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The « Added Value » of the European Convention on Human Rights in the Ambit of Religious Freedom and Religious Autonomy in Belgian Constitutional Case Law

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Abstract

This paper sheds light on the « added value » of the case law of the European Convention on Human Rights in the ambit of religious freedom and religious autonomy in Belgian Constitutional case law with the help of concrete examples.

Introduction

As the principal legal source of human rights protection in Belgium since 1831, the Constitution forms the basis for freedom of religion and the « mutual independence » of State and Church. The specific provisions relating to religion contained in the Belgian Constitution constitute a paradigmatic example of compromise: they are the result of the discussions that took place between Catholic and Liberal members of the National Congress in 1830-1831. In that sense, the Belgian Constitution is – as are most constitutions – manifestly coloured by its particular history and values it embodies, especially concerning the regulation of religion (Articles 19, 20, 21 and 181). For instance, it bears noting that the National Congress decided to fix the public funding of religious ministers in the Constitution itself (old Article 117[1]) as a consequence of the influence of the funding that already existed when Belgian territories were subject to the rule of the Austrian Netherlands, the French Republic and the Netherlands.

In the same vein, again because they are coloured by the particular history and values of a given society, Constitutions generally ensure a more efficient protection of rights in the State concerned. In Belgium this is – amongst others – true of Article 14*bis* of the Constitution that prohibits capital punishment compared, for instance, to the European Convention on

[1] Now Article 181 of the Constitution.

Human Rights that still tolerates it[2]. It is also true of Article 22*bis* that guarantees the respect of moral, physical, mental and sexual integrity of every child. However, that finding does not apply to freedom of religion and religious autonomy. Indeed, as this paper will show, Articles of the Belgian Constitution dedicated to religious matters have not been modified since 1831, which explains why the Constitutional Court regularly relies upon the case law of the European Court of Human Rights to « modernise » its interpretation of those Articles.

After a (very) general overview of the principles of religious freedom and religious autonomy (1), this paper will focus upon the status of the European Convention on Human Rights in Belgian Constitutional Law (2) and, with the help of concrete examples, will analyse the influence of Strasbourg cases on Belgian Constitutional case law in the ambit of religious freedom and religious autonomy (3) compared to the case law of the Belgian Court of Cassation and Council of State (4).

1. Religious freedom and religious autonomy: general overview

In Belgian law at least[3] two human rights instruments must be taken into consideration in order to analyse the scope of religious freedom and religious autonomy: on the one hand, the Belgian Constitution (A) and on the other hand, the European Convention on Human Rights (B).

A. The Scope of Articles 19 to 21 of the Belgian Constitution

1. The Scope of the Constitution of 1831: A Spirit of Compromise

Since its very inception in 1831 – shortly after the State became independent in 1830 – and in the vein of numerous national and international human rights instruments, the Belgian Constitution has formed the basis for freedom of religion in Belgium. More precisely, Article 19 provides that « 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 ».

[2] However see: Protocol No. 13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances

[3] We could also point out the Universal Declaration of Human Rights and the EU Charter of Fundamental Rights. However, in the present paper, the analysis is limited to the Constitution and the European Convention on Human Rights because of the importance given to the Strasbourg jurisprudence in Belgian constitutional case-law.

Since its creation, even if the text does not explicitly state it, the Constitution has also formed the basis for religious autonomy. More precisely, Article 21 § 1 ensures that « 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 ». Legal literature and jurisprudence consider that Article 21 § 1 of the Constitution contains a general principle of prohibition on State intervention in religious affairs. In other words, as explained by Rik Torfs, « Article 21 of the Belgian Constitution always has been perceived as a *pars pro toto*. It does not exclusively deal with correspondence or with the appointment of ministers. On the contrary, freedom of internal organisation and autonomy as a? whole are at stake »[4].

Article 20 of the Constitution must also be mentioned. By providing that « 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 », Article 20 is the « negative » counterpart to Article 19.

In 1831, Articles 19, 20 and 21 very well reflected the position of the Parliament and the population *vis-à-vis* religious phenomena. In broad terms, the Constitution of 1831 was a compromise between Catholic members of the National Congress – who wanted freedom of religion and autonomy of churches (Articles 19 and 21) – and Liberals who wanted the right not to be obliged to believe in or manifest membership of any religion (Article 20) and the priority of civil over religious marriage ceremonies (Article 21, § 2[5]).

2. The Scope of Today's Constitution: A Lack of Modernity?

If Articles 19, 20 and 21 of the Constitution corresponded perfectly to the social and religious realities of the nineteenth century, today they are more questionable. One of the most intriguing aspects is the total absence of any possibility of limiting or restricting those rights. It is understood that Articles 19 to 21 are only based on a *repressive* logic, in opposition, for instance, to the European Convention on Human Rights that is based on a *preventive* logic[6].

[4] R. TORFS, « Church Autonomy in Belgium », *in Church Autonomy: a Comparative Survey,* G. Robbers (dir.), Frankfurt am Main, Peter Lang, 2001, p. 608.
[5] More precisely, Article 21, sub. 2, of the Constitution provides that « A civil wedding should always precede the blessing of the marriage, apart from the exceptions to be established by the law if needed ».
[6] See below point B.

In line with this problem, two constitutionalists – Jan Velaers and Sébastien van Drooghenbroeck – were invited as experts by the Belgian Federal Parliament in 2004 to propose a modernisation of Title II of the Constitution entitled « Belgians and their rights »[7] (which includes, amongst others, Articles 19, 20 and 21). In two final documents containing more than 500 pages, the two constitutionalists' proposals included « cross-cutting clauses »[8] for the authorisation of limitations on human rights (very similar to those in § 2 of Articles 8 to 11 of the European Convention on Human Rights).

However, until now, this modernisation initiative has remained theoretical[9].

