

**BELGIAN ADMINISTRATIVE JUSTICE ORGANISATION: WHEN
FEDERALISM OR DEVOLUTION BRINGS JUSTICE WITH IT, OR WHEN
REGIONALISM IS INVADING EUROPE?**

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1. The wind of change, which is blowing on the organisation of Belgian administrative justice, should be of interest for other states in which federalism or devolution does exist. This is notably the case within the United Kingdom, between Westminster, on the one hand, and Wales, on the other. If certain studies are to be believed, these bodies experience situations in which some aspects are similar².

Since 2009, the Flemish Region, which is interested in grabbing more autonomy from the Belgian state for technical but also political reasons³, is organising and modelling, inch by inch, a regional administrative justice, which could upset the balance of the current Belgian administrative justice and imply its large reorganisation, if not in the short term, at least in the medium one.

On the basis of a background (I), it is all about displaying how the situation might have been created and legally admitted (II), in order to criticise its key milestones and to measure the afferent consequences of the running process (III).

² With respect to asymmetric devolution, see notably M. ELLIOTT - R. THOMAS, *Public Law*, 2nd ed., Oxford, Oxford University Press, 2014, 271-308; with respect to administrative justice system within the asymmetric devolution framework set up in the United Kingdom, see notably H. PRITCHARD, *Building a Welsh Jurisdiction through administrative Justice*, in *Administrative Justice in Wales and Comparative Perspectives Conference*, Bangor University, September 2015.

³ See notably the Charter for Flanders proposed, in 2012, by the political parties of the Flemish governing coalition at the time and, in this respect, S. LAMBRECHT, *Handvest voor Vlaanderen, T.v.C.R.*, 2013, 360-371, including the footnotes, the ten first witnessing that political autonomy is not a new purpose for the Flemish Region. See also, more recently, the project of Flemish Constitution called for, in 2016, by the current Minister-President of the Flemish Government (https://www.standaard.be/cnt/dmf20160306_02168410;<https://www.law.kuleuven.be/home/onderzoek/nieuws-onderzoek/prof-s-sottiaux-over-vlaamse-grondwet>).

In terms of conclusion, we ask the question whether equality can be an ultimate rampart against what might be seen as a progressive dismantling of a common justice in a society called a state.

1. BACKGROUND: WHO IS WHO AND WHO DOES WHAT?

2. Belgium is a Federal State composed of federated entities⁴. Since 1970 they have accumulated even more competences originally exercised by the National State, which then became the Federal one⁵.

Both the creation and organisation of justice have always been a competence entrusted to the National State since the country gained its independence⁶.

⁴ See Belgian Constitution, art 1.

⁵ See Belgian Constitution, art. 127 to 134 ; see also loi spéciale of 8 August 1980 « de réformes institutionnelles » (*Moniteur belge*, 15 August 1980), art. 4 to 16ter ; loi spéciale of 12 January 1989 « relative aux institutions bruxelloises » (*Moniteur belge*, 14 January 1989, *err. Moniteur belge*, 16 March 1989), art. 4 to 5ter ; loi of 31 December 1983 « sur la Communauté germanophone » (*Moniteur belge*, 18 January 1984), art. 4 and 5.

⁶ See notably, in this respect, Belgian Constitution, art. 144 to 161; D. DE BRUYN, *Les compétences implicites en matière d'organisation de juridictions*, obs. sous C.A., 14 février 2001, n° 19/2001 et C.A., 13 mars 2001, n° 33/2001, *Journal des tribunaux*, 2002/1, n° 6037, 4-8 ; X. DELGRANGE et N. LAGASSE, *La création de juridictions administratives par les communautés et les régions*, in H. DUMONT, P. JADOUL et S. VAN DROOGHENBROECK (dir.), *La protection juridictionnelle du citoyen face à l'administration*, Bruxelles, La Charte, 2007, 487-524 ; A.-S. BOUVY, *La place des juridictions administratives régionales et communautaires dans la Belgique fédérale*, *Revue belge de droit constitutionnel*, 2015/2, 215-264.

In a country in which the federal system is centrifugal as opposed to centripetal, it is not surprising to observe that certain federated entities could have a stray impulse to obtain the power to model and organise their own — regional or community — justice, rather than to remain subjected to a national justice system which settles every dispute, including the ones related to regional or community rules of law applications.

