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The end of the opt-out era in Belgian governmental schools?

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Abstract:

The Belgian Constitution holds an obligation for governmental schools to organise RE in the recognised religions and in non-confessional ethics for all children of school age. While neither the Flemish nor the French Community legislator can thus abandon RE altogether, both legislators have recently taken initiatives, moving beyond the opt-out system, towards an opt-in system and a partial withdrawal of RE in governmental schools. After a brief description of the Belgian RE system and its historical roots, we scrutinise these evolutions. Although the Constitution does offer some room for manoeuvring, not everything goes: ending the possibility for students in governmental schools to opt for RE in any of the recognised religions or in non-denominational ethics altogether would, for instance, not be allowed. This is different from the perspective of human rights instruments such as the ECtHR, which permits, but does not require governmental schools to organise moral or religious education. Following the margin of appreciation doctrine of the ECtHR, the ECHR does not pose strict limits on governmental possibilities. It remains, however, to be seen whether the Flemish and French Community will manage to stay in line with the stricter regime of the Belgian Constitution.

1. Introduction

Whether it is about the Islamic headscarf, the presence of crucifixes in classrooms, or the embedding of religious education (RE) in the curriculum, questions about the relationship between public education and religion keep fostering debate all over the world. International human rights obligations thereby limit the possibilities of public authorities.

To name only one recent example: on 20 October 2020 the European Court of Human Rights (ECtHR) ruled on a case against Russia about the obligation for member states of the European Convention on Human Rights (ECHR) to 'respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions' (art. 2 of Protocol no. 1 ECHR).¹ The case concerned a Russian Orthodox rite of blessing a classroom, performed in a municipal school at the beginning of the new academic year by an Orthodox priest, in the presence of a pupil – seven years old at the time – belonging to a different denomination. Although the majority of the Court found no violation of the ECHR, three of the seven judges dissented, stating Russia had failed 'to fulfil its duty of *religious neutrality*'. The four headed majority, on the other hand, connected the witnessing of a religious ritual to '[t]he values of pluralism and tolerance and the spirit of compromise and dialogue[, which] are indispensable in a democratic society'.²

Should governmental schools adhere to a strict form of neutrality in terms of religion? Or does an open, democratic society require students to learn about a diversity of religions and worldviews to nurture in them ‘the values of pluralism and tolerance and the spirit of compromise and dialogue’ (cf. *Perovy v. Russia*)? The question of whether governmental schools should provide RE and/or teaching about a diverse set of religions and worldviews is a hot topic in Belgian educational policy debates too. In addition to having to respect international human rights norms, Belgian authorities face an extra challenge: they are bound by an elaborate constitutional regime predefining the role of RE.

This article starts with an exploration of the Belgian constitutional framework surrounding education in general and RE in particular. Our focus will be on RE in governmental schools, which offer all pupils of school age the choice between RE classes in any of the recognised religions or in non-confessional ethics. In the second paragraph, the question of exemption of these RE classes is explored. In the third paragraph, an analysis of recent RE reforms in the Flemish and French Community, as well as of plans for future reforms, is made. Leaning on advice by the Council of State and Constitutional Court jurisprudence, we aim to investigate whether these reforms are in line with the Constitution, as well as whether they are in turn showing an evolution of the constitutional framework itself. The degree of conformity of these evolutions with international human rights standards, particularly with article 2 of the First Protocol to the ECHR, is explored in a separate paragraph. We conclude that the recent reforms in RE are both in line with the Belgian Constitution and with international human rights. The plans for future reforms seem in line with the ECHR as well. However, some specific reforms, such as transforming RE into an extracurricular activity or abolishing RE altogether from governmental schools, seem difficult or even impossible without constitutional amendments.

2. Religious education in Belgium: history and current policy

2.1. The Belgian educational landscape

Belgium is a federal state with a complex institutional structure, containing three regions (Flanders, Wallonia and Brussels-Capital) and three Communities (Flemish, French and German-speaking). Since 1988, the competence for education resides with the three Communities, who enjoy autonomy in developing their own educational policy. This autonomy is, however, restricted by the shared Constitution, in particular by article 24 (emphasis added), which stipulates:

§ 1. Education is free; any preventive measure is forbidden; the punishment of offences is regulated only by the law or federate law.

The community offers free choice to parents.

The community organises [neutral]³ education. This implies in particular the respect of the philosophical, ideological or religious beliefs of parents and pupils.

Schools run by the public authorities offer, until the end of compulsory education, the choice between the teaching of one of the recognised religions and non-denominational ethics teaching.

[...]

§ 3. Everyone has the right to education with the respect of fundamental rights and freedoms. Access to education is free until the end of compulsory education.

All pupils of school age have **the right to moral or religious education at the community’s expense.**

[...]

In addition to the aforementioned *regionalisation*, education is, in Belgium, also characterised by *pillarisation*. The Belgian Constitution has stated from the moment of its adoption in 1831 that 'Education is free' (cf. art. 24, § 1, section 1), meaning private individuals and organisations have the freedom to develop their own schools and pedagogical projects. Building on this clause, a wide variety of educational initiatives have seen the light. In order for this constitutional 'educational freedom' to be more than a mere theory, government funding is deemed necessary (cf. Constitutional Court no. 76/96, 18 December 1996, B.4.3). Thus, the Communities do not only fund governmental or 'official' schools,⁴ but also schools established by private organisations (non-governmental or 'free' schools).⁵ As a result of history, most of these non-governmental schools are Catholic, serving more than 60% of the total school population.

