

CHAPTER VII THE JUDICIARY

PARTS A, B AND C

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The Belgian judicial organisation is built on two main principles: that there should be a court or tribunal for every dispute and that the ordinary courts and tribunals are competent for all disputes about subjective rights. For historical reasons, the Constitution distinguishes between disputes about 'civil rights' and disputes about 'political rights'. All disputes about civil rights come under the exclusive jurisdiction of the ordinary courts¹. Disputes about political rights also fall to the jurisdiction of the ordinary courts, but in those cases indicated by statute they may come under the jurisdiction of specific tribunals created by the (federal) legislator.² The legislator has made use of this power and has set up administrative courts and tribunals under various names. The existence of the highest administrative court, the Council of State, has however been confirmed by the Constitution itself.³ Only the courts and tribunals mentioned in Chapter VI of the Constitution are considered to belong to the third power, the Judiciary. They are the 'ordinary' courts and tribunals. The judicial instances created by the legislator with the Council of State at the top, are from an institutional point of view, outside the judiciary.

The Constitution distinguishes between civil rights and political rights, but does not give any textual indication as to the nature of this difference. Consequently, a right is generally considered to be a political right in the meaning of article 145 of the Constitution, when the legislator has entrusted its protection to another tribunal or court than the ordinary tribunals and courts. This way of deciding which rights are 'political' is not entirely satisfactory, neither from a theoretical point of view, since it contains an element of circularity, nor from a legal point of view, since it practically gives the Executive Branch and the legislator a free hand in defining which rights are 'political' and therefore outside the jurisdiction of the ordinary courts and tribunals. This is contrary to the spirit of the Constitution which intended the articles 144 and 145 as a protection against possible abuses, especially of the Executive Branch.

A. THE ORDINARY COURTS AND TRIBUNALS – ORGANIZATION⁴ AND JURISDICTION

The term 'court' refers to the higher judicial bodies, which in principle deal with cases only in second or last instance. Such are for example the Court of Cassation, the Courts of Appeal, the Labour Courts and the

1. Const. art. 144.

2. Const. art. 145.

3. Const. art. 160. Added to the text of the Constitution: 18.6.1993 (Mon. 29.6.1993).

4. See Diagram p. 167.

Courts of Assizes. In first instance cases are usually dealt with in tribunals, which operate on a lower level, such as e.g. the tribunal of the justice of the peace, the tribunal of first instance, the district tribunal, the labour tribunal and the tribunals of commerce.

The ordinary courts and tribunals are organized according to the principles of specialization and territorial jurisdiction. The law attributes to each type of court or tribunal a specific competence *ratione materiae*, which allows the judges and justices to acquire a thorough knowledge of the matters confided to them. On the other hand, the law multiplies the number of courts and especially of tribunals, more or less according to the expected case load, and spreads them all over the country taking into account the density of the population and the distance people will have to cover to reach the nearest court or tribunal.

Consequently, a tribunal of the justice of the peace is to be found in every 'canton', which according to the density of the population includes one or more municipalities, or is itself but a part of a municipality. A number of *cantons* make up a judicial district. The next judicial territorial subdivision is the province, taken alone, as for the Courts of Assizes, or several gathered together, as for the Courts of Appeal. The highest ordinary court, the Court of Cassation, is unique: it has territorial jurisdiction for the whole of the country and it has its seat in the Capital: Brussels.

The jurisdiction of the courts and tribunals is further defined by the value of the matter in dispute and by the type of persons involved. In this way, disputes in commercial matters go to the justice of the peace when their value is lower than 75 000 BF and to the commercial tribunal, when a higher amount is at stake. Cases concerning juveniles, however, go to the youth magistrate of the tribunal of first instance.

There are four levels of ordinary tribunals and courts. From low to high, they are the level of the *cantons*: the tribunals of the justices of the peace; the level of the judicial district: the tribunal of first instance, the labour tribunal, the tribunal of commerce and the district tribunal⁵; the level of the provinces: the Courts of Assizes and the Courts of Appeals; the level of the Country: the Court of Cassation.

As a rule every dispute gets two chances to be judged on the merits and as to the law of the matter. Except in those cases⁶ in which the legislator has limited the parties to but one decision on the merits, appeal is of right and goes to a tribunal or court of the level just above the level of the first

5. The district tribunal consists of the presidents of the three aforementioned tribunals and deals solely with matters of jurisdiction.

6. Which become more and more numerous.

decision. Thus it is the tribunal of first instance which decides on appeal in cases decided by the justice of the peace, while appeal against a decision of the commerce tribunal lies with the Court of Appeals.

