The Struggle Concerning Interpretative Authority in the Context of Human Rights – The Belgian Experience [1]

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This chapter deals with Belgian experiences with conflicts relating to human rights and fundamental freedoms, and especially with conflicts between various norms containing such rights or limitations to such rights. The author discusses in general the relationship between domestic rules in general (statutes), the Constitution and international norms. He further argues that, due to the proliferation of human rights, many more conflicts between human rights arise and in most of those conflicts between human rights, the maximalisation principle does not work. In countries with strong constitutional guarantees of liberties, giving supremacy to international law does actually restrict these liberties, as can be seen in Belgium. The chapter further deals with possible wars between courts when the interpretative authority is fragmented over different courts.

Introductory remarks

(1) This Belgian report is dealing merely with some of the questions asked by the General Reporter, and does so probably even in an idiosyncratic way. Let me explain the two main reasons for this choice.

Firstly, as Belgium is a member state of the EU and the Council of Europe, many features of the law on human rights and their protection are not specifically Belgian, but common to the European countries. I will therefore limit my report basically to the elements that are more specifically dealing with Belgium, i.e. the position of international human rights instruments under Belgian (constitutional) law and the protection of fundamental rights under domestic law (including the Belgian federal Constitution).

Secondly, it is my personal opinion that most so-called human rights do indeed express universal human values, but that their specific form and content varies from period tot period and civilisation to civilisation. More precisely: the way these values, which are often conflicting, are balanced, will differ. This opinion is widely shared in Belgium, too; there are, however, certainly conflicting ideas as to the consequences of this opinion and related questions. Many of the conflicts relate to the question to know which persons or institutions have or should have, in a democratic polity, the

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[1] Belgian report at the XVIIIth International Congress of Comparative law, Washington D.C. 2010, Topic "Are human rights universal and binding?" (general reporter: Prof. Arnold). The original version is published in R. ARNOLD, *The Universalism of Human Rights*, series Ius Gentium: Comparative Perspectives on Law and Justice nr. 16, Springer 2012, ISBN 978-94-007-4509-4, Chapter 13, available at www.springerlink.com.

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authority to interpret these human rights, and in how far this involves margins of appreciation.

(2) A third introductory remark concerns the structure and position of the judiciary in the Belgian legal system. Generally speaking, Belgium has a unitary judicial system at the federal level (no regional courts, except some very specific administrative Tribunals) which is basically also a system of general courts with a possibility of appeal and in the end a recourse in "cassation" before the Court of cassation. These courts have the power of judicial review of administrative decisions and subordinate legislation in all respects (decentralised review, art. 159 Constitution[3]); they have no power to review the constitutionality of statutes (acts of parliaments), but have since long taken the power to review the conformity of statutes with international law (see infra). The review of the constitutionality of statutes was entrusted gradually (in steps, starting in 1980) to the Constitutional Court[4] (centralised review), which decides either on a direct recourse (only within 6 months of publication of a statute) or on a preliminary question of constitutionality raised in a lawsuit before a(nother) court.

A. The position of international public law in general

(3) Belgian courts, followed by a large majority of doctrine of scholars and by politicians, give supremacy over national law to any rule of international public law with direct effect. This priority of international law over national law is considered by most authors rather self-evident and a traditional characteristic of Belgian law, although it is not.

Let me first distinguish two questions: a) under which conditions international law is part of domestic law, and b) whether it has priority.

1. Monism

a) Approved treaties

(4) There is no doubt that international treaties that have been ratified and approved by the competent (federal or regional) parliament[5] are consequently part of domestic law, without any need of further implementation or incorporation, and that the rules contained in them basically have direct effect (as to this question of "direct effect", see *infra*). The Belgian system is monistic in that sense - which, however, does not exclude the constitutional review of the statute of assent (Act of parliamentary assent).

The main international treaties in the field of human rights have all been ratified by Belgium, including the European Convention on Human Rights and Fundamental Freedoms (ECHR) and most of the additional protocols, the UN Convention on civil

[3] An English translation of the Belgian Constitution can be found @ http://www.const-court.be/en/basic_text/basic_text_constitution.html.

[4] http://www.const-court.be/. The main rules on constitutional review can be found in the Constitutional Act of 6 January 1989 on the Constitutional court (as amended); an English translation of that Act can be found @ http://www.const-court.be/en/basic_text/basic_text_law_01.html.

