Chapter 4
The Ability to Deviate from the Principle of Retroactivity: A Well-Established Practice Before the Constitutional Court and the Council of State in Belgium

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Abstract In Belgium, every judicial decision has, in principle, retroactive effect. Parliament gave the Constitutional Court and the Council of State the ability to deviate from this initial retroactive effect when the Court or Council *deems this necessary.* It appears from the Constitutional Court's case law that the Court repeatedly makes use of this ability to attach prospective effects to its decisions. A variety of reasons is given to justify a temporal modulation, such as the protection of legal certainty, the prevention of financial and/or administrative difficulties and the possibility for Parliament to revise the annulled norm. Similar considerations are invoked before the Council of State, but the latter is much more reluctant to deviate from the initialretroactive effect and it imposes a higher burden of proof on to the

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requesting parties. Since the recent law reform of 2014, the Council is moreover deprived of the power to modulate *ex officio* the retroactive effect of its annulment decisions.

Introduction

In Belgium, judicial decisions as a rule have retroactive effect. This rule applies to both decisions of the ordinary courts, and those of specialized courts such as the Constitutional Court and the Council of State.[1] The regime applying to both categories of courts, however, differs in many respects. For ordinary courts, retroactive effect results from declaratory theory, according to which courts do not create law (Roubier 1960). In the case of abstract review by specialized courts, it was considered that if the court finds that an administrative decision or Act of Parliament violates the law or the constitution, the norm was afflicted with this irregularity since its coming into force. It was felt that for this reason, the norm should be removed from the legal order *ex tunc* (par. 2).

In the case of annulment decisions pronounced by the Constitutional Court or the Council of State, Parliament provided for the possibility to deviate from the principal rule of retroactivity (Art. 8(3) Special Law on the Constitutional Court (SLCC); Art. 14*ter* Coordinated Laws on the Council of State (CLCS)). This allows the court to find a balance between legality, which is affected by the irregular norm, and legal certainty, which may be affected if the norm is annulled with retroactive effect. The respective provisions provide that where the Court or the Council so deems necessary, it shall, by a general ruling, specify which effects of the nullified provisions are to be considered maintained or be provisionally maintained for the period appointed by the Court. Parliament did not provide for a similar provision in the case of referral decisions, but this did not retain the Constitutional Court from appropriating this power for itself. The Council of State, for its part, has a similar competence to maintain the effects of a nullified provision. Until recently, however, it was not allowed to deviate from the principal retroactive effect where the annulment concerned an individual act.

Similar powers for ordinary courts to deviate from the principal retroactive affect is neither provided by law nor developed in established case law. Such power was considered to imply a particular acknowledgment that courts in fact do have a creative role in the development of the law. In only two cases did the Court

[1]The Constitutional Court has the power to annul federal and subnational statutes and give referral decisions to courts regarding the constitutionality of these statutes. These statutes are called "laws" if they emanate from the federal parliament, "decrees" if they emanate from the subnational Communities and Regions and "ordinances" if they are adopted by the Brussels Parliament or the Joint Community Council in Brussels. The Council of State acts as the supreme court regarding administrative courts but also has the power to annul administrative acts and regulations.

of Cassation[2] decide to limit the retroactive effect of its decision. This reluctant stance stands in sharp contrast with the case law developed by the Court since 2007 regarding the temporal effect of referral decisions pronounced by the Constitutional Court (par. 3).

The Constitutional Court frequently makes use of the possibility to definitively or provisionally maintain the effects of an annulled provision. The reason-giving for such decisions, however, often leaves much to be desired. The Council of State is a less frequent user of this possibility, but provides a more elaborated reason-giving. An analysis of the case law of both courts, nevertheless, reveals that they rely on similar reasons for deviating from the principal retroactive effect of their decisions (par. 4).

Retroactivity as the Principal Rule

Ordinary Courts

As mentioned above, declaratory theory explains the retroactive effect of judicial decisions of the ordinary courts. According to this theory judges merely explain the meaning of legal texts as they always were and always should have been interpreted (Roubier 1960; Haazen 2001; Dirix 2008–2009; Velu 2011). ROBESPIERRE established that *"Le mot de jurisprudence ce doit être effacé de notre langue; dans un pays qui a une constitution, une législation ce n'est autre chose que la loi"* (Scholten 1954). Likewise, BLACKSTONE, eighteenth-century lawyer and fervent adherent of the declaratory theory, asserted that judges merely determine pre-existing law: "*For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was not law, that is, that it is not the established custom of the realm, as has been erroneously determined"* (Blackstone 1796). In this theory, syllogisms suffice for the judge to settle a judicial dispute. Applying the general rule (*maior*) to the concrete facts of a case (*minor*) is supposed to lead to the one possible conclusion (Scholten 1954; Merryman 1969; van Gerven 1973; Wiarda 1999; Lasser 2004; Schollen 2011).

Labeling the temporal effects of judicial decisions as 'retroactive' seems at odds with this theory. According to declaratory theory, there is no question of transitory issues, as the old precedent is deemed inexistent (Scholten 1954; Haazen 2001; Molfessis 2005). If the court determines the law as it always existed, the decision has a declaratory instead of a retroactive effect. The different approach taken under each of these labels, however, cannot conceal that declaratory and retroactive decisions create the same effects.

In the end, it may come as no surprise that judgments of the ordinary courts are characterized by a retroactive effect, as judicial decisions are necessarily

[2]The Court of Cassation is the supreme court in Belgium. This court controls the legality of judicial decisions but does not assess the facts of a case.

pronounced after the events which lead to the judicial procedure or after the adoption of the act at issue (Husserl 1955; Rivero 1968; Ost 1998; Rigaux 1998; Le Berre 2000; Ost and Van Drooghenbroeck 2002; Dirix 2008–2009; Tulkens and Van Drooghenbroeck 2011; Verstraelen 2015).

The Constitutional Court

The Constitutional Court has the power to review federal and subnational Acts of Parliament against rules allocating powers between the federal and the subnational authorities, against title II of the Constitution regarding fundamental rights, and against the Articles 143 (federal loyalty), 170 and 172 regarding taxes and Article 191 regarding the protection of foreigners on Belgian soil (Art. 142 Belgian Constitution; Art. 1 and 26 Special Law on the Constitutional Court).

Parliamentary acts can be challenged before the Belgian Constitutional Court in two different ways: through an annulment procedure or by way of a preliminary reference.

Annulment Procedures

The annulment procedure implies an abstract control of the Parliamentary Act. The annulment request must be lodged before the Court within a period of 6 months after publication of the Act in the Official Gazette. The federal government, the subnational executives, the presidents of parliamentary assemblies at the request of two-thirds of their members, as well as every person with an interest have access to the court (Art. 2 and Art. 3, § 1, SLCC). A decision to annul applies *erga omnes* and is final as from its publication in the Official Gazette.

Annulment decisions are given retroactive effect. Reports of the parliamentary debates concerning the 1983 law on the Court of Arbitration, as the Constitutional Court was initially named, reveal that this was considered the obvious outcome of the annulment procedure (Parl.Doc. No 579/2). According to the Legislative Branch of the Council of State, which gives non-binding advice on bills and proposals of laws and regulatory acts, it was "logical" that annulment decisions should have effect *ex tunc* (Parl.Doc. Senate No 704/1, No 246/2). Subsequent doctrine affirmed that retroactive effect was self-evident (Gillet 1985; Krings 1985–1986; Rigaux 1986; Simonart 1988a). Nevertheless it is hard to argue that a Parliamentary Act is unconstitutional from its coming into force, especially since the Constitutional Court, in ninety percent of the cases, reviews acts against the equality clause.[3]

[3]This is due to the fact that the Court, initially, had very limited competences and used the equality clause to broaden its scope of reference norms. In 2013 the equality clause was invoked in 158 out of 183 judgments pronounced by the Constitutional Court, see the Year Report 2013, at p. 315–316, which can be consulted at www.const-court.be (accessed in July 2014).

