50th Anniversary of the Constitutional Judiciary in the Republic of Macedonia

CONSTITUTIONAL COURT OF THE REPUBLIC OF MACEDONIA

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The Belgian Constitutional Court and the separation of powers

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Introduction

Compared to the Constitutional Court of Macedonia, which celebrates its 50th anniversary this year and is thus in human terms gradually becoming middle-aged, the Belgian Constitutional Court is some 20 years younger. It will indeed celebrate its 30th anniversary next year. Installed on 2 October 1984, it delivered its first judgments on 6 April 1985. Compared to the Macedonian Court, the competencies of the Belgian Court are, although considerably extended over time, somewhat more restricted.

From the seventies of last century on, Belgium embarked on a process of federalization. This gave rise to an awareness of the need to put in place a constitutional review of legislative acts. The transformation of the unitary Belgian state into a federal state engendered a multiplication of legislative bodies in Belgium. The creation of federated entities – Regions and Communities (the Belgian State structure is rather complex[1]) - empowered to adopt rules with the same legal effect as acts of the federal parliament opened up the possibility of conflicts between legislative acts. The constitutional legislator had no choice but to renounce the principle of infallibility of the legislator that has prevailed for a long time and to establish a constitutional court which it was to call "Court of Arbitration", since its mission was simply to arbitrate conflicts of jurisdiction. In 1980, Article 107c (now Article 142) of the Constitution established a "Court of Arbitration", while the Act of 28 June 1983 "on the composition, competence and functioning of the Court of Arbitration" was adopted. The name that was first given to the Court says a lot about its original mission, which was - and still is - to supervise the observance of the constitutional division of powers between the federal state, the communities and the regions[2].

By the constitutional amendment of 15 July 1988, the competence of the Court was extended a first time to include the supervision of the observance of the Articles 10, 11 and 24 of the Belgian 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" (that is an Act of Parliament adopted with a qualified majority) to grant the Court the competence to review compliance with other provisions of the Constitution. This facility was used in the Special Act of 9 March 2003. Not only Articles 10, 11 and 24 of the Constitution, but the

[1] See: A. Alen (ed.), *Treatise on Belgian Constitutional Law*, Kluwer Law and Taxation Publishers, Deventer-Boston, 1992, p. 123-170; A. Alen & D. Haljan (eds.), *Belgium, International Encyclopedia of Laws*, *Constitutional Law* – Suppl. 105 (2013), Kluwer Law International, Alphen aan den Rijn, p. 143-182.

[2] A. Alen (ed.), *op. cit.*, p. 108-115; A. Alen & D. Haljan (eds.), *op.cit.,* p. 124-135.

entire Section II dealing with fundamental rights (Articles 8 to 32), as well as the Articles 170, 172 and 191 (legality in tax matters, equality in tax law and protection of foreign nationals) of the Constitution, now constitute the frame of reference for the constitutional review of statutes by the Court. When the Constitution was revised on 7 May 2007, the name of the Court of Arbitration was changed to that of "Constitutional Court"[3]. Under the Special Act of 6 January 2014, the Court is now also competent to adjudicate appeals against sanctions imposed on members of parliament by the Commission for the Control of Electoral Expenditures of the House of Representatives, for violation of the legislation limiting election expenses and for the preventive constitutional control of Referenda organised by Regional Parliaments.

The Belgian Constitutional Court is thus a Court that is specialised in constitutional review and to which ordinary courts have to refer when such questions arise before them.

The Constitutional Court is exclusively competent to review domestic legal norms that have force of law. By domestic legal norms having force of law are meant both substantive and formal rules adopted by the federal parliament (statutes or federal acts of parliament) and by the parliaments of the communities and regions (decrees and ordinances). All other legal norms of an executive nature, such as Royal Decrees, decrees of governments of communities and regions, ministerial decrees, regulations and decrees of provinces and municipalities[4], as well as court judgments fall outside the jurisdiction of the Court. The review of lower legal norms for compliance with international treaties, the Constitution or the law falls within the jurisdiction of the ordinary courts and the *Council of State* (the Supreme Administrative Court).