Most other schools are official schools. They are established either by one of the three Communities, or by provinces (provincial schools) and municipalities (municipal schools). This contribution focuses on official schools, which count for 38,6% of the primary school students and 27.9% of the secondary school students in the Flemish Community.⁶ For the French Community, the respective numbers are 57.5% and 38.9%.⁷ According to the Constitution (art.24, §1, section 3), official schools have to be 'neutral' or 'non-denominational'. Echoing article 2 of the ECHR's First Protocol, this neutrality is stated to imply, in particular, 'the respect of the philosophical, ideological or religious beliefs of parents and pupils'. Official schools are required to offer all students of school age the choice between the teaching of one of the recognised religions (RE) and non-denominational ethics teaching (art. 24, § 1, section 4 of the Constitution).

In order to make RE not a sole prerogative of official schools, article 24, §3 adds that all pupils of school age have a right to a moral or religious upbringing at the Community's expense. Accordingly, RE in non-governmental schools (being mainly Roman-Catholic RE) is also paid for by the state. While state authorities are withheld from interfering with the content of RE classes in governmental as well as in non-governmental schools, the Constitution guarantees its state funding in both school types.

2.2. Religious education in official schools: a large menu to choose from

According to article 24 of the Belgian Constitution, official schools are required to offer all students of school age the choice between the teaching of one of the recognised religions (RE) or non-denominational ethics. The underlying idea goes as far back as the very first education legislation adopted by the then still unitary Belgian state in 1842. The 1842 Law on Primary Education provided for municipal primary schools to offer two hours a week of either Catholic religious classes or a more neutral class on morality. However, this very first educational compromise of 1842 could not prevent underlying tensions from arising between Catholics, on the one hand, and secular liberals, later joined by socialists, on the other hand. Hence, the second half of the 19th and the first half of the 20th century saw intense debates on two main issues. On the one hand, Catholics questioned the necessity for governmental schools in municipalities with a sufficient amount of 'free' Catholic school places, while the secular parties tried to limit the influence of the Church by promoting 'neutral' governmental schooling. On the other hand, the role of RE in official schools was a topic of debate. Did governmental schools need to offer a neutral class on morality when a majority of parents were to prefer Catholic RE? Should RE continue to be a part of the curriculum as was decided in 1842? As the major political parties had opposing views on the matter, education policy altered with the composition of parliament and government, leading to a rather unstable system and protests engaging large parts of the population.

A durable 'school peace' wasn't achieved until the conclusion of a School Pact between the three major parties (Catholic, Liberal and Socialist) in 1958, sealed in 1959 into a School Pact Law. This law provided state subsidies for non-governmental schools (including their organisation of RE), and simultaneously provided for official schools to offer a choice of education in one of the recognised religions and in non-confessional ethics. In 1988, when education was delegated from the Belgian state to the Communities, these principles were implemented in the revised Belgian Constitution.

Thus, the financing of RE, both in governmental and in non-governmental schools, was only agreed upon in 1958 and enshrined in the Constitution in 1988. Nevertheless, the idea aligns with a much older model of 'mutual independence' between church and state, which has been anchored in the Constitution since 1831. According to article 181, the Belgian state recognises and subsidises a number of religions and worldviews. In 1830, when Belgium became independent, the Catholic, Protestant and Jewish religions were already recognised (in 1802, under the French regime) and in 1870, Anglicanism was added to this list of recognised religions.⁸ It took more than a century before other religions and worldviews were recognised: Islam in 1974, Orthodox Christianity in 1985 and the non-confessional humanists in 1993/2002 (cf. infra). These recognised religions and worldviews are the ones article 24 of the Constitution refers to in its 'choice menu' of available religious classes. In principle, there is no minimum of students needed in order to organise the respective RE subject: even if only one parent/student demands RE in one of the recognised religions/worldviews, the respective governmental school has to organise this particular RE subject. In practice, however, this does not always happen.⁹

In order to respect the separation of church and state, all RE subjects (including non-confessional ethics in the Flemish community; cf. infra) are organised by the respective recognised religious communities: they are responsible for teacher training, teacher selection,¹⁰ curricula, study material and inspection. Given this large autonomy of the religious communities, the aims and content can vary fundamentally in the different RE classes. In order to stimulate interreligious dialogue between the different RE subjects, *Interreligious Competencies* (ILC) were formulated by the Commission of RE subjects (which is composed of delegates of the different recognised religions/worldviews) in 2012.¹¹ These ILC are subscribed by all the recognised religions/worldviews. Although rooted in a voluntary, common initiative from the religious communities, the Flemish legislator in 2018 made it mandatory for all providers of RE and non-confessional ethics to 'respect ILC'.¹² Notwithstanding this common initiative, the different RE subjects often differ in practice with regard to content and aims. Some RE subjects can be labelled as 'religious instruction': they emphasise the own religious tradition and focus merely on socialisation in that particular tradition. Other subjects, by contrast, pay more attention to religious diversity and interreligious dialogue and aim at socialisation in the diversified society, rather than at socialisation in the 'own' religious tradition. Therefore, these RE classes can be labelled as 'semi-confessional'.

3. An option unforeseen by the constitution: the will to be exempted from religious education

The idea of the 'Belgian compromise' set out in the paragraphs above was to facilitate the wishes of a broad segment of the population. According to the School Pact Law, every family has the possibility to have their child educated in their own religion or worldview. Hence, the subsidisation of Catholic (and other non-governmental) schools and their respective RE classes, as well as the organisation of RE in the recognised religions in official schools. In case one's religion was not recognised, parents were given the possibility to enrol their child(ren) in a neutral class on non-confessional ethics (cf. the original 1842 compromise).

