

## CONSTITUTIONAL REVIEW OF DISPROPORTIONATELY DIFFERENT PERIODS OF LIMITATION OF ACTIONS (PRESCRIPTION)

### I. Arbitragehof - Cour d'Arbitrage - Schiedshof 21-3-1995, B.S. - Mon.B 31-3-1995

*S'agissant du délai de prescription pour l'introduction d'une action civile, la différence de traitement des victimes selon que la faute qui est à l'origine du dommage constitue ou non une infraction (article 26 du titre préliminaire du Code de procédure pénale) a pour conséquence que la situation d'une personne ayant subi un dommage résultant d'une faute est sensiblement plus défavorable lorsque cette faute constitue une infraction que lorsqu'elle n'en constitue pas une. Il en résulte, spécialement dans les cas où le dommage ne se fait ressentir que tardivement, une grave limitation des droits de la victime, hors de proportion avec les intérêts que le législateur de 1878 et celui de 1961 entendaient protéger par cette disposition, à savoir le droit de l'auteur des faits à l'oubli, assurer la sécurité juridique et éviter que la paix publique restaurée dans l'intervalle soit à nouveau perturbée. Ces préoccupations justifient que l'action publique soit soumise à des délais de prescription particuliers, proportionnés à la gravité des faits. Mais elle ne justifie pas que l'action civile en réparation des dommages causés par ces faits soit prescrite après cinq ans - quels que soient les correctifs apportés par la loi et la jurisprudence - alors que la réparation du dommage causé par une faute civile, moins grave qu'une faute que le législateur a qualifiée de pénale, peut être demandée pendant trente ans. Il n'existe donc pas de rapport raisonnable de proportionnalité entre le but poursuivi par la mesure et ses conséquences pour les victimes d'infractions.*

*Der Behandlungsunterschied zwischen Opfern hinsichtlich der Verjährungsfrist für die Erhebung der Zivilklage, je nachdem, ob das dem Schaden zugrunde liegende Fehlverhalten ein Strafdelikt darstellt oder nicht (Art. 26 des Präliminärtitels des Strafprozeßgesetzbuches) hat zur Folge, daß diejenigen, die wegen eines Fehlverhaltens Schäden erleiden, sich in einer wesentlich ungünstigeren Lage befinden, wenn dieses Fehlverhalten ein Strafdelikt darstellt. Dies führt zumal in den Fällen, in denen der Schaden sich erst nach langer Zeit bemerkbar macht zu einer gravierenden Einschränkung der Rechte des Opfers, zu welcher die Interessen, die der Gesetzgeber 1878 bzw. 1961 mit der Maßnahme zu schützen bezweckte, in keinem Verhältnis stehen; dabei handelt es sich insbesondere darum, das Recht des Täters eines*

*Strafdelikts auf Vergessenheit zu gewährleisten, die Rechtssicherheit zu wahren und zu verhindern, daß die mittlerweile wiederhergestellte öffentliche Ruhe und Ordnung erneut gestört wird. Diese Bemühungen rechtfertigen, daß für die öffentliche Klage besondere Verjährungsfristen gelten, die im Verhältnis zum Ernst des Tatbestands stehen. Sie rechtfertigen aber nicht, daß die Zivilklage auf Wiedergutmachung des infolge des Tatbestands entstandenen Schaden nach fünf Jahren verjährt - ungeachtet der durch das Gesetz und durch die Rechtsprechung vorgenommenen Anpassungen -, wohingegen die Wiedergutmachung des Schadens aus einem Zivilrechtlichen Fehlverhalten, das weniger gravierend ist als ein Fehlverhalten, daß der Gesetzgeber als strafbar bezeichnet hat, während dreißig Jahren gefordert werden kann. Es liegt keine angemessene Verhältnismäßigkeit zwischen der durch die Maßnahme verfolgten Zielsetzung und ihren Folgen für die Opfer von Delikten vor.*

