

THE CONSTITUTIONAL COURT OF BELGIUM



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CONTENTS¹

1. FROM COURT OF ARBITRATION TO CONSTITUTIONAL COURT	5
a) Establishment of the Court of Arbitration	5
b) From Court of Arbitration to Constitutional Court	6
c) Legal (constitutional) foundations	7
2. ORGANIZATION OF THE CONSTITUTIONAL COURT	9
3. JURISDICTION OF THE CONSTITUTIONAL COURT	10
a) <i>A priori</i> jurisdiction	10
b) <i>A posteriori</i> jurisdiction	10
1. Regulations reviewed by the Constitutional Court	10
2. Regulations constituting the yardstick for review by the Constitutional Court	11
4. METHOD OF REFERRAL	13
a) Constitutional review of legislative acts	13
1. Actions for annulment	13
2. Preliminary questions	15
b) Other competences	15
5. HOW THE CONSTITUTIONAL COURT OPERATES	17
6. PROCEDURE BEFORE THE CONSTITUTIONAL COURT	18
a) Constitutional review of legislative acts	18
b) Other proceedings	19
7. JUDGMENTS AND DECISIONS	21
a) Constitutional review of legislative acts	21
1. Pronouncement and publication	21
2. Effects of judgments	21
b) Other proceedings	22

¹ The special Act of 6 January 1989 on the Constitutional Court and other organic provisions concerning the Court can be consulted on the website www.const-court.be.



Entrance

1. FROM COURT OF ARBITRATION TO CONSTITUTIONAL COURT

a) Establishment of the Court of Arbitration

The Constitutional Court owes its existence to the development of the Belgian unitary state into a federal state.

The unitary Belgian state has undergone thoroughgoing reforms since 1970. Those reforms, which took place in several stages, resulted in the establishment of a federal state where the legislative power is divided between the federation and the federated regions according to a system in which each legislative body has exclusive powers. The laws of the federation and the decrees and ordinances of the federated regions have the same force of law.

The division of the legislative power between different legislative assemblies brought with it the risk of conflicts of competence, and the need to find a solution to this problem led the Constitutional legislator in 1980 to decide – in the then Article 107^{ter} of the Constitution – to establish a new judicial body, the Court of Arbitration, which was given the task of demarcating the boundaries of each authority's jurisdiction. For this purpose, the Court could review laws, decrees and ordinances for compliance with the division of competences that have been established by or in pursuance of the Constitution.

The aforementioned constitutional provision was implemented by the Act of 28 June 1983, which defined the composition, competence and functioning of this new court. The Court of Arbitration was officially inaugurated in the Senate on 1 October 1984. On 5 April 1985 it delivered its first judgment.

b) From Court of Arbitration to Constitutional Court

By the constitutional amendment of 15 July 1988, the competence of the Court was extended to include the supervision of the observance of Articles 10, 11 and 24 of the Constitution guaranteeing the principles of equality, non-discrimination and the rights and liberties in respect of education.

By the same constitutional amendment of 1988, it was left up to the special legislator to grant the Court of Arbitration competence to review compliance with other articles of the Constitution. This facility has so far been used twice: the special Act of 9 March 2003 extends the competence of the Court to all provisions of Section II of the Constitution, which relate to rights and freedoms (Articles 8 to 32), as well as to Articles 170 (the legality principle in tax matters), 172 (the equality principle in tax matters) and 191 (the protection of foreign nationals) of the Constitution; the special Act of 6 January 2014 extends this competence further to Article 143, § 1 (the principle of federal loyalty) of the Constitution.

When the Constitution was coordinated in 1994, the provision concerning the Court of Arbitration was incorporated in Article 142.

When the Constitution was amended on 7 May 2007, the name of the Court of Arbitration was changed into “Constitutional Court”.

c) Legal (constitutional) foundations

The present Article 142, first paragraph, of the Constitution stipulates that for the whole of Belgium there is one Constitutional Court, the composition, jurisdiction and functioning of which are determined by statute. The Court rules, by means of judgments, on conflicts of authority, on violations of Articles 10, 11 and 24 of the Constitution, and on violations of such articles of the Constitution which the law designates (the articles of Section II of the Constitution as well as Articles 143, § 1, 170, 172 and 191). A case can be brought before the Court by any authority designated by statute, any person who has a justifiable interest, or, in a preliminary issue, any court of law.

Article 142 of the Constitution was implemented by the (repeatedly amended) special Act of 6 January 1989, which regulates the organization, jurisdiction, functioning and procedure of the Court and the effects of its judgments. An (ordinary) Act of 6 January 1989 regulates the emoluments and pensions of the judges, legal secretaries and registrars of the Court.

