

The Administration and the Judge: Pragmatism in Belgian Case Law (1890–1910)

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*Ainsi l'interprétation n'est pas une science exacte et les qualités personnelles du juriste ont une grande influence sur la justesse des solutions qu'il préconise.*²

I. Introduction

Belgian administrative justice currently falls within the 'French model of administrative justice'. It is indeed designed around a *Conseil d'Etat*—in many respects close to the French *Conseil d'Etat*—exercising objective control over administrative action and quashing administrative decisions. This system dates only from 1946, however. Before 1946 administrative justice was mainly carried out by the ordinary courts, also competent for adjudicating disputes between private persons. Their two main tools were the exception of illegality and the awarding of damages. In that respect Belgian administrative justice was definitively exercising subjective control over administrative action at the turn of the twentieth century. This chapter argues that this system gave room for judicial creativity in protecting individual freedom thanks to a pragmatic stance taken by the Supreme Court, even if it often concealed this behind a formal stance.

Overlaid with subjective and objective elements, Belgian administrative and legal culture is difficult to grasp. More generally, Belgian legal culture has been

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² P vander Eycken, *Méthode positive de l'interprétation juridique* (Librairie Falk Fils 1906) 421: 'Hence interpretation is not an exact science and the lawyer's personal qualities have a great bearing on the fairness of the solutions he advocates' (my translation).

said to be non-existent,³ pervaded by the ‘belgitude’ sung of by Brel in the 1960s and 1970s. Belgium is mainly defined by what it is not: not French, not Dutch, not German. At the same time, Belgium is very much at the crossroads between France, the United Kingdom, the Netherlands, and Germany. In 1897 a prominent lawyer, E Picard, thus sought to define the Belgian soul.⁴ He was also vocal about the main issues of his time: the social question, the poor state of legislation and the need to set up (male) universal suffrage. New ideas, especially from the United States and their sociological school, quickly found fertile ground in the hyper-connected Belgian intellectual circles. The traditional interpretation methods were no longer satisfactory. Ideas intended to ensure that public institutions would be maintained overall while social inequity would be lessened started to emerge, although not unchallenged.

This chapter suggests that, against the backdrop of these discussions, the Belgian judiciary developed a distinctive approach to protecting individual freedoms from administrative arbitrariness. The extent to which changes happened during the period between 1890 and 1910 is best illustrated by the journey between two of the most well-known judicial decisions in Belgian administrative law, decided in 1866 and 1920 respectively. In 1866 the Supreme Court refused to review the discretion of a local authority registering a woman as a prostitute, against the conclusion of the advocate-general.⁵ The main argument of the Supreme Court was that the separation of powers prevented the judiciary from interfering with the sovereign decisions of local government. In 1920 the Court decided that this same principle meant that judges were the protectors of subjective rights and that therefore public authorities harming civil rights had to compensate citizens, regardless of the type of action that had caused them harm.⁶

This chapter reconstructs the journey between these two decisions through analysing the entanglements that the Supreme Court encountered in its case law between 1890 and 1910. If Belgium has no clear administrative culture this may partly be connected to the fact that the Supreme Court muddled through cases, taking an incremental approach to the issues brought before it without ever letting conservatives or progressives win the day for long. The Supreme Court steered a pragmatic course between extremes. It contextualized solutions, taking into account not only the law, but also the legal and practical consequences of its decisions. In doing so the Court gave time to various political and social forces to find their own balances, before taking the big step of proclaiming judges the guarantors of Belgian subjective rights in 1920. In this specific way the Supreme Court was

³ M Storme and D Heirbaut, ‘The Belgian Legal Tradition: From a Long Quest for Legal Independence to a Longing for Dependence?’ in *Belgian Reports for the XVII International Congress of Comparative Law* (Bruylant 2006) 3 and [2006] ERPL 645.

⁴ E Picard, ‘L’âme belge’ [1897] *Revue Encyclopédique* 595–99.

⁵ Cass (*chambres réunies*), 24 October 1866, Pas, 1867, I, 11, *conclusions contraires* Leclercq.

⁶ Cass, 5 November 1920, Pas, 1920, I, 192.

pragmatic, that is, it was mindful of the concrete legal and social consequences that its decisions might have outside the court buildings.

This chapter argues that this judicial approach mirrors discussions pertaining to judicial interpretation at the time. New scientific methods, such as sociology, gained interest. The articulation between interpreting the legal texts through formalism and positivism with empirically observable social needs in the real world was discussed. One such articulation was proposed by the Belgian school of the *libre recherche scientifique*. The Supreme Court and its advocates-general were actively engaging with the ideas underlying this approach. Pragmatism and the nature of things, the limits to logical reasoning based on the statute book and the balancing of interests were arguments surfacing in the judicial creativity of the Supreme Court's members. This chapter argues therefore that pragmatism is one of the defining features of Belgian legal (and especially administrative) culture and that the Supreme Court helped make it so through its administrative case law in the period 1890–1910 at the same time as it shaped a positivist legal system.

The chapter proceeds as follows. It first describes how pragmatism become embedded in the context of control over administrative action between 1890 and 1910 in Belgium (section II), before providing an overview of the relevant judicial outputs (section III). It then explores key avenues where judicial creativity in setting standards for administrative action can be tested by discussing a selection of the most salient cases (section IV). Finally, the conclusions bring together the main pragmatic features found in the case law of the Supreme Court between 1890 and 1910 to show how it shaped the general outlook of modern Belgian administrative law.

II. Pragmatism and the legal culture

The Supreme Court's judicial activity did not take place in a void. The period 1890–1910 was a troubled time throughout Europe. It was even more delicate in Belgium, a liberal state that only appeared on the international stage in 1831 after having been included in a succession of other European states in the preceding centuries.⁷ At the end of the nineteenth century Belgium needed to respond to social unrest while consolidating the State apparatus (section II.A). This building process was fed by intense political discussions involving prominent intellectuals, entrepreneurs and dynamic lawyers (section II.B). The Supreme Court itself had, by 1890, become a distinctive institution in the Belgian landscape (section II.C). Questions of judicial interpretation were becoming prominent in this context (section II.D).

⁷ Belgium was a part of the Holy German Empire under King Charles V; thereafter of the Spanish and Austrian Netherlands before becoming French between 1795 and 1815 and Dutch between 1815 and 1830.

A short overview of the case law of the Supreme Court offers an insight into the ways in which litigation pertaining to industrialization and the social question were adjudicated (section II.E). Overall, pragmatism started to hold sway. Formal law was definitively not set aside, but opportunities for judicial solutions ‘outside the box’ of the syllogism were progressively embraced.

A. Needs of the liberal state: appeasing social unrest

The liberal and free trade system operating in Belgium in the nineteenth century was rooted in legal texts dating from the French Revolution. The French civil code (including its dispositions on property, contracts and civil liability), the *Loi le Chapelier*⁸ and the *Décret d'Allarde*⁹ abolishing the professional corporations and establishing freedom of trade were all taken up in Belgium. Most of the legislation adopted by the newly created state was capitalistic in nature (credit organizations, industrial expansion, and trade). As in many parts of Europe, the long nineteenth century was the apotheosis of deep structural changes in all walks of life (social, economic, and political) brought about by the Industrial Revolution.

In the 1880s these changes drastically affected the nature of legislation. In 1885 the labour movement started to be organized. In 1886 social, economic, and political unrest changed the overall approach to the relationships between labour and capital.¹⁰ As a reaction King Léopold II asked in his 1886 throne speech for more protection for the vulnerable classes.¹¹ Measures were then adopted to adapt the statute book to the needs of industrialization and to include social measures. In 1893 a general strike was a decisive moment in the development of the Belgian socialist movement, which triggered profound changes in the political landscape and called for male universal suffrage. The Constitution was then revised to allow for universal suffrage, with multiple votes depending on criteria of property ownership and education.¹² New departments were set up, such as the Department of Industry and Work in 1894.¹³ This process led to more specifically Belgian legislation. Belgian scholarship and the advocates-general of the Supreme Court drew attention to problems arising from the overly slack writing of legal texts and started looking for solutions.¹⁴ Specific units dedicated to legal drafting were set up in

⁸ 14 June 1791.

⁹ 2–17 March 1791.

¹⁰ P Errera, *Traité de droit public belge. Droit constitutionnel. Droit administratif* (1st edn, Giard et Bière 1909) 677.

¹¹ Extract of Léopold II's throne speech before the parliament, 9 November 1886.

¹² Article 48 Constitution.

¹³ Errera (n 10) 678.

¹⁴ E Picard, ‘De la confection vicieuse des lois en Belgique et des moyens d’y remédier’, *Pandectes*, (t 6, 1881) Introduction; R Janssens, *L'institution d'un Conseil d'Etat en Belgique*, Discours prononcé à l'audience solennelle de rentrée, 1 October 1902.

departments.¹⁵ For legal scholarship the main problem with the administration was not the risk of arbitrariness, perceived to be low, but the lack of professionalism in the civil service and administrative inertia.¹⁶

In due course this need for technical legal writing helped forge a pragmatic consensus to set up a *Conseil d'Etat* in Belgium. In 1919 male universal suffrage would be introduced by constitutional reform,¹⁷ which also purported to set up an administrative court.¹⁸ Female universal suffrage and the administrative court, however, materialized only after the end of World War II.

B. People and ideas: practitioners immersed in conflicting worldviews

In a tiny yet very composite country such as Belgium it was very easy for the various intellectual circles to become enmeshed with each other.¹⁹ Conservatism and liberalism were immersed in broader considerations connected to international discussions pertaining to the need to turn to the sciences to inform social reforms. Three comments are useful at this point. A first general one pertains to the Belgian intellectual circles; the other two pertain to specific features of the Belgian legal community, namely its pragmatism and one of the most dynamic Belgian lawyers of the time.

Firstly, political and legal ideas from abroad, especially France, Germany, and the United States, were received in Belgium. Belgian opinions reflected broader intellectual movements, differing as regards suitable actions and reactions to them. A first group framed social issues in terms of culture and language, asking for the recognition of Flemish in the administration. Their demands would be slowly recognized in the period between 1880 and 1918, but the most important developments in this area would be delayed until after World War I. A second group included conservatives, for whom the law as it was represented the best means of preserving (formal) equality. A third group acknowledged the need for social changes. Distinct types of initiatives emerged in this area, differing as regards the extent of these changes and the methods of providing for them. On the one hand, scientific discourse was seen as a way for social sciences (especially sociology) to

¹⁵ P Bouvier, 'À propos du Conseil d'État' (2016) (76:2) *Annales de Droit de Louvain* 229–42, spec 232; *Pandectes*, v° *Travaux préparatoires* (t 115, 1923) para 14 ff.

¹⁶ L Wodon, *Le contrôle juridictionnel de l'administration et la responsabilité des services publics en Belgique* (Lamartin 1920) 111–12.

¹⁷ F Muller, *La Cour de Cassation belge à l'aune des rapports entre pouvoirs: de sa naissance dans le modèle classique de la séparation des pouvoirs à l'aube d'une extension de la fonction juridictionnelle, 1832-1914/1936* (La Charte 2011) 293–301.

¹⁸ Doc Parl Ch session 1918–19, 10 September 1919, no 329, 2, quoted in Muller (n 17) 296.

¹⁹ See G Kurgan-van Hentenryk (ed), *Laboratoires et réseaux de diffusion des idées en Belgique (XIXè-XXè siècles)* (Université de Bruxelles 1994).

become a vehicle for incremental social progress. Scientific writings by Le Play,²⁰ Proudhon, and Tarde were discussed. On the other hand, Belgian entrepreneurs undertook to reform their own companies. E Solvay, for instance, implemented benevolent measures in his own business while also setting up academic centres dedicated to improving human productivity based on economic and sociological methods.²¹

Secondly, the pragmatic Belgian legal community also became concerned with the difficulty faced by people in weaker socioeconomic positions in being protected by the law. It never developed conceptual or theoretical principles to organize the law as a scientific field. At the end of the nineteenth century, and still very much today, the main role of legal periodicals was to inform practitioners about case law, providing them with summaries of cases and case notes.²² There were very few conceptual works in the Belgian scholarship. Scholarship sought indeed to provide useful information for lawyers to help them tackle the day-to-day issues they faced, mostly in courts. Therefore, the legal community looked for practical responses to the social question but very little was actually written in terms of any fundamental conceptualization of the implications of social changes for the law, its form, or its social role.

This situation is especially relevant when it comes to administrative law as a legal field during our period of reference, a time when administrative law was being shaped in Germany and France. Key Belgian authors (Bourquin, Errera, and Vauthier) wrote works pertaining to public law and citizens' protection. They did not, however, conceptualize their concern in a distinctive legal field such as 'administrative justice'. For instance, Bourquin identified very specific fields where administrative litigation took place: elections, civic guards, public finances, the civil service, mine concessions, dangerous and unhealthy buildings, and so on. He did not suggest transversal or overarching principles or standards. Belgian scholarship picked and chose inspiration from abroad, especially from French scholarship (eg Henrion de Pansey,²³ Hauriou, Duguit, Saleilles, and Berthélémy),²⁴ either to demonstrate the solution that Belgium should follow or to distance itself from the French experience. For instance, Bourquin devoted a full chapter to the French

²⁰ J Deferme and J de Maeyer, 'Entre sciences sociales et politique—La pensée leplaysienne et les milieux catholiques belges' (2009) (149/150:1) *Les études sociales* 147–66.

