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REPORT

THE INFLUENCE OF THE ECHR ON NATIONAL CONSTITUTIONALJURISPRUDENCE: THE EXAMPLE OF THE BELGIAN CONSTITUTIONAL COURT

by

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I. Short Introduction on Human Rights Protection in Belgium[1]

§ 1. Sources of Human Rights

1. The protection of fundamental rights and freedoms in the Belgian legal system is enshrined in the Constitution and in human rights treaties. Following the approval of the ratification laws, the European Convention on Human Rights (ECHR) forms an integral part of the internal legal system. The Constitution and the ECHR safeguard the following rights:

- Right to life (Article 2, ECHR; Article 1, Sixth Protocol; Article 1, Thirteenth Protocol);
- Right to a life in conformity with human dignity (Article 23, Constitution);
- Right of every child to respect for his integrity (Article 22*b*, Constitution);
- Prohibition of torture and of inhuman or degrading treatment (Article 3, ECHR);
- Prohibition of slavery and forced labour (Article 4, ECHR);
- Right to liberty and security (Article 12, Constitution; Article 5, ECHR; Article 1, Fourth Protocol);
- Freedom of movement and residence (Article 12, Constitution; Article 2, Fourth Protocol);
- Prohibition of expulsion of nationals and collective expulsion of aliens (Articles 3 and 4, Fourth Protocol);
- Prohibition of certain penalties (Articles 17 and 18, Constitution; Articles 2 to 4, Sixth Protocol);
- No punishment without law (Articles 12 and 14, Constitution; Article 7, ECHR);
- Prohibition of retroactive effect in criminal law (Article 7, ECHR);
- Presumption of innocence (Article 6, § 2, ECHR);
- Right to a fair trial (Articles 148 and 149, Constitution; Article 6, ECHR);
- Right to an effective remedy (Articles 13 and 31, Constitution; Article 13, ECHR);
- Right to respect for private and family life (Articles 15, 22 and 29, Constitution; Article 8, ECHR);
- Right to marry and to found a family (Article 12, ECHR);
- Freedom of thought, conscience and religion (Articles 19, 20 and 21, Constitution; Article 9, ECHR);
- Freedom of expression (Articles 19 and 25, Constitution; Article 10, ECHR);
- Freedom of assembly and association (Articles 26 and 27, Constitution; Article 11, ECHR);
- Freedom of language use (Article 30, Constitution);
- Right to and freedom of education (Article 24, Constitution; Article 2, First Protocol);
- Right to protection of property (Article 16, Constitution; Article 1, First Protocol);
- Right to equal treatment and prohibition of discrimination (Articles 10, 11, 11*b*, 24, 172 and 191, Constitution; Article 14, ECHR; Article 1, Twelfth Protocol);
- Right to elect and to be elected (Article 8, Constitution; Article 3, First Protocol);
- Right to consult administrative documents (Article 32, Constitution);
- Right to address petitions (Article 28, Constitution);
- Right to employment and to the free choice of a professional activity (Article 23, third paragraph, 1°, Constitution);

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[1] For a more detailed discussion, see Y. HAECK and J. VANDE LANOTTE, "Human Rights in Belgium: Sources, Monism-Dualism, Hierarchy, Direct Effect, Third-Party Applicability and Implementation Mechanisms", in J. VANDE LANOTTE, J. SARKIN and Y. HAECK (eds.), *The Principle of Equality. A South African and a Belgian Perspective*, Antwerp, Maklu, 2001, 1-69.

- Right to information, consultation and collective negotiation (Article 23, third paragraph, 1°, Constitution);
- Right to social security, to health care and to social, medical and legal aid (Article 23, third paragraph, 2°, Constitution);
- Right to decent accommodation (Article 23, third paragraph, 3°, Constitution);
- Right to enjoy the protection of a healthy environment (Article 23, third paragraph, 4°, Constitution);
- Right to enjoy cultural and social fulfilment (Article 23, third paragraph, 5°, Constitution).

2. Besides the Constitution and the European Convention on Human Rights, there are other treaties and legal principles that safeguard fundamental rights. One example of a general legal principle of constitutional value that is acknowledged in the case-law of the Court of Arbitration – as the Belgian Constitutional Court is called – is the right to be tried within a reasonable time (judgment no. 148/2004).[2] This right is enshrined in Article 6 of the ECHR, but not in any constitutional provision. The general legal principle may be relevant if the dispute does not fall within the scope of Article 6 of the ECHR.