The constitutional amendment of 6 January 2014 extended the jurisdiction of the Court to an *a priori* review of regional referendums and the review of decisions of the House of Representatives or its bodies concerning the election expenditure for the election of that legislative assembly. Those new provisions were implemented by two special acts of 6 January 2014 amending the special Act of 6 January 1989.

Finally, there are several Royal Decrees, regulations and guidelines relating to various aspects of the competence and operation of the Court.

All these texts can be found on the website of the Constitutional Court (www.const-court.be) under the heading “Basic Texts”.



Courtroom

2. ORGANIZATION OF THE CONSTITUTIONAL COURT

The Court is composed of twelve judges, appointed for life by the King from a list of two candidates proposed alternately by the House of Representatives and the Senate by a majority of at least two-thirds of the members present.

Six judges belong to the Dutch language group, six to the French language group. One of the judges must have an adequate knowledge of German. Each linguistic group is composed of three judges appointed on the basis of their legal experience (professor of law at a Belgian university, judicial officer at the Supreme Court or the Council of State, legal secretary at the Constitutional Court) and three judges who have had at least five years' experience as Members of Parliament. The Court is composed of judges of both genders, at the rate of at least one third for the least numerous group, on the understanding that this group must be represented in both the aforementioned professional categories.

Candidates must be at least forty years old. The judges may hold office until the age of seventy. There are strict rules of incompatibility with other offices, posts and professional activities. The judges of each linguistic group elect a president, who preside in turn over the Court for a term of one year, commencing on 1 September.

The Court is assisted by legal secretaries (maximum 24), of whom half are Dutch-speakers and the other half French-speakers. They have a university degree in law and are selected on the basis of an open competition, the terms and conditions of which are determined by the Court.

The Court also has one Dutch-speaking and one French-speaking registrar. The Court appoints the administrative staff that works in the different departments. The Court has its own funding system based on an annual grant, which enables it to operate in total independence and impartiality.

3. JURISDICTION OF THE CONSTITUTIONAL COURT

The jurisdiction of the Constitutional Court is determined, on the one hand, by the type of regulations that can be reviewed and, on the other hand, by the type of regulations that constitute the yardstick for review.

a) *A priori* jurisdiction

The Court rules by way of decisions on all regional referendums which the regions may organize in most matters that fall within their remit. It is the mission of the Court to examine, before the referendum is organized, whether that referendum complies with the organic provisions regulating regional referendums, and with the other constitutional and legal provisions against which the Court carries out its review (see under (b)(2) below). The referendum cannot be organized as long as the Court has not delivered a favourable decision.

b) *A posteriori* jurisdiction

1) Regulations reviewed by the Constitutional Court

The Constitutional Court is competent to review legislative acts. By legislative acts are meant both substantive and formal rules adopted by the federal parliament (statutes) and by the parliaments of the communities and regions (decrees and ordinances). All other regulations, such as Royal Decrees, decrees of governments of communities and regions, ministerial decrees, regulations and decrees of provinces and municipalities, and court decisions fall outside the jurisdiction of the Court.

The Court is also competent to review decisions of the House of Representatives or its bodies concerning the election expenditure for the election of that legislative assembly.

2°) Regulations constituting the yardstick for review by the Constitutional Court

Article 142 of the Constitution gives the Constitutional Court the exclusive authority to review legislative acts for compliance with the rules that determine the respective competences of the federal State, the communities and the regions. These rules are set forth in the Constitution and in laws (usually passed by a special majority vote) that are enacted with a view to institutional reform in federal Belgium.

The Constitutional Court also has the authority to pass judgment on any violation by legislative acts of the fundamental rights and liberties guaranteed in Section II of the Constitution (Articles 8 to 32) and of Articles 143, § 1 (the principle of federal loyalty), 170 (the legality principle in tax matters), 172 (the equality principle in tax matters) and 191 (the protection of foreign nationals) of the Constitution.

In reviewing decisions of the House of Representatives or its bodies concerning certain election expenditures, the Court verifies the substantial forms or forms prescribed on pain of nullity, as well as the excess or abuse of power, and not just the aforementioned reference standards.



Deliberations room

4. METHOD OF REFERRAL

a) Constitutional review of legislative acts

A case may be brought before the Constitutional Court in two ways: in the form of an action for annulment or in the form of a preliminary question referred by a court of law.

1) Actions for annulment

The following authorities and persons may bring an action for annulment before the Constitutional Court:

- the Council of Ministers and the governments of the communities and the regions;
- the presidents of all legislative assemblies, at the request of two-thirds of their members;
- natural or legal persons, both private and public, Belgian as well as foreign nationals.

