

## BELGIUM

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### Chapter 1: Concept of the Rule of Law

#### *Question 1*

The principle of the rule of law is not expressly referred to nor defined in the Belgian Constitution and Belgian law in general. Its importance in Belgian Constitutional law is nevertheless recognised by the literature<sup>2</sup>, as well as by the national supreme courts<sup>3</sup>. It has been described as being “an elementary unwritten constitutional principle as well as a foundational principle” of the Belgian legal order<sup>4</sup>. Even if a clear definition is not provided by Belgian case-law and literature, leaving open the question of whether it is to be understood in a “thin” or “thick” manner, the concept is regularly linked to the principle of legal certainty, the principle of proportionality, the separation of powers and the checks and balances system, as well as to the protection of individual fundamental freedoms<sup>5</sup>.

As regards to the check and balances system, Article 33 of the Constitution states that “all powers emanate from the Nation. They are exercised in the manner established by the Constitution” (our translation). This article is presented as implementing the rule of law principle by Belgian literature<sup>6</sup>. More specifically, it

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<sup>2</sup> H. Dumont, “La démocratie, moteur des mutations de l'Etat de droit et vice-versa”, *Liber Amicorum André Allen*, Bruxelles, Intersentia, 2020, p. 79 ; F. Belleflamme and E. Maes, “Origine et cheminement du principe de légalité en droit public belge: gouvernement par la loi ou Etat de droit ?”, in M. El Berhoumi and al., *La légalité: un principe de la démocratie belge en péril*, Bruxelles, Larcier, 2020, p. 675 ; M. Uyttendaele, *Trente Leçons de droit constitutionnel*, Bruxelles, ULB, 2011, p. 7.

<sup>3</sup> Const. Court., judgement n°151/2002, 15 October 2002, B.3.2, available at [www.const-court.be](http://www.const-court.be); Const. Court, judgement n°177/2005, 7 December 2005, B. 23; Council of State, administrative section, judgment n°244.565, of 21 May 2019.

<sup>4</sup> L.P. Suetens, “De invloed van het Arbitragehof op het grondwettelijk recht”, *R.W.*, 1993-94, 1317-1318, cited by A. Alen and W. Verrijdt, “The Rule of Law in the Case Law of the Belgian Constitutional Court: History and Challenges”, 25<sup>th</sup> Anniversary of the Constitutional Court of Slovenia, available at <https://www.const-court.be/public/stet/f/stet-2016-001f.pdf>, p. 5.

<sup>5</sup> A. Alen and W. Verrijdt, *op. cit.*, pp. 5 and f.

<sup>6</sup> M. Verdussen, *La Constitution belge*, Bruxelles, Le Cri, 2003, p.122 ; Council of State, administrative section, judgement n°126.770 of 23 December 2003.

reflects the principle that public authorities are subject to the law<sup>7</sup>, and that they can only act within the limits of the powers granted to them by the Constitution<sup>8</sup>. The principle of judicial independence is also explicitly enshrined in the Belgian Constitution (Art. 151).

The concept of the rule of law is considered as being inherently linked to the constitutional liberalism<sup>9</sup> and the protection of fundamental freedoms. Historically, the Belgian Constitution was presented, in 1831, as a pioneering text in liberal democracy<sup>10</sup>. The Belgian National Congress indeed included a series of principles implementing a liberal democratic ideal, including the independence of the judiciary, as well as a highly developed protection of fundamental rights for the time. The Title 2 of the Constitution indeed contained what could be seen, at this time, as a very rich and innovative catalogue of human rights, including the right to individual liberty (at the time Art. 5, now replaced by Art. 12), the right to religious freedom (at the time Art. 14, now replaced by Art. 19), the right to equality before the law (at the time Art. 6, now replaced by Art. 10), etc. Today, however, the Belgian constitutional text could be considered, with regard to the protection of the rule of law and fundamental rights at least, as somewhat outdated, given the absence of any global reform of its content since its adoption in comparison to other European Constitutions<sup>11</sup>. Belgian doctrine has therefore proposed an update, particularly of Title II, which is dedicated to the protection of individual freedoms and rights<sup>12</sup>. Small amendments have nevertheless been adopted since 1831, including one in 1994 that added the right to lead a life of human dignity to Article 23 of the Constitution.

The principle of the rule of law is also often linked to the democratic principle, especially in the case law of the Constitutional Court, which regularly uses

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<sup>7</sup> Council of state, judgement n°65.974 of 22 April 1997; Const. court. judgement n°151/2002 of 15 October 2002, B.3.2.

<sup>8</sup> Council of state, judgement n°126.770 of 23 December 2003.

<sup>9</sup> M. Verdussen, *op. cit.*, p. 122.

<sup>10</sup> F. Rigaux, "L'influence du jacobinisme et du premier empire sur la Belgique", *Ann. Dr. Louvain*, 1989, p. 11

<sup>11</sup> See, for example, M. Verdussen, who stated, already in 2001, that "In the wording given to it by the constituent of 1831, Title II of the Constitution has become largely inadequate. When compared with certain European constitutions adopted after the Second World War (Germany, Italy, Spain, Portugal, etc.), it is clear that these offer more precise and contemporary catalogues of fundamental rights", *Rapport fait au nom de la commission des affaires institutionnelles, Révision du titre II de la Constitution, en vue d'y insérer un article nouveau relatif au droit des femmes et des hommes à l'égalité*, doc. Sénat, session 2000-2011, n° 465/4, pp. 52-53

<sup>12</sup> S. Van Drooghenbroeck, "Pour une mise à jour du droit constitutionnel belge des libertés publiques et des droits de l'homme. Réflexions au départ de l'article 22bis de la Constitution garantissant le droit de l'enfant à l'intégrité physique, morale, psychique et sexuelle", *A.P.T.*, 2001, pp. 142 and f.