## **II. Arbitragehof - Cour d'Arbitrage - Schiedshof 15-5-1996, B.S. - Mon.B. - 20-6-1996**

*A l'égard des créances nées de la responsabilité civile extracontractuelle de l'Etat, la fixation d'une prescription à cinq ans par l'art. 34 L. 18 mai 1846 et par l'art. 1er, al. 1er, littera a L. 6 février 1970 n'apparaît pas comme raisonnablement justifiée. Il s'agit en effet de créances nées d'un préjudice qui peut n'apparaître que plusieurs années après que les travaux ont été exécutés. Les réclamations tardives s'expliquent, le plus souvent, non par la négligence du créancier mais par l'apparition tardive du dommage. Sans doute est-il pertinent, en cette matière aussi, d'éviter que des demandes d'indemnisation soient présentées à l'Etat longtemps après l'exécution des travaux générateurs du préjudice allégué. Il est vrai que de telles dettes échappent aux prévisions budgétaires, qu'elles mettent à charge de l'Etat des dépenses imprévues et qu'elles rendent malaisé le contrôle que le Parlement doit exercer sur les dépenses publiques si ce contrôle s'exerce longtemps après que les personnes responsables ont cessé d'être en fonction. Mais de tels inconvénients ne sont pas différents de ceux qui peuvent empêcher toute personne de se défendre efficacement lorsque sa responsabilité est recherchée pour des travaux à ce point anciens que les documents utiles sont perdus et que les personnes responsables ont disparu. En soumettant à la prescription quinquennale l'action par laquelle une personne demande d'être indemnisée du préjudice causé à ses biens par des travaux effectués par l'Etat, tandis que la même action est soumise à la prescription trentenaire lorsqu'elle est dirigée contre un particulier, la loi contient une mesure qui est disproportionnée au but poursuivie par le législateur.*

*Si l'article 34 L. 18 mai 1846 et l'art. 1er, al. 1er, littera a L. 6 février 1970 étaient interprétés en ce sens qu'ils ne viseraient pas les obligations pour lesquelles aucun crédit n'a été engagé et ne pourraient donc s'appliquer aux actions fondées sur la responsabilité civile extracontractuelle, ils ne créeraient pas de discrimination.*

*Hinsichtlich Schadensersatzforderungen wegen außervertraglicher Haftung des Staates sind die Bestimmungen von Art. 34 G. vom 18 Mai 1846 und Art. 1, Al. 1, littera a G. vom 6 Februar 1970, die die Verjährung der Forderungen zu Lasten des Staates nach fünf Jahren vorsehen, nicht angemessen gerechtfertigt. Es geht nämlich um Forderungen, die aus einem Schaden entstehen, der sich vielleicht erst viele Jahre, nachdem die Arbeiten ausgeführt wurden, zeigen wird. Die späten Beschwerden werden meistens nicht durch eine Nachlässigkeit der Gläubiger erklärt, sondern durch die Tatsache, daß der Schaden sich spät manifestiert. Es ist wohl einleuchtend, diesbezüglich zu vermeiden, daß dem Staat Schadensersatzanträge vorgelegt werden, lange nachdem die Arbeiten, die den behaupteten Schaden verursacht haben, fertiggestellt worden sind. Es ist richtig, daß derartige Schulden im Haushaltsplan nicht auftauchen, daß sie dem Staat unvorhergesehene Ausgaben aufbürden und daß sie die Kontrolle, die das Parlament über die Öffentlichen Ausgaben ausüben muß, erschweren, wenn diese Kontrolle ausgeübt wird, lange nachdem die Verantwortlichen ihr Amt niedergelegt haben. Aber derartige Nachteile unterscheiden sich nicht von jenen, die jeden daran hindern können, sich wirksam zu verteidigen, wenn man ihn für Arbeiten haftbar machen will, die vor so langer Zeit durchgeführt wurden, daß die zweckdienlichen Dokumente verlorengegangen und die Verantwortlichen verschwunden sind. Indem die Klage, mittels deren jemand Schadensersatz verlangt für den Schaden, der seinen Gütern durch vom Staat ausgeführten Arbeiten zugefügt wurde, einer fünfjährigen Verjährungsfrist unterworfen wurde, während dieselbe Klage, wenn sie sich gegen eine Privatperson richtet, einer dreißigjährigen Verjährungsfrist unterliegt, enthält das Gesetz eine Maßnahme, die unverhältnismäßig ist zu dem vom Gesetzgeber angestrebten Ziel.*

