J. VRIELINK, *Menselijke waardigheid in de Nederlandse Grondwet? Voorstudie ten behoeve van de Staatscommissie Grondwet (2009),* Alphen aan den Rijn, Kluwer, 2010, 34.
[423] W. RAUWS, "Niet de ver-van-mijn-bed-show: sociale grondrechten en de praktijk", in W. VAN EECKHOUTTE and M. RIGAUX (eds.), *Sociaal recht: niets dan uitdagingen*, Gent, Mys & Breesch, 1996, (793) 798; In contrast to art. 23 of the Constitution, art. 1 of the OCMW-law grants the person in question a subjective right.
[424] Explanatory Memorandum of the proposal by Mr. Taminiaux and Mr. Lallemand, *Parl.St.* Senaat BZ 1991-92, no. 100-2/2°, 1-2; Report submitted by Mr. Hostekint concerning the proposal to revise Title II of the Constitution, by incorporation of an article 24bis on the economic and social rights, *Parl.St.* Kamer BZ 1991-92, no. 218/3, 23: It was articulated that human dignity should be given the same meaning as in the Law concerning the Public Centers for Social Welfare.

feed oneself, having a place to stay or having access to healthcare. In 2006, one out of four OCMWs did not even have a standardized set of formal or informal norms for the assessment of financial support.[425] This autonomy has thus 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.[426] It has been documented repeatedly that such differences also even occur within the same OCMW.[427] In its book for starting OCMW council members (2013), 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* (translated)."[428] 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?[429] Although working towards more harmonization and standardization is certainly recommendable, 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".[430]

[425] N. VAN MECHELEN and. K. BOGAERTS, *Aanvullende steun in Vlaamse OCMW's*, Antwerpen, Centrum voor Sociaal Beleid, 2008.
[426] D. CUYPERS and B. DE VOS, "De menselijke waardigheid en de arbeidsgerechten", *TSR* 1999, (495) 535.
[427] K. BEYNS, S. BRUYNDONCKX, E. SCHILDERMANS, V. VAN BEURDEN, F. VAN BRAECKEL and E. VAN DEUN, *Menswaardig leven. Een onderzoek binnen de Kempense OCMW's*, Geel, Katholieke Hogeschool Kempen, 2008; B. STORMS, N. PEETERS, I. CORNELIS, J.-F. REYNAERT, P. THIJS and L. NISEN, "Ook getest op mensen. Referentiebudgetten als maatstaf voor de doeltreffendheid van de sociale bescherming", in L. WILLY, P. ISABELLE, J. VRANKEN and R. VAN ROSSEM (eds.), *Armoede en Sociale Uitsluiting. Jaarboek 2013*, Leuven, Acco, 2013, 267-287; J. VRANKEN, "Het OCMW: dertig jaren op weg naar een recht op maatschappelijke dienstverlening", in J. VRANKEN, K. DE BOYSER and D. DIERCKX (eds.), *Armoede en Sociale Uitsluiting. Jaarboek 2005*, Leuven, Acco, 2006, (151) 159; Steunpunt tot bestrijding van armoede, bestaansonzekerheid en sociale uitsluiting, *Recht op maatschappelijke dienstverlening: 10 jaar na het algemeen verslag over de armoede*, 2005, www.armoedebestrijding.be/publications/AVA10jaar/MaatschappelijkeDienstverleningNl.pdf, 6-7
[428] Agentschap Binnenlands Bestuur, *Startersboek OCMW-raadsleden*, 2013, https://issuu.com/vlaanderen-be/docs/ecb3f844-a822-4f84-838b-2ce711a87544, 13.
[429] J. VRANKEN, "Het OCMW: dertig jaren op weg naar een recht op maatschappelijke dienstverlening", in J. VRANKEN, K. DE BOYSER and D. DIERCKX (eds.), *Armoede en Sociale Uitsluiting. Jaarboek 2005*, Leuven, Acco, 2006, (151) 160.
[430] Steunpunt tot bestrijding van armoede, bestaansonzekerheid en sociale uitsluiting, *Recht op maatschappelijke dienstverlening: 10 jaar na het algemeen verslag over de armoede*, 2005, www.armoedebestrijding.be/publications/AVA10jaar/MaatschappelijkeDienstverleningNl.pdf, 7.

c. Subjective vs. objective dignity

151. For some authors, the role of the courts is too prominent in interpreting dignity. Although one could argue that the use of open legal norms is inevitable to accommodate evolutions in society, they question the monopolistic position that judges acquire in this debate and the broad judicial freedom of interpretation on the matter.[431] More precisely, they warn for what is called a "*gouvernement des juges*".[432] Lee goes as far as saying that "*(dignity's) lack of precision often leads judges to introduce their own moral standards amid competing claims of rights each of which has a plausible case of human dignity violation.*"[433] The most cited and criticized (but by no means only[434]) case in that regard is the *Wackenheim* case. Manuel Wackenheim suffered from human growth hormone deficiency. He participated in a rather bizarre form of public entertainment: a dwarf tossing competition. Authorities decided to ban the competition on the basis of human dignity and the consequential violation of public order. Although he consented to the whole ritual and claimed to be happy on both a professional (gathered an monthly income of 20.000 FF) as well as a personal level (he had friends and ambitions for the first time in his life), both the French Conseil d'État[435] as well as the UN Human Rights Committee[436] sided against Wackenheim.

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[431] M. MAHLMANN, "The Basic Law at 60 – Human Dignity and the Culture of Republicanism", *German Law Journa*l 2010, vol.11, no.1, (9) 11; R.D. GLENSY, "The right to dignity", *Columbia Human Rights Law Review* 2011, (65) 76; A. WOOD, "Human dignity, right and the realm of ends", *Acta Juridica* 2008, (47) 138.

[432] S. HENNETTE-VAUCHEZ, "When ambivalent principles prevail. Leads for explaining Western legal orders' infatuation with the human dignity principle", *EUI Working Papers Law* 2007, http://cadmus.eui.eu/bitstream/handle/1814/7664/LAW-2007-37.pdf?sequence=1, 18p. ; P. MARTENS, "Encore la dignité humaine: réflexions d'un juge sur la promotion par les juges d'une norme suspecte", in X. (ed.), *Les Droits de l'homme au seuil du troisième millénaire : mélanges en hommage à Pierre Lambert*, Brussel, Bruylant, 2000, (561) 568 : "*Le juge puise dans le mystère d'une notion métaphysique et éthique pour y trouver l'instrument de son jugement. Il ne se réfère plus à la loi, ni même à la Constitution puisque le principe sur lequel il se fonde est pré-juridique ou supraconstitutionel. (…) La notion est si vague, son contenu si indécelable qu'en l'inscrivant dans un texte normatif, le constituant donne une véritable délégation constitutionelle au juge*".

[433] M.Y.K. LEE, "Universal Human Dignity: some reflections in the Asian Context", *Asian Journal of Comparative Law* 2008, vol. 3, no. 1, 1-33.

[434] This is not the only case where the individually perceived dignity of a person is overruled by a different interpretation of dignity by the court, e.g.: Court of Appeal Antwerp 30 September 1997, *RW* 1997-98, 749-750 (case of the SM-judge); ECtHR 29 April 2002, no. 2346/02, Pretty/UK, par. 53 and 65; Constitutional Court (Germany) 15 December 1981, no. C232.79, BVerfGE 64, 274 (Peep-show case): the Court found that a striptease performed by a woman in some sort of cage who gradually becomes more visible when the audience pays more, violated human dignity; Administrative Court of Appeal (France) 9 June 1998, no. 95PA03104, www.legifrance.gouv.fr (Senanayake case): Although a Jehovah's witness declined a blood transfusion on the basis of human dignity, the doctors still operated this procedure when this person's health aggravated, upon which the Court decided that human dignity is not synonymous with autonomous freedom and the doctor's obligation to save lives therefore took precedence over the will of the patient.

[435] Conseil d'État (France) 27 October 1995, no. 136727, www.legifrance.gouv.fr, concl. Frydman.

[436] UN Human Rights Committee, *Manuel Wackenheim v. France*, 15 July 2002, no. 854/1999, UN Doc. CCPR/C/75/D/854/1999.

152. We are thus presented with two different views on human dignity, two subcategories which we will call subjective and objective dignity respectively. While subjective dignity encompasses what we as individuals regard as pertaining to our personal human dignity, objective dignity is more of a perceived dignity, of what society beholds as human dignity.[437] A highly individual interpretation today may become a prevailing thought or principle in the future and become part of the "objective dignity".[438,439] Nevertheless, objective dignity raises two serious questions.

153. First, we might argue about how objective this dignity can be (in the hands of a judge)?[440] What is the basis for a judge to be able to determine what is good for someone and other people alike?[441] Do these questions go too far in that they actually criticize the core task of the judiciary itself? After all, law applies quite a lot of other open notions: public order, democratic society, reasonableness, good manners, etc.[442] There is nonetheless a certain tension between both subcategories of subjective and objective dignity. In the socio-economic field, this tension is eminently at stake in the *Gosselin* decision by the Canadian Supreme Court.[443] In this case, a complaint was lodged against the Quebec government which provided those who were single, unemployed and under the age of 30 with only 170 Canadian dollars per month in social assistance (only 1/3 of the regular benefits). This could only augment through participation in employability programs. A small majority of the Supreme Court did not find a violation of the "equality rights" of section 15 of the Canadian Charter of Rights and Freedoms. They held that human dignity was not violated by these regulations because a reasonable person would have perceived the government's positive motives, namely to promote long-term employability of young people. In her dissenting opinion, Justice L'Heureux-Dubé claims that instead of focusing on the actual experiences of the applicant (i.e. subjective dignity), the majority focuses on the introduction of an objective element (i.e.

[437] J. FIERENS, "La dignité humaine comme concept juridique", *JT* 2002, no. 22, (577) 580.
[438] In our opinion, Julia Davis aptly refers to human dignity in the context of the Wackenheim case as morally important, but factually imprecise: J. DAVIS, "Doing justice to dignity in the criminal law", in J. MALPAS and N. LICKISS (eds.), *Perspectives on human dignity: a conversation*, Dordrecht, Springer, 2007, (169) 177-178.
[439] In this light, the evolution of the debate on euthanasia comes to mind.
[440] Let alone the cultural relevance of a concept like dignity, for more on this subject see J. DONNELLY, "Human rights and human dignity: an analytic critique of non-western conceptions of human rights", *The American Political Science Review* 1982, vol.76, no.2, 303-316.
[441] P. CAROZZA, "Human dignity and judicial interpretation of human rights: a reply", *EJIL* 2008, vol.19, no.5, (931) 944; C. McCRUDDEN, "Human dignity and judicial interpretation of human rights", *EJIL* 2008, vol.19, no.4, (655) 705-707.
[442] J. FIERENS, "Existe-t-il un principe général du droit du respect de la dignité humaine" (note under Court of Cassation 18 November 2013), *RCJB* 2015, no. 4, (358) 376.
[443] Supreme Court (Canada) 19 December 2002, no. 27418, Gosselin/Quebec (Attorney General), *[2002] 4 S.C.R. 429.*

objective dignity), a "reasonable person", which turns out to be no more than the government's own perception of its policy aims.[444] In contrast, L'Heureux-Dubé considers the possible physical and psychological threats of such a legislative scheme for individuals and concludes that they could indeed perceive that their dignity had been threatened.[445]

154. The second, more general question concerns the relationship between objective dignity (or what it is perceived to be) and the individual's own sense of dignity. Some authors advocate a more subjective approach, stating that "*human dignity seems constantly oriented to enhancing the dominant values of the community regardless of the individual's choices*"[446], while it is in fact this subjective experience that forms the focal point of dignity.[447] When applied to *Wackenheim*, this means that no imperatives should have to be imposed on this person's free choice to be part of a dwarf tossing competition, certainly given the fact that this does not affect any other individual's free will.[448] But does this also imply that a measure that obliges homeless people, who clearly live in conditions contrary to "objective human dignity", to accept help and temporary shelter, is contrary to human dignity when this goes straight against their own wishes?[449] This criticism on the judicial interpretation of human dignity is often based on the argument of autonomy. As Feldman says, "*this paternalistic approach (by the judiciary) is allied to a form of legal moralism which treats autonomy as an aspect of human dignity but one which can be overridden by reference to the need to maintain respect for the dignity of whole human societies and the human race. (…) Human dignity becomes a ground for interfering with human autonomy.*"[450] A fierce defender of autonomy in the context of dignity is Kant himself. According to him, dignity and autonomy are of a complementary nature. When a person's autonomy is restricted, his dignity will be violated

[444] S. FREDMAN, "Providing Equality: Substantive Equality and the Positive Duty to Provide", *S. Afr. J. on Hum. Rts.* 2005, vol.21, (163) 177.
[445] G. BRODSKY : "Gosselin v. Quebec (Attorney General) : Autonomy with a Vengeance", *Canadian Journal of Women and the Law* 2004, vol.15, 194-213; S. LIEBENBERG, "The value of human dignity in interpreting socio-economic rights", *S. Afr. J. on Hum. Rts.* 2005, vol.21, (1) 18-20.
[446] M.R. MARELLA, "A New Perspective on Human Dignity : European Contract Law, Social Dignity and the Retreat of the Welfare State", in S. GRUNDMANN (ed.), *Constitutional Values and European Contract Law*, The Netherlands, Kluwer, 2008, (123) 130
[447] D.J. MATTSON and S.G. CLARK, "Human dignity in concept and practice", *Policy Sciences* 2011, vol.44, (303) 309.
[448] C. ENDERS, "A right to have rights – The German Constitutional concept of human dignity", *NUJS Law Review* 2010, (253) 261.
[449] This is not a mere hypothetical situation. In the winter of 2010 for example, such an emergency ordinance was promulgated by the major of Amsterdam.
[450] D. FELDMAN, "Human Dignity as a Legal Value: part 1", *Pub. L.* 1999, (682) 702.

and vice versa.[451] Consequently, the majority of Kant scholars believes that his concept of human dignity justifies the enforcement of only negative rights[452], rights not to interfere with one's life. Although we concur that autonomy is indeed an important aspect of dignity, we oppose such a one-sided notion of the concept and give a much broader interpretation to what social dignity is.

§ 2. Social dignity

155. In the previous paragraphs we have seen how, in the context of the right to housing, the concept of human dignity tends to merge with the idea of decent housing and how its open-endedness has the potential to establish a very restrictive interpretation. Since it raises more questions than it solves and thereby creates a certain level of preventable legal insecurity, we argue that its conceptual added value as a dispute settlement or administrative criterion is at the very least questionable. At the same time we cannot deny how dignity takes up centre stage and performs an important role in the constitutional right to housing. Described as the purpose of article 23, it is only logical for the purposes of law and policy making that we elaborate on the meaning of such a right to social dignity.

156. We have explained earlier that we use the term social dignity instead of human dignity because it serves as a way to distinguish the use of the concept as a protect-worthy value or right from its application as an inherent characteristic of all human beings validating the protection of human rights. We should clarify first however that our choice for the word social as used here in social dignity should neither be understood as the exact opposite of a personal or individually perceived dignity, nor as a concept that is engaged only in socio-economic rights (which thereby consolidates or emphasizes the classical dichotomy of human rights). Rather, it should be interpreted *sensu lato*, as being able to develop as a full member of society. As such, the word social acquires a relational value.[453] While a vital feature, dignity is not just a question of legal or material conditions. As interconnected beings, our

[451] J. RABKIN, "What can we learn about human dignity from international law", *Harvard Journal of Law & Public Policy* 2003, vol.27, no.1, 145-168; A. BARBOSA DA SILVA, "Autonomy, dignity and integrity in health care ethics – a moral philosophical perspective", in H. SINDING AASEN, R. HALVORSEN and A. BARBOSA DA SILVA (eds.), *Human rights, dignity and autonomy in health care and social services: Nordic perspectives*, Antwerp, Intersentia, 2009, (13) 24; J. RAZ, *The authority of law*, Oxford, Clarendon Press, 1979, 221.
[452] M. WHITE, "Kantian dignity and social economics*", Forum for Social Economics* 2003, vol.32, no. 2, (1) 6.
[453] S. LIEBENBERG, "The value of human dignity in interpreting socio-economic rights", in A.J. VAN DER WALT (ed.), *Theories of social and economic justice*, Stellenbosch, Sun Press, 2005, (141) 149-152.

sense of self-worth, autonomy and freedom is also impacted by the perception of others and society at large. In that connection, it is important just as well to constitute positive relationships in which people can empower themselves as they wish to.

A. Conceptualisation in the context of social justice

1) Autonomy and well-being

157. Based on how dignity is incorporated as the aim of the right to housing, our broad interpretation concerns more than only a minimum standard or as sometimes proclaimed a minimum core, more than just a socio-economic safety net.[454] It takes into account the legal-philosophical concerns and underpinnings that have for example also formed the basis for the distinction between objective versus subjective dignity. In more concrete terms, social dignity encompasses both well-being as well as autonomy and freedom.[455] We consider the latter features to both precede and follow from the former. It pertains to the autonomy to achieve well-being or what one wishes to attain in general and the freedom one acquires as a consequence of that well-being at the same time. When combined a right to social dignity can be said to entail a right to personal development, to be able to fully participate in society. Somewhat paradoxically, such a right to development is actually already explicitly included amongst the other fundamental rights of the third paragraph of article 23.[456] But rather than a right in and of itself, the right to social dignity in the first paragraph makes it a necessary inherent feature of the right to housing as well. Social dignity thus goes beyond basic means of subsistence and satisfactory material conditions, even though it is still a major component of it. It includes, to quote Marella, "*a set of conditions that make a person a fully participating member of society*".[457]

[454] G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerpen, Intersentia, 2003, 409-411, 414 and 451.
[455] K. RAES, *Controversiële rechtsfiguren. Rechtsfilosofische excursies over de relaties tussen ethiek en recht*, Gent, Academia Press, 2001, 340; A. GEWIRTH, *Reason and morality*, Chicago, University of Chicago Press, 1978, 52-62 and 210-248: Alan Gewirth refers to these two aspects as necessary goods for agency (i.e. voluntary and purposeful human action), from which he derives human dignity, see: M. PETRUSEK, "Human capacities and the problem of universally equal dignity: two philosophical test cases and a theistic response", *Journal of Moral Theology* 2016, vol. 5, no. 1, (37) 43-45.
[456] B. HUBEAU, "De sociale grondrechten na een decennium: hefboom of toekomstdroom in de uitsluiting van sociale uitsluiting", in J. VRANKEN, K. DE BOYSER and D. DIERCKX (eds.), *Armoede en sociale uitsluiting. Jaarboek 2003*, Leuven, Acco, 2004, (369) 374.
[457] M.R. MARELLA, "A New Perspective on Human Dignity: European Contract Law, Social Dignity and the Retreat of the Welfare State", in S. GRUNDMANN (ed.), *Constitutional Values and European Contract Law*, The Netherlands, Kluwer, 2008, (123) 126 and 133.

158. The aspects of well-being/social welfare and autonomy/freedom are traditionally linked with respectively socio-economic rights on the one hand and civil and political rights on the other.[458] Yet, freedom is definitely not a monopoly of civil and political rights. Academic literature has repeatedly mentioned that without a certain amount of material needs, unfortunate people will *de facto* also be deprived of their individual freedom and autonomy.[459, 460] Similarly, the South African Constitutional Court stated in its famous *Grootboom* decision that "*there can be no doubt that human dignity, freedom and equality (…), are denied (to) those who have no food, clothing or shelter*".[461] Former President of the United States Franklin D. Roosevelt argued back in 1941 in the same strand that "*true individual freedom cannot exist without economic security and independence. Necessitous men are not free men*".[462] Consequently, both socio-economic well-being as well as autonomy are not only indispensable for social dignity, they are also interdependent concepts.[463] And considering that socio-economic rights pursue socio-economic well-being, these rights are necessary just as well to enable everyone to obtain the autonomy envisioned and pursue their conception of a good life.[464]

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[458] T.H. MARSHALL, *Class, citizenship and social development*, Chicago, University of Chicago Press, 1977, 78-79.

[459] H. SHUE, *Basic rights*, Princeton, Princeton University Press, 1980, 23-26; H.C. KELMAN, "The conditions, criteria and dialectics of human dignity: a transnational perspective", *International Studies Quarterly* 1977, vol. 21, no. 3, (529) 533-535; M.A. LUTZ, "Centering social economics on human dignity", *Review of Social Economy* 1995, vol. 53, no. 2, (171) 188; B.A. ANDREASSEN, A.G. SMITH and H. STOKKE, "Compliance with economic and social human rights: realistic evaluations and monitoring in the light of immediate obligations", in A. EIDE and B. HAGTVET (eds.), *Human Rights in Perspective: a Global Assessment*, Oxford, Oxford University Press 1992, (252) 260; J. WALDRON, "Homelessness and the issue of freedom", *UCLA Law Review* 1991, vol. 39, (295) 316; J. RAWLS, *A theory of justice*, Cambridge, Harvard University Press, 1971, 62 and 92; R. BUITENWEG, *Recht op een menswaardig bestaan. Een humanistieke reflectie op sociaal-economische mensenrechten*, Utrecht, de Graaff, 2001, 102; P. KING, "Housing as a freedom right", *Housing Studies* 2003, vol. 18, no. 5, 661-672; J. RAZ, *The morality of freedom*, Oxford, Clarendon Press, 1986, 155.

[460] With regard to housing in particular, it has been said that an acceptable standard is a necessary condition of full membership of society, see: T.H. MARSHALL, "Citizenship and social class", in T.H. MARSHALL (ed.), *Class, citizenship and social development*, Westport, Green Press, 1964, 70; D. MILLER, "Democracy and social justice", *British Journal of Political Science* 1978, vol. 8 1-19.

[461] Constitutional Court (South Africa) 4 October 2000, CCT 11/00, Government of the Republic of South Africa et al./Grootboom et al., par. 23.

[462] F.D. ROOSEVELT, *The four freedoms*, speech delivered on January 6, 1941; A. EIDE, "Economic, social and cultural rights as human rights", in A. EIDE, C. KRAUSE and A. ROSAS (eds.), *Economic, social and cultural rights*, Dordrecht, Martinus Nijhoff Publishers, 2001, (9) 15; C. ALBISA and J. SCHULTZ, "The United States", in M. LANGFORD (ed.), *Social rights jurisprudence. Emerging trends in international and comparative law*, Cambridge, Cambridge University Press, 2009, 232.

[463] C. FABRE, *Social rights under the Constitution: government and the decent life*, Oxford, Oxford University Press, 2000, 13 and 18-19.

[464] F.M.C. VLEMMINX and H.R.B.M. KUMMELING, "Algemene situering van de sociale grondrechten in de Nederlandse rechtsorde", in B. HUBEAU and R. DE LANGE (eds.), *Het Grondrecht op wonen. De grondwettelijke erkenning van het recht op huisvesting in Nederland en België*, Antwerpen, Maklu, 1995, (13) 15-16; K. RAES, *Controversiële rechtsfiguren. Rechtsfilosofische excursies over de relaties tussen ethiek en recht*, Gent, Academia Press, 2001, 344-345.

159. In the end, both generations of human rights play their part to achieve that goal. Effective socio-economic rights will help to create the conditions to be able to fully exercise the classic fundamental rights[465], while the intensity of socio-economic needs do not diminish the urgency to realise civil and political freedoms either.[466] Against that background it is regrettable that the Belgian Constitution approaches social dignity exclusively from the socio-economic viewpoint.[467] The Commission of Professors, appointed to assist the Federal Government to elaborate on a coordinated version of the Constitution back in 1992, had nonetheless suggested to place 'human dignity' at the very beginning of Title II of the Constitution ("Belgians and their rights").[468] The commission 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*" (translated). In the context of the given interpretation on social dignity, this different layout would have made more sense. It encompasses the need for both types of fundamental rights to fully realize one's capabilities.[469]

160. Some have interpreted the freedom that stems from socio-economic rights as positive freedom and have drawn a distinction with the abstinence of governmental interference that characterizes negative freedom.[470] Others have phrased it differently and have distinguished liberty from the worth of liberty. In that interpretation, socio-economic rights are only geared towards increasing the worth of liberty offered by the classic fundamental rights in the first place.[471] In essence, both distinctions depart from the idea that the first and second generation

[465] N. CHANDHOKE, "Thinking through social and economic rights", in D.A. BELL and J.-M. COICAUD (eds.), *Ethics in action: the ethical challenges of international human rights nongovernmental organizations*, Cambridge, Cambridge University Press, 2007, (181) 193-194; H.J.L.M. VAN DE LUYTGAARDEN, "Sociale grondrechten "gerenoveerd": het rechtskarakter van sociale grondrechten vanuit juridiseringsperspectief", in A.R.J. GROOT and H.J.L.M. VAN DE LUYTGAARDEN (eds.), *Zonder meer recht*, Zwolle, Tjeenk Willink, 1993, (149) 171-172; J. WALDRON, *Liberal rights*, Cambridge, Cambridge University Press 1993, 276.

[466] T.H. MARSHALL, "Citizenship and social class", in T.H. MARSHALL and T. BOTTOMORE (eds.), *Citizenship and social class*, London, Pluto, 1992, 7; A. SEN, *Vrijheid is vooruitgang*, Amsterdam, Contact, 2000, 144-156; K. RAES and G. COENE, "Sociale grondrechten als voorwaarden voor een gelijke handelingsvrijheid", *Welzijnsgids* 2009, no. 72, (25) 46.

[467] A. VANDEBURIE, *L'article 23 de la Constitution. Coquille vide ou boîte aux trésors?*, Brussel, La Charte, 2008, 154-156 ; Constitutional Court 26 April 2007, no. 66/2007, B.10.3.

[468] *Parl.St.* Kamer, 1992-93, no. 1092/1; *Parl.st.* Senaat, BZ 1991-92, no. 100-46/5°.

[469] K. RIMANQUE, "Synthese: de betekenis van de sociale grondrechten", in ICM (ed.), *Jaarboek Mensenrechten 1994*, Antwerpen, Maklu, 1995, (179) 181.

[470] I. BERLIN, *Four essays on liberty*, Oxford, Oxford University Press, 1964; R.P. VAN EXTER, *Het internationale aspect der grondrechten*, Vlaardingen, Drukkerij Van Dooren, 1955, 32, 37-38 and 41-44.

[471] J. RAWLS, *A theory of justice*, Cambridge, Harvard University Press, 1971, 204-205; G.M. VAN ASPEREN, *Het bedachte leven*, Amsterdam, Boom Uitgevers, 1993, 111; see also J. WALDRON, "Socioeconomic rights and theories of justice", *Public Law Research Paper no. 10-79*, 2010, 19.

of human rights establish freedom respectively in a direct and indirect manner, which once again emphasizes the gap between both types of fundamental rights. Moreover, it takes away from the fact that in our interpretation well-being remains a full-fledged aspect of social dignity in its own right. We do not interpret it as *only* a condition for autonomy.[472] We concur with Fabre in that it is not the only justification for socio-economic rights and that we should not fail to account for legislation and policies aimed primarily at simply establishing socio-economic security.[473] Providing housing to the homeless is for example not just prompted by the idea that without a home, they will not be able to enjoy freedom to its full extent. It also simply protects them from suffering. As a consequence, even though well-being is an important factor in enabling freedom, we consider it an independent aspect of social dignity just as well.

161. Translated to housing legislation and policies, this means that not each and every measure taken must be primarily occupied by creating more autonomy. But, given the central place of dignity in article 23 of the Belgian Constitution, it does of course mean that the idea of freedom and personal development should be generally present throughout the policies that try to effectively realise the right to housing.[474] The preparatory works for article 23 after all promulgated that socio-economic rights should enable personal development and that the government should enable the capacities for people to do so.[475]

2) Connection to capabilities?

162. Our conception of social dignity envisions concerns for well-being as well as autonomy and the capability of people to develop as they wish. These characteristics create an at first sight logical connection to Amartya Sen's capability approach.[476] Sen combines the same concerns and looks at what people are actually able to be and do. It is in this context equally important to refer to Martha Nussbaum, who took the capabilities approach more concretely

[472] E.g.: J. RAZ, *The morality of freedom*, Oxford, Clarendon Press, 1986, 288-320; A. GEWIRTH, *The community of rights*, Chicago, University of Chicago Press, 1996, 12; For more on how housing is not just a purpose in and of itself anymore, no longer a mere basic requirement, but a means for self-creation and self-fulfillment, see also D. CLAPHAM, *The meaning of housing. A pathways approach*, Cambridge, Policy Press, 2005.
[473] C. FABRE, *Social rights under the Constitution: government and the decent life*, Oxford, Oxford University Press, 2000, 13 and 20.
[474] E. LANCKSWEERDT, "Het concept menselijke waardigheid als motor voor de verdere ontwikkeling van recht en rechtspraktijk", *TBP* 2013, vol. 9, (534) 536-537.
[475] Explanatory Memorandum of the proposal by Mr. Stroobant and Mr. Taminiaux, *Parl.St.* Senaat BZ 1991-92, no. 100-2/3°, 10.
[476] This concept was first developed in A. SEN, "Equality of what?", *The Tanner Lecture on Human Values* 1980, vol. 1, 197-220.

into the heartland of human rights law.[477] As a matter of fact, she applied the concept of human dignity as the basis for her list of entitlements that every society should strive for to guarantee to its members.[478]

163. In order to see what the distinguishing features are, we must first take a look at the content of this approach. Capability refers to the set of valuable functionings a person has effective access to. These human functionings are states of being and doing, such as having shelter.[479] A person's capability then represents the freedom to choose between what he/she perceives as a valuable functioning.[480] Sen describes the relevant concepts as follows: "*Functionings are (...) different aspects of living conditions. Capabilities, in contrast, are notions of freedom, in the positive sense: what real opportunities you have regarding the life you may lead*".[481]

164. Of course, the protagonists of the approach acknowledge that the necessary capabilities are not always at one's disposal. The approach therefore targets the creation of conditions that endows all citizens with opportunities with regard to their preferred life path.[482] It concerns the real opportunities (as against formal opportunities) of people to be, do and achieve what they desire to. This can justify a selective approach to welfare (or in our case housing policy), but not one that should automatically be means-tested.[483] The central question is not as much

[477] M. NUSSBAUM, *Creating capabilities: the human development approach*, Cambridge, Harvard University Press, 2011, 33-34.
[478] At its core, Alan Gewirth's moral theory shows significant similarities with Nussbaum's capability theory of justice. Both focus on whether a person is able to pursue his goals and both attach in that context considerable importance to well-being and positive rights, see: R. CLAASSEN and M. DÜWELL, "The foundations of capability theory: comparing Nussbaum and Gewirth", *Ethic Theory and Moral Practice* 2013, vol. 16, no. 3, (493) 502.
[479] A. SEN, "Capability and well-being, in M. NUSSBAUM and A. SEN (eds.), *The quality of Life*, Oxford, Clarendon Press, 1993, (30) 31.
[480] A. SEN, *Rationality and freedom*, Cambridge, Harvard University Press, 2002, 586.
[481] A. SEN, *The standard of living*, Cambridge, Cambridge University Press, 1987, 36.
[482] J.M. ALEXANDER, "Capabilities, human rights and moral pluralism", *The International Journal of Human Rights* 2004, vol.8, no.3, 3-4; P. VAN DIJK and G.J.H. VAN HOOF, *De Europese Conventie in theorie en praktijk,* Nijmegen, Ars Aequi Libri, 1982, 547; W. CASSIERS, "Les droits sociaux en quête d'effectivité", in V. VAN DER PLANCKE (ed.), *Les droits sociaux fondamentaux dans la lutte contre la pauvreté*, Brussel, Die Keure, 2012, (288) 303-305; K. RAES and G. COENE, "Sociale grondrechten als voorwaarden voor een gelijke handelingsvrijheid", *Welzijnsgids*, 2009, no. 72, (25) 39; D. BILCHITZ, "Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights", Oxford, Oxford University Press, 2007, 11-14; S. LIEBENBERG, *Socio-economic rights. Adjudication under a transformative constitution*, Claremont, Juta, 2010, 10.
[483] D. BILCHITZ, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, Oxford, Oxford University Press, 2007, 178; M. GARRIDO GÓMEZ, "Rights Guarantees, Equality and Social Rights", in J. MOTMANS, D. CUYPERS, P. MEIER, D. MORTELMANS and P. ZANONI (eds.), *Equal is not Enough: Challenging Differences and Inequalities in Contemporary Societies*, 2012, www.steunpuntgelijkekansen.be/wp-content/uploads/II.39-Equal-is-not-enough.pdf, (17) 19; K. RAES and G.

what a person does, but rather what this person is in a position to do.[484] That is the central element to freedom in Sen's approach.

165. The conundrum created by this approach is where exactly one should draw the line between being in a position to achieve certain aspired functionings and not being capable to. In an attempt to address this question, Nussbaum provides us with a list of functional capabilities necessary for human flourishing.[485] Capabilities such as life, bodily health and bodily integrity, but also control over one's material environment and even play can definitely be used as a justification for a right to housing[486], one that even appears to cover more than merely a right to basic shelter.[487] After all, adequate housing enables us to increase our capabilities by allowing us to rest, clean ourselves, work, provide space for personal and social relations, stimulate creativity, participate to politics, etc.[488]

166. It remains difficult to deduce an adequate standard of housing (and the scope of a right thereto) from this list of capabilities. In that regard, an important difference in rationale between our point of view and the capability theory exists. The capability approach is a basis for a theory of social justice, by way of which (certain) human rights or at the very least their core could be justified. Given the opportunity based nature of the capability approach though (as opposed to a more outcome based one), the scope of fundamental rights could potentially be perceived fairly limited. As a consequence, the capability approach obviously does not

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COENE, "Sociale grondrechten als voorwaarden voor een gelijke handelingsvrijheid", *Welzijnsgids* 2009, no. 72, (25) 40; A. SEN, "Elements of a theory of human rights", *Philosophy and Public Affairs* 2004, vol. 23, no. 4, (315) 332: As such, we argue that a capabilities approach would for example support a system of social housing distribution where people with the largest housing need are given priority to those who are simply next on the waiting list, as is currently still more established for social rental agencies than social housing companies.

[484] M. NUSSBAUM, *Women and human development: the capabilities approach*, Cambridge, Cambridge University Press, 2000, 70-74 and 88; A. SEN, "Human rights and capabilities", *Journal of Human Development* 2005, vol. 6, no. 2, (151) 153-154.

[485] M. NUSSBAUM, *Creating capabilities: the human development approach*, Cambridge, Harvard University Press, 2011, 33-34; For another attempt at a capabilities list that also provides clear connections to a right to housing, see: P. VIZARD and T. BURCHARDT, *Developing a capability list: final recommendations of the equalities review steering group on measurement*, London, Centre for Analysis of Social Exclusion, 2007, http://sticerd.lse.ac.uk/dps/case/cp/CASEpaper121.pdf, 6.

[486] C. McNAUGHTON NICHOLLS, "Housing, homelessness and capabilities", *Housing, Theory and Society* 2010, vol. 27, no. 1, (23) 30-36; S. FITZPATRICK, B. BENGTSSON and B. WATTS, "Rights to housing: reviewing the terrain and exploring a way forward", *Housing, Theory and Society* 2014, 31 (4), (447) 451.

[487] P. KING, "Housing as a freedom right", *Housing Studies* 2003, vol. 18, no. 5, (661) 669.

[488] G.F. EVANGELISTA, "Poverty, homelessness and freedom: an approach to the capabilities theory", *European Journal of Homelessness* 2010, vol. 4, (189) 193.

impose an obligation with regard to the realization of specific goals or the maximization of well-being.[489]

167. Our research on the other hand departs from already existing and functional human rights law, from an already established (higher) level of protection. In that context it is legally determined what aspects of housing must be protected and fulfilled and that the state must realize them progressively (infra, part III). The maximization of well-being and the attainment of specific goals are therefore automatically part of the fabric of our research, which expands beyond what one might envision as just in the context of a capability approach. One could describe our starting point as a very maximalist approach to capabilities, departing from a right to housing aimed at the realization of all aspects of adequate housing that could contribute to being autonomous, to being able to develop as one pleases.

168. With these differences firmly in the back of our mind, our conception of social dignity remains just as the capability theory concerned with freedom. In Sen's approach though, capability actually represents freedom and as such offers an interpretation of freedom that can be virtually equated with the ability to achieve a life one values living rather than the freedom that might flow from adequate housing.[490] He thereby distinguishes his approach from for example Rawls' theory of social justice, which describes so called primary goods as a means to this freedom.[491] Both of these aspects of freedom relate to our conception of social dignity as set out earlier. Translated to our research topic, it raises questions as to the factual opportunities to apply housing rights to their full extent as well as how housing is able to establish autonomy. Considering the important place and proverbial weight given to dignity and a right thereto, we will take a more concrete look with regard to these questions and its connection to the current housing legislation and policies shortly.

3) A different voice on social justice

169. Before we continue with some applications of social dignity on the right to housing though, we should point out that there are also diverging theories of social justice (and

[489] R. CLAASSEN and M. DÜWELL, "The foundations of capability theory: comparing Nussbaum and Gewirth", *Ethic Theory and Moral Practice* 2013, vol. 16, no. 3, (493) 502.
[490] K. MENON, "Justice", in R. BHARGAVA and A. ACHARYA (eds.), *Political theory: an introduction*, Delhi, Pearson, 2008, (74) 83; A. SEN, "Human rights and capabilities", *Journal of Human Development* 2005, vol. 6, no. 2, (151) 153-154.
[491] J. RAWLS, *A theory of justice*, Cambridge, Harvard University Press, 1971, 75-80; see also S. FREEMAN, *Rawls*, London, Routledge, 2007, 90-91.

autonomy for that matter) and that some (more libertarian) of them give leeway to a more hostile perspective on socio-economic rights.[492] Perhaps the best known proponent of that approach is Robert Nozick.[493] While he does not neglect socio-economic needs and suffering, he is of the opinion that people cannot be forced in their positive responsibilities towards others. Their right to property is in that regard considered an inviolable right. This means that measures like the obligation that rests upon building operators to reserve a certain quota of houses for social housing purposes would be unacceptable. As a matter of fact, state intervention in the housing market must automatically be condemned as a violation of individual rights, regardless of whether such intervention would be beneficial in terms of utility.[494] Nozick deems the entitlements that socio-economic rights create in general to restrict the freedom of other individuals because the cost for realising these rights will ultimately be recovered from other people's property. In other words, his conception of autonomy is very differently construed than ours. That does not mean that a libertarian perspective is entirely void of the concept of equality, it is only differently construed. More specifically, it concerns an equal respect for everyone in that no one should be given advantages. This idea goes hand in hand with the argument that too much paternalism will hinder personal engagement, that any other approach will reinforce the status of dependency and take away incentives to social improvement, hereby limiting autonomous choice and personal responsibility.[495] For these reasons, a state should not actively intervene for reasons of social redistribution.[496] People's liberties should not be traded off for the sake of the socio-economic well-being of the weaker people in society.[497]

170. We do not agree with the idea that every interference in a person's life should be seen as a violation of one's liberties. As Griffin made clear, a tax that does not hinder a person to pursue or live a valuable life does not destroy this person's liberty. One might find it unjust or disproportionate, but it does not limit someone's capabilities when living comfortably above

[492] J. WALDRON, "Socioeconomic rights and theories of justice", *Public Law & Legal Theory research paper series* 2010, 2; T.R. MACHAN and D.B. RASMUSSEN (eds.), *Liberty for the twenty-first century*, Lanham, Rowman & Littlefield Publishers, 1995.
[493] R. NOZICK, *Anarchy, state and utopia*, New York, Basic Books, 1974.
[494] *Ibid*., 150-153.
[495] P. SPICKER, "The rights of the poor: conceptual issues", in P. ROBSON and A. KJONSTAD (eds.), *Poverty and the law*, Oxford, Hart Publishing, 2001, 13; P. DE BEER, J. VAN DER MEER and P. PEKELHARING, *Gelijk. De noodzakelijke terugkeer van een klassiek ideaal*, Amsterdam, Van Gennep/De Balie, 2006, 181; R.L. KIDDER, *Connecting law and society*, New Jersey, Prentice-Hall, 1983, 137; S. LIEBENBERG, *Socio-economic rights. Adjudication under a transformative constitution*, Claremont, Juta, 2010, 147.
[496] W. KYMLICKA, *Contemporary political philosophy: an introduction*, Oxford, Clarendon Press, 1990, 97.
[497] R. NOZICK, *Anarchy, state and utopia*, New York, Basic Books, 1974, 166-172.

minimum levels.[498] This argument though is little convincing from a libertarian viewpoint. There, freedom is very much focused on freedom from coercion imposed by the state. It is in other words of little relevance whether one is still capable of personal development after his contributions to the state. But freedom can also be perceived as freedom not only from, but also in and through or by means of the state.[499] A better question to ask then is why deprivation of socio-economic needs is not also perceived as a compulsion on people's freedom.[500] Does this not hinder them in exercising their freedom? Deprivation can very well be described as the presence of coercion just as well.[501]

171. Additionally, there is also a more practical argument in response to this individualistic approach to social justice. If having to pay taxes to the state is an infringement of the right to property, then it would obviously be purposeful having to pay as little as possible. Yet, a libertarian view does not take into account the argument that poverty and social inequality are in fact more expensive for a society than the scenario in which there is more social equality.[502] It has for example been said that inequality leads to an increase in crime rates which raises imprisonment costs.[503] While these are not expenses in the context of socio-economic entitlements, they will inevitably have to be paid by the public.

B. Social dignity in the right to housing

172. Admittedly, dignity as interpreted here remains a difficult multi-faceted concept. This conceptualisation definitely opens up its meaning beyond a mere standard for housing quality and prevents it from being a convenient but vague *deus ex machina* whenever a decision requires some extra backing. But considering its comprehensive meaning, more than a concept apt for housing rights jurisprudence, it should provide direction for law and policy making as the crux of the constitutional right to housing. Against the background of our

[498] J. J. GRIFFIN, "Welfare rights", *The Journal of Ethics* 2000, vol. 1-2, (27) 39.
[499] N. BOBBIO, *The age of rights*, Cambridge, Polity Press, 1995, 18.
[500] In the words of Raz, "*an autonomous agent is one who is not always struggling to maintain the minimum conditions of a worthwhile life*". In that regard, government can encourage the creation of the conditions for such a life, see: J. RAZ, *The morality of freedom*, Oxford, Clarendon Press, 1986, 155 and 297.
[501] R. BUITENWEG, *Recht op een menswaardig bestaan. Een humanistieke reflectie op sociaal-economische mensenrechten*, Utrecht, de Graaff, 2001, 352-354.
[502] A. GLYN and D. MILIBAND (eds.), *Paying for inequality. The economic cost of social injustice*, London, Rivers Oram, 1994; In the United Kingdom, the Equality Trust think tank calculated that social inequality costs Britain 39 billion pounds a year (more than 50 billion euro), see: The Equality Trust, *The cost of inequality*, 2014, available at www.equalitytrust.org.uk/sites/default/files/The%20Cost%20of%20Inequality%20%20-%20full%20report.pdf.
[503] R.H. McADAMS, "The economic costs of inequality", *John M. Olin Program in Law & Economics working paper no.* 370, 2007.

interpretation of social dignity, we now pose the question what the implications are for some housing related issues and policies, especially with regard to the element of autonomy. This selection of issues below relate to both aspects of autonomy we have distinguished, as the ability to enjoy the right to housing and the freedom adequate housing creates. In that regard, we take a look at how our social housing system relates to these concerns, the provision of social legal aid, and the arguments it raises in favour or against a property-driven housing policy.

1) Housing First

173. We start though by shortly mentioning a copybook example of a project that neatly fits the concept of social dignity: Housing First. Originally developed in the United States in the 1990s, Housing First has a particularly simple yet for a long time neglected starting point. It is first and foremost preoccupied with providing homeless people quick access to secure and permanent independent housing.[504] This means that housing is not made dependent upon having a regular job and that no prior commitment to treatment is necessary for those with psychiatric problems or addictions. Support in different shapes and forms may of course be necessary and should be available, but Housing First rests on the belief that it is beneficial to separate housing from guidance and not to have those people go through a classic staircase model where they in a way have to earn permanent housing step by step.[505] Ultimately, Housing First aims to establish well-being and autonomy first in order to provide homeless people with the opportunity to empowerment.[506]

174. After several different forms have been adopted across the EU[507], the Housing First Belgium project was set in motion in 2013 and takes place in the five largest cities. According

[504] N. PLEACE, *Housing First*, DIHAL, 2012, www.feantsaresearch.org/IMG/pdf/housing_first_pleace.pdf, 3.
[505] I. PANNECOUCKE and P. DE DECKER, *Housing first: een alternatief voor de woonladder?*, Leuven, Steunpunt Wonen, 2014, 3-6 and 8.
[506] Housing First is in other words a capabilities informed framework: C. McNAUGHTON NICHOLLS, "Housing, homelessness and capabilities", *Housing, Theory and Society* 2010, vol. 27, no. 1, (23) 37-38.
[507] E.g.: H. TAINIO and P. FREDIKSSON, "The Finnish homelessness strategy: from a 'staircase' model to a 'housing first' approach to tackling long-term homelessness", *European Journal of Homelessness* 2009, vol. 3, 181-199; N. HOUARD, "The French homelessness strategy: reforming temporary accommodation, and access to housing to deliver 'Housing First': continuum or clean break", *European Journal of Homelessness* 2011, vol. 5, no. 2, 83-98; V. BUSCH-GEERTSEMA, "Housing First Europe – results of a European social experimentation project", *European Journal of Homelessness* 2014, vol. 8, no. 1, 13-28; L. GRANELLI, G. INVERNIZZI and L. MARCHESI, "The rolling stones project: a housing led experiment in Italy, *European Journal of Homelessness* 2014, vol. 8, no. 1, 77-96; Outside of the EU, an interesting evaluation report was made in Canada: P. GOERING, et al. *National final report. At Home/Chez Soi*, Calgary, Mental Health Commission of Canada, 2014, http://www.housingfirstbelgium.be/medias/files/rapport-canada.pdf.

to an evaluation presented at the Housing First conference of June 9, 2016, the project has been a success up to now.[508] We should mention however that not each of these projects ought to be considered Housing First *sensu stricto*. In Antwerp for example, empty social housing is used only as temporary housing for the chronically homeless.[509] Yet, the paradigm shift that appears to take place in the direction of at least more of a 'housing-led' policy (also supported by the Flemish action plan on poverty reduction[510]) can only be welcomed. As we will see in part III, a more prominent focus on stable, permanent housing for homeless people also saves the government a considerable amount of money in the long run.[511]

2) Social legal aid

175. As we have said, people who live in adequate housing will be better placed to develop themselves as they wish. Measures that pursue to provide people with such socio-economic security will therefore enhance their autonomy indirectly. But there are more influences than only the material content of the socio-economic measures itself. We can think back to some of the effectiveness influencing factors discussed in the previous chapter (e.g. the importance of clear-cut legislation, the weaker position of tenants). They reveal how it is one thing for a right to housing to exist, but often a whole different matter to be able to properly apply and enforce it. The former alone does not guarantee the essential assets necessary for personal development. As such, we stress the importance of being free from practical hindrances to be able to attain one's aspired level of well-being.

176. If we were to apply a strict capability approach, the earlier mentioned conundrum would creep up once again. At what point does a person have the opportunity to overcome these influences? When is he adequately positioned to do so? Approaching it from an established right to social dignity as we do however, a different, more positive question arises: what can be done to enhance that sense of autonomy? In that regard, we can only encourage initiatives that provide the necessary legal aid to those persons in need of it and thereby at the same time contribute to their active participation in society. It emphasizes how our interpretation of

[508] No evaluation report has been published yet. A fact sheet with the most important figures can be found at: www.kennisplein.be/Documents/Housing%20First%20Belgium%20resultaten-NL.pdf.
[509] FLEMISH HOUSING COUNCIL, *Dak- en thuisloosheid in Vlaanderen: pistes voor een meer woongericht beleid*, 24 March 2016, no. 2016/04, 31.
[510] Memorandum of the Flemish Government on the Flemish, submitted by vice minister-president Liesbeth Homas, *Parl.St.* Vl. Parl. 2014-15, no. 423/1.
[511] E. DEMAERSCHALK, "Dakloosheid kost handenvol geld. Housing First als goedkoper alternatief", *Alert* 2014, vol. 40, no. 5, 16-24.

autonomy is not one of essential independency. One does not exclude the other.[512] Rather, it is a reminder of the relational nature of our conception of dignity. Given the nature of this research, we will focus exclusively on the specific housing legal aid initiatives. We think in this context in particular of tenant unions and housing shops. This means that we do not take a closer look at the legal assistance provided by the legal profession. The opportunities for participation specifically with regard to social housing will be discussed in a next section.

177. Back in the eighties, tenant unions developed out of more general law shops, which found themselves predominantly occupied with rental law issues in the first place. [513] Now, in accordance with the Flemish Housing Code, tenant unions can be officially recognised and funded by the Flemish government.[514] They are appointed to contribute to the realization of the right to housing and to protect in particular the interests of the most vulnerable families and single persons on the private housing market. This mission and the tasks it brings with it is described more extensively in a 2006 decision by the Flemish Government.[515]

178. Tenant unions have a wide array of functions, but their core task revolves around providing information and legal aid to both private and social tenants. This information can concern an explanation of legal provisions, procedures or institutions, as long as it is tenancy related. They also investigate the lawfulness of a situation or dispute and propose resolution patterns. In order to request such advice, the tenant will have to pay a yearly fee of 12 to 17 euro, depending on the province.[516] In order to lower possible barriers further, organisations and local governments can also subscribe collectively. When for example an OCMW enters into such a subscription, they can provide people with tenancy problems more specific advice coming straight from the tenant union or even refer them directly to one, all without it costing

[512] R. DE BRABANDER, *Wie wil er nou niet zelfredzaam zijn? De mythe van zelfredzaamheid*, Antwerpen, Garant, 2014, 86-91.
[513] L. NOTREDAME, "De nieuwe wooninitiatieven. Maatschappelijke ontwikkelingen aan de basis", *Welzijnsgids* 1999, vol. 31, (25) 36.
[514] Article 56 and 58 Flemish Housing Code; T. VANDROMME and B. HUBEAU, "Algemene schets van de huisvestingssector en het huisvestingsrecht", in X. (ed.), *Het onroerend goed in de praktijk*, Mechelen, Kluwer, 2015, VII.A-1 – VII.A.3-11, (351) 378.
[515] Article 2 Decision Flemish Government 6 February 2004 concerning the stipulation of the conditions for the recognition and subsidization of social rental agencies, *BS* 16 March 2004: "*(1) to give information and advice on an individual or collective basis about all matters concerning housing in rented dwellings, such as understandable information and advice on renting matters; they can deliver legal assistance to current and future tenants in general and to the most vulnerable tenants in particular; (2) to protect the interests of tenants in general and of the most vulnerable tenants in particular; (3) to promote th qualities of good legal aid, i.e. accessibility, availability, simplicity, utility and affordability, with special attention to the advising of local authorities and the development of local cooperation works.*"
[516] They also receive the bimonthly "Tenants Journal" (*Huurdersblad*).

their clients any money at all. Furthermore, tenant unions cooperate with the Flemish translation phone service in order to provide the same opportunities to this weaker group of non-native speakers too.

179. As an additional service, tenant unions can engage in communication with the concerned landlord or other parties involved. In exceptional cases, they will go even further and actually assist and/or represent a member in court procedures or mediation. Furthermore, they also try to put their mark on housing policies by for example actively participating in housing councils. Last but certainly not least, tenant unions have an important preventive function as well. By holding educational sessions in schools, for resident groups and to advisors from different organisations, they engage themselves in trying to tackle tenancy problems more by their root.[517]

180. With this package of services we could say that tenant unions have a role to play in both so called lines of legal assistance. These lines were formally introduced into the Belgian Judicial Code back in 1998 in the context of the legal aid provided by the Bar[518], but have been referred to regarding social legal aid as well.[519] While the first line of legal assistance entails the provision of practical information and more simple problem solving, the second one provides a more comprehensive legal advice and assistance in procedures and before court.[520] The focus of the tenant union is obviously on the first line, but with its occasional court occurences does establish its presence on the second line of legal aid as well.

181. The tenant unions in Flanders reside under a coordination structure also institutionalized by the Flemish Housing Code.[521] The Platform for Tenants (until 2012 called the Flemish Consultation Organisation for Occupiers or VOB[522]) is responsible for the concertation with

[517] J. GOORDEN, J. MERTENS et al., "De sociale rechtshulp in kaart gebracht", in J. GOORDEN and J. MERTENS (eds.), *Recht op recht. Sociale rechtshulp en sociaaljuridische dienstverlening in Vlaanderen*, Mechelen, Kluwer, 2011, (47) 83-86.
[518] Article 4 Law 23 November 1998 concerning legal assistance, *BS* 22 December 1998 juncto article 508/1 Judicial Code.
[519] A. DE BEL, "Sociale rechtshulp contra juridische eerstelijnsbijstand?", *OCMW-visies* 2000, no. 1, 13-20; B. HUBEAU, "Sociale rechtshulp en sociaaljuridische dienstverlening zijn mensenwerk", in J. GOORDEN and J. MERTENS (eds.), *Recht op recht. Sociale rechtshulp en sociaaljuridische dienstverlening in Vlaanderen*, Mechelen, Kluwer, 2011, (5) 9-19.
[520] P. SCHOLLEN and B. VANGEEBERGEN, "Juridische bijstand", *Jura Falconis* 2000-01, vol. 37, no. 3, 407-442.
[521] Art. 57 Flemish Housing Code.
[522] For a historic perspective, see: A. VANHOVE, "De nieuwe wooninitiatieven", *Welzijnsgids* 1999, vol. 31, (65) 70-71 and 93-94.

and support of all tenant unions in Flanders.[523] It assists the tenant unions in the realization of their missions and looks after their interests in consultations with the relevant governments. In illustration of this, the Platform occasionally also lodges complaints before court, even up to the Constitutional Court.[524]

182. Housing shops provide a different channel to pose questions and receive information and advice from with regard to housing and housing subsidies. In contrast to the tenant unions, their services are not confined to only tenancy problems. The concept has found its way under the guise of several different names and practices, but they all have the same main objective: support and orientate people in their search for adequate housing.[525] They do so in a characteristically personal and integrated manner. This means that when useful a housing shop will make an analysis of a household's situation (housing related and beyond) and propose a custom-made plan to overcome the potential problems.[526] In other instances it will be appropriate to refer dossiers to better placed services like the tenant unions, but sometimes they do mediate renting matters themselves or even lodge complaints against the refusal of subsidies. Finally, housing shops also try to put their mark on (local) housing policies.[527]

183. In contrast to the tenant unions which are organized by province, housing shops predominantly operate as part of cities and municipalities, public authorities from which they also receive their funding. With their local character and personal approach, housing shops aim to be easily accessible to everyone with housing questions. Unfortunately however, their services are said not to (or insufficiently) reach those who could use their assistance most (homeless, squatters, …).[528] If we want these instances to fully achieve what we set out, which is to make the right to housing a capability for personal development not only in theory but also in practice, it is important to get a better understanding why these apparent barriers are still existing and what can be done to overcome them.

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[523] The Platform for Tenants also supports the functioning of the aforementioned network of social tenants VIVAS.
[524] E.g.: Council of State 18 February 2003, no. 222.544, *RW* 2013-14, no. 39, 1533, note B. HUBEAU and T. VANDROMME; Constitutional Court 5 March 2015, no. 24/2015; Constitutional Court 10 July 2008, no. 101/2008; Summary Procedure Court of First Instance Gent 30 October 2003, *T. App.* 2004, no. 3, 18.
[525] J. GOORDEN, J. MERTENS et al., "De sociale rechtshulp in kaart gebracht", in J. GOORDEN and J. MERTENS (eds.), *Recht op recht. Sociale rechtshulp en sociaaljuridische dienstverlening in Vlaanderen*, Mechelen, Kluwer, 2011, (47) 89-91.
[526] A. VANHOVE, "De nieuwe wooninitiatieven", *Welzijnsgids* 1999, vol. 31, (65) 89.
[527] S. GIBENS and B. HUBEAU, "Legal aid and housing issues", in B. HUBEAU and A. TERLOUW (eds.), *Legal aid in the Low Countries*, Antwerpen, Intersentia, 2014, (141) 147.
[528] See footnote no. 514, 93-94.

3) Property as a primary concern

a. The right to housing as a right to property

184. In what follows (part II), we will see that the European Court of Human Rights utilizes the right to property (article 1 of the First Protocol to the ECHR) in such a way that it can have an influence on the right to housing and domestic housing policies. Even tenants can have their interests protected by this provision. But of course, both rights are not the same.[529] No matter how broad the interpretation of possession may be (i.e. a legitimate expectation of something), the right to property does not envision everyone to acquire property as it is the case with adequate housing and the fundamental right thereto. The same can be said about the relationship between article 23 of the Belgian Constitution and the right to property in article 16, which is equally explicit in its description as a negative protection right against interferences.

185. That does not take away from the fact that the federal as well as the regional governments are focused on promoting the acquisition of property. Over the years, many countries have generally shown to favour fiscal benefits with regard to home ownership.[530] But while most European governments did not pursue home ownership as a primary objective until the 1970s and 1980s[531], Belgium has a longstanding history of a property-driven housing policy. It dates back all the way to the end of the nineteenth century. The first Housing Act was drafted in 1889 and laid the foundation for the system of fiscal benefits for home owners. After the competence for housing policy was transferred to the regions in 1980, a budgetary shift became visible to the social rental sector, a shift which could potentially reestablish itself now that the regions have become competent with regard to private rental legislation and tax

[529] UN Office of the High Commissioner for Human Rights, *The Right to Adequate Housing. Fact sheet no. 21*, www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf, 7-8; P. KENNA, "Housing rights: positive duties and enforceable rights at the European Court Of Human Rights", *E.H.R.L.R.* 2008, no. 2, (193) 198-199.

[530] F. FIGARI, A. PAULUS, H. SUTHERLAND, P. TSAKLOGLOU, G. VERBIST and F. ZANTOMIO, "Removing homeownership bias in taxation: the distributional effects of including net imputed rent in taxable income", *Fiscal Studies* 2016, vol. 37, not yet published; S.C. BOURASSA and W.G. GRIGSBY, "Income tax concessions for owner-occupied housing", *Housing Policy Debate* 2000, vol. 11, no. 3, 521-546; H. TER RELE and G. VAN STEEN, "Measuring housing subsidies: distortionary and distributional effects in the Netherlands", *Fiscal Studies* 2003, vol. 24, no. 3, 317-339.

[531] Around that time, the idea of an asset- or property-based welfare state took more centre stage. This entails that individuals should take (more) responsibility in investing in assets and in particular property which builds up personal capital: D. CONLEY and B. GIFFORD, "Home ownership, social insurance, and the welfare state", *Sociological Forum* 2006, vol. 21, no. 1, (55) 60; J. DOLING and R. RONALD, "Home ownership and asset-based welfare", *Journal of Housing and the Built Environment* 2010, vol. 25, no. 2, 165-173; The concept was first developed in M. SHERRADEN, *Assets and the poor. A new American welfare policy*, New York, M.E. Sharpe, 1991.

benefits for homeowners as well.[532] Still however, the Flemish government has over the years retained its primary goal of supporting private home ownership.[533] This is not all that surprising given the consensus that seems to exist on this topic across the entire political spectrum.[534]

186. According to Verbist, even the Constitutional Court has hinted at the idea that the right to housing is first and foremost a right to home ownership.[535] In a case that contested the social tenants' right to buy the social dwelling they live in, the Court decided that in light of the constitutional right to housing the assessment of the legislators concerning the general interest had to be respected. Yet, the Court did not stop there. By considering that the legislator found itself in the position to argue that the previous regulation (by which the social housing companies could decide whether or not to sell their property) did not sufficiently respond to the aims of its housing policy[536], Verbist sees the Court implicitly recognizing the right to housing as a right to home ownership. By extension he argues that, following this judgment, housing without a right to property is apparently inadequate.[537]

187. Regardless of whether one is supportive of this reading of the judgment, the longstanding focus on property-based welfare has not missed its effect on the composition of the housing market. The home ownership rate in Flanders climbed to about 75 per cent in 2005 before decreasing slightly over the following years to 70.5 per cent by 2013. The impact seems to be confined to the two lowest income quintiles, an observation to which we will return later.[538] That slight decrease though does not appear to be in correlation to any drop in preference or fundamental change of political focus. Rather, it has been contributed to the impact of the economic crises and the fact that 15 to 20 years ago significantly less home owners could be found in the older age groups. When those disappeared from the statistics, the ownership rate

[532] S. WINTERS, "Are there grounds for housing allowances in Flanders (Belgium)?", *European Journal of Housing Policy* 2005, vol. 5, no. 2, (167) 168-170.
[533] V. GEURTS and L. GOOSSENS, "Home ownership and social inequality in Belgium", in K. KURZ and H.P. BLOSFELD (eds.), *Home ownership and social inequality in comparative perspective*, Stanford, Stanford University Press, 2004, (79) 82.
[534] P. DE DECKER, *Eigen woning: geldmachine of pensioensparen?*, Antwerpen, Garant, 2013, 9-10 and 41-43.
[535] S. VERBIST, "Impliceert het recht op behoorlijke huisvesting een recht op eigendom" (note under Constitutional Court 7 March 2007, no. 33/2007), *RABG* 2007, no. 16, 1103-1109.
[536] Constitutional Court 7 March 2007, no. 33/2007, B.5.4.
[537] S. VERBIST, "Impliceert het recht op behoorlijke huisvesting een recht op eigendom" (note under Constitutional Court 7 March 2007, no. 33/2007), *RABG* 2007, no. 16, (1103) 1107-1108.
[538] K. HEYLEN, Grote *woononderzoek 2013. Deel 2. Deelmarkten, woonkosten en betaalbaarheid*, Leuven, Steunpunt Wonen, 2015, https://steunpuntwonen.be/Documenten/Onderzoek_Werkpakketten/gwo-volume-2-deel-2-eind.pdf, 10.

increased in a relative way. Since much of the older population is currently in position of their own property, the opposite now occurs.[539]

188. That all said, the following question now arises: on the basis of our conception of social dignity and with autonomy as a component of it, should home ownership indeed be pursued in the context of the right to housing as the most important housing policy option?[540]

b. Home ownership as the pinnacle of autonomy

1. The benefits of home ownership in the balance

189. Housing has been described as a means for self-creation and self-fulfillment, a safe space for the construction and maintenance of personal identity.[541] Many relate these features exclusively to home ownership.[542] Ownership of property is said to enhance social citizenship and political participation, spread wealth and equality and be the foundation for social stability and democracy.[543] It is often equated with the characteristics of dignity, autonomy and liberty (which non-owners are then much more difficult to establish[544]) and therefore justifies specific protection by the state.[545] This perspective on the connection between dignity, freedom and home ownership finds its roots in the ideas of Kant and Hegel[546], the latter claiming that private property "*is something everyone needs in order to develop his freedom and individuality*".[547]

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[539] *Ibid*., 4-5.
[540] B. CLAESSENS, E. VLERICK and P. DE DECKER, *Op zoek naar de betekenis van wonen. Een verkennend literatuuronderzoek*, Heverlee, Steunpunt Ruimte en Wonen, 2009, https://steunpuntwonen.be/Documenten/Publicaties_steunpunt_ruimte_en_wonen_2007-2011/2009/2009-01-op-zoek-naar-de-betekenis-van-wonen.pdf, 25.
[541] D. CLAPHAM, *The meaning of housing. A pathways approach*, Cambridge, Policy Press, 2005.
[542] Saunders for example, one of the most prominent academic supporters of home ownership as a source of individual rewards, describes homeownership as "an emotional expression of autonomy, security, or personal identity", see P. SAUNDERS, A nation of homeowners, London, Unwin Hyman, 1990, 39; C. ROSE, "Property as a keystone right?", *Notre Dame Law Review* 1995, vol. 71, (329) 358; S. SMITH, "The essential qualities of home", *Journal of Environmental Psychology* 1994, vol. 14, no.1, 31-46.
[543] D.B. BARROS, "Home as a legal concept", *Santa Clara Law Review* 2006, vol. 46, (255) 300-305; L. UNDERKUFFLER, *The idea of property: its meaning and power*, Oxford, Oxford University Press, 2003, 138.
[544] D. ROSENDORF, "Homelessness and the uses of theory: an analysis of economic and personality theories of property in the context of voting rights and squatting rights", *University of Miami Law Review* 1990, (701) 710.
[545] M.J. RADIN, "Property and personhood", *Stanford Law Review* 1982, vol. 34, (957) .
[546] M. SIGRON, *Legitimate expectations under article 1 of Protocol no. 1 to the European Convention on Human Rights*, Antwerpen, Intersentia, 2014, 23-25.
[547] J. WALDRON, *The right to private property*, Oxford, Oxford University Press, 1990, 351.

190. These more academic considerations are reflected in the preferences of citizens across first world countries.[548] Some have proposed that this aspiration for home ownership has been influenced by the socio-cultural portrayal of ownership, backed by government rhetorics.[549] Kemeny for example believes that tenure systems are a cause rather than a product of tenure preferences.[550] Regardless of the composition of the national housing market or the promotion of home ownership however, people traditionally prefer to acquire their own property.[551] Take for example Sweden, a country where home ownership has not been promoted to the same extent as in many other countries and is ahead of the pack when it comes to tenant protection.[552] Still the outcome remains the same. Swedish households show a preference for owner-occupied housing just as well.[553]

191. More generally speaking, renting is seen as a negative choice one is forced to due to financial or unforeseen personal circumstances rather than a positive choice.[554] When asked about this, people usually refer to several reasons that can be linked to autonomy and freedom, or at least their perceptions on it. On the basis of their argumentation, we distinguish financial, material and subjective autonomy.

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[548] A preference for home ownership is present in all European countries discussed in M. ELSINGA, P. DE DECKER, N. TELLER and J. TOUSSAINT (eds.), *Home ownership beyond asset and security. Perceptions of housing related security and insecurity in eight European countries*, Amsterdam, IOS Press, 2007; A. VASSENDEN, "Homeownership and symbolic boundaries: exclusion of disadvantaged non-homeowners in the homeowner nation of Norway", *Housing Studies* 2014, vol. 29, no. 6, 760-780 (Norway); R.M. RAKOFF, "Ideology in everyday life: the meaning of the house", *Politics and Society* 1977, vol. 7, (85) 100 (United States); L. HOLDSWORTH, "Sole voices: experiences of non-homeowning sole mother renters", *Journal of Family Studies* 2011, vol. 17, no.1, 59-70 (Australia); A. DUPUIS and D.C. THORNS, "Home, home ownership and the search for ontological security", *The Sociological Review* 1998, vol. 46, no. 1, 24-47 (New Zealand).

[549] R. LAWRENCE, "Deciphering home: an integrative historical perspective" in D. BENJAMIN (ed.), *The home: words, interpretations, meanings and environments*, Aldershot, Ashgate, 1995, 60.

[550] J. KEMENY, *The myth of home ownership: public versus private choices in housing tenure*, London, Routledge, 1981, 63.

[551] Even a housing market crisis does not seem to push public opinion into a definitive different direction, see: H. RUONAVAARA and P. NAUMANEN, "Finland: trust, risk-taking and scepticism", in M. ELSINGA, P. DE DECKER, N. TELLER and J. TOUSSAINT (eds.), *Home ownership beyond asset and security. Perceptions of housing related security and insecurity in eight European countries*, Amsterdam, IOS Press, 2007, (67) 77-78; P. SAUNDERS, *A nation of homeowners*, London, Unwin Hyman, 1990, 69 and 80.

[552] D. ANDREWS, A. CALDERA SÁNCHEZ and A. JOHANSSON, *Housing markets and structural policies in OECD countries*, OECD Economics Department Working Papers no. 836, www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP%282011%295&docLanguage=En, 47-49.

[553] E. ANDERSSON, P. NAUMANEN, H. RUONAVAARA and B. TURNER, "Housing, socio-economic security and risks. A qualitative comparison of household attitudes in Finland and Sweden", *European Journal of Housing Policy 2007*, vol. 7, no. 2, (151) 168.

[554] I. ESVELDT, "Intentie om een woning te kopen varieert sterk onder starters en huurders", *Bevolkingstrends* 2013, april issue, (1) 2.

192. From a financial standpoint, the main argument seems to be universally agreed upon. The advantage connected to acquiring property is that money is spent efficiently. In comparison, paying rent to a landlord is widely interpreted as *de facto* throwing money away.[555] One could potentially reap financial benefits from rising house prices (even though that appears to be less probable in the case of low-income households[556]), but that possibility is not the advantage we should focus on in the context of autonomy. Even regardless of whether the value of one's property increases or decreases, home ownership is still regarded as a good financial investment simply because it creates financial freedom (over time).[557] This vision is certainly prominent in Flanders, where home owners tend to stay in their home as long as possible. In that regard, the very prospect of fully acquired home ownership appears to overshadow the fact that one is usually still dependent upon financial institutions for several years and even decades due to mortgage debts, a period over which financial difficulties could potentially occur. Still it is of course true that once this mortgage is paid off, home owners are able to live rent-free and gather additional income (imputed rent) after retirement. With the social welfare state and the old-age pensions under significant financial pressure however, the political support for home ownership might not only exist to promote this financial aspect of autonomy, but also as a means to remove some of the financial burden away from the state and to cut back on social expenses.[558]

193. A second advantage of home ownership that people connect to the term autonomy concerns the idea of freedom from external control by a letter. On the one hand it means that you can do as you like with the property, shape your home to your preferences and needs and

[555] P. DE DECKER, *Eigen woning: geldmachine of pensioensparen?*, Antwerpen, Garant, 2013, 66, 71 and 126; M. ELSINGA, P. DE DECKER, N. TELLER and J. TOUSSAINT (eds.), *Home ownership beyond asset and security. Perceptions of housing related security and insecurity in eight European countries*, Amsterdam, IOS Press, 2007, 79 (Finland), 182 (the Netherlands) and 269 (United Kingdom); C. GURNEY, "Lowering the drawbridge: a case study of analogy and metaphor in the social construction of home ownership", *Urban Studies* 1999, vol. 36, (1706) 1716.

[556] J. DOLING and B. STAFFORD, *Home ownership: the diversity of experience*, Aldershot, Gower, 1989; G. McCARTHY, S. VAN ZANDT and W. ROHE, *The economic benefits and costs of homeownership. A critical assessment of the research*, Arlington, Research Institute for Housing America, 2001, 18.

[557] G. McCARTHY, S. VAN ZANDT and W. ROHE, *The economic benefits and costs of homeownership. A critical assessment of the research*, Arlington, Research Institute for Housing America, 2001, 18; M. HAFFNER, *Appel voor de dorst. Vermogen van ouderen op de woningmarkt*, Utrecht, NETHUR, 2005; J. DOLING and M. ELSINGA, *Demographic change and housing wealth: homeowners, pensions and asset-based welfare in Europe*, Dordrecht, Springer, 2013, 105 and 107.

[558] F.G. CASTLES, "The really big trade-off: home ownership and the welfare state in the new world and the old", *Acta Politica* 1998, vol. 33, no. 1, (5) 8: "*When individuals own houses they can get by on smaller pensions*"; P. DE DECKER and V. GEURTS, "Belgium" in J. DOLING and J. FORD (eds.), *Globalisation and home ownership. Experiences in eight member states of the European Union*, Delft, Housing and Urban Policy Studies, DUP Science, 2003, 23-24; P. DE DECKER and C. DEWILDE, "Home ownership and asset-based welfare: the case of Belgium", *Journal of Housing and the Built Environment* 2010, vol. 25, (243) 250-253.

through that build and maintain personal identity, uncompromised by possible conditions set in a rental agreement.[559] On the other hand this material control has a sense of security associated with it. It has been emphasized that an amount of certainty about the home, of being in control of (not) moving is vital to one's ability to develop.[560] It might even be the most indispensable element of a right to housing, as a basis upon which to build a life and fully participate in society.[561] As such it is also critical for our conception of social dignity. Owners are in that sense not subjected to the uncertainty that the letter might want to sell his property or move into the dwelling himself (or family of his), unlike tenants who would then be forced to search for a new place to call home.[562]

194. As we have seen in the introductory part, Belgian and Flemish rent legislation provides tenants with a certain extent of protection against evictions and insecurity of tenure more in general. The ease with which a landlord is legally able to exercise his power to evict may not be the only thing that matters though. Important is also the mere capacity to do so, the possibility that this might happen.[563] In that sense, both *de iure* as well as *de facto* security play their role in the perception of home ownership and tenancy.[564]

195. Of course, not only the preference of the letter influences security of tenure. Other elements of the right to housing such as affordability can have an impact too.[565] The difference is that affordability problems can affect the degree of security for (mortgage paying) owners just as well. This has become all the more visible following the economic crisis. In Spain, 350.000 foreclosures occurred between 2007 and 2012, with 159 evictions a day in

[559] P. DE DECKER, *Eigen woning: geldmachine of pensioensparen?*, Antwerpen, Garant, 2013, 65-66; A. VASSENDEN, "Homeownership and symbolic boundaries: exclusion of disadvantaged non-homeowners in the homeowner nation of Norway", *Housing Studies* 2014, vol. 29, no. 6, (760) 769-770.
[560] S.J. BRIGHT and N. HOPKINS, "Home, meaning and identity: learning from the English model of shared ownership housing", *Theory and Society* 2011, vol. 28, no. 4, (377) 287.
[561] S. LECKIE, "Where it matters most: making international housing rights meaningful at the national level", in S. LECKIE (ed.), *National perspectives on housing rights*, The Hague, Martinus Nijhoff Publishers, 2003, (3) 35; D.H. BELL, "Providing security of tenure for residential tenants: good faith as a limitation on the landlord's right to terminate", *Ga. L. Rev.* 1985, vol. 19, (483) 532; Some authors have claimed though that the significance has been exaggerated: M. BALL, *The UK private rented sector as a source of affordable accommodation*, York, Joseph Rowntree Foundation, 2010, 15; J. RUGG and D. RHODES, *The private rented sector: its contribution and potential*, York, Centre for Housing Policy, 2008.
[562] H. RUONAVAARA, "Types and forms of housing tenure, toward solving the comparison/translation problem", *Scandinavian Housing and Planning Research* 1993, vol. 10, (3) 12.
[563] S. LUKES, *Power: a radical view*, Basingstoke, Palgrave Macmillan, 2005, 12; J.-L. VAN GELDER, "What tenure security? The case for a tripartite view", *Land Use Policy* 2010, vol. 27, (449) 451.
[564] S. FITZPATRICK and H. PAWSON, "Ending security of tenure for social renters: transitioning to 'ambulance service' social housing", *Housing Studies* 2014, vol. 29, no. 5, (597) 603-604.
[565] Think for example also of a dwelling of severely insufficient quality, which can also lead to a forced eviction.

2012 and still 95 a day two years later.[566] Luckily, nowhere near such dazzling figures exist with regard to the Belgian mortgage market, but it has been reported that ever more Belgian home owners are incapable of paying off their mortgage debts on time.[567] It can reasonably be suspected that households facing (considerable) mortgage arrears seem unlikely to derive the same feelings of freedom or identity that yet seem to be exclusively associated with home ownership.[568]

196. Finally, there is subjective autonomy. It should be clear by now that the previous arguments in favour of home ownership are not entirely objective anyway, but what we allude to here is the status that is linked to this form of tenure.[569] People (not only home owners) tend to make positive connotations to home ownership, while renting often has a stigma attached to it.[570] Owning a home is in that regard interpreted as the result of being a hard worker and a responsible human being. It is something to be proud of, something that has an impact on one's self-esteem. People who rent their home on the other hand are widely perceived as poorer, less civic minded and less successful[571], especially if they have passed the age of 30.[572] This is even more so the case in particular regard to social tenants.[573]

197. Whether or not these connotations might hold little amount of truth, we cannot dismiss these perceptions considering the relational nature of dignity we explained earlier; our sense of freedom is also impacted by the perception of society. That perception however appears to be somewhat malleable. In contrast to the general preference for home ownership which as we

[566] UN General Assembly, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, 10 August 2012, A/67/150, 10.
[567] De Morgen, "Steeds mee Belgen kunnen hun hypotheek niet tijdig inlossen", 10 May 2016, www.demorgen.be/economie/steeds-meer-belgen-kunnen-hypotheek-niet-tijdig-aflossen-b876f32b/.
[568] C. GURNEY, *The meaning of home in the decade of owner occupation: towards an experiential perspective*, Bristol, School of Advanced Urban Studies, 1990, 8.
[569] J. HOHMANN, *The right to housing. Law, concepts, possibilities*, Oxford, Hart Publishing, 2013, 175; J. FORD, R. BURROWS and S. NETTLETON, *Home-ownership in a risk society*, Bristol, The Policy Press, 2001, 148-149; S. MALLETT, "Understanding home: a critical review of the literature", *The Sociological Review* 2004, vol. 52, no. 1, (62) 66.
[570] C. GURNEY, "Pride and prejudice: discourses of normalization in public and private accounts of home ownership", *Housing Studies* 1999, vol. 14, (163) 165.
[571] W.M. ROHE and W.A. STEGMAN, "The effects of homeownership: on the self-esteem, perceived control and life satisfaction of low-income people", *Journal of the American Planning Association* 1994, vol. 60, no. 2, 173-184; E. SCANLON, *Home ownership and its impacts: implications for housing policy for low-income families*, Center for Social Development, Washington University, 1996, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.591.2405&rep=rep1&type=pdf, 7-9; L. FOX, *Conceptualising home. Theories, laws and policies*, Oxford, Hart Publishing, 2007, 173.
[572] B. MEEUS and P. DE DECKER, *De geest van Suburbia*, Antwerpen, Garant, 2013, 302; D. KNIGHT, "Imaginaire deadlines en volwassenheid", *Agora* 2010, no. 3, 15-18.
[573] S. FITZPATRICK and H. PAWSON, "Ending security of tenure for social renters: transitioning to 'ambulance service' social housing", *Housing Studies* 2014, vol. 29, no. 5, (597) 600.

said is not influenced by the composition of the housing market or the extent of tenant protection, the latter influence appears to be able to play a role with regard to the general attitude towards and the status of renting.[574] In the Netherlands, Sweden and Germany, renting is seen as an acceptable alternative rather than a temporary solution or a last resort. Considering that on average they provide stronger legal protection for tenants (also through some form of rent control[575]), it is interesting to see that the connotation society usually makes with regard to renting is largely absent in these countries.[576]

2. *Justifying a property-driven policy*

198. We come to the main question: does (a right to) social dignity encourage or at least justify the promotion of home ownership? Firstly, we argue that some of the proclaimed advantages of home ownership that are connected to an interpretation of autonomy are not always as clear-cut or exclusive.[577] In the same vein, Murie argued that "*certain attributes of the tenure (i.e. owner-occupation) were increasingly identified as if they were inherent to it and were the underlying reason for its promotion.*"[578] Secondly, the question arises whether all the advantages described above are actually advantages that should be pursued in the context of social dignity.

i. (Perception of) housing security

199. In order to enhance part of the autonomy that is now connected to home ownership in particular, it would be an option to provide tenants with more legal security of tenure through

[574] A. VASSENDEN, "Homeownership and symbolic boundaries: exclusion of disadvantaged non-homeowners in the homeowner nation of Norway", *Housing Studies* 2014, vol. 29, no. 6, (760) 778; S. MANDIC and D. CLAPHAM, "The meaning of home ownership in the transition from socialism: the example of Slovenia", *Urban Studies* 1996, vol. 33, no. 1, 83-97.

[575] M. HAFFNER, M. ELSINGA and J. HOEKSTRA, "Rent regulation: the balance between private landlords and tenants in six European countries", *European Journal of Housing Policy* 2008, vol. 8, no. 2, (217) 224-225 and 228-229.

[576] E. ANDERSSON, P. NAUMANEN, H. RUONAVAARA and B. TURNER, "Housing, socio-economic security and risks. A qualitative comparison of household attitudes in Finland and Sweden", *European Journal of Housing Policy 2007*, vol. 7, no. 2, (151) 159-160 and 168-169; G. TEGEDER and I. HELBRECHT, "Germany: home ownership, a Janus-faced advantage in time of welfare restructuring", in M. ELSINGA, P. DE DECKER, N. TELLER and J. TOUSSAINT (eds.), *Home ownership beyond asset and security. Perceptions of housing related security and insecurity in eight European countries*, Amsterdam, IOS Press, 2007, 128; J.-L. VAN GELDER, "What tenure security? The case for a tripartite view", *Land Use Policy* 2010, vol. 27, (449) 453.

[577] K. VAN DEN BROECK, M. HAFFNER and S. WINTERS, *Discussion paper: towards a cost-effective housing policy*, Leuven, HIVA KU Leuven, 2016, 25.

[578] A. MURIE, "Secure and contented citizens? Home ownership in Britain" in A. MARSH and D. MULLINS (eds.), *Housing and public policy: citizenship, choice and control*, Buckingham, Open University Press, 1998, (79) 82; see also K. HULSE and V. MILLIGAN, "Secure occupancy: a new framework for analyzing security in rental housing", *Housing Studies* 2014, vol. 29, no. 5, (638) 639 and 642-644.

a more comprehensive system of rent control or a more "pro-tenant" bias in contract regulation. As we have mentioned, security of tenure is seen as an important feature for personal development.

200. In terms of rent control on the private rental market, regulation currently exists only in the continuity of the rent price throughout the term of the contract, with the exception of adjustments that can be made yearly in accordance with the health index. Parties can agree on a revision of the rent price between the ninth and sixth month before the end of each three year period. A judge can assess the rental value of the property to decide on a possible adjustment.[579] Alternatively, as Dambre has proposed, it is possible to objectify rent prices. If that is too much of a strain, tenants could be given the opportunity to question the reasonableness of the rental price or a maximum limit could be set to prevent abuses (cf. German *mietspiegel*).[580]

201. With social housing contracts at least currently still of indefinite duration, improvements on security of tenure could be made particularly with regard to the private rental market. Currently, Belgium is seen as presenting a neutral stance in contract regulation[581] and thereby ranks slightly below the middle in terms of housing security for private tenants in comparison to other OECD countries.[582] At the same time it must be said that a nine year lease term is fairly long when compared to other European countries. In addition, Scanlon classifies Belgium as one of the countries with a high tenure security after the lease period.[583]

202. That of course does not take anything away from the fact that on the one hand a letter can still make an end to the agreement at every single moment of the tenure. As we have seen, this is possible for personal use of the property or use by a family member up until in the

[579] Art. 6 and 7 Housing Rent Act.
[580] M. DAMBRE, *De huurprijs. Analyse van de financiële verbintenissen van de huurder en onderzoek naar de mogelijkheid tot objectivering van de woninghuurprijzen*, Brugge, Die Keure, 2009, 344 and 361.
[581] C. CUERPO, S. KALANTARYAN and P. PONTUCH, *Rental market regulation in the European Union*, Brussels, European Commission, 2014, http://ec.europa.eu/economy_finance/publications/economic_paper/2014/pdf/ecp515_en.pdf, 7-8.
[582] D. ANDREWS, A. CALDERA SÁNCHEZ and A. JOHANSSON, *Housing markets and structural policies in OECD countries*, OECD Economics Department Working Papers no. 836, www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP%282011%295&docLanguage=En, 47-49.
[583] K. SCANLON, "Private renting in other countries", in K. SCANLON and B. KOCHAN (eds.), *Towards a sustainable private rented sector. The lessons from other countries*, London, LSE, 2011, (15) 31-37; K. HULSE and V. MILLIGAN, "Secure occupancy: a new framework for analyzing security in rental housing", *Housing Studies* 2014, vol. 29, no. 5, (638) 647-648 and 650.

second degree, but can also be done without mentioning any motive at all (even though this scenario requires the landlord to pay a financial compensation).[584] Neither does it on the other hand take into account that while nine years is a long term from a comparative perspective, the majority of rental contracts *de facto* still have a short lease term. By imposing that in case of subsequent short-term contracts the new rent price cannot exceed the old one for nine years[585], the Housing Rent Act has anticipated that landlords might take advantage of this type of tenure duration and use it as a mechanism to raise rent prices for each new short term contract. But because a new tenant will have difficulties to gather relevant information from the previous one, this is very difficult to assure in practice.[586] Moreover, there is no sanction coupled to the non-registration of such short term contracts either, a deviation from the rule for nine year contracts which does not violate the equality principle according to the Constitutional Court.[587] As we pointed out earlier, registration is important in that it protects tenants in case the rented dwelling is transferred to a new owner.

203. A stronger protection of tenants will not alter the preference for home ownership. It is for a reason Belgians are said "to be born with a brick in their stomach". We should not neglect the advantages that do remain connected to home ownership either. But we have also seen that there is an apparent link between more positive connotations and the legal protection of tenants.[588] Besides the fact that renting would *de iure* become more of a full-fledged alternative for those who are not in a position to become owner[589], greater tenancy protection might also change the perception of renting, which is also important in terms of housing security and our concept of social dignity.

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[584] M. DAMBRE, "Woninghuur in Vlaamse handen: nieuwe kansen voor het grondrecht op behoorlijke huisvesting?", in B. HUBEAU and T. VANDROMME (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013, (273) 274-275.

[585] A new short-term agreement with the same tenant can only be prolonged once, with a total maximum period that cannot exceed three years.

[586] B. HUBEAU and D. VERMEIR, *Een evaluatie van het federale woninghuurrecht. Tussentijds rapport inzake duur, opzegging, waarborg en woningkwaliteit*, Leuven, Steunpunt Wonen, 2014, 77.

[587] Constitutional Court 9 July 2009, no. 109/2009, *NJW* 2009, 721, note M. DAMBRE, "Niet-registratie van een woninghuurcontract van korte duur", and *TBBR* 2009, 485, note A. CRUQUENAIRE, "La sanction du défaut d'enregistrement du bail de résidence principale".

[588] See footnote no. 563.

[589] V. GEURTS and L. GOOSSENS, "Home ownership and social inequality in Belgium", in K. KURZ and H.P. BLOSFELD (eds.), *Home ownership and social inequality in comparative perspective*, Stanford, Stanford University Press, 2004, (79) 85; P. DE DECKER, "Op weg naar een duurzaam woonbeleid? Hoe tegenwoordig blijft het verleden?" *Welzijnsgids* 2002, no. 44, (23) 36; B. CLAESSENS, E. VLERICK and P. DE DECKER, *Op zoek naar de betekenis van wonen. Een verkennend literatuuronderzoek*, Heverlee, Steunpunt Ruimte en Wonen, 2009, https://steunpuntwonen.be/Documenten/Publicaties_steunpunt_ruimte_en_wonen_2007-2011/2009/2009-01-op-zoek-naar-de-betekenis-van-wonen.pdf, 27.

204. Somewhat of a counterargument for this is that 70 per cent of tenants already declare to feel secure that they will be able to live in their rented homes for as long as they want.[590] Additionally, there is also a risk that a stronger legal protection of housing security, with or without a form of rent control, could lead to more short-term contracts or a decline in private rental housing. While the benefits would indeed be primarily found on the side of the tenants, landlords could experience some indirect positive effects as well, from fewer switchover maintenance and search costs to increased popularity of the sector.[591]

ii. Consequences for the rental market

205. A second reason why we believe increased attention to the rental market is justified on the basis of our conception of dignity that also entails autonomy and freedom is that some of the discussed advantages of home ownership linked to these features are pretty far-reaching for what we perceive as indispensable for social dignity. We should not be hypocritical in denying the remaining benefits of home ownership. It would be ideal if everyone is able to acquire property without running any severe financial risks, but that is simply not realistic. What is necessary to experience a sense of self-fulfillment and the ability to develop however is in our opinion not an exclusive Hegelian feature of owner-occupancy.[592] It can be established for tenants as well, even though these housing elements are currently less attained on the private rental market.[593] Freedom in the context of social dignity does therefore not encourage the government to promote home ownership in particular. At the very least not to the extent to which it has done so over the years.