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the concept of “*Etat de droit démocratique*”<sup>13</sup>. Both principles are in this sense understood as being mutually dependent<sup>14</sup>. Nonetheless, the existence of possible tensions between these two principles is also raised in Belgian literature, insofar as the democratic requirement is understood as the form of exercise of collective autonomy, which may be limited by the requirements arising from the rule of law. Prof. Hugues Dumont points in this sense out that by imposing recourse to independent administrative authorities, EU law can present a threat to Belgian democracy while implementing an ideal of the rule of law detached from political power<sup>15</sup>. The attribution of powers to independent authorities may indeed represent a threat to the democratic ideal since the Constitution, adopted by the exercise of the collective autonomy of the Belgian people, does not provide for this type of delegation. The Belgian supreme courts have, however, accepted this practice under certain conditions, to which we will return later (see question 3).

### Question 2

The Belgian conception of the rule of law corresponds to the requirements of European Union law, as defined, for example, in the Commission’s Rule of law report 2020<sup>16</sup>, or more recently in the judgments of the Court of Justice on the conditionality regulation<sup>17</sup>. Indeed, the principles of legality<sup>18</sup>, legal certainty<sup>19</sup>, protection against arbitrariness<sup>20</sup>, judicial protection<sup>21</sup> and equality before the law<sup>22</sup> are all part of the principles enshrined in Belgian constitutional law as part of the rule of law. It is not surprising, moreover, that Belgian constitutional law embraces the European requirements in this area, whether they derive from the Council of Europe or from European Union law, as Belgium has a tradition of openness towards European and international law<sup>23</sup>.

<sup>13</sup> Const. Court, judgment n°157/2009 of 13 October 2009 B.3.1; see, also, Cass., judgement of 17 January 2019, F.17.0156.F, ECLI:BE:CASS:2019:ARR.20190117.3

<sup>14</sup> H. Dumont, *op. cit.*, p. 80.

<sup>15</sup> H. Dumont, *op. cit.*, p. 86

<sup>16</sup> Communication from the Commission to the European Parliament, the Council, the European Council, 2020 Rule of Law Report, “the rule of law situation in the European Union”, COM/2020/580 final, p. 1.

<sup>17</sup> CJEU, judgement of 16 February 2022, *Hungary v. Parliament and Council*, C-156/21, ECLI:EU:C:2022:97, §230, judgement of 16 February 2022, *Republic of Poland v. European Parliament and Council of the European Union*, C-157/21, ECLI:EU:C:2022:98, §325.

<sup>18</sup> F. Belleflamme and E. Maes, “Origine et cheminement du principe de légalité en droit public belge: gouvernement par la loi ou Etat de droit ?”, in M. El Berhoumi and al., *La légalité: un principe de la démocratie belge en péril*, Bruxelles, Larcier, 2020, p. 675

<sup>19</sup> Council of State, judgment n°229.606 of 18 December 2014.

<sup>20</sup> Const. Court, judgment n°16/2020 of 6 February 2020, B.7.3.

<sup>21</sup> Art. 13 Constitution and CC, nr 167/2020, 17 December 2020, B.5.3.

<sup>22</sup> Art. 10 of the Constitution.

<sup>23</sup> See S. Lambrecht, “Belgium: The EU Charter in a Tradition of Openness”, in M. Bobek and J. Adams-Prassl (eds), *The EU Charter of Fundamental Rights in the Member States*, Oxford, Hart Publishing, 2020, p. 87;

### Question 3

Independent administrative authorities have proliferated in Belgium since the 1990s and have been the subject of much doctrinal and jurisprudential controversy since then<sup>24</sup>. These administrative authorities have varying powers, which may include individual decision-making, the power to give opinions and recommendations, and sometimes the power to adopt regulatory norms. The Belgian legal system has thus developed a culture of regulatory independence, particularly as a result of European obligations in this area.

An erosion of the principle of legality, which reserves the implementation of certain competences to the legislator, has been noted because of the increasing use of independent administrative authorities. The Belgian literature therefore points to a tension between this development and the democratic principle<sup>25</sup>. The delegation of certain functions by the government to independent authorities also threatens another fundamental principle of Belgian constitutional law, that of parliamentary control over the action of the executive. The government can no longer be held responsible for the activities of these independent authorities, which do not operate under its supervision. Moreover, it is to the King, through the government – at the federal level – and to the governments of the federated entities – at the level of the regions and communities – that the regulatory power is attributed, by the Belgian Constitution<sup>26</sup>, and by the special law on institutional reforms<sup>27</sup>. By delegating powers to independent agencies, the principle of unity of executive power, enshrined in the Belgian Constitution, is thus circumvented. Moreover, as underlined by E. Slautsky, the establishment of these authorities by EU law results in a situation where the legislator is no longer master of the delegations of powers that he grants and thus implies a displacement of decision-making “in favour of independent authorities, which even if they have other assets, do not have the vocation to represent the population”<sup>28</sup>.

As a result, the attribution of powers to independent authorities has long been contested in the Belgian legal order, as in other countries<sup>29</sup>. The Council of State

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A Alen and W. Werrijdt, “Les relations entre la Constitution belge et le droit international et européen”, in *Liber Amicorum Rusen Ergec*, Luxembourg, *Pasicrisie luxembourgeoise*, 2017, 45.

