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https://wccj5.mkri.id

Constitutional Justice and Peace

Report of the Belgian Constitutional Court[1]

The World Conference on Constitutional Justice unites 117 Constitutional Courts and Councils and Supreme Courts across the world.[2] It promotes constitutional justice – understood as constitutional review including human rights case-law – as a key element for democracy, the protection of human rights and the rule of law. These fundamental principles are closely linked to peace, in the sense of peaceful settlement of conflicts within the state. The participants of the 5th Congress were invited to share their experiences on the role of their courts in preventing conflict, maintaining peace and settling disputes that otherwise result in conflict. This report was drawn up on the basis of the preliminary questionnaire.

Part I – Constitutional Justice and Peace

A. Sources and Jurisdiction

1. Does your Constitution make a specific reference to peace or to reconciliation? How has your court interpreted such provisions?

The Belgian Constitution dates back to the 19th century (1831) and, although it has been amended several times, it remains essentially a child of its time. The word "peace" or "reconciliation" does not appear in the Constitution. The word "war" does.

According to Article 167(2) of the Constitution, the King commands the armed forces; he states that there exists a state of war or that hostilities have ceased.[3] However, these concepts of "war" and "cessation of hostilities" typically refer to interstate conflicts, which are largely beyond the remit of the Constitutional Court (and outside the subject of this questionnaire).

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1 Drafted by Jan THEUNIS, *référendaire* at the Constitutional Court.
2 On 30 September 2021, see www.venice.coe.int/WCCJ.
3 This command occurs under Ministerial responsibility, as is the case of all powers of the King (A. ALEN and D. HALJAN (eds), *Constitutional Law in Belgium*, Kluwer, 2020, p. 305).

When a state of war in the sense of Article 167(2) has been stated to exist, Article 157(1) of the Constitution authorises the legislative branch to organise "military courts".

"Justices of the peace" are also mentioned in the Constitution, specifically in Article 151(4). Yet they are not the counterpart of military courts, but the small claims courts at the bottom of the Belgian judicial hierarchy, with limited jurisdiction.[4]

2. Has your Court been seized of draft constitutional amendments containing provisions related to peace and reconciliation?

As will be explained below, the actual "justice of the peace" for the purpose of this report is the Constitutional Court. However, the jurisdiction of the Constitutional Court is limited to the judicial review over primary legislation. It has no authority to decide on a choice made by the Constituent.[5] Hence, it cannot be seized of (draft) constitutional amendments.

3. Has your Court a specific mandate to maintain social peace? Has your Court interpreted its jurisdiction in a way as to include such a mandate?

In the second half of the 20th century Belgium evolved into a federal state. The Constitutional Court is a product of that evolution. Since the federal state structure was created to meet the divergent aspirations of the two major linguistic communities, it is essentially the task of the Constitutional Court to guard the social peace between those communities (the so-called "paix communautaire" in French).

In its first years, the jurisdiction of the Court was limited to the adjudication of competence conflicts between the federal government and the federated entities. Therefore, the Court was originally called the "Arbitration Court". Over the years, the Court's power of review has been extended to fundamental rights and it has been renamed the "Constitutional Court". However, federalism litigation still amounts to about ten per cent of the Court's case load,[6] thus allowing the Court to fulfil its role as watchdog over the Belgian federal consensus democracy.[7]

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4 The Justices of the Peace have jurisdiction in civil claims whose value does not exceed EUR 5,000. These judges, represented in each of the 162 cantons, were traditionally considered as mediators in disputes among neighbours. At present they have obtained, by gradual attribution, exclusive jurisdiction in various matters, such as landlord-tenant matters, irrespective of the amounts at issue (A. ALEN and D. HALJAN (eds), *Constitutional Law in Belgium*, Alphen aan den Rijn, Kluwer, 2020, p. 305).

5 E.g. Cons. 15 September 1999, no. 97/99, B.12.

6 P. CANNOOT, J. GOOSSENS, L. LAVRYSEN, V. MEERSCHAERT en J. THEUNIS, "Developments in Belgian Constitutional Law: The Year 2015 in review", http://www.iconnectblog.com/2016/10/developments-in-belgian-constitutional-law-the-year-2015-in-review/.

7 P. POPELIER, "The Belgian Constitutional Court: Guardian of Consensus Democracy or Venue for Deliberation?", in *Liberae Cogitationes. Liber amicorum Marc Bossuyt*, Cambridge, Intersentia, 2013, p. 499.

4. Has your Court encountered constitutional or legal provisions that made maintaining social peace difficult? How has your Court interpreted these provisions? Has it repealed them for being unconstitutional / interpreted them in a specific way?

Most constitutional provisions are worded broadly enough to allow for "peaceful" interpretation as well as constitutionally compliant interpretation of legal provisions by the Constitutional Court. However, in the last state reform (2012-2014), the Constituent deliberately placed certain elements of the reform outside the scope of the Constitutional Court, so that the Court has no jurisdiction to rule on them. The Constituent did so by not only prescribing that in the future a certain matter should be decided by a special majority act, but by already anticipating, in the preparatory documents of the constitutional revision, the content of those special majority acts. This strategy prevented the Court from ruling on a difference in treatment or a restriction of a fundamental right "resulting from a choice made by the Constitution itself".[8]

5. Is traditional justice a source of law and has it helped resolve conflict situations?

Although constitutional practice and customs play an important role in the operation of Belgian government bodies (the process of forming a government, the role of the Prime Minister, the rule of consensus decisions in the federal Cabinet, …), the Belgian legal system has no traditional justice.

B. Application

1. Has your Court interpreted constitutional provisions relating to peace and reconciliation?

As mentioned above (see A.1), the Belgian Constitution does not explicitly refer to peace or reconciliation. However, the Constitutional Court plays a significant role in maintaining social peace. This role largely coincides with the major cleavages in Belgian society. According to the classical cleavage model,[9] most societies are built around geographic, historical and cultural differences. Belgian society has long been divided (and still is at certain points) along three traditional cleavages.[10]

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8 E.g. Cons. 3 April 2014, no. 57/2014, B.7.1.

