

Need of security and Human rights The recent case-law of the Constitutional Court of Belgium

**The Protection of Fundamental Citizens' Rights and National Security in
the Modern World. The Role of Constitutional Courts
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1. In the Kingdom of Belgium, it soon becomes clear from the definition of the tasks of the Constitutional Court that the protection of citizens' fundamental rights or human rights is one of the main concerns of that court of law. This does not apply to national security, even if that concern is likely to occupy an important place in the daily exercise of the competencies of the Constitutional Court of Belgium¹ (I.).

In practice, an examination of its case-law reveals that national security is something which the judges of the Constitutional Court have already been led to take into account in its relations with the right to a fair trial (II.), the right to respect for private and family life (III.), the freedom of association (IV.), the right to freely choose one's residence (V.) or the equality of treatment between foreigners (VI.).

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¹ Hereafter called the Constitutional Court. Until 8 May 2007, the court of the Kingdom of Belgium that is now called the 'Constitutional Court' was called the 'Court of Arbitration'. On that date, a Constitutional amendment of 7 May 2007 entered into force of which the sole purpose was to change the name of that court of law without changing its powers.

I. National security in the competences of the Constitutional Court

2. The Constitution of the Kingdom of Belgium² and the law defining the competences of the Constitutional Court³ entrust it with the task of exercising three types of review.

The Constitutional Court rules, first and foremost, on the validity of legislative acts adopted by the legislature of the federal government or by the legislatures of the eight federated entities of the Federal State⁴. It is also empowered to review referendums - prior to their organization - by certain federated entities of the federal state, and to verify the validity of sanctions imposed on a member of the House of Representatives (one of the two legislative assemblies of the Federal Parliament) who has breached the rules limiting the expenditure allowed during election campaigns⁵.

None of those three competences of the Constitutional Court is directly motivated by the concern to protect national security. This does not mean, however, that national security does not figure among the concerns of that court of law.

² Hereafter called the Constitution. The Constitution of the Kingdom of Belgium was adopted by the National Congress on 7 February 1831. It has subsequently been amended many times, and a coordinated version was adopted and published on 17 February 1994. The Constitution has undergone multiple modifications in the last twenty years. An up-to-date version can be found on the site of the Constitutional Court (www.const-court.be), under the heading 'Basic texts', in French, Dutch, German and English.

³ Special Act of 6 January 1989 on the Constitutional Court, amended several times. An up-to-date version of this act can be found on the site of the Constitutional Court (www.const-court.be), under the heading "Basic texts", in French, Dutch, German and English.

⁴ The Flemish Community, the Flemish Region, the French-speaking Community, the Walloon Region, the Brussels-Capital Region, the Joint Community Commission, the French Community Commission, and the German-speaking Community.

⁵ The Court has not yet had the opportunity to exercise the two last competences, which were entrusted to it less than three years ago.

3. As part of its mission to review the validity of legislative acts, the Constitutional Court may be led to verify whether those acts⁶ respect certain 'rights' that the Constitution grants to Belgians and foreigners alike⁷. Those rights include the equality of Belgians among themselves as well as between Belgians and foreigners, equality between men and women, the rights of 'ideological and philosophical minorities', personal liberty, prohibition of the death penalty, inviolability of the home, right of ownership, freedom of religion, freedom to express one's opinions, right to respect for private and family life, right of the child to respect for his 'moral, physical and sexual integrity', right to 'lead a life in keeping with human dignity', right to education, freedom of the press, right to 'gather peaceably and without arms', right to associate, and privacy of correspondence.

Also as part of its mission to review the validity of legislative acts, the Court in practice considers itself competent to review the compatibility of the legislative acts adopted by the federal authority or by the federated entities with the human rights enshrined in the international treaties that are binding on the Kingdom of Belgium. The treaty that is most often cited before the Court is the Convention for the Protection of Human Rights and Fundamental Freedoms. The other international treaties regularly used by the Court include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, and the Charter of Fundamental Rights of the European Union.

4. No reference is made to 'national security' in any of the provisions of the Constitution setting out the 'rights' with which the Constitutional Court must ensure compliance by legislative acts^{8/9}.