Verstegen (2015) confirms that non-confessional ethics was, along the lines of the School Pact, to be considered a 'neutral' and state-organised subject for students who did not belong to a recognised religion. However, this interpretation is not shared by everyone. In particular, the humanist association does not agree with this view and argues that non-confessional ethics has always been a humanist, anticlerical and atheistic school subject (cf. Borms 2008; Devuyt and Van Warebeke 2010). Whatever the *original intention* of the School Pact may be, in practice, the school subject 'non-confessional ethics' is not being taught in a neutral way, as it is imbued with secular humanism. As a result of this practice, the 1958 compromise came under pressure. Because the non-confessional ethics class was in practice not neutral, parents not adhering to one of the six recognised religions *and* not supporting the humanist worldview promoted in non-confessional ethics, were lacking a suitable, neutral alternative. Therefore, an exemption for RE was granted in 1990.¹³

In 1993, the non-confessional humanists were officially recognised by the Belgian state as a 'non-denominational philosophical organisation' (cf. Constitution, art.181, §2).¹⁴ This recognition made the right to exemption even more opportune: as a result of their recognition, the secular humanists claimed the constitutional right to organise *their* 'RE' subject in official schools, and in order to assure this right, the organisation of non-confessional ethics was in the Flemish Community delegated from the state to the recognised humanists.¹⁵ Obviously, one of the consequences of this delegation was that non-confessional ethics could also in legal/official terms no longer function as a compulsory and neutral alternative for students who did not belong to any of the recognised religions. From a human rights perspective, an exemption for RE was thus required.

In the French Community, the situation was different since non-confessional ethics remained organised by the state. In 2015, however, the issue of exemption also came to the fore there: confronted with a prejudicial question about exemption in an official school in Brussels, the Constitutional Court ruled that the course of non-confessional ethics was not neutral, but linked to secular humanism.¹⁶ Accordingly, an exemption on a simple request had to be granted.

While the Flemish Community limited its 'solution' to the creation of an opt-out system, the issue of exemption was a trigger for a more profound reform of RE in the French Community. In 2016 and 2017, a new subject *Cours de Philosophie et de Citoyenneté* (CPC – Course in Philosophy and Citizenship) was introduced as a compulsory subject in official primary and secondary schools. The time to be spent on RE, which since the 1842 law on primary education had been organised for two hours on a weekly basis, was reduced to one hour a week, thus freeing up time for one hour of CPC. In addition, students were granted the right to be exempted from RE altogether. For students using this opt-out possibility, an extra weekly hour of CPC is organised. In 2018–19, the number of exempted students in the French Community was 12.2% for primary schools and 15.3% for secondary schools (Sägesser 2019). These numbers are much lower in the Flemish Community, where both in primary and in secondary schools about 0.3% of the students opt out.¹⁷ We assume that this difference in numbers can be explained by the fact that there is no alternative course for exempted students in Flemish official schools: they have to spend the regular 'RE time' on study of their own religion or worldview and parents are required to equip them with the necessary study material. While the 'exemption' (and the extra hour of CPC) in the French Community is presented as a fully fledged alternative to any of the RE options, in Flanders the exemption of RE seems to be considered an undesirable exception with unwanted organisational consequences for schools and parents.

4. Recent changes in RE: from Opting out to opting in?

4.1. Lowering the school age – RE for all children of school age?

Very recently, the reduction of the start of the mandatory school age from the age of six (first year of primary schooling) to the age of five (last year of kindergarten) by the federal legislator in September 2020 sparked a new debate. The Constitution provides a ‘right to moral or religious education at the community’s expense’ for ‘all pupils of *school age*’ (art. 24, § 3, section 2, emphasis added) and a choice, in official schools, between the teaching of one of the recognised religions and non-denominational ethics ‘*until the end of compulsory education*’ (art. 24, § 1, section 4, emphasis added). Thus, the lowering of the mandatory school age risked to result in an obligation for the Communities to finance a whole extra year of RE, sometimes for very small classes. In order to be in accordance with this constitutional obligation, the different Community legislators had to reform their RE policy.

In this matter, the different Communities seemed to be looking for the exact borders of the Constitution. The Flemish government’s initial plan was to simply not offer 5 year old pupils in kindergarten RE. This plan was deemed unconstitutional by the Council of State, which stated:

An arrangement whereby the new group of pupils of school age in official school is offered in no way and not even to a limited extent the choice for education in one of the recognised religions or non-denominational ethics, is [...] not reconcilable with Article 24, § 1, section 4, and § 3 of the Constitution.’¹⁸

While banning RE altogether was deemed unconstitutional, there were, nevertheless, other creative – and apparently constitutionally ‘safe’ – solutions. In its advice on the federal law on lowering the school age,¹⁹ the Council of State referred to the existing policy for six and seven year pupils who are enrolled in kindergarten for a prolonged period: although there is no RE organised in kindergarten for these pupils (who are of school age), they can, at parental request, join one of the RE classes organised for the first year of primary school. Following this advice, this policy was also implemented for five-year-old children in official schools in the different Communities. In the recently amended decree on Flemish Education, this regulation is formulated as follows:

For school aged toddlers in official schools (5 year-olds, but also 6- and 7- year olds who are enrolled in kindergarten for a prolonged period) there is no obligation to take RE. There is, nevertheless, a right to RE for these [pupils], at parental request. It is up to the parents to decide freely, without any pressure, about this option.

