Belgium

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I. INTRODUCTION

In this contribution, we firstly address the discussions on and the adoption of the so-called 'Pandemic Act'. It raised important questions about the relation between the Parliament and the Government in the Belgian parliamentary system. Next, the article provides an overview of the main cases of the Belgian Constitutional Court over the past year that may be of interest to an international audience. Those concern management of the COVID-19 pandemic, labor issues, protection of privacy and personal data, freedom of religion, and freedom of speech. Finally, we look ahead to several interesting pending cases, as well as to evolutions in the composition of the Constitutional Court.

II. MAJOR CONSTITUTIONAL DEVELOPMENTS

In our 2020 Overview, we already addressed several aspects regarding the management of the COVID-19 pandemic. Among others, we observed that constitutional scholars criticized the approach of the federal government to combat the pandemic mainly through ministerial decrees.[1] The government mostly relied on the Civil Security Act of 2007 as the legal basis of the corona measures, which grants powers to the Minister of the Interior to take protective measures in case of *acute and temporary emergencies* (such as fires, explosions, or the release of radioactive materials). Even though the general assembly of the Administrative Litigation Section of the Council of State[2] stated that the protection of civil security in the meaning of the 2007 Act can also include catastrophes like virus infections, the Minister of the Interior Verlinden announced at the beginning of 2021 to submit a draft Pandemic Act to parliament in response to the growing criticism. This finally resulted in the Federal Act of August 14, 2021, on administrative police measures during an epidemic emergency (Pandemic Act).

The *Pandemic Act* introduces a uniform

legal framework for administrative police measures in case of an 'epidemic emergency', such as the current COVID-19 pandemic. Article 2, 3° of the Act contains a comprehensive definition of '*epidemic emergency*'. This emergency must be based on an (objective) risk analysis and can only be declared after consultation of the Council of Ministers and advice from the Minister of Health. It can be declared by the federal government via Royal Decree for a limited and strictly necessary period, and for a maximum of 3 months. It can be extended by a new Royal Decree for another 3 months after a new risk analysis and new advice.

Following strong criticism from experts and advice of the Legislative Division of the Council of State (n° 68.936/AV), the Act from now on clearly states that *administrative police measures* necessary to prevent or limit the consequences of the emergency for public health should be taken by a *Royal Decree* and are thus a collective decision of the government (i.e., no longer by ministerial decree).[3] Such a Decree must first be submitted for consultation to the Council of Ministers and the bodies competent for crisis management that also involve the necessary experts in the field of fundamental rights, economy and mental health. Moreover, if the measures have a direct impact on policy areas that fall within the powers of the federated states, the federal government is required to consult with them in advance to discuss the consequences of these measures for their policy areas, unless in case of urgency. The Royal Decree has immediate effect but must be *ratified by law* within a period of 15 days from its entry into force.

Nonetheless, in case of *imminent danger* the Minister of the Interior can exercise these powers alone and take all necessary administrative police measures that "do not tolerate any delay". These measures must be submitted to the Council of Ministers for consultation. Moreover, in the event local circumstances require so, the governors and mayors can take – in accordance with possible instructions of the Minister of the Interior – measures applicable to their own territory that are stricter than the Royal or Ministerial Decrees.

The *administrative police measures* can only have effect for the future and for a period of maximum 3 months, which can be extended each time by a maximum of 3 months and only insofar as the emergency is declared or sustained. Besides this limitation in time, the measures must be necessary, appropriate, and proportionate to the intended purpose. Article 5 of the Pandemic Act provides a list of 8 possible categories of measures that can be taken. On October 28, 2021, 2 Royal Decrees were published, which entered into force immediately. The first one declared the epidemic emergency and the second one contained corona measures to further combat the COVID-19 pandemic. Hitherto, a first extension has also been ratified by Parliament, so that the epidemic emergency for now lasts until April 28, 2022, at the latest.