The latter category of persons must “declare a justifiable interest”. This means that those persons must demonstrate in their application to the Court that they are liable to be personally, directly and unfavourably affected by the challenged act.

As a general rule, with certain exceptions, actions must be brought within six months of the publication of the challenged regulation in the Official Journal.

The action for annulment does not suspend the effect of the challenged act. In order to guard against the possibility that the challenged act may cause prejudice that is difficult to repair during the period between the institution of the action and the pronouncement of the judgment, and that a subsequent retroactive annulment may no longer have any effect, the Court may, at the applicant’s request and in exceptional circumstances, order the suspension of the challenged act pending judgment on the merits of the case, which has to be given within three months following a suspension decision. Such an action for suspension must be brought within three months following the publication of the challenged act in the Official Journal.



Reception room

2) Preliminary questions

The Constitutional Court has the exclusive authority to review legislative acts for compliance with the Constitutional and statutory provisions for which it has jurisdiction.

If a question comes up in a court of law regarding the compatibility of laws, decrees and ordinances with the rules governing the division of competences between the federal State, the communities and the regions or with Articles 8 to 32, 143, § 1, 170, 172 or 191 of the Constitution, that court must in principle address a preliminary question to the Constitutional Court. When a court of law addresses a question, the proceedings before that court are suspended pending the ruling of the Constitutional Court.

b) Other competences

It is the president of the regional parliament concerned who can seize the Court prior to the organization of a regional referendum.

Actions for annulment of decisions taken by the House of Representatives or its bodies concerning certain election expenses may be brought by elected candidates against whom a penalty has been pronounced. The action must be brought within thirty days after notification of the penalty.



Registry waiting room

5. HOW THE CONSTITUTIONAL COURT OPERATES

In principle, a case is heard before the Court by a bench of seven judges. Cases may also be heard by a larger (ten or twelve) or smaller (three) bench.

Each year on 1 September (when the presidency changes), the benches of the Court are constituted. Normally the cases are heard by benches of seven judges, composed of the two presidents, who sit in all cases, and five judges who are appointed according to a complex rota system established by the special legislator. This system guarantees that each bench has at least three judges from each linguistic group and that there are always at least two former Members of Parliament and two judges with legal qualifications. In the, normal, benches of seven judges, decisions are taken by ordinary majority vote.

The presidents may, however, decide to submit a case to the Constitutional Court in plenary session. They can decide to do so each individually whenever they deem it necessary. They are also obliged to do so when two of the seven judges who make up the (normal) bench so request. At least ten judges, and in any case as many Dutch-speaking and French-speaking judges, must be present for the Court to rule in plenary session. The presiding judge has the casting vote in the event of a tie in a ruling given by the Court in plenary session.

In each case, according to a system determined by the special legislator, one Dutch-speaking judge and one French-speaking judge is appointed as judge-rapporteur. Together with their legal secretaries, the judges-rapporteurs are responsible for preparing the case.

Cases which, as a result of a screening procedure, which does not apply to the organization of regional referendums, clearly do not fall within the jurisdiction of the Court or are manifestly inadmissible may be heard by a “restricted chamber”, composed of the president and the two judges-rapporteurs.

6. PROCEDURE BEFORE THE CONSTITUTIONAL COURT

a) Constitutional review of legislative acts

The procedure before the Constitutional Court is essentially written and adversarial. The rules of procedure concerning actions for annulment and preliminary questions are largely the same, except of course as regards the way in which cases are referred and the effects of the Court's judgments. The procedure before the Court is regulated by the special Act of 6 January 1989 and by the guidelines of the Court on procedure. These texts can be found on the website of the Court under the heading "Basic Texts".

Cases may be brought before the Court in Dutch, French or German, as the case may be, but the hearing and examination takes place in Dutch or in French in accordance with the rules set forth in the special Act of 6 January 1989. After being entered on the docket, each case is assigned to a particular bench according to a system determined by law. The first judges of each linguistic group who have been appointed to the case will act as rapporteurs. In order to avoid an overload of work, there is a summary procedure to deal with certain cases, for example cases that are inadmissible or are relatively straightforward.

