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The contribution of the Constitution to the protection of human rights

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RECENSIONS

Constitutional Versus International Protection of Human Rights: Added Value or Redundancy? The Belgian Case, in the Light of the Advisory Practice of the Venice Commission

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Abstract

This article addresses the role the national constitutions still can play in the protection of human rights, in a multi-layered legal order that increasingly emphasises the importance of the international and regional protection of human rights. It contains three parts. First, it examines, both from an international and European perspective and from a national constitutional perspective, the relative openness of both systems to each other. Then it turns to the not always entirely successful efforts in Belgium to harmonise the constitutional and the European and international protection of fundamental rights. Lastly, it looks at the advisory practice of the Venice Commission and raises the question: what is its position on the utility of constitutional protection for human rights when we see the proliferation of international and European protections?

In our multi-layered legal order, human rights are protected at two levels[1]. National constitutions have always contained a significant number of provisions on fundamental rights. International and regional protection of human rights, however, is a relatively recent phenomenon. It started after 1945 but has developed dramatically over the past few decades, both in general treaties and conventions at UN and EU levels, and in more specific treaties on torture, discrimination, children's rights, gender equality, national minorities, etc. Today we can speak of a genuine « proliferation both of texts and of courts and agencies with a mission to protect human rights ». In this article we will address the role that the protection of human rights in national constitutions still has to play. Does it still have an added value, or is it redundant?

[1] G.L. NEUMAN, « Human Rights and Constitutional Rights: Harmony and Dissonance », *Stanford Law Review*, 2003, p. 1863.

This article includes three parts. First, we examine, both from an international and European perspective and from a national constitutional perspective, the relative openness of both systems to each other (1). Then we will turn to the not always entirely successful efforts in Belgium to harmonise the constitutional and the European and international protection of fundamental rights (2). Lastly, we will look at the advisory practice of the Venice Commission and raise the question: what is its position on the utility of constitutional protection for human rights when we see the proliferation of international and European protections? (3)

1. The International/European and the National Constitutional Perspectives

As both the national and the international and European systems for the protection of human rights perform the same function, it comes as no surprise that the domestic bill of rights and human rights treaties are broadly similar in substance[2]. Generally, their relationship is not characterised by conflict but rather by complementarity[3], interaction and dialogue, mutual respect and deference[4], although tensions between the various jurisdictions within the multilayered legal order are not entirely avoidable. This is however not the issue we address in this article[5].

A. The European and International Perspective

The international and European human rights conventions, signed after the Second World War, built upon the constitutions of the various states. They were in no way intended to take the place of national constitutional protections, let alone to abolish them. Key terms that were used from the very beginning were « minimum standard » and « subsidiarity », and over time, the case law of the European Court of Human Rights began to speak of the search for a « common European

[2] St. GARDBAUM, "« Human Rights as International Constitutional Rights »", *European Journal of International Law*, 2008, Vol. 19, n° 4, pp. 750, 752.
[3] J. ROBERT, « Constitutional and international protection of human rights: competing or complementary systems », *HRLJ*, 1994, p. 8; M. BAUMGÄRTEL *et al.*, « Hierarchy, coordination or conflict? Global Law Theories and the Question of Human Rights », *Journal européen des droits de l'homme*, 2014, 3, pp. 326-353.
[4] M. CLAES en M. DE VISSER, « AreYou Networked Yet? On dialogues in European judicial Networks », *Utrecht Law Review,* Vol. 8, May 2012, Issue 2.
[5] See e.g. the Opinion of the Venice Commission on the tension between the Russian Constitutional Court and the ECtHR on the disenfrenchment of prisoners. Opinion on the amendments to the Federal Constitutional Law on the Constitutional Court (Venice, 10-11 June 2016), CDL-AD(2016)016.

ground » and the « national margin of appreciation ». Each of these terms refers to the national responsibility for protection of fundamental rights.

Subsidiarity means that it is first and foremost the state's task to protect fundamental rights. The European and international level comes second, should the first one fail[6]. Domestic remedies have to be exhausted, before submitting a complaint to any international body. Nation-states must be the first to provide protection. They can do so based on their own constitutions. The European Court of Human Rights does not require that states incorporate the European Convention on Human Rights into their own legal order so as to give them direct effect[7]. They can comply with their treaty obligations by applying constitutional provisions.

The international and European conventions aim to offer a « minimum standard » of protection of human rights[8]. They seek, in other words, to provide « a floor » for the protection of human rights, not « a ceiling »[9]. States have to comply with this minimum standard, but of course they can go further. They may give human rights better protection. Almost all human rights conventions confirm this explicitly. That is, they contain « saving clauses » or « most favourable to the individual clauses ». Article 53 of the ECHR is the best known example of this[10]. Although these clauses do not mention national constitutions explicitly, their main function is, of course, to ensure that the conventions do not override the constitutional protection of human rights. Naturally, we know that these « saving clauses » apply only where the same right would be better protected in the constitution than in the convention, and not in the event of a conflict between two fundamental rights. The higher constitutional protection of one right may not lead to the violation of international protection of another right[11]. Moreover, we know that the « saving clause » in Article 53 of the EU Charter of Fundamental Rights has a very different scope. The judgment of the European Court of

[6] J. ROBERT, *op. cit.*, note 3, p. 7.
[7] EctHR, *Swedish Engine drivers' Union*, 6 February 1976, § 50; EctHR, *Ireland v. UK*, 18 January 1978, § 239; EctHR, *James and others v. UK*, 21 February 1986, § 85.
[8] E. BJORGE, « National supreme courts and the development of the ECHR rights », I-CON, vol. 9, 2011, n° 1, p. 22.
[9] G.L. NEUMAN, « Human Rights and Constitutional Rights: Harmony and Dissonance », *Stanford Law Review*, 2003, n°55, p. 1886.
[10] It provides that « nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party ». See also art. 5.2. ICCPR and art. 53 EU-Charter.
[11] M. CLAES and B. DE WITTE, « The role of constitutional courts in European legal space », *Ius Publicum Europaeum*, 2016, Band VI, p. 7.

Justice in the *Melloni* case states that the national authorities can only apply national standards of protection of fundamental rights in so far as « the primacy, unity and effectiveness of EU law are thereby not compromised » [12]. Hence, while « saving clauses » do not always guarantee the supremacy of the higher constitutional protection, their essential message is clear: the constitution can go beyond the minimum standards set by the international conventions.

A third concept that often plays a crucial role in the case law of the European Court of Human Rights is that of « common European ground » [13]. Where converging human rights standards emerge at the national level, the ECtHR will consider it more readily legitimate to treat them as a « common European ground » and to impose them on all states. Conversely, where there is no convergence of national case law, the Court hesitates to formulate a European minimum standard. It grants the states a « margin of national appreciation » [14]. The Court in such cases shows a certain deference to the state's evaluation [15]. The main idea behind this doctrine of « common European standards » and « margin for national appreciation » is that the European Court recognizes that an important responsibility still rests with the national authorities. Not only does this doctrine leave room for divergent applications of human rights adapted to the specific national context, but it also indicates that the constitutional protection of human rights contributes significantly to the formation of « common standards » that can serve as the basis for European protection [16].

[12] ECJ, *Melloni,* Case C-399/1, 26 February 2013.
[13] P. MAZHONEY and R. KONDUKT, « Common ground. A starting point or destination for Comparative Law Analysis of the European Court of Human Rights », *in Courts and Comparative Law*, M. Adenas and D. Fairgrieve (eds.), Oxford, Oxford University Press, 2015, pp. 119-139.
[14] Y. ARAI-TAKAHASHI , « The margin of appreciation doctrine: a theoretical analysis of Strasbourg's variable geometry », *in* A. Follesdal, B. Peters and G. Ulfstein (eds.), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context,* Cambridge, Cambridge University Press, 2013, pp. 62-105; D. SPIELMAN, « Consensus et marge d'appréciation nationale », *JT,* 2012, pp. 592-593; N. LAVENDER, « The Problem of the Margin of Appreciation », *European Human Rights Law Review*, 1997, pp. 380-390; M.R. HUTCHINSON, « The Margin of Appreciation Doctrine in the European Court of Human Rights », *International and Comparative Law Quarterly,* 1999, pp. 638-650.
[15] J. GERARDS, « Pluralism, deferrence and the margin of appreciation doctrine », *European Law Journal*, 2011, pp. 80-120.
[16] M. CLAES en B. DE WITTE, *op. cit.*, note 11, p. 4: « through their case law, they contribute to formulate an emerging common constitutional law of Europe and act as a source of inspiration for the Eureopean Courts and fort heir counterparts in other countries »; A. BAILLEUX, « Human Rights in network. Les droits de l'homme en

B. The National Constitutional Perspective

If we examine this question from a national constitutional perspective, we see on the one hand that the constitutions of all 47 member states of the Council of Europe have their own catalogues and system of guarantees of fundamental rights, with distinctive national emphases. On the other hand, we also observe a high degree of harmonisation of national constitutional protection with international and European protection of fundamental rights.

