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The Impact of the European Convention and European Court Decisions on Court Cases Related to Religious Issues in Belgium

October 2009

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The Belgian system of relationships between state and religions is historically rooted in the principle of state-recognition of religions and worldviews. After Belgium gained independence in 1830, Catholicism, Protestantism and Judaism enjoyed de facto state recognition on the basis of the official status they had been granted under French rule at the beginning of the 19th century. Anglicanism was recognized in 1835, Islam in 1974, and Orthodoxy in 1985. Secular humanism was recognized in 1993 and buddhism is in the process of receiving the same status.

A religious denomination seeking state recognition applies to the Ministry of Justice, which then conducts a thorough review before recommending approval or rejection. Final approval is the sole responsibility of the Parliament. A negative decision can be appealed at the Council of State.

All religious and spiritual groups - old or recently established – which are not eligible for state recognition are registered as non-profit associations without any further distinction.

All the components of freedom of religion – freedoms of worship, assembly, expression, association – are guaranteed and respected in Belgium. However, tensions have emerged in the second half of the 1990s between the state and a number of belief, spiritual and religious groups labeled as cults. The religious attire and symbols (headscarf, burqa, burqini, kirpan) also constitute an area of conflict between Muslims and the state.

Until 1997[i], very few cases against the Belgian state were brought to court by state-recognized religions or by other religious groups. Since then, religious associations and believers have started to lodge complaints against the state and this process is accelerating.

This paper will deal with several cases examined by various jurisdictions:

- civil courts: two cases introduced by non-traditional religions
- the Council of State: a case concerning the Muslim community and a case raised by a Jehovah's Witness
- the Arbitration Court: a case presented by the Muslim community and another one by Roman Catholic and Anglican believers.

Decisions of Civil Courts

Family Federation for World Peace and Unification v. Belgian state

In the case *Family Federation for World Peace and Unification v. Belgium*, the complaint was against the denial of access to the Belgian territory by 80-year old Rev. Moon and his wife on the ground that in 1995 they had been filed by Germany as personae non gratae in Europe in the Schengen Information System (SIS). Rev. Moon is the head of the Unification Church which is considered a cult in Germany,

France, Belgium and other countries. In 2005, he was invited by his followers in Belgium to give a lecture. Although as a South Korean citizen he did not need a visa, his blacklisting obliged him to apply for such a document.

After an unsuccessful attempt to solve the problem through an emergency first instance court ruling, the appellate court of Brussels took another decision on 7 December 2006[ii]. It ruled that Belgium could not deny Rev. Moon a visa.

The judges stressed among other things that the Schengen Agreement was not superior to the European Convention in the hierarchy of international standards and stated that the Belgian state had violated Articles 9 and 11 of the European Convention.

In this regard, they referred to several decisions of the European Court. They quoted an excerpt of the case *Metropolitan Church of Bessarabia and Others v. Moldova* (13 December 2001, § 114) to substantiate the right of Rev. Moon and his followers to manifest their religion or conviction publicly, by worshipping, teaching and accomplishing rites. The same case was also used to recall that Article 11 protects associations against undue interference of the state in their lives (§ 117 and others). Reference was also made to the case *Hassan and Chaush v. Bulgaria* (26 October 2000, § 78)[iii] to warn the Belgian state against assessing the legitimacy of religious beliefs and their mode of expression. The case *Kokkinakis v. Greece* (15 May 1993, § 117 and others) was also used to support the idea that in a pluralistic society the state has to accommodate the interests of various groups and to respect their beliefs. Concerning the argument that the Unification Church is a cult, the judges kept in mind the case *Paturel v. France* (22 December 2005, § 31) where it was said that the cult issue constitutes "a debate of general interest" in the framework of which "Recommendations 1178 and 1412 of the Parliamentary Assembly of the Council of Europe discourage the adoption of national laws restricting the freedom of such movements or forbidding them."

Interference of the state is possible but must be proportionate to the pursued goal, concluded the judges. They held that the denial of a visa to Rev. Moon was an undue interference in the freedom of worship and the activities of the religious movement as it could not be substantiated by the necessity to guarantee public security or to protect a democratic society.

In this case, the European Convention and the European Court jurisprudence were extremely helpful to protect various aspects of religious freedom.

Sahaja Yoga v. Belgian state

On 7 March 2005, on request of a member of the municipal council of Ghent in charge of social affairs, the Federal Cult Observatory (acronym IACSSO in Dutch and CIAOSN in French) issued and made public an opinion about the movement Sahaja Yoga that was considered mischaracterized and defamatory by the plaintiff. Subsequently, the non-profit-making association Sahaja Yoga Belgium lodged a complaint against the Belgian state.

