State and Church in Belgium

Rik Torfs and Jogchum Vrielink

I. Social Facts

Belgium is characterised by a rich diversity in religions and beliefs. This has not always been the case. For a variety of reasons Belgium used to be a predominantly Roman Catholic country. In the National Census of 1846, for instance, no less than 99% of the population registered their religious adherence as Roman Catholic. However, ever since the 1960s the combined forces of secularisation and immigration have drastically altered this former state of affairs: the number of Catholics has steadily decreased, and church attendance has entered into a free-fall, while the presence of ‘new’ religions has increased.

Religious adherence is no longer officially registered; the 1846 census was the last one to include it (for reasons of privacy and (negative) freedom of religion it was henceforth excluded). As such, reliable statistics are notoriously difficult to come by and estimates of the relative and absolute sizes of religious groups vary widely, and are often based on questionable and mutually contradictory sources.

Bearing that in mind, it is currently estimated that between 50 to 60% of the population belongs to the Roman Catholic Church. With a total population of 11.4 million, this would amount to 5.7 million to 6.8 mil-

1 This chapter was based on the text written by Rik Torfs for the 2005 edition of State and Church in the European Union, and – in part – on the entry on ‘Law and religion in Belgium’ for the 2016 Encyclopedia of Law and Religion (Brill, editors: G. Robbers & W.C. Durham), by Rik Torfs and Jogchum Vrielink. New material has also been included.
2 Full professor at the Faculty of Canon Law, KU Leuven.
3 Associate professor at Université Saint-Louis – Bruxelles (Centre interdisciplinaire de recherches en droit constitutionnel et administratif).
lion adherents. The vast majority of these, however, are not active practitioners. For instance, only about 8 to 15% of people who self-identify as Catholic regularly attend Sunday mass. Socially, though, Catholicism does retain significance in major life events. A relatively high number of children are baptised, about half of the population still opts for a religious marriage, and many funerals include religious services. Furthermore, and strikingly, in primary and secondary education Catholic schools remain responsible for the education of between 60% and 70% of the school-going population (infra VIa).

Muslims have been present in Belgium in significant numbers only since the post-WWII period. Between 1945 and the late 1960s massive labour immigration took place, strengthening the country’s industrial workforce with Italians, Turks, Moroccans and Tunisians; this was followed by a process of family and marriage immigration from the 1970s onwards.6

Due in large part to these processes, Islam is presently the second biggest religion in terms of adherents, estimated to number between 400,000 and 910,000 (amounting to between 3.5% and 8% of the population).

The prominent presence of Islam, and (fear of) radical Islam in particular, is an important issue in public and political debates in Belgium, giving rise to a significant number of repressive and restrictive policy initiatives and legal measures. More generally, it has – more than ever – brought back religion on the political agenda.

The remaining religious and belief groups are significantly smaller in size than Catholics and Muslims, though exact numbers are again impossible to come by. The number of Protestants is estimated at 80,000 to 110,000 (around 1%). Jews and Orthodox Christians are believed to range between 30,000 and 50,000 each. Most Jews live in Antwerp and Brussels. Many of those living in Antwerp belong to a variety of Hasidic groups. They have extensive networks of synagogues, shops, schools and organisations. The Orthodox minority mostly includes (descendants of) Greek, Romanian, Bulgarian, Ukrainian and Russian migrants.

Other religious minorities, smaller still, include Jehovah’s Witnesses, Anglicans, other Christian congregations, Buddhists, Hindus, Mormons, Sikhs, Hare Krishnas, Jains, and Scientologists.

Belgium is characterised by a high degree of secularisation, which is, according to various experts, more widespread than in countries such as the Netherlands and Germany. However, even more so than with regard to religious groups, the exact number of agnostics and (active) non-believers is a matter of fierce debate.

Representatives of official movements of (active) non-believers estimate their own number at 1.5 million. According to Government however, there are only 350,000, 110,000 of which are members of organised secular humanist groups.

Finally, a significant portion of Belgian society, ranging between 25 and 35%, regards itself as non-affiliated to any religion, without considering themselves non-believers or atheists.

II. Historical Background

Christianity arrived early on in the region that is currently Belgium. It soon became home to thriving monasteries that contributed to its economic and cultural development.

During the Ancien Régime, Catholicism became the region’s established religion (after 1648, Peace of Westphalia). An attempt to curtail the privileges of the Catholic clergy, was made during the Austrian Habsburg period, by the Holy Roman Emperor Joseph II (1741-90), in his efforts to modernise the traditional Catholic Church and to introduce (some degree of) religious freedom, through his Edict of Tolerance of 1781. Joseph II’s efforts in this regard met with vehement resistance, and led to the Brabant Revolution of 1789, resulting in the temporary establishment of the United States of Belgium in 1790.

Shortly after the suppression of this revolt by the Austrians, annexation to France followed in 1795. In the wake of the French Revolution, religious orders were dissolved, privileges abolished, and many churches were confiscated and sold. Napoleon Bonaparte, upon seizing power in 1799, reopened the churches to the public, and restored Catholicism to a privileged position in his ‘Concordat’ of 1801.

---

7 At least they did so in 2001, see: Questions and Answers, Chamber of Representatives, 2000-2001, 13 August 2001, 1003 (Question no. 373, Van Den Eynde).

In 1815 the region that is currently Belgium split off from the French Empire, along with what are now the Netherlands and Luxemburg, to form the United Kingdom of the Netherlands. This regime, led by the Protestant King William I, provided a significant degree of religious tolerance on paper, guaranteeing freedom of religion and equality of religious communities in the Constitution. However, King William himself was inclined to interfere intensively with the religious life of his subjects (as with other aspects); in practice, Church and State were not separate.9

Geographically, the Kingdom’s north was mostly Protestant, while the south was predominantly Catholic. The south objected to William’s rule: the Catholics saw their influence, and privileges, declining, while the anticlerical liberals were disgruntled with the meddlesome northern King for other reasons. Together they forged what went into history as the ‘monstrous’ or ‘unholy alliance’ (Monsterverbond), resulting in the 1830 Belgian Revolution.

Once independent, Belgium drafted one of Europe’s most liberal constitutions, partially by way of (negative) response to the preceding regimes. Young liberal politicians wanted to propagate the modern freedoms and protect them constitutionally, including religious freedom and autonomy (abandoning attempts to exercise absolute governmental supervision over the Church). Equally, it was a time when a rather progressive Belgian Church was prepared to step forward and be a loyal partner in the negotiation of the Constitution, without upholding (formalised) privileges for the Roman Catholic Church.10 Thus, the Belgian constitution established a regime of exceptionally far-reaching freedoms, including for the freedom of religion, worship, association, education, speech and press, as well as introducing a system of financial state support for religions present in the country.11

---


10 The letter from the Prince de Méan, Archbishop of Mechelen, which was read out before those gathered during the meeting of the National Congress (Congrès National), on 17 December 1830, undoubtedly had a major influence on the final drafting of the articles of the 1831 Constitution in which the basis for the relationship between Church and State was to be laid down.

IIIa. Legal Sources

Church and State relationships in Belgium are largely governed by the Constitution, and – to a lesser extent – specific, federal and federated, legislation.

i. Constitution

The original 1831 Constitution has been amended on many occasions, but the core rights and principles governing State and Church, and granting religious (and closely associated) rights have largely remained untouched. The pervading mood of 1830, the year Belgium became independent, can still be felt (*supra* IIa). The Belgian Constitution explicitly mentions ‘religion’ in two distinct titles: the one on *fundamental rights* (Title II), and that on *finances* (Title V).

Firstly, Title II, on ‘Belgians and their rights’, contains at least four articles relevant to the freedom of religion, guaranteeing full religious freedom on both the individual and the community level.

Freedom of worship and its free and public practice are guaranteed under article 19 of the Constitution, with the (sole) exception of allowing the punishment of criminal offences committed in the exercise of said freedoms.

The corollary of article 19 is contained in article 20: no person can be *forced* or obliged to contribute in any way to the acts of worship or ceremonies of any religion or to respect its days of rest/worship.

Article 21, section 1 stresses that the State has no right to intervene either in the appointment or installation of ministers of any religion (1), or to forbid them from corresponding with their superiors (2), or to publish the acts of these superiors (3). Regarding the latter, article 21 points out that such publications are, however, subject to the ordinary rules of liability concerning the use of the press and publishing. Article 21 is generally interpreted as an affirmation of the freedom of internal ecclesiastical organization. At the same time, the article’s second section contains an exception to this principle by providing that civil marriage must always precede the religious marriage ceremony, apart from exceptions that may be established by law, if necessary (*infra* XIa).

