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The Legality of Religious Symbols in Belgium's Classrooms: What Writings are on the Wall?

Cedric D'Hondt

Abstract

Belgium has known a protracted discussion regarding the presence of religious symbols in educational institutions. The hijab, in particular, continues to spark controversy. Belgian courts have repeatedly found that school regulations violate the freedom of religion when banning students and teachers from wearing religious symbols. Yet schools maintain their contested regulations and ongoing legal proceedings result in conflicting conclusions. This study examines how the Belgian debate on religious symbols in educational institutions affects the freedom of religion. To do so, it will first scrutinise the case law of Belgian courts. Consequently, the study will juxtapose Belgian case law with decisions of the European Court of Human Rights. The study will highlight conflicting viewpoints between national judges and the ECtHR, and explain possible consequences for Belgium. In this way, the paper will assess the legality of a general ban on religious symbols in Belgian schools.

Keywords: Freedom of Religion; Education; Intersectionality of discrimination; Religious symbols; European Convention on Human Rights

Introduction

In the last decade, Belgian education has witnessed a remarkable shift. Whereas schools used to observe active pluralism, accepting religious diversity in their premises, they now often apply a strict principle of neutrality. Consequently, school boards prohibit teachers and students from manifesting their convictions by wearing religious symbols. Such prohibitions recurrently spark debates on the scope of freedom of religion. Evidently, the controversy puts various values at stake, such as diversity, secularism, gender equality, the right to education, security and identity.

Belgian judges have occasionally been placed before the daunting task of balancing these interests, with conflicting results. Uncertainty remains, and schools maintain a ban on religious symbols. This research assesses the scope of freedom of religion in Belgian schools by adopting a

legal research methodology. Starting from the relevant provisions in both the Belgian Constitution and the European Convention on Human Rights (ECHR), this paper describes, analyses and evaluates case law of Belgian courts and the European Court of Human Rights (ECtHR). In order to fully understand the case law, the first chapter summarises the layout of Belgium's educational system.

As most Belgian literature is either in French or Dutch, all citations in this paper are translated to English by the author with a reference to the original sources. Furthermore, while this paper addresses religious symbols in general, it will focus on the hijab. After all, as noted by a Belgian judge, the debate often has a one-sided focus on the Muslim headscarf.¹ 'Religious symbols' as used by this research do not include the niqab or burqa, since face-covering clothing is prohibited in Belgium.

Lastly, some schools only prohibit headwear indirectly because of alleged courtesy, thus effectively banning the wearing of, for instance, a Jewish kippah, a Sikh dastar or a Muslim hijab. Other schools directly ban any religious attire, which includes subtler symbols like a Christian crucifix, a Star of David or the Hand of Fatima. Because an indirect ban equally affects the freedom of religion, this paper understands a 'ban on religious symbols' to encompass both direct and indirect prohibitions.

Belgium's Educational Landscape

School wars

Two historical dynamics have contributed to the configuration of Belgium's educational system. It is no coincidence that the first of both dynamics is related to religious matters as well. Unlike the name may suggest, the First and Second School War (French: *Guerre scolaire*; Dutch: *Schoolstrijd*) did not involve physical violence. Instead it concerned political debates between liberal and Catholic parties. The liberals sought to topple the dominant position of the Catholic Church in education, whilst the Catholics wanted to support private, Catholic schools.² Eventually the School Pact of 1958 brought an end to the animosities by establishing a divide between public education and free education.³

Federalisation of Belgium

Second, the federalisation of Belgium has also had an impact. A linguistic conflict between the Dutch-speaking north, Flanders, and the French-speaking south, Wallonia, characterises Belgian history. In an attempt to resolve the dispute between Flanders and Wallonia, six state reforms have thus far been enacted between 1970 and 2011, resulting in an extensive federalisation of Belgium.

Currently, the Belgian federal state encompasses six entities. There is a territorial divide into three regions: The Flemish Region, the Walloon Region and the Brussels-Capital Region. Additionally, the same territory is divided across the linguistic borders into three communities: The Flemish community, the French Community and the German Community. The Flemish and the French Community both function independently inside the bilingual region of Brussels. Given

the importance of language in schooling, education is a competence of the communities since the third state reform in 1989.

Conclusion: Three school networks in three communities

Consequently, education is organised independently in the three communities, in each of which exist three different school networks. First, there is the government-provided education that is directly provided by the community itself.⁴ Second, there is the subsidised public network, the schools of which are provided by the province, a city or municipality. Parallel to the two public networks, there is the network of free schools, which predominantly exists out of confessional schools. The majority of free schools remain Catholic, although there exist some Protestant, Muslim and Jewish schools.

Between Religion and Neutrality: The Debate Continues

The division of school networks within each community has solved most historical tensions. Free schools can continue to be confession-based, while public schools have to adopt a neutral position according to article 24 of the Belgian Constitution.⁵ However, this neutrality does not entail strict secularism but pluralism instead, meaning that every public school has to facilitate the choice between the teaching of one of Belgium's six recognised religions⁶ and non-denominational ethics.⁷

Parents are consequently free to choose a school that can educate their children according to their conviction. This freedom of choice is known as the passive freedom of education, which is equally safeguarded by article 24 of the Constitution.⁸

Nevertheless, religion sparks controversy once more. Some believe that the principle of neutrality should be applied more strictly in today's multicultural society, which resulted in prohibitions on religious symbols within school premises. However, school regulations that prohibit wearing religious symbols did not remain unchallenged. Both affected students and teachers have repeatedly taken the issue to court.