[5] Approval is required by art. 167 Constitution before the Treaty forms part of domestic law.

and political rights, the UN Convention on social economic and cultural rights, the Convention against racism (with a reservation on freedom of speech), etc. By ratifying the Lisbon Treaty on the European Union, Belgium has also ratified the Charter of fundamental rights of the European Union. Their rules are thus as such part of domestic law.

Belgium has on the other hand not ratified the European Framework Convention on the Protection of national minorities, as important segments of Belgium fear that it may be contrary to our constitutional system; the Belgian federal system grants a protection to the national linguistic groups which in many respects goes much and much further than the Framework convention, especially by granting a large autonomy, but some rules in the Convention could be interpreted in such a way as to contradict some of the more fundamental building blocks which underpin this system of autonomy of the different national groups (basically the "territorial" character of autonomy, except in the bilingual capital region of Brussels).

b) Other rules of international law.

(5) Belgian law nowadays seems to admit that all rules of international public law binding upon Belgium are also part of domestic law – the so-called monistic doctrine, contrary to the dualistic doctrine accepted by many other countries.

In my view, this radical form of monism is partly the result of a misunderstanding. The basic decision to accept international law as part of domestic law is the decision in *Drecoll*, Hof van cassatie / Cour de cassation 25 January 1906:

"Attendu qu'à des degrés divers le Droit des Gens forme partie du Droit respectif des Nations;

Que ce principe est si vrai que Blackstone déclarait que la Loi des Nations, c'est-à-dire le Droit des Gens, quand il s'élève une question qui est de son ressort, doit, en Angleterre, être adopté dans toute sa plénitude par la loi commune et être regardé comme faisant partie de la loi du pays;

Que, de même, aux Etats-Unis le droit des Gens est considéré comme formant partie intégrante de la loi du pays, ainsi que l'attestaient déjà Thomas Jefferson et Daniel Webster, qui tous deux ont rempli des fonctions de secrétaire d'Etat;

Que la Cour suprême y a placé le droit des gens coutumier au même rang que le droit des gens conventionnel, et a proclamé que les Cours fédérales doivent respecter le droit des gens comme une partie du droit national;

Attendu que ce principe est également vrai en Belgique".

The principle that international law is part of domestic law was thus motivated by reference to English and American law, although it is rather doubtful that these systems are really monistic with regard to large parts of international public law. It is clear that the notion of international law as part of domestic law did not at all cover the field of what we call international public law today. What was accepted as

international law was not a different level of legal norms, but legal norms governing a different set of questions. It is only in that sense that international law did form part of domestic law in the UK and the US in 1906 (and even then the reference to Blackstone was erroneous[6]). The 1906 case was referring to the roman concept of *ius gentium*, being the rules applicable to foreigners, diplomats, relations between states, etc. but certainly not with human rights ! (and even less with domestic procedural law, family law, property law, succession law, personality rights, criminal law, administrative law, etc.). Insofar as those issues of an international nature were not governed by national statutes or ratified treaties, they were governed by a subsidiary transnational customary law called *ius gentium*. The subject matter even covered international private law rather than what is now called international public law. Further, the idea that those customary rules would have priority over (national) statutes was certainly not accepted.

Anyway, in the course of the 20th century, a general doctrine of monism has triumphed in Belgium: any rule that is binding upon Belgium in the international legal order forms part of domestic law (and has direct effect under the same conditions as national legal or constitutional provisions).

c) Direct and indirect effect

(6) When international public law forms part of domestic law (ratified treaties, international customary law), its rules have direct effect under the same conditions as any domestic rule. That depends on the formulation and content of the rule and not on its source or place in the hierarchy of norms. The question is basically the same question for international norms, for constitutional norms and for national statutes. When its wording is sufficiently clear and unconditional to be capable of application as such, without requiring a further rule implementing it, the rule will have direct effect. According to Belgian doctrine and case law, this is equally true for rules on human rights or other fundamental rights. The effect may differ from rule to rule within the same document. Thus, certain fundamental rights in the Belgian Constitution have direct effect and other not, and the same is true for rights in e.g. the UN Convention on civil and political rights.