206. From a fundamental rights perspective, a more preferential treatment of private tenants would therefore be appropriate. Nowhere has the distorted balance manifested itself more than in the context of housing affordability and fiscal benefits. It has been proven that the higher income deciles in particular have profited from the primary source of public spending, the

[590] K. HEYLEN, *Grote Woononderzoek 2013: Deel 5. De private huurmarkt: vraag- en aanbodzijde*, Leuven, Steunpunt Wonen, 2015, https://steunpuntwonen.be/Documenten/Onderzoek_Werkpakketten/gwo-volume-2-deel-5-eind.pdf, 28.
[591] M. HAFFNER, M. ELSINGA and J. HOEKSTRA, "Rent regulation: the balance between private landlords and tenants in six European countries", *European Journal of Housing Policy* 2008, vol. 8, no. 2, (217) 219, 222 and 229-230.
[592] P. MARCUSE, "The ideologies of ownership and property rights" in R. PLUNZ (ed.), *Housing form and public policy in the United States*, New York, Praeger, 1980, 41; J. HOHMANN, *The right to housing. Law, concepts, possibilities*, Oxford, Hart Publishing, 2013, 164.
[593] S. WINTERS, "Belgian state reform as an opportunity to reorient Flemish housing policy", *International Journal of Housing Policy* 2013, vol. 13, no. 1, (90) 95.

housing bonus.[594] That is not all that surprising in and of itself. Measures that support home ownership are to some extent inherently asocial because a household will always have to dispose of a sizable income to consider buying property in the first place.[595] In the same vein it has been said that Flanders has financially promoted home ownership for many households that did not need such a boost to acquire property in the first place.[596] While it has been established that the housing bonus has had a slight positive effect on the poverty risk (number of households with a disposable income below the poverty line, which is 60% of the median equivalised disposable income) and poverty gap (average shortfall of the population from the poverty line)[597], it has also – almost evidently – increased income inequality.[598] This can only be seen as an undesirable effect both in light of human rights law in general and the idea of empowerment and social dignity in particular.[599]

207. With housing prices rising and increasingly difficult conditions posed by banks, it has nonetheless become harder to buy property over recent years.[600] While still significantly lower than for private tenants (supra, introduction), the share of owner-occupiers with a mortgage housing cost above 30 per cent of their income has increased with ten per cent between 2005 and 2013 (27.1%).[601] According to several studies, the housing bonus itself is partly to blame

[594] K. HEYLEN, "Nieuwe inzichten in matteüseffect van het woonbeleid", *De Gids* 2013, (10) 14; K. HEYLEN and S. WINTERS, *De verdeling van de subsidies op vlak van wonen in Vlaanderen*, Heverlee, Steunpunt Ruimte en Wonen, 2012, https://steunpuntwonen.be/Documenten/Publicaties_steunpunt-wonen-2012-2015/2012/2012-18-de-verdeling-van-de-woonsubsidies-versie.pdf, 80 and 84.

[595] P. DE DECKER, "Op weg naar een duurzaam woonbeleid? Hoe tegenwoordig blijft het verleden?" *Welzijnsgids* 2002, no. 44, (23) 38; Balchin described measures that financially support home ownership as unjust, wasteful and inefficient, see: P. BALCHIN, *Housing policy: an introduction*, London, Routledge, 1995, 225.

[596] V. GEURTS and L. GOOSSENS, "Home ownership and social inequality in Belgium", in K. KURZ and H.P. BLOSFELD (eds.), *Home ownership and social inequality in comparative perspective*, Stanford, Stanford University Press, 2004, (79) 103; P. DE DECKER, "Not for the homeless? Housing policy in Flanders: between selectivity and legitimacy", *European Journal of Homelessness* 2011, vol. 5, no. 2, (129) 1134-135.

[597] G. VERBIST and J. VANHILLE, "Tussen huursubsidies en woonbonus: een verdelingsanalyse voor Vlaanderen", in D. DIERCKX, J. COENEN, A. VAN HAARLEM and P. RAEYMAECKERS, *Armoede en sociale uitsluiting. Jaarboek 2013*, Antwerpen, Acco 2013, (293) 299-300.

[598] G. GOEYVAERTS, M. HAFFNER, K. HEYLEN, K. VAN DEN BROECK, F. VASTMANS and S. WINTERS, *Onderzoek naar de woonfiscaliteit in Vlaanderen. Deel 4 Bouwstenen en scenario's*, Leuven, CES-KU Leuven, 2014, https://feb.kuleuven.be/drc/Economics/research/documenten/deel-4-bouwstenen-en-scenarios.pdf, 41.

[599] E.g.: ECSR 7 December 2005, no. 27/2004, European Roma Rights Centre/Italy, par. 18: "*the right to housing (…) contributes to the abolishment of socio-economic inequalities*."

[600] S. ZWART, *Maintaining an efficient and equitable housing market in Belgium*, OECD Economics Department Working Papers, no. 1208, Paris, OECD Publishing, www.oecd-ilibrary.org/docserver/download/5js30ttdx36c.pdf?expires=1453890455&id=id&accname=guest&checksum=EF13A0F068B0A10A156C51AF313B9738, 2015, 13.

[601] K. HEYLEN, *Grote woononderzoek deel 2. Deelmarkten, woonkosten en betaalbaarheid*, Leuven, Steunpunt Wonen, 2015, https://steunpuntwonen.be/Documenten/studiedagen/Studiedag_Wonen_in_Vlaanderen_anno_2013_3_maart_2015/gwo-volume-2-deel-2-eind.pdf, 28-29.

for. Due to the low long-term price elasticity of the Belgian housing stock, the mortgage tax relief has likely been passed on to higher housing prices, benefiting sellers rather than buyers and distributing welfare primarily on the property market.[602] For all these reasons it can only be encouraged that the Flemish government decided to reduce the tax benefits provided by the housing bonus following its transition to the regions.[603] In all fairness, that decision was made out of budgetary concerns more than anything else.[604] The savings are not planned to be used for redirecting Flemish housing policy, more specifically for creating a more fiscally neutral housing policy. The latter has nonetheless been recommended by academics, the OECD, the Special Rapporteur for housing, etc.[605] In illustration of how this is not a (primary) concern, an additional adjustment to the housing bonus now enables borrowers to profit from the housing bonus not only with regard to their first but also their second, third, … dwelling. This does obviously not abide by housing affordability concerns at all.

208. For a good understanding, we do not oppose all forms of financial benefits for property owners. Yet, they should be more selective, more targeted at specific groups, for example at older homeowners who cannot afford the necessary renovations to improve quality

[602] R. HELGERS and E. BUYST, *Woningprijzen: een regionaal woningprijsmodel*, Leuven, Steunpunt Wonen, 2014, https://steunpuntwonen.be/Documenten/Onderzoek_Werkpakketten/zkc4494-wp9-woningprijzen-een-regionaal.pdf, 35; D. ANDREWS, A. CALDERA SÁNCHEZ and A. JOHANSSON, *Housing markets and structural policies in OECD countries*, OECD Economics Department Working Papers no. 836, www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP%282011%295&docLanguage=En; G. GOEYVAERTS, M. HAFFNER, K. HEYLEN, K. VAN DEN BROECK, F. VASTMANS and S. WINTERS, *Onderzoek naar de woonfiscaliteit in Vlaanderen. Deel 4 Bouwstenen en scenario's*, Leuven, CES-KU Leuven, 2014, https://feb.kuleuven.be/drc/Economics/research/documenten/deel-4-bouwstenen-en-scenarios.pdf.

[603] In 2014, the last year in which the previous conditions were applied, the cost of the housing bonus for Flanders was 1,7 billion euro. Since the conditions will not change retroactively, the housing bonus will remain a large expenditure for several years to come. For new loan contracts (1 January 2015), the housing bonus is cut by one-third. The deduction at the borrower's marginal tax rate was converted into a flat rate deduction of 40 percent; See S. WINTERS and K. VAN DEN BROECK, "Milestones in 25 years of housing finance in Belgium", in J. LUNDE and C. WHITEHEAD (eds.), *Milestones in European housing finance*, Oxford, Wiley-Blackwell, 2016, (75) 88-89.

[604] M. HAFFNER and S. WINTERS, "Homeownership taxation in Flanders: moving towards 'optimal taxation'?", *International Journal of Housing Policy* 2015, (1) 14-15.

[605] E.g.: FLEMISH HOUSING COUNCIL, *Aanbodbeleid op de private huurmarkt. Bevraging van actoren en voorstellen van de Vlaamse Woonraad*, 17 December 2015, no. 2015/14, www.rwo.be/Portals/126/Vlaamse%20Woonraad/VWR_advies_aanbod_private_huur_def.pdf, 36; S. ZWART, *Maintaining an efficient and equitable housing market in Belgium*, OECD Economics Department Working Papers, no. 1208, Paris, OECD Publishing, www.oecd-ilibrary.org/docserver/download/5js30ttdx36c.pdf?expires=1453890455&id=id&accname=guest&checksum=EF13A0F068B0A10A156C51AF313B9738, 2015, 20-21; UN General Assembly, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living*, 10 August 2012, A/67/150, 21-22; G. GOEYVAERTS, M. HAFFNER, K. HEYLEN, K. VAN DEN BROECK, F. VASTMANS and S. WINTERS, *Onderzoek naar de woonfiscaliteit in Vlaanderen. Deel 4 Bouwstenen en scenario's*, Leuven, CES-KU Leuven, 2014, https://feb.kuleuven.be/drc/Economics/research/documenten/deel-4-bouwstenen-en-scenarios.pdf.

standards.[606] What then about social loans? There is no doubt that they are more selective than the housing bonus from a relative point of view. Based on loans granted in 2009, the three lowest income quintiles all profit to a considerable extent with the second one as the outlier.[607] The theoretical disposable income limits are nonetheless still pretty universal, enabling a single person in the eight income decile (or in the ninth decile for two-person households) to request a social loan. On the other side of the same coin however it is important as well that these social loans do not persuade households whose finances would be stressed to the limit to try and acquire property against the odds. A minimum residual income limit of 10.000 euro and an investigation into the solvability of the applicant aims to prevent this scenario.

209. While definitely a more sustainable and justifiable measure than the housing bonus, the large and increasing cost of social loans is undeniable. Ultimately, this is once again to the detriment of those who cannot gather enough capital to consider this option and are designated to the rental market. With the earlier mentioned rise in prices, the popularity of social loans has risen considerably. In response, the Flemish government has raised the 2016 budget for social loans with 200 million euro to 925 million euro. Add that to the enormous remaining cost of the housing bonus and housing affordability is anything but tenure-neutral. Just in comparison, the rental premium costs the Flemish government a mere 14,5 million euro.[608]

210. It is in that regard that we rally behind those in support of a more general rental subsidy. In a parliamentary discussion at the end of 2015, a couple of estimates were made in case such a subsidy would be distributed to everyone on the waiting list for social housing (instead of only for those who have been waiting for four years). The highest estimation, made by the

[606] S. WINTERS, "Belgian state reform as an opportunity to reorient Flemish housing policy", *International Journal of Housing Policy* 2013, vol. 13, no. 1, (90) 96.
[607] There are however differences in the selectivity of the measure depending on whether the loan is granted by the Flemish Company for Social Housing (VMSW) or the Flemish Housing Fund (VW), see: FLEMISH HOUSING COUNCIL, , *Wonen en armoede: aanbevelingen voor een woonbeleid gericht op het tegengaan van armoede en sociale uitsluiting*, 28 April 2011, no. 2011/04 www.rwo.be/portals/100/vlaamse%20woonraad/vwr_advies_armoede_20110428_def2.pdf, 51-53.
[608] Additionally and according to the Flemish Housing Council, the share of beneficiaries of rental subsidies in Flanders is significantly low (2,1%) in comparison most other Western-European countries, see: FLEMISH HOUSING COUNCIL, *Aanbodbeleid op de private huurmarkt. Bevraging van actoren en voorstellen van de Vlaamse Woonraad*, 17 December 2015, no. 2015/14, www.rwo.be/Portals/126/Vlaamse%20Woonraad/VWR_advies_aanbod_private_huur_def.pdf, 17.

current Flemish Minister for Housing herself, was 202 million euro.[609] This is still a marginal amount when compared to the public investments in property acquisition. Now this is only one option. The subsidy does not have to be coupled to those waiting lists. As a matter of fact it would probably be more efficient to look at housing needs. It could then for example be applicable to households with a limited income whose housing costs are excessive.[610] This scenario has been investigated by Verbist and Vanhille. They estimate that while the accompanying decrease of fiscal benefits on property would make more losers than winners, the losses would be rather insignificant compared to the gains made by the beneficiaries.[611] Regardless, some reticence is still appropriate. While it is purported as having a larger positive effect on poverty risk and poverty gap than the housing bonus, we should add that there is still some uncertainty on the effects of such subsidies on rental prices.

211. We do not believe that our interpretation of social dignity, a concept founded in human rights law, justifies or promotes in particular a housing policy focused mainly on home ownership. We do not consider the right to housing as only a freedom right, but the elements that generate adequate housing are indeed indispensable to create that freedom. Considering the attainment of these elements are a problem more tenants than owner-occupiers struggle with, a more tenure-neutral policy seems fitting. This might positively influence the perception of renting at the same time, creating a double impact on social dignity.

4) Stigmatization on the social rental market

212. The previous sections predominantly focused on the private rental market, but there is no doubt that both nationally and internationally social housing is by far the most stigmatised in public.[612] According to De Decker, policy makers and the media play an important role in

[609] Report on behalf of the Commission on Housing, Poverty Policy and Equal Opportunities released by Mr. Anseeuw and Ms. Hostekint concerning the policy letter housing 2015-2016, *Parl.St.* Vl.Parl. 2015-16, no. 524-4, 28 and 39.

[610] FLEMISH HOUSING COUNCIL, *Huursubsidie voor kandidaat-huurders sociale huisvestingsmaatschappijen*, 26 January 2010, no. 2010/02, www.rwo.be/Portals/126/Vlaamse%20Woonraad/Microsoft%20Word%20-%20HS-%20eindvoorstel-besluitVDB.pdf, 6.

[611] G. VERBIST and J. VANHILLE, "Tussen huursubsidies en woonbonus: een verdelingsanalyse voor Vlaanderen", in D. DIERCKX, J. COENEN, A. VAN HAARLEM and P. RAEYMAECKERS (eds.), *Armoede en sociale uitsluiting. Jaarboek 2013*, Antwerpen, Acco 2013, (293) 300-302.

[612] A. VASSENDEN and T. LIE, "Telling other how you live – refinig Goffman's stigma theory through an analysis of housing strugglers in a homeowner nation", *Symbolic Interaction* 2013, vol. 36, no. 1, (78) ; S. FITZPATRICK and H. PAWSON, "Ending security of tenure for social renters: transitioning to 'ambulance service' social housing", *Housing Studies* 2014, vol. 29, no. 5, 600.

enlarging this image.[613] More so than other forms of tenure the social housing market is related to social problems of different sorts, almost as a natural consequence of the high concentration of 'weaker' groups. A social tenant with rent arrears will more quickly be perceived as irresponsible, while an owner-occupier with mortgage debts is more probably a victim of unfortunate circumstances. We already alluded to the impact of a negative connotation on the relational aspect of dignity earlier. A negative reputation can have its repercussions on the self-image and magnify a person's marginality.[614] We therefore take a look at some options for social renting and the social rental sector inspired by our considerations for social dignity.

a. Composition of the (social) rental sector

213. A drastic approach to counter residualisation of the social rental sector could be to dismantle the social housing market constructed as a separate component of a dualist rental system. In defense of this option, we could refer back to Sweden, where as we said earlier the stigma with regard to renting has been much less tangible.[615] This could in part be due to what Bengtsson describes as a universal housing system open to everyone.[616] This does not mean that selective measures like housing allowances to support certain households do not exist (all welfare systems are to an extent selective), but what makes it universal is the fact that the Swedish housing market is not divided into an open and a protected sector.[617] There is only one integrated rental market with non-profit municipally-owned housing companies in it.[618] And due to the strong tenancy and rent control regulations, not only is there equality in terms

[613] P. DE DECKER, "Rook zonder vuur? Fragmenten van de genese van een slechte reputatie en haar gevolgen voor de sociale huursector", in J. VRANKEN, K. DE BOYSER and D. DIERCKX (eds.), *Armoede en Uitsluiting. Jaarboek 2004*, Leuven, Acco, 2004, 207-225.
[614] *Ibid*., 221-223.
[615] The Netherlands and Germany, the two other countries we have mentioned as not predominantly stigmatising towards renting also have a integrated rental market. Due to allocation systems and rent regulation however, the gap between both rental markets is larger than in Sweden. Based on: M. HAFFNER, J. HOEKSTRA, M. OXLEY and H. VAN DER HEIJDEN, "Universalistic, particularistic and middle way approaches to comparing the private rental sector", *International Journal of Housing Policy* 2010, vol. 10, no. 4, (357) 372-374; J. KEMENY, "Corporatism and housing regimes", *Housing, Theory and Society* 2006, vol. 23, no. 1, 1-18.
[616] B. BENGTSSON, "Housing as a social right: implications for welfare state theory", *Scandinavian Political Studies* 2001, vol. 24, no. 4, (255) 270.
[617] *Ibid*., 262-264 and 267-269; J. KEMENY, *From public housing to the social market: rental policy strategies in comparative perspective*, London, Routledge, 1995, 49-58.
[618] H. RUONAVAARA, "Home ownership and Nordic housing policies in 'retrenchment'", in R. RONALD and M. ELSINGA (eds.), *Beyond home ownership: housing, welfare and society*, London, Routledge, 2011, (91) 97-99; E. ANDERSSON, P. NAUMANEN, H. RUONAVAARA and B. TURNER, "Housing, socio-economic security and risks. A qualitative comparison of household attitudes in Finland and Sweden", *European Journal of Housing Policy 2007*, vol. 7, no. 2, 151-170.

of access to housing, but the differences in housing quality and rent levels are also smaller.[619] This housing policy (or philosophy) however is under serious pressure. The special position of the municipal rental housing companies has been largely abolished, not in the least due to the incompatibility with European rules on state support.[620] This is only complicated by the fact that Swedish rent regulation links private sector rents to those charged by the social sector and unsubsidised commercial suppliers therefore have to charge sub-market rents.[621] More privatisation has become the obligatory new mantra. According to Holmqvist and Turner, the Swedish model with a non-profit sector open to all will probably come to an end, making it harder to prevent housing segregation in a structural manner.[622]

214. Against the specific background of UK housing policy, King also proposes the establishment of only one rental market with housing benefits for those in need of it.[623] In contrast, his plea relies on privatisation from the get go. He gives a lot of proverbial weight to the concept of choice, which a social tenant is considered unable to exercise but would be available to all tenants once the rental market is universalised. Based on the idea that the consequences of one's choices generate responsibility, the proposition is seen as a form of real empowerment. Before continuing, we should perhaps repeat that there is actually some limited amount of choice involved in the allocation of social housing in Flanders. Flemish applicants for social housing are able to give preferences in relation to a couple of categories. We do admit though that this choice is different from the choices on the property or the private rental market.

215. Yet, the only potential we can see for an integrated market to work effectively in the context of social dignity and the right to housing is under the condition of strong rental legislation highly protective of tenants' interests (i.e. rent control[624]), as is (was?) the case in

[619] J. HOEKSTRA, "Two types of rental system? An exploratory empirical test of Kemeny's rental system typology", *Urban Studies* 2009, vol. 46, no. 1, (45) 53.
[620] E. HOLMQVIST and L.M. TURNER, "Swedish welfare state and housing markets: under economic and political pressure", *Journal of Housing and the Built Environment* 2014, vol. 29, (237) 241; H. RUONAVAARA, "Home ownership and Nordic housing policies in 'retrenchment'", in R. RONALD and M. ELSINGA (eds.), *Beyond home ownership: housing, welfare and society*, London, Routledge, 2011, (91) 103-104.
[621] M. OXLEY, M. ELSINGA, M. HAFFNER and H. VAN DER HEIJDEN, "Competition and social housing in Europe", *Economic Affairs* 2008, vol. 28, no. 2, (31) 31.
[622] E. HOLMQVIST and L.M. TURNER, "Swedish welfare state and housing markets: under economic and political pressure", *Journal of Housing and the Built Environment* 2014, vol. 29, (237) 249 and 251.
[623] P. KING, *Choice and the end of social housing*, London, The Institute of Economic Affairs, 2006, 103-127.
[624] The Swedish rent control system has been said to keep the rent level permanently below the market level, see: H. LIND, "Rent regulation: a conceptual and comparative analysis", *European Journal of Housing Policy* 2001,

Sweden but is only scarcely highlighted in King's approach.[625] If this would not be the case, the socio-economically disadvantaged tenant could very well be constrained in his real choices once again, being subjected to the forces of the free market. How much is choice ultimately worth in the context of empowerment if the primary elements for human flourishing, the different aspects of adequate housing, would become much more uncertain to be attained? In Flanders, those housing elements are right now definitely better protected by social housing, with dwellings of higher quality, less tenants with a disproportionate housing cost and more security of tenure than on the private rental market. Not only that, a large majority of social tenants (81.2%) still shows to be satisfied with their dwelling, even if this number has dropped almost 8 per cent in comparison to 2005.[626] They show a similar level of satisfaction with their neighbourhood as well.[627] On the basis of these figures one could conclude that luckily, the negative image of social housing has apparently not yet affected most Flemish tenants' enjoyment of their dwelling.

216. In order to prevent this from happening, a different way to counter negative perception to some extent and perhaps provide somewhat of a middle ground between either a single or a dual rental system might come through more widespread success of social rental agencies. It first of all limits concentration or what some may call segregation of socio-economically disadvantaged groups. Owners might not be in direct relation to the sub-tenants, but for them the latter will no longer be a separate group in (or at the boundaries of) society. Quite on the contrary since the system of social rental agencies actually provides them certain benefits.

217. With regard to the "traditional" type of social housing, it is possible to further expand income requirements to try and create more of a social mix[628] (on this occasion more particularly a socio-economic mix) and again affect the predominantly negative status of social tenants. That of course assumes that higher income households will not be hindered by the negative image of social housing. Considering that the income conditions are already quite

vol. 1, no. 1, (41) 48-49; D. CZISCHKE, "Managing social rental housing in the EU: a comparative study", *European Journal of Housing Policy* 2009, vol. 9, no. 2, (121) 128.

[625] *Ibid*., 110.

[626] I. PANNECOUCKE and P. DE DECKER, *Grote Woononderzoek 2013. Deel 7. Woontevredenheid en woongeschiedenis*, Leuven, Steunpunt Wonen, 2015, https://steunpuntwonen.be/Documenten/Onderzoek_Werkpakketten/gwo-volume-2-deel-7-eind.pdf, 10-11.

[627] *Ibid*., 32-33.

[628] C. JOHNSTON, "Housing policy and social mix: an exploratory paper", 2002, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.559.5412&rep=rep1&type=pdf.

lenient, Bervoets and Loopmans argue that this already the case.[629] Additionally, the higher income groups are sometimes purported as being able to perform an exemplary role for others, thereby increasing the liveability of neighbourhoods.[630] There is however a lot of uncertainty about whether this is actually the case.[631] Moreover, there is the problem of the limited supply of social housing, to which we will return in the next part of this research. All in all, it might be more effective to create such a social mix more organically, through smaller social housing building initiatives rather than through changing income requirements.[632]

b. Participation in social housing

218. When people feel excluded, their self-development potential can be harmed.[633] In social housing, these feelings have a bigger breeding ground. In comparison to owner-occupiers and even private tenants, social tenants are less autonomous in the sense that they are more strongly dependent upon legislation and the social housing company. For reasons of empowerment it is therefore of increased importance that social tenants are given the opportunity to participate to one extent or another on issues like the housing aspects themselves, the neighbourhood or the functioning of the social housing company.[634] Anno 2016, this idea is clearly rooted in Flemish legislation. The Housing Code proclaims that the government can take measures aimed at the participation of involved resident groups.[635] And

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[629] W. BERVOETS and M. LOOPMANS, *Diversiteit en discriminatie in de sociale huisvesting: een kritische benadering van 'sociale mix'*, Brussel, STeR, 2010, www.unia.be/files/legacy/Mixite_NL_DEF.pdf, 84.
[630] P. DE DECKER, "Rook zonder vuur? Fragmenten van de genese van een slechte reputatie en haar gevolgen voor de sociale huursector", in J. VRANKEN, K. DE BOYSER and D. DIERCKX (eds.), *Armoede en Uitsluiting. Jaarboek 2004*, Leuven, Acco, 2004, (207) 219 and 224.
[631] N. SCHUERMANS, B. MEEUS and P. DE DECKER, "Geographies of whiteness and wealth: white, middle class discourses on segregation and social mix in Flanders, Belgium", *Journal of Urban Affairs* 2014, vol. 37, no. 4, (478) 478-479 and 491; W. BERVOETS and M. LOOPMANS, *Diversiteit en discriminatie in de sociale huisvesting: een kritische benadering van 'sociale mix'*, Brussel, STeR, 2010, www.unia.be/files/legacy/Mixite_NL_DEF.pdf, 21-24; K. HEYLEN, K. TRATSAERT and S. WINTERS, *Leefbaarheid en de rol van toewijzing in de Vlaamse sociale huisvesting*, Brussel, Departement RWO-Woonbeleid, 2007, https://steunpuntwonen.be/Documenten/Publicaties_steunpunt_ruimte_en_wonen_2007-2011/2007/2007-06-b2257-samenvattingonderzoek-leefbaarheid95.pdf, 15 and 17.
[632] W. BERVOETS and M. LOOPMANS, *Diversiteit en discriminatie in de sociale huisvesting: een kritische benadering van 'sociale mix'*, Brussel, STeR, 2010, www.unia.be/files/legacy/Mixite_NL_DEF.pdf, 45.
[633] R. BUITENWEG, *Recht op een menswaardig bestaan. Een humanistieke reflectie op sociaal-economische mensenrechten*, Utrecht, de Graaff, 2001, 129.
[634] M. SANTENS, "Participatie tussen emancipatie en culturele innovatie", in L. BOUDRY et al. (eds.), *Inzet, opzet, voorzet: stadsprojecten in Vlaanderen*, Brussel, Ministerie van de Vlaamse Gemeenschap, 2006, (164) 174-176; B. VANDEKERCKHOVE and G. VAN BORTEL, "Hoe ver reikt de participatieladder voor huurders in de sociale huisvesting?", in X. (ed.), *Het onroerend goed in de praktijk*, Mechelen, Kluwer, 2012, XIV.F, (173) 183: Even if it only appears to be useful after the basic housing elements are complied with. This confirms the importance of adequate housing for empowerment potential; with regard to empowerment more in general, see: T. VAN REGENMORTEL, *Empowerment en maatzorg. Een krachtgerichte psychologische kijk op armoede*, Leuven, Acco, 2002.
[635] Article 4, §3, 5° Flemish Housing Code.

indeed, in several decisions the Flemish government has included the involvement of tenants in the assignments of both the social housing companies as well as the social rental agencies.[636] An important actor in putting participation in the social housing system more on the map has been VIVAS, the Flemish network of and for social tenants and a partnership of local resident groups. VIVAS is also represented in the Flemish Housing Council, thereby giving the association a voice in the process of social housing policy making.[637]

219. While the idea of participation is catching on and social housing companies are slowly becoming more supportive of the idea as well, there is still a long way to go. Despite the regulation in place, there is no clear view on how participation should be operationalized. It can be organized in many different ways and can range from being properly informed over the opportunity to react to and discuss issues and proposals of and with social housing companies, to an advising and potentially even a decision-making role.[638] On the one hand this open-endedness enables tailor-made initiatives that take into account local sensitivities, but on the other hand further concretization in law could be fruitful to establish more participation. Right now participation is still often perceived as a favour rather than a right. The current legislation imposes an obligation to initiate deliberation with tenants under the form of tenant meetings, but this mainly still entails gathering information from and communicating to tenants, and even that component of participation is said to be insufficiently developed by legislation. It is not too surprising then that only some social housing companies have given social tenants a real advisory role, for example by establishing a tenant advice council. On this basis, a legal modification is recommendable.[639]

220. This is not at all to say that the Flemish government has not done anything to ascertain that social housing companies would take into account their existing participation-related assignments. The 2010 decision on the recognition of social housing companies has

[636] Article 29bis Framework Decision Social Rent; Ministerial Decision 21 December 2007 concerning the execution of a couple of provisions of the Decision by the Flemish Government of 12 October 2007 on the regulation of the social housing system in execution of title VII of the Flemish Housing Code, *BS* 18 January 2008; Decision Flemish Government 6 February 2004 determining the conditions for recognition and financing of social rental agencies, *BS* 16 March 2004.
[637] VIVAS, *Tien jaar VIVAS. Bewonersparticipatie in de sociale huisvesting*, Brussel, Samenlevingsopbouw Vlaanderen, 2013, www.samenlevingsopbouwwvl.be/websites/1/uploads/files/documents/20140312120938-10-jaar-vivas_2-4-2014_14_02_14.pdf.
[638] E. DEBUSSCHERE, B. VANDEKERCKHOVE and G. VAN BORTEL, *Praktisch handboek: huurdersparticipatie in de sociale huisvesting*, Heverlee, Steunpunt Ruimte en Wonen, 2009, https://steunpuntwonen.be/Documenten/Publicaties_steunpunt_ruimte_en_wonen_2007-2011/2009/2009-03-20100105-praktisch-handboek.pdf, 23-27.
[639] *Ibid*., 28-29, 42 and 45.

established an independent visitation commission that subjects all social housing companies to a performance assessment every four years. Interestingly, the performance field entitled "social policy" also includes tenant involvement and is thus part of the performance assessment.[640] If this is found to be insufficient by the final visitation report, the Minister is competent to compel the social housing company to develop and execute an improvement plan.

c. Empowerment through obligations

221. Finally, we argue that concerns for social dignity and empowerment can also be expressed in restrictions to housing rights. We think especially of the corresponding obligations to which the second paragraph of article 23 alludes. On that basis, some obligations might not only be justified because they impose a proportionate (i.e. corresponding) burden of responsibility upon citizens, but because they actually promote personal development themselves. Probably the most prominent example in the context of housing is the requirement for candidate-tenants of social housing to illustrate willingness to learn the Dutch language.[641] In response to an appeal for annulment, the Constitutional Court considered the purposes of this condition to be proportionate.[642] The aims were described as improving communication with the social landlord and other tenants, increasing self-reliance and contributing to the recognition of these persons as valuable citizens by society.[643] The Court bestowed specific importance on the fact that it concerns elementary knowledge, that the language lessons are free and that the obligation is not one of result.[644] Moreover, any sanction has to be commensurate to the severity of the breach. Only if non-compliance would lead to nuisance or liveability problems for other tenants would it be possible to terminate the social rental contract.[645]

222. Striking a right balance between on the one hand trying to create more autonomy and on the other not to (excessively) conditionalize the core housing elements that establish social

[640] Art.14 Decision Flemish Government 22 October 2010 concerning the determination of complementary requirements and the procedure for the recognition as social housing company and concerning the determination of the procedure for the assessment of the performances by social housing companies, *BS* 29 December 2010.
[641] Article 95, § 1 Flemish Housing Code.
[642] Constitutional Court 10 July 2008, no. 101/2008, B.32.1-B.34.4; This reasoning has been confirmed more recently: Constitutional Court 5 March 2015, no. 24/2015, note T. VANDROMME, "Ook partner van sociale huurder moet aan voorwaarden sociale huur voldoen", *Juristenkrant* 2015, no. 317, 4.
[643] *Ibid*., B.32.1-B.32.3.
[644] *Ibid*., B.34.1-B.34.2
[645] *Ibid*., B.34.3-B.34.4.

dignity in the first place can be a very delicate matter. The plans of the current administration to change the obligation to one of result, as described in the policy letter on housing 2015-2016[646], illustrate this. On face value, it looks like this modification would not survive an appeal to the Constitutional Court, which as we mentioned used the fact that the condition imposed no obligation of result as an important argument not to annul the contested provisions. As a matter of fact, the Court has explicitly prohibited an obligation of result as a condition to gain access to social housing back in 2007. [647] Aware of this judgment and in defence of the planned modifications, the Minister for Housing stresses that this argument was specifically based on the fact that that annulled measure connected the compliance with the obligation to whether a person could get access to or remain resided in his/her current social dwelling. In contrast, the current proposal is said not do so. When a person does not succeed a language test, he could only be fined.[648] It will be interesting to see how this debate evolves further.

223. We acknowledge that obligations and restrictions are sometimes able to contribute to personal development, but a certain wariness is in its place, and not only with regard to the effect on the realization of the core elements of the right to housing. The politically popular term of self-reliance regularly surfaces in this context.[649] Now, this term can of course be applied in a positive sense, embodying the need for empowerment. But its frequent use in relation only to the socio-economically weaker groups or – translated to housing – tenants on the social housing market and what they should do "in return" also creates or feeds the impression that social housing must be equated with people who are not self-reliant and should be more independent.[650] To some extent, this devaluates social housing as a fully valid alternative, as a real home, all the while a lot of these social tenants are not very well positioned to grow out of this situation and are actually doing pretty well to "save themselves"[651] with what little they sometimes have.

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[646] Policy Letter Housing 2015-2016 submitted by viceminister-president Homans, *Parl.St.* Vl. Parl. 2015-16, no. 524-1, 23-24; see also: Report on behalf of the Commission for Housing, Poverty Policy and Equal Opportunities released by Mr. Anseeuw and Ms. Hostekint concerning the policy letter on Housing 2015-2016, *Parl.St.* Vl. Parl. 2015-16, no. 524-4, 10-11.

[647] Constitutional Court 12 July 2007, no. 104/2007, B.9.2.

[648] Report on behalf of the Commission for Housing, Poverty Policy and Equal Opportunities released by Mr. Anseeuw and Ms. Hostekint concerning the policy letter on Housing 2015-2016, *Parl.St.* Vl. Parl. 2015-16, no. 524-4, 36; *Vr. en Antw.* Vl.Parl., Vr. nr. 1013, 12 February 2015 (K. PARTYKA).

[649] R. DE BRABANDER, *Wie wil er nou niet zelfredzaam zijn? De mythe van zelfredzaamheid*, Antwerpen, Garant, 2014, 86-91, 96-98 and 171-172.

[650] R. SENNETT, *Respect in a World of inequality*, New York, Norton, 2003, 101.

[651] Translation of the Dutch word "zelfredzaamheid" to which we refer with the term self-reliance.

§ 3. Conclusion

224. Taking into consideration top-down and bottom-up influences on an effective realisation of the right to housing is only relevant if sufficient thought is given to what constitutes this effectiveness. On the basis of how article 23 of the Constitution is constructed, this means that proper attention needs to be given to the concept of human dignity, the attainment of which the right to housing should contribute to. But human dignity is complex and multi-interpretable. It can be a value or a right, objective or subjective and as broad or as limited as the particular situation demands. It is therefore that we are torn about its added value in (fundamental) rights jurisprudence.

225. Considering its importance for the constitutional right to housing though, we have developed our own interpretation of what we have called a right to social dignity, a term used to mark the difference with the interpretation of dignity as an inherent worth justifying the existence of other human rights. Social dignity contains the aspects of well-being and autonomy/freedom, often recurring features of dignity in philosophy and social justice theories. We have argued that autonomy both precedes and follows from well-being. It is the freedom a person develops from living adequately, but also the freedom from circumstances that may hinder a different person from acquiring adequate housing in the first place. Add to that the unmistakable subjective/perceptional component of autonomy and not only does social dignity clearly distinguish itself from the traditional elements of adequate housing, it also provides for a new perspective to be taken into account when discussing housing legislation and policies. As such, we have stressed the importance of legal aid as wel as participation in social housing (as a sector susceptible to marginalization), but denounced the idea that a more tenure-neutral policy is inconsistent with a serious concern for the autonomy component of social dignity.

Part II: European jurisprudence: a protection of and inspiration for the right to housing?

226. In contrast to the first part, parts II and III embark upon an investigation into the legal possibilities to strengthen and enforce the obligations of the state with regard to the right to housing. First we look at what European jurisprudence is able to provide us with. For many, the word Europe evokes thoughts of a distant and unpopular bureaucracy. But the European (quasi-)judicial instances in Strasbourg and even Luxembourg have clearly shown their potential as a gateway for social justice, at the very least more so than sometimes publicly perceived. It has certainly been said that Europe has significant but regularly overlooked possibilities for the right to housing and its advocates.[652] Now what is European jurisprudence really able to contribute with regard to imposing obligations on or at least incentivizing states to protect and fully realize the right to adequate housing? This part will provide a closer look and aims to draw connections between the case law of the three main actors at the same time: the European Court of Human Rights (ECtHR), the European Committee of Social Rights (ECSR) and to a lesser extent the European Court of Justice (ECJ). We will also assess the plausibility of a collective complaint against the Belgian state based on previous decisions of the ECSR.

§ 1. Access to European courts

A. Burdens of admissibility

227. Before we plunge into the housing-related case law, it is important to mention a couple of early disclaimers. In contrast to for example the right to free speech, a social right like the right to housing obviously carries more weight for the weaker and marginalized persons and groups in society. Regardless even whether or not complaints before the ECtHR inspired by or linked to the right to housing can be successful, it is first and foremost necessary that those people are able to find their way to these human rights institutions. For the common tenant

[652] E.g.: P. KENNA and M. JORDAN, "Housing rights in Europe: the Council of Europe leads the way", in P. KENNA (ed.), *Contemporary housing issues in globalized world*, Farnham, Ashgate, 2014, (115) 140; F. SPINNEWIJN, "Een versterkt recht op wonen als dam tegen dakloosheid en sociale uitsluiting?", Presentation during a seminar organized by the Flemish Housing Council on 11 March 2014, *Towards a strengthened right to housing*, www.rwo.be/Portals/126/Vlaamse%20Woonraad/Presentation2%20%5BAlleen-lezen%5D.pdf.

however, the Council of Europe is probably as far away removed from molded bathrooms, undersized dwellings, imminent evictions and other everyday problems as possible. Even though it has been discussed more extensively earlier in this research, it feels suitable to remind the reader of the notion of one-shotters.[653] Considering the admissibility criteria that all domestic remedies (safe any possible unavailable, inadequate or ineffective ones[654]) have to be exhausted, they are unlikely to litigate all the way to Europe.[655] Procedural burdens like these also make it more expensive and time-consuming to lodge a complaint. Who could blame a social tenant for spending his/her time and money into finding a fitting new home instead of contesting eviction procedures in Strasbourg? Whatever the plausibility of a successful outcome in such a case may be, which will be illustrated a bit further, we should not discard or underestimate how these considerations have an impact on the possible role of the ECtHR for the right to housing.[656]

228. Unlike the European Court of Human Rights, the conditions that have to be met before a complaint will be considered admissible by the European Committee of Social Rights are much more lenient.[657] While undeniably also better placed to assess problems concerning the right to housing (under article 31 Revised European Social Charter (RESC)), the ECSR only treats collective complaints. For the purposes of this topic, the relevant claimants are then international non-governmental organizations with a consultative status at the Council of Europe and which have been enregistered on a list established for this purpose by the Governmental Committee.[658] State parties to the Charter can also accept other, national non-governmental organizations within their jurisdiction to formulate complaints, as long as they have particular competence in the matters governed in the Charter.[659] The previous Flemish

[653] M. GALANTER, "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change", *Law and Society Review* 1974, vol. 9, no. 1, 95-160.
[654] ECtHR 6 September 1996, no. 21893/93, Akdivar/Turkey, par. 67.
[655] M. SCHEININ, "Access to justice before international human rights bodies", in F. FRANCIONI (ed.), *Access to justice as a human right*, New York, Oxford University Press, 2007, 135-152.
[656] For more on access to justice and the European Court of Human Rights, see: C. FORDER, "The right to legal aid according to the European Court of Human Rights: a study of the rights of undocumented persons", in B. HUBEAU and A. TERLOUW (eds.), *Legal aid in the Low Countries*, Antwerpen, Intersentia, 2014, (209) 218-225.
[657] R. CHURCHILL and U. KHALIQ, "Violations of Economic, Social and Cultural Rights: The Current Use and Future Potential of the Collective Complaints Mechanism of the European Social Charter", in M.A. BADERIN and R. McCORQUODALE (eds.), *Economic, Social and Cultural Rights in Action*, Oxford University Press, Oxford, 2007, (195) 211-221; ECSR 1 July 2013 (adm. dec.), no. 86/2012 and 90/2013, FEANTSA/The Netherlands and Conference of European Churches/The Netherlands.
[658] Art. 1 Add. Prot. to the European Social Charter providing for a system of collective complaints: national and international organizations of employers and trade unions are of course less relevant claimants in the context of the right to housing.
[659] Art. 2 Add. Prot. to the European Social Charter providing for a system of collective complaints.

government has uttered its willingness to provide access to this procedure to civil society.[660] Thus far however, Finland is still the only signatory state to authorize national NGOs.[661]

229. The impossibility for a person to lodge an individual complaint to the Committee to respond to situations of individual hardship and deprivation is obviously another disadvantage in seeking to realize one's rights.[662] That is also why there will always remain a certain attraction to the ECtHR, even though the protection of social rights will be constrained to an indirect application (infra).[663] That does not lead to the conclusion that the collective complaints mechanism is not useful, quite on the contrary. It partly provides an answer to the aforementioned problem of accessibility due to the complexity of procedures. NGOs do have the power, knowledge and means (even though the latter should not be overestimated) to enforce rights, when an individual might be unable to litigate. They can address problems of victims without having to be victims themselves, since there is no such requirement. A group also has more power than an individual.[664] In the words of Langford, "*collective action rights can allow marginalized groups to emerge as repeat-action litigation players rather than one-shotters; thus leveling the litigation playing field against well-organized government and corporate legal teams.*"[665] Additionally, collective complaints often have a preventive nature. Negative effects of legislation do not have to manifest themselves before a complaint can be made, which simplifies the assessment of progressive realization of this fundamental right.[666]

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[660] Note Flemish Government concerning human rights and the Flemish international policy, *Parl.St.* Vl.Parl. 2011-12, no. 1426-1, 24.

[661] www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp (as of April 2015).

[662] V. MANTOUVALOU and P. VOYATZIS, "The Council of Europe and the protection of human rights: a system in need of reform", in S. JOSEPH and A. McBETH (eds.), *Research Handbook on International Human Rights Law*, Cheltenham, Edward Elgar Publishing, 2010, (326) 349; H. CULLEN, "The collective complaints of the European Social Charter: interpretative methods of the European Committee of Social Rights", *HRLR* 2009, vol. 9, no. 1, (61) 66.

[663] E. BREMS, "Indirect protection of social rights by the European Court of Human Rights", in D. BARAK-EREZ and A. GROSS (eds.), *Exploring social rights. Between theory and practice*, Portland, Hart Publishing, 2007, (135) 164.

[664] R. BRILLAT, "De collectieve klachtenprocedure van het Europese Sociale Handvest en de strijd tegen armoede", in Steunpunt tot Bestrijding van Armoede, Bestaansonzekerheid en Sociale Uitsluiting, *Armoede-Waardigheid-Mensenrechten*, Brussel, 2008, www.armoedebestrijding.be/publications/10jaarsamenwerking/10jaarsamenwerking_rapport_NL.pdf, (74) 76.

[665] M. LANGFORD, "Judicial review in national courts: recognition and responsiveness", in E. RIEDEL, G. GIACCA and C. GOLAY (eds.), *Economic, social and cultural rights: Contemporary issues and challenges*, Oxford, Oxford University Press, 2014, (417) 424-425.

[666] R. BRILLAT, "De collectieve klachtenprocedure van het Europese Sociale Handvest en de strijd tegen armoede", in Steunpunt tot Bestrijding van Armoede, Bestaansonzekerheid en Sociale Uitsluiting, *Armoede-Waardigheid-Mensenrechten*, 2008, www.armoedebestrijding.be/publications/10jaarsamenwerking/10jaarsamenwerking_rapport_NL.pdf, (74) 76.

230. A glaring limitation to a widespread improvement of the right to housing through the recommendations of this mechanism is the number of state parties that have accepted the complaints procedure. Regrettably, only 15 of the 43 states that have ratified the RESC have done so thus far.[667] Additionally, a mere 9 state parties have accepted all paragraphs of article 31 on the right to adequate housing, another 4 at least one of its paragraphs.[668] The "*à la carte*" nature of the Charter combined with the fact that the right to housing is not one of the 9 core rights of the RESC (of which 6 have to be ratified) is obviously an important factor. But even when taking this fact into account, article 31 is still the provision with the lowest acceptance rate. We will see further in the text how this problem is or can be circumvented with the application of article 16 RESC.

B. Twelfth Additional Protocol to the ECHR

231. In the same vein, the ratification of the Twelfth Additional Protocol to the European Convention of Human Rights could also improve the access to the ECtHR in the context of social rights.[669] Under this Protocol, it is no longer necessary to link a discrimination claim (article 14) with a substantive article of the ECHR. Theoretically, with the same non-exhaustive list of discrimination grounds as article 14[670], it could open up the potential to combat social exclusion.[671] Against that background, it has been said that the *ratione materiae* of the Protocol could open up to fundamental social rights to which state parties are bound by other international instruments, such as the European Social Charter.[672] This would be hinted at by the lack of specification that the enjoyment of "*any right set forth by law*" should be secured without discrimination. The explanatory report on the text of the Protocol does indeed

[667] Belgium, Bulgaria, Cyprus, Czech Republic, Finland, France, Greece, Ireland, Italy, Netherlands, Norway, Portugal, Slovenia and Sweden (www.coe.int/t/dghl/monitoring/socialcharter/Presentation/Overview_en.asp).
[668] Andorra, Finland, France, Italy, Latvia, Lithuania, Netherlands, Norway, Portugal, Slovenia, Sweden, Turkey, Ukraine (www.coe.int/t/dghl/monitoring/socialcharter/Presentation/ProvisionTableRevMarch2013Rev_en.pdf).
[669] Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms.
[670] Art. 14 ECHR and art. 1 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms: "*The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status*."
[671] E. BREMS, "Indirect protection of social rights by the European Court of Human Rights", in D. BARAK-EREZ and A. GROSS (eds.), *Exploring social rights. Between theory and practice*, Portland, Hart Publishing, 2007, (135) 162-163; N. BERNARD, "Pas d'expulsion de logement sans contrôle juridictionnel – le droit au logement et la Cour Européenne des Droits de l'Homme", *RTDH* 2009, no. 79, (527) 550-551.
[672] F. SUDRE, "La protection des droits sociaux par la Cour Européenne des Droits de l'Homme : un exercice de 'jurisprudence fiction'?", *RTDH* 2003, no. 55, (756) 770; F. TULKENS and S. VAN DROOGHENBROECK, "Le droit au logement dans la Convention Européenne des Droits de l'Homme. Bilan et perspectives", in N. BERNARD and C. MERTENS (eds.), *Le logement dans sa multidimensionalité. Une grande cause régionale*, Ministère de la Région wallonne, 2005, www.rtdh.eu/pdf/droitaulogement_f-tulkens_s-vandrooghenbroeck.pdf, (311) 323.

mention specifically that '*law*' may also cover international law.[673] The Court could obviously not examine a state's compliance with the RESC, but it should be able to assess whether the enjoyment of a ratified provision of the European Social Charter is or is not subject to discrimination.[674] Hypothetically, the ratification of this Protocol could therefore further introduce social rights and the right to housing into the Court's jurisprudence. Ten years after the entry into force of Protocol No. 12 however, there appears to be no real evidence that it has indeed opened up the content of the Convention in any tangible way.

232. Since the Twelfth Additional Protocol (as well as the European Convention on Human Rights) relate to competences of both the Belgian federal as well as the community and/or regional governments, we speak of a mixed agreement.[675] According to the Cooperation Agreement of 1994, this type of treaties can only be ratified by the federal state with the approval of each of the competent parliaments (infra).[676] Unsurprisingly, it has been pointed out that the approval and ratification of mixed agreements take considerably more time (years, not months) than exclusive treaties.[677] At this point (and this has been the case for over a decade), only the Flemish Parliament has yet to consent with the Protocol.[678,679]

233. Although the ECtHR only reviews the application of legal norms in specific cases and not the legal norms themselves, the former often coincides with the latter. In comparison, the Belgian Constitutional Court can also test legal norms to the principle of equality and non-discrimination in articles 10 and 11 of the Constitution, which proclaims that Belgians must

[673] Draft Explanatory Report to Protocol No.12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, 14 January 2000, CM(2000)53 Addendum, par. 29.
[674] F. SUDRE, "La protection des droits sociaux par la Cour Européenne des Droits de l'Homme : un exercice de 'jurisprudence fiction'?", *RTDH* 2003, no. 55, (756) 775.
[675] The Fourth Belgian State Reform of 1993 honours the principle that the treaty-making power follows the substantive division of competences in domestic law (*in foro interno, in foro externo*).
[676] Cooperation Agreement 8 March 1994 between the federal government, the communities and the regions concerning the rules on concluding mixed treaties, *BS* 17 December 1996: article 2 does provide one exception in which the King can ratify a treaty without having the approval of all concerned legislative bodies; A. ALEN and K. MUYLLE, *Handboek van het Belgische Staatsrecht*, Mechelen, Kluwer, 2011, 758-761.
[677] J. VELAERS, " 'In foro interno et in foro externo': de international bevoegdheden van gemeenschappen en gewesten", in F. JUDO and G. GEUDENS (eds.), *Internationale betrekkingen en federalisme*, Gent, Larcier, 2006, (3) 35.
[678]Approval has been given by the Walloon Region (*BS* 15 January 2004), the Joint Community Commission (*BS* 29 January 2003), the French Community Commission (*BS* 4 June 2003), the Region Brussels-Capital (*BS* 3 March 2003) and the German Community (*BS* 30 July 2002); European Commission against Racism and Intolerance, *ERCI-Rapport over België (vijfde monitoringcyclus)*, 2014, www.coe.int/t/dghl/monitoring/ecri/country-by-country/belgium/BEL-CbC-V-2014-001-NLD.pdf, 13.
[679] In the Commission for Foreign Affairs, Chamber representative Véronique Caprasse has recently asked the Minister of Foreign Affairs to give the state of affairs on the ratification procedure of Protocol No. 12: *Vr. en Antw.* Kamer, Vr. nr. 2087, 30 March 2015 (V. CAPRASSE).

be able to enjoy their rights and freedoms without discrimination.[680] Here may also lay the core of a counterargument against ratification. Taking into account that a decision on an equal, non-discriminative nature of social rights can certainly be politically or ideologically loaded, it is possible to argue that a national court might be better placed to consider the societal context.[681] On the other hand, the experience the European Court has built up from repeatedly assessing the proportionality question suggests that this is not too big of a task. The margin of appreciation lies at the core of a majority of its case law, including with regard to article 14. Even more so, this margin of appreciation enables the Court to be quite reticent in cases based on the Twelfth Protocol. So while the reason for ratification is obvious, the tangible impact on the social protection of citizens is still questionable.

§ 2. Lessons from European jurisprudence: housing rights protection on three levels

A. Acknowledgment of the right to housing by the ECtHR

234. Despite its focus on civil and political rights, the European Court of Human Rights has over the years shone its light on many issues related to social and economic rights. In 1979, it already stated in the *Airey* case that the European Convention on Human Rights is a "*living instrument*", which should be interpreted "*in the light of present-day conditions*" (supra, par. 92). "*Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature*".[682] Former President of the Court, Luzius Wildhaber, has even stated that this evolutionary interpretation is fundamental to the effectiveness of the Convention system and the Court's authority.[683] While it is legally acceptable to say that the Convention is permeable to social rights[684] and certain aspects of socio-economic rights have been (indirectly) protected, it is important not to confuse the socio-economic implications of an effective protection of the Convention rights with the

[680] Cf. the formulation in Constitutional Court 13 October 1989, no. 23/89 with ECHR 23 July 1968, no. 1474/62, 1677/62, 1769/63 and 1994/63, Case "relating to certain aspects of the laws on the use of languages in education in Belgium"/Belgium.
[681] G. GOEDERTIER, "Het Twaalfde Protocol E.V.R.M.: het non-discriminatiebeginsel losgekoppeld van de in het E.V.R.M. opgenomen rechten en vrijheden", *Jaarboek Mensenrechten* 2000-2001, (71) 88.
[682] ECtHR 9 October 1979, no. 6289/73, Airey/Ireland, par. 26; C. WARBRICK, "Economic and social interests and the European Convention on Human Rights", in M.A. BADERIN and R. McCORQUODALE (eds.), *Economic, Social and Cultural Rights in Action*, Oxford, Oxford University Press, 2007, (241) 245-246; I. LEIJTEN, "Meergelaagdheid en ondeelbare mensenrechten", *TBP* 2013, no. 2-3, (95) 98.
[683] L. WILDHABER, "European Court of Human Rights", *C.Y.I.L* 2002, vol. 40, (309) 310.
[684] F. SUDRE, "La perméabilité de la Convention européenne des droits de l'homme aux droits sociaux", *Pouvoir et liberté. Études offertes à J. Mourgeon*, Brussel, Bruylant, 1998, 46.

existence of a social right in the ECHR.[685] Take for example cases in which homosexual partners are granted the same protection as other partners with regard to housing.[686] Rather than a housing case, this is a discrimination case. A considerable bulk of the housing related case law follows a similar pattern, dealing with housing purely factually rather than legally. In the words of Koch, "*he who is 'only' hungry, homeless or sick will go in vain to the ECtHR*".[687] Despite that, the Convention has proven to be more capable than originally envisioned in protecting housing rights related issues through a range of Convention rights.[688]

235. In order to avoid any misunderstanding, it is worth recalling that the Court has stressed repeatedly that it does not recognise a right to housing. In *Balakin*, the Court framed its words from the *Airey* case in a housing context and stated that "*even though there is no watertight division separating the sphere of social and economic rights from the field covered by the Convention, the Court considers that (...) [the right to housing] clearly belongs to the realm of socio-economic rights, which is not covered by the Convention*."[689] Much earlier, the then European Commission on Human Rights stated that while states must respect an individual's home in accordance with article 8 of the Convention, this provision "*in no way imposes on a state a positive obligation to provide a home*".[690] It has been said that the Convention rights do not guarantee housing "*of a particular standard or at all*"[691], and the Court's jurisprudence does not appear to acknowledge such a right either.[692]

236. State parties have been convicted for not providing social housing, but only when this had first been ordered by a national judge. Their failure to enforce domestic judgments within a reasonable time frame first and foremost brings those cases within the sphere of the right to

[685] O. DE SCHUTTER, "The protection of social rights by the European Court of Human Rights", in P. VAN DER AUWERAERT, T. DE PELSMAEKER, J. SARKIN and J. VANDE LANOTTE (eds.), *Social, economic and cultural rights. An appraisal of current European and international developments*, Antwerpen, Maklu, 2002, (207) 215.
[686] ECtHR 24 July 2003, no. 40016/98, Karner/Austria; ECtHR 2 March 2010, no. 13102/02, Kozak/Poland; C.U. SCHMID and J.R. DINSE, *Towards a common core of residential tenancy law in Europe? The impact of the European Court of Human Rights on tenancy law*, 2013, www.jura.uni-bremen.de/lib/download.php?file=68a11d81f1.pdf&filename=WP%201_2013.pdf, 11-13.
[687] I.E. KOCH, "The European Convention on Human Rights and the protection of socio-economic demands", in A. MIHR and M. GIBNEY (eds.), *The SAGE Handbook of Human Rights. Volume 2*, Los Angeles, SAGE, 2014, (673) 673.
[688] S. LECKIE, "The human right to adequate housing", in A. EIDE, C. KRAUSE and A. ROSAS (eds.), *Economic, social and cultural rights*, Dordrecht, Martinus Nijhoff Publishers, 2001, (149) 159.
[689] ECtHR 4 July 2013, no. 21788/06, Balakin/Russia, par. 33.
[690] ECHR 21 May 1975 (adm. dec.), no.4560/70.
[691] ECtHR 18 November 2003, no. 48758/99, Volkova/Russia.
[692] ECtHR 18 January 2001, no. 27238/95, Chapman/United Kingdom, par. 99.

a fair trial of article 6 and access to justice of article 13 of the Convention.[693] On this basis, the Court has decided that while a delay can be justified in certain circumstances, a lack of funds or housing cannot be cited as an acceptable excuse for not honouring a judgment.[694] This has been confirmed in a 2015 case against France, where for the first time the aforementioned *Droit au Logement Opposable* was the subject of jurisprudence by the European Court of Human Rights.[695] Since the social housing ordered by the national judge had not been provided within a reasonable period of time, the Court found a violation of article 6 of the Convention. We will return to DALO as well as this judgment more comprehensively in part III.

237. In contrast to a judicial decision however, a mere promise of social housing by the administrative authorities, as was the case in *Balakin*, has not been deemed sufficient for a violation of the Convention rights, because such an issue directly pertains to the right to housing.[696] The earlier citation of this judgment must also be understood within that context.

238. Nevertheless, the Court has definitely acknowledged housing as a protectable interest, not in the least in the context of article 8 ECHR. This provision proclaims a right to respect private and family life including the home.[697] The peaceful enjoyment of the home has frequently been balanced against other interests of the community (often of an economic nature)[698], for example in cases of pollution[699] and noise disturbances.[700] But a home can also be protected autonomously on the basis of article 8 ECHR. In the *Moldovan* case for example, the Court was presented with the destruction of 18 Roma houses, to which state officials had

[693] ECtHR 28 July 2009, no. 467/07, 22539/05, 17911/08 and 13136/07, Olaru and others/Moldova; ECtHR 1 July 2014, no. 29920/05 et al., Gerasimov and others/Russia; ECtHR 30 June 2005, no. 11931/03, Teteriny/Russia.
[694] ECtHR 30 June 2005, no. 11931/03, Teteriny/Russia, par. 41.
[695] ECtHR 9 April 2015, no. 65829/12, Tchokontio Happi/France.
[696] ECtHR 4 July 2013, no. 21788/06, Balakin/Russia.
[697] F. TULKENS, *The contribution of the European Convention on Human Rights to the poverty issue in times of crisis*, 8 July 2014, www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/ECtHR%20for%20EU%20Judicial%20Trainers/ECtHR%202014/Presentation_ECHR_economic_crisis_and_poverty_TULKENS_2014.pdf, 18; I.E. KOCH, "The European Convention on Human Rights and the protection of socio-economic demands", in A. MIHR and M. GIBNEY (eds.), *The SAGE Handbook of Human Rights. Volume 2*, Los Angeles, SAGE, 2014, (673) 677-678.
[698] P. KENNA, "Housing rights: positive duties and enforceable rights at the European Court Of Human Rights", *E.H.R.L.R.* 2008, no. 2, (193) 201.
[699] ECtHR 9 June 2005, no. 55723/00, Fadeyeva/Russia; ECtHR 9 December 1994, no. 16798/90, Lopez-Ostra/Spain; ECtHR 19 February 1998, no. 116/1996/735/932, Guerra and others/Italy.
[700] ECtHR 8 July 2003, no. 36022/97, Hatton and others/United Kingdom; ECtHR 16 November 2004, no. 4143/02, Moreno Gómez/Spain.

allegedly contributed. The ECtHR concluded that the applicants could no longer enjoy the use of their homes and had to live in poor, cramped conditions. It held that article 8 contains positive obligations that are inherent of an effective respect for private or family life and the home.[701] Considering the applicants' living conditions for the last ten years and the way they were dealt with by authorities, the Court also decided on a violation of article 3 of the Convention (inhuman or degrading treatment).[702]

239. In *Marzari*, the Court further elaborated on a state party's positive obligations under article 8 ECHR by arguing that while there is no guarantee "*to have one's housing problems solved by the authorities, a refusal to provide assistance in this respect to an individual suffering from a severe disease might in certain circumstances raise an issue under article 8 of the Convention because of the impact on the private life of the individual*".[703] Yet, the closest the Court has gotten to recognizing a right to housing was probably in the *Yordanova* case. Not only did it consider a home to be a protectable interest in the context of article 8 ECHR and found a lack of alternative housing in case of eviction to be a weighty argument (as it has done on several occasions)[704], the Court added that for particularly vulnerable individuals, exceptional circumstances can even lead to an obligation to secure shelter.[705] Even here however, the Court preceded this statement by repeating earlier jurisprudence that there is no right to be provided with a home and that positive obligations to house the homeless must be limited.[706]

B. Housing rights related implications in EU (case) law

240. While not an acknowledged right in the context of the European Convention on Human Rights, we have seen that housing has become a protectable interest. With an explicit right to housing in the (Revised) European Social Charter and a right to housing assistance (note: not

[701] ECtHR 12 July 2005, no. 41138/98 and 64320/01, Moldovan and others/Romania, par. 93.
[702] *Ibid*, par.110; A. BUYSE, "Destruction of housing and discrimination against Roma – developments at the ECtHR", *Housing and ESC Rights Law Quarterly* 2006, vol. 3, no. 1, (5) 5-6.
[703] ECtHR 4 May 1999 (adm.dec.), no. 36448/97, Marzari/Italy; compare with ECtHR 26 June 2001 (adm.dec.), no. 39022/97, O'Rourke/United Kingdom.
[704] E.g.: ECtHR 9 October 2007, no. 7205/02, Stanková/Russia, par. 60; ECtHR 6 December 2011, no. 7097/10, Gladysheva/Russia, par. 96 ; ECtHR 24 May 2007, no. 32718/02, Tuleshov/Russia, par. 53.
[705] ECtHR 24 April 2012, no. 25446/06, Yordanova and others/Bulgaria, par. 130.
[706] A. REMICHE, "Yordanova and Others v. Bulgaria: the influence of the social right to adequate housing on the interpretation of the civil right to respect for one's home", *H.R.L.R.* 2012, vol. 12, no. 4, (787) 798.

a right to housing *in se*[707,708]) to ensure a decent existence for all those who lack sufficient resources in the EU Charter of Fundamental Rights (article 34, § 3)[709], European housing related case law has the opportunity to develop on three levels.

241. In spite of this, housing related obligations following from the case law of the European Court of Justice have up to this moment derived only once from this latter provision. This was the case in *Kamberaj*, in which an Albanian with a permanent residence permit in Italy was not granted the same rental subsidy as other EU citizens.[710] Consequently, it is difficult to say anything definitively about the significance of the provision since its application is still to be fully embraced and explored by housing advocates. It is important to warm up to the idea that the EU Charter can be used to combat social exclusion, even if the outcome is not yet known. Although the Court was not asked to set out the exact parameters for article 34, § 3 of the EU Charter in *Kamberaj*, there is no reason to think why the provision should not be able to provide an added impetus to the development and interpretation of housing rights. This is not in the least because article 34, § 3 has been said to draw on the corresponding articles (article 13, 30 and 31) of the (Revised) European Social Charter.[711] Perhaps this might over time convince the European Court of Justice to look at the argumentation of the ECSR. Even if the ECJ's considerations would not go nearly as far as those expressed by the European Committee of Social Rights, a more subdued protection of the right to housing like the one offered by the ECtHR has also shown its value. In the European Union in particular, such rights could play an important role as a counterweight against free market concerns.[712]

242. For now however, most of the ECJ case law with housing related implications deals with the equal treatment of EU citizens in the context of the free movement of persons, services

[707] A.P. VAN DER MEI, "The justiciability of social rights in the European Union", in F. COOMANS (ed.), *Justiciability of economic and social rights*, Antwerp, Intersentia, 2006, (389) 404.
[708] In a Report on Housing and Regional Policy of 28 March 2007, the European Parliament has nonetheless taken the view that the right to adequate housing at an affordable price is indeed a fundamental right. This has actually been repeated in the context of the ECJ, albeit in an opinion of the Advocate-General. In this case, a subsidy for obtaining your own dwelling was succesfully contested because the compensation was only available for housing on the German territory. See: Opinion Adv.Gen. Bot 28 June 2007, no. C-152/05, Commission/Germany, par. 87.
[709] Art. 34, par.3 Charter of Fundamental Rights of the European Union, *OJ.C.* 26 October 2012, no. 326.
[710] ECJ 24 April 2012, no. C-571/10, Servet Kamberaj/ Istituto per l'Edilizia sociale della Provincia autonoma di Bolzano (IPES) and others.
[711] Explanations relating to the Charter of Fundamental Rights, *OJ.C.* 14 December 2007, no. 303, 27.
[712] P. KENNA and M. JORDAN, "Housing rights in Europe: the Council of Europe leads the way", in P. KENNA (ed.), *Contemporary housing issues in globalized world*, Farnham, Ashgate, 2014, (115) 137 and 140.

and capital.[713] That was the main focus point in the *Kamberaj* judgment as well. As with a considerable share of the housing related case law by the ECtHR, housing rights concerns again play only play second fiddle to other interests of – in this case – EU law.

243. That does not mean though it cannot be impactful on how the right to housing is given shape at the domestic level. In a decision addressing prejudicial questions by the Belgian Constitutional Court for example, the ECJ shone its light over some of the aspects that were incorporated into the Flemish Decree on Land and Real Estate. The two main elements concerned firstly the social obligation for building operators to put a percentage of their buildings at disposal for social purposes[714], and secondly a measure called "living in your own region" ("*wonen in eigen streek*"), requiring people who wanted to acquire grounds and buildings in certain enlisted communes to illustrate a sufficient link, be it personal or professional, with this municipality.[715] Surely, the ECJ had to test these measures against the EU freedoms in particular[716], but decisions like this one do have an obvious impact on how housing legislation is assessed by the national court. What is even more interesting is how the Court clarified that limitations to free movement can be justified, accepting that housing policies can indeed be overriding reasons of general interest.[717] It thus acknowledged the importance of social housing policies.

C. Housing related concerns

244. Whether the European Convention on Human Rights, the European Social Charter or EU legislation, each of them have shown to have their own direct or indirect connections to the right to housing. Some housing related circumstances however are connected to the ECHR, the ECSR and EU law at the same time and have therefore triggered decisions from all different levels of European jurisprudence. An interesting issue is how these decisions are often formed with references to decisions in similar cases by the other (quasi-)judicial institutions.

[713] E.g.: ECJ 20 January 2011, C-155/09, Commission/Greece; ECJ 11 November 2014, C-333/13, Dano/Jobcenter Leipzig; ECJ 17 January 2008, C-152/05, Commission/Germany.
[714] ECJ 8 May 2013, no. C-197/11 and C-203/11, Libert and others/Flemish Government and All Projects & Developments NV and others/Flemish Government, par. 67-69.
[715] *Ibid*., par. 52-60.
[716] Art. 21, 45, 49 and 63 Treaty on the Functioning of the European Union.
[717] *Ibid*., par. 52 and 67; see also: ECJ 1 October 2009, C-567/07, Minister voor Wonen, Wijken en Integratie/Woningstichting Sint Servatius, par. 29-30.

1) Accommodation for asylum seekers

245. In the ECtHR case of *M.S.S. against Belgium and Greece*, an asylum seeker had found himself living on the streets of Greece for several months with no resources or access to essential needs. The Greek government had shown no regard to the applicant's vulnerability.[718] By implementing EU Council Directive 2003/9/EC (which has meanwhile been replaced by directive 2013/33/EU)[719], the Court judged that Greece had taken up the obligation to provide accommodation and decent material conditions to impoverished asylum seekers.[720] In casu, the Greek state had failed to do so and had violated article 3 ECHR.[721]

246. By mentioning Directive 2003/9/EC, a link with EU legislation is immediately established. As a matter of fact, the directive has initiated decisions by the European Court of Justice that follow the same pattern of the ECtHR in *M.S.S.* The prejudicial question in *Cimade* for example only asks whether the obligations of the directive should also be guaranteed by a member state that considers another state to have jurisdiction to examine the asylum application at hand. Yet, the positive answer appears to also be rooted in fundamental rights, referring twice to the Charter of Fundamental Rights of the European Union and the importance of human dignity to be respected and protected.[722] This is repeated in *Saciri*, a decision in response to a prejudicial question by the Labour Court of Appeal in Brussels.[723] The Court says that member states can choose to grant material reception conditions in the form of financial allowances, but they must be sufficient to ensure a dignified standard of living. This includes that financial allowances must enable them to obtain social housing, but if necessary, should even ensure their subsistence on the private rental market.[724]

247. The European Committee of Social Rights has also discussed a couple of collective complaints against Belgium and the Netherlands concerning accommodation for asylum

[718] ECtHR 21 January 2011, no. 30696/09, M.S.S./Belgium and Greece, par. 263.
[719] Directive European Parliament and Council no. 2013/33/EU, 26 June 2013 laying down standards for the reception of applicants for international protection, *OJ L* 29 June 2013.
[720] ECtHR 21 January 2011, no. 30696/09, M.S.S./Belgium and Greece, par. 250.
[721] See also ECtHR 7 July 2015, no. 60125/11, V.M. and others/Belgium (currently pending before the Grand Chamber).
[722] ECJ 27 September 2012, no. C-179/11, Cimade/Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration, par. 42 and 56.
[723] ECJ 27 February 2014, no. C-79/13, Federaal agentschap voor de opvang van asielzoekers/Saciri and others, par. 35.
[724] *Ibid*., par. 42.

seekers and persons unlawfully present on the territory of a state party.[725] With specific regard to Belgium, the Committee found a violation of the Social Charter by insufficiently providing appropriate accommodation to both accompanied and unaccompanied foreign minors unlawfully present on its territory.[726] These decisions against the Low Countries include occasional references to the *M.S.S.* case (ECtHR), Directive 2003/9/EC[727] and even the *Saciri* case (ECJ).[728] In contrast however to EU law and the *M.S.S.* case, which both deal with asylum seekers (i.e. with their application pending), the material scope of the relevant provisions of the RESC extends to those whose asylum claims have already been rejected.[729] Accordingly, the Committee finds that there is an obligation, both in law and practice, to provide shelter to both irregular migrant children and adults for as long as they are in a state party's jurisdiction and that all foreigners have a legal right to the satisfaction of their basic needs.[730] The Committee clarified though that this does not mean that the denial of adequate housing to those unlawfully present on the territory of the state party automatically entails a denial of these basic needs. It argued in a for the Committee uncharacteristically conservative fashion that such lasting housing could discourage people to return to their country of origin.[731]

248. Even though connected to different provisions focusing on different elements, which also creates different perceptions on the exact scope of obligations, the reception of asylum seekers is a good illustration of how housing rights related concerns (in casu temporary accommodation) can be common to both European human rights law (ECHR as well as ECSR) and European Union law.

2) The loss of a home: protection against evictions

249. According to the European Committee of Social Rights, an eviction is the deprivation of housing which a person occupied on account of insolvency or wrongful occupation.[732] As in the previous section on migration, all three levels of European jurisprudence have elaborated

[725] ECSR 20 October 2009, no. 47/2008, Defence for Children International (DCI)/The Netherlands; ECSR 23 October 2012, no. 69/2011, DCI/Belgium; ECSR 2 July 2014, no. 86/2012, Feantsa/The Netherlands.
[726] ECSR 23 October 2012, no. 69/2011, DCI/Belgium, par. 82.
[727] ECSR 2 July 2014, no. 86/2012, Feantsa/The Netherlands, par. 27, 41-42 and 184; ECSR 23 October 2012, no. 69/2011, DCI/Belgium, par. 105.
[728] ECSR 2 July 2014, no. 86/2012, Feantsa/The Netherlands, par. 42.
[729] *Ibid*., par. 184.
[730] *Ibid*., par. 115 and 173; ECSR 20 October 2009, no. 47/2008, DCI/the Netherlands, par. 64; ECSR 1 July 2014, no. 90/2013, Conference of European Churches (CEC)/the Netherlands, par. 128-130
[731] ECSR 20 October 2009, no. 47/2008, DCI/The Netherlands, par. 44.
[732] ECSR, Conclusions 2003, vol. 2, Sweden, 655.

on such housing (or land) evictions, albeit one perhaps slightly less pronounced than the other. Unsurprisingly, the majority of eviction cases stems from the European Court of Human Rights, where the *Buckley* case is often regarded as the starting point for this important strand of human rights jurisprudence. In this case the Court expanded the meaning of 'home' from article 8 to include land, caravans, etc., basically any specific place which a party can prove a sufficient and continuous link with. Even an illegally occupied place or dwelling, whether public or private property, can be considered a home for the purposes of article 8 ECHR.[733] Consequently, interferences with these 'homes' such as evictions have to be in accordance with law, pursue a legitimate aim and be necessary in a democratic society. To meet this latter requirement, the Court gives state parties a large margin of appreciation. Yet, as was clarified in *Connors*, this interference should answer a 'pressing social need' and be proportionate to its legitimate aim.[734] To abide by these requirements, it has been stressed time and again that procedural safeguards should have to be made available.[735]

250. Perhaps most iconic in this context is the case of *McCann*. Here, the Court stated "*the loss of a home is a most extreme form of interference with the right to respect for the home*" and that therefore the proportionality of the measure should be evaluated by an independent tribunal, still in view of course of the applicant's personal circumstances.[736] The housing security rights that are derived from article 8 are thus mainly procedural rights reminiscent of article 6 of the Convention.[737] Compared to the Belgian rent legislation, this brings little new to the table. We know that the lease agreement cannot contain an explicit resolutive condition (art. 1762bis Civil Code) and that the resolution of the contract will have to be accomplished by court (art. 1184 Civil Code). That is not to downplay the importance of article 8 ECHR or

[733] ECtHR 29 September 1996, no. 20348/92, Buckley/United Kingdom, par. 53; F. TULKENS, *The contribution of the European Convention on Human Rights to the poverty issue in times of crisis*, 2014, www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/ECtHR%20for%20EU%20Judicial%20Trainers/ECtHR%202014/Presentation_ECHR_economic_crisis_and_poverty_TULKENS_2014.pdf, 17-18.
[734] ECtHR 27 May 2004, no. 66746/01, Connors/United Kingdom, par. 81.
[735] E.g.: ECtHR 18 January 2001, no. 27238/95, Chapman/United Kingdom, par. 92 and 96; ECtHR 18 January 2001, no. 24882/94, Beard/United Kingdom, par. 103 and 107; ECtHR 27 May 2004, no. 66746/01, Connors/United Kingdom, par. 83-84.
[736] ECtHR 13 August 2008, no. 19009/04, McCann/United Kingdom, par. 50; Repeated in e.g. ECtHR 15 January 2009, no. 28261/06, Cosic/Croatia, par. 22; ECtHR 21 September 2010, no. 37341/06, Kay and others/United Kingdom, par. 68.
[737] X., note under ECtHR 29 May 2012, no. 42150/09, Bjedov/Croatia, *Housing Rights Watch Newsletter* 2012, vol. 4, 11; C.U. SCHMID and J.R. DINSE, *Towards a common core of residential tenancy law in Europe? The impact of the European Court of Human Rights on tenancy law*, 2013, www.jura.uni-bremen.de/lib/download.php?file=68a11d81f1.pdf&filename=WP%201_2013.pdf, 8-10.

the judgment in *McCann* in particular.[738] It does however illustrate once again only the indirect protection of housing offered under the ECHR. The domestic law on evictions as well as the result for the applicant might be unjust, only the more objectifiable procedural safeguards can be reviewed.[739]

251. Nevertheless, *McCann* has obtained its place in the housing related case law of the Belgian Constitutional Court. The Court applies the judgment in its own proportionality assessments of housing legislation as an ultimate limit to the state's considerable margin of appreciation. *McCann* has for example been referred to in a judgment that ordered the annulment of a Flemish Housing Code provision that would enable social letters to terminate a rental agreement without the preceding intervention of a peace judge (infra).[740] We will return to this matter much more comprehensively in the third part of this research.

252. As we have seen, illegally occupied homes may fall under the protection of article 8 ECHR as well. With regard to the proportionality assessment however, the illegality of that occupation is also taken into account. The Court says that those who simply squat in or on other people's property must be distinguished from others.[741] That does not mean that the ECtHR never protects illegal occupants in the context of article 8, quite on the contrary. According to the Court, the proportionality principle requires that cases in which an entire community is affected over a long period of time should be treated entirely different from individual cases of removal from unlawfully occupied territory.[742] This is particularly relevant in the case of travelers. As such, the Court has stressed in the aforementioned *Yordanova* judgment that the traditional lifestyle of the applicant and the vulnerable position of travelers in general has to be taken into account.[743] Moreover, it requires that due consideration should

[738] It has had an impact on domestic legislation: M. VOLS, M. KIEHL and J. SIDOLI DEL CENO, "Human rights and protection against eviction in anti-social behaviour cases in the Netherlands and Germany", *European Journal of Comparative Law and Governance* 2015, no. 2, 156-181.
[739] N. BERNARD, "Pas d'expulsion de logement sans contrôle juridictionnel – le droit au logement et la Cour Européenne des Droits de l'Homme", *Rev.trim.dr.h.* 2009, no. 79, (527) 544-545 and 549; E. DUBOUT, "La procéduralisation des obligations relatives aux droits fondamentaux substantiels par la Cour européenne de droits de l'homme", *RTDH* 2007, no. 70, (397) 402.
[740] F. TULKENS and S. VAN DROOGHENBROECK, "Armoede en mensenrechten. De bijdrage van het Europese Hof voor de Rechten van de Mens", in Steunpunt tot Bestrijding van Armoede, Bestaansonzekerheid en Sociale Uitsluiting, *Armoede-Waardigheid-Mensenrechten*, 2008, www.armoedebestrijding.be/publications/10jaarsamenwerking/10jaarsamenwerking_rapport_NL.pdf, (65) 70; Constitutional Court 10 July 2008, no. 101/208, B.23.3.
[741] ECtHR 18 January 2001, no. 27238/95, Chapman/United Kingdom, par. 102; ECtHR 21 June 2011, no.48833/07, Orlic/Croatia
[742] ECtHR 24 April 2012, no. 25446/06, Yordanova and others/Russia, par. 121.
[743] *Ibid*., par. 83.

be given to the consequences of a removal and the risk of homelessness[744], paying attention to the specificity of social groups and their (possibly additional) needs.[745] As mentioned earlier, this ultimately leads the Court to proclaiming that an obligation to secure shelter to particularly vulnerable individuals may follow from article 8 ECHR in exceptional cases.[746] One could therefore say that the Court has added a couple of substantive touches to the other more formal and procedural safeguards that state parties were considered to comply with in the context of article 8 ECHR.[747]

253. While not entirely surprising considering the more progressive content of the *Yordanova* judgment itself, this was the first judgment in which the Court referred to a decision on this matter by the European Committee of Social Rights.[748] Due to the considerable amount of Roma and eviction cases that are brought before the ECSR, the latter had already developed a strand of "case law" on this particular subject.[749] Identical to the ECtHR, the Committee stresses the importance of procedural safeguards and the need for legal remedies. Inspired by the Charter's right to housing though, the Committee takes a step further and adds that authorities must also adopt measures to rehouse or financially assist persons in case of a justified eviction.[750]

254. In case of an imminent eviction of illegal occupants, the Court has not just taken the vulnerable position of travelers into consideration. In recent years, Spanish squatters have successfully requested for the adoption of interim measures. These interim measures, described in Rule 39 of the Rules of the Court, have always been largely complied with[751], but their binding nature has only been formally acknowledged in the 2005 case of *Mamatkulov*.[752]

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[744] *Ibid*., par. 126.
[745] *Ibid*., par. 129.
[746] *Ibid*., par. 130.
[747] A. REMICHE, "Yordanova and Others v. Bulgaria : the influence of the social right to adequate housing on the interpretation of the civil right to respect for one's home", *Human Rights Law Review* 2012, vol. 12, no. 4, (787) 791-793.
[748] ECtHR 24 April 2012, no. 25446/06, Yordanova and others/Russia, par. 73-75.
[749] M. MIKKOLA, *Housing as a human right in Europe*, 2006, www.helsinki.fi/oikeustiede/omasivu/mikkola_matti/pdf/right-to-housing.pdf, 27.
[750] ECSR 5 December 2007, no. 39/2006, Feantsa/France, par. 86; ECSR 5 December 2007, no. 33/2006, International Movement ATD Fourth World/France, par. 78.
[751] H.R. GARRY, "When procedure involves matters of life and death: interim measures and the European Convention on Human Rights", *E.P.L.* 2001, vol.7, no.3, (399) 418.
[752] ECtHR 4 February 2005, no. 46827/99 and 46951/99, Mamatkulov and Askarov/Turkey, par. 125-129; V. KRSTICEVIC and B. GRIFFEY, "Interim measures", in M. LANGFORD, B. PORTER, R. BROWN and J. ROSSI (eds.), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: a commentary*, Pretoria, University Law Press, 2015, 23; On the binding character of interim measures, see also:

On the two occasions under scrutiny, the Court indicated to the Spanish government not to carry out an eviction of squatters. It added that the government should provide the Court with information on the applicant's future housing status and how violations of the Convention rights would be prevented in light of the applicant's vulnerability.[753] Although the observations submitted by the government satisfied the Court both times, it seems likely that the Court would have found a violation of article 8 had this not been the case. Even if only a temporary saving grace in practice, the decisions show that even illegal occupants are protected against evictions to the extent that state parties must at all times guarantee that safeguards are complied with and specific circumstances have been taken into account.

255. Finally, a more indirect form of protection for squatters in case of an imminent eviction has come through the Court's interpretation of article 6 ECHR. While domestic judgments on evictions must be carried out within a reasonable period of time to comply with the owner's due process rights, state parties dispose of a margin of appreciation on this matter just as well. In *Cofinfo*, the French authorities had responded to the precarious situation of the persons involved (under which families and children) and had looked for rehousing before carrying out the eviction. Persuaded by these objectives, the Court judged that the non-execution of the eviction judgment had not been the result of a fault by the administration and found their actions to be justified.[754]

256. What then about our third branch of European jurisprudence? At first sight, there appears to be little to connect European Union law to housing evictions. In the area of consumer protection however, the European Court of Justice has exceptionally illustrated its concerns about this issue. In *Aziz*, the applicant had stopped paying his loan installments. Since the loan agreement had been secured by a mortgage on his family home, he was ultimately evicted. In conformity with Directive 93/13/EEC[755], the Court argued that during national proceedings that seek to find whether a contract term is unfair, courts should be able to adopt interim measures, so that consumer protection does not preclude the prevention of the definitive and irreversible loss of the home and would automatically limit itself to the possible payment of

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W. VANDENHOLE, "VN-mensenrechtencomité en Mensenrechtenhof op één lijn over verplichtend karakter voorlopige maatregelen", *Juristenkrant* 2003, no. 74, 12.

[753] ECtHR 28 January 2014 (adm.dec.), no.77842/12, A.M.B. and others/Spain (interim measures had been applied on 12 December 2012); ECtHR 5 November 2013, no. 62688/13, Ceesay Ceesay and others/Spain (interim measures had been applied on 15 October 2013).

[754] ECtHR 12 October 2010 (adm. dec.), no. 23516/08, Société Cofinfo/France.

[755] Directive Council no. 93/13/EEC, 5 April 1993 on unfair terms in consumer contracts, *OJ.L.* 21 April 1993.

damages.[756] The idea that the loss of a family home seriously undermines consumer rights was used in the similar but for us more interesting *Kusionova* case. Here, the European Court of Justice explicitly coupled its findings from *Aziz* with the aforementioned statements by the ECtHR on the importance of the home in *McCann*.[757] As a matter of fact, the Luxembourg Court even went a step further. It proceeded with a reference to the "right to accommodation", which it considered guaranteed by article 7 of the EU Charter of Fundamental Rights.[758] Considering that this provision is almost a perfect replica of article 8 of the European Convention on Human Rights and the ECtHR has consistently opposed that a right to housing stems from this article, the interpretation of this provision by the European Court of Justice is certainly remarkable.

D. The right to property: strengthening and weakening the right to housing at the same time

257. Finally, no chapter on European housing jurisprudence is complete without some elaboration on the right to property (article 1 of the First Protocol to the ECHR). This right has had a significant impact on housing rights related case law by the European Court of Human Rights. Let us depart from the just mentioned *Cofinfo* case. That decision, indirectly in favour of the illegal occupants, is ultimately an exception to the rule. Most evictions that are carried out late or not at all often do end up in a violation of article 6 ECHR. Not only that, it is frequently paired with a violation of the right to property.[759]

258. For a good account, article 1 of the First Protocol to the ECHR is commonly applied in a way that it concerns the effective enjoyment of one's property that has been destroyed due to the actions or lack thereof by a state party.[760] At its narrow core, the right to property is in other words first and foremost directed at the protection of existing possessions of individuals against interferences. It does in other words not guarantee a right to acquire possession and is

[756] ECJ 14 March 2013, C-415/11, Aziz/Catalunyacaixa, par. 59 and 61.
[757] ECJ 10 September 2014, C-34/13, Kusionova/SMART Capital, par. 64.
[758] *Ibid*., par. 65.
[759] ECtHR 28 July 2005, no. 55161/00, Cima/Italy; ECtHR 28 July 1999, no. 22774/93, Immobiliare Saffi/Italy; ECtHR 10 October 2013, no. 16806/11 and 61696/11, Israfilova and Agalarov/Azerbaijan; ECtHR 1 June 2006, no. 68345/01, Ciucci/Italy; F. TULKENS, "La réglementation de l'usage des biens dans l'intérêt général. La troisième norme de l'article 1er du premier Protocole de la Convention européenne des Droits de l'homme", in H. VANDENBERGHE (ed.), *Property and human rights*, Brugge, Die Keure, 2006, (61) 90.
[760] ECtHR 30 November 2004, no. 48939/99, Öneryildiz/Turkey; ECtHR 20 March 2008, no. 15339/02 et al., Budayeva and others/Russia; ECtHR 16 September 1996, no. 21893/93, Akdivar and others/Turkey.

accordingly not anything like a right to housing.[761] Of course, this does not mean that the social function of property cannot be taken into account or that social measures cannot confine this right[762], as is actually stipulated in the second paragraph of the relevant provision itself.[763] It does not imply either that tenants cannot lodge a complaint on the basis of article 1 Protocol No.1. Giving leeway to a very broad interpretation of possession, the Court held in *Stretch v. United Kingdom* that 'possessions' can also include tenant's legitimate expectations in the continuation of a tenancy.[764]

259. While lodged on the basis of a liberal and individualistic conception of property, allegations of unlawful or disproportionate interference with a landlord's right to property have brought along judicial decisions of a much more social nature, once again showing the permeability of the Convention to housing rights as well as the possibility for state interferences on the private rental market.[765] The first case of this kind was *James v. United Kingdom*. The right of tenants under leases for a term of over twenty years to acquire full ownership of the property was considered by the Court as a legitimate means to pursue public interest. The Court significantly states:

> "*Modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces. The margin of appreciation is wide enough to cover legislation aimed at securing greater social*

[761] F. TULKENS and S. VAN DROOGHENBROECK, "Le droit au logement dans la Convention Européenne des Droits de l'Homme. Bilan et perspectives", in N. BERNARD and C. MERTENS (eds.), Le *logement dans sa multidimensionalité. Une grande cause régionale*, Ministère de la Région wallonne, 2005, www.rtdh.eu/pdf/droitaulogement_f-tulkens_s-vandrooghenbroeck.pdf, (311) 318-319; C. KRAUSE, "The right to property", in A. EIDE, C. KRAUSE and A. ROSAS (eds.), *Economic, social and cultural rights*, Dordrecht, Martinus Nijhoff Publishers, 2001, (191) 191.

[762] J. SLUYSMANS and R. DE GRAAFF, "Ontwikkelingen in het eigendomsbegrip onder artikel 1 Eerste Protocol", *NJCM-Bulletin* 2014, vol. 39, no. 3, (255) 256 and 269; C. KRAUSE, "The right to property", in A. EIDE, C. KRAUSE and A. ROSAS (eds.), *Economic, social and cultural rights*, Dordrecht, Martinus Nijhoff Publishers, 2001, (191) 203; J. SPINKS, "De geoorloofdheid van het opleggen van eigendomsbeperkende maatregelen door de overheid", *Jura Falconis* 2004-2005, vol. 41, no. 3, (365) 390-396.

[763] Art. 1, par. 2 Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms: "*The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties*."

[764] ECtHR 24 June 2003, no. 44277/98, Stretch/United Kingdom, par. 111; M. SIGRON, *Legitimate expectations under Article 1 of Protocol No.1 to the European Convention on Human Rights*, Antwerpen, Intersentia, 2014, 147.

[765] M. SARIGIANNIDIS and I. PERVOU, "Adequate housing: seeking justiciability through the right to property", *International Journal of Human Rights and Constitutional Studies* 2013, vol. 1, no. 1, (27) 32-33; P. KENNA, "Housing rights: positive duties and enforceable rights at the European Court Of Human Rights", *E.H.R.L.R.* 2008, no. 2, (193) 198.

justice in the sphere of people's homes, even where such legislation interferes with existing contractual relations between private parties."[766]

260. Consequently, the ECtHR provides states with a rather wide margin of appreciation in implementing social policies that might result in interferences with article 1 of the first Protocol, only intervening when the national legislator's judgment of public interest is manifestly unreasonable.[767] Measures aimed at the elimination of social injustices can justify far-reaching interferences in an individual's property rights. Similarly, the Court argued in *Mellacher* that the introduction of a statutory reduction in rent (which was initially freely negotiated) did not violate article 1 of Protocol No.1 to the Convention given the wide margin of appreciation for the state.[768] The interference was thus proportionate with the aim of reducing excessive and unjustified disparities between rents for equivalent apartments. The Court also clarified that it is not for them to scrutinize whether the chosen measures are the most effective ones, responding to the applicant's argument that a genuinely social measure would have been to accord rent subsidies to the most needy.[769] Finally, the Court had also observed in the *Spadea* and *Scollo* cases that the expiration of a large number of leases within a certain period of time combined with the concern to enable affected tenants to find new homes, can render domestic provisions suspending evictions proportionate.[770]

261. In 2001, Krause stated that the consequences of a rather weak right to property is actually two-fold for the protection of social rights. While the application of the proportionality principle might benefit housing concerns, the extent to which social rights are also included within the broad conception of property can confine them at the same time.[771] In the years afterwards, many believe that the Court has changed its lenient approach in favor of

[766] ECtHR 21 February 1986, no. 8793/79, James and others/United Kingdom, par. 47
[767] C.L. ROZAKIS and P. VOYATZIS, " 'Le droit au respect de ses biens': une clause déclaratoire ou une 'omnibus' norme?", in H. VANDENBERGHE (ed.), *Property and human rights*, Brugge, Die Keure, 2006, (1) 23; H. VANDENBERGHE, "La privation de propriété. La deuxième norme de l'article 1er du premier protocole de la Convention européenne des Droits de l'Homme", in H. VANDENBERGHE (ed.), *Property and human rights*, Brugge, Die Keure, 2006, (29) 46 and 52.
[768] ECtHR 19 December 1989, no. 10522/83 et al., Mellacher and others/Austria; S. LECKIE, "The human right to adequate housing", in A. EIDE, C. KRAUSE and A. ROSAS (eds.), *Economic, social and cultural rights*, Dordrecht, Martinus Nijhoff Publishers, 2001, 160.
[769] ECtHR 19 December 1989, no. 10522/83 et al., Mellacher and others/Austria, par. 52.
[770] ECtHR 28 September 1995, no. 12868/87, Spadea and Scalabrino/Italy, par. 31 and 38; ECtHR 28 September 1995, no. 19133/91, Scollo/Italy.
[771] C. KRAUSE, "The right to property", in A. EIDE, C. KRAUSE and A. ROSAS (eds.), *Economic, social and cultural rights*, Dordrecht, Martinus Nijhoff Publishers, 2001, (191) 203.

tenants for "*a revival of a liberal theory of property*".[772] While the interests of the landlord have been found violated because of disproportionate social measures on a number of occasions[773], the *Hutten-Czapska* judgment (a Grand Chamber judgment), interpretable as the instigator of this "revival", is probably the most discussed one. Here, the Court elaborated on the Polish special lease system that combined restrictions on the amount of rent chargeable and on the termination of leases.