Though it cannot be denied that Title II of the Constitution has been modified to some extent (*e.g.*: the addition of specific children's rights, the right to integrity, the abolition of capital punishment, etc.), the modernisation proposed by the two constitutionalists would have been particularly interesting in relation to the ambit of religious freedom and religious autonomy as they apply to current social and religious realities. However, no revision of Articles 19, 20 and 21 has been made since 1831.

B. The Scope of Article 9 of the European Convention on Human Rights

1. Religious Freedom and Religious Autonomy

It is well known that, since 1950, Article 9 § 1 of the European Convention on Human Rights has guaranteed freedom of religion by providing that « everyone has the right to freedom of thought, conscience and religion; this right includes a person's freedom to change his religion or belief and freedom, either alone or jointly with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance ».

Even if it is not expressly stated, Article 9 of the Convention does not only protect freedom of thought, conscience and religion, but also religious autonomy. Frequently, the European Court of Human Rights reiterates that « religious communities traditionally and universally exist in the form of organised structures. Where the organisation of the religious community is at issue, Article 9 of the Convention must be interpreted in the light of Article 11, which safeguards associations against unjustified State interference. (…)

[7] See: *Doc. parl.*, Ch. repr., sess. ord. 2004-2005, n° 2304/1.
[8] See: *Doc. parl.*, Ch. repr., sess. ord. 2004-2005, n° 2304/1.
[9] On that topic, see also: E. BREMS, « Vers des clauses transversales en matière de droits et libertés dans la Constitution belge ? », *Rev. trim. D.H.*, 2007, pp. 351-383.

The autonomous existence of religious communities is indispensable for pluralism in a democratic society and is an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of these communities as such but also the effective enjoyment of the right to freedom of religion by all their active members. Were the organisational life of the community not protected by Article 9, all other aspects of the individual's freedom of religion would become vulnerable »[10].

2. *Forum Externum* v. *Forum Internum*

It is important to underline the fact that the freedom of thought, freedom of conscience and freedom of religion guaranteed by Article 9 § 1 have dual aspects. More precisely, Article 9 § 1 « does not only protect inner convictions and beliefs (so-called *forum internum*) but also the expression of these convictions and beliefs (so-called *forum externum*) »[11]. The fundamental difference between those two expressions of freedom relates to the admissibility of the State's *interferences* in the terms of Article 9 § 2 of the European Convention on Human Rights. Interferences are only possible within the *forum externum*, whereas the *forum internum* is an absolute right that can never be limited by the State. This is peculiar to Article 9 and does not feature in Articles 8, 10 and 11 of the Convention. This has been clarified by the European Court of Human Rights in its judgment *Kokkinakis v. Greece* on 25 May 1993: « The fundamental nature of the rights guaranteed in Article 9 para. 1 (art. 9-1) is also reflected in the wording of the paragraph providing for limitations on them. Unlike the second paragraphs of Articles 8, 10 and 11 (art. 8-2, art. 10-2, art, 11-2) which cover all the rights mentioned in the first paragraphs of those Articles (art. 8-1, art. 10-1, art. 11-1), that of Article 9 (art. 9-1) refers only to "freedom to manifest one's religion or belief". In so doing, it recognises that in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected »[12].

Norman Doe explains that « in line with Strasbourg jurisprudence on Article 9 ECHR, national laws in Europe make a clear distinction between the right to hold and change religious beliefs, which is an absolute right, and

[10] E.Ct.H.R., *Hasan and Chaush v. Bulgaria*, 26 October 2000, § 62; E.Ct.H.R., *Metropolitan Church of Bessarabia and Others v. Moldova*, 13 December 2001, § 118; E.Ct.H.R., *Sindicatul* « *Păstorul cel Bun* » *v. Romania*, 9 July 2013, § 136.

[11] R. UERPMANN-WITTZACK, « Personal Rights and the Prohibition of Discrimination », *in European Fundamental Rights and Freedoms,* D. Ehlers (dir.), De Gruyter Textbook, 2007, p. 78.

[12] E.Ct.H.R., *Kokkinakis v. Greece*, 25 May 1993, § 33.

the right to manifest religious beliefs, which is qualified »[13]. In Belgium, a short caveat must be provided to this affirmation, in the sense that this distinction is not expressly included in the law *sensu stricto* or in the Constitution but comes – as we will see[14] – from the « praetorian method » used by the Constitutional Court.

3. Conditions of Interferences

Interferences into religious freedom and religious autonomy are only accepted by the European Court of Human Rights in the presence of three conditions fixed by the Convention to avoid any arbitrary intervention of the State.

First, the interference must be prescribed by law. This « rule of law test » is « not, however, confined to domestic legal processes and includes more abstract or general assumptions about the requirements of the "rule of law", a basic Council of Europe idea »[15]. In other words, the concept of « law » need not be interpreted in its formal sense. Regularly, the European Court of Human Rights « reiterates its settled case law affirming that the expression "prescribed by law" requires first that the impugned measure should have a basis in domestic law. It also refers to the quality of the law in question, requiring that it be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail and to regulate their conduct »[16].

Second, the interference must pursue a legitimate aim. An exhaustive list of legitimate aims is provided by Article 9 § 2 of the Convention. More precisely, limitations to freedom of religion are only admitted if they serve the interests of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others.

Third, the interference must be necessary in a democratic society. This third condition is the vaguest, most complex and open-textured of the three. This is also true for limitations to Articles 8, 10 and 11. Concerning the freedom of religion, it is important to underline that in its case law, the European Court of Human Rights regularly reiterates that « as protected by

[13] N. DOE, *Law and Religion in Europe: A Comparative Introduction*, Oxford, Oxford University Press, 2011, p. 42.
[14] See *infra* section **2**.
[15] S. GREER, *The exceptions to Articles 8 to 11 of the European Convention on Human Rights*, Strasbourg, Council of Europe Publishing, 1997, p. 9.
[16] See among others: E.Ct.H.R. (GC), *Refah Partisi and Others v. Turkey*, 13 February 2003; E.Ct.H.R. (GC), *Bayatyan v. Armenia*, 7 July 2011, § 113.