1. Constitutional Protection of Fundamental Rights with National Accents

The constitutions of all the member states of the Council of Europe contain a title or chapter on fundamental rights and freedoms. Already in the nineteenth-century constitutions, fundamental rights played an important part. They often reflected the national temperament and tradition, the political, sociological, ideological, religious and ethnic features of the given state. In most states, the 19th century constitutions have long been replaced. In no fewer than 40 of the 47 member states of the Council of Europe, the constitution dates to the period following the Second World War [17]. The constitutional renewal took place immediately after the war in countries such as Germany, Austria and Italy, in the 1970s in countries such as Spain and Portugal, and of course after 1989 in the countries of Central and Eastern Europe. In all those countries, there is now a new, updated and often fairly extensive catalogue of fundamental rights. Often this catalogue is inspired by the post-war human rights conventions, and chiefly by the European Convention on Human Rights. Only six countries have a constitution that dates from before the Second World War [18]. In these

réseau », *Journal européen des droits de l'homme*, 2014, 3, p. 303: « A growing consensus on the existence of a right among the states party to the convention may lead a change in the case law of the ECtHR and to a recognition of a right under the ECHR by the EctHR ».
[17] Albania 1998, Andorra 1993, Armenia 1995, Austria 1945, Azerbaijan 1995, Bosnia-Herzegovina 1995, Bulgaria 1991, Croatia 1991, Cyprus 1960, Czech Republic, 1993, Denmark 1953, Estonia 1992, Finland 1999, France 1958, Georgia 1995, Germany 1949, Greece, 1975, Hungary 2011, Iceland 1944, Italy 1947, Latvia 1991, Lithuania 1992, Former Yugoslav Republic of Macedonia 1991, Malta 1964, Moldova 1992, Monaco 1962, Montenegro 2007, Ukraine 1996, Poland 1997, Portugal 1976, Romania 1991, Russia 1993, San Marino 1974, Serbia 2006, Slovakia 1992, Slovenia 1991, Spain 1978, Sweden 1974, Switzerland 1999, Turkey 1982, United Kingdom (Human Rights Act, 1999).
[18] Belgium 1831 (coordination, 1994), Ireland 1937, Liechtenstein 1921, Luxemburg 1868, Netherlands 1815, Norway 1814.

countries, too, the catalogue of fundamental rights has since been extended, but never comprehensively reviewed.

2. Constitutional Protection of Fundamental Rights Harmonized with International and European Protection

In addition to its own national accents, the constitutional protection of fundamental rights is characterised by a great openness to European and international human rights protection. Although constitutional law varies substantially on the relationship between international and domestic law (monism or dualism), on the incorporation of human rights treaties in the national legal order, on their rank in the hierarchy of norms, and on the judicial review of conventionality and constitutionality[19], with Keller and Stone Sweet one can affirm that all 47 member states of the Council of Europe have incorporated the ECHR and the case law of the ECtHR into domestic law, in one form or another[20]. In most of the member states, the international and European standards have even, to a certain extent, been constitutionalised. This is especially the case in states with a constitutional court. It is perhaps useful to remember that 37 out of the 47 member states of the Council of Europe have a constitutional court. Only 10 do not. [21]

In states without a constitutional court, human rights treaties are very often directly applicable. Courts and tribunals are forced to disapply legislation that is contrary to them. In most of these states – Denmark[22], Finland [23], Greece[24], Ireland[25], Iceland[26] and Norway[27] – this control for

[19] See the Report of the Venice Commission « on the implementation of international human rights treaties in domestic law and the role of the courts », 10-11 October 2014, CDL-AD(2014)036; See also A. NOLLKAEMPER, *National Courts and the International Rule of Law,* Oxford, Oxford University Press, 2011, 304 p.; G. MARTINICO and O. POLLICINO (eds), *The National Judicial Treatment of the ECHR and EU Laws. A comparative Constitutional perspective*, Groningen, Europa Law Publishing, 2010, 511 p.

[20] H. KELLER and A. STONE SWEET, « Assessing the impact of the ECHR on national legal systems », *in A Europe of rights: the impact of the ECHR on national legal systems*, H. KELLER and A. STONE SWEET (eds), Oxford, Oxford University Press, pp. 677-683; see also J. GERARDS and J. FLEUREN (eds), *Implementation of the European Convention on Human Rights and the Judgments of the ECtHR in national case-law,* Antwerp, Intersentia, 2014.

[21] Denmark, Finland, Greece, Iceland, Ireland, Netherlands, Norway, Sweden, Switzerland and the United Kingdom of Great-Britain.

[22] Denmark: Statute n° 285 of 29 april 1992 concerning the European Convention on Human Rights; See R. HOFMANN, « Das dänische Gesetz vom 29. April 1992 zur innerstaatlichen Anwendung der EMRK », *EUGrZ*, 1992, 19.

[23] Finland: case law, see J. VILJANEN, « The European Convention on Human Rights and the Transformation of the Finnish Fundamental Rights System: The Model of

« conventionality » is added to the control for « constitutionality » which is also exercised by ordinary judges. In the Netherlands[28] the judge can only control for conventionality, not for the constitutionality of legislation.

In states with a constitutional court, the scope of judicial review by the court is expanded to include the review of conventionality, if not directly then at least indirectly. With Neuman we distinguish three different types of constitutionalisation: a strong, a moderate, and a soft one[29].

Strong constitutionalisation consists of incorporating the international or European convention as such in the constitution, sometimes granting it the same rank as the constitution, and bringing it directly or indirectly, within the scope of the constitutional court[30]. Examples of the incorporation of human rights conventions in the constitution include Andorra[31], Bosnia-Herzegovina[32], Latvia[33], Montenegro[34], Russia[35], San Marino[36], Serbia[37] and

Interpretative Harmonisation and Interaction », *Scandinavian Studies In Law*, 1999-2012.

[24] Article 28, § 1 Constitution.

[25] European Convention on Human Rights Act 2003.

[26] Act No. 62/1994 on the European Convention on Human Rights.

[27] Human Rights Act of 1999. See also Article 92 The authorities of the State shall respect and secure the human rights as they are written in this Constitution and in the treaties of human rights that are binding for Norway.

[28] Article 93 and 94 Constitution provide for direct applicability of international legal norms. Self-executing provisions of treaties have priority even over the Constitution. See also M. CLAES en G.J. LEENKNEGT, « The Netherlands. A case of constitutinal leapfrog. Fundamental rights protection under the Constitution, the ECHR and the EU-charter in the Netherlands » *in Human Rights protection in the European legal order: The interaction bertween the European and the national courts*, P. Popelier, C. Van de Heyning and P. Van Nuffel (eds), Cambridge, Intersentia, 2011, pp. 287-308. See for Switzerland the contribution of M. HERTIG RANDALL to this dossier.

[29] G.L. NEUMAN, « Human Rights and Constitutional Rights: Harmony and Dissonance », *Stanford Law Review*, 2003 1890.

[30] O. DUTHEILLET DE LAMOTHE, « Draft Report on Case-Law regarding the Supremacy of International Human Rights Treaties », Venice Commission, 2 October 2004, CDL-DI(2004)005, n° 37-40.

[31] Article 5 Constitution.

[32] Article VI. 3. C. Constitution.

[33] Article 89 Constitution.

[34] Article 17 Constitution.

[35] Article 17. 1.and Article 55. 1 Constitution. A 2003 ruling of the Russian Supreme Court confirmed that international law has priority over the laws, but not over the Russian Constitution; Supreme Court decision n° 5 of 10 October 2003, *HRLJ,* 2004, pp. 108-111.

Sweden[38]. The prime example of granting constitutional status to the conventions is Austria[39].

In the case of moderate constitutionalisation, the rights guaranteed by the conventions are also enshrined in an analogous manner in the constitution[40]. Examples of this approach can be found chiefly in the post-Communist constitutions of Central and Eastern European countries that were drawn up after the fall of the Berlin Wall. These constitutions contain, often following the recommendations of the Venice Commission[41], provisions that reflect at least the European minimum standards. Not only do the catalogues of fundamental rights in these constitutions bear a great resemblance to that of the ECHR and other human rights conventions, but also their limitation clauses – transversally or per individual right – include the requirements of legality, legitimacy and necessity or proportionality. Some of these constitutions also contain clauses regarding the « abuse of fundamental rights » and « derogations from fundamental rights in times of war or emergency ».

Finally, there is a weak form of constitutionalisation, through the application of the principle of treaty-conform interpretation of the constitution[42]. A number of constitutions explicitly provide that the fundamental rights which they guarantee must be interpreted and applied in accordance with human rights conventions. Such provision is found in the constitution of Moldova[43], Portugal[44], Romania[45], Serbia[46] and Spain[47] as

[36] Art. 1 Decree n. 79 of 8 July 2002. Declaration on the citizen's rights and fundamental principles of San Marino constitutional declaration.
[37] Art. 18 Constitution.
[38] Art. 19 Constitution. F. SUNDBERG, « The European Convention on Human Rights in Swedish Law, German », *Y.B. Int.L.*, 1996, p. 558.
[39] Bundesverfassungsgesetz vom 4. März 1964, mit dem Bestimmungen des Bundes-Verfassungsgesetzes in der Fassung von 1929 über Staatsverträge abgeändert und ergänzt werden. See for Switzerland the contribution of M. HERTIG RANDALL to this dossier.
[40] G. MARTINCO, « Is the European Convention Going to be "Supreme"? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts », *EJIL*, 2012, 23, pp. 401-424.
[41] See hereafter section **3**.
[42] E. TANCHEV, « Application of International Treaties by Constitutional Courts and equivalent Bodies: Challenges to the Dialogue », CDL-JU(2015)020.
[43] Article 4.1. Constitution.
[44] Article 16.2. Constitution.
[45] Article 20.1. Constitution.
[46] Article 18 Constitution.
[47] Section 10, Part 1, 2. Constitution

well as – to the extent that it can be regarded as part of the « constitution » of the European Union – in the EU Charter of Fundamental Rights[48]. In some countries, the constitutions do not contain such a provision. That has not stopped the constitutional court, when called upon to interpret the fundamental rights guaranteed by the constitution, from drawing inspiration from the ECHR and from the case law of the European Court of Human Rights, in particular[49]. A number of constitutional courts do not hesitate to refer explicitly in their judgments to the Convention and to the Strasbourg case law. Other constitutional courts rarely indicate in their judgments where they draw their inspiration from. Insiders and Court watchers suggest, however, that the constitutional courts do take into account the case law of the ECtHR. The Venice Commission considers this « willingness to interpret national constitutional provisions in a manner that is sympathetic to the requirements flowing from ECtHR judgments » as a means to reduce the possibilities of conflicts between the European and the national human rights protection[50].