Parents who chose RE for their toddler of school age are required to choose, by themselves, an official primary school where the desired RE course is organised. During this course, the pupil will leave his/her class and join the primary school children which are enrolled in the same RE class. Official kindergartens are thus not required to offer RE.²⁰

This new regulation is in line with the *text* of the Constitution and doesn’t seem to counter its *spirit* either – the drafters of the 1988 text were not considering the last year of kindergarten; and the ‘full’ offer of RE in primary and secondary education is maintained. Nevertheless, the new system risks to turn the constitutional practice upside down: while the default option has always been that pupils *do* enrol for RE (which was initially even an *obligation*; cf. *supra*), the default option in the present system (at least for five-year olds) is to *not* enrol in RE. Even though the *right* to RE is maintained, we can observe a shift here from an opt-out system (exemption) to an opt-in system.

The question arises whether the same shift is possible for primary and secondary education too. Although one could argue that the *spirit* of the Constitution contains the default idea of an offer of RE with the possibility of exemption, this doesn't strike us as convincing. If the right to RE for 5 year olds can be organised as an opt-in, why wouldn't the same be true for older students, whose right to RE goes back to the same constitutional *text*? What is all the more striking in this evolution is that the incentive for this new policy did not come from the legislator, who regularly tries to push the borders of the constitutionally possible. Noticeably, it was the Council of State, and thus one of the guardians of the Constitution, who came up with this hint, which has been enthusiastically picked up by the Community legislators. However, as the Constitutional Court, which has the last word on constitutionality, has not ruled on the matter, we need to be careful in drawing conclusions.

4.2. Opting-in, out of regular school time

If – as we believe – the Constitution (as interpreted by the Council of State) allows for a broader shift to an opt-in system, more questions arise. How broad are the possibilities for Community legislators to organise an opt-in system? Can they, for instance, decide to move RE out of the regular timetable, making it *de facto* an extracurricular activity?²¹ Differently put, does the Constitution require the organisation of RE as an ordinary school subject and thus within the regular timetable, or can schools and/or the Community legislators transform RE into an extracurricular class, potentially even to be offered after regular school time (cf. Lievens 2019, 128)? Some legal experts (De Groof 1989; Veny 1988) argue that the underlying intention of the Constitution was an enshrinement of RE within the regular timetable and that, accordingly, it would be unconstitutional to organise RE outside of the regular curriculum. Even though the Constitution does not *literally* require the organisation of RE courses within the regular curriculum, organising RE as optional, extracurricular subjects, would be against the *spirit* or *intention* of the law. Taking RE out of the regular timetable could have a discouraging effect on parents and students to opt-in: not only would it make their choice all the more visible, the integration in the regular school day makes it more convenient in a practical sense to attend RE classes too.

However, the abovementioned arguments can also be used to defend a system of *opting in* and to organise RE outside the regular school time: if RE in the regular timetable is the default position and if there is no alternative for exempted students (which is at the time of writing the case in the Flemish Community), these students face exactly the same problems (visibility; stigmatisation) the pupils of the recognised religions would face if RE were an optional, extracurricular school subject. As argued by Uyttendaele (2013, 22), the right to enrol in RE in official schools also implies that students are not disadvantaged by their choice for RE; and in a similar way, the right to be exempted should be organised in such a way that exempted students are not injured. At this point, it is up to the legislators to find a proportional balance between the interests of those students opting for RE and those opting for an exemption. A pragmatic solution, proposed by Uyttendaele (2013, 22) is the organisation of RE at the beginning and at the end of the school day, so that neither the students enrolled in RE nor students exempted, would face any major inconvenience.

As the analysis above makes clear, there is little doubt that the 1988 drafters of the Constitution were envisioning RE as *part of the regular timetable*. One could therefore argue that the enshrinement within the regular school day is protected by *the spirit* of the Constitution. However, as we have seen in discussing the lowering of the school age, the Council of State does not seem to hold on overly intensely to the concept of RE as envisioned by the drafters of the Constitution, as long as the offered RE 'is not eroded to the extent that the obligation of Article 24, § 1, fourth section, of the Constitution is no longer correctly complied with'.²² Some would argue that if the shift to an opt-in

system is in line with the Constitution, the same goes for the creation of an *extracurricular* opt-in system. Again, however, we should take into account the lack of information about how the Constitutional Court would evaluate these evolutions and ideas.

5. Changing times

5.1. From two hours of RE to one

Triggered by the Constitutional Court case about exemption in 2015 mentioned above, the French Community decided to reduce the number of RE teaching hours in official schools from two hours to one hour in 2016 (primary schools) and in 2017 (secondary schools) and to organise a new, mandatory subject CPC in the hour freed up.²³ In addition, exempted students get an extra hour of this new – neutral – course on philosophy and citizenship. Since the Constitution itself is silent about the number of teaching hours for RE in official schools, this policy seems to respect the Constitution. Although one could argue that the 1988 drafters of the Constitution envisioned two hours of RE per week (cf. *supra*), they did not make this explicit. It seems therefore fair to say that the Constitution allows some flexibility *as long as a sufficiently substantive offer of RE remains*.²⁴

The Flemish Community as well seems eager to explore this trajectory. In the Flemish Government Agreement 2019–2024, the following paragraph about RE is included on p.13 (see also p.23):

In the last year of secondary education, Flemish Community schools (*Gemeenschapsonderwijs*) can switch from two hours of RE to one hour of RE and one hour interreligious dialogue, wherein (cross-curricular) aims of citizenship can be realised. We will enter into dialogue with all [stakeholders] involved in order to offer a meaningful option for exempted pupils.²⁵

