Strasbourg, 2 November 2006

CCS 2006/11

CDL-JU(2006)046
Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

in co-operation with

THE CONSTITUTIONAL COURT OF AZERBAIJAN

INTERRELATIONS BETWEEN THE CONSTITUTIONAL COURT AND ORDINARY COURTS

Baku, Azerbaijan, 9-10 November 2006

REPORT

The interrelations between the Constitutional Court and ordinary courts

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I. Introduction

A. The Belgian Constitutional Court

1. The Belgian Constitutional Court is a relatively young court. Exactly one year ago, the Court organised a conference to celebrate the twentieth anniversary of its very first judgment in 1985. In the course of these twenty-one years of constitutional jurisprudence the Court delivered about 2,200 judgments.

At the beginning, the Court was only competent to verify whether the parliaments of the State and the regions and communities did not overstep their competence. As a matter of fact, Belgium had just been transformed into a federal state and it was necessary, as in every federal state, to have an arbitrator, *a referee*, to solve conflicts of competence between the different state entities. That explains why the official name of the Belgian Constitutional Court is still "Court of Arbitration", although parliament is currently changing it into "Constitutional Court".

It's only in 1989 that the Court became competent to review compatibility with certain fundamental rights, more particularly the principle of equality, the prohibition of discrimination and the right to education. Only since 2003 does the Court have full jurisdiction to review compatibility with other constitutional rights and freedoms.

B. Juxtaposition with the Supreme Court

2. Although constitutional case-law in Belgium is a fairly recent phenomenon, the subject-matter of this conference is a hot issue in Belgium. The juxtaposition of the Constitutional Court and the Supreme Court (*Cour de cassation*) was even described in the legal doctrine as *la guerre des juges*, the war of the judges. This was also the reason why the Constitutional Court decided to discuss the problems at the Conference to celebrate the twentieth anniversary of the Constitutional Court.

C. Implementation of Human Rights in the Belgian Legal System

3. The jurisdiction to review whether a fundamental right has been violated has not been given to one single court of law. Every Belgian court is obliged to refrain from enforcing a (general or individual) act of the executive if it is contrary to a higher legal standard, such as the provisions of the Constitution and the European Convention on Human Rights. Such an act of the executive may also be annulled by the Council of State at the request of an interested party.

A legislative act can only be reviewed and subsequently annulled by the Constitutional Court. As I mentioned before, the Court is empowered to review legislative acts for compatibility with the constitutional rights and freedoms. In its review, the Court takes into account provisions of international law that guarantee similar rights and freedoms. The ordinary courts and the Council of State do not have the authority to review the constitutionality of statutes.

D. Two Ways to Bring a Case before the Constitutional Court

4. A case may be brought before the Constitutional Court through an action for annulment or a preliminary issue. Along with the action for annulment, or during the course of the proceedings, the suspension of the challenged legislative act may be demanded.

Action for annulment

5. An action for annulment can be lodged by the various governments, presidents of parliaments (at the request of two-thirds of their members) and by any person able to prove an interest in the annulment of the statute. An action for annulment must, as a rule, be brought within six months of the publication of the challenged act. If the Court deems the application to be well-founded, it will annul all or part of the challenged provisions, while (provisionally) maintaining, where appropriate, the effects of the provisions in question. The judgment of annulment has absolute binding force (*erga omnes*) from the date of its publication in the *Official Gazette*. The judgment has retroactive effect, which means that the annulled legislation must be considered never to have existed. If the action for annulment is dismissed, the judgment shall be binding with respect to the points of law settled by the judgment.

Preliminary issue

6. The Constitutional Court may also be asked for a ruling on a preliminary question. If in a dispute before a court of law one of the parties invokes the infringement by a legislative act of one of the provisions falling within the jurisdiction of the Constitutional Court, the court of law hearing the case must in principle refer a preliminary issue to the Constitutional Court. Naturally no time limit is set for doing so. The referring court and any other court of law called upon to rule in the same case are bound by the Court's judgment when adjudicating the case. The judgment is said to have relative binding force (*inter partes*). The challenged provision shall remain in effect. However, if the Constitutional Court has established an infringement, a new six-month term will be granted in which an action for annulment of that provision may be brought. When a court in another case is confronted with a similar problem, it may dispense with raising a preliminary question on condition that it follows the judgment already given.

