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Forms and Limits of Judicial Deference: The Case of Constitutional Courts

Report on behalf of the Constitutional Court of Belgium

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I. Non-justiciable questions and deference intensities

1. In your jurisdictions, what is meant by "judicial deference"?

The Court has no general concept or definition of "judicial deference". Moreover, other than the purely quantitative annual reports, there is no systematic or regular self-assessment by the Court of the case-law to detect any implicit practice. Scholarship is starting to analyse in a more comprehensive way the varying intensity of review of the Court.[5]

2. Is there a spectrum of deference for your Court? Are there "no-go" areas or established zones of legal unaccountability or non-justiciable questions for your Court (*e.g.* questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, substantial financial implications for the government etc.)?

[1] French speaking President of the Court
[2] Dutch speaking President of the Court
[3] Legal Secretary
[4] Legal secretary
[5] See eg B. MEEUSEN, *Variërende toetsingsintensiteit in de rechtspraak van het Grondwettelijk Hof*, doctoral thesis, Ghent University, 2023, 409 p. (not published yet).

Several no-go areas are pre-determined by the Constitution and the organic law on the Constitutional Court. Indeed, the Court is only entrusted with the task of assessing the conformity of legislative norms with regard to a specific list of the constitutional articles (see article 142 of the Belgian Constitution[6] and articles 1 and 26 of the Special Law on the Constitutional Court of 6 January 1989[7]). Those mostly include the Bill of Rights of the country (freedoms and liberties, etc.) and the rules that determine the respective competences of the federal State, the communities and the regions. Other institutional provisions are therefore excluded from the scope of action of the Court. As a result, the latter is protected in advance against some attempts that would be too political since the most politically and institutionally sensitive articles of the Belgian supreme text are not entrusted to the Court for safekeeping. For instance, one of the cornerstones of the Belgian executive branch is that the federal Government must comprise as much French-speaking ministers as Dutch-speaking ones (article 99 of the Constitution). This latter provision is unaccountable before the Constitutional court. One must therefore bear in mind that the need for 'deference' in Belgium is at least in part attenuated by the fact that the Court itself is legally bound in its jurisdiction. Beyond this first aspect, there is no specific normative prohibition for the Court relating to questions of moral controversy, political sensitivity, societal controversy, the allocation of scarce resources, or substantial financial implications for the government.

3. Are there factors to determine when and how your Court should defer (*e.g.* the culture and the conditions of your state; the historical experiences in your state; the absolute or qualified character of fundamental rights in issue; the subject matter of the issue before the Court; whether the subject-matter of the case involves changing social conditions and attitudes)?

One might claim that a lot is put in place as to encourage deference. First and foremost is the fact that the composition of the Court is drawn from the political world, directly or indirectly. Half the judges must be former members of Parliament, and all of them are appointed by Royal Decree on proposal of the House of Representatives or the Senate in a way that guarantees the political representativeness resulting from the elections by proportional suffrage. If we add to this the fact that Belgium is divided between eight different entities, with (almost) every conceivable political coalition, it means that no judge is in a position where her or his political ideology is forever unfavoured by the law. Furthermore, there is the historical fact that large reforms (especially State reforms) in Belgium take time (see the 541 days for the one in 2010-2011) and are the result of a wide-ranging political consensus. A politically and electorally pluralistic country might be more prone to deference. Additionally, the jurisdiction of the Court

[6] An English version of the Constitution is available on the website of the House of Representatives: https://www.lachambre.be/kvvcr/pdf_sections/publications/constitution/GrondwetUK.pdf.

[7] An unofficial English version of the Special Law on the Constitutional Court is available at this url: https://hdl.handle.net/2268/305658 (pp. 48-70). The Special Law will be referred to as the SLCC in the rest of the report.

is specifically limited with regard to certain areas that might typically be susceptible to greater deference (see question 2).

4. Are there situations when your Court deferred because it had no institutional competence or expertise?

See answer to question 2. It is clear that expertise does not play a major role in the way the Court operates or reasons. However, a formal possibility of investigating and seeking out proper experts exists in the organic law, even if those provisions are rarely if never used (articles 91 and 94 of the SLCC). In any case, the Court always takes time to clear up any factual issues, however complicated, before deciding. The Court may address questions to the parties, who then have the responsibility to provide the necessary information. See for instance a case concerning the prohibition, for men who have sexual intercourse with men, to donate blood. In this case, the Court asked the parties questions regarding the safety measures that might be necessary to guarantee safe donation[8]. In two other recent cases involving medical expertise, regarding covid safe tickets[9] and transgender law[10], the Court was more deferential for the first one and less so for the second, regardless of any issue of expertise.