262. The Grand Chamber acknowledged the difficult housing situation in Poland, but found the Rent Act to be disproportionate on the grounds that the landlord had never entered a freely negotiated lease, had lost his right to terminate the lease (unlike in *Spadea*) and that the rent levels were set below that required to cover necessary maintenance expenses (unlike in *Mellacher*).[774] In short, the Court considered the owners to carry a disproportionate burden. Most surprisingly though is how the Court determined that the interests of landlords (which were considered to be insufficiently taken into account) also include their entitlement to derive profit from their property.[775] Judge Zupancic dissented with this particular passage, raising the question how deriving profit by merely owning an apartment building could be a landlord's right, let alone a human right.[776]

263. It is certainly true that the balance of interests has frequently tilted into the direction of the owners. In *Berger-Krall*, the applicants who invoked a violation of article 1 Protocol No.1 were tenants and not landlords.[777] They claimed that their specially protected tenancy, which allegedly constituted a possession within the meaning of the relevant provision, had been violated by an excessive increase in rent. The Court was of the opinion that this case was

[772] T. ALLEN, "Liberalism, social democracy and the value of property under the European Convention on Human Rights", *I.C.L.Q.* 2010, (1055) 1078; see also P. KENNA, "Housing rights: positive duties and enforceable rights at the European Court Of Human Rights", *E.H.R.L.R.* 2008, no. 2, (193) 199; C.U. SCHMID and J.R. DINSE, *Towards a common core of residential tenancy law in Europe? The impact of the European Court of Human Rights on tenancy law*, 2013, www.jura.uni-bremen.de/lib/download.php?file=68a11d81f1.pdf&filename=WP%201_2013.pdf, 15.

[773] E.g.: ECtHR 24 October 2006, no. 17647/04, Edwards/Malta: ECtHR 12 June 2012, no. 13221/08 and 2139/10, Lindheim and others/Norway; ECtHR 12 June 2014, no. 14717/04, Berger-Krall and others/Slovenia; ECtHR 3 July 2014, no. 37926/05 et al., R&L, S.R.O. and others/Czech Republic; ECtHR 28 January 2014, no. 30255/09, Bittó and others/Slovakia.

[774] ECtHR 19 June 2006, no. 35014/97, Hutten-Czapska/Poland, par. 224; A. KUCS, Z. SEDLOVA and L. PIERHUROVICA, "The right to housing: international, European and national perspectives", *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol* 2008, no. 64/65, (101) 110-111.

[775] ECtHR 19 June 2006, no.35014/97, Hutten-Czapska/Poland, par.239; This was repeated in ECtHR 24 October 2006, no.17647/04, Edwards/Malta.

[776] Partly concurring, partly dissenting opinion by Judge Zupancic, ECtHR 19 June 2006, no.35014/97, Hutten-Czapska/Poland.

[777] ECtHR 12 June 2014, no.14717/04, Berger-Krall and others/Slovenia.

simply the mirror image of *Hutten-Czapska*[778]: it argued fully in line with this case but since the claimant was the opposite party, the Court did obviously not find a violation of article 1 Protocol No.1. Consequently, one could come to the conclusion with regard to *Berger-Krall* that the Court does not as much confine the state's margin of appreciation with regard to measures that interfere with the right to property than that it gives considerable weight to the landlord's interests.

264. It is however difficult to say whether the Court has purposefully shifted this balance.[779] Nowhere has the Court explicitly overruled its initial principles regarding article 1 of the First Protocol, as set out in *James* and *Mellacher*. In *Hutten-Czapska*, the Grand Chamber made additional arguments on behalf of the landlord's interests, but it did not discard its earlier case law. Even more so, it explicitly distinguished the circumstances from those in *Spadea* and *Mellacher*, concluding that this earlier jurisprudence did not restrict the right to property to such a considerable extent as in the present case. In *Almeida Ferreira*, a case from 2010, the Court did not only refer to this earlier case law, it also decided again in favor of the tenants. In casu, a domestic law protected tenants who had rented a dwelling for over twenty years against the requisition of the property. The court found the aim to protect a social group that the state considered in need of specific protection proportional and did not violate the relevant provision.[780] Furthermore, the perhaps most liberal standpoint that seemed to stem from the right to property in *Hutten-Czapska*, a right to obtain profit, has been categorically denied in the case of *R&L and others v. the Czech Republic*.[781] Whether or not consciously narrowing the margin of appreciation for states to make restrictions on landlord's property rights, the Court certainly considers that a limit is reached when the economic balance of the contractual exchange is manifestly disturbed.

E. Interim conclusion

265. Housing is both directly and indirectly protected in European (quasi-)jurisprudence. If we take a very strict approach to the matter, case law concerning the right to housing and the substantive obligations it imposes on states is confined to the quasi-judicial decisions of the European Committee of Social Rights, whose impact and potential will be looked at more

[778] *Ibid*., par.202.
[779] J. SLUYSMANS and R. DE GRAAFF, "Ontwikkelingen in het eigendomsbegrip onder artikel 1 Eerste Protocol", *NJCM-Bulletin* 2014, vol.39, no.3, (255) 269.
[780] ECtHR 21 December 2010, no.41696/07, Almeida Ferreira and Melo Ferreira/Portugal, par.33.
[781] ECtHR 3 July 2014, no.37926/05 et al., R&L, S.R.O. and others/Czech Republic, par.103.

closely in the next section. However, when coupled to other rights such as articles 6 or 8 ECHR, article 1 of the First Protocol, or the free movement of persons and capital, decisions relevant (even if not always beneficial) to the right to housing can occur in any European courtroom.

266. Even though the EU Charter of Fundamental Rights contains a right to housing assistance, the scope of that obligation has not yet been put to a real test by the European Court of Justice. More interesting case law comes from the European Court of Human Rights. While the ECtHR imposes primarily procedural safeguards (even though specific circumstances have to be taken into account) and leaves a considerable margin of appreciation to the states, it does provide some limits as to housing policies that benefit tenants/interfere with owners' rights and vice versa.

§ 3. A collective complaint against the Belgian state?

267. For a start, we should clarify that this title might be somewhat misleading. There have already been a couple of housing related collective complaints and decisions against the Belgian State.[782] These cases however targeted quite specific concerns and groups of persons. What they have not done is question the broader housing policy as a whole, which has been the case with regard to France.[783] Is such a complaint viable in the context of Belgium? What are the chances that violations will be found? And is the eventual outcome even worth the effort?

A. Ratification of article 31 RESC

1) A mixed treaty provision

268. We have mentioned that no provision of the European Social Charter is accepted (both partially and in its entirety) by as few states as article 31. The Belgian state did not do so either, based on the argument that the legislation in place at the time of the ratification of the RESC could not guarantee the rights set out in article 31. We will return to this reasoning for other purposes in a following chapter. For now we can say that it is certainly questionable

[782] ECSR 23 October 2012, no.69/2011, DCI/Belgium; ECSR 21 March 2012, no.62/2010, International Federation of Human Rights (FIDH)/Belgium.
[783] ECSR 5 December 2007, no.33/2006, International Movement ATD Fourth World/France; ECSR 5 December 2007, no.39/2006, Feantsa/France.

whether the recognition of an essential fundamental right should have to be measured against the extent to which it has or has not yet been realized.[784] Not in the least with regard to socio-economic rights in particular, because they are regarded in general as imposing progressive obligations (infra). Ratifying this fundamental right should in other words have to engage a government to take the necessary steps rather than to freeze lawmakers in fear of possible instant findings of violations. Housing legislation and housing policy in Belgium and Flanders, moreover, has evolved substantially over the last 15 years. The argument for a revision of the original standpoint on article 31 could therefore certainly be raised.[785] At the same time however, the reasoning against ratification in 2001 could easily still apply. At that moment, both the constitutional provision on housing as well as the Flemish and Walloon Housing Codes (notwithstanding the changes that have since been made) were already in force.

269. That is not to say that no political will to ratify this provision has been shown at the Flemish level. In a 2011-2012 policy document on human rights and Flemish international policy, the Flemish government did state that it was in favour of an expansion of the commitments of the Belgian state with regard to the provisions and paragraphs that had not yet been accepted, hereby explicitly mentioning the right to housing.[786] We have not found any similar statements for the current legislature.

270. Even though the sixth Belgian state reform has transferred important housing related competences to the regions (e.g. housing rental law), it is still connected to the federal level too (e.g. common rental law). Similar to the aforementioned Protocol No.12 to the ECHR, we are thus dealing with a mixed treaty or in this case rather a mixed treaty provision. Accordingly, the same rules apply. This means that even if the Flemish government is indeed politically committed to ratify article 31 RESC, their approval of the provision would only have legal consequences after it has been approved by all competent legislators. Finally, the act of ratification can only be made by the King, i.e. the federal state.[787]

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[784] G. INSLEGERS, "Van inroepbaarheid naar afdwingbaarheid van het recht op wonen bekeken in mensenrechtelijk perspectief", in N. BERNARD and B. HUBEAU (eds.), *Recht op wonen: naar een resultaatsverbintenis?*, Brugge, Die Keure, 2013, (253) 262.

[785] Steunpunt tot bestrijding van armoede, bestaansonzekerheid en sociale uitsluiting, *Strijd tegen armoede. Een bijdrage aan politiek debat en politieke actie. Tweejaarlijks verslag 2010-2011*, 2012, www.armoedebestrijding.be/publications/verslag6/volledigverslag.pdf, 19.

[786] Note Flemish Government concerning human rights and the Flemish international policy, *Parl.St.* Vl.Parl. 2011-12, no. 1426-1, 23-24.

[787] Cooperation Agreement 8 March 1994 between the federal state, the communities and the regions concerning the rules on concluding mixed treaties, *BS.* 17 December 1996; A. ALEN and K. MUYLLE, *Handboek van het Belgische Staatsrecht*, Mechelen, Kluwer, 2011, 758-761.

271. In addition to the fact that Belgian domestic law requires ratification by the federal state to create international legal consequences, international public law seems to confine the conclusion of treaties to states (and international organisations) anyway.[788] Notwithstanding a sole exception, international human rights treaties demand ratification by sovereign states as well.[789] On the question what this means with regard to violations of the RESC, the European Committee of Social Rights has clarified in a couple of decisions against the Belgian state that in accordance with public international law[790] and regardless of the responsibility under domestic law, the ultimate responsibility for implementation of the Charter rests with the national authorities.[791] It has added that "*the domestic legal system cannot exempt a State Party from the international obligations it entered into on ratifying the Charter*" and that "*the Belgian state must ensure that these obligations are respected by the regions and communities*".[792] That also seems to exclude the application of the exceptional measure provided for in the Cooperation Agreement of 1994[793] and which enables the King to ratify a treaty with the reservation that it will not have effect on the entire Belgian territory.[794] The scenario in which one region does not want to participate in the ratification of article 31, but no objection is raised to proceed without every Belgian competent authority therefore appears to be impossible. The Council of State already indicated in its advice concerning the Cooperation Agreement that this might encounter resistance at the international level for reasons of irreconcilability with the principles of legal security and reciprocity of treaty obligations.[795] In short we can only conclude that for article 31 RESC to take effect, the political commitment will have to exist amongst all competent legislators.

272. Reconciling domestic law with international law would however become a pressing issue when all housing related competences belong to the regions. In that scenario, the regions

[788] Vienna Convention on the Law of Treaties from 23 May 1969, *BS* 25 December 1993.
[789] K. DE FEYTER, "Sites of rights resistance", in K. DE FEYTER, S. PARMENTIER, C. TIMMERMAN and G. ULRICH (eds.), *The local relevance of human rights*, Cambridge, Cambridge University Press, 2011, (11) 29: An exception to that rule is the UN Convention on the Rights of Persons with Disabilities (UN Doc. A/RES/61/106 (2006)), which stipulates in article 43 that the Convention is open to formal confirmation by signatory regional integration organisations.
[790] Art. 27 Vienna Convention on the Law of Treaties from 23 May 1969, *BS* 25 December 1993.
[791] ECSR 21 March 2012, no. 62/2010, FIDH/Belgium, par. 54; ECSR 18 March 2013, no. 75/2011, FIDH/Belgium, par. 54-55.
[792] ECSR 18 March 2013, no. 75/2011, FIDH/Belgium, par.54-55.
[793] Art. 2 Cooperation Agreement 8 March 1994 between the federal government, the communities and the regions concerning the rules on concluding mixed treaties, *BS* 17 December 1996.
[794] A. ALEN and K. MUYLLE, *Handboek van het Belgische Staatsrecht*, Mechelen, Kluwer, 2011, 759-760.
[795] Adv. Council of State 13 December 1994, no. 1-233/1 on the approval with the Cooperation Agreement between the federal state, the communities and the regions concerning the rules on concluding mixed treaties, *Parl.St.* Senate 1995-96, 1-233/1; See also R. DEHOUSSE, *Fédéralisme et relations internationals*, Bruxelles, Bruylant, 1991, 185-186.

would have the competence to conclude and ratify article 31 by themselves according to national law[796], which is as we have seen not possible according to public international law or allowed by human rights treaties. The *travaux préparatoires* of the Vienna Treaty on Treaty Law on the other hand do offer some nuance, since they do not contest that state members of a federal state conclude treaties.[797] Of course, as Velaers admits, due to the limited number of federal states that allocate autonomous treaty-making competences to its regions, the debate on this issue remains largely theoretical.[798] And since the housing policy in Belgium is not an exclusive competence for the regions either, we are talking in pure hypotheticals. This is only further confirmed by the broad interpretation of what mixed treaties are by the Council of State[799], rendering it very likely that with any possible further transfers of competences in the near future, some link to the federal level could probably still be established.

273. Purely hypothetical however and discarding current international law principles, we argue that if any human rights instrument is even slightly suited or perhaps rather adaptable to ratifications by regions, it is the European Social Charter. First of all, it has acknowledged earlier the important role of the regions. In the Conclusions following the national reports, the Committee already makes this distinction between the different levels where necessary. Secondly and probably most importantly, there is the extraordinary "*à la carte*" system for social rights and the possibility therefore to opt-out of certain provisions or paragraphs.[800] This could present regions with the option to take a step further in the protection of a fundamental right and build on the foundations that had already been laid (i.e. ratified) by the federal state. It does in other words not have to imply a ratification of a convention which was previously put aside by the state itself. Considering the newly acquired competences in the

[796] Art. 167, §3 Belgian Constitution; Special Act 5 May 1993 concerning the international relations of Communities and Regions, *BS* 8 May 1993.
[797] A. ALEN and P. PEETERS, "Federal Belgium within the international legal order: theory and practice", in K. WELLENS (ed.), *International law: theory and practice. Essays in honour of Eric Suy*, Den Haag, Martinus Nijhoff Publishers, 1998, (123) 135-136.
[798] J. VELAERS, " 'In foro interno et in foro externo': de international bevoegdheden van gemeenschappen en gewesten", in F. JUDO and G. GEUDENS (eds.), *Internationale betrekkingen en federalisme*, Gent, Larcier, 2006, (3) 17-20.
[799] Adv. Council of State 14 February 2001, *Parl.St.* Senate 2005-06, 3-1474/1, 21-23.
[800] This à la carte system concerns the choice of accepting specific rights in a human rights convention and should be distinguished from the much more occasional opportunity for states to ratify a convention while rejecting the jurisdiction of the relevant Court (e.g.: Optional Protocol regarding an inter-state and individual complaints mechanism ; Poland and the United Kingdom with regard to the Charter of Fundamental Rights of The European Union, see C. BARNARD, "The 'opt-out' for the UK and Poland from the Carter of Fundamental Rights: triumph of rhetoric or reality?", in S. GRILLER and J. ZILLER (eds.), *The Lisbon Treaty: EU Constitutionalism without a constitutional treaty?*, Vienna, Springer, 2008, 257-283; Inter-American Convention on Human Rights, see L. BURGORGUE-LARSEN and A. UBEDA DE TORRES, *The Inter-American Court of Human Rights*, Oxford, Oxford University Press, 2011, 17).

wake of the sixth Belgian State Reform, the regions' power to promote access to housing of an adequate standard (along the lines of the first paragraph of article 31) and to prevent and reduce homelessness (second paragraph) has certainly been increased. Additionally, it has put them in a position to take measures for the affordability of housing prices to those without adequate resources too (third paragraph).

274. But what then about violations? Similar to the ECtHR, the Committee's decisions in the collective complaints mechanism conclude with the question whether or what articles have been violated by the state party under scrutiny. Considering nonetheless that these decisions are less binding than for example the judgments by the ECtHR (infra) and the fact that they do not resolve individual claims, the focus of these decisions is unmistakably more geared towards what should (progressively) be done instead of the culpabilisation of the state for wrongdoing of an individual. Just maybe, the steps that the Committee deems necessary to take could potentially just as well be specifically addressed to a region. As a matter of fact, the Committee has already found violations of article 16 RESC (which is also housing related) for reasons that diverge from one region (in casu the Walloon region) to the others (Flemish and Brussels-Capital).[801]

275. A counterargument could be that, despite the existence of an overarching and shared constitutional right to adequate housing, there would be a distinction in human rights protection on the international level. Is it not logical that a human rights treaty should be applicable to all people under the jurisdiction of a state?[802] Yet, while access to justice through the ECSR would then certainly depend upon one's place of residence, one could just as easily say that a different level of protection has been imbedded in the Belgian legal system ever since the regional Housing Codes are in force.

276. An in our opinion more convincing criticism comes from the Committee's case law itself. In 2007, the Committee stated the following: *"The Charter was conceived as a whole and all its provisions complement each other and overlap in part. It is impossible to draw watertight*

[801] ECSR 21 March 2012, no. 62/2010, FIDH/Belgium, par. 211: Article 16 was found violated: a. in the Walloon region because it had failed to recognise caravans and dwellings, and b. in the Flemish and Brussels Regions because the housing quality standards were not adapted to caravans and the sites on which they were installed.

[802] J. VELAERS, " 'In foro interno et in foro externo': de international bevoegdheden van gemeenschappen en gewesten", in F. JUDO and G. GEUDENS (eds.), *Internationale betrekkingen en federalisme*, Gent, Larcier, 2006, (3) 33.

divisions between the material scope of each article or paragraph".[803] Although article 31 might have a distinct subject, the indivisible nature of and strong connections between the RESC rights can initiate the appeal to or application of other provisions during a complaint procedure. These in turn could address subjects which are not regional competences. Obviously, the fewer competences left for the federal government, the less likely this scenario would unfold.

277. In conclusion to this issue, we wish to emphasize again that this is only a hypothesis that does not take international human rights law into account. We merely want to illustrate that the extraordinary nature of the RESC and its Committee are probably the most susceptible instruments for a different approach.

2) The right to housing through other RESC provisions

278. Let us now return to the *lex lata*. Although a collective complaint against the Belgian state on the basis of article 31 is out of the question, the short excerpt from the decision quoted in the previous paragraph does offer possibilities. Possibilities which the Committee has eagerly turned to with respect to housing. This subject is not only touched upon in article 31, but also in article 16 and 30 RESC. The former describes the provision of housing as a necessary condition for full development of the family as a fundamental unit of society, while the latter predicates measures to promote effective access to i.e. housing for persons who live or risk living in a situation of social exclusion or poverty. Article 16 in particular, though different in personal and material scope, is regarded as partially overlapping with article 31.[804] The Committee considers that the explicit right to housing in article 31 does not preclude a consideration of relevant housing issues arising under article 16 and that the notions of forced eviction and adequate housing are identical under both provisions[805], both referring to dwellings of a decent standard with all essential amenities and of suitable size.[806] The fact that a state has not ratified a right will thus not on its own render a complaint based on the subject of that right inadmissible.[807] As a result, the Committee seems to give meaning to the

[803] ECSR 26 June 2007 (adm.dec.), no. 41/2007, Mental Disability Advocacy Center (MDAC)/Bulgaria, par.9.
[804] ECSR 18 October 2006, no. 31/2005, European Roma Rights Centre (ERRC)/Bulgaria, par. 17; D. GAILIUTE, "Right to housing in the jurisprudence of the European Committee of Social Rights", *Societal Studies* 2012, vol.4, no.4, (1605) 1608.
[805] ECSR 18 October 2006, no.31/2005, European Roma Rights Centre (ERRC)/Bulgaria, par.9.
[806] ECSR 8 December 2004, no.15/2003, European Roma Rights Centre (ERRC)/Greece, par.24.
[807] J.-F. AKANDJI-KOMBÉ, "Charte sociale européenne et procedure de reclamations collectives (1998-1er juillet 1998)", *JDE* 2008, (217) 219 ; N. BERNARD, "Le droit au logement dans la Charte Sociale Révisée: à

Convention as an all-inclusive package rather than as the originally designed *à la carte* system.[808] It is certainly well aware of the impact of its statements and the possible risk of delegitimizing the Charter, clarifying that it must ensure "*that obligations are not imposed on states stemming from provisions they did not intend to accept*". At the same time however the Committee argues that it must guard that "*the essential core of accepted provisions is not amputated as a result of the fact it may contain obligations which may also result from unaccepted provisions*."[809] This has been repeated and explicitly established for the right to housing in the case of the International Federation of Human Rights (FIDH) against Belgium. Not only did the Committee consider that its views on the scope of the obligations stemming from article 31 may be useful to determine the scope of the obligations with regard to the right to housing arising from article 16, but also from article 30.[810] As a matter of fact, this statement was made in response to the Belgian government's objections to the indirect use of an unaccepted article.[811]

279. Why then could there possibly still be some doubt about the proposed complaint? The Committee's stance on article 16 appears to import the obligations of article 31, but this provision is of course still directed at *families*. The aforementioned FIDH case from 2010 was heavily centred around (discrimination of) travelers families. Similarly, a more recent complaint lodged by FIDH claimed a violation of article 16 because the shortage of adapted accommodation for highly dependent adults with disabilities obliged many families to devote themselves to caring full-time for their relative, ultimately leading to a lack of protection of the family as a unit of society.[812] The third housing related case against the Belgian state revolved around accompanied foreign minors who were unlawfully present in the country. Here, the Committee argued that a complaint about insufficient reception facilities did not relate to the protection of the family and referred to its assessment made with regard to other provisions.[813] Nevertheless, these complaints all arise from the specific concerns for certain types of families, some of them merely including housing rights problems.

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propos de la condamnation de la France par le Comité Européen des Droits Sociaux", *RTDH* 2009, no. 80, (1061) 1083-1086.

[808] J. HOHMANN, *The right to housing. Law, concepts, possibilities*, Oxford, Hart Publishing, 2013, 53.

[809] ECSR 26 June 2007 (adm.dec.), no. 41/2007, Mental Disability Advocacy Center (MDAC)/Bulgaria, par.9.

[810] ECSR 21 March 2012, no. 62/2010, International Federation of Human Rights (FIDH)/Belgium, par.43-46.

[811] P. KENNA and M. JORDAN, "Housing rights in Europe: the Council of Europe leads the way", in P. KENNA (ed.), *Contemporary housing issues in globalized world*, Farnham, Ashgate, 2014, (115) 131-132.

[812] ECSR 18 March 2013, no.75/2011, FIDH/Belgium, par.178-187.

[813] ECSR 23 October 2012, no.69/2011, Defence for Children International (DCI)/Belgium, par.142: In this case, housing for minors is also addressed under article 17 RESC.

280. In contrast, our hypothetical complaint would follow the lines of the complaints of *ATD Fourth World* and *Feantsa against France*, primarily assessing the imperfections of the national housing policy as a whole (eviction procedures, lacking housing quality, affordability, …). These arguments come from the very essence of the right to housing. The French state had already ratified article 31, rendering that provision as the obvious most important basis for both complaints and decisions. Yet, that did not stop the Committee from also finding violations of the overlapping articles 16 and 30 in the ATD Fourth World case. This followed from the conclusions in respect of article 31 that the poorest households were insufficiently assisted by the housing policy.[814] We therefore believe that if a collective complaint against the Belgian state would properly address the concerns that the current housing policy raises for poor people and family units (for example the relationship between serious housing quality problems and different income groups[815]), it is certainly not unlikely that a similar complaint would be investigated even without the ratification of article 31. The large margin of discretion which the Committee has endowed upon itself to decide on overlapping provisions certainly seems to suggest just that.

281. We still deem it only logical though that the Belgian state, which acknowledges a right to adequate housing in its Constitution, would still ratify article 31. Even if not necessarily a judicial game changer, it still has a political and symbolic value. Considering on the other hand that the admissibility of most if not all housing rights related complaints seems plausible, the most important proposal to the government for a more enforceable right to housing before European courts might not even be the ratification of article 31, but the expansion of authorized claimants to national NGOs, providing a boost to access to justice.

B. Arguments against the Belgian State

282. For the purposes of this part, it is important to note that we do not aim to present here an all-inclusive overview of problems or areas of improvement in the field of housing. We could for example argue that the so called public management right ("*sociaal beheersrecht*") over empty buildings[816], a form of property regulation that endows certain public institutions with the possibility to control a third party's property for a certain period of time, has been

[814] ECSR 5 December 2007, no.33/2006, International Movement ATD Fourth World/France, par.156-170.
[815] Serious safety and health concerns such as a risk at CO-poisoning and moisture problems are more frequently observed in dwellings of lower income households, see: S. WINTERS et al., *Wonen in Vlaanderen anno 2013. De bevindingen uit het Grote Woononderzoek 2013 gebundeld*, Antwerpen, Garant, 2015, 69-72.
[816] Art. 134bis New Municipality Law; art. 90 Flemish Housing Code.

unsuccessful up to now and therefore fails to contribute to the availability of housing.[817] We choose however to stay very close to the specific arguments and parameters that the ECSR has already set out for acts or ommissions to be a violation of the right to housing.[818] By comparing similar situations and arguments with and measuring the parameters up against the Belgian (particularly Flemish) housing context, we then get a more accurate picture of the success rate of a complaint. We should of course remain aware that the arguments given in those reference cases are not absolute, unchangeable principles. The ECSR is not bound by earlier decisions and a decision can therefore be somewhat dependent upon the Committee's composition.[819] Additionally, there is still a certain vagueness about the exact scope of the obligations that stem from the right to housing, which should be realized progressively and dependent upon available resources (infra, part III).[820] Consequently, we should maintain at least some reticence in drawing conclusions from decisions relating to one country for the purposes of a collective complaint against a different State Party. What we do know is that state parties must[821]:

a. *Adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter;*
b. *Maintain meaningful statistics on needs, resources and results;*
c. *Undertake regular reviews of the impact of strategies adopted;*
d. *Establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage.*
e. *Pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable.*

[817] F. VANNESTE, "Over de cruciale rol van (sociale) grondrechten in België", in Vereniging voor de vergelijkende studie van het recht van België en Nederland, *Preadviezen 2012,* Den Haag, Boom Juridische Uitgevers, 2012, (13) 51.
[818] M. MIKKOLA, *Housing as a human right in Europe*, paper presented at the Conference on housing rights organised under the Finnish EU presidency in Helsinki, 18-19 September 2006, www.helsinki.fi/oikeustiede/omasivu/mikkola_matti/pdf/right-to-housing.pdf, 36-39; N. BERNARD, "Le droit au logement dans la Charte Sociale Révisée: à propos de la condamnation de la France par le Comité Européen des Droits Sociaux", *RTDH* 2009, no. 80, (1061) 1070-1073; M. UHRY and T. VIARD, "De Raad van Europa pakt Frankrijk aan over het recht op huisvesting en het recht op bescherming tegen armoede", in Steunpunt tot Bestrijding van Armoede, Bestaansonzekerheid en Sociale Uitsluiting, *Armoede-Waardigheid-Mensenrechten*, 2008, www.armoedebestrijding.be/publications/10jaarsamenwerking/10jaarsamenwerking_rapport_NL.pdf, (81) 86-87.
[819] J. HOHMANN, *The right to housing. Law, concepts, possibilities*, Oxford, Hart Publishing, 2013, 124.
[820] ECSR 5 December 2007, no.33/2006, ATD Fourth World/France, par.62; ECSR 4 November 2003, Autism Europe/France, Complaint no.13/2002, par.53.
[821] ECSR 5 December 2007, no.33/2006, ATD Fourth World/France, par.60.

In addition, the decisions of Feantsa and ATD Fourth World against France offer enough concrete material regarding the execution of national housing rules and policy to extrapolate to a hypothetical case against the Belgian state.

283. A first topic in the decisions that lends itself to comparison concerns the supply of affordable housing, for which governments must encourage the construction of particularly social housing.[822] While the Committee agreed that steps had been taken by the French state to improve the stock of social housing, it also noted that "*even if all these objectives were achieved, (…) there would still be a considerable shortfall compared with needs*".[823] The objective of 591.000 new social housing units did indeed not even approximate the estimated number of applications for social housing a couple of years earlier (1.640.000). In comparison, the binding social objective developed by the Flemish government foresees 50.000 new social housing units by 2025, as we have seen in the introductory part to this research.[824] We have also mentioned earlier there are around 120.000 candidate-tenants registered on the waiting list. With the promise of 4.300 new social housing units by 2016, the Walloon government aimed to meet the initial objectives of 7.000 units by 2014.[825] Nevertheless, in the beginning of 2013, almost 38.000 candidate-tenants were already on hold.[826] Whether or not such a simple ratio suffices as a compelling and decisive argument on the matter, it is the one applied by the Committee. And on this basis, the ECSR could easily argue similarly vis-à-vis the Belgian state.

284. ATD Fourth World also received a response from the Committee to the following pressing question posed during the hearing of the case: *"what is a legitimate waiting period for a household to have to its disposal a dwelling, electricity, a legally protected housing statute?"*[827] According to the ECSR, the average waiting time for allocation of social housing

[822] ECSR, Conclusions 2003, vol.2, Sweden, 656.
[823] ECSR 5 December 2007, no.33/2006, ATD Fourth World/France, par. 96-98.
[824] Article 4.1.2 Flemish Decree 27 March 2009 concerning Land and Housing Policy juncto art.22 bis Flemish Housing Code; Art. 20 Draft Decree concerning the amendment of various decrees on housing.
[825] *Programme d'ancrage communal du logement 2014-2016*, http://docum1.wallonie.be/DOCUMENTS/PCAML14_16/Hainaut/55010-L14-0001-01-ANEX-01-01.pdf, for a quick overview, see: http://nollet.wallonie.be/4354-nouveaux-logements-publics-pour-la-wallonie.
[826] http://www.armoedebestrijding.be/cijfers_sociale_huisvesting.htm.
[827] M. UHRY and T. VIARD, "De Raad van Europa pakt Frankrijk aan over het recht op huisvesting en het recht op bescherming tegen armoede", in Steunpunt tot Bestrijding van Armoede, Bestaansonzekerheid en Sociale Uitsluiting, *Armoede-Waardigheid-Mensenrechten*, 2008, www.armoedebestrijding.be/publications/10jaarsamenwerking/10jaarsamenwerking_rapport_NL.pdf, (81) 83.

in France is at any rate definitely too long.[828] The average of 2 years and 4 months at the time of the case is however still shorter than the average waiting period in Flanders, which is almost 3 years. The same data also reveal that this average is subject to severe differences between municipalities, ranging from 11 days to 12 years and 7 months.[829] In 2011, it was said that the average waiting period in Wallonia even amounted to 5 years.[830] With respect to France, the Committee also argued that legal redress for people who had been waiting for social housing over an excessive period of time showed serious shortcomings.[831] In contrast to Belgium however, France did already have mediation commissions in place. The Flemish region does distribute a rental premium for households that have been on the waiting list for four years (initially five)[832], but it is impossible to predict how the Committee would assess this measure. The same can be said about the access to social housing for households in the lowest income quintile. While recent numbers do show that 15% of the Flemish households in this income group has obtained social housing[833], thereby topping the 5 to 10% which the Committee deemed insufficient for France[834], it is disputable whether it would deem this a satisfactory standard.

285. The next line of arguments revolves around the eviction procedure. The ECSR found France in conformity with the Charter by providing a two month period after formal notice of the eviction and suspension of evictions in winter.[835] In contrast, the Belgian Judicial Code does not go that far: it provides only one month notice, and although this period can be extended during winter, evictions are not legally excluded during that time.[836] With regard to rehousing on the other hand, the Committee argued that the French Anti-Exclusion Act of 1998 did not contain any guarantees. While rehousing is certainly covered much more extensively by the regional housing codes in Belgium, the question whether their guarantees reach far enough in the opinion of the Committee remains unclear.

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[828] ECSR 5 December 2007, no. 33/2006, ATD Fourth World/France, par. 129.
[829] *Vr. en Antw.* Vl. Parl., Vr. nr. 286, 23 December 2014 (L. PARYS).
[830] Société Wallonne du Logement, *La location d'un logement public en Wallonie*, 2013, www.foyercinacien.be/fichiers/brochure2013.pdf, 39.
[831] ECSR 5 December 2007, no.33/2006, ATD Fourth World/France, par. 131.
[832] Art. 16 Decision Flemish Government 21 March 2014 on altering the Decision of the Flemish Government of 4 May 2012 concerning the installation of a compensation of candidate-tenants, *BS* 5 May 2014.
[833] K. HEYLEN, *Grote woononderzoek deel 2. Deelmarkten, woonkosten en betaalbaarheid*, Leuven, Steunpunt Wonen 2015, https://steunpuntwonen.be/Documenten/studiedagen/Studiedag_Wonen_in_Vlaanderen_anno_2013_3_maart_2015/gwo-volume-2-deel-2-eind.pdf, 9.
[834] ECSR 5 December 2007, no.33/2006, ATD Fourth World /France, par.129.
[835] *Ibid*., par.79.
[836] Article 1344quater Judicial Code.

286. With regard to adequate housing, France had failed to take and implement sufficient and effective measures to eradicate substandard housing. The Committee emphasized that health risks due to these substandard conditions still affected around 400.000 to 600.000 dwellings.[837] For the very first time, the Flemish Housing Research of 2013 has subjugated a sample of 5.000 dwellings in Flanders to a technical screening. The results have been staggering. Despite the existence of for example conformity certificates, several different renovation premiums and fiscal benefits, no less than 37% of the Flemish housing market (circa 1 million dwellings) was found to be of inadequate quality.[838] Considering however that perceptions on substandard housing might differ in practice and not all defects that resulted in penalty points in the technical screening are immediate health risks, we have to be extremely careful to compare these numbers. The enduring significance of this data (which unfortunately have not been available for the other regions) makes it nonetheless likely that a hypothetical case would render a similar argumentation on this point.

287. Finally, we would also like to take inspiration from another case: *Feantsa v. the Netherlands*. In this decision, the Court found that a 'local connection criterion' restricts the access to community shelter.[839] As the term suggests, this criterion demands homeless people to have a connection to the municipality in which they seek shelter. Admittedly, considering that the other arguments mostly contained numerical parameters suited for comparison, this topic is a bit of a stretch in terms of the probability of success of our hypothetical complaint. But still we feel that there is plenty of overlap with the Belgian context to justify its addition. An obvious link is the annulment by the Belgian Constitutional Court of the fifth book of the Flemish Decree on Land and Real Estate entitled "living in your own region" ("*wonen in eigen streek*").[840] As we have seen, this segment of the decree had earlier been the subject of a request for a preliminary ruling to the European Court of Justice (supra, par. 243), which found the measure to infringe the free movement of persons and workers and the right of establishment. The Constitutional Court judged that the measure, by requiring some sort of

[837] ECSR 5 December 2007, no.39/2006, Feantsa/France, par.76.
[838] L. VANDERSTRAETEN and M. RYCKEWAERT, *Grote woononderzoek 2013 deel 3. Technische woningkwaliteit*, Leuven, Steunpunt Wonen, 2015, https://steunpuntwonen.be/Documenten/studiedagen/Studiedag_Wonen_in_Vlaanderen_anno_2013_3_maart_2015/gwo-volume-2-deel-3-eind.pdf, 76.
[839] ECSR 2 July 2014, no.86/2012, Feantsa/the Netherlands, par.118.
[840] Constitutional Court 7 November 2013, no.144/2013.

link to the municipality in question, placed a too significant burden on the person who wanted to acquire a ground or dwelling on that territory.[841]

288. Obviously, as the Decree on Land and Real Estate has meanwhile been changed, this is of little relevance for a future complaint. Yet, it leads us to other similar measures. In Flanders, municipalities have the competence to also apply a local connection criterion with regard to the allocation of social housing[842], whereas the Walloon government has adopted a local connection criterion into a point system for priority in social housing. [843] While both aim to strengthen social cohesion, it can undeniably also restrict people's access to housing, the argument used by the Committee against such a criterion in the case against the Netherlands.

289. In sum, we can conclude that there are indeed some arguments and parameters already developed by the European Committee of Social Rights by which we can take a well-advised stance on the chances for a successful collective complaint against the Belgian state. But what if article 16 and/or 30 RESC (or eventually maybe article 31) would ultimately be found to be violated? How much influence would such a decision have? We will discuss its potential and limitations next.

C. The value of a decision by the ECSR

1) Legally binding?

290. Régis Brillat, Executive Secretary of the European Committee for Social Rights, is clear in its wording: "*Call it what you will, the fact is that the Charter is no less binding than the European Convention on Human Rights*" and proceeds that "*although not a court, the ECSR is a quasi-judicial body which interprets the Charter in a way that is binding on the states parties".*[844] Consequently, he stipulates that states have the obligation to bring a situation in line with the RESC when a violation has been found. A bit further in the same publication

[841] Art. 5.2.1, § 1, par.2 Flemish Decree of 27 March 2009 on Land and Real Estate; Constitutional Court 7 November 2013, no. 144/2013.
[842] Art. 27 Framework Decision Social Rent juncto art. 95 Flemish Housing Code.
[843] Art. 17, § 2, par.3 Arrêté du Gouvernement wallon 6 September 2007 organisant la location des logements gérés par la Société wallonne du Logement ou par les sociétés de logement de service public; For more information, see N. BERNARD, "Des 'mesures immédiates' pour désamorcer le critère du rattachement local dans l'hébergement des sans-abri", *Housing Rights Watch* 2014, (1) 12-13.
[844] R. BRILLAT, "The European Social Charter and monitoring its implementation", in N. ALIPRANTIS and I. PAPAGEORGIOU (eds.), "Social rights at European, regional and international level. Challenges for the 21st century", Brussel, Bruylant, 2010, (43) 45 and 50.

however, he admits that there is insufficient pressure on states to conform with the Charter.[845] In practice, this last, very true statement downgrades the previous ones.

291. The ECSR's conclusions on the merits are neither final nor binding as its report, which focuses solely on compliance with the RESC[846], has to be transmitted to the Committee of Ministers for a definitive disposal of the complaint. In case of a violation, they "shall" then adopt (by a majority of two-thirds) a recommendation for the state party in question.[847] The state party must then provide information on the measures taken in response to that recommendation.[848] There has however been a lot of discussion about the true scope of the obligations of the Committee of Ministers.[849] Do they have to comply with the ECSR, and if so to what extent are they bound by what are essentially nothing more than declaratory decisions? Even the ECSR had to join in on the debate in response to a remark by the French state that some decisions by the Committee of Ministers differed from the ECSR.[850]

292. Regardless of the different interpretations, we see that the practice of providing State Parties with recommendations following some kind of inconformity with the Charter is virtually non-existent.[851] Moreover, it is generally agreed that the recommendations by the Committee of Ministers are not legally binding anyway.[852] And yet, in the aftermath of the 2014 cases of CEC and Feantsa against the Netherlands, there have been a couple of Dutch judgments in which considerable weight has been given to the Committee's decision. While these domestic judgments agree that the ECSR decisions are not directly binding, this does not mean that they deem them without any meaning. They consider them as authoritative

[845] *Ibid*., 53.
[846] The Committee seems for example unentitled to award or suggest compensation or costs, see: ECSR 11 December 2001, no. 9/2000, Confédération française de l'Encadrement (CGC)/France, par.58; ECSR 7 February 2005, no.15/2003, ERRC/Greece, par.57.
[847] Art. 9 Add. Prot. to the European Social Charter providing for a system of collective complaints.
[848] *Ibid*., art.10; A. KUCS, Z. SEDLOVA and L. PIERHUROVICA, "The right to housing: international, European and national perspectives", *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol* 2008, no. 64/65, (101) 114.
[849] Cf. D.J. HARRIS and J. DARCY, *The European Social Charter*, New York, Transnational Publishers, 2001, 365-367; F. SUDRE, "Le protocole additionnel à la Charte Sociale Européenne prévoyant un système de réclamations collectives", *Revue Générale de Droit International Public* 1996, vol. 100, (715) 737.
[850] ECSR 30 November 2004, no. 16/2003, Confédération française de l'Encadrement CFE-CGC/France, par. 20-21.
[851] The only exception is: Committee of Ministers 31 January 2001, Recommendation RecChS(2001)1 on collective complaint no. 6/1999, *Syndicat national des Professions du tourisme/France*.
[852] R. CHURCHILL and U. KHALIQ, "Violations of Economic, Social and Cultural Rights: The Current Use and Future Potential of the Collective Complaints Mechanism of the European Social Charter", in M.A. BADERIN and R. McCORQUODALE (eds.), *Economic, Social and Cultural Rights in Action*, Oxford, Oxford University Press, 2007, (195) 218.

statements that can also be used in the application of articles 3 and 8 of the European Convention on Human Rights. It is clear that in practice the ECSR decisions have played a vital role in the argumentation of the Dutch courts in these cases. It has even been said that it could not be ruled out that the decisions of the ECSR can influence Dutch law with retroactive effect.[853]

293. Nevertheless, it is safe to say that if the hypothetical complaint would result in a violation of the RESC by the Belgian state, there is no certainty that actual steps would be taken to address these problems. One cannot underestimate the political pressure a decision of the Committee might ensue, but the lack of legal consequences definitely remains one of the weaknesses of the complaint mechanism of the Charter. All this is influenced by the partly political nature of the whole system. However convincing the legal arguments of the ECSR may be, the Committee of Ministers will ultimately make a political decision as to the requirement of a follow-up.[854] A lot is thus depending on the political will of the Committee of Ministers, where the defendant state is also allowed to join the vote.[855]

2) Immediate measures

294. With the amendments of the internal rules of procedures in 2011, the Committee has tried to improve the follow-up of its decisions through the added possibility of immediate measures (rule 36)[856], which can be requested by a party or proposed by the ECSR on its own initiative.[857] In contrast to the aforementioned interim measures of the European Court of Human Rights which are adopted before the investigation on the merits, immediate measures serve as a follow-up of the assessment. Identically however, the purpose of such measures is to avoid the risk of a serious irreparable injury. In line with its subdued role as the little, less

[853] Central Council of Appeal 17 December 2014, no. 14-5507 WMO-VV, ECLI:NL:CRVB:2014:4178, par. 5.7; Court of First Instance Amsterdam 8 May 2015, ECLI:NL:RBAMS:2015:2651, par. 8-10 and 15.
[854] H. CULLEN, "The collective complaints of the European Social Charter: interpretative methods of the European Committee of Social Rights", *H.R.L.R.* 2009, vol. 9, no. 1, (61) 67.
[855] R. CHURCHILL and U. KHALIQ, "Violations of Economic, Social and Cultural Rights: The Current Use and Future Potential of the Collective Complaints Mechanism of the European Social Charter", in M.A. BADERIN and R. McCORQUODALE (eds.), *Economic, Social and Cultural Rights in Action*, Oxford, Oxford University Press, 2007, (195) 229.
[856] L.J. QUESADA, Speech during a panel discussion on "Strengthening cooperation between international and regional human rights systems to mainstreaming economic, social and cultural rights", *Workshop on enhancing cooperation between United Nations and regional human rights mechanisms*, available at www.ohchr.org/EN/Countries/NHRI/Pages/Presentations.aspx, 8-9 October 2014.
[857] Rule 36 of the Rules of the European Committee of Social Rights, available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168047eea7.

important sister of the more authoritative Court, the introduction of immediate measures has unfortunately not inspired a lot of jurists to write on the subject. Consequently, little has been said about the question whether or not these measures are also binding. This and similar questions did come up during a seminar organized by Housing Rights Watch in the wake of the earlier cited decisions on the merits of CEC and Feantsa against the Netherlands.[858] The Committee had earlier asked for these immediate measures "*through the implementation of a co-ordinated approach at national and municipal levels with a view to ensuring that their basic needs (shelter) are met*".[859] Considering that the request for these measures does not go through the hands of the Committee of Ministers, it is a legitimate question whether they are actually more enforceable than the decision on the merits itself. In the same strand of reasoning it has been asked whether non-compliance with these immediate measures or irreparable damage that would result therefrom could trigger a complaint before the European Court of Human Rights, on the basis of the right to an effective remedy (article 13 ECHR). This would of course make both regional human rights instruments much more intertwined and once again highlight the interdependence of human rights.

295. In comparison to the enthousiasm for a stronger European Committee of Social Rights which is reflected in these questions, reality is (as often) much more sobering. First of all, the ECSR has made perfectly clear that immediate measures are of an exceptional nature.[860] Furthermore, on the question of the binding character of immediate measures by the Dutch Secretary of State, the advisory department of the Dutch Council of State concluded that immediate measures of the ECSR are judicially not binding, only authoritative. Its main argument relied on the fact that the decisions of the Committee were not binding either.[861] We agree that there is indeed little reason to argue *a contrario*. Interim measures, which consist more of obligations to abstain from any interference, only aim to secure the continued existence of the substantive claim of an individual, whereas immediate measures, which focus more on obligations to take action, do not. This is also illustrated by the aforementioned fact that immediate measures are ordered after the decision on the merits.[862]

[858] Housing Rights Watch Expert Seminar: Collective complaints against the Netherlands, The Hague, 14 November 2014.
[859] ECSR 25 October 2013 (decision on immediate measures), no. 86/2012, Feantsa/the Netherlands; ECSR 25 October 2013 (decision on immediate measures), no. 90/2013, Conference of European Churches (CEC)/the Netherlands.
[860] E.g.: ECSR 25 October 2013 (decision on immediate measures), no.86/2012, Feantsa/the Netherlands, par. 1.
[861] Adv. Council of State (NL) 13 December 2013, no. W03.13.0414/II/Vo, *Kamerstukken II 2013-14*, 29279.
[862] N. BERNARD, "Des 'mesures immédiates' pour désamorcer le critère du rattachement local dans l'hébergement des sans-abri", *Housing Rights Watch* 2014, (1) 25-26.

296. Still however we must pose ourselves the question how this might develop over time? We should remember that the recognition of the ECHR's interim measures as binding has also been a process of many years. Luis Jimena Quesada, President of the European Committee of Social Rights, is certainly optimistic about the immediate measures. He states that "*they have already had a significant positive impact in the mass media and, above all, in practice through involvement of NGOs and municipalities*", thereby referring to the municipalities of Utrecht, Rotterdam, Amsterdam and the Hague who have jointly declared the Committee's decision on immediate measures of great importance.[863]

3) With a little help from your friends: empowering socio-economic rights case law

297. Based on all of the above, it would be somewhat of an overstatement to declare that states that change domestic law in order to bring situations in line with the Charter always do so due to the legal force of the decision of the ECSR. It can for example also be influenced by the binding judgments of the ECtHR.[864] It is therefore important for the Committee to import principles developed by the Court whenever possible. Aware of the difference in both legal and symbolic authority, the Committee can try to use the Court's case law to compensate the "flaws" of its mere quasi-judicial character and raise its legitimacy towards states.[865] Decisions related to the right to housing are no exception when it comes to the often applied technique of referencing ECtHR judgments. The ECSR has stated that it is "*particularly concerned that its interpretation of article 31 is fully in line with the European Court of Human Rights' interpretation of the relevant provisions of the Convention*".[866] More concretely, it has for example referred to the cases of *Buckley* and *McCann* to define 'home' and to assess the access to judicial remedies in event of an eviction in line with the Court's

[863] L.J. QUESADA, Speech during a panel discussion on "Strengthening cooperation between international and regional human rights systems to mainstreaming economic, social and cultural rights", *Workshop on enhancing cooperation between United Nations and regional human rights mechanisms*, available at www.ohchr.org/EN/Countries/NHRI/Pages/Presentations.aspx, 8-9 October 2014.

[864] R. BRILLAT, "The European Social Charter and monitoring its implementation", in N. ALIPRANTIS en I. PAPAGEORGIOU (eds.), "Social rights at European, regional and international level. Challenges for the 21st century", Brussel, Bruylant, 2010, (43) 56.

[865] F. BENOÎT-ROHMER, "The impact of the European Convention of Human Rights on the jurisdictionalisation of the European Committee of Social Rights", in N. ALIPRANTIS and I. PAPAGEORGIOU (eds.), *Social rights at European, regional and international level. Challenges for the 21st century*, Brussel, Bruylant, 2010, (233) 235-236 and 239.

[866] ECSR 5 December 2007, no.33/2006, International Movement ATD Fourth World/France, par. 69.

jurisprudence.[867] The Committee has also used the interpretation of article 8 ECHR in the *Connors* case to legitimize and actually even broaden the scope of article 16 RESC.[868]

298. The ECSR can thus piggyback on the authority of the European Court of Human Rights by referencing the latter's judgments and thereby highlighting the indivisibility of human rights. The ECtHR itself can improve the authority of the Committee's decisions by cross-referencing as well. By doing so, it validates the case law of the Committee as equally important and boosts its legitimacy.[869] In housing related matters however, there seems to be some reluctance by the Court to draw on the extensively developed jurisprudence based on the RESC.[870] In the earlier discussed *Yordanova* case, which involved the eviction of Roma who lived in illegally built dwellings in Bulgaria, the Court did refer to a similar case by the ECSR for the first time (*ERRC v. Bulgaria*).[871] It was however only used as "relevant international material" and not in the assessment of the case itself. What it does of course illustrate is that article 8 of the Convention is not just used on its own merits in housing related cases, but that the Court acknowledges its connection to a right to housing.[872]

299. In the more recent case of *Berger-Krall* against Slovenia, the Court did refer to the ECSR decision of 8 September 2009 (*Feantsa v. Slovenia*) in its actual argumentation.[873] It did however not use this decision in relation to the specific circumstances of the case (even though both were set against exactly the same background), but only with regard to the Committee's statement that article 31 RESC could not be interpreted as imposing an obligation of results upon states (infra: part III, chapter 1). While the Court only selected a passage from *Feantsa v. Slovenia* to support the lawfulness of an interference with tenants' rights, this ECSR decision actually used an earlier ECtHR judgment (*Mellacher*) to

[867] ECSR 21 March 2012, no.62/2010, FIDH/Belgium, par. 32 and 71.
[868] ECSR 8 December 2004, no.15/2003, ERRC/Greece, par. 19-20 and 24-25: "*The implementation of article 16 as regards nomadic groups including itinerant Roma, implies that adequate stopping places be provided, in this respect article 16 contains similar obligations to article 8 of the European Convention of Human Rights*"; ECtHR 27 May 2004, no. 66746/01, Connors/United Kingdom, par. 84; D. GAILIUTE, "Right to housing in the jurisprudence of the European Committee of Social Rights", *Societal Studies* 2012, vol. 4, no. 4, (1605) 1610.
[869] F. BENOIT-ROHMER, "The impact of the European Convention of Human Rights on the jurisdictionalisation of the European Committee of Social Rights", in N. ALIPRANTIS and I. PAPAGEORGIOU (eds.), *Social rights at European, regional and international level. Challenges for the 21st century*, Brussel, Bruylant, 2010, (233) 242.
[870] P. KENNA, "Housing rights: positive duties and enforceable rights at the European Court Of Human Rights", *E.H.R.L.R.* 2008, no.2, (193) 205.
[871] ECtHR 24 April 2012, no.25446/06, Yordanova and Others/Bulgaria, par.73; ECSR 18 October 2006, no.31/2005, ERRC/Bulgaria.
[872] A. REMICHE, "Yordanova and Others v.Bulgaria : the influence of the social right to adequate housing on the interpretation of the civil right to respect for one's home", *H.R.L.R.* 2012, vol. 12, no. 4, (787) 794.
[873] ECtHR 12 June 2014, no. 14717/04, Berger-Krall and Others/Slovenia, par. 190.

substantiate *a contrario* that interferences are allowed to protect vulnerable tenants.[874] In other words, in this rare example of cross-referencing back and forward between Court and Committee, the Court selected argumentation from the ECSR that furthered the case for a restriction of the applicants' right to housing, while the Committee did the exact opposite with the case law of the European Court of Human Rights. The selectiveness of references can thus also negatively impact the ability of the Court's case law to increase the legitimacy of the European Social Charter system.

300. With regard to enhancing the importance of Committee decisions by way of referencing its argumentation, we should also reiterate that article 34 (3) EU Charter of Fundamental Rights significantly draws on the relevant provision of the RESC. Depending of course on the willingness of the Court of Justice, the interpretation of the content of article 34 (3) could logically be drawn from the jurisprudence of the ECSR. This carries great potential to increase the importance of both institutions with regard to the right to housing. In this scenario, the European Union would then of course adopt a broad interpretation of this social right, whereas the ECSR's decisions and principles would be anchored in the case law of a more established institution with binding jurisprudence that is not even only centered around just human rights, giving the Committee's considerations much more proverbial weight.

301. In future, an extra influence could be lurking from beyond the European borders. With the recently established complaints mechanism of the UN Committee on Economic, Social and Cultural Rights, an additional actor joins the debate. While still in its infancy, one of the few cases that have been decided on already refers to the European Court of Justice, more specifically to the aforementioned *Aziz* case.[875] It is interesting to see whether this international complaint mechanism will become an influence itself over time and whether it will borrow (more) from the housing related European jurisprudence in the future, thereby maybe also gathering more attention for the ECSR.

302. Generally speaking however, the aforementioned flaws inherent to the ECSR system have led to a sense of indifference amongst all relevant parties, to which we can also add the

[874] ECSR 8 September 2009, no. 53/2008, Feantsa/Slovenia, par. 34.
[875] CESCR 13 October 2015, no. 2/2014, I.D.G./Spain, par. 13.6.

media.[876] The list of registered NGO's is still limited and the number of collective complaints is nowhere near comparable to the flood of cases before the ECtHR.[877] Although certain institutional changes could undoubtedly be made to increase the power of the RESC, disinterest or disbelief in what the collective complaints mechanism can mean or achieve can also work as a self-fulfilling prophecy.

303. We therefore argue that it would be exaggerated to say that lodging a collective complaint before the ECSR is useless. Although they lack binding character, decisions by the Committee are publicized. At the very least, they are authoritative statements, which in turn can trigger bottom-up initiatives, empower civil society in their fight for more enforceable social rights and ultimately maybe trickle down (or should we say up) into politics. The publicity generated by the guiding cases against France certainly created this kind of impetus for the proposal of the bill that ultimately became the *Droit au logement opposable* (DALO).[878]

§ 4. Conclusion

304. For a judicial body judging alleged violations of a Convention that contains no right to housing, the European Court of Human Rights has surely engaged itself to discuss housing rights related aspects through several Convention rights. We should definitely embrace its willingness to do so. Not only does the Court's jurisprudence offer solutions to individual litigation, it indirectly sets out structural guidelines as well of what a state is or is not allowed to do with regard to for example interferences on the private rental market/with the right to property. Despite the fact that it proclaims how specific circumstances and disadvantaged groups and persons must be taken into particular account, the Court still provides a large margin of appreciation to the state party. As a consequence, the impact on state obligations regarding the right to housing remains largely procedural. The Court has no aim to promote the realisation of the right to housing as long as the procedural safeguards are in place and no disproportionate measures have been taken. It is also somewhat unclear whether that margin

[876] V. VAN DER PLANCKE and M. SANT'ANA, "Protection des droits sociaux fondamentaux et lutte contre la pauvreté au sein du Conseil de l'Europe", in V. VAN DER PLANCKE (ed.), *Les droits sociaux fondamentaux dans la lutte contre la pauvreté* ? Brussel, Die Keure, 2012, (211) 243.
[877] KHEMANI, "The European Social Charter as a means of protecting fundamental economic and social rights in Europe: relevant or redundant", 2009, http://ssrn.com/abstract=1606110, (1) 14 and 16.
[878] K. OLDS, "The role of courts in making the right to housing a reality throughout Europe: lessons from France and the Netherlands", *Wisconsin International Law Journal* 2010, vol. 28, (170) 190.

of appreciation is quite as broad for measures that actually protect tenants and thereby might infringe owner's right to property.

305. A full-fledged right to housing is not recognized in the case law of the ECtHR. To repeat the words of Koch, he who is only homeless will go there in vain. In contrast, the Revised European Social Charter does provide such a right, which renders the reasoning by the European Committee of Social Rights more substantive as well. As we have seen, it is here that a state's housing legislation and policy will be under scrutiny in the most comprehensive manner. This procedure though is not open to individual complaints, nor are the decisions by the Committee binding. We have argued that the legitimacy of their decisions in political circles could be given a boost with consistent references to and more importantly by the ECtHR. Considering that article 34 of the Charter of Fundamental Rights of the European Union has been based on the very similar article 31 RESC, one can hope that the European Court of Justice might eventually also borrow the Committee's argumentation. Continuing on the subject of legitimacy, we also argue that even if a complaint against the Belgian state along the same lines of ATD Fourth World and Feantsa against France might be possible on the basis of article 16 and 30 RESC, the legitimacy of such a decision would certainly increase if article 31 would be ratified. It would give a clear normative framework to reflect on the Belgian and regional housing legislation and policies. Once again, it emphasizes how European jurisprudence has and the extent to which it could have its effect on the protection and realisation of the right to housing on the domestic level.

Part III: Strengthening housing rights obligations on the domestic level

306. Part III continues with exploring the obligations that (could) be imposed on states to protect and fulfill the right to adequate housing. Our focus shifts however from what can be achieved through European jurisprudence to the more technical issues on the domestic level that both impede and potentially enable the Flemish/Belgian government to progressively realize that fundamental right. The central question is simple: how can we make the right to housing and the accompanying obligations stronger from a legal perspective (cf. part I on the non-legal perspective)?

307. This part consists of two chapters. Chapter 1 departs from the idea to transform the right to adequate housing from imposing its current obligation of means to an obligation of result.[879] During our research into the sense (and nonsense) of this idea, we quickly bumped into some serious questions and eventually even objections with regard to the use of such a qualification of obligations with regard to the right to housing and socio-economic rights in general. Most of these problems seemed to stem from the different interpretation that is given in private law on the one hand and public international law on the other. In order to grasp the full extent of these complexities and its consequences on the protection of socio-economic rights, we deem it important to first take a step back and look at the exact interpretation of obligations of result and obligations of conduct or means in both private and public international law. Based on the findings of our comparison, we will then scrutinize the extended use of the concept of obligation of result and its meaning for the right to housing on both the international human rights level and the domestic level.

[879] Explanatory Memorandum to the draft of Decree concerning the Flemish Housing Code, *Parl. St.* Vl. Parl. 1996-97, no. 654/1, 11; N. BERNARD and B. HUBEAU (eds.), *Recht op wonen: naar een resultaatsverbintenis?*, Brugge, Die Keure, 2013, 308 p; G. VAN IMPE, "L'effectivité du droit au logement: une obligation de résultat à charge des pouvoirs publics?", *Echos log.* 2012, no.2, 39-40; Steunpunt tot bestrijding van armoede, bestaansonzekerheid en sociale uitsluiting, *Naar een effectief recht op wonen: welke lessen kunnen we trekken uit de Franse en Schotse ervaringen*, 2011, www.armoedebestrijding.be/publications/verslag_resultaatsverbintenis.pdf, 63 p; see also the description of ATD Fourth World's argumentation during the hearing of their case against France before the European Committee of Social Rights in M. UHRY and T. VIARD, "De Raad van Europa pakt Frankrijk aan over het recht op huisvesting en het recht op bescherming tegen armoede", in Steunpunt tot Bestrijding van Armoede, Bestaansonzekerheid en Sociale Uitsluiting, *Armoede-Waardigheid-Mensenrechten*, 2008, www.armoedebestrijding.be/publications/10jaarsamenwerking/10jaarsamenwerking_rapport_NL.pdf, (81) 83.

308. The downsides of using the obligations dichotomy as portrayed in the first chapter ultimately lead us to chapter 2. Still in search of a more result-oriented right to housing in Belgium and Flanders, we take a look at whether and how the international concept of progressive realization and its derivatives like the prohibition of retrogression could take up a (more concrete) role in this process.

Chapter 1: From obligation of means to obligation of result?

§ 1. Private law

A. Origin and meaning

309. Obligations of result and obligations of conduct have a longstanding history in private law. Both in national [880] as well as international [881] literature, these concepts are often attributed to French legal academic René Demogue[882], who first applied the distinction almost ninety years ago in the context of the burden of proof.[883] Nevertheless, obligations of means had already been introduced in a couple of Dutch publications shortly after the turn of the century.[884] Here, they were initially developed for reasons of fairness. This stemmed from situations where it might not be impossible for a debtor to achieve a certain result, but where at the same time one should not expect him to attain it.[885]

[880] M. STORME, *De bewijslast in het Belgisch privaatrecht*, Gent, Story-Scientia, 1962, 387-388; T. VANSWEEVELT, *De civielrechtelijke aansprakelijkheid van de geneesheer en het ziekenhuis*, Antwerpen, Maklu, 1992, 105.
[881] M. PIERRAT, "De la distinction entre obligations de moyens et obligations de résultat : pile ou face?", *JT Luxembourg* 2011, no.15, (61) 61-62; D. ALESSI, "The distinction between obligations de résultat and obligations de moyens and the enforceability of promises", *ERPL* 2005, vol.5, (657) 659-660.
[882] M. PIERRAT, "De la distinction entre obligations de moyens et obligations de résultat : pile ou face?", *JT Luxembourg* 2011, nr.15, (61) 61-62; D. ALESSI, "The distinction between obligations de résultat and obligations de moyens and the enforceability of promises", *ERPL 2005*, vol.5, (657) 659-660; M. STORME, *De bewijslast in het Belgisch privaatrecht*, Gent, Story-Scientia, 1962, 387-388; T. VANSWEEVELT, *De civielrechtelijke aansprakelijkheid van de geneesheer en het ziekenhuis*, Antwerpen, Maklu, 1992, 105.
[883] R. DEMOGUE, *Traité des obligations en général: Tome V*, Paris, Rousseau, 1925, nr. 1237.
[884] J.L.L. WERY, *Overmacht bij overeenkomsten*, Amsterdam, A.H. Kruyt, 1919; M.G. LEVENBACH, *Iets over de spanning van de contractsband bij verandering in de omstandigheden*, Amsterdam, 1923; J.D.A. DEN TONKELAAR, *Resultaatsverbintenissen en inspanningsverbintenissen*, Zwolle, Tjeenk Willink, 1982, 1.
[885] J.F. HOUWING, "Overmacht of onmogelijkheid?", *RM* 1904, 297; J.D.A. DEN TONKELAAR, *Resultaatsverbintenissen en inspanningsverbintenissen*, Zwolle, Tjeenk Willink, 1982, 1-5; P.A.N. HOUWING, "De inhoud van de verbintenis en de overmacht, *WPNR* 1953, 4316-4324.

310. The original, private law interpretation of the distinction is unsurprisingly the most logical one. The obligation of result (obligation de résultat) is simply the obligation of the debtor to attain a predetermined result. The obligation of means or conduct (obligation de moyens) on the other hand obliges the debtor "only" to give his or her best effort to reach that result, but doesn't make him or her responsible solely on the basis of the final outcome.[886] The debtor must only act like a good housefather, or in other words, in accordance with a thoughtful and careful person placed in the same circumstances.[887]

311. Obviously, this distinction offers the possibility to specify the content and scope of an agreement and can therefore also determine whether or not a debtor has complied with his responsibility.[888] Considering the cited origins for the development of the distinction, it evidently has considerable importance on the parties' burden of proof.[889] In case of an obligation of result, the debtor can only free himself by *force majeure*.[890] This obligation is thereby linked to article 1147 of the Belgian Civil Code. With an obligation of means on the other hand, it is the creditor who must prove non-compliance by lack of due diligence. He must demonstrate that the debtor has not acted as a *pater familias diligens*.[891] Obligations of means could therefore be coupled to article 1137 of the Civil Code. Although the burden of proof shifts from debtor to creditor depending on the qualification of the obligation, it is inaccurate to speak of a reverse *onus*. In accordance with the *actori incumbit probatio* principle, the creditor must still prove the existence and non-fulfillment of the commitment in case of an obligation of result.[892]

312. Considering the frequent absence of an explicit statement between the parties regarding the type of obligation, it is often the judge who will have to make a decision on the

[886] P. WERY, *Droit des obligations. Vol. 1. Théorie générale du contrat*, Brussel, Larcier, 2010, 482; C. VANACKERE, "Enkele soorten verbintenissen", in J. ROODHOOFT (ed.), *Bestendig Handboek Verbintenissenrecht,* Antwerpen, Kluwer, 1998, I.2, (20) 25; L. VAN VALCKENBORGH, "De kwalificatie van een verbintenis als resultaats- of middelenverbintenis", *TBBR* 2011, vol.5, (222) 222.
[887] A. TUNC, "La distinction des obligations de résultat et des obligations due diligence", *JCP* 1945, nr. 449 ; R. KRUITHOF, "Overzicht van rechtspraak (1974-1980)", *TPR* 1983, (495) 616; P. VAN OMMESLAGHE, *Droit des obligations: tome premier*, Brussel, Bruylant, 2010, 40; W. VAN GERVEN and S. COVEMAEKER, *Verbintenissenrecht,* Leuven, Acco, 2001, 28 and 239-241.
[888] R. KRUITHOF, "Overzicht van rechtspraak (1974-1980)", *TPR* 1983, (495) 616.
[889] C. VANACKERE, "Enkele soorten verbintenissen", in J. ROODHOOFT (ed.), *Bestendig Handboek Verbintenissenrecht*, Antwerpen, Kluwer, 1998, I.2, (20) 25.
[890] Court of Cassation 10 December 1953, *Arr. Cass.* 1954, 244; P. WERY, *Droit des obligations. Vol. 1. Théorie générale du contrat*, Brussel, Larcier, 2010, 483.
[891] Court of Cassation 26 February 1962, *Pas.* 1962, I, 723; W. VAN GERVEN and S. COVEMAEKER, *Verbintenissenrecht*, Leuven, Acco, 2001, 105-106.
[892] T. VANSWEEVELT, *De civielrechtelijke aansprakelijkheid van de geneesheer en het ziekenhuis*, Antwerpen, Maklu, 1992, 107.

qualification. Although the legal doctrine has developed several methods[893], the most recurring one is the aleatory character of the perceived result. This means that the decision depends on the extent to which the realization of the result is plausible.[894] This was clearly worded by Attorney-General Krings in 1984. He stated that the bigger the uncertainty, the more likely it is considered to be an obligation of means, because a debtor does not want to commit himself to achieving a goal that he knows is very difficult to reach.[895]

313. The qualification regularly coincides with the specific nature of a certain agreement or a certain profession.[896] Professions do however sometimes hold both obligations of result and obligations of means. Lawyers for example have an obligation of result with regard to mere formal aspects of their job like giving notice of appeal in due time[897], but are not responsible for the outcome of the judgment.[898] This is of course somewhat different from the American point of view on advocacy, which is largely built on the idea of "no cure, no pay".[899] Furthermore, courts sometimes assess an obligation to be one of result[900], while at other times it considers the same obligation to be one of means.[901] The obligation of a municipality to keep roads in good and safe conditions is a good illustration of such an inconsistency.

B. Success and criticism

314. The private law distinction between obligations of result and obligations of means can only be described as a success. Extensively used in legal doctrine and frequently applied in court, the distinction has not only found its way into French and Belgian civil law, but has

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[893] C. VANACKERE, "Enkele soorten verbintenissen", in J. ROODHOOFT (ed.), *Bestendig Handboek Verbintenissenrecht*, Antwerpen, Kluwer, 1998, I.2, (1) 5-10; P. VAN OMMESLAGHE, *Droit des obligations: tome premier*, Brussel, Bruylant, 2010, 40-41.

[894] M. PIERRAT, "De la distinction entre obligations de moyens et obligations de résultat: pile ou face ?", *JT Luxembourg* 2011, no. 15, (61) 62; P. VAN OMMESLAGHE, *Droit des obligations: tome premier*, Brussel, Bruylant, 2010, 40-41.

[895] Court of Cassation 3 May 1984, *Arr. Cass.* 1983-1984, 1147-1151, concl. E. KRINGS.

[896] L. VAN VALCKENBORGH, "De kwalificatie van een verbintenis als resultaats- of middelenverbintenis", *TBBR* 2011, vol.5, (222) 223.

[897] Court of Appeal Antwerp 7 October 2002, *NJW* 2003, 493; Court of Appeal Antwerp 26 March 2006, *TBBR* 2008, 561.

[898] P. DEPUYDT, "De beroepsaansprakelijkheid van de advocaat", *TBBR* 1993, 295-310; Court of Appeal Brussel 16 May 2002, *JLMB* 2003, 1673; Court of Appeal Luik 30 June 2000, *JLMB* 2005, 280.

[899] R.E. KAUFMAN, M.F. DAVIS and H.M. WEGLEITNER, "The interdependence of rights: protecting the human right to housing by promoting the right to counsel, *Columbia Human Rights Law Review* 2014, vol.45, no.3, 772-815.

[900] Peace Court Aarschot 23 October 1998, *TBBR* 1999, 148; Police Court Hoei 8 October 1985, *JL* 1985, 611.

[901] Court of Cassation 6 November 2009, *TBP* 2010, 551; Court of Appeal Gent 16 April 2004, *T.Verz.* 2005, 361.

also had an influence on *inter alia* Dutch, Italian and Luxembourg private law[902], as well as in large parts of Northern Europe.[903]

315. Despite its widespread success, the concepts have not been void of criticism.[904] It has for example been argued that an obligation of means frequently comprises aspects that do not only require mere effort.[905] In response, we agree that there are often only a limited number of ways to work towards a certain goal in a diligent manner. It is therefore understandable that these actions or measures could also be regarded as obligations with regard to certain results or more drastically, that the notion of obligation of means is fundamentally misconceived.[906] Nevertheless, we disagree with such criticism. The distinction is based on the obligation with regard to the intended "end result" or in other words the contract's purpose. [907] Performing certain actions within the realm of the agreement should thus not be confused with the performance connected to the contractual obligation itself.[908] The fact that for example a surgeon must be on time for surgery, respect hygienic procedures and apply specific tools, does not in any way affect the qualification of the end result (curing the patient), as an obligation of means. If one would like to use the private law terminology for mere components of the commitment, it would be possible to speak of so called obligations of result with regard to the means.[909]

§ 2. Public international law

316. The distinction between both types of obligations was first initiated in public international law in the context of the Draft Articles on State Responsibility (DASR) by then

[902] C. FERRON, "L'intensité de l'obligation juridique ou des obligations de diligence, de résultat et de garantie" , *RDUS* 1991, (239) 240 ; D. ALESSI, "The distinction between obligations de résultat and obligations de moyens and the enforceability of promises", *ERPL 2005*, vol.5, (657) 662.
[903] H. HONKA, "Harmonization of contract law through international trade: a Nordic perspective", *Tul. Eur. & Civ. L.F*. 1996, vol.11, (111) 164-165.
[904] H.C.F. SCHOORDIJK, "Inspanningsverbintenis en resultaatsverbintenis", *Bouwrecht* 1969, 65; D. ALESSI, "The distinction between obligations de résultat and obligations de moyens and the enforceability of promises", *ERPL 2005*, vol.5, 657-692.
[905] J.D.A. DEN TONKELAAR, *Resultaatsverbintenissen en inspanningsverbintenissen*, Zwolle, Tjeenk Willink, 1982, 17.
[906] D. ALESSI, "The distinction between obligations de résultat and obligations de moyens and the enforceability of promises", *ERPL* 2005, vol.5, (657) 684-689.
[907] J.D.A. DEN TONKELAAR, *Resultaatsverbintenissen en inspanningsverbintenissen*, Zwolle, Tjeenk Willink, 1982, 7 and 40.
[908] D. ALESSI, "The distinction between obligations de résultat and obligations de moyens and the enforceability of promises", *ERPL* 2005, vol.5, (657) 687.
[909] T. VANSWEEVELT, *De civielrechtelijke aansprakelijkheid van de geneesheer en het ziekenhuis*, Antwerpen, Maklu, 1992, 121.

Special Rapporteur of the International Law Commission (ILC) Roberto Ago in the late seventies.[910] Although the final version of the DASR no longer spends specific provisions on these obligations[911], the commentary to the current article 12 shows that the distinction is still very much alive and relevant in international law.[912] It is therefore certainly of value to look back at the definition that was given in articles 20 and 21 DASR of the 1977 version.

317. According to article 21, a state has an obligation of result when it has to achieve a specific result, but still has the discretion and freedom to choose the appropriate way to reach this goal. No specific measures are in other words imposed internationally, or these measures only contain mere preferences. The commentaries to the concerned provision use article 2 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR) as an example of this, because it proposes the adoption of legislative measures as one of the appropriate means to progressively achieve the realization of the convention rights without limiting the state's discretion.[913] A large margin of appreciation is in other words given to the state to accomplish what is then often some kind of benchmark or imposed target[914], like reducing homelessness to a certain level by 2020:

> *"A breach of an international obligation requiring the State to achieve a particular result, exists if, by the conduct adopted in exercising its freedom of choice, the State has not in fact achieved the internationally required result".*[915]

318. In contrast to the obligation of result, the international obligation of conduct[916] compels a state to follow a specific course of action and adopt and implement defined measures.[917] In

[910] P. GAUTIER, "On the Classification of Obligations in International Law", in H.P. HESTERMEYER, D. KÖNIG, N. MATZ-LÜCK, V. RÖBEN, A. SEIBERT-FOHR, P.-T. STOLL and S. VÖNEKY (eds.), *Coexistence, cooperation and solidarity*. *Liber amicorum Rüdiger Wolfrum*, Dordrecht, Martinus Nijhoff Publishers, 2012, (853) 854.

[911] UN International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001, www.un.org/ga/search/view_doc.asp?symbol=A/res/56/83.

[912] UN International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries*, UN Doc. A/56/10, 2001, http://legal.un.org/il/texts/instruments/english/commentaries/9_6_2001.pdf, 56-57.

[913] United Nations, *Sixth report on state responsbility, by Mr. Roberto Ago, Special Rapporteur – the internationally wrongful act of the state, source of international responsibility*, UN Doc. A/CN.4/302 and Yearbook of the International Law Commission 1977. Vol.II, part one, 1978, (3) 8-9.

[914] *Ibid*., 4 and 8-9; A.P.M. COOMANS, "De internationale bescherming van het recht op onderwijs", Leiden, Stichting NJCM-boekerij, 1992, 28-29.

[915] United Nations, *Sixth report on state responsbility, by Mr. Roberto Ago, Special Rapporteur – the internationally wrongful act of the state, source of international responsibility*, UN Doc. A/CN.4/302 and Yearbook of the International Law Commission 1977. Vol.II, part one, 1978, (3) 20.

[916] In international law, obligation of conduct is more frequently used than obligation of means.

the context of the right to housing, we could think of the obligation to develop a national housing strategy.[918] Consequently, article 20 describes the non-compliance as follows:

> *"A breach by the State of an international obligation specifically calling for it to adopt a particular course of conduct exists simply by virtue of the adoption of a course of conduct different from that specifically required."*[919]

319. As a matter of fact, a breach by the State of an international obligation of conduct even occurs when the set goal is effectively reached, but not in the way or by measures that were actually imposed. When for example child labour is non-existent in a state, this state would theoretically still violate art. 10 (3) ICESCR if the employment of children in circumstances that are harmful for their health is not punishable by law.[920] Evidently, this appears to have little to no relevance for human rights supervisory bodies. The absence or lack of legislation that has been imposed by human rights treaty law, is highly unlikely to amount to a violation of that treaty when no direct victim is involved. [921] As a matter of fact, the latter is a recurrent admissibility criterion. Of course, both the universal periodic review under the auspices of the Human Rights Council as well the reporting procedures by the UN treaty-based committees do recognize holes in the legislative protection of human rights. The judicial consequences are then however confined to recommendations or issues of concern.

§ 3. Differences between both approaches

320. Although it was clearly stated that the inspiration for the distinction in public international law came from private law, the ILC has managed to tangle up the interpretation of the concept and have to a certain extent even switched their meanings.[922] The diverging

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[917] R. LEFEBER, *Transboundary Environmental Interference and the Origin of State Liability*, Den Haag, Kluwer, 1996, 74; United Nations, *Fourth report on state responsibility, by Mr. James Crawford, Special Rapporteur*, UN Doc. A/CN.4/498 and Yearbook of International Law Commission 2001. Volume II, part one, (1) 20.

[918] S. LECKIE, "Another step towards indivisibility: identifying the key features of violations of ECOSOC rights", *HRQ* 1998, (81) 92.

[919] United Nations, *Sixth report on state responsbility, by Mr. Roberto Ago, Special Rapporteur – the internationally wrongful act of the state, source of international responsibility*, UN Doc. A/CN.4/302 and Yearbook of the International Law Commission 1977. Vol.II, part one, 1978, (3) 8.

[920] *Ibid*., 6.

[921] An exception: ECtHR 22 October 1981, no. 7525/76, Dudgeon/United Kingdom.

[922] P.-M. DUPUY, "Reviewing the difficulties of codification: on Ago's classification of obligations of means and obligations of result in relation to state responsibility", *EJIL 1999*, vol.10, nr.2, (371) 376; United Nations, *Summary records of the meetings of the fifty-first session*, UN Doc. A/CN.4/SER.A/1999 and Yearbook of the International Law Commission 1999. Volume I., 48 (opinion of Mr. Al-Khasawneh).

approach was even mentioned in the commentaries to that version of the DASR.[923] Remarkably, no real further thoughts were ever given to the possible consequences of such a conceptual development. In academic literature, the distinction has remained largely unnoticed too.[924]

321. Two main differences can be perceived. The first one concerns the gravity of the obligations. Since an obligation of means or conduct according to private law is only a best efforts obligation, the obligation of result obviously comprises the heavier duty in that field of law.[925] In contrast, it is the obligation of conduct that is the more demanding obligation in public international law, as it confines the state's policy discretion to attain the set goal.[926] Considering though that compliance with the specific measures typical of international obligations of conduct is in fact a result in and of itself, we argue that this type of obligation could actually be regarded as small, intermediate obligations of result according to private law.[927] These considerations are strongly reminiscent of the earlier mentioned criticism on the validity of the obligation of means. The only difference here is that we are no longer talking about components of an obligation of means (private law), but about an international obligation of conduct, a full-fledged and independent obligation.

322. Secondly and strongly connected to the first difference is the basis behind the distinction.[928] In private law this is the failed result. In practice, the question as to the

[923] United Nations, *Sixth report on state responsbility, by Mr. Roberto Ago, Special Rapporteur – the internationally wrongful act of the state, source of international responsibility*, UN Doc. A/CN.4/302 and Yearbook of the International Law Commission 1977. Vol.II, part one, 1978, (3) 8; United Nations, *Report of the International Law Commission on the work of its twenty-ninth session*, UN Doc. A/32/10 and Yearbook of the International Law Commission 1977. Vol.II, part two, 1978, 12.

[924] One of the few exceptions: O. DE SCHUTTER, *Fonctions de juger et droits fondamentaux. Transformation du contrôle juridictionnel dans les ordres juridiques Américain et Européens*, Bruxelles, Bruylant, 1999, 136-139.

[925] J.D.A. DEN TONKELAAR, *Resultaatsverbintenissen en inspanningsverbintenissen*, Zwolle, Tjeenk Willink, 1982, 44.

[926] M.E. SALOMON, *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, Oxford, Oxford University Press, 2007, 133; United Nations, *Fourth report on state responsibility, by Mr. James Crawford, Special Rapporteur*, UN Doc. A/CN.4/498 and Yearbook of International Law Commission 2001. Volume II, part one, (1) 21; P.-M. DUPUY, "Reviewing the difficulties of codification: on Ago's classification of obligations of means and obligations of result in relation to state responsibility", *EJIL 1999*, vol.10, nr.2, (371) 375-376.

[927] M.C.R. CRAVEN, *The International Covenant on Economic, Social and Cultural Rights. A perspective on its development*, Oxford, Clarendon Press, 1995, 108.

[928] M. STORME, *De bewijslast in het Belgisch privaatrecht*, Gent, Story-Scientia, 1962, 388; T. VANSWEEVELT, *De civielrechtelijke aansprakelijkheid van de geneesheer en het ziekenhuis*, Antwerpen, Maklu, 1992, 107; J. COMBACAU, "Obligations de résultat et obligations de comportement. Quelques questions et pas de réponse", in D. BARDONNET, J. COMBACAU, M. VIRALLY and P. WEIL (eds.), *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité*, Parijs, Éditions A. Pedone, 1981, (181)

qualification of the obligation normally only arises on these occasions. It should not influence the debtor beforehand, since his/her intention should still be to achieve the end result of the commitment.[929] This follows quite naturally from the fact that the distinction originated in the context of the burden of proof. The distinction in international law on the other hand is primarily based on the way in which a state is expected to achieve the result.[930] Consequently, the international obligation of result strongly resembles the definition of an EU directive[931]: "*A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.*"[932]

323. Evidently, the two different interpretations demand to be applied with the utmost care and consistency. The approaches from both fields of law should at all times be kept separately. Unsurprisingly however, this has not always been the case. In a case between Argentina and Uruguay, the International Court of Justice initially seemed to adhere to the obligation of conduct as described in international law, proclaiming the duty to specific conduct:

> "*The Court considers that the obligation (…) prescribes the specific conduct of coordinating the necessary measures (…) to avoid changes to the ecological balance. An obligation to adopt regulatory or administrative measures either individually or jointly and to enforce them is an obligation of conduct."*[933]

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194 : "(…) *que l'objectif n'ait pas été atteint, c'est sans doute une condition nécessaire à la mise en œuvre de la responsabilité*"; P. GAUTIER, "On the Classification of Obligations in International Law", in H.P. HESTERMEYER, D. KÖNIG, N. MATZ-LÜCK, V. RÖBEN, A. SEIBERT-FOHR, P.-T. STOLL and S. VÖNEKY (eds.), *Coexistence, cooperation and solidarity*. *Liber amicorum Rüdiger Wolfrum*, Dordrecht, Martinus Nijhoff Publishers, 2012, 857.

[929] D. ALESSI, "The distinction between obligations de résultat and obligations de moyens and the enforceability of promises", *ERPL* 2005, vol.5, (657) 687.

[930] J. COMBACAU, "Obligations de résultat et obligations de comportement. Quelques questions et pas de réponse", in D. BARDONNET, J. COMBACAU, M. VIRALLY and P. WEIL (eds.), *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité*, Paris, Éditions A. Pedone, 1981, (181) 194-195 and 202 ; D. ALESSI, "The distinction between obligations de résultat and obligations de moyens and the enforceability of promises", *ERPL 2005*, vol.5, 657-692; United Nations, *Fourth report on state responsibility, by Mr. James Crawford, Special Rapporteur*, UN Doc. A/CN.4/498 and Yearbook of International Law Commission 2001. Volume II, part one, (1) 21.

[931] P. GAUTIER, "On the Classification of Obligations in International Law", in H.P. HESTERMEYER, D. KÖNIG, N. MATZ-LÜCK, V. RÖBEN, A. SEIBERT-FOHR, P.-T. STOLL and S. VÖNEKY (eds.), *Coexistence, cooperation and solidarity*. *Liber amicorum Rüdiger Wolfrum*, Dordrecht, Martinus Nijhoff Publishers, 2012, (853) 855.

[932] Art. 288 Treaty on the Functioning of the European Union.

[933] ICJ 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, www.icj-cij.org, par. 187.

324. Subsequently however, the Court changes course and explains the obligation in a private law sense, as a best efforts obligation[934]:

> "*Both parties are therefore called upon (...) to exercise due diligence in acting through the Commission for the necessary measures to preserve the ecological balance of the river."*[935]

325. It is in circumstances like these that ambiguities regarding the exact scope of obligations and thus also their compliance occur. As we will see however, the main difficulties arise in a human rights context.

§ 4. Impact on economic, social and cultural rights and the right to housing

A. International ESC-rights: obligations of result or conduct? According to private or international law?

326. Before proceeding with the issue under scrutiny, we deem it important to stress that economic, social and cultural rights, just as civil and political rights, actually contain both obligations of result as well as obligations of conduct/means. Article 6 ICESCR concerning the right to work requires for example that steps have to be taken to realize complete employment (international obligation of result), but also very concretely forbids forced labour (international obligation of conduct). [936] That much has even been explicitly stated in General Comment no.3 of the Committee on Economic, Social and Cultural Rights (CESCR) on the nature of the obligations of state parties[937], and is generally accepted in international human rights literature.[938] In practice however, we notice that a dichotomy between human rights of

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[934] P. GAUTIER, "On the Classification of Obligations in International Law", in H.P. HESTERMEYER, D. KÖNIG, N. MATZ-LÜCK, V. RÖBEN, A. SEIBERT-FOHR, P.-T. STOLL and S. VÖNEKY (eds.), *Coexistence, cooperation and solidarity*. *Liber amicorum Rüdiger Wolfrum*, Dordrecht, Martinus Nijhoff Publishers, 2012, (853) 857.

[935] ICJ 20 April 2010, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, www.icj-cij.org, par. 187.

[936] Art. 6 ICESCR; M. CRAVEN, *The International Covenant on Economic, Social and Cultural Rights: a perspective on its development*, Oxford, Clarendon Press, 1995, 108.

[937] UN Committee of Social, Economic and Cultural Rights, *General Comment no.3: The Nature of States Parties' Obligations (art.2, para.1 of the Covenant)*, 14 December 1990, par.1 (hereafter General Comment No.3).

[938] E.g.: M. SEPULVEDA, *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, Antwerpen, Intersentia, 2003, 185-195; D. MATAS, "Economic, social and cultural rights and the role of lawyers: North American perspectives", *ICJ Review* 1985, nr.55, (123) 124; P. ALSTON and G. QUINN, "The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights", *HRQ* 1987, vol.9, no.2, (156) 185; M.C.R. CRAVEN, *The International Covenant on Economic, Social and Cultural Rights. A perspective on its development*, Oxford, Clarendon Press, 1995, 107-108; S. LECKIE, "Another step towards indivisibility: identifying the key features of violations of ECOSOC rights", *HRQ* 1998, (81) 92.

the first and second generation is still very much present and that ESC-rights are still perceived as having second-class status and being less enforceable.[939]

327. During the negotiations of what eventually would become the ICESCR back in the early fifties, Western delegations showed considerable reluctance to make these so called second generation rights strong, enforceable obligations and the equivalent of civil and political rights.[940] This reticence revolved around sheer practical concerns, since the realization of ESC-rights are often considered to be much more onerous and costly.[941] Consequently and similar to private law, the aleatory character of these obligations also determined the classic qualification of ESC-rights. René Cassin, one of the drafters of the Universal Declaration of Human Rights, referred in this context to the private law distinction and found that ESC-rights should *not* be expressed as obligations of result, but rather as obligations to take action, thereby implying obligations of means.[942] Considering that the interpretation by the ILC was still distant future, the distinction made by Cassin could only be interpreted in a private law sense. But even today, almost forty years after the ILC's elaborations on the concepts, we see that for example the right to housing is sometimes referred to as being classically interpreted as an obligation of means.[943] As we will see further on however, this happens predominantly in a national context.[944]

328. Given that human rights are part of public international law, it is not surprising that the interpretation made by the ILC has also made a considerable impact on qualifying human

[939] P. O'CONNELL, *Vindicating socio-economic rights. International standards and comparative experiences*, London, Routledge, 2012, 1-2; CESCR, *Report of the open-ended working roup to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights*, 15 March 2004, UN Doc E/CN.4/2004/44.

[940] M.J. DENNIS and D.P. STEWART, "Justiciability of economic, social and cultural rights: should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?, *AJIL* 2004, vol.98, nr.3, (462) 476-484; M.R. ISHAY, *The history of human rights*, London, University of California Press, 2004, 221-229.