If circumstances change, a difference in treatment may no longer be justified or, conversely, it may become necessary to differentiate if certain categories are no longer comparable (Popelier 2008; Dubuisson and Van Drooghenbroeck 2011).

The annulment *ex nunc*, implying a prospective effect from the date of the decision, was rejected as an alternative, because this was considered similar to an abolishment by Parliament and therefore bore too much resemblance to an Act of Parliament. Nevertheless, an annulment *ex tunc* is undeniably more far-reaching than an annulment *ex nunc*, in particular since, as explained below, the annulment *ex tunc* opens a new term to challenge final decisions made on the basis of the Act before its annulment. Interestingly, a comparative study reveals that the majority of Constitutional Courts within the European Union pronounce judgments with, as a principle, a prospective effect (Hufen 2008 Partie 2).

The retroactive effect of the Constitutional Court's judgments aims at wiping out the irregular norm, as if the latter never existed. This is a fiction, since the annulled norm undeniably did create legal effects, such as administrative acts enacted or judicial decisions pronounced on the basis of the irregular norm. The annulment does not automatically eliminate these consequences from the legal order; this takes additional actions by the parties and/or the Public Ministry. The Special Law on the Constitutional Court provides the possibility to lodge an action to retract a final judicial decision or to challenge an administrative act (Art. 10–18 SLCC). The former possibility is, from a comparative point of view, rather exceptional. Usually the judgments of constitutional courts do not impact upon final judicial decisions, except in penal cases (Verstraelen 2013).

Preliminary References

Every court has the duty to refer a preliminary question to the Constitutional Court if, in a concrete case, the constitutionality of a parliamentary act is questioned (Art. 26, § 2 (1) SLCC). The Special Law on the Constitutional Court, however, provides for exceptions to the principal duty to refer (Art. 26 §§ 2–4 SLCC). Even though a concrete case triggers the preliminary reference, the Constitutional Court exercises an abstract norm control as it does not decide the given case, but only deals with the constitutionality issue (Simonart 1988b; Melchior 1994–1995; Alen and Muylle 2008; Martens 2009).

Initially the referral decisions were said to come into force *inter partes*, as Article 28 of the Special Law on the Constitutional Court provides that the referral decision is binding upon the referring court as well as any other court passing judgment in the same case. Nevertheless, in reality, the effects of the referral decision go beyond the boundaries of that concrete case. Courts, including the supreme courts, are not obliged to refer a preliminary question to the Constitutional Court if the latter court already ruled on a question or appeal on an identical subject (Art. 26 §2 (1) 2° SLCC). Moreover, if the Constitutional Court in its referral decision finds that a parliamentary act is unconstitutional, this opens a new term for an annulment request (art. 4(2) SLCC), resulting in an annulment *erga omnes*.

Referral decisions, like annulment decisions, have an effect *ex tunc*. The unconstitutional provision is considered to have violated the constitution since its coming into force (Krings 1985–1986; Popelier 2008). As the referral decision was presumed to have merely an effect *inter partes*, little attention was paid to its temporal effects. When bearing in mind that Acts of Parliament can be challenged through preliminary references without time limits, and that the consequences of the referral decision go beyond the concrete case, fact that the referral decision does exceed the limits of the concrete case, it becomes clear that the finding of unconstitutionality, and in particular its retroactive effects, may seriously affect legal certainty.

The Council of State

The Administrative Litigation Branch of the Council of State[4] is the supreme administrative court in Belgium. It has the power to annul individual and regulatory administrative acts of (mainly) administrative authorities (Art. 14 CLCS).

The Council's decisions also have a retroactive effect. This issue was discussed only incidentally throughout the parliamentary debates in 1939, preceding the establishment of the Council of State. It was merely asserted that the annulled act was considered irregular from the beginning (*ab initio*) (Parl.Doc. Senate No 80; House Nos 281/1, 341/1, 644/4). Article 14 of the Council of State, regarding annulment requests, does not explicitly give retroactive effect to annulment decisions (Boes 2012). Only in 1996 did an amendment provide for clarity by inserting Article 14*ter* in the coordinated laws on the Council of State, which allows for deviations from the principal rule of retroactivity.

Again, the retroactive effect of the annulment decisions rests upon a fiction. The annulment does not lead to a *tabula rasa*; it is not always simple to radically wipe out the effects of a decision if it has already been executed (Lust 2012).

In some cases the retroactive effect of an annulment is toned down for reasons of legal certainty, equity and continuity of public service, so that certain effects of the annulled norm are maintained. For example, the public servant whose appointment to office is annulled, will preserve the salary he received for his services (Wirtgen 2004; Mast et al. 2009; Lefranc 2012). However, the coordinated laws on the Council of State do not leave open this possibility for acts based upon the annulled act (compare Art. 10–18 SLCC), which creates ambiguity. For example, it is uncertain whether an administrative act based upon a basic act retroactively disappears when the basic act is annulled. Neither doctrine nor case law provide for a univocal answer (Lefranc 2012).

[4]As mentioned, the Council of State also has a Legislation Section. In this contribution, the term 'Council of State' in principle refers to the Administrative Litigation Section.

The Possibility to Deviate from the Principal Rule

Ordinary Courts

The declaratory theory was abandoned and replaced by the constitutive theory which acknowledges that judicial decisions may constitute (new) law (De Page 1961; Haazen 2001; Lagerde 2006). Society's increasing complexity gave evidence that the legalist approach favored by declaratory theory was no longer tenable (Van Gerven 1973; Maris 1996; Schollen 2011; Verstraelen 2015). Moreover, judicial norm creation is encouraged by Article 5 of the judicial code, which prohibits the denial of justice, even in the case of silence, ambiguity or incompletion of the law.

Once it is acknowledged that judges can create law, the problematic nature of retroactivity becomes apparent, as a new jurisprudential rule will be applied to facts which arose before the creation of this new rule. If parties are confronted with a rule the existence of which they could not know, this affects legal certainty and legitimate expectations.

Parliament did not provide for the ordinary courts, including the Court of Cassation, to mitigate the retroactive effect of their decisions, nor did the Belgian courts adopt the practice of prospective overruling developed in US case law. It is argued that such evolution would be incompatible with Article 6 of the Judicial Code, which explicitly states that judges are not to pronounce judgment by way of general rule (Rivero 1968; Ost and Van Drooghenbroeck 2002; Molfessis 2005).

Nevertheless, the claim that courts cannot mitigate the temporal effects of their own judgments is untenable, since the temporal effect is a substantial part of their decision (Verstraelen 2015). The Belgian Court of Cassation mitigated (more or less) the temporal effects of its judgments in only two decisions. This poor record is remarkable especially since in its latest year reports the Court explicitly mentions that contributing to the unity and finding of law constitutes its core business, and explicitly acknowledges that it contributes to law creation (Year Report 2011, 2012, 2013).

