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THE RIGHT TO SOCIAL SECURITY IN THE BELGIAN CONSTITUTION*

Introduction

> *Article 23 Belgian Constitution:*
> *Everyone has the right to live a life in conformity with human dignity. To this end, the laws, decrees and rulings alluded in Article 134 guarantee, taking into account corresponding obligations, economic, social and cultural rights, and determine the conditions for exercising them.*
> *These rights include notably:*
> *1. The right to employment and to the free choice of professional activity in the framework of a general employment policy, aimed among others at ensuring a level of employment that is as stable and high as possible, the right to fair terms of employment and to fair remuneration, as well as the right to information, consultation and collective negotiation;*
> ***2. The right to social security, to health care and to social, medical and legal aid;***
> *3. The right to have decent accommodation;*
> *4. The right to enjoy the protection of a healthy environment;*
> *5. The right to enjoy cultural and social fulfilment.*

In this contribution we will discuss the right to social security in the Belgian Constitution and its relation to the different social security reforms due to the recent economic crisis. The main research question is the following: "Can the right to social security in the Belgian Constitution be used as a real instrument to prevent social regress and as a stop for the roll-back of social expenses in times of crisis?"

In order to answer our main question, the contribution is divided into four chapters, in each of them we will discuss a different topic. The **first chapter** will look at the different constitutional guarantees that protect the social security system in Belgium, namely the right to social security (Article 23), the prohibition of discrimination (Articles 10 and 11) and the right to property (Article 16 of the Belgian Constitution and Article 1 Protocol no. 1 ECHR).

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In the **second chapter**, we will examine the material and personal scope of the right to social security in Article 23 more in detail. Before doing so, we will briefly discuss its development in the Belgian legal order.

The **third chapter** will provide a short overview of the case law of the Belgian Constitutional Court and the doctrine with regard to the right to social security in article 23. Due to the concise formulation of the Belgian constitutional legislator, the Court and the literature had to define the contents and scope of this article. Moreover, the case law of the Constitutional Court will allow us to sketch the possible impact of the right to social security on national legislation and the Belgian legal system as a whole.

The **fourth chapter** will further elaborate on possible threats to social security rights due to the recent economic crisis. This chapter will describe some of the recent and future changes in Belgian social security law succinctly. In addition, the possible impact of the European Semester of the European Union on the Belgian social security system will also be discussed. Finally, in the **conclusion** an answer will be formulated to the central research question.

1. Overview of the constitutional guarantees of social security rights

Despite the fact that the Belgian Constitution does not explicitly proclaim Belgium as a 'social state', it does contain several guarantees for the protection of social security claims. This chapter will briefly discuss each of them. Firstly, Article 23 will be examined, followed by a brief overview of the prohibition of discrimination in Articles 10 and 11 of the Constitution. Finally, we will look succinctly at the right to property in Article 16 of the Belgian Constitution and Article 1 Protocol no. 1 European Convention on Human Rights (ECHR).

a) Right to social security

Article 23, which contains the right to social security, consists of three separate parts, each having its own specific function. The first paragraph sets out an overarching principle, namely *"the right to live a life in conformity with human dignity"* that serves as the foundation for the more specific social and economic rights set out in this provision. To this end, the second section of Article 23 points out that the Belgian legislator, both at the federal and the regional level, should take into account the different social, economic and cultural rights when exercising its competences.

Finally, Article 23 consists of a non-exhaustive list of economic, social and cultural rights that has to provide the contents of the overarching principle.[1] This list contains amongst others the right to employment and to the free choice of an occupation within the context of a general employment policy and the right to social security. However, no practical information was given by the constitutional legislator on how to interpret this

[1] D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe,* Groningen, Europa Law Publishing, 2010, 24.

right to social security.[2] The case law of the Belgian Constitutional Court is therefore of utmost importance in determining and interpreting the concrete scope of Article 23 *(cfr.* Chapter three). In chapter two we will discuss the material and personal scope of the right to social security further.

b) Prohibition of discrimination

Articles 10 and 11 of the Belgian Constitution provide, like Article 23, some protection for social security claims. Article 10 formulates the principle of equality, while Article 11 contains a general prohibition of discrimination. The Belgian Constitutional Court often combines both articles to interpret the constitutionality of legal norms. In order to do so, the Court has established a specific test which is based upon the case law of European Court of Human Rights.[3] This specific test comprises the following criteria:

1) Prohibition of arbitrariness (distinction must have a legal or justified goal as objective)
2) Criterion of objectivity (distinction must have an objective character)
3) Criterion of adequacy (distinction must be able to reach the justified goal)
4) Criterion of proportionality (the legal measures must be in proportion with the justified goal)

The Belgian Constitutional Court has often used Articles 10 and 11 in social security claims in previous case law. It is important to note that before 2003 the Constitutional Court could only test the validity of Belgian legislation against Articles 10 and 11, but not against Article 23. As a result, Articles 10 and 11 of the Constitution have played an important role in social security cases. For example, in 2003 the Court had to interpret an article of the Belgian Social Aid Statute *(OCMW-wet)* that limited social aid of urgent medical care for illegal residents.[4] According to the Court, there was a double discrimination. First, illegally staying children and legally staying children were treated unequally. As the objective of the legislation was to encourage persons leaving the country, the criterion was not adequate because both categories were not capable of leaving the country by themselves. A second discrimination concerned the equal treatment of illegally staying adults and illegally staying children. The former have the choice to leave the country, whilst the latter do not. Consequently the Social Aid Statute had to be adapted: illegally staying children now have to right to receive the necessary assistance.