²¹ W van Acker, 'Sociology in Brussels, organicism and the idea of a world society in the period before the First World War' in B Rayward (ed) *Information beyond borders—International cultural and intellectual exchange in the Belle Epoque* (Ashgate 2014) 143–68, spec 147–50.

²² D Heirbaut, 'Law reviews in Belgium (1763–2004): Instruments of legal practice and linguistic conflicts' in M Stolleis and T Simon (eds), *Juristische Zeitschriften in Europa* (Vittorio Klostermann 2006) 343–67.

²³ An author whose writings were much discussed, especially by advocates-general (eg Cass, 1st ch, 12 January 1893, Pas, 1893, I, 79, concl Mélot, 82).

²⁴ eg L Wodon, *Le contrôle juridictionnel de l'administration et la responsabilité des services publics en Belgique* (Lamartin 1920) 132–33.

system and another to the English system,²⁵ referring from time to time to German scholarship (eg Gierke²⁶ or Mayer²⁷). However, Wodon stressed deeper distinctions from French administrative law.²⁸ Overall, these authors looked for answers to technical questions, not to developing a grand scheme of principles from which to deduce solutions.

Thirdly, among the Belgian legal community at the end of the nineteenth century, one lawyer, E Picard, stands out. An important political and legal figure, yet a controversial one,²⁹ Picard was a member of the Brussels Bar and then the Supreme Court Bar, even becoming its chair (1898–90; 1916). He joined the Socialist Party early on and became one of its senators between 1894 and 1908. He played a key role in two distinct legal enterprises then flourishing in Belgium.³⁰ The first enterprise was the *Pandectes belges*, a systematic encyclopaedia of Belgian law organized by keywords, published between 1879 and 1940, and running to 151 volumes. It became a structural reference source gathering material in a conscious effort towards identifying a Belgian body of law following the example of Justinian's Digest. The second of these undertakings was the production of an alternative legal journal, the *Journal des Tribunaux*,³¹ in 1881. The main legal journal at the time was the *Belgique judiciaire*,³² a conservative publication.³³ Picard sought to develop a different voice. His primary objective was to actually give access to the content of the law, the statutes, and/or the case law to the man in the street. In this he failed. Yet, the *Journal des Tribunaux* has become one of the leading Belgian journals for practitioners up to today, certainly for French-speaking practitioners.³⁴ Through his many activities Picard sought to develop the 'socialization of the law', that is, a process by which the law should be incrementally reformed to better account for the difficulties encountered by the least favoured social classes.

²⁵ M Bourquin, *La protection des droits individuels contre les abus de pouvoir de l'autorité administrative en Belgique* (Bruylant 1912) respectively 268–310 and 311–30.

²⁶ Bourquin (n 25) 7.

²⁷ Bourquin (n 25) 235, 332.

²⁸ Wodon (n 24) 5–69.

²⁹ He was progressive when it came to social reforms for economically poor people, while running a very successful business in arts and the legal profession. However, he developed a legal theory which revolved openly on the supremacy of the Aryan race over other groups. His racist and anti-Semitic discourses make him now toxic. B Coppein, 'Het onzekere fundament van het recht—Edmond Picard en het natuurrecht' in D Heirbaut, X Rousseaux, and A Wijffels (eds), *Histoire du droit et de la justice—Justitie- en rechtsgeschiedenis* (Louvain-la-Neuve 2010) 511–26, <<http://books.openedition.org/pucl/885#ftn7>> last accessed 14 May 2020.

³⁰ B Coppein, 'Le droit qu'une partie de la nation n'a pas—Edmond Picard en de vermaatschappelijking van het recht in België tijdens het fin de siècle' (2008) 86(2) *R Belge Philol & Hist* 375–409.

³¹ Abbreviated JT.

³² Abbreviated BJ.

³³ Heirbaut (n 22) 343–67, spec 347–48.

³⁴ Heirbaut (n 22) 343–67, spec 352–56.

C. Institutions: a distinct role for the Supreme Court

A key feature of Belgian legal culture is the very porous distinction between public and private law. There was no clear criterion available to bring a legal issue within the one or the other during our period of reference (1890–1910).³⁵ There was no distinct administrative court in Belgium, but a series of specific administrative litigations (such as in taxation or elections, both very much connected to property rights at the time) could arise, for instance at the level of the *députation provinciale*, although its powers were limited after an 1881 reform.³⁶ This lack of a clear public–private divide led to difficulties when it came to defining what qualified as ‘administrative law’. Most litigation—pertaining to public or private law—would indeed be submitted to the Belgian Supreme Court, which thus plays a key role in our analysis.³⁷

The Belgian Supreme Court is one of these institutions that Belgium borrowed from the French. As in France, decisions from the Supreme Court between 1890 and 1910 tended to brevity. It can be difficult to gain a clear idea of the reasoning the Court followed and especially of what lay behind the reasoning. However, there are major differences between the two Supreme Courts, starting with the fact that the French Supreme Court is not an administrative judge and that the Belgian Supreme Court had to find its own identity in the decades following Belgian independence. It is thus useful to retrace briefly the main steps that led the Belgian Supreme Court to gain a distinctive position by 1890.

First, the Supreme Court faced an institutional question regarding its position in interpreting the law and referring questions to parliament. The so-called ‘*référé législatif*’ was abolished in 1867. It was replaced by a new procedure. When the Supreme Court is asked to adjudicate on the same point of law for the second time in the same case, meaning that the lower courts have twice been in disagreement with the Supreme Court, the Supreme Court decides in grand chamber. The lower court to which the decision may be referred (if the Supreme Court decides to quash the referred decision) is bound to follow the decision of the Supreme Court. Statistically, this procedure is rare.

Secondly, the Supreme Court faced changes in its composition through a combination of factors. The first change was related to the education of its judges. The question emerged whether judges could stay in position until they passed away,

³⁵ The public/private divide is endlessly discussed in Belgium (for a recent illustration, see Centre interdisciplinaire de recherche en droit constitutionnel, *La distinction entre droit privé et droit public? Pertinence, influences croisées et questions transversales*, FUSL, 11 March 2019).

³⁶ For a discussion of this reform, see *Traité de la juridiction administrative et des recours administratifs—vol 1* (Berger-Levrault et Cie 1887) 67–70.

³⁷ For an illustration of how the Supreme Court and its advocate-general considered public law as equal to private law, see Cass, 1st ch, 18 June 1891, Pas, 1891, I, 165, 173.

as the Constitution provided for in order to protect judicial independence. Soon, practical issues arose with ageing and ailing judges. After a degree of resistance the 'éméritat' system was adopted,³⁸ which meant that judges could receive their pension while keeping their last salary. This change altered the composition of the Supreme Court. Many of the 'older' judges had been trained outside Belgium or by law teachers brought in from abroad.³⁹ New judges, now trained in one of the Belgian universities by Belgian staff, would slowly become judges and gain access to the Supreme Court. The judicial interpretation of increasingly Belgian legislation became home-grown. This is not merely a transplantation of the French apodictic style and syllogism. Belgian judicial decisions are longer, more convoluted, and generally build on 'polysyllogism' or a chain of syllogisms.⁴⁰ This shapes a broad space for judicial creativity.

The second change in the composition of the Supreme Court relates to its connection with parliament. Indeed, the 1830 Parliament was called a 'parliament of civil servants' as it mostly included civil servants and judges. This, however, changed over the following sixty years: the electoral system increasingly included people from wider socioeconomic backgrounds. In 1848 an incompatibility between judges and members of parliament was adopted.⁴¹ In turn, this transformed the meaning of the separation of powers. When the Supreme Court wrote in the early days that the government was accountable to parliament it actually referred to accountability to another institution with the same social membership as the courts.⁴² When the Supreme Court mentioned this accountability to parliament in the 1890s it meant accountability to another body and other people.

The third change in the composition of the Supreme Court was a political one. Traditionally, the appointment system led to an overall political balance between its judges and advocates-general. The Catholics mostly staffed the sitting judiciary while the Liberals were represented by the advocates-general. However, between 1884 and World War I, Catholics were continuously in power, appointing judges and advocates-general for a long period, thus shattering the previous political balance among the Supreme Court's members.⁴³

This change needs to be read in parallel with the distinctive roles of the advocates-general⁴⁴ in the Supreme Court. As in the French system, the advocates-general

³⁸ *L sur la mise à la retraite des magistrats*, 25 July 1867: the pension equals the average of earnings during their last five years of employment.

³⁹ P Wautelet, 'La faculté de droit de l'Université de Liège—Notes historiques succinctes' (2017) 1 *Rev Dr ULg* 9–17.

⁴⁰ F Rigaux, *La nature du contrôle de la Cour de Cassation* (Bruylant 1966) 36–46.

⁴¹ A Hendick and F Muller, 'La magistrature belge de 1830 à nos jours' in X Rousseaux, M De Koster, and D Heirbaut (eds), *Deux siècles de justice—Encyclopédie historique de la justice belge* (Die Keure 2015) 304–29, spec 311.

⁴² The incompatibility between being a member of parliament and of the Supreme Court has existed since 1832 (L 4 August 1832 *organique de l'ordre judiciaire*, art 6).

⁴³ Hendick and Muller (n 41) 304–29, spec 308–09.

⁴⁴ Although different words differentiate between members with different seniorities this chapter uses the word 'advocate-general' throughout, regardless of the seniority of the person.

mainly provide the Court with an objective analysis of legal issues, that is, their conclusions, often published with the decision of the Court. Highly informative, these conclusions help the reader to understand the reasoning behind decisions. They often use comparative law to seek inspiration abroad or reject foreign solutions. In the overwhelming majority of cases the advocates-general and the Court arrive at the same conclusion—that is, quashing or not quashing a lower-court decision. However, their reasoning processes can differ widely, perhaps because they address different questions. The decisions of the Court rely on a logic between the legal principles or provisions to be applied and their correct application in the case (internal reasoning), while the conclusions aim to justify the choice of the legal principles or provisions applied in a case (external justification).⁴⁵

Advocates-general have additional roles. For instance, they read an annual discourse at the beginning of the judicial year, taking into account the ‘circumstances’.⁴⁶ This is one of the rare opportunities for the judiciary to express their views on social, political, and economic events. Between 1890 and 1910 these discourses were, for instance, entitled *Le collectivisme* (collectivism),⁴⁷ *L’institution d’un Conseil d’Etat en Belgique* (the creation of a Belgian Council of State),⁴⁸ and *Syndicats et unions professionnelles* (trade unions and labour organizations).⁴⁹ Overall, advocates-general are keen to protect public order.⁵⁰

D. Tools: new interpretative methods

The succession of political changes in a short time at the turn of the eighteenth-nineteenth century was associated with rapid legal changes in Belgium. This made it difficult to identify the applicable law in a dispute. Sometimes customs or Roman law provided solutions. Sometimes the Belgian civil code (ie the French civil code) provided answers. In that case the extent to which the judge could depart from a mere automatic application of the law became as problematic as it had become in France. Despite criticisms, the Belgian Exegetic School would only disappear in Belgium when its main Belgian proponent, Laurent, passed away in 1887. The problems linked to the identification of the applicable norm were more complex when the civil code did not apply. Judges then had to develop new ways to adjudicate litigation.

⁴⁵ P Brunet, ‘Le style déductif du Conseil d’État et la ligne de partage des mots’ (2015) 91(3) *Droit et société* 545–61 (in relation to the conclusions of the public reporter in the French *Conseil d’Etat*). The same distinction holds true in general for the Belgian Supreme Court between 1890 and 1910.

⁴⁶ Hendick and Muller (n 41) 304–29, spec 317, 321–22.

⁴⁷ L De Gamond, *Discours prononcé à l’audience d’ouverture de l’année 1898*.

⁴⁸ R Janssens, *Discours prononcé à l’audience solennelle de rentrée*, 1 October 1902.

⁴⁹ R Janssens, *Discours prononcé à l’audience solennelle de rentrée*, 1 October 1910.

⁵⁰ Hendick and Muller (n 41) 304–29, spec 322–26.

