"Toward a Capability Approach of Legal Effectiveness. The Case of European Social Rights"

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Abstract
Legal Effectiveness of Social rights is an old issue of legal sociology. The Authors propose to develop a Capability Approach of rights, inspired by Amartya Sen but compleled by legal sociology. The example of parental leave in the European Union is examined as an empirical application of this approach. This Working Paper is the translation of a paper in French, published in 2008 in Jean De Munck and Bénédicte Zimmermann (eds.), La liberté au prisme des capacités. Amartya Sen au-delà du libéralisme, Paris : ed. de l'EHESS.


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Toward a Capability Approach of Legal Effectiveness
The Case of European Social Rights

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Toward a Capability Approach of Legal Effectiveness  
The Case of European Social Rights

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Introduction

Does the Capability Approach provide new insights into the difficult question of the effectiveness of law? In particular, might it allow us to assess the effectiveness of social rights – those so-called 'second-generation' rights which characterise the Welfare State? The answer to both questions is 'yes'. When used with imagination, Amartya Sen’s Capability Approach supplies a fruitful heuristic framework for an enquiry into the effectiveness of social rights, and notably those European social rights whose hesitant emergence allows us to hope for the development of a European power at the service of the freedom of individuals. We take the Capability Approach as a liberal theory of positive freedoms which gives meaning to social rights as well as political and civil rights (Sen, 2004).

Everybody knows the current high level of citizens’ disaffection with the European Union. Europe is now seen – not without reason – as destructive of personal freedoms. It has become the vehicle of (alleged) economic necessity without also offering each citizen new possibilities of self realisation. For many people, European Law is just a competition law opening new markets without creating new effective freedoms. It is framed by negative freedoms instead of positive liberties. The word ‘Europe’ has become synonymous with the restriction of the space of opportunities and with the absence of choice. In this unfortunate situation, the European project is divorced from democracy. The emergence of European social rights offers a glimmer of hope, one which we should neither exaggerate nor underestimate. The evaluation of these rights calls for a theoretical framework that allows us to grasp the complexity of the processes at work.

We will proceed in three stages in order to sketch a brief outline of this evaluation of social rights.

First, we will say a few words on a theoretical displacement required by a definition of rights as capabilities. The law must therefore be considered as a space generating valued possible worlds offered to the freedom of individuals. We will make clear how rights-as-
capabilities may be understood according to two meanings that must always be intertwined to give them their full signification, namely as orientation of meaning and as resource.

On the basis of these two aspects we will then attempt to outline what a theory of the effectiveness of rights-as-capabilities might be, by applying it to a privileged example: the 1996 European Directive giving all citizens of the European Union a right to parental leave. As is well known, the effectiveness of a right created at the European level is produced in a very complicated way since it demands translation and implementation at lower political levels (national, regional) or at different levels of production of norms (parliaments, social dialogue). In what follows, we will limit ourselves to the implementation of this Directive in Belgium.

The first line of analysis consists initially in a hermeneutics of the meaning of rights.

The second line is an analysis of access to resources created by the law. In each case we will state how the relationship between the right and the capabilities of individuals can be understood.

Finally, we will emphasise the importance of the contextual factors of conversion of rights in real-life use. We will see that the effectiveness of a European social right such as the one giving universal access to parental leave is a rather fragile effectiveness, one that requires the mobilisation of numerous intermediary agents. If, as is desirable, the European Union at its level wishes to give more weight to the creation of social rights, and hence to renew in a real sense its link with the democratic project, it must concern itself more with the conditions for effectiveness of the rights it claims to promote. In this respect, the Capability Approach could structure an ‘informational basis’ (in Sen’s sense) that would be useful in the necessary and difficult renewal of the EU’s public action.

