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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

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in co-operation with the

CONSTITUTIONAL COURT OF AZERBAIJAN

Seminar on

"The Value of Precedents (national, foreign, international) for Constitutional Courts"

THE STANDPOINT OF THE COURT OF ARBITRATION, BELGIUM

Report

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The purpose of the seminar being held by the Venice Commission in co-operation with the Constitutional Court of Azerbaijan is to discuss the value of precedents (national, foreign, international) for constitutional courts.

This report by Belgium's Court of Arbitration sets out to answer three main questions: firstly, whether the Court of Arbitration is bound by its own decisions; secondly, what authority or influence is exerted by the case-law of foreign constitutional courts; and, thirdly, the impact of the case-law of international courts[1] on the judgments of the Court of Arbitration.

I. Is the Court of Arbitration bound by its own decisions? Are obiter dicta also binding on other courts as regards their interpretation?

1. Neither the Constitution nor the Special Act on the Court of Arbitration of 6 January 1989 contains a provision stipulating that the Court of Arbitration is bound by its own decisions.

The Court is free to form its own opinions and may possibly depart from its established precedents. That said, changes in the case-law are rare in practice, since the Court is concerned to ensure the consistency of its decisions.

It is clear to see that the constitutional case-law has remained consistent over time; tangible evidence of this is that the reasoning of the Court of Arbitration's judgments is based on principles regularly reiterated in the same terms. "This obviously helps to make judgments foreseeable and accordingly admits of some expectation as to what they will say, which is conducive to legal certainty."[2]

2. A more thorough approach to this matter entails considering the Court of Arbitration's decisions in the light of the method of referral of cases, since the binding effect of judgments differs according to whether they are delivered in an action for annulment[3] or in response to a preliminary question. That explains why some issues are repeatedly raised in preliminary questions.

3. An *action for annulment* can be lodged by any authority designated by law[4] or by any party able to prove an interest. The purpose is to make a "direct"[5] application to the Court for annulment of a piece of legislation alleged to violate a provision which the Court is responsible for upholding.[6]

Where the Court deems an application to be well-founded, it annuls all or part of the challenged legislation. Judgments have retroactive effect, and the legislation must

[1] The Court of Arbitration uses the term supranational case-law to designate the judgments of the European Court of Human Rights and the Court of Justice of the European Communities.

[2] "The way a constitutional court is composed is not devoid of impact on the consistency of its work. At one time an increase in the number of judges in the Court of Arbitration was envisaged, but, fortunately, the idea was abandoned. An increase would have inevitably led to the Court's reorganisation in separate divisions, whereas, at present, the judges sit as a court of seven, ten or twelve members, without any separation into divisions. This system guarantees the constitutional case-law's unity." (M. VERDUSSEN, "*Les douze juges – La légitimité de la Cour constitutionnelle*", Brussels, Labor, 2004, pp. 65 and 70).

[3] An action for annulment may be accompanied by a request for suspension of the challenged legislation. Proceedings concerning requests for suspension are an adjunct to the action for annulment and are moreover of more marginal significance. They are not dealt with here. It can nonetheless be noted that, although it rules on the seriousness of the arguments advanced and the possibility of damage difficult to repair, a suspension decision in no way prejudges the final outcome of the case.

[4] Legislative and executive authorities throughout Belgium.

[5] In contrast with the "indirect" approach of raising a preliminary question.

[6] The Court solely has jurisdiction to decide the conformity of laws and decrees referred to it with the rules laid down in the Constitution, or pursuant thereto, determining the respective powers of the state, the communities and the regions or with Section II or Articles 170, 172 and 191 of the Constitution.

consequently be considered never to have existed. The Court may therefore accompany its judgments with specific decisions stipulating their effect over time. A judgment has absolute binding force from its publication in the *Moniteur belge.*[7] At that point it becomes binding on everyone without exception.

Judgments dismissing an action for annulment are binding on the courts in respect of the points of law which they settle.[8]

4. The Court of Arbitration may also be asked for a ruling on a preliminary question. A preliminary question is raised by a court - referred to as the "court *a quo*" in the Court of Arbitration's judgments - based on an actual case pending before it.

All courts are in principle obliged to refer a preliminary question to the Court of Arbitration where they come up against an issue of the compatibility with a higher law[9] of legislation applicable to the case before them.

The Court of Arbitration's decision has relative binding force. That means that the referring court is bound by the Court's judgment when adjudicating the case in respect of which the question was posed.[10]

This is nonetheless a reinforced form of relative binding force, since any other court[11] required to decide a similar case may dispense with raising a preliminary question on condition that it abides by the judgment already given.

