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I. INTRODUCTION

During the last two months of 2018, Belgian politics were dominated by controversy on whether the Prime Minister could approve the so-called UN Migration Compact. The disagreement resulted first in a minority government and finally led to the resignation of the federal government. These events are elaborated below, since they constitute the most important constitutional developments in Belgium over the course of 2018. Next, the article gives an overview of the main cases of the Belgian Constitutional Court of the past year that may be of interest to an international audience. Finally, the overview looks ahead to the upcoming vacancy in the Constitutional Court, a number of interesting pending cases and the upcoming electoral period.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

During the last two months of 2018, Belgian politics were dominated by controversy. The main question at issue was whether Prime Minister Charles Michel could approve the Global Compact for Safe, Orderly and Regular Migration (hereafter: UN Migration Compact),[1] an intergovernmental agreement promoting a common global approach to migrant flows, at the UN intergovernmental conference in Marrakesh on 10 December 2018, and formally endorse it at the UN General Assembly on 19 December 2018. In spite of it being non-binding, it is generally accepted that the Compact can be used as guidelines for legal developments. In the end, the Prime Minister both approved and endorsed it, which first resulted in a minority government and finally led to the resignation of the government.

After the federal elections of 25 May 2014, Flemish parties N-VA, Open VLD and CD&V, together with Walloon party MR, established government Michel I. All four government parties initially agreed on the Compact and PM Michel pledged Belgium's support at the UN General Assembly. Following Austria's opposition to the Compact and the local elections of 14 October 2018, which led to an increase of votes for the extreme right party Vlaams Belang, N-VA (i.e., New Flemish Alliance, a Flemish nationalist, right-wing political party), and more importantly its Secretary of State for Migration Theo Francken, suddenly started to oppose the Compact, while the three other government parties continued to defend it. This created a situation of deadlock. N-VA also refused the proposal to write a supplementary declaration on how the text is interpreted by Belgium. Since the decisions of the gov-

[1] See <https://refugeesmigrants.un.org/sites/default/files/180711_final_draft_0.pdf> accessed 13 February 2019.

ernment are made on the basis of consensus, N-VA could no longer be part of a government that would endorse the Compact.

Consequently, as of 9 December, the other three parties continued as a minority government— which is quite exceptional in Belgian politics—without N-VA and with the support of only 52 of 150 seats in the House of Representatives. It is controversial whether this rearrangement established a new government, as the Prime Minister did not offer the resignation of his government to the King, but only entailed the dismissal of three ministers and two Secretaries of State and a redistribution of the powers among the remaining members of the government. However, it became common to refer to (the new) "Government Michel II" in the press. The opposition claimed that the government required a vote of confidence, a position which was supported by a considerable number of scholars, but not by all.

Nonetheless, after ten days, on 18 December, the Belgian government eventually fell. PM Michel tried to find support from left-wing opposition parties in order to stay in power until the parliamentary elections in May 2019. However, the socialists and greens announced that they would table a motion of no confidence in Parliament,[2] which triggered the Prime Minister to offer his resignation to the King. The day after, on 19 December, PM Michel endorsed the Migration Compact. After consultations with the presidents of the political parties, King Filip accepted the resignation of the government on 21 December, which turned it into a caretaker government with limited powers.

N-VA has proposed a turn to confederalism after the federal, state and European elections in May 2019. However, it is now uncertain whether a list with constitutional provisions susceptible to amendment will be approved before the elections. According to the constitutional amendment procedure of Article 195 of the Constitution, that is necessary in order to be able to amend the Constitution (with a two-thirds majority) after the election. Undeniably, 2019 will again be an interesting time for consociational democracy in Belgium.