Belgian Case Law regarding Religious Symbols at School

Case law of the Council of State

The first decision on the substance of the matter was issued well over a decade ago by Belgium's supreme administrative court, the Council of State (French: *Conseil d'État*; Dutch: *Raad van State*).⁹ It can suspend and annul an administrative act, such as school regulations, that violates the law. However, recourse to the Council is limited in time. Complaints must be lodged within sixty days counting from the official publication, notification or observation of the administrative act. Furthermore, the applicant must have an interest that has been affected by the contested administrative act.¹⁰

In 2009, an Islamic religion teacher deemed that an administrative act indeed harmed her interests. She had been teaching religion in two primary schools of the Flemish Community network *GO!*. Although the schools banned ‘ostentatious’ religious symbols, they made an exception for religion teachers, who could wear symbols during their own classes only. Nevertheless, the teacher did not remove her hijab outside her classroom and both schools dismissed her.

The Council of State considered her dismissal to be in contravention of the law.¹¹ After all, the teacher’s personal commitment did not end at the classroom’s door. Simultaneously, the Council of State acknowledged that in some cases a prohibition of wearing the hijab can be warranted. In this case, however, the school boards did not convincingly establish such necessity. Without the verified need for a general ban, the Council declared the dismissal irregular.

In response, the *GO!* sent out a first circular in September 2009, urging its schools to include a general ban on religious symbols in school regulations. This circular gave rise to another series of litigations. In a March 2010 judgement, the Council of State believed that according to the Belgian Constitution, only the parliament can establish a general ban on religious symbols.¹² However, after a preliminary ruling from the Belgian Constitutional Court, the Council of State acknowledged that the circular did not constitute a regulatory text.¹³ It merely concerned an instruction to all schools of the *GO!* network. Hence, the circular remains unrevoked and the Council of State can only review the regulations of individual schools, not the circular they rely upon.

In December 2010, the Council of State decided for the first time on a Walloon case, which involved a math teacher in municipal schools of the city of Charleroi. Her hijab posed a problem for the city council, and local authorities prohibited the teacher from wearing any religious symbols. Eventually the city of Charleroi dismissed the teacher. In contrast to the 2009 case regarding the religion teacher in the Flemish *GO!*, the Council of State declared the ban in Charleroi’s public schools legal.¹⁴

The different conclusion was due to legislation of the French Community, which had adopted a decree in 1994 to clarify the constitutional principle of neutrality in public education. Article 4 of said decree reads as follows: ‘In front of students, one refrains from every attitude and every partisan statement regarding ideological, moral or social problems that are topical and that divide public opinion.’¹⁵ The Council of State considered the hijab to be such subject of public debate, as it affects another fundamental democratic value, namely equality between men and women.

In 2014, the Council of State confirmed its earlier judgement regarding religion teachers in the Flemish public education.¹⁶ Two Muslim women saw their appointment to the position of religion teacher refused by schools of the *GO!* network, due to their hijab. Although the Council of State eventually dismissed the application due to a lack of interest, the judge stressed that the position of a religion teacher is inherently linked with a personal commitment. Moreover, the Council considered that removing any religious symbols outside the classroom can negatively impact the teacher’s credibility in front of students and parents.

In 2014, the Council of State issued two other verdicts concerning students of *GO!* schools.¹⁷ One case involved a Sikh student, while the other concerned six Muslim girls. The reasoning of the Council of State is similar in both cases and – for the first time – very elaborate and balanced. The judge considered that a ban on religious symbols principally restricts the freedom of religion, enshrined in article 9 of the ECHR.¹⁸ The Council of State repeated that particular circumstances can necessitate such restriction. This time, however, the Council explicitly referred to the three conditions of article 9 of the ECHR that would allow a ban on religious symbols: the ban must (1) be prescribed by law; (2) pursue one of the legitimate aims listed in article 9.2 of the ECHR; and (3) be necessary in a democratic society, meaning that the restrictive measure should be imperative, pertinent and proportionate.

The Council of State found that the ban on religious symbols had met the first two requirements, since school regulations constitute a law in the broad sense of article 9.2 ECHR and the schools aimed to protect the rights and freedoms of others. Importantly, the judge elaborated that the passive right of education does not entail the right to demand that children are not to be confronted by the religious symbols of fellow students.¹⁹ Equally important is the judge's dismissal of the argument of gender equality.²⁰ According to the Council, the girls chose to wear the hijab out of their own free will. Only behaviour that endangers the neutrality of education or the rights of others, such as proselytism, justifies restriction of the freedom of religion.

This led to a problem regarding the third requirement. Whereas the Council of State acknowledged that the *GO!* is pursuing a legitimate aim, the judge found no specific circumstances that indicate the school's need of a general ban on religious symbols to safeguard public order or the rights of others. Due to the lack of a 'democratic necessity', the Council of State found the ban on religious symbols an illegitimate restriction of the freedom of religion, and annulled the provision of both school regulations accordingly.

