

## Religion and the State in Belgian Law

“Religious freedom disturbs us,” observed Gérard Gonzalez in 1997.<sup>1</sup> True, today this freedom is laboriously seeking to navigate through legal requirements, social constraints, and political tensions. Looking at it more closely, one is struck by the extraordinary revival in recent years of the importance of the relationship between the positive law of the State and the normative systems set out in religious and philosophical beliefs, especially in so-called ‘secular’ countries.<sup>2</sup> Belgium, like the great majority of contemporary democracies finds itself confronted with new and rapid social changes. These changes originate partly with the growing importance of non-religious beliefs, but also with the new religions and beliefs that came along with post-war immigration.<sup>3</sup> These two different developments are making society ever more complex and diverse. The political system, and the legal system which is its instrument, are confronted with questions about religious and other identities, the relationship of these to the existing legal framework, and how the latter protects the position of the various identities. Belgian law cannot escape this confrontation. This is probably why there has been a resurgence of

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1. Gérard Gonzalez, *La Convention Européenne des Droits de l’Homme et la Liberté des Religions* (Paris: Economica, 1997), Introduction.

2. See in particular Rex Ahdar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford: Oxford U.P., 2005); Vernon Bader, *Secularism or Democracy? Associational Governance of Religious Diversity* (Amsterdam: Amsterdam U.P., 2007); Monica Mookherjee, ed., *Tolerance and Recognition in an Age of Religious Pluralism* (Vienna: Springer, 2009); Timothy Byrnes and Peter J. Katzenstein, eds., *Religion in an Expanding Europe* (Cambridge: Cambridge U.P., 2006); Ernest Caparros and Louis-Leon Christians, eds., *Religion in Comparative Law at the Dawn of the 21st Century* [15th Congress, International Academy of Comparative Law] (Brussels: Bruylant, 2002); Elizabeth B. Coleman and Kevin White, eds., *Negotiating the Sacred: Blasphemy and Sacrilege in a Multicultural Society* (Canberra: ANU Press, 2006); Silvio Ferrari, “Nationalism, Patriotism and Religious Belief in Europe,” *University of Detroit Mercy Law Review* (2006): 625-639; Jonathan Fox, *A World Survey of Religion and the State* (Cambridge: Cambridge U.P., 2008); Andrew Lewis and Richard O’Dair, eds., *Law and Religion* (Oxford: Oxford U.P., 2001); Jenny E. Goldschmidt and Titia Loenen, eds., *Religious Pluralism and Human Rights in Europe: Where to Draw the Line?* (Antwerp/Oxford: Intersentia, 2007); Rubya Mehdi, Gordon R. Woodman, Erik Reeberg Sand and Hanne Petersen, eds., *Religion and Law in Multicultural Societies* (Copenhagen: DJØF Publishing, 2008); Prakash Shah, *Legal Pluralism in Conflict: Coping with Cultural Diversity in Law* (London: Glass House, 2005); Rik Torfs, “Religion, Concord and Disconcord,” *Nihon University Tokyo Comparative Law* (2007): 207-223; Jean-Paul Willaime, “Le Retour du Religieux dans la Sphère Publique. Vers une Laïcité de Reconnaissance et de Dialogue,” in *Convictions et Sociétés* (Lyon: Olivétan, 2008).

3. See supra n. 2; Francis R. Messner and Jean-Pierre Bastian, eds., *Les Minorités Religieuses en Europe* (Paris: PUF, 2006).

interest in recent years of questions revolving around the place of freedom of religion and belief under the law. Not only in Belgium but all over the world, law is being challenged to do justice to today's new social configurations.

In order to examine the relations between religion and the State under Belgian law, we will seek to identify some of the main questions concerning the protection of freedom of religion and belief that confront legislators and courts, both in principle and as they develop in practice. After citing and briefly explicating the main constitutional texts that deal with relations between the Belgian State and religious and other beliefs (I), we will distinguish two central themes, so as to present matters as systematically as possible. The *first* of these goes back to the underlying principles of Belgian constitutional law, which apply to all religions and belief systems: the neutrality of the State; the individual freedom of religion and belief and its possible limitations placed on freedom of religion and belief; the institutional freedom of the various religious communities and their equal treatment by the State; and the right not to belong to any religion or belief system at all

Our *second* theme (II) will be the various facets of the status of 'recognized' religious groups and communities. This status presently applies to six religions (Catholic, Protestant, Jewish, Anglican, Muslim, and Orthodox), as well as to organized secularism, all of which enjoy certain legal rights vis-à-vis the public authorities. Once such recognition under Belgian law is granted it determines the institutional relations of the Belgian State with the group or community. We will pay special attention to the recognition under Belgian law of Islam and of 'non-confessional' convictions that are not identified with any religion but nevertheless granted the status of 'recognized' body (III). We will conclude by briefly treating an issue that seems to exemplify the problem of religious freedom in a pluralist society, not just in Belgium but all over Europe: the Muslim headscarf (IV).

## I. THE CONSTITUTIONAL TEXTS

In Belgian constitutional law, there are four basic provisions that govern the relationship between the State and the various religions and beliefs within society. We reproduce them here in their entirety, so that they can be referred to in the course of our exposition:

Article 19: "Freedom of worship, its public practice and freedom to demonstrate one's opinions on all matters are guaranteed, but offences committed when this freedom is used may be punished."

Article 20: "No one can be obliged to contribute in any way whatsoever to the acts or ceremonies of a religion or to observe its days of rest."

Article 21: "The State does not have the right to intervene either in the appointment or in the installation of ministers of any religion whatsoever or to forbid these ministers from corresponding with their superiors, from publishing the acts of these superiors, but, in this latter case, normal responsibilities as regards the press and publishing apply.

A civil wedding shall always precede the religious marriage, apart from the exceptions to be established by the law if needed."

Article 181: "§1: The salaries and living expenses of ministers of religion are paid for by the State; the amounts required are charged annually to the budget."

"§2: The salaries and living expenses of representatives of organizations recognized by the law as providing moral assistance according to a non-religious philosophical concept are paid for by the State; the amounts required are charged annually to the budget."

For the sake of completeness, there should be added the other constitutional rights and freedoms that relate, directly or indirectly, to the religious domain. These include freedom of education (Article 24), freedom of assembly (Article 26) and freedom of association (Article 27). We will, however, place our emphasis on those constitutional provisions that specifically guarantee freedom of religion.

## II. FOUR BASIC CONSTITUTIONAL PRINCIPLES WHICH APPLY TO ALL RELIGIONS AND CONVICTIONS

The provisions cited above guarantee religious freedom under Belgian law, based on four basic principles that can be summed up as follows: the principle of the neutrality of the State; the principle that freedom of religion and belief is guaranteed but may, under certain circumstances, be limited; the right not to belong to any religion or belief system and the institutional freedom or autonomy principle.

### A. *The Neutrality of the State*

The principle of the neutrality of the State is not laid down explicitly in the Belgian Constitution. But in an Opinion issued on 20 May 2008, the Council of State (*Conseil d'État/Raad van State*) recalled that it is a matter of constitutional principle, tightly bound up with the prohibition against discrimination and with the principle of equality: "In fact, the neutrality of the public authorities, while not enunciated in so many words in the Constitution itself, is nonetheless intimately bound up with the general prohibition against discrimination, and in particular with the principle of the equality of those who make use of public services. In a State governed by democratic law, the public authority is necessarily neutral<sup>4</sup> because it is the authority of all citizens and for all citizens, and must therefore, in principle, treat everyone equally, without discriminating on the basis of religion, belief, or choice of a community or party."<sup>5</sup>

The neutrality of the State and of the public authorities implies that the State itself has no particular religion or belief, and does not pass judgment on the religions or beliefs held by its citizens. Unlike countries with an established Church, the Belgian State does not identify itself with any particular religion or belief. A few years after the country's proclamation of independence, the Belgian Court of Cassation gave the following definition to freedom of religion and belief: "the right of everyone to believe and profess religious faith without prohibition or persecution; the right to practise religion without prohibition in whole or in part by the public authorities – whether on account of its nature, its claims to truth, or its quality of organization – and without interference or regulation by the public authorities in a way that the State deems best suited to its purposes, or its worship of the divinity, its behaviour, its propagation of its beliefs, or its moral practices."<sup>6</sup>

The principle of the neutrality of the State remains unquestioned today. But for some time, people have been exploring the consequences of this principle, especially in matters of the participation of State officials in religious services (see A, below), and the display of crucifixes in public buildings (see B, below). This is the context for the debate about whether to prohibit public employees to wear religious or philosophical symbols while performing their official duties. We shall return to this question in part III.

### 1. The Participation of State Officials in Religious Services

The constitutional principle of neutrality applies to State officials and representatives in the performance of their duties. In its current interpretation, the principle does not prohibit them to participate in their official capacities, in religious services such as the *Te Deum* which is celebrated annually in the Catholic churches of the country.<sup>7</sup> Some people

4. Under this head, see Opinion 44.351/1/2/3/4, delivered 21 April 2008 on a bill containing various provisions (I), remarks on Article 40 of the bill (Doc. parl. *Chambre*, 2007-2008, no 52-1200/1, 249).

5. Opinion 44.521/AG, 20 May 2008, on a proposed law on the regulation of religious organizations and non-confessional religious and philosophical communities, Doc. Parl. *Sénat*, 2007-2008, no 4-351/2.

6. Cass., 7 November 1843, *Pas.*, I, 1834, 230.

7. This ceremony of the Roman Catholic Church has as its main purpose the rendering of thanks to God for the life of the country and the asking for blessings on behalf of the authorities, including the King. For many years, in various parishes of the kingdom, members of other religions have taken part in the *Te Deum*.

are, however, opposed to their participation. A bill by Mahoux and others, (2009) tabled in the Senate and dealing with the separation of the State and the church attempted to prohibit such participation (hereafter the Mahoux bill)<sup>8</sup>, but was never put to a vote. A few years ago, the neutrality of the Belgian Head of State was the target of criticism because of the visit on 10 October 2009 paid by King Albert II of Belgium and Queen Paola, with a delegation of many serving ministers, to mark on the occasion of the canonization of the Belgian missionary Joseph De Veuster (Père Damien), known for his humanitarian work among lepers on the Hawaiian island of Molokai. The Belgian head of State knelt to kiss the Pope's ring. To some, this religious gesture ran counter to the separation of church and state under Belgian constitutional law. When questioned about the presence of an important ministerial delegation at this canonization, the then Prime Minister Herman Van Rompuy attempted to explain that it was a question of honouring an outstanding compatriot, with no harm done to the separation of the State from religion.<sup>9</sup>

## 2. Crucifixes in Public Buildings

The neutrality of the State must likewise be respected in matters of the architecture and furnishings of its buildings which are used for official, public purposes. Religious symbols have no place here.<sup>10</sup> In this context, the principle of the neutrality of the State has given rise to lively argument in many European countries, especially around the question whether crucifixes have any place in public schools and in courtrooms. In the *Lautsi* case,<sup>11</sup> the European Court of Human Rights first ruled in favour of their removal, but later its Grand Chamber allowed them to be maintained.<sup>12</sup> As we have seen, this ruling

8. Art. 3, "Those exercising public authority shall not, directly or indirectly, organize or participate in official ceremonies that make reference to confessional or non-confessional philosophical concepts, especially with reference to particular times and places." Bill to separate the State from religious and philosophical organizations and communities, whether confessional or non-confessional, Doc. Parl. *Sénat*, 2007-2008, no. 4-351-1. See also: <http://www.ulb.ac.be/cal/laiciteAZ/impartialite.html>.

