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Presentation of Aarhus-related cases of the Belgian Constitutional Court*

Prof. Dr. Luc Lavrysen

1 Introduction

In this article,^{*} I would like to illustrate how a Constitutional Court can contribute to the implementation of the Aarhus Convention. To this end, I will use two judgements of the Belgian Constitutional Court dating from 14 September 2006¹ as examples.

Before discussing the cases, I think it would be useful to briefly introduce our Constitutional Court.

The Belgian Constitutional Court², as it has recently been re-named as a result of the Constitutional Amendment of 7 May 2007 (it was formerly known as the Court of Arbitration), is exclusively competent to review regulations in Belgium that have force of law. Both substantive and formal rules adopted by the federal parliament (statutes) and by the parliaments of the communities and regions (decrees and ordinances) are understood as regulations which have force of law. All other regulations, such as Royal decrees, decrees of governments of communities and regions, ministerial decrees, regulations and decrees of provinces and municipalities as well as court judgements, fall outside the jurisdiction of the Court. Instead, they fall within the competence of the Council of State (Supreme Administrative Court) and the ordinary courts, headed by the Court of Cassation (Supreme Court).

Article 142 of the Constitution gives the Constitutional Court the exclusive authority to review regulations that have force of law for compliance with the rules that determine the respective powers of the State, the communities and the regions. These power-defining rules are set forth in the Constitution as well as in laws (usually passed by a special majority) that are enacted with a view to institutional reform in federal Belgium.

The Constitutional Court also has the authority to pronounce judgement on any violation by a regulation having force of law with regard to fundamental rights and liberties guaranteed in Section II of the Constitution (Articles 8 to 32) and Articles 170 (legality principle in tax-related matters), 172 (equality in tax-related matters) and 191 (protection of foreigners). The Court includes all international

and European provisions in its review that are relevant to the case in question.

A case may be brought before the Constitutional Court in two ways. Firstly, a case may be brought before the Court in the form of an action for annulment that may be instituted by any authority designated by statute or by any person who has a justifiable interest. Secondly, any tribunal may refer preliminary issues to the Court of Arbitration.

The following authorities and persons may bring an action for annulment before the Constitutional Court: the Council of Ministers and the governments of the communities and regions; the presidents of all legislative assemblies, at the request of two-thirds of their members; natural or legal persons, both in private law and public law, Belgian as well as foreign nationals.

The latter category of persons must declare a justifiable interest. This means that those persons must demonstrate in their application to the Court that they are liable to be personally, directly and unfavourably affected by the challenged regulation. The “arguments” must be set out in the application. In other words, it must be specified which of the rules for which the Court guarantees compliance have been violated, as well as which provisions are thought to violate those rules. It must also be explained in which respect those rules have been violated by the provisions in question. As a general rule, with certain exceptions, actions must be brought within six months of the publication of the challenged regulation in the *Moniteur belge* (Official Belgian Journal).

The action for annulment does not suspend the effect of the challenged regulation. In order to guard against the possibility that the challenged regulation may cause irrevocable prejudice during the period between the introduction of the action and the judgement of the Court, and that a subsequent retroactive annulment may no longer have any effect, the Court may, at the applicant’s request and in exceptional circumstances, order the suspension of the challenged regulation pending a judgement on the merits of the case within three months following a suspension decision. Such an action for suspension must be brought within three months following the publication of the challenged regulation in the *Moniteur belge*.

If a question arises in a particular tribunal regarding the correspondence of laws, decrees and ordinances with the rules laying down the division of powers between the State, the communities and the regions or with Articles 8 to 32, 170, 172 or 191 of the Con-

* The paper is based on the Acces to Justice Regional Workshop for High Level Judiciary (Eastern Europe and South Caucasus Region); Kiev, Ukraine, 4-5 June 2007.

¹ The Constitutional Court of Slovenia also recently found an Act (the Act Amending the Lipica Stud Farm Act) to be inconsistent with the Aarhus Convention as it prevents the public from participating in the development of a detailed plan of national importance (U-1 – 406/06).

² www.const-court.be

stitution, that tribunal must, in principle, address a preliminary question to the Constitutional Court. "Preliminary" means before the tribunal passes further judgement. When a tribunal addresses a question, the proceedings before the tribunal in question are suspended pending the answer of the Court. If the Constitutional Court decides that the legislation in question conflicts with the rules mentioned above, the referring judge must no longer take this legislation into consideration in the further adjudication of the case. The legislation in question, however, will be maintained in the legal system, but the courts will, on the basis of the judgement of the Constitutional Court, refuse to apply it. It should be pointed out in this context that the courts themselves can rule against the violation of power-defining rules and fundamental rights by acts of administrative authorities.

Around 8 % of the Court cases are dealing with environmental law, including land use planning legislation³.

2 The cases

The two cases which I will discuss concern actions for annulment of provisions of Walloon regional law introduced respectively by *Inter-Environnement Wallonie*, which is the umbrella environmental NGO in the French speaking part of Belgium (Judgement 137/2006 of 14 September 2006), and by a group of individuals living in the neighbourhood of a planned highway junction together with a local environmental NGO, *Groupement Cerexhe-Heusseux/Beaufays* (Judgement 135/2006 of 14 September 2006). Both actions were brought against different Amendments of the Walloon Town and Country Planning Code introduced by a Decree of the Walloon Region of 3 February 2005 "on economic recovery and administrative simplification".

