Secularism and State Neutrality in Constitutional Adjudication: A Comparative Analysis of Belgium, Germany and France

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Introduction

The principle of state neutrality towards religions and convictions (henceforth: neutrality principle) plays a central role in how most constitutional democracies in Europe conceptualize the relationship between public authorities and religious individuals, groups and institutions. This principle has constitutional status in many countries, including Belgium, Germany or France. It has, moreover, been recognized by the European Court of Human Rights (ECtHR). The ECtHR has deduced from the rights to freedom of conscience and religion protected under Article 9 of the European Convention on Human Rights (ECHR) that 'in its relations with the various religions, denominations and beliefs, the State has a duty to remain neutral and impartial'.[1] The role of public authorities vis-à-vis religion in a democratic society is thus to act as 'the neutral and impartial organiser of the exercise of various religions, faiths and beliefs'.[2] The notion of neutrality, and the content it is given in a constitutional context, therefore determines to a large extent how constitutional democracies deal with issues of religious diversity.

Yet, while there is broad consensus on the minimal meaning of the neutrality principle, vivid debates arise as to what it implies for some specific issues raised by contemporary religious pluralism. These discussions not only oppose different *national* interpretations of the concept of neutrality; also *within states* disagreements can be observed as to what state neutrality entails in particular contexts. As part of this ongoing contestation, in the last thirty years courts have increasingly been asked to settle conflicts over issues involving neutrality and religious diversity[3].

This chapter aims to discuss the constitutional interpretation of the neutrality principle in a comparative law perspective. Focusing on cases relating to prohibitions on the wearing of religious symbols or dress in the public sphere, we will contrast interpretations deployed in Belgium by the Constitutional Court and the Council of State (Section 2), with constitutional interpretation of the neutrality principle in two neighboring countries, namely Germany (Section 3) and France (Section 4). Regarding the Belgian and French Councils of State, we will discuss their case law rendered as high administrative courts as well as their opinions delivered as advisory bodies of the legislature or the executive. But before delving into the constitutional law analysis,

[1] *Metropolitan Church of Bessarabia and Others* (2001) ECHR 2001-XII, para 116. The duty of public authorities to be neutral towards religions and beliefs was first asserted by the ECtHR in *Hasan and Chaush v Bulgaria* (Grand Chamber) (2000) ECHR 2000-XI, para. 78.

[2] *Refah Partisi (the Welfare Party) and others v Turkey* (2003) 37 ECHR 2003-II, para 91. On the European Court of Human Rights's conception of state neutrality, see i.a. J. Ringelheim, "State Religious Neutrality as a Common European Standard? Reappraising the European Court of Human Rights Approach", *Oxford Journal of Law and Religion* 2017, 24-47; R. Pierik, "State Neutrality and the Limits of Religious Symbolism", in J. Temperman (ed.), *The Lautsi Papers: Multidisciplinary Reflections on Religious Symbols in the Public School Classroom*, Leiden, Brill, 2012, 201-2018; F. Tulkens, "The European Convention on Human Rights and Church-State Relations: Pluralism vs. Pluralism", *Cardozo Law Review* 2009, 2575-2591.

[3] See Ch. McCrudden, *Litigating Religions. An Essay on Human Rights, Courts, and Belief*, Oxford, Oxford University Press, 2018; X. Delgrange and D. Koussens, "La fabrique de la laïcité par le juge. Éléments de comparaison Belgique-France-Québec", *R.I.E.J.* 2020/2, 93-127; Cl. Proeschel, "*Who Draws the Line?* La mission impossible du juge laïque, un regard de politiste", *R.I.E.J.* 2020/2, 129-160.

some conceptual clarifications are needed as to the meaning of 'state neutrality' and how it relates to the notion of secularism or *laïcité* (Section 1).

Section 1. Secularism/laïcité and State Neutrality: Clarifying the Concepts

Some conceptual confusion surrounds the notion of secularism or *laïcité*. It is sometimes presented as a 'French exception': From this perspective, it designates a particular model of state-religions relations that is specific to France and arguably exists nowhere else.[4] Most historians, sociologists and philosophers writing on the subject, however, have a broader understanding of the concept:[5] secularism or *laïcité*, in their view, characterizes a polity in which government is separate from religion. In this line of thought, the French model represents just one of the multiple ways in which secularism can be given content. In this chapter, we follow this second approach which we see as the most illuminating from an analytical point of view.

As highlighted by J. Baubérot and M. Milot,[6] followed by J. Maclure and Ch. Taylor,[7] secularism rests on two prior principles, namely freedom of conscience and the right to equality. It is fundamentally a form of political organization that aims at ensuring every individual the right (not) to hold and practice a faith, and not be discriminated against on the basis of their convictions. In that sense, secularism is indissociable from religious pluralism. Its central concern is to guarantee, in a society where there is no consensus on conceptions of the good, that everyone has an equal right to live according to their beliefs, whether religious or non-religious.

On an institutional level, this principle of secularism translates into two operating modes: the separation of church and state, on the one hand, and the neutrality of the state towards the various religions and beliefs, on the other.[8]

Separation means that in a secular state, political power is independent of religion: its legitimacy does not depend on a religious authority, and the law is autonomous from religious norms. These principles, however, can be implemented through different institutional arrangements. Some states, notably France and the United States, have adopted a *strict separation* model. In such a regime, public authorities are prohibited from funding or granting special legal status to religious communities. Other countries have opted for a *flexible separation* system. In such a framework, while the state remains

[4] See e.g. R. Debray, "La laïcité : une exception française", in H. Dubost (ed.), *Genèse et enjeux de la société. Christianisme et laïcité*, Geneva, Labor et Fids, 1990, 220.
[5] See i.a. P. Weil, *De la laïcité en France*, Paris, Gallimard, 2021, 28; G. Haarscher, *La laïcité*, Paris, P.U.F., coll. Que sais-je ?, 2021, spéc. 4; V. Zuber, *La laïcité en France et dans le monde*, Paris, La Documentation française, 2017 ; J. Baubérot and M. Milot, *Laïcités sans frontières*, Paris, Seuil, 2011; J. Maclure and Ch. Taylor, *Secularism and Freedom of Conscience* (transl. J. M. Todd), Cambridge (Massachusetts) and London (England), Harvard University Press, 2011.
[6] J. Baubérot and M. Milot, *op. cit.*, 8 and 76-77.
[7] J. Maclure and Ch. Taylor, *op. cit.*, 20.
[8] J. Maclure and Ch. Taylor, *op. cit.*, 20; J. Baubérot and M. Milot, *op. cit.*, 8 and 77-81.

institutionally distinct from religions, it is not prevented from providing financial support to certain religious communities, nor from developing some forms of cooperation with them. Most European states, in particular Belgium and Germany, have adopted a flexible model.[9] In Belgium, salaries of priests of 'recognized cults' are paid for by the state[10] and pupils can choose to be taught any of the recognized religions or non-denominational ethics in public schools.[11] It should be noted, however, that despite its regime of strict separation, France has also adopted measures aimed at facilitating the practice of religion in specific contexts like prisons, hospitals, or schools (see *infra*). This indicates that the line between the model of strict separation and that of flexible separation is a blurry boundary rather than a hard border.

Aside from the separation of church and state, secularism also entails a second operating mode: the neutrality of the state.[12] This notion echoes a classic tenet of political liberalism, namely the idea that the state should not favor nor disfavor any comprehensive conception of the good life.[13] In other words, the state should refrain from imposing or promoting one controversial view of the good life over others, instead confining itself to providing a 'neutral framework within which different and potentially conflicting conceptions of the good can be pursued.'[14] Importantly, state neutrality is generally considered not to be an end in itself but a means to guarantee some higher principles.[15] Similar to the broader principle of secularism, neutrality is seen as a necessary condition to protect individuals' freedom of conscience and religion[16] as well as their right to be treated as equals.[17] The means-ends relationship between neutrality and the other principles it is intended to safeguard – primarily freedom of conscience and religion and the right to equality – has important practical consequences. It is in light of religious freedom and the right to equality that the obligations deriving from the principle of neutrality can be identified.

It is widely agreed that the state's duty of neutrality entails that it cannot oblige or pressure individuals into adhering to a faith. Likewise, it must treat all individuals without discrimination, regardless of their religious views. Yet, the precise implications of these general requirements in specific contexts are the subject of heated

[9] See Ph. Portier, "Une analyse comparée des laïcités", *Annuaire de l'École pratique des hautes études (EPHE), Section des sciences religieuses. Résumé des conférences et travaux* 2020, available at http://journals.openedition.org/asr/3452; V. Zuber, *op. cit.*; J. Martinez-Torron and W. Cole Durham Jr. (eds), *Religion and the Secular State*, Madrid, Universidad Complutense, 2015; S. Ferrari, "Models of State-Religion Relations in Western Europe", in A. D. Hertzke, *The Future of Religious Freedom: Global Challenges*, Oxford, Oxford University Press, 2012, 202-214.
[10] Art. 181 of the Belgian Constitution.
[11] Art. 24, § 1, al. 4.
[12] Some authors argue that the notions of *laïcité* and state's religious neutrality have in fact the same meaning. See, for instance, J. Rivero, "La notion juridique de laïcité", *Recueil Dalloz* 1949, 137 and, more recently, M. A. Saygin, *La laïcité dans l'ordre constitutionnel belge*, Louvain-la-Neuve, Academia, 2015.
[13] See i.a. J. Rawls, *Political Liberalism*, New York, Columbia University Press, 1993; R. Dworkin, "Liberalism", in S. Hampshire (ed.), *Public and Private Morality*, Cambridge, Cambridge University Press, 1978; W. Kymlicka, "Liberal Individualism and Liberal Neutrality", *Ethics* 1989, 883-905; Ch. Larmore, "Political Liberalism", *Political Theory* 1990, 339-360. See also P. Jones, "The Ideal of the Neutral State", in R. Goodin and A. Reeve (eds), *Liberal Neutrality*, London, Routledge, 1989.
[14] W. Kymlicka, *op. cit.*, 883.
[15] See in particular J. Baubérot and M. Milot, *op. cit.*, 78-81.
[16] See in particular W. Kymlicka, *op. cit.*, 892.
[17] See in particular R. Dworkin, *op. cit.*, 127.

debates, whether in Belgium, Germany or France. This is particularly the case for the question whether some categories of persons can be prohibited from wearing symbols or clothing with religious significance in certain settings to preserve state neutrality.

