The Role of the Judiciary in the Execution of Judgments of the ECtHR

Conference organized by the Constitutional Court of Latvia and the Supreme Court of Latvia
20-21 September 2023

Supervision of National Measures of execution of judgements of ECtHR and separation of powers

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As set out by Madame President of the European Court of Human Rights, Sioffra O'Leary in her contribution this morning, the execution of judgments of the European Court of Human Rights, as the last step of the control mechanism implemented by the European Convention on Human Rights (hereafter: ECHR), is a crucial aspect in the effectiveness of this system for the protection of rights and freedoms and, more broadly, the respect of the State for the rule of law in Europe.

In a nutshell, it is acknowledged that, given the subsidiary nature of the ECHR's system of protection, judgments rendered by the ECtHR are primarily of a declaratory nature[1]. In other words, the obligation of the contracting States to abide by Court judgments in which a violation is established, as provided for in Article 46 of the ECHR[2], is a results-based obligation. The State is expected to remove the breach of the Convention from its legal system. To this end, the State has, in principle, a choice of means, under the supervision of the Committee of Ministers[3]. Specifically, three categories of measures may arise from the obligation to execute a Court judgment: the State is thus not only bound to pay the applicant the sums allocated by the Court as just satisfaction but also, within its internal legal order, to take individual measures (reopening of the domestic judicial procedure, granting of a residence permit, etc.) and/or general measures (changes to laws, case law, etc.), to put an end to the breach found in the future and to ensure reparation is made[4].

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[1] The ECHR's system differs from that of the Inter-American Convention on Human Rights, which authorises the Court, under its Article 63 § 1, to "rule that the consequences of the measure or situation that constituted the breach [of the provision of the Convention] be remedied". The Inter-American Court can thus order the defending State to take specific measures to remedy the breach found.

[2] Article 46 of the ECHR (Binding force and execution of judgments)
"1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.
2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution."

[3] ECtHR,*Papamichalopoulos and Others v. Greece*, 31 October 1995, Application no. 14556/89, § 34.

[4] ECtHR (GC), *Ilgar Mammadov v. Azerbaijan,* 29 May 2019, Application no. 15172/13, § 147.

The topic that has been assigned to me relates to the execution of judgments of the ECtHR that require the adoption of general measures, and to the role of the national judge in this regard, particularly as regards oversight of the execution by the legislator, in the case of partial non-performance or even inaction by the latter. When the violation of the ECHR arises from a structural problem, potentially highlighted by the adoption of a pilot judgment by the ECtHR, the execution of the judgment requires the adoption of general measures, particularly of a legislative nature. One of the questions raised is that of coordination and possible tensions between the role of national judge as the executing agent of the judgments of the ECtHR to ensure the effectiveness of the rights and freedoms, and the principle of the separation of powers, which takes precedence in domestic law.

It is certainly not by chance that this topic has been entrusted to me as judge of the Belgian Constitutional Court as there have been two ground-breaking Belgian cases which are key as to the direct applicability of EtCHR judgments and as to the role of the national judge in this respect.

Thus, at the time of the *Vermeire v. Belgium* judgment rendered in 1991[5], the ECtHR abandoned its traditional reserve and the subsidiary nature of its role in the execution of judgments by requiring the Belgian judicial authorities to directly implement the provisions of the ECHR as interpreted by the Court twelve years earlier in the famous *Marckx* judgment (1979)[6].
As a reminder, the *Marckx* judgment related to discrimination under Belgian law regarding children born in or out wedlock as regards, in particular, inheritance rights. At the time of the *Marckx* judgment, this discrimination was condemned as contrary to Articles 8 and 14 of the ECHR. However, the law change, which required a reform to the Civil Code, was not implemented until 1987, i.e. nearly eight years after the ECtHR judgment. Yet, in the *Vermeire* case, the Belgian courts (Court of Appeal and Court of Cassation) had refused to place illegitimate children on an equal footing with legitimate children in inheritances opened prior to the law change. This attitude of certain Belgian judges, justified by the obligation to abide by the law and the separation of powers, gave rise to a second conviction against Belgium at the time of the *Vermeire* judgment rendered in 1991. The European Court asserts therein that the choice of means left to the State does not allow it to suspend the implementation of the Convention while waiting for wide-ranging legislative reform to be introduced. Provided that the operative part of the judgment is sufficiently clear and precise, the judge is obliged to conform thereto without waiting for legislative reform[7].

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[5] ECtHR, *Vermeire v. Belgium,* 29 November 1991, Application no. 12849/87.

[6] ECtHR, *Marckx, v. Belgium* 13 June 1979, Application no. 6833/74.

