

# **The Rule of Law in the Case Law of the Belgian Constitutional Court: History and Challenges**

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## **Prof. em. dr. André Alen**

Judge in and former president of the Belgian Constitutional Court  
Professor emeritus at the KU Leuven  
Judge ad hoc in the European Court of Human Rights  
Honorary Secretary of the Belgian Council of Ministers

## **Willem Verrijdt**

Law clerk at the Belgian Constitutional Court  
Affiliated researcher at the KU Leuven

## I. History

### 1. From the “inviolability of legislation” to its review against the Constitution and treaties

1. Apart from its interpretation in conformity with the Constitution,<sup>1</sup> legislation remained “inviolable” or sovereign until 1971, when the Court of Cassation ruled that a validly enacted self-executing *treaty*, “by the very nature of international law laid down by treaties”, takes precedence over both earlier and later legislation. Every ordinary and administrative court must thus refuse to apply it in case of conflict.<sup>2</sup> This is called *diffuse review*.

2. Referring to “*The Federalist*”, Robert BADINTER, former president of the French *Conseil constitutionnel* (1986-1995), rightly pointed out the two reasons for the constitutional review of legislation in the USA, i.e. guarding the delicate balance between the Federation and the States, and protecting fundamental rights.<sup>3</sup>

Constitutional review of legislation in Belgium was prompted by the same reasons, the difference being that this power of review is not given to every court, but exclusively to the Constitutional Court. This is Kelsen’s model of *centralized constitutional review*, in which the principal mission is largely the protection of fundamental rights and freedoms.<sup>4</sup>

3. As soon as federated entities (in Belgium: Communities and Regions) with legislative powers came into being alongside the central (i.e. federal) State, the *division of powers* between those authorities necessitated a review of their legislation. In 1980, the Constitution<sup>5</sup> reserved the task of controlling that division of powers and reviewing the respective rules having force of statutory law for the Constitutional Court,<sup>6</sup> a court which does not form part of the judiciary and half of whose members are former Members of Parliament. The purpose

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<sup>1</sup> Cass. 20 April 1950 (*Waleffe*), *Pas.*, 1950, I, 560, with conclusions by L. CORNIL.

<sup>2</sup> Cass. 27 May 1971 (*S.A. Fromagerie Franco-Suisse Le Ski*), *Pas.*, 1971, I, 886, with conclusions by W.J. GANSHOF VAN DER MEERSCH.

<sup>3</sup> R. BADINTER, Préface, S. BREYER, *La Cour suprême, l’Amérique et son histoire*, Paris, Odile Jacob, 2011, 10-11.

<sup>4</sup> Between 1985 and 2015, the Court delivered 3900 judgments, 473 of which concern the division of powers between the federal State, the Communities and the Regions, while the others relate to rights and freedoms.

<sup>5</sup> Now Article 142 of the Constitution.

<sup>6</sup> Then still called the “Court of Arbitration”: constitutional provision of 29 July 1980 (*Moniteur belge*, 30 July 1980, 2<sup>nd</sup> edition); changed to “Constitutional Court” by the constitutional provision of 7 May 2007 (*Moniteur belge*, 8 May 2007, 3<sup>rd</sup> edition).

was to safeguard the uniformity of constitutional interpretation in matters concerning the powers of the federal State and the federated entities.

4. Besides this first mission of the Constitutional Court, its jurisdiction was subsequently extended to cover the compliance of legislation with *rights and freedoms*. As of 1988, the Constitutional Court has jurisdiction to control the observance of the Articles 10 and 11 (the principle of equality and non-discrimination) and 24 (the right to and freedom of education) of the Constitution<sup>7</sup> and, as of 2003, the Court's review jurisdiction has been extended to the entire Title II ("The Belgians and their rights") of the Constitution, as well as to the Articles 170, 172 and 191 (the principles of legality and equality in tax matters, and the protection of foreigners).<sup>8</sup>

Additionally, the Constitutional Court substantially extended its review in matters of rights and freedoms following each of those two extensions of jurisdiction. First of all, it decided to read the Articles 10 and 11 of the Constitution in combination with all rights and freedoms enshrined in the Constitution,<sup>9</sup> in treaty provisions binding Belgium<sup>10</sup> or in general principles of law,<sup>11</sup> since it cannot be accepted that a particular category of persons is wrongfully deprived from guarantees that are given to everyone. Next, the Court *ex officio* read the constitutional provisions relied upon by the parties in combination with treaty provisions binding Belgium and guaranteeing analogous rights and freedoms.<sup>12</sup>

5. This twofold technique of reading constitutional provisions in combination with international treaty provisions has many advantages, such as a modernization of the fundamental rights provisions in the Belgian Constitution, many of which date back to 1831 and the incorporation of Luxembourg and Strasbourg case law in the Constitutional Court's judgments.<sup>13</sup> Although this Court is not competent to review directly against international treaties, its case law of reading constitutional provisions in combination with those treaties

<sup>7</sup> Constitutional provision of 15 July 1988 (*Moniteur belge*, 19 July 1988).

<sup>8</sup> Special Majority Act of 9 March 2003 (*Moniteur belge*, 11 April 2003, 1<sup>st</sup> edition).

<sup>9</sup> CC no. 23/89, 13 October 1989, B.1.2.

<sup>10</sup> CC no. 18/90, 23 May 1990, B.11.3; even if an international treaty is not self-executing: CC no. 106/2003, 22 July 2003, B.4.2.

<sup>11</sup> CC no. 72/92, 18 November 1992, B.2.1.

<sup>12</sup> CC no. 136/2004, 22 July 2004, B.5.3-B.5.4.

<sup>13</sup> For further details, see A. ALEN, J. SPREUTELS, E. PEREMANS and W. VERRIJDT, "Cour constitutionnelle de Belgique", in R. HUPPMANN en R. SCHNABL (eds.), *La coopération entre les Cours constitutionnelles en Europe. Situation actuelle et perspectives*, Wien, Verlag Österreich, 2014, vol. 1, 293-347.

parallels the direct review by any ordinary and administrative court of legislation against self-executing treaties.

For the compliance of legislation with treaties, two distinct review systems are thus in place: diffuse treaty review and centralized constitutional review. In order to solve the problem of a potential “concurrence of fundamental rights”, the Special Majority Act on the Constitutional Court was amended: when before a court the infringement is invoked by a legislative act of a fundamental right guaranteed in an entirely or partially analogous manner by a provision of Title II of the Constitution and by a provision of European or international law, the court must in principle first refer the case to the Constitutional Court for a preliminary ruling on the compatibility with the provision of Title II of the Constitution.<sup>14</sup> Only after the Constitutional Court’s negative answer on the question of constitutionality, the referring court may review the legislative act against the provision of European or international law. This arrangement, which sets an order of review, was similarly adopted by the French legislature. This French regulation led to the famous *Melki and Abdeli* judgment of the Court of Justice, in which the latter accepted the conformity of the *question prioritaire de constitutionnalité* with the principle of full effect of EU law, provided that some conditions are met.<sup>15</sup>

## **2. Explicit reference to the “rule of law” in the case law of the Constitutional Court is fairly limited**

**6.** The Constitutional Court only rarely makes explicit reference to the “rule of law” in its case law. Four types of references can be distinguished.

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<sup>14</sup> Article 26(4) of the Special Majority Act of 6 January 1989 on the Constitutional Court, inserted by the Special Majority Act of 12 July 2009 (*Moniteur belge*, 31 July 2009, 2<sup>nd</sup> edition) and complemented by the Special Majority Act of 4 April 2014 (*Moniteur belge*, 15 April 2014, 1<sup>st</sup> edition).

<sup>(15)</sup> ECJ 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10: the national courts or tribunals remain free (i) to refer to the Court of Justice for a preliminary ruling, at whatever stage of the proceedings they consider appropriate, even at the end of the interlocutory procedure for the review of constitutionality, any question which they consider necessary, (ii) to adopt any measure necessary to ensure provisional judicial protection of the rights conferred under the European Union legal order, and (iii) to disapply, at the end of such an interlocutory procedure, the national legislative provision at issue if they consider it to be contrary to EU law. If the national law transposes the mandatory provisions of an EU directive, a fourth condition applies, i.e. a mandatory referral to the Court of Justice of a question on the validity of that directive. See W. VERRIJDT, “Should the EU Effectiveness Principle be Applied To Judge National Constitutional Review Procedures?”, in X (ed.), *Liège, Strasbourg, Bruxelles : parcours des droits de l’homme - Liber amicorum Michel Melchior*, Liège, Anthemis, 2010, 543-571.

(i) First of all, the Court has referred to the actual meaning of “*l’Etat de droit*” when stressing that not only the governed, but also those who govern, are bound by the law. An oath is to be understood as a solemn declaration that a person exercising public authority will abide by the law; the mere fact that the official constitutional oath refers to the King, cannot dismiss a republican from the obligation to take that oath, by which he merely acknowledges his allegiance to the existing state structure as set out by the Constitution.<sup>16</sup>

(ii) The Court’s second use of the rule of law principle is an immediate consequence of the first one. This principle requires access to a judge<sup>17</sup> in order to have all irregularities committed by governmental bodies sanctioned, including a damages action against public authorities.<sup>18</sup>

(iii) The third meaning of the rule of law principle by the Constitutional Court is a direct consequence of the second one. Access to justice in itself does not suffice: its effectiveness requires the organization of the Judiciary to meet certain requirements. These characteristics linked to the rule of law concern the due process rights,<sup>19</sup> the principles of judicial independence and impartiality,<sup>20</sup> the professional secrecy of attorneys at law,<sup>21</sup> the courts’ full jurisdiction (“*pleine juridiction*”),<sup>22</sup> the right to the effective enforcement of definitive

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<sup>16</sup> CC no. 151/2002, 15 October 2002, B.3.2: “*The Belgian State is governed by the rule of law. One of the characteristics of the rule of law is that the leaders are subject to the law*”.

<sup>17</sup> CC no. 182/2008, 18 December 2008, B.5.3; no. 19/2011, 3 February 2011, B.4.2: “*The right of access to the courts, which is an essential aspect of the right to a fair trial, is a fundamental right in a State governed by the rule of law*”. See also CC no. 18/2012, 9 February 2012, B.9.2; no. 139/2012, 14 November 2012, B.13; no. 48/2015, 30 April 2015, B.18.1; no. 108/2015, 16 July 2015, B.11.3.

<sup>18</sup> CC n° 99/2014, 30 June 2014, B.14. This case involved damages because of a tort committed by the highest courts. The Constitutional Court stated: “*In the absence of any opportunity to have an irregularity allegedly committed by the court of last instance censured by available legal remedies, the right of the person who believes he is injured by that irregularity to bring an action of tort is of crucial importance in a State governed by the rule of law*”. Because of judicial hierarchy and legal certainty, however, the Constitutional Court specified that only a sufficiently serious violation suffices for a lower court to state the tort committed by one of the highest courts.

