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Belgian Constitutional Court Upholds the “Essential Elements” of Power Sharing Deal

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The former Belgian Prime Minister Jean Luc Dehaene found Belgium to be a schizophrenic country.^[i] (#_edn1) He argued that while for Dutch speakers (known as ‘Flemings’) the Belgian polity and its constitutional law are underpinned by the territoriality principle, for French speakers the personality principle was dominant. While the principle of territoriality binds linguistic and cultural rights to a specific territory within the country; the principle of personality allows for these rights to travel with the person. This struggle reflects deeper political interests. Flemings insist on the territoriality principle to protect Dutch as the only official language of their region. French speakers favour the personality principle, both as an expression of citizenship and power, which arises from the higher social standing of the French language. This dualism between the personality and territoriality principles gives rise to Belgium’s “split mind,” the schizophrenia diagnosed by Dehaene, and its lack of a single constitutional identity.

A recent decision of the Belgian Constitutional Court touches this politically sensitive nerve of the Belgian *polity*.^[ii] (#_edn2) The judgment has not received many comments,^[iii] (#_edn3) but it is interesting in a broader perspective for two reasons. First, it offers evidence of the judicialization of “mega politics”^[iv] (#_edn4) and its political counter-reactions. Second, it shows how constitutional courts can enflame or diffuse political conflicts between communities in pluri-national states with judicial means. Before discussing the core of the judgment, I introduce you to the complex institutional and political context that embeds the decision.

The constitution states that Belgium is a “federal state composed of [three] regions and [three] communities (Article 1);”^[v] (#_edn5) which are divided by an internal language border (Article 4). The two politically relevant communities are the French and the Dutch ones (situated in the uni-lingual regions of Wallonia and Flanders respectively). They share important competences in the administration of the third

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region, the Brussels federal capital region. Brussels is the only bilingual region in Belgium, but its population is overwhelmingly French speaking. It is surrounded by Flemish territory (including the cities of Halle and Vilvoorde), home to a significant and expanding French-speaking minority. When the language border was traced in 1963, French speakers of six linguistically mixed municipalities close to Brussels but situated in Flanders were given special language rights (the so-called “municipalities with language facilities”). The district of Brussels Halle Vilvoorde (BHV) unites Brussels with its periphery, has existed since the country’s independence, and is the only district to cross the internal language border.

BHV has been a highly symbolic dossier for both French and Dutch speakers. Prof. Patricia Popelier wrote that “[t]he francophone parties opposed the scission [of BHV] as fiercely as the Flemish parties fought for it, for strategic reasons which were hardly concealed: the maintenance of the electoral (and judicial) district would, along with facilities, help create a corridor between Wallonia and Brussels, making it easier to claim Brussels after a possible secession by Flanders.”^[vi] (#_edn6) BHV allowed both French speakers in Brussels to vote for the French-speaking minority in its periphery and Flemings from the periphery to vote for candidates of the Flemish minority in Brussels. BHV was an expression of Belgium’s schizophrenia that angered Dutch speakers, which insisted on clear internal borders in accordance with the territoriality principle.

As no political agreement for splitting BHV was possible, Flemings repeatedly challenged its constitutionality before the Court of Arbitration (which later evolved into a constitutional court). In 1994 the Court, rejecting the case, qualified BHV as essential to the delicate political equilibrium between language communities in Belgium. The Court changed its mind in 2003 in a contorted decision: it formally rejected the case but insisted on the unconstitutionality of BHV.^[vii] (#_edn7) The Court argued that, contrary to previously rejected legal challenges, the institutional framework of the country had changed. As a result of an electoral reform in 2002, every province formed a separate constituency, except for the province of Flemish Brabant. The latter was composed of the electoral districts of BHV and Leuven, but Dutch-speaking parties had a single candidate list for both constituencies. For the Court, it meant that these candidates were treated differently from candidates of all other Belgian provinces.^[viii] (#_edn8) Politicians and academics from both communities fundamentally disagreed about the meaning and the legal consequences of the judgment.^[ix] (#_edn9)

The political dispute concerning the judgment’s implementation brought Belgium to the brink of state collapse: it took nine years, the fall of one government, and 589 days of negotiations to find a solution. At the request of Flemish parties, the electoral district was split (one for bilingual Brussels; one for the unilingual province of Flemish Brabant), but, with the blessing of the Constitutional Court,^[x] (#_edn10) a special regime for French voters in the municipalities with language facilities was introduced. As a concession to French speakers, the judicial district of BHV was maintained, although certain tribunals have been split (“duplicated”) along language lines.^[xi] (#_edn11) The Flemish bar association and Flemish political movements (mainly the nationalist parties N-VA and *Vlaams Belang*)

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challenged the compromise before the Constitutional Court in 2013.

