

Chapter 2

BASIC FEATURES OF THE LEGAL SYSTEM

*Mark Van Hoecke and Michiel Elst**

I. 'Belgian legal culture(s)'

In nineteenth century and during the first half of the twentieth century Belgian law and legal culture have been strongly influenced by French law and legal culture. On many points (e.g., statutory interpretation, the way of giving reasons in the judgments) there is still a strong similarity between both legal systems. Over the last few decades, growing attention has been paid to other foreign legal systems: the Dutch, the English, the American ones and, albeit to a lesser extent, the German legal system.¹

For obvious linguistic reasons, legal culture in the French-speaking part of Belgium is still mainly influenced by the French legal culture, whereas in Flanders the Dutch and English influence became much more important than the French one. This leads to a division of Belgian legal culture into two different cultures: the Flemish one and the French-speaking one. Even when the Belgian supreme courts² apply national (federal) law, a newly formulated interpretation is sometimes considered to be applicable only in the region of the parties and the judges

* Professors, Katholieke Universiteit Brussels.

¹ During the early period of the European Communities, when only Belgium, Luxembourg, the Netherlands, France, Germany and Italy were members of the EC, it became customary in doctoral theses to compare the Belgian law with all other legal systems within the EC. Today comparison is, inevitably, limited to a few major legal systems, of which the English and the French are the most prominent.

² *Raad van State (Conseil d'Etat)* for administrative cases, *Hof van Cassatie (Cour de cassation)* for the others (see chapter 5).

involved.³ Thus, one cannot only expect for the future a growth of the two Belgian legal subcultures – because of the federal structure of the State⁴ and the autonomy of the regions to create law in important fields, like education, culture, environment and so on – but we can also find a development, which has already commenced, by which both main linguistic communities are seen to go their separate ways beyond the level of the creation of their own rules within the limits of their constitutional legal autonomy. Interpretation of federal rules, legal doctrine, judicial style, and other elements of legal culture also tend to develop partly in different directions. A declining knowledge of the language⁵ of the other subculture already restricts the opportunity to read each other's literature and court decisions. But it also limits the possibility of reception of doctrinal legal constructs. The Dutch legal concept of '*marginale toetsing*'⁶ for example, has been adopted by Flemish legal doctrine and has taken hold in several fields of the law. However, because of lack of an adequate French word, which could be considered the equivalent of '*marginale toetsing*', the concept is a lot less established in French speaking legal doctrine and legal practice.

Nevertheless, one should not overestimate the differences in legal culture between

³ In the 1980s the *Raad van State* (*Conseil d'Etat*) annulled the decision of an examination board in the University of Ghent, because a student, who failed a written examination, did not get the chance to take an additional oral examination (*Raad van State*, 13 May 1980, *Bracke v. Univ. of Ghent, Arresten van de Raad van State*, 1980, 633). The court interpreted the applicable statutory rules in the sense that every student is entitled to ask for an (additional) oral examination, when written tests are organised. As, especially in large faculties, a majority of the tests were only organised in written form, this decision caused a lot of commotion. All Flemish universities adapted their examination rules in such a way as to abide by the rule which followed from the decision of the *Raad van State*. In French-speaking universities, however, nothing changed, although from a legal point of view there was no single reason why these universities should not follow these rules (at that time those rules were still a national (federal) matter). French-speaking universities, including their law professors, considered that decision of the *Raad van State* not to be relevant for their examination practice as it was a 'Flemish case', in which a Flemish student and a Flemish university were involved, and which had been decided by Flemish judges within the *Raad van State*.

⁴ See chapter 3 on Constitutional Law.

⁵ Knowledge of Dutch is slightly increasing amongst French speaking law students, but knowledge of French is considerably decreasing amongst Flemish law students.

⁶ A limited control by the judge over legal acts, not in view of checking their contents as such – as the persons or bodies concerned have the legal power to decide freely about it – but only in view of the question whether they did not exceed their authority, including compliance with minimum standards of reasonableness, fairness, etc. (see chapter 8).

the North and the South of the country. As regards culture in general, way of life, food habits and so on, both linguistic communities have much more in common than they have with the Dutch and the French people respectively, with whom, however, they share their language. Even though both legal communities go their own way more than in the past, for a long time they will share, to a large extent, a common legal culture, the core of which will be described in broad outline in this chapter.

For legal practice and legal doctrine there are at least three levels on which common (unconscious) premisses constitute a 'legal culture' and make legal practice and doctrine possible by constituting their framework: the levels of epistemology, of methodology and of ideology.

On the level of epistemology one has to agree on the question of which sources create law (where do we find valid law?).

On the level of methodology one needs a common set of (workable) interpretation rules and techniques and a common argumentation theory (which types of arguments and lines of reasoning are allowed?).

On the level of ideology there is a common basic world view among lawyers which determines (part of) the content of vague concepts in law (fairness, abuse of right, reasonableness, interest of the child, etc.). More specifically there is a common view on the role of law in society, on the roles of judges and of other legal professions (for instance, do judges have to play an active role in a trial or not?).

In the following paragraphs we will give an outline of the presuppositions of Belgian lawyers on each of these three levels. Together they form the paradigm of Belgian legal culture.

A. Epistemological presuppositions: The sources of law

Over the last two centuries, law has always been considered valid to the extent that it could be based, directly or indirectly, on Acts of Belgian parliament, including in the first place the Belgian Constitution. In the nineteenth century, when customary law still played an important role alongside statutory law, this customary law was considered valid to the extent that it was implicitly or explicitly recognised by parliament. In the second half of the twentieth century courts accepted unwritten 'general principles of law' as sources of law. But in most cases they were, or at least were assumed to be, derived from statutory law, behind which they were considered to be implicitly present, as an unuttered starting point on which at least some Acts had been based. Even when court decisions depart considerably from the 'will of the legislator' at the time the statute was enacted, they will, as a rule, try to present their interpretation as a true expression of the legislator's will.

In general, one can say that the 'official' doctrine is a strictly legal positivistic one: 'as (only) parliament has been democratically elected, valid law can only be derived from decisions of that parliament. The judge has to determine the scope of these Acts, but he should not create law, except when he would find a gap in the law.'⁷ Actually, this (limited) creative power awarded to the judge by traditional doctrine, is as such directly based on the text of Art. 5 of the Code of Civil Procedure.⁸ In practice, however, Belgian lawyers, and especially judges, tend to be more flexible and less formalistic than the appearances they are keeping up.

After the First World War the principle of one man-one vote was accepted for parliamentary elections. However, the parliament, which voted for this important change of the Constitution, had already been elected according to this principle. From a strict legalistic point of view this parliament had not been elected in a valid way, and so the change of the Constitution was also invalid. As a consequence, everything enacted by the parliament after 1921 would have to be considered as invalid... However, this kind of reasoning has not been followed by a majority, and even not by a minority among the lawyers: this problem, albeit a very serious one within the frame of the official positivistic doctrine, has never even been discussed!