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[2] M. JAMOULLE, "L'article de la Constitution Belge dans ses relations avec les droits fondamentaux, le droit du travail et la securite sociale" in G. VAN LIMBERGHEN en K. SALOMEZ (eds.), *Sociale grondrechten als bakens voor een vernieuwd sociaal recht – liber amicorum Professor Maxime Stroobant,* Gent, Mys & Breesch, 2001, 128; G. MAES, *De afdwingbaarheid van sociale grondrechten,* Antwerp, Intersentia, 2003, 406–407.

[3] Const. Court (Belgium), no. 21/89, 13 July 1989, online access www.juridat.be; Const. Court (Belgium), no. 23/89, 13 October 1989, online access www.juridat.be; D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. *SCHOUKENS (eds.), Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 32.

[4] Const. Court of Belgium, no. 106/2003, 22 July 2003, online access www.juridat.be.

c) Right to property

The right to property in Article 16 of the Belgian Constitution provides another guarantee for the protection of social security claims, next to the prohibition of discrimination and the right to the social security. Article 16 protects citizens against the expropriation power of the state and it entails a duty for the state to find a balance between the public interest and the owner's private interests. However, it remains uncertain whether social security claims can be regarded as property and to what extent they are protected under Article 16.[5] As no social security claims have been brought before the national courts invoking Article 16 of the Constitution so far, nor does it provide a definition of property.[6] Although Article 16 could play a role in cases where social benefits are lowered or even abolished by law, the role and the extent to which this provision could provide protection is still uncertain at he moment.

It seems that national courts rather refer to Article 1 Protocol no. 1 ECHR (for now), when providing protection for social security claims under the right to property. There are various reasons that explain this trend. First, only the Constitutional Court can judge the validity of Belgian legislation with the Constitution, whilst all courts can decide not to apply a statute when not in conformity with the ECHR. Secondly, the concept of property in Article 1 Protocol no. 1 ECHR seems broader than the one in Article 16 of the Belgian Constitution.[7] It is clear from the case law of the ECHR that social security claims, regardless of them being financed by contributions, can enjoy the protection of Article 1 Protocol no. 1 ECHR.[8] Thirdly, it is not necessary that loss of property is definitive under Article 1 Protocol no. 1 ECHR, while the Belgian Supreme Court[9] *(Hof van Cassatie / Cour de Cassation)* does require this with regard to Article 16.[10]

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[5] D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 39.

[6] D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 38–39.

[7] D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 38–39.

[8] See for example following cases : ECtHR 16 September 1996, Gaygusuz, 17371/90, paragraphs 39–41;ECtHR 12 October 2004, Asmundsson, 60669/00; ECtHR 30 September 2003, Poirrez, 40892/98 ; ECtHR Grand Chamber, 6 July 2005 (decision on admissibility), Stec and others, 65731/01 and 65900/01, paragraphs 42–47; For more information : M. COUSINS, *The European Convention of Human Rights and Social Security Law*, Antwerp, Intersentia, 2008, 65; P. LEACH, *Taking a Case to the European Court of Human Rights*, Oxford, Oxford University Press, 2011, 399; A. GOMEZ HEREDERO, *Social security as a human right. The protection afforded by the European Convention on Human Rights*, Council of Europe Publishing, Strasbourg, 2007, 20–22; K. KAPUY, "Social security and the European Convention on Human Rights: how an odd couple has become presentable", *European Journal of Social Security* 2007, 223.

[9] Besides the Constitutional Court, the Belgian Supreme Court also has the competence to interpret the Constitution and Constitutional Rights but only the Constitutional Court can squash legislation when not in conformity with the Belgian constitution and constitutional rights; See for example: S. SOTTIAUX, "Grondwetsconforme interpretatie: garantie of aantasting van de scheiding der machten" in A. ALEN et al. (eds.), *Leuvense Staatsrechtelijke Standpunten 2*, Brugge, Die Keure, 2010, 196.

[10] See e.g. Supreme Court (Belgium), 4 December 2008, *Amen*. 2009, 133.

2. Personal and material scope of the right to social security in article 23 of the Belgian constitution

a) Development

The right to social security, as included in Article 23 of the Belgian Constitution, is the result of several years of political debate and deliberation that started in 1988 and ended in 1994 with the adoption of a catalogue on economic and social rights.[11] During the first years of this parliamentary debate, the Belgian government was hardly interested in supporting the original parliamentary proposal.[12] The government did not consider this proposal as urgent and decided to prioritize other legislative acts in the same domain such as the approval of the revised European Social Charter.[13]

During the period between 1992 and 1994, the debate about economic and social rights came to the fore again. Both the federal Parliament and the Senate started working at two concrete proposals to adopt several social and economic rights in the Belgian Constitution. The Parliament formulated the different socio-economic rights negatively,[14] contrary to the Senate that formulated the rights in a positive way. Eventually, the Senate's proposal was adopted in 1994.[15]

b) Material scope

The text of Article 23, third section, 2° of the Belgian Constitution, entails *"the right to social security, to health care and to social, medical and legal aid*". The distinction between social security, health care and social aid was based on the International Covenant on Economic and Social Rights which distinguishes between the right to social security (Article 9) and the right to an adequate standard of living and the right to the best possible physical and mental health (Articles 11 and 12).

The concept of social security is not defined in the Constitution, nor does the constitutional legislator explain in what direction social security should evolve or what standards should be used in order to determine whether there is a violation of Article 23. It seems that the preparatory works defined social security in a rather restricted sense, namely as an overall term for all social insurances against recognized social risks.[16]

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[11] Constitutional amendment of 31 January 1994, *BS* 12 February 1994, 3660.

[12] G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, 393.