5. In the Court's judgments it is not just the operative provisions[12] that have binding force, but also the reasons given by the Court for its decisions, which constitute the necessary support for the operative provisions.[13] However, *obiter dicta* do not have the same binding force.[14]

6. In both types of proceedings - action for annulment or raising of a preliminary question - the same issue, but with shades of difference, may be brought before the Court several times in a given matter. This occurs more frequently with preliminary questions.

This is a consequence of the fact that the referring court is, in principle, obliged to pose a preliminary question where it has doubts about legislation's compatibility with a reference provision, unless the Court of Arbitration has already answered a similar question.[15] Another explanation lies in the relative binding force, albeit reinforced, of judgments given in answer to preliminary questions.

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[7] Article 9, paragraph 1, of the Special Act on the Court of Arbitration of 6 January 1989. (The *Moniteur belge* is Belgium's official gazette.)

[8] Article 9, paragraph 2, of the Special Act on the Court of Arbitration of 6 January 1989.

[9] This concerns the same reference provisions as in an action for annulment. See footnote 6.

[10] As is any other court dealing with the same case (Article 28 of the Special Act on the Court of Arbitration of 6 January 1989).

[11] For information on the system that existed before the passing of the Special Act of 9 March 2003 amending the Act on the Court of Arbitration, see below.

[12] This term is used to designate the part of the judgment formally setting out the Court of Arbitration's decisions.

[13] J. VAN COMPERNOLLE and M. VERDUSSEN, "La guerre des juges aura-t-elle lieu ? A propos de l'autorité des arrêts préjudiciels de la Cour d'arbitrage", *J.T.*, 2000, p. 299.

[14] The difficulty lies in distinguishing between a *ratio decidendi* and an *obiter dictum*.

[15] Before the passing of the Special Act of 9 March 2003 amending the Special Act on the Court of Arbitration, the Court of Cassation and the Conseil d'Etat, both of whose decisions are final, were required to refer a preliminary question to the Court of Arbitration even where it had already settled the issue. The Court therefore sometimes gave several decisions concerning the same legal provision and the same causes of action.

7. As already mentioned, the Court is genuinely concerned to ensure the consistency of its case-law. In this connection it should be said that, where a question raised before it is identical or similar to one it has already answered, the Special Act on the Court of Arbitration of 6 January 1989 permits expedited settlement of a case through a procedure designated as "preliminary".[16] The Court then gives what is known as a "judgment of instant reply".

8. The Court's case-law is constantly developing in line with the initiatives taken by the referring courts.

Via the preliminary questions mechanism the referring courts may address a number of increasingly precise questions to the Court of Arbitration, all in the same field. This then leads to a fine-tuning of the case-law, which may become more complex as a result.[17]

9. Although the growing precision of the questions referred to the Court gradually brings it to clarify its case-law, another consequence may be that it is sometimes led to depart from an established precedent.[18]

10. In the Court of Arbitration cases are in principle heard by a bench of seven judges. However, where the matter before it is a particularly sensitive one or it is likely to set a precedent or to depart from an existing precedent,[19] cases are heard and considered in plenary session.[20]

II. How are the Court of Arbitration's judgments influenced by comparative foreign constitutional case law?

1. In other words does the Court of Arbitration take comparative case-law into consideration when investigating cases? Do the decisions of other constitutional courts have some influence

[16] Articles 69 to 73 (Chapter II – Preliminary procedure) of the Special Act on the Court of Arbitration of 6 January 1989.

[17] This was recently the case, for example, with the concept of "excusability" *(allowing extinction of the debts of a tradesperson who has been declared bankrupt, with no further possibility of legal action by the creditors - excusability makes it possible to wipe the slate clean and resume business on a healthier basis (a fresh start))* introduced by the Bankruptcy Act of 8 August 1997. See the Court of Arbitration's judgments Nos. 132/2000, 23/2001, 156/2001, 69/2002, 113/2002, 11/2003, 39/2003, 28/2004, 68/2004, 76/2004, 78/2004 and 114/2004. (The Court's judgments can be consulted on its Internet site (http://www.arbitrage.be) in French, Dutch and German.)