In this case, the court of first instance in Brussels[iv] considered that there had not been a violation of articles 9 and 19, article 2 of the First Protocol[v] of the European Convention unlike what had been alleged by the plaintiff but sentenced the Belgian state for failing to motivate its opinion, for lack of objectivity and denial of right to defence. The Belgian state had to publish the judgment on the website of the IACSSO and in two major daily newspapers (in Dutch and in French). The case has been pending since then on appeal.

Decisions of the Council of State

Religious issues can be addressed through the Council of State[vi], an independent court instituted by the law of 23 December 1946. The Council of State consists of two sections: a legislation section providing technical assistance for the legislative work of the parliaments and governments, and an administration section, the highest administrative jurisdiction in the country. Under this section, any citizen or legal personality (companies, charities, non-profit-making organizations, etc.) may request the cancellation of legal acts or regulations issued by an administrative authority.

Recently a number of cases concerning the ban of the headscarf in public schools have been brought to the Council of State but none of the decisions have made any reference to the European Convention and the European Court jurisprudence.

Two types of cases will be addressed in this study: the first one concerns the administration section and the second one the legislation section.

Decision of the Flemish Secretary of State for School Education dated 17 October 1988 refusing exemption from religious classes and ethics classes at a public school[vii]

On 14 December 1988, Jean-Pierre Vermeersch, a Flemish Jehovah's Witness, seized the Administration Section of the Council of State to ask for the annulment of the decision of the Secretary of State for School Education dated 17 October 1988 which denied exemption of his children Rein and Thor from the religious classes and ethics classes at a public school in Brugge which is under the authority of the Flemish Community.

For the two previous school-years, the applicant's children had however been allowed to opt out. On 1 September 1988, he sent a letter to the Flemish Community to expose his objection and to ask for exemption, referring to articles 9 and 10 of the European Convention and article 2 of the First Protocol[viii] as well as articles 14 and 15 of the Belgian Constitution[ix]. On 26 September, the Secretary of State sent him a negative answer. A second request sent on 29 September was followed by a second negative answer on the ground that "there is no legal basis for that" although such an exemption had been granted twice before and the legal environment had not changed.

Article 2 of the First Protocol was quite instrumental in this case. The Council of State recognized that the applicant could not accept ethics classes as an option, quoting him as follows: "as they convey moral attitudes that negate the existence of absolute moral values, which is conflicting with the biblical views and my own views, (…),I want to protect them against some teaching that is conflicting with my values."

Concerning the interpretation of Article 2 of the First Protocol, the European Court referred to previous cases such as

- *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (7 December 1976) to define the non-infringement by the state upon the religious and philosophical beliefs of the parents;
- *Campbell and Cosans v. UK* (25 February 1982) to define the word "beliefs";
- *Young, James and Webster v.* UK (13 August 1981) to construe the respect due to beliefs in a democratic society.

In the same case, it is also said that article 2 must be read in conjunction with articles 8, 9 and 10 of the European Convention which proclaims "the right for any person, including parents and children, to respect of their private and family life", "freedom of thought, conscience and religion" and "freedom to receive or to communicate information or ideas."
Finally, the European Court puts the objection to the attendance of religious and ethics classes on the same footing as objection to military service on religious grounds and recognizes the right of the Jehovah's Witness not to enroll his children in a religious or ethics class.

Later on, this case led to the adoption of a decree by the Flemish Community providing for the possibility of exemption from both religious and ethics classes.

Draft Royal Decree on the creation of a commission on the replacement of the members of the Executive of the Muslims in Belgium (EMB)[x]

On 28 June 2004, Deputy Prime Minister and Minister of Justice Laurette Onckelinx requested the advice of the Council of State within five days on the creation of a Commission on the replacement of the members of the EMB.[xi]

The 2nd Chamber of the Legislation Section of the Council of State analyzed the compatibility of the draft decree with articles 9, 10 and 11 of the European Convention and with the European Court decisions in the cases *Kokkinakis v. Greece* (19 April 1993) for the protection of the individual freedom of conscience and religion, and the case *Hassan and Chaush v. Bulgaria* (26 October 2000) for the protection of religious communities against undue interference of the state. It also examined the possible restrictions to freedom of religion as outlined in article 9, par. 2 of the Convention and the interpretation of the margin of appreciation granted to the executive power in a number of other cases: *Sunday Times v. UK* (26 April 1979, § 49), *Larissis and Others v. Greece* (24 February 1998, § 40), *Hashman and Harrup v. UK* (25 November 1999, § 31), *Rotaru v. Romania* ((4 May 2000, § 52).

In its decision of 2 July 2004, the Council of State concluded as follows: "Due to their specificity, the draft measures lack some legal foundation in domestic law. A preliminary intervention of the lawmaker is requested to make them applicable. Moreover, the system globally put in place will have to be compatible with articles 9, 11 and 14 of the European Convention and with articles 10, 11, 19-22 and 181 of the Constitution."