9. Ann. Parl., *Chambre*, 27 October 2009, 7-9.

10. This principle was reiterated in a circular by the Ministry of Justice issued on 28 April 2004 (Circular no. 25. Bâtiments judiciaires. Neutralité. Symboles religieux, available at [www.juridat.be/wel3/circf.htm](http://www.juridat.be/wel3/circf.htm)): "All locations within the courthouse, including courtrooms, must present an appearance of strict neutrality with respect to religious, philosophical, and moral beliefs." As a consequence, and by virtue of the principle of neutrality, "no images, reproductions or works of art displayed on judicial premises may represent religious symbols." One exception is provided, in cases where a listed feature also covers the contents of the building, or "on those premises where works of art whose subject includes particular religious or philosophical symbols have been on display for a long time," but which "are part of the aesthetic scheme of courtroom, and thus contribute to its solemnity." Religious or philosophical symbols which can legitimately be considered works of art are also exempt from removal or relegation to storage. Sébastien van Drooghenbroeck, "Les Transformations du Concept de Neutralité de l'Etat: Quelques Reflexions Provocatrices," in *Le Droit et la Diversité Culturelle*, ed. Julie Ringelheim (Brussels: Bruylant, 2011), 75-120.

11. On 3 November 2009, the European Court of Human Rights gave its judgment in the case of *Lautsi v. Italy*, determining that the display of crucifixes in Italian public schools violated Article 2 of Protocol 1 (right to education) and Article 9 (freedom of thought, conscience, and religion) of the Convention. In so doing, the Court rejected the Italian government's assertion that the crucifix is a national symbol with cultural and historical significance. Some, particularly representatives of the churches, immediately expressed the fear that this decision would reopen the issue of the display of religious symbols in schools throughout Europe.

12. The Grand Chamber's judgment in *Lautsi v. Italy* of 18 March 2011 reversed the first decision in critical aspects. It confirmed the state's duty of neutrality and impartiality, and also that the crucifix is above all a religious symbol. However, it argued that "[...] there is no evidence before the Court that the display of a religious symbol on classroom walls may have an influence on pupils so it cannot reasonably be asserted that it does or does not have an effect on young persons whose convictions are still in the process of being formed." To the Grand Chamber, Italy has acted within the limits of its margin of appreciation. This applies to the content of the curriculum as well as to the place of religion in society. The Grand Chamber is of the opinion that a regulation prescribing the presence of crucifixes in state school classrooms may confer a preponderant visibility to that majority religion in the school environment; this would not be sufficient to denote a process of indoctrination. Moreover, a crucifix on a wall would be an essentially passive symbol, and since it is not accompanied with compulsory teaching about Christianity,<sup>12</sup> while Italy would open its school environment in several respects to other religions, it acted within what is to be seen as a state's (broad) margin of appreciation. ECtHR (Grand Chamber) 18 March 2011, *Lautsi and others v. Italy*. On the judgments in the *Lautsi v. Italy*

raised a good deal of alarm in Catholic circles, not only in Italy but in other European countries as well. The discussion about crucifixes reveals a growing sensitivity about the neutrality of the State among some segments of the European population.<sup>13</sup> But in Belgium, the debate on the subject is closed. The principle of neutrality means that every building where a public service is provided must be neutral. This is particularly true of public schools; private schools do not fall under this prohibition.<sup>14</sup> A question however arises about whether and if so to which extent the prohibition applies to private institutions with a specific religious or philosophical origin which for the health care services they offer largely depend on public funding. Does that entail that they cannot be permitted to display religious or philosophical symbols? In its opinion on the Mahoux bill,<sup>15</sup> the Council of State adopted the following position: “(...) schools, hospitals, and providers of social services may have a religious or philosophical identity. The very fact of their religious or philosophical origins has never been considered a violation of the Belgian Constitution, which must be interpreted as, in fact, permitting such initiatives.”<sup>16</sup>

In the case of courts and tribunals, the appearance of neutrality is clearly fundamental, because their function is to render justice to the population as a whole, without regard to religion, and especially not to favour any particular faith. The days when a religious symbol in a courtroom did not patently threaten the impartiality of judges are over. The principle of the neutrality of the State and, in particular, its practical application, have cleared up the situation. Except in cases where the crucifix is an integral part of the building’s architecture, and/or has its own value in terms of aesthetics or historicity, the crucifix is perceived to violate the principle of the neutrality of public buildings.<sup>17</sup>

The principle of the neutrality of the State applies equally to the management of cemeteries. In Belgium, the management of cemeteries is a public service handled at the local (*commune*) level, which allows religious and philosophical symbols to be placed on graves.<sup>18</sup> This is clearly a matter of personal choice, which cannot be imposed by the public authorities. In matters that involve the public character of the cemetery, the Council of State judged that a municipal regulation which imposed the religious symbol

case, see Jeroen Temperman, ed., *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom* (Leiden/Boston: Martinus Nijhoff Publishers, 2012).

13. See especially Herbert Kalb, Richard Potz and Brigitte Schinkele, *Das Kreuz im Klassenzimmer und Gerichtssaal* (Freistadt: Plöchl, 1996).

14. This position was confirmed in the above-mentioned opinion of the Council of State (Conseil d’État/Raad van State). See supra n. 5.

15. See supra n. 5.

16. See supra n. 5.

17. See particularly the Justice Minister’s Circular no. 25 (2005), addressed to the presidents of the *Commissions des bâtiments judiciaires* on the subject of the neutrality of judicial buildings and religious symbols. This supersedes a previous Circular of 22 January 2001.

18. In Belgium, the Special Law of 13 July 2001 transferred various powers to the Regions and the Communities. Article 4 of this law delegates authority in matters of funerals and graves to the Regions. The latter are thus empowered to amend at their discretion the Law of 20 July 1971 on funerals and graves (*Belgian Official Gazette [Moniteur belge/Belgisch Staatsblad]*, 3 August 1971). The legislatures of Flanders (in the Decree of 16 January 2004) and of Brussels (in the Decree of 18 July 2002) have since issued legislation on the matter. On 4 March 2009, a regional decree on funerals and graves was adopted by the legislature of Wallonia (*Belgian Official Gazette*, 26 March 2009), with various important provisions dealing with religious and philosophical material. This decree applies only to the francophone region, for which it abrogates the fundamentals of the Law of 21 July 1971. On the subject of grave markers, Article 1232-27 provides that “in the absence of the wishes to the contrary by the deceased or the opposition of his or her family, every person has the right to place a marker on the grave of a relative or friend without prejudice to the rights of the holder of the land. The local council, the autonomous municipal administration or the appropriate inter-communal body regulates the exercise of this right and, especially, whatever concerns the size of grave markers or the materials used in their construction.” The decree also provides for the possibility of specific religious sections within public cemeteries: “[The public authorities] may also operate a section of the grounds that allows for the funeral rites and burials of recognized religious groups. These sections are an integral part of the cemetery; there can be no physical separation between them and the rest of the cemetery. Every burial or cremation must be carried out under the provisions of the present decree.” (Article L1232-2, sec. 4). The possibility of creating these had depended, until now, only on a single federal circular from the Minister of the Interior of 27 January 2000, without ever being included in a legislative text.

of the Christian cross on all citizens, regardless of their philosophical or religious convictions, infringes on the public nature of cemeteries and the concomitant need for the impartiality of public services.<sup>19</sup>

### B. *Freedom of Religion and Belief, and its Limits*

A second principle of Belgian constitutional law is that the freedom of religion and belief entails certain responsibilities. Freedom of religion and belief is not absolute; legislative authority can impose limits on its exercise. Conforming to Article 19 of the Constitution the freedom afforded to religious groups and communities to freely practise their faith and express their opinions on all subjects is guaranteed, "(...) but offences committed while this freedom is being exercised may be punished." In other words, freedom is the fundamental principle, and the authorities have no power to intervene and/or impose restrictions except in cases where this freedom has been abused. This precedence given to freedom also means that the public authorities are not authorized to take preventive measures which would limit the risks of this freedom being abused. The old adage that "an ounce of prevention is worth a pound of cure" has no place in matters of freedom of religion and belief. Prevention, in this sphere, would mean, for example, that this expression would have to be submitted for prior authorization, which would be equivalent to a kind of censorship. This would contravene the spirit in which Belgian law understands freedom of belief and its protection. We shall deal, in turn, with three types of measures – preventive, punitive, and those which regulate the exercise of freedom – to show how the principles of Belgian constitutional law relate to each type.

#### 1. The Prohibition of Preventive Measures

Under Belgian law, any measures which might be taken to prevent the believers and ministers of a religious body from exercising their freedom of belief are strictly prohibited. The organization of religious meetings in a place of prayer cannot be subject to obtaining any sort of permission from local authorities.

But matters are different in the case of public assemblies. Article 19 must be read in conjunction with Article 26 of the Constitution, which provides that "Belgians have the right to gather peaceably and without arms, in accordance with the laws that can regulate the exercise of this right, without submitting it to prior authorization." The second paragraph also provides, however, that "This provision does not apply to open air meetings, which are entirely subject to police regulations."<sup>20</sup> In application of the second paragraph, therefore, open-air religious processions may be prohibited by a police decree.

The question of preventive measures in matters of religion and belief has taken on a new currency in recent years, in the form of a question about how to respond to so-called dangerous sects or cults and how best to manage, under Belgian law, the concern they arouse. Rightly or wrongly, since the 1990s Belgium has been singled out as a country that is deeply worried about the risks posed by various so-called sectarian movements.<sup>21</sup> A parliamentary commission was tasked with conducting an inquiry with the purpose of "... developing a policy to combat the illegal practices of cults and the dangers they pose to society and to individuals, especially to minors." On 28 April 1997, this commission delivered its final report, containing a series of measures to be taken against the devious practices of the cults. One of the measures proposed by the commission, which was

19. Council of State, 7 July 1975, no. 17.114, *Tijdschrift voor Bestuurswetenschappen en Publiekrecht*. 1976. Annotated in particular by Louis-Paul Suetens, *Rechtskundig Weekblad*, 1975-1976, 300.

20. On this head, Cass., 23 January 1879, *Pas.*, 1879, I, 75; Cass., 9 January 1882, *Pas.*, 1882, I, 25; Cass., 8 June 1892, *Pas.*, 1892, I, 286.