E. Two Areas of Conflict with the Ordinary Courts

7. It is mainly this second way of access, the system of preliminary questions, that contains the seeds of a conflict between the Constitutional Court and the ordinary courts. It was only a question of time before two areas of conflict would come to the surface: Who is the ultimate protector of human rights? And who is the ultimate interpreter of legislation?

II. Who is the Ultimate Protector of Human Rights?

A. Point of View of the Supreme Court

8. The ordinary courts, with on top of the pyramid the Supreme Court, have a much longer tradition than the Constitutional Court. They are as old as the Belgian State (1830) and, as described above, they have always been competent to review compatibility of executive – not legislative – acts with the Constitution.
Since the early seventies, however, the Supreme Court considers the ordinary courts competent – and at the same time compelled – to refrain from enforcing any law that is contrary to directly applicable provisions of international law. This is because, in the reasoning of the Supreme Court, the law of treaties takes precedence over national law.

9. At the moment the Constitutional Court was created, with the obligation to refer preliminary questions to that Court concerning the compatibility of statutes with constitutional rights and freedoms, this jurisprudence of the Supreme Court became problematic. Logic says that the reviewing by the ordinary courts of the compatibility of statutes with conventional rights and freedoms was implicitly overruled by the legislator.

This was not the Supreme Court's point of view. To say that this Court was not amused by the creation of a Constitutional Court is probably an understatement. For more than 150 years, this court had had the last word and now it had to admit another Supreme Court at its side.

However, as long as that new Court was only competent to verify whether the parliaments of the State and the regions and communities did not overstep their competence, there was little to fear.

B. First Extension of the Constitutional Court's Competence

10. As mentioned before, the competence of the Constitutional Court was extended in 1989 to the principles of equality and non-discrimination. The question arose what an ordinary court had to do if it considered a legislative act that it had to apply contrary to, for instance, Article 26 of the International Covenant on Civil and Political Rights, which contains an autonomous principle of non-discrimination. Did it have to refrain from enforcing the act because it is contrary to a directly applicable provision of international law? Or was it obliged to refer a preliminary question to the Constitutional Court because this Court was given the exclusive power to review compatibility with the non-discrimination principle and because that principle is one and the same principle regardless whether it is guaranteed by an international covenant or by the Belgian Constitution?

It is generally accepted that the second option was to be preferred and even the Supreme Court systematically referred "discrimination questions" to the Constitutional Court. It did however not refer other questions concerning fundamental rights to the Constitutional Court, although that Court considered itself competent to review the compatibility of legislative acts with these fundamental rights, read in combination with the non-discrimination principle.

11. As a matter of fact, the Court has always held the view that Articles 10 and 11 of the Constitution, which contain the principles of equality and non-discrimination, are general in scope and prohibit any form of discrimination, irrespective of its grounds: the constitutional principles of equality and non-discrimination apply to all rights and freedoms, including those that ensue from international treaties that are binding on Belgium. Consequently, the Court had been reviewing legislative acts for compatibility with the other rights and freedoms already before its jurisdiction was extended, namely indirectly through Articles 10 and 11 of the Constitution.

This means, for instance, that if the right to freedom of speech of a certain group of citizens is breached, this group is also discriminated against when the same right to freedom of speech of other citizens has not been infringed. The justification for interference in the right to freedom of speech applied outright as a justification for the unequal treatment of different categories of persons.

12. Other ordinary courts regularly referred questions indirectly concerning other fundamental rights to the Constitutional Court. The Supreme Court, however, apparently continued to consider the Constitutional Court as a highly specialised court, from which it had little to fear.

C. Second Extension of the Constitutional Court's Competence

13. This situation changed in 2003, when the legislator explicitly gave full jurisdiction to the Constitutional Court to review compatibility with all constitutional rights and freedoms. At that moment an open conflict could no longer be avoided.