5. Are there cases where your Court deferred because there was a risk of judicial error?

The concept of 'judicial error' is in itself unknown to the case-law of the Court. Two things must nevertheless be pointed out. First, the Court always takes great care to assemble all relevant facts and information (see question 4). Second, criminal matters, where we most generally speak of 'judicial error', call for specific scrutiny in the Court's case-law. In particular, the Court is more generous in granting the condition of interest in the action where the claimant or the party to the original dispute is (or could be) subject to criminal law.

6. Are there cases when your Court deferred, invoking the institutional or democratic legitimacy of the decision-maker?

We found no trace of any explicit mentions of the democratic legitimacy in such a context, however, this is obviously one of the considerations underlying any reference to a large margin of appreciation of the legislator, especially in the light of the fact that the Court's competence is limited to legislative acts. The paradigmatic example of a domain where the Court recognises a 'large margin of appreciation' to the legislator is the socio-economic policy in general and tax law in particular, for which there is extensive case-law (see eg case nr 56/2022). But there are other instances in which the Court does make such a stance: the law of nationality (eg case

[8] CC 26.09.2019, nr. 122/2019, ECLI:BE:GHCC:2019:ARR.122.
[9] CC 17.05.2023, nr. 75/2023, ECLI:BE:GHCC:2023:ARR.075. See e.g. B.41.3.2. on the 'scientific consensus'.
[10] CC 19.06.2019, nr. 99/2019, ECLI :BE:GHCC:2019:ARR.99.

nr 79/2022), road safety regulations (eg nr 134/2021), the organisation of municipal emergency services (eg case nr 5/2016), notice periods under employment law (eg case nr 98/2015), the status of military personnel (eg case nr 40/2015) or police personnel (eg case nr 79/2011), etc. In practice, the legislator's margin of appreciation determines the general framework of the Court's review, rather than the review, as such, of the proportionality of the measure. A priori, the review of proportionality remains the same as regards its nature, but the Court simply announces its restraint, since it will limit itself to censuring what is manifestly unreasonable or manifestly disproportionate.

As for the democratic aspect of an adopted law, with the obvious exception of the application of the principle of legality attached to certain provisions (for instance article 23 of the Constitution or the rule *nullum crimen sine lege*), the case-law of the Court does not show a clear-cut and systematic deference rule whether the legislation challenged has been adopted by a more or less wide majority of the relevant assembly. For example, a regulation relating to ritual slaughter of animals, unanimously voted by the Walloon Region parliament, was validated by the Court but with some caveats[11].

7. "The more the legislation concerns matter of broad social policy, the less ready will be a court to intervene". Is this a valid standard for your Court? Does your Court share the conception that questions of policy should be decided by democratic processes, because courts are unelected and they lack the democratic mandate to decide questions of policy?

There are different layers in this question. On the one hand, the case-law of the Court often mentions the 'margin of appreciation' of the democratic assemblies of the country. For instance, the Court refuses to assess the intrinsic seriousness of a criminal offense (see eg the case on the absence of statute of limitations for sexual offences against minors[12]), or the opportunity to create a new tax (see question 6). The Court reserves pure questions of policy to the legislative branch and acts if those go beyond what is considered reasonable (vis-à-vis the principles of equality and non-discrimination, among others). On the other hand, the Court rarely (if ever) acknowledges its 'unelected' status to defer. Nor does it use a so-called 'broad social policy' distinction to do so. There are numerous examples of strict or more lenient (or marginal) review for different 'broad social' issues, so no fixed trend can be inferred.

8. Does your Court accept a general principle of deference in judging penal philosophy and policies?

There is no general principle of deference in judging penal philosophy and policies. On the contrary, case-by-case review is the rule. However, the 'margin of appreciation' in criminal

[11] CC 30.09.2021, nr. 117/2021, ECLI :BE:GHCC:2021:ARR.117.

[12] CC 09.06.2022, nr. 76/2022, ECLI :BE:GHCC:2022:ARR.76.

cases has been largely studied by Belgian legal scholarship. In general, criminal laws are reviewed in a more lenient way, for instance when the legislator decides to create a new offense or chooses to aggravate the severity of punishments[13], or in a more strict way when assessing the conformity of criminal laws with articles 6 and 7 ECHR[14].