Article 9, freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion »[17].

The analysis which follows will demonstrate how this triptych has influenced the Constitutional Court in its development of the so-called « conciliatory method » (*méthode concilatoire*[18]) when interpreting restrictions to freedom of religion and religious autonomy.

2. The Status of the European Convention on Human Rights in Belgian Constitutional Law

As Dean Spielmann has highlighted, « the Belgian Constitution does not contain a provision regarding the relationship between international and national law. In Belgium, the status of the Convention as superior law has had long tradition since the ruling of the *Cour de Cassation* in *Fromagerie Franco-Suisse "Le Ski"* of 27 May 1971 deciding that international law prevails over domestic law »[19].

Even though the conformity of a law to the European Convention on Human Rights cannot be directly controlled by the Belgian Constitutional Court – because the Convention is not included in the « *bloc de constitutionnalité* » –, it has had an important place in the case law of the Court since its beginning. Indeed, « the Belgian Constitutional Court, formerly the *Cour d'Arbitrage*, has since its creation in 1984 insisted on strict

[17] See among others: E.Ct.H.R., *Buscarini and Others v. San Marino*, 18 February 1999, § 34; E.Ct.H.R., *Kokkinakis v. Greece*, 25 May 1993, § 31; E.Ct.H.R., *Refah Partisi and Others v. Turkey*, 13 February 2003, § 90.

[18] On that method, see: M. VERDUSSEN, *Justice constitutionnelle*, Bruxelles, Larcier, 2012, pp. 132-138. See also: H. SIMONART and M. VERDUSSEN, « La réforme de la Cour d'arbitrage et la protection des droits fondamentaux », *R.B.D.C.*, 2000, p. 189 ; X. DELGRANGE, « De l'ensemble indissociable à l'interprétation conciliante », *in Le droit international et européen des droits de l'homme devant le juge national,* S. van Drooghenbroeck (dir.), Bruxelles, Larcier, 2014, pp. 150-152.

[19] D. SPIELMANN, « Jurisprudence of the European Court of Human Rights and the Constitutional systems in Europe », *in The Oxford Handbook of Comparative Constitutional Law,* M. Rosenfeld and A. Sajó (dir.), Oxford, Oxford University Press, 2012, p. 1241.

observance of the provisions of the Convention and the interpretations given by the ECtHR »[20]. More precisely, as explained by Patricia Popelier, « originally the Court of Arbitration's only mandate was the supervision of the division of powers between the federation and the federated entities. In 1989 however every person with justifiable interest was given access to the Court and its competence was extended to the review of Statutes against the equality and non-discrimination principles (Articles 10-11 Belgian Constitution) and the rights and freedoms concerning education (Article 24 Belgian Constitution). (…). As the Court accepts that Articles 10-11 of the Constitution are combined with other rules and legal principles, it gives protection against Statutes which violate human rights laid down in the constitution or international treaties »[21].

This affirmation has become even stronger since the introduction in 2009 of paragraph 4 to Article 26 of the Special Act of 6 January 1989 on the Constitutional Court. Pursuant to this new paragraph, « where it is invoked before a court of law that a statute, decree or rule referred to in Article 134 of the Constitution infringes a fundamental right which is guaranteed in an entirely or partly similar manner by a provision of Title II of the Constitution and by a provision of European or international law, said court of law shall first refer the question of compatibility with the provision of Title II of the Constitution to the Constitutional Court for a preliminary ruling. Where only the infringement of the provision of European or international law is invoked before the court of law, said court of law shall, even of its own motion, investigate whether Title II of the Constitution contains an entirely or partly similar provision. These obligations shall not prejudice the right of the court of law, at the same time or at a later date, to refer a question to the Court of Justice of the European Union for a preliminary ruling ».

In other words, this paragraph gives *priority* to the constitutional procedure by *obliging*[22] the *a quo* judge to first refer the question of

[20] D. SPIELMANN, *op. cit.*, note 19, p. 1241.

[21] P. POPELIER, « Belgium. The supremacy dilemma: the Belgian Constitutional Court caught between the European Court of Human Rights and the European Court of Justice », *in Human rights protection in the European legal order: The interaction between European and the national courts,* P. Popelier, C. Van de Heyning and P. Van Nuffel (eds.), Cambridge/Antwerp/Porland, Intersentia, 2011, pp. 150-151.

[22] However, four exceptions can be invoked to avoid referring the question of compatibility to the Constitutional Court. More precisely, Article 26, § 4, sub. 2, provides that: « Notwithstanding the first paragraph, the obligation to refer a preliminary question to the Constitutional Court shall not apply:
1° in the cases referred to in paragraphs 2 and 3 [of Article 26];
2° if the court of law finds that the provision of Title II of the Constitution has manifestly not been infringed;

compatibility to the Constitutional Court when the invoked violation concerns a right protected both by a provision of European law – whether embodied in the European Convention on Human Rights or elsewhere – or international law and by the provisions of Title II of the Constitution.

Even though compliance with the European Convention is not included in the « *bloc de constitutionnalité* », the Constitutional Court has created a « praetorian method » called the « conciliatory method » (*méthode conciliatoire*) in which the Court analyses Articles of the Constitution *in light of* the corresponding provision of the European Convention on Human Rights. As explained by Marc Bossuyt and Willem Verrijdt « in this judgment, the Court considers all analogous constitutional and treaty rights to form an "inextricable unity" (*ensemble indissociable*). Nevertheless, the formal reference provision is still a constitutional right, because the Court cannot directly examine whether a provision of international or European law has been violated. Examples of such analogous rights include the right to privacy, the freedom of expression and the protection of property »[23], but also the freedom of religion, the freedom of association, etc.

Thanks to the so-called « conciliatory method », the Belgian Constitutional Court has partly « corrected » the lack of modernity of Title II of the Constitution and has endorsed the content of the Strasbourg case law, even though the European Convention on Human Right is not part of the « *bloc de constitutionnalité* ».