3. A significant issue with the situation described above is caused by the fact that not all the parts of Belgium demand new competences. A number of members wish to continue to share justice with the diverse members of the Federation.

Concretely, only Flemish Region and Community are particularly centrifugal while, at the same time, Walloon and Brussels Regions, as well as Francophone and German-speaking Communities, are predominantly centripetal⁷.

The singularity of the situation is solved by compromises reached between the different Belgian Federation members.

Until now, a significant number of competences were transferred to the federated entities covering cultural, educational, social, economical, environmental or even urban policies. However, in regard to the sovereign departments such as justice, army, police or foreign office, the competences still remain in the hands of the Federal State, which allows the most patriotic representatives and citizens to be assuaged.

4. As a result, Belgian law displays an organisational system in which a significant proportion of the provisions are created by federated entities while the litigation regarding any rule of law, including the ones adopted by the federated entities, are judged by a federal justice system.

⁷ See, however, Avis du Conseil d'Etat n° 55.237/AG/4, 10 March 2014, sur un avant-projet de décret « créant un Conseil du contentieux administratif wallon », cited by J. VAN NIEUWENHOVE, *Adviespraktijk Raad van State, Tijdschrift voor Wetgeving*, 2014/2, 162-164.

Without debating whether a transfer of competences could and would be operated for the benefit of the federated entities in terms of building and organising justice — which might be unsuccessful —, the Flemish Region has decided to create a specific administrative jurisdiction in planning urban law, for the purpose of settling disputes about individual planning permissions and permission refusals, decided by the Flemish administration⁸.

Notwithstanding the division of competences set up between the Federal and the federated entities, the Belgian constitutional court —, which notably judges whether or not the rules related to the allocation of competences between the Federation members have been followed⁹ — has decided to agree that the Flemish legislator was right¹⁰. From now on, federated entities may create and organise jurisdictions under certain conditions¹¹.

⁸ Decreet van de Vlaamse Overheid of 27 March 2009 « tot aanpassing en aanvulling van het ruimtelijke plannings-, vergunningen- en handhavingsbeleid », *Belgisch Staatsblad*, 15 May 2009.

⁹ See Belgian Constitution, art. 142 and loi spéciale of 6 January 1989 « sur la Cour constitutionnelle », *Moniteur belge*, 7 January 1980, art. 1st and 26.

¹⁰ C. const., arrêt n° 8/2011 of 27 January 2011. See notably, in this respect, J. VANPRAET, *Deelstatelijke administratieve rechtscollege: enkele beschouwingen bij het arrest nr. 8/2011 van het Grondwettelijk Hof*, *Tijdschrift voor Bestuurswetenschappen and Publiekrecht*, 2011/4, 195-201; J. MOLLIN, *De ruimte impliciete bevoegdheid van de deelgebieden om administratieve rechtscolleges op te richten*, obs. sous C. const., 27 janvier 2011, n° 8/2011, *Rechtskundig Weekblad*, 2011-2012/37, 1641-1645.

¹¹ *Ibidem*, B.8.6., B.8.7.2., B.8.8., B.8.9., B.8.10.1. et B.8.10.2.

2. A SITUATION CREATED AND LEGALLY ADMITTED: HOW AND WHY?

5. On 27 March 2009, the Flemish legislator decided to initiate its proper jurisdiction, to which it has entrusted the competence of annulling diverse individual administrative acts with regards to planning urban law¹². This new institution is called *le Conseil pour les contestations des autorisations*, in Dutch *de Raad voor de vergunningsbetwistingen*.

As an administrative jurisdiction, *de Raad* is responsible for judging the actions directed against several types of either permissions or permission refusals regarding building¹³.

2.1. A glance on the allocation of competences in matters of justice

6. If we consider the Belgian justice system at the foundation of the state, it is constitutionally quite simple. Upon being under French rule between 1800 and 1815, under Dutch rule between 1815 and 1830 and obtaining its independence from the Netherlands in 1830, the founding fathers of the nation decided to create only a unitary judicial system¹⁴.

¹² Decreet van de Vlaamse Overheid of 27 March 2009 « tot aanpassing en aanvulling van het ruimtelijke plannings-, vergunningen- en handhavingsbeleid », *op. cit.*

¹³ Art. 36 of the Decreet van de Vlaamse Overheid of 27 March 2009 « tot aanpassing en aanvulling van het ruimtelijke plannings-, vergunningen- en handhavingsbeleid », *op. cit.*

¹⁴ Belgian Constitution of 7 February 1831, art. 92 to 107.

