# Shortcomings in the rule of law? The *Antigoon*-doctrine in Belgium or the recovery of the fruit of the poisonous tree

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Try a Google search on the "rule of law" and here is your first hit: the rule of law is the restriction of the arbitrary exercise of power by subordinating it to well-defined and established laws.

A second source, Wikipedia, quotes the definition given by the *Oxford English Dictionary*:

> The authority and influence of law in society, especially when viewed as a constraint on individual and institutional behaviour; (hence) the principle whereby all members of a society (including those in government) are considered equally subject to publicly disclosed legal codes and processes.

Wikipedia goes on to say that

> The rule of law implies that every person is subject to the law, including people who are lawmakers, law enforcement officials, and judges.

The rule of law implies, every now and then, despite the gravity of the underlying facts, that – by way of examples – alleged drug dealers are acquitted or that the results of investigations on human trafficking are set aside on such grounds as a telephone tap without proper authorisation or a search warrant which lacks the judge's signature.

Invariably press articles will blame the investigators for their incompetence or accuse judges of being short-sighted. Criticism of this nature is rarely followed by a public debate on the meaning and purpose of the rule violated by the authority responsible for gathering the evidence that eventually will be discarded.

The public disapproval of the theory of the "fruit of the poisonous tree" has, however, not been without consequences. One might expect that politicians who are the law makers would be the first to react. Indeed, if public support for a procedural rule imposed by law evaporates, should it not simply be contemplated to drop it?

Surprising as it may seem, in Belgium the first reaction emerged in case law rather than in parliamentary action.

In a first judgement of 14 October 2003 (P.03.0762.N), now generally known as the *Antigoon*-case, the Belgian Court of Cassation confirmed a conviction that was based on the results of an illegal search in a vehicle in which an illegal fire arm was discovered.

The finding that the search was illegal was, as such, not disputed. Contrary to previous jurisprudence the Court held that there was no general rule of Belgian law according to which evidence obtained through a violation of a legal rule had to be discarded. The Court went on to say that such evidence will only have to be discarded:

- if the violated rule explicitly provides for this sanction;
- if the violation of the rule has contaminated the reliability of the evidence; or
- if the use of the evidence violates the right to a fair trial.

The Court's ruling has been incorporated in the Code of Criminal Procedure (article 32 of the Preliminary Title) ten years later by virtue of the law of 24 October 2013.

In the meantime the *Antigoon* doctrine has also been used to 'launder' evidence that was illegally obtained (*i.e.* through a violation of the rules that govern the gathering of evidence) in social security[1], civil[2] and – more frequently - tax[3] proceedings.

Over time the Court of Cassation has determined a number of yardsticks that may be used by lower Courts in order to appreciate if evidence will have to be discarded. This will be required if:

- the evidence is gathered in a manner that is absolutely unacceptable on the part of a civilised authority[4];
- the use of the evidence infringes the right to a fair trial.

In the context of their appreciation of the value of the evidence lower judges may take into account such elements as the finding that the evidentiary rule that is violated is a merely formal one[5]; the effect of the violation on the right which the evidentiary rule aims to protect[6]; the deliberate or involuntary nature of the violation of the rule; or the fact that the seriousness of the violation of the rule on evidence by the authorities outweighs the seriousness of the breach discovered as a result of it [7].

The violation of a rule that protects fundamental rights guaranteed by the European Convention of Human Rights does not automatically imply that evidence so obtained must be discarded[8], not even if the violated rule is deemed part of public policy (*ordre public*)[9].

This led the Court of Cassation to accept as valid evidence, for example, information obtained through a violation of a lawyer's professional privilege, although it should be mentioned that the evidence was discovered in connection with a different (tax) case from the one the lawyer

[1] Cass., 10 March 2008, S.07.0073.N.
[2] Mons, 2 March 2010, JT, 2010, 296; D. MOUGENOT, Le point sur la jurisprudence Antigone en matière civile, JT, 2017, 69.
[3] Cass., 22 May 2015, F.13.007.N.
[4] one may think of evidence obtained by torture or waterboarding.
[5] e.g. a tax inspector forgets to show his identification badge before entering the tax payer's premises (*vide* Cass., 12 September 2008, F.07.0013.N).
[6] e.g. Cass., 4 November 2016, F.15.0106.N : a tax inspector may not force a taxpayer to send him copies of invoices, but should go to the taxpayer to inspect them. The protected right (reducing the administrative burden on the taxpayer) has become obsolete in times when all companies have photocopiers.
[7] Judges may be more lenient for infringements by the authorities if, as a result of these infringements, serious crimes or serious misbehaviour are discovered.
[8] Cass., 16 November 2004, P.04.0644.N.
[9] Cass., 19 May 2015, P.14.0921.N.

had been consulted for[10]. The evidence could only have been discarded if it had passed the *Antigoon* test – which, in the Court of Cassation's judgment, was not the case.

However, the Court of Cassation could not ignore that the case law of the European Court of Human Rights and, more recently, of the European Court of Justice is more severe when it comes to the violation of fundamental rights guaranteed by the European Convention on Human Rights[11] and the Charter of Fundamental Rights of the European Union[12].

In a first decision the Belgian Court of Cassation decided that this more stringent approach only affected cases in which EU law has to be applied[13] but that it was not relevant in other cases.

Sixteen months later, the Court took a much more nuanced view[14]. After having compared the case law of the European Court of Humans Rights and the European Court of Justice with its own, it decided to request a preliminary ruling from the European Court of Justice. The case is related to direct income tax, a matter which is not governed by EU law. The problem is that the facts also give rise to a value added tax claim, which is subject to rules based on European Directives…

As a result of the case law differences in the treatment of evidence obtained as a result of a violation of fundamental rights, a citizen (tax payer) runs the risk of being treated differently depending on whether he or she is involved in matter governed by domestic law or by EU law. Such difference in treatment may not only be unconstitutional, it may also be tantamount to a violation of his or her right to a fair trial[15].

The question submitted to the European Court is whether Article 47 of the Charter of Fundamental Rights requires that evidence be discarded whenever it is gathered in the context of a violation of fundamental rights or if, in cases governed by EU law, there also is room for a Belgian style *Antigoon* test.

The heart of the matter is that the European Court is asked to decide whether the Belgian *Antigoon* case law has any chance to survive as a means to overrule the rule of law[16].

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[10] Cass., 18 January 2018, F.16.0031.N.
[11] It should be noted that Article 6 ECHR contains a tax carve out.
[12] which does not contain a "tax carve out", see : ECJ, 17 December 2015, WebMindLicenses Kft., C-419/14.
[13] Cass., 28 February 2017, P.16.0261.N.
[14] Cass., 28 June 2018, F.17.0016.N.
[15] Imagine the situation whereby the direct income tax case is dealt with prior to the VAT-case or the opposite where it is more likely that the evidence will be rejected…
[16] S. GNEDASJ, Impact van het WebMindLicenses op de fiscale en strafrechtelijke Antigoon-doctrines AFT, 2016, 33; F. KONING, La preuve irrégulière en matière fiscale ou le Réquiem d'Antigone, JT, 2017, 73.