<sup>24</sup> E. Slautsky, “Principe de légalité et attributions de pouvoirs à des autorités indépendantes: une relation équivoque”, in: M. El Berhoumi, L. Detroux et B. Lombaert, *La légalité, un principe principe en péril*, Bruxelles, Bruylant, p. 577.

<sup>25</sup> *Ibid.*, p. 581.

<sup>26</sup> Articles 105 et 108 of the Belgian Constitution.

<sup>27</sup> Article 20 of the “loi spéciale de réformes institutionnelles” of 8 August 1980.

<sup>28</sup> E. Slautsky, *op. cit.*, p. 90.

<sup>29</sup> For a comparative study see C. JENART, *Constitutional principles on outsourcing rulemaking powers*, Cambridge, CUP, 2022.

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recently recalled that such an attribution can indeed “undermine the principle of the unity of regulatory power” and impede direct parliamentary control<sup>30</sup>. Moreover, “the guarantees that come with traditional regulation, such as those relating to publication, preventive control by the Council of State, Legislation Section, and precise rank in the hierarchy of norms, are absent”<sup>31</sup> when this regulatory technique is used.

The position of the supreme courts has nevertheless become more flexible, notably because of the obligations arising from European Union law. Currently, the Legislation Section of the Council of State admits delegations to independent administrative authorities “insofar as they are very limited and non-political in nature, due to their secondary or mainly technical scope”<sup>32</sup>. It also considers that these bodies must “be subject in this respect to both jurisdictional and political control”<sup>33</sup> (our translation). The Constitutional Court imposes the respect of four conditions for a delegation to an independent administrative authority to be accepted<sup>34</sup>: 1. The mission given to the administrative authority must concern a particular market or field; 2. The delegated executive power must be limited; 3. Judicial control and parliamentary control over the independent authority must be established; 4. The delegation may not relate to essential elements of matters reserved to the law by the Constitution.

It should be noted, however, that the Constitutional Court adopts a more flexible position when the delegation to an independent administrative authority is imposed by European Union law<sup>35</sup>. Because of the principle of primacy, the classical requirements imposed on delegations cannot override an obligation imposed by European Union law according to this Court<sup>36</sup>.

### Question 4

The right to access to a judge has a central place in Belgian constitutional law since the adoption of the Constitution in 1831. The right to an effective remedy is indeed

<sup>30</sup> Our translation, Council of State, advice n°70.897/3 of 28 mars 2022, pt. 8.2.

<sup>31</sup> Our translation, Council of State, advice n°70.897/3 of 28 mars 2022, pt. 8.2.

<sup>32</sup> Our translation, Council of State, advice n°70.897/3 of 28 mars 2022, pt. 8.2.

<sup>33</sup> Council of State, advice n°70.897/3 of 28 mars 2022, pt. 8.2.

<sup>34</sup> E. Slautsky, “Principe de légalité et attributions de pouvoirs à des autorités indépendantes: une relation équivoque”, in M. El Berhoumi, L. Detroux et B. Lombaert, *La légalité, un principe en péril*, Bruxelles, Bruylant, p. 587 and P. Nihoul, “Le droit dérivé de l’Union européenne, justification d’une législation prétendument inconstitutionnelle ?”, in *Les visages de l’État. Liber amicorum Yves Lejeune*, Bruxelles, Bruylant, 2017, pp. 615 et 616.

<sup>35</sup> Const. Court, judgment n°130/2010 of 18 November 2010, B.8.1

<sup>36</sup> See, *a contrario*, Const. Court. Judgment n°110/2022 of 22 September 2022, B.39, which condemns a delegation that does not comply with the above-mentioned conditions, “without this being justified by a requirement under European Union law”.

protected by a general principle of Belgian law, according to the Constitutional Court,<sup>37</sup> and the Council of State<sup>38</sup>. Hand in hand with the right to a fair trial, these principles are considered to be general principles of Belgian law, operationalising the rule of law<sup>39</sup>. Judicial protection finds its main legal basis in article 13 of the Constitution<sup>40</sup>. This article reads as follows: “No one may be distracted, against his will, from the judge assigned to him by law” (our translation). Besides this article, other constitutional provisions also lay down guarantees relating to judicial protection including the principle of legality of the organization of the judicial power and the prohibition of the establishment of extraordinary tribunals (art. 146), the publicity of hearings (art. 148), the publicity and motivation of judicial decisions (art. 149) and judicial independence (art. 151).<sup>41</sup> Introduced in 1994, article 23, 2° of the Constitution moreover enshrines the right to legal aid. However, this provision lacks direct effect as it must be implemented by the legislator.

In terms of content, these guarantees are construed in the light of International and European sources. In this respect, the European Convention on Human Rights (ECHR) is the main source of inspiration for construing the content of judicial protection in the Belgian legal order<sup>42</sup>. The principle of effective judicial protection in EU law and article 47 of the Charter<sup>43</sup> have also recently been used as a source of inspiration to construe national provision, but to a lesser extent.

According to the Belgian Constitutional Court, “the right of access to a judge would be rendered meaningless if the requirements of a fair trial, guaranteed by article 6.1 of the ECHR, were not met. Consequently, when reviewing the application of article 13 of the Constitution, these guarantees must be taken into account”.<sup>44</sup> In this sense, the Constitutional Court considers that even in fields falling outside the scope of article 6 of the ECHR, “the right to a fair trial is also guaranteed by a general principle of law”.<sup>45</sup> In other words, the right of access

<sup>37</sup> Const. Court, judgment n°13/2016 of 27 January 2016, point B.17.3; Const. Court, judgment, n° 49/2019 of 4 April 2019; Const. Court, judgement n°195/2009 of 3 December 2009, B.9.1, B.7 and B.8.