At this time, that political choice was conceived as a strong principle built on the basis of a certain hostility towards France and the Netherlands which formed an administrative jurisdiction called *le Conseil d'Etat* (the Council of State), not independent and impartial from the rulers and, thus, strongly rejected at the crucial moment they shaped the constitutional organisation of the budding country¹⁵.

More precisely, the constituent authority decided to see jurisdictional litigation in two different forms: the disputes regarding civil subjective rights on the one hand and the disputes concerning political subjective rights on the other¹⁶.

Civil rights are entirely under the protection of the judiciary courts, while the political ones fall under the same protection, but solely on principle. In other words, the national legislator — at that time unique in its power — could create an administrative jurisdiction if it was considered — by definition at the margin — an absolute necessity to judge a particular sort of disputes involving such a kind of right¹⁷.

7. Notwithstanding the transformation of the Belgian state from a unitary structure to a federal one, the competence of modelling and organising the judiciary courts

¹⁵ See notably, in this respect, Ph. BOUVIER, *La naissance du Conseil d'Etat de Belgique: une histoire française ?*, Bruxelles, Bruylant, 2012, 43 to 45.

¹⁶ See Belgian Constitution of 7 February 1831, art. 92 and 93.

¹⁷ See notably, in this respect, B. BLERO, *L'article 145 de la Constitution comme solution aux conflits de compétence entre le juge de l'excès de pouvoir et le juge judiciaire*, in B. BLERO (ed.), *Le Conseil d'Etat de Belgique cinquante ans après sa création (1946-1996)*, Bruxelles, Bruylant, 1999, 203-267 ; B. BLERO, *Du droit objectif aux droits politiques des administrés. Essai sur la répartition des compétences entre le juge judiciaire et le juge de l'excès de pouvoir*, *Chroniques de Droit public*, 1998, 151 to 157.

is still, today, in principle in the hands of the federal legislator, as well as the creation and organisation of the administrative one¹⁸.

On this basis, many modifications have been made with regards to the judiciary courts¹⁹, while innumerable administrative jurisdictions were created, sometimes so discreetly that they do not play a substantial role in society²⁰, sometimes so fundamental that they have deeply changed the institutional landscape of Belgium²¹.

This is especially relevant in the case of the... Belgian *Conseil d'Etat*, which was born after World War II, from the acknowledgement that the judiciary courts were too reluctant over a long period to protect the citizen from the illicit acts and behaviour of the administration acting as a public power using the so called *imperium* powers²².

¹⁸ C. const., arrêt n° 25/97 of 30 April 1997, B.4. ; C. const., arrêt n° 8/2001 of 31 January 2001, B.9. ; C. const., arrêt n° 33/2001 of 13 March 2001, B.5.5.1.; C. const., arrêt n° 49/2003 of 30 April 2003, B.6. ; C. const., arrêt n° 91/2010 of 29 July 2010, B.3.3. ; C. const., arrêt n° 8/2011 of 27 January 2011, B.8.4. ; C. const., arrêt n° 139/2012 of 14 November 2012, B.4.3. ; C. const., arrêt n° 98/2014 of 30 June 2014, B.14.2.

¹⁹ For example, Loi of 17 May 2006 « instaurant des tribunaux d'application des peines », *Moniteur belge*, 15 June 2006; Loi of 30 July 2013 « portant création d'un tribunal de la famille et de la jeunesse », *Moniteur belge*, 27 September 2013.

²⁰ For example, la Commission relative à l'indemnité en cas de détention préventive inopérante (art. 28, §4, of the loi of 13 March 1973 « relative à l'indemnité en cas de détention préventive inopérante », *Moniteur belge*, 10 April 1973); le Conseil d'Etablissement (Loi of 26 June 2002 « relative à l'instauration du Conseil d'Etablissement », *Moniteur belge*, 27 August 2002).

²¹ For example, le Conseil du contentieux des étrangers (Loi of 15 September 2006 « réformant le Conseil d'Etat et créant un Conseil du Contentieux des Etrangers », *Moniteur belge*, 6 October 2006).