However, the Council of State made an important addendum: a general ban on religious symbols is not in and of itself irreconcilable with the ECHR. Whereas the condition of proportionality usually demands a limited restriction, the judge acknowledged the possible emergence of a so-called 'tipping point' at which a general ban becomes warranted.²¹ Several circumstances could constitute this tipping point, such as segregation, repression, and a predicament to equal educational opportunities.

Other courts

The verdicts of 15 October 2014 were the last rulings by the Council of State regarding religious symbols in schools. Since then, several civil courts have also decided on the matter. The underlying reason is simple: there is a legal deadline to challenge an administrative act before the Council of State. After this deadline, one only has recourse to a civil court. There is, however, an important difference between the effect of a civil court judgement and a ruling by the Council of State. While the Council of State can annul an administrative act, the civil judge can only declare an irregular act inapplicable to the parties involved. The act itself, unlawful as it may be, continues to exist.

A first case concerned a public college of the province of Liège. Barred from wearing the hijab on campus, sixteen female students took the case to the Liège court of first instance. The judge's reasoning was concise but straightforward: 'The wearing of the veil is not an obstacle to education, and neither a source of tension as such.'²² Two other cases both concerned Muslim girls who could no longer wear the hijab in the premises of *GO!* schools.²³ The judges reached the same conclusion as the Liège court: there were no indicators of a 'democratic necessity', which rendered a general ban disproportionate. Consequently, the judges prohibited the schools from enforcing the ban on the students involved.

However, the *GO!* appealed one of the judgements, and the Antwerp court of appeal overruled the initial decision. The judge now accepted, for the first time, the necessity of a ban: 'Incidents at community schools have illustrated that open pluralism is not up to the challenges that come with the increasing diversity in society. The wearing of religious symbols has led to disturbances of the peace and peer pressure.'²⁴ In other words, the judge assumed that the Council of State's 'tipping point' had been reached. Furthermore, the judge believed that students should make concessions when it comes to wearing religious symbols to safeguard the constitutional principles of neutrality and the passive freedom of education. The ban was found legitimate, and the applicants have to abide by school regulations once more.

Analysis of the Belgian case law

The chronological overview of the case law shows that initially the Council of State was reluctant to address the subject. Only the verdicts of 2014 contain an elaborate argumentation. While it has taken the Council of State several years to develop this reasoning, its final case law is conclusive: The Council did not accept a general ban on religious symbols for students. While the judge did not exclude a future ban on religious symbols, it did highlight its exceptional character.²⁵ Circumstantial evidence must demonstrate that all three requirements of 9.2 of the ECHR have been met.

This is different for teachers. The Council of State accepted that religion teachers are allowed to manifest their convictions, provided that they do not infringe on the rights of others. This principle stems from the position itself, which implies a personal commitment. Accordingly, this principle is inapplicable to non-religion teachers in francophone public schools, since the French Community has enacted a decree.²⁶ This suggests a difference between the French Community and the Flemish Community, since the Flemish Community never issued similar legislation. In light of the constitutional principle of neutrality, a prohibition on displaying religious symbols for all teachers in Flemish schools seems hard to defend.

Additionally, the case law reveals a loophole. Through its circular of 2009, the *GO!* instructs its schools to ban religious symbols. Although the Council of State has repeatedly declared a general ban disproportionate, the *GO!* persists. Simultaneously, the Council of State cannot annul the circular itself, for it does not constitute an administrative act. The cynicism becomes even starker when we take into account the judgements of the civil courts, which exclusively bind the

parties. Therefore, schools can continue to enforce regulations on students that were not involved in the proceedings. The *GO!* stubbornness perpetuates legal uncertainty.

The ruling of the Antwerp court of appeal makes it unlikely that the *GO!* will reassess its circular. The verdict, however, is susceptible to criticism. While the court accepted the necessity of a general ban, it did not refer to specific events. Instead, the judge wallowed in ambiguous language such as ‘incidents’, ‘disturbing the peace’ and ‘peer pressure’. Yet, the Council of State requires specific indicators, such as testimonies and reports, to justify the restriction of a fundamental freedom. Without a proper assessment of the ban’s proportionality, the court of appeal has arguably been too quick to accept a general ban.

Consequently, legal uncertainty remains. The Council of State has annulled some schools’ regulations, while other schools can maintain their rules. And even though a civil court finds a ban illegal, a school can simply decide to enforce its regulations on other students. Amidst the controversy, it is important to note that the ECtHR has equally interpreted article 9 of the ECHR. To ascertain the legality of any ban on religious symbols in Belgium, it is important to study the verdicts of this human rights tribunal as well.

Case law of the European Court of Human Rights

Teachers in public education

The ECtHR was first confronted with the question in 2001.²⁷ Ms Dahlab, a teacher in a public primary school in Switzerland, had converted to Islam in 1991, and started wearing a hijab from then onwards. In 1996, Swiss authorities prohibited her from wearing the hijab at school. After Swiss judges had confirmed the prohibition, Ms Dahlab beseeched the ECtHR. The Court, however, found her application manifestly ill-founded, and therefore inadmissible, because the prohibition had a legal basis, served a legitimate aim and was necessary in a democratic society. In particular, the judge also considered that the pupils of Ms Dahlab were at an age at which children are more easily influenced than older pupils.²⁸ The judge added: ‘that the hijab appears to be imposed on women by a precept [...] which is hard to square with the principle of gender equality.’²⁹

The ECtHR confirmed this conclusion in 2006.³⁰ Ms Kurtulmuş, a professor at the public University of Istanbul, had become the subject of a disciplinary investigation because of her hijab. Ultimately the authorities imposed a resignation due to her failure to comply with vestimentary rules. Again, the ECtHR found the application inadmissible, as the principle of neutrality in state education and the principle of secularism warranted the measure.