**Law as a space for generating possibilities**

In order to grasp the impact of the Capability Approach on our notions of the effectiveness of law we need first of all to stress the introduction into the very theory of law of the idea of possibility. This is clearly often implicit in theories of law, but is not adequately examined in itself. In law and in discourse on law the category of possibility is too often obscured, or even overwhelmed, by the category of obligation (or its negative version, prohibition). The simplification of law to a catalogue of obligations and prohibitions is certainly the natural course of legal practice: in practice, we have recourse to the law in order to know what we must do and what we may not do. The definition of what is permissible seems to be a logical result of these constraints. But the possible is not reduced merely to the permissible according to the rules of the ‘deontic’ framework – as the logics of norms would put it – which links, by means of purely formal and deductive rules, the permissible, the obligatory, the prohibited and the optional. Not everything which is allowed is possible! If law is thought of in the order of the possible, its effectiveness is no longer confined by the deontic framework. To approach rights as positive liberties (and not just as negative liberties) is, then, to agree to evaluate the very complex relationship which places the space of the permitted in tension with the space of the possible.
We should certainly not underestimate the importance of the category of obligation in the logical structure of an entitlement. An *entitlement* always presents in one aspect the structure of an obligation. The right of one person imposes an obligation on another: the right of the tenant is the obligation of the landlord, the right of the wife is the obligation of the husband, the right of the child is the obligation of the parent, and so on. The provision of a right is most often evoked in these dyadic terms. But, in reality, this dyadic relationship is dependent on a triadic relationship. If a client truly has a right with regard to a vendor then it us up to the proper authority and not just the vendor to make sure that the right is respected. The State is therefore the third partner in the structure of obligation that characterises a right. In this respect it has often been noted that social rights, which by their very nature are open and are not clearly limited, could not claim to have a real status as ‘right’ since the corresponding obligations always seem to be contextual and therefore highly variable, uncertain, floating. Legal reasoning likes concepts with sharp outlines, concepts that allow a ‘yes’ or ‘no’ answer to the question of whether an obligation exists, and that allow us to discover what the clear and distinct criteria of the basis of the obligation are, and what the obligation consists of. On the basis of this vagueness, some people deduce that social rights do not exist at all. Sen (2004: 338-342) does not fall into this trap: an ‘imperfect’ duty remains a duty, even if its content requires more extensive consideration and interpretation than does a ‘perfect’ obligation. For example, the right to housing, the right to education, the right to freedom of expression all produce obligations which affect all States and all individuals, in order to endow all citizens with the capabilities of beings and doings to which these rights are connected.

Even if the law (social law included) always has a structure of obligation, Lawrence Friedman stressed in 1971 (at the time of the civil rights struggle in the United States) that ‘the law contains more than a collection of commands. Moreover, there are rules which authorise actions but do not require it – rules which supply opportunities for the exercise of individual initiative. They, too, are important.’ (1971:190). The right granted to a person constitutes a possibility. People can – or cannot – activate this right. We cannot deduce the use of the right from the resource of the right. A right may ‘exist’ in the sense that it is correctly promulgated within a legal system without at the same time automatically having a legal effect (for example, it may never be invoked in court). We should not immediately deduce from this situation that the right is not *applied* since ‘when an individual decides to take legal action it is not a question of the execution of a norm. We can no longer claim that the fact of not using the legal instrument is a deviation.’ (Friedman, 1971:191). However, we might say of such an under-used right that it is not *effective*. This means that the right does not structure the space of possibilities for citizens. In this sense, the effectiveness of the right does not allow itself to be reduced to the application of a norm.

This important insight is without doubt connected to comprehensive theories in the sociology of law. Thus, commenting on the importance of an approach to law of Weberian inspiration, Pierre Lascoumes and Evelyne Serverin stress the importance of treating law as an endogenous orientation of social activity and not as an exogenous norm. ‘From this point of view, the “judicial order” is seen...not as a collection of imperatives but as a collection of resources.’ (1995: 164). In this case, law is seen as an ‘orientation’ embedded in the activity of individuals. One may activate a law or not, make use of it, employ it in a course of action. To consider the law from the perspective of access to possible worlds is to treat it as a space generating multiple activities, which are self-evidently not deducible from the text of the law. To take a comparison from the field of linguistics, the law therefore resembles a Chomskian grammar: it is a collection of rules capable of generating
an infinity of performances with unforeseeable content. The analysis of the application of law therefore demands an enquiry into the uses of law and the capabilities of individuals.

**Two meanings of rights-as-capabilities**

We must distinguish between these two aspects of law - the law as orientation of meaning and the law as resource. The latter is equally well described by the idea of instrument; the former on the other hand cannot be understood as being within the order of instrumentality (the being-ready-to-hand which we make use of as we like) but in the order of meaning.