[18] **This is what happened with judgment No. 170/2003 of 17 December 2003, in which the Court departed from the precedent it had established with judgment No. 96/2001 of 12 July 2001.**
The preliminary question that gave rise to judgment No. 96/2001 asked whether Articles 32, paragraph 2, and 46, paragraph 2, of the Judicial Code, taken in combination with other provisions of the same code, entailed discrimination since they provided that a **procedural time-limit** (for lodging an appeal) should start running from **the date of dispatch** of judicial documents by recorded delivery, whereas in the event of service of the documents by a bailiff time started running from the date of delivery **(date of receipt)**. The Court considered that this difference in treatment involved no discrimination.
The question that gave rise to judgment No. 170/2004 asked the Court to reconsider this matter, taking account of a difference in treatment about which it had not been consulted previously. Article 50, paragraph 2, of the Judicial Code provides for an extension of the time-limit for lodging an appeal where it begins or expires during a court holiday. The referring court pointed out that where a recorded delivery was sent on the last working day before the start of a court holiday, the addressee, who could but examine the documents during that holiday, would not benefit from the extension of the time-limit for appealing, whereas if the documents were served by a bailiff during a court holiday, the recipient could benefit from the extension.
In judgment No. 170/2003 the Court held that, since these provisions were construed to mean that the time-limit for appealing ran from **the date of dispatch** of the recorded delivery, they resulted in a disproportionate limitation of the right to a fair hearing.
The Court noted that the provisions could nonetheless be interpreted to mean that the time-limit began running from the **date of receipt** of the recorded delivery [referred to as the "saving interpretation"]. Interpreted in that way, they resulted in no discrimination.

[19] Judgment No. 170/2003 of 17 December 2003 was, for instance, delivered in plenary session.

[20] Article 56, paragraph 2, of the Special Act on the Court of Arbitration of 6 January 1989 provides "where he or she deems necessary, each President may refer a case to the Court of Arbitration convened in plenary session. The Presidents shall be obliged to do so, where requested by two of the seven judges composing the Court in accordance with Article 55."

(inspirational or persuasive) on its decisions? Lastly, are those other courts' decisions cited in the Court's judgments?

2. The influence of the case-law of foreign constitutional courts on the judgments of the Court of Arbitration is scarcely perceptible. At all events, their decisions are never cited in the Court's judgments, which makes it difficult to find any signs of such influence.

3. Although they constitute a merely indirect source of inspiration, decisions by other constitutional courts are nonetheless regularly consulted. When compiling files of reference material, the legal secretaries[21] unfailingly take account of foreign constitutional case-law of relevance to the matters being dealt with. The Venice Commission's constitutional case-law bulletin and CODICES data base are usually consulted.

4. The Court of Arbitration belongs to associations of constitutional courts. It is a member of the Association of Constitutional Courts having in common the Use of French (Association des Cours Constitutionnelles ayant en Partage l'Usage du Français[22] (A.C.C.P.U.F.)) and of the Conference of European Constitutional Courts.[23] Desirous of promoting co-operation, these associations offer access to a collection of reference material and foster the pooling of information on case-law developments.

III. What impact does international case law (mainly that of the European Court of Human Rights have on the Court of Arbitration's judgments?

1. The Court of Arbitration has never given a decision on the legal force of judgments of the **European Court of Human Rights.**[24] It can nonetheless be seen from the Court of Arbitration's case-law that not only does it avoid departing from the precedents set in Strasbourg, but it also frequently draws inspiration from them and possibly makes express reference to them.

2. The Court of Arbitration abides by the Strasbourg court's precedents for two reasons:

- the first can be qualified as pragmatic. The Court of Arbitration is careful to ensure that it does not place Belgium at any risk of being found to have violated the Convention;[25]

- second, the Court is concerned to ensure consistency and harmony in judicial matters. Belgium is a Contracting Party to the European Convention and upholds the rights enshrined therein. The Court of Arbitration invests the Strasbourg court's case-law with genuine binding effect. It takes account of the European Court's interpretations of the guarantees enshrined in the Convention.[26] It accordingly seeks to ensure that in its