[941] M.J. DENNIS and D.P. STEWART, "Justiciability of economic, social and cultural rights: should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?, *AJIL* 2004, vol.98, no. 3, (462) 484; P. ALSTON and G. QUINN, "The nature and scope of states parties' obligations under the ICESCR", *HRQ* 1987, (156) 174; A. EIDE, "Economic, Social and Cultural Rights as Human Rights", in A. EIDE, C. KRAUSE and A. ROSAS (eds.), *Economic, social and cultural rights. A textbook (second revised edition)*, Dordrecht, Martinus Nijhoff Publishers, 2001, (9) 10.

[942] UN Commission on Human Rights, *Summary record of the two hundred and seventieth meeting*, 14 May 1952, UN Doc. E/CN.4/SR.270, 11.

[943] W. VANDENHOLE, "Recht op wonen als resultaatsverbintenis? Enkele reflecties", *Juristenkrant 2013*, no. 264, 12.

[944] E.g.: F. DELPEREE, "Les droits sociaux fondamentaux et le droit belge", in M. STROOBANT (ed.), *Sociale grondrechten*, Antwerpen, Maklu, 1995, (19) 27 ; B. HUBEAU and A. VAN DE WIEL, "Recht op wonen als resultaatsverbintenis. Over de effectiviteit van sociale grondrechten", *TvMR* 2013, no.3, 11-14.

rights obligations. Even the aforementioned General Comment no.3 explicitly refers to the work of the ILC as a main source.[945] Traditionally however, this distinction has again been used as a way to split civil and political rights on the one hand and economic, social and cultural rights on the other. The former category is then often labeled as obligations of conduct (the heavier obligation in international law), the latter rather as obligations of result.[946] This had sprung from the rudimentary idea that while civil and political rights mainly encompass negative obligations (obligation to respect), ESC-rights demand positive action (obligation to fulfill) and therefore also necessitate a large margin of state discretion in order to realize them, ergo only imposing obligations of result.[947]

B. A recipe for confusion

329. From the above, we can deduce that ESC-rights have been called both obligations of conduct/means and obligations of result, not only because they actually entail both types of obligations, but sometimes just depending on whether the use of the concept is derived from private or international law. The reason why this has remained largely unnoticed probably pertains to the fact that in both fields of law, these rights are linked with the "lighter" obligation. In other words, they are regarded in both formulations as having only a limited enforceability. The use of one interpretation or the other possibly also depends upon the context in which the qualification is used: the judicial enforceability of an obligation or the way in which a fundamental right should be realized.

330. Nevertheless, we believe that this creates confusion. Firstly because this is ambiguous in a purely terminological sense. When for example a judge of the European Court of Human Rights states that "*social rights are usually viewed as obligations of conduct*" with regard to

[945] CESCR, *General Comment No.3*, par.1

[946] B.A. ANDREASSEN, A.G. SMITH and H. STOKKE, "Compliance with economic and social human rights: realistic evaluations and monitoring in the light of immediate obligations", in A. EIDE and B. HAGTVET (eds.), *Human Rights in Perspective: a Global Assessment,* Oxford, 1992, (252) 256; M. SEPULVEDA, *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, Antwerpen, Intersentia, 2003, 185-195; D. MATAS, "Economic, social and cultural rights and the role of lawyers: North American perspectives", *ICJ Review* 1985, no.55, (123) 188.

[947] E.A. POSNER, "Human welfare, not human rights", *Columbia Law Review* 2008, vol.108, (1758) 1765; B. PORTER, "Reasonableness and article 8(4)", in R. BROWN, M. LANGFORD, B. PORTER and J. ROSSI, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: a commentary*, Capetown, Pretoria University Law Press, 2016 (194) 196-197; A. EIDE, "Economic, Social and Cultural Rights as Human Rights", in A. EIDE, C. KRAUSE and A. ROSAS (eds.), *Economic, social and cultural rights. A textbook (second revised edition)*, Dordrecht, Martinus Nijhoff Publishers, 2001, (9) 24-25.

taking steps with a view to achieve the progressive realization of these rights[948], this deviates from General Comment no.3, where progressive realization is considered the "*principal obligation of result*".[949] Did this happen consciously or is it actually a case of what we might call "private law contamination", maybe due to the fact that the Court usually applies these obligations as private law concepts?[950,951]

331. A second and more important reason for being accurate in using this typology stems from the fact that, as we have seen, the content of the cited obligations according to international law differs from the content of the obligations in private law. Moreover, they are not each other's exact opposites either. It can thus easily create ambiguities with regard to the exact scope of the obligations for states. We will illustrate this by refering once again to the decision of *ATD Fourth World against France* by the European Committee of Social Rights, which we have applied earlier in our hypothetical collective complaint in part II.[952] On the basis of this decision, Executive Secretary of the ECSR Régis Brillat concluded, in our opinion correctly, that the classic distinction between obligations of means and obligations of result is not a satisfactory interpretation framework for understanding the Charter.[953]

332. We already know that ATD Fourth World argued that the French state had violated articles 16, 30 and 31 of the Revised European Social Charter by not fulfilling its obligation to adequately house people who lived in situations of extreme poverty. Specifically relevant for the purposes of this chapter however is the argument of the French government that the right to adequate housing (art. 31) imposes only an obligation of means. That proclamation here clearly refers to the best efforts obligation from private law.[954] In its response to the argument, the Committee agrees that the relevant provision "*cannot be interpreted as imposing on states an obligation of 'results'* ", but also that the right must "*take a practical and effective, rather*

[948] Partly concurring, partly dissenting opinion of Judge Pinto de Albuquerque, ECtHR 22 March 2012, no. 30078/06, Konstantin Markin/Russia.
[949] CESCR 14 December 1990, General Comment No.3, *The Nature of States Parties' Obligations (art.2, para.1 of the Covenant)*, par.9.
[950] E.g.: ECtHR 21 June 1988, no. 10126/82, Plattform 'Ärtze für das Leben'/Austria, par.34; ECtHR 25 August 2009, no. 23458/02, Giuliana & Gaggio/Italy, par.210.
[951] Another clear example of how the terminology can be mixed up: Separate Opinion of Judge Cançado Trindade, ICJ 20 juli 2012, *Belgium vs. Senegal (Questions Relating to the Obligation to Prosecute or Extradite)*, www.icj-cij.org, par. 46-47.
[952] ECSR 5 December 2007, no. 33/2006, International Movement ATD Fourth World/France.
[953] R. BRILLAT, "The effective implementation of the right to housing of homeless of poorly housed persons : the role of the European Social Charter", *Feantsa Magazine* 2008, no. 2, (7) 7.
[954] *Ibid*, par. 58.

than purely theoretical, form".[955] The Committee illustrates this by enlisting five measures that must be carried out in order for the situation to be in conformity with the treaty. Measures which we will return to in the context of progressive realization in the next chapter.[956]

333. Nonetheless, these obligations clearly reach further than the best efforts obligation the French government had in mind when claiming that the right to housing does not impose an obligation of result. It actually obliges the state to apply imposed measures and take specific actions. In other words, the Committee interprets article 31 much more as imposing the heavier international obligation of conduct.[957] By using actual parentheses when stating that the provision in question is not an obligation of "*results*", the Committee unconsciously confirms the confusion surrounding the two-sided nature of the concept. Surely, the right to adequate housing might not be an obligation of result in terms of realizing adequate housing for everyone at this very moment, but it does impose smaller obligations that on their own could be interpreted as intermediate results that are enforceable and which aim at progressive realisation (supra).[958] Along the same lines Nicolas Bernard has stated that "*la traditionelle obligation de moyens doit se concevoir plutôt comme une obligation de résultat à réalisation graduelle*".[959]

334. As exemplified, the muddled history of the concepts can lead to states being unsure of what exact obligations they carry, but it can also be used as an argument to try and reduce their responsibility. Considering the above, we believe that this confusion could very well have been a factor in maintaining the image of ESC-rights as programmatic ideals and that it has therefore hindered the evolution of ESC-rights as stronger, more enforceable human rights. Too often these rights are still interpreted as mere best efforts obligations according to private

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[955] *Ibid*, par.59.
[956] *Ibid*, par.60: "(…) *a. adopt the necessary legal, financial and operational means of ensuring steady progress towards achieving the goals laid down by the Charter;*
b. maintain meaningful statistics on needs, resources and results;
c. undertake regular reviews of the impact of the strategies adopted;
d. establish a timetable and not defer indefinitely the deadline for achieving the objectives of each stage;
e. pay close attention to the impact of the policies adopted on each of the categories of persons concerned, particularly the most vulnerable."
[957] The ECSR has repeated this approach in: ECS 19 October 2009, no. 51/2008, European Roma Rights Centre (ERRC)/France, par.30.
[958] M. UHRY and T. VIARD, "De Raad van Europa pakt Frankrijk aan over het recht op huisvesting en het recht op bescherming tegen armoede", in Steunpunt tot Bestrijding van Armoede, Bestaansonzekerheid en Sociale Uitsluiting, *Armoede-Waardigheid-Mensenrechten*, 2008, www.armoedebestrijding.be/publications/10jaarsamenwerking/10jaarsamenwerking_rapport_NL.pdf, (81) 85.
[959] N. BERNARD, "Le droit au logement dans la Charte Sociale Révisée: à propos de la condamnation de la France par le Comité Européen des Droits Sociaux", *RTDH* 2009, no. 80, (1061) 1078.

law in order not to be held responsible by the end result, but at the same time they are coupled with the large margin of discretion typical of an international obligation of result, the less severe obligation in that field of law.

335. We have seen that the use of the qualification under scrutiny could in our view be severely detrimental to both the clear interpretation as well as the scope of international economic, social and cultural rights. In the next paragraph we will look at how the intricate differences influence or have influenced the national perspective on the realization of the right to adequate housing, as prescribed in article 23 of the Constitution.

§ 5. Impact on the Belgian right to housing

A. The constitutional right to housing: an obligation of means

336. While we by now of course know about the legal effect of article 23 of the Belgian Constitution, the preparatory works did not explicitly stipulate what kind of obligation the right to housing entails. They did speak out clearly about the qualification of the right to work. Considering that it was simply not possible to guarantee work to everyone and therefore to provide everyone with a subjective right to work, they concluded that this fundamental right did not lend itself to anything more than an obligation of means. [960] Once again, the aleatory character of the obligation showed its importance.

337. In 2001, the Belgian government used the same argument against the ratification of article 31 of the Revised European Social Charter: "*Regardless of the initiatives taken in the area of housing assurance, it is not sure whether the Belgian legislation currently in place sufficiently guarantees the right to housing as described in this provision. Its ratification is therefore not recommendable in the current state of affairs, but could be carried out in a later stage*."[961] Based on this excerpt and the argumentation behind the classification of the right to work as an obligation of means, a likewise conclusion could logically be drawn with regard to the right to housing. The preparatory works to the Flemish Housing Code are more explicit about this: the right to housing is an obligation of means. The government should help to

[960] Report on behalf of the Commission for the review of the Constitution and the reform of the institutions released by Mr. Arts and Ms. Nelis, *Parl.St.* Senaat BZ 1991-92, no. 100-2/4°, 63.
[961] Explanatory Memorandum of the Draft Decree concerning the consent with the revised European Social Charter and its appendix, *Parl.St*. Senaat BZ 2000-01, no. 2-838/1, 9.

realise this right, but cannot guarantee it in absolute terms. It does not entail an obligation of result because the government does not, "*and certainly not the Flemish government*", dispose of all resources (both material and immaterial) that would require this outcome.[962] Accordingly, the legal doctrine shows consensus on this matter too: the realisation of the right to housing is an obligation of means.[963]

338. On the basis of this classification, one might expect that it should be possible to hold the state accountable if it does not take steps to guarantee the overarching right to dignity. After all, an obligation of means is and remains an obligation the debtor in question is responsible for. Yet despite the fact that the right to housing is commonly considered to be an obligation of means, there has been some uncertainty regarding this option.[964] The fact that article 23 does not have direct effect and the government is considered to have a very large margin of discretion certainly contribute to this. In response to these arguments, it is not absurd to consider that the second paragraph of article 23 is actually sufficiently precise in its wording and thus has direct effect by stating that the laws and decrees must guarantee the enlisted socio-economic rights.[965] Additionally, it is not because the government has a large margin of discretion that it is hypothetically allowed not to do anything at all.[966] And yet, regardless of these valid counterarguments, it is remarkable how the right to housing is so easily declared to be an obligation of means when there is no real certainty about the actual possibility of a liability claim on the basis of article 23. It is almost as if the term is used in a way just to

[962] Explanatory Memorandum to the draft of Decree concerning the Flemish Housing Code, *Parl.St.* Vl. Parl. 1996-97, no. 654/1, 11; L. GOOSSENS, "De scheve schaats rond het recht op wonen. Bespiegelingen rond wonen na 10 jaar samenwerkingsakkoord rond armoedebeleid", in Steunpunt tot Bestrijding van Armoede, Bestaansonzekerheid en Sociale Uitsluiting, *Armoede-Waardigheid-Mensenrechten*, 2008, www.armoedebestrijding.be/publications/10jaarsamenwerking/10jaarsamenwerking_rapport_NL.pdf, (147) 148.
[963] M. DAMBRE, "Over huurgenot en woningkwaliteit", in X., *Overeenkomstenrecht 1999-2000*, Antwerpen, Kluwer, 2000, no. 379; F. DELPEREE, "Les droits sociaux fondamentaux et le droit belge", in M. STROOBANT (ed.), *Sociale grondrechten*, Antwerpen, Maklu, 1995, (19) 27; N. BERNARD and B. HUBEAU (eds.), *Recht op wonen: naar een resultaatsverbintenis?*", Brugge, Die Keure, 2013, 308p.; G. VAN IMPE, "L'effectivité du droit au logement: une obligation de résultat à charge des pouvoirs publics?", *Echos log.* 2012, no. 2, (39) 39-40; W. VANDENHOLE, "Recht op wonen als resultaatsverbintenis? Enkele reflecties", *Juristenkrant* 2013, no. 264, (12) 12; Y. TRILLET, "Vers une nouvelle effectivité des droits économiques, sociaux et culturels?", *Dr.Q.M.* 2000, vol.27, (3) 9-10; AGENTSCHAP WONEN-VLAANDEREN, Procesnota. *Naar een Woonbeleidsplan Vlaanderen*, 2011, www.wonenvlaanderen.be/uploads:documentenbank/d85fbdadd41114f124327b8d6f17d33f.pdf?ht=1, 3.
[964] G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerpen, Intersentia, 2003, 138; See with regard to the right to social aid: M. DISPERSYN, "Le droit à la sécurité dans l'article 23 de la Constitution", in R. ERGEC (ed.), *Les droits économiques, sociaux et culturels dans la Constitution*, Brussel, Bruylant, 1995, (193) 226 : "*le citoyen ne pourra pas mettre en cause l'abstention du législateur qui n'aurait pas pris les mesures déterminant les conditions d'exercice d'un droit* ."
[965] G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerpen, Intersentia, 2003, 138-139.
[966] A. VANDEBURIE , "La mise en œuvre de droit à un logement décent de Waterloo à l'hôtel Tagawa, où sont les responsables" (note under Peace Court Brussel 14 November 2006), *TBBR* 2008, (489) 496-497.

differentiate from the fact that it is not an obligation of result, that it focuses rather on the extensive freedom (policy and resource-related) the government has at its disposal (i.e. an obligation of result according to international law) than the responsibility it should also bring along. An obligation of means is and remains after all an enforceable duty for which the debtor can be held accountable.[967] Back in 1995, Delpérée already argued correctly that "*une obligations de moyens n'est pas une absence d'obligation. Lorsque la Constitution précise que la loi, le décret et l'ordonnance 'garantissent' les droits économiques, sociaux et culturels, ce ne saurait être pris comme une sorte de constat sociologique, mais cela doit être compris comme une véritable obligation juridique qui pèse sur les pouvoirs publics et qui les contraint, dans la mesure de leurs moyens et selon les calendriers qu'il juge utiles, à poursuivre de tels objectifs*."[968] In the second chapter we will investigate further how at least legally no real stumbling blocks appear to be left to make such a liability claim.

339. Let us illustrate with a more concrete example related to the right to housing how a measure that does not impose an obligation of result upon the government remains an enforceable obligation. Take the Flemish Decree on Land and Building Policy from 2009, which introduced the earlier mentioned binding social objective. In contribution to the regional policy objectives, the decree imposes on each municipality to realize a certain number of social houses destined for rent and sale.[969] In order to attain these objectives, the municipalities have a broad autonomy to establish priorities in their own local housing policy. A key moment to do so is during the local housing deliberation ("*lokaal woonoverleg*") with social housing organizations and possibly other housing actors like the OCMW. Now despite having the term "binding" in its name, the municipalities are not legally bound by the objectives themselves. In other words, they are not burdened with an obligation of result. That does not mean that they do not carry any responsibility at all. [970] The Flemish Housing Code provides the Flemish government with sufficient opportunities to intervene whenever a municipality shows manifestly insufficient efforts to reach the social objective.[971] She can

[967] Y. TRILLET, "Vers une nouvelle effectivité des droits économiques, sociaux et culturels?", *Dr.Q.M.* 2000, vol.27, (3) 9-10.
[968] F. DELPEREE, "Les droits sociaux fondamentaux et le droit belge", in M. STROOBANT (ed.), *Sociale grondrechten*, Antwerpen, Maklu, 1995, (19) 27; A. VANDEBURIE , "La mise en œuvre de droit à un logement décent de Waterloo à l'hôtel Tagawa, où sont les responsables" (note under Peace Court Brussel 14 November 2006), *TBBR* 2008, (489) 495.
[969] Art. 4.1.2 Flemish Decree 27 March 2009 concerning Land and Housing Policy.
[970] J. VAN POTTELBERGE, "Lokaal woonbeleid", in B. HUBEAU and T. VANDROMME (eds.), *Viftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013, (171) 192-193.
[971] Art. 22bis, §2 Flemish Housing Code.

directly address social housing organizations and conclude an agreement to realize the imposed goals on the territory of the municipality. This municipality is then expected to cooperate with the execution of the agreement. If it does not do so, the Flemish government can apply any financial mechanism to sanction non-compliance with these obligations, for example by reducing the subsidies for the local housing policy. [972]

340. An obligation of means is clearly not an absence of obligation. Yet here as well do we notice how this obligation is sometimes underestimated. The Association of Flemish Cities and Municipalities (VVSG) unluckily stated in its advice to the Flemish Parliament concerning the Decree on Land and Building Policy that because it is only an obligation of means, no sanctions can be carried out on municipalities that do not reach the set targets.[973] While the outcome is not in itself a reason for a sanction, municipalities are not automatically exempt from any liability either. It is important not to diminish the legal effect of an obligation of means just because it concerns a socio-economic right. It is not the opposite of an obligation of result in that it does not impose an obligation. Along the same lines we will see in the continuation of this chapter that we should not overestimate the importance of an obligation of result either, or at least not the obligations that we perceive as such.

B. Towards an obligation of result?

341. The last couple of years, the idea has been raised to transform the right to housing from the current obligation of means (or at least this is what it is perceived as) to an obligation of result.[974] It was borne from the notion that the law was previously insufficiently effective, a concession that the obligation of means has failed to deliver, and, by consequence, that a switch is required to an obligation of result. This obviously remains rather vague in its outset. Such a shift would for example raise questions regarding the "*corresponding obligations*" for citizens as mentioned in the second paragraph of article 23. If the right to housing could be considered an obligation of result, would it then also be possible to interpret these duties more severely, in accordance with the stronger, more enforceable right? Could for example the

[972] Draft Decree concerning land and housing policy, *Parl.St.* Vl. Parl. 2008-09, no. 2012/1, 145.
[973] Association of Flemish Cities and Municipalities (VVSG), *Advice on the Draft Decree concerning Land and Housing Policy*, *Parl.St.* Vl.Parl. 2008-09, no. 2012/1, 348, par. 2.1.7.
[974] N. BERNARD and B. HUBEAU (eds.), *Recht op wonen: naar een resultaatsverbintenis?*, Brugge, Die Keure, 2013, 308 p; G. VAN IMPE, "L'effectivité du droit au logement: une obligation de résultat à charge des pouvoirs publics?", *Echos log.* 2012, no. 2, 39-40; Steunpunt tot bestrijding van armoede, bestaansonzekerheid en sociale uitsluiting, *Naar een effectief recht op wonen: welke lessen kunnen we trekken uit de Franse en Schotse ervaringen*, 2011, www.armoedebestrijding.be/publications/verslag_resultaatsverbintenis.pdf, 63 p.

language requirements for the obtainment of social housing then also become an obligation of result, in contrast to what current case law proclaims.[975]

342. The idea of working towards an obligation of result is of course also vague because the right to housing comprises much more than only one obligation by one actor. Instead, the right penetrates to different areas of law and consists of an intricate web of obligations in which various actors occur: amongst them legislators, mayors, social housing agencies, public centers for social welfare, but also private renters and tenants. And within this framework, several obligations of result have already been recognized. Sometimes it just depends on when exactly one considers an obligation that deals with housing in general as being connected to the fundamental right to housing. A normal rent agreement will be managed by the Housing Rent Act and the accompanying general provisions of the Civil Code[976]. Their legal relationship will thus be based on civil law. Although not directly linked to the fundamental right to housing and pertaining to a strictly horizontal legal relationship, this legislation can in no way be considered as being disengaged from such a fundamental rights context either. For example, the Housing Rent Act dictates that the rented property must answer to the elementary demands of safety, health and livability[977], akin to some of the basic requirements inscribed in the regional Housing Codes. This provision and its accompanying obligations, which also include obligations of result, are clearly related to the fundamental right to housing too. To illustrate this, we refer to a Peace Court decision of 2012, concerning the obligation of the letter to ensure peaceful enjoyment of the rented good (art.1719, 3° Civil Code), *in casu* by providing heat and water:

> *"(…) le bailleur a manqué à* ***l'obligation de résultat*** *essentielle de faire jouir paisiblement le preneur, pendant la durée du bail (article 1719, 3°, du code civil). Laissée sans chauffage ni eau chaude avec une très jeune enfant par des températures qui en mars passé voisinaient souvent zéro degré, madame B. a subi un trouble de jouissance important et son droit de se loger dans des conditions dignes a été lésé. "*[978]

343. Obligations of result have nonetheless been recognized more directly related to the fundamental right to housing as well, albeit on rare occasions. One of the few unambiguous

[975] Constitutional Court 10 July 2008, no.101/2008, B.34.2.
[976] Art. 1708-1762bis Belgian Civil Code.
[977] Art.2 Housing Rent Act.
[978] Peace Court Grâce-Hollogne 25 May 2012, *JLMB* 2012, no.40, (1917) 1921.

judicial decisions regarding the type of obligation stems from the Labour Court of Nivelles. In 2005, this court emphatically imposed an obligation of result on the Public Center for Social Welfare to provide a home with respect to homeless people and people that live in unhealthy dwellings which infringe their human dignity. [979]

344. Consequently, the general idea to make the right to housing into an obligation of result does clearly not mean that such obligations do not yet exist in this context.[980] Rather is the idea based on the notion that the right to housing could be more and stronger enforced. And the way to achieve this is by having more obligations of result across the whole housing policy. But what then about the obligations of result that are already in place? Do they simply not suffice to have a tangible impact on the effectiveness of this fundamental right or could it perhaps be possible that once again the complexity of the concepts leads to wrong interpretations. We will take a closer look at some housing rights related obligations that frequently pop up in this discussion and are occasionally interpreted as imposing results.

345. Firstly, references are often made to the French '*Droit au Logement Opposable*' (DALO) as a good example of how to make the right to housing an obligation of result. This tool gives homeless or inadequately housed individuals 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. The decision on the priority question is taken by a mediation commission. Persons who have been labelled as such then have an opportunity for recourse to the administrative courts if no housing option has been given within a certain period of

[979] Labour Court Nijvel (2nd Chamber) 8 November 2005, no. 677/N/2005, *Soc.Kron.* 2008, vol. 2, (108) 109: "*Le droit au logement constitue un droit fondamental, énoncé à l'article 23 de la Constitution. Il appartient aux C.P.A.S. de garantir ce droit. Les obligations des C.P.A.S. présentent cependant des degrés différents selon la situation de la personne concernée:*
A. A l'égard des personnes sans logement, ou vivant dans les conditions d'insalubrité portant gravement atteinte à la dignité humaine, le C.P.A.S. est tenu par une obligation de résultat: il doit leur trouver un logement.
B. A l'égard des personnes qui disposent d'un logement, mais qui font appel au C.P.A.S. parce que leur logement n'est plus adapté à leurs moyens financiers, à leur situation familiale ou à leur état de santé, le C.P.A.S. a une obligation de moyen: il doit mettre activement ses services à disposition de ces personnes pour les accompagner dans leurs recherches, mais elles ne disposent pas d'un droit leur permettant d'exiger du C.P.A.S. qu'il leur mette un logement à disposition."
[980] W. VANDENHOLE, "Recht op wonen als resultaatsverbintenis? Enkele reflecties", *Juristenkrant* 2013, no. 264, 12.

time.[981] This court will then oblige the prefect to rehouse this person on penalty of financial compensation. However, this non-compliance fine has to be paid not to the person in question, but to a social housing fund from the government[982], thereby creating a vicious circle where the money goes from one specific budget line for housing to the other.[983] It is therefore debatable whether this "droit opposable" really imposes an obligation of result in full compliance with the concept as understood in civil law.[984]

346. Returning to Belgian and Flemish housing law, one of the most recognized examples of an obligation of result probably concerns the allocation of social housing. Whenever a person complies with certain admission criteria, he is entitled to it. In reality however, the very long waiting lists concretized earlier in this research make the impact of the obligation of "result" for many virtually non-existent. The expansion of the current Flemish rental premium developed as a compensation for people who have been waiting for four years can therefore only be commended.

347. Another illustration that has been brought up in this context is the earlier discussed rehousing obligation by the public government and its agencies. There has been some discussion in the legal doctrine on the type of obligation (result or means) that is imposed upon the mayor in cases of unsuitable, uninhabitable or overcrowded housing.[985] Most do

[981] P. QUILICHINI, "Le droit au logement opposable", *AJDI* 2007, 364; E. SALES, "Droit constitutionnel et droit social. La dualité du 'droit au logement opposable'", *RFDC* 2009, no. 79, 601-620; R. PIASTRA, "Observations sur le droit au logement opposable", *Dalloz* 2007, 809; B. LACHARME, "Reconnu hier, opposable aujourd'hui, assumé demain? Le droit au logement en France", in N. BERNARD and B. HUBEAU (eds.), *Recht op wonen : naar een resultaatsverbintenis?*, Brugge, Die Keure, 2013, 31-46.

[982] B. LACHARME, "Reconnu hier, opposable aujourd'hui, assumé demain? Le droit au logement en France", in N. BERNARD and B. HUBEAU (eds.), *Recht op wonen: naar een resultaatsverbintenis?*, Brugge, Die Keure, 2013, (31) 40.

[983] Out of discontent with this appeal procedure, some plaintiffs have (successfully) sued the State for compensation, e.g.: Tribunal Administratif de Paris 17 December 2010, www.legifrance.gouv.fr.

[984] L. THOLOMÉ, "Le droit au logement opposable : gadget ou véritable protection sociale ?", *Echos log.* 2007, no. 2, 17-24.

[985] S. LIERMAN and P.J. VAN DE WEYER, "Recente ontwikkelingen in de rechtspraak en de wetgeving over algemene bestuurlijke politiebevoegdheden van de gemeente", in X., *Recht in beweging*, Antwerpen, Maklu, 2014, 48-49; N. BERNARD, *La réception du droit au logement par la jurisprudence. Quand les juges donnent corps au droit au logement*, Brussel, Larcier, 2011, 56-63; L. THOLOMÉ, "L'article 23 de la constitution n'est pas une simple déclaration de principe", *Echos log. 2000*, no.4, (121) 122; B. HUBEAU, "De uithuiszetting en de herhuisvesting, de Achilleshiel in het sociaal woonbeleid, ook in het Vlaamse Gewest", *PRK* 2010, vol.14, (43) 47-48; T. VANDROMME, *Woningkwaliteitsbewaking in het Vlaamse Gewest*, Mechelen, Kluwer, 2008, 73; P. JONCKHEERE, "Frontverhalen van een huisvestingsambtenaar: vijftien jaar Vlaamse Wooncode in Oostende", in B. HUBEAU and T. VANDROMME (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013, (301) 303; F. TOLLENAERE, "Uithuiszettingen, Het standpunt van de huurders", in N. BERNARD (ed.), *Les expulsions de logement/Uithuiszettingen*, Brugge, Die Keure, 2010, (161) 170; Steunpunt Armoedebestrijding, *Strijd tegen armoede. Een bijdrage aan politiek debat en politieke actie*, 2011, www.armoedebestrijding.be/publications/verslag6/II_resultaatsverbintenis.pdf, 33.

appear to acknowledge though that it this an obligation of means.[986] For a mayor's rehousing obligation to amount to an obligation of result in the strict sense of the word, the only valid result would be to effectively provide substitutional housing, and that otherwise, the mayor in question could be held responsible. Without judging the scope of these obligations at this point, we think it is indeed clear that the regional Housing Codes do not foresee such a broad obligation. As was discussed in the introduction, the Flemish Housing Code merely proclaims that a mayor should take the necessary measures to rehouse the persons in question. When neither the municipality nor the concerning OCMW dispose of sufficient housing possibilities, he will have to appeal to the social housing organizations.[987] Similarly, the Walloon Housing Code states that when none of the specifically listed public housing types is available at the time[988], the mayor should have to pass the file on to the "Société Wallonne du Logement", which will search on the territory of the entire province and will in certain cases also look at the private housing market.[989] In both scenarios, the mayor is not obliged to effectively provide rehousing. What it does of course mean is that mayors cannot afford not to take initiative and search for housing options, using all housing rights instruments made available by law.[990]

C. A result-oriented approach

348. If the examples given in the previous paragraphs show us one thing, it is that the value of the obligation of result should not be overestimated. Let us first be clear that we do not deny the heavier legal-technical ramifications of the private law obligation of result compared to the obligation of means. That would be quite silly considering what we have stated at the beginning of this chapter. What we do mean however is that it should not be perceived as the one and only goal in order to enhance the effectiveness of the right to housing. Especially not as long as a shortage of adequate housing remains a pressing issue. This will automatically compromise the impact a lot of the housing rights related obligations of result or obligations perceived as such. As we have seen, a person's legal entitlement to social housing is generally

[986] De Smedt has changed his opinion on this issue over time: P. DE SMEDT, "De woonkwaliteitsregeling in de Vlaamse Wooncode", in B. HUBEAU (ed.), *De Vlaamse Wooncode, lokaal woonbeleid en woonkwaliteit*, Brugge, Die Keure, 1999, 120; P. DE SMEDT, "Kwaliteitsbewaking in de Vlaamse Wooncode: juridische knel- en kwelpunten", in B. HUBEAU (ed.), *Vijf jaar Vlaamse Wooncode: het woonbeleid (nog) niet op kruissnelheid?*, Brugge, Die Keure, 2002, 143-144.
[987] Art.17bis Flemish Housing Code.
[988] Art.7, 8 Walloon Housing Code.
[989] Art.7, 9 Walloon Housing Code.
[990] Council of State 12 February 2003, no.115/808, Leroy & Postiau; T. VANDROMME, *Woningkwaliteitsbewaking in het Vlaamse Gewest*, Mechelen, Kluwer, 2008, 73.

regarded as an obligation of result, but it can hardly be called a very effective aspect of the right to housing due to the long waiting lists.

349. The application of DALO just as well suffers from the imbalance between supply and demand. In some regions with a shortage of adequate housing, mediation commissions tend to set additional requirements for applicants of the priority status.[991] We have also said that it can be debated whether DALO really is an obligation of result *sensu stricto* due to how the compensation finds its destination in a public fund. In the aforementioned judgment of *Tchokontio Happi* by the European Court of Human Rights (supra, par. 236), the Court acknowledged that this does not suffice as an appropriate execution of the domestic judgment to provide housing.[992] Against that background, it is again difficult to speak of an obligation of result.

350. Regardless of the type of obligation though, legislation like DALO does impose strong obligations that are result-oriented, that do legally incite authorities to act and make progress in realizing the right to housing. The *Tchokontio Happi* judgment attests to this. Since the applicant had not received a housing proposal more than three years after the Paris Administrative Court had instructed the Prefect of the Île-de-France region to do so, the authorities were found not to have executed the judgment timely nor sufficiently. [993] The Court decided that article 6 ECHR had been violated. If not an obligation of result, the judgment surely illustrates the widespread enforceability potential of a legislative scheme like DALO.[994]

351. A similar conclusion can be made with regard to the rehousing obligation. While it might not be common ground to hold a mayor responsible for actual rehousing, he is responsible to perform and take certain legally specified actions and measures in an attempt to find adequate housing. These actions then become results of themselves. Considering the above, one could

[991] B. LACHARME, "Reconnu hier, opposable aujourd'hui, assumé demain? Le droit au logement en France", in N. BERNARD and B. HUBEAU (eds.), *Recht op wonen: naar een resultaatsverbintenis?*, Brugge, Die Keure, 2013, (31) 38-39.
[992] ECtHR 9 April 2015, no. 65829/12, Tchokontio Happi/France, par. 47.
[993] *Ibid*., par. 47-52; N. BERNARD, "Commentaire de l'arrêt Tchokontio Happi de la Cour Européenne des droits de l'homme", *Echos Log*. 2016, no. 1, (56) 58-59.
[994] N. MOONS, "EHRM maakt recht op huisvesting nog meer afdwingbaar", *Juristenkrant* 2015, vol. 308, 4; N. BERNARD, "Commentaire de l'arrêt Tchokontio Happi de la Cour Européenne des droits de l'homme", *Echos Log*. 2016, no. 1, 56-59.

say that the rehousing obligation has turned into obligations of conduct according to international law, as small, intermediate obligations of result.

352. It is in other words not because an obligation is only an obligation of means, that it could not be useful or maybe even more useful. The lack of a legal obligation of result can be compensated by providing instruments that with probability will lead to an effective result.[995] One should not forget that an obligation of means should just as well target the intended result.[996] In other words, the debate on how to make the right to housing an obligation of result should be subordinate to the question whether measures are effective and result-oriented, whatever their actual qualification might be. We therefore conclude that extensive use of this qualification rather hinders than helps the discussion on the effectiveness of the right to housing, and by extension other economic, social and cultural rights.

§ 6. Conclusion

353. Since long, the concepts of obligations of result and obligations of conduct/means have been used in human rights law, often to distinguish civil and political rights from economic, social and cultural rights. Although a clear-cut distinction at first sight, the diverging interpretation in private law on the one hand and public international law on the other has created difficulties that have remained largely unnoticed in human rights doctrine. We have seen that the concept's complex double meaning raises questions regarding the exact scope of obligations that derive from socio-economic rights, thereby also enabling a more restrictive view on a state's responsibilities.

354. Similar misinterpretations have also infiltrated the Belgian right to housing. Additionally, the examples given in this chapter have shown us how the qualification as one type of obligation or the other is not inherently decisive for a more or less effective right to housing. We therefore argue that placing too much weight on the legal concept of the obligation of result, can actually hinder the realisation of this fundamental right. We believe that it is preferable for reasons of both clarity as well as enhanced enforceability, to shift our attention

[995] T. VANDROMME, "Het recht op wonen: een stand van zaken", in B. HUBEAU and T. VANDROMME (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus ongelukkig?*, Brugge, Die Keure, 2013, (17) 24.
[996] A. VANDEBURIE, "La mise en œuvre du droit à un logement décent (art.23 de la Constitution) : du boulevard de Waterloo à l'hôtel Tagawa, où sont les responsables?" (note under Peace Court Brussel 14 November 2006), *TBBR* 2008, (489) 495-496.

away from this classic qualification and rather to focus on defining clear-cut and result-oriented obligations to realise the right to housing.

Chapter 2: Progressive realization

§ 1. Introduction

355. In the first chapter, we came to the conclusion that the dichotomy between obligations of conduct or means and obligations of result is muddled with theoretical and practical difficulties. We therefore proposed to focus on adopting legal or policy measures that are result-oriented. But what does this entail? In an attempt for concretization, we notice that this necessary drive towards result is reminiscent of the basic concept of progressive realization from article 2 (1) of the International Covenant on Economic, Social and Cultural Rights:

> *"Each state party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures." (Art.2 (1) ICESCR)*

356. That does not mean that international human rights law has not tried to categorize this general provision as one of the aforementioned obligations (result or means) as well. General Comment No.3 of the Committee on Economic, Social and Cultural Rights describes the view of achieving progressively the full realization of the rights recognized in the Covenant as an obligation of result (in its international law meaning of course)[997], while some literature has categorized the undertaking to take steps to do so as an obligation of conduct.[998] Since the obligation to take steps still leaves a huge margin of appreciation, this latter argument appears to be a rather odd statement. Even the explicit reference to the adoption of legislative

[997] CESCR, *General Comment No*.3, par.9.
[998] M.A. BADERIN and R. McCORQUODALE, "The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development", in M.A. BADERIN and R. McCORQUODALE (eds.), *Economic, Social and Cultural Rights in Action*, Oxford, Oxford University Press, 2007, (3) 12; P. ALSTON and G. QUINN, "The nature and scope of states parties' obligations under the ICESCR", *Human Rights Quarterly* 1987, (156) 165.

measures can be regarded as a mere preference or recommendation from the CESCR rather than a specific form of required conduct.[999]

357. In the end, it is of little importance to categorize progressive realization and article 2 (1) ICESCR itself anyway. Above all, the provision is a guiding principle from which a list of specific rights-based obligations is generated in the rest of the Covenant, in other general comments and by jurisprudence. And these more specific obligations can be obligations of conduct, obligations of result or hybrids (i.e. contain both types), all driven by the mandate of an ongoing improvement of the enjoyment of socio-economic rights.[1000] It is this latter obligation, this result-oriented character that is ultimately the essence of what progressive realization entails.

358. The choice for this concept as the general idea behind the ICESCR raises a number of questions: can we learn or borrow anything from the content of this international concept to possibly apply to the Belgian right to housing or to specific measures related to this fundamental right? What if we would do so? Does it have the qualities to improve the enjoyment of socio-economic rights?

359. We start by looking at the meaning of the relevant aspects of progressive realization as incorporated in article 2 (1) ICESCR and the obligations it brings about for the right to housing. We also consider the possibility for adopting retrogressive measures. Consequently, we take a closer look at the assessment of the enjoyment of the right to housing through monitoring tests and reasonableness review. Throughout this chapter, occasional analyses will be made of (possible future) national measures, drawing parallels on the basis of the theoretical framework of international human rights law. Finally, we return to the national plane entirely to make a proposal to incorporate the idea of progressive realization more firmly and structurally into housing rights legislation and policy and trigger more result-oriented obligations.

[999] United Nations, *Report of the International Law Commission on the work of its twenty-ninth session*, UN Doc. A/32/10 and Yearbook of the International Law Commission 1977. Vol.II, part two, 1978, 20.
[1000] CESCR, *General Comment No.*3, par.1; P. ALSTON and G. QUINN, "The nature and scope of states parties' obligations under the ICESCR", *Human Rights Quarterly* 1987, (156) 185; F. VLEMMINX, *Een nieuw profiel van de grondrechten: een analyse van de prestatieplichten ingevolge klassieke en sociale grondrechten*, Den Haag, Boom Juridische Uitgevers, 2002, 54.

§ 2. The concept of progressive realization under scrutiny: from a housing rights perspective

A. Progressiveness as a flexibility device

360. From a theoretical perspective, article 2 (1) ICESCR is quite self-explanatory. A state party should take the necessary steps towards the full realization of the relevant rights in accordance with the maximum of its available resources. It has "*to move as expeditiously as possible towards the realization of the rights*".[1001] Taking steps should not be confined to the adoption of legal measures, but necessitate programmatic statements and policies that have the intention of realizing the full enjoyment of the relevant rights.[1002] In other words, international human rights law is not satisfied with mere law in the books. It is one thing to guarantee housing to every individual by law, it is another thing to give this law meaning by ensuring that sufficient housing is available. The incorporation of progressive realization into the general provision of the ICESCR rests on the earlier mentioned assumption that socio-economic rights are more onerous and costly to achieve and can therefore not be realized in a short period of time. The inclusion of this concept is thus a kind of flexibility device that allows for practical difficulties to be taken into account.[1003] One of those difficulties is the availability or, more pessimistically, the scarcity of resources. There is no reason to confine this to financial resources, yet it is exactly this type that receives most attention, both from jurists as well as states in their argumentation as to why the relevant rights have not been realized.[1004] Even though departing from a different level of existing socio-economic rights protection than third world countries, resource availability is just as much a relevant factor for the most developed countries too, especially in the long aftermath of the financial crisis of 2007. As part of this flexibility device, a state party also has a lot of policy freedom to work progressively towards full realization. Consequently, the CESCR does not give any preferences to one political system or policy perspective that it regards to better fit the agenda

[1001] *The Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights*, as contained in Commission on Human Rights, *Note verbale dated 5 December 1986 from the Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ('Limburg Principles')*, 8 January 1987, E/CN.4/1987/17, par.21.

[1002] B.A. ANDREASSEN, A.G. SMITH and H. STOKKE, "Compliance with economic and social human rights: realistic evaluations and monitoring in the light of immediate obligations", in A. EIDE and B. HAGTVET (eds.), *Human Rights in Perspective: a Global Assessment*, Oxford, Oxford University Press, 1992, (252) 256; E.g.: CESCR, *Concluding observations Canada*, E/X.12/1993/5, par.6.

[1003] J. HOHMANN, *The right to housing. Law, concepts, possibilities*, Oxford, Hart Publishing, 2013, 19; CESCR, *General Comment No*.3, par. 9.

[1004] For a critique on the one-sided interpretation of available resources, see S. SKOGLY, "The requirement of using the 'maximum of available resources' for human rights realization: a question of quality as well as quantity", *HRLR* 2012, vol.12, no.3, 393-420.

of socio-economic rights.[1005] The Committee is in other words neutral and stresses that the realization of the rights recognized in the Covenant is possible in a wide variety of different political and economic systems.[1006]

361. In contrast to the ICESCR, the Revised European Social Charter does not include a general clause on progressive realization.[1007] In accordance however with the CESCR's use as a flexibility device, the European Committee of Social Rights has accepted that a state cannot be expected to give full effect to all rights immediately.[1008] Against that background, the ECSR has without a doubt used the content of progressive realization in its case law, including most of the relevant aspects from the original definition in the ICESCR: "*A State Party must take measures that allows it to achieve the objectives of the Charter within a reasonable time, with measurable progress and to an extent consistent with the maximum use of available resources*".[1009] In the *ERRC v. Bulgaria* decision, the Committee repeats these words in the context of the right to housing.[1010] The earlier cited *ATD Fourth World v. France* expresses similarly to what we have mentioned in the context of article 2 (1) ICESCR that to ensure "*steady progress towards achieving the goals laid down by the Charter*", state parties must adopt legal, financial and operational means to do so, but also make available the resources and introduce the operational procedures necessary to give full effect to the relevant rights. Finally, in *COHRE v. Italy*, the Committee held that the realization of fundamental social rights recognized by the Charter is guided by the principle of progressiveness. It even stated that this is explicitly established in the Preamble of the Charter.[1011] Although we consider the latter to be a bit of a convenient *ex post* reading of the Preamble[1012], it is clear that the use of the concept of progressive realization as a flexibility device and the idea of

[1005] Provided of course that it is democratic and that all human rights are thereby respected.
[1006] M.C.R. CRAVEN, *The International Covenant on Economic, Social and Cultural Rights. A perspective on its development*, Oxford, Clarendon Press, 1995, 123.
[1007] W. VANDENHOLE, "Article 26: The right to benefit from social security", in A. ALEN, J. VANDE LANOTTE, E. VERHELLEN, F. ANG, E. BERGHMANS and M. VERHEYDE (eds.), *A commentary on the United Nations Convention on the Rights of the Child*, Leiden, Martinus Nijhoff Publishers, (1) 27.
[1008] U. KHALIQ and R. CHURCHILL, "The European Committee of Social Rights", in M. LANGFORD (ed.), *Social rights jurisprudence. Emerging trends in international and comparative law*, Cambridge, University Press, 2009, (428) 434.
[1009] ECSR 4 November 2003, no.13/2002, Autism Europe/France, par.53.
[1010] ECSR 18 October 2006, no.31/2005, ERRC/Bulgaria, par.37.
[1011] ECSR 25 June 2010, no. 58/2009, Centre on Housing Rights and Evictions (COHRE)/Italy, par.27.
[1012] Preamble to the Revised European Social Charter: *"(…) Considering that the aim of the Council of Europe is the achievement of greater unity between its members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and of facilitating their economic and social progress, in particular by the maintenance and further realization of human rights and fundamental freedoms. (…)"*

implementing result-oriented measures is certainly present in the case law of the European Committee of Social Rights and not confined to the CESCR.

362. While flexibility is to a certain extent a necessary accommodation and justifies the use of progressive realization, it is important to stress that the word progressively has not been added to make life easy on national governments.[1013] It should not in any way be interpreted as providing some sort of mechanism for states to abrogate responsibility for the implementation of socio-economic rights.[1014] Yet, that was exactly the fear of those who opposed the application of the concept during the negotiations. According to Alston and Quinn, it was indeed those states that had supported the inclusion of the obligation of progressive realization that subsequently misused the weakness of the term as evidence of the non-binding nature of socio-economic rights.[1015]

B. Flexibility does not equal freedom of obligations

1) Drittwirkung

363. We have stated that the Committee leaves a lot of political and economic freedom to the states in the implementation of socio-economic rights. It does not oppose the privatization of state properties, social sectors or the housing market in the context of the implementation of Covenant rights, but a state party should then in turn not expect to be preempted from its responsibility because it has taken full use of its margin of discretion and in a way outsourced (some of its) obligations. Consequently, we embark upon the concept of '*drittwirkung'* of human rights.[1016] Because of its obligation to protect individuals from third parties, a state will have to adopt measures which will create obligations between those private parties, and effective ones at that. In other words, it has to take an active role to prevent and protect individuals, especially the most vulnerable an disadvantaged groups in society, against violations of socio-economic rights by private actors.[1017] So when the private sector is the most important actor in providing housing, the state must ensure that the operation of the

[1013] F. VLEMMINX, *Het profiel van sociale grondrechten*, Zwolle, Tjeenk Willink, 1994, 133.
[1014] S. LECKIE, "Another step towards indivisibility: identifying the key features of violations of ECOSOC rights", *Human Rights Quarterly* 1998, (81) 94; See for example also Commission on Human Rights, E/CN.4/SR.236 (1951) (Mr. Sørensen, Denmark).
[1015] P. ALSTON and G. QUINN, "The nature and scope of states parties' obligations under the ICESCR", *Human Rights Quarterly* 1987, (156) 175-179.
[1016] R. KÜNNEMANN, *A human rights textbook*, Heidelberg, FIAN International Secretariat, 1998, 48.
[1017] M. SEPULVEDA, *The nature of the obligations under the ICESCR*, Antwerpen, Intersentia, 2003, 314 and 367.

market is fair and equitable.[1018] In first instance those private parties are of course responsible themselves for performing according to the rules, but the state is responsible for adopting those obligations.[1019] In a scenario in which a particular third party group does not abide by the obligations in general, the state should have to step up, especially when the private relationship does not lend itself to legal action or when the weaker party is ill-positioned to enforce it through court.

364. Translated to the Flemish housing context, these considerations should thus also have priority when developing a housing policy that talks about enforcing the private housing market.[1020] Let us take a look at a more concrete example. In order to accommodate people that cannot pay their rent guarantee, Flemish banks are obliged upon request of their own clients to provide them with a loan for this guarantee.[1021] The tenant is then required to reimburse the amount within a three year period. Now evidently, if a state party decides to improve the affordability of housing by giving tenants the possibility to receive a loan for their rental guarantee, international human rights law does not instruct it to do so by distributing such a loan directly via public services. But if the state does dedicate this task to private banks, it does bear the responsibility to ensure that sufficient obligations are in place and that they do have their effect.

365. As we elaborate a bit further on our example, we notice that the legislator has not stipulated a sanction for scenarios in which a bank declines to carry out its legal obligation.[1022] That means that tenants do not have the legal tools to enforce the compliance of this obligation[1023], but also that banks can have a reticent attitude towards granting this guarantee. A study conducted by the University of Ghent claims that this is exactly the case. On the basis of a practice test, it was concluded that more than a quarter of the Flemish bank

[1018] M.C.R. CRAVEN, "The International Covenant on Economic, Social and Cultural Rights", in R. HANSKI and M. SUKSI (eds.), *An introduction to the international protection of human rights: a textbook*, Turku, Institute for Human Rights, Abo Akademi University, 1999, (101) 110.
[1019] S. LECKIE, "Another step towards indivisibility: identifying the key features of violations of ECOSOC rights", *Human Rights Quarterly* 1998, (81) 111.
[1020] Flemish Government, Policy Memorandum Housing, *Parl. St.* Vl. Parl. 2014-15, no. 135, 23-27.
[1021] Art. 10 Housing Rent Act.
[1022] B. HUBEAU and D. VERMEIR, *Een evaluatie van het federale woninghuurrecht. Tussentijds rapport inzake duur, opzegging, waarborg en woningkwaliteit*, Leuven, Steunpunt Wonen, 2014, 44.
[1023] The tenant could theoretically go to court and demand the obligatory execution, but this does not seem very likely: A. VAN OEVELEN, "Wijzigingen in het (woning)huurrecht", *RW* 2007, no. 8, (289) 305.

branches dismisses the possibility of a bank guarantee in response to a request by mail.[1024] The Flemish Minister for Housing[1025] reacted sharply to the announcement of the results. She criticized that no such conclusions can be drawn, because the researchers merely pretended to be clients (identifying only by surname) of the bank they were addressing by e-mail and that banks do not carry such obligation to persons who are not clients.[1026] It is definitely true that banks are only obliged to provide a guarantee at the request of their own clients. Not only would that explain why certain offices have explicitly asked for more information (33%), it is also possible that the bank branches that did not react to the question at all (18%) had the exact same motives.[1027] With regard to these categories in particular, we agree with the minister that the premise of the test might not be strong enough to draw absolutely watertight conclusions. But with regard to the most important category, the offices that denied the bank guarantee, we feel a different conclusion would have been more appropriate. Based on a conversation with Pieter-Paul Verhaeghe, one of the authors of the research, it became clear that the reasons for rejection in this category do not relate to the question whether or not this person could be found in the customer database. We were provided with a couple of typical examples of literal responses to the anonymous requests:

- *"Such a bank guarantee does not exist."*
- *"We abrogated this two years ago."*
- *"It is not possible to pay off a rent guarantee by way of periodical payments. For such options, we would like to redirect you to the Public Centre for Social Welfare (OCMW)."*
- *"We cannot provide a bank guarantee for a rent guarantee."*
- *"We don't provide a real bank guarantee anymore, this was the guarantee nothing had to be paid for. A classic rent guarantee account is still possible"*[1028]

366. Despite the fact that the e-mails were not sent out by real customers, the content of these responses at the very least suggests a problem with law compliance. Moreover, these results follow the same pattern of earlier findings.[1029] On the basis of the above, we can only

[1024] P. VERHAEGHE and K. VAN DER BRACHT, *Is de bankwaarborg wel gewaarborgd? Praktijktesten bij banken*, Gent, University of Gent, 2015, https://biblio.ugent.be/publication/6914014/file/6914022.pdf, 12.
[1025] Hereafter referred to as 'the minister' or 'minister Homans'.
[1026] *Vr. en antw.* Vl. Parl., Vr. nr. 2714 and 2717, 9 July 2015 (J. ENGELBOSCH and M. HOSTEKINT).
[1027] This was done by a third of the bank branches: P. VERHAEGHE and K. VAN DER BRACHT, *Is de bankwaarborg wel gewaarborgd? Praktijktesten bij banken*, Gent, University of Gent, 2015, https://biblio.ugent.be/publication/6914014/file/6914022.pdf, 9.
[1028] This information was provided by one of the authors of this research (P. Verhaeghe) as part of a written conversation we had in September 2015.
[1029] Steunpunt tot bestrijding van armoede, bestaansonzekerheid en sociale uitsluiting, "Huurwaarborg: hoe werkelijk de toegang tot de huisvestingsmarkt verlagen?" in *Verslag Armoedebestrijding 2008-2009. Deel 1:*

conclude that steps should be taken to address these problems, whether it be by adapting the regulations for the private sector or, as repeatedly recommended by researchers[1030], poverty organizations[1031], the Flemish Housing Council[1032] and in certain political circles as well[1033], by installing a central deposit fund. This fund would request payment by the tenant and procure a proof of the guarantee to the letter. Since all communication concerning the rent deposit would go through the fund and no longer directly between the renting parties, this would prevent social exclusion. In case a tenant is not able to pay the amount, the fund would also lend the necessary money.[1034]

2) Immediate obligations

367. We come to a second aspect of how progressively working towards a result is not free of responsibilities. The immediate implications of article 2 (1) ICESCR assure that states would not avoid carrying out at least some of their most basic obligations.[1035] Besides the obligation not to take retrogressive measures (which will be discussed later), General Comment No. 3 declares that, in line with the 1987 Limburg Principles[1036], the obligation to take steps itself applies immediately as well.[1037]

Een bijdrage aan politiek debat en politieke actie, Brussel, 2009, www.armoedebestrijding.be/publications/verslag5/Verslag2009.pdf, 35; Steunpunt tot bestrijding van armoede, bestaansonzekerheid en sociale uitsluiting, *Wet huurwaarborg werkt niet! Parlement moet actie ondernemen*, press conference 26 May 2011, available at: www.armoedebestrijding.be/publications/perconf%20huurwaarborg/bijlage%20huurwaarborg%20NL.pdf; With regard to Brussels: Brusselse Bond voor het Recht op Wonen, *Huurwaarborg: nieuwe wet werkt niet naar behoren*, 28 September 2008, www.rbdh-bbrow.be/spip.php?article961.

[1030] P. VERHAEGHE and K. VAN DER BRACHT, *Is de bankwaarborg wel gewaarborgd? Praktijktesten bij banken*, Gent, University of Gent, 2015, https://biblio.ugent.be/publication/6914014/file/6914022.pdf, 13; P. LEMAHIEU and E. BUYST, *Naar een centraal huurwaarborgfonds*, Leuven, Kenniscentrum voor Duurzaam Woonbeleid, 2007; N. BERNARD, "Vers un fonds centralisée (mutualisé!) de garanties locatives: balises et suggestions pour une opérationnalisation", *Les Échos du Logement* 2015, no. 3, 3-10; M. DAMBRE, *De huurprijs. Analyse van de financiële verbintenissen van de huurder en onderzoek naar de mogelijkheid tot objectivering van de woninghuurprijzen*, Brugge, Die Keure, 2009, 514-517.

[1031] Steunpunt tot Bestrijding van armoede, bestaansonzekerheid en sociale uitsluiting, *Verslag armoedebestrijding 2008-2009, deel 1. Een bijdrage aan politiek debat en politieke actie*, 2009, 38; Netwerk tegen Armoede, *Centraal huurwaarborgfonds geeft meer zekerheid aan huurder en verhuurder dan hogere huurwaarborg*, 29 April 2015.

[1032] FLEMISH HOUSING COUNCIL, *Naar een beleid ter ondersteuning van de private huurwoningmarkt*, 30 September 2010, no. 2010/11, www.rwo.be/Portals/100/Vlaamse%20Woonraad/broch_Vl_Woonraad_web.pdf.

[1033] E.g.: Proposal of Law (G. TURAN) concerning the adoption of a central rental guarantee fund, *Parl. St.* Senaat 2010-11, no. 5-1017/1; The proposals date back more than ten years, e.g.: Proposal of Law (F. PEHLIVAN) concerning the adoption of the rental guarantee fund, *Parl. St.* Senaat 2004-05, no. 3-1308/1.

[1034] For more on the advantages and disadvantages of such a fund, see: B. HUBEAU and D. VERMEIR, *Een evaluatie van het federale woninghuurrecht. Tussentijds rapport inzake duur, opzegging, waarborg en woningkwaliteit*, Leuven, Steunpunt Wonen, 2014, 50-58.

[1035] I. LEIJTEN, "Meergelaagdheid en ondeelbare mensenrechten", *TBP* 2013, no.2-3, (95) 105.

[1036] *The Limburg Principles on the implementation of the International Covenant on Economic, Social and Cultural Rights*, as contained in Commission on Human Rights, *Note verbale dated 5 December 1986 from the*

368. Additionally, the General Comment imposes an immediate obligation to assure that the Covenant rights will be exercised without discrimination, as prescribed by articles 2 (2) and 3 ICESCR.[1038] This is expressed with specific regard to the right to housing in General Comment No. 4, which says that "*individuals, as well as families are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors*".[1039] As we have seen earlier in this research however, we know how a gap definitely still exists between the legal measures of protection against discrimination and the reality on the Flemish housing market (supra, par. 100-101).

369. Furthermore, it has been argued that only the state's obligation to fulfill is actually subject to progressive realization. The obligation to respect and protect are then of immediate effect.[1040] Just like the other General Comments have summed up a couple of these immediate obligations with regard to other Covenant rights, albeit in varying degrees of clarity and uniformity, General Comment No. 4 has done so too. State parties must for example take immediate measures to confer upon everyone legal security of tenure through legal protection against forced evictions.[1041] The abstention by the government from certain practices (which is essentially the state's obligation to respect) is also listed as an immediate obligation[1042], as is the effective monitoring of the housing situation.[1043] Although not explicitly referred to as having immediate effect, the composition of the text suggests that the obligation to give due priority to social groups living in unfavourable conditions[1044] can be regarded as an immediate obligation as well. The idea of categorical selectivity as a principle present throughout the Flemish Housing Code and policy certainly caters to this obligation. Finally, the adoption of a

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Permanent Mission of the Netherlands to the United Nations Office at Geneva addressed to the Centre for Human Rights ('Limburg Principles'), 8 January 1987, E/CN.4/1987/17, par.16 and 21.

[1037] B.A. ANDREASSEN, A.G. SMITH and H. STOKKE, "Compliance with economic and social human rights: realistic evaluations and monitoring in the light of immediate obligations", in A. EIDE and B. HAGTVET (eds.), *Human Rights in Perspective: a Global Assessment*, Oxford, Oxford University Press,1992, (252) 256.

[1038] CESCR, *General Comment No. 3*, par.8; A. CHAPMAN and S. RUSSELL, *Core obligations: building a framework for economic, social and cultural rights*, Antwerpen, Intersentia, 2002, 6.

[1039] CESCR, *General Comment No.4*, par. 6.

[1040] M. FORMISANO PRADA, *Empowering the poor through human rights litigation*, Paris, UNESCO, 2011, 39-40; UN Office of the High Commissioner for Human Rights, *The Right to Adequate Housing. Fact sheet no. 21*, www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf, 31; E. FELNER, "Closing the 'escape hatch': a toolkit to monitor the progressive realization of economic, social and cultural rights", *Journal of Human Rights Practice* 2009, vol.1, no.3, (402) 403.

[1041] CESCR, *General Comment no.4*, par. 8a; See also UN Office of the High Commissioner for Human Rights, *Forced Evictions. Fact Sheet no. 25*, 2014, 9.

[1042] CESCR, *General Comment no.4*, par.10.

[1043] *Ibid*., par.13.

[1044] *Ibid*., par.11.

national housing strategy reflecting extensive genuine consultation with and participation by all affected parties is also hinted at as an immediate obligation.[1045]

370. As with the approach to progressive realization, similar obligations of a more immediate nature seem to have found their way into housing rights related decision-making of the European Committee of Social Rights. In ATD Fourth World, we know that the Committee stipulated the obligation to maintain meaningful statistics, undertake regular impact reviews, establish a timetable, and pay particular attention to the impact of the policies on the most vulnerable.[1046]

3) Minimum core

371. With regard to the immediate implications of the Covenant rights, General Comment No. 3 also says that a state party must provide a minimum core. It must in other words "*ensure the satisfaction of, at the very least, minimum essential levels of each of the Covenant rights*".[1047] This was confirmed in the 1997 Maastricht Guidelines on Violations of Economic, social and cultural rights.[1048] Notwithstanding the presumption of guilt on behalf of the state party, the non-fulfillment of the minimum core can still be justified. The state will then have to demonstrate that "*every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations*".[1049] Danilo Turk, former Special Rapporteur on the Realization of Economic, Social and Cultural Rights added that this obligation stands irrespective of the level of economic development.[1050] Having a development-neutral minimum core definitely makes it much more demanding for third world countries to assure compliance. In the more developed states of the first world though, this renders the minimum core obligation more easily attainable. And since the focus is often on these more immediate implications it can even direct attention away from housing rights problems and shortcomings that do still exist (and states are obliged to address over time as

[1045] *Ibid*., par.12.
[1046] ECSR 5 December 2007, no. 33/2006, International Movement ATD Fourth World/France, par.60-61.
[1047] CESCR, *General Comment No. 3*, par. 10; R.E. ROBERTSON, "Measuring state compliance with the obligation to devote the maximum available resources to realizing economic, social and cultural rights", *Human Rights Quarterly* 1994, (693) 701.
[1048] International Commission of Jurists (ICJ), "Maastricht Guidelines on Violations of Economic, Social and Cultural Rights", *HRQ* 1998, vol. 20, (691) 695, par. 9.
[1049] CESCR, *General Comment No. 3*, par.10.
[1050] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The realization of Economic, Social and Cultural Rights. Second Report prepared by Mr. Danilo Türk, Special Rapporteur*, 18 July 1991, E/CN.4/Sub.2/1991/17, par.52. For a contrasting opinion on the matter, see: F. VLEMMINX, *Een nieuw profiel van de grondrechten: een analyse van de prestatieplichten ingevolge klassieke en sociale grondrechten*, Den Haag, Boom Juridische Uitgevers, 2002, 167.

well).[1051] In practice though, the Committee has applied different standards to countries of different development status in its concluding observations.[1052]

372. With regard to the right to housing, General Comment No. 3 used the example that a state party should not have any significant number of individuals being deprived of basic shelter and housing. Considering the basic conception of minimum core just presented, this is a rather odd example. How could a core of a human right possibly allow for a non-significant number of persons (whatever that number may even be) to be homeless? Does a different core (*ergo* a different right) then apply to different people?

373. Unfortunately for us, the General Comments on housing (no.4) and forced evictions (no.7) did not explicitly return to, let alone clarify the minimum core in the context of the right to housing. The early publication date of these housing related General Comments appears to be the only reason why no core obligations were included. Ever since the CESCR's Twelfth General Comment, core obligations have consistently returned in an explicit manner and have been specified in the context of the right to food, education, work, social security, ...[1053] As a matter of fact, from General Comment No. 14 onwards, considerations on core obligations have even been dealt with under their own caption.[1054] The latter General Comment, which concerns the right to the highest attainable standard of health, does however explicitly mention access to basic shelter and housing as one of the core obligations.[1055]

[1051] I.E. KOCH, *Human rights as indivisible rights. The protection of socio-economic demands under the European Convention of Human Rights*, Leiden, Martinus Nijhoff Publishers, 2009, 285.

[1052] M. LANGFORD and J.A. KING, "Committee on Economic, Social and Cultural Rights", in M. LANGFORD (ed.), *Social rights jurisprudence. Emerging trends in international and comparative law*, Cambridge, Cambridge University Press, 2009, (477) 495.

[1053] With the exceptions of General Comments 16 and 20, which did not address a specific socio-economic right, but the right not to be discriminated in the enjoyment of economic, social and cultural rights; CESCR, *General Comment no. 12: The Right to Adequate Food (art.11 of the Covenant)*, 12 May 1999, par.6 and 8; CESCR, *General Comment no.13: The Right to Education (art.13 of the Covenant)*, 8 December 1999, par.57.

[1054] CESCR, *General Comment No. 14: The Right to the Highest Attainable Standard of Health (art.12 of the Covenant)*, 11 August 2000, par. 43-44; CESCR, *General Comment no.15: The Right to Water (arts. 11 and 12 of the Covenant)*, 20 January 2003, par.37; CESCR, *General Comment no.17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (art.15, par.1 (c) of the Covenant)*, 12 January 2006, par.39; CESCR, *General Comment no.18: The Right to Work (art.6 of the Covenant)*, 6 February 2006, par.31; CESCR, *General Comment no.19: The right to social security (art.9 of the Covenant)*, 4 February 2008, par.59; CESCR, *General Comment no. 21: Right of everyone to take part in cultural life (art.15, par.1a of the Covenant)*, 21 December 2009, par.55; CESCR, *Right to just and favourable conditions of work (art.7 of the Covenant*, Draft prepared by Virginia Bras Gomes and Renato Ribeiro Leao, 20 January 2015, par.64.

[1055] CESCR, *General Comment no.14*, par.43 (c).

374. What exactly such a minimum core entails is obviously prone to at least a minimal amount of subjectivity.[1056] Unsurprisingly, different approaches exist to define the minimum core (of the right to housing). One could look at the core content of the right, the normative essence. [1057] It relates to the "*unrelinquishable nucleus (that) is the raison d'être of the basic legal norm, essential to its definition, and surrounded by the less securely guarded elements*."[1058] With regard to the right to housing, Bilchitz describes its most basic feature as being free from general threats to one's survival, as one's ability to survive.[1059] This is what comes to mind spontaneously when reading the CESCR's formulation of "minimum essential levels". A quite different and more subjective minimum core interpretation is a value-based core. Here, the focus is not on basic needs or necessary requirements for life, but on what is necessary to be human, based on values such as freedom, equality and – here the concept pops up again – human dignity.

375. Some legal doctrine has given an interpretation of the right to housing with a very broad range of elements pertaining to its minimum core. They consider the whole of paragraph 8 of General Comment No. 4 as minimum core guarantees.[1060] This paragraph elaborates on each of the essential housing aspects that constitute adequate housing. Consequently, there are core issues with regard to habitability, security of tenure, affordability and so forth. Hohmann denounces this interpretation with specific reference to the element of availability of services, materials, facilities and infrastructure. She stated that the CESCR does not hold a failure to provide such services as an outright violation of the right to housing[1061], favouring the view that these services are long-term policy aims.[1062] We agree with this criticism and argue that a minimum core for all separate housing rights related elements would once again raise questions whether different cores apply to different people. How would this for example relate to the homeless, whose right to a minimum core will in practice only stretch to basic

[1056] I. LEIJTEN, "Meergelaagdheid en ondeelbare mensenrechten", *TBP* 2013, no.2-3, (95) 107.
[1057] K.G. YOUNG, "The minimum core of economic and social rights: a concept in search of content", *Yale Journal of International Law* 2008, vol.33, (113) 126-140.
[1058] E. ÖRÜCÜ, "The core rights and freedoms: the limits of limits", in T. CAMPBELL, D. GOLDBERG, S. McLEAN and T. MULLEN (eds.), *Human rights: from rhetoric to reality*, Oxford, Blackwell, 1986, 52.
[1059] D. BILCHITZ, *Poverty and fundamental rights: the justification and enforcement of socio-economic rights*, Oxford, Oxford University Press, 2007, 198.
[1060] M. FORMISANO PRADA, *Empowering the poor through human rights litigation*, Paris, UNESCO, 2011, 39-40; UN Office of the High Commissioner for Human Rights, *The Right to Adequate Housing. Fact sheet no. 21*, www.ohchr.org/Documents/Publications/FS21_rev_1_Housing_en.pdf, 67; P. KENNA, *Housing rights and human rights*, 2005, www.nuigalway.ie/media/housinglawrightsandpolicy/Housing-rights-and-human-rights.pdf, 5-6.
[1061] J. HOHMANN, *The right to housing. Law, concepts, possibilities*, Oxford, Hart Publishing, 2013, 23.
[1062] M.C.R. CRAVEN, *The International Covenant on Economic, Social and Cultural Rights. A perspective on its development*, Oxford, Clarendon Press, 1995, 290.

shelter to survive (the night), while the proud tenants of a two story loft could hypothetically have a minimum core right not to have mould in their bathroom? Based on this reasoning and the fact that the implementation of the ICESCR requires particular attention to the weaker people and groups in society, a limited minimum core (any other would actually be a *contradictio in terminis* anyway) reminiscent of the interpretation given by Bilchitz seems to be the better option.

376. But there is more to it. The CESCR has a tendency to locate the minimum core in the content of the obligations raised by the right rather than in the content of the right itself. [1063] In other words, it seems ill-founded to speak in this context of a minimum core of the right to housing, while every essential housing aspect has core obligations of its own. The aforementioned example that no significant number of people should be deprived of shelter in the twenty-five year old General Comment no. 3 did already portray the core requirements of a housing policy rather than the minimum essential levels it had defined the minimum core as earlier in that same paragraph. In contrast to a minimum core comprised of both a right to shelter for the homeless and a right to a damp free home, having core obligations for each of the right to housing components separately does certainly seem just and potentially useful, as long as the priorities are set right. But by adopting an obligations approach for the concept of minimum core, thereby expanding the core's range, the CESCR has obscured the distinction with the immediate obligations. The result is that the General Comments portray a certain degree of arbitrariness.[1064] Some state explicitly that all the enlisted core obligations are immediate obligations[1065], others do not but still manage to put immediate obligations such as the duty to ensure non-discrimination, to adopt a national strategy and plan of action and/or to monitor the realization under the heading of minimum core obligations.[1066]

[1063] K.G. YOUNG, "The minimum core of economic and social rights: a concept in search of content", *Yale Journal of International Law* 2008, vol.33, (113) 117 and 154-157.
[1064] M. LANGFORD and J.A. KING, "Committee on Economic, Social and Cultural Rights", in M. LANGFORD (ed.), *Social rights jurisprudence. Emerging trends in international and comparative law*, Cambridge, University Press, 2009, (477) 493-494.
[1065] CESCR, *General Comment no.15*, par.37; CESCR, *General Comment no.17*, par.39; CESCR, *General Comment no.21*, par.55.
[1066] E.g.: CESCR, *General Comment no.13*, par.57; CESCR, *General Comment no.14*, par.43 (a) and (f); CESCR, *General Comment no.18*, par.31 (b) and (c); CESCR, *General Comment no.19*, par.59 (b), (d) and (f).

C. Focus on progressiveness

377. While it was necessary to set out the immediate implications of the ICESCR as a way to place progressive realization in its right perspective, the general thrust of this chapter is still to find ways to concretize result-oriented measures through the concept of progressive realization. Besides, these immediate effects certainly have their share of attention in human rights literature and practice already. It has even been stated that the focus on these immediate consequences have overshadowed the progressive character of socio-economic rights and the development of its content, targeting only on the most flagrant, more event-based violations. This is not entirely surprising. Human rights practitioners will prefer to address breaches of immediate obligations or the minimum core, because they are more easily identifiable and assessable than obligations of a progressive nature. Considering that naming and shaming is an important method for NGOs to disclose human rights injustices, certainly when it concerns already less enforceable socio-economic rights, it is important for them to focus on more clear-cut and tangible short-term obligations to raise widespread attention.[1067] While our primary focus is thus more on progressive realization itself, there is an immediate application very closely connected and (arguably) contributing to it: the prohibition of retrogressive measures.

§ 3. Retrogressive measures and financial constraints

378. In our pursuit for result-oriented measures, an important factor is the prohibition of retrogressive measures. Because principally, how can a government be urged to work towards the full realization of a right if it is allowed to backtrack at random? We explore the meaning and allowable extent of retrogressive measures, but also its appropriateness. In contrast to the concepts of progressive realization, immediate obligations and minimum core, which are only seldom used in Belgian law, the idea of retrogressive measures does have practical consequences in domestic jurisprudence in the form of the standstill principle, which has been introduced with regard to article 23. We will investigate how the application of this principle compares to the seemingly similar concept in international law.

[1067] G. DE BECO, "The interplay between human rights and development the other way round: the emerging use of quantitative tools for measuring the progressive realization of economic, social and cultural rights", *HR&ILD* 2010, afl.2, (265) 273-274; E. FELNER, "Closing the 'escape hatch': a toolkit to monitor the progressive realization of economic, social and cultural rights", *Journal of Human Rights Practice* 2009, vol.1, no.3, (402) 407-408.

A. Origins in international human rights law

379. As mentioned earlier, the principle that a state should generally abstain from taking retrogressive measures in the implementation of the ICESCR is one of the immediate implications of the Covenant. This manifests itself naturally as the antithesis of progressiveness, of the envisioned continuous improvement of socio-economic rights protection, explaining its said inherent nature to the idea of progressive realization.[1068]

380. The concept of non-retrogression was also introduced in the General Comment No. 3 of the CESCR, stating that any deliberate measure of this kind (…) "*would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum of available resources*."[1069] The following General Comment on the right to adequate housing elaborated that if not accompanied by compensatory measures, a general decline in living and housing conditions directly attributable to policy and legislative decisions, would be inconsistent with the Covenant.[1070] There is a considerable difference between both descriptions. The first one concerns a measure that retrogresses socio-economic rights protection, whereas the latter talks about a factual decline as well. While undoubtedly convergent in some scenarios, this is certainly not always the case. A rule can be implemented with the best intentions for the protection of socio-economic rights, but indirectly create consequences that actually aggravate a situation. If a state for example decides to impose very strict housing quality obligations, no one would question that the idea behind it is to progressively improve housing quality. But if this would be followed up with inspections and certificates to assure that the obligation is goal-oriented, housing affordability could suffer in the long run, private letters could possibly retreat from the private housing market or, even worse, a considerable number of people would have to be evicted from their house because it does not comply with quality requirements. Likewise, it is not always easy to predict whether the adoption of a rule that appears to restrict socio-economic rights protection at first sight will affect real-life conditions (infra). Ultimately, on the basis of the consistent use of the term 'measure' with regard to non-regression in the other General Comments, the examples found

[1068] L. CHENWI, "Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance", *De Jure* 2013, vol.46, no.3, (742) 745; E. RIEDEL, G. GIACCA and C. GOLAY, "The development of economic, social, and cultural rights in international law", in E. RIEDEL, G. GIACCA and C. GOLAY (eds.), *Economic, social, and cultural rights in international law: contemporary issues and challenges*, Oxford, Oxford University Press, 2014, (3) 15.
[1069] CESCR, *General Comment no.3*, par.9.
[1070] CESCR, *General Comment no.4*, par.11.

in the GC on the right to work[1071], as well as the concluding observations[1072], the focus of non-retrogression seems to be predominantly on the measures themselves. It has been said though that there is one more factual criterion that does trigger the concept of non-retrogression: the budget. Besides normative retrogression, the reduction of public expenditures devoted to the implementation of (certain) Covenant rights should thus also be scrutinized according to the conditions of non-retrogression.[1073] Unsurprisingly, this is often connected to the so called austerity measures states have been taking in reaction to the economic crisis (infra), rendering the classification of *de facto* retrogression debatable. In sum, non-retrogression appears to apply to measures that threaten socio-economic rights protection, whether purely normative or budget-related in the form of austerity measures.

B. Application in Belgian law

1) Acknowledgment of the principle

381. Aside from the linguistic preference for the term standstill instead of retrogressive measure, the basic idea is very well acknowledged on the national plane. While the Council of State has clarified that the International Covenant on Economic, Social and Cultural Rights does not have direct effect in the Belgian judicial order, it did impose the obligation to act according to the principles of the Covenant.[1074] Standstill certainly has its place amongst these principles. More specifically, the Council of State had already applied the standstill principle earlier with regard to the right to education (article 13 ICESCR).[1075] A couple of years later, the Constitutional Court also accepted that a standstill obligation stems from the same article 13.[1076] To this date, a similarly explicit observation has not been made with regard to the more

[1071] CESCR, *General Comment no.18*, par.34.
[1072] CESCR, *Concluding Observations New Zealand*, 31 May 2002, E/C.12/NZL/CO/3, par.17; Explicit references to retrogressive measures are quite rare. The Committee has of course determined deteriorating human rights conditions in other concluding observations, but it does not couple this with non-retrogression: F. COOMANS, "Reviewing implementation of social and economic rights: an assessment of the 'reasonableness' test as developed by the South African Constitutional Court", *ZaöRV* 2005, vol.65, (167) 184.
[1073] S. WAY, N. LUSIANI and I. SAIZ, "Economic and social rights in the 'Great Recession'. Towards a human rights-centred economic policy in times of crisis", in E. RIEDEL, G. GIACCA and C. GOLAY (eds.), *Economic, social, and cultural rights in international law: contemporary issues and challenges*, Oxford, Oxford University Press, 2014, (86) 93; A. NOLAN and M. DUTSCHKE, "Article 2(1) ICESCR and states parties' obligations: whither the budget", *EHRLR* 2010, vol.3, (280) 292.
[1074] Council of State 30 December 1993, no.45.552, *Soc.Kron*. 1994, 244, note J. JACQMAIN.
[1075] Council of State 6 September 1989, no.32.989, *APM* 1990, 276, note M. DUMONT: The Council of State used the signing of the treaty as reference point for the standstill obligation; K. DE FEYTER, "De juridische gevolgen van de internationale en nationale erkenning van economische, sociale en culturele rechten", *Jaarboek Mensenrechten* 1994, (161) 172-173.
[1076] Constitutional Court 7 May 1992, no. 33/92, B.7.2 and B.8.2; Constitutional Court 19 May 1994, no. 40/94, B.2.7: In contrast to the Council of State, the Constitutional Court compares the measure under scrutiny to the

relevant article 11 ICESCR[1077], let alone specifically to the right to adequate housing as incorporated in that provision.[1078] But since the wording of some of the judgments does seem to acknowledge the existence of the standstill obligation for all Covenant rights, there is no real reason to assume otherwise.[1079] It is however much less clear whether the standstill obligation also applies with regard to rights in the Revised European Social Charter.[1080]

382. With explicit references to the aforementioned judgments that acknowledge the standstill principle for the rights of the ICESCR, the Parliamentary proceedings for article 23 included the standstill obligation with regard to this constitutional provision.[1081] It served as a political compromise between on the one hand not bestowing the constitutional provision with direct effect and on the other still giving it a certain legal weight.[1082] The exact interpretation of the content of the standstill obligation was left to judges and scholars.[1083] Over the years and despite the aims just set out, some have considered the standstill principle to give the provision a special type or at least a weakened form of direct effect. [1084] We believe this could

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moment when the ICESCR entered into force, which creates a considerably different reference point when it comes to the ICESCR; H. VANDERLINDEN, "Effectiviteit van de sociale grondrechten in het Belgische recht, mythe of realiteit", *RW* 2008-09, no. 29, (1202) 1210.

[1077] According to Vanheule, the extent to which the Constitutional Court has examined the alleged violation of (the standstill obligation of) article 11 ICESCR in its judgment of 29 June 1994, no. 51/94, suggests at least implicitly the application of the standstill principle for this Covenant right, see: D. VANHEULE, "Maatschappelijke dienstverlening als instrument in het immigratiebeleid", *T. Vreemd.* 1994, (247) 250.

[1078] Recently, the Council of State did have another opportunity to do so in response to the applicant's mention of standstill in the context of article 11 ICESCR, but did not explicitly address the concept in its judgment: Council of State (15th Chamber) 6 January 2015, no.229.729.

[1079] Court of Cassation 20 December 1990, AR 8840, Najimi; Council of State 6 September 1989, no.32.989, *APM* 1990, 276, note M. DUMONT; Constitutional Court 14 December 1995, no. 81/95, B.7.3.1 and B.7.5.1.

[1080] Council of State 16 October 1997, no. 68.914, 3.3.2.3.2: the Council stipulated that the European Social Charter does not have direct effect, but the question remains whether it does not impose a standstill obligation either, hereby departing from the conclusion by the auditor; Constitutional Court 6 April 2000, no. 42/2000, B.6.3: Article 32 of the Charter says that when domestic law provides more protection than the corresponding rule of the Charter, the Charter cannot affect this rule. The Court interpreted this article as not imposing a standstill obligation to adjust legislation. But in our opinion this says little about the scenario in which the domestic law does not provide more favourable rules. Quite on the contrary, the Court explicitly says that it does not impose a standstill obligation only as far as the adjustment is compatible with the Charter; cf. G. MAES, "Het standstillbeginsel in verdragsbepalingen en in art.23 G.W.: progressieve (sociale) grondrechtenbescherming", *RW* 2005-06, no.28, (1081) 1086.

[1081] Explanatory Memorandum of the proposal by Mr. Stroobant and Mr. Taminiaux, *Parl.St.* Senaat BZ 1991-92, no. 100-2/3°, 13.

[1082] Report on behalf of the Commission for the review of the Constitution and the reform of the institutions released by Mr. Arts and Ms. Nelis, *Parl.St.* Senaat BZ 1991-92, no.100-2/4°, 86-88; Explanatory Memorandum of the proposal by Mr. Stroobant and Mr. Taminiaux, *Parl.St.* Senaat BZ 1991-92, no. 100-2/3°, 4 and 9-11.

[1083] M. STROOBANT, "Sociale en economische grondrechten in de Belgische Grondwet. Wordingsgeschiedenis van artikel 23: het Akkoord van "Le Ry d'Ave" Rochefort", in W. RAUWS en M. STROOBANT (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, (19) 44 and 50; G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerpen, Intersentia, 2003, 439-444.

[1084] R. ERGEC, "Introduction générale", in R. ERGEC (ed.), *Les droits économiques, sociaux et culturels dans la Constitution*, Brussel, Bruylant, 1995, (1) 15; A. VANDEBURIE*, L'article 23 de la Constitution. Coquille*

be due to the manner in which the obligation has been applied, as a proportionality test directly linked to article 23 rather than as a comparison between two different levels of legal protection. We will come to this issue in a moment.

383. Not only do others discard the idea that the standstill principle creates a direct effect[1085], a couple of legal academics has actually opposed the appropriateness of applying the standstill principle with regard to article 23 altoghether.[1086] The argumentation given by Rimanque indicates however that he perceived standstill differently than we have done so far and courts have done since. He argued that increasing unemployment due to economic reasons should not have to be compensated by increased employment in public services.[1087] Clearly, he interpreted standstill as relating to the public atonement for factual socio-economic adversities instead of today's conventional view pertaining to legal or policy measures that might decrease socio-economic rights protection.

384. A different argument against article 23 containing a standstill clause is the fact that the provision is far less precise than the ICESCR. Vande Lanotte therefore argues that "*there is no compelling legal argument*" as to why a margin of discretion should not also work 'downwards'. [1088] As we will see a bit later though, a margin of appreciation has definitely been established in the application of the standstill principle by jurisprudence. Hence, a margin of discretion is certainly not incompatible with the existence of a standstill obligation as currently interpreted. Quite to the contrary, it is considered an essential element.[1089] What this statement moreover suggests by using the existence of a margin of discretion as an

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vide ou boîte aux trésors ?, Brussel, La Charte, 2008, 135; A. ALEN and K. MUYLLE, *Handboek van het Belgische Staatsrecht*, Mechelen, Kluwer, 2011, 68.

[1085] L. THOLOMÉ, "L'article 23 de la constitution n'est pas une simple déclaration de principe", *Echos log.* 2000, no.4, (121) 121.

[1086] M. VERDUSSEN and A. NOËL, "Les droits fondamentaux et la réforme constitutionnelle de 1993", *APT* 1994, (127) 132; K. RIMANQUE, "Algemene situering van de grondrechten in de Belgische rechtsorde", in B. HUBEAU and R. DE LANGE (eds.), *Het Grondrecht op wonen. De grondwettelijke erkenning van het recht op huisvesting in Nederland en België*, Antwerpen, Maklu, 1995, (37) 45.

[1087] K. RIMANQUE, "Algemene situering van de grondrechten in de Belgische rechtsorde", in B. HUBEAU and R. DE LANGE (eds.), *Het Grondrecht op wonen. De grondwettelijke erkenning van het recht op huisvesting in Nederland en België*, Antwerpen, Maklu, 1995, (37) 45.

[1088] J. VANDE LANOTTE and T. DE PELSMAEKER, "Economic, social and cultural rights in the Belgian Constitution", in P. VAN DER AUWERAERT, T. DE PELSMAEKER, J. SARKIN and J. VANDE LANOTTE (eds.), *Social, economic and cultural rights. An appraisal of current European and international developments*, Antwerpen, Maklu, 2002, (263) 275.

[1089] M. BOSSUYT, "Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof", in W. RAUWS en M. STROOBANT (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, (59) 64; M. STROOBANT, "De sociale grondrechten naar Belgisch recht. Een analyse van de parlementaire werkzaamheden bij art.23 G.W.", in M. STROOBANT (ed.), *Sociale grondrechten*, Antwerpen, Maklu, 1995, (57) 76.

argument against a standstill clause, is that any 'upward' margin of discretion must then be virtually incontestable.

2) Conditions

385. Generally speaking, the legal doctrine overwhelmingly acknowledges the application of the standstill principle. The case law of the Council of State and the Constitutional Court shows that it is commonly used in the context of article 23, but also that the content of the obligation has evolved. Initially, both the Administrative Litigation Section as well as the Legislation Section of the Council of State stated that the legally embedded socio-economic guarantees could only be diverted from for compulsory reasons of general interest.[1090] This was certainly a more stringent interpretation of the standstill obligation than the one that has been and is still given by the Constitutional Court today.[1091] By the latter judicial body, the understanding is that the obligation is violated only when the competent legislator has reduced the level of socio-economic legal protection *considerably* without a reason of general interest to do so.[1092] After a while, the Legislation Section of the Council of State also adopted the Constitutional Court's approach, giving the government a larger margin of appreciation.[1093] The other section seems to have settled any possible divergent interpretations left with the *Coomans* judgement in 2008. It explicitly renounced its earlier case law by refuting the applicant's argument that compulsory reasons are necessary to justify a considerable reduction of the level of protection on the basis that "*this view cannot find support in the case law of the Constitutional Court*".[1094]

386. The current approach raises two questions for any possible assessment of allegedly retrogressive measures: does the measure create a considerable decline in the level of socio-economic rights protection and, if that is the case, is there a reason of general interest for it?

[1090] E.g.: Council of State 29 April 1999, no. 80.018; Adv. Council of State 8 October 2003, no.35.6889/4 on a draft of an Ordinance concerning a couple of provisions regarding spatial planning, *Parl. St. Br. Parl.* 2003-2004, 703/1, 49-50; B. STEEN, "Artikel 23 van de Grondwet en de rechtspraak van de Raad van State", in W. RAUWS en M. STROOBANT (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, (113) 121-123.

[1091] A. VANDEBURIE*, L'article 23 de la Constitution. Coquille vide ou boîte aux trésors?*, Brussel, La Charte, 2008, 58-59.

[1092] E.g.: Constitutional Court 14 July 2004, no. 130/2004, B.5; Constitutional Court 14 September 2006, no. 135/2006, B.10.

[1093] E.g.: Adv. Council of State 10 December 2004, no.37.741/2/4 concerning a draft of the 'décret-programme de reliance économique et de simplification administrative', *Parl. St. W. Parl.* 2004-05, 74/1, 82-89.

[1094] Council of State 17 November 2008, no. 187.998, Coomans, par. 18.1.

a. Considerable decline: compared to what?

387. Off the bat, we can say that it is virtually impossible to give a general definition of what a considerable decline is. In fact, this has also been mentioned as one of the downsides of the standstill obligation. Judges might not always be well-positioned or in possession of the right tools to assess the exact implications of a new measure or policy, let alone to decide whether the regression is significant enough.[1095] A couple of years back for example, the Flemish Government made the decision to constrain the right of candidate-tenants to give their preference regarding the type, location and maximum rental price of the social dwelling.[1096] The Council of State has annulled this modification because it did not abide by the free choice of the social (candidate-)tenant that had been guaranteed by decree (article 93, § 1 of the Flemish Housing Code).[1097] Yet, one could argue that the same outcome could have been reached because it violated the standstill principle, because it had limited candidate-tenants' access to adequate social housing and therefore created a decline in their protection level.[1098] But was it significant enough?[1099] As a matter of fact, it is even possible to make a case for the exact opposite. The argument behind the adoption of the measure actually complies with the basic components of the right to housing. It was said that the expressed preferences were able to reveal those people with the highest housing need, thereby in a way also contributing to social housing access.

388. If anything, it should be clear that the standstill question will not always provide an unambiguous answer. What has been put forward with regard to what constitutes a significant

[1095] H. DUMONT, "Conclusions: l'apport des droits fondamentaux au droit de l'environnement, de l'urbanisme et du logement", *Amén*. 1996, (287) 289; J. VANDE LANOTTE and T. DE PELSMAEKER, "Economic, social and cultural rights in the Belgian Constitution", in P. VAN DER AUWERAERT, T. DE PELSMAEKER, J. SARKIN and J. VANDE LANOTTE (eds.), *Social, economic and cultural rights. An appraisal of current European and international developments*, Antwerpen, Maklu, 2002, (263) 276.

[1096] Art. 3 Decision Flemish Government 30 September 2011 concerning the amendment of various provisions of the decision of the Flemish Government of 12 October 2007 on the regulation of the social renting system in execution of title VII of the Flemish Housing Code and in modification of article 17 of the decision of the Flemish Government of 12 October 2007 concerning the financing of social rental companies for the realization of social rental housing and the accompanied operating costs, *BS* 25 november 2011: the provision modified art. 10 Framework Decision Social Rent, which was later restored following the annulment judgment by the Council of State.

[1097] The request for annulment was made by the Flemish Platform for Tenants and the Flemish Network of Associations of People Experiencing Poverty: Council of State 18 February 2013, no. 222.544, par. 5.7-5.8.

