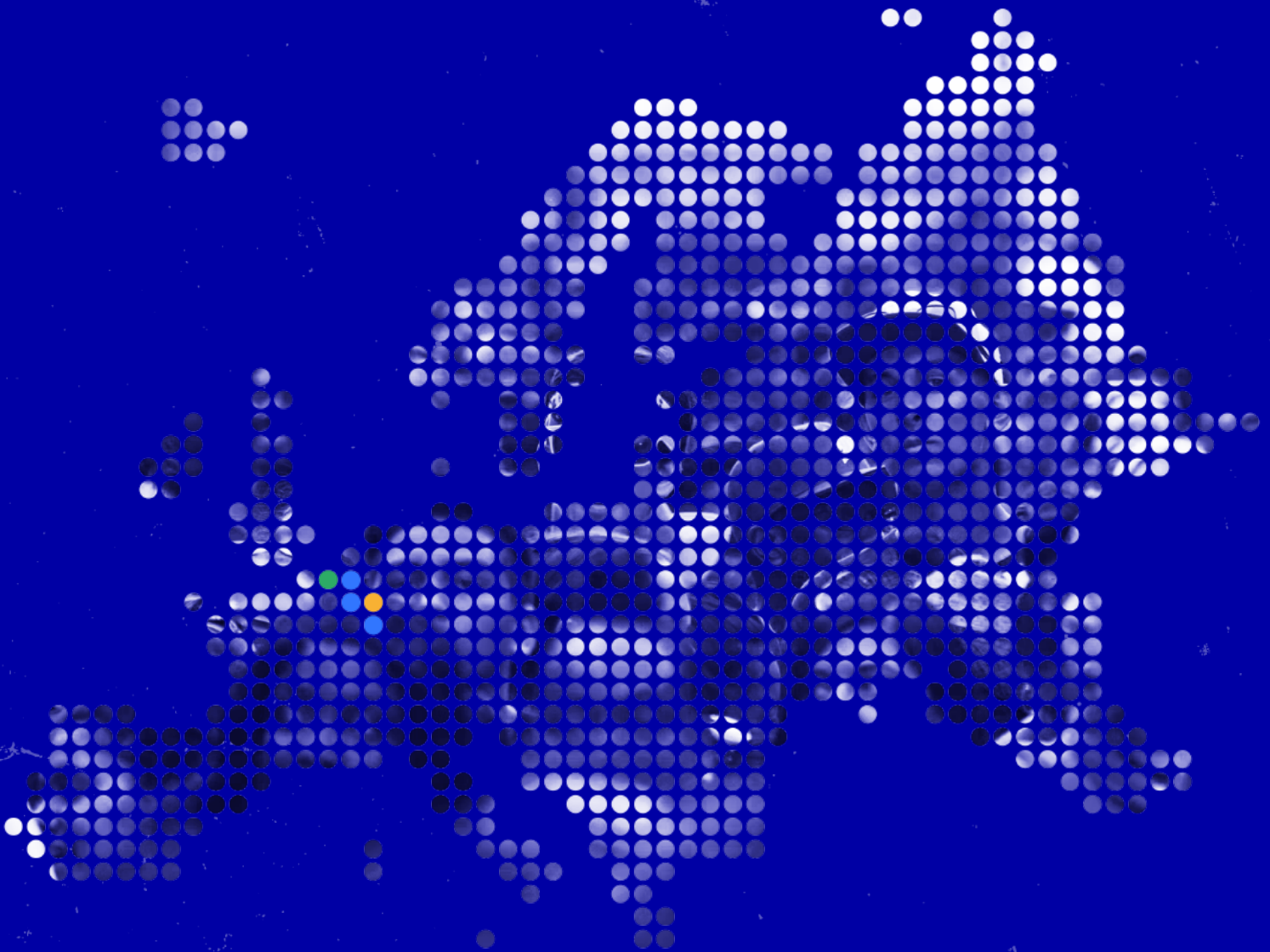


LIBERTIES RULE OF LAW REPORT 2022

BELGIUM



Foreword

This country report is part of the Liberties Rule of Law Report 2022, which is the third annual report on the state of rule of law in the European Union (EU) published by the Civil Liberties Union for Europe (Liberties). Liberties is a non-governmental organisation (NGO) promoting the civil liberties of everyone in the EU, and it is built on a network of national civil liberties NGOs from across the EU. Currently, we have member and partner organisations in Belgium, Bulgaria, the Czech Republic, Croatia, Estonia, France, Germany, Hungary, Ireland, Italy, Lithuania, the Netherlands, Poland, Romania, Slovakia, Slovenia, Spain and Sweden.

Liberties, together with its members and partner organisations, carries out advocacy, campaigning and public education activities to explain what the rule of law is, what the EU and national governments are doing to protect or harm it, and to gather public support to press leaders at EU and national level to fully respect, promote and protect our basic rights and values.

The 2022 Report was drafted by Liberties and its member and partner organisations and covers the situation in 2021. It is a ‘shadow report’ to the European Commission’s annual rule of law audit. As such, its purpose is to provide the European Commission with reliable information and analysis from the ground to feed its own rule of law reports and to provide an independent analysis of the state of the rule of law in the EU in its own right.

Liberties’ report represents the most in-depth reporting exercise carried out to date by an NGO network to map developments in a wide range of areas connected to the rule of law in the EU. The 2022 Report includes 17 country reports that follow a common structure mirroring and expanding on the priority areas and indicators identified by the European Commission for its annual rule of law monitoring cycle. Thirty-two member and partner organisations across the EU contributed to the compilation of these country reports.

Building on the country findings, the 2022 Report offers an overview of general trends on the rule of law in the EU and compiles a series of recommendations to national and EU policy makers, which suggest concrete actions the EU institutions and national governments need to take to address identified shortcomings.

[Download the full Liberties Rule of Law Report 2022 here](#)

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Belgium

About the authors



For over a hundred years, the **Ligue des Droits Humains (LDH)** (League of Human Rights) has fought injustices and infringements of fundamental rights in Belgium. LDH educates the public to the respect of basic human rights (including institutional violence, access to justice, respect for minorities, women's rights), challenges the political powers on issues concerning human rights, trains adults on awareness over human rights issues and the law, and brings issues regarding the development of educational tools and training to the attention of education stakeholders. Born in 1901, the League of Human Rights is a non-profit, independent, pluralistic and interdisciplinary organization. It is a movement in which everyone feels concerned and acts with respect for the dignity of all. LDH works on subjects such as youth, prisoners' rights, migrant and refugee's situation and rights, access to justice, economic, social and cultural rights, psychiatric patient's rights, equal opportunities, privacy and diversity. LDH is also a member of the International Federation for Human of Human Rights (FIDH), a non-governmental organization with 192 leagues worldwide.

Key concerns

In the area of justice, no significant progress was made on existing concerns and no major reform seems to be planned by the federal government. Among the most pressing issues affecting judicial independence, it is worth noting how the composition of the Constitutional Court makes it vulnerable to political pressure. The recent disclosure of the informal practice of cooperation between the public prosecutor's office and judges of the Court of Cassation ahead of judgments being handed down also raises concern. Despite some improvements in recent years, the legal aid system remains inadequate and acts as a barrier to access to justice, especially for the most vulnerable. The shortage of resources which characterises the justice system has a negative impact on access to justice, on the independence of judges and on the fairness and efficiency of justice, notably for its consequences on the length of proceedings. While the COVID-19 pandemic expedited plans to digitalise the justice system, there are concerns as to the respect of fair trial and data protection standards with respect to the use of videoconferencing. In the area of criminal justice, the excessive use of pre-trial detention affects the fairness of proceedings and impacts particularly people belonging to minority groups. The accessibility of court decisions is still hindered by the fact that a 2019 law providing for decisions to be published online in a database accessible to every citizen remains, to date, unimplemented.

No significant progress has been made or is planned to be made to strengthen the anti-corruption framework, either. The lack of resources and a certain political reluctance hinders the authorities' capacity to effectively investigate and prosecute corruption, in particular financial crime. The legal framework for the protection of whistleblowers is not in place to date, and the treatment of the whistleblowers who recently denounced the dysfunctions of the Data Protection Authority – dysfunctions which triggered the European Commission to start an infringement procedure – is at odds with Belgium's obligations under the EU Whistleblowers Protection Directive.







As regards media freedom and freedom of expression, it is concerning that police forces seem to be reluctant to abide to legal standards on the respect of freedom of expression and information, and engage instead in intimidation, destruction of journalistic material, arrest or even prosecution of journalists and citizens filming police interventions.

Despite steps taken to ensure legality of measures restricting fundamental rights and freedoms adopted in the context of the COVID-19 pandemic, concerns over the necessity and proportionality of such measures persist, and triggered the scrutiny of courts. Limitations on the independence of human rights monitoring bodies and the pursuit of arms sales to states that massively violate human rights, which persist in a total lack of transparency and in violation of final court decisions, are worrying trends negatively affecting the system of checks and balances, which worsened in 2021.

The repeated acts of repression of freedom of assembly and the persistent failure to respect the case law of the Court of Justice of the EU as regards “data retention”, against the background of blanket surveillance of citizens, are worrying practices that severely restrict civic space. Limited access to information, legal harassment, smear campaigns by public authorities and the criminalization of solidarity also negatively affect the work of activists and rights defenders.

Prison overcrowding, incarceration of people with mental illnesses and police violence remain systemic human rights issues that are not taken seriously by Belgian authorities, thus negatively impacting on the national rule of law framework.