[7] "An overall revision of the legislation, with the aim of carrying out a thoroughgoing and consistent amendment of the whole of the law on affiliation and inheritance on intestacy, was not necessary at all as an essential preliminary to compliance with the Convention as interpreted by the Court in the *Marckx* case. The freedom of choice allowed to a State as to the means of fulfilling its obligation under Article 53 (art. 53, new Art. 46) cannot allow it to suspend the application of the Convention while waiting for such a reform to be completed, to the extent of compelling the Court to reject in 1991, with respect to a succession which took effect on 22 July 1980, complaints identical to those which it upheld on 13 June 1979" (§ 26).

As emphasised by Géraldine Rosoux in an article in which she revisits the legacy of the *Marckx* and *Vermeire* judgments: "the office of the national judge in the protection of fundamental rights thus has its roots in the *Marckx* and *Vermeire* judgments, and in the combination of notions of direct effect and positive obligations". For the purpose of ensuring the effectiveness of fundamental rights, the ECtHR thus establishes the national judge as a "potential co-legislator"[8], requiring, in order to draw out all consequences of the violation of the Convention, that s/he not only remove a legislative rule contrary to the ECHR but also, where applicable, extend the benefit of legislation to other beneficiaries, in this particular case, this meant extending the inheritance system for legitimate children to illegitimate children.

Such a position asserted by the European Court of Human Rights on the grounds of the effectiveness of its judgments and, more broadly, fundamental rights, was likely at the time to lead to tension with the principle of the separation of powers[9]. In addition, it could turn out to be especially revolutionary for States in which "parliamentary legislation was inviolable"[10].

By using Belgium as a case study, I have attempted to map the various ways the national judge, whether a constitutional judge or judicial judge, may act, and the various roles that s/he can play in the execution of judgments of the ECtHR that require the adoption of general legislative measures. In each of these instances, we will consider, as a guiding thread, the potential tensions between the requirements related to the effectiveness of fundamental rights and Belgium's international obligations to execute the judgments of the European Court of Human Rights on the one hand, and those pertaining to the separation of powers on the other.
I would like to clarify that, within the limited framework of this contribution, I have not envisaged the impact of Protocol 16 of the ECHR given that the recent ratification by Belgium has not yet allowed for a useful period of assessment for this purpose.

A. Role of the constitutional judge

In Belgium, the Constitutional Court may play a double role linked to the execution of judgments of the ECtHR. First of all, it can reinforce the finding of a breach of the ECHR by doubling up with a finding of unconstitutionality (1.). Then it can sanction the legislator's inaction, as a shortcoming, when this inaction appears to violate what is required for the execution of a judgment of the ECtHR (2.).

1. The constitutional judge, as reinforcer of the finding of a breach of the Convention

[8] G. Rosoux, « Les droits fondamentaux dessinés par le juge constitutionnel belge. L'héritage de l'arrêt Marckx dans la jurisprudence constitutionnelle des droits fondamentaux », In *La Cour constitutionnelle - De l'art de modeler le Droit pour préserver l'Egalité - Actes du colloque du 28 avril 2016 organisé par la Conférence libre du Jeune Barreau de Liège*, Limal, Anthemis, pp. 75-144.
[9] This tension was clearly highlighted by Olivier de Schutter in a long-standing contribution dating back to 1997 (O. De Schutter, O. De Schutter, "La coopération entre la Cour européenne des droits de l'homme et le juge national" ("Cooperation between the European Court of Human Rights and the national judge"), *Revue belge de droit international*, 1997/1, pp. 21-68.
[10] S. Lambrecht, *Convention through States' eyes: Embedding of the European Convention on Human Rights in States Parties*, PhD submitted on 31 May 2022, University of Antwerp, 2022, p. 228.

Since the beginning of the 1990s, the Constitutional Court has developed and implements a technique, based on established case law, with which it exerts its control over legislative rules that are submitted to it not only with a view to fundamental rights enshrined in the Constitution but also with a view to the international and European rules that are binding upon Belgium. These relate to a two-fold method of reading constitutional provisions in combination with international treaty provisions.[11] The provisions of the ECHR, as interpreted by the European Court of Human Rights, thus play an important role in the indirect rules of reference used by the Court in its control of constitutionality[12]. The Constitutional Court has a reputation for taking the Convention's rights seriously. It recognises the interpretative authority of the judgments of the ECtHR, which it frequently makes use of in its case law. Doctrine has conveyed this attitude by referring to a "Convention-friendly" stance of the Constitutional Court[13].

With regard to the role of the constitutional judge in connection with the execution of a judgment of the European Court of Human Rights, several scenarios may be envisaged.