9 S. LIPSET and S. ROKKAN, *Party systems and voter alignments: cross-national perspectives*, New York, Free Press, 1967, 554 p.

10 L. HUYSE, *De gewapende vrede – Politiek in België na 1945*, Leuven, Kritak, 1986, 122 p.

The **first cleavage** is based on language, dividing between the French-speaking and the Dutch-speaking citizens. As explained above (see A.3), the conflict between these two largest linguistic groups of the country has largely been pacified by the federalisation process. Although this process is still ongoing, since 1993 Article 1 of the Constitution confirms that "Belgium is a federal State composed of Communities and Regions". When certain components of the state structure contained in primary legislation – as opposed to the Constitution itself – are challenged, the Court repeatedly refers to the legitimate objective of maintaining the balance and peace between the communities and the federal State.[11]

The control of linguistic problems is further implemented in the Local Official Language Proficiency Act of 8 August 1988, the so-called Pacification Act. On several occasions the Constitutional Court has upheld the constitutionality of that Act, "since the balance it establishes is based on a broad consensus between communities".[12]

Another pivotal provision is Article 143(1) of the Constitution, stating that "In the exercise of their respective responsibilities, the federal State, the Communities, the Regions and the Joint Community Commission act with respect for federal loyalty, in order to prevent conflicts of interest". In the case-law of the Constitutional Court this so-called "principle of federal loyalty" is interpreted as requiring compliance with the principle of proportionality. In a recent case involving a ban on flying drones over nature reserves, introduced by the Walloon Region, the Federal Government invoked that principle, stating that the ban makes the exercise of the federal competences in relation to aviation, defence, police and civil security impossible or excessively difficult. The Court ruled:

> "Respect for federal loyalty presupposes that, when exercising their competences, the federal government and the federated entities do not disrupt the balance of the federal structure as a whole. Federal loyalty concerns more than the mere exercise of powers: it indicates the mind-set in which this must be done.
>
> The principle of federal loyalty compels each legislator to ensure that the exercise of its own competence does not make the exercise by other legislators of their competences impossible or excessively difficult.
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> In this respect, taking the principle of proportionality into account adds nothing to the principle of federal loyalty.
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> As regards the impact on the federal affairs of defence, police and civil security, it should be noted that the contested decree does not impose an absolute ban."

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11 E.g. Cons. 19 September 2019, no. 120/2019, B.16.5.

12 Cons. 25 March 2003, no. 35/2003, B.13.4.

The Court concluded that, since it provides for derogations, "the contested decree does not render impossible or excessively difficult the exercise by the federal authority of its defence, police and civil security powers and respects the principle of federal loyalty".[13]

The **second cleavage** in Belgian society is based on ideology and religion, dividing originally between Catholics and secular groups. The "peace-keeping" between those two groups of citizens has been institutionalised by multiple legal instruments, ultimately resulting in the so-called Culture Pact, concluded by the three large political families at that time (christian democrats, liberals and socialists). The adoption of the Culture Pact is closely related to the start of the federalisation process. The first step towards federalism was the establishment of the "cultural communities", with the "cultural councils" (later community parliaments) as legislative bodies. At the time of its establishment in 1970, the Liberals feared that the Catholics would dominate the decision-making in the Cultural Council of the Dutch Cultural Community. In exchange for the votes necessary to carry out the 1970 revision of the Constitution (the first step in the federalisation process), the Liberal Party acquired the guarantees contained in Articles 11 and 131 of the Constitution and their implementing laws.[14]

Article 11 of the Constitution provides a general prohibition on discrimination, as the flipside of the equality principle provided in Article 10,[15] but in addition it compels the federal and Community legislators to guarantee the rights and freedoms of "ideological and philosophical minorities". Implementing this provision, the so-called Culture Pact Act[16] protects ideological and philosophical minorities from measures taken by executive bodies in cultural matters. It establishes, amongst other things, a right to participate in the development of cultural policy concerning youth, the fine arts, the media, sports, physical education and so on.[17] However, as regards the balanced distribution of staff among the various ideological and philosophical tendencies (Article 20 of the Culture Pact Act), the Constitutional Court ruled that it was a violation of the equality principle itself:

> "Although the legislature may legitimately secure that balance, it fails to observe the principle of proportionality if, in order to achieve this objective, it has recourse to a system which obliges the State to deviate from the principle of equality on the basis of personal convictions. This is all the more the case since, in terms of principles, the system demands a sacrifice that is certain in order to obtain an advantage that remains hypothetical. There is no encouragement for any official to perform his duties impartially if the intention which

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13 Cons. 15 July 2021, no. 106/2021, B.17.3.1-B.17.4. All quotations from Court judgments in this contribution are unofficial translations.

14 J. THEUNIS, "De ideologische en filosofische alarmbelprocedure: *revival* of *requiem*?", in *Liber amicorum Marnix Van Damme*, Bruges, die Keure, 2021, p. 50.

15 See Cons. 8 July 1997, no. 37/97, B.4: "those two constitutional rules are the expression of the same principle and are therefore inseparable from each other".

16 *Official Gazette* 16 October 1973.