The law distinguishes between criminal and civil cases. Criminal cases are those in which society seeks to inflict a punishment, whereas all the others fall within the category of 'civil cases'.⁷ Belgian criminal law distinguishes three levels of criminal behaviour, following the maximum period of imprisonment attached to them. The lightest offences which cannot be punished with prison terms of more than seven days, are called petty offences or 'infringements'.⁸ The second class are misdemeanours⁹ and can be punished with five years minus one day of imprisonment. The most serious misbehaviour, which may be punished with life imprisonment, is a felony.¹⁰ Infringements and misdemeanours are judged by specific chambers of ordinary courts and tribunals. Thus a justice of the peace will eventually¹¹ act also as police judge for infringements or petty offences, and a chamber of the tribunal of first instance becomes the 'correctional tribunal', competent for misdemeanours. Only the heaviest crimes are judged by a court which is in no way connected with a civil court: the Court of Assizes.

Courts and tribunals are composed of judges, assisted by members of the public prosecutor's office and by clerks of court. The judges solely are competent to render judgments. The members of the public prosecutor's office act as advisers of the judges and in the cases indicated by law, defend the interests of society or of parties considered to be especially vulnerable, such as minors or incompetent persons. They also prosecute persons accused of a criminal offense. The clerks of court take care of the administrative aspects, receive and keep all documents or other pieces of evidence in connection with the work of the courts and tribunals and countersign the judgments to authenticate them.

The legislator has entrusted the courts and tribunals with other tasks besides the solution of legal disputes.¹² They intervene for certain administrative decisions which require a thorough knowledge of the law in a certain subject matter, or an undisputed independence and impartiality.¹³

7. Note the difference in meaning: criminal cases are 'civil' in the meaning of art. 144-145 Const.

8. Petty offences or infringements of the law; *Overtredingen (van de wet)*; *contraventions (à la loi)*.

9. *Wanbedrijf*; *délit*.

10. *Misdaad*; *crime*.

11. Except when the 'canton' has a separate police tribunal, dealing with all minor criminal offences, as well as all road-traffic related cases.

12. Contentious jurisdiction.

13. Non-contentious jurisdiction.

Certain judges, mostly the presidents of tribunals or the judges appointed by them, have specific competences to grant interlocutory relief in urgent cases. They may order the discontinuation of a situation or an activity, to prevent further prejudice or irreparable tort which might be done to the applicant party. Such interlocutory relief can be directed at authorities as well as at private persons or organizations. In extremely urgent cases, a party may seek to obtain an *ex parte* injunction, without notification of the opposing party, which will be reviewed later when the case is decided on the merits.

In the commercial tribunal and the labour court the judges are assisted by lay judges. The lay-judges of the commercial tribunal are businessmen of good repute appointed by the King. The lay-judges of the labour court are also appointed by the King, on a list of candidates proposed by the representative professional organizations of employees, employers and the self-employed.

B. THE ADMINISTRATIVE COURTS AND TRIBUNALS

§ 1. Organization and jurisdiction

The federal legislator has created administrative courts and tribunals, from time to time, as the need for them was felt. It has never worked out a structure or a set of legal rules common to them all, so that it is quite impossible to present them in any orderly scheme or overview.

Some of these judicial bodies have been created to give solutions to disputes arising within or with certain administrative services. In that case the judges very often are civil servants, sometimes presided over by a professional magistrate.

Others have been created within the framework of a certain legislation, such as the legislation on family allowances or on retirement of a named class of employees. Possible conflicts over the application of this legislation are then entrusted to commissions of experts or civil servants, mostly under the chairmanship of a professional magistrate.

The legislator has very often, but not always, provided the possibility of appeal against the decisions of such administrative courts and tribunals, but appeal is sometimes limited to points of law only. He may have entrusted this appeal to another administrative judicial body, created specifically for this purpose, or to an ordinary court, or to the Council of State. In all cases where the legislation does not contain any explicit

provisions concerning appeal or cassation, the Council of State, Division Administration, is competent.

§ 2. The Council of State

The highest and most important administrative court is the Council of State. It has been established by the Act of 23 December 1946 and has two divisions: the Division Legislation, an advisory body, and the Divisions Administration, with mainly a jurisdictional function.

1. *The Division Legislation*

Before a legislative rule may be submitted to a parliamentary body or before a regulation may be enacted, prior advice may be required from consultative bodies. One of the most important advisory bodies in that respect is the Division Legislation or Legislation Department of the Council of State.

A draft Government bill containing general binding rules has to be submitted by the competent Minister to the Division Legislation of the Council of State for a mandatory legal advice. The Governments of the Communities and the Regions have to comply with the same procedural requirement for their decrees or ordinances. Draft regulations of the federal Government and of the Governments of the Communities and the Regions must also be submitted to the Division Legislation for prior advice.

In some cases, the initiative to submit a legislative norm for advice to the Division Legislation may stem from a parliamentary initiative. In still other cases, the advice of the Division may be purely within the discretion of the chairman of the assembly concerned.