§ 2. Restrictions on Human Rights

3. The ability to restrict a fundamental right is conceived differently in the Constitution and in the ECHR. The Constitution allows a restriction on a formal basis, whereas the ECHR allows it on a substantive basis. In other words, the Constitution contains no grounds on which fundamental rights can be restricted, as the ECHR does. The Constitution usually only requires that no preventive measures are imposed and that the other restrictions are laid down by or in accordance with the law. The ECHR also contains a legality principle, but this merely refers to the existence of a legal basis, although this must be sufficiently accessible and precise. The constitutional principle of legality, on the other hand, guarantees that a restriction can only be imposed by a democratically elected deliberating assembly. This does not mean, however, that everything has to be provided for by the legislature. A delegation of powers to the executive does not constitute a violation of the legality principle insofar as such delegation is precisely defined and concerns the implementation of measures of which the essential elements have been established by the legislative assembly beforehand.

4. The absence in the Constitution of grounds on which fundamental rights may be restricted does not mean that the legislature can do as it pleases. The Court of Arbitration considers that where a provision of a treaty that is binding on Belgium is similar in scope to one or several provisions of the Constitution, the safeguards contained in those treaty provisions constitute an inseparable whole with the safeguards contained in the constitutional provisions in question (judgment no. 136/2004). Consequently, when an infringement of a constitutional provision is adduced, the Court in its review will take into account provisions of international law that guarantee similar rights and freedoms.

§ 3. Implementation of Human Rights

5. Preventive review is in principle carried out by the Legislation Section of the Council of State. The opinions it delivers, however, are not binding.

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[2] The judgments of the Court of Arbitration can be found at www.arbitrage.be; the judgments of the European Court of Human Rights can be found at www.echr.coe.int.

6. The jurisdiction to review *a posteriori* whether a fundamental right has been violated has not been given to one single court of law. Every court is obliged to refrain from enforcing a (general or individual) act of the executive if it is contrary to a higher legal standard, such as the provisions of the Constitution and the ECHR (Article 159, Constitution). Such an act may also be annulled at the request of an interested party by the Administration Section of the Council of State. In principle, a legislative act can only be reviewed and subsequently annulled by the Court of Arbitration. The Court is empowered to review legislative acts for compatibility with Title II of the Constitution, which contains provisions that guarantee a number of fundamental rights. As said earlier, the Court in its review takes into account provisions of international law that guarantee similar rights and freedoms. The ordinary courts and tribunals and the Council of State do not have the authority to review the constitutionality of statutes. By virtue of the precedence of the law of treaties over legislative acts, however, they are obliged to refrain from enforcing any law that is contrary to directly applicable provisions of international law (Cass. 27 May 1971, *Arr. Cass.* 1971, 959). The interpretation that the European Court of Human Rights gives to a provision of the ECHR is deemed to constitute an integral part of that provision.

7. A case may be brought before the Court of Arbitration through an action for annulment or a preliminary issue. Along with the action for annulment, or during the course of the proceedings, the suspension of the challenged legislative act may be demanded.

An action for annulment may be brought by the various governments, presidents of parliaments (at the request of two-thirds of their members) and by any person who declares an interest in the annulment of the legislative act in question. An action for annulment must, as a rule, be brought within six months of the publication of the challenged act. If an action for annulment is well-founded, the Court will annul all or part of the challenged provisions, while (provisionally) maintaining, where appropriate, the effects of the provisions in question. The judgment of annulment is absolutely final and conclusive from the date of its publication in the *Belgisch Staatsblad*. If the action for annulment is dismissed, the judgment shall be binding with respect to the points of law settled by those judgments.

If in a dispute before a court of law one of the parties invokes the infringement by a legislative act of one of the provisions, the compatibility with which the Court of Arbitration is empowered to review, the court of law hearing the case must in principle refer a preliminary issue to the Court of Arbitration. Naturally no time limit is set for doing so. The court that raised the preliminary issue and any other court of law called upon to rule on the same matter must, in settling the dispute, comply with the ruling given by the Court of Arbitration. The challenged provision shall remain in effect; however, if the Court of Arbitration has established an infringement, a new six-month term will be granted in which an action for annulment of that provision may be brought. When a court in another case is confronted with a dispute with reference to which it is obliged to apply legal provisions that are subject to constitutional review, the logic of the system says that the constitutional legislator wanted that court to refuse to apply provisions that the Court of Arbitration has deemed unconstitutional, unless the court considers it necessary to raise a new preliminary issue (judgment no. 62/2002).

