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BELGIUM: State and religion in Belgium: the slap of the European Court

State and religion in Belgium: the slap of the European Court

HRWF (06.27.2022) – For decades, Anderlecht, a commune of Brussels, has been famous for its football club.

Since 5 April 2022, it has been becoming famous for a decision of the European Court in Strasbourg which unequivocally denounces the historical system of state recognition of religions and belief systems (philosophical movements) as

incompatible with the international standards regulating freedom of religion or belief. We are sharing hereafter an analysis of the ECtHR decision by Cathérine Van de Graaf published in "Strasbourg Observers" under the title: *"Belgium reprimanded in Anderlecht Christian Assembly of Jehovah's Witnesses and Others: the procedure for recognition of a religion lacks minimum guarantees of fairness."*

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Strasbourg Observers (14.06.2022) – https://bit.ly/3u53wxR – *Anderlecht Christian Assembly of Jehovah's Witnesses and Others* v. Belgium is one of these judgments where you are reading the reasoning of the European Court of Human Rights (hereinafter: Court or ECtHR) and you think you know the direction it is going, but it then takes a turn that nobody saw coming, perhaps least of all the Belgian government. *In casu*, what starts as a judgment on the validity of a denial of an exemption of property tax then morphs into a serious slap on the wrist for Belgium and its system for the recognition of religions and non-religious worldviews. Once recognised, they can count on substantial financial support from the State. Yet, the Court has now found that the procedure towards such recognition lacks minimum guarantees of fairness and does not afford sufficient safeguards against discrimination.

The Belgian system of recognising religions

Before going into the specific facts of the case and the discussion of the judgment, I will briefly sketch the Belgian context. Unlike France, the United States or Turkey, Belgium does not have a strict church/state separation. Nor does it

have a system of partial separation with a state church like the United Kingdom or Sweden. What we find in Belgium instead is a system of active state support to various religions and worldviews. There are **different reasons** for this active state support: compensation for the loss of income as a result of the confiscation of church property shortly after the French Revolution, the importance of religion for societal stability and cohesion, the exercise of a certain level of control (in countering extremism, for instance) and ensuring the positive freedom of religion.

When assessing the compatibility of such a system with the liberal idea of state neutrality, **Franken and Loobuyck** found that, at first sight, a hands-off approach seems more neutral than one of active state support. If, however, a system of support is based on clear, objective, and relevant criteria that ensure equal opportunities and equal treatment of the different religions and worldviews, it can be equally neutral. Yet, in Belgium, both the criteria on which the support is based as well as the equal division of said support have been subject of scrutiny. Currently, five formal criteria on which state support depends have been distilled from answers of several ministers of justice to different parliamentary questions (listed in § 17 of the judgment). These criteria are: 1) bringing together a relatively large number of adherents (several tens of thousands), 2) being structured with a representative body that can represent the religion in its relation with civil authorities, 3) presence in the country for a fairly long period (several decades), 4) offering some social benefit, and 5) not including any activity that is contrary to public order. Clearly, these criteria are not very straightforward and can – as foreseen by the great **Jan Velaers** – lead to legal insecurity. Also, regarding the second criterion in particular, it has been asked whether certain religions were forced to fit into a

straitjacket inspired by the organisation of the Catholic church (see **here)** and subject themselves to a higher degree of state control than others (see **here)**.

Recognition is a competence of the Federal government (Article 6 § 1, VIII, 6° of the **Special Law for the Reform of Institutions**).

When a religion or non-religious worldview wants to obtain recognition, they **submit their file** to the Minister of Justice. Only after, when this part is finalised, will it go to the Chamber of Representatives. Yet, no prescribed process is included in the Constitution or any law for that matter. Recognition has **always** been the result of *ad hoc*decisions. After such a positive decision, a recognised religion or non-religious worldview enjoys many privileges. For instance, salaries and retirement of "ministers of religion" and "representatives of organisations recognized by the law as providing moral assistance" are paid by the State (Articles 181 and 182 of the **Belgian Constitution**). Additionally, recognised religions and worldviews can organise courses in public schools at the community's expense and all pupils of school age have the right to follow such religious education (Article 24). Besides the recognition process, the criteria used to calculate the amount of financial support are regularly criticised as well (see, for instance, **Franken**).

