The Activism of the Constitutional Court of Belgium

By

Pierre NIHOUL

Judge at the Constitutional Court of Belgium

Professor at the Faculty of Law of UCL

Honorary Member of the Council of State

Introduction

The Belgian Constitutional Court has had to show a certain degree of activism to establish its position in the Belgian judicial landscape.

Firstly, with regard to the political authority. Belgium has long resisted constitutionalism in an ideological context of "legicentrism". The establishment of the Constitutional Court is fairly recent (1985) and is rooted in federalism, since its sole competence is the settlement of conflicts of legislative authority between the federated entities of the Belgian state.

Secondly, with regard to the judicial authority. The judicial authority dates from the independence of Belgium (1831), the Council of State from 1946. Those two jurisdictional orders have developed a case law since 1971 that enables them to review the conventionality of legislative and regulatory acts. The Court therefore had to find its place as it was gradually entrusted with constitutional litigation in the area of fundamental freedoms on account of its closeness to conventionality review.

Finally, with regard to its litigants and their counsels. The Court extended access to its jurisdiction and opened up new opportunities in terms of procedural guarantees.

We will develop those thoughts in three themes: the jurisdictional rules of the Court (I), the procedural rules and guarantees (II), and certain areas of substantive litigation (III).

For the oral presentation we will develop only the first two themes.

I. The jurisdictional rules of the Court

The Court has jurisdiction to hear two kinds of litigation: the division of powers between the federal state and the federated entities (in Belgium the communities and regions) (A); public freedoms and fundamental rights (B).

A. Litigation in matters of federalism

Belgian federalism is based on the principle of exclusivity of powers, which means that any judicial issue is in principle settled by one single legislator. The Belgian system is characterized by the absence of a hierarchy between the acts of the different legislators and by the absence of the subsidiarity principle. Where a regulation has links with several regulatory authorities, the Court tries to identify the primordial element of the regulated legal relationship.

Nevertheless, the Court has made some qualifications to this principle in order to make the system more flexible:

- The principle of federal loyalty, which prohibits the entities from using their powers in a way that prevents the other entities from using theirs or makes that use exceedingly difficult;

- The broad scope which the Court has from the outset given to the principle of economic and monetary union which initially regulated the exercise of economic competences by the regions and which was subsequently extended by the Court to all regional, community and even federal competences;

- The principle of collaboration or cooperation: the absence of a cooperation agreement in a matter where the special legislator does not require such an agreement does not, in principle, constitute an infringement of the rules governing the division of powers. Nevertheless, where the powers overlap to such an extent that they can only be exercised after some form of collaboration or cooperation between the relevant legislators has been put in place, the Court considers any unilateral action by the legislator in question as an infringement of the proportionality principle inherent in any exercise of powers.

B. Litigation in matters of public freedoms and fundamental rights

In 1988, the Court has received certain competences in this kind of litigation, restricted to freedom of education (Article 24 of the Constitution) and the principle of equality and non-discrimination (Articles 10 and 11 of the Constitution).

Nevertheless, the Court soon used litigation in matters of equality to expand its jurisdiction in three directions.

1. First, in judgment no. 21/89 it adopted the extended criteria accepted by the European Court of Human Rights in the review of the principle of equality and non-discrimination. The formulation has remained the same since judgment no. 21/89, except for some minor modifications:

"The principle of equality and non-discrimination does not rule out that a difference in treatment may be established between categories of persons, provided that such a difference is based on objective criteria and that it is reasonably justified. Moreover, this principle precludes the equal treatment, without reasonable justification, of categories of persons in situations which, having regard to the measure under consideration, are essentially different.

The existence of such justification must be assessed having regard to the aim and effects of the measure under consideration and the nature of the principles in question; the principle of equality and non-discrimination is infringed where it is found that there is no reasonable proportionality between the means employed and the aim sought to be realized."

2. It also finds that the principle of equality and non-discrimination is infringed whenever the legislator violates the fundamental rights or guarantees enshrined in other constitutional provisions or in an international treaty, whether or not it has a direct effect. The deprivation of a fundamental right constitutes *ipso facto* an infringement of the equality principle. The "prism" technique of Articles 10 and 11 of the Constitution permitted the Court to indirectly incorporate litigation in matters of public freedoms within its competence.