This issue has been raised first and foremost in relation to *civil servants*. Does the obligation of the state to be neutral justify, or even require, that its agents be prohibited from revealing their religious beliefs through the wearing of a particular sign or clothing? Opponents and supporters of such prohibitions tend to rely on two different interpretations of state neutrality, which have been characterized as 'inclusive' and 'exclusive'.[18] Proponents of so-called 'inclusive neutrality' argue that neutrality only requires from civil servants that they be neutral *in their actions*, in the sense that they cannot discriminate any individual. In this line of thought, insofar as wearing a religious symbol or garment does not affect the way they act, civil servants should, like any individual, be free to manifest their beliefs in this way. Proponents of 'exclusive neutrality', by contrast, contend that state neutrality also entails an obligation, for civil servants, to project an *image of neutrality*. According to this view, state agents should not only treat people equally, they should also refrain from revealing, through their appearance, their religious beliefs in order to avoid raising doubts about their neutrality in the minds of citizens. In short, according to the first approach, civil servants' obligation to be neutral only requires a 'neutrality of action' while in the exclusive conception of neutrality, the obligation of civil servants also extends to a 'neutrality of appearance.'[19] The latter view, however, raises a further question: can such 'neutrality of appearance' be required from *all* state agents or is it only when they perform certain types of functions that such a restriction to their religious freedom can be deemed justified? We will return to this question throughout the chapter.

In both France and Belgium, a further question has arisen: can *users* of public services, in certain circumstances, be banned from wearing religious symbols in the name of state neutrality? This question has been particularly prominent in the context of public education. Here as well, two divergent understandings of state neutrality are at stake. Under one reading, the neutrality principle only binds the state, as a legal person, and the public officials through which it acts. Yet some posit that the requirement of neutrality applies, more broadly, to public institutions conceived of as physical spaces. Under this view, any person entering these spaces, even if they do not perform any public function, could be subject to an obligation of neutrality, including in their appearance. This question will also be discussed throughout the chapter.

[18] See e.g. X. Delgrange, "Faut-il enchâsser la laïcité politique dans la Constitution belge?", in X. Delgrange (ed.), *Les débats autour de l'inscription de la laïcité politique dans la Constitution belge. Les Cahiers du CIRC*, No. 4, 2020, 48. See also Final Report of the Commission of intercultural dialogue (*Commissie voor Interculturele Dialoog/Commission du dialogue interculturel*), 2005, 54-56 and 115-119, available at www.unia.be.

[19] See S. Van Drooghenbroeck, "Les transformations du concept de neutralité de l'Etat : quelques réflexions provocatrices", in J. Ringelheim (ed.), *Le droit et la diversité culturelle*, Brussels, Bruylant, 2011, 75-120.

An additional debate has emerged on whether a duty to be neutral in their appearance can be imposed on *employees of private organizations*. A number of private businesses have argued that their wish to display a corporate image of religious neutrality can justify imposing restrictions on their workers' right to manifest their religious beliefs.[20] This discussion, however, is beyond the scope of this chapter insofar as it does not concern the concept of *state* neutrality. At the same time, in the French context, it has been contended that a duty of neutrality of appearance can be imposed on the employees of private entities, based on the principle of state neutrality, whenever they perform a public service. This argument will be considered in this contribution.

The above controversies bring into play not only questions as to how state neutrality should be understood, but also about how the neutrality principle relates to fundamental rights, in particular the right to manifest one's beliefs and the right not to be discriminated against based on one's religion or conviction. In all three countries examined in this chapter, higher courts have been called upon to deal with these queries. As we intend to show, despite the similarities in the principles applied by the Belgian, German and French institutions, significant differences can be observed in the conclusions they have arrived at. Our inquiry considers the relevant jurisprudence of the Belgian and German Constitutional Courts, the French Court of Cassation as well as the Belgian and French Councils of State.[21] It should be noted that in both Belgium and France, the Council of State may act either as a high administrative court or as an advisory body of the legislature or the executive. In either case it is competent to provide an authoritative interpretation of the Constitution. Therefore, the positions taken by the Belgian and French Councils of State in both their capacities are taken into account in this contribution.

[20] The European Court of Justice of the European Union has stated that 'an employer's wish to project an image of neutrality towards customers relates to the freedom to conduct a business that is recognized in Article 16 of the Charter [of Fundamental Rights] and is, in principle, legitimate' (Case C-157/15, *Achbita, Centrum voor gelijkheid van kansen en voor racismebestrijding v G4S Secure Solutions* NV, 14 March 2017, at 38). In a later case, however, it specified that 'the mere desire of an employer to pursue a policy of neutrality – while in itself a legitimate aim – is not sufficient, as such, to justify objectively a difference of treatment indirectly based on religion or belief, since such a justification can be regarded as being objective only where there is a genuine need on the part of that employer, which it is for that employer to demonstrate.' (C-804/18 and C-341/19, *IX v WABE* eV and *MH Müller Handels GmbH v MJ*, 15 July 2021, at 64). Moreover, in order for a difference of treatment indirectly based on religion and justified by this objective not to constitute indirect discrimination, the means of achieving that aim must be appropriate and necessary. The European Court of Human Rights has also addressed this issue when examining the case of a British Airways employee who was forbidden from wearing a cross. It found that while an employer's wish to project a certain corporate image is legitimate, the domestic courts had accorded it too much weight in this case, neglecting the fact that what was at stake for the applicant was a fundamental right (ECtHR, *Eweida and others v. United Kingdom*, 15 January 2013, para. 94). On claims by private businesses to apply a neutrality policy, see more generally L. Vanbellingen, *La neutralité de l'entreprise face aux expressions religieuses du travailleur. Test de compatibilité en droit européen de la liberté de religion et de non-discrimination*, Brussels, Bruylant, 2022.

[21] The work of the French Constitutional Council (*Conseil constitutionnel*) is not examined in this chapter because this institution has not yet been called upon to examine bans on religious symbols justified by *laïcité* or state neutrality. To be sure, the Constitutional Council was asked to examine the draft Law Prohibiting the Concealment of the Face in the Public Space (*Loi interdisant la dissimulation du visage dans l'espace public*) before it was adopted (see Decision no. 2010-613 DC-7 October 2010). This law, however, was presented by the French legislator as necessary to preserve the public order. The concept of *laïcité* is thus not discussed in this decision. The law was finally adopted on 11 October 2010 (Law no. 2010-1192). Note that this law was challenged before the European Court of Human Rights, see ECtHR (Grand Chamber), *S.A.S. v. France*, 1 July 2014.

Section 2. Constitutional interpretation of the neutrality principle in Belgium

Contrary to the Constitution of France,[22] the Belgian Constitution does not describe Belgium as a secular state.[23] The Council of State is adamant: '[i]n the Belgian Constitution, the Belgian State is not defined as a secular (*laïque*) State'.[24] It should be noted that the Council of State understands *laïcité* here as referring to the French model of state-religions relations, characterized by a strict separation. As explained in Section 1, Belgium is instead understood to have adopted a flexible approach to the separation of religion and state, in which some constitutional provisions are aimed at separating religion from the state, while others presuppose a degree of cooperation between both.

For example, while the Constitution prevents the state from interfering in the appointment of ministers of religion (art. 21 Const.), it simultaneously mandates that the state pay the salaries and pensions of ministers of recognized religions (art. 181 Const.). In the field of education, as well, the Constitution presupposes both separation *and* cooperation of religion and state. On the one hand, the Constitution provides that education should be free in order to guarantee freedom of choice between so-called 'official' (non-denominational) and 'free' (often denominational) education (art. 24, §1 Const.). On the other hand, the Constitution requires that pupils in public schools have the ability to opt for education in one of the recognized religions or in non-denominational ethics (art. 24, §1 Const.). As a result, the Communities are not only obliged to organize a system of public education, but also to set up a complex system of religious teaching *within* these public schools.[25]

2.1. Constitutional framework on neutrality

The flexible approach to the separation of religion and state in the Belgian Constitution is mirrored by a lack of clarity on the exact meaning of the neutrality principle in the constitutional framework. At present,[26] the concept of neutrality features twice in the text of the Constitution, both times in article 24, §1 Const. This provision entails a

[22] Constitution of France, article 1: 'France shall be an indivisible, secular [*laïque*], democratic and social Republic' (official English translation, available at https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf)

[23] J. Velaers and M-C. Foblets, "Religion and the Secular State in Belgium: Le fait religieux dans ses rapports avec l'État en droit belge", in J. Martínez-Torrón and W. C. Durham, Jr. (eds), *Religion and the Secular State: National Reports*, Madrid, Complutense University Law School, 2010, 123.

[24] Council of State, 21 December 2010, no. 210.000, para. 6.7.2. (all translations in this section are our own, both of the jurisprudence of the Council of State and of the case law of the Constitutional Court).

[25] P. Loobuyck, "De levensbeschouwelijke vakken in artikel 24 van de Belgische Grondwet ter discussie", *TORB* 2020, 410-420.

[26] Over the course of the past decades, several proposals have been made, mostly by liberal (i.e. center-right) Members of Parliament, to inscribe *laïcité*, neutrality or secularism in the Belgian Constitution. None of these have been successful. For a pending proposal, see *Proposition de déclaration de révision du titre II de la Constitution, en vue d'y insérer un nouvel article 10/1 établissant la neutralité de l'État et l'impartialité de son action*, *Parl. St.* DOC 55 2238/001 ("Art. 10/1. *L'État est neutre. L'action des pouvoirs publics est impartiale. La séparation des Églises et de l'État est garantie. Les représentants de l'État doivent se comporter de manière neutre et ne peuvent afficher leurs convictions religieuses, politiques et philosophiques dans l'exercice de leurs fonctions*.").

general obligation for the Communities to organize neutral education and specifies that such neutrality implies respect for the philosophical, ideological or religious beliefs of parents and pupils.

The concept of neutrality was originally introduced in the Constitution to constitutionally entrench the neutrality of public education in (then) article 17 Const., as previously laid down in the political School Pact of 1958.[27] The School Pact states that schools in the official education system are to be neutral in the sense of 'respect[ing] all philosophical or religious opinions of the parents who entrust their children to them'.[28] In 1963, the Standing Committee of the School Pact clarified that a neutral school does not 'compromise any conviction or belief', instead anchoring education 'in a positive climate' characterized by 'acceptance of the recognized multiplicity of ideas', while simultaneously rejecting 'any proselytism' by teachers or pupils.[29] Herein lie the seeds of contestation over the interpretation of the neutrality principle in Belgian public law, for depending on where one places the emphasis within the definition of a neutral school in the 1963 resolution, one can head in two directions. In placing the emphasis on rejection of proselytism, one may be led down a path of 'exclusive neutrality' (or neutrality of appearance). By contrast, in emphasizing the positive climate and the acceptance of different faiths, one is guided down a path of 'inclusive neutrality' (or neutrality of action).