2. The Belgian Case

A. Title II of the Constitution: A Child of Its Time, with Its Own National Accents

The Belgian Constitution dates back to 1831. It was a child of its time. It bears the traces of the 19th century. Between the lines of its text, one can discover the constitutional solutions that were found for the political conflicts that have long divided this country: the religious and ideological struggles are reflected in no fewer than four articles of the constitution (Art. 19, 20, 21 and 181), the schools dispute in the long Article 24 of the constitution and the language issue in Article 4 and Article 30. One might say that these articles belong to the national constitutional identity of Belgium. They clearly

[48] Article 52.3 EU Charter of Fundamental Rights.
[49] E. BJORGE, *op. cit.*, note 8, p. 14; L. BURGORGUE-MARSEN, « L'autonomie constitutionnelle aux prises avec la Convention européenne des droits de l'homme, *RDCB,* 2001,1, pp. 42-54; J. POLIAKIEWICZ, « The Status of the Convention in National Law, Fundamental Rights, *in Europe. The European Convention on Human Rights and its Member States*, R. Blackburn en J. Poliakiewicz (eds), Oxford, Oxford University Press, 2000, p. 32; J. ROBERT, *op. cit.*, note 3, pp. 1-23; P. POPELIER, C. VAN DE HEYNING and P. VAN NUFFEL, *Human Rights protection in the European legal order: the interaction between the European and the national courts,* Cambridge, Intersentia, 2011.
[50] Opinion on the amendments to the Federal Constitutional Lqw on the Constitutional Court (Venice, 10-11 June 2016), CDL-AD(2016)016, 110 (Interim report)

offer an added value as regards the articles found in the human rights conventions[51].

Not only the catalogue of fundamental rights, but also the system of protections still reflects strong national accents. By banning preventive measures and emphasising a strong and formal principle of legality as regards any limitations on fundamental rights, the constitution reflects legal policy insights that were typical of the beginning of the 19th century. In the light of past experience, the drafters of the constitution opted to live with the risks of freedom rather than with the risks of preventive intervention by the authorities. This was the significance of the principle of « freedom in responsibility »: first freedom, and only then responsibility[52]. The drafters of the constitution also placed a great deal of trust in the legislature[53]. In 1831, people presumed that fundamental rights had to be protected primarily from the executive and not from the legislative branch, which was treated with a great deal of respect and trust by the National Congress[54]. The idea of a judge reviewing laws in light of the constitution was not the order of the day in 1831.

From 1970 on, the constitutional drafters sought to update the catalogue of fundamental rights. Title II of the Belgian constitution now comprises twenty-five articles on fundamental rights. Sixteen of them have remained unchanged. They still read as the National Congress of 1831 drew

[51] S. LAMBRECHT, « De meerwaarde van een grondwettelijke catalogus van grondrechten in een gelaagd systeem van grondrechtenbescherming, *Jura Falconis*, 2011-2012, 227-277; J. VELAERS, De samenloop van grondrechten in het Belgisch rechtsbestel, in Vereniging voor de vergelijkende studie van het recht van België en Nederland, Preaviezen, 2008, Boom Juridische Uitgevers, 2008, 81-141; P. POPELIER and C. VANDEHEYNING, « Droits constitutionnels et droits conventionnels: concurrence ou complémentarité? », *in Les droits constitutionnels en Belgique*, M. Verdussen and N. Bonbled (ed.), Brussels, Bruylant, 2011, pp. 496-499, p. 491.

[52] The prohibition of preventive measures is confirmed in the articles 19 (freedom of religion and freedom of expression), 24, § 1 (freedom of education) 25 (freedom of the press), 26 (freedom of assembly), 27 (freedom of association).

[53] The legality principle is confirmed in the articles 8, 10, alinea 2, 13, 14, 15, 16, 19, 21, alinea 2, 22, 23, alinea 2, 24, § 1, 26, alinea 2, 30, 32 of the Constitution.

[54] G. CEREXHE, « "Les matières réservées": une notion de droit constitutionnel? », *Adm. Publ.*, (T), 1983, p. 252: « Cette confiance en la loi résultait de l'application de la théorie de Jean-Jacques Rousseau selon laquelle la loi était l'expression de la volonté générale et ne pouvait être oppressive. Elle devait par conséquence être considérée comme la meilleure garantie du respect des droits individuels et était seule à même de préserver l'individu des emprises de l'exécutif. Inspiré par cette théorie, le constituant a, aux articles 7, 8, 9, 10, 11, 17, 19, 22, 23 et 128 prévu expressément l'intervention du législateur pour apporter des restrictions aux libertés individuelles ».

them up. Nine articles are new[55]. The legislators did not decide to conduct a systematic updating of Title II, but rather to take what is known as a « pointillist » approach[56]. Here and there a fundamental right was added, without making it clear what pre-set plan or what criteria were being followed.

B. Title II Needs Systematic Updating [57]

The consequence of this situation is that the Constitution has a number of important lacunae. Thus, the right to life is not guaranteed explicitly[58], the prohibition on torture and inhuman or degrading treatment is not mentioned, and the right to fair trial[59], substantive guarantees against arbitrary detention[60] and respect for the principles of sound administration[61] are treated as poor relatives. Certain articles on liberal fundamental rights, unchanged since 1831, are so outdated that they are in need of a facelift[62]. Last but not least, the system of protection of fundamental rights is itself outmoded. Title II contains a purely formal system of limitations (ban on preventive measures and the principle of legality). It does not provide for any material standards for assessing any restrictions on fundamental rights. Nor does the Constitution contain any provisions allowing for « derogations » during times of war or public emergency (Art. 15 ECHR)[63] or to prevent « abuses » in the implementation of fundamental rights (Art. 17 ECHR)[64].

C. Three Attempts to Constitutionalise Fundamental Rights

There have in the past been three attempts to update the Constitution somewhat more systematically and to adapt it to current views of the

[55] Art. 10 alinea 3, 11, 11bis, 14bis, 22, 22bis, 23, 24, 32.

[56] M. VERDUSSEN, « Le pointillisme constitutionnel », *in La Constitution : hier, aujourd'hui et demain*, Brussels, Bruylant, 2006, p. 125.

[57] See J. VELAERS, « La révision du titre II de la Constitution "Des Belges et de leurs droits": une mission pour le législateur constitutionnel et peut-être aussi pour la Commission de Venise », *RBDC*, 2014, 3-4, pp. 449-460.

[58] See however Const. Court (Belgium), n° 91/2006, 7 June 2006, B.34.

[59] Some of the guarantees related to the right to a fair trial are mentioned in the articles 13, 31, 144 to 146, 148, 149, 152 and 155 of the Constitution

[60] Compare art. 12 of the Constitution with art. 5 ECHR.

[61] Only the right to consult any administrative document and to obtain a copy, is guaranteed. (art. 32).

[62] See hereafter.

[63] Art. 187 of the Constitution: « The Constitution cannot be wholly or partially be suspended. »; S. VAN DROOGHENBROECK, « L'article 187 de la Constitution », *RBDC.*, 2006, 3, pp. 293-297.

[64] In applying the constitutonal provisions, the Constitutional Court takes account of Article 17 on the abuse of human rights; See *e.g.* Const. Court (Belgium), n° 45/96, 12 July 1996, B.7.16; Const. Court (Belgium), n° 10/2001, 7 February 2001, B.4.8.1.

protection of fundamental rights, without at the same time altering the distinctive character of Title II with regard to fundamental rights. The three types of constitutionalisation we have mentioned before appear in the Belgian approach. There was a strong, a moderate and a weak attempt at constitutionalisation, but only the last one succeeded.

1. Strong Constitutionalisation: The Incorporation of the ECHR in Article 32bis of the Constitution

The attempt at strong constitutionalisation took place in 2001. The then minister for Institutional Reform, Johan Vande Lanotte, suggested giving the European Convention on Human Rights constitutional status in a new article – Article 32*bis*, and to confer on the Constitutional Court a monopoly on reviewing the conformity of laws, decrees and ordinances with the Convention[65]. The proposal was met with considerable objection[66]. Most significantly, it was argued that, with this proposal, the direct effect of the conventions – established in the *Franco-Suisse Le Ski* judgment of the Belgian Court of Cassation[67] – would be eliminated and that the Constitutional Court would henceforth review legislation in the light of the conventions. These changes required amendments of articles of the Constitution that were not open for revision at that time. Moreover, the question arose as to why such an intervention should apply only to the European Convention and not to other human rights conventions.

2. Moderate Constitutionalisation: Amendments to the Constitution in the Light of Human Rights Conventions

A second attempt – which failed again – considered amending Title II of the Constitution more systematically. Since 1987 successive declarations regarding the review of the Constitution offered the constitutional drafters the possibility of inserting « new provisions that ensure the protection of the rights and freedoms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms »[68]. In 2005, the House of Representatives set up a working group and tasked it with investigating the possibility of a « complete updating, modernisation, and recodification of Title II of the Constitution, in the light of the conventions on human rights ».

[65] *Parl.Doc.*, Senate, 2000-2001, 2-575/1.
[66] See the hearings in the Senate *Parl. Doc.* Senate, 2000-2001, 2-897/6.119
[67] Cass. (Belgium), 27 May 1971, *Franco Suisse Le Ski*, *Arr. Cass.* 1971, pp. 959-968
[68] See the declarations on the amendment of the Constitution of 9 November 1987, 18 October1991, 12 April 1995, 5 May 1999, 10 April 2003, 2 May 2007, 7 May 2010 and 28 April 2014.