²² See notably, in this respect, Ph. BOUVIER, *La naissance du Conseil d'Etat de Belgique : une histoire française ?*, *op. cit.*, 109 -152.

2.2. A judgement of the constitutional court in apparent opposition with the allocation of competences in matters of justice

8. The Belgian constitutional court decided that the creation of the *Raad voor vergunningsbetwistingen*, created by the Flemish legislator, was compatible with the constitutional allocation of competences. The power of creating any court of justice is, in Belgium, confided to the federal legislator by the Constitution itself, but the Flemish legislator could create this body.

Unsurprisingly, the constitutional court begins its reasoning by recalling the constitutional provisions applicable to such a matter²³. As a result, it states without ambiguity that the Flemish legislator was not competent for adopting an act establishing a new administrative *court*²⁴.

However, the constitutional court continues its reasoning by mentioning the existence of a provision in a quasi-constitutional law in the margin of the Constitution itself, which stipulates that the regions and communities can legislate in matters in which they are not specifically competent, under certain conditions²⁵.

To make such a provision applicable, it is required:

— That the legislative act adopted by the region or the community at issue is *necessary* for the exercise of its own competences;

²³ C. const., arrêt n° 8/2011 of 27 January 2011, B.8.4.

²⁴ *Ibidem*, B.8.5.

²⁵ See art. 10 of the loi spéciale of 8 August 1980 « de réformes institutionnelles », *Moniteur belge*, 15 August 1980.

— That the matter can *be regulated differently* from a member of the Federation to another;

— And that the incidence of the adopted act on the considered matter is only *marginal*²⁶.

9. On application of the above-mentioned conditions, the constitutional court investigates firstly the criterion of *necessity*.

The usual technique implemented by the court is to check what the legislator has sought to do by the analysis of the preparatory documents leading to the adoption of the act at issue.

According to these documents, the shifting of the administrative appeal organised until that time, before the Flemish government, by a jurisdictional action introduced before *de Raad* takes place in the framework of a strong will: the one of no longer let the regional administration controlling the action of the local administration principally competent in matters of delivering or refusing urban permissions²⁷.

According to these documents, again, the decisions relating to permissions and refusals of them have to be subjected to a control in which the controller could only sanction the administrative action at the margin, considering good land planning. In the opinion of the Flemish legislator, the unique solution provided by law is to entrust a

²⁶ See notably, in this respect, D. RENDERS, *La consolidation législative de l'acte administratif unilatéral*, Bruxelles, Bruylant, Paris, L.G.D.J., 2003, 277 to 282 ; C. const., arrêt n° 19/2001 of 14 February 2001 ; C. const., arrêt n° 33/2001 of 13 March 2001 ; C. const., arrêt n° 154/2003 of 26 November 2003 ; C. const., arrêt n° 171/2003 of 17 December 2003 ; C. const., arrêt n° 114/2005 of 30 June 2005 ; C. const., arrêt n° 57/2012 of 3 May 2012 ; C. const., arrêt n° 89/2012 of 12 July 2012 ; C. const., arrêt n° 91/2013 of 13 June 2013 ; C. const., arrêt n° 154/2013 of 13 November 2013 ; C. const., arrêt n° 169/2013 of 19 December 2013 ; C. const. n° 73/2016 of 25 May 2016.

²⁷ C. const., arrêt n° 8/2011 of 27 January 2011, B.8.7.1.

jurisdiction to exercise such a control instead of the administration. In its view, it is above all the case considering the fact the controller must have at one's disposal accurate skills in terms of good land planning, what only a judge can provide²⁸.

Reading the preparatory documents, the necessity for a quick assessment of the action is equally underlined by the legislator, what the court highlights²⁹.

To summarize the first criterion under examination, the constitutional court merely decided that the assessment of the legislator of necessity does not seem erroneous.

10. By application of the above-mentioned conditions, the constitutional court moves on to the criterion of *differentiated regulation*.

From the constitutional court point of view, this criterion is equally satisfied.

The court notices that, even if *de Raad* is called to judge disputes settled, till that time, by the *Conseil d'Etat*, it does exist — at the federal level either — some exceptions to the general competence of this jurisdiction which is instituted to be subsidiary to other jurisdictional controls created in a specific text if need be³⁰.

