



COLLANA DEL DIPARTIMENTO DI GIURISPRUDENZA
UNIVERSITÀ DEGLI STUDI DI BRESCIA

ADMINISTRATIVE JUSTICE, REGIONAL COURTS AND LEGAL CERTAINTY

A comparative overview

Edited by
Vera Parisio



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ADMINISTRATIVE JUSTICE, REGIONAL COURTS AND LEGAL CERTAINTY IN BELGIUM

David Renders, Caroline Delforge

SUMMARY: I. Introduction. – II. A distinct administrative order, recognised after a long and winding road. – III. A curiously (dis)organised administrative jurisdictional order. – IV. An administrative court system guaranteeing the authority of *res judicata* and recognising the concept of non-binding precedent. – V. An administrative jurisdiction influenced by the lessons of the Court of Justice of the European Union. – VI. Conclusion. – Abstract. – References.

I. Introduction

When administrative justice is administered by a system comprising several courts, including, where appropriate, regional courts, questions of legal certainty inevitably arise. Belgium is no exception.

To give an overview of the issues in Belgian law, we propose to answer, in order, the questions in the questionnaire drawn up by the organisers of the international colloquium whose proceedings are contained in this book. Essentially, the question is whether the administrative courts constitute a judicial order distinct from that constituted by the ordinary courts (II.), how the administrative courts are organised (III.), whether the administrative courts of first instance are required to follow the precedents set by the higher courts (IV.), and what influence the lessons of the Court of Justice of the European Union have had on the case law of the Belgian administrative courts (V.).

II. A distinct administrative order, recognised after a long and winding road

In Belgium, there are currently two distinct jurisdictional orders: a judicial order and an administrative order. However, this has not always been the case.

Belgium became independent in 1831. Previously, it had been French from 1800 to 1815 and Dutch from 1815 to 1830. The Founding Fathers of the New Nation had no desire whatsoever for jurisdictional dualism. They wanted Belgium to move away from the model that had been imposed on it over the previous thirty years and saw in the institution of the Council of State a French and Dutch emblem from which it needed to free itself.

It was against this backdrop that the Constitution of 7 February 1831 identified one – and only one – jurisdictional order: the judicial jurisdictional order. Clearly, the idea was that all disputes, whether involving private individuals or public authorities, come under the jurisdiction of the same judge: the judicial courts, who are therefore the ordinary courts in the full sense of the term.¹

As early as 1831, however, the Constitution opened a breach, albeit a timid one.

In the constitutional text of the time, one reads that while the resolution of disputes concerning subjective civil rights is imperatively entrusted to the judicial courts,² the resolution of disputes concerning subjective rights of a political nature is entrusted to these same courts, with the exceptions established by law.³

At that time, however, the Constituent Assembly did not think that disputes concerning subjective rights of a political nature that might escape the jurisdiction of the courts should be settled by administrative courts. Rather, the idea at the time was to entrust their resolution to the administration itself.⁴

It is, moreover, in this context that if a conflict of powers should arise between the judicial courts and the administration, it is up to the Court of Cassation – the highest judicial court – to settle this conflict, which is thus set up as a “court of conflicts”, which it still is today, but in an institutional landscape that is, to say the least, different.⁵ It was only later that the administrative courts would appear.

These courts are numerous and, in fact, countless.⁶ The most important,

¹ See, in this respect, D. RENDERS-B. GORS, *Le Conseil d'État*, coll. «Centre Montesquieu d'études de l'action publique», Larcier, Brussels, 2020, p. 5, and references cited.

² See current Art. 144, subparagraph 1 of the Constitution.

³ See current Art. 145 of the Constitution.

⁴ See, in this sense, D. RENDERS-B. GORS, *Le Conseil d'État*, cit., p. 6.

⁵ See Art. 158 of the Constitution. On the conflicts of powers apprehended in a historical perspective, see D. RENDERS, *Conflits d'attributions au sens de l'article 158 de la Constitution: quand et dans quelle mesure le pouvoir de contrôle du juge judiciaire sur l'action du juge administratif a-t-il été altéré?*, comment of Cass. (1st ch.), 25 April 2013, in *Revue Critique de Jurisprudence Belge*, 2015/2, pp. 109-132.