It was the intention of the legislator to improve the technical and legal quality of the legislation. Therefore the advice of the Division Legislation does not concern the appropriateness of a regulation and will give no policy recommendations. It will, for example, aim at adjusting the French and the Dutch version of the same text. It will strive for a uniform terminology as well as for a logical structure and internal coherence of the legislative and regulatory texts. Sometimes, one regulation will affect existing regulations in other fields and may necessitate the changing of other texts. The Council of State will point this out and suggest an appropriate adaptation of the text.

The Division Legislation also plays an important role in preserving the rule of law. It will examine whether there is an adequate constitutional or statutory basis for the norm submitted to it, whether the norm has been proposed by the competent authority and whether the correct proce-

dures have been complied with. The Division Legislation will also examine whether the submitted norm does not conflict with a higher norm.

Although, legally speaking, the advice of the Division Legislation is mandatory, it is not binding. The sanction for disobeying the rule in connection with a draft bill of a legislator, is purely political. Courts and tribunals refuse to review the formal legality of legislators' norms. If the mandatory advice has not been sought for a draft regulation, however, the regulation can be submitted to the control of the Division Administration and this will find it to be null and void. However, draft regulation is exempted from the obligation to submit it for advice, if the draft regulation has to be accepted urgently, and explicitly gives the reasons for the invoked urgency.

2. *The Division Administration*

The Division Administration has been set up in the first place to remedy the defects in the legal protection of the individual against abuses on the part of the administration. Before the creation of the Council of State, individuals had no means of directly challenging the legality of a decision of the administration, judicial¹⁴ or non-judicial.¹⁵ For this reason, the Division Administration of the Council of State has been given the power to annul decisions of the administration, judicial and non-judicial.

The Council of State has in principle no jurisdiction to order public authorities to provide financial redress for the loss or damage incurred by the citizen. Only the ordinary courts have jurisdiction to deal with tort actions against public authorities. It has however a general power to grant temporary relief, including the possibility to suspend a regulatory decision which is the object of a request for annulment.

2.1 *The power to annul non-judicial administrative decisions*

2.1.1 *Decisions subject to annulment*

The Council of State's power to annul is confined to unilateral, binding administrative regulations and orders. Since agreements cannot be considered to be unilateral administrative acts, they do not fall within the scope of the Council of State's jurisdiction. However the Council of State is

14. Except in those cases in which the legislator had granted the right to appeal in an ordinary court or tribunal.

15. Defense against illegal decisions of the administration was often limited to the possibility to invoke the exception of illegality and the application of article 159 of the Constitution.

empowered to examine the legality of the unilateral decisions, preceding the conclusion of a contract. The fact that the unilateral decision can lead to the conclusion of a contract and that disputes concerning this contract belong to the jurisdiction of the ordinary courts, has no influence on the power of the Council of State to set aside the preparatory decision.¹⁶

Only completed and enforceable administrative acts can be subject to annulment by the Council of State. Authorizations to take certain decisions, advices and proposals are only preparatory decisions and do not immediately harm the persons concerned. Therefore they cannot be challenged separately.

The challenged decision must stem from a Belgian administrative authority, i.e. a public or even a private institution acting in the general interest and empowered to impose unilateral obligations in application of the law.

The lack of a decision in cases where the law imposes upon the administration the obligation to take a decision, can under certain strict conditions be challenged as a negative decision.

2.1.2 *Illegality of the decision*

Judicial review of administrative action is aimed at sanctioning decisions which are *ultra vires*. The simple proposition that a public authority may not exceed its power, covers many forms of illegality. The Council of State reviews all forms of illegality: the external illegality (i.e., lack of power on the part of the authority that adopted the measure, or the infringement of essential procedural requirements) and the internal illegality (the answer to the question whether the material requirements for the act are met and whether the authorities have exercised their powers in a lawful way).

In most cases, legal provisions only define the scope of the powers of public authorities by means of general formulae, leaving a measure of discretion to the competent authority. The Council of State is not competent to review the policy choices made in the exercise of this discretion. It must however check whether the decision does not transgress the limits of the discretionary power. In order to do so, the Council of State has developed a set of 'general principles of law', the so called 'general principles of a sound and a proper administration'. These principles include the right of due process, the principle of impartiality, the principle according to which decisions taken on irrelevant considerations or adopted for improper purposes are illegal, the principle of fair play, the principle

16. Doctrine of the "*acte détachable*" ("detachable act" or "divisible act").

of due care, the principle of non-discrimination, the principle of reasonableness and the principle of proportionality. Without ever having the right to substitute its discretion for that of the administrative body or person to whom discretion has been entrusted, the Council of State may sanction the exercise of discretion on grounds of unreasonableness, provided that the administrative authority has come to a conclusion so unreasonable that no reasonable authority acting under the same circumstances could ever have come to it.