With these amendments the Walloon Region sought, according to the parliamentary preparations, "to put an end to the administrative obstacles to the creation of new activities", "to simplify the planning instruments", "to accelerate the procedures for the construction of large-scale infrastructures", "to make available buildable sites of which the use is as yet undecided", "to accelerate the procedures for granting planning permission", "to guarantee legal certainty", "to protect the vulnerable functions", "to promote public participation", and, finally, to enable the appeal authority "to hear appeals proactively".

3 First Case - Judgement 137/2006

The first case concerns the so-called "*deferred development zones of an industrial nature*". In many regional land use plans of the Walloon Region, such zones were introduced over time. The development of such zones was, before the contested amendments, contingent on the existence of a *municipal planning scheme for the whole area*. Failing that, the zone could not be developed. As a result of the amendments, such a zone could be developed since then without such a prior municipal planning scheme for the whole area and permits could be granted for all economic activities with the exception of "agro-economic neighbourhood activities" and "wholesale distribution".

Inter-Environnement Wallonie criticised the challenged decree provision for abolishing the municipal planning scheme as an instrument for the development of these zones, and for failing to put an equivalent document in its place. This abolition and failure were thought to constitute a deterioration of the procedural guarantees and thus a violation of the standstill obligation in terms of the right to the protection of a healthy environment, as guaranteed by Article 23 of the Belgian Constitution. Furthermore, Articles 10 and 11 of the Constitution were also thought to have been infringed, insofar as the local residents of such zone did not see this area being developed in accordance with the relevant standards and regulations, nor obtain an environmental impact assessment of the programming measures for the area in question, nor have any say in the way in which the area would be developed.

The Court followed *Inter-Environnement Wallonie* in this reasoning. In the first place, it is noticeable that there was no discussion at all as to whether the umbrella NGO had standing or not. Indeed, although the pure *actio popularis* is not accepted, the Court has a broad view on standing for NGOs (and this is not only the case for environmental NGOs). NGOs have standing in the Court if they pursue effectively a collective interest that is sufficiently specified and this collective interest can be jeopardised by the challenged provision. Because this is well established case law - and to my knowledge the Court has never denied an environmental NGO from challenging environmental law provisions - the Walloon Regional Government did not even try to formulate an exception of lack of standing, so the Court was not obliged to go into that matter.

The Court found a violation of Article 23 of the Constitution, taking into account Articles 3 to 6 of Directive 2001/42/EC of the European Parliament and the Council of 27 June 2001 on the assessment of the effect of certain plans and programmes on the environment, and Articles 7 and 8 of the Convention on access to information, public participation in decision-making and access to justice in

³ Jan Van den Berghe, Report to the European Forum for Environmental Judges on the Belgian situation in respect of training and specialization of judicial officers in environmental law, www.eufje.org.

environmental matters, signed in Aarhus on 25 June 1998 and ratified by Belgium on 21 January 2003.

The Court held:

“B.7.2. [...] Directive 2001/42/EC concerns the environmental assessment of plans and programmes that are likely to have significant effects on the environment. According to Article 3(2)(a) of that Directive, all plans and programmes which are prepared for town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment are subject to an environmental assessment in accordance with the requirements of the first Directive. Considering the economic designation of the areas in question, it cannot be ruled out that in those areas projects will be realized of the types referred to in Annexes I or II of Directive 85/337/EEC and that consequently the development of such areas is subject to compliance with the provisions of Directive 2001/42/EC.

Directive 2001/42/EC lays down a minimum framework for such environmental assessment. The environmental assessment must be carried out during the preparation and before the adoption of a plan or programme (Article 4, paragraph 1). The assessment involves the preparation of an environmental report that must satisfy the requirements of Article 5, consultation of the relevant environmental authorities and the public on the draft plan or programme and the environmental report (Article 6), and the obligation to take into account the environmental report and the results of the consultations during the preparation of the plan or programme (Article 8).

Article 7 of the Aarhus Convention imposes the obligation to provide opportunities for public participation in the “preparation of plans and programmes relating to the environment”. More particularly, appropriate practical and/or other provisions must be made for the public to participate, within a transparent and fair framework, having provided the necessary information to the public.

B.7.3. Under the previous legislation, the development of a deferred development zone of an industrial nature was subject to a municipal planning scheme for the whole area. Such a municipal planning scheme, even if it took the form of a simplified municipal planning scheme (Article 49, second paragraph, of the Walloon Town and Country Planning Code), was subject to environmental impact assessment in accordance with the requirements of Articles 50 to 53 of the Walloon Town and Country Planning Code, including the necessity of calling upon an approved project author, the obligation to seek the opinion of specialised authorities, the intervention of the municipal council and the obligation to organise

a public inquiry. In the absence of such a municipal planning scheme, elaborated in accordance with the aforementioned guarantees, a deferred development zone of an industrial nature could not be developed.

