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The Belgian Constitutional Court and the re-enacting of an annulled law[1]

by

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1. The Institution of a Constitutional Court in Belgium marked the start of a shift from parliamentary to judicial sovereignty, as since then the final word about the constitutionality of laws no longer lies in the hands of the legislator.

1.1. The Constitutional Court as a positive legislator

1. According to Hans Kelsen, the function of a Constitutional Court is inherently a legislative one, because its decisions alter the outcome of a democratically elected body's deliberations. However, still according to Hans Kelsen, a Constitutional Court is a negative legislator who annuls existing legislation, but does not create any new legal provisions.
2. Nowadays, Kelsen's description is nevertheless considered to be a too narrow definition of what a constitutional court really stands for. Contemporary constitutional courts do much more than simply stating that legal provisions are incompatible with the Constitution. They have rather become, at least to some extent, positive legislators. Indeed, they offer the legislator guidelines as to how the Constitution is to be read and how future legislation should be conceived in order to be constitutional. In some cases, they also impose injunctions on the legislative bodies to restore an unconstitutionality by legiferating within a specified delay. Sometimes they explain how legislation should be read in order to be constitutional. In Belgium, five techniques are used by the Constitutional Court which illustrate that it does not restrict itself to be a purely negative legislator.
3. The first technique consists in the maintaining the effects of the annulled provisions, in particular by maintaining executive decisions or judgments based on the annulled law, in order to mitigate the retroactive effect of a judgment of annulment. By doing so, the legislator is given a certain period of time during which he has the obligation to remedy the unconstitutionality found by the Court.
4. The second technique consists of a partial annulment of the unconstitutional provisions. The Court may annul one or more paragraphs, or even some words, of a contested provision. This will generally have only a negative effect, but exceptionally it may also expand the scope of the provision concerned.
5. The third technique consists in rejecting the request to annul a legal provision, provided, however, that it will be interpreted as stated in the judgment. Even when this interpretation is different from the one intended by the legislator, the ordinary judge will be under the obligation to apply the interpretation considered by the Court in conformity with the Constitution.
6. The fourth technique consists in the finding of an unconstitutionality caused by the by the lack of a similar provision applicable to another category (the so-called "*legislative lacunae*").
7. The fifth technique consists of a wide interpretation of competence by the Court with respect to the repartition of powers between the federal State, the Communities and the Regions. The Court has done so by accepting as reference norms the provision concerning the federal loyalty as well as the need of the free circulation of goods and production factors between the federated entities, the Belgian State constituting an economic and monetary union.

1.2. The *positive legislator* and democratic legitimacy

1. Since the Belgian revolution in 1830 was mainly a reaction against the exaggerated powers the Executive possessed under the Dutch regime, the Belgian Constitution of 1831 vested an important trust in the

Legislature. Therefore, the Judiciary was considered unable to examine the law's constitutionality, since the Legislature could do no wrong.

2. In the second half of the 20th century, this paradigm was undermined, first by the shift - due to the increasing power of political parties - of the centre of the political debate from the Parliament to the Government, and later also by the upcoming federalism and by the creation of supranational institutions such as the EU.
3. An opening for true constitutional review emerged, when the Court of Cassation, first, accepted that an Act of Parliament which is open for different interpretations, should be interpreted in a way which is compatible with the Constitution, and secondly, that every judge possesses the competence to examine an Act of Parliament's conformity with directly applicable provisions of international law.
4. Not being elected and not carrying any political responsibility, a constitutional judge as positive lawmaker may raise questions of democratic legitimacy, as the legislator remains the body which is invested of the strongest democratic legitimacy.
5. However, the legitimacy of the constitutional judge is not the key issue when the debate is about addressing the legislator's mistakes. By creating a Constitutional Court, the Constituant body has taken the view that there is no identity between the eternal will of the Nation and the temporary composition of (the majority of) Parliament. Since the Nation's will, e.g. the protection of human rights, is reflected in the text of the Constitution, the constitutional judge must examine whether the Acts of Parliament are constitutional and he should be able to impose its will even on the representation of the Nation itself.