21. See Louis-Leon Christians, "Vers un Principe de Précaution Religieuse en Europe? Risque Sectaire et Conflit de Normes," *Il Diritto Ecclesiastico* (2001): 173-213; Rik Torfs, "Sekten en Recht," *Collationes* (1998): 385-406; Rik Torfs, "Sekten, Godsdienstvrijheid en de Staat," *Ethiek en maatschappij* 1(2002): 69-81; Vassilis Saragiou, Louis-Léon Christians, Coralie Buxant and Stefania Casafiore, *Mouvements religieux contestés. Psychologie, droit et pratiques de précaution* (Louvain-la-Neuve: Academia Press, 2005).

implemented by the Law of 2 June 1998,<sup>22</sup> was the creation of an Information and Advisory Centre, an independent federal agency charged with informing the public. Its object was to extend and supplement the work of the parliamentary commission with a permanent structure, and to carry on the investigation into the phenomenon of dangerous sectarian groups and their practices. An appeal to quash the Law of 27 June 1908 was rejected by the Constitutional Court. In its ruling of 21 March 2000, the Court found that the law did not contravene the prohibition on preventive measures. The Court decided that the Centre had not, in fact, been authorized to prohibit expressions of opinion by religious or philosophical minorities. Its mandate was restricted to informing the public about the activities of particular groups, so as to provide the public with a more concrete picture of possibly dangerous opinions.<sup>23</sup>

## 2. Punitive Measures

Article 19 of the Belgian Constitution allows for the punishment of abuses of the freedom of religion and belief. In such cases, criminal law is to be applied. So far in Belgian penal law, there are almost no specific provisions criminalizing explicitly religious activities as such.<sup>24</sup> Under Belgian law the principle is that opinions, in themselves, are never punishable, thus ruling out, as it were, the notion of ‘*thought crime*’. It is not, therefore, an opinion as such that is subject to punishment, but rather its potentially harmful effects. Article 268 of the Criminal Code offers an illustration of a punitive provision: “ministers of religion who, in the exercise of their ministry, directly attack by speech in a public assembly the government, any law, royal decree or other official act of the public authorities are punishable.” This article seeks to guarantee respect for the public authorities on the part of ministers of religion, in whose appointment the State may not interfere.

## 3. Measures to Regulate the Exercise of the Freedom of Religion

Protection of freedom of religion and belief does not exclude the taking of measures to *regulate* its exercise. For example, a municipal regulation which forbids the ringing of church bells at certain times of day does not violate the Constitution.<sup>25</sup> Examples could be multiplied. This is equally true of measures taken in the interests of security or in application of public planning measures: the establishment and construction of places of worship may be an integral part of the exercise of religious freedom, but this does not mean that measures in view of building safety or environmental regulations cannot be applied to preliminary applications for permission to establish, construct or renovate, in which cases permission from the relevant public authorities is required. The outcry which resulted all over Europe, in November 2009, over the results of the Swiss referendum to ban the construction of minarets gave occasion for some to point out that, under Belgian

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22. Law of 2 June 1998 mandating the creation of an Information and Advisory Centre on harmful sectarian organizations and an administrative framework for combating them, *Belgian Official Gazette*, 25 November 1998.

23. Constitutional Court, no. 31/2000, 21 March 2000.

24. The Criminal Code contains measures aimed, conversely, at protecting the free exercise of religion. See Articles 142 to 146, which provide penalties for the following classes of persons; those who, by actions or threats restrain or prevent one or more persons from practising their religion, being present at the practice thereof, celebrating certain religious festivals, observing certain days of rest and, as a result, from opening or closing their workshops, shops, or stores, and from performing or abstaining from certain tasks (Art. 142); those who, by disputes or disturbances, prevent, delay or interrupt the practice of religion, whether in a location designated or habitually used for these religious practices, or in the public ceremonies of the religion (Art. 143); those who by act, word, gesture or threat insult the objects of a religion, either in locations designated or habitually used for religious practices or in the public ceremonies of the religion (Art. 144); and those who insult the minister of a religion during the practice of religious observances (Art. 145). A person guilty of violence causing bloodshed, wounds, or illness is subject to more severe punishment (Art. 146). All of these provisions of the Criminal Code seek to ensure respect for freedom of belief and practice.

25. Under this head, Cass., 3 February 1879, *Pas.*, 1879, *Pas.*, I, 106.

law, only measures that regulate the construction of religious buildings are acceptable, not those which seek a blanket ban on a types of structure characteristic of a particular belief, as the Swiss prohibition did.

The text of the Belgian Constitution itself provides a measure that regulates the exercise of freedom of religion and belief. Article 21, in its last paragraph, gives precedence to the civil form of marriage. This precedence is explicable in light of its historical context: in the Ancien Regime many people used to marry only in church, believing that they were thereby formally (civilly) married as well. Frequent application of this practice tends to impede the proper functioning of the services of the secular state.<sup>26</sup> By requiring the prior celebration of civil marriage, the framers of the Belgian Constitution of 1831 sought to prevent people from bypassing the legal marriage process by contracting a solely religious marriage. The precedence accorded to civil marriage is an example of regulation of the exercise of freedom of religion and belief. It is not a measure that shows a lack of understanding. The law penalizes the officiating minister, and not the spouses involved. Furthermore, religious marriages celebrated because one of the parties is in danger of death do not fall under the penalty (Article 267 of the Belgian Criminal Code).

This rule of constitutional law might appear obsolete today, but under certain circumstances it still retains its currency. In a logic that respects tradition, some communities, especially of immigrant origin, still retain the custom of limiting themselves to religious celebration, and in so doing keeping with their preference.<sup>27</sup> Sometimes this is done in good faith, in ignorance of the constitutional prohibition; other times it allows a couple to regularize their relationship in the eyes of their own community where the community does not accept pre-nuptial cohabitation, but without the 'spouse(s)' intending to carry out the responsibilities which a civil marriage entails. In other European countries, the legislator took a different stance, notably in Spain and in the UK the right to religious freedom allows persons who have no intention of contracting a civil marriage to contract a religious one.<sup>28</sup> Belgium could of course also follow this path, but in that case in order to prevent people from deluding themselves about the civil effects of their religious marriage, officiating ministers of religion might be required to more adequately inform candidates for marriage of the facts of the matter.

### C. Freedom Not to Adhere to Any Religion

The third constitutional principle is the freedom to adhere to no belief or religion at all. Article 20 of the Belgian Constitution protects this freedom explicitly: "No one can be obliged to contribute in any way whatsoever to the acts and ceremonies of a religion or to observe its days of rest." In the nineteenth century, this constitutional provision gave rise to various more or less lively disputes, of which some were brought before the courts and provided occasion for judicial decisions, on matters such as the mandatory attendance by military personnel at the *Te Deum* ceremony<sup>29</sup> and the oath required of witnesses in court. The freedom not to adhere to any religion is nowadays guaranteed by the wording of the

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26. This prohibition should be read in conjunction with Article 164 of the Constitution, which stipulates that the drafting of registry office certificates by the secular state and the maintenance of registers fall exclusively under the responsibility of the municipal authorities. The principle of the secularization of the state is thus enshrined in the text of the Constitution. See also Rik Torfs, "Le Mariage Religieux et son Efficacité Civile en Belgique," in *Marriage and Religion in Europe*, ed. European Consortium for Church-State Research (Milan: Guiffré, 1993), 221-251.

27. See especially Edwige Rude-Antoine, *Le Mariage Maghrébin en France* (Paris: Karthala, 1990); Nathan Dessing, *Rituals of Birth, Circumcision, Marriage and Death among Muslims in the Netherlands* (Leuven: Peeters, 2001). More recently, see also Samia Bano, "Muslim Family Justice and Human Rights: The Experience of British Muslim Women," *Journal of Comparative Law* (2007): 1-29.

28. These marriages produce the effects of a civil marriage though.

29. See supra n. 7.



oath: it makes no reference to any God or supreme authority which would make a connection with religious belief.<sup>30</sup>

The terms of Article 20 of the Belgian Constitution include the right not to be required to observe any particular religious calendar. It should be noted that the provision of Sunday as a day of rest was not inspired by any desire on the part of the Belgian legislature to respect the ceremonies associated with that day by Christian communities; rather, it was a legislative decision made under social law, bound up with the fact that historically, Sunday traditionally corresponded to the weekly day of rest for a large majority of the population, but without implying in any way the obligation to respect the day in religious terms. In the same line, courts generally do not accept that persons who appeal on their religion be excluded from unemployment benefits solely on the grounds that their religion forbids them to work on certain days of the week.<sup>31</sup>

The right not to adhere to any religious belief logically implies the right to disapprove of the religion or beliefs of others. This principle has been, from the very start, confirmed under Belgian law. Liberals, who were fiercely opposed to the dominion of the Catholic Church over society, made use of it immediately after Belgium gained independence. The controversy over the issue finally led, on 3 November 1863, to a judgment by the Court of Cassation in the Keym case. This involved two cartoons dealing with some questionable practices on the part of the clergy of the time. The question in law was whether a decree, dating from the period of Dutch rule, that penalized any writing and/or representation that ridiculed or belittled religion was still in force. The court responded in the negative, on the grounds that this decree violated the freedom of religion and the equal status of different religions and beliefs as written into the Belgian Constitution.<sup>32</sup> With this precedent in mind, blasphemy does not constitute an offence punishable under Belgian law. For some, freedom of religion means the assurance of being able to live out their religious beliefs; for others, it means the right to live without adhering to any belief at all, but also the right to engage in any form of opposition to religious belief by attempting to convince their neighbours of the sound basis for this opposition. But this opposition has limits. The Law of 30 July 1981 to punish certain acts inspired by racism or xenophobia effectively penalizes incitement to hatred, violence or discrimination on the basis of religion (Articles 20 to 28).<sup>33</sup> Under the ruling of the Constitutional Court, for an interpretation of this Law to be in line with the Constitution, a particular element is required: condemnation can be justified only in cases where incitement is intentionally meant to make a particular group of the population, a victim of hate, violence, or discrimination.<sup>34</sup>

#### *D. Institutional Freedom for Religions*

The fourth constitutional principle that deals with freedom of religion, is enshrined in Article 21, first paragraph, of the Belgian Constitution, as cited above: “The State does

30. See especially Article 934 of the *Belgian Judicial Code* and Article 75 of the *Code of Criminal Procedure*.

31. ‘Commission de recours’ (appeals committee) of the National Employment Office (ONEM/RVA), 22 December 1962, *Journal des Tribunaux* (1963): 285 (note F.A.).

32. Cass., 3 November 1863, *La Belgique judiciaire (B.J.)*, 1863, I, 1554. At the time when the southern parts of the Netherlands broke away to form the Kingdom of Belgium, in 1830, religious issues played an important role. The policies of King William of the Netherlands, a Protestant who believed the Church should be controlled by the state, aroused indignation; Catholics claimed the right to organize their own worship and education, while liberals (as they would have put it, the ‘forces of progress’) claimed freedom of conscience and expression. The union of the two groups gave rise to an extremely liberal constitution, which guarantees the freedom of religion, the press, education, and association.