A final article in Title II that merits brief mention here is article 24, on the freedom of education and educational rights. Important amendments were introduced to this article in 1988 concerning the religious rights of
parents, including a right to be offered denominational religious education (see infra VI).

Aside from articles on fundamental rights, religion is also mentioned in Title V on finances (though it can be pointed out that state support for religion is also already visible in the educational field, as religious schools are subsidised, and religious education in primary and secondary public education is state-financed). More specifically, article 181 § 1 in Title V provides that the salaries and pensions of ministers of religion are borne by the State.

While article 181 § 1 remains unchanged since 1831, the article’s second paragraph was introduced only in 1993. It extends the same financial privileges to non-religious beliefs as well. This arrangement created a constitutional basis for the expansion of state support for secular-humanist institutions.12

### ii. Secondary legislation13

In addition to the Constitution there is a range of ordinary laws and provisions concerned with the legal relationship between Church and State. Here we will limit ourselves to listing a number of criminal provisions in particular: article 268 of the Criminal Code punishes religious ministers who verbally and directly attack the authorities during gatherings held in public with a fine and a prison sentence (the so-called ‘pulpit offence’); article 142 of the Criminal Code renders it an offence to either force or hinder anyone to practise a religion, by means of violence or threats; relatedly, article 143 of said Code forbids disrupting, hindering or interrupting the practice of a religion, by means of creating disturbances or disorder either in locations that serve for religious activities or during public ceremonies of that religion; article 144 criminalises anyone who “by means of actions, words, gestures or threats” reviles or abuses attributes of a religion, either in places of worship or at public ceremonies of that religion, while article 145, in turn, prohibits anyone from defaming a minister of a religion “in the exercise of his religious service” by means, again, of “actions, words, gestures or threats”.

---


gestures or threats”; article 228 protects the official robes; and article 267 punishes ministers who ordain marriages before a civil marriage service has been held; article 442\textsuperscript{quater} (since 2011) penalises abuse of an individual’s vulnerability by sectarian organisations; discrimination legislation (on all federated levels) contains criminal provision banning ‘incitement to hatred, discrimination and violence’ vis-à-vis persons or groups on the basis of religion or belief (either in public or at least in the presence of witnesses); the Criminal Code provides in aggravating circumstances in case one of the motives for certain crimes\textsuperscript{14} “consisted in the hatred against, the contempt for, or the hostility against a person based on” religion or belief (and a large number of other grounds); a final provision that merits mention is art. 563\textsuperscript{bis} of the Criminal Code, that in July 2011 introduced a general prohibition on face-covering clothing in public life (a so-called ‘burqa ban’).

\textit{iii. Impact of devolution}

The gradual regionalisation or devolution of the former Belgian unitary state into a (con)federal one is also relevant in the field of the relationship between State and Church. Aside from the federal level, the Belgian state comprises three communities (the Flemish Community, the French Community, and the German-speaking Community), three regions (the Brussels-Capital Region (Brussels), the Flemish Region (Flanders), and the Walloon Region (Wallonia)), and four language areas (the Dutch language area, the French language area, the German language area, and the bilingual Brussels-Capital area).

The impact of the ongoing devolution on church and state relationships is both direct and indirect. Indirectly, the regionalisation of topics such as culture and education entails ‘incidental’ consequences with regard to the legal position of religion. For instance, the time awarded to religion on radio and television is a regional matter, which can lead (and has led) to differences on this level between the federated entities (\textit{infra} VIb). Furthermore, although the right to religious education, even in public schools, is based on the constitution, the interlocutors of churches and religious bodies are chosen at the regional level and – moreover – the constitution does

\textsuperscript{14} The relevant provisions apply to a large number of crimes, including rape, assault, manslaughter, murder, criminal negligence, stalking, arson, defamation and slander, grave desecration, vandalism, etc.

https://doi.org/10.5771/9783845296265-11

Generiert durch IP '54.70.40.11', am 09.01.2021, 05:25:10.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.
not detail the number of hours that have to be provided (again allowing for regional variations: *infra* VIa).

More *directly*, regionalisation has affected religion *inter alia* on the basis of a law of 13 July 2001 that rendered the regions (rather than the federal state) responsible for the material organisation of the recognised religions.\(^{15}\)

All in all, the legal position of religion is gradually becoming a mixed matter. Although many of the main elements remain federal, the influence and competence of the regions and communities continually increases.

### IIIb. Basic Categories of the system

#### i. Separation of Church-State and neutrality

It is not unusual for the term ‘separation of Church and State’ to be used as a description to sum up the relationship between the two bodies or spheres. However, the separation of Church and State in Belgium is not a strict or full separation, as can already be inferred from the rather central place that religion takes up in the country’s Constitution (art. 181 in particular). The State positively promotes the free development of religious activities (ideally) without interference with their independence. Some refer to this as ‘positive neutrality’ or ‘active pluralism’.\(^{15}\) Others speak of the ‘mutual independence’ of Church and State.\(^{17}\)

More generally, in the relationship between church(es) and the State, the neutrality of the state is considered an important constitutional principle, albeit not explicitly laid down in the Constitution itself. The Belgian Council of State (the country’s highest administrative Court and advisory body) considers the principle to be intimately associated with the principle of non-discrimination and equality, particularly on religious grounds.\(^{18}\) Neutrality implies that the State itself does not adhere to or identify with any one religion in particular. This means, among many other things, that

---


\(^{18}\) Council of State 20 May 2008, no. 44.521/AG.
religious symbols (such as crucifixes) in public buildings and courts are generally unacceptable, except in cases in which they are part of the (historical) architecture. More generally, neutrality entails that the state ought also to refrain from interpreting religious rules and practices (infra IIb.iii).

**ii. Recognised religions**

The constitutional system of state support for religions and non-religious beliefs self-evidently requires identification of those religions and beliefs that are eligible for financing. In others words, Belgium has a system of recognised religions (see, on the criteria for recognition: infra IVa.i).

**iii. (Legal) concept of religion**

Belgian courts often employ the concepts of religion and religious rules or prescripts, but their precise content remains mostly un(der)defined, and purposely so. In Belgium, as in many other countries, the separation of Church and State (supra IIIb.i) and the core of religious freedom itself are believed to require restraint on the part of courts and authorities in assessing what may or may not constitute a religion or a religious prescript. When assessing whether a ‘religion’ is involved, judges are assumed to first base their assessment on the subjective claims of believers, and secondly on external aspects such as the existence of temples, prayer texts or ritual acts. Only when this does not yield sufficient clarity, a certain amount of analysis of what is contained within the movement may (exceptionally) be regarded as necessary.

Formerly, this analysis used to be less reticent: up until the middle of the 20th century for instance (some) jurisprudence took the view that for something to be (legally) regarded as a religion, a practice focused on a

19 Although a more tolerant position is generally adopted where it concerns nativity scenes and other Christmas related icons and symbols.
20 Supreme Court (Cour de Cassation or Hof van Cassatie) 7 November 1834, Pas., I, 332.
deity was required. Under the influence of ongoing ‘multiculturalisation’, this somewhat ethnocentric approach, which would for instance exclude some schools of Buddhism, has been abandoned.

These days, Belgian courts either employ highly abstract general criteria to determine what constitutes a religion (much like the Strasbourg institutions do, by requiring that beliefs “attain a certain level of cogency, seriousness, cohesion and importance”, in order to qualify for protection under Article 9 ECHR), or – increasingly – simply start from the assumption of an interference with the freedom of religion, and to subsequently assess the legitimacy of this interference, avoiding the question of what constitutes a religion altogether; though the latter approach, obviously, raises problems of its own.

IV. The Legal Status of Religious Communities

While the Belgian Constitution and the principle of neutrality posit a theoretical equality between religions, one cannot get around the fact that in practice differences in treatment remain. In part the very system itself provides for this: as mentioned, Belgium has a system of official recognition of religious communities by, or by virtue of, law.

i. Recognised religions and beliefs

The main basis for recognition is the social value of the religion as a service to the population. Concrete criteria that are employed for recognition include that the religious group must be: considerably large; well-structured and organised; established in the country for a sufficiently long period of time; represent a certain social interest and importance; and not constitute

---

22 E.g. Court of Appeal of Liège, 21 November 1949, Pas. 1950, II, 57.
a threat to social or public order. Strikingly, these (policy) criteria have no basis in formal legislation (let alone in the Constitution).

