
Freedom of expression, a comparative law perspective

Belgium

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FREEDOM OF EXPRESSION, A COMPARATIVE LAW PERSPECTIVE

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Summary

This study forms part of a wider-ranging project which seeks to lay the groundwork for comparisons between legal frameworks governing freedom of expression in different legal systems.

The following pages will analyse, with reference to Belgium and the subject at hand, the legislation in force, the most relevant case-law and the concept of freedom of expression with its current and prospective limits, and end with some conclusions and possible solutions for future challenges.

From the moment the Kingdom of Belgium was established, freedom of expression was protected within the country's legal system. As society has evolved so, to some extent, has the understanding and exercising of the right to freedom of expression. The legislature and case-law have had to keep pace with these changes in order to ensure continuity in the protection afforded to freedom of expression, but also to the rights of others with which this freedom may conflict.

AUTHOR

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List of abbreviations

A&M	Authors and media
'Bull. off'.	Official Journal
Cass.	Judgment of the Court of Cassation
C. const.	Judgment of the Constitutional Court
C.D.P.K.	Public law chronicles
C.E.	Conseil d'État (Council of State)
ECHR	European Convention on Human Rights
CIPE	Interministerial Conference on Foreign Policy
ECJ	Court of Justice of the European Union
Parl. doc.	Parliamentary documents
JLMB	Case-law of Liège, Mons and Brussels
OJEU	Official Journal of the European Union
LSBxl	Special act on the Brussels institutions
LSRI	Special act on insitutional reform
N.j.W.	Nieuw juridisch weekblad ('New Legal Weekly')
UN	United Nations
Pas.	Pasicrisie (Case Reports)
Pasin.	Pasinomie (Law Reports)
ICCPR	International Covenant on Civil and Political Rights
RBDC	Revue belge de droit constitutionnel (Belgian Review of Constitutional Law)
RTDI	Revue du Droit des Technologies de l'Information (Review of Information Technology Law)
Rev. dr. comm.	Review of Communal Law
RTDH	Quarterly Human Rights Review
R.W.	Rechtskundig weekblad ('Lawyers' Weekly')
SPF	Federal Public Service (formerly Federal Ministry)
TORB	Tijdschrift voor onderwijsrecht en onderwijsbeleid ('Journal on Education Law and Policy')

N.B.: According to convention in Belgium, judgments which mention only the name of a city (e.g. Brussels, 27 November 2012) are judgments of a Court of Appeal.

Summary

Under Belgian law, freedom of expression is a constitutionally protected democratic value. The Belgian Constitution provides considerable protection for the freedom of opinion, of education and of the press, and for the freedom of expression of members of parliament, through its Articles 19, 24, 25 and 58.

The Belgian legislature was subsequently led to limit freedom of expression to a certain extent where it adversely affects the rights of others. By establishing the offences of slander and defamation, provided for in Article 443 et seq. of the Criminal Code, the legislature protects anyone who considers himself to be the victim of an attack on his honour, on account of an excessive exercising of freedom of expression. Following the same principle, a person whose use of the freedom of expression in any way damages another person may be held liable for that damage. For example, this study focuses in particular on the various ethical obligations that a journalist has to respect when disseminating information to the general public. The right to be forgotten is another palliative measure enabling victims to secure the anonymisation of articles contained in archives, in particular those accessible online. Finally, the legislature has sought to avoid the right to freedom of expression giving rise to propaganda of discriminatory views: in particular, the laws of 30 July 1981 on the suppression of certain acts of racism or xenophobia, and of 23 March 1995 seeking to prevent the denial, minimisation, justification or approval of the genocide committed by the German Nazi regime during World War II, were adopted to that end.

In addition, Belgian case-law provides its own interpretation of Articles 19 and 25 of the Constitution. In particular, the Belgian courts have questioned whether measures can be taken in order to prevent certain opinions from being disseminated, with a view to reconciling the right to freedom of expression with other constitutionally protected rights. Moreover, the term 'press' within the meaning of Article 25 of the Constitution has been the subject of several case-law developments stemming from the rise of the audiovisual and internet press.

Finally, when exercised extensively, freedom of expression may conflict with other fundamental rights such as the right to privacy or the right to the maintenance of law and order. Belgian law therefore provides that freedom of expression may be limited to a certain extent. For example, as mentioned above, it criminalises Holocaust denial, racism and xenophobia. Moreover, Article 25 of the Constitution makes it possible to penalise the publication of a written document in the press. In this respect, the extent to which such preventive measures are compatible with the Constitution is an ongoing cause for debate.

I. Introduction to the origins of freedom of expression in Belgium

Freedom of expression is a fundamental right which plays a key role in any democratic regime. That premise was laid down in Belgian law by the original constituent power when the state was founded. The highest Belgian law, the Constitution, protects freedom of expression in many different ways. We therefore propose, by way of an introduction, to investigate the origins of freedom of expression in the country and to answer the following question: how did the original constituent power in Belgium approach this important right when drafting the Constitution?

First, the Constitution enshrined the freedom of *opinion*. The National Congress wanted to guarantee freedom of religion and opinions in all matters, i.e. the manifestation of thought, in its many forms¹. 'Religions', wrote Émile Huytens, 'like the press, must be entirely free: religions are the expression of the feelings of the soul, of humanity; the press is the expression of opinions and of enlightenment'². Preventive measures could only be taken against acts that disturbed the peace and public order³.

In particular, the Constitution held freedom of *religion* in great esteem. The Belgians, under Dutch rule, had been particularly irritated by 'the hidden but quite active government persecution of Catholic religion and instruction'⁴. In fact that persecution had only served to add momentum to the Belgian revolution. As the Baron de Sécus stressed at the National Congress, 'to thus establish this freedom on an unchallengeable basis is to ensure the future security of the state which we are hereby called upon to create. It is to heed the lessons of the past so as to seize control of the future and destroy the seed of what might yet lead to unrest'.⁵

The constituent power then enshrined the freedom of the press. During the Ancien Régime all kinds of preventive and repressive measures had been deployed against the press. Censorship and prior authorisation to publish or continue to publish a newspaper had been commonplace. Thereafter, despite the French Revolution, Napoleon Bonaparte had retained a system of censorship⁶, while King William I of the Netherlands⁷ had introduced a system of prior authorisation, imposing severe penalties for printing press-related crimes⁸. This system persisted throughout the period of Dutch rule over the territories of present-day Belgium. It was in response to this period of censorship that the Belgian constituent power moved to protect the freedom of the press in the Constitution so that 'all opinions can freely be stated, for a state would be unjust if it were to declare all opinions free while imposing restrictions on some'.⁹ That freedom was already largely rooted in the habits of public opinion, to the extent

¹ Emile HUYTENS, *Discussions du Congrès national de Belgique 1830-1831*, Brussels, Société typographique belge Adolphe Wahlen et Cie, 1844, p. 574.

² Emile HUYTENS, *op. cit.*, p. 576.

³ Emile HUYTENS, *op. cit.*, p. 575.

⁴ Emile HUYTENS, *op. cit.*, p. 575.

⁵ Emile HUYTENS, *op. cit.*, p. 575.

⁶ Belgium was part of France from 1795 to 1815.

⁷ Belgium was part of the Netherlands from 1815 to 1830.

⁸ Henri VAN MOL, *Manuel de droit constitutionnel de la Belgique*, Liège, Georges Thone, 1946, pp. 58-59 ; Jan Velaers, "'De censuur kan noe worden ingevoerd'. Over de motieven van het censuurverbod", in *X, Censuur. Papers from the colloquium of 16 May 2003*, Brussels, Larcier, 2003, pp. 13-21.

⁹ Emile HUYTENS, *op. cit.*, p. 653.

that the principle was seen as 'the cornerstone of the constitutional structure, because it protects and preserves all other freedoms'.¹⁰

The constituent power then enshrined the freedom of education. Prior to the country's independence, opponents of the Dutch regime resented its control over both religious and secular education.¹¹ Indeed, the Netherlands imposed a particular style of thought in education.¹² For this reason, the Belgian National Congress considered that:

'oversight is, like censorship, a preventive measure, sufficient to destroy all freedom at the whim of the government'.¹³

The Belgian provisional government therefore proclaimed the freedom of education, while allowing existing universities and colleges to continue to operate. This then enabled the state to retain for itself the inalienable right to instruct the general public¹⁴, but only within the institutions that it itself funded.¹⁵ For the constituent power considered that state intervention in education was not an obstacle to the freedom of education, but was something that nevertheless helped to offset the harmful effects of unlimited freedom. In this regard, Théodore Juste stressed that:

'Since free institutions depend on the often precarious resources of those who create or direct them, the state must be able to cater for all eventualities. It cannot, without disregarding its highest task, abandon the nation's intellectual future to the fluctuating fortunes and often highly perilous experiments of speculation and competition. The institutions founded and directed by the government with the support of the legislature are intended to give rise to noble competition, to prevent monopoly, to dispense with the routine, to constantly maintain education at the level of scientific progress, and finally to strengthen national morale.'¹⁶

Thus, it is clear that freedom of expression was a fundamental right which was securely anchored in the Belgian constitution from the outset of the founding of the nation. Subsequently, socio-economic events and developments repeatedly led Belgian legislation and case-law to adopt new positions as the concept of freedom of expression evolved: sometimes to protect this freedom as new technologies and new media arose, and sometimes to limit this freedom when it clashed with other fundamental rights or developments in a pluralistic democracy.

The purpose of this study is to provide an overview of the different manifestations of freedom of expression in Belgian law. In the first chapter we will examine the different rules in force governing this fundamental right (II). In the second, we will examine the interpretation in Belgian case-law of certain aspects of freedom of expression (III). In the third and final chapter we will analyse the conflicts that can arise when several competing fundamental rights, such as the respect for private life or the maintaining of law and order, are simultaneously at play (IV.1). Finally we will review a few of the limitations that Belgian law imposes on freedom of expression (IV.2).

¹⁰ Théodore JUSTE, *Histoire du Congrès national ou de la fondation de la monarchie belge*, Brussels, Libraire polytechnique d'Aug. Decq., 1850, I, p. 372.

¹¹ Théodore JUSTE, *op. cit.* I, p. 361.

¹² Théodore JUSTE, *op. cit.*, p. 366.

¹³ Théodore JUSTE, *op. cit.* I, p. 366.

¹⁴ Théodore JUSTE, *op. cit.*, p. 363.

¹⁵ Théodore JUSTE, *op. cit.*, p. 367.

¹⁶ Théodore JUSTE, *op. cit.*, p. 371.

II. Legislation governing freedom of expression in Belgium

This second chapter, which begins our analysis of the state of freedom of expression in Belgium, provides an overview of the constitutional and legislative standards that either support or restrict freedom of expression. First, we will look at the Belgian Constitution. Here, over four sub-sections, we will examine freedom of expression in general, freedom of education, freedom of the press and the principles of freedom of expression for members of parliament. Secondly, we will analyse the provisions of Belgian law governing libel/slander and defamation; civil liability; hate speech; and Holocaust denial.

II.1. The Constitution

II.1.1. Freedom of opinion and expression (Article 19 of the Constitution)

Article 19 of the Constitution, unchanged since 1831, states that:

‘The freedom of religion and public worship, and the freedom to express one’s views in all respects, shall be guaranteed, except when offences are committed in the exercising of these freedoms’.¹⁷

This provision guarantees both the freedom of religion and the freedom of expression. In contrast to the constitutions of other states and treaties on fundamental rights and freedoms¹⁸, the Belgian constituent power did not wish to enshrine these two fundamental rights in separate articles. This peculiarity is explained by the compromise that had to be found to bridge the views of the Catholics and the Liberals at the National Congress of 1830-1831¹⁹.

The Belgian Constitution guarantees the expression of opinion in several forms: dissemination by means of video, written material or internet content, images, photographs or even drawings²⁰. Moreover, symbolic language is also covered by freedom of expression²¹.

Commercial advertising and communication is also, in principle, protected to some extent by Article 19. However, certain restrictions may be imposed²².

Moreover, it can be seen from that provision that, as of 1831, the Constitution acknowledged that there were certain limits to freedom of expression and that certain associated penalties could be imposed. The abuse of this freedom, provided that it constitutes an offence, can be

¹⁷ Article 19 of the Belgian Constitution.

¹⁸ By way of an example, see the Constitution of the French Republic, which, in its preamble, refers to the Declaration of Human Rights, which itself provides protection for freedom of religious opinion (Article 10) and freedom of expression (Article 11); see, too, the Spanish Constitution, which guarantees freedom of opinion, religion and worship (Article 16) and freedom of expression (Article 20).

¹⁹ Jan Velars, *De Grondwet — Een artikelgewijze Commentar, Deel I, Het federale België, de grondrechten*, Bruges, Die Keure, 2019, p. 325.

²⁰ Christian BEHRENDT and Martin VRANCKEN, *Principes de droit constitutionnel belge*, Brussels, La Charte, 2019, p. 718; Johan VANDE LANOTTE, *Belgisch Publiekrecht*, I, Bruges, Die Keure, 2015, p. 577.