Students in public education

The ECtHR examined multiple applications from students. A first case equally originated in the University of Istanbul, where Ms Şahinwas not allowed to wear her hijab on campus. The ECtHR found no violation of article 9 of the ECHR.³¹ Whilst assessing the prohibition’s ‘necessity in a democratic society’, the judge elaborated on Turkey’s constitutional tradition of secularism.³²

This focus is no coincidence, as the ECtHR acknowledged that in the matter of religious symbols, member states enjoy a ‘margin of appreciation’.³³ This doctrine concedes a confined sphere of autonomy to national authorities when applying the ECHR. The rationale behind this discretion is conciliation between the diverse legal and cultural traditions of Europe.³⁴ The domestic judge ought to know best how to balance individual rights and public values. Evidently, the margin increases when member states do not agree on an issue, as is the case with public expressions of a religious belief.³⁵

As a result, the ECtHR repeatedly upheld its conclusion. When ninety-four students were banned from wearing the hijab in a Turkish secondary school, the ECtHR declared their complaint inadmissible.³⁶ The expulsion of two French students who refused to remove their hijab in physical education classes did not violate article 9 of the ECHR either.³⁷ Moreover, the Court attached similar importance to the French tradition of *laïcité*.³⁸ Another series of applications, filed by both Muslim and Sikh students against France, was equally deemed inadmissible.³⁹

Analysis of the ECtHR case law

The ECtHR clearly adopted a stricter stance than the Belgian Council of State. The Belgian judge only accepted a prohibition on the display of religious symbols for teachers, religion teachers being the notable exception. Students, on the other hand, remain free to wear religious symbols according to the Council of State, provided that they do not harm the freedom of others. Whereas the ECtHR always acknowledged that member states enjoy some freedom within the margin of appreciation, it seemingly favours a separation between the state and religion in education. The individual freedom of religion of both teachers and students consistently had to yield to the principle of neutrality.

For this stance, the ECtHR received reasonable criticism. First, in *Dahlab v. Switzerland* the Court hypothesised that wearing the hijab *might* have an effect on children. In other cases, the judge equally accepted that a ban on religious symbols is necessary to safeguard the rights of others. However, there is insufficient scientific evidence that the wearing of religious symbols by either a teacher or by peers indeed influences the view of students.⁴⁰ Moreover, the Court never found specific indicators that any of the complainants had engaged in harmful behaviour such as proselytism.

Second, the ECtHR observed the constitutional principles of secularism in Turkey and *laïcité* in France. Yet, the judge never elaborated on the meaning of both concepts, suggesting that they equal a mere ‘neutrality’. Hence, the judge bluntly ignored what the UN Special Rapporteur on Religion or Belief had already established in 2000: when it comes to religious matters, the Turkish state is not neutral.⁴¹ The judge had a similar disregard for the semantics of the French *laïcité*. The often-used English translation ‘secularism’ does not encapsulate the particular meaning of the word that goes beyond neutrality.⁴² By accepting both secularism and *laïcité* as traditions that justify a ban on religious symbols, the Court evaded a debate on the normativity of a strict separation between the public and religious spheres.⁴³ Yet, the argument can be made that an equal access to the public sphere for all religions benefits liberty far more than a strict separation.⁴⁴

Third, the stance of the ECtHR has led to an inconsistency with its own case law regarding another fundamental right: the freedom of expression in article 10 of the ECHR.⁴⁵ The Court consistently stated that prohibiting the hijab pursues a legitimate aim when it serves to protect the feelings of those who do not want to wear it. However, regarding freedom of expression, the ECtHR has firmly held that any expression of public interest cannot be restricted on the grounds that it might offend, shock or disturb.⁴⁶ GUNN rightly remarks that '[w]e would not normally expect a human rights tribunal to be more solicitous of the sensibilities of those who do not like religious expression [...] than on the right to manifest religion [...].'⁴⁷

Last, the ECtHR finds it difficult to reconcile the hijab with the principle of gender equality. Again, the Court failed to explain its viewpoint, reducing the hijab to a symbol of patriarchal oppression and ignoring the research that has exposed a more complex meaning.⁴⁸ Indeed, rather than a symbol of oppression, some women consider wearing the hijab as a confirmation of their dignity, or an expression of identity.⁴⁹ Others regard it as a statement against anti-Muslim policies in a post-9/11 world.⁵⁰ Such selective interpretation of the hijab and a blindness for the intersectionality of discrimination is a stain on the record of a human rights court.⁵¹ In light of this criticism, the ECtHR issued a remarkable decision in the 2011 case of *Lautsi and others v. Italy*.

Lautsie.a. v. Italy: A change of view or a bias confirmed?

