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Preliminary Survey

BELGIUM

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1. What are the conditions of access to a court in environmental litigation in your country or jurisdiction ?[1]

Constitutional Court

The *Constitutional Court* (www.const-court.be) has the exclusive power to review federal and regional legislative acts for compliance with the rules that determine the respective powers of the Federal State, the communities and the regions. The Constitutional Court is also competent to decide on any violation by acts of the federal or regional parliaments of the fundamental rights and freedoms guaranteed in the Constitution. The Constitutional Court combines its constitutional review with the review of compliance with international and European Law, including environmental law. The Constitutional Court can annul or suspend legislative acts (or part thereof). In case the lower courts have doubts about the conformity of such acts with the abovementioned rules, they must refer the case for preliminary ruling to the Constitutional Court. 7 to 9 % of the cases are concerning environmental law in the broad sense.[2]

General courts

Belgium is judicially organised (www.rechtbanken-tribunaux.be) on the basis of a territorial subdivision on four levels with a supreme court *(Court of Cassation*) for the whole country at the top. The *Court of Cassation* is the highest court of law and oversees the correct interpretation of the laws by the courts and tribunals. The 5 Belgian *Courts of Appeal* and *Labour Appeal Courts* are the appeal bodies for the courts in their jurisdiction. A Court of Appeal has 3 divisions. There are the divisions for civil cases, which hear appeals against judgments delivered in the first instance by the civil divisions of the courts of first instance and the enterprise courts. The criminal law divisions decide in criminal cases on the appeal against sentences passed by the corresponding divisions of the courts of first instance. Finally, there are the family and juvenile divisions, which handle appeals against judgments of the family and juvenile judges at the court of first instance. The Courts of Appeal of Antwerp, Ghent and Mons have chambers specialising in environmental and town planning law and a specialised Attorney-General. The Labour Appeal courts have jurisdiction in matters of social and labour law.

[1] For more information, see: https://e-justice.europa.eu/300/EN/access_to_justice_in_environmental_matters?BELGIUM&action=maximizeMS&clang=en&idSubpage=1&member=1

[2] https://www.const-court.be/public/stet/n/stet-2022-001n.pdf

A *Court of First Instance* has three divisions. The civil divisions have jurisdiction in all cases that have not been exclusively assigned to other courts of law. These divisions also rule on the appeal against judgments delivered by the Justices of the Peace and the Magistrates' Courts in civil matters. Divisions for criminal law (also called penal court or *tribunal correctionnel*), decide on offences that have not been assigned to the Magistrates' Court or the Assize Court (criminal court). They also rule on appeals against sentences passed by the Magistrates' Courts in criminal cases. The juvenile divisions (or juvenile court), rule on protective measures towards minors or take repressive measures against juvenile offenders. The Court of First Instance has general and full jurisdiction. This means that it has power to rule on all matters that are not reserved for another court of law. So the Court of First Instance tries most environmental cases, in criminal matters as well as in civil matters. It is however for the moment not mandatory to install specialised environmental chambers. Only the Courts of First Instance of Antwerp, West-Flanders, Liège, Luxemburg and Namur have formally installed a department specialised in and handling all the environmental penal cases of the district. The president of the Court of First Instance has special powers in urgent cases. He may decide in interim injunction proceedings on urgent matters. Judgments delivered by the Court of First Instance (except for cases that are already an appeal against a decision of a Justice of the Peace or a Magistrates' Court) are open to appeal before a Court of Appeal. The Labour Tribunals and Enterprise Courts have jurisdiction in cases of social and labour law and in conflicts between companies respectively.

Each canton has one *Justice of the Peace Court* (162 in total). This court stands closest to the citizens. A Justice of the Peace hears all cases where the value of the petition does not exceed 5,000.00 euro. Some of the cases of neighbourhood nuisances can be considered as environmental, dealing with issues as noise, odour or distance of plantations. In addition, the Justice of the Peace has extensive powers in rent disputes, expropriations, easements, agricultural affairs and the mentally ill. Judgments delivered by a Justice of the Peace are open to appeal before the Court of First Instance or the Company Court, depending on the type of case. *Magistrates' Courts* decide on claims for compensation for damage suffered in road accidents. Magistrates' Courts also punish traffic offences and some offences against the Forest Code, the Rural Code, the River Fishery Code and the Railway Code. Judgments are open to appeal before the Court of First Instance.

Administrative Courts

The Council of State is the supreme administrative court (www.raadvst-consetat.be). The Administrative Jurisprudence Section protects the citizen against unlawful administrative acts (individual legal acts and administrative regulations). Any natural or legal person having an interest can bring a request for annulment before the Administrative Jurisprudence Section of the Council of State against irregular administrative acts that have caused them detriment. As the highest administrative court, the Council of State also acts as a cassation body against judgments of lower administrative courts. The rulings of the Council of State are not open to appeal. A request for suspension may be brought along with a request for annulment. The Council of State may suspend the challenged decision, provided that the grounds for annulment seem valid and there is urgency. Within the Administrative Jurisprudence Section of the Council of State there are 2 Dutch-speaking chambers and 2 French-speaking chambers specialising in environmental and town planning cases. The environmental cases and town and country planning cases account for around 25 %.