Both during the First and the Second World Wars it was impossible for the legislator to act in compliance with the Constitution. In practice the government enacted statutes, without any parliamentary approval. During the First World War there was still an assent by the king, but during the Second, this was not possible, as the king stayed in Belgium as a prisoner of the Germans, whereas the government was in exile, mainly in London. Nevertheless, after these wars, the supreme court (*Hof van Cassatie/Cour de cassation*) considered all Acts, enacted in this way, to be fully valid.⁹ The Courts, including the Court of Cassation, accepted the principle of constitutional *force majeure*, although the Constitution does not provide any such principle.

The same official legalistic doctrine did not prevent lawyers from developing the theory of abuse of right, by which a formally valid right is put aside on moral grounds. Neither did it prevent judges from applying this theory in a generally

⁷ For example, this position has been taken in an explicit way by Rob Kruithof: Kruithof, R., 'Naar een "gouvernement des juges" in het verbintenisrecht?' in: *Hulde aan Prof. dr. R. Kruithof*, Antwerp, Maklu and Brussels, Bruylant 1992, nos. 29 and 31, 70-79.

⁸ This article, previously included in the Civil Code as Art. 4, reads: 'There is denial of justice when the judge refuses to decide a case under any pretext, be it the silence, the obscurity or the incompleteness of the statute' (Art. 5 *Gerechtigd Wetboek*).

⁹ Cass. 11 February 1919, *Pas.* 1919, I, 9; Cass. 11 December 1944, *Pas.* 1945, I, 65.

accepted way.¹⁰ This pragmatic approach of Belgian lawyers sometimes leads to 'kinks' in the justification of the decision. The court decides in a way it considers desirable from a practical and moral point of view, but afterwards feels compelled to present the decision as if it followed in a strict logical way from statutory law.

B. Methodological presuppositions

1. Statutory interpretation

The maxim *interpretatio cessat in claris* is still part of the dominant interpretation theory in Belgium. It is regularly used as an argument in the justification of judicial decisions,¹¹ thus allowing the judge to disregard the whole interpretation discussion. But, on the other hand, statutory texts with an obvious 'plain meaning' are as often interpreted in view of a different outcome, when the *prima facie* 'plain meaning' seems absurd, unjust, or inadequate in the instant case.

The assumption of the rationality of the legislator is another methodological presupposition in Belgian law. When interpreting a text, lawyers, as a rule, take it for granted that the legislator does not make mistakes, that he is always using the same coherent, univocal language, that, notwithstanding the daily changes in legislation, the legal system remains a coherent whole, without antinomies or gaps. Rather than an assumption, this is a fiction that sometimes seems necessary in order to reduce the complexity of an interpretation problem. In fact, all lawyers today are aware of the incoherence of the legal system and of a lack of 'rationality' of the legislator as regards large parts of present-day regulations. But, in interpretation practice, this assumption of rationality of the legislator still plays, to a large extent unconsciously, an important role as a presupposition for the interpretation of statutes.

As regards the methods of statutory construction, the Belgian judge uses the classical methods of interpretation, without any clear hierarchy amongst them: the grammatical interpretation, the systemic one, the use of legislative materials (*travaux préparatoires/voorbereidende werken*), the historical interpretation and the teleological construction of statutes.

Methodology is used for underpinning a (desired) result, rather than as a means for 'discovering' the 'correct' interpretation. The canons of interpretation are

¹⁰ Accepted by the supreme court since 1971: Cass. 10 September 1971, *Arr. Cass.*, 1972, 31; *Pas.* 1972, I, 28.

¹¹ Although the Court of Cassation seems to have become reluctant, since the middle of the 70s, in mentioning the rule explicitly, without, however, rejecting it either (Ost, F. & Van De Kerchove, M., *Entre la lettre et l'esprit. Les directives d'interprétation en droit*, Brussels, Bruylant, 1989, 97).

pragmatic tools for judges when deciding cases, not rigid rules, that dictate the result of judicial reasoning.¹²

2. Argumentation theory

Following the French tradition, the reasons stated in Belgian judicial decisions are rather limited. This is mainly the case for the Court of Cassation.¹³ In fact, this court gives hardly any reasons at all in its decisions. The correct interpretation and application of the law is simply stated.¹⁴ Implicitly however, the court refers to the highly elaborated opinion of the Advocate-General (*procureur-generaal & advocaat-generaal/procureur-général & avocat-général*).¹⁵

Offering adequate reasons for judicial decisions for appeal at the Court of Cassation (Art. 149 of the Constitution), lower courts have to indicate the grounds of the decision in their judgments. According to the case law of the Court of Cassation, however, this obligation is interpreted in a rather narrow way, so that judges, for example, do not have to answer every argument invoked by the parties at the trial. Giving reasons for a judgment is considered to be a formality, rather than an attempt to persuade the losing party that (s)he was wrong, which could help him or her to accept the judgment more willingly.

Two types of argument prevail in Belgian case law and doctrinal legal writing: arguments of authority and arguments of consensus.

Argumentation in the first place aims at linking the decision with the authority of the legislator. Showing that the judgment follows directly from the text of the statute, or at least from the will of the legislator, seems to be the most powerful argumentation. It is for this reason that judges will try to present their reasoning as much as possible in this way, even if it is only a façade. A second type of authority

¹² Judge P. Mahillon of the Court of Cassation, when analysing the construction of statutes by Belgian judges, also stated 'that courts, as a rule, proceed in a pragmatic way, thus disillusioning legal doctrine' (Mahillon, P., 'La contribution du juge à l'évolution du droit des personnes', in: *Mélanges offerts à Robert Legros*, Brussels, 1985, 424).

¹³ Reasons given in the decisions of the *Raad van State* and the *Arbitragehof* are much more elaborated. This can partly be explained by the fact that these courts were only founded in 1946 and 1983, respectively, so that they have not been directly seized by the French tradition which the Court of Cassation has followed from the very beginning.

¹⁴ This is the case even when the court changes its own jurisprudence (see: Vanwelkenhuyzen, A., 'La motivation des revirements de jurisprudence', in: Perelman, Ch. and Foriers, P. (eds.), *La motivation des décisions de justice*, Brussels, Bruylant, 1978, 270, where a few examples are given).

¹⁵ Vanwelkenhuyzen, A., *op. cit.*, 278-279.

argument is a reference to a decision by a (higher) court. Although precedents do not have any binding force in the Belgian legal system, referring to a supreme court decision will always be a very strong argument,¹⁶ and in one way even stronger than the text of the statute itself. If the Act only offers a text, which still has to be interpreted when applied to a concrete case, the supreme court decision offers an authoritative interpretation of that Act. And, ultimately, this interpretation will be the valid, enforceable¹⁷ law.

For lower courts, decisions of the court of appeal in their territorial jurisdiction, will have a similar weight. In general, the weight of judgments as authoritative arguments will follow the hierarchy of the courts: the higher the court the more weighty the precedents will be.

Reference to doctrinal legal writing as an authoritative source will never be found in the case law of the Court of Cassation. In the motivation of other courts' judgments it may play some limited role as an argument of authority, but less than the text of the statutes or than other court decisions.