Alternative interpretative tools were suggested to judges. Next to Picard's socialization of the law, Vander Eycken⁵¹ and Leclercq (who reached the highest rank as the advocate-general of the Supreme Court in 1926–38)⁵² followed Gén'y's free scientific method (*libre méthode scientifique*).⁵³ Their idea was not to replace positivism, but to identify clearly the limit of the written law and to leave space for judges to identify, through a scientific method based on reality and the '*nature des choses*', which legal solution should prevail in a given situation when formal law was silent. Another approach drew on American pragmatism, with the key idea then being to ensure that scientific knowledge was translated into action. (Legal) notions were important for the consequences that they might entail. Judges were supposed to balance the competing interests at stake in litigation. These approaches then morphed into a form of pragmatism, leading to the 'Brussels School' and the 'new rhetoric' in the subsequent period.⁵⁴

Due to the specific problems connected to the norms involved in administrative adjudication (ie most often not the civil code, but technical overlapping statutes often contradicting each other), administrative litigation was probably one of the first fields where the Supreme Court left the exegetic method to start experimenting with other ways to interpret the law, structure the conflicting norms, and develop them into a coherent whole, echoing the discussions held elsewhere in Belgian intellectual circles. This chapter maps how the administrative case law of the Belgian Supreme Court between 1890 and 1910 mirrors the ideas underpinning pragmatism.

III. Judicial outputs: trends and diversity

As there was no distinct administrative court or chamber in Belgium, and as administrative law was very much in a formative phase, it is impossible to give a comprehensive view of all the cases adjudicated by the Supreme Court in relation to what today would be called administrative law. The best way to have a reasonably accurate understanding of the case law is to look for key words⁵⁵ connected to administrative law in the annual tables of the main legal periodicals of the time, such as *Pasicrisie*⁵⁶

⁵¹ P Vander Eycken, *Méthode positive de l'interprétation juridique* (Brussels Librairie Falk Fils 1906).

⁵² B Frydman, 'Le projet scientifique de François Gén'y' in *François Gén'y, mythe et réalités: 1899–1999. Centenaire de Méthode d'interprétation et sources en droit privé positif* (Dalloz/Bruylant 2000) 213–31, spec n 10.

⁵³ J-P Chazal, 'Léon Duguit et François Gén'y, Controverse sur la rénovation de la science juridique' (2010) 65(2) RIEJ 85–133.

⁵⁴ B Frydman, *Le sens des lois—Histoire de l'interprétation et de la raison juridique* (3rd edn, Bruylant 2011) paras 304–644.

⁵⁵ Namely: separation of powers, competence, delegation, local government, province, art 92 C, art 93 C, art 107 C, legality of administrative decisions, administrative liability, etc.

⁵⁶ Online free access to the *Pasicrisie* (abbreviated Pas) is available on the KU Leuven website <https://bib.kuleuven.be/rbib/collectie/online-tijdschriften/cassatie> last accessed 14 May 2020.

and *Belgique judiciaire*.⁵⁷ Many decisions involved questions of liability,⁵⁸ concessions, and expropriations.⁵⁹ These have not all been included here as they often replicated the same type of reasoning. What matters is to flag up divergences and uncertainty, not the fine details of these divergences, which were often connected to a state of legislation totally superseded by later developments. Cross-references in the case notes and the conclusions of the advocates-general were further used to ensure that there was no chance of omissions. This led to the identification of eighty-nine decisions adopted by the Supreme Court between 1890 and 1910 relating to administrative litigation.⁶⁰ It is reasonable to think that most relevant cases have been located in doing so. Three general comments can be made on the basis of this general overview.

First, the findings can be summarized quantitatively as follows. A first differentiation can be made between cases adjudicated by the criminal chamber of the Supreme Court (2nd Chamber) and cases adjudicated by its civil chamber (1st Chamber). Based on this distinction, fifty-four cases of our sample are criminal and thirty-three civil. A second distinction can be made according to the parties to the case. A relative majority of the cases involve local governments (twenty-seven), a minority central government (nine), or provinces (three). The difference in the total number of cases and these figures is explained by the fact that many cases involve other types of bodies such as civic guards or hospices. A small number of cases (six) relate to direct litigation between public bodies themselves.

Secondly, three decisions have a specific procedural background: in only two cases did the Supreme Court decide against the advocate-general's conclusions⁶¹ and in only one case did the Supreme Court decide in grand chamber after a referred lower court disagreed with the first decision adopted by the Supreme Court.⁶² As these cases demonstrate a level of disagreement that is so clear as to be procedurally marked they are discussed apart under the heading 'difficult cases'.⁶³

Finally, the Supreme Court decided in eighteen cases that the administrative decision was to be set aside (ie one in five cases).⁶⁴ The overall chance of success for citizens was thus significant. However, some citizens were clearly not protected against the administration. This was especially true for retiring civil servants

⁵⁷ Online free access to the *Belgique judiciaire* is available on Digithemis <http://www.digithemis.be/index.php/en/> last accessed 14 May 2020.

⁵⁸ R Marcq, *La responsabilité de la puissance publique* (Larcier 1911).

⁵⁹ *Pandectes*, v° *utilité publique* (1938, t 129^{ter} and *quarter*).

⁶⁰ This research also found forty-three decisions from lower courts and decisions from provincial bodies or from the king. There was no systematism in the way these decisions were published, however, so their representativeness cannot be ascertained. This chapter uses them for illustrative purposes only.

⁶¹ Cass, 1st, 4 January 1894, Pas, 1894, I, 71, *conclusions contraires* Mesdach de ter Kiele; Cass, 2nd, 22 October 1900, BJ, 1901, 293, *conclusions contraires* Van Schoor.

⁶² Cass (*grand chamber*), 8 June 1892, BJ, 1892, 1381.

⁶³ Section III.D.

⁶⁴ In some cases no administrative decision was challenged (as the litigation may pertain to material action and the ensuing liability), which means that the rate of setting aside administrative decisions is actually even higher.

pending an administrative decision granting them a pension. Their rights were only protected once they had been granted a pension, while often the dispute turned on this very granting.⁶⁵ Pending this decision the civil servant had no civil right to a pension as this was a decision taken on a discretionary basis by the government.⁶⁶ Many cases tested this boundary between rights and interests, and even more between civil and political rights. This distinction was muddled at the time.⁶⁷ It triggered an important body of writing after our period, leading to key definitions of what should be understood by ‘subjective rights’⁶⁸ and conceptual discussions of ‘interests.’⁶⁹ Despite these theoretical developments since the period 1890–1910, in Belgian scholarship the procedural distinction between subjective rights (leading the ordinary courts to be competent) and interests in challenging a norm (leading the administrative judge to be competent) remains fraught with uncertainty up to today.⁷⁰ This leads us to think that this tension between subjective rights and interests is inherent to Belgian administrative culture and its pragmatism, despite repeated attempts to move beyond it.

IV. Applied pragmatism: balancing individual freedom and public power

This section analyses judicial creativity in setting the standards for reviewing administrative action on the basis of a selection of cases. It illustrates the main questions arising in administrative litigation, namely: the power of the judge to adjudicate the case (section IV.A), the powers of the administration (section IV.B), the legal norms and procedural requirements that administrative decisions have to follow (section IV.C), and difficult cases, that is, cases where judges adjudicated between competing norms or interests and where judges either had to find a practical logical solution in a normative chaos or cases which proved so thorny that they led to distinctive procedures at a formal level (section IV.D). The cases selected illustrate the difficulties the Supreme Court faced when interpreting the law. If the

⁶⁵ eg.: Cass, 1st, 19 July 1900, BJ, 1901, 39; *Civ Verviers*, 19 March 1899, BJ, 1900, 105.

⁶⁶ See section III.A.2.

⁶⁷ See section III.A.2.

⁶⁸ J Dabin, *Le droit subjectif* (Dalloz 1952) starting his book with a discussion of the positions taken by Duguit and Kelsen.

⁶⁹ P Gérard, Fr Ost, and M van de Kerchove (eds), *Droit et intérêt*, 3 vols (Facultés universitaires Saint-Louis 1990). The prominence of this scholarship when it comes to these discussions can be illustrated by how well their writings travel. For instance, Geoffrey Samuel, who contributed to the *Gérard et al* volumes builds on them for his own theory (*Rethinking Legal Reasoning* (Edward Elgar 2018)).

⁷⁰ eg M Leroy, *Contentieux administratif* (5th edn, Anthémis 2011) 324–59; M Joassart, ‘Le juge civil et la séparation des pouvoirs—Commentaire des arrêts de la Cour d’appel de Bruxelles du 21 février 2014 et du 12 septembre 2014’ [2016] APT 435–47; B Bléro, ‘La théorie de l’objet véritable du recours n’est-elle pas véritablement devenue sans objet?’ (note sous Cass (*chambres réunies*), 20 December 2007) [2009] RCJB 420–80.

overall case law paved the way to liberal ideology in Belgian law through affirming key tenets of positivism and formal solutions, the road was littered with pragmatic features.⁷¹

A. Separation of powers: a second-best principle

As mentioned earlier, the pragmatic Belgian scholarship did not discuss how to conceptually frame the litigation connected to social transformations at the time. The best candidate for giving an overall direction for judges facing new forms of litigation was the principle of the separation of powers. It was a principle in the making, however. A difficult principle to pin down (section IV.A.1), its implementation in concrete litigation was fraught with difficulties (section IV.A.2).

1. A watermarked constitutional principle

The liberal Belgian constitutive legislature wished to deliberately move away from the French and Dutch powerful executives.⁷² The Constitution did not contain a provision formally referring to the separation of powers, but established a system where the allocations of power guaranteed independence, security, and liberty for citizens.⁷³ It included a series of provisions on which citizens could rely for protection against the executive. In particular, these were art 92 ('Disputes about civil rights belong exclusively to the competence of the courts'), art 93 ('Disputes about political rights belong to the competence of the courts, except for the exceptions established by the law'), and art 107 ('Courts only apply general, provincial or local decisions and regulations provided that they are in accordance with the law'). This last, embodying the 'exception of illegality', made the Belgian Constitution one of the rare constitutions to providing explicitly for this.⁷⁴

This put the judiciary in a privileged position to supervise the ways in which the executive, provincial, and local powers worked.⁷⁵ However, the Supreme Court was cautious in using the exception of illegality from 1840 onwards.⁷⁶ For instance,

⁷¹ O Corten and A Schaus, *Le droit comme idéologie—Introduction critique au droit belge* (2nd edn, Editions de l'Université libre de Bruxelles 2009) ch 4 suggests the articulation between positivism and natural law as a key explanation for Belgian law. This contribution claims that positivism is the outcome of the concurring action of formalism and pragmatism and that natural law can percolate in formalism and pragmatism. However, Corten's and Schaus' general point that the two aspects of positivism and natural law co-exist is not challenged. This contribution looks at the reasoning method more than at the theoretical underpinning of the two approaches.

⁷² J Romieu, 'De la séparation des pouvoirs administratif et judiciaire en Belgique' [1886] JT 1073.

⁷³ C Faider, 'La séparation des pouvoirs', discours prononcé à l'audience solennelle de rentrée, Cour de Cassation, 15 October 1875, 9.

⁷⁴ J Theunis, *De exceptieve van onwettigheid* (Die Keure 2011) no 149.

⁷⁵ Ch Faider, 'La séparation des pouvoirs', discours prononcé à l'audience solennelle de rentrée, Cour de Cassation, 15 October 1875, 13.

⁷⁶ This was dubbed the 'auto-mutilation' of the Supreme Court (see Muller (n 17) 244–81).

in 1866 the Supreme Court refused to control the inscription of a prostitute on a local register, noting that the separation of powers prevented the judiciary from interfering with the sovereign decision of a local government. This met with the resistance of two appeal courts; the advocate-general also concluded in the opposite direction. Scholarship claimed that this decision left too much scope for executive arbitrariness. Soon this would lead to calls for the setting up of a proper administrative court.⁷⁷ The 1866 decision is seen as the epitome of the liberal state, with minimal interference from the judiciary in administrative matters.

Although no major work in Belgian public law theorizing the separation of powers as a core concept appeared,⁷⁸ the separation of powers was recognized increasingly clearly as being cardinal. For instance, one advocate-general wrote that 'the rule of the separation of powers is absolute, it is the basis of our social organisation, it is the protection against authority and the remedy to anarchy'.⁷⁹ Despite this, hesitations around the principle endured. Firstly, various constitutional provisions were linked to it, sometimes even the 'Constitution' as a whole.⁸⁰ Article 107 C and the separation of powers could overlap but not automatically.⁸¹ The textual basis for the principle was shifting, making it difficult to build on a formal interpretation of the Constitution for recognizing its potential to fully protect citizens from abuse of powers.

Secondly, the separation of powers was formulated in different ways, sometimes with a focus on reciprocal independence,⁸² sometimes on reciprocal control,⁸³ sometimes on balance and harmony.⁸⁴ The Supreme Court referred sometimes to the 'constitutional principle of separation of powers'⁸⁵ or to the 'constitutional principle of separation and independence of powers'⁸⁶ without further explanation. Sometimes the explanation of the Supreme Court remained elliptical but stated forcefully that 'the Constitution established the separation of powers as an essential principle of the political order'.⁸⁷ In other cases the Court proceeded in detailed steps. For instance, it first stated that the 'Constitution consecrates the

⁷⁷ P Duez, *Les actes de gouvernement* (Daloz 1935, reed.) 107 and references to Wodon.