The procedure for judicial review of administrative decisions by the Council of State is laid down in its basic act (*lois coordonnées sur le Conseil d'Etat)* and complementary regulations. This procedure can be used to challenge *any unilateral, final, legally binding act of a Belgian administrative authority, whether of an individual or regulatory nature* (i.e. administrative decisions in individual cases as well as executive orders and administrative regulations laying down generally applicable rules). An action for annulment of an administrative act can be

brought by any party (any natural or legal person) which has been "harmed" or has an "interest" at stake. Meeting this requirement does not pose particular problems for individual claimants (legal or natural persons) in environmental cases and the standing requirements do not vary according the type of environmental legislation concerned. Proof of actual harm is not required. A legitimate interest in the contested act is sufficient. This interest need not necessarily be based on a legally recognised subjective right. Whether a natural person has the interest required to seek judicial review of an administrative decision affecting his or her environment is essentially a factual matter, which will be judged by the Council of State based on the specific circumstances of the case. Although the notion "public concerned" within the meaning of the Aarhus Convention is not actually used as such, the case law on the criteria for standing for individual members of the public in substance comes very close to the definition of this notion in the Convention. The Council will examine whether the claimant will or may be affected by the environmental effects of the implementation of the decision. The nature and range of those effects will be taken into account. In the event of uncertainties, the decision on standing tends to be in favour of the claimant. The distance between the claimant's home and the activity that is the subject of the contested decision is an important consideration, but it is not necessarily decisive. In planning cases, e.g., the settled case-law is that any "inhabitant of the neighbourhood" has a legitimate interest to seek review of planning decisions affecting its aspect and development. There is also case law in which the Council held that a person using a forest area for recreational purposes (e.g. walking) can challenge the legality of an administrative act which will result in the deterioration of that area.

Specialised environmental administrative courts in the Flemish Region

3 The Flemish Region has two specialised environmental administrative courts: The Council for Permit Disputes (*Raad voor Vergunningsbetwistingen* https://www.dbrc.be/raad-voor-vergunningsbetwistingen) and the Enforcement College (*Handhavingscollege* https://www.dbrc.be/handhaving). The Council for Permit Disputes has competence for annulment and suspension of environmental (including town and country planning) permits. The 'public concerned' can bring a request for annulment before the Council against illegal permits. Some administrations have also standing in front of the Council. A request for suspension may be brought along with the action for annulment. The Council can suspend the challenged decision if the grounds for annulment are found to be valid and if there is an urgency. The Council for Permit Disputes has the power to decide on the suspension and annulment of permits. The Council also has the competence to impose an injunction on administrative authorities. In rare cases and only if the administrative authority has circumscribed powers, the Council can make a decision instead of the administrative authority. The Council can also decide on mediation on demand of the parties.

Infringements of environmental law are often sanctioned through administrative fines. These administrative fines can be challenged before the Enforcement College. The appeal has a suspensive effect. The Enforcement College can annul and substitute a decision of the government agency. The Council of State acts as an appeal (cassation) body against judgments of the Enforcement College.

Standing

Administrative Courts

As standing of NGOs is concerned, the jurisprudence of the Council of State that had been developed in a strict way in the past, has been relaxed more than a decade ago under the influence of the case-law of the Constitutional Court, the CJEU and the ECtHR and brought into line with the Aarhus Convention. Since a judgment of the general assembly of the Council of State of 2008 (Council of State, N° 187.998, 17 November 2008, *Coomans*), the Council is

using the formula of the Constitutional Court concerning standing requirements for NGO's, in stating that a non-profit organization that has legal personality (*association sans but lucratif*) has standing if its statutory objective is of a particular nature, and thus different from that of general interest, that it is defending a collective interest, that the statutory aim can be affected by the challenged act and that it is obvious that it is pursuing its statutory objective in an active way. There are no recent cases in which an environmental NGO has been declared inadmissible. In principle foreign NGOs should be treated on equal footing, as is the case with foreign administrative authorities (Council of State, N° 239.291, 5 October 2017, *Provincie Noord-Brabant*). The Council for Permit Disputes is following the same approach (RvVb 5 September 2017, RvVb/A/1718/002, *vzw Natuurpunt*).
Organisations without legal personality have no standing, but different persons can introduce a collective demand for annulment and suspension, each of them being required to pay the court fee. The judgements of the Council of State or the Council of Permit Disputes have an "*erga omnes*" effect. So when an administrative act or regulation is annulled, everyone who would have been harmed by the act or regulation, benefits from the annulment, also when he was not a party in the procedure.

Civil and Criminal Courts

The conditions of access to the civil courts are determined by the general provisions of Art. 17 and 18 of the *Code judiciaire*, which apply both to ordinary civil actions and summary proceedings. These provisions essentially require that the claimant be able to invoke a legally recognised interest as a basis for his or her action. The notion of "interest" (*intérêt*) is not further defined by law, beyond the requirement in Art. 18 that it should be an *existing* and *actual* interest, not a hypothetical one. However, further conditions result from the interpretation of these general provisions in the case-law, which requires a "personal" and "direct" interest. Actions brought by individual plaintiffs against acts or omissions with effects on their immediate environment would normally be declared admissible, to the extent that the environmental impact is affecting or likely to affect well-established individual subjective rights such as the right to (enjoyment of) property or the right to health and personal integrity. Preventing or halting violations of environmental law to uphold such rights qualify as a personal and direct interest.[3]
The Supreme Court relaxed standing requirement for NGOs with a judgment of 11 June 2013[4]. Referring to Articles 2(4), 3(4) and 9(3) of the Aarhus Convention it stated that Belgium has engaged itself to secure access to justice for environmental NGOs when they like to challenge acts or omissions of private persons and public authorities which contravene domestic environmental law, provided they meet the criteria laid down in national law. Those criteria may not be construed or interpreted in such a way that they deny such organizations in such a case access to justice. Judges should interpret the criteria laid down in national law in conformity with the objectives of art. 9 (3) of the Aarhus Convention. According to Art. 3 of the Preliminary Title of the Criminal Procedure Code, the legal action to repair damages belongs to the victims. They shall demonstrate a direct and personal interest. When such an action is introduced by an environmental NGO and aims to challenge acts and omissions that contravene domestic environmental law, such an environmental NGO has a sufficient interest to do so.