2. Legislative recidivism in Belgium

1. A judgment annulling a legal provision does not in itself contain a prohibition to adopt an identical or analogous provision. Nevertheless, when a legislative body chooses to re-enact an annulled law, a constitutional court can choose between two possible reactions: on the one hand, the Constitutional Court's reaction may be one of indignation, almost certainly leading to a new annulment; on the other hand, the Constitutional Court may accept to be overruled by a body possessing a stronger democratic legitimacy and hence render a judgment which is more moderate or even opposite to the previous one.
2. In Belgium, the Constitution provides for a specific suspension procedure in the hypothesis of a bill re-enacting the annulled provisions and the Constitutional Court may also be called upon to inquire again into the merits of the case in the framework of an ordinary annulment procedure.

2.1. A specific procedure for the suspension of a re-enacted provision

1. The Constitutional Court can not suspend *proprio motu* the effects of a new legal provision pending an annulment procedure. It can only do so if a complainant has requested a suspension in the framework of an ordinary annulment procedure. A suspension can be requested if the complainant can demonstrate that his arguments in favour of the provision's annulment appear to be serious at first sight and that the immediate application of the allegedly unconstitutional provision would cause him a significant and virtually irreparable prejudice.
2. In addition, in the hypothesis of re-enactment of a previously annulled provision, that new legal provision's effects can be suspended "if the annulment is requested of a provision identical or analogous to a provision by the same legislator which has previously been annulled by the Constitutional Court". In that hypothesis, the complainant does not need to demonstrate that the merits of the case appear at first sight to be serious and that a significant and virtually irreparable prejudice would arise because of the immediate application of the questioned provision.
3. That specific suspension procedure applies as soon as the same legislator adopts a provision containing the same *normative content* as a previous provision which has already been annulled by the Constitutional Court. However, if the differences between the two norms are "significant and more then purely formal", that procedure cannot be applied.
4. While requests for annulment of a legal provision must, in principle, be submitted within the first six months after the allegedly unconstitutional provision is published in the Official Journal, a request for suspension has to be submitted within three months after its publication. The judgment deciding upon the suspension has to be rendered as soon as possible and, in case of suspension, the has to be published in the Official Journal within the first five days after its delivery. The judgment takes effect from that date, but this effect only lasts for three months: if by that time, the Constitutional Court has not yet examined the case on the merits, the suspension ceases to have effect.

5. Until now, this specific suspension procedure has only been successfully invoked in two cases. The first case involved a bill placing people with considerable debts under the surveillance of a debt councillor, who develops a debt conciliation. In 2000, the Constitutional Court had annulled a provision of that bill which obliged lawyers to reveal all information they possessed about their client's financial transactions, regardless their professional secrecy. According to the Court, the professional secrecy could, however, only be set aside in case of emergency.
6. By a bill of 13 December 2005, the provision setting aside the lawyer's professional secrecy was restored. The new provision added, however, that the professional secrecy could only be set aside by a judicial decision and that the lawyer could opt to reveal this information only to the judge who could ask the opinion of the official lawyers federation. Despite those new elements, the Constitutional Court found that the new provision was analogous to the annulled one, because the professional secrecy could still be set aside in any case of collective debt rescheduling, whether or not it involved a case of emergency.
7. The second case concerned a tax on non-reusable bottles: while producers of such bottles were submitted to a tax amounting to almost 10 euros per hectolitre of packed fluid, this tax did not apply to producers of reusable bottles, since the law foresaw an exemption on their behalf. Although the Constitutional Court accepted this distinction, which was based on environmental reasons, it nevertheless found a discrimination in the non-existence of a similar exemption for producers of non-reusable bottles containing recycled materials, because scientific studies had proven that the recycling process of non-reusable bottles was equally beneficial for the environment than the reuse of reusable bottles. While annulling the contested provisions, the Court maintained their effects for a six-month period, during which the legislator had to reconsider this tax.
8. Invoking budgetary reasons, the legislator, however, simply re-enacted the annulled provision a couple of months later, not providing for any exception for the recycling of non-reusable bottles, by imposing a tax of 10 euros per hectolitre for non-reusable bottles and a tax of 0 euros for reusable bottles. The Court could not but conclude that there is no actual difference between an exemption from a tax and a tax amounting to 0 euros. The Constitutional Court suspended the re-enacted provisions and annulled them three months later. This judgment did, however, not mark the end of this particular dialogue between the legislator and the Constitutional Court.