II. Influence of the case-law of the European Court of Human Rights on the jurisprudence of the Belgian Constitutional Court

8. As emerged in the previous chapter, constitutionality review in the Belgian legal system is largely a diffuse matter. It turned out to be impossible to offer a survey of the entire case-law

in this area. A few examples from the case-law of the Court of Arbitration are given below. These will show that the influence of the case-law of the European Court of Human Rights can be called paramount.

9. For a proper understanding of the matter, it should first be observed that the jurisdiction of the Court of Arbitration to review compatibility with fundamental rights was, until recently, restricted to Articles 10, 11 and 24 of the Constitution, which enshrine the principle of equality, the prohibition of discrimination and the right to education respectively. Since mid-2003, the Court has jurisdiction to review compatibility with other constitutional rights and freedoms as well. The Court, however, has always held the view that Articles 10 and 11 are general in scope and prohibit any form of discrimination, irrespective of its grounds: the constitutional principles of equality and non-discrimination apply to all rights and freedoms, including those that ensue from international treaties that are binding on Belgium (e.g. judgment no. 18/90 and judgment no. 106/2003). Consequently, the Court had been reviewing legislative acts for compatibility with the other rights and freedoms already before its jurisdiction was extended, namely indirectly through Articles 10 and 11 of the Constitution.

It should also be reiterated that when an infringement is claimed of a provision of the constitution, the Court in its investigations takes into account provisions of international law that guarantee similar rights and freedoms (see no. 4). Where such provisions grant rights to "every person", yet provide that exceptions are allowed under certain conditions, the Court has to examine whether the legislator has not exceeded the limits within which such exceptions are allowed (judgment no. 4/96).

§ 1. The Principle of Equality and Non-discrimination

10. Review of compatibility with the principle of equality figures prominently in the case-law of the Court of Arbitration, whereas in the case-law of the European Court of Human Rights it is still of secondary importance. Nevertheless, on the subject of the possible restrictions of the equality principle, the Court of Arbitration has from the outset sought inspiration from the case-law of the European Court of Human Rights.

In the well-known *Belgian Linguistic case* of 23 July 1968, the European Court of Human Rights was asked to rule for the first time on an alleged infringement of Article 14 of the European Convention on Human Rights. The first problem of interpretation which it had to address resulted from a textual difference between the French and English versions of the Convention. Where the English version provided that *"the enjoyment of the rights and freedoms shall be protected without discrimination",* the French version uses the word *distinction* instead of *discrimination*. The European Court of Human Rights rightly considered that not every distinction can be forbidden, but only distinctions of a discriminatory nature. The next question was: When is differentiation discrimination?

"On this question the Court, following the principles which may be extracted from the legal practice of a large number of democratic States, holds that the principle of equality of treatment is violated if the distinction has no objective and reasonable justification. The existence of such a justification must be assessed in relation to the aim and effects of the measure under consideration, regard being had to the principles which normally prevail in democratic societies. A difference of treatment in the exercise of a right laid down in the Convention must not only pursue a legitimate aim: Article 14 is likewise violated when it is clearly established that there is no reasonable relationship of proportionality between the

means employed and the aim sought to be realised." (ECHR, 23 July 1968, *Belgian Linguistic case*)

According to settled case-law of the Court of Arbitration, the constitutional principles of equality and non-discrimination do not rule out that a difference in treatment may be instituted between different categories of persons, provided that such difference is based on objective criteria and is reasonably justified. The existence of such a justification must be assessed in the light of the purpose and effects of the challenged measure and the nature of the principles that apply in this case. The equality principle is said to be violated if it is certain that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (e.g. judgment no. 37/97).

According to the Court of Arbitration, the same rules oppose the identical treatment, without reasonable justification, of different categories of persons who for the purposes of the challenged measure are in essentially different situations (e.g. judgment no. 1/94). The European Court of Human Rights has been sharing this view for some years now (ECHR, 6 April 2000, *Thlimmenos*).