In 2018, Article 17 of the Judicial Code was amended as follows: an action of a legal person, which aims to protect human rights or fundamental freedoms as recognized in the Constitution and in the international instruments binding Belgium, is also admissible under the following conditions: 1° the social purpose of the legal entity is of a special nature, distinct from the pursuit of the general interest; 2° the legal entity pursues this social goal in a sustainable

[3] See in relation to climate change: trib.civ._klimaatzaak.pdf (justice-en-ligne.be)
[4] Hof van Cassatie, 11 June 2013, Nr. P.12.1389.N; https://unece.org/DAM/env/pp/a.to.j/Jurisprudence_prj/BELGIUM/Crim_standing/Belgium_2013_Criminal_standing.pdf

and effective manner; 3° the legal entity takes legal action in the context of that social purpose, with a view to defending an interest related to that purpose; 4° the legal entity pursues only a collective interest with its legal action. These provisions are clearly inspired by the broad standing concept of the Constitutional Court.[5]

Right of action for the protection of the environment

The *President of the Court of First Instance* also has special powers for the protection of the environment on the basis of the Federal Act of 12 January 1993 on a right of action for the protection of the environment (*vorderingsrecht inzake bescherming van het leefmilieu*, *droit d'action en matière de protection de l'environnement*). In accelerated proceedings, the public prosecutor, an administrative authority or an environmental organization with legal personality can ask the President to order the cessation of actions that constitute, or threaten to constitute, an obvious breach of environmental law. In a judgment of 8 November 1996 (Cass., 8 November 1996, n° C.95.0206.N, *Eurantex nv / Boterstraatcomité vzw*) the supreme court considered that the purpose of the Act was not only to prevent damage to the environment, but also to ensure a viable environment for the population, so that the protection of the environment also extends to a protection of town and country planning. According to the Court, the Act not only makes it possible to order the cessation of illegal works that impair the environment, but also that the works already completed be undone, if such an injunction is necessary to prevent further damage to the environment.
The special environmental action on the basis of the Act of 12 January 1993 is normally only available for the public prosecutor, the administrative authorities (including municipalities) or environmental organizations with legal personality meeting the following requirements: their purpose is to protect the environment, their statutes define the territory to which their activities extend and they meet the conditions provided for in Article 17 of the Judicial Code. These conditions include: 1° the corporate purpose of the legal person is of a special nature, distinct from the pursuit of the public interest in general; 2° the legal person pursues this social objective in a sustainable and effective manner; 3° the legal person takes legal action within the framework of that corporate purpose, with a view to the defence of an interest related to that objective; 4° the legal person pursues merely a collective interest with the legal claim. However, article 271 of the Federal Municipal Act and its regional successors like art. 194 of the Flemish Municipality Decree – a Decree that had abolished article 271 of the Federal Municipal Act has been annulled by the Constitutional Court for violation of the *standstill* obligation of article 23 of the Constitution (Constitutional Court, N° 129/2019, 10 October 2019) – allows *one or several residents of a municipality* to act on behalf of the municipality if the mayor and aldermen fail to do so. This provision can be combined with the Act of 12 January 1993**,** so that individual citizens living in the municipality concerned are able to bring such an action themselves on behalf of a defaulting municipal authority by taking the place of the municipality that refuses to bring such an action. It follows from the joint reading of the two aforementioned Acts that if the mayor and aldermen fail to act under those circumstances, one or several residents can take legal action on behalf of the municipality in order to protect the environment. No particular interest needs to be demonstrated because the municipality is presumed to have an interest. The circumstance that residents can bring an action for cessation on behalf of the municipality if the latter fails to do so, actually gave rise to another problem. What if the municipality itself shares responsibility for the breach of environmental law by having issued an illegal permit? This matter has been settled by the Constitutional Court, which ruled that not allowing the action under such circumstances would constitute an infringement of the principle of equality and non-discrimination (Constitutional Court, n° 70/2007, 26 April 2007*, M. Lenaerts and others/n.v. 's Heerenbosch*).

[5]See in relation to climate change: https://www.justice-en-ligne.be/IMG/pdf/trib.civ._klimaatzaak.pdf , *TMR* 2021, 390-394.

2. Case Law

There is abundant environmental jurisprudence in Belgium. A legal database[6] contains 9.993 Belgian cases classified under the keyword "environmental law". Furthermore there are 10.615 cases under the keyword "land use planning". That are only judgments that have been published in legal journals or on the website of the different courts, which is only a part of the jurisprudence. There are no recent comprehensive articles or books published on the leading environmental cases in Belgium, so that the question is hard to answer. One might say that in the case law all types of environmental problems and all types of norms are present, as well as various legal principles, not only the well know environmental principles of precaution, prevention, polluter pays, integration, preference for action at source… but also the principles of good administration, proportionality, non-discrimination, etc.