33. Amended by the Law of 7 May 2007 (*Belgian Official Gazette*, 30 May 2007).

34. Court of Arbitration (precursor to the Constitutional Court), no. 157/2004, 6 October 2004, annotation in Jan Velaers, “Het Arbitragehof en de Antidiscriminatiewet,” *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (2004): 601-614; see also Dajo De Prins and Jogchum Vrieling, “Die Wiederkehr des Gleichen: Het Grondwettelijk Hof en de (Federale) Discriminatiewetgeving,” *Tijdschrift voor Bestuurswetenschappen en Publiekrecht* (2009): 579-614.

not have the right to intervene either in the appointment or in the installation of ministers of any religion whatsoever or to forbid these ministers from corresponding with their superiors, from publishing the acts of these superiors, but, in the latter case, normal responsibilities as regards the press and publishing apply.”

This provision of the Constitution covers the institutional aspects of freedom. If freedom of religion taken in the broad sense, including non-faith based beliefs is, basically and to a very large extent, an individual freedom, it is nevertheless very often exercised within a community. Thus, it also has collective, and/or institutional dimensions.

Article 21 forbids the Belgian State to intervene in the internal organization of religions; it distinguishes three different aspects of organization: appointment and installation of ministers of religion; correspondence between these ministers and their superiors in the hierarchy; and publication of the documents issued by the latter. This provision needs to be seen in historical context: in 1831, the framers of the Constitution had in mind primarily the public reading, from the pulpit, of pastoral letters. Legal doctrine and case law have always given Article 21 a broad interpretation considering that the list of activities enumerated is not exhaustive, and that the principle of the organizational autonomy in general is guaranteed.<sup>35</sup> The European Court of Human Rights has also corroborated this principle by permitting religious communities to organize themselves and select their own religious leaders.<sup>36</sup>

Organizational autonomy guarantees that the State will not meddle in the internal structures of a religious community, or in the hierarchical relationships which may exist within certain churches. Thus the Catholic Church, for example, retains its right to appoint bishops and create new dioceses without having to request advance permission from the civil authorities. This organizational autonomy however, does not mean that the State authorities are automatically bound to grant civil effect to these decisions.<sup>37</sup> We shall return to this question in the following section, dealing with the status of ‘recognized’ religions.

In a judgment of 5 October 2005, the Belgian Constitutional Court expressed itself on the principle of organizational autonomy as follows:

Freedom of religion includes, among other things, the freedom to profess one’s religion, whether alone or with others. Religious communities have traditionally existed in the form of organized structures. Participation in the life of a religious community is an expression of religious belief which enjoys the protection of religious freedom. Equally, from the standpoint of freedom of expression, religious freedom means that the religious community can operate peaceably, without interference from the authorities. The autonomy of religious communities is, in fact, essential to pluralism within a democratic society, and thus lies at the heart of religious freedom. It directly affects not only the organization of the religious body as such, but also the effective enjoyment of religious freedom by the members of the religious community. If the organization of the life of the religious community is not protected by Article 9 of the European Convention on Human Rights, all other aspects of religious freedom will accordingly be weakened (European Court of Human Rights, *Hassan & Chaush v. Bulgaria*, §62). The freedom of religion guaranteed by Article 21, paragraph 1, of the Belgian Constitution recognizes the same principle of the autonomy of religious communities.<sup>38</sup>

Every religion is accordingly free to have its own structures and to organize itself as it wishes.

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35. Under this head, see Opinion 36.134/3 of the Legislation section of the Council of State, 13 January 2004.

36. See especially *Hassan & Chaush v. Bulgaria* (application no. 30985/96), judgment of 26 October 2000, European Court of Human Rights, Grand Chamber, Rec. 2000-XI.

37. Council of State, Legislation section, Opinion of 4 January 1962, Doc. Parl., session 1961-62, 296/1, 3.

38. Court of Arbitration (precursor to Constitutional Court), Judgment no. 152/2005, 5 October 2005, cons. B.4.

### III. THE STATUS OF RECOGNIZED RELIGIONS

#### A. *The Recognition of Religious Groups and Communities*

Under domestic Belgian law the relationship between State authorities and the various belief systems is one of the mutual independence, albeit adjusted by a regime of State funding to recognized religions. This goes back to the independence of the nation. At the behest of the archbishop of Mechelen-Brussels, the national congress which drew up the Constitution agreed to enshrine in it the principle of public funding (of religions), in the form of payment of the salaries of religious ministers: Article 181 provides that “The salaries and living expenses of ministers of religion shall be the responsibility of the State; the necessary sums for so doing shall be yearly provided in the budget.” This enshrines in the Constitution a practice begun under the French regime, after the Revolution, to compensate for the nationalization of the property of the clergy and the suppression of tithes.<sup>39</sup> The Belgian Constitution thus provides for a regime of public funding of officially recognized religious groups and communities. This is the origin of the concept of ‘recognized religions’, which refers back to a statute that allows religions access to public funding.<sup>40</sup> Recognition of a religion in no way implies that the public authorities approve of its doctrine or worship.

Under Belgian constitutional law, the principle of the equality of religions does not mean that a single regulatory approach applies to all of them. Constitutional principles that involve religious freedom distinguish between recognized and unrecognized religious groups and communities. All religions, without differentiation, have access to the freedoms enshrined in Articles 19, 20 and 21 of the Constitution and Article 9 of the European Convention on Human Rights, but recognized religions enjoy additional advantages, particularly in the form of various types of public funding: provision of salary and living expenses to their ministers (Article 181) and other material benefits; subsidization of their religious instruction in public schools; management of their temporal affairs;<sup>41</sup> radio and television broadcasting; and chaplains to ensure free exercise of these religions in institutions whose residents or participants cannot practise their religion in their own neighbourhoods (such as hospitals, hospices, asylums, prisons, the armed forces, etc.).

Six religions currently benefit from this status: Catholics,<sup>42</sup> Protestants,<sup>43</sup> Jews<sup>44</sup>, Anglicans,<sup>45</sup> Muslims,<sup>46</sup> and Orthodox (Greek and Russian).<sup>47</sup> Recognition of

39. See especially Herman Van Goethem, “Het Beginsel van Verdraagzaamheid in de Belgische Grondwet: Een Historische Duiding,” in *Recht en Verdraagzaamheid in de Belgische Samenleving*, ed. Jan Velaers (Antwerp: Maklu, 1993), 33-63.

40. Law of 4 March 1870 on the temporal goods of religious bodies, *Belgian Official Gazette*, 9 March 1870. This law has since been amended and expanded on numerous occasions. To qualify, religious groups must: a) have a relatively high membership (in the tens of thousands); b) be organized; c) have been established in the country for many years; d) not be in any way involved with activities that would threaten public order.

41. Under the Law of 4 March 1870 on the temporal goods of religious bodies, *ibid.*

42. Recognition of Catholicism is a consequence of the Concordat of 1801, later confirmed by the Law of 18 Germinal X (8 April 1802).

43. Protestantism is also recognized under the Law of 18 Germinal X (8 April 1802). In February 1871, in application of the Law of 4 March 1870 on the temporal goods of religious bodies, a royal decree confirmed the administrative councils of eleven Protestant congregations (Royal Decree of 23 February 1871 on the organization of Protestant and Jewish congregations, *Belgian Official Gazette*, 27 February 1871). Five years later, a royal decree enumerated the composition and method of selection of members of the administrative councils of Protestant churches (Royal Decree of 7 February 1876 on Evangelical religious bodies, *Belgian Official Gazette*, 15 February 1876).

44. The Jewish religion was recognized by a decree of 17 March 1818. In application of the Law of 4 March 1870 on the temporal goods of religious bodies, a royal decree confirmed the administrative councils of four synagogues and entrusted the role exercised by bishops in the Catholic Church to the *Consistoire central israélite* (Central Jewish Consistory) (see *infra* n. 56.). In 1876, a royal decree enumerated the composition and method of election of members of the administrative councils of synagogues (Royal Decree of 7 February 1876 on the Jewish religion, *Belgian Official Gazette*, 15 February 1876).

45. Anglicanism was recognized by the decrees of 18 and 24 April 1835. The recognition of Catholicism, Protestantism and Anglicanism was confirmed by the Law of 4 March 1870 on the temporal goods of religious

Catholicism, Protestantism, and Judaism is based on legislation that pre-dates Belgian independence and that was carried over until the new Constitution was promulgated. It is not excluded that on the grounds of Article 181 of the Constitution, salaries and pensions may in future also be granted to representatives of Buddhism. For the moment that is not yet the case. The non-profit association “The Belgian Buddhist Union” does, however, receive a grant “with a view to the structuring of Buddhism in Belgium.”<sup>48</sup> This can be considered the first step towards the recognition of Buddhism, whether as a “recognized community of worship” (Art. 181, § 1 Const.) or as a “non-confessional philosophical association” (Art. 181, § 2 Const.). Secularism – although the word does not occur in the Constitution – has since 1993 been considered one of the ideological constituents of Belgian society, on the same footing as the other belief systems. It is defined as a non-religious understanding of humanity and the world; a particular philosophical choice that serves as the equivalent of a religion. As a result, a second paragraph was added to Article 181 of the Constitution, expanding recipients of State financial aid to include “representatives of organizations recognized by the law as providing moral assistance according to a non-denominational philosophical concept.”

The set of criteria which a religious group or community must satisfy in order to gain recognition under Belgian law is not spelled out in any legislative text. In order to receive legal recognition, a religious group must, according to a declaration in Parliament from the Minister of Justice<sup>49</sup>: a) have a relatively large membership (several tens of thousands); b) be organized; c) be established in the country for a sufficiently long time; d) represent a certain social interest; and e) not be involved in any way with any activities which might threaten public order.<sup>50</sup>

Official recognition brings with it, as we have pointed out, certain advantages such as the payment of salaries and living expenses for ministers of the religion, the organization of religious instruction in public schools, access to air time on public radio and television stations, and the appointment of chaplains to the armed forces, hospitals, and prisons.<sup>51</sup> Recognition also entails that bodies that have the status of legal persons under public law are entrusted with the management of temporal affairs of religions – the goods belonging to the church or religious community. Moreover, buildings whose purpose is the exercise of religion are exempt from taxation. In exchange, the law subjects the institutional bodies of these religions/groups to an audit of their accounts and civil acts. The recognition also applies to local religious communities which are thus eligible for public funding for, among others, upkeep and renovations of their places of worship.

bodies (*Belgian Official Gazette*, 9 March 1870). In 1875, a royal decree was issued on the organization of Anglicanism (Royal Decree of 17 January 1875, Anglican Church – Organization, *Belgian Official Gazette*, 24 January 1875).

46. Law of 19 July 1974 recognizing the administrations charged with the management of the temporal affairs of Islamic bodies (amendment of the Law of 4 March 1870, *Belgian Official Gazette*, 23 August 1974).

47. The recognition of Orthodoxy in 1985 took the form of a new amendment of the 1879 law, introducing Orthodoxy in Article 19 *bis* of the law on the temporal affairs of religious bodies (Law of 17 April 1985 recognizing the administrative bodies entrusted with management of the temporal affairs of Orthodox bodies, *Belgian Official Gazette*, 11 May 1985).