It is important to note that the Constitutional Court has adopted a broad interpretation of its jurisdiction, especially in relation to the review of compliance with the equality principle, and later on, in relation to other fundamental constitutional rights. From the outset, it has involved all other provisions of the Constitution, international and European law in its review. The Court is of the opinion that the fundamental rights guaranteed by the Constitution and by International and EU Law form a 'inseparable whole". The review of acts of parliament against those provisions is however 'indirect'[5]. The arguments brought before the Court are constructed in the following form: violation of e.g. Art. 10 and 11 of the Constitution *read in conjunction* with some other articles of the Constitution and some provisions of International Treaties or European Union Law provisions. Moreover, the Court makes sure to match its case-law as much as possible with that of the European Court of Human Rights[6] and of the Court of Justice of the European Union[7].

Separation of powers in the Belgian Constitution

Although the principle of the separation of powers as such is not mentioned in the Belgian Constitution, which was adopted in its original form in 1831, the Belgian Constituent Assembly was heavily influenced by Montesquieu's writings. The Constitution provides for a division of labour among different state organs as to the various tasks which the exercise of public powers involves.

[3] www.const-court.be

[4] This is different from the Macedonian Constitutional Court.

[5] M. Bossuyt & W. Verrijdt, "The Full Effect of EU Law and of Constitutional Review in Belgium and France after the Melki Judgment", *European Constitutional Law Review*, 2011 (7), p. 357-358; G. Rosoux, "La Cour constitutionnelle de Belgique", *Les Nouveaux Cahiers du Conseil Constitutionnel*, 2013 (4), p. 201.

[6] L. Lavrysen & J. Theunis, «The Belgian Constitutional Court : a Satellite of the ECtHR ? », in A. Alen, V. Joosten, R. Leysen & W. Verrijdt (eds.), *Liberae Cogitationes. Liber amicorum Marc Bossuyt*, Intersentia, Cambridge-Antwerp-Portland, 2013, p. 331-332.

[7] L. Lavrysen, "Die Europaïsche Union, Belgien und der belgische Verfassungsgerichtshof", *Luxemburger Expertenforum zur Entwicklung des Gemeinschaftsrechts, 3, Proceedings.* European Court of Justice, 2009, 21 p.

This specialisation and division of labour between the Legislature, the Executive and the Judiciary, is meant to prevent an excessive concentration of power in the hands of one body, which might lead to violations of the rights of citizens[8]. In Belgian constitutional law, the separation of powers is an unwritten binding principle of law, underlying various constitutional provisions. The principle that each power is independent in its own sphere is, however, not absolute. On the one hand, since there is no rigid delimitation of an exclusive sphere of each power, in which the other power would have no authority to act, it would be in fact more appropriate to talk about *division of powers* or *equilibrium of powers*[9] rather than about *separation of powers*. On the other hand, the independence of each power within its principal function is relative because an optimal functioning of the state presupposes a close cooperation of the three powers.

Art. 159 of the Constitution[10], which assigns to the courts a function of control of the Executive Branch, is a key provision in the system of checks and balances between de different State Powers. Every judge must indeed check the legality of regulations and decisions of the Executive Branch at the different levels (federal, regional, local), before applying them in a concrete case, and setting them aside if they should violate higher legal standards (acts of parliament, Constitution, international and European law)[11].

Case Law of the Constitutional Court

As has been explained, the Constitutional Court of Belgium is the judge of the federal, regional and community legislators, and is not, as such, in charge of the enforcement of the division of powers between the different branches of the state powers[12]. However, this does not exclude that the principle of the separation of powers plays a role in the constitutional case law. In its judgment no. 82/2007, the Court ruled that it is not empowered to *directly review* legal norms against *general principles* or treaty provisions. However, the Court may take them into consideration in its constitutionality review, but only if provisions are also adduced which the Court may use directly as a yardstick for review, either Articles 10 and 11 of the Constitution, or, where a treaty provision is adduced, a constitutional provision guaranteeing similar rights or freedoms[13].

The first time that the Court took into consideration *the general principle of the separation of powers*, while judging an Act of Parliament, occurred in its judgment n° 87/95 of 21 December 1995[14]. The Court was of the opinion that retroactively imposing by an Act of Parliament the payment of taxes previously provided for in an Executive order that had been annulled by the Council of State for violation of the legality principle, did not violate Articles 10 and 11 of the Constitution, in conjunction with Articles 6.1 and 13 ECHR, or with the *res judicata* attached to the decision of the

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[8] A. Alen (ed.), *op. cit.*, p. 9; A. Alen & D. Haljan (eds.), *op.cit.,* p. 30.