<sup>38</sup> Council of State, judgment n°105.304 of 28 March 2002; Council of State, judgment n° 237.723 of 21 March 2017.

<sup>39</sup> Const. Court, judgement n°122/2012 of 18 October 2012, B.6. Same position in Const. Court, judgment n° 56/2014 of 27 March 2014, B.5.

<sup>40</sup> J. Velaers, *De Grondwet, een artikelsgewijze commentaar*; Brugge, Die Keure 2019, p. 255 and R. Andersen and H. Simonart, “Vers une protection juridictionnelle commune en Europe ? Rapport pour la Belgique”, *Revue européenne de droit public*, 1997, p. 635.

<sup>41</sup> J. Velaers, *op. cit.*, p. 255.

<sup>42</sup> Const. Court, judgment n° 13/2016 of 27 January 2016, points B.17.3 and B.7.1.

<sup>43</sup> Const. Court, judgment n° 48/2015 of 30 April 2015, B.18.1.

<sup>44</sup> Const Court, judgment n° 62/2018 of 31 May 2018, B.15.2.

<sup>45</sup> Const Court, judgment n° 167/2020 of 17 December 2020, B.5.3; Const Court, judgment n°13/2016 of 27 January 2016, B.17.3.

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to a judge, as enshrined in article 13 of the Belgian Constitution, includes the protection of the right to a fair trial in the meaning of the ECHR.

In the same way as in articles 6 and 13 of the Convention, and 47 of the Charter, the right of access to a judge enshrined in article 13 of the Belgian Constitution is not absolute.<sup>46</sup> The conditions of the admissibility of restrictions, established in the light of the case law of the ECtHR, include the requirements of legality, legitimacy and proportionality.

While the issue of judicial independence as such is not subject to much contestation in Belgium, it is rather the lack of means allocated to the judiciary that seems to pose a threat to judicial protection in Belgium<sup>47</sup>.

### **Chapter 2: Normative Foundations for the Role of the European Union in Protecting the Rule of Law**

#### ***Question 5***

Belgian legal scholarship offers positive feedback on the European Union's action to protect the rule of law<sup>48</sup>. This action justified by the importance of values for the European project, as well as by the instrumental necessity to ensure the respect of fundamental values to safeguard other EU law rules, such as the principle of mutual trust and more generally the effectiveness of EU law<sup>49</sup>. Several press articles report on the European Union's response to the decline of the rule of law in some Member States<sup>50</sup>. Belgian judges have also spoken out on several occasions in favour of the European Union sanctioning the undermining of the rule of law in EU Member

<sup>46</sup> J. Velaers, *op. cit.*, p. 255; C.E., 237.723, 21 March 2017, point 13.

<sup>47</sup> See, for instance, the recent editorial of the review published by the National Judges' Association, *Justine*, 2022, p. 2 and "La justice sonne l'alarme sur son sous-financement, *La Libre*, 2022, available at <https://www.lalibre.be/belgique/judiciaire/2022/05/18/la-justice-sonne-lalarme-sur-son-sous-financement-BQ7TQQK5XVCIHPDUQC4X6VLRTQ/>

<sup>48</sup> T. Bontinck, "L'Union européenne au secours de la justice belge ?", *Journal des tribunaux*, 2019, pp. 207-208 ; C. Rizcallah and V. Davio, "L'article 19 du Traité sur l'Union européenne: sésame de l'Union de droit", *Revue trimestrielle des droits de l'homme*, 2020, pp. 159 and f. ; S. Adam and P. Van Elsuwege, "L'exigence d'indépendance du juge, paradigme de l'Union européenne comme union de droit", *Journal de droit européen*, pp. 334 -343 ; T. Moonen, "De onafhankelijkheid van de rechter in het Unierecht: groedrecht of rechtsstaat ?", *TBP* 2019, nr. 9, 503-510

<sup>49</sup> C. Rizcallah and V. Davio, *op. cit.*, p. 159; M. Giacometti, "Les défaillances systémiques concernant l'indépendance du pouvoir judiciaire polonaise: un coup d'arrêt à l'exécution des mandats d'arrêts européens émis par la Pologne ?", *Revue trimestrielle des droits de l'homme*, 2021, p. 680.

<sup>50</sup> See, for example, "La défense de l'état de droit est une question de 'crédibilité' pour l'Union", *La Libre*, 14.07.2022, available at <https://www.lalibre.be/international/europe/2022/07/14/la-defense-de-letat-de-droit-est-une-question-de-credibilite-pour-lunion-NJY744RYEVGZTHQLC2A6DVKXXQ/>.

States<sup>51</sup>. However, it is observed by Belgian scholarship that “despite the gradual constitutionalisation of values, it seems that the EU lacks the power of enforcement or the political will to use it when common values are undermined”<sup>52</sup>.

### Question 6

As Belgium has an open and monistic tradition with regard to European and International law in general, the role of the European Union seems to be accepted as resulting from the interdependence between the Union and the national legal orders<sup>53</sup>. There is little, if any, discussion questioning the intervention of the Union in the field of the protection of the rule of law.

## Chapter 3: Instruments for enforcing and protecting the rule of law and the role of the CJEU

### Question 7

Belgian legal scholarship has noted the “very limited impact”<sup>54</sup> and the “lack of conclusive results”<sup>55</sup>, of legal remedies currently available at EU level to combat the rule of law decay at national level, including Article 7 of the TEU, the preliminary procedure as well as the infringement procedure. The political sanctions laid down in Article 7 TEU have been described as being “*sans issue*”<sup>56</sup>.

