

Belgian Pluralism and Pragmatism

Shared Principles in a Strained Relationship

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I. Belgium and the CoE: An Auspicious Start for a Country at the Crossroads between French and Dutch Administrative Cultures

A founding member of the Council of Europe (CoE), Belgium signed the Treaty of London, i.e. the Statute of the Council of Europe (SCoE), on 5th May 1949 and ratified it on 8th August 1949. The treaty entered into force for Belgium on that day. One of the main drivers behind this treaty was a well-established Belgian diplomat and convinced European, Paul-Henri Spaak,² who chaired the first general assembly of the Union Nations. One of the key negotiators behind the founding of the CoE, providing momentum when needed,³ Spaak was elected the first president of the Parliamentary Assembly of the CoE (PACE),⁴ in recognition of his prestige at the time. Spaak saw the CoE as a component of wider internationalization efforts that Belgium made after the end of World War II in order to secure peace.⁵ Belgium was one of the first states to sign the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) on 4th November 1950 in Rome. It ratified it on 14th June 1955 and the ECHR entered into force on that day for Belgium. Belgium also signed all protocols. Protocols 12, 15, and 16 have not been ratified, however.

4.01

Given such a start the CoE might have enjoyed high standing in Belgium. In practice this is true for the ECHR and the European Court of Human Rights (ECtHR) case law. The influence of other CoE instruments on Belgian administrative law is more nuanced, however. In some

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¹ The author thanks the editors of the *Grands arrêts de droit administratif belge*, Professors Patrick Goffaux, Jérôme Sohler, and Emmanuel Slautsky, for sharing with her the draft of comments they are collecting (2021 forthcoming), Antoine Mayence for his help in locating information and Professors Dimitri Yearnault, Steven van Garsse, and Kris Wauters for sharing their comments. As French is one of the official languages of the CoE the French names of Belgian institutions are used when they relate to the federal, bilingual, or French-speaking parts of the country. In the other cases their official Dutch names are used.

² P.-H. Spaak, *The Continuing Battle: Memoirs of a European 1936–1966* (1971); P.-H. Spaak, 'The Integration of Europe: Dreams and Realities', (1950) 29 *Foreign Affairs*, pp. 94–100.

³ N. Weiß, 'Origin and further development', in S. Schmahel and M. Breuer (eds.), *The Council of Europe—Its Law and Policies* (2017), pp. 3–22 (MN. 1.21 et seq.).

⁴ Weiß (n. 3), MN. 1.34.

⁵ E. Witte, J. Craeybeckx, and A. Meynen, *Political History of Belgium—From 1830 onwards* (2009), pp. 245–48.

areas, such as administrative transparency, CoE recommendations have encouraged Belgium to undertake reforms. In other areas, such as the civil service, no interplay between the CoE and Belgian administrative law can be ascertained. In other areas the CoE and Belgium have even come to loggerheads, such as in language-related matters in the public sphere.

4.03 General legal principles and principles of good administration have been around in Belgium since the end of World War II. It would thus be an incommensurable task to review the whole legislation and case law pertaining to them in Belgium, even if only in relation to the CoE. Therefore, this report follows a two-tier method. Firstly, it refers whenever possible to research already undertaken on specific topics, seeking to update it when appropriate. Secondly, the database of the *Conseil d'Etat* has been consulted using keywords such as 'Conseil de l'Europe', 'Raad van Europa', 'Recommandation' and 'Aanbeveling'. Databases of the federal, Flemish, French-speaking, and Brussels legislative bodies have also been consulted as well as the website of the official gazette (*Moniteur belge*) in its consolidated version. This search in the official databases aimed to confirm or illustrate the information provided in the secondary literature.

4.04 The overall message resulting from this approach is two-fold. Firstly, influence is a very fuzzy concept. One can see factors converging over time to make change happen in a specific legal system. CoE activities can be one of these factors but are rarely the only or the main one. Secondly, besides the formal and positivist components of any administrative reform Belgium strikingly illustrates the informal and personal dynamic behind changes within a constitutional and political context that can resist ambitious changes. Therefore, the CoE contributes to the Belgian administrative system and its principles of good administration in providing inspiration and a forum for discussing ideas within a community of selected states. However, there are hardcore pockets resisting not so much the CoE's influence but change as such: unlocking change may be treacherous in a society based on multi-layered consensus (linguistic, religious, and socio-economic). It seems as if the major actors (constitutional and administrative judges) prefer to keep working with tried and tested idiosyncratic techniques rather than venturing towards the unknown. To understand this some background information is needed on the Belgian federal state and awareness of the CoE's work in Belgian legal communities.

1. The Belgian Administrative Structure in a Nutshell

4.05 When signing the SCoE in 1949 Belgium was a centralized state with one of the oldest constitutions on the European continent—dating back to 1831. However, since then, six constitutional reforms have transformed Belgium into a federal state,⁶ despite Belgium having a

⁶ P. Peeters and D. Haljan, 'Belgium's sixth state reform: The state of the nations(s)', (2016) 22 *EPL*, pp. 411–38; P. Popelier, 'Belgium', in L. Besselink, P. Bovend'Eert, H. Broeksteeg, R. de Lang, and W. Voermans (eds.), *Constitutional Law of the EU Member States* (2014), pp. 65–117; S. Lust, 'Administrative Law in Belgium' in R. Seerden (ed.), *Administrative Law of the European Union, its Member States and the United States—A Comparative Analysis* (2nd edition 2007), pp. 5–60; P. Popelier and C. Van de Heyning, 'The Belgian Constitution: The Efficacy Approach to European and Global Governance' in A. Albi and S. Bardutzky (eds.), *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law* (2019), pp. 1225–270.

rigid constitution.⁷ Both the constitutional background rooted in nineteenth century liberalism and the succession of constitutional reforms since the 1970s are key to understanding how the CoE may contribute to developing principles of good administration in Belgium, in terms of opportunities and challenges.

Constitutional reforms since the 1970s have led Belgium to become a federal state by dissociation, and administrative matters are decided both at federal and sub-national levels. There are altogether three regions and three communities with legislative powers,⁸ besides the federal level: roughly speaking, seven different administrative regimes coexist in Belgium. However, the Flemish region and Flemish community are closely aligned on the Dutch-speaking side. On the French-speaking side alignment is less systematic.

Despite this fragmentation similarities remain numerous across the entities for historical, institutional, and legal reasons. First, the administration was homogeneous across the country until 1970–80: since then differentiation has been increasing but commonalities endure. Secondly, the judicial system remains strongly unitary—although this is also starting to slowly change. Administrative justice is in a process of territorial and sectoral fragmentation. However, the Belgian *Conseil d'Etat* remains competent in a majority of cases, even if only through ‘cassation power’.⁹ Finally, legal instruments ensure a level of uniformity or shared standards across the country: for instance, the civil service is governed by minimal legal principles throughout all administrations,¹⁰ and administrative liability is addressed on the basis of the Belgian *Code Civil* (especially Article 1382 seq.) in a uniform way.¹¹

From the start Belgian administrative law has been under the influence of both the French and the Dutch administrative systems,¹² as it was successively included in France during Napoleon times (1799–1815) and then the Netherlands (1815–30). For instance, key organizational matters, such as local government and administrative justice, are borrowed from

⁷ For a description: <https://www.coe.int/en/web/portal/belgianchairmanship-federalstate>; E. Wayenberg, F. De Rynck, K. Steyvers, and J.-B. Pilet, ‘Belgium: A Tale of Regional Divergence?’ in F. Hendriks, A. Lidström, and J. Loughlin (eds.), *Oxford Handbook of Local and Regional Democracy in Europe* (2010), pp. 71–95; C. Behrendt and S. Vandenbosch, ‘Le réaménagement de la répartition des compétences dans le fédéralisme asymétrique belge’, (2017) 38 *Civitas Europa*, pp. 241–54. On the rigidity of the revision: Venice Commission, *Opinion No. 679/2012 on the Revision of the Constitution of Belgium* (CDL-AD(2012)010) of 20 June 2012 at [18].

⁸ To make it simple, it is enough for the reader to know that Belgium is made up of three regions (Flanders, Wallonia, and Brussels) and three communities (Flemish, French-speaking, and German-speaking).

⁹ Y. Marique, ‘The Shaping of Federal Administrative Justice in Belgium—Recasting Citizens-Administration Relationships’ in S. Nason (ed.) *Administrative Justice in Wales and Comparative Perspectives* (2017), pp. 283–315.

¹⁰ AR, 2 Octobre 1937, *portant le statut des agents de l'État*; AR, 26 Septembre 1994, *fixant les principes généraux du statut administratif et pécuniaire des agents de l'État applicables au personnel des services des Gouvernements de Communauté et de Région et des Collèges de la Commission communautaire commune et de la Commission communautaire française ainsi qu'aux personnes morales de droit public qui en dépendent*; AR, 22 December 2000, *fixant les principes généraux du statut administratif et pécuniaire des agents de l'État applicables au personnel des services des Gouvernements de Communauté et de Région et des Collèges de la Commission communautaire commune et de la Commission communautaire française ainsi qu'aux personnes morales de droit public qui en dépendent*. B. Lombaert and S. Adriaenssen, ‘Que reste-t-il des principes généraux de la fonction publique?’, (2016) *CDPK*, pp. 408–28.

¹¹ I. Durant, ‘The liability of public authorities in Belgium’ in K. Oliphant (ed.), *The liability of public authorities in comparative perspective* (2016), pp. 51–80.

¹² M. Fromont, *Droit administratif des états européens* (2006), pp. 24–27. For the general context of relationships between the Netherlands and Flanders, see, e.g., S. Govaert, ‘La Flandre et les Pays-Bas: rapports nouveaux’, (1982) (no 960–961) *Courrier hebdomadaire du CRISP*, pp. 1–49.

France. However, in other matters, Belgium leans towards the Dutch system. For instance, the distinction between public and private law is more fluid in Belgium than in France, with consequences for the interplay between the civil judge and the administrative judge: administrative liability and litigation in the performance of public contracts fall within the remit of civil courts and not that of the administrative court *per se*.¹³

- 4.09** Belgium is thus at the crossroads between two administrative cultures—one oriented toward Dutch administrative law and one oriented towards French administrative law.¹⁴ The highest administrative courts of these three countries have frequent interactions.¹⁵ Due to this position Belgium has failed to develop its own administrative legal culture¹⁶ in two respects at least. First, the French-speaking and Dutch-speaking chambers of the *Conseil d'Etat* have developed diverging trends in case law.¹⁷ Secondly, administrative law issues are rarely discussed by putting them within an historical—Belgian—context of development.¹⁸ Two other devices are usually used to contextualize administrative law topics: comparison with the French and/or Dutch systems¹⁹ and discussions in the light of European regulation, often including the ECHR.²⁰
- 4.10** This openness towards new ways of organizing the administration might be linked to the fact that the cultural and socio-economic balance organizing Belgian administration and society until the 1970s started to change under the growing pressure of federalization. Until then there had been an extensive practice of external advice-seeking in policy-making based around religious, economic, and cultural groups.²¹ Federalization began to change

¹³ Until 2014 exclusively within the judiciary (*loi*, 20 January 2014, *portant réforme de la compétence, de la procédure et de l'organisation du Conseil d'Etat*). Since 2014, claimants can choose to claim damages from the administrative judge or the judiciary (F. Glansdorff, 'L'indemnité réparatrice: Une nouvelle compétence du Conseil d'Etat vue par un civiliste', [2014] *J.T.*, pp. 474–79; M. Quintin, 'Contentieux de l'indemnité en droit administratif belge', [2017] *APT*, pp. 157–69).

¹⁴ C. De Visscher, 'Fédéralisme et réformes administratives en Belgique: quelles différences de trajectoires entre la Flandre et la Wallonie' in *Itinéraires d'un constitutionnaliste—En hommage à Francis Delperée* (2007), pp. 383–95.

¹⁵ Illustration of interactions between Belgium and the Netherlands: E. Lanckswaert, 'Rapport sur l'organisation et le fonctionnement du Conseil d'Etat des Pays-Bas', (2011) *APT*, pp. 73–82; illustration of interactions between Belgium and France: J.-M. Sauvé, *avant-propos* in P. Bouvier, *La naissance du Conseil d'Etat de Belgique—une histoire française?* (2012); P. Bouvier and M. Joassart, 'Le Conseil d'Etat de Belgique, rampart des libertés et de l'ordre public', (2017) *APT*, pp. 60–68.

¹⁶ M. Storme and D. Heirbaut, 'The Belgian Legal Tradition: From a Long Quest for Legal Independence to a Longing for Dependence?', (2006) *European Review of Private Law*, pp. 645–83.

¹⁷ J. Sohler, 'Chambres flamandes et chambres francophones: divergences et dissonances', in *Le Conseil d'Etat de Belgique: cinquante ans après sa création (1946–1996)* (1999), pp. 699–731. This divergence is illustrated with the different reception of principles of good administration (see MN. 4.46 et seq.).

¹⁸ For one of these rare exceptions, taking up the methodological challenges that this undertaking triggers: P.-O. Debroux and D. Yernault, 'Clio, Jupiter et Mercure: de l'importance de l'analyse historique pour l'étude du droit public économique contemporain', (2012) *CDPK*, pp. 510–35.

¹⁹ e.g.: R. Andersen, 'Vers une publicité générale et intégrale des avis du Conseil d'Etat' in *Les visages de l'Etat—Liber amicorum Yves Lejeune* (2017), pp. 75–89; L. Wintgens (ed.), *De adviesbevoegdheid van de Raad van State—La compétence d'avis du Conseil d'Etat* (2003). For a comparison with France: D. Yernault, 'Une administration doit-elle respecter les règles du droit à un procès équitable? Les sanctions administratives et l'article 6 de la Convention européenne des droits de l'homme dans les jurisprudences belge, française et européenne', (1995) *APT*, pp. 240–90.

²⁰ e.g.: I. Opdebeek and A. Coolsaet, *Ambtenarenrecht—Rechtspositieregeling—Algemene beginselen en ambtenarenrecht* (2011), pp. 1–40.

²¹ C. Van den Berg, C. Bran, and T. Steen, 'Consensus politics as administrative practice—The Europeanization of external advice-seeking' in H. Vollaard, J. Beyers, and P. Dumont (eds.) *European Integration and Consensus Politics in the Low Countries* (2015), pp. 114–33 (p. 116).

the balance between these groups in each sub-national entity, so that new ways to organize the decision-making process emerged.

That the legal scholarship turned to the CoE as an international source of inspiration in the 1970s–1980s, can also be linked to a rising dissatisfaction with the protection offered to citizens against the administration by the Belgian Constitution around that time. Constitutional reforms were not keeping up with developments under international law as they were mostly devoted to federalization. Title II of the Constitution, ‘Belgians and their rights’, was still very much that of the 1831 Constitution²² and thus very much a witness of the nineteenth century. It was a rather progressive list of liberal freedoms at the time but was often vague by the standards of the twenty-first century; it was mostly protective against the executive (and not the legislative) and it accepted the risks entailed by freedom (with no preventive restriction on freedoms).²³ Therefore, the need arose to update the constitutional protection of citizens against administrative power. Flexible and constructive interpretation based on international commitments undertaken by Belgium was fostered. Interestingly one of the most striking constitutional changes in the realm of fundamental rights is connected to the CoE’s work, namely administrative transparency (cf. MN. 4.38). The CoE’s work is thus of relevance within Belgian administrative law when a range of factors converge in that direction. Otherwise, resistance to the CoE’s influence in domestic matters may build up. The remainder of this paper is devoted to analysing this tension within Belgian administrative practice.