⁶ See, for example, D. RENDERS, *Droit administratif général*, 4^e éd., coll. «Centre Montesquieu d'études de l'action publique», Larcier, Brussels, 2022, p. 742.

however, is undoubtedly the administrative litigation section of the Council of State.

It is legitimate to ask why a Council of State was finally created, when there was little desire for one at the time of Belgium's independence. The reason is as follows. The Belgian Constituent Assembly was counting – as has been said – on the courts of the judicial order to ensure the protection of citizens against the administration abusing its power. The Constituent Assembly, which did not create a Council of State, and which did not institute litigation on the misuse of power at the time, thought, above all, that the protection of the constituent vis-à-vis the administration could properly be achieved through litigation on extra-contractual civil liability for the act of administering, which the courts of the judicial order were meant to settle.

The problem is that the courts of the judicial order are timid: they barely consider themselves in a position to order legal persons under public law to compensate the damage they have caused through their fault, when the fault was committed in their activity as a person who administers like a private individual.

On the other hand, when a public entity carries out its public duties using the instruments of public authority, the judicial courts rule that any damage that may be caused because of a fault committed in the context of this activity – the most important one – does not have to be compensated.

Criticism has been voiced by members of the public, intellectuals, particularly university professors, and even by political representatives. For them, it is unacceptable that administrative entities cannot be opposed by a judge in the exercise of public power. And, since the judicial courts are not fully assuming the role for which they were given a monopoly, they are seriously considering adding a rival court: an administrative court in its own right.⁷

The supreme court of the judicial order – the Court of Cassation – feels threatened. A small case in Bruges gave it the opportunity to respond to this criticism. A tree belonging to the City of Bruges unexpectedly fell on the premises of a private horticultural company called *La Flandria*.

Essentially, the question arises as to whether the tree in question is located on the City's public or private property. If it is located on private property, the dispute is akin to a conflict between two private individuals: the public entity that manages property on its private property is part of a purely private legal relationship and, in this case, the courts recognise – as we have seen – that the legal entity governed by public law has been able to incur extra-contractual liability since 1831.

But if the tree is located in the public domain, the dispute is between the

⁷D. RENDERS, *Préface*, in Ph. BOUVIER, *La naissance du Conseil d'État de Belgique: une histoire française?*, coll. «Centre Montesquieu d'études de l'action publique», Larcier, Brussels, 2012, p. 16.

public authority and a private individual: the public authority that manages an asset in its public domain is part of a legal relationship under public law and, in this case, the courts do not recognise that the public authority can incur extra-contractual liability, despite what the Constituent Assembly has expected of them since 1831.

In this case – in which there were no deaths or injuries, just some material damage – the Court of Cassation ruled that the tree was located in the public domain of the City of Bruges and, in the process, established a jurisprudential turnaround: since this judgment – handed down on 5 November 1920 – a public entity incurs extra-contractual liability even in a legal relationship in which the public entity carries out public tasks and, to do so, exercises the attributes of public power.⁸

The Court of Cassation thought it had cooled the ardour of those in favour of creating the administrative court that was being considered by condemning the legal person under public law for the act of administering, thus recognising the need to better protect the citizen against the administration's misconduct.

However, it was too late: this competing court, to be known as the “Council of State”, was instituted.⁹ It took Belgium another twenty-six years to establish this institution by means of a simple law, and to grant it jurisdiction over cases involving excess of power, as well as other cases at the same time.¹⁰

Recognition of an administrative jurisdictional order in the Constitution was still a long way off. It was not until the so-called fourth reform of the State in 1993 that this happened. Two provisions were inserted into the Constitution: Art. 160 and Art. 161. Article 160 recognised the existence of the Council of State. Article 161 sets out to establish administrative courts of first instance, which have not yet been created.

