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European and comparative administrative law

Article 47 of the Charter of Fundamental Rights: A Fruitful Tree Growing in the Belgian Landscape of Judicial Protection, by Yseult Marique and Cecilia Rizcallah

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Introduction

What is the impact of Article 47 of the European Charter of Fundamental Rights (hereinafter referred to as the Charter or the Charter of Fundamental Rights) in the Belgian Legal Order? This was in essence the question we aimed to tackle in our chapter published in *Article 47 of the Charter of Fundamental Rights – volume 2 – The National Courts' Perspectives*, edited by M Eliantonio, G Gentile and M Bonelli (Hart/Bloomsbury forthc Nov 2023). As effective judicial protection is described as one of the rights with the most important potential within the Charter, the goal of the chapter was to assess its effective usefulness on the ground. Based on an in-depth analysis of the case law of the three Belgian supreme courts (Constitutional Court, Court of Cassation and Council of State) and of the lower courts in the judiciary, this chapter suggests that, even if rarely used, Article 47 of the Charter could have the potential to strengthen the protection of effective judicial protection in Belgium.

The Belgian Legal Order and the EU Charter of Fundamental Rights

With regard to EU law in general and the Charter of Fundamental Rights in particular, a great receptiveness can be observed on the part of Belgian courts, especially since this instrument received binding force with the Lisbon Treaty (For a transversal analysis see S Lambrecht, 'Belgium: The EU Charter in a Tradition of Openness' in M Bobek and J Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States* (Hart Publishing, 2020) 87). Indeed, the Charter is often referred to by the three Belgian supreme courts. Nevertheless, it still faces some obstacles to fully penetrate the Belgian legal order, in particular at the level of lower courts. This could be explained among others by the

practitioners' ignorance of this instrument, the Charter's limited scope of application, and its competitive disadvantage vis-à-vis the European Convention of Human Rights (hereinafter referred to as ECHR), which is better known and has a general scope of application. For the time being, it can be concluded that the actual impact of the Charter largely depends on whether the lawyers and judges involved in a given case are familiar or not with EU law, and with the Charter in particular (ibid, 108). In relation to the case law at the level of the Constitutional Court, there are encouraging signs that professional orders (especially those of lawyers) and civil society associations are becoming aware of the existence of the Charter, as they are the claimants who rely most on Article 47 in their pleas.

The Benefits Provided by Article 47 of the Charter

Despite these weaknesses, it appears that Article 47 of the Charter can offer a real added value to effective judicial protection in Belgium.

First, it enriches the panorama of legal sources protecting effective judicial protection and can, in some circumstances, widen the scope of application of the guarantees it protects. Indeed, effective judicial protection in the Belgian legal order relies upon different – national, European and international – sources, whose scope of application and legal content may differ. Adopting what we could call a 'holistic' approach to fundamental rights, it appears that Belgian courts interconnect ('weave together') these different sources instead of applying them in isolation, and that their contents, as a result, reinforce each other. As a matter of fact, guarantees deriving from Article 6 of the ECHR may apply in fields that do not fall within its scope of application, i.e., outside the fields concerning civil rights, obligations and criminal charges. The Belgian Constitutional Court notably found in a case relating to political rights – and thus not covered by Article 6 of the Convention – that 'it is not necessary to determine in this case whether Article 6.1 of the ECHR is applicable, since the requirements it contains regarding the independence and impartiality of the judge are valid as general principles of law' (Constitutional Court of Belgium (CC) no 157/2009, 13 October 2009, B.5.1.). Moreover, in order to construe these principles 'the Court takes into account the case law of the European Court of Human Rights in this regard' (ibid.). The same reasoning has been held in regard to Article 47 of the Charter, which can play the role of a vehicle for the requirements imposed by Article 6 of the ECHR in fields where it is not applicable in itself, such as in the fields of asylum (See CC, 13/2016, 27 January 2016, B.17.3), the admissibility of evidence in non-criminal proceedings (traffic offences or tax litigation) (Cass, P.19.0356.F, 5 June 2019, (2019-I) *Pasicrisie*, 1256[Court of Cassation of Belgium]; Cass, P.17.0882.N, 20 February 2018, (2018-I) *Pasicrisie*, 364), and fiscal matters (For example, see: CC, 167/2020, 17 December 2020; CC, 168/2020, 17 December 2020).