III. CONSTITUTIONAL CASES

In 2018, the Belgian Constitutional Court delivered 183 judgments and handled 226 cases in total. Regarding the nature of the complaints, conflicts of competencies between the federated entities and the federal state only represent 4% of the judgments in 2018. The majority of cases concern infringements of fundamental rights. In 2018, the principle of equality and non-discrimination is still the most invoked principle before the Court (51%), followed by review of compliance with the jurisdictional warranties of Article 13 (6%), the property rights of Article 16 (6%), the right to private and family life of Article 22 (6%), the socioeconomic rights of Article 23 of the Constitution (6%), the guarantees in taxation matters of Articles 170 and 172 (4%), the personal freedom and legality of criminal charges of Article 12 of the Constitution (4%) and the freedom and equality in education of Article 24 (3%). References were made to the jurisprudence of the European Court of Human Rights (ECtHR) in 49 cases. Moreover, the jurisprudence of the Court of Justice of the European Union (CJEU) is also regularly reflected in the judgments of the Constitutional Court, with references to this case law in 17 cases. References to other sources of international law can be found in 29 cases.

1. Measures of Integration and Exclusion

At the end of 2016, the Belgian legislator inserted two new conditions in the Immigration Act of 15 December 1980: the so-called "integration efforts" and "newcomers declaration." As to the first condition, a person has to provide evidence, in the first term of his temporary residence permit, of his willingness to integrate into society. If he is unable to prove his "reasonable effort" to integrate, the Immigration Office can put an end to its permit. The second condition implies that a person applying for a residence permit needs to sign a declaration indicating that he or she "understands the fundamental values and norms of society and will act accordingly." Signing this "newcomers declaration" will be a condition of admissibility for the residence permit. In case no. 126/2018, the Constitutional Court rejected almost all arguments invoked against both conditions. However, it ruled out that the criminal past of a person can be taken into account when measuring his integration efforts because of the disproportionately wide scope of that criterion. It is also interesting to note that the freedom of expression and religion, according to the Court, includes the right of a person not to reveal his convictions. It observes, however, that the newcomers declaration does not compel a person to accept the fundamental values and norms of society, but only to understand them and act accordingly.

Under Article 23 of the Citizenship Code, citizens may have their citizenship withdrawn if they seriously breach their duties as Belgian citizens, provided that the withdrawal does not result in the person concerned being made stateless. This provision makes it possible to exclude certain citizens from the national community when their conduct demonstrates that they do not accept the basic rules of community life and seriously infringe on the rights and freedom of their fellow citizens. The Antwerp Court of Appeal submitted preliminary questions to the Constitutional Court concerning the application by the state prosecutor to have FB's Belgian citizenship withdrawn. FB had been convicted of criminal offences of acts of violence and leadership of a terrorist group. In case no. 16/2018, the Constitutional Court considered the provision not discriminatory. As a matter of fact, citizenship can only be withdrawn in cases where citizenship is not obtained as a result of birth but on the ground of a declaration, before the age of 18 years. According to the Court, this difference of treatment is based on an objective and relevant distinguishing criterion, which

[2] In case of an ordinary vote of no confidence, Parliament indicates that it no longer supports the government, but government is not obliged to resign. In case of a constructive vote of no confidence (introduced in 1993) supported by a parliamentary majority, however, Parliament itself proposes an alternative Prime Minister and forces the government to resign (Article 96 of the Constitution).

is linked to the way Belgian citizenship was acquired and the ties maintained with the national community. Further, the Court held that the impugned provision did not infringe on the general legal principle of *non bis in idem* enshrined in Article 14.7 ICCPR and Article 4 Protocol 7 ECHR. The withdrawal of citizenship at issue is not a penalty but a civil measure. Finally, it is interesting to note that the Court, for the first time in its history, ruled that the hearing, for security reasons, would be televised (interlocutory Judgment no. 1/2018).

2. Fight against Terrorism

In 2018, the Court addressed two cases that dealt with regulations regarding counter-terrorism. In case no. 8/2018, the Court rejected an appeal for annulment of Article 140sexies of the Criminal Code that penalized those who leave or enter the national territory with the intent to commit terrorist acts or criminal offences of incitement to commit terrorist acts. According to the Court, the fact that it can be difficult for the prosecuting authorities to prove double "intention" (the intention to adopt a specific behavior which itself is motivated by a more precise intention) was insufficient to conclude that this provision is inconceivable with the principle of legality in criminal matters. Moreover, it did not affect the free movement of persons. The Court concluded that the text of this Article, despite its general scope containing cross-references, is sufficiently foreseeable and a more precise definition of the term "intention" is not necessary. It is for the judge to assess this intention objectively on a case-by-case basis.