11. With regard to the last — but not least — criterion, which requests that the legislative intervention on the federal field overlaps only marginally, the constitutional court thinks that the condition is also fulfilled, since the competence of *de Raad* is limited to the control of some individual types of decisions regarding urban planning law³¹.

²⁸ *Ibidem*.

²⁹ C. const., arrêt n° 8/2011 of 27 January 2011, B.8.7.2.

³⁰ C. const., arrêt n° 8/2011 of 27 January 2011, B.8.8.

³¹ C. const., arrêt n° 8/2011 of 27 January 2011, B.8.9.

The court adds that, during the debates organised in view of adopting the text, which became the law submitted to the constitutional control, it has been explicitly confirmed that the *Conseil d'Etat* is competent as a judge of cassation. According to the court, this is the case, since the product of *the Raad* control has been an administrative jurisdictional judgment, which, like any other, is subjected to the control of the *Conseil d'Etat* acting, this time, not as the judge of administrative acts annulment, but as the Belgian administrative cassation judge³².

This precision has been considered in the case at issue as an important element in order to evaluate favourably the marginal character of the legislative measure submitted to the control of the constitutional court³³.

As a consequence of the fulfilling of the three conditions posed by the quasi-constitutional act, as interpreted by the Belgian constitutional court, the legislative act creating *de Raad* is judged conform to the Constitution³⁴.

³² C. const., arrêt n° 8/2011 of 27 January 2011, B.8.10.2.

³³ M. PAQUES, C. VERCHEVAL, *Section 1- Origine, réforme de l'Etat et répartition des compétences, Droit wallon de l'urbanisme*, Bruxelles, Larcier, 2015, 84 ; F. JUDO, *Hou me tegen, of ik doe een ongeluk ! De Raad van State naast- en tegenover- de deelstakelijke administratieve rechtscolleges*, in J. VANPRAET (ed.), *Administratieve rechtscollege – Recht en Regio/ Juridictions administratieves- Droit et Région*, Brugge, La Chartre, 2014, 38 ; J. MOLLIN, *De ruimte impliciete bevoegheid van de deelgebieden om administratieve rechtscolleges op te richten*, *Rechtskundige Weekblad*, 2011-2012, 1645 ; A.-S. BOUVY, *La place des juridictions administratives régionales et communautaires dans la Belgique fédérale*, *Revue belge de droit constitutionnel*, 2015/2, 246-247 ; T. VANDENPUT, P. DE MAEYER, M. BERTRAND, *Les nouvelles juridictions administratives régionales compétentes en matière d'urbanisme et d'environnement*, in F. VISEUR, J. PHILIPPART (ed.), *La justice administrative*, Bruxelles, Larcier, 2015, 612 to 617.

³⁴ C. const., arrêt n° 8/2011 of 27 January 2011, B.8.11.

3. CRITICISMS AND CONSEQUENCES OF THE SITUATION: WHAT AND WHY?

12. The case law of the constitutional court is legally connected to the only legislative act deferred to the control of the court. But we can easily imagine that such a precedent has potentially serious consequences.

This precedent means that when a federated entity displays a logical purpose and limits the competence of the jurisdiction it wants to create at a certain type of dispute, the legislative act which institutes the new jurisdiction is safe from criticism in terms of competences repartition, as far as the *Conseil d'Etat* remains both a subsidiary judge of the administrative act annulment and the judge of the administrative cassation.

3.1. A reasoning, which lends itself to criticism and endorses a political strategy

13. To put it simply, such reasoning can be criticized on the grounds that none of the three conditions are truly satisfied.

As far as the *necessity* criterion is concerned, we can observe that the judge who is assigned to replace the administration could be the *Conseil d'Etat* and not a new Flemish judge.

That is probably why the justification is also based on the rapidity of the control instituted, at a time in which the *Conseil d'Etat* had a backlog, which is, now, not the case

anymore³⁵, ... contrary to *de Raad*, which has — and in any case has been³⁶ — serious flaws in this regard.

In the light of these considerations, it can be suggested that the *necessity* criterion has not truly been fulfilled.

14. The criterion of *differentiated regulation* raises questions.

If the *Conseil d'Etat* is the subsidiary judge of administrative acts annulment — which is true³⁷ —, it is in the sense that new, particular jurisdictions can be created, but in the measure that the latter is both instituted by the federal legislator and in a particular field.