48. Art. 139 of the Law of 24 July 2008 containing various provisions (I), *Belgian Official Gazette*, 7 August 2008. See also the Royal Decree of 20 November 2008 concerning the subsidization of the non-profit association “Boeddhistische Unie van België” – “Union bouddhique belge,” *Belgian Official Gazette*, 6 December 2008 and *Belgian Official Gazette*, 20 November 2008 implementing the Royal Decree concerning the subsidization of the non-profit association “Boeddhistische Unie van België” – “Union bouddhique belge,” *Belgian Official Gazette*, 16 December 2008.

49. For specific criteria relating to recognition, see *Questions et réponses, Chambre*, 1999-2000, 4 September 2000, 5120 (Question 44, Borginon); *Questions et réponses, Chambre*, 1996-1997, 4 July 1997, 12970 (Question 631, Borginon).

50. Louis-Leon Christians, “Une Mise en Perspective du Concept du Culte Reconnu en Droit Belge,” in *L'Islam en Belgique* (Brussels: Luc Pire, 1998), 23-39.

51. For a detailed enumeration of these advantages, see especially Caroline Sägerser and Vincent de Coorebyter, *Cultes et Laïcité en Belgique* (Brussels: Dossiers du C.R.I.S.P., 2000).

## B. Recognized Religious Groups and Communities and their Autonomy

The recognition of a religion by the public authorities, and the financial and material benefits which it entails, are not without implications for their autonomy. We shall look at some of these consequences.

### 1. Selection of a Spokesperson with the Public Authorities

The principle of (internal) organizational autonomy of religious groups or communities, to which we refer above, and which is enshrined in Article 21 of the Belgian Constitution, does not prevent the State authorities from requiring that the religious group or community designates a spokesperson with whom public authorities can deal whenever needed in matters concerning the civil effects of the existence and recognition of the group. In its judgment of 4 March 1993, the Constitutional Court clearly stated that legislative bodies may “(...) reasonably (...) require religions whose instruction may be subsidized to present a minimal structure which can be recognized as competent to participate in the hiring of teachers to provide that religious instruction.”<sup>52</sup> We will treat this separately below in the case of Islamic religion (see *infra* Section E. Representation and Funding of Islamic Religion). The recognition of Islam, in particular, has been accompanied by many interventions on the part of the public authorities which seem to indicate a certain awkwardness on their part with regard to the effects of this recognition.

### 2. Management of the Temporal Affairs

Another consequence of recognition involves the management of temporal affairs. “Even if it only involves the temporal affairs of the religious body,” note Carolyn Sägesser and Vincent de Coorebyter, “the organization of recognized religions inevitably puts two principles at odds: that of the autonomy of religious groups and the possibilities of control over temporal affairs which the State takes on itself – to some extent – by providing funding for these groups.”<sup>53</sup>

Regulation of the management of the temporal affairs of religious groups and communities has been significantly amended under Belgian law in 2001. By special Law of 13 July 2001 this management has been transferred to the Regions.<sup>54</sup> In a judgment given on 5 October 2005, the Constitutional Court ruled on the scope of the control over temporal affairs conferred upon the regional authorities. The court recalled that freedom of religion and of worship does not prevent public authorities from taking positive steps to permit the effective exercise of these freedoms. The desire of the legislator to create institutions charged under public law with the material aspects of recognized religions and the management of their temporal affairs can contribute to the effective enjoyment of religious freedom.

Yet the question of course, is at what point does a measure become an interference with the right of recognized religious groups and communities to operate autonomously? In practice, the competent public authority has a margin of discretion. In addition, the court could be asked to verify whether such measures are compatible “(...) with freedom of religion and freedom of worship; thus, measures must be the subject of an accessible and precise system of regulations, pursue a legitimate end and be necessary in a democratic society. This implies that the interference must correspond to ‘a recognized social need’, and that there must be a reasonably proportional relationship between the end being pursued, on the one hand, and the limitation of these freedoms, on the other.”<sup>55</sup>

52. Constitutional Court, Judgment no. 18/93 (4 March 1993), cons. B.5.4.

53 Sägesser and de Coorebyter, *supra* n. 51 at 7.

54. Article 6, sec. 1, VIII, paragraph 1, 6°, Special law on institutional reform, replaced by Article 4 of the special Law of 13 July 2001, *Belgian Official Gazette*, 4 August 2001.

55. Constitutional Court, Judgment no. 152/2005, 5 October 2005, cons. B.5.

In the case in question, the decree (of the Flemish government) under challenge imposed an age limit of 75 years on membership in church councils. The intention was to encourage renewal of the membership by requiring the replacement of members who had reached that limit. The changes to the councils' composition would contribute to the reorganization and modernization of the management of the groups, in a situation where the public authority had to bear the responsibility for their shortcomings. The court judged that the measure does not amount to an unjustified limitation of freedom of religion and worship.

Nevertheless, it examined the disputed measure in the light of Articles 10 and 11 of the Constitution, which forbid discrimination. In the court's opinion, imposing an age limit on the membership of 'church councils', even on the objective grounds of the age of the members, constitutes discrimination: "It must nevertheless be stated that the proposed measure is based on the presumption that persons who have reached the age fixed by the legislators are incapable of possessing the qualities required for this sort of management. Even if, despite their age, they had not served previously on a body responsible for administering the temporal goods of the religious group, and even if this were their first involvement with the administration, they would not be considered capable of providing rational and modern management of their religious community's temporal goods in accordance with the decree on the material organization and functioning of recognized religious bodies. The introduction of an age limit which applies without exception excludes a whole category of older believers – who are becoming an increasingly important segment of religious communities – from any participation in the administration of the community's goods. The measure is thus out of proportion to the end pursued."<sup>56</sup>

### 3. The Selection of Ministers of Religion

The tension referred to by Sägerser and de Coorebyter<sup>57</sup> is equally apparent in the matter of selection of ministers for the various recognized religions. The rights guaranteed under Article 181 of the Constitution and the benefits derived therefrom by the ministers of recognized religions are in fact civil rights as defined in Article 144 of the Constitution. As a result, only the civil courts are competent to deal with disputes that may arise regarding these rights. In any event, the principle of institutional autonomy as established in Article 21 of the Constitution provides certain guidelines. Thus, for example, the salary or living expenses to which ministers of a recognized religion are entitled is a conditional or subsidiary right: it applies only to the degree and during the time that the person concerned is employed as a church minister within the meaning of Article 181 of the Constitution. It is the responsibility of the recognized religions, without reference to any other authority, to appoint their own ministers for ecclesiastical purposes. If someone contests a decision to remove him or her from the ministry, the dispute falls under the jurisdiction of the civil courts. Since the latter are prohibited under the Constitution from getting involved in internal religious affairs, they are limited in what they are allowed to assess. They are not competent to judge the expediency of the decision, nor are they authorized to enter into theological and/or internal debates within the religious body. The civil judge's competence is thus a strictly formal one: he/she is permitted to determine whether the ecclesiastical authority which made the decision in question was competent to do so, and whether in so doing it followed the rules of the religion in question, but that is as far as his or her authority goes.<sup>58</sup>

On numerous occasions, the Court of Cassation has rejected the contention, made by some, that the rights of defence and other principles stated in Article 6, paragraph 1, of the European Convention on Human Rights should be respected by the religious authorities:

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56. Id., cons. B.8.

57. See *infra* n. 59.

58. Cass., 20 October 1994, *Rechtskundig Weekblad*, 1994-1995, 1082; *Rec. Cass.* 1995, 57, note by H.Vuye; Cass., 3 June 1999, *Chronique de droit public*, 2000, 214. See also K. Martens, "Het Hof van Cassatie en de Interpretatie van Artikel 21 G.W.," *Chronique de Droit Public* (2000): 215-218 (note under Cass., 3 June 1999).

“From the principle of the organizational autonomy of every religion it follows that, on the one hand, the appointment and removal of the ministers of a religion can only be carried out by the appropriate religious authority, in accordance with the religion’s own rules, and on the other hand, that ecclesiastical discipline and jurisdiction can only be exercised by that same authority in conformity with those same rules.”<sup>59</sup>

#### 4. The Designation of Religious Educators

The constitutional principle of non-interference in internal religious affairs also applies to matters of education. Under the constitutional revision of 15 July 1988, the competence of education in Belgium was transferred to the federated entities, more specifically to the Communities. Since then, the Flemish-, French- and German-speaking communities have been responsible for education. They are nevertheless bound by Article 24 of the Constitution, which ensures protection for all ideological, philosophical, and religious beliefs on the part of parents and students within the field of education.<sup>60</sup> This protection is spelled out in the first paragraph of the Article that requires the community to ensure that parents have free choice and to organize a neutral educational system not bound to any particular ideology: “(...)the community shall organize a system of education which is neutral. Neutrality involves, in particular, respect for the philosophical, ideological, and religious beliefs of parents and pupils.” In applying this constitutional guarantee, schools run by the public authorities offer, during the years of compulsory schooling, a choice between courses in one of the recognized religions or in a non-confessional teaching of moral values. This education is provided free of charge and paid for by the State.

The State thus positively supports the teaching of religion and/or moral values in its schools, but without interfering with the independence of religions in matters of course content. This is part of the prohibition of such interference, as defined by the Constitutional Court in a judgment of 4 March 1994: “(...) the community’s powers to control the quality of teaching are limited in this matter by the constitutional freedom of religion and belief and the prohibition on interference which results from it (Articles 19 and 21 of the Constitution).”<sup>61</sup>

#### 5. Representation and Funding of Islamic Religion

The application of regulations for the management of the temporal affairs of recognized religions raises particular problems in the case of Islam, with which we shall deal briefly below.

One criticism frequently levelled at the Belgian model of recognition of religions is that, historically, it is based on the structure and function of the Roman Catholic Church. The temporal affairs of Islamic bodies were recognized by the Law of 19 July 1974,<sup>62</sup> in line with the Law of 4 March 1870 on the temporal goods of religious bodies.<sup>63</sup> Since then, Islam has enjoyed the status of a religion officially recognized by the Belgian State. In May 1987, a royal decree fixed the concrete terms under which Islamic religion was to manage its temporal affairs.<sup>64</sup> This provided for public recognition of Islamic communities at the provincial level. For many years however, this decree did not give rise to any concrete recognition of Islamic communities, nor (in consequence) to any effective funding for imams at mosques or to any provincial responsibility for deficiencies in

59. Id.

60. Rik Torfs, *Congregationele Gezondheidsinstellingen: Toekomstige Structuren naar Profaan en Kerkelijk Recht* (Canon Law) (Leuven: Peeters, 1992).

61. Constitutional Court, Judgment no. 18/1993 (3 March 1994).

62. See supra n. 46. Law of 19 July 1974 recognizing the administrations charged with the management of the temporal affairs of Islamic bodies, *Belgian Official Gazette*, 23 August 1974.