[1098] As a matter of fact, the applicants also invoked the standstill argument, but it was not explicitly addressed by the Council. B. HUBEAU and T. VANDROMME, "De beperking van het keuzerecht van kandidaat sociale huurders: beperking van het grondrecht op wonen of net toepassing van het grondrecht op wonen" (note under Council of State 18 February 2013, no. 222.544), *RW* 2013-14, no. 39, (1537) 1539-1540.

[1099] Even though the Council of State annulled the relevant provision, it did not do so on the basis of substantive reasons: Council of State 18 February 2013, no. 222.544.

regression is that the limitation cannot go as far as intruding the core of the right.[1100] That of course simply moves the problem from one concept to another. And as we have seen earlier, there is anything but consensus on how this minimum core should have to look like. With regard to the right to housing for example, we will see how the case law appears to have used the *McCann* judgment of the European Court of Human Rights to create a lower threshold for an acceptable regression.

389. A different issue concerning the question of what 'considerable' entails in this context relates to what exactly the adopted or proposed measure that allegedly violates the standstill clause should have to be compared with. Both the Constitutional Court and the Council of State compare to a previous legal state of affairs instead of a factual state.[1101] They use the norm itself as the point of reference. A comparison is made to how it is supposed to apply or what level of protection it is supposed to achieve and not to how it works in practice. While understandable from a pragmatic and legal security point of view, we already mentioned that there can be a considerable gap between law in the books and law in action. For example, at the motivated request of the president of the OCMW-council, article 134bis of the New Municipality Act authorizes the mayor to lay claim to any building that has been abandoned for over six months to place at the disposal of the homeless. An obviously well intended and result-oriented measure to accommodate those who do not have a roof above their head that is nonetheless only rarely applied. Here, it is obviously beneficial to the right to adequate housing to look at the reference norm in order to judge whether or not a measure on this matter would be retrogressive. But it can also be beneficial to look at those types of practical problems and take them into account as a reference point in order to ultimately improve measures.

390. Take for example the decision to reduce the housing bonus.[1102] This undoubtedly falls within the *ratione materiae* of the standstill clause. When we only use the previous norm as

[1100] K. RIMANQUE, "Algemene situering van de grondrechten in de Belgische rechtsorde", in B. HUBEAU and R. DE LANGE (eds.), *Het Grondrecht op wonen. De grondwettelijke erkenning van het recht op huisvesting in Nederland en België*, Antwerpen, Maklu, 1995, (37) 44; A. ALEN and K. MUYLLE, *Handboek van het Belgische Staatsrecht*, Mechelen, Kluwer, 2011, 103.

[1101] The Constitutional Court has been very explicit on this with regard to free art education: Constitutional Court 19 May 1994, no. 40/94, B.2.6; G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerpen, Intersentia, 2003, 128; B. STEEN, "Artikel 23 van de Grondwet en de rechtspraak van de Raad van State", in W. RAUWS en M. STROOBANT (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, (113) 125.

[1102] Art. 64-71 Decree 19 December 2014 concerning provisions accompanying the budget estimates, *BS* 30 December 2014; Flemish Government, *Coalition Agreement Flemish Government 2014-2019*, 22 July 2014, 19.

the reference point, there is an undeniable decline visible in the legal protection of the affordability of housing (regardless of the question whether this would constitute the necessary *considerable* decline). But if our comparison takes into account the consequences of and numbers behind this fiscal measure, we find out that there are also practical disadvantages attached to the housing bonus (the aforementioned increase in property prices, unfair distribution of benefits among different income groups)[1103], resulting in a whole different perspective on the issue, one that might not lead to the same conclusion. If of course the spare money is then not recycled into socio-economic rights protection in a different shape or form, one could once again make a strong argument that the standstill clause still applies. In practice however, choosing either the norm or the factual situation as the reference point might not make too much of a difference for this particular example. The practical effectiveness of the norm or the lack thereof could always be used as an argument to justify the retrogressive measure as being in the general interest. This once again highlights the difficulty of this type of assessments.

b. Considerable decline: compared to when?

391. We now know that the case law takes a previous legal state of affairs into account for its standstill assessment, but does this imply that the comparison should be made with the moment of adoption or entry into force of article 23 on the one hand[1104] or with the legislation in place just before the measures under scrutiny were adopted? In other words, is the comparison based on a fixed or a mobile point of reference? While the relevant case law has compared to a fixed reference point in the past[1105], more recent decisions tend to look at the applicable legislation.[1106]

[1103] P. DE DECKER, "Afbouw woonbonus: nu of nooit", *Samenleving en Politiek* 2014, vol. 21, no. 1, 64-75; F. VASTMANS and E. BUYST, *Vastgoedprijzen en woningaanbod in de centrumsteden. Deel 1: Woningprijzen en woningkenmerken*, 2011, www.kenniscentrumvlaamsesteden.be/kennisbank/lopendonderzoek/Documents/rapport%20deel1%20vastgoedprijzen%20en%20aanbod%5B1%5D.pdf, 12-15; N. BERNARD and V. LEMAIRE, "Regionalisering van de woonbonus: naar een beleid op maat van het Brussels Gewest?", *Brussels Studies* 2015, no. 83, (1) 1-7; FLEMISH HOUSING COUNCIL, *Advies over de regionalisering van de woonbonus*, 10 December 2012, no. 2012/12, www.rwo.be/Portals/100/Vlaamse%20Woonraad/VWR_woonbonus_advies_20121210_def_brochure.pdf.

[1104] In contrast to the long ratification process of the ICESCR, where a large time gap exists between the signing and ratification of the Covenant and therefore a period in which the level of protection could have been significantly altered, the period between adoption and entry into force of article 23 of the Constitution is negligible.

[1105] E.g.: Constitutional Court 27 November 2002, no. 169/2002, B.6.5; Constitutional Court 14 January 2004, no. 5/2004, B.14.6; Constitutional Court 18 December 2008, no. 182/2008, B.7.3.

[1106] E.g.: Constitutional Court 16 September 2010, no. 99/2010, B.4.7; Constitutional Court 16 September 2010, no. 99/2010, B.4.7; Constitutional Court 16 March 2005, no. 59/2005, B.7.2; Adv. Council of State 10 June 2013

392. An argument against this mobile point theory is that this knowledge could limit the commitment of the public authorities to make further strides in socio-economic rights protection, since they would not be able anymore to scale the new level down again.[1107, 1108] We certainly consider this a valid argument against a very strict, almost absolute standstill obligation, like the one characterized by the strict conditions created in the General Comments of the CESCR (infra). First and foremost though, this is simply not the case with the interpretation of the standstill clause in the Belgian legal order; standstill is considered a relative obligation and only kicks into gear when it concerns a considerable regression. It is not as if no retrogressive measures are allowed to be taken, quite on the contrary as we consider the low success rate of the standstill argument in Belgian case law.[1109] We do therefore not agree with the particular use of this argument as opposing a mobile point of reference. It runs counter to the basic idea of progressiveness.[1110] Considering as well that article 23 does not have direct effect and does not create any justiciable positive obligations anyway, a fixed point of reference would render the fact that the right to housing has been constitutionalized more than twenty years ago instead of today almost regrettable.

393. That does not mean that a mobile point of reference is completely free from flaws in the protection of the right to housing. Take for example the amount of rent guarantee that can be asked by the letter. Since 2007, this amount cannot exceed two months of rent when the tenant chooses to deposit this on an individualized bank account.[1111] The current Flemish Minister has publicly announced that she would like to increase this maximum again to three

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concerning a draft of Law to amend the Judicial Code with regards to legal aid, no. 53.322/3 4.2.2.2; Adv. Council of State 24 January 2006, advice no. 39563/VR/3 on a draft of Decree concerning the modification of the decree of 15 July 1997 concerning the Flemish Housing Code, *Parl. St.* Vl. Parl. 2005-06, no. 824/1; Council of State 9 January 2007, no. 166439; A. VANDEBURIE*, L'article 23 de la Constitution. Coquille vide ou boîte aux trésors ?*, Brussel, La Charte, 2008, 63-65; J. THEUNIS, "De toetsing aan grondrechten door het Grondwettelijk Hof", *TBP* 2012, no.1, (3) 35.

[1107] Y. TRILLET, "Vers une nouvelle effectivité des droits économiques, sociaux et culturels ? ", *Dr.Q.M.* 2000, vol.27, (3) 30.

[1108] Proponents of the fixed point theory, see: S. VAN DROOGHENBROECK, "Mendicité, ordre public et proportionalité" (note under Council of State 8 October 1997), *RBDC* 1997, no.4, (407) 427; E. BREMS, "De nieuwe grondrechten in de Belgische Grondwet en hun verhouding tot het international, inzonderheid het Europese recht", *TBP* 1996, (619) 632;

[1109] A. ALEN and K. MUYLLE, *Handboek van het Belgische Staatsrecht*, Mechelen, Kluwer, 2011, 76.

[1110] I. HACHEZ, "L'effet de standstill: le pari des droits économiques, sociaux et culturels?", *AP* 2000, (30) 50; G. MAES, "Het standstillbeginsel in verdragsbepalingen en in art. 23 G.W.: progressieve (sociale) grondrechtenbescherming", *RW* 2005-06, no.28, (1081) 1086.

[1111] Art. 103 Law 25 April 2007 concerning various provisions (IV), *BS* 8 May 2007: when a tenant opts for a bank guarantee, the maximum stands not at two, but at three months of rent. Despite the prescription of only two months guarantee when the sum of money is deposited on an individualized bank account, 14% of the tenants who have concluded a rental agreement since 2008 declares to have paid three months of guarantee, see: S. WINTERS et al., *Wonen in Vlaanderen anno 2013. De bevindingen uit het Grote Woononderzoek 2013 gebundeld*, Antwerpen, Garant, 2015, 103.

months in an attempt to balance out the rights and duties of both contracting parties.[1112] While not yet developed into a concrete proposal, it has been subject of parliamentary debate.[1113] Let us for illustrative purposes assume that this measure does not reduce the protection level considerably. This would mean that no further justification is necessary by the public authorities and the rent guarantee can be increased. Now obviously, a mobile point of reference also moves down whenever the protection level decreases. But because of this, there is no theoretical reason why it would not be hypothetically possible to step by step raise the guarantee to four and five months in the following months and years. Since the point of reference adapts itself each time to the current level of protection, a further increase with one month of rent would again not be considered a considerable retrogression. While three months of additional rent guarantee as a whole would obviously threaten the affordability of housing considerably, a gradual degradation one step at a time cannot be prevented with a mobile point of reference. That is of course as long as it does not violate the core of the right. One alternative argument to address this problem could be to make the minimum core more mobile itself by having it expand in accordance with the level of realization of the right to housing. It then obtains the characteristic of a "rising floor".[1114]

c. Exceptions to the standstill obligation

394. On to the second question then: what are reasons of general interest to render retrogressive measures reconcilable with the standstill principle? Maes distinguished three categories[1115], which were later also adopted by Vanderlinden.[1116] The first one concerns having measures in place that can serve as equivalent alternatives for the adopted retrogressive measures. These measures have the ability to absorb restrictions on or even the abrogation of another measure to guarantee an equal degree of socio-economic protection. To illustrate, let us return to the example of the possible future increase of the rent guarantee to three months, assuming this time that it is indeed a considerable regression. The legislator could make a case for the OCMW and the bank guarantee as alternatives that are being used and could expansively be used by socio-economically disadvantaged persons in society to

[1112] Telefacts, 28 April 2015.
[1113] *Vr. en Antw.* Vl. Parl. 2014-15, Vr. nr. 323 and 324, 29 April 2015 (K. PARTYKA and M. HOSTEKINT).
[1114] A. CHAPMAN and S. RUSSELL, *Core obligations: building a framework for economic, social and cultural rights*, Antwerpen, Intersentia, 2002, 14.
[1115] G. MAES, "Het standstillbeginsel in verdragsbepalingen en in art. 23 G.W.: progressieve (sociale) grondrechtenbescherming", *RW* 2005-2006, no. 28, (1081) 1090-1093.
[1116] H. VANDERLINDEN, "Effectiviteit van de sociale grondrechten in het Belgische recht, mythe of realiteit", *RW* 2008-09, no.29, (1202) 1212-1213.

settle increasing problems that might arise in paying the guarantee.[1117] As a matter of fact, the Minister has already used these exact alternatives to defend an increase of rent guarantee.[1118] This presumes of course that an alternative like the bank guarantee works without too many problems and, as we have discussed earlier in this chapter, this remains rather questionable. The question however is whether or to what extent this factual knowledge would have to be taken into account to assess the justification of the retrogressive measure. After all, did we not conclude earlier that the legal and not the factual state of affairs is the main focus of the comparison to assess the severity of the regression?

395. A second category pertains to retrogressive measures that are compensated for in the totality of socio-economic rights protection. This very much resembles the condition that justifies a retrogressive measure "*by reference to the totality of the rights*" in General Comment No.3. The regression that has been made can be compensated for either in a different aspect of the same right or with an increase of protection in a different right altogether. It has fittingly been called the '*effet standstill global*' by some authors.[1119] The dismantlement of the housing bonus can once again serve as an example. This decision could have been justified by pointing out the need for a revised budget allocation in the Flemish housing policy. As we have mentioned earlier, the price tag of the housing bonus for the public authorities has been very high, certainly when compared to other housing related expenses. It was projected that by 2024, the cost would amount to somewhere between 2,5 and 2,9 billion euro.[1120] At the same time, it has been proven that the housing bonus does not help those who are most in need of it and that it has not only increased property prices, but also rent prices.[1121] Consequently, an injection of (part of) those resources into the private

[1117] Anno 2013, 9 % of the renting households paid their rent guarantee with a loan from their bank and 3 % with an intervention by the OCMW: S. WINTERS et al., *Wonen in Vlaanderen anno 2013. De bevindingen uit het Grote Woononderzoek 2013 gebundeld*, Leuven, Steunpunt Wonen, https://steunpuntwonen.be/Documenten/Onderzoek_Werkpakketten/gwo-volume-1-eind.pdf, 2015, 74.
[1118] *Vr. en Antw.* Vl. Parl. 2014-15, Vr. nr. 323 and 324, 29 April 2015 (K. PARTYKA and M. HOSTEKINT).
[1119] Y. TRILLET, "Vers une nouvelle effectivité des droits économiques, sociaux et culturels?", *Dr.Q.M.* 2000, vol.27, (3) 32-33; J. FIERENS, "L'article 23 de la Constitution. Une arme contre la misère?", *Dr.Q.M.* 1994, no.3, (3) 9.
[1120] N. HUYGHEBAERT, *Berekening woonbonus op kruissnelheid*, KU Leuven, 2012, not published; P. DE DECKER, "Afbouw woonbonus: nu of nooit", *Samenleving en Politiek* 2014, vol. 21, no. 1, (64) 74.
[1121] K. HEYLEN and S. WINTERS, *De verdeling van de subsidies op vlak van wonen in Vlaanderen*, Leuven, Steunpunt Ruimte en Wonen, 2012, https://lirias.kuleuven.be/bitstream/123456789/361362/1/De+verdeling+van+de+woonsubsidies.pdf, 36.

housing market could undeniably be seen as a justifiable direct compensation.[1122] This of course is an illustration where the compensation takes place in the protection of the same right.

396. The right to housing is also linked to other rights in article 23, not in the least to the right to a decent living environment. Think for example about the different financial support systems in place to renovate houses. Modernization is not only important for the quality of the housing stock, it is also beneficial for energy expenses and thus also for the environment. An upgraded housing stock can on the other hand also have a damaging effect on the issue of affordability. This example of course merely shows the interaction between basic aspects of different rights, it does not involve a retrogressive measure *in se*.

397. What could be considered as such is the abrogation of the free share of a hundred kilowatt-hour of electricity.[1123] Unsurprisingly, the proposal has passed the Council of State without a reference to the standstill principle; energy policies do not touch upon article 23 of the Constitution *sensu stricto*. But since we have considered energy expenditure as an aspect of the affordability (and quality) of housing, these measures certainly seem retrogressive with regard to the right to housing. One of the reasons why the Flemish government has made this decision is of an ecological nature.[1124] The idea that the polluter should pay accordingly was considered not reconcilable with the distribution of free electricity. While potentially destabilizing the quality/affordability of housing (we will return to this issue later), the right to a decent living environment could serve as a justification. The explanation of this measure on the website of the Flemish government seems to have actually refuted this very own motive. It explains how the free electricity used to be compensated in higher distribution network prices for the other kilowatt-hours and that the annulment of this measure will lower this share of the price tag. In contrast to the ecological motive, it concludes that persons with a low energy consumption will have to pay more and that being more energy-consuming becomes relatively cheaper.[1125]

[1122] FLEMISH HOUSING COUNCIL, *Naar een beleid ter ondersteuning van de private huurwoningmarkt*, 30 September 2010, no. 2010/11, www.rwo.be/Portals/100/Vlaamse%20Woonraad/broch_Vl_Woonraad_web.pdf; P. DE DECKER, "Afbouw woonbonus: nu of nooit", *Samenleving en Politiek* 2014, vol. 21, no. 1, 64-75.

[1123] Article 25 Decree 27 November 2015 concerning miscellaneous provisions on energy, *BS* 10 December 2015.

[1124] Report on behalf of the Commission for Living Environment, Nature, Spatial Planning, Energy and Animal Welfare on the draft of Decree concerning miscellaneous provisions on energy, *Parl.St.* Vl.Parl. 2015-16, no. 6, 5.

[1125] www.vlaanderen.be/nl/bouwen-wonen-en-energie/elektriciteit-aardgas-en-verwarming/gratis-hoeveelheid-elektriciteit# (last visited on 6 June 2016).

398. The third and last category of reasons of general interest concerns the stability of welfare (‘*welvaartsvastheid’*). It departs from the idea that it must be possible to alter, limit and abolish measures due to a changed economic or budgetary situation. This means that it can be justified to raise public incomes (e.g. tuition fees for education) according to the increasing cost of living, but also to not allow public expenditures (e.g. subsidies) evolve accordingly.[1126] The much discussed and criticized ‘index leap’ for example might primarily be adopted to improve the competitiveness of companies, it also reduces government expenses on *inter alia* the payment of social security benefits and retirement wages.[1127]

399. The issue has also caused a stir in the context of housing. The Flemish government, which is competent to divert from the general framework set out by the federal government within the realm of its own competences[1128], did not want to include rent prices in the index jump.[1129] This means that the rent price of social as well private tenants will, unlike their income, still be subject to the increase of the index. Now there are a couple of problems to properly assess this issue from the perspective of the standstill principle. Firstly, there is a considerable disagreement on how much a non-indexation of the rent would cost a household, ranging from 12 euro[1130] to only 6 cent per month.[1131] This is quite a discrepancy to accurately decide on the degree of regression (considerable or not). More blatant however is the question whether the standstill principle actually applies. The impact of the index jump on the level of protection of the right to housing is only indirect. As a matter of fact, the alleged regression revolves more around the government not taking a measure to skip the indexation for rent prices as well (as with regard to income). And as we know well by now, the standstill obligation is obviously not a positive obligation to take measures.[1132] It does of course raise questions on the positive side of state obligations, questions to which we will return later in this chapter.

[1126] G. MAES, “Het standstillbeginsel in verdragsbepalingen en in art. 23 G.W.: progressieve (sociale) grondrechtenbescherming”, *RW* 2005-06, no.28, (1081) 1091.
[1127] Law 23 April 2015 on the improvement of employment opportunities, *BS* 27 April 2015: the new law even has a small chapter entitled ‘stability of welfare’ (‘welvaartsvastheid’)
[1128] Adv. Council of State 11 March 2015, no.57.195/1, *Parl. St.* Kamer 2014-15, 54-0960/001.
[1129] *Vr. en antw.* Vl. Parl., Vr. nr. 1202 and 1244, 26 February 2015, (K. PARTYKA and C. JANSSENS).
[1130] Report on behalf of the Committee on Housing, Poverty Policy and Equal Opportunity concerning the proposal of decree on not adapting the rent price to the living costs, *Parl. St.* Vl. Parl. 2014-15, no. 327/2, 6-7.
[1131] *Vr. en antw.* Vl. Parl., Vr. nr. 1202 and 1244, 26 February 2015, (K. PARTYKA and C. JANSSENS).
[1132] De Standaard, *Homans: ‘geen indexsprong bij huurprijzen’*, 26 February 2015.

400. We have mentioned earlier the defaults of the housing bonus and how its dismantlement can be advocated by investing the saved resources in a more efficient manner by way of compensation. Yet, the measure was taken primarily out of budgetary concerns, as an austerity measure.[1133] Consequently, the adopted decision actually falls into this third category. But how appropriate is it to adopt a retrogressive measure based on budgetary concerns? Hachez makes the distinction between financial or economic considerations as reasons of general interest (which can be justified) and as legitimate purposes in and of itself (which is not justifiable).[1134] Although we agree with this principal standpoint, the example shows that it is not always easy to distinguish both. One can also disguise a measure as being necessary for different reasons of general interest, while in essence adopting it primarily for austerity reasons. This obviously only further complicates the already difficult question whether or not the standstill obligation has been violated.

401. Ultimately and irrespective of the categories by which we have constructed this text, the one thing that we can be absolutely clear about is that the standstill obligation is not an absolute obligation and that the margin of appreciation for the legislative and executive branch remains fairly large. As the Constitutional Court and Council of State have said with regard to the right to legal assistance: "*The prohibition to significantly reduce the existing level of protection without reasons of general interest cannot be understood in such a way that every legislator, in the context of its competences, has the obligation not to touch upon the particular rules that exist in the context of the right to legal assistance. (…) It does not deny them their competence to assess how that right should be ensured in the most adequate way*" (paraphrased).[1135] There might be a subjective right to standstill, but the argument that the standstill principle creates a subjective right to a *status quo* is therefore a bit too optimistic.[1136] It serves as a dam against an inferior level of protection of constitutional rights[1137], but a leaky one at that.

[1133] E.g.: M. HAFFNER and S. WINTERS, "Homeownership taxation in Flanders: moving towards 'optimal taxation'?", *International Journal of Housing Policy* 2015, (1) 15; D. VAN VOOREN and S. OOSTERLYNCK, presentation during a seminar organised by research group HauS (KUL), *Woonnood in Vlaanderen. Feiten / mythen / voorstellen*, 8 September 2015.

[1134] I. HACHEZ, *Le principe de standstill dans le droit des droits fondamentaux: une irreversibilité relative*, Brussel, Bruylant, 2008, 420-421.

[1135] Constitutional Court 27 November 2002, no. 169/2002, B.6.6; Adv. Council of State 10 June 2013, no.53.322/3, 4.2.2.2.

[1136] R. ERGEC, "Le minerval exigé des élèves étrangers et les effets directs de droits économiques et sociaux", *JLMB* 1991, (1206) 1206.

[1137] S. WYCKAERT, "Het 'standstill'-effect in de milieurechtspraak van de Raad van State", *AJT* 1999-2000, (413) 415; A. VANDEBURIE*, L'article 23 de la Constitution. Coquille vide ou boîte aux trésors?*, Brussel, La

3) Proportionality: testing directly against article 23

a. The treatment of standstill claims under the right to housing

402. Admittedly, we have thus far omitted to mention an important aspect. It is actually anything but clear that a standstill obligation is endowed upon all the rights in article 23.[1138] The Constitutional Court has applied the principle in the field of the right to social assistance[1139] as well as legal assistance[1140] (both par. 3, 2°), but the most popular area of application appears to be the right to a healthy living environment (par. 3, 4°).[1141] The right to adequate housing has on the other hand not yet been explicitly acknowledged as imposing a standstill obligation.[1142] As a matter of fact, the Flemish government has recently used this knowledge before the Constitutional Court in its defense against the request to annul the Decree of May 31, 2013 on the amendment of diverse decrees concerning housing.[1143]

403. The administrative litigation section of the Council of State seems to follow the same pattern as the Constitutional Court as far as the explicit recognition of a standstill clause for the right to housing goes. In response to the argument of standstill in a case against a decision concerning the rent prices for temporary rehousing, the section has commented that it does not have the competence to take stance in what is essentially 'opportunity criticism'.[1144] On the other hand however it has stated before that "*l'article 23 de la Constitution implique, dans les matières qu'il couvre, une obligation de standstill*".[1145] Here, it did obviously not make a distinction between the different socio-economic rights protected by the constitutional

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Charte, 2008, 53; G. MAES, "Het standstillbeginsel in verdragsbepalingen en in art. 23 G.W.: progressieve (sociale) grondrechtenbescherming", *RW* 2005-06, no.28, (1081) 1082.

[1138] M. BOSSUYT, "Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof", in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, (59) 62.

[1139] E.g.: Constitutional Court 30 June 2014, no. 95/2014; Constitutional Court 27 November 2002, no.169/2002, B.6; Constitutional Court 27 July 2011, no.135/2011, B.5.2 and B.18.2.

[1140] E.g.: Constitutional Court 16 September 2010, no.99/10, B.4.7; Constitutional Court 18 December 2008, no.182/2008, B.7.3.

[1141] E.g.: Constitutional Court 19 December 2013, no.177/2013, B.5; Constitutional Court 29 July 2010, no.94/2010, B.6.7. and B.7.4; Constitutional Court 18 November 2010, no. 131/2010, B.8.4; Constitutional Court 14 September 2006, no. 135/2006, B.10; J. THEUNIS, "De toetsing aan grondrechten door het Grondwettelijk Hof", *TBP* 2012, no.1, (3) 35.

[1142] A. ALEN and K. MUYLLE, *Handboek van het Belgische Staatsrecht*, Mechelen, Kluwer, 2011, 74-75.

[1143] Constitutional Court 5 March 2015, no. 24/2015, A.16.

[1144] Council of State 3 May 2012, no. 219.159, par. 12 and 28.

[1145] Council of State 23 September 2011, no. 215.309, Cléon Angelo; I. HACHEZ, "Le principe de standstill: actualités et perspectives", *RCJB* 2012, no.1, (6) 9.

provision. In that respect, the legislation section has been more straightforward, explicitly addressing the standstill obligation in some housing related advisory opinions.[1146]

404. Both times that applicants have explicitly argued before the Constitutional Court that a violation of the standstill obligation in respect of the right to housing had taken place, the Court did not explicitly address that point in its considerations.[1147] In its judgment from July 10, 2008, the Court at least did use the term 'considerable regression'. It echoed the standstill argument the applicants had invoked with regard to a couple of provisions from the Flemish Decree of December 15, 2006, which had changed the Flemish Housing Code: firstly, the measure that enabled the inclusion of explicit termination clauses into the social rent contract, and secondly the combination of a trial period of maximum two years combined with the opportunity to cancel the agreement during or after this period without judicial intervention in case of a negative evaluation.[1148] By mimicking the applicant's argument and using the words 'considerable regression', the absence of the word standstill becomes all the more remarkable.[1149] On the one hand we could ask ourselves what else 'considerable regression' could possibly refer to, but on the other hand the unwillingness to apply the word standstill suggests that the right to housing does indeed not have a standstill clause. This is further enhanced by the fact that the Constitutional Court never investigates whether there is indeed a regression, a necessary first step in the inquiry of the standstill obligation.

405. What follows is actually a proper proportionality assessment that directly tests the relevant rules against the right to adequate housing in article 23 of the Constitution.[1150] Similar to other housing related case law applying a proportionality test, which most

[1146] E.g.: Adv. Council of State 10 January 2006, no. 39575 concerning a draft a Decree on the modification of the Walloon Housing Code, *Parl. St.* W. Parl. 2005-06, no. 322; Adv. Council of State 24 January 2006, no. 39563/VR/3 concerning a draft of Decree on the modification of the Decree of 15 July 1997 concerning the Flemish Housing Code, *Parl. St.* Vl. Parl. 2005-06, no. 824/1; Adv. Council of State 16 January 2012, no.50764/4 concerning the draft of Decision of the Walloon Government modifying the decision by the Walloon Government of 6 September 2007 organising the distribution of housing managed by the Walloon housing association or public housing associations (not published).
[1147] Constitutional Court 5 March 2015, no. 24/2015, A.15.1; Constitutional Court 10 July 2008, no. 101/2008, A.6.1.1 and A.7.1; The administrative litigation section of the Council of State did not answer to the standstill argument of the applicants either in: Council of State 18 February 2013, no. 222.544, par. 5.2.
[1148] Constitutional Court 10 July 2008, no. 101/2008, B.20.
[1149] F. VANNESTE, "Over de cruciale rol van (sociale) grondrechten in België", in Vereniging voor de vergelijkende studie van het recht van België en Nederland (ed.), *Preadviezen 2012,* Den Haag, Boom Juridische Uitgevers, 2012, (13) 41.
[1150] Constitutional Court 10 July 2008, no. 101/2008, B.25.2.

commonly concerns conflicts with the right to property[1151], the Court starts the balancing of interests from the principle that the opinion of the legislator regarding the general interest must always be respected, unless it is manifestly unreasonable.[1152] This obviously renders the state with a considerable margin of appreciation. Yet, in contrast to the aforementioned case law on the right to property, the Court here adds that this freedom is restricted when it can cause certain categories of persons to lose their home, using the ECtHR's *McCann* judgment as reference.[1153] With that in mind, the judgment ultimately decided that the challenged provisions had not been reasonably justified and that the relevant provisions had to be annulled.[1154]

406. While not exactly a textbook example of judging a standstill obligation, the Court did at least depart from the standstill argument of the applicants. That is however with regard only to the aforementioned measures. The Court did not cite or similarly refer to the standstill argument the applicants had nonetheless also used with regard to the language requirement for obtaining access to social housing. Instead, it merely characterized this measure as a 'corresponding obligation' (i.e. corresponding to the rights from article 23 as explicitly mentioned in the provision itself), which also triggered a form of proportionality assessment.[1155] While the response to one argument at least appears to depart from a standstill obligation and the other does not, both arguments are ultimately answered by a proportionality test.

407. The only other, more recent occasion on which the applicants argued that a violation of the standstill principle in the context of housing had taken place, shows striking similarities. Here, the extension of the conditions (i.e. again language requirements) to gain access to social housing to those who marry or either factually or legally cohabit with the social tenant was under investigation.[1156] Again, the Court did not directly reply or refer to the standstill argument and applied a proportionality test, thereby addressing the same corresponding

[1151] Constitutional Court 12 February 2015, no. 16/2015; Constitutional Court 29 July 2010, no.91/2010; Constitutional Court 10 May 2006, no. 75/2006; Constitutional Court 26 June 2008, no. 92/2008; M. DAMBRE, *Bijzondere overeenkomsten*, Brugge, Die Keure, 2014, 248.
[1152] Constitutional Court 10 July 2008, no. 101/2008, B.23.3.
[1153] *Ibid*.: The Court hereby refers to the McCann judgment by the European Court of Human Rights (13 May 2008, par. 50).
[1154] *Ibid*., B.26.
[1155] *Ibid*., B.27-B.37.
[1156] Art. 50, 3° Decree 31 May 2013 concerning the amendment of various decrees on housing, *BS* 11 July 2013 juncto article art. 95, §1 Flemish Housing Code.

obligation in a similar way as it had done in the 2008 judgment. It also repeated its considerations on respecting the judgment of the legislative branch and protecting people from the loss of their home at the same time.[1157]

408. Before drawing any conclusions with regard to the working of the standstill clause for the right to housing, we must return and take a look at the Council of State. As we have mentioned, the Legislation Section has not shied away from recognizing the principle of standstill in the context of the right to housing. But either it does not really apply the principle[1158] or it again carries out a proportionality assessment that directly tests against article 23.[1159] Let us elucidate on the reasoning of the Council of State in its advisory opinion of January 24, 2006, which once again (although chronologically for the first time) concerns the imposition of an obligation for (candidate-)tenants to show willingness to learn the Dutch language.[1160]

409. On the question whether this measure is reconcilable with the standstill principle, the Council argued that it did not have to identify a regression of the existing legal protection. It continued that, taking into account the purpose of the measure and the conditions the Council had set out in its proportionality assessment in the previous paragraphs, it had already clarified that the measure could not be considered as a significant regression, let alone as one that could not be justified for reasons of general interest. As such, the measure under scrutiny was found not to be in conflict with the standstill obligation.[1161] The Council of State thus relies entirely on its proportionality assessment to come to that conclusion, which raises a couple of thoughts.

410. Firstly, we think that it is simply not possible to conclude that there is no regression on the mere basis that the measure is balanced. Those are two entirely different questions. We do however agree that the proportionality assessment *in casu* certainly conveys the existence of a

[1157] Constitutional Court 5 March 2015, no. 24/2015, B.21.2; see also T. VANDROMME, "Ook partner van sociale huurder moet aan voorwaarden sociale huur voldoen", *Juristenkrant* 2015, no. 317, 4.
[1158] Adv. Council of State 10 January 2006, no. 39575 concerning a draft of Decree on the modification of the Walloon Housing Code, *Parl. St.* W. Parl. 2005-06, no. 322, 25-26.
[1159] Adv. Council of State 9 December 2008, no. 45479 concerning a draft of a Decision of the Flemish Government to modify the regulation on the social rental system and the transfer of immovable property (not published).
[1160] Adv. Council of State 24 January 2006, no. 39563/VR/3 concerning a draft of Decree on the modification of the Decree of 15 July 1997 concerning the Flemish Housing Code, *Parl. St.* Vl. Parl. 2005-06, no. 824/1.
[1161] *Ibid*., 5.4.

general interest, more specifically the improvement of communication between letter and tenant and thereby also the livability of social residential complexes.[1162] As a consequence, no violation of the standstill clause had appeared according to the Council of State. This inevitably leads us to our second remark. Combined with the aforementioned case law of the Constitutional Court, how do both tests relate to each other? Do they actually merge into one test or are they two separate tests? And if so, is there one that we should favor to enhance the protection of the fundamental right to adequate housing?

b. Standstill vs. proportionality

411. In response to these questions, one possibility is to argue that proportionality is actually a central aspect of any investigation into the standstill obligation. Hachez for example approaches the justification of retrogressive measures in a similar way the European Court of Human Rights discusses the justification of limitations to ECHR rights (based on the conditions of legality, legitimate purpose and proportionality).[1163] Moreover, our focus on the limited number of judgments and advisory opinions that relate to the standstill principle in the context of the right to housing shows that the corresponding obligation to demonstrate willingness to learn the Dutch language is a recurring point of discussion. And because of this wording alone ('corresponding'), a proportionality test here does force itself to the foreground in a very natural way. That does of course not explain how the other relevant and contested measures in these judgments and advisory opinions, which were not described as corresponding obligations, were subjected to a proportionality test just as well.

412. We believe that a proportionality assessment that directly tests these measures against article 23 differs quite significantly from the way in which we have described the standstill principle thus far. We have seen how the first essential step, an inquiry into the regression itself and the extent thereof, has not been taken. This sloppy approach rather than a systematic standstill investigation has actually been a more general recurring problem in national case law.[1164]

[1162] *Ibid*., 5.2.2.
[1163] I. HACHEZ, *Le principe de standstill dans le droit des droits fondamentaux: une irréversibilité relative*, Brussel, Bruylant, 2008, 424-429.
[1164] I. HACHEZ, "Le principe de standstill: actualités et perspectives", *RCJB* 2012, no.1, (6) 12-16; For an example of a judgment that does carefully apply the right order of standstill investigation, see: Council of State 23 September 2011, no.215.309, Cléon Angelo.

413. Also, and more importantly, the standstill principle demands for a comparison of situations, not (or certainly not in first instance) for a balancing of interests under article 23. The aforementioned *Coomans* judgment departs from what appears to give extra credibility to the idea that they are indeed two different tests. The Council of State clarified that the standstill principle should only be taken into account when the government has neglected to properly protect the rights of its citizens against others, not when it concerns a negative obligation to abstain from interfering with the enjoyment of a constitutional right.[1165,1166] By calling the obligations to protect positive obligations, the Council of State deviates from the traditional typology of human rights obligations, which categorizes them as negative obligations. The ensuing practical difficulties of such a distinction become visible all too quickly when the Council starts to apply its theoretical considerations to the case and awkwardly concludes that it is not necessary to make a distinction and to decide the type of obligation on this occasion. It continues that either way, a proportionality assessment has to ensue. So while the theoretical considerations seemed to make a distinction between standstill and proportionality, their application to the case provides quite a different outlook.

414. In response to the Coomans decision, Steen correctly concludes that it broadens the scope of the standstill obligation, because proportionality is usually applied when investigating constitutional rights that indisputably do have direct effect.[1167] Vanneste adds to this reaction that the decision suggests that standstill is only one expression of the proportionality test.[1168] What follows from both reactions to the judgment is that the proportionality test, which we have seen to dominate the (limited) standstill case law on the right to housing, is not traditionally part of the standstill obligation.

415. Now if retrogressive measures on the right to housing can indeed be directly tested against article 23 on the basis of proportionality, it seems self-evident that we should be

[1165] Council of State 17 November 2008, no. 187.998, Coomans; B. STEEN, "Artikel 23 van de Grondwet en de rechtspraak van de Raad van State", in W. RAUWS en M. STROOBANT (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, (113) 128-131.
[1166] It is unclear whether this also resonates in the other rights of article 23 or only with regard to the right to a decent living environment: A. VANDEBURIE, "Le Conseil d'État et l'obligation de standstill déduite de l'article 23, alinéa 3, 4°, de la Constitution : de nouvelles précisions", *JLMB* 2009, no.2, (75) 78.
[1167] B. STEEN, "Artikel 23 van de Grondwet en de rechtspraak van de Raad van State", in W. RAUWS en M. STROOBANT (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, (113) 130.
[1168] F. VANNESTE, "Over de cruciale rol van (sociale) grondrechten in België", in Vereniging voor de vergelijkende studie van het recht van België en Nederland (ed.), *Preadviezen 2012,* Den Haag, Boom Juridische Uitgevers, 2012, (13) 39.

pleased with this evolution from the perspective of socio-economic rights protection. There appears to be for example no need to properly investigate the question whether or not the regression is considerable. In case of a strict application of the standstill principle on the other hand, the judge only has to determine that the decline of the protection level is not significant: case closed.[1169]

416. Yet, somewhat paradoxically, we argue that a proportionality test actually does provide the government more leeway to decrease the protection level than is accepted on the basis of the traditional theory of the standstill principle.[1170] We have said that in case a considerable regression has been determined in the context of the standstill principle, the government has to prove that a (pressing) general interest for the challenged measure exists. But we have also seen how the proportionality test is based on the assumption that the government has acted in the general interest, and that this can only be contested in case of manifest unreasonableness. In other words, there is a difference in who carries the burden of proof. Admittedly, as we have mentioned earlier, the relevant case law does stress that despite the necessary respect for the opinion of the competent legislator, the core of the right to adequate housing must still be protected. This of course narrows the margin of appreciation again, but in our opinion only very slightly. For the Constitutional Court, this minimum core merely pertains to avoiding the loss of a home. Only then will it thus be possible to question the relevant measure. One could make a case that the term 'considerable regression' used in the context of the standstill principle requires at least a bit more than only that.

417. We may conclude that directly testing a retrogressive measure against article 23 on the basis of proportionality is not (necessarily) superior to the standstill principle. At best, it is able to further concretize the right's content. It is clear that in this context a proportionality test is neither a threat to the separation of powers due to judges exceeding their competences, nor that this form of direct effect creates some sort of breakthrough in housing rights protection.

[1169] I. HACHEZ, "Le principe de standstill: actualités et perspectives", *R.C.J.B.* 2012, no.1, (6) 11.
[1170] F. VANNESTE, "Over de cruciale rol van (sociale) grondrechten in België", in Vereniging voor de vergelijkende studie van het recht van België en Nederland (ed.), *Preadviezen 2012*, Den Haag, Boom Juridische Uitgevers, 2012, (13) 33; B. STEEN, "Artikel 23 van de Grondwet en de rechtspraak van de Raad van State", in W. RAUWS en M. STROOBANT (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, (113) 130.

418. Regardless of the exact content of the test applied to investigate retrogressive measures, a considerable margin of appreciation is clearly left to the government *sensu lato*. The domestic approach to the principle is by and large the same with regard to international instruments and article 23 of the Constitution.[1171] At the same time, this consistency between the interpretation of national and international law only exists within the case law of the national courts. It is undisputed that the standstill principle of article 23 of the Constitution is imported from international human rights law on socio-economic rights, but having been appointed by the legislator as the protagonist to give practical meaning to this obligation, the judicial branch has obviously given its own interpretation to the concept and has diverted somewhat from the approach elaborated in General Comments of the Committee on Economic, Social and Cultural Rights. So what are then the main differences? Could they come to a different outcome for the same retrogressive measures? And most importantly, should we adhere more closely to these theoretical conditions from international human rights law to give more result-oriented effect to the right to housing on the national plane?

C. Justification of retrogressive measures in international human rights law

1) Presumption of impermissibility

419. In General Comment No. 3, retrogressive measures are not regarded as *prima facie* violations of the Covenant; they merely have to be justified accordingly. In General Comments no. 13 through 19 however, the Committee took the position that there is a strong presumption of impermissibility of any retrogressive measures.[1172] Only afterwards did it repeat the original conditions to divert from this rule with the obligatory reference to the totality of rights and the full use of maximum available resources, also adding that the state party has the burden of proving that all alternatives have been carefully considered.[1173] As said before, the justification via the totality of rights is reminiscent of one of the exceptions described earlier in the national context (supra, par. 395). The two other exceptions as distinguished by Maes and Vanderlinden in the national context are nonetheless absent. While we have considered the equivalent alternative as a possible explanation for the adoption of a

[1171] G. MAES, "Het standstillbeginsel in verdragsbepalingen en in art. 23 G.W.: progressieve (sociale) grondrechtenbescherming", *RW* 2005-06, no.28, (1081) 1084.
[1172] A. MÜLLER, "Limitations and derogations from economic, social and cultural rights", *HRLR* 2009, vol.9, no.4, (557) 588; A. NOLAN, "Budget analysis and economic and social rights", in E. RIEDEL, G. GIACCA and C. GOLAY (eds.), *Economic, social, and cultural rights in international law: contemporary issues and challenges*, Oxford, Oxford University Press, 2014, (369) 376.
[1173] CESCR, *General Comment no.13*, par.45.

retrogressive measure, there is no requirement to the standstill obligation to consider all alternatives.

420. In four of those General Comments (No. 14, 15, 17 and 19), the Committee has additionally stated that retrogressive measures cannot be incompatible with the core obligations.[1174] Considering that there is no consensus on the content of this core, it is unclear as to when exactly a retrogressive measure would violate it.[1175] We have seen how the loss of a home has been described as the essence of the right to housing in Belgian case law, but there it was considered as the point at which the government's large margin of appreciation is limited, not the point at which a retrogressive measure is automatically prohibited.

421. Somewhat on a side note but nonetheless illustrative of the problematic relationship between retrogression, minimum core and progressive realization, we notice that of those four General Comments, both the 14th and 15th General Comment state that the minimum core itself is also non-derogable.[1176] This could be considered as a confirmation of the Maastricht Guidelines[1177], but clearly diverts from the Committee's original position in General Comment No. 3 (supra). While General Comment No. 15 already reintroduced the unavailability of resources as a justification for not fulfilling the minimum core, the other two more recent General Comments (No. 17 and 19) no longer characterized the core as non-derogable altogether. We therefore appear to have gone full circle with regard to the question whether the non-fulfillment of the minimum core can be justified.[1178] Yet, combined with the statement in General Comments No. 17 and 19 that retrogressive measures cannot violate the core, it leads to the awkward conclusion that a state can justify its non-compliance with the core obligations of those rights as long as it has not realized that core yet. Beyond that point

[1174] CESCR, *General Comment no.14*, par.48; CESCR, *General Comment no.15*, par. 42; CESCR, *General Comment no.17*, par. 42; CESCR, *General Comment no.19*, par. 64.
[1175] If we would apply the aforementioned maximalist approach with regard to the right to housing and include the entire paragraph 8 of General Comment No. 4 to the core or incorporate immediate obligations of respect and protect to it, a state would have a very small margin of appreciation.
[1176] CESCR, *General Comment no.14*, par. 47; CESCR, *General Comment no.15*, par. 40.
[1177] International Commission of Jurists (ICJ), "Maastricht Guidelines on Violations of Economic, Social and Cultural Rights", *HRQ* 1998, vol. 20, (691) 695, par.9: "*(…) minimum core obligations apply irrespective of the availability of resources of the country concerned or any other factors and difficulties*"; We agree with De Schutter that this is not an accurate reading of the Committee's own position in General Comment no.3, par.10: O. DE SCHUTTER, "Introduction", in O. DE SCHUTTER (ed.), *Economic, social and cultural rights as human rights*, Edward Elgar Publishing, Cheltenham, 2013, (xiii) xxvii; L. CHENWI, "Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance", *De Jure* 2013, vol.46, no.3, (742) 753.
[1178] M. LANGFORD and J.A. KING, "Committee on Economic, Social and Cultural Rights", in M. LANGFORD (ed.), *Social rights jurisprudence. Emerging trends in international and comparative law*, Cambridge, University Press, 2009, (477) 493.

(but only then) will any measure threatening this core be held to be in violation of the Covenant. This places a burden on the better students of the international classroom and benefits the lesser ones. It serves as a first illustration of how too much focus on retrogression can easily stand in the way of the idea of progressive realisation (infra).[1179]

422. The conditions for adopting a retrogressive measure have been changing from one General Comment to the other. The most comprehensive specification of the conditions was provided by the General Comment on the right to social security:

> *(a) There was reasonable justification for the action;*
> *(b) Alternatives were comprehensively examined;*
> *(c) There was genuine participation of affected groups in examining the proposed measures and alternatives;*
> *(d) The measures were not directly or indirectly discriminatory;*
> *(e) The measures will not have a sustained impact on the realization of the right or an unreasonable impact on acquired rights and will not deprive an individual or group access to the minimum essential level;*
> (f) *There was an independent review of the measures at the national level.*[1180]

423. Some of those definitely also appear in the review of the (domestic) standstill clause, albeit in a different shape or form. The first one certainly reminds us of the necessary reason of general interest, while (f) is assured by the advisory opinion of the Legislation Section of the Council of State. Furthermore, the equality principle should guarantee that measures will not be discriminatory (d). Conditions (b) and (c) on the other hand are not required according to domestic law (even though alternatives can of course be looked at by courts). Finally, the requirement in (e) is fulfilled with regard to the minimum core, which is also protected by the domestic application of the standstill principle. In contrast however, (e) also explicitly prohibits considerable retrogression instead of using it as only a condition to decide whether or not to investigate a possible violation of the standstill principle. An inquiry into for example the extent to which an increase of the rent guarantee creates an unfavourable impact on the right to housing is an inquiry to decide on the permissibility of the measure altogether,

[1179] M. DOWELL-JONES, *Contextualising the International Covenant on Economic, Social and Cultural Rights: assessing the economic deficit*, Leiden, Martinus Nijhoff Publishers, 2004, 52.
[1180] CESCR, *General Comment No. 19*, par. 42.

not on the question whether or not a reason of general interest can be found to explain the existence of the measure.

424. One could question the general nature of the requirements set out by General Comment No. 19. They could be considered to be only relevant for the right to social security in particular, certainly considering the aforementioned variations between the different General Comments. In the same vein, the presumption of impermissibility might only pertain to the specific right discussed in each of those later General Comments (and in other words not to the right to housing). In General Comment No. 18 however, the Committee adds the short but significant phrase "*as with all other rights*"[1181], which suggests a more general application of this presumption.

2) More leeway for budgetary concerns?

425. Regardless of the above, the Committee seems to have taken a step back in recent years. In General Comment No. 21, but especially nos. 22 and 23, the CESCR does no longer mention impermissibility as the starting point.[1182] Equally remarkable is how these General Comments have been adopted since the beginning of the economic crisis.[1183] Is it a coincidental diversion of its previous General Comments[1184] or does the Committee very consciously want to leave more normative and policy wiggle room in tackling the crisis? It is difficult to say. General Comment no. 23 still proclaims that State parties "*should avoid taking any deliberately retrogressive measure without careful consideration and justification*", but at the same time it does refer to the economic crisis as a reason for introducing retrogressive measures. The requirements the document cites next stem directly from a letter on austerity measures by the CESCR Chairperson as well[1185]: states have to demonstrate that

[1181] CESCR, *General Comment no.18*, par.34.
[1182] CESCR, *General Comment no. 21: Right of everyone to take part in cultural life (art. 15, para. 1(a), of the International Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, par. 65; CESCR, *General Comment no. 22 on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)*, 2 May 2016, par. 38; CESCR, *General Comment no. 23 on the right to just and favourable conditions of work (article 7 International Covenant on Economic, Social and Cultural Rights)*, 27 April 2006, par. 52.
[1183] The adoption of General Comment no. 19 on the right to social security also dates from after the beginning of the crisis, but was developed and discussed earlier.
[1184] After all, the General Comment merely concerns the right to take part in cultural life, not one of the more discussed ones in times of economic crisis like the right to work or social security that do raise more significant budget-related questions.
[1185] Chairperson of the CESCR, *Open letter to states parties regarding the protection of rights in the context of economic crisis*, www2.ohchr.org/english/bodies/cescr/docs/LetterCESCRtoSP16.05.12.pdf, 16 May 2012.

the measures are temporary, necessary and proportionate, non-discriminatory and respect the core obligations.[1186]

426. This was not the first time the Committee addressed the scenario in which a state party uses resource constraints as an explanation for retrogressive measures. An earlier statement had already provided some limited guidance in the form of objective criteria that have to be taken into consideration in such scenarios.[1187] Of course, all of this specifically relates to measures adopted out of budgetary concerns, not to non-resource related normative or policy choices that also negatively impact socio-economic rights protection. The Chairperson's letter from which General Comment no. 23 borrowed its conditions clearly indicates that it envisions austerity measures in particular and does in fact not mention the words "retrogressive measures" once.[1188] The inclusion of the condition that these measures should only be temporary also hints at that. So while the economic crisis appears to have made the CESCR reconsider the presumed impermissibility of retrogressive measures due to budgetary considerations, it is far from established that its position on retrogressive measures in general has changed or is changing significantly. Firstly because the cited documents do obviously not concern non-resource related retrogressive measures, but secondly also because the requirements outlined in the Chairperson's letter are actually still applied by the CESCR in a strict manner in its Concluding Observations.[1189]

3) Connection between article 2 (1) and 4 ICESCR

427. When making a distinction between resource and non-resource motivated retrogressive measures, we cannot ignore the relationship between article 2 (1) and the limitations clause of

[1186] CESCR, *General Comment no. 23*, par. 52; See also: CESCR, *Right to just and favourable conditions of work (art.7 of the Covenant*, Draft prepared by Virginia Bras Gomes and Renato Ribeiro Leao, 20 January 2015, par. 52.

[1187] CESCR, *An evaluation of the obligation to take steps to the 'maximum of available resources' under an Optional Protocol to the Covenant*, E/C.12/2007/1, 10 May 2007, par. 10: "(a) the country's level of development; (b) the severity of the alleged breach, in particular whether the situation concerned the enjoyment of the minimum core content of the Covenant; (c) the country's current economic situation, in particular whether the country was undergoing a period of economic recession; (d) the existence of other serious claims on the State party's limited resources (…); (e) whether the State party had sought to identify low-cost options; (f) whether the State party had sought cooperation and assistance or rejected offers of resources from the international community (…)."

[1188] A. NOLAN, "Budget analysis and economic and social rights", in E. RIEDEL, G. GIACCA and C. GOLAY (eds.), *Economic, social, and cultural rights in international law: contemporary issues and challenges*, Oxford, Oxford University Press, 2014, (369) 378.

[1189] CESCR, *Concluding Observations Iceland*, 11 December 2012, E/C.12/ISL/CO/4, par. 6; CESCR, *Concluding Observations New Zealand*, 31 May 2012, E/C.23/NZL/CO/3, par. 17; CESCR, *Concluding Observations Spain*, 6 June 2012, E/C.12/ESP/CO/5, par. 8.

article 4 of the Covenant, a problematic relationship the Committee has thus far failed to properly unravel.[1190] According to the latter provision, state parties may only subject Covenant rights to limitations "*determined by law*" and "*in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society*".[1191] Since every retrogressive measure limits the enjoyment of one or more socio-economic rights, both Craven and Leckie have argued that every one of those measures should also have to be justified on the basis of article 4 ICESCR.[1192] This obviously tightens up the standstill obligation only further.

428. But there is also a different reasoning, one that assigns each provision to a type of retrogressive measure. Article 4 then refers to formal limitations, while article 2 (1) merely concerns resource-motivated reductions in the level of protection.[1193] If that is the case, our comparison of the conditions justifying domestic retrogressive measures to international human rights law conditions should also take into account the requirements from article 4 ICESCR. And these conditions point to an even more rigid interpretation, because it can only be justified for the purpose of promoting general welfare.[1194] Reasons of for example maintaining public order or public morality are in other words rejected. The same can even be said with regard to respect for rights and freedoms of others, which would have a considerable impact on any proportionality assessment between the right to housing and the right to property. Consequently, the only justification appears to refer to the socio-economic well-being of people[1195], which offers a clearly smaller window of opportunity for retrogressive measures than 'reasons of general interest'.

[1190] A. NOLAN, "Budget analysis and economic and social rights", in E. RIEDEL, G. GIACCA and C. GOLAY (eds.), *Economic, social, and cultural rights in international law: contemporary issues and challenges*, Oxford, Oxford University Press, 2014, (369) 375.

[1191] Cf. article G Revised European Social Charter, which permits limitations that "*are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health or morals*".

[1192] M.C.R. CRAVEN, *The International Covenant on Economic, Social and Cultural Rights. A perspective on its development*, Oxford, Clarendon Press, 1995, 132; S. LECKIE, "Another step towards indivisibility: identifying the key features of violations of ECOSOC rights", *Human Rights Quarterly* 1998, (81) 98.

[1193] F. VLEMMINX, *Het profiel van sociale grondrechten*, Zwolle, Tjeenk Willink, 1994, 155-156; P. ALSTON and G. QUINN, "The nature and scope of states parties' obligations under the ICESCR", *Human Rights Quarterly* 1987, (156) 205; M. GOLDMANN, "Human rights and sovereign debt workouts", in J.P. BOHOSLAVSKY and J.L. CERNIC (eds.), *Making sovereign financing and human rights work*, Oxford, Hart Publishing, 2014, (71) 87.

[1194] A. MÜLLER, "Limitations to and derogations from economic, social and cultural rights", *HRLR* 2009, vol. 9, no. 4, (557) 587.

[1195] *Ibid*., 570-573.

429. There are however two major issues with having two sets of criteria. First of all, as was apparent in our national housing related examples earlier in this chapter, it is difficult "*to draw a strict line between retrogressive measures that were taken because of resource constraints and limitations that are not related to scarce resources*".[1196] But secondly, since it would be easier to justify, it would also invite governments to play the resource card more frequently.[1197] That would in turn instigate the already regularly used criticism that the economic crisis is applied as a convenient excuse by certain parts of the political spectrum for a policy which it wished to pursue on ideological grounds anyway.[1198]

4) Budgetary concerns: the position of the European Committee of Social Rights

430. We cannot end our comparison between national and international law on the topic of retrogressive measures without at least mentioning the European Committee of Social Rights. Here, things appear to be slightly different. We have seen earlier how the idea of progressive realization was not embedded in the European Social Charter. From there it logically follows that the principle of non-retrogression is not part of the Charter either. In the context of the collective complaints mechanism, the ECSR has referred to the principle only twice in an explicit manner.[1199,1200] One of those occasions was in the aforementioned *COHRE v. Italy*, where the earlier cited considerations on progressiveness were actually triggered by the argument that the Italian government had taken retrogressive measures.[1201] More important is then the reporting procedure, in which the European Committee has chosen for a more pragmatic approach.[1202] In the context of the economic crisis in Greece, the European Committee recognized in 2012 that "*it may be necessary to consolidate public finances in times of economic crisis*" to guarantee the sustainability of the welfare state, as long as it does

[1196] *Ibid*., 590.
[1197] F. VLEMMINX, *Het profiel van sociale grondrechten*, Zwolle, Tjeenk Willink, 1994, 157;
[1198] For a strong voice against the demonization of the austerity crisis as "neo-liberal", see: M. DOWELL-JONES, "The economics fo the austerity crisis: unpicking some human rights arguments", *HRLR* 2015, no. 15, (193) 208-212.
[1199] ECSR 23 May 2012, no. 66/2011, General Federation of employees of the national electric power corporation (GENOP-DEI) and the Confederation of Greek Civil Servants' Trade Unions (ADEDY)/Greece, par.47.
[1200] Additionally, the ECSR has implicitly referred to the prohibition to take retrogressive measures in ECSR 7 December 2012, no. 76/2012, Federation of employed pensioners of Greece (IKA-ETAM)/Greece, par. 69 and 78; see also I. HACHEZ, "Le Comité Européen des Droits Sociaux confronté à la crise financière Grecque: des decisions osées mais inégalement motivées", *TSR* 2014, no. 3, (243) 257.
[1201] ECSR 25 June 2010, no. 58/2009, COHRE/Italy, par. 24-27.
[1202] ECSR, "General consideration on certain areas covered by the Charter: social protection. General Introduction", *Conclusions* XIII-4, 143; ECSR, *Conclusions* XIV-1, Finland; W. VANDENHOLE, "Article 26: The right to benefit from social security", in A. ALEN, J. VANDE LANOTTE, E. VERHELLEN, F. ANG, E. BERGHMANS and M. VERHEYDE (eds.), *A commentary on the United Nations Convention on the Rights of the Child*, Leiden, Martinus Nijhoff Publishers, (1) 29.

not undermine the core framework of social protection.[1203] It also declared that a retrogressive measure is permissible if it does not "*excessively destabilize the situation of those who enjoy the rights enshrined in the Charter*."[1204] This is obviously much more reminiscent of the conditions brought forward in domestic case law (i.e. only excessive regression is impermissible, margin of discretion until the core is reached).

431. Yet, the Committee has shown a whole different approach as well. Back in 2009, it clearly stated that the economic crisis provides no excuse for states not to fulfill their obligations.[1205] In the context of the right to housing, the Committee has also spoken very clearly against the reduction of socio-economic rights protection during the crisis. It has argued that state parties have to take measures to effectively guarantee the protection of Charter rights at times when beneficiaries need it most. Regardless of the economic situation, a state must for example match the increase of persons necessitating shelter or social housing. [1206] According to the ECSR, even in harsh economic times the idea of progressiveness apparently prevails over the possibilities for retrogression.

432. Despite the lack of clarity on the part of both the CESCR and ECSR concerning retrogressive measures, there is one thing we can ultimately conclude with confidence on the basis of the above: compared to domestic jurisprudence, these international human rights bodies definitely advocate a more stringent interpretation of the standstill principle.

D. Appropriateness of retrogressive measures

433. In our search for more result-oriented obligations to improve the enjoyment of the right to housing, there is a certain tendency to quickly criticize or confine the possibilities for retrogressive measures. The theoretical international standards could therefore provide some more safeguards. But is it also the most appropriate way forward?

[1203] *Ibid*, par. 47; M. GOLDMANN, "Human rights and sovereign debt workouts", in J.P. BOHOSLAVSKY and J.L. CERNIC (eds.), *Making sovereign financing and human rights work*, Hart Publishing, Oxford, 2014, (71) 89.
[1204] ECSR 23 May 2012, no. 66/2011, General Federation of employees of the national electric power corporation (GENOP-DEI) and the Confederation of Greek Civil Servants' Trade Unions (ADEDY)/Greece, par. 13.
[1205] ECSR, *Conclusions* XIX-2 on the repercussions of the economic crisis on social rights.
[1206] ECSR 2 July 2014, no.86/2012, Feantsa/the Netherlands, par.128.

434. There is no better way to tackle that question than to hear from a firm opponent of the principle of non-retrogression, Mary Dowell-Jones: "*Not only does it appear to create an incentive for States parties not to implement Covenant rights to their highest ability nor to experiment with various strategies for their realization in case they are then held to be an unsuccessful program, it also fails to capture the complexity and fluidity of the task of realizing socio-economic rights given the ebb and flow of economic and political conditions.*"[1207] From this passage, we can distinguish two major quarrels she has with the concept.

435. Her first point of criticism (the part before the comma) is actually a more elaborated version of the argument we have encountered earlier when discussing the mobile point theory: a standstill obligation could limit the commitment of the public authorities to make further strides in socio-economic rights protection, since they would not be able anymore to scale the new level down again (supra). While we did not consider it a good argument against having a progressive reference point, we do support the argument against a very strong standstill obligation in itself. Making retrogressive measures much more conditional or almost absolute does indeed do little to promote or incentivize the progressive realization of socio-economic rights in the long run. It demobilizes states to actively pursue the full enjoyment of these rights, takes the edge of the idea of progressive realization.[1208] Instead of focusing on making strides, it directs our attention to what has been done, no matter how ineffective that might possibly be.[1209]

436. We can critique Belgian case law for restricting the *ratione materiae* of the standstill obligation to only those measures that mark a significant regression, leaving lots of uncertain interpretative space to the judiciary.[1210] We can also point out how the standstill principle has regularly been replaced by a proportionality test directly testing against article 23, which removes the main burden of proof from the government (supra). But for the specific reasons given above, we do not oppose the idea that the government must have a certain margin of discretion. It should keep the possibility to reevaluate measures and policies and change

[1207] M. DOWELL-JONES, *Contextualising the International Covenant on Economic, Social and Cultural Rights: assessing the economic deficit*, Leiden, Martinus Nijhoff Publishers, 2004, 52.
[1208] A. VANDEBURIE, *L'article 23 de la Constitution. Coquille vide ou boîte aux trésors?*, Brussel, La Charte, 2008, 66.
[1209] I. HACHEZ, *Le principe de standstill dans le droit des droits fondamentaux: une irreversibilité relative*, Brussel, Bruylant, 2008, 585-588 and 591-592.
[1210] H. DUMONT, "Conclusions: l'apport des droits fondamentaux au droit de l'environnement, de l'urbanisme et du logement", *Amén*. 1996, (287) 289.

course drastically if it considers this to be necessary for the effectiveness of socio-economic rights, even if this first entails taking a step back.

437. Take for example the aforementioned abolition of the free share of electricity. Besides the ecological argument used in favour of the abolition, it was also said that it did not attain its social objectives.[1211] Since the cost of the measure was compensated in the other kilowatt-hours (supra), it favoured those households with a low energy consumption level. Yet, a significant number of the poorer households live in badly isolated dwellings heated with electricity and/or use older energy-wasting equipment. They did in other words not benefit from the measure.[1212] Even worse, the households with a budgetmeter, who already have serious problems to pay their energy bills, did not receive the free share altoghether, since they have to load a pay card in order to receive electricity.[1213] In short, there is enough reason to argue in favour of an abolition of the measure. This of course requires one big leap of faith: we must assume that these types of measures are indeed taken out of concern for the protection of the right to adequate housing. It is a difficult task to decide whether or not the government has adopted these measures in the general interest.

438. The second problem (the part behind the comma) that can be gathered from the cited passage concerns the flexibility of the principle in light of the affordability of the welfare state. In other words, it relates more specifically to resource-motivated decisions, which find particular relevance in the economic crisis. This is of course not the first economic crisis since the adoption of the ICESCR. In response to the economic recession in the 1980s, Tomuschat pessimistically said that "*with the collapse of the underlying economic assumptions (…), the [ICESCR] itself now seems to have lost its cornerstones*".[1214] The assumptions Tomuschat refers to were based on the economic optimism of the fifties and sixties. But then again, every treaty or piece of legislation is essentially a testament of its time. Just as much as democratic elections or free speech should be upheld and respected in times of political distress or uproar,

[1211] Report on behalf of the Commission for Living Environment, Nature, Spatial Planning, Energy and Animal Welfare on the draft of Decree concerning miscellaneous provisions on energy, *Parl. St.* Vl. Parl. 2015-16, no. 461/6, 5.
[1212] N. BATIS and H. VAN OOTEGEM, "Eau et énergie: à quand des droits effectifs?", *Echos log.* 2010, no.1, (14) 15; VREG and VEA, *Eindrapport met betrekking tot de evaluatie van de maatregel tot toekenning van gratis elektriciteit*, 2012, www.vreg.be/sites/default/files/rapporten/rapp-2012-4.pdf, 40.
[1213] M. CLYMANS and M. VANDEN EYNDE, "Leve de liberalisering ! Gas en elektriciteit vrij te koop. Of toch niet?", in B. HUBEAU and P. JADOUL (eds.), *Vers un droit fondamental à l'énergie? Naar een grondrecht op energie?*, Brugge, Die Keure, 2006, (183) 187.
[1214] C. TOMUSCHAT, "Human rights in a world-wide framework – some current issues", *Zeitschrift für Aüslandisches öffentliches Recht und Völkerrecht* 1985, vol.45, (547) 566-567.

an economic recession is a litmus test for socio-economic rights.[1215] Even more so, specifically at these moments should fundamental rights rise to the occasion.[1216]

439. At the same time, it is of course much easier to proclaim a principled prohibition of retrogressive measures in times of economic prosperity. An important question, applicable to Belgium but to a lot of other western European countries as well, is the following: with a considerable public debt, an economy still recovering from a serious crisis and, most importantly, a population gradually ageing, to what extent will the current level of socio-economic protection remain feasible? Against that background, one might argue that for the survival of the social welfare state in the long run, the standstill principle should not be applied too rigorously so that budgetary cuts can be made. Not addressing deficits now could also lead to a subpar protection of socio-economic rights in the future, potentially worse than what might result from current retrogressive measures. Legal backing for that argument can actually be found in the requirement of article 2 (1) ICESCR to use the maximum of available resources. While this phrase is traditionally used to urge state parties to do more, there is no reason why it could not also impose the obligation not to go beyond that maximum, not to financially outstretch beyond those limits.[1217]

440. In 2013, the ratio for Belgium of government expenditure to GDP was 54.4 %, resulting in a sixth highest place amongst EU countries (cf. EU-28: 48.6%). The percentage of total expenditure spent on the main social functions as measured by Eurostat (health, education and social protection) totaled 62.5%, which is only the fourteenth highest figure in the EU.[1218] When looking at housing expenditure in particular, Belgium has always had a low ratio compared to the GDP due to the high home-ownership rate.[1219] For Flanders, this has not been any different in the most recent budget estimate, where only 1.74% of the expenditures will be

[1215] Simma, E/C.12/1990/SR.15, 3, par.7.
[1216] K.D. BEITER, *The protection of the right to education by international law*, Leiden, Martinus Nijhoff Publishers, 2005, 401-402; P. ALSTON and G. QUINN, "The nature and scope of states parties' obligations under the ICESCR", *Human Rights Quarterly* 1987, (156) 163-164.
[1217] M. DOWELL-JONES, "The sovereign bond markets and socio-economic rights. Understanding the challenge of austerity", in E. RIEDEL, G. GIACCA and C. GOLAY (eds.), *Economic, social, and cultural rights in international law: contemporary issues and challenges*, Oxford, Oxford University Press, 2014, (51) 66.
[1218] Eurostat, *Total general government expenditure by function*, 2013, http://ec.europa.eu/eurostat/statistics-explained/index.php/File:Total_general_government_expenditure_by_function_2013_(%25_of_GDP_%25_of_total_expenditure).png.
[1219] European Parliament, *Housing policy in the EU member states*, Social Affairs Series W-14, 1996, http://aei.pitt.edu/5992/1/5992.pdf, 9-10.

spent on the policy area of spatial planning, housing and immovable heritage.[1220] Backed by these figures, it definitely seems worthwhile and plausible to try and avoid cutting into socio-economic protection as much as possible. But since socio-economic rights are so interlaced with all different aspects of society, this is easier said than done.[1221] Take for example the abolition of a considerable amount of the so called '*belbussen*' (busses on demand) due to budgetary cuts or, in the words of the competent minister, budget optimization.[1222] It concerns a service free of extra charge provided by the Flemish transportation company De Lijn and enables people who request so in advance to take the bus at a chosen time and bus stop. While there is no right to transportation as such, this service is of particular importance for the elderly and persons with a disability[1223], whose mobility has been clearly acknowledged as a significant aspect of their independence in human rights instruments.[1224] In a very broad interpretation, transportation could even be regarded as an indicator of location adequacy in the context of housing adequacy.[1225]

441. Ultimately, the lasting affordability of socio-economic rights on its own is indeed a legitimate reason to take retrogressive measures. But only this reason should then be able to trigger such action. We argue that such measures can only be justified when they are indeed adopted with serious concern for the protection of socio-economic rights and with the idea of progressive realization still in mind. Part of that entails that disadvantaged groups in society, like those in the example of the *belbus*, have to be exempted as much as possible.[1226] It also means that the aforementioned argumentation for austerity measures should be clearly differentiated from delaying or reducing the development of socio-economic rights purely for

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[1220] https://www.vlaanderen.be/nl/vlaamse-overheid/werking-van-de-vlaamse-overheid/de-vlaamse-begroting-cijfers#47335.

[1221] M. DOWELL-JONES, "The sovereign bond markets and socio-economic rights. Understanding the challenge of austerity", in E. RIEDEL, G. GIACCA and C. GOLAY (eds.), *Economic, social, and cultural rights in international law: contemporary issues and challenges*, Oxford, Oxford University Press, 2014, (51) 64.

[1222] *Vr. en antw.* Vl. Parl., Vr. nr. 232, 11 March 2015 (K. BROUWERS); *Vr. en antw.* Vl. Parl., Vr. nr. 925, 20 March 2015 (B. RZOSKA).

[1223] VFG, *VFG-standpunt rond openbaar vervoer*, www.vfg.be/in-de-kijker/pages/vfg-standpunt-rond-openbaar-vervoer.aspx.

[1224] CESCR, *General Comment no. 6: The economic, social and cultural rights of older persons*, 7 October 1996, par. 33: "(…) national policies should help elderly persons to continue to live in their own homes as long as possible" and they should "facilitate mobility and communication through the provision of adequate means of transport"; Art. 9 and 20 Convention on the Rights of Persons with Disabilities.

[1225] United Nations Housing Rights Programme, *Monitoring housing rights. Developing a set of indicators to monitor the full and progressive realisation of the human right to adequate housing*, Nairobi, UN-HABITAT, 2003, 31-32.

[1226] CESCR, *General Comment no. 3*, par. 12; CESCR, *Concluding Observations Spain*, 6 June 2012, E/C.12/ESP/CO/5, par. 8; M. SEPULVEDA, *The nature of the obligations under the ICESCR*, Antwerpen, Intersentia, 2003, 328.

reasons of benefitting economic development. The latter should not suffice as a justification for austerity measures.[1227] The so called trickle-down effect, the idea that benefits from higher growth will ultimately flow to the disadvantaged sectors of society[1228], has generally been dismissed.[1229] Moreover, questions have also arisen on the effects of austerity measures on the economy in general. It has been said that they can actually create a negative spiral on the economy and could *de facto* materialize what they were originally set out to prevent.[1230]

442. Finally, we should address the uncontested presumption that has underpinned the whole discussion up to now: austerity measures threaten socio-economic rights protection. Since the budget is undeniably a very important instrument in the realization of socio-economic rights, budgetary decisions most definitely play a key role in the realization process.[1231] Most of the time these negative measures will manifest themselves in stricter conditions and lower allowances in order to optimize the budget. But do saving measures always have to be at odds with improving socio-economic rights, with adopting result-oriented measures? Consider for example the battle against homelessness. Research has repeatedly shown that prevention of homelessness and providing housing for homeless people is much more cost-effective for a state than solving and financing recurring problems afterwards.[1232] Only last year, the Centre

[1227] A. MÜLLER, "Limitations to and derogations from economic, social and cultural rights", *HRLR* 2009, vol. 9, no. 4, (557) 574 and 590.
[1228] E.g.: F.A. HAYEK, *The mirage of social justice*, London, Routledge, 1976.
[1229] E.g.: OECD, *Focus on inequality and growth*, 2014, www.oecd.org/els/soc/Focus-Inequality-and-Growth-2014.pdf; E. DABLA-NORRIS, K. KOCHNAR, F. RICKA, N. SUPHAPHIPHAT and E. TSOUNTA, "Causes and consequences of income inequality: a global perspective", *IMF Staff Discussion Note SDN/15/13*, 2015, www.imf.org/external/pubs/ft/sdn/2015/sdn1513.pdf; A. McCHESNEY, "Promoting the general welfare in a democratic society: balancing human rights and development", *NILR* 1980, vol. 27, (283) 319; UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The realization of economic, social and cultural rights. Final report submitted by Mr. Danilo Türk, Special Rapporteur*, E/CN.4/Sub.2/1992/16, 3 July 1992, 24-26; P. HUNT, *Reclaiming social rights*, Aldershot, Ashgate, 1999, 197.
[1230] J. GUAJARDO, D. LEIGH and A. PESCATORI, "Expansionary austerity: new international evidence", *IMF Working Paper WP/11/158*, 2011, www.imf.org/external/pubs/ft/wp/2011/wp11158.pdf; Financial Times, "Nobel economist blasts Europe's austerity plans", 14 December 2011; M. DOWELL-JONES, "The sovereign bond markets and socio-economic rights. Understanding the challenge of austerity", in E. RIEDEL, G. GIACCA and C. GOLAY (eds.), *Economic, social, and cultural rights in international law: contemporary issues and challenges*, Oxford, Oxford University Press, 2014, (51) 82.
[1231] OHCHR, *Report of the High Commissioner for Human Rights on Implementation of Economic, Social and Cultural Rights*, E/2009/90, 8 June 2009, par. 46; Los Angeles Times, "Utah is winning the war on chronic homelessness with 'housing first' program", 24 May 2015, www.latimes.com/nation/la-na-utah-housing-first-20150524-story.html.
[1232] E.g.: D.P. CULHANE, "The Cost of Homelessness: A Perspective from the United States", *European Journal of Homelessness* 2008, vol. 2, no. 1, 97-114; P. FLATAU, K. ZARETKY, M. BRADY, Y. HAIGH and R. MARTIN, *The cost-effectiveness of homelessness programs: a first assessment: Volume 1*, Australian Housing and Urban Research Institute, 2008, www.ahuri.edu.au/publications/download.asp?ContentID=ahuri_80306_fr&redirect=true; P. KENWAY and G. PALMER, *How many, how much? Single homelessness and the question of numbers and cost*, New Policy Institute, 2003, www.crisis.org.uk/data/files/document_library/research/howmanyhowmuch_full.pdf; E.

for Housing Policy presented new results that once more clarified how homelessness has not only a terrible human cost, but is also incredibly expensive for the public purse.[1233] With regard to the United Kingdom, it illustrated that differences in public costs between resolving homelessness quickly or allowing it to persist depend severely on the personal stories behind and reasons for homelessness. But there is one returning element: preventing and rapidly resolving homelessness always costs less public money than allowing it to become sustained or repeated, ranging from little more than 3.000 to almost 19.000 pounds (between 4.000 and 26.500 euro).[1234] In 2005, the state of Utah (US) calculated the annual costs for an average homeless person to be 16.670 dollar, while providing an apartment and social worker only totaled 11.000 dollar. Convinced by those numbers, the State adopted the housing first program providing permanent supportive housing for targeted individuals and managed to reduce the share of chronically homeless with 91% over the last decade.[1235] On the basis of this knowledge, we can only support that in times of austerity measures the Flemish government decided to invest an extra 312.000 euro into the prevention of evictions.[1236]

443. A last example comes from the Netherlands, where in 2006 the four largest Dutch cities launched an ambitious plan to tackle homelessness. This plan aimed to provide homeless people with a structural form of housing (besides an income and an obligatory care plan) and also to prevent homelessness deriving from eviction.[1237] Not only were the effects visible in practice[1238], a 2011 research illustrated that it was also cheaper. With regard to the factual homeless, the financial benefits of the plan were measured to be double of its costs. The benefits of the plan for the potential homeless even totaled 1,3 billion euro.[1239] Of course, this

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DEMAERSCHALK, "Dakloosheid kost handenvol geld. Housing first als goedkoper alternatief", *Alert* 2014, vol. 40, no. 5, 16-24.

[1233] N. PLEACE, *At what cost? An estimation of the financial costs of single homelessness in the UK*, Centre for Housing Policy, University of York, 2015, www.crisis.org.uk/data/files/publications/CostsofHomelessness_Finalweb.pdf.

[1234] *Ibid*., vi and 10-17.

[1235] Utah Housing and Community Development Division, *Comprehensive report on Homelessness*, 2014, https://jobs.utah.gov/housing/scso/documents/homelessness2014.pdf;

[1236] *Hand*. Vl.Parl. Commission for Housing, Poverty Policy and Equal Opportunities, 2014-15, 8 January 2015, http://docs.vlaamsparlement.be/docs/handelingen_commissies/2014-2015/commWON-20150108-944755.pdf.

[1237] K. HERMANS, "Bouwstenen voor een Vlaams actieplan tegen dak- en thuisloosheid. Inspiratie uit Nederland, Finland en Schotland", Leuven, Steunpunt Beleidsrelevant Onderzoek Armoede, 2012, www.kuleuven.be/lucas/pub/publi_upload/2012_KH_paper%20vlas.pdf, 7-13.

[1238] Dutch Ministry of Health, Welfare and Sport, *Plan van aanpak dak- en thuislozen (maatschappelijke opvang). 2e fase*, 2011, https:/ www.movisie.nl/sites/default/files/alfresco_files/Plan%20van%20aanpak%20maatschappelijke%20opvang%202011%20[MOV-494198-0.3].pdf, 6.

[1239] Cebeon, *Kosten en baten van maatschappelijke opvang. Bouwstenen voor effectieve inzet van publieke middelen*, Dutch Ministry of Health, Welfare and Sport, 2011, www.opvang.nl/files/kba_MO_eindrapport_012.pdf, 6, 24 and 30.

does require a long-term vision, which is not always evident in times of economic crisis. With the beginning of the second phase of the program, resources were no longer assured. Short term financial gains were chosen over long term result-oriented governing. Nevertheless, these examples show that sometimes the expenses for protecting the right to housing can indeed be optimized, but that this does not automatically have to entail a decline of the protection level itself.

§ 4. Towards result-oriented obligations

444. One of our main points of criticism against the standstill obligation was that it does not push the envelope in trying to realize the right to housing. Even though theoretically the obligation not to take any retrogressive measures could certainly be seen as an invitation to take positive measures[1240], it does not legally incentivize a state to do so, quite on the contrary. The minimum core (obligations) and immediate obligations still require a lot of conceptual clarification as well in order for them to consistently and fully contribute to socio-economic rights progress. The last paragraph of this chapter will therefore specifically reflect on the possibilities and mechanisms that are more result-oriented.

A. A positive standstill obligation

445. The standstill obligation focuses on the (prohibition of a) significant reduction of the protection of the constitutional right to adequate housing. In other words, standstill is applied in a negative sense. But what about the possibility for a positive standstill obligation, which compels the government to take steps? A scenario in which this positive aspect of the principle could actually be enforced and the state could be held responsible for not making the constant effort to further realize the right to housing is however still very contested.[1241,1242]

[1240] G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerpen, Intersentia, 2003, 138; Report on behalf of the Commission for the review of the Constitution and the reform of the institutions released by Mr. Arts and Ms. Nelis, *Parl.St.* Senaat BZ 1991-92, no.100-2/4°, 85-86.

[1241] G. MAES, "Het standstillbeginsel in verdragsbepalingen en in art.23 G.W.: progressieve (sociale) grondrechtenbescherming", *RW* 2005-06, no.28, (1081) 1093.

[1242] Adv. Council of State 3 March 2011, no. 49323/I: This advice, concerning the consequences of reducing the distinction between employees and laborers, illustrates the limited working and negative application of the standstill-principle. Instead of answering the more prominent question whether each of the categories separately are guaranteed sufficient social protection, the Council only assessed whether their global level of protection would not be reduced. For more, see: F. VANNESTE, "Over de cruciale rol van (sociale) grondrechten in België", in Vereniging voor de vergelijkende studie van het recht van België en Nederland, *Preadviezen 2012*, Den Haag, Boom Juridische Uitgevers, 2012, (13) 29-30.

446. With the question at hand we are obviously entering the territory of state responsibility. With regard to the executive branch, the Court of Cassation clarified back in 1971 (the *Goffin* judgment) that when no specific time period is prescribed in which to carry out a certain law or decree, negligence can lead to an indemnification from the government.[1243] The second paragraph of article 23 of the Constitution obviously also encompasses the obligation of the legislative branch, since it stipulates that laws and decrees must guarantee economic, social and cultural rights to ensure everyone their right to dignity. It has however taken the Court of Cassation 35 years to pass a judgment similar to the one from 1971 but related to the legislative branch. During that time spell, the responsibility of the legislator for not taking legislative steps has nonetheless been argued for by a significant part of the legal doctrine, also with specific regard to article 23 of the Constitution. There was good reason for it as well, considering that no legal norm has ever fundamentally prevented such a judicial decision and that jurisprudence has certainly steered in that direction.[1244, 1245]

447. On the basis of for example the *Francovich* judgment by the European Court of Justice[1246], which decided that a member state could be convicted in case of negligence on behalf of the national legislator to timely or correctly transpose an EU directive into national law, Rauws concluded that it was no longer impossible that a judge would decide on a possible fault by the legislator according to national law as well.[1247] He continued that only time could tell what the implications would be for the positive obligation arising from the insertion of the socio-economic rights into the Constitution. Jacqmain was much clearer in his assertions following the *Francovich* judgment: "*Si un tel état des choses devait se prolonger, il deviendrait évident que le législateur (peut-être les législateurs) pèche par abstention*

[1243] Court of Cassation 23 April 1971, *RW* 1970-71, 1793, concl. F. DUMON.
[1244] Court of Cassation 27 May 1971, *Pas.* 1971, 962: With this judgment, the Court of Cassation determined that laws (i.e. also decrees and ordonnances) must respect hierarchically higher legal norms (with direct effect) and thus that the legislator must be careful in both taking and not taking action.
[1245] E.g.: Constitutional Court 15 May 1996, no. 31/96; Constitutional Court 6 June 1996, no. 36/96; A. VAN OEVELEN and P. POPELIER, "De aansprakelijkheid van publiekrechtelijke rechtspersonen voor ondeugdelijke wetgeving", in A. ALEN (ed.), *De doorwerking van het publiekrecht in het privaatrecht*, Gent, Mys & Breesch, 1997, (75) 125-126; M. MELCHIOR and C. COURTOY, "Het veruim van de wetgever of de lacune in de grondwettelijke rechtspraak", *TBP* 2008, no. 10, (587) 589.
[1246] ECJ 19 November 1991, C-6/90, Francovich and Bonifaci/Italy.
[1247] W. RAUWS, "Niet de ver-van-mijn-bed-show: sociale grondrechten en de praktijk, in W. VAN EECKHOUTTE and M. RIGAUX (eds.), *Sociaal recht: niets dan uitdagingen*, Gent, Mys & Breesch, 1995, (793) 804-805.

coupable à l'égard la mise en œuvre de l'art. 23, le défaut de normes positives enfreignant les article 10 et 11."[1248]

448. The aforementioned Court of Cassation judgment with regard to the responsibility of the executive branch logically also triggered the idea that a similar responsibility could be held by the legislator.[1249] With regard to the conditions for a fault that could lead to the liability of the legislator[1250], Maes found more concrete inspiration in the conclusion by Advocate-General Dumon and transposed his argumentation concerning the executive branch to the legislative branch.[1251,1252] Consequently, a higher norm would be needed to impose an obligation (not a mere possibility) on the legislator to enact legislation. This obligation would arise from the higher norm itself or the *ratio legis*. We have said earlier that due to the precise and specific wording of the second paragraph of article 23 it is possible to argue that this component of the constitutional provision has direct effect.[1253] In that scenario a full-fledged obligation on the legislator to take the necessary measures to guarantee the right to housing would arise from it.

449. Yet beside this objective element, direct effect traditionally requires a subjective element too, which refers to the legislator's intentions. As we know, the latter was obviously opposed to the provision having direct effect. But even if the higher norm does not impose an obligation with sufficient legal effect to potentially raise a liability claim, the legislator's fault could also arise from a violation of the *bonus pater familias* principle[1254]. In a social welfare state the government can after all be expected to see to its citizens as a *bonus pater*

[1248] J. JACQMAIN, "Droit au travail, droit du travail", in R. ERGEC (ed.), *Les droits économiques, sociaux et culturels dans la constitution*, Brussel, Bruylant, 1995, (163) 188.
[1249] H. VUYE, "Aansprakelijkheid van de Belgische Staat voor het doen en laten van de wetgever", *TBBR* 2002, no. 8, (526) 538.
[1250] That is of course notwithstanding the conditions of damage and the existence of a causal link between fault and damage, see: Concl. Adv.-Gen. F. DUMON, Court of Cassation 23 April 1971, *Arr. Cass.* 1971, 786-816; A. VAN OEVELEN, "De materiële voorwaarden voor de aansprakelijkheid van de staat voor de niet-uitvoering van zijn regelgevende bevoegdheid: een vergelijking tussen de rechtspraak van het Europees Hof van Justitie en die van het Hof van Cassatie", in X., *Publiek recht, ruim bekeken: opstellen aangeboden aan prof. J. Gijssels*, Antwerpen, Maklu, 1994, (427) 432-434.
[1251] G. MAES, "Algemene zorgvuldigheidsnorm en aansprakelijkheid voor de wetgevende macht", *NJW* 2004, no. 66, (398) 403-404.
[1252] The same parallels for the legislative branch could be drawn on the basis of other case law with a similar line of argumentation, see A. VANDEBURIE , "La mise en œuvre de droit à un logement décent de Waterloo à l'hôtel Tagawa, où sont les responsables" (note under Peace Court Brussel 14 November 2006), *TBBR* 2008, (489) 497.
[1253] G. MAES, "Het standstillbeginsel in verdragsbepalingen en in art.23 G.W.: progressieve (sociale) grondrechtenbescherming", *RW* 2005-06, no.28, (1081) 1094.
[1254] E. MAES, "Het Hof van Cassatie over de fout van overheidsorganen: streng, strenger, strengst …" (note under Court of Cassation 28 September 2006), *TBP* 2007, no. 9, (547) 550.

familias.[1255] However, as Dumon clarified in line with other jurisprudence, this does not mean that a judge can assess the expediency of the absence of legislation. The judge is only competent to assess the legality of it.[1256] Keeping with the application of Dumon's argumentation to the legislative branch, the legislator must comply with the time period the higher norm imposes. When no specific time period is indicated, as is the case in the context of article 23, the legislator should act within a reasonable time frame. This should then be judged on the basis of the conduct of a normal, careful and reasonably acting legislator placed in the same concrete circumstances.

450. On September 28, 2006, the Court of Cassation definitively sealed the deal regarding the question of the liability of the legislator for not adopting legislation imposed by a higher norm.[1257] In the run-up to the judgment, the conclusion by Advocate-General Leclercq applied a conception of fault very similar to the one set out in the previous paragraph. Leclercq included both the violation of a higher norm and of the *bonus pater familias* principle as faults by the legislator and adopted the condition of a reasonable time frame.[1258] This resulted in the then evident conclusion that *l'abstention du législateur ne peut donner lieu qu'à la responsabilité politique du législateur devant la Nation mais qu'à défaut de violation des règles de droit qui s'imposent au législateur, tels la Constitution, les traités internationaux et le droit communautaire, il ne peut y avoir faute du législateur*."[1259]

451. Although the outcome in the final judgment was ultimately the same, the Court of Cassation did not address the liability criteria in the same comprehensive manner. It does not mention the *bonus pater familias* principle, yet expands the responsibility of the legislator at the same time by apparently broadening the competences of the judge[1260]: "*Saisi d'une demande tendant à la réparation d'un dommage causé par une atteinte fautive à un droit*

[1255] P. DE HAAN, *Enkele hoofdlijnen van rechtsontwikkeling in de verzorgingsstaat*, Amsterdam, Koninklijke Nederlandse Academie van Wetenschappen, 1988.
[1256] Concl. Adv.-Gen. F. DUMON, Court of Cassation 23 April 1971, *Arr. Cass.* 1971, (786) 808.
[1257] Court of Cassation 28 September 2006, *Pas.* 2006, no. 9-10; The theoretical possibility was already announced a couple of months earlier in Court of Cassation 1 June 2006; H. VANDENBERGHE, "Overheidsaansprakelijkheid", *TPR* 2010, (2013) 2084.
[1258] Concl. Adv.-Gen. J.F. LECLERCQ, Court of Cassation 28 September 2006, *JT* 2006, (594) 598; see also E. MAES, "Het Hof van Cassatie over de fout van overheidsorganen: streng, strenger, strengst …" (note under Court of Cassation 28 September 2006), *TBP* 2007, no. 9, (547) 551; A. ALEN, "De overheidsaansprakelijkheid voor fouten van de wetgever. Over de cassatiearresten van 1 juni 2006 en 28 septemer 2006, in W. PINTENS, A. ALEN, E. DIRIX and P. SENAEVE (eds.), *Vigilantibus ius scriptum: feestbundel voor Hugo Vandenberghe*, Brugge, Die Keure, 2007, (1) 8.
[1259] Concl. Adv.-Gen. J.F. LECLERCQ, Court of Cassation 28 September 2006, *JT* 2006, (594) 603.
[1260] E. MAES, "Het Hof van Cassatie over de fout van overheidsorganen: streng, strenger, strengst …" (note under Court of Cassation 28 September 2006), *TBP* 2007, no. 9, (547) 549 and 551.

consacré par une norme supérieure imposant une obligation à l'État, un tribunal de l'ordre judiciaire a le pouvoir de contrôler si le pouvoir législatif a légiféré de manière adéquate ou suffisante pour permettre à l'État de respecter cette obligation, lors même que la norme qui la prescrit laisse au législateur un pouvoir d'appréciation quant aux moyens à mettre en œuvre pour en assurer le respect."[1261] In other words, the judgment declares that even when the higher norm provides a margin of appreciation as to what steps should be taken (i.e. an obligation of result according to international law (supra)), the legislator can be held responsible.[1262]

452. What does all of this now mean for the possibility of a positive standstill obligation for the right to housing? The considerations above show that the majority of the legal doctrine agrees with the Court of Cassation that it should be possible to hold the legislator liable for legislative lacunas it is obliged to address. The possibility for a judge to assess not only the legality of the legislator's negligence but also the expediency of it, as the 2006 judgment suggests, has nonetheless attracted some criticism because it would threaten the government's large margin of appreciation and the distribution of state powers.[1263] Additionally, it is important to take into account that the judgment of the 28th of September 2006 dealt with judicial delays and led to the finding of a violation of article 6 ECHR, a right of the first generation of human rights. As we know well by now, socio-economic rights are perceived as less enforceable and their content provides a particularly broad margin of appreciation (supra).[1264] Consequently, a similar judgment in the context of the right to housing appears unlikely.