Central cleavages between proponents of 'inclusive' and 'exclusive neutrality', already present in the 1963 resolution, have remained in place until the present day. In part, this is the result of a constitutional framework that refuses to 'take sides.' During the constitutional debate on the 1988 revision of the Constitution, in which the concept of neutrality was inserted into (then) article 17 Const., it was regularly stressed that neutrality should be given a dynamic interpretation so as to allow for future evolutions in understandings of the concept. Throughout the constitutional debate, it was moreover predicted that these understandings may develop in different directions in the French and the Flemish Community.[30]

For purposes of this chapter, the salient takeaway from this brief historical discussion is that neither the text of the Constitution nor the constitutional debate on the insertion of neutrality in the Constitution provide a clear and fixed understanding of the neutrality principle.[31] This lack of clarity has contributed to ongoing contestation about

[27] See P. Loobuyck, *op. cit.*, 411-412; R. Verstegen, "Levensbeschouwing en onderwijs: het juridisch kader", *TORB* 2013, 316.
[28] School Pact of 20 November 1958, resolution 9.
[29] Resolution of 8 May 1963 of the *Permanente Commissie van het Schoolpact/Commission permanente du Pacte scolaire*.
[30] Report of the revision of article 17 Constitution, Parl. St. Senaat BZ 1988, nr. 100-1/2, 62 (in which the State Secretary for Education stated that "the 'national' definition of 'neutrality' [...] does not exclude an evolution, for example in the Flemish Community, towards a 'positive' neutrality and a more contemporary pluralistic attitude"; our translation). See also ibid., 546 (in which the State Secretary for Education added that: "In the Flemish Community, they are prepared, across party lines, to evolve towards a more active form of neutrality."; our translation).
[31] For further discussion of the constitutional debate on (then) article 17 Const., see J. De Groof and K. Willems, "Onderwijsvrijheid en het artikel 24 § 1 Belgische Grondwet: 30 jaar interpretatie door het Grondwettelijk Hof en de Raad van State", *TORB* 2017, 5-52; S. Smet, "Grondwettelijke interpretatie van het neutraliteitsbeginsel in de onderwijscontext: een schild of een zwaard?", *TORB* 2021, 293-319.

central questions on the relationship between religion and state, first and foremost on the wearing of religious dress in the public sphere.

As explained in Section 1, proponents of 'inclusive neutrality' (or neutrality of action) argue that the wearing of religious symbols by individuals in public institutions, be they civil servants or users of public services, does not ordinarily conflict with the principle of neutrality insofar as it does not constitute an act of discrimination and does not infringe upon other citizens' freedom of conscience. Proponents of 'exclusive neutrality' (or neutrality of appearance), by contrast, insist that civil servants should not only be prevented from committing discrimination, but also from appearing partial. Since advocates of this view equate the wearing of religious symbols to an appearance of partiality, they argue that civil servants should be precluded from displaying any philosophical or religious symbol in the performance of their duties. Some further claim that the preservation of neutrality also requires banning the wearing of religious garments by *users* of certain public institutions, in particular in the case of pupils or students in public education establishments. Two types of arguments are put forward to support this thesis. First, that the mere presence of religious symbols, regardless of who wears them, would compromise the neutrality of these public settings. Second, that the wearing of religious clothing in these institutions would infringe upon the right of other citizens to freedom of conscience.

Although the Belgian constitutional framework does not, as such, support an exclusive interpretation of neutrality, a distinct evolution towards this stricter understanding of neutrality has nevertheless occurred in policy and practice. Over the course of the past couple of decades, bans on the wearing of religious dress have mushroomed. These measures, however, have been adopted by local authorities and not by the legislator.[32] Such bans are now in place in most public schools (for teachers *and* pupils), in civil service (especially at the municipal level), and in many private corporations (the *Achbita* case at the CJEU for instance originated in Belgium).[33] The reach of these bans, which has been likened to a growing oil spill,[34] indicates that policy and practice have effectively moved Belgium closer to the exclusive side of the neutrality continuum.[35]

Yet, Belgian courts are divided on whether this evolution is in line with the constitutional framework and fundamental human rights. In Sections 2.2. and 2.3., respectively, the relevant jurisprudence and opinions of the Council of State and case law of the Constitutional Court are discussed.[36] Throughout the discussion, it will

[32] E. Brems and S. Smet, "Islamitische kledij, neutraliteit en vivre ensemble: een kritische analyse", in G. Coene and M. Van den Bossche, *Vrij(heid) van religie*, Brussels, VUB Press, 2015, 203. The wearing of the full-face veil has been prohibited by law in the whole public square (1 June 2011 Act Aimed at Prohibiting the Wearing of Any Clothing Hiding totally or principally the Face). This law, however, has not been justified by the preservation of state neutrality and will therefore not be discussed in this chapter.
[33] CJEU 14 March 2017, C-157/15 (G4S Secure Solutions). See Labour Court of Appeal (Antwerp) 23 December 2011; Court of Cassation (Belgium) 9 March 2015 (referring questions for preliminary ruling to the CJEU). See also Labour Court of Appeal (Ghent) 12 October 2020 (ruling, after the CJEU judgment, that Ms. Achbita had not been discriminated against).
[34] E. Brems and S. Smet, *op. cit.*, 215.
[35] Ibid, 206.
[36] For more extensive discussion, see S. Smet, *op. cit.*.

become clear that while both institutions agree on the underlying principles, they disagree on their application to specific settings.

2.2. Position of the Council of State on religious dress

Both the Legislative and the Jurisprudence sections of the Council of State have repeatedly been invited to consider the interpretation and requirements of the neutrality principle in Belgian public law, particularly in relation to the freedom to manifest one's religion as guaranteed in article 19 Const. and article 9 ECHR, on the one hand, and the right to education enshrined in article 24 Const. and article 2 of the first Protocol to the ECHR, on the other.[37]

In responding to these requests and claims, the Council of State has built up an extensive jurisprudence on the interpretation of the neutrality principle in Belgian public law. At the heart of this jurisprudence lies the consideration that

> [i]n a democratic state governed by the rule of law, the government must be neutral, because it is the government of and for all citizens and because it must treat them equally in principle, without discriminating on the basis of their religion, their worldview or their preference for a community or party.[38]

As a matter of principle, the Council of State thus interprets neutrality as a means to safeguard another constitutional principle, that of equality, in line with the approach we proposed in Section 1. This means-ends relationship has important consequences for how the Council of State applies the neutrality principle to different contexts in which individuals seek to manifest their religion in the public sphere. In its advisory practice and case law, the Council of State has adopted a distinctive approach to three broad categories of individuals: (1) civil servants in general; (2) teachers in public schools in particular; and (3) pupils in public schools.

With regard to the first category, that of civil servants in general, the Council of State has repeatedly confirmed that state agents must strictly observe the principle of neutrality and equality of users in the performance of their functions.[39] Yet, this duty to be neutral in their actions does not necessarily entail, in the view of the Council of State, an obligation for civil servants to also be neutral in their outward appearance.[40] Given that such an obligation would constitute a restriction on civil servants' freedom

[37] The Belgian Council of State is composed of two sections. The Section Jurisprudence sits as the highest administrative court and has the power to review and annul administrative decisions of the executive branch of government (it also acts as a court of cassation within the administrative courts system). The Legislative Section, by contrast, is a *sui generis* institution that issues non-binding advisory opinions on bills during the law-making process.
[38] See Council of State, 20 May 2008, no. 44.521/AV, p. 8; Council of State, 21 December 2010, no. 210.000, para. 6.7.2. See also Council of State, 27 March 2013, no. 223.042, para. VI.2.6.
[39] Council of State, 20 May 2008, Opinion no. 44.521/AV, p. 8. See also 20 April 2010, Opinion no. 48.042/AG; 13 July 2010, Opinion no. 48.144/4/AG; 12 May 2022, Opinion no. 69.726.
[40] Council of State, 20 May 2008, Opinion no. 44.521/AV, p. 9.

of expression and religion, it can only be imposed upon them by the legislator if it is necessary to achieve a legitimate aim and proportionate to this aim.

The Council of State admits that such a duty of neutrality of appearance can be justified by a legitimate objective, namely reinforcing citizens' trust in the neutrality of the civil service, based on the consideration that the wearing of a religious symbol by civil servants may generate in citizens' minds the fear that they might not perform their duties in an impartial way. However, this rationale cannot justify imposing such an obligation on *all* civil servants: it is relevant only in the case of civil servants who, in view of the functions they perform, could raise doubts as to their impartiality by wearing a religious symbol.[41] The Council of State thus considers that this rationale is not adequate to justify the imposition of such a prohibition on any and all agents, in particular on agents exercising purely technical or executive functions.[42] Arguably, the question whether the agent is in contact with the public is also a relevant criterion.

Regarding the second category, that of teachers in public schools, the jurisprudence of the Council of State draws on a distinction between two types of teachers: teachers of religion, on the one hand, and all other teachers, on the other. The Council of State has repeatedly ruled that, in the absence of indoctrination, aggression, pressure or provocation, teachers of religion cannot be barred from wearing religious dress, since it is inherent in their role as a teacher of religion to manifest their religious beliefs (all cases, unsurprisingly, revolve around the Islamic headscarf).[43]

In relation to all *other* teachers, by contrast, the Council of State has accepted that bans on the wearing of religious and ideological symbols can be justified to safeguard the neutrality of public education:

> The neutrality of education, as enshrined in article 24 of the Constitution, may lead a community to prefer that its teachers, as civil servants, refrain from visibly wearing any conspicuous religious, political or philosophical sign, to avoid any suspicion of pressure or influence on the pupils over whom they exercise their authority.[44]

It is striking that the Council of State does not reference, in this line of case law, the distinction between the actions of teachers and their outward appearance. This silence or omission can only be considered coherent to the extent that the Council of State equates teachers in public schools with civil servants who are in contact with the public

[41] Council of State, 20 May 2008, Opinion no. 44.521/AV, p. 12. See also 20 April 2010, Opinion no. 48.042/AG, para. 4.5.
[42] Council of State, 20 May 2008, Opinion no. 44.521/AV, p. 12. The Council of State has also admitted that organizational constraints can be taken into account to assess the proportionality of a general ban on the wearing of philosophical or religious symbols by civil servants. It specified however that the legislator would have to convincingly demonstrate that it would be extremely difficult, if not impossible, for organizational reasons to apply the ban to some agents and not others. See Council of State, 13 July 2010, Opinion no. 48.146/A/AG.
[43] Council of State, 1 February 2016, no. 233.672; Council of State, 17 April 2013, no. 223.201; Council of State, 2 June 2016, no. 234.914. See also Council of State, 20 April 2010, no. 48.022/AG.
[44] Council of State, 27 March 2013, no. 223.042, para. VI.2.6.

and exercise a decision-making function. In line with the advisory practice of the Legislative Section on civil servants in general, a duty of neutrality of appearance can thus be imposed on teachers in public schools without a need for concrete justifications related to their behavior, role or influence.