The draft royal decree was revised and a law was finally adopted on 20 July 2004 but it was attacked by a group of Muslim organizations and individuals through the court of arbitration.

Decisions of the Arbitration Court

A law or a decree allegedly conflicting with constitutional rights and fundamental freedoms guaranteed by the European Convention can be challenged through the Arbitration Court by any person demonstrating it is concretely harmful to him/her. The Arbitration Court can cancel laws, decrees and ordinances that breach the fundamental rights of the citizen[xii]. Two cases will be presented hereafter. They emanate from individuals and associations linked to state-recognized religions.

Application for the annulment of the 20 July 2004 Law on the replacement of the members of the Executive of the Muslims in Belgium

On 5 November 2004, 27 Muslim organizations and a dozen individuals introduced a request of cancellation of the 20 July 2004 Law creating a commission to replace the membership of the EMB[xiii] whose acronym is EMB[xiv] as it constituted, according to them, an undue interference of the state in the internal affairs of their religion.

At the Arbitration Court, the Belgian state held that the law pursued a legitimate goal, was necessary in a democratic society and was proportionate as it was meant "to put an end to internal conflicts paralyzing the freedom of expression of Muslims in their representative body and to enable the Muslim community to get public financing."

In the last ten years, several conflicts had already arisen inside the EMB and between the EMB and the state.

This was the context of the request of annulment of the 20 July 2004 Law.

The applicants considered that articles 19, 21 and 181 of the Belgian Constitution[xv] and articles 9 and 11 of the European Convention were being violated by the law because such early elections had been imposed by the state against the will of the EMB and its general assembly and because the commission in charge of the replacement of the membership of the EMB was also mandated "to take the necessary measures to organize general early elections." Moreover, some of these "necessary measures" imposed the identification of the country of origin of the candidates as well as gender and linguistic quotas while none of these criteria was requested for other state-recognized religions.

In its decision, the court of arbitration quoted articles 9 and 11 of the European Convention and the European Court decision in the case *Hassan and Chaush v. Bulgaria* (26 October 2000) and recognized "the right for religious communities to organize themselves freely without the lawmaker being allowed in principle to interfere in this matter." However, the arbitration court ruled that the law was legitimate, necessary and did not constitute a disproportionate interference in freedom of religion. The court considered that "the law was not meant to limit the individual or collective practice of a religion or the right to self-management" and that the creation of a temporary election commission was meant to

facilitate “the appointment of a representative body likely to be the interlocutor of the public powers in order to carry out article 181 of the Constitution.”

The decision of the court was not challenged by any of the applicants at the European Court.

Request of suspension of articles 10 and 126 of the 7 May 2004 Decree of the Flemish Community

On 6 December 2004, eight members of the church administration departments[xvi] of Roman Catholic and Anglican parishes asked in two separate requests for the cancellation of articles 10 and 126 of a decree regulating the material management and the functioning of the state-sanctioned religions that the Flemish regional parliament took on 7 May 2004[xvii]. The controversial provisions imposed the de facto dismissal of members of the said administrative departments who had reached the age of 75. Five of the eight plaintiffs were then already 75 years; their mandate was carried out on a voluntary basis.
This decree which was to come in force on 1 March 2005 is related to the state’s oversight role of the management of public funding received by religious congregations.

Apart from the reference to the Belgian Constitution which forbids the interference of the state in the internal affairs of churches and does not allow the state to impose by law the dismissal of members of local public law institutions, the plaintiffs also stressed that Article 9 of the European Convention protecting freedom of religion had been violated.

In its first decision[xviii], the Court of Arbitration rejected the request of the plaintiffs but they appealed the judgment.

In its second decision[xix], the Court of Arbitration referred to Article 9 of the European Convention and quoted among others the European Court decision in the case *Hassan and Chaush v. Bulgaria* (26 October 2000, § 62)[xx] to defend the autonomy of religious communities and to condemn the arbitrary interference of public powers in their functioning. “Were the organizational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable,” said the arbitration court.

Conclusions

These specific cases pertaining to a wide variety of religious issues have shown that the European Convention and the European Court jurisprudence are taken into consideration by the various Belgian jurisdictions. There are however other cases where such a reference is ignored, in particular with regard to the accommodation of Islam. Enhanced efforts are certainly needed to give more visibility and more publicity to decisions of the European Court related to the management of religious diversity. Legal, technical and financial assistance to individual and collective plaintiffs is also needed to bring more test cases to Strasbourg and enrich the European jurisprudence.

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Paper presented at the University of Ghent (Belgium)

[i] In 1997, a parliamentary commission on sects/cults released a controversial report listing 189 religious and philosophical movements suspected of being potentially harmful. This was the starting point of a wave of protests and of judicial proceedings initiated by the targeted movements. This also created a general atmosphere of mistrust in society amplified by the media. Cases of defamation and discrimination by state institutions were brought to court.