Sebastien Van Drooghenbroeck and I had the pleasure of accompanying the working group over two years in the capacity of expert advisers.

The work resulted in two extensive reports[69]. In the first report, recommendations were made to introduce six cross-cutting provisions into Title II of the Constitution[70]: 1) a clause on guaranteeing human rights – with the classic triad « to respect, to fulfil and to protect »; 2) on the treaty-conform interpretation of fundamental rights, 3) on the limitation of human rights, with reference to the principle of proportionality; 4) on the abuse of human rights; 5) on derogations from human rights in times of war and public emergency; 6) and on human rights and the division of competences within the federal state. The second report sought to point out the lacunae in the Constitution by comparing the catalogue of fundamental rights in Title II with the current and more extensive catalogue of fundamental rights found in the EU Charter[71]. The two reports are now gathering dust in the filing cabinets of the Chamber of Representatives. The legislator did nothing with it. The Belgian state was going through an unprecedented constitutional crisis at the time. Fiddling with Title II of the Constitution was thus not a priority.

3. Weak Constitutionalisation – Treaty-Conform Interpretation of Title II of the Constitution – Reference to the ECHR, to the Strasbourg Court's Case Law and to Other Human Rights Conventions

Ultimately the Constitutional Court itself pushed through the constitutionalisation of the human rights conventions. It considered itself obligated to do so. When in 1989 it was argued that the former Court of Arbitration should review legislation for conformity with the whole of Title II of the Constitution, the government replied that this was premature, since first Title II had to be thoroughly revised in order to introduce standards that the Court could use when reviewing legislation[72]. In 2003, Title II had still not

[69] See also J. VELAERS, « Over de noodzaak om titel II van de Grondwet over "De Belgen en hun rechten" te herzien », *in De Grondwet, verleden, heden en toekomst,* Cahier Belgische Senaat 2, Brussels, Bruylant, 2006, pp. 111-120 and E. BREMS, « Vers des clauses transversales en matière de droits et libertés dans la Constitution belge », *Rev. Trim. Dr. H.*, 2007, 70, pp. 351-383
[70] Report « Les clauses transversales en matière de droits et libertés », *Parl. Doc.* Chambre, 2003-2004, n° 51-2304/001, 206 p.
[71] Report « *Les droits fondamentaux garantis par la Constitution au regard des instruments internationaux de protection des droits fondamentaux* », *Parl. Doc.*, Chamber, 2006-2007, n° 51-2867/001, 344 p.; Report « Recommandations relatives à une déclaration de révision du titre II de la Constitution », *Parl. Doc.*, Chamber., 2006-2007, n° 51-2304/002, 23 p.
[72] Prime minister Martens, *Parl. Doc.*, Senate, 1988-89, nr. 483/2, p. 9.

been amended, but the Court was nevertheless given the competence to review legislation against it. We now know how the Court resolved the problem. The Court is not competent to review legislation directly for conformity with the conventions. But it developed two techniques for doing so indirectly. It considers every breach of rights and freedoms guaranteed in the conventions as a breach of Article 10 and 11 of the Constitution regarding the principle of equality and the prohibition of discrimination[73]. Moreover, the Court applies the principle of treaty-conform interpretation. It presumes that constitutional guarantees and the legal guarantees in the Convention form an « inseparable » whole, so that the Court must, when reviewing the constitutionality of legislation, « take account » of the provisions of the conventions that guarantee analogous rights and freedoms[74].

These two techniques have as a consequence that the Belgian Constitutional Court regularly refers in its case law to the European Convention on Human Rights and the case law of the Strasbourg Court[75], but also to other human rights conventions. This suggests that the Court has tried to kill three birds with one stone. It updates Title II of the Constitution, through a treaty-conform interpretation. It thus contributes to preventing breaches of the ECHR and cases heard by the European Court of Human Rights. And the result is a maximisation of constitutional protection: both the added value that the national constitution offers and the application of international standards by the Constitutional Court.

[73] See Const. Court (Belgium), n° 18/90, 23 May 1990; Const. Court (Belgium), n° 51/94, 29 June 1994, B.5.2.

[74] See Const. Court (Belgium), n° 136/2004, 22 July 2004, B.5.3. and B.5.4. ; X. DELGRANGE, « De l'ensemble indissociable à l'interprétation conciliante. Observations », *in Le droit international et européen des droits de l'homme devant le juge national*, S. Van Drooghenbroeck (dir.), Bruxelles, Larcier, 2014, pp. 148-159. J. THEUNIS, *Report: the influence of the ECHR on national constitutional jurisprudence; the example of the Belgian Constitutional Court*, Kyiev, ECDL – International Conference on the influence of the ECHR Case Law on national constitutional jurisprudence, 2005 www.venice.coe.int/docs/2005/CDL-JU(2005)057prov-e.pdf,13.

[75] See A. BAILLEUX, *op. cit.*, note 16, p. 300; M. MELCHIOR and L. DE GREVE, « Protection constitutionnelle et protection internationale des droits de l'Homme: concurrence ou complémentarité? Rapport de la Cour d'arbitrage de Belgique », *RUDH*, 1995, p. 217; J. VELAERS, « Samenloop van grondrechten: het Arbitragehof, titel II van de Grondwet en de internationale mensenrechtenverdragen », *TBP*, 2005, 297-318; M. VERDUSSEN, « La convention européenne des droits de l'homme et le juge constitutionnel », *in La mise en œuvre interne de la Convention européenne des droits de l'homme*, Brusselss, Ed. du Jeune barreau de Bruxelles, 1994, pp. 30-58.

One might therefore think: we are living in the « best of all possible worlds », there is no longer any problem. There is no more need to amend Title II of the Constitution. The Constitutional Court has already done it. That is not our conclusion, however. There are four good reasons for which we continue to think that Title II of the Constitution needs a thorough revision on several points.

D. Reasons for a Thorough Revision of Title II

1. The Transparency of the Constitution: « What You See, Is Not What You Get ... »

The Constitution is the basic document of our legal order. One may expect it to offer citizens insight into their fundamental rights. Title II of the Constitution no longer does so. There is a growing discrepancy between the terms of the Constitution and its meaning, as this arises from the case law of the Constitutional Court. Today, Title II of the Constitution is misleading in several instances. It starts with the title itself: « On Belgians and their rights », as if these fundamental rights were not also granted to foreigners[76]. Similarly, Article 10 of the Constitution states that « Belgians » are equal before the law and that only the latter « may be admitted to civil service positions », whatever the case law of the Court of Justice of the European Union may say on the matter[77]. The Constitution also gives the impression that it offers protection of property only against expropriation and not other forms of property infringement (Art. 16 of the Constitution)[78]. It wrongly suggests that a law is sufficient to limit the right to respect for privacy (Art. 22 of the Constitution)[79], that in the matter of separation of church and state, only three practices are prohibited, which in the 19th century chiefly affected the Catholic Church (Art. 21 of the Constitution), that only the printed press is worthy of protection but not radio, television and other media, that the prohibition against censorship is absolute (Art. 25 of the Constitution) and that a judge in summary proceedings can never order a publication or distribution ban, not even in the case of serious breaches of privacy[80], that the inviolability of the confidentiality of letters is absolute (Art. 29 of the

[76] See however Const. Court (Belgium), n° 61/94, 14 July 1994, B.2.

[77] See ECJ, *Commission v. Belgium*, C-149/79, 17 December 1982; ECJ, *Commission v. Luxembourg*, C-473/93, 2 July 1996. Meanwhile the Council of State interpreted article 10, alinea 2 of the Constitution in conformity with EU law. See Council of State (Belgium), *Van Hauthem*, n°. 226.980, 31 March 2014.

[78] See hereafter section 2.

[79] See Const. Court (Belgium), n° 162/2004, 20 October 2004, B.2.4. and B.5.1.

[80] Cass., 2 June 2006, A&M, 2006, p. 355. See also on the confusion in the Belgian case law : ECtHR, *RTBF v. Belgium*, 29 March 2011.

Constitution)[81] and so on. As a result of these outdated formulations, the Constitution is readable only by constitutionalists, knowing well the case law of the constitutional court, whereas it ought to be as clear as possible to everyone, especially when it comes to fundamental rights.

2. Limits on the Constitutional Court's Capacity to Update the Constitution

The attempt by the Constitutional Court to update the Constitution is of course very valuable. The two techniques used by the Court have their limits, however. These are made visible mainly when it comes to rights and freedoms that are protected only in the conventions and absent from any provision of the Constitution itself. The judgments by which the Constitutional Court tries to fill these gaps can hardly be considered interpretations of the Constitution. The Court rather rewrites the Constitution « for a good cause ». So the Court deduced the principles of a fair trial from Article 13 of the Constitution, which simply provides that no one may be separated from the judge that the law has assigned to him[82]. The right to life was deduced from Articles 22*bis* and 23, which clearly guarantee only the right of every child to respect for his moral, physical, psychological and sexual integrity, and the right to lead a life in keeping with human dignity thanks to fundamental social and economic rights[83]. The most far-reaching example of this technique is Article 16 of the Constitution, which provides: « No one may be deprived of his property except in the case of expropriation for a public purpose, in the cases and manner established by the law and in return for fair compensation paid beforehand ». The Court has found in this provision a protection against any infringement of property, and like the European Court of Human Rights, applies this article to social security benefits, for example, of course without then applying the guarantee of a « fair compensation paid beforehand ».[84]

Recently a law clerk to the Constitutional Court, Geraldine Rosoux, defended an excellent doctoral thesis titled « La dématérialisation des droits de l'homme »[85]. By « dematerialisation » she means that the Constitutional Court sometimes departs completely from the text of the Constitution. We are no longer in the realm of interpretation – that is, of a broad, evolving, teleological, analogical or systematic interpretation. The Court is reviewing

[81] Const. Court (Belgium), n° 202/2004, 21 December 2004, B.12.2.
[82] Const. Court (Belgium), 3 December 2009, 195/2009,
[83] Const. Court (Belgium), n° 91/206, 7 June 2006, B.34
[84] Const. Court (Belgium), n° 74/2013, 30 May 2013, B.7.1.
[85] G. ROSOUX, *Vers une « dématérialisation » des droits fondamentaux ? Convergence des droits fondamentaux dans une protection fragmentée, à la lumière du raisonnement du juge constitutionnel belge*, Brussels, Bruylant, 2015, 1072 p.

laws not for conformity with the Constitution but with fundamental rights, whether these are enshrined in the Constitution or not. This is far from straightforward, in our view. But one can hardly blame the Court for overstepping the limits to freedom of interpretation at times. Instead, one ought to blame the drafters of the Constitution for saddling the Constitutional Court with outdated texts from the 19th century that cannot serve as a basis for adequate protection of the fundamental rights in the 21st century.