III. CONSTITUTIONAL CASES

In 2021, the Constitutional Court delivered 193 judgments and handled 246 cases in total. Regarding the nature of the complaints, conflicts of competencies between the federated entities and the federal state only represent 4% of the judgments in 2021. The majority of cases concern infringements of fundamental rights. In 2021, the principle of equality and non-discrimination was still the most invoked principle before the Court (46%), followed by review of compliance with the right to private and family life (7%), socio-economic rights (7%), guarantees in taxation matters (7%), property rights (5%), the principle of legality in criminal matters (5%), jurisdictional warranties (4%), the principle of legality in criminal matters (3%), the freedom of religion and freedom to hold opinions (3%), the rights of the child (2%), and the freedom and equality in education (2%).

References were made to the jurisprudence of the ECtHR in 57 cases. Moreover, the jurisprudence of the CJEU is also regularly reflected in the judgments of the Constitutional Court, with references to this case law in 38 cases. References to other sources of international law can be found in 44 cases.
Last year, the Court referred 1 case for preliminary ruling to the CJEU.

1. Management of the COVID-19 pandemic

As has been indicated in our 2020 Overview, the pandemic in Belgium is mainly managed through executive regulations from the federal, regional and community governments. This has given rise to many cases before the Council of State and the ordinary judiciary, as well as important opinions of the Legislative section of the Council of State, in which constitutional issues were decided.[4] Some of the measures to combat COVID-19 have however been adopted by Acts of the federal, regional and community parliaments and have been challenged directly before the Constitutional Court. Some of those cases have been decided in 2021, others are pending.

With its judgment n° 32/2021, the Court suspended Article 46 of the federal Act of December 20, 2020, containing various temporary and structural provisions on justice in the context of the fight against the spread of COVID-19. Six detainees requested the Court to suspend and annul the provision under which the Chamber for the Protection of Society of the Criminal Enforcement Court, for an extendable period, was no longer under an obligation to hear the detainee in person, but only his lawyer and the public prosecutor. The Court ruled that internment, as a specific method of detention, requires that the judge who decides on the continuation or the modalities of the internment, personally ascertains the condition of the internee. In its judgment n° 76/2021 the Court subsequently also annulled that provision for violation of the Articles 10 and 11 of the Constitution, read in conjunction with Article 5 (4) of the ECHR. In doing so, the Court expressly relies on case law of the ECtHR, according to which special procedural guarantees may be necessary in the event of detention based on mental illness. While measures involving reduced physical contact can legitimately be imposed to protect public health, the suspension of the right of the detainee to be heard in person is not necessary for that objective. Hence, the Court found that there was a lack of consideration of less restrictive alternatives (such as videoconferencing).

In its judgment n° 56/2021 the Court dismissed the application against a federal Act

of November 6, 2020, that allows other persons than nurses to perform nursing activities under certain conditions in the context of the COVID-19 pandemic. Neither the principle of equality nor the fundamental right to health protection were violated. The Court found that the contested Act imposed various cumulative conditions for non-nurses to perform nursing activities (shortage of nurses, complexity of the activities, supervision of a coordinating nurse…), so that there was a justified difference in treatment of both categories of staff. The contested Act aimed to relieve the overburdened healthcare staff temporarily and imposed strict conditions. The Court concluded from this that the contested Act did not reduce the level of protection of the right to health protection, but on the contrary protected that right.

By its judgments nos. 88/2021 and 89/2021 the Court rejected the demand to suspend the Flemish Act introducing contact tracing and quarantine and isolation obligations in the context of COVID-19. A number of individuals requested the suspension of the mandatory temporary seclusion which was imposed in case of contamination or high-risk contacts, and the associated monitoring and sanctions. The Court inferred from the case law of the ECtHR that the classification of a freedom-restricting measure as a restriction on freedom of movement or as a deprivation of liberty depended on various factors, which were always to be examined in concrete terms. The Court concluded that compulsory seclusion, despite its drastic nature and possible criminal sanctions in case of violation, was a restriction on freedom of movement within the meaning of Article 2 of the Fourth Additional Protocol and not a deprivation of liberty within the meaning of Article 5(1) of the ECHR.