<sup>19</sup> CC no. 202/2004, 21 December 2004, B.27.6; no. 105/2007, 19 July 2007, B.11.1; no. 107/2007, 26 July 2007, B.7.1; no. 22/2008, 21 February 2008, B.7; no. 98/2008, 3 July 2008, B.7; no. 201/2011, 22 December 2011, B.12.1; no. 178/2015, 17 December 2015, B.77.2: “*The rights of defence and the right to a fair trial are fundamental rights in a State governed by the rule of law*”. These judgments all involve the principle of equality of arms and the right to an adversarial trial.

<sup>20</sup> CC no. 67/2013, 16 May 2013, B.7.2; no. 74/2014, 8 May 2014, B.7.2; no. 103/2015, 16 July 2015, B.11.2; no. 138/2015, 15 October 2015, B.26; no. 152/2015, 29 October 2015, B.12.2..

<sup>21</sup> CC no. 126/2005, 13 July 2005, B.7.1-B.7.2.: “*In order to be found compatible with the fundamental principles of the Belgian legal system, the act of lifting the legal professional privilege must be justified by a compelling reason and must be strictly proportionate*”.

<sup>22</sup> CC no. 78/98, 7 July 1998, B.9-B.10; CC no. 25/2016, 18 February 2016, B.37.1.

judicial decisions,<sup>23</sup> and the right that definitive judicial decisions are not called into question.<sup>24</sup> More in general, “*it is fundamentally important in a democratic State governed by the rule of law that the courts and tribunals inspire confidence in the public and in the parties to the proceedings*”.<sup>25</sup>

(iv) The fourth meaning of the rule of law in the Constitutional Court’s case law relates to the “*fundamental principles of the Belgian legal order*”, such as the separation of powers,<sup>26</sup> the necessity to have official documents published before they bind the public,<sup>27</sup> and human rights such as the principle of equality and non-discrimination<sup>28</sup> and the right to vote and to be elected.<sup>29</sup>

### **3. Nevertheless, the “rule of law” is an unwritten constitutional principle and a foundational principle**

7. An honorary judge in the Constitutional Court has written that this Court has conceived the rule of law as an elementary unwritten constitutional principle as well as a foundational principle, which forms the basis for other principles, more particularly the principle of legal

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<sup>23</sup> CC no. 122/2012, 18 October 2012, B.6; no. 56/2014, 27 March 2014, B.5: “*The right to an effective enforcement of definitive judicial decisions is one of the fundamental attributes of the rule of law*”.

<sup>24</sup> CC no 177/2005, 7 December 2005, B.23; no. 6/2009, 15 January 2009, B.3.10; no. 199/2009, 17 December 2009, B.8. See also CC no. 172/2008, 3 December 2008, B.20; no. 107/2011, 16 June 2011, B.7.1; no. 9/2012, 25 January 2012, B.13.2; no. 160/2013, 21 November 2013, B.10.1; no. 113/2015, 17 September 2015, B.8.2: “*Even when legislating with retroactive effect, the legislator cannot, [...], at the risk of infringing one of the essential principles of the rule of law, bring into discussion judicial decisions that have become final*”.

<sup>25</sup> CC no. 157/2009, 13 October 2009, B.3.1; no. 123/2011, 7 July 2011, B.8.1; no. 155/2011, 13 October 2011, B.3; no. 3/2016, 14 January 2016, B.10.1.

<sup>26</sup> CC no. 67/2013, 16 May 2013, B.7.2; no. 74/2014, 8 May 2014, B.7.2; no. 103/2015, 16 July 2015, B.11.2; no. 138/2015, 15 October 2015, B.26; no. 152/2015, 29 October 2015, B.12.2: “*The principles of judicial independence and the separation of powers are basic attributes of the rule of law*”.

<sup>27</sup> CC no. 106/2004, 16 June 2004, B.3.2.: “*Bearing in mind that publication is an essential condition for the binding effect of official texts, the ability of each person to take cognizance of those texts at any time is a right that is inherent in the rule of law, since such cognizance permits each person to comply with them*”.

<sup>28</sup> CC no. 17/2009, 12 February 2009, B.10.3. This principle is part of the *ordre public*: e.g. CC no. 8/2012, 18 January 2012, B.15.5.: “*The principle of equality and non-discrimination is not, [...], simply a principle of good legislation and good administration. It is one of the cornerstones of a democratic State governed by the rule of law*”.

<sup>29</sup> CC no. 187/2005, 14 December 2005, B.5.1; no. 130/2006, 28 July 2006, B.6; no. 87/2014, 6 June 2014, B.3.2; no. 136/2015, 1 October 2015, B.9; no. 80/2010, 1 July 2010, B.5.1; no. 169/2015, 26 November 2015, B.4: “*The right to vote and the right to be elected are fundamental political rights in a State governed by the rule of law*”.

certainty and the principle of proportionality.<sup>30</sup> We will discuss very briefly both of these principles in the abundant case law of the Constitutional Court.

**8.1.** The principle of *legal certainty*, an inherent attribute of the rule of law,<sup>31</sup> requires that individuals can foresee the legal consequences of their actions.<sup>32</sup> The principle of legality *in criminal matters* proceeds from the idea that “*criminal law must be formulated in terms which ensure that everyone will know, when deciding to adopt a course of conduct, whether that conduct is punishable and, where appropriate, to know the punishment incurred. It requires the legislature to indicate, in terms which are sufficiently precise and clear and provide legal certainty, what acts are to be punished, so that, on the one hand, a person adopting a course of action may first make a due assessment of what the criminal consequences of that action will be, and, on the other hand, to ensure that not too much is left to the discretion of the judge*”. Influenced by the case law of the European Court of Human Rights, the Constitutional Court has since 2005-2006 added the following considerations: “*However, the lex certa principle does not prohibit the legislature to grant a certain margin of appreciation to the judge, because of the general character of legislation, its applicability to a wide variety of cases and the evolution of the acts they aim to sanction.*”

*The condition that an offence must be clearly defined by the law is satisfied when the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable.*

*It is only by examining a particular provision of criminal law that it is possible to determine, taking into account the elements proper to the offences it is intended to punish, whether the general terms used by the legislature are so vague as to infringe the principle of legality in criminal matters”.*<sup>33</sup>

**8.2.** The principle of the *non-retroactive effect of laws* is a general principle of law.<sup>34</sup> Leaving aside criminal law,<sup>35</sup> interpretative laws<sup>36</sup> and validation laws, the Constitutional Court states:

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<sup>30</sup> L.P. SUETENS, “De invloed van het Arbitragehof op het grondwettelijk recht”, *R.W.*, 1993-94, 1317-1318.

<sup>31</sup> CC no. 106/2004, 16 June 2004, B.3.2.

<sup>32</sup> E.g. CC no. 49/1996, 12 July 1996, B.3.8.

<sup>33</sup> E.g. CC no. 1/2016, 14 January 2016, B.5.3.

<sup>34</sup> CC no. 7/1997, 19 February 1997, B.4.6.

*“The non-retroactive effect of laws is a safeguard meant to prevent legal uncertainty. This safeguard requires that the content of the law is foreseeable and accessible, so that the individual can reasonably foresee the consequences of a particular act when it is carried out. Retroactivity is only justified if it is essential to achieve an objective of general interest.*

*If, moreover, it turns out that the purpose or consequence of the retroactivity consists of influencing the outcome of a judicial proceeding in a certain direction or to prevent the courts from deciding a specific point of law, the nature of the principle at issue requires that exceptional circumstances or compelling grounds of the general interest justify the intervention of the legislature, which infringes, at the expense of one category of citizens, the procedural safeguards that are offered to everyone”.*<sup>37</sup>

Finally, a legislative act must on no account infringe on final judgments. If that is its aim, it would violate the Articles 10 and 11 of the Constitution by depriving a certain category of persons from the benefit of final judgments, which cannot be justified under any circumstance. *“This is one of the essential principles of the rule of law”.*<sup>38</sup>

According to the recent case law of the Constitutional Court, mere budgetary considerations no longer seem able to justify retroactivity.<sup>39</sup>

**8.3.** In principle, it is up to the legislature to consider, when introducing new regulations, whether it is necessary or appropriate to include *transitional provisions*. *“The principle of equality and non-discrimination is only violated if the transitional regime, or the absence thereof, results in a difference in treatment without reasonable justification, or if the principle*

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<sup>35</sup> The Constitutional Court applies Article 7 of the European Convention on Human Rights and Article 15 of the International Covenant on Civil and Political Rights.

<sup>36</sup> The Constitutional Court verifies whether a so-called interpretative law is really *“a law that gives a legislative provision the meaning that the legislator meant to give it at the time of its adoption and that it can reasonably be given”*. Indeed, *“the safeguard of the non-retroactive effect of laws cannot be evaded by the mere fact that a law with retroactive effect is presented as an interpretative law”*: CC no. 102/2006, 21 June 2006, B.5.2.

<sup>37</sup> E.g. CC no. 77/2015, 28 May 2015, B.4.1.

<sup>38</sup> E.g. CC no. 107/2011, 16 June 2011, B.7.1.

<sup>39</sup> CC no. 54/2015, 7 May 2015, B.13. See also CC no. 1/2015, 22 January 2015, and European Court of Human Rights, 3 September 2013, *M.C. and others v. Italy*, as well as CC no. 131/2015, 1 October 2015, B.13 (*“The budgetary objective invoked during the parliamentary travaux cannot release the legislator from its obligation to guarantee for every person the right to lead a life in keeping with human dignity when a foreign national needs urgent medical attention”*).



*of legitimate expectations is excessively impaired*".<sup>40</sup> Such is the case if "*the legitimate expectations of a specific category of persons are impaired without any compelling ground of the general interest justifying the absence of a transitional regime put in place for their benefit*".<sup>41</sup>

#### **4. The unstoppable rise of the principle of proportionality**

**9.** Under this title, P. MARTENS, honorary President of the Constitutional Court, described in 1992 the rise of the principle of proportionality in (public) law.<sup>42</sup> About a quarter of a century later, the principle of proportionality has become firmly entrenched in the case law of the Constitutional Court, particularly with respect to rights and freedoms, but also with respect to the division of powers.

**10.1.** According to the Constitutional Court, "*the principle of proportionality is inherent in any exercise of powers*".<sup>43</sup>

**10.2.** This principle prohibits any legislature from exercising its powers in such a way that it becomes impossible or excessively difficult for another legislature to efficiently exercise its powers.<sup>44</sup>

Since the *absence of cooperation* in a matter for which the Special Majority Act on Institutional Reform requires mandatory cooperation, is not compatible with the principle of proportionality inherent in any exercise of powers, the Court may verify compliance with the obligation to conclude cooperation agreements.<sup>45</sup> If the powers of the federal State and the federated entities have become interwoven to such an extent that they can no longer be exercised without mutual cooperation, for instance as a result of technological developments, a legislature violates the principle of proportionality if it legislates unilaterally on the matter,

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<sup>40</sup> E.g. CC no. 41/2016, 17 March 2016, B.10.

<sup>41</sup> E.g. CC no. 86/2015, 11 June 2015, B.4.6 (violation as in several judgments).

<sup>42</sup> P. MARTENS, "L'irrésistible ascension du principe de proportionnalité", in *Présence du droit public et des droits de l'homme. Mélanges offerts à Jacques Velu*, Brussels, Bruylant, 1992, I, 49-68.

