

***Le principe de subsidiarité : mise en œuvre nationale de la Convention européenne des droits de l'homme***

***Conférence du 4 mai 2023, Conseil de l'Europe, Strasbourg***

# **Les avantages du Réseau pour les Cours suprêmes nationales**

## **Le point de vue du Conseil d'Etat de Belgique**

Frédéric Gosselin

Conseiller d'Etat

Chargé de cours à l'Université libre de Bruxelles

Personne de contact du Réseau des Cours Supérieures pour le Conseil d'Etat de Belgique

1. L'information transmise aux juridictions  
suprêmes dans le cadre du RCS

# 1. Les *flash* de jurisprudence

# 1. Les *flash* de jurisprudence



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

Directorate of the Jurisconsult  
Direction du Jurisconsulte

## Case-Law Update<sup>1</sup> Grand Chamber

### **Ukraine and the Netherlands v. Russia**, nos. 8019/16, 43800/14 and 28525/20

Decision delivered on 25 January 2023, Grand Chamber

**Articles 1 and 35 § 1: exclusion from jurisdiction and the active phase of hostilities; relevance of non-domestic remedies in an inter-State case for the purposes of the six-month rule**

In its two inter-State applications, the Ukrainian Government alleges an administrative practice by Russia resulting in numerous Convention violations in the areas of Eastern Ukraine under separatist control. The inter-State application lodged by the Dutch Government concerns the downing of flight MH17. In its decision, the Grand Chamber held that Russia had effective control over all areas in the hands of separatists from 11 May 2014 and that the impugned facts fell within the spatial jurisdiction (*ratione loci*) of Russia within the meaning of Article 1, with the exception of the Ukrainian Government's complaint about the bombing and shelling of areas outside separatist control. The question of whether Russia had personal jurisdiction (State agent authority and control) over the latter complaint was joined to the merits. The Grand Chamber confirmed its *ratione materiae* jurisdiction to examine complaints concerning armed conflict. It dismissed the respondent Government's further preliminary objections (the alleged lack of the "requirements of a genuine application" (Article 33), non-exhaustion of domestic remedies and non-compliance with the six-month time-limit) and declared admissible: the Dutch Government's complaints under the substantive and procedural aspects of Article 2, Article 3 and Article 13 in respect of the downing of flight MH17; as well as the Ukrainian Government's complaints about an alleged administrative practice contrary to Articles 2, 3, 4 § 2, 5, 8, 9, 10 of the Convention and Articles 1 and 2 of Protocol No. 1, Article 2 of Protocol No. 4, as well as Article 14 of the Convention, taken in conjunction with

# 1. Les *flash* de jurisprudence



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

Directorate of the Jurisconsult  
Direction du Jurisconsulte

## Case-Law Update<sup>1</sup> Grand Chamber

### **Ukraine and the Netherlands v. Russia**, nos. 8019/16, 43800/14 and 28525/20

Decision delivered on 25 January 2023, Grand Chamber

**Articles 1 and 35 § 1: exclusion from jurisdiction and the active phase of hostilities; relevance of non-domestic remedies in an inter-State case for the purposes of the six-month rule**

In its two inter-State applications, the Ukrainian Government alleges an administrative practice by Russia resulting in numerous Convention violations in the areas of Eastern Ukraine under separatist control. The inter-State application lodged by the Dutch Government concerns the downing of flight MH17. In its decision, the Grand Chamber held that Russia had effective control over all areas in the hands of separatists from 11 May 2014 and that the impugned facts fell within the spatial jurisdiction (*ratione loci*) of Russia within the meaning of Article 1, with the exception of the Ukrainian Government's complaint about the bombing and shelling of areas outside separatist control. The question of whether Russia had personal jurisdiction (State agent authority and control) over the latter complaint was joined to the merits. The Grand Chamber confirmed its *ratione materiae* jurisdiction to examine complaints concerning armed conflict. It dismissed the respondent Government's further preliminary objections (the alleged lack of the "requirements of a genuine application" (Article 33), non-exhaustion of domestic remedies and non-compliance with the six-month time-limit) and declared admissible: the Dutch Government's complaints under the substantive and procedural aspects of Article 2, Article 3 and Article 13 in respect of the downing of flight MH17; as well as the Ukrainian Government's complaints about an alleged administrative practice contrary to Articles 2, 3, 4 § 2, 5, 8, 9, 10 of the Convention and Articles 1 and 2 of Protocol No. 1, Article 2 of Protocol No. 4, as well as Article 14 of the Convention, taken in conjunction with

- Date, nom et n° de requête
- Article de la Convention
- Résumé de l'affaire
- Intérêt : pourquoi un *Flash*?