(7) When the conditions for direct effect of a rule (whether a rule of international law, a constitutional provision, etc.) are not fulfilled, the rule nevertheless is part of the law and may have "indirect" effects. More specifically, it can and even has to be used in interpreting the rest of the law. Thus norms and reports of the World Health

[6] In his *Commentaries* , Blackstone wrote on the 1709 Act of Queen Anne (7 Anne cap. 12) concerning the immunity of foreign diplomats that "*In consequence of this statute thus declaring and enforcing the law of nations, these privileges are now held to be part of the law of the land*", which clearly means that these privileges became part of English law only by their incorporation by *statute* (comp. E.R. ADAIR, "The law of nations and the common law of England. A study of 7 Anne cap. 12", 2. *Cambridge Historical Journal* 1928, p. 290 v.). It is true that Lord Mansfield held the opposite opinion, namely that the *ius gentium* was part of English law even without statutory incorporation (in *Triquet v. Bath* (1764) 3 Burr. 1478).

Organization have frequently been used to interpret the applicable domestic health legislation[7].

(8) Remarkable is also the way in which the Constitutional Court refers to rules of international law, because that court has no authority to review the conformity of statutes with international law, but only their conformity with the constitution. Nevertheless, the court uses rules of international public law as a mode of interpretation of the constitution whenever the rule is essentially similar or dealing with the same matter – in practice, this concerns rules on fundamental rights and freedoms in international instruments such as the European Convention of Human Rights and the UN Conventions on human rights.

d) Interpretation

(9) Autonomous interpretation of international instruments is clearly a basic principle in Belgian law. This in itself does clearly not ensure a uniform interpretation. In those cases where an international Court is established with the authority to interpret an instrument, such as the ECtHR for the ECHR or the ECJ for the Charter of rights of the EU, the decisions of such Courts are deemed to have authority and are used frequently. This does not mean that the Belgian Courts will always follow them in practice; in a (small) minority of cases, the Belgian courts have refused to follow the case law of the ECtHR, usually not openly, but by giving that case law a very restrictive interpretation. Hot topics in this respect today are the extent of the right to be assisted by a lawyer during preliminary criminal investigations (doctrine of the *Salduz*-decision of the ECtHR 26 April 2007) and the rights to be granted to asylum seekers[8].

2. Priority over national law ?

a) In general

(10) As to the second point, the priority of rules of international origin over rules of national origin is a rather recent development. Even in 1966, the Hof van cassatie / Cour de cassation decided as to customary rules of public international law (not a ratified treaty):

Attendu que quelque éventuelle contradiction entre le droit interne (...) et les principes coutumiers du droit international public (...) qui gouvernent les relations

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[7] E.g. Cass. 1 October 1997, *Arr.Cass.* 1997, 378; Raad van State / Conseil d'Etat 10 July 2002, no. 109.145, *Bourdeaud'hui e.a,* http://www.raadvst-consetat.be/Arresten/109000/100/109145.pdf; Raad van State / Conseil d'Etat 25 October 2001, no. 100.331, *Coghe*, http://www.raadvst-consetat.be/Arresten/100000/300/100331.pdf;
Raad van State / Conseil d'Etat 17 September 1999, no. 82.291, *Mutualité libérale Centre-Charleroi-Mons*, http://www.raadvst-consetat.be/Arrets/82000/200/82291.pdf.

[8] See M. BOSSUYT, *Strasbourg et les demandeurs d'asile: des juges sur un terrain glissant,* Bruylant, 2010, 189 p. Marc BOSSUYT is the President of the Belgian Constitutional Court.

entre Etats, encore serait-il que ces derniers principes ne sauraient faire échec à l'application du premier.[9]

Clearly, customary rules of international public law were seen as legal rules applicable by default, i.e. as long as there is no statutory rule or other national rule of the same ranking setting them aside. They were applicable *praeter legem* and not *contra legem*.

(11) On 27 May 1971, the Hof van cassatie / Cour de cassation ruled in the case *Fromagerie Franco-Suisse Le Ski*[10]on a conflict between European Community law and a later domestic statute. In conformity with the doctrine of Community law and given the modification of the Belgian constitution in 1970[11], it rightly came to the conclusion that Community law (enacted within the limits of the powers attributed to the EC[12]) has priority over national statues, even of a later date.