2. Port labor: protection of dock workers

The Court of Cassation asked the Constitutional Court to rule on the constitutionality of the obligation for employers in port areas to call on recognized dockers for activities which, strictly speaking, were unrelated to the loading and unloading of ships and could also be carried out outside the port areas. Before ruling on that question, the Constitutional Court asked the CJEU whether the national system of recognized port labor infringed the freedom of establishment or the free movement of services (see our 2019 Overview). In its decision of 2021[5], the Court of Justice held that a law which reserves port activities to recognized dockers may be compatible with EU law if its objective is to ensure safety in port areas and prevent accidents at work. Taking that ruling into account, the Constitutional Court in its judgment n° 168/2021 examined the activity in dispute at the origin of the question: the preparation of trailers on a quay for shipment using a vehicle specifically designed for the purpose (a 'tug master'). According to the Court, the extent of the risks involved was not significantly different from the risks involved in loading and unloading ships in the strict sense. The obligation to have recourse only to recognized dockers was motivated precisely by the need to ensure safety in port areas and to prevent accidents at work. Therefore, it was not considered discriminatory that the obligation to use recognized dockers should apply to both types of port activities.

3. Protection of privacy and personal data

In its judgment n° 2/2021, the Constitutional Court assessed the constitutionality of a federal Act of November 25, 2018, that imposed the integration of a digital fingerprint image into identity cards. That image could subsequently be consulted by several government agencies, including police and border authorities. Several applicants questioned the compatibility of this measure with the right to private life and the protection of personal data, including the rights provided under the GDPR. The Court found the aim of the Act, which was to combat identity fraud, legitimate and concluded that the measure was relevant, even if digital fingerprints could not completely rule out identity fraud. Concerning proportionality, inclusion of digital fingerprints on identity cards required stricter scrutiny than was needed with regard to passports, as the former are mandatory documents and are used daily. Nevertheless, according to the Court, taking fingerprints was not an intimate matter and did not cause physical or psychological discomfort. Moreover, the Act did not create a central register of digital fingerprints. Whereas their temporary storage during the production process could create a risk of identity theft, the Act required the executive branch to take sufficient security measures. Finally, the Court was satisfied that the authorities permitted to read the digital fingerprints were not allowed to store them either.

Still in the context of the protection of the right to privacy, the Court in its judgment n° 52/2021 examined an Act that limited the professional secrecy of participants in a newly established form of local security bodies aimed at preventing terrorist crimes. The establishment of those bodies, which performed a consultation function, was a result of the 2016 terror attacks in Brussels. Upon invitation by the mayor, personnel of local services (such as schools, hospitals or welfare) could be invited. Participants held by professional secrecy were not required to adhere to that obligation in the context of those meetings. The Court did not consider that situation unconstitutional. It argued that participation in such a meeting was voluntary, as was disclosing information. Moreover, the participants in the meeting were themselves required to observe professional secrecy with regard to the information they obtained. Also, the information shared was not registered in a database. Finally, given the diversity of local situations, it was reasonable to leave it to the mayor to decide who to invite precisely.

In its judgment n° 57/2021, the Constitutional Court investigated the Act of May 29, 2016, concerning the collection and retention of data in the sector of electronic communications (Data Retention Act), which provided for the general and undifferentiated collection and storage of data by network providers. In a prior judgment of 2018 (n° 96/2018), the Court, by means of a preliminary question, inquired with the CJEU whether this requirement was in accordance with the directive on privacy and electronic communications, read in light of the Charter of Fundamental Rights. In the decision following that request (La Quadrature du Net e.a.; 6 October 2020; C-511/18, C-512/18 and C520/18), the CJEU ruled that

EU law does preclude legislative measures that provide for the preventive, general and undifferentiated retention of traffic and location data, except in limited circumstances. More specifically, the preventive and general collection of data is only allowed for a period no longer than strictly necessary and with the aim to prevent serious crimes or for the protection of public safety. Since the legislator pursued more general aims than the ones indicated by the CJEU, the Constitutional Court in its final judgment concluded that the Data Retention Act violated EU law.