# 1. Les *flash* de jurisprudence



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

Directorate of the Jurisconsult  
Direction du Jurisconsulte

## Case-Law Update<sup>1</sup> Grand Chamber

### **Ukraine and the Netherlands v. Russia**, nos. 8019/16, 43800/14 and 28525/20

Decision delivered on 25 January 2023, Grand Chamber

**Articles 1 and 35 § 1: exclusion from jurisdiction and the active phase of hostilities; relevance of non-domestic remedies in an inter-State case for the purposes of the six-month rule**

In its two inter-State applications, the Ukrainian Government alleges an administrative practice by Russia resulting in numerous Convention violations in the areas of Eastern Ukraine under separatist control. The inter-State application lodged by the Dutch Government concerns the downing of flight MH17. In its decision, the Grand Chamber held that Russia had effective control over all areas in the hands of separatists from 11 May 2014 and that the impugned facts fell within the spatial jurisdiction (*ratione loci*) of Russia within the meaning of Article 1, with the exception of the Ukrainian Government's complaint about the bombing and shelling of areas outside separatist control. The question of whether Russia had personal jurisdiction (State agent authority and control)

→ Compilé dans une *mail* mensuel à l'ensemble des magistrats du Conseil d'Etat belge

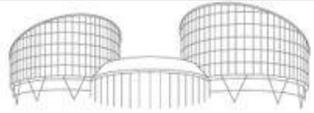
Government's further preliminary objections (the alleged lack of the "requirements of a genuine application" (Article 33), non-exhaustion of domestic remedies and non-compliance with the six-month time-limit) and declared admissible: the Dutch Government's complaints under the substantive and procedural aspects of Article 2, Article 3 and Article 13 in respect of the downing of flight MH17; as well as the Ukrainian Government's complaints about an alleged administrative practice contrary to Articles 2, 3, 4 § 2, 5, 8, 9, 10 of the Convention and Articles 1 and 2 of Protocol No. 1, Article 2 of Protocol No. 4, as well as Article 14 of the Convention, taken in conjunction with

- Date, nom et n° de requête
- Article de la Convention
- Résumé de l'affaire
- Intérêt : pourquoi un *Flash*?

## 2. Les autres arrêts de la semaine, en un coup d'oeil

## 2. Les autres arrêts de la semaine, en un coup d'oeil

# 2. Les autres arrêts de la semaine, en un coup d'oeil



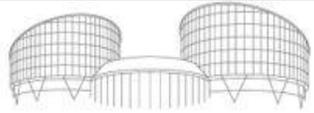
EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