Presently, Belgium recognises and subsidises six religions and one non-religious belief: Roman Catholicism, Protestantism, Judaism, Anglicanism, Islam, Orthodoxy and the (secular-)Humanist movement (or organised laïcité). Roman Catholicism and Protestantism were financed from the outset. Judaism and Anglicanism followed suit in 1831 and 1835 respectively. It was not until the end of the 20th century, in 1974 and 1985, that Islam and Orthodoxy were recognised. Finally, and as mentioned, a constitutional amendment in 1993 ensured (full) recognition of the secular Humanist movement (supra III), which probably postponed a fundamental debate on the support system.

Since the turn of the century, a union of Buddhist organisations has been seeking to be recognised as well. This request has not resulted in formal recognition yet, though things seem to be progressing in that direction, albeit very slowly. The Belgian state already provides funding to the Buddhist applicants in order to enable them to fulfil the structural requirements for recognition, but more concrete steps towards recognition have not been realised.

Of the six recognised religions, Roman Catholicism is the most important one, by virtue of sheer numbers (supra I). While this has not resulted in the religion having a privileged position de iure, de facto things look differently. Firstly, the legal status of religions in Belgian law quite clearly finds its source of inspiration in the structure and functioning of the Roman Catholic Church.

This is evidenced for instance in the above-mentioned criteria that are employed for recognition, which are strongly modelled upon characteristics of Catholicism. Relatedly, the criteria have been critiqued for being...
discriminatory, by scholars as well as by international organisations, such as the Human Rights Commission. Another, related, example is the following: in order to be able to make actual claims for State payment of religious ministers, a hierarchically structured religious community is required (with a governing body), which, moreover, works on a territorial basis. The Catholic Church obviously fulfils these requirements, but this is not as clear for the Islamic faith. As a result Islamic religious ministers were not paid by the State until 2007, despite Islam having been recognised since 1974. Effective recognition of mosques, likewise, took a significant amount of time.

Additionally, the Roman Catholic Church plays a significantly bigger role than other religions when it comes to public expressions of faith (see also infra VI, on culture). Belgium’s National Day (21 July), for instance, typically starts with a Catholic Te Deum service in the Cathedral of Brussels, attended by the King and other dignitaries. The Catholic Church also had a prominent role at the funeral of King Baudouin on 7 August 1993, and more generally the royal family has a reputation of deeply rooted Catholicism.

Summarising, it might be said that among the recognised religions, the Roman Catholic one is *primus inter pares*.

**ii. Unrecognised religious groups**

Aside from the recognised religions there is a range of unrecognised (minority) religions (*supra* I). Their legal status is not always enviable. Not only do they not receive state support like recognised religions do (*infra* VIII), but they are also liable to experience additional disadvantages.

Firstly, as a legal definition of religion is lacking (*supra* IIIb.iii), the system of recognised religions sometimes results in a certain degree of ‘spill-
over’ in the wider religious (legal) context. Not infrequently (though by no means systematically) religious liberties and rights are wrongfully reserved – by courts or other public authorities – for recognised religions. So not only do unrecognised religious groups not enjoy the advantages that recognised religions can lay claim to, but they are sometimes not even regarded as religions, pure and simple.

Secondly, non-recognised religions and religious groups are, in practice, much more likely to clash with concepts of public order.

For instance, up until the abolition of compulsory military service, the problems that Jehovah’s Witnesses encountered were well known. For reasons of belief they refused to perform military service as well as the alternative to it: civic service. On the basis of article 46 of the military penal statute book, the individuals concerned were classified as deserters, and this generally led to a two-year prison sentence. 32

Furthermore, Belgium has been among those countries strongly concerned by so-called ‘harmful sectarian organisations’. 33 A parliamentary report on this issue was submitted to the Chamber of Representatives on 28 April 1997, which contained a list of organisations. Publication of the report stirred much commotion, causing the Parliamentary commission that had issued the report to officially state that the presence of a certain movement on the list did not imply that the group was a sect, let alone that it was considered dangerous.

After examination of the report an ‘Information and Advice Center concerning Harmful Sectarian Organisations’ (IACSSO) was founded in 1998. The Center and its functioning led to controversy, both within Belgium and abroad. 34 An Antroposophical organisation challenged the Center’s founding law before the Belgian Constitutional Court (Grondwettelijk Hof or Cour Constitutionnelle). The Court declined to annul the legislation, suggesting that harmful sectarian organisations may be treated more strictly than harmful organisations in general. In other words, religious groups, paradoxically, (may) enjoy less protection, in this context, than ordinary

associations.\textsuperscript{35} The Court did state that the Center cannot prevent or forbid the expression of an opinion by a philosophical or religious minority. The Center may only inform the public with regard to activities of particular associations and groups, in order to enable people to evaluate potentially harmful opinions and beliefs with greater accuracy.\textsuperscript{36}

At least one religious organisation has attempted through the court system to compel the Belgian State and the IACSSO to retract an advice, as well as to be financially compensated for any harm that occurred due to it; ultimately, these attempts proved unsuccessful.

More specifically, it concerned Sahaja Yoga Belgium, which had been the subject of an advisory opinion by the IACSSO in 2005. Sahaja Yoga took issue with the contents of the opinion and sued the Belgian State and the IACSSO. The case was initially declared unfounded in December 2005 in summary proceedings. In June 2006, the court of appeal ruled in favor of Sahaja Yoga, since the advisory opinion had not been prepared with the necessary objectivity and it had not been sufficiently reasoned; a ruling that was confirmed by the court of first instance in February 2008. However, in a judgment of 12 April 2011, the court of appeal in Brussels reversed, finding Sahaja Yoga unable to provide conclusive evidence for alleged errors committed by the IACSSO. This last judgment was final.

\textit{iii. Religious autonomy: general}

Article 21 of the constitution has always been considered a solid legal basis for the self-government of religious communities: the provision bears the imprint of the newly created Belgian State wishing to distance itself from the meddlesome policies of King William I (\textit{supra} II and III). The provision entails that the State may not interfere with or supervise the Churches, and that the latter are free to choose their own internal structure. It would be overstating things, however, to say that the State has no opportunity whatsoever to control churches and their activities.

Traditionally, the control exercised by secular courts remained exclusively formal, which meant that the civil judge merely had the right to determine whether a challenged decision was in fact taken by the competent


\textsuperscript{36} Constitutional Court 21 March 2000, no. 31/2000.
ecclesiastical authority. This approach was dominant throughout the 19th century.37

Following two decisions by the Belgian Supreme Court, in 1994 and 1999,38 an evolution in this case law became apparent. In these cases, the Supreme Court was confronted with decisions by courts of appeal, which went beyond the traditional approach. The courts of appeal ruled that religious groups could also be legally held to correctly observe procedures as internally prescribed, and, moreover, that they were bound to respect the right of defence as well as all other principles laid down in article 6 § 1 of the European Convention on Human Rights. While the Supreme Court declined to support this rather radical new viewpoint in its entirety, it did accept the principle that religious groups were held to act within their own procedural norms, and that it was up to the courts to verify this.

In taking this position, the Supreme Court went beyond the traditional position, without however accepting the option taken by the courts of appeal that had previously adjudicated the cases. All this may be summarised as follows (see table 1).