[13] M. STROOBANT, "Sociale en economische grondrechten in de Belgische grondwet. Wordingsgeschiedenis van artikel 23: het Akkoord van 'Le Ry d'Ave" in W. RAUWS and M. STROOBANT, *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia,* Antwerp, Intersentia, 2010, 22.

[14] G. MAES, *De afdwingbaarheid van sociale grondrechten,* Antwerp, Intersentia, 2003, 408.

[15] G. MAES, *De afdwingbaarheid van sociale grondrechten,* Antwerp, Intersentia, 2003, 407; M. RIGAUX, "De schanierfunctie van art. 23 G.W." in M. Stroobant (eds.), *Sociale grondrechten,* Antwerp, Maklu, 1995, 111.

[16] D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe,* Groningen, Europa Law Publishing, 2010, 26.

As Leclerq pointed out, even though there is no precise or commonly accepted definition of the concept of social security, the constitutional legislator has tried to make clear that the right to social security should be perceived as the right to be socially insured, e.g. the self-employed worker, the public servant or the employee, when having an occupation. According to the author this right is linked to the duty of paying social security contributions.[17]

c) Personal scope

Article 23 of the Belgian Constitution states that *"everyone"* has the right to live in human dignity. Nationality is hence not a requirement to enjoy the right to social security. Nevertheless, the fact that different social security schemes, for example, exist for civil servants, self-employed and wage-earners, does not breach the right to social security in Article 23 of the Belgian Constitution.[18] Article 23 thus does not implicate that everyone has the right to enjoy the same rights under the social security system.

Moreover, the Belgian Constitutional Court interprets the word *"everyone"* in a strict sense,[19] wherefore it is possible to limit the application scope of social and economic rights to certain categories of persons in order to achieve a goal of general interest.[20] The restriction of social assistance benefits to the extent of urgent medical care for adult illegal immigrants was, for instance, in conformity with Article 23 (case 131/2001).[21] According to the Court, the state should not assume the same responsibilities for illegal residents and individuals residing lawfully in Belgium. However, as stated above, the fact that social assistance benefits were restricted to urgent medical care for both illegal adults as minors was contrary to Articles 10 and 11 of the Belgian Constitution (case 106/2003).[22] This means that the national legislator will still need to respect the prohibition of discrimination in Articles 10 and 11 of the Belgian Constitution.

3. The impact of the right to social security on the Belgian legal system

The formulation of Article 23 was rather vague and needed further clarification by national courts and doctrine to define the concrete contents and the possible impact of this

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[17] See Review of Title II Constitution to add Article *24bis* regarding economic and social rights, Toelichting *Parl. St. Senaat,* 1992–93, no. 100–2/3°; 18 J.F. LECLERCQ, "Sociale zekerheid : honderduizend of niets, stop je of ga je verder?", *RW* 2007–08, 509–510.

[18] D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe,* Groningen, Europa Law Publishing, 2010, 25.

[19] M. BOSSUYT, "Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof" in W. RAUWS and M. STROOBANT, *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia,* Antwerp, Intersentia, 2010, 61.

[20] G. MAES, *De afdwingbaarheid van sociale grondrechten,* Antwerp, Intersentia, 2003, 412 and 415.

[21] Const. Court. (Belgium), no. 131/2001, 30 January 2001, online access: www.juridat.be.; Const. Court (Belgium), no. 203/2004, 2 March 2004, online access: www.juridat.be.

[22] Const. Court (Belgium), no. 106/2003, 22 July 2003, online access: www.juridat.be.

article on the domestic legal system. For that reason, this chapter will give an overview of the case law of the Belgian Constitutional Court and the relevant doctrine. Furthermore, by looking at the case law of the Court, we will get an impression of the possible impact of the right to social security on Belgian legislation as the Constitutional Court is able to test the validity of Belgian legislation in relation to Article 23 since 2003.[23]

The margin of discretion given by the Constitutional Court to the Belgian legislator and the corresponding obligations that can be imposed on individuals, will first be discussed. Secondly, the question whether the right to social security has direct effect will be dealt with as well as the principle of standstill. In a final part, an overview of some recent critiques and ambiguities concerning the right to social security will be given.

a) Margin of discretion

A first question raised before the Constitutional Court concerned the margin of discretion of the different legislators in Belgium with regard to the development of the right to social security.[24] The Belgian Constitutional Court decided that the lack of clarity of the right to social security in the Constitution implies that the legislator himself had to define the specific content of this right.[25] This means that the legislator has a rather large margin of discretion in realizing the right to social security.

In addition, the legislator could delegate some of his powers to establish the content of Article 23, when he has indicated the specific subject and the limits to the delegation of powers. According to the Court, the highly technical and complex nature of social security legislation can be considered a justified delegation of power.[26] As social security legislation requires the possibility for a flexible and swift reform, it is sufficient that the legislator lays down the overall guidelines and objectives for the executive.[27]

b) Corresponding obligations in Article 23 of the Belgian Constitution

Part two of Article 23 of the Belgian Constitution specifies that the different economic, social and cultural rights guaranteed under this article, can also contain *"obligations"* that individuals have to fulfil. As PIETERS and SCHOUKENS point out, the Belgian Constitution does not usually mention fundamental obligations, which makes the refer-

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[23] Special law changing the special law of 6 January 1989 on the Arbitragehof, *BS* 11 april 2003.

[24] Const. Court (Belgium), no. 99/2008, 3 July 2008, online access: www.juridat.be.

[25] M. BOSSUYT, "Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof" in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia,* Antwerp, Intersentia, 2010, 60.

[26] Const. Court (Belgium), no. 64/2008, 17 April 2008, online access: juridat.be; A. ALEN and K. MUYLLE, *Compendium van het Belgisch Staatsrecht,* Mechelen, Kluwer, 2012, 38; M. BOSSUYT, "Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof", in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia,* Antwerp, Intersentia, 2010, 61.