According to a first, substantive, sense (1) a right is a *moral title* given to citizens to achieve certain ends (housing oneself, feeding oneself, participating in public life, choosing one’s partner, etc.). It is a question of the orientation of the meaning of the action (in the Weberian sense), not just legally validated but also morally validated by the institutional world to which it belongs. According to a second, procedural, sense (2), a right is a legal instrument which, within an institutional setting, confers a possibility of valid action calling for the support of the proper authorities, that is of the executive power (government, administration) and of the judicial power. If the first sense can be seen as a capability – individual or collective – of giving a meaning to action, the second can be viewed rather as a capability of having available and using specific resources in order to achieve a possible and desirable life. As I have argued elsewhere (De Munck, 2007), both senses are implied in Sen’s definition of a capability. A capability is always a capability of giving meaning to one’s life and decisions, and a capability to use resources to realise this meaning in one’s real world. The structure of rights is the structure of capabilities.

These two senses demand specific analyses. In one sense, the first meaning of right is the stronger and the more exacting. It links the right to meaning and to value. The accomplishment of the right is, in this view, an infinite task. It does not only demand that actors conform to external rules: it supposes that the meaning of the right – that is to say, the reference to values that it bears – is embedded in social activity. Important consequences follow from this for the capabilities of citizens and legal professionals on the other hand. These capabilities are connected to the interpretative possibilities available to actors. The second meaning of rights – this time understood as resources permitting access to other resources – also bears considerable significance for the capabilities of individuals. In this case we must focus analysis on the context and on the opportunities that it offers to convert a right into capabilities.

From these two standpoints, the problem of a capabilities approach to rights can be summed up in the following way: how can we measure the space of real possibilities which are opened up to individual freedoms by legal institutions? How can we think about the support of legal instruments for the positive liberties proclaimed by rights? This kind of evaluation depends on considering public action from the viewpoint of the recipient and not from a internal point of view to the political and judicial system. The *effective freedom* of individuals is ultimately the final judge legal institutions and public action. Economic efficiency in the strict sense is not let out of this evaluative grid, but it is present only as a means to be assessed relative to other means and to substantial ends. The efficiency of institutions therefore requires a measure *external* to those which they produce by
endogenous means. This external standard is provided by the capability set of every citizen in European Union.

Let’s take a concrete and specific example: the Parental Leave Directive (Directive 96/34/EC) adopted on 3 June 1996 by the Council of Europe. This Directive sets out ‘minimum requirements on parental leave and time off from work on grounds of force majeure, as an important means of reconciling work and family life and promoting equal opportunities and treatment between men and women.’ Parental leave is defined in the Directive as a non-transferable individual right granted to men and women following the birth or adoption of a child so that they may look after the this child during at least three months until a given age which may be up to eight years (clause 2). This is one of the few social rights established by the European Union, alongside rights to information and worker consultation and arrangements relating to home-working, part-time working and fixed contract employment.

**Law as orientations of meaning**

Amartya Sen has never wished to neglect the values linked to rights—it is one of the points which distinguishes his liberalism from libertarianism. Rights space is not only a neutral space offering individuals the possibility of doing or not doing, of being or not being. They also constitute the public proclamation of a meaning, that is to say a space of valued possibilities. If rights discourse has acquired such a place in our democratic societies since the first formulations of modern natural rights it is because rights have a value as a proposition of meaning for the individuals who inhabit them. The proclamation of the right to freedom of speech is not only the public guarantee of a performance one might or might not wish to carry out. It is the affirmation of the central value of citizenship in democratic societies. It is the institutional consecration of a certain idea of the City. If we were to think of rights only as opportunities we would be leaving out the dimension of finality which is revealed in their very proclamation. We would be reducing rights to negative liberties (not being prevented). The rights must be considered as the expression and tool of positive freedoms. They are goals for a good life.

Values appear in the discourse of clarification and justification of rights. Thus, in adopting the text of the Parental Leave Directive, the European Union proposes frames of understanding and of giving value to the social world. These concern work relations, race relations and family relations. In effect, the category of Parental Leave acquires its meaning in a very general discourse, of high moral and political ambition, that reveals the ‘considerations’ of the Directive. These ‘considerations’ are not rules or prescriptions but rather the ideas, or frameworks, that form the basis of and orient the rules that are to follow. We would be wrong to think that they have no legal effect: they make comprehensible the content of the provisions to which they refer.