The constitutional court seems to mix up two realities: a first on the basis of which diverse jurisdictions can be created beside the *Conseil d'Etat*, at a federal level, and a second according to which diverse jurisdictions could be instituted beside the *Conseil d'Etat* and vary from a federated entity to another. The real meaning of the *differentiated regulation* criterion rests on this second approach.

By applying the criterion in a confusing sense, the constitutional court omits to ask the correct question, which is: should we accept that a federated entity could create a federated judge, whereas other entities continue to be submitted, in the same field, to the federal judge, in other words the *Conseil d'Etat*?

³⁵ See notably Rapport d'activité du Conseil d'Etat de Belgique 2012-2013, 93 and 95, 2013-2014, 19, 21, 33, 51 and 52 ; and 2014-2015, 20, 22, 26, 30, 58, 59 and 60.

³⁶ See notably Raad voor Vergunningsbetwistingen, Jaarverslag 2009-2010, 30; Jaarsverslag 2011-2012, 5, 6, 17 and 76.

³⁷ See art. 14, §1er, *in limine*, des lois coordonnées « sur le Conseil d'Etat » of 12 January 1973, *Moniteur belge*, 21 March 1973.

15. The way in which the constitutional court implemented the *marginality* criterion in the case at issue is puzzling, too.

By considering that a federated entity can create a new administrative jurisdiction if the latter is entrusted with competences in a specific field, the temptation of creating different administrative jurisdictions with specific competences instead of a large one — which as a result is the same — could not be stopped...

16. ... This is precisely what the Flemish Region has done.

This Region has created a specific jurisdiction, not only in urban planning law, but also in local election law³⁸, in education³⁹ and environmental law⁴⁰, without being disturbed neither by the other members of the federation, nor by the constitutional court⁴¹.

In 2014, it took a big step and adopted a framework-act in order to provide a same set of organisational rules at the diverse administrative jurisdictions⁴².

³⁸ Decreet van de Vlaamse Overheid of 8 July 2011 « houdende de organisatie van de lokale en provinciale verkiezingen en houdende wijziging van het Gemeentedecreet van 15 juli 2005, het Provinciedecreet van 9 december 2005 en het decreet van 19 december 2008 betreffende de organisatie van de openbare centra voor maatschappelijk welzijn », *Belgisch Staatsblad*, 25 August 2011.

³⁹ Decreet van de Vlaamse Overheid of 19 March 2004 « betreffende de rechtspositieregeling van de student, de participatie in het hoger onderwijs, de integratie van bepaalde afdelingen van het hoger onderwijs voor sociale promotie in de hogescholen en de begeleiding van de herstructurering van het hoger onderwijs in Vlaanderen », *Belgisch Staatsblad*, 10 June 2004.

⁴⁰ Decreet van de Vlaamse Overheid of 21 December 2007 « tot aanvulling van het decreet van 5 april 1995 houdende algemene bepalingen inzake milieubeleid met een titel XVI 'Toezicht, handhaving en veiligheidsmaatregelen' », *Belgisch Staatsblad*, 29 February 2008.

⁴¹ See C. const., arrêt n° 152/2015 of 29 October 2015, obs. D. RENDERS - D. DE VALKENEER, *Où peut aller la justice administrative flamande, en particulier si la coupole n'est pas encore pleine ?*, *Administration publique*, 2016/4, 557-570.

Since that time, a First President has been appointed who rules and represents an institution composed of multiple branches originally presented as independent to each other⁴³, today implemented as a whole, sharing the same building and the same infrastructures⁴⁴.

The preparatory documents of the framework-act reveal that the purpose is clearly affirmed to legislate in order to shelter other administrative jurisdictions without having to recreate, every time, a new organisation from scratch⁴⁵.

As a result, we can expect an increasing absorption of the competences of the *Conseil d'Etat* in terms of annulment of Flemish administrative acts. This means, at a later stage, an imbalance of the Francophone and the Flemish magistrates of the supreme jurisdiction, capable of gradually diminishing the *Conseil d'Etat*'s attributions.

Behind the gradual building of new jurisdictions in the Flemish Region, we so see a clear weakening of one more federal institution and a no less clear weakening of the Belgian State, connected to the strategy of the Flemish autonomy.