Table 1: Development

<table>
<thead>
<tr>
<th>1. Traditional (19th century) position</th>
<th>Did the competent religious authority take the challenged decision? (a)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Intermediate (current) position</td>
<td>Did the competent religious authority take the challenged decision (a), and is it in compliance with the procedural norms of the religion? (b)</td>
</tr>
<tr>
<td>3. Rejected (radical) position</td>
<td>Did the competent religious authority take the challenged decision (a), and is it in compliance with the procedural norms of the religion (b), and do these norms respect the right to a fair trial as well as other principles formulated by art. 6 § 1 ECHR? (c)</td>
</tr>
</tbody>
</table>

38 Supreme Court, 20 October 1994; Supreme Court, 3 June 1999.
At the same time, it should be pointed out that the Belgian Constitutional Court has, in at least one case, been highly tolerant of far-reaching intervention in religious organisational autonomy. In March 2005, the Court rejected an appeal for annulment brought by the executive council of Muslims of Belgium (L’Exécutif des Musulmans de Belgique or Executief van de Moslims van België) against elections for this body, of March 2005. The problem was that these elections had been entirely organised by the government, rather than by the religious community itself.\textsuperscript{39}

Strikingly, in the Court’s opinion, this use of imposed elections, as a means of choosing a body to represent the Islamic community to the Belgian public authorities, did \textit{not} amount to a violation of religious autonomy or freedom of religion. The Court considered that elections had previously been chosen by the Muslim community as an appropriate means of selection, and it believed the Belgian legal authorities could not “be reproached for having surrounded the election with measures intended to ensure its fairness”, especially given “that the Muslim religion has neither a pre-established, universally recognised structure, nor a clergy as such”.\textsuperscript{40}

It seems highly doubtful whether this decision would have survived scrutiny by the European Court of Human Rights.\textsuperscript{41}

\textbf{iv. Religious autonomy and non-discrimination}

Since the turn of the century, the impact of non-discrimination legislation may also be felt in this domain. Discrimination law can, in this context, be regarded as a double-edged sword, effectuating either \textit{less} or \textit{more} autonomy, depending on the situation.

The former may be the case, \textit{inter alia}, due to the procedural and evidentiary impact, pertaining to the burden of proof that discrimination law may have.

This can be inferred from a case in which the applicant was expelled from the Jehovah’s Witnesses for (allegedly) not having behaved in accordance with the congregation’s rules. He complained in particular about the fact that the expulsion was accompanied by instructions to congregation members to refrain from having (more than minimal) contact with


\textsuperscript{40} Constitutional Court 28 September 2005, 148/2005, B.5.8 & B.6.2.

\textsuperscript{41} See e.g. ECtHR (GC) 26 October 2000, Hassan & Chaush v. Bulgaria, app. no. 30985/96.
expelled individuals, even if these are family members. In bringing his suit, the applicant relied on the federal anti-discrimination act.

The court of appeal of Liège had concluded that the applicant had not established, sufficiently convincingly, that he had been discriminated against.\textsuperscript{42} The Supreme Court, however, quashed this decision due to it being in breach of the principle of the reversal of the burden of proof as enshrined in the Federal discrimination legislation, ruling that the applicant need not \textit{unequivocally} prove discrimination, merely that there were sufficient elements to \textit{presume} discriminatory treatment, at which point the burden of proof would have to shift.\textsuperscript{43}

The case was remanded to the Court of Appeal of Mons, which again rejected the action of the applicant. On the one hand, the Court held that the applicant had not invoked any pertinent element to presume the existence of discrimination. Therefore the burden of proof did not have to shift after all. On the other hand, the Court emphasised that State obligations of neutrality and the principle of autonomy forbade it to assess the legitimacy of religious beliefs and the way in which these manifest themselves (cf. \textit{supra}).

The principle of non-discrimination may, \textit{de facto}, act as a force for greater autonomy of religious communities as well. For instance, in 2004 the Flemish Region introduced legislation that stipulated that an elected or appointed member of a church council would automatically be considered as having resigned upon reaching 75 years of age. While rejecting the argument that this rule amounted to an interference with religious autonomy \textit{stricto sensu}, the Constitutional Court did consider the rule to constitute discrimination on grounds of age. The Court accepted that imposing such an age limit pursued a legitimate aim, i.e. of encouraging the renewal of the membership of church councils, and thereby to ensure an effective and efficient management. However, it found the rule disproportionate to this aim, as it was based on an absolute presumption that members of church councils aged 75 years would no longer be capable of ensuring good management.\textsuperscript{44}

\textsuperscript{42} Court of Appeal of Liège, 6 February 2006.
\textsuperscript{43} Supreme Court, 18 December 2008.
\textsuperscript{44} Constitutional Court, 5 October 2005, no. 152/2005.
v. Religious autonomy: range of activities

In addition to the basic principle(s) there is the issue of the precise range of activities that enjoy protection from religious autonomy. In this regard, it tends to be only the religious organisation in the strict sense that fully enjoys the autonomy as delineated by article 21, and as elaborated by the Supreme Court.

Religions that desire to organise activities in other fields, such as health care and education (infra VI), are bound by the civil legislation in that field (though more limited exceptions and exemptions may sometimes apply). In order to participate properly in such societal areas, religious representatives are required to establish a legal person, which will mostly take the form of a non-profit organisation.

The latter is necessary for at least two interconnected reasons. Firstly, religions themselves, as well as religious substructures (e.g. dioceses, parishes, etc.) do not possess legal personality according to Belgian law. Secondly, legal personality is necessary for several practical reasons. It tends to be required, for instance, in order for one to receive financial support from the State (see also infra VIII). Civil structures tend therefore to be indispensable.

V. Churches and Religious Communities within the Political System

The relationship between politics and religion has always been informal, but important. For many years, the Catholic or Christian Democratic Party has played a key role in Belgian politics. For virtually the entire second half of the 20th century, for instance, the party was considered a necessary and inescapable partner in (federal) government coalitions. In 1999 they moved to the opposition for the first time in more than forty years, to return to (and remain in) power again since 2007.

In the late 1960s, the Christian-democratic party split in two parts, a Dutch-speaking party (initially called CVP, presently CD&V) and a French-speaking one (initially called PSC, presently cdH). This phenomenon was by no means specific to the Christian-democratic party, as

45 Vereniging zonder Winstoogmerk (VZW) or Association Sans But Lucratif (ASBL).
46 Although the government since 2014 only included the Dutch-speaking Christian democratic party (CD&V), and not its French-speaking counterpart (cdH).
the same happened to the two other main political families, the socialists and the liberals.

Generally speaking, secularisation has diminished the Christian democrats’ dominance (as well as that of its pillar: see infra VI) at once rendering it unable to oppose liberal legislation on traditionally sensitive issues like abortion (1993), euthanasia (2002), and same sex marriage (2003). Increasingly, moreover, the party’s own positions on these issues have become far less radical than those that the Catholic Church espouses: the link between the Church and the Christian democrats has gradually weakened. Influence of church leaders became less pronounced, and presently is quite marginal, and the parties are very much open to non-believers as well.

VI. Culture

Religious communities, and especially the Catholics, play an important role in Belgian cultural life. While the liberals and Catholics were brought together in 1830 in their resistance against the Dutch King and his policies (supra IIb), their differences were again brought to the fore once Belgium became an independent political entity. Their mutual opposition led to enduring struggles over issues related to church and state relationships, leading to a strong ‘pillarisation’ of society along religious and ideological lines in the 20th century: trade unions, schools, political parties (supra V), health services, youth organisations, cultural associations, newspapers, and schools were all (a)religiously fragmented. Many ‘pillarised’ organisations and institutions persist to this day. Most have, however, become much more open to ‘outsiders’, with labels like ‘Catholic’, ‘liberal’ or ‘socialist’, having become sociological rather than ideological. In this section, we focus specifically on the place and role for religion and religious organisations in education (a) and the media (b).

a. Education

Education, by and large, is not a federal competence in Belgium, but one which resides with the French, Flemish and German-speaking Communities \((supra\ \text{IIIa.iii})\). However, the level of differentiation that this can lead to is curtailed by constitutional provisions and principles that all political entities and levels of the Belgian federation have to adhere to. Changing these aspects would require constitutional revision.

To begin with, article 24 § 1 of the Constitution provides that “education is free”, which entails that citizens are free to found their own schools, on any religious or non-religious basis that they choose. These schools are collectively referred to as ‘free (subsidised) education’.

Article 24’s first paragraph also requires the three language communities to provide non-denominational, \textit{public education}, which implies in particular “the respect of the philosophical, ideological or religious beliefs of parents and pupils”. These, as well as all other public schools, are furthermore required, until the end of compulsory education, to provide students with a “choice between the teaching of one of the recognised religions and non-denominational ethics teaching” (24 § 1). As such, even if the three communities have exclusive competence over issues pertaining to education, they must all include (denominational) ‘religion education’ – organised by the religious communities themselves\(^{52}\) – in the school programmes of their state schools.

It should be noted that fierce debates are waged concerning this issue of religious education, in the French as well as the Flemish community.\(^{53}\) The present-day legal state of affairs is the result of a political compromise

---

51 Non-public schools based on a specific religious (or non-religious) basis are free to decide for themselves how to handle the confessional part of their curriculum.