²¹ For example, burning a flag, raising a fist, or taking part in an event.

²² Regarding commercial communication, see Constitutional Court decree no 102/99 of 30 September 1999; Cass., 12 November 2004, *N.J.W.*, 2005, p. 552; Constitutional court judgment no 194/2009 of 26 November 2009 and the case-law criticism of Bernard Motulsky, « Divers — À propos de l'interdiction de la publicité audiovisuelle par les universités – Nobles principes, mais irréalistes ! », *J.T.*, 2010/6, no 6382, p. 102; Johan VANDE LANOTTE, *op. cit.*, pp. 577 and 578.

punished at criminal or civil level²³. By way of illustration, see Article 1382 of the Civil Code, Article 443 et seq. of the Criminal Code or the law of 23 March 1995 seeking to prevent the denial, minimisation, justification or approval of the genocide committed by the German Nazi regime during the Second World War.²⁴ These examples will be explained later in our analysis. Other restrictions on freedom of expression are conceivable and have been developed in case-law. For example, preventive measures can be taken. These restrictions will be examined in the later section on developments in case-law.

Finally, we should point out that Article 19 of the Belgian Constitution is, while a standalone provision, also subsidiary in that it can, if necessary, be combined with other freedoms such as freedom of religion (Articles 20 and 21), freedom of education (Article 24), freedom of the press (Article 25), freedom of assembly (Article 26)²⁵ or even the freedom of expression for members of parliament (Article 58)²⁶.

II.1.2. Freedom of education (Article 24 of the Constitution)

Article 24 of the Constitution guarantees freedom of education²⁷. Indeed, the public authorities do not have a monopoly on education. Private individuals, in associations or acting in their own right, may provide educational services. The question of whether legal persons governed by public law, with the exception of the Communities, such as municipalities, also enjoy the rights afforded by freedom of education, remains open to debate²⁸.

Freedom of education also covers the freedom to open a school and to organise and provide education on the premises. It also covers the choice of teaching methods and content of lessons, as well as their assessment and certification. Gradually, freedom of education has expanded and now includes the ability to provide education based not on specific beliefs but on alternative teaching methods²⁹.

Freedom of education, understood in the sense of freedom of expression, also encompasses academic freedom. The latter principle should be understood in the sense that teachers and researchers, in the interests of the development of knowledge and the diversity of opinion, should enjoy the extended freedom to conduct research and to express their views in the course of their professional activities³⁰. There are also authors who call for scientific research

²³ Dirk VOORHOF, « De doorwerking van publiekrechtelijke beginselen in de civielrechtelijke aansprakelijkheid voor informatie via (multi-)media », in X, *Publiekrecht. De doorwerking van het publiekrecht in het privaatrecht. Postuniversitaire Cyclus Willy Delva 1996-1997*, Ghent, Mys and Breesch, 1997, pp. 181-227 and 485-523.

²⁴ Christian BEHRENDT and Martin VRANCKEN, *op. cit.*, p. 720; Johan VANDE LANOTTE, *op. cit.*, pp. 580-584.

²⁵ François TULKENS, « La liberté d'expression en général », in Marc VERDUSSEN and Nicolas BONBLED (dirs.), *Les droits Constitutionnels en Belgique*, Volume II, Brussels, Bruylant, 2011, p. 821.

²⁶ Christian BEHRENDT and Martin VRANCKEN, *op. cit.*, p. 718.

²⁷ Article 24 of the Constitution.

²⁸ Jan DE GROOF and Kurt WILLEMS, « Onderwijsvrijheid en het artikel 24 § 1 Belgische Grondwet – 30 jaar interpretatie door het Grondwettelijk Hof en de Raad van State », *T.O.R.B.*, 2017-2018, p. 8; C.E. *Louvet judgment*, no 226.660 of 11 March 2014: the Conseil d'État ruled that, despite employing a number of staff considered excessive according to the standards set for the school population of Belgium's French Community, as said staff were paid out of own resources and therefore not subsidised, the Commission of the French Community (COCOF) was simply availing itself of the principle of freedom of education in the same way as any organiser of subsidised education, be it free or official. Article 24(5) of the Constitution does not restrict that freedom.

²⁹ Christian BEHRENDT and Martin VRANCKEN, *op. cit.*, pp. 700 et seq.; Johan VANDE LANOTTE, *op. cit.*, p. 646 et seq.; see C.E. judgment on *ASBL Hiberniaschool*, no 25.423 of 31 May 1985; See also C. const., judgments no 25/92 of 2 April 1992 and no 76/96 of 18 December 1996.

³⁰ Johan VANDE LANOTTE, *op. cit.*, p. 648; see also Const. Court judgment no 167/2005 of 23 November 2005, recital B.18.1 and B.21; Const. Court judgment no 159/2009 of 13 October 2009 and Const. Court judgment no 155/2011 of 13 October 2011.

carried out in and by universities to be regarded as 'education' and thus covered by Article 24³¹.

II.1.3. Freedom of the press (Article 25 of the Constitution)

Article 25 of the Belgian Constitution guarantees the freedom of the press. It states that:

'The press is free; censorship can never be permitted; writers, publishers or printers can never be required to pay a security.

When the author is known and domiciled in Belgium, the publisher, printer or distributor cannot be prosecuted.'³²

We will first analyse the freedom of the press in general, before considering the prohibition on censorship of the press enshrined in Article 25 of the Constitution.

II.1.3.1 Freedom of the press

Article 25 of the Constitution, after declaring that the press shall be free, prohibits censorship by the authorities or any requirement for writers, publishers or printers to pay a security³³. Censorship can be defined as requiring prior authorisation from the authorities before publishing or disseminating written text³⁴. Bonding is defined as the pre-payment of a certain sum of money to guarantee compensation for any damage which might be caused by publications³⁵. On the other hand, any abuse on the part of an author of their freedom to write and to distribute printed articles may be punished, but only after the event³⁶. Indeed, the constituent power considered that such a system would be sufficient to prevent the spread of abuses of the freedom of expression³⁷.

With the rise and development of new media (radio, television and, more recently, the internet), the precise definition of 'the press' has become more complex, as we will see in the section on developments in case-law.

II.1.3.2 Press offences

A press offence is deemed to have been committed where the expression of an opinion is excessively prejudicial to another person³⁸, when disseminated in a written text which exists in several copies³⁹ generated by means of a reproduction, printing or similar process⁴⁰, and which is the subject of real and effective advertising⁴¹.

³¹ Jan VELAERS, *Het federale België, het grondgebied, de grondrechten*, op. cit., p. 476; for further information see Geert VAN HAEGENDOREN, *De bevoegdheidsverdeling in het Federale België, Deel 6, Het Wetenschappelijk onderzoek*, Bruges, Die Keure, 2000, p. 65 and Michel PÂQUES, « Réforme de l'État et politique scientifique », *Adm. Publ.*, 1994, p. 198.

³² Article 25 of the Constitution; Johan VANDE LANOTTE, op. cit., p. 592.

³³ François JONGEN and Cyrille DONY, « La liberté de la presse », in Marc VERDUSSEN and Nicolas BONBLED (dirs.), op. cit., Volume II, Brussels, Bruylant, 2011, pp. 855-857.

³⁴ Christian BEHRENDT and Martin VRANCKEN, op. cit., p. 654.

³⁵ *Ibid.*, p. 654.

³⁶ Oscar ORBAN, *Le droit constitutionnel de la Belgique*, volume III, Liège and Paris, Dessain en Giard & Brière, 1911, p. 441.

³⁷ Emile HUYTTENS, *Discussions du Congrès national de Belgique, 1830-1831*, volume I, Brussels, Société typographique belge, 1844, p. 642.

³⁸ Cass., 12 May 1930, *Pas.*, I, p. 211, esp. p. 223; Cass., 21 October 1981, *Pas. I*, p. 259, esp. p. 262.

³⁹ Cass., 20 July 1966, *Pas.*, I, p. 1405.

⁴⁰ Cass., 9 December, *Pas.*, 1982, I, p. 482.

⁴¹ Cass., 13 April 1988, *Pas.*, I, p. 942; Christian BEHRENDT and Martin VRANCKEN, op. cit., p. 656; Johan VANDE LANOTTE, op. cit., pp. 594 et seq.

The constituent power made press offences subject to a specific regime, which can be broken down into three parts. First, the Constitution provides for a 'cascading liability' mechanism. Second, the rules of jurisdiction deviate from the conventional rules governing criminal justice in Belgium. Third, Article 25 contains a derogation from the rules on the public nature of hearings.

II.1.3.2.a) Cascading liability

Firstly, where press offences are concerned, the constituent power set in place a 'cascading liability' mechanism. This form of liability means that proceedings must be carried out in the order laid down in Article 25 of the Constitution. Only one person can thus be liable for the offence. The provision states that when the author is known and is domiciled in Belgium, the publisher, printer or distributor cannot be prosecuted.

Conversely, if the author is unknown or they do not live in Belgium, the publisher alone can be prosecuted. This multi-layer liability is an exception to the principles of criminal law. Whereas anyone who has taken part in a crime in any way can be prosecuted either as a perpetrator or an accessory⁴², in matters of the press only one person can be held liable⁴³.

The origins of cascading liability reside in the fear of the National Congress that the traditional liability regime would lead to a form of indirect, private censorship: namely the refusal of publishers to disseminate certain publications⁴⁴. The rule of cascading liability also applies in civil matters, for publications, which makes it possible to hold journalists and authors liable for any mistakes they make when exercising their freedom of expression and of the press⁴⁵.

II.1.3.2.b) Derogation from the rules of jurisdiction in criminal matters

Secondly, in the area of the freedom of the press, a derogation is provided for in relation to the rules on jurisdiction in criminal matters. Article 150 of the Constitution states that press crimes and offences shall in principle be heard before the Court of Assizes⁴⁶. That court is composed of a jury of peers selected by the drawing of lots⁴⁷.

The fact that such a dispute is assigned to a court with trials by jury is explained by the confidence that the constituent power had in the judgment of the people and the relative distrust it had in the judiciary⁴⁸. This provision is to be interpreted strictly: the jury of that court is responsible for criminal prosecutions, but not for civil prosecutions. However, the public prosecutor's office only rarely prosecutes those responsible for offences concerning the printed press, as we will see in the section on Belgian case-law. Consequently, a person who has been adversely affected by statements published in the press can seek compensation for the harm suffered⁴⁹.

⁴² Articles 66-69 of the Belgian Criminal Code.

⁴³ André ALEN, *Algemene inleiding tot het Belgisch publiek recht*, Brussels, Story-Scientia, 1986, p. 336.

⁴⁴ Robert SENELLE, *Commentaar op de Belgische Grondwet*, Brussels, Ministry of Foreign Affairs, Foreign Trade and Development Cooperation, 1974, p. 48.

⁴⁵ Cass., 31 May 1996, *R.W. 1996-1997*, p. 565; Johan VANDE LANOTTE, *op. cit.*, pp. 596 and 597; François JONGEN and Cyrille DONY, *op. cit.*, p. 857-861.

⁴⁶ Article 150 of the Constitution: with the exception of press violations stemming from expressions of racism or xenophobia.

⁴⁷ André MAST and Jean DUJARDIN, *Overzicht van het Belgisch grondwettelijk recht*, Brussels, Story-Scientia, 1987, p. 517.

⁴⁸ Christian BEHRENDT and Martin VRANCKEN, *op. cit.*, pp. 656 and 657.

⁴⁹ Johan VANDE LANOTTE, *op. cit.*, pp. 597 and 598; in this case, almost exclusive use will be made of Article 1382 of the Civil Code, analysed below.

II.1.3.2.c) *Derogation from the principle of public hearings*

Finally, Article 148 of the Constitution affords an additional protection to the freedom of the press: hearings must be held in public. Exceptions to this principle are allowed only in very specific cases, where such publicity would endanger 'public order and decency; such cases are determined by order of the court'⁵⁰.

In the case of press offences, the court may decide to proceed *in camera* if this is a unanimous decision; this, clearly, establishes an additional layer of protection⁵¹.

II.1.4. **Freedom of expression for members of parliament (Article 58 of the Constitution)**

Article 58 of the Constitution remains unaltered since its adoption by the National Congress in 1831:

'No member of either House can be prosecuted or be the subject of any investigation with regard to opinions expressed and votes cast by them in the exercise of their duties.'⁵²

This provision allows members of parliament to express themselves freely in debates in the assembly. It guarantees 'the representation of the country against the government, against the judiciary, against any government other than the Houses themselves, and also against individuals'⁵³. This article has its roots in the freedom of speech provision set out in the Bill of Rights of 1689, which was intended to protect parliamentarians from the excesses of royal power following the period of absolutism in the reign of James II⁵⁴.

The scope of Article 58 of the Constitution includes two elements:

- the protection of opinions and votes cast by a parliamentarian;
- in the course of the performance of their duties.