All public authorities have the legal obligation to mention in every unilateral decision that affects an individual or another administration, the reasons for this decision, i.e. the grounds in law and in fact on which the decision is based. The law considers this requirement to be essential for the legality of the decision. Therefore a decision which is not or insufficiently reasoned, will be declared null and void.

2.1.3 *Conditions*

While in Belgium the control of administrative action is primarily exercised by the courts, there exist also various forms of administrative appeal. If the right of administrative appeal is formally organized by a statute, a decree or an ordinance, it must be used before lodging the case with the Council of State.

Annulment procedures must be initiated by a written petition filed within sixty days following the publication of the regulation or decision, or following the notification if it is an individual act. If there is no obligation to publish or to notify the administrative decision, the sixty day period will start on the day following the day the party concerned has become acquainted with it. It is up to the defendant authority to prove that the petitioner was acquainted with the disputed decision more than sixty days before his appeal.

Sheer knowledge of the disputed decision is not a sufficient ground to start the sixty day period. The petitioner should have a sufficient knowledge of the contents of the decision and of its implications to form an opinion about the chances of a procedure with the Council of State.

After expiration of the sixty day period, the Council of State is no longer competent to annul an administrative act, but it can still – and eventually, must – make use of the power to set an illegal decision aside.¹⁷

17. Const. art. 159.

2.1.4 *Standing*

The petitioner must prove a sufficient interest, i.e. a direct, personal and lawful interest in the relief sought. The requirement to establish a sufficient interest must be met at all stages of the proceedings, i.e. from the filing of the petition until the judgment has been rendered.

If the interest in the matter is not direct or personal, only associations with legal personality have standing-to-sue and only for issues falling within the purpose for which they have been set up.

2.1.5 *Consequences of Annulment*

The annulled decision is held never to have been enacted. It is however up to the competent administrative authority to decide whether and how the void that has thus been created, will be filled. In taking a new decision, the administrative authority is obliged to comply with the terms of the judgment of the Council of State: it should not repeat the illegality which has just been sanctioned. This will not prevent the administration from taking materially the same decision again, if it was set aside because of formal shortcomings. The illegality can be repaired by taking an identical but formally correct decision.

In order to secure the enforcement of judgments, the petitioner may ask the Council of State to impose a daily fine for non-performance. This implies that in cases where the law obliges the administration to take a new decision and the administration refuses to comply with the judgment in doing so, it will have to pay a daily fine until the judgment has been complied with. This remedy may only be invoked after a judgment has been rendered, condemning the administration, and after the latter has failed to comply with this judgement, having been duly summoned to do so. The daily fine is not granted to the petitioner. It is paid into a special fund for the modernisation of the organisation of administrative courts.

2.2 *The power to suspend non-judicial administrative decisions*

Before the Council of State was given the power to suspend the challenged administrative acts, the ordinary courts were entitled to issue a positive or a negative preliminary injunction against serious illegalities on the part of the administration. Now, the Council of State has a general power to suspend the regulation or decision under review. From the moment on when a request for annulment has been filed, the Council is the only court having the power to suspend the challenged action and to order other interim measures.

2.2.1 *Conditions*

The suspension of a decision under review will only be ordered provided there is a serious cause of action and the immediate or continued execution of the challenged decision is likely to entail a serious and irreparable harm.

The arguments for annulment are considered to be serious if they seem valid *prima facie*. The fact that the validity of the arguments cannot be excluded, is not sufficient to conclude to the seriousness of the invoked arguments.

The condition concerning the harmful effects of the challenged decision relates both to the seriousness of the harm and to the fact that the annulment will not be sufficient to provide redress. Decisions which cause only a financial prejudice are generally not considered to entail irreparable harm. Such a prejudice, even if it is considerable, can be compensated and consequently does not count as irreparable.

The Council of State is not obliged to order the suspension of the disputed act when the conditions for suspension are met. It may take into account the probable consequences of the interim measures for all parties and persons likely to be concerned and may decide not to grant the requested remedy if the negative consequences would exceed the benefits.

2.2.2 *Procedural aspects*

The request for annulment does not automatically result in a decision concerning suspension or other interim measures. These have to be asked for at the same moment, but in a separate request. The judgment with respect to the request for suspension has to be rendered within a period of 45 days. It is possible however, that even the delay of 45 days may cause substantial and irreparable harm. Therefore, in very urgent cases, the petitioner can request the immediate suspension of the challenged decision as well as other interim measures. In this case, the judgment can be rendered forthwith. The judgment imposing immediate suspension or other urgent provisional measures has then to be reconsidered and eventually confirmed, within a period of 45 days.

If a decision is suspended, the Council of State must render its judgment on the request for annulment, within a period of six months at the latest.

3. Review of decisions of administrative courts and tribunals

3.1 The Council of State as administrative Supreme Court

The Division Administration of the Council of State is the highest administrative court in Belgium. It acts as a Court of Cassation with respect to the lower administrative courts. It reviews the external and internal legality of the decisions of the lower administrative tribunals.