Directorate of the Jurisconsult  
Direction du Jurisconsulte

## Week's case-law at a glance 3-7 April 2023<sup>1</sup>

Chamber	Case	Case-Law Development	Case-law update
GC			
Section I	<i>Drozdz v. Poland</i> , no. 15158/19	<p><b>Article 10 (freedom of expression)</b> - The applicants, as members of an "informal civic movement", took part in a peaceful demonstration initially outside parliament grounds. Having entered (on a day pass) the grounds of parliament, they unfurled a banner ("Defend independent courts") and were immediately escorted from the grounds and banned from re-entry for a year.</p> <ul style="list-style-type: none"> <li>- See the developments in relation to the fact that the incident occurred on the grounds of parliament, but not directly interfering with the orderly conduct of parliamentary debate, §§ 68-70.</li> <li>- See the assessment of the procedural safeguards against abuse "even assuming that the sanction imposed on the applicants was supported by relevant and sufficient reasons", § 72.</li> <li>- Lack of adequate procedural safeguards: no opportunity under domestic law to be involved in the relevant decision-making procedure and lack of a clear procedure for challenging the impugned ban, §§ 72-75.</li> </ul> <p>Violation of Article 10 of the Convention.</p>	
Section II	<i>UAB Kinko Senukai Lithuania v. Lithuania</i> , no. 19162/19	<p><b>Article 8 (home and correspondence)</b> - Suspecting a number of producers and retailers of price fixing, the Competition Council obtained a warrant to carry out searches and seizures in the applicant company's offices. The applicant company complained that the search had been carried out in an unlawful and disproportionate manner and had not been subjected to any subsequent judicial review.</p> <ul style="list-style-type: none"> <li>- Note the examination of the absence of an <i>ex post facto</i> judicial review under the procedural aspect of Article 8 (and not Article 13), see and compare with <i>Lindstrand Partners Advokatbyrå AB v. Sweden</i>, and <i>Posevini v. Bulgaria</i>.</li> <li>- Article 8 is not to be interpreted as requiring an <i>ex post facto</i> judicial review in all such cases, but its availability is among the elements that might be taken into account when assessing compliance therewith, § 117. And see the assessment in the case at stake, §§ 120-126.</li> </ul> <p>Violation of Article 8 of the Convention.</p>	
Section III			
Section IV	<i>Radonjić and Romić v. Serbia</i> , no. 43674/16	<p><b>Article 5 §§ 3 and 4</b> - The applicants were arrested on suspicion of murder of a journalist and newspaper publisher and complained under Article 5 § 3 of the length of their pre-trial detention and under Article 5 § 4 about the length of the proceedings before the Constitutional Court, by which they had challenged the lawfulness of their deprivation of liberty.</p> <ul style="list-style-type: none"> <li>- See the developments on the victim status following an express acknowledgment by the Constitutional Court of a breach of Article 5 § 3 for the second part of the applicants' pre-trial detention but without a compensation award, §§ 48-51.</li> </ul> <p>Violation of Article 5 § 3 of the Convention. Violation of Article 5 § 4 of the Convention.</p>	
	<i>O.H. and G.H. v. Germany</i> , nos. 53568/18 and	<p><b>Article 8 (right to respect for private life) and Article 14</b> - The case concerned two applicants, a transgender parent (O.H.) and his child, the second applicant (G.H.), to whom he had given birth. They complained about a refusal of the domestic courts to allow O.H. to be recorded as father of G.H. on the grounds that O.H. had given birth to the child, even though the legal</p>	Case-law update

# 2. Les autres arrêts de la semaine, en un coup d'oeil



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

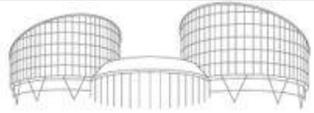
Directorate of the Jurisconsult  
Direction du Jurisconsulte

## Week's case-law at a glance 3-7 April 2023<sup>1</sup>

Chamber	Case	Case-Law Development	Case-law update
GC			
Section I	<i>Drozdz v. Poland</i> , no. 15158/19	<p><b>Article 10 (freedom of expression)</b> - The applicants, as members of an "informal civic movement", took part in a peaceful demonstration initially outside parliament grounds. Having entered (on a day pass) the grounds of parliament, they unfurled a banner ("Defend independent courts") and were immediately escorted from the grounds and banned from re-entry for a year.</p> <p>- See the developments in relation to the fact that the incident occurred on the grounds of parliament, but not directly interfering with the orderly conduct of parliamentary debate, §§ 68-70.</p> <p>- See the assessment of the procedural safeguards against abuse "even assuming that the sanction imposed on the applicants was supported by relevant and sufficient reasons", § 72.</p> <p>- Lack of adequate procedural safeguards: no opportunity under domestic law to be involved in the relevant decision-making procedure and lack of a clear procedure for challenging the impugned ban, §§ 72-75.</p> <p>Violation of Article 10 of the Convention.</p>	
Section II	<i>UAB Kinko Senokai Lithuania v. Lithuania</i> , no. 19162/19	<p><b>Article 8 (home and correspondence)</b> - Suspecting a number of producers and retailers of price fixing, the Competition Council obtained a warrant to carry out searches and seizures in the applicant company's offices. The applicant company complained that the search had been carried out in an unlawful and disproportionate manner and had not been subjected to any subsequent judicial review.</p> <p>- Note the examination of the absence of an <i>ex post facto</i> judicial review under the procedural aspect of Article 8 (and not Article 13), see and compare with <i>Lindström Partners Advokatbyrå AB v. Sweden</i>, and <i>Posevini v. Bulgaria</i>.</p> <p>- Article 8 is not to be interpreted as requiring an <i>ex post facto</i> judicial review in all such cases, but its availability is among the elements that might be taken into account when assessing compliance therewith, § 117. And see the assessment in the case at stake, §§ 120-126.</p> <p>Violation of Article 8 of the Convention.</p>	
Section III			
Section IV	<i>Radonjić and Romić v. Serbia</i> , no. 43674/16	<p><b>Article 5 §§ 3 and 4</b> - The applicants were arrested on suspicion of murder of a journalist and newspaper publisher and complained under Article 5 § 3 of the length of their pre-trial detention and under Article 5 § 4 about the length of the proceedings before the Constitutional Court, by which they had challenged the lawfulness of their deprivation of liberty.</p> <p>- See the developments on the victim status following an express acknowledgment by the Constitutional Court of a breach of Article 5 § 3 for the second part of the applicants' pre-trial detention but without a compensation award, §§ 48-51.</p> <p>Violation of Article 5 § 3 of the Convention. Violation of Article 5 § 4 of the Convention.</p>	
	<i>O.H. and G.H. v. Germany</i> , nos. 53568/18 and	<p><b>Article 8 (right to respect for private life) and Article 14</b> - The case concerned two applicants, a transgender parent (O.H.) and his child, the second applicant (G.H.), to whom he had given birth. They complained about a refusal of the domestic courts to allow O.H. to be recorded as father of G.H. on the grounds that O.H. had given birth to the child, even though the legal</p>	Case-law update