In this discourse we can distinguish four elements that form, as it were, semantic nuclei that interconnect multiple meanings. First, the discourse of parental leave links the right to parental leave to a better work-family life relationship (considerations 3 and 5 of the Directive). It is not therefore a matter of bluntly affirming the value of work, but of relativising it in what is sketched out as a pluralist conception of the different spheres of life. In the second place, the dimension of ‘gender’ quite obviously constitutes a second symbolic direction of this right. The struggle against sex discrimination (considerations 3
and 17 of the Directive) is at the heart of the provision. The Directive proposes a *parental* leave, not just *maternal* leave. The difference and similarity between specific needs of men and women in the job market are taken into account. Third semantic nucleus: far from limiting itself to concerns for the sphere of *outside* work, and concerns to equality *relating to* work, the right to parental leave is justified by a new discourse *about* work in post-industrial times. This promotes the development of new and flexible ways of organising work and time – in order to enhance economic competitiveness (considerations 5, 6, and 12 of the Directive). This search for flexibility is linked to concerns for the security of workers on parental leave; the Directive advocates the maintenance of benefits in kind from health insurance during the period of leave as well as the maintenance of rights to social security benefits (considerations 10 and 11 of the Directive). Finally, the application of the Directive also has a symbolic effect on the proportion of working time in relation to employment. Although the Directive does not explicitly encourage the systematic replacement of workers on parental leave by temporary workers, the problem of replacing workers is mentioned in the framework agreement: the difficulty of finding a replacement when linked to the functioning of the business constitutes, for the employer, a justifiable reason for postponing the exercise of the right to parental leave. Flexible ways of organising work and time produce, in a systematic way, flexibility – included in this is the deformalisation of the categories of work and of unemployment, in so far as benefits payable for interruption of professional career are a matter for employment insurance (we will come back to this point).

In structuring the space of opportunities, the right therefore *at the same time* suggests new ways of interpreting and valuing the world as well as publicly acceptable reasons for choosing these opportunities. Legal institutions provide actors ways of behaviour *and* reasons for acting; they put to work the interpretative categories of actors who must deal with the meanings carried by the right. This symbolic efficiency is the first dimension we must take into account when evoking the implementation of rights. At this level, a right has no need to be sanctioned to be efficient. Quite the opposite, we might say, since the absence of legal recourse may very well signify the remarkably high level of effectiveness of a right whose violations are somewhat rare (just as it might signify, on the contrary, the symbolic and total non-effectiveness of a right). We must also rule out the possibility of measuring this symbolic effectiveness in any quantitative way. The symbolic effect is non-measurable, but, contrary to what is maintained by the positivist paralogism in vogue (*only the measurable is real*) no less real for that. It may well be that in matters of legal effectiveness the most fundamental reality is precisely this non-measurable effect of meaning.

*Bourdieu's mistake*

The symbolic impact of rights on the culture of a society therefore represents the first dimension to analyse. This idea is one familiar to sociologists, and is usually evoked by the concept of ‘legal socialisation’. Bourdieu used the idea when he evoked the symbolic violence of the State (and of the law through which it is given expression). By means of the law (particularly), the State, says Bourdieu, is ‘in a position to impose and inculcate in a universal fashion, within certain territorial limits, identical or similar cognitive and evaluative structures.’ (1994: 124). According to him, lawyers play an extremely important role in this process of domination since in order to understand the symbolic effectiveness of the State it is necessary to ‘examine very closely the structure of
the legal field, bringing to light the generic interests of the groups of owners of this kind of cultural capital, with its tendency to function as symbolic capital, that is legal competence. (1994: 130). Legal socialisation, then, is simply the interiorisation by individuals of the objective structures of State domination.

In these remarks of Bourdieu we find a perfect example of the negative consequences which follow from the reduction of law to commandments. The reasons of law are then, by association, themselves treated as a means of inculcating, as prisons of thought, as violence committed by power. As a result, reasons cease to be reasons; there remain only ‘nominations’ and the capacity to choose is converted to *habitus*.

The problem with Bourdieu’s analysis is that it underestimates the equivocal nature and the multiplicity of meanings of law, as well as the importance of public discussion of norms. Even if they wished to do so, the State and the legal professionals in its pay (allegedly) would have great difficulty in unifying and restricting the plurality of possible interpretations of the law. The resource does not determine use, the text does not determine its interpretation, the law does not sentence social meaning to State custody.