In a first hypothesis, in parallel to a case brought before the European Court of Human Rights leading to Belgium being condemned for violating fundamental rights, a preliminary ruling proceeding may be referred to the Constitutional Court, targeting the unconstitutionality, deriving from a combination of constitutional and treaty provisions, of a legislative rule that is moreover at the centre of the ruling of the European Court of Human Rights. In this hypothesis, it is likely that the Constitutional Court will recognise the unconstitutionality of the legislative rule through the application of the two-fold combination method[14]. The breach of the

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[11] A. Alen & 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, Slovenia, June 2016.
M.-F. Rigaux et B. Renaud, *Cour constitutionnelle*, Répertoire Pratique du Droit belge, Bruxelles, Larcier, 2023, pp. 322-325 ; G. Rosoux, *Contentieux constitutionnel*, Bruxelles, Larcier, 2021, pp. 157-180. **The combination method** has, in particular, enabled the Constitutional Court to integrate into its control of constitutionality, through the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution), all rights and freedoms guaranteed by the rules of international law binding upon Belgium (see CC, judgment no. 18/90 of 23 May 1990, B.11.3; judgment no. 106/2003 of 22 July 2003, B.4.2; judgment no. 126/2018 of 4 October 2018). The so-called "**indivisible whole" technique** was highlighted in judgment no. 136/2004 of 22 July 2004. When a treaty provision that binds Belgium is similar in scope to one or more of the constitutional provisions under its supervision, this entails considering the guarantees enshrined in this treaty provision as constituting an indivisible whole with the guarantees set out in the constitutional provisions in question. In such a case, the Constitutional Court, as part of its oversight, takes into account the international provisions that guarantee similar rights or freedoms (B.5.2 to B.5.4) (Const. Ct., judgment no. 189/2005, 14 December 2005).

[12] G. Schaiko, P. Lemmens & K. Lemmens, "Chapter 3 – Belgium", in J. Gerards & J. Fleurens (Eds.), *Implementation of the European Convention on Human Rights and of the judgments of the ECHR in national case-law. A comparative* analysis, Cambridge, Antwerp, Portland, Intersentia, 2014, pp. 95-143, p. 119.

[13] The Court of Cassation expressly recognised the interpretative authority of the judgments of the European Court of Human Rights (see F. Tulkens & S. Van Drooghenbroeck, « La Cour de cassation et la Cour européenne des droits de l'homme. Les voies de la banalisation », in *Imperat Lex. Liber amicorum Pierre Marchal,* Ghent, Larcier, 2003, pp. 121-141) and such authority is implicitly derived from the case law of the Constitutional Court (G. Schaiko, P. Lemmens & K. Lemmens, *op. cit*., pp. 123-127).

[14] The difference between the European Court of Human Rights, which rules ***in concreto*** on violation of individual rights in a particular situation, and the Constitutional Court, which rules on the conformity of legislative Acts with fundamental rights ***in abstracto***, is in this case mitigated by the fact that we are proceeding from the hypothesis that the breach established by the European Court of Human Rights is found in a legislative provision and requires

Convention that by assumption resides in a national legislative rule also constitutes a breach either of similar rules of the Constitution or through a combination with the prohibition of discrimination. In so doing, the Court confirms and simultaneously reinforces the finding resulting from the judgment of the European Court of Human Rights. An unconstitutionality is thus added to the breach of the ECHR. In addition to the impact that such a decision in the preliminary ruling proceeding will have on the case before the national judge bound to adhere to the stance of the Constitutional Court, such a finding will have the effect of reopening the deadline with a view to bringing an action for annulment of the legislative act found to be unconstitutional[15]. This reinforces the execution of the judgment of the European Court of Human Rights, by tightening the screw around the legislator and fast-tracking the removal of the rule violating the ECHR in the internal legal order.

The *Marckx* case and its aftermath, as already described, once again offers an excellent illustration. Thus, the Constitutional Court, examining a preliminary proceeding in another case concerning discrimination against illegitimate children in matters of filiation, broadly established its grounds on the *Marckx* judgment of the European Court of Human Rights[16]. As such, it first considered that the law of 31 March 1987 on matters of filiation had generally put an end to reported discrimination against children born out of wedlock. The fact that a transitional provision maintains the discriminatory system for inheritances opened before the law came into force is deemed unconstitutional. However, it can be seen that the *Marckx* judgment of the European Court of Human Rights is a pivotal date as regards the effect of this unconstitutionality over time. Therefore, the inheritance system differentiating between children born in or out of wedlock cannot be applied to inheritances opened as of 13 June 1979, the date of the Marckx judgment, which declared this discrimination contrary to the Convention[17].