Finally, in relation to the category of pupils, the Council of State has found that the duty of neutrality incumbent on (non-religious) teachers cannot simply be extended to pupils in public schools, since the latter are users of a public service and not its providers.[45] The distinction between service user and service provider has important consequences for the interpretation of the principle of neutrality:

> Whereas neutrality [...] can be understood as a basic rule of the operation of public services in relation to teachers in their capacity of public employees and providers of education, things are different in relation to pupils. Here, an examination is needed as to whether the way in which neutrality is understood – and implemented – fits the objective of protecting public order or the rights and freedoms of others.[46]

In relation to pupils, the relevant question is therefore not whether the neutrality of public education justifies a ban on religious dress, but rather to what extent there is an actual disturbance of school peace or a violation of the rights and freedoms of other pupils.[47] It should be noted that in each of the relevant cases, the Council of State has concluded that the ban at issue violated the pupils' freedom of religions, since the public authorities had failed to provide evidence for their claim that an evolution towards exclusive neutrality – also for pupils – was needed to protect public order and the rights of others in schools.[48]

2.3. Case law of the Constitutional Court on religious dress

Although bans on religious dress in different public institutions have consistently been enacted through administrative acts, the Constitutional Court has nevertheless had the opportunity – through questions for preliminary ruling put to it by the ordinary and administrative courts – to evaluate the extent to which such bans can be justified with reference to the neutrality principle. Judgments no. 40/2011 and 81/2020 concern bans on religious dress enacted in the context of public education, respectively for pupils in secondary schools and students in higher education. As transpires from both judgments, the Constitutional Court concurs with the Council of State on the broad contours of the interpretation of the neutrality principle in the Belgian constitutional context, but disagrees on its application to pupils and students.

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[45] Council of State, 14 October 2014, no. 228.752, paras. 38.2-38.3.
[46] Ibid., para. 38.5.
[47] Ibid.
[48] Ibid., para 53. See also, decided on the same day, Council of State, 14 October 2014, no. 228.748; Council of State, 14 October 2014, no. 228.751 (in both cases, the claimants belonged to the Sikh community; Sikhs effectively suffered 'collateral damage' from bans that, although formulated neutrally, were aimed at excluding the headscarf worn by Muslim pupils).

In its 2011 judgment, the Court has set out a number of basic principles on the interpretation of the concept neutrality, as used in article 24 Const., considered in the light of freedom of religion and the right to education.[49] In line with the jurisprudence of the Council of State, the Court has noted that the principle of neutrality is 'closely linked to the principle of non-discrimination'.[50] From this connection, the Court has deduced a minimum content of the neutrality principle, which cannot be deviated from without violating the Constitution.[51] In the specific context of public education organized by the Communities, this minimum content entails two types of obligations for the state.[52] On the one hand, the state is under a negative obligation not to prejudice, favor or impose philosophical, ideological or religious views.[53] On the other hand, it is under a positive obligation to ensure, among other things, the positive recognition and appreciation of the diversity of opinions and attitudes in public education organized by the Communities.[54] At the same time, however, the Court has noted that this positive obligation does not apply to opinions and attitudes that constitute a 'threat to democracy and to fundamental rights and freedoms'.[55] In its 2011 ruling, the Constitutional Court has further confirmed the view, adopted by the constituted power during the constitutional revision of 1988, that neutrality should be understood as a dynamic concept, the meaning of which can evolve over time.[56]

Given the contested nature of the neutrality principle, these basic principles do not provide an unequivocal answer to the question of whether a ban on religious dress for pupils in public schools can be justified in the name of neutrality.[57] This question was answered, in the affirmative, in the Court's 2020 judgment regarding the interpretation of the decree of the French Community of 31 March 1994 on the neutrality of public education in the French Community.[58] The preliminary ruling case revolves around a general ban on the wearing of insignia, jewellery or clothing representing political, philosophical or religious views or opinions, applicable to students enrolled at a

[49] The underlying case concerned bans for pupils in public schools in the Flemish Community education system, enacted by individual schools following a decision by the governing body of the Flemish Community education system to the effect that pupils within this system should no longer be allowed to wear religious or ideological signs to preserve the neutrality of education. A pupil challenged the decision of the governing body before the Council of State, which referred a question for preliminary ruling to the Constitutional Court concerning the delegation of the power to issue a general and principled ban by the state legislator to the governing body of the Flemish Community education system. In its judgment 40/2011, the Constitutional Court thus had to answer a question of legality under article 24 Const. In the process, it provided an interpretation of the concept of neutrality, as contained in article 24 Const.
[50] Constitutional Court, 15 March 2011, no. 40/2011., para. B.9.5.
[51] Ibid., para. B.9.4.
[52] Ibid., para. B.9.5.
[53] Ibid.
[54] Ibid.
[55] Ibid.
[56] Ibid., para B.9.3.
[57] In an ambivalent passage in judgment no. 40/2011, the Constitutional Court indicates that the introduction of a general ban for pupils signals a reconceptualization of the concept of neutrality by the Flemish Community, but one that is "not by definition" incompatible with it. See ibid., para. B.15.
[58] Constitutional Court, 4 June 2020, no. 81/2020. For more extensive discussion of the judgment, see S. Smet and M. Vrancken, "Religieuze kentekens, neutraliteit en sociale druk in het hoger onderwijs: Noot bij Grondwettelijk Hof 4 juni 2020, arrest nr. 81/2020", *TORB* 2020, 264-271; X. Delgrange, "Interdiction du voile dans l'enseignement supérieur: la Cour constitutionnelle, substitut d'un législateur paralysé", *Journal des tribunaux* 2021, Issue 2, 2-15.

college for higher education located in Brussels and enacted by the municipality of Brussels in its capacity as the organizing authority of the college at issue.

Although the Constitutional Court discusses the interpretation of the neutrality principle at length in its 2020 judgment, it mostly confirms the general principles on the interpretation of the neutrality principle set out in its 2011 judgment.[59] Rather than elaborating on these principles and giving further substantive content to the neutrality principle, the Court defers to the interpretation given to neutrality by the municipality of Brussels. In line with its earlier ruling, the Court confirms that varying interpretations of the neutrality principles can be entirely in line with the Constitution.[60] It goes on to note that, since 'the Constituent did not conceive of the neutrality of community education as a rigid principle, unaffected by social developments',[61] it is not within the Court's power 'to give priority to one particular concept of "neutrality" over other possible conceptions'.[62] In other words, the Court invokes the dynamic nature of the neutrality principle to explain why it cannot (or should not) provide its own substantive interpretation of the principle.

This approach may appear sensible in a federalism logic, to the extent that a federal Constitutional Court may take into account constitutional history and context to avoid imposing a single interpretation of a constitutional principle on different subunits of the federation. At the same time, the Constitutional Court's judicial avoidance strategy is striking when considered from a fundamental rights perspective, since the Court ultimately surrenders its power to check how the legislative branch – and, in practice, governing bodies without a democratic mandate – interpret a constitutional principle with an immediate impact on the enjoyment of fundamental rights. In the 2020 case before the Constitutional Court, the governing body argued that it wished to create 'a completely neutral educational environment', which it understood as an environment in which students would not be exposed to any attempt to influence their political, philosophical and religious opinions or convictions.[63] The Constitutional Court does not question, nor critically interrogate this approach, under which it is assumed that the mere wearing of a religious symbol constitutes an attempt to influence others. Instead, it follows suit by describing the prohibition as

> a measure designed to protect all students, in accordance with the pedagogical project based on a well-defined concept of neutrality of official education, from the social pressure which might be exerted by those of them who make their opinions and convictions visible.[64]

[59] Constitutional Court (Belgium), 4 June 2020, no. 81/2020, paras. B.17.5.-B.17.6.
[60] Ibid., para. B.24.2 ("Since the concept of 'neutrality' is not understood in a static way by the Constitution, it must be inferred that different conceptions of 'neutrality' can exist with that precept").
[61] Ibid., para. B.18.1.
[62] Ibid., para. B.24.2.
[63] Ibid.
[64] Ibid.

Such deferential review by the Constitutional Court, in which the Court effectively abdicates its responsibility as ultimate interpreter of the Constitution, is not an inevitable consequence of its findings on the dynamic nature of neutrality. Instead, it is the result of a deliberate choice to remain on the sidelines in establishing the precise relationship between the neutrality principle and freedom of religion in the context of public education.

Ultimately, the Constitutional Court concludes in its 2020 judgment that bans on religious dress for students at higher education institutions can be justified by

> the objective of achieving an orderly progression of the educational project based on neutrality, in which pupils or students of various convictions participate actively and interactively, and by the objective of protecting pupils or students who do not wish to make their convictions visible from the social pressure that may be exerted on them by those who do wish to make their convictions visible.[65]

In this key passage, the Court deviates from the approach of the Council of State (see Section 2.2.). Whereas the Council of State refuses to accept abstract invocation of neutrality as a justification for bans on religious dress for pupils in public schools, instead requiring concrete evidence that such a measure would respond to threats to public order or the rights and freedoms of other pupils, the Constitutional Court identifies two *alternative* justifications. The Court indicates that neutrality can serve as a valid justification for bans on religious dress for higher education students in two situations: *either* because the neutrality of education safeguards public order in colleges and protects the rights of other students *or* when a specific understanding of neutrality, as neutrality of appearance, is a constitutive component of a college's educational project.

Under the first of these justifications, neutrality necessarily serves as a means to protect the constitutional ends of public order in colleges and the rights and freedoms of other students. However, when public authorities claim that a ban on religious dress for pupils or students is necessary to avoid disturbance of order, conversion zeal and social pressure, it is logical for courts to require proof of a genuine threat to public order and to the rights of others. Otherwise, a ban is not necessary and constitutes an unjustified interference with freedom of religion. As is evident from the relevant cases at the Council of State on bans for pupils in public schools, it can be difficult for public authorities to provide the requisite proof. It is thus hardly surprising that public authorities are increasingly resorting to the second justification, presenting bans on religious dress as necessary to guarantee the neutrality of education, full stop.

[65] Ibid., para. B.25.6.

On this important point, the Constitutional Court innovates in its 2020 judgment by accepting that neutrality *as such* can be a valid justification for bans on religious dress, not only for minor pupils but also for adult students. By accepting the invocation of neutrality as an end in itself, the Constitutional Court declares a far-reaching extension of exclusive neutrality to the context of higher education to be constitutionally permissible (though not constitutionally required).[66] Yet, the Court does not address the underlying question, that of why higher education would no longer be neutral if and when adult students are allowed to wear religious, philosophical or ideological symbols. The Court simply defers to the understanding of neutrality favored by the governing and refrains from reviewing the extent to which it is in line with fundamental rights. The case law of the German Constitutional Court shows that an alternative approach was – and is – possible.