Case no. 31/2018 concerned an action for annulment of two Articles of the act containing a number of provisions to combat terrorism (here: Terro III). The first item was Article 2 Terro III, which amended Article 140bis of the Criminal Code in three different ways, of which two were challenged before the Constitutional Court. Article 140bis, final sentence, of the Criminal Code contained a so-called "risk requirement," which means that only serious indications of a possible terrorist crime may be punished. Article 2, 3° Terro III deleted that risk requirement aimed at simplifying the assessment of evidence. However, this deletion was annulled by the Constitutional Court because it violated the freedom of expression. The Court considered that the intended aim does not justify that a person is likely to be sentenced to five to ten years' imprisonment and be fined, even if the risk requirement would not be fulfilled. The Court stipulated that the effects of this provision remained in force until 1 September 2018. The second item was Article 6 Terro III, which facilitates the conditions for issuing an arrest warrant in cases of terrorist crimes that exceed the maximum penalty of five years. The Court rejected this action as unfounded because the rights of the accused are not disproportionately affected. The procedural safeguards were still guaranteed, including the fact that the investigating judge remains competent.

3. Access to Justice (pro bono legal advice)

In 2018, the Constitutional Court ruled in two remarkable cases relating to access to justice, specifically with regard to *pro bono* legal advice. In one of them, a rare argument concerning forced labor was raised. *Pro bono* legal advice is a service to which citizens are entitled if certain conditions are met. This advice is offered by attorneys who are later paid by the government on the basis of a performance-related code. Attorneys usually offer their services voluntarily. In an act in 2016 however, the legislator decided that the bar association can force attorneys to perform pro bono whenever this is necessary for the effectiveness of the service. Qualifying this measure as forced labor, a number of attorneys and a bar association applied to the Constitutional Court. In its decision no. 41/2018, the Court disagreed. It observed that attorneys have a significant role to play in the administration of justice. They also enjoy certain privileges. Given that, they can be expected to contribute to the performance of the justice system, which is a pillar of the rule of law. Moreover, *pro bono* services are an essential element of the right to legal aid as provided in Article 23 of the Constitution. Qualifying lawyers are free to exercise the profession of attorney as they please, so whoever chooses this profession accepts the burdens that come with it, including providing *pro bono* services. As such, the Court concluded, the measure does not violate the right to free choice of a profession, nor does it constitute forced labor.

The Court's judgment in case no. 77/2018 potentially has more far-reaching consequences. During the last years, access to justice has increasingly been analyzed through the prism of *financial* access. Obviously, access to pro bono services is an essential component of that. Through the act of 2016 already mentioned above, the legislator had restricted the access to those services by imposing a broader definition of the means taken into account to determine an individual's need for assistance and by tightening presumptions of need and control mechanisms. In addition, the legislator introduced a limited, flat rate contribution required from anyone relying on *pro bono* services. Although the law provided for general and individual exceptions, the Constitutional Court struck this new financial burden in view of the standstill obligation in Article 23 of the Constitution. The Court was puzzled by the idea that a contribution was imposed on litigants who were, by definition, incapable of paying for their legal advice. By lack of numbers demonstrating a real problem of overconsumption, the argument that the measure was intended to promote a responsible litigation attitude was equally rejected. As a result, for the first time, the Court found a violation of the standstill obligation as it is applicable to the right to legal aid.

