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Environmental cases before the Belgian Constitutional Court

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The Belgian Constitutional Court is dealing with environmental cases most of the time from two different perspectives, mainly in function of the parties that are bringing the cases.

It is, on the one hand, reviewing legislation against the constitutional right to the protection of a healthy environment in cases introduced by individual citizens and environmental NGOs. It is checking on the other hand the compatibility of environmental legislation with property rights and the freedom of trade and industry in cases introduced by industrial federations, businesses, and landowners.

The right to the protection of a healthy environment.

The right to the protection of a healthy environment forms part of the economic, social and cultural rights which have been enshrined in the Belgian Constitution since 1994 and which can be found now in article 23 of the Constitution. The review by the Constitutional Court is chiefly carried out on the basis of the so called standstill obligation or non-regression principle, that has been derived from that constitutional provision and that itself, be it in other matters, stems from international law, more precisely art. 2 (1) of the International Covenant on Economic, Social and Cultural Rights. By the standstill effect is meant that the level of protection as acquired in the legal system must not be reduced. The principle is interpreted in a flexible way by the Court. A non-significant regression is not prohibited. A significant regression does not automatically result in an infringement of Article 23 of the Constitution. That is only the case in the absence of reasons connected with the public interest. So the Court will

check if the reasons invoked by the legislator to lower the level of protection can be justified or not. A reason e.g. that is incompatible with international or European law does not qualify to justify a significant regression of domestic environmental law. The first time the Court annulled a legislative provision because of violation of the right to the protection of a healthy environment was a case (judgment 137/2006) in which a regional town and country planning law had been relaxed in a way that was believed to be contrary to the EU Directive on Strategic Environmental Assessment and art. 7 of the Aarhus Convention. In its judgment 125/2016 the Court annulled a provision providing the transformation of environmental permits that were under the previous legislation limited in time into licenses for an indefinite period without the obligation to carry out an appropriate assessment according the EU Habitats Directive, for violation art. 23 of the Constitution in conjunction with the Habitats Directive. In its judgment 57/2016 the court annulled some provisions of an amendment of a regional nature protection law for violation of Art. 23 of the Constitution and art. 7 of the Aarhus convention by not providing public participation for the establishment of some nature management plans. In that case however the standstill obligation was not at stake. In total the Court has held in 9 environmental cases that the stand still obligation was violated and the majority of those cases have been judged since 2019.[1]

Property rights and the freedom of trade and industry

The majority of the actions for annulment that are brought before the court against federal or regional environmental legislation are instituted by owners or owners' associations, or by polluters or associations of polluters, who believe that new environmental legislation constitutes an excessive infringement of their fundamental rights. Besides a far-reaching infringement of property rights, an infringement of the freedom of commerce and industry (freedom of enterprise) is invoked in particular. What emerges from the case law is that the Constitutional Court has no intention whatsoever of counteracting the development of environmental law. So far, the court has always considered the restrictions on ownership resulting from the challenged environmental laws to be justified and not disproportionate to the objectives of the public interest pursued, even though when the (at times far-reaching) ownership restrictions did not give rise to compensation from the government. The court also argues that the freedom of commerce and industry in Belgium is not unlimited, and that an effective environmental policy necessarily implies that activities, which cause environmental nuisances, are monitored and regulated. In the court's view, there can only be an infringement of the aforementioned freedom if restrictions are imposed without there being any necessity for doing so, or if the restriction is completely disproportionate to the objective being pursued. Nearly all restrictions introduced by environmental legislation have so far been deemed compatible with the freedom of commerce and industry clause. Recent examples include the interdiction to use cars that do not meet emission standards that become stricter over time in low emission zones introduced by the regions (judgments 37/2019 and 43/2021) or the introduction of additional measures to reduce the pollution of water by nitrates due to the use of manure as a fertilizer (judgment 19/2021).

[1] Judgments 137/2006, 125/2016, 57/2016, 80/2019, 129/2019, 131/2019, 145/2019, 162/2020, 6/2021.

Burden of Proof, Expertise and the Interests of Future Generations

As the Burden of Proof is concerned, the principle which prevails in the Court's jurisprudence is the free production of evidence. The burden of proof is on the party who makes the claim and the only criterium to appreciate the evidence produced resides in its credibility that is appreciated by the Court. Although the Court has according to Art. 91 of its Organic Act of 6 January 1989 the broadest investigation powers, and can request information from other authorities than those present in the case, hear any person it deems useful or appoint experts, it has never used those powers. When something is not sufficient clear for the Court, it will invite the parties present in the case to provide the information it deems necessary and to answer the questions it has raised (art. 90). In technical matters the governments will provide often the studies that have been taken into consideration by the preparation of the challenged legislation and that have most of the time been referred to in the parliamentary discussions. There can be off course cases in which one is confronted with scientific uncertainty. In those cases the Court will refer to the precautionary principle. The Court has done this in cases concerning non-ionizing radiations. In its judgement 2/2009 the Court held that the choice of the legislator to have introduced a strict standard, applying the precautionary principle, falls within the discretion of that legislator and cannot be rejected in the absence of binding international or European standards in this area. The relaxation of that standard later on, has not been found contrary to the precautionary principle in judgment 12/2016. In that judgment the Court referred to the understanding of the precautionary principle by the CJEU in its caselaw. By quadrupling the standard after thorough research and expert consultation during the parliamentary preparation the Court noted that it is still about 50 times stricter than the *International Commission on Non-Ionizing Radiation Protection* (non-binding) standard.

So far the interest of future generations has only a few times be discussed in the case law of the court Artikel 7b of the Belgian Constitution, introduced in 2007, provides that in the exercise of their respective competences, the Federal State, the Communities and the Regions pursue the objectives of sustainable development in its social, economic and environmental aspects, taking into account the solidarity between the generations. It is the only provision contained in a separate Title Ib of the Constitution on general policy objectives. The constitutional legislator has opted for a separate Title to make sure that those provisions are not within the constitutional provisions that are within the scope of review by the Constitutional Court. Although the Court recognised in its judgment 125/2016 – a case concerning legislation that could have an important impact on social rights - that it cannot review legislations against art 7b as such, it can take into consideration art. 7b while reviewing the constitutionality of legislation against the rights enshrined in art. 23. So the Court held that by guaranteeing the economic, social and cultural rights the legislators must take into consideration the effects of their policies for future generations. However, as the Court noted in judgment 75/2011, art 7b provides for a broad margin of appreciation for the legislators, so that indirect review of legislation against that provision (so in combination with other constitutional provisions) will only in exceptional circumstances have as a consequence that a legislative norm is unconstitutional.