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the adoption of general legislative measures to put an end to it. In this way, the judgment rendered by the European Court of Human Rights is close to a judgment rendered on the conformity of a legislative Act with the ECHR's fundamental rights.

[15] Since 2003, judgments establishing a breach of the Constitution rendered in a preliminary ruling have an enhanced authority of *res judicata*. Indeed, to offset the lack of *erga omnes* effect of a finding of unconstitutionality rendered in a preliminary ruling, Article 4.2 of the special law of 6 January 1989 sets a new six-month deadline to institute an action for annulment for any person - natural or legal - demonstrating an interest (G. Rosoux, *Contentieux constitutionnel, op. cit*. p. 727 et seq. [*sic*]

[16] Const. Ct, judgment no. 18/91, 4 July 1991.

[17] In this regard, see G. Rosoux, « Les droits fondamentaux dessinés par le juge constitutionnel belge (…) », *op. cit*. §§ 37 and 38. It would be possible to mention other examples of successive cases relating to the claims of a breach of a fundamental right recognised both by the Constitution and by the ECHR through the same national legislation brought respectively before the Constitutional Court and the European Court of Human Rights, which engage in an informal dialogue contributing to the effectiveness of the judgments of the European Court of Human Rights. So for example, the Constitutional Court agreed to amend previous case law that was deemed contrary to the ECHR by the ECtHR (ECtHR, Judgment *Pressos Compania Naviera and others v. Belgium*, 20 November 1995, Application no. 17849/91): "The Constitutional Court does not hesitate to modify its case-law where this has been found by the ECtHR to be in violation of the ECHR. In a 1995 case relating to a Belgian statute , which retroactively excluded the liability of organisers of pilot services for damage resulting from negligence by pilots in the exercise of their functions, the Constitutional Court ruled that only acquired property enjoyed the protection of the right of property, guaranteed by Article 16 of the Constitution and Article 1 of Protocol nr 1 (CC, 5 July 1995, 25/1995). In the subsequent proceedings before the ECtHR, the applicants invoked a violation of Article 1 of Protocol n 1, which the ECHR held to be well founded. Since then the Constitutional Court has accepted that a financial claim may, under certain circumstances, fall within the scope of Article 1 of Protocol No 1 (Const. Ct, 21 December 2004, no. 210/2004)" (G. Schaiko, P. Lemmens & K. Lemmens, "Chapter 3 – Belgium", *op. cit*., p. 127).

In a second hypothesis, the Constitutional Court may intervene *ex post*, while the legislator intervened in order to execute a judgment of the European Court of Human Rights condemning Belgium. In this case, an action for annulment may be brought to the Constitutional Court, whereupon it may be expected to determine whether the choices made by the legislator are indeed compliant with the Constitution, read in combination with the provisions of the ECHR, as interpreted by the European Court of Human Rights.
Thus, as emphasised by M.-F. Rigaux and B. Renaud, cross-references may arise between the case law of the European Court of Human Rights and that of the Constitutional Court, leading to stronger protection of the defendants. For example, in its pilot judgment rendered in the *W.D. v. Belgium* case, "in the matter of a breach of the fundamental rights of persons with mental disorders held in prisons even though they should have been placed in suitable health care institutions, the European Court cites a judgment of the Constitutional Court (judgment no. 142/2009), which found a breach of Article 5 of the ECHR due to the lack of space available in suitable institutions. As an action for annulment targeting the subsequent legislative reform was brought before the Constitutional Court, the latter, in turn, made substantial use of the case law of the European Court of Human Rights and insisted on the need for the State to abide by the latter (judgment no. 80/2018)"[18].

In both hypotheses, this enhancing role of the constitutional judge reinforces the effectiveness of fundamental rights, regardless of their formal source, without causing tension with the principle of separation of powers. Indeed, the role played in this case by the Constitutional Court falls within the scope of its office and task of supervising the legislative power. Consideration of the lessons learned from the judgments of the European Court of Human Rights contributes to a fruitful dialogue with the European court, which helps, where applicable, to avoid any future breaches of the ECHR by Belgium.