[21] Articles 35 to 39 of the Special Act on the Court of Arbitration
[22] http://www.accpuf.org
[23] http://www.confcoconsteu.org
[24] C. Courtoy, "Les relations entre les Cours constitutionnelles et les autres juridictions nationales, y compris l'interférence, en cette matière, de l'action des juridictions européennes. Rapport établi pour la Belgique", *R.B.D.C.*, 2002, p. 308
[25] Reference can be made to the Court of Arbitration's judgment No. 25/90 of 5 July 1990 (an action for annulment of the Act of 30 August 1988 amending the Act of 3 November 1967 on the piloting of seagoing ships). The applicants complained, inter alia, of discrimination in enjoyment of the right of ownership, recognised under Article 11 (now 16) of the Constitution and Article 1 of the First Protocol to the European Convention on Human Rights. The Court of Arbitration held that parliament had "introduced no unwarranted distinction, since the protection guaranteed by the above-mentioned provisions covers only already acquired possessions." The matter was subsequently brought before the European Court of Human Rights, which more broadly construed the concept of "possessions", as protected under Article 1 of the First Protocol, and found a violation of that article by Belgium.
[26] M. Verdussen, « La Cour d'arbitrage belge et l'application de la Convention européenne des droits de l'homme », *Rev.fr.dr.const.*, 1994, p. 437.

judgments the Convention is applied as interpreted by the European Court and the European Commission of Human Rights.

3. The Court of Arbitration has no direct jurisdiction to monitor compliance with the European Convention on Human Rights.[27] It is by supervising observance of the principle of equal treatment and the ban on discrimination[28] that it exercises a form of "combined monitoring", which leads it to ensure that the rights and freedoms safeguarded by the Convention are being upheld. It accordingly considers that discrimination breaching the rights guaranteed under the Convention also constitutes a violation of Articles 10 and 11 of the Constitution.[29]

4. An example of this approach can be found in judgment No. 45/96 of 12 July 1996, which expands on the Strasbourg court's case-law concerning Articles 10 and 17 of the Convention.[30]

The Court of Arbitration was asked to give a decision on an Act of 23 March 1995 penalising denial, minimisation, justification or approval of the genocide perpetrated by the German National Socialist regime during the Second World War, since it was alleged that this legislation interfered with freedom of expression, as guaranteed by Article 10 of the European Convention on Human Rights.

Reiterating the case-law of the European Court of Human Rights, the Court firstly pointed out that "Freedom of expression constitutes one of the essential foundations of a democratic society. It is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'." (Handyside v. the United Kingdom judgment of 7 December 1976, § 49; Otto-Preminger-Institut v. Austria judgment of 20 September 1994, § 49)

The Court went on to note that it followed from Article 10.2 of the Convention (inter alia) that freedom of expression could be made subject to certain formalities, conditions, restrictions or penalties, prescribed by law and necessary in a democratic society to safeguard the aims expressly mentioned in the previously cited provisions of the Convention. It accordingly considered whether the challenged legislation "could be regarded as necessary in a democratic society, within the meaning of Article 10 of the European Convention on Human Rights, … that is to say as proportionate, in such a society, to the aim pursued by the legislature."

Lastly, referring to Article 17 of the Convention, the Court stated "this provision is intended

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[27] The Belgian courts have jurisdiction to give interlocutory decisions on the conformity of legislation with, inter alia, the European Convention on Human Rights. This is a consequence of the *Le Ski* case-law. The *Le Ski* judgment (Belgian Court of Cassation, 27 May 1971) states "where a provision of international treaty law having direct effect in the national legal order conflicts with a provision of national law, the rule laid down in the treaty must take precedence owing to the very nature of international treaty law."(Cass., 27 May 1971, *Pas*., I, p. 886).

[28] It can be noted that, in defining the scope of this constitutional principle, the Court of Arbitration draws inspiration from the case-law of the European Court of Human Rights. The most recent wording used by the Court of Arbitration stipulates "the constitutional principles of equality and non-discrimination do not rule out a difference in treatment between categories of individuals, where that difference in treatment is based on an objective criterion and there is reasonable justification for it. The existence of such justification must be assessed in the light of the aim and the consequences of the challenged measure and the nature of the principles at stake; the principle of equality is violated where it is shown that there the means used are not reasonably proportionate to the aim being pursued."

[29] M. Verdussen, « La Cour d'arbitrage belge et l'application de la Convention européenne des droits de l'homme », *op. cit.*, pp. 433 to 438.

[30] J. Velaers, « Het Arbitragehof, de vrijheid van meningsuiting en de wet tot bestraffing van het negationnisme en het revisionnisme », *C.D.P.K.*, 1997, p. 579.

to … exclude from the sphere of protection of the European Convention on Human Rights violations of fundamental rights perpetrated by anti-democratic regimes, by groups or by individuals." It concluded that freedom of expression, as guaranteed by Article 10 of the Convention, could not be relied on in breach of Article 17.