63. See supra n. 40

64. Royal Decree of 3 May 1987, dealing with the committees entrusted with the management of temporal goods for recognized Islamic communities, *Belgian Official Gazette*, 6 May 1987.

mosques or in the housing of imams. The difficulty arose from one of the preliminary conditions required for the actual payment of ministers of religion: the religious group is required to designate a governing body to represent its interests in dealing with the State.<sup>65</sup> This posed a particular problem for Muslims.

In fact, these difficulties have grown over time, to the point that in recent years an increasing number of persons who are concerned about the legal position of Islam in Belgium – not all of them Muslims – no longer hesitate to call the situation one of discrimination.<sup>66</sup> These authors contend that the process of recognition and institutionalization of Islam under Belgian law has run into two major difficulties<sup>67</sup>. The first relates to the establishment of a “governing body for the religious group” which can interact with the public authorities, and take responsibility for appointing and removing Islamic ministers. The second follows on the first, and relates to funding for Islam.

The first of these is without a doubt the more serious. Islam has no pre-established or universally recognized structures or clergy as such. Conforming to Belgian law it is now required to deal with a set of conditions alien to it, obliging it to create and provide a representative structure and designate a body that can interact with the public authorities and manage its temporal affairs by means of delegates. At the outset, this management was entrusted to the *Centre islamique et culturelle de Belgique* (Belgian Islamic and Cultural Centre, better known as the Grand Mosque of Brussels).<sup>68</sup> But this never managed to acquire full legitimacy within the larger Muslim community throughout the country. Numerous efforts followed on the part of the Belgian authorities, seeking to put in place a representative body by means of an elective process.<sup>69</sup> Since these efforts ran up against both government disapproval and a weak sense of legitimacy within the community, Islam in Belgium went through a long period of instability, characterized by innumerable negotiations and attempts to appoint representatives. On the one hand, the public authorities wanted to retain a certain amount of control over the organization of Islam in Belgium; on the other, the community pointed to a posture of meddling on the part of the State, charging it with infringing the institutional autonomy of the religion.

The controversy concerned in particular the two elections (December 1998 and March 2005) held for a General Assembly of Belgian Muslims (*Assemblée générale des musulmans de Belgique*), which would in turn set up an executive body. Although the Constitutional Court accepted the law which organized the election of a representative body,<sup>70</sup> the electoral process was not realistically the appropriate means of selecting a body to represent the temporal affairs of the religion before the Belgian State: the elections of 2005 were boycotted by most Muslims of Moroccan origin. The government

65. See supra nn. 39 and 40.

66. We will not deal here with associated problems, relating in particular to wage inequalities between religious groups or the weak social protection afforded to the status of ministers of religion.

67. For the various crises and events which accompanied the early years of this institutionalization, see especially Laurent Panafit, *Quand le Droit Écrit l'Islam. L'intégration Juridique de l'Islam en Belgique* (Brussels: Bruylant, 1999).

68. For the first phases of the institutionalization of Islam in Belgium, see especially Felice Bassetto and Albert Bastenier, *L'Islam Transplanté. Vie et Organisation des Minorités Musulmanes de Belgique* (Brussels/Antwerp: EPO, 1984).

69. For these efforts, see especially Sägerser and de Coorebyter, supra n. 51 at 15.

70. In a judgment of 28 September 2005, the Constitutional Court rejected an appeal for annulment brought by the Executive of Belgian Muslims against the elections of March 2005. In the court's opinion, the use of elections as a means of choosing a body to represent the Islamic community to the Belgian public authorities did not constitute an infringement of freedom of religion. “Bearing in mind the fact that elections were chosen by the Muslim community as an appropriate means of selection, and taking into account the fundamental democratic values which such a process entails, the Belgian legal authorities cannot be reproached for providing that the General Assembly of Belgian Muslims should be selected by the members of the community, still less for having surrounded the election with measures intended to ensure its fairness” (cons. B.5.8). And further, “Considering the peculiar fact that the Muslim religion has neither a pre-established, universally recognized structure, nor clergy as such, and the fact that the elective process was chosen by representatives of different factions within the Muslim world, the legislative authority could reasonably have recourse to elections for an organization that would represent this religious community before the public authorities” (cons. B.6.2.). Court of Arbitration, Judgment no. 148/2005 (28 September 2005).



proceeded despite these objections, and designated, by the Royal Decree of 7 October 2005, the members who would hold a mandate on the Executive.<sup>71</sup> But that body was not capable of acting as a representative institution. The situation deteriorated so badly after this – a number of members of the Executive received a vote of no confidence from the General Assembly and others resigned on their own initiative – that the government found it necessary, in March 2008, to suspend funding for the Executive.<sup>72</sup> Since then, the General Assembly of Belgian Muslims has succeeded in reaching a new agreement making possible a temporary prorogation of the situation.<sup>73</sup> But the future remains uncertain.

The second difficulty arises from the first, and relates to the funding of Islamic religious bodies. Recall that the Belgian Constitution provides, in Article 181, for the State to pay the salaries and living expenses of ministers of recognized religions.<sup>74</sup> The system is one that funds the ministers of religion, rather than directly funding the religious groups or communities. As with the other recognized religions, the commitment to pay the salaries of imams falls under the responsibility of local communities (Islamic committees). The aforementioned problems, and the inability of the Executive to act as a spokesperson with the public authorities, have for several years prevented the recognition of Islamic committees. The *Exécutif des Musulmans de Belgique* receives funding from the federal government<sup>75</sup>; it allows for payment of a secretary general, an assistant, a bookkeeper, and a translator<sup>76</sup> but was not intended to cover the salaries of imams. The situation has been at an impasse ever since. Today, following the State Reform of 2001 and the transfer of authority over religious establishments to the Regions, a considerable number of mosques have been recognized in Wallonia, Flanders and Brussels, which now have responsibility for the material organization and functioning of local religious bodies. While the first recognitions of mosques were expected in 2002, the procedures turned out to require more time, especially because of the more vigorous checks by the State Security service (*Sûreté de l'Etat/Veiligheid van de Staat*), which required mosques to meet various additional standards, particularly for security, upkeep, and hygiene. Some rejections resulted from the findings of State Security, either because the mosques in question practised a 'hard-line' form of the religion or because they received direct financial support from foreign nations deemed to be fundamentalist.<sup>77</sup> In total, several

71. *Belgian Official Gazette*, 14 October 2005.

72. Royal Decree of 27 March 2008, *Belgian Official Gazette*, 11 April 2008.

73. Royal Decree of 9 May 2008 on the recognition of officials holding mandates for the *Exécutif des Musulmans de Belgique*, *Belgian Official Gazette*, 19 May 2008. Since then, several royal decrees have been promulgated, each extending the mandate of these officials of the Executive. See especially the Royal Decree of 30 March 2009, amending the Royal Decree of 9 May 2008 on the recognition of officials holding mandates for the *Exécutif des Musulmans de Belgique*, *Belgian Official Gazette*, 21 April 2009. The most recent decree is that of 30 December 2009 (*Belgian Official Gazette*, 12 January 2010). The structure constituting a general assembly and an executive remains in force. But it seems inevitable, at this point, that the system will have to be revised, since the present structures are insufficiently representative.

74. And, since 1993, for the officers of secularist organizations as well; see *infra* Section C., Non-confessional Systems.

75. Among other provisions, the Royal Decree of 3 July 1996 on the *Exécutif des Musulmans de Belgique* establishes a stipend to cover in particular, "payment of personnel, the costs of purchasing, renting, and maintenance of buildings, the costs of purchasing necessary equipment and furnishings, direct and indirect, relating to the organization of the activities of the executive." This decree has been amended several times since then. The *Conseil central laïque*, which we will discuss below, receives equivalent financial support, originally established by the Law of 23 January 1981 (*Belgian Official Gazette*, 8 April 1981) and later made permanent by the Law of 22 June 2002, dealing with the management of the material and financial interests of non-confessional communities of belief. The question which arises is whether the provisional stipend to the *Exécutif des Musulmans de Belgique* needs to be kept up, since the salaries of imams are now the responsibility of the Federal Public Service Justice and the recognized mosques; this means their deficits are covered by the provinces.

76. Jean-Francois Husson, ed., *Le Financement des Cultes et de la Laïcité: Comparaison Internationale et Perspectives* (Namur: Les Editions Namuroises/Presses Universitaires de Namur, 2005), available at <http://www.cil.be/files>.

77. Jean-Pierre Stroobants, "Le Système Belge de Financement des Cultes est Étendu aux Musulmans," *Le Monde*, 27 June 2007.

dozen mosques have now received official recognition. The Federal State has thus been able to take charge of the salaries, living expenses and pensions for the imams who serve there. The development of the situation in the years ahead will depend, concludes J.-F. Husson, “on the number of mosques recognized and on the pace of recognition. Various questions also need to be settled, such as the ownership of religious venues, the level of financial support required from the provinces, the question of mosques financed by foreign countries, the future use of donations by the faithful (...).”<sup>78</sup>

The conclusion might appear to be a hard one, but it seems to be unavoidable: only the concrete reorganization and renewal of the existing structures, with the power to carry out the mission entrusted, will permit the further development of Islam in the Belgian context.

### C. Non-confessional Systems

As indicated above, the constitutional revision of 5 May 1993 added a second paragraph to the text of Article 181, empowering the State to undertake payment of salary and living expenses to representatives who offer non-confessional moral services.<sup>79</sup> This change to the Constitution affords non-confessional groups and communities a legal status analogous to that provided to the six religious groupings already recognized. The text of Article 181 refers to ‘organizations’. At the moment, only one organization – that of organized secularism – is recognized under the Law of 21 June 2002.<sup>80</sup> This is the non-profit association *Conseil central des communautés philosophiques et non confessionnelles de Belgique/Centrale Raad der niet-confessionele levensbeschouwelijke gemeenschappen van België* [Central council of philosophical and non-confessional communities of Belgium], consisting of the Flemish-speaking *Unie van vrijzinnige verenigingen* [Union of Freethinking Associations] and the francophone *Centre d’action laïque* [Secular action centre].<sup>81</sup> Borrowing from a 1991 parliamentary report, Sägerser and de Coorebyter give the following definition of organized secularism: it involves a non-confessional community, legally recognized and organized, “which is intended for those who do not belong to any religion, who in their view of life do not wish to accord a privileged place to a relationship with a divine power, and who, as a result, wish to organize certain aspects of life which are usually governed by religion, without reference to any religious grouping.”<sup>82</sup> The Law of 21 June 2001 not only recognizes the *Conseil central*, but also establishes the specific forms of organization for philosophical communities, and the composition of administrative councils entrusted with the management of their material and financial interests and the welfare services they provide.

As with the other recognized religions, the State undertakes payment of salaries and living expenses for those persons chosen by the representative body who “provide moral assistance in accord with non-confessional philosophical convictions”, while the Communities take charge of the salaries of those who teach non-confessional morality in

78. Jean-Francois Husson, ed. *Le Financement du Culte Islamique en Belgique* (Namur: Les Editions Namuroises/Presses Universitaires de Namur, 2005), available at <http://www.cil.be/files>.