The first judgment dates from 9 September 1993 and concerns a case regarding marriage in international private law (Cass. AR 9426). Before the recent codification, international private law was mainly of a jurisprudential nature. According to the old reference rule, the nationality of the husband determined the legal system regarding marital property that was to apply in case the spouses had different nationalities. The Court of Cassation reversed this rule in 1993, ruling that the first marital residence determines the applicable legal system. It hereby confirmed the national (and international) striving for equality between spouses, which lay at the basis of the Belgian national legal framework adopted in 1976 (Coipel 1994; Liénard-Ligny 1994; Watté 1994; Popelier 2001; Ost and Van Drooghenbroeck 2002; Verstraelen 2014a). The case concerned a Belgian woman and an Italian man married on 26 April 1952. Considering the retroactive effect of judicial decisions, the new rule should have applied to their case. Nevertheless, the Court ruled that in this case the Italian legal system remained applicable, thereby mitigating the

retroactive effect of its decision. It referred in general wordings to the system of transitional law applicable to written laws and reasoned that the legal marital property regime, applicable in the absence of a marriage settlement, is so closely linked to marriage that the spouses must have certainty about the applicable legal system at the moment of marriage. Hence, in 1952, the spouses knew that the Italian legal system would determine their marital property regime, and new rules were not to interfere with this acquired right. It remains, however, unclear why legal certainty was so important in this case, since nothing prevented possible modifications of the substantial laws within the Italian legal system confronting the couple with different rules by the end of their marriage. There is no indication, then, why the Court of Cassation tempered the retroactive application of its decision in this case, while legal certainty is also – and often more – at stake in other cases. One possible explanation is that, at the time, international private law was essentially of a jurisprudential nature, exposing very clearly the creative role of the court.

About a month later the Court of Cassation ruled for the second and last time on the temporal effects of its decision. The *Marckx* judgment, pronounced by the European Court of Human Rights, precedes this case (ECtHR *Marckx* 1979). In the *Marckx* judgment of 13 June 1979, the Strasbourg Court found that the Belgian law and in particular art. 756 of the Civil Code, violated the Articles 8 and 14 of the Convention, because it abridged the inheritance rights of so-called 'illegitimate' children, born out of wedlock. The Strasbourg Court, however, considering the principle of legal certainty inherent to the Convention, dispensed the Belgian State from re-opening legal acts or situations that antedated the delivery of its judgment (§ 58). This was, for that matter, the first judgment where the European Court of Human Rights explicitly limited the retroactive effect of its decision (Tulkens and Van Drooghenbroeck 2011; Popelier 2014).

The Court of Cassation referred to the *Marckx* judgment in its judgment of 15 May 1992, concerning a succession that devolved to the heirs on 22 May 1983, and in its judgment of 21 October 1993, concerning a succession that devolved to the heirs on 30 April 1984 (Cass. AR 6583; Cass. AR 9616). It established in both decisions that the succession occurred after the Strasbourg judgment and therefore confirmed the court of appeal's decision to not apply the discriminating Belgian provisions to this case. As the Court of Cassation simply adopts the ruling of the European Court of Human Rights, it cannot be inferred from these judgments that the Court, as a rule, accepts its competence to modulate the temporal effect of its decisions (Popelier 2001; Ost and Van Drooghenbroeck 2002; Verstraelen 2014a).

Constitutional Court

In order to tone down legal uncertainty that may arise from the retroactive annulment of laws, the Constitutional Court is given the power to maintain the consequences of the annulled provisions. Article 8, third sentence, of the Special Law on the

Constitutional Court, provides that "Where the Court so deems necessary, it shall, by a general ruling, specify which effects of the nullified provisions are to be considered maintained or be provisionally maintained for the period appointed by the Court."

It should be noted that if the Court finds a violation, it has to annul the unconstitutional provision (Art. 8(1) SLCC). Hence, the Court maintains the *consequences*, but not the annulled provision itself (Rosoux 2007). Therefore, these effects acquire a new legal foundation: they are now based upon the judgment of the Constitutional Court that pronounces their maintenance instead of the annulled provisions (Lust and Popelier 2001–2002).

The words 'by a general ruling' were only afterwards inserted in Article 8 by the Law of 10 May 1985 regarding the effects of annulment judgments pronounced by the Constitutional Court (Art. 1, *Official Gazette* 12 June 1985). Parliament intended to avoid arbitrariness by prohibiting the Constitutional Court to maintain the legal effects of some particular individual judicial decisions or administrative acts (Parl.Doc. Senate No 579/3; Velaers 1990). The Court itself would violate the principle of equality if it were to make exceptions for very specific and individual cases (Parl.Doc. Senate No 483/2). This, however, does not prevent the Court from distinguishing between subject matters or between judicial decisions and administrative acts dependent upon the date of their pronouncement or enactment (Parl.Doc. Senate No 579/3; Moerenhout 1999).

The Court can definitively or provisionally maintain the effects of the annulled provision. Inspiration for maintaining definitively was found in the then Article 174 EEC Treaty and Article 31 of the Additional Protocol to the Treaty concerning the establishment and statute of a Benelux Court of Justice (Parl.Doc. Senate No 246/1). Article 174, second sentence, EEC Treaty stated: "In the case of a regulation, however, the Court of Justice shall, if it considers this necessary, state which of the effects of the regulation which it has declared void shall be considered as definitive." The similarity with Article 8, third sentence, of the Belgian law on the Constitutional Court is striking.

A definitive maintenance implies that although the unconstitutional provision was annulled, its effects remain final (Simonart 1988a). Hence, the application of the Articles 10–18 of the Special Law on the Constitutional Court is excluded: administrative acts and judicial decisions based upon the annulled provision remain valid, with the Constitutional Court's judgment as their new legal foundation (Lust and Popelier 2001–2002; Rosoux 2007).

Another option is the provisional maintenance for the period specified by the Court. In this case, the Court enables Parliament to adopt a new regulation within the given period of time (Parl.Doc. Senate No 246/2, Moerenhout 1999). Inspiration for this alternative was found in the practice of the German *Bundesverfassungsgericht* (Parl.Doc. Senate 246/2; Velaers 1990). The German Court, instead of annulling a norm with retroactive effect, has the power to merely declare it unconstitutional, so that the norm does not immediately disappear from the legal order. This gives the lawmaker time to remedy the unconstitutionality (Schroeder 2014).

With the possibility to maintain provisionally, the Constitutional Court is granted a far-reaching power: the Court is not only a 'negative lawmaker' in that it removes

norms from the legal order, it acts in fact as a 'positive lawmaker' by imposing the continued application of an irregular norm (Behrendt 2006; Rosoux 2007; Brewer-Carias 2011; Verstraelen 2015).

For a long time it was debated whether provisional maintenance measures could also cover new effects, established after the annulment (Critically: Velaers 1990; Beirlaen 1991; Debaedts 1994; Storme 2004). During parliamentary debates it was underlined that an annulled norm cannot create new legal situations (Parl.Doc. Senate No 246/2; Parl.Acts 26 April 1983). Nevertheless, in its case law the Constitutional Court evolved in another direction: in 36 out of 47 judgments in which the Court provisionally maintains the effects of an annulled provision, the maintenance measures – sometimes implicitly – seem to encompass new effects (Moerenhout 1999; Rosoux 2007; Popelier 2008; Verstraelen 2015). For example, in 2011 the Court found that consumers and employees alike are exposed to harmful substances in restaurants and bars. Therefore, it considered that excluding bars that only served pre-packed food from the smoking prohibition violated the constitution (Constitutional Court (CC) No 37/2011). The Court maintained the consequences of the unconstitutional norm for several months, to enable bars to bring themselves into lines with the general smoking prohibition. During these months, smoking in these bars was still allowed, despite its unconstitutional nature. The Court, moreover, sometimes explicitly refers to the necessity to continue the application of an unconstitutional norm as a reason for maintenance (CC No 79/92, CC No 132/2004).