5. Judgments Nos. 50/2003 and 51/2003 of 30 April 2003[31] also offer two examples of decisions in which the Court of Arbitration determined the scope of a Convention provision in the light of the European Court of Human Rights' case-law. In these cases it was Article 8 of the Convention, enshrining the right to respect for private and family life, which was concerned. The Court of Arbitration took express note in its decisions that "the European Court of Human Rights has acknowledged (Powell and Rayner v. the United Kingdom judgment of 21 February 1990; Hatton v. the United Kingdom judgment of 2 October 2001) that, where excessive, noise pollution generated by aircraft could diminish the quality of life of persons living near airports and could be regarded either as failure to fulfil the positive duty on states to take appropriate measures to secure applicants' rights under Article 8, paragraph 1, of the European Convention on Human Rights or as interference by a public authority, which must be justified in the light of the criteria set out in paragraph 2 of that article. In this connection, regard must be had to the fair balance that has to be struck between the interests of the individual and of the community as a whole, and in both contexts the state enjoys a certain margin of appreciation in determining the steps to be taken, especially where the operation of an airport pursues a legitimate aim and its negative impact on the environment cannot be eliminated entirely." The Court of Arbitration followed the same reasoning in these two judgments concerning noise pollution generated by the activities of airports.

6. Since being given jurisdiction to review legislation's conformity with Section II ("Belgians and their rights") and Articles 170, 172 and 191 of the Constitution[32] the Court of Arbitration "has taken account in its review of the provisions of international law guaranteeing similar rights and freedoms."[33] In this respect, the Court has pointed out that "where a treaty provision binding on Belgium is similar in scope to one or more of the above-mentioned constitutional provisions, the guarantees enshrined in that treaty provision constitute an inseparable whole with the guarantees set out in the constitutional provisions in question." It has also stated that "violation of a fundamental right constitutes *ipso facto* a violation of the principle of equality and non-discrimination."

7. The Court of Arbitration applies the **case-law of the Court of Justice of the European Communities**. It moreover makes express reference thereto in its judgments.[34]

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[31] Both judgments were delivered in proceedings concerning the challenged legislation's compliance with the power-defining rules.
[32] It was the Special Act of 9 March 2003 amending the Act on the Court of Arbitration which conferred these new powers on the Court.
[33] Judgment No. 136/2004 of 22 July 2004
[34] See, inter alia, judgments Nos. 7/95 and 8/95 of 2 February 1995

Parties also sometimes ask the Court to refer a matter to the Court of Justice. If the question referred to the Court fails to fulfil any of the three conditions in which, according to Article 234 of the Treaty establishing the European Community,[35] a preliminary question can or must be raised with the Court of Justice, the Court considers that there is no reason to grant the request.[36]

The Court of Arbitration has twice[37] referred preliminary questions to the Court of Justice, asking the Luxembourg Court for an interpretation of EU Directives, so as to enable it to assess the compatibility of challenged legislation with the directive in question.

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[35] Article 234, paragraph 3, of the Treaty establishing the European Community provides:
"The Court of Justice shall have jurisdiction to give preliminary rulings concerning:
(a) the interpretation of this Treaty;
(b) the validity and interpretation of acts of the institutions of the Community and of the ECB;
(c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.
Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice."
[36] Judgments Nos. 94/2003 and 151/2003.
[37] Judgments Nos. 6/97 and 139/2003

CONCLUDING OBSERVATIONS

Given the need for concision, this report merely deals with the most noteworthy aspects of the Belgian constitutional court's practice as regards precedents.

The conclusion that can be drawn is that the case-law of the European Court of Human Rights plays a fundamental role. For the Court of Arbitration that case-law serves as a source of inspiration and a guide to interpretation of the rights and freedoms guaranteed by the Convention. As already mentioned, in its judgments the Court of Arbitration is concerned to apply the Convention *as interpreted* by the European Court.

This is a cause for satisfaction, as one of the very purposes of the European Court's case-law is to ensure a uniform interpretation of the rights safeguarded by the Convention.

It should nonetheless be noted that some differences in interpretation of the rights guaranteed by the Convention may exist in the case-law of the Belgian national courts.

That is doubtless inevitable since there are necessarily areas of the Convention's application that remain unexplored, or incompletely signposted, by the Strasbourg court, areas in which the Belgian national courts must adopt their own interpretations. Attention can also be drawn to the fact that, as a consequence of the *Le Ski* case-law,[38] in the Belgian legal system many different courts have jurisdiction for reviewing compatibility with the Convention.

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[38] See footnote 27