To the extent that it would not prove possible to link the decision to the will of the legislator as it appears from the Act(s) or from the legislative materials, or to construe it through another type of interpretation, judges will try to link up with some kind of *consensus* amongst lawyers.

Referring to a consensus about a concrete interpretation or legal solution for the type of case under consideration is a most powerful argument.

Such a consensus in doctrinal legal writing, but especially in case law, is very weighty. A large consensus amongst judges of (lower) courts, as it appears from their judgments, sometimes can be considered as a stronger argument than the authority of a decision by the supreme court. In fact, such a consensus among lower courts, on a position which is opposed to a previous decision of the Court of Cassation, is one of the scarce reasons for the latter to change its jurisprudence.¹⁸

An underlying presupposition is that such a consensus among courts – among lawyers in general – is a safeguard, and maybe the only conclusive safeguard, against arbitrary judgments.

¹⁶ Henri De Page remarked that 'once the court of cassation has decided, the lower courts are almost always reconciling themselves' even if previously there were strong oppositions amongst them as regards the decided issue (De Page, H., *Traité élémentaire de droit civil belge*, vol. 1, 3rd ed., Brussels, Bruylant, 1962, no. 212bis A, 307).

¹⁷ R. Kruithof has argued that although decisions of the Court of Cassation are formally not '*arrêts de règlement*', as the judge is not entitled to formulate (new) general rules in his judgments, in a material sense they really are (Kruithof, R., *op. cit.*, 57).

¹⁸ See: Vanwelkenhuyzen, A., *op. cit.*, 258-259.

C. Ideological presuppositions

1. Theory of the State: The task of the judge

The way of deciding cases and of interpreting statutes is strongly influenced by the judge's conception of his role as a judge. In its turn this conception is to a large extent determined by the current view amongst lawyers and in society of the task of the judge, and, more generally, of the functioning of the State.

As already mentioned above, a traditional basic assumption is the strict division of power between the legislator, the executive and the judiciary, with a very strong emphasis on the legislator. Because of this view, the potential active role of the judge is very limited. This is still the official doctrine. In practice, however, there has been an important historical shift as regards the view on the relation between the legislature and the judiciary. One of the main concerns by the end of the eighteenth century and early nineteenth century was to limit the large power of judges by statutes enacted by a (relatively) democratically elected parliament: it was obvious that henceforth the active role of the judge should and would be limited. A pragmatic approach has allowed judges to play a more active role when they considered it necessary, whilst still upholding the legalistic façade, although without ever usurping their position. Even if the strict legalistic borderlines have, ever since the early nineteenth century, often been crossed, there has always been a loyalty towards the general principles of the legal system. Judges may sometimes have curbed developments of the law, but they have never tried to make radical changes. Wherever they have departed from the strict wording of statutory law, they have remained faithful to the aims of the law. Whenever the aim of the historical legislator has, exceptionally, not been followed, the judicial decision has been based on a current, generally shared view in society.

On the other hand, legislative inflation, rapid changes of statutes because of a relative political instability, an actual shift of power from parliament to the executive, political scandals, etc., have greatly diminished the image of the legislature. Today, stability, defence of the rule of law, protection of the individual against the State, and implementation of the general principles of law seem to be offered mainly by the courts, instead of, if not against, the legislature and the executive. This image has been reinforced by the role, and the influence, of the European Court of Human Rights, the Belgian Constitutional Court (*Arbitragehof/Cour d'arbitrage*)¹⁹ and

¹⁹ The *Arbitragehof* was established in 1983. Its role has been very significant since 1989, when its competence was considerably enlarged.

the Administrative Supreme Court (Council of State *Raad van State/Conseil d'Etat*)²⁰, and, through its acceptance, by the Court of Cassation of the precedence of international treaties, ratified by the Belgian parliament over more recently adopted statutes.²¹ Nowadays the dominant view in society is no longer a fear for the arbitrary judge and a trust in the democratically functioning legislature. There is rather a distrust of politicians, and hence of parliament and government, and a hope that courts will protect and enforce fundamental legal principles, when the legislature or the executive are seen to depart from them. In this spirit of the age there is a growing acceptance of a more active role of the judge. This active role often appears in a different form to a more liberal construction of statutes. Summary proceedings, for instance, have become very important, not only as a means for the rapid attainment of a temporary solution for a dispute, but often as a solution accepted by all parties and thus definitive. The 'real' legal discussion is very often not even brought before the court, as, in a very large majority of the cases, the trial ends with a 'temporary' injunction.

Although a more active role of the judge is increasingly accepted, and even expected, judges still basically stick to the traditional conception of their task: a cautious pragmatic approach, often behind a legalistic façade. One of the most striking materials of this façade is the presentation of the legal system as being coherent and stable over time. When the (supreme) courts are changing their jurisprudence they generally hide the change and try to give an impression of continuity.²² Starting from the assumption of the rationality of the legislator, judges consider it to be their task to interpret the law in such a way as to be as coherent as possible.²³

2. World view of the Belgian judge

It is not only when interpreting statutes that the personal world view of the judge may influence his judgment. This is also the case when judges are interpreting and evaluating facts, and hearing submitted proofs. The world view of the judge most obviously plays a decisive role when applying vague concepts, such as 'the interest of the child', 'good faith', 'common decency', 'tort', 'reasonable' and so forth, or when filling gaps in the law.

Empirical research has shown that this does not lead to strongly divergent

²⁰ This court has the power to annul rules enacted by the executive.

²¹ Cass. 27 May 1971, *Fromagerie Franco-Suisse Le Ski v. Belgische Staat*, Arr. Cass. 1971, 959, and *JT* 1971, 460

²² Vanwelkenhuyzen, A., *op. cit.*, 252-253, 263, 270-277, 286.

²³ Ost, F., and Van De Kerchove, M., *op. cit.* (fn. 10), 83-85.

decisions, depending on the personal opinion of the judges concerned, as one could expect. On the contrary, there seems to be a striking homogeneity in the world views of the judges.²⁴

Judges tend to be rather conservative, as lawyers mostly are. In general, however, they seem to follow developments in society, as it appears from the case law on divorce, concubinage, the relationship between parents and children, the position of women within marriage, the concept of 'common decency' and so on.²⁵ In 'adapting' the content of concepts following changes in society, judges indeed seem to express a general 'legal awareness'. It is indeed striking that the legislator never reacted to such developments except by adapting the statute to the judicial developments.²⁶

An increased 'moral' approach to the law can be noticed: over the last decades courts have accepted the protection of 'abuse of right' as a general principle of law.²⁷ The duty to act according to 'good faith', which only finds a statutory application as regards the execution of contracts, is now considered to be an unwritten general principle of law.²⁸ The judiciary has limited the discretionary power of the authorities by introducing the principle of reasonableness.²⁹ Since

²⁴ See: Van Hoecke, M., *Mens- en maatschappijbeeld van de rechter*, Ghent, 1975 (results of an analysis of all civil judgments of the Ghent Court of Appeal in the year 1972) and Van Hoecke, M., 'Mens- en maatschappijbeeld van de vrederechter', in: Broekman, J., *et al.*, *Vrederechter: Openbare Dienst*, Brugge, Die Keure, 1989, 123-178 (analysis of the judgments of the Justices of the Peace, published in the journal of the association of the justices of the peace (*Tijdschrift van de Vrederechters/Journal des Juges de Paix*) between 1986 and 1989).