As regards fundamental rights, while the Charter is considered as being a useful instrument for enhancing their protection<sup>57</sup>, its limited scope of application is

<sup>51</sup> C. Verbruggen, “Une rencontre avec les juges polonais de Iustitia. Des juges sous pression”, *Journal des tribunaux*, 2022, pp. 163 – 164.

<sup>52</sup> R. Coman, *The Politics of the Rule of Law in the EU Polity*, Cham, Palgrave, 2022.

<sup>53</sup> See, for example, J. Wildemeersch, who states that “organisation des voies de recours susceptibles d’assurer le respect d’un droit conféré par le droit de l’Union reste de la compétence des États membres lorsqu’aucune norme de droit dérivé ne prévoit les conditions de ces recours. En organisant ceux-ci, les États membres mettent néanmoins en œuvre le droit de l’Union, leur autonomie procédurale devra donc s’exercer dans le respect des garanties de l’article 47 de la Charte. Conformément à l’article 52, paragraphe 1, de la Charte, leur intervention sera évaluée à l’aune du principe de proportionnalité plutôt qu’au regard des principes d’équivalence et d’effectivité”, *Cahiers de droit européen*, 2021, pp. 921-922.

<sup>54</sup> A. Guillerme, “Conditionnalité des financements européens au respect des principes de l’État de droit dans les États membres: un mécanisme prometteur, enserré dans une logique budgétaire stricte”, *Journal des tribunaux*, 2022, p. 347.

<sup>55</sup> L. Badet, “À propos de l’article 19 du Traité sur l’Union européenne, pierre angulaire de l’action de l’Union européenne pour la sauvegarde de l’état de droit”, *Cahiers de droit européen*, 2020, p. 60.

<sup>56</sup> A. Bailleux et C. Rizcallah, “Les droits fondamentaux dans l’ordre juridique de l’Union européenne – 2019”, *Journal de droit européen*, 2019, p. 369 ; see, also, J. Englebert, “Gouverner les juges et les recadrer: quelques exemples européens”, in: M. Cadelli and J. Englebert, *Gouvernement des juges: une accusation, une vertu et une analyse critique*, Limal, Anthémis, 2020, p. 167

<sup>57</sup> E. Muir, “La plus-value de la Charte: à la croisée de plusieurs systèmes juridiques”, *Cahiers de droit européen*, 2021, p. 74.

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described as being an important hurdle for its effectiveness<sup>58</sup>. The lack of clarity of the concept of “scope of application of EU law” is moreover regularly criticized in Belgian legal scholarship<sup>59</sup>.

The rule of law conditionality mechanism has received attention by Belgian literature but mostly in a descriptive and analytical way<sup>60</sup>. It was nevertheless regretted that it had come so late, as violations of the rule of law have now become systemic in some Member States. Furthermore, given the current political context with the Russian invasion of Ukraine and the impact this is having on countries like Poland, it is feared that this mechanism will not be used in the end<sup>61</sup>.

### *Question 8*

The case law of the Court of Justice on the independence of the judiciary has been commented on in Belgian legal literature<sup>62</sup>. This literature is mainly concerned with analysing and clarifying this case law. To our knowledge, no particular criticism has been made of it in Belgian scholarship. The possibility of extending this case law to the protection of other Article 2 values has not, to date, been discussed in Belgian scholarship.

### *Question 9*

The growing action of the Court of Justice to protect judicial independence is perceived, by Belgian literature, as being necessary to ensure the sustainability of the European judicial system. Indeed, it is agreed that ensuring the independence of the national judiciaries is a condition for the viability of both the preliminary ruling mechanism and the principle of mutual trust, which is necessary for the proper functioning of judicial cooperation<sup>63</sup>.

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<sup>58</sup> I. Gambardella, “L’application de la Charte des droits fondamentaux de l’Union européenne aux Etats membres: le critère de mise en œuvre du droit de l’Union comme obstacle à son effectivité”, *Cahiers de droit européen*, 2021, pp. 241 – 286.

<sup>59</sup> A. Bailleux, “Les contours du champ d’application de la Charte. Une tentative de recadrage”, in A. Iliopolou. Penot and L. Xenou, *La Charte des droits fondamentaux, source de renouveau constitutionnel européen ?*, Bruxelles, Bruylant, 2020, pp. 201 – 2022.

<sup>60</sup> M. Chamon, “De conditionaliteitsverordering: een (beperkte) uitbreiding van het rechtsstaatsarsenaal van de EU”, *SEW*, 2022, issue 7/8, pp. 337 – 350 and L. Fromont, “La conditionnalité des financements octroyés par la Facilité pour la reprise et la résilience”, *Revue des affaires européennes*, 2021, pp. 771 – 781.

<sup>61</sup> A. Guillerme, *op. cit.*, p. 349.

<sup>62</sup> See, a.o., C. Rizcallah et V. Davio, “La Cour de justice de l’Union européenne, garante de l’indépendance des pouvoirs judiciaires nationaux ? Assurément ! Mais à certaines conditions ....”, *Journal des tribunaux*, 2020, pp. 675-677, J. Wildemeersh, *op. cit.*, pp. 867 – 924 ; L. Badet, *op. cit.*, pp. 57 – 106 ; C. Rizcallah and V. Davio, “L’article 19 du Traité sur l’Union européenne (...)”, *op. cit.*, 156-186 and M. Leloup, “Het Hof van Justitie als hoeder van de rechtsstaat”, *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* 2018, 571

<sup>63</sup> C. Rizcallah and V. Davio, *op. cit.*, pp. 159 and f.