4.11

2. Research, Education, and Access to CoE Material

The Belgian legal scholarship understood early on that the CoE could have an influence on the protection of citizens against the administration.²⁴ CoE law features in Belgian legal awareness in three different ways going back to the early days of the ECtHR: the ECtHR case law, Belgian judges at the ECtHR and the dissemination of ECtHR case law in the legal scholarship.

4.12

The first factor in the influence of the CoE on Belgian law is the early case law decided on by the ECtHR in major cases relating to Belgium. These cases had deep repercussions for specific issues, such as individual freedom.²⁵ For instance, Article 6 ECHR was applied to the office of the *Procureur Général* at the Supreme Court (*Cour de Cassation*) in the *Delcourt* case.²⁶ Belgium was hence the first country where the objective impartiality of the judge (in

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²² V. Dujardin, ‘Les droits constitutionnels originaux’ in M. Verdussen and N. Bonbled (eds.) *Les droits constitutionnels en Belgique—Vol 1* (2011), pp. 37–75; M. Verdussen, ‘Les droits constitutionnels subséquents’, in Verdussen and Bonbled, *ibid.*, pp. 78–90.

²³ J. Velaers, ‘La révision du titre II de la Constitution « Des Belges et de leurs Droits »: Une mission pour le législateur constitutionnel et peut-être aussi pour la Commission de Venise’, (2014) (3/4) *RBDC*, pp. 449–60 (pp. 454 et seq.); J. Velaers, ‘Constitutional Versus International Protection of Human Rights: Added Value or Redundancy? The Belgian Case, in the Light of the Advisory Practice of the Venice Commission’, (2016) (77:2) *RIEJ*, pp. 265–95 (pp. 273 et seq.).

²⁴ P. Charlier, ‘Contribution du Conseil de l’Europe à la protection du citoyen en présence de l’administration’, (1981) *J.T.*, pp. 545–47.

²⁵ F. Sudre (ed.), *Les grands arrêts de la Cour européenne des Droits de l’Homme* (8th edition 2017), pp. 236–44. J. Velu commented on this case: (1971) *J.T.*, pp. 341–46. This journal was the reference journal for law practitioners.

²⁶ *Delcourt v. Belgium* (2689/65) 17 January 1970 ECtHR.

the Anglo-Saxon way²⁷) was relied upon by the ECtHR. Other cases followed, such as the *Le Compte* case, extending Article 6 ECHR to professional organizations;²⁸ the *Vermeulen* case, applying equality of arms and the right to be heard in civil matters at the level of the *Cour de Cassation*²⁹ and the *Borgers* case applying equality of arms and the right to be heard in criminal matters at the level of the *Cour de Cassation*.³⁰ *Borgers* and *Vermeulen* triggered adaptation in the ways in which the *Cour de Cassation* worked. These cases are the equivalent of the French *Kress* case.³¹ However, while *Kress* applied to the administrative judge (cf. MN. 5.06), the *Borgers* and *Vermeulen* cases applied to the ordinary judge. Furthermore, although there has been no equivalent of the cases *Procola*³² in Luxembourg, *Kleyn*³³ in the Netherlands, and *Sacilor Lormines*³⁴ in France³⁵ regarding the Belgian *Conseil d'Etat*, all three cases have been discussed in Belgium due to the fact that the Belgian *Conseil d'Etat* belongs to the same institutional family as the Dutch, Luxembourgian, and French Council of State.³⁶ Overall, the interpretation given by the ECtHR to Article 6 ECHR regarding civil and criminal matters that administrative matters were included within the remit of Article 6 ECHR (cf. MN. 1.45 et seq.) meant that this development had to be included in Belgium as well.³⁷ More recently, the ECtHR has applied Article 6 ECHR when a cassation procedure is available to parties to the Belgian *Conseil d'Etat*.³⁸

- 4.14** The second factor explaining why Belgium pays attention to the CoE's work relates to prominent Belgians who have been judges at the ECtHR, namely *Henri Rolin* (1959–73, president 1968–71), *Walter-Jean Ganshof van der Meersch* (1973–86, after a career that led to him becoming *Procureur General* at the *Cour de Cassation*³⁹), *Jan De Meyer* (1986–98), *Françoise*

²⁷ A. Claeys, 'L'évaluation de l'influence de l'argument de droit comparé sur l'appréhension du principe d'impartialité "objective" par le Conseil d'Etat français', in F. Melleray (ed.) *L'argument de droit comparé en droit administratif français* (2007), pp. 283–319.

²⁸ *Le Compte, Van Leuven and De Meyere v. Belgium* (6878/75 and 7238/75) 23 June 1981 ECtHR [Plenary], extending the reach of Article 6 ECHR to disciplinary actions undertaken by professional organizations (Sudre (n. 25), pp. 245–52); *Albert and Le Compte v. Belgium* (7299/75 and 7496/76) 10 February 1983 ECtHR [Plenary]. This remains a landmark case (see eg A. Zrvandyan, *Casebook on European fair trial standards in administrative justice* (2016), p. 28. The *Le Compte* case is one of the few examples where the *Cour de Cassation* resisted the ECtHR (D. Spielmann, 'Jurisprudence of the European Court of Human Rights and the Constitutional Systems in Europe' in M. Rosenfeld and A. Sajo (eds.), *Oxford Handbook of Comparative Constitutional Law* (2012), pp. 1231–52 (p. 1249 n. 125)).

²⁹ *Vermeulen v. Belgium* (19075/91) 20 February 1996 ECtHR [GC]. R. Andersen, 'L'arrêt Vermeulen et le rôle de l'auditeur au Conseil d'Etat' in *Les droits de l'homme au seuil du troisième millénaire—Mélanges en hommage à Pierre Lambert* (2000), pp. 1–18.

³⁰ *Borgers v. Belgium* (12005/86) 30 October 1991 ECtHR [Plenary]. Sudre (n. 25), pp. 352–69.

³¹ *Kress v. France* (39594/98) 7 June 2001 ECtHR [GC].

³² *Procola v. Luxembourg* (14570/89) 28 September 1995 ECtHR.

³³ *Kleyn and Others v. Netherlands* (39343/98 39651/98 43147/98 46664/99) 6 May 2003 ECtHR [GC].

³⁴ *Société Sacilor-Lormines v. France* (65411/01) 9 November 2006 ECtHR.

³⁵ e.g., these three ECtHR cases were referred to in the *Vlaams Belang* case by the Belgian CC (3 December 2009, no 195/2009, B.12.1, cf. MN. 4.49).

³⁶ Belgian scholarship greatly discussed the *Bentham v. Netherlands* case (8848/80) 23 October 1985 ECtHR [Plenary] (cf. MN. 7.37): S. Van Drooghebroeck, 'Vingt-cinq ans après Bentham: sens et non-sens d'une application limitée de l'article 6 de la Convention européenne des droits de l'homme dans le contentieux de droit public' in *Liber amicorum Michel Melchior—Liège, Strasbourg, Bruxelles—Parcours des droits de l'homme* (2010), pp. 691–716. For an illustration of the discussions triggered by Article 6 ECHR with respect to administrative justice, see M. Leroy, *Contentieux administratif* (5th edition 2011), pp. 83–97.

³⁷ J. Goossens, 'De vervaagde grens tussen burgerlijke en administratieve rechter', (2014) *TBP*, pp. 275–94.

³⁸ *Miessen v. Belgium* (31517/12) 18 October 2016 ECtHR. D. Renders and L. Ceci, 'Quel avenir pour le mémoire de synthèse dans la procédure en cassation administrative devant le Conseil d'Etat?', (2017) 22 *Revue de Jurisprudence de Liège, Mons et Bruxelles*, pp. 1028–40; E. Loncke, 'De strikte benadering van de 'samenvattende memorie': Overformalisme in de cassatieprocedure bij de Raad van State', (2017) *TBP*, pp. 88–94.

³⁹ For a detailed explanation of this judge's career, see: *Miscellaneous W.J. Ganshof Van der Meersch* (1972); R. Legros, 'Walter Ganshof Van der Meersch', (1995) *Annuaire de l'Académie Royale*, pp. 120–47. He is well-known

Tulkens (1998–2012) and *Paul Lemmens* (2012–). Personally committed to the human rights cause, they wrote extensively on CoE-related topics in their academic capacity, ensuring that awareness of the CoE spread deeply within the Belgian legal and judicial communities and contributing to the intellectual blossoming of the ECHR.⁴⁰

The third factor in the influence of CoE law on Belgian law is related to dense research on the CoE in Belgium in Dutch,⁴¹ French,⁴² and even English.⁴³ In most general and public law journals a section brings updates about ECtHR case law. Other activities of the CoE have also triggered attention in Belgium. From the first recommendations of the Committee of Ministers of the CoE (CM) on ‘good administration’ onward, scholarship has reported on the contribution that the CoE might make to the protection of citizens against the administration.⁴⁴ At a time when access to the CoE’s soft law was not made easy thanks to the internet (cf. MN. 1.08) it was made possible by the fact that many CM recommendations were published and/or commented on in the annual reports of the French *Conseil d’Etat*, to which Belgian scholarship refers when commenting on CM recommendations.⁴⁵

This trend has been confirmed over the years. To this day any Belgian lawyer has been acquainted during his/her studies with the ECHR and the ECtHR case law: modules pertaining to fundamental freedoms are in bachelor programmes in law and normally include an international dimension. Optional modules pertaining to in-depth issues on human rights or the international protection of human rights are also offered at master’s level.⁴⁶ Dedicated expert master’s programmes are also devoted to human rights law.⁴⁷ Regular sessions on continuing professional developments are targeted at an audience of lawyers and judges. These sessions include aspects related to international law, human rights, or

among students in Belgian administrative law for his role as ‘commissaire du gouvernement’ in the *Schaerbeek counters* case. In this capacity he represented the state authority to ensure that linguistic legislation was duly applied in a Brussels local government (Schaerbeek), in 1976. In 1971, he concluded as *Procureur Général* in the *Franco-suisse Le Ski* case (cf. MN. 4.23). In his annual discourses as *Procureur Général* at the *Cour de Cassation*, he penned major contributions: ‘Le juge belge à l’heure du droit international et du droit communautaire’, (1969) *J.T.*, pp. 537–51 or on the relationship between the law and general principles (cf. MN. 4.52).

⁴⁰ D. Spielmann, ‘La contribution des juges belges au rayonnement de la Convention européenne des droits de l’homme’, (2015) 101 *RTDH*, pp. 25–38.

⁴¹ e.g.: The would-be CJEU President (2015–19), K. Lenaerts, *Machtsbegrenzing door de rechter: een rechtstheoretische studie aan de hand van de rechtspraak van het Opperste Gerechtshof van de Verenigde Staten van Amerika, van het Hof van Justitie van de Europese Gemeenschappen en van het Europese Hof voor de Rechten van de Mensen* (Katholieke Universiteit Leuven, PhD thesis, 1982).

⁴² e.g.: J. Velu and R. Ergec, ‘La Convention européenne des droits de l’homme’, *Répertoire pratique de droit belge* (1990, supplmt T. VII), pp. 138–52.

⁴³ For an early illustration: P. Van Dijk and G. Van Hoof, *Theory and Practice of the European Convention on Human Rights*, first published in 1978 and now in its 5th edition (2018). This was a cooperation between Dutch and Belgian lawyers. P. Van Dijk became the Dutch judge at the ECtHR (1996–98).

⁴⁴ Charlier (n. 24), pp. 545 et seq.

⁴⁵ e.g.: D. Lagasse, ‘La motivation—Faut-il rendre obligatoire la motivation des actes administratifs?’, (1981) *APT*, pp. 69–93.

⁴⁶ e.g.: R. Ergec, *Protection européenne et internationale des droits de l’homme* (3rd edition 2014); Module in Droits de l’Homme—Human Rights at the Université catholique de Louvain: (<https://uclouvain.be/prog-2017-droi2m-ldrop229o>).

⁴⁷ e.g.: Master de spécialisation en droits de l’homme of the Université catholique de Louvain (<http://www.usaintlouis.be/sl/2015/drho2mc.html>).

administration.⁴⁸ PhDs on human rights or the CoE, ECHR, and ECtHR case law are regularly defended. Dedicated legal journals are devoted to the international dimensions of human rights.⁴⁹ This all encourages the blossoming of a lively scholarly community.

- 4.17** Belgian lawyers are well informed about ECtHR case law. ECtHR case law has been routinely reported on in legal journals for a long while.⁵⁰ Conferences and continuing education programmes where legal practitioners, civil servants, judges, and other relevant actors meet are regularly organized.⁵¹ ECHR and the ECtHR case law have become truly embedded in the Belgian legal consciousness.

II. Belgium in the Landscape of Ratified CoE Conventions

1. Problems with CoE Conventions from a Belgian Perspective

- 4.18** Belgium has signed 175 CoE treaties and ratified 137 (cf. MN. 1.06). Among the 42 treaties that Belgium has *not* signed are mostly treaties relating to children, medical, and cultural issues, including the European Charter for Regional or Minority Languages (cf. MN. 1.57).
- 4.19** This attitude calls for two comments. First, it illustrates the distinctiveness of family conceptions in Belgian legal culture. It may be enough to recall here the famous *Marckx* arrest, where Belgium was condemned by the ECtHR for its discriminatory treatment of illegitimate children in 1979.⁵² The *Marckx* saga raised the profile of ECtHR case law beyond family law. Scholarly debates including discussions of the ECHR greatly increased in the Belgian legal community thereafter. The legal community became more aware about the

⁴⁸ e.g.: J. Van Meerbeeck, 'L'accès à la justice à l'aune des exigences européennes' in J. Van Meerbeeck (ed.), *L'accès à la justice* (2017), pp. 7–37; F. Krenc and F. Tulkens, 'Le droit disciplinaire au regard de la Convention européenne des droits de l'homme. L'état actuel de la jurisprudence de la Cour européenne des droits de l'homme' in G.-A. Dal (ed.), *Actualités du droit disciplinaire* (2016), pp. 11–46; F. Tulkens and D. Vandermeersch, 'Quel horizon pour l'étranger en séjour illégal condamné à une peine privative de liberté?' in *Actualités de droit pénal—Hommage à Ann Jacobs* (2015), pp. 123–56; P. Martens (ed.), *Saisir le Conseil d'État et la Cour européenne des droits de l'homme* (2013).

⁴⁹ In French: *RTDH*, set up by Pierre Lambert in 1990. Lambert was entrusted with various missions for the CoE in former Eastern Europe in the 1990s. In Dutch, the *Ligua voor Mensenrechten* publishes the *Tijdschrift voor Mensenrechten*. The *Ligua* seeks the CoE's support on Belgian issues, which shows the awareness of the civil society in mobilizing ECHR-related instruments.

⁵⁰ e.g.: F. Krenc and S. van Drooghenbroeck, 'Chronique de jurisprudence de la Cour européenne des droits de l'homme (1er janvier–30 juin 2016)', (2016) *J.T.*, pp. 757–66; F. Krenc and S. van Drooghenbroeck, 'Chronique de jurisprudence de la Cour européenne des droits de l'homme (1er juillet–31 décembre 2016)', (2017) *J.T.*, pp. 473–83; P. Marchal, 'Examen de jurisprudence (2001–2010)—Convention européenne des droits de l'homme', (2014) *Revue critique de jurisprudence belge*, pp. 329–515; P. Lambert, 'Examen de jurisprudence—La Cour européenne des droits de l'homme—1998', (1999) *J.T.—Droit européen*, pp. 31–41; 'Examen de jurisprudence—La Cour européenne des droits de l'homme—1999', (2000) *J.T.—Droit européen*, pp. 34–42; W. Verrijdt, 'Europees Hof voor de Rechten van de Mens', (2015) *TBP*, pp. 580–91; W. Verrijdt, 'Europees Hof voor de Rechten van de Mens', (2012) *TBP*, pp. 423–40. The author was a legal clerk at the Belgian CC when authoring these case law overviews.