When the judgement of the lower administrative tribunal or court is annulled, the case is remanded to a like or to the same¹⁸ administrative tribunal or court for a new decision. The lower court or tribunal must follow the decision of the Council of State on the point of law which was the cause for the annulment.

3.2 The Council of State as court of full jurisdiction

In a very limited number of cases, explicitly mentioned in the law, the Division Administration has full jurisdiction, either originally, or on appeal.

4. The award of extra-ordinary damages

Ordinary law courts may order the administrative authorities and/or civil servants to provide financial redress for the loss or damage they have caused, under the same conditions as apply in cases of tort between private persons.

The Division Administration of the Council of State is competent to order an equitable financial redress for exceptional damages caused by an administrative authority. The challenged act may not be of a tortious nature, nor may it be based on a nuisance or consist in an illegality. For damages following from such causes, the ordinary law courts are competent. The damages have to be 'exceptional' in just this way: they do not follow from a defective application of the law, or from an illegal act, but from a *de facto* unequal apportionment of the negative consequences of a formally correct application of the law.

Because those very restrictive conditions are rarely met, very few such claims have been successful.

18. If there is only one such administrative judicial body.

C. BASIC PROCEDURAL GUARANTEES

§ 1. Sources

The Constitution contains some basic guarantees for the quality of courts and tribunals and their procedures.¹⁹ A settled line of case law limits the effect of these articles of the Constitution to the ordinary courts and tribunals. They apply to the administrative courts and tribunals only in so far as the legislator has declared them applicable, or has inserted their contents into the statutes organizing these courts and tribunals. The Council of State considers these articles however as the expression of general principles of law and expects the administrative courts and tribunals to respect them even in the absence of written provisions stating so. Moreover, the guarantees contained in the European Convention on Human Rights and in the International Convention on Civil and Political Rights apply cumulatively with the guarantees of the Constitution or the legislator, and have even higher authority.²⁰ All this effectively ensures that proceedings will be fair in all judicial bodies. The two supreme courts: the Court of Cassation, for the ordinary courts and tribunals, and the Council of State, for the administrative courts and tribunals, watch over their application at all levels. Moreover, the Court of Arbitration, while watching over the respect for equal treatment in the norms of all legislators, also watches over the respect paid by those legislators to the fundamental procedural rights guaranteed by international law.

§ 2. The main guarantees

1. *Independence*

The independence of the Judiciary is guaranteed both as to the legislator and as to the executive.

The Constitution guarantees the independence of the judiciary both by an explicit provision²¹ and by applying the principle of separation of powers: the power to decide about the creation and organization of courts and tribunals, the nomination of judges, and the financial situation of judges, is given to different authorities.

19. Const. art. 148, 149, 152, 154, 155.

20. See Chapter II, C.

21. Const. art. 151, mod. dd. 20.11.1998 (Mon. 24.11.1998).

Next to the Constituent Power, only the federal legislator can create or organize courts or tribunals. It can delegate the power to organize them to the King,²² but the King can act only by virtue of a statutory text and within the limits put down by it. The King cannot claim to organize a body with competence over litigation, on the sole ground of his power to organise the administration or to implement the law.

The King appoints the judges,²³ but he has no further authority over them. The appointment by the King is the conclusion of a procedure of selection and assessment of candidates by the High Council of Justice. The High Council of Justice²⁴ is not part of the judiciary and does not decide any legal disputes. It guarantees the impartiality of the appointment process and plays an important role in controlling the efficiency of the judiciary.

The judges are nominated for life and retire at an age fixed by statute.²⁵ The King²⁶ cannot transfer them or alter their appointment other than with their consent.²⁷ He has no disciplinary power over them: if necessary, judges will be judged by other judges (of a higher court) and only they can eventually pronounce the incapability or unworthiness of a judge, which will put an end to his functions.²⁸ The administration will see to the payment of salaries and retirement pensions of judges, but has no say as to the amount or calculation: those are established by statute.²⁹

The Constitution seals the independence of the judges from the executive, by granting them the power to review the legality of all administrative decisions.³⁰ International law protects them against possible abuses committed by the legislator.

2. *Fair trial*

The Constitution guarantees the fairness and correctness of procedures by imposing the publicity of the court sessions and of the judgments, and by imposing upon the judges the obligation to render reasoned decisions.³¹

22. Const. art. 146: "...by virtue of a statute.": a statute must lay the base, but the King can, in application of his executive power, do the rest.

23. Const. art. 151.

24. Established by art. 151, § 2 of the constitution. It consists of 44 members half of whom are judges and members of the public prosecutor's office elected by their peers, while the other half is composed of lawyers, law professors and other professionals, appointed by the Senate with a two thirds majority.