⁶ The legislative acts adopted by the federal authority are generally called 'laws'; those adopted by the Brussels-Capital Region and by the Joint Community Commission are, in principle, called 'ordinances', whereas those adopted by the other federated entities (see above under footnote 4) are generally referred to as 'decrees'.

⁷ Those rights are enumerated in Articles 8 to 32 of Title II of the Constitution (entitled 'On Belgians and their rights') and in Articles 170, 172 and 191 of the Constitution.

⁸ The only 'security' mentioned in the catalogue of 'rights' recognized by the Constitution of the Kingdom of Belgium is the 'right to *social* security' (Article 23, paragraph 3, 2°).

Nevertheless, the idea of 'national security' emerges from certain articles of the Constitution, the breach of which may be penalized by the Constitutional Court, and which make reference to 'police', 'order' and 'army'.

There are two clauses with which the Constitution protects the so-called 'freedom of assembly': 'Belgians have the right to gather *peaceably and without arms*, in accordance with the laws that can regulate the exercise of this right, without submitting it to prior authorisation. This provision does not apply to open air meetings, which are entirely subject to police regulations.'¹⁰

It should also be mentioned that, as part of its task of monitoring respect for the equality of the Belgians, the Constitutional Court considers itself competent to verify that the legislative acts comply with the constitutional rule that 'Court hearings are public, unless such public access endangers morals or the *peace*'¹¹, or to verify that various aspects of the organization of the armed forces and the police - which make up what the Constitution calls the 'armed forces and the police service'¹² - are properly regulated by the Federal Parliament¹³.

⁹ The few provisions of the Constitution which refer to the concept of security fall outside the remit of the Constitutional Court to rule on the respect of legislative acts for the fundamental rights. This is the case with the provision which stipulates that a law must provide for the participation of the federated entities in 'planning security policy' (Article 151(1)(2)), the provision which requires the King (in practice, the Government) to notify the Federal Parliament that there exists a state of war or that hostilities have ceased 'as soon as interests and *security* of the State permit' (Article 167(1)(2)), and even that which specifies that the King swears in his oath 'to preserve the country's national independence and its territorial integrity' (Article 91).

¹⁰ Article 26.

¹¹ Article 148. On this subject, see also Constitutional Court, n° 98/2014, 30 June 2014, B.2 to B.6.1.

¹² See heading of Title VI of the Constitution.

¹³ See Articles 182 (Army recruitment methods; promotion, rights and duties of military personnel), 184 (organization and competence of the 'integrated police service, structured at two levels'; 'essential features' of the status and of the members of the personnel of the integrated police service) and 186 (deprivation of rank, honours and pensions of military personnel) of the Constitution.

5. The absence of an explicit reference to 'national security' in the text of the Constitution does not mean, however, that the concept is absent from the reference standards - sometimes called the 'constitutional corpus' - used by the Constitutional Court in its mission to protect human rights.

As has already been pointed out (see no. 3 above), the Constitutional Court considers itself competent to review the compatibility of legislative acts with the international treaties that enshrine human rights. The concern to protect 'national security' is explicitly regarded by numerous provisions of those treaties as a reason which, on certain conditions, may justify restrictions on the exercise of several fundamental rights. The Constitutional Court may therefore, by applying those provisions, be induced to verify whether the concern of national security warrants restrictions on the exercise of those fundamental rights that are enshrined in Belgian legislative acts.

The many international provisions by virtue of which the protection of national security may warrant restrictions on the exercise of fundamental rights include, besides the texts cited below (nos. 6, 10, 14, 16 and 18), Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms¹⁴ and Article 19 of the International Covenant on Civil and Political Rights¹⁵ (which both recognize the freedom of expression), Article 21 of

¹⁴ "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

¹⁵ "1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

that Covenant¹⁶ (which recognizes the right of peaceful assembly) and Article 8.1 of the International Covenant on Economic, Social and Cultural Rights¹⁷ (on the freedom of association and the right of trade unions to operate freely).

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

¹⁶ “The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.”

¹⁷ “1. The States Parties to the present Covenant undertake to ensure:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.”

II. National security and the right to a fair trial

6. Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides:

“In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.”¹⁸

The European Court of Human Rights infers from that provision that it is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. It adds that the right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition, that same international provision requires that the prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused¹⁹.