17 A. ALEN and D. HALJAN (eds), *Constitutional Law in Belgium*, Alphen aan den Rijn, Kluwer, 2020, p. 275.

> prompted him to confess is made official and if consequences are attached to that intention with regard to his career."[18]

Another case concerned the Flemish decree of 27 June 1985 recognising and subsidising private Dutch-language archive and documentation centres. The subsidies were restricted to the archives of the (now) four major ideological-philosophical tendencies in Flanders: the Catholic, the Socialist, the Liberal and the Flemish-National. The Constitutional Court ruled that the legislator could exclude other philosophical tendencies which, regardless of their current importance, do not have the same historical significance. But by not also choosing an archive centre that falls under the "secular tendency", the decree was contrary to the principle of equality, according to the Court. The heritage of "the secular (non-denominational) ideology" was therefore wrongly excluded from the scope of the decree.[19]

Article 131 of the Constitution for its part compels the federal legislator "to prevent all forms of discrimination for ideological or philosophical reasons". In implementation of this provision, an Act of 3 July 1971[20] introduced an "alarm-bel procedure" to prevent ideological or philosophical discrimination in the legislative bodies of the communities. As the European Court of Human Rights repeatedly recalls, "democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved that ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position".[21] In that sense, the alarm-bel provides a counter-majority mechanism,[22] involving the federal parliament as "peace-keeper" in ideological disputes. André ALEN, former President of the Constitutional Court, and David HALJAN describe the procedure as follows:

> "If a Bill introduced in the Flemish Parliament or in the Parliament of the French Community is considered discriminatory on the basis of ideology or philosophy, one quarter of the members of that legislature may request the suspension of the Bill. The motion must be introduced before the final vote on the Bill. If the Presidents of the federal Houses of Parliament and of the Community Parliaments, convened in joint meeting, rule in favour of admissibility, the motion must be reviewed on its merits by the federal Houses of Parliament. The Community Parliament may not consider the Bill further, unless the House of Representatives and the Senate declare that there are no grounds for the motion. The involvement of the federal Parliament in this 'alarm-bell procedure' prevents any risk of certain ideological tendencies at the Community level being reduced to a minority. A similar procedure applies to the Parliament of the German Community, in which case the President of this Parliament takes part in the decision-making of the joint meeting."[23]

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18 Cons. 15 July 1993, no. 65/93, B.5; Cons. 16 December 1993, no. 86/93, B.5; Cons. 20 January 1994, no. 7/94, B.5; Cons. 20 April 1999, no. 47/99, B.3.

19 Cons. 1 February 2006, no. 18/2006, B.5-B.7.

20 *Official Gazette* 6 July 1971.

21 E.g. ECtHR 14 January 2020, Beizaras and Levickas/Litouwen, § 106.

22 J. THEUNIS, "De ideologische en filosofische alarmbelprocedure: *revival* of *requiem*?", in *Liber amicorum Marnix Van Damme*, Bruges, die Keure, 2021, p. 59.

23 A. ALEN and D. HALJAN (eds), *Constitutional Law in Belgium*, Alphen aan den Rijn, Kluwer, 2020, p. 275.

The procedure is rarely used and tends to be dissuasive. Most recently however, in 2020, it has been applied to a draft Bill recognising sociocultural organisations and granting subsidies, submitted in the Flemish Parliament, but both the House and the Senate declared the motion unfounded.[24]

A last provision that needs to be mentioned in relation to the second cleavage is Article 24 of the Constitution. This provision is a direct result of another pact between the Catholics and the secular parties (Liberals and Socialists), the so-called School Pact, which in 1958 pacified the long-lasting conflict between free (catholic) education and the official education networks. This agreement, laid down in the School Pact Act, established a number of principles: free primary and secondary education, free choice of school and the same remuneration for teachers in free and official education. While the State retained the right to set up a complete network of educational institutions, the free-school networks would be subsidised on an equal footing.[25] Thirty years later, in 1988, when the competence over education was almost entirely transferred to the communities, the essential principles of the School Pact were added to Article 24 and brought under the jurisdiction of the Constitutional Court. While originally limited to guaranteeing freedom of education, Article 24 now offers wider protection:

> "§ 1. Education is free; any preventive measure is forbidden; the punishment of offences is regulated only by the law or federate law.
> The community offers free choice to parents.
> The community organises non-denominational education. This implies in particular the respect of the philosophical, ideological or religious beliefs of parents and pupils.
> Schools run by the public authorities offer, until the end of compulsory education, the choice between the teaching of one of the recognised religions and non-denominational ethics teaching.
>
> § 2. If a community, in its capacity as an organising authority, wishes to delegate powers to one or several autonomous bodies, it can only do so by federate law adopted by a two-thirds majority of the votes cast.
>
> § 3. Everyone has the right to education with the respect of fundamental rights and freedoms. Access to education is free until the end of compulsory education.
> All pupils of school age have the right to moral or religious education at the community's expense.
>
> § 4. All pupils or students, parents, teaching staff or institutions are equal before the law or federate law. The law and federate law take into account objective differences, in particular the characteristics of each organising authority that warrant appropriate treatment.

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24 See J. THEUNIS, "De ideologische en filosofische alarmbelprocedure: *revival* of *requiem*?", in *Liber amicorum Marnix Van Damme*, Bruges, die Keure, 2021, p. 49-62.

25 L. HUYSE, *De gewapende vrede – Politiek in België na 1945*, Leuven, Kritak, 1986, p. 43; A. ALEN and D. HALJAN (eds.), *Constitutional Law in Belgium*, Alphen aan den Rijn, Kluwer, 2020, p. 241-242.

§ 5. The organisation, the recognition and the subsidising of education by the community are regulated by the law or federate law."[26]

Each Community must ensure "that the school peace, as henceforth enshrined in Article 24 of the Constitution, is not compromised".[27] In a case brought to the Constitutional Court by the official education network for instance, the Court found that the difference in the investment resources allocated for the school buildings "did not affect the parents' freedom of choice or the balance between the educational establishments and, consequently, the school peace".[28]

The **third cleavage** in Belgian society runs along socio-economic lines, dividing between employers and employees (capital and labour). Like the cultural-linguistic and ideological-philosophical conflicts, the socio-economic disputes were also pacified by a large agreement, the so-called Pact of Social Solidarity, concluded in 1944 between representatives of trade unions and employers' organisations. This pact was based on the premise that socio-economic disputes should be dealt with in a climate of social peace.[29] A system of consultation bodies was set up at company, sectoral and national level. Unlike the other agreements (Federal Pact, School Pact, Culture Pact), the Social Pact did not find its way into the Belgian Constitution.