The facts of the case

The applicants are nine associations of Jehovah's Witnesses scattered across different municipalities of the Brussels Capital Region and established under Belgian law. In these municipalities, they own properties which are used for the

public worship of their religion. Before the 2018 fiscal year, they were exempt from paying property tax on their real estate used for the public exercise of their religion. Yet, an **amendment** of the Income Tax Code of the Brussels-Capital Region of 23 November 2017 narrowed the enjoyment of said exemption down to properties in the Region used for public worship by "recognised religions" only (Article 12). (Certain taxes belong to the competence of the federal entities of Belgium, such as regions, communities and municipalities.) The applicants could thus no longer claim the tax benefit they had enjoyed up until that moment.

On 6 June 2018, these nine associations brought an action to the Belgian Constitutional Court seeking an annulment of the disputed provision, claiming a breach of Articles 10 and 11 (principle of equality and non-discrimination), 19 (freedom of religion) and 172 (equality before the tax authorities) of the Belgian Constitution, in conjunction with Articles 9, 11 and 14 of the Convention and Article 1 of Protocol No. 1 to the European Convention on Human Rights (hereinafter: Convention or ECHR).

In the **judgment of 14 November 2019,** the Constitutional Court dismissed their application. First, it held that the criterion of recognition of worship was objective and relevant to the legitimate aim of combating tax evasion. Second, the Constitutional Court found that the applicants did not demonstrate that the financial impact suffered was of such a nature that it would threaten their internal organisation, functioning and religious activities. Third, it considered that the criterion of recognition of the religion was not disproportionate since non-recognised religions could apply for recognition of their religion. Finally, it stressed that the procedure for recognising religions, criticised by the applicants, was not governed by the provision challenged before it, so that it was not the subject of the present

action.

Dissatisfied with the outcome, these nine associations challenged this judgment at the ECtHR. The applicants alleged a violation of Article 9 in conjunction with Article 11 of the Convention, Article 1 of Protocol No. 1 and Article 14 of the Convention in conjunction with Articles 9 and 11 and Article 1 of Protocol No. 1 to the Convention.

The reasoning of the Court

In what follows, the reasoning of the Court in *Anderlecht Christian Assembly of Jehovah's Witnesses and Others* will be explained in detail. The Court first found that the primary question raised was one of differential treatment between recognised and non-recognised religions. Thus, priority was given in its investigation to the complaint under Article 14 (in conjunction with Articles 9 and 11 of the Convention and Article 1 of Protocol No. 1 to the Convention). Then, it argued that the complaint under Article 14 in conjunction with Article 11 was manifestly ill-founded and must be rejected.

a) As to the applicability

The Court discussed whether the facts of the case fell within the scope of Article 9 and Article 1 of Protocol No. 1. The Court argued that the tax on property owned by the applicants represented between 21.4% and 32% of the annual operation cost of the buildings, depending on the years concerned. An imposition, which the Court deemed significant, considerably affects the applicants' functioning as religious communities. The Court observed that the national authorities themselves linked the exemption from the impugned tax to the public

exercise of religion, implicitly but necessarily considering that such an exemption contributes to the effective exercise of freedom of religion. It added:

"If the State has gone beyond its obligations and created additional rights which fall within the broader scope of the rights guaranteed by the Convention as a whole, it cannot, in applying those rights, adopt discriminatory measures under Article 14. […] Therefore, where national authorities grant tax privileges to certain communities without necessarily being obliged to do so under Article 9 of the Convention, they must also comply with Article 14 of the Convention." (§ 39) (As the judgment is only available in French, all included quotes are the author's own translation.)