⁵¹ e.g.: *Vie privée et droits de l'homme—Actes du troisième colloque international sur la Convention européenne des droits de l'homme*, Brussels, 30th September–3rd October 1970 (1973).

⁵² *Marckx v. Belgium* (6833/74) 13 June 1979 ECtHR [Plenary]. This case remains in the memory (see e.g. press release 'Marckx' case: European Court of Human Rights has an impact on your daily life ...' of the Ministry of Foreign Affairs of 26 November 2014 issued when Belgium took over the CoE's chairmanship in 2014; Spielmann (n. 28), p. 1249, noting that the implementation of the ECtHR decision took nearly ten years. K. Rimanque, 'De nakoming van Straatsburgse beslissingen: Een taak voor regelgevers en rechters', in *Présence du droit public et des droits de l'homme—Mélanges offerts à Jacques Velu—Vol. III* (1992), pp. 1347–60 illustrates delays in changing the Belgian legislation in the early days further.

potential for the ECHR to change core Belgian legal principles, opening up possibilities up to the present day.⁵³

The second comment on the CoE treaties that Belgium has not signed relates to the use of language when the administration interacts with citizens, which is an important distinctive—practical and symbolic—feature of administrative matters in Belgium.⁵⁴ Over the years this has been a contentious issue arising time and again in the political arena, judicial fora, and at constitutional level.⁵⁵ The ECtHR has taken a hands-off approach to this question in its case law on the treatment of the French-speaking minority in the Dutch-speaking territory.⁵⁶ These cases have thus drawn the attention of politicians and law academics and practitioners concerned with the activities of the ECtHR.

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Continuing over the years, this situation is illustrated in the deadlock on the signing of the Charter for the Regional or Minority Languages.⁵⁷ This charter has fuelled a range of academic and political debates in light of the linguistic pluralism that the country knows: French, Dutch, and German are the official languages but they are minority languages in some parts of the Belgian territory, with some territorial entities having a bilingual regime or a special protection regime (known as ‘communes à facilités’ or local government with (linguistic) facilities). The status of this protection regime, i.e. permanent or temporary, is disputed, as reflected in the Belgian case law:⁵⁸ questions arise about the territoriality principle and personal freedom to use a language.⁵⁹ In 2002 the European Commission for Democracy through Law (the ‘Venice Commission’) adopted an opinion relating to the

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⁵³ e.g.: Y.H. Leleu, ‘De l’arrêt Marckx à l’arrêt Mazurek, la longue marche des enfants adultérins’, (2000) *Revue trimestrielle de droit familial*, pp. 397–410; F. Tulkens and S. van Drooghenbroeck, ‘L’ombre de Marckx: Pour un débat renouvelé sur les effets dans le temps des arrêts de la Cour européenne des droits de l’homme’, in *L’homme dans la société internationale. Mélanges en hommage au Professeur Paul Tavernier* (2013), pp. 1089–117. This case remains a landmark decision: *Sudre* (n. 25), pp. 603–18. It was again mentioned when Article 22bis was introduced in the Constitution (*Documents parlementaires, Sénat* (1999–2000), *rapport fait au nom de la Commission des affaires institutionnelles du Sénat par Mme Taelman à propos de la révision du Titre II de la Constitution en vue d’y insérer des dispositions nouvelles permettant d’assurer la protection des droits de l’enfant à l’intégrité morale, physique, mentale et sexuelle*, no 21/4, p. 39).

⁵⁴ In Dutch: J. Clement, *Taalvrijheid, bestuursstaal en minderheidsrechten—Het Belgische model* (2003); T. De Pelsmaeker, L. Deridder, F. Judo, J. Proot, and F. Vandendriessche, *Taalgebruik in bestuurszaken* (2004); in French: F. Gosselin, *L’emploi des langues en matière administrative* (2nd edition 2017).

⁵⁵ See Popelier (n. 6), pp. 66 et seq.

⁵⁶ *Case ‘relating to certain aspects of the laws on the use of languages in education in Belgium’ v. Belgium* (1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64) 23 July 1968 (‘Belgian linguistics’) ECtHR [Plenary] (‘Belgian linguistics’). The 1968 case was one of the most important cases that the ECtHR had to decide on up to that time (R. Pelloux, ‘L’arrêt de la Cour européenne des droits de l’homme dans l’affaire linguistique belge (fond)’, (1968) 14 *Annuaire français de droit international*, pp. 201–16 (p. 201). C. McCrudden and B. O’Leary, ‘The Belgian consociational cases in the European Court of Human Rights’ in C. McCrudden and B. O’Leary (eds.), *Courts and Consociations: Human Rights versus Power-Sharing* (2013), pp. 48–66; L. Lavrysen and J. Theunis, ‘The Belgian Constitutional Court: A satellite of the ECtHR?’, in *Liber amicorum Marc Bossuyt* (2013), pp. 331–54 (p. 333); *Sudre* (n. 25), pp. 101–17.

⁵⁷ N. Goethals, ‘Het taalgebruik in de randgemeenten: Wat met het Minderhedenverdrag?—De strikte interpretatie van de Belgische taalfaciliteiten in het licht van het Kaderverdrag ter bescherming van de nationale minderheden’, (2014–15) 50 *Jura Falconis*, pp. 635–710; T. Nijs, ‘De mogelijke invloed van het Kaderverdrag ter bescherming van de nationale minderheden op het Belgisch taalmodel. De doos van Pandora gewikt en gewogen’, (2005–06) 1 *Jura Falconis*, pp. 211–42.

⁵⁸ Y. Lejeune, ‘Le cas de la Belgique’ in *La protection des langues minoritaires en Europe: vers une nouvelle décennie* (2010), p. 48; Marique (n. 9), pp. 298–305.

⁵⁹ S. Van Der Jeught, ‘Territoriality and freedom of language: The case of Belgium’, (2017) 18 *Current Issues in Language Planning*, pp. 181–98.

minority groups to which the Framework Convention could apply in Belgium. The opinion concluded that overall the French-speaking and Dutch-speaking communities were in a position of 'co-dominance', although the situation was different at regional level where there were indeed regional minorities.⁶⁰ In 2013 the signing of the Charter came onto the agenda as Belgium was to take the Chair of the CoE for the first semester of 2015. However, the Charter is a mixed treaty under the Belgian constitutional system, requiring the consent of all regional and federal entities. As Flanders refuses to consent to it Belgium cannot sign the Charter.⁶¹ This situation does not, however, mean that the CoE remains totally absent from Belgian linguistic issues: the CoE regularly revisits Belgium in relation to its local self-government (cf. MN. 4.30).

2. The Incorporation of CoE Conventions into Domestic Law

4.22 Belgian public law scholarship does not delve into the debates between monism and dualism when it comes to the transposition of international law sources into domestic law. According to Article 167 of the Constitution the executive negotiates treaties at the international level; all treaties, whatever their format, are then ratified by the legislative bodies. The legislative's consent needs to be given before treaties are ratified.⁶²

4.23 The relationships between national and international law are not clearly addressed in the Constitution.⁶³ Since the famous *Franco-suisse Le Ski* case of 1971 the *Cour de Cassation* holds that self-executing treaty provisions are superior to domestic law.⁶⁴ Scholarship heavily debates whether similar reasoning can be applied between the Constitution and international law provisions.⁶⁵ However, the Belgian *Conseil d'État* uses a broad formulation to express the relationship between international and national law, namely:

when a conflict exists between a norm in national law and a norm under international law that has direct effects in the domestic legal order, the norm under the treaty has to prevail.⁶⁶

⁶⁰ Venice Commission, *Opinion on Possible Groups of Persons to which the Framework Convention for the Protection of National Minorities could be applied in Belgium* (CDL-AD(2002)001-e) of 12 March 2002.

⁶¹ *Chambre, Bulletin des questions et réponses* (2012-13), *Question et réponse écrite* no 0582, *La signature par la Belgique de la Charte européenne des langues régionales ou minoritaires*.

⁶² e.g.: M. Uyttendaele, *Trente leçons de droit constitutionnel* (2014), pp. 117–40.

⁶³ Spielmann (n. 28), pp. 1241 et seq. Article 34 of the Constitution only relates to Belgian membership to international organizations: P. Vandernoot, 'Regards du Conseil d'État sur une disposition orpheline: l'article 34 de la Constitution', *Itinéraires d'un constitutionnaliste—En hommage à Francis Delpérée* (2007), pp. 1599–630.

⁶⁴ Cass, 27 May 1971, (1971-I) *Pasicrisie*, p. 886, S.A. *Fromagerie franco-suisse Le Ski*, concl. Procureur Général Ganshof van der Meersch. This decision was taken following the CJEU case law on the relationships between European and domestic law. See also Popelier (n. 6), p. 79.

⁶⁵ E. Slautsky, 'De la hiérarchie entre Constitution et droit international—Réflexions au départ de l'arrêt de la Cour de Cassation du 16 novembre 2004', (2009) *APT*, pp. 227–41. On the concept of 'self-executing treaty provisions' and the ECHR: J. Pieret, 'L'influence du juge belge sur l'effectivité de la Convention: retour doctrinal et jurisprudentiel sur le concept d'effet direct' in *Cinquante années d'application de la Convention européenne des droits de l'homme—Actes du colloque 'entre ombres et lumières'—20 et 21 octobre 2005—Centre de droit public de l'Université libre de Bruxelles* (2008), pp. 83–143.

⁶⁶ CE, no 62.921, 5 October 1996, *Goosse*; CE, no 62.922, 5 October 1996, *Orfinger*; CE, no 62.924, 5 October 1996, *De Baenst*; CE, no 62.923, 5 October 1996, *Gerfa*. This priority goes far as the Constitutional Court has no power to review legislation consenting to European Union treaties or the ECHR and its protocols. *L. spéc.*, 6 January 1989, *sur la Cour constitutionnelle*, Art. 26 §1bis. Belgian special legislation refers to Acts adopted following a special procedure, with higher majorities required in both Dutch-speaking and French-speaking groups. Special legislation is below the Constitution but above ordinary legislation in the norm hierarchy.

The exact norm hierarchy between the Constitution, international treaties, and legislation gives rise to divided positions between the *Cour de Cassation* and the *Conseil d'Etat*, on the one hand, and the Constitutional Court (*Cour constitutionnelle*) on the other hand. The first two readily accept the primacy of international self-executing provisions over the Constitution, while the Constitutional Court has at times been more resistant.⁶⁷

Finally, the principle of legality as understood in Belgium implies that the administration has an obligation to ensure that its decisions comply with superior norms, i.e. statutes, the constitution and international treaties ratified by Belgium (and entered into force).⁶⁸ An (ordinary or administrative) judge has the duty to set aside any administrative decision that does not comply with superior norms at any time (Article 159 Constitution).⁶⁹ The *Conseil d'Etat* can strike out an administrative decision when it does not comply with international obligations undertaken by Belgium, provided the claim is introduced within the set time limit (i.e., sixty days).

4.24

3. Main Troubles: the European Charter of Local Self-Government

Belgium signed the European Charter of Local Self-Government (MN. 1.58) on 15th October 1985 and ratified it on 25th August 2004 (entry into force on 1st December 2004)⁷⁰. In accordance with Article 13 of the Charter Belgium confines the scope of the Charter to its provinces and municipalities (*communes*). According to a declaration contained in a *note verbale* deposited at the time of ratification Belgium considered itself bound by twenty-five dispositions but not by Articles 3.2, 8.2, 9.2, 9.6, and 9.7. Belgium signed the Additional Protocol to the European Charter of Local Self-government on the right to participate in the affairs of a local authority on 16th September 2009 but has not ratified it yet.⁷¹

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The European Charter on Local Self-Government had been long in the making, illustrating its political sensitivity.⁷² This is confirmed in Belgium, which encountered some trouble with the charter despite the fact that one key artisan of the Charter was a Belgian mayor

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⁶⁷ P. Martens, 'Les enjeux d'une théorie générale des droits constitutionnels', in Verdussen and Bonbled (n. 22), pp. 11–22 (pp. 17 et seq.).

⁶⁸ P. Goffaux, *Dictionnaire de droit administratif* (2nd edition 2016), p. 355 (v° *légalité*).

⁶⁹ J. Theunis, 'De rechter geklemd tussen het beginsel van scheiding der machten en het vereiste van volle rechtsmacht', in I. Cooreman (ed.), *De wettigheidstoets van artikel 159 van de Grondwet* (2010), pp. 153–227 (p. 155).

⁷⁰ F. Ratto Trabucco, 'The development on the local democratization in Belgium', (2015) 1 *Jus Publicum* pp. 1–38

⁷¹ E. Lanckswert, 'De gevolgen van het aanvullend protocol bij het Europees Handvest inzake lokale autonomie betreffende het recht op participatie in de aangelegenheden van lokale autoriteiten', (2012) *Tijdschrift voor gemeenterecht*, pp. 180–82. However, some of the regional entities have already adopted a legislative act paving the way toward ratification (e.g.: VI. Decreet 15 July 2011 houdende instemming met het aanvullend protocol bij het Europees handvest inzake lokale autonomie betreffende het recht op participatie in de aangelegenheden van lokale autoriteiten, opgemaakt in Utrecht op 16 november 2009, MB, 31 August 2011; Décret wallon 20 July 2011 portant assentiment au Protocole additionnel à la Charte européenne de l'autonomie locale, sur le droit de participer aux affaires des collectivités locales, signé à Utrecht, le 16 novembre 2009, MB, 8 August 2011; Décret Communauté française 19 July 2011 portant assentiment au Protocole additionnel à la Charte européenne de l'autonomie locale, sur le droit de participer aux affaires des collectivités locales, signé à Utrecht le 16 novembre 2009, MB, 16 August 2011).

⁷² P. Williams-Riquier, 'La charte européenne de l'autonomie locale: un instrument juridique international pour la décentralisation', (2007), *RFPA*, pp. 191–202 (pp. 191 et seq.).

and minister.⁷³ Nearly twenty years elapsed between Belgium signing the Charter and ratifying it. Such a delay is striking as Belgium has a long tradition of strong local government, embedded in Article 162 (1) of the Constitution. This provision has granted wide autonomy to local government (both *communes* and *provinces*) since its inception in the 1831 Constitution. Local governments could take decisions in the local interest⁷⁴ without the need to find a specific statutory basis to do so. This wide local self-government⁷⁵ contrasted with the centralized system applicable at the time in France.

4.27 The delay of nearly twenty years in ratifying the charter was thus not about recognizing the principle of local autonomy: it was mainly due to institutional issues related to the federalization process in the 1980s–1990s. While all the political energy was devoted to regions and communities local governments were forgotten, although the 1970 constitutional reform had purposefully introduced a paragraph 3 in Article 162 of the Constitution in order to facilitate a process of decentralizing to local government.⁷⁶ Even though Belgium broadly complied with most of the charter provisions⁷⁷ political issues arose in relation to the domestic process of ratification as the charter is a mixed treaty under Belgian law requiring the cooperation of federal and sub-federal entities.⁷⁸ In 2001, however, the federalization process reached a new stage, granting powers to regions to regulate local government in their territory.⁷⁹ This paved the way for ratifying the charter.