Three important differences with the French Community can be named. One, the proposal only encompasses Community schools, thus excluding provincial and municipal schools. The reduction of RE to one hour in favour of CPC in the French Community, by contrast, also affects provincial, municipal and even non-confessional private schools. Two, the Government Agreement only announces *a possibility* for Community schools to swap an hour of RE for an hour of interreligious dialogue. It is unclear yet whether the government or the legislator will actually push for a mandatory shift. Three, the focus on ‘interreligious dialogue’ seems to allow for a more religiously embedded education than the secular approach of CPC. During the formation negotiations of the government, two of the three coalition partners seemed to push for a new, non-denominational school subject about religion, ethics and philosophy (LEF: *Levensbeschouwing, Ethiek, Filosofie*).²⁶ However, soon after the publication of the Government Agreement, delegates of the different recognised religions and of the humanist association proposed in a common declaration, to be prepared ‘to fully take their responsibility where [schools] opt for a different organisation of the second (RE) hour’.²⁷ Because the Government Agreement is rather vague, it is not clear what will happen in the near future: will the ‘new’ hour of ‘interreligious dialogue’ be organised by the recognised religions and worldviews, or will the government take responsibility in this matter? In the former case, the new policy will in fact be nothing more than an extension of the already existing concept of ‘interreligious competencies’, a set of learning goals developed by the recognised religions and the humanist association, which is already included in their respective RE classes. Bringing the new hour of interreligious dialogue under the control of the recognised religions and the humanist association would more or less sustain the status quo. If, however, the government itself or the Community school network were to take on the task of organising this new hour, a new course –

such as LEF – could be introduced in the last two years of secondary education (albeit only in Community schools). This latter option seems to be more in line with the mission of the Flemish Community schools as formulated in their 2019–2024 Memorandum:

For the organisation of RE in public schools, Flemish Community Schools are in favour of a “1+1” scenario. Within the two scheduled hours of RE, we plead for one hour of active citizenship (with attention for interreligious dialogue). With this proposal, active citizenship will obtain a full-fledged place in the curriculum, which is in line with the new curriculum standards (‘eindtermen’), wherein active citizenship is an mandatory theme. (GO! Onderwijs van de Vlaamse Gemeenschap, Memorandum 2019-2024, p.14)²⁸

5.2. From one hour of RE to zero?

According to Franken and Sägesser (2021, 43), it is possible that the shift in the French Community from two hours of RE to one hour is only a first step in a more profound reform: ‘the French-speaking part of Belgium has a long tradition of looking towards the French system of *laïcité*; many have long believed that religion should not have any place at all in state schools and are determined to see the end of public funding for RE’. Following this line of argument, it is not a big surprise that, according to the 2019–2024 Government Agreement of the French Community, the possibility of further RE reforms will be investigated:

School should be a place of life and activity, open and participating. The Government is engaged to: establish a specific working group in the Parliament of the Federation of Wallonia-Brussels [i.e. the French Community] in order to examine the extension of two hours of education in philosophy and citizenship for all the students of official schools.²⁹

In all probability, this possibility of extending the CPC class to two hours in official schools will be influenced by what will happen in the near future with regard to school-aged toddlers: if the new policy of *opting in* for RE is deemed constitutional for those pupils (as we believe is the correct approach), an extension of this policy to all children of school age might be constitutional as well, provided official schools still organise RE at parental request. This, in turn, could open the possibility for official schools in the French Community to organise two hours of CPC in the regular curriculum as a substitute for the present RE classes, which will in this scenario become optional, extracurricular subjects.

These, however, are at the time of writing merely speculative ideas. As long as the Constitutional Court has not ruled on the legitimacy of the matter, we need to be careful in drawing conclusions. Moreover, if we want to play the constitutional game in a fair and safe way, it would be more opportune to amend the Constitution rather than to balance on its borders. In this regard, there has been a discussion in the Belgian Parliament (federal level) in April 2019 at the end of the legislative session in order to open article 24 of the Constitution, which was a necessary step for amending this article during the current legislative session. An amendment could have allowed for, e.g., a minimum age of six years for RE; a minimum number of pupils enrolled in RE; a restriction on the number of RE subjects; or even an elimination of the constitutional RE requirements altogether. In the latter case, the Flemish, French and German-speaking Communities would be allowed to decide in a more autonomous way how to organise RE. However, even though the proposal passed in the Chamber of Deputies, there was no majority in the Senate and as a consequence, RE policy has to remain in accordance with the aforementioned constitutional requirements. Notwithstanding the continuity of the Constitutional *text* (unaltered since 1988 and indebted to the 1842 and 1959 legislation), the

educational policy of the Flemish and the French Community seems to be pushing – and widening – the constitutionally possible.

6. Religious education in Belgium through the lens of human rights

In the previous paragraphs, we have looked at the offer of RE through the lens of the Belgian Constitution. In most, if not in all cases, the Belgian Constitution provides stricter limits than international human rights instruments. It is nevertheless interesting to have a brief look at human rights, in particular at the ECHR, and the degree to which the evolving RE policy in Belgium is consistent with international human rights law.