⁷⁸ The most conceptual article found during this research is the one written by G Devin, 'La séparation des pouvoirs exécutif et judiciaire' [1897] BJ 513. The author was chair of the Bar to the French *Cour de Cassation and Conseil d'Etat*. At the start of the contribution he writes that 'there is a big gap between theory and practice'. The paper was read at the opening of a conference for legal trainees (in France).

⁷⁹ De le Court under Civ Brussels, 3 December 1907, BJ, 1907, 1377, spec 1378.

⁸⁰ Cass, 1st Ch, 5 March 1891, BJ, 1891, 737, spec 743.

⁸¹ Examples of some of the rare overlaps: Cass, 1st, 20 November 1890, Pas, 1891, I, 15; Cass, 30 December 1897, BJ, 1897, 417; Cass, 1st Ch, 25 May 1900, Pas, 1900, I, 266.

⁸² *Pandectes*, v° *compétence respective de l'administration et des tribunaux* (t 22, 1887) para 8.

⁸³ *Pandectes*, v° *séparation des pouvoirs* (t 96, 1909) para 6.

⁸⁴ C Faider, *La séparation des pouvoirs*, discours prononcé à l'audience de rentrée, 15 October 1875, spec 5–6.

⁸⁵ Cass, 1st, 6 February 1890, Pas, 1890, I, 79. All translations of decisions are my own.

⁸⁶ Cass, 2nd, 11 December 1905, Pas, 1906, I, 57.

⁸⁷ Cass, 1st, 20 November 1890, Pas, 1891, I, 15, spec 17.

principle of separation and independence of power'. It then mentioned that the implementation of the law belonged only to the monarch and the administration, with implementation of the law, including the power to adjudicate on any issues, arising from this implementation. In a following step it recalled arts 92 and 93 C, which entrust the judiciary with litigation pertaining to civil and political rights. It then defined these civil and political rights, leading the Court to focus on the competences of the judiciary pertaining to civil rights as litigation arising only between private persons. Finally, the Court concluded on a pragmatic note:

that, out of necessary consequence, the judiciary does not have the power to know the litigations between administrative bodies or between administrative bodies and citizens, about the implementation of statutes of general interest, when no private and individual rights is at stake;

That this allocation of powers between the judiciary and the executive power is even more justified since this is the only one that leaves intact the independence of each of these powers.⁸⁸

This approach explains that contemporaries such as Laferrière classified Belgium in a third category of systems, neither French with its own administrative judges nor English, where judges have wide powers relating to the administration.⁸⁹ Yet, this does not mean that the administration was left uncontrolled, but only that control evolved through pragmatic solutions and compromises searching to balance powers against each other.⁹⁰

2. Implementation in litigation in administrative matters: the chicken-and-egg question

When it came to the implementation of the separation of powers the crucial point revolved around civil and political rights. Civil rights were defined as rights recognized by the law for any natural or legal person, regardless of his/her nationality, and whose direct subject matter was the private good of a person⁹¹. Political rights meant all the rights that included some form of participation (even minor) in the exercise of sovereignty or pertained to orders and interdictions issued by the

⁸⁸ Cass, 1st, 5 March 1891, BJ, 1891, 737, spec 743.

⁸⁹ E Laferrière, *Traité de la juridiction administrative et des recours administratifs—vol 1* (Berger-Levrault et Cie 1887) 26–27. The author notes the wide powers that courts exercised in some matters such as public purchasing and the protection of private property (ibid 70).

⁹⁰ ibid 74. The President of the Supreme Court, Charles Beckers, anonymously acknowledged the importance of pragmatism for our topic ('De la responsabilité civile de l'Etat, des administrations publiques et des fonctionnaires dans ses rapports avec le principe de la séparation des pouvoirs' (1879) XXVI Rev adm 137–68; 'De la responsabilité civile des administrations publiques et des fonctionnaires' (1890) XXXVII Rev adm 93–123). My thanks to Dr Françoise Muller for having drawn my attention to this reference and the identity behind the anonymous signature.

⁹¹ See for a later discussion: J Dabin, 'Lésion d'intérêt ou lésion de droit comme condition de la réparation des dommages en droit privé et en droit public' [1948] Ann dr sc pol 36–37.

authority and affecting the person or his/her goods.⁹² They included the rights to vote, to stand for political office, to pay taxes and to be part of the army.⁹³

Distinguishing these political rights from mere interests or between civil and political rights was arcane during our period of reference, however.⁹⁴ When did statutes only grant discretion to public bodies to award benefits or licences to citizens? When was the administration sovereign (where immunity prevailed) and when did citizens enjoy rights (where judicial control prevailed, unless a legal exception had been provided for political rights)? The two aspects, that is, sovereign action and exceptions provided by the law in relation to political rights, could overlap but did not necessarily do so. Depending on how the legal question was framed, that is, starting with looking at the author of an administrative decision (Did he or she act as a sovereign?) or starting from the addressee of an administrative action (Did he or she have a right?), the judge could be incompetent (as in not constitutionally allowed to impinge on executive powers) or competent (as the constitutional guarantor of individual rights). The Supreme Court did not identify a clear systematic starting point for the reasoning process or a general theory for an 'act of Government'.⁹⁵ The lack of method was astounding. However, the judiciary tried to clarify the grey zone between immunity and control at the time as the decisions falling within it increased enormously.

The first attempt towards clarification revolved around the distinction between the State acting as the representative of the nation (eg imperium and taxation) and the State acting as a natural person.⁹⁶ For instance, the identification of which parts of streets needed to be lit (a police power) fell within the sovereign remit of local government.⁹⁷ Yet the precise remit of the police function was uncertain. Questions arose regarding the legal qualification of works done by cranes in Antwerp harbour. These works were not merely material since they also involved a level of control over material acts. Was the State liable for the action of the crane staff in the event of an accident? In one decision the Supreme Court distinguished between the separation of powers and a principle of liability: absolute immunity only applied to activities falling within the remit of governmental action, not when the public bodies acted as private persons.⁹⁸ If there was a defect in implementing administrative decisions, judges could say that this defect was actually the outcome of a single administrative decision, so that no liability was incurred.⁹⁹ This distinction was clearly made in relation to pensions for civil servants and their widows: the Ministry and its administration were the only ones to decide

⁹² Errera (n 10) 247–48.

⁹³ M Uyttendaele, *Trente leçons de droit constitutionnel* (Anthémis 2014) 587.

⁹⁴ Errera (n 10) 245.

⁹⁵ Duez (n 77) 104–09.

⁹⁶ Concl Paul Leclercq before Brussels, 4 February 1907, BJ, 1907, 513.

⁹⁷ Liège, 18 October 1893, BJ, 1893, 1547.

⁹⁸ Cass, 12 January 1893, Pas, 1893, I, 79.

⁹⁹ Civ Antwerp, 9 April 1910, BJ, 1910, 615; Civ Anvers, 23 July 1910, BJ, 1910, 1161, spec 1162.

on the granting of a pension and there was no judicial review of their decisions.¹⁰⁰ However, in other cases, it led to difficulties in implementation. For instance, in circumstances similar to the Antwerp cranes, the Supreme Court decided one time that the public body had only performed simple acts of management and was thus not liable,¹⁰¹ while deciding in the opposite direction a few years later.¹⁰²

B. Power-holders: empowering the actors needed for a functioning state

Before its independence Belgium was not a single political unit with its own king. The Belgian provinces had long been administered locally; hence the understanding that local government was a (quasi) fourth power.¹⁰³ The memory of illiberal regimes under the French and Dutch haunted many discourses in the writings of the judiciary and advocates-general. The respective scopes of local (section IV.B.1) and royal (section IV.B.2) powers were still very much being formulated at the end of the nineteenth century. The case law of the Supreme Court helped shape and articulate local and royal powers (section IV.B.3), bearing in mind that royal and local powers were the hinges to allow a functioning state dealing with the twin problems of industrialization and urbanization.

1. Reshaping local self-government

Belgium had inherited its local government structure (communes and provinces) from the French, yet the differences between the two systems ran deep.¹⁰⁴ The Constitution recognized their autonomy¹⁰⁵ in providing that local governments could take decisions in the local interest (*autonomie locale*).¹⁰⁶ Control over local government was looser in Belgium than in France.¹⁰⁷ However, by the end of the nineteenth century, local autonomy became more constrained for financial and technical reasons: people and goods were increasingly moving across the country and some degree of harmonization (eg in relation to food safety) was needed. These changes led to litigation regarding the scope of local government power.

¹⁰⁰ Eg Cass, 1st Ch, 19 July 1900, BJ, 1901, 39; Brussels, 21 February 1896, BJ, 1896, 1143; Civ Verviers, 29 March 1899, BJ, 1899, 105.

¹⁰¹ Cass, 1st, 2 November 1894, BJ, 1894, 1495.

¹⁰² Cass, 1st, 25 May 1900, Pas, 1900, I, 266; BJ, 1900, 945.

¹⁰³ C Faider, 'La séparation des pouvoirs', discours prononcé à l'audience solennelle de rentrée, Cour de Cassation, 15 octobre 1875, 5; Errera (n 10) 114.

¹⁰⁴ For the distinctive historical background in Belgium: A Mast, J Dujardin, M Van Damme, and J Vande Lanotte, *Overzicht van het Belgisch Administratief Recht* (18th edn, Kluwer 2009) paras 562–63.

¹⁰⁵ Article 108 Constitution.

¹⁰⁶ Errera (n 10) 114.

¹⁰⁷ M Bourquin, *La protection des droits individuels contre les abus de pouvoir de l'autorité administrative en Belgique* (Brussels 1912) 245–46.

The first question pertained to the powers enjoyed by local government. Judges checked whether local decisions fell within the scope of powers legally recognized to local governments. Hence, when local governments adopted decisions on matters outside the local police (ie to maintain public order and especially hygiene, security, and civic peace) judges considered the decisions illegal (eg because they were grounded in morality).¹⁰⁸ However, judges did not assess the merits of administrative decisions.¹⁰⁹ It was enough for the administration to say that the decision was needed to secure public order or hygiene. However, as the times were fraught with social agitation¹¹⁰ and labour organizations organized demonstrations, protests, and strikes, mayors used their police powers to maintain public order and limit these actions. Questions arose as to whether mayors were then breaching art 19 of the Constitution (on freedom of assembly). Judges then examined whether mayors were or were not acting arbitrarily, that is, for instance whether the circumstances justified a mayor's temporary urgent measures.¹¹¹

The second category of cases pertains to matters of taxation. Before its independence Belgium had local customs taxes, but these had become controversial. The establishment of such a tax on the Schelde by the Dutch had been the economic cause of the revolution. Yet it would be 1860 before these local taxes would be fully abolished.¹¹² Local governments were keen to re-establish them in some form to gain financial resources to address the social needs of their local populations. Judges reviewed these taxes when they contradicted the principle of free trade,¹¹³ but were hands-off as regards the rest.¹¹⁴ For instance, the Supreme Court decided that 'in the exercise of its power [to identify the different components of local taxation], the local government is the natural assessor of the budgetary needs and taxpayers' ability [to pay]'.¹¹⁵

The third category of cases pertains to the allocation of powers among local government bodies. For instance, judges decided on the respective attributions between mayors, local councils, and/or local assemblies.¹¹⁶ Some matters were petty, such as who should be in charge of the local seal.¹¹⁷ Other matters pertained to public order: a mayor could only act alone in case of emergency, when public order

¹⁰⁸ Observations under Trib Gand, 13 June 1906, (1907) RA 102 referring *inter alia* the following cases: Cass, 18 January 1892, (1892) RA 42; Gand, 14 January 1905, (1905) RA 173.

¹⁰⁹ Cass, 2nd, 21 November 1892, BJ, 1893, 166; X, 'Observations', (1907) RA 104; Brussels, 2 May 1903, (1904) RA 106.

¹¹⁰ See for another instance: Civ Mons, 19 July 1895, BJ, 1895, 956.

¹¹¹ Cass, 2nd, 12 October 1896, BJ, 1897, 699; Corr Bruges, 22 March 1894, BJ, 1894, 473.

¹¹² *L portant abolition des octrois communaux*, 18 July 1860.

¹¹³ eg Cass, 2nd, 9 October 1899, BJ, 1900, 124. For a case where the taxation was 'clearly prohibitive': Corr Leuven, 12 June 1894, BJ, 1894, 927.

¹¹⁴ Cass, 2nd, 28 June 1897, BJ, 1898, 172 with critical observations on how the judiciary reviewed local taxation.

¹¹⁵ Cass, 2nd, 22 January 1900, BJ, 1900, 515. Also Cass, 2nd, 11 March 1901, BJ, 1901, 943.

¹¹⁶ eg Cass, 2nd, 11 March 1901, BJ, 1901, 943; Cass, 2nd Ch, 30 January 1905, BJ, 1905, 557.