- Quelle Section de la CEDH
- Nom et n° de requête
- Article(s) de la Convention
- Points de fait et de droit
- Dispositif: violation ou non

# 2. Les autres arrêts de la semaine, en un coup d'oeil



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

Directorate of the Jurisconsult  
Direction du Jurisconsulte

## Week's case-law at a glance 3-7 April 2023<sup>1</sup>

Chamber	Case	Case-Law Development	Case-law update
GC			
Section I	<i>Droz v. Poland</i> , no. 15158/19	<p><b>Article 10 (freedom of expression)</b> - The applicants, as members of an "informal civic movement", took part in a peaceful demonstration initially outside parliament grounds. Having entered (on a day pass) the grounds of parliament, they unfurled a banner ("Defend independent courts") and were immediately escorted from the grounds and banned from re-entry for a year.</p> <p>- See the developments in relation to the fact that the incident occurred on the grounds of parliament, but not directly interfering with the orderly conduct of parliamentary debate, §§ 68-70.</p> <p>- See the assessment of the procedural safeguards against abuse "even assuming that the sanction imposed on the applicants was supported by relevant and sufficient reasons", § 72.</p> <p>- Lack of adequate procedural safeguards: no opportunity under domestic law to be involved in the relevant decision-making procedure and lack of a clear procedure for challenging the impugned ban, §§ 72-75.</p> <p>Violation of Article 10 of the Convention.</p>	
Section II	<i>UAB Kinko Senokai Lithuania v. Lithuania</i> , no. 19162/19	<p><b>Article 8 (home and correspondence)</b> - Suspecting a number of producers and retailers of price fixing, the Competition Council obtained a warrant to carry out searches and seizures in the applicant company's offices. The applicant company complained that the search had been carried out in an unlawful and disproportionate manner and had not been subjected to any subsequent judicial review.</p> <p>- Note the examination of the absence of an <i>ex post facto</i> judicial review under the procedural aspect of Article 8 (and not Article 13), see and compare with <i>Lindström Partners Advokatbyrå AB v. Sweden</i>, and <i>Posevini v. Bulgaria</i>.</p> <p>- Article 8 is not to be interpreted as requiring an <i>ex post facto</i> judicial review in all such cases, but its availability is among the elements that might be taken into account when assessing compliance therewith, § 117. And see the assessment in the case at stake, §§ 120-126.</p> <p>Violation of Article 8 of the Convention.</p>	
Section III			
Section IV	<i>Radonjić and Romić v. Serbia</i> , no. 43474/18	<p><b>Article 5 §§ 3 and 4</b> - The applicants were arrested on suspicion of murder of a journalist and newspaper publisher and complained under Article 5 § 3 of the length of their pre-trial detention and under Article 5 § 4 about the length of the proceedings before the Constitutional Court, by which they had challenged the lawfulness of their deprivation of liberty.</p> <p>Violation of Article 5 § 3 of the Convention.</p> <p>Violation of Article 5 § 4 of the Convention.</p>	
	<i>O.H. and G.H. v. Germany</i> , nos. 53568/18 and	<p><b>Article 8 (right to respect for private life) and Article 14</b> - The case concerned two applicants, a transgender parent (O.H.) and his child, the second applicant (G.H.), to whom he had given birth. They complained about a refusal of the domestic courts to allow O.H. to be recorded as father of G.H. on the grounds that O.H. had given birth to the child, even though the legal</p>	Case-law update