As regards the first element, both the oral and written statements of parliamentarians fall within the scope of protection of Article 58 of the Constitution. Collective opinions are also covered. The precise nature of the views expressed is irrelevant: these may be offensive, oppressive, defamatory or racist. The fact is that the effectiveness of the protection afforded by Article 58 to members of parliament would be seriously undermined if there were any words which, by their nature, were not covered by it⁵⁵.

As regards the second element, the protection of Article 58 applies only if a member's comments are made in the exercising of their mandate. This notion of the 'exercising of the parliamentary mandate' is to be interpreted strictly. Thus, giving a speech at a political meeting is not covered by the exercising of parliamentary duties. The case-law goes even further in considering that the views expressed by a parliamentarian in the press, even if the words in which those views are expressed are strictly identical to those the member had used in the Chamber, are not covered by Article 58. The case-law on this point has been unwavering since the *Crombez* judgment of the Court of Cassation of 1904⁵⁶. However, Article 58 does not

⁵⁰ Article 148 of the Constitution.

⁵¹ Johan VANDE LANOTTE, *op. cit.*, p. 599 ; François ONGEN and Cyrille DONY, *op. cit.*, p. 861 and 862.

⁵² Article 58 of the Constitution.

⁵³ Raoul HAYOIT DE TERMICOURT, « De parlementaire immuniteit », *R. W.* 1955-1956, p. 50.

⁵⁴ Oswald DE KERCKHOVE DE DENTREGHEM, *De l'inviolabilité parlementaire*, Brussels, Lacroix, 1867, p. 6.

⁵⁵ Christian BEHRENDT and Martin VRANCKEN, *op. cit.*, p. 157.

⁵⁶ Cass., 11 April 1904, *Crombez c. Havez*, *Pas.*, I, p. 199, Opinion of First Advocate General Ter Linden.

only cover opinions expressed in the House: it also protects views expressed in committee debates, political group meetings and parliamentary committees of inquiry⁵⁷.

Finally, with regard to the effects of this provision, the protection conferred is absolute and perpetual. The freedom of expression of members of parliament is thus guaranteed in full: they may not be held liable for such expression, neither during nor after their term of office. This protection is to be interpreted broadly. It applies in criminal, civil and disciplinary matters⁵⁸. It precludes any legal action directly targeting a member of parliament, but also any measure which might indirectly amount to penalising the member's conduct⁵⁹.

II.2. Legislation

II.2.1. Libel/slander and defamation (Articles 443 et seq. of the Criminal Code)

Article 443 of the Belgian Criminal Code defines the basic elements of libel/slander and defamation. It reads as follows:

'Any person who, in the following cases, has maliciously attributed to another individual a specific fact such as to impugn the honour of that person or to expose them to public contempt, without lawful proof of that fact being given, is guilty of libel/slander when the law admits proof of the alleged fact, and of defamation when the law does not admit such proof.

(...)'⁶⁰.

In this context, libel/slander may be defined as the malicious attribution of a specific fact such as to impugn the honour of a person or expose them to public contempt when the law admits the proof of this fact but the legal proof is not provided, and when this is done in a public forum as defined in Article 444 of the Criminal Code. Defamation is defined in virtually the same way but in this case the law does not admit the proof of the attributed fact⁶¹.

These two offences are built around the following elements:

- the attribution of a specific fact to a specific person;
- a fact liable to impugn the honour of that person or to expose them to public contempt;
- a fact whose legal proof is not provided or not admitted by law;
- malicious intent;
- the public nature of the forum in which the fact is attributed to the person⁶².

Firstly, the verb 'attribute' means that the fact must be attributed to a person, the supposed author of the fact. Such an attribution differs from an allegation in that an allegation is simply

⁵⁷ Cass., 1 June 2006, *J. T.*, 2006, 461, note by Sébastien VAN DROOGHENBROEK; Christian BEHRENDT and Martin VRANCKEN, *op. cit.*, pp. 158 and 159; Johan VANDE LANOTTE, *op. cit.*, p. 871 and 872; Jan VELAERS, *op. cit.*, p. 230; Jacques VELU, *Droit Public, volume I, Le statut des gouvernants*, Brussels, Bruylant, 1986, pp. 498 and 499.

⁵⁸ Koen MUYLLE, « Parlementaire onverantwoordelijkheid en parlementaire tucht: not so strange bedfellows », in *Liber Discipulorum André Alen*, Bruges, die Keure, 2015, p. 299.

⁵⁹ Christian BEHRENDT and Martin VRANCKEN, *op. cit.*, p. 159; for more details see Hendrick VUYE and Noémie RENUART, « Le libre débat politique, une valeur essentielle à la démocratie », *C.D.P.K.*, 2014, pp. 368 - 403.

⁶⁰ Article 443 of the Criminal Code.

⁶¹ Alain LORENT, « Atteintes portées à l'honneur ou à la considération des personnes », in *Droit pénal et procédure pénale*, Brussels, Kluwer, 2005, p. 12.

⁶² Alain DE NAUW and Franklin KUTY, *Manuel de droit pénal spécial*, Liège, Wolters Kluwer, 2018, p. 589.

the disclosing of a fact advanced by other parties, while leaving some doubt as to its veracity⁶³. In principle, then, a purely hypothetical attribution is not punishable⁶⁴.

On the other hand, such an attribution of a fact is no less criminal if it takes the form of a question or a suspicion, or if it is couched in irony, or if it is made as an allusion or an insinuation – and it is equally punishable in these forms. The same is not true of an attribution presented merely as a possibility or when outlining an impossible event, as long as not even a small section of the population might see such an event as possible⁶⁵.

Any fact whose truth may be both supported by evidence or challenged by evidence to the contrary shall be considered to be a 'specific fact'⁶⁶. In other words, a specific fact is only something for which there is a clear and direct attribution which may be verified, irrespective of whether it is a text, a speech or even a single word or a simple sign. In reality this question depends greatly on the circumstances of the case⁶⁷.

This attribution of a specific fact must be made in regard to a specific person. There is no requirement for that person to be explicitly named. It is sufficient for them to be identified in such a way that nobody could be mistaken as to their identity. Such an attribution is also a punishable offence if, while targeting a specific person, it falls indirectly on a third party and affects them personally, even if this is not visible or is uncertain. The fact that an attribution has to concern a specific person means that an attack on a non-specific group (for example, 'doctors' or 'lawyers') cannot directly affect the members of that group and as such is not punishable. The term 'person' covers both natural and legal persons⁶⁸.

Secondly, the attribution must be such that it impugns a person's honour or exposes them to public contempt. Honour can be defined as an individual's moral property. It is the feeling of deserving the consideration of others. This is the concept that is considered in this case⁶⁹. The legislature also focuses on those facts that expose a person to public contempt, that is to say facts which, if they were true, would undermine the person's moral integrity in the eyes of the public⁷⁰.

Thirdly, for there to be libel/slander or defamation, it is necessary that legal proof of the fact cannot be provided. Both for libel/slander and defamation to exist, the accuser must not be able to prove the alleged fact. In the absence of this proof, the fact is deemed to be false⁷¹.

Fourthly, one of the constituent elements of the criminal act is that there needs to be malicious intent. The accuser must have acted with the express intention to cause a person harm or to

⁶³ Alain LORENT, *op. cit.*, p. 13; this is not a minor detail because Article 443 of the Belgian Criminal Code only punishes attributions of fact, whereas the French Criminal Code also punishes allegations. For more on this subject, see Alain LORENT, *op. cit.*, p. 13.

⁶⁴ *Ibid.*, p. 14.

⁶⁵ *Ibid.*, pp. 15 and 16.

⁶⁶ Cass., 15 December 1958, *Pas.*, 1959, I, p. 395.

⁶⁷ Alain LORENT, *op. cit.*, pp. 13-23.

⁶⁸ Article 446 of the Belgian Criminal Code; Alain DE NAUW and Franklin KUTY, *op. cit.*, pp. 590 and 591.

⁶⁹ For example, the fact of being named on notices of protests was considered an attack on a person's honour (Corr. Charleroi, 15 April 1896, *Pand. pér.*, 1896, p. 815) as was the attribution to a local councillor of having 'plotted to draw up and sign an illegal protocol' and of having been 'responsible for the financial collapse of Hadès and the Foyer d'Hornu' (Corr. Mons, 10 December 1992, *Rev. dr. comm.*, 1993, p. 314).

⁷⁰ Alain LORENT, *op. cit.*, pp. 29-34.

⁷¹ Alain LORENT, *op. cit.*, p. 34.

offend them. In this way, any attribution made in a considered way or in the form of a joke is not considered malicious⁷².

Fifthly, the attribution of the fact must be made in public⁷³. The various forms of public pronouncement considered here are the spoken and written word, images and emblems. Audiovisual media are also included⁷⁴. Absent any public pronouncement, Article 561(7) of the Criminal Code applies. The offence then takes the form of an 'insult'⁷⁵.

II.2.2. Non-contractual (civil) liability (Article 1382 of the Civil Code)

Article 1382 of the Civil Code states that:

'A person must repair any damage caused through that person's fault to another.'

This provision relates to non-contractual liability. Three elements must be in place for a person to be held civilly liable: the existence of fault, the existence of damage, and a causal link between these two elements. This broad formulation has afforded judges considerable leeway in their interpretation of this liability: in particular, this provision limits, to a certain extent, freedom of expression. We will examine in turn the principles of civil liability applied to journalistic ethics, and the principles of civil liability applied to the right to be forgotten.

II.2.2.1 Journalistic Ethics

Journalists may be held civilly liable in the event of their failure to comply with journalistic standards of conduct.

Journalistic ethics is a form of self-regulation by the profession. It is a safeguard against sanctions being imposed on journalists, based on the 'duties and responsibilities' inherent in their activity, but it also limits to a certain extent the freedom of expression of the journalist⁷⁶. The existence of a wrongful act within the meaning of Article 1382 of the Civil Code may be assessed against a breach of journalistic ethical standards, such as the prohibition on the

⁷² One example of malicious intent might be when a witness in a public hearing or before a court, and with no legitimate reason, makes slanderous or defamatory accusations against a third party (Corr. Verviers, 17 November 1854, cl. and B., III, p. 606). On the other hand, no malicious intent can be attached to a psychiatrist's finding, in the course of a parliamentary investigation, that a religious sect had sexually abused minors, given that he had become aware of these facts in judicial proceedings which had led to a conviction (Civ. Brussels, 25 July 2001, *J.L.M.B.*, 2001, p. 1575).

⁷³ Art 444 of the Criminal Code.

⁷⁴ For radio broadcasting, see Brussels, 5 December 1991, *J. T.*, 1992, p. 387; for cinema, see Georges LEVASSEUR, « Crimes et délits contre les personnes », *Rev. sc. crim.*, 1980, pp. 981 et seq. and Cass., 11 September 1990, *Pas.*, 1991, p. 36.

⁷⁵ Alain LORENT, *op. cit.*, pp. 66 and 67.

⁷⁶ Journalists' activities may be questioned before bodies specifically established for that purpose: the Conseil de Déontologie Journalistique for the French- and German-language media and the Raad voor de Journalistiek for the Dutch-language media. These bodies cannot penalise journalists other than by issuing a public reprimand, but this restriction does not diminish their influence: the publicity received by their opinions gives them great weight and in practice most of the journalists called before the professional ethics bodies take the defence of their professional reputations very seriously. *Ratione materiae*, these bodies have a relatively wide scope of action: they are aware of any complaints of an ethical nature directed against any person who practises or purports to practise journalism. On this subject see the Decree of the French Community of 30 April 2009 governing the conditions for the recognition and subsidising of a body for the self-regulation of journalistic ethics, published in the Official Gazette of 10 September 2009; the *Raad voor de Journalistiek* is a non-governmental organisation and its creation was therefore not recorded by a Belgian state body in the Official Gazette; see www.ejustice.just.fgov.be and <http://lecdj.be>; Quentin VAN ENIS, « La liberté d'expression des 'journalistes' et des autres 'chiens de garde' de la démocratie », in *X, Six figures de la liberté d'expression*, Brussels, Anthemis, 2015, pp. 60 et seq.

dissemination of information of unknown origin, or the obligation to verify the truthfulness of facts and to report them in an honest way.

For example, in a judgment of 21 January 2014, the Brussels Court of First Instance held that the distribution by a journalist of a Facebook page freely accessible to the public would nevertheless have to be assessed in the light of journalistic standards⁷⁷. The case-law in this regard is settled. Between 2012 and 2014, numerous judgments have referred to journalistic standards of conduct in order to define the scope of the general obligation of prudence, the breach of which may constitute a failing for which the journalist in question might, if that failing were causally linked to damage, be liable under Article 1382 of the Civil Code⁷⁸. Care should be taken, however, because the breach of a rule of professional conduct does not, *ipso facto*, constitute a wrongful act within the meaning of Belgian civil liability. Indeed, the Brussels Court of Appeal ruled that 'courts and tribunals of the judicial system are not authorities empowered to rule on the question of whether or not a defendant has fulfilled their journalistic obligations'; 'breach of a rule of professional conduct *may* constitute civil misconduct'⁷⁹.