453. While we believe that there are no major legal stumbling blocks left, even much less so than when Maes declared accordingly back in 2003[1265], the specific character of socio-

[1261] Court of Cassation 28 September 2006, *Pas.* 2006, no. 9-10, 1907; *CDPK* 2007, 218, note M. RIGAUX; *RCJB* 2007, 353, note S. VAN DROOGHENBROECK; *RW* 2006-07, 27, note A. VAN OEVELEN; *TBP* 2007, 546, note E. MAES.
[1262] Cf. Concl. Adv.-Gen. J.F. LECLERCQ, Court of Cassation 28 September 2006, *Pas*. 2006, no. 9-10, (1870) 1896.
[1263] M. UYTTENDAELE, "Du réflexe salutaire à l'ivresse du pouvoir" (note under Court of Cassation 28 September 2006), *JLMB* 2006, (1554) 1563; R. ERGEC, "La responsabilité du fait de la carence législative", in X. (ed.), *Mélanges Ph. Gérard*, Brussel, Bruylant, 2002, (287) 303; M. MAHIEU and S. VAN DROOGHENBROECK, "La responsabilité des pouvoirs publics du chef de méconnaissance des normes supérieures de droit national par un pouvoir législatif", *JT* 1998, (825) 842-844.
[1264] E.g.: M. SEPULVEDA, *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, Antwerpen, Intersentia, 2003, 121 et al.; T.H. MARSHALL, *Class, citizenship and social development*, Chicago, Chicago University Press, 1977, 115-116.
[1265] G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerpen, Intersentia, 2003, 362.

economic rights is an important factor to take into account when we ask ourselves the question whether or when a judge would apply such a positive standstill obligation.[1266] We reckon that it might be just a bit too delicate for a court to take into account financial and resource possibilities and constraints, political and social context and socio-economic circumstances in order to question the legislator's lack of action within its large margin of discretion. The very same argument can just as well be made with regard to the executive branch of government.[1267] Moreover and maybe most importantly, we have to realize that a positive standstill principle deals with the absence of legislation in itself. And considering that plenty of housing related legislation is in place, legislative lacunas are not the main problem. As we have tried to clarify in earlier chapters, this does not mean that the current legislation effectively contributes to the further realization of the right to housing. It is therefore necessary to consider viable ways to address further implementation of legislation on the right to housing.

B. A more enforceable attention for progress

454. We have seen how a principled prohibition of retrogressive measures does not give a positive impulse to make further progress and that an effective protection of a positive aspect of this standstill obligation would only address very extreme cases of state negligence. But how do we test whether sufficient progress is made and how could this be given any more enforceable meaning in a national context? We will first look into some techniques that have been developed in order to measure progress (1). Then we investigate the possibilities for enforcing progressive realization through court, again based on the international development of that concept (2). With that knowledge, we try to develop a framework that has the potential to create more result-oriented obligations on the domestic level (3).

1) International monitoring techniques

455. On the international plane, attempts to find the most appropriate ways to monitor progress have been made for several decades now. Quantitative tools can certainly provide at

[1266] H. VANDERLINDEN, "Effectiviteit van de sociale grondrechten in het Belgische recht, mythe of realiteit", *RW* 2008-09, no. 29, (1202) 1215.
[1267] N. VAN LEUVEN and F. VANNESTE, "De inroepbaarheid van het recht op wonen", in N. BERNARD and B. HUBEAU (eds.), *Recht op wonen: naar een resultaatsverbintenis?*, Brugge, Die Keure, 2013, (221) 251.

least some guidance.[1268] An important early source in this respect was the 1990 report by Special Rapporteur Danilo Türk regarding economic and social indicators. These indicators refer to statistical data that provide information for the assessment of progress in the realization of the rights concerned.[1269] With a comprehensive publication on human rights indicators by the Office of the High Commissioner for Human Rights twenty-two years later, it is safe to say that considerable progress has been made in the theoretical development of these indicators.[1270]

456. They are traditionally divided into three categories: structural, process and outcome. The first one relates to the extent to which a state has ratified relevant international instruments, adopted a regulatory framework and set up institutional mechanisms. Process indicators then look at the policy measures and necessary budgetary commitments the state has made or is willing to make in order to give effect to the rights it has accepted. Finally, the outcome indicators measure a state's human rights performance in different specific categories.[1271] Indicators have been developed in the context of the right to housing too, for example in a 2003 working paper by The UN Housing Rights Programme (UNHRP).[1272] In retrospect we can confidently state that this attempt was not overtly convincing. Not only did it not differentiate between the different types of indicators, it did not classify them under logical categories either. National legal protection and acceptance of international standards were for example used as housing rights elements under which indicators were categorized, alongside elements like housing adequacy and security of tenure. But in contrast to those latter aspects, the former are not components of the right to housing in itself. Rather they belong as structural indicators under each of the more substantive housing dimensions such as housing adequacy.[1273] The aforementioned document from the OHCHR is much more useful. It does

[1268] G. DE BECO, "The interplay between human rights and development the other way round: the emerging use of quantitative tools for measuring the progressive realization of economic, social and cultural rights", *HR&ILD* 2010, no. 2, (265) 276.
[1269] UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The new international economic order and the promotion of human rights. Progress report prepared by Mr. Danilo Türk, Special Rapporteur*, E/CN.4/Sub.2/1990/19, 6 July 1990, 4.
[1270] OHCHR, *Human rights indicators. A guide to measurement and implementation*, HR/PUB/12/5, 2012.
[1271] O. DE SCHUTTER, *International human rights law*, Cambridge, Cambridge University Press, 2010, 480; OHCHR, *Report on indicators for monitoring compliance with international human rights instruments: a conceptual and methodological framework*, HRI/MC/2006/7, 11 May 2006, 7.
[1272] United Nations Housing Rights Programme, *Monitoring housing rights. Developing a set of indicators to monitor the full and progressive realisation of the human right to adequate housing*, Nairobi, UN-HABITAT, 2003, 37-38.
[1273] A. EIDE, "The use of indicators in the practice of the Committee on Economic, Social and Cultural Rights", in A. EIDE, C. KRAUSE and A. ROSAS (eds.), *Economic, social and cultural rights*, Dordrecht, Martinus Nijhoff Publishers, 2001, (545) 550.

clearly distinguish between structural, process and outcome indicators and breaks down the indicators into the different dimensions that flow from General Comment No. 4 (habitability, availability, affordability and security of tenure).[1274]

457. While these indicators can help human rights practitioners as well as the CESCR in the assessment of progressive realization, they do focus only on the quantitative aspect. This is illustrated in the OHCHR document in that all the indicators begin with the words "proportion of" or a very similar wording (e.g. proportion of households living with sufficient living space, number/proportion of legal procedures seeking compensation following evictions). These indicators on their own are mere empty figures. They do not tell the entire story nor expose the reasons behind certain patterns, why for example x number of households live in hazardous conditions. Process and outcome indicators are basically interpreted in a simple cause-and-effect relationship.[1275] This is somewhat reminiscent of the perception of law as ultimate instrument for social change (i.e. legal instrumentalism), which we have criticized in part I of this research. There, we highlighted the need to take more socio-legal influences into consideration as well.

458. The system of indicators can be given more meaning with the establishment of benchmarks, which serve as projected levels of compliance (over a period of time) set at the domestic level. The indicators can then be tested against these benchmarks. Indicators and benchmarks also form part of the four-step approach (IBSA) proposed by the CESCR since General Comment No. 14. It requires the state to use a list of relevant human rights indicators (I) and set concrete benchmarks (B) that should then be suggested to the CESCR. In a third step called scoping (S), the latter will then discuss these proposals with the state party. Finally, an assessment (A) takes place of the state party report.[1276]

459. In practice however, the use of indicators and benchmarks in general has up to now not appeared to have been very successful.[1277] Even with sufficient data it is very difficult to pin

[1274] OHCHR, *Human rights indicators. A guide to measurement and implementation*, HR/PUB/12/5, 2012, 94.
[1275] OHCHR, *Report on indicators for monitoring compliance with international human rights instruments: a conceptual and methodological framework*, HRI/MC/2006/7, 11 May 2006, 7.
[1276] E. RIEDEL, G. GIACCA and C. GOLAY, "Development of economic, social and cultural rights in international law", in E. RIEDEL, G. GIACCA and C. GOLAY (eds.), *Economic, social, and cultural rights in international law: contemporary issues and challenges*, Oxford, Oxford University Press, 2014, (3) 24-26.
[1277] L. CHENWI, "Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance", *De Jure* 2013, vol. 46, no. 3, (742) 759; E. FELNER, "Closing the 'escape hatch': a toolkit to monitor the progressive realization of economic,

down benchmarks that are both sufficiently ambitious and realistic at the same time. No matter whether or not the concerned benchmark is reached, that information does not give a conclusive answer to the question whether the state has done everything it could have done according to the maximum of its available resources.[1278] In order to evaluate a state's capacity and willingness to use its resources but also even to determine benchmarks, the need for an analysis of the public budget allocation arises. Such an analysis can look at the public expenditure ratio, the social allocation ratio and the social priority ratio (i.e. how much of the social allocation ratio goes to each social component). With the information provided by the human rights indicators, a budget analysis can assist in identifying whether the government's priorities coincide with those that ought to be made.[1279] As with housing rights indicators and benchmarks however, a certain reticence is appropriate with regard to the causality between ratios and the enjoyment of the right to housing.[1280] A budget analysis should not be used in isolation because the bare data and ratios neglect to a certain extent the more complex and subjective societal reality that affects budget expenditures and their efficiency.[1281] As mentioned earlier, the relatively limited resources allocated to housing can for example not be analysed separately from the fact that the owner rate in Flanders is relatively high.

460. A specific approach that makes use of all these types of information to evaluate a state's compliance with its economic and social rights obligations is the International Social and Economic Rights Fulfillment Index.[1282] This SERF index, as it is abbreviated, is built on the information provided by outcome indicators as to how well aspects of socio-economic rights are enjoyed. From there the approach works with so called Achievement Possibility Frontiers

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social and cultural rights", *Journal of Human Rights Practice* 2009, vol. 1, no. 3, (402) 410; M. SEPULVEDA, *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, Antwerpen, Intersentia, 2003, 317.

[1278] S. OSMANI, "Human rights to food, health and education", *Journal of Human Development* 2000, vol. 1, no. 2, (273) 291.

[1279] Fundar Center for Research and Analysis, "Dignity counts. A guide to use budget analysis to advance human rights", 2004, www.iie.org/Programs/IHRIP/Publications, 30.

[1280] G. DE BECO, "The interplay between human rights and development the other way round: the emerging use of quantitative tools for measuring the progressive realization of economic, social and cultural rights", *HR&ILD* 2010, no. 2, (265) 284.

[1281] E. FELNER, "Closing the 'escape hatch': a toolkit to monitor the progressive realization of economic, social and cultural rights", *Journal of Human Rights Practice* 2009, vol. 1, no. 3, (402) 412.

[1282] S. FUKUDA-PARR, T. LAWSON-REMER and S. RANDOLPH, "Measuring the progressive realization of human rights obligations: an index of economic and social rights fulfillment", *Economics Working Papers* 2008; S. RANDOLPH, S. FUKUDA-PARR and T. LAWSON-REMER, "Making the principle of progressive realization operational – The SERF Index. An index for monitoring state fulfillment of economic and social rights obligations", 2010, http://sakikofukudaparr.net/wp-content-/uploads/2013/01/AnIndexforMonitoringStateFulfillmentofEconomicandSocialRightsObligations2010.pdf, 2-3 and 5.

or APFs. On the basis of a comparison between the selected indicators and the concerned state's GDP per capita, APFs reveal what is feasible for a state to achieve when it would allocate the maximum of available resources to realizing socio-economic rights. They benchmark the obligations a state should be required to meet according to best practice. In other words, this approach tries to quantify the intricate meaning of "maximum of its available resources", reconciling for practical purposes the idealism of human rights rhetoric ("maximum") with the policy space states have at their disposal ("available").[1283] It is a very technical approach firmly rooted in economics and therefore a good illustration of how the monitoring of socio-economic rights is very much dependent on interdisciplinary collaboration.

461. As is the case with all aforementioned techniques that may monitor progress in the field of the right to housing, the SERF index is part of a quantitative assessment, primarily based on statistical data. All these approaches have a tendency to focus merely on the results without answering the many critical questions that arise between the existence of a right and its outcome. To what extent is the outcome actually the consequence of the adopted measure? We do not in any way contend that quantitative analysis cannot contribute to the assessment of progressive realization. On the contrary, it is a necessary element to assess a state's compliance, but it does give only an incomplete picture.[1284] Additionally, given the main research question of this chapter, a more qualitative perspective is appropriate. Our primary aim is to look for ways to make the right to housing and the obligations that derive from it more result-oriented on the domestic level, not only to answer the question whether sufficient progress has been made in certain aspects of this right, which is the purpose of the CESCR reporting procedure and the main impetus for the use of indicators.

462. More useful for our purposes then is the OPERA framework. This approach contains both a quantitative and a qualitative analysis. It assesses both the outcome of a socio-economic right as well as the efforts taken to improve its realization, both obligations of result

[1283] A paradox described by: R.E. ROBERTSON, "Measuring state compliance with the obligation to devote the maximum available resources to realizing economic, social and cultural rights", *Human Rights Quarterly* 1994, (693) 694.
[1284] For more downsides of mere quantitative analysis, see Center for Economic and Social Rights, "The OPERA Framework. Assessing compliance with the obligation to fulfill economic, social and cultural rights", www.cesr.org/downloads/the.opera.framework.pdf, 11-12.

as well as obligations of conduct and the link between them.[1285] OPERA is an acronym depicting the four steps of the approach: outcomes, policy efforts, resources and assessment. The first step is pretty much self-explanatory in that it looks at indicators to measure the level of rights enjoyment. It does so with regard to minimum core obligations, non-discrimination and progressive realization. Since OPERA departs from the idea that outcomes alone cannot give a full understanding of a state's compliance, the second step looks at the policy efforts and seeks to determine to what extent laws and policies have translated into goods and services on the ground that are available, accessible, acceptable and of adequate quality (AAAAQ criteria). This step not only tries to answer the question whether law in the books has transformed into law in action. It also considers whether this has happened while upholding the principles of participation, accountability and transparency, principles that are certainly related to the value of autonomy as part of social dignity (supra). The third step (resources) then draws on the well-known tools of budget and economic policy analysis, but also explores the priorities of the state's resource policy and whether expenditures are equitable and effective (e.g. which income groups benefit from the expenditures?). In its final step (assessment) the frameworks provides a broader analysis of the contextual factors, both bottom-up (e.g. knowledge of law) as well as top-down influences (e.g. state structure, conduct of third parties), to ultimately synthesize with the findings of the first three steps to make a final assessment.[1286]

463. Very similar to OPERA but slightly more compact is Felner's causality analysis.[1287] Felner too tries to remedy the idea that the main focus should be on the attainment of indicators, promoting both a quantitative as well as a qualitative perspective in a three-step approach. The first step once more uses quantitative data to identify deprivations and disparities in the enjoyment of socio-economic rights. Secondly, the direct and indirect determinants of these outcomes need to be analyzed to identify what can reasonably be expected of the state. These influencing factors are present both on the supply-side (where the AAAAQ criteria ought to be taken into account) as well as the demand-side. A third and final

[1285] L. CHENWI, "Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance", *De Jure* 2013, vol. 46, no. 3, (742) 765.
[1286] Center for Economic and Social Rights, "The OPERA Framework. Assessing compliance with the obligation to fulfill economic, social and cultural rights", www.cesr.org/downloads/the.opera.framework.pdf, 13-29.
[1287] E. FELNER, "A new frontier in economic and social rights advocacy? Turning quantitative data into a tool for human rights accountability", *Sur-International Journal on Human Rights* 2008, vol. 5, no. 9, (109) 116-126.

phase of the causality analysis assesses the adequacy of the policy efforts taken to address these different determinants, which includes an analysis of the budget allocation.

464. For the purposes of this chapter, approaches like the OPERA framework and Felner's causality analysis are certainly useful, but indicators, benchmarks and other techniques alone enable only the monitoring of the fulfillment of the right to housing. A next step is to see what we can take away from the judicially imposed obligations that stem from the concept of progressive realization.

2) Enforceability of progressive realization

a. A review criterion

465. We know from the decisions of the European Committee of Social Rights as referenced throughout this research that this Committee has applied the idea of progressive realization in its decision-making. The decisions we used for our hypothetical complaint (supra, par. 280) also show how the Committee is able to put its finger on the existing problems and shortcomings of the state (and thereby point to what should be done). But the ECSR is of course not part of a system of separation of powers and checks and balances similar to that within states.[1288] It can therefore take a stance that stretches beyond the jurisprudence of the domestic judicial branch.[1289] This is only enhanced by the fact that progressive realization was neither incorporated into the Charter itself nor developed elsewhere than in the complaints procedure and the reporting system by the Committee itself. There is in other words no politically agreed-upon content that might serve as a viable criterion for application at the domestic level.

466. In contrast, the Optional Protocol to the ICESCR (OP-ICESCR)[1290], which entered into force in 2013, does provide such a review criterion that states have agreed upon: reasonableness. Individuals and groups of individuals can now submit communications to the CESCR concerning alleged violations of any of the Covenant rights. Belgium has ratified the Protocol on 20 May 2014, but no complaints against the Belgian state have been made yet. As

[1288] F. COOMANS, "Reviewing implementation of social and economic rights: an assessment of the 'reasonableness' test as developed by the South African Constitutional Court", *ZaöRV* 2005, vol.65, (167) 185.
[1289] G. DE BECO, "The interplay between human rights and development the other way round: the emerging use of quantitative tools for measuring the progressive realization of economic, social and cultural rights", *HR&ILD* 2010, no. 2, (265) 274.
[1290] Art. 18 Optional Protocol to the ICESCR: the OP required ten ratifications to come into force.

a matter of fact, at the moment of writing a total of only ten complaints against two State Parties (Spain and Ecuador) has thus far reached the CESCR, with two of them declared inadmissible and six complaints still pending.[1291] Article 8 (4) OP-ICESCR provides the CESCR with the review criteria to assess these complaints:

> *"When examining communications under the present Protocol, the Committee shall consider the reasonableness of the steps taken by the State Party in accordance with Part II of the Covenant. In doing so, the Committee shall bear in mind that the State Party may adopt a range of possible policy measures for the implementation of the rights set forth in the Covenant."*

467. Such a reasonableness review can of course not be entirely separated from aforementioned methods as for example Felner's causality approach. The third step of his analysis also requires a clarification of what may reasonably be expected from the concerned state.[1292] What is different is the way in which it is applied. Here it serves as the criterion for the CESCR acting as a quasi-judicial mechanism to assess an alleged violation of a specific Convention right. It is no surprise then that the incorporation of the reasonableness test and the exact wording of it is the outcome of fierce political debates.

468. Important voices against the adjudication of the rights in the ICESCR were the USA, China, Canada and the UK. They first opposed the idea of a complaints procedure altogether and later advocated for a reduced level of scrutiny and a general deference to states' policy choices.[1293] Several delegations also expressed concerns about possible interference with budget decisions and social policymaking.[1294] It was Louise Arbour, then High Commissioner for Human Rights, who made an appeal to the concept of reasonableness as a potential solution to the stalemate: "*As for normal judicial review functions, the key is often in*

[1291] As of 13 July 2016: www.ohchr.org/EN/HRBodies/CESCR/Pages/PendingCases.aspx.
[1292] O. DE SCHUTTER, *International human rights law*, Cambridge, Cambridge University Press, 2010, 509.
[1293] C. MAHON, "Progress at the front : the draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", *HRLR* 2008, vol. 8, no. 4, (617) 620-626; B. PORTER, "Reasonableness and article 8(4)", in R. BROWN, M. LANGFORD, B. PORTER and J. ROSSI, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: a commentary*, Capetown, Pretoria University Law Press, 2016 (194) 198-199.
[1294] E.g.: UN Commission on Human Rights, *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its first session*, E/CN.4/2004/44, 15 March 2004, par. 22 and 57-66; UN Commission on Human Rights, *Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its second session*, E/CN.4/2005/52, 10 February 2005, par. 32.

examining the 'reasonableness' of measures adopted by each state – given its specific resources and circumstances – by reference to objective criteria that are developed in accordance with standard judicial experience and with the accumulation of jurisprudence. (…) In many cases, it can also serve to establish if there is already the effective or appropriate implementation of existing laws and policies, rather than to determine the reasonableness of such laws and policies".[1295] That did not immediately persuade the most ardent opponents, who argued for a long time in favour of the inclusion of a reference to a state's broad margin of appreciation and proposed to include a standard of unreasonableness rather than one of reasonableness.[1296] It is in this negative sense that reasonableness is best known in common law countries. Giving in to such proposals however would have illustrated once more how human rights generations have to be treated differently. But not adequately addressing these political obstacles could have threatened the creation of a complaints procedure altogether.

469. The solution would ultimately come from the South African Constitutional Court and its judgment in the *Grootboom* case. Considering that the socio-economic rights sections 26 and 27 of the South African Constitution were drafted with article 2 (1) ICESCR firmly in mind[1297], it is not that surprising to see the negotiations now reverted back to South African practice in order to give shape to the justiciability of the concept of progressive realization. The relevant passage reads as follows: "*The measures must (be) … directed towards the progressive realization of the right of access to adequate housing (…) The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness*".[1298] With this declaration the Court

[1295] UN High Commissioner for Human Rights, *Statement by Ms. Louise Arbour to the Open-ended Working Group established by the Commission on Human Rights to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights*, 2005).

[1296] B. GRIFFEY, "Reasonableness test: assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", *HRLR* 2011, vol. 11, no. 2, (275) 295; Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development. Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fourth session*, A/HRC/6/8, 30 August 2007, par. 37, 95, 97 and 153; Human Rights Council, *Promotion and protection of all human rights, civil, political, economic, social and cultural rights including the right to development. Report of the open-ended working group to consider options regarding the elaboration of an optional protocol to the International Covenant on Economic, Social and Cultural Rights on its fifth session*, A/HRC/8/7, 23 May 2008, par. 10-11.

[1297] F. COOMANS, "Reviewing implementation of social and economic rights: an assessment of the 'reasonableness' test as developed by the South African Constitutional Court", *ZaöRV* 2005, vol. 65, (167) 170-171.

[1298] Constitutional Court (South Africa) 4 October 2000, CCT 11/00, Government of the Republic of South Africa et al./Grootboom et al., par. 41.

recognized the important role of the government in exercising policy choices without deferring to the state with regard to the assessment of the reasonableness itself.[1299] The excerpt served as a blueprint for a revised version of article 8 (4) OP-ICESCR with the criterion of reasonableness but without the explicit words "margin of appreciation", a draft that could finally be agreed upon by all delegates.[1300]

470. Through this difficult drafting process, it became clear that the CESCR would not be able to impose its own policy choices as part of the reasonableness review. The state was considered to be better placed to adopt effective measures and design adequate policies.[1301] Additionally and to reassure states during the negotiations, the Committee listed a number of possible factors that would come into play when assessing reasonableness:

> *"(a) the extent to which the measures taken were deliberate, concrete and targeted towards the fulfillment of economic, social and cultural rights;*
> *(b) whether the State party exercised its discretion in a non-discriminatory and non-arbitrary manner;*
> *(c) whether the State party's decision (not) to allocate available resources is in accordance with international human rights standards;*
> *(d) where several policy options are available, whether the State party adopts the option that least restricts Covenant rights;*
> *(e) the time frame in which the steps were taken;*
> *(f) whether the steps had taken into account the precarious situation of disadvantaged and marginalized individuals or groups and, whether they were non-discriminatory, and whether they prioritized grave situations or situations of risk."*[1302]

[1299] B. PORTER, "Reasonableness and article 8(4)", in R. BROWN, M. LANGFORD, B. PORTER and J. ROSSI, *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: a commentary*, Capetown, Pretoria University Law Press, 2016 (194) 208-209.
[1300] C. MAHON, "Progress at the front : the draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", *HRLR* 2008, vol. 8, no. 4, (617) 638; B. GRIFFEY, "Reasonableness test: assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", *HRLR* 2011, vol. 11, no. 2, (275) 302.
[1301] B. PORTER, "The reasonableness of article 8(4) – adjudicating claims from the margins", *NJHR* 2009, vol. 27, no. 1, (39) 40-41.
[1302] CESCR, *An evaluation of the obligation to take steps to the 'maximum of available resources' under an Optional Protocol to the Covenant*, E/C.12/2007/1, 10 May 2007, par. 8.

471. These criteria do not bring a lot of new elements to the table compared to the interpretations given in the context of article 2 (1) ICESCR.[1303] For practical (quasi-)judicial purposes, they still leave an awful lot of middle ground. The Committee disposes of plenty of space to elaborate on, to choose the direction it would ultimately go in with the concept of reasonableness. We opt very consciously for a future tense here. As mentioned earlier, the CESCR has thus far assessed only two complaints on the merits, so it is far too early to draw any definitive conclusions on the Committee's take on the reasonableness review. Even though one of those two communications interestingly dealt with an alleged violation of the right to housing, the decision does not add a whole lot to the current discussion. That has more to do with the facts of the case than with the CESCR. The Committee held that Spain had failed to take all reasonable measures to adequately notify the applicant that the lending institution from which she had received a mortgage loan, had filed a mortgage foreclosure against her. She was deprived of the possibility to adequately defend her right to housing in judicial proceedings. Consequently, the CESCR concluded that Spain had violated the right to housing.[1304] The findings in this case are clearly not all that different from what the European Court of Human Rights would be able to judge on the basis of article 6 ECHR applied in a socio-economic rights context (supra, part II). The reference to the judgment of the European Court of Justice in *Aziz* too illustrates how this could well be decided by a court not particularly known for socio-economic rights adjudication.[1305] Because of all this, the Committee's reasonableness review did not as much have to delve into sensitive questions concerning the adequacy of socio-economic rights policy in se, unveiling very little on the future potential of the reasonableness assessment.

b. Reasonableness

1. Different scopes of reasonableness

472. There are some unclear elements about the concept of reasonableness in the context of progressive realization that need to be clarified before we can properly judge the potential and desirability of this internationally adopted approach for application at the Belgian level. On the one hand it can be used to assess whether the government has acted reasonably. This way, the reasonableness question is still primarily concerned with state conduct, with abiding by a formal obligation rather than reaching for the full realization of a right. On the other hand

[1303] They also resemble the obligations set out in ATD Fourth World, par. 58-60.
[1304] CESCR 13 October 2015, no. 2/2014, I.D.G/Spain, par. 15.
[1305] *Ibid*., par. 13.6.

however it can serve as an appropriateness or even ability review, where the government's actions are submitted to a substantive analysis of rights claims that go to the systemic causes of social problems. As a legal standard, appropriateness clearly sets a higher bar than reasonableness.[1306] Unsurprisingly, there was little support for a text proposal for article 8 (4) OP-ICESCR stating that the Committee should not only consider the reasonableness but also the appropriateness of the steps taken.[1307]

473. In this regard we may want to look back at the *Grootboom* judgment, which inspired the adoption of the internationally adopted reasonableness review in the first place and is a good illustration of what it can and cannot entail. In this case, Mrs. Grootboom challenged the forced eviction of her community from their informal settlements. Their homes were destroyed in a bid to clear the land for regularized housing development for other informal settlers. More important than the facts of this specific case for the purposes of our research is how the South African Constitutional Court conceptualized progressive realization and reasonableness (in the context of the public housing programme).

474. While some welcomed the interpretation as a realistic standard of review and a flexible tool[1308], others have described this flexibility as "*a double-edged sword*"[1309] and applicable "*as though on a sliding scale*".[1310] The *Grootboom* judgment definitely sends out mixed signals as to what interpretation the Court adheres to most. Judge Yacoob J (in whose judgment all the justices concurred) clarified how the government is not obliged to take appropriate steps, only reasonable steps.[1311] And we already know from the negotiations on

[1306] V. ABRAMOVIC, "Fostering dialogue: the role of the judiciary and litigation", in J. SQUIRES, M. LANGFORD and B. THIELE (eds.), *The road to a remedy: current issues in the litigation of economic, social and cultural rights,*Sydney, University of New South Wales Press 2006, (167) 171.

[1307] B. PORTER, "The reasonableness of article 8(4) – adjudicating claims from the margins", *NJHR* 2009, vol. 27, no. 1, (39) 49; see also A. VANDENBOGAERDE and W. VANDENHOLE, "The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An *Ex Ante* Assessment of its Effectiveness in Light of the Drafting Process", *HRLR* 2010, vol. 10, no. 2, 207-237.

[1308] E.g. : C.R. SUNSTEIN, "Social and economic rights? Lessons from South Africa", *Constitutional Forum* 2001, vol. 11, no. 4, 123-131; J.M. WOODS, "Justiciable social rights as a critique of the liberal paradigm", *Texas International Law Journal* 2003, vol. 38, (763) 785; P. DE VOS, "Grootboom, the right of access to housing and substantive equality as contextual fairness", *SAJHR* 2001, vol. 17, (258) 260-263; F. COOMANS, "Reviewing implementation of social and economic rights: an assessment of the 'reasonableness' test as developed by the South African Constitutional Court", *ZaöRV* 2005, vol. 65, (167) 186.

[1309] B. PORTER, "The reasonableness of article 8(4) – adjudicating claims from the margins", *NJHR* 2009, vol. 27, no. 1, (39) 40.

[1310] D. BRAND, "Socio-economic rights and courts in South Africa: justiciability on a sliding scale", in F. COOMANS (ed.), *Justiciability of economic and social rights. Experiences from domestic systems*, Antwerpen, Intersentia, 2006, (207) 227.

[1311] Constitutional Court (South Africa) 7 June 2000, CCT 35/99, Dawood et al./Minister of Home Affairs et al.,par. 28.

article 8 (4) OP-ICESCR that it was also said that many of the wide range of measures open for the state would meet the requirement of reasonableness.[1312] Ultimately however and in spite of these excerpts, reasonableness is certainly not interpreted in such a restrictive way that it can justify a virtually unlimited margin of discretion. The same paragraph of the Grootboom judgment actually states that the housing programme must be capable of facilitating the realisation of the right. It continues that it may not even be sufficient "*to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right*".[1313] Yacoob J ultimately concluded that the state had instituted an integrated housing development policy whose "*medium and long term objectives cannot be criticised*".[1314] To be reasonable, he added that measures cannot exclude a significant segment of society. A housing programme like the one under scrutiny cannot ignore "*those whose needs are most urgent and whose ability to enjoy the right is therefore most in peril*".[1315] It is exactly here that the programme was found to fall short of the obligations imposed on the government. It had failed "*to recognise that the state must provide for relief for those in desperate need*".[1316]

475. By imposing priorities for the socio-economically disadvantaged, it is fair to say that the Court's assessment definitely surpasses a mere review of unreasonableness of conduct.[1317] Moreover, it has been asserted that this assessment of reasonableness is indeed result-based and not merely focused on intent.[1318] Arosemena has argued that "*even as duties of results are replaced by duties of conduct, the whole approach remains goal oriented*".[1319] A government might not be able to provide shelter for every homeless person, but it needs to take measures that are adequate to contribute to the eventual achievement of this goal.

476. But there has also been criticism on the formal way in which the reasonableness review has been applied. By arguing that the government had excluded the more vulnerable groups in

[1312] *Ibid*., par. 41.
[1313] *Ibid*., par. 44.
[1314] *Ibid*., par. 64
[1315] *Ibid*., par. 44.
[1316] *Ibid*., par. 66.
[1317] B. GRIFFEY, "Reasonableness test: assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", *HRLR* 2011, vol. 11, no. 2, (275) 312.
[1318] G. AROSEMENA, *Rights, scarcity and justice. An analytical inquiry into the adjudication of the welfare aspects of human rights*, Cambridge, Intersentia, 2014, 105; B. PORTER, "The reasonableness of article 8(4) – adjudicating claims from the margins", *NJHR* 2009, vol. 27, no. 1, (39), 51.
[1319] G. AROSEMENA, *Rights, scarcity and justice. An analytical inquiry into the adjudication of the welfare aspects of human rights*, Cambridge, Intersentia, 2014, 94.

society but not elaborating further on whether the government is required to do anything more substantial than just be inclusive[1320], the Court had reached its decision on the basis of the more structural rather than concrete elements of the test. [1321] Accordingly, some commentators consider the application of the reasonableness review strongly proceduralized and largely divorced from the substantive content of the fundamental rights, raising doubts about the suitability of the approach to meet the transformative aims of the South African Constitution.[1322] In their opinion, deference owed to the government in defining reasonable action appears to extend to an undue deference to the state in defining the content of the right itself. [1323] They therefore call for a more substantive judicial approach to reasonableness, which includes an assessment of what the right in question requires. [1324] Until some understanding of this content has been developed, the assessment of whether the measures adopted by the state are reasonably capable of facilitating its realization takes place in a normative vacuum.[1325]

2. *Reasonableness as appropriateness*

i. A preliminary proposal

477. We do of course not aim to evaluate the factual outcome of the relevant South African case law in itself. We look for legal possibilities to assess the contribution of Belgian/Flemish housing measures, programmes, etc. to the realization of the right to housing. Such an assessment does indeed require a substantive assessment. As we have seen earlier in housing rights examples regarding the standstill principle, it is not always straightforward to determine whether a measure or policy signifies progress or regression. To properly do so, it is

[1320] T. ROUX, "Understanding Grootboom – A response to Cass R Sunstein", *Constitutional Forum* 2002, vol. 12, no. 2, (41) 43; S. LIEBENBERG, *Socio-economic rights. Adjudication under a transformative constitution*, Claremont, Juta, 2010, 177.
[1321] D. BRAND, "The proceduralisation of South African socio-economic rights jurisprudence", or 'What are socio-economic rights for?' ", in H. BOTHA, A. VAN DER WALT and J. VAN DER WALT (eds.), *Rights and democracy in a transformative constitution*, Stellenbosch, SUN Press, 2003, (33) 49-50.
[1322] M. PIETERSE, "Coming to terms with the judicial enforcement of socio-economic rights", *SAJHR* 2004, vol. 20, (383) 410-411; S. LIEBENBERG, *Socio-economic rights. Adjudication under a transformative constitution*, Claremont, Juta, 2010, 173.
[1323] J. HOHMANN, *The right to housing. Law, concepts, possibilities*, Oxford, Hart Publishing, 2013, 100.
[1324] S. LIEBENBERG, "Socio-economic rights: evaluating reasonableness review and minimum core obligations", in S. WOOLMAN and M. BISHOP (eds.), *Constitutional conversations*, Cape Town, Pretoria University Law Press, 2008, (303) 324; M. PIETERSE, "On 'dialogue, 'translation' and 'voice': reply to Sandra Liebenberg", in S. WOOLMAN and M. BISHOP (eds.), *Constitutional conversations*, Cape Town, Pretoria University Law Press, 2008, (331) 333.
[1325] D. BILCHITZ, *Poverty and fundamental rights: the justification and enforcement of socio-economic rights*, Oxford, Oxford University Press, 2007, 143.

indispensable that a judge assesses the situation by reference to the substantive requirements of the right and the real-life influences on the effectiveness of that right.[1326]

478. Moreover, we argue that for a reasonableness review to be useful as an instigator for result-oriented obligations, it is definitely necessary that it is interpreted as an appropriateness or even an ability review. Only when a judge is able to substantively assess whether an adopted measure or initiative has the ability to achieve improvement of the right to housing, a reasonableness approach would take the socio-economic rights realization to another level, beyond the implications of a mere obligation of means. It is important to emphasize that this scenario is still significantly different from a court imposing certain measures or policies on the government. But at the same time this interpretation does try to bridge the earlier discussed gap between an effective right and the effective realization of a right (supra, part I). This corresponds to a distinction made by Amartya Sen.[1327] Circumstances might impede a subjective right to be adequately housed immediately, but there is a meta-right to housing, a right to have measures and policies that genuinely pursue this goal and are able to do so.[1328]

479. In order to make the right to housing more of a result-oriented obligation, our preliminary proposal is that measures should be able to be examined by court on the question whether they can contribute to progressively realizing the right to housing. We do apply the term preliminary proposal because important questions and practical counterarguments that arise concerning the practical application of this approach are yet to be properly addressed, not in the least because, as sketched here, the assessment would be entirely outsourced to the judicial branch.

ii. Possible criticism and imperfections

480. There are a couple of aspects that deserve attention in the context of our preliminary proposal. First off, it could be questioned whether such a reasonableness review sufficiently protects vulnerable persons and groups from the perspective of individualized relief. It is indeed true that the focus of the approach is not as much on how to help a claimant in

[1326] G. AROSEMENA, *Rights, scarcity and justice. An analytical inquiry into the adjudication of the welfare aspects of human rights*, Cambridge, Intersentia, 2014, 114-115.
[1327] A. SEN, "The right not to be hungry", in P. ALSTON and K. TOMASEVSKI (eds.), *The right to food*, Leiden, Martinus Nijhoff, 1984, (69) 70-71.
[1328] D. BILCHITZ, *Poverty and fundamental rights: the justification and enforcement of socio-economic rights*, Oxford, Oxford University Press, 2007, 218-219.

particular than it is on the bigger picture of an effective right to housing and result-oriented obligations.[1329] That is the route we chose to take. Neither should we forget that a considerable amount of relevant housing legislation already enables subjective claim-rights as well. And if our proposal would incentivize more result-oriented obligations, this might obviously benefit individual protection in the longer run too.

481. Additionally, emphasizing primarily individualized relief would prioritize only those who are able and willing to bring their claims to court, which could lead to greater inequalities. It forces a government to address instant problems in a way that does not necessarily expose and remedy the underlying reasons for those problems. Instead of focusing on long-term solutions and investments, the government would be forced to divert valuable resources to meeting specific court-enforced claims which might hinder it to effectively realize the right to housing for every one of its citizens.[1330] In contrast to such one-dimensional rule-based jurisprudence, our account of reasonableness is normatively more open and therefore not only a better and more comprehensive facilitator for structural improvement, but also a more realistic one since it still respects the effective functioning of the legislative and executive branches of government.[1331]

482. A second point of discussion concerns the use of the term reasonableness. Some commentators argue that a proportionality review is a more appropriate standard for (socio-economic rights) jurisprudence than a reasonableness test.[1332] In traditional civil and political rights adjudication, proportionality is primarily used as a method to evaluate limitations to fundamental rights. After looking at the questions whether the measure/policy pursues a legitimate aim and whether the means to do so are rationally connected to it, benefits resulting from the measure/policy are finally weighed against the harm inflicted to the fundamental right. The aforementioned proponents prefer such a proportionality review to a reasonableness

[1329] F. COOMANS, "Reviewing implementation of social and economic rights: an assessment of the 'reasonableness' test as developed by the South African Constitutional Court", *ZaöRV* 2005, vol. 65, (167) 188.
[1330] M. WESSON, "Grootboom and beyond: reassessing the socio-economic rights jurisprudence of the South African Constitutional Court", *SAJHR* 2004, vol. 20, (284) 303-305; A. NOLAN, *Children's socio-economic rights, democracy and the courts*, Oxford, Hart Publishing, 2011, 237; D. BILCHITZ, *Poverty and fundamental rights: the justification and enforcement of socio-economic rights*, Oxford, Oxford University Press, 2007, 203.
[1331] C. STEINBERG, "Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence", *South African Law Journal* 2006, vol. 123, (264) 274-276; K. YOUNG, "The minimum core of economic, social and cultural rights: a concept in search of content", *Yale International Law Journal* 2008, vol. 33, (113) 140.
[1332] A. STONE SWEET and J. MATHEWS, "Proportionality balancing and global constitutionalism", *Columbia Journal of Transnational Law* 2008, vol. 47, (68) 73-74; S. FREDMAN, "New horizons: incorporating socio-economic rights in a British Bill of Rights", *Public Law* 2010, April issue, (297) 318.

assessment because it has a more structured, transparent and substantive nature and because it provides a more demanding examination of state policy.[1333] According to Rivers, this is the reason why the European Court of Human Rights rejected the reasonableness review.[1334]

483. The validity of this argumentation strongly depends though on what interpretation of reasonableness one compares the proportionality review with. The more substantive approach to reasonableness that we have put forward surely also addresses the advantages that were deemed exclusive properties of the proportionality review. In our interpretation, reasonableness is connected to the measure or policy itself; it does not only refer to the conduct the government has to adopt.[1335] As a matter of fact, O'Connell stated that for the application of a proportionality review in the context of socio-economic rights adjudication, courts should adopt a "consequential" approach to proportionality, asking whether the state action is likely to achieve a mandated measure or policy.[1336] Likewise, Hershkoff argues that the key "*judicial question should be whether a challenged law (or policy) achieves, or is at least likely to achieve, the constitutionally prescribed end*".[1337] Those interpretations of what a proportionality review should entail in a socio-economic rights context are strikingly similar to the interpretation that we have deduced from the concept of reasonableness.

484. Of course, we have arrived at this point through adhering to the CESCR's approach and its South African source of inspiration. But one could certainly argue for continuing to use the term proportionality. Giving preference to the term that is more widely established in international civil and political rights law would be strikingly symbolic for the indivisibility of all human rights. On the other hand a case can be made on behalf of our conception of reasonableness in order to make a distinction with the current use of the proportionality principle in the case law of the Belgian Constitutional Court. The latter uses the principle to establish whether for example a housing measure does not disproportionally infringe the right

[1333] D. DYZENHAUS, M. HUNT and M. TAGGART, "The principle of legality in administrative law: internationalisation as constitutionalisation", *Oxford University Commonwealth Law Journal* 2001, vol. 1, (5) 20; A. STONE SWEET and J. MATHEWS, "Proportionality balancing and global constitutionalism", *Columbia Journal of Transnational Law* 2008, vol. 47, (68) 79; M. NOVAK, "Three models of balancing (in constitutional review)", *Ratio Juris* 2010, vol. 23, (101) 108.
[1334] J. RIVERS, "Proportionality and variable intensity of review", *Cambridge Law Journal* 2006, vol. 65, no. 1, (174) 191.
[1335] D. BILCHITZ, *Poverty and fundamental rights: the justification and enforcement of socio-economic rights*, Oxford, Oxford University Press, 2007, 143.
[1336] P. O'CONNELL, *Vindicating socio-economic rights. International standards and comparative experiences*, London, Routledge, 2012, 189.
[1337] H. HERSHKOFF, "Positive rights and state constitutions: the limits of federal rationality review", *Harvard Law Review* 1999, vol. 112, (1131) 1137.

to property, not in the aforementioned "consequential" way. Our approach is thus quite different from this type of proportionality test and might therefore require a different terminology. But if that is the case, reasonableness might not be the most appropriate word either. The premise of any proportionality assessment by the Constitutional Court includes a reference to a different conception of reasonableness as well, since the legislator's view of the general interest must always be respected, unless it is manifestly unreasonable (supra).

485. It should be clear by now that there are reasons for the application of both terms. But considering how similarly legal literature has interpreted both concepts in a socio-economic rights context, we do not believe this choice would make any large substantive differences, let alone create a problem regarding the interpretation in itself.

486. A more valuable point of criticism against our reasonableness approach is the ever recurring principle of the separation of powers. The hardliners in this debate reject the possibility that a court can compel the government to take this or that action because it would discuss utterly political questions and turn the judiciary into a political organ.[1338] It has been argued that it is democratically inappropriate to allow courts a more robust role because it would erode vibrant democratic action.[1339] It is true that "*the blurring of the limits between interpretation and normative jurisdiction could transform the guardian of the constitution into the sovereign*".[1340] On the other hand it must be said that the principle of the separation of powers has evolved. Courts are already involved in a considerable range of matters which have important resource and political implications. Both jurisprudence and legal doctrine have interpreted the principle as aiming to establish a balance between the different powers, thereby refining rather than rigorously demarcating the basic principle of the Belgian constitutional order.[1341] A court should obviously not, to use the words of the Constitutional Court, dispose of a freedom of discretion comparable to that of the legislative branch.[1342] But

[1338] E.W. VIERDAG, "The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights", *Netherlands Yearbook of International Law* 1978, vol. 9, (69) 92-93.
[1339] D.M. DAVIS, "The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles", *SAJHR* 1992, vol. 8, (475) 488-490.
[1340] A.R. BREWER-CARIAS, *Constitutional courts as positive legislators: a comparative law study*, Cambridge, Cambridge University Press, 2011, 40.
[1341] Court of Cassation 28 September 2006, *Pas.* 2006, no. 9-10, (1870) 1907; E. MAES, "Het Hof van Cassatie over de fout van overheidsorganen: streng, strenger, strengst …" (note under Court of Cassation 28 September 2006), *TBP* 2007, no. 9, (547) 548; A. ALEN, "'Scheiding' of 'samenwerking' der machten?", *Academiae analecta. Klasse der Letteren* 1990, vol. 52, no. 1, 1-73.
[1342] E.g.: Constitutional Court 3 June 1993, no. 41/93; Constitutional Court 7 February 2001, no. 10/2001; Constitutional Court 20 October 2005, no. 157/2005.

as we have mentioned earlier, our result-oriented approach does not prescribe what specific measures the government should take. In fact, in response to the eroding democracy argument we are tempted to say that its focus on progressive realization would actually increase (the need for more) qualitative and evidence-based democratic deliberation more than anything else.

487. Notwithstanding the valid counterarguments to the argument of the separation of powers, we cannot deny that a court competent to judge the contribution of housing measures to the improvement of the right to adequate housing would be a major step into unchartered territories. The current assessments of whether a measure is proportional to article 23 of the Constitution, which focus only on the negative impact on the right to housing, already illustrate the Court's reserved attitude in order to avoid its approach being called a *gouvernement des juges*.[1343]

488. An equally important impediment for the adoption of our proposal is of a practical nature. Not only could it potentially lead to a floodgate of cases, the review in itself is a serious obstacle too. While the Court takes different perspectives into account in comprehensively assessing proportionality[1344], this is still far removed from the substantive assessment a court would have to make when adopting this approach. To answer the extremely difficult question whether a measure or policy is appropriate to lead to an improvement of the right to housing, courts are ineffective agents. Their longstanding experience does not provide them with the technical knowledge or data to make such an assessment.[1345] And while the Constitutional Court disposes of the most extensive research possibilities[1346], it rarely utilizes them, rendering itself dependent on the information provided by the parties.[1347]

[1343] P. POPELIER, "Het evenredigheidsbeginsel in de rechtspraak van Grondwettelijk Hof: tussen grondrechtenbescherming en scheiding der machten", in P. MARTENS et al. (eds.), *Liège, Strasbourg, Bruxelles: parcours des droits de l'homme*, Limal, Anthemis, 2010, 189-196.
[1344] E.g.: In the context of a proportionality test concerning the infringement of the right to property due to a 'social obligation' for building operators according to the Flemish Decree on Land and Real Estate Policy, the Constitutional Court referred to a couple of analyses from strategic advice councils: Constitutional Court 6 April 2011, no. 50/2011, B.40.2.
[1345] D. BRAND, "Socio-economic rights and courts in South Africa: justiciability on a sliding scale", in F. COOMANS (ed.), *Justiciability of economic and social rights. Experiences from domestic systems*, Antwerpen, Intersentia, 2006, (207) 225.
[1346] Art. 91 Special Law 6 January 1989 concerning the Constitutional Court.
[1347] J. DE JAEGERE, "Inclusiviteit als deliberatieve bouwsteen van legitimiteit", *TBP* 2015, no. 4-5, (194) 197.

489. Ultimately, we think this preliminary proposal is defendable on a theoretical level, but for the reasons set out it may be a more viable and realistic approach if we take some of that burden away from the judicial branch.

3) Combining monitoring and reasonableness

a. Overview of the proposal

490. In order to address the most poignant counterarguments, the focal point of our result-oriented approach should be moved from the judicial branch to the legislative process. Not only is this necessary for the reasons given above, it also has the advantage that the improvement of the right to housing would no longer only be protected reactively by a court, but also proactively.[1348] What does our proposal entail in essence? We argue in favour of the adoption of a strongly equipped monitoring mechanism for the right to housing. Due to the comprehensive scientific expertise of the Flemish Housing Council and the Policy Research Centre Housing ('*Steunpunt Wonen*'), these bodies could acquire a new and more important role in our new framework. The monitoring mechanism would firstly be competent to investigate early in the legislative process whether a new legislative or executive act will be able (i.e. reasonable) to work towards the further realization of the right to housing (analysis ex ante). Secondly and on the basis of its earlier findings, it would also conduct a causality analysis on the basis of the effects afterwards (ex post). The third and final aspect of our proposal aims to provide an enforceable capstone for a result-oriented right to housing. On the basis of the monitoring body's extensive research and assessment ex post, it would be possible to request the annulment of the measure before the Constitutional Court. Let us here and in the upcoming sections elaborate more into detail on the intricacies of this proposal.

491. The monitoring mechanism we support is at its core inspired by Stroobant, who has argued for a federal monitoring body in the context of article 23 of the Constitution.[1349] In light of the further growing competences of the regions in the field of housing, we deem it most appropriate to establish this mechanism at the regional level. In theory, any preliminary proposal or draft of a measure related to (the right to) housing would then have to be scrutinized on the basis of the question whether the measure at hand would have the potential

[1348] A. NOLAN, *Children's socio-economic rights, democracy and the courts*, Oxford, Hart Publishing, 2011, 232-233.
[1349] M. STROOBANT, "Algemeen besluit", in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, (201) 206.

to improve the right to housing. It is in other words subjected to a reasonableness review as we have discussed earlier. Improvement can be interpreted as relating to one of the main aspects that we have discussed in the introductory part of this research: accessibility, affordability, quality and security of tenure. In line with our conception of social dignity, autonomy and participation are also part of this assessment. As explained earlier as well, article 23 of the Constitution (just as the ICESCR for that matter) stresses the importance of the protection of disadvantaged persons and groups in society. Improvement of the right to housing is thus closely connected to the position of the socio-economically disadvantaged in relation to housing. It is also important to stress that the assessment should be approached from a practical perspective, not only a mere legal one as is the case with the standstill principle. In that context we would like to refer back to the earlier used illustration of the possible increase of the rental guarantee from two months back to three. As we have seen, legal alternatives like the bank guarantee are in place to help those who have troubles collecting the necessary deposit. The sheer existence of such alternatives to ensure the affordability of housing (e.g. the bank guarantee) is however not sufficient, since its functioning in practice leaves to be desired.

492. In order to respect the democratic process, the conclusion of this monitoring mechanism cannot contain any binding consequences for the legislator. If, in case of a negative evaluation, the legislator persists in the original proposal there is little one could do but accept.[1350] An assessment like this requires a great deal of expertise, knowledge and data. But no matter how much data is available, it will be nearly impossible for the vast majority of analyzed proposals to answer our reasonableness question with a probability bordering on certainty. Not only from a theoretical but also from a practical viewpoint is it therefore undesirable to question the political primacy at this point in the legislative process. Policy makers will remain able (and be necessitated) to make ideological choices.[1351]

493. It is unrealistic to expect that the third part of our proposal, i.e. trying to enforce a more result-oriented right to housing through an appeal for annulment before the Constitutional Court, would be successful at this point. No matter how valuable it might be to take the capability analysis ex ante into consideration in the law and decision making process, the lack

[1350] That is of course based on the assumption that the ex-ante analysis has been carried out appropriately. If not it should be possible to invoke a violation of the due diligence principle before the Constitutional Court.
[1351] P. POPELIER, "De (ir)rationele wetgever vroeger, vandaag en in de toekomst", in B. PEETERS and J. VELAERS (eds.), *De Grondwet in groothoekperspectief*, Antwerpen, Intersentia, 2007, (57) 63 and 91.

of scientific certainty should temper any possible expectations regarding enforceability through court. It is unrealistic to suppose that the Constitutional Court would annul a legislative act on the basis of the capability analysis by the monitoring body. There obviously remains the possibility to argue before the Constitutional Court that the standstill obligation has been violated, but this principle discusses a question (i.e. is there a considerable decline in housing rights protection?) which we have seen to be less pertinent as the more result-oriented one that is asked in our proposal.

494. It is important though that the monitoring mechanism would not to develop into a mere obligatory formality. In addition to the ex ante analysis of the potential to improve the right to housing, the assessed measures should therefore have to be monitored afterwards as well. We could say that such an assessment will be reminiscent of Felner's causality analysis (supra).[1352] The results will be compared with the scientific projections/assessments of the ex-ante analysis and the question remains virtually the same: do the adopted measures take steps in progressively realizing the right to housing? And if not, is this due to the measure itself or are there other reasons that might hamper its impact? Again, neither the legislator nor the government can be immediately bound by the recommendations following the analysis, even though it would attest to rational policy making if it would take these into account.

495. The difference at this point is that because of the more tangible indicators and the knowledge of the law in action, the quality of the analysis should be far superior to that of the ex-ante analysis. In anticipation of the ex post analysis, research can be very issue-specific and useful indicators could be set up when possible. In this regard we should not underestimate either the abundance of already existing qualitative and quantitative research data provided by *inter alia* the Policy Research Centre Housing.[1353]

496. When a measure, based on all this gathered scientific information, does not contribute to the progressive realization of the right to housing and no steps are taken by the legislator to address the obstacles and make the necessary modifications, we come to a point at which we argue that a more result-oriented measure could be enforced. In case of an appeal for annulment of the measure before the Constitutional Court, the Court could rely on the

[1352] We do acknowledge that Felner laid more emphasis on the resource question.
[1353] The Policy Research Centre Housing is funded by the Flemish government, fitting within the program "Research Centres for Policy relevant research".

scientific analysis to assess the evidence-based character of the legislation and decide on a violation of article 23. This in turn aims to incentivize the legislator to take the assessments of the monitoring body to heart more seriously and trigger effective progress.

497. We must admit though that there are some legal obstacles that could hinder the most effective outcome of this proposal. The Constitutional Court is only competent to assess legislative acts, but important consequences for the right to housing obviously stem from executive decisions as well. It must be said though that many of the examples applied in this research are anchored in legislative acts or – in case of proposals – will have to be. Another legal obstacle is that in order to conduct a proper and representative ex post analysis, a couple of years must pass. According to current legislation however, an appeal to the Constitutional Court for annulment of a law or decree must be lodged within six months of the publication of the legislation.[1354] This should have to be modified in order for the proposal to be viable, even though we acknowledge that this would decrease legal security to a certain extent.

498. As to the more practical plausibility of our proposal (i.e. monitoring before and afterwards, with an increased role for the Constitutional Court) unfolding, it should be noted that the Court has stated in explicit terms that no constitutional provision renders the legislator dependent upon the existence of scientific or statistical data.[1355] Yet, at the same time, it regularly refers to scientific studies, statistics and advices to base its judgment on.[1356] When for example the Flemish Decree on Land and Real Estate Policy was under scrutiny for obliging building operators to reserve a certain quota of houses for social housing purposes, the Court used a couple of analyses from strategic advice councils to reach its conclusion concerning the infringement of the right to property.[1357] One could as a matter of fact argue that when the Constitutional Court is able to rely on such evidence, it should be encouraged to be more audacious in its protection of constitutional rights.[1358] Backed by an authoritative housing rights monitoring body that operates both ex-ante and ex-post, it will find itself in a stronger position to assess the adopted housing measure. Popelier argues that considering the undeniable evolution towards more evidence-based legislation, such a so called procedural

[1354] Art. 3, § 1 Special Law 6 January 1989 concerning the Constitutional Court, *BS* 7 January 1989.
[1355] Constitutional Court 31 July 2008, no. 110/2008, B.8.4.
[1356] E.g.: Constitutional Court 30 April 2003, no. 51/2003; Constitutional Court 11 January 2007, no. 9/2007; Constitutional Court 7 January 1993, no. 1/93.
[1357] Constitutional Court 6 April 2011, no. 50/2011, B.40.2.
[1358] P. POPELIER and C. VAN DE HEYNING, "Procedural rationality: giving teeth to the proportionality analysis", *European Constitutional Law Review* 2013, (230) 254-256 and 260.

rationality test most likely will gain further importance.[1359] A monitoring mechanism with a strong scientific component like the one we propose would certainly enhance this opportunity.[1360]

499. At the same time however, it must first be mentioned that the Court still adheres to the presumption that the assessment of the legislator is based on adequate information. Secondly and also more importantly is the need to stress that our result-oriented approach would most definitely still go beyond any currently emerging evolution. Accordingly, the Court would no longer only judge whether the legislator has adopted a measure that directly infringes a constitutional provision on the basis of the proportionality test, but rather whether it has adopted one that infringes the right to housing because it cannot improve this fundamental right. It would in other words be concerned more about the positive (instead of only negative) obligation to fully realize the right to housing. So despite resemblances with the emerging procedural rationality test, we acknowledge that for the purposes of our proposal, the Court's competences would have to be interpreted in a progressive manner.

500. For both these reasons, the quality of the analysis of the monitoring mechanism as well as data on which it relies is of vital importance. The more this is the case, the more the Constitutional Court will feel confident to be the legal capstone of our result-oriented proposal, and the less its assessment will be regarded as a 'gouvernement des juges'. [1361] It is therefore necessary to take a closer look at some of the monitoring mechanisms that are already in place in the legislative process. What can we learn from their application? In which sense do they differ from our evidence-based mechanism and what would our approach ideally add to this process?

[1359] This test can be called a procedural rationality test, see: P. POPELIER and W. MARNEFFE, "De reguleringsimpactanalyse en de bescherming van grondrechten: een verantwoordelijkheid van wetgever en rechter. Een toepassing op het huisonderwijs", *TVW* 2014, no. 3, (202) 205.
[1360] This has been argued in the context of the RIA-methodology (regulation impact analysis), see: *Ibid*., 224.
[1361] M. DIERICKX VISSCHERS, "De Vlaamse reguleringsimpactanalyse, gewikt en gewogen", in J. DE MOT (ed.), *Liber amicorum Boudewijn Bouckaert. Vrank en vrij*, 2012, (243) 252-253.

b. Lessons from current regulation analysis

1. Ex ante

i. RIA

501. The installment of a mechanism that would hold measures up against a result-oriented perception of the right to housing would certainly not be the first monitoring mechanism for legislation. The most obvious institution for the purposes of our research is the Flemish Housing Council, which we will discuss a bit further. First we need to address the system of regulation impact analyses (RIA), operational at the Flemish level since the beginning of 2005. Such a RIA has to be made for all drafts of decrees and decisions of the Flemish government by the person or team that prepares this legislative act, notwithstanding a list of exceptions for specific types of decrees and decisions. In practice, the regulation agenda will provide an overview of the planned legislation for which a RIA is considered necessary.[1362] The fact that the Flemish Housing Council regularly remarks that it regrets that no useful RIA had been made illustrates that certainly not all housing measures are being submitted to a RIA (or a poverty test for that matter (infra)).[1363]

502. With the application of the RIA-methodology, the Flemish government aims to comply with the nine criteria of good legislation.[1364] To do so, a RIA looks at the intended purpose of the proposed piece of legislation and makes an estimated assessment of its positive and negative effects. Additionally it needs to include an analysis of at least two other scenarios, including the zero option and one other alternative and relevant option. For both, the benefits and disadvantages will also have to be scrutinized.[1365] In the end, a RIA should help in

[1362] The regulation agenda is available at: http://regelgevingsagenda.bestuurszaken.be/.
[1363] E.g.: FLEMISH HOUSING COUNCIL, *Advice concerning the amendment of the Framework Decision Social Rent*, 7 June 2013, no. 2013/08, www.rwo.be/Portals/100/Vlaamse%20Woonraad/VWR_advies_KSH_def.pdf; FLEMISH HOUSING COUNCIL, *Advice concerning the financing of operation in the context of social housing projects*, , 10 September 2012, no. 2012/08, www.rwo.be/Portals/100/Vlaamse%20Woonraad/VWR_advies_financiering_sociale_huisvesting_def.pdf; FLEMISH HOUSING COUNCIL, *Advice concerning the modifications on social rent in the draft decree on the amendment of various decrees on housing and concerning the draft decision by the Flemish Government to amend the Framework Decision Social Rent*, 28 January 2016, no. 2016/03, www.wonenvlaanderen.be/nieuws/advies-vlaamse-woonraad-over-de-aanpassing-van-het-kaderbesluit-sociale-huur, 3-4.
[1364] Good legislation is: necessary and effective; appropriate and balanced; feasible and maintainable; legitimate; cohesive; simple, clear and accessible; substantiated and discussed; permanently relevant and topical; digital friendly: Ministry of the Flemish Community, *Kenmerken van goede regelgeving*, Brussel, Ministry of the Flemish Community, 2003, 4-5.
[1365] K. POEL and W. MARNEFFE, "De federale regelgevingsimpactanalyse: een stand van zaken na zes maanden", *TVW* 2014, no. 3, (185) 189.

making thoughtful, well-informed legislative choices that take underlying societal problems more into consideration and at the same time increase transparency between government and citizen. To further enhance these advantages, the Flemish Inter-institutional Agreement from 2009 tried to involve the Flemish Parliament and the strategic advice councils more closely in the whole methodology.[1366] While Flemish representatives can draw the RIA into the parliamentary discussion concerning the legislative initiative, the strategic advice councils will take the RIA into consideration when conferring advice and are also allowed to identify alternatives in the early phases of the policy development.

503. Before looking for pros and cons to borrow for our proposal of a housing rights monitoring instance, we should underscore that the approach to the ex ante analysis is significantly different to that in the RIA. The latter is merely concerned with the question what the positive and negative effects of a certain measure would be and which option is in that respect the most favorable one to adopt. From that perspective it has been said that the cost-benefit analysis in the RIA frequently relies on the economic principle of the Pareto efficiency.[1367] Such an efficiency occurs when the economic output for one party cannot be improved without putting a different party in a disadvantage or vice versa. The question relevant to the form of monitoring we propose on the other hand concerns whether the proposed measure is result-oriented in the context of the right to housing. The cost-benefit analysis is important but subordinate to that primary question. Accordingly, the Pareto efficiency is not the most appropriate manner by which to assess the envisioned effects of a proposed measure. This criterion treats all individuals as equal (moral neutrality), but by doing so only looks at the sum of the welfare of all members of society. It does in other words not take into account the unequal distribution of socio-economic resources in society.[1368] And when the analysis would involve the realization of the right to housing, the position of the disadvantaged must take a prominent place. Take for example the hypothesis that the housing bonus would be abolished entirely and the spare public money would be redistributed into the (private) rental market. Regardless of whether or not this is the preferable option from a housing rights perspective, it would present a Pareto inefficiency because the increased

[1366] "Inter-Institutional Agreement" (IIA) between the Flemish Parliament, the Flemish Government, the SERV and the Strategic Advice Councils concerning the common approach of the regulation impact analysis (RIA), 2009, par. 10 and 13-14, available at www.bestuurszaken.be/sites/default/files/ondertekening_IIA-06092010.pdf.
[1367] M. DIERICKX VISSCHERS, "De Vlaamse reguleringsimpactanalyse, gewikt en gewogen", in J. DE MOT (ed.), *Liber amicorum Boudewijn Bouckaert. Vrank en vrij*, Brugge, Die Keure, 2012, (243) 249.
[1368] A. RENDA, *Law and economics in the RIA world. Improving the use of economic analysis in public policy and legislation*, Antwerpen, Intersentia, 2011, 129-131.

benefits for group A (tenants) would be detrimental to group B (owners). The Pareto criterion, unengaged with the possibility that group A might be more destitute of those benefits than group B, would not recommend such a policy overhaul.

504. Notwithstanding that different approach there are certain lessons to be drawn from the functioning of the RIA for the purposes of our research. The legal doctrine as well as the Socio-Economic Council of Flanders (SERV) have identified several problems that impede the RIA to have a more tangible effect on the eventual legislative act. Partly due to the difficulty to dispose of all relevant data, something we have already responded to in the context of our proposal, the quality of the RIAs has been regarded as questionable.[1369] A repeatedly mentioned and even more important factor in the impediment of a better application of the RIA is the lack of political will. This relies on the idea that policy makers are in first place concerned about getting re-elected. If largely symbolic lawmaking is necessary to please the voting public, they will not hesitate to do so. From this perspective policy makers wish to avoid the transparency that a RIA brings along with it.[1370] RIAs are usually also made only at a moment when the important political choices have already been made. Consequently, they do not serve as a way to reasonably underpin a legislative decision, nor do they have a tangible impact on the whole lawmaking process. Too often a RIA becomes an administrative formality that only aims at legitimizing a decision that has been determined earlier.[1371] These are without a doubt serious pitfalls to which a weak monitoring mechanism for the right to housing might succumb just as well.

505. A more positive aspect is the inclusion of other scenarios. In line with the RIA-methodology, it is a possibility that the assessment by the housing rights monitoring instance would include the analysis of alternative options. Depending on who would conduct the ex ante analysis, we feel however that this might not be a good idea. The focus of the assessment is already quite different from that of the RIA and if there would be a fair amount of input by

[1369] SERV, *Wetgevingsprocedures, -structuren en –instrumenten in Vlaanderen: een evaluatie van 10 jaar wetgevingsbeleid in Vlaanderen,* 2009, www.serv.be/sites/default/files/documenten/pdfpublicaties/1572.pdf, 46; In the context of housing, the Flemish Housing Council has also indicated that the RIA was lacking in quality, e.g.: FLEMISH HOUSING COUNCIL, *Advies over het ontwerp van besluit van de Vlaamse Regering van 7 juli 2011 tot wijziging van de sociale* huurreglementering, 1 September 2011, no. 2011/10, www.rwo.be/Portals/100/Vlaamse%20Woonraad/VWR_advies_socialehuur_def.pdf, 2.

[1370] M. DIERICKX VISSCHERS, "De Vlaamse reguleringsimpactanalyse, gewikt en gewogen", in J. DE MOT (ed.), *Liber amicorum Boudewijn Bouckaert. Vrank en vrij*, 2012, (243) 244.

[1371] SERV, *Wetgevingsprocedures, -structuren en –instrumenten in Vlaanderen: een evaluatie van 10 jaar wetgevingsbeleid in Vlaanderen*, 2009, www.serv.be/sites/default/files/documenten/pdfpublicaties/1572.pdf, 46.

external experts, the proposals could be perceived as even more encroaching upon the political primacy, upon the legislative branch. One might get the impression that policies are pushed forward by people who are not democratically elected, whereas they should limit themselves to evaluating what proposed and adopted measures mean to the right to housing.

ii. Other forms of ex ante analysis

506. We have clarified how our monitoring mechanism has a different approach compared to the RIA.[1372] There are however also more specific ex-ante impact analyses that look at legislation from a perspective closer related to fundamental rights: the poverty test, evaluating the effects of new measures on poverty, and the Child and Youth Impact Report (JoKER), doing the same with regard to persons under the age of 25. Since 2013 they are both an integral part of the RIA methodology. This does not mean that every RIA has to include these assessments, merely that they can only be carried out when a RIA will have to be made.

507. The poverty test in particular could be of good use in the context of the right to housing, but numbers show that it will have little to no practical effect. While the aforementioned regulation agenda shows that a good part of the planned new legislation that necessitates a RIA is currently related to the policy area of spatial planning, housing and immovable heritage, not a single poverty test related to such measures is scheduled at the moment of this writing.[1373] This is quite remarkable considering the unmistakable impact of a housing policy on the weaker segments of society, certainly when the foreseen measures include topics like the modification of the fund to prevent evictions, the abolishment of lifelong social rent agreements and the installment of an underutilization fee. In that respect it is encouraging to hear that the Flemish Community Commission in Brussels[1374] has made the commitment to work together with poverty organizations to submit every legislative initiative to a quick screening of its possible impact on people living in poverty.[1375]

[1372] A different approach does obviously not mean that a RIA disregards human rights altogether. The RIA guideline includes subjects as respect for human rights and housing in the impact matrix, see: Regulatory Management Unit ('Dienst Wetsmatiging'), *Leidraad voor de opmaak van een reguleringsimpactanalyse (RIA)*, 2012, www.bestuurszaken.be/sites/bz.vlaanderen.be/files/RIA-leidraad.pdf, 50-51.
[1373] According to the data provided by the regulation agenda on 30 December 2015.
[1374] The Flemish Community Commission is a Flemish government institution competent to perform tasks of the Flemish Community in the Brussels-Capital Region. It consists of its own legislative organ (Council) as well as an executive organ (College).
[1375] De Redactie, "Vlaamse Gemeenschapscommissie screent beleid met armoedetoets", 8 February 2016.

508. Nevertheless, it should not come as a surprise that the same core deficiencies occur in the context of a poverty test or a JoKER as discussed with regard to the "general" RIA. An evaluation report of the JoKER documents how the evaluation is made at a point in time when all political decisions have been taken[1376], rendering the evaluation process as an obligatory formality rather than an influencing mechanism contributing to legislation of a higher quality.[1377] What we have not yet discussed however is how proposals of decree by the Flemish Parliament are exempted from the JoKER (and RIA) methodology. The evaluation report reveals that this distinction has led to occassions on which the Flemish government has tried to bypass the JoKER process by having a draft decree formally introduced by a member of parliament (thus becoming a proposal of decree).[1378] This is obviously also a tricky characteristic that might have to be addressed for a best possible application of our proposal.

509. Following an OESO recommendation from 2010[1379], the federal government adopted its own version of the RIA system, which entered into force in 2014. One can hardly argue that the federal version has properly addressed the complaints about the Flemish RIA. The major points of difference actually speak in favour of the latter.[1380] The Council of State has for example questioned the many exemptions from the obligatory impact analysis at the federal level.[1381] A further contrast to the Flemish RIA relates to the comprehensiveness of the impact analysis. At the federal level the RIA does not require the assessment of at least three options. It discusses only the impact of the chosen policy option. Unsurprisingly this also leads to a shorter evaluation.[1382] When coupled with the fact that housing policy is not a theme discussed in the federal RIA, it is clear that for the purposes of our research it has little additional to offer.

510. We have thus far left out an important actor in the current housing policy: the Flemish Housing Council. Given the significant role the Council already plays in analyzing housing

[1376] E. DESMET, H. OP DE BEECK and W. VANDENHOLE, *Evaluatie van de kind- en jongereneffectrapportage (JoKER)*, Gent, KEKI, 2012, 60
[1377] *Ibid*., 70 and 85-87.
[1378] *Ibid*., 30.
[1379] www.oecd.org/regreform/regulatory-policy/betterregulationineuropebelgium.htm
[1380] Perhaps the most obvious yet harmless difference is the application of only four criteria of what good regulation entails instead of the nine characteristics given at the Flemish level: anticipation, integrity, quality and transparancy.
[1381] Adv. Council of State 10 April 2013, no. 53.020/1 on a draft of the Law concerning various provisions regarding administrative simplification, *Parl. St.* Kamer 2012-13, no. 2922/1, par. 4.1-4.5.
[1382] P. T'KINDT and J. VAN NIEUWENHOVE, "De federale voorafgaande regelgevingsimpactanalyse (RIA) – een wassen neus of een stapje vooruit?", *TVW* 2014, no. 3, 168-184; K. POEL and W. MARNEFFE, "De federale regelgevingsimpactanalyse: een stand van zaken na zes maanden", *TVW* 2014, no. 3, (185) 189-190.

legislation ex ante [1383], it is only logical that it should be involved in our more comprehensive and centralized monitoring body. An obvious advantage is that in contrast to the RIA, JoKER or poverty test, which are performed by the administration itself, the Housing Council is an independent strategic advisory body. It is also encouraging to see that the more practical issues of the advisory opinions are regularly picked up by the government and that more frequently than before an advice is requested from the Housing Council before the proposed legislation goes to the Council of State.[1384] The recent advice by the Council of State on introducing a new financial compensation for renovation costs gives more legal weight to that dynamic. It stated that given the substantive character of the remarks made by the Flemish Housing Council, the Flemish Government must first assess these remarks and decide whether the draft decision should be amended before it can submit the text to the Council of State.[1385]

511. Despite these positive aspects, the government appears less willing to abide by the more strategic remarks made by the Housing Council. This is not too remarkable considering that also in contrast to the RIAs, the advice is requested at the end of the law making process, after a first principled approval by the Flemish Government. Since we are aware of the criticism that even RIAs and poverty tests are carried out after political choices have been made and do not have sufficient impact on the legislative process, one can be quite sure that the leeway for important changes by the time the proposal or draft reaches the Housing Council will be minimal. It is therefore necessary that the proposed monitoring body can jump in much earlier.

2. Ex post

512. Our proposal installs both an ex ante as well as an ex post analysis with regard to measures related to the right to housing. This is in line with the general perception that sound lawmaking requires both types of analysis.[1386] What we propose does not take away from the fact that some housing measures already have been or are being reviewed in retrospect. As a

[1383] Over the last three years, the Flemish Housing Council has made 27 advices at request of the Flemish Government and 13 on its own initiative.
[1384] Based on a written conversation from January 2016 with Pol Van Damme, secretary of the Flemish Housing Council.
[1385] Adv. Council of State 30 September 2015, no. 58.162/3 concerning a draft of the decision by the Flemish Government on introducing a compensation for the renovation costs of existing dwellings or the realisation of a new dwelling.
[1386] P. VAN HUMBEECK, "Best practices in regulatory impact analysis: a review of the Flemish region in Belgium", *SERV Working Paper* 2007, 38; K. VAN AEKEN, "Een kroon van klatergoud? De wet van 25 april 2007 over de oprichting van een Parlementair Comité belast met wetsevaluatie", *TVW* 2009, no. 3, (204) 210; V. VERLINDEN, "Wie hoedt de wet? Op zoek naar een nieuwe invulling van de wetgevingsprocedure", *RW* 2010-11, no. 20, (818) 823.

matter of fact, the Policy memorandum for Housing 2014-2019 repeatedly mentions evaluations that will and have to be made during this legislature.[1387] The planned modifications to the fund to prevent evictions, which we mentioned earlier, will for example be proposed only after an evaluation of the working of the fund has been completed. As imposed by the text of the legislative act itself[1388], the Flemish government has also published an extensive evaluation of the Decree on Land and Real Estate policy early 2015.[1389] We can only encourage that the evaluation relies in part upon the scientific data provided for by the Policy Research Centre Housing. The same can be said about the government's choice to construct the analysis on the basis of the framework for ex post evaluation of housing measures developed by the same research centre.[1390] This framework aims to put the evaluation in its proper social context and is thereby reminiscent of the causality analysis that we proposed.

513. As is commonly the case with ex post evaluations however, the analysis is limited to providing an answer to the question whether the adopted measure attains the intended effects and which difficulties have arisen in the process.[1391] The effects are not necessarily measured against the question whether the measure – for the purposes of our proposal – is able/has shown to be able to improve the realization of the right to housing and be result-oriented. This assessment, either in line or at odds with the ex ante reasonableness assessment, is what we would expect our ex post monitoring mechanism to have to do in order to make a tangible impact.

514. Unlike the RIAs, these current ex post evaluations are not an established component of the legislative process. Even though the Flemish government has shown an increased interest for a more systematic and methodological form of ex post evaluation in its Policy

[1387] Flemish Government, Policy Memorandum Housing, *Parl. St.* Vl. Parl. 2014-15, no. 135/1.
[1388] Art. 7.1.1 Decree on Land and Real Estate Policy.
[1389] Memorandum of the Flemish Government, *Evaluation of the Decree of 27 March 2009 concerning the land and real estate policy*, 12 January 2015, no. 202/1, https://docs.vlaamsparlement.be/docs/stukken/2014-2015/g202-1.pdf.
[1390] K. HEYLEN, M. HAFFNER and S. WINTERS, *Globaal kader voor ex post evaluatie van beleidsmaatregelen voor wonen*, Heverlee, Steunpunt Ruimte en Wonen, 2010, https://steunpuntwonen.be/Documenten/Publicaties_steunpunt_ruimte_en_wonen_2007-2011/2010/2010-03-evaluatiekader-maatregelen-woonbeleid.pdf.
[1391] SERV, *Tien denksporen voor ex post decreetsevaluatie in en door het Vlaams Parlement*, 21 September 2015, available at https://docs.vlaamsparlement.be/docs/stukken/2014-2015/g61-1.pdf, 12.

memorandum for General Government Policy 2014-2019[1392], no such mechanism has been established yet at the Flemish level.[1393] At the federal level the Chamber of Representatives and the Senate have established a mixed Parliamentary Committee in charge of law evaluation, but this ex post evaluation instance has been criticized.[1394] The Committee consists of eleven representatives from each chamber and analyzes requests by citizens, other representatives or administrative services. It also reviews relevant case law by the Constitutional Court monthly and reports sent by the College of Attorney-Generals concerning laws that presented courts with difficulties. To be able to properly assess the effectiveness of a law in action, a three year waiting period is prescribed. A case has been made to shorten this to two year.[1395] Either way, a similar period of time would most definitely be necessary in light of our proposal.

515. As with the RIA however, electoral concerns play an important role in the Committee's functioning. Representatives do not have any real stakes to invest a considerable amount of their time in law evaluation. It will not pay off in votes. Even worse, when the results of an evaluation are disappointing, it could have an effect on their career. Considering the political composition of the Committee and the dependency upon political goodwill, there is enough reason to be wary of the objectivity, autonomy and quality of the evaluation, certainly when considering that legislation is not reviewed on the basis of empirical research data.[1396]

3. Interim conclusions

516. It is fair to summarize that the current forms of regulation analysis, regardless of their approach, are not yet optimized. Probably the most important (but also most difficult) thing to do in order to establish an effective housing rights monitoring mechanism is to bypass hindrances of a more political nature. That means for example that the reasonableness analysis (ex ante) should be held early enough in the legislative process so that political opinions are still open for review and adjustments are still very much possible when desirable.

[1392] Flemish Government, *Policy Memorandum 2014-2019. General Government Policy*, 24 October 2014, available at http://docs.vlaamsparlement.be/docs/stukken/2014-2015/g145-1.pdf.
[1393] For more on this issue, see: SERV, *Tien denksporen voor ex post decreetsevaluatie in en door het Vlaams Parlement*, 21 September 2015, available at https://docs.vlaamsparlement.be/docs/stukken/2014-2015/g61-1.pdf, 55-71.
[1394] V. VERLINDEN, "Wie hoedt de wet? Op zoek naar een nieuwe invulling van de wetgevingsprocedure", *RW* 2010-11, no. 20, (818) 824-825.
[1395] H.B. WINTER, *Evaluatie van wetgeving. Structurering en institutionalisering van wetsevaluatie in Nederland*, Deventer, Kluwer, 2002, 31.
[1396] J. VAN NIEUWENHOVE, "Een aantal kanttekeningen bij het wetsvoorstel tot oprichting van een Parlementair Comité belast met de wetsevaluatie", *TVW* 2004, no. 8, (275) 275-276; K. VAN AEKEN, "Een kroon van klatergoud? De wet van 25 april 2007 over de oprichting van een Parlementair Comité belast met wetsevaluatie", *TVW* 2009, no. 3, (204) 205, 208 and 214.

Avoiding political maneuvering will also be achieved by making the assessment applicable for all types of proposed housing measures (i.e. legislative and executive). A counterargument could be that the Parliament disposes of only a limited administration compared to that of the Flemish Government to make the assessments.[1397] But rather than an argument against the expansion of the *ratione materiae* of regulation analysis, we consider it one in favour of an independent expert monitoring body that should nonetheless be in close contact with the relevant administration. Considering both the qualitative and quantitative expertise built up over the years by the Housing Council and the Policy Research Centre Housing, it is a logical step that these instances would play a vital role under a new extended mandate (both ex ante and ex post).

517. The most important reason to have an expert body is obviously the need for objectivity, as the criticism on the parliamentary committee in charge of law evaluation clearly illustrates. While it has been said that a political composition might be a better guarantee for later modifications on the basis of the analysis[1398], one has to take into account that our proposal includes the possibility of an eventual involvement of the Constitutional Court (with regard to legislative acts). The possibility that the Constitutional Court intervenes afterwards should encourage the legislator to take the analyses seriously regardless of who participated in the analysis. But for that to happen, the scientific quality of the analysis has to be excellent, once again an argument in favour of an independent expert monitoring body. By being involved in the whole process, it could concentrate on conducting research and gathering data specifically with regard to the newly adopted measures, with a view of preparing the ex post analysis.

c. In practice: encounter with difficulties

518. Now that we have looked at mostly institutional stumbling blocks, there are also some more practical questions to discuss. The ex post evaluation will depart from the outcomes of the measure over the last two to three years. These outcomes are ideally given shape in relevant indicators. The Policy Research Centre for Housing has developed an interesting list of such housing indicators that could be used at the Flemish level.[1399] But obviously not every

[1397] E. DESMET, H. OP DE BEECK and W. VANDENHOLE, *Evaluatie van de kind- en jongereneffectrapportage (JoKER)*, Gent, KEKI, 2012, 30.
[1398] J. VAN NIEUWENHOVE, *Wetsevaluatie in België*, Deventer, Kluwer, 2002, 15-17.
[1399] S. WINTERS et al., *Voorstel tot indicatoren voor het Vlaamse woonbeleid*, 2013, https://steunpuntwonen.be/Documenten/Onderzoek_Werkpakketten/zkc4494-wp6-voorstel-indicatoren-eind.pdf, 58-63.

measure will have its own very specific indicator. If for example general indicators on affordability are the only data available for the quantitative assessment of a particular measure concerning housing affordability, the qualitative analysis becomes even more important. To what extent does the measure contribute to the outcomes and what are the reasons for it? While essential in the assessment of what the measure can signify for the realization of the right to housing, there is no point in denying the difficulty of isolating the influence of legislation from the many different influencing factors.[1400] If housing has become less affordable for the poorer segments of society, this on its own merits should not be regarded as indisputable evidence that a certain measure has negatively affected a vital aspect of the right to housing. Other factors could thwart the potential of a measure that is otherwise result-oriented. The same is obviously true the other way around.

519. Complications do not only arise in the context of illustrating causality. For some proposed measures it is simply very difficult to assess whether or not they are reasonable to improve the right to housing. We have already touched upon this issue shortly in the context of the standstill principle when discussing the preferences of candidate-tenants for social housing. The example illustrates how this is particularly evident in discussions whether to adopt a more universal/maximalistic or a more selective/minimalistic approach to the improvement of fundamental rights[1401] or, when translated to the Flemish housing context, to what extent categorical selectivity ought to be exclusive.[1402]

520. Take for example the waiting list for social housing. By the end of 2014 that list contained 120.436 candidate-tenants, an increase of 30.000 compared to a year earlier.[1403] The Flemish Minister of Housing Homans has attributed this to the expansion of the income

[1400] K. VAN AEKEN, "Een kroon van klatergoud? De wet van 25 april 2007 over de oprichting van een Parlementair Comité belast met wetsevaluatie", *TVW* 2009, no. 3, (204) 211-212.
[1401] For an overview of the accessibility system used in some European countries, see: K. SCANLON and C. WHITEHEAD, "Le logement social en Europe: tendances communes et diversités persistantes", in C. LÉVY-VROELANT and C. TUTIN (eds.), *Le logement social en Europe au début du XXI^e Siècle: la révision générale*, Rennes, Presses Universitaires de Rennes, 2010, (17) 29-31.
[1402] B. HUBEAU, "Zijn het sociaal woonbeleid en de huisvestingssector mee met de onderkant?", in P. DE DECKER, L. GOOSSENS and I. PANNECOUCKE (eds.), *Wonen aan de onderkant*, Leuven, Garant, 2005, 353-370; D. DIERCKX, and T. GHYS, "Solidariteit en herverdeling in structurele armoedbestrijding" in D. DIERCKX, J. COENE, A. VAN HAARLEM and P. RAEYMAECKERS (eds.), *Armoede en sociale uitsluiting. Jaarboek 2013*, Leuven, Acco, 2013, (175) 185; W. KORPI and J. PALME, "The paradox of redistribution and strategies of equality: welfare state institutions, inequality, and poverty in the Western countries", *American Sociological Review* 1998, vol. 63, no. 5, (661) 683.
[1403] *Vr. en Antw.* Vl. Parl., Vr. nr. 802, 30 June 2015 (M. TAELMAN).

requirements back in 2013.[1404] Then Minister of Housing Van den Bossche stated that it provided much more people who are in need of social housing, especially one person households, with the opportunity of eventually obtaining such accommodation. [1405] Theoretically, it can also contribute to the prevention of social segregation, in achieving more of a social mix, as we discussed in the chapter on social dignity (supra, par. 217).[1406] Other Flemish representatives disagreed because of what is basically the same argument: access to housing. They argued that it would just become more difficult to obtain social housing in practice, that the shortage would just be redistributed.[1407] According to this argumentation, we should focus on the most disadvantaged people in society.

521. What it boils down to is the question how selective housing measures should be to have optimal effect. While the figures clearly indicate that the waiting lists have grown in the aftermath of the expansion of the income requirements, it is difficult to say that in principle the expansion of the income conditions is not able to contribute to the realization of the right to housing. The advice by the Flemish Housing Council also illustrates this discord.[1408] An expansion of income requirements both expands and restricts the accessibility of housing, one of the main pillars of the right to housing, at the same time. This definitely presents an extra difficulty to make a convincing case either for or against such a measure.

522. Regardless of the question what segment of society should be eligible for social housing[1409], we do agree with the Flemish Housing Council that the focus of the allocation should first and foremost be on those with an urgent housing need. The issue of raising or

[1404] Art. 3, § 2 Framework Decision Social Rent; As Hubeau said a decade ago, income requirements have been on a sliding scale for decades, see: B. HUBEAU, "Zijn het sociaal woonbeleid en de huisvestingssector mee met de onderkant?", in P. DE DECKER, L. GOOSSENS and I. PANNECOUCKE (eds.), *Wonen aan de onderkant*, Antwerpen, Garant, 2005, (353) 356.

[1405] SP.a, "Hogere inkomensgrens voor sociale woning", www.s-p-a.be/artikel/hogere-inkomensgrens-voor-sociale-woning/, 3 May 2013.

[1406] An additional argument in favour of higher income limits is the higher revenue it provides for the social housing sector, which could enable them to help more candidate-tenants in the long run. The additional revenue should however be considerably high to make a tangible impact on the housing stock, cf. B. HUBEAU, "Het kooprecht van de zittende sociale huurder: juridisch en/of maatschappelijk een maat voor niets?" (note under Constitutional Court 30 June 2004, no. 115/2004) *RW* 2004-05, (891) 894.

[1407] *Vr. en Antw.* Vl. Parl., Vr. nr. 311 and 312, 8 May 2013 (P. DE WAELE and M. VAN VOLCEM).

[1408] FLEMISH HOUSING COUNCIL, *Advies over het ontwerp van besluit van de Vlaamse Regering tot wijziging van diverse bepalingen betreffende het woonbeleid*, 7 June 2013, no. 2013/08, www.rwo.be/Portals/100/Vlaamse%20Woonraad/VWR_advies_KSH_def.pdf, 3-5; Around the same time, the Flemish Government did introduce the rental premium, which could be perceived as compensating for the broadening the income requirements.

[1409] For more information on this issue, see: S. WINTERS, M. ELSINGA, M. HAFFNER, K. HEYLEN, K. TRATSAERT, G. VAN DAALEN and B. VAN DAMME, *Op weg naar een nieuw Vlaams sociaal huurstelsel?*, Brussel, Departement RWO, 2007, 79-98.

lowering income requirements would thus lose some of its practical relevance when housing need would be the main criterion. Here, the ETHOS-typology can serve as a framework.[1410] Under ETHOS, points are awarded depending on the factual severity of a person's housing need. The social rental agencies increasingly assign housing to the main target groups of ETHOS (from 46 per cent in 2012 to 60 per cent in 2014).[1411] Despite existing priority rules, social housing companies on the other hand adhere more to the waiting list for its allocations.[1412] Social rental agencies can therefore be said to be a step ahead of the social housing companies by allocating housing in a more flexible way, and thereby prioritizing those most in need.