3. «Outsourcing » the Protection of Human Rights Can Endanger the Added Value of the Constitution

That the Constitutional Court often cannot rely upon the Constitution but is constantly having to borrow from others, mainly from the European Convention and the case law of Strasbourg, has its own risks. By « outsourcing » the protection of fundamental rights the Constitutional Court runs the risk to follow too slavishly the case law of the European Court of Human Rights and not take enough responsibility for giving shape to its own national Constitution, which can go further than the minimum protection that Strasbourg aims to offer. Sometimes it seems as if the Constitutional Court's attitude toward the European Court of Human Rights is borrowed from the British motto: « Not more, and certainly not less... » [86]. This so-called « mirror » principle[87] finds expression in three ways in the case law of the Constitutional Court.

In the first place, the Court sometimes appears to wait for a judgment of the Strasbourg court in a comparable case before it hands down its own judgment. In a very frank article by the judge and later president of the Constitutional Court, Paul Martens, there are a number of striking examples of this attitude[88]. Once the European Court has ruled, the Constitutional

[86] In *Ullah v. Special Adjudicator* (2004), UK HL. 26, (2004) 2 A.C., the House of Lords (Lord Bingham) stated: « It is of course open to member states to provide for rights more generous than those guaranteed by the Convention, but such provision should not be the product of interpretation of the Convention by national courts, since the meaning of the Convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more but certainly no less ».
[87] See E. BJORGE, *op. cit.*, note 8, , p. 15 and S. LAMBRECHT, « De houding van de vier hoogste rechtscolleges ten aanzien van het EVRM en het Europees Hof voor de Rechten van de Mens: Strasbourg has spoken ... », *TBP,* 2013, 2-3, p. 89.
[88] So the Constitutional Court waited and then followed the leads of the Strassbourg Court in the Hatton case on the noise disturbance caused by aircraft noise, the Hirst case on the loss of the right to vote as a result of a criminal conviction and in the *Mamidakis* case on the amount of tax penalties. P. MARTENS, « L'influence de la

Court often follows its decision to the full. This policy can turn out to be premature, when the Strasbourg court later revises and refines its case law. Thus, in 2010, the Constitutional Court annulled a decree by the French Community that imposed an absolute ban on political parties advertising on the radio or television[89]. The court referred extensively to the judgment of the ECtHR of 11 December 2008 in the case of *TV Vest AS & Rogaland Pensjonistiparti v. Norway*[90]. Later judgments[91] indicated, however, that the Strasbourg court did find such a ban justified in certain circumstances. Finally, by being too loyal to the Strasbourg Court, the Constitutional Court risks missing opportunities to offer added value to the national protection of fundamental rights. On several occasions the Constitutional Court justified its finding that a fundamental right had not been violated by referring to a judgment in which the ECtHR, in a comparable case, had also found a complaint unfounded, but doing so on the grounds that the state in that case had a margin of national appreciation. The question arises whether the Constitutional Court did not overlook that it was precisely its task to give substance to this national margin of appreciation. The European Court explicitly stated: « The doctrine of margin of appreciation has always been meant as a tool to define relations between the domestic authorities and the Court. It cannot have the same application to the relations between the organs of the State at the domestic level »[92]. In more recent case law, notably a 2013 judgment on the status of the child, the Court acknowledged explicitly that the fact « that the European Court of Human Rights has ruled that a regulation that is comparable with the regulation in the case at hand did not violate Article 8 of the ECHR » did not prevent the Court from holding that there was a violation of Article 22 of the Constitution read together with Article 8 of the European Convention[93].

The question arises why the Belgian Constitutional Court – more than any other constitutional court – seems so often to « outsource » the protection of fundamental rights. A comparison with the German *Bundesverfassungsgericht*[94] and the French *Conseil Constitutionnel*[95] is

jurisprudence de la Cour européenne des droits de l'homme sur la Cour constitutionnelle », *CDPK*, 2010,3, pp. 350-358

[89] Const. Court (Belgium), n° 161/2010, 22 December 2010.

[90] ECtHR, *TV Vest AS & Rogaland Pensjonistiparti v. Norway*, 11 December 2008.

[91] See *e.g.* ECtHR, *Animal Defenders v. the United Kingdom*, 22 April 2013.

[92] ECtHR, *A e.a. v. VK*, 19 February 2009, § 184.

[93] Const. Court (Belgium), n° 29/2013, 7 March 2013, B.11; Const. Court (Belgium), n° 147/2013, 7 November 2013, B.19.

[94] Bundesverfassungsgericht, 14 October 2004, 2 BvR 1481/04, p. 4: « De Gewährleistungen der Konvention beeinflussen jedoch die Auslegung der Grundrechte und rechtsstaatlichen Grundsätze des Grundgesetzes. Der

instructive here. These constitutional courts also draw inspiration from the case law of the European Court of Human Rights. Yet they rarely refer to the European Convention or to Strasbourg judgments. In a 2013 article in the *Tijdschrift voor Publiekrecht*, Sarah Lambrecht[96] demonstrated that those courts place their national constitutions much more at the centre of their decisions. They seem to have much less need for outsourcing. Several explanations could be given for this difference in approach. It has, for instance, been suggested that the Constitutional Court of Belgium, unlike the German *Bundesverfassungsgericht* or the French *Conseil Constitutionnel*, is a more recent institution and so cannot rely on a longstanding tradition of protection of fundamental rights. One could also cite the Constitutional Court's well-known European loyalty, as a result of which the Court appears more willing than many other constitutional courts to grant EU law priority over national law[97]. And finally the fact that the text of Title II of the Constitution does not meet contemporary needs in terms of protection of fundamental rights, and that the Court therefore has to opt for a treaty-conform interpretation of the Constitution; this runs the risk that outsourcing protection sacrifices the added value that constitutional protection of fundamental rights can offer.

Konventionstext und die Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte dienen auf der Ebene des Verfassungsrechts als Auslegungshilfen für die Bestimmung von Inhalt und Reichweite von Grundrechten und rechtsstaatlichen Grundsätzen des Grundgesetzes, sofern dies nicht zu einer – von der Konvention selbst nicht gewollten (vgl. Art. 53 EMRK) – Einschränkung oder Minderung des Grundrechtsschutzes nach dem Grundgesetz führt. »; R. ARNOLD, « Germany. The Federal Constitutional Court of Germany in the context of the European Integration », *in Human Rights protection in the European legal order: the interaction between the European and the national courts*, P. Popelier, C. Van de Heyning and P. Van Nuffel (eds.), Cambridge, Intersentia, 2011, pp. 237-259.

[95] J.P. CAMBY, « Le Conseil constitionnel, l'Europe, son droit et ses juges », *Revue du droit public*, 2008, pp. 1216-1243.

[96] S. LAMBRECHT, « De houding van de vier hoogste rechtscolleges ten aanzien van het EVRM en het Europees Hof voor de Rechten van de Mens: Strasbourg has spoken ... », *op. cit.*,, note 87, p.88.

[97] Only recently the Constitutional court acknowledged that article 34 of the Constitution, which is the basis for the transfer of powers to the EU, does not justify violations of the national identity, reflected in the political and constitutional fundamental structures, or of the basic values the Constitution aims to protect. Const. Court (Belgium), n° 62/2016, 28 April 2016, B.8.7.

4. The Possible Conflicts Between the Review of Constitutionality by the Constitutional Court and the Review of Conventionality by the Courts and Tribunals

There is perhaps a fourth reason for arguing for a facelift of Title II of the Constitution, so that the Court may be less inclined to practice outsourcing: in Belgium ultimately it is not the Constitutional Court's role to review laws, decrees and ordinances for conformity with the European Convention and the other human rights treaties. That task belongs, since the judgment of the Court of Cassation of 27 May 1971 in the *Franco-Suisse Le Ski* case[98], to the courts and tribunals. The judgment of the Court of Cassation of 15 December 2014 is a painful reminder of this. The Constitutional Court[99] initially held that a federal pension law was not contrary to the ban on discrimination in Articles 10 and 11 of the Constitution, read in compliance with the case law of the European Court of Human Rights. Thereafter, the Court of Cassation, which had itself applied for the preliminary ruling[100], held that the law *was* contrary to the ban on discrimination in Article 14 read together with Article 1 of the First Protocol to the European Convention on Human Rights, and referred likewise to the Strasbourg case law[101]. Although one may hope that this was a one-time occurrence, it is clear that as long as judicial review is duplicated – with the courts and tribunals reviewing for conventionality and the Constitutional Court for constitutionality – the question arises whether it is wise for the Constitutional Court to take on the task of reviewing – indirectly – for conventionality as well. The Court knows that it does not have the final word on the matter, at the national level. Should it not, like the *Bundesverfassungsgericht* and the *Conseil Constitutionnel*, keep more closely to the Constitution? But therefore a major clean-up of Title II of the Constitution is needed.