[9] Belgian Supreme Court, 28 September 2006, *Ferrara:* Cass. 28 September 2006, *Arr. Cass.,* 2006, N° 445, *RW* 2006-07, p. 1123, note A. Van Oevelen, *TBP* 2007, p. 546-553.

[10] "Courts only apply general, provincial or local decisions and regulations provided that they are in accordance with the law".

[11] On this subject: J. THEUNIS, *De exceptie van onwettigheid*, Administratieve Rechtsbibliotheek, Nr. 18, die Keure, Brugge, 2011, 777 p.

[12] Constitutional Court, N° 33/2011, 2 March 2011, *Brusselse Hoofdstedelijke Regering.*

[13] Constitutional Court, N° 64/2008, 17 April 2008, *G. Fievet and Others*; Constitutional Court, N° 99/2011, 31 May 2011, *S. Thomas & bvba Bexan v. Belgian State & Federale Raad van Beroep van landmeters-experten.*

[14] Constitutional Court, N° 87/95, 21 December 1995, *v.z.w. Belgische Federatie van de Distributieondernemingen (Fedis)*, *n.v. Van-O-Bel and Others and n.v. Petitjean & Frères;* confirmed by Constitutional Court, N° 49/98, 20 May 1998*, nv Fonck-Dehennin.*

Council of State, the general principle of the separation of powers or the independence of the judiciary[15].

This was specified in judgment no. 17/2000[16], which ruled that Articles 14, 15, 21 and 23 of the Act of 23 March 1998 on the establishment of a Budgetary Fund for the health and quality of animals and animal products, *which have retroactive effect, must on no account lead to final and conclusive court judgments being challenged*. If that is their intended effect, they would violate Articles 10 and 11 of the Constitution by denying a particular category of persons the benefit of court judgments that have become final and conclusive, which cannot be justified by any circumstance[17].

The issue of *legislative validations* recurs on a regular basis. Starting with judgment no. 73/2004[18], which concerns the legislative validation of a tax introduced by an Executive decision, we see how the Court has steadily attuned its case law to that of the ECHR. In that judgment, the Court ruled that the principles of the rule of law, more particularly in light of the case law relating to Article 6 of the European Convention on Human Rights, cannot be interpreted in the sense that they preclude all State interference in a pending lawsuit. Although the aforementioned principles, insofar as they are enshrined in the same Article 6, in principle preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of a dispute, such interference may nevertheless be justified by compelling grounds of general interest (see in particular ECR, *Zielinski and Pradal* v. France, judgment of 28 October 1999, §57, and *Agoudimos and Cefallonian Sky Shipping Co.* v. Greece, judgment of 28 June 2001, §30). The Court considered that the purpose of the provisions at issue in that case was not to interfere in pending lawsuits and that, even if that were to be the result, the grounds that inspired the action of the legislature and that are connected with the legislature's views on policy of medical care are compelling grounds of general interest. Similarly, in its judgment no. 188/2005[19], in which an arrangement for the planning of retirement homes was substituted for a similar arrangement that had previously been set out in a decree of the Walloon Government that had been declared unlawful by the Council of State, the Court found no evidence to suggest that the purpose of the provision at issue was to interfere in pending lawsuits. Even if that were to be the result, the grounds that inspired the action of the and that are connected with the legislator's views on policy for the elderly are compelling grounds of general interest that may justify interference by the legislator with the administration of justice, even if this has the effect of influencing the judicial determination of a dispute (see in particular European Court of Human Rights, *Building Societies* v. United Kingdom, 23 October 1997, §112; *Zielinski and Pradal* v. France, 28 October 1999, §57; *Agoudimos and Cefallonian Sky Shipping Co.* v. Greece, 28 June 2001, §30; *Gorriaz Lizarraga* v. Spain, 27 April 2004, §64)[20].

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[15] See also in connection with an ordinance that retroactively provides a legal basis for a concession for a bike rental system: Constitutional Court, N° 68/2012, 31 May 2012, *nv Clear Channel Belgium*.