⁴² Décret van de Vlaamse Overheid of 4 April 2014 « betreffende de organisatie en de rechtspleging van sommige Vlaamse bestuursrechtscolleges », *Belgisch Staatsblad*, 1 October 2014. For a detailed analysis of the Decreet, see notably A. MAES, « Het nieuwe DBRC-decreet : een eerste blik op de procedurele wijzigingen voor de Raad voor vergunningsbetwistingen », *Chroniques de Droit public — Publiekrechtelijke Kronieken*, 2015/3, 363-386

⁴³ Art. 5 and 9 of the décret of 4 April 2014 « betreffende de organisatie en de rechtspleging van sommige Vlaamse bestuursrechtscolleges », *op. cit.*

⁴⁴ Art. 2 of the Besluit van de Vlaamse Regering of 16 May 2014 « houdende de rechtspleging voor sommige Vlaamse bestuursrechtscolleges », *Belgisch Staatsblad*, 3 December 2014 (Bâtiment Ellips, Koning Albert II-laan 35, 1030 Brussel). It should also be noted that, from judicial year 2014-2015, the activity of all the Flemish administrative jurisdictions subject to the framework-act leads to one and only one annual report.

⁴⁵ Ontwerp van decreet « betreffende de organisatie en de rechtspleging van sommige Vlaamse bestuursrechtscolleges », *Parl. doc.*, Vlaams Parlement, gew. zit. 2013-2014, n° 2383/1, 8.

3.2. *An enterprise without limits?*

17. If a strategy is indubitably implemented in order to de-federalize the administrative justice in Belgium, we could legitimately raise the question whether this enterprise, accomplished with the agreement of the constitutional court, is unlimited.

Facing this question, we can reasonably answer negatively, at least in the actual state of legal art.

18. A *first limit* seems to have been posed by the constitutional court in the judgement it delivered about the creation of *de Raad*.

In this judgement, the court stresses on the fact that an important reason why it considers that the *marginality* criterion has been satisfied is because the *Conseil d'Etat* remains the judge of cassation for the administrative judgements delivered by the new Flemish administrative jurisdiction.

This precision could mean that the compromise between the judges composing the constitutional court might have been to admit the existence of administrative jurisdictions as long as the *Conseil d'Etat* is preserved as a national jurisdiction in terms of administrative cassation.

But the following question arises: is it a definitive or a transitory compromise?

19. A *second limit* seems to have been posed by the constitutional court in two judgements: a first, concerning the validity of an amendment with respect to the procedure applicable before the *Raad* and a second, regarding to the aforementioned framework-act, intended to establish a same set of organisational rules for the diverse Flemish administrative jurisdictions.

The limit consists in declaring unconstitutional a range of provisions allowing the administration to modify in different respects a unilateral administrative act challenged

before a Flemish administrative jurisdiction in the course of the proceeding in progress before the latter⁴⁶.

Certain criticisms are not debated as a part of this paper, since they are connected with the device at issue in itself but not with the allocation of competences between the Federal State and the federated entities⁴⁷. However, one criticism must be highlighted for the reason it is precisely connected to this allocation⁴⁸.

This criticism lies in the following observation: by agreeing with the fact that the administration is entitled to operate an *a posteriori* modification of the motivation of its decision, meanwhile the content of the operative part of the latter must remain unchanged, the corrective mechanism in question breaches the legal standard provision of formal motivation⁴⁹. This provision, which demand to the authorities of preceding an administrative individual decision by a formal motivation, is still under federal jurisdiction and, in these circumstances, cannot be vicariously affected⁵⁰.

⁴⁶ C. const., arrêt n° 74/2014 of 8 May 2014 (see notably, in this respect, D. RENDERS, *La boucle administrative ne serait-elle pas bouclée ?*, *Jurisprudence de Liège, Mons et Bruxelles*, 2014/25, 1201 to 1211; F. BELLEFLAMME, J. BOURTEMBOURG, *Requiem pour la boucle*, obs. sous C. const., 8 May 2014, n° 74/2014, *Journal des tribunaux*, 2014, 480 to 483 ; M. UYTENDAELE, *Sauver la boucle administrative*, obs. sous C. const., 8 May 2014, n° 74/2014, *Administration publique*, 2015, 40); C. const., arrêt n° 152/2015 of 29 October 2015.

⁴⁷ C. const., arrêt n° 74/2014 of 8 May 2014, B.7.2., B.8.4., B.8.5. ; C. const., arrêt n° 152/2015 of 29 October 2015, B.12.3. to B.13.4.