In the current state of Belgian positive law, the administrative jurisdictional order that the Constitution enshrines in Articles 160 and 161 thus includes an administrative litigation section of the Council of State but not the administrative courts of first instance called for by the Constituent Assembly. There are also specialised administrative courts enshrined in various pieces of legislation, the number of which being not determined.¹¹

⁸ Court of Cassation, 5 November 1920, *Pasicrisie*, 1920, I, p. 193, concl. First General Advocate P. LECLERCQ. See, in this respect, P. VAN OMMESELAGHE, *La responsabilité des pouvoirs publics pour la fonction juridictionnelle et la fonction législative*, in P. VAN OMMESELAGHE (coord.), *Actualités en droit de la responsabilité*, coll. «UB3», Bruylant, Brussels, 2010, pp. 110-112.

⁹ Ph. BOUVIER, *La naissance du Conseil d'État de Belgique: une histoire française?*, cit., pp. 87-96.

¹⁰ See law of 23 December 1946 “creating the Council of State”, *Official Gazette* 9 January 1947.

¹¹ Cf. *supra*: II. A distinct administrative order, recognised after a long and winding road.

III. A curiously (dis)organised administrative jurisdictional order

Belgium is a federal state. This means that it not only has a federal authority but also federated entities. Curious as it may seem, there are two types of federated entities in Belgium: the regions and the communities.¹²

One of the main organisational principles of the Belgian federal state is the exclusive division of powers between the federal authority, the regions, and the communities. In the name of this principle, each competence is attributed exclusively to one of the components of the State. Clearly, either the competence is entrusted to the federal authority, or to the regions, or to the communities.¹³

The question then arises as to who is responsible for the organisation and operation of the justice system. Currently, the federal authority remains responsible for justice. This principle applies equally to both ordinary justice and administrative justice. This means that, even today, the federal legislator alone is responsible for creating and organising the justice system, whether it concerns judicial justice or administrative justice.

In essence, ordinary justice comprises courts of first instance, courts of appeal, and a Court of Cassation. It is therefore organised in the classic form of a pyramid. As has already been suggested, administrative justice is not organised in the same way: it is organised in the form of a somewhat disorganised whole comprising multiple courts, which are in fact countless.¹⁴

As mentioned above, one of the administrative courts is the administrative litigation section of the Council of State. The administrative litigation section of the Council of State has several responsibilities.¹⁵

The most important of these is the power to annul and suspend the execution of unlawful unilateral administrative acts, if no other specialised court has been set up for this purpose. This is known as the litigation of annulment and suspension.¹⁶ The Council of State also has the power to

¹² See Art. 1 of the Constitution.

¹³ On the principle of exclusive division of powers, see notably Y. LEJEUNE, *Droit constitutionnel belge*, coll. «Précis de la Faculté de droit et de criminologie de l'Université catholique de Louvain», 4^e éd., Larcier, Brussels, 2021, pp. 508-511, and references cited; Ch. BEHRENDT-M. VRANCKEN, *Principes de droit constitutionnel belge*, 3^e éd., la Charte, Brussels, 2024, pp. 487-489, and references cited.

¹⁴ Cf. *supra*: II. A distinct administrative order, recognised after a long and winding road.

¹⁵ See, in this respect, the laws “on the Council of State”, coordinated on 12 January 1973, *Official Gazette* of 21 March 1973. On the Council of State, see notably J. SALMON-J. JAUMOTTE-E. THIBAUT, *Le Conseil d'État de Belgique*, 2 volumes, Bruylant, Brussels, 2012, 2455 pp.; D. RENDERS-B. GORS, *Le Conseil d'État*, cit., p. 692; M. PÂQUES-L. DONNAY, *Contentieux administratif*, coll. «Précis de la Faculté de droit de l'Université de Liège», Larcier, Brussels, 2023, in particular pp. 297-760.