First, the general Belgian policy of organising and subsidising RE in official schools is in line with human rights legislation, as long as parents/students also have the possibility *not* to enrol in RE. Thus, the shift in Belgian official schools from RE as an ‘ordinary school subject *with an obligation to enrol in one of the RE courses*’ to RE as an ‘ordinary school subject *with the possibility of exemption*’ was necessary to be in line with human rights obligations. Because non-confessional ethics is not a neutral school subject, a policy of exemption was required in order to guarantee the parents’ freedom of religion and education (cf. ECHR, *Folgerø and Others v. Norway* [GC], Appl. no. 15,472/02; ECHR, *Mansur Yalçın and Others v. Turkey*, Appl. no. 21,163/11; ECHR, *Papageorgiou and others v. Greece*, Appl. nos. 4762/18 and 6140/18). In order to be in line with the right to privacy (article 8 ECHR) and the freedom of conscience and religion (article 9 ECHR), parents who want to make use of the exemption possibility cannot be obliged to disclose their own convictions (cf. *Folgerø and Others v. Norway*; *Hasan and Eylem Zengin v. Turkey*; *Mansur Yalçın v Turkey*; *Papageorgiou and others v. Greece*). Both the Flemish and French RE policy are in line with this requirement. All options – the six religions, non-denominational ethics and the exemption (Flemish Community) or CPC (French Community) – are open to all parents, who do not have to motivate their decision. A problem might nevertheless arise in practice in the Flemish Community when schools control the compliance with the obligation for exempted students to spend the regular ‘RE time’ on ‘study of their own religion or worldview’. Some Flemish schools for instance explicitly prohibit exempted students from doing homework for other classes, but in order to enforce such a rule, schools risk to control the religious or philosophical convictions of students and their parents, which implies their disclosure.

The recent policy change concerning toddlers of school age in official schools can be evaluated through an international human rights lens as well. Although these pupils have the constitutional right to RE in any of the recognised religions or in non-confessional ethics, the Council of State suggested a policy wherein RE is not organised as a separate school subject in kindergarten, but wherein school-aged toddlers can, at request, join RE in the first year of primary schooling. At this point, a shift from *opting out* to *opting in* can be observed: for school-aged toddlers, the default position is *no RE*, but opting in at request is possible. From a human rights perspective, this policy does not seem to pose any problems: the ECHR *allows* governmental schools to organise RE, but does not *require* so. Moreover, even when governmental schools organise RE, individual member states are free in shaping the concrete policy. In governmental schools in Austria, for instance, RE in the recognised religions is the *default position* for pupils belonging to these religions, under the condition that a sufficient number of pupils are reached.³⁰ However, in order to guarantee the negative dimension of religious freedom, *all children* (or the parents, if children have not reached the age of 14) have the possibility to *opt out* at request. In most German *Bundesländer*, a similar system of *opting out* is common in governmental schools.³¹ The Netherlands, by contrast, applies a policy of *opting in*, with different implementations in primary and in secondary schools. At both school levels, *no RE* is the default position, but at the request of a minimum number of pupils, a course on a

specific religion or on secular humanism is organised. While the *law on primary education* (art.50)³² requires the organisation of these classes *within the regular timetable*, this requirement is absent in secondary schools: according to the *law on secondary education*,³³ optional RE can be organised *in the schools*, but there is no requirement to do this during regular school time. At present, the Belgian policy seems to be a combination of these different models: while RE in primary and secondary schools is considered an *ordinary school subject* with the possibility to *opt out* (cf. Austria; Germany), and while this school subject is organised in the *regular school time* (cf. Austria, Germany and Dutch primary schools), the situation is different in the last year of kindergarten. Here, a policy of *opting in* during school time (cf. Dutch primary schools) has been chosen. From a human rights perspective, it would also be possible to go a step further and follow the model of Dutch secondary schools by organising RE at request, after regular school time. It is, however, not taken for granted that this would still be in line with the Belgian constitutional framework.

Thirdly, Belgian education policy shows a shift from two hours to one hour of RE on a weekly basis. This shift was recently enforced in the French Community, and comparable plans have been discussed in the Flemish Community. Once again, this shift is not only in line with the Belgian Constitution but also with the ECHR, according to which there is *no legal requirement* to organise RE in governmental schools. Once a policy of RE has been chosen, it is up to the member states to decide upon its practical implementation, including the number of teaching hours.

Interestingly, the introduction of CPC also touches on another human rights issue: the question of whether it is allowed to organise education *about* religions as a mandatory school subject. As stated in the recently amended Decrees on Education for the French Community, one of the aims of CPC is 'knowledge, from an historical and sociological perspective, about different currents of thought, philosophies *and religions*' (emphasis added).³⁴ Even though this religious studies-based approach is often criticised (in particular by the delegates of the recognised religions and in Flanders also by some humanists), there were no constitutional amendments needed for the introduction of this subject in official schools in the French Community. The organisation of a religious studies-based RE subject can be considered in line with the ECHR as well, provided this subject is taught 'in an objective, critical and pluralistic manner' (*ECtHR, Appel-Irrgang and others v. Germany*, Appl. no. 45216/07; *ECtHR, Kjeldsen, Busk Madsen and Pedersen v. Denmark*, Appl. no. 5095/71; 5920/72; 5926/72; *ECtHR, Folgerø and others v. Norway*, Appl. no. 15472/02)³⁵ and does not lead to indoctrination. If organised in such an open and pluralistic manner, the ECHR allows for the organisation of CPC or LEF, both as an exemption alternative for RE, and as mandatory subjects for all students of school age.

Finally, because the ECHR does not contain a legal requirement to organise RE, it would even allow to ban RE altogether from the curriculum and to abstain from organising RE as a regular school subject. This is for instance the case in France with the exception of Alsace-Moselle and the transoceanic territories (see, e.g. Willaime 2014) and since 2017 also in Luxembourg (see, e.g. Braem 2018). In both nations, the compulsory curriculum contains courses focusing on society, citizenship, values and/or philosophy. While separate, denominational RE does not exist (any longer), the study of religious facts (*le fait religieux*) is nevertheless integrated in 'secular' school subjects such as history, geography and literature (in France), or in the 2017 introduced school subject *Vie et Société* (in Luxembourg). In Belgium, implementing this policy would only be feasible after amending the Constitution (cf. *supra*).