Section 3. Constitutional interpretation of the neutrality principle in Germany

Although the Preamble to the German Basic Law begins with a religious reference, in the opening phrase 'Conscious of their responsibility before God and man', the constitutional framework on religion and state in Germany is decidedly secular in nature. It is also similar to the Belgian constitutional framework, in that it is characterized by a flexible approach to the separation of religion and state. The constitutional basis of this flexible system, in which principled separation coexists with elements of cooperation, is located in a range of constitutional provisions.[67]

A first set of components can be found in article 137 Weimar Constitution, as incorporated through article 140 of the Basic Law.[68] In terms of separation, this constitutional provision states that there shall be no state church, guarantees the freedom to form religious societies, prohibits the state from interfering in appointments to religious office, and declares that all religious societies shall regulate and administer their affairs independently within the limits of the law.[69] Whereas these elements all point towards a system of separation of religion and state, other limbs of article 137 Weimar Constitution entail (or presuppose) a degree of cooperation between state and religion. This is particularly evident in the provision that recognized religious societies shall be corporations under public law and shall, as such, be entitled

[66] Ibid., para. B.25.9.
[67] C. E. Haupt, *Religion-State Relations in the United States and Germany: The Quest for Neutrality*, Cambridge, Cambridge University Press, 2011, 170; S. Korioth and I. Augsburg, "Religion and the Secular State in Germany", *German National Reports to the 18th International Congress of Comparative Law* 2010, 322.
[68] Article 140 Basic Law ("The provisions of Articles 136, 137, 138, 139 and 141 of the German Constitution of 11 August 1919 shall be an integral part of this Basic Law."). All provisions are taken from the official English translation, available at https://www.gesetze-im-internet.de/englisch_gg.
[69] Article 137 (1), (2) and (3) Weimar Constitution of 11 August 1919.

to levy taxes on the basis of civil taxation lists.[70] As is well known, these taxes are levied on behalf of recognized religious communities by the state and its tax authorities.[71]

Other central aspects of the relationship between religion and state in the German constitutional framework are regulated by articles 3, 4, 7 and 33 Basic Law. While articles 3 and 4 Basic Law guarantee broad constitutional rights, respectively equality before the law and freedom of conscience and religion, articles 7 and 33 contain more specific rules. Article 7 Basic Law is in essence a mirror image of article 24 of the Belgian Constitution, to the extent that it guarantees that parents shall have the right to decide whether their children will receive religious instruction and provides that religious instruction shall form part of the regular curriculum in state schools (but with the exception of non-denominational schools).[72] Article 33 Basic Law, finally, ensures that

> [n]either the enjoyment of civil and political rights nor eligibility for public office nor rights acquired in the public service shall be dependent upon religious affiliation. No one may be disadvantaged by reason of adherence or non-adherence to a particular religious denomination or philosophical creed.[73]

3.1. Constitutional framework on neutrality

As S. Korioth and I. Augsburg argue, the principle of state neutrality resides at the heart of the relationship between religion and state in the German constitutional framework.[74] A central component of this principle – the prohibition of advantaging or disadvantaging adherents to particular religions or philosophical beliefs for reasons of their adherence – is even safeguarded in article 33 Basic Law itself, whereas it has been deduced from broader constitutional principles in the Belgian constitutional context (see Section 2.3.).

At the same time, similar to Belgium, the federal structure of the German state has an impact on the regulation of religious diversity, in the sense that divergent approaches to questions of religious diversity in the different *Länder* have resulted in a relative plurality of models on the relationship between religion and state.[75] This is most

[70] Article 137 (5) and (6) Weimar Constitution of 11 August 1919. See also article 141 Weimar Constitution ("To the extent that a need exists for religious services and pastoral work in the army, in hospitals, in prisons or in other public institutions, religious societies shall be permitted to provide them, but without compulsion of any kind.").
[71] S. Korioth and I. Augsburg, *op. cit.*, 327.
[72] Article 7 Basic Law.
[73] Article 33 (3) Basic Law.
[74] S. Korioth and I. Augsburg, *op. cit.*, 322-323.
[75] S. Toscer-Angot, "La gestion de la pluralité religieuse en Allemagne: la singularité de la loi berlinoise de 'neutralité exclusive'", in X. Delgrange, *Les débats autour de l'inscription de la laïcité politique dans la Constitution belge*, Brussels, Université Saint-Louis, 2020, 112; S. Berghahn et al, "In the name of *laïcité* and neutrality: Prohibitive regulations of the veil in France, Germany and Turkey", in S. Rosenberger, *Politics, religion and gender: Framing and regulating the veil*, London, Routledge, 2012, 157 ("Due to Germany's federalism, its party system and its ponderous decision-making mechanisms, the competing political parties try to enforce their controversial interpretations of state neutrality and of Germany's future as a society of immigration.").

evident in the fact that certain *Länder* have adopted legislation and regulations that require (or presuppose) a stricter separation of the public and the private sphere.[76]

About half of the German *Länder* have enacted some form of regulation to restrict the wearing of religious dress – the Islamic headscarf, in particular – in certain public institutions.[77] Several of these *Länder* originally provided for exception clauses allowing the display of Christian symbols.[78] The latter marks an important difference with analogous regulations in Belgium and France (see Section 3), which are invariably phrased in neutral terms. As S. Berghahn et al. note,

> the prohibitive policies of some *Bundesländer* contradict the national legal tradition [of open neutrality]. This holds especially true for those five states where a 'Christian- occidental clause' was passed saying that the exhibition of 'Christian-occidental educational and cultural values or traditions' […] does not contravene the duty of teachers to maintain neutrality.[79]

The 'open neutrality' to which S. Berhahn et al. refer, is the dominant conception of neutrality in German constitutional law, as deduced from the constitutional framework by the Constitutional Court.[80] On the one hand, the Constitutional Court has interpreted article 4 Basic Law, which guarantees freedom of conscience and religion, as implying a duty of neutrality on the part of the state towards all religions and beliefs.[81] On the other hand, the Constitutional Court has held that the neutrality principle stems from the reality of pluralism and from the constitutional value of equality:

> The State, in which adherents of different or even opposing religious and philosophical convictions live together, can guarantee peaceful coexistence only if it itself maintains neutrality in questions of belief […] [The Basic Law bars] the introduction of legal forms of establishment of religion and forbid[s] the privileging of particular confessions or the exclusion of those of other beliefs […] The State must instead ensure treatment of the various religious and philosophical communities on an equal footing.[82]

The Court thus interprets the neutrality principle as a means to protect *other* constitutional principles and values, in particular freedom of religion, pluralism and equality. Much of this is in line with constitutional interpretation of the neutrality

[76] S. Berghahn et al, *op. cit.*, 165.
[77] Ibid., 152.
[78] Ibid.
[79] Ibid., 159.
[80] Ibid.
[81] Constitutional Court (Germany), 16 May 1995, 1 BvR 1087/91; Constitutional Court (Germany), 27 January 2015, 1 BvR 471/10 and 1 BvR 1181/10, para. 109; Constitutional Court (Germany), 14 January 2020, 2 BvR 1333/17, para. 87.
[82] Constitutional Court (Germany), 16 May 1995, 1 BvR 1087/91 (all translations, throughout this section, are from the official English translations of the Constitutional Court's judgments). See also Constitutional Court (Germany), 27 January 2015, 1 BvR 471/10 and 1 BvR 1181/10, para. 109; Constitutional Court (Germany), 14 January 2020, 2 BvR 1333/17, para. 87 ("The state must ensure that the treatment of the various religious and ideological communities is guided by the principle of equality").

principle in Belgium, especially by the Council of State (see Section 2.2). At the same time, the German Constitutional Court has deviated from its Belgian counterpart on an important point: its approach to the role division between the different branches of government concerning the constitutional interpretation of neutrality. Whereas the Belgian Court has surrendered (or deferred) its power as ultimate interpreter of the Constitution to the legislator – and in the educational context even to the governing body of public schools or colleges – the German Court has taken upon itself the ultimate responsibility of interpreting the neutrality principle.

Instead of leaving the constitutional interpretation to the legislature in the individual *Länder*, for instance in recognition of the dynamic nature of the concept of neutrality in a federal state, the Constitutional Court has given the neutrality principle further substantive content. In particular, the Court interprets neutrality as an open and overarching attitude which promotes the freedom of faith for all beliefs equally:[83]

> The religious and ideological neutrality required of the state is not to be understood as a distancing attitude in the sense of a strict separation of state and church, but as an open and comprehensive one, encouraging freedom of faith equally for all beliefs.[84]

The Court moreover construes this 'open neutrality' as the only sensible understanding of neutrality in the German constitutional framework: '[i]t is through this openness that the free state under the Basic Law preserves its religious and ideological neutrality'.[85] Living up to the requirements of open neutrality further entails positive duties for the state 'to ensure that there is room for an active exercise of religious convictions and a realisation of one's autonomous personality in the religious and ideological sphere'.[86] By adopting a relatively fine-grained substantive understanding of the neutrality principle – *qua* open neutrality – the German Constitutional Court has put important limitations on the ability of the *Länder* to regulate the display of religious symbols and the wearing of religious dress in public, as it transpires from a series of landmark judgments.

3.2. Case law of the Constitutional Court on religious symbols and dress

The Constitutional Court first introduced its understanding of open neutrality in the 1995 'Crucifix Judgment', in which it declared unconstitutional a Bavarian law requiring the posting of crucifixes in public school classrooms. In this 1995 ruling, open neutrality acts as a shield to safeguard freedom of religion and the right to equality by

[83] In the Belgian constitutional context, this is referred to as 'inclusive neutrality'. See for instance X. Delgrange, "Interdiction du voile dans l'enseignement supérieur: la Cour constitutionnelle, substitut d'un législateur paralysé", *Journal des tribunaux* 2021, Issue 2, 10.
[84] Constitutional Court (Germany), 27 January 2015, 1 BvR 471/10 and 1 BvR 1181/10, para. 110. See also Constitutional Court (Germany), 14 January 2020, 2 BvR 1333/17, para. 88.
[85] Constitutional Court (Germany), 27 January 2015, 1 BvR 471/10 and 1 BvR 1181/10, para. 111.
[86] Constitutional Court (Germany), 27 January 2015, 1 BvR 471/10 and 1 BvR 1181/10, para. 110. See also Constitutional Court (Germany), 14 January 2020, 2 BvR 1333/17, para. 88.

protecting citizens from state imposition of a particular religious display. According to the Constitutional Court, '[t]he affixing of crosses in classrooms goes beyond the boundary' of open neutrality, since 'the cross cannot be divested of its specific reference to the beliefs of Christianity'.[87] Its display in public school classrooms is therefore unconstitutional, as it discloses preferential treatment by the state of one religion to the detriment of all others and of philosophical beliefs.