*Würden die Bestimmungen von Art. 34 G. vom 18 Mai 1846 und Art. 1, Al. 1, littera a G. vom 6 Februar 1970 in diesem Sinne interpretiert werden, daß sie sich nicht auf Verpflichtungen bezögen, für die noch keine Mittel festgelegt worden seien, und somit nicht anwendbar seien auf die Klagen, die sich auf eine außervertragliche Haftung stützen, so würden sie die*

*Diskriminierung nicht schaffen.*

## **INTRODUCTORY (BELGIAN) NOTE**

### 1. Two periods of limitation declared unconstitutional in Belgium.

In two famous decisions of 1995 *c.q.* 1996, the Belgian Constitutional Court (called, for historical reasons "Arbitragehof" / "Cour d'Arbitrage" / "Schiedshof") ruled - in preliminary proceedings (comparable to those before the ECJ) - that two specific - but important - rules of abbreviated prescription (limitation of actions) were contrary to the constitutional principle of equality before the law.

The judgment of March 21, 1995<sup>1</sup> concerned the rule of Art. 26 of the Introductory Provisions of the Code of Criminal Procedure (Statute of 17th April 1878). This rule links the prescription of an action for damages arising out of an act which is at the same time a criminal offence to the prescription of the penal action, with a minimum period, however, of 5 years. This rule thus shortens the prescription period for claims for damages on the ground of an illicit act to 5 years if the illicit act constitutes at the same time a criminal offence, unless the penal action of the State is not yet prescribed; actions for damages arising out of illicit acts constituting also a criminal offence therefore often prescribe more quickly than actions for damages arising out of illicit acts not constituting a criminal offence (the normal prescription period for liability arising out of illicit acts being 30 years). The Court decided that the rule of Art. 26 thus introduced or maintained an unreasonable distinction and was therefore contrary to the constitutional principle of equality before the law.

The judgment of May 15, 1996, concerned the rules causing an action for damages against the public authorities to prescribe more quickly than a similar action against private persons (this

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<sup>1</sup> Constitutional Court 21-3-1995; annotated i.a. by P. TRAEEST, in *RW* (= *Rechtskundig Weekblad*), 1994-95, 1325 ff. and more extensively in M. DAMBRE, H. BOCKEN et al. (eds), *Gandaius Actueel I*, Kluwer Antwerpen 1995, 99 ff.

result followed from an extensive interpretation of the short prescription in favour of the State<sup>2</sup>). These rules were held unconstitutional insofar as the prescription period runs from the time the damage has occurred (a shorter period running only from the moment a credit has been inserted in the budget of the public authority, was judged acceptable).

These decisions raise the question of judicial review (esp. by Constitutional courts) of the - frequent - disparity of prescription (limitation) periods. Sure, it is probably rare to have a rule as in Belgian law, shortening the period of prescription of liability for an illicit act on the mere ground that it equally constitutes a criminal offence - the opposite rule, *i.e.* lengthening the prescription period in such cases, is certainly less absurd and more common -. But other legal systems as well as the Belgian one make a number of other distinctions giving rise to radically different prescription periods, which may be equally unreasonable.

Before commenting further these cases and their meaning for - the constitutionality of - the variety periods of prescription, I'd like to put these questions in a more general framework.