State of play

-  Justice system
-  Anti-corruption framework
-  Media environment and freedom of expression and of information
-  Checks and balances
-  Enabling framework for civil society
-  Systemic human rights issues

Legend (versus 2020)

Regression: 

No progress: 

Progress: 

Justice system -

Key recommendations

- The legitimacy of the right to access to justice should be forcefully reaffirmed and its application guaranteed through the legal aid system. This guarantee requires adequate funding and could be achieved through the establishment, in the long term, of a form of mutualisation of legal costs.
- The available data shows that the length of proceedings is particularly long in Belgium, which is a cause for concern. The lack of resources allocated to the justice system being the main reason, it is necessary to provide for massive investment in the judicial sector and give the judiciary control over the management of its budget.
- The use of videoconferencing does not guarantee the public nature of hearings, which is an essential democratic guarantee protected by the Constitution, and raises a number of questions in terms of data protection. It should therefore

not be a remedy to respond to the lack of investments in the justice system, even in times of pandemic.

Judicial independence

Appointment and selection of judges, prosecutors and court presidents

Half of the Constitutional Court judges must be ex-representatives of the Legislative power¹ and are designated by political parties, which leads to obscure, behind-closed-doors political negotiations and deals. Their nomination can therefore trigger political rivalry.² This situation is unacceptable to guarantee the independence of the Constitutional Court and should be remedied: all constitutional judges must be highly qualified professionals and nominated by the High Justice Council, like any other magistrate.

Significant developments capable of affecting the perception that the general public has of the independence of the judiciary

In recent proceedings before the European Court of Human Rights (ECtHR),³ the Belgian government openly mentioned the existence of a procedure within the Court of

1 See <https://www.const-court.be/en/court/presentation/organization>.

2 See among others https://www.rtf.be/info/belgique/detail_zakia-khattabi-le-mr-a-tente-de-marchander-ma-nomination-a-la-cour-constitutionnelle-contre-300-millions-d-euros?id=10516346 or https://www.rtf.be/info/article/detail_une-cour-la-particratic-et-madame-khattabi-philippe-walkowiak?id=10503368.

3 ECHR (3rd Ch.), 18 May 2021, *Manzano Diaz v. Belgium*.

Cassation, which is not provided for in the law, by which the Advocate General and the judge of the Court of Cassation would consult and cooperate on draft judgments prior to them being handed down, before the cassation hearing and in the absence and without the knowledge of the parties concerned and their lawyers. This would happen by means of practical arrangements that are not laid down in the law either.⁴ The very existence of this “entre-soi” on the subject of a draft judgment between a representative of the public prosecutor’s office and a judge at the Court of Cassation raises questions about the respect for the principle of the separation of powers and the rule of law. It is also in contradiction with ECtHR jurisprudence.⁵

Quality of justice

Accessibility of courts

Access to justice is a fundamental principle of the rule of law. Yet it remains complicated in Belgium, despite the fact that the Constitution expressly states that everyone has the right to legal aid, and that the legislator cannot infringe this right.⁶ The legal aid system was substantially modified in 2016.⁷ The reform is based on a suspicion of widespread, unsubstantiated abuse, and on the alleged irresponsibility of the poorest litigants and the lawyers accepting to defend them.⁸

On several occasions, the Constitutional Court has recognized that access to justice is too costly for many citizens and has annulled some of the provisions introduced by the reform.⁹ However, the reform remains in force in its other aspects and continues to discourage access to justice for the most vulnerable.¹⁰ The costs of the proceedings remain a barrier for many litigants.¹¹

4 Ibid., §§ 19-20.

5 See ECHR (G.C.), 30 October 1991, *Borgers v. Belgium* ; ECHR (G.C.), 31 March 1998, *Reinhard and Slimane-Kaïd v. France*.

6 Const., art. 23.

7 Act of July 6, 2016, amending the Judicial Code with respect to legal aid (M.B. 14-07-2016).

8 For more information, see the preparatory work of the law, House of Representatives, « A bill to amend the Judicial Code with respect to legal aid », May 4, 2016, DOC54 1819/001, pp. 4-6.

9 C.C., judgment n° 77/2018 of June 21, 2018.

10 LDH, “*Réforme de l’aide juridique: la Cour Constitutionnelle annule le ticket modérateur mais l’accès à la justice reste semé d’embûches* », on June 25, 2018.

11 For a comparison between legal costs and average household income, see LDH, « *La Cour Constitutionnelle annule la hausse des droits de greffe et reconnaît que l’accès à la justice était trop coûteux pour de nombreux citoyens* », June

It should be noted that some improvements can be observed over the years. For example, the thresholds for access to legal aid have been raised.¹²

Resources of the judiciary

For several years, various actors have been sounding the alarm about the lack of resources in the justice system. The judicial system is cruelly lacking in resources, which has detrimental consequences in practice. This lack of means is felt in three aspects.

On the human level, the legal framework establishing the number of judges is not respected,¹³ in many jurisdictions there is a serious lack of personnel.¹⁴ This lack of judges has, in some cases, led to the postponement and cancellation of hearings.¹⁵

Financially, justice is also undergoing budgetary restrictions. The year 2020 closed with a budget slightly below 2 billion euros.¹⁶ Since 2018, there have been denunciations of the way justice is treated. The justice budget represents 0.5% of GDP, and 0.7% of public spending. Since 2014, every year, a linear economy has been imposed on it. After 5 years, this represents a decrease of 10%. This way, the government does not give justice the means to properly carry out its missions.¹⁷

On the material level, some progress has been made in digitalizing the justice system, but this is still insufficient.¹⁸ The government is considering ambitious initiatives to be completed by 2025.¹⁹ These initiatives include the creation of a single online justice portal for citizens and businesses, the creation of a single case management system for all jurisdiction, etc.

14, 2021.

12 Act of July 31, 2020, amending the Judicial Code to improve access to legal aid by increasing the applicable income limits (M.B. 06-08-2020).

13 For example, at the French-speaking court of first instance in Brussels, the legal framework provides for 126 judges distributed among the different branches. In reality, there are only 106. M. Joris, "Justice: des juges à bout de souffle, des délais six fois plus longs", available [here](#), May 17, 2021.

14 This article lists the number of magistrates in each judicial district, C. Dath, "[La justice belge est surchargée: quels sont les temps d'attente dans les différentes cours d'appel](#)", May 9, 2019.

15 La Libre, « [Le manque de magistrats conduit à la suppression d'audiences](#) », October 4, 2018.

16 All data related to the justice budget can be found on the [Federal Public Service website](#).

17 A. Lismond-Mertes, "[On est occupé à casser le pouvoir judiciaire](#)", December 2018.

18 Opinion of the European Commission in its report on the state of law 2021 in Belgium, Document SWD(2021), of July 20, 2021, p. 4.

19 Belgian Government (2021), National Plan for Recovery and Resilience.

All in all, the means allocated to the justice system do not guarantee its independence.²⁰ The only constitutional and consistent power against the executive is the judiciary. However, successive federal governments considerably weakened it, which constitutes a danger for democracy as a whole.

Digitalisation

Due to the COVID-19 pandemic, the Minister of Justice prepared a ‘Covid bill’ in which it envisaged the abolition of oral hearings and the generalisation of written procedure in certain matters. In other matters, particularly criminal matters, hearings by videoconference would have become the norm.²¹ Though the minister had to back down following outraged reactions by civil society actors,²² he stated that his renouncement was only temporary.

The right to access to a judge must be concrete and effective, not theoretical or illusory. It is therefore necessary to create the conditions

that allow all courts to deliver justice in a humane manner and within a reasonable time. In certain matters, particularly in criminal matters, personal appearance is a fundamental right²³ recognised by the Constitutional Court.²⁴ The accused should therefore always be able to appear in person, assisted by his or her lawyer, unless he or she expressly waives this right. The use of videoconferencing poses a number of difficulties and does not appear to be an acceptable alternative to holding hearings.²⁵

Moreover, the use of videoconferencing does not guarantee the public nature of hearings, which is an essential democratic guarantee protected by the Constitution, and raises a number of questions in terms of data protection.

Geographical distribution and number of courts/jurisdictions (“judicial map”)

The lack of means from which the judicial system suffers impacts the geographical

20 Opinion of the President of the French Bar Association in an interview by L. Colart, “*Les avocats attaquent l’état fédéral en justice*”, April 12, 2019.

21 See <https://plus.lesoir.be/335503/article/2020-11-02/justice-la-videoconference-casse-tete-pour-la-nouvelle-loi-covid>.

22 See <https://www.liguedh.be/loi-covid-le-recours-generalise-a-la-procedure-ecrite-et-la-videoconference-contraires-a-une-administration-de-la-justice-humaine-efficace-et-respectueuse-des-droits-fondamentaux/>.

23 ECHR, 24 November 1993, *Poitrinol vs. France*, § 35 ; ECHR, 25 November 1997, *Zana vs. Turkey*, § 68.

24 C.C., judgment n° 76/2018, 21 June 2018.

25 Byrom, N. (2020). What we know about the impact of remote hearings on access to justice: a rapid evidence review. Briefing paper. London: Nuffield Family Justice Observatory/The Legal Education Foundation ; Shari Seidman Diamond, Locke E. Bowman, Manyee Wong, Matthew M. Patton, Efficiency and Cost: The Impact of Videoconferenced Hearings on Bail Decisions, 100 J. Crim. L. & Criminology 869 (2010). See also <https://www.brennancenter.org/our-work/research-reports/impact-video-proceedings-fairness-and-access-justice-court>.

distribution and the number of jurisdictions within our country. Several court buildings are in disrepair, and some court locations have had to be eliminated for budgetary reasons.²⁶ This decrease in the number of court locations constitutes an additional obstacle to access to justice.²⁷

Fairness and efficiency of the justice system

Length of proceedings

Significant data gaps remain with respect to the length of court proceedings. The available data show that the length of proceedings is particularly long, which is a cause for concern.²⁸ The lack of resources allocated to the justice system is one of the main reasons for the length of proceedings.²⁹ Indeed, as already explained above, the justice system lacks staff, an efficient computer system and a real

digitalization policy, which leads to numerous delays in the processing of cases.

