All Education Is Free, but Some Initiatives Are Freer than Others. The End of Jewish Education in Flanders?

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1. Introduction

"Education is free; any preventive measure is forbidden […]". The starting phrase of article 24 (former article 17) of the Belgian Constitution lays out the most fundamental principle of Belgian education law: the active freedom of education. Active educational freedom guarantees the autonomy of Catholic, Jewish, Protestant and Muslim schools as well as of schools based on a specific pedagogical project such as Waldorf, Freinet and Montessori.

Thus, the Belgian constitutional appears as more liberal than the European Convention on Human Rights (ECHR). The latter does, through the second article of its first protocol, guarantee parents the right to ensure their children an education and teaching in conformity with their own religious and philosophical convictions. Contrary to what is the case within the Belgian constitutional framework, a right to establish schools in conformity with specific religious, philosophical and even pedagogical convictions is not guaranteed, nor is – according to Strasbourg jurisprudence – the right to homeschooling.

Although back in 1831, the Belgian Constituent Assembly considered this "freedom of education" as essential as the freedom of religion or the freedom of the press, it has recently come under pressure due to policy of the Flemish Community aimed at the reinforcement of both educational quality and equality. The curtailing effect of this educational policy is most intensely felt in methodological schools and (Orthodox) Jewish schools. This paper focusses on the latter. To sketch the extent to which educational autonomy has been hampered recent legislation of the Flemish Community and case law of the Constitutional Court and the Conseil d'Etat relating to Jewish education are discussed (3). Before looking at the specific situation of (ultra-Orthodox) Jewish education, this paper briefly handles how the freedom of education has come into existence, what it means, and how the role of the government in education has been questioned, both in the past and today (2).

2. The freedom of education

The freedom of education was enshrined in the Constitution when Belgium became independent in 1830 as a reaction to the centralized education policy of the first French and then Dutch 'occupier' that was considered too activist. At the time, the existing catholic educational initiatives desired a constitutional guarantee to be able to provide education independent from government intervention. Faithful to the motto of the Constituent Assembly – "Liberté en tout pour tous" (Liberty in all matters, for all) – both the catholic and the liberal members supported the creation of a freedom of education, which was considered as the logical continuation of the freedom of religion, the freedom of the press

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All judgments of the Belgian Constitutional Court to which this article refers can be found on http://www.const-court.be in French, Dutch and German. All judgments of the Belgian Conseil d'Etat to which reference is made can be found through http://www.raadvst-consetat.be/?lang=en&page=caselaw_page4 in their original language.

and the freedom of association[1]. In the words of Abbot Van Crombrugghe, member of the Constituent Assembly: "*Gentlemen, as we want freedom of religion and the press, we also want freedom of education; today, the one cannot exist without the other*"[2].

Since Belgian independence (and its enshrinement in the Constitution) the active freedom of education has been subject to vivid debate. Two periods in which this fundamental right was being discussed can be distinguished. In a first period, which started shortly after Belgian independence in 1830 and did not end until a School Pact was signed in 1958, debate was focused on the subsidiary or autonomous role to be played by state schools, next to private initiatives (2.1). The seeds of the second period of debate were sown at the end of the 1980s when the competence for educational policy was transferred from the federal level to the Communities. The latter were more active in developing an educational policy appearing, at least in some points, intrusive towards schools' autonomy (2.2).

2.1 First debate: primacy of Church or State in education

Shortly after Belgium became independent, it became clear that the consensus built up around the motto of "liberté en tout pour tous" was not as strong as it first appeared. With the falling apart of the 'Union' between Catholics and Liberals, the united opposition against the Netherlands, two different views on education arose[3]. The Catholic vision on education was that private (i.e. Catholic) educational initiatives were to form the core of the educational system. According to that vision, public schools should be limited to a subsidiary role: only in towns were private initiative would not suffice the needs, towns, provinces and the state itself could organize schools. As the state could rely on (catholic) private initiative to provide education, freeing it from the duty to do so itself, some governmental support, in the form of subsidies, was considered logical. Catholic religious education was considered part of the normal school curriculum.

The vision of the Liberals differed. Contrary to the subsidiarity view of their catholic opponents, liberals promoted the idea of an autonomous public school system, in which religious education had no place. Private educational initiatives were free to organize themselves, as long as they did so at their own costs.

Two 'School Wars' had to pass before this debate could be closed. Both in 1878-1884 and in 1950-1958 the succeeding Catholic and Liberal (or Liberal-Socialist in the 1950s) governments imposed their own vision on education, leading to a constant alternating educational policy. A durable 'school peace' was achieved when the three opposing parties – Christian Democrats on the one hand, Liberals and Socialists on the other – concluded the 1958 'School Pact'[4]. This pact, often recalled as one of the examples of Belgian compromise building, provided a dual school system. On the one hand, the autonomy of public schools was confirmed, leading to a certain expansion of this school type. On the other hand, a subsidy system for private schools was set up, guaranteeing the consolidation of a broad system of catholic schools.

Although only a very limited number of children falls under it, a third option has remained available to parents: next to official schools and subsidized private schools, parents can opt for unsubsidized private education[5]. Within this category two options can be distinguished. On the one hand, there are what we could call private schools *sensu stricto*. As Belgium does not know a system of compulsory school

1 C. Glenn and J. De Groof, *Balancing Freedom, Autonomy and Accauntability in Education Volume 2*, Nijmegen, Wolf Legal Publishers, 2005, 20.

2 E. Huyttens, *Discussions du Congrès national de Belgique (1830-1831)*, Brussel, Société typographique belge, 1844, Title 1, p. 634 (own translation).