2.2. The second examination on the merits

1. After the Court had suspended and re-annulled the re-enacted discrimination between reusable bottles and non-reusable bottles containing recycled materials, the legislator defined a reusable bottle as being designed to be refilled at least seven times. Hence, the 10 euros per hectolitre tax on non-reusable bottles could, according to the legislator, be maintained, if the reusable bottle, thus defined, was submitted to a tax amounting to 1/7 of 10 euros.
2. While this new re-enactment had still not foreseen an arrangement for the specific problem of non-reusable bottles containing recycled materials, the Court did not find the bill to be discriminatory. Stating that it belonged to the discretion of the legislator not to take into account the recycled non-reusable bottles, the Court considered the new legal provisions relevant and proportionate in order to obtain the pursued environmental benefits.
3. A second case in which the Constitutional Court had to re-examine the merits after re-enactment of an annulled provision concerns the publication of new legislation. A law of 24 December 2002 abolished the paper version of the Official Journal by providing that from 1 January 2003 on, besides three copies to be stored in official locations, the official publication of Belgian legislation occurs online.
4. In 2004, the Constitutional Court accepted the abolishment of the paper version of the Official Journal but considered that the lack of accompanying measures for persons not possessing an internet connection was found discriminatory. The Court maintained the annulled provisions until 31 July 2005.
5. The edition of the Official Journal of 29 July 2005 published the new law on its publication. The legislator reconfirmed the principle of electronic publication and provided for some accompanying measures such as the creation of a help desk: every Belgian citizen may call the free phone number of the Official Journal where a team of four civil servants will help him in his search for the relevant legal provisions. This helpdesk will also copy, at the citizen's request, the requested documents, and send them to his address, provided the paper and sending costs are paid for by him.
6. While there were doubts on the question whether those measures could be considered sufficient, the Constitutional Court considered that by contacting the helpdesk it was possible to identify the interesting content of every edition. The Court concluded that that persons not possessing an internet connection were no longer discriminated against. It was observed in the doctrine that this judgment was rendered

because the Court itself did not know which accompanying measures would be constitutional. The doctrine also added that, if a dialogue between the constitutional judge and the legislator is to be effective, it requires from the constitutional judge clear and constructive guidelines.

3. Concluding remarks

1. While the jurisprudence concerning the specific suspension procedure suggests that the Constitutional Court speaks the final word about an Act of Parliament's constitutionality, the jurisprudence concerning the second examination on the merits suggests the opposite, since in both cases discussed, the Constitutional Court has respected the legislator's disobedience.
2. The importance of the question whether the Constitutional Court prevails over the Legislature or *vice versa*, should not be overestimated. In any case, none of both powers stand at the top of the hierarchy, since only the Nation's will is truly sovereign. The Nation representing all citizens from the past, the present and the future is an abstract concept to be distinguished from the current composition of the Legislature. The Nation's will reflected in the Constitution prevails both over the Legislature and over the Constitutional Court. Hence, it is the Constitution which speaks the final word. The Constituant body may amend the Constitution in order to restore the balance between the legislator and his guard. On the one hand, the Constitutional Court should fulfil its constitutional review role in the most effective way by granting citizens a true protection when an Act of Parliament violates their rights. On the other hand, the Constitutional Court should not be too activist, since a *gouvernement des juges* is not a legitimate system either.
3. In their mutual relations the constitutional court and the legislator should strive to find a satisfactory equilibrium. Constitutionalism requires a dialogue between both powers: sometimes the Court has to stick to its prior decision, and sometimes it has to give in. Judging when to be activist and when to be prudent is inherent to any judicial activity, including that of a constitutional court.

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[1] The present note is based on a contribution by Willem VERRIJDT, Legal Secretary at the Belgian Constitutional Court and Assistant at the Catholic University of Leuven, on "Re-enacting an annulled law: the Belgian Constitutional Court and legislative recidivism", published in the *International Almanac Constitutional Justice in the New Millennium*, 2008, 200-217.