## 2. General background.

During the last decennia, the law of prescription has been characterized, at least in private law, by a tendency towards shorter prescription periods<sup>3</sup>. This tendency can at least be seen in legislation (statute law). Examples can be found in most jurisdictions. In the Netherlands, the NBW (new civil code) has shortened the general period of prescription (with some exceptions) from 30 to 20 years, and further introduced a prescription period of 5 years for large categories of actions (the starting point for the 5 year period, however, is framed more restrictively, and this period thus often starts later than the 20 year period - see art. 3:307 *et sq.* NBW). In Belgium, the legislator continued to introduce specific short prescriptions on request of various pressure groups (*e.g.* in favour of advocates and judicial experts - see articles 2276*bis* and 2276 *ter* B.W./C.C.<sup>4</sup> - legal professions treat the law sometimes as a self-service). Government has

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<sup>2</sup> Now art. 100 ff Government Accounts Legislation (as codified by Royal decree of 17 July 1991 - formerly art. 34 ff Act of 15 May 1846, as modified by Act 5 March 1952, and replaced by Act of 6 February 1970); art. 2 Act of 6-2-1970 relating to the prescription of debts in favour of or against the State and the Provinces.

<sup>3</sup> Comp. E. HONDIUS, "General report", in *Extinctive prescription. On the limitation of actions, Reports to the XIVth Congress, International Academy of Comparative Law 1994*, Kluwer 1995, p. (1) 7 .

<sup>4</sup> Acts of 8-8-1985 and 19-2-1990.

served itself earlier already by introducing short prescriptions<sup>5</sup> - although, it must be recognized, on the basis of reciprocity. In recent years, the legislator further served different groups considered to be “weaker” parties, such as tenants<sup>6</sup> and recipients of medical care<sup>7</sup>. Many other liability cases were in practice subject to short prescription until the judgment of March 21, 1995, as a consequence of the abovementioned linking of the civil action to the penal one (see *infra*). This fact, together with a general lack of interest of the Belgian legislator in private law, may be the reason why no general statutory abridgment of prescription has been introduced in Belgium until now (the situation may change as a result of the two judgments annotated here).

The tendency to shorten prescription periods is clearly less present in case law. I can see three elements leading to this. First of all, there is a tendency in case law to let the “common” prescription period - which is the longest in principle (30 years) prevail. Secondly, there is a tendency to postpone the starting point of prescription, especially when the period itself is shortened (this tendency can also be found in legislation, equally as a compensation for shortening prescription periods). Finally, there is a tendency in some case law and legislation at least, to widen the possibilities of interruption, suspension or lengthening of prescription.

Only the first and second tendency are under discussion in this note. They are moreover linked to each other. The two judgments of the Belgian Constitutional Court show that prescription periods become challengeable precisely in those cases where a shorter prescription cannot be legitimated by a later starting point (when compared to longer periods of prescription) (as it is, on the contrary, the case with *e.g.* the 5 year prescription period of the Dutch NBW and with some more specific cases under Belgian law). The second judgment especially shows that statutory prescription periods cannot be reviewed judicially by comparing only the periods, and must take into account also their starting point. As I have developed elsewhere<sup>8</sup>, the sharpest

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<sup>5</sup> See art. 100 ff Government Accounts Legislation (as codified by Royal decree of 17 July 1991 - formerly art. 34 ff. Act of 15-5-1846); art. 2 Act of 6-2-1970 relating to the prescription of debts in favour of or against the State and the Provinces; art. 27, 3° National Giro Service (Postcheque) Act.

<sup>6</sup> Art. 2273 B.W./C.C., Act of 29 December 1983.

<sup>7</sup> Art. 2277 *bis* B.W./C.C., Act of 6 August 1993.

<sup>8</sup> "Extinctive prescription under Belgian law", in *Extinctive prescription, On the limitation of actions, Reports to the 14th international Congress of the international Academy of comparative law*, ed. E. Hondius, Kluwer 1995, p.

questions concerning prescription do not rise because of short periods as such, but where prescription starts to run too early, namely at a time at which the creditor (entitled party) still has insufficient knowledge of the various elements in order to be able to sue the debtor.