4.28 Thereafter, however, the charter was used only to a limited extent when reforming the Belgian landscape of local government. Following the regionalization of local government the three regions reformed the legal framework regulating local government in their territory. The charter did not play a major role in these reforms⁸⁰ but a couple of technical constraints were discussed in relation to the charter. For instance, the scope of oversight that the regions can exercise over local government was discussed: could it exercise control on merit or did it have to exercise limited control over legality? The charter would suggest the second. However, the Flemish Decree assenting to the charter expressed a reservation on this aspect.⁸¹ Furthermore, the charter has been invoked in cases decided by the *Conseil*

⁷³ P. De Bruycker, 'Introduction' in P. De Bruycker (ed.), *L'avenir des communes et provinces dans la Belgique fédérale—Entre régionalisation et Charte européenne de l'autonomie locale* (1997), pp. xv–xxi (p. xv); C. Himsworth, *The European Charter of Local Self-Government—A Treaty for local democracy* (2015), pp. 23–26: the Belgian Lucien Harmegnies was the reporter for the draft of the European Charter of Local Self-Government.

⁷⁴ Cass, 24 October 1887, (1887-I) *Pasicrisie*, p. 370; Cass, 8 February 1889, (1889-I) *Pasicrisie*, p. 110.

⁷⁵ P. Errera, *Traité de droit public belge. Droit constitutionnel. Droit administratif* (1st edition 1909), p. 114.

⁷⁶ See P. De Bruycker, 'Introduction' in P. De Bruycker (ed.), *L'avenir des communes et provinces dans la Belgique fédérale—Entre régionalisation et Charte européenne de l'autonomie locale* (1997), pp. xv–xxi (p. xix).

⁷⁷ M. Leroy, 'L'impact de la Charte en droit interne belge', in De Bruycker (n. 76), pp. 145–63.

⁷⁸ A. Schaus, 'La problématique de la ratification de la Charte en Belgique', in De Bruycker (n. 76), pp. 137–43.

⁷⁹ *Loi spéc.*, 13 July 2001, *portant transfert de diverses compétences aux régions et communautés*, Art. 4. J. Sohler, 'La régionalisation des pouvoirs locaux', in *Les accords du Lombard et du Lambermont—Actes du Colloque du 22 février 2002 organisé par le Centre de droit public de l'Université libre de Bruxelles* (2002), pp. 373–405.

⁸⁰ For instance, the *code wallon de la démocratie locale et de la décentralisation* has been adopted by the executive and ratified by the Legislative (Wall Decree 27 May 2004). In the report and discussions in the Walloon Parliament, the Charter is not mentioned at all (see *Parlement wallon*, (2003–04) 710).

⁸¹ Article 3 of the Decree 19 March 2004 *houdende instemming met het Europees Handvest inzake lokale autonomie*, ondertekend in Straatsburg op 15 oktober 1985, MB, 3 May. The Walloon decrees did not (Décrets Wallons 14 December 2000 *portant assentiment à la Charte européenne de l'autonomie ocale*, faite à Strasbourg, le 15 octobre 1985, MB, 18 January and 19 January 2001) nor the French Community Decree (Décret 29 March 2001 *portant assentiment à la Charte européenne de l'autonomie locale*, faite à Strasbourg le 15 octobre 1985, MB, 28 April 2001) or the Commission Communautaire française Decree (Décret 21 November 2002 *portant*

d'Etat. However, the judge set it aside.⁸² Finally, legal scholarship assesses the current state of local government against European charter standards.⁸³

The Congress of Local and Regional Authorities (CLRAE) monitored, in its general monitoring capacity,⁸⁴ the situation of local democracy in Belgium in 2003⁸⁵ (before ratification) and 2014.⁸⁶ The main findings were that local and regional democracy in Belgium generally complied with the charter's requirements. The 2014 recommendation flags up a few legislative and constitutional changes matching the charter's requirements. On the French-speaking side of Belgium legislation has been adapted especially with regard to the automatic appointment of bourgmestres.⁸⁷ The main issues that the committee noted were related to the financial resources available to local government.

In its topical monitoring capacity⁸⁸ the CLRAE has been called upon three times in relation to the non-appointment of French-speaking mayors by the Flemish authorities in areas formally designated as Flemish-speaking areas.⁸⁹ The Recommendation and Resolution in 2008 was one of those rare occasions when the preamble of the Charter was invoked.⁹⁰ Although the CoE flagged them up the issues are on-going: they relate to the basic balance of the Belgian consociational structure and compromises. Few issues could be more politically sensitive than this one in Belgium. Although a group claiming to be representative of the French-speaking minority is looking for ways to externalize the discussions and bring them to an international level this strategy has been so far largely unsuccessful. Solutions

assentiment par l'Assemblée de la Commission communautaire française à la Charte européenne de l'autonomie locale, MB, 24 January 2003) or the German Community one (Décret 18 February 2002 *portant assentiment à la Charte européenne de l'autonomie locale*, faite à Strasbourg le 15 octobre 1985, MB, 30 July 2002). See T. Bombois, 'L'organisation régionale des pouvoirs locaux balisée par la section de législation du Conseil d'Etat', (2011) *CDPK*, pp. 490–502 (p. 493).

⁸² CE, no 238.751, 4 July 2017, *Kraainem*; CE, no 236.978, 9 January 2017, *Sint-Genesius-Rode*.

⁸³ e.g.: S. Aerts, 'Lokale autonomie en de rechtspositieregeling van het Vlaams gemeentepersoneel. Beknopte schets en signalering van enkele knelpunten', (2015) *TBP*, pp. 228–42.

⁸⁴ Also called 'ex officio monitoring': B. Schaffarzik, 'Congress of Local and regional authorities' in Schmahl and Breuer (n. 3), pp. 269–95 (MN. 10.44 et seq.).

⁸⁵ CLRAE Recommendation 131 (2003)1 of 22 May 2013 'Local democracy in Belgium'; CLRAE Resolution 156 (2003) of 22 May 2013 'Local democracy in Belgium'.

⁸⁶ CLRAE, *Local and regional democracy in Belgium* (CG(27)7FINAL) of 14 October 2014.

⁸⁷ For details on legislative changes on the French-speaking side, see N. Bonbled, 'Vingt années d'existence de la Charte européenne de l'autonomie locale: bilan et perspectives en droit belge', (2006) *Revue de droit communal*, pp. 2–17.

⁸⁸ Also called 'monitoring through municipal complaints': Schaffarzik (n. 84), MN. 10.48 et seq.

⁸⁹ The first time was in 1998: PACE Resolution 1172 (1998) *Situation of the French-speaking population living in the Brussels periphery*. The resolution was based on the so-called 'Columberg report' (PACE, Report, Committee on Legal Affairs and Human Rights, *Situation of the French-speaking population living in the Brussels periphery*, Doc. 8182, 4 September 1998 where the different ECtHR cases pertaining to Belgian linguistics are mentioned [see e.g. paragraphs 7, 14 and 20]). The second time was in 2008: CLRAE Recommendation 258 (2008) of December 2008 'Local democracy in Belgium: non-appointment by the Flemish authorities of three mayors'; CLRAE Resolution 276 (2008) of 2 December 2008 'Local democracy in Belgium: non-appointment by the Flemish authorities of three mayors'. The third time was in 2017: CLRAE Recommendation 409 (2017) of 20 October 2017 'The functioning of the organs of local democracy in a context of linguistic diversity in the communes 'with facilities' around Brussels in the Flemish region'. The discussion in the Flemish Parliament (with the Flemish members of the CLRAE) is available at <https://www.vlaamsparlement.be/plenaire-vergaderingen/1201445/verslag/1202753> (Vlaams Parlement, (2017–2018) 36, *Actuele vraag over de aanbevelingen geformuleerd in het jongste rapport van de Raad van Europa met betrekking tot de faciliteitengemeenten van Karim Van Overmeire aan minister Liesbeth Homans*). The minister decided not to give any follow up on the recommendation. The discussion challenged the way in which the CLRAE failed to follow procedural requirements in adopting the recommendation.

⁹⁰ Himsworth (n. 73), p. 33.

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need to find their ways into the deepest constitutional layers as they touch upon the basic expressions of sovereignty over territorium and people. Time, patience, and ‘do-it-yourself’ are required. Non-legally binding recommendations can be easily set aside whenever the political will does not seek to actively flesh them out. Importantly, the very legitimacy of the CoE was called into question on this occasion.

4. Minor References: Data Privacy, Freedom of Information, and Access to Official Documents Conventions

- 4.31** Belgium signed the Convention on Protection of Individuals with regard to Automatic Processing of Personal Data (cf MN. 1.60 et seq.) on 7th May 1982 and ratified it on 28th May 1993. It entered into force on 1st September 1993. Belgium adopted a statute in relation to this matter, *Loi du 8 décembre 1992 sur la protection de la vie privée à l'égard des traitements de données à caractère personnel*.⁹¹ Belgium signed its additional protocol regarding supervisory authorities and transborder data flows on 30th April 2002 but did not ratify it. Belgium made a series of declarations at the time of deposit of the instrument of ratification to the effect of adapting the scope of its Article 3. According to a declaration made when depositing the instrument of convention ratification the designated authority for the purposes of Article 14 is the Commission for the Protection of Privacy. In Belgium the 1981 Convention has shifted in the background as EU instruments (such as Directive 95/46/CE and its successors) have more precisely shaped Belgian obligations.⁹²
- 4.32** Belgium signed the Convention on Access to Official Documents (cf. MN. 1.59) on 18th June 2009 but has not yet ratified it. Belgium included access to official documents in Article 32 of the Constitution (under the title ‘Belgians and their rights’) in 1993. The Constitutional Court and the *Conseil d'Etat* regard transparency as a genuine fundamental and constitutional right.⁹³

III. Reception of the Pan-European General Principles of Good Administration by the National Legislator

- 4.33** In general, the CoE’s influence on Belgian legislation is difficult to identify. However, two sides of the coin can be briefly mentioned here. On the one side, various factors make such influence highly unlikely for a series of topics, such as administrative procedure, state

⁹¹ *Documents parlementaires, Chambre* (1990–91), *projet de loi relative à la protection de la vie privée à l'égard des traitements des données à caractère personnel, exposé des motifs*. If the CoE Convention is indeed mentioned as one element in the international landscape, it seems that Belgium was more concerned with developments at EU level and the position that the European Commission faced with the inertia of some countries: distortions among Member States were seen as obstacles to a European market of information (see p. 2).

⁹² B. Docquir, ‘Le droit de la vie privée: Aperçu général et règle de proportionnalité’, in B. Docquir and A. Puttemans (eds.), *Actualités du droit de la vie privée* (2008), pp. 1–38 (p. 4).

⁹³ CC, 25 March 1998, no. 17/97; CC, 15 September 2004, no. 150/2004; CE, 2 October 1997, no. 68.610, *Delwart*; CE, 12 December 2003, no. 126.340, *Vanderzande & Hallumiez*; CE, 3 October 2011, no. 215.506, *Baumwald*. S. Keunen and S. Van Garsse, ‘Access to information in Belgium’ in D. Dragos, B. Marseille, and P. Kovač (eds.), *The Laws of Transparency in Action: A European Perspective* (2018), pp. 119–62.

liability, and the civil service. On the other side, a remarkable trilogy of aspects (transparency, the ombudsman, and administrative justice) constitute a clear exception to administrative changes undertaken in the 1990s where the ECHR or CoE recommendations can be explicitly and unambiguously identified as key factors in changing national legislation. We shall look at these two sides of the coin in turn.

1. The Limited Impact of the CoE on Legislation in the Field of Administrative Law in General

In a range of topics Belgian administrative law is not structurally conducive to being receptive to CoE influence. Firstly, administrative procedure is not codified in Belgium, meaning that the CoE could not influence solutions reached during codification. Codification had been mooted in 1956⁹⁴ before the CoE had developed any significant recommendations. It was limited to the duty to give reasons, clarification of deadlines, and similar formalities as a means of limiting administrative arbitrariness. The authors' proposal wrote that this proposal was a step towards the realization of a true 'Etat de droit'.⁹⁵ Eventually, this codification project failed.⁹⁶ It was again discussed in the 1970s when a project was introduced in the Parliament,⁹⁷ with no more success. It merely took over the first project without much elaboration. In the early 2000s Flemish legal scholarship re-initiated the idea of codifying administrative procedure. Their main source of inspiration was, however, the Dutch administrative procedure act, which did not say a word about the CoE.⁹⁸

Secondly, state liability finds its origins in a landmark decision of 1920⁹⁹ and has been extended to include local governments and any other public bodies in their administrative, judicial, and legislative capacities.¹⁰⁰ The highly comprehensive regime that the case law has developed for state liability in Belgium since 1920 up to today was built totally independently of any positive¹⁰¹ foreign influence as far as can be ascertained.¹⁰²

Finally, the key principles of the civil service were enshrined in law in the 1930s. Although there have been reforms since these reforms have more to do with managerialism and new

⁹⁴ Proposition déposée par les sénateurs Neybergh, Rolin, Duvieusart et Claeys (*Documents parlementaires, Sénat* [1956–57], no 235).

⁹⁵ Proposition (n. 94), p. 3.

⁹⁶ G. Langrod, 'Projet de réforme législative de la procédure administrative non contentieuse en Belgique', (1957) (10:58) *Revue administrative*, pp. 430–33.

⁹⁷ Proposition submitted by MP Desmarets (*Documents parlementaires, Chambre* [1975–76], no 964/1); M.A. Flamme, 'Vers la codification de la procédure administrative', (1970) *Revue de l'Administration*, pp. 221–44.

⁹⁸ J. De Staercke and J. Van Steenlandt (eds.), *Een algemeen Decreet Bestuursrecht in Vlaanderen?* (2004), pp. 9–12 (the Netherlands), p. 13 (France), p. 14 (other sources of inspiration, notably the German administrative codification). No mention at all is made of the CoE.

⁹⁹ Cass, 5 November 1920, (1920-I) *Pasicrisie*, p. 192.

¹⁰⁰ D. Renders (ed.), *La responsabilité des pouvoirs publics* (2016).

¹⁰¹ The *Flandria* decision was devised as a reaction to the developments emerging in France since the Blanco-decision.

¹⁰² e.g.: Durant (n. 11), pp. 51–80, does not refer to foreign influence in her contribution. However, two contributions in Renders (n. 100) have presented the French situation and another contribution a perspective from comparative law.

public management¹⁰³ than with the CoE. When the regions have reformed the civil service falling within their competences they have not mentioned the CoE's work.¹⁰⁴

2. Exceptions: Legislation on Freedom of Information, the Duty to Give Reasons, and Ombudsmen

- 4.37** In some cases the CoE's soft law is mentioned with varying success during parliamentary discussions leading to legislation. For instance, the Venice Commission's code of good practice in electoral matters¹⁰⁵ is regularly drawn upon in discussions regarding electoral reforms but direct influence on legislation is difficult to ascertain.¹⁰⁶ Moreover, there are exceptions to the aforementioned general obstacles to CoE influence on Belgian legislation in the realm of administrative law (cf. MN. 4.34 et seq.). These relate to possible influence in the realm of the freedom of information act, the duty to give reasons, and ombudsmen. These three topics are often bound together in the legal scholarship¹⁰⁷ and in legislative reforms.¹⁰⁸ However, the CoE's influence has been differentiated in these topics and reforms have met with varying degree of success in practice.
- 4.38** Firstly, in the 1980s the legal scholarship called the attention of the legislator to the need to enact specific provisions pertaining to administrative transparency. In doing so it relied strongly on the CoE recommendations available at the time to support their case. The scholarship's main arguments revolved around the benefits that administrative transparency would bring in reining

¹⁰³ D. Piron, 'Évolutions et changement de paradigme dans la fonction publique fédérale belge', (2012) *Revue de la Faculté de droit de l'Université de Liège*, pp. 513–32; P.-O. Debroux, 'De Camu à Copernic: L'évolution de la fonction publique en Belgique', (2005) *APT*, pp. 158–77.