A staunch atheist, Ms Lautsi did not accept that her two sons attended an Italian public school where a crucifix decorated the wall of every classroom. Ms Lautsi saw her freedom of thought violated by a predisposed educational system.⁵² Unsurprisingly, she referred to the case law of the ECtHR, in particular the case of *Dahlab v. Switzerland*, in which the ECtHR itself had considered the power external religious symbols can exert over pupils. Initially, the Court followed its own reasoning: given the state's duty to safeguard denominational neutrality in public education, the presence of a crucifix in state schools violates article 9 of the ECHR.⁵³

However, the ruling sparked such unprecedented protest from member states that the Court's Grand Chamber reviewed the case. The seventeen judges of the Grand Chamber did not agree with the initial verdict. Contrary to the assertion that 'a headscarf *might* have some kind of proselytising effect'⁵⁴, the Court now found no evidence at all that the display of a religious symbol may influence pupils. Whereas the Court previously took into account the possible effects of a hijab on the feelings of others, it now declared that 'the applicant's subjective perception' is not in itself sufficient to establish a violation of the ECHR. The judges also accepted that crucifixes are not merely linked to religion, but to Italian identity and tradition as well. The decision to perpetuate such tradition falls within the margin of appreciation. The ECtHR Grand Chamber concluded that the presence of a crucifix, an 'essentially passive symbol'⁵⁵, does not violate the ECHR.

In an attempt to explain the inconsistency between this conclusion and *Dahlab v. Switzerland*, the ECtHR made three distinctions. First, a crucifix allegedly 'is not associated with compulsory teaching about Christianity'. Second, Italy's school environment is equally open to other religions. The Court illustrates this by the fact that students were free to wear any religious

symbol. Lastly, the Court found no indicators that the authorities excluded atheist students, or that the presence of a crucifix encouraged proselytizing teachings.

These arguments, however, are inadequate, for the Court considers issues that were never investigated in the first place. In none of the aforementioned verdicts did the judge establish the presence of compulsory teachings. Rather, the ECtHR reasoned that the hijab is oppressive, suggesting that somehow it must be related to compulsory courses. Contrary to the applicants, who professed diversity and pluralism, it was the Turkish, Swiss and French states that took exclusive measures. Through the inadequate differentiation between *Lautsie.a. v. Italy* and the older case law, the Court shows that it did not intend to revise its own standpoint, revealing itself as being blatantly biased.⁵⁶

Back to Belgium: What Lessons does the ECtHR Offer?

When comparing the ECtHR case law with the Belgian cases, three observations can be made. First, there is a noteworthy difference between the Turkish and French contexts on the one side, and Belgium on the other. Belgium does not have a strong constitutional tradition of secularism like Turkey and France.⁵⁷ It is unclear, however, to what extent this would impact Belgium's margin of appreciation if the question of religious symbols in Belgian schools ever makes it to Strasbourg.

Second, the case of *Dahlab v. Switzerland* allows for some parallels to be drawn between this case and non-religion teachers in the French Community. Just like Switzerland, the French Community has legislation according to which public school teachers must remain neutral. Even though the argument can be made that a display of religious symbols does not necessarily obstruct neutrality, as *Lautsie.a. v. Italy* shows both the ECtHR and the Belgian Council of State have favoured the principle of neutrality over the freedom of religion when it comes to non-religion teachers.

Last, in contrast with the differential approach of the ECtHR, the Belgian Council of State has developed a consistent view that is more in line with international human rights law. According to this view, a general ban on religious symbols can only be in conformity with the ECHR in exceptional, well-documented circumstances, when less restrictive measures fall short of reaching one of the legitimate objectives. *Lautsie.a.v. Italy*, the sole case to date in which the ECtHR correctly applied the Convention regarding religious symbols in school, was a missed opportunity for the Court to revise its own deficient findings.

Conclusion: What Writings are on the Wall?

Hitherto, no solution has been found to break the legal stalemate in Belgium, in spite of the Council of State's clear human-rights approach. The near future will unlikely offer a way out of the deadlock. In addition to the Antwerp court of appeal's acceptance of a general ban on religious

symbols in Flemish Community education without giving proper grounds, the *GO!* has another appeal pending. Meanwhile, politicians are eagerly looking forward to the outcome.

This is no surprise, as the newly-formed Flemish government (2019-2024) has put the issue on the agenda. The coalition agreement explicitly aims at reaching neutrality in community education for both teachers and students.⁵⁸ To do so, the Flemish government has professed the intention of giving the ban a legal basis. However, on 9 January 2020, the Flemish minister of Education hailed the verdict of the Antwerp court of appeal as a positive development.⁵⁹ Mistakably he argued that the verdict has ended legal uncertainty and that legislative steps are not necessary for the time being. Anyhow, legislative proposals from the Flemish government will equally have to respect the conditions of article 9.2 of the ECHR. As stated before, it is unlikely that a general ban will do so.

Other community governments have not yet adopted an equally outspoken viewpoint. Nonetheless, a prohibition on religious symbols for both teachers and students remains a prevalent practice in both public and free schools across Belgium. The reasons for such a ban are recurring: avoiding peer pressure, promoting gender equality and safeguarding public order. Indeed, in Belgian society, radicalisation is a tangible problem, of which the terrorist attacks of 22 March 2016 stand as a saddening testimony.