Except where the summary procedure is applied, it is announced in the Official Journal that a case has been brought before the Court. Besides the applicants (in actions for annulment) and the parties before the referring court (in referrals for preliminary questions), interested third parties may intervene by written submissions. The various legislative assemblies and governments may intervene in all cases. After the time has expired that is necessary for exchanging written submissions and for the investigations by the judges-rapporteurs and their legal secretaries, the Court considers whether the case is ready for hearing and whether a hearing should take place. In that case, the date of the hearing will be set and questions, if any, are formulated in the order deciding that the case is ready for hearing. All parties that lodged a written submission are notified thereof and receive a written report of the judges-rapporteurs drawing attention to the questions that may be addressed to them at the hearing. The hearing is public. If no hearing has been set, each

party may ask to be heard. Failing this, the case is taken into deliberation. If a hearing is held, the first judge-rapporteur reports on the case. The second judge-rapporteur, from the other linguistic group, may issue a supplementary report. All parties that lodged written submissions may also make oral arguments (in Dutch, French or German, with simultaneous interpretation), either in person or represented by a lawyer.

When the case is taken into deliberation, the Court rules by majority vote. In the event of a tie (if the bench is in plenary session), the president has the casting vote. The deliberations of the Court are secret. No provision has been made for concurring or dissenting opinions. The Court is obliged to deliver a judgment within twelve months following the submission of the case.

b) Other proceedings

The primarily written procedure is, *mutatis mutandis*, modelled on the procedure for the constitutional review of legislative acts. With respect to the organization of regional referendums, the special Act does not provide for a summary procedure or for a hearing, and restricts the exchange of written submissions to the Council of Ministers, the community and regional governments, the presidents of the legislative assemblies, and the initiator(s) of the referendum. With respect to disputes over certain election expenses, the special Act provides for the referral to the Court, by the president of the House of Representatives, of the case file that led to the challenged decision, as well as for the referral to the Court, by the House Committee, of a written submission to which the petitioner can reply. The Council of Ministers may also file a written submission if the Court, as part of those proceedings, is called upon to rule on the constitutionality of legislative acts.



7. JUDGMENTS AND DECISIONS

a) Constitutional review of legislative acts

Judgments of the Constitutional Court are enforceable by law and not open to appeal.

1) Pronouncement and publication

The judgments of the Court are drafted in Dutch and in French. Judgments in actions for annulment and in cases that were instituted in German are also drafted in German. They may be pronounced by the presiding judges in public session; alternatively, publication on the website of the Court will count as pronouncement. In addition to this publication (in Dutch and in French (in full), and in German (in excerpt form)), keyword indexes are provided to facilitate consultation of the case-law. The judgments are also published in the Official Journal.

2°) Effects of judgments

The effects of the judgments of the Constitutional Court differ according to whether they have been pronounced in respect of an action for annulment or in respect of a preliminary question.

If the action for annulment is well-founded, the challenged legislative act will be entirely or partially annulled. Annulment judgments have absolute binding force from the moment they are published in the Official Journal. Such annulment has retroactive effect, which means that the annulled act must be deemed never to have existed. If necessary, the Constitutional Court may moderate the retroactive effect of the annulment by upholding the effects of the annulled act.

Where the Court fails to do so, the administrative acts, regulations and court decisions based on the annulled legislative act will still stand. In addition to the use of the ordinary legal remedies where this is still possible, the special Act provides that final court decisions or administrative acts and regulations that are founded on a legislative act that is subsequently annulled may be rendered unenforceable or be challenged, provided this is requested within six months after the publication of the Court's judgment in the Official Journal. For this purpose, special legal remedies are available to the prosecuting authorities and the interested parties.

Judgments delivered by the Constitutional Court dismissing actions for annulment are binding on the courts in respect of the points of law settled by such judgments.

The effects of rulings given on preliminary questions are somewhat different. The court of law that referred the preliminary question, and any other court passing judgment in the same case (for instance on appeal) must, in settling the dispute that gave rise to the preliminary question, comply with the ruling given by the Constitutional Court on the preliminary point of law in question. Where the Court finds a violation, the legislative act will remain part of the legal system, but, bearing in mind that the judgment has an effect that reaches further than the case that is pending before the referring court, and given that a fair balance must be preserved between the concern that every situation that conflicts with the Constitution is remedied and the concern that existing conditions and raised expectations are not jeopardized in the course of time, the Court considered that the opportunity offered by the special Act to uphold the effects of provisions that have been nullified by an annulment judgment also applies to judgments delivered on a preliminary question. Furthermore, a new six-month term commences in which an action for annulment of the legislative act concerned can be brought forward.

b) Other proceedings

Decisions preceding the organization of a regional referendum must be taken within sixty days after the petition has been filed. Regional referendums which the Court has considered incompatible with the regulations that the Court is required to enforce, or in respect of which the Court has not been seized, cannot be organized; this also applies as long as the Court has not given a decision.

In disputes over certain election expenses, if the action for annulment is well-founded, the Court will nullify the decision of the House Committee against which the action was brought; the Committee will consequently revert to the situation that existed before the annulled decision.