3. The Advisory Practice of the Venice Commission

In this final section, we address the standpoint of the Commission for democracy through law – the so-called Venice Commission – on the relationship between the constitutional and the conventional protection of

[98] Cass. (Belgium), *Franco Suisse Le Ski*, *Arr. Cass.* 1971, 27 May 1971, pp. 959-968.
[99] Const. Court (Belgium), n° 86/2014, 6 June 2014.
[100] Cass. (Belgium), *Office National des Pensions v. A.R.*, S.12.0081.F/1, 27 May 2013. Article 26, § 4, of the Special Law on the Constitutional Court imposes the priority of the question on the compliance with the Constitution.
[101] Cass. (Belgium), , *Office National des Pensions*, S.12.0081.F/1, 15 December 2014.

fundamental rights. The Venice Commission was established in 1990 as an independent consultative body of the Council of Europe[102]. Initially its main objective was to assist former Communist states in their transition to democracy and the rule of law[103]. During the twenty-five years of its existence, the Commission became a « constitutional helpdesk » for states engaged in the process of newly creating or amending their constitution. It has delivered more than 50 opinions on draft constitutions and amendments to the constitutions. Most of these opinions relate to the constitutional developments in Central and Eastern European countries. So the Venice Commission examined the draft constitutions and/or amendements to the Constitution of Albania (1998)[104], Armenia (2001, 2004, 2015[105]), Azarbaijan

[102] Resolution (90) 6 on a Partial Agreement establishing the European Commission for Democracy through Law. The Venice Commission was created on the initiative of the Italian Foreign Affairs Minister. See, A. LA PERGOLA et G.BUQUICCHIO, « Vingt ans avec Antonio La Pergola pour le développement de la démocratie », *in Liber Amicorum Antonio La Pergola*, Rome, Libreria dello Stato, 2008, pp. 23-28.
[103] See G. BUQUICCHIO et S. GRANATA-MENGHINI, « The Venice Commission Twenty Years on. Challenge met but Challenges ahead », *in Fundamental Rights and Principles – Liber amicorum Pieter van Dijk*, M. van Roosmalen *et al.* (eds.), Cambridge, Anvers, Portland, Intersentia, 2013, p. 241; C. GIAKOUMOPOULOS, « La contribution du Conseil de l'Europe aux réformes constitutionnelles : l'action de la Commission de Venise », *in* G. AMATO, G. BRAIBANT, E. VENIZELOS, *The Constitutional Revision in Today's Europe / La révision constitutionnelle dans l'Europe d'aujourd'hui*, European Public Law Series, vol. XXIX, p. 695; J.-C. ENGEL, « La Commission européenne pour la démocratie par le droit, dite "Commission de Venise" : cadre et acteur privilégiés de coopération en matière de justice constitutionnelle », *in Mélanges en l'honneur du professeur Jean Touscoz*, Nice, France-Europe, 2007, p. 869; J. JOWELL, « The Venice Commission – Disseminating Democracy through Law », *Public Law*, 2001, p. 675; G. MALINVERNI, « La réconciliation à travers l'assistance constitutionnelle aux pays de l'Europe de l'Est : le rôle de la Commission de Venise », *Les cahiers de la paix*, 2004, n° 10, p. 207; R. RYCKEBOER, « De Europese Commissie voor Democratie door Recht », *in Publiek recht, ruim bekeken. Opstellen aangeboden aan Prof. J. Gijssels*, Antwerpen, Maklu Uitgevers, 1994, pp. 255-273.
[104] Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania 17/04/1998 CDL-INF(1998)009.
[105] Opinion on the ratification of the European Convention for the protection of Human Rights and Fundamental Freedoms under the Constitution of the Republic of Armenia of 1995 (14-15 December 2001) CDL-INF(2001),025-e; Interim Opinion on Constitutional Reforms in the Republic of Armenia adopted by the Venice Commission at its 61st Plenary Session (Venice, 3-4 December 2004) CDL-AD(2004)044; Second Opinion on the Draft Amendments to the Constitution (in particular to Chapters 8, 9, 11 to 16) of the Republic of Armenia endorsed by the Venice Commission at its 104th Plenary Session (Venice, 23-24 October 2015) CDL-AD(2015)038

(2001, 2009)[106], Belarus (1996)[107], Bosnia Herzegovina (2004)[108], Bulgaria(2003, 2008, 2015)[109], Croatia (2000, 2001)[110], Georgia (2004, 2005, 2009, 2013)[111], Hungaria (1996, 2011, 2013)[112] Kyrgystan (2002, 2005, 2010, 2015, 2016)[113], Moldovia (2002, 2004)[114], Monténégro (2007,

Opinion on the Draft Constitutional Law of the Republic of Azerbaijan on "Safeguards for the Vote of Confidence to the Cabinet of Ministers by the Milli Maljis":(14-15 December 2001) CDL-INF(2001)026); Opinion on the Draft Amendments to the Constitution of the Republic of Azerbaijan (13-14 March 2009), CDL-AD(2009)010-e

[107] Opinion on the amendments and addenda to the Constitution of the Republic of Belarus, (18 November 1996), CDL-INF(1996)008 .

[108] Opinion on the Draft amendments to the Constitution of the Federation of Bosnia and Herzegovina, (12-13 March 2004) CDL-AD(2004)014; Opinion on the New Draft Amendments to the Constitution of the Federation of Bosnia and Herzegovina concerning Local Government (8-9 October 2004) CDL-AD(2004)032 Opinion on the Draft Amendments to the Constitution of Bosnia and Herzegovina (10 June 2006) CDL- D(2006)019.

[109] Opinion on the Constitutional Amendments reforming the Judicial System in Bulgaria (17-18 October 2003),CDL-AD(2003)016; Opinion on the Constitution of Bulgaria, (14-15 March 2008) CDL-AD(2008)009.Opinion on the draft Act to amend and supplement the Constitution (in the field of the Judiciary) of the Republic of Bulgaria (23-24 October 2015) CDL-AD(2015)022.

[110] Opinion on the Croatian Constitutional Law amending the Constitutional Law of 1991, (16 June 2000); Opinion on the Amendments of 9 November 2000 and 28 March 2001 to the Constitution of Croatia (6-7 July 2001) CDL-INF(2000)010.

[111] Opinion on the Draft Amendments to the Constitution of Georgia (12-13 March 2004) CDL-AD(2004)008; Opinion on Draft Constitutional Amendments relating to the Reform of the Judiciary in Georgia (11-12 March 2005) **CDL-**AD(2005)005; Opinion on Four Constitutional Laws amending the Constitution of Georgia (13-14 March 2009) **CDL-**AD(2009)017; Opinion on a Draft Constitutional Law on the Amendments to the Constitution of Georgia (12-13 June 2009) CDL-AD(2009)030; Final opinion on the draft constitutional law on amendments and changes to the constitution of Georgia (15-16 October 2010) CDL-AD(2010)028; Opinion on three Draft Constitutional Laws amending two Constitutional Laws amending the Constitution of Georgia (11-12 October 2013) CDL-AD(2013)029.

[112]Opinion on the regulatory concept of the Constitution of the Republic of Hungary, CDL-INF(1996)002; Opinion on the new Constitution of Hungary (17-18 June 2011) CDL-AD(2011)016; Opinion on the Fourth Amendment to the Fundamental Law of Hungary (14-15 June 2013 CDL-AD(2013)012.

[113] Opinion on the Draft Amendments to the Constitution of Kyrgyzstan (13-14 December 2002) CDL-AD(2002)033; Interim Opinion on Constitutional Reform in the Kyrgyz Republic (21-22 October 2005) CDL-AD(2005)022; Opinion on the Draft Constitution of the Kyrgyz Republic (4 June 2010)CDL-AD(2010)015; Joint Opinion on the draft law « on introduction of changes and amendments to the Constitution » of the Kyrgyz Republic (19-20 June 2015) CDL-AD(2015)014; Opinion on the Draft Law on introduction of amendments and changes to the Constitution CDL-PI(2016)009.

2011, 2013) [115], Poland (1991)[116], Roumania (2002, 2003, 2014)[117], Russia (1994, 2016)[118], Serbia (2007)[119] the former Yogoslav Republic of Macenia (2014)[120] and Ukraine (1996, 1997, 2003, 2008, 2009, 2013, 2014)[121].

[114] Opinions on the Draft Law on Modification and Amendment to the Constitution of the Republic of Moldova (5-6 July 2002) CDL-AD(2002)014; Opinion on the Law on Modification and Addition in the Constitution of the Republic of Moldova in Particular Concerning the Status of Gagauzia (8-9 March 2002) CDL-AD(2002)020; Opinion on the Proposal to Amend the Constitution of the Republic of Moldova (3-4 December 2004) CDL-AD(2004)043.

[115] Opinion on the Constitution of Montenegro (14-15 December 2007) CDL-AD(2007)047; Interim Opinion on the Draft Constitution of Montenegro (1-2 June 2007) CDL-AD(2007)017; Opinion on the draft amendments to the Constitution of Montenegro, as well as on the draft amendments to the law on courts, the law on the state prosecutor's office and the law on the judicial council of Montenegro (17-18 June 2011) CDL-AD(2011)010; Opinion on the Draft Amendments to three Constitutional Provisions relating to the Constitutional Court, the Supreme State Prosecutor and the Judicial Council of Montenegro (11-12 October 2013) CDL-AD(2013)028.