<sup>43</sup> E.g. CC no. 168/2004, 28 October 2004, B.5.3; no. 172/2006, 22 November 2006, B.8.

<sup>44</sup> E.g. CC no. 116/2009, 16 July 2009, B.8.

<sup>45</sup> E.g. CC no. 40/2012, 8 March 2012, B.5.

even if the Special Majority Act on Institutional Reform does not provide for an obligation to conclude a cooperation agreement.<sup>46</sup>

Before the Special Majority Act on the Constitutional Court in 2014 conferred jurisdiction on the Constitutional Court to review the compatibility of legislation with the principle of *federal loyalty*<sup>47</sup> enshrined in Article 143(1) of the Constitution,<sup>48</sup> the Constitutional Court already ensured the respect for that principle, read in combination with the principle of reasonableness and proportionality, by granting this principle the same significance as the principle of proportionality.<sup>49</sup>

The Constitutional Court also applies the principle of proportionality when a legislature deprives the municipalities or the provinces of some of their powers<sup>50</sup> or when it examines whether implied powers may be accepted by verifying the condition whereby the provisions adopted by a legislature outside the scope of its powers only have a marginal impact on the powers conferred upon another legislature.

**10.3.** The principle of proportionality does not only limit the legislatures' powers *ratione materiae*, but also their powers *ratione loci*: because of the very nature of the promotion of culture, the powers relating to this matter may produce effects outside the territory for which a community legislature is responsible; nevertheless, those potential extraterritorial effects "*must not counteract the cultural policy of the other community*".<sup>51</sup>

**11.1.** Even more so than in the review of the division of powers, the principle of proportionality plays an important part in the review of the compliance of legislation with the *principle of equality and with the other fundamental rights*; the litigation in those matters accounts for around 90 percent of the case law of the Constitutional Court.

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<sup>46</sup> CC no. 132/2004, 14 July 2004, B.6.2; no. 128/2005, 13 July 2005, B.6; no. 163/2006, 8 November 2006, B.3-B.4. See also CC no. 158/2013, 21 November 2013, B.17.7.

<sup>47</sup> See the Articles 1(3°) and 26(1)(4°) of the Special Majority Act of 6 January 1989 on the Constitutional Court, inserted by the Articles 47 and 48 of the Special Majority Act of 6 January 2014 (*Moniteur belge*, 31 January 2014, 1<sup>st</sup> edition).

<sup>48</sup> This article provides: "In the exercise of their respective responsibilities, the federal State [and the federated entities] act with respect for federal loyalty, in order to prevent conflicts of interest".

<sup>49</sup> "The principle of federal loyalty [...] means that each legislator is obliged, in the exercise of its own powers, to ensure that its own actions do not render the exercise of the other legislatures' powers impossible or excessively difficult": CC no. 119/2004, 30 June 2004, B.3.3; no. 97/2014, 30 June 2014, B.4.5. See also CC no. 98/2015, 25 June 2015, B.30.3; no. 21/2016, 18 February 2016, B.12.

<sup>50</sup> As of judgment no. 95/2005, 25 May 2005, B.26.

<sup>51</sup> CC no. 54/96, 3 October 1996, B.7.2.

**11.2.** As in the case law of the European courts and the higher courts in the national order, review against the principle of proportionality is often the final stage in the examination of the observance of the *principle of equality and non-discrimination*,<sup>52</sup> in which the Constitutional Court examines whether a measure, in its consequences, and the means employed to achieve that measure, are in reasonable proportion to the aim pursued. The Court had already established its case law on that matter in its first judgment on the principle of equality and non-discrimination.<sup>53</sup> In that judgment, the Court ruled as follows: *“It is not for the Court to assess whether a measure established by law is appropriate or desirable. It is up to the legislature to determine what measures have to be taken to achieve the aim it has set itself. [...] It is not for the Court to examine [...] whether or not the aim pursued by the legislature can be achieved by different legal measures”*.<sup>54</sup> Fortunately, the Court has abandoned this view, as such examination does form part of the proportionality test.<sup>55</sup> The Court has also considered that *“it does not have the same scope of appraisal as does the legislature”*,<sup>56</sup> yet such considerations have become very rare. Likewise, the term *“manifest(ly)”* has largely disappeared from the Court’s parlance. The foregoing all suggests a more complete review of the principle of proportionality, rather than a merely marginal review. The requirement of proportionality is in fact implicitly laid down in the Articles 10 and 11 of the Constitution.<sup>57</sup>

**11.3.** As was already mentioned (no. 4), the Constitutional Court reads the Articles 10 and 11 of the Constitution in conjunction with all *rights and freedoms* guaranteed by international treaties binding Belgium, and reads the fundamental rights enshrined in the Constitution in combination with the treaty provisions binding Belgium which are analogous in scope. The Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and the International Covenant on Civil and Political Rights are the most often applied international human rights conventions. Unlike the Belgian Constitution, which makes a formal distinction as regards restrictions between regulatory measures, repressive measures

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<sup>52</sup> After - where appropriate - the comparability test, the review of the aim pursued, the objective and the relevant criterion of distinction.

<sup>53</sup> CC no. 23/89, 13 October 1989, B.1.3: *“[...] the principle of equality is violated if it is found that there is no reasonable degree of proportionality between the means employed and the aim pursued”*.

<sup>54</sup> CC no. 23/89, 13 October 1989, B.2.7.

<sup>55</sup> E.g. CC no. 16/2005, 19 January 2005, B.6.2 (regarding the restriction of the right to respect for private and family life enshrined in Article 22 of the Constitution): *“[...] since this aim may also be achieved in a manner that is less harmful to those concerned [...]”*.

<sup>56</sup> E.g. CC no. 121/2009, 16 July 2009, B.14.6. See also CC no. 157/2005, 20 October 2005, B.7.2; no. 18/2015, 12 February 2015, B.5.

<sup>57</sup> CC no. 40/2003, 9 April 2003, B.23.2; no. 88/2004, 19 May 2004, B.27.

(both permitted in principle) and preventive measures (prohibited in principle), the aforementioned international conventions employ a system of substantive restrictions: “*the law*” (i.e. a provision of national law which is accessible and precise) may subject the exercise of most freedoms to certain restrictions, provided that they are strictly necessary in a democratic society, and that they pursue a legitimate aim. The measure must be both relevant (i.e. meet a pressing social need) and proportionate to the legitimate aim being pursued. When reading the Belgian Constitution in conjunction with a treaty provision, the Constitutional Court verifies whether the restriction is provided for by a “law” in the formal sense, if the Belgian Constitution so requires, but also whether it satisfies the substantive conditions stipulated in the treaty provision: the legislative provision must be sufficiently precise, meet a pressing social need, and be proportionate to the legitimate aim being pursued.<sup>58</sup>

**11.4.** As in the case law of the European Court of Human Rights, the principle of proportionality is a *general principle of law* in the Constitutional Court’s case law, i.e. a criterion for finding the right balance between the protection of the general interest of the society and the respect for fundamental human rights.<sup>59</sup> For every court, the principle of proportionality is the ideal instrument to weigh interests and values.<sup>60</sup>

The case law of the Constitutional Court contains many other applications of the principle of proportionality, for example in the matter of administrative fines,<sup>61</sup> penalties<sup>62</sup> and the right to property.<sup>63</sup>

## 5. Conclusion

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<sup>58</sup> Established case law since CC no. 202/2004, 21 December 2004, B.5.4.

<sup>59</sup> M.A. EISSEN, “Le principe de proportionnalité dans la jurisprudence de la Cour européenne des droits de l’homme”, *Etudes et Documents du Conseil d’Etat*, 1988, 275-284.

<sup>60</sup> W. VAN GERVEN, “Het proportionaliteitsbeginsel”, in *Hommage aan Marcel Storme. De norm achter de regel*, Deurne, Kluwer, 1995, 1-17.

<sup>61</sup> E.g. CC no. 25/2016, 18 February 2016, B.40.2: the mere fact that the Council of State does not have the power to “quash” decisions is not sufficient to conclude that its review does not meet the requirements of full jurisdiction within the meaning of Article 6 of the European Convention on Human Rights, since it carries out an in-depth review, in law and in fact, of the decision and of its proportionality.

<sup>62</sup> E.g. CC no. 13/2015, 5 February 2015, B.20: “[...], the principle of legality demands that the penalty must be in proportion to the offence committed. The penalty inflicted must be in proportion to the seriousness of the reprehensible conduct”. See also CC no. 8/2010, 4 February 2010, B.12 (regarding disciplinary penalties).

<sup>63</sup> Article 16 of the Constitution, which only relates to expropriation, and Article 1 of the First Protocol to the European Convention on Human Rights are considered by the Constitutional Court as “analogous provisions”.

**12.** Belgium has come a long way, from the “inviolability of the law” to its review against the Constitution by the Constitutional Court, which also involves international treaties in its review (nos 1-5). Despite the fact that explicit reference to the “rule of law” in the case law of the Constitutional Court is rare (no. 6), it constitutes for this Court an unwritten constitutional principle underlying other principles (no. 7), in particular the principle of legal certainty (no. 8) and the principle of proportionality (no. 9), the latter both in the review of the division of powers (no. 10) and even more so in the review against the principle of equality and the other fundamental rights (no. 11). In the case law of the Constitutional Court, the rule of law is indeed alive and kicking.

## **II. Challenges**

**13.** As it is impossible to sum up all possible challenges, we will discuss two challenges of an entirely different nature: on the one hand, an institutional one, the relationship between EU law and the Constitution; on the other hand, a substantive challenge, the fight against terrorism.

### ***1. EU law***

**14.** Belgium’s EU membership has been a challenge for the Constitution. Its accession to the Treaty establishing the European Coal and Steel Community (1951), the Treaty establishing the European Economic Community (1957) and the Treaty establishing the European Atomic Energy Community (1957) was said to violate the principle of national sovereignty enshrined in Article 33 of the Constitution, because the assignment of the exercise of legislative, executive, judicial and fiscal competences to supranational organizations ran counter to the requirement that all powers must be exercised in the manner laid down by the Constitution, which did not mention competences of international organizations.<sup>64</sup> This problem was only resolved in 1970, when a new Article 34 was inserted into the Constitution, stipulating that “*the exercising of specific powers can be assigned by a treaty or by a law to institutions of*

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<sup>64</sup> Council of State, general assembly of the Legislation Division, opinion of 12 January 1953, *Parl. Doc.*, House of Representatives, 1952-1953, no. 163. *Adde* the legal opinions of G. DOR, W.J. GANSHOF VAN DER MEERSCH, P. DE VISSCHER and A. MAST of 17 April 1953, *Parl. Doc.*, House of Representatives, 1952-1953, no. 696.