¹⁶ See Art. 14, para. 1, of the laws “on the Council of State”, cit., for annulment litigation. See Art. 17 of the laws “on the Council of State”, *already cited*, for suspension litigation.

quash decisions handed down by (almost) all other administrative courts.¹⁷

It is therefore understandable that although the administrative courts are somewhat disorganised, given their number and their independence from one another, one of these courts has multiple important powers, including the power to annul and suspend the execution of administrative acts and the power to declare the administrative cassation of decisions handed down by (almost) all the other administrative courts. This court – it will have been understood – is the administrative litigation section of the Council of State.

However, a peculiarity of the organisation of the federal State must be noted here.

The great principle of the exclusivity of competences, whereby the federal authority, the regions and the communities are recognised as having different competences, has certainly been criticised.¹⁸ It was also specified that justice was a power vested in the federal authority, which therefore exercised it exclusively.¹⁹

However, we should mention here the existence of a particular concept: that of “implicit powers”. “Implicit powers” originate in Article 10 of the special law of 8 August 1980 “on institutional reforms”.²⁰

In substance, they allow the regions and communities to exercise a competence of the federal authority if doing so is necessary for the exercise of their regional or community competences, if this overrun of competence is only marginal and, finally, if the point of law settled by this means lends itself to a differentiated settlement from region to region or from community to community.²¹

On the basis of these powers, certain regions and communities have set up administrative courts in specific areas relating to their competences: urban planning, the environment, protection of the disabled, education, local elections, etc.

The question has arisen as to whether the creation of these courts is legally admissible in the light of the conditions for application of Article 10 of the special law, cited above, and the case law – especially constitutional – relating to it. In an important judgment handed down on 27 January 2011,

¹⁷ See Arts. 14, §2, 15 and 20 of the laws “on the Council of State”, cit.

¹⁸ Cf. *supra*: III. A curiously (dis)organised administrative jurisdictional order.

¹⁹ Cf. *supra*: III. A curiously (dis)organised administrative jurisdictional order.

²⁰ *Official Gazette* of 15 August 1980.

²¹ On the concept of “implicit powers”, see notably G. CEREXHE, *Les compétences implicites et leur application en droit belge*, coll. «Centre d'études constitutionnelles et administratives», Bruylant, Brussels, 1989, 485 pp.; Y. LEJEUNE, *Droit constitutionnel belge*, 4^e éd., cit., pp. 884-897, and references cited; Ch. BEHRENDT-M. VRANCKEN, *Principes de droit constitutionnel belge*, 3^e éd., cit., pp. 589-590, and references cited; A.-S. BOUVY, *Les compétences implicites et le contentieux administratif: l'heure du bilan «post-Covid»*, in *Administration publique*, 2024/1, pp. 94-101.

the Constitutional Court answered this question in the affirmative.²² However, this is subject to two conditions: the courts must be specialised administrative courts and the Council of State must be the court of cassation for decisions they hand down.²³

In practice, it is the Flemish Region and Community in particular that have set up such specialised courts. For many political figures in Flanders, the ultimate aim is to create a Flemish Council of State. However, the applicable rules of law currently prevent them from doing so, as administrative courts can only be established through implicit powers and under the conditions laid down by the Constitutional Court.

A brief comment is in order here. One might ask to what extent the proliferation of specialised administrative courts in Flanders is acceptable in terms of implicit powers. The reason is that, in this way, we arrive at a result that comes ever closer to the creation of an administrative court with general jurisdiction, which the Constitutional Court does not tolerate.²⁴