However, since the economic, social and cultural rights were introduced by constitutional amendment of 31 January 1994,[30] Article 23 of the Constitution guarantees amongst others "the right to fair terms of employment and to fair remuneration, as well as the right to information, consultation and collective negotiation". These rights are protected by the principle of non-regression, under the jurisdiction of the Constitutional Court. In addition, the Court in its case-law repeatedly refers to "social peace" as a legitimate aim of legislation.[31]

According to Paul MARTENS, former President of the Constitutional Court, the social peace (*la paix sociale*), as well as the community peace (*la paix communautaire*) and the school peace (*la paix scolaire*), are aims of a higher value (*des objectifs de valeur supérieure*).[32] In the same line of thought, the Court also takes into account the social consultation prior to legislation as an element underpinning its review of legislation.[33]

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26 Translation available on the Court's website (www.const-court.be).

27 Cons. 8 December 1991, no. 38/91, B.3.8.

28 Cons. 17 July 2014, no. 109/2014, B.10.

29 L. HUYSE, *De gewapende vrede – Politiek in België na 1945*, Leuven, Kritak, 1986, p. 16.

30 *Official Gazette* 12 February 1994.

31 E.g. Cons. 11 May 2005, no. 88/2005, B.8.1: "The system of fixed compensation for damages resulting from an accident at work aims to maintain (…) social peace and labour relations within companies by ruling out an increase in liability lawsuits."

32 P. MARTENS, "Le métier de juge constitutionnel", in *La saisine du juge constitutionnel : aspects de droit comparé,* F. DELPÉRÉE and P. FOUCHER (eds), Bussels, Bruylant, 1998, p. 37. See also Cons. 23 May 1990, no. 18/90, B.9.2.

33 E.g. Cons. 1 July 2021, no. 100/2021, B.8: "In socio-economic affairs, the legislator has a wide margin of appreciation. This is all the more the case when the regulation in question has been the subject of social consultation."

In more recent history, **new cleavages** have emerged around “contemporary” issues, in addition – or succession[34] – to the historical dividing lines. The environmental and climate challenges are a striking example (materialism vs. post-materialism).[35] In that respect, on 25 April 2007 a new Article 7*bis* was introduced in the Belgian Constitution, providing a general policy objective for the federal government and the communities and regions, namely that, in exercising their respective powers, they pursue the objectives of "sustainable development in its social, economic and environmental aspects, taking into account solidarity between generations". That provision can be read as a duty of “intergenerational peace”.

As it is part of a new Title I*bis* of the Constitution entitled “General policy objectives of federal Belgium, the Communities and the Regions”, the provision falls outside the jurisdiction of the Constitutional Court. However, as stated in judgment 125/2016, "nothing prevents the Court from carrying out a review of the contested provisions in accordance with Article 23 of the Constitution, read in conjunction with that Article 7*bis*".[36] Hence, legislators must take into account the impact of their policies on future generations,[37] for example – in the area of spatial planning – the sustainable development of the open space.[38]

Only in exceptional cases, however, the indirect review of Article 7*bis* of the Constitution can lead to the conclusion that a legislative provision is unconstitutional, as the Court emphasised in another judgment. Since that provision does not indicate how the related “social, economic and environmental” aspects are to be weighed against each other, the competent authority has a wide discretion in that regard.[39]

In sum, although the Belgian Constitution does not explicitly refer to peace or reconciliation, the Constitutional Court has acted as “justice of the constitutional peace” in different conflict areas, with due judicial restraint.

2. Does your state have a law on peace and reconciliation? If so, has it been referred to this Court for the purpose of assessing its constitutionality?

As mentioned above, the Belgian Constitution does not refer to peace or reconciliation. According to the wartime decree[40] of 11 October 1916, the Government has almost unfettered

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34 G. MARKS, D. ATTEWELL, J. ROVNY and L. HOOGHE, “Cleavage Theory”, in M. RIDDERVOLD et al. (eds.), *The Palgrave Handbook of EU Crises*, Palgrave Studies in European Union Politics, 2021, p. 174, noticing the rise of a “transnational cleavage” (www.hooghe.web.unc.edu).

35 C. DEVOS (ed.), *Een plattegrond van de macht*, Ghent, Academia Press, 2020, pp. 93, 103 and 117.

36 Cons. 6 October 2016, no. 125/2016, B.47.2.1-B.47.2.2. See also Cons. 25 February 2021, no. 30/2021, B.33.1.

37 Cons. 28 April 2016, no. 62/2016, B.6.4.

38 Cons. 16 September 2021, no. 115/2021, B.23.

39 Cons. 18 May 2011, no. 75/2011, B.6.

40 “Besluitwet” in Dutch, “Arrêté-loi” in French. See A. ALEN and D. HALJAN (eds), *Constitutional Law in Belgium*, Alphen aan den Rijn, Kluwer, 2020, p. 58.

powers in time of war, between the date of mobilisation of the army and the date when the army is brought back to peace. This wartime decree dates back to the first world war (1914-1918), long before the establishment of the Constitutional Court. If a new war situation were to arise, it could, however, be referred to the Court for a preliminary ruling.[41]

Although in more recent history the Belgian army was regularly deployed for foreign military and peacekeeping operations, the last war Belgium was involved in, was world war II (1940-1945). Like the first world war, it was followed by repression (prosecution and punishment) of civilians who collaborated with the enemy. Unlike after the first world war,[42] however, the period of repression was not followed by an official reconciliation in the form of an amnesty law. Up to now, the Constitutional Court has been unable to rule on a law on peace or reconciliation.

3. Did your Court adjudicate cases in which the social peace in your country was in danger? Did the judgment of your Court pacify the situation / settle the conflict?