Also in connection with the principle of equality, and also under the influence of the case-law of the European Court of Human Rights, the Court of Arbitration argues that review for compliance with the equality principle is stricter when certain "questionable" criteria are involved, such as gender (judgment no. 166/2003, cf. ECHR, 24 June 1993, *Schuler-Zgraggen*), nationality (judgment no. 62/98, cf. ECHR, 16 September 1996, *Gaygusuz*) or birth (judgment no. 140/2004, cf. ECHR, 1 February 2000, *Mazurek*).

11. Also in the review of specific cases in terms of compliance with the equality principle, the Court of Arbitration from the outset endorsed the case-law of the European Court of Human Rights. Hen asked to rule on a transitional provision which, after judgment was given against the Belgian State in the *Marckx* judgment, maintained the discrimination of illegitimate children for a number of years, the Court of Arbitration considered, in keeping with the *Marckx* judgment, that in order to avoid legal uncertainty it was justifiable that the estates that devolved before the pronouncement of the *Marckx* judgment should remain intact, despite the discrimination that was found, but that the discriminatory rule could no longer be applied to the estates that devolved after 13 July 1979 (judgment no. 18/91). The European Court of Human Rights upheld the view of the Court of Arbitration shortly afterwards (ECHR, 29 November 1991, *Vermeire*).

§ 2. The Prohibition of Retroactive Legislation

12. As a result of the central role of the equality principle in the case-law of the Court of Arbitration, retroactive legislation is also reviewed in accordance with Articles 10 and 11 of the Constitution. A legislative act is considered contrary to the principle of equality if the principle of legal certainty is infringed in a discriminatory manner as a result of its retroactive effect. This is the case if there is no objective and reasonable justification for infringing the legal certainty of a certain category of persons. Retroactive legislation is only justifiable if it is essential to the achievement of a particular objective in the public interest, such as the proper functioning or continuity of the public service. If, in addition, it turns out that, as a result of the retroactive effect, the outcome of one or several lawsuits is influenced in a particular way, or courts of law are prevented from ruling on a particular point of law, the nature of the principle at issue requires that extraordinary circumstances or compelling grounds of public interest provide a justification for the actions of the legislator, which for a

given category of citizens infringe the jurisdictional guarantees that are given to all persons (e.g. judgment no. 49/98 and judgment no. 30/2004).

The European Convention on Human Rights, too, contains no express prohibition of retroactive legislation, except in criminal cases. Nevertheless, such legislation is the object of scrutiny in the case-law of the European Court of Human Rights. The prohibition is enforced by reviewing retroactive legislation for compatibility with the right to a fair trial where the legislature interferes with the administration of justice in order to influence the judicial determination of the dispute (ECHR, 9 December 1994, *Stran Greek Refineries and Stratis Andreadis*). While in principle such interference cannot be precluded, it can only be justified by compelling grounds of public interest (ECHR, 28 October 1999, *Zielinski and Pradal & Gonzalez and others*). Moreover, a retrospective provision can violate the right of ownership if it upsets the balance between the general interest and the interests of the individual (ECHR, 20 November 1995, *Pressos Compania Naviera S.A. and others*).

Although review of retroactive legislation takes place by different routes, the Court of Arbitration expressly refers to the case-law of the European Court of Human Rights.

13. In accordance with the case-law of the European Court of Human Rights, Article 7 of the European Convention on Human Rights upholds the principle of legality in criminal cases and prohibits in particular the retroactive application of criminal law where this is to the disadvantage of the individual concerned. For instance, at the time when an accused committed an act for which he was prosecuted and convicted, there had to exist a legal provision declaring that particular act punishable (judgment no. 73/2005, with reference to ECHR, 25 May 1993, *Kokkinakis* and 22 June 2000, *Coëme and others*).

Although retroactive effect is in principle prohibited, the reverse applies when a criminal law provision is made more lenient. In that case, retroactivity is required. In this connection, the Court of Arbitration refers to Article 2 of the Penal Code and also to treaty provisions. Article 15.1 of the International Covenant on Civil and Political Rights (ICCPR) provides, "If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby". According to the case-law, Article 7 of the European Convention on Human Rights has the same import. As a consequence of those treaty provisions, the accused can retroactively claim the application of a more favourable provision than the one that was in force at the time he committed the act with which he was charged, if it emerges from the new provision that the legislator's views concerning the punishable nature of the act in question have changed (judgment no. 14/2005, with reference to ECHR, 27 September 1995, *G.*).