The possibilities of judges to set aside, *contra legem*, prescription where judged inappropriate, are not unlimited; they vary also according to the formulation used in the statutory provisions. But it is precisely in cases where it is felt that the possibilities to postpone the starting point of prescription are insufficient, that prescription periods tend to be attacked frontally.

Although the specific rules and problems are certainly differing from jurisdiction to jurisdiction, the general background of the problem is common to all our legal systems. Taking into account the various aspects of the problem can explain e.g. why in some other countries, long prescription periods, rather than short ones have been attacked as too short : their starting point is indeed defined differently (e.g. the discussion in the Netherlands concerning the 20 year period, whereas the 5 year period of art. 3:307 NBW did not come under attack : the starting point of the 5 year period is often much later).

### 3. The role of the discrimination argument.

Let me further discuss shortly the specific technique which has been used in both cases, namely to question differences between prescription periods for different, but comparable cases, as contrary to the Constitutional principle of equality before the law.

As it is often the case, the remedy creates the demand. Since the Belgian “Court of Arbitration” (Constitutional Court) obtained, in 1983<sup>9</sup>, jurisdiction to annul Acts of Parliament (whether federal, or state parliaments) - provided this is requested within 6 months after their publication<sup>10</sup> - *c.q.* to declare them unconstitutional in preliminary proceedings (irrespective of

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41 ff, no 16 ff (also as “Perspektieven voor de bevrijdende verjaring in het vermogensrecht”, in *Tijdschrift voor privaatrecht* 1994, p (1977 ff) 1998 no 16 ff.).

<sup>9</sup> Act of 28 June 1983, meanwhile replaced by the Special Act of 6 January 1989 concerning the Court of Arbitration, implementing art. 142 of the Constitution (numbering of articles of the 1994 Constitution) (for “Special Act”, see fn 12).

<sup>10</sup> See art. 1 ff Act of 6-1-1989.

the date of publication of the Act)<sup>11</sup> in case of violation of the constitutional principle of equality before the law (formal equality principle)<sup>12</sup>, more and more legal rules have been looked at in the light of the equality principle and its violation became a favourite argument for lawyers in all types of cases. This has created a new dynamics in the development of Belgian law : a whole series of antiquated rules, the upholding of which did hardly find any longer a material support, but which survived thanks to the inertia of Parliament and the strong conservatism (traditionalism is probably a better word)<sup>13</sup> of the *Hof van cassatie / Cour de cassation*, have finally been confined to the waste-paper basket.

It is my impression that, in its case law on the equality principle developed since 1989, the *Arbitragehof / Cour d'arbitrage* has been rather reserved towards annulling recent legislation clearly based on political decision, but less reverential towards older legislation<sup>14</sup>. The most interesting judgments have therefore often been pronounced in preliminary proceedings.

The *Arbitragehof / Cour d'arbitrage* uses generally speaking the same standard in reviewing discrimination as the European Court of Human Rights and the Court of Justice of the European Community<sup>15</sup>. The standard is also repeated in the Judgment of March 21st, 1995 : just like any other inequality, different prescription rules have to be based on objective criteria and

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<sup>11</sup> See art. 26 ff Act of 6-1-1989.

<sup>12</sup> Constitutional review of Acts of (federal or state) Parliament is in Belgium restricted to a number of constitutional articles, particularly the principle of equality before the law and the rules concerning the devolution of powers within the federal state. Constitutional review can be extended to other articles of the Constitution by a "special Act" of the federal Parliament, *i.e.* an Act requiring a two thirds majority in the federal Parliament as well as a majority of both the Dutch speaking as the French speaking members of that Parliament).