2. The constitutional judge as the body sanctioning the failure of the legislator to act in putting an end to a breach of the ECHR

It is a more complex situation when the breach of the ECHR found in the judgment of the European Court of Human Rights results from the failure of the legislator to act in order to tackle a structural problem. The Constitutional Court has not been granted formal jurisdiction to sanction legislator inaction as such or the shortcoming of the latter in executing a ruling of

[18] M.-F. Rigaux and B. Renaud, *Cour constitutionnelle*, op. cit., p. 333. « In view of the recognition of the interpretative authority of judgments of the European Court of Human Rights that do not concern Belgium, it is also possible that informal dialogue takes place between the Constitutional Court and the European Court of Human Rights following a judgment rendered against another State and regarding a law intended to comply with it. This is what occurred with the action for annulment brought before the Constitutional Court against the so-called "Salduz" law, which aimed to bring the Belgian legal system into line with the ECHR and, in particular, the judgment of the European Court of Human Rights in the *Salduz v. Turkey* case. To perform its review of constitutionality, the Constitutional Court made ample use of the judgment of the European Court of Human Rights in the *Salduz v. Turkey* case, enabling it to preventively limit the risks of a conviction against Belgium for a breach of the ECHR".

the European Court of Human Rights[19]. It has nevertheless developed case law in which it sanctions unconstitutionality that derives not from provisions submitted to it in preliminary proceedings but rather from a legislative gap[20].

Without going into the details of this case law here, it should be noted that legislative gaps thus found result, according to the expression offered by G. Rosoux, in a "trialogue between the constitutional judge, the legislator and the ordinary judge"[21], which could raise questions concerning their respective roles and the separation of powers.

In this regard, it should be noted that, based explicitly on the *Vermeire* case law of the European Court of Human Rights, the Constitutional Court specified that, when a gap is identified in a sufficiently precise and complete manner, it must be filled in by the national judge[22].

It can thus be seen that the legacy of the *Vermeire* judgment of the European Court of Human Rights is the basis of the Constitutional Court's case law on self-repairing gaps and the determination of the ordinary judge's power when faced with a legal vacuum contrary to fundamental rights. The Constitutional Court thus invited the Court of Cassation to revisit its reasoning and agree to fill in itself the gap raised by the constitutional judge, which the Court of Cassation agreed to do in a judgment rendered in the same year[23].

As part of a preliminary ruling proceeding, the Constitutional Court does not itself fill in the legislative gap; consequently, there is, in principle, no direct tension with the principle of the separation of powers. Nevertheless, one cannot exclude that such tension may arise due to the obligation of the judicial judge to fill in the self-repairing gap deemed unconstitutional pending intervention by the legislator.

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[19] According to a traditional notion of the mandate of the constitutional judge, his/her mission is that of a negative legislator who only has the power to censure the law but not to draft it or direct the legislator to act in a given sense.

[20] In this regard, see: M. Melchior and Cl. Courtoy, « L'omission législative ou la lacune dans la jurisprudence constitutionnelle », *J.T.*, 2008, pp. 669-678 ; G. Rosoux, *Contentieux constitutionnel, op. cit*., pp. 736-748. More rarely, the Court has extended this "gap" case law in the context of actions for annulment. Also see J.-Cl. Scholsem, « La Cour d'arbitrage et les lacunes législatives », in *Les rapports entre la Cour d'arbitrage, le Pouvoir judiciaire et le Conseil d'Etat*, Bruxelles, La Charte, 2006, pp. 213-237)

[21] G. Rosoux, *Contentieux constitutionnel, op. cit*., p. 741.

[22] Thus, in a judgment of 2008 (judgment no. 111/2008 of 31 July 2008), the Constitutional Court, deciding on a preliminary question raised by the Court of Cassation, highlighted the possibility of a gap being filled in by the judge when this gap is self-repairing: "B.10. Finally, with regard to the observation of the Council of Ministers according to which the Court may detect a legislative gap but cannot fill it in, it is up to the judge of the lower court, if the gap is found in the text submitted to the Court, to put an end to the unconstitutionality found by the latter, provided that this finding is expressed in terms that are sufficiently precise and clear to enable the provision in question to be applied in accordance with Articles 10 and 11 of the Constitution (comp. ECtHR, *Vermeire v. Belgium*, § 25)".

[23] Cass. 14 October 2008, no. P.08.1329.N: "If it is possible to put an end to the unconstitutionality by simply supplementing the legal provision so that it is no longer contrary to Articles 10 and 11 of the Constitution, the judge has the power and duty to do this"; also see Cass., 5 February 2016, commented upon by G. Rosoux, « Les droits fondamentaux dessinés par le juge constitutionnel belge (…) », *op. cit*., pp. 92-93. ("The judge is obliged to remedy any legal gaps whose unconstitutionality has been detected by the Constitutional Court, or those resulting from a provision of law judged unconstitutional, when s/he can address this shortcoming within the scope of existing legal provisions to bring the law into line with Articles 10 and 11 of the Constitution").

This leads to the review of the judicial judge's role in the execution of the judgments of the European Court of Human Rights (B.).