In journalism, mention should also be made of the law of 7 April 2005 on the protection of journalistic sources⁸⁰.

II.2.2.2 Right to be forgotten

In the area of the right to be forgotten, there is some case-law to the effect that, given the general obligation of caution, a publisher may be required to anonymise certain items contained in online archives by deleting the names of persons who have been the subject of legal proceedings⁸¹. The question then arises of whether a publisher who does not comply with that obligation could be prosecuted on the basis of Article 1382 of the Civil Code.

The existence of damage and a causal link to it can easily be established. The damage usually consists of the moral burden that is borne by any individual whose legal history can easily be dug up online. The causal link stems from the publicity that the publisher gives to this information.

However, it is hard to prove fault on the part of the publisher. In order to establish the existence of such fault, the court must weigh the different fundamental rights that are in conflict: on the one hand, the protection of privacy, and on the other, freedom of expression. We will analyse this conflict later in the section devoted to conflicting fundamental rights⁸².

II.2.3. Combating hate speech inspired by racism and xenophobia (law of 30 July 1981)

Under Belgian law, the law of 30 July 1981 punishing certain actions inspired by racism or xenophobia imposes limits on freedom of expression. First we will consider the various reasons why the legislature was led to restrict freedom of expression when discourse has racist

⁷⁷ Civ. Brussels (14th ch.), 21 January 2014, unpublished, R.G. 2013/3312/A.

⁷⁸ See in particular Civ. Brussels (20th ch.), 27 March 2012, A.&M., 2012, p. 602; Civ. Bruges, 30 April 2012, A.&M., 2012, p. 592.

⁷⁹ Quentin VAN ENIS, « Droit des médias, liberté d'expression et nouvelles technologies », *R.D. T. I.*, 2015, p. 182; Brussels, 27 November 2012, A. & M., 2013, p. 254; our italics.

⁸⁰ *M.B.*, 27 April, *erratum* 13 May.

⁸¹ *Ibid.*, p. 190.

⁸² *Ibid.*, p. 191; For further details see Stéphane HOEBEKE and Bernard MOUFFE, *Le droit de la presse*, Louvain-la-Neuve, Academia-Bruylant, 2005.

or xenophobic undertones; we will then examine the elements that go to make up such an offence within the meaning of that law.

II.2.3.1 Historical background

In the aftermath of the Second World War, Belgium, looking to ensure its economic and industrial growth, especially in the coal and steel sector, actively encouraged immigration. As early as the 1950s and through until the early 1970s it concluded several international conventions, particularly with Italy, Morocco, Tunisia and Yugoslavia. The return of immigrants following the cessation of their employment in Belgium was not expressly regulated. Moreover, these conventions remained confidential and were not immediately published in the Official Journal so as to afford a margin for negotiation with other third countries keen to conclude such conventions.

These various conventions had the effect of increasing the number of foreigners living in Belgium. Thus, in 1982, one year after the adoption of the 1981 law, 8.9% of the total population was of foreign extraction⁸³, and this proportion continued to increase in subsequent years. This rise in the number of immigrants led to some sections of public opinion developing a distinctly less favourable view of immigration, and criticism began to be voiced openly (even though it was the result of official Belgian policy). This fact, combined with the economic crisis which hit the steel industry hard as of the 1970s, saw certain parts of the population increasingly turn against foreigners who were viewed as both competitors and the progenitors of the crisis. Belgium also saw the birth of new racist and anti-Semitic theories⁸⁴.

It is also important to note the developments in international law on this point. The International Convention on the Elimination of All Forms of Racial Discrimination, signed in New York, was adopted on 7 March 1966 and approved by Belgium in the law of 9 July 1975⁸⁵.

In the Belgian legal system, the foundations for a law seeking to suppress racist and xenophobic speech were laid in 1960 when a bill was brought before the Senate with the explanation that it sought to counter the resurgence of anti-Semitism, noting that the courts of that time were 'insufficiently armed, and it is important that we make our criminal law more effective in this area'⁸⁶. A few years later, on 1 December 1966, a bill for a 'law on combating certain acts inspired by racism or xenophobia' was tabled. This law had a much greater scope than the one of 1960⁸⁷. However, the bill consistently struggled to make it through a single legislature, lapsing with the end of each one, and was only finally adopted on 12 February 1981 (hereafter 'the law of 1981')⁸⁸.

⁸³ Bulletin de l'Institut National des Statistiques, 1982.

⁸⁴ Laurence GALLEZ, « La lutte renouvelée contre les discriminations », *R.B. D. C.*, 2005, p. 399.

⁸⁵ Convention adopted by the General Assembly of the United Nations in its Resolution 2106 A (XX) of 21 December 1965, opened for signature in New York on 7 March 1966, approved by Belgium by the law of 9 July 1975 and ratified by Belgium on 7 August 1975, M.B. 11 December 1975.

⁸⁶ Parl. doc, Senate, ord. session, 1059-60, no 99; Bernard RENSON: « Le racisme, la loi et l'opinion publique - Commentaires sur la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie », *R.D. E.*, 1985, pp. 1 and 2.

⁸⁷ Parl. doc, Senate, ord. session, 1966-67, no 309.

⁸⁸ Law of 30 July 1981 punishing certain actions inspired by racism or xenophobia, M. B. 8 August, amended by the law of 10 May 2007 amending the law of 30 July 1981 punishing certain actions inspired by racism and xenophobia, M. B. 30 May, and by the law of 17 August 2013 amending the law of 15 February 1993 creating a Centre for Equal Opportunities and the Fight Against Racism with a view to converting this into a Federal Centre for the Analysis of Migratory Flows, the Protection of the Fundamental Rights of Foreigners and the Fight Against Human Trafficking, M. B. 5 March 2014; Bernard RENSON, *op. cit.*, pp. 8 and 9.

Historically, the law consisted of six articles. This law was later amended in 2007⁸⁹ and 2013⁹⁰, repealing the six historic articles and replacing them with 34 new provisions making up the current law⁹¹.

Today the law covers a much wider field of action than 'mere' hate speech. The law now covers all forms of discrimination. However, as a description of all the forms of discrimination would go well beyond this study, we will focus only on the part concerning freedom of expression⁹².

II.2.3.2 Elements constituting an offence

The law of 1981 states that:

'Anyone who, in one of the circumstances set out in Article 444 of the Criminal Code, distributes ideas based on racial superiority or hatred, shall be punished by imprisonment of one month to one year and a fine of EUR 50-1,000, or one of those penalties only'⁹³.

'Any person who is a member of a group or association which, in a manifest and repeated manner, promotes or is an accessory to discrimination or segregation on the basis of one of the criteria set out in Article 444 of the Criminal Code, shall be liable to a term of imprisonment of between one month and one year and a fine of EUR 50-1,000, or one of those penalties.'⁹⁴

The term 'racism' used by the legislature requires some clarification. The legislature considers that recognising and accepting within the same territory different ethnicities, cultures and societies is to embrace and nurture the diversity of the human world. Therefore, being racist is to deny or reject this diversity, and to seek to bind a people, or even humanity as a whole, to a single model⁹⁵. Thus the definition of racism given by the legislature is built around the statement of two principles: the claim that one party is superior, and the claim that the other party is inferior⁹⁶.

Next, when the legislature provides that groups or associations which promote discrimination or segregation may be penalised, this limits the scope of the provision *ratione materiae* to the simple fact of belonging to such a group, which, in Belgian law, is quite exceptional⁹⁷. The court called upon to rule on the basis of this article will have to work in three stages.

⁸⁹ Law of 10 May 2007 amending the law of 30 July 1981 punishing certain actions inspired by racism and xenophobia, *M. B.* 30 May.

⁹⁰ Law of 17 August 2013 amending the law of 15 February 1993 creating a Centre for Equal Opportunities and the Fight Against Racism with a view to converting this into a Federal Centre for the Analysis of Migratory Flows, the Protection of the Fundamental Rights of Foreigners and the Fight Against Human Trafficking, *M. B.* 5 March 2014.

⁹¹ Article 2 of the law of 10 May 2007 amending the law of 30 July 1981 punishing certain actions inspired by racism and xenophobia, *M.B.* 30 May.

⁹² See Articles 7-11 and Article 12 of the law of 30 July 1981 punishing certain actions inspired by racism and xenophobia, *M.B.* 8 August 1981.

⁹³ Article 21 of the law punishing certain actions inspired by racism or xenophobia.

⁹⁴ Article 22 of the law punishing certain actions inspired by racism or xenophobia.

⁹⁵ Parl. doc., Senate, ord. session, 1980-81, no 594/2, p. 15.

⁹⁶ Bernard RENSON, *op. cit.*, pp. 4 and 5. While these considerations on the concept of racism and xenophobia arose during the discussions resulting in the 1981 law, they remain relevant to this day.

⁹⁷ Thus, it seems to us that only Article 324b of the Criminal Code envisages a similar scope *ratione materiae*; on this question see Tom VANDER BEKEN, « Voor de sport. De strafrechtelijke aanpak van discriminatie vanaf 2003 », in Marc DE VOS and Eva BREMS (dirs.), *De wet bestrijding discriminatie in de praktijk*, Antwerp, Intersentia, 2004, p.265.

First, it will have to determine the actual existence of a group or association. In order to be classified as an organisation, it is not necessary to have legal personality. This was made clear in parliamentary proceedings in order to be able to include trade unions or political parties (neither of which has legal personality)⁹⁸. It should be noted, however, that a group must be 'stable and have at least some structure to help it achieve its aim'⁹⁹.

Secondly, the court must assess the racist nature of the group. This condition gives rise to further difficulties. The objective assessment of what does or does not constitute racist acts or speech is an arduous exercise. The court will have to show that it is not being misled by its own, subjective approach. It will need to analyse the group or association's documents and proceedings, as well as the frequency and the publicity given to them¹⁰⁰.

Third, the court must assess who the members are, and who gave their support to the discriminating group. No particular wilful misrepresentation is required¹⁰¹. However, the member of the association must be aware of the aims of the organisation and must, on a voluntary basis, contribute to the pursuit of these objectives¹⁰². It is not necessary for the accused member to have themselves engaged in or promoted the spread of hate speech. Passive group membership can be a punishable offence if the member endorses the association's actions and therefore contributes, even implicitly, to the dissemination of its ideas¹⁰³.

II.2.4. Recognising Holocaust denial (law of 23 March 1995)

The Belgian legislature established in 1995 the crime of denying the genocide committed by the German Nazi regime in the Second World War. First we will briefly consider the issues at stake when introducing this crime into Belgian law; we will then examine the various elements that go to make up the offence.

II.2.4.1 Historical background

The Belgian legislature sought to establish the crime of Holocaust denial with the law of 23 March 1995 seeking to prevent the denial, minimisation, justification or approval of the genocide committed by the German Nazi regime during the Second World War (hereafter 'the 1995 law'). However, the plans gave rise to heated debates. The leading opponents of this law feared the dangers of establishing an official truth as well as the possible obstacles this could set in the path of historical research. Furthermore, some parliamentarians considered that, although it is morally wrong, the specific criminalisation of the denial of the Shoah was unnecessary as such facts would already be covered by the 1981 law on hate speech. Others felt that this criminalisation would be counter-productive as criminal prosecutions could provide an additional platform for the views of Holocaust deniers¹⁰⁴.

The 1995 law was amended in December 2018. From now on, the Inter-Federal Centre for equal opportunities and combating racism and discrimination, and more generally any legal

⁹⁸ Parl. doc, House, extraord. session, 1979, no 214/9, p. 36;

⁹⁹ Corr. Namur, 23 September 1993, www.anti-racisme.be; Corr. Liège, 28 January 2002, www.anti-racisme.be; Liège, 5 February 2003, *R. D. E.*, 2003, n° 22, pp. 55-58; Laurence GALLEZ, *op. cit.*, p. 402.

¹⁰⁰ *Ibid.*, p. 403.

¹⁰¹ Ghent, 21 April 2004, www.anti-racisme.be, p. 59.

¹⁰² Parl. doc, House, extraord. session, 1979, no 214/9, p. 36.

¹⁰³ Corr. Liège, 28 January 2002, www.anti-racisme.be.

¹⁰⁴ See the debates transcribed in « Proposition de loi tendant à réprimer contestation, la remise en cause et la négation ou l'apologie des crimes contre l'humanité et des crimes de guerre, Report by Mr LANDUYT, 27 January 1995 », *Parl. doc.*, House, ord. session, 1991-1992, 557/5, and in particular the speeches of Ms STENGERS, Mr de Clerck and Ms Dillen, pp. 3, 4, 7 and 13.

person that proposes in its statutes to defend the moral interests and honour of the resistance or deportees, may be a party to legal proceedings, provided that the conditions relating to the admissibility of legal proceedings are fulfilled¹⁰⁵.