²⁵ For example, the negative attitude towards divorce and the traditional view on the roles of husband and wife as they appeared from the Ghent Court decisions in 1972 (Van Hoecke, M., *op. cit.*) have nowadays been seen to have considerably diminished, if not disappeared. By the end of the 1970s, courts in Belgium considered that the criminal act of rape is even possible within a marriage (first published case: Brussel, 21 June 1979, *RTDF*, 1980, 159). The legislator followed this evolution and changed the law in 1989.

²⁶ Van Hoecke, M., 'Naar een theorie van de algemene rechtsbeginselen' in: *Algemene Rechtsbeginselen*, Van Hoecke, M. (ed.), Antwerp, Kluwer Rechtswetenschappen, 1991, 400-401, no. 16.

²⁷ Cass. 10 September 1971, *Arr. Cass.* 1972, 31; *Pas.* 1972, I, 28; Van Oevelen, A., 'Algemene rechtsbeginselen in het verbintenissen- en contractenrecht', in: Van Hoecke, M. (ed.), *op. cit.*, 142-146.

²⁸ Van Ommeslaghe, P., 'L'exécution de bonne foi, principe général de droit?', in: *TBBR* 1987, 101-110.

²⁹ Debaedts, F., 'Algemene rechtsbeginselen in het administratief recht' in: *Algemene Rechtsbeginselen*, *op. cit.*, 256-258.

1989, statutes which violate the constitutional principle of equality³⁰ can be annulled by the Constitutional Court (*Arbitragehof/Cour d'arbitrage*). Nevertheless, courts have never, or rarely³¹ been criticised for this application of their own world view, even against the wording of statutes. The main reason for the general acceptance of this case law is the cautious manner in which judges have applied their moral views. It is only when behaviour, which apparently seems to be legal, *clearly* conflicts with generally accepted moral principles, that these moral rules are applied and that a black letter interpretation is disregarded.

II. Recognised sources of law

A. Internal sources of law

As a really *binding* source of law there is virtually only the Constitution and legislation issued by bodies with a legislative competence. However, other sources such as court decisions or legal doctrine may have a lot of authority and a strong influence on the way law is perceived and interpreted in legal practice.

1. Legislation

Belgium has had a written *Constitution* since 1831. This document, with its subsequent amendments, is the highest legal rule in the internal legal order. It lays down (a) the principal functions of, and the interaction between the legislative, the executive and the judicial powers in the State, (b) the general principles of the federal system, and (c) human liberties and rights protecting the individual from abuse of power by the State, and, since 1994, socio-economic fundamental rights.

The constitutional rules on the federal system are further elaborated in *Special-majority Laws*, i.e. laws having to be adopted in compliance with a special (linguistic) majority requirement.

Ordinary Laws at the national level, *Decrees (decreten/décrets)* at the level of the Flemish, French and German Communities, and of the Walloon and Flemish Regions, and *Ordinances (ordonnanties/ordonnances)* at the level of Brussels-Capital Region all have equal force of law throughout the territory for which the respective legislatures are competent, insofar as they are enacted within the allocation of powers provided under the Constitution and the Special-majority Laws.

³⁰ Art. 142 of the Constitution.

³¹ See e.g.: Kruithof, R., *op. cit.*

It is an important feature of the Belgian federal system that there is no hierarchy between national statutes and the statutes enacted by the communities and the regions. The *Arbitragehof* (*Cour d'arbitrage*), which is in fact a constitutional court with limited powers, is entrusted with the power to control whether the national laws, decrees or ordinances violate, either *ratione loci*, or *ratione materiae*, this allocation of powers. In 1989, powers of the constitutional court were extended as to include the review of the said rules with the principles of equality, non-discrimination and freedom of education, guaranteed under Arts. 10, 11 and 24 of the Constitution. The ordinary courts always have refused to review the constitutionality of statutory rules, arguing that the legislature at the national and regional levels itself, and not the courts should ensure that legislation is not unconstitutional.³² If the meaning of a legislative act is unclear, the courts are guided by the presumption of constitutionality, i.e. they may assume that it was not the intention of the legislature to violate the constitution.³³

Legislative Acts are implemented by the executive in the form of Royal Decrees (*koninklijke besluiten/arrêts royaux*) and for matters of secondary importance, Ministerial Decrees and Decrees of the State Secretaries (*ministeriële besluiten/arrêts ministériels*) at the national level, and by Regulations and Orders of the regional Governments (called 'Executives' ('*Excutieven*'/'*Excutifs*')) until 1993) at the level of the Communities and Regions. Subordinate authorities may enact Provincial and Municipal Regulations and Orders (*provinciale/gemeentelijke reglementen en verordeningen/règlements provinciales/municipales*) in all matters of provincial or municipal interest.

All these administrative regulations and orders are subject to the principle of legality, which means that these administrative authorities may only act insofar as they are empowered to do so by the Constitution, a law, decree or ordinance. By virtue of Art. 159 of the Constitution the ordinary courts must refuse the application of administrative acts violating the higher legal rules. Moreover, the Administration Section of the Council of State (*Raad van State/Conseil d'Etat*) is empowered to annul regulations and orders on the same grounds.

In case of conflicting rules of different subordinate authorities, the local autonomy and the respective powers *ratione materiae* are to be taken into account. In this

³² The law provides for one exception in regard of Ordinances issued by the Brussels-Capital Region. They are, contrary to national statutes and decrees, subject to a limited judicial review by the ordinary courts. Moreover they are, in certain cases, subject to limited administrative oversight by the national authorities in order to protect the international role of Brussels and its function as a capital.

³³ Cass. 20 April 1950 (*Waleffe*), *Pas.*, 1950, I, 560.

way a provincial decree does not automatically prevail over a municipal decree.³⁴ In any case, this local autonomy represents less than it suggests, as the acts of the local authorities are subject to administrative oversight by the higher authorities, which review not only its legality, but also its merits.

2. Case law

Precedents in case law do not have any legally binding force for future cases. There are only two exceptions to this rule.

The first case in which a court decision is binding is a *second decision* in one and the same case by the Court of Cassation after a second appeal to this court *on the same legal grounds*. In this case, and only in this case, the lower court is bound by the interpretation and application of the law as made by the supreme court for giving the final decision *in that same case*. The Court of Cassation, indeed, does not decide the case under consideration as such, it only checks the correctness of the interpretation and application of the law by lower courts. After a successful appeal in cassation, another lower court will have to give the final decision in this case.