3 M. El Berhoumi, *Le régime juridique de la liberté d'enseignement à l'épreuve des politiques scolaires*, Brussels, Bruylant, 2013, p. 59-82; L. Veny, *Onderwijsrecht I. Dragende beginselen*, Brugge, Die Keure, 2010, p. 7-8.

4 School Pact of November 20 1958, made legally enforceable by the Law of May 29 1959, *MB* June 19 1959.

5 C. Glenn and J. De Groof, *Balancing Freedom, Autonomy and Accauntability in Education Volume 2*, Nijmegen, Wolf Legal Publishers, 2005, p. 34 and 36.

attendance ("schoolplicht"), but only compulsory education ("leerplicht"), home school education is part of this category too[6].

Scheme 1: the Belgian educational system

<table>
<tr><th colspan="2">Public schools</th><th colspan="3">Subsidized private schools</th><th rowspan="2">Private schools s.s.</th><th rowspan="2">Home school education</th></tr>
<tr><td>State financed schools</td><td>Subsidized public schools</td><td colspan="2">based on religious convictions</td><td>based on pedagogy</td></tr>
<tr><td>Community Education</td><td>municipality + province</td><td>Catholic</td><td>Jewish
Muslim?</td><td>Freinet, Steiner …</td><td></td><td></td></tr>
</table>

2.2 Second debate: quality and equality in education versus schools' autonomy

The School Pact has worked as a petrification spell on education policy. The years after its conclusion were characterized by a durable 'school peace' in which the government was very reticent and careful in (not) regulating education. Until 1988 education thus remained free from big controversy. When, in that year, the competence for education was transferred from the federal level to the Communities, some feared a revival of the old 'School Wars'. To prevent this scenario the School Pact principles were 'constitutionalized' in article 24 of the Belgian Constitution, and the Constitutional Court was given jurisdiction on the compliance with this article[7].

The 1988 constitutional amendment has had two major consequences. On the one hand, delegating jurisdiction to the Constitutional Court has allowed a clarification[8] of the meaning and scope of the principles enshrined in article 24 of the Constitution, the active freedom of education included. For example, the Constitutional Court has been able to confirm the earlier jurisprudence of the Conseil d'Etat that educational freedom does not only guarantee a right of existence of catholic schools but also of schools based on specific pedagogical convictions[9].

On the other hand, shifting the competence for education to the Communities seems to have broken the spell that had been petrifying educational policy for almost 30 years. Contrary to tendencies to deregulation in other fields, the educational policy of the Flemish Community[10] has broadened over the last 30 years[11]. Government action aimed at the reinforcement of both educational quality and equality has curtailed schools' autonomy. The role of private initiatives and of government in education is thereby questioned once again, be it differently: the autonomous role of state schools and subsidization of private schools is no longer questioned. What is questioned is the level of government intervention aimed at enforcing educational quality and equality.

Traditionally, government intervention is justified by the subsidizing system that came forth of the 1958 School Pact. The Constitutional Court has confirmed that, in order for the freedom of education

6 See e.g. Constitutional Court March 1 2005, n° 48/2005, B.7.

7 See C. Glenn and J. De Groof, *Balancing Freedom, Autonomy and Accauntability in Education Volume 2*, Nijmegen, Wolf Legal Publishers, 2005, p. 20, 29 and 30.

8 In the early 1990's this evolution was still considered a 'forthification' of the freedom of education (e.g. L. Lenaerts, "Eindtermen en vrijheid van onderwijs", *TORB* 1994-1995, p. 317). As will become clear further in this paper, the Constitutional Court has not proven itself to be a clear defender of educational freedom, balancing it against sometimes rather pragmatic policy concerns.

9 Constitutional Court April 2 1992, n° 25/92, 4.B.1; Conseil d'Etat May 31 1985, n° 25.423, *TBP* 1986.

10 The same evolution is taking place in the French Community. See El Berhoumi, *Le régime juridique de la liberté d'enseignement à l'épreuve des politiques scolaires*, Brussels, Bruylant, 2013, p. 435-666.

11 C. Glenn and J. De Groof, *Balancing Freedom, Autonomy and Accauntability in Education Volume 2*, Nijmegen, Wolf Legal Publishers, 2005, p. 59.

to be more than mere theory, private schools can apply, under certain conditions, for subsidies[12]. At the same time, the Constitutional Court has made clear that those subsidies can be made dependent on the fulfillment of conditions "related to the public interest, among which qualitative education and the respect of school population norms, and the necessity to divide the available financial resources among the different responsibilities of the Community."[13] The infringement on schools' autonomy made by those conditions should not be disproportionate in comparison with the pursued goals.

Thus, the Constitutional Court has ruled in a number of cases that the freedom of education, often in combination with the freedom of religion and the freedom of association, does not preclude the government from posing certain conditions to its financial support with regard to quality and equality of education. It concerned conditions such as:

- the implementation of common standards for school curricula (at the condition that schools would keep some flexibility as to the realization of their own pedagogical project)[14];
- the obligation for institutions of higher education to form an 'association' with a university[15];
- the obliged representation of at least 20% of students in certain decision bodies of the universities[16];
- the competence of a school headmaster, determined by decree, and the obliged choice of a headmaster from the group of subsidized staff[17];
- and the introduction of a right of enrolment at the school of once choice for anyone who formally agrees with the pedagogical project and with the school regulations[18].

In this jurisprudence a first paradox can be observed: to be able to enjoy the freedom of education, financial support is deemed necessary; but the acceptance of those subsidies comes with a range of conditions, limiting the freedom of education. As government intervention increases, it seems that educational freedom is more and more limited to those rare educational institutions that can provide financial means of their own, those falling under the category of private education *sensu stricto*.

Recently, however, a new justification for government intