

The ECHR and the EU Charter of Fundamental Rights in the Case Law of the Belgian Constitutional Court

Emeritus Prof. Dr. Luc Lavrysen
President of the Constitutional Court of Belgium

The Rule of Law, the Protection of Fundamental Rights and the Principle of Effective Judicial Protection

The Belgian Constitution does not explicitly refer to the rule of law. However, both the Court of Cassation¹ and the Constitutional Court² consider the concept as a general principle of law, compelling all branches of State power, the legislative, executive and judicial power, to comply with the law.³ In particular, the Constitutional Court regards respect for the rule of law as an essential condition for the protection of all fundamental rights.⁴ In doing so, the Constitutional Court adheres to a *substantive interpretation* of the rule of law. In that interpretation the rule of law necessarily entails protection of the fundamental rights. It implies the necessity of respecting the separation of powers and the hierarchy of legal rules, since those institutional principles also aim at guaranteeing the fundamental rights and liberties of citizens⁵.

¹ Court of Cassation 17 October 2006, ECLI:BE:CASS:2006:ARR.20061017.4.

² Constitutional Court 5 July 2018, ECLI:BE:GHCC:2018:ARR.087, B.17.2.

³ A. Alen and D. Haljan, *Constitutional Law in Belgium* (Kluwer 2020), p. 30-31.

⁴ Constitutional Court (plenary) 10 October 2019, ECLI:BE:GHCC:2019:ARR.129 and ECLI:BE:GHCC:2019:ARR.131, B.10.3.

⁵ For further reading on this subject, we refer to contributions of the former and current Presidents of the Constitutional Court, available on the Court's website: A. Alen and W. Verrijdt, "The Rule of Law in the Case Law of the Belgian Constitutional Court: History and Challenges", 25th Anniversary of the Constitutional Court of Slovenia (Bled 2016); J. Spreutels, E. De Groot, G. Goedertier and E. Peremans, "L'Etat de droit et la justice constitutionnelle dans le monde moderne", Rapport de la Cour constitutionnelle de Belgique présenté au 4^e Congrès de la Conférence mondiale sur la justice constitutionnelle, (Vilnius 2017); L. Lavrysen, "The Belgian Constitutional Court and the separation of powers", 50th Anniversary of the Constitutional Judiciary in the Republic of Macedonia (Skopje 2014); P. Nihoul,

It seems that both the Council of Europe and the European Union adhere to this substantive interpretation of the rule of law. According to Article 3 of the Statute of the Council of Europe every Member State of the Council of Europe must accept the principles of the rule of law, human rights and democracy. Since the ECtHR's judgment in *Golder v the UK*⁶, the principle of the rule of law has become a guiding principle for the Court⁷, it “inspires the whole Convention”⁸ and is “inherent in all the Articles of the Convention”⁹. It is defined as “one of the fundamental principles of a democratic society”¹⁰. The close relationship between the rule of law and the democratic society has been underlined by the Court through different expressions: “democratic society subscribing to the rule of law”¹¹, “democratic society based on the rule of law”¹² and more systematically “rule of law in a democratic society”¹³. An efficient, impartial and independent judiciary is the cornerstone of any functioning system of democratic checks and balances. Judges are the means by which powerful interests are restrained¹⁴. They guarantee that all individuals, irrespective of their backgrounds, are treated equally before the law. The Court has adopted important judgments related to the requirement that a tribunal be established by law under Article 6 of the Convention. It has also underlined the growing importance of the separation of powers in the interpretation of the independence requirement, in particular in cases concerning the dismissal of judges.¹⁵

According to Article 2 of the Treaty on the European Union, that Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are considered to be common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. The CJEU has held that the European Union is a union based on the rule of law in which individual parties have the right to

“Les relations entre la Cour constitutionnelle belge et les autres pouvoirs. Indépendance et influence”, Colloque des cours constitutionnelles (Chisinau 2017); <https://www.const-court.be/nl/court/publications/studies>

⁶ ECtHR, Case of *Golder v. The United Kingdom*, 21 February 1975, § 34.

⁷ Linos-Alexandre Siciliano, “The Rule of Law and the European Court of Human Rights: the independence of the judiciary”, Montenegrin Academy of Sciences and Arts, Montenegro, 28 February 2020, p. 2.

⁸ ECtHR, Case of *Engel and Others v. The Netherlands*, 8 June 1976, § 69.

⁹ ECtHR, Case of *Amuur v. France*, 25 June 1996, § 50.

¹⁰ ECtHR, Case of *Klass and Others v. Germany*, 6 September 1978, § 55.

¹¹ ECtHR, Case of *Winterwerp v. The Netherlands*, 24 October 1979, § 39.

¹² ECtHR, Case of *Vereniging Weekblad Bluf! v. Netherlands*, 9 February 1995, § 35.

¹³ ECtHR, Case of *Malone v. United Kingdom*, 2 August 1984, § 79.

¹⁴ Linos-Alexandre Siciliano (2020), p. 3.

¹⁵ ECtHR, Case of *Baka v Hungary*, 23 June 2016, § 112-122; Case of *Grzęda v. Poland*, 15 March 2022, § 320-350; Case of *Żurek v. Poland*, 16 June 2022, § 146-151.

challenge before the courts the legality of any decision or other national measure relating to the application to them of an EU act. Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals. Consequently, national courts and tribunals, in collaboration with the Court of Justice, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed. The Member States are therefore obliged, by reason, inter alia, of the principle of sincere cooperation, set out in the first subparagraph of Article 4(3) TEU, to ensure, in their respective territories, the application of and respect for EU law. In that regard, as provided for by the second subparagraph of Article 19(1) TEU, Member States are to provide remedies sufficient to ensure effective judicial protection for individual parties in the fields covered by EU law. It is, therefore, for the Member States to establish a system of legal remedies and procedures ensuring effective judicial review in those fields. The principle of the effective judicial protection of individuals' rights under EU law, referred to in the second subparagraph of Article 19(1) TEU, is a general principle of EU law stemming from the constitutional traditions common to the Member States, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which is now reaffirmed by Article 47 of the Charter. The very existence of effective judicial review designed to ensure compliance with EU law is the essence of the rule of law.¹⁶

A twofold judicial doctrine of the Belgian Constitutional Court

While the jurisdiction of the Belgian Constitutional Court was originally limited to the adjudication of conflicts of competence between the federal legislator and the federated legislators (1985-1988), its competence has been widened in 1989 and further on in 2003. It includes now judging over any violation by federal, regional and community legislative acts of the fundamental rights and liberties guaranteed in Section II of the Constitution (Articles 8 to 32) and of Articles 143 (1) (the principle of federal loyalty), 170 (the legality principle in tax matters), 172 (the equality principle in tax

¹⁶ CJEU, Case C-64/16, *Associação Sindical dos Juízes Portugueses*, 27 February 2018, ECLI:EU:C:2018:117, paragraphs 30-36; see also: Case C-585/18, *A.K. (Independence of the Disciplinary Chamber of the Supreme Court)*, 19 November 2019, ECLI:EU:C:2019:982; Joined cases C-83/19, C-127/19, C-195/19, C-291/19, C-355/19 and C-397/19, 8 May 2021, *Asociația 'Forumul Judecătorilor din România' and Others*, EU:C:2021:393; Case C-791/19, *Commission v Poland (Régime disciplinaire des juges)*, 15 July 2021, ECLI:EU:C:2021:596; Case C-204/21, *Commission v Poland (Indépendance et vie privée des juges)*, 5 June 2023, ECLI:EU:C:2023:442.

matters) and 191 (the protection of foreign nationals) of the Constitution. Nowadays the protection of fundamental rights counts for more than 90 % of the case law.¹⁷

In its review, the Court does not limit itself to check the conformity of legislation with the said provisions of the Belgian Constitution; in its review, the ECHR and the Charter of Fundamental Rights of the EU, and the related caselaw of the ECtHR and the CJEU, plays a very important role.

Following two extensions of jurisdiction in 1989 and 2003, the Constitutional Court has indeed developed a twofold judicial doctrine.¹⁸

Firstly, when the scope of review was extended in 1989, the Court took full advantage of the principle of equality and non-discrimination. It decided to read Articles 10 and 11 of the Constitution in combination with all rights and freedoms enshrined in the Constitution, in treaty provisions binding Belgium and in general principles of law. The rationale behind this doctrine is that a particular category of persons is being discriminated if it is wrongfully deprived from guarantees that are given to everyone.¹⁹

Secondly, soon after its scope of review was extended to all constitutional rights and freedoms in 2003, the Constitutional Court started to read the constitutional provisions relied upon by the parties in combination with treaty provisions binding Belgium and guaranteeing analogous rights and freedoms, regardless of whether they have direct effect or not. The Court considered that where a treaty provision is similar in scope to one or more provisions of the Constitution, the safeguards contained in those treaty provisions constitute an “inseparable whole” or “normative unity” with the safeguards contained in the constitutional provisions in question. Following the rationale behind that doctrine, the provisions under Title II of the Constitution cannot be interpreted otherwise than in conjunction with the provisions concerning similar fundamental rights in the international treaties. This applies, in particular, to the ECHR. For instance, if respect for privacy and family life is at stake, the Constitutional Court reads Article 22 of the Constitution in the light of Article 8 of the ECHR, even if the latter provision was not explicitly invoked by the parties before the Court. In this case, Article 22 of the Constitution operates as a portal or an interface

¹⁷ L. Lavrysen and J. Theunis, *Primacy of EU Law and Equality before the Law of EU Citizens*, The Belgian Constitutional Court, paper, EUnited in diversity II. The Rule of Law and Constitutional Diversity (The Hague 2023), p. 2.

¹⁸ L. Lavrysen and Jan Theunis (2023), p. 2-3.

¹⁹ L. Lavrysen and Jan Theunis (2023), p. 3-4.

allowing the Constitutional Court to review primary legislation *indirectly* against the analogous fundamental right in the ECHR (or the ICCPR, EU Charter, etc.).

The European Convention on Human Rights and the EU Charter of Fundamental Rights

The ECHR and its protocols are the most frequently referred provisions of international law in the caselaw of the Court. All substantive articles of the ECHR itself and of most protocols have been referred to many times. Ranging from ten references to Article 1 ECHR (obligation to respect Human Rights), over more than forty times to Article 2 ECHR (right to life), more than hundred times to Article 5 (right to liberty and security), nearly two hundred times to Article 6 (right to a fair trial), more than hundred times to Article 7 (no punishment without law), around hundred times to Article 8 (right to respect for private and family life) etc. In most instances the Court will at the same time refer to the most relevant caselaw of the ECtHR, not limiting itself to cases against Belgium, and in particular to Grand Chamber cases.

As the Charter of Fundamental Rights of the European Union is concerned, in the period before the entry into force of the Lisbon Treaty, the Court referred in a judgment of 2005²⁰ in the following terms to Article 13 of the Charter, that was invoked by the applicant universities: “by determining that “academic freedom is respected”, Article 13 of the Charter confirms, even if it has not an immediately binding character, the academic freedom as a “common value” of the European Union.” In a judgment of 2007²¹ the Court referred to the principle of proportionality mentioned in particular in Article 49(3) of the Charter, according to which “the severity of the punishment [...] [may] not be disproportionate to the criminal offence.” The Court made clear, with reference to the caselaw of the CJEU, that the Charter in itself was not legally binding at that time, but that it expressed the principle of the rule of law, on which, according to Article 6 of the than Union Treaty, the Union is based, and it is an illustration of the fundamental rights that the Union must respect, as guaranteed by the European Convention on Human Rights and as they emerge from the common constitutional traditions of the Member States, as general principles of European law. Consequently, when punishing infringements of provisions of European law, the severity of the penalties may not be disproportionate to the criminal offence, and for that reason the Court declared a penal provision in a law transposing a directive, unconstitutional. This jurisprudence was confirmed in 2008²².