⁴⁸ C. const., arrêt n° 74/2014 of 8 May 2014, B.9.5. ; C. const., arrêt n° 152/2015 of 29 October 2015, B.14.3. to B.14.7.

⁴⁹ *Ibidem*.

⁵⁰ *Ibidem*.

It follows that allocation of other competences than those directly related to the jurisdictional system in itself can influence the extent to the latter can be changed.

20. A *third limit* which can be mentioned deals with the status of the ordinary set of jurisdictions called in French *les cours et tribunaux*, in Dutch *de hoven en rechtbanken*, also responsible, in Belgian law, for delivering administrative justice to some significant degree, in particular in the field of public contracts and administration's extra-contractual liability.

The difference between the ordinary jurisdictions and the administrative jurisdictions lies in the fact that the earlier have been created and organised by the Constitution itself⁵¹, in contrast with the latter, which have been introduced by a mere law, except the *Conseil d'Etat*⁵².

This means that the room for manoeuvre in order to make them partly federated is narrower, if not bordering on inexistent.

On the whole, we so can state that de-federalizing the ordinary justice needs an amendment of the Constitution, which demands to launch a heavy procedure including the dissolution of the federal assemblies and the organisation of a new general election⁵³.

However, the federal character of the ordinary justice is fragile in the sense that such a public service needs money for being efficient. The latter is also even weaker by the fact that the judges belonging to this jurisdictional order are confronted to the obligation of

⁵¹ See Belgian Constitution, art. 146 to 159.

⁵² See Belgian Constitution, art. 160.

⁵³ See Belgian Constitution, art. 195. Regarding the amendment procedure of the Belgian Constitution, see notably F. DELPEREE (ed.), *La procédure de révision de la Constitution*, Bruxelles, Bruylant, 2003.

applying an increasing variety of regional and community rules, meaning that, if they exercise the same formal function, the material one is becoming substantially different.

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21. In front of such a peculiar landscape, the question could be raised whether the current organisation of Belgian public justice remains compatible with the Napoleonic version of the principle of equality of citizens before the law and, here more precisely, with the principle of equality of persons subject to trial before justice.

In that respect, it should be noted that the Belgian Constitution lays down the principle of equality in general⁵⁴ and the principle of equality before the public justice service in particular⁵⁵. If equality in general might demand that the law sets up the same judge for resolving the same category of disputes⁵⁶, equality before the public justice

⁵⁴ See Belgian Constitution, art. 10 and 11.

⁵⁵ See Belgian Constitution, art. 13.

⁵⁶ See notably, in this respect, M. VERDUSSEN, *Contours et enjeux du droit constitutionnel pénal*, Bruxelles, Bruylant, 1995, 413; D. RENDERS, *La consolidation législative de l'acte administratif unilatéral*, *op. cit.*, 89-91.

service barely imposes that the law would be equally observed, without prejudice to the content of the rule, which inducts possible differences established by the law⁵⁷.

22. However, in a Federal state even influenced by a Napoleonic approach, a basic principle needs that each member of the Federation — the Federal state as well as the federated entities — has the power to make an equal law as the one enacted by the others and might develop an autonomous approach of what it can decide⁵⁸.

From the time the law in general and the justice in particular are potentially ruled, even for a part, by the federated entities, equality before justice is a statement available in a range exactly equal to the number of the Federation members entitled to legislate in such a matter.

23. It follows from these considerations that, in practical terms, equality cannot constitute an ultimate rampart against a variety of justice systems within the same Federal state.

The true point is, thus, all about what human beings conceive to pool in this kind of structure. Everyone will measure that such an issue arises, at this time, in many more fields than in administrative justice and in many more states in Europe than in Belgium, not to mention the European Union itself.

So, should we not conclude that both the point and the solution in play are in the hands of the politicians, much more than in those of the lawyers?

⁵⁷ See notably, in this respect, M. VERDUSSEN, *Contours et enjeux du droit constitutionnel pénal*, *op. cit.*, 412-413; D. RENDERS, *La consolidation législative de l'acte administratif unilatéral*, *op. cit.*, 90-91.

⁵⁸ See notably, in this respect, F. DELPEREE et S. DEPRE, *Le système constitutionnel de la Belgique*, Bruxelles, Larcier, 1998, 115.