However, a general ban is a blunt instrument that cannot give an alternative narrative for radicalism. Instead it risks alienating people, pushing them towards other schools and thus effectively bolstering segregation in Belgium's education. Moreover, people that cannot manifest their religion might turn to their active right to education, *i.e.* establishing their own free schools, which would create challenges of its own. Moreover, a ban ignores the identity-related aspects of religious symbols. Specifically, the Orientalist perception of the oppressed Muslim woman risks denying sexual agency to female students who wish to wear the hijab. A limited query amongst 103 Muslim girls has already documented a negative perception of the ban on religious symbols in *GO!* schools.⁶⁰ However, as the Committee on the Elimination of Discrimination Against Women has recommended, more extensive research into the impact of a ban is needed.⁶¹

The ECtHR has ignored such considerations, and has mostly held that a general ban on religious symbols in educational institutions is legal. Only in *Lautsie.a v. Italy* has the Strasbourg Court taken a more lenient approach towards religious symbols. However, this judgement unfortunately did not herald a revised viewpoint of the Court, but rather, a bias towards the hijab and dastar. In contrast with the ECtHR, the Council of State has rightly concluded that a general ban for students and religion teachers can only be legal if it is duly grounded in exceptional circumstances. For other teachers, at least in public schools in the French Community, the principle of neutrality takes precedence over the individual freedom of religion.

The verdicts of the Council of State have not yet dissuaded both public and free schools from maintaining a prohibition on religious symbols. Another solution, such as clear legislation that comprehensibly translates the abstract principles of the ECHR, is warranted. However, as long as the political will to adopt such solution is lacking, litigation and legal uncertainty for Belgium's religious minorities will remain. Amidst continuing legal proceedings, it is good to remember a

consideration that reverberates across several of the judgements scrutinised by this paper: ‘Pluralism, tolerance and broadmindedness are hallmarks of a democratic society.’⁶² To relinquish one, might very well mean losing the other.

About the Author

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¹ Council of State, 14 October 2014, no. 228.748 and no. 228.752, <http://www.raadvanstate.be>.

² De Smaele, Henk (2009) *RechtsVlaanderen: ReligieenStemgedrag in negentiende-eeuws België* [Right-wing Flanders: Religion and Voting Behavior in Nineteenth-Century Belgium] (Leuven: Leuven University Press), p. 202-203.

³ Devriendt, Sien (2018) ‘Godsdienstvrijheid en onderwijsvrijheid binnen het Vlaamsofficieelonderwijs: de verhouding tussen de internationale/Europese grondwetelijke bepalingen en de schoolreglementen’ [Freedom of Religion and Freedom of Education in the Flemish Public Education: The Relationship Between the International/European and Constitutional Provisions and School Regulations], *Tijdschrift voor Onderwijsrechten Onderwijsbeleid* [Journal for Education Law and School Policies] 4-5, pp 323-340; El Berhoumi, Mathias (2013) *Le régime juridique de la liberté d'enseignement à l'épreuve des politiques scolaires* [The Legal Framework of Freedom of Education Challenged by School Policies] (Brussels : Bruylant), p. 122-125.

⁴ In the Flemish Community, this is the *Gemeenschapsonderwijs* (GO!), which literally translates to “Community Education”. The French-speaking Community has the *Wallonie-BruxellesEnseignement* (WBE), or “Wallonia-Brussels Education”. The German-speaking Community has the *Gemeinschaftsunterrichtswesen* (GUW).

⁵ Article 24, §1 of the Belgian Constitution, https://www.senate.be/doc/const_nl.html.

⁶ Belgium's recognised religions are: Catholic Church, Orthodox Church, Anglican Church, Protestant Church, Judaism, Islam.

⁷ El Berhoumi, Mathias (2009), *La liberté d'enseignement* [The Freedom of Education] (Brussels: Larcier), p. 57 et seq.; Lievens, Johan and Jonas Vernimmen (2017), *Over rechten, plichten en vrijheden. Een juridische blik op levensbeschouwelijke diversiteit op school* [On Rights, Duties and Liberties. A Legal Look at Religious Diversity in School], <https://www.law.kuleuven.be/pub/nl/bestanden/>.

⁸ Article 24, §1 of the Belgian Constitution, https://www.senate.be/doc/const_nl.html.

⁹ Jaumotte, Jacques and, Eric Thibaut (2012) *Le Conseil d'état de Belgique* [The Council of State of Belgium] (Brussels: Bruylant), p. 331.

¹⁰ Article 19 of the Law on the Council of State, coordinated on 12 January 1973, *Moniteur Belge* 21 March 1973.

¹¹ Council of State, 2 July 2009, no. 195.044, <http://www.raadvanstate.be>.

¹² Council of State, 18 March 2010, no. 202.039, <http://www.raadvanstate.be>.

¹³ Council of State, 10 July 2012, no. 220.245, <http://www.raadvanstate.be>.

¹⁴ Council of State, 21 December 2010, no. 210.000, <http://www.raadvanstate.be>.

¹⁵ Decree of 31 March 1994 defining the neutrality of community education, *Moniteur Belge* 18 June 1994, https://www.gallilex.cfwb.be/document/pdf/18312_000.pdf.

¹⁶ Council of State, 5 February 2014, no. 226.345 and no. 226.346, <http://www.raadvanstate.be>.

¹⁷ Council of State, 14 October 2014, no. 228.748 and no. 228.752, <http://www.raadvanstate.be>.

¹⁸ Article 9.2 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed on 4 November 1950, entry into force on 3 September 1953, https://www.echr.coe.int/Documents/Convention_ENG.pdf.