In June 2014, the Court upheld most of the law on the judicial district of BHV. The applicants challenged several elements, including the seat of courts, their competence, the linguistic quota (80% French-20% Dutch magistrates in Brussels) and the presence of French speaking magistrates in Halle Vilvoorde.[xii] (# edn12) For the defendants (government as well as French and German speaking bar associations as *amici curiae*), the challenged dispositions could not be unconstitutional, as they were part of the country’s constitutional law itself.[xiii] (# edn13)

The reform “survived” despite its many legal challenges because its essential elements had been constitutionalized. As compensation to French-speaking parties for accepting the split of the electoral district, the Constitution had been amended in 2012. Following Article 157bis, only a qualified majority in parliament could change “the essential elements of the reform concerning the use of languages in judicial matters within the judicial district of BHV, as well as related aspects regarding prosecution, seat and resort.”[xiv] (# edn14) Contrary to the advice of the Council of State,[xv] (# edn15) the legislator did not define these essential elements, so that the Court interpreted them by reference to the *travaux préparatoires* of the law.[xvi] (# edn16) The Court showed deference to the legislator; it argued that it was not competent to review a difference in treatment or a limitation of a fundamental right that the constituent power itself had adopted.[xvii] (# edn17)

Nonetheless, the Court annulled with its decision one aspect of the power-sharing compromise between French and Dutch speakers. Following the reform of the judicial district, the head prosecutor of the Brussels district (*procureur du roi/Procureur des Konings*) had to be a French speaker, with a “profound” knowledge of Dutch, while his deputy had to be a Dutch speaker with a “profound” knowledge of French. The applicants had argued that this decision violated the equality of the two language communities over Brussels (Article 4 of the Constitution), as well as the equality and non-discrimination principles. For the government, on the contrary, it was an “essential element” of the reform, which guaranteed peace and equality between language groups in Belgium. As the head prosecutor of Halle-Vilvoorde had to be a Dutch speaker, the government argued that, to respect the principle of parity, the Brussels head prosecutor needed to be a French speaker. The Court declared the compromise unconstitutional (but maintained its legal effects), because parity between language groups in a coordination committee composed by the head prosecutors of Brussels as well as Vilvoorde could not be defined as an “essential element of the reform.” The Court argued that the only those “essential elements” textually mentioned in the *travaux préparatoires* could qualify as such.[xviii] (# edn18)

The decision of the Constitutional Court allows us to draw three conclusions. First, power-sharing systems fall increasingly under the principle of strict scrutiny if they contain a direct discrimination in favor of or against one ethnicity or language group (see ECtHR cases *Sejdic and Finci v. Bosnia, Zornic v. Bosnia*). Second, political actors may react against the judicialization of “mega politics”. The Belgian legislator constitutionalized the core elements of the

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compromise between language communities in order to prevent judicial activism in this sensitive area. Third, the Court has shown that it can reach balanced decisions on difficult communitarian issues. One may speculate that the deliberations between the Court’s six Dutch and French speaking judges were long and intensive. The judgment puts a (provisional) end to the BHV saga, which the Court had itself forced on the political agenda through its decision a decade earlier.

Suggested citation: Stefan Graziadei, *Belgian Constitutional Court Upholds the “Essential Elements” of Power Sharing Deal*, Int’l J. Const. L. Blog, Jan. 28, 2015, at: <http://www.iconnectblog.com/2015/01/belgian-constitutional-court-upholds-the-essential-elements-of-power-sharing-deal/>

[i] (#_ednref1) Quoted in Jan Velears, *Territorialiteit versus personaliteit: een never ending story? Recente ontwikkelingen in de jurisprudentie van het Grondwettelijk Hof, de legisprudentie van de Raad van State en het Vlinderakkoord over de zesde staats hervorming* [Territoriality versus personality principle: a never ending story? Recent developments in jurisprudence (Constitutional Court, Council of State) and politics (Sixth reform of the State)]. In Popelier et al., *Belgie quo vadis, Waarheen na de zesde staats hervorming* [Belgium quo vadis? Whereto after the sixth state reform], 61-110, at 61.

[ii] (#_ednref2) Belgian Constitutional Court, 96/2014 of 30 June 2014, available in French, Dutch and German at <http://www.const-court.be/> (<http://www.const-court.be/>).