II.2.4.2 Elements constituting an offence

The criminalisation of denial is provided in Belgian law by Article 1 of the law of 23 March 1995, which states that

‘any person who, in one of the circumstances set out in Article 444 of the Criminal Code, denies, crudely minimises, seeks to justify or approves of the genocide committed by the German Nazi regime during the Second World War (...) may be imprisoned for a period of eight days to one year and fined between 26 and 5,000 francs’¹⁰⁶.

In order to understand the precise scope of the crime it is necessary to analyse, on the one hand, the material behaviour in question and, on the other, the required element of intent.

II.2.4.2.a) *The element of material behaviour*

The 1995 law criminalises behaviour that denies, minimises, justifies or approves the genocide committed by the Nazi German Nazi regime during the Second World War. Moreover, this behaviour must be public in nature, in accordance with Article 444 of the Criminal Code¹⁰⁷. In addition, it must take the form of a denial, crude minimisation, justification or approval. The addition of the adjective ‘crude’ in the law is intended to protect historical research carried out in good faith and according to scientific methods. In its 1996 judgment, the Court of Arbitration held that those terms were sufficiently precise to constitute a restriction on the exercising of freedom of expression¹⁰⁸. We will return to the content of that judgment in greater detail below.

The denial referred to in the law does not concern all of the crimes committed during the Shoah, only those covered by the legal qualification of genocide. To that end, the legislature was careful to refer to Article 2 of the International Convention of 9 December 1948 for the Prevention and Punishment of the Crime of Genocide¹⁰⁹. With the adoption of that Convention, the term genocide acquired a specific legal sense making it possible to distinguish it from crimes against humanity, which are not within the scope of the 1995 law.

The precise and restrictive definition of the scope of application *ratione materiae* therefore undoubtedly determines its compatibility with freedom of expression. It is interesting to note that case-law has developed, interpreting Article 1 of the 1995 law quite broadly¹¹⁰.

¹⁰⁵ Article 4 of the law of 23 March 1995 seeking to prevent the denial, minimisation, justification or approval of the genocide committed by the German Nazi regime during the Second World War, amended by Article 13 of the law of 7 August 2013, amending the law of 15 February 1993 creating a Centre for Equal Opportunities and the Fight Against Racism with a view to converting this into a Federal Centre for the Analysis of Migratory Flows, the Protection of the Fundamental Rights of Foreigners and the Fight Against Human Trafficking, M. B. 5 March 2014, and Article 142 of the law of 21 December 2018 introducing additional legal provisions, M. B. 31 December.

¹⁰⁶ Article 1 of the law of 23 March 1999.

¹⁰⁷ François DUBUISSON, *op. cit.*, p. 141.

¹⁰⁸ C. const., judgment no 45/96 of 12 July 1996; François DUBUISSON, *op. cit.*, p. 143.

¹⁰⁹ Incorporated into Belgian law by the law ratifying the International Convention for the Prevention and Punishment of the Crime of Genocide, adopted in Paris on 9 December 1948 by the United Nations General Assembly, M. B., 11 January 1952.

¹¹⁰ Corr. Brussels, 20 October 2004, available on the website of the Centre for Equal Opportunities and the Fight Against Racism, <http://www.unia.be>; François DUBUISSON, *op. cit.*, pp. 141-

II.2.4.2.b) The element of intent

The law does not specify whether there needs to be intent in order to criminalise a denial of genocide. It is clear, however, that if the legislature considered that the requirement of an intentional element was not essential, it is because denial discourse is intrinsically anti-Semitic and promotes the redemption of the German national socialist regime¹¹¹. Due to the strong similarity between Holocaust denial and anti-Semitic insults, some judges have preferred to re-categorise the facts brought before them as falling under the law of 30 July 1981. It is for that reason that the infringement established by the 1995 law is conceived as a special form of incitement to racial hatred rather than falling within a wholly distinct criminal category. The fact that there is no specific requirement for intent suggests that there is a certain degree of uncertainty in its application¹¹².

145. Two pupils who shouted 'Heil Hitler!' and made anti-Semitic comments such as 'death to the Jews' and 'we don't want Jews here' were judged on this basis.

¹¹¹ François DUBUISSON, *op. cit.*, p. 149.

¹¹² *Ibid.*, pp. 141-151; on this subject see Patrick WASCHMAN, « Liberté d'expression et négationnisme », *R.T. D. H.*, 2001, pp. 585 et seq.

III. The most relevant case-law in this area

The Belgian Constitution does not guarantee absolute freedom of expression. Article 19 of the Constitution, as Orban said, 'is not explicit in that it limits itself to declaring the freedom to express opinion and to practise religion'¹¹³. Article 25 of the Constitution affords an additional constitutional protection for the press.

We will first consider the interpretation of Article 19 of the Constitution in Belgian case-law, and then we will consider the interpretation given to Article 25 of the Constitution.

III.1. The interpretation of Article 19 of the Constitution

The Belgian courts' interpretation of Article 19 of the Constitution is based on Article 10 of the European Convention on Human Rights ('ECHR') and the case-law of the Strasbourg Court.

The Belgian Constitutional Court, looking to international provisions, defines freedom of expression as 'the right to express freely and at will one's opinions in all respects and by all means, on condition that no criminal offences are committed in the exercising of that freedom'¹¹⁴. It has added more recently that this right shall include 'the freedom to seek, receive and impart information and ideas of all kinds, regardless of borders, either orally, in writing or in print, in the form of art, or through any other chosen media'¹¹⁵.

The Constitutional Court's integrative approach to Article 10 of the ECHR and Strasbourg case-law sometimes gives rise to difficulties. For where the same right is guaranteed by several different instruments, these may conflict. As regards freedom of expression, the Belgian Constitution provides for 'the greatest possible freedom of thought'¹¹⁶. It rejects any preventive measures in the area of freedom of expression, whereas Article 10 of the ECHR and Article 19 of the International Covenant on Civil and Political Rights (ICCPR) do allow them.

Before any further development, it would seem appropriate to provide for the benefit of the reader an outline of what is meant by 'preventive measure'. The legal theory of this concept will be examined more specifically in the later section on the limits on freedom of expression. We will then consider the interpretation of the concept in the case-law.

III.1.1. Legal interpretation of the concept of 'preventive measure'

Preventive measures may be defined as interventions prior to the dissemination of an opinion. They have the effect of allowing an authority to check or even prohibit, *a priori*, the expression of an opinion¹¹⁷. Jan Velaers draws a distinction between preventive measures and repressive measures using three criteria¹¹⁸.

The first criterion is the impact of the measure. The preventive measure concerns the lawful exercising of the freedom whereas the punitive measure targets only the abuse of this exercising of the freedom. The second criterion is the timing of the intervention. Prohibited measures are those which occur *a priori*, that is to say, before the exercising of the freedom.

¹¹³ Oscar ORBAN, *Le droit constitutionnel de la Belgique*, Tome III, Liège and Paris, Dessain and Giard & Brière, 1911, p. 373.

¹¹⁴ C. const. judgment no 24/96, 27 March 1996, B.1.14.

¹¹⁵ C. const. judgment no 9/2009, 15 January 2009, B.20.

¹¹⁶ Paul ERRERA, *Traité de droit public belge*, 2nd ed., Paris, Giard & Brière, 1918, p. 61.

¹¹⁷ François TULKENS, « La liberté d'expression en général », in Marc VERDUSSEN and Nicolas BONBLED (eds.), *Les droits constitutionnels en Belgique*, volume 2, Brussels, Bruylant, 2011, p. 828.

¹¹⁸ Jan Velaers, *De beperkingen van de vrijheid van meningsuiting*, Antwerp, Maklu, 1991, p. 139.

The third criterion concerns the ruling body. It is for the court alone to rule on the punitive measures, whereas 'this is not the case for preventive measures where even the administrative authorities may intervene'¹¹⁹.

III.1.2. Interpretation of the concept of 'preventive measure' in case-law

First, the Constitutional Court proposes its own interpretation of the concept of 'preventive measure'.

On the one hand, the Constitutional Court, in Case No 157/2004, gave its interpretation of the time from which intervention may be classified as a preventive measure. According to the Court, the application of Article 19 of the Constitution implies that judicial intervention is possible only when dissemination has already occurred. Moreover,

'the court will have to ascertain whether the restriction on the freedom of expression, which may result from the application of this provision, is necessary in the specific case, whether it meets an urgent social need, and whether it is proportionate to the legitimate aim pursued by this provision'¹²⁰.

On the other hand, in judgment no 136/2003, the Constitutional Court was asked whether Article 1 of the decree-law of 29 December 1945 prohibiting the display of text on the public highway was compatible with Articles 10 and 11 of the Constitution, in conjunction with Article 19 of the Constitution, Article 10 of the ECHR and Article 19 of the ICCPR. According to that decree-law, the posting of text shall be restricted to the places set aside for that purpose by the municipal authorities and to those places the owners of which have given their prior approval in writing¹²¹.

In that case, the Court ruled that:

'the decree-law lays down a series of detailed rules governing such posting, without, however, stipulating the preventive measures. Thus, the possibility of distributing or posting such text is not contingent on a prior assessment of the content of the message. Indeed, the decree-law at issue in no way empowers the authorities to control or prohibit *a priori* the expression of an opinion, whatever its nature, but merely provides for *a posteriori* penalties'¹²².

The Court then recognised that 'the contested decree-law restricts the practical implementation of the freedom of expression guaranteed by the Constitution and by international provisions'¹²³, in particular by Article 10 of the ECHR and Article 19 ICCPR. The Court noted that the limitation on distributing or posting text established by the decree-law 'is intended to safeguard public order and to protect the rights of others'¹²⁴. Finally, the Court concluded that the measure is not disproportionate to the objectives pursued by the legislature¹²⁵.

The Constitutional Court said nothing in this case that had not been said before by the Court of Cassation in its judgment of 19 October 1953. In that judgment, it concluded that 'although

¹¹⁹ Koen LEMMENS, « Taisez-vous, Elkabbach ! L'interdiction de la censure à la lumière des pratiques sociales », *R.B. D. C.*, 2003, p. 383.

¹²⁰ C. const., judgment no 157/2004 of 6 October 2004, B.75.

¹²¹ Decree-law of 29 December 1945 prohibiting the display of text on the public highway, *M. B.*, 4 January 1946.

¹²² C. const., judgment no 136/2003 of 22 October 2003, B.5.1.

¹²³ *Idem*, B.6.1.

¹²⁴ *Idem*, B.6.3.

¹²⁵ *Idem*.

Article 19 of the Constitution does not permit the authorities to make the public expression of opinions subject to prior review, nor does it recognise the unlimited freedom to use the public highway for the purposes of such expression'. Consequently,

'as the distribution or sale of printed matter on the public highway may, in certain places or at certain times, be such as to adversely affect street hygiene, or even give rise to congestion, then a municipal regulation which, for the sole purpose of preventing such effects, makes the distribution or sale of printed matter subject to municipal authorisation, cannot be said to contradict the aims of the Constitution'¹²⁶.

It therefore appears that, according to the Constitutional Court, for a measure to be classified as a preventive measure, it must include an *a priori* check on the content of the message¹²⁷. Consequently, authorisation schemes which do not concern the content of the message do not infringe the constitutional requirement. This interpretation was confirmed by judgment no 9/2004 of 21 January 2004, in which the Court noted that

'the provision in question merely foresees prior authorisation in very specific cases. Such authorisation cannot be regarded as compromising freedom of expression, since it is not intended in any way to prevent or excessively hamper the dissemination of an opinion.'¹²⁸

The guarantees enshrined in Articles 19 and 25 of the Constitution must, however, be reconciled with the protection of other constitutionally protected rights. The Constitutional Court seems to be sensitive to this need as it does not appear to make the ban on preventive measures a 'categorical imperative'¹²⁹. Its case-law calls on the adjudicating court to 'take account of' the constitutional prohibition, but does not consider this to be absolute. The Court appears to accept that 'the absolute nature of certain rights guaranteed internally must be reconciled with restrictions which may nevertheless be justified in order to observe other fundamental rights by application of supranational provisions'¹³⁰.

The Court of Cassation, too, appears to adopt a rather similar line of reasoning. In the abovementioned judgment of 19 October 1953, it accepted that a municipal regulation may make the distribution or sale of printed matter subject to authorisation in order to mitigate any nuisance relating to street hygiene¹³¹.

Finally, the Council of State takes the view that:

'Articles 19 and 25 of the Constitution do not expressly grant the authorities the power to impose preventive measures on the exercising of the right to freedom of expression and freedom of the press, even if they do not either impose any express general prohibition on such measures'¹³².

¹²⁶ Cass., 19 October 1953, *Pas.*, 1954, I, p. 109.

¹²⁷ Nicolas BONBLED, 'Conflict of fundamental rights before the Constitutional Court of Belgium: the case of freedom of speech' in E. BREMS (ed.), *Conflicts Between Fundamental Rights*, Antwerp-Oxford-Portland, Intersentia, 2008, p. 341.