3. Concrete Applications of the Influence of Strasbourg Case Law on Belgian Constitutional Jurisprudence in the Ambit of Religious Freedom and Religious Autonomy

We propose here to analyse three clear illustrations of the use of the so-called « conciliatory method » by the Belgian Constitutional Court in the ambit of religious freedom and religious autonomy. The first one relates to the renewing of the representative bodies of Islam (A); the second one

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3° if the court of law finds that it appears from a judgment delivered by an international court of law that the provision of European or international law has manifestly been infringed; 4° if the court of law finds that it appears from a judgment delivered by the Constitutional Court that the provision of Title II of the Constitution has manifestly been infringed ».

[23] M. BOSSUYT and W. VERRIJDT, « The Full Effect of EU Law and of Constitutional Review in Belgium and France after the Melki Judgment », *European Constitutional Law Review*, 2011, p. 358. See also: P. POPELIER, « Belgium. The supremacy dilemma: the Belgian Constitutional Court caught between the European Court of Human Rights and the European Court of Justice », *op. cit.*, note 21, p. 155.

focuses on the « burqa ban law » (B) and the third one deals with children's obligation to follow religious and non-confessional courses in State schools (C).

A. Decision 148/2005 of 28 September 2005: « Muslim Executive of Belgium » Case

On 28 September 2005, the Belgian Constitutional Court had to decide whether the Law of 20 July 2004 that had created a Commission in charge of renewing the bodies representing Islam complied with Articles 19 to 21 of the Belgian Constitution read together with Articles 9 and 11 of the European Convention on Human Rights[24].

In its decision, the Constitutional Court expressly refers to the *Hassan and Tchaouch v. Bulgaria* case in the European Court of Human Rights, citing at B.5.2 that « freedom to manifest one's religion, alone and in private, or in community with others, in public and within the circle of those whose faith one shares. Religious communities traditionally and universally exist in the form of organised structures. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention »[25].

The *Hassan and Tchaouch* case is particularly interesting in relation to the replacement of the leadership of a religious organisation and, more generally, in relation to the collective expression of freedom of religion. At § 84 of its judgment, the European Court of Human Rights « reiterates its settled case law according to which the expressions "prescribed by law" and "in accordance with the law" in Articles 8 to 11 of the Convention not only require that the impugned measure should have some basis in domestic law, but also refer to the quality of the law in question. The law should be both adequately accessible and foreseeable (…). For domestic law to meet these requirements it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention ». Specifically, according to the Court, the relevant law did not provide any substantive criteria on the basis of which the State authorities could register religious denominations and changes of their leadership in circumstances where internal divisions and conflicting claims for legitimacy existed (§ 85). Therefore, the European Court of Human Rights found that Bulgaria had violated Article 9 of the Convention[26].

[24] C. const. (Belgium), n°148/2005, 28 September 2005.
[25] This affirmation is taken directly from § 60 and § 62 of E.Ct.H.R, *Hassan and Tchaouch v. Bulgaria*, 26 October 2000.
[26] But also Articles 11 and 13 of the Convention.

In Decision 148/2005, the Belgian Constitutional Court also emphasises the fact that Article 24 (religious or moral education) and Article 181 (funding of recognised religious and non-confessional organisations) of the Constitution imply that the State can require that all recognised religions provide, as a minimum, the structure enabling them to appoint a spokesperson in their relations with public authorities. According to the Constitutional Court, by creating a Commission in charge of renewing the bodies representing Islam, the legislator's act only relates to concretising the recognition and public funding of Islam. In that sense, the Court judged that the legislator's goal was not to place conditions upon the exercise of freedom of religion[27].

Given the absence of structure in Islam in this respect, the Court held that the legislator had legitimately created a Commission in charge of renewing the representative bodies[28]. The Court concluded that the State had not violated the right to freedom of religion.

B. Decision 145/2012 of 6 December 2012: « Burqa Ban Law »

On 6 December 2012, the Belgian Constitutional Court[29] had to decide whether the Law of 1 June 2011 « prohibiting the wearing of any clothing which totally or mainly conceals the face » respected the applicants' right to freedom of religion (Article 19 of the Belgian Constitution and Article 9 of the European Convention on Human Rights, read together)[30].

This Law inserted the following new Article 563*bis* into the Criminal Code: « Persons who, unless otherwise provided by law, appear in a place that is accessible to the public with their faces completely or partially

[27] C. const. (Belgium), n°148/2005, 28 September 2005, B.5.4.
[28] C. const. (Belgium), n°148/2005, 28 September 2005, B.7.4.
[29] C. const. (Belgium), n°145/2012, 6 December 2012. On that judgment, see among others: L.-L. CHRISTIANS, S. MINETTE and S. WATTIER, « Le visage du sujet de droit: la *burqa* entre religion et sécurité », *J.T.*, 2013, pp. 234-245 ; X. DELGRANGE and M. EL BERHOUMI, « Pour vivre ensemble, vivons dévisagés : le voile intégral sous le regard des juges constitutionnels belge et français », note sous Cons. const. fr., 7 octobre 2010 et C. const., n° 145/2012 du 6 décembre 2012, *Rev. trim. D.H.*, 2014, pp. 639-665. See also: F. KUTY, « L'article 563bis du Code pénal ou l'interdiction de dissimuler son visage dans les lieux accessibles au public », *J.T.*, 2012, pp. 81-89 ; L.-L. CHRISTIANS, S. MINETTE, et S. WATTIER, « Cour constitutionnelle et préjudice religieux : la preuve du caractère absolu des convictions », note sous C. const., n° 148/2011 du 5 octobre 2011, *C.D.P.K.*, 2011, pp. 443-451; X. DELGRANGE, « La désobéissance civile, seul recours effectif contre la loi? », note sous C. const., n° 148/2011 du 5 octobre 2011, *J.T.*, 2011, pp. 709-712.
[30] Other human rights were invoked by the applicants (freedom of expression, right to privacy, human dignity, etc.) but we limit our comments to freedom of religion.

covered or hidden, such as not to be identifiable, shall be liable to a fine of between fifteen and twenty-five euros and imprisonment of between one and seven days, or only one of those sanctions. However, paragraph 1 hereof shall not concern persons who are present in a place that is accessible to the public with their faces completely or partially covered or hidden where this is provided for by employment regulations or by an administrative ordinance in connection with festive events »[31].