¹⁰⁴ e.g.: Arrêté Gouvernement wallon, 18 December 2003, portant le Code de la fonction publique wallonne, MB, 31 December. It is not possible to get access to the specific elaboration process leading up to this act. The CE (opinion 35.184/2) mentions nothing connected to the CoE's work.

¹⁰⁵ Venice Commission, *Code of Good Practice in Electoral Matters—Guidelines and Explanatory Report* (CDL-AD(2002)023rev2-cor) of 25 October 2002.

¹⁰⁶ See, e.g. *Documents parlementaires, Sénat* (2013–14) *projet de loi portant dispositions diverses en matière électorale*, report, no 5-2434/3, amendment nr 1 (rejected); *Documents parlementaires, Sénat* (2010–11) *proposition de loi insérant un article 104/1 dans le Code électoral afin de garantir la neutralité des bureaux*, developments, no 5-503/1; *Documents parlementaires, Sénat* (SE 2010) *proposition de loi relative à la privation du droit d'éligibilité lors d'une condamnation sur la base de la loi du 30 juillet 1981 tendant à réprimer certains actes inspirés par le racisme ou la xénophobie, de la loi du 23 mars 1995 tendant à réprimer la négation, la minimisation, la justification ou l'approbation du génocide commis par le régime national-socialiste pendant la Seconde Guerre mondiale, de la loi du 10 mai 2007 tendant à lutter contre certaines formes de discrimination et de la loi du 10 mai 2007 tendant à lutter contre la discrimination entre les femmes et les hommes*, developments, no 5-235/1; *Documents parlementaires, Sénat* (2008-09) *proposition de loi insérant un article 104/1 dans le Code électoral afin de garantir la neutralité des bureaux*, developments, no 4-1304/1. See further *Documents parlementaires, Sénat* (1999–2000) *proposition de loi modifiant la loi électorale communale et la nouvelle loi communale, en vue d'intensifier la lutte contre l'extrême droite*, no 2-394/1 (which draws on Venice Commission, *Guidelines on prohibition and dissolution of political parties and analogous measures* (CDL-INF(2000)001) of 10 January 2000).

¹⁰⁷ R. Thielemans, 'Grondrechten en de bevoegdheden van Staat, gemeenschappen en gewesten: Openbaarheid van bestuur, motivering van bestuurshandelingen en ombudsman', (1990) *TBP*, pp. 838–53.

¹⁰⁸ *Accord de gouvernement 'Dehaene Ier'* 9 March 1992, *Documents parlementaires*, (session extraordinaire 1991–92): *Chambre*, no 290/1; *Sénat*, no 224, pp. 15–16. Ombudsman and freedom of information as well as other initiatives such as citizens' charter were brought under the broader umbrella of a 'renouveau politique et administratif', i.e. political and administrative revival. These topics were also included in the *Déclaration de révision de la Constitution* 17 October 1991, MB, 18 October 1991. Only administrative transparency was eventually included in the Constitution, for a reason that the legal scholarship has not been able to ascertain (D. Yernault, 'Observations—Libertés classiques et droits dérivés: le cas de l'accès aux documents administratifs', (1996) *RTDH*, pp. 211–27 (esp. note 47).

in the potential risk of administrative arbitrariness.¹⁰⁹ When revising the Constitution on this point the Parliament referred to foreign experience¹¹⁰ and the CoE's work including its recommendations.¹¹¹ Subsequently, when the Parliament discussed the legislation implementing this revision, it seemed to lose sight of the CoE's recommendations in its *travaux préparatoires*.¹¹² The principle of administrative secrecy was thus transformed into a principle of an individual right to access administrative documents.¹¹³ This was considered to be 'revolutionary' in comparison with the general culture of the administration at the time.¹¹⁴

Secondly, a similar process can be observed when it comes to the duty to give reasons. Resolution No. R (77) 31 on the protection of the individual in relation to acts of administrative authorities (cf. MN. 1.64) and Recommendation No. R (80) 2 concerning the exercising of discretionary powers by administrative authorities (cf. MN. 1.65) were relied upon first by legal scholarship advocating administrative reforms¹¹⁵ and then during the *travaux préparatoires*¹¹⁶ of the *loi du 29 juillet 1991 relative à la motivation formelle des actes administratifs*. This was in order to achieve a 'revolution',¹¹⁷ namely to ensure that the administration would formally give reasons in law and in fact for any individual administrative decision—regardless of its positive or adversarial impact on individual addressees. French legal scholarship was also relied upon during the legislative process.¹¹⁸

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¹⁰⁹ For the various political undertakings in the direction toward improving administrative transparency in Belgium, see C. Benedek and P. De Bruycker, 'La transparence de l'administration—Quelques observations à propos de l'accès aux documents administratifs en droit belge', in *Présence du droit public et des droits de l'homme—Mélanges offerts à Jacques Velu*—Vol. 2 (1992), pp. 781–809 (p. 798 noting the CoE's work).

¹¹⁰ e.g.: *Documents parlementaires, Chambre* (1992–93), no 839/4, *Révision de la Constitution—Proposition du Gouvernement visant à insérer un Article 24ter dans la Constitution relatif à la publicité de l'administration—Rapport fait au nom de la Commission de la révision de la Constitution, des réformes institutionnelles et du règlement des conflits*, 18 March 1993, p. 2.

¹¹¹ Especially: Recommendations and resolutions of the CoE (Resolution 428 [1970]; Recommendation 582 [1970]; 854 [1979] and 1037 [1986]) and CM Résolution 77 [1977] and CM Recommendation 19 [1981]). See *Documents parlementaires, Chambre* (1992–93), no 839/4, *Révision de la Constitution—Proposition du Gouvernement visant à insérer un article 24ter dans la Constitution relatif à la publicité de l'administration—note explicative*, 30 December 1992, p. 3.

¹¹² e.g.: *Documents parlementaires, Chambre* (1992–93) *projet de loi relatif à la publicité de l'administration*, no 1112/1, p. 5 gives a comparative perspective on administrative transparency but does not repeat the CoE's recommendations and resolution. However, the European influence on Belgian administrative law is not limited to the influence of the CoE recommendations. Belgium had already transposed the European Directive of 7 June 1990 on access to environmental information (see: C. Benedek, 'La transparence administrative en Belgique—L'accès aux documents administratifs', (1993) APT, pp. 159–71, spec. p. 168).

¹¹³ *Loi*, 11 April 1994, *relative à la publicité de l'administration*. On its implementation at federal level and in Flanders: see Keunen and Van Garsse (n. 93), pp. 119 et seq.

¹¹⁴ *Documents parlementaires, Chambre* (1992–93) *projet de loi relatif à la publicité de l'administration, rapport*, no 1112/13, p. 13.

¹¹⁵ Lagasse (n. 45), p. 62 mentions these recommendations as the impetus for legal changes in Belgium.

¹¹⁶ *Documents parlementaires, Chambre* (1990–91), *proposition de loi relative à la motivation des autorités administratives*, no 1397/1, *développements*, p. 2 (reference to Resolution 77 (31); p. 3 refers to the French and German situations, while the remainder of the text discusses the French solution. *Documents parlementaires, Chambre* (1990–91), *projet de loi relatif à la motivation formelle des actes administratifs*, no 1594/4, *rapport*, p. 4. *Documents parlementaires, Sénat*, (SE 1988), *proposition de loi relative à la motivation formelle des actes administratifs*, no 215/1: *développements* are interesting as they present the situation from a comparative perspective to follow this overview with a 'new approach' where the CoE's Resolution 77(31) is discussed. A *proposition de loi relative à la motivation des autorités administratives* had already been introduced in the Senate earlier on (1979–80), no 449/1. The text already mentioned Resolution 77(31) (p. 4) but did not progress in the legislative process due to the troubled political times.

¹¹⁷ I. Opdebeek and A. Coolsaet, *Formele motivering van bestuurshandelingen* (1999), pp. 1–12.

¹¹⁸ X. Delgrange and B. Lombaert, 'La loi du 29 juillet 1991 relative à la motivation formelle des actes administratifs: Questions d'actualités' in P. Jadoul and S. Van Drooghenbroeck (eds.), *La motivation formelle des actes administratifs* (2005), pp. 1–6 (p. 4).

4.40 Thirdly, the successful influence of the CoE on Belgian legislation on administrative transparency and the duty to give reasons needs to be contrasted with the case of the ombudsman. Indeed, Belgium did not have any ombudsman for a long time.¹¹⁹ Belgian scholarship did not seem to put much effort into seeking to promote ombudsmen, however. A project to introduce the ombudsman in the Constitution¹²⁰ failed for no apparent reason.¹²¹ Federal ombudsmen were finally set up in 1995.¹²² Neither the project nor the report in the Lower House or the Senate's documents mention the CoE's recommendations on the ombudsman however.¹²³ Despite this formal introduction ombudsmen are low-key actors as an alternative dispute mechanism and have barely taken root in Belgium.¹²⁴

3. A major Impact: the ECtHR's Case Law in National Law

4.41 The ECtHR's case law (especially on Article 6 ECHR) has influenced Belgian administrative law in a range of ways¹²⁵ in relation to administrative justice and substantive administrative law. One of the best illustrations of this influence is found in the reforming of the administrative court system following an ECtHR judgment condemning Belgium for a breach of Article 6 ECHR in 2004 due to lengthy proceedings.¹²⁶ The main issue, case-overload¹²⁷ at the level of the *Conseil d'Etat*, was a well-known one.¹²⁸ In the early 1990s the *Conseil d'Etat* started to fall behind in its processing of cases, with a backlog of 13,532 cases by 1995.¹²⁹ The average duration of a case was three years.¹³⁰ This kept increasing over the following years,

¹¹⁹ For an explanation of the resistance to setting up an ombudsman in Belgium, despite the CoE's recommendations, see A. Anciaux, 'Un ombudsman en Belgique?' (1990) (no 1284–1285) *Courrier hebdomadaire du CRISP*, which lists fifteen attempts to set up an ombudsman in Belgium (p. 5). H. Van Impe, 'La question de la création d'un emploi d'ombudsman en Belgique' (1971) (no 533) *Courrier hebdomadaire du CRISP*, pp. 1–14. He does not mention the CoE's work on this.

¹²⁰ *Documents parlementaires, Sénat* (2001–02), *révision de l'article 28 de la Constitution*, no 2-972/1. The developments explaining the revision of Article 28 were extremely concise. There is no indication of the CoE.

¹²¹ The Senate database does not explain what happened, while in many other cases it mentions the reasons why the procedure did not go through.

¹²² *Loi*, 22 March 1995, *instaurant des médiateurs fédéraux*.

¹²³ *Documents parlementaires, Chambre* (1993–94), *projet de loi*, no 1436/1 and report, no 1436/7; *Documents parlementaires, Sénat* (1994–95), no 1284.

¹²⁴ S. Van Drooghenbroeck, 'L'équité et la Constitution. A propos de l'avis du Conseil d'Etat du 20 décembre 2000 sur une proposition de loi modifiant l'Article 14 de la loi du 22 mars 1995 instaurant des médiateurs fédéraux', (2001) *CDPK*, pp. 357–73; L. M. Veny, 'The Complexity of Administrative Tools in Belgium: Not Seeing the Woods for the Trees' in D. C. Dragos and B. Neamtu (eds.), *Alternative Dispute Resolution in European Administrative Law* (2014), pp. 179–207 (pp. 193 et seq.). For a discussion of some of the technical issues arising with the ombudsman in Belgium, see: D. Renders and R. Born, 'Le médiateur institutionnel ne devrait-il pas pouvoir être saisi d'une réclamation formée contre tout visage incarnant le service public?', in *Les visages de l'Etat—Liber amicorum Yves Lejeune* (2017), pp. 673–95.

¹²⁵ For examples beyond administrative law see above MN. 4.13 and 4.19.

¹²⁶ This section draws on Marique (n. 9), pp. 290–91.

¹²⁷ P. Gilliaux, 'Les juridictions administratives: de l'oubli à l'inconstitutionnalité', (2003) *J.T.*, pp. 125–29; M. Van Damme, 'Het wegwerken van de achterstand in de rechtsbedeling door de Raad van State', (1998–99) *Rechtskundig Weekblad*, pp. 1469–74; D. D'Hooghe and M. Gelders, 'De gerechtelijke achterstand bij de Raad van State en de maatregelen tot versnelling van de rechtspleging' in E. Brems, K. Broeckx, and G. Debersaques (eds.), *Goed Procesrecht, goed procederen* (2004), pp. 575–80.

¹²⁸ F. Maussion, 'Le Conseil d'Etat face à l'arriéré du contentieux: de l'accélération de la procédure à la création des tribunaux administratifs de première instance' in B. Bléro (ed.), *Le Conseil d'Etat de Belgique cinquante ans après sa création* (1999), pp. 833–59.

¹²⁹ CE, Rapport annuel 1994–95, p. 77.

¹³⁰ CE, Rapport annuel 1994–95, p. 85.

resulting in Belgium being condemned by the ECtHR for a violation of Article 6 ECHR in 2004.¹³¹

Here, the ECtHR's influence can be traced to the condemnation of Belgium for the length of proceedings in administrative justice: this triggered the need to adapt the administrative court system. However, it did not go further than this initial impulse. It did not influence the solution eventually adopted. When a major reform of the *Conseil d'Etat* was undertaken in 2014,¹³² to seek to promote efficiency in the administrative justice system, it did not refer much to the CoE's work. The *Conseil d'Etat's* opinion, however, mentions the ECtHR case law on administrative sanctions.¹³³

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A second illustration of the impact of ECtHR case law on national law, or at least the framing function that the ECtHR's case law can have when the Belgian legislator adopts new legislation related to administrative matters, can be found in the legislation on local administrative sanctions.¹³⁴ In Belgium administrative sanctions are classically understood as 'degenerated' criminal law.¹³⁵ However, in 1999¹³⁶ the legislator decided to grant local governments the power to impose administrative sanctions. Thereafter ECtHR case law was discussed in the legal scholarship¹³⁷ as well during as in the 2013 reform of the system.¹³⁸ This reception of the CoE's work in Belgium is further illustrated by the fact that the French-speaking *Dictionnaire de droit administratif* takes Recommendation No. R (91) 1 on administrative sanctions (cf. MN. 1.65) as its starting point for defining 'administrative sanctions'.¹³⁹

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¹³¹ *Stoeterij Zangersheide NV v. Belgium* (47295/99) 22 December 2004 ECtHR (twenty-two years to reach a decision by the CE).

¹³² *Loi*, 20 January 2014, *portant réforme de la compétence, de la procédure et de l'organisation du Conseil d'Etat*, MB, 3 February.

¹³³ *Documents parlementaires, Sénat* (2012–13), *projet de loi portant réforme de la compétence, de la procédure et de l'organisation du Conseil d'Etat*, no 2277/1, *exposé des motifs—avis du Conseil d'Etat*, pp. 102 et seq.