<sup>13</sup> Concerning this "traditionalism" (rather than conservatism in the political sense of the word) of the Hof van cassatie, see my "Bedenkingen bij de door het Hof van cassatie gehanteerde wijze van rechtsvinding en rechtsopvatting. Tegelijk een bijdrage tot de studie van een onderschatte rechtsbron : de traditie", *TPR (Tijdschrift voor Privaatrecht)* 1995, 971 ff.

<sup>14</sup> The Hof van cassatie, on the other hand, is less reverential to legislative innovation and its loyalty is rather opposite to the one shown by the Arbitragehof. The Hof van cassatie rather acts, as English judges tend to do, as the keeper of the tradition of our common law (evidently common law in the continental sense of the word, *i.e.* the civil law tradition) and often minimalizes legislative innovation which deviates from this tradition, even if such interpretation is contrary to the intent of the actual legislator. See again my contribution in *TPR* 1995, 971 ff.

<sup>15</sup> Sometimes, the Court shrugs the problem off too light by declaring that the terms (categories) of the comparison made to show discrimination are just not comparable, thus dispensing itself from analysing whether there is a reasonable justification for the differences in treatment of these categories.

reasonably justified, taking into account the purpose and the effects of the challenged provision: the means used (inequal treatment) have to be proportional to the purpose of the rule (see consideration B3). The proportionality principle is therefore the key to constitutional review as such<sup>16</sup>.

It would take us too far to reflect here more generally on the growing influence of constitutional law on private law<sup>17</sup>, which does not make everybody happy (including myself)<sup>18</sup>. Insofar as judicial review does, however, result in disposing of anomalies in private law, rather than undermining its coherence and its proper philosophy, it can only be welcomed. The two annotated judgments of the Belgian Constitutional Court do, in my opinion, play such a role.

Since the introduction of a (limited) constitutional review of Acts of Parliaments, short prescription periods can thus be set aside if the abridgment of prescription is not reasonably justified, in particular if it is disproportional to the (even legitimate) purpose aimed for. Judicial review is indeed in principle based on a comparison between the challenged provision and the “common” rule - *in casu* the prescription period of 30 years.

#### 4. The judgment of March 21st, 1995 : the influence of penal prescription set aside.

The first victim of this review in Belgium was the abridged prescription of actions for damages based of an act which is at the same time a criminal offence, abridgment following from the - partial - linking of the prescription of these actions to the prescription of the penal action. On the one hand, this results in the rule that the civil action cannot be prescribed as long as the penal action is not. But it also resulted in the challenged rule that the civil action cannot, as a rule, survive the penal action. Such a situation would create the scandal of a crime being made public in a lawsuit without being punished. This so-called “solidarity principle” between both actions was found without exception in the Napoleonic Code of 1808. In order to understand

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<sup>16</sup> Comp. also W. van GERVEN, “Het evenredigheidsbeginsel”, in *In het nu, wat worden zal, Schoordijk-bundel*; P. MARTENS, “L’irrésistible ascension du principe de proportionnalité”, in *Présence du droit public et des droits de l’homme, Mélanges Jacques Velu*, 1992, 49 ff (P. MARTENS is judge in the Arbitragehof / Cour d’arbitrage).

<sup>17</sup> See eg C. von BAR, “Der Einfluß des Verfassungsrechts auf die westeuropäische Deliktsrechte”, *AcP* 1995, 203 v.

<sup>18</sup> Zie bv. D. MEDICUS, “Der Grundsatz der Verhältnismäßigkeit im Privatrecht”, *AcP (Archiv für die civilistische Praxis)*, 1992, 35 ff, esp 54 ff.