§ 3. The Right of Access to Court

14. The case-law of the European Court of Human Rights can be unmistakably discerned when the right of access to court is at issue. This right, which is inextricably linked to the right to a fair trial, may be subject to conditions of admissibility, in particular with regard to the institution of a legal remedy within a specified time. Those conditions, however, must not have the effect of limiting the right in such a way as to impair its essence. The right to use a legal remedy that has been provided for by the legislature would be infringed if the restrictions do not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (e.g. judgment no. 25/2001, with reference to ECHR, 19 December 1997, *Brualla Gómez de la Torre*).

The rules on time limits for appeals are designed to ensure the proper administration of justice and compliance with the principle of legal certainty. However, those rules must not prevent litigants from making use of the available remedies (e.g. judgment no. 25/2001, with reference to ECHR, 28 October 1998, *Pérez de Rada Cavanilles*).

Following the example of the European Court of Human Rights, the Court of Arbitration pointed out that the courts of law must see to it that the rules are not applied in an excessively formalistic way (judgment no. 120/2004, with reference to ECHR, 20 April 2004, *Bulena*).

15. Also after the example of the European Court of Human Rights, the Court of Arbitration was of the opinion that, in civil procedures before a higher court, the obligation to be represented by a lawyer who is admitted to that court is not as such incompatible with the requirements of Article 6.1 of the European Convention on Human Rights (judgment 99/2005, with reference to ECHR, 5 December 2002, *Emma Vogl*). The obligation to request the official intervention of a lawyer who is registered with the Bar at the Court of Cassation in order to lodge an appeal in cassation in civil cases is justifiable both by the extraordinary nature of the legal remedy and by the specific scope and the special consequences of that legal remedy. If, on the other hand, the Court of Cassation gives a judgment not on the basis of an extraordinary legal remedy and within the strict limits that are imposed on the review by the Court of Cassation, but instead in the context of an "objective dispute" (in this case following a petition for annulment of the rules of a bar association) that has been brought before that Court in the first and last instance, the right of access to court cannot be subjected to such a significant restriction (judgment no. 99/2005).

§ 4. The *Nulla Poena Sine Lege* Principle

16. By empowering the legislature to decide in which cases and in what form prosecution is possible and to adopt a law under which a penalty can be set and enforced, Articles 12, second paragraph, and 14 of the Constitution guarantee every citizen that no conduct will be made punishable and no penalty will be imposed except in accordance with rules adopted by a democratically elected deliberating assembly.

The Court of Arbitration has already repeatedly ruled on the scope of this principle of legality in criminal cases. It holds the view that the aforementioned constitutional provisions do not prevent the law from granting power of adjudication to the court charged with enforcing the law, provided that it does not disregard the relevant special requirements in terms of preciseness, clarity and predictability which criminal laws must meet. It emerges from Articles 12 and 14 of the Constitution, and from Article 7 of the European Convention on Human Rights and Article 15 of the International Covenant on Civil and Political Rights that although criminal law may display a certain degree of flexibility to keep pace with changing circumstances, it must nevertheless be formulated in such a way that any person can make out at the time when he commits a particular act or omission whether or not that act or omission renders him criminally liable (e.g. judgment no. 136/2004). The Court must, however, take into account the general nature of the laws, the diversity of situations they apply to and the evolution of the acts or omissions they are designed to penalize. It is only when examining a specific penal provision that it is possible, taking into consideration the facts that are typical of the offences they are meant to penalize, to determine whether the general wording used by the legislator is so vague as to violate the principle of legality (e.g. judgment of 92/2005, with reference to ECHR, 25 May 1993, *Kokkinakis*, 22 November 1995, *S.W.* and 15 November 1996, *Cantoni*)

§ 5. The Right to Protection of Private and Family Life

17. The right to protection of private and family life is safeguarded by Article 22 of the Constitution. The parliamentary preparations for that provision show that the constitutional legislator sought to achieve the greatest possible concordance with Article 8 of the European Convention on Human Rights.