7. In conclusion

The organisation of RE in official schools was anchored in the Belgian Constitution in 1988, with legislative roots dating as far back as 1842 (first education legislation) and 1959 (School Pact Law). According to the constitutional tradition, 'the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions' requires active support from the government. Hence, non-governmental schools and their respective RE classes are being subsidised, and governmental schools have to offer their students RE in any of the recognised religions and in non-confessional ethics.

Over the past decades, this constitutional tradition has been challenged by increasing religious diversity and secularisation. This, in its turn, has led to several evolutions in RE: an increasing number of RE subjects; the possibility of exemption; a reduction from two to one hours; and a policy of *opting in* in kindergarten. Throughout these evolutions, Community legislators seem to be exploring the boundaries of the constitutionally permissible. As far as we can observe, the Constitution does indeed offer some room for manoeuvring, but not everything goes. Ending the possibility for students in governmental schools to opt for RE in any of the recognised religions or in non-denominational ethics altogether would, for instance, not be allowed within the Belgian constitutional framework. This is different from the perspective of human rights instruments. The ECHR, for instance, permits, but does not require state schools to organise moral or religious education. Following the *margin of appreciation* doctrine of the ECtHR,³⁶ it is up to the member states to decide how to fulfil the parental right to education in conformity with their religious and philosophical convictions, taking into account the particular historical, cultural and sociological background of the respective nation states. While the ECHR does not pose strict limits on governmental possibilities, it remains to be seen whether the Flemish and French Community will manage to stay in line with the stricter regime of the Belgian Constitution.

Notes

1. ECtHR, *Perovy v. Russia*, Appl. no. 47429/09, 20 October 2020. See for an analysis: Van Soolingen (2020).

2. Cf. ECtHR, *Perovy v. Russia*, Appl. no. 47429/09, 20 October 2020, §73.

3. In the official English translation of the Belgian Constitution, article 24, §1, section 3 mentions the obligation for the Communities to organise 'non-denominational education'. This is somehow misleading. We believe 'neutral education' to be a more correct translation, which is better in line with the Dutch (neutraal), French (neutre), and German (neutral) versions of the text. The wording 'non-denominational education' in article 24, §1, section 3 wrongfully suggests a terminological link with the obligation to organise 'non-denominational ethics teaching' in article 24, §1, section 4 (Dutch: niet-confessionele zedenleer, French: morale non confessionnelle, German: nichtkonfessioneller Sittenlehre).

4. 'Governmental schools' or 'official schools' can be defined as schools 'owned, run, and financed by (a flexible combination of) governmental (federal, state, municipal) authorities' (Maussen and Bader 2015, 3) and are therefore considered to be neutral.

5. 'Non-governmental' schools can be defined as schools 'owned and run by (central or local) organisations or associations whether (partly or fully) publicly financed or not'. (Maussen and Bader 2015, 3).

6. Numbers available at: <https://onderwijs.vlaanderen.be/nl/statistisch-jaarboek-van-het-vlaams-onderwijs-2019-2020> (Accessed 2 February 2021).

7. These figures are for 2014–2015 and are the latest published by the ministry in Les indicateurs de l'enseignement 2016. Available from: <http://www.agers.cfwb.be/index.php?page=28017&navi=2264> (Accessed 6 January 2021). The German Community, where German is the official language, is a very small Community, with about 76,000 inhabitants. Given its small scope, we will not include it here.

8. Anglicanism was officially recognised by Royal Decree in 1870, but Anglican parishes were already funded by the state since 1835. BRITISH JOURNAL OF RELIGIOUS EDUCATION 11

9. Sometimes practical problems (finding teachers; fixing schedules; finding classrooms) lead to the fact that not all students can be enrolled in their chosen RE class, especially if the chosen religion is a rather 'small' one in Belgium (e.g. Anglicanism, orthodox Christianity, Judaism). In this case, these students either take another RE course, or they are exempted. Because of the small number of adherents, the French and German-speaking Communities do not offer Anglicanism at all.

10. RE teachers are nominated by the respective RE community and appointed by the state.

11. The ILC are online available (in Dutch) at <https://www.levensbeschouwelijkevakken.be/interlevensbeschouwelijke-competenties/> (Accessed 6 January 2021). An English translation can be found in Franken and Loobuyck 2020, 4.

12. Article 45, §§2-4 of the Decree of primary education and article 147/3, §§ 3–4 of the Codex on Secondary Education (as introduced via http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2018012633&table_name=wet (Accessed 2 February 2021).

13. In 1985, exemption was allowed a first time after a judgement of the Council of State (Sluijs nr. 25.326, 14–05- 1985). In 1989, however, a request for exemption was denied by the Council of State (Lallemand, nr. 32.637, 24– 05-1989), arguing that non-confessional ethics is a neutral school subject. Following the same line of argument, the European Commission of Human Rights stated in 1992 that 'in fact, the directives emitted in the programme non-confessional ethics show that this course does not constitute any attempt of indoctrination. Rather the contrary: its authorities aim to safeguard that the information taught in the course is educated in an objective, critical and pluralist way, and to avoid that [this course] serves a particular social conception or philosophical doctrine' (ECHR, Sluijs v. Belgium, 9–09-1992, nr. 17,568/90). In 1990, the policy about exemption changed once again, as the Council of State reaffirmed the right to be exempted (Council of State, Vermeersch nr. 35.442, 10–06-1990; Council of State, Davison nr. 35.834, 13–11-1990).