[116] Some observations on the draft of the new Constitution of the Republic of Poland CDL(1991)015

[117] Opinion on the Draft Revision of the Romanian Constitution (5-6 July 2002) CDL-AD(2002)012; Opinion on the Draft Revision of the Constitution of Romania (14-15 March 2003) CDL-AD(2003)004 Opinion on the Draft Law on the Review of the Constitution of Romania (21-22 March 2014) CDL-AD(2014)010.

[118] Opinion on the Constitution of the Russian Federation adopted by popular vote on 12 December 1993 CDL(1994)011; Opinion on the amendments to the Federal Constitutional Law on the Constitutional Court (10-11 June 2016), CDL-AD(2016)016.

[119] Opinion on the Constitution of Serbia (17-18 March 2007) CDL-AD(2007)004.

[120] Opinion on the seven amendments to the Constitution of "the former Yugoslav Republic of Macedonia" concerning, in particular, the judicial Council, the competence of the Constitutional Court and special financial zones (10-11 October 2014) CDL-AD(2014)026

[121] Opinion on the draft Constitution of Ukraine (17-18 May 1996), CDL(96)15) CDL-INF(1996)006; Opinion on the Constitution of Ukraine, (7 - 8 March 1997 CDL-INF(1997)002; Opinion on three Draft Laws proposing Amendments to the Constitution of Ukraine (12-13 December 2003) CDL-AD(2003)019; Opinion on the Draft Constitution of Ukraine (13-14 June 2008) CDL-AD(2008)015; Opinion on the Draft Law of Ukraine amending the Constitution (12-13 June 2009) CDL-AD(2009)024; Opinion on the Draft Law on the amendments to the Constitution, Strengthening the Independence of Judges and on the Changes to the Constitution proposed by the Constitutional Assembly of Ukraine (14-15 June 2013) CDL-AD(2013)014; Opinion on proposals amending the Draft Law on the amendments to the Constitution to strengthen the independence of Judges of Ukraine; CDL-CD(2013)034; Opinion on the Draft law amending the Constitution of Ukraine (10-11 October 2014) CDL-AD(2014)037

However, a recent development has been that well-established democracies that undertake substantial revisions of their constitutions also ask for the opinion of the Commission. Thus, in the last few years, the Commission has issued opinions on important constitutional developments in Liechtenstein (2002)[122], Finland (2008)[123], France (2016)[124] Luxembourg (2009) [125], Iceland (2013)[126] and Monaco (2013)[127]. Most recently, the Commission has also assisted with the new constitution of Tunisia (2013)[128].

The Commission has not (yet) issued a thematic report[129] on the utility of the national constitutional protection of human rights, in the light of the international and European conventional protection. However on several occasions the Commission has addressed aspects of this issue. From its opinions, reports and studies, it is possible to draw some « constitutional standards » or « constitutional good practices »[130] the Commission applies in this field.

The Venice Commission emphasises that « fundamental rights are a constitutional matter *par excellence* ». (Hungary, 2011, 59) In all its opinions, the Commission devotes ample attention to the title or chapter of the constitution devoted to human rights. Notwithstanding the importance of international human rights conventions, the Venice Commission will never

[122] Avis relatif aux amendements que la Maison princière du Liechtenstein propose d'apporter à la Constitution du Liechtenstein (13-14 December 2002) CDL-AD(2002)032.
[123] Opinion on the Constitution of Finland (14-15 March 2008) CDL-AD(2008)010
[124] Opinion on the Draft Constitutional Law on « Protection of the Nation » of France (11-12 March 2016) CDL-AD(2016)006
[125] Interim Opinion on the Draft Constitutional Amendments of Luxembourg (11-12 December 2009) (Venice, 11-12 December 2009) CDL-AD(2009)057
[126] Opinion on the Draft New Constitution of Iceland (8-9 March 2013) CDL-AD(2013)010
[127] Opinion on the balance of powers in the Constitution and the Legislation of the Principality of Monaco (14-15 June 2013) CDL-AD(2013)018.
[128] Opinion on the Final Draft Constitution of the Republic of Tunisia (11-12 October 2013) CDL-AD(2013)032 .
[129] The Commission published *e.g.* reports « on the implementation of international human rights treaties in domestic law and the role of the courts » (CDL-AD(2014)036, 10-11 October 2014) and "on constitutional amendment" (CDL-AD(2010)001, 11-12 December 2009)
[130] The Commission does not always distinguish explicitly between common constitutional standards that states have to comply with, on the one hand, and constitutional good practices and guidelines that they are encouraged to approximate, on the other hand. See M. DE VISSER, « A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform », *American Journal of Comparative Law*, 2015, 63 (4), pp. 963-1008.

say that there is no need to protect in the Constitution what is already protected in the Conventions. On the contrary, the Commission finds it « understandable that the people (of a state) wish to have their own catalogue of human rights which would reflect a consensus within the country on human rights protection ». (Bosnia Herzegovina, 2006, 77) The Commission not only emphasises that the « symbolic role of a catalogue of specific rights should certainly not be disregarded » (Hungary, 1996, 2 — the Constitution reflecting the basic values on which the society is built – but it also underlines that constitutionalising fundamental rights has « the effect of placing them under the (direct) jurisdiction of the Constitutional Court » (Luxembourg, 2009, 36), which may be of some importance.

The Venice Commission has to deal with states that are signatories of the various human rights treaties and conventions, in particular of the European Convention on Human Rights. Various constitutions also state explicitly that these treaties are directly applicable and take precedence over all domestic legislation, and sometimes even over the constitution. Without stating that there is an obligation to have such provisions incorporated in the constitution, « in order to prevent any ambiguity and debate », the Commission encourages constitutional drafters to adopt a clear stance within the constitution itself, regarding the place of international treaties in the hierarchy of norms, to clarify their hierarchical relationship with the Constitution, and not to leave this to the discretion of the judiciary (Armenia, 2004, 11; Kyrgyz Republic, 2016, 42; Luxembourg, 2009, 35).

The Venice Commission of course also stresses that the national constitution may not contradict international conventions on human rights. However, « a real contradiction may only be found where the constitutional provisions expressly prevent the enjoyment of the rights enshrined in the (International) and European Convention » (Armenia 2001, 12). Such provisions have only seldom occurred in the constitutions examined by the Commission. In the draft Constitution of Hungary, for instance, « life imprisonment without parole » was allowed. The Commission was of the opinion that this was not in compliance with Article 3 of the Convention, as applied by the ECtHR in its case law, and specifically in its Judgment of 12 February 2008 (Hungary, 2011, 69) [131]. The draft Constitutions of some other countries provided that some fundamental rights – the right to own land, (Armenia, 2001, 12) freedom of religion (Tunisia, 2013, 37) or the principle of equality and non-discrimination (Armenia, 2001, 9; Bosnia Herzegovina, 2006, 85; Bulgaria, 2008, 55; Romania, 2014, 49 and 52; Tunisia, 2013, 45) – could not be invoked by non-citizens. The Commission found this to be a

[131] ECtHR, *Kafkaris v. Cyprus*, n°21906/04, 12 February 2008.

violation of Article 14 of the ECHR. A constitution is, not, however in contradiction with the human rights conventions if it simply does not confirm the rights guaranteed by those conventions. As long as the constitution does not exclude respect for the conventions, there is no problem.

Furthermore, the Venice Commission emphasises « that international human rights treaties are almost invariably intended to set out minimum standards. States are permitted and even encouraged to provide more extensive rights in their constitutions, as long as these do not violate the minimum international standards » (Finland, 2008, 9). This additional constitutional protection can pertain to both the catalogue of rights and to the system of restrictions. As regards the catalogue, the Commission *e.g.* welcomed that a Constitution did not limit the scope of the right to a fair trial to civil and criminal proceedings (Serbia, 2007, 35). As for the system of restrictions, in its opinion on the Luxembourg Constitution – which is largely inspired from the Belgian Constitution – the Commission referred to the legality principle and the prohibition of preventive measures, and qualified these guarantees as « very important » (Luxembourg, 2009, 41). It is not only the constitutional catalogue of human rights and the constitutional system of restrictions that can have an added value. « States are also entitled, within the margin of appreciation permitted to them, to achieve a balance between competing rights which best suit their constitutional traditions and culture » (155, Finland, 2008, 9). « For example, one state may place greater emphasis on freedom of information than another, and less on the privacy of personal data – and yet still comply with its international obligations. The ECHR should be considered as the minimum content of fundamental rights, while the limitations admitted by the Court's case law should be considered as maximum to the national legislator » (Finland, 2008, 9).

The Venice Commission further underlines that it is « certainly not necessary for any state to reproduce the international conventions in the Constitution itself » (Hungary, 2006, 2). Even the ECHR « does not require that the rights guaranteed therein be given constitutional status » (Armenia, 2001, 15). The Commission stresses that there is no obligation whatsoever to « incorporate blindly the provisions of any particular international human rights conventions into the text. Besides, the number of such conventions and the great variety of rights and freedoms which they contain would make such a requirement unrealistic » (Luxembourg, 2009, 34). Where a state « has ratified many human rights treaties, striving for complete harmony may involve inserting a very long and therefore confusing catalogue of rights into the constitution » (Finland, 2008, 9).

However – and this seems to be the main guideline in the Venice Commission's opinions – the Commission takes the stance that as the European Convention and the international conventions establish the minimum standard, the constitutional drafters « must ensure that the level of national human rights protection is not below the international level and that the Constitution confirms the generally recognised standards and faithfully reflects the possibilities for restricting human rights » (Luxembourg, 2009, 44). There are, however, several means to achieve this goal. In its opinions, the Commission distinguishes between states « emerging from a period of authoritarian rule, with limited traditions of meaningful constitutional rights », and states that have « a relatively long democratic and constitutional tradition » (Finland, 2008, 9; 29/156). We will refer to these as the « new » and the « old » democracies respectively.