how it functioned, one must know that in Belgium, the action for damages based on an act which is at the same time a criminal offence is normally judged by the criminal court - the civil courts having no jurisdiction until the criminal proceedings are closed. Given the fact that the penal action prescribes, depending on the gravity of the crime or offence, within 1, 5 or 10 years (the prescription period for the most relevant crime, namely battery or injury, being 5 years), and that this period can be lengthened to twice the original period at most, and simply continues to run during criminal proceedings, it is not so difficult to see that this often brought about a disproportion between torts governed by the common law on prescription (30 years, suspended during proceedings in court, subject to interruption, etc.) and those constituting at the same time a criminal offence. The position of the victim was amended somewhat in the course of history. An Act of March 30, 1891 introduced suspension of the prescription of the civil action during the criminal proceedings. An Act of May 30, 1961 modified art. 26 of the 1878 Act (Introductory Title of the Code of criminal procedure), providing since then that civil actions do not prescribe before a period of 5 years has expired (and never before the penal action). Still, the disproportion remained manifest in many cases.

All kinds of arguments, which have been put forward in the course of history in favour of this disproportional abridgment of prescription, and which in 1961 were still convincing enough to prevent the unlinking of civil and penal prescription in Parliament<sup>19</sup>, had become obsolete to an unprejudiced observer. As it often happens, it did, however, require a newborn institution (the Constitutional Court) to make it as clear as day that the emperor was wearing no clothes.

##### 5. The judgment of May 15, 1996 and the privileges of the State.

A second victim fell through the judgment of May 15, 1996. Although the Court did decide in this case that the challenged statutory rule was not necessarily unconstitutional, its current interpretation (by case law) was declared to be so. The case concerned the rule that claims against (as well as from) the State as a rule prescribe within 5 years. The Court declared this rule unconstitutional insofar as it would be applied as such to claims arising out of tort, but not

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<sup>19</sup> As the Court put it, these arguments were arguments in favour of prescription in general and prescription of penal actions in particular (public tranquillity, absence of scandal, etc.); but as arguments in favour of a shorter period for prescription of actions based on a criminal offence compared to the period of prescription for mere civil torts, they make no sense.

insofar as it would be applied only to claims for which a credit has (already) been inserted in the Budget (assuming that in this interpretation, the common rules of prescription remain applicable as long as no credit has been inserted in the Budget). The constitutionality of the abridgment of prescription has thus been linked to its starting point. The judgment explicitly states that an abridgment from 30 years to 5 years is not justified where claims arise out of damages which may come to light only many years after the facts causing them (Consideration B. 17). It follows *a contrario* from this motivation that it is reasonably justified (and thus constitutional) to shorten prescription from the moment at which the damage manifests itself.

This motivation may surprise, because a similar argument was advanced in the first case (judgment of March 21, 1995), namely that the short prescription period was reasonable enough, at least in cases of injury or battery (which is the most frequent criminal offence giving rise to an action for damages), because it did run, according to recent case law at least (Cass. 13 January 1994, *Coessens t. Marioli*) only from the moment the damage appears, and this argument has then been swept aside. The disproportionality in the first case was, however, simply unjustifiable (liberating a person committing a more serious tort quicker than the one committing a less serious one); in the second case, some justification was possible (the complexity of Government Accounts compared to accounts of private persons). Further, there was not really a correlation (other than an accidental one) in the first case between the shortening of prescription and its later starting point. Finally, the second Judgment shows that the Constitutional Court favours a legislative intervention in the direction of a system as can be found in some other jurisdictions (notably the Dutch NBW), and which had also been put forward by several authors commenting the judgment of March 21st, 1995<sup>20</sup>. Its basic idea is developed *infra*.

## 6. Other cases.

The two annotated cases are in my opinion the deathblow, under Belgian law, for all rules

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<sup>20</sup> See my abovementioned article in *TPR* 1994 and further "De verjaring van de burgerlijke vordering al dan niet voortspruitend voor een misdrijf eengemaakt : ja, maar hoe ?" *R.W.*, 1994-1995, 1349 ff; comp. Ph. TRAEST in *R.W.*, 1994-95, 1325 ff; M. FONTAINE & J.L. FAGNART, "Réflexions sur la prescription des actions en responsabilité", *Revue générale des assurances et responsabilités (RGAR)* 1995 no. 12502; albeit that the opinions about the precise length of the periods to be introduced are varying.

abridging prescription of actions for damages, unless prescription runs only from the moment at which the damage manifests itself. Unless the federal legislator intervenes - but speed is not its most famous characteristic - some more short prescription periods could well fall victim, too<sup>21</sup>.