²² Constitutional Court, judgment n. 8/2011 of 27 January 2011. See notably, in this respect, J. VANPRAET, *Deelstatelijke administratieve rechtscolleges: enkele beschouwingen bij het arrest nr. 8/2011 van het Grondwettelijk Hof*, in *Tijdschrift voor Bestuurswetenschappen en Publiek Recht*, 2011/4, pp. 195-201; J. MOLLIN, *De ruime impliciete bevoegdheid van de deelgebieden om administratieve rechtscolleges op te richten, comment of Constitutional Court, judgment n. 8/2011 of 27 January 2011*, in *Rechtskundig Weekblad*, 2011-2012/37, pp. 1641-1645. It should be noted that before issuing its judgment n. 8/2011 of 27 January 2011, the Constitutional Court had already ruled on this issue in a previous decision, which concerned the establishment of a Walloon administrative jurisdiction responsible for “judgment on appeals lodged against decisions relating to the granting of benefits in kind or in cash to disabled people” taken by what was then known as the Walloon Agency for the Integration of Disabled People. In this judgment, the Constitutional Court also found that the Walloon legislator had respected the rules governing the division of powers, given that the decree in question, while disregarding the competence of the federal authority in matters of justice, could, on the other hand, be authorised, *in casu*, by the exercise of the implicit powers enshrined in Art. 10 of the special law of August 8, 1980 “on institutional reforms” (See Constitutional Court, judgment n. 49/2003 of 30 April 2003).

²³ See notably, in this respect, I. OPDEBEEK-S. DE SOMER, *Algemeen bestuursrecht, Grondslagen en beginselen*, 2^{de} ed., Intersentia, Antwerpen-Cambridge, 2019, pp. 684-701, and references cited; D. RENDERS, *Belgian administrative justice organisation: when Federalism or devolution brings justice with it, or when regionalism is invading Europe?*, in *Ius Publicum*, 2018/1; D. RENDERS-D. DE VALKENEEER, *Où peut aller la justice administrative flamande, en particulier si la coupole n'est pas encore pleine?*, comment of Constitutional Court, judgment n. 152/2015 of 29 October 2015, in *Administration publique*, 2016/4, pp. 557-570.

²⁴ For the year 2023, there are two Flemish decrees increasing the powers of two Flemish administrative jurisdictions. About the *Raad voor Vergunningsbetwistingen*, see the decree of 14 July 2023 “amending the Flemish Town and Country Planning Code of 15 May 2009, the decree of 4 April 2014 on the organisation and procedure of certain Flemish administrative jurisdictions and the decree of 25 April 2014 on complex projects, as regards the extension of the jurisdiction of the Permit Disputes Council”, *Official Gazette* 28 August 2023. About the *Handhavingscollege*, see the framework decree of 14 July 2023 “relating to the maintenance of Flemish regulations”, *Official Gazette* 29 August 2023. The Constitutional Court has just censured these two decrees (Constitutional Court, judgments ns. 22/25

This also has an impact on the operation of the Council of State. The creation of specialised administrative jurisdictions has had the effect of transferring specialised litigation from the administrative litigation section of the Council of State to the newly created Flemish administrative jurisdiction. As a result, the Dutch-speaking magistrates of the Belgian Council of State are gradually losing jurisdiction over a growing number of specific cases, with the result that the workload between the French-speaking magistrates and the Dutch-speaking magistrates of the Council of State – whose numbers are strictly equal – is becoming increasingly imbalanced, generating tensions within the Belgian Council of State.²⁵

IV. *An administrative court system guaranteeing the authority of res judicata and recognising the concept of non-binding precedent*

As will now have become clear, the Belgian administrative justice system is not a multi-stage system: only an appeal in cassation is possible against a decision handed down by an administrative court. In this respect, there are two main possibilities.

Either the case is decided by a specialised administrative court, and an appeal in cassation is lodged with the Council of State. Or the case is decided by the Council of State, and an appeal is possible to the Court of Cassation in its capacity as a “court of conflicts”, which means that, in this case, the appeal in cassation is only open to discuss the allocation of jurisdiction between the ordinary courts and the Council of State. Decisions handed down in cassation by either the Council of State or the Court of Cassation are binding on the administrative court whose decision has been censured.

In the case of a judgment in cassation by the Council of State, Art. 15 of the laws “on the Council of State” specifies that the Council’s judgment is binding on the lower administrative court. This does not necessarily mean that the administrative court in question must issue a new judgment.

and 23/25 of 13 February 2025). In 2023, the deconstruction of federal administrative justice also resulted in the reallocation of a significant amount of litigation from the Council of State to the judicial courts (see, in this respect, the Flemish decree of 16 June 2023 “amending the provincial decree of 9 December 2005 and the decree of 22 December 2017 on local administration, with regard to the termination of the status of statutory agent”, *Official Gazette* 10 July 2023). The adoption of this decree will result in the transfer of litigation concerning the termination of employment of statutory agents of local authorities to the (Flemish) labour courts.