(12) This decision is generally seen as confirming in general the priority of any rule out of the 'international legal order' over domestic law. Such a radical and far-reaching doctrine does not yet follow from that decision, but is certainly dominant today and was accepted by the Court of Cassation in more recent case law (s. infra). The 1971 decision already implies the priority of rules contained in ratified and approved treaties over domestic statutes; even this was all but evident, as the Court of cassation has consistently refused to accept a judicial review of the constitutionality of statutes[13]. Several authors have suspected "political" motives behind the case law, more precisely on the side of the French-speaking minority which has since the federal reform of the country in 1970 often tried to invoke arguments of international law (and more specifically human rights) against the new constitutional order established in 1970 (more specifically against the "territoriality" of linguistic rights)[14] and tried to convince domestic judges to give priority to their interpretation of human rights over the Belgian Constitution.

b) Priority of international law instruments over the Constitution?

(13) The position of the Belgian Hof van cassatie / Cour de cassation is even more extreme: the Court holds that international public law even has supremacy over the Constitution. The Constitution is in its case law thus no longer the supreme law of the land. The Belgian constitution making powers have thus lost their control over the contents of their own legal system – which is very questionable from the perspective of democracy. Did the Founders of the US not declare in the Declaration of Independence that one of the reasons for the revolution was that "(*he) has combined*

[9] Cass. 26 May 1966, *Pittacos, Pas.* 1966, I 1211.

[10] *Arr Cass* 1971, 959, concl. Procureur-Generaal W. Ganshof Van Der Meersch.

[11] Which allows transfers of power to international organisations.

[12] This was not disputed *in casu*.

[13] Since Cass. 23 juli 1849, *Pasicrisie* 1849, I p. 443. Since the Court lost part of its powers to the Constitutional Court, it seems to love the Constitution even less ...

[14] See the discussion by P. VERMEULEN in *Actualité du contrôle juridictionnel des lois, journées juridiques Jean Dabin*, Faculté de droit UCL, Larcier Brussel 1973, p. (554 ff.) 555 and 557 ff.

with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws; giving his Assent to their Acts of pretended Legislation". Would the same not apply today to most of our Courts?

(14) The Constitutional Court on the other hand has rightly accepted that it has authority to review the constitutionality of statutes of assent ratifying international treaties[15], which necessarily implies a judicial review of the content of the treaty[16]. This logically implies the supremacy of the Constitution over such treaties. In practice the Court will apply as far as possible a harmonious interpretation of both the Constitution and international law, but where really necessary, it will give priority to the Constitution[17].

(15) By Constitutional Statute of 9 March 2003 amending the Constitutional Court Statute of 1989, the legislator has restricted the judicial review by the Constitutional Court by excluding any review of statutes ratifying European Union treaties or the European Convention of Human Rights by way of preliminary ruling[18]. Since then, such statutes can only be reviewed within 60 days after their promulgation (for all statutes approving Treaties, the period is 60 days instead of 6 months, Art. 3 § 2). If, however, European Union institutions interpret a European treaty in an 'evolutionary' way, extending it beyond the original wording or intent[19], especially to an interpretation which goes against the Belgian constitution, there is no remedy. On the other hand, the modification of 2003 makes it clear that all treaties can be constitutionally reviewed by the Constitutional Court, and that there is no limitation period for a preliminary review for any other treaties than those mentioned, e.g. not other human rights treaties (even if the limitation period for an annulment is much shorter than for other statutes, 60 days instead of 6 months, Art. 3, 2 Constitutional Court Statute of 1989).

(16) According to Article 26 § 2 of the Constitutional Court Statute, the Hof van cassatie / Cour de cassation is obliged to suspend proceedings and ask a preliminary question to the Constitutional Court as to the constitutionality of a statutory provision whenever such a question is raised. The Hof van cassatie / Cour de cassation uses all possible tricks to circumvent this obligation. Thus, in some recent decisions, the excuse used was that the ECHR has priority over the Constitution; the Hof van

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[15] E.g. Const.C. no. 26/91, 16 October 1991, http://www.const-court.be/public/n/1991/1991-026n.pdf; no. 12/94, 3 February 1994, http://www.const-court.be/public/n/1994/1994-012n.pdf; no. 33/94, 26 April 1994, http://www.const-court.be/public/n/1994/1994-033n.pdf.