25. Const. art. 152.

26. The federal government.

27. Const. art. 152, *in fine*.

28. Const. art. 152, second sentence.

29. Const. art. 154.

30. Const. art. 159.

31. Const. art. 148-149.

All sessions of courts and tribunals are public, unless the publicity creates a serious risk for public order or morality. In that case however, the closing of the doors can only be pronounced by the tribunal or court in a sentence and this decision is open for appeal. The wider possibility of closing the doors to the public, provided for in article six of the European Convention on Human Rights or in article fourteen of the International Convention on Civil and Political Rights, applies only in so far it ensures a wider protection of the interests of the individuals.³² Judgments must always be pronounced in public session and may be published³³ or consulted to get a better understanding of the law, within the limits imposed by the right to privacy of the parties concerned.³⁴ The publicity of the sessions and the judgments does not only submit the judges to public scrutiny and criticism, but is considered necessary to allow the public a better understanding of the law.

The obligation to motivate all judicial decisions implies that the reasons for a decision must be given in the sentence itself. The Council of State however, on which the legislator has imposed the same obligation, accepts that the reasons be given in another document if the parties concerned can consult this document.

Legislation has augmented these guarantees with all the 'rights of the defense' protected in the above mentioned international treaties.

The legislator has regulated the use of languages in court proceedings, in order to ensure that the parties to a dispute will understand one another as well as the court or tribunal.³⁵

D. THE COURT OF ARBITRATION

§ 1. Introduction – The context

The establishment of a constitutional court is generally considered to be essential for a federally structured state. The Belgian federal State is no exception to this rule. The creation of a constitutional court was felt to be essential, but the competences that were given to the Court to review the

32. E.C.H.R. art. 60; I.C.C.P.R. art. 5, 2.

33. The legislator has not regulated the publishing of judicial sentences. As a rule, the sentences of the highest courts are published in print,

34. It is not clear what limits the right to privacy imposes.

35. Act 15.6.135 (Mon. 22.6.1938) concerning the use of languages in judicial procedures; Coord. Acts on the Council of State 12.1.1973 (Mon. 21.3.1973), Heading VI.

constitutionality of federal statutes and regional and community decrees and ordinances are limited.

In the chapter describing the federal structure of Belgium, it was stressed that the Belgian federal State is characterised by a fundamental bipolarity which has far reaching consequences and impact on the State's institutions. This fundamental bipolarity of the State is also reflected in the composition of the 'Court of Arbitration', as the constitutional court is officially called in Belgium.

The Court of Arbitration was created during the 1980 constitutional revision through the insertion of a new section³⁶ which was implemented by the Double Majority Act of June 28, 1983. The Court was officially installed on October 1, 1984 and heard its first case on March 19, 1985.

The establishment of a constitutional court meant an important innovation in Belgian public law. Short after the creation of Belgium as an independent State, in a judgment rendered on July 23, 1849, the Court of Cassation set out the principle that in view of the trust the Constituent Assembly had put in the Legislature, it was not up to the courts to review the constitutionality of legislation, but up to the Legislature itself. This ruling set a precedent that would be upheld for over one hundred and thirty years. The principle of the 'inviolability of the Law' was partly overruled by the famous 1971 *Le Ski* case, a landmark in the case law of the Court of Cassation. The Court held that each judge must refuse to enforce statutes which conflict with self-executing international treaties.

This first exception to the principle of the inviolability of legislators' acts led to the rather paradoxical situation that Belgian courts henceforth refused to apply an act conflicting with fundamental rights guaranteed by self-executing international treaties (for instance the European Convention on Human Rights) but, on the other hand, that the same Belgian courts did not have the authority to review national legislation for its compatibility with the constitutionally guaranteed rights and liberties.

The real breakthrough was caused by the State reform transforming the unitary state into a pluricentral federal state composed of Communities and Regions, each having the power to enact legislative norms. The legal status of federal statutes, decrees and ordinances – legislative norms of equal authority – made it necessary to find a referee to clear up conflicts of competence. It was clear that it could not be left to each legislative body to decide on its own whether its rules are in compliance with the constitutional division of powers. This would have resulted in divergent

36. Now: Const. art. 142.

interpretations of the Constitution, jeopardizing the existence of the State itself.

A solution was found through the creation of a constitutional body with judicial competence, but located outside the Judiciary, composed of judges of whom half are recruited from political circles and half from amongst magistrates in the highest courts and law professors. All of these judges are nominated for life, to shield them from political pressure and to guarantee the independence of the court.

The innate mistrust of a '*gouvernement des juges*' or 'government by judges', led originally to a strict limitation of the Court's jurisdiction to conflicts of competence between the Legislatures. This was even reflected in the name given to the Court – Court of Arbitration –, which points towards its political role of referee rather than towards its judicial quality. It was only five years later, at the third state reform in 1988-89, when the Court of Arbitration had already proved its ability to secure the balance in the new pluricentral State, that its jurisdiction was extended. Besides the judicial review of conflicts of competence, the Court became competent to review the compliance of legislative norms (federal statutes, decrees and ordinances of Communities and Regions) with three constitutionally guaranteed fundamental rights: the principles of equality and non-discrimination³⁷ and the right to and freedom of education.³⁸ This extension of the Court's judicial review is closely linked with the transfer of legislative competences in the field of education to the Communities, the Court becoming the guarantor of equality between the Catholic and the State-organized school networks.