3. While not competent to hear direct infringements of international laws, the Court acknowledges that the constitutional provisions which it is empowered to enforce, both directly and indirectly, can be read in conjunction with the comparable international laws. This is the technique of the combination of rules on the protection of fundamental rights. It allows the Court to incorporate in its review standards international guarantees that offer greater protection and are more extensive.

In 2003, the special legislator extended the Court's jurisdiction in matters of public freedoms to all the rights and freedoms enshrined in Title II of the Constitution. The Court therefore no longer has to use the indirect route of Articles 10 and 11 of the Constitution to hear violations of the freedoms enshrined in the Constitution. It can now try them directly. This new competence is expanded by the combination technique explained above of constitutional rights and international guarantees. The Court's review takes in similar provisions set out in international instruments and "takes into account" the guarantees provided by those instruments, which are considered inseparable from those enshrined in the Constitution[1]. Furthermore, it continues, through the prism of Articles 10 and 11 of the Constitution, to take cognizance of infringements of other constitutional provisions than those contained in Title II of the Constitution[2] or infringements of international guarantees that have no counterpart in the Constitution[3].

To sum up, the Court's jurisdiction is in principle confined to the rights and freedoms enshrined in Title II of the Constitution. By a method of combination, the Court's competence extends to similar international guarantees. This observance of international treaty law is reflected in references made in the Court's judgments to the case law of the European Court

[1] Thus the Court reads Articles 12, paragraph 2, and 14 of the Constitution (*nullum crimen, nulla poena sine lege*), which require that the essential elements of a charge or penalty must be prescribed by the law, taking into account the economy of those provisions, as well as in combination with the material requirements set out in Article 7 of the European Convention on Human Rights and in Article 15 of the International Covenant on Civil and Political Rights, such as the principle of *lex certa*.

[2] Thus the Court oversees the observance of local autonomy for the municipalities and provinces as enshrined in Articles 41 and 160 of the Constitution, read in conjunction with Articles 10 and 11 of the Constitution.

[3] Thus the Court examines infringements of the prohibition of inhuman and degrading treatment, not provided for by the Belgian Constitution, through Articles 10 and 11 of the Constitution, read in conjunction with Article 3 of the European Convention on Human Rights. It adopts the same approach to the right to an effective remedy, which is not enshrined as such in the Constitution, through the infringement of Articles 10 and 11 of the Constitution, read in conjunction with Articles 6 and 13 of the Convention.

of Human Rights and to European Union law, such as the Charter of Fundamental Rights of the European Union and the case law of the Court of Justice of the European Union, as well as the referral of questions for a preliminary ruling to the Court of Justice of the European Union (26 judgments as at 31 March 2016). Furthermore, by the indirect route of Articles 10 and 11 of the Constitution, the Court reviews the constitutional guarantees that fall outside its jurisdiction and the international guarantees that have no counterpart in the Constitution.

II. Procedural rules and guarantees

Cases are brought before the Court in two ways: actions for annulment brought by a natural or legal person demonstrating an interest, or referrals for a preliminary ruling in connection with a case pending before an ordinary court.

A. Actions for annulment

1. The condition of an interest in taking action

The criteria that constitute the concept of interest are not set out in the law, leaving it up to the Court to determine those criteria; the Court requires petitioners to demonstrate in their petition that they are "liable to be directly and adversely affected by the challenged act". Those two concepts are broadly interpreted by the Court.

The Court thus broadly acknowledges the interest that natural and legal persons have in taking action in order to defend their own interests, particularly in the area of electoral, tax and criminal law. It also favourably receives petitions from organizations and associations acting in defence of a collective interest, subject to a review of the permanent nature of their activities, the specific nature of their statutory objective, and the observance of their bylaws. With regard to the latter point, the Court recently (2014) agreed to consider that it could be assumed from the lawyer's mandate *ad litem* that the action was validly instituted, unless proven otherwise. It also declared actions admissible that are brought by unincorporated associations, such as trade unions and political parties, while restricting their access where they are acting in matters for which they are legally acknowledged as constituting distinct

legal entities and, although they are legally associated as such with the functioning of the public services, the actual conditions of that association are at issue.