¹⁸ Article 14.1 of the International Covenant on Civil and Political Rights provides along similar lines: “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.”

¹⁹ See for example: European Court of Human Rights (Grand Chamber), 16 February 2000, *Jasper v. United Kingdom*, §51; European Court of Human Rights, 22 July 2003, *Edwards and Lewis v. United Kingdom*, §52; European Court of Human Rights (Grand Chamber), 27 October 2004, *Edwards and Lewis v. United Kingdom*, §48.

However, the European Court of Human Rights points out that the entitlement to disclosure of relevant evidence is not an absolute right, and that in any criminal proceedings there may be “competing interests, such as *national security* or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused”. The European Court of Human Rights considers that, in some cases, it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, it holds that only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6.1 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities²⁰.

7. Several judgments of the Constitutional Court echo this case-law of the European Court of Human Rights which says that national security may justify the withholding of certain evidence from the defence in the context of criminal proceedings.

In most of those judgments, the Court observes in general:

“The rights of the defence and the right to a fair trial are fundamental aspects of the rule of law. The principle of equality of arms between the prosecution and defence, and the adversarial nature of proceedings, including the elements which relate to procedure, are fundamental aspects of the right to a fair trial. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. In addition, the prosecution authorities should in principle disclose to the defence all material evidence.

Nevertheless, the right to have knowledge of all the relevant evidence from the prosecution is not absolute. In certain criminal proceedings there may be competing

²⁰ See for example: European Court of Human Rights (Grand Chamber), 16 February 2000, *Jasper v. United Kingdom*, §52; European Court of Human Rights, 22 July 2003, *Edwards and Lewis v. United Kingdom*, §53; European Court of Human Rights (Grand Chamber), 27 October 2004, *Edwards and Lewis v. United Kingdom*, §48; European Court of Human Rights, 31 October 2006, *Güner Çorum v. Turkey*, §27.

interests, such as national security or the need to protect witnesses or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. In some cases, it may be necessary not to disclose certain evidence to the defence in order to preserve the fundamental rights of another individual or to safeguard an important public interest.

A restriction of the rights of the defence may, however, only be justified if it is in strict proportion to the importance of the objectives pursued and it is counterbalanced by a procedure that allows an independent and impartial judge to verify the legality of the procedure [...]"²¹

8. Most of the judgments in which the Constitutional Court rules that national security may, on certain conditions, justify a limitation of the right to have knowledge of all the facts of a case relate to legislation on 'special methods of investigation', such as surveillance, infiltration or working with informers.

Where the law enforcement authorities charged with investigating and prosecuting criminal offences have recourse to those methods, the public prosecutor is required under that legislation to open and keep a 'confidential file' containing information relating to those procedures.

The Constitutional Court considered that it was justified not to allow the accused to have access to that file²², but not without requesting the legislature to take the necessary measures to allow the courts entrusted with verifying the regularity of the use of those methods to have access to that file²³.

It is important to point out, however, that to justify such limitation of the rights of the accused, the Constitutional Court did not cite the need to protect national security as an

²¹ See Court of Arbitration, n° 202/2004, 21 December 2004, B.27. In the same sense, see on the subject of special methods of investigation: Constitutional Court, n° 105/2007, 19 July 2007, B.11.1; Constitutional Court, n° 107/2007, 26 July 2007, B.7.1; Constitutional Court, n° 22/2008, 21 February 2008, B.7; Constitutional Court, n° 98/2008, 3 July 2008, B.7. See also on the subject of certain data collected by the security and intelligence services: Constitutional Court, n° 145/2011, 22 September 2011, B.18-B.19.

²² See Constitutional Court, n° 105/2007, 19 July 2007, B.9.4 to B.12.5; Constitutional Court, n° 105/2007, 19 July 2007, B.5 to B.8.

²³ See Court of Arbitration, n° 202/2004, 21 December 2004, B.26-B.29.

argument, as there are other equally legitimate concerns of public interest that are sufficient to warrant that restriction.

9. The objective of protecting national security has allowed the Constitutional Court to find the laws on 'security clearance' compatible with the rights of the defence in that they limit the right of an individual in a lawsuit to have access to certain information.