The judicial review by the Court may further be extended to other constitutional provisions, by a statute voted with the double majority. Up until now, this possibility has not been applied. There is however no urgent need for such formal extension. The power to review compliance with the principles of equality and non-discrimination enables the Court in practice to review the compliance of federal, Community and regional legislation with other constitutionally guaranteed rights and liberties in combination with the principle of equality. This makes the need for a further increase of the Court's competence less felt at the moment.

37. Const. art. 10 and 11.

38. Const. art. 24.

§ 2. Composition

The Court is composed of twelve judges, fourteen law clerks or legal assistants³⁹ and two registrars. The judges are appointed for life by the King from lists of two candidates submitted alternately by the House of Representatives and the Senate. The list must be adopted by a two-thirds majority vote in order to ensure the presence of the main political tendencies within the Court.

As already mentioned above, the composition of the Court of Arbitration reflects the fundamental bipolar structure of the State. Thus the Court is composed on the basis of language parity: six judges are Dutch-speaking, six are French-speaking. They make up the Dutch, c.q. the French language group of the Court. Each language group elects its president from amongst its members. The office of Chief Justice is alternately held for a one-year period by the president of each language group. The language adherence of the judges-lawyers (see below) is determined by the language of their university diploma, while the language adherence of the judges-politicians (see below) is determined by the parliamentary language group of which they were last a member.

In addition to the language parity within the Court, there is a second balance which must be observed, i.e. the balance between judges who are former senior magistrates or law professors of a Belgian university (category of the judges-lawyers), and judges who are former Members of the federal, Community or regional parliaments without having necessarily had legal training (category of the judges-politicians). The introduction of the latter category obviously reflects the already mentioned distrust of 'government by the judges'. The category of judges-lawyers should always comprise at least one former magistrate of the Court of Cassation or one former magistrate of the Council of State and one law professor. At least one judge-lawyer should prove an adequate mastery of the German language.

As a rule, a case is heard by a chamber composed of seven judges. The language group of that year's Chief Justice has the majority (four judges). When exceptionally a case is heard in plenary session, the Court can only pass judgment when at least ten judges and an equal number of Dutch- and French-speaking judges, are present. When this last condition isn't met, the youngest judge of the language group in the majority should abstain. Cases are decided by a vote. In case of equality of votes, the vote of the Chief Justice is decisive. This system avoids a structural majority

39. *Referendarissen, référendaires.*

position of one language group within the Court, but also a permanent deadlock. On the other hand, the system of alternating language majorities tends to prevent any abuse of the temporary majority situation. Since the office of Chief Justice will be held the following year by the president of the other language group, the 'ruling' language majority knows that it will itself become a minority the next year.

Each language group within the Court always comprises three judges-lawyers and three judges-politicians.

The rule of language parity is not limited to the judges. The fourteen law clerks, who are appointed by the Court, are also equally divided into a Dutch and a French language group. The language adherence is determined by the language of their diploma. At least one law clerk in each language group has to prove a sufficient mastery of the German language. Of the two registrars, one is Dutch-speaking, the other is French-speaking. The registrars are appointed by the King from a list submitted by the Dutch, c.q. the French language group of the Court of Arbitration.

§ 3. Competence

The competence of the Court of Arbitration can be described from four different but complementary angles: the object of its judicial review; the constitutional rules which are its standards; the ways in which cases may be submitted to the Court, and the consequences attached to its decisions.

1. The object of judicial review

The object of the judicial review by the Court of Arbitration is limited to legal norms enacted by the different legislators, i.e. federal statutes and regional or Community decrees or ordinances, including federal statutes, decrees and ordinances giving assent to a treaty or a cooperative agreement. Decrees voted by the French Community Commission or ordinances voted by the Common Community Commission of the Brussels Capital Region, are likewise subject to the Court's judicial review. The Court is not competent to review the constitutionality of administrative regulations and orders. This competence is exercised by the ordinary law courts and by the Division Administration of the Council of State.

When the Court has to review a federal statute, decree or ordinance giving assent to a treaty or to a cooperative agreement, it will consider not only the compliance of the federal statute, decree or ordinance giving assent with the constitutional allocation of legislative powers, but through the federal statute, decree or ordinance it will consider also the compliance of

the treaty provisions and the provisions of the cooperative agreement themselves with the principles of equality and non-discrimination and with the constitutional protection of education.