## Chapter 4: Impact on Mutual Recognition and Mutual Trust

### *Question 10*

At the time of writing, Belgium does not provide a performant search engine enabling an exhaustive identification of all judgments in which EAWs are (non-) executed. However, our non-exhaustive research revealed that the execution of EAWs has already been contested by national judges, applying the case law of the Court of justice, in relation to the existence of bad detention conditions in the state of emission<sup>64</sup>.

With regard to judicial independence, a judgement was delivered in 2019 by the indictment chamber refused not to execute an EAW issued by Poland for the purpose of enforcing a sentence for theft. The person concerned by the EAW was complaining about the risks of violation of the principle of independence of the judiciary in Poland. The indictment chamber considered that “contrary to the claim of the accused person, the Court of Justice of the European Union did not conclude that there were systemic or at least widespread failings of the Polish trial courts”<sup>65</sup>. Moreover, it considered that the shortcomings identified, for example, in the Proposal for a Council Decision on the finding of a clear risk of a serious violation by the Republic of Poland do not concern the situation of the person concerned. According to the indictment chamber, there was no objective and personal link between, among others, the retirement age of Polish judges and the powers of the Polish Minister of Justice to appoint or dismiss the presidents of the courts. The indictment chamber therefore confirmed the execution of the EAW.

More recently, there have been decisions on EAWs issued by Spain for Catalan politicians. Here, the indictment chamber refused the execution of an EAW on the grounds that it violated, in its view, the right to be judged by the “natural judge” (“*juge naturel*”), since it was the Catalan courts that should have had jurisdiction in the case and not the Supreme Court in Madrid<sup>66</sup>. This case law echoes other rulings in Belgium refusing to execute European arrest warrants issued for Basque independency activists<sup>67</sup>.

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<sup>64</sup> Cour d'appel (mis. acc.), 9 octobre 2018, published in *Revue de droit penal et de criminologie*, 2019, p. 100, commented by C. Rizcallah, “La protection des droits fondamentaux dans le cadre du mandat d'arrêt européen: un impératif difficile à mettre en œuvre”.

<sup>65</sup> Our translation. Decision unpublished and delivered in closed session.

<sup>66</sup> The judgments delivered by the indictment chamber are not published. This information has been released in the Belgian press (<https://www.lesoir.be/347611/article/2021-01-07/crise-en-catalogne-la-belgique-nexecutera-pas-le-mandat-darret-europeen-de-lluis>).

<sup>67</sup> M. Meysman, “Belgium and the European Arrest Warrant: Is European Criminal Cooperation Under Pressure?”, *European criminal law review*, 2016, 186 – 210.

### *Question 11*

Belgian legal scholarship has commented on the existence of this double test, first in relation to detention conditions<sup>68</sup>, and then in relation to the independence of the judiciary<sup>69</sup>. While the fact that exceptions to the principle of mutual trust have been enshrined to safeguard fundamental rights has been considered very welcome<sup>70</sup>, the feasibility of this test has been more controversial. Indeed, it was pointed out that the implementation of this test can be very complicated in practice, in particular due to a lack of information or cooperation from other national authorities. In connection with the protection of the independence of the judiciary, it was pointed out that it could be illusory to carry out the second step of the test, which consists in verifying the concrete risk. How can a judicial authority directly question another judicial authority on its own independence?<sup>71</sup> The implementation of this case law of the Court of Justice is therefore strongly questioned by the Belgian legal doctrine. Nevertheless, the importance of protecting the rights of the victims and avoiding imputnity in the area of freedom security and justice is acknowledged by the different authors.

In order to better understand the “systemic deficiency test”, an international conference on the “systemic” criterion in EU law (including in relation to judicial independence) has been organised in Belgium by the Université Saint-Louis – Bruxelles and the KU Leuven on 17 November 2022<sup>72</sup>.

<sup>68</sup> E. Bribosia and A. Weyembergh, “Arrêt ‘Aranyosi et Caldaru’: imposition de certaines limites à la confiance mutuelle dans la coopération judiciaire pénale”, *Journal de droit européen*, 2016, pp. 225 – 228 ; C. Rizcallah, “Arrêt ‘Dorobantu’: mandat d’arrêt européen et exigences minimales relatives aux conditions de détention”, *Journal de droit européen*, 2020, pp. 62 – 65.

<sup>69</sup> M. Giacometti, “Les défaillances systémiques concernant l’indépendance du pouvoir judiciaire polonais: un coup d’arrêt à l’exécution des mandats d’arrêt européens émis par la Pologne ?”, *Revue trimestrielle des droits de l’homme*, 2021, pp. 677 à 692 ; C. Rizcallah, “Arrêt ‘LM’: un risque de violation du droit fondamental à un tribunal indépendant s’oppose-t-il à l’exécution d’un mandat d’arrêt européen ?”, *Journal de droit européen*, 2018, pp. 348 – 351.

<sup>70</sup> E. Bribosia et A. Weyembergh, “Confiance mutuelle et droits fondamentaux: ‘Back to the Future’”, *Cahiers de droit européen*, 2016, p. 520

<sup>71</sup> C. Rizcallah, *The principle of mutual trust in European Union Law. An Essential Principle Facing a Crisis of Values*, Brussels, Larcier, p. 397; and C. Rizcallah, “Arrêt ‘LM’: un risque de violation du droit fondamental à un tribunal indépendant s’oppose-t-il à l’exécution d’un mandat d’arrêt européen ?”, *Journal de droit européen*, 2018, p. 350.