'Security clearance' is an official document, drawn up on the basis of information gathered by a security and intelligence service, which shows that an individual offers adequate assurances to have access to classified information. If such clearance is denied to a person who requested it or withdrawn from a person who obtained it, an appeal may be brought before the 'Standing Committee for oversight of the intelligence and security services'. After examining this appeal, this independent and impartial judicial authority may decide, for certain reasons, that neither the applicant nor his lawyer can have access to information that has been transmitted to that authority by the security service that gave the contested decision of refusal or withdrawal.

When asked about the constitutionality of that restriction of access to certain information in the context of legal proceedings, more administrative than truly penal in nature, the Constitutional Court considered in general terms:

"The adversarial nature of proceedings is a fundamental aspect of the right to a fair trial and the respect for the rights of the defence.

Nevertheless, the right to have knowledge of all the facts of a case may be subject to restrictions, in particular when national security so requires. In some cases, it may be necessary not to disclose facts of a case to a party in order to protect or safeguard an important public interest.

A restriction of the rights of the defence may, however, only be justified if it is in strict proportion to the importance of the objectives pursued and it is counterbalanced by a procedure that allows an independent and impartial judge to verify the legality of the procedure [...]"²⁴

²⁴ Court of Arbitration, n° 14/2006, 25 January 2006, B.19

After having observed, among other things, that the prohibition for the applicant to have access to certain information underlying the decision which he contests is intended to strike a balance between the rights of the defence and the requirements of source protection and national security, and that the partly secret nature of the procedure in question is subject to the review of an independent and impartial judicial authority, the Constitutional Court finds that the breach of the rights of defence resulting from the restriction in question is in proportion to the 'objective of national security'²⁵.

²⁵ Court of Arbitration, n° 14/2006, 25 January 2006, B.16 to B.21

III. National security and the right to respect for private life

10. Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides:

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

It follows from this provision that any interference by a public authority in the exercise of the right to respect for private life must have a valid basis in law. The European Court of Human Rights consistently holds that, to satisfy this condition of legality, the law in question must be foreseeable, which means that it must be formulated in a sufficiently precise manner so that any individual can foresee, to a reasonable extent under the circumstances, the consequences of his actions. Nevertheless, the same Court considers that if the interference is necessary in the interests of national security, the degree of foreseeability of the law that provides for the interference may be less than in other areas²⁶.

11. On two occasions, when asked about the compatibility of federal laws with Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the Constitutional Court echoed this case-law of the European Court of Human Rights.

The first case concerned a review of the constitutionality of legislative provisions empowering the public authorities, in the event of a threat, to require the delivery of a ‘security certificate’ - issued after ‘security screening’ - to allow persons access to certain places that are connected with public authority positions or to a diplomatic or ceremonial

²⁶ See in particular: European Court of Human Rights, *Leander v. Sweden*, 26 March 1987, §51; European Court of Human Rights, *Lupsa v. Romania*, 8 June 2006, §33; *C.G. and others v. Bulgaria*, 24 April 2008, §40.

event²⁷. The second case concerned legislative provisions authorizing the State Security Service to use 'exceptional intelligence gathering methods' in the event of a serious threat relating to what the law calls 'radicalization'. In this case, the Court specified that those provisions must form part of 'preventive action against terrorism'²⁸.

12. The Constitutional Court was also asked to rule on the compatibility with the right to respect for private life of a law requiring that, to 'qualify for recruitment in the armed forces', the applicant must 'satisfy the regulations governing the appearance of military personnel'.

Pointing out that this right guarantees in particular the right to express one's own personality as well as the free choice of one's appearance, the Court finds that those 'regulations' constitute an interference with the right to respect for private life. It observes that the legislative provision in question is intended to maintain discipline in the army, to uphold its image in society, and to recruit military personnel who are able to handle military equipment unhindered. It infers from this that the obligation for the applicant to comply with the regulations governing the appearance of military personnel is in proportion to the aim pursued, 'having regard to the duties which the armed forces carry out in the context of the protection of national security, public safety and public order'²⁹.