It also considers that, if an action brought by several petitioners is admissible in respect of one of them, the interest of the other parties does not need to be investigated.

Finally, the Court examines the interest in the action rather than the interest in the ground, so that when the action is admissible, it does not need to examine each ground.

2. The act under review

The Court can only review legislative acts. Here, too, the term is broadly interpreted: it covers substantive laws as well as formal laws, such as budgetary laws, naturalization laws and laws approving Belgian cooperation agreements and international treaties.

B. Preliminary rulings

The same accessibility is to be found in referrals for preliminary rulings.

Firstly, with respect to the court that refers a question to the Constitutional Court for a preliminary ruling: in the absence of a filter between the ordinary court and the Constitutional Court, the latter will not hesitate to reformulate a poorly drafted question or to broadly interpret the admissibility conditions of the question. Moreover, if the Court considers from the outset that the assessment of the applicability of a legislative act to the lawsuit pending before the referring court is the exclusive competence of that court, it verifies, ever since judgment no. 111/2000, whether the provision referred to in the question may reasonably be held to apply to the lawsuit pending before the court; the Court will only decline to review the constitutionality of a legislative provision being referred to it if that provision manifestly does not concern the lawsuit in question.

Secondly, its case law has evolved as regards the assessment of the interest of parties in a preliminary ruling procedure. Certain persons who are not present in the case before the referring court argue that they are parties to a similar procedure pending before another court. Where originally such an interest was not admitted, the Constitutional Court, ever since

judgment no. 44/2008, allows such an intervention because of the indirect effect that the preliminary ruling has on comparable lawsuits.

Finally, since judgment no. 125/2011, the Court has extended to preliminary rulings the possibility to maintain the effects of an annulment judgment for the time period it sets in the past or the future. Where the special Act on the Constitutional Court contained such a possibility for annulment judgments (Article 8, paragraph 2), it contains no such rule for preliminary rulings. The Court nevertheless considered that a preliminary ruling, while not removing the unconstitutional provision from the legal system, has an effect that reaches beyond the action pending before the court that referred the preliminary question, so that in this case the Court must also examine whether the impact of the judgment should not be tempered over time. This is necessary to ensure respect for the principles of legal certainty and legitimate expectations.

III. Substantive litigation

The purpose of this paper is not to reflect the entire case law of the Constitutional Court and the areas in which it has demonstrated constitutional activism. Certain matters get more focus.

1. The higher interest of the child

Belgian parentage law does not preclude disputes of paternity in or out of wedlock. Nevertheless, it prioritizes, to a certain extent, a stable family environment and socio-emotional reality over biological truth. To this end, it sets grounds of inadmissibility for such actions in the form of short time limits and the concept of recognized enjoyment of status.

Since 2011, the Court has called into question most of those obstacles to the search for biological truth on account of them being too absolute. For this purpose, the Court refers to the right of the individual to search for his identity, which is part of the right to respect for private and family life, and the paramount value assigned to the interest of the child by Article 22b of the Constitution. When elaborating a regime that allows the public authorities to interfere in family life, the legislator has a certain margin of appreciation to get the right balance between the competing interests of the individual and society as a whole, as well as

between the conflicting interests of the persons concerned. When balancing the different interests at stake, the interest of the child occupies a special place as it represents the weaker party in the family relationship. It is up to the court to find the right balance. The Constitutional Court has therefore found the obstacle of recognized enjoyment of status to be unconstitutional, as is the one-year time limit which the child was allowed after the age of 22 from the moment it had knowledge of the existence of its biological father to challenge its legal paternity.

The Court also challenged the absolute impossibility decreed by the Civil Code to establish an incestuous parentage, leaving it up to the court to assess the interests at issue.