Parliament did not provide for similar powers to mitigate the temporal effects of referral decisions (Parl.Doc. Senate No 246/2). This is striking, since Article 8, third paragraph of the Special Law on the Constitutional Court, regarding maintenance in the case of annulment decisions, was inspired by the European Court of Justice. Apparently it went unnoticed that this Court had, at the time of the parliamentary discussions in Belgium, already modulated the temporal effects of referral decisions. This is remarkable because the *Defrenne* judgment, in which the Court of Justice proceeded in this way for the first time, was a case against the Belgian airline SABENA (Court of Justice (CJ) 43/75, CJ 61/79, CJ 66, 127 and 128/79, CJ 4/79, CJ 109/79, CJ 145/79).

In practice, however, it soon became clear that if the Court is to exercise its preliminary task properly, it must be able to modulate the consequences of its referral decisions. Throughout its case law the Court looked for ways of circumventing the prohibition to modulate the temporal effects of its referral decisions (Popelier 2008). For example, the Court declared that a particular parliamentary act was still constitutional, but warned that the same act would be considered unconstitutional in the future (CC No 53/93, CC No 56/93).

In 2003, when the Special Law on the Constitutional Court was amended, the issue was discussed in depth in parliament (Parl.Doc. Senate No 2-897/6). Melchior and Arts, then presidents of the Constitutional Court, appealed to Parliament to extend the maintenance competence to referral decisions, considering their far-reaching effects (Parl.Doc. Senate No 2-897/6). The most important counter-argument was that third parties have limited possibilities to intervene in preliminary

procedures (Parl.Doc. Senate No 2-897/6). This problem, however, could have been solved by imposing an interest requirement similar to the one applied in annulment procedures. In that case, a third party would have to give evidence of *a justifiable interest* affected by the challenged law instead of *a justifiable interest in the case pending before the referring court*. In any case, the Court decided, for the first time in case No 44/2008, to soften the interest requirement in a preliminary procedure in this direction (CC No 44/2008; CC No 89/2008; CC No 117/2008; CC No 13/2009; CC No 171/2009; CC No 17/2010).

With its notable judgment of 20 December 2007, the Court of Cassation also takes position in the discussion about the temporal effects of referral decisions. According to the Court of Cassation, if the Constitutional Court establishes in a referral decision that the constitution is violated, it is for the judiciary to determine the temporal consequences thereof. The Court of Cassation confirmed this thesis in subsequent judgments. In each of these judgments the Court of Cassation concluded that the judge had to apply the challenged Act to facts which occurred before the referral decision was pronounced, as if the latter decision did not exist. Hence, while the Court of Cassation is reluctant to modulate the effects of its own judgments, it does consider itself competent to limit the retroactive effect of referral decisions, although the lawmaker purposefully denied this competence to the Constitutional Court (Cass. AR C070227N; Cass. AR C060019N; Cass. AR C070642N; Cass. AR C090570N).

One may assume that the Constitutional Court wished to convey a powerful message when, in 2011, it analogously applied, for the first time, Article 8, third sentence, of the Special Law on the Constitutional Court to the preliminary procedure (CC No 125/2011). Considering our analysis above, this reversal in the Court's case law may not come as a surprise (Verstraelen 2011–2012). The Court used broad and general considerations, enabling the analogous application in future referral decisions (§§ B.5.1.-B.5.6.). In subsequent judgments, the Court explicitly emphasized that it will only apply this maintenance power in exceptional circumstances, namely when the benefit flowing from setting aside the provision that was declared unconstitutional by the Constitutional Court, is disproportional to the distortion this would cause to the legal order (CC No 1/2013; CC No 3/2013; CC No 48/2013). In its case law the Court upholds a strict interpretation of this requirement. Until now, the Court has, besides decision No 125/2011, decided in only two other preliminary reference procedures that such exceptional circumstances were present and, consequently, that Article 8, third paragraph, of the Special Law on the Constitutional Court, should be analogously applied (CC No 60/2014; CC No 67/2014).

Council of State

Although the Council of State was established in 1946, art. 14*ter* of the coordinated laws on the Council of State was only inserted in 1996. Article 14*ter* introduced a maintenance competence with the purpose to prevent a legal vacuum and to

avoid legal uncertainty caused by the retroactive annulment of administrative decisions (Parl.Doc. House Nos 281/1, 341/1, 644/4). During the parliamentary proceedings an overview of the maintenance judgments pronounced so far by the Constitutional Court was provided. Article 8, third sentence, of the Special Law on the Constitutional Court clearly served as a source of inspiration: it was almost literally repeated in Art. 14*ter*.

Article 14*ter* of the coordinated laws on the Council of State stated: "Where the Council so deems necessary, it shall, by a general ruling, specify which effects of the nullified provisions of administrative regulations are to be considered maintained or be provisionally maintained for the period appointed by the Council." Hence, one important alteration was added: the Council could only maintain the consequences of regulatory provisions. During the parliamentary debate, individual acts were explicitly excluded. It was considered recommendable to first make the Council familiar with its new maintenance power and, if need be, to extend the system to annulled individual administrative acts after an evaluation (Parl.Doc. House No 644/4).

The exclusion of individual administrative acts was remarkable, in particular considering the parliamentary debates leading to Article 8, third sentence, of the Special Law on the Constitutional Court. During these debates, the building permit, i.e. an individual administrative act, was used as an ideal example to demonstrate when it could be necessary to annul a norm, *in casu* the permit, but to maintain its consequences, *in casu* preventing the demolition of the building that was already raised (Parl.Doc. Senate No 246/2). Moreover, the Council of State decided already in 1985 to maintain the consequences of an irregular individual administrative act (Council of State (CS) No 25.424). In this judgment, it annulled the appointment of a lecturer on May 31, but, considering the disturbing effect of the annulment on the examination proceedings of that academic year, the Council maintained the consequences of the appointment until 1 October 1985. Recently the Council confirmed this case law by annulling an allocation decision on 9 June 2009, but maintaining the consequences until 1 August 2009. The Council considered that the potential harm for the applicant of having to function another several weeks in the primary school in question, did not outweigh the certain harm that the disruption would cause to the providing of education by this school following from the retroactive application of the judgment (CS No 194.015).

The Constitutional Court was asked whether Article 14*ter* of the coordinated laws on the Council of States violated the equality principle by only allowing for the maintenance of regulatory provisions, to the exclusion of individual administrative acts (CC No 164/2012). According to the Court reasonable considerations justified this limitation, as in the case of regulatory provisions, which by definition are addressed to an undetermined number of persons, the risk of disproportional consequences is higher.

Although an official evaluation of the maintenance power by the Council of State, as announced during parliamentary debate, has not been conducted, Parliament recently amended Article 14*ter* of the coordinated laws on the Council of State. Article 3 of the Law of 20 January 2014 regarding the reform of the competences,

procedure and organization of the Council of State extended the possible application of article 14*ter* to all acts and regulations annulled by the Council, including individual administrative acts (Official Gazette 3 February 2014). This Article 3 amended the first paragraph of Article 14*ter* as follows: "On the request of the defending or intervening party, and if the Council so deems necessary, it shall specify which effects of the annulled individual administrative act, or, by a general ruling, of the nullified provisions of administrative regulations, are to be considered maintained or be provisionally maintained for the period appointed by the Council."

The extension to individual administrative acts, however, may give rise to an unequal treatment of persons challenging the legality of an administrative act before the Council of State, which may maintain the consequences of an irregular act, and those who challenge its legality before an ordinary court, which does not have such power. In case No 73/2013, the Constitutional Court assessed the absence of any power for the Brussels' Court of Appeal to maintain when using its power to annul acts of the Belgian Institute for Postal services and Telecommunication (BIPT). It did not consider the difference in treatment unconstitutional, because the lawmaker could take into account that the risk of disproportionality is higher in the case of regulatory provisions, as prescribed by Article 14*ter*, compared to individual acts, as those enacted by the BIPT. Inversely, this implies that the current extension of Article 14*ter* to individual administrative acts indeed constitutes an unjustified difference in treatment.