[16] Constitutional Court, N° 17/2000, 9 February 2000, *E. Pelsser and Others, n.v. Georges Lornoy en Zonen and Others.*

[17] See also: Constitutional Court, N° 107/2011, 16 June 2011, *C. Fievez v. Flemish Region.*

[18] Constitutional Court, N° 73/2004, 5 May 2004, *v.z.w. AVGI and Merck Sharp & Dohme BV*; in the same sense: Constitutional Court, N° 86/2005, 4 May 2005, c*.v.b.a. Centrale Afdeling voor fractionering van het Rode Kruis*, *Merck Sharp & Dohme BV* and *n.v. Pfizer*.

[19] Constitutional Court, N° 188/2005, 14 December *2005 bvba Résidence Biernaux and Others v. Walloon Region.*

[20] See also: Constitutional Court, N° 6/2010, 4 February 2010, *nv ICOPAL v. P. Bouvier and the Fédération des Métallurgistes F.G.T.B. de la Province de Liège v. nv ICOPAL and Others;* Constitutional Court, N° 55/2010, 12 May 2010, *R. Parizot v. nv Dexia and Others*; Constitutional Court, N° 107/2011, 16 June 2011, *C. Fievez v. Flemish Region.*

In its judgment no. 78/2001[21], the Court ruled on the subject of a system of *tacit planning permission* that in the area of town planning it is usually essential for both the planning applicant and interested third parties that they should not be denied the services which a specialist authority can offer by assessing their situation in practical terms, and that the courts can examine whether the public authority has not committed a manifest error of judgment by deciding whether or not the application is in agreement with good town and country planning, or by granting a derogation from the planning regulations in force. This review may be carried out by the Council of State when an administrative decision has been taken or, if the administrative authority remains silent, is deemed to have been taken. In the case of such an administrative decision, the ordinary courts may carry out a similar review by virtue of Article 159 of the Constitution. In the situation that is created by Article 137(2) of the ordinance of the Brussels Capital Council of 29 August 1991 on the organization of town planning, *the ordinary courts do not have an administrative decision which they may review. Asking the ordinary courts in such circumstances to substitute their assessment for the discretionary power of assessment of the administrative authority would amount to granting them a power that is incompatible with the principles governing relations between the administrative authority and the courts of law.* This suggests a disproportionate impairment of the rights of interested third parties, and consequently a discrimination of that category of persons in relation to persons enjoying the guarantees of a judicial review.

In its judgment no. 177/2005[22], the Court ruled on a change in the regulations regarding the interruption of the limitation period in the area of income taxes that, *even when taking retrospective legislative action,* the legislature must not, at the risk of violating one of the basic principles of the rule of law, *challenge final and conclusive court judgments*[23]. Along the same lines, the Court ruled in its judgment no. 172/2008[24] that Article 42(5) of the Act of 27 April 2007 on the reform of the divorce procedure – which provides that the new Article 301(4) of the Civil Code applies to maintenance payments set by judgments delivered prior to the entry into force of said Act – must on no account have the effect of *challenging court judgments that are final and conclusive*. If that is its intended effect, it would violate Articles 10 and 11 of the Constitution by denying a particular category of persons the benefit of court judgments that have become final and conclusive, which cannot be justified by any circumstance. In its judgment no. 6/2009[25], the Constitutional Court ruled in connection with a law which retroactively reinstated levies that had previously been enacted in a Royal Decree that was annulled by the Council of State, that reservations had to be made in terms of constitutionality with respect to final and conclusive judgments in which the Federal Agency for Nuclear Control was ordered to repay charges that had been wrongfully levied in pursuance of the annulled provisions of the Royal Decree of 24 August 2001. Even when taking retrospective legislative action, the legislature must not, at the risk of violating one of the basic principles of the rule of law, challenge final and conclusive court judgments. Although the explanatory memorandum of the legislative proposal says that "those who successfully reclaimed their annual charge on the basis of the judgment delivered by the Council of State on 8 November 2006 cannot invoke the exemption rule", the new Article 30c(2) of the Act of 15 April 1994 should not be understood to mean that no exemption from charges for the years 2001 to 2006 would be granted to those who in

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[21] Constitutional Court, N° 78/2001, 7 June 2001, *A. Marchini-Camia*, confirmed by Constititutional Court, N° 156/2003, 26 November 2003, *J.-M. Borsus & D. Dumont de Chassart* and Constitutional Court, N° 74/2006, 10 May 2006, *Y. Beirens v. Flemish Region*.