9. There may be narrow circumstances where the government cannot reveal information to the Court, especially in contexts of national security involving secret intelligence. Has your Court deferred on national security grounds?

The fact that the Court seldom deals with concrete matters does not offer much to answer the question. However, those circumstances, should they arise, shouldn't be an obstacle for the Court to ask whatever document or information required by the case. Article 91 of the organic law states that "The Court has the widest powers of inquiry and investigation" and can "obtain from any public authority all documents and information relating to the case". Case-law of the Belgian Council of State regarding the licensing of heavy weapons to Saudi Arabia, stating that the Government must provide all unredacted documents to the jurisdiction (even when they cannot be transmitted to the parties for security reasons), could be applied by analogy by the Constitutional court should it be necessary[15].

10. Given the courts' role as guardians of the Constitution, should they interfere with policies stronger (apply stricter scrutiny) when the governments are passive in introducing rights-compliant reforms?

In several cases, the Court has explicitly taken into account that the legislator had framed a contested provision as a specific rights-compliant reform, to conclude that in the light of this specific aim, the reform did not go far enough. For instance, regarding the provision that allowed the use of double family-names (from both parents), this provision was explicitly framed by the legislator to ensure equality between women and men. In that context, the Court concluded that the rule that, in case of disagreement between the parents, the father's name would always come first, was unconstitutional[16]. A similar reasoning was applied when the rules regarding the gender mentioned on birth certificates were changed, without taking into account non-binary people[17]. More broadly, the Court will be more inclined to point to the passivity of the legislator where this concerns Belgium's positive obligations under European or international law. However, no clear trend can be spotted.

[13] Eg CC 13.07.2005, nr. 125/2005, ECLI :BE:GHCC:2005:ARR.125.

[14] See for instance O. MICHIELS, *La Jurisprudence de la Cour constitutionnelle en procédure pénale : le Code d'instruction criminelle remodelé par le procès équitable ?*, Anthemis, 2015.

[15] Belgian Council of State, 14.06.2019, nr. 244.800.
[16] CC 14.01.2016, nr. 2/2016, ECLI:BE:GHCC:2016:ARR.2
[17] CC 19.06.2019, nr. 99/2019, ECLI :BE:GHCC:2019:ARR.99.

II. The decision-maker

11. Does your Court pay greater deference to an act of Parliament than to a decision of the executive? Does your Court defer depending on the degree of democratic accountability of the original decision maker?

Given the limits of the Court's jurisdiction (except some specific exceptions that have yet to happen in practice, only legislative acts can be contested before the Court, art. 142 of the Belgian Constitution), this question does not arise.

12. What weight gives your Court to legislative history? What legal relevance, if any, should parliamentary consideration have for the judicial assessment of human rights compatibility?

The parliamentary preparatory documents feature prominently in the decisions of the Court, as a starting point to evaluate the presence of a legitimate aim, and to evaluate the justification of a certain provision. In Belgium, the opinion of the Legislative Section of the Council of State on draft legislation is also required in many instances, and the Court pays particular attention to this opinion as well as the reaction (or lack thereof) of the legislator to this opinion. Moreover, the Court also considers the provision in its larger historical context, as many newer provisions of course build on or modify existing legislation or systems. There is a very famous precedent in the case-law of the Court when historical weight was considered against questioning an existing legislation, although probably unconstitutional. This is the case in Belgian labour law of the (former) distinction between 'workers' and 'employees'. Asked about this quite clear inequality, the Court accepted the weight of legislative history to validate the legislation. However, ten years or so after this judgement, when asked the same question, the Court reassessed the balance between history and equality and finally favoured the latter, by declaring the law unconstitutional[18].

13. Does your Court verify whether the decision maker has justified the decision or whether the decision is one that the Court would have reached, had it itself been the decision maker?

The former. Broadly, in most cases and when there are no more specific requirement (for instance based on ECtHR-case law but also on specific requirements mentioned in the Constitution), the Court evaluates whether a certain choice by the legislator is reasonably justified. It concludes to a violation when there is no reasonable proportionality between the goals of the legislator, the chosen measures and their consequences. Also, in several cases, the

[18] CC 02.02.2016, nr. 86/2016, ECLI:BE:GHCC:2016:ARR.86.