The law of 20 January 2014 did not only extend the scope of Article 14*ter* of the coordinated laws on the Council of State to individual acts; it also added a paragraph. According to this paragraph, the decision to maintain the effects of an annulled norm can only be imposed when exceptional reasons justify an infringement on the principle of legality. Furthermore, the Council can only maintain after an adversarial procedure and must do so in a reasoned decision, in which the Council may take the interests of third parties into account. In what follows, we shall discuss this reform when relevant.

Like the Constitutional Court, the Council of State can maintain definitely or provisionally. As for the difference between both measures, we refer to our explanation regarding annulment decisions by the Constitutional Court. In the case of provisional maintenance, the Council, like the Constitutional Court, accepts the emergence of new consequences after annulment. This is illustrated in a judgment from 1 April 2005. In this case, the French Community (one of the federated entities in the Belgian federal system) made it possible to obtain a degree as geometrician-real estate surveyor in after-hours education for which employees get study leave, through a so-called 'integrated test'. According to the Council of State, this infringed upon the exclusive competence of the federal government to regulate access to a specific profession. The Council, however, decided to maintain the consequences of the annulment until the end of the school year. This way, degrees obtained by the end of that year, months after the annulment decision, still gave access to the said profession (CS No 142.753).

Article 14*ter* of the coordinated laws on the Council of State does not explicitly state that the finding of an irregularity is necessarily sanctioned by an annulment.

Therefore it is not clear whether the maintenance decision simply postpones the annulment of the norm or, as in the case of the Constitutional Court, the annulment follows immediately while the maintenance judgment serves as the legal ground for the (new) consequences of the irregular act (Renders 2010; Theunis 2011–2012; Lindemans 2012). One can cautiously deduce the second option from the Council's case law. In its decision, the Council annuls the act before deciding to maintain. Moreover, the Council usually considers that 'the consequences of the annulled norm' should be maintained instead of the norm as such (CS No 96.807; CS No 142.753; CS No 158.604; CS No 158.605; CS No 164.521; CS No 164.523; CS No 191.272; CS No 196.106; CS No 198.039; CS No 198.040; CS No 217.085; CS No 221.078. Exceptions are 'older' judgments: CS No 71.610; CS No 82.185; CS No 106.318; CS No 161.063; CS No 162.616).

In 2011, a preliminary question was referred to the Constitutional Court regarding the constitutionality of Article 14*ter* because by maintaining the consequences of an annulled norm, the courts are prevented from not applying unlawful administrative acts as required by Article 159 of the Constitution.[5] The Constitutional Court, however, found no violation (CC No 18/2012). It considered that Article 159 of the Constitution does not lay down an absolute rule. Its application can therefore be restricted if this is necessary to ensure observance of fundamental rights. According to the Court, the lawmaker, by adopting Article 14*ter*, established a fair balance between, on the one hand, the interest in remedying unlawful situations and, on the other hand, the concern that existing situations and legitimate expectations, after a certain laps of time, are no longer threatened (Lust 2000; Renders 2002, 2010; Wirtgen 2004; Andersen 2010; Theunis 2011–2012; Verstraelen 2012b).

Practice of the Constitutional Court and the Council of State

In this paragraph, we discuss the maintenance practice of the Constitutional Court and the Council of State together. Considering the similarity between Article 8, third sentence, of the Special Law on the Constitutional Court and (former) Article 14*ter* of the coordinated laws on the Council of State, both courts were in fact granted a similar competence.[6] In what follows we will examine how this textual and theoretical similarity is reflected in the practice of both courts.

[5]Article 159 of the Constitution states: "Courts only apply general, provincial or local decisions and regulations provided that they are in accordance with the law".

[6]Because the Law of 20 January 2014, which amended Article 14*ter* of the coordinated laws on the Council of State, became effective from the first of March 2014 (Art. 39 of the Law of 20 January 2014; Art. 51 of the Royal Decree of 28 January 2014), the discussed case law of the Council of State entails the application of the former Article 14*ter*.

Discretionary Competence

According to Article 8, third sentence, of the Special Law on the Constitutional Court and Article 14*ter* of the coordinated laws on the Council of State, the Court resp. the Council has the power to maintain where it "so deems necessary". Hence, it is the sovereign decision of these courts whether maintenance of the consequences of an annulled norm is appropriate (Velaers 1985; Rosoux 2007). During the parliamentary debates preceding the adoption of Article 8, third sentence, of the Special Law on the Constitutional Court, this competence was criticized for its far-reaching, almost legislative scope (Parl.Doc. Senate No 246/2, No 246/6, No 483/2; Velaers 1990; Lust and Popelier 2001–2002; Rigaux and Renauld 2009). Nevertheless, this potential normative interference by the Court did not influence the principle choice for an annulment *ex tunc* (Acts Senate 28 April 1983).

The Constitutional Court applies Article 8, third sentence, of the Special Law on the Constitutional Court in almost one out of four annulment decisions: the Court maintained in 86 out of the 353 annulment judgments rendered by the Court so far (Verstraelen 2015).[7] This can hardly be considered an excessive use, although the Court clearly is less reluctant than the Council of State, which considers that it should use its power to maintain with 'wisdom and prudence' (CS No 164.368; CS No 164.522). Since 1996, hardly 58 judgments gave evidence that Article 14*ter* was explicitly used or that its application was requested.[8] In only 19 judgments the Council in effect decided to maintain (Verstraelen 2015).

Noteworthy, Rosoux deters from this discretionary power that the Constitutional Court is not obliged to give reasons for its decision to maintain or not maintain the consequences of an annulled norm (Rosoux 2007). It is, however, difficult to share this view. Quite the contrary: the broad discretionary power of the courts fortifies the duty to give reasons. The courts cannot use their freedom without justification to society (Adams 2008–2009). We will return to this duty to give reasons.[9]

Ex Officio or on the Party's Request

The Court or the Council (according to the former Article 14*ter*) can maintain by virtue of its own office, or on request of a party. Whether parties request application of Article 8, third sentence, of the Special Law on the Constitutional Court, can be deterred from part A in the Court's judgment, which recapitulates the parties'

[7] In a period of approximately 30 years, from 1985 to, and including, June 2014. See the yearly reports of the Constitutional Court, accessible on www.const-court.be

[8] For this rapport, decision No 226.144 from 21 January 2014 is the last judgment of the Council of State that dealt with the possible application of Article 14*ter* of the coordinated laws on the Council of State.

[9] See section "Reasons".

positions. The Constitutional Court's case law reveals that the Court in not less than 65 out of 86 maintenance judgments modulated *ex officio* the retroactive effect of its annulment decision (Verstraelen 2015). Parties do more often explicitly request the analogous application of Article 8 in preliminary procedures, since the Court's precedent in case no 125/2011 (E.g. CC No 85/2012; CC No 1/2013; CC No 3/2013; CC No 48/2013).

The Council of State reveals a reverse tendency. Only in exceptional circumstances did the Council maintain *ex officio* (E.g. CS No 71.610; CS No 74.861, CS No 82.125, CS No 185.304, CS No 158.605). A reason for this is found in the burden of proof imposed by the Council. If a party requests a modulation, it must prove that the retroactive effect entails serious consequences. The Council rejected several requests to apply Article 14*ter*, for lack of evidence that retroactive annulment would harm legal certainty to an unacceptable extent (CS No 100.963; CS No 127.983; CS No 164.368; CS No 164.258; CS No 183.473; CS No 187.224; CS No 214.028; CS No 216.841; CS No 217.996; CS No 221.648). Since the recent reform of Article 14*ter,* the Council has entirely lost its power to maintain *ex officio*, but is only able to act on the request of the defending or intervening party. This addition is conspicuous, as the Council until now made a very cautious use of its power to maintain *ex officio*.