For the so-called « new democracies » in search of a new constitution under the rule of law, the Commission has always been of the opinion that they should strive for harmony at least with the international human rights treaties, (Finland, 2008, 9), especially with the European Convention which they all have ratified as member states of the Council of Europe. Both the catalogue of the rights and the limitation clauses should reflect the provisions of the Convention. Precisely because these states often have no tradition of constitutional protection of human rights and need « to rapidly put into place a coherent catalogue », the Commission takes the view that they « will find that the harmonised approach can be particularly useful » (Finland, 2008, 9)[132]. Often the drafts submitted to the Venice Commission contained very comprehensive and precise catalogues, yet sometimes several rights and freedoms were missing. Thus the Commission on several occasions recommended that the constitution should contain a provision on the prohibition of capital punishment, (Armenia, 2004 13, Kyrgyz Republic, 2005, 15, Ukraine, 2008, 25)[133], on the prohibition of torture and inhuman and degrading treatment or punishment, (Montenegro, 2007, 75) on the prohibition of slavery and forced labour, (Montenegro, 2007, 94; Tunisia, 2013, 77), on the guarantees in case of detention, and on the right to a fair trial. These provisions should reflect Articles 5 and 6 ECHR (Montenegro,

[132] See also Armenia, 2001, 19: « The Venice Commission insisted upon the necessity to enshrine clearly all fundamental values and more specifically all fundamental human rights in the Constitution ».

[133] The Commission recommended this, although the state had ratified Protocol 6 (« Protection of death penalty ») and protocol 13 (« Complete abolition of death penalty ») (Hungary, 2011, 68).

2007, 56; Romania, 2014, 55; Ukraine, 1996, p. 6; Tunisia, 2013, 56-57; Armenia, 2001, 2, Armenia, 2004, 15)[134].

The Venice Commission considered that not only should the catalogue of rights reflect the European Convention on Human Rights, but it also recommended that « the limitation clauses should be in harmony with the ECHR's case law and other applicable international instruments » (Armenia, 2014, 28). Some state authorities pointed out that, through its ratification, the Convention was part of the national legal system and, consequently, the « second paragraphs » of the Convention rights, *i.e.* the limitation clauses, were part of national law. The Venice Commission maintained however « that it is preferable from the point of view of effective protection of the rights concerned that such substantive limitation clauses be added to the various rights of the human rights chapter in the Constitution itself ». (Bulgaria, 2008, 68) In several of its opinions, the Commission recommended referring in the limitation clauses to the principles of legality, legitimacy, and proportionality. (Armenia, 2004, 31; Montenegro, 2007, 21, 32; Ukraine, 1996, Tunisia, 2013, 28)[135]

For the so-called old democracies – the states « with a relatively long democratic tradition, which emphasises continuity in constitutional development and which has a rights catalogue which to a large extent predates its acceptance of international obligations » – the Venice Commission is of the opinion that« the "harmonised approach" is less appealing and may not be so practicable ». (Finland, 2008, 9) Striving for the incorporation of the ECHR catalogue into the existing constitutional catalogue – the significance and added value of which is very often established in the case law and the constitutional culture of the country – will often not be possible at all or will result in a very confused catalogue. This also applies to the limitation clauses. Therefore, in the opinions on the amending of the constitution of Finland, Iceland and Luxembourg, the

[134] The Commission inter alia also recommended inserting more detailed provisions on the prohibition of discrimination, referring to the different suspected grounds, (Tunisia, 2013, 46) on the right to freedom of thought and belief, (Montenegro, 2007, 67) the right to respect for family life, (Montenegro, 2007, 96; Tunisia, 2013, 77) the right to form and join trade unions, (Montenegro, 2007, 75) the freedom of movement and residence, (Montenegro, 2007, 58) and the freedom to choose a profession (Ukraine, 1996, p. 6).

[135] In some of the opinions on draft constitutions of so-called new democracies, the Commission expressed its preference for an article-by-article limitation, added to the various rights, rejecting « a common necessarily vague, general clause covering without distinction all rights ». (Iceland, 2013, 37; Bulgaria, 2008, 67-72, Ukraine, 1997), in others it did not criticize the inclusion of a general clause, on the condition that it complied with the international limitation clauses.

Venice Commission does not recommend the « harmonising approach ». It nevertheless is of the opinion that notwithstanding the existence of international human rights conventions, « it might be appropriate to update » the chapter on human rights in the constitution « from the angles both of human rights and of clauses limiting such rights ». (Luxembourg, 2009, 34) In its opinions, the Commission seems to express two major concerns.

As regards the updating of the catalogue, the Commission takes the view « that a national constitution should guarantee the human rights and public freedoms which are designated as fundamental at State level » (Luxembourg, 2009, 36). A state cannot afford to not guarantee in its constitution the most vital and crucial fundamental rights. The Commission also insists on the need for coherence in a constitution. It warns against an inconsistent updating, with some of the most fundamental rights added and others not. In its opinion on the amendment of the Luxembourg Constitution, the Commission stated that the catalogue lacked consistency because, for instance, « such incontrovertible fundamental rights as the right to life, safeguards in cases of deprivation of liberty and general guarantees relating to a fair trial are not mentioned » (Luxembourg, 2009, 36). The Commission underlined that as the right to life is « a vital element of human dignity », a specific provision should guarantee this right. A provision on the prohibition of capital punishment was deemed insufficient as it « did not comprise all the guarantees set out in Article 2 ECHR » (Luxembourg, 2009, 48). Moreover the Commission was of the opinion that the provisions of the Constitution should reflect Articles 5 and 6 ECHR (Luxembourg, 2009, 54).

A second concern seems to be that the Venice Commission recommends that constitutional drafters strive for a certain harmony, not by introducing provisions reflecting the European Convention on Human Rights or other human rights treaties, but rather by introducing so called transversal or cross-referencing provisions on the interpretation, limitation, derogation and the abuse of human rights. These provisions have the advantage of not disrupting the existing constitutional provisions, « which still retain their raison d'être and possess added value », while at the same time bringing the Constitution, to a large extent at least, in line with the international and European human rights instruments. As regards the interpretation clause, the Commission refers to Article 52.3 of the EU Charter of Fundamental Rights (Luxembourg, 2009, 47)[136]. It is of the opinion that it « would be

[136] Article 52.3: « In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection ».

helpful to accept as a general rule that all (constitutional) norms have to be interpreted in the light of international human rights treaties » (Kyrgyz Republic, 2010, 16) and that introducing such a provision into the Constitution is to be considered « a positive signal, a commitment to international and European standards » (Serbia, 2007, 26). « Gaps and tensions » that might exist between the international and European obligations of a state on the one hand and the literal wording of the constitutional provisions on the other, can be filled « through the application of the principle of treaty-conform construction, taking full account of the applicable international case law » (Finland, 2008, 12).

As for the general limitation clause, the Venice Commission refers to Article 52.1 of the EU Charter[137]. The advantage of a general limitation clause is that it leaves intact the existing, more specific clauses of the constitution while at the same time providing criteria for assessing the legality, legitimacy and proportionality of the restrictions, in compliance with international human rights standards. For some countries introducing such clause into the Constitution would only mean a confirmation of the existing constitutional practice. This is however not considered by the Venice Commission to be a good excuse for not introducing it. In its opinion on the amendment of the Finnish Constitution, the Commission observed that the Constitution itself did not contain such a general limitation clause, but that it was set out in the preparatory work to the Constitution. The Commission considered « that as long as these statements in the preparatory work are faithfully and fully applied in practice by both the legislature and the courts, it is not incompatible with European standards » (Finland, 2008, 15). The Commission nevertheless « strongly urges that the Finnish parliament consider, in any future reform of Chapter II, whether these general limits may be set out in the text of the Constitution itself ». The Commission has also recommended considering the introduction of a clause prohibiting the abuse of fundamental rights, on the model of Article 17 of the ECHR, Article 5 (1) of the ICCPR and Article 54 of the EU Charter, (Luxembourg, 2009, 47), as well as introducing a clause on derogations from human rights in times of war or other public emergency, on the model of Article 15 of the ECHR and Article 4.1 of the ICCPR (France, 2016, 51-54)[138] .

[137] Art. 52.1. « Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others ».

[138] « The Venice Commission, given that constitutions normally contain provisions to safeguard fundamental rights and freedoms, has already expressed the view that provision for situations of emergency rule should be made in the form of express

We come to our conclusions. Constitutional versus international protection of human rights: added value or redundancy? We would answer: added value and redundancy. Added value, because states have been the first and must still be the first to provide protection of human rights. The European and international level of protection comes second. States have always provided this protection and they can still do so on the basis of their own constitutions, which contain the national identity of the human rights protection and can go further than the « minimum standards » set out by the conventions. Redundancy, because national protection, especially by the Constitutional Courts, has of course to comply with these minimum standards, which therefore – for the sake of transparency and consistency – should be reflected in the Constitution. When a Constitution is outdated – as to a certain extent is the case with the Belgian Constitution – the Constitutional Court can try to solve the problem by reading the Constitution in a broad and progressive manner, but ultimately it is the responsibility of the Constitutional legislator to update the Constitution and bring it into line with the international minimum standards of human rights protection.

constitutional rules ». (§ 52) See also Armenia, 2015, 61; Bulgaria, 2008, 73; Finland, 2008, 11; Luxembourg, 2009, 47; Montenegro, 2007, 34; Serbia, 2007, 28; Ukraine, 1997, art. 33.