14. In 1993, a second paragraph was added to the Belgian Constitution (art.181), which since then states that not only 'the salaries and pensions of ministers of religion are paid for by the State' (§1; emphasis added), but also that 'the salaries and pensions of representatives of organisations recognised by the law as providing moral assistance according to a non-denominational philosophical concept are paid for by the State' (§2; emphasis added). In 2002, the law concerning the Central Council of the non-confessional communities in Belgium, which is the official 'representative organ' for the non-confessional humanists, was enacted, thus completing their recognition.

15. Decree of the Flemish Community of 1 December 1993 'betreffende de inspectie & begeleiding van de levensbeschouwelijke vakken' (Belgian Official Gazette 21/12/93).
16. Constitutional Court no. 34/2015, 12–03-2015.
17. <https://onderwijs.vlaanderen.be/nl/statistisch-jaarboek-van-het-vlaams-onderwijs-2019-2020>.
18. Council of State, 67.151/1, 30–04-2020.
19. Council of State, 62.492/VR/1-62.496/VR/1, 30–04-2018.
20. Information available from: <https://data-onderwijs.vlaanderen.be/edulex/document.aspx?docid=13255> (Accessed 2 February 2021). For the comparable regulation in the Federation of Brussels-Wallonia, see [http://enseignement.be/upload/circulaires/000000000003/FWB%20-%20Circulaire%207674%20\(7927_20200717_172711\).pdf](http://enseignement.be/upload/circulaires/000000000003/FWB%20-%20Circulaire%207674%20(7927_20200717_172711).pdf) (Accessed 2 February 2021).
21. This has, amongst others, been proposed by the Flemish Liberals and by some members of the Flemish socialist party.
22. Council of State, 48.023/AG, 20–04-2010.
23. Decree of the French Community of 22 October 2015 on the organisation of a course and an education in philosophy and citizenship (Belgian Official Gazette 9–12-2015), available from: http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2015102208 (Accessed 6 January 2021).
24. Cf. Council of State, 43.023/AG, 20–04-2010 and Council of State, 67.151/1, 30–04-2020.
25. Available on: <https://www.vlaanderen.be/publicaties/regeerakkoord-van-de-vlaamse-regering-2019-2024> (Accessed 6 January 2021).
26. This was put on the agenda by the Flemish liberals and was also supported by a part of the Flemish nationalists. The Christian-democrats were, like the Catholic school network, against this proposal. See also Franken and Loobuyck 2020 for the most recent discussions surrounding LEF.
27. Available from: <https://www.kerknet.be/kerknet-redactie/persbericht/erkende-instanties-over-interreligieuzedialog-3de-graad-go> (Accessed 6 January 2021).
28. Online available from: <https://pro.g-o.be/blog/Documents/GO-memorandum2019-2024.pdf> (Accessed 6 January 2021).
29. Déclaration de politique Fédération Wallonie Bruxelles, 16, available from: https://www.wallonie.be/sites/default/files/2019-09/declaration_politique_regionale_2019-2024.pdf (Accessed 6 January 2021).
30. For RE regulations in Austria, see Bundesgesetz vom 13. Juli 1949, betreffend den Religionsunterricht in der Schule, available from: <https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10009217> (Accessed 2 February 2021).
31. In Germany, RE is organised at the local level, but the Bundesländer are, nevertheless, bound to the German Constitution (Bundesgesetz, available from: <https://www.bundestag.de/gg> [Accessed 2

February 2021]), wherein Art. 7, §2 and 3 stipulates: (§2) Die Erziehungsberechtigten haben das Recht, über die Teilnahme des Kindes am Religionsunterricht zu bestimmen. (§3) Der Religionsunterricht ist in den öffentlichen Schulen mit Ausnahme der bekenntnisfreien Schulen ordentliches Lehrfach. Unbeschadet des staatlichen Aufsichtsrechtes wird der Religionsunterricht in Übereinstimmung mit den Grundsätzen der Religionsgemeinschaften erteilt. Kein Lehrer darf gegen seinen Willen verpflichtet werden, Religionsunterricht zu erteilen.

32. Available from: <https://wetten.overheid.nl/BWBR0003420/2019-08-01> (Accessed 6 January 2021).

33. Available from: <https://wetten.overheid.nl/BWBR0002399/2020-11-01> (Accessed 6 January 2021).

34. Belgian Official Gazette, 09–12-2015. § 3.

35. In a similar vein, the Canadian Supreme Court argued in *SL v. Commission scolaire des Chênes* (SCC 7, 1 S.C.R. 235, 2012, §37), that ‘exposing children to “a comprehensive presentation of various religions without forcing the children to join them” [cannot constitute] in itself an indoctrination of students that would infringe [upon] the appellants’ freedom of religion’.

36. This doctrine has taken up a central place in the ECtHR’s case law since its first appearance in *Handyside v United Kingdom* (Appl. no. 5493/72) in 1976. The underlying idea is that State authorities, ‘by reason of their direct and continuous contact with the vital forces of their countries’ are in principle in a better position than the international judge to strike a balance between the competing interests of national moral and political convictions on the one hand and ECHR standards on the other hand. The margin of appreciation is essentially the degree of discretion that the ECtHR leaves the Member States to decide how they implement ECHR standards within their domestic legal system (cf. Lievens and Verbrugge 2020, 87). The scope of the margin of appreciation varies according to the circumstances of each case (the subject-matter, the Convention right in issue, the nature of the aim pursued by its restrictions, etc.) (see e.g. *Rasmussen v Denmark*, Appl. no. 8777/79, para 40 and *Chapman v. United Kingdom*, Appl. no. 27238/95, para 91).

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