From the perspective of a Capability Approach, the symbolic efficiency of law does not depend on the capability of individuals to internalize its norms. Rather, it depends on the capability of individuals to inscribe the values put forward by the law within the fabric of reasons governing their life choices. This is not a matter of strict training by symbolic violence but of the construction of a sensible discussion. In other words, the right to parental leave becomes an effective right if it is in line, within the lifeworld, with the demands internal to the ideas of self-realisation which inhabit this world and which appear publicly acceptable within it. This encounter between legal institution and cultural discourses is in no sense an automatic one and, by and large, it eludes the State’s domination.

### The meaning of parental leave in context

The understanding of the right to parental leave must first of all focus on this area. Is it really the case that the meanings that the right to parental leave gives to flexible working are meanings that are shared or shareable by individuals? We might note the existence of powerful contextual counter-tendencies. An entire level of discourse assimilates flexibility to economic efficiency, to professional excellence, to *work ethics*, and not to the plurality of valuable life spheres of activity. In addition, we might ask ourselves if male workers really have the capability of giving a publicly acceptable meaning in their own worlds to their preference for the family rather than for work. Won’t taking parental leave be interpreted by the employer and colleagues as a sign of lack of interest in professional work? As a violation of shared notions of masculinity? If the right to parental leave is applied in a world where the division of tasks remains profoundly *macho* and where the work ethics overwhelms all other areas of social relations then it runs the risk of not achieving its objectives at all and of reinforcing inequalities.

In fact, Belgian statistics for parental leave demonstrate this reality: it is used overwhelmingly by women. The proportion of men on parental leave was 5.5% in 2000. It reached 17.2% in 2005, an interesting increase, although still far from parity. The right to
parental leave has not yet been sufficient to change the cultural and normative environment that frames parenthood.

All this suggest that one of the conditions for effectiveness of the right to parental leave lies in a cultural and political effort of making the meaning of such a right and the culture of individuals cohere. Without this consistance, individuals lack the effective capabilities to implement his (or her) rights. It may well be that citizens (on both the employers’ and the employees’ sides) intentionally give the right a set of meanings which are not foreseen. Let us bear in mind, then, this central dimension of capabilities: a right becomes effective if all the meanings to which it gives value are inscribed without inconsistence within an individual’s capabilities set for self-realisation, that is to say for giving the individual’s life a meaning (or, as Sen puts it, choosing a ‘project of life’).

**Rights as institutionalised access to resources**

Let us now consider the right not as an orientation of meaning but as a sheer legal instrument in institutional settings. The effectiveness of rights is often reduced to this aspect. This reduction derives from an internalist theory of law, promoted by legal positivism. Hence we come upon a purely legal notion of the capabilities of individuals. This notion constitutes an indispensable component of a global theory of the capabilities of individuals. But it must contextualised by an understanding of ends, that is to say, of the reasons and of the meanings of rights (above); and by a consideration of the non-legal conversion factors in the implementation of rights (below). Provided this triptych (meaning/legal resources/other resources) is respected, the notion merits its place in the capabilities approach to rights.

The right constitutes an access resource to resources. Three kinds of resource are made accessible by the right: statutory resources (1); financial resources (2); judicial resources (3). With a right such as the right to parental leave, then, comes a whole ‘toolkit’ which largely conditions the capabilities of individuals to make use of the right.

Before dealing with each one of these resources, we should make clear for the non-Belgian reader that in our country the European Directive *Parental Leave* has been the subject of a complex implementation guaranteed, on the one hand, by a collective agreement (*convention collective*) at the national level and, on the other hand, by Royal decrees (*Arrêtés royaux*). This translation process involved the remarkable hybridation of two legal institutions: one old (the so-called “career break”) and one new (parental leave). The “career break” is a provision dating from 1985. It gave the right to leave the labour market without losing career entitlements and without giving up rights to national allowances. It has been a legal measure by which the employment contract was made more flexible, linked to the struggle against unemployment and the steady rise in demands for individually-tailored careers. “New” European parental leave fits into this new post-Fordist institutions. The two institutions merge in the Belgian legal implementation of the European Directive, notably on a crucial point: with regard to remuneration, parental leave is included in the career break.
Very precise provisions establish the conditions for use: the age of the beneficiary’s child may not exceed four years, that of a handicapped child may not exceed eight years, that of an adopted child may not exceed eight years (four years after the date of adoption); the beneficiary must have worked for 12 of the 15 months preceding written notification. The provisions determine the maximum length (three months) and the modes of parental leave (full-time or part-time), depending on the sector. Three versions are offered: full-time parental leave for a maximum of three months; part-time leave for a maximum of six months; 4/5 time for a maximum of 15 months. The provisions lay out precisely the worker’s special protection against dismissal. They determine the worker’s social rights and the status during parental leave. One remarkable thing: the employment contract continues in force during the leave, although its execution is suspended, notably in relation to the acquisition of new rights linked to remuneration.