[27] G. MAES, *De afdwingbaarheid van sociale grondrechten,* Antwerp, Intersentia, 2003, 412 and 415–419.

ence to the corresponding obligations – which individuals have to fulfil when they call upon Article 23 – all the more relevant.[28]

In principle, the Belgian government must ascertain that individuals can enjoy the right to live in dignity, for example, by organizing a social security system that provides for an adequate safety net.[29] However, the basic rights under Article 23 can be limited on the basis of admissibility criteria.[30] For example, in order to receive social benefits, individuals should make efforts to receive an income, by, for instance, looking for a job.[31] In the context of social security law, this means that an individual could be refused social aid when he/she systematically fails to assume his/her responsibilities towards society.[32]

The assertion of the reference to corresponding duties shows that the social rights guaranteed in Article 23 are not absolute, but that they possess a relative character as not everyone can claim these rights unconditionally. However, the Court did point out that the corresponding obligations have to be proportionate in order to enable everyone's realization of their right to live in human dignity.[33]

c) Direct effect

The question whether Article 23 has direct effect or not, has been debated since its introduction in the Belgian Constitution. The original intention of the constitutional legislator was that Article 23 would not have direct effect. In order to avoid that doctrine and jurisprudence would accord direct effect to Article 23, the constitutional legislator stated explicitly that secondary law should establish and regulate social rights. As a result, it is generally alleged that individuals cannot deduct subjective rights from the right to social security.

Subsequently, part of the doctrine and the judiciary followed the decision of the constitutional legislator.[34] However, an increasing number of (lower) courts, such as the

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[28] D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe,* Groningen, Europa Law Publishing, 2010, 29.

[29] A. VAN LOOVEREN, "Sociale rechten en minimarechten" in R. JANVIER (ed.), *Actuele problemen van het sociale zekerheidsrecht,* Bruges, die Keure, 1999, 263–264.

[30] Const. Court (Belgium), no. 28/2002, 30 January 2002, online access www.juridat.be; Const. Court (Belgium), no. 101/2008, 10 June 2008, online access www.juridat.be.

[31] D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe,* Groningen, Europa Law Publishing, 2010, 29.

[32] Const. Court (Belgium), no. 28/2002, 30 January 2002, online access: www.juridat.be; D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe,* Groningen, Europa Law Publishing, 2010, 29; A. VAN LOOVEREN, "Sociale rechten en minimarechten" in R. JANVIER (ed.), *Actuele problemen van het sociale zekerheidsrecht,* Brugge, die Keure, 1999, 256–261.

[33] Const. Court (Belgium), no. 28/2002, 30 January 2002, online access: www.juridat.be.

[34] For an overview see D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe,* Groningen, Europa Law Publishing, 2010, 28 en G. MAES, *De afdwingbaarheid van sociale grondrechten,* Antwerp, Intersentia, 2003, 442 e.v.

Court of Appeal of Mons, did accord direct effect to a part of Article 23, more specifically to the overarching principle of it *("the right to live a life in conformity with human dignity").* This case concerned a subsistence level payment within the law on social service departments (OCMW-wet). Yet, the direct effect of Article 23 with regard to social aid is not unconditional, as it is linked to the willingness to work.

One could apply the same reasoning for the right to social security. As PIETERS and SCHOUKENS stated: if someone is socially insured and fulfils his/her duties in relation to the social security institution, but does not receive a social benefit, that person could claim his right to social security from the social security administration.[35] However, the courts have not granted direct effect to the right to social security at the moment. Nevertheless, it is important to note that even if the right to social security would have direct effect, this does not mean that its direct effect is unlimited, just as the right to social security is not unconditional.[36]

d) The principle of standstill

In the preparatory works concerning the adoption of Article 23, the Belgian Senate had mentioned the existence of a *"standstill – principle"*[37] for the socio-economic rights under this article.[38] Yet, this principle was not mentioned in the final draft of the article which meant that the question whether Article 23 included a principle of standstill was left to the Constitutional Court.[39] In case 169/2002, the Court accepted the existence of a standstill-principle, which obliges the legislator to abstain from lowering the level of protection under the right to social assistance.[40] In case 5/2004, the Court confirmed its previous case but added that the standstill-principle prohibits the legislator to diminish the protection that existed at the moment Article 23 came into force in a considerable way.[41] In this way,

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[35] D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), Security: *A General Principle of Social Security Law in Europe*, Groningen, Europa Law Publishing, 2010, 28.

[36] D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe,* Groningen, Europa Law Publishing, 2010, 28.

[37] For some general works on the principle of standstill in the Belgian constitutional order: A. ALEN, K. MUYLLE, *Compendium van het Belgisch Staatsrecht,* Mechelen, Kluwer, 2008, 38. J. THEUNIS, "Het recht op de bescherming van een gezond leefmilieu, even stilstaan bij de standstill" in K. DEKETELAERE (ed.), *Feestbundel Milieurecht,* Bruges, die Keure, 88.

[38] Preparatory Works Senate (Belgium), BZ 1991–92 nr 100–2/3, 4 and 9–11.

[39] Const. Court (Belgium), no. 169/2002, 27 November 2002, online access : www.juridat.be, noot S. BOUCKAERT; Const. Court (Belgium), no. 4/2004, 14 January 2004, online access: www.juridat.be.