13. Finally, it should be pointed out that, in a case concerning legislation on 'security clearance' (see no. 9 above), the Constitutional Court incidentally considered that the protection of national security justified the collection and entry in secret files by the competent authorities of information about individuals and to use that information for the purpose of assessing the suitability of candidates for important positions from the viewpoint

²⁷ Court of Arbitration, n° 151/2006, 18 October 2006, B.5 to B.7

²⁸ Constitutional Court, n° 145/2011, 22 September 2011, B.93 to B.97

²⁹ Constitutional Court, n° 40/2015, 19 March 2015, B.25, B.30 and B.31

of security, despite those acts constituting an interference with the right to respect for private life³⁰.

³⁰ Court of Arbitration, n° 14/2006, 25 January 2006, B.20. This judgment makes reference to the *Leander v. Sweden* judgment that was delivered on 25 February 1987 by the European Court of Human Rights.

IV. National security and the freedom of association

14. Article 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides:

“1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.”³¹

Article 22 of the International Covenant on Civil and Political Rights provides:

“1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

3. Nothing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the

³¹ Article 12.1 of the Charter of Fundamental Rights of the European Union provides: “Everyone has the right to *freedom of peaceful assembly and to freedom of association* at all levels, in particular in political, trade union and civic matters, which implies the right of everyone to form and to join trade unions for the protection of his or her interests.” Article 52.3 of the same Charter provides: “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.” Article 52.1 provides: Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

Right to Organize to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice, the guarantees provided for in that Convention.”

15. When asked to rule on the constitutionality of an article of the Penal Code which criminalizes the act of recruiting a person to commit a ‘terrorist offence’ or to take part in the activities of a terrorist group, as well as on the constitutionality of another article of the same Code which criminalizes the act of giving instructions or training to manufacture arms or dangerous substances with a view to committing a ‘terrorist offence’, the Constitutional Court found that those legislative provisions could be construed as restricting the freedom of association enshrined in the abovementioned provisions of the Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights³².

Nevertheless, the Court believes that those restrictions are not unconstitutional as they are necessary in a democratic society in the interests of national security (as well as of public safety, public order, the prevention of crime, and the protection of the rights and freedoms of others)³³.

³² Constitutional Court, n° 9/2015, 28 January 2015, B.1.1, B.1.4, B.2.3, B.2.4, B.37 and B.46

³³ Constitutional Court, n° 9/2015, 28 January 2015, B.37-B.38 and B.46-B.47

V. National security and the right to freely choose one's residence

16. Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the First Protocol thereto³⁴ provides:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. [...]”

Article 12 of the International Covenant on Civil and Political Rights provides:

“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.”

17. When seized of an action against a federal law authorizing the minister responsible for access to the national territory to impose a location for administrative registration of foreign nationals who filed an application for refugee status within the meaning of the Convention relating to the Status of Refugees, adopted in Geneva on 28 July 1951, the Constitutional Court found that this measure could limit the exercise of each person's fundamental right to freely choose one's residence, and accordingly restricts the right of all

³⁴ This Protocol, which was signed in Strasbourg on 16 September 1963, became binding on the Kingdom of Belgium on 21 September 1970.

persons lawfully on the territory of a State 'to freely choose their residence', a right that is enshrined in Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, and in Article 12 of the International Covenant on Civil and Political Rights.

Nevertheless, the Court finds that such a restriction of this right is 'necessary in a democratic society in the interests of national security'^{35/36}.

³⁵ Court of Arbitration, n° 61/94, 14 July 1994, B.4

³⁶ It should be noted that, in another case, the Court incidentally observes that the minister holding general powers in the matter of access to the territory, residence, establishment and deportation of foreign nationals is, in that respect, a 'guardian of public order and national security' (Court of Arbitration, n° 21/2007, 25 January 2007, B.2.3).

VI. National security and the equal treatment of foreigners

18. Article 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms provides:

“1. An alien lawfully resident in the territory of a State shall not be expelled therefrom except in pursuance of a decision reached in accordance with law and shall be allowed:

a) to submit reasons against his expulsion,
 b) to have his case reviewed, and
 c) to be represented for these purposes before the competent authority or a person or persons designated by that authority.