(1) Under this system the resources allocated to individuals are first of all financial. Since it is subsumed under the career break, the right to parental leave gives the user access to a small national allowance which does not replace the salary but is nevertheless significant.

| Amount standard allowance paid by ONEM during parental leave (2000-2005) |
|-----------------------------|-----------------------------|-----------------------------|
| Gross monthly amount        | Complete break              | Reduction to 1/2 time        | Reduction to 1/5 time        |
|                             | - 50 years                  | + 50 years                  | - 50 years                  | + 50 years                  |
| 671.52                      | 335.75                      | 569.52                      | 113.9 or 153.17*            | 227.81                      |
| Net monthly amount          | 603.50                      | 278.17                      | 471.85                      | 94.37 or 126.91*            | 188.75                      |

* only for single workers (except employees of educational or federal authorities)

(2) At the statutory level, two effects deserve to be pointed out.

The first relates to the very concept of the employment contract. In suspending the execution of the contract without stopping it, parental leave could lead to a form of activity contract (Boissonnat, 1995: 278-304) guaranteeing the continuity of employment irrespective of any change in job. One of its remarkable consequences, then, would be a result of its capability to add to other measures and create a new rule in the institutional space. We might perhaps speak of an “emerging rule”, more inductive than deductive, more reflective than determinant (in Kant’s sense), which would constitute one of the major mechanisms of legal innovation. If generalised, such a reflecting interpretation of the measure could give genuine new capabilities to the worker.

The second effect relates to the area of social security. Here again we note the conjunction of two institutions which are, on the face of it, very distinct: social insurance agencies and the employment contract. The payment of “career-break” allowances is actually managed by the unemployment allowance office (of the National Employment Office)! Here, then, we find the unemployment insurance budget called on to finance the increased flexibility, rather than the interruption, of the employment contract. As ever, one
example can stand for many and the process could spread: the capability of workers to enjoy allowances not directly linked to effective work opens the door, perhaps, to ‘social drawing rights’ (Supiot et al., 2001 : 222), ensuring the management of transitions (as specialists in ‘transitional markets’ say, cfr. Schmid and Gazier, 2002).

(3) Third, and finally, the right to parental leave goes along with a right to legal recourse. We might say that this is the only resource directly created by the European Directive itself (it does not provide for any of the financial or statutory resources we have just outlined, which appear only in the context of the Directive’s implementation in Belgian law). This right of recourse has been used on several occasions. Judgements in the courts and tribunals have produced a precise definition of the Belgian version of the right to parental leave.

These financial, statutory and legal resources are therefore made available by the Belgian system’s transposition of the Directive and by the Directive itself. But these resources constitute only possible uses of the right to parental leave. Their conversion into real achievements depends on many factors.

Individuals first need to be aware of these rights. This requires more than the existence of written laws: the information must be disseminated, repeated, implemented in exemplary cases that are well known to the public. In the course of their enquiries, sociologists often note that individuals— and even businesses, or entire economic sectors— have no awareness of the legal resources that are available to them. It is also necessary that support in claiming rights should be available: within the legal system there is the crucial question of access, both material and symbolic, to justice; in the sphere of public action there is the question of the existence of collective effort – political, by voluntary organisations, by the media – towards claiming rights. From this perspective, the intermediary agents and settings are crucial for the effectiveness of rights. Finally, it is necessary that claiming rights does not endanger the situation of individuals who do so. Claiming rights can actually result in conflict. Conflict can be very costly, materially, socially, psychologically. Fulfilment of rights does depend on the right alone; the inventory of legal resources is not sufficient to account for the effectiveness of rights. We must therefore turn to contextual conversion factors.