→ Compilation dans un *mail* mensuel à l'ensemble des magistrats du Conseil d'Etat belge

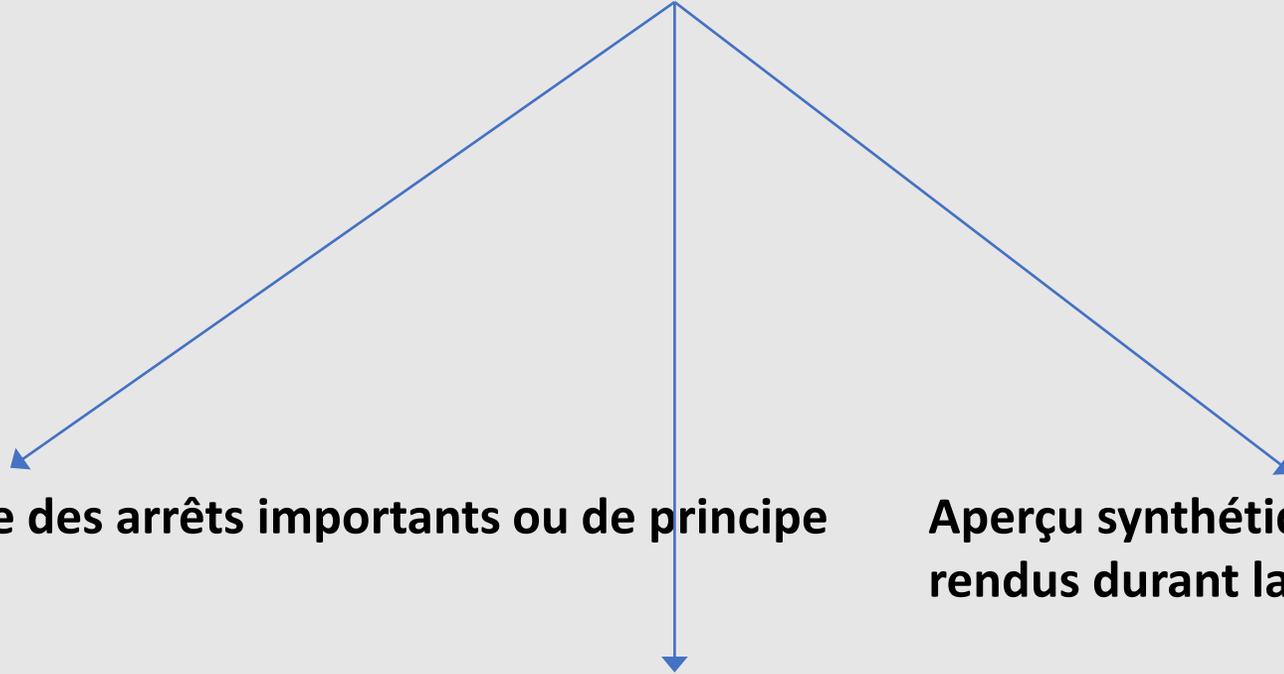
- Quelle Section de la CEDH
- Nom et n° de requête
- Article(s) de la Convention
- Points de fait et de droit
- Dispositif: violation ou non

### 3. Les réponses des membres du RCS à une demande émanant de la CEDH

Droit national des Etats → Étude de droit comparé

→ Transmis avec le *mail* mensuel à l'ensemble des magistrats du Conseil d'Etat belge

# Réseau des Cours Supérieures



**Information instantanée des arrêts importants ou de principe**

**Aperçu synthétique hebdomadaire des arrêts rendus durant la semaine**

**Compilation des réponses nationales: droit comparé**



**Intégration immédiate de la jurisprudence de la CEDH dans les rapports et arrêts du Conseil d'Etat de Belgique**

2. Le premier débiteur des droits fondamentaux,  
c'est l'Etat

→ Le principe de subsidiarité... dépend aussi des **agents** de l'Etat

1<sup>ère</sup> année du *Master en Administration publique*  
(Université libre de Bruxelles)