This phenomenon is not recent; Belgium has already been condemned several times by the ECtHR for violation of the right to be tried within a reasonable time.³⁰ However, the judicial framework remains unchanged.

Respect for fair trial standards including in the context of pre-trial detention

In Belgium, the use of pre-trial detention of foreign nationals is described as a common practice that could be due to external pressure from different actors such as public opinion, the police and the media.³¹ A recent study by the National Institute of Criminalistics and Criminology³² shows that, among other things, a person born outside of Belgium is more likely to be detained, and even more so if he or she was born outside of Europe, regardless of whether or not he or she is domiciled

26 Testimony of the President of the magistrates' union association in the article of M. Akutu, "*Les conséquences du sous-financement de la justice*", available on , 2019.

27 Barriers to access to justice are identified in an article by the LDH, "*La justice pour toutes et tous, qu'en disent les partis?*", available on , May 24, 2019.

28 Opinion of the European Commission in its report on the state of law 2021 in Belgium, *op. cit.*, p.2.

29 For example, it takes 39 months for a dispute between an employee and his employer to simply be settled in the Labour Court. This example taken from an interview with the President of the Labour Court of Brussels conducted by J. Balboni, available [here](#), November 5, 2021.

30 ECHR, J.R. v. Belgium, January 24, 2017. For a more recent case, see ECHR, *Brus v. Belgium*, September 14, 2021.

31 C. Tange, D. Burssens & E. Maes. (2021), *Un tiers des personnes en prison sont des prévenus : expliquer le recours à la détention préventive en Belgique - Une étude longitudinale*, Bruxelles, Institut National de Criminalistique et de Criminologie, p. 12

32 <https://incc.fgov.be/>

in Belgium. However, a person who is not domiciled in Belgium is twice as likely to be detained. This is explained by the concern of magistrates about the risk of absconding and evading justice. In this respect, foreign nationality increases the possibility of being held in pre-trial detention as well as the duration of this detention.

These findings echo the ones of the UN Committee on the Elimination of Racial Discrimination, which “remains concerned (...) about (...) [r]eports that non-citizens are overrepresented in the prison system and the lack of reliable data on the national or ethnic origin of the persons concerned and the rate and length of imprisonment”.³³

Regarding pre-trial detention, it is to be noted that preventive detention should be thoroughly reformed in order to limit its use to solely the most serious crimes and offenses. Indeed, the Act of 20 July 1990 on preventive detention³⁴ is not respected or properly applied. This leads to a worrying trend: 35 to 40 per cent of the detainees in Belgian prisons are in fact held in preventive detention. There is an urgent need to reform this legislation in order to limit

the excessive use of preventive detention, in particular by limiting the offenses which may justify preventive detention (offenses against persons, increasing the threshold of the penalty allowing the use of preventive detention, etc.).

Quality and accessibility of court decisions

As of September 1, 2020, all judgments and rulings rendered by Belgian courts and tribunals were supposed to be published online in a database accessible to every citizen. This fundamental right goes beyond all commercial considerations and is guaranteed by a May 5, 2019, law, amending Article 149 of the Constitution.³⁵ However, this major democratic promise remains unfulfilled because, almost three years after its adoption, this law is not yet in effect.³⁶ Furthermore, neither the normative means nor the technical means that would enable it to be implemented have yet been specified. In view of the difficulties that lie ahead in this respect and the unpreparedness of the Belgian authorities, it is to be feared that the entry into force of this law will be postponed once again.³⁷

33 [Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twentieth to twenty-second periodic reports of Belgium](#), 21 May 2021, CERD/C/BEL/CO/20-22, § 26.

34 M.B. 14-08-1990.

35 Act of May 5, 2019 amending the Code of Criminal Procedure and the Judicial Code regarding the publication of judgments and rulings (M.B. 16-05-2019).

36 The coming into force of the above-mentioned law has been postponed from September 1, 2020 to September 1, 2022.

37 See <https://www.lesoir.be/401670/article/2021-10-23/carta-academica-sur-louverture-du-droit-et-de-la-justice-ou-en-est-ou-va-t> and <https://openjustice.be/2020/05/16/la-publication-online-des-decisions-de-justice-constats-durgence/>.

Anti-corruption framework –

Key recommendations

- Allocate the necessary resources (financial, human and legal) to allow an efficient fight against financial crime and corruption.
- Put in place comprehensive whistleblower legislation to protect whistleblowers, specifically mentioning the protection of civil servants.

Levels of corruption and investigation and prosecution of corruption cases

Belgium's corruption-related problems lie in the link that can be established between corruption and the lack of financial means

granted to the fight against financial crime.³⁸ This type of crime is a real problem in a lot of countries, and Belgium is no exception: a lot of money disappears from the state's coffers.³⁹

However, several actors in the field denounce the timidity of political actions in the fight against financial crime. Indeed, investigations are confronted with obstacles, not only because of a lack of legal and material means, but also because of political obstacles.⁴⁰ For several years now, the fight against financial crime has produced very poor results.⁴¹ In spite of this shortfall, the government does not seem to want to include in its agenda an increase in means or a reform to fight against this type of delinquency.

Some judicial actors believe that beyond a lack of political will, there is rather a political will not to tackle economic and financial delinquency.⁴² One of the reasons could be that the political, economic and bureaucratic worlds are closely intertwined. Therefore, political

38 For more information on corruption in Belgium, see the evaluation of the Group of States on Corruption (GRECO).

39 For an estimate of the losses for the Belgian state, see the article of C. Dechamps, "*La fuite: enquête sur la fraude fiscale en Belgique*", July 4, 2019.

40 Numerous testimonies of magistrates specialized in financial crime are included in the article of L. Baudrihay-Gérard, "The Doubts: les magistrats belges face à la lutte contre la délinquance économique et financière", *Rev. Dr. Pén. Crim.*, 2017/2, p. 100.

41 For several years, the poor results of the fight against financial crime have been denounced. See in particular the report made on behalf of the Committee and the budget by Mr. Luk Van Biesen, Belgian House of Representatives, hearing of the College of Public Prosecutors General on the problem of the follow-up of judicial files on tax fraud and money laundering of 24 Mars 2014, *Doc. Parl.*, Ch., n°53-3481/001, p. 3.

42 This belief emerges from the interviews conducted by L. Baudrihay-Gérard, *op. cit.*, pp. 119-120.

representatives may not act because they are themselves “corrupt”.⁴³

Unfortunately, we lack reports that clearly highlight this possible connection between corruption and the lack of resources allocated to the fight against financial crime.

Framework to prevent corruption

Measures in place to ensure whistleblower protection and encourage reporting of corruption

As early as November 2020, the European Commission was alerted, through a complaint by two of its directors, of breaches of independence of several members of the Belgian Data Protection Authority (DPA), in violation of Article 52 of the General Data Protection Regulation (GDPR). Belgium was then invited in August 2021 to take corrective measures. As Belgium has not put an end to those breaches of the DPA’s independence, as the members concerned remained in function, the European Commission decided to send

a reasoned opinion to Belgium in November 2021.⁴⁴ Consequently, Belgium had to, before January 12, 2022, take the necessary measures, failing which the Commission may decide to refer the matter to the Court of Justice of the European Union.

Not only did Belgium fail to respect its obligations in that matter,⁴⁵ it also decided to initiate a procedure aiming at firing both the whistleblowers, Ms. Alexandra Jaspar and Ms. Charlotte Dereppe. Both having alerted the Parliament on multiple occasions about the dysfunctions of the DPA, such a procedure in their regard is tinged with a potential violation of the protection due to whistleblowers under the Directive (EU) 2019/1937, not yet transposed into Belgian law.

As the EU Commission puts it in its 2020 Rule of Law country report about Belgium: *“Comprehensive whistleblower legislation has not yet been put in place. The government agreement provides for the adoption of comprehensive rules to protect whistleblowers, specifically mentioning the protection of civil servants who, in good faith,*

43 Opinion of Michel Claise, investigating judge specialized in the fight against financial crime, interview conducted by M. Benayad and F. Mathieu, “Michel Claise, juge d’instruction à Bruxelles: nous sommes dans un pays corrompu, c’est quelque chose d’épouvantable”, available on , September 24, 2021.

44 EU Commission, Data Protection: Commission sends a reasoned opinion to BELGIUM for lack of independence of its Data Protection Authority, 12 November 2021: https://ec.europa.eu/commission/presscorner/detail/en/inf_21_5342.

45 See <https://www.liguedh.be/wp-content/uploads/2022/01/2022.01.11-Lettre-commission-UE.pdf> and <https://www.lesoir.be/418065/article/2022-01-14/pourquoi-le-probleme-de-non-independance-de-lapd-est-loin-detre-regle>

blow the whistle on wrongdoing before the end of 2021”.⁴⁶ It is still the case in 2022.

Media environment and freedom of expression and of information ↓

Key recommendations

- Guarantee the right to film and to take photographs of law enforcement interventions.
- Prevent all lawsuits and prosecutions against journalists and citizens for simply filming the police.
- Prohibit the detention of journalists and citizens for simply filming the police.

Safety and protection of journalists and other media activists

Frequency of verbal and physical attacks

Verbal abuse against journalists from police forces is not uncommon in Belgium. In some cases, obstacle to the exercise of their profession or even illegal arrests took place. In its analysis, Reporters Without Borders notes that the situation of journalists and press freedom remains worrying. It cites as an example the case of a reporter who was pushed around, arrested and threatened by police officers, despite presenting his press card, during a Black Lives Matter demonstration.⁴⁷ It is not an uncommon situation.

In that framework, the association of professional journalists also condemned on several occasions acts of police violence against journalists.⁴⁸

It is not unusual in Belgium to see complaints filed against police officers who have administratively arrested journalists, and who have seized and erased the images taken by

46 Opinion of the European Commission in its report on the state of law 2021 in Belgium, Document SWD(2021), of July 20, 2021, p. 9.