**Non-legal conversion factors of rights**

If we take an overview of the uses of parental leave in Belgium we are immediately struck by an astonishing contrast: the use of parental leave is significantly lower in Wallonia and in Brussels than it is in Flanders. In 2005, 72% of those on parental leave were resident in Flanders, 22.4% in Wallonia and 5.6% in Brussels. We should, though, note that this disparity has narrowed since 2000. And, of the 27,352 individuals estimated as the annual average in Belgium for 2005, 58.4% were women resident in Flanders. However, we should note that the proportion of men on parental leave is (and always has been) larger in Flanders, amounting to 18.9% in 2005.

**Parental leave:**

*breakdown by year and by Region (%)*
<table>
<thead>
<tr>
<th></th>
<th>Brussels Reg</th>
<th>Flanders</th>
<th>Wallonia</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2000</td>
<td>4.5</td>
<td>75.3</td>
<td>23.7</td>
<td>100.0</td>
</tr>
<tr>
<td>2001</td>
<td>5.0</td>
<td>73.0</td>
<td>21.9</td>
<td>100.0</td>
</tr>
<tr>
<td>2002</td>
<td>5.8</td>
<td>72.4</td>
<td>21.8</td>
<td>100.0</td>
</tr>
<tr>
<td>2003</td>
<td>5.6</td>
<td>72.4</td>
<td>22.0</td>
<td>100.0</td>
</tr>
<tr>
<td>2004</td>
<td>5.7</td>
<td>72.0</td>
<td>22.3</td>
<td>100.0</td>
</tr>
<tr>
<td>2005</td>
<td>5.6</td>
<td>72.0</td>
<td>22.4</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Source: ONEM (annual average of individuals)

How can we explain such a regional disparity within the same national system? We can present some hypotheses on the factors which enable the Flemish to convert their rights into effective leave more easily than do the inhabitants of the Brussels Region or of Wallonia.

1) *the family as conversion factor:* in terms of the structure of the population, Flanders has 58.1% of households with children. We also note that the Brussels Region is characterised by an overrepresentation of single mothers, particularly of single mothers with two or more children. A statistical report remarks that ‘while Brussels households account for only 11% of Belgian households, 13% of all single mothers live in the Brussels Region. With regard to single women with three or more children, this figure rises to 15%. Nearly 10% of single fathers live in the Brussels Region. Nearly one third of mothers in the Brussels Region are single (29%, compared to 14.4% in Flanders and 21.8% in Wallonia). 5.7% of fathers in Brussels are single (compared to 3.5% in Flanders and 4.7% in Wallonia).’ (OBMTQ, 2004: 15). Household composition in Wallonia seems to be somewhere between that of Flanders and that of the Brussels Region. We may assume that the close Flemish family constitutes a favourable conversion factor for maternal parental leave since it allows a continuity of income unattainable in single-parent families.

2) *the employment market as conversion factor:* unemployment rates are highest in the Brussels Region, activity rates are lowest in Wallonia, employment rates are highest in Flanders. Competition in the employment market is therefore not standard across the whole of Belgium. The risk of losing one’s job is markedly higher in the Brussels Region and in Wallonia than it is in Flanders, which may explain a hesitancy with regard to career breaks, even if temporary.

*Employment rate, activity rate and unemployment rate by sex and region of residence (year 2004)*

<table>
<thead>
<tr>
<th></th>
<th>Brussels Region</th>
<th>Flanders</th>
<th>Wallonia</th>
<th>Belgium</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>M</td>
<td>F</td>
<td>T</td>
<td>M</td>
</tr>
<tr>
<td>Activity rate *</td>
<td>72.1</td>
<td>56.7</td>
<td>64.3</td>
<td>75.1</td>
</tr>
<tr>
<td>Employment rate **</td>
<td>60.3</td>
<td>47.9</td>
<td>54.1</td>
<td>71.6</td>
</tr>
<tr>
<td>Unemployment rate ***</td>
<td>16.3</td>
<td>15.4</td>
<td>15.9</td>
<td>4.6</td>
</tr>
</tbody>
</table>

Source: INS-EFT

* Activity rate: active population/total population
** Employment rate: population in work/total population
*** Unemployment rate: unemployed ILO/active population
3) Regional allowance as a supplementary resource: we should also mention an additional allowance of 100 euros paid by the government of Flanders to those who choose parental leave (on condition that they are Belgian and reside in Flanders). Inhabitants of Wallonia and Brussels do not benefit from similar advantages.