B. Role of the judicial judge

Within the limit of this contribution, it is proceeded more briefly to the assessment of the role of the judicial judge in the execution of judgments of the European Court of Human Rights, firstly as responsible for direct implementation of the judgments of the said Court (3.) and secondly as sanctioning the responsible legislating State due to its inappropriate action or failure to act (4.).

3. The judicial judge as responsible for direct implementation of the judgments of the European Court of Human Rights,

In the introduction, I mentioned that the *Vermeire v. Belgium* judgment of the European Court of Human Rights highlighted the obligation of the judge to execute the judgments of the said Court and to put an end to the breaches pointed out in the case law of the European Court of Human Rights, if necessary by rejecting the application of the law that is contrary to the ECHR or by filling a legislative gap.

As long as the operative part of the judgment is sufficiently clear and precise, the judgments of the ECHR are binding on national judges, who are obliged to abide by them pending possible legislative reform. The argument that there is a risk of a breach of the separation of powers is not, in principle, regarded as a means of obstructing the obligations imposed on the court to give effect to judgments condemning Belgium by the European Court of Human Rights.

As an illustration of this possibility of the judge to anticipate the legislative reform required to execute a judgment of the European Court of Human Rights, we can cite the consequences of the judgment of the European Court of Human Rights in the *Lachiri v. Belgium* case. At the centre of this case was a provision of the Judicial Code (Article 759) dating back to the 19th century, establishing that "the person who attends a hearing stands uncovered, respectful and quiet (…)".In its Chamber judgment rendered on 18 September 2018, the European Court of Human Rights ruled against Belgium for a breach of religious freedom enshrined in Article 9 of the ECHR. The exclusion of Mrs Lachiri, who had decided to file a civil suit, from the hearing chamber of a court on the ground of her refusal to remove her hijab is not justified by the legitimate aim of "protection of order", and of preventing disrespectful behaviours with regard to the judicial institution and/or disruptive to the proper conduct of a hearing[24]. Pending the legislative change, which took place in November 2021[25], the "President of the College of

[24] ECtHR, judgment of 18 September 2018, no 3413/09, *Lachiri v. Belgium*.

[25] Article 22 of the Law of 28 November 2021 (published on 30 November) amended Article 759 of the Judicial Code, which stated as follows: "The person who attends a hearing stands uncovered, respectful and quiet: all that the judge orders to maintain order is enforced punctually and instantly". By removing the word "uncovered" so as to no longer refer to "uncovered head" (orders of certain magistrates to remove a hijab, kippah or head covering

Courts and Tribunals had asked to disseminate the lessons of the judgment to all magistrates of the court and the Judicial Training Institute integrated this judgment into their training in deontology and ethics, in order to reiterate that there were no express prohibitions on religious symbols worn in court hearings by private individuals, notwithstanding cases of disruption of the proper conduct of such hearings which could justify exclusion"[26].

In light of the direct applicability of its judgments, a kind of informal dialogue is established between the European Court of Human Rights and national judges. Provided that the judge's intervention does not exceed what is necessary to ensure the effectiveness of sufficiently clear and precise judgments of the European Court of Human Rights, the principle of the separation of powers does not pose an obstacle to such intervention intended to execute the judgments of the said Court pending action by the legislator. If, however, legislator action is essential, it will be possible to ask the judge, in the case of inaction or inappropriate action, to invoke the liability of the legislating State.

4. The judicial judge as body sanctioning the liability of the legislating State due to its inappropriate action or failure to act

In some cases, the finding of a breach of the ECHR by the European Court of Human Rights cannot be executed directly by the judge and requires action by the legislator. In the case of inaction by the latter or action that is not compliant with the requirements deriving from execution of the judgment of the European Court of Human Rights, an action may be brought before the judicial judge to hold the legislating State liable due to inappropriate action or failure to act. This possibility of holding the legislating State liable was validated by the Court of Cassation, following a significant change in its jurisprudence, in a judgment of 28 September

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for medical reasons), the Belgian authorities provided a permanent solution to the lessons of the Lachiri judgment (https://www.coe.int/fr/web/execution/-/belgiique-modification-du-code-judiciaire-ayant-pour-effet-de-renforcer-la-liberte-de-religion#:~:text=Une%20loi%20du%2028%20novembre,et%20à%20l%27instant%20») (Article 759 du Code judiciaire: « Celui qui assiste aux audiences se tient découvert, dans le respect et le silence : tout ce que le juge ordonne pour le maintien de l'ordre est exécuté ponctuellement et à l'instant ». En supprimant le mot « découvert » pour ne plus faire référence à « tête découverte » (ordres de certains magistrats de retirer un hijab, une kippa ou un couvre-chef pour motifs médicaux), les autorités belges ont apporté une solution définitive aux enseignements de l'arrêt Lachiri (https://www.coe.int/fr/web/execution/-/belgiique-modification-du-code-judiciaire-ayant-pour-effet-de-renforcer-la-liberte-de-religion#:~:text=Une%20loi%20du%2028%20novembre,et%20à%20l%27instant%20».