[40] Const. Court (Belgium), no. 169/2002, 27 November 2002, online access : www.juridat.be See also M. BOSSUYT, "Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof" in W. RAUWS and M. STROOBANT, *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia,* Antwerp, Intersentia, 2010, 63; S. BOUCKAERT, "De verplichte materiele dienstverlening aan kandidaat-vluchtelingen en de toetst door het Arbitragehof aan het grondrechteninstrumentarium in het algemeen en aan het standstilbeginsel in het bijzonder", *RW* 2003–04, 93; J.F. LECLERCQ, "Sociale zekerheid: honderduizend of niets, stop je of ga je verder?", *RW* 2007–08, 510.

[41] Const. Court (Belgium), no. 4/2004, 14 January 2004, online access: www.juridat.be.

the Court prohibits measures that would result in a significant deterioration of the rights ensured by the right to social security. The court now compares the changes with previous legislation, and does not limit itself to the legislation that was already in force in 1994.

The standstill-principle in Article 23 does not guarantee that the social security system should be gradually extended in Belgium,[42] nor does it mean that the legislator cannot touch upon the modalities of certain social security benefits anymore.[43] Moreover, the Belgian doctrine considers this standstill-principle only as a relative duty for the Belgian legislator in the sense that it prohibits a substantial decline of the rights in Article 23. The legislator still has the freedom to decide on how to guarantee these rights in the most adequate way.[44] In certain cases a reduction of social security rights could be justified for the sake of public interest.[45] According to Maes, this still leaves ample space to withdraw social rights in the case of severe economic problems.[46] To conclude, the right to social security allows for some restrictions as long as they do not declare the constitutional right completely void and they are not unlimited in time.[47]

e) Ambiguities and criticism

As the Belgian Constitutional Court seems to have a rather reticent attitude when reviewing legislation's conformity with the right to social security, the Belgian legislator has a large margin of discretion for the realization of Article 23, third section 2.[48] As BOSSUYT points out, the Court has been more reluctant with regard to the social and economic rights under Article 23, than with regard to classic rights and freedoms.[49]

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[42] Const. Court (Belgium), no. 64/2008, 17 April 2008, online access: www.juridat.be.

[43] J.F. LECLERCQ, "Sociale zekerheid : honderduizend of niets, stop je of ga je verder?", *RW* 2007-08,511.

[44] D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe,* Groningen, Europa Law Publishing, 2010, 30.

[45] *De transversale bepalingen inzake recht en vrijheden,* Report Working Party on Title II Belgian Constitution, Belgische Kamer van Volksvertegenwoordigers, 20 february 2006, DOC 51 2304/001,17; M. BOSSUYT, "Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof" in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia,* Antwerp, Intersentia, 2010, 64; G. MAES, *De afdwingbaarheid van sociale grondrechten,* Antwerp, Intersentia, 2003, 125; D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe,* Groningen, Europa Law Publishing, 2010, 31.

[46] G. MAES, *De afdwingbaarheid van sociale grondrechten*, Antwerp, Intersentia, 2003, 125.

[47] D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe,* Groningen, Europa Law Publishing, 2010, 31.

[48] M. BOSSUYT, "Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof", in W. RAUWS and M. STROOBANT, *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia,* Antwerp, Intersentia, 2010, 67.

[49] M. BOSSUYT, "Artikel 23 van de Grondwet in de rechtspraak van het Grondwettelijk Hof", in W. RAUWS and M. STROOBANT, *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia,* Antwerp, Intersentia, 2010, 67. In its text the author refers to following cases: Const. Court (Belgium), no. 41/2002, 20 February 2002, online access: www.juridat.be; Const. Court (Belgium),

However, with the acceptance of the standstill-principle, the Court gradually makes a profound legal protection possible with respect to the right to social security. This brings about that the Constitutional Court still leaves the legislator a large margin of discretion.

Some ambiguities concerning the right to social security in Article 23 have to be solved in the future. Firstly, it is still uncertain whether the right to social security has direct effect in the Belgian legal order. Legal doctrine and jurisdiction both accepted the direct effect of several parts of Article 23 of the Belgian Constitution. However, this seems to conflict with the constitutional legislator's original intention.[50] Secondly, the contents of the right to social security is not entirely clear and will need further refinement by the Constitutional Court.

Thirdly, the case law of the Constitutional Court is criticized by legal scholars because Article 23 does not accord with Article 12 (3) of the (Revised) European Social Charter that establishes the states' obligation to gradually extend the protection's scope of the national social security system. Such gradual extension is not accepted by the Constitutional Court.[51]

At last, it is not clear in which way the standstill-principle of the Constitutional Court should be applied in practice at this moment. Although it has been extensively studied by the legal doctrine, the standstill principle still needs further elaboration and refinement.[52] Hence we can conclude that the right to social security in the Belgian constitution is still, twenty years after its enactment, in a transitional phase. Some additional flesh should be put on the bones of Article 23 by either the Constitutional Court or the competent Belgian authorities in order to provide a firm and legally secure guarantee for the protection of social security rights in Belgium.

4. Social security rights in times of economic crisis

This chapter will provide an overview of some important changes in the Belgian social security system during the recent economic crisis (from 2007 until now). As this is a legal contribution, we will focus upon a couple of important legislative changes in Belgian social security law, more specifically in the area of pensions and unemployment

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no. 66/2007, 26 April 2007, online access: www.juridat.be; Const. Court (Belgium), no. 92/2008, 26 June 2008, online access: www.juridat.be; See as well : M. DAMBRE, "Het verplicht schriftelijk woninghuurcontract doorstaat de grondwettelijke toets", noot onder Const. Court, no. 92/2008/, 26 June 2008, *NjW* 2008, 735/736.