*public international law*”, thus providing a *post factum* constitutional basis for Belgium’s membership of international organizations.<sup>65</sup>

Article 34 of the Constitution is regularly invoked by the Council of State’s Legislation Division, which has developed five cumulative criteria for examining the constitutionality of further assignments of the exercise of powers to international organizations.<sup>66</sup> First, the assignment only concerns the ‘*exercising*’ of powers, whereas the powers themselves remain with the competent Belgian institutions. The exercising of powers can be taken back at any time,<sup>67</sup> even though this will likely lead to Belgium leaving the international organization. Second, the assignment should only concern ‘*specific*’ powers, which must be limited in scope and clearly defined. Third, every assignment requires the ‘*legislature’s consent*’, e.g. by approving the treaty establishing an international organization. Fourth, the assignment must be to the benefit of an ‘*institution of public international law*’, i.e. not to the benefit of another State or to the benefit of a cross-border association of municipalities. And fifth, these assignments may only deviate from the constitutional provisions concerning the exercise of ‘*powers*’: if an assignment deviates from other constitutional provisions, such as human rights, the treaty may only be approved and ratified after amending the constitutional provisions concerned.<sup>68</sup>

Unfortunately, these criteria are often ignored by the legislature, who has approved some of these treaties without passing the necessary constitutional amendments.<sup>69</sup>

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<sup>65</sup> See A. ALLEN, *Hoe ‘Belgisch’ is het ‘Belgische staatsrecht’ nog?*, Antwerp, Intersentia, 2015, 21-26; P. VANDERNOOT, “Regards du Conseil d’Etat sur une disposition orpheline: l’article 34 de la Constitution”, in *En hommage à Francis Delpérée*, Brussels, Bruylant, 2007, 1599-1630; W. VERRIJDT, “EU Integration and the Belgian Constitution”, in S. GRILLER, M. CLAES and L. PAPADOPOULOU (eds.), *Member States’ Constitutions and EU Integration*, Oxford, Hart Publishing, 2016 (to be published), no. 20.

<sup>66</sup> E.g. Council of State, Legislation Division, opinion of 15 February 2005, *Parl. Doc.*, Senate, 2004-2005, no. 3-1091/1 (the European Constitution); opinion of 29 January 2008, *Parl. Doc.*, Senate, 2007-2008, no. 4-568/1 (the Lisbon Treaty); opinion of 18 September 2012, *Parl. Doc.*, Flemish Parliament, 2012-2013, no. 1815/1 (the Fiscal Compact); and opinion of 3 April 2012, *Parl. Doc.*, Senate, 2011-2012, no. 5-1598/1 (the ESM Treaty). See on these criteria P. VANDERNOOT, *o.c.*, 1599-1630.

<sup>67</sup> *Parl. Doc.*, House of Representatives, Extraordinary Session 1968, no. 16/2, pp. 4-5; P. DE STEXHE, *La révision de la Constitution belge 1968-1970*, Brussels, Larcier, 1972, no. 304.

<sup>68</sup> The Council of State’s Legislation Division has suggested that Article 195 of the Constitution, which stipulates the procedure for amending the Constitution, would be amended in order to allow for such revisions of the Constitution following a swifter procedure than the current one, which involves the dissolution of the Parliament and legislative elections (Council of State, Legislation Division, opinion of 29 January 2008, *Parl. Doc.*, Senate, 2007-2008, no. 4-568/1, p. 343). This path has, however, not been followed yet.

<sup>69</sup> Concerning the Lisbon Treaty, the *Conseil d’Etat*’s Legislation Division had suggested the prior amendment of the principle *nullum crimen sine lege* in Article 12 of the Constitution, in which ‘*lege*’ refers to a Belgian legislator, in order to allow for the creation of a European Public Prosecutor’s Office, but this constitutional amendment has never been adopted. Meanwhile, the Constitutional Court has accepted that an EU regulation

**15.** The significance of Article 34 of the Constitution stretches beyond the assignment of new competences to the European Union. According to the Council of State's Legislation Division, this constitutional provision also implies that, after the assignment of new competences, the empowered EU bodies may take autonomous decisions, without being bound by the Belgian Constitution. Therefore, the provisions of the Belgian Constitution cannot take precedence over secondary EU law that obliges the Belgian authorities to take actions violating the Constitution, even including constitutional rights.<sup>70</sup>

**16.** This possibility of having to adopt unconstitutional legislation increases with every extension of the EU's competences, taking into account that they are interpreted very extensively by the ECJ, which also has exclusive jurisdiction for examining the validity of norms of secondary EU law. In a multi-layered legal order, the question how constitutional courts should deal with this challenge, is a very important one.

The two most compelling problems in this regard involve, on the one hand, the position of the national constitutional provisions offering a more extensive human rights protection than the Charter of Fundamental Rights of the European Union (hereinafter: the Charter), and, on the other hand, the wider human rights protection offered by the European Convention on Human Rights (hereinafter: the Convention).

**17.** Before addressing these two problems, it should be stressed that, among European constitutional courts, the Belgian Constitutional Court has a very particular approach towards EU law, by examining, through the lens of its discrimination test, whether legislation respects EU law (see no. 4), by respecting all procedural requirements derived from the principle of full effect of EU law by the ECJ,<sup>71</sup> and by having referred 91 preliminary questions to the ECJ in 26 judgments.<sup>72</sup>

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suffices as a legal basis, because of its direct applicability (CC no. 37/2010, 22 April 2010), but this argument cannot be used for secondary EU law lacking direct applicability.

<sup>70</sup> Council of State, Legislation Division, opinion no. 39.192/3 of 4 November 2005, *Parl. Doc.*, House of Representatives, 2005-2006, no. 51-2189/1, pp. 113-116 (a directive concerning advertising for medication); opinion of 29 January 2008, *Parl. Doc.*, Senate, 2007-2008, no. 4-568/1, p. 341 (the Lisbon Treaty). The Council of State's Administrative Tribunal Division upholds the same principle: CE 5 November 1996, *Goosse*, no. 62.921 and *Orfinger*, no. 62.922; CE 31 March 2014, *J.V.H. e.a.*, no. 226.980 (in the latter judgment, the Council of State holds that rules of secondary EU law trump constitutional provisions, insofar as these rules do not leave any margin for a measure which respects the Constitution).

<sup>71</sup> E.g. the *Marleasing* requirement of interpretation in conformity with EU law (CC no. 55/2011, 6 April 2011; no. 161/2012, 20 December 2012); the *Factortame* requirement of interim measures (CC no. 96/2010, 29 July

*a. EU law and the Constitution*

**18.** Nevertheless, the possibility of unconstitutional obligations of EU law remains, and hence, the hierarchical relation between the Constitution and EU law must be addressed.<sup>73</sup> A distinction should, in this regard, be made between primary EU law and secondary EU law.

As primary EU law is plain treaty law, it follows the logic of the relation between international law and the Constitution. According to the Court of Cassation, all self-executing treaties have precedence over the Constitution.<sup>74</sup> According to the Council of State and the Constitutional Court, however, the Constitution ranks higher than international treaties, because treaties can only enter the Belgian legal order after being approved by an Act which is fully subjected to the Constitutional Court's constitutional review. An additional argument is that the legislature may not do indirectly, by approving an unconstitutional treaty, what he may not do directly, i.e. violate the Constitution.<sup>75</sup> The Constitution does not resolve this discussion. The legislature has, however, implicitly subscribed to the latter view, as he has shortened the delay for challenging Acts approving treaties before the Constitutional Court from six months to sixty days, and as he has only precluded preliminary references concerning Acts approving the 'constituent EU Treaties' and the Convention and its additional protocols.<sup>76</sup>

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2010); the *van Schijndel and van Veen* requirement of *ex officio* application of EU law (CC no. 97/2011, 31 May 2011; no. 74/2012, 12 June 2012; no. 15/2015, 5 February 2015); the *Winner-Wetten* prohibition on the temporal maintenance of legislation violating EU law (CC no. 144/2013, 7 November 2013); etc. See J. THEUNIS, "Het Grondwettelijk Hof en de procedurele verplichtingen uit het Europees Unierecht", in W. PAS, P. PEETERS and W. VERRIJDT (eds.), *Liber discipulorum André Alen*, Bruges, die Keure, 2015, 409-438.

<sup>72</sup> See A. ALEN and W. VERRIJDT, "Le dialogue préjudiciel de la Cour constitutionnelle belge avec la Cour de justice de l'Union européenne", in *Liber amicorum Yves Lejeune*, 2016 (to be published).

<sup>73</sup> See A. ALEN and W. VERRIJDT, "La relation entre la Constitution belge et le droit international et européen", in *Liber amicorum Rusen Ergec*, 2016 (to be published).

<sup>74</sup> Cass. 9 November 2004, *Rev. Dr. Pén.* 2005, 789; Cass. 16 November 2004 *RW* 2005-06, 387. Except if the Constitution offers a more extensive protection (Article 53 of the Convention). The Special Majority Act of 12 July 2009 has implicitly sanctioned this position (see no. 5, concerning Article 26 (4) of the Special Majority Act on the Constitutional Court).

<sup>75</sup> CC no. 26/91, 16 October 1991; CC no. 12/94, 3 February 1994; CC no. 20/2004, 4 February 2004; CC no. 87/2010, 8 July 2010; CC no. 117/2011, 30 June 2011; CC no. 32/2013, 7 March 2013; CC. no. 62/2016, 28 April 2016; Council of State, Legislation Division, opinion no. 21.540, 6 May 1992, *Parl. Doc.*, House of Representatives, 1991-1992, no. 482/1, pp. 69-72; opinion no. 28.936/2, 21 April 1999, *Parl. Doc.*, Senate, 1999-2000, no. 2-329/1, pp. 94-101.

<sup>76</sup> Articles 3 (2) and 26 (*ibis*) of the Special Majority Act on the Constitutional Court.



Concerning secondary EU law, all ‘*supreme courts*’ reach the same outcome, albeit based on a different reasoning. Whereas the Court of Cassation bases the primacy of secondary EU law over the Constitution on the ECJ’s *Internationale Handelsgesellschaft* judgment,<sup>77</sup> the Constitutional Court and the Council of State base that same primacy on Article 34 of the Constitution.<sup>78</sup> The latter reasoning implies that, in the end, the Constitution is the highest norm, and that the precedence of EU law over the Constitution is constraint to the conditions defined in the Constitution.

**19.** The Constitutional Court has long been silent about the role of Article 34 of the Constitution in this regard. In a 2010 judgment, it has, for the first time, used this provision to justify the legislature’s implementation of a directive which was alleged to violate the Constitution. That EU directive required the legislature to confer vast regulatory powers upon the independent federal energy regulatory office (CREG). The legal provisions concerned were challenged because of a lack of accountability towards the competent Minister and towards the Parliament, principles anchored in the Articles 33, 37 and 101 of the Constitution. The Constitutional Court, however, ruled that, insofar as necessary, the deviation of these constitutional rules was justified because of Article 34 of the Constitution.<sup>79</sup> It must be noted, however, that Article 34 of the Constitution was not used as the sole justification in the Court’s reasoning: it was mentioned as a final argument and it was thus used to grant the legislature a very broad margin of appreciation when transposing the obligations following from secondary EU law.

**20.** In a recent judgment, the Constitutional Court was more explicit about the meaning of Article 34 of the Constitution and the relation between the Belgian Constitution and EU law. Rejecting actions for annulment against the Act approving the ESM Treaty, because the petitioners lacked standing, the Court added the following *obiter dictum* argument: “*When approving a treaty which [attributes new competences to EU institutions], the legislature must respect Article 34 of the Constitution. By virtue of that provision, the exercising of specific powers can be assigned by a treaty or by a law to institutions of public international law. While these institutions may subsequently decide autonomously about how they exercise*

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<sup>77</sup> Cass. 2 June 2003, *RCJB* 2007, 24. It has also referred to the precedence of EU law over all other norms of law as a general principle of law (Cass. 4 April 2008, *Arr.Cass.* 2008, no. 205).