¹¹⁷ Cass, 1st, 20 November 1890, Pas, 1891, I, 15.

was under threat from social protest. In other cases, he had to act upon by-laws decided by the local council.¹¹⁸

2. Affirming royal powers: a centralizing force

Coming from the British Court, the first Belgian king accepted, tentatively at first, the principle of limited powers in a parliamentary system, embracing it fully after 1857 when his influence on the formation of the government diminished with the organization of formal political parties.¹¹⁹ Two main trends then converged to centralize powers in the king's hands: first, the interdiction of sub-delegation to ministers in some matters; secondly, the need to coordinate interests throughout the national territory.

a. Central government organization: subdelegation to ministers

The Supreme Court consolidated royal powers within the government in decisions relating to the subdelegation of powers.¹²⁰ A discussion arose to interpret a statute that granted powers to the government in the context of setting up private schools, a sensitive question argued over by Catholics and Liberals at the time: does 'government' mean the king (protective of the freedom to set up private schools) or ministers (against such a freedom)? In his conclusions the advocate-general showed that the word 'government' was used with different meanings across statutes, while 'king' and 'government' were at times used to refer to the same entity. This led to a logical argument based on the obviousness that 'it is impossible for the same function to fall within the attributions of another part of the administration'. 'Either always or never; otherwise, there would be a conflict, and a positive conflict, which needs to be avoided at all costs ... the nature of the statute is to leave nothing to chance or arbitrary; it necessarily has a rigorous, precise and exclusive character'. In seeking a solution the advocate-general looked to French references, transparency issues, Loyseau, old customs, the Bible, the Digest, English history, Locke and the 'social contract'. According to the advocate-general, ministers had some powers in the field of primary education; however, the question was how to distinguish precisely between the king's powers and those of his subordinates. Such a distinction needed to be 'rigorous, pre-identified and unchanging', based on the 'nature of the function'. Here, the king could not delegate his powers.

The Court started with the plain fact that 'the word 'government' is a generic term, likely to have various meanings'. Relying on the preparatory works, practices by the Home Minister and the need not to discriminate between the various situations provided for in the statute, the Court stated that the word here referred

¹¹⁸ Cass, 2nd, 12 October 1896, BJ, 1897, 699.

¹¹⁹ For the progressive implementation of this principle, B Deseure, 'National sovereignty in the Belgian Constitution of 1831. On the meaning(s) of Article 25' in U Müßig (ed) *Reconsidering constitutional formation—National sovereignty* (Springer 2016) 93–157, spec 125.

¹²⁰ Cass, 1st, 6 February 1891, Pas, 1891, I, 54. *Add* Cass, 2nd, 23 March 1903, BJ, 1903, 771.

to the king. Furthermore, the king had no right to delegate his power. The Court stated that:

the sovereignty lies with the nation, and all the powers, that emanate from it, are only exercised by delegation.

The delegated powers do not, in principle, include sub-delegation: inferior or superior from a hierarchical perspective, the powers do not derivate from each other; they have a similar origin from which they directly proceed; they are inalienable and non-transferable;

[...] inspired by these principles, the constitutive legislature in 1831 applied them even more rigorously to the royal powers as it had to react against a genuine system of encroachment practised under the Dutch regime; [...] it has decided that the king has no other right than the ones formally granted by the Constitution or the statutes implementing the Constitution;

No text has conferred to the King a general right of delegation; and the [statute that needed to be applied in this case] has formally excluded the right of the King to delegate his powers, guaranteeing minorities and local government the protection that they found in the royal powers.

This decision can be read formally as the Court providing a philological interpretation to the disputed provision, looking at the general consistency of the interpretation both in the legislative intent and the practical implementation of the statute. It also sought to limit overly extensive royal powers. Three features fall outside a formal interpretation, however. First, obviously, the word 'government' could be interpreted in various ways: there was no reason why this should be understood as meaning the king, except for the consequences that could be connected to this interpretation in a second step. Secondly, supra-constitutional principles connected to the nation's sovereignty appeared in a second part of the Court's reasoning, as the Court affirmed that this principle inspired the Constitution. This perspective is striking because it clearly put the sovereignty of the nation above the Constitution. Yet, the sentence 'the sovereignty lies with the nation, and all the powers, that emanate from it' is nearly a word-for-word reproduction of art 25, first sentence, of the Constitution. The Supreme Court did not refer in a formal way to this article for good reasons. The second sentence of art 25 continues as follows: 'the powers are exercised according to the Constitution.' This could lead to various interpretations, not all of them resulting in the impossibility of subdelegation. The Supreme Court decided not to engage with these possible interpretations and clearly chose the interpretation it wanted to apply, namely that powers could not be delegated. Thirdly, the Supreme Court went back to the historic reasons why royal powers could be dangerous. But here it reversed the king's role: minorities and local governments and their autonomy are supposed to be protected by the king against the possible arbitrariness exercised by ministers. Hence in limiting the delegation of

power, the Supreme Court was not actually expressing distrust in the king but confidence (in his benevolent view of setting up private schools). The explicit mention of the freedom of conscience and the protection of minorities bears the mark of an interpretative device used to justify a legal solution for its practical consequences.

b. The king: coordinator of interests and the allocation of resources throughout the national territory

As the courts were limiting their powers to review the merits of administrative decisions they broadly shaped the king's position. Different characters can be seen here. One is a figure like St Louis under his tree. For instance, the Supreme Court decided that a citizen could not go in cassation against an administrative decision because there was an appeal open to the king.¹²¹ Another figure is that of the 'superintendant de la voirie' (ie superintendent of the highways).¹²² For instance, a dispute arose between a tramway concession (supposed to be local to each city) and a train concession (supposed to link rural areas and larger population centres), leading the Supreme Court to wonder whether they could travel outside their respective areas. Articulating the tracks was problematic in the real world and fell beyond the judge's relevant expertise. This matter was thus for the king to decide.¹²³ In a more general way complaints could be directed to the king, who weighed competing interests against each other and coordinated them. In a case involving a local regulation imposing taxation to avoid the financial ruin of an important section of local taxpayers, the advocate-general stated that:

the matter is sensitive; the local government is in front of three competing interests: that of established merchants, that of door-to-door-sellers and that of consumers. The question as to whether the tax has been adopted by the local government taking account fairly of these three interests is one of social and public order. Hence the statute has reserved its examination to the superior administration, i.e. the King.¹²⁴

Similarly, in cases of conflict between administrations the king was the last resort instance to 'identify, with regard to the current needs, the part (from monies in excess in a foundation) that needs to be granted to charitable bodies to distribute to destitute elderly and the part to be granted to foster traineeships'.¹²⁵

¹²¹ Cass, 2nd, 11 November 1907, BJ, 1908, 383.

¹²² Cass, 1st, 30 May 1908, BJ, 1908, 1084.

¹²³ Cass, 1st, 30 May 1908, BJ, 1908, 1084.

¹²⁴ Concl before Cass, 2nd, 28 June 1897, BJ, 1898, 172.

¹²⁵ Liège, 30 December 1896, BJ, 1898, 291, spec 294.

3. Articulation between central and local government

In this new landscape, where local autonomy was redesigned and central powers reinforced, judges had to map the interactions between central administration and local government. The role of local and central government needed to be articulated to prevent fragmentation in policies with national scope (eg animal sickness,¹²⁶ food regulation, or railways). The solution was based on pragmatism more than legal analysis in the sense that judges looked at whether local derogations to a national scheme could lead to problems. For instance, the Supreme Court noted that the objective of a statute pertaining to food safety (meats) was to 'supplement the inertia of some local governments'.¹²⁷ The regulation of vehicle traffic by local governments also illustrates this point. The Supreme Court accepted that mayors adapted the maximum speed to local circumstances,¹²⁸ but not that they could add new requirements regarding the lights to be placed on vehicles, contradicting national regulations.¹²⁹

In some of these coordination cases the Supreme Court seemed to establish a distinction between the king acting as a norm-giver and the king acting as a norm-follower. In one case a citizen wanted to build a house 7.5m from the street. As the local government requested that the house be built 8m from the street the citizen appealed to the king, who reformed the local government decision in favour of the citizen. The citizen started building her house accordingly. The local government asked the judiciary to order the demolition of the house. A conflict arose between the local and the central government. The Supreme Court decided that:

when the decisions of the executive power are taken in a purely administrative matter, in the collective interest of society, without hurting the civil or political rights of the one who asks for its implementation or who challenges it, no challenge to the administrative judge is open as this would grant judges, not the right to judge, but to govern and *create intractable conflicts*.¹³⁰

Here, the Supreme Court did not want to intervene in a conflict between two public bodies, while the formal use of the hierarchy of norms would have had the royal decree placed above local regulation anyway. However, in another case the judge considered that a building constructor acting on behalf of the State had to secure the necessary local building permits even when the building was to be raised on the *public domain*.¹³¹ In this case no normative action was involved on the part of the State and it needed to comply with local regulation.

¹²⁶ Cass 2nd, 15 January 1900, BJ, 1900, 588.

¹²⁷ Cass 2nd, 3 July 1893, BJ, 1893, 1492, spec 1498.

¹²⁸ Cass 2nd, 21 December 1903, BJ, 1904, 893.

¹²⁹ Cass 2nd, 10 October 1904, BJ, 1905, 142.

¹³⁰ Cass 2nd, 11 December 1905, Pas, I, 1906, 57 (my emphasis).

¹³¹ Corr Gand, 27 March 1891, BJ, 1891, 681.

C. Principles: the legality of administrative action

During the period 1890–1910 the hierarchy of norms was still taking shape in Belgium. Indeed, a formal constitutional provision, art 107 C, provides clearly that local regulations are only valid if they comply with higher acts. This could have led to the buttressing of the principle of legality in administrative action through the hierarchy of norms and reliance on mere formalism. Formalism can indeed go a long way towards providing answers; yet, in the implementation of the principle of legality, pragmatic considerations played a role. This section starts with the pyramid itself (section IV.C.1), before looking at legislative intent as a way to identify the reach of the law (section IV.C.2). It then ends with the external (ie procedural) aspects of the principle of legality, where again pragmatism moderated judicial wishes to extend the right to be heard beyond the formal cases where the law provided for it (section IV.C.3).

1. The pyramid

Article 107 C explicitly facilitates the development of a normative pyramid. Its legal consequences include the setting aside of illegal administrative acts and depriving a decision taken *ultra vires* by the administration of its legal effects.¹³² It finds application in straightforward cases. For instance, art 112 C provided for the interdiction of preference in taxation matters.¹³³ Hence, it was applied in the last battles against local protectionism,¹³⁴ when local authorities tried to obtain financial resources for their activities. For instance, local regulation imposed local taxes while exempting innkeepers located in a certain district of the local government.¹³⁵ The Supreme Court checked whether the taxes entailed a privilege, breaking art 112 C, yet left the freedom to local governments to set their taxation otherwise.¹³⁶

However, judges faced complicated situations in some cases when the applicable legal norm was not easily identifiable. They often had to sift through various strands of norms (Roman law, local customs, Marie-Thérèse's edicts, French Revolution decrees, the French civil code, 1815 Dutch fundamental law and William's decrees, and the new statutes adopted by the Belgian Legislature after 1831). Illustrations can be found in discussions pertaining to the procedures applicable to provincial councils,¹³⁷ rivers and their use,¹³⁸ railway

¹³² D De Roy, 'Les paradoxes d'un mode de résolution des conflits entre gouvernants et gouvernés: l'exception d'illégalité des actes administratifs en droit belge', in S Dauchy (ed), *La résolution des conflits entre gouvernants et gouvernés* (Publications des Facultés universitaires Saint-Louis 2009) 119–39, spec 121.

¹³³ 'No privileges with regard to taxes can be introduced. No exemption or reduction of taxes can be introduced except by a law'. For a declaration of unconstitutionality: Cass, 1st, 15 June 1893, BJ, 1893, 1409.

¹³⁴ See section III.B.1.

¹³⁵ Cass, 1st, 15 June 1893, BJ, 1893, 1409. Montigny, 'Droit administratif—Taxes communales', BJ, 1894, 1185.

¹³⁶ Cass, 2nd, 6 November 1899, BJ, 1900, 117.

¹³⁷ Cass, 2nd, 22 January 1900, BJ, 1900, 515.