523. Discussions on housing measures regularly revolve around an interpretation of categorical selectivity. Another hot topic that fits this context is the introduction of temporary rental agreements in social housing.[1413] In accordance with the private rental market, contracts for a period of nine years would replace the current indefinite contracts.[1414] Instead of having two approaches to one aspect of the right to housing as in the previous example, the accessibility element is pitted here against housing security. The nine year contracts would make it possible to terminate the agreement when a certain income level has been exceeded at the end of the initial nine year period. If the social tenant still meets the requirements, the rent agreement would be extended for another three years.

524. This initiative aims to create a better flow of people from the social to the private housing market which could increase access to social housing. At the same time however it would also reduce the housing security of social tenants, which makes for a very difficult

[1410] FLEMISH HOUSING COUNCIL, *Sociale huur in Vlaanderen. Een aanzet tot toekomstoriëntatie*, 17 October 2014, no. 2014/08, www.rwo.be/Portals/126/Vlaamse%20Woonraad/VWR_advies_sociale_huur_def_20141017.pdf, 10; FEANTSA, *European Typology of Homelessness and housing exclusion (ETHOS)*, available at www.feantsa.org/spip.php?article120&lang=en.

[1411] D. VAN VOOREN, "Menswaardig wonen aan de onderkant. Pistes voor een toekomstig Vlaams woonbeleid", presentation during a seminar on 8 September 2015, *Woonnood in Vlaanderen*, presentation available at: https://steunpuntwonen.be/Documenten/studiedagen/studienamiddag-woonnood-in-vlaanderen-feiten-mythen-voorstellen-8-september-2015/03-david-van-vooren-menswaardig-wonen-aan-de.pdf.

[1412] Cf. art. 18-20 and art. 21 Framework Decision Social Rent; A. HANSELAER, "De verhuring van sociale woningen", in B. HUBEAU and T. VANDROMME (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013, (109) 122-124; Surprisingly, the allocation system used by the social housing companies has no priority rule for homeless people. They can only be given priority at the request of the Public Centre for Social Welfare.

[1413] This excludes housing provided by social rental agencies, since they dispose of the accommodation for only a limited period.

[1414] For exceptions, see: Art. 98, § 3 Flemish Housing Code.

reasonableness assessment as to whether it would improve the right to housing.[1415] Proponents of the reform interpret moving to the private market as part of a person's regained autonomy[1416], creating space for those who have even fewer resources in the process. On the other hand a more maximalistic view encourages a system that aims to develop more of a sustainable basis from which it becomes possible for a person to improve his/her socio-economic position.[1417] With regard to the first perspective it is doubtful whether the measure actually encourages self-development at all. It could very well undermine a tenant's incentive to find a (better) job because it might lead to the loss of his or her home. This so called unemployment trap is not unfamiliar to the current Flemish Minister of Housing.[1418] It actually withheld her to openly support temporary contracts earlier.[1419] In order to prevent such a scenario unfolding, the draft bill on introducing nine year contracts in social housing raises the income limit applicable at the end of the contract with 25 per cent. We nonetheless agree with the advice by the Flemish Housing Council that this may not be sufficient to ascertain that tenants leaving the social housing market will find an adequate dwelling on the private market, especially in the case of single person households.[1420]

525. Nevertheless, it is hard to argue in advance that adopting a measure that prioritizes candidate-tenants and has their interests prevail over those of the present tenants is unreasonable, i.e. that it would not be able to improve the right to housing.[1421] Accordingly, the Flemish Housing Council is not opposed in principle against the idea behind the measure either. Yet, that does not mean that the specific conditions of the initiative cannot be in conflict with the right to housing.[1422] This is not only what the Flemish Housing Council

[1415] For an overview of some of the arguments pro and contra, see: Report on behalf of the Commission for Housing, Poverty Policy and Equal Opportunities concerning the policy letter on Housing 2015-2016, *Parl. St.* Vl. Parl. 2015-16, no. 524/4, 19, 28-29 and 40-44.
[1416] *Ibid*., 29.
[1417] T. VANDROMME and B. HUBEAU, *De sociale huur als instrument ter verwezenlijking van het grondrecht op wonen*, Antwerpen, Universiteit Antwerpen, 2015, 56.
[1418] *Vr. en Antw.* Vl. Parl. 2014-2015, Vr. nr. 187, 4 February 2015 (B. ANSEEUW).
[1419] Knack, "Wie weigert onze taal te leren, hoort niet thuis in een sociale woning van Antwerpen", 2 November 2011.
[1420] FLEMISH HOUSING COUNCIL, *Advice concerning the modifications on social rent in the draft decree on the amendment of various decrees on housing and concerning the draft decision by the Flemish Government to amend the Framework Decision Social Rent*, 28 January 2016, no. 2016/03, www.wonenvlaanderen.be/nieuws/advies-vlaamse-woonraad-over-de-aanpassing-van-het-kaderbesluit-sociale-huur, 7-8.
[1421] T. VANDROMME and B. HUBEAU, *De sociale huur als instrument ter verwezenlijking van het grondrecht op wonen*, Antwerpen, Universiteit Antwerpen, 2015, 56-57.
[1422] The Flemish Housing Council had showed a cautious attitude towards nine-year social rental contracts earlier in its own-initiative advice on the Policy Letter for Housing 2015-2016: FLEMISH HOUSING COUNCIL, *Advice concerning the Policy Letter on Housing*, 13 November 2015, no. 2015/12, www.rwo.be/Portals/126/Vlaamse%20Woonraad/VWR-beleidsbrief-v5.pdf, 6-7.

argues[1423], the Council of State raised similar concerns when the Walloon Region introduced this type of rental contracts back in 2006.[1424] It wondered whether fixed-term social housing contracts were an absolute necessity, whether its purpose could not be attained without abolishing indefinite contracts.[1425] That is a very relevant question in the current context again, especially since Flemish legislation already contains an optional ground for termination of the agreement on the basis of income.[1426]

526. A similar advice by the Council of State for the new draft bill would have been logical, certainly considering that the conditions in the Flemish draft bill are quite strict when compared to not only the Walloon legislation[1427] (where the contract can be annulled only after each period of nine years), but also the legislation of the Brussels-Capital Region (where a more lenient income limit of 150% was chosen).[1428] It is therefore remarkable that the Council of State has neither addressed this issue in any way nor even referred to its earlier advice.

527. Whether or not the proposed amendment will maintain its current form, it should be clear that a proper ex post analysis is necessary, especially in scenarios where the impact of a measure is particularly unclear or unpredictable. In that regard it will have to be examined whether the amendment has created enough access into social housing to justify the infringement of the element of housing security. Conducting follow-ups of households whose social rental contracts have been terminated could for example indicate whether their forced departure from social housing has proven to be socio-economically sustainable or whether

[1423] FLEMISH HOUSING COUNCIL, *Advice concerning the modifications on social rent in the draft decree on the amendment of various decrees on housing and concerning the draft decision by the Flemish Government to amend the Framework Decision Social Rent*, 28 January 2016, no. 2016/03, www.wonenvlaanderen.be/nieuws/advies-vlaamse-woonraad-over-de-aanpassing-van-het-kaderbesluit-sociale-huur, 5-6.

[1424] Decree 30 March 2006 concerning the modification of the Walloon Housing Code, *BS* 2 May 2006.

[1425] Adv. Council of State, no. L.39.575/4 concerning a draft of decree modifying the Walloon Housing Code, *Parl. St.* W. Parl. 2005-06, no. 322/1, 26; The measure was also contested in the legal doctrine: N. BERNARD, "Le nouveau bail de logement social en région Wallonne", 2010, http://ciep.be/_archivage/documents/NveauBailLog_Soc_SWL.pdf, 43.

[1426] Art. 33, § 2 Framework Decision Social Rent: This possibility occurs when a tenant pays the basic rental price for three consecutive years and his income is at least twice the applicable income limit during this three years stretch, the social letters that have included this option in their internal rent regulations can terminate the agreement.

[1427] Art. 24, § 4 Decision of the Walloon Government of 6 September 2007 concerning the organization of the rent of housing managed by the Walloon Housing Company ("Société wallonne du Logement") or the public housing companies, *BS* 7 November 2007, *err. BS* 14 November 2007, *err. BS* 31 December 2007.

[1428] Art. 142, § 2 Brussels Housing Code juncto art. 15.7-15.19 Decision of the Brussels-Capital Government of 26 September 1996 concerning the regulation of the rent of housing managed by Brussels Regional Housing Company or the public real estate companies, *BS* 14 November 1996.

they were back on that waiting list within a considerable period of time. And if the system turns out to have the tendency to take the form of a revolving door, could that perhaps be due to the way in or period over which the decisive increase in income has been evaluated?

528. In contrast to the previous examples, the potential of a measure is sometimes much more obvious at first glance, but only when the assessment is limited to a short term perspective. Take for example the rental premium.[1429] There is no doubt that the affordability of housing has improved with the adoption of an allowance for those who have been on the waiting list for social housing for four years.[1430] At the same time however it could be regarded as a largely cosmetic measure, a patchwork solution to a failing social housing policy rather than a structural one. Considering the average waiting time of little over three years[1431], it does not create any considerable financial pressure on the government either to make additional efforts in optimizing[1432] and expanding[1433] the social housing stock, even despite the fact that the rental premium has been expanded to tenants waiting only four instead of five years.[1434]

[1429] Art. 81-82 Flemish Housing Code; Decision Flemish Government 21 March 2014 on the amendment of the decision by the Flemish Government from 2 February 2007 concerning the installation of a rental price compensation for tenants in housing need and the decision of the Flemish Government from 4 May 2012 concerning the installation of a compensation for candidate-tenants, *BS* 5 May 2014.

[1430] J. VANDENBERGHE, "De huurpremie voor kandidaat-huurders voor een sociale woning", in M. DAMBRE, B. HUBEAU, A. KIEKENS, T. VANDROMME and K. VANNESTE (eds.), *Huurzakboekje 2015*, Mechelen, Wolters Kluwer, 2015, 255-259; V. VAN DE KEERE, "Vlaamse huurpremie voor huurders die wachten op een sociale woning", *NNK* 2013, no. 1, 6-12.

[1431] *Vr. en Antw.* Vl. Parl. 2014-2015, Vr. nr. 831, 14 July 2015 (E. ROBEYNS).

[1432] 6 % of the social housing stock is (e.g.: necessary renovation works) (cf. the Netherlands: 3,5 %), see: S. ZWART, "Maintaining an efficient and equitable housing market in Belguim", *OECD Economics Department Working Papers, no. 1208*, Paris, OECD Publishing, 2015, www.oecd-ilibrary.org/docserver/download/5js30ttdx36c.pdf?expires=1453890455&id=id&accname=guest&checksum=EF13A0F068B0A10A156C51AF313B9738, 22.

[1433] In accordance with the Flemish Coalition Agreement 2014-2019, the deadline to obtain the social objective will be postponed to 2025 (instead of 2023) with an amendment to the Flemish Housing Code. The amendment also updates the objective of social rental housing itself from 43.440 to 50.000. There are however serious questions about the growth path. Between 2009 and 2014 the waiting list for social housing has increased by 46 %. Even if the objective of 50.000 extra social rental houses is reached by 2025, the increase since the baseline measurement in 2008 will not even cancel out the increase of eligible candidate-tenants (FLEMISH HOUSING COUNCIL, *Advice concerning the draft decree on the amendment of various decrees on housing*, 28 January 2016, no. 2016/02, www.wonenvlaanderen.be/nieuws/advies-vlaamse-woonraad-over-diverse-decreten-met-betrekking-tot-wonen, 5). Of course, this is only a preliminary prediction. Over the following years, the waiting list could become even longer (e.g. due to the refugee crisis), but also decrease (e.g. due to the introduction of temporary contracts). Regardless, the social housing stock will probably not reach the minimum of 9 % of the entire housing stock as recommended by the Flemish Housing Council (FLEMISH HOUSING COUNCIL, *Sociale huur in Vlaanderen. Een aanzet tot toekomstoriëntatie*, 17 October 2014, no. 2014/08, www.rwo.be/Portals/126/Vlaamse%20Woonraad/VWR_advies_sociale_huur_def_20141017.pdf, 9).

[1434] Less than 0,5 % of the Flemish private tenants receive a rental premium or a rent subsidy, see: S. WINTERS and D. VERMEIR, *The evolution of the private rental market in Flanders*, https://lirias.kuleuven.be/bitstream/123456789/411957/1/ENHR+2013+PRS.pdf, 2013, 4.

529. The same can be said about the decision of the Flemish government that social housing instances can use their housing stock outside of the social rental regulations to provide temporary shelter for homeless people during the winter period.[1435] The dwellings can only be provided for a period of six months and do not have to fully comply with all housing quality norms as long as they do not exhibit any safety or health risks. Besides some practical questions concerning the specific organisation of the initiative, it is difficult to oppose this more pragmatic short-term solution on its own merits.[1436] At the same time it only offers a temporary solution. Our reasonableness approach also requires an answer to the question whether it can improve the right to housing in the long run, in a more structural manner. When the proposed monitoring body is in such a position, it should therefore take a quick look at other relevant measures in force, possibly on the basis of its own earlier assessments. Do they combat homelessness on a more structural level, are they geared towards housing rather than just shelter?[1437] When that is not the case, the monitoring body should make a clear mention of it. Otherwise, the assessment would be comparable to a regular regulation impact analysis or evaluation, where the outcome is tested only against the objective of the measure itself.

530. By conducting both ex ante and ex post analyses of housing measures, all the necessary expertise on what does and does not work, attested by quantitative and qualitative research, would be centralized in one authoritative voice. This voice could perhaps convince the legislator of the need for a more structural approach when necessary, especially when the monitoring body would have to resort to that argumentation repeatedly with regard to different patchwork measures. Additionally, we have seen earlier how at least in theory an infringement of the positive standstill obligation is not impossible. One could thus even argue that these repeated statements could be used to support such a claim.

[1435] Decision of the Flemish Government 27 November 2015 to amend article 55quinquies of the decision by the Flemish Government from 12 October 2007 concerning the regulation of the social rental system in execution of title VII of the Flemish Housing Code and to amend article 1 and 2 and annex 1, 2 and 3 of the decision of the Flemish Government from 12 July 2013 concerning the housing quality and safety norms, *BS* 12 January 2016.

[1436] FLEMISH HOUSING COUNCIL, *Advice concerning the organisation of the winter shelter of homeless people in social housing*, 9 October 2015, no. 2015/08, www.rwo.be/Portals/126/Vlaamse%20Woonraad/VWR_%20eindadvies_winteropvang.pdf.

[1437] In that respect we definitely support the Flemish Action Plan against Povery 2015-2019 in its acknowledgment of the need for an evidence-based long-term approach to homelessness, available at: www4.vlaanderen.be/wvg/armoede/vlaamsactieplan/Documents/20150702_ontwerptekst%20VAPA%20-%20DEFINITIEF%20-%20BIS.pdf, 53-59.

531. Let it be clear that the monitoring mechanism as we perceive it should not aim to prevent adequate temporary solutions or have them annulled. It should nonetheless use its authority to address a measure that does not contribute to the realization of the right to housing in the long run and to warn the legislator when other measures do not do so either. In that respect, the current proposal to impose the adoption of a housing policy plan by decree can only be encouraged. [1438] By creating a more structured look at medium and long term housing policy objectives, this plan not only reflects the idea of progressive realization, it also helps the monitoring instance in putting specific measures in a broader perspective. Do the measures taken or planned to be taken address these obstacles more structurally as well?

532. Another aspect that deserves at least some attention in the framework of our proposal is the relationship with the right to property.[1439] We have seen earlier how both in European and domestic jurisprudence the right to housing is regularly considered to be at odds with the right to property. With a strong(er) legislative focus on the realization of the right to housing, concerns could be raised that the right to property might be interfered with more frequently. There is however little credence in a possible devaluation of the right to property. First of all, a proper analysis of what might improve the right to housing should take the interests of owners into account as well. As we have seen earlier, this might very well have an impact on a housing measure's chances for success (supra).

533. Secondly, even if the assumption that an improvement of the right to housing necessitates further constraints on the right to property is correct, the possibility to request the annulment of a legislative measure before the Constitutional Court on the basis of article 16 obviously remains intact. In that context it has been said that any interference with the right to property necessitates a balance between the general interest and the enjoyment of one's property. This proportionality requirement is not fulfilled when owners bear an excessive burden.[1440] Despite this premise, it is noteworthy to mention that the protection of the right to property has not been a very successful argument against housing measures anyway. Over the last ten years, the jurisprudence of the Constitutional Court illustrates that it has been very lenient towards housing measures that might impede the right to property (e.g. legislation

[1438] FLEMISH HOUSING COUNCIL, *Advice concerning the draft decree on the amendment of various decrees on housing*, 28 January 2016, no. 2016/02, www.wonenvlaanderen.be/nieuws/advies-vlaamse-woonraad-over-diverse-decreten-met-betrekking-tot-wonen, 3.
[1439] Art. 16 Belgian Constitution.
[1440] E.g.: ECtHR 8 July 1986, no. 9006/80 et al., Lithgow et al./ United Kingdom, par. 120; Constitutional Court 7 March 2007, no. 33/2007, B.5.3.

concerning the public management right, written rental contracts, buying rights for social tenants, …).[1441] The only judgments where the Court did find legislation to be disproportionate with article 16 of the Constitution involved the social obligation for building operators to put a percentage of their buildings at disposal for social purposes.[1442] Even more so, the Court has occasionally declared that article 23 had triggered, even forced, the legislator to adopt the housing related measures it had taken.[1443] For all these reasons we do not think our proposal would complicate the relationship with the right to property any further.

§ 5. Conclusion

534. In order to attain an enforceable reasonableness approach to the right to housing that incentivizes result-oriented obligations, we have advocated the need for both an ex ante and an ex post analysis for each measure related to this fundamental right. The ex ante assessment should be held at a time when it can still have a substantive impact on the development of the policy measure, while the evaluation afterwards can rely on the issue-specific research (qualitative and/or quantitative) organized on the basis of the ex ante analysis to decide whether the measure is indeed result-oriented. We argue that only in case of a more coordinated assessment process it may become more likely that the Constitutional Court will feel confident enough to rely on this analysis in the context of annulment proceedings.

535. We should not be naive about the plausibility of this proposal materializing. Besides the institutional stumbling blocks that currently impede better law evaluation, it is also costly and time-consuming. The Constitutional Court would go beyond its current assessment criteria as well. At the same time however we believe our result-oriented approach is a logically attained outcome from what we have gathered from international human rights law, from what article 23 of the Constitution ultimately envisions and from the concerns that such a complex assessment of the potential to improve the realization of the right to housing cannot be left

[1441] Constitutional Court 29 July 2010, no. 91/2010; Constitutional Court, 1 September 2008, no. 130/2008; Constitutional Court 20 April 2005, no. 69/2005; Constitutional Court 26 June 2008, no. 93/2008; Constitutional Court 26 June 2008, no. 92/2008; M. DAMBRE, "Het verplicht schriftelijk woninghuurcontract doorstaat de grondwettelijke toets", *Huur* 2009, 24; Constitutional Court 7 March 2007, no. 33/2007; Constitutional Court 12 February 2015, no. 16/2015; Constitutional Court 18 April 2007, no. 62/2007

[1442] Constitutional Court 6 April 2011, no. 50/2011; Constitutional Court 7 November 2013, no. 145/2013.

[1443] Constitutional Court 20 April 2005, no. 69/2005, B.17.2 and B.19.3: the Court considered that article 23 had *forced* the legislator to enlarge the housing market through public management right, rendering it of general interest and proportional to the right to property; Constitutional Court 26 June 2008, no. 92/2008, B.7.3 and B.12: the Court established that article 23 justified introducing an obligatory written housing rent agreement.

exclusively to a judge. The positive component that would become part of Court's case law fits within this result-oriented idea of progressive realization, an idea that was after all very much present in the drafting process of article 23.[1444] We should not forget that the constitutional provision does expect the government to positively take steps to try and achieve the principled perspectives of the right to housing[1445], while the Flemish Housing Code literally speaks of the need to improve adequate housing.[1446] An extra argument for the extended use of the concept of progressive realization comes from the interpretation of the ICESCR by the Council of State. It has said that while the Covenant does not have direct effect in the Belgian legal order, the government does have the obligation to act in accordance with the principles of the ICESCR.[1447] While usually cited in the standstill debate (supra), it appears logical to wonder why then the government should not have to act in accordance with the principle of progressive realization as well?

536. Against that background the following question arises: if the Constitutional Court is able to judge that a legislative act irresponsibly interferes with a constitutional right on the basis of scientific knowledge (supra), can we not hope for a similar approach with respect to a fundamental right that has been described as having to be progressively realized? The approach does not hamper democratic law-making nor does it exclude ideological choices. It only requires that these choices are backed by an evidence-based rationale that fits within the boundaries of progressively realizing the right to housing.

[1444] Explanatory Memorandum of the proposal by Mr. Stroobant and Mr. Taminiaux, *Parl.St.* Senaat BZ 1991-92, no. 100-2/3°, 10; Report on behalf of the Commission for the review of the Constitution and the reform of the institutions released by Mr. Arts and Ms. Nelis, *Parl.St.* Senaat BZ 1991-92, no.100-2/4°, 13 and 70.
[1445] A. VAN OEVELEN, "De burgerrechtelijke en bestuursrechtelijke regeling van de woningkwaliteit in de federale en Vlaamse regelgeving", *RW* 2002-2003, (1401) 1402-1403; T. VANDROMME and B. HUBEAU, *De sociale huur als instrument ter verwezenlijking van het grondrecht op wonen*, Antwerpen, Universiteit Antwerpen, 2015, 19-20.
[1446] Art. 3 Flemish Housing Code.
[1447] Council of State 30 December 1993, no. 45.552, De Wispelaere, Soc.Kron.1994, 244, note J. JACQMAIN; K. DE FEYTER, "De juridische gevolgen van de internationale en nationale erkenning van economische, sociale en culturele rechten", *Jaarboek Mensenrechten* 1994, (161) 169.

Conclusions

537. There is no discussion on the importance of adequate housing for everyday life. Not only does it provide shelter against the elements, our home, a personal and broad concept, is the central operating base of our existence. It allows us to enjoy other (human) rights to their full potential. This has translated itself into the widespread recognition of the right to adequate housing. From UN Covenants over regional Charters to national Constitutions or other domestic legislation, the right to housing has acquired its own place. In Belgium, this right has been incorporated in article 23 of the Constitution and has further been given shape in regional housing codes. These regions carry the majority of competences with regard to housing. Since the most recent state reform in 2014, which has transferred the competence of private housing rent to the regions as well, they are more than ever in possession of the keys for a more effective right to housing.

538. Our research has focused primarily on Flanders. The Flemish Housing Code largely distinguishes four essential housing elements: availability/access, affordability, quality and security of tenure. We have argued how affordable and adequate energy supply is very much part of that full enjoyment of the home. Despite this recognition *de iure*, we have seen how for every one of these elements (serious) shortcomings are still very much a reality, especially on the (private) rental market. Plenty of research has been conducted as to what measures should and should not be taken in order to address these problems appropriately. While we have addressed the pros and cons of certain legislative and policy options along the line, this has been subordinate to the question how the established shortcomings cannot only become more visible but can also trigger the necessary changes in a more forceful manner. To do so, we have relied and built on a couple of concepts often used in either socio-economic rights talk in general or the (Belgian/Flemish) housing debate, but which have not yet/always been given due attention to with regard to their potential in improving the realization of the right to housing in practice (e.g. human dignity, obligations of result, standstill, progressive realization).

539. In part I, we started by making an important distinction. It is one thing to proclaim a right to housing, it is a different one to effectively assure that this right is being fully realized in

practice. There are many elements that can and do influence whether a housing measure is able to achieve what it was set out to do or, more importantly but not always the same thing, de facto contribute to the right to housing. Tenants are often in a disadvantaged position in comparison to their landlords. This relates to both access to justice as well as the position of dependency in which they find themselves. The dependency is of course also present when it comes to choosing the appropriate tenant, where a thin line exists between personal preferences, valid financial considerations and discrimination. Housing rights law can be impacted as well by semi-autonomous social fields creating their own inner norms, sometimes opposite to legal norms, or a simple lack of knowledge amongst the beneficiaries of a right. It is possible though that the quality and clarity of legislation, as we have illustrated with the different housing quality norms (federal and regional), has a hand in thwarting the potential of certain measures. Finally, effectiveness can be influenced by the costs and benefits of complying by or breaching certain obligations. In this context, we are in favour of measures that can benefit both tenants as well as landlords, but we stress at the same time that little bargaining room should be available with regard to elementary requirements of adequate housing.

540. This selection of influencing elements must be taken into account for law to be a succesful mechanism in the realization of the right to housing, for assuring that housing rights legislation is indeed effective in practice. In other words, it aims to avoid or at least reduce the gap between formal and practical effectiveness. What exactly 'effective' means is portrayed in the overarching concept of human dignity in the first paragraph of article 23. We have argued though that its open-ended nature is problematic for a consistent application in jurisprudence. A justification for human rights or a fundamental right in itself, a minimum core, a synonym for adequate housing or a platform for other rights, … a court can interpret human dignity in any of these ways. In order not to dismiss the important value endowed upon the concept in article 23 however, we have elaborated further on what it can mean as the purpose of the right to adequate housing. In our take on what we have called social dignity, we take into account both the elements of well-being and autonomy/freedom. The latter was constructed as pertaining to both being factually able to exercise one's right to adequate housing and the autonomy that derives from living in an adequate dwelling. We deem a person's perception of this autonomy as an important factor as well. On the basis of this double-edged autonomy concept, we have taken a look at social legal aid and housing first and investigated whether and how social housing meets these criteria of social dignity. We

also concluded that while owning property does have its advantages in the context of autonomy (even though these are sometimes overestimated), we do not think it justifies in particular a property-driven housing policy (instead of a more tenure-neutral one).

541. As the first of two parts discussing the (potential) scope of state obligations with regard to the right to housing, part II focused on judgments and decisions by the European Court of Human Rights, the European Committee of Social Rights and to a lesser extent the European Court of Justice. Of these three, the ECSR is unsurprisingly the most straightforward protector of the right to housing. This fundamental right is after all explicitly established in article 31 of the European Social Charter. In correspondence with article 23 of the Constitution, we propose that the Belgian state (through agreement amongst all competent legislators) should finally take steps to ratify this (mixed treaty) provision. Considering though the other relevant provisions of the Charter from which a right to housing can be derived, a successful collective complaint with regard to the Belgian housing policy in general seems plausible even at this point. On the basis of the Committee's argumentation in earlier decisions investigating the French housing policy, we have illustrated how the (many) shortcomings of the Belgian/Flemish housing policy would likely be revealed through an authoritative – albeit not automatically binding – statement. In order to counter this lack of legal weight (regardless of any possible future institutional changes), we deem it important to give the Committee's decisions as much symbolic weight as possible. For those purposes it could be useful to authorize national NGOs to lodge complaints as well and to display the Committee's important place in human rights jurisprudence by cross-referencing the European Court of Human Rights. It would be welcomed if the latter would do the same vice versa with regard to vital elements of the Committee's decisions. The same can be said with regard to the European Court of Justice, especially since the right to housing assistance in the EU Charter of Fundamental Rights is significantly based on article 31 RESC.

542. Speaking of the ECJ, we feel as if its full potential for the right to housing has not been reached yet. Aside from some decisions on accommodation for asylum seekers and modest attempts to stress the importance of the home, housing related case law is still very much rooted in legal concerns for free movement. In contrast, the ECtHR has interpreted housing as an important protectable interest in the broader context of several different Convention rights. Confined by the lack of a substantive right to housing though, the Court imposes states primarily to comply with certain procedural safeguards. It does require the state to take

specific circumstances and the disadvantaged position of people into account, but it is obviously not in a position to assess the effectiveness of a housing measure in itself or dictate what measures should be adopted in that context. That also means that a large margin of appreciation is left to the states. In connection to the right to property however, the Court does provide some insight in how much a housing policy can or cannot interfere with the right to property, which in its broad sense does not only refer to owners but also to tenants. As such, the Court does not remain entirely silent on the admissibility of tenant protecting measures, like the adoption of a form of rent control (cf. part I, chapter II). As we have seen though, a case could be made that the Court sides more easily with the owner's interests and thereby somewhat limits the possibility for stronger tenant protection.

543. The third and final part of this research continued exploring the housing rights obligations that are or could be imposed upon the state. Here however, we searched for a more structural way to strengthen these obligations. Against that background, we embarked upon the idea of developing the right to housing into an obligation of result. By exploring this concept further though, unclarities started to arise. Originally a private law concept, the obligation of result and its counterpart, the obligation of means or conduct, were given a secondary and to a certain extent opposite meaning in public international law. With regard to human rights law and socio-economic rights in particular, this raised serious questions about the exact scope of the obligation. Moreover, it became clear that circumstances could render an obligation of result ineffective just as well and that other obligations, maybe not of result in a strict sense, do effectively work towards attaining that result. It is here that we developed the term result-oriented obligation as the focal point for a strenghtened right to housing.

544. What followed was an investigation into the meaning and ultimately potential enforceability of result-oriented obligations. We found inspiration from the international human rights concept of progressive realization. Both are after all concerned with making progress and working towards – in this case – the full realization of the right to adequate housing. An important element of progressive realization on which we have elaborated extensively is the (principled) prohibition to take retrogressive measures. In the form of a standstill obligation, a similar prohibition that nonetheless requires a *considerable* decline in protection has been established with regard to several of the rights in article 23 of the Belgium Constitution. In response to this argument in housing related case law, the jurisprudence adopts what can only be described as a proportionality test. While it does provide article 23

with direct effect, it can be argued whether this is favourable from a fundamental rights protection point of view.

545. In the end though, the primary focus should not be on whether measures are retrogressive in the first place. We believe that this can hinder creativity and long-term solution making. The main question should be whether progress is actually made or whether a measure is able to do so. With that question firmly in mind, we have looked at monitoring techniques and the possibility to enforce progressive realization through court. Ultimately, based on practical concerns and with the aim of providing a viable and realistic approach to incentivize result-oriented obligations, we have adopted a proposal that still gives clear precedence to the legislative branch. We argue for a monitoring body that conducts both an ex ante and an ex post analysis for each measure related to this fundamental right. Rather than assessing whether a rule's objective has been attained, it looks at whether it is able to improve the right to housing. The ex ante assessment should be held at a time when it can still have a substantive impact on the development of the measure, while the evaluation afterwards can rely on the issue-specific research (qualitative and/or quantitative) organized on the basis of the ex ante analysis to decide whether the measure is indeed result-oriented. As such, this structured assessment process aims to trigger the government *sensu lato* to develop a more result-oriented right to housing. As the enforceable capstone of the proposal, we argue that an appeal for annulment to the Constitutional Court should have a considerable chance of success. The Court could support its judgment on the evidence-based character of the assessment(s) by the monitoring mechanism.

546. Evidently, these three parts have their own perspective. Part I establishes from a broader point of view what an effective right to housing entails, the second part is preoccupied with European (quasi-)jurisprudence and part III focuses on how to acquire result-oriented obligations. But even though each part focuses on its own pathway to strengthen the right to housing, each of them also contribute together to the idea that progress must be made. As such, they should not be perceived as being disengaged from one another.

547. Take for example the practical influences on the effective functioning of housing rights as well as our conception of social dignity from part I. They should be taken into account when making the assessments *ex ante* and *ex post* in accordance with our proposal in part III. Social dignity basically provides an explanation of what progress in the context of housing

entails (it is after all the aim of article 23 of the Constitution), while the more sociological influences on effectiveness play a role in assessing whether a housing measure or policy is able to establish progress "in action". Part II on European (quasi-)jurisprudence also contributes to this bigger picture, and not just because the European Committee of Social Rights pays attention to progressive and effective realization in practice too. Or because it has provided us with argumentation for a result-oriented obligation instead of an obligation of result. It is also because a collective complaint against the Belgian State could reveal or at least confirm shortcomings and trigger more result-oriented improvements on the national/Flemish level. With our proposal from part III in force, the decision could serve as an extra authoritative statement for legislative review or even an annulment judgment by the Constitutional Court.

548. In conclusion, we can say that this research did not intend to present the reader with a general or exhausive description of legislation and jurisprudence that can be linked to the right to housing. Amongst the bulk of existing housing rights research and publications, we have purposefully chosen to focus and elaborate on just a selection of concepts and options borrowed from human rights law that are in our opinion able to contribute as stepping stones for a more effective right to housing in Belgium/Flanders. With housing protected as a fundamental right across the globe and as a protectable interest in jurisprudence, time has come to search for ways to incentivize and to a certain extent even compel progress rather than non-retrogression, in practice rather than only in law. This research has attempted to take a step in that direction.

Bibliography

ABRAMOVIC, V., "Fostering dialogue: the role of the judiciary and litigation", in J. SQUIRES, M. LANGFORD and B. THIELE (eds.), *The road to a remedy: current issues in the litigation of economic, social and cultural rights,*Sydney, University of New South Wales Press 2006, 167-176.

AGENTSCHAP WONEN-VLAANDEREN, *Jaarverslag 2014*, www.vlaanderen.be/nl/publicaties/detail/wonen-vlaanderen-jaarverslag-2012, 67 p.

AKANDJI-KOMBÉ, J.-F., "Charte sociale européenne et procedure de reclamations collectives (1998-1er juillet 1998)", *JDE* 2008, 217-221.

ALBISA, C. and SCHULTZ, J., "The United States", in M. LANGFORD (ed.), *Social rights jurisprudence. Emerging trends in international and comparative law,* Cambridge, Cambridge University Press, 2009, 232-249.

ALEN, A. and MUYLLE, K., *Handboek van het Belgische Staatsrecht*, Mechelen, Kluwer, 2011, 1096 p.

ALEN, A., "De overheidsaansprakelijkheid voor fouten van de wetgever. Over de cassatiearresten van 1 juni 2006 en 28 septemer 2006, in W. PINTENS, A. ALEN, E. DIRIX and P. SENAEVE (eds.), *Vigilantibus ius scriptum: feestbundel voor Hugo Vandenberghe*, Brugge, Die Keure, 2007, 1-14.

ALEN, A. and PEETERS, P., "Federal Belgium within the international legal order: theory and practice", in K. WELLENS (ed.), *International law: theory and practice. Essays in honour of Eric Suy*, Den Haag, Martinus Nijhoff Publishers, 1998, 123-143.

ALEN, A., CLEMENT, J., PAS, W., PEETERS, P. and VAN NIEUWENHOVE, J., "Het federale België in de gecoördineerde Grondwet van 17 februari 1994, *RW* 1993-94, 1345-1360.

ALEN, A., "'Scheiding' of 'samenwerking' der machten?", *Academiae analecta. Klasse der Letteren* 1990, vol. 52, no. 1, 1-73.

ALESSI, D., "The distinction between obligations de résultat and obligations de moyens and the enforceability of promises", *ERPL* 2005, vol.5, 657-692.

ALEXANDER, J.M., "Capabilities, human rights and moral pluralism", *IJHR* 2004, vol.8, no.3, 451-469.

ALLEN, T., "Liberalism, social democracy and the value of property under the European Convention on Human Rights", *I.C.L.Q.* 2010, 1055-1078.

ALLOTT, A., "The effectiveness of law", *Valparaiso University Law Review* 1981, vol. 15, no. 2, 229-242.

ALSTON, P. and QUINN, G., "The nature and scope of states parties' obligations under the International Covenant on Economic, Social and Cultural Rights", *HRQ* 1987, vol.9, no.2, 156-229.

ANDERSSON, E., NAUMANEN, P., RUONAVAARA, H. and TURNER, B., "Housing, socio-economic security and risks. A qualitative comparison of household attitudes in Finland and Sweden", *European Journal of Housing Policy 2007*, vol. 7, no. 2, 151-172.

B.A. ANDREASSEN, A.G. SMITH and H. STOKKE, "Compliance with economic and social human rights: realistic evaluations and monitoring in the light of immediate obligations", in A. EIDE and B. HAGTVET (eds.), *Human Rights in Perspective: a Global Assessment,* Oxford, Oxford University Press 1992, 252-267.

D. ANDREWS, A. CALDERA SÁNCHEZ and A. JOHANSSON, *Housing markets and structural policies in OECD countries*, OECD Economics Department Working Papers no. 836, www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=ECO/WKP%282011%295&docLanguage=En, 84 p.

ARIELI, Y., "On the Necessary and Sufficient Conditions for the Emergence of the Doctrine of the Dignity of Man and His Rights", in KRETZMER, D. and KLEIN, E. (eds.), *The Concept of Human Dignity in Human Rights Discourse*, The Hague, Kluwer, 2002, 1-11.

AROSEMENA, G., *Rights, scarcity and justice. An analytical inquiry into the adjudication of the welfare aspects of human rights*, Cambridge, Intersentia, 2014, 214 p.

AUBERT, V., "Enkele sociale functies van wetgeving", in GRIFFITHS, J. (ed.), *De sociale werking van recht*, Nijmegen, Ars Aequi, 1996, 113-135.

BADERIN, M.A. and McCORQUODALE, R., "The International Covenant on Economic, Social and Cultural Rights: Forty Years of Development", in BADERIN, M.A. and McCORQUODALE, R. (eds.), *Economic, Social and Cultural Rights in Action*, Oxford, Oxford University Press, 2007, 3-24.

BALCHIN, P., *Housing policy: an introduction*, London, Routledge, 1995, 492 p.

BALL, J., "From individual to collective squat: economic, theory and the regulation of squatting in England and France", in KENNA, P. (ed.), *Contemporary housing issues in globalized world*, Farnham, Ashgate, 2014, 227-250.

BALL, M., *The UK private rented sector as a source of affordable accommodation*, York, Joseph Rowntree Foundation, 2010, 36 p.

BARBOSA DA SILVA, A., "Autonomy, dignity and integrity in health care ethics – a moral philosophical perspective", in SINDING AASEN, H., HALVORSEN, R. and BARBOSA DA SILVA, A. (eds.), *Human rights, dignity and autonomy in health care and social services: Nordic perspectives*, Antwerp,Intersentia, 2009, 13-52.

BARNARD, C., "The 'opt-out' for the UK and Poland from the Carter of Fundamental Rights: triumph of rhetoric or reality?", in GRILLER, S. and ZILLER, J. (eds.), *The Lisbon Treaty: EU Constitutionalism without a constitutional treaty?*, Vienna, Springer, 2008, 257-283;

BARROS, D.B., "Home as a legal concept", *Santa Clara Law Review* 2006, vol. 46, 255-306.

BARROSO, L.R., "Here, there and everywhere: human dignity in contemporary law and in the transnational discourse", *Boston College International & Comparative Law Review* 2012, vol.35, 331-394.

BATIS, N. and VAN OOTEGEM, H., "Eau et énergie: à quand des droits effectifs?", *Echos log.* 2010, no.1, 14-20.

BAXI, U., "Too many, or too few, human rights?", *HRLR* 2001, vol. 1, no. 1, 1-9;

BEITER, K.D., *The protection of the right to education by international law*, Leiden, Martinus Nijhoff Publishers, 2005, 719 p.

BELL, D.H., "Providing security of tenure for residential tenants: good faith as a limitation on the landlord's right to terminate", *Ga. L. Rev.* 1985, vol. 19, (483) 530.

BENGTSSON, B., "Housing as a social right: implications for welfare state theory", *Scandinavian Political Studies* 2001, vol. 24, no. 4, 255-275.

BENOÎT-ROHMER, F., "The impact of the European Convention of Human Rights on the jurisdictionalisation of the European Committee of Social Rights", in ALIPRANTIS, N. and PAPAGEORGIOU, I. (eds.), *Social rights at European, regional and international level. Challenges for the 21st century*, Brussel, Bruylant, 2010, 233-250.

BERLIN, I., *Four essays on liberty*, Oxford, Oxford University Press, 1964, 213 p.

BERNARD, N., "Commentaire de l'arrêt Tchokontio Happi de la Cour Européenne des droits de l'homme", *Echos Log*. 2016, no. 1, 56-59.

BERNARD, N. and LEMAIRE, V., "Regionalisering van de woonbonus: naar een beleid op maat van het Brussels Gewest?", *Brussels Studies* 2015, no. 83, 1-7;

BERNARD, N., "Vers un fonds centralisée (mutualisé!) de garanties locatives: balises et suggestions pour une opérationnalisation", *Les Échos du Logement* 2015, no. 3, 3-10;

BERNARD, N., "Des 'mesures immédiates' pour désamorcer le critère du rattachement local dans l'hébergement des sans-abri", *Housing Rights Watch* 2014, 26 p.

BERNARD, N., "Quel droit au logement pour les gens du voyage?", *Echos log.* 2012, no. 1, 3-18.

BERNARD, N., "Le droit constitutionnel au logement, une source d'inspiration pour le droit à l'énergie", *RBDC* 2012, no. 2, 89-113.

BERNARD, N., "Uithuiszettingen: tussen wet en praktijk", in BERNARD, N. (ed.), *Les expulsions de logement/Uithuiszettingen*, Brugge, Die Keure, 2011, 41-81.

BERNARD, N., *La réception du droit au logement par la jurisprudence. Quand les juges donnent corps au droit au logement*, Brussel, Larcier, 2011, 416 p.

BERNARD, N. and LEMAIRE, L., *Expulsions de logement, sans-abrisme et relogement*, Brussels, Larcier, 2010, 256 p.

BERNARD, N. and HUBEAU, B., "Poverty and fundamental social and economic rights: on the effectiveness of the right to decent housing", in DIERCKX, D., VAN HERCK, N. and VRANKEN, J. (eds.), *Poverty in Belgium*, Antwerpen, Acco, 2010, 195-206.

BERNARD, N., "Le nouveau bail de logement social en région Wallonne", 2010, http://ciep.be/_archivage/documents/NveauBailLog_Soc_SWL.pdf, 59 p.

BERNARD, N., "Le droit au logement dans la Charte Sociale Révisée: à propos de la condamnation de la France par le Comité Européen des Droits Sociaux", *RTDH* 2009, no. 80, 1061-1089.

BERNARD, N., "Pas d'expulsion de logement sans contrôle juridictionnel – le droit au logement et la Cour Européenne des Droits de l'Homme", *RTDH* 2009, no. 79, 527-552.

BERNARD, N., "Les lois anti-discrimination et le secteur du logement (privé et social)", in BAYART, C., SOTTIAUX, S. and VAN DROOGHENBROECK, S. (eds.), *De nieuwe federale antidiscriminatiewetten*, Brugge, Die Keure, 2008, 797-843.

BERNARD, N., "La loi du 25 avril 2007 et les nouvelles dispositions en matière de bail à loyer", *JT* 2007, 513-518.

BERVOETS, W. and LOOPMANS, M., *Diversiteit en discriminatie in de sociale huisvesting: een kritische benadering van 'sociale mix'*, Brussel, STeR, 2010, www.unia.be/files/legacy/Mixite_NL_DEF.pdf, 96 p.

BEYLEVELD, D. and BROWNSWORD, R., "Human dignity, human rights and human genetics", *Modern Law Review* 1998, 661-680.

BEYNS, K., BRUYNDONCKX, S., SCHILDERMANS, E., VAN BEURDEN, F., VAN BRAECKEL, F. and VAN DEUN, E., *Menswaardig leven. Een onderzoek binnen de Kempense OCMW's*, Geel, Katholieke Hogeschool Kempen, 2008;

BILCHITZ, D., *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, Oxford, Oxford University Press, 2007, 300 p.

BLACK, D., *The behaviour of law*, New York, Academic Press, 1976, 203 p.

BOBBIO, N., *The age of rights*, Cambridge, Polity Press, 1995, 192 p.

BORTELS, H. and HEYVAERT, P., "Het legaliteitsbeginsel in de rechtspraak van het Grondwettelijk Hof: een variërende intensiteit van de toetsing", *TBP* 2011, no. 6, 334-364.

BOSCH, A., *Citizens enforcing the law: The legal and social space for citizen's arrest*, Antwerp, Maklu, 2013, 182 p.

BOSCH, M., CARNERO, M.A. and FARRÉ, L., "Information and discrimination in the rental housing market: evidence from a field experiment", *Regional Science and Urban Economics* 2010, vol. 40, 11-19.

BOSSUYT, M., "Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof", in RAUWS, W. and STROOBANT, M. (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, 59-67.

BOURASSA, S.C. and GRIGSBY, W.G., "Income tax concessions for owner-occupied housing", *Housing Policy Debate* 2000, vol. 11, no. 3, 521-546.

BRAND, D., "Socio-economic rights and courts in South Africa: justiciability on a sliding scale", in COOMANS, F. (ed.), *Justiciability of economic and social rights. Experiences from domestic systems*, Antwerpen, Intersentia, 2006, 207-236.

BRAND, D., "The proceduralisation of South African socio-economic rights jurisprudence", or 'What are socio-economic rights for?' ", in BOTHA, H., VAN DER WALT, A. and VAN DER WALT, J. (eds.), *Rights and democracy in a transformative constitution*, Stellenbosch, SUN Press, 2003, 33-56.

BRATT, R.G., STONE, M.E. and HARTMAN, C.W., "Why a right to housing is needed and makes sense", in BRATT, R.G., STONE, M.E. and HARTMAN, C.W. (eds.), *A right to housing. Foundation for a new social agenda*, Philadelphia, Temple University Press, 2006, 1-19.

BREMS, E. and VRIELINK, J., *Menselijke waardigheid in de Nederlandse Grondwet? Voorstudie ten behoeve van de Staatscommissie Grondwet (2009)*, Alphen aan den Rijn, Kluwer, 2010, 72 p.

BREMS, E., "Indirect protection of social rights by the European Court of Human Rights", in BARAK-EREZ, D. and GROSS, A. (eds.), *Exploring social rights. Between theory and practice*, Portland, Hart Publishing, 2007, 135-167.

BREMS, E., "Geen recht op kraken", *Juristenkrant* 2003, no. 79, 13.

BREMS, E., "De nieuwe grondrechten in de Belgische Grondwet en hun verhouding tot het international, inzonderheid het Europese recht", *TBP* 1996, 619-636.

BREWER-CARIAS, A.R., *Constitutional courts as positive legislators: a comparative law study*, Cambridge, Cambridge University Press, 2011, 962 p.

BRIGHT, S.J. and HOPKINS, N., "Home, meaning and identity: learning from the English model of shared ownership housing", *Theory and Society* 2011, vol. 28, no. 4, 377-397.

BRILLAT, R., "The European Social Charter and monitoring its implementation", in ALIPRANTIS, N. and PAPAGEORGIOU, I., (eds.), "Social rights at European, regional and international level. Challenges for the 21st century", Brussel, Bruylant, 2010, 43-59.

BRILLAT, R., "De collectieve klachtenprocedure van het Europese Sociale Handvest en de strijd tegen armoede", in Steunpunt tot Bestrijding van Armoede, Bestaansonzekerheid en Sociale Uitsluiting, *Armoede-Waardigheid-Mensenrechten*, Brussel, 2008, www.armoedebestrijding.be/publications/10jaarsamenwerking/10jaarsamenwerking_rapport_NL.pdf, 74-80.

BRILLAT, R., "The effective implementation of the right to housing of homeless of poorly housed persons : the role of the European Social Charter", *Feantsa Magazine* 2008, no. 2, 7-8.

BRODSKY, G., "Gosselin v. Quebec (Attorney General) : Autonomy with a Vengeance", *Canadian Journal of Women and the Law* 2004, vol.15, 194-213.

BRUGGER, W., "Human rights norms in ethical perspective", *German Yearbook of International Law* 1982 vol. 25, 113-137.

BURGORGUE-LARSEN, L. and UBEDA DE TORRES, A., *The Inter-American Court of Human Rights*, Oxford, Oxford University Press, 2011, 948 p.

BUITENWEG, R., *Recht op een menswaardig bestaan. Een humanistieke reflectie op sociaal-economische mensenrechten*, Utrecht, de Graaff, 2001, 384 p.

BURGORGUE-LARSEN, L. (ed.), *La dignité saisie par les juges en Europe*, Brussel, Bruylant, 2010, 262 p.

BUSCH-GEERTSEMA, V., "Housing First Europe – results of a European social experimentation project", *European Journal of Homelessness* 2014, vol. 8, no. 1, 13-28;

BUYSE, A., "Destruction of housing and discrimination against Roma – developments at the ECtHR", *Housing and ESC Rights Law Quarterly* 2006, vol. 3, no. 1, 5-6.

BYRNE, T. and CULHANE, D.P., "The right to housing: an effective means for addressing homelessness?", *Univ. of Pennsylvania Journal of Law and Social Change* 2011, vol. 14, 379-391.

CAMPAERT, G., "De onderkant van de woonmarkt", in VRANKEN, J., CAMPAERT, G., DE BOYSER, K. and DIERCKX, D. (eds.), *Armoede en sociale uitsluiting. Jaarboek 2007*, Leuven, Acco, 99-111.

CARETTE, N. and QUIRYNEN, A., "Actuele ontwikkelingen inzake woninghuur en handelshuur", in TILLEMAN, B. and VERBEKE, A.-L. (eds.), *Bijzondere overeenkomsten*, Brugge, Die Keure, 2015, 35-90.

CAROZZA, P., "Human dignity and judicial interpretation of human rights: a reply", *EJIL* 2008, vol.19, no.5, 931-944.

CASIER, I., BAUWENS, A., DISTELMANS, W. and SNACKEN, S., "Over het concept menselijke waardigheid", in RAES, K., DEBEUCKELAERE, W., GUTWIRTH, S. and LAMBRECHTS, M. (eds.), *Ontmoetingen met Koen Raes*, Brugge, die Keure, 2012, 85-95.

CASSIERS, W., "Les droits sociaux en quête d'effectivité", in VAN DER PLANCKE, V. (ed.), *Les droits sociaux fondamentaux dans la lutte contre la pauvreté*, Brussel, Die Keure, 2012, 288-310.

CASTELEIN, D., "Knelpunten huurwaarborg en uithuiszettingen", in BRULEZ, P. and VERBEKE, A.-L. (eds.), *Knelpunten huurrecht: tien perspectieven*, Antwerpen, Intersentia, 2012, 175-216.

CASTLES, F.G., "The really big trade-off: home ownership and the welfare state in the new world and the old", *Acta Politica* 1998, vol. 33, no. 1, 5-19.

CAUFFMAN, C., "Hervorming van de verzoeningspoging bij hoofdvorderingen inzake de huur van woningen", *RW* 2008-09, no. 6, 252-254.

CAUFFMAN, C., "Opschortingsrechten bij niet-nakoming", in SMITS, J. and STIJNS, S. (eds.), *Remedies in het Belgisch en Nederlands contractenrecht*, Antwerpen, Intersentia, 2000, 141-171;

CEBEON, *Kosten en baten van maatschappelijke opvang. Bouwstenen voor effectieve inzet van publieke middelen*, Dutch Ministry of Health, Welfare and Sport, 2011, www.opvang.nl/files/kba_MO_eindrapport_012.pdf, 64 p.

Center for Economic and Social Rights, "The OPERA Framework. Assessing compliance with the obligation to fulfill economic, social and cultural rights", www.cesr.org/downloads/the.opera.framework.pdf, 48 p.

CHANDHOKE, N., "Thinking through social and economic rights", in BELL, D.A. and COICAUD, J.-M. (eds.), *Ethics in action: the ethical challenges of international human rights nongovernmental organizations*, Cambridge, Cambridge University Press, 2007, 181-197.

CHAPMAN, A. and RUSSELL, S., *Core obligations: building a framework for economic, social and cultural rights*, Antwerpen, Intersentia, 2002, 351 p.

CHENWI, L., "Unpacking 'progressive realisation', its relation to resources, minimum core and reasonableness, and some methodological considerations for assessing compliance", *De Jure* 2013, vol.46, no.3, 742-769.

CHURCHILL, R. and KHALIQ, U., "Violations of Economic, Social and Cultural Rights: The Current Use and Future Potential of the Collective Complaints Mechanism of the European Social Charter", in BADERIN, M.A. and McCORQUODALE, R. (eds.), *Economic, Social and Cultural Rights in Action*, Oxford University Press, Oxford, 2007, 195-240.

CLAASSEN, R. and DÜWELL, M., "The foundations of capability theory: comparing Nussbaum and Gewirth", *Ethic Theory and Moral Practice* 2013, vol. 16, no. 3, 493-510.

CLAESSENS, B. VLERICK, E. and DE DECKER, P., *Op zoek naar de betekenis van wonen. Een verkennend literatuuronderzoek*, Heverlee, Steunpunt Ruimte en Wonen, 2009, 100 p.

CLAPHAM, D., *The meaning of housing. A pathways approach*, Cambridge, Policy Press, 2005, 286 p.

CLITEUR, P.B. and VAN WISSEN, R.G.T., "De menselijke waardigheid als grondslag voor mensenrechten: een beschouwing over het werk van Kant en Schopenhauer in relatie tot de filosofische reflective over mensenrechten", in VAN DER LIST, G.A. (ed.), *De Rechten van de Mens*, Den Haag, Teldersstichting, 1998, 25-42.

CLITEUR, P.B. "De dreigende proliferatie van mensenrechten", in HULS, N. (ed.), *Grenzen aan MR*, Leiden, Stichting NJCM-boekerij, 1995, 7-31.

CLYMANS, M. and VANDEN EYNDE, M., "Leve de liberalisering ! Gas en elektriciteit vrij te koop. Of toch niet?", in HUBEAU, B. and JADOUL, P. (eds.), *Vers un droit fondamental à l'énergie? Naar een grondrecht op energie?*, Brugge, Die Keure, 2006, 183-192.

COLAES, J., "Recente wijzigingen in de Huurwet 2006-2007, *Huur* 2007, 133-161.

COMBACAU, J., "Obligations de résultat et obligations de comportement. Quelques questions et pas de réponse", in BARDONNET, D. COMBACAU, J., VIRALLY, J. and WEIL, P. (eds.), *Mélanges offerts à Paul Reuter. Le droit international: unité et diversité*, Parijs, Éditions A. Pedone, 1981, 181- 204.

CONLEY, D. and GIFFORD, B., "Home ownership, social insurance, and the welfare state", *Sociological Forum* 2006, vol. 21, no. 1, 55-82.

COOMANS, A.P.M., "De internationale bescherming van het recht op onderwijs", Leiden, Stichting NJCM-boekerij, 1992.

COOMANS, F., "Reviewing implementation of social and economic rights: an assessment of the 'reasonableness' test as developed by the South African Constitutional Court", *ZaöRV* 2005, vol. 65, 167-196.

CRAVEN, M.C.R., "The International Covenant on Economic, Social and Cultural Rights", in HANSKI, R. and SUKSI, M. (eds.), *An introduction to the international protection of human rights: a textbook*, Turku, Institute for Human Rights, Abo Akademi University, 1999, 101-123.

CRAVEN, M.C.R., *The International Covenant on Economic, Social and Cultural Rights. A perspective on its development*, Oxford, Clarendon Press, 1995, 144 p.

CUERPO, C., KALANTARYAN, S. and PONTUCH, P., *Rental market regulation in the European Union*, Brussels, European Commission, 2014, http://ec.europa.eu/economy_finance/publications/economic_paper/2014/pdf/ecp515_en.pdf, 52 p.

CULHANE, D.P., "The Cost of Homelessness: A Perspective from the United States", *European Journal of Homelessness* 2008, vol. 2, no. 1, 97-114.

CULLEN, H., "The collective complaints of the European Social Charter: interpretative methods of the European Committee of Social Rights", *HRLR* 2009, vol. 9, no. 1, 61-93.

CUYPERS, D. and DE VOS, B., "De menselijke waardigheid en de arbeidsgerechten", *TSR* 1999, 495-560.

CZISCHKE, D., "Managing social rental housing in the EU: a comparative study", *European Journal of Housing Policy* 2009, vol. 9, no. 2, 121-151.

DABLA-NORRIS, E., KOCHNAR, K., RICKA, F., SUPHAPHIPHAT, N. and TSOUNTA, E., "Causes and consequences of income inequality: a global perspective", *IMF Staff Discussion Note SDN/15/13*, 2015, www.imf.org/external/pubs/ft/sdn/2015/sdn1513.pdf, 39 p.

DAMBRE, M., *Bijzondere overeenkomsten*, Brugge, Die Keure, 2014, 534 p.

DAMBRE, M. "Woninghuur in Vlaamse handen: nieuwe kansen voor het grondrecht op behoorlijke huisvesting?", in HUBEAU, B. and VANDROMME, T. (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013, 273-282.

DAMBRE, M., "Nietigheid huurcontract bij inbreuk op kwaliteitsnormen: mogelijk, wenselijk en wat zijn de gevolgen?", *TBO* 2012, no. 6, 251-256.

DAMBRE, M., *De huurprijs. Analyse van de financiële verbintenissen van de huurder en onderzoek naar de mogelijkheid tot objectivering van de woninghuurprijzen*, Brugge, Die Keure, 2009, 598 p.

DAMBRE, M., "Het verplicht schriftelijk woninghuurcontract doorstaat de grondwettelijke toets", *Huur* 2009, 24.

DAMBRE, M., HUBEAU, B. and STIJNS, S., *Handboek algemeen huurrecht*, Brugge, Die Keure, 2006, 874 p.

DAMBRE, M. and HUBEAU, B., *Woninghuur*, Antwerpen, Kluwer, 2002, 563 p.

DAMBRE, M., "De (relatieve) doorwerking van het grondrecht op wonen in de rechtspraktijk, inzonderheid in de jurisprudentie in België", in HUBEAU, B. and DE LANGE, R. (eds.), *Het grondrecht op wonen. De grondwettelijk erkenning van het recht op huisvesting in België en Nederland*, Antwerpen, Maklu, 1995, 105-112.

DAVIS, D.M., "The case against the inclusion of socio-economic demands in a Bill of Rights except as directive principles", *SAJHR* 1992, vol. 8, 475-490.

DAVIS, J. "Doing justice to dignity in the criminal law", in MALPAS, J. and LICKISS, N. (eds.), *Perspectives on human dignity: a conversation*, Dordrecht, Springer, 2007, 169-182.

DE BECO, G., "The interplay between human rights and development the other way round: the emerging use of quantitative tools for measuring the progressive realization of economic, social and cultural rights", *HR&ILD* 2010, afl.2, 265-287.

DE BEER, P., VAN DER MEER, J. and PEKELHARING, P., *Gelijk. De noodzakelijke terugkeer van een klassiek ideaal*, Amsterdam, Van Gennep/De Balie, 2006, 430 p.

DE BEL, A., "Sociale rechtshulp contra juridische eerstelijnsbijstand?", *OCMW-visies* 2000, no. 1, 13-20;

DE BRABANDER, R., *Wie wil er nou niet zelfredzaam zijn? De mythe van zelfredzaamheid*, Antwerpen, Garant, 2014, 192 p.

DEBUSSCHERE, E., VANDEKERCKHOVE, B. and VAN BORTEL, G., *Praktisch handboek: huurdersparticipatie in de sociale huisvesting*, Heverlee, Steunpunt Ruimte en Wonen, 2009, https://steunpuntwonen.be/Documenten/Publicaties_steunpunt_ruimte_en_wonen_2007-2011/2009/2009-03-20100105-praktisch-handboek.pdf, 57 p.

DE DECKER, P., VLERICK, E. and LE ROY, M, "Verhuurders beoordelen sociale verhuurkantoren", in DE DECKER, P., MEEUS, B., PANNECOUCKE, I., SCHILLEBEECKX, E., VERSTRAETE, J. and VOLCKAERT, E., *Woonnood in Vlaanderen. Feiten / mythen / voorstellen*, Antwerpen, Garant, 2015, 313-325.

DE DECKER, P., "Afbouw woonbonus: nu of nooit", *Samenleving en Politiek* 2014, no. 1, 64-75.

DE DECKER, P., *Eigen woning: geldmachine of pensioensparen?*, Antwerpen, Garant, 2013, 208 p.

DE DECKER, P., "Not for the homeless? Housing policy in Flanders: between selectivity and legitimacy", *European Journal Of Homelessness* 2011, vol. 5, no. 2, 129-143.

DE DECKER, P. and DEWILDE, C., "Home ownership and asset-based welfare: the case of Belgium", *Journal of Housing and the Built Environment* 2010, vol. 25, 243-262.

DE DECKER, P., "Rook zonder vuur? Fragmenten van de genese van een slechte reputatie en haar gevolgen voor de sociale huursector", in J. VRANKEN, K. DE BOYSER and D. DIERCKX (eds.), *Armoede en Uitsluiting. Jaarboek 2004*, Leuven, Acco, 2004, 207-225.

DE DECKER, P. and GEURTS, V., "Belgium" in DOLING, J. and FORD, J. (eds.), *Globalisation and home ownership. Experiences in eight member states of the European Union*, Delft, Housing and Urban Policy Studies, DUP Science, 2003, 21-52.

DE DECKER, P., "Op weg naar een duurzaam woonbeleid? Hoe tegenwoordig blijft het verleden?" *Welzijnsgids* 2002, no. 44, 23-59.

DE DECKER, P. and GEURTS, V., "Wonen. Residualiseert de huursector?", in VRANKEN, J., GELDOF, D. and VAN MENXEL, G. (eds.), *Armoede en sociale uitsluiting. Jaarboek 2000*, Leuven, Acco, 193-204.

DE FEYTER, K., "Sites of rights resistance", in DE FEYTER, K., PARMENTIER, S., TIMMERMAN, C. and ULRICH, G. (eds.), *The local relevance of human rights*, Cambridge, Cambridge University Press, 2011, 11-39.

DE FEYTER, K., "De juridische gevolgen van de internationale en nationale erkenning van economische, sociale en culturele rechten", *Jaarboek Mensenrechten* 1994, 161-178.

DE GREVE, K., "Gekraakt leven – processuele actiemogelijkheden in het burgerlijk procesrecht", *Huur* 2014, no. 1, 7-20.

DE HAAN, P., *Enkele hoofdlijnen van rechtsontwikkeling in de verzorgingsstaat*, Amsterdam, Koninklijke Nederlandse Academie van Wetenschappen, 1988, 28 p.

DEHOUSSE, R., *Fédéralisme et relations internationals*, Bruxelles, Bruylant, 1991, 298 p.

DE JAEGERE, J., "Inclusiviteit als deliberatieve bouwsteen van legitimiteit", *TBP* 2015, no. 4-5, 194-215.

DELPEREE, F., "Les droits sociaux fondamentaux et le droit belge", in STROOBANT, M. (ed.), *Sociale grondrechten*, Antwerpen, Maklu, 1995, (19) 28.

DEMAERSCHALK, E., "Dakloosheid kost handenvol geld. Housing First als goedkoper alternatief", *Alert* 2014, vol. 40, no. 5, 16-24.

DE MAN, M., "Civiel en fiscaalrechtelijke aspecten van de levenslange woninghuur", *TEP* 2010, no. 4, 211-240.

DEMOGUE, R., *Traité des obligations en général: Tome V*, Paris, Rousseau, 1925.

DENNIS, M.J. and STEWART, D.P., "Justiciability of economic, social and cultural rights: should there be an international complaints mechanism to adjudicate the rights to food, water, housing and health?, *AJIL* 2004, vol.98, nr.3, 462-515.

DEN TONKELAAR, J.D.A., *Resultaatsverbintenissen en inspanningsverbintenissen*, Zwolle, Tjeenk Willink, 1982, 95 p.

DEPUYDT, P., "De beroepsaansprakelijkheid van de advocaat", *TBBR* 1993, 295-310;

DE SCHUTTER, O., "Introduction", in DE SCHUTTER, O. (ed.), *Economic, social and cultural rights as human rights*, Edward Elgar Publishing, Cheltenham, 2013, xiii-xxvii;

DE SCHUTTER, O., *International human rights law*, Cambridge, Cambridge University Press, 2010, 1052 p.

DE SCHUTTER, O., "The protection of social rights by the European Court of Human Rights", in VAN DER AUWERAERT, P., DE PELSMAEKER, T., SARKIN, J. and VANDE LANOTTE, J. (eds.), *Social, economic and cultural rights. An appraisal of current European and international developments*, Antwerpen, Maklu, 2002, 207-239.

DE SCHUTTER, O., *Fonctions de juger et droits fondamentaux. Transformation du contrôle juridictionnel dans les ordres juridiques Américain et Européens*, Bruxelles, Bruylant, 1999, 1164 p.

DE SMEDT, P., DE WITTE, E., SLABBINCK, R. and VANDAMME, S., "Administratiefrechtelijke aspecten in het Vlaamse Gewest", in DAMBRE, M., HUBEAU, B. and STIJNS, S. (eds.), *Handboek algemeen huurrecht*, Brugge, Die Keure, 2015, 145-212.

DE SMEDT, P., "De Vlaamse Wooncode anno 2013: naar een (nog meer) integrale en slagkrachtige woonkwaliteitsbewaking?", in HUBEAU, B. and VANDROMME, T. (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013, 41-90.

DE SMEDT, P., HUBEAU, B. and JANSSENS, E., *Omzien in verwondering. Terugblik op tien jaar Vlaamse wooncode*, Brugge, Die Keure, 2007.

DE SMEDT, P. "Kwaliteitsbewaking in de Vlaamse Wooncode: juridische knel- en kwelpunten", in HUBEAU, B. (ed.), *Vijf jaar Vlaamse Wooncode: het woonbeleid (nog) niet op kruissnelheid?*, Brugge, Die Keure, 2002, 121-161.

DE SMEDT, P., "De woonkwaliteitsregeling in de Vlaamse Wooncode", in HUBEAU, B (ed.), *De Vlaamse Wooncode, lokaal woonbeleid en woonkwaliteit*, Brugge, Die Keure, 1999, 57-139.

DESMET, E., OP DE BEECK, H. and VANDENHOLE, W., *Evaluatie van de kind- en jongereneffectrapportage (JoKER)*, Gent, KEKI, 2012, 123 p.

DE SOTO, H., *The other path: the invisible revolution in the third world*, New York, Basic Books, 1989, 271 p.

DE VOS, P., "Grootboom, the right of access to housing and substantive equality as contextual fairness", *SAJHR* 2001, vol. 17, 258-276.

DE WITTE, J. and AENDENBOOM, I., "Discriminatie en haatmisdrijven: individuele, maar ook collectieve schade", *De orde van de dag* 2011, vol. 54, 49-54.

D'HAUWERS, K., "Vijftien jaar Vlaamse Wooncode: standpunt van het AES (algemeen eigenaarssyndicaat)", in HUBEAU, B. and VANDROMME, T. (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brussel, Die Keure, 2013, 295-300.

DIERCKX, D. and GHYS, T., "Solidariteit en herverdeling in structurele armoedbestrijding" in DIERCKX, D, COENE, J., VAN HAARLEM, A. and RAEYMAECKERS, P. (eds.), *Armoede en sociale uitsluiting. Jaarboek 2013*, Leuven, Acco, 2013, 175-188.

DIERICKX VISSCHERS, M., "De Vlaamse reguleringsimpactanalyse, gewikt en gewogen", in DE MOT, J. (ed.), *Liber amicorum Boudewijn Bouckaert. Vrank en vrij*, 2012, 243-260.

DIJON, X., "Introduction historique et philosophique", in VAN DER PLANCKE, V. (ed.), *Les droits sociaux fondamentaux dans la lutte contre la pauvreté* ? Brussel, Die Keure, 2012, 21-40.

DISPERSYN, M., "Le droit à la sécurité dans l'article 23 de la Constitution", in ERGEC, R. (ed.), *Les droits économiques, sociaux et culturels dans la Constitution*, Brussel, Bruylant, 1995, 193-230.

DOLING, J. and ELSINGA, M., *Demographic change and housing wealth: homeowners, pensions and asset-based welfare in Europe*, Dordrecht, Springer, 2013, 149 p.

DOLING, J. and RONALD, R., "Home ownership and asset-based welfare", *Journal of Housing and the Built Environment* 2010, vol. 25, no. 2, 165-173.

DOLING, J. and STAFFORD, B., *Home ownership: the diversity of experience*, Aldershot, Gower, 1989.

DONNELLY, J., "Human rights and human dignity: an analytic critique of non-western conceptions of human rights", *The American Political Science Review* 1982, vol.76, no.2, 303-316.

DOWELL-JONES, M., "The economics fo the austerity crisis: unpicking some human rights arguments", *HRLR* 2015, no. 15, 193-223.

DOWELL-JONES, M., "The sovereign bond markets and socio-economic rights. Understanding the challenge of austerity", in E. RIEDEL, G. GIACCA and C. GOLAY (eds.), *Economic, social, and cultural rights in international law: contemporary issues and challenges*, Oxford, Oxford University Press, 2014, 51-85.

DOWELL-JONES, M., *Contextualising the International Covenant on Economic, Social and Cultural Rights: assessing the economic deficit*, Leiden, Martinus Nijhoff Publishers, 2004, 214 p.

DUBOUT, E., "La procéduralisation des obligations relatives aux droits fondamentaux substantiels par la Cour européenne de droits de l'homme", *RTDH* 2007, no. 70, 397-425.

DUMONT, H., "Conclusions: l'apport des droits fondamentaux au droit de l'environnement, de l'urbanisme et du logement", *Amén*. 1996, 287- 289.

DUPUIS, A. and THORNS, D.C., "Home, home ownership and the search for ontological security", *The Sociological Review* 1998, vol. 46, no. 1, 24-47.

DUPUY, P.-M., "Reviewing the difficulties of codification: on Ago's classification of obligations of means and obligations of result in relation to state responsibility", *EJIL 1999*, vol.10, nr.2, 371-385.

DÜWELL, M., BRAARVIG, J., BRONSWORD, R. and MIETH, D. (eds.), *The Cambridge handbook of human dignity. Interdisciplinary perspectives*, Cambridge, Cambridge University Press, 2014, 634 p.

DWORKIN, R., *Law's empire*, Cambridge, Harvard University Press, 1986, 488 p.

DYZENHAUS, D., HUNT, M. and TAGGART, M., "The principle of legality in administrative law: internationalisation as constitutionalisation", *Oxford University Commonwealth Law Journal* 2001, vol. 1, 5-34.

EHRLICH, E., *Fundamental principles of the sociology of law*, Cambridge, Harvard University Press, 1936, 493 p.

EHRLICH, E., *Grundlegung der Soziologie des Rechts*, Berlin, Duncker & Humblot, 1913, 409 p.

ELSINGA, M., HAFFNER, M., HOEKSTRA, J., VANDENBROUCKE, P., BUYST, E. and WINTERS, S., *Beleid voor de private huur: een vergelijking van zes landen*, Brussel, Departement RWO-Woonbeleid, 2007, 157 p.

ELSINGA, M., DE DECKER, P., TELLER, N. and TOUSSAINT, J. (eds.), *Home ownership beyond asset and security. Perceptions of housing related security and insecurity in eight European countries*, Amsterdam, IOS Press, 2007, 335 p.

ENDERS, C., "A right to have rights – The German Constitutional concept of human dignity", *NUJS Law Review* 2010, 253-264.

ERGEC, R., "La responsabilité du fait de la carence législative", in X. (ed.), *Mélanges Ph. Gérard*, Brussel, Bruylant, 2002, 287-303.

ERGEC, R., "Introduction générale", in R. ERGEC (ed.), *Les droits économiques, sociaux et culturels dans la Constitution*, Brussel, Bruylant, 1995, 1-16.

ERGEC, R., "Le minerval exigé des élèves étrangers et les effets directs de droits économiques et sociaux", *JLMB* 1991, 1206-1211.

ESVELDT, I., "Intentie om een woning te kopen varieert sterk onder starters en huurders", *Bevolkingstrends* 2013, april issue, 1-20.

European Commission against Racism and Intolerance, *ERCI-Rapport over België (vijfde monitoringcyclus)*, 2014, www.coe.int/t/dghl/monitoring/ecri/country-by-country/belgium/BEL-CbC-V-2014-001-NLD.pdf, 55 p.

EVANGELISTA, G.F., "Poverty, homelessness and freedom: an approach to the capabilities theory", *European Journal of Homelessness* 2010, vol. 4, 189-202.

FABRE, C., *Social rights under the Constitution: government and the decent life*, Oxford, Oxford University Press, 2000, 202 p.

FEANTSA, *The role of housing in pathways into and out of homelessness*, 2008, www.better-housing.org.uk/sites/default/files/consultations/responses/08_European_Report_FEANTSA_Housing_final_EN.pdf, 44 p.

FEELEY, M.M., "The concept of laws in social science: a critique and notes on an expended view", *Law & Society Review* 1975, vol. 10, 497-523.

FELDMAN, D., "Human Dignity as a Legal Value: part 1", *Pub. L.* 1999, 682-702.

FELNER, E., "Closing the 'escape hatch': a toolkit to monitor the progressive realization of economic, social and cultural rights", *Journal of Human Rights Practice* 2009, vol.1, no.3, 402-435.

FELNER, E., "A new frontier in economic and social rights advocacy? Turning quantitative data into a tool for human rights accountability", *Sur-International Journal on Human Rights* 2008, vol. 5, no. 9, 109-154.

FERRON, C., "L'intensité de l'obligation juridique ou des obligations de diligence, de résultat et de garantie" , *RDUS* 1991, 239-246.

FIERENS, J., "Existe-t-il un principe général du droit du respect de la dignité humaine" (note under Court of Cassation 18 November 2013), *RCJB* 2015, no. 4, 358-382.

FIERENS, J., "Vers un droit à l'eau effectif?" (note under Vred. Fontaine-l'Evêque 15 October 2009), *T.Vred.* 2012, 306-316.

FIERENS, J., "La dignité humaine comme concept juridique", *JT* 2002, no. 22, 577-582.

FIERENS, J., "La dignité humaine, limite à l'application de l'exception d'inexécution", *TBBR* 2000, 594-601;

FIGARI, F., PAULUS, A., SUTHERLAND, H, TSAKLOGLOU, P., VERBIST, G. and ZANTOMIO, F., "Removing homeownership bias in taxation: the distributional effects of including net imputed rent in taxable income", *Fiscal Studies* 2016, vol. 37, not yet published;

FITZPATRICK, S., BENGTSSON, B. and WATTS, B., "Rights to housing: reviewing the terrain and exploring a way forward", *Housing, Theory and Society* 2014, vol. 31, no. 4, 447-463.

FITZPATRICK, S. and PAWSON, H., "Ending security of tenure for social renters: transitioning to 'ambulance service' social housing", *Housing Studies* 2014, vol. 29, no. 5, 597-615.

FLATAU, P., ZARETKY, K., BRADY, M., HAIGH, Y. and MARTIN, R., *The cost-effectiveness of homelessness programs: a first assessment: Volume 1*, Australian Housing and Urban Research Institute, 2008, www.ahuri.edu.au/publications/download.asp?ContentID=ahuri_80306_fr&redirect=true, 160 p.

FLEMISH HOUSING COUNCIL, *Dak- en thuisloosheid in Vlaanderen: pistes voor een meer woongericht beleid*, 24 March 2016, no. 2016/04.

FLEMISH HOUSING COUNCIL, *Advice concerning the modifications on social rent in the draft decree on the amendment of various decrees on housing and concerning the draft decision by the Flemish Government to amend the Framework Decision Social Rent*, 28 January 2016, no. 2016/03.

FLEMISH HOUSING COUNCIL, *Advice concerning the draft decree on the amendment of various decrees on housing*, 28 January 2016, no. 2016/02.

FLEMISH HOUSING COUNCIL, *Aanbodbeleid op de private huurmarkt. Bevragingen van actoren en voorstellen van de Vlaamse Woonraad*, 17 December 2015, no. 2015/14.

FLEMISH HOUSING COUNCIL, *Advice concerning the Policy Letter on Housing*, 13 November 2015, no. 2015/12.

FLEMISH HOUSING COUNCIL, Advice concerning the proposal of a decision by the Flemish Government on the subsidization of the acquisition, the equipment, the renovation and the expansion of the sites for travellers, 15 October 2015, no. 2015/09.

FLEMISH HOUSING COUNCIL, *Advice concerning the organisation of the winter shelter of homeless people in social housing*, 9 October 2015, no. 2015/08.

FLEMISH HOUSING COUNCIL, *Sociale huur in Vlaanderen. Een aanzet tot toekomstoriëntatie*, 17 October 2014, no. 2014/08.

FLEMISH HOUSING COUNCIL, *Naar een versterkt recht op wonen? Aanbevelingen van de Vlaamse Woonraad, met pleidooi voor een Vlaamse woonrechtcommissaris*, 19 December 2013, no. 2013/17.

FLEMISH HOUSING COUNCIL, *Advice concerning the amendment of the Framework Decision Social Rent*, 7 June 2013, no. 2013/08.

FLEMISH HOUSING COUNCIL, *Advies over de regionalisering van de woonbonus*, 10 December 2012, no. 2012/12.

FLEMISH HOUSING COUNCIL, *Advice concerning the financing of operation in the context of social housing projects*, , 10 September 2012, no. 2012/08.

FLEMISH HOUSING COUNCIL, *Advies over het ontwerp van besluit van de Vlaamse Regering van 7 juli 2011 tot wijziging van de sociale* huurreglementering, 1 September 2011, no. 2011/10.

FLEMISH HOUSING COUNCIL, , *Wonen en armoede: aanbevelingen voor een woonbeleid gericht op het tegengaan van armoede en sociale uitsluiting*, 28 April 2011, no. 2011/04.

FLEMISH HOUSING COUNCIL, *Naar een beleid ter ondersteuning van de private huurwoningmarkt*, 30 September 2010, no. 2010/11.

FLEMISH HOUSING COUNCIL, *Huursubsidie voor kandidaat-huurders sociale huisvestingsmaatschappijen*, 26 January 2010, no. 2010/02.

FORD, J., BURROWS, R. and NETTLETON, S., *Home-ownership in a risk society*, Bristol, The Policy Press, 2001, 205 p.

FORDER, C., "The right to legal aid according to the European Court of Human Rights: a study of the rights of undocumented persons", in HUBEAU, B. and TERLOUW, A. (eds.), *Legal aid in the Low Countries*, Antwerpen, Intersentia, 2014, 209-229.

FORMISANO PRADA, M., *Empowering the poor through human rights litigation*, Paris, UNESCO, 2011, 123 p.

FOX, L., *Conceptualising home. Theories, laws and policies*, Oxford, Hart Publishing, 2007, 551 p.

FREDMAN, S., "New horizons: incorporating socio-economic rights in a British Bill of Rights", *Public Law* 2010, April issue, 297-330.

FREDMAN, S., "Providing Equality: Substantive Equality and the Positive Duty to Provide", *S. Afr. J. on Hum. Rts.* 2005, vol.21, 163-190.

FREEMAN, S., *Rawls*, London, Routledge, 2007, 576 p.

FRIEDMAN, L.M., *The legal system. A social science perspective*, New York, Russell Sage Foundation, 1975, 338 p.

FUKUDA-PARR, S., LAWSON-REMER, T. and RANDOLPH, S., "Measuring the progressive realization of human rights obligations: an index of economic and social rights fulfillment", *Economics Working Papers* 2008, 40 p.

FULLER, L.L., *The morality of law*, New Haven, Yale University Press 1964, 202 p.

FUNCK, H., "L'article 23 de la Constitution, à travers la jurisprudence des ours et tribunaux (1994-2008): un droit en arrière-fond ou l'ultime recours du juge", in RAUWS, W. and STROOBANT, M. (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, 69-111.

Fundar Center for Research and Analysis, "Dignity counts. A guide to use budget analysis to advance human rights", 2004, www.iie.org/Programs/IHRIP/Publications, 83 p.

GAILIUTE, D., "Right to housing in the jurisprudence of the European Committee of Social Rights", *Societal Studies* 2012, vol.4, no.4, 1605-1622.

GALANTER, M., "De duivel schijt altijd op de grote hoop. Bespiegelingen over de grenzen van rechtshervorming", in GRIFFITHS, J. and WEYERS, H. (eds.), *De sociale werking van recht*, Nijmegen, Ars Aequi, 2005.

GALANTER, M., "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change", *Law and Society Review* 1974, vol. 9, no. 1, 95-160.

GARRIDO GÓMEZ, M., "Rights Guarantees, Equality and Social Rights", in MOTMANS, J., CUYPERS, D., MEIER, P., MORTELMANS, D. and ZANONI, P. (eds.), *Equal is not Enough: Challenging Differences and Inequalities in Contemporary Societies*, 2012, www.steunpuntgelijkekansen.be/wp-content/uploads/II.39-Equal-is-not-enough.pdf, 17-23.

GARRY, H.R., "When procedure involves matters of life and death: interim measures and the European Convention on Human Rights", *E.P.L.* 2001, vol.7, no.3, 399-432.

GAUTIER, P., "On the Classification of Obligations in International Law", in HESTERMEYER, H.P., KÖNIG, D., MATZ-LÜCK, N., RÖBEN, V., SEIBERT-FOHR, A., STOLL, P.-T. and VÖNEKY, S. (eds.), *Coexistence, cooperation and solidarity. Liber amicorum Rüdiger Wolfrum*, Dordrecht, Martinus Nijhoff Publishers, 2012, 853-879.

GEURTS, V. and GOOSSENS, L., "Home ownership and social inequality in Belgium", in KURZ, K. and BLOSFELD, H.P. (eds.), *Home ownership and social inequality in comparative perspective*, Stanford, Stanford University Press, 2004, 79-111.

GEWIRTH, A., *Self-fulfillment*, Princeton, Princeton University Press, 1998, 248 p.

GEWIRTH, A., *The community of rights*, Chicago, University of Chicago Press, 1996, 396 p.

GEWIRTH, A., "Human Dignity as the Basis of Rights", in MEYER, M. and PARENT, W. (eds.), *The Constitution of Rights: Human Dignity*, Ithaca, Cornell University Press, 1992, 10-28.

GEWIRTH, A., *Reason and morality*, Chicago, University of Chicago Press, 1978, 401 p.

GIBENS, S. and HUBEAU, B., "Legal aid and housing issues", in HUBEAU, B. and TERLOUW, A. (eds.), *Legal aid in the Low Countries*, Antwerpen, Intersentia, 2014, 141-159.

GLENSY, R.D., "The right to dignity", *Columbia Human Rights Law Review* 2011, 65-142

GLYN, A. and MILIBAND, D. (eds.), *Paying for inequality. The economic cost of social injustice*, London, Rivers Oram, 1994, 248 p.

GOEDERTIER, G., "Het Twaalfde Protocol E.V.R.M.: het non-discriminatiebeginsel losgekoppeld van de in het E.V.R.M. opgenomen rechten en vrijheden", *Jaarboek Mensenrechten* 2000-2001, 71-94.

GOERING, P. et al. *National final report. At Home/Chez Soi*, Calgary, Mental Health Commission of Canada, 2014, www.housingfirstbelgium.be/medias/files/rapport-canada.pdf, 48 p.

GOEYVAERTS, G., HAFFNER, M., HEYLEN, K., VAN DEN BROECK, K., VASTMANS, F. and WINTERS, S., *Onderzoek naar de woonfiscaliteit in Vlaanderen. Deel 4 Bouwstenen en scenario's*, Leuven, CES-KU Leuven, 2014, 117 p.

GOLDMANN, M., "Human rights and sovereign debt workouts", in BOHOSLAVSKY, J.P. and CERNIC, J.L. (eds.), *Making sovereign financing and human rights work*, Oxford, Hart Publishing, 2014, 79-100.

GOORDEN, J. MERTENS, J. et al., "De sociale rechtshulp in kaart gebracht", in HUBEAU, B., GOORDEN, J. and MERTENS, J. (eds.), *Recht op recht. Sociale rechtshulp en sociaaljuridische dienstverlening in Vlaanderen*, Mechelen, Kluwer, 2011, 47-135.

GOOSSENS, L., "samenwerkingsakkoord rond armoedebeleid", in Steunpunt tot Bestrijding van Armoede, Bestaansonzekerheid en Sociale Uitsluiting, *Armoede-Waardigheid-Mensenrechten*, 2008, www.armoedebestrijding.be/publications/10jaarsamenwerking/10jaarsamenwerking_rapport_NL.pdf, 208 p.

GRABOWSKI, A., *Juristic concept of the validity of statutory law: a critique of contemporary legal nonpositivism*, Heidelberg, Springer, 2013, 594 p.

GRANELLI, L., INVERNIZZI, G. and MARCHESI, L., "The rolling stones project: a housing led experiment in Italy, *European Journal of Homelessness* 2014, vol. 8, no. 1, 77-96.

GRANT, E., "Dignity and equality", *HRLR* 2007, vol. 7, no. 2, 299-329.

GRIFFEY, B., "Reasonableness test: assessing violations of state obligations under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", *HRLR* 2011, vol. 11, no. 2, 275-325.

GRIFFIN, J. J., "Welfare rights", *The Journal of Ethics* 2000, vol. 1-2, 27-43.

GRIFFITHS, J., "De sociale werking van wetgeving", in GRIFFITHS, J. and WEYERS, H. (eds.), *De sociale werking van recht*, Nijmegen, Ars Aequi, 2005, 467-505.

GRIFFITHS, J., "The social working of legal rules", *The Journal of Legal Pluralism and Unofficial Law* 2003, vol.35, no.48, 1-84.

GRIGGS, J. and KEMP, P.A., "Housing allowances as income support: comparing European welfare regimes", *International Journal of Housing Policy* 2012, vol. 12, no. 4, 391-412.

GUAJARDO, J., LEIGH, D. and PESCATORI, A., "Expansionary austerity: new international evidence", *IMF Working Paper WP/11/158*, 2011, www.imf.org/external/pubs/ft/wp/2011/wp11158.pdf, 41 p.
GURNEY, C., "Pride and prejudice: discourses of normalization in public and private accounts of home ownership", *Housing Studies* 1999, vol. 14, 163-183.

GURNEY, C., "Lowering the drawbridge: a case study of analogy and metaphor in the social construction of home ownership", *Urban Studies* 1999, vol. 36, 1706-1722.

GURNEY, C., *The meaning of home in the decade of owner occupation: towards an experiential perspective*, Bristol, School of Advanced Urban Studies, 1990, 54 p.

GUSFIELD, J., "Moral passage: the symbolic process in public designations of deviance", *Social Problems* 1967, vol.15, 175-188.

HAARSCHER, G., "Le droit de mener une vie conforme à la dignité humaine", in R. ERGEC (ed.), *Les droits économiques, sociaux et culturels dans la Constitution: actes du colloque tenu les 21 et 22 décembre 1994*, Brussel, Bruylant, 1995, 133-144.

HACHEZ, I., "Le Comité Européen des Droits Sociaux confronté à la crise financière Grecque: des decisions osées mais inégalement motivées", *TSR* 2014, no. 3, 243-279.

HACHEZ, I., "Le principe de standstill: actualités et perspectives", *RCJB* 2012, no.1, 6-18.

HACHEZ, I., *Le principe de standstill dans le droit des droits fondamentaux: une irreversibilité relative*, Brussel, Bruylant, 2008, 694 p.

HACHEZ, I., "L'effet de standstill: le pari des droits économiques, sociaux et culturels?", *AP* 2000, 30-57.

HAFFNER, M. and WINTERS, S., "Homeownership taxation in Flanders: moving towards 'optimal taxation'?", *International Journal of Housing Policy* 2015, 1-18.

HAFFNER, M. and HEYLEN, K., *De verdeling van de woonsubsidies. Vlaanderen en Nederland vergeleken*, Leuven, Steunpunt Wonen, 2014, 86 p.

HAFFNER, M., HOEKSTRA, J., OXLEY, M. and VAN DER HEIJDEN, H., "Universalistic, particularistic and middle way approaches to comparing the private rental sector", *International Journal of Housing Policy* 2010, vol. 10, no. 4, 357-377.

HAFFNER, M., ELSINGA, M. and HOEKSTRA, J., "Rent regulation: the balance between private landlords and tenants in six European countries", *European Journal of Housing Policy* 2008, vol. 8, no. 2, 217-233.

HAFFNER, M., *Appel voor de dorst. Vermogen van ouderen op de woningmarkt*, Utrecht, NETHUR, 2005, 73 p.

HALPÉRIN, J.-L., "Law in books and law in action: the problem of legal change", *Maine Law Review* 2011, vol.64, no.1, 45-76.

HANSELAER, A., "De duur en de beëindiging van de sociale huurovereenkomst", in HANSELAER, A. and HUBEAU, B. (eds.), *Sociale huur*, Brugge, Die Keure, 2011, 150-165.

HANSELAER, A., "Heffing op leegstand en verkrotting", *NJW* 2005, vol. 124, 1046-1052.

HANSELAER, A., "Het kooprecht van de sociale huurder: een quasi-onteigening", *TBO* 2005, 107-109.

HARTMAN, C.,"The case for a right to housing", *Housing Policy Debate* 1998, vol. 9, no. 2, 223-246.

HARRIS, D.J. and DARCY, J., *The European Social Charter*, New York, Transnational Publishers, 2001, 446 p.

HAYEK, F.A., *The mirage of social justice*, London, Routledge, 1976, 195 p.

HELGERS, R. and BUYST, E., *Woningprijzen: een regionaal woningprijsmodel*, Leuven, Steunpunt Wonen, 2014, 51 p.

HENNETTE-VAUCHEZ, S., "When ambivalent principles prevail. Leads for explaining Western legal orders' infatuation with the human dignity principle", *EUI Working Papers Law* 2007, http://cadmus.eui.eu/bitstream/handle/1814/7664/LAW-2007-37.pdf?sequence=1, 18p. ;

HERINGA, A.W., *Sociale grondrechten. Hun plaats in de gereedschapskist van de rechter*, Den Haag, Asser Instituut, 1989, 406 p.