14. The Constitutional Court has considered, and this is a key consideration in its case-law, that where a treaty provision that is binding on Belgium is similar in scope to one or several provisions of the Constitution, the safeguards contained in those treaty provisions constitute an inseparable whole – *un ensemble indissociable*, *ein Untrennbares Ganzes* (the judgments of the Belgian Court are in Dutch, French and German) – with the safeguards contained in the similar constitutional provisions. Consequently, when an infringement of a constitutional provision is adduced, the Court in its review will take into account provisions of international law that guarantee similar rights and freedoms.

At first sight, this may look as if the Court is further extending its own competence, but it's just common sense. The fundamental rights guaranteed by the Constitution and those enshrined in the international conventions are inextricably linked. It is therefore unavoidable that the constitutional provisions should be interpreted in conjunction with the provisions concerning similar fundamental rights in the international treaties. After all, they are the same fundamental rights, regardless of whether they are guaranteed by the Constitution or by e.g. the European Convention on Human Rights. Freedom of speech is freedom of speech. The wording may be different, but this does not essentially alter the substance of the fundamental right.

15. As a result, if a question arises before an ordinary court concerning the compatibility of a law with for instance the freedom of speech, that court would no longer be able to set aside that law because it considers it contrary to Article 10 of the European Convention on Human Rights, but has to refer to the Constitutional Court the question whether the statute is contrary to Article 19 of the Constitution, read in conjunction with Article 10 of the European Convention.

D. Reaction of the Supreme Court

16. Although this was considered an unavoidable evolution from the point of view of the Constitutional Court, which in fact declared itself the ultimate fundamental rights protector, it is not difficult to understand that it was conceived as a declaration of war by the Supreme Court. Its reaction is clear: it refuses to refer questions relating to conventional rights and freedoms to the Constitutional Court, thereby confirming its former case-law and ignoring the evolution in the jurisdiction of the Constitutional Court. The consequence of this attitude is, of course, an increasing risk of diverging and even contradictory judgments as far as fundamental rights are concerned.

17. Before exploring the possible solutions to get out of this problematic situation, it should be noted that the conflict only exists with the Supreme Court and not with the lower courts, which continue to be very eager to refer questions to the Constitutional Court, nor with the Council of State, which is the highest Administrative Court.

E. Possible Solutions

18. Last year, as already mentioned, the Court invited the other courts, and especially the Supreme Court and the Council of State, to discuss their conflicts. One of the working groups which prepared the discussions and in which I had the honour to participate came up with a solution. The working group drafted an amendment to the Law on the Constitutional Court. It proposes to make referral to the Constitutional Court compulsory every time a question arises concerning the compatibility of a legislative act with a fundamental right that is safeguarded by a treaty provision and that is at the same time safeguarded, in a completely or partly similar way, by a constitutional provision. In return – it was the result of a compromise – the courts would no longer be obliged to refer the question if they consider it obvious that there is no violation or if it follows from the case-law of the Constitutional Court or an international court that the fundamental right is violated.

19. This draft amendment seems to be the least intrusive way to address the existing problem. It is not able to entail a completely unified interpretation of fundamental rights. As far as the review of acts of the executive is concerned, this continues to fall within the scope of the ordinary and administrative courts. However, the lack of a unified interpretation, which could be reached by the introduction of a constitutional complaint (*Verfassungsbeschwerde*, *recurso de amparo*), is not the main concern. The main concern – and this is also the advantage of the draft amendment – is that only the Constitutional Court, with its specific composition, with its group of law clerks and with the possibility for the authorities to take part in the procedure and thus to defend their statutes, that only that Court – and not every single judge – is competent to declare a law – an act adopted by a majority of the representatives of the nation – in breach with a fundamental right.

The main weakness of the proposal is the risk that the Supreme Court might consider itself not to be bound by this amendment because of the precedence of international law over national law, on which its case-law is based and which is sometimes described as a general principle of constitutional law. Therefore, an amendment of the Constitution would be a more solid solution. This would also have the advantage of allowing an explicit extension of the competence of the Constitutional Court to conventional rights and freedoms.