[50] J.F. LECLERCQ, "Sociale zekerheid: honderduizend of niets, stop je of ga je verder?", *RW* 200708, 509; G. MAES, *De afdwingbaarheid van sociale grondrechten,* Antwerp, Intersentia, 2003, 389393; M. STROOBANT, "Algemeen Besluit" in W. RAUWS and M. STROOBANT, *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia,* Antwerp, Intersentia, 2010, 201; For an overview of some of the case law concerning the direct effect of Article 23 : D. PIETERS and P. SCHOUKENS, "Country Report on Belgium" in U. BECKER, D. PIETERS, F. ROSS and P. SCHOUKENS (eds.), *Security: A General Principle of Social Security Law in Europe,* Groningen, Europa Law Publishing, 2010, 27.

[51] M. STROOBANT, "Algemeen Besluit" in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia,* Antwerp, Intersentia, 2010, 204.

[52] M. STROOBANT, "Algemeen Besluit" in W. RAUWS and M. STROOBANT (eds.), *Sociale en economische grondrechten. Artikel 23 GW: een stand van zaken na twee decennia,* Antwerp, Intersentia, 2010, 204.

benefits. We will also take a closer look at some recommendations from the Council of the European Union under the European Semester[53] which may have an influence on the current social security reforms in Belgium.

a) Recent social security changes in Belgium

At the end of 2011, the Belgian pension system was reformed by a statute in which the Belgian Government approved some final issues before the end of the year.[54] Aim of the different reforms was to render early retirement increasingly difficult by installing different reforms. First, the early retirement age was raised for all citizens to 62 years.[55] This increase will be realized gradually, with a pension age-gain of half a year, starting in 2013. In this way, the actual pension age of 65 years will be reached in 2016. These reforms also altered the minimum career length, which was increased from 35 to 40 years.[56] Again, this increase will be realized gradually, starting in 2012 and ending at 42 years in 2015. Additional changes were made in 2015 to increase the retirement age to 66 years in 2025 and 67 in 2030.[57] Furthermore, age for early retirement was also increased from 62.5 to 63 years in 2018.[58] The minimum career length will also be further increased from 41 years in 2017 to 47 years in 2019.[59]

Furthermore, the statute repealed some special pension schemes for sailors and pilots.[60] The statute also introduced more stringent criteria for several periods of non-activity which are equivalent to work for the determination of the career length.[61] Finally, the calculation of the pension for civil servants was made less favourably: their pension will now be calculated on the basis of the average income received the last ten years of their career instead of the last five years.[62]

Changes were moreover made to the survivor's pension system in order to remove the existing unemployment traps. The survivor's pensions currently aim at compensat-

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[53] For additional information on the EU semester and EU economic governance : F. FABBRINI, "The Euro-crisis and the courts: judicial review and the political process in comparative persective", *Berkeley J. Int'l L.* 2014, 1–79; A. HINAREJOS, "The Euro Area Crisis and Constitutional Limits to Fiscal Integration", *CYELS* 2012, 243; K. LENAERTS, "Economic Integration, Solidarity and Legitimacy", *KU Leuven Euroforum* 2013, 6.

[54] Wet van 28 december 2011 houdende diverse bepalingen, *BS* 30 december 2011, p. 81644.

[55] Art. 85 wet van 28 december 2011 houdende diverse bepalingen, *BS* 30 december 2011, p. 81644.

[56] Art. 85 wet van 28 december 2011 houdende diverse bepalingen, *BS* 30 december 2011, p. 81644.

[57] Art. 12 Wet van 10 augustus tot verhoging van de wettelijke leeftijd voor het rustpensioen en tot wijziging van de voorwaarden voor de toegang tot het vervroegd pensioen en de minimumleeftijd van het overlevingspensioen, *BS* 21 augustus 2015, 2de editie, p. 54410.

[58] Art. 18 Wet van 10 augustus tot verhoging van de wettelijke leeftijd voor het rustpensioen en tot wijziging van de voorwaarden voor de toegang tot het vervroegd pensioen en de minimumleeftijd van het overlevingspensioen, *BS* 21 augustus 2015, 2de editie, p. 54410.

[59] Art. 18 Wet van 10 augustus tot verhoging van de wettelijke leeftijd voor het rustpensioen en tot wijziging van de voorwaarden voor de toegang tot het vervroegd pensioen en de minimumleeftijd van het overlevingspensioen, *BS* 21 augustus 2015, 2de editie, p. 54410.

[60] Art. 111–116 wet van 28 december 2011 houdende diverse bepalingen, *BS* 30 december 2011, p. 81644.

[61] Art. 122 – 126 wet van 28 december 2011 houdende diverse bepalingen, *BS* 30 december 2011, p. 81644.

[62] Art. 110 wet van 28 december 2011 houdende diverse bepalingen, *BS* 30 december 2011, p. 81644.

ing the financial losses regarding the spouse's death. However, as this pension can only be combined with a limited professional income, persons who were granted a survivor's pension reduced or in some cases even stopped their professional activities.[63] From 2015 onwards, the survivor's pension will be replaced by a transitional allowance for widowers or widows under 45 years old, allowing to cumulate this benefit with a professional income.[64] The age of 45 will be gradually increased, to 50 years in 2025. Finally, the survivor's pension shall also be limited in time: two years for a widow or widower with dependent children, one year otherwise.[65]

As of November 2012, a reform regarding the Belgian unemployment benefits entered into force.[66] While preserving the regime of receiving unemployment benefits unlimited in time, some changes were introduced to ensure that the unemployed will return quicker to the labour market. These changes concern, amongst others, the amount of the unemployment benefits, granting higher unemployment benefits in the first three months of unemployment and decreasing benefits quicker.[67] In calculating the benefits, the period during which an individual previously worked as an employee and the period of unemployment will play a more important role.[68]

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[63] Wet tot wijziging van het rustpensioen en het overlevingspensioen en tot invoering van de overgangsuitkering in de pensioenregeling voor werknemers en houdende geleidelijke opheffing van de verschillen in behandeling die berusten op het onderscheid tussen werklieden en bedienden inzake aanvullende pensioenen, *BS* 9 mei 2014; Voorstel van wet 4 maart 2014 tot hervorming van het overlevingspensioen van de zelfstandigen, *Parl. St.* Kamer 2013–2014, nr. 3418/01.