47 Reporter Without Borders, opinion on Belgium, available on <https://rsf.org/fr/belgique>. For more information on this case, see <https://www.rtbef.be/article/intimidations-de-journalistes-par-la-police-l-ajp-ouvre-un-dossier-de-plainte-10517526>.

48 The Professional Association of Journalists publishes various articles on its website in which it denounces police violence against journalists.

the cameras.⁴⁹ These complaints are eventually successful, as the Belgian courts respect the jurisprudence of the European Court of Human rights and the EU Court of Justice, which recognize that the role played by the media is of particular importance. The courts state that the media's presence guarantees that the authorities can be held accountable for their behavior towards the public in general.⁵⁰

However, police forces seem to ignore this state of play. Since a few years, following several well-documented incidents of questionable, even illegitimate, police action against both professional journalists and citizens, the issue of the right to film law enforcement agencies has been omnipresent in various events, whether on a large scale (Extinction Rebellion

demonstration and intimidation of national television journalists,⁵¹ Black Lives Matter demonstration and intimidation of a journalist from Agence France Presse,⁵² to name but a few examples) or in everyday life (intimidation of a journalist filming an arrest in the context of compliance with containment standards⁵³).

While the work of journalists in providing information is more necessary than ever, it is also under threat. Indeed, abusive arrests of journalists are also denounced in our country.⁵⁴

In December 2021, a Brussels civil court convicted the Belgian state for the arrest of two journalists reporting on a peaceful demonstration, stating that this arrest is “*a clear violation*

49 See for example the case of the members of ZinTV and the ATTAC collective who filed a complaint against police officers for the reasons stated. In January 2021, the police officers were convicted for theft of use and illegal erasure of video data by the correctional court of Brussels. For more details, see <https://bx1.be/communes/bruxelles-ville/deux-policiers-qui-avaient-pris-la-camera-des-journalistes-de-zin-tv-coupables-de-vol-dusage/> and <https://www.alterechos.be/shoot-or-dont-shoot/>.

50 ECHR, case *Pentikäinen v. Finlande*, October 25, 2015, § 89; CJEU, February 14, 2019, *Buivids vs. Latvia*, Case C-345/17.

51 See https://www.rtb.be/info/inside/detail_extinction-rebellion-pouvait-on-filmer-les-arrestations-par-la-police?id=10355443. During this demonstration, Olivier de Schutter, UN Special Rapporteur on extreme poverty and human rights and professor at the Catholic University of Leuven, was molested and gassed in the face while peacefully addressing the police. He had been invited by the organizers to give a speech at the event (see <https://www.lesoir.be/253441/article/2019-10-13/enquete-sur-les-violences-policieres-lencontre-dextinction-rebellion> and <https://www.lecho.be/economie-politique/belgique/bruxelles/extinction-rebellion-olivier-de-schutter-gaze-au-visage-raconte/10171416.html>).

52 See above.

53 See <https://www.dhnet.be/regions/bruxelles/policiers-filmes-en-pleine-arrestation-a-bruxelles-pourquoi-le-policier-sur-cette-video-a-tort-5f3cf8acd8ad5862199ac26>.

54 The Association of Professional Journalists and the RTBF (national media group) denounce the abusive arrests of journalists in the article “*L’APJ et la RTBF dénoncent l’arrestation abusive de journalistes*”, June 20, 2018.

*of the fundamental right to freedom of expression of journalists”.*⁵⁵

Recently, the UN Committee against torture (CAT) issued a recommendation to Belgian authorities stating that “*The State party should (...) Enhance training for the police on the use of force, techniques intended to prevent violence from escalating, respect for fundamental freedoms, including in connection with the filming of police interventions, and the obligation for police officers to identify themselves and explain their actions.*”⁵⁶ The Court of Justice of the EU (CJEU) has also clearly established rules protecting journalists and citizens in this framework.⁵⁷

Unfortunately, Belgian authorities seem to stay deaf to this appeal. Proof is the recent opinion by the Supervisory Body for Police Information, which sheds doubt on the well-established right of citizens and journalists to film police action.⁵⁸

Lawsuits and prosecutions against journalists and safeguards against abuse

The “Don’t shoot” trial highlighted the tensions between the police and the media. The trial originated from a complaint filed by police officers and a police body (police zone of Brussels-Capital – Ixelles) against a photo exhibition describing police interventions in the public space.⁵⁹

This exhibition was organized by civil society actors and professional photographers. The police zone and police officers complained about an infringement of the right to image, honor and reputation because they were identifiable in some photos. The court of first instance of Brussels was able to recognize the undeniable journalistic and educational vocation of the exhibition and the importance of the subject of general interest that constitutes the denunciation of police violence.⁶⁰

55 See <https://www.lesoir.be/414275/article/2021-12-23/arrestation-de-journalistes-en-reportage-au-127-bis-la-police-condamnee>.

56 UN Committee against torture, *Concluding observations on the fourth periodic report of Belgium*, 25 August 2021, CAT/C/BEL/CO/4, § 12.

57 CJEU, February 14, 2019, *Buvirds vs. Latvia*, Case C-345/17.

58 Organe de contrôle de l’information policière, *Avis d’initiative concernant les situations dans lesquelles des citoyens filment des interventions de police et concernant la protection des données à caractère personnel et de la vie privée des fonctionnaires de police à l’égard de tiers pendant l’exécution de leurs missions policières*, 22 November 2021, https://www.organedecontrol.be/files/DD200025_Avis_dInitiative_F_SIGN%C3%89_00045750.pdf.

59 The photos and videos selected were intended to illustrate the repression of freedom of expression, the increasing criminalization of social movements and the increasingly blatant impossibility of being able to photograph the police during these events without being arrested and confiscated or destroying the equipment.

60 For a more detailed analysis of the ruling, see the LDH article « *Procès “Don’t Shoot”: la justice confirme le droit de diffuser des images non floutées de la police* », November 9, 2019.

This trial illustrates the position of our national jurisdictions on the importance of the role of journalists. It also constitutes a worrying threat to the freedom to inform. This lawsuit comes at a time when abusive limitations on the work of the press are increasing, whether through legal action or through the prohibition to take pictures in the field.⁶¹ This type of lawsuit is also worrisome in that it may discourage media outlets or individuals who legitimately wish to publish a photograph or video reporting on police actions.

Despite the court's decision, the media support and the clear standards set by the CJEU, the police zone decided to introduce an appeal against this decision, putting pressure on the organizers of this photographic exhibition. And, through them, on all journalists covering police interventions.

Freedom of expression and of information

Access to information and public documents

In 2021, two newspapers teamed up to lead a project over transparency of local authorities.⁶² They conducted a survey of 281 Walloon and Brussels municipalities to see if it was possible for a citizen to obtain precise information before each municipal council. The verdict: no, in the vast majority of cases. It constitutes a breach of Art. 32 of the Belgian Constitution, which guarantees the right to transparency of public powers and therefore can constitute an important tool in the fight against corruption.

On another level, the Federal Commission for Access to Administrative Documents (CADA)⁶³ is no longer functioning at all. The reason for this is that the royal decree appointing its members, which must be issued every four years, has still not been renewed. The last one dates from June 22, 2017. However, there is no provision for members to extend their mandate until they are renewed. The president of the CADA managed to keep its work going for part of the summer 2021, in line with the continuity of public services. But since 1

61 Opinion of M. Simonis, Secretary General of the Association of Professional Journalists and R. Gutiérrez, Secretary General of the European Federation of Journalists in the article "*Carte blanche: Quand la police menace le droit d'informer*", October 1, 2019.

62 See <https://www.lesoir.be/401758/article/2021-10-21/les-communes-wallonnes-devront-se-montrer-plus-transparentes>.

63 See <https://www.ibz.rn.fgov.be/fr/commissions/publicite-de-ladministration/presentation-de-la-commission/>.

September 1, 2021, the Commission has been inoperative.⁶⁴

See also developments below about the transparency of administrative decisions in the framework of arms exportation.

Checks and balances

Key recommendations

- Ratify the OPCAT as soon as possible and establish a national prevention mechanism with adequate legal, financial and human resources to ensure effective, independent and impartial external monitoring of all places where people are deprived of their liberty, in accordance with the OPCAT requirements.
- Ensure the independence of human rights monitoring bodies, such as the Permanent Control Committee of the Police Services (Committee P), the Supervisory Body for Police Information and the Data Protection Authority (DPA), to ensure the effectiveness of the complaint's mechanisms, in

accordance with international recommendations.

- Guarantee the respect of fundamental rights as well as greater transparency in the issuing of licences for the export of arms to foreign countries by thoroughly amending the Walloon decree of June 21, 2012, on the import, export, transit and transfer of civilian arms and defence-related products.

Process for preparing and enacting laws

Transparency and quality of the legislative process, in particular in the context of the COVID-19 pandemic

As noted in the EU Commission 2021 report on the state of the rule of law in Belgium,⁶⁵ on March 31, 2021, the Brussels Court of First Instance ruled that the coronavirus measures taken by the federal government did not have a sufficient legal basis. After several unsuccessful appeals to the government, LDH and the Liga voor mensenrechten filed an action for interim relief against the Belgian state with the Brussels Court of First Instance. The purpose of this action was to challenge the legality of the management of the health crisis

64 See <https://www.levif.be/actualite/belgique/transparence-toujours-pas-de-baton-wallon/article-normal-1474361.html>.

65 Opinion of the European Commission in its report on the state of law 2021 in Belgium, Document SWD(2021), of July 20, 2021, p. 13.

by means of ministerial decrees and the use of a dubious legal basis to limit fundamental rights and freedoms.⁶⁶ Indeed, in view of the restrictions to fundamental freedoms imposed to fight the COVID-19 pandemic, a debate in the Parliament was essential. These measures have an undeniable impact on rights and freedoms and, even in a health or security crisis, the principles of the rule of law and legality must prevail. Beyond the formal requirements they set, these principles are the best guarantee of the democratic legitimacy of the measures adopted. However, the Belgian state didn't comply with these obligations for a long time, dealing with the pandemic through executive acts and ignoring advice of official bodies, such as the DPA, in the process.⁶⁷

The Brussels Court of Appeal finally overturned the decision of the Court of First Instance and rejected the application of the Leagues, finding that the measures did not *prima facie* appear to be manifestly illegal. The court found, however, that the process raised serious questions in terms of respect for fundamental rights, as enshrined in the Constitution and the European Convention on Human Rights. In particular, the Court of

Appeal questions the constitutionality of the laws that were invoked as the legal basis for the ministerial orders.⁶⁸ The Court of Appeal also considered that it was necessary to await the forthcoming ruling of the Constitutional Court as to whether the COVID-19 measures were adopted in full compliance with the Constitution and fundamental rights. This ruling is still awaited, as are several privacy-related cases in front of the Council of State.