<sup>78</sup> CC no. 130/2010, 18 November 2010; Council of State, Administrative Tribunal Division, 5 November 1996, *Goosse*, n° 62.921; *id.*, 5 November 1996, *Orfinger*, no. 62.922.

<sup>79</sup> CC no. 130/2010, 18 November 2010, B.8.1.

*these competences, Article 34 of the Constitution cannot be interpreted as granting an unlimited licence to the legislature, when approving that treaty, or to the said institutions, when exercising their attributed powers. Article 34 of the Constitution does not allow a discriminating derogation to the national identity inherent in the fundamental structures, political and constitutional,<sup>80</sup> or to the basic values of the protection offered by the Constitution to all legal subjects”.*<sup>81</sup>

The Constitutional Court has thus explicitly acknowledged that neither primary nor secondary EU law may violate the Belgian national and constitutional identity or the basic values of human rights protection. Implicitly, it has also acknowledged that the European institutions may not act *ultra vires*. These lines can be read as a subscription to the German *Bundesverfassungsgericht*'s *Honeywell* jurisprudence, which protects the same aspects of the German Constitution against infringements by EU law.

Whereas the *Bundesverfassungsgericht* developed this jurisprudence in several subsequent judgments, in which it added several material and procedural specifications and conditions, the Belgian Constitutional Court did not go further than mentioning the principle of national identity and the basic values of constitutional protection. It did not specify whether these principles imply a review competence for the Constitutional Court, nor what the consequences of such a review would be for the applicability of the examined rule of secondary EU law in Belgium.

Nor did the Constitutional Court explain whether it would enter into a preliminary dialogue with the ECJ before conducting its possible review and whether it would grant a *Fehlertoleranz* to the ECJ. If the *Bundesverfassungsgericht*'s practice is followed, a preliminary dialogue with the ECJ is necessary both in the *ultra vires* review<sup>82</sup> and in the identity review,<sup>83</sup> because this is a crucial element in atoning respect for the full effect of EU law and the protection of the essence of the Constitution.

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<sup>80</sup> This formulation reflects Article 4.2 TEU.

<sup>81</sup> CC no. 62/2016, 28 April 2016, B.8.7.

<sup>82</sup> E.g. BVerfG 14 January 2014, 2 BvR 2728/13 (*Gauweiler*). This referring judgment was followed by ECJ 16 June 2015, *Gauweiler*, C-62/14 and BVerfG 21 June 2016, 2 BvR 2728/13. In the *Bundesverfassungsgericht*'s final judgment, the OMT mechanism was only held to be consistent with the German Constitution provided some restrictive interpretations.

<sup>83</sup> E.g. BVerfG 15 December 2015, 2 BvR 2735/14.

21. The Constitutional Court also avoided the most delicate discussion in this regard, i.e. which constitutional provisions and principles are part of Belgium's national identity and which ones are not. This question has not yet been the subject of much doctrinal debate, but it is clear that the ambit of the constitutional provisions which could be used as "a shield" against EU law, may not be too broad, so that only some key aspects of the Constitution, relating to Belgium's specific constitutional history and culture, can come into play.<sup>84</sup> These constitutional aspects could relate to, on the one hand, the very reasons why Belgium became an independent State, and, on the other hand, the reasons why it still exists, after surviving several linguistic and ideological tensions.<sup>85</sup>

The first set of aspects may be less significant than the second one, because of the long time passed since 1831 and the evolutionary interpretations of many of the constitutional provisions which were framed as a reaction against the Dutch King Willem I's reign. Nevertheless, this historical background still explains why the Belgian Constitution puts so much emphasis on the legality principle, requiring the intervention of a democratically elected legislature in several matters, such as limitations to human rights. It also explains why several human rights which were systematically ignored by the Dutch King Willem I between 1815 and 1830, benefit from a more extensive protection by the Belgian Constitution than analogous human rights in the Convention and the Charter (e.g. the freedom of education, the freedom of religion and the freedom of the press).<sup>86</sup>

The second set of aspects reveals another particularity of the Belgian polity, i.e. its talent for reaching compromises.<sup>87</sup> The Belgian history shows several examples of bipolar oppositions, such as the ideological opposition between Catholics, on the one hand, and Socialists and Liberals, on the other hand, culminating in the 'School Issues', which were resolved by the

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<sup>84</sup> H. DUMONT, "L'intégration européenne et le respect de l'identité nationale des états (notamment fédéraux)", in E. VANDENBOSSCHE and S. VAN DROOGHENBROECK (eds.), *Europese voorschriften en Staatshervorming / Contraintes européennes et réforme de l'Etat*, Bruges, die Keure, 2013, 55, who limits this ambit to "ce qui fait qu'un État est lui-même et non un autre, ce qui permet de le reconnaître et de le distinguer des autres".

<sup>85</sup> W. VERRIJDT, *o.c.*, no. 43.

<sup>86</sup> See, on the historical links between the Dutch Constitution of 1815 and the Belgian Constitution of 1831, A. ALEN, D. HEIRBAUT, A.W. HERINGA and C. ROTTEVEEL MANSVELD (eds.), *De Grondwet van het Verenigd Koninkrijk der Nederlanden van 1815. Staatkundige en historische beschouwingen uit België en Nederland*, The Hague / Bruges, Boom / die Keure, 2016 (to be published).

<sup>87</sup> For more details, see A. ALEN, D. HALJAN, P. PEETERS and S. FEYEN (eds.), *International Encyclopaedia of Constitutional Law – Belgium*, Alphen aan den Rijn, Kluwer Law International, 2013, nos. 425, 456-458 and 484.

*School Pact* in 1958,<sup>88</sup> and the linguistic opposition between Flemish and Walloons, starting as soon as the 1840's, cumulating in violent student protests in 1968 and eventually leading to Belgium's transformation into a federal state *sui generis*. Arguably, these fundamental compromises, which were reached after difficult negotiations, and every single aspect of equal importance to the pacifying compromise, are part of Belgium's "*fundamental structures, political and constitutional*", because they have resolved deeply rooted crises. If some elements of a delicate compromise would perish, the whole equilibrium could be lost.

Therefore, the basic choices made during Belgium's federalisation process can be considered to be part of its national identity.<sup>89</sup> In that respect, the fundamental choices for territorial federalism, the rule of linguistic parity, and the specific linguistic regulations<sup>90</sup> are relevant. The specific choices, typical for Belgian federalism, regarding the operation of participative and cooperative federalism can also be mentioned in this context.<sup>91</sup>

**22.** Another interesting question is whether the constitutional catalogues of human rights are part of the national identity, or at least if they remain valid as "a shield" against secondary EU law insofar as they offer a more extensive human rights protection than the Charter. In Belgium, several constitutional rights which still offer a more extensive protection than the Charter and the Convention, are indeed the result of Belgium's specific historical context (see no. 21).

According to the ECJ's interpretation of Article 53 of the Charter, the national constitutions may, however, not offer such a protection against acts of secondary EU law and their national implementation, because that would jeopardize the "primacy, unity and effectiveness" of EU

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<sup>88</sup> The essential aspects of this School Pact, regarding the active and passive freedom of education and its financing, were anchored in Article 24 of the Constitution in 1988 and the Constitutional Court was empowered to review the compliance of legislation with this new Article 24.

<sup>89</sup> E. CLOOTS, "Europese integratie en de eerbiediging van de nationale identiteit van de lidstaten", in E. VANDENBOSSCHE and S. VAN DROOGHENBROECK (eds.), *o.c.*, 25-26. This author includes the choice whether or not to grant regional authorities a degree of political autonomy, the choice to become a federal State, the circumscription of the federated entities, the definition of their legislative powers, as well as their applicability *ratione personae* and *ratione materiae*, and the organs competent for exercising these powers and for safeguarding the division of competences.

<sup>90</sup> In its *Las* judgment, the ECJ has acknowledged that the protection of the official language of a federated entity is part of Belgium's national identity, but it has nevertheless stated that a Flemish Community Act requiring the contracts between employers and employees to be in Dutch, regardless their own language, went too far (ECJ 16 April 2013, *Las*, C-202/11, par. 26).

<sup>91</sup> H. DUMONT, *o.c.*, 66.

law.<sup>92</sup> This interpretation by the ECJ is criticized because it seems to contradict the very wording of that provision, to jeopardize the level of human rights protection offered by the national constitutions and to lead to the emergence of two different levels of human rights protection, depending on the applicability of EU law. This danger, and the legal uncertainty it would bring along, can only be contained by a strong dialogue between the ECJ and the national constitutional courts, and by a stronger reasoning of the ECJ's judgments, which also takes into account national constitutional interests.<sup>93</sup>

A judgment of the German *Bundesverfassungsgericht* dated 15 December 2015 shows the potential of linking the principle of national identity with the constitutional human rights catalogue. In that judgment, the *Bundesverfassungsgericht* explained that it will protect fundamental rights as part of identity review in *Verfassungsbeschwerde* proceedings.<sup>94</sup> Such a reasoning seems to imply that, if the *Grundgesetz* offers a wider protection than the Charter, the *Melloni* judgment is *de facto* set aside. It should, however, be noted that the *Bundesverfassungsgericht* will exercise this competence with restraint, with an open mind to European integration, and after a preliminary dialogue with the ECJ.

As the Belgian Constitutional Court has not yet defined the scope of the Belgian national identity (see no. 21), it is unclear whether it would circumvent the *Melloni* judgment using this technique.

**23.** In the ECJ's view, the monopoly for the review of secondary EU law resides in the Luxembourg Court,<sup>95</sup> and includes the national identity review in light of Article 4.2 TEU.<sup>96</sup> In this view, there is no room for national identity review by constitutional courts. Nevertheless, several constitutional courts have already acknowledged that they would

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<sup>92</sup> ECJ 26 February 2013, *Melloni*, C-399/11, par. 60. See par. 58: "That interpretation of Article 53 of the Charter [giving to a Member State to apply the standard of protection of fundamental rights guaranteed by its constitution when that standard is higher than that deriving from the Charter] would undermine the principle of the primacy of EU law inasmuch as it would allow a Member State to disapply EU legal rules which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State's constitution".

<sup>93</sup> A. ALEN, *o.c.*, 36-38; J. KOMAREK, "The place of national constitutional courts in the EU", *ECLR* 2013, 433.

<sup>94</sup> BVerfG 15 December 2015, 2 BvR 2735/14 (see no. 20).

<sup>95</sup> ECJ 22 October 1987, *Foto-Frost*, C-314/85; ECJ 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10.