[16] Most recently: Const.C. no. 87/2010 of July 8, 2010, http://www.const-court.be/public/n/2010/2010-087n.pdf.

[17] E.g. Decision no. 10/2008 of 23 January 2008 concerning the restriction of the professional privilege of the independent lawyer by the Statute implementing the European rules on money laundering, see http://www.const-court.be/public/n/2008/2008-010n.pdf

[18] Art. 26 § 1 *bis* Constitutional Court Statute: "From the scope of this article shall be excluded the statutes, decrees and rules referred to in Article 134 of the Constitution which ratify a treaty establishing the European Union or the Convention of 4 November 1950 for the protection of human rights and fundamental freedoms or an Additional Protocol to this Convention".

[19] A clear example of a decision going beyond the intent of the Treaty-making parties was the decision of the ECtHR of 1 June 1979 in *Marckx / Belgium*.

cassatie / Cour de cassation held that the statutory provision at stake (a restriction of free speech) was not contrary to the ECHR and that it thus did not have to refer the question of constitutionality to the Constitutional Court[20]. In this way, constitutional liberties are eroded and their often less restrictive interpretations by the Constitutional Court evaded.

(17) In response to this evasive behaviour of the Court of Cassation, the Federal Parliament has enacted an additional rule in the Constitutional Statute on the Constitutional Court, Art. 26 § 2, 3. When in last instance, the violation of as well a constitutional provision as an applicable rule of international law is invoked, the Court of Cassation is obliged to refer the constitutional question to the Constitutional Court before judging the conformity with international law, unless it is clear that the statute is unconstitutional (this does not exclude that the Court may at the same time interrogate the ECJ on the interpretation of EU law if such a preliminary question is also relevant). However, two other evasion routes are left open in such a case: the Court of cassation may still judge on its own (without referral for preliminary ruling) that the Constitution is manifestly not violated and/or that international law is manifestly violated.

II. Conflicting fundamental rights

1. Belgian experiences

(18) The opinion of the Court of cassation is sometimes defended on the basis of the so-called maximalisation principle. It is stated that the priority of international law over the Constitution does not erode fundamental rights, as the ECHR itself provides in art. 53 that priority is always given to the highest level of protection; where the Constitution provides for a higher level of protection, the ECHR would not diminish it. This however, supposes that fundamental rights would never come into conflict with each other, and that the higher protection of one specific right would never imply a restriction of another one.

This is clearly not the case, especially in relation with some of the newer generations of "human rights" (non-discrimination, some social economic or cultural rights).

Indeed, as to the classical fundamental rights, which consisted mainly of a) fundamental freedoms towards the public authorities and b) procedural or similar guarantees, conflicts were and are rare. They do not very often bite each other and have thus rarely to be "balanced" against each other. The main conflict between fundamental freedoms is the conflict between the right to privacy and other fundamental freedoms. But conflicts between freedom of speech and press, freedom of association, freedom of religion and freedom of education are very rare. They

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[20] Cass. 9 november 2004, http://jure.juridat.just.fgov.be/pdfapp/download_blob?idpdf=N-20041109-13. Critical annotations i.a. by F. MEERSSCHAUT, "De ondraaglijke lichtheid van de Grondwet", *TBP* 2005, 49 ff. (pleading in favour of a procedure of constitutional complaint against judicial decisions in last instance, as it exists in e.g. Germany and Spain, and in a different form in the US); also critical B. GORS, “Une cause de refus de renvoi prejudiciel: la primauté de la convention européenne sur la Constitution”, *Rev.B.Dr.Const.* 2005, 507 f.

usually only occur when someone pretends to deduce from one of these freedoms also a claim-right, e.g. people claiming that free speech must be restricted because of a duty to "respect" religion or religious feelings of others. Thus, e.g., Belgian law did and does not know a crime of "blasphemy", but it does prohibit the interference by anyone with peaceful religious services. Most often, a conflict only arises when a right not to be discriminated by other people (horizontalisation of the non-discrimination rule) is introduced and granted the same level as the classical fundamental rights.