<sup>72</sup> The paper presented will be published as a special issue in the German Law Journal, R. Gadbled and C. Rizcallah (eds.), “The Systemic and the Particular in EU Law”, *German Law Journal*, special issue, forthcoming in 2023.

### **Question 12**

Belgian literature include works focusing on the principle of mutual trust in the field of competition law<sup>73</sup>, in connection with internal market law<sup>74</sup> and also with judicial cooperation in civil matters<sup>75</sup>. To the best of our knowledge, however, the risks resulting from the rule of law problems have yet not received any particular attention in the Belgian scholarship within these fields. Nor are we aware of any judgments of the Belgian courts on this subject. Nevertheless, as already pointed out above, Belgium does not have a search engine that exhaustively lists judgments rendered in Belgium, so we cannot guarantee the exhaustiveness of our research.

### **Question 13**

One could consider that the procedures for the appointment of International/European judges and magistrates in Belgium do not to meet all the requirements deriving of the rule of law usually imposed in Belgian judicial law. It appears indeed that the procedure suffers a certain opacity and that it is not clearly regulated by law, as now required by European standards<sup>76</sup>. An appeal was lodged in this respect by one of the unsuccessful candidates for the position of European Public Prosecutor at the European Public Prosecutor's Office designated by Belgium<sup>77</sup>. The Tribunal of the European Union however dismissed his action.

Not to our knowledge.

## **Chapter 5: The Rule of Law and the Existential Requirements of EU Law**

### **Question 14**

The relationship between national and international law is not explicitly addressed in the Belgian Constitution<sup>78</sup>. However, the primacy of international law provisions

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<sup>73</sup> D. Gérard, *Managing Diversity in the European Union: Cooperation, Convergence and Mutual Trust*, PhD defended at the Université catholique de Louvain in 2014.

<sup>74</sup> N. Cambien, "Mutual Recognition and Mutual Trust in the Internal Market", *European Papers*, 2017, pp. 93 – 115.

<sup>75</sup> S. Pfeiff, "L'efficacité des décisions certifiées conformément à l'article 42 du Règlement Bruxelles IIbis: l'apogée de la confiance mutuelle entre États membres?", *Act. dr. fam.* 2011, pp. liv. 5, 88-94.

<sup>76</sup> See, for example, ECtHR (GC), *Guðmundur Andri Ástráðsson v. Island*, 1 December 2020, app. 26374/18.

<sup>77</sup> CJEU, judgment of 12 January 2022, *Verlest v. Council*, aff. T-647/20, ECLI:EU:T:2022:5.

<sup>78</sup> 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*, Oxford, OUP, 2012 1231-52, 1241 ff. 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

## BELGIUM

with direct effect over domestic law, including the Constitution, was put on a firm footing in early case law of the Court of cassation<sup>79</sup>. Since then, Belgian ordinary courts have generally accepted the primacy of EU law over Belgian law<sup>80</sup>. They have the duty to set aside any national provision contrary to a self-executing obligation imposed by International or European Law. The Council of State, administrative section, has also recognized the primacy of EU law provisions having a direct effect over national law, including the Constitution<sup>81</sup>.

In relation to the Constitution, the Constitutional Court is less lenient with regard to the principle of primacy. It indeed considers that laws of assent to treaties must be in conformity with the Constitution, so that Belgium could not ratify a treaty contrary to it<sup>82</sup>. The legislator however has removed from the competence of this Court the control of laws of assent to treaties constituting the European Union<sup>83</sup>.

The Constitutional court nevertheless recognises the primacy of international and EU law over national legislation, although it also expressed some caution in a case pertaining to the *Treaty on Stability, Coordination and Governance*<sup>84</sup>. In that case, the Constitutional Court stressed that the transfer of power to international organisations did not amount to a “*blanc seing*” and that it did not allow discriminatory violations of the “national identity inherent to the fundamental political and constitutional structures or fundamental values of the protection that the Constitution grants to legal subjects” (our translation)<sup>85</sup>. Nevertheless, it has not ruled so far that any EU instrument or provision constitute such an infringement to the Belgian national identity.

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Constitution”, in *Itinéraires d'un constitutionnaliste–En hommage à Francis Delperée*, Bruxelles, Bruylant, 2007, pp. 1599-1563.

<sup>79</sup> In relation to international law, see Cass, 27 May 1971, *Pasicrisie*, 1971,886, S.A. *Fromagerie franco-suisse Le Ski*, concl. Procureur Général Ganshof van der Meersch, and in relation to EU law more specifically, Cass, 2 June 2003, R.G. n°S.02.0039.N and C.E. n°62.922, 5 November 1996, *Orfinger e.a.*, *Journal des Tribunaux*, 1997, 254. In Cass., 9 novembre 2004, the Court of cassation recognised the primacy of the ECHR over the Constitution, *Pasicrisie*, 2004, p. 1745.

<sup>80</sup> See, *ia* S Lambrecht, *op. cit.*, p. 87; A Alen and W Werrijdt, *op. cit.*, p. 45.

<sup>81</sup> In relation to primary law, see, Council of State, judgment n° 62.921; 62.922; 62.923; 62.924 of 5 November 1996, *Orfinger*; in relation to secondary law: Council of State, judgment n° 226.980 of 31 March 2014. See, on this question, E. Slautsky, “La primauté du droit international et du droit européen dans la jurisprudence du Conseil d’Etat”, *Journal des tribunaux*, 2021, pp. 637 – 642.