Second, Article 47 of the Charter could present clear added value, given the effects that the CJEU has recognised to this provision. Indeed, the CJEU has recognised the direct effect of Article 47 and the fact that it could 'in itself be a directly applicable basis for jurisdiction', when the national legal order does not provide for an effective remedy required by the principle of effective judicial protection in EU law

(Joined cases C-924/19 PPU and C-925/19 PPU *Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság* EU:C:2020:367, paras 145 and 146). This effect presents an important potential for the judicial protection of individuals with regard to acts against which domestic law does not provide any remedy. Indeed, Article 13 of the Belgian Constitution could not, as such, constitute a legal basis for national judges to broaden their jurisdiction recognised by the national legislation. Moreover, this provision does not give them the power to set aside legislation limiting their competence, given the centrality of the constitutionality control of legal norms. Article 6 of the ECHR is not able to come directly to the rescue of an individual who does not have an effective remedy in the Belgian legal order. Indeed, according to the Belgian supreme courts, the provision lacks direct effect; it cannot, therefore, be invoked before a court with a view to extending its competence or jurisdiction (M Dumont, 'Le Droit à la protection juridique : note sous Cour d'arbitrage, 26/4/94' (1995) *Revue trimestrielle des droits de l'homme* 487, 519). Consequently, the Council of State has observed that Article 6 of the ECHR cannot, in itself, constitute a legal basis for its competence to settle a dispute that does not fall within its jurisdiction under Belgian law (CE, 170.302, 23 April 2007 [Council of State]. For a comment, see F Belleflamme, 'L'effet direct du droit au juge' in S Van Drooghenbroeck (ed), *Le droit international et européen des droits de l'homme devant le juge national* (Larcier, 2014). The absence of direct effect of Article 6 of the Convention was already established earlier, see CE, 38.014, 31 October 1991; CE, 68.116, 15 September 1997. For a comment, S Van Drooghenbroeck and O De Schutter, *Les grands arrêts de la jurisprudence belge : droit international des droits de l'homme devant le juge national* (Larcier, 1999) 351-61). In cases falling within the scope of EU law, Article 47 of the Charter could therefore present clear added value in this field within the Belgian legal order.

An Interesting Dynamic – The Judicial Dialogue between the National Courts and the CJEU

Belgian courts are known to be European law-friendly, especially because of their frequent use of the preliminary reference procedure. Quantitatively, by 2022, Belgian administrative judges had submitted 12 requests for references relating to Article 47: the Belgian Constitutional Court three, and the Court of Cassation one, and the lower ordinary courts had also contributed references. These references cover the following fi elds: competition, torts, taxes, data protection and judicial cooperation in civil matters.

There are at least two ways to illustrate the limits of these active interactions, however. First, one field stands out – that of migration and asylum. While the lower courts, the Council of State and the Constitutional Court have referred a number of requests for a preliminary reference to the CJEU, leading to detailed case law, the Council for Alien Law Litigation and the Court of Cassation have systematically rejected requests for references in this latter area.

Indeed, following what seem to have been repeated attempts by claimants to press the Court of Cassation to proceed with a preliminary reference regarding the judicial protection of aliens, the Court of Cassation refused to ask for a preliminary reference on this issue, changing its justification over time. In

one case, it justified its refusal by ruling that:

A court is not obliged to refer a question to the Court of Justice of the European Union for a preliminary ruling on a shortcoming in national law if it finds that, even if it were the source

of an infringement of European Union law, it could not remedy the shortcoming without the

intervention of the legislator. This is the case here. (Cass, P.21.0227.F, 3 March 2021).

Such justification does not meet the CILFIT criteria.

Secondly, the Constitutional Court has also at times adopted a restrictive interpretation of the procedural requirements and the strategic choices adopted by the parties to reject a late request to refer a question to the CJEU (CC, 168/2020, 17 December 2020).

Conclusions

Judicial protection has a central place in the Belgian fundamental rights landscape. The right to a fair trial and the right to have access to a competent judge are indeed considered to be general principles of Belgian law, operationalising the rule of law. They are anchored in various provisions of the Belgian Constitution. However, in terms of content, this guarantee is mainly based on international and European sources. In this respect, the ECHR is the main source of inspiration for construing the content of judicial protection in the Belgian legal order. Nevertheless, it appears that Article 47 of the Charter and the related case law of the Court of Justice are increasingly influencing judicial protection in Belgium.

Indeed, although it appears that the penetration of the 'made in the EU' protection of fundamental rights in the Belgian legal order still has certain weaknesses, Article 47 of the Charter might offer real added value in the Belgian landscape of judicial protection.

Posted by Yseult Marique (Essex, ULB, UC Louvain) and Cecilia Rizcallah (Professor of European Law and Human Rights at the Université Saint-Louis – Bruxelles, researcher at the Institute for the European Law of the KU Leuven) and visiting professor at the ULB).

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