This is also true for the second case: administrative tribunals and commissions to which a case is referred for final decision after the annulment of an earlier decision in the same case by the Council of State (*Raad van State/Conseil d'Etat*), are bound by the decision of Belgium's highest administrative jurisdiction insofar as it interpretes and applies the law. Contrary to the first case, the first decision of the Council of State has binding force for the administrative tribunal to which the case is referred.

In practice, decisions of the highest courts do have a strong moral authority, especially when confirmed repeatedly over the years.

3. Customary law and general principles of law

Customary law is also a binding source of law, but, it plays only a very marginal role today, as almost every aspect of social life is nowadays ruled by some form of legislation at a local, regional, federal or European level. Examples of customary law may still be found in constitutional law, such as the limitation of the powers of an outgoing government to the conduct of the 'current affairs', and the rule of secrecy governing the relations between the king and his Ministers.

Over the last few decades courts have accepted a new legally binding 'source of law', notably the '*unwritten general principles of law*'. Although these principles

³⁴ Alen, A., and Tilleman, B., *Treatise on Belgian Constitutional Law*, Deventer, Kluwer Law and Taxation Publishers, 1992, 47.

are 'found' and worded by courts (which do not have the power, or even the right, to impose general rules), a breach of such a principle has been accepted by the Court of Cassation as a reason for annulment of a judicial decision. Such general principles of law are mostly derived from existing elements of the legal system. As it has been the case in many European countries, the general principle of 'good faith', e.g., has been derived from the statutory obligation to execute a contract in accordance with good faith (laid down in Art. 1134 of the Belgian Civil Code). But, there is sometimes no such statutory support to be found for an unwritten general principle of law. This is the case, for example, with the 'reasonableness principle' applied to the use of discretionary powers by authorities. In the last case unwritten general principles have a more limited scope and are used for correcting unreasonable or inequitable effects of a strict application of legislative rules, whereas the former are used as guiding principles, comparable to those laid down in legislation.

Equity also is generally recognised as a source of law. However, its role is very marginal, for the same reason that customary law plays an extremely limited role in the current Belgian legal system: an inflation of regulation by public authorities. Moreover, the role of 'equity' has also to a large extent been taken over by several unwritten general principles of law, most notably the 'abuse of right principle'.

4. Legal doctrine

Legal doctrine, for its part, plays an important role in the creation and the development of law. But, it is only an indirect source of law, as new interpretations and theories proposed by doctrinal legal writers have to be accepted by courts, before they are considered to be really 'law'. However, in practice, in order to have knowledge of Belgian law, one starts by looking for legal doctrine, as it offers a coherent description of the 'main' legal sources (applicable legislation and relevant court decisions). From the point of view of *information*, legal doctrine then is the most important 'source' for finding the law.

B. Influence of European and international law

1. The supremacy of international law

The Belgian Constitution remains silent on the relationship between international and domestic law. Before 1971, Belgian judges advocated a dualistic vision, stating that the international and national levels are two separate legal systems. Following this theory an international treaty only became part of the internal, national legal system if it was incorporated or implemented into national law. In the hierarchy of norms, a treaty had the same legal force as an Act of parliament: pursuant to the principle of *lex posterior priori derogat* the treaty prevailed over earlier laws, but

not over Acts of parliament adopted and entered into force after the incorporation of the said treaty into the national legal order.

In the *Le Ski* case of 1971, the Court of Cassation left its former dualistic approach, and adhered to a monistic vision.³⁵ International and domestic law are considered now to form a single legal system. Once parliament has given its consent to an international treaty, it becomes directly applicable to the national legal order. There is no further need for implementing treaties. If, moreover, the provisions of such treaty are sufficiently clear and complete to generate all of their own rights and duties for individuals, in the sense that no additional national regulations are required, then these provisions are self-executing and they prevail over former and later Acts of parliament. Ordinary courts which are confronted with earlier or later laws containing provisions inconsistent with self-executing treaties, must declare these laws inoperative.

This prevalence of self-executing international legal norms over domestic law is particularly important in the field of human rights and European Union Law.

2. Human rights treaties

The Belgian courts hold most of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms, its Protocols and the International Covenant on Civil and Political Rights to be self-executing. Citizens may therefore directly invoke the provisions of these treaties before the courts, even if this means that Acts of parliament are set aside.

This is not as obvious as it seems. As we have seen, the ordinary courts traditionally refrain from reviewing the constitutionality of laws, and therefore do not control whether Acts of parliament contradict the human rights provisions in the Constitution. Nevertheless, since the *Le Ski* case, they do control the conformity of such Acts with the provisions of the international human rights treaties mentioned above.

Moreover, the Constitutional Court (*Arbitragehof/Cour d'arbitrage*), when exercising its limited constitutional review of laws, decrees and ordinances, may link the constitutional principles of equality and non-discrimination to the human rights as they are formulated, not only by the Constitution itself, but also by the self-executing human rights treaties. Thus, it may annul a law for reason of unconstitutionality, if such law contains a provision that introduces an unjustified unequal treatment of citizens (Art. 10 Constitution) in the way they may exercise their freedom of association (Art. 11 ECHR).

³⁵ See above, note 21.

As a result the impact of the human rights treaties, and more in particular of the European Convention for the Protection of Human Rights, on the legal developments in Belgium is significant in several branches of law, especially family law and criminal procedure law (see the respective chapters).

3. European law

The legal order of the European Communities is a very particular international legal system, as the basic EC-Treaties established institutions that were empowered to create rules in an autonomous way that are binding in the territories of all of its Member States. European law was superimposed on the domestic legal systems of the Member States. One of these autonomous institutions, the European Court of Justice, considered that a supranational legal order would be meaningless and lose its uniformity, if it could be set aside by domestic norms of the Member States.³⁶ This reasoning was also accepted by the Court of Cassation in the leading *Le Ski* case, in which it recognised the direct applicability and the self-executing character of Art. 12 EC Treaty (now Art. 25), and the supremacy thereof in relation to those domestic norms, even of a later date.

Secondary community law, i.e. the norms adopted and promulgated by these autonomous institutions within the powers granted to them by the EC Treaties, also prevails over domestic law. This clearly is the case for *regulations*, which are by definition directly applicable in the Member States (Art. 249 EC Treaty), which means that they belong automatically to the (highest) norms of the internal legal order of the Member States without any need for implementation into domestic law.³⁷ If the provisions of the Regulation are sufficiently clear and determined, and do not leave any margin of appreciation to the national authorities, they may be invoked by natural and legal persons, not just against the State, but also against other persons.

European directives are not directly applicable, but must be implemented into national law within a certain time period set by the directive itself. Directives may still contain provisions that fulfil all conditions for being self-executing. If the period for implementation has lapsed, and a Member State has failed to take the necessary measures for reaching the aim set by the directive, persons may invoke the self-executing provisions against the negligent Member-State, but not against

³⁶ ECJ, 15 July 1964, *Costa v. E.N.E.L.*, Case 6/64, ECR, 1964, 1199.