The application *ex officio* of the power to maintain can be problematic if parties are not given room for dispute. An annulled norm, when maintained, can still find application.[10] If parties did not have the chance to give arguments, this is questionable in the light of Article 6 ECHR (ECtHR *Ruiz-Mateos* 1993; ECtHR *Milatova* 2005; ECtHR *Soffer* 2007; Lombaert 1998). It is therefore to be welcomed that parties in recent preliminary procedures argue in their statements the analogous application of Article 8, third sentence, of the Special Law on the Constitutional Court (Mahieu and Pijcke 2011).

The Council of State goes one step further when it reopens the debates to enable all parties to make their position known regarding the possible application of Article 14*ter* of the coordinated laws on the Council of State (CS No 212.127; CS No 216.047; CS No 218.227; CS No 220.085; CS No 220.914). Here as well, evidence for the necessity of a maintenance measure remains crucial; the Council, in several cases, rejects also after reopening of the debates the request to maintain, for lack of evidence of the detrimental effects of the retroactive annulment (CS No 216.841; CS No 217.996). The law of 20 January 2014 makes this requirement concrete and explicit in the second paragraph of the amended Article 14*ter.* The Royal Decree of 28 January 2014 even lays down the precise procedural rules to ensure this debate takes place (Official Gazette 3 February 2014). The Constitutional Court, on the other hand, seems to find itself sufficiently competent to assess all possible consequences of a retroactive annulment, without arguments or evidence provided by the parties.

[10] See further section "Exclusion of the Petitioner from the Maintenance Measure".

Definite or Provisional

Consequences After Expiration of the Term

Both courts can decide to maintain the consequences of a norm either permanently or provisionally. Discussion arose regarding the consequences of a provisional maintenance if the lawmaker fails to interfere. This was debated in particular regarding the Constitutional Court's decisions to maintain, but, considering the similarity between the two norms granting the power to maintain, the arguments also apply to the decisions pronounced by the Council of State. In particular, it is discussed whether administrative acts and judicial decisions which were maintained provisionally can be questioned after the term has expired (Velaers 1990; Moerenhout 1999), or whether they remain immune, while only new consequences lack a legal basis (Simonart 1988a). The first option gives more incentives to Parliament to act, while legal certainty is best served by the latter option. Therefore, we are more inclined to endorse the second option, which puts the difference between definitive and provisional maintenance into perspective. As Muylle (2007) noted, the difference does not so much concern the fate of the maintained consequences, but rather the period envisaged. Moreover, the first option is difficult to reconcile with the fact that the Constitutional Court and the Council both accept that new consequences are established during the period of provisional maintenance.

Balance of Definite and Provisional Maintenance Decisions

The Constitutional Court maintained provisionally for a determined period in 44 judgments, definite in 39 judgments and pronounced a provisional as well as a definite maintenance in 3 judgments.[11] The judgments of the Council of State as well demonstrate a balanced distribution amongst both categories: the Council maintained definite in ten judgments and provisionally in nine judgments (Verstraelen 2015).[12]

Date of Expiration

In the case of a definite maintenance, both courts usually maintain the consequences of the unconstitutional or unlawful norm until the moment of the annulment judgment, the date of publication of that judgment, or – with regard to the Council of State – the date of notice of the judgment to the parties (This concerns the majority of definite maintenance judgments pronounced by the Constitutional Court and the

[11]The data encompass all maintenance judgments pronounced from 1985 to, and including, June 2014.

[12]The data encompass all maintenance judgments pronounced from 1996 to, and including, January 2014.

Council of State, see e.g. CC No 40, CC No 56/2002; CC No 105/2007; CC No 140/2008; CS No 96.807; CS No 106.318; CS No 164.521; CS No 191.272; CS No 196.106; CS No 198.039). It is surprising, to say the least, that this accounts for the majority of the definite decisions. When the Constitutional Court was established, the option of an annulment *ex nunc*, i.e. with immediate effect, was rejected because of its similarity to an abolishment, which was considered an act of lawmaking. However, if courts maintain the consequences of an annulled norm until the day of pronouncement, publication or notice, this in fact comes down to an annulment *ex nunc* (Simonart 1988a; Lombaert 1998).

The supreme courts may also limit the temporal effects of a definite maintenance by maintaining the consequences of an annulled norm until a given date which precedes the pronouncement of the annulment judgment. In practice this occurs only exceptionally (CC No 37/96; CC No 186/2005; CC No 49/2007; CC No 134/2012; CS No 82.185; CS No 164.523; CS No 221.078). For example, the court may maintain until the date upon which a new norm, which replaces the annulled one, comes into force (CC No 186/2005; CS No 164.523). The Constitutional Court considered it appropriate in two judgments to maintain the consequences of an annulled norm until the date of publication of a previous referral decision which established that the norm was unconstitutional. As mentioned above, when the Court in its referral decision establishes that a law is unconstitutional, the norm does not disappear *erga omnes*, but a new term for an annulment request is opened. In both cases, the annulment was pronounced on the request of a party, after reopening the 6 month period for the institution of an action for annulment following a referral decision (CC No 49/2007; CC No 134/2012). By using such specific term, the court demonstrates that it clearly envisages the consequences an annulment may entail.

In some cases, the Constitutional Court considers that the consequences of an annulled norm are maintained, without determining a specific term. It can be presumed that in these cases, the Court opts for the general rule, i.e. the maintenance of all (CC No 100/2000; CC No 73/2003; CC No 1/2005; CC No 54/2008; CC No 184/2011) or a certain category of consequences (CC No 32/93; CC No 104/2006) until the publication of the annulment judgment in the Official Gazette. Considering requirements of legal certainty and transparency, it is recommendable that the Court explicitly mentions the temporal scope of a maintenance.

As for the provisional maintenance, it can be noted that none of both articles limits the term that can be granted to the lawmaker. Such limitation exists in the Austrian system, where the period in which the Constitutional Court can postpone an annulment is constrained to a maximum of 18 months according to Article 140 (5) of the Austrian Constitution (Stelzer 2014). In Belgium, the courts can appreciate freely how much time the lawmaker will need to adopt a new law. This term will be determined with consideration of the irregularity. Hence it will matter whether the entire regulation needs revision or whether a minor addition will suffice (Verstraelen 2015).

Average Term

The annulment judgments of the Constitutional Court reveal an average term of 9 months, ranging from a minimum of 2 months (CC No 49/2001) to a maximum of 18 months (CC No 116/2011). Unfortunately, the Court shows no consistency in determining a term. Moreover, the Court does not give reasons for its choice (Verstraelen 2015).

The Council of State maintains the consequences of an annulled norm for an average term of 7 months. The shortest term amounted to 3 months and was determined in the case already discussed above, regarding the access to the profession of geometrician-real estate surveyor, where the Council maintained the consequences until the end of the running school year (CS No 142.753). The Council granted a term of 1 year in two cases (CS No 198.040; CS No 217.085).

The Constitutional Court pronounced a notable judgment in this respect which dates from 17 March 2004 (CC No 45/2004). The Court considered that the federal lawmaker, by modifying a certain registration tax rate, infringed upon regional fiscal competences. In order to respect the legitimate expectations of tax payers, the Court provisionally maintained the consequences of the law until the coming into force of provisions, adopted by the regional Parliaments, establishing a new tax rate (B.7. and dictum). Hence, the Court, instead of determining a specific term, called upon the regional authorities to establish a registration tax. This way, it was left to the regional Parliaments to decide for how long the federal law was entitled to infringe upon their competences.