III. Who is the Ultimate Interpreter of Human Rights?

A. Interpretation of a Legislative Act

20. The system of preliminary questions also gives rise to conflicts in another area where the Supreme Court feels even more threatened, more particularly that of the interpretation of legislative acts.
When the Constitutional Court replies to a preliminary question, it usually reviews the challenged provision in the interpretation that has been given to it by the referring court. However, when the Court comes to the conclusion that the challenged act is unconstitutional in the interpretation being offered, it will propose an interpretation that is in keeping with the Constitution. The question is whether the referring court is bound by that Constitution-compliant interpretation.

Although the Constitutional Court cannot impose a Constitution-compliant interpretation, it would seem common sense for the court not to simply discard the application of the provision in

question, but to interpret and apply it in a manner that complies with the Constitution, unless it chooses to submit the provision to the Court in another interpretation. A court in another case cannot dismiss the unconstitutionality review and the Constitution-compliant interpretation without referring the problem once more to the Constitutional Court.

21. The referring courts and the other courts of law therefore have a very limited scope when the Constitutional Court gives a Constitution-compliant interpretation of a legislative act. In practice, however, it has been shown that the Supreme Court gives a broader interpretation to that scope.

B. Characterization of a Legislative Act

22. If the Constitutional Court usually reviews the challenged act in the interpretation that the referring court has given to it, this is not the case when the characterization of the legislative act is important for the Court to be able to exercise its competence.

For example, when the referring court regards a particular legislative act as a tax, the Constitutional Court will not take over this interpretation just like that. The Court has to examine whether a tax complies with the legality principle (*no taxation without representation*), yet such a review only makes sense if the measure in question is indeed a tax. The Court therefore reserves the right to investigate whether the legislative act in question has been rightly characterized as a tax.

C. Possible Solutions

23. It has been suggested in the legal doctrine to solve conflicts of interpretation by employing the *diritto vivente* from Italian law. According to that suggestion, the Constitutional Court, after it has reached a verdict of unconstitutionality, may only propose a Constitution-compliant interpretation if the challenged legislative act has not given rise to a firm and consolidated interpretation and therefore there is no question of *diritto vivente*. In other words, the Constitutional Court would have to show more restraint. The question, however, is whether such a solution will enhance legal certainty. Although the risk of conflicts of interpretation will be reduced, there will for a long time be uncertainty about the new interpretation, which may in turn be found to be unconstitutional.

24. This problem was also the topic of one of the discussion groups that were asked to prepare the aforementioned conference of the highest Belgian courts of law. This working group, however, failed to come up with a cut-and-dried solution. In this case, too, an amendment to the law or, if necessary, to the Constitution may be proposed in which the Constitutional Court is designated as the ultimate interpreter of legislative acts and it is empowered to impose that interpretation on the other courts.

In that connection it should be pointed out that, after a verdict of unconstitutionality has been reached in response to a preliminary question, a new term of six months is granted for bringing an action for annulment of the legal act that has been found to be unconstitutional. Little use is made of this facility, although a recent case in which it has been used is worth citing.

The Constitutional Court had found a provision to be unconstitutional in the interpretation that had been submitted to it, without proposing a Constitution-compliant interpretation. An interested party subsequently brought an action for annulment of the challenged provision, but the Court dismissed the action since it actually interpreted the provision in keeping with the Constitution. The Court

notes that this interpretation concerns a point of law settled by the Court and that the courts are therefore obliged to apply the provision in that interpretation. As we have already pointed out, a judgment dismissing an action for annulment is binding on the courts as regards the points of law settled by that judgment.

25. A possible solution to avoid conflicts of interpretation might be to empower the Constitutional Court, after a verdict of unconstitutionality has been reached in a preliminary issue, to proceed *ex officio* to the annulment of the legislative act in question or, as in the example discussed above, not to annul it but to impose a binding interpretation.

Here, too, a more thoroughgoing solution would be to introduce a constitutionality action against rulings of the Supreme Court, after the example of the *Verfassungsbeschwerde* and the *recurso de amparo*, although it is highly doubtful whether the drawbacks of that system are outweighed by the advantage of uniform interpretation that is pursued by it.