4. Curtailing the Vulture Funds

The Federal Act of 12 July 2015 curtails the activities of so-called "Vulture Funds"; it was adopted unanimously by the Belgian Parliament and found its origin in a bill drafted in consultation with the Committee for the Abolition of Illegitimate Debt, an umbrella of a bunch of NGOs. The Court rejected an appeal for annulment of that act introduced by NML Capital Ltd., a subsidiary of Paul Singer's hedge fund Elliott Management Corp., registered in the Cayman Islands (case no. 61/2018). The act provides that when creditors pursue an illegitimate advantage by the purchase of a State's loan or debt obligation, their rights towards the debtor State

will be limited to the price they paid for the purchase. The challenged act also prohibits the issuance of an enforcement order in Belgium, or the adoption of measures aimed at ensuring the payment of the debt, where this gives the creditor an illegitimate advantage. The pursuit of an illegitimate advantage is deduced from the existence of a manifest disproportion between the purchase value of the loan or debt obligation by the creditor and the face value of the loan or debt obligation, or else between the purchase value of the loan or debt obligation by the debtor and the amount they demand in payment. The Court held that this limitation is not infringing property rights, nor primary or secondary EU Law, nor the right to a fair trial. The criterion of "manifest disproportion" between the said values is deemed to be sufficiently precise to be applied by the courts and the curtailing to the purchase value is not infringing on the undisturbed enjoyment of the property of the creditor.

5. Data Protection

In 2018, the Court addressed four cases that dealt with the protection, management and exchange of personal data. Case no. 29/2018 concerned an action for annulment of federal legislation that provided for automatic exchange of data between utility companies and the providers of social housing in order to combat domicile fraud. Although the Court acknowledged that the measure interfered with the right of social tenants to retain respect for their private lives *ex* Article 22 of the Constitution and Article 8 ECHR, it held that it was pertinent and proportionate in light of the aim to effectively and efficiently combat social fraud. According to the Court, the legislator had foreseen sufficient guarantees to contain the pushing, mining and storing of data.

The Flemish Parliament had adopted similar legislation in October 2016. Indeed, it had also provided for an additional exchange of personal data between government departments and agencies in order to combat domicile fraud in social housing. The new measure essentially required all agencies involved in social housing to share information with the supervisory authorities if they suspected fraud. The Flemish Tenants Association challenged the legislation before the Constitutional Court (case no. 104/2018). The Court considered the measure to be an interference with the right to respect for private life ex Article 22 of the Constitution and Article 8 ECHR, which was nevertheless justified in light of the fight against social fraud. According to the Court, the legislator implemented strict boundaries for the exchange of data. Not only does the information provider have to check whether the data are relevant and useful for the receiver's statutory duties but the receiver also has to effectively limit the use of the information to its statutory duties. Moreover, according to the Court, the exchange of data only leads to higher levels of government efficiency, since the information exchange is limited to relevant data that other government agencies involved in social housing already obtained.

In case no. 174/2018, the Constitutional Court annulled Articles 39*bis*, §3 of the Code of Criminal Investigation and Article 13 of the Act on Special Investigation Methods. On the basis of these provisions, the Public Prosecutor had become competent to order a non-confidential network search, instead of the previously competent investigating judge. The Court held that an investigation method that enables access to all personal communication data presents an interference with the right to respect for private life comparable to a house search or wiretapping. Considering the severity of the investigation method and the lack of procedural safeguards similar to the guarantees complementing a house search, the Court held that a network search can only be ordered by an investigating judge.

Last year, the Court referred four cases for preliminary ruling to the CJEU. One of these cases, concerning the new Belgian *Data Retention Act*, deserves particular attention (case no. 96/2018). This act replaced the previous one annulled by the Court in a judgment (case no. 84/2015)[3] narrowly tailored to the judgment of the CJEU that declared invalid the EU Directive 2006/24/EC on data retention.[4] The annulled Belgian Act transposed that directive. Meanwhile, the CJEU has confirmed and has even strengthened its views in a more recent judgment.[5] The CJEU held indeed that Directive 2002/58/EC must be interpreted as precluding national legislation, which, for the purpose of fighting crime, provides for general and indiscriminate retention of all traffic and location data of all subscribers and registered users relating to all means of electronic communication. Furthermore, those provisions preclude national legislation governing the protection and security of traffic and location data and, in particular, access of the competent national authorities to the retained data, where the objective pursued by that access (in the context of fighting crime) is not restricted solely to fighting serious crime, where access is not subject to prior review by a court or an independent administrative authority, and where there is no requirement that the data concerned should be retained within the European Union. However, the ECtHR adopted a different view on data retention when it found that Swedish legislation on the subject did not infringe on Article 8 ECHR.[6] Although the new Belgian Act is stricter than the previous one, it nevertheless still provides for massive data retention, but more limited in time and subject to more safeguards to avoid misuse of those data. The Constitutional Court found it necessary to continue its dialogue with the CJEU, offering it the opportunity to nuance, detail or alter its jurisprudence[7] given the fact that the Belgian legislator is of the opinion that it is simply impossible to practice more