The federal legislator finally adopted a law on the pandemic,⁶⁹ but it didn't prevent federal, regional and community governments from adopting measures highly questionable regarding the respect of fundamental rights and the rule of law.

On December 22, 2021, governments decided on a new set of measures to deal with the arrival of the new omicron variant. Among these measures, the cultural sector was particularly affected: theatres, concert halls and cinemas had to close their doors. This measure undermined the right to participate in cultural life and the rights of workers in the cultural sector. This was incomprehensible and unjustified considering the advice rendered by the

66 See <https://www.liguedh.be/suite-a-laction-introduite-par-la-ligue-des-droits-humains-et-la-liga-voor-mensen-rechten-letat-belge-est-condamne-a-adopter-un-cadre-legal-pour-encadrer-les-mesures-covid/> and <https://www.justice-en-ligne.be/L-Etat-a-trente-jours-pour-revoir>.

67 See for example <https://www.liguedh.be/applications-de-tracing-pour-la-ligue-des-droits-humains-la-vigilance-reste-de-mise/>.

68 See <https://www.liguedh.be/legalite-des-mesures-covid-la-cour-dappel-reforme-la-decision-du-tribunal-de-premiere-instance-le-recours-aux-arretes-ministeriels-nest-pas-manifestement-illegal-mais-pose-questi/> and <https://www.justice-en-ligne.be/Justice-et-mesures-COVID-pour-la>.

69 Act of August 14, 2021 on administrative police measures during an epidemic emergency (M.B. 20-08-2021).

group of experts commissioned by governments (GEMS): the closure of performing arts venues was not one of the measures they advocated. Therefore, the Council of State had to annul the contested measures.⁷⁰

Use of fast-track procedures and emergency procedures

As noted by the EU Commission, “*the Advisory Division of the Council of State continues to face difficulties in carrying out its mandate effectively. A lack of resources, in particular budgetary and human resources, continues to pose difficulties for the advisory branch. These difficulties, combined with the frequent use of shortened procedures, mean that the Council of State is in some cases unable to give an opinion on draft legislation. In addition, recent budgetary restrictions have made it even more difficult for the Advisory Division to carry out its mandate of ensuring the quality of legislation effectively*”.⁷¹ This assertion is particularly true regarding anti-pandemic pieces of legislation and is still true to this day.

Independent authorities

There are several bodies in Belgium that do not enjoy the independence required to carry out their missions.⁷²

First, Belgium signed in 2005 the Optional Protocol to the United Nations Convention against Torture (OPCAT), but it has not yet been ratified. Belgium has repeatedly announced its intention to ratify it, but to date, no law of assent has been published. In Belgium, there are various institutions responsible for reviewing places of deprivation of liberty, such as the Central Supervisory Board of Prisons (CCSP)⁷³ or, marginally, the Standing Police Monitoring Committee.⁷⁴ However, none of these bodies meets the international requirements for NPMs (national prevention mechanism). In practice, this means that there is no independent national preventive body responsible for monitoring places of deprivation of liberty, and that detainees are deprived of an external review of their rights. It is absolutely necessary that Belgium ratify the OPCAT as soon as possible and establish a preventive mechanism with adequate financial, human and legal means to ensure an effective, independent and impartial expertise consistent with its international obligations, as

70 Council of State, decision n° 252.564, 28 of December 2021.

71 Opinion of the European Commission in its report on the state of law 2021 in Belgium, Document SWD(2021), of July 20, 2021, p. 13.

72 For more information, see League of Human Rights, *Chiens de garde de la démocratie: mordants ou non?* Chronique n° 196, September 2021, .

73 See <https://ccsp.belgium.be/>.

74 See <https://comitep.be/index.html?lang=en>.

stated by the UN Committee against torture: *“The Committee (...) urges the State party to (...) [r]atify the Optional Protocol to the Convention as soon as possible, in order that the State party can establish or designate a national mechanism for the prevention of torture”*.⁷⁵

Secondly, the Standing Police Monitoring Committee (Committee P) has been criticized by many international organizations for its lack of independence, particularly because of the composition of its investigate department.⁷⁶ This department is composed of police officers from different units who are responsible for the work of law enforcement officials. Several recommendations suggest that the Belgian state should take appropriate measures to further strengthen the control and supervision mechanisms within the police. It is not new that Committee P and its investigation department are particularly targeted, as they should

be composed of independent experts recruited from outside the police.⁷⁷ In that regard, the independence of the Supervisory Body for Police Information also raises questions.⁷⁸

Finally, as already mentioned, the independence of the Data Protection Authority (DPA) can also be questioned. Several conflicts of interest can be observed within this institution, which could undermine its independence.⁷⁹ For instance, three members of the DPA are members of the civil service. However, according to the conditions of appointment defined in the law,⁸⁰ the members of this authority cannot be public officials. This creates a legal incompatibility, since the mandatary, as a principal, must be loyal to the executive branch for which he or she works.⁸¹ Another problematic example is a member of the DPA who is also a political staff member. Being employed in a political group is not

75 UN Committee against torture, Concluding observations on the fourth periodic report of Belgium, 25 August 2021, CAT/C/BEL/CO/4, § 18.

76 *“The Committee once more expresses its concern about the ineffectiveness of the inquiries carried out by oversight bodies, in particular the Investigation Service of the Standing Committee for Police Oversight (Committee P), which is made up of full members and members seconded from the police and is responsible not only for inquiries but also for identifying police failings and helping the police to remedy them, a situation that can give rise to a conflict of interests and undermine its impartiality”* UN Committee against torture, Concluding observations on the fourth periodic report of Belgium, 25 August 2021, CAT/C/BEL/CO/4, § 7.

77 See for instance UN Committee against torture, Final observations of the Committee against torture: Belgium, January 3, 2014, § 13,e (CAT/C/BEL/CO/3).

78 See above, the Media environment and freedom of expression and information chapter.

79 See above, the Anti-corruption framework chapter.

80 Act of December 3, 2017, establishing the Data Protection Authority (M.B. 10-01-2018), art. 38.

81 For further explanations and examples, see the letter to the speaker of the House of Representatives and the group leaders sent by the LDH, June 23, 2020.

compatible with the independence requirements for this authority.⁸² Furthermore, this double-hatting is not in line with the established case law of the CJEU, which establishes the incompatibility of holding an office subject to a political supervisory authority, with also holding an office with the data protection authority.⁸³ As a result, as already mentioned, the European Commission decided to send a reasoned opinion to Belgium in November 2021⁸⁴ and will likely prosecute the Belgian state for non-complying with its obligations.⁸⁵

These examples reflect various and serious problems of independence within certain institutions in Belgium.

Accessibility and judicial review of administrative decisions

Transparency of administrative decisions and sanctions

The granting of arms export licenses is subject to a severe lack of transparency on the part of the Walloon authorities. So much so that a petition to the Walloon Parliament has been launched by various associations to be heard on the lack of transparency and that the Parliament recently organized an hearing on the matter.⁸⁶

In fact, the Belgian state has signed and ratified the United Nations treaty on the arms trade.⁸⁷ However, it blithely violates this treaty – as well as European and Walloon law – by allowing arms exports to states involved in serious violations of international humanitarian law. The violations of these different rights are attested by the multiple suspensions by the Council of State of the decisions of the Walloon Minister-President to grant export

82 General Data Protection Regulation, art. 52.

83 For examples, see the judgment C-518/07, *European Commission v. Federal Republic of Germany*, March 9, 2010, and judgment C-614/10, *European Commission v. Republic of Austria*, October 16, 2012.

84 EU Commission, [Data Protection: Commission sends a reasoned opinion to BELGIUM for lack of independence of its Data Protection Authority](#), 12 November 2021.

85 See <https://www.liguedh.be/wp-content/uploads/2022/01/2022.01.11-Lettre-commission-UE.pdf>.

86 See <https://www.lesoir.be/418550/article/2022-01-17/armes-wallonnes-une-petition-pour-plus-de-transparence-defendue-au-parlement?> and <https://www.liguedh.be/armes-wallonnes-amnesty-la-cnapd-la-ldh-et-vredes-actie-deposit-une-petition-au-parlement-de-wallonie-pour-plus-de-transparence/>.