4. Freedom of religion

Legislative Acts of the Walloon and Flemish regions prohibit the slaughter of animals without prior (reversible) stunning, to meet animal welfare standards. The lack of religious exemptions was challenged before the Constitutional Court by Jewish and Muslim litigants. At the request of the Constitutional Court in its judgment n° 53/2019, the CJEU ruled that Regulation 1099/2009 (which protects animal welfare at the time of killing but permits religious exemptions to the prior stunning requirement) authorizes the Member States to adopt stricter national rules on animal welfare in relation to religious slaughtering. Thus, a Flemish[6] ban on non-stun religious slaughter is valid. In its ensuing proceedings, judgments nos. 117/2021 and 118/2021, the Constitutional Court followed the CJEU. The Constitutional Court argued that the Acts were compatible with EU Regulation 1099/2009. The Court further held that the Acts were constitutional, provided that the legislators (in order for a State to fulfil its 'duty of neutrality and impartiality') refrained from judging on the content of methods of slaughtering animals prescribed by religious rites. The Court found that the Acts did not violate the right to freedom of religion. It stated that promoting animal welfare was a legitimate objective of general interest. Furthermore, the Court held that the Acts struck a fair balance between animal welfare and the freedom to manifest one's religion. The Court concluded that the alternative stunning procedure was proportionate. It also emphasized that the Acts resonated with the wider sensitivity for animal welfare. Furthermore, the Court held that the Acts did not infringe the right to work and to the free choice of occupation, the freedom to conduct a business and the free movement of goods and services. It underlined the possibility to import *kosher* and *halal* meat without prior stunning from abroad. The Court also did not consider the Acts to be discriminatory, finding that ritual slaughtering is not comparable to the killing of animals for hunting and fishing.

5. Freedom of speech

The Act of January 24, 1977, concerning the health protection of consumers regarding food and other products, included a ban on tobacco product advertising, except that point-of-sale tobacco *brand* advertising was exempt from that requirement. An Act of March 25, 2020 (in effect since January 1, 2021), abrogated that exemption. The petitioner (a tobacco company) submitted an application for annulment of the 2020 Act. In its judgment n° 183/2021, the Constitutional Court upheld the regulation, as it did not violate constitutional rights (e.g., the right to freedom of expression, the right to property, the freedom of enterprise and the principle of equality and non-discrimination). In that context, the Court held that exposure to point-of-sale tobacco promotion elicited cravings and inhibited quitting. Especially adolescents may be vulnerable to exposure to tobacco advertisements. As such, the 2020 Act aimed to protect public health and was justified. The Court underlined that the prohibition therefore applied to all retail outlets that sold combustible or non-combustible tobacco products or tobacco-free alternative products. The Court's justification for equal treatment lied in the harmful effects of those products.

In its judgment n° 4/2021, the Constitutional Court rejected an application for annulment of Article 115 of the Act of May 5, 2019, that amended Article 20 of the Act of July 30, 1981, concerning criminalization of offences motivated by racism or xenophobia. This provision criminalizes anyone that denies, grossly minimizes, approves, or justifies acts constituting genocide or crimes against humanity and war crimes. This provision also protects the right of privacy, as stipulated in Article 8 of the ECHR, which includes the right of preservation of identity. The Court considered this provision also from the perspective of Article 10 of the ECHR and Article 19 of the Belgian Constitution, which both protect the right to freedom of expression. If the right of privacy and the right to freedom of expression are at odds with each other, a fair balance must be struck between those fundamental rights to resolve any potential conflict. The reservation that it will make punishable crimes referred to in the provision, only if these crimes relate to genocides that have been established by final decision of an international court, allowed, so the Court argued, to determine when a particular event can be legally described as a negationist statement.