52 The recognised religions are largely free to determine the contents of these courses, albeit that the Flemish legislator determined in 2013 that the contents should at least respect international and constitutional principles of human rights and children’s right in particular, and that they have to respect the wider goals of education and development: Flemish decree 19 June 2013 (\textit{Moniteur Belge}, 27 August 2013). In its advice concerning the introduction of this requirement, the Council of State emphasised that in applying it there ought to be sufficient respect for the freedom of religion (Advice Council of State 16 May 2013, no. 53.213/1).

embodied in the so-called School Pact and in the School Pact Act of 29 May 1959. In practice, it has caused several kinds of problems and discussions.

One of these problems concerns the content of the non-religious ethics course, which had to be followed if classes in one of the recognised religions were not chosen. The Council of State decided in the 1985 Sluijs case that no one may be forced to take an ethics course, which manifestly defines itself to be non-confessional, and which expressly promotes ideas that can be labelled as ‘free thinking’. After education became a community competence, a related judgment came down concerning a Jehovah’s Witness, Vermeersch, who neither wished to choose classes in any of the recognised religions nor in non-denominational ethics. The Council of State ruled that no one could be forced to make such a choice against his or her own convictions. A third ruling, shortly afterwards, in the case of Davison, significantly reduced the justification requirements for requesting an exemption (which had appeared to still be quite demanding in Vermeersch).

Gradually, this led to an increasing number of requests for exemption from both religious education and non-religious ethics teachings, with governments on some levels having become increasingly open to accepting exemptions from the traditional ‘mandatory choice’. More accurately: the ‘mandatory choice’ was largely replaced by ‘exemptions on demand’; at least in the Flemish public educational system. For that context, for instance, a circular of 8 July 1992 ensured that exemptions no longer had to be granted by the ministerial level. Instead, they could simply be obtained from the boards of individual schools. In 1997 the right to an exemption was explicitly included in formal legislation for primary education, for secondary education this took until 2004.

54 Council of State 14 May 1985, no. 25.326.
55 Council of State, 10 July 1990, no. 35.442.
56 Council of State, 13 November 1991, no. 35.834.
59 J. Lievens (2019), De vrijheid van onderwijs, Antwerp, Intersentia, 470.

https://doi.org/10.5771/9783845296265-11
Generiert durch IP '54.70.40.11', am 09.01.2021, 05:25:10.
Das Erstellen und Weitergeben von Kopien dieses PDFs ist nicht zulässig.
Nonetheless, the ‘mandatory choice’ still remained in many schools in the French Community. The background of this was as follows. In Flanders, the ethics course is organized by the recognised secular-Humanist movement, and as such is quite plainly non-neutral. However, in the French Community the government itself oversees the course, and as such it was claimed to be ‘truly’ neutral, allegedly making exemptions unnecessary. Meanwhile, however, the Constitutional Court has confirmed that, in the French Community as well, regulations that provide a ‘mandatory choice’, and that do not allow for exemptions on demand (without much motivation), cannot be regarded as constitutional, since teachers of the ethics course were not obliged to be neutral. A system of exemptions has since been introduced.

In addition to the introduction of exemptions, the ruling by the Constitutional Court also led the French Community to modify the system of religious education. Religious education has been reduced from two hours to one hour per week, in public schools and in non-confessional subsidised schools (which was considered possible since although the Constitution guarantees religious education, it does not specify the required number of hours). A specifically designed course in ‘philosophy and citizenship’ is now organised in the hour that thus became available.

60 Constitutional Court 12 March 2015, no. 34/2015.
i. Primary and secondary education

In practice, in the area of education, in terms of sheer numbers, Catholic education outstrips State education significantly; especially in Flanders. About 60% of all Belgian secondary school students go to Catholic schools, but in Flanders this number is close to 70%, a percentage that is exceptionally high compared to other Western European countries. It must be underlined, however, that the religious character of most of these schools has moved into the background.

Other religions organise education in Belgium as well. Judaism, for instance, has a longstanding tradition in this area. Geographically, Jewish schools are almost exclusively situated in Brussels and Antwerp. Especially in Antwerp a high percentage of Jewish children (as many as 95%) receive their education in a Jewish school. For Brussels, where most Jews are more liberal, this percentage is significantly lower.

A number of (primary) Protestant schools are present in Belgium as well, predominantly in Flanders, commonly known as ‘Biblical Schools’ (Scholen met de Bijbel).

Up until quite recently there was but a single recognised Islamic school in Belgium. When it was established, in 1989, it encountered strong opposition, both in the public opinion and on the political level. Since 2011, 2012 and 2017 respectively three additional schools have been recognised. All three schools are located in the Brussels agglomeration, and all concern primary education. 2015 witnessed the upstart and recognition of the first secondary Islamic school (in Schaerbeek, a municipality in Brussels).

Finally, the free education network includes a number of so-called ‘method schools’ (mетодесchoolen), such as the Modern School Movement (Freinet), Waldorf education (Steiner), Jenaplan schools, etc.

ii. Religion in higher education

At the level of higher education several denominational research and teaching institutions exist. The protestant religion has the strictly private Faculty of Protestant Theology in Brussels (Universitaire Faculteit voor Protestantse Godgeleerdheid or Faculté universitaire de théologie protestante), which delivers university diplomas in protestant theology. This bilingual institution was founded in 1950, and its recognition as an academic insti-
tute took place in 1963. Additionally, a Flemish evangelical theological faculty (Evangelische Theologische Faculteit) in the town of Heverlee (Leuven) was recognised in 1983.

The Institute for Higher Jewish Studies (Instituut voor Hogere Joodse Studies or Institut de Hautes Études Juives) was founded in 1959. It was closely associated with the Institute of Sociology of the Free University of Brussels (ULB). As of the academic year 2000-01, the Dutch speaking part of the institute was taken over by a new Institute for Jewish Studies (Instituut voor Joodse Studies) at the University of Antwerp. This new institute receives financial support from the Flemish community.

Existence of other denominational institutes notwithstanding, the position of (traditionally) Catholic institutions for higher learning is dominant by far. As far as universities are concerned, five Catholic ones remain: the Catholic University of Leuven (KU Leuven); the Catholic University of Louvain (UCL); the University Saint-Louis – Bruxelles (USL-B), formerly known as the Facultés Universitaires Saint-Louis (FUSL); the University of Namur (formerly Facultés Universitaires Notre-Dame de la Paix); and the (private) Catholic university of Mons (Facultés Universitaires Catholiques de Mons (FUCaM)). Aside from these universities, stricto sensu, there are numerous Catholic colleges throughout the country (hogescholen or haute écoles).

As is the case with primary and secondary schools, ‘Catholic’ has – in the context of higher education – become more of a sociological than an ideological or religious notion, with many or most students and staff members being non-believers or adherents of other faiths. Catholic theology is taught only at the Catholic University of Leuven (KU Leuven), in Dutch and English, and at the University of Louvain (UCL), in French. Canon Law can only be studied at the Catholic University of Leuven (KU Leuven).

b. Media

As far as religious broadcasting on radio and TV is concerned, recognised worldviews were traditionally entitled to (free) public radio and television

63 P. De Pooter (2003), De rechtspositie van erkende erediensten en levensbeschouwingen in Staat en maatschappij, Brussels, Larcier, 443.
64 USL-B and UCL are involved in a process of merger.
65 On the Dutch-speaking side, these are often part of an association with the KU Leuven.
broadcasting time (known as le droit à l’antenne, which literally translates as ‘the right to the antenna’). This principle was first established by the federal government in 1964. Since then radio and television have become regional matters. Currently, the French and German speaking public broadcasting regimes still offer airtime to recognised religious groups. In Flanders, however, the system was revised in 2016, reducing airtime for the (recognised) religious communities themselves to broadcasting a limited number of religious services (on the radio, about 57 Roman-Catholic services are broadcast annually (and none for other religions), while some 30 Roman-Catholic services, 6 Protestant ones, and 2 Orthodox, Islamic of Jewish services (each) are televised).

In the written press, the role of religions is more indirect. A large number of the daily newspapers were historically Catholic (e.g. De Standaard and La Libre Belgique), however without the Church authorities having editorial control. Many of those have, however, evolved towards pluralism. Today, none of the mainstream daily newspapers is still Catholic. In Flanders, as a reaction to this development, the Church, together with external sponsors, founded the weekly, Tertio, in the year 2000, with a limited number of readers but with an outspoken Catholic identity. The weeklies Kerk en Leven and Dimanche are also Catholic.