³⁷ In fact the formal reception of a regulation into the internal legal order is unacceptable, as this would lead to misunderstandings as to the legal nature of these norms and the date of their entry into force: ECJ, 7 February 1973, *Commission v. Italy*, Case 39/72, ECR, 1973, 101.

other persons. Moreover the Member State may be held liable for damages caused to persons as a result of this untimely or incorrect implementation.³⁸

4. International law versus the Constitution

There is a general consensus that the Constitutional Court (*Arbitragehof/Cour d'arbitrage*) has the power to control the so-called extrinsic constitutionality, i.e. the power of the respective authorities to give consent to a treaty. This court is indeed empowered to annul an Act expressing the consent of parliament to a treaty, if this Act violates the division of competences between the federal State, the regions and/or the communities.

Moreover the *Arbitragehof* seems to consider that it is also empowered to control the intrinsic constitutionality, i.e. to control whether the contents of a treaty conform to the constitutional principles the safeguarding of which is entrusted to that Court (principles of equality, non-discrimination, and freedom of education). The Court argues that, if the constitutioner forbade the legislature to adopt internal Acts that violate the Constitution, he may not be presumed to have allowed the legislature to violate the Constitution in an indirect way, through giving consent to an international treaty. Moreover, there is no rule of international law granting the States the power to conclude a treaty contravening their respective Constitutions. Still, the *Arbitragehof* concedes that such control must be exercised in a reserved manner, as a treaty is not just a one-sided act of sovereignty, but also generates legal consequences outside the internal legal order.³⁹

The *Arbitragehof* has not yet been confronted with a conflict between the Constitution and a norm of primary or secondary EU law. The Administration Section of the Council of State, on the other hand, in its recent decisions seems to have accepted the prevalence of EC norms, as they are interpreted by the European Court of Justice (in this concrete case through application of an evolutionary construction method), over norms contained in the Belgian Constitution. In two cases on the access to the Belgian civil service for nationals of EU Member States, the Council of State considered that 'from the Belgian constitutional point of view, the authority of the interpretation given to the Treaty of Rome by the Court of Justice is based on Art. 34 of the Constitution, even if this interpretation would

³⁸ ECJ, 19 November 1991, *Francovich et al.*, joint Cases C-6/90 and C-9/90, ECR, 1991, I-5357.

³⁹ *Arbitragehof*, Case no. 26/91 of 16 October 1991, *Belgisch Staatsblad*, 23 November 1991; *Arbitragehof*, Case no. 12/94 of 3 February 1994, *Belgisch Staatsblad*, 11 March 1994.

lead to the setting out of force of a part of Arts. 8 and 10 of the Constitution'.⁴⁰ Art. 34 was introduced into the Constitution in 1970 to take away all doubts about the constitutionality of the EC Treaties. As these Treaties imply a transfer of sovereignty to supranational bodies, and Art. 33 of the Constitution considers the nation and its representatives as the exclusive holders of sovereignty, the constitutioner felt the need to include a provision into the Constitution (Art. 34) expressly stating that the exercise of certain powers may be attributed by a treaty or an Act to institutions of international public law. No doubt this Art. 34 of the Constitution is a major argument in favour of the primacy of EU Law over the Belgian Constitution.

III. Finding the law

A. Bibliographical works

The most efficient way to look for references to the traditional sources of Belgian law nowadays is the consultation of the electronic databases *Judit* and *R.A.J.B.i.* (*Recueil annuel de jurisprudence belge informatisé*). Both are available on CD-ROM, the former in a Dutch and a French version, the latter only in French. *Judit* contains references to statutes, case law and doctrinal writings dating from 1980, and is in fact a cumulative compilation of two traditional bibliographical publications, the monthly journal *Tijdschrift Rechtsdocumentatie/Information et documentation juridiques*, and the systematic looseleaf reference work *Rechtsgids*. The *R.A.J.B.i.* goes back to 1978. It only contains references to case law and to a selection of doctrinal writings, not to legislation. In its original (and still existing) paper form it is available as a yearbook.

Other traditional law bibliographies are the *Répertoire décennal de la Jurisprudence Belge* (an extremely useful instrument for finding references to case law and legal doctrine from 1814 to 1975), the *Répertoire bibliographique du droit belge* (with references to Belgian legal doctrine from 1919 to 1970) and the *Doctrines juridiques belge*, which has appeared as a yearbook since 1986 and contains references to legal doctrine, including comments under published case law.

⁴⁰ *Raad van State*, Case no. 62,922, 5 November 1996, *Journal des Tribunaux*, 1997, 254, with comments by R. Ergec (see also Case no. 62,920 of the same date).

B. Where to find legislation?

The bilingual *Belgisch Staatsblad/Moniteur belge* is the official record of Belgium's statutes and by-laws. Since 1 June 1997 it is also available on Internet.⁴¹ All laws enacted by the federal legislature or government or the Ordinances and Regulations of the Brussels Regional Council are published in French and Dutch, both being equally authentic versions. This means that, should the case arise, differences between the Dutch and French texts must be resolved according to the will of the legislator, which is to be determined according to the usual interpretation methods and without giving preference to one of the texts.

Normative acts adopted by the legislative and executive bodies of the Communities and Regions, except for those of the Brussels authorities, are unilingual. Their official publication is always accompanied with a non-authentic translation into one or two of the other national languages.⁴²

Although the *Belgisch Staatsblad/Moniteur belge* provides the only official version of a normative act, it is certainly not the best instrument to find a specific law. If the date of promulgation of the legal act is known, but not the date of publication, then the basically chronological collections, such as *Omnilegie* (bilingual, since 1952) and *Pasinomie* (in French since 1833, but containing texts retrospectively to 1788), may be helpful.

In all other cases one should resort to one of the many privately co-ordinated collections of laws, of which the most important and complete ones are the *Tweetalige Wetboeken Story-Scientia (TWS)* and the *Codes Larcier*. Both have the ambition to cover most, if not all, branches of law. The former is a looseleaf bilingual publication, divided according to the different branches of law, and containing within each branch first the official code (if any), then the specific laws and regulations in chronological order, and finally the international treaties. *TWS* is also available on CD-ROM (*TWS-CD*) and, in an extended version, on the Internet (only accessible for paying customers): www.jura.be. The *Codes Larcier* are bound, and exist in separate French (five volumes) and Dutch (seven volumes) versions.

⁴¹ <http://www.just.fgov.be>, and <http://staatsblad.be> (Dutch) or <http://moniteur.be> (French).

⁴² Legal Acts by the authorities of the legislative and executive bodies of the Flemish Community and Region (French Community) are published in Dutch (French) with a translation into French (Dutch); legislation enacted by the authorities of the Walloon Region (German Community) are published in French (German) with a translation into Dutch and German (Dutch and French). Moreover, the Decrees and Regulations enacted by the authorities of the German Community are published in German in the *Memorial des Rates der deutschsprachigen Gemeinschaft*.

They are also divided according to the branches of law; within each branch first the official code is published (if any), and then all specific laws and regulations are subsumed under topical entries which are set in alphabetical order. It is updated by supplemental volumes. Both *TWS* and *Codes Larcier* have very useful analytical and chronological tables. Apart from these two collections of laws, there are many pocket publications of laws, or collections of law in specialised law fields (e.g. *Medialex* for media law).