[64] Art. 2 Wet tot wijziging van het rustpensioen en het overlevingspensioen en tot invoering van de overgangsuitkering in de pensioenregeling voor werknemers en houdende geleidelijke opheffing van de verschillen in behandeling die berusten op het onderscheid tussen werklieden en bedienden inzake aanvullende pensioenen, *BS* 9 mei 2014; See also : Voorstel van wet 4 maart 2014 tot hervorming van het overlevingspensioen van de zelfstandigen, *Parl. St.* Kamer 20132014, nr. 3418/01.

[65] Art. 8 Wet tot wijziging van het rustpensioen en het overlevingspensioen en tot invoering van de overgangsuitkering in de pensioenregeling voor werknemers en houdende geleidelijke opheffing van de verschillen in behandeling die berusten op het onderscheid tussen werklieden en bedienden inzake aanvullende pensioenen, *BS* 9 mei 2014; See also : Voorstel van wet 4 maart 2014 tot hervorming van het overlevingspensioen van de zelfstandigen, *Parl. St.* Kamer 20132014, nr. 3418/01.

[66] KB tot wijziging van de artikelen 27, 36, 36ter, 36quater, 36sexies, 40, 59quinquies, 59sexies, 63, 79, 92, 93, 94, 97, 124 en 131septies van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering, *BS* 30 december 2011; KB tot wijziging van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering in het kader van de versterkte degressiviteit van de werkloosheidsuitkeringen en tot wijziging van het koninklijk besluit van 28 december 2011 tot wijziging van de artikelen 27, 36, 36ter, 36quater, 36sexies, 40, 59quinquies, 59sexies, 63, 79, 92, 93, 94, 97, 124 en 131septies van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering, *B.S.* 30 juni 2012.

[67] KB tot wijziging van de artikelen 27, 36, 36ter, 36quater, 36sexies, 40, 59quinquies, 59sexies, 63, 79, 92, 93, 94, 97, 124 en 131septies van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering, *BS* 30 december 2011; Koninklijk besluit tot wijziging van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering in het kader van de versterkte degressiviteit van de werkloosheidsuitkeringen en tot wijziging van het koninklijk besluit van 28 december 2011 van de artikelen 27, 36, 36ter, 36quater, 36sexies, 40, 59quinquies, 59sexies, 63, 79, 92, 93, 94, 97, 124 en 131septies van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering, *BS* 30 juni 2012.

[68] KB tot wijziging van de artikelen 27, 36, 36ter, 36quater, 36sexies, 40, 59quinquies, 59sexies, 63, 79, 92, 93, 94, 97, 124 en 131septies van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering, *B.S.* 30 december 2011; KB tot wijziging van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering in het kader van de versterkte degressiviteit van de werkloos-

b) Country-Specific recommendations under the European Semester

The Country-Specific recommendations under the European Semester are part of the budgetary supervision procedure at the level of the European Union. Due to the crisis this supervision mechanism was tightened, amongst others, through the creation of the European Semester. The European Semester is a yearly cycle of economic policy coordination where the Commission analyses the projected economic and structural reforms of the member states and provides recommendations for each of them.[69] When member states do not act upon these recommendations within the time frame given by the Commission and the Council, a warning can be issued. In the case of excessive macroeconomic imbalances, the Council can issue a sanction against the member state in question.[70]

The Country-Specific recommendations under the European Semester lay down measures in order to strengthen the economic position of the member states, including the national social security systems as they are an important part of the national budgets.

In the Country Specific recommendations of 2014 and 2013, the Commission and the Council encouraged Belgium to close the gap between the effective and statutory retirement age and to pursue the ongoing reforms of reducing early-exit possibilities.[71] Furthermore, Belgium has to invest in active-aging programs and in increasing the statutory retirement age by aligning the retirement age with the life expectancy. Also, the cost-efficiency of public spending on long-term care has to be improved.[72] In 2015 the government was encouraged to complement the pension reform by linking the statutory retirement age to the life expectancy.[73]

Furthermore, the Commission and the Council emphasized the importance of the longterm sustainability's improvement of Belgian public finances. Belgium can realize

heidsuitkeringen en tot wijziging van het koninklijk besluit van 28 december 2011 tot wijziging van de artikelen 27, 36, 36ter, 36quater, 36sexies, 40, 59quinquies, 59sexies, 63, 79, 92, 93, 94, 97, 124 en 131septies van het koninklijk besluit van 25 november 1991 houdende de werkloosheidsreglementering, *B.S.* 30 juli 2012.

[69] The Council and the European Council have to approve the draft country specific- recommendations of the Commission. For more information about the European Semester and Country Specific Recommendations see: P. SCHOUKENS and J. BEKE SMETS, "Fighting Social Exclusion under EU Horizon 2020. Enhancing the Legal Enforceability of the Social Inclusion Recommendations", *European Journal of Social Security* 2014, 51–73.

[70] For more information see : K. Lenaerts, "Economic Integration, Solidarity and Legitimacy", *KU Leuven Euroforum* 2013, 6; P. SCHOUKENS and J. BEKE SMETS, "Fighting Social Exclusion under EU Horizon 2020. Enhancing the Legal Enforceability of the Social Inclusion Recommendations", *European Journal of Social Security* 2014, 51–73.