²⁵ See, in this respect, D. RENDERS, *Les métamorphoses d’une réforme ... et du Conseil d’État*, in *PubliAdmin*, 2024/1, p. 14.

In some cases, the administrative court may not be able to reverse a decision. This is the case, for example, if the Council of State overturns the court's decision on the grounds that the administrative court that issued it was not competent to do so. This is also the case if the Council of State quashes the administrative jurisdictional decision on the grounds that the appeal that gave rise to the decision was out of time.²⁶

In other cases, the administrative court will have to adopt a decision. If this is the case, the court will have to respect the Council of State's judgment, failing which it will violate the authority of *res judicata* of the Council of State's decision. Should this *res judicata* principle not be respected, the defeated party could then lodge a new appeal before the Council of State, arguing that the *res judicata* principle of the Council of State judgment, guaranteed by the aforementioned Article 15, has not been respected.²⁷

Regarding the decision of the Court of Cassation, there are two possible situations.

Either the Court of cassation considers that the Council of State was competent, even though it had declared itself incompetent: in this case, the Council of State will have to issue a new judgment in which it will have to declare itself competent and continue, on this basis, the examination of the appeal that had been submitted to it, failing which it will violate the *res judicata* authority of the Court of Cassation judgment, which could lead to a new appeal and a new cassation.

Or the Court of Cassation considers that the Council of State was incompetent, even though it had declared itself competent. In this case, the Council of State can no longer decide anything, and only the judicial courts can be called upon to settle the dispute in question.

In addition to the *res judicata* effect of a judgment handed down in cassation against a decision handed down by an administrative court, the jurisprudence of the various courts can serve as a precedent for other courts. In this respect, the jurisprudential lessons of the Council of State and the Court of Cassation are followed particularly closely, as are those of the Constitutional Court. As supreme courts, these three have a major influence on the way the country's other courts make decisions.

However, in Belgian law, precedent is not binding on the other courts. This is only the case if it falls within the limits of the aforementioned *res judicata*. The only exception to this principle is a precedent contained in a judgment by which the Constitutional Court provides an answer to a preliminary question that has previously been put to it. In this case, the precedent "may" apply to any jurisdiction, in any dispute if the problem of

²⁶ See notably, in this respect, D. RENDERS-B. GORS, *Le Conseil d'État*, cit., p. 596.

²⁷ *Ibid.*, p. 598.

constitutionality already resolved by the Constitutional Court is “identical” to the one that arises again.²⁸

V. *An administrative jurisdiction influenced by the lessons of the Court of Justice of the European Union*

Belgian law recognises the existence of a principle of primacy of international law – including European law – with direct effect. The principle of primacy of international and European law was first enshrined in an important judgment of the Court of Cassation of 27 May 1971, in the case of *Fromagerie Franco-Suisse Le Ski* against the Belgian State.²⁹

In this judgment, the Court of Cassation enshrined the obligation of judges to set aside the application of domestic norms that do not comply with international norms of direct effect. This lesson is worth recalling in the context of the present study, given that the ordinary courts are, as we have seen, vested with multiple and important powers in administrative litigation.³⁰

The Council of State – Belgium’s highest administrative court, which handles another part of administrative litigation – has adopted a case law similar to that of the Court of Cassation.³¹ The Constitutional Court, for its

²⁸ See Art. 26, Art. 2, subparagraph 2, 2°, first sentence of the Special Law of 6 January 1989 “on the Constitutional Court”, *Official Gazette* of 7 January 1989. For a comment of this provision, see G. ROSOUX, *Contentieux constitutionnel*, coll. «Faculté de droit de l’Université de Liège», Larcier, Brussels, 2021, pp. 250-268; M. VERDUSSEN, *Justice constitutionnelle*, coll. «Précis de la Faculté de droit et de criminologie de l’Université catholique de Louvain», Larcier, Brussels, 2024, pp. 423-459.