¹³⁴ Y. Marique, 'C.E., 1er décembre 1987, no 28.938, S.P.R.L. Lambregts Transportbedrijf' in P. Goffaux, J. Sohier, and E. Slautsky (eds.), *Grands arrêts de droit administratif belge* (forthcoming).

¹³⁵ P. Martens, 'Les sanctions administratives, un droit pénal dégénéré' in R. Andersen, D. Déom, and D. Renders (eds.), *Les sanctions administratives* (2007), pp. 13–22.

¹³⁶ *Loi*, 13 May 1999, *relative aux sanctions administratives dans les communes*, MB, 10 June; D. Yernault, 'Une administration doit-elle respecter les règles du droit à un procès équitable? Les sanctions administratives et l'article 6 de la Convention européenne des droits de l'homme dans les jurisprudences belge, française et européenne', (1995) *APT*, pp. 240–90 (with Recommendation No. R (91) 1 on administrative sanctions in appendix). The legislator did not mention the ECHR or its case law but the CE did in its opinion (*Documents parlementaires, Chambre* (1998–99) *projet de loi relatif aux sanctions administratives dans les communes*, no 2031/1, explanation of reasons—opinion of *Conseil d'Etat*, pp. 14–15).

¹³⁷ S. Van Drooghenbroeck, 'De vraies sanctions administratives ou des sanctions pénales camouflées? Réflexions à propos de la jurisprudence récente de la Cour européenne des droits de l'Homme', (2005) *Revue de la Faculté de droit de l'Université de Liège*, pp. 467–90; A. Masset, 'De vraies sanctions administratives ou des sanctions pénales camouflées? Réflexions en droit interne belge', (2005) *Revue de la Faculté de droit de l'Université de Liège*, pp. 441–66; M. de Geyter, 'Een mensenrechtelijke benadering van het fenomeen van de bestuurlijke sancties. Een analyse van de rechtspraak van het Arbitragehof en het Europees Hof voor de Rechten van de Mens' in C. Billiet and M. Santens (eds.), *Gewapend bestuur* (2005), pp. 107–16.

¹³⁸ *Loi*, 24 June 2013, *relative aux sanctions administratives communales*, MB, 1st June 2013. *Documents parlementaires, Chambre* (2012–13) *projet de loi relative aux sanctions administratives communales*, no 2712/1, explanation of reasons—opinion of *Conseil d'Etat*, pp. 62–66. The report (no 2712/6) mentions discussions among MPs about the characterization of administrative sanctions under the ECHR (p. 35 and 41). In its decisions the CC extensively discussed the conformity of administrative sanctions with the ECHR and its protocol (see CC, No. 44/2015 and No. 45/2015, 23 April 2015). It does not mention Recommendation No. R (91) 1 on administrative sanctions, however.

¹³⁹ Goffaux (n. 68), *v° sanction administrative*.

IV. Reception of the Pan-European General Principles of Good Administration by Belgian Courts

1. Major Potential for Reception: Application of the ECHR in the National Case Law

4.44 It has already been mentioned that, even if relationships between national and international law are not clearly addressed in the Constitution, it is recognized that self-executing international obligations can be directly invoked in court and have priority over national law (cf. MN. 4.23). There is no doubt in Belgium that the ECHR is such a self-executing international obligation.¹⁴⁰ Attempts to clarify the relationships formally have been attempted twice, once in 2001 when a strong constitutionalization, i.e. the formal incorporation of the ECHR in a constitutional provision, was suggested,¹⁴¹ and once in 2005 when a moderate constitutionalization was contemplated through systematic updating of the constitutional provisions related to individual rights and freedoms in the light of the ECHR.¹⁴² Yet, none of these attempts have been successful, leaving a weak form of constitutionalization to gradually take place. The process can be briefly summed up as follows.

4.45 Following its approach in the *Franco-suisse Le Ski* case (cf. MN. 4.23) the *Cour de Cassation* held in a politically sensitive case, the *Vlaams Blok* case,¹⁴³ that the ECHR had priority above the Constitution. This case pertained to restrictions on the principle of freedom of expression in a case where the Belgian legislator had sought to incriminate acts inspired by hate and xenophobia. The *Cour de Cassation* refused to refer a preliminary ruling to the Belgian Constitutional Court, stating that:

the [ECHR] has priority above the Constitution; ... in this case, the Constitution does not submit the exercise of freedoms of expression, meeting and association to stricter conditions than the ones authorized under the [ECHR]; that it belongs first and foremost to the judge to interpret and apply the [ECHR].

4.46 The special legislator¹⁴⁴ reacted to this *Cour de Cassation* decision by adapting the Constitutional Court Special Act (6 January 1989).¹⁴⁵ The idea is that when a fundamental right is partly or wholly equally protected by the Constitution and a European

¹⁴⁰ Leroy (n. 36), pp. 414–15 (with reference to case law).

¹⁴¹ The purpose was to constitutionalize the ECHR through a reference in inserting a new Article 32bis in the Constitution (*Documents parlementaires, Sénat* [2002-03], no 897/1).

¹⁴² See: *Documents parlementaires, Chambre* (2004-05), no 2304/001, *Les clauses transversales en matière de droits et libertés—Rapport fait au nom du groupe de travail chargé de l'examen du Titre II de la Constitution*, 20 February 2006. J. Velaers, 'Constitutional Versus International Protection of Human Rights: Added Value or Redundancy? The Belgian Case, in the Light of the Advisory Practice of the Venice Commission', (2016) (77:2) *RIEJ*, pp. 265–95 (pp. 276–77).

¹⁴³ Cass, 9 November 2004, (2004-I) *Pasicrisie*, p. 1745.B. Gors, 'Une cause de refus de renvoi préjudiciel: la primauté de la Convention européenne sur la Constitution', (2005) *RBDC*, pp. 507–31. B. Cadranel and J. Ludmer, 'La législation concernant le financement des partis liberticides', (2008/16) (no 2001–2002) *Courrier hebdomadaire du CRISP*, pp. 5–60 (pp. 52–54).

¹⁴⁴ Belgian special legislation refers to acts adopted following a special procedure with higher majorities required in both Dutch-speaking and French-speaking groups. Special legislation is below the Constitution but above ordinary legislation in the norm hierarchy.

¹⁴⁵ *Loi spéc.*, 12 July 2009, *modifiant l'article 26 de la loi spéciale du 6 janvier 1989 sur la Cour d'arbitrage*, MB, 31 July 2009. The formulation has been adapted by *Loi spéc.*, 4 April 2014, *portant modification de la loi du 6 janvier 1989 sur la Cour constitutionnelle*, MB, 15 April.

or international provision, the judge is now bound to make a preliminary reference to the Constitutional Court about the compatibility of the legal provision with Title II Constitution first.

Further elements about the relationships between the ECHR and the Belgian legal order are worth noting. First, the *Conseil d'Etat* has a 'proofing' function. When the executive submits a legislative project it has to ask the *Conseil d'Etat's* opinion. The *Conseil d'Etat* ensures that statute projects and administrative act projects (i.e., those with general and abstract scopes) comply with the international obligations undertaken by Belgium.¹⁴⁶ The *Conseil d'Etat* checks legal and technical issues, including whether the legislative project complies with Belgian international commitments, especially the ECHR.¹⁴⁷

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Secondly, the ECHR has had a special role in Belgian constitutional case law. Indeed, until 2003 the Belgian Constitutional Court¹⁴⁸ had limited powers. It could only review legislative acts for compatibility with a few constitutional provisions (and the repartition of powers between the different units of the Belgian state): Articles 10 (equality), 11 (non-discrimination), and 24 (right to education) of the Constitution. Through a creative interpretation of its powers the Constitutional Court developed a technique whereby it connected Articles 10 and 11 of the Constitution with relevant ECHR provisions and ECtHR case law in order to strengthen its review.¹⁴⁹ Since 2003 the Constitutional Court has been competent to review the constitutionality of legislative acts with the whole Title II of the Constitution ('Belgians and their rights'¹⁵⁰), reducing its need to go on using this creative technique. However, when the Belgian Constitution does not include a right corresponding to a right recognized in the ECHR, using Articles 10 and 11 remains useful.¹⁵¹

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Furthermore, the Belgian Constitutional Court uses a 'conciliatory method' of interpretation in which the court analyses articles of the Constitution in light of the corresponding provision of the ECHR.¹⁵² This makes it a 'satellite' of the

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¹⁴⁶ B. De Sutter and M. Van Damme, *Raad van State—Afdeling Wetgeving* (2013), pp. 163–72.

¹⁴⁷ CE, *Principes de technique législative—Guide de rédaction des textes législatifs et réglementaires*, 2008, at [251], p. 194. A basic search in the database of CE legal opinions suggests that the ECHR is mentioned in most opinions if not all of them.

¹⁴⁸ For an analysis of the Belgian Constitutional Court's approaches, see L. Dalla Pellegrina, J. de Mot, M. Faure, and N. Garoupa, 'Litigating federalism: an empirical analysis of decisions of the Belgian Constitutional Courts', (2017) *EUConst*, pp. 305–46.

¹⁴⁹ Popelier (n. 6), p. 79.

¹⁵⁰ A proposal to modernize this title (drawing inspiration from the ECHR) was made in 2004 but did not result in any reform. S. Wattier, 'The « Added Value » of the European Convention on Human Rights in the Ambit of Religious Freedom and Religious Autonomy in Belgian Constitutional Case Law', (2016) (77) *RIEJ*, pp. 297–317 (p. 300).

¹⁵¹ A. Alen, K. Muylle, and W. Verrijdt, 'De verhouding tussen het Grondwettelijk Hof en het Europees Hof voor de Rechten van de Mens' in A. Alen and J. Theunis (eds.), *Leuvense Staatsrechtelijke Standpunten 3. De Europese dimensie in het Belgische publiekrecht* (2012), pp. 3–45; Lavrysen and Theunis (n. 56), pp. 331 et seq.; P. Martens, 'L'influence de la jurisprudence de la Cour européenne des droits de l'homme sur la Cour constitutionnelle', (2010) *CDPK*, pp. 350–58; C. Van de Heyning, 'Grondwettelijke conversaties: een meerwaarde voor de bescherming van fundamentele rechten?', (2012) *TBP*, pp. 395–419. To understand the interpretation of the ECHR and ECtHR case law in Belgium it is useful to know that in their draft decisions constitutional judges refer routinely to the case law of the European courts. In the editing phase the references are not always published with the decisions (see A. Alen and K. Muylle, 'Du (non-)usage de précédents étrangers par la Cour constitutionnelle belge', [2015] (3/4) *RBDC*, pp. 279–303 [pp. 287 et seq.]).

¹⁵² Wattier (n. 150), p. 305; X. Delgrange, 'De l'ensemble indissociable à l'interprétation conciliante—Observations' in S. Van Drooghenbroeck (ed.), *Le droit international et européen des droits de l'homme devant le juge national* (2014), pp. 148–59. J. Theunis, *Report: the influence of the ECHR on national constitutional jurisprudence; the example of the Belgian Constitutional Court* (CDL-JU(2005)057prov.) of 10 September 2005.

ECtHR.¹⁵³ In general, the Constitutional Court makes sure that ECtHR's decisions are implemented in Belgium.¹⁵⁴ According to Constitutional Court members the court refers expressly to ECtHR case law in roughly one-third of the cases where the ECHR is invoked.¹⁵⁵ For instance, in the *Vlaams Belang* case¹⁵⁶ the Court referred to eighteen ECtHR decisions.¹⁵⁷ This overall attitude from the Constitutional Court towards the case law of the ECtHR has been regarded as an 'outsourcing' of the protection of Belgian fundamental rights to the ECtHR.¹⁵⁸ However, among this wealth of case law and cross-referencing it has not been directly possible to clearly locate Constitutional Court decisions related to the principles of good administration as understood in ECtHR case law (such as, for instance, the *Magyar Helsinki v. Hungary* case, cf. MN. 1.48 et seq.).

- 4.50** Finally, all civil, criminal, and administrative courts review the conformity of legislative acts with the ECHR, following the *Franco-suisse Le Ski* case¹⁵⁹ (cf. MN. 4.23). They are all inclined to faithfully implement ECtHR case law, following a doctrine of the *autorité de la chose interprétée*,¹⁶⁰ which tends to give a de facto *erga omnes* effect to judgments, even in relation to the case law concerning other Higher Contracting Authorities.¹⁶¹ For instance, in 1993 *Rusen Ergec* wrote that Belgian case law had developed general legal principles extending the guarantees provided by Article 6 ECHR in many cases across administrative case law thanks to dynamic interpretation and judicial constructions, careful to efficiently protect individuals.¹⁶² By contrast, however, Belgian ombudsmen play a very limited, if any, role in relation to the ECHR.

2. A Pocket of Insulation: Indifference to the Pan-European Dimension in the Domestic Principles of Good Administration

- 4.51** Overall, ECtHR case law has clearly widely permeated Belgian case law. When moving from the constitutional scene to the more administrative level one question may arise, namely if and how Belgian administrative case law related to general principles of good administration may have responded to the CoE's work. As already mentioned (cf. MN. 4.34), Belgium is one of the rare European legal systems without a code for administrative procedure. This

¹⁵³ Lavrysen and Theunis (n. 56), pp. 353 et seq. concurs with Martens in acknowledging that 'the case-law of the European Court of Human Right has a considerable influence on the case-law of the Constitutional Court' (p. 353). They write that 'The explanation for this is obvious. The Constitutional Court makes the assumption that the fundamental rights under Title II of the Constitution and those enshrined in the international conventions are inextricably linked' (p. 353). Add. G. Schaiko, P. Lemmens, and K. Lemmens, 'Belgium', in J. Gerards and J. Fleuren (eds.), *Implementation of the European Convention on Human Rights and of the Judgements of the ECtHR in National Case-law—A Comparative Analysis* (2014), pp. 95–143.

¹⁵⁴ W. Verrijdt, 'De rol van het grondwettelijk Hof in de uitvoering van veroordelende arresten van het EHRM' in *Liber discipulorum André Alen* (2015), pp. 507–40.

¹⁵⁵ Alen and Muylle (n. 151) pp. 294 et seq.

¹⁵⁶ CC, no 195/2009, 3 December 2009, B.12.1.

¹⁵⁷ Alen and Muylle (n. 151), p. 295.

¹⁵⁸ Velaers (n. 142), pp. 282 et seq.

¹⁵⁹ Velaers (n. 142), p. 284.

¹⁶⁰ W. Ganshof van der Meersch, 'La garantie des droits de l'homme et la Cour européenne de Strasbourg', (1982) *J.T.*, pp. 102–15 (p. 107).

¹⁶¹ Spielmann (n. 28), p. 1249.