Court explicitly mentions that, although several constitutional options are available, it does not have the authority to make that choice[19].

14. Does your Court defer depending on the extent to which the decision or measure was preceded by a thorough inquiry regarding compatibility with fundamental rights? How deep must the legislative inquiry be, for example, before your Court will, eventually, give weight to it?
15. Does your Court analyze whether the opposing views were fully represented in the parliamentary debate when adopting a measure? Is it sufficient for there to be an extensive debate on the general merits of the legislation or must there be a more targeted focus on the implications for rights?
16. Is the fact that the decision is one of the legislature's or has come about after public consultation or public deliberation conclusive evidence of a decision's democratic legitimacy?

We would like to answer these questions together. The Court consistently states that it has no jurisdiction with regard to the way the contested provisions were adopted (unless it concerns the rules regarding the distribution of powers amongst the different legislators within the federal system)[20]. This includes the fulfilment of certain criteria regarding special majorities, the obligation to consult the Council of State, etc. Recently, the Court has however concluded that obligations resulting from European Union law (such as mandatory participation regarding environmental law or mandatory consultation on privacy matters) do enter the scope of its competence[21].

Of course, extensively motivated parliamentary documents might make it easier for the Government to defend a certain provision, but the Court has also concluded that the fact that a certain argument is not mentioned in these documents, does not keep the Government from raising it before the Court. [22]

III. Rights' scope, legality and proportionality

17. Has your Court ever deferred at the rights-definition stage, by giving weight to the government's definition of the right or its application of that definition to the facts?

The Court naturally avoids playing with words and relies first and foremost on either the common-sense definition or the official definitions of the legal concepts (whether enshrined in

[19] CC 19.06.2019, nr. 99/2019, ECLI :BE:GHCC:2019:ARR.99.
[20] For instance CC 26.09.2019, nr. 121/2019, ECLI :BE :GHCC :2019 :ARR.121.
[21] For instance CC 28.02.2019, nr. 33/2019, ECLI:BE:GHCC:2019:ARR.33; CC 15.06.2023, nr. 92/2023, ECLI:BE:GHCC:2023:ARR.92.
[22] For instance CC 22.12.2010, nr. 160/2010, ECLI:BE:GHCC:2010:ARR.160; CC 27.10.2022, nr. 138/2022, ECLI:BE:GHCC:2022:ARR.138.

the law or deduced from the parliamentary debates). However, definitions do not always benefit the public authorities and the Court is careful not to use a definition in such a way as to deny potential applicants access to constitutional justice. For instance, the Court granted standing to an applicant using the definition of "riverside owner" in the common sense, against the alleged definition of the Government[23].

18. Does the nature of applicable fundamental rights affect the degree of deference? Does your Court see some rights or aspects of rights more important, and hence more deserving of rigorous scrutiny, than others?

Quite a vast question, that would require something like a doctoral thesis… In fact, in June 2023, a PhD has been submitted concerning the intensity of review in the jurisprudence of the Belgian Constitutional Court, by Benjamin Meeusen a researcher at Ghent University. However, the defence as well as the publication will take place after the deadline for the submission of this report. The Court awaits his conclusions with great interest.

Less directly, we could remark that the Court operates a kind of classification of rights based on their importance, as part of the case-law concerning the condition of interest to the action or standing. A person has to prove an 'interest to annulment' and the Court considers that certain rights are so important that everyone has standing. *Habeas corpus* is one of them. However, the impact of this reasoning is somewhat limited, as the Court is generally quite lenient when it comes to standing-requirements anyway.

19. Do you have a scale of clarity when you review the constitutionality of a law? How do you decide how clear is a law? When do you apply the *In claris non fit interpretatio* canon?

The *In claris non fit interpretatio* canon does not apply before the Court. Since the Court deals with a type of litigation that could be said objective (focused on the law) rather than subjective (focused on interests), vagueness does not prevent the Court from performing its Constitutional duty. In practice, the judges and their clerks carry out all the necessary additional research where information or arguments are lacking.

20. What is the intensity review of your Court in case of the legitimate aim test?

To our knowledge, the Court has never concluded that a certain provision failed the legitimate aim test.

[23] CC 19.06.2019, nr. 99/2019, ECLI:BE:GHCC:2019:ARR.99.

21. What proportionality test employs your Court? Does your Court apply all the stages of the "classic" proportionality test (*i.e.* suitability, necessity, and proportionality in the narrower sense)?