Sustainable Development

Article 7b of the Belgian Constitution, the only article of Title Ib entitled: "General Policy Objectives of Federal Belgium, its Communities and Regions", was inserted in 2007, and reads as follows: "In the exercise of their respective powers, the Federal State, the communities and the regions pursue the objectives of *sustainable development*, in its social, economic and environmental dimensions, taking into account *solidarity between generations*."

This provision is the only provision providing a general objective which appears in the Belgian Constitution and therefore a political objective with constitutional value which, in accordance with the hierarchy of legal norms, must be deemed to take precedence over other political objectives which do not appear in the Constitution (or in higher international or European standards).

The concept of sustainable development has deliberately not been defined in more detail by the constituent assembly. It did not want to exclude an interpretation of the concept which evolves over time. It emerges from the parliamentary preparatory work that the concept must be further developed, taking into account authoritative texts at international level such as the Brundtland report and the documents adopted at the Rio conference, in particular the Rio Declaration and the principles it contains, as well as European treaties and relevant policy documents. It seems to me that since then we must add the Sustainable Development Goals adopted on September 25, 2015, by all UN Member States, to those sources.

Although the concept of sustainable development is not defined in the Constitution, its three aspects or dimensions, often called "pillars", are mentioned: the social, economic and environmental dimensions. According to the *travaux préparatoires*, this means ensuring a balance between these pillars and their integration, both vertically and horizontally. No mutual hierarchy between the three dimensions has been determined.

The text specifies that, in the exercise of their powers, the various authorities must take into account intergenerational solidarity, which means that not only the interests of current generations must be taken into account (so-called intragenerational solidarity), but also those of future generations (known as intergenerational solidarity). The provision applies to all authorities, whether they exercise legislative, executive or judicial power.

What legal consequences can be attached to the insertion of this provision in the Constitution? First, the constituent deliberately chose to insert a new title in the Constitution rather than including the said provision in Title II thereof, relating to fundamental rights. It was affirmed that

[6]The Jura database from Wolters Kluwer, https://jura.kluwer.be/secure/Home.aspx

the line of conduct is thus binding on the public authorities, without being the source of a subjective right. One wanted to prevent a subjective right from being created. This also has as a consequence that the respect of this provision by the various legislators cannot be controlled directly by the Constitutional Court. Although the Belgian Constitutional Court is not competent to directly review laws, decrees and ordinances vis-à-vis this provision - which is the case, among other things, for the rights and freedoms enshrined in Title II of the Constitution - the question was raised whether this could not be done indirectly, in particular when this provision is combined with constitutional provisions over which the Court has a right of direct control. We think e.g. of Articles 10 and 11 (equality principle and prohibition of discrimination) but also Article 23, of the Constitution, concerning economic and social rights, including the right to the protection of a healthy environment.

The Constitutional Court has indeed embarked on this path. In its judgment no. 75/2011,[7] responding to a preliminary question from the Ghent Criminal Court in which the Court was asked to review regional provisions vis-à-vis Article 23 whether or not combined with Article 7b, it ruled:

"Under the terms of Article 142, paragraph 2, of the Constitution and Article 26, § 1, of the special law of January 6, 1989, the Court is competent, by way of a preliminary ruling, to rule on questions relating to the violation, by a law, a decree or a rule referred to in Article 134 of the Constitution, of the rules established by or by virtue of the Constitution to determine the respective competences of the State, the communities and the regions, or articles of title II "The Belgians and their rights", and articles 170, 172 and 191 of the Constitution, as well as to questions concerning any other conflict resulting from the respective scope of application of the decrees or regulations referred to in Article 134 of the Constitution, which emanate from different legislators.

Article 7b of the Constitution was inserted by the constitutional provision of 25 April 2007 in a new title Ibis entitled "General policy objectives of federal Belgium, of the communities and of the regions". The Court is not competent to rule directly on the compatibility of the provisions in question with this constitutional provision. »

But the Court may nevertheless *take into account* Article 7b in the constitutional review for which it is expressly competent, and therefore exercises an indirect review.

After the Court ruled in Judgment 75/2011 that the provisions did not violate Article 23 of the Constitution, it added: "Taking into account Article 7b of the Constitution does not lead to a different conclusion. The objectives of sustainable development mentioned in this provision cannot, solely on the basis of this provision, be determined with the precision required for judicial review, as far as spatial planning policy is concerned. Indeed, since this provision does not indicate how the 'social, economic and environmental' dimensions linked to it must be balanced, the competent authority has a wide discretion in the matter. »

Given the relatively ambiguous content of the concept of sustainable development, even if it is interpreted in the light of authoritative international documents and the principles they are supposed to contain, judicial review is not without difficulty. The different dimensions of the concept can thus enter into conflict and the question arises as to which dimension should be privileged in such a case, since the Constituent has precisely indicated that there is no hierarchy between these dimensions. It is primarily up to the competent authorities to make this assessment, and it is difficult to see how the constitutional judge can censure this assessment without taking the place of the legislator or the administration, except in the event of a manifest error of assessment. Accordingly, substantive judicial review of legislation and policy under Article 7b will be difficult, but arguably not excluded in exceptional cases. Although substantive review of legislation and policy under Article 7b is not easy, it cannot be excluded

[7] https://www.const-court.be/public/f/2011/2011-075f.pdf

that there is judicial review of this provision in the area of policy preparation, more precisely at the procedural level. When legislation and policies with an impact on sustainable development are enacted, the competent judge could consider whether, when preparing the decision, sufficient attention was given to the possible effects of the proposed policy on the various dimensions of the sustainable development, including the long-term consequences and therefore on the interests of future generations. If it appears that no attention has been paid to it or that only one dimension or another has been considered, without paying attention to the other dimensions and aspects, this could constitute a violation of the said provision. In this regard, it is interesting to point out that important decisions taken at the federal level must be subject to a prior regulatory impact analysis, including those related to sustainable development. The impact analysis is organized by title 2, chapter 2 of the law of 15 December 2013[8]. But attention to the interests of future generations is weak in the relevant guidelines.