VII. Labour Law within Religious Communities

Important evolutions have taken place in the relationship between employment law and religions. As far as religious personnel are concerned, it used to be the case – to varying degrees – that the religious element dominated the relationship of religious personnel with their churches, with religious personnel not even being regarded as employees or as being self-employed, due to inter alia the absence of (formal) employment contracts.

Presently however, the presumption in favour of the religious relationship has been amended. The closeness to the heart of the message and the institution plays a part. For a pastor, the ecclesiastical relationship dominates, whereas other functions, often more common and secular, tend to give way to labour law. This development, triggered by pension claims by religious personnel, reflects the fact that society in general no longer con-

sidered labour in a religious context as fundamentally different to other types of work. Concerning secular or lay personnel, the development mirrors that of religious personnel, albeit with a few important differences.

VIII. Financing of Churches

The Belgian system of State financing for religions is one of direct financing only, and is limited to recognised religions (supra IIIa.i & VIa.i). As provided by article 181 of the Constitution, this first and foremost entails payment of the (modest) salaries and pensions of ministers. This practice, enshrined in the Constitution, already began under the French regime, after the Revolution, as a means to compensate for the nationalisation of the property of the clergy (supra II.a), and the suppression of the so-called tithes.

In addition to payment of salaries and pensions of ministers, recognition entails a few additional benefits for the religions involved.

To begin with, deficits incurred by ecclesiastical administrations for temporal goods are borne by the municipalities. It may be noted that this does not always encourage financial responsibility on the part of said administrations.

An additional advantage entails that recognised religions may request State subsidies for constructing or renovating their buildings. Pastors and bishops must furthermore be granted appropriate housing (‘in accordance with their social status’), and expenditure for these purposes is, again, chargeable to the municipalities or provinces.

Furthermore, recognised religions and beliefs may designate chaplains, paid by the State, in prisons and in the army (infra IX). Moreover, one of the aspects of article 24 of the constitution, as mentioned, entails that schools organised by public authorities must offer a choice between instruction in one of the recognised religions and instruction in non-religious ethics for the duration of compulsory education, and the State must also pay for this instruction (supra VIa).

69 Council of State, 2 April 1953.
The system also offers a number of tax benefits, including an exemption from taxation on income derived from property ownership for buildings (or parts of buildings) that are used for worship.

IX. Access of Religious Communities to Public Institutions

This section firstly deals with the three main chaplaincies in public institutions, i.e. those in the military (a), in health care institutions (b) and in prison facilities (c). Afterwards, chaplaincies in other public institutions are addressed (d).

a. Armed forces

A military chaplaincy existed within the Belgian army since the country’s foundation. Until 1914 its corps consisted exclusively of Roman Catholic clergy. The First World War (and the effects of the accompanying conscription) ensured that the religious diversity that had started to characterise the country also became reflected in the army. This quickly led to the admission of chaplains for Protestant and Jewish soldiers and, ultimately, to the establishment of a religiously pluralistic model of spiritual care.

After much and sustained insistence – with the first legislative proposals dating back to 1980 – space was also created within the army chaplaincy for secular humanist spiritual care in 1991.

---


71 Additionally, the state police (Rijkswacht), a militarised national police corps, disposed of its own chaplaincy up until 1 January 1997. Eventually its chaplaincy was integrated into the army chaplaincy. See Parliamentary Documents, Senate 1996-97, 28 November 1996, 2029.

72 See inter alia Ministerial Decree 7 August 1914 (waarbij aan de bedienars der verschillende erkende eerediensten vrije toegang tot de zieken en gekwetsten verleend wordt), Moniteur belge 8 August 1914; Royal Decree 17 August 1927 (régulant l’état et la position des aumôniers militaires), Moniteur belge 1 September 1927.

The size of the military chaplaincy is closely linked to the actual need or demand for spiritual care. This means, for instance, that the number of military chaplains has shrunk significantly since the end of the Cold War and after the abolition of conscription. In 2015 16 chaplains remained, organised into a Department of Religious and Moral Assistance. Of these 16 chaplains, 13 are Catholic, 2 are Protestant and 1 is Jewish. In addition the military employs 6 secular humanist counsellors.

Islamic or Orthodox spiritual care is not provided within the armed forces. Plans for introducing a Muslim chaplain have been around since 2008, but so far without result. The government attributes this to the lack of a valid Islamic interlocutor, able to legitimately nominate a chaplain.

b. Hospitals

Since Belgian independence the government has, in one way or another, supported and enabled chaplaincies in hospitals. Spiritual and moral assistance in general hospitals is governed by a Royal Decree of 1964. The decree obliges hospitals to grant access to ministers of religion at the patient’s request. In 1970 the decree was amended to provide the same access rights to secular humanist counsellors. Currently, the relevant provision provides:

“Ministers of religion and lay counselors [secular humanist counselors] will be granted unrestricted access to the facilities; they must be met with the appropriate atmosphere and facilities for the performance of their duties. Full freedom of belief, religion, and political conviction.

74 In 1994 conscription was suspended. In 2004 it was formally abolished.
76 Ibid., 13.
77 Ibid. The government furthermore denies that its ambition for religious expansion, in this context, is driven by a fear for radicalisation: “La mission de l’assistance religieuse et morale consiste à assurer les cultes et à fournir l’assistance morale et religieuse nécessaire au personnel qui le demande. La Défense dispose d’autres services chargés de la sécurité et de la lutte contre la radicalisation”.
78 Royal Decree of 23 October 1964 (tot bepaling van de normen die door de ziekenhuizen en hun diensten moeten worden nageleefd), Moniteur belge 7 November 1964 (latest amendment: 8 August 2014).
must be guaranteed to everyone” (annex B, III, 5° Royal Decree 7 November 1964)

A circular of 1973 (amended and reaffirmed in 1997) served to further clarify and elaborate this provision. The document stipulates that the individual freedom of the patient must be respected as much as possible, and that moral, religious or philosophical assistance under the best conditions by an expert of his or her choice should be facilitated. In practice, patients are informed of their rights after checking into a hospital, and they are presented with the (non-obligatory) option of filling out a form specifying their wishes in this regard. They may also express (or change) their wishes at any given time, later on, and the hospital is held to inform the religious or spiritual representatives of these wishes as soon as possible. All requests and information must be treated confidentially.

The persons providing (subsidised) religious and moral support in this context are appointed by the recognised religions and beliefs, and patients may not be charged for their services. For the Roman Catholic religion not only priests fulfil these tasks, but mandated laypersons as well (with the exception of administering sacraments). Patients may also request representatives from non-recognised religions, albeit that these do not receive government remuneration.

---

80 Circular of 5 April 1973. In 1971 an earlier circular had already been issued, but the arrangement therein encountered fierce resistance in Catholic institutions in particular, and it was abrogated as to its effects on 13 March 1972. See also the circulars of 5 April 1974, 12 February 1987 and 13 March 1997, elaborating and/or amending the one from 1973.


82 Point 6 Circular of 5 April 1973. A number of shortcomings both in the circular itself and in its implementation can be identified. See inter alia: Proposition of resolution concerning the religious, philosophical and moral assistance within hospital care, Parliamentary Documents 2006-2007, no. 51-2709/1, 4-6.

83 Point 1 (in fine) Circular of 5 April 1973. Due to privacy considerations the circular also expressly prohibits asking patients (either by means of forms or in person) about their religious adherence. See inter alia Circular 5 April 1974 (addressing the fact that a number of hospitals were not respecting this principle).

84 These individuals are granted the same rights as (other) representatives by point 2 of the Circular of 5 April 1973.

The religious and moral representatives may visit the patients at any desired time and without being subjected to time limits. However, they are obliged to abstain from visiting patients who have opted for religious or spiritual assistance from another denomination or patients who have expressed their wish not to receive any assistance whatsoever. The representatives are also bound to professional secrecy.

Concerning psychiatric hospitals, the same arrangements are applicable. In that context additional norms apply as well though, due to the specific nature and conditions of psychiatric patients, which may require added caution. Accordingly, and under threat of criminal sanctions, the Act of 1990 concerning the protection of the mentally ill posits that “every mentally ill person must be treated with full respect for his freedom of opinion, his religious and philosophical beliefs, in such a manner that his physical and mental health, his social and familial contacts as well as his cultural development are encouraged” (art. 31 § 1).