HERMANS, K., *Bouwstenen voor een Vlaams actieplan tegen dak- en thuisloosheid. Inspiratie uit Nederland, Finland en Schotland*, Leuven, Steunpunt Beleidsrelevant Onderzoek Armoede, 2012, 41 p.

HERSHKOFF, H., "Positive rights and state constitutions: the limits of federal rationality review", *Harvard Law Review* 1999, vol. 112, 1131-1194.

HERTOGH, M., "Wat weten en vinden burgers van het recht", in HERTOGH, M. and WEIJERS, H. (eds.), *Het recht van onderop. Antwoorden uit de rechtssociologie*, Nijmegen, Ars Aequi, 2011, 287-300.

HERTOGH, M., "The living *Rechtsstaat*: a bottom-up approach to legal ideas and social reality", in VAN DER BURG, W. and TAEKEMA, S. (eds.), *The importance of ideals: debating their relevance in law, morality, and politics*, Brussel, P.I.E. Peter-Lang, 2004, 75-95.

HEYLEN, K., "Eigendomsstatuut, woonuitgaven en betaalbaarheid. Evolutie tussen 2005 en 2013", in DE DECKER, P., MEEUS, B., PANNECOUCKE, I., SCHILLEBEECKX, E., VERSTRAETE, J. and VOLCKAERT, E. (eds.), *Woonnood in Vlaanderen. Feiten / mythen / voorstellen*, Antwerpen, Garant, 2015, 25-42.

HEYLEN, K., *Grote Woononderzoek 2013: Deel 5. De private huurmarkt: vraag- en aanbodzijde*, Leuven, Steunpunt Wonen, 2015, 40 p.

HEYLEN, K., Grote *woononderzoek 2013. Deel 2. Deelmarkten, woonkosten en betaalbaarheid*, Leuven, Steunpunt Wonen, 2015, 60 p.

HEYLEN, K., "Nieuwe inzichten in matteüseffect van het woonbeleid", *De Gids* 2013, no. 2, 10-16.

HEYLEN, K. and WINTERS, S., *De verdeling van subsidies op vlak van wonen in Vlaanderen*, Leuven, Steunpunt Ruimte en Wonen, 2012, 95 p.

HEYLEN, K. and HAFFNER, M., "Hoe meten we de betaalbaarheid van het wonen?", in WINTERS, S. (ed.), *Is wonen in Vlaandere betaalbaar?*, Antwerpen, Garant, 2011, 49-70.

HEYLEN, K., HAFFNER, M. and WINTERS, S., *Globaal kader voor ex post evaluatie van beleidsmaatregelen voor wonen*, Heverlee, Steunpunt Ruimte en Wonen, 2010, 37 p.

HEYLEN, K. and WINTERS, S., *Evolutie van eigenaarschap en woningcomfort in Vlaanderen*, Heverlee, Steunpunt Ruimte en Wonen, 2010, 40 p.

HEYLEN, K., TRATSAERT, K. and WINTERS, S., *Leefbaarheid en de rol van toewijzing in de Vlaamse sociale huisvesting*, Brussel, Departement RWO-Woonbeleid, 2007, 47 p.

HOEBEL, E.A., *The law of primitive man. A study in comparative legal dynamics*, Cambridge, Harvard University Press, 1954, 368 p.

HOEKSTRA, J., "Two types of rental system? An exploratory empirical test of Kemeny's rental system typology", *Urban Studies* 2009, vol. 46, no. 1, 45-62.

HOHMANN, J., *The right to housing. Law, concepts, possibilities*, Oxford, Hart Publishing, 2013, 75-91.

HOLDSWORTH, L., "Sole voices: experiences of non-homeowning sole mother renters", *Journal of Family Studies* 2011, vol. 17, no.1, 59-70.

HOLMQVIST, E. and TURNER, L.M., "Swedish welfare state and housing markets: under economic and political pressure", *Journal of Housing and the Built Environment* 2014, vol. 29, 237-254.

HONKA, H., "Harmonization of contract law through international trade: a Nordic perspective", *Tul. Eur. & Civ. L.F.* 1996, vol.11, 111-184.

HOUARD, N., "The French homelessness strategy: reforming temporary accommodation, and access to housing to deliver 'Housing First': continuum or clean break", *European Journal of Homelessness* 2011, vol. 5, no. 2, 83-98.

HOUWING, J.F., "Overmacht of onmogelijkheid?", *RM* 1904, 250-297.

HOUWING, P.A.N., "De inhoud van de verbintenis en de overmacht, *WPNR* 1953, 4316-4324.

HOWARD, R.E. and DONNELLY, J., "Human dignity, human rights and political regimes", *The American Political Science Review* 1986, vol.80, nr.3, 801-817.

HUBEAU, B. and VERMEIR, D., *Een evaluatie van het woninghuurrecht – Deel II. Bevindingen werkgroepen 'Toegang, selectie en discriminatie', 'Procedure en bemiddeling' en 'Huurprijs', resultaten wegingsoefening en aanbevelingen expertencommissie*, Leuven, Steunpunt Wonen, 2015, 255 p.

HUBEAU, B. and VERMEIR, D., *Een evaluatie van het federale woninghuurrecht. Tussentijds rapport inzake duur, opzegging, waarborg en woningkwaliteit*, Leuven, Steunpunt Wonen, 2014, 180 p.

HUBEAU, B. and VANDROMME, T., "De beperking van het keuzerecht van kandidaat sociale huurders: beperking van het grondrecht op wonen of net toepassing van het grondrecht op wonen" (note under Council of State 18 February 2013, no. 222.544), *RW* 2013-14, no. 39, 1537-1541.

HUBEAU, B. and VERMEIR, D., *Regionalisering van de federale huurwetgeving*, Leuven, Steunpunt Wonen, 2013, 118 p.

HUBEAU, B. and VANDROMME, T. (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013, 405 p.

HUBEAU, B. and VAN DE WIEL, A., "Recht op wonen als resultaatsverbintenis. Over de effectiviteit van sociale grondrechten", *TvMR* 2013, no.3, 11-14.

HUBEAU, B., "De sociale huur en het grondrecht op behoorlijke huisvesting", in HANSELAER, A. and HUBEAU, B. (eds.), *Sociale huur*, Brugge, Die Keure, 2011, 55-87.

HUBEAU, B., "Sociale rechtshulp en sociaaljuridische dienstverlening zijn mensenwerk", in GOORDEN, J. and MERTENS, J. (eds.), *Recht op recht. Sociale rechtshulp en sociaaljuridische dienstverlening in Vlaanderen*, Mechelen, Kluwer, 2011, 5-29.

HUBEAU, B. and VANDROMME, T., "Kroniek van de sociale huisvesting (2003-2009)", *RW* 2010-11, no. 16, 642-664.

HUBEAU, B., "De uithuiszetting en de herhuisvesting, de Achilleshiel in het sociaal woonbeleid, ook in het Vlaamse Gewest", *PRK* 2010, vol.14, 43-54.

HUBEAU, B., "Zijn het sociaal woonbeleid en de huisvestingssector mee met de onderkant?", in DE DECKER, P., GOOSSENS, L. and PANNECOUCKE, I. (eds.), *Wonen aan de onderkant*, Leuven, Garant, 2005, 353-370.

HUBEAU, B., "Het kooprecht van de zittende sociale huurder: juridisch en/of maatschappelijk een maat voor niets?" (note under Constitutional Court 30 June 2004), *RW* 2004-05, 891-894.

HUBEAU, B., "De sociale grondrechten na een decennium: hefboom of toekomstdroom in de uitsluiting van sociale uitsluiting", in VRANKEN, J., DE BOYSER, K. and DIERCKX, D. (eds.), *Armoede en sociale uitsluiting Jaarboek 2003*, Leuven, Acco, 2004, 369-384.

HUBEAU, B., "Een analyse van de positiefrechtelijke woonzekerheid", in HUBEAU, B. and VANDE LANOTTE, J. (eds.), *Wonen in (on)zekerheid. De woonzekerheid in het huur- en huisvestingsbeleid*, Antwerpen, Kluwer, 1988, 175-225.

HUGHES, G., "The concept of dignity in the Universal Declaration of Human Rights", *Journal of Religious Ethics* 2011, 1-24.

HULCHANSKI, D., "The concept of housing affordability: six contemporary uses of the housing expenditure-to-income ratio", *Housing Studies* 1995, vol. 10, no. 4, 471-491;

HULS, N., *Actie en reactie. Een inleiding in de rechtssociologie*, Den Haag, Boom Juridische Uitgevers, 2008, 380 p.

HULSE, K. and MILLIGAN, V., "Secure occupancy: a new framework for analyzing security in rental housing", *Housing Studies* 2014, vol. 29, no. 5, 638-656.

HUNT, P., *Reclaiming social rights*, Aldershot, Ashgate, 1999, 313 p.

HUYBRECHS, F., MEYER, S. and VRANKEN, J., *Energiearmoede in België*, OASeS & CEESE, 2011, http://dev.ulb.ac.be/ceese/CEESE/documents/Energiearmoede_in_Belgie_finaal_verslag.pdf, 195.

HUYGHE, S., "Het nieuwe decreet ter bestrijding van de leegstand en verwaarlozing van woningen en gebouwen", *LRB* 2004, no. 4, 217.

HUYGHEBAERT, N., *Berekening woonbonus op kruissnelheid*, KU Leuven, 2012, not published;

IGLESIAS, T., "Bedrock Truths and the Dignity of the Individual", *Logos* 2001, vol.4, 114-134.

INSLEGERS, I., "Van inroepbaarheid naar afdwingbaarheid van het recht op wonen bekeken in mensenrechtelijk perspectief", in BERNARD, N. and HUBEAU, B. (eds.), *Recht op wonen: naar een resultaatsverbintenis?*, Brugge, Die Keure, 2013, 253-276.

ISHAY, M.R. *The history of human rights*, London, University of California Press, 2004, 221-229.

JACOBSON, N., "Dignity and health: a review", *Social Science & Medicine* 2007, vol.62, 292-302.

JACQMAIN, J., "Droit au travail, droit du travail", in ERGEC, R. (ed.), *Les droits économiques, sociaux et culturels dans la constitution*, Brussel, Bruylant, 1995, 163-192.

JAMOULLE, M., "L'article 23 de la Constitution belge dans ses relations avec les droits fondamentaux, le droit au travail et la sécurité sociale", in VAN LIMBERGHEN, G. and SALOMEZ, K. (eds.), *Sociale grondrechten als bakens voor een vernieuwd sociaal recht – Liber amicorum professor Maxime Stroobant*, Gent, Mys & Breesch, 2001, 121-147.

KANT, I., *Groundwork for the Metaphysics of Morals*, as translated by WOOD, A.W., New Haven, Yale University Press, 2002, 224 p.

KAUFMAN, R.E., DAVIS, M.F. and WEGLEITNER, H.M., "The interdependence of rights: protecting the human right to housing by promoting the right to counsel, *Columbia Human Rights Law Review* 2014, vol.45, no.3, 772-815.

KELMAN, H.C., "The conditions, criteria and dialectics of human dignity: a transnational perspective", *International Studies Quarterly* 1977, vol.21, nr.3, 529-552.

KEMENY, J., "Corporatism and housing regimes", *Housing, Theory and Society* 2006, vol. 23, no. 1, 1-18.

KEMENY, J., *From public housing to the social market: rental policy strategies in comparative perspective*, London, Routledge, 1995, 49-58.

KEMENY, J., *The myth of home ownership: public versus private choices in housing tenure*, London, Routledge, 1981, 196 p.

KEMPSON, E., BRYSON, A. and ROWLINGSON, K., *Hard times? How poor families make ends meet*, London, Policy Studies Institute, 1994, 305 p.

KENNA, P. and JORDAN, M., "Housing rights in Europe: the Council of Europe leads the way", in KENNA, P. (ed.), *Contemporary housing issues in globalized world*, Farnham, Ashgate, 2014, 115-140.

KENNA, P., "Housing rights: positive duties and enforceable rights at the European Court Of Human Rights", *E.H.R.L.R.* 2008, no. 2, (193) 193-208.

KENNA, P., *Housing rights and human rights*, 2005, www.nuigalway.ie/media/housinglawrightsandpolicy/Housing-rights-and-human-rights.pdf, 119 p.

KENWAY, P. and PALMER, G., *How many, how much? Single homelessness and the question of numbers and cost*, New Policy Institute, 2003, www.crisis.org.uk/data/files/document_library/research/howmanyhowmuch_full.pdf, 66 p.

KERSTEIN, S.J., "Kantian dignity: a critique", in DÜWELL, M., BRAARVIG, J., BRONSWORD, R. and MIETH, D. (eds.), *The Cambridge handbook of human dignity. Interdisciplinary perspectives*, Cambridge, Cambridge University Press, 2014, 220-228.

KHALIQ, U. and CHURCHILL, R., "The European Committee of Social Rights", in LANGFORD, M. (ed.), *Social rights jurisprudence. Emerging trends in international and comparative law*, Cambridge, University Press, 2009, 428-452.

KHEMANI, M., *The European Social Charter as a means of protecting fundamental economic and social rights in Europe: relevant or redundant*, 2009, http://ssrn.com/abstract=1606110, 31 p.

KIDDER, R.L., *Connecting law and society*, New Jersey, Prentice-Hall, 1983, 286 p.

KING, P., *Choice and the end of social housing*, London, The Institute of Economic Affairs, 2006, 103-127.

KING, P., "Housing as a freedom right", *Housing Studies* 2003, vol. 18, no. 5, 661-672;

KLEINFELD, J., "Enforcement and the concept of law", *Yale Law Journal Online* 2011, vol. 121, 293-315.

KNIGHT, D., "Imaginaire deadlines en volwassenheid", *Agora* 2010, no. 3, 15-18.

KOCH, I.E., "The European Convention on Human Rights and the protection of socio-economic demands", in MIHR, A. and GIBNEY, M. (eds.), *The SAGE Handbook of Human Rights. Volume 2*, Los Angeles, SAGE, 2014, 673-690.

KOCH, I.E., *Human rights as indivisible rights. The protection of socio-economic demands under the European Convention of Human Rights*, Leiden, Martinus Nijhoff Publishers, 2009, 346 p.

KORPI, W. and PALME, J., "The paradox of redistribution and strategies of equality: welfare state institutions, inequality, and poverty in the Western countries", *American Sociological Review* 1998, vol. 63, no. 5, 661-687.

KRAUSE, C., "The right to property", in EIDE, A., KRAUSE, C. and ROSAS, A. (eds.), *Economic, social and cultural rights*, Dordrecht, Martinus Nijhoff Publishers, 2001, 191-209.

KRSTICEVIC, V. and GRIFFEY, B., "Interim measures", in LANGFORD, M., PORTER, B., BROWN, R. and ROSSI, J. (eds.), *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: a commentary*, Pretoria, University Law Press, 2015, 323-356.

KRUITHOF, R., "Overzicht van rechtspraak (1974-1980)", *TPR* 1983, 495-717.

KUCS, A. SEDLOVA, Z. and PIERHUROVICA, L., "The right to housing: international, European and national perspectives", *Cuadernos Constitucionales de la Cátedra Fadrique Furió Ceriol* 2008, no. 64/65, 101-123.

KUTCHINSKY, B., "The legal consciousness: a survey of research and opinion about law", in PODGORECKI, A., KAUPEN, W., VAN HOUTTE, J., VINCKE, P. and KUTCHINSKY, B. (eds.), *Knowledge and opinion about law*, London, Martin Robertson, 1973, 101-139.

KYMLICKA, W., *Contemporary political philosophy: an introduction*, Oxford, Clarendon Press, 1990, 342.

LANCKSWEERDT, E., "Het concept menselijke waardigheid als motor voor de verdere ontwikkeling van recht en rechtspraktijk", *TBP* 2013, vol. 9, 534-538.

LANGFORD, M., "Judicial review in national courts: recognition and responsiveness", in RIEDEL, E., GIACCA, G. and GOLAY, C. (eds.), *Economic, social and cultural rights: Contemporary issues and challenges*, Oxford, Oxford University Press, 2014, 417-447.

LANGFORD, M. and KING, J.A., "Committee on Economic, Social and Cultural Rights", in LANGFORD, M. (ed.), *Social rights jurisprudence. Emerging trends in international and comparative law*, Cambridge, Cambridge University Press, 2009, 477-516.

LAUSTER, N. and EASTERBROOK, A., "No room for new families? A field experiment measuring rental discrimination against same-sex couples and single parents", *Social Problems* 2011, vol. 58, no. 3, 389-409.

LAWRENCE, R., "Deciphering home: an integrative historical perspective" in BENJAMIN, D. (ed.), *The home: words, interpretations, meanings and environments*, Aldershot, Ashgate, 1995, 53-68.

LECKIE, S., "Where it matters most: making international housing rights meaningful at the national level", in LECKIE, S. (ed.), *National perspectives on housing rights*, The Hague, Martinus Nijhoff Publishers, 2003, 3-41.

LECKIE, S., "The human right to adequate housing", in EIDE, A., KRAUSE, C. and ROSAS, A. (eds.), *Economic, social and cultural rights*, Dordrecht, Martinus Nijhoff Publishers, 2001, 149-168.

LECKIE, S., "Another step towards indivisibility: identifying the key features of violations of ECOSOC rights", *HRQ* 1998, 81-124.

LECKIE, S., *Towards an International Convention on Housing Rights at Habitat II*, Washington, The American Society of International Law, 1994, 112 p.

LEE, M.Y.K., "Universal Human Dignity: some reflections in the Asian Context", *Asian Journal of Comparative Law* 2008, vol. 3, no. 1, 1-33.

LEFEBER, R., *Transboundary Environmental Interference and the Origin of State Liability*, Den Haag, Kluwer, 1996, 365.

LEIJTEN, I., "Meergelaagdheid en ondeelbare mensenrechten", *TBP* 2013, no. 2-3, 95-113.

LEMAHIEU P. and BUYST, E., *Naar een centraal huurwaarborgfonds*, Leuven, Kenniscentrum voor Duurzaam Woonbeleid, 2007, 15 p.

LE ROY, M. and VANDEKERCKHOVE, B., *Evaluatie van het kwaliteitsinstrumentarium. Vanuit het perspectief van de huurder*, Leuven, Steunpunt Ruimte en Wonen, 2011, https://steunpuntwonen.be/Documenten/Publicaties_steunpunt_ruimte_en_wonen_2007-2011/2011/2011-03-kwaliteitsbewaking-huurder--met-bijlage.pdf, 126 p.

LEVINET, M., "Dignité contre dignité. L'épilogue de l'affaire du 'lancer de nains' devant le Comité des droits de l'homme des Nations Unies", *RTDH* 2003, 1017-1042.

LIEBENBERG, S., *Socio-economic rights. Adjudication under a transformative constitution*, Claremont, Juta, 2010, 541 p.

LIEBENBERG, S., "Socio-economic rights: evaluating reasonableness review and minimum core obligations", in WOOLMAN, S. and BISHOP, M. (eds.), *Constitutional conversations*, Cape Town, Pretoria University Law Press, 2008, 303-329.

LIEBENBERG, S., "The value of human dignity in interpreting socio-economic rights", *S. Afr. J. on Hum. Rts.* 2005, vol.21, 1-31.

LIERMAN, S. and VAN DE WEYER, P.J., "Recente ontwikkelingen in de rechtspraak en de wetgeving over algemene bestuurlijke politiebevoegdheden van de gemeente", in X., *Recht in beweging*, Antwerpen, Maklu, 2014, 23-50.

LIND, H., "Rent regulation: a conceptual and comparative analysis", *European Journal of Housing Policy* 2001, vol. 1, no. 1, 41-57.

LITTLEFIELD, N.O., "Eugen Ehrlich's fundamental principles of the sociology of law", *Maine Law Review* 1967, vol.19, 1-27.

LOOPMANS, M. et al., "Onderzoek van de private huisvestingsmarkt in België in het kader van de Diversiteitsbarometer, in Interfederaal Gelijkekansencentrum (UNIA) (ed.), *Diversiteitsbarometer huisvesting*, Brussel, Interfederaal Gelijkekansencentrum, 2014, 134-245.

LUKES, S., *Power: a radical view*, Basingstoke, Palgrave Macmillan, 2005, 192 p.

LUTZ, M.A., "Centering social economics on human dignity", *Review of Social Economy* 1995, vol.53, no.2, 171- 194.

MACHAN, T.R. and RASMUSSEN, D.B. (eds.), *Liberty for the twenty-first century*, Lanham, Rowman & Littlefield Publishers, 1995, 386.

MAES, E., "Het Hof van Cassatie over de fout van overheidsorganen: streng, strenger, strengst …" (note under Court of Cassation 28 September 2006), *TBP* 2007, no. 9, 547-553.

MAES, G., "Twintig jaar sociale grondrechten in de Grondwet", in RAUWS, W. and STROOBANT, M. (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, 139-162.

MAES, G., "Het standstillbeginsel in verdragsbepalingen en in art. 23 G.W.: progressieve (sociale) grondrechtenbescherming", *RW* 2005-06, no.28, 1081-1094.

MAES, G., "Grondwetstoetsing of afweerrecht: art. 23 G.W. en het recht op maatschappelijke dienstverlening voor personen die een regularisatieaanvraag indienden" (note under Court of Cassation 7 June 2004), *RW* 2004-05, no. 27, 1058-1063.

MAES, G., "Algemene zorgvuldigheidsnorm en aansprakelijkheid voor de wetgevende macht", *NJW* 2004, no. 66, 398-404.

MAES, G., *De afdwingbaarheid van sociale grondrechten*, Antwerpen, Intersentia, 2003, 523 p.

MAHIEU, M. and VAN DROOGHENBROECK, S., "La responsabilité des pouvoirs publics du chef de méconnaissance des normes supérieures de droit national par un pouvoir législatif", *JT* 1998, 825-846.

MAHLMANN, M., "The Basic Law at 60 – Human Dignity and the Culture of Republicanism", *German Law Journa*l 2010, vol.11, no.1, 9-32.

MAHON, C., "Progress at the front : the draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights", *HRLR* 2008, vol. 8, no. 4, 617-646.

MALLETT, S., "Understanding home: a critical review of the literature", *The Sociological Review* 2004, vol. 52, no. 1, 62-89.

MALPASS, P. and MURIE, A., *Housing policy and practice*, London, Macmillan, 1982, 360 p.

MANDIC, S. and CLAPHAM, D., "The meaning of home ownership in the transition from socialism: the example of Slovenia", *Urban Studies* 1996, vol. 33, no. 1, 83-97.

MANTOUVALOU, V. and VOYATZIS, P., "The Council of Europe and the protection of human rights: a system in need of reform", in JOSEPH, S. and McBETH, A. (eds.), *Research Handbook on International Human Rights Law*, Cheltenham, Edward Elgar Publishing, 2010, 326-352.

MARELLA, M.R., "A New Perspective on Human Dignity : European Contract Law, Social Dignity and the Retreat of the Welfare State", in GRUNDMANN, S. (ed.), *Constitutional Values and European Contract Law*, The Netherlands, Kluwer, 2008, 123-147.

MARSHALL, T.H., *Class, citizenship and social development*, Chicago, University of Chicago Press, 1977, 365 p.

MARTENS, I., "De verplichte verkoop van sociale huurwoningen: een geoorloofde vorm van ontzetting uit de eigendom?", *RABG* 2005, no. 5, 398-405;

MARTENS, P., "Encore la dignité humaine: réflexions d'un juge sur la promotion par les juges d'une norme suspecte", in X. (ed.), *Les Droits de l'homme au seuil du troisième millénaire : mélanges en hommage à Pierre Lambert*, Brussel, Bruylant, 2000, 561-579.

MARTENS, P., "La commune et les droits économiques et sociaux", *Rev. dr. commun.* 1996, no. 4-5, 206-219.

MARYSSE, S., "Rechten en verbintenissen van de verhuurder", in DAMBRE, M., HUBEAU, B. and STIJNS, S. (eds.), *Handboek algemeen huurrecht*, Brugge, Die Keure, 2015, 415-512.

MATAS, D., "Economic, social and cultural rights and the role of lawyers: North American perspectives", *ICJ Review* 1985, nr.55, 123-140.

MATTSON, D.J. and CLARK, S.G., "Human dignity in concept and practice", *Policy Sciences* 2011, vol.44, 303-319.

McADAMS, R.H., "The economic costs of inequality", *John M. Olin Program in Law & Economics working paper no.* 370, 2007, 23-41.

McCARTHY, G., VAN ZANDT, S. and ROHE, W., *The economic benefits and costs of homeownership. A critical assessment of the research*, Arlington, Research Institute for Housing America, 2001, 62 p.

McCHESNEY, A., "Promoting the general welfare in a democratic society: balancing human rights and development", *NILR* 1980, vol. 27, 283-334.

McCRUDDEN, C., "Human dignity and judicial interpretation of human rights", *EJIL* 2008, vol.19, nr.4, 655-724.

McNAUGHTON NICHOLLS, C., "Housing, homelessness and capabilities", *Housing, Theory and Society* 2010, vol. 27, no. 1, 23-41.

MEEUS, B. and DE DECKER, P., *De geest van Suburbia*, Antwerpen, Garant, 2013, 344 p.

MELCHIOR, M. and COURTOY, C., "Het veruim van de wetgever of de lacune in de grondwettelijke rechtspraak", *TBP* 2008, no. 10, 587-603.

MENON, K., "Justice", in BHARGAVA, R. and ACHARYA, A. (eds.), *Political theory: an introduction*, Delhi, Pearson, 2008, 74-87.

MERTON, R.K., "The Matthew effect in science", *Science* 1968, no. 159, 56-63.

MIKKOLA, M., *Housing as a human right in Europe*, 2006, www.helsinki.fi/oikeustiede/omasivu/mikkola_matti/pdf/right-to-housing.pdf, 56.

MILLER, D., "Democracy and social justice", *British Journal of Political Science* 1978, vol. 8 1-19.

Minderhedenforum, *De stem van het Minderhedenforum over woonwagenbewoners*, 2014, www.minderhedenforum.be/download/media/251/brochure-woonwagenbewoners-minderhedenforum.pdf, 16.

MONSALVE, V.B. and ROMÁN, J.A., "Tensions of human dignity : conceptualization and appplication to international human rights law", *IJHR* 2009, vol. 6, no. 11, 39-59.

MOONS, N., "Tenant vs. owner: deriving access to justice from the right to housing", *RdW* 2015, vol. 36, no. 3, 99-112.

MOONS, N., "EHRM maakt recht op huisvesting nog meer afdwingbaar", *Juristenkrant* 2015, vol. 308, 4.

MOORE, S.F., "Recht en maatschappelijke verandering: de rol van het 'semi-autonoom social veld'", in GRIFFITHS, J.and WEYERS, H. (eds.), *De sociale werking van recht*, Nijmegen, Ars Aequi, 2005, 177-196.

MOORE, S.F., "Law and social change: the semi-autonomous social field as an appropriate subject of study", in *Law & Society Review* 1972, vol.7, no.1, 720-746.

MORIS, M., and LOOPMANS, M., "Label: 'allochtoon', middelen: beperkt. Discriminatie-ervaringen en vermijdingsstrategieën van financieel beperkte huurders van buitenlandse origine op de private huurmarkt", in DE DECKER, P., MEEUS, B., PANNECOUCKE, I., SCHILLEBEECKX, E., VERSTRAETE, J. and VOLCKAERT, E. (eds.), *Woonnood in Vlaanderen. Feiten / mythen / voorstellen*, Antwerpen, Garant, 2015, 297-310.

MORRIS, B., "The dignity of man", *Ethics* 1946, vol. 57, no. 1, 57-64.

MORSINK, J., *The Universal Declaration of Human Rights. Origins, Drafting and Intent*, Philadelphia, University of Pennsylvania Press, 1999, 396 p.

MÜLLER, A., "Limitations and derogations from economic, social and cultural rights", *HRLR* 2009, vol.9, no.4, 557-601.

MURIE, A., "Secure and contented citizens? Home ownership in Britain", in MARSH, A. and MULLINS, D. (eds.), *Housing and public policy: citizenship, choice and control*, Buckingham, Open University Press, 1998, 79-98.

NADLER, J., "Hart, Fuller and the connection between law and justice", *Law and Philosophy* 2007, vol.27, 1-34.

NELKEN, D., "Law in action or living law? Back to the beginning in sociology of law", *Legal Studies* 1984, vol.4, 157-174.

Netwerk tegen Armoede, *Centraal huurwaarborgfonds geeft meer zekerheid aan huurder en verhuurder dan hogere huurwaarborg*, 29 April 2015.

NIEMEIJER, B., "Wat leren wetsevaluaties ons over de effectiviteit van wetgeving?", in HERTOGH M. and WEIJERS, H. (eds.), *Het recht van onderop. Antwoorden uit de rechtssociologie*, Nijmegen, Ars Aequi, 2011, 41-61.

NIMAGA, S., "Pounding on Ehrlich. Again?", in HERTOGH, M. (ed.), *Living Law. Reconsidering Eugen Ehrlich*, Oxford, Hart Publishing, 2009, 157-175.

NOLAN, A., "Budget analysis and economic and social rights", in RIEDEL, E., GIACCA, G. and GOLAY, C. (eds.), *Economic, social, and cultural rights in international law: contemporary issues and challenges*, Oxford, Oxford University Press, 2014, 369-390.

NOLAN, A., *Children's socio-economic rights, democracy and the courts*, Oxford, Hart Publishing, 2011, 300 p.

NOLAN, A. and DUTSCHKE, M., "Article 2(1) ICESCR and states parties' obligations: whither the budget", *EHRLR* 2010, vol.3, 280-289..

NOLF, J., "Over de helaasheid der huurders", *Juristenkrant* 2010, no. 201, 11.

NOTREDAME, L., "De nieuwe wooninitiatieven. Maatschappelijke ontwikkelingen aan de basis", *Welzijnsgids* 1999, vol. 31, 25-64.

NOVAK, M., "Three models of balancing (in constitutional review)", *Ratio Juris* 2010, vol. 23, 101-112.

NOZICK, R., *Anarchy, state and utopia*, New York, Basic Books, 1974, 367..

NUSSBAUM, M., *Creating capabilities: the human development approach*, Cambridge, Harvard University Press, 2011, 237 p.

NUSSBAUM, M., "Human dignity and political entitlements", in President's Council on Bioethics (ed.), *Human dignity and bioethics: essays commissioned by the President's Council on Bioethics*, Washington, 2008, 351-380.

NUSSBAUM, M., *Women and human development: the capabilities approach*, Cambridge, Cambridge University Press, 2000, 312 p.

O'CONNELL, P., *Vindicating socio-economic rights. International standards and comparative experiences*, London, Routledge, 2012, 248 p.

OECD, *Focus on inequality and growth*, 2014, www.oecd.org/els/soc/Focus-Inequality-and-Growth-2014.pdf, 4.

OLDS, K., "The role of courts in making the right to housing a reality throughout Europe: lessons from France and the Netherlands", *Wisconsin International Law Journal* 2010, vol. 28, 170-199.

O'MAHONEY, C., "There is no such thing as a right to dignity", *Int'l. J. Const. L.* 2012, vol. 10, no. 2, 551-574.

OREN, M., ALTERMAN, R. and ZILBERSHATS, Y., "Housing rights in constitutional legislation: a conceptual classification", in KENNA, P. (ed.), *Contemporary housing issues in a globalized world*, Farnham, Ashgate, 2014, 141-158.

OSMANI, S., "Human rights to food, health and education", *Journal of Human Development* 2000, vol. 1, no. 2, 273-298.

OXLEY, M., ELSINGA, M., HAFFNER, M. and VAN DER HEIJDEN, H., "Competition and social housing in Europe", *Economic Affairs* 2008, vol. 28, no. 2, 31-36.

PACHECO, N. and SALES, L., "From the recognition to the justiciability of housing rights: building the future", *International Journal of Land Law & Agricultural Science* 2011, no.11, 34-53.

PANNECOUCKE, I. and DE DECKER, P., *Grote Woononderzoek 2013. Deel 7. Woontevredenheid en woongeschiedenis*, Leuven, Steunpunt Wonen, 2015, 63 p.

PANNECOUCKE, I. and DE DECKER, P., *Housing first: een alternatief voor de woonladder?*, Leuven, Steunpunt Wonen, 2014, 31 p.

PANNECOUCKE, I., DE DECKER, P. and GOOSSENS, L., *Onderzoek naar de mogelijkheden voor de integratie van de particuliere huurmarkt in het Vlaams woonbeleid*, Antwerpen, OASeS, 2003, 293 p.

PAREKH, S., "Resisting 'dull and torpid' assent : returning to the debate over the foundatoins of human rights", *Human Rights Quarterly 2007*, vol. 29, 754-778.

PAS, W. and VAN NIEUWENHOVE, J., "Het recht een menswaardig leven te leiden", in ICM (ed.), *Jaarboek Mensenrechten 1994*, Antwerpen, Maklu, 1995, 113-138.

PIERRAT, M., "De la distinction entre obligations de moyens et obligations de résultat : pile ou face?", *JT Luxembourg* 2011, no.15, 61-67.

PETRUSEK, M., "Human capacities and the problem of universally equal dignity: two philosophical test cases and a theistic response", *Journal of Moral Theology* 2016, vol. 5, no. 1, 37.

PIETERSE, M., "On 'dialogue, 'translation' and 'voice': reply to Sandra Liebenberg", in WOOLMAN, S. and BISHOP, M. (eds.), *Constitutional conversations*, Cape Town, Pretoria University Law Press, 2008, 331-347.

PIETERSE, M., "Eating socioeconomic rights: the usefulness of rights talk in alleviating social hardship revisited", *Human Rights Quarterly* 2007, vol. 29, 796-822.

PIETERSE, M., "Coming to terms with the judicial enforcement of socio-economic rights", *SAJHR* 2004, vol. 20, 383-417.

PLEACE, N., *At what cost? An estimation of the financial costs of single homelessness in the UK*, Centre for Housing Policy, University of York, 2015, www.crisis.org.uk/data/files/publications/CostsofHomelessness_Finalweb.pdf, 36 p.

PLEACE, N., *Housing First*, DIHAL, 2012, www.feantsaresearch.org/IMG/pdf/housing_first_pleace.pdf, 52 p.

PODGORECKI, A., "Public opinion on law", in PODGORECKI, A., KAUPEN, W., VAN HOUTTE, J., VINCKE, P. and KUTCHINSKY, B. (eds.), *Knowledge and opinion about law*, London, Martin Robertson, 1973, 65-100.

POEL, K. and MARNEFFE, W., "De federale regelgevingsimpactanalyse: een stand van zaken na zes maanden", *TVW* 2014, no. 3, 185-201.

POPELIER, P. and MARNEFFE, W., "De reguleringsimpactanalyse en de bescherming van grondrechten: een verantwoordelijkheid van wetgever en rechter. Een toepassing op het huisonderwijs", *TVW* 2014, no. 3, 202-224.

POPELIER, P. and VAN DE HEYNING, C., "Procedural rationality: giving teeth to the proportionality analysis", *European Constitutional Law Review* 2013, 230-262.

POPELIER, P., "Het evenredigheidsbeginsel in de rechtspraak van Grondwettelijk Hof: tussen grondrechtenbescherming en scheiding der machten", in MARTENS, P. et al. (eds.), *Liège, Strasbourg, Bruxelles: parcours des droits de l'homme*, Limal, Anthemis, 2010, 189-196.

POPELIER, P., "De (ir)rationele wetgever vroeger, vandaag en in de toekomst", in PEETERS B. and VELAERS, J. (eds.), *De Grondwet in groothoekperspectief*, Antwerpen, Intersentia, 2007, 57-98.

PORTER, B., "Reasonableness and article 8(4)", in BROWN, R., LANGFORD, M., PORTER, B. and ROSSI, J., *The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: a commentary*, Capetown, Pretoria University Law Press, 2016, 194-226.

PORTER, B., "The reasonableness of article 8(4) – adjudicating claims from the margins", *NJHR* 2009, vol. 27, no. 1, 39-53.

POSNER, E.A., "Human welfare, not human rights", *Columbia Law Review* 2008, vol.108, 1758-1800.

POSTEMA, G.J., "Conformity, custom, and convergence: rethinking the efficacy of law", in KRAMER, M.H., GRANT, C., COLBURN, B. and HATZISTAVROU, A. (eds.), *The legacy of H.L.A. Hart. Legal, political and moral philosophy*, Oxford, Oxford University Press, 2008, 45-65.

POUND, R., "Law in books and law in action", *American Law Review* 1910, vol.44, no.12, 12-36.

QUILICHINI, P., "Le droit au logement opposable", *AJDI* 2007, 364-369.

Raad voor Maatschappelijke Ontwikkeling, *Toegang tot Recht*, Den Haag, 2004, 186 p.

RABKIN, J., "What can we learn about human dignity from international law", *Harvard Journal of Law & Public Policy* 2003, vol.27, no.1, 145-168.

RADIN, M.J., "Property and personhood", *Stanford Law Review* 1982, vol. 34, 957-1015.

RAES, K. and COENE, G., "Sociale grondrechten als voorwaarden voor een gelijke handelingsvrijheid", *Welzijnsgids* 2009, no. 72, 25-84.

RAES, K., *Controversiële rechtsfiguren. Rechtsfilosofische excursies over de relaties tussen ethiek en recht*, Gent, Academia Press, 2001, 458 p.

RAKOFF, R.M., "Ideology in everyday life: the meaning of the home", *Politics and Society* 1977, vol. 7, no. 1, 85-104

RANDOLPH, S., FUKUDA-PARR S. and LAWSON-REMER, T., "Making the principle of progressive realization operational – The SERF Index. An index for monitoring state fulfillment of economic and social rights obligations", in HAGLUND, L. and STRYKER, R., *Closing the rights gap: from human rights to social transformation*, Oakland, University of California Press, 2015, 239-264.

RAUWS, W., "Het recht op maatschappelijke dienstverlening van illegalen die een regularisatieaanvraag indienden: het Hof van Cassatie versus het Arbitragehof" (note under Labour Court Gent 7 November 2002), *RW* 2003-04, no. 17, 664-669.

RAUWS, W., "Niet de ver-van-mijn-bed-show: sociale grondrechten en de praktijk", in VAN EECKHOUTTE, W. and RIGAUX, M. (eds.), *Sociaal recht: niets dan uitdagingen*, Gent, Mys & Breesch, 1995, 793-843..

RAWLS, J., *A theory of justice*, Cambridge, Harvard University Press, 1971, 607 p.

RAZ, J., *The morality of freedom*, Oxford, Clarendon Press, 1986, 434 p.

RAZ, J., *The authority of law*, Oxford, Clarendon Press, 1979, 289 p.

Regulatory Management Unit ('Dienst Wetsmatiging'), *Leidraad voor de opmaak van een reguleringsimpactanalyse (RIA)*, 2012, www.bestuurszaken.be/sites/bz.vlaanderen.be/files/RIA-leidraad.pdf, 92 p.

REMICHE, A., "Yordanova and Others v. Bulgaria: the influence of the social right to adequate housing on the interpretation of the civil right to respect for one's home", *H.R.L.R.* 2012, vol. 12, no. 4, 787-800.

RENDA, A., *Law and economics in the RIA world. Improving the use of economic analysis in public policy and legislation*, Antwerpen, Intersentia, 2011, 270 p.

RIETIKER, D., "The principle of 'effectiveness' in the recent jurisprudence of the European Court of Human Rights: its different dimensions and its consistency with public international law – no need for the concept of treaty *sui generis*", *Nordic Journal of International Law* 2010, vol.79, 245-277.

RIGAUX, M., "Algemene conclusie: artikel 23 GW, het recht om een menswaardig leven te leiden, zoals gewaarborgd door art.23 GW, hoeksteen van een adequate rechtsbescherming van de kansarme?" in Centrum voor Beroepsvolmaking in de Rechten (ed.), *Arm Recht? Kansarmoede en Recht*, Antwerpen, Maklu, 1997, 439-445.

RIEDEL, E., GIACCA G. and GOLAY, C., "The development of economic, social, and cultural rights in international law", in RIEDEL, E., GIACCA G., and GOLAY, C. (eds.), *Economic, social, and cultural rights in international law: contemporary issues and challenges*, Oxford, Oxford University Press, 2014, 3-50.

RIMANQUE, K., "Algemene situering van de sociale grondrechten in de Belgische rechtsorde", in HUBEAU, B. and DE LANGE, R. (eds.), *Het grondrecht op wonen. De grondwettelijke erkenning van het recht op huisvesting in Nederland en België*, Antwerpen, Maklu, 1995, 37-48.

RIMANQUE, K., "Synthese: de betekenis van de sociale grondrechten", in ICM (ed.), *Jaarboek Mensenrechten 1994*, Antwerpen, Maklu, 1995, 179-182.

RIVERS, J., "Proportionality and variable intensity of review", *Cambridge Law Journal* 2006, vol. 65, no. 1, 174-207.

ROBERTSON, R.E., "Measuring state compliance with the obligation to devote the maximum available resources to realizing economic, social and cultural rights", *Human Rights Quarterly* 1994, 693-714.

ROBITAILLE, D., "De gerechtelijke opvatting over armoede in Canada: onveranderlijke maatschappelijke positie of gewoon een kwestie van wil?", in Steunpunt tot Bestrijding van Armoede, Bestaansonzekerheid en Sociale Uitsluiting, *Armoede-Waardigheid-Mensenrechten*, Brussel, 2008, www.armoedebestrijding.be/publications/10jaarsamenwerking/10jaarsamenwerking_rapport_NL.pdf, 95-104.

ROHE, W.M. and STEGMAN, W.A., "The effects of homeownership: on the self-esteem, perceived control and life satisfaction of low-income people", *Journal of the American Planning Association* 1994, vol. 60, no. 2, 173-184.

ROSCIGNO, V.J., KARAFIN, D.L. and TESTER, G., "The complexities and processes of racial housing discrimination, *Social Problems* 2009, vol. 56, no. 1, 49-69.

ROSE, C., "Property as a keystone right?", *Notre Dame Law Review* 1995, vol. 71, 329-365.

ROSENDORF, D., "Homelessness and the uses of theory: an analysis of economic and personality theories of property in the context of voting rights and squatting rights", *University of Miami Law Review* 1990, 701.

ROUX, T., "Understanding Grootboom – A response to Cass R Sunstein", *Constitutional Forum* 2002, vol. 12, no. 2, 41-49.

ROZAKIS, C.L. and VOYATZIS, P., " 'Le droit au respect de ses biens': une clause déclaratoire ou une 'omnibus' norme?", in VANDENBERGHE, H. (ed.), *Property and human rights*, Brugge, Die Keure, 2006, 1-28.

RUGG, J. and RHODES, D., *The private rented sector: its contribution and potential*, York, Centre for Housing Policy, 2008, 150 p.

RUONAVAARA, H., "Home ownership and Nordic housing policies in 'retrenchment'", in RONALD, R. and ELSINGA, M. (eds.), *Beyond home ownership: housing, welfare and society*, London, Routledge, 2011, 91-107.

RUONAVAARA, H. and NAUMANEN, P., "Finland: trust, risk-taking and scepticism", in ELSINGA, M., DE DECKER, P., TELLER, N. and TOUSSAINT, J. (eds.), *Home ownership beyond asset and security. Perceptions of housing related security and insecurity in eight European countries*, Amsterdam, IOS Press, 2007, 67-100.

RUONAVAARA, H., "Types and forms of housing tenure, toward solving the comparison/translation problem", *Scandinavian Housing and Planning Research* 1993, vol. 10, 3-20.

SAGER, L., "Material rights, underenforcement and the adjudication thesis", *Boston University Law Review* 2010, vol. 90, 579-620.

SALES, E., "Droit constitutionnel et droit social. La dualité du 'droit au logement opposable'", *RFDC* 2009, no. 79, 601-620.

SALOMON, M.E., *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, Oxford, Oxford University Press, 2007, 274 p.

SAMYN, B., "De bewijslast. Rechtsleer getoetst aan tien jaar cassatierechtspraak", *P&B* 2010, 50-71.

SANTENS, M., "Participatie tussen emancipatie en culturele innovatie", in BOUDRY, L. et al. (eds.), *Inzet, opzet, voorzet: stadsprojecten in Vlaanderen*, Brussel, Ministerie van de Vlaamse Gemeenschap, 2006, 164-173.

SARIGIANNIDIS, M. and PERVOU, I., "Adequate housing: seeking justiciability through the right to property", *International Journal of Human Rights and Constitutional Studies* 2013, vol. 1, no. 1, 27-40.

SAUNDERS, P., *A nation of homeowners*, London, Unwin Hyman, 1990, 418 p.

SCANLON, K., "Private renting in other countries", in SCANLON, K.and KOCHAN, B. (eds.), *Towards a sustainable private rented sector. The lessons from other countries*, London, LSE, 2011, 15-44.

SCANLON, K. and WHITEHEAD, C., "Le logement social en Europe: tendances communes et diversités persistantes", in LÉVY-VROELANT, C. and TUTIN, C. (eds.), *Le logement social en Europe au début du XXI^e Siècle: la révision générale*, Rennes, Presses Universitaires de Rennes, 2010, 17-49.

SCHACHTER, O., "Human dignity as a normative concept", *The American Journal of International Law* 1983, vol.77, no. 4, 848-854.

SCHEININ, M., "Access to justice before international human rights bodies", in FRANCIONI, F. (ed.), *Access to justice as a human right*, New York, Oxford University Press, 2007, 135-152.

SCHMID, C.U. and DINSE, J.R., *Towards a common core of residential tenancy law in Europe? The impact of the European Court of Human Rights on tenancy law*, 2013, www.jura.uni-bremen.de/lib/download.php?file=68a11d81f1.pdf&filename=WP%201_2013.pdf, 24 p.

SCHOLLEN, P. and VANGEEBERGEN, B., "Juridische bijstand", *Jura Falconis* 2000-01, vol. 37, no. 3, 407-442.

SCHUERMANS, N., MEEUS, B. and DE DECKER, P., "Geographies of whiteness and wealth: white, middle class discourses on segregation and social mix in Flanders, Belgium", *Journal of Urban Affairs* 2014, vol. 37, no. 4, 478- 495.

SCHWITTERS, R.J.S., *Recht en samenleving in verandering*, Deventer, Kluwer, 2008, 305 p.

SEN, A., "Human rights and capabilities", *Journal of Human Development* 2005, vol. 6, no. 2, 151-166.

SEN, A., "Elements of a theory of human rights", *Philosophy and Public Affairs* 2004, vol. 23, no. 4, 315-356.

SEN, A., *Rationality and freedom*, Cambridge, Harvard University Press, 2002, 586 p.

SEN, A., *Vrijheid is vooruitgang*, Amsterdam, Contact, 2000, 144-156;

SEN, A., "Capability and well-being", in M. NUSSBAUM and A. SEN (eds.), *The quality of Life*, Oxford, Clarendon Press, 1993, 30-53.

SEN, A., *The standard of living*, Cambridge, Cambridge University Press, 1987, 125 p.

SEN, A., "The right not to be hungry", in ALSTON P. and TOMASEVSKI K. (eds.), *The right to food*, Leiden, Martinus Nijhoff, 1984, 69-81.

SEN, A., "Equality of what?", *The Tanner Lecture on Human Values* 1980, vol. 1, 197-220.

SENNETT, R., *Respect in a World of inequality*, New York, Norton, 2003, 304 p.

SEPULVEDA, M., *The nature of the obligations under the International Covenant on Economic, Social and Cultural Rights*, Antwerpen, Intersentia, 2003, 477 p.

SERV, *Tien denksporen voor ex post decreetsevaluatie in en door het Vlaams Parlement*, 21 September 2015, available at https://docs.vlaamsparlement.be/docs/stukken/2014-2015/g61-1.pdf, 111 p.

SERV, *Wetgevingsprocedures, -structuren en –instrumenten in Vlaanderen: een evaluatie van 10 jaar wetgevingsbeleid in Vlaanderen*, 2009, www.serv.be/sites/default/files/documenten/pdfpublicaties/1572.pdf, 134 p.

SHERRADEN, M., *Assets and the poor. A new American welfare policy*, New York, M.E. Sharpe, 1991, 344 p.

SHUE, H., *Basic rights*, Princeton, Princeton University Press, 1980, 256 p.

SHULTZINER, D., "Human Dignity – Functions and Meanings", *Global Jurist Topics* 2003, vol.5, 1-23.

SIGRON, M., *Legitimate expectations under article 1 of Protocol no. 1 to the European Convention on Human Rights*, Antwerpen, Intersentia, 2014, 314 p.

SINGER, P., *Applied Ethics*, Londen, Oxford University Press, 1986, 264 p.

SKOGLY, S., "The requirement of using the 'maximum of available resources' for human rights realization: a question of quality as well as quantity", *HRLR* 2012, vol.12, no.3, 393-420.

SLUYSMANS J. and DE GRAAFF, R., "Ontwikkelingen in het eigendomsbegrip onder artikel 1 Eerste Protocol", *NJCM-Bulletin* 2014, vol. 39, no. 3, 255-271.

SMAERS, G., "De strafbaarheid van het kraken van woningen naar Belgisch recht", *RW* 1986-87, 2193-2218.

SMITH, S., "The essential qualities of home", *Journal of Environmental Psychology* 1994, vol. 14, no.1, 31-46.

SPICKER, P., "The rights of the poor: conceptual issues", in ROBSON, P. and KJONSTAD, A. (eds.), *Poverty and the law*, Oxford, Hart Publishing, 2001, 3-15.

SPINKS, J., "De geoorloofdheid van het opleggen van eigendomsbeperkende maatregelen door de overheid", *Jura Falconis* 2004-2005, vol. 41, no. 3, 365-406.

SPINNEWIJN, F., "Een versterkt recht op wonen als dam tegen dakloosheid en sociale uitsluiting?", Presentation during a seminar organized by the Flemish Housing Council on 11 March 2014, *Towards a strengthened right to housing*, www.rwo.be/Portals/126/Vlaamse%20Woonraad/Presentation2%20%5BAlleen-lezen%5D.pdf.

STEINBERG, C., "Can reasonableness protect the poor? A review of South Africa's socio-economic rights jurisprudence", *South African Law Journal* 2006, vol. 123, 264-284.

Steunpunt tot bestrijding van armoede, bestaansonzekerheid en sociale uitsluiting, *Strijd tegen armoede. Een bijdrage aan politiek debat en politieke actie. Tweejaarlijks verslag 2010-2011*, 2012, www.armoedebestrijding.be/publications/verslag6/volledigverslag.pdf, 141 p.

Steunpunt tot bestrijding van armoede, bestaansonzekerheid en sociale uitsluiting, *Naar een effectief recht op wonen: welke lessen kunnen we trekken uit de Franse en Schotse ervaringen*, 2011, www.armoedebestrijding.be/publications/verslag_resultaatsverbintenis.pdf, 63 p.

Steunpunt tot bestrijding van armoede, bestaansonzekerheid en sociale uitsluiting, "Huurwaarborg: hoe werkelijk de toegang tot de huisvestingsmarkt verlagen?" in *Verslag Armoedebestrijding 2008-2009. Deel 1: Een bijdrage aan politiek debat en politieke actie*, Brussel, 2009, www.armoedebestrijding.be/publications/verslag5/Verslag2009.pdf, 222 p.

Steunpunt tot best rijding van armoede, bestaansonzekerheid en sociale uitsluiting, *Recht op maatschappelijke dienstverlening: 10 jaar na het algemeen verslag over de armoede*, 2005, www.armoedebestrijding.be/publications/AVA10jaar/MaatschappelijkeDienstverleningNl.pdf, 12 p.

STEEN, B., "Artikel 23 van de Grondwet en de rechtspraak van de Raad van State", in RAUWS, W. en STROOBANT, M. (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, 113-138.

STIJNS, S., JANSEN, S. and PEERAER, F., "Schorsing en beëindiging van de huurovereenkomst naar gemeen recht", in DAMBRE, M., HUBEAU, B. and STIJNS, S. (eds.), *Handboek algemeen huurrecht*, Brugge, Die Keure, 2015, 685-710.

STIJNS, S., "De uitstelbevoegdheid van de rechter bij de ontbinding van het huurcontract" (note under Peace Court Fontaine-l'Evêque 21 August 2003), *T.Vred*. 2003, 301.

STONE SWEET, A. and MATHEWS, J., "Proportionality balancing and global constitutionalism", *Columbia Journal of Transnational Law* 2008, vol. 47, 68-122.

STORME, M., *De bewijslast in het Belgisch privaatrecht*, Gent, Story-Scientia, 1962, 475.

STORMS, B., PEETERS, N., CORNELIS, I., . REYNAERT, J.-F., THIJS, P. and NISEN, L., "Ook getest op mensen. Referentiebudgetten als maatstaf voor de doeltreffendheid van de sociale bescherming", in WILLY, L., ISABELLE, P., VRANKEN, J. and VAN ROSSEM, R. (eds.), *Armoede en Sociale Uitsluiting. Jaarboek 2013*, Leuven, Acco, 2013, 267-287.

STORMS, B. and VAN DEN BOSCH, K., *Wat heeft een gezin minimaal nodig? Een budgetstandaard voor Vlaanderen*, Den Haag, Acco, 2009, 32 p.

STROOBANT, M., "Sociale en economische grondrechten in de Belgische Grondwet. Wordingsgeschiedenis van artikel 23: het Akkoord van 'Le Ry d'Ave' Rochefort", in RAUWS, W. and STROOBANT, M. (eds.), *Sociale en economische grondrechten. Art.23 Gw.: een stand van zaken na twee decennia*, Antwerpen, Intersentia, 2010, 19-57.

STROOBANT, M., "De sociale grondrechten naar Belgisch recht. Een analyse van de parlementaire werkzaamheden bij art.23 G.W.", in STROOBANT, M. (ed.), *Sociale grondrechten*, Antwerpen, Maklu, 1995, 57-94.

SUDRE, F., "La protection des droits sociaux par la Cour Européenne des Droits de l'Homme : un exercice de 'jurisprudence fiction'?", *RTDH* 2003, no. 55.

SUDRE, F., "La perméabilité de la Convention européenne des droits de l'homme aux droits sociaux", *Pouvoir et liberté. Études offertes à J. Mourgeon*, Brussel, Bruylant, 1998, 46.

SUDRE, F., "Le protocole additionnel à la Charte Sociale Européenne prévoyant un système de réclamations collectives", *Revue Générale de Droit International Public* 1996, vol. 100, 715-739.

SUMNER, W.G., *Folkways: a study of the sociological importance of usages, manners, customs, mores and morals*, Boston, Ginn and Company, 1906, 717 p.

SUNSTEIN, C.R., "Social and economic rights? Lessons from South Africa", *Constitutional Forum* 2001, vol. 11, no. 4, 123-131.

TAINIO, H. and FREDIKSSON, P., "The Finnish homelessness strategy: from a 'staircase' model to a 'housing first' approach to tackling long-term homelessness", *European Journal of Homelessness* 2009, vol. 3, 181-199.

TAMANAHA, B.Z., "A vision of social-legal change: rescuing Ehrlich from 'living law'", *Law & Social Inquiry* 2011, vol.36, no.1, 297-318.

TEGEDER, G. and HELBRECHT, I., "Germany: home ownership, a Janus-faced advantage in time of welfare restructuring", in ELSINGA, M., DE DECKER, P., TELLER, N. and TOUSSAINT, J. (eds.), *Home ownership beyond asset and security. Perceptions of housing related security and insecurity in eight European countries*, Amsterdam, IOS Press, 2007, 101-132.

TENLAW, *National Report for Sweden*, 2015, www.tenlaw.uni-bremen.de/reports/SwedenReport_18052015.pdf, 130 p.

TERLOUW, A., "Draagt wetgeving bij aan gelijkheid?", in HERTOGH, M.and WEIJERS, H. (eds.), *Het recht van onderop. Antwoorden uit de rechtssociologie*, Nijmegen, Ars Aequi, 2011, 349-370.

TER RELE, H. and VAN STEEN, G., "Measuring housing subsidies: distortionary and distributional effects in the Netherlands", *Fiscal Studies* 2003, vol. 24, no. 3, 317-339.

TESTER, G. and WINGFIELD, A.H., "Moving past picket fences: the meaning of 'home' for public housing residents", *Sociological Forum* 2013, vol. 28, no. 1, 70-83.

THEUNIS, J., "De toetsing aan grondrechten door het Grondwettelijk Hof", *TBP* 2012, no.1, 3-37.

THOLOMÉ, L., "Le droit au logement opposable : gadget ou véritable protection sociale ?", *Echos log.* 2007, no. 2, 17-24.

THOLOMÉ, L., "L'article 23 de la constitution n'est pas une simple déclaration de principe", *Echos log.* 2000, no.4, 121-123.

TIMMERMANS, R., "Overbewoning vanuit het gezichtspunt van de huurder en van de verhuurder", *Huur* 2015, no. 1, 3-8.

TIMMERMANS, R., "Armworstelen met het huurgarantiefonds", *Huur* 2014, vol.1, 21-26.

T'KINDT, P. and VAN NIEUWENHOVE, J., "De federale voorafgaande regelgevingsimpactanalyse (RIA) – een wassen neus of een stapje vooruit?", *TVW* 2014, no. 3, 168-184.

TOLLENAERE, F., "Uithuiszettingen, Het standpunt van de huurders", in BERNARD, N. (ed.), *Les expulsions de logement/Uithuiszettingen*, Brugge, Die Keure, 2011, 161.

TOLLENAERE, V., "Sociaal beheersrecht", in HUBEAU, B. (ed.), *Vijf jaar Vlaamse Wooncode: het woonbeleid (nog) niet op kruissnelheid?*, Brugge, Die Keure, 2002, 267-280.

TOMASIC, R., *The sociology of law*, London, Sage Publications, 1985, 275 p.

TOMUSCHAT, C., "Human rights in a world-wide framework – some current issues", *Zeitschrift für Aüslandisches öffentliches Recht und Völkerrecht* 1985, vol.45, 547-584.

TRATSAERT, K., *Huurprijzen en richthuurprijzen. Deel II: De registratie van huurcontracten als informatiebron voor de private huurmarkt*, Heverlee, Steunpunt Ruimte en Wonen, 2012, https://steunpuntwonen.be/Documenten/studiedagen/studiedag-private-huurmarkt-15-mei-2012/deel-ii.pdf, 71 p.

TRILLET, Y., "Vers une nouvelle effectivité des droits économiques, sociaux et culturels ? ", *Dr.Q.M.* 2000, vol.27, 3-10.

TULKENS, F., *The contribution of the European Convention on Human Rights to the poverty issue in times of crisis*, 8 July 2014, www.ejtn.eu/Documents/About%20EJTN/Independent%20Seminars/ECtHR%20for%20EU%20Judicial%20Trainers/ECtHR%202014/Presentation_ECHR_economic_crisis_and_poverty_TULKENS_2014.pdf, 24 p.

TULKENS, F. and VAN DROOGHENBROECK, S., "Armoede en mensenrechten. De bijdrage van het Europese Hof voor de Rechten van de Mens", in Steunpunt tot Bestrijding van Armoede, Bestaansonzekerheid en Sociale Uitsluiting, *Armoede-Waardigheid-Mensenrechten*, 2008, www.armoedebestrijding.be/publications/10jaarsamenwerking/10jaarsamenwerking_rapport_NL.pdf, 65-73.

TULKENS, F., "La réglementation de l'usage des biens dans l'intérêt général. La troisième norme de l'article 1er du premier Protocole de la Convention européenne des Droits de l'homme", in VANDENBERGHE, H. (ed.), *Property and human rights*, Brugge, Die Keure, 2006, 61-97.

TULKENS, F. and VAN DROOGHENBROECK, S., "Le droit au logement dans la Convention Européenne des Droits de l'Homme. Bilan et perspectives", in BERNARD, N. and MERTENS, C. (eds.), *Le logement dans sa multidimensionalité. Une grande cause régionale*, Ministère de la Région wallonne, 2005, www.rtdh.eu/pdf/droitaulogement_f-tulkens_s-vandrooghenbroeck.pdf, 311-323.

TULLY, S., "The Contribution of Human Rights to Universal Energy Access", *Nw. J. Int'l Hum. Rts.* 2006, vol. 4, no. 3, (518) 525.

TULLY, S., "Access to Electricity as a Human Right", *Neth. Q. Hum. Rts.* 2006, vol. 24, no. 4, 557-588.

UHRY, M. and VIARD, T., "De Raad van Europa pakt Frankrijk aan over het recht op huisvesting en het recht op bescherming tegen armoede", in Steunpunt tot Bestrijding van Armoede, Bestaansonzekerheid en Sociale

Uitsluiting, *Armoede-Waardigheid-Mensenrechten*, 2008, www.armoedebestrijding.be/publications/10jaarsamenwerking/10jaarsamenwerking_rapport_NL.pdf; 81-88.

UNDERKUFFLER, L., *The idea of property: its meaning and power*, Oxford, Oxford University Press, 2003, 163 p.

Utah Housing and Community Development Division, *Comprehensive report on Homelessness*, 2014, https://jobs.utah.gov/housing/scso/documents/homelessness2014.pdf, 60 p.

UYTTENDAELE, M., "Du réflexe salutaire à l'ivresse du pouvoir" (note under Court of Cassation 28 September 2006), *JLMB* 2006, 1554-1564.

VANACKERE, C., "Enkele soorten verbintenissen", in ROODHOOFT, J. (ed.), *Bestendig Handboek Verbintenissenrecht*, Antwerpen, Kluwer, 1998, I.2, 1-17.

VAN AEKEN, K., "Een rechtssociologische analyse van de juridisering van de samenleving", in HUBEAU, B., GIBENS, S., MERCELIS, S., PARMENTIER, S., PONSAERS, P., VAN AEKEN, K., VANDE WALLE, G. and VAN HOUTTE, J. (eds.), *Dialogen tussen recht en samenleving*, Leuven, Acco, 2012, 67-84.

VAN ASPEREN, G.M., *Het bedachte leven*, Amsterdam, Boom Uitgevers, 1993, 247 p.

VANDEBURIE, A., *L'article 23 de la Constitution. Coquille vide ou boîte aux trésors?*, Brussel, La Charte, 2008, 266 p.

VANDEBURIE, A., "Coupures d'eau, de gaz et d'électricité : ça suffit ! L'article 23 de la Constitution à la rescousse des besoins énergétiques fondamentaux" (note under Peace Court Moeskroen 24 May 2004), *TBBR* 2008, 274-282;

VANDEBURIE , A., "La mise en œuvre de droit à un logement décent de Waterloo à l'hôtel Tagawa, où sont les responsables" (note under Peace Court Brussel 14 November 2006), *TBBR* 2008, 489-500.

VAN DE KEERE, V., "Vlaamse huurpremie voor huurders die wachten op een sociale woning", *NNK* 2013, no. 1, 6-12.

VANDEKERCKHOVE, B. and VAN BORTEL, G., "Hoe ver reikt de participatieladder voor huurders in de sociale huisvesting?", in X. (ed.), *Het onroerend goed in de praktijk*, Mechelen, Kluwer, 2012, XIV.F, 173-190.

VANDE LANOTTE, J. and GOEDERTIER, G., *Overzicht publiekrecht*, Brugge, Die Keure, 2008, 1576 p.

VANDE LANOTTE J. and DE PELSMAEKER, T., "Economic, social and cultural rights in the Belgian Constitution", in VAN DER AUWERAERT, P., DE PELSMAEKER, T., SARKIN, J.and VANDE LANOTTE, J. (eds.), *Social, economic and cultural rights. An appraisal of current European and international developments*, Antwerpen, Maklu, 2002, 263-285.

VAN DE LUYTGAARDEN, H.J.L.M., "Sociale grondrechten "gerenoveerd": het rechtskarakter van sociale grondrechten vanuit juridiseringsperspectief", in GROOT, A.R.J. and VAN DE LUYTGAARDEN, H.J.L.M. (eds.), *Zonder meer recht*, Zwolle, Tjeenk Willink, 1993, 149-189.

VANDENBERGHE, H., "Overheidsaansprakelijkheid", *TPR* 2010, 2013-2097.

VANDENBERGHE, H., "La privation de propriété. La deuxième norme de l'article 1er du premier protocole de la Convention européenne des Droits de l'Homme", in VANDENBERGHE, H. (ed.), *Property and human rights*, Brugge, Die Keure, 2006, 29-59.

VANDENBERGHE, J., "De huurpremie voor kandidaat-huurders voor een sociale woning", in DAMBRE, M., HUBEAU, B., KIEKENS, A., VANDROMME T. and VANNESTE, K. (eds.), *Huurzakboekje 2015*, Mechelen, Wolters Kluwer, 2015, 255-259.

VANDENBOGAERDE, A. and VANDENHOLE, W., "The Optional Protocol to the International Covenant on Economic, Social and Cultural Rights: An *Ex Ante* Assessment of its Effectiveness in Light of the Drafting Process", *HRLR* 2010, vol. 10, no. 2, 207-237.

VAN DEN BROECK, K., HAFFNER, M. and WINTERS, S., *Discussion paper: towards a cost-effective housing policy*, Leuven, HIVA KU Leuven, 2016, 118 p.

VAN DEN BROECK, K. and HEYLEN, K., "Differential treatment of rental home seekers according to their sociodemographic and economic status by real estate agencies in Belgium", *European Journal of Homelessness* 2015, vol. 9, no. 2, 39-60.

VAN DEN BROECK, K. and HEYLEN, K., *Discriminatie en selectie op de private huurmarkt in België*, Leuven, HIVA, 2014, www.unia.be/files/legacy/baro_div_huisvesting_discriminatie_en_selectie_praktijktest.pdf, 91 p.

VANDENBROUCKE, P., BUYST, E., WINTERS, S., ELSINGA, M., HAFFNER, M. and HOEKSTRA, J., *Naar een aanbodbeleid voor de Vlaamse private huurmarkt*, Brussel, Departement RWO-Woonbeleid, 2007, 83-95.

VANDENHOLE, W., "Het grondrecht op toereikende energie: over wat het is en zou kunnen zijn", in HUBEAU, B.and JADOUL, P. (eds.), *Vers un droit fondamental à l'énergie? Naar een grondrecht op energie?*, Die Keure, Brugge, 2006, 11-36.

VANDENHOLE, W., "Recht op wonen als resultaatsverbintenis? Enkele reflecties", *Juristenkrant 2013*, no. 264, 12.

VANDENHOLE, W., "VN-mensenrechtencomité en Mensenrechtenhof op één lijn over verplichtend karakter voorlopige maatregelen", *Juristenkrant* 2003, no. 74, 12.

VANDENHOLE, W., "Article 26: The right to benefit from social security", in ALEN, A., VANDE LANOTTE, J., VERHELLEN, E., ANG, F., BERGHMANS, E. and VERHEYDE, M. (eds.), *A commentary on the United Nations Convention on the Rights of the Child*, Leiden, Martinus Nijhoff Publishers, 1-45.

VAN DER BRACHT, K. and VAN DE PUTTE, B., *Het not-in-my-property-syndroom (NIMPS). Etnische discriminatie*, Gent, Universiteit Gent, 2013, 20 p.

VANDERLINDEN, H., "Effectiviteit van de sociale grondrechten in het Belgische recht, mythe of realiteit", *RW* 2008-09, no. 29, 1202-1216.

VAN DER MEI, A.P., "The justiciability of social rights in the European Union", in COOMANS, F. (ed.), *Justiciability of economic and social rights*, Antwerp, Intersentia, 2006, 389-408.

VAN DER PLANCKE, V. and SANT'ANA, M., "Protection des droits sociaux fondamentaux et lutte contre la pauvreté au sein du Conseil de l'Europe", in VAN DER PLANCKE, V. (ed.), *Les droits sociaux fondamentaux dans la lutte contre la pauvreté* ? Brussel, Die Keure, 2012, 211-265.

VANDERSTRAETEN, L. and RYCKEWAERT, M., *Groot woononderzoek 2013. Deel 3: Technische woningkwaliteit*, Leuven, Steunpunt Wonen, 2015, 109 p.

VANDEVELDE, M., "De verkoop van de sociale huurwoning aan de zittende huurder", in HANSELAER, A. and HUBEAU, B. (eds.), *Sociale huur*, Brugge, Die Keure, 2011, 173-191.

VANDEVELDE, M., "Het kooprecht van sociale huurders", *Huur* 2007, no. 2, 52-61.

VAN DIJK, P. and VAN HOOF, G.J.H., *De Europese Conventie in theorie en praktijk*, Nijmegen, Ars Aequi Libri, 1982, 720 p.

VANDROMME, T. and HUBEAU, B., *De sociale huur als instrument ter verwezenlijking van het grondrecht op wonen*, Antwerpen, Universiteit Antwerpen, 2015, 273 p.

VANDROMME, T., "Ook partner van sociale huurder moet aan voorwaarden sociale huur voldoen", *Juristenkrant* 2015, no. 317, 4.

VANDROMME, T., "Het kraken van panden bekeken vanuit de grondrechten, het strafrecht en het burgerlijk recht (inclusief het procesrecht)", *RW* 2014-15, no. 35, 1363-1378.

VANDROMME, T., "De gemeentelijke mogelijkheden bij de bewaking van de woningkwaliteit", *T. Gem.* 2014, no. 4, 250-257.

VANDROMME, T., "Vlaams Fonds ter bestrijding van de uithuiszettingen van start", *Juristenkrant* 2013, no. 280, 4.

VANDROMME, T., "Een aanzet tot een concrete invulling van het grondrecht op wonen", in BERNARD, N. and HUBEAU, B. (eds.), *Recht op wonen: naar een resultaatsverbintenis?*", Brugge, Die Keure, 2013, 157-181.

VANDROMME, T., "Het recht op wonen: een stand van zaken", in HUBEAU, B. and VANDROMME, T. (eds.), *Vijftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013, 17-40.

VANDROMME, T., "Begripsomschrijving", in HANSELAER, A. and HUBEAU, B. (eds.), *Sociale huur*, Brugge, Die Keure, 2011.

VANDROMME, T., "De gevolgen voor de huurovereenkomst bij inbreuken op de gewestelijke woonkwaliteitsnormen: botst de Vlaamse Wooncode met het gemene huurrecht?", *Huur* 2009, vol.2, 104-108.

VANDROMME, T., *Woningkwaliteitsbewaking in het Vlaamse Gewest*, Mechelen, Kluwer, 2008, 97-103.

VANDROMME, T., "Een grotere slagkracht voor de Wooninspectie dankzij wijzigingen aan de Vlaamse Wooncode en het Kamerdecreet", *RW* 2007-08, no. 16, 634-641.

VAN DROOGHENBROECK, S., "Mendicité, ordre public et proportionalité" (note under Council of State 8 October 1997), *RBDC* 1997, no.4, 407-436.

VAN EXTER, R.P., *Het internationale aspect der grondrechten*, Vlaardingen, Drukkerij Van Dooren, 1955, 157 p.

VAN GELDER, J.-L., "What tenure security? The case for a tripartite view", *Land Use Policy* 2010, vol. 27, 449-456.

VAN GERVEN, W. and COVEMAEKER, S., *Verbintenissenrecht,* Leuven, Acco, 2001, 919 p.

VAN HAARLEM, A. and COENE, J., "Armoede en sociale uitsluiting ontcijferd", in DIERCKX, D., COENE, J,. VAN HAARLEM, A. and RAEYMAECKERS P. (eds.), *Armoede en sociale uitsluiting. Jaarboek 2013*, Leuven, Acco, 2013, 357-410.

VANHEULE, D., "Maatschappelijke dienstverlening als instrument in het immigratiebeleid", *T. Vreemd.* 1994, 247-252.

VAN HOUTTE, J., VAN WAMBEKE, W. and DELANOEIJE, E., *Rechtshulp en rechtsinformatie*, Brussel, Federale Diensten voor Wetenschappelijke, Technische en Culturele Aangelegenheden, 1995, 160 p.

VANHOVE, A., "De nieuwe wooninitiatieven", *Welzijnsgids* 1999, vol. 31, 65-97.

VAN HUMBEECK, P., "Best practices in regulatory impact analysis: a review of the Flemish region in Belgium", *SERV Working Paper* 2007, 50 p.

VAN IMPE, G.,"L'effectivité du droit au logement: une obligation de résultat à charge des pouvoirs publics?", *Echos log.* 2012, no. 2, 39-40.

VAN IMPE, G., "L'effectivité du droit au logement: une obligation de résultat à charge des pouvoirs publics?", *Echos log.* 2012, no.2, 39-40; Steunpunt tot bestrijding van armoede, bestaansonzekerheid en sociale uitsluiting,

Naar een effectief recht op wonen: welke lessen kunnen we trekken uit de Franse en Schotse ervaringen, 2011, www.armoedebestrijding.be/publications/verslag_resultaatsverbintenis.pdf, 63 p;

VAN KLINK, B., "Facts and norms: the unfinished debate between Eugen Ehrlich and Hans Kelsen", in HERTOGH, M. (ed.), *Living Law. Reconsidering Eugen Ehrlich*, Oxford, Hart Publishing, 2009, 127-156.

VAN LEUVEN, N., "De antidiscriminatiewet en de huurovereenkomst", in STIJNS, S. and WÉRY, P. (eds.), *Antidiscriminatiewet en contracten*, Brugge, Die Keure, 2006, 111-141.

VAN MECHELEN, N. and. BOGAERTS, K., *Aanvullende steun in Vlaamse OCMW's*, Antwerpen, Centrum voor Sociaal Beleid, 2008, 21 p.

VAN MENXEL, G., BLOW, H. and DE WACKER, A., "Thuisloosheid schaadt de gezondheid", in VRANKEN, J., CAMPAERT, G., DE BOYSER, K. and DIERCKX, D. (eds.), *Armoede en sociale uitsluiting. Jaarboek 2007,* Leuven, Acco, 2007, 221-239.

VANNESTE, F., "Over de cruciale rol van (sociale) grondrechten in België", in Vereniging voor de vergelijkende studie van het recht van België en Nederland (ed.), *Preadviezen 2012,* Den Haag, Boom Juridische Uitgevers, 2012, 11-60.

VAN NIEUWENHOVE, J., "Een aantal kanttekeningen bij het wetsvoorstel tot oprichting van een Parlementair Comité belast met de wetsevaluatie", *TVW* 2004, no. 8, 275-278.

VAN NIEUWENHOVE, J., *Wetsevaluatie in België*, Deventer, Kluwer, 2002, 70 p.

VAN OEVELEN, A., "De staat van de gehuurde woning, de federale, gewestelijke en gemeentelijke woningkwaliteitsnormen en de renovatiehuurovereenkomst", in VAN OEVELEN, A. (ed.), *Woninghuur*, Brugge, Die Keure, 2009, 73-105.

VAN OEVELEN, A., "Wijzigingen in het (woning)huurrecht", *RW* 2007, no. 8, 298-306.

VAN OEVELEN, A., "Kroniek van het woninghuurrecht (1998-2005)", *RW* 2005-06, 1521-1536.

VAN OEVELEN, A., "De burgerrechtelijke en bestuursrechtelijke regeling van de woningkwaliteit in de federale en Vlaamse regelgeving", *RW* 2002-2003, 1401-1419.

VAN OEVELEN, A., "Woninghuur en kansarmoede: een overzicht en een analyse van de mogelijke huurproblemen van kansarmen", in Centrum voor Beroepsvolmaking in de Rechten (ed.), *Arm recht? Kansarmoede en recht*, Antwerpen, Maklu, 1997, 205-238.

VAN OEVELEN, A. and POPELIER, P., "De aansprakelijkheid van publiekrechtelijke rechtspersonen voor ondeugdelijke wetgeving", in ALEN, A. (ed.), *De doorwerking van het publiekrecht in het privaatrecht*, Gent, Mys & Breesch, 1997, 75-127.

VAN OEVELEN, A., "De materiële voorwaarden voor de aansprakelijkheid van de staat voor de niet-uitvoering van zijn regelgevende bevoegdheid: een vergelijking tussen de rechtspraak van het Europees Hof van Justitie en die van het Hof van Cassatie", in X., *Publiek recht, ruim bekeken: opstellen aangeboden aan prof. J. Gijssels*, Antwerpen, Maklu, 1994, 427-444.

VAN OEVELEN, A., "Eerbiediging van de grondrechten en het woonrecht", in RIMANQUE, K. (ed.), *De toepasselijkheid van de grondrechten in private verhoudingen*, Antwerpen, Kluwer, 1982, 93-146.

VAN OMMESLAGHE, P., *Droit des obligations: tome premier*, Brussel, Bruylant, 2010.

VAN POTTELBERGE, J., "De rol van gemeenten bij sociale huisvesting", *T.Gem.* 2014, no. 1, 33-51

VAN POTTELBERGE, J., "Lokaal woonbeleid", in HUBEAU, B. and VANDROMME, T. (eds.), *Viftien jaar Vlaamse Wooncode. Sisyphus (on)gelukkig?*, Brugge, Die Keure, 2013, 171-208.

VAN REGENMORTEL, T., *Empowerment en maatzorg. Een krachtgerichte psychologische kijk op armoede*, Leuven, Acco, 2002, 216 p.

VANSWEEVELT, T., *De civielrechtelijke aansprakelijkheid van de geneesheer en het ziekenhuis*, Antwerpen, Maklu, 1992, 960 p.

VAN THIELEN, L. and STORMS, B., *Het maximum uit het minimum halen. Overlevingsstrategieën van mensen die moeten rondkomen met een te beperkt inkomen*, Geel, CEBUD, 2013.

VAN VALCKENBORGH, L., "De kwalificatie van een verbintenis als resultaats- of middelenverbintenis", *TBBR* 2011, vol.5, 222-231.

VAUGHAN T.R.,, "The landlord-tenant relationship in low-income area", *Social Problems* 1968, vol. 16, no. 2, 208-218.

VASSENDEN, A., "Homeownership and symbolic boundaries: exclusion of disadvantaged non-homeowners in the homeowner nation of Norway", *Housing Studies* 2014, vol. 29, no. 6, 760-780.

VASSENDEN, A. and LIE, T., "Telling other how you live – refinig Goffman's stigma theory through an analysis of housing strugglers in a homeowner nation", *Symbolic Interaction* 2013, vol. 36, no. 1, 78-98.

VASTMANS, F. and BUYST, E., *Vastgoedprijzen en woningaanbod in de centrumsteden. Deel 1: Woningprijzen en woningkenmerken*, 2011, www.kenniscentrumvlaamsesteden.be/kennisbank/lopendonderzoek/Documents/rapport%20deel1%20vastgoedprijzen%20en%20aanbod%5B1%5D.pdf, 89p.

VELAERS, J., " 'In foro interno et in foro externo': de international bevoegdheden van gemeenschappen en gewesten", in JUDO, F. and GEUDENS, G. (eds.), *Internationale betrekkingen en federalisme*, Gent, Larcier, 2006, 3-86.

VERBIST, G. and VANHILLE, J., "Tussen huursubsidies en woonbonus: een verdelingsanalyse voor Vlaanderen", in DIERCKX, D., COENEN, J., VAN HAARLEM, A. and RAEYMAECKERS, P., *Armoede en sociale uitsluiting. Jaarboek 2013*, Antwerpen, Acco 2013, 291-306.

VERBIST, S., "Impliceert het recht op behoorlijke huisvesting een recht op eigendom" (note under Constitutional Court 7 March 2007, no. 33/2007), *RABG* 2007, no. 16, 1103-1109.

VERDUSSEN, M. and NOËL, A., "Les droits fondamentaux et la réforme constitutionnelle de 1993", *APT* 1994, 127-143.

VERHAEGHE, P. and VAN DER BRACHT, K., *Is de bankwaarborg wel gewaarborgd? Praktijktesten bij banken*, Gent, University of Gent, 2015, https://biblio.ugent.be/publication/6914014/file/6914022.pdf, 15 p.

VERLINDEN, V., "Wie hoedt de wet? Op zoek naar een nieuwe invulling van de wetgevingsprocedure", *RW* 2010-11, no. 20, 818-828.

VERSTRAETEN, J., "Uithuiszettingen in Vlaanderen: veel vragen, weinig antwoorden", *De Gids* 2016, no. 1, 21.

VERSTRAETE J., and DE DECKER, P., "Discriminatie van financieel kwetsbare huishoudens op de private huurmarkt in België", in DIERCKX, D., COENE, J. and RAEYMAECKERS, P. (eds.), *Armoede en sociale uitsluiting. Jaarboek 2014*, Leuven, Acco, 2014, 110-126.

VIVAS, *Tien jaar VIVAS. Bewonersparticipatie in de sociale huisvesting*, Brussel, Samenlevingsopbouw Vlaanderen, 2013, www.samenlevingsopbouwwvl.be/websites/1/uploads/files/documents/20140312120938-10-jaar-vivas_2-4-2014_14_02_14.pdf, 29 p.

VREG and VEA, *Eindrapport met betrekking tot de evaluatie van de maatregel tot toekenning van gratis elektriciteit*, 2012, www.vreg.be/sites/default/files/rapporten/rapp-2012-4.pdf, 55 p.

VIERDAG, E.W., "The legal nature of the rights granted by the International Covenant on Economic, Social and Cultural Rights", *Netherlands Yearbook of International Law* 1978, vol. 9, 69-105.

VIZARD, P. and BURCHARDT, T., *Developing a capability list: final recommendations of the equalities review steering group on measurement*, London, Centre for Analysis of Social Exclusion, 2007, http://sticerd.lse.ac.uk/dps/case/cp/CASEpaper121.pdf, 92 p.

VLEMMINX, F., *Een nieuw profiel van de grondrechten: een analyse van de prestatieplichten ingevolge klassieke en sociale grondrechten*, Den Haag, Boom Juridische Uitgevers, 2002, 251 p.

VLEMMINX F., and KUMMELING, H.R.B.M., "Algemene situering van de sociale grondrechten in de Nederlandse rechtsorde", in HUBEAU, B. and DE LANGE, R. (eds.), *Het Grondrecht op wonen. De grondwettelijke erkenning van het recht op huisvesting in Nederland en België*, Antwerpen, Maklu, 1995, 13-36.

VLEMMINX, F., *Het profiel van sociale grondrechten*, Zwolle, Tjeenk Willink, 1994, 162 p.

VOLCKAERT, E., "De weerslag van de anti-discriminatiewetgeving op het afsluiten van een huurovereenkomst", *Huur* 2008, vol.3, 107-113.

VOLS, M., KIEHL, M. and SIDOLI DEL CENO, J., "Human rights and protection against eviction in anti-social behaviour cases in the Netherlands and Germany", *European Journal of Comparative Law and Governance* 2015, no. 2, 156-181.

VRANKEN, J., "Het OCMW: dertig jaren op weg naar een recht op maatschappelijke dienstverlening", in VRANKEN, J., DE BOYSER, K. and DIERCKX, D. (eds.), *Armoede en Sociale Uitsluiting. Jaarboek 2005*, Leuven, Acco, 2006, 151-164.

VUYE, H., "Aansprakelijkheid van de Belgische Staat voor het doen en laten van de wetgever", *TBBR* 2002, no. 8, 526-540.

WÄLDE, T.W., "Non-conventional views on effectiveness: the holy grail of modern international lawyers: the new paradigm? A chimera? Or a brave new world in the global economy?", *Austrian Review of International & European Law* 1999, vol.4, 164-203.

WARBRICK, C., "Economic and social interests and the European Convention on Human Rights", in BADERIN, M.A. and McCORQUODALE, R. (eds.), *Economic, Social and Cultural Rights in Action*, Oxford, Oxford University Press, 2007, 241-256.

WALDRON, J., "Dignity, rights and responsibilities", *New York University Public Law and Legal Theory Research Paper Series* 2010, Working paper no.10-83, http://lsr.nellco.org/cgi/viewcontent.cgi?article=1318&context=nyu_plltwp, 1-25.

WALDRON, J., "Socioeconomic rights and theories of justice", *Public Law Research Paper no. 10-79*, 2010, 1-30 p.

WALDRON, J., *Liberal rights*, Cambridge, Cambridge University Press 1993, 480 p.

WALDRON, J., "Homelessness and the issue of freedom", *UCLA Law Review* 1991, vol. 39, 295-324.

WALDRON, J., *The right to private property*, Oxford, Oxford University Press, 1990, 470 p.

WAY, S., LUSIANI, N. and SAIZ, I., "Economic and social rights in the 'Great Recession'. Towards a human rights-centred economic policy in times of crisis", in RIEDEL, E., GIACCA, G. and GOLAY, C. (eds.), *Economic, social, and cultural rights in international law: contemporary issues and challenges*, Oxford, Oxford University Press, 2014, 86-110.

WERY, J.L.L., *Overmacht bij overeenkomsten*, Amsterdam, A.H. Kruyt, 1919, 140 p.

WERY, P., *Droit des obligations. Vol. 1. Théorie générale du contrat*, Brussel, Larcier, 2010, 1056 p.

WESSON, M., "Grootboom and beyond: reassessing the socio-economic rights jurisprudence of the South African Constitutional Court", *SAJHR* 2004, vol. 20, 284-308.

WHITE, E.K., "There is no such thing as a right to human dignity: a reply to Conor O'Mahony", *Int'l. J. Const. L.* 2012, vol.10, no. 2, 575-584.

WHITE, M., "Kantian dignity and social economics", *Forum for Social Economics* 2003, vol.32, no. 2, 1-11.

WHITEHEAD, C., MONK, S., MARKKANEN, S. and SCANLON, K., *The private rented sector in the new century: a comparative approach*, Copenhagen, Boligøkonomisk Videncenter, 2012, www.lse.ac.uk/geographyAndEnvironment/research/london/pdf/The-Private-Rented-Sector-WEB%5B1%5D.pdf, 211 p.

WILDHABER, L., "European Court of Human Rights", *C.Y.I.L* 2002, vol. 40, 309-322.

WILLEMS, E., *Recht op huisvesting: ook voor vreemdelingen?*, Antwerpen, Kluwer, 2012, 158 p.

WINTER, H.B., *Evaluatie van wetgeving. Structurering en institutionalisering van wetsevaluatie in Nederland*, Deventer, Kluwer, 2002, 51 p.

WINTERS, S. and VAN DEN BROECK, K., "Milestones in 25 years of housing finance in Belgium", in LUNDE, J. and WHITEHEAD, C. (eds.), *Milestones in European housing finance*, Oxford, Wiley-Blackwell, 2016, 75-91.

WINTERS, S. et al., *Voorstel tot indicatoren voor het Vlaamse woonbeleid*, 2013, https://steunpuntwonen.be/Documenten/Onderzoek_Werkpakketten/zkc4494-wp6-voorstel-indicatoren-eind.pdf, 74 p.

WINTERS, S. et al., *Wonen in Vlaanderen anno 2013. De bevindingen uit het Grote Woononderzoek 2013 gebundeld*, Antwerpen, Garant, 2015, 97 p.

WINTERS, S., "Wat is er mis met huren", *Bank Fin.* 2013, no. 6, 480-488.

WINTERS, S., "Belgian state reform as an opportunity to reorient Flemish housing policy", *International Journal of Housing Policy* 2013, vol. 13, no. 1, 74-82.

WINTERS, S. and VERMEIR, D., *The evolution of the private rental market in Flanders*, 2013, https://lirias.kuleuven.be/bitstream/123456789/411957/1/ENHR+2013+PRS.pdf, 9 p.

WINTERS, S., *Huurprijzen en richthuurprijzen. Deel I: literatuurstudie over richthuurprijzen*, Leuven, Steunpunt Ruimte en Wonen, 2012, 29 p.

WINTERS, S., ELSINGA, M., HAFFNER, M., HEYLEN, K., TRATSAERT, K., VAN DAALEN, G. and VAN DAMME, B., *Op weg naar een nieuw Vlaams sociaal huurstelsel?*, Brussel, Departement RWO, 2007, 79-98.

WINTERS, S., "Are there grounds for housing allowances in Flanders (Belgium)?", *European Journal of Housing Policy* 2005, vol. 5, no. 2, 167-185.

WOOD, A., "Human dignity, right and the realm of ends", *Acta Juridica* 2008, 47-65.

WOODS, J.M., "Justiciable social rights as a critique of the liberal paradigm", *Texas International Law Journal* 2003, vol. 38, 763-793.

WYCKAERT, S., "Het 'standstill'-effect in de milieurechtspraak van de Raad van State", *AJT* 1999-2000, 413-420.

YOUNG, K.G., "The minimum core of economic and social rights: a concept in search of content", *Yale Journal of International Law* 2008, vol.33, (113) 126-140.

ZAJADLO, J., "Human dignity and human rights", in HANSKI, R. and SUSKI, M. (eds.), *An introduction to the international protection of human rights: a textbook*, Turku, Institute for Human Rights, Abo Akademi University, 1999, 15-24.

ZIV, L., "Bronnen van verbod op discriminatie bij particuliere huur", in BRULEZ, P. and VERBEKE, A.-L. (eds.), *Knelpunten huurrecht: tien perspectieven*, Antwerpen, Intersentia, 2012, 253-268.

ZWART, S., *Maintaining an efficient and equitable housing market in Belgium*, OECD Economics Department Working Papers, no. 1208, Paris, OECD Publishing, 2015, www.oecd-ilibrary.org/docserver/download/5js30ttdx36c.pdf?expires=1453890455&id=id&accname=guest&checksum=EF13A0F068B0A10A156C51AF313B9738, 36 p.