In a later series of cases, the Constitutional Court had applied the principles of open neutrality not to the display of religious symbols by the state, but to the issue of the wearing of religious dress by civil servants. The Court's first judgment on the matter, in the 2003 *Ludin* case, concerned a Muslim woman who was denied employment as a public school teacher in Baden-Wurttemberg for wearing the headscarf in contravention of the public authorities' interpretation of the neutrality requirement for civil servants.[88] Although the Constitutional Court ruled in favor of the applicant on narrow grounds, given that the refusal to employ her lacked a clear legal basis, it left the substantive decision to introduce bans on religious dress to the discretion of the legislature in the different *Länder*.[89] Analogous to the Belgian Constitutional Court in its 2020 judgment, but concerning public school teachers and not higher education students, the German Constitutional Court held that the neutrality principle could accommodate both a permission *and* a prohibition on the wearing of religious dress.[90] Thus, it was not for the Constitutional Court but for the legislature in the different *Länder* to determine whether a ban should be enacted. The Court's 2003 ruling was heavily criticized by German legal scholars, among others since it entailed 'a dereliction of duty on the part of the Federal Constitutional Court'.[91] Critics noted, in particular, that the Court had erred by handing state legislatures the power to interpret constitutional principles, with immediate repercussions for the enjoyment of fundamental constitutional rights.[92]

In 2015, the Constitutional Court was given the opportunity to reconsider the matter, and came to a different conclusion. The 2015 case concerned a ban on the wearing of non-Christian religious symbols and garments by teachers in public school, introduced by the North Rhine-Westphalian legislature to safeguard state neutrality vis-à-vis pupils and parents.[93] In declaring the *Land* legislation unconstitutional, the Court held that abstract invocations of state neutrality cannot justify a ban for teachers in public schools. The Court found, in particular, that

[87] Constitutional Court (Germany), 16 May 1995, 1 BvR 1087/91.
[88] E. Haupt, *op. cit.*, 96-97; S. Toscer-Angot, *op. cit.*, 113.
[89] Constitutional Court (Germany), 24 September 2003, 2 BvR 1436/02. For discussion, see among others J. R. Leiss, "One Court, Two Voices: Case Note on the First Senate's Order on the Ban on Headscarves for Teachers from 27 January 2015: Case No. 1 BvR 471/10, 1 BvR 1181/10", *German Law Journal* 2015, 901-915.
[90] Ibid.
[91] J. M. Mushaben, "Women Between a Rock and a Hard Place: State Neutrality vs. EU Anti-Discrimination Mandates in the German Headscarf Debate", *German Law Journal* 2013, 1771.
[92] Ibid.
[93] J. R. Leiss, *op. cit.*, 903.

> the mere visibility, apparent in their outer appearance, of the religious or ideological affiliation of individual members of educational staff [in public schools] is not precluded as such by the neutrality required of the state.[94]

The Constitutional Court thus indicated instead that a ban on the wearing of religious dress by teachers in public schools could only be justified if there was a *concrete* threat to peace in schools or to state neutrality.[95] Such a threat had to be qualified, manifest, and substantial enough to justify a prohibition.[96] In the absence of any concrete threat, the visibility of certain religious symbols – in particular the Islamic headscarf – had to be accepted as merely reflecting the existence of a pluralist society within state schools.[97] As J.R. Leiss notes, the Constitutional Court thus

> made a strong plea in favor of understanding the German State's neutral role in religious matters as one of openness and inclusion of a plurality of religions and worldviews, rather than that of a laizistic (sic) polity.[98]

The German Constitutional Court's reasoning in its 2015 judgment is remarkably similar to that of the Belgian Council of State in relation to pupils, while also being crucially *different* by applying it to a category of persons in relation to which the Council of State continues to accept abstract invocations of the neutrality principles: teachers. Drawing on the religion-friendly notion of open neutrality, the German Constitutional Court is thus (even) more supportive of the right to manifest one's religion in public institutions than the Belgian Council of State.

At the same time, it is important to note that the German notion of open neutrality is not limitless. An important limit has recently been introduced by the Constitutional Court in a 2020 headscarf judgment.[99] In contrast to earlier cases, the 2020 case did not concern public education but the judicial context. The case revolved around a young woman who was barred from wearing her headscarf during her traineeship as a magistrate in the *Land* of Hesse, to preserve the neutrality of the courtroom.[100]

In its judgment, the Constitutional Court acknowledges, in line with the jurisprudence of the Belgian Council of State, that the 'state's duty of neutrality necessarily also entails a duty of neutrality for public officials since the state can only act through individuals'.[101] At the same time, however, the Constitutional Court notes that public officials should also be *differentiated* from the state, to the extent that they can exercise

[94] Constitutional Court (Germany), 27 January 2015, 1 BvR 471/10 and 1 BvR 1181/10, para. 111.
[95] Ibid, para. 80.
[96] M. Mahlmann, "Religious Symbolism and the Resilience of Liberal Constitutionalism: On the Federal German Constitutional Court's Second Head Scarf Decision", *German Law Journal* 2015, 892.
[97] Ibid., 893.
[98] J. R. Leiss, *op. cit.*, 902.
[99] Constitutional Court (Germany), 14 January 2020, 2 BvR 1333/17.
[100] Ibid.
[101] Ibid., para. 89.

fundamental rights, including freedom of religion.[102] As M. Mahlmann argues, the Court is right to note the central difference between a symbol worn by a person and a symbol displayed by the state, given that the former cannot necessarily be equated to the latter.[103] In other words, the wearing of a religious symbol by a civil servant does not, contrary to the argument from neutrality of appearance (see Section 1), *ipso facto* entail endorsement of a particular religion by the state.

The distinction drawn by the Constitutional Court between the state as an abstract entity, on the one hand, and civil servants as rights-bearing individuals, on the other hand, is central to the Court's overall interpretation of the duty of neutrality of civil servants. When it comes to assessing interferences with the freedom of civils servants to manifest their religion, the Court has held, a balancing exercise always needs to be conducted between that fundamental right and the neutrality interest pursued by the state. Whenever actions of civil servants cannot be immediately attributed to the state, the neutrality principle as such does not suffice to justify restrictions on the freedom to manifest one's religion. The wearing of a headscarf by public school teachers, as the Constitutional Court held in its 2015 judgment, falls within this category.

In the context of the justice system, by contrast, the Constitutional Court acknowledges that it can be more difficult for citizens to draw a clear line between a magistrate acting for the state and the actions of the state itself.[104] Through the justice system, the state moreover 'exercises public authority vis-à-vis the individual in the classic hierarchical sense', which 'gives rise to more serious impairments' of citizens' rights.[105] The courtroom thus differs from a public school, in the sense that the latter is 'meant to reflect society's pluralism in religious matters', whereas this is not a central feature of the former.[106] As a result of these central differences between public schools and courtrooms, the Constitutional Court finds fewer reasons to insist on strict adherence to open neutrality in the courtroom. Instead, more far-reaching restrictions of freedom of religion are allowed in the context of the justice system.

Ultimately, however, the Constitutional Court does not consider bans on religious dress for civil servants in courtrooms to be constitutionally required. Instead, the Court notes that it is unable to determine which of the two interests – neutrality or freedom of religion – should prevail 'to such an extent that it would be absolutely necessary under constitutional law to either prohibit or permit the wearing of religious symbols by the complainant in the courtroom'.[107] In a somewhat analogous move to the Belgian Constitutional Court in its 2020 judgment, although in an entirely different context, the German Constitutional Court thus ends up deferring the matter to the legislature.

[102] Ibid.
[103] M. Mahlmann, *op. cit.*, 897.
[104] Constitutional Court (Germany), 14 January 2020, 2 BvR 1333/17, para. 90.
[105] Ibid., para. 95.
[106] Ibid.
[107] Ibid., para. 102.

The brief overview of the case law of the German Constitutional Court on the notion of neutrality, as applied to issues of religious dress in different public institutions, underscores two points. First, the German Court's reasoning is (much) more nuanced and fine-grained than that of its Belgian counterpart (and to some extent also the Belgian Council of State). Second, the analysis further solidifies the observation made in Section 2 that the Belgian Constitutional Court has abdicated it central role as the ultimate interpreter of the Constitution by deferring the interpretation of the neutrality principle to the legislature, regardless of the detrimental impact this has on the enjoyment of fundamental rights by individuals. How else, but through the idea of abdication of judicial responsibility, can one explain the Belgian Constitutional Court's decision to uphold the constitutionality of a ban for adult students in higher education? In the specific context of higher education, the Belgian Constitutional Court has put Belgium on an even more restrictive path than France.

Section 4. Constitutional interpretation of *laïcité* and neutrality in France

4.1. Constitutional framework on *laïcité* and neutrality

Under article 1 of the French Constitution, 'France shall be an indivisible, secular *[laïque]*, democratic and social Republic.'[108] The constitutional text refers to the concept of *laïcité* rather than neutrality. But as already noted, it is widely accepted that the notion of *laïcité* is closely connected to that of state neutrality. To take only one example, the Commission of reflection on the application of the principle of secularism in the Republic, appointed by the President Jacques Chirac in 2003 (the so-called Stasi Commission based on the name of its president), observes in its report that 'secularism implies the neutrality of the state'.[109]

As noted above, in terms of state-religion regimes, France has a strict separation model. The foundational text is the 1905 Law on the Separation of Churches from the State, which famously states: 'The Republic neither recognizes, finances or subsidises any religion' (Art. 2).[110] At the same time, Article 1 of this Law provides that the 'Republic safeguards the freedom of conscience' and 'guarantees the free exercise of religions under the provisos enacted hereafter in the interest of public order.' Accordingly, the prohibition of state recognition and financing of religions is considered compatible

[108] Official English translation, available at https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/constiution_anglais_oct2009.pdf.
[109] Report submitted to the President of the Republic on 11 December 2003, p. 13. All translations in this section are our own, unless stated otherwise.
[110] *Loi du 9 décembre 1905 concernant la séparation des Églises et de l'État*, Article 2. It should be noted that in Alsace-Moselle, two territories that were ceded to Germany after the 1870 war and reintegrated into France after the first World War, the 1905 Law on the Separation of Churches from the State does not apply. Instead, the regime in place before the 1905 law was passed, based on the public funding of 'recognized religions', has been maintained. In a 2013 judgment, the Constitutional Council ruled that maintaining this system in Alsace-Moselle is not in breach of the principle of *laïcité* nor of any right or freedom guaranteed by the Constitution. See Decision No. 2012-297, QPC, 21 February 2013.

with certain measures aimed at facilitating the practice of a faith in specific settings. Article 2, al. 2, of the 1905 Law indeed allows state authorities to fund chaplaincies in public institutions like schools, hospitals, and prisons.[111] Moreover, private schools, the vast majority of which are denominational schools, may benefit from state funding if they meet certain conditions.[112]

4.2. Constitutional interpretation of *laïcité* and neutrality: the case of civil servants

For what regards civil servants, the French Council of State has long established that the principle of *laïcité*, as enshrined into French law, entails that they are subject to a 'duty of strict neutrality.'[113] In the 2000 *Demoiselle Marteaux* case, it inferred from there that they are prohibited from manifesting their religious beliefs during the performance of their duties, including through their appearance:

> the fact that a civil servant (...) manifests his or her religious beliefs in the performance of his or her duties, in particular by wearing a sign intended to indicate his or her membership of a religion, constitutes a breach of his or her obligations.[114]

While the case concerned a teacher, the Council of State made it clear that this rule applies to all public servants.[115] It thus resolutely opted for an interpretation of neutrality in terms of neutrality of appearance or 'exclusive neutrality'.[116] Yet the Council of State does not elaborate on the reasons that make neutrality of appearance of public servants necessary to preserve state secularism; rather it asserts it as a matter of self-evidence. This absence of justification is all the more striking that the prohibition concerns all public servants, whatever the function they perform and regardless of whether they are in contact with the public. Similarly, the Council of State does not discuss the proportionality of the restriction imposed on public agents' freedom of religion. This contrasts with the careful consideration of the justification and adequacy of similar measures that can be found in the case law of the German Constitutional Court.