For both houses of the federal parliament, and for all regional and community parliaments separately the Parliamentary Papers include three kind of publications: a first reporting the parliamentary debates, discussions and votes in the respective assemblies (e.g. *Handelingen van de Belgische Senaat/Annales du Sénat de Belgique*), a second containing the record of Parliamentary Questions-and-Answers (*Bulletin van Vragen en Antwoorden/Bulletin des questions et réponses*), and a third containing all documents used in the law-creating process, such as bills, proposed amendments, the record of discussions within the parliamentary commission, the advice formulated by the Legislation Section of the Council of State, etc. (e.g. *Stukken van de Senaat/Documents du Sénat*). There is a growing tendency to make these publications also available on Internet.⁴³

C. Where to find case law?

Except for the decisions of the *Arbitragehof/Cour d'Arbitrage*, which are published in the *Belgisch Staatsblad/Moniteur belge*, and the judgments of the Council of State annulling or suspending executive or local decrees, which are communicated to the public in extract in the same place as these decrees were published (e.g. in the *Belgisch Staatsblad* for Royal Decrees or by posting at the outside of the town hall for municipal decrees),⁴⁴ there is generally speaking no legal obligation to publish court decisions.⁴⁵ Therefore, only a tiny part of case law is accessible to the public.

⁴³ For the national parliament, see <http://www.senaat.be> and <http://www.dekamer.be>. Except for an introduction into English, all documents are available exclusively in French and Dutch. For the Flemish parliament, see: www.vlaamsparlement.be, with links to the websites of all other regional parliaments.

⁴⁴ Judgments of the Council of State have recently become available in full text on Internet and CD-ROM (Art. 28 Co-ordinated Laws on the Council of State, as amended on 4 August 1996; Royal Decree of 7 July 1997). The internet website address is <http://www.raadvst-consetat.be>.

⁴⁵ Unless otherwise provided by law (e.g. extracts of judgments declaring an enterprise bankrupt are to be published in the *Belgisch Staatsblad*) or ordered as an additional sanction by the judge.

However, the highest courts do have their own periodicals (*Cour d'arbitrage – arrêts/Arbitragehof – Arresten/Schiedsgerichtshof – Entscheidungen; Bulletin des arrêts de la Cour de cassation/Arresten van het Hof van Cassatie; Recueil des arrêts du Conseil d'Etat/Verzameling der Arresten van de Raad van State*). An endless list of legal journals also publish case law, often accompanied by critical comments by legal scholars. They may be either general, in the sense that they cover any branch of law and any jurisdiction (*Journal des tribunaux, Rechtskundig Weekblad, Algemeen Juridisch Tijdschrift, Revue critique de jurisprudence belge*), or specific as to the territory (e.g. *Revue de jurisprudence de Liège, Mons et Bruxelles*), the jurisdiction (e.g. *Journal des tribunaux du travail*) or the branch of law (e.g. *Tijdschrift voor Belgisch burgerlijk recht*) covered. Finally, special mention should be made of the *Pasicrisie belge*, an impressive collection of case law in all branches of law from 1791 to date.

D. Where to find legal doctrinal writings?

Most of the legal journals indicated in the previous section also publish scholarly articles on general or specific topics of legal practice and theory. Many legal journals are bilingual, others are unilingual (Dutch or French). Apart from those journals already mentioned, reference should be made – to name a small selection – to *Tijdschrift voor Bestuurswetenschappen en Publiek Recht* in the field of public law; to *Tijdschrift voor Privaatrecht* in the field of private law; to *Tijdschrift voor Sociaal Recht/Revue de droit social* in the field of social security and labour law; to *Tijdschrift voor Belgisch Handelsrecht/Revue de droit commercial belge* in the field of commercial law; to *Panopticon* and *Revue de droit pénal et de criminologie* in the field of criminal law; and to *Intellectuele Rechten/Droit intellectuel, L'ingénieur-Conseil*, and *Auteurs & Media* in the field of intellectual property and media law.⁴⁶

Apart from the articles in legal journals, francophone legal doctrine in particular has sometimes taken the form of legal encyclopaedias, with the (impossible) ambition to cover all branches of law. The most important ones are *Les Pandectes belges* (1878-1933, 151 volumes!), *Les Nouvelles* (1931 to date) and *Répertoire pratique du droit belge* (1930-1961, subsequently eight supplements). These monumental works, especially the latter two, are in many parts still important tools in Belgian law collections.

In the same spirit of monumentality, one should mention two impressive studies of private law, H. De Page's *Traité élémentaire de droit civil belge* (ten vols.,

⁴⁶ For a more or less complete list of legal journals, see *Juridische Verwijzingen & Afskortingen*, 1997, 3th ed., Antwerp, Kluwer rechtswetenschappen, 104-125.

1933-90) and A. Kluyskens' *Beginselen van Burgerlijk Recht* (six vols., 1942-55).

Thousands of manuals, monographs, doctoral dissertations, collections, *libri amicorum* and so forth complete the picture.

IV. Branches of law

In Belgian doctrinal writings the branches of law are usually subsumed into two broad categories, *Public Law* and *Private Law*. Whereas the latter regulates the legal relationships among citizens, the former focuses on the relationship between these citizens and the State, on the internal organisation of the State, and on the legal relations between States (i.e. international public law). At first sight, this basic division seems to have a mere academic, or heuristic nature. Moreover, it is subject to modifications and nuances. As in the modern welfare state the authorities intervene in one way or another in nearly every aspect of social and economic life, those branches of law that are the typical products of this tendency, and therefore have developed in an explosive manner after the Second World War, all have a mixed public/private character: social security law, environmental law, media and entertainment law, and so on.

As a general rule it is accepted that rather than the identity of parties, the character of their relationship determines the nature of the applicable legal norm. If the State, a region, a province or a municipality purchases a building to house its administration, this official body acts as a private person; it stands in a horizontal relationship with the seller, to which private law rules are applied. If the same authority expropriates a private person in order to reach the same purpose, it uses its vertical monopoly of force, which implies the application of public law rules.

National public law consists of:

- *constitutional law*, determining the organisation and functioning of the State, and the human rights and liberties. It may be found mainly in the Constitution and a number of Special-majority Laws;
- *administrative law* regulates, in numerous acts of parliament, Royal and ministerial decrees, provincial and municipal regulations etc., the functioning of the executive power, the administration (including expropriation, environmental planning, etc.);
- *taxation law*, mainly fixed in a number of taxation codes, defines how the income of the authorities is established and collected;
- *criminal law* and *criminal procedure law* are mainly laid down in the 1867 Criminal Code and 1808 Code of Criminal Procedure.