[22] Constitutional Court, N° 177/2005, 7 December 2005*, P. Frisee and Others*.

[23] In dezelfde zin : Constitutional Court, N° 199/2009, 17 December 2009*, M. Thonnard & A. Fraikin* v. *Belgian State.*

[24] Constitutional Court, N° 172/2008, 3 December 2008*, asbl Conseil des femmes francophones de Belgique and Others.*

[25] Constitutional Court, N° 6/2009, 15 January 2009, *Belgische Beroepsvereniging der geneesheren-specialisten in radiotherapie-oncologie and Others.*

the meantime have secured reimbursement of the charges in question on the basis of final and conclusive judgments.

In its judgment no. 122/2008[26], the Court ruled on the subject of the composition of the evaluation boards charged with the *periodical evaluation of the chiefs of staff of the courts and tribunals* that it is reasonable that the legislature, when adopting such a measure which is already provided for by the Constitution for other judicial officers, wants the evaluation board to have access to additional information by seeking the opinion of persons outside the judiciary, given that a chief of staff must also manage a budget and direct a court's staff. More particularly, it provided that an opinion must be delivered by the Director-General of the Directorate-General for Judicial Organization of the Federal Department of Justice; similarly, it may seem advisable for the evaluation board to have information about "the appropriation of the financial resources made available to the chief of staff", or information supplied by an expert in human resources management, more particularly in the field of appraisal. However, by giving a *voting right* to a judicial officer of the Audit Office appointed by the First President of that Office, and to an expert in human resources management appointed by the Minister of Justice on the proposal of the Minister for the Civil Service, the challenged provision permits *public authorities not belonging to the judiciary to interfere with the judiciary,* whereas the Constitutional legislator, at the adoption of Article 151 of the Constitution, specified that the evaluation had to "take place with due regard for the independence of the judiciary" and that the evaluation had to "be seen as an appraisal carried out by equals as part of the organization of the judiciary system". This violation of the principle of the separation of powers constitutes a discriminatory impairment of the independence which Article 151(1) of the Constitution guarantees to the persons targeted by that article.

In its judgment no. 67/2013[27], the Court ruled that Articles 151, 152, 154 and 155 of the Constitution enshrine the essential characteristics of the *status of the judiciary*. This constitutional enshrinement primarily aims to guarantee the independence of the judiciary, since that independence is essential in a system of separation of powers. To this end, Article 151 of the Constitution regulates the nomination and appointment of judicial officers. Article 152 of the Constitution guarantees that judges are appointed for life, that they can only be removed from office by a court decision, and that they can only be transferred with their own consent. Under Article 154 of the Constitution, their salaries are determined by law. Under Article 155 of the Constitution, a judge cannot accept a salaried position from a government. Although the principles of independence of the judiciary and of the separation of powers are fundamental features of the rule of law, this does not mean that the salary and pension conditions of the judicial officers may not be brought into line with the arrangements that apply to public service employees by the branch of the legislature competent in matters of remuneration and pensions of judicial officers. Article 152 of the Constitution, which was amended by the constitutional provision of 23 January 1981, stipulates that the salaries and pensions of judges are determined by law; this provision does not require the pension to amount to a continued salary, as was the case with the retirement pension prior to the Act of 5 August 1978.

Conclusion

In the case law of the Belgian Constitutional Court, the principle of the separation of powers serves primarily to guarantee the independence and powers of the judiciary by penalizing unlawful curtailments of that independence by the legislature and the executive branch. Its purpose is also to

[26] Constitutional Court, N° 122/2008, 1 September 2008, *B. Ceulemans and Others.*
[27] Constitutional Court, N° 67/2013, 16 May 2013, *vzw Koninklijk Verbond van de Vrederechters en Rechters in de politierechtbank van België and Others*

prevent discretionary powers being assigned to the courts which by their very nature should be exercised by the executive. Although the Belgian Constitutional Court is not the guardian of the division of powers between the legislature, the executive and the judiciary, the principle does nevertheless play an important part in the constitutionality review of the actions of the various legislatures. In this respect, a parallel may be drawn with the recent case law of the European Court of Human Rights[28].

[28] ECtHR, 27 May 2014, *Case of Baka v.* Hungary, § 88.