Finally, in the context of nursing and care homes similar principles hold concerning the freedom of choice for inhabitants and the right of entry for religious and moral representatives. An important difference is that the

---

86 Point 4 Circular of 5 April 1973.
87 Ibid.
89 Transl. of: “Iedere geesteszieke wordt behandeld met eerbiediging van zijn vrijheid van mening, van zijn godsdienstige en filosofische overtuiging en op zulke wijze dat zijn lichamelijke en geestelijke gezondheid, zijn sociale en gezinscontacten alsmede zijn culturele ontwikkeling in de hand worden gewerkt”. On a side-note, the Act also contains this noteworthy provision (art. 2, section 2 Act of 26 June 1990): “Maladjustment to moral, social, religious, political or other values may not in itself be considered a mental illness” (transl. of: “De onaangepastheid aan de zedelijke, maatschappelijke, religieuze, politieke of andere waarden mag op zichzelf niet als een geestesziekte worden beschouwd”).
90 See art. N1, 4, e; art. N1 (Walloon region), 4, e; art. N1 (Brussels capital region), 4, e; art. N1, 4, e (Flemish region) Royal Decree of 21 September 2004 (houdende vaststelling van de normen voor de bijzondere erkenning als rust- en verzorgingstehuis, als centrum voor dagverzorging of als centrum voor niet aangeboren hersenletsels), Moniteur belge 10 April 2014 (latest amendment 12 January 2016). Similar requirements were previously inscribed in the Royal Decree of 2 December 1982 (abrogated by art. 7 of the aforementioned Royal Decree of 2004). See also, specifically for the Walloon region, the Decree of 5 June 1997 (betreffende de rustoorden, de serviceflats en de dagcentra voor bejaarden (…)), Moniteur belge 26 June 1997 (art. 5 § 2, 9°, a and c).
relevant regulations do not provide for government funding for payment of chaplains and moral counsellors in this context.\textsuperscript{91}

c. Penitentiaries

Much as the aforementioned chaplaincies, the prison chaplaincy is of ancient date and it has long been, at least in terms of being state financed, the exclusive domain of the Roman Catholic Church.\textsuperscript{92} Until the beginning of the 21st century virtually the entire staff consisted of Roman Catholic chaplains, with the exception of a single Protestant one. Other religions and beliefs provided services on a voluntary basis, which took on an ever-increasing scale. Partly for this reason, the system was a controversial one: it was widely considered discriminatory by virtue of its clinging to historical (and out-dated) proportions. The arrangement was fundamentally revised in 2005.\textsuperscript{93} At the time the government attempted, for the first time ever, to base staff allocation on an empirical needs assessment.

The size and composition of the prison chaplaincy has since 2005 become somewhat more proportionate to the actual needs and demands, with Anglican, Islamic,\textsuperscript{94} Orthodox, Jewish and secular humanist spiritual care being introduced. However, the relative numbers of prison chaplains are still by no means proportionate to the contextual needs assessment within the context of prison facilities (see table 2). The secular humanists, for instance, would have had only a limited presence in this sector (1.6\%) based on the assessment. However, in 2005 they were granted 9 representatives, out of total of 65 positions at the time, which roughly amounts to 14\% of the corps.\textsuperscript{95}

\begin{flushleft}
\textsuperscript{91} See “Wettelijk kader”, Pastoralezorg.be.
\textsuperscript{92} In addition spiritual care is offered by volunteers. This is the case for all recognised religious groups.
\textsuperscript{95} See Royal Decree 25 October 2005 (houdende vaststelling van het kader van de aalmoezeniers en de islamconsulenten van de erkende erediensten en van de moreel consulenten van de Centrale Vrijzinnige Raad der niet confessionele levensbeschouwing bij de Strafinrichtingen, zomede tot vaststelling van hun weddeschalen), Moniteur belge 10 November 2005.
\end{flushleft}
Since 2005, the number of personnel has steadily increased, rendering this form of spiritual care in public institutions the most important one, numerically speaking.

In 2015 it was estimated that over 35% of detainees were Muslim. This numerical development coupled with the fear that Muslims in detention situations are liable to radicalise, led to an important (or historic, even) change in the corps’ composition: in 2016 the Islamic prison chaplaincy became larger than that of the previously dominant Roman Catholic one (see table 2).

Table 2: Prison chaplaincies

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Catholic</td>
<td>40</td>
<td>25</td>
<td>25</td>
<td>53.8%</td>
</tr>
<tr>
<td>Protestant</td>
<td>1</td>
<td>6</td>
<td>9.4</td>
<td>9.2%</td>
</tr>
<tr>
<td>Anglican</td>
<td>-</td>
<td>1</td>
<td>2</td>
<td>0.1%</td>
</tr>
<tr>
<td>Orthodox</td>
<td>-</td>
<td>4</td>
<td>5</td>
<td>3.5%</td>
</tr>
<tr>
<td>Jewish</td>
<td>-</td>
<td>2</td>
<td>2</td>
<td>0.3%</td>
</tr>
<tr>
<td>Islamic</td>
<td>-</td>
<td>18</td>
<td>27</td>
<td>31.4%</td>
</tr>
<tr>
<td>Humanist</td>
<td>-</td>
<td>9</td>
<td>9</td>
<td>1.6%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>41</strong></td>
<td><strong>65</strong></td>
<td><strong>78.4</strong></td>
<td><strong>100% (99.9%)</strong></td>
</tr>
</tbody>
</table>

Spiritual care for inmates is also taken up by others than the chaplains of recognised religions: non-recognised religions and beliefs may also provide some form of spiritual guidance in prisons (albeit unpaid and under restrictive conditions). The legislation that was enacted in 2005 even con-

---


98 Royal Decree 10 April 2016 (tot wijziging van het koninklijk besluit van 25 oktober 2005), Moniteur belge 19 April 2016.
tained a specific provision guaranteeing their rights, but it was removed again in 2006. This significantly weakened the position of Buddhists, Hindus and Jehovah’s Witnesses among others.99

d. Other public institutions

The post-World War II arrival of migrant workers soon led to the establishment of state-funded ‘migrant chaplaincies’.100 In retrospect these chaplaincies can be regarded as early harbingers of the formal recognition of the religions of these newly arrived migrants under the system of article 181 of the Constitution, in 1974 (Islam) and 1985 (Orthodoxy) respectively.

The migrant chaplaincies differed from other forms of chaplaincies in that they were explicitly open for (at the time and/or still) unrecognised religions.101 The system was even characterised by a form of positive discrimination vis-à-vis non-recognised religions: in order to receive funding chaplains of unrecognised religions had to meet lower requirements concerning the numbers of adherents they had to reach than did chaplains of recognised religions (i.e. 1,000 versus 5,000).102 Since the competence for this issue was transferred, due to devolution, to the communities the situation in Flanders has legally remained as it previously was, but since the year 2000 the government no longer provides a budget for migrant chaplains (resulting in a de facto abolition).103 The French Community replaced


100 Royal Decree 10 July 1952 (fixant l’indemnité allouée aux aumôniers des travailleurs étrangers occupés en Belgique), Moniteur belge 14-15 July 1952. By Royal Decree of 11 May 1971 (Moniteur belge 22 May 1971) the aforementioned Decree was supplemented with an arrangement concerning secular humanist counsellors.

101 Art. 3 Royal Decree 10 July 1952.

102 Ibid.

103 House of Representatives, Parliamentary questions and answers, 1999-2000, 2 June 2000 (question no. 132, Ludwig Caluwé), 1397. The considerations that the government referred to for cutting the budget were as follows: 1. the changed legal and policy context: “current legislation is aimed at participation, emancipation, reception of newcomers, refugees and travelling people”; 2. the fact that self-organisations of migrants and ethnic minorities are recognised and subsidised; 3. the (operational) recognition of Islam, and its associated funding on the basis of art. 181 of the Constitution.
the former arrangement in 1983 (and 1984); since then only recognised religions and beliefs could receive funding.\textsuperscript{104}

A Belgian peculiarity was the phenomenon of the chaplaincy for offshore fishermen.\textsuperscript{105} Formally instituted in 1886, it long remained the only chaplaincy (with one chaplain) reserved for a single religion: Roman Catholicism. Eventually a second, secular humanist, counsellor was added. This expansion took place \textit{ad hoc}, without being based on objective distribution criteria. In October of 2014 the Roman Catholic chaplain was forced to retire, without being replaced;\textsuperscript{106} he did remain active on a voluntary basis after his retirement.

