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Recent developments in environmental jurisprudence[1]

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I would like to share with you some information and thoughts on my experiences with environmental cases as a Justice in a Constitutional Court.

The Belgian Constitutional Court is competent to check the constitutionality of Acts of the Federal and Regional Parliaments. The Court is not adjudicating individual cases. When a constitutional question, that was not already dealt with by the Constitutional Court, arises before an ordinary or administrative judge in a particular case, that judge shall refer the constitutional issue to the Constitutional Court and apply the preliminary judgment that the Constitutional Court delivers in that case. Acts of Parliament can also be challenged in the form of a demand for annulment within a period of 6 months after their official publication, by any interested party.

While checking the constitutionality of the Acts of Parliament referred to it, the Belgian Constitutional Court takes into consideration International and European Union Law, including International Human Rights Conventions and other binding International Agreements.

Around 15 percent of our cases are dealing with environmental law in the broad sense.

On the one hand, we have cases in which environmental legislation is challenged by owners and industry for alleged violations of the right to property, the freedom of trade and industry or the equality principle. The success rate of these cases has been proved to be very low. Only in very exceptional circumstances one or another provision has been declared unconstitutional. In reality that were cases in which there was either question of bad legislation, causing unwanted side effects, either than that the level of environmental protection guaranteed by the challenged Acts of Parliament or the instruments used for that purpose were found to violate the Constitution. The Constitutional Court has indeed no intention whatsoever to frustrate ambitious environmental legislators.

On the other hand, there are the cases in which the plea is that the provisions in question are not sufficiently protecting the environment. Those cases are mainly brought by citizens, environmental ngo's and from time to time by judges *ex officio*. Very often the relevant provisions of the Constitution are than combined with International and European environmental law provisions, including the Aarhus Convention on access to information, public participation and access to justice in environmental matters. Also the well-known Rio-principles, in so far they have been laid down in binding MEA's or the EU

[1] Sunday, February 17, 2013 : 9.00-10:00

treaties, regulations and directives, are often invoked before the Court, in particular the precautionary principle, the prevention principle, and the polluter pays principle.

The right to the protection of a healthy environment, on its turn, forms part of the economic, social and cultural rights which have been enshrined in the Belgian Constitution since 1994, in its article 23. The parliamentary preparation of that article suggests that the fundamental economic, social and cultural rights are supposed to produce a so called *standstill effect*. In other words: environmental policy should pursue not only a healthy environment, but also an environment with a standard of health not lower than the existing one.

The review of the compatibility of legislation with art. 23 of the Belgian Constitution by the Constitutional Court is chiefly carried out on the basis of that *standstill* obligation that has been recognized in multiple judgments since the first ones of 14 September 2006. As was already mentioned, what is usually meant by the *standstill* effect is that the level of protection of the guaranteed rights as acquired in the legal system must not be reduced; in practice, however, this definition did not solve all the problems. The most important question was whether the prohibition of impairing the existing protection is absolute, in other words, whether the Constitutional Court needs to nullify the slightest weakening of a legislative act for infringement of Article 23 of the Constitution. In the light of the case-law of the Court, the answer to this question clearly has to be no. A non-significant weakening is permitted. In connection with the protection of a healthy environment, even a significant weakening does not automatically result in an infringement of Article 23 of the Constitution; this is only the case in the absence of reasons connected with the public interest. The result of this is that in most of the cases no violation of the *standstill* principle was found by the Court. However in at least two cases the Court came to the conclusion that some provisions of Acts of Parliament were violating the *standstill* principle and had to be annulled. In one case this was based on a combination of art. 23 of the Constitution with some provisions of the Aarhus Convention.

Recently one can observe that different other courts, especially in Latin America,are developing similar jurisprudence on the basis of their constitutions. The principle is known there as the *principle of non-regression*. The principle has gained interest in different academic, societal and political circles in the run up to the Rio + 20 Conference. Different proposals to introduce it in the Outcome Document were suggested. Although the principle as such is not mentioned in the Document, the idea behind it is present in paragraph 20 of it [2]. The Rio+20 Declaration on Justice, Governance and Law for Environmental Sustainability mention: "We recognize that environmental laws and policies adopted to achieve those objectives *should be non-regressive*." The principle is also mentioned in the Concept Note of the High-Level Meeting on the Rule of Law and the Environment (UNEP, Nairobi, 17 February 2013, 9.00 – 17.00, Press Room) as a new and emerging principle that should be examined and discussed. The IUCN Commission on Environmental Law has on its turn established a Non-Regression Knowledge Forum.

To conclude: I am of the opinion that given the fact that legislators in different parts of the world are increasingly confronted with demands to lower in some aspects the environmental law *acquis*, under the influence of *inter alia* the financial and economic crises, the principle can in a very useful way complement the Rio Principles as standards for constitutional review of legislation.

[2] "In this regard, it is critical *that we do not backtrack* from our commitment to the outcome of the United Nations Conference on Environment and Development".