So far, the Constitutional Court has referred in 21 judgments to Article 7b of the Constitution, sometimes ex officio. Most of the judgments have been delivered in environmental matters, but there is also a judgment on budgetary policy (judgment 62/2016), a judgment on pension reform (judgment 104/2017) and one on public companies (judgment 38/2018). This last judgment confirms that the Court cannot directly review compliance with Article 7b. In some of these judgments, the Court annuls contested provisions on the basis of Article 23 of the Constitution read in conjunction with Article 7b. This is the case for judgments 114/2013, 12/2016, 129/2019 and 131/2019. In most cases, the Court rejects the applications for annulment or does not find a violation (8 cases). In some cases, article 7b does not seem to play a role in the decision (judgments 125/2016, 58/2017, 13/2018 and 11/2020). In quite a few cases, the reference to article 7bis serves to contribute to the justification of the challenged norm and therefore to a rejection of the appeal or a finding of no violation (judgments 62/2016, 104/2017, 95/2018, 60/2021, 115/2021).

An explicit reference to future generations is present in four judgments, judgment 62/2016 on budgetary policy, judgment 104/2017 on pension reform, judgment 115/2021 on spatial planning and judgment 147/2022[9] on energy and climate policy.

In this last case the Court had to check whether the rules regarding phasing out of fossil oil-based heating of housing, were compatible with the Articles 10 and 11 of the Constitution, in conjunction with art. 34 TFEU (interdiction of measures equivalent to quantitative restrictions). The Court refers ex officio to Art 7b of the Constitution and judged: “Undoubtedly, the Flemish, Belgian and European reduction targets [concerning the emission of GHG] would be even better achieved, if the contested measure was not limited to the placement and replacement of oil boilers, but would also prohibit the installation and replacement of natural gas boilers. Given the impact of such an injunction on, primarily, the owners of existing installations, it is not unreasonable to opt for a partial phasing out of fossil heating installations, in the first place the most polluting installations are targeted, and at the same time an economically feasible alternative to those owners. Since from the study referenced in the parliamentary preparation [….] reference shows that the CO2 emission factor for fuel oil is about 32% higher than that of natural gas, and 15 to 18 % higher than that of propane and butane gas, as well as that the NOx emissions from a new fuel oil boiler are still about 45% higher than the emissions from a new natural gas boiler, and since in 2018 more than 90% of the buildings were connectable to the natural gas network, the legislator was able in a first phase to opt for a ban on the installation of fuel oil boilers and the replacement of one oil boiler by another oil boiler, when a natural gas network is available in the street.
In view of the discretion that should be left to the competent legislator in this regard and because of the a priori reasonable character of the elements on which he has based its action, it is not to the Court to challenge the legislature's analysis for the sole reason that other studies

[8] https://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&cn=2013121534&table_name=loi
[9] https://www.const-court.be/public/f/2022/2022-147f.pdf

put forward by the applicants, regardless of whether those studies are representative, would allow us to draw a different conclusion.
Incidentally, it appears that the legislator has already made a start with the implementation of the next phase in the fossil phase-out heating installations. After all, Article 4.1.16/2 of the Energy Decree contains a prohibition on the connection to the natural gas distribution network of residential and non-residential buildings for which an environmental permit is filed from 1 January 2025 onwards."[10]

Till now, in the Belgian jurisprudence only the Constitutional Court seems to have referred to art. 7b of the Constitution. However, there is also a lot of specific legislation, that refers to sustainable development and the interests of future generations. E.g. the Flemish Spatial Planning Code in is Article 1.1.4.states: "Spatial planning is aimed at *sustainable* spatial development in which space is managed for the benefit of the current generation, *without compromising the needs of future generations*. The spatial needs of the various social activities are simultaneously weighed against each other. The spatial carrying capacity, the consequences for the environment and the cultural, economic, aesthetic and social consequences are taken into account. In this way, the aim is to achieve spatial quality." Article 1.2.1 of the Flemish Decree on general rules on environmental policy stipulates: "For the benefit of current *and future generations*, environmental policy aims to: 1° the management of the environment through the sustainable use of raw materials and nature; 2° the protection against pollution and extraction of people and the environment, and in particular of ecosystems that are important for the functioning of the biosphere and that relate to food supply, health and other aspects of human life ; 3° the conservation of nature and the promotion of biological and landscape diversity, in particular through the conservation, restoration and development of natural habitats, ecosystems and landscapes of ecological value and the conservation of wild species, in particular those endangered, vulnerable, rare or endemic.". Similar provisions can be found in the legislation of the other regions. In administrative jurisprudence there is plenty reference to those provisions. E.g. the concept of sustainable development (in French or Dutch) is mentioned in more than 1.800 Council of State judgements, while future generations are mentioned in over 250 judgments. A similar picture can be found in the jurisprudence of the Council for Permit Disputes An analysis of what has been the role of those concepts in the jurisprudence is however lacking.