Private law embraces the following branches of law:

- *civil law*, i.e. the set of rules regulating the civil status of persons (name, domicile, legal capacity) and goods (ownership, mortgage, etc.), family law, the relationship between parents and children, patrimonial law, inheritance law, contracts, torts and so on. Many of these rules are fixed in the Napoleonic Civil Code of 1804 (amended on numerous occasions since then);
- *commercial law*, regulating the status of merchants and commercial activities. It is based on the 1882 Commercial Code and a great number of specific laws. It also includes the so-called economic law, i.e. the State intervention into economic life, and is in this respect more of a public law nature;
- *social law*, including social security law and labour law.

The division between these three branches of private law is not of a mere academic nature, as it determines also the structure of the courts. The courts of first instance have a general jurisdiction as to civil disputes exceeding 75,000 BEF. Disputes among traders, relating to matters deemed to be commercial by law, as well as disputes involving certain matters of commercial (bankruptcy, bills of exchange, promissory notes) and corporate law are decided upon by Commercial Courts, at least when the claim exceeds 75,000 BEF. Individual labour disputes and certain claims related to social security benefits are submitted to the Labour Courts; appeals against their judgments are brought before a proper Labour Court of Appeal.

The Law of Civil Procedure determines the structure and powers of all these courts, including the Courts of Appeal and the Court of Cassation deciding in civil matters, as well as the procedure before these courts. These rules are mainly laid out by the 1967 Code of Civil Procedure.

V. Legal education and legal professions

A. Legal education

Law studies in Belgium have a duration of five years. Students generally start at the age of 18 or 19 years, after having finished secondary school. There is no selection procedure for entry into law school. In practice, however, the examinations at the end of the first year function as a selection, as, on average, only 40 per cent of the students succeed in this first year, and almost half of the group starting law school will never reach the second year.

Since the 1990s, there is a different statutory regulation of university studies for Flemish and francophone universities, but both the curriculum and the general organisation of the law studies are roughly comparable.

In the first two years, up to half of the courses are non-legal disciplines, such as economics, sociology and psychology, but most notably history and philosophy. From the third year, almost only positive law subjects are taught. Most of the courses are compulsory, with the exception of the final year.

Teaching is generally not interactive but *ex cathedra* and most courses end with an oral or written examination at the end of the semester or the year. For optional courses the evaluation is more often done on the basis of a paper, written by the student in the course of the academic year.

B. Legal professions

The basic law degree gives direct access to most legal professions.

1. Advocates

In order to defend a case in court one has to be member of the bar. In order to be accepted as a 'trainee advocate' (*advocaat-stagiair/avocat stagiaire*) a senior advocate is needed to supervise the trainee for three years and to pay at least the minimum salary. There are 28 independently functioning bars in Belgium, with their own rules and practices. They are organised at the basis of the *gerechtelijk arrondissement/arrondissement judiciaire* which is the territory for which a court of first instance has competence. There are 27 such territories in Belgium. In Brussels there is a francophone and a Flemish bar. After three years of apprenticeship and fulfillment of the local requirements, including sometimes examinations, one may be accepted as a full advocate. A trainee advocate can in practice act before court as a full advocate. The only exception to this rule – pleading before the supreme administrative court, the Council of State (*Raad van State/Conseil d'Etat*) – was declared unconstitutional by the Constitutional Court (*Arbitragehof/Cour d'arbitrage*).⁴⁷

Every advocate may take cases for any court in Belgium, except non-penal cases in the Court of Cassation, for which one has to be represented by one of the sixteen appointed 'advocates at the Court of Cassation'.

Generally speaking, only advocates are entitled to defend a client before courts.

⁴⁷ *Arbitragehof*, Case no. 55/98 of 20 May 1998, *Belgisch Staatsblad*, 7 August 1998.

2. Notaries

In order to become a public notary one has to obtain an additional diploma of *licentiaat in het notariaat/licencié en notariat* after one year of full-time university studies. Moreover, one has to do an apprenticeship of three years as a 'candidate notary' with a public notary. After having fulfilled these requirements one may be appointed as a public notary if there is a vacancy. The number of notaries is limited (1221 notaries in 1998, of which 678 are Flemish and 543 French-speaking) and appointment is made by the Minister of Justice.

Intercession by a notary is compulsory for all conveyancing of rights *in rem* on real estate and for concluding a matrimonial contract. Notaries also often act for drafting wills.⁴⁸

3. Judges and public prosecutors

In order to become a judge or a public prosecutor one has to pass an examination, organised by the Ministry of Justice. Appointments of judges and public prosecutors is made upon a vacancy by the High Council of Justice (*Hoge Raad voor de Magistratuur/Conseil Supérieur de la magistrature*). Appointment in the position is made for life. A career change can only be made when a new vacancy arises.

Selected bibliography

De Theux, A., and Kovalovszky, I., *Précis de méthodologie juridique. Les sources documentaires du droit*, Brussels, Publications des Facultés universitaires Saint-Louis, 1995, 561p.

Dillemans, R. (ed.) *Rechtsgids*, Ghent, Story Scientia (now: Antwerp, Kluwer), since 1982, looseleaf (almost complete systematic and synthetic work of reference).

Interuniversitaire Commissie Juridische Verwijzingen en Afkortingen, *Juridische verwijzingen en afkortingen* (Citations and abbreviations in law), Deurne, Kluwer Rechtswetenschappen, 3rd ed., 1997, 203 p. This is an official list, drafted for the first time in 1979 on behalf of the Flemish law faculties, with the collaboration of some of the main law journals and publishing houses. It contains all abbreviations and ways of citing and quoting all kinds of Belgian, European, and some international legal institutions and publications. It has

⁴⁸ Practical information, offered by the *Royal Federation of Belgian Notaries* is available on Internet: www.notaris.be (in Dutch) and www.notaire.net (in French).

become the standard for legal writing, used in legal education, and, with very few exceptions, in law journals and books published in Flanders. There is no counterpart for the French-speaking part of Belgium.

Malliet, C., *Elementaire Bibliografie Belgisch Recht* (Elementary Bibliography of Belgian Law), Ghent, Mys & Breesch, regularly updated (last edition: 1996), lists a selection of books on Belgian law, divided per branch of law, including publications in English and German. This bibliography is also available on the Internet; for the English language publications, see: <http://www.law.kuleuven.ac.be/lib/ebbr/engels.htm>.

Van De Kerchove, M., (ed), *L'interprétation en droit. Approche pluridisciplinaire*, Brussels, Publications des Facultés Universitaires Saint-Louis, 1978, 588 p.

Van Hoecke, M., *De interpretatievrijheid van de rechter*, Antwerp, Kluwer Rechtswetenschappen, 1979, 432 p.

Van Hoecke, M., and Bouckaert, B., *Inleiding tot het Recht*, Leuven, Acco, 15th ed., 1999, 383 p. (overview of Belgian constitutional law, European institutions, the law of civil procedure, and civil law).

Van Hoecke, M., and Warrington, M., 'Legal Cultures, Legal Paradigms and Legal Doctrine: Towards a New Model for Comparative Law', *The International and Comparative Law Quarterly*, 1998, 495-536.

Verbeke, Ch.F., 'Belgian Law: Bibliographic Guide to Reference Materials, 1830-1990', 20 *International Journal of Legal Information*, 1992 No. 2, 133-154