¹³⁸ Cass, 1st, 4 January 1894, Pas, I, 1894, *conclusions contraires* Mestdagh de ter Kiele.

concessions,¹³⁹ and obligations to religious ministers¹⁴⁰ or church wardens.¹⁴¹ The Court interpreted art 107 C extensively to state that although it was worded in the future tense it did not only apply in the future: administrative decisions taken before 1831, especially Dutch decrees, could also be set aside in this manner. The Supreme Court justified this by the fact that the Belgian constitutive legislative aimed to 'react against the abuses of the past, against that regime of royal orders, that under the last years of the Dutch ruling triggered so many complaints.'¹⁴²

2. The legislative will and the spirit of the text

The legal text is the first place for a judge to look to identify the legality and scope of the powers granted to public bodies. However, the legal text is not clear in many cases, so other interpretative tools are needed. The Exegetic School and positivism turned to preparatory works¹⁴³ and the spirit of the law.¹⁴⁴ The Supreme Court and its advocates-general looked in the same way to the parliamentary debates,¹⁴⁵ changes submitted but not adopted, preambles to royal decrees,¹⁴⁶ reports to the king, interpretative guidelines,¹⁴⁷ discussions and letters from ministers, and so on. The Supreme Court looked at the most authoritative written evidence for the legislative will, noting for instance that 'these declarations have not been challenged in either the Chamber of Representatives or the Senate,'¹⁴⁸ that 'these words [...] have been accepted without objections by the Chamber'¹⁴⁹ or looking at the author of the proposals and its explanations.¹⁵⁰ The Supreme Court did so to set aside an administrative decision¹⁵¹ or to confirm its legality.¹⁵²

The scope for creativity that this approach allowed is best understood if we recall that, at the time, Belgian authors repeatedly highlighted the weaknesses in the statutory elaboration¹⁵³ and advocates-general flagged up the difficulties of relying on statutes. In short, the *travaux préparatoires* opened the doors for the Supreme

¹³⁹ Cass, 1st, 17 December 1896, Pas, 1897, I, 43.

¹⁴⁰ Cass, 1st, 29 December 1898, Pas, 1898, I, 68.

¹⁴¹ Cass, 1st, 30 December 1897, BJ, 1897, 417.

¹⁴² Cass, 1st, 30 December 1897, BJ, 1897, 417.

¹⁴³ Cass, 1st, 23 January 1879, Pas, 1879, I, 75; Cass, 1st, 7 April 1876, Pas, 1876, I, 246; BJ, 1876, 537.

¹⁴⁴ eg Cass, 1st, 31 May 1889, Pas, 1889, I, 234.

¹⁴⁵ eg Cass, 2nd, 9 February 1903, BJ, 1903, 603.

¹⁴⁶ eg Cass, 2nd, 22 October 1900, BJ, 1901, 293, *conclusions contraires* Van Schoor (in the Court's decision).

¹⁴⁷ eg Cass, 1st, 6 February 1891, Pas, 1891, I, 54; Cass, 2nd, 22 October 1900, BJ, 1901, 293, *conclusions contraires* Van Schoor. Cass, 2nd, 10 October 1904, BJ, 1905, 142. Each time in the advocate-general's conclusions.

¹⁴⁸ Cass, 2nd, 28 June 1897, BJ, 1898, 172, spec 173.

¹⁴⁹ Cass, 2nd, 3 July 1893, BJ, 1893, 1492.

¹⁵⁰ eg Cass, 2nd, 17 December 1906, BJ, 1907, 655 (in the Court's decision).

¹⁵¹ eg Cass, 2nd, 22 October 1900, BJ, 1901, 293, *conclusions contraires* Van Schoor.

¹⁵² eg Cass, 2nd, 17 December 1906, BJ, 1907, 655.

¹⁵³ eg Edmond Picard, 'De la confection vicieuse des lois en Belgique et des moyens d'y remédier', *Pandectes*, (t 6, 1881), Introduction; *Pandectes*, v° *Travaux préparatoires* (t 115, 1923); *Pandectes*, v° *Conseil d'Etat* (t 24, 1887).

Court to pick and choose the snippets that best fitted the solutions it wanted to give to a case. Even though the Court and its advocates-general looked for the most authoritative parts of the parliamentary discussions (eg the constituent power,¹⁵⁴ reports from the central section,¹⁵⁵ the Justice Minister¹⁵⁶), the Supreme Court often turned in reality to the voice of the Government (eg in invoking the 'exposé des motifs', namely the formal justification joined to a bill¹⁵⁷). In short, the Supreme Court did not so much look for the legislative intent as for the intent of the executive when acting in its legislative capacity.¹⁵⁸

3. External legality

The Supreme Court controlled the external legality of administrative decisions, namely problems in procedure or in the form of administrative decisions. When standards were set in a statute no problem arose. For instance, judges exercised their control to ensure that the formal requirements set out in a statute on the 'civic guard' were complied with. This statute required that the decisions of the board included a series of pieces of information such as the composition of the board, the publicizing of hearings, the doctors' oath and its reasons. If decisions did not include these substantial forms they were found void.¹⁵⁹ However, if the objective of the form had been met by another means the sanction was not the nullity of the decision but another appropriate sanction, such as the extension of a time limit.¹⁶⁰

However, when the statute did not set formal or procedural requirements the Supreme Court enjoyed some space to decide whether to extend its control or not, and thus to impose respect for certain formal or procedural requirements even beyond an explicit legal basis. For instance, it ensured that formalities such as visas were applied in provincial by-laws related to traffic matters although no statute explicitly required them.¹⁶¹ In other cases the Supreme Court refused to make a 'good rule to follow' binding, however, thus rejecting the claim that the administrative decision was void.¹⁶² It seemed that the legal position to be taken with respect to meeting formal and/or procedural requirements was calling for attention. The

¹⁵⁴ Cass (*grand chamber*), 8 June 1892, BJ, 1892, 1381 (in the Court's decision itself).

¹⁵⁵ Cass, 1st, 6 February 1891, Pas, 1891, I, 54 (in the Court's decision itself); Cass (*grand chamber*), 8 June 1892, BJ, 1892, 1381, spec 1383 (in the advocate-general's conclusions).

¹⁵⁶ eg Cass, 2nd, 17 December 1906, BJ, 1907, 655 (in the Court's decision itself).

¹⁵⁷ eg Cass, 2nd, 7 April 1903, Pas, 1903, I, 163. The *exposé des motifs*, signed by the Minister of Finances, Mr Charles Graux is reproduced in a footnote to the Loi 28 May 1884 (*Pasinomie*, 1884, 217, esp 222).

¹⁵⁸ For a similar approach by advocates-general: eg Cass (*grand chamber*), 8 June 1892, BJ, 1892, 1381, spec 1386 (referring to the position taken by the Home Minister during parliamentary discussions).

¹⁵⁹ eg Cass, 2nd, 16 May 1898, BJ, 1898, 1104; Cass, 2nd, 31 May 1898, BJ, 1898, 1119; Cass, 2nd, 31 May 1898, BJ, 1898, 1224; Cass, 2nd, 20 June 1898, BJ, 1898, 1224. For an example of a form that was deemed merely 'external': Cass, 2nd Ch, 10 July 1899, BJ, 1899, 1095.

¹⁶⁰ eg Cass, 2nd, 31 May 1898, BJ, 1898, 1225.

¹⁶¹ eg Cass, 2nd, 9 February 1903, BJ, 1903, 603.

¹⁶² Cass, 2nd, 9 March 1896, BJ, 1897, 829 (verbal notice of the decision without a copy of the administrative decision included).

editor of the *Belgique judiciaire* decided to publish a series of cases pertaining in one way or another to this very question at the same time. On the one hand, a case pertaining to the 'good rule to follow' was published with a criminal procedure case where a similar issue was disputed. In this later case the Supreme Court reviewed whether the substantive forms or the forms that the law prescribed on pain of nullity had been met.¹⁶³ On the other hand, this was followed by the publication of a much older decision where a person had been caught hunting with a licence that did not have a visa from the competent authority.¹⁶⁴ The Supreme Court then examined if this formal irregularity made the hunting illegal. The Supreme Court, however, identified further irregularities in the background of this case. It then set aside the legal norm that required the hunting licence to bear a visa. Although this case was convoluted it illustrated that the Supreme Court was willing to look into the formal irregularities of administrative decisions, setting them aside when there were flaws even when no express statute required specific forms. The Supreme Court seemed especially demanding in cases where criminal prosecutions were likely for violation of an administrative decision.

One specific issue arose in relation to the right to be heard in administrative litigation. Legal provisions recognized the right to be heard in specific cases, such as for local teachers being appointed, suspended, or dismissed,¹⁶⁵ and for disciplinary measures taken against local civil servants and employees.¹⁶⁶ In this case the Court ensured that these provisions were complied with. The question was whether such a right to be heard should also be recognized when no specific provision required it. Lawyers pleaded in favour of hearing rights in cases leading to sanctions. Lower judges even stated that: 'a superior principle of justice opposes that anybody would be sentenced without having had the possibility to defend his/her case'.¹⁶⁷ However, this was not followed in case law, either in general (eg railway staff)¹⁶⁸ or because in the specific circumstances of the cases judges decided that claimants had been given enough opportunities to make their own views known to the administration.¹⁶⁹

¹⁶³ Cass, 2nd, 16 October 1896, BJ, 1897, 826.

¹⁶⁴ Cass, 2nd, 12 September 1834, BJ, 1897, 829.

¹⁶⁵ Article 10 L 15 September 1895 (quoted in A Valerius, *Organisation—Attributions et Responsabilité des communes* (LGDJ 1912) 92).

¹⁶⁶ Article 8 L 30 July 1903 (commented in a ministerial guideline of 3 August 1903, quoted in Valerius (n 165) 95–96).

¹⁶⁷ Civ Brussels, 3 December 1907, BJ, 1907, 1377, spec 1383.

¹⁶⁸ Louis André, 'Des recours juridictionnels en matière administrative suivant la législation belge', in *Exposition Internationale de Bruxelles, Premier congrès international des sciences administratives à l'Exposition universelle et internationale de Bruxelles*, 1910: rapports—Congrès international des sciences administratives (Goemaere 1910) III-1-8.

¹⁶⁹ Civ Brussels, 3 December 1907, BJ, 1907, 1377, a case dealing with the dismissal of a doctor running an asylum. The doctor claimed that the dismissal was illegal because he had not been heard on a range of occasions. Yet, the doctor had been heard by the governor, by the *députation permanente* and by the minister (twice face to face). The minister had even written to the doctor to ask him for an explanation of all the facts invoked against him and the doctor had replied at length.

The Supreme Court never explicitly recognized a right to be heard in general terms during our period of reference.¹⁷⁰ However, the case law hesitated and was far from being a blunt rejection of the right. On the one hand, the Supreme Court recognized the right to be heard in a case where a couple was accused of running a brothel. The couple offered to give evidence eliciting their liability. However, they faced a problem: the facts for which they were being pursued were not revealed as no witness had been heard at any stage of the procedure and no facts were related in the written procedure.¹⁷¹ On the other hand, the Supreme Court took a more restrictive approach in a case where the right to be heard was invoked in proceedings pertaining to local taxation in front of the provincial council (acting in a judicial capacity) to challenge the legality of the provincial decision. The question was understood as entailing whether the deliberation room could be open to oral, public, and adversarial discussions.¹⁷² The Supreme Court found that the legislature had attempted to recognize for provincial councils the ability to grant a right to be heard during their proceedings. Yet, all the attempts in parliament had failed to do so.¹⁷³ It was then difficult for the Supreme Court to by-pass this situation, that is, this negative will of the legislature. Even pragmatism cannot be used to side-step a formal legal provision or clear legislative intent. It is normally only used to fill a gap or address actual competition between norms. In this case the legislative intent had been genuinely to refuse a right to be heard after parliamentary discussions on this very point. The advocate-general also demonstrated that opening up the discussions to the public could result in negative consequences for public order.

D. 'Hard' cases: competing norms and interests

The end of the nineteenth century witnessed an increasingly poor, untidy, and technical statute book in Belgium. Within this emerging normative chaos using judicial creativity to balance competing norms or interests seemed a necessary step. Was it a just step? Would it not lead to a government of judges? Could judges legitimately create normative solutions? Were judges no longer the mouth of the legislature, when the legislature, this fiction, displayed its limitations and could no longer be credibly understood as perfect and rational? The attributes characterizing the sovereignty of the legislature were contradicted by their outputs, in very

¹⁷⁰ The Supreme Court recognized it, along with general principles in broader terms, much later (for an extended discussion see W-J Ganshof van der Meersch, 'Le droit de la défense, principe général de droit. Réflexion sur des arrêts récents', in *Mélanges en l'honneur de Jean Dabin—vol. 2* (Bruylant 1963) 569–614, spec 587–89 and 590–94 and 'Propos sur le texte de la loi et les principes généraux du droit' (Mercuriale prononcée lors de l'audience solennelle de rentrée de la Cour de cassation, le 1er sept 1970) [1970] JT 557–73 and 581–96).

¹⁷¹ Cass, 2nd, 1st July 1907, BJ, 1908, 223.

¹⁷² Van Schoor under Cass, 2nd, 22 January 1900, BJ, 1900, 515, spec 520.

¹⁷³ Cass, 2nd, 22 January 1900, BJ, 1900, 515, concl Van Schoor.

observable ways, making it difficult to apply the law and to resist the scientific call ringing out then: the empirical data—that is, the statutory provisions—were full of contradictions, lacunae, and imprecisions. The letter of the law, and even the intent of the legislature, were foggy at best in many cases. In these cases, when the formal interpretation could not claim to be objective anyway, could the social purpose of the law become the new standard in the application of the law? Could it be the starting point for developing a scientific method of interpretation? In 1906 Vander Eycken suggested this very path, following Génys's *méthode de la libre recherche scientifique*.