In its decision of 6 December 2012, quoting the Strasbourg cases *Pichon and Sajous v. France*, *Leyla Sahin v. Turkey* and *Mann Singh v. France*, the Constitutional Court of Belgium emphasised that those constitutional and conventional articles do not protect the right to freedom of religion under all circumstances[32]. In arguing that it is necessary, in a democratic society, to protect the values and principles that founded the European Convention on Human Rights, the Constitutional Court expressly cites § 108 of the *Leyla Sahin*'s case: « Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society". Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position (…). Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society (…). Where these "rights and freedoms" are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a "democratic society" (…) »[33].

Quoting *Manoussakis and a. v. Greece*, *Hassan and Tchaouch v. Bulgaria* and *Hasan and Eylem Zengin v. Turkey*, the Constitutional Court also emphasises the fact that the State cannot make any judgment on the legitimacy of beliefs[34].

[31] This traduction of new Article 563*bis* of the Criminal Code comes from: E.Ct.H.R. (GC), *S.A.S. v. France* of 1 July 2014, § 41.
[32] C. const., n°145/2012, 6 December 2012, B.16.1.
[33] E.Ct.H.R., *Leyla Sahin v. Turkey*, 10 November 2005, § 108.
[34] C. const. (Belgium), n° 145/2012,6 December 2012, B.16.3.

Analysing preparatory works to the Law of 1 June 2011, the Constitutional Court identifies three aims that justify the adoption of the Law: public security, equality between men and women, and a « certain conception of "*vivre ensemble*" in society »[35]. According to the Court, those aims are legitimate aims which fall within the category of Article 9 of the European Convention on Human Rights that are the protection of public order and public security and the protection of the rights of others[36]. By reasoning this way, the Constitutional Court clearly applies the « conciliatory method » and, therefore, in a way, remedies the lack of an interference clause in Article 19 of the Belgian Constitution.

In relation to the necessity and proportionality criteria, the Court again analysed the legislator's preparatory works and held that the Law serves public security but also a « certain conception of "*vivre ensemble*" in society »[37].

Finally, the Court concluded that the Belgian State had not violated the freedom of religion.

To complete the analysis of the Belgian « burqa ban law », it is particularly interesting to note that on the date of the Constitutional Court's judgment, France was the only other European country to have adopted a similar legislation. More precisely, the French Law had been adopted on 11 October 2010. As reaction to that prohibition, a French national who described herself as a « devout Muslim » wearing the burqa and niqab made an application to the European Court of Human Rights. Quite logically, Belgium became a third-party to the case before the European Court of Human Rights.

In its judgment of 1 July 2014[38], the European Court of Human Rights pays particular attention to the concept of « living together » (« *vivre*

[35] C. const. (Belgium), n° 145/2012,6 December 2012, B. 17.
[36] *Ibid.*, B. 18.
[37] C. const. (Belgium), n° 145/2012,6 December 2012, B.17.
[38] Regarding this decision, see among others: N. RENUART, « Brevet de conventionnalité pour l'interdiction du port du voile intégral dans l'espace public », note sous Cour eur. dr. h. (GC), S.A.S. c. France, 1 juillet 2014, *C.D.P.K.*, 2014, pp. 440-450 ; E. HERRERA CEBALLOS, La prohibición del velo integral en espacios públicos: La sentencia del TEDH (Gran Sala) en el asunto S.A.S. contra Francia, de 1 de julio de 2014, *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, 36, 2014; V. CAMARERO SUÁREZ, »La Sentencia del TEDH en el caso S.A.S. c. Francia: un análisis crítico », *Revista General de Derecho Canónico y Derecho Eclesiástico del Estado*, 37, 2015,; G. GONZALEZ et G. HAARSCHER, « Consécration jésuitique d'une exigence fondamentale de la civilité démocratique ? Le voile intégral sous le regard des juges de la Cour européenne », note sous Cour eur. dr. h. (GC),

ensemble ») which was the basis of both French and Belgian legislation banning the burqa and niqab. In France, the report of the National Assembly on wearing the full-face veil in national territory dated January 2010 – which contains a total of 658 pages – clearly considers that the « full-face veil infringes the notion of "*vivre ensemble*" »[39]. So, originally, the concept of « *vivre ensemble* » was created by the French government emphasising that « voluntary and systematic concealment of the face is problematic because it is quite simply incompatible with the fundamental requirements of "living together" in French society »[40]. Then, this notion was taken up by the Belgian legislator and affirmed by the Belgian Constitutional Court, which held that « the individuality of every subject of law (*sujet de droit*) in a democratic society is inconceivable without his or her face, a fundamental element thereof, being visible. (…) [I]t was entitled to take the view that the creation of human relationships, being necessary for living together in society, was rendered impossible by the presence in the public sphere, which quintessentially concerned the community, of persons who concealed this fundamental element of their individuality »[41].

Even if the « *vivre ensemble* » is not a legal concept that would be listed among the legitimate aims of paragraph 2 of Articles 8 and 9 of the European Convention on Human Rights to justify a limitation to freedom, it is worth noting that the Court finds that the « burqa ban law » can be regarded « as proportionate to the aim pursued, namely the preservation of the conditions of "living together" as an element of the "protection of the rights and freedoms of others" »[42]

S.A.S. c. France, 1 juillet 2014, *Rev. trim. D.H.*, 2015, pp. 219-233; P. DUCOULOMBIER, « Le port de la burqa et du niqab interdit dans l'espace public. Tenue correcte exigée », Observations sous l'arrêt CEDH, gr. ch., 1 juillet 2014, S.A.S. c/France, *Rev. trim. D.H.*, 2015, pp. 95-116.