A simple solution would consist of the introduction of a general prescription period of *e.g.* 5 years (it could also be 3), provided that such period runs only from the moment at which all elements required for a claim can be known by the claimant. In addition, the existing 30 year period could be maintained, provided it runs from the moment of the facts themselves.

### 7. State liability in case of “resurrected” claims ?

The introduction of constitutional review also raises the question of state liability - on the basis of tort - for damages caused by - maintaining - unconstitutional legislation. As to the annotated judgments, the question arises particularly in relation to the “damage” incurred by persons declared liable for damages arising out of tort in case the claim for damages was already prescribed on March 21, 1995 by application of the rules declared unconstitutional by the judgment of that date, insofar as such persons would be able to prove that they could have avoided (or shifted) this burden if the legislator would not have maintained the unconstitutional rule.

The possibility of State liability is a logical consequence of the introduction of judicial review of Acts of Parliament, just like the liability of EC Member States for damages caused by - enacting or maintaining - legal rules which are contrary to Community law<sup>22</sup> is a logical consequence of the judicial review of national or state legislation in the light of Community law<sup>23</sup>. The first Belgian judgment recognizing State liability for illicit legislation (*in casu* as

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<sup>21</sup> Some possible candidates have already been mentioned by H. de RODE, “L’arrêt de la Cour d’arbitrage du 21 mars 1995 et ses conséquences quant aux actions de responsabilité. Ou ‘La boîte de Pandore’”, *Tijdschrift voor verzekeringen / Bulletin des assurances* 1996, p (23) 27-28.

<sup>22</sup> See ECJ 19-11-1991, cases nrs. 6/90 and 9/90 *Francovich and Bonifaci*; ECJ 5-3-96, cases 46/93 and 48/93, *Brasserie du Pêcheur v. Bundesrepublik Deutschland c.q. Factortame Ltd.*

<sup>23</sup> Comp. in the same sense M. LEROY, “Responsabilité des pouvoirs publics du chef de méconnaissance des normes supérieures de droit national par un pouvoir législatif”, in *La responsabilité des pouvoirs publics*, Bruylant Brussel 1991, 299 ff; A. van OEVELEN & P. POPELIER, *De gevolgen van onrechtmatige wetgeving in het Belgische recht*, preadvies Vereniging voor de vergelijkende studie van het recht in België en Nederland 1986, 26f.

contrary to the ECHR and/or EC law) has been given in the beginning of 1997<sup>24</sup>, so that the Courts cannot avoid this discussion any longer.

Evidently, the mere fact that an unconstitutional rule has been enacted or - as *in casu* - maintained is not sufficient to give rise to State liability. Damage must be proven as well as a causal link, and that is all but evident. Still, a party declared liable by application of the common rule of prescription (instead of the shorter one) could maybe prove that it was in reliance on the short prescription that he has neglected evidence in his favour or that he has not covered his liability with an insurance which would still cover such - late - claims<sup>25</sup>. In both cases, that party can probably only prove that, due to the fault of the legislator, he has lost a chance to win his case *c.q.* to be covered by insurance. But the loss of a chance can give rise, under Belgian law, to a partial liability of the party who has caused that loss. State liability can thus not be excluded totally.

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**(ENGLISH NOTE)**

**(ITALIAN NOTE)**

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<sup>24</sup> Civ. Brussels, 7th Ch, 17-3-1997, *Spaas Industrie v. Ministry of Finance*.

<sup>25</sup> This is evidently linked with the problem of the extension of insurance coverage - date of the facts, loss occurrence or claims made -, but its analysis would lead us to far here.