79. See Charles Bricman, “L’Article 181, Par. 2, de la Constitution: L’irrésistible Puissance des Symboles,” *Rev. Belge de Droit Constitutionnel*, 1995, 21-31; W. Verougstraete, “De Vrijzinnigheid; Een Nieuwe Kerk, een Levensbeschouwelijke Strekking of een Ongebonden Aanbod?,” in *Liber Amicorum Paul de Vroede* (Diegem: Kluwer, 1994), 1513-1524.

80. Law of 21 June 2002 on the *Conseil central des Communautés philosophiques non confessionnelles de Belgique/Centrale Raad der niet-confessionele levensbeschouwelijke gemeenschappen van België*, its officers and with institutions entrusted with the management of material and financial interests for recognized non-confessional philosophical communities, *Belgian Official Gazette*, 22 October 2002.

81. See the Law of 23 January 1981 on the granting of subsidies to non-confessional philosophical communities in Belgium, *Belgian Official Gazette*, 8 April 1981.

82. Sägerser and de Coorebyter, *supra* n. 51 at 11.

public schools.<sup>83</sup> It is the sole province of the representative body to determine, on its own authority, whether a teacher has the proper educational, personal, and moral credentials to teach non-confessional morality. In these matters, the Council of State has set out for non-confessional systems the same criteria that apply to teachers of (other) recognized religions, specifying that the sole grounds admissible for dismissal are the lack of credentials in these three areas.<sup>84</sup>

It should be noted, however, that from the outset, the treatment of non-confessional convictions in the form of organized secularist associations as being parallel to religious bodies has not met with universal agreement within the secularist community. For some, the system of public funding of religions, as historically practised under Belgian law, needs to be fundamentally reformed. As a result, they have long opposed in principle the participation of secularism in this funding system.<sup>85</sup> Nonetheless, a majority of secular organizations eventually opted for the more pragmatic position of working with(in) the existing system, which allows them to benefit from the same budgetary resources as the six recognized religions, on the grounds that salaries should be provided equally for the various families of confessional and philosophical groups. The alternative would be non-participation in the current system, which is the fate of non-recognized religions and belief systems.

#### *D. Non-recognized Religions and Belief Systems*

The Belgian religious and philosophical landscape has changed profoundly since the 1960s. New beliefs and practices have emerged, in response to the secularization resulting from the decline in traditional religious activities. In addition, major waves of immigration have led to a significant place for Islam, as well as for new Orthodox and evangelical Protestant churches, including many groups of African origin. These phenomena run up against a system of recognition and funding of (traditional) religious groups and communities which was not designed for the new situation. Along with the recognized religions, there are a large number of belief systems which remain unrecognized, such as the Jehovah's Witnesses and the Mormons. The Buddhists, which are probably the largest of these, are as said most probably on the way to be recognized.<sup>86</sup>

Without official recognition, these groups cannot avail themselves of the many advantages described above, all of which are bound up with recognition by the public authorities. Non-recognized groups can take the form of a non-profit association (ASBL/vzw), which allows them among other things to accept gifts and bequests. But for the latter to happen administrators, or, should legal cases arise, judges who have to rule on the tax exemptions being requested, must acknowledge that they are dealing with a 'religion'. In Belgian law, there is no statutory definition of 'religion', so this judgment falls within the domain of case law. Pursuant to the principle of freedom of religion, and especially of the constitutional principle of the separation of church and state in Belgium, as discussed above, the tribunal or court faced with deciding whether a movement is a 'confession' or a religion is not permitted to base its judgment on arguments about the content of the religion in question.<sup>87</sup> They must make their decisions based on outward signs, such as places of worship, providing believers with the texts of prayers, or the practice of ritual acts.<sup>88</sup> In an analysis of legal doctrine and case law made by Rik Torfs,

83. Géraldine Brausch, "La Laïcité à L'épreuve de ses Usages. Le Cas D'une Certaine Forme de Selection des Professeurs de Morale non Confessionnelle," in *Du Bon Usage de la Laïcité*, eds. Marc Jacquemain and Nadine Rosa-Rosso (Eden Editions, 2008), 159-171.

84. Council of State, Van Butsele Judgment, no. 135.938 (12 October 2004).

85. See under this head Caroline Sägerser and Jean-Francois Husson, *La Reconnaissance et le Financement de la Laïcité*, (Brussels: Crisp (no. 1756), 2002).

86. See supra n. 48.

87. Geert Van Haegendoeren, "Sekte of Kerk: De Niet Erkende Erediensten in België," *Tijdschrift Voor Bestuurswetenschappen en Publiekrecht* (1986): 390.

88. See the case law on this question: Pierre Mahillon and Simon Fredericq, "Het Regime van de Minoritaire Erediensten," *Rechtskundig Weekblad* (1961): 2376; cited by Rik Torfs, *Etat et Eglises en Belgique*, 9-34,

the author concludes that, at the very least, “(...) in order to speak of a religion, you must have some form of theistic worship.”<sup>89</sup> Even so, the fact of being defined as a ‘religion’ or a ‘confession’ is not enough to allow a group to benefit from the advantages that recognized religious bodies can claim.

#### IV. THE ISLAMIC HEADSCARF

In Belgium, as in many other European countries, the wearing of the Islamic headscarf seems to arouse deep feelings. It is practically impossible to sum up in a few lines the variety of opinions that surrounds this distinctive sign. The fact is that the number of Muslim women who wear the headscarf has been growing over the years, and their resolve seems to be growing firmer. The question of the Islamic headscarf illustrates in its own peculiar fashion how the idea of religious freedom has been transformed in parallel with social change. It also illustrates the problems that arise when this sort of religious development takes place within a constitutional framework that dictates the neutrality of the State and regulates the relationship between the State and religious bodies while also guaranteeing freedom of religion. These problems have arisen recently in cases where the headscarf is worn by civil servants and in the educational system. The two situations have given rise to stormy debate.

The approach taken in the question of the Islamic headscarf in Europe depends, in large part, on the constitutional terms applied to the relationship between the State and religious belief.<sup>90</sup> In Belgium, the situation is quite different from that in France. The French principle of the secularity of the State that excludes any reference to religion at the level of the public authorities does not appear as such in the Belgian Constitution. The latter’s guarantee of religious freedom includes the right to express beliefs publicly. Public worship and the freedom to express opinions on all matters are guaranteed. Furthermore, it might be said that, traditionally under Belgian law, the State and its institutions have adopted a positive attitude that supports recognized religions and secular belief systems.<sup>91</sup> On this basis, the wearing of the headscarf or other symbols of belief would appear to be safe from legal prohibition in general terms, whether in schools or in the civil service. Until recently in Belgium, one could say that the position taken on the question of the headscarf was not considered to be a matter of doctrine, which would provide an *a priori* basis for prohibition. However this tendency toward a more pragmatic approach - prohibition can only be justified in cases where there are real problems - is now being put to question, as we shall attempt to demonstrate below,<sup>92</sup>

##### *A. The Islamic Headscarf and the Civil Service*

The extent of the primary requirement of neutrality on the part of agents of the State has been the subject of discussion in the context of dress codes which are to be applied in this case.<sup>93</sup> In a close analysis of the question, Sébastien van Drooghenbroeck has surveyed the regulatory and legislative initiatives in Belgium which have attempted to solve the problem.<sup>94</sup> He brings up, in particular, the local regulations adopted by the cities

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[http://www.univ-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchenrecht/Staat\\_und\\_Kirche\\_in\\_der\\_EU/01-Belgique.pdf](http://www.univ-trier.de/fileadmin/fb5/inst/IEVR/Arbeitsmaterialien/Staatskirchenrecht/Staat_und_Kirche_in_der_EU/01-Belgique.pdf)

89. Id. at 17.

90. See Erica Howard, *Law and the Wearing of Religious Symbols: European Bans on the Wearing of Religious Symbols in Education* (London/New York: Routledge, 2013).

91. Articles 24, sec. 3, para. 2, and 181 of the Constitution.

92. In Belgium, since 2004 many municipalities in Flanders and a few in Brussels have included in their policies a prohibition against the wearing of the full headscarf in public places, on the grounds that everyone who uses public places should be identifiable. So far, none of these prohibitions has given rise to requests for the opinion of the Council of State or to litigation.

93. See esp. F. Gosselein, “Les Droits et Devoirs des Fonctionnaires,” *Administration Publique*, vol. 3-4 (2005): 212ff.

94. Van Drooghenbroeck, “Les transformations du concept de neutralité de l’Etat ...”, supra n. 10.

of Antwerp, Ghent, and Lier which prohibits some or all agents of the municipal administration to wear distinctive religious or political symbols. Other cities and municipalities have since followed their lead. Another initiative is the reformulation of the “rights and duties of agents” contained in the Royal Decree of 2 October 1937 on agents of the State, by a Royal Decree dated 14 June 2007.<sup>95</sup> Henceforth, pursuant to Article 8, sec. 1, “Agents of the State (...) shall strictly respect the principles of neutrality, equal treatment, and respect for laws, regulations, and directives. Whenever, in the course of their duties, they are in contact with the public, agents of the State must avoid any words, attitudes, and gestures which might have the effect of shaking public confidence in their complete neutrality, competence, or worthiness.” These terms are more explicit than those found in the previous version of the Decree.<sup>96</sup> Finally, a ministerial Circular of 17 August 2007, relating to the code of professional ethics that governs agents of the State entrusted with public administration of the federal level, requires that “With respect to their constitutional rights, (agents) shall ensure that their participation or involvement in political or philosophical activities does not endanger the confidence of the public in their impartial, neutral, and loyal performance of their duties.”<sup>97</sup> In addition, it might be useful to mention – yet again – the Mahoux bill,<sup>98</sup> which aimed to impose neutrality not only in the performance of duties as such, but also with regard to public expression on the part of the public agents concerned. On the question of a dress code for agents of the State, the bill suggested that “agents of the public authorities shall abstain, in the performance of their duties, from any public display of any form of philosophical, religious, partisan or other group expression.” The purpose was to restrict the right of agents of the State to express their opinions through public display.

In the previously cited opinion of the Council of State on this bill,<sup>99</sup> the Council recalled the obligations entailed by compliance with Articles 9 and 10 of the European Convention on Human Rights, which it sees as an obstacle to *a priori* approaches to the question and those “which specifically require” the public services to be neutral, as argued by the framers of the bill. After minutely examining the case law in the European Court of Human Rights, the Council of State declared that the precedents do in fact mean that, “This is not a matter of judgment in the abstract, but of judgment in concrete situations, in which we must bear in mind the particular circumstances under which the prohibition of the veil was at issue, such as the purpose the prohibition was intended to serve and the constitutional, political and religious context of the society where it was put into practice.” And further, “Moreover, it would seem to follow from the case law in the European Court of Human Rights that legislation in this matter may maintain a balance between freedom of religion and the factors bound up with the State’s legitimate rights of intervention (as provided for in the second paragraphs of Articles 9 and 10 of the European Convention on Human Rights) only in cases where there are problems at issue that involve the integrity of the State as a whole and its agencies – not simply potential problems, but actual and compelling problems.”