(19) Let me turn to the main examples where the Belgian constitution has granted further reaching rights or guarantees with direct effect than the main international law instruments. They are mainly the following:

a) protection of property: according to art. 16 Constitution, expropriation may only take place in the public interest and on condition of an equitable and <u>prior</u> compensation;

b) freedom of religion: the Constitution does not only guarantee freedom of religion and its public manifestation (art. 19) but also the freedom of internal organisation of religious corporations (art. 21 Constitution);

c) freedom of education: according to art. 24 of the Constitution, education is free and preventive measures are forbidden. In practice, the freedom is severely restricted for subsidized schools (and given the high tax level in Belgium, very few people can afford sending their children to a non-subsidized school). But, contrary to some other countries, parents are not obliged to send their children to school and can provide homeschooling. In recent years, tighter controls have been installed;

d) content of freedom of press: apart from the general freedom of speech in art. 19 Constitution (interpreted in basically the same way as the corresponding article in the ECHR), there is a more specific protection of the freedom of press in art. 25, consisting of the following additional guarantees;

- strict prohibition of censorship or other "preventive" measures before publication. This means a judge cannot on beforehand forbid publication, but merely stop further distribution after publication (and only in case the publication constitutes a crime, which presupposes that the restriction of freedom of speech is necessary and proportional);

- immunity of the printer, publisher and distributors when the author is known and residing in Belgium ; this is a measure against self-censorship by such persons (a measure authors did need and very often even today still need to distribute their opinions);

- right to a jury (art. 150 Constitution); it must, however, be said that case law has eroded this guarantee very much by giving a restrictive interpretation to "press delicts"; a further restriction was introduced in the Constitution in 1999 by abolishing the right to a jury for "racist and xenophobic" press delicts - a distinction which is in my view very doubtful in the light of art. 6 ECHR and equality before the law;

- Belgium also made a reservation on freedom of speech when ratifying the UN Convention against racism;

e) freedom of (unarmed) gathering in private places: no permission can be required (art. 26);

f) freedom of association: again, no preventive measures are allowed (art. 27). An additional *décret* of 16 October 1830 adds that the law may only punish the tortious acts of the members of an association, but never the right to associate itself[21];

g) freedom of language: the use of languages can only be regulated for administrative matters (use of language by the public authorities and in relation with them, including legally prescribed documents of enterprises), public and subsidized schools and labour relations (see art. 30 and 129 Constitution);

h) right to sue the government or public officials without any prior permission (art. 31 Constitution).

I have not included the social, economic and cultural rights more recently introduced in the Constitution, as only some aspects of them have direct effect, and as they are more or less corresponding to similar rights in international instruments.

(20) The abovementioned rights guaranteed by the Belgian Constitution are fundamental in our legal order, but not universal. They even come into conflict with certain interpretations of human rights today. As mentioned, the main cause of conflict is the tendency to recognise a horizontal right of non-discrimination. Such a right necessarily and essentially conflicts with classic fundamental freedoms. Thus, freedom of speech, freedom of religion and freedom of association have been eroded strongly by recent antidiscrimination laws (e.g. a statutory provision in art. 22 of the Antiracism Act punishing mere membership of or cooperation with a discriminating organisation; the Constitutional Court has given the provision a restrictive interpretation, but did not dare to annul it).

(21) Important in my view is that a number of the abovementioned rules, which are missing in international instruments, are not so much additional "rights" but additional guarantees or institutions which make some of the fundamental rights more "self-executing". Rights are only really protected when their protection does not require a complex balancing in each concrete case. At least certain forms of exercising a freedom must be free from any such balancing. Thus, any doctrine that balances free speech against other values without very clearly establishing the limits of free speech, has a "chilling effect" on free speech. The Constitutional Court has understood this slightly better than the common Courts (including the Court of cassation).

(22) The judicial protection of constitutionally entrenched fundamental rights is generally speaking well developed. Thus, differing from many other countries, every

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[21] "*La loi ne pourra atteindre que les actes coupables de l'association ou des associés et non le droit d'association lui-même*"

citizen has the right to go directly to the Constitutional Court to demand annulment of new Acts of Parliament within the first 6 months after publication; it is sufficient that the Act contains rules to which a citizen is subjected. Further, without any time limit, the constitutionality of an Act of Parliament (other than ratification of EU Treaties or the ECHR) can always be challenged in the framework of a lawsuit, by formulating a constitutional question.