[39] Rapport d'information du 26 janvier 2010 de l'Assemblée nationale sur la pratique du port du voile intégral sur le territoire national, p. 87, available on http://www.assemblee-nationale.fr/ (free translation).

[40] See : *Exposé des motifs*, Assemblée nationale de France, projet de loi n° 2520 (10 May 2010), quoted by E.Ct.H.R. (GC), *S.A.S. v. France*,1 July 2014, § 25.

[41] C. const. (Belgium), n° 145/2012, 6 December 2012, B.21.

[42] E.Ct.H.R. (GC), *S.A.S. v. France* of 1 July 2014, § 157. However, this point of view is not shared by all the judges of the Court. Some of them have strong reservations about this approach. It is important to mention here that in its judgment *S.A.S v. France*, the Court holds by fifteen votes to two that there has been no violation of Articles 8 and 9 of the Convention. More precisely, one dissenting opinion is formulated by two judges (Judges Nußberger and Jäderblom). According to those two judges, « the very general concept of "living together" does not fall directly under any of the rights and freedoms guaranteed within the Convention » and that is the reason why they doubt that « Law prohibiting the concealment of one's face in public

C. Decision 34/2015 of 12 March 2015: Religious and Non-Confessional Courses in Public Schools

On 12 March 2015, the Constitutional Court of Belgium had to rule on a preliminary reference submitted by the Council of State relating to the obligation for children under 18 years old going to State schools to receive religious or moral education. This obligation is contained in Article 8 of the Law of 29 May 1959 (the so-called « *Loi du Pacte scolaire* ») and in Article 5 of the Decree of the French Community defining neutrality of education.

In its decision, the Constitutional Court noted that Article 24 § 3 sub. 2 sets out the statutory rather than the constitutional obligation, that: « All pupils of school age have the right to moral or religious education at the community's expense ». The Court stated that pursuant to Article 24, § 3, of the Constitution, everyone has the right to education in accordance with the fundamental rights and freedoms and that these rights include the right of parents to ensure that such education and teaching aligns with their own religious and philosophical convictions, guaranteed by Article 2 of the First Additional Protocol to the European Convention on Human Rights[43].

In order to clarify the scope of Article 24 § 3 of the Constitution, the Constitutional Court makes express reference to the Strasbourg jurisprudence on Article 2 of the First Additional Protocol. According to the European Court of Human Rights, « Article 2 of Protocol No. 1 does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme »[44]. The European Court also considers there is an « obligation under the second sentence of Article 2 of Protocol No. 1, which gives parents the right to demand from the State respect for their religious and philosophical convictions in the teaching of religion » and finds that « where a Contracting State includes religious instruction in the curriculum for study, it is then necessary, in so far as possible, to avoid a situation where pupils face a conflict between the religious education given by the school and the religious or philosophical convictions of their parents »[45].

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places pursues any legitimate aim under Article 8 § 2 or Article 9 § 2 of the Convention ».

[43] C. const. (Belgium), n°34/2015, 12 March 2015, B.5.1.

[44] E.Ct.H.R. (GC), *Folgero and others v. Norway*,9 October 2007, § 84; E.Ct.H.R., *Hasan and Eylem Zengin v. Turkey*, 9 October 2007, § 48, quoted by C. const. (Belgium), n°34/2015, 12 March 2015, B.5.2.

[45] E.Ct.H.R., *Hasan and Eylem Zengin v. Turkey,* 9 October 2007, § 71; E.Ct.H.R., *Mansur Yalçin and others v. Turkey*, 16 September 2014, § 72, quoted by C. const. (Belgium), n°34/2015, 12 March 2015, B.5.3.

Noting that the current system in the French Community only authorises parents and children to choose between « courses of religion » and « moral courses inspired by free spirit », the Constitutional Court considers that the French Community only offers « orientated » courses and, therefore, does not comply with the Strasbourg case law. According to the Constitutional Court, it must be possible for the students to be exempted from religious and moral lessons[46].

In conclusion, the French Community will have to change its system in order to comply with the decision of the Constitutional Court and, in the meantime, in relation to the case law of the European Court of Human Rights. In that sense, decision 34/2015 of 12 March 2015 constitutes a paradigmatic illustration of the influence of Strasbourg case law on Belgian constitutional law.

4. A Counter-Example: The Jurisprudence of the Belgian Court of Cassation and Council of State on the Principle of Religious Autonomy

Analysing the jurisprudence of the Belgian Court of Cassation and Council of State relating to the principle of religious autonomy enables us to understand how the Constitutional Court is more greatly influenced by the case law of the European Court of Human Rights. This is especially true concerning respect for the rights of the defence in the proceedings for the revocation of religious ministers (A) as compared to the Strasbourg case law (B) and its « absence » of influence on the jurisprudence of the Belgian Court of Cassation and Council of State (C).

A. The Belgian Court of Cassation and Council of State's Case Law on the Revocation of Religious Ministers

As explained by Rik Torfs, « traditionally, the control exercised by secular courts remains exclusively formal, which means that the civil judge only has the right to determine whether a challenged decision has been taken by the competent ecclesiastical authority. This was a generally accepted approach throughout the nineteenth century, a tendency that was confirmed by the *Cour de Cassation*, the Belgian Supreme Court, in 1975 »[47].

In other words, according to the Belgian Court of Cassation, a civil court can never rule on whether a decision to revoke a religious minister has been adopted in accordance with the rights of the defence by the religious

[46] C. const. (Belgium), n°34/2015, 12 March 2015, B.7.1.
[47] R. TORFS, « Church Autonomy in Belgium », *op. cit.*, note 4, p. 611.

authority. In this sense, the Court of Cassation interprets Article 21 of the Constitution – that contains a general principle relating to the separation of Church and State – in a very strict way.