²⁹ Court of Cassation, 27 May 1971, in *Journal des Tribunaux*, 1971, p. 464 and concl. General Prosecutor W.-J. GANSHOF VAN DER MEERSCH. Over this judgment, see equally P. PESCATORE, *Comment on Court of Cassation, 27 May 1971*, in *Cahiers de Droit Européen*, 1971, p. 564-586; P. DE VISSCHER-F. DELPEREE, *Pour une juridiction constitutionnelle en Belgique*, in *Actualité du contrôle juridictionnel des lois. Travaux des sixièmes journées d’études juridiques Jean Dabin*, Larcier, Brussels, 1973, pp. 252-253; C. NAOME, *Les relations entre le droit international et le droit interne belge après l’arrêt de la Cour d’arbitrage du 16 octobre 1991*, in *Revue de Droit international et de Droit Comparé*, 1994, pp. 24-56; J. VELAERS, *La hiérarchie des normes et l’arrêt Franco-Suisse Le Ski*, in *Journal des Tribunaux*, 2021, pp. 596-602.

³⁰ Cf. *supra*: II. A distinct administrative order, recognised after a long and winding road.

³¹ For the first time, the Council of State accepted that an individual could directly invoke the provisions of a directive before it in its *Corveleyn* judgment, n. 13.146 of 7 October 1968. For further details on the development of case law concerning the invocability of European Union law standards before the Council of State, see notably E. SLAUTSKY, *La primauté du droit international et du droit européen dans la jurisprudence du Conseil d’État*, in *Journal des Tribunaux*, 2021, pp. 637-642.

part, recognises the primacy of international and European law over domestic norms other than the Constitution.³² Where the Constitution is concerned, the Court's case law is more complex and subtle.³³

Given the primacy of international and European law with direct effect over provisions of national law, Belgian courts, in principle, ensure compliance with European Union law standards in administrative litigation.

In carrying out this task, the national courts take account of the case law of the Court of Justice of the European Union, and appear to accept that the Court's judgments have "declaratory effect" or *res interpretata* in the meaning understood by this court, i.e. that its judgments indicate how an existing European Union standard must – and should – have been understood since its entry into force (*ex tunc*).³⁴

It should be noted, however, that the national case law of which we are aware very rarely – if ever – refers to this notion of "declaratory effect" or *res interpretata* and applies the lessons of the Court of Justice's judgments without referring to these notions.

Case law contains numerous examples of situations in which Belgian judicial and administrative courts refer to the case law of the Court of Justice of the European Union. These situations fall into two categories.

The first category of scenarios covers cases where national courts are faced with a question of European institutional law. This category includes decisions in which national courts refer to the case law of the Court of Justice concerning the existence of an obligation on the part of a national court to refer a question for a preliminary judgment,³⁵ the conditions for the direct effect of European Union law provisions,³⁶ or the principles of procedural autonomy, equivalence and effectiveness.³⁷

A second category of situations encompasses cases in which national courts are faced with questions of interpreting substantive European law

³² See Constitutional Court, judgment n. 159/2022 of 1 December 2022.

³³ See notably S. VAN DROOGHENBROECK, *La Cour constitutionnelle et la primauté du droit international. L'héritage Le Ski sous bénéfice d'inventaire*, in *Journal des Tribunaux*, 2021, pp. 618-622.

³⁴ See notably, on the "declaratory effect" of judgments by the Court of Justice of the European Union, N. CARIAT, *Le point sur... l'autorité des arrêts de la Cour de justice de l'Union européenne pour les juridictions nationales*, in *Journal des Tribunaux*, 2020, pp. 826-829.

³⁵ See notably, in the Council of State case law, Council of State, judgment n. 260.325 of 28 June 2024, p. 36; Council of State, judgment n. 260.120 of 14 June 2024, pp. 20-21; Council of State, n. 254.571 of 21 September 2022, pp. 73-74 and pp. 145-146; Council of State, judgment n. 250.823 of 8 June 2021, pp. 5-6.