Social peace in the sense of good relations between employers and employees regularly features in the Constitutional Court's case-law (see B.1), as a legitimate aim against which to assess a difference of treatment or an interference with a fundamental right. As far as collective negotiations are concerned, the legislator may, for example, make a distinction between trade unions that are representative and trade unions that are not. “The selection of partners for the purpose of ensuring a permanent and effective social dialogue in order to preserve social peace is not in itself illegal”, the Court ruled. “In principle, this measure is not disproportionate to the objective”.[43]

The most salient case concerns the single statute for blue and white collar workers. In 1993, the Constitutional Court ruled that differentiating between workers and employees based on whether their work was categorised mainly as manual or intellectual was a criterion difficult to justify a different length of notice. At the same time, however, the Court admitted that the harmonisation of both statutes could only be achieved progressively.[44]

A new preliminary reference was brought before the Constitutional Court in 2010. In its landmark judgment no. 125/2011, the Court confirmed that the difference of treatment is contrary to Articles 10 and 11 of the Constitution (principle of equality and non-discrimination). The Court also confirmed that the legislator may bring about the reform slowly and in stages, but it nonetheless considered the time available to the legislature to be limited. Eighteen years after the Court found that the relevant criterion for distinction could no longer be deemed

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41 G. VAN HAEGENBORGH and W. VERRIJDT, “De noodtoestand in het Belgische publiekrecht”, *Vereniging voor de vergelijkende studie van het recht van België en Nederland*, *Preadviezen 2016*, The Hague, Boom juridisch, 2016, p. 31.

42 See Th. LUYCKX and M. PLATEL, *Politieke geschiedenis van België*, Antwerp, Kluwer, 1985, p. 368-369.

43 Cons. 18 November 1992, no. 71/92, B.5.

44 Cons. 8 July 1993, no. 56/93, B.6.2.1-B.6.3.2.

relevant, retaining certain differences in treatment, such as those adduced before the Court, for much longer would only perpetuate a blatantly unconstitutional situation.

The Court further reinforced the authority of the judgment, and thus of the social stability and peace resulting from it, by noting that a preliminary judgment has an effect that transcends the proceedings pending before the judge who posed the preliminary question. However, the Special Majority Act of 6 January 1989 on the Constitutional Court does not empower the Court, through a general provision, to determine which of the effects of the unconstitutional provision must be considered as definitive or provisionally retained for a period it determines, as it can do when ruling on an action for annulment. Nevertheless, the Court found that in light of the principles of legal certainty and legitimate expectations, it may be justified in certain, limited cases that the retroactive effect derived from a preliminary ruling can be mitigated. In the instant case, the Court considered that an unqualified finding of unconstitutionality would, in many pending and future cases, lead to considerable legal uncertainty, and might cause serious financial difficulties for a large number of employers. It could also hamper the harmonisation efforts that the Court had urged the legislature to conduct. The Court therefore decided to maintain the effect of the provisions at issue until 8 July 2013 at the latest.[45]

The single statute for blue and white collar workers was finally introduced by Act of 26 December 2013. After that (late) introduction, the Constitutional Court was called upon to settle numerous disputes arising from that Act and thus to further safeguard social peace.[46]

4. Did your Court have to address post-(armed) conflict situations in its case-law? How did it approach these questions? Was your Court confronted with the need to contribute to the implementation of political conflict settlement agreements that potentially contradicted the Constitution?

As mentioned above (see B.2), the Constitutional Court was not yet called upon to rule on a law settling a post-(armed) conflict. In a salient case, however, the Court had to decide on a social allowance, accorded by the Flemish Parliament in 1998, to war victims and “victims of repression”. The Flemish decree was brought before the Court by over two hundred applicants opposing the decree. The Constitutional Court ruled that all measures of repression and epuration continue to fall under the competence of the federal legislator, including the social allowances for victims. As a consequence, it annulled the Flemish decree.

From a more international perspective, it is worth mentioning the federal Act of 16 June 1993 on the prevention of serious breaches of international humanitarian law, conferring universal jurisdiction on the Belgian courts in regard to serious breaches of international humanitarian law, irrespective of the place where the offence was committed, the nationality of the

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45 Cons. 7 July 2011, no. 125/2011, B.3.1-B.6 (English summary in www.codices.coe.int, BEL-2011-2-008).

46 E.g. Cons. 17 September 2015, no. 116/2015.

perpetrator of the offence or that of the victim, and even if the presumed perpetrator of the offence was not in Belgium. The Act of 5 August 2003 restricted the possibilities of proceedings in respect of those offences by providing for a criterion of personal connection of the perpetrator or the victim with Belgium. In addition, under the new provisions, only the Federal Prosecutor was entitled to initiate proceedings in Belgium and no appeal lay against his decision.

Two human rights associations brought an action before the Constitutional Court for annulment of that new statutory rule. The Court acknowledged that they had a collective interest in taking action as associations whose object was to combat injustice and any arbitrary interference with the rights of an individual or a community. The Court held, however, that it was for the legislature to determine, in compliance with Belgium's international obligations and the principle of equality and non-discrimination, the rules governing proceedings in respect of serious breaches of international humanitarian law or other serious offences committed outside Belgian territory. Owing to the problems which had arisen in the application of the Act of 16 June 1993, it was reasonable for the legislature to consider that limitations on extra-territorial criminal jurisdiction in relation to serious violations of international humanitarian law were required and to introduce, inter alia, a criterion that the perpetrator or victim must be personally connected with Belgium. It was also reasonable for the legislature to consider it necessary to limit the possibilities of initiating criminal proceedings in certain cases by reserving the power to do so to the Federal Prosecutor.