Nevertheless, a weak spot remains: there is no remedy when a common Court refuses to refer such a constitutional question to the Constitutional Court, and especially the Court of cassation has invented many unlawful reasons to refuse to do so; in many other countries, there is a recourse against the decision of a supreme civil or criminal court (constitutional complaint, *Verfassungsbeschwerde, recurso de amparo*, etc.), not in Belgium.

Another weak spot resides in the fact that the Constitutional Court has no authority to judge the constitutionality of delegated legislation or of administrative decisions. In principle, every judge should set aside an act of delegated legislation or an administrative decision whenever it is contrary to either the Constitution or an Act of Parliament (art. 159 Constitution), which is in itself a strong protection, but common courts tend to give a more restrictive interpretation to constitutional rights than the Constitutional Court thus.

A final weak spot is the fact that courts refuse to refer a question to the Constitutional Court when a citizen invokes a self-executing constitutional provision which he considers violated (e.g. right to a jury trial): requests to refer a case to a jury are systematically turned down by the common courts and there is no recourse before the Constitutional Court (As a practising lawyer, I have filed a series of complaints against Belgium before the European Court of Human Rights on this[22]).

2. General evaluation(s)

(22) More generally, conflicts between human rights cannot be solved *in abstracto*: there is no universally valid hierarchy between human rights, even if some are more fundamental than others. But it seems that no human right has an absolute priority over all other ones. In case of conflict, some balancing will be necessary. And that balancing cannot take place without taking into account the concrete historical experience.

(23) The real questions deduced from the Belgian experience are therefore not so much whether we recognise human rights or whether we consider them universal or not, but who has the last word in interpreting them and how conflicts between human rights or interpretations of human rights are solved. "*Who writes the unwritten laws of the Gods?*", as Claudio Magris formulated it[23].

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[22] ECtHR, cases nos. 20019/09, 20022/09, 20024/09 and 20029/09.

[23] Essay reprinted in C. MAGRIS, *Utopia e disincanto, Storie speranze illusioni del moderno*, Garzanti Milano 1999.

"Human rights" turns out to be an "*essentially contested concept*"[24], just like democracy, freedom or equality: everybody agrees on the idea, but not on its concrete meaning. It is in the concrete forms and guarantees associated with it that the universal human rights get flesh and blood, it is in a concrete political community that they become real; or, as Michael WALZER expressed it in his book *Thick and thin. Moral argument at home and abroad*: *"Societies are necessarily particular because they have members and memories, members with memories not only of their own but also of their common life. Humanity by contrast, has members but no memory, and so it has no history and no culture, no customary practices, no familiar life-ways, no festivals, no shared understanding of social goods"*[25].

This is an argument in favour of a rather large "margin of appreciation" for the national political institutions (parliament, referenda where they exist) and national judiciary (especially Constitutional Courts where they exist) in interpreting and concretizing the universal human rights. There is no single model which is perfect in this respect, and the important thing is having sufficient checks and balances rather than a single institution always having the final say.

(24) The history of political ideas shows us that the founders of constitutionalism considered it very essential to entrust to the judiciary the task of protecting existing rights, developed through history, against violations by political institutions, not, however, the task of setting aside historically grown fundamental rights on the basis of newly invented rights. The constitutional authority of the judge is given to maintain the political power within certain limits, within the limits of constitutional rights and liberties, and not to adapt these rights to the "madness of the day": "*The Constitution is meant to protect against, rather than conform to, current 'widespread belief'*"[26].

[24] The expression was, as far as I know, first used by W. B. GALLIE, "Essentially Contested Concepts", *Proceedings of the Aristotelian Society* 1956, p.167 ff.

[25] M. WALZER, *Thick and thin.Moral argument at home and abroad*, University of Notre Dame Press, 1994, p. 8.

[26] SCOTUS Judge Antonin SCALIA in *Maryland v. Craig*, 27 juni 1990 (http://supreme.justia.com/us/497/836/). See also R. VAN CAENEGEM, *Historical considerations on judicial review and federalism in the United States of America, with special reference to England and the Dutch Republic*, Koninklijke Vlaamse academie van België voor wetenschappen en kunsten, 2003 p. 19 (also @ http://www.storme.be/VanCaenegem.pdf).