The Court of Arbitration had been asked recently to rule on a provision in accordance with which disciplinary suspensions of adult sports practitioners are posted for the duration of the suspension on the website launched for this purpose by the Flemish Government and publicized through the communication channels officially set up by the sports federations. The name, first name and date of birth of the sports practitioner are published, along with the beginning and end of the suspension period and the sports discipline in which the violation was reported.

The publication of personal details in such a general manner constitutes an interference with the right to protection of private life as guaranteed by Article 22 of the Constitution and Article 8 of the European Convention on Human Rights. For such interference to be permissible, it must be necessary to achieve a particular legitimate aim, which implies, among other things, that there must be a reasonable relationship of proportionality between the consequences of the measure for the person concerned and the public interest.

A limited form of electronic publication for the benefit of the supervisory officials and the senior staff of the sports associations may be deemed necessary to ensure actual compliance with the sanctions imposed on sports practitioners and serves a legitimate purpose. The dissemination of personal details on an unsecured website that can be accessed by everyone, as the decree requires, goes beyond what is required for that purpose. Such publication not only entails that any person can become acquainted with those details, even if this information is of no use to him, but also makes it possible for those data to be used and further processed for other purposes, which means that they can still be disseminated even after the sanctions have come to an end and the information has been removed from the website in question.

Since, on the one hand, the challenged publication does not prove necessary to achieve the legitimate aim pursued by the decree-giver, since that aim can also be achieved in a manner that is less detrimental to the individual concerned, and, on the other hand, the consequences of the measure are disproportionate to that aim, the Court of Arbitration concludes that the challenged provision is contrary to Article 22 of the Constitution and the treaty provisions that have a similar import (judgments nos. 162/2004 and 16/2005).

§ 6. The Right to Freedom of Expression

18. In agreement with the European Court of Human Rights, the Court of Arbitration believes that freedom of expression is one of the cornerstones of a democratic society. This applies not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, disturb or offend the State or a particular section of the population. Such are the demands of pluralism, tolerance and broadmindedness, without which there can be no democratic society (e.g. judgment no. 157/2004, with reference to ECHR, 7 December 1976, *Handyside*, 23 September 1998, *Lehideux and Isorni*, and 28 September 1999, *Öztürk*).

It will not come as a surprise that the possibility of restricting freedom of expression, as emerges from the case-law of the Court of Arbitration, is to a large extent attuned to the case-law of the European Court of Human Rights. The exceptions to the freedom of expression must be strictly interpreted. It must be demonstrated that the restrictions are necessary in a democratic society, that they meet an urgent necessity and that they are in proportion to the legitimate aims being pursued by those restrictions (judgment no. 157/2004). The Court accordingly annulled a provision of the Anti-discrimination Act on the grounds that it failed to indicate in what manner or in what cases discriminatory statements exceed the limits permissible in a democratic society for propounding ideas that may "shock, disturb or offend". Consequently, that provision does not meet the strict requirements for restricting the freedom of expression.

§ 7. The Right to Freedom of Association

19. Article 27 of the Constitution recognizes the right to associate, as well as the right not to associate, and prohibits that right from being subjected to preventive measures. However, this does not prevent the legislator from laying down conditions of operation and supervision if the association receives government subsidies. In order to determine the scope of the freedom of association, the Court of Arbitration also bears in mind Article 11 of the European Convention on Human Rights. According to this provision, "No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others".

A provision which stipulates that students may form part of the decision-making bodies of the free universities, thus enabling them to influence the policy of those associations, constitutes an interference with the freedom of association of the free educational establishments that organize university education. The Court of Arbitration was asked to examine whether such a measure is apposite and in proportion to the aim pursued by the legislator.

The interference with the freedom of association is intended primarily to protect the rights of students. The decree-giver considered that this aim could only be achieved if a minimum representation of the students is guaranteed and if they had the right to vote as members of those decision-making bodies. Such a requirement is relevant to the aim being pursued, yet risks amounting to an unreasonable or disproportionate interference in the organization and operation of the subsidies universities if an inordinate representation is imposed. This applies in particular to matters that are decisive for the general policy of a university affecting the interests of all sections of that establishment.