¹⁹ Council of State, 14 October 2014, no. 228.752, §36.

²⁰ Council of State, 14 October 2014, no. 228.752, §37.2; Lievens, Johan and Vrielink, Jogchum (2019) ‘Het verbot op religieuze tekens (opnieuw) uit de doekengedaan: De casus van het (gemeenschaps)onderwijs [The Ban on Religious Symbols Unveiled (Again): The Case of (Community) Education], *Tijdschrift voor Onderwijsrechten Onderwijsbeleid* [Journal for Education Law and School Policies], pp. 349-353.

²¹ *Ibid.*, §44.1; Council of State, 14 October 2014, no. 228.748, §66.1.

²² Liège court of first instance, 4 October 2016, <https://www.unia.be/files/Documenten/>.

²³ Tongeren court of first instance, 23 February 2018, <https://www.unia.be/files/Documenten/>; Leuven court of first instance, 27 August 2019, <https://www.unia.be/files/Documenten/>.

²⁴ Antwerp court of appeal, 23 December 2019.

²⁵ De Hert, Paul and Caroline De Geest (2014), ‘De Raad van State hervindt grondrechtenlijn in arresten GO! Hoofddoekenverbod. Naareenkader voor een ‘school per school’-beleid’ [The Council of State Rediscovered a Line of Fundamental Rights in GO! Veil-Ban Arrests. Towards a Framework for a ‘School-by-School’ Policy], *Tijdschrift voor Onderwijsrechten Onderwijsbeleid* [Journal for Education Law and School Policies] 5, pp. 8-11; Lievens, Johan and Jogchum Vrielink (2014) ‘Symbolenstrijd. De Raad van State en religieuze tekens in het (Gemeenschaps)onderwijs’ [‘Battle of Symbols’. The Council of State and Religious Symbols in (Community) Education], *Tijdschrift voor Onderwijsrechten Onderwijsbeleid* [Journal for Education Law and School Policies], pp. 4-14; Lievens, Johan and Jogchum Vrielink (2019) ‘Het verbot op religieuze tekens (opnieuw) uit de doekengedaan: De casus van het (gemeenschaps)onderwijs [The Ban on Religious Symbols Unveiled (Again): The Case of (Community) Education], *Tijdschrift voor Onderwijsrechten Onderwijsbeleid* [Journal for Education Law and School Policies], pp. 349-353.

²⁶ *Ibid.*

²⁷ European Court of Human Rights, 15 February 2001, *Dahlab v. Switzerland*, no. 42393/98, <https://hudoc.echr.coe.int>.

²⁸ *Ibid.* p. 11.

²⁹ *Ibid.* p. 13.

³⁰ European Court of Human Rights, 24 January 2006, *Kurtulmuş v. Turkey*, no. 65500/01, <https://hudoc.echr.coe.int>.

³¹ European Court of Human Rights, 10 November 2005, *Leyla Şahin v. Turkey*, no. 44774/98, <https://hudoc.echr.coe.int>.

³² *Ibid.* §116.

³³ The doctrine was accepted by the ECtHR for the first time in the 1968 *Belgian Linguistic Case*.

³⁴ Agha, Petr (2017) ‘Introduction’ in Petr Agha (ed.) *Human Rights Between Law and Politics. The Margin of Appreciation in Post-National Contexts* (Portland: Hart Publishing); Letsas, George (2006) ‘Two Concepts of the Margin of Appreciation’, *Oxford Journal of Legal Studies*, 26 (4), pp. 705-732.

³⁵ Berry, Stephanie (2017) ‘Religious Freedom and the European Court of Human Rights’ Two Margins of Appreciation’, *Religion and Human Rights* 12, pp. 198-209.

³⁶ European Court of Human Rights, 24 January 2006, *Köse and 93 others v. Turkey*, no. 26625/02, <https://hudoc.echr.coe.int>.

³⁷ European Court of Human Rights, 4 December 2008, *Dogru v. France*, no. 27058/05 and *Kervancı v. France*, no. 31645/04, <https://hudoc.echr.coe.int>.

³⁸ *Ibid.* §65 *et seq.* and §64 *et seq.*

³⁹ European Court of Human Rights, 30 June 2009, *Aktas v. France*, no. 43563/08; *Bayrak v. France*, no. 14308/08; *Gamaleddyn v. France*, no. 18527/08; *Ghazal v. France*, no. 29134/08; *Jasvir Singh v. France*, no. 25463/08 and *Ranjit Singh v. France*, no. 7561/08, <https://hudoc.echr.coe.int>.

⁴⁰ Radačić, Ivana (2012) ‘Religious Symbols in Educational Institutions: Jurisprudence of the European Court of Human Rights’, *Religion and Human Rights* 7, pp. 133-149.

⁴¹ *Interim Report of the Special Rapporteur of the Commission on Human Rights on the elimination of all forms of tolerance and of discrimination based on religion or belief*, 11 August 2000, UN Doc. A/55/280/Add.1, https://ap.ohchr.org/documents/alldocs.aspx?doc_id=5540.