This nineteenth-century interpretation has never been changed and has even been upheld by the Court of Cassation since 1975, in its decision of 3 June 1999[48].

Like the Court of Cassation, the Belgian Council of State adopts a very strict interpretation of Article 21 of the Constitution and has emphasised the importance of the principle of separation between the state sphere and religious sphere on several occasions[49].

In relation to the revocation of religious ministers, the Council of State also considers that civil courts can never rule on whether a religious decision to revoke a religious minister has been made in accordance with the rights of the defence[50].

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[48] This decision of 1999 concerned the famous case of « Père Samuel ». The Court of Cassation had previously adopted a decision in the same sense on 20 October 1994. We intentionally limit our analysis on this case which has already been extensively commented upon. Among others, see: F. RIGAUX, « Le respect des droits fondamentaux par les institutions non étatiques », note sous Cass., 20 octobre 1994, *R.C.J.B.*, pp. 124-129 ; L.-L. CHRISTIANS, « L'autonomie des systèmes religieux : réaffirmation d'un principe », *J.L.M.B.,* 1995, p. 507; H. VUYE, « Hoe gescheiden zijn Kerk en Staat? Interpretatiemogelijkheden omtrent art. 21 van de Grondwet », *R. Cass.,* 1995, pp. 49-56; S. VAN DROOGHENBROECK, obs. sous Cass. (1ère ch.), 20 octobre 1994, *in Droit international des droits de l'homme*,O. De Schutter and S. van Drooghenbroeck (dir.), Bruxelles, Larcier, 1999, pp. 205-213. On the judgment of 3 June 1999, see among others: K. MARTENS, « Het Hof van Cassatie en de interpretatie van artikel 21 G.W.: de verhouding tussen Kerk en Staat dan toch niet op nieuwe wegen?, *C.D.P.K.*, 2000, pp. 215-218; H. VUYE, « Nogmaals: hoe gescheiden zijn Kerk en Staat? Over de bevoegdheid van de rechter bij beslissingen tot benoeming of afzetting van bedienaren van de eredienst in het licht van art. 21 Grondwet », *R. Cass*., 2000, pp. 105-110; R. TORFS, « Religieuze gemeenschappen en interne autonomie. Fluwelen evolutie? », *Jaarboek Mensenrechten*, 1998-00, pp. 256-264.

[49] Among others, see Council of State (Belgium), n° 16.993, 29 April 1975, *Van Grembergen*; Council of State (Belgium), n° 25.995, 20 December 1985, *Mgr Van Peteghem.*

[50] Among others, see Council of State (Belgium), n° 211.300, 16 February 2011, *Toubali*, obs. S. WATTIER, « La "séparation de l'Eglise et de l'Etat" : un principe réaffirmé par le Conseil d'Etat », *J.T.*, 2011, pp. 775-778, obs. K. VAN GEYT, « De religieuze overheid en het ontslag van haar bedienaren. Soeverein in een slinkend rechtsgebied? », *R.W.*, 2012, pp. 61-65.

B. The Strasbourg Case Law on the Civil Effects of Religious Decisions

In the last few years, several Belgian legal commentators[51] have begun to argue that civil courts could possibly rule on whether decisions made by religious bodies comply with the European Convention on Human Rights, including in relation to Article 6 that contains the rights of the defence. According to those theories, the position of the Belgian Court of Cassation and Council of State has to become less strict with regard to the application of religious autonomy to the proceedings relating to the revocation of religious ministers. The authors of those theories essentially base their analyses on the *Pellegrini v. Italy* case of 20 July 2001 in the European Court of Human Rights.

In that instance, the applicant (Mrs Maria Grazia Pellegrini) married her husband (Mr Gigliozzi) in 1962 in a religious ceremony which also took effect in civil law (*matrimonio concordatario*). In February 1987, she petitioned the Rome District Court for judicial separation, which granted her demand in 1990 and ordered her husband to pay her maintenance every month[52]. In the meantime, she was summoned by the Lazio Regional Ecclesiastical Court of the Rome Vicariate on 1 December 1987 to answer questions about her matrimonial case. Her husband had asked for the annulment of their marriage on the ground of consanguinity, based on the fact that the applicant's mother and Mr Gigliozzi's father were cousins. On 10 December 1987, following a summary hearing (*praetermissis solemnitatibus processus ordinarii*) under Article 1688 of the Code of Canon Law, the religious Court annulled the marriage on the ground of consanguinity. The applicant introduced an appeal to the Roman Rota. She alleged « a breach of her defence rights and of the adversarial principle on account of the fact that she had been summoned to appear before the Ecclesiastical Court without being informed in advance either of the application to have the marriage annulled or the reasons for that application. She had therefore not prepared any defence and, furthermore, had not been assisted by a lawyer »[53]. However, the Roman Rota affirmed the decision to annul the marriage. In November 1989, the Rota informed Mr Gigliozzi that

[51] See in particular: H. VUYE, « Liberté des cultes : la Cour européenne des droits de l'homme et la Cour de cassation sur des longueurs d'ondes différentes? », *C.D.P.K.*, 2004, pp. 14-16; M.-F. RIGAUX, « La séparation de l'Eglise et de l'Etat : une frontière difficile à tracer », note sous Liège, 12 juin 2007, *J.T.*, 2007, p. 781; F. AMEZ, « Le régime des cultes sous la pression de la jurisprudence de Strasbourg », note sous Mons, 23 décembre 2008, *J.L.M.B.*, 2009, pp. 706-712.
[52] E.Ct.H.R, *Pellegrini v. Italy*, 20 July 2001, §§ 12-13.
[53] E.Ct.H.R, *Pellegrini v. Italy*, 20 July 2001, § 18.

the annulment decision « which had become enforceable by a decision of the superior ecclesiastical review body, had been referred to the Florence Court of Appeal for a declaration that it could be enforced under Italian law »[54].