In its judgment n° 157/2021, the Constitutional Court investigated whether the Act of April 6, 1847, concerning the criminal punishment for insulting the King, violated the Constitution. This judgment was rendered in response to a preliminary question concerning the execution of a European arrest warrant. The warrant, which demanded the extradition of a Spanish citizen who was convicted for insulting the Spanish Crown, could only be executed if the facts supporting that conviction were also punishable under Belgian criminal law. While the 1847 Act indeed provided for criminal sanctions for insulting the King, the defendant argued that it should not be applied, as he believed it violated the right to freedom of speech. The Constitutional Court confirmed that this was the case. The Act did not meet a compelling interest and was disproportionate to the aim of protecting the reputation of the head of state. The Court ruled that the penalty of imprisonment (6 months to 3 years) was contrary to the right to freedom of speech, since it could be imposed for opinions expressed in the context of a political debate or debates on matters of public interest. Furthermore, the Court criticized the fact that the reputation of the King was more broadly protected than that of other persons, as the offence had a broader scope than similar crimes of general application and did not require malicious intent.

IV. LOOKING AHEAD

On January 1, 2022, 246 cases were pending before the Constitutional Court. Some of these cases are of interest to an international audience. In a case directed against the Federal Act of December 25, 2016, concerning the processing of passenger data that imposes an obligation on carriers and travel operators to transfer PNR data and transposes various EU Directives, the Court by its judgment of 2019 (n° 135/2019) referred some questions on the interpretation and the validity of different EU Law provisions dealing with that matter to the CJEU. AG Pitruzzella has delivered its opinion early 2022[7], so that a CJEU judgment may be expected during 2022. In a case concerning legislation on the administrative cooperation in the field of taxation, which provides for mandatory automatic exchange of information on cross-border constructions, the Court referred by its judgment of 2020 (n° 167/2020) the question to the CJEU asking whether the implemented Directive infringes the right to a fair trial and the right to respect for private life.[8] Other pending cases concern the relaxation of the legislation on euthanasia, the management of the COVID-19 pandemic, including the Pandemic Act, obligations concerning tax information of Airbnb platforms, restrictions of Uber services and the compatibility with the active and passive freedom of education and the rights of the child to quality education of the new educational objectives in the Flemish Community.

The renewal of the composition of the Constitutional Court is going ahead. By Royal Decree of June 22, 2021, Sabine de Bethune, a former speaker of the Senate, has been appointed as Judge replacing retiring Judge Trees Merckx-Van Goey, while Emmanuelle Bribosia, a European Law Professor at the *Université Libre de Bruxelles* (ULB), has been appointed by Royal Decree of October 29, 2021, to replace Francophone President Daoût, who retired upon reaching the mandatory retirement age of seventy. His peers have elected Pierre Nihoul as French-speaking president from mid-September onwards. In 2022, there will be 2 vacancies, due to the retirement of Judge Riet Leysen in March and Judge Jean-Paul Moerman in August.

As the Covid-19 waves seem to be winding down slightly, the Court is preparing for the wave of applications directed against the pandemic legislation. We will report further on this in our 2022 Overview, as well as on the large-scale citizens' enquiry into institutional reform and democratic innovation that is currently in preparation.

1 See, e.g., P. Popelier, "COVID-19 legislation in Belgium at the crossroads of a political and a health crisis", The Theory and Practice of Legislation, (2020/8), 138-141.
2 E.g., judgments nos. 248.818 and 248.819 of October 30, 2020
3 Article 108 of the Constitution states that regulatory powers should be exercised by Royal Decree.
4 J. Velaers, "Constitutionele lessen uit de COVID-19-crisis", *Tijdschrift voor Bestuurswetenschappen & Publiekrecht* (2021), 532-552.
5 Joined cases C407/19 and C471/19.
6 The legislative Act of the Walloon region was not subject of the case before the CJEU.
7 Case C-817/19, "Ligue des droits humains", ECLI:EU:C:2022:65.
8 Case C-694/20, "Orde van Vlaamse Balies and Others".