87 Arms trade Treaty of the United Nations. There is a particular interest in its article 7, which establishes a precautionary principle in the context of arms export.

licenses to Saudi Arabia to Walloon arms companies.⁸⁸

There have been numerous political declarations stating that the Minister will not grant licenses for new contracts to countries that commit serious violations of international humanitarian law or international human rights law.⁸⁹ In fact, these weapons are constantly found in countries that should be prohibited, which contradicts the statements of political representatives.⁹⁰

In order to put an end to this opacity, NGOs ask that the decisions to grant – or refuse – licenses, as well as the decisions of the Commission of Advice, competent to give counsel to the Walloon Minister-President, be made public; that the date provided in the government reports be standardized with those available to the customs authorities in order to

allow for a real readability of exports; that the frequency with which these reports are published be increased; and that the time limits for the publication of the reports be reduced in order to allow for an effective parliamentary and public control.⁹¹

Furthermore, it is of utmost necessity to review the composition of the Commission of Advice, to guarantee its independence. Indeed, the decree of June 21, 2012, on the import, export, transit and transfer of civilian arms and defence-related products⁹² has created a “Commission for advice on arms export licenses”, responsible for formulating reasoned and confidential opinions “at the request of the Government or on its own initiative”. Unfortunately, the advice it has produced remains secret and its composition is not independent, as a majority of its members directly depend from the Walloon authorities.⁹³

88 For the last one, see [Council of State, decision n° 249.991 of 5 March 2021](#): “*The Council of State suspends, under the extreme urgency procedure, the execution of four export licences for arms and defence-related material issued by the Walloon Region to Saudi Arabia. It considers that these licences are not adequately motivated with regard to the clear risk that the military technology or equipment whose export is envisaged will be used for internal repression or to commit serious violations of international humanitarian law in the context of the conflict in Yemen*”.

89 Région Wallonne, « Déclaration de politique régionale pour la Wallonie 2019-2024 », September 9, 2019, pp. 20-21.

90 More details are in the report of the [Walloon weapons observatory](#), May 26, 2020.

91 All the recommendations are included in the article of the LDH, « Armes wallonnes: Amnesty, la CNAPD, la LDH et Vredesactie déposent une pétition au Parlement de Wallonie pour plus de transparence », *op. cit.* See also the affirmation of the GRIP, « Valeur des licences en hausse, l’Arabie Saoudite reste n°1: décryptage du Rapport annuel 2018 sur les exportations d’armes wallonnes », available [here](#).

92 M.B. 05-07-2012.

93 Among the 8 members of the Advisory Committee on Arms Export Licences, 5 are members of the Walloon administration, including its president (https://www.liguedh.be/wp-content/uploads/2020/09/observatoire_des_armes_wallonnes_-_3e_me_e_dition.pdf).

Therefore, it is essential to guarantee greater transparency by thoroughly amending the Walloon decree of June 21, 2012.

Implementation by the public administration and State institutions of final court decisions

As mentioned in the previous section, the Walloon Region has been granting export licenses for arms and defence material to Saudi Arabia. NGOs have been successfully challenging in court those decisions, but the Walloon authorities stubbornly persists to grant those licenses, in blatant contradiction with the UN, EU and regional rules. These licences, which had been suspended by the Council of State in March 2020 and August 2020, were again readopted in February 2021. It is becoming really urgent that the Walloon Region understands that its decisions concerning the granting of arms export licenses to Saudi Arabia are simply unjustifiable under international and Wallonian law.

Enabling framework for civil society

Key recommendations

- Guarantee freedom of assembly and freedom of expression by imposing clear engagement rules to

police forces in cases of pacific demonstrations and by prosecuting every infringement to the exercise of these freedoms.

- Refrain from prosecuting civil society actors when they express legitimate concerns and claims about Belgium's human rights situation.
- Strictly respect the CJEU jurisprudence in the "data retention" case by forbidding blanket surveillance of citizens and by limiting exceptions to the strictly necessary cases, providing sufficient safeguards are put in place.

Regulatory framework

Freedom of assembly

Police made numerous arrests during demonstrations in 2021, which raised doubts about the authorities' recognition of the fundamental nature of the right to demonstrate. Concerns mounted in particular following a demonstration on January 24, 2021, in Brussels, in light the number of protesters arrested and the numerous testimonies indicating a disproportionate and illegitimate use of force in policing the demonstration.⁹⁴ This was the third rally in three months aimed at denouncing the worrying levels of police violence and the

94 For more information on this demonstration, see <https://dossiers.parismatch.be/les-casernes-de-la-honte/?ga=2.261101645.1310436169.1618985695-1664218201.1587652888>.

dysfunction of the justice system that police ended up excessively repressing in defiance of the law and fundamental rights.

The Police Act requires that the use of force by the police meets the criteria of proportionality, necessity and legitimacy. During three consecutive rallies (“Justice for Adil” in Anderlecht on November 27, 2020, “Justice for Ibrahima” in Saint-Josse on January 17, 2021, and “Against class and racist justice” on Sunday, January 24, 2021), many testimonies were received about the illegitimate nature of the use of force by the police, including as regards: disproportionate police measures and a lack of communication with demonstrators and passers-by, and even provocative, aggressive and intimidating behaviour towards them; non-respect for the right to demonstrate; arbitrary and violent arrests, particularly of minors, often racialised, accompanied by racist and sexist insults; violations of the right to film the police; disproportionate and illegitimate use of force during detention; and detention conditions that do not respect the rights of the detainees, many of whom are minors, nor the sanitary conditions.⁹⁵

These demonstrations reflect the tensions triggered by a more general context of repressive policing, which has become even tougher in recent months. LDH was specifically contacted by victims and relatives of victims

who took part in these three demonstrations. LDH examined these three demonstrations in particular because, in addition to the infringement of the right to demonstrate and the disproportionate police presence, the police manifested particularly violent attitudes (physical and psychological) against racialised people, which was documented in the public space and in the police premises. LDH is also concerned about the way social distancing and precautionary measures imposed on public gatherings in response to the COVID-19 pandemic are being abused to prevent citizens from demanding justice for victims of police violence and an end to police impunity, the arrest of a large number of minors and the persistence of ethnic profiling.

Access and participation to decision-making processes

As already mentioned, in 2021, two newspapers teamed up to lead a project over transparency of local authorities.⁹⁶ They conducted a survey of 281 Walloon and Brussels municipalities to see if it was possible for a citizen to obtain precise information before each municipal council. The findings indicated that this is not possible in the vast majority of cases. This constitutes a breach of Art. 32 of the Belgian Constitution, which guarantees the right to transparency of public powers and therefore

95 See <https://www.liguedh.be/quand-les-citoyen%C2%B7ne%C2%B7s-utilisent-leur-droit-de-manifester-pour-demontrer-les-violences-policieres-les-forces-de-lordre-repondent-par-la-violence/>.

96 See <https://www.lesoir.be/401758/article/2021-10-21/les-communes-wallonnes-devront-se-montrer-plus-transparentes>.

can constitute an important tool for the participation of civil society in public affairs.

Attacks and harassment

Legal harassment, including SLAPPs, prosecutions and convictions of civil society actors

As already mentioned, the “Don’t shoot” trial, which originated in a complaint by police officers and a police body (police zone of Brussels-Capital – Ixelles) against a photo exhibition describing police interventions in the public space,⁹⁷ highlighted existing tensions between the police, the media and civil society actors. The complaint was grounded in the claim of an alleged infringement of the right to image, honor and reputation because law enforcement officials were identifiable in some photos. The court of first instance of Brussels was able to recognize the undeniable journalistic and educational vocation of the exhibition and the importance of the subject of general interest that constitutes the denunciation of police violence.⁹⁸

This trial illustrates the position of our national jurisdictions on the importance of the role of journalists and civil society actors. It also constitutes a worrying threat to the freedom to inform and to the freedom of expression. This lawsuit comes at a time when abusive limitations on the work of the press are increasing, whether through legal action or through the prohibition to take pictures in the field.⁹⁹ This type of lawsuit is also worrisome in that it may discourage media outlets or individuals who legitimately wish to publish a photograph or video reporting on police actions.

Despite the court’s decision, the media support and the clear jurisprudence of the CJEU, the police zone decided to introduce an appeal against this decision, putting pressure on the organizers of this photographic exhibition. And, through them, on all journalists and civil society actors covering police interventions or expressing critical opinion on police actions.

In another case, the criminal court of Tournai ruled in January 6, 2022, the dismissal of charges against anti-racist activist Nordine Saïdi and his movement, Brussels Panthers, prosecuted for having opposed the racist

97 The photos and videos selected were intended to illustrate the repression of freedom of expression, the increasing criminalization of social movements and the increasingly blatant impossibility of being able to photograph the police during these events without being arrested and confiscated or destroying your equipment.

98 For a more detailed analysis of the ruling, see the LDH article « *Procès “Don’t Shoot”: la justice confirme le droit de diffuser des images non floutées de la police* », November 9, 2019.

99 Opinion of M. Simonis, Secretary General of the Association of Professional Journalists and R. Gutiérrez, Secretary General of the European Federation of Journalists in the article “*Carte blanche: Quand la police menace le droit d’informer*”, October 1, 2019.

folklore of what was called until 2018 “*La grande sortie des Nègres*” (sic).¹⁰⁰ Nordine Saïdi and the Brussels Panthers were prosecuted on the one hand for “threats” and on the other hand for “harassment”, all in a “terrorist context”, because he had sent two letters to the municipal authorities in 2018 asking for the cancellation of the traditional event.

The Tournai correctional court dismissed the charges, insisting on the legality of the motive and the means used, considered as not threatening to any reasonable person. As far as the plaintiffs are concerned, the court insists that Nordine Saïdi was indeed addressing the mayor and the political representatives in their capacity to act against negrophobic folklore. For the court, the two letters sent by the Brussels Panthers did not represent a threat, and the collective indicated that it wanted to raise awareness about racism. This case can be seen as an attempt to repress a legitimate political expression.

Furthermore, it seems that there was an instrumental use of justice: that this case has gone so far and that the resources of the police and judicial authorities have been mobilized for many months is in itself a serious concern.

Even if the outcome is positive, this case should never have reached a criminal court.