Reasons

In the judgments of the Constitutional Court, the reasons given for the maintenance of the consequences of an annulled norm are often confined to, at most, one paragraph. As the Court usually imposes a maintenance measure *ex officio* and parties did not have the possibility to give their views in their written statements, it is difficult to detect the real reasons which inspired the Court to opt for this specific measure. The general considerations do not reveal the underlying balance of interests. A more elaborated reason giving would improve the predictability of the Court's practice regarding the use of Article 8, third sentence, of the Special Law on the Constitutional Court. This would encourage parties to anticipate a possible maintenance and give arguments in their written statements. Considering the far-reaching scope of the Court's competence to maintain, which resembles positive law making, it is a minimum requirement for the Court to give account of its reasons.

The case law of the Council of State shows a different picture. Initially the Council also remained concise in its reason giving (e.g. CS No 82.185). Recent case law, however, demonstrates that the Council pays increasing attention to its power to maintain. The reopening of the debates regarding the possible application of Article 14*ter* of the coordinated laws on the Council of State (CS No 212.127; CS

No 216.047; CS No 218.227; CS No 220.085; CS No 220.914), leads to judgments which (almost) exclusively and extensively examine the arguments to maintain or not (CS No 216.841; CS No 217.996; CS No 217.996; CS No 221.078). In that respect, the recent reform of Article 14*ter*, that explicitly added that a decision to maintain should be reasoned and taken after a debate, seems redundant.

From the analysis of maintenance judgments by both courts, it seems that the reasons put forward for justifying maintenance measures are quite diverse. This may not come as a surprise, as the decision to maintain always depends upon the concrete norm that is annulled. Nonetheless, out of the case law of both courts, six large categories of reasons can be distilled (Popelier 2008; Verstraelen 2015).

First of all, a widely used argument by both courts is the protection of legal certainty. Considering the retroactive effect of an annulment, (almost) every annulment decision affects legal certainty (CS No 136.919). Therefore, it can be presumed that the protection of legal certainty underpins each measure to maintain, even if this is not explicitly mentioned in the judgment.

Next, both courts take into account the consequences of an annulment for the functioning of public services. For example, the Constitutional Court referred to the required continuity of the policy regarding social welfare (CC No 4/91), education (CC No 33/92), care for the elderly (CC No 40; CC No 41) and the functioning of the new inspectorate (CC No 32/93). Likewise, the Council of State maintained to secure the continuity in the functioning of hospitals (CS No 196.106) and considering the vital importance of the fight against crime (CS No 198.039; CS No 198.040). Within this category, a separate set of arguments can be distinguished. Unquestionably, Belgium is subjected to an increasing number of supranational obligations. Accordingly, the Constitutional Court repeatedly maintained the consequences of an annulled norm because the latter, despite its deficiencies from a constitutional point of view, fulfilled European requirements (CC No 11/2009; CC No 33/2011; CC No 45/2012; CC No 76/2012).

Third, both courts give consideration to the excessive consequences which the retroactive effect of an annulment might entail. The Council of State repeatedly maintained when the annulled norm had already served as the legal ground for many (individual) decisions (CS No 106.318; CS No 164.521; CS No 164.523). The Constitutional Court as well applied Article 8, third sentence of the Special Law on the Constitutional Court so as not to jeopardize the legitimate expectations of tax payers (CC No 45/2004) or endanger running procedures (CC No 30/98; CC No 56/2002; CC No 158/2004), or to safeguard the legal position of employees (CC No 58; CC No 71; CC No 2/89; CC No 146/2007) or acquired permits (CC No 63/2000). It should be reminded that in the latter case, Articles 10 to 18 of the Special Law on the Constitutional Court allow for the reopening of terms to challenge such decisions if the Court does not maintain the consequences of the annulled norm.

A fourth consideration is found in two judgments of the Constitutional Court, where the Court maintained the consequences of an annulled norm so as to safeguard the purpose of the law (CC No 2/92; CC No 4/2011).

The last two considerations concern the prevention of financial and administrative difficulties and the granting of a term to enable Parliament to revise the legislation. Both considerations are frequently mentioned in the case law of the Constitutional Court, but only sporadically in the case law of the Council of State. Instead, the Council of State on several occasions underlined that mere administrative and financial difficulties do not justify application of Article 14*ter* of the coordinated laws on the Council of State. As annulment decisions as a rule entail certain difficulties, the parties should make the financial consequences sufficiently concrete (CS No 132.989; CS No 133.275; CS No 164.522; CS No 204.782; CS No 214.028). The Constitutional Court, on the other hand, does not only give consideration to possible administrative and financial difficulties for the government (CC No 6/93; CC No 37/96; CC No 78/2003; CC No 49/2004; CC No 186/2005; CC No 39/2007; CC No 54/2008; CC No 104/2008; CC No 37/2011; CC No 116/2011; CC No 135/2012), but also to possible financial consequences for third persons who had already applied the annulled norm (CC No 42/97; CC No 29/2005; CC No 184/2011; CC No 67/2012).

The Constitutional Court's special position may explain why this Court is more willing than the Council of State to grant Parliament the time required for revising regulation. The Constitution reveals a distrust of the executive – with as a clear example Article 159 of the Constitution which submits the executive to the reviewing power of the courts – while it demonstrates great confidence in Parliament. Therefore, the Council of State's power to control the administrative authorities was not considered problematic, in contrast to the Constitutional Court's power to review Acts of Parliament. The Constitutional Court's inclination to give Parliament time to adapt its legislation, can be viewed from this angle. It gives Parliament the chance, in particular in politically delicate questions, to develop a new Act which complies with constitutional requirements but can nevertheless rely on political balances.

Exclusion of the Petitioner from the Maintenance Measure

If the petitioner is not excluded from the maintenance measure, his efforts lead to a Pyrrhic victory. The court proves the petitioner right by annulling the norm, but due to the maintenance measure the norm will still be applied in concrete cases. One may fear that interested parties, other than interest groups, will be reluctant to spend time, effort and money in procedures from which they will not benefit, solely for *la beauté du droit*. This may contravene Article 13 of the European Convention of Human Rights, alone or combined with Article 6 of the same Convention (White and Ovey 2010), which guarantee the right to an effective remedy. Again we can refer to the Austrian constitution, more particularly to Article 140 (7) of this constitution that requires the Constitutional Court to exclude the petitioners, the so-called *case in point*, from maintenance measures. In that case, the petitioners always benefit from the declaration of unconstitutionality (Stelzer 2014).

In Belgium, however, it is presumed that neither the Constitutional Court nor the Council of State can grant an exception to the petitioning parties. This presumption is based on the statutory requirement to decide 'by a general ruling' as explained above (Parl.Doc. House No 644/4; Lust 2000; Wirtgen 2004). Nonetheless, the claim that by granting such exception, the Court or the Council would act arbitrarily or discriminate is untenable. Indeed, the petitioning parties, who invested time and efforts in challenging the constitutionality or legality of the norm, can hardly be put on a par with persons who omitted to act and thereby accepted the application of the norm (Verstraelen 2012b). In the recently amended Article 14*ter* of the coordinated laws on the Council of State, the phrase 'by a general ruling' is explicitly preserved in case the Council maintains the consequences of a regulatory administrative act. Thus the question remains whether requesting parties can be excluded from the temporal limitation.

The Constitutional Court did make an individual exemption in two annulment judgments. In both cases, the annulment request was lodged on the ground of Article 4, second paragraph of the Special Law on the Constitutional Court, which reopens the term for annulment requests after a referral decision which establishes a violation of the constitution. In case No 56/92 the Court maintained for reasons of legal certainty, to the exclusion of the consequences of the annulled provisions concerning the case which had given rise to the referral decision. In case No 140/2008 the Court definitely maintained for reasons of budgetary and administrative difficulties, except as regarded the petitioner.