2. The constitutional reference standards

The Court of Arbitration reviews the compliance of the above-mentioned legal rules with the allocation of legislative powers provided under the Constitution and its implementing legislation: the double majority and ordinary institutional reform Acts; the institutional reform Act for the German-speaking Community; the Double Majority Act concerning the Brussels institutions, the Double Majority Act on the finances of Regions and Communities.⁴⁰ The Court reviews also the compliance with the constitutional principles of equality and non-discrimination and with the right to and freedom of education.

The Court itself identifies the legal norms which allocate powers to the federal State and its federated entities. The Court interprets its competence in an extensive manner. It reviews for instance also whether a statute, decree or ordinance has been enacted in compliance with the constitutionally prescribed special majority vote, although these constitutional provisions allocate legislative powers rather between the special majority and the ordinary majority legislator.

The Court interprets its competence to review compliance with the constitutional principles of equality and freedom of education just as extensively. According to the case law of the Court, the principles of equality and non-discrimination apply to all constitutionally guaranteed rights and liberties and even to all rights and liberties which are guaranteed by self-executing international treaties. In this way the Court extends its review to all other fundamental rights and liberties. The Court considers itself competent to review all legislative discrimination, even outside the field of education.

3. Ways to submit a case to the Court of Arbitration

3.1 Direct application for annulment

Any natural or legal person having an interest in the eventual annulment of a legislative norm, may initiate proceedings for annulment. The statu-

40. Regulating the financial resources of all the Communities and Regions, with the exception of the German-speaking Community.

tory required interest implies that the petitioner demonstrate that he is directly and unfavourably affected by the challenged norm. On the side of the authorities, every authority designated by statute can do the same. Actually only the federal Council of Ministers, the Governments of the Regions and Communities and the Chairmen of the legislative assemblies on request of at least two-thirds of their Members, are allowed to file a request for annulment.

The request for annulment must be filed within a period of six months after the publication of the legislative norm in the *Official Gazette*. If the challenged legislative norm pertains however to the approval of a treaty, the request for annulment should be made within a period of sixty days following its publication, in order to limit the period of uncertainty. On the other hand, a new period of six months, and therefore a new possibility to obtain an annulment, is open to the federal Council of Ministers and the Governments of Regions and Communities when the Court of Arbitration in a preliminary ruling has pronounced a legislative norm to be *ultra vires* or to violate one or more of the articles ten, eleven or twenty four of the Constitution. The same possibility exists when an annulment procedure against a legislative norm is in process and the newly challenged norm has basically the same subject but is made by another legislator, or, finally, when the Court has before annulled a norm with the same content which was enacted by another legislator.

The petitioner may ask the Court to suspend the challenged norm pending the annulment proceedings. For this two conditions should be met. The petitioner has to establish that his claim is based on serious grounds, and, that the enforcement will cause him serious damage which might be very difficult to repair afterwards. The decision to suspend operates *erga omnes* but is only effective for three months.

Until now, the Court has shown itself very reluctant to exercise its power to suspend.

3.2 Preliminary rulings

All courts and tribunals may, and those who are to decide in last instance must, ask the Court of Arbitration for a preliminary ruling on the question whether a legislator has acted *ultra vires* or has violated the articles ten, eleven or twenty four of the Constitution, if such question is raised before them. A tribunal or court which does not decide in last instance, is not compelled to refer that question to the Court of Arbitration when it considers that there is manifestly no violation of one of the reference standards, when the answer to the question on which a preliminary ruling

is sought is considered not essential to the decision or when the Court of Arbitration has already ruled on the same issue. The obligation to refer a question to the Court of Arbitration for a preliminary ruling is, however, absolute for the Court of Cassation and the Council of State except when the claim is inadmissible on procedural grounds which themselves are not the object of the question for a preliminary ruling.

Contrary to the direct request for annulment, requests for a preliminary ruling need not be made within a certain period of time after the publication of the challenged norm. This makes it possible to subject legislation older than the reform of the State, to the scrutiny of the Court of Arbitration.

4. Legal consequences of the decisions of the Court of Arbitration.

Annulment judgments rendered by the Court of Arbitration are final and binding as from their publication in the *Official Gazette*. They operate *erga omnes* and have in principle retroactive effect *ex tunc*. The Court may however limit the effect of the annulment in the time in order to limit the negative effects it may have on persons and authorities.

The decision of the Court of Arbitration causes the norm or the parts of the norm it indicates, to disappear. It does not however wipe out the applications that have been made before the decision was rendered. Interested persons must ask for this separately and must address themselves to the authority responsible for the application.

In case of a preliminary ruling, the judgment is binding only for the referring court or tribunal and for all other courts or tribunals ruling in the same case. Moreover, a judgment on a preliminary question frees the lower courts and tribunals from the obligation to refer a question to the Court of Arbitration for a preliminary ruling, provided they comply with the decision of the Court on the same subject matter.

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