[3] See Developments in Belgian Constitutional Law: The Year 2015 in Review: <http://www.iconnectblog.com/2016/10/developments-in-belgian-constitutional-law-the-year-2015-in-review/> accessed 28 January 2019.

[4] Cases C -293/12 and C-594/12 *Digital Rights Ireland and Seitlinger and Others* [2014] CJEU.

[5] Cases C-203/15 and C-698/15 *Tele2 Sverige and Watson and Others* [2016] CJEU.

[6] *Centrum för Rättvisa v Sweden* App no 35252/08 (ECHR, 19 June 2018). In February 2019, the case was referred to the ECtHR's Grand Chamber.

[7] See <http://europeanlawblog.eu/2018/10/01/reconsidering-the-blanket-data-retention-taboo-for-human-rights-sake/> accessed 28 January 2019.

differentiated data retention as advocated by the CJEU (an opinion that is shared by other EU Member States).[8] Furthermore the Court noted that more than one reference for a preliminary ruling was pending before the CJEU,[9] that an advocate general has delivered opinions which are critical for the case law and that data retention is not only practiced in view of combating serious crime but also, e.g., to protect the physical and moral integrity of minors in the fight against sexual abuse by electronic communication means.[10] The Court therefore submitted several preliminary questions to the CJEU concerning the interpretation of Directive 2002/58/EC read in conjunction with the EU Charter of Fundamental Rights.

IV. LOOKING AHEAD

On January 1, 2019, 337 cases were pending before the Constitutional Court. Some of these cases are of interest to an international audience. The Court must, for example, decide whether the *Unstunned Slaughter Ban* introduced in the Flemish and Walloon Region is compatible with the freedom of religion, the separation of church and state and the freedom of labour and enterprise, and whether the *Federal Transgender Act* respects the non-discrimination principle. Various cases concern the right to privacy, in particular with regard to the obligation to communicate personal data (e.g., client data by Airbnb hosts and Air companies) to the authorities. Furthermore, we have cases on the *Act to Combat Squatting*, the act providing that there should be a minimum service of the railways in case of an industrial action and the act prohibiting some persons to be blood donors. In October 2019, a Dutch-speaking[11] Justice from the group of former MPs,[12] Erik Derycke, is retiring, which means a new judge from that group has to be appointed. Lastly, new elections for the European Parliament, the Federal Parliament and the parliaments of the federated entities will be held on 26 May 2019.

[8] <http://statewatch.org/news/2017/nov/eu-eurojust-data-retention-MS-report-10098-17.pdf> accessed 28 January 2019.

[9] Referrals of the Investigatory Powers Tribunal London, 31 October 2017, Case C 623/17 *Privacy International / Secretary of State for Foreign and Commonwealth Affairs e.a.* and of the Audiencia provincial de Tarragona, Sección cuarta, 14 April 2016, Case C 207/16, Ministerio Fiscal. The Grand Chamber has already delivered judgment in the latter case: Case C 307/16 *Ministerio Fiscal* [2018] CJEU.

[10] See *K.U. v Finland* App no 2872/02 (ECHR, 2 December 2008).

[11] The Court is composed of six Dutch-speaking and six French-speaking Justices, each linguistic group electing their own president.

[12] The Court is composed of six former Members of Parliament and six Justices with a background in the legal or academic profession.