In a November 1991 decision, the Florence Court of Appeal declared the annulment enforceable. The applicant appealed and alleged again that her defence rights had been infringed in the proceedings before the ecclesiastical courts. During the proceedings, she asked the Ecclesiastical Court to give her a copy of the relevant documents but this was refused by the court clerk « on the ground that the parties could receive only the operative provisions of the judgment, "which should be sufficient to allow them to exercise their defence rights" »[55]. In March 1995, the Italian Court of Cassation dismissed the applicant's appeal.

Before the European Court of Human Rights, the applicant argued that Article 6 of the Convention had been violated because « the Italian courts declared the decision of the ecclesiastical courts annulling her marriage enforceable at the end of proceedings in which her defence rights had been breached »[56] . Noting that the Vatican has not ratified the European Convention on Human Rights, the Court of Strasbourg explains that its task « consists not in examining whether the proceedings before the ecclesiastical courts complied with Article 6 of the Convention, but whether the Italian courts, before authorising enforcement of the decision annulling the marriage, duly satisfied themselves that the relevant proceedings fulfilled the guarantees of Article 6. A review of that kind is required where a decision in respect of which enforcement is requested emanates from the courts of a country which does not apply the Convention. Such a review is especially necessary where the implications of a declaration of enforceability are of capital importance for the parties » [57]. Examining the reasons given by the Florence Court of Appeal and the Court of Cassation for dismissing the applicant's complaints about the proceedings before the ecclesiastical courts, the Court affirmed that it was not satisfied with those reasons[58]. According to the European Court of Human Rights, the Italian courts did not consider the fact that the applicant could not have access to the evidence produced by her ex-husband, nor to the fact that she was not assisted by a lawyer before the Ecclesiastical Courts, which is contrary to Article 6 of the Convention.

[54] *Ibid.*, § 23.
[55] *Ibid.*, § 28.
[56] *Ibid.*, § 33.
[57] *Ibid.*, § 34.
[58] *Ibid.*, §§ 41-44.

In conclusion, the Court of Strasbourg judges that « the Italian courts breached their duty of satisfying themselves, before authorising enforcement of the Roman Rota's judgment, that the applicant had had a fair trial in the proceedings under canon law », and that « there has therefore been a violation of Article 6 § 1 of the Convention »[59].

C. The « Lack » of Influence of the Strasbourg Case Law on the Jurisprudence of the Belgian Court of Cassation and Council of State

According to legal literature, the *Pellegrini v. Italy* case is « a new approach to church autonomy »[60]. Moreover, as mentioned before, a part of the Belgian authors[61] uses this Strasbourg case to claim that the Court of Cassation and the Council of State have to change their approach concerning the compliance with the rights of the defence in the religious proceedings relating to the revocation of religious ministers when the State's courts have to deal with that issue.

Unfortunately, since 1999, the Belgian Court of Cassation has not heard any new cases where the rights of the defence in religious proceedings relating to revocation are at issue. In that sense, it is impossible to evaluate the potential influence of the *Pellegrini* case of 2001. However, it is very unfortunate that the case concerning a nun revoked by her religious order was not referred to the Court of Cassation after the Court of Appeal of Mons recognised in its decision of 23 December 2008 that her defence rights had been violated by her religious superiors[62]. The Court of Appeal of Mons was clearly influenced by the Strasbourg case law[63].

Regarding the jurisprudence of the Council of State, the situation is quite different. The Council of State has considered the rights of the defence in religious proceedings relating to revocation several times since the *Pellegrini* case of 2001. This could have been the opportunity to follow the « Strasbourg example ». However, until now, the position of the Council of State has never evolved in this direction. The administrative court often repeats that there is a strict separation between Church and State and refuses to rule upon adherence to the rights of the defence in religious revocation proceedings. This view has been repeated by the Council of State in its decisions in 2004[64], 2007[65] and 2011[66].

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[59] *Ibid*., §§ 47-48.
[60] I. CISMAS, *Religious Actors and International Law*, Oxford, Oxford University Press, 2014, p. 134.
[61] See in particular *supra*, note 41.
[62] Mons, 23 décembre 2008.
[63] On that point, see: F. AMEZ, *op. cit.*, note 41..
[64] Council of State (Belgium), n° 135.938, 12 October 2004, *Van Butsele.*

Conclusion

When it was adopted in 1831, the Belgian Constitutional regime relating to freedom of religion and religious autonomy (Articles 19, 20, 21) was hailed for its modernity and its originality[67]. However, almost two centuries later, those Articles have not been changed at all. This lack of modernity does not concern the entire Constitution but is very conspicuous in relation to freedom of religion and religious autonomy.

The Belgian Constitutional Court has been dealing with this deficiency using the « conciliatory method » (*méthode conciliatoire*) in which the Court analyses articles of the Constitution in the light of corresponding provisions in the European Convention on Human Rights. In that sense, when ruling on compliance with freedom of religion and religious autonomy, the Court enriches and modernises its reasoning by taking inspiration from the Strasbourg case law.

The use of the « conciliatory method » illustrates the significant influence the jurisprudence of the European Court of Human Rights has on the reasoning of the Belgian Constitutional Court. This is especially true when it is compared to the jurisprudence of the Council of State on the application of the principle of religious autonomy in revocation proceedings. Despite the wishes expressed in the Belgian legal literature, the Council of State does not seem willing to follow the Strasbourg example.

Although the « conciliatory method » is certainly a very positive step towards modernising the interpretation of the Constitution, it also diminishes the need to modernise the second Title of the Constitution, which has still, however, a place on the Belgian State's « to do list ».

[65] Council of State (Belgium), n° 177.348, 29 November 2007, *Moulai and others.*
[66] Council of State (Belgium), n° 211.300, 16 February 2011, *Toubali.*
[67] L. DE LICHTERVELDE, *Le Congrès national*, Bruxelles, La renaissance du livre, 1945, pp. 63-67.