[71] Council Recommendation, 8 July 2014, on Belgium's national reform program and delivering a Council opinion on Belgium's 2014 stability programme; Council Recommendation No. 10623/1/13, 19 June 2013, on Belgium's 2013 national reform program and delivering a Council opinion on Belgium's stability program for 2012–2016.

[72] Council Recommendation, 8 July 2014, on Belgium's national reform program and delivering a Council opinion on Belgium's 2014 stability programme; Council Recommendation No. 10623/1/13, 19 June 2013, on Belgium's 2013 national reform program and delivering a Council opinion on Belgium's stability program for 2012–2016.

[73] Council Recommendation, 14 July 2015 on the national reform programme of Belgium and delivering a Council opinion on the 2015 stability programme of Belgium.

this by curbing age-related expenditure, which includes health care expenditure. In 2011 and 2012, Belgium received a similar remark from the Council and the Commission.[74]

Moreover, the Council and the Commission urged Belgium in 2011 and 2012 to pursue the initiated reform of the unemployment benefit system to reduce disincentives to work and to strengthen the focus of activation policies on vulnerable groups, in particular people with a migrant background.[75] Belgium should also reduce the high social security burden for low paid-jobs.

c) Recent and future changes to the Belgian social security system and the right to social security

During the crisis, the pension reforms, which increased the early retirement age to 62 years and adapted the social statute of civil workers, made early retirement increasingly difficult. The survivor's pensions and the unemployment benefits were also reformed in order to increase the labour force participation rate. These reforms were (at least to a certain extent) the result of the Country-Specific recommendations addressed to Belgium.

The question remains which reforms regarding the Belgian social security system will be established in the near future. During the Belgian elections of May 2014, social security reform was an important topic: several political parties suggested an increase of the retirement age, an abolition of unemployment benefits unlimited in time and some proposed the rationalization of the overall social security system together with the elimination of possible abuses. Some of the proposals have been translated into legislation, e.g. further increase of the retirement age.

Besides political wishes to reform the social security system in Belgium, the European Union also has an increased impact on the Belgian social security legislation. In the yearly Country-Specific recommendations, Belgium is urged to reform its social security system in order to strengthen its competitiveness and to ensure the long-term sustainability of its public finances. As stated above, the recent reforms in Belgium with respect to the pension and unemployment system are examples of this increased impact.

However, we have to emphasize that the European Union does not have comprehensive legislative competences in the field of social security and that it cannot (or only limitedly) change the social security legislation of the member states by means of directives or regulations. In any case, the recommendations of the Commission and the Council will have to be implemented by national law. When altering national legislation, the legislator will have to respect the guarantees under Article 23, Articles 10 and 11, and the right to property under Article 1 Protocol no. 1 ECHR (and possibly Article 16 of the Belgian

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[74] Council Recommendation No. 11244/12, 6 July 2012, on Belgium's national reform programme 2012 of Belgium and delivering a Council opinion on the Stability Programme of Belgium, 20122015; Council Recommendation No. 209/2011, 12 July 2011, on Belgium's national reform programme 2012 of Belgium and delivering a Council opinion on the Stability Programme of Belgium, 2012–2015.

[75] Council Recommendation No. 11244/12, 6 July 2012, on Belgium's national reform programme 2012 of Belgium and delivering a Council opinion on the Stability Programme of Belgium, 20122015; Council Recommendation No. 209/2011, 12 July 2011, on Belgium's national reform programme 2012 of Belgium and delivering a Council opinion on the Stability Programme of Belgium, 2012–2015.

Constitution). As the Constitutional Court can test the validity of legislation with regard to these rights, they can be important guiding principles for the legislator when altering social security legislation. Especially the principle of standstill can play an important role in assessing the validity of detrimental changes in national social security legislation.

Conclusion

As from 1994, Belgium has its own right to social security, which is included in Article 23 of the Belgian Constitution. Because of the lack of clarity by the constitutional legislator regarding the scope and contents of the right to social security, the Belgian Constitutional Court and the doctrine had to interpret this new-born right. As the Court seems to acknowledge a large discretion to the legislator in defining the specific content of the right to social security, the protection of this right appears rather limited. Secondly, the fact that the right to social security in Article 23 does not have direct effect, seems to restrict the application of this Article even further. Nevertheless, the right to social security entails a standstill-principle which means that the legislator cannot diminish the level of protection in a considerable way.

The right to social security hence requires the legislator to motivate possible changes and to make sure that these changes respect the guarantees provided in the Constitution. Article 23 can thus be seen as a *"buffer",* but it still allows the legislator to reform or alter the national social security system in case of economic problems. Furthermore, this article also allows the legislation to ensure the sustainability of the national system.

Not only Article 23 can protect social security claims, the prohibition of discrimination in Articles 10 and 11 too provide some protection by laying down a duty for the legislator not to discriminate, also with regard to social security rights. The right to property in Article 1 Protocol no. 1 ECHR provides a third judicial safeguard, however it remains unclear whether Article 16 of the Belgian Constitution can be invoked in social security claims.

From the previous chapters, it has become clear that the protection of social security is layered and guaranteed through different constitutional guarantees. Whilst still leaving ample leeway for reform, the different constitutional guarantees do seem to provide for some protection.

Summary

The paper discusses the right to social security in the Belgian Constitution and its relation to the different social security reforms due to the recent economic crisis. The main research question is the following: "Can the right to social security in the Belgian Constitution be used as a real instrument to prevent social regress and as a stop for the roll-back of social expenses in times of crisis?"

Keywords: Belgium, social security rights, constitution, Right to social security