²⁰ Judgment n° 167/2005 of 23 November 2005, ECLI:BE:GHCC:2005:ARR.167.

²¹ Judgment n° 81/2007 of 7 June 2007, ECLI:BE:GHCC:2007:ARR.081.

²² Judgment n° 140/2008 of 30 October 2008, ECLI:BE:GHCC:2008:ARR.140.

The Court ruled in another judgment of 2008²³, in a case in which one of the parties relied upon Art. 34 (3) of the Charter, that since the Charter is not included in a normative text with binding force with regard to Belgium, the plea is inadmissible insofar as it is derived from the violation of Article 23 of the Constitution, read in conjunction with Article 34(3) of the Charter. But the Court added, that to the extent that the Charter of Fundamental Rights of the European Union confirms the existence of common values of the European Union which are essentially also provisions that are enshrined in the Constitution, the Court may however *take into consideration* the Charter in its constitutionality review. In another case the Court held in 2009 that the Court must also take into account Article 10 of the Charter of Fundamental Rights of the European Union, which was not yet legally binding.²⁴ In that same year the Court referred to Articles 20, 21 and 23 of the Charter in a case in which it referred questions of interpretation and validity to the CJEU.²⁵ The CJEU declared subsequently Article 5(2) of Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services, invalid with effect from 21 December 2012, because it was held to be incompatible with Articles 21 and 23 of the Charter.²⁶

Since the entry into force of the Lisbon Treaty on 1 December 2009, the amended version of the Charter is, as one knows, legally binding. In accordance with Article 6 of the Treaty on the European Union, it has the same legal value as the EU treaties. It applies to the EU institutions in all their actions and to the EU Member States when they are implementing EU Law (art. 51 of the Charter). As more and more domestic legislation seeks to implement EU secondary law or is within the reach of the economic freedoms of the TFEU, the Charter is often invoked before the Constitutional Court. As a rule, the Court first checks whether the Charter is applicable or not. If that is the case, the Court will include the relevant Charter provisions in its constitutional review. Up to now, nearly all Charter provisions have been applied by the Court, the only exceptions being Articles 5 (prohibition of slavery and forced labour), 25 (the rights of the elderly), 26 (integration of persons with disabilities), 27 (workers' right to information and consultation within the undertaking), 29 (right of access to placement services), 32 (prohibition of child labour and protection of young people at work), 39 (right to vote and to stand as a candidate at elections to the European Parliament), 40 (right to vote and to stand as a candidate at municipal elections) and 46

²³ Judgment n° 101/2008, 10 July 2008, ECLI:BE:GHCC:2008:ARR.101.

²⁴ Judgment n° 17/2009 of 12 February 2009, ECLI:BE:GHCC:2009:ARR.017.

²⁵ Judgment n° 103/2009 of 18 June 2009, ECLI:BE:GHCC:2009:ARR.103.

²⁶ Case C-236/09, 1 March 2011, *Belgische Verbruikersunie Test-Aankoop VZW*, ECLI:EU:C:2011:100.

(diplomatic and consular protection). The most applied provisions are Article 52 (scope and interpretation of rights and principles), with more than 80 occurrences, Article 47 (right to an effective remedy and to a fair trial), with more than 50 occurrences, Article 21 (non-discrimination) with 40, Article 7 (respect for private and family life) with 39, Article 20 (equality before the law) with 35, Article 16 (freedom to conduct a business) with 31, Article 49 (principles of legality and proportionality of criminal offences and penalties) with 27, Article 8 (protection of personal data), with 22 and the remaining articles referred to between 1 and 18 times. When available, the Court will refer to caselaw of the CJEU in relation to those articles.

In legal doctrine, the twofold technique of reading constitutional provisions in combination with international treaty provisions is considered to have certain advantages, such as a modernization of the fundamental rights provisions in the Belgian Constitution, many of which date back to 1831, and the incorporation of the Strasbourg case law in the judgments of the Belgian Constitutional Court. Consequently, the Strasbourg Court has a considerable influence on the case law of the Constitutional Court. In 2022, for instance, the ECHR was present in 30 percent of the judgments, mostly with reference to the Strasbourg case law.

European Union Law

The “inclusive” judicial doctrines of the Constitutional Court also apply to EU law. In this way, they not only ensure the alignment of constitutional fundamental rights with those of the EU Charter of Fundamental Rights (which are themselves aligned with those of the ECHR), but also safeguard the primacy of EU law and the principle of equality before that law. In a significant number of cases, the Belgian Constitutional Court adhered to the primacy of EU law.

Last year (2022) the Constitutional Court (indirectly) applied EU law in 21 judgments. Hence, if we extrapolate that figure – even assuming there were fewer judgments in the early years – there are several hundreds of other examples. Through that intensive application, the Belgian Constitutional Court contributes in a significant way to the effective implementation of the law of the European Union in Belgium.

The Constitutional Court’s openness towards European law is particularly demonstrated by the large number of references for preliminary rulings to the Court of Justice of the European Union, until present 40 referring judgments, accounting for 138 distinct questions, both on interpretation

and on validity. In cases of validity the CJEU will often be invited by the Constitutional Court to review the validity of secondary EU law against Charter provisions. Thus far, the Court has submitted 23 of such validity questions to the CJEU. While the CJEU came so far in some of the cases submitted by the Constitutional Court to the conclusion that the secondary legislation at stake was valid²⁷, it declared a few times a piece of legislation (partially) invalid because it was incompatible with some Charter provisions²⁸ or held that the provisions should be interpreted in a precise way so that they are compatible with Charter provisions.²⁹

Up to now, the Court has not found any contradiction between the Constitution and the ECHR/EU Charter. The incorporation of both instruments and the related caselaw of the ECtHR/CJEU in the case law of the Constitutional Court has been proven to be a fruitful approach.

An illustrative example

The following example, taken from judgment 26/2023 of 16 February 2023³⁰, illustrates the added value of our approach.

In this case, legislation adopted in view of combatting the COVID-19 pandemic has been challenged before the Court by way of a demand for annulment. The legislation dealt with obligations concerning testing, contact tracing, self-isolation and quarantine in case of risk of infection, or of a positive COVID test, respectively, and the related supervision and sanctioning provisions. Many different issues (respective competences of different legislators, privacy and data protection...), were at stake in this case, but I will limit myself to the measures concerning self-isolation and quarantine. The litigants believed that those provisions violated some constitutional provisions, namely the Articles 10, 11, 12 and 13, concerning respectively equality, non-discrimination, personal freedom and the right that no one may be deprived, against his will, of the judge that the law has assigned to him.

²⁷ CJEU, 28 July 2016, C-543/14, *Ordre des barreaux francophones and germanophone and Others*, ECLI:EU:C:2016:605; CJEU, 26 September 2013, C-195/12, *IBV & Cie*, ECLI:EU:C:2013:598

²⁸ CJEU, 8 December 2022, C-694/20, *Orde van Vlaamse Balies and Others*. ECLI:EU:C:2022:963.

²⁹ CJEU, C-511/18, 6 October 2020, *La Quadrature du Net and Others*, ECLI:EU:C:2020:6; CJEU, 17 December 2020, C-336/19, *Centraal Israëlitisch Consistorie van België and Others*, ECLI:EU:C:2020:695 CJEU, 21 June 2022, C-817/19, *Ligue des droits humains*, ECLI:EU:C:2022:491

³⁰ <https://www.const-court.be/public/n/2023/2023-026n.pdf>; <https://www.const-court.be/public/f/2023/2023-026f.pdf>; <https://www.const-court.be/public/d/2023/2023-026d.pdf>

Article 12 of the Constitution reads as follows:

The freedom of the individual is guaranteed.

No one can be prosecuted except in the cases provided for by the law, and in the form prescribed by the law.

Except in the case of a flagrant offence, no one can be arrested except on the strength of a reasoned judge's order, which must be served at the latest within forty-eight hours from the deprivation of liberty and which may only result in provisional detention.

It gives little or no guidance in relation to measures concerning self-isolation and quarantine. That is the reason why the Court included in its review art. 5 ECHR and art. 2 of Protocol No. 4, to the ECHR:

“B.33.2. When a treaty provision that binds Belgium has a scope analogous to that of one of the constitutional provisions the review of which falls within the jurisdiction of the Court and the violation of which is alleged, the guarantees contained in that treaty provision form an inseparable whole with the guarantees contained in the relevant constitutional provisions.

Since both Article 12 of the Constitution and Article 5 of the European Convention on Human Rights guarantee the right to individual freedom, the Court must take the aforementioned treaty provision into account when assessing whether that constitutional provision is in question.

B.33.3. According to the applicants, the obligation of isolation and quarantine referred to in the contested provisions would constitute a "deprivation of liberty" within the meaning of Article 5(1) of the European Convention on Human Rights. The grievances they set out are based on that qualification. According to the Flemish Government and the Joint Community Commission, this measure is on the other hand, a "restriction of freedom" within the meaning of Article 2 of Protocol No. 4 to the European Convention on Human Rights.

(...)

B.34. Whether a measure restricting freedom is to be regarded as a restriction of freedom of movement within the meaning of Article 2 of Protocol No. 4 to the European Convention on Human Rights or as a deprivation of liberty within the meaning of Article 5(1) 1 of the European Convention on Human Rights depends on several factors, which must always be examined in concrete terms.

It is not so much the content of the freedom-restricting measure that should be taken into account, but rather its intensity. Important factors in its qualification are the context in which it was taken, its nature, its duration, its consequences and its method of implementation (ECHR, Grand Chamber, 12 September 2012, *Nada v. Switzerland*, ECLI:CE:ECHR:2012:0912JUD001059308, § 225; Grand Chamber, 23 February 2017, *de Tommaso v. Italy*, ECLI:CE:ECHR:2017:0223JUD004339509, §§ 80-81). Moreover, the consequences of the measure must be examined cumulatively and in their mutual interaction (ECHR, 6 November 1980, *Guzzardi v. Italy*, ECLI:CE:ECHR:1980:1106JUD000736776, § 95).

B.35.1. The Grand Chamber of the European Court of Human Rights emphasizes that in a modern society, situations may arise in which the public must accept restrictions on their freedom of movement in the public interest (ECtHR, Grand Chamber, March 15, 2012, *Austin et al. v. United Kingdom*, ECLI:CE:ECHR:2012:0315JUD003969209, § 59).

In terms of context, the properties of the SARS-CoV-2 virus and the epidemiological reality of the COVID-19 pandemic should be taken into account. The SARS-CoV-2 virus is a highly contagious virus that is transmissible through the air and in practice is mainly transmitted through breathing. Close physical contact between people is therefore the greatest risk factor.

The COVID 19 pandemic is characterized by a high reproduction number. Without sanitary measures it therefore has a very rapid exponential spread. In addition, it is characterized by a high number of asymptomatic patients who can nevertheless act as super spreaders. Of those patients who do develop symptoms, a substantial number require hospitalization, and a significant number require intensive care or even die.

In that context, there is a direct link, established on the basis of scientific insights into the contagiousness of COVID 19, between, on the one hand, the nature and intensity of the measures limiting close physical contacts between people and, on the other hand, the number of patients and the burden on the healthcare system.

In this context, the European Court of Human Rights is of the opinion that "the COVID 19 pandemic can undoubtedly have very serious consequences, not only for health, but also for society, the economy, the functioning of the State and life in general, and that the situation must therefore be qualified as an 'unforeseeable exceptional context' » (ECtHR, April 13, 2021, decision, *Terheş v. Romania*, ECLI:CE:ECHR:2012:0413DEC004993320, § 39)."