In answering the complaint that there was no provision for review of the Federal Prosecutor's decision to discontinue the proceedings in respect of serious infringements of international humanitarian law, the Court took into account, in particular, the legislature's desire not to seriously damage Belgium's international relations or the safety of Belgian citizens. It considered, however, that in not allowing the Federal Prosecutor's decision to be reviewed by an independent and impartial judge in any case, the legislature had taken a measure which went beyond the objective pursued. The Court specified what parts of the contested provisions must therefore be annulled, but it also decided to maintain the effects of the annulled provisions until 31 March 2006 in order to allow the legislature the necessary time to amend the law.[47]

In a recent judgment, the European Court of Human Rights considered that the decision by the Belgian courts, following the entry into force of the 2003 Act, to decline jurisdiction to hear and determine the civil-party application of ten Jordanian nationals, had not been disproportionate to the legitimate aims pursued. Indeed, the reasons given by the Belgian authorities – proper administration of justice and the immunities issue raised by the proceedings under international law – could be considered as compelling grounds of public interest. There had therefore been no violation of Article 6 § 1 of the European Convention on Human Rights.[48]

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47 Cons. 23 March 2005, no. 62/2005 (English summary in www.codices.coe.int, BEL-2005-1-005).

48 ECtHR 16 March 2021, Hussein and others/Belgium.

5. Did your Court have a role in adjudicating cases relating to peace and reconciliation as required by the Constitution?

As explained above (see B.1), the Constitutional Court plays a pivotal role, through its review of primary legislation, in keeping the community peace (*la paix communautaire*) as well as the social peace (*la paix sociale*), the school peace (*la paix scolaire*) and the intergenerational peace.

6. What is the role of 'intermediary bodies', such as civil society organisations, trade unions, employers or consumers associations, etc., for maintaining social peace as applicants to your Court, as amicus curiae or for shaping the context in which the Court operates.

The Special Majority Act on the Constitutional Court does not provide for *amicus curiae*. However, although formally not admitting the *actio popularis*, the Court has widely accepted legal standing of non-profit organisations attaining public interests, such as environmental organisations and human rights associations (as mentioned above, see B.4). When such organisation is not invoking its personal interest, it must defend a collective interest – as its statutory purpose – that is distinct from the general interest. The Court also requires that the organisation is actually pursuing its purpose and, of course, that the challenged act might affect that purpose.[49]

Most trade unions in Belgium do not have legal personality and therefore lack the required capacity to bring an action for annulment before the Court. Nonetheless, the Court accepts their legal standing whenever a law impinges on their prerogatives.[50]

7. Has your Court been asked by a Court of another country about a conflict situation?

The former president of the Constitutional Court, Irène PÉTRY, was member of the Arbitration Commission of the Peace Conference on Yugoslavia, an arbitration body set up by the Council of Ministers of the European Economic Community (EEC). Between late 1991 and the middle of 1993, the Arbitration Commission handed down 15 opinions on legal issues arising from the fragmentation of Yugoslavia.[51]

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49 E.g. Cons. 1 April 2021, no. 52/2021, B.4.2.

50 E.g. Cons. 26 July 2017, no. 101/2017, B.7.1-B.8.1.

51 See A. PELLET, "L'activité de la Commission d'arbitrage de la Conférence européenne pour la paix en Yougoslavie", *Annuaire Français de Droit International* 1992, 222-238.

C. Limitations of the role of constitutional courts in maintaining peace

1. What are the limitations of your Court in contributing to peace? (e.g. acting only upon request; limitation by the scope of the request)

The general limitations on the Constitutional Court's jurisdiction apply. As already mentioned, the Court only reviews primary legislation, against the rules on division of powers and fundamental rights. A case can be brought before the Court by a judge (request for a preliminary ruling) or by an applicant (action for annulment). Applicants must, in principle, show an interest for standing and lodge an appeal within six months. Actions for annulment amount to approximately one third of the case load of the Court. The Court is not allowed to initiate a case itself, nor can it act *ultra petita* in a case that is on the docket.

2. Have issues that were supposedly finally settled by a judgment of Court remained in a state of conflict?

The judgments of the Constitutional Court are final. An annulled act disappears from the legal system, but even when the Court rejects the action for annulment, the points of law settled by the judgment are binding.[52] A preliminary ruling is binding on the court of law which posed the preliminary question and any other court of law passing judgment in the same case.[53] In fact, it has *res judicata* in other cases as well. That said, the judgement of the Court does not necessarily mean the end of the underlying conflict, as shown, for example, by the Court's ruling on the single statute for workers and employees (see B.3). In both types of procedure – annulment and preliminary ruling – the Court is allowed to mitigate the consequential effects of its judgement, giving Parliament the time necessary to enact new legislative provisions conforming to the Constitution.[54] Generally speaking, the conflicts arising from the aforementioned cleavages can never be fully settled by any court.

3. Has the role of your Court in settling disputes and thus contributing to peace been challenged by other state powers, the media, etc.? (see also special session on the stocktaking on the independence of the courts)

The various authorities may defend their legislative norms before the Constitutional Court when they are the subject of an action for annulment or a preliminary reference. Beyond that,

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52 Article 9.2 of the Special Act of 9 January 1989 on the Constitutional Court.

53 Article 28.1 of the Special Act of 9 January 1989 on the Constitutional Court.

54 Article 8.1 and 28.2 of the Special Act of 9 January 1989 on the Constitutional Court.

the other state powers (both legislative and executive) are usually very reticent about the Court's role.

The media has shown limited interest in the case-law of the Constitutional Court, except in certain high-profile cases. However, for some years now, the Court has been paying more attention to the propagation of its jurisprudence, by issuing press releases and tweets.

4. Is your Court confronted with a positive or rather critical attitude in society and in the media as far as the trust in reconciliation by your court and/or the judiciary in general is concerned?