However, the Court of Arbitration argues that student participation is only required for certain matters which do not impinge on the freedom to set up an educational establishment and do not prevent the organizing authority from freely determining the religious or philosophical character of their academic offering or their educational project or from defining the tenor thereof. Furthermore, students cannot interfere in a disproportionate manner in the organization and operation of the subsidized establishments where they are enrolled, since the weight of their vote – assuming this is unanimous – is only 20 percent and the universities remain free to divide the other 80 percent as they see fit (judgment no. 48/2005).

§ 8. The Right to Free Elections

20. On the subject of electoral law, the Court of Arbitration refers to Article 3 of the First Additional Protocol to the European Convention on Human Rights. The rights derived from this provision to elect and stand for election must be guaranteed without discrimination in accordance with Article 14 of the European Convention on Human Rights and Articles 10 and 11 of the Constitution. The restrictions on those rights must pursue a legitimate aim and must be in proportion to that aim. They must not impair the essence of those rights. The Court of Arbitration expressly refers in this connection to the case-law of the European Court of Human Rights (ECHR, 2 March 1987, *Mathieu-Mohin and Clerfayt*; 1 July 1997, *Gitonas and others*; 2 September 1998, *Ahmed and others*; 18 February 1999, *Matthews*; 4 June 2000, *Labita*; 9 April 2002, *Podkolzina*; 6 June 2002, *Selim Sadak and others*).

In order to meet the requirements of Article 3 of the First Additional Protocol to the European Convention on Human Rights, the Court of Arbitration is of the opinion – in accordance with the *Mathieu-Mohin and Clerfayt* judgment – that elections may be held both according to a system of proportional representation and according to the first-past-the-post system. Even if elections are held according to a system of absolute proportional representation, it cannot be avoided that some votes – the so-called residual votes – will be lost. It follows from this that not every vote has the same weight in the election results, nor that all candidates have the same chance to be elected. In the same way as Article 3 does not imply that the division of seats should be an exact reflection of the number of votes, there is in principle nothing to prevent the setting of an electoral threshold in order to limit the fragmentation of the representational body (e.g. judgment no. 30/2003, cf. ECHR, 7 June 2001, *Federacion Nacionalista Canaria*).

§ 9. The Right to Protection of a Healthy Environment

21. The right to protection of a healthy environment is guaranteed by the Constitution, but not by the European Convention on Human Rights, at least not explicitly. In a ruling on a standard for night flights, the Court of Arbitration referred to the case-law of the European Court of Human Rights which showed that noise nuisance from aircraft, where this is excessive, can impair the quality of life of the people living in the vicinity, and that this noise nuisance can be regarded as a failure in the positive obligation of States to take adequate measures to protect the rights which the applicants derive from Article 8, first paragraph, of the European Convention on Human Rights, or as interference by a government authority which should be justified according to the criteria enumerated in the second paragraph of that article. In this context, regard must be had to a fair balance that has to be struck between the interests of the individual and those of the community as a whole. In both cases, the State enjoys a certain margin of appreciation in determining the steps to be taken, particularly where a legitimate aim is pursued with the operation of an airport, and negative effects on the environment cannot be ruled out entirely (judgment no. 50/2003, with reference to ECHR, 21 February 1990, *Powell and Rayner*, and 2 October 2001, *Hatton*).

§ 10. The Right to Protection of Property

22. The Court of Arbitration has repeatedly referred to the case-law of the European Court of Human Rights in connection with the right to protection of property. The Court of Arbitration recently had to rule on an inheritance tax rate of 90 percent on the amount above 175,000 euros. In the opinion of the Court, the obligation for the legatee to pay high inheritance tax is such as to infringe the right to the peaceful enjoyment of one's possessions as guaranteed by Article 1 of the First Additional Protocol to the European Convention on Human Rights. This provision stipulates that the protection of property "shall not, however, in any way impair the

right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties".

Even though the fiscal legislator has a wide margin of appreciation, a tax can be disproportionate and unjustifiably impair the peaceful enjoyment of a person's possessions if it upsets the fair balance between the requirements of public interest and the protection of the right to the peaceful enjoyment of one's possessions (judgment no. 107/2005, with reference to ECHR, 23 February 1995, *Gasus Dosier- und Fördertechnik GmbH*, 16 April 2002, *s.a. Dangeville* and *s.a. Cabinet Diot and s.a. Gras Savoye,* and 3 July 2003, *Buffalo SRL in liquidation*). Furthermore, it is also assumed that the inheritance tax on inherited real estate can infringe the rights that are guaranteed by Article 1 of the aforementioned First Additional Protocol (*Ibid*, with reference to EHRM, 21 May 2002, *Jokela*).