¹²⁸ C. const., judgment no 9/2004 of 21 January 2004, B.12.

¹²⁹ Nicolas BONBLED, « La conciliation des restrictions constitutionnelles et conventionnelles à la liberté d'expression: le cas des discours haineux », *R.B. D. C.*, 2005, p. 479.

¹³⁰ François TULKENS, « La liberté d'expression en général », in Marc VERDUSSEN and Nicolas BONBLED (eds.), *Les droits constitutionnels en Belgique*, volume 2, Brussels, Bruylant, 2011, p. 832.

¹³¹ Cass., 19 October 1953, *Pas.*, 1954, I, p. 109.

¹³² C.E. judgment no 80.282 of 18 May 1999.

It also refers to Article 10 of the ECHR, stressing the requirements of legality, legitimacy and proportionality required as a legitimate basis for a restriction on freedom of expression. Consequently, the administrative court expressly rejects the adoption of preventive measures¹³³.

We will later consider in greater detail the question of the admissibility of preventive measures under Belgian law in the chapter on restrictions of freedom of expression.

III.2. The interpretation of Article 25 of the Constitution

Article 25 raises many questions of interpretation, all based around the word 'press'. In the 19th century there was no particular difficulty in defining the word. It was from the 20th century onwards that it became more important to define what the concept of the press covered exactly. According to those in favour of an evolving interpretation, the non-press media may be included in the scope *ratione materiae* of Article 25. The use of the word 'press', they maintain, is merely 'the result of historical circumstances'¹³⁴.

For a long time, however, the concept of the press referred to in Article 25 of the Constitution had been interpreted strictly. Then, in a judgment of 9 December 1981, the Court of Cassation gave a pivotal interpretation of the constitutional notion of the press. It considered that the protection afforded by Article 25 of the Constitution was granted solely to the written press, excluding other media such as television or radio¹³⁵. The Court of Cassation upheld this case-law in a judgment of 2 June 2006: 'neither radio nor television nor cable broadcasts are printed forms of expression and, consequently, the article [25] of the Constitution does not apply to them.'¹³⁶ The authentic Dutch-language version of the Constitution, adopted in 1967, is wholly aligned with this reasoning, using as it does the term 'drukkers' (printed press). The Court of Cassation thus decided to read the Constitution literally¹³⁷.

This distinction between the written press on the one hand and the audiovisual media on the other has serious consequences. For while press offences fall within the jurisdiction of the Court of Assizes jury, other offences fall within the jurisdiction of the criminal courts. In reality, press offences are no longer prosecuted as crimes. This is because the public prosecutor's office, mainly for budgetary and organisational reasons, has ceased to establish Court of Assizes juries to rule on these offences. As a result, press offences benefit from *de facto* criminal impunity¹³⁸.

Then, in two judgments of 6 March 2012, the Court of Cassation made a judicial U-turn and decided that a text published on the internet did indeed constitute a written document falling within the scope of Article 25 of the Constitution¹³⁹. According to the Court's new ruling, the digital distribution of a text is a process comparable to that of written reproduction in the press. The Court also reiterated that freedom of the press only applies if a text is written. Thus,

¹³³ François TULKENS, « La liberté d'expression en général », in Marc VERDUSSEN and Nicolas BONBLED (eds.), *Les droits constitutionnels en Belgique*, volume 2, Brussels, Bruylant, 2011, p. 830.

¹³⁴ Nicolas BONBLED, « La conciliation des restrictions constitutionnelles et conventionnelles à la liberté d'expression: le cas des discours haineux », *R.B. D. C.*, 2005, p. 427.

¹³⁵ Cass., 9 December 1981, *Pas.*, 1982, I, pp. 482 et seq., *De Koster; J. L. M. B.*, pp. 1402-1413, in particular p. 1412, note of François JONGEN; *Judg. Cass.*, p. 1297.

¹³⁶ Cass., 2 June 2006, *Pas.*, 2006, I, p. 302.

¹³⁷ Christian BEHRENDT, « Le délit de presse à l'ère numérique », *R. B. D. C.*, 2014, p. 306.

¹³⁸ Christian BEHRENDT, « Le délit de presse à l'ère numérique », *R.B. D. C.*, 2014, p. 306.

¹³⁹ Cass., 6 March 2012, *Pas.*, I, p. 527. *Judg. Cass.*, p. 558. *N. j. W.*, 2012, p. 342, *A. & M.*, 2012, p. 253, note of Dirk VOORHOF, *J. T.*, 2012, p. 505, obs. Quentin VAN ENIS.

audiovisual content, such as a podcast or a video posted on a blog, is not covered by Article 25¹⁴⁰.

This case-law has led to a distinction being drawn between written text published on the internet and audiovisual content. Such a distinction seems entirely unjustified in the modern world and is not at all aligned with current means of communication. It is difficult to follow the Court of Cassation's reasoning that audiovisual media content cannot constitute the expression of an opinion. In addition, this leads to some confusion: for example, an interview in a magazine that is later published on the internet in the form of a written transcript will benefit from the protection of Article 25 of the Constitution, but the same text would not be covered were it to go out as a podcast¹⁴¹.

However, this case-law is ripe for amendment. In a recent decision of 7 September 2018, the Criminal Court of Liège ruled, in the case of a local politician who had been attacked on Facebook, that it had jurisdiction in respect of defamation, harassment, and the threat of violence against a person or property¹⁴².

That judgment was made given the *de facto* impunity for press offences stemming from the impossibility for the case to be heard by a Court of Assizes jury for want of sufficient resources. The judge in this case thus adopted an innovative line, taking account of the increasing trend to publish solely on the internet.¹⁴³

First, as regards the lack of proceedings before the Court of Assizes, the original article of the Constitution, which precisely refers press offences to jury of that court, simply resolved the question of jurisdiction. However, 'with time this has become a type of grounds for excuse that lawyers specialising in this area are now well acquainted with'¹⁴⁴. Indeed, the jury has convened only twice since the end of the Second World War to deliberate on press offences. This *de facto* impunity calls into question both the principle of access to the courts and the effectiveness of criminal law. What is more, the legislature is aware of this impunity. It had, after all, decided to bring press offences inspired by racism and xenophobia under the jurisdiction of the criminal courts, precisely so that they would not go unpunished¹⁴⁵.

Second, concerning the advent of new technologies, social networks have changed our perception of freedom of expression. Thus 'a social network such as Facebook is not a "forum" for the exchange of opinions, but is in some way a contemporary extension of the sphere of speech, marking a real paradigm shift in the importance of written versus oral expression.'¹⁴⁶ There is a clear unity of intent shared by a written statement and audiovisual content hosted on the internet: disseminating an opinion by means of the 'press'. This means that both modes of expression should be treated equally¹⁴⁷.

¹⁴⁰ Christian Behrendt and Martin Vrancken, *op. cit.*, pp. 653 and 654.

¹⁴¹ Christian BEHRENDT, « Le délit de presse à l'ère numérique », *R.B. D. C.*, 2014, pp. 307 and 308.

¹⁴² See Quentin PIRONNET, « Des insultes sur les réseaux sociaux ne relèvent pas du délit de presse », *J.L. M. B.*, 2018, pp. 1825 – 1831.

¹⁴³ Quentin PIRONNET, *op. cit.*, p. 1825.

¹⁴⁴ Quentin PIRONNET, *op. cit.*, p. 1826.

¹⁴⁵ Quentin PIRONNET, *op. cit.*, p. 1826.

¹⁴⁶ Quentin PIRONNET, *op. cit.*, p. 1827.

¹⁴⁷ Quentin PIRONNET, *op. cit.*, p. 1828.

This decision of the criminal court, which was upheld on appeal¹⁴⁸, may lead to a change in the case-law of the Court of Cassation. An appeal against the judgment of the Court of Appeal is currently pending.

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¹⁴⁸ Liège, 28 May 2019, ref. 2018/CO/816.

IV. The concept of freedom of expression and its current and possible future restrictions

Several aspects of freedom of expression are protected under Belgian law, as we have seen in the sections devoted to Belgian legislation and case-law. However, freedom of expression cannot be absolute. If it is not delimited then inevitably it will run up against and openly conflict with other fundamental rights. In this section we will provide a brief overview of how freedom of expression is recognised in the provisions of international law. We will then focus on the various ways in which freedom of expression clashes with fundamental rights. Finally, we will examine some of the limits imposed by the legislature on freedom of expression.

IV.1. The concept proposed

Article 19 of the Belgian Constitution sought to guarantee ‘the freedom to express one’s views in all respects’, subject to the punishment of crimes committed when availing oneself of that freedom¹⁴⁹. As discussed above, this provision enshrines, in principle, freedom of expression in Belgian law¹⁵⁰. It is supplemented by Article 25 which guarantees freedom of the press.

Freedom of expression, as enshrined in the aforementioned constitutional provisions, is interpreted by the Belgian courts in the light of Article 10 ECHR and Article 19 of the International Covenant on Civil and Political Rights, as has already been explained in the section on case-law. These international provisions, having effect in national law, have made it possible to extend the concept of freedom of expression under Belgian law¹⁵¹. Article 10 of the European Convention on Human Rights provides that the right to freedom of expression includes the freedom to hold opinions, and to receive and impart information and ideas. Article 19 of the International Covenant on Civil and Political Rights notes that this freedom also includes ‘the freedom to seek (...) ideas of all kinds, regardless of borders, either orally, in writing or in print, in the form of art, or through any other chosen media’¹⁵².

Moreover, in a judgment on the constitutionality of a law prohibiting Holocaust denial (which we examined above), the Court attached particular importance to freedom of expression. To that end, it cited the well-known *Handyside* judgment of the European Court of Human Rights. Like the Strasbourg Court, the Belgian Constitutional Court notes that:

‘Freedom of expression is one of the essential foundations of a democratic society. It applies not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that shock, worry or attack the state or any part of the population. This is required by the pluralism, tolerance and spirit of openness without which democratic society cannot exist.’¹⁵³

¹⁴⁹ Christian BEHRENDT and Martin VRANCKEN, *Principes de droit constitutionnel belge*, Brussels, La Charte, 2019, p. 483.

¹⁵⁰ François Tulkens, « La liberté d’expression en général », in Marc Verdussen and Nicolas Bonbled (eds.), *Les droits constitutionnels en Belgique*, volume 2, Brussels, Bruylant, 2011, p. 821.

¹⁵¹ Velu, J. and R. Ergec, *La Convention européenne des droits de l’homme*, Brussels, Bruylant, 2014, p. 737.

¹⁵² François Tulkens, « La liberté d’expression en général », in Marc Verdussen and Nicolas Bonbled (eds.), *Les droits constitutionnels en Belgique*, volume 2, Brussels, Bruylant, 2011, p. 823.

¹⁵³ C. const. judgment no 45/96, 12 July 1996, B.7.6.

IV.2. When laws collide: freedom of expression versus other fundamental rights

The essence of freedom of expression 'arises from the essential role it plays in the establishment, effectiveness and maintenance of any democratic regime. Exercised freely, it will inevitably enter into conflict with other, equally protected rights'¹⁵⁴. This section illustrates how certain manifestations of freedom of expression conflict starkly with other fundamental rights.

As we know, any limitation imposed by the state on the exercising of freedom of expression must be justifiable on the basis of the criteria listed in Article 10(2) ECHR¹⁵⁵. Furthermore, in its judgment of 27 April 2007, the Court of Cassation added that 'it must be apparent from the decision of the court that it has examined the right to freedom of expression in relation to other human rights and fundamental freedoms, but also that the restriction imposed, having regard to the context in which the opinion is expressed, the status of the parties and the other circumstances of the case, meets an imperative social need, that it is relevant and that, as a result of the restriction imposed, proportionality is respected between the means used and the objective pursued'¹⁵⁶.

Below we will examine the fundamental rights which are accepted under Belgian law as providing grounds for restricting the right to freedom of expression. We will illustrate this by referring to the relevant Belgian case-law.

Our presentation does not seek to be exhaustive and will consider just those fundamental rights which, in our opinion, are the most relevant for freedom of expression. We will examine in turn the right to respect for private life and the right to have law and order maintained.

IV.2.1. The right to respect for private life

Freedom of expression may, in certain circumstances, conflict with the right to respect for private life. Such conflicts usually arise out of the content of journalistic publications. Therefore, in this section, we will focus more specifically on a particular aspect of freedom of expression, namely freedom of the press.

It is generally accepted that 'certain investigations into private life and some disclosures by the press of elements relating to private life may be justified in the case of the private life of a person whose function, talent or situation afford them a degree of public recognition. In such cases it is considered that the general public does have a legitimate interest in knowing certain facts even if, objectively, they belong to the domain of private life'¹⁵⁷.

However, there is well established case-law that considers that restrictions on freedom of expression may be justified, especially in cases such as the right to be forgotten, and the right to one's own image, honour and reputation.