As the granting of a tax exemption would have lawfully allowed the applicants not to pay the tax, not getting the exemption falls within the scope of Article 1 of Protocol No. 1.

b) As to the existence of a difference in treatment

Next, the Court observed that the parties agreed on the existence of a difference in treatment between religious communities, which are deprived, in the absence of recognition, of the benefit of the exemption from property tax and other religious communities, which can continue to benefit from it once they are recognised. Yet, it found that the situation of the applicants is comparable to that of communities whose religion is recognised and whose buildings are used for the public exercise of a religion.

c) As to the pursuit of a legitimate aim

The Court verified whether the difference in treatment at issue is based on an objective and reasonable justification. For example, the fight against tax fraud, put forward by Belgium, was considered a legitimate objective by the Court,

although there was no proof that the applicants were ever suspected of having abused the tax exemption.

d) Whether there is a reasonable relationship of proportionality

The Court then went on to conduct a proportionality test. It started by stating that by choosing recognition of religious affiliation as a criterion of distinction for exemption from property tax, the authorities of the Brussels-Capital Region have opted for a criterion which is objective in nature and which may be relevant to the aim pursued. The choice of this criterion falls within the margin of appreciation in the context at hand. The fact that this same criterion is not used in the Flemish or Walloon Region does not make it discriminatory.

Although the Court recognised that the applicants' complaints about the serious shortcomings in the recognition procedure have not been subjected to constitutional review, it still went on to ascertain whether the federal recognition system offers enough guarantees against discriminatory treatment contrary to Article 12 ECHR. The Court observed that neither the criteria nor the procedure for recognition by the federal authority are laid down in "a text that satisfies the requirements of accessibility and foreseeability, which are inherent in the concept of the rule of law that governs all the articles of the Convention" (§ 51).

The Court noted that the recognition of a religion in Belgium is based on criteria which were identified by the Minister of Justice only in the course of parliamentary questions addressed to him. These have been worded in particularly vague terms which do not offer a sufficient degree of legal certainty. Additionally, the procedure for recognising religious denominations is not governed by any text, be it legislative or even regulatory, so that an application for recognition is not accompanied by any guarantee, either as

regards the actual adoption of the decision on such an application or as regards the process preceding that decision and the appeal which might, if necessary, be lodged against it subsequently. Another issue is the lack of time limits that govern the procedure. The Court referred in this regard to the backlog in processing the applications for recognition of the Belgian Buddhist Union and the Hindu Forum of Belgium, that were lodged in 2006 and 2013, respectively.

Finally, the Court added that recognition can only occur on the initiative of the Minister of Justice and even when that happens it is contingent on the discretion of the legislature. It concludes that:

"Such a system inherently entails a risk of arbitrariness and religious communities cannot reasonably be expected to submit to a process which is not based on minimum guarantees of fairness and does not ensure an objective assessment of their application in order to benefit from the tax exemption at issue" (§ 54).

The Court concluded that the system to obtain recognition does not offer sufficient guarantees against discriminatory treatment and, thus, the difference in treatment to which the applicants are subjected lacks objective and reasonable justification.

As such, the judges unanimously found a violation of Article 14, in conjunction with Article 9 and Article 1 of Protocol No. 1 to the Convention.

What is next for Belgium?

What the current judgment made very clear is that the recognition procedure in its current form is not in line with

the protection standard offered by the Convention. How will Belgium set the record straight? The Court ruled that the process was flawed to such a degree that religious communities could not reasonably be expected to submit themselves to it. This can be considered a serious call to action for Belgium. Once the judgment becomes final, the initiation of the execution process will hopefully prompt a substantial revision of the current flawed system. However, that such a revision will not be easy is demonstrated by the various failed attempts that have been undertaken in the past years to optimise (and even abolish) it (a list of proposed bills can be found in **footnote 2 here).**

It seems that to rectify the current situation the legislative power itself will have to determine the precise criteria for recognition. In an opinion of 26 April 2011 on one of the abovementioned failed attempts at optimisation, the Belgian Council of State emphasized that "the question is, however, whether the recognition of the religions […] is not rather entirely a matter for the legislator, i.e. on the basis of criteria established by it". So, it does not appear that the judgment in its current form could be executed without passing through that first crucial step. Yet, as the Minister of Justice already **stated** in response to the judgment, this is a politically very sensitive matter. It opens the door to a broader debate on the division of the state support as well as the question of whether it is desirable to have state support for religion to begin with. Right after the judgment, the political party of the Minister **proposed** a reform that would allow citizens to choose the religion they would want to support. Such a very thorough reform would require an amendment of the Constitution and will thus not be taking place in the near future.

More reading

European Court of Human Rights: Belgium found guilty of tax discrimination against the Jehovah's Witnesses

Photo: European Court of Human Rights Strasbourg-France

Further reading about FORB in Belgium on HRWF

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