In case No 18/2012, where the Constitutional Court discussed the relationship between Art. 159 of the Constitution and Article 14*ter* of the coordinated laws on the Council of State, the Court considered that the Council of State, if it deems so necessary considering the circumstances of the case, can exclude from the decision to maintain the consequences of the annulled regulation those petitioners which timely lodged an annulment request against that regulation, taking account of the principle of equality and non-discrimination (B.9.3.). Undeniably, while meeting the concerns regarding an effective legal remedy expressed above, this runs counter to the literal phrasing of Article 14*ter* of the coordinated laws on the Council of State and, more broadly, Article 8, third sentence, of the Special Law on the Constitutional Court (Verstraelen 2012b). Future case law will tell whether the Council of State will make use of this opening made by the Constitutional Court, and whether the Constitutional Court will apply it in other cases than the ones grounded on Article 4, second paragraph of the Special Law on the Constitutional Court (Verstraelen 2015).

Exclusion from Liability

The Belgian Court of Cassation confirmed that the Belgian State is liable for damages caused by a fault for which the executive (Cass. *Pas.* 1920) or Parliament (Cass. AR C050494N, Cass. *TBP* 2007, Alen 2007; Popelier 2011; Van Ommeslaghe

and Verbist 2008–09) can be held responsible. The annulment of a norm by the Constitutional Court or the Council of State can therefore engage the Belgian State's liability. In this paper, we will leave aside the debate regarding the question whether the finding of a violation in itself constitutes a fault (see at length Maes 2004, 2007; Leclercq 2006; Wirtgen 2008; Van Ommeslaghe and Verbist 2008–2009; Alen 2010; Verrijdt 2010; Popelier 2010–2011; Bocken and Boone 2011; Dubuisson and Van Drooghenbroeck 2011).

If the court decides to maintain, however, a liability claim is no longer possible for damages which occur in the period in which the maintenance decision applies. This is generally accepted as regards the maintenance measures pronounced by the Constitutional Court on the basis of Article 8, third sentence, of the Special Law on the Constitutional Court. The Court's decision to maintain provides a legal basis for the consequences of the annulled norm; allowing claims for damages would undermine the useful effect of the maintenance measure (Van Oevelen and Popelier 1997; Popelier 2006–2007; Muylle 2008; Van Ommeslaghe and Verbist 2008–2009; Alen 2010; Feyt and Tulkens 2014). It can be presumed that a maintenance measure pronounced by the Council of State on the basis of Article 14*ter* of the coordinated laws on the Council of State, also temporarily hinders liability claims, as this provision has the same purpose as its counterpart in the Special Law on the Constitutional Court: avoiding legal uncertainty, solving a possible legal vacuum created by the retroactive effect of the annulment, and giving the lawmaker time to remedy the irregularity (Verstraelen 2012a, see however, pointing to the opposite stance: CS No 225.912, Feyt and Tulkens 2014). Thus, the decision to maintain allows the lawmaker to take the time required for finding a coherent solution without concerns for liability claims This, at least, in theory; in practice the legislator more often than not turns to last-minute patchwork.

The exclusion of liability may incline the court to actually annul norms that are contrary to the law or the constitution. Therefore, scholars plea for the extension of the possibility to maintain, laid down in Article 8, third sentence of the Special Law on the Constitutional Court, to preliminary procedures (Parl.Doc. Senate No 246/2, No 2-897/4, No 2-897/6, Alen 2007; Van Ommeslaghe and Verbist 2008–2009).

These considerations, however, lead to the following result. If a norm is annulled, but its consequences are maintained, a claim for damages is excluded and, in the case of irregular administrative decisions, Article 159 of the Constitution which prohibits courts to apply irregular administrative decisions, is foreclosed. If, moreover, petitioners are only rarely excluded from the maintenance measure, it becomes clear that (requesting) parties are left empty-handed. Despite the fact that the norm violates the law or the constitution, the measure to maintain leads to the further application of the norm. Only the lawmaking authorities can provide for remedy (Popelier 2006–2007). Hence, the impact of the measure to maintain should not be underestimated.

On a final note, we refer to the recent reform of the Council of State. It was mentioned above that from now on, Article 14*ter* of the coordinated laws on the Council of State also applies to individual administrative acts. It is conceivable that the decision to maintain in that case will infringe the right to an effective remedy,

as guaranteed by Article 13 ECHR alone or combined with Article 6 ECHR. This is in particular the case if such decision hinders liability claims. However, during the recent reform of the Council of State, Parliament also gave the Council the power to grant compensation to the petitioner or an intervening party, taking into account all circumstances of public and private interest (Art. 144 (2) Belgian Constitution, Art. 11*bis* CLCS). The Council is able to grant such compensation, not only after an annulment, but also for all damages which follow from irregularities established in the judgment (Verstraelen 2014b). This seems to imply the possibility to give the petitioner compensation despite modulation of the temporal effect. The possibility to grant compensation is of major importance as it offers a possibility of redress to the requesting party, i.e. the victim of the unlawful act (Verstraelen 2014b).[13]

Conclusion

From the foregoing we can conclude that a contrast exists between objective and subjective legal proceedings regarding the possibility to modulate the temporal effects of judicial decisions. Ordinary courts firmly hold on to the retroactive effect of their decisions. The Court of Cassation modulated the temporal effects of its decisions in hardly two cases, despite the fact that in its yearly reports it explicitly acknowledges that it has a law creating function. This reluctant position, however, did not prevent the Court from assuming the power to limit the retroactive effects of referral decisions pronounced by the Constitutional Court. Since the Constitutional Court explicitly reclaimed the power to determine the temporal effects of its referral decisions, the Court of Cassation's further reaction remains to be seen.

The importance of a measure to maintain pronounced by either the Constitutional Court or the Council of State should not be underestimated, especially since the Constitutional Court makes use of this power in a quarter of its annulment judgments. Considering the quasi legislative nature of such decision, the Court's reason giving often falls short. Combined with the fact that the Court often imposes a maintenance measure *ex officio*, this leads to unpredictability. Parties have no insight in the balance of interests which led to the application of Article 8, third sentence, of the Special Law on the Constitutional Court. This results in a vicious circle: should the Court give a more elaborated reason giving, the parties, knowing which arguments may influence the Court's decision, would address this in their written statements, which, in turn, would allow the Court to an even more detailed reason giving.

As for the Council of State, the trend is set in motion. The Council shows the necessary wisdom and restraint in applying the power to maintain and generally

[13]The Council of State is, contrary to a claim for damages before the civil judge, not obliged to grant full redress. The Council may take into account all circumstances of public and private interest when it rules on the question of compensation.

gives detailed reasons for its decision whether or not to maintain the consequences of an annulled norm. The Council demands that the parties clarify the concrete detrimental effects of an annulment. If the parties fail to do so, the Council will refuse the request to maintain the consequences.

The different emphasis in the use of the power to maintain which appear when comparing the practice of both courts may not come as a surprise, considering the different nature of the Constitutional Court on the one hand, and the Council of State on the other. The consequences of a measure to maintain, however, should not be underestimated, when reminding the exclusion of liability claims. In this respect, more attention should be paid to the position of requesting parties. Excluding them from the measure to maintain, or granting them an equitable form of compensation, could offer some form of remedy.

To conclude, we notice that more attention is being paid to the temporal effects of judicial decisions in the Belgian legal system. This evolution must be applauded, when bearing in mind the far-reaching and considerable consequences of the retroactive effect of judicial decisions.

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