<sup>82</sup> C. Const., judgment n°12/94 of 3 February 1994, For an in-depth analysis of the position of the Constitutional Court, see, S. Van Drooghenbroeck, “La Cour constitutionnelle et la primauté du droit international. L’héritage de Le Ski sous bénéfice d’inventaire”, *Journal des tribunaux*, 2021, pp. 618 -622.

<sup>83</sup> Article 26, § 1<sup>er</sup> bis, of the “loi spéciale du 6 janvier 1989”.

<sup>84</sup> Const. Court, judgment n° 62/2016 of 28 April 2016, B.8.7. M El Berhoumi and others, “La Cour constitutionnelle face au Pacte budgétaire européen: un arrêt sans intérêt?”, *Journal des tribunaux*, 2017, pp. 565-83; P. Gérard and W. Verrijdt, “Belgian Constitutional Court Adopts National Identity Discourse”, *European Constitutional Law Review*, 2017, pp. 182-205; X., Special issue devoted to the Constitutional Court’s decision of 28 April 2016, 62/2016, *Tijdschrift voor bestuurswetenschappen en publiekrecht*, 2017.

<sup>85</sup> *Ibid*, B.8.7.

The Belgian legal scholarship also generally accepts the primacy of EU law over Belgian law<sup>86</sup>. Yet, these debates linked to the principle of primacy are, to our best knowledge, not directly linked with the one related to the principle of the rule of law. According to Belgian scholarship, relying upon the case-law of the Court of justice, the principle of primacy is justified by the need to ensure the uniformity of application of EU law and by the principle of equality between the Member States<sup>87</sup>.

### **Question 15**

The concept of “national identity” made its first appearance in the Belgian case law in a judgment delivered by the Constitutional Court of 28 April 2016<sup>88</sup>. This judgment has been commented by an Honorary President of the Constitutional Court and an actual judge at the same Court, and they observed that the Court “avoided the most delicate discussion in this regard, i.e. which constitutional provisions and principles are part of Belgium’s national identity and which ones are not. This question has not yet been the subject of much doctrinal debate, but it is clear that the ambit of the constitutional provisions which could be used as ‘a shield’ against EU law, may not be too broad, so that only some key aspects of the Constitution, relating to Belgium’s specific constitutional history and culture, can come into play. These constitutional aspects could relate to, on the one hand, the very reasons why Belgium became an independent State, and, on the other hand, the reasons why it still exists, after surviving several linguistic and ideological tensions”<sup>89</sup>. In a ruling on a measure restricting fundamental rights in the context of the fight against the pandemic, the Council of State referred to the notion of “fundamental values” protected by the Belgian constitutional identity as including the fundamental freedom of religion<sup>90</sup>.

To our knowledge, the notion of “EU constitutional identity” has not been addressed as such by Belgian legal scholarship.

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<sup>86</sup> N. Cariat, “Le point sur... l'autorité des arrêts de la Cour de justice de l'Union européenne pour les juridictions nationales”, *Journal des tribunaux*, 2020, pp. 826 -827.

<sup>87</sup> N. Cariat, *op. cit.*, pp. 826 -827.

<sup>88</sup> Const. Court, judgment n° 62/2016 of 28 April 2016, B.8.7.

<sup>89</sup> A. Alen and W. Verrijdt, *op. cit.*, p. 16. See, also, H. Dumont, “L'intégration européenne et le respect de l'identité nationale des états (notamment fédéraux)”, in E. Vandenboshee and S. Van Drooghenbroeck (eds.), *Europese voorschriften en Staatshervorming / Contraintes européennes et réforme de l'Etat*, Bruges, die Keure, 2013, p. 55.

<sup>90</sup> Council of State, judgement n249.177 of 8 December 2020, and judgment n°234.315 of 22 December 2020. See, on this question S. Van Drooghenbroeck, “La Cour constitutionnelle et la primauté du droit international. L'héritage de Le Ski sous bénéfice d'inventaire”, *op. cit.*, p. 622.

## BULGARIA

*Stanislav Kostov*<sup>1</sup>

### CONCEPT OF THE RULE OF LAW

#### *Question 1*

Article 4 (1) of the Bulgarian Constitution provides that the Republic of Bulgaria shall be a State governed by the rule of law, by the Constitution and by the laws adopted by the parliament. As per Art. 4 (2) of the Constitution, Bulgaria shall guarantee the life, dignity and rights of the individual and shall create conditions conducive to the free development of the individual and the civil society. Finally, the power of the State shall be divided to legislative, executive and judicial branches (Art. 8 of the Constitution).

Along with the catalog of fundamental rights in the Constitution (Articles 25-61), these are the main constitutional provisions that legally enshrine the principle of the rule of law in the Bulgarian legislation.

In its practice, the Constitutional Court emphasises that l'Etat de droit as a manifestation of the principle of rule of law is one of the main constitutional principles. The rule of law is a dynamic concept that predetermines the lack of its definition in positive law and the lack of regulation of its main features<sup>2</sup>.

Accepting that this principle has a complex nature, the Constitutional Court consistently unfolds its content based on the understanding that it unites the rule of law in a formal and material sense, establishing the requirements for legality and justice. The Constitutional Court defines the principle of legality (as the main element of the rule of law in a formal sense) which is related to the requirements for legal certainty and predictability. According to the Constitutional Court, the rule of law in its substantive sense includes the fundamental rights and their guarantee, effective exercise and fair balancing<sup>3</sup>.

The basis of the rule of law is constitutionalism and legality. The rule of law means the exercise of state power on the basis of the Constitution and within

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<sup>2</sup> Decision No 1/2005 in const. case No 8/2004.

<sup>3</sup> Decision No11/2022 in const. case No 3/2022.