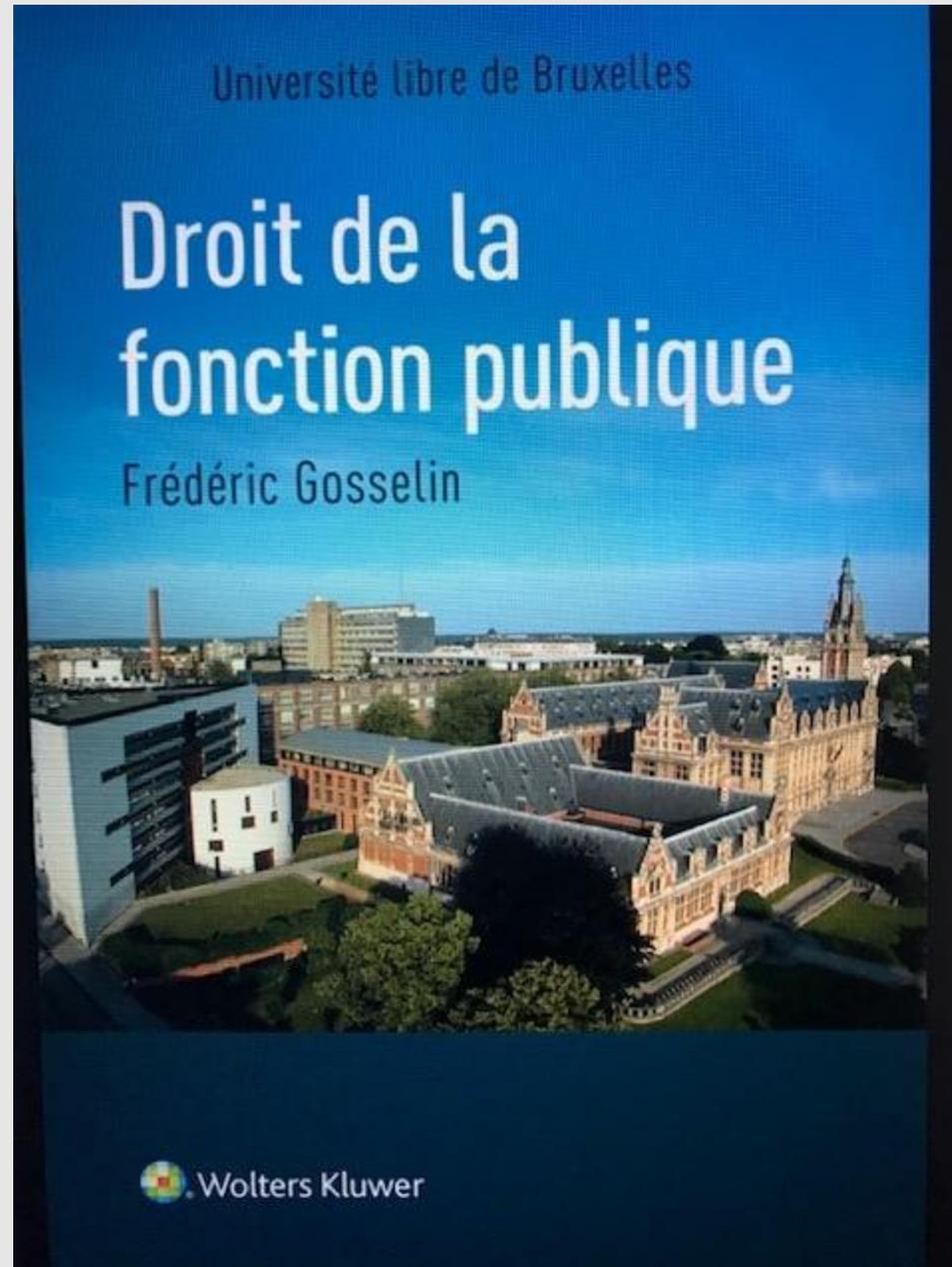
1<sup>ère</sup> année du *Master en Administration publique*

(Université libre de Bruxelles)



**Les futurs cadres et dirigeants des administrations de l'Etat fédéral, des Communautés, des Régions et des communes**

Avant d'avoir rejoint le RCS...



Depuis 2017...

**ULB**

COLLECTION DE LA FACULTÉ DE DROIT  
UNIVERSITÉ LIBRE DE BRUXELLES

**FRÉDÉRIC GOSSELIN**

**DROIT DE LA FONCTION  
PUBLIQUE À L'AUNE  
DU DROIT EUROPÉEN**



**LORCIER**  
LIBRAL

1<sup>ère</sup> année du *Master en Administration publique*  
(Université libre de Bruxelles)

cours de *Droit de la fonction public à l'aune du droit européen*:

*Partie III:*

« L'européanisation du droit de la fonction publique »

(pp. 497-829)



Assimilation directe de la jurisprudence de la CEDH par les futurs cadres des administrations belges