The guarantees which the challenged provision puts in their place, more particularly the obligation of justification in the light of the elements referred to in the fourth paragraph of the challenged provision, cannot make up for the loss of the substantive and procedural guarantees that are linked to the preparation of a municipal planning scheme.

Consequently, local residents of such areas are confronted with a significant deterioration in the level of protection that was offered by the previous legislation, a deterioration that on the basis of the aforementioned provisions of European and international law cannot be justified by the reasons of public interest underlying the challenged provision.

B.8. The ground is well-founded insofar as the challenged Article 55 does not provide for an environmental impact assessment procedure that satisfies the requirements of the aforementioned Directive 2001/42/EC and of Article 7 of the aforementioned Aarhus convention.”

Thus, for these reasons, the Court annulled the challenged provision. However, the Court maintained the effects of the annulled provision with regard to the permits which were delivered in accordance with said provision and which became effective before the date of publication of the judgement in the *Moniteur belge*.

4 Second case - Judgement 135/2006

The second case is about a highway junction in the region of Liège. In the regional land use plan, two alternatives were provided for realising a junction between two highways in the form of two relative broad “reservation and easements zones”. Before realizing one of the two alternatives it was necessary - according to the initial legislation - to review the regional land use plan in view to transform one of the two reservation zones into a more precise projected path for the highway junction. A revision of the regional land use plan is subject to environmental impact assessment and public participation. By the challenged amendment of the Walloon Town and Country Planning Code it was decided that such a revision of the regional land use plan was no longer necessary because this broader reservation zones are since then to be considered as equivalent to a projected path of a line infrastructure like a highway junction.

In this case we find in the first place a discussion of the interest of the parties. The Court held: *“The applicants, who are natural persons, live, according to the regional plan that relates to them, in the vicinity of a reservation and easement zone which is*

governed by the rules concerning the reservation perimeter [...] A project for the construction of a motorway link accounts for the incorporation of the reservation and easement zone in the regional plan. The applicants therefore prove the requisite interest in challenging the aforesaid provisions, which are likely to directly and adversely affect their environment. [...] Since the interest of the applicants – natural persons – has now been established, the action for annulment is admissible and it is not necessary to examine whether the applicant organization can also prove the requisite interest.”

As the merits of the case are concerned, the Court found that although the level of protection of the environment of the plaintiffs was diminishing, the amendment of the Walloon Town and Country Planning Code could be, in this particular case, justified by reasons of public interest.

The Court held:

“B.11 [...] Article 3(3) of Directive 2001/42/EC, however, provides that an environmental assessment is required for “minor modifications” to said plans only where the Member States determine that they are likely to have significant environmental effects, taking into account the relevant criteria set out in Annex II to the Directive (Article 3(5)).

Article 7 of the Aarhus Convention imposes the obligation to provide opportunities for public participation in the “preparation of plans and programmes relating to the environment”. More particularly, appropriate practical and/or other provisions must be made for the public to participate, within a transparent and fair framework, having provided the necessary information to the public.

B.12. The Walloon decree-giver, without exceeding its power of assessment, was able to decide that the

conversion of a reservation and easement zone of a regional plan into a reservation perimeter coinciding with a path concerns a “minor modification” within the meaning of Article 3(3) of Directive 2001/42/EC, with which no significant environmental effects are associated. It was also able to decide that the conversion, pursuant to the decree, of reservation and easement zones into reservation perimeters coinciding with paths does not as such constitute a plan or programme within the meaning of Article 7 of the Aarhus Convention. Consequently, Article 10 of the EC Treaty cannot be considered to have been infringed.”

Although it is henceforth possible to obtain planning permission for the construction of a motorway in such a zone without a prior revision of the regional plan with a view to the incorporation of the path of such an infrastructural project, this does not mean that the parties concerned are deprived of any form of preventive and curative legal protection.

The Court described in its judgement all relevant provisions of environmental and planning law that are still applicable before a permit can be granted for the construction of the motorway junction, namely the obligation to prepare an environmental impact assessment for the projected motorway-junction, including public consultation, the proper assessment of significant effects on Natura 2000 sites, the possibility to challenge the permit before the Council of State (see B.13.2- B.13.5) and concluded: “Having regard to the remaining level of preventive and curative protection, the challenged provision does not constitute a significant deterioration which cannot be justified by the underlying reasons of public interest.”

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

- Undertaking projects in developing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research:

- **European environmental policy**
 - Research on implementation of European law
 - Effectiveness of legal and economic instruments
 - European governance
- **Environmental advice in developing countries**
 - Advice for legislation and institution development
 - Know-how-transfer
- **Companies and environment**
 - Environmental management
 - Risk management

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

- Product policy/REACH
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the

- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

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In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brus-

sels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London, 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd., London, 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann / Dyssli (eds.), Cameron May Ltd., London, 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/ Küppers (eds.), P. Lang, 1993
- Licensing Procedures for Industrial Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wilmowsky/Roller, P. Lang, 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

ElNi Website: elni.org

On the elni website www.elni.org one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.