Right to the protection of a healthy environment

The right to the protection of a healthy environment forms part of the economic, social and cultural rights which have been enshrined in the Belgian Constitution since 1994 and which can be found now in Article 23 of the Constitution. The review of respect of that provision by the federal and regional legislators by the Belgian Constitutional Court is chiefly carried out on the basis of the so called *standstill obligation or non-regression principle*, that has been derived from that constitutional provision and that itself, be it in other matters, stems from international law, more precisely Article 2(1) of the International Covenant on Economic, Social and Cultural Rights.

By the standstill effect is meant that the level of protection as realised in the legal system at a given moment must not be reduced. The principle is interpreted in a flexible way by the Court. A non-significant regression is not prohibited. A significant regression does not automatically result in an infringement of Article 23 of the Constitution. That is only the case in the absence of reasons connected with the public interest. So, the Court will check if the reasons invoked

[10] L. Lavrysen, The interests of future generations in the case law of the *Bundesverfassungsgericht*, the *Conseil Constitutionelle* and the Belgian Constitutional Court, paper, Joint Workshop of ELTE University and Aarhus University, Budapest, 8-9 June 2023.

by the legislator to lower the level of protection can be justified or not. A reason e.g., that is incompatible with international or European law does not qualify to justify a significant regression of domestic environmental law.

The first time the Court annulled a legislative provision because of the violation of the right to the protection of a healthy environment was a case (judgment 137/2006)[11] in which a regional town and country planning law was deemed to be contrary to the EU Directive on Strategic Environmental Assessment and Article 7 of the Aarhus Convention. In its judgment 125/2016[12] the Court annulled a provision providing the transformation of environmental permits that were under the previous legislation limited in time into licenses for an indefinite period without the obligation to carry out an appropriate assessment according to the EU Habitats Directive, for violating Article 23 of the Constitution in conjunction with the Habitats Directive. In its judgment 57/2016[13] the Court annulled some provisions of an amendment of a regional nature protection law for violation of Article 23 of the Constitution and Article 7 of the Aarhus convention by not providing public participation for the establishment of some nature management plans. In that case, however the standstill obligation was not at stake.

In total, the Court has held in 9 environmental cases that the standstill obligation was violated, and the majority of those cases have been judged since 2019.

The majority of the actions for annulment that are brought before the Court *against* federal or regional environmental legislation are instituted by enterprises or business associations, who believe that new environmental legislation constitutes an excessive infringement of their fundamental rights. Besides a far-reaching infringement of property rights, an infringement of the freedom of commerce and industry (or the freedom of enterprise) is invoked in particular.

What emerges from the case law is that the Constitutional Court has no intention whatsoever of counteracting the development of environmental law. So far, the Court has always considered the restrictions on ownership resulting from the challenged environmental laws to be justified and not disproportionate to the objectives of the public interest pursued, even though when the (at times far-reaching) ownership restrictions did not give rise to compensation from the government. The fact that the right to protection of a healthy environment is recognised in the Constitution is off course of great importance when the Court has to balance it against rights that are not as such in the Constitution.

The Court also argues that the freedom of commerce and industry in Belgium is not unlimited, and that an effective environmental policy necessarily implies that activities, which cause environmental nuisances, are monitored and regulated. In the Court's view, there can only be an infringement of the aforementioned freedom if restrictions are imposed without there being any necessity for doing so, or if the restriction is completely disproportionate to the objective being pursued. Nearly all restrictions introduced by environmental legislation have so far been deemed compatible with the freedom of commerce and industry clause. Recent examples include the interdiction to use cars that do not meet emission standards that become stricter over time in low emission zones introduced by the regions (judgments 37/2019 and 43/2021) or the introduction of additional measures to reduce the pollution of water by nitrates due to the use of manure as a fertilizer (judgment 19/2021).[14]

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[11] https://www.const-court.be/public/f/2006/2006-137f.pdf
[12] https://www.const-court.be/public/f/2016/2016-125f.pdf
[13] https://www.const-court.be/public/f/2016/2016-057f.pdf
[14] L. Lavrysen, *Environmental cases before the Belgian Constitutional Court*, paper, Workshop Courts faced with new public health, technological and environmental challenges, Constitutional Council Paris, 21 February 2022; L. Lavrysen, *Will the UNGA resolution on the human right to a clean, healthy and sustainable environment have*

In the jura database some 250 cases are included in which a reference to the right to the protection of a healthy environment is present, including more than 100 cases of the Council of State and around 40 from ordinary judges. In general they follow the interpretation of the Constitutional Court, sometimes they have a stricter interpretation of the standstill obligation.[15]