On the basis of a detailed analysis of the measures at stake the Constitutional Court came to the conclusion that given their characteristics, the obligation to isolate or quarantine cannot be equated

with a measure depriving one's liberty. And the Court to conclude that the pleas were unfounded insofar as they are derived from the violation of Article 12 of the Constitution, read in conjunction with Article 5 of the European Convention on Human Rights.

In the same case the way in which Covid-19 relating personal data were processed by the different actors involved, was challenged.

The Court held in this regard:

“B.72.3. According to Article 52(3) of the Charter of Fundamental Rights of the European Union, where that Charter contains rights corresponding to rights guaranteed by the European Convention on Human Rights, "its content and scope shall be the same as those conferred upon it by the said treaty." That provision aligns the content and scope of the rights guaranteed by the Charter with the corresponding rights guaranteed by the European Convention on Human Rights.

The Explanations to the Charter (2007/C 303/02), published in the *Official Journal* of 14 December 2007, indicate that, among articles with the same content and scope as the corresponding articles of the European Convention on the Rights of the human, Article 7 of the Charter corresponds to Article 8 of the European Convention on Human Rights.

The Court of Justice of the European Union recalls in that regard that "Article 7 of the Charter, on respect for private and family life, contains rights corresponding to those set out in Article 8(1) of the [European Convention on Human Rights] guaranteed rights and that, in accordance with Article 52(3) of the Charter, that Article 7 should therefore be given the same content and scope as that given to Article 8(1) of the [European Convention on Human Rights], as interpreted in the case law of the European Court of Human Rights » (ECJ, 17 December 2015, C 419/14, *WebMindLicenses Kft.*, ECLI:EU:C: 2015:832, paragraph 70; 14 February 2019, C-345/17, *Buivids*, ECLI:EU:C:2019:122, paragraph 65).

As regards Article 8 of the Charter, the Court of Justice holds that, as expressly provided for in the second sentence of Article 52(3), Union law may afford broader protection than the European Convention on Human Rights, and that Article 8 of the Charter concerns a different fundamental right than that referred to in Article 7 of the Charter formulated fundamental right, which has no equivalent in the European Convention on Human Rights (ECJ, Grand Chamber, 21 December 2016, C 203/15 and C 698/15, *Tele2 Sverige AB*, ECLI:EU:C:2016:970 , paragraph 129).

B.72.4. It follows from the foregoing that, within the scope of Union law, Article 22 of the Constitution, Article 8 of the European Convention on Human Rights and Article 7 of the Charter of Fundamental Rights

of the European Union guarantee analogous fundamental rights, while Article 8 of that Charter aims at specific legal protection regarding personal data.

(...)

B.73.2. However, the rights guaranteed by Article 22 of the Constitution and Article 8 of the European Convention on Human Rights are not absolute. As stated in B.64.2, they do not exclude government interference with the right to respect for private life but require that it be permitted by a sufficiently precise legal provision, that it meets a compelling social need in a democratic society and that it is proportionate to the legal objective it pursues.

Nor do the fundamental rights enshrined in Articles 7 and 8 of the Charter have absolute validity (CJEU, Grand Chamber, 16 July 2020, C 311/18, *Data Protection Commissioner*, ECLI:EU:C:2020:559, paragraph 172).