¹⁶² R. Ergec, 'L'incidence du droit du Conseil de l'Europe sur le développement du droit administratif', (1993) *APT*, pp. 1–11 (p. 7).

lack of codification leaves ample room for general legal principles, including principles of good administration, to have the potential to play a key role in providing for legal solutions regarding administrative issues.¹⁶³

General legal principles were at first not an obvious legal source in Belgium as positivism was strongly followed by the legislative and the judiciary.¹⁶⁴ However, the *Conseil d'Etat* quickly engaged in the process of recognizing general legal principles, starting with 'patere legem quam ipse fecisti' in 1949.¹⁶⁵ Resistance to general legal principles further shifted in the 1960s, with the (then) new judicial code formally recognizing general legal principles¹⁶⁶ and the *Cour de Cassation* following suit. *Procureur Général* Ganshof van der Meersch's annual discourse set a hallmark here in 1970. He states the limited role of the judiciary clearly: it does not create principles, it only 'formulates' them. Judges have to keep within the law. They should not wander into the realm of legal philosophy and morals.¹⁶⁷ He illustrates his comments with two *Cour de Cassation* decisions where the Court drew inspiration from the ECHR to apply the defence principle (in extradition and in tax reclamation¹⁶⁸).¹⁶⁹

In this changing context regarding general legal principles 'general principles of good administration' have a special place under the inspiration of the Dutch model. The key phrase 'good administration' appears in the table of the *Conseil d'Etat*'s decisions for the first time in 1968.¹⁷⁰ The concepts of *beginselen van behoorlijk bestuur* (principles of good administration) were discussed in the main Dutch-speaking administrative law journal of the time between a Dutch administrative judge, G. Wiarda, judge at the ECtHR,¹⁷¹ and a key Belgian administrative judge, L.P. Suetens,¹⁷² in 1970.¹⁷³ The principles discussed and compared at the time in Wiarda's account were 1) fair play (*onpartijdigheid* and right of defence), 2) care (*zorgvuldigheid*), 3) purity of purpose (*zuiverheid van oogmerk*), 4) balance (*evenwichtigheid*), and 5) legal certainty. In Suetens' account they were 1) fair play, 2) the duty to give reasons, 3) care, 4) interdiction of power abuse, 5) interdiction of arbitrariness, 6) equality (*gelijkheidsbeginsel*), 7) legal certainty, and 8) the principle of financial economy (*zuinigheidsplicht*).

¹⁶³ For a detailed overview of the origin, content and difficulties of the principles of good administration in Belgium, see: D. Renders, 'Origine et contours des principes de bonne administration en droit belge', (2012) *RFDA*, pp. 763–72.

¹⁶⁴ W. J. Ganshof van der Meersch, '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) *J.T.*, pp. 557–73 (p. 566).

¹⁶⁵ I. Mathy, 'Les principes généraux: Genèse et consécration d'une source majeure du droit administratif' in S. Ben Messaoud and F. Viseur (eds.), *Les principes généraux de droit administrative—Actualités et applications pratiques* (2017), pp. 21–58 (p. 23).

¹⁶⁶ Art. 2 of the Judicial Code (entered into force in 1970).

¹⁶⁷ Ganshof van der Meersch (n. 164), p. 567.

¹⁶⁸ Cass, 7 April 1970, (1970-I), *Pasicrisie*, p. 673. References in the summary link this case to the article written by W. J. Ganshof van der Meersch ('Le droit de la défense—Principe général de droit—Réflexions sur des arrêts récents' in *Mélanges en l'honneur de Jean Dabin—Vol. 2* [1963], pp. 569–614).

¹⁶⁹ Ganshof van der Meersch (n. 168, p. 569) also put his approach within the lineage of Henri Rolin's views on the matter.

¹⁷⁰ Renders (n. 163), p. 763, n. 7.

¹⁷¹ G. Wiarda was a judge at the ECtHR (1966–85) and president (1981–85).

¹⁷² First president of the Belgian *Conseil d'Etat* in fact (as the appointed president was on sick leave) and then formally between 1948 and 1965 (*Conseil d'Etat—Liber Memorialis 1948–1998* [1999], p. 39).

¹⁷³ G. Wiarda, 'Algemene beginselen van behoorlijk bestuur in het Nederlands recht', (1970) *TBP*, pp. 372–78; L.-P. Suetens, 'Algemene rechtsbeginselen en algemene beginselen van behoorlijk bestuur in het Belgisch administratief recht', (1970) *TBP*, pp. 379–96.

- 4.54** Although the *beginselen van behoorlijk bestuur* have evolved in the Netherlands to refer to the principles of openness, integrity, fairness, participation, accountability, and effectiveness (cf. MN. 7.22 et seq.),¹⁷⁴ they have not evolved in the same direction in Belgium and remain anchored in their first meaning of referring to the duty to give reasons, the principle of reasonableness, the equality principle, the right to be heard, the impartiality principle, the principle of legal certainty and legitimate expectations, the principle of continuity and adaptation (of public service), and of reasonable time limits.
- 4.55** This became much discussed in the 1980s and 1990s. Legal scholarship was divided about the judicial practice of recognizing general principles of good administration. Part of the scholarship feared that the *Conseil d'Etat* might develop control on merit, while another part of the scholarship welcomed these developments as a way to control administrative action.¹⁷⁵ However, things were complicated: in some cases, principles of good administration repeated principles already accepted, such as the equality principle, non-retroactivity, or misuse of power.¹⁷⁶ It was not obvious what the concept of 'principles of good administration' added to these principles. Some principles had a written basis, such as the principle of equality and non-discrimination enshrined in the Constitution. However, not all of them had such a written basis. Basically, *Procureur Général* Ganshof van der Meersch's annual discourse (cf. MN. 4.52) remains the main lodestar for structuring discussions among judges and legal scholarship about the recognition of general principles, including general principles of good administration. Some call on judges to be more creative in controlling administrative arbitrariness and discretion while others seek to be more formalistic.
- 4.56** 'Principles of good administration' have now been widely recognized in the judicial¹⁷⁷ and administrative case law. For instance, the principles of impartiality,¹⁷⁸ fair play,¹⁷⁹ reasonable and proportionate decisions,¹⁸⁰ and legal certainty¹⁸¹ are recognized under the principles of good administration. There are, however, differences between the French-speaking and Dutch-speaking chambers of the *Conseil d'Etat*. In a simplified way, this dividing line runs as follows.
- 4.57** The Dutch-speaking chambers take a flexible view of general principles of good administration. Dutch-speaking legal scholarship has analysed them at length¹⁸² to extend their

¹⁷⁴ The Dutch report (cf. MN. 7.15 et seq.) distinguishes these principles in terms of 'general principles of administration' and what are now accepted as general principles of good administration, what we could call principles of good administration or good governance of the 'second generation', such as openness, integrity, fairness, participation, accountability, and effectiveness. These last principles have no abiding value in the Netherlands, and neither do they have any in Belgium. One difference between the Netherlands and Belgium relates to transparency. This is on the verge of moving from a principle of good administration to a general legal principle in the Netherlands (cf. MN. 7.24), while it has been a constitutional right in Belgium since 1993 (MN. 4.32).

¹⁷⁵ J. Conrardt, 'Les principes de bonne administration dans la jurisprudence du Conseil d'Etat', (1999) *APT*, pp. 262–86 (p. 262).

¹⁷⁶ Conrardt (n. 175), pp. 263–67.

¹⁷⁷ Cass, 27 March 1992, (1995) *Revue critique de jurisprudence belge*, p. 56 (legal certainty recognized as a component of good administration in fiscal matters).

¹⁷⁸ e.g.: CE, 17 May 2016, no 234.744, *Del Pero Marianne v. Région wallonne, Commune de Les Bons Villers*.

¹⁷⁹ CE, 3 February 2017, no 237.285 and 237.284, *NV Intervest Offices & Warehouses*.

¹⁸⁰ CE, 23 December 2014, no 229.698, *Bvba E.F.*

¹⁸¹ CE, 21 January 2015, no 229.890, *T.L.*; CE, 18 November 2014, no 229.210, *Emma Cooreman*; CE, 21 November 2014, no 229.270, *NV Katoen Natie, NV Seaport Terminals*.

¹⁸² I. Opdebeek and M. Van Damme (eds.), *Beginselen van behoorlijk bestuur* (2006).

reach in many specific administrative fields, such as public procurement¹⁸³ or *public domaine* (public estates).¹⁸⁴ They also seek to broaden the scope of what can be understood as falling within the scope of ‘principles of good administration’. The most contentious principle, however, is the principle of good care (*zorgvuldigheidsbeginsel*) recognized in Flemish administrative law on the basis of Article 1382 of the *Code Civil*.¹⁸⁵

By contrast, the French-speaking chambers take a strict approach to the general principles of good administration: they require claimants to identify precisely the principle violated, if possible linking it to legal provisions.¹⁸⁶ Thus, the extensive approach of the Dutch-speaking chambers is contested in the French-speaking administrative scholarship.¹⁸⁷ In some cases the *Conseil d’Etat* (French chambers) has rejected it expressly.¹⁸⁸ For instance, *Michel Leroy*, a French-speaking administrative judge, wrote in his academic capacity against recognition of the ‘*zorgvuldigheidsbeginsel*’. For him, lack of care can sometimes explain that an illegality has been committed (and can then trigger administrative liability) but is not an illegality on its own.¹⁸⁹

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To give a more comprehensive picture of the potential for the CoE’s work to percolate in the administrative case law an overarching undercurrent in the case law should be noted, namely the tendency to assess whether public bodies have acted ‘reasonably’ or in a ‘proportionate’ way. When they fail to do so they breach their duty of care under Article 1382 *Code Civil* in acting negligently. This opens the door for administrative liability (when the other conditions for such a liability are met). Judges assess this failure in a very concrete manner: they ask themselves how a normally diligent administration would have behaved if it had had to act in a similar case.¹⁹⁰ Judges use their understanding of how the administration works in Belgium or in the different regional entities. They have never—to our best knowledge—used the CM Recommendations on principles of good administration to assess how administrative bodies should have acted *in abstracto* or could have acted. This would indeed not fit with how fault is assessed in Belgian (civil) law, namely *in concreto*.¹⁹¹

4.59

¹⁸³ M. De Groot, ‘Algemene beginselen van behoorlijk bestuur en behoorlijk burgerschap bij het formele onderzoek van de voorstellen bij overheidsopdrachten’, (2014) *TBP*, pp. 4–21.

¹⁸⁴ T. Leys, ‘De beslissing van de publiekrechtelijke rechtspersoon tot herroeping van een privaat recht op het openbaar domein: al dan niet onderworpen aan de beginselen van behoorlijk bestuur?’, (2017) *TBP*, pp. 192–99.

¹⁸⁵ K. Leus, ‘Het zorgvuldigheidsbeginsel’ in I. Opdebeek and M. Van Damme (n. 182), pp. 101–29. E.g.: CE, 13 October 2016, no 236.113, *Laeremans, R., Kisser, X*; CE, no 227.125, 15 April 2014, *X*.

¹⁸⁶ e.g.: CE, 26 March 2013, no 222.988, *S.C.R.I. Warakzai*; CE, 18 February 2015, no 230.237, *Poli*; CE, 19 January 2013, no 222.296, *Vaes*.

¹⁸⁷ e.g.: for a nuanced position in relation to the duty of care see: Goffaux (n. 68), *v° minutie (devoir de)*; D. Renders, *Droit administratif général* (2nd edition 2017), pp. 336–38.

¹⁸⁸ e.g.: CE, 3 March 2016, no 234.014, *Clear Channel Belgium*; CE, 19 Octobre 2015, no 232.601, *Lemaire and Bakrim*; CE 25 March 2014, no 226.883, *Strabag*; CE, 15 January 2010, no 199.529, *Fédération belge des entreprises de distribution*. Y. Marique, ‘C.E., 31 mai 1979, no 19.671, S.A. Intercommunale voor teledistributie van het gewest Antwerpen Integan’ in Goffaux, Sohler, and Slaatsky (n. 134) (forthcoming).

¹⁸⁹ Leroy (n. 36), pp. 436–39.

¹⁹⁰ Y. Mossoux, ‘Les principes du raisonnable et de proportionnalité’ in P.-O. De Broux, B. Lombaert, and F. Tulkens (eds.), *Actualité des principes généraux en droit administratif, social et fiscal* (2015), pp. 51–97.

¹⁹¹ Durant (n. 11), p. 60.

3. Soft Law Recommendations and Domestic Case Law

- 4.60** Despite the disparities between the French-speaking and the Dutch-speaking chambers of the *Conseil d'Etat* in receiving the concept of 'principles of good administration' as an autonomous source of obligations for administrative bodies, one needs to note that neither of them brings the CM Recommendations on good administration (cf. MN. 1.64 et seq.) into their reasoning. As a matter of principle soft law instruments play only a marginal role in Belgian case law. Although parties mention soft law in their arguments from time to time,¹⁹² Belgian courts rarely refer to soft law in their decisions:¹⁹³ they seem to be indifferent to it.
- 4.61** However, the scholarship is able to locate a few examples when soft law instruments, mainly non-binding recommendations from the WHO and International Labor Organization, have influenced judges, especially in the ways in which human rights are interpreted.¹⁹⁴ Such examples can be found for instance in a couple of Constitutional Court decisions.¹⁹⁵ However, in 2005 the Constitutional Court did not take soft law into account when it came to the code of good electoral conduct adopted by the Venice Commission. As this case law was before the ECtHR took this code into account to flesh out Article 3 of Protocol No. 1 to the ECHR (right to free elections) it remains to be seen how the Belgian Constitutional Court would decide should this code of good electoral conduct again be invoked before it.¹⁹⁶
- 4.62** By contrast, the *Conseil d'Etat* (section législation, i.e. in its advisory capacity, not as a judge) refers to soft law, including some CoE recommendations,¹⁹⁷ in some legal opinions. Furthermore, in one isolated case the *Conseil d'Etat* (litigation section) explicitly reinforced a provision from the judicial code pertaining to the right to be heard in relying on Recommendation No. R (91) 1 on administrative sanctions (cf. MN 1.65).¹⁹⁸ Despite being lonely this case mattered as it related to the power of regulatory agencies in the field of energy to take administrative sanctions. The issue led to a Constitutional Court decision regarded as shattering the basis of parliamentary accountability in Belgium.¹⁹⁹

¹⁹² e.g.: CE, 19 November 2013, no 225.529, *SCA Siquet* (PACE Resolution 1815 [2011], The potential dangers of electromagnetic fields and their effect on the environment). The claimants also invoked an official French report. The CE quashed the administrative decision without directly relying on the resolution or the French report.

¹⁹³ I. Hachez, 'Le soft law: qui trop embrasse mal étreint?' in I. Hachez, Y. Cartuyvels, H. Dumont, P. Gérard, F. Ost, and M. Van de Kerchove (eds.), *Les sources de droit revisitées—La théorie des sources du droit—Vol. 4* (2012), pp. 539–86.

¹⁹⁴ F. Vanneste, 'Le soft law du droit international des droits de l'homme, dans la jurisprudence internationale et la jurisprudence interne' in I. Hachez, Y. Cartuyvels, H. Dumont, P. Gérard, F. Ost, and M. Van de Kerchove (eds.), *Les sources de droit revisitées—La théorie des sources du droit—Vol. 1* (2012), pp. 110–25 (p. 113).

¹⁹⁵ CC, no 37/2011, 15 March 2011, B.6.1-B.7; CC no 101/2008, 10 July 2008, B.21.4; CC, no 78/2005, 27 April 2005, B.20.1-B.20.4.

¹⁹⁶ S. Van Drooghenbroeck and I. Hachez, 'Als soft law hard law inhaalt. Van Venetie naar Brussel, met tussenstop in Straatsburg', (2013) *Tijdschrift voor Mensenrechten*, pp. 7–10 write that the CC indirectly recognizes soft law through its creative interpretation linking Articles 10 and 11 of the Constitution with the ECtHR case law (see p. 9).

¹⁹⁷ e.g.: Opinion 53.000/AG/3, 22 April 2013, *sur un avant-projet de loi 'modifiant les arrondissements judiciaires'*, *Documents parlementaires*, Chambre, no 53-2858/1, p. 102, n. 11; Opinion, 46.237/AG, 21 April 2009, *sur une proposition de décret spécial 'visant à assurer la constitutionnalité du scrutin régional et à répondre à l'arrêt 149/2007 de la Cour constitutionnelle'*, *Documents*, *Parlement wallon* (2008-2009), no 943/2.