This section selected four Supreme Court cases that stand out in administrative case law, where the limits of formalism and the possible contribution of the *libre recherche scientifique* could be tested. It first analyses a materially difficult case, where legal provisions contradicted each other, leading to dramatic accidents, a typical example where legal formalism resulted in solutions disconnected from social reality. This section then turns to three cases bearing procedural distinctiveness: the first decision was the only decision taken in grand chamber in administrative matters between 1890 and 1910 (meaning that a conflict arose in the lower and higher courts in this case); the last two decisions were the two decisions where the advocate-general and the Court disagreed on the outcome of the case. Due to their procedural features these three cases were undoubtedly understood as 'difficult cases' at the time—a stronger level of disagreement on the legal solution had been formally expressed at the highest level of the judiciary or as a conflict between the lower courts and the Supreme Court. Hence, the legal issues underpinning these cases have a symbolic reach. The reasoning pursued in these cases can inform us about how difficult cases, and complicated political and social issues, were addressed. These decisions seem at first glance to consecrate a formal approach to difficult cases: they strongly link the legal solution to legal provisions. However, because of their procedural features a bit more information may be gleaned about the architecture of the reasoning and we might be forgiven for believing that these decisions were written with special care so that the reasoning was not casual. These decisions were more far-reaching than purely mechanical application of the law in a specific case would have been. Behind the form lurks a distinctly pragmatic attitude: a powerful awareness of social reality and its needs. That the Supreme Court then chose to clothe its legal preference in formal drafting may be seen as expressing its 'spirit', its commitment to conciliation and peace-making in a pragmatic way.

1. Logical principles for guiding individual behaviour

By the end of the nineteenth century the legislative and administrative norms regulating trains, tramways, and local public transportation were in a state of total chaos, with cross-references, overlaps, modifications, and silences that were difficult to interpret. Problems ensued, especially in terms of who had priority at

crossings. Fatal accidents resulted. Before establishing who was liable for these accidents the Supreme Court had to identify which method of public transportation had to give way to the others.¹⁷⁴ Although this case may appear to have had subjective rights and personal liability at stake, the issue was more complex: the problem did not so much lie with the defendant but with the way in which the government drafted its decrees and coordinated them. Nobody could tell for sure which norm applied in this case. At a time when administrative liability for this kind of problem was not yet recognized, the Supreme Court had to use a different avenue to provide legal certainty to users in their daily lives. This case fell within the category of incident identification and control over the applicable norm.

In his conclusions the advocate-general explained the conflict in the norms. Three norms, relating to three different transportation modes (trains, vicinal trams, and tramways), all adopted by the government, provided that: 'all vehicles whatsoever had to give priority' to other forms of transportation. This resulted in a lock-in. According to the advocate-general there was a loophole in the normative framework. He ran through possible solutions, such as absolving each conductor from responsibility, which would be absurd. Applying the hierarchy of norms led nowhere as the entangling of norms was too confusing. He proceeded then with a logical solution, namely that the minor vehicle should give way to the major vehicle, demonstrating that it would not be arbitrary as the idea could be found in previous discussions during parliamentary debates and in certain police regulation.

The advocate-general looked at the concrete consequences of his solution, saying that the director of the vicinal tramway should have taken measures to ensure that his conductors would give way to the trains. He acknowledged that this could result in harsh consequences for the company director: after all, as the advocate-general himself had stated how untidy the norms were, how could the company director have known what the law was saying? In his last paragraph the advocate-general sought to allay resistance towards the possible unfairness of his solution. He clearly said that the lower court had to assess cases on the basis of the specificities of the case, paving the way for the lower court to find that, in fact, there was no criminal liability in the company director. The advocate-general concluded that 'for this reason it seems just and necessary to quash the decision of the [lower court]'.

The Supreme Court retraced the reasoning taken by the lower court. This court had established that no legal provision regulated the conflicts between vicinal trains and tramways, so that each of them had an equal right of way. This equal right resulted in conflicts between the two company owners and in dangerous practices by their drivers. The Supreme Court went back to the parliamentary discussions and read a range of legislative and administrative provisions, which allowed it to

¹⁷⁴ Cass, 2nd, 7 April 1903, Pas, 1903, I, 163.

say that all vehicles, including vicinal tramways, had to make sure no train was approaching when they crossed tracks (which happened to be enshrined in one provision from a 1893 royal decree). According to the Supreme Court there was thus indeed a legal provision solving the problem and the appeal decision was quashed.

The Supreme Court followed a legalistic line of reasoning to ground its decisions in a specific provision. However, the only obvious thing in this case was that the identification of the applicable norm was not clear at all. The Supreme Court was at pains to justify the applicability of the 1893 royal decree. It was thus very much engaged in a creative work in order to set up a legal principle according to which smaller vehicles had to give way to larger vehicles, in line with the advocate-general's conclusions and logic. Although the Supreme Court was not as explicitly pragmatic as its advocate-general, it took care to mention that the quashing of the lower decision had no effect for individuals already acquitted, thus limiting the possible unfairness of its findings.

This case, especially in the light of the advocate-general's conclusions, echoes the reasoning of the *libre recherche scientifique*. They are pragmatic in three ways. Firstly, they look to solve a very concrete problem that was presenting a real threat to public safety. The solution is based on pure logic. Other solutions, such that the most vulnerable vehicle needs to be given way to (a solution actually opted for in maritime law or in favour of pedestrians in cities) may have been logically possible but practically difficult: how to regulate speed or stopping and restarting bigger engines at each crossing? This would probably have made travelling from one agglomeration to another a slow business (in a densely populated state, as Belgium was already even then). Secondly, the advocate-general was also pragmatic in looking at what his newly found solution meant for the company director. He did not want an overly harsh sanction for somebody who was only partly to blame. Thirdly, technically speaking, the issue was not one of administrative law but one of possible administrative negligence in how regulatory provisions were drafted. The administration should have dealt with this problem: it was unrealistic to expect the invisible hand to work, namely that each company director would negotiate with other companies to reach a solution for each crossing, an option the lower court supported. Only public authorities in their coordinating role could do so, but they had failed in this. Hence judges stepped in so that economic actors had a yardstick to go by in the future. In this sense the pragmatic consequences of this yardstick reached far beyond the circumstances of the cases. It may seem a rather technical and logical matter, it may have triggered little principled resistance as the judges were not stepping over into politically sensitive matters, but this case clearly established a principle for guiding future behaviour beyond any legal basis to do so. The judges were setting norms.

2. Constitutional freedoms versus public order

One type of substantive difficult case occurs when a judge has to adjudicate between competing legal principles, such as freedom of the press and public order. The matter became especially politically sensitive after 1886 as social protest grew, eventually leading to one of the main European general strikes in 1894. This substantial difficult case turned into a procedural difficult case. Local government conditioned the sales of newspapers on street to an authorization in local by-laws with the avowed objective of maintaining public order or sometimes preventing the dissemination of revolutionary and immoral newspapers. As these by-laws were not complied with, prosecution ensued. Judges had then to review whether the local by-laws were lawful, especially whether they complied with art 18 C, which proclaims the freedom of the press without any further qualification. Lower courts set aside these local by-laws. The Supreme Court could have followed them and endorsed a formalistic approach to the superior constitutional norms and their explicit wording disregarding the potential problems on the street, in the concrete reality of people's lives. The Supreme Court decided to be prudent and to engage in a creative and pragmatic interpretation.

In its first decision¹⁷⁵ the Supreme Court articulated the competing interests: public order and constitutional rights granted to citizens (namely, press freedom). From all of the applicable provisions the legislature had subordinated the use of consecrated freedoms to the requirements of public order. The Supreme Court considered that the very activity targeted here consisted in a trade that might hinder circulation on the street. Therefore, there was no ground for excusing it in an absolute way from preventive police measures that the administration deemed essential to maintain public order. It would not be rational to find all by-laws illegal for the sole reason that they might lead to arbitrary decisions. Judges could only review whether the by-laws were 'necessary' to maintain public order or whether, behind their appearances, they aimed to limit press freedom and apply censorship. The lower decision was hence quashed. The referred court disagreed with the Supreme Court, finding the by-laws to be unconstitutional for a second time. This led to a second procedure in the Supreme Court.

In his conclusions before this second decision the advocate-general analysed the relationship between press freedom, free (and safe) circulation on the street and local police powers, mentioning a few times that these powers reflected the 'nature of things'. He stated that the 1831 Constitution did not alter previously existing local powers. He emphasized the importance of maintaining public order for peaceful people. However, he recognized limitations to the local powers, as the executive could (as in the past) be arbitrary. Only in that case could judges review the legality of by-laws. The advocate-general put order and the collective interest

¹⁷⁵ Cass, 2nd, 18 January 1892, BJ, 1892, 617.

above individual freedom. In his demonstration he relied on wide-ranging materials, such as Loyseau, discussions before the Constitution and other statutes, case law, the *Digeste*, and Latin maxims. He rarely mentioned legal provisions except with reference to local powers.

Taking a different course in its second decision,¹⁷⁶ the Supreme Court found a formal legal point where the two competing interests hinged on each other. On the one hand, the legal provisions recognizing local powers were interpreted so as to include 'order in the street'. On the other hand, the Constitution had to be interpreted as seeking to protect individual freedom, which was related to local police power, as expressed in art 19 C, a provision pertaining to freedom of assembly. Article 19 C, however, included a possible legal reservation. The Supreme Court said that this article did not submit the freedom to assembly to an authorization 'with the formal exception of gathering in the open air "which remains, [art 19 C] says, fully submitted to police laws"'. The Supreme Court explained away, based on purely concrete elements, why the constituent power (with no reference to a constitutional provision) did not provide a legal reservation for press freedom.¹⁷⁷ The press had not been granted any special privilege: like any other citizen or industry it had to respect police measures when exercised on the street. Streets are 'in their essence' supposed to be used for circulation. According to the Court, only mayors could ensure that material order was maintained, which the by-law indeed aimed to do. Judges had no power to review whether the by-laws were necessary or if they could lead to arbitrary decisions.

In this case the lower courts rebelled against the Supreme Court. The Supreme Court maintained the same outcome but shifted its reasoning between the two cases, from being overtly pragmatic in the first case to becoming apparently more formalist in the second decision. In the first case the Supreme Court based its decision on various constitutional provisions and balancing of the competing interests, while ensuring that judges could review extreme cases where censorship and arbitrary decisions would be at stake. This may therefore be read as a pragmatic decision where the Supreme Court sought mostly to identify the scope of judicial review and not to limit the powers of local government. In the second decision the Supreme Court appeared to abandon this approach. It had to force the interpretation of the Constitution, however, to find a way to protect the powers of local government. The Supreme Court shifted its reasoning from art 18 C (formulated in absolute terms) to art 19 C, where legal reservations are allowed. Curiously, the Supreme Court stated that art 19 'formally' allows for gatherings in the open air to be subject to legal reservations. Yet, the words 'open air' do not appear in art 19.

¹⁷⁶ Cass (*grand chamber*), 8 June 1892, BJ, 1892, 1381.

¹⁷⁷ '[S]i la constitution n'a fait expressément cette réserve qu'à l'occasion du droit de s'assembler, ce n'est pas dans l'intention de laisser la liberté de la presse dans une situation privilégiée, mais parce que le droit de s'assembler s'exerce fréquemment dans les rues, tandis que celles-ci ne sont pas le domaine naturel de la presse [...]'].

The Supreme Court constructed a bridge from art 18 to art 19 in order to allow for reservations. It explained why it did so: streets are by their very essence the place where circulation has to be protected. In an *obiter dictum* the Supreme Court clearly subordinated individual freedoms to public order as the essential guarantee of all other freedoms. This subordination did not have a constitutional basis. Furthermore, the Supreme Court seems to have departed from its first decision in saying that judges could not review local special circumstances and the necessity of local measures. Yet, this departure may have been more formal than real as the Supreme Court affirmed that mayors only had powers to maintain material order. This meant that they did not have the powers to impose moral or political order. If this were the case the Supreme Court decision remains silent about what judges could do, but it seems logical to conclude that the Supreme Court would accept that judicial review would occur.

This interpretation highlights three features. First, the Supreme Court extensively interpreted constitutional provisions and proclaimed that public order had priority, while a formal reading of the Constitution would lead us to think that individual freedom is central to it. The Supreme Court saw the individual freedom of all people as more important than the individual freedom of some. It accepted a supra-constitutional principle, namely public order. The public body in charge of it, the local government, does not rely on an explicit constitutional basis for exercising its police powers. The Supreme Court was not bothered with this: it did not say why this is so. However, the advocate-general's conclusions lead us to think that this approach was accepted on the ground that the 1831 Constitution did not change local governance as it existed previously. The empirical reality of pre-constitutional police power was stronger than changes brought about by the Constitution when it came to local police power. At the same time historical events were not forgotten, as the references to 'material order' in the decision and to 'past oppression' in the advocate-general's conclusions recall. This apparently formal decision, with its step-by-step reasoning, was far from a formal literal reading of the Constitution. It was grounded in the fact that, in a society, individual freedoms are necessarily limited by those of others people, as the advocate-general mentioned. No constitutional provision can make this social fact disappear.