Whereas the recognition of such a duty of strict neutrality for civil servants has not raised much debate in France, the progressive extension, on the basis of secularism, of

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[111] Article 2, al. 2, of the 9 December 1905 Law relating to the separation of Churches from the State. Note also that schools may propose meals adapted to dietary rules of certain religions (Council of State, 11 December 2020, Commune de Chalon-sur-Saône). See P. Weil, *op. cit*., 74-78.

[112] Loi n°59-1557 du 31 décembre 1959 sur les rapports entre l'État et les établissements d'enseignement privés (*Law on the Relations between the State and Private Education Establishment*).

[113] C.E., 3 May 1950, *Delle Jamet,* no. 28238, *Rec. CE*, p. 247, S. 1951, 3, 73.

[114] C.E., Opinion, 3 May 2000, *Demoiselle Marteaux*, no. 217017.

[115] Ibid. See O. Bui-Xuan, "Conciliation de l'obligation de neutralité religieuse et du principe de non-discrimination en droit de la fonction publique", *Revue du droit des religions* 2017, No. 4, available at http://journals.openedition.org/rdr/673.

[116] This rule has now been enshrined in the law. As modified by the Law No. 2016-483 of 20 April 2016 relating to the deontology and rights and obligations of public servants (*Loi relative à la déontologie et aux droits et obligations des fonctionnaires*), Art. 25, 3d al., of the Law No. 83-634 on the rights and obligations of public servants (*Loi portant droits et obligations des fonctionnaires)* provides that "Public servants shall perform their duties in accordance with the principle of secularism. Accordingly, they shall refrain from manifesting their religious opinions in the performance of their duties".

a similar obligation to other categories of individuals has been more controversial. This evolution has occurred against the background of heated debates over the integration of Islam in French society and, in particular, over the practice of the wearing of headscarves by Muslim women.[117]

4.3. The case of public school pupils and other users of public services

The controversy first arose in relation to pupils of public schools. In 1989, after three Muslim teenagers were excluded from their secondary schools for insisting on wearing a headscarf, the minister of education asked the Council of State to determine whether the display of religious symbols by pupils was compatible with the principle of secularism. In its opinion delivered on 27 November 1989, the Council of State replied that it was:

> […] in schools, the wearing by pupils of signs by which they intend to manifest their membership of a religion *is not in itself incompatible with the principle of secularism [laïcité]*, insofar as it constitutes the exercise of the freedom of expression and manifestation of religious beliefs.

It added that this freedom could be restricted only where such restriction was necessary to preserve certain legitimate objectives:

> this freedom cannot allow pupils to display signs of religious affiliation which, by their nature, by the conditions in which they are worn individually or collectively, or by their ostentatious or demanding nature, would constitute an act of pressure, provocation, proselytizing or propaganda, would undermine the dignity or freedom of the pupil or other members of the educational community, compromise their health or safety, disrupt the conduct of teaching activities and the educational role of teachers, or disrupt order in the school or the normal functioning of the public service.[118]

Importantly, the Council of State clarified that the principle of secularism of public education required that education be provided in accordance with the neutrality of public services, on the one hand, and freedom of conscience of pupils, on the other hand. Pupils, therefore, were free to manifest their religion within education establishments, subject to the restrictions necessary to pursue certain legitimate objectives.

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[117] See i.a. Ph. Raynaud, *La laïcité. Histoire d'une singularité française*, Paris, P.U.F., 2019,185-226 ; G. Calvès, *Territoires disputés de la laïcité*, Paris, P.U.F., 2018, 19-60 ; A.-S. Lamine, "Les foulards et la République", *Revue des sciences sociales* 2006, 154-165; J. Bowen, *Why the French Don't Like Headscarves. Islam, the State and Public Space*, Princeton, Princeton University Press, 2006; "Le voile en procès", *Droit et société* 2008/1, No. 68; V. Amiraux, "L' 'affaire du foulard' en France : retour sur une affaire qui n'en est pas encore une", *Sociologie et sociétés* 2009, 273-298; S. Hennette-Vauchez et V. Valentin, *L'affaire Baby Loup ou la nouvelle laïcité*, Paris, LGDJ, 2014 ; P. Weil, *op. cit.*, 58-65 and 79-83.

[118] Opinion of the Council of State, 27 November 1989, No 346893 (our emphasis).

Fifteen years later, in 2004, a law was finally adopted to prohibit 'the wearing of signs or clothing by which pupils ostensibly manifest a religious affiliation' in public schools, colleges and lycées.[119] The fact that a legislative reform was necessary indicates that such a rule did not clearly flow from the constitutional principle of secularism as it had been understood until then. As a result, pupils in public schools are now also subject to a duty of neutrality of appearance.

The extension of such a strict duty of neutrality to *users* of public services has, however, been limited to the context of education, and more specifically, to primary and secondary education. It has sometimes been proposed to extend it to higher education students, but this suggestion never received the support of the government nor of the majority of the Parliament.[120] Interestingly, the Commission of reflection on the application of the principle of secularism in the Republic, which in 2003 recommended banning the wearing of religious symbols in public schools, stated in its report that such a measure would be inappropriate in higher education:

> The situation of the university, although an integral part of the public education service, is quite different from that of the school. People of legal age study there. The university must be open to the world. There is therefore no question of preventing students from expressing their religious, political or philosophical convictions.[121]

This comment is interesting to contrast with the reasoning held by the Belgian Constitutional Court in the judgment No. 81/2020 commented on above.

In a study published in 2013 clarifying the meaning and implications of *laïcité* in French law, the French Council of State emphasized that users of public services are not, in principle, subject to the requirement of religious neutrality. Their situation, it insists, is different from that of public servants:

> whereas [public service] agents personify a service that must be neutral, users personify only themselves. Within the framework of secularism, users of the public service may therefore express their religious opinions, provided that this expression does not constitute a disturbance of public order or the proper functioning of the service.[122]

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[119] Law No. 2004-228 of 15 March 2004 regulating, in application of the principle of secularism, the wearing of signs or clothing manifesting a religious affiliation in public schools, colleges and lycées (*Loi encadrant, en application du principe de laïcité, le port de signes ou tenues manifestant une appartenance religieuse dans les écoles, collèges et lycées publics*). See also Article L. 141-5-1 of the Code of education.

[120] In February 2015, a bill providing for such an extension was submitted by an MP but was not adopted (see Calvès, *op. cit.*, n°78). Another bill, aimed at "extending the principle of *laïcité* to users of public services", was submitted on 24 June 2016. It was not adopted either. See Calvès, *op. cit.*, n°78.

[121] Stasi Commission Report, 60.

[122] Study requested by the Defensor of Rights on 20 September 2013 (*Étude demandée par le Défenseur des droits le 20 septembre 2013*), adopted by the Council of State general assembly on 19 December 2013, p. 30, available at https://www.defenseurdesdroits.fr/sites/default/files/atoms/files/ddd_avis_20130909_laicite.pdf.

4.4. The broadening scope of the duty of neutrality of appearance: from civil servants to any person performing a public service mission

The duty of neutrality of appearance has nonetheless been extended, since the 2010s, to ever wider categories of people through a different route, consisting in equating with civil servants, for what regard the requirement of neutrality, certain people who are not employed by public authorities. This evolution has primarily concerned employees of private entities carrying out a public service mission. These employees have traditionally been considered as subject to private law obligations only.[123] But in its 19 March 2013 judgment in *CPAM de Seine St Denis*, the social chamber of the Court of Cassation[124] has held that employees of such entities are, like public servants, subject to a duty of strict neutrality and therefore prohibited from manifesting their religious beliefs "by external signs, in particular clothing", and this regardless of whether they are in contact with the public.[125] In so doing, the Court of Cassation has considerably extended the scope of application of the obligation of neutrality of appearances. Its reasoning is based on the argument that the principles of neutrality and secularism of public services are applicable to all public services, including when they are provided by a private law entity. But no more than the Council of State in the *Demoiselle Marteaux case*, has the Court of Cassation provided an explanation of why secularism and neutrality of public services would be undermined if an employee of such an entity was wearing a sign revealing his or her religious beliefs, especially where this employee has no contact with the public.

In another judgment issued on the same day, the social chamber of the Court of Cassation specified by contrast that the principle of *laïcité* established under article 1 of the Constitution "does not apply to employees of private law employers who do not manage a public service". The case concerned an employee of a private nursery (called *Baby Loup*) who was dismissed for insisting on wearing a headscarf.[126]

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[123] S. Hennette-Vauchez, "L'Etat néo-libéral face à lui-même. Quand l'affirmation des valeurs républicaines bute sur le recul du service public", *A.J.D.A.* 2022, 570.

[124] The French Court of Cassation is composed of three civil chambers, one criminal chamber and one social chamber. The social chamber deals with labour law cases. When major questions of principle are at stake, the Court may rule in plenary assembly, where all six chambers are represented.

[125] Court of Cassation, social chamber, 19 March 2013, *CPAM de Seine St Denis*, No. 12-11690 (concerning the case of a health insurance fund's employee). On this case, see i.a. S. Hennette-Vauchez et V. Valentin, *L'affaire Baby Loup ou la nouvelle laïcité*, Paris, LGDJ, 2014, 32 and J.-D. Dreyfus, "La gestion d'un service public conditionne l'application des principes de neutralité et de laïcité aux organismes privés", *A.J.D.A.* 2013, 1069.