<sup>96</sup> ECJ 14 October 2004, *Omega Spielhallen- und Automatenaufstellungs- GmbH t. Oberbürgermeisterin der Bundesstadt Bonn*, C-36/02; ECJ 22 December 2010, *Ilonka Sayn-Wittgenstein*, C-208/09.

declare obligations of secondary EU law inapplicable if they would run counter to elements of national identity.<sup>97</sup>

The case law of these constitutional courts shows that the EU's perspective of national identity does not stand alone, but should be balanced with the national perspective on the same principle.<sup>98</sup> According to some authors, the ECJ is not very well placed to determine, for each Member State, which aspects of its national constitution relate to its national identity.<sup>99</sup> A genuine dialogue between the national constitutional courts and the ECJ is therefore called for whenever an element of national identity is in play.

**24.** The Belgian Constitutional Court's practice shows that it does not avoid dialogue with the ECJ (see no. 17). In principle, the Belgian Constitutional Court will respect the precedence of EU law, and it will only examine the constitutionality of Acts transposing norms of secondary EU law insofar as they leave the legislature a free choice of means.<sup>100</sup> If the validity of a norm of secondary EU law is challenged before the Constitutional Court, it will refer the case to the ECJ for a preliminary ruling.<sup>101</sup>

An interesting example of this practice concerns the *Test-Achats* case. The Belgian consumer protection organization, which did not have standing before the ECJ in order to challenge a directive provision allowing the national legislatures to distinguish between men and women for the height of life insurance premiums, challenged the Act transposing that possibility before the Constitutional Court. The petition for annulment was based on the principle of equality and non-discrimination laid down in the Belgian Constitution, but the Constitutional Court referred the case to the ECJ for a preliminary ruling on the directive's respect for the

<sup>97</sup> E.g. BVerfG 6 July 2010, 2 BvR 2661/06, *Honeywell* (Germany); CC n° 2006-540, 27 July 2006, *Droit d'auteur*; CC n° 2010-79 QPC, 17 December 2010, *Kamel Daoudi* (France); comp. with a direct constitutionality review of secondary EU law by the Polish Constitutional Court (SK 45/09, 16 November 2011). The Czech Constitutional Court has already declared a norm of secondary EU law inapplicable after an ultra vires review (Pl. ÚS 5/12, 14 February 2012). See also the recent decision of the Bundesverfassungsgericht in the *Gauweiler* case, in which the OMT mechanism was only held to be consistent with the German Constitution provided some restrictive interpretations (BVerfG 21 June 2016, 2 BvR 2728/13; see no. 20).

<sup>98</sup> R. ARNOLD, "The Federal Constitutional Court of Germany in the context of European integration", in P. POPELIER, C. VAN DE HEYNING and P. VAN NUFFEL (eds.), *Human Rights Protection in the European legal order: the interaction between the European and the national courts*, Antwerp, Intersentia, 2011, 252-253.

<sup>99</sup> L. BESSELINK, "National and constitutional identity before and after Lisbon", *Utrecht Law Review* 2010, 45.

<sup>100</sup> CC no. 59/2014, 3 April 2014; no. 144/2014, 9 October 2014.

<sup>101</sup> Validity questions to the ECJ have been referred in the following eight cases: CC no. 124/2005, 13 July 2005 (*European Arrest Warrant*); no. 126/2005, 13 July 2005 (*Money Laundering*); no. 103/2009, 18 June 2009 (*Services Directive*); no. 128/2009, 24 July 2009 (*European Arrest Warrant*); no. 116/2012, 10 October 2012 (*Directive 95/46*); no. 172/2013, 19 December 2013 (*Universal Services Directive*); no. 165/2014, 13 November 2014 (*VAT Directive*); no. 15/2015, 5 February 2015 (*Commission decisions*).

principle of equality laid down in EU law.<sup>102</sup> The ECJ found a violation of this principle and ruled the directive's provision was invalid.<sup>103</sup> Subsequently, the Constitutional Court annulled the Belgian transposition, by merely copying the reasoning on the merits from the ECJ's judgment.<sup>104</sup>

**25.** The Belgian Constitutional Court thus subscribes to the principle of sincere cooperation with the European Union. Ensuring the full effect of EU law accords with upholding the rule of law. Nevertheless, ensuring human rights is an even more compelling feature of the rule of law. If both principles run counter to each other, the Constitutional Court is likely to use all existing techniques of judicial dialogue in order to avoid problems, but it has suggested that it will take the rule of law into account.

*b. EU law and the European Convention on Human Rights*

**26.** European constitutional pluralism is not limited to national constitutions and EU law, but also comprises the Convention, which must also be interpreted and applied according to a principle of full effect.<sup>105</sup> Problems may arise when EU law's principle of full effect conflicts with the Convention's principle of full effect.<sup>106</sup>

From the ECtHR's perspective, the Convention sets minimum standards of protection, which must be met by all Member States, even if their constitutions or other treaty obligations grant a lower threshold of protection. A Member State cannot set aside these obligations simply by referring to its other international and supranational obligations,<sup>107</sup> including its obligations imposed by EU law. In the absence of the EU's formal accession to the Convention, the ECtHR lacks competence to directly review acts of secondary EU law against the Convention.<sup>108</sup> By contrast, the ECtHR indirectly reviews secondary EU law against the Convention by reviewing the Acts and decisions with which the Member States transpose and implement secondary EU law.<sup>109</sup> In its famous *Bosphorus* case, the ECtHR balanced the

<sup>102</sup> CC no. 103/2009, 18 June 2009.

<sup>103</sup> ECJ 1 March 2011, *Test-Achats*, C-236/09.

<sup>104</sup> CC no. 116/2011, 30 June 2011.

<sup>105</sup> ECtHR (GC) 7 February 2013, *Fabris v. France*, § 75.

<sup>106</sup> E.g. M. BOSSUYT and W. VERRIJDT, "The Full Effect of EU Law and of Constitutional Review in Belgium and France after the *Melki* Judgment", *EuConst* 2011, 383-387.

<sup>107</sup> E.g. ECtHR (GC) 12 September 2012, *Nada v. Switzerland*, §§ 196-198.

<sup>108</sup> ECtHR (GC) 18 February 1999, *Matthews v. United Kingdom*, §§ 32-35.

<sup>109</sup> ECtHR (GC) 15 November 1996, *Cantoni v. France*, § 30.

interests of human rights protection with the interests of European integration by accepting that, in principle, a lower standard of review applies if obligations of EU law are at stake. In such cases, it will presume that a Member State which implements an obligation of EU law, has respected its obligations under the Convention, but only insofar as the protection, “as regards both the substantive guarantees offered and the mechanisms controlling their observance”, offered by EU law is “equivalent” to the protection under the Convention. This presumption can, however, be rebutted if, in the circumstances of a particular case, it is considered that the protection of Convention rights was manifestly deficient.<sup>110</sup> A manifestly deficient protection exists, and the ECtHR’s ordinary review applies, if the national judge has failed to refer the case to the ECJ for a preliminary validity question.<sup>111</sup> Also, if the State’s action is not fully dictated by EU law, because the State organs had some discretionary power, the *Bosphorus* presumption does not apply where a State exercised State discretion.<sup>112</sup>

From the ECJ’s perspective, the Convention is not part of primary EU law and therefore not a formal review norm for secondary EU law. It only operates as a tool to interpret the human rights which are part of primary EU law because they are laid down in the Charter or because they are general principles of EU law. The normative value of the Convention is nevertheless strengthened by Article 52.3 of the Charter, which requires that the meaning and scope of Charter rights which correspond to Convention rights, shall be the same as those laid down by the Convention,<sup>113</sup> provided the EU’s possibility to grant a more extensive protection. This provision articulates the EU’s dimension of the faith put in the EU’s human rights protection by the ECtHR in the *Bosphorus* judgment. The ECJ’s jurisprudence, by contrast, does not articulate a principle of equivalent protection towards the Convention system.<sup>114</sup> Given the ECJ’s strong attachment to the principle of the unity of EU law, it reserves the monopoly for examining the validity of secondary EU law<sup>115</sup> and does not allow the national judges to set aside secondary EU law or its national transposition for violating the Convention. The Opinion on the accession of the EU to the Convention additionally makes clear that the ECJ does not accept an exterior control by the ECtHR either.<sup>116</sup>

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<sup>110</sup> ECtHR (GC) 30 June 2005, *Bosphorus v. Ireland*, §§ 152-158.

<sup>111</sup> ECtHR 6 December 2012, *Michaud v. France*, §§ 112-115.

<sup>112</sup> ECtHR (GC) 21 January 2011, *M.S.S. v. Belgium and Greece*, §§ 338-340.

<sup>113</sup> This includes the ECtHR’s interpretation of these Convention rights (Explanations relating to the Charter of Fundamental Rights, 2007/C-303/02, *OJ* 14 December 2007, C-303/32-35).

<sup>114</sup> G. ROSOUX, *Vers une “dématérialisation” des droits fondamentaux?*, Brussels, Bruylant, 2015, 777.

<sup>115</sup> ECJ 22 October 1987, *Foto-Frost*, C-314/85; ECJ 22 June 2010, *Melki and Abdeli*, C-188/10 and C-189/10.

<sup>116</sup> ECJ 18 December 2014, *Opinion no. 2/13 on the Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*.



**27.** In this context, the question arises what approach the national constitutional courts should follow when reviewing an Act transposing or implementing an obligation of secondary EU law which runs counter to the Convention, as interpreted by the ECtHR, whereas that norm of secondary EU law does not run counter to the Charter, as interpreted by the ECJ.<sup>117</sup>

**28.** The tension increases if the ECJ does not fully implement the interpretation given by the ECtHR to Convention rights which are analogous to Charter rights.<sup>118</sup> In its *Åkerberg Fransson* case, for example, the ECJ did not follow - and did not even mention - the ECtHR's case law concerning the *ne bis in idem* principle.<sup>119</sup> In this case, the ECJ noted "*that Article 50 of the Charter does not preclude a Member State from imposing, for the same acts of non-compliance [...], a combination of tax penalties and criminal penalties. In order to ensure that all VAT revenue is collected and, in so doing, that the financial interests of the European Union are protected, the Member States have freedom to choose the applicable penalties [...]. These penalties may therefore take the form of administrative penalties, criminal penalties or a combination of the two. [...]*". It then left it "*for the referring court to determine, [...], whether the combining of tax penalties and criminal penalties that is provided for by national law should be examined in relation to the national standards [...], which could lead it, as the case may be, to regard their combination as contrary to those standards, as long as the remaining penalties are effective, proportionate and dissuasive*".<sup>120</sup> The Strasbourg case law does not provide for an exception to the *ne bis in idem* rule.<sup>121</sup>

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<sup>117</sup> The answer to this question would be a lot easier if the EU would accede the Convention itself.

<sup>118</sup> See the examples mentioned by J. CALLEWAERT, "Leur sens et leur portée sont les mêmes. Quelques réflexions sur l'article 52, § 3 de la Charte des droits fondamentaux de l'Union européenne", *Journal des Tribunaux* 2012, 596.

<sup>119</sup> The Explanations relating to the Charter of Fundamental Rights nevertheless explicitly mention Article 50 of the Charter and Article 4 of the Seventh Protocol to the Convention to have the same meaning and scope. The protection in EU law should even be more extensive, as all jurisdictions in all Member States are concerned.