[iii] (#_ednref3) All I could find was one short comment in French, one press release of the Court and one blog entry on BHV more in general. Ilse Vogelaere, *La Cour constitutionnelle annule les exigences linguistiques pour le procureur du Roi et l’auditeur du travail de Bruxelles*, 24 July 2014, at http://www.legalworld.be/legalworld/m_content.aspx?mid=77714&LangType=2060 (http://www.legalworld.be/legalworld/m_content.aspx?mid=77714&LangType=2060). Constitutional Court, Information note on the decision 96/2014 [in French], at <http://www.const-court.be/public/f/2014/2014-096f-info.pdf> (<http://www.const-court.be/public/f/2014/2014-096f-info.pdf>). *Laurens Dumoulin, Mukan Heynderick, Jurgen Goossens* (<http://www.ugent.be/re/epir/en/sections/public-law/departement/constitutional-law/jgoossens.htm>) and *Pieter Cannoot* (<http://www.linkedin.com/pub/pieter-cannoot/49/433/b80>), *BHV finally split-up through typical Belgian compromise*, 24 November 2014, *Belgian Constitutional Law blog*, at <http://belgianconstitutionallawblog.com/2014/11/24/bhv-finally-split-typical-belgian-compromise/> (<http://belgianconstitutionallawblog.com/2014/11/24/bhv-finally-split-typical-belgian-compromise/>).

[iv] (#_ednref4) Ran Hirschl, *The Judicialization of Mega-Politcs and the Rise of Political Courts*, *Annual Review of Political Science*, vol. 11, 2008.

[v] (#_ednref5) Article 1 of the Belgian Constitution.

[vi] (#_ednref6) Patricia Popelier, ‘Secessionist and Autonomy Movements in Flanders: the disintegration of Belgium as the chronicle of a death foretold?’ in E.M. Belser and J. Bourke Martignoni (eds), *States falling apart*, Bern, Stämpfli Verlag 2015 (forthcoming).

[vii] (#_ednref7) Belgian Constitutional Court, 73/2003 of 26 May 2003, available in French, Dutch and German at <http://www.const-court.be/> (<http://www.const-court.be/>)

[viii] (#_ednref8) Belgian Constitutional Court, 73/2003 of 26 May 2003, B.9.5., available in French, Dutch and German at <http://www.const-court.be/> (<http://www.const-court.be/>).

[ix] (#_ednref9) A special edition of a Belgian journal was dedicated to the question of Brussels Halle-Vilvoorde and gives space to both positions (in French and Dutch): “Fédéralisme et frontières internes: les enjeux de l’arrondissement de BHV (Bruxelles-Hal-Vilvorde/Brussel-Halle-Vilvoorde)”, 8(1) *Fédéralisme Régionalisme* (2008), <http://popups.ulg.ac.be/1374-3864/index.php?id=518>.

[x] (#_ednref10) As a concession to French speakers, the Court held that special measures for the protection of the legitimate interests of French and Dutch speakers in the former province of Brabant were legitimate. Belgian Constitutional Court, 73/2003 of 26 May 2003, B.9.7., available in French, Dutch and German at <http://www.const-court.be/> (<http://www.const-court.be/>)

[xi] (#_ednref11) For an overview of the different aspects of the law, consult Bart Martel and Jürgen Vanpraet, Reform of the Judicial District of Brussels, Eubelius Attorneys, September 2012, at <http://www.eubelius.com/en/spotlight/reform-judicial-district-brussels> (<http://www.eubelius.com/en/spotlight/reform-judicial-district-brussels>). The Law on the reform of the judicial district can be consulted at http://www.ejustice.just.fgov.be/mopdf/2012/08/22_1.pdf#Page49 (http://www.ejustice.just.fgov.be/mopdf/2012/08/22_1.pdf#Page49) (Law of 19 July 2012 on the reform of the judicial district of Brussels, Moniteur Belge/Belgisch Staatsblad 22 August 2012).

[xii] (#_ednref12) Consult the information note of the Court for a full list of legal dispositions that were challenged. Information note on the decision 96/2014 [in French], p.3, at <http://www.const-court.be/public/f/2014/2014-096f-info.pdf> (<http://www.const-court.be/public/f/2014/2014-096f-info.pdf>).

[xiii] (#_ednref13) Constitutional Court, 96/2014, B.20.

[xiv] (#_ednref14) I used the translation of Article 157bis provided by Martel and Vanpreat, *ibid*.

[xv] (#_ednref15) The Council of State is an institution that exerts ex ante-control over draft legislation in Belgium, other than functioning as well the country’s supreme administrative court. See advice of the Council of State on the law 5-1674 (Belgian Chamber of Deputies, doc. n° 53-2140/2, at p.11, at <http://www.lachambre.be/FLWB/pdf/53/2140/53K2140002.pdf> (<http://www.lachambre.be/FLWB/pdf/53/2140/53K2140002.pdf>))

[xvi] (#_ednref16) Constitutional Court, 96/2014, B.22.1.

[xvii] (#_ednref17) *Ibid*.

[xviii] (# ednref18) Ibid, B.22.2.

Published on [January 28, 2015](#)

Author: [Stefan Graziadei](#) Filed under: [Developments](#), [Uncategorized](#)

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