Belgian media and legal doctrine are generally quite supportive of the Constitutional Court's work. Recently, a debate has started on the composition of the Court, as also noted by a leading political scientist:

> "Despite the flawless track record of the Constitutional Court, questions have recently been raised about the appointment procedure of 'political' judges (Moonen 2019).[55] Shouldn't the appointment of these judges be taken out of the party-political sphere and shouldn't competence prevail over political colour? For this reason, some suggest that the nominated candidate be subjected to a kind of hearing. Moreover, a candidate should also have at least a legal degree."[56]

D. Fundamental principles: the protection of human rights, democracy and the rule of law as a precondition to peace

1. Do you have case-law showing that the protection of human rights contributed to peace?

The protection of human rights accounts for about 90 per cent of the Constitutional Court's case-law. In most of these cases, the Court has to balance different rights and interests, often including public or social peace. In a sense, every case involving human rights contributes to that peace. The aforementioned case-law on the unitary statute is a striking example (see B.3). By forcing the legislature to establish equality between blue and white collar workers, the Court's case-law has certainly contributed to social peace.

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55 T. MOONEN, "House of Courts? De vernieuwing van het Grondwettelijk Hof", *RW* 2019-20, 403-417 and 443-456.

56 C. DEVOS (ed.), *Een plattegrond van de macht*, Ghent, Academia Press, 2020, p. 425 (translated with www.DeepL.com).

2. Do you have case-law showing that the protection of democracy contributed to peace?

In a salient case concerning the financing of political parties, the Constitutional Court had to rule on a new condition to be met in order to continue to receive public funding. In particular, the legislator wanted the commitment to respect the European Convention on Human Rights and its additional protocols, which must be included in a provision of the statutes or the party programme, to be respected. The Act was challenged by leaders of the right-wing extremist party *Vlaams Blok*, together with the association which received the allocation on the party's behalf. In its judgment, the Court clearly endorsed the legislator's legitimate concern that a democracy must be able to defend itself vigorously, not allowing political freedoms to be used to destroy it. The Court rejected the appeal with the proviso, however, that the provisions under challenge must be interpreted strictly, could not affect parliamentary immunity and could not cause a party to lose funding which had clearly and publicly disavowed the group or member manifesting hostility towards fundamental rights or freedoms.[57]

The Constitutional Court has no jurisdiction over the elections itself. However, since 2014, the Court has had two new areas of review jurisdiction with regard to democratic decision-making. André ALEN and David HALJAN describe these areas as follows:

> "The first new area of jurisdiction concerns the a priori review of the constitutionality of consultative Region referenda (Article 142 paragraph 4 Constitution). The new Article 39*bis* of the Constitution allows consultative referenda at the Region level provided that the question submitted to the public concerns a Region competence, with the exception of budget and financing and of matters for which a two-thirds majority is required. According to the new Article 30*ter* of the Special Majority Act on the Constitutional Court, a referendum can only be held after the Constitutional Court has determined that the proposed question falls within these substantive limits. Additionally, the Court's a priori review involves examining whether the question proposed respects the rules dividing legislative powers among the federal level, the Communities, and the Regions; the principle of federal loyalty, and the human rights guaranteed by Articles 8–30, 170, 172 and 191 of the Constitution. The Court is also to ensure the referendum complies with the Region Act on Referenda and does not have a binding character. A consultative referendum may not be held as long as the Court has not given its fiat.
>
> The second new area of jurisdiction concerns a rather limited review of the decisions taken by the Control Commission of the House of Representatives (Article 142 paragraph 5 Constitution). The 1989 Act on Political Party Finance limits the spending of political parties on federal election campaigns. The Control Commission, a parliamentary commission consisting of seventeen MPs and four independent experts, reviews whether the parties and the candidates have stayed within these limits. The Commission can impose sanctions on individual MPs in the forms of a warning, a limit on expense

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57 Cons. 7 February 2001, no. 10/2001, B.4.7.2-B.4.8.3 (English summary in www.codices.coe.int, BEL-2001-1-001).

recoupment, a temporary suspension of their mandate, or even a revocation of their mandate. These decisions can be challenged before the Constitutional Court following the procedure laid down in Articles 25*bis*–25*septies* of the Special Majority Act on the Constitutional Court." [58]

Neither of these new areas of jurisdiction has yet been invoked in any case before the Court. Thus the Court has not been able to develop any case-law on these points.[59]

The fact that the Court has no jurisdiction over elections, might change in the near future. Up to now, the Houses of Parliament themselves decide whether or not members meet the conditions of eligibility (Article 48 of the Constitution). However, in recent grand chamber judgment the European Court of Human Rights held that the procedure, conducted by the Walloon Parliament, for examining a complaint about the May 2014 election results did not satisfy the effectiveness requirements of the Convention, thus violating Article 3 of Protocol No. 1 to the European Convention on Human Rights (right to free elections) and Article 13 of the Convention (right to an effective remedy).[60] It is most likely that the jurisdiction to adjudicate post-electoral complaints, after amending Article 48 of the Constitution, will be assigned to the Constitutional Court.

3. Do you have case-law showing that safeguarding the rule of law contributed to peace?

The rule of law can be regarded as the material component of democracy, alongside the formal component consisting of citizen participation through elections. The foundations of the rule of law are the separation of powers and the fundamental rights.[61] In this sense, the answer to the question is already contained in the answer to the previous questions. For further reading on this subject, please refer to contributions of the former[62] and current[63] Presidents of the Constitutional Court, available on the Court's website.

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58 A. ALEN and D. HALJAN (eds), *Constitutional Law in Belgium*, Alphen aan den Rijn, Kluwer, 2020, p. 135-136.

59 *Ibid*.

60 ECtHR (grand chamber) 10 July 2020, Mugemangango/Belgium.

61 J. THEUNIS, *De exceptie van onwettigheid*, Bruges, die Keure, 2011, nr. 9.

62 A. ALEN and W. VERRIJDT, "The Rule of Law in the Case Law of the Belgian Constitutional Court: History and Challenges", 25th Anniversary of the Constitutional Court of Slovenia Bled, Slovenia, June 2016; J. SPREUTELS, E. DE GROOT, G. GOEDERTIER, E. PEREMANS, "L'Etat de droit et la justice constitutionnelle dans le monde moderne", Rapport de la Cour constitutionnelle de Belgique présenté au 4e Congrès de la Conférence mondiale sur la justice constitutionnelle, Vilnius, Septembre 2017.