**Going beyond the magic concept of the law**

A magical concept of rights – and law in general – prevails in matters of public action: a law simply has to exist for reality to be automatically transformed. Attached to this concept is a ‘platonic’ concept of political action: politics consists of making laws. The production of norms would therefore be sufficient to produce a European politics. Also linked to it is a certain vision of the control of effectiveness: the only important thing, in this perspective, is the translation of European legal standards into national legal texts. The Commission and European judges only have to oversee the correct implementation of this legalistic work in the member states. Everything else is a matter of subsidiarity.

A capabilities approach reveals the imposture of this magical concept of law. Such an ‘internalist’ point of view of the legal system is extremely inadequate in accounting for the effectiveness of a right. If the furtherance of rights truly becomes a political orientation of the European Union, if rights are considered as ‘goals’ (as Sen says, 1985), much more is needed than simply controlling the legislative translation of texts.

It would first be necessary to take into account the multiple intermediations of law (De Munck, 2006). At the symbolic level, the right to Parental Leave opens a space of intermediation which can undoubtedly prove fertile and clearly progressive. It could play a part in reconfiguring the meaning of work and of the family. And it is in this regard that it could be, in the end, the most innovative: it opens up new possible worlds to the imagination of Europeans since it broadens the range of publicly recognised life choices. But that supposes a huge cultural task of interpretation, as much in the strictly legal sphere as in the lifeworld of Europeans. This task necessarily consists in discussion and communication involving trades unions, agencies, city councils, etc. It is the political, legal, associational and administrative intermediaries who hold the key to the statutory interpretations and reinterpretations of a measure such as parental leave.

What holds true for the law as value also holds true for the law as resource. Even under a system as ‘social’ as the Belgian one, the resources offered by the law are insufficient to equalise the capabilities of enjoying a right such as the right to parental leave. The effective use of these resources calls for a narrow political and social mapping guaranteeing all citizens access to these resources. This is to say that the involvement of organised civil society in European politics is one of the conditions for the effectiveness of the rights which it proclaims.

Second, it would be necessary to dare to question the sacrosanct principle of subsidiarity; it now constitutes an obstacle to a European politics of rights. For example, we have seen how far the existence of an allowance is a determining factor in individuals’ use of the right to parental leave; and, as a result, how much it contributes to inequalities within the same Belgian system. What then are we to think of inequalities in claiming the right to parental leave at the level of the whole of Europe? The creation of a European
parental leave fund, which would give a substantial income replacement allowance to all Europeans who chose to use it, would be a genuine equalising measure and a strong gesture towards creating individual capabilities on the labour market. Without being sufficient, this measure would at least have the merit of making a significant contribution both to the fight against inequalities among Europeans and to opening up the choice of possible worlds during their lifetimes. The production of a Directive ‘unequipped’ with such a provision has been a first step, but it will become a mere cosmetic social measure if a second step is not taken in this direction. Then the European project, currently bogged down in the discourse of necessity and the reduction of the possible, might once again become a project of opening up new possible worlds – that is to say, a project of freedom.


De Munck, Jean. 2007. “Qu’est-ce qu’une capacité?”, Raisons pratiques, Paris : ed. de l'EHESS (to be published)


1 The implementation of the Directive 96/34/CE was effected in Belgium by means of collective agreement and by legal instruments: on the one hand, the creation of the collective working agreement nº64 of the
Conseil National du Travail establishing a right to parental leave (29/04/1997); on the other hand, the Royal Decree of 29 October 1997 regarding the introduction of a right to parental leave within the framework of a career break (applicable to the private sector), the Royal Decrees of 07/05/1999, 26/05/1999 and 04/06/1999 (applicable to the public sector), the Royal Decree of 04/06/1999 (applicable to the teaching sector), and the Royal Decree of 10/06/2002 (applicable to public organisations).  
1 2ème chambre du Tribunal du Travail de Bruxelles, le 17/12/2001 (n°JS60084_1), 4ème chambre de la Cour du Travail de Bruxelles, le 16/11/2004 (n°JS1670_1), 8ème chambre de la Cour du Travail de Liège (section de Liège), le 18/03/2004 (n°JS60789_1).