¹⁵⁴ Nicolas BONBLED, « La conciliation des restrictions constitutionnelles et conventionnelles à la liberté d'expression: le cas des discours haineux », *R.B.D.C.*, 2005, p. 423.

¹⁵⁵ François DUBUISSON, « L'incrimination générique du négationnisme est-elle conciliable avec le droit à la liberté d'expression », *Rev. dr. ULB*, 2007, p. 153.

¹⁵⁶ Cass., 27 April 2007, *N.J. W.*, 2007/19, no 172, pp. 897 and 899.

¹⁵⁷ Joëlle MILQUET, « La responsabilité aquilienne de la presse », *Ann. Dr. Louvain*, 1989, p. 68.

IV.2.1.1 *Right to be forgotten*

The right to be forgotten is traditionally defined as the right of an individual, under certain circumstances, to have any personal data concerning them deleted.¹⁵⁸

Two judgments illustrate the balancing act that the courts have to perform when deciding between the right to freedom of expression and the right to be forgotten.

In the first case, the Liège Court of Appeal ruled that ‘when a request to remain anonymous strikes the right balance between the right to freedom of expression and the right to be forgotten, it would be wrong for a publisher to refuse this request as to do so would not be befitting a normally cautious and diligent publisher operating in the same circumstances’¹⁵⁹.

In this particular case, some 20 years previously a doctor had been found guilty of causing the death of two people in a road traffic accident. He was calling on the court of first instance to find against a publisher’s refusal to anonymise him in an online article, despite his having made a reasonable and reasoned request. The court found in his favour. This ruling was subsequently upheld on appeal¹⁶⁰.

When making this ruling, the Liège Court of Appeal stressed that ‘the right to be forgotten is an integral part of the law on the respect for privacy as set out in Article 8 ECHR and Articles 22 of the Constitution and 17 of the International Covenant on Civil and Political Rights’¹⁶¹.

The Court went on to set out the conditions needed to conclude that there is a right to be forgotten. It ruled that for this to be the case ‘the initial disclosure of the facts must have been lawful and judicial in nature, there should be no contemporary interest in their further disclosure, the facts should have no historical interest, a certain period of time should have elapsed between the two disclosures, and the person concerned should not be in the public eye, has an interest in rejoining society and has discharged their debt to society’¹⁶².

In another case referred to the Liège court, a defendant accused, but not convicted, in a case relating to the murder of a Belgian politician, claimed that the refusal of a website’s publisher to anonymise the content in question constituted a fault under law and that the publisher should be obliged to delete the damaging content. The court adopted the same reasoning as the Liège Court of Appeal in its ruling and ordered the publisher to replace the applicant’s name in the article at issue with the letter X¹⁶³.

This case differs from the previous one in that the applicant was able to invoke the right to be forgotten in the absence of any judicial order against him¹⁶⁴.

These two judgments highlight the relative nature of the freedom of expression of the press in the light of the right to be forgotten.

¹⁵⁸ Alain BENSOUSSAN, « D », in *La protection des données personnelles de A à Z*, Brussels, Éditions Larcier, 2017, p. 89.

¹⁵⁹ Liège, 25 September 2014, *A. & M.*, 2014.

¹⁶⁰ Quentin VAN ENIS, « Droit des médias, liberté d’expression et nouvelles technologies », *R. D. T. I.*, 2015, pp. 191 and 192.

¹⁶¹ Liège, 25 September 2014, *A. & M.*, 2014.

¹⁶² *Ibid.*

¹⁶³ Liège, 3 November 2014, *R. G. D. C.*, p. 531.

¹⁶⁴ Quentin VAN ENIS, « Droit des médias, liberté d’expression et nouvelles technologies », *R. D. T. I.*, 2015, pp. 191 and 192; Edouard CRUYSMANS, « Liberté d’expression, archives numériques et protection de la vie privée : la conciliation de trois réalités divergentes grâce au droit à l’oubli », *J. L. M. B.*, 2014, pp. 1972 and 1980.

A judgment of the Court of Cassation of 8 November 2018, published only recently¹⁶⁵ and relating to the online archives of the written press, confirms the delicate nature of this problem.

IV.2.1.2 The right to one's own image

The right to one's own image allows any person to object to the realisation, exhibition or use of their image without consent¹⁶⁶.

'The person shown may invoke their right to their own image not only where its reproduction has not been authorised, but also where the reproduction distorts any reproduction agreement concluded and/or the facts, or where an image has been illicitly combined with another, or where the reproduction is accompanied by captions or comments attacking the honour of the person illustrated'¹⁶⁷.

One example of the infringement of the right to one's own image was the publication of an article alleging that a certain police officer was 'bent', accompanied by a photograph of the officer in question out of uniform and without him having given his consent¹⁶⁸.

IV.2.1.3 The right to protection of honour and reputation

In performing their duties, journalists must formally comply with a number of principles. Those principles are inter alia established on the basis of the case-law of the European Court of Human Rights and national case-law.

A journalist must first have assessed the truthfulness of any facts being relayed, and by all available means. This must be done objectively, fairly and in a discerning manner, which also implies checking one's sources¹⁶⁹.

For facts can, by their very nature, be proven. If, on the other hand, a journalistic piece makes value judgments which, by definition, cannot be proved beyond doubt, this cannot lead to insult or damage to honour and reputation¹⁷⁰. 'It follows that while a person is responsible for the truthfulness of any factual claims they make, the same is not true of opinions, where they only have responsibility for form and tone.'¹⁷¹

In particular, an attack on a person's honour and reputation was defined as 'the use of words that are unnecessarily hurtful and insulting, when such use is in no way in the public interest'¹⁷². In this ruling the Brussels Civil Court went on to state that 'it is unlawful to deliberately attack the honour and reputation of a person clearly for purely subjective reasons, by way of texts which cannot be regarded as 'acceptable' given their use of a bitter, strident or mocking tone but which, in fact, amount to an offensive opinion out of all proportion with and in no way necessary to express the opinion'¹⁷³.

¹⁶⁵ J.L.M.B. 2019, p. 1411 (edition of 27 September 2019).

¹⁶⁶ Bernard MOUFFE, *La responsabilité civile des médias*, Bruxelles, Wolters Kluwer, 2014, p. 92.

¹⁶⁷ *Ibid.*, p. 93.

¹⁶⁸ Liège, 24 February 2014, *J. L. M. B.*, 2014, p. 963.

¹⁶⁹ Brussels, 4 November 2008, *A. & M.*, 2008, p. 493.

¹⁷⁰ Dirk VOORHOOF, « Fotomontage in Humo beschermd door persvrijheid of manifeste schending van de privacy? », *A. & M.*, 2008, pp. 502 and 507.

¹⁷¹ François TULKENS, « La liberté d'expression en général », in Marc VERDUSSEN and Nicolas BONBLED (eds.), *Les droits constitutionnels en Belgique*, volume 2, Brussels, Bruylant, 2011, p. 841.

¹⁷² Brussels, 20 June 2011, *A. & M.*, 2012, p. 463.

¹⁷³ Brussels, 20 June 2011, *A. & M.*, 2012, p. 463.

IV.2.2. The right to the maintenance of law and order

When an application was received for the partial annulment of a law amending the staff regulations governing the operational wing of the police force, the Constitutional Court was called upon to weigh the right to the maintenance of law and order against the right to freedom of expression¹⁷⁴.

One of the provisions at issue required that 'staff shall in all circumstances refrain from making public their political opinions and engaging in political activities'¹⁷⁵.

The applicants maintained that the provision infringed their right to freedom of expression.

As a first remark, the Court accepted that the provision in question imposed considerable restrictions on the members of staff concerned as regards their freedom of expression¹⁷⁶. However, it went on to recall that that right could be subject to limitations, in accordance with Article 10 (2) of the ECHR.

Finally, the Court conceded that, 'in order to ensure the functioning of those institutions that are essential for a democratic state governed by the rule of law, and the rights of citizens, it may be necessary to impose certain limitations on freedom of expression, in particular with a view to ensuring compliance with the law and the maintenance of law and order'¹⁷⁷.

In its view, the contested provision 'is not manifestly disproportionate to the objective pursued, which is to guarantee an effective police service whose impartiality is indisputable, for the benefit of the authorities and the general public, in order to protect the proper functioning of democracy'¹⁷⁸.

IV.3. Perspective on limits to freedom of expression

To quote Prosecutor General Jacques Velu, 'in the democratic societies of the world we live in, most human rights and fundamental freedoms have a relative value in the sense that their exercise may be subject to certain limitations. It is not a truism to claim that this is the case with freedom of expression.'¹⁷⁹

The Constitutional Court and the Court of Cassation have accepted that the right to freedom of expression may be subject to restrictions provided that they satisfy the conditions laid down in Article 10 ECHR¹⁸⁰. This limitation must be:

- established in law;
- based on a legitimate aim;
- and considered necessary in a democratic society.

¹⁷⁴ Law of 24 July 1992 amending certain provisions relating to the staff regulations governing the operational wing of the police force and certain other laws concerning the police force, M.B. 31 July.

¹⁷⁵ Article 24/9 of the law of 24 July 1992 amending certain provisions relating to the staff regulations governing the operational wing of the police force and certain other laws concerning the police force, M.B. 31 July. This provision has since been repealed, but it has been replaced in a more recent law by an identically worded article.

¹⁷⁶ Constitutional Court judgment no 62/93, 15 July 1993, B.3.3.

¹⁷⁷ Constitutional Court judgment no 62/93, 15 July 1993, B.3.5.

¹⁷⁸ *Ibid.*, B.3.5.

¹⁷⁹ Jacques VELU, « PROPOS sur les normes européennes applicables aux relations entre la justice et la presse », *J. T.*, 1995, pp. 581 and 582.

¹⁸⁰ Cass., 1 December 2004, *A. & M.*, 2005, p. 167; Const. Court judgment no 45/96, 12 July 1996, B.7.6.

The 'necessary' nature of the measures presupposes the existence of a pressing social need¹⁸¹. In addition, these 'exceptions' are a matter of strict interpretation¹⁸².

However, the issue at stake is not so much restrictions on freedom of expression *per se*, but rather their impact and consequences. Some restrictions are subject to strict control, while in other cases this control will be less rigorous¹⁸³.

We have already seen a number of limitations on freedom of expression in the chapter on Belgian legislation, such as the offence of libel/slander and defamation, the right to be forgotten, and the possibility of seeking damages in the civil courts for the expression of an opinion. In this section, we will examine in more depth two limits which are open to debate: the criminalisation of Holocaust denial and racist and xenophobic language; and preventive measures.

IV.3.1. Combating Holocaust denial, racism and xenophobia

Belgian law criminalises Holocaust denial, racism and xenophobia, as discussed above in the chapter on Belgian freedom of expression legislation.

In addition to the anti-racism and xenophobia law of 30 July 1981, in 1995 a law against the denial of the Shoah was introduced into the Belgian legal system¹⁸⁴. The Explanatory Memorandum of the law of 23 March 1995 criminalising the denial, minimisation, justification or approval of the genocide committed by the German Nazi regime during the Second World War is based on the need 'to criminalise certain statements which are contrary to accepted facts and are expressed solely in order to magnify racist ideas and undermine the memory of all the victims of the 1940-1945 Holocaust'¹⁸⁵. The justification for this law is therefore rooted in the fight against racism and anti-Semitism.

Shortly after its entry into force, two actions for the annulment of this law were brought before the Court of Arbitration. The Court decided to hear the two cases jointly.

The applicants maintained that the contested law, by criminalising the expression of a specific opinion, is not consistent with the right to freedom of expression as enshrined in Article 19 of the Constitution. A request for suspension was also made against this law. According to the applicant, 'the criterion used by the law is not objective, it is far too vague and the effect of the law, namely a very serious breach of the right to freedom of expression of opinion, thus goes beyond the objective pursued'¹⁸⁶.

The Court did not agree with the reasoning of the applicants. In its view, the terms set out in that law are sufficiently precise to justify a restriction on freedom of expression. It further stated that 'it is apparent from the preparatory work that the legislature was fully aware of the fundamental importance of the right to freedom of expression since it deliberately sought to define the subject matter in question in a restrictive and unequivocal manner. In general

¹⁸¹ François DUBUISSON, « L'incrimination générique du négationnisme est-elle conciliable avec le droit à la liberté d'expression », *Rev. dr. ULB*, 2007, p. 153.

¹⁸² Bernard MOUFFE, *La responsabilité civile des médias*, Brussels, Wolters Kluwer, 2014, p. 52.

¹⁸³ Koen LEMMENS, « Taisez-vous, Elkabbach ! L'interdiction de la censure à la lumière des pratiques sociales », *R.B. D. C.*, 2003, p. 378.

¹⁸⁴ François DUBUISSON, « L'incrimination générique du négationnisme est-elle conciliable avec le droit à la liberté d'expression », *Rev. dr. ULB*, 2007, p. 137.