63 L. LAVRYSEN, "The Belgian Constitutional Court and the separation of powers", 50th Anniversary of the Constitutional Judiciary in the Republic of Macedonia, Skopje, September 2014; P. NIHOUL, "Les relations entre la Cour constitutionnelle belge et les autres pouvoirs. Indépendance et influence", Colloque des cours constitutionnelles tenu à Chisinau en mars 2017.

E. Doctrine

1. Does your Court interpret constitutional provisions in a way that contributes to social peace?

As follows from the foregoing answers, the Court's interpretation of constitutional provisions amply contributes to social peace.

2. Has your Court developed case-law that balances between legitimate interests of parties and thus contributes to social peace?

As is also apparent from the foregoing, the balancing of legitimate interests is an essential part of fundamental rights review and thus deeply rooted in the Constitutional Court's case-law.

3. Has your Court developed any doctrine contributing to the peaceful settlement of conflicts?

The doctrine of federal loyalty, as described above (see B.1), requiring compliance with the principle of proportionality by the state entities in the exercise of their competences, has contributed significantly to the peaceful settlement of conflicts between the communities, the regions and the federal State.

Part II – Stocktaking on the independence of the Member Courts

1. ***Has pressure been exercised on your Court by other state powers during the consideration (examination) of cases?***

2. ***Has excessive pressure been exercised on your Court by the media during the consideration (examination) of cases?***

3. ***Has your Court encountered resistance from other state powers following the adoption of decisions which they disliked?***

4. ***Have the decisions of your Court been duly published?***

5. ***Are the decisions of your Court being executed? Are there special mechanisms for the execution of the decisions of your Court?***

6. ***Are there problems in the execution of specific types of decisions?***

7. ***Have there been attacks on the Court following the adoption of decisions?***

8. ***Have there been any legislative initiatives or actions leading to creating obstacles to the activity of your Court?***

9. ***How did your Court deal with cases of pressure from other state powers, media, etc.?***

10. ***Has your Court received assistance from other bodies at the national or international level? Please specify the provided assistance.***

11. ***Does your Court consider that it is prevented by judicial restraint from defending itself in the media or from seeking assistance?***

In its previous report,[64] the Constitutional Court collectively answered those questions as follows:

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64 J. SPREUTELS, E. DE GROOT, G. GOEDERTIER, E. PEREMANS, "L'Etat de droit et la justice constitutionnelle dans le monde moderne", Rapport de la Cour constitutionnelle de Belgique présenté au 4e Congrès de la Conférence mondiale sur la justice constitutionnelle, Vilnius, Septembre 2017.

> "La Cour constitutionnelle de Belgique n'a jamais été confrontée à des pressions ou à des attaques de la part des autres pouvoirs de l'Etat ou des médias au cours de l'examen d'affaires ou à la suite des décisions qui les clôturent, étant entendu qu'il est normal dans une société démocratique que les décisions d'une juridiction puissent faire l'objet de critiques, tant dans le discours des mandataires politiques que dans les médias. De même, le pouvoir législatif n'a jamais entrepris d'action visant à créer des obstacles à l'activité de la Cour.
>
> Les arrêts de la Cour sont dûment publiés : ils le sont par les soins de son greffier sur le site web de la Cour ainsi que, dans leur intégralité ou par extraits, dans le Moniteur belge, conformément à l'article 114 de la loi spéciale du 6 janvier 1989. Ils sont en outre, d'une part, notifiés par le greffier aux parties et à la juridiction qui a posé la question préjudicielle et, d'autre part, communiqués par voie électronique aux autorités politiques désignées par l'article 113 de la même loi.
>
> Il n'y a pas de mécanismes spéciaux pour l'exécution des décisions de la Cour : ses arrêts sont exécutoires de plein droit (article 115 de la loi spéciale du 6 janvier 1989).
>
> De plus, les décisions de la Cour sont régulièrement suivies d'effet compte tenu, en particulier, de ce qu'elle est habilitée à prendre des décisions qui, parce qu'elles annulent ou censurent des normes législatives, sont de nature à créer dans l'ordre juridique un trouble qui requiert a posteriori l'intervention du législateur, même s'il n'est pas rare que celle-ci se fasse attendre. La Chambre des représentants a d'ailleurs créé en son sein un comité du suivi législatif chargé d'examiner les décisions de la Cour et les mesures à prendre pour, le cas échéant, y donner suite.
>
> La Cour, enfin, ne se considère pas à proprement parler comme tenue par un devoir de réserve judiciaire l'empêchant de se défendre dans les médias, mais estime n'avoir à s'exprimer que de la manière prévue par les dispositions qui définissent ses compétences, à savoir par ses arrêts. Ce n'est que récemment et à l'occasion d'arrêts rendus dans des matières complexes ou sensibles, qu'elle a jugé opportun de diffuser, lorsque l'arrêt est rendu, un communiqué de presse tendant, de manière succincte, à mettre en perspective les différents aspects de la décision."

The same answer is still valid. As to the execution of the judgments, a parliamentary committee indeed considers, on a monthly basis, the judgments of the Constitutional Court that have an impact on the effective functioning of the judicial system. The reports of that committee may, where appropriate, be accompanied by a proposal for a legislative initiative.[65] Furthermore, as already mentioned (see C.3), the Court opened an account on twitter in October 2019, as an additional channel for communicating its case-law to the public.

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[65] See G. VAN DER BIESEN, "Het Grondwettelijk Hof en de wetgever. Een dialoog met lange monologen", in G*rondwettelijk Hof 1985-2015 – Cour constitutionnelle 1985-2015*, Actes du colloque du 1er avril 2015 à l'occasion du trentième anniversaire du premier arrêt de la Cour, Brugge, die Keure, 2016, p. 51-65.