[ii] Appellate Court of Brussels, 21st Chamber, Public audience of 7 December 2006. Case nr 2006/KR/223. Court decision 8996.

[iii] § 78: "Nevertheless, the Court considers, like the Commission, that facts demonstrating a failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers' freedom to manifest their religion within the meaning of Article 9 of the Convention. It recalls that, but for very exceptional cases, the right to freedom of religion as guaranteed under the Convention excludes any discretion on the part of the State to determine whether religious beliefs or the means used to express such beliefs are legitimate. State action favoring one leader of a divided religious community or undertaken with the purpose of forcing the community to come together under a single leadership against its own wishes would likewise constitute an interference with freedom of religion. In democratic societies the State does not need to take measures to ensure that religious communities are brought under a unified leadership (see *Serif*, cited above, § 52)."

[iv] Court of First Instance in Brussels, 24th Chamber. Case nr 2005/13740/A. Court decision dated 29 February 2008.

[v] Article 2 of the First Protocol (1952) to the European Convention on Human Rights includes the right to education: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions."

[vi] The Council of State is headed by a First President and a President, chosen by their peers. Twelve presidents preside over the different chambers, each of them consisting of a president and two advisers (councilors). There are 28 councilors: they are all judges (14 French-speaking and 14 Dutch-speaking). They are appointed for life by the King (the federal government) from a double list of candidates. One list is presented by the Council of State itself, the other alternately by the House of Representatives and the Senate. The candidates must be aged at least 40, graduates or doctors of law, and have at least ten years of legal experience.

[vii] Council of State, Administration Section, Decision nr 35.442, 10 July 1990 in the case A. 39.967/IV-12.624.

[viii] See footnote nr 4.

[ix] Art. 14: No punishment can be made or given except in pursuance of the law.
Art. 15: The domicile is inviolable; no visit to the individual's residence can take place except in the cases provided for by law and in the form prescribed by law.

[x] Every state-recognized religion must have a representative body to deal with the state institutions. The EMB is the administrative management body of the Muslim religion. Its 17 members are elected by a general assembly of 68 elected members. The first representative body of the Muslim religion was only recognized by the state in May 1999, i.e. 25 years after the recognition of Islam.

[xi] Advice 37.484/2, Legislation Section of the Council of State.

[xii] The Arbitration Court was formally set up on 1 October 1984. Article 142 of the Constitution and the special law of 6 January 1989 govern the activities of the Court. It acts as an independent arbitrator between the Federal State, the Communities and the Regions. It guarantees the observance of the fundamental rights under Title II of the Constitution (On Belgians and their Rights), and articles 170, 172 and 191. The Arbitration Court does not come under the hierarchy of other courts and tribunals. The Court consists of 12 judges (6 French-speaking and 6 Dutch-speaking judges). They must be at least 40 years old and may exercise their office until they reach the age of 70. The procedure is essentially written, with both parties being heard. The proceedings are free of charge and the parties do not have to be represented by a lawyer.

[xiii] Reference number of the case: 3127.

[xiv] EMB : Exécutif des Musulmans de Belgique. The first representative body of the Muslim religion was only recognized by the state in May 1999, i.e. 25 years after the recognition of Islam.

[xv] Art. 19: Freedom of worship, public practice of the latter, as well as freedom to demonstrate one's opinions on all matters, are guaranteed, except for the repression of offences committed when using this freedom.
Art. 21: The State does not have the right to intervene either in the nomination or in the installation of ministers of any religion whatsoever, nor to forbid these ministers from corresponding with their superiors, from publishing their acts, except, in the latter case, taking into consideration normal responsibilities in matters of press and publication.
Art. 181:§ 1. The State awards remuneration and pensions to religious leaders; those amounts required are included in the budget on an annual basis.
§ 2. The State awards remuneration and pensions to representatives of organizations recognized by the law as providing moral assistance according to a non-religious philosophical concept; those amounts required are included in the budget on an annual basis.

[xvi] They are called « fabriques d'églises » in French.
[xvii] Cases registered under nr 3185 and 3186.
[xviii] Decision nr 33/2005, 9 February 2005.
[xix] Decision nr 152/2005, 5 October 2005

[xx] § 62: "The Court recalls that religious communities traditionally and universally exist in the form of organised structures. They abide by rules which are often seen by followers as being of a divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention.

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 associative life against unjustified State interference. Seen in this perspective, the believers' right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully, free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords. It directly concerns not only the organisation of the community as such but also the effective enjoyment of the right to freedom of religion by all its active members. Were the organisational life of the community not protected by Article 9 of the Convention, all other aspects of the individual's freedom of religion would become vulnerable."