The Belgian Climate Case

The most notable case in which the interests of future generations are at stake is the Belgian climate case, initiated by a small ENGO, the non-profit organization "*Klimaatzaak*", and supported by more than 58,000 co-applicants. The case, which argues that in Belgium the federal government and the three regional authorities are failing in their climate policy, has a long history. The case was introduced the first of December 2014. It took nearly four years, till 20 April 2018 to have a final judgment of the Court of cassation on the question if the case could been conducted in French (the official language of the Flemish region is Dutch). It took another three years to obtain a first judgment of the Court of First Instance of Brussels on the 17 June 2021. The Court of First Instance of Brussels held the Belgian authorities collectively responsible for their negligent climate policy. The Court ruled that the Belgian climate policy is so substandard that it violates the legal duty of care and human rights, but it refrained from ordering a reduction in emissions, because the Court believed that such an injunction would be incompatible with the separation of powers.[16] On November 17, 2021, *Klimaatzaak* appealed the judgment of the Brussels Court of First Instance. In its judgment of 30 November 2023, the Court of Appeal held that, with regard to the climate policy that the defendants had been pursuing and implementing since the First Instance judgment and until the date of the appeal judgment, and in view of its commitments of emissions reduction of 2020 and 2030, the Belgian State, the Flemish Region and the Brussels-Capital Region had violated articles 2 and 8 of the ECHR and committed faults, within the meaning of articles 1382 and 1383 of the Civil Code. As compensation for the harmful consequences of the breaches observed, part of which has already occurred, as well as to prevent the occurrence of the future and certain damage, and to ensure the effectiveness of the protection of Articles 2 and 8 of the ECHR, the Court issued an injunction to the Belgian State, the Flemish Region and the Brussels-Capital Region to take, after consultation with the Walloon Region, the appropriate measures to do their part in the reduction in the overall volume of annual GHG emissions from the Belgian territory of at least -55% in 2030 compared to 1990[17]. The Court held that it was up to those authorities to determine, in consultation with the Walloon Region, what portion must be supported by each of them. The Court deferred its ruling on the request for penalty payments intended to guarantee the execution of the injunction pending communication, by the most diligent party, of official figures of GHG emissions from Belgium for the years 2022 to 2024, official figures which will be contained in particular in the annual inventories of GHG emissions in accordance with Article 26 of the EU Regulation EU 2018/1999 of December 11, 2018 and in the latest

an impact on the jurisprudence of the Belgian Constitutional Court and the European Court of Human Rights?, in J. Schenten, B. Brohmann, Rebecca Niebler (Hrsg.), Menschen und Moleküle in der Transformation. Festschrift Martin Führ, Sofia Berichte, Sonderausgabe, Darmstadt, 2023, p. 68-73.

[15] E.g. Raad van State 2 mei 2019, nr. 244.351, http://www.raadvst-consetat.be/Arresten/244000/300/244351.pdf#xml=http://www.raadvst-consetat.be/apps/dtsearch/getpdf.asp?DocId=39618&Index=c%3a%5csoftware%5cdtsearch%5cindex%5carrets%5fnl%5c&HitCount=2&hits=16+17+&01145420232714

[16] https://climatecasechart.com/non-us-case/vzw-klimaatzaak-v-kingdom-of-belgium-et-al/

[17] Under the EU effort sharing regulation (Regulation (EU) 2018/842 on binding annual greenhouse gas emission reductions by Member States from 2021 to 2030 contributing to climate action to meet commitments under the Paris Agreement) Belgium should reduce its emissions from non-ETS sectors with at least 47 %

NECP, updated for the years 2021-2030. The Court also invited the most diligent party to have the case re-established before the court, upon obtaining GHG emissions figures for the years 2022 to 2024 and the latest updated NECP available at that time, with a view to ruling on the request for penalty payments and on the request for production, under penalty of a fine, of the GHG emissions report of the year 2030.

Please note that one of the defending parties, the Flemish Region, has communicated that it will challenge the decision before the Cour de cassation.

In the judgment there are plenty references to future generations. In the first place, in the part in which the Court describes the facts and the context and in the part of the judgments concerning the appeal request. But the Court refers also to future generations while giving motives for its decision:

As to the decision to impose a 55 % reduction, the Court held:
"*This threshold is reasonably imposed to avoid:*
*- exposing **future generations** to the risk of major climate change that would make part of the territory uninhabitable (rising sea level, areas floodable) or present serious consequences on the economy, health and access to basic resources (heatwaves, storms, extreme rains, etc.),*
- imposing a very strong reduction in GHG emissions in the future, on a 20-year interval between 2030 and 2050.
Two hypotheses which, without a doubt, would be much more damaging for the entire Belgian population than the constraints and restrictions to be expected from a higher level of ambition right now, for 2030." (p. 127).

As the personal harm is concerned, the Court held:
"*Concerning Klimaatzaak, it was explained above in paragraph 127 that it was admissible to claim moral damages due to damage to the environment.*
As indicated above, an environmental defence association can, at least, suffer moral damage when the collective interest it defends and for which it was constituted, is jeopardised (C.C., January 21, 2016, n° 7/2016, Amén., 2016, n° 3, p. 194, B.8.1).
In this case, this association's aims are:
*- the protection of current **and future generations** against anthropogenic climate change;*
- the protection of current and future generations against the loss of biodiversity;
- the protection of the environment understood within the meaning of the law of January 12, 1993 regarding a right of action in environmental matters.
It is scientifically established that these interests are harmed by the risk of global warming. climate above 1.5°C.
The Court found that Belgian climate governance as carried out so far does not respect the minimum contribution that can be expected from Belgium, in terms of reduction of GHG emissions, to meet this risk and therefore violates both articles 2 and 8 of the ECHR as well as articles 1382 and 1383 of the old Civil Code.
This observation is sufficient to demonstrate the injury to the interests for the defense of which Klimaatzaak was formed." (p. 136-137)

On the causal link between the fault and the harm, the Court held:
"*Among the harmful effects of emissions from 1980 to the present day, the Court nevertheless retained, as being causally linked to the faults committed:*

- *eco-anxiety, a health problem which has been shown to affect part of significant portion of the population (exhibit E.22 of the appellants, study of The Lancet Countdown),*