³⁶ See notably, in the case law of the Council of State, C.E., judgment n. 260.352 of 2 July 2024, p. 6; Council of State, judgment n. 260.247 of 25 June 2024, pp. 19-20.

³⁷ See notably, in the case law of the Council of State, Council of State, judgment n. 257.449 of 27 September 2023, p. 52; Council of State, judgment n. 236.171 of 18 October 2016, pp. 8-9; Council of State, judgment n. 232.181 of 14 September 2015, p. 18.

and refer to the case law of the Court of Justice for answers. This is particularly the case in matters relating to the award of public contracts,³⁸ in environmental matters³⁹ and in matters relating to asylum and immigration.⁴⁰

It is clear that, by virtue of the principle of primacy of European Union law with direct effect and the declaratory effect of European Court of Justice judgments, implicitly accepted by the Belgian courts, the case law of the European Court should, in the event of contradiction, prevail over that of a “higher” court judgment in administrative litigation.

VI. Conclusion

In the light of the foregoing, it may be concluded that there exists in Belgium an administrative jurisdictional order distinct from the judicial jurisdictional order. The administrative court system was not, however, intended, and only came into being as a result of the failure of the judicial court system to exercise control over the administration.

The fact that the administrative jurisdictional order appeared surreptitiously plays a role in its relative organisation. Moreover, while the organisation of both judicial and administrative justice is a matter for the federal authority, the Belgian Constitutional Court has accepted that federated entities may set up administrative courts, provided that these are recognised as having special jurisdiction and are subject to cassation by the Council of State.

In the administrative jurisdictional order – as in the judicial jurisdictional one – *res judicata* is a guaranteed principle. On the other hand, while the concept of precedent does exist, it is never binding beyond the authority of *res judicata*, with the exception of judgments handed down by the Constitutional Court on preliminary questions concerning identical issues.

Both the principle of the primacy of international and European law and the declaratory effect of judgments by the Court of Justice of the European Union are recognised by national administrative and judicial jurisdictions, as can be seen from the numerous decisions that invoke Luxembourg case law in support of their reasoning.

³⁸ See notably Council of State, judgment n. 254.209 of 1^{er} July 2022; Council of State, judgment n. 250.897 of 15 June 2021.

³⁹ See notably, in the case law of the Council of State, Council of State, judgment n. 257.642 and n. 257.643 of 17 October 2023; Council of State, judgment n. 257.093 of 11 July 2023; Council of State, judgment n. 255.773 of 10 February 2023.

⁴⁰ See notably, in the case law of the Council of State, Council of State, judgment n. 260.981 of 10 October 2024; Council of State, judgment n. 259.728 of 15 May 2024; Council of State, judgment n. 243.988 of 20 March 2019; Council of State, judgment n. 240.394 of 11 January 2018.

It can thus be concluded that the legal uncertainty that may arise in Belgian law has more to do with the very existence of a dual judicial system capable of controlling administrative action than with respect for *res judicata* or the principle of primacy of international and European law.

We are, however, among those who consider that the existence of a dual judicial system capable of controlling administrative action is an opportunity, despite the (relative) source of uncertainty that it may represent.

These two orders, although requiring detailed articulation what is not necessarily simple, nonetheless provide the litigant a greater degree of jurisdictional protection from potential administrative arbitrariness.

Abstract

In Belgium, the Constitution originally entrusted the resolution of all disputes to a single jurisdictional order: the judicial courts. However, after a long and winding road, a separate administrative court system was eventually recognised. The organisation of this new administrative court system is, however, curious and deserves some explanation. The fact remains that administrative justice, like judicial justice, guarantees respect for *res judicata* and recognises the concept of non-binding precedent. Like judicial justice, administrative justice is also influenced by the lessons of the Court of Justice of the European Union. The question is therefore to know where legal uncertainty lies, if it exists at all.

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