[26] Belgium, Execution of the judgments of the European Court of Human Rights. Main achievements in the Member States, https://rm.coe.int/ma-belgium-fra/1680a2a377

For another example, see the execution of the judgment of the European Court of Human Rights *Pressos Compania Naviera and others v. Belgium*, of 20 November 1995. Following the judgment of the European Court of Human Rights, the national courts first modified their case law and stopped enforcing the contested provisions that had been introduced in 1988 and retroactively exempted the State from its liability for damages caused by accidents at sea resulting from negligence by marine pilots. The law on piloting of seagoing vessels was amended for the first time in 1996 to remove the reference to the State's exemption from liability for pilots before a global reform of the laws on piloting of seagoing vessels was undertaken and completed in 2002 (https://rm.coe.int/ma-belgium-fra/1680a2a37)7.

2006[27]. We will note that the case related to the reasonable time limit being exceeded in a civil proceeding, due to the backlog of court cases in Brussels, in violation of Article 6, § 1 of the ECHR. This related to litigation in which Belgium had been condemned on several occasions by the European Court of Human Rights, and which was the subject of constant monitoring by the Committee of Ministers pending the adoption of structural measures intended to resolve the problems of the excessive duration of proceedings[28].

It follows from this case law that disregard of a rule of international or European law on human rights by a legislative action or omission may incur the State's liability. Although it is an important factor in assessing the State's liability, the finding of such disregard through a European or international decision is not an essential prerequisite for incurring such liability[29]. Even though the principle of the separation of powers had long been considered an insurmountable barrier preventing the judge from supervising the legislator and ruling on the latter's conduct as to whether it was prudent or imprudent, negligent or attentive, the Court of Cassation eventually "crosses the Rubicon", as expressed by S. Van Drooghenbroeck, and asserts that neither the principle of the separation of powers nor the principle of independence of the legislative branch are an obstacle to the liability of the legislating State as a result of its inappropriate action or inaction[30].

As part of the informal dialogue between the Belgian courts and the European Court of Human Rights and the subsidiary nature of the European protection mechanism, it should be noted that the latter considered in the first instance that a compensatory remedy for exceeding a reasonable period, once it had acquired a sufficient degree of certainty, was an effective remedy within the meaning of Article 13 of the ECHR. All remedies therefore had to be exhausted, pursuant to the requirement of exhaustion of domestic remedies, before referring the case to the European Court of Human Rights[31]. However, it is noted that in a recent judgment of 5 September 2023,

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[27] For comments on this judgment of the Court of Cassation, see S. Van Drooghenbroeck, « La responsabilité de l'Etat du fait du législateur », in S. Van Drooghenbroeck (sous la dir.), *Le droit international et européen des droits de l'homme devant le juge national*, Bruxelles, Larcier, 2014, pp. 409-420.

[28] In particular, see Interim Resolution (CM/ResDH(2021)103), adopted on 9 June 2021 by the Committee of Ministers as part of the *Bell v. Belgium* case (no. 44826/05, 4 November 2008) (https://rm.coe.int/0900001680a2ba5b)

[29] S. Van Drooghenbroeck, « La responsabilité de l'Etat du fait du législateur », *op. cit.*, pp. 416-420.

[30] "The principle of the separation of powers, which tends to provide balance between the different powers of the State, does not mean that the latter is broadly exempt from remedying the damage caused to others by its own fault or that of its bodies exercising the legislative function. Neither this principle nor Articles 33, 36 and 42 of the Constitution prevent a court of law from finding such fault when ordering the State to remedy the resulting harmful consequences. By assessing the wrongful nature of the harmful behaviour of the legislative branch, this court is not interfering with the legislative function or the political processes for drafting laws but is abiding by its mission as judicial power to protect civil rights" (« Le principe de séparation des pouvoirs, qui tend à réaliser un équilibre entre les différents pouvoirs de l'Etat, n'implique pas que celui-ci serait, de manière générale soustrait à l'obligation de réparer le dommage causé à autrui par sa faute ou celle de ses organes dans l'exercice de la fonction législative. Ni ce principe ni les articles 33, 36 et 42 de la Constitution ne s'opposent à ce qu'un tribunal de l'ordre judiciaire constate pareille faute pour condamner l'Etat à réparer les conséquences dommageables qui en sont résultées. En appréciant le caractère fautif du comportement dommageable du pouvoir législatif, ce tribunal ne s'immisce pas dans la fonction législative et dans le processus politiques de l'élaboration des lois mais se conforme à la mission du pouvoir judiciaire de protéger les droits civils »).