In accordance with the first sentence of Article 52(1) of the Charter of Fundamental Rights of the European Union, restrictions on the exercise of the rights and freedoms recognized therein, including in particular the right to respect for private life and freedom guaranteed by Article 7, the right to the protection of personal data laid down in Article 8 thereof, are provided for by law, respect the essence of those rights and, taking into account the principle of proportionality, are necessary and actually meet an objective of general interest or the requirements of the protection of the rights and freedoms of others (ECJ, Grand Chamber, 6 October 2020, C 623/17, *Privacy International*, ECLI:EU:C:2020:790, paragraph 64). In the same sense, in accordance with Article 23 of the GDPR, limitations on certain obligations of controllers and the rights of data subjects contained therein must be imposed by law, do not affect the essence of the fundamental rights and freedoms, are necessary and proportionate in a democratic society measure to achieve the objective pursued, and comply with the specific requirements formulated in the second paragraph (ECJ, Grand Chamber, October 6, 2020, C 511/18, C 512/18 and C 520/18, *La Quadrature du Net*, ECLI:EU:C:2020:791, paragraphs 209-210; 10 December 2020, C 620/19, *Land Nordrhein-Westfalen*, ECLI:EU:C:2020:1011, paragraph 46).”

Analysing the contested provisions and fully taken into consideration the caselaw of the CJEU regarding Art. 8 of the Charter, the Constitutional Court came to the conclusion that the contested provisions, did not violate Art. 22 of the Constitution, read in conjunction with Article 8 ECHR, Article 17 ICCPR and Article 7 and 8 of the Charter of Fundamental Rights of the European Union, subject to a specific interpretation of a particular provision.

Loss of Sovereignty ?

During the panel at the Conference the question was raised if in doing so, the Constitutional Court of Belgium is not giving up the sovereignty of the country. We believe that this is not the case. Of course, being member of the EU, and transferring competences to the EU institutions comes with a limitation of sovereignty of the member states. EU member states are indeed highly integrated with one another and *thus share their sovereignty through EU institutions*. When an international treaty as the Treaty on the European Union or the Treaty on the Functioning of the European Union has been negotiated and signed by the constitutional competent organ of the state and has been approved and ratified according to the constitutional (art. 167) and quasi-constitutional rules (art. 92bis, § 4ter of the Special Act of 8 August 1980 and the Co-Operation Agreement of 8 March 1994)³¹, they are legally binding and should be implemented. Under international law, every treaty in force is binding upon the parties to it and must be performed by them in good faith.³² This implies that a party to a treaty cannot invoke provisions of its domestic law as justification for negligence of its obligations pursuant to the treaty in question.³³ Shared sovereignty through EU institutions means that both the Belgian Governments (through their participation in the European Council and the Council of the European Union) as the Belgian citizens (through the periodical elections of the European Parliament) are fully associated in the EU law making. Belgian judges are in the same way associated with the ECtHR and the CJEU. Those Courts have been entrusted, by treaties that have been ratified according to our constitutional rules, with the task of respectively ensuring the observance of the engagements undertaken by the High Contracting Parties in the ECHR and the Protocols thereto and verifying that the law is observed in the interpretation and application of the EU Treaties. Membership of the Council of Europe and of the European Union comes with important advantages for the states concerned, but also with obligations that should be executed in good faith.

The Treaty on the European Union contains also a guarantee for the Member States, in its Art. 4 (2):

³¹ A. Alen and D. Haljan (eds.), *Belgium*, International Encyclopaedia of Laws (Kluwer Law International 2013), p. 270-274. To insure the stability of international relations the period in which an act of parliament by which a convention is ratified can be challenged before the Belgian Constitutional Court is 60 days instead of the normal period of 6 months. For the same reasons acts of parliament which ratify a treaty establishing the European Union or the Convention of 4 November 1950 for the protection of human rights and fundamental freedoms or an Additional Protocol to this Convention, are for the same reason excluded from the review of the Constitutional Court by way of preliminary rulings.

³² Art. 26 of the 1969 Vienna Convention on the Law of Treaties.

³³ Art. 27 of the 1969 Vienna Convention on the Law of Treaties.

“The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.”

In case there would be a serious concern that one or another piece of EU secondary law would be infringing this provision, any national judge can refer the case to the Court of Justice of the European Union for having checked the validity of such legislation in light of Art. 4 (2) TEU.³⁴

³⁴ L. Lavrysen and Jan Theunis (2023), p. 10-11. E.g. CJEU, Case C-391/207, September 2022, *Boriss Cilevičs e.a.*, ECLI:EU:C:2022:638.