⁴² Barbier, Maurice (2005) ‘Pour une définition de la laïcité française’ [For a definition of the French *laïcité*], *Le Débat* 134, <https://www.diplomatie.gouv.fr/IMG/pdf/0205-Barbier-FR-5.pdf>; Gunn, Jeremy (2004), ‘Under God but not the scarf: The founding myths of religious freedom in the United States and Laïcité in France’, *Journal of Church and State* 46 (1), pp. 7-24,

<https://doi-org.kuleuven.ezproxy.kuleuven.be/10.1093/jcs/46.1.7>.

⁴³ Radačić, Ivana (2012) ‘Religious Symbols in Educational Institutions: Jurisprudence of the European Court of Human Rights’, *Religion and Human Rights* 7, pp. 133-149.

⁴⁴ Rosenfeld, Michel (2011) *Law, Justice, Democracy, and the Clash of Cultures* (Cambridge: Cambridge University Press).

⁴⁵ Gunn, Jeremy (2008), ‘Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights in *Sahin v. Turkey* (conference paper)’, *Droit et Religions* [Law and Religions] 3, pp. 341-367.

⁴⁶ See for instance the European Court of Human Rights, 26 February 2002, *Dichand and others v. Austria*, no. 29271/95; European Court of Human Rights, 13 November 2003, *Sarsach and News Verlagsgesellschaft v. Austria*, no. 39394/98; Council of Europe (2007) *Freedom of Expression in Europe: Case-law concerning article 10 of the European Convention on Human Rights* (Strasbourg: Council of Europe Publishing).

⁴⁷ Gunn, Jeremy (2008), ‘Fearful Symbols: The Islamic Headscarf and the European Court of Human Rights in *Sahin v. Turkey* (conference paper)’, *Droit et Religions* [Law and Religions] 3, pp. 341-367.

⁴⁸ Radačić, Ivana (2012) ‘Religious Symbols in Educational Institutions: Jurisprudence of the European Court of Human Rights’, *Religion and Human Rights* 7, pp. 133-149.

⁴⁹ Lyon, Dawn and Debora Spini (2004) ‘Unveiling the Headscarf Debate’, *Feminist Legal Studies* 12, <https://link-springer-com.kuleuven.ezproxy.kuleuven.be/article/10.1007/s10691-004-4991-4>; Abu Odeh, Lama (1993) ‘Post-Colonial Feminism and the Veil: Thinking the Difference’, *Feminist Review* 43, pp. 26-37.

⁵⁰ Radačić, Ivana (2012) ‘Religious Symbols in Educational Institutions: Jurisprudence of the European Court of Human Rights’, *Religion and Human Rights* 7, pp. 133-149.

⁵¹ The intersectionality of discrimination means that discriminatory practices are based on several personal characteristics or identities. This means that a Muslim woman can face a unique form of discrimination, that is different from ‘discrimination against Muslims’ or ‘discrimination against women’.

See Crenshaw, Kimberle (1989) ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’, *University of Chicago Legal Forum* 1, pp. 139-167; Tigroudja, Hélène (2019) ‘Ports de signes religieux, “discrimination croisée” et ingérence de l’Etat dans la liberté de manifestersa religion’ [Wearing Religious Symbols, “Intersectional Discrimination” and Interference of the State in the Freedom to Manifest One’s Religion], *Revue trimestrielle des droits de l’homme* 118, pp. 411-414, <https://www-jurisquare-be.kuleuven.ezproxy.kuleuven.be/en/journal/revtrimdrh/index.html>.

⁵² European Court of Human Rights, 18 March 2011, *Lautsi and others v. Italy*, no. 30814/06, §45, <https://hudoc.echr.coe.int>.

⁵³ European Court of Human Rights, 18 March 2011, *Lautsi and others v. Italy*, no. 30814/06, §30, <https://hudoc.echr.coe.int>.

⁵⁴ European Court of Human Rights, 15 February 2001, *Dahlab v. Switzerland*, no. 42393/98, <https://hudoc.echr.coe.int>.

⁵⁵ European Court of Human Rights, 18 March 2011, *Lautsi and others v. Italy*, no. 30814/06, §72, <https://hudoc.echr.coe.int>.

⁵⁶ Radačić, Ivana (2012) ‘Religious Symbols in Educational Institutions: Jurisprudence of the European Court of Human Rights’, *Religion and Human Rights* 7, pp. 133-149.

⁵⁷ Leuven court of first instance, 27 August 2019, <https://www.unia.be/files/Documenten/>.

⁵⁸ (2019) *Regeerakkoord van de Vlaamse Regering 2019-2024* [Coalition Agreement of the Flemish Government 2019-2024], p. 25, <https://www.vlaanderen.be/publicaties/>.

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⁶⁰ Bakir, Kawtar (2018), *De Invloed van het hoofddoekenverbod op adolescentemoslima’s* [The Influence of the Headscarf Ban on Adolescent Muslim Girls], <https://www.scriptiebank.be/scriptie/2018>.

⁶¹ Committee on the Elimination of Discrimination against Women (2014), *Concluding Observations on the Seventh Periodic Report of Belgium*, CEDAW/C/BEL/CO/7.

⁶² European Court of Human Rights, 10 November 2005, *Leyla Şahin v. Turkey*, no. 44774/98, §108, <https://hudoc.echr.coe.int>; Council of State, 14 October 2014, no. 228.752, §44.1; Leuven court of first instance, 27 August 2019, <https://www.unia.be/files/Documenten/>.