Smear campaigns and other measures capable of affecting the public perception of civil society organisations

On February 27, 2021, Philippe Pivin, deputy of the Federal Parliament, made comments about LDH and Police Watch, LDH’s Observatory of Police Violence, describing its publications as “a driver of social tensions” that “stirs up anti-police movements” and denounces “unacceptable comments”. As a result, he announced that he had asked the Minister of the Interior to “launch an investigation” and nothing less than an “early suspension of payments of public money” to Police Watch.¹⁰¹

These remarks, close to intimidation, echo those made on February 10, 2021, by Vincent Gilles, president of the SLFP Police, the country’s main police union, who claimed that LDH was composed of “ill-intentioned people” who aim to “destabilise our democracy and our State”.¹⁰² A few months earlier, the same union leader insulted the director of Amnesty International Belgium live on a national TV channel.¹⁰³ The violence of these

100 See <https://www.lesoir.be/416543/article/2022-01-06/annulation-de-la-sortie-des-negres-le-representant-du-collectif-antiraciste>.

101 N. Bensalem, « Philippe Pivin flingue l’observatoire des violences policières de la Ligue des droits humains : « c’est anti-policier ! » », DH Les Sports, 27 février 2021.

102 F. De Halleux, « Bashing pour déstabiliser la police... et l’Etat ! », *Sudinfo.be*, 10 février 2021.

103 See <https://www.lesoir.be/322287/article/2020-09-01/affaire-chovanec-le-president-dun-syndicat-policier-insulte-le-directeur>.

remarks raises questions: there is a hardening of the discourse of some police unions, which have an important weight in the functioning of the police and whose positions are relayed by the voice of some political representatives.

LDH is an association that has been defending and promoting fundamental rights for over 100 years. It is recognised for the rigour of its analyses, its strict independence from any political party or movement and its presence in the associative and militant sector. It covers many human rights issues, including police violence. Police Watch, its observatory on police violence, has three missions: to inform, to analyse and to act. This is why LDH has already met several times with police authorities to discuss the findings of Police Watch.

Criminalisation of solidarity

As it is the case in other EU countries, there is a trend in Belgium toward the criminalisation of solidarity, including the misuse of criminal law to target individuals defending the rights of refugees, asylum seekers and migrants.

For instance, in a highly publicised case, four individuals were prosecuted for providing minimal assistance in a human trafficking case after helping migrants cross into Great

Britain in 2017.¹⁰⁴ The prosecution accused them of having lent money or a telephone to migrants they were hosting at home, which they would have used to help other migrants reach Great Britain. Several defence lawyers jointly denounced it as a political trial, the intention of which was to dissuade people who come to the aid of migrants from doing so, by showing them what criminal proceedings they are exposed to. For them, the prosecution was turning this case into a “trial of solidarity”, by trying to convict Belgian citizens who only wanted to help destitute migrants, and to convict migrants themselves who wanted to help others get to Britain.¹⁰⁵ Fortunately, in May 2021, the Brussels Court of Appeal acquitted the four people who had sheltered migrants in 2017.¹⁰⁶

Despite the successful outcome in this particular case, it is necessary to publicly recognise, promote and commend the role of these organisations and individuals as human rights defenders and protect their legitimate activities, which include a wide range of solidarity actions.

Control and surveillance

In 2015, the Constitutional Court¹⁰⁷ annulled the law of July 30, 2013, amending Articles

104 See <https://www.justice-en-ligne.be/Proces-des-hebergeurs-hebergeurs>

105 See <https://www.rtf.be/article/bruxelles-l-arret-dans-le-dossier-dit-des-hebergeurs-de-migrants-sera-prononce-mercredi-10769051?id=10769051>.

106 See <https://www.lalibre.be/belgique/judiciaire/2021/05/26/acquittement-general-lors-du-proces-des-hebergeurs-de-migrants-F5AVRLF72BGSFPZLVSTTIZCZFA/>.

107 C.C., 11 June 2015, n° 84/2015.

2, 126 and 145 of the Act of 13 June 2005 on electronic communications and Article 90*decies* of the Code of Criminal Procedure (the so-called ‘Data Retention Act’)¹⁰⁸ transposing the European Directive 2006/24/EC,¹⁰⁹ which had itself been invalidated by the Court of Justice of the European Union in its Digital Rights judgment.¹¹⁰

This annulment was intended to put an end to the obligation imposed on telecommunications operators and Internet access providers to retain, for the purposes of combating serious crime, all traffic information concerning telecommunications users (also known as metadata).

Despite this first annulment, the Belgian state adopted new but similar legislation¹¹¹ which, although it did not have all the flaws of the first one, nevertheless imposed a systematic and massive collection of the metadata of people present on Belgian territory. Therefore, NGOs logically asked and obtained from the Constitutional Court the annulment of this legislative norm in 2021.¹¹²

The CJEU clearly established that the state may derogate from this prohibition of generalized surveillance, but only in the event of a serious threat to national security and provided that the retention of data is limited in time and to the extent strictly necessary, that sufficient safeguards are provided and that the control of access is in the hands of a court or an independent administrative authority.

Unfortunately, the Belgian federal government disregarded the clear indications provided by both national and international courts. Indeed, the first echoes from the Council of Ministers are far from reassuring: far from limiting itself to “repairing” the illegalities observed by the above-mentioned courts, the initial draft bill introduced a requirement relating to encrypted messaging applications aimed at making it possible to decrypt what is exchanged by certain users, at the request of law enforcement agencies and with the agreement of an investigating judge. In other words, service providers would have been obliged to “disable” encryption for certain users.¹¹³ However, the encryption of communications makes the information sent

108 M.B., 23-08-2013.

109 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, Official Journal of the European Union (ISSN 1725-2563), 13 April 2006, p. 54.

110 CJEU, 8 April 2014, *Digital Rights Ireland Ltd & Michael Seitlinger e.a.*, C-293/12 & C-594/12.

111 Act of 29 May 2016 on the collection and retention of data in the electronic communications sector, M.B., 18-07-2016.

112 C.C., 22 April 2021, n° 57/2021.

113 See https://www.rtf.be/info/belgique/detail_un-projet-de-loi-belge-menace-la-confidentialite-des-messages-cryptes?id=10858753.

with an application unreadable for people who are not the recipients of the message. Thus, the information that passes through an encrypted channel is scrambled, accessible only to those who are communicating with each other. This is an indispensable tool in a democracy, not only for certain specific professions (journalists, lawyers, etc.), but also for all individuals.

Faced with a strong reaction from civil society¹¹⁴ and the Data Protection Authority,¹¹⁵ the government was forced to backtrack and announced that it would no longer include this obligation in the draft bill in question. However, it appears that the executive has not completely abandoned this possibility in the future, which is extremely problematic.¹¹⁶

It should also be noted that, with regard to the other issues raised by the data retention reform, the draft bill in question has been the subject of a very critical and detailed opinion from the Data Protection Authority (DPA).¹¹⁷ The DPA notes that there are significant risks for the respect of fundamental rights, whether from the point of view of legality, necessity or

proportionality.¹¹⁸ It also notes, among other things, the fact that the preliminary draft does not provide for access to data to be always subject to prior control either by a court or by an independent administrative body which has the status of a third party in relation to the authority requesting access to the data, which is a European requirement.¹¹⁹

In view of the DPA's conclusions regarding this preliminary draft, the possibility of a new appeal to the Constitutional Court for annulment is far from hypothetical. Indeed, the DPA concludes with regard to the preliminary draft that *"It must be noted, however to note that the draft bill does not really bring about the change of perspective required by the case law of the CJEU and the CC. In its opinion, the Authority notes that the draft bill intends to impose new measures for the retention of traffic and location data which could lead to the de facto reintroduction of general and undifferentiated data retention obligations, while at the same time extending the possibilities of access to such data"*.¹²⁰

114 See Global Encryption Coalition, « [Open Letter: 107 organizations and cybersecurity experts call on the Belgian Government to halt legislation to undermine end-to-end encryption](#) », 28 September 2021, .

115 Data Protection Authority, Opinion n° 108/2021 of 28 June 2021, § 163.

116 See Council of Ministers, « [Retention of identification data and metadata in the electronic communications sector - Second reading](#) », [press release of 17 December 2021](#), which mentions that *"The government will study the possibility of supplementing the Electronic Communications Act or another law with a provision on access to the content of encrypted communications"*.

117 Data Protection Authority, Opinion n° 108/2021 of 28 June 2021.

118 *Ibid.*, pp. 71-75

119 *Ibid.*, §§ 153-155.

120 *Ibid.*, p. 76.

Disregard of human rights obligations and other systemic issues affecting the rule of law framework ↓

Key recommendations

- Belgium should put an end to the endemic prison overcrowding situation by developing alternatives to deprivation of liberty in case of conviction and by reviewing its penal policies to ensure that the prison sentence is the *ultimum remedium*.
- Belgian authorities should take the necessary measures to combat ill-treatment by the police effectively, including ill-treatment based on any form of discrimination, and punish the perpetrators appropriately. To do so, it needs to guarantee the independence of the Permanent Control Committee of the Police

Services (Committee P). It should also authorize filming or photographing police interventions.

- Put an immediate end to the incarceration of people with mental illnesses in prisons.

Systemic human rights violations

Widespread human rights violations and/or persistent protection failures

Prison overcrowding is endemic in Belgium and the resulting conditions of detention lead to inhuman or degrading treatment. As a result, the Belgian state faced several convictions of violations of Article 3 of the ECHR.¹²¹ The Belgian state was also sentenced by the national judicial order for endemic prison overcrowding of a Brussels establishment.¹²²

The Belgian state must comply with the requirements of international bodies in this field, in particular of the European Committee for the Prevention of Torture (CPT)¹²³ and of

121 ECHR, *Sylla and Nollomont vs Belgium*, 16 May 2017, req. n°37768/13 and 36467/14 ; ECHR, *W.D. vs. Belgique*, 6 September 2016, req. n°73548/13 ; ECHR, *Bamouhammad vs Belgium*, 17 November 2015, req. n°47687/13 ; ECHR, *Vasilescu vs Belgium*, November 25, 2014, req. n°68682/12 ; etc.