- *moral damage resulting from conscience, on the part of the appellant parties in the main proceedings, of the insufficiency of the means implemented by the Belgian authorities to protect the **interests of future generations**,*
- *the attack on the interests defended by Klimaatzaak."*

And:
"*The court concludes that there is a causal link between the faults it identified and the damage of the appellants in the main proceedings, which consists of:*
- the phenomenon of eco-anxiety;
*- moral damage resulting from awareness of the insufficiency of the means put in place by the Belgian authorities **to protect the interests of future generations**;*
*- the loss of a chance to avoid the effects of global warming as they are already appearing today in Europe (heatwaves, droughts, floods, etc.) and will appear **in the future**;*
*- the excessive reduction of the residual carbon budget compared to what was required by good climate governance, with **future but certain consequences** that that implies;*
- affecting the interests defended by Klimaatzaak.
Without the mistakes committed, eco-anxiety would be less, as would the moral damage, the residual carbon budget would not have been impaired to the same extent, the interests of Klimaatzaak would be preserved and Belgium would be in a better position to fight effectively, in concert with other nations, against the risk of global dangerous climate warming."

3. Execution of judicial decisions

The situation is different according to the type of court decision and the contents of it. Annulment decisions of the Constitutional Court or the Council of State and of administrative courts are self-executing. The annulled act, regulation or decision, or the annulled part of it, disappears *ex tunc* from the legal order, but those jurisdictions can uphold the legal effects of the annulled act, regulation, or decision for some time in the interest of legal certainty. A declaration of unconstitutionality by the Constitutional Court by way of a preliminary ruling, is binding for the judges who have to decide in the case in which the issue was raised, and other judges should follow the ruling by dis-applying the provision at stake, but it is still part of the legal order. So often, the legislator or the executive branch of government must intervene to bring the legal order in line with the rulings of the Constitutional Court or the Council of State. While the Constitutional Court do not dispose of real sanctions to force the legislator to act, the Council of State has some sanctions at is disposal. Since the last reform of 2014, the Council of State may, at the request of a party, indicate in the reasons for its judgment annulling the measures to be taken to remedy the illegality that led to it, or order a decision be taken within a certain time if the annulment judgment implies that the authority take a new decision. The Council of State may also order a penalty payment.

Both the Constitutional Court and the Council of State can suspend the challenged acts by way of interim measures. In cases where the procedure for ordinary administrative summary proceedings are not likely to offer the applicant adequate protection of legality, a suspension procedure "of extreme urgency" is provided before the Council of State. Equivalent to an emergency application in chambers before judicial courts, this suspension procedure of extreme urgency allows for a hearing to be promptly scheduled and a judgement to be

delivered in a short span of time (a few days).[18] The Council for Permit Disputes in the Flemish region dispose of similar remedies.

In civil matters if a debtor fails to comply voluntarily with a judgment, the claimant can enforce compliance through the courts; this is known as compulsory enforcement. It requires an enforceable title (Article 1386 of the Judicial Code), because it involves an intrusion into the debtor's personal legal sphere. Such a title will usually be a judgment or a notarial deed. Out of respect for the debtor's privacy, the title may not be enforced at certain times (Article 1387 Judicial Code). The title is executed by a bailiff. Compulsory enforcement is usually used to recover money, but it can be applied to enforce performance of, or refraining from, an act. In the past the government enjoyed immunity from enforcement actions, with the result that it was not possible to attach government property. This has now been modified slightly by Article 1412a Judicial Code.

Another important aspect is the penalty payment (Article 1385a Judicial Code). This is a means of exerting pressure on the person convicted in order to encourage compliance with a judgment. A penalty payment cannot, however, be imposed in certain cases: when the person has been ordered to pay a sum of money or to comply with an employment contract and when it would be incompatible with human dignity. A penalty payment is enforced on the basis of the title providing for it and no further title is therefore required. To enforce measures, e.g. restoration measures, taken by a criminal judge also penalty payments can be provided for.

The concept of the separation of powers can however have a negative impact on the enforceability of judgments. In the case of *Klimaatzaak* the Court or First Instance of Brussels [19] found the federal state and the three regions jointly and individually in breach of their duty of care for failing to enact good climate governance. The Court found that despite being aware of the certain risk of dangerous climate change to the country's population, the authorities failed to take necessary action, meaning that they failed to act with prudence and diligence under Article 1382 of the Civil Code. Further, by failing to take sufficient climate action to protect the life and privacy of the plaintiffs, the defendants were in breach of their obligations under Articles 2 and 8 of the European Convention on Human Rights. Nevertheless, the Court of First Instance declined to issue an injunction ordering the government to set the specific emission reduction targets requested by the plaintiffs. The Court found that the separation of powers doctrine limited the Court's ability to set such targets, and doing so would contravene legislative or administrative authority. The Court explained that neither European nor international law required the specific reduction targets requested by the plaintiffs, and that the scientific report that they relied on, while scientifically meritorious, was not legally binding. The specific targets, therefore, were a matter for the legislative and executive bodies to decide.

However, as indicated above, the Court of Appeal has meanwhile given a reduction order and the Court has stayed the decision on penalty payments. The ENGO can bring the case back to the Court if the emission figures are problematic, in view of deciding on penalty payments (see above).

[18] https://www.aca-europe.eu/index.php/en/tour-d-europe-en
[19] trib.civ._klimaatzaak.pdf (justice-en-ligne.be)