2. An alien may be expelled before the exercise of his rights under paragraph 1.a, b and c of this article, when such expulsion is necessary in the interests of public order or is grounded on reasons of national security.³⁷

19. The Constitutional Court was seized of an action for annulment of a federal law authorizing the minister responsible for access to the territory to order the expulsion of a foreign national who is not allowed to stay in the Kingdom for longer than three months when ‘by his behaviour he is considered a threat to national security’.

This action, however, did not derive any argument from the international convention referred to above³⁸. It claimed a violation of Articles 10 and 11 of the Constitution, which guarantees the equal treatment of all Belgians³⁹, and from which the Constitutional Court

³⁷ Article 13 of the International Covenant on Civil and Political Rights provides: “An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.”

³⁸ Signed in Strasbourg on 22 November 1984, Protocol No. 7 was only signed by the Kingdom of Belgium on 11 May 2005 and only became binding on it on 1 July 2012.

³⁹ Article 10 of the Constitution provides:

derives the principle of equality and non-discrimination. This principle may also be relied upon by foreign nationals in pursuance of Article 191 of the Constitution⁴⁰. According to the Court, this principle only permits a difference in treatment between categories of similar individuals if that difference is objectively and reasonably justified.

The law being contested before the Court sets up a difference in treatment between the foreign national mentioned above and foreign nationals who are allowed to stay on Belgian territory for longer than three months and can only be expelled if they have actually already posed a threat to national security. The Court finds that this difference in treatment is not a source of discrimination. After pointing out, on the one hand, that the measure being criticized was intended to bring the law into conformity with the Convention 'implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders', signed in Schengen on 19 June 1990 and, on the other hand, that where national security is likely to be affected, the legislature may legitimately consider that any threat to national security can justify an order to leave the territory, the Court ruled that the aforementioned difference in treatment does not appear manifestly unreasonable given the 'lesser degree of integration in the national community' of a foreign national who is not allowed to stay in the territory of the Kingdom for longer than three months⁴¹.

* * *

"No class distinctions exist in the State.

Belgians are equal before the law; they alone are eligible for civil and military service, but for the exceptions that can be created by a law for particular cases.

Equality between women and men is guaranteed."

Article 11 of the Constitution provides: "Enjoyment of the rights and freedoms recognised for Belgians must be provided without discrimination. To this end, laws and federate laws guarantee among others the rights and freedoms of ideological and philosophical minorities."

⁴⁰ "All foreigners on Belgian soil benefit from the protection provided to persons and property, except for those exceptions provided for by the law."

⁴¹ Court of Arbitration, n° 43/98, 22 April 1998, B.11 to B.15

20. In conclusion, it should be noted first of all that the concern of national security emerges from only a relatively small number of judgments of the Constitutional Court. Of the four thousand or so judgments delivered since 5 April 1985, only about ten judgments of the Court actually take this concern into consideration.

This observation, however, should not conceal the fact that the Constitutional Court has already ruled on the validity of numerous laws directly or indirectly connected with national security, without necessarily having to settle a conflict between the protection of human rights and the concern of national security. This is particularly the case in the area of the fight against terrorism⁴² or with regard to the status of military personnel⁴³.

Finally, it is worth noting that, so far, whenever the Constitutional Court has been called upon to settle a conflict between a fundamental right and the concern of national security, it is always the latter that has prevailed.

⁴² See for example: Court of Arbitration, n° 73/2005, 20 April 2005; Court of Arbitration, n° 125/2005, 13 July 2005; Constitutional Court, n° 105/2007, 19 July 2007; Constitutional Court, n° 10/2008, 23 January 2008; Constitutional Court, n° 145/2011, 22 September 2011; Constitutional Court, n° 5/2012, 11 January 2012; Constitutional Court, n° 7/2013, 14 February 2013; Constitutional Court, n° 3/2016, 14 January 2016.

⁴³ See for example: Court of Arbitration, n° 148/2003, 19 November 2003; Court of Arbitration, n° 173/2006, 22 November 2006; Constitutional Court, n° 76/2010, 23 June 2010; Constitutional Court, n° 65/2011, 5 May 2011; Constitutional Court, n° 175/2011, 10 November 2011; Constitutional Court, n° 46/2015, 30 April 2015; Constitutional Court, n° 90/2015, 18 June 2015.