2. Right of access to the courts

Associations have a right of access to the ordinary courts which is interpreted restrictively by the Court of Cassation and by the legislator when they are acting to defend a collective interest. The Constitutional Court does not hesitate to call such restrictions into question:

- Before the ordinary courts, an action is declared inadmissible in respect of a legal entity if it does not concern the existence of the legal entity, its assets or its moral rights, which means that actions that are brought for the purpose of a collective interest are not allowed. Firstly, the Court finds that the Belgian legislator has passed several laws granting a right of action to certain associations that claim a collective interest. However, Articles 10 and 11 of the Constitution, which enshrine the equality principle, do not compel the legislator to extend that right to **all** associations. Secondly, the Court notes that certain laws have allowed actions to be brought before the courts by associations claiming a collective interest relating to the protection of fundamental freedoms as enshrined in the Constitution and in international treaties to which Belgium is a signatory party. It follows that legal entities bringing an action in the name of a collective interest relating to the protection of fundamental freedoms but not recognized by those laws are discriminated against. Nevertheless, it is up to the legislator to specify on what conditions those legal entities may be granted a right of action (judgment no. 133/2013);

- Article 1382 of the Civil Code is the legal foundation for civil liability in Belgium. It assumes a fault, damage and causation. As a rule, the victim is entitled to full compensation for the prejudice he has suffered, but the court may decide to carry out a fair valuation of the damage if it is impossible to determine otherwise, as is the case with environmental damage. This provision is considered discriminatory in the interpretation where a legal entity that has been set up and is acting in defence of a collective interest, such as the protection of the environment or certain elements thereof, is unable to receive more than a symbolic euro in compensation to repair the damage caused by the infringement of the collective interest for which it has been set up. Such a restriction also disproportionately affects the interests of the environmental organizations in question, which play an important part in defending the right to the protection of a healthy environment as enshrined in the Constitution (judgment no. 7/2016);

- Belgian law has instituted the class action for damages to allow wider access to justice for victims of collective damage in the area of consumer affairs. This right of action is subject to certain conditions, such as designating a public service or certain approved associations to represent the group. The Court found that the requirement of approval discriminated against similar foreign associations of the European Union that do not have such approval (judgment no. 41/2016).

3. Right to property

Article 16 of the Constitution provides "No one can be deprived of his property except in the case of expropriation for a public purpose, in the cases and manner established by the law and in return for fair compensation paid beforehand". The Belgian Constitution only mentions the right to property and the deprivation of that right, which limits the constitutional protection to expropriation in the strict sense of immovable property.

Article 1 of the First Protocol to the European Convention on Human Rights is broader in scope. The First Protocol concerns the protection of property in general, both movable and immovable property, tangible and intangible property, real and personal rights. It deals not

only with the limitation of ownership, but also with the control of the use of property, which encompasses restrictions of ownership. Using the combination technique explained earlier, the Constitutional Court incorporated the First Protocol and the case law of the European Court of Human Rights in its own case law on the grounds that the rights being protected were similar and that the two provisions constituted an inseparable whole. Consequently, the protection of the right to property has been considerably broadened.

The Court took a further step by deducing from those two "inseparable" provisions a principle of equality in relation to the discharge of public burdens, from which it infers a right to compensation that covers situations other than expropriation. The principle of equality of citizens in relation to the discharge of public burdens precludes the public authority from imposing, without compensation, burdens exceeding those that must be borne by an individual in the general interest. It follows from this principle that the disproportionate prejudicial effects – i.e. the extraordinary social or occupational risk imposed on a small group of citizens or institutions – of a coercive measure which is lawful in itself must not be imposed on the injured parties, but must be shared out equally across the community. This right to compensation has been recognized in the following situations:

- the holder of a validly issued planning permission who has no real right over a building lot that is subject to a construction ban under a particular legal provision cannot get compensation for the expenses he has incurred to use the building lot for its intended purpose (55/2012);

- the absence of a compensation scheme for a construction ban resulting from a protection order (12/2014);

- the holders of real rights over an archaeological site, a historic building or an urban or rural site in respect of which a heritage protection order has been issued, are not entitled to compensation if the decrease in value of the immovable property is the direct result of the provisions of the final protection order of a site (132/2015).