[126] The Court of Cassation nonetheless suggested that an obligation of neutrality of appearance could be imposed by a private organization on its employees if it was provided for in a sufficiently precise clause of its internal rules. Considering that *in casu* the organization's internal rules, which referenced the principles of *laïcité* and neutrality, were too general and imprecise, it found that the dismissal was discriminatory (Court of Cassation, social chamber, 19 March 2013, No 11-28845, *Baby Loup*). Tasked with re-examining the case, the Appeal Court of Paris however held that the dismissal was justified on the ground that an organization which fulfils a mission that serves the general interest and which receives public subsidies can choose to impose an obligation of neutrality on its personnel and hence be considered as an "ethics-based organization", allowing it to make distinctions based on religion (Appeal Court of Paris, 27 November 2013, No 13/02981). The case came back before the Court of Cassation. Meeting in plenary assembly this time, it held that this latter justification was invalid. Yet, it found that the restriction to the religious freedom of its employees the organization provided for in its internal rules was after all sufficiently precise, justified by the nature of the tasks performed by the employees and proportionate to the objective sought (Court of Cassation, 25 June 2014, General assembly, No 13-28369). On this case, see Hennette-Vauchez and Valentin, *op. cit.*; P. Adam, "Affaire Baby-Loup : vues du sommet", *Rev. dr. trav.* 2014, n°10, 609 ; J. Mouly, "L'affaire Baby loup devant la Cour de renvoi : la revanche de la laïcité ?", *Recueil Dalloz* 2014, 67 ; P. Delvolvé, "Entreprise privée, laïcité, liberté religieuse. L'affaire

The evolution signaled by the Court of Cassation judgment in *CPAM de Seine St Denis* has been confirmed and enlarged by the French legislator. Article 1 of the Law consolidating the respect of the principles of the Republic, adopted on 24 August 2021,[127] provides for an even wider application of this duty of neutrality of appearance. It imposes on public and private law bodies entrusted by law or regulation of the performance of a public service a new obligation, that of ensuring that their employees – and any person over whom they exercise hierarchical authority – refrain from manifesting their political or religious opinions when they take part in the performance of a public service. The same obligation is established for companies holding a public order contract whose purpose is, in whole or in part, the performance of a public service. Moreover, this duty of strict neutrality extends to employees of subcontractors if they participate in the performance of a public service mission.[128] The range of workers that could be concerned by this obligation is extremely wide: it includes employees contributing for instance to waste collection, water purification services, maintenance of parks and gardens, preparation and delivery of school meals, funeral services, etc.[129] The impact study carried out before the adoption of the bill admits that it is impossible to evaluate the total number of contracts nor the number of employees that will be concerned by this rule.[130]

The tendency to equate with civil servants certain categories of people who do not work for public authorities can also be observed in the case of parents accompanying school outings. Some schools have decided, based on the principle of secularism, to prohibit these parents from wearing signs revealing their religion. These bans have been contested in administrative courts which have issued contradictory decisions.[131] One tribunal found that parents in this situation were 'participating in the public service of education' and, as such, subject to a duty of strict neutrality like public service agents.[132] Others, by contrast, insisted that parents were not public agents and therefore not concerned by such a duty.[133] In its above-mentioned 2013 study (see section 4.2), the Council of State endorsed this latter view:

Baby-Loup", *R.F.D.A.* 2014, 954-961; and D. Dockès, "Liberté, laïcité, Baby Loup : de la très modeste et très contestée résistance de la Cour de cassation face à la xénophobie montante", *Dr. soc.* 2013 388. Since then, a new provision was inserted in the French labour code in 2016 which allows private companies to include the principle of neutrality in their internal rules and to restrict the freedom of their employees to manifest their convictions if these restrictions are justified by the exercise of other fundamental rights or by the needs of the proper functioning of the company and are proportionate to the aim sought (art. L1321-2-1 Labour code). On the case-law of the ECJ and the ECtHR regarding the prohibition of religious symbols by private companies, see above footnote 20.

[127] Law No. 2021-1109 du 24 août 2021 confortant le respect des principes de la République.

[128] See S. Hennette-Vauchez, "L'Etat néo-libéral face à lui-même", *op. cit.*

[129] Ibid.

[130] *Étude d'impact. Projet de loi confortant le respect des principes de la République*, 8 December 2020, 37 (available at https://www.legifrance.gouv.fr/contenu/Media/Files/autour-de-la-loi/legislatif-et-reglementaire/etudes-d-impact-des-lois/ei_art_39_2020/ei_intx20300831_cm_9.12.2020.pdf (last visit: 2 June 2022).

[131] A. Blouet, "Le droit administratif face aux parents accompagnateurs de sorties scolaires : enjeux de catégories individuelles et réflexion sur les justifications du régime de laïcité", *Revue des droits de l'homme* 2020.

[132] Administrative tribunal of Montreuil, 22 Nov. 2011, No. 1012015, *Mme O.*, *A.J.D.A.* 2012, 163 note S. Hennette-Vauchez. [e] See Administrative tribunal of Amiens, 15 December 2015, No. 1401797, *Mme Loubna A.* and Administrative tribunal of Nice, 9 June 2015, No. 13°5386, *A.J.D.A.* 2015, 1125 and 1933, note C. Brice-Delajoux.

> Between the agent and the user, the law and case law have not identified a third category of 'collaborators' or 'participants', which would be subject as such to the requirement of religious neutrality.[134]

Accordingly, the principle of secularism cannot justify a general ban on the wearing of religious symbols by accompanying parents. With some ambiguity, however, the Council of State in the same study observes that, in the case of parents taking part in school trips or activities, a school may, 'based on the requirements linked to the proper functioning of the public service of education […], *recommend* that they refrain from manifesting their religious affiliation or beliefs'.[135] But the Council of State does not specify why and how the manifestation of a religious affiliation or belief by a parent can be detrimental to the proper functioning of the public education service. It also talks about *recommendation* and not *obligation*, leaving it unclear what level of constraints a school can impose on parents who offer to accompany school outings.

Conclusion

In the last 30 years, the highest courts in Belgium, Germany and France have repeatedly assessed the constitutionality of bans on the wearing of religious symbols in public institutions. In all three countries, the decisions of the courts have been shaped by the interpretation given to the constitutional principle of state neutrality towards religion and convictions. As shown throughout this contribution, the conclusions arrived at and the reasoning adopted by the relevant courts differ from country to country. In Belgium, internal variations can moreover be observed between the Council of State and the Constitutional Court.

With regard to a first category of individuals, civil servants, the highest courts in all three countries agree that the principle of state neutrality entails that this category of individuals is subject to a duty of neutrality. Yet, the implications of this duty are understood differently in France, Belgium and Germany. The French Council of State has held that the principle of *laïcité*, as established by the French Constitution, entails that all civil servants are subject to a duty of strict neutrality, meaning that they are forbidden from wearing any sign or clothing that reveals their religious beliefs. Neutrality is thus understood as an obligation of 'neutrality of appearance' for civil servants. The Belgian Council of State and the German Constitutional Court, by contrast, consider that civil servants' obligation of neutrality primarily concerns their actions: for a civil servant, being neutral means treating all citizens equally and refraining from favoring one religion or conviction over others. Moreover, the wearing

[e] Study requested by the Defensor of Rights, *op. cit.*, 30.
[135] Ibid., 34 (our emphasis).

by a civil servant of a sign or dress revealing their affiliation with a religion cannot be equated with an endorsement of this religion by the state.

Accordingly, the Belgian Council of State and the German Constitutional Court have concluded that a general ban on the wearing of religious symbols is not necessary to ensure the neutrality of civil servants since merely wearing a particular garment does not amount to acting in a biased way. Both institutions nonetheless acknowledge that a ban could in specific circumstances be justified by a somewhat different objective, namely that of reinforcing citizen's trust in the neutrality of the civil service by avoiding the risk that civil servants are perceived as partial. However, this justification does not hold for any civil servant, since the restriction that a ban entails on the right to religious freedom always has to be proportionate to the aim pursued. Amongst others, the need for a ban thus has to be assessed in the light of the functions performed by the category of civil servants at issue.

To be sure, the diverging stance of the French Council of State in relation to civil servants has to be understood in the light of the specific French regime of state-religions relations, that is characterized by a strict separation and thus differs from the Belgian and German systems of flexible separation. Yet, the fact remains that the French Council of State does not explain why the wearing of a religious sign by civil servants, regardless of the functions they perform and whether or not they have contact with the public, undermines state neutrality and the objectives this principle is supposed to serve, namely the right to equality and freedom of conscience. Nor does the French Council of State engage in any proportionality review. The necessity of a ban is simply taken for granted. A similar attitude can be observed on the part of the French Court of Cassation. In its 2013 judgment in the *CPAM de Seine St-Denis* case, the Court of Cassation has considerably extended the scope of application of the duty of neutrality by holding that not only civil servants, but also employees of private entities performing a public service are subject to an obligation of neutrality understood as neutrality of appearance. However, the Court has failed to explain why *laïcité* and state neutrality would be undermined if an employee of such an entity would wear a religious symbol.

Concerning a second category of individuals, pupils in public schools, the approach of the French Council of State in its 1989 advisory opinion is similar to that of the Belgian Council of State. Both institutions have held that the principles of *laïcité* and neutrality, respectively, do not require prohibiting pupils from wearing signs by which they indicate their affiliation with a certain religion. Instead, a ban can only be justified when there is concrete evidence of a threat to the public order or the rights of others. It was ultimately through a law that a general prohibition on the wearing of 'ostentatious religious signs' by pupils in public schools was established in France,

which arguably confirms that such a measure could not be derived directly from the constitutional principle of *laïcité* as it had been understood until then.

Regarding other users of public services, finally, the French Council of State has made it clear in its 2013 study on the concept of *laïcité* that these users are not subject to any duty of neutrality, since contrary to civil servants they do not represent the state. The French Council of State has thus clearly rejected the view that an obligation of neutrality would apply to any person who enters a public institution. It has instead recalled that the obligation to be religiously neutral applies to the state, and by extension to the civil servants through which it acts, but not to society in general.

Against this background, the position adopted by the Belgian Constitutional Court concerning the ban on the wearing of religious symbols by (adult) students in higher education is puzzling. The Constitutional Court has accepted that such a ban – which concerns users of a public service – can be justified by the choice of a higher education institution to apply a specific understanding of neutrality of education, as implying the exclusion of any religious sign or dress regardless of who is wearing it. Yet, the Court did not explain how the wearing of a religious symbol by a student could jeopardize the neutrality of education. To be sure, the Court has suggested that a ban could also be justified by the necessity to protect the rights of other students. But contrary to the Belgian Council of State in cases concerning pupils in secondary schools, the Constitutional Court did not require that the concerned authorities provide concrete evidence that the display of religious symbols or dress by some students threatened the freedom of conscience of others. In effect, the Court has deferred entirely to the understanding of neutrality defended by the governing body of the school. It has thereby surrendered its power to check how the executive and the legislature interpret the constitutional principle of neutrality, despite the fact that a serious restriction of a fundamental right was at issue.

This reasoning of the Belgian Constitutional Court echoes that of the French Council of State and Court of Cassation on civil servants and employees of private entities carrying out a public service mission. These cases are part of a regrettable trend in which neutrality is equated with neutrality of appearance and treated as an end in itself, detached from the objectives it is supposed to serve. The *raison d'être* of state neutrality and secularism, that of preserving individuals' freedom of conscience and right to equality, is thereby neglected. The scope of neutrality is transformed in the process: the mere visibility of individuals' religious affiliation becomes a problem, without any evidence being required that the attitude of these individuals actually endangers the rights of other people. One has to wonder whether such a conception of neutrality can be reconciled with respect for pluralism and the diversity of views and beliefs that characterize a democratic society.