[31] European Court of Human Rights, decision *Depauw v. Belgium* of 15 May 2007. The Court confirmed this case law in several later cases (in particular, see *Nagler and Nalimmo B.V.B.A. v. Belgium*, no. 40628/04, 17 July 2007,

rendered in the *Van den Kerkhof v. Belgium* case, the European Court conversely considered that prior exhaustion of the liability claim for breach of reasonable period in a civil proceeding was not required, due to the Belgian government's failure to prove the effectiveness of this remedy[32].

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What does this mapping reveal about the different roles that the judge may play in the execution of judgments of the European Court of Human Rights that require the adoption of general legislative measures?

In the first type of role, the judge is expected to give effect to the finding of a breach of the Convention by drawing out the consequences of a particular case, which is the responsibility of the judicial judge in accordance with the direct applicability of international law, or by reinforcing it by recognition of an additional unconstitutionality, which is the responsibility of the Constitutional Court.
In the second type of role, the judge may be expected to sanction the legislator for failure to execute. The Constitutional Court, hearing a preliminary ruling proceeding, may detect an unconstitutionality resulting from a legislative gap. As for the judicial judge, s/he may rule on the liability of the legislating State resulting from inappropriate action or inaction in the execution of a judgment of the European Court of Human Rights.

What about the possible tensions between the requirements deriving from effectiveness of fundamental rights on the one hand, and those related to the separation of powers on the other? The progress that has taken place in the Belgian legal system tends to show the absence of any real tension between the separation of powers and the different roles that may be played by the constitutional or judicial judges in the framework of the execution of ECHR judgments. In reality, this is an interpretation of the principle of the separation of powers which does not involve a strict separation but rather fosters relationships of interdependency between powers by means of checks and balances. As highlighted by the Consultative Council of European Judges, in an opinion in 2015[33], "the three powers act as checks on one another, which means

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De Saedeleer v. Belgium, no. 27535/04, 24 July 2007, *De Turck v. Belgium*, no. 43542/04, 25 September 2007, and *Raway and Wera v. Belgium*, no. 25864/04, 27 November 2007).
In addition, with regard to the execution of the group of cases *Vasilescu v. Belgium* (25 November 2014, https://hudoc.exec.coe.int/eng#{"execidentifier":["004-1263"]}) in matters of overcrowding in prisons and the lack of effective remedy, the Committee of Ministers stressed, in 2021, that it had noted with interest the development, in practice, of a compensatory remedy while noting, with concern, the lack of any relevant progress testifying to the existence of an effective preventive remedy.

[32]"In conclusion, the Court notes that the Government - which bears the burden of proof - has not shown that, under the specific circumstances of this case relating to a civil judicial proceeding that is still pending (conversely, see *Coussios v. Belgium* (Dec.), no. 23104/08, §§ 29-37, 15 September 2015), the compensatory remedy based on Article 1382 of the Civil Code met the requirements of effectiveness required to file a complaint regarding the excessive duration of the proceeding initiated by the applicant" (European Court of Human Rights, *Van den Kerkhof v. Belgium*, 5 September 2023, § 83).

[33] Consultative Council of European Judges, opinion no. 18 (2015) "The place of the judicial system and its relations with the other powers of the State in a modern democracy"

they must be accountable to each other in the interest of society. It would therefore be useful to accept that a certain level of tension is inevitable between the powers of a democratic State. If this becomes a 'creative tension', it proves that each power is playing the role of watchdog over the others and thus helps to maintain a good balance (…)".

Of course, the balance is precarious and provisional and is by no means immune to a resurgence of these kinds of questions or doctrinal or political stances opposing the role of the judge and the role of the legislator and criticising judicial activism in the name of popular sovereignty[34]. The fact nevertheless remains that this flexible design of the separation of powers involving faithful cooperation between them seems to be the most suitable fit for ensuring the effectiveness of the protection of fundamental rights and of Belgium's European and international commitments.

[34] Serge Gutwirth & Paul De Hert, "De stem van het volk laten primeren op justitie? Die boemerang kan je snel in je gezicht krijgen", *De Knack*, 12 August 2023, 'De stem van het volk laten primeren op justitie? Die boemerang kan je snel in je gezicht krijgen' (knack.be)