It was in this light that the Council of State judged that the proponents of the Mahoux bill gave insufficient justification for the extremely wide scope that it gave to the principle of the neutrality of all public agents. In particular, the circumstances did not provide sufficient grounds for the obligation imposed on all agents of the public authorities to observe the same strict neutrality in their external appearance, no matter what the nature

95. *Belgian Official Gazette*, 22 June 2007.

96. Article 8, sec. 1 (earlier version) of the Royal Decree of 2 October 1937 specifies, “Agents of the State shall treat those who use their services with comprehension and without any form of discrimination.”

97. *Moniteur Belge*, 27 August 2007.

98. See supra n. 8. Van Drooghenbroeck (supra n. 10) draws a parallel with a bill introduced in the French *Assemblée nationale*, aimed at prohibiting, to anyone invested with public authority, or entrusted with a responsibility for public service or contributing thereto, the wearing of symbols or clothing that visibly indicate religious, political, or philosophical affiliation (<http://www.assemblee-nationale.fr/13/propositions/pion1080.asp>).

99. See supra n. 5.

of their duties and without respect to whether or not these duties involved contact with the public. The Council further deemed that

Taking into account the principle of proportionality, this justification is all the more necessary since the requirements under Article 5 [of the bill] could lead to the exclusion of citizens from the civil service solely on the grounds of exercising a basic right, without adequately showing that this exercise presents a danger to public safety, (...) the protection of public order, health, or morals, (...) or the protection of the rights and freedoms of others (Article 9, paragraph 2, of the European Convention on Human Rights) or to national security, (...) public safety, (...) the maintenance of public order and (...) the prevention of crime, (...) the protection of health or morals, (...) the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence or for maintaining the authority and impartiality of the judiciary (Article 10, paragraph 2, of the European Convention on Human Rights).

For the Council of State, such justification must meet both the requirements of the principle of equality and those of the principle of non-discrimination. On the basis of this opinion, the Belgian Council of State affirmed that only a functional and pragmatic approach can do justice to freedom of religion in the civil service.

### *B. The Islamic Headscarf and Education*

The controversy over the Islamic headscarf is not, however, confined to the civil service. It turns up in the educational sector as well, in relation to the wearing of the headscarf by both teachers and students. The principle that the authorities can require teachers in public schools to follow a neutral dress code has been accepted both by the Administrative litigation<sup>100</sup> and the Legislation<sup>101</sup> sections of the Council of State. It follows from Article 24, § 1, third paragraph, of the Constitution that the Community must offer a neutral education that respects “the philosophical, ideological or religious views of the parents and the students.” In the judgment of 21 December 2010, the Administrative litigation section ruled with regard to a decision by the Charleroi town council that forbids teaching staff who do not teach religion or philosophy to wear religious, political or philosophical symbols on school premises: “State officials may also be expected to uphold strictly the principles of neutrality and equality in usage in the performance of their duties towards citizens. Neutrality in education is also intended to safeguard the fundamental rights of students and their parents.”<sup>102</sup>

The debate surrounding the question of whether a ban on wearing religious or philosophical signs can be imposed on the students in public schools as well has not yet been resolved in law. What is certain is that both regular judges and the Council of State accept that such a ban may be adopted in a school’s regulations on account of concrete circumstances specific to the situation in a given school. Thus a judge took into consideration, for example, that the militant behavior of a number of Muslim girls in her

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100. Council of State, no. 210.000, 21 December 2010, Topal, recital 6.7.2. The Council held that: “State officials may also be expected to uphold strictly the principles of neutrality and equality in usage in the performance of their duties towards citizens. Neutrality in education is also intended to safeguard the fundamental rights of students and their parents.” See also in connection with a teacher of Islam in Community schools: Council of State; no. 226.345, 5 February 2014, in the matter of XXXX v. Community education.

101. Opinion 48.022/AV, 20 April 2010 on a proposed decree “prohibiting the wearing of religious or philosophical signs by the staff of official educational institutions organized or subsidized by the French Community” (*Parl. Docs.*, Parl. of the French Community, 2009-2010, no. 84/1).

102. Council of State, no. 210.000, 21 December 2010, recital 6.7.2. See also the annulment of a dismissal of a teacher of Islamic religion because the teacher wore a headscarf outside of the classroom, which was forbidden in the school regulations. The Council held that the interpretation of neutrality in Community education is exclusively the preserve of the Community Education Council. Council of State, no. 195.044, 2 July 2009.

school created serious tensions that undermined its educational mission.<sup>103</sup> Whether the ban may also be imposed *in abstracto*, solely on the basis of the Community's obligation, according to Article 24, § 1, third paragraph of the Constitution, to establish neutral education, remains a subject of dispute. On 11 September 2009 the Community Education Council decided on a general and principled ban on pupils, students, and members of staff wearing visible religious and philosophical signs in any institutions of Community education.<sup>104</sup> In judgment no. 40/2011 of 15 March 2011<sup>105</sup> the Constitutional Court ruled that the Community Education Council is competent to take such a decision. The Council of State, in its judgment no. 220.245 of 10 July 2012 overturned the appeal for annulment of the ban on the grounds of incompatibility with the freedom of religion; the Council of State argued that the decision of the Community Education Council "is to be regarded solely as an internal, preparatory instruction that the Community educational institutions have in due course to implement in accordance with the prescribed procedures."<sup>106</sup> Only once a school has implemented the decision and an appeal for annulment is lodged with the Council of State's Administrative litigation section, be able to rule on the matter.

In an opinion dated 10 July 2012,<sup>107</sup> the General Meeting of the Legislation section of the Council of State expressed its position on a proposal for a decree aimed at introducing a ban on headscarves for all minors of mandatory school age at all educational institutions. According to those who introduced the proposal, the headscarf is a discriminatory and an item of clothing that expresses the subordination of women to men. It is therefore diametrically opposed to the fundamental western values and way of life. Just like the German Constitutional Court<sup>108</sup> and the Swiss Federal Court,<sup>109</sup> the Belgian Council of State also took the view that those who introduced the proposed decree gave a one-sided interpretation to the wearing of a headscarf "that ignores the fact that more than one interpretation is possible" and that they "generally do consider the situation of Muslim girls who wear the headscarf for reasons that have nothing to do with the idea that women are subordinate to men."

In general, the headscarf raises highly sensitive questions, hence the intensity of the discussion. The debate seems to divide the public into two camps. On the one hand, there are those who believe that, in a secular state, all distinctive religious or philosophical symbols should be banned from the public square. On the other are those who believe that displaying such distinguishing symbols, particularly in matters of dress, is an integral part of freedom of religion and/or freedom of thought. In this sense, the question of the headscarf is symptomatic of the debate over religious and cultural pluralism as it stands at present. It is further symptomatic of the mist that floats over the nature and character of the public square as a consequence of the debate about the multi-religious society. "The public square is, obviously, the essential space where people appear in public, but it has its origins in a particular historical interaction between a State in the process of construction and a dominant Church, which resulted in a compromise over their relationship and spheres of influence," as Corinne Torrekens remarks about Belgium.<sup>110</sup> According to her, the present challenge is to integrate new beliefs and philosophical

103. See for example Antwerp 14 June 2005, *R.W.* 2006-2007, 136, with comm. Jan Velaers and Marie-Claire Foblets, "De Hoofddoek, het Onderwijs en de Antidiscriminatiewet," *R.W.* (2006-2007): 122-132; *Juristenkrant* 14 September 2005, issue 3, with a note by Eva Brems. See also, for example, Council of State, no. 196.092, 15 September 2009.

104. In every institution of the Community Education System of the Flemish Community, pupils, students and staff may no longer wear religious or philosophical signs; an exception is made for teachers of religious subjects, who may wear such signs but exclusively during the religion class. During the said classes, the students present may also wear these signs.

105. Constitutional Court, 40/2011, 15 March 2011.

106. Council of State, no. 220.245 of 10 July 2012, in the matter of XXX v. Community education.

107. Council of State, Legislation section, 49.974/AV, 10 July 2012, about a proposed decree 'on the introduction of a ban on wearing a headscarf at educational institutions and centres for student guidance run by the Flemish Community' (*Parl.Docs.* VI.Parl. 2010-11, no. 1027/2).

108. Federal Constitutional Court, 24 September 2003, 2 BvR 1436/02, BverfGE, 108, (282), 305.

109. Federal Court, 27 February 2008, BGE, 134, I, (49), p. 54, recital 3.2.

110. Corinne Torrekens, "Le Pluralisme Religieux en Belgique," *Diversité Canadienne* 4 (2005): 56-8.

expressions into the definition of the public square. Her position runs counter to those who reject the concept of the public square as being a place where identities can encounter one another and who, therefore, oppose any visible appearance of religion.

## V. CONCLUSION

Here we conclude our sketch of the constitutional principles that, under Belgian law, govern the relations between the State and the various religious and other belief systems present in society. To do the subject full justice, we would also have had to take into account other aspects of the religious situation as they relate to the State under Belgian law: conscientious objection, the place of believers within the vast field of family law, the law of contracts, the references to belief under criminal law, to name but a few. That would have allowed us to present a comprehensive view of the situation and of the various factors affecting the way Belgian law provides normative regulation for the phenomenon of religion. But that would have required us to exceed the limits given us.

Even a cursory examination of the Belgian constitutional framework as it relates to religious freedom makes clear that there is a crying need for systematic study of these conflicts, whose numbers continue to grow and which juxtapose the law of the secularized State and the rights of citizens to exercise freedom of religion. These conflicts point to a fundamental question: that of the legitimacy of norms enacted by the laws of the State. In a context where the assertion of identities – including religious convictions – is returning to the foreground,<sup>111</sup> it is vital that the legal framework established to regulate these assertions should be prepared to offer adequate responses. Such responses should, ideally, embrace this diversity from the point of view of the freedom of religion and thought, freedoms which are guaranteed as basic human rights enjoyed by every individual. The challenge is all the greater because, in practice, religious and philosophical diversity is clearly on the increase, and religious self-assertion is often bound up with the assertion of identities which tend to become more radical if they are not met with empathy and respect for their significance to the parties concerned.<sup>112</sup> Analysis of the relations between the State and religious and other belief systems and of the protection of freedom of religion and belief shows how great the challenge is, but also that it is being taken seriously, albeit not without confrontations and frustrations.

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111. Olivier Roy, *La Sainte Ignorance: Le Temps de la Religion Sans Culture* (Paris: Seuil, 2008).

112. Felice Dassetto, *Paroles D'Islam: Individus, Sociétés et Discours dans L'Islam Européen Contemporain* (Paris: Maisonneuve, 2000); Abdulkader H. Sinno, ed., *Muslims in Western Politics* (Bloomington: Indiana U.P., 2009); Nikola Tietze, *Islamische Identitäten: Formen Muslimischer Religiosität Junger Männer in Deutschland und Frankreich* (Hamburg: HIS Verlag, 2001).