Secondly, the Supreme Court provided yardsticks for balancing individual freedom and police power that could be applied beyond this case. It would use them later when it accepted that local by-laws required applicants to be free from criminal sanctions for licences to be issued.¹⁷⁸

Thirdly, the Supreme Court mentioned separation of powers in its first decision, but not in its second, although it seems to be an application of that very principle. Interpreting this omission may be far-fetched. The Supreme Court might have

¹⁷⁸ Cass, 2nd, 18 June 1906 (2 cases), (1907) RA 62.

been hesitant to proclaim the principle of power separation too overtly. What was the actual constitutional value of this principle at the time if not a specific reading of combined constitutional provisions? Was the Supreme Court not aware that it was very much overstepping the legislative/judicial boundaries with a creative reading of the Constitution? Not long before a double cassation procedure would have led to a legislative reference. The Supreme Court may have liked parliament to have been given the opportunity to decide the matter in this very case.

3. Focusing the scope of public action

Two decisions show a rare open disagreement between the Court and its advocates-general. In both cases the issue involved was the scope of public powers in order to protect private/civil rights. Strikingly, both decisions are very concise, appearing to side-step the core political questions. The Supreme Court applied a formalistic reasoning, with one key creative paragraph with limited concrete consequences.¹⁷⁹

Against a background of feudality dating back to the seventeenth century, the first case involved Hainaut province and the Duke of Arenberg.¹⁸⁰ It pertained to the question of whether the owners of a mill were entitled to damages for an administrative decision barring them from accessing a river, while the administrative decision had been taken for the sake of the general interest (public hygiene). The advocate-general suggested that rivers could be owned by individuals who were only permitted by the sovereign to access the waterways. Public bodies had a right to decide measures in the public interest, especially when it came to hygiene. It was the role of a 'prudent and wise' administration to manage the relationship between conflicting interests. His reasoning was based on a range of sources, such as Loyseau, edicts from Charles V, French Revolution decrees, customs books, scholarship including Proudhon's public domain theory, case law, and the civil code. Relying on constitutional provisions establishing the distinction between powers as an essential principle of the political order, the Supreme Court put forward clearly two principles without many other details. The first was that an administrative decision, even if lawful, could breach individual rights and lead to liability for its author. The second was that provinces enjoyed their own powers without acting on behalf of the central state. The lower court could thus proceed with the case.

This decision took place at the crossroads between the industrialization and pauperization of the population. On the one hand, the mill owners, also former feudal seigneurs, wanted to keep access to the river so that their mill would be operated by water force. This led to the water being polluted downstream. On the other hand,

¹⁷⁹ In one case, the problem was one of competence and the subject matter was not decided by the Supreme Court; in the other case, the public body could re-take the same decision in improving its formal justification if need be.

¹⁸⁰ Cass, 1st, 4 January 1894, Pas, 1894, I, 71, *conclusions contraires* Mesdach de ter Kiele. For other examples of this type of litigation, see Brussels, 11 November 1890, BJ, 1890, 1448; before the period 1890–1910, Cass, 17 May 1888, BJ, 1888, 1025.

the local government stopped this access to the river to clean up the location and ensure that social housing would not suffer from pollution. The socioeconomic question revolved around balancing the interests of an industry with the health of a collective. The advocate-general and the Supreme Court diverged on the legal response to this question. The advocate-general sought to update the ancient regime's idea of sovereign powers in the hands of the 'prince' (ie the State and the collective), to be exercised to pursue collective aims such as hygiene. The prince was rebranded in a benevolent way as the provider of hygiene for the area. No individual right was conferred on waterways. In this way the prince emerged with greater powers. However, the individual industry was left with a precarious concession to access the waterway and its water force. The advocate-general dealt with externalities triggered by industry in strengthening the power of the State as a guarantor of collective goods, legally mediated by the 'public domain'. The Supreme Court chose another approach. It did not say that access to waterways was a property right, but considered it to be a civil right. The Supreme Court protected this right against (lawful) encroachment from public bodies: it sought to avoid the development of a huge Leviathan, stressing that the province was not acting on behalf of the king but on its own account. The Supreme Court provided a role for individual rights and intermediary groupings and preferred to transform the socioeconomic question into a legal conflict between individual rights versus the powers of intermediary groupings. The competing interests were thus reframed, some being strengthened (mill owners and industrialists had their rights protected by the courts) on the one hand, versus provincial powers (acting in their own name, provinces had to bear the consequences of their actions, so that they would have to pay damages if/when they caused damage) on the other hand. This should make provinces think twice before taking decisions, hence ensuring that they acted 'prudently and carefully'. In this way the Supreme Court concurred with its advocate-general. However, instead of assuming that the administration was prudent and careful it sought to legally incentivize it to be so. Behind an apparently formal short decision, where very little seems to have been about competing interests in the reasoning, the Supreme Court was deciding creatively, looking at ways in which individual rights, public power, and the common good could be articulated and the practical consequences of this articulation beyond the specific case to be decided upon.

The second case where the advocate-general and the Supreme Court disagreed involved a local prosecutor against a licence-holder who was allowed to operate an activity in a busy neighbourhood.¹⁸¹ The legal issue revolved around the question of knowing whether the province could repeal an authorization to operate a dangerous activity on the grounds that the activity was 'extremely harmful for a person named in the decision', namely a neighbour claiming that the noise and smoke produced by

¹⁸¹ Cass, 2nd, 22 October 1900, BJ, 1901, 293, *conclusions contraires* Van Schoor.

the workshop would make it more difficult for him to rent his apartments. The lower court decided that the provincial council did not follow the procedure required to repeal the authorization and quashed the withdrawal.

To answer the legal question in this case the advocate-general referred to the nature of things to justify the police power of the administration and the need for the administration to adapt precautionary measures relating to circumstances and new information. He went back to various royal decrees regulating authorizations to operate activities, discussing the *rapport au roi* (a report explaining the motives for the king enacting a particular decree) and a lower court case where the judge was said to be the most authoritative in administrative law scholarship. All in all, the advocate-general argued that there was a need to allow licensing authorities to revise or repeal authorizations: local circumstance changes, hygiene and security could not be subject to unconditional authorization.

Straightforward in its reasoning, the Supreme Court started with a preamble on the applicable royal decree. This preamble formally stated the need to conciliate hygiene and security on the one hand, and industrial interest on the other hand. The Court therefore decided that 'the interest of public order for which these decrees are adopted is also the yardstick for the powers they grant to various administrative bodies for their implementation.' The Court applied this to the administrative decision, the legality of which was challenged. As this decision was only justified by reference to a private interest, with nothing even indirectly connected to public order, the administrative body had acted *ultra vires* and the decision of the lower court was correct in quashing the administrative decision.

In this concise decision the Supreme Court found a formal anchorage for the need to balance competing needs in the applicable legal decree. It could then redirect the adjudication on this balance towards justifying the administrative decision. When the administration went beyond its remit (in pursuing private interests) the judge stepped in to rein in this kind of potential administrative arbitrariness. This decision ensured that the only missions pursued by public authorities were in the interest of public order. Judges kept an eye on this; however, extensive room for manoeuvre was left to administrative bodies as they only had to be able to give formal reasons for their actions. They should, however, not prefer one set of private interests over other private interests if there was no public interest justifying their preference. In short, this was also a decision seeking to protect public bodies from pressures exercised by individuals who would selfishly like to see public bodies use their powers to their own benefit, without due consideration for competing interests.

V. Concluding remarks

Analysing the administrative case law of the Belgian Supreme Court between 1890 and 1910, this chapter shows that the Supreme Court applied the main features of

a positivist legal system (based on the assumption of clarity, coherence, and completeness of the formal law) to administrative action and its legality. The Belgian Supreme Court equipped the institutions of State, such as central and local government, with functioning powers, allowing an operational state to develop despite social unrest. As the social and technological context changed, the statute book became more confused. This gave the Supreme Court room to interpret the law creatively and pragmatically. Three distinctive features can be flagged up about this approach and the interactions between pragmatism and formalism in Belgian administrative law.

First, Belgium had a none-too-specific understanding of the separation of powers. The Supreme Court formulated it in various ways depending on circumstances and no writer conceptualized it. The Supreme Court was mindful of the liberal principles underpinning the Constitution: the risk of executive arbitrariness was often flagged up as a thing of the past. However, decisions also showed confidence in the executive, especially the king (eg in the subdelegation case) and local government (eg to maintain public order and thus limit constitutional freedoms). Although the administration may have had its flaws, such as inertia or a lack of co-ordination, the main threat was social unrest. If the separation of powers was only a second-best constitutional principle, public order might have well been the major overarching principle, trumping constitutional provisions—not only as a social need but also as local governments were historically anterior to the constitutional regime set up in 1831. In this way the Belgian Supreme Court was pragmatic in the choice of the major legal principles it chose to apply.

Secondly, the Belgian Supreme Court controlled the legality of administrative action. In the period between 1890 and 1910 legality did not enjoy empirical objectivity. It had to be constructed by articulating the relationships between local and central government and selecting the very content of the legality—such as the setting aside of Dutch decrees, for instance. Equally, relying on legislative intent when the legislation was chaotic and parliamentary works filled with opposing views gave the Supreme Court a real margin to ‘create’ legislative intent. As it often looked for the most authoritative elements from among the preparatory works, it ended up relying on the intent of the executive as expressed when exercising its legislative function. Hence, shaping legality was not a neutral operation and the Supreme Court was selective and pragmatic here as well.

Thirdly, the Supreme Court interpreted the Constitution liberally. Appearing at first sight to avoid engaging in the substance of political arguments, the Court may seem to have been impervious to powerful dissent on sensitive issues such as the relationships between State and Church and the social demands voiced by individuals. Prudence was required to ensure that social, political, and cultural tensions were maintained within the bounds of law and order. However, legal solutions developed incrementally. On the most contentious points, such as the delineation of public powers or between political rights and political interests,

the case law became nebulous. However, at one point a solution was adopted, accepted because either it created certainty in this relative judicial fog or because it provided a formal solution (eg the withdrawal of the workshop authorization). In short there may not have been loud thunder in a blue sky, but judicial control developed incrementally to cover many aspects of public activities. Overall, through a mix of formal and less formal decisions, the Supreme Court contributed to shaping and maintaining a functioning administrative state at a time when the main threat in Belgium was more the possible chaos resulting from a revolution than administrative excess. The ‘administrative miracle’ in Belgium is that the Supreme Court did not shackle social forces and unbridle the administration so much that the very course it wanted to avert actually happened. This may be down to the judicial genius that the Belgian judiciary developed in relying on a formal approach while deciding creatively on the substance of cases.

Overall, at first glance a positivist understanding of the law (with a formal hierarchy of norms, extreme reliance on an identified legal basis, on the legislator’s intent and preparatory works, etc) emerges from Belgian administrative case law between 1890 and 1910. However, a more nuanced picture of the Supreme Court’s reasoning can be highlighted. When we get past the outcomes for the law and the legal system resulting from case law, a different storyline appears, co-existing, not replacing, the first one. Did the setting up of an administrative court after World War II, and much later a constitutional court, change this? Similar times of change and tension are with us once more. Questions of balancing legality with efficiency of administrative action, individual freedom with administrative discretion, were again at the core of the most recent reforms in 2014 of the Belgian administrative justice system.¹⁸² The dynamics of judicial control over the administration in earlier times have formed the legal mindset and how legal issues are approached in Belgium up to this day. In their own ways they have shaped the background for judicial standards in controlling public action. They also led Belgium to have its own administrative law culture, one based on its own specific mix of formalism and pragmatism, one where great theories and concepts are eschewed, one where the international and the local can easily forge alliances to minimize the action of the ‘central’ (now called in Belgium the global or federal) level. It is thus one where networks can be seriously discussed as a legal paradigm.¹⁸³ In this specific culture—some would call it an ideology—positivism is strongly embedded and the legal system basically understood as complete, coherent, and closed.¹⁸⁴

¹⁸² L portant réforme de la compétence, de la procédure et de l’organisation du Conseil d’Etat, 20 January 2014.

¹⁸³ M van de Kerckove and F Ost, *De la pyramide au réseau?—Pour une théorie dialectique du droit* (Publications Facultés St Louis 2002).

¹⁸⁴ O Corten and A Schaus, *Le droit comme idéologie—Introduction critique au droit belge* (2nd edn, Editions de l’Université libre de Bruxelles 2009) passim.

However, open norms and general legal principles, even supra-constitutional principles, very quickly emerge to ensure that these assumptions hold together (while at the same time shattering them). In this culture the separation of powers is not so much a constitutional principle, but the simple fact that powers are fragmented, legality having exploded, and that from legal chaos emerges judicial creativity.