Finally, we may refer to the airport chaplaincy (Zaventem), which originally resided under the Authority of the Airways (\textit{Regie der Luchtwegen}), a central government agency.\textsuperscript{107} This chaplaincy was developed prior to the privatisation of the national airport. Presently it consists of a corps of four chaplains (Roman Catholic, Protestant, Orthodox and Jewish) and one humanist counsellor.\textsuperscript{108} An Islamic airport chaplain was never introduced. Following the privatisation of the airport, public funding extinguished, though the religious communities themselves still provide religious assistance in this context.


\textsuperscript{105} Royal Decree 28 November 2002 (\textit{tot vaststelling van het statuut en de bezoldigingsregeling van de aalmoezenier en de morele consulent bij de Dienst Zeevisserij van het Ministerie van Middenstand en Landbouw}, \textit{Moniteur belge} 19 December 2002).

\textsuperscript{106} It had already been decided in 2005 that the government was no longer under the obligation to appoint and pay for a chaplain in this context, but the agreement also entailed that the serving chaplain could remain in place until his retirement.

\textsuperscript{107} The current ‘Belgocontrol’.

\textsuperscript{108} Remuneration was established by Royal Decree of 27 March 1998. The staff formation was determined by the Royal Decrees of 17 June 1997 and 26 May 1998. See: \textit{Parliamentary questions and answers}, Senate 2000-2001, 9 January 2001, 1301 (question no. 849 De Schamphelaere). Answer provided by the Minister of Telecommunication and Public Enterprises.
X. Legal status of Priests and Members of Religious Orders

The legal position of priests and religious personnel is, for most purposes, no different from that of any other Belgian citizen. There are, however, several exceptions. To begin with, the Judicial Code (art. 224, 120) provides that ministers of recognised religions or representatives of recognised (non-religious) beliefs are exempted from jury duty.

Additionally, some incompatibilities between combining certain religious positions with other functions flow from both the Constitution and regular legislation. Here, notably, being a (paid) minister for a recognised religion is often considered more problematic than being a minister for a religion that is not (yet) recognised.

To begin with, article 51 (originally art. 36) of the Constitution determines that having “any salaried position other than that of [government] minister”, paid by the federal government, cannot be combined with being a Member of Parliament. This includes ministers of religion in the sense of article 181 of the Constitution to the extent that they receive payment by the State (supra IIIa.i & VIII). Positions on committees or lower level representative bodies, such as municipal councils, do remain possible. Other incompatibilities with being a cleric of a recognised religion include holding the function of judge, clerk and registrar in the Constitutional Court (art. 44 Special Law concerning the Constitutional Court).

However, not all incompatibilities are limited to ministers of recognised religions. ‘Ministers of the religions’ in general are not allowed to become Mayors or Aldermen, for instance (art. 72 New Municipal Code). Furthermore, being a member of the Council of State (or of its auditeurs’ office, coordination office, and registry) or being any kind of judge is incompatible with being part of the ‘ecclesial order’ (geestelijke stand or l’état ecclésias-tique) or clergy.109

Case law pertaining to this issue is limited. An exception involved a priest who was neither paid by the State nor acting as a parish priest, who had hoped to become a judge, but was rejected, with the State invoking the aforementioned incompatibility. He eventually took his case to the European Commission for Human Rights. The Commission ended up ruling against him, refusing to read into article 9 (right to freedom of religion) a right to hold public office.110

109 See resp. Laws on the Council of State (art. 107); Judicial Code (art. 293).
XI. Matrimonial and Family Law

a. Civil marriage prior to religious marriage

As mentioned above, article 21 of the Constitution provides that a civil marriage must always precede the religious marriage ceremony (*supra* II-Ia.i). Article 267 of the Criminal Code also renders the reverse order a crime, stipulating that any minister of a religion, who concludes a religious marriage prior to the civil marriage ceremony having been performed, will be punished with a fine (*supra* III.a.ii); note that the spouses involved are not punishable. In case of recidivism, the minister may receive a prison sentence.

Historical and mostly practical reasons lie at the root of this restriction contained in both the Constitution and the criminal law. In the 19th century, in accordance with long tradition, many people married only in Church and did so despite the fact that the bishops encouraged them to also conclude a civil marriage. This widespread practice (which had already previously been banned, under French rule) was considered detrimental for an efficient functioning of the services of the secular state. In order to bring an end to this situation, and in a spirit of reconciliation, the Catholic majority of the post-revolutionary National Congress approved the second paragraph of the current article 21 of the Constitution. Later on, the corresponding criminal provision was introduced in the criminal code.

While introduced with a view to prevent a common Roman Catholic practice, both the Constitutional and criminal provisions are neutral in their wording. As such, the rule is applicable to any kind of marriage, which was also explicitly confirmed by case law from the Supreme Court.

In practice, courts sometimes have difficulty with the interpretation of the religious concepts of marriage, as it is not always clear whether particu-

111 An exception to the rule holds if one of the persons involved in the ceremony was in mortal danger, and any postponement could have made the wedding impossible.


114 E.g. Supreme Court 26 December 1876.
lar religious manifestations under legal scrutiny, which preceded a civil marriage, already constituted a religious marriage, or, for instance, only a betrothal.

b. Children: adoption and religious upbringing

Concerning children and parenthood, legislation on adoption explicitly includes religion and belief (that is the religious background of the child) as one of the elements that should be taken into consideration when deciding on an adoption, in order to ensure the type of adoption that is in the best interest of the child and its fundamental rights (art. 362.3, 3° Act of 24 April 2003).

Furthermore, as far as children’s religious upbringing after separation of the parents is concerned, article 374 § 1 of the Civil Code provides that, in case the parents do not agree, the competent judge has the authority to make one of the parents responsible for major religious choices for the child.115

c. Private International Law

Belgian private international law allows a personal status created abroad to have (indirect) effects in Belgium, through the mechanism of a simplified public order control.116 This rule, while not explicitly mentioning religion, can have the effect of (partially) accommodating religious norms to some extent, e.g. polygamy and dowry systems.

i. Polygamy

Polygamy is unlawful in Belgium, but through the application of private international law, widows that were lawfully married abroad into polygamous marriages are able to obtain an equal and proportional (but divided)

share in survival pension rights. However, Belgium’s highest courts disagree on whether, in cases where the first wife has the nationality of a country prohibiting polygamy, the second wife has to be excluded from widow pension claims.

As far as (underage) children from polygamous marriages are concerned, the Belgian Constitutional Court ruled in 2008 that these children should not be discriminated against in the context of family reunitification.

**ii. Dowry**

Belgian case law is divided on the question whether or not the payment of a dowry as a condition of matrimonial validity is in conformity with Belgian international public order. In 1989 the Brussels court of first instance was confronted with a Moroccan woman who claimed that she had not received the *sadaq* (the required marriage gift given by the groom to the bride). The Judge enforced the application of the Moroccan family code (*Mudawana*), and declared the nullity of marriage due to lack of a dowry. Likewise, the Court of appeal of Brussels has ruled that the lack of a dowry could be deemed equivalent to and evidence of lack of consent.

Contrary rulings have *inter alia* come down from the court of appeal of Ghent, which ruled that in order to be taken into account as an evidence of lack of consent – a missing dowry must be supplemented by other evidence, since it is contrary to the principle of liberty and equality of spouses to give formal legal effect to a mere lack of a dowry.

---

117 Constitutional Court 4 June 2009, nr. 96/2009.
119 Constitutional Court 26 June 2008, no. 95/2008.
121 Court of appeal of Brussels, 1 February 1994, and 10 May 1996.
122 Court of Appeal of Ghent, 12 September 1994.
XII. Conclusion

The situation of Church and State relationships in Belgium may be summarised as follows:

1. The system, quite favourable to religion, is more a system establishing mutual independence than separation in a strict sense.
2. Although theoretically all religions enjoy the same rights, there is an important difference between recognised and non-recognised religious groups. Furthermore, practice reveals the Roman Catholic religion to be primus inter pares among the recognised religions.
3. Gradually secularisation is colouring the Belgian Church and State system. This secularisation is not generally characterised by a frontal attack on religion, but rather by a gradual loss of power and the degree of autonomy of the churches in various fields. An example is the increasing influence of labour law in Church life as well as tendencies favourable to (moderate) State control of internal church procedures.

XIII. Select bibliography