¹⁹⁸ CE, 7 April 2011, no 212.557, *Ville de Wavre*.

¹⁹⁹ E. Slautsky, 'Droit européen, Constitution et autorités administratives indépendantes: commentaire de l'arrêt de la Cour constitutionnelle du 18 novembre 2010, no 130/2010 et de l'arrêt du Conseil d'État du 7 avril 2011, *Ville de Wavre*, no 212.557', (2012) *APT*, pp. 95–113; S. de Somer, 'Internationale impuls en nationale beheersingsdrang inzake bestuurlijke verzelfstandiging: het Grondwettelijk Hof en de casus van de energieregulator', (2012) *TBP*, pp. 214–28.

V. (Marginal) Reception of the Pan-European General Principles of Good Administration in Codes of Good Conduct

The pan-European general principles of good administration can also be channelled in the domestic legal order through informal routes even if non-binding decisions of international organizations, such as CoE recommendations, do not entail legal obligations for Belgium. However, the government and administration can take them into account when developing policies or codes of good practice (cf. MN. 2.45 et seq.) In fact, principles of good administration have been codified in charters, such as the federal charter on good governance,²⁰⁰ the *charte de l'assuré social*²⁰¹ and an ethical framework for the federal civil service.²⁰² This last document refers to a range of soft law material produced by the Organisation for Economic Co-operation and Development (OECD) and the CoE, in particular the twenty principles included in CM Resolution (97) 24 on the twenty guiding principles for the fight against corruption. In the same vein the European Charter of local Self-Government has been mentioned in soft law for local entities falling outside the scope of application of the Charter in Belgium.²⁰³

4.63

VI. Percolation of the Pan-European General Principles of Good Administration through Expert Communities

This report has already flagged up the role that leading Belgian judges at the ECtHR have had in raising the awareness of the Belgian legal community about the existence of the CoE, the ECtHR, and its case law (cf. MN. 4.13). However, the ECtHR is not the only organ that exists at the CoE level: CoE satellites like the Venice Commission, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)²⁰⁴ and the Group of States against Corruption (GRECO) (cf. MN. 1.10 and 1.85) may also influence how the Belgian legal community becomes aware of the CoE's work and how principles of good administration may spread in the legal mindset.

4.64

One further example of such CoE satellites would be the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data.²⁰⁵ Although the Convention on Automatic Processing of Personal Data has limited influence in Belgium due to the strong presence of European Union requirements in the field of data protection (cf. MN. 4.31), national data protection institutions cooperate

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²⁰⁰ *Charte de l'utilisateur des services publics*, 4 December 1992, MB, 22 January 1993. It does not however mention CoE's work.

²⁰¹ *Charte de l'assuré social* (adopted by the *Loi*, 11 April 1995, MB, 6 September 1995) seems to partially codify the principle of good administration (J.-F. Neven, 'Les principes de bonne administration, la Charte de l'assuré social et la réglementation du chômage' in J.-F. Neven and S. Gilson (eds.), *La réglementation du chômage: vingt ans d'application de l'arrêté royal du 25 novembre 1991* (2011), pp. 588 et seq., referred to by Renders (n. 163) in n. 13.

²⁰² MB, 27 August 2007.

²⁰³ *Circulaire Gouvernement wallon* 22 November 2011 *concernant les actes des Centres publics d'action sociale soumis à la tutelle générale des Gouverneurs de province*, MB, 4 January 2012.

²⁰⁴ For a discussion of the CPT's work in Belgian prisons, C. Crucifix and A. Gilot, 'Grève dans les prisons: pour l'instauration d'un service minimum en Belgique', (2017) *RTDH*, pp. 295–306. CE, no 221.793, 18 December 2012, *État belge v. 1. le bourgmestre de la commune de Forest, 2. la commune de Forest*.

²⁰⁵ Cf. R. Uerpman-Witzack, 'Media and Information Society' in Schmahl and Breuer (n. 3), pp. 708–31 (MN. 31.31 et seq.).

with this CoE committee. In Belgium the national institution has long been the Privacy Commission (*Commission de la protection de la vie privée*—CPVP), now the Belgian Data Protection Authority.²⁰⁶ The CPVP's website refers to the Convention, its protocol, and CM Recommendation No. R (87) 15 regulating the use of personal data in the police sector (but not the other recommendations) as the legal framework applicable at European level.²⁰⁷ Belgium is officially represented by the Belgian Justice Department in the consultative committee that ensures the interpretation and the development of the convention. However, the Belgian Justice Department is seeking advice from the CPVP in this mission.²⁰⁸ The CPVP also cooperates with the CoE committee²⁰⁹ and publishes in its annual report a summary of its international activities and of key decisions of the Court of Justice of the European Union (CJEU) and the ECtHR in relation to its data protection mission. For instance, in its annual report of 2016 it reported on the *Magyar Helsinki Bizottság v. Hungary*²¹⁰ case (cf. MN. 1.48 et seq.). Although this does not strictly speaking imply that the CPVP applies the ECtHR's case law, it shows its interest in, awareness of, and attention to CoE practice in general. Overall, this creates a general working environment favourable to acclimation of CoE work within the domestic setting.

- 4.66** The second CoE satellite that receives attention in the Belgian legal scholarship is the Venice Commission. The Venice Commission's role can be traced to various indications, such as its opinions in relation to important symbolic matters in Belgium, namely national minorities²¹¹ and contentious constitutional reform in 2012,²¹² and to references made (with various success) by the constitutional legislator to Venice Commission documents.²¹³
- 4.67** The Venice Commission has proved to have a wider impact in Belgium²¹⁴ thanks to the people working in and for the commission and its rapporteurs. Two Belgian representatives, professors Scholsem and Velaers,²¹⁵ have played a key role in bridging the work of

²⁰⁶ The CPVP became the Data Protection Authority following the entry into force of the *Loi*, 3 Decembre 2017, portant création de l'Autorité de protection des données (MB, 10 January 2018) on 25th May 2018.

²⁰⁷ <https://www.privacycommission.be/fr/conseil-de-l-europe>.

²⁰⁸ CPVP, *Rapport annuel* 2015, p. 32.

²⁰⁹ CPVP, *Rapport annuel* 2016 at [6.2.] (<https://www.autoriteprotectiondonnees.be/jaarverslag-rapport-annuel-2016/fr/>).

²¹⁰ CPVP (n. 209) at [6.3.6.].

²¹¹ Venice Commission, Opinion CDL-AD(2002)001-e (n. 60).

²¹² Venice Commission, Opinion No. 679/2012 (n. 7). P. Vandernoot, 'La révision de l'article 195 de la Constitution du 29 mars 2012: "Ceci (n'est) pas) une revision"' in *La sixième réforme de l'Etat, 2012–2013: Tournant historique ou soubresaut ordinaire? Hommage à Philippe Lauvaux, Philippe Quertainmont, Michel Leroy et Rusen Ergec* (2013), pp. 13–80 (pp. 52 et seq.); P. Popelier, 'De truc met artikel 195: een lapje voor het bloeden met de zegen van Venetië', (2012) *CDPK*, pp. 421–43.

²¹³ Namely: reference to Venice Commission's Code of Good Practice in Electoral Matters (n. 105) when Article 39ter was successfully introduced in the Constitution *Documents parlementaires, Sénat* (2013–14) *révision de la Constitution, développements*, no 1749/1 (pp. 5–6); *rapport*, no 1749/4. J. Velaers, 'La révision du titre II de la Constitution "Des Belges et de leurs Droits": Une mission pour le législateur constitutionnel et peut-être aussi pour la Commission de Venise', (2014) (3/4) *RBDC*, pp. 449–60 (pp. 452 et seq.). A reference to Venice Commission's guidelines on prohibition and dissolution of political parties (n. 106) was made in a previous unsuccessful constitutional reform (*Documents parlementaires, Sénat* (2000–01), *proposition de déclaration de révision du titre II de la Constitution, en vue d'y insérer un article permettant de priver les groupements liberticides du bénéfice des subventions, moyens et mandats octroyés à des groupements politiques, économiques, sociaux ou culturels en raison des services qu'ils rendent à la collectivité*, no 2-870/1, fn 11). This proposal became void as another proposal was adopted with no mention of the Venice Commission's work.

²¹⁴ Similarly: C. Grabenwarter, 'Constitutional standard-setting and stretching new democracies' in Schmahl and Breuer (n. 3), pp. 732–46 (MN. 32.33).

²¹⁵ See above in relation to the group of experts tasked with the revision of Title II Constitution in the early 2000s.

the Venice Commission with the Belgian legal landscape. Professor Scholsem, a member of the Commission since the beginning of the Commission (1990) and vice-president of the Commission between 1997–98, worked on the Venice Commission's advice on Poland.²¹⁶ He has written widely on topics related to his work in the Venice Commission²¹⁷ and acted inter alia as the PhD supervisor of Géraldine Rosoux, a referendar at the Belgian Constitutional Court.²¹⁸

Professor Velaers, an expert advising the working group on revising Title II of the Belgian Constitution, advocated modernizing Title II of the Belgian Constitution based on the Venice Commission's work.²¹⁹ He also was appointed by the Belgian government to reflect Belgium's adherence to the Framework Convention for the Protection of National Minorities.²²⁰ He co-authored a range of Venice Commission opinions on sensitive topics, such as the situation in Hungary²²¹ or the French project of constitutional reform related to a state of emergency²²² and curfews in Turkey.²²³

4.68

VII. Conclusion: Incrementalism and Patience: Two Undervalued Principles of Good Administration?

In summary, Belgian administrative law is very much in the making, incrementally working out the best mix between international, European, national, regional, and local components. Belgian public law culture is indeed one of 'bricolage'²²⁴ ('do-it-yourself'). Regarding the CoE's treaties and recommendations, the approach taken by the Belgian legislator, judiciary, and scholarship is shaped by three key features.

4.69

Firstly, historic elements help to explain why CoE treaties and recommendations only have a limited influence on Belgian principles of good administration. A range of principles included in CoE recommendations, such as the right to be heard, are reasonably

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²¹⁶ Venice Commission, *Opinion No. 833/2015 on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland* (CDL-AD(2016)001) of 11 March 2016.

²¹⁷ J. Scholsem, 'Le « modèle belge » de pacification communautaire: un produit d'exportation?', (2005) 3 *Revue de la Faculté de droit de l'Université de Liège*, pp. 281–94; 'Quel avenir pour la Convention-Cadre des minorités nationales en Belgique', (2008) *CDPK*, pp. 577–86.

²¹⁸ PhD dissertation entitled 'Les droits fondamentaux au carrefour de sources et de jurisprudences: Vers une "dématérialisation" des droits fondamentaux'. See Summary in (2015) *APT*, pp. 408–19.

²¹⁹ Velaers (n. 213), pp. 449 et seq.

²²⁰ Groupe d'experts (R. Ergec, Y. Lejeune, L. Neycken, J.C. Scholsem, R. Senelle, E. Suy, and J. Velaers), 'Raamverdrag over de bescherming van de Nationale minderheden (Raad van Europa: verslag van de groep van grondwetspecialisten gevraagd door de "Interministeriële Conferentie Buitenlands Beleid" (ICBB) van 12 maart 1996', (1998) *CDPK*, pp. 491–527.

²²¹ Venice Commission, *Opinion No. 663/2012 on Act CLXII of 2011 on the legal status and remuneration of judges and Act CLXI of 2011 on the organization and administration of courts of Hungary* (CDL-AD(2012)001) of 19 March 2012; Venice Commission, *Opinion No. 671/2012 on the Act on the Rights of Nationalities of Hungary* (CDL-AD(2012)011) of 19 June 2012; Venice Commission, *Opinion 663/2012 on the cardinal acts on the judiciary that were amended following the adoption of opinion CDL-AD(2012)001 on Hungary* (CDL-AD(2012)020) of 15 October 2012.

²²² Venice Commission, *Opinion No. 838/2016 on the Draft Constitutional Law on 'Protection of the Nation' of France* (CDL-AD(2016)006) of 14 March 2016.

²²³ Venice Commission, *Turkey—Opinion No. 842/2016 on the Legal Framework governing Curfews* (CDL-AD(2016)010) of 13 June 2016.

²²⁴ Borrowed from F. Tulkens and H. Dumont, 'Le droit constitutionnel', (2000) *J.T.*, pp. 5–6 (p. 5).

well-embedded in Belgian administrative law regardless of any external influence or inspiration. Furthermore, Belgian law has developed clear legal principles in general and in particular in administrative law. However, the primary sources of inspiration in this undertaking are the immediate neighbouring countries, France and the Netherlands, both with sophisticated systems of general principles of administrative law. The socio-economic, political, and administrative realities these principles come from and are seeking to address are close to the Belgian situation, which facilitates transplantation. It may be the case that the CoE's recommendations might be too general in their phrasing to give concrete guidelines on which Belgian administrative actors can rely.

- 4.71** Secondly, the influence of CoE treaties and recommendations in Belgium is connected to the existence of legal, procedural, and technical 'hooks' or bridges. This hook or bridge can be of a differing nature. For a long while Articles 10 and 11 Constitution acted as a procedural hook between the Belgian and CoE normative orders. In other instances the bridge is of an institutional nature, such as the active participation of the CPVP in the works of the Consultative Committee of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data. In other instances, the monitoring and peer-review system established through either the Venice Commission or the CLRAE ensures that Belgium has slowly adapted its administrative system to CoE documents. There is only one exception to this clear 'hook', namely the case of administrative transparency, where CoE recommendations and resolutions were significant in the scholarly literature before administrative transparency was enshrined in the Constitution and legislation implemented.
- 4.72** Thirdly, there is a major obstacle to CoE documents having more influence on Belgian principles of good administration: the political sensitivity of language, minority and cultural rights in Belgium. The CoE's work on regional languages and self-government is used by local actors in a highly political way. The normative limits of the CoE approach (i.e. the need for a country to sign and ratify the convention) appear very clearly here. This matter also shows that principles of good administration are not merely technical or neutral. They have a political dimension. When the CoE's work has indeed influenced the Belgian legal order it was because Belgian actors found in the CoE's work a convenient source of inspiration and alignment. In this way one may even venture to say that the CoE exercises a kind of 'high magistrature' of influence as long as its work is accepted as credible and legitimate enough by Belgian actors for them to refer to it.

List of Belgian Abbreviations Used in this Chapter

APT	<i>Administration publique—Trimestriel</i> (law journal)
AR	<i>Arrêté royal</i>
Cass	<i>Cour de Cassation—Hof van Cassatie—Kassationshof</i> (Supreme Court)
CC	<i>Cour constitutionnelle—Grondwettelijk Hof—Verfassungsgerichtshof</i> (Constitutional court; until 2009 <i>Cour d'arbitrage</i>)
CDPK	<i>Chroniques de droit public—Publiekrechtelijke Kronieken</i> (law journal)
CE	<i>Conseil d'État—Raad van State—Staatsrat</i> (Council of State)
CPVP	<i>Commission de la protection de la vie privée</i> (Belgian data protection authority)

<i>J.T.</i>	<i>Journal des tribunaux</i> (law journal)
<i>MB</i>	<i>Moniteur belge</i>
<i>RBDC</i>	<i>Revue belge de droit constitutionnel</i> (law journal)
<i>RIEJ</i>	<i>Revue interdisciplinaire d'études juridiques</i> (law journal)
<i>TBP</i>	<i>Tijdschrift voor Bestuurswetenschappen en Publiekrecht</i> (law journal)