122 International Prison Observatory (OIP) - Belgian section, « The Belgian State responsible for prison overcrowding », January 17, 2019.

123 <https://www.coe.int/en/web/cpt> See in particular CPT, Report to the Government of Belgium on the visit in Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading

the High Commissioner for Human Rights of the Council of Europe,¹²⁴ by adopting a policy that does not involve the construction of new penal institutions. As also highlighted by the UN CAT, “*the State party must consider instituting alternative measures to detention rather than increasing prison capacity*”.¹²⁵ The CPT points out that “*It is important, however, that priority should continue to be given to reducing the prison population and controlling it to reasonable proportion [...]. This also requires ensuring that attention is not excessively given to the increase of the total capacity of the penal institution*”.¹²⁶

Prison expansion is a ploy, as many scientific studies have shown: the evolution of the prison population actually depends on the implemented criminal policies. In this regard, given the obvious failure of the criminal policy that has been deployed for decades and the largely counterproductive nature of freedom

deprivation in many cases, it is necessary to ensure that prison sentence is truly the *ultimum remedium*, both about preventive detention and the execution of sentences. This includes in particular the use of alternative sanctions. In that regard, the Belgian state should on the one end ensure the proper implementation of cooperation agreements between the federal state and the communities responsible for the enforcement of sanctions of unpaid work and electronic monitoring, on the other end by developing new alternatives (special confiscation, day fines, etc.), while remaining careful not to widen the criminal net.

Impunity and/or lack of accountability for human rights violations

There is a lack of accountability in Belgium as regards the illegitimate use of force by the police. In their recommendations to the

Treatment or Punishment (CPT) from 27 March to 6 April 2017, March 8, 2018, §§ 36 and seq. ; see also CPT, Report to the Government of Belgium on the visit in Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 28 September to 7 October 2009, July 23, 2010, § 79.

124 Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Belgium from 15 to 19 December 2008, June 17, 2009, CommDH(2009)14, p. 31, § 6.

125 UN Committee against Torture, « Concluding observations of the Committee against Torture – Belgium », November 21, 2008, CAT/C/BEL/CO/2, § 18.

126 CPT, Report to the Government of Belgium on the visit in Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 March to 6 April 2017, March 8, 2018, § 38.

Belgian state, the CPT,¹²⁷ the UN Human Rights Council¹²⁸ and the UN CAT stipulated, among other things, that “*The State party should take the necessary measures to combat ill-treatment effectively, including ill-treatment based on any form of discrimination, and punish the perpetrators appropriately*”.¹²⁹ More recently, the UN CAT has stated that “*recalling the recommendation contained in its previous concluding observations (...), the Committee calls on the State party to urgently conduct an independent and transparent investigation into the use of ill-treatment and the excessive use of force by the police, with a view to establishing the necessary prevention policies and strengthening internal and external oversight mechanisms*”.¹³⁰ The UN CERD, for its part, recommended that the Belgian

state “*[t]ake measures to ensure that prompt, thorough and impartial investigations are carried out into all racist incidents caused by or involving the police, ensure that those responsible for such acts are prosecuted and appropriately punished and provide adequate reparation to the victims*”.¹³¹ Despite this, allegations of ill-treatment by law enforcement officers continue to be made.

Reports and news over the last few years pointed to police violence as an acute problem in Belgium. Many documented cases of disproportionate use of force by police eventually resulted in the death of the persons arrested, without an adequate reaction from the judicial authorities.¹³² Similarly, many disproportionate police interventions resulted in the serious

127 CPT, « Report to the Government of Belgium on the visit to Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27th March to 6th April 2017 », 8th March 2018, §§ 12 ff. See also, CPT, « Report to the Government of Belgium on the visit to Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 18th to 27th April 2005 », 20th April 2006, §§ 11 and 12 ; CPT, « Report to the Government of Belgium on the visit to Belgium carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 28th September to 7th October 2009 », 23rd July 2010, §§ 13 ff.

128 UN Human Rights Council, Draft report of the Working Group on the Universal Periodic Review - Belgium, 11 April 2016, A/HRC/32/8, pt. 139.8 - 139.10.

129 UN Committee against Torture, ‘Concluding observations: Belgium’, 19 January 2009, CAT/C/BEL/CO/2, § 13.

130 UN Committee against torture, Concluding observations on the fourth periodic report of Belgium, 25 August 2021, CAT/C/BEL/CO/4, § 8.

131 UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twentieth to twenty-second periodic reports of Belgium, 21 May 2021, CERD/C/BEL/CO/20-22, § 14. (a).

132 To take up only the deaths in the hands of the police, see the ‘Bangoura’ case in *Le Soir*, ‘Mort de Lamine Bangoura : pas de renvoi en correctionnelle pour les 8 policiers’, 16 March 2021 ; ‘Barrie’ case in *Le Soir*, ‘Décès d’un jeune homme après son passage au commissariat de Saint-Josse : ce que l’on sait’, 11 January 2021 ; ‘Charrot’ case in *Le Soir*, ‘Affaire Adil : une plainte pénale déposée contre le parquet de Bruxelles’, 16 December 2020 ; ‘Chovanec’ case in *Le Vif*, ‘Chovanec : l’enquête sous enquête’, 10 September 2020 ; ‘Abbedou’ case in *Le Soir*,

interference with the fundamental rights of citizens peacefully demonstrating in the public space.¹³³ Measures adopted in the context of the public health emergency also amounted to numerous interferences with the fundamental rights of individuals.¹³⁴ In this context, the fact of being a minor or young adult did not protect individuals from disproportionate or even illegal police interventions,¹³⁵ nor did the fact of being in a particularly vulnerable situation due to one's administrative status.¹³⁶

Reactions by the Belgian authorities are limited and not commensurate with the seriousness of the phenomenon.

Follow-up to recommendations of international and regional human rights monitoring bodies

As already highlighted, Belgium has serious shortcomings in following-up recommendations of international and regional human rights bodies. Specifically for the year 2021, see the UN CAT recommendations,¹³⁷ the UN Committee on the Elimination of Racial

'Décès d'Ilyes Abbedou : chronologie d'une détention qui pose bien des questions', 25 January 2021 ; 'Kadri' case in *RTBF*, 'Anvers : la mort d'Akram à la suite d'une intervention policière suscite l'indignation sur les réseaux sociaux', 20 July 2020 ; 'Bouda' case in *Sud Info*, 'Mehdi, 17 ans, tué par un combi de police : sa famille pense demander des devoirs d'enquête complémentaires, 'on se battra pour se faire entendre', 8 October 2020 ; etc.

133 On the subject, see the analysis of Police Watch, the LDH's Observatory of Police Violence, « When citizens use their right to demonstrate to denounce police violence, the police respond with violence », 3 February 2021.

134 LDH, « Police Watch Report. Police abuses and lock-downs », June 2020.

135 See in this regard the report of the General Delegate for the Rights of the Child of the French Community, which states that « *The General Delegate is regularly questioned by young people, their families or front- and second-line professionals, making allegations of police violence, abusive and discriminatory identity checks or denouncing, more generally, intimidating or humiliating methods.* » in Délégué Général aux Droits de l'Enfant, « Rapports sur le Covid-19 et les activités 2019-2020 », p. 113.

136 In October 2018, Médecins du Monde published a survey on police violence against migrants and refugees in transit in Belgium, highlighting, among other things, the fact that almost 60 % of respondents said they had been confronted with police violence in the field (Médecins du Monde, « Police violence against migrants and refugees in transit in Belgium - A quantitative and qualitative survey », October 2018).

137 UN Committee against torture, Concluding observations on the fourth periodic report of Belgium, 25 August 2021, CAT/C/BEL/CO/4.

Discrimination¹³⁸ and the UN Human Rights Council.¹³⁹ A consistent number of those recommendations are reiterations of recommendations already made in previous reports, which remain not implemented.

Implementation of decisions by supranational courts

Data retention

As already mentioned in previous sections, the Belgian state continues to show reluctance in abiding to the CJEU jurisprudence in the “data retention” case.

Rights of detainees with mental health problems

The incarceration of people with mental illnesses in prisons must be ended: this recommendation has been made many times before and the Belgian authorities have been frequently condemned for this, even to the extent of a pilot ruling by the ECtHR.¹⁴⁰ This underlines once more the urgency of this issue. However, to date, and although the government seems to have become aware of the importance of this problem, in part by creating closed care facilities which are independent of prisons, the psychiatric annexes to prisons

do still exist and the law of May 4, 2016, on internment and various provisions relating to justice¹⁴¹ still allows patients to be sent there.

138 [UN Committee on the Elimination of Racial Discrimination, Concluding observations on the combined twentieth to twenty-second periodic reports of Belgium, 21 May 2021, CERD/C/BEL/CO/20-22.](#)

139 [UN Human Rights Council, Report of the Working Group on the Universal Periodic Review – Belgium, 14 July 2021, A/HRC/48/8.](#)

140 ECHR, *W.D. vs. Belgique*, 6 September 2016, req. n°73548/13.

141 M.B. 13-05-2016.

Contacts

Ligue des Droits Humains (LDH)

League of Human Rights

For over a hundred years, the Ligue des Droits Humains (LDH, League of Human Rights) has combated injustices and infringements of fundamental rights in the French Community of Belgium. LDH works on subjects such as: youth, prisoners' rights, migrant and refugees situation and rights, access to justice, economic, social and cultural rights, psychiatric patient's rights, equal opportunities, privacy and diversity.

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The Civil Liberties Union for Europe

The Civil Liberties Union for Europe (Liberties) is a non-governmental organisation promoting the civil liberties of everyone in the European Union. We are headquartered in Berlin and have a presence in Brussels. Liberties is built on a network of 19 national civil liberties NGOs from across the EU.

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