The Court of Arbitration acknowledges that the legislator, besides the fiscal aim it pursues, attempts to influence the behaviour of taxpayers in certain matters, which may justify a particularly high tax rate. This is for instance the case with taxes that are intended to urge consumers to stop using disposable items or products that are harmful to the environment (reference to judgments nos. 11/94, 3/95, 4/95, 5/95, 6/95, 7/95, 8/95, 9/95, 10/95, 30/99, 195/2004 in connection with environmental taxes), penalize unlawful acts (reference to judgments nos. 44/2000, 28/2003 and 72/2004 in connection with secret commissions), or discourage tolerated yet harmful activities (reference to judgment no. 100/2001 in connection with gambling and betting). In this case, however, it would not appear that the decree-giver assumed that the wish of a testator to benefit persons who are dear to him but who do not have a sufficiently close blood relationship with him constituted a non-legitimate act. Even though in the matter of inheritance tax it may be assumed that, by implementing favourable tax rates, the legislator favours relatives who are presumed to have ties of affection with the testator (reference to judgments nos. 128/98, 82/99 and 66/2004), it does not follow that the legislator should in no way take into consideration the ties of affection of which the existence is proven by the terms of a will.

The Court of Arbitration came to the conclusion that the decree-giver not only disproportionately infringed the right of the testator to dispose freely of his property, but also that it failed to meet the legitimate expectations of the legatee to inherit that property by setting a taxation rate that bears no comparison with the tax levied on other forms of property transfer, or with the tax rates applicable to other categories of heirs. Even though it is one of the policy choices of the fiscal legislator to apply different rates to different taxes, and to tax various categories of heirs differently, it is nevertheless clearly incommensurate to apply such a high rate of inheritance tax that is not justified by any purpose specific to the intended category of taxpayers, but where solely the budgetary objectives are taken into consideration.

II. Concluding observations

23. As appears from this concise overview, the case-law of the European Court of Human Rights has a considerable influence on the case-law of the Court of Arbitration. The explanation for this is obvious. The Court of Arbitration makes the assumption that the fundamental rights under Title II of the Constitution and those enshrined in the international conventions are inextricably linked. It is therefore unavoidable that the provisions under Title II of the Constitution should be interpreted in conjunction with the provisions concerning similar fundamental rights in the international treaties. After all, they are the same fundamental rights, regardless of whether they are guaranteed by the Constitution or by the

European Convention on Human Rights. The wording may be different, but this does not essentially alter the substance of the fundamental rights.

Furthermore, a different formulation of the same fundamental right, for example different conditions of restriction, can but strengthen the guarantee in question. This is due to the effect of Article 53 of the European Convention on Human Rights. According to that Article, the provisions of the European Convention cannot be construed as limiting or derogating from any of the human rights and fundamental freedoms that are ensured under domestic law. Article 8.2 of the European Convention, for instance, does not require, by using the word "law", that the interference which it allows is provided for by a "law" in the formal meaning of the word. Nevertheless, the Court of Arbitration pointed out that the same word "law", used in Article 22 of the Constitution, which also guarantees the right to respect for private and family life, refers to a legal provision (see no. 3). This requirement is imposed on the Belgian legislator by virtue of Article 53 of the European Convention on Human Rights (judgment no. 131/2005). It ensues from this provision that Article 8 of the European Convention, which only requires a substantive law, should not be interpreted as being intended to abolish the stricter constitutional requirement in this context.

It is worth noting that the Court of Arbitration does expressly refer to judgments of the European Court of Human Rights, but not – save for one exception – to its own case-law. One possible explanation may be that the Court of Arbitration does not wish to consider itself bound, or at least does not want to give the impression of considering itself bound, by its previous judgments. On the other hand, this serves to show that the Court of Arbitration does consider itself bound by the judgments of the European Court of Human Rights, or more particularly by the provisions of the European Convention on Human Rights as they are interpreted by the European Court of Human Rights.

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