The Court indeed applies the three stages of the classic proportionality test, but these are sometimes indistinguishable or aggregated. There is no fixed rule, the Court operates on a case-by-case basis. Most of the times, the Court goes all the way to the proportionality in the narrower sense and either does not address the previous stages, or performs a light check. However, there has been some rare cases in which the Court points an issue with the suitability or the necessity.

22. Does your Court go through every applicable limb of the proportionality test?

Not always explicitly. The Court usually reminds the reader of the existence of the criteria and their theoretical implications, but sometimes concerns regarding readability or clarity require a less rigid approach in how the actual application of the test is presented (for instance when the test is applied several times within the same decision, regarding different provisions).

23. Are there cases where your Court accepts that the impugned measure satisfies one or more stages of the proportionality test even if there is, on the face of it, insufficient evidence to show this?

We could not find any such cases. See also our answer to question 2.

24. Has the inception of proportionality review in your Court's case-law been concomitant with the rise of the judicial deference doctrine?

See our answer to question 26. Additionally, the Court is relatively young (1985 for its first case), and proportionality review (explicitly or implicitly) has always featured heavily in its case-law, so it might be difficult to speak of a period before the inception of proportionality review

25. Has the jurisprudence of the ECtHR shaped your Court's approach to deference? Is the ECtHR's doctrine of the margin of appreciation the domestic equivalent of the margin of discretion your Court affords? If not, how often do considerations regarding the margin of appreciation of the ECtHR overlap with the considerations regarding deference of your Court in similar cases?

The ECtHR's doctrine of the margin of appreciation focuses on allowing Member States to guarantee Convention rights in the best possible way at domestic level. This doctrine restricts the margin of appreciation as the legal culture between States is harmonised. While the Belgian Constitutional Court draws on the case law of the ECtHR to review the conformity of laws submitted to it with the standards of the Convention that are similar to those of the Constitution, its underlying philosophy for leaving a margin of appreciation to the legislature, whether federal or federated, is different. See question 6.

26. Had the ECtHR condemned your State because of the deference given by your Court in a specific case, a deference that has made it an ineffective remedy?

There are no such decisions.

IV. Other peculiarities

27. How often does the issue of deference arise in human rights cases adjudicated by your Court?

It is very logical that in a lot of cases, the government defending the contested provisions will at least try to argue that the legislator has a large margin of appreciation in the subject matter. However, regarding the answer of the Court, we would like to refer to our answers on the questions in title I.

28. Has your Court have grown more deferential over time?

To answer this question, it might be possible to look at the annual reports (published on the website[24]) and check the ratio of annulment/rejection and unconstitutionality/constitutionality, while placing a caveat as to the simplistic and reductive aspect of only looking at quantitative figures. However, the relatively limited number of cases before the Court make any basic statistical analysis of these results highly susceptible to outliers. As for a qualitative assessment, it is not possible to do so within the context of this report.

29. Does the deferential attitude depend on the case load of your Court?

[24] https://www.const-court.be/fr/court/publications/annual-reports.

Again, and referring to the previous question, answering this question correctly would require a level of quantitative and qualitative analysis that goes beyond the scope of this report, and does not happen systematically within the Court either. Moreover, because of the way the cases are assigned to the judges and their collaborators, the individual case load for the people writing the first drafts of the decisions, can vary a lot at any given time and is not necessarily reflective of the total caseload of the Court.

30. Can your Court base its decisions on reasons that are not advanced by the parties? Can the Court reclassify the reasons advanced under a different constitutional provision than the one invoked by the applicant?

According to article 90 of the organic law, the Court can indicate the arguments it would like to raise ex officio, in addition to the ones raised by the parties. It happens very seldom.

31. Can your Court extend its constitutionality review to other legal provision that has not been contested before it, but has a connection with the applicant's situation?

The Court might, in some occasions, conclude that a provision that is not explicitly contested, is intrinsically linked with the contested provision, and therefore the former has to be included in the annulment of the latter[25]. This reasoning is however more linked to the internal logic of the contested law, and less to the applicant's situation.

[25] The Court has done so very explicitly, by first confirming that certain provisions have not been contested by the parties, to then conclude that, these provisions should nevertheless be included in any potention annulment, due to their intrinsic link with the contested provisions. CC 19/11/2020, nr. 154/2020, ECLI:BE:GHCC:2020:ARR.154.