¹⁸⁵ The law of 23 March 1995 seeking to prevent the denial, minimisation, justification or approval of the genocide committed by the German Nazi regime during the Second World War, M. B. 30 March; Parl. doc, House, ord. session, 1991-1992, no 557/5, p. 3;

¹⁸⁶ Const. Court judgment no 45/96, 12 July 1996, A.4.3.

terms, moreover, the contested law requires a restrictive interpretation in that it reduces freedom of expression and because it is a criminal law¹⁸⁷.

The precise and restrictive definition of the material scope of the crime determines its compatibility with the principle of freedom of expression.¹⁸⁸ Thus, 'the conformity of the law with the principle of freedom of expression has been clearly established precisely by emphasising the strict interpretation which must be given to the law and by establishing a precise framework for its application. The Court of Arbitration has stressed that the law does not criminalise certain expressions of opinion because of their content, but rather because of their racist and anti-Semitic dimension, which is considered detrimental to a whole community'¹⁸⁹.

However, when defining the contours of this crime, the legislature was keen to exclude from its scope any scientific work carried out in good faith, i.e. which did not include any element of ill intent. The Court of Arbitration acknowledged the legislature's intentions, as set out in the preparatory work, not to undermine scientific freedom. However, while it considered the absence of an intentional element in the law of 1995 to be well founded, the Court nevertheless introduced the requirement to verify the existence of a specific intention, recognising as it did the judge's discretion to consider, in the light of the circumstances, whether the speech in question stemmed from a desire to 'restore a criminal ideology that is hostile to democracy'¹⁹⁰.

The legislature sought to amend the 1995 law to extend the criminalisation of Holocaust denial to situations other than the genocide perpetrated by the German Nazi regime. In particular, the amendments proposed by the Senate sought to extend this crime to include the Armenian and Rwandan genocides¹⁹¹. However, any extension of the scope of the law could raise legal problems with respect to freedom of expression and the understandability of criminal law¹⁹².

Indeed, as a first step it is necessary to consider whether it is for legislative bodies to definitively determine official truths and to assess historical events. For 'there is a great risk of finding, at the European level or at the international level, considerable disparities in the recognition of truths that will cast doubt as to whether any given fact is "clearly established", within the meaning of the case-law of the European Court of Human Rights'¹⁹³.

The Belgian legislature took the decision to extend the crime of genocide denial to include the Rwandan genocide and the Srebrenica massacre, broadening the scope of Article 20 of the

¹⁸⁷ *Ibid.*, B.7.8.

¹⁸⁸ François DUBUISSON, « L'incrimination générique du négationnisme est-elle conciliable avec le droit à la liberté d'expression », *Rev. dr. ULB*, 2007, p. 145.

¹⁸⁹ François DUBUISSON, « L'incrimination générique du négationnisme est-elle conciliable avec le droit à la liberté d'expression », *Rev. dr. ULB*, 2007, p. 154.

¹⁹⁰ C. Const. Court judgment no 45/96, 12 July 1996, B.7.10.

¹⁹¹ By way of example, see the draft law of 17 June 1995 amending the law of 23 March 1995 seeking to prevent the denial, minimisation, justification or approval of the genocide committed by the German Nazi regime during the Second World War, *Parl. doc.*, ord. session. 2014-2019, no 1182/001.

¹⁹² François DUBUISSON, « L'incrimination générique du négationnisme est-elle conciliable avec le droit à la liberté d'expression », *Rev. dr. ULB*, 2007, p. 164.

¹⁹³ François DUBUISSON, « L'incrimination générique du négationnisme est-elle conciliable avec le droit à la liberté d'expression », *Rev. dr. ULB*, 2007, p. 182.

law against racism and xenophobia of 30 July 1981¹⁹⁴. The legislature held that, in view of the specific nature of the 1995 law, which refers to the genocide which occurred during the Second World War, it was preferable to introduce the new provisions into the law of 30 July 1981 instead. The coexistence of these two laws does not give rise to confusion, given that the two texts provide for different penalties. In contrast to the 1995 law, the 1981 law requires particular intent for the offence to be deemed to have been committed. Moreover, the legislature chose to leave the 1995 law unchanged in order to underline the specific nature of the genocide committed by the German Nazi regime¹⁹⁵.

On the other hand, Belgium did not extend the scope of the law to include the Armenian genocide. This was because the draft law only covers those genocides recognised by an international court. Therefore, although Belgium recognises the Armenian genocide, it does not prosecute its denial.

To conclude, we see in current legislative developments that the Belgian Parliament is being encouraged to pass laws against an increasing number of crimes against humanity, without the reader being able to clearly identify the genocides covered by the criminal provisions¹⁹⁶. This poses a problem with regard to the legibility of criminal law. In addition, the legislature's decision that it will decide what qualifies as genocide has the effect of criminalising any criticism or questioning of that very decision – which constitutes an important restriction on freedom of expression¹⁹⁷.

IV.3.2. Preventive measures

As we saw in the chapter on case-law, the European Court of Human Rights considers that preventive measures are compatible with Article 10 ECHR, although a detailed examination of those measures is necessary. However, there is some controversy as to the admissibility of such measures under Belgian law.

Article 25 of the Constitution does not state that it excludes all forms of preventive measures. It merely refers to two expressly, namely censorship and securities. Some authors believe that this leaves the door open to a much wider interpretation. They consider that if securities and censorship are excluded, then *a fortiori* the same applies to other prohibitory measures adopted in advance:

Thus the Constitution prohibits all preventive measures which could be adopted in respect of specific content or which, irrespective of the planned content, could seriously impede the general exercising of freedom of the press¹⁹⁸.

There is another aspect of the admissibility of preventive measures that deserves attention, namely the question of how to distinguish between preventive measures ordered *a priori* and law enforcement measures, laid down in the Constitution under the heading of press offences. For as soon as the start of actual dissemination has been established, the prohibition is no longer preventive but instead falls within the scope of press offences, as provided for in Article 25 of the Constitution. The Court of Cassation has held that it is possible to speak of censorship

¹⁹⁴ Draft law of 4 April 2019 laying down various provisions in criminal and religious matters, *Parl. doc.*, ord. session. 2014-2019, no 3515/10, p. 57.

¹⁹⁵ Draft law of 4 April 2019 laying down various provisions in criminal and religious matters, *Parl. doc.*, ord. session. 2014-2019, no 3515/001, pp. 145 and 146.

¹⁹⁶ By way of example, see Article 136c of the Belgian Criminal Code.

¹⁹⁷ François DUBUISSON, « L'incrimination générique du négationnisme est-elle conciliable avec le droit à la liberté d'expression », *Rev. dr. ULB*, 2007, p. 184.

¹⁹⁸ Quentin VAN ENIS, *La liberté de la presse à l'ère numérique*, Brussels, Larcier, 2015, p. 310.

where a written document 'has already been widely distributed at the time the withdrawal order is served'¹⁹⁹.

However, assuming that such measures were possible only if no form of dissemination had already taken place, in the absence of any knowledge of the opinions liable to be communicated, the court might run the risk of basing its judgment on mere suppositions, which would be tantamount to making the opinion subject to prior authorisation. Moreover, 'the intervention of a judge before the publication in question has been sufficiently disseminated may have the unwanted consequence of allowing the author to evade judgment by their natural judge, namely, in the event of a press offence, a jury of one's peers'²⁰⁰. For as discussed above in the chapter on the constitutional provisions guaranteeing freedom of expression, Article 25 of the Constitution limits this fundamental right, subject to certain conditions, when its exercising constitutes a press offence²⁰¹. The Constitutional Court has also stated, in the judgment referred to in the chapter on Belgian case-law, that the court must 'take into account the prohibition of preventive measures in general and the prohibition of censorship in particular, laid down in Articles 19 and 25 of the Constitution, which means that judicial intervention is possible only where *dissemination has already taken place*'²⁰².

Finally, consideration should be given to the admissibility of preventive measures in the field of new media, such as the audiovisual sector, which 'is characterised by a certain immediacy of effect, with the initial broadcasting of any content generally coinciding with its largest audience'²⁰³. In its 'RTBF' judgment, the European Court of Human Rights – referring to the Court of Cassation's decision that the start of dissemination of written content was the criterion for distinguishing between *a priori* and *a posteriori* measures – held that Article 19 of the Constitution prohibits preventive measures in respect of all means of communication²⁰⁴. This ruling by the Strasbourg Court raises questions as to its application to digital media. The fact is that internet content can be disseminated and withdrawn in a few fractions of a second. It is therefore difficult to determine when dissemination has begun within the meaning of the Belgian case-law. In this case, legal literature considers that

'to avoid stripping the principle of the prohibition of censorship of any substance, a court cannot simply note that an article has simply been uploaded to draw the line between preventive and repressive measures'²⁰⁵.

¹⁹⁹ Cass. 29 June 2000, *Pas.*, 2000, I, p. 1222.

According to M. J. Velaers, a temporary injunction issued by the court hearing the initial request does not necessarily constitute a preventive measure banned by the Constitution. Indeed, unlike the application for interim measures, an *a priori* authorisation covers any form of publication. The court in such a case would impose a temporary order which is proportionate in that it would take effect only in the event of manifest infringements of other fundamental rights. Moreover, such a measure can only be taken when the opinion in question has already been sufficiently disseminated. Consequently, according to this author, 'the injunction would be in line with the constitutional requirement because it would only be ordered after the competent court had ruled that an offence had been committed, even if this decision were provisional, by confining itself only to manifest infringements of the rights of third parties and to the condition that dissemination had begun'. Quentin VAN ENIS, *La liberté de la presse à l'ère numérique*, Brussels, Larcier, 2015, p. 316 ; On this subject see Jan VELAERS *de Beperking van de vrijheid van meningsuiting*, Antwerp, Maku, 1991, p. 224.

²⁰⁰ Quentin VAN ENIS, *La liberté de la presse à l'ère numérique*, Brussels, Larcier, 2015, p. 317.

²⁰¹ Quentin VAN ENIS, *La liberté de la presse à l'ère numérique*, Brussels, Larcier, 2015, p. 318.

²⁰² Const. court, judgment no 157/2004 of 6 October 2004, B.74 and B.75.

²⁰³ Quentin VAN ENIS, *La liberté de la presse à l'ère numérique*, Brussels, Larcier, 2015, p. 321.

²⁰⁴ Quentin VAN ENIS, *La liberté de la presse à l'ère numérique*, Brussels, Larcier, 2015, p. 320 ; ECHR, judgment *RTBF vs. Belgium*, 29 March 2011.

²⁰⁵ Quentin VAN ENIS, *La liberté de la presse à l'ère numérique*, Brussels, Larcier, 2015, p. 321.

V. Conclusions

This study sought firstly to sketch out how freedom of expression is enshrined in Belgian law, by analysing the relevant legislation and case-law. Secondly, it focused on the situations in which freedom of expression has run up against other fundamental rights and some of the limits that the legislature and case-law have placed on the exercising of that freedom.

Modern society has seen the birth of new forms of communication. The internet, and in particular social media such as Facebook and Twitter, are changing our understanding of how the right to freedom of expression can be exercised. When an individual publishes an offensive comment or photograph on these social networks, something which might initially seem quite harmless, they are unaware of the risk they run of harming the reputation of others or even of themselves²⁰⁶. Such developments cannot be taken lightly and nor can we rely on the existing rules to govern this technological revolution.

The constituent power has not expressed any intention to adapt the basic provisions of the constitution to accommodate this evolution. We can only assume, therefore, that this new manifestation of the right of freedom of expression will be handled by successive case-law.

In this way the right to be forgotten can be invoked against a search engine such as Google. However, the way in which this right is handled may turn out to be quite complex²⁰⁷.

The case-law of the Court of Cassation with regard to internet content draws a distinction between written and audiovisual content distributed online. The Liège Criminal Court, in its judgment of 7 September 2018, which was subsequently upheld by the Liège Court of Appeal, held – correctly in our view – that threats on Facebook do not benefit from the protection afforded by Article 25 of the Constitution, which refers press offences to the Court of Assizes. However, at this stage it is impossible to predict how the Court of Cassation will rule in an appeal against this judgment.

With regard to the admissibility of preventive measures in the field of digital media, the ‘start of dissemination’ criterion which the Court of Cassation has used has shown its limits²⁰⁸. For when an internet user publishes any words or media online even for just a few seconds, that space of time is sufficient for others to download it and to be in possession of the harmful content. Consequently, the Court of Cassation will again have to clarify its case-law, in order to continue its arbitration between freedom of expression on the internet and respect for the fundamental rights of internet users.

²⁰⁶ Édouard CRUYSMANS, « La protection de la réputation en ligne : droit de réponse, droit de rectification, droit à l’oubli », in *L’Europe des droits de l’homme à l’heure d’Internet*, Brussels, Bruylant, 2019, p. 418.

²⁰⁷ *Ibid*, p. 419.

²⁰⁸ Cass., 29 June 2000, *Pas.*, 2000, I, p. 1222.

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