<sup>120</sup> ECJ 26 February 2013, *Åkerberg Fransson*, C-617/10, par. 34 and par. 36. The Advocate General's conclusion (par. 71-74) indicates that the Court's not mentioning the ECtHR's case law might be explained by the fact that not all Member States have ratified the Seventh Protocol and other Member States have lodged reservations or declarations to Article 4 of Protocol no. 7, restricting its application to criminal offences. This lack of agreement between the Member States explains why Member States are – as opposed to the *Melloni* judgment pronounced the same day – free to apply higher standards of fundamental rights protection (K. LENAERTS, "Human rights protection through judicial dialogue between national constitutional courts and the European Court of Justice", in A. ALEN, V. JOOSTEN, R. LEYSEN and W. VERRIJDT (eds.), *Liberae cogitationes. Liber amicorum Marc Bossuyt*, Antwerp, Intersentia, 2013, 376-377.

<sup>121</sup> In fact, Sweden was condemned by the ECtHR in a very similar case posterior to the ECJ's *Åkerberg Fransson* judgment (ECtHR 27 November 2014, *Lucky Dev v. Sweden*, § 62).

The Belgian Constitutional Court was confronted with this divergent case law when adjudicating an action for annulment against an Act allowing the Public Prosecution's Office and the tax administration to decide between them whether a tax offence would be prosecuted criminally or administratively. A punitive prosecution remained possible after an administrative fine was imposed for the same facts, albeit that the administrative fine could not be enforced as long as the criminal prosecution was pending and that it was lifted when the suspect was referred to the trial judge. The Constitutional Court annulled this possible double jeopardy, without referring to the ECJ's *Åkerberg Fransson* judgment,<sup>122</sup> which might allow such procedures, while only referring to the stricter ECtHR jurisprudence, which disallows any double jeopardy.<sup>123</sup>

The Constitutional Court thus applied the principle of the most extensive protection. According to an author, the Constitutional Court has implicitly acknowledged that Article 4 of the Seventh Protocol and Article 50 of the Charter offer an equivalent protection, as referred to in Article 52.3 of the Charter, by mentioning both treaty provisions, while only referring to the ECtHR's case law.<sup>124</sup> It must be noted, however, that this case did not fall under the ambit of EU law.

**29.** When EU law is applicable, the Belgian Constitutional Court engages in a preliminary dialogue with the ECJ.<sup>125</sup> This dialogue causes the procedural limb of the *Bosphorus* presumption to apply, so that the ECtHR will subsequently apply its deferential approach (see no. 26). Therefore, even if the ECJ does not find a violation and the Constitutional Court would limit itself to implementing the ECJ's judgment, there is only little risk of the ECtHR finding a violation in a subsequent judgment. Nevertheless, at least one case indicates that the Belgian Constitutional Court does not limit its subsequent review to a mere implementation of the ECJ's judgment.

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<sup>122</sup> It did, however, not disregard the possible applicability of EU law, and it did mention the existence of Article 50 of the Charter.

<sup>123</sup> CC no. 61/2014, 3 April 2014, referring to Article 4 of the Seventh Protocol to the Convention, which came into force in Belgium on 1 July 2012, and to ECtHR (GC) 10 February 2009, *Zolotukhin v. Russia*, § 82; ECtHR 16 June 2009, *Ruotsalainen v. Finland*, § 56.

<sup>124</sup> G. ROSOUX, *o.c.*, 792.

<sup>125</sup> CC no. 126/2005, 13 July 2005; CC no. 165/2014, 13 November 2014. Implicitly, by only referring to Article 6 TEU without specifying the relevant Convention rights: CC no. 124/2005, 13 July 2005.

This case concerned the second Money Laundering Directive,<sup>126</sup> the transposing Act of which was challenged before the Constitutional Court, mainly because of a violation of the Articles 6 and 8 of the Convention. The Court had sent this case to the ECJ for a preliminary ruling on whether the Money Laundering Directive violates Article 6 of the Convention (and thus Article 6 TEU) insofar as it extends the duty to report suspect transactions to lawyers.<sup>127</sup> The ECJ found no violation of the right to a fair trial,<sup>128</sup> but subsequently, the Constitutional Court did require the legal provisions transposing the Money Laundering Directive to be interpreted in conformity with Article 8 of the Convention.<sup>129</sup> If the Constitutional Court would have simply applied the logic of the primacy of EU law, it should either have implemented the ECJ's judgment, finding no violation, or have referred the same case to the ECJ again for a preliminary ruling on the directive's compliance with Article 8 of the Convention.

The Constitutional Court thus offered a more extensive human rights protection than the ECJ,<sup>130</sup> which had not followed the conclusion of its Advocate-General, who had also mentioned potential problems under Article 8 of the Convention.<sup>131</sup> The Constitutional Court's approach was later upheld by the ECtHR in its famous *Michaud* judgment.<sup>132</sup>

**30.** The Constitutional Court attaches a great importance to the full effect of EU law when conducting its review of legislative provisions against the Convention. It refers both to ECJ and ECtHR case law when interpreting the human rights laid down in the Belgian Constitution, and engages in an active dialogue with the ECJ for further clarifications. Irrespective, its practice shows that it applies the principle of the most extensive human rights protection.

### *c. Conclusion*

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<sup>126</sup> Directive 2001/97/EC of the European Parliament and of the Council of 4 December 2001 amending Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering.

<sup>127</sup> CC no. 126/2005, 13 July 2005.

<sup>128</sup> ECJ 26 June 2007, *Ordre des barreaux francophones et germanophone and Others v Conseil des ministres (belge)*, C-305/05.

<sup>129</sup> CC no. 10/2008, 23 January 2008. According to the Constitutional Court, the only interpretation which respects Article 8 of the Convention requires that the information the lawyer receives during a confident discussion with his client, whether or not in the course of legal representation, is protected by professional secrecy.

<sup>130</sup> E. CLOOTS, "Het Grondwettelijk Hof en de toetsing van secundair Unierecht aan fundamentele rechten", in A. ALEN and J. VAN NIEUWENHOVE (eds.), *Leuvense Staatsrechtelijke Standpunten 1*, Bruges, die Keure, 2008, 28-33.

<sup>131</sup> Concl. Adv.-Gen. Poiares Maduro, 14 december 2006, C-305/05, par. 41.

<sup>132</sup> ECtHR 6 December 2012, *Michaud v. France*, §§ 126-131.

**31.** In any State governed by the rule of law, human rights are the highest norms and they must be respected by all State organs, including all judges. The existence of many overlapping human rights documents, both national and supranational, should only lead to a more extensive protection, but in reality, they often lead to confusion, as the human rights' interpretation and application might differ between national and supranational constitutional judges. The Constitutional Court systematically aims at providing legal certainty in this field, and at avoiding judgments by the ECtHR and the ECJ finding a violation, by interpreting the human rights laid down in the Belgian Constitution in light of the interpretation of the Convention and the Charter by the ECtHR and the ECJ. When the scope of analogous human rights differs, the Constitutional Court is likely to choose for the most extensive human rights protection.

## ***2. The fight against terrorism***

**32.** Fundamental rule of law principles such as human rights can come under threat after shocking societal events, the most relevant contemporary example of which are terrorist attacks. Terrorism is directly and indirectly linked to human rights: directly, as terrorist attacks aim to cause death and severe bodily harm, and indirectly, when a State's response to terrorism leads to the adoption of policies and practices which limit human rights.<sup>133</sup> While under the legal obligation to combat terrorism, States also remain under the obligation to respect the boundaries set by human rights law.

Terrorist threats often spark new legislation, which is likely to be brought before the Constitutional Court. The Court's task is then to find a proper balance between combatting those who threaten the very foundations of the Western European society and preserving the rule of law, which is one of these foundations. The Convention plays an important role in this regard, because, on the one hand, the Constitutional Court's human rights jurisprudence is always guided by the existing ECtHR case law (see no. 4), but also because the ECtHR can be called upon to examine, in individual cases, the conformity of the Constitutional Court's

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<sup>133</sup> Special UN Rapporteur K. KOUFA, "Terrorism and Human Rights", UN Doc. E/CN.4/Sub.2/1999/27; UN Doc. E/CN.4/Sub.2/2001/31; UN Doc. E/CN.4/Sub.2/2002/35.

judgments with the Convention. Before addressing these standards, two preliminary remarks must be made.

**33.** It should first be noted that, contrary to many national constitutions, the Belgian Constitution does not contain an emergency clause. Article 187 of the Constitution even provides for the opposite: “*The Constitution cannot be wholly or partially suspended*”. This shows that Belgium has a peacetime Constitution, drafted from the point of view of a country which was to remain neutral in any conflict.<sup>134</sup> Moreover, this provision’s aim was avoiding *coups d’état*, and is historically linked to the turmoil in France in July 1830. This provision implies that the constitutional rights, as interpreted in the light of the Convention, fully apply in the review of counter-terrorism measures.

Given this constitutional provision, one might wonder whether the Belgian authorities are entitled to declare the state of emergency under Article 15 of the Convention. As the human rights laid down in the Belgian Constitution are inextricably linked to the human rights laid down in the Convention (see no. 4), every derogation to (some of) the rights laid down in the Convention implies a partial suspension of the Constitution. Article 187 of the Constitution can thus be seen as offering a more extensive human rights protection than Article 15 of the Convention.

**34.** Secondly, it has been contended in the European<sup>135</sup> literature that balancing models of human rights adjudication offer a better equilibrium between national security and human rights protection, compared to categorization models.<sup>136</sup> Balancing offers the judge the possibility to outweigh all relevant stakes, both public and private, whereas categorization uses clearly defined categories. The human rights review operated by the Constitutional Court mainly follows the balancing model, apart from its review against absolute human rights, which do not allow for limitations.

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<sup>134</sup> W.J. GANSHOF VAN DER MEERSCH, “De schorsing van de vrijheidsrechten in uitzonderingstoestand”, *Preadviezen voor de Vereniging voor vergelijkende studie van het recht in België en Nederland*, Zwolle, Tjeenk Willink, 1950, 13.

<sup>135</sup> American scholars rather believe that balancing models put too much emphasis on individual concerns and therefore give leeway to terrorists (e.g. L. TRIBE, *American Constitutional Law*, Westbury, Foundation Press, 1988, 794).

<sup>136</sup> S. SOTTIAUX, *Terrorism and the Limitation of Rights*, Oxford, Hart Publishing, 2008, 406.

**35.** The ECtHR has developed a massive jurisprudence regarding counter-terrorism measures.<sup>137</sup> This case law expresses three leading principles. The first one is that the ECtHR maintains the clear distinction between measures limiting the absolute human rights, i.e. the ones protected from derogation under Article 15 of the Convention, and the measures limiting other human rights. This distinction is more important than a formal notification of a state of emergency under Article 15 of the Convention, which does not significantly alter the Court's review.

The second principle is that a state of emergency does not allow the States to lower the threshold of the non-derogable rights. Nevertheless, even concerning these rights, the Court shows some understanding for the difficult circumstances under which the State authorities have to operate, and it therefore shows some leniency in its adjudication of whether the threshold has been reached. It has, for example, accepted the extradition of a terrorism suspect to a non-Convention country, based on mere diplomatic assurances that he would not be subjected to torture.<sup>138</sup> It has also accepted the solitary confinement for eight years of an extremely dangerous terrorist.<sup>139</sup> In a case concerning the siege in a Moscow theatre by Chechen separatists, it did not find a violation of the right to life, although the Russian authorities ended the hostage crisis with several casualties.<sup>140</sup> Nevertheless, the Court has clearly reaffirmed that the scope of application of non-derogable rights does encompass measures of counter-terrorism and it does not hesitate to find a violation of these rights, even in a terrorist context.<sup>141</sup>

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<sup>137</sup> See F. BERNARD, "La Cour européenne des droits de l'homme et la lutte contre le terrorisme", *RTDH* 2016, 43-59; S. KOWALSKA, "Human Rights Protection and Terrorism - Reflections in the Context of Strasbourg Jurisprudence", *Politické vedy* 2015, 25-42; J.P. LOOF, *Mensenrechten en staatsveiligheid: verenigbare grootheden?*, Nijmegen, Wolf Legal Publishers, 2005; L.-A. SICILIANOS, "The European Court of Human Rights at a Time of Crisis in Europe", *EHRLR* 2016, 121-135; S. SOTTIAUX, *o.c.*, 67-321; F. VANNESTE, "Het Europese Hof voor de Rechten van de Mens en de overheden die terrorisme bestrijden: brothers in arms?", *RW* 2003-2004, 1665-1677. See also the Factsheet "Terrorism and the European Convention on Human Rights", established by the Press Unit of the European Court of Human Rights, [www.echr.coe.int/Documents/FS\\_Terrorism\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Terrorism_ENG.pdf).

<sup>138</sup> ECtHR 17 January 2012, *Othman (Abu Qatada) v. United Kingdom*, §§ 192-204.

<sup>139</sup> ECtHR (GC) 4 July 2006, *Ramirez Sanchez v. France*, §§ 136-150.

<sup>140</sup> ECtHR 20 December 2011, *Finogenov and others v. Russia*, §§ 217-262.

<sup>141</sup> E.g. ECtHR (GC) 28 February 2008, *Saadi v. Italy*, § 138; ECtHR (GC) 19 February 2009, *A. and others v. United Kingdom*, § 126; ECtHR 31 January 2012, *M.S. v. Belgium*, § 126; ECtHR (GC) 13 December 2012, *El-Masri v. FYROM*, § 195; ECtHR 4 September 2014, *Trabelsi v. Belgium*, § 118: "However, none of these factors have any effect on the absolute nature of Article 3. As the Court has affirmed on several occasions, this rule brooks no exception. [...] that it is not possible to make the activities of the individual in question, however undesirable or dangerous, a material consideration or to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of the State is engaged under Article 3".

The third principle is that the Court shows a large degree of leniency towards limitations to the derogable rights in a terrorist context, granting the Member States a very broad margin of appreciation.

Such measures must still be directly relevant for the goal pursued.<sup>142</sup> But relevant measures are virtually always accepted,<sup>143</sup> without a thorough review on the merits, provided that all individual applications of such measures must be subjected to the control of an independent judge. This ‘*proceduralisation*’ approach, which aims to prevent abuses of legislation which is in itself necessary for combatting terrorism, applies to techniques of infiltration, telephone tapping, access to classified files, etc.<sup>144</sup>

**36.** The Belgian Constitutional Court’s case law concerning counter-terrorism measures is guided by the same principles. The case law about non-derogable rights is limited to cases involving Article 7 of the Convention. In a case in which a retrospective criminal indictment<sup>145</sup> was enacted in order to prosecute one suspected terrorist who had allegedly committed terrorist crimes in Turkey, but resided in Belgium, the Constitutional Court made clear that the non-derogable rights fully apply in terrorism cases. In a very short reasoning, it noted that Article 7 of the Convention prohibits retroactive criminal indictments to the detriment of suspected offenders, and therefore annulled this provision,<sup>146</sup> without examining whether the principle of non-retroactivity should be applied more leniently in terrorism-related cases.

Concerning the *lex certa* principle, which leaves a bit more manoeuvring room than the prohibition on retroactivity, the Constitutional Court did show some understanding for the

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<sup>142</sup> ECtHR 2 December 2014, *Güler and Ugur v. Turkey*, § 53: “*laws against terrorism should not be used as a pretext to limit legitimate religious activity*”.

<sup>143</sup> E.g. an administrative fine for a cartoon which seemed to approve the 9/11 attacks (ECtHR 2 October 2008, *Leroy v. France*, §§ 43-46), the dissolution of a political party (ECtHR 30 June 2009, *Herri Batasuna and Batasuna v. Spain*, §§ 85-91).

<sup>144</sup> ECtHR 6 September 1978, *Klass and others v. Germany*, § 56 (in that case, the review was performed by the Bundestag, instead of by a judge); ECtHR 24 April 1990, *Kruslin v. France*, § 34; ECtHR 15 June 1992, *Lüdi v. Switzerland*, § 38; ECtHR 26 May 1993, *Brannigan and McBride v. United Kingdom*, § 61-65; ECtHR 18 May 2010, *Kennedy v. United Kingdom*, § 167; ECtHR (GC) 12 September 2012, *Nada v. Switzerland*, § 212.

<sup>145</sup> A legal provision extended the Belgian criminal courts’ jurisdiction to terrorist crimes committed by a foreigner outside Belgium, if that foreigner could be found in Belgium. At first, that provision was only applicable to acts committed after its entry into force, but in order to secure the prosecution of one alleged terrorist, the legislator subsequently granted it an immediate effect in ongoing procedures. The Constitutional Court qualified this extension of jurisdiction as a rule of material criminal law, because it allowed for the prosecution of persons who could not be prosecuted before this rule’s enactment.

<sup>146</sup> CC no. 73/2005, 20 April 2005, B.8.

difficult circumstances under which the State authorities have to operate when combatting terrorism. Its prior case law concerning the *lex certa* principle had been very strict, but the Constitutional Court changed its course when it had to apply this very same principle in a terrorism-related case. Referring to the ECtHR's case law,<sup>147</sup> it ruled that the *lex certa* principle does not prohibit the legislature to grant a certain margin of appreciation to the judge, because of the general character of legislation, its applicability to a wide variety of cases and the evolution of the acts they aim to sanction.<sup>148</sup> The Court therefore accepted the rather vague definition of a “*terrorist crime*”, considering that only a specific intention to commit an act of terrorism could be sanctioned under this heading. This lenient approach has continued to apply, both in terrorism-related cases<sup>149</sup> and in unrelated cases.<sup>150</sup>

**37.** The Constitutional Court's case law concerning derogable rights reflects both the broad margin of appreciation offered by the ECtHR and the tendency towards proceduralisation.

The most notable example concerns the extension of the techniques allowed for the intelligence services to exercise their missions.<sup>151</sup> The Constitutional Court accepted these new techniques, because they aimed to cope with elevated security risks and new techniques used by those threatening the security of the State. The Court even accepted the keeping of secret surveillance records concerning all persons of interest. Nevertheless, it did require that once the Executive Commission had ruled that the secrecy of a given file was no longer necessary, the person concerned must automatically be notified of the surveillance record's existence, allowing him to exercise his procedural rights.

**38.** The greater latitude for the legislature in terrorism-related cases is also reflected in the Court's judgments concerning special techniques of investigation. In 2004, the Court ruled upon an action for annulment against legislation granting the criminal prosecutors a new set of techniques of investigation. As these techniques could be used in any criminal investigation, the judgment does not refer to terrorist threats. Applying the ECtHR's case law, the Court annulled some techniques which infringed upon the right to privacy, such as the

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<sup>147</sup> ECtHR 25 May 1993, *Kokkinakis v. Greece*, §§ 40 and 52; ECtHR 22 November 1995, *S.W. v. United Kingdom*, § 36; ECtHR 15 November 1996, *Cantoni v. France*, §§ 29 and 31.

<sup>148</sup> CC no. 125/2005, 13 July 2005, B.6.2.

<sup>149</sup> CC no. 122/2014, 19 September 2014 (“*membership of a terrorist organization*”); CC no. 9/2015, 28 January 2015 (“*incitement to terrorist activities*”, “*recruiting terrorists*”, “*training terrorists*”).

<sup>150</sup> E.g. CC no. 110/2015, 17 September 2015 (“*plastic surgery*”); CC no. 72/2016, 25 May 2016 (“*sexism*”).

<sup>151</sup> CC no. 145/2011, 22 September 2011.



observation, or which could violate due process rights or spark discriminations, such as infiltrations and incitement by police officers. In addition, it ruled that the judicial control on the exercise of these special techniques did not suffice.<sup>152</sup>

In 2007, the Court had to rule upon a further extension of the special techniques of investigation with the specific aim of combatting terrorism, and the Court refers to this aim 13 times in its reasoning. In this case, the Constitutional Court applied a much more deferential approach, accepting all techniques of investigation - some of which were modified because of the Court's prior judgment - and only sanctioning the lack of independent judicial control of the classified parts of the case file.<sup>153</sup>

**39.** In terrorism-related cases, as in other cases, the Constitutional Court implements the relevant case law of the ECtHR and the ECJ. The most notable example is the Court's annulment<sup>154</sup> of the Act transposing the Data Retention Directive, in which its reasoning mainly consisted of a copy-paste of the ECJ's judgment invalidating that directive.<sup>155</sup>

**40.** The aforementioned judgments prove that the Belgian Constitutional Court, as does the ECtHR, does not consider the human rights discourse a strong obstacle for combatting terrorism, but rather a supplementary source of upholding the democratic values, drawing the borders in which the fight against terrorism is to be fought.<sup>156</sup> It takes into account the seriousness of terrorist threats and the complexity of combatting them, therefore granting the State organs a sufficient leeway to take appropriate measures, but not a blanket permission: absolute human rights remain absolute, whereas derogable human rights can only be limited provided the *ex post* control by an independent judge. In the same way as the ECtHR, the Constitutional Court therefore refuses to acknowledge the false dilemma between freedom and security, but rather requests the protection of both interests, which are both necessary aspects of the rule of law.<sup>157</sup> Indeed, one must bear in mind that the rule of law is not to be harmed, or even destroyed, for the sake of its protection.<sup>158</sup>

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<sup>152</sup> CC no. 202/2004, 21 December 2004.

<sup>153</sup> CC no. 105/2007, 19 July 2007.

<sup>154</sup> CC no. 84/2015, 11 June 2015.

<sup>155</sup> ECJ 8 April 2014, *Digital Rights Ireland Ltd.*, C-293/12 and C-594/12, *Kärntner Landesregierung and others*.

<sup>156</sup> F. VANNESTE, "Het Europese Hof voor de Rechten van de Mens en de overheden die terrorisme bestrijden: brothers in arms?", *RW* 2003-2004, 1665.

<sup>157</sup> L.-A. SICILIANOS, *o.c.*, 135.

<sup>158</sup> ECtHR 6 September 1978, *Klass and others v. Germany*, § 49.

## *Conclusion*

**41.** Although the Belgian Constitutional Court was originally only conceived as an arbiter of the legislative competences of the federal level and the federated entities, later extensions of its competences, as well as its own jurisprudence, have established it as an important player in the field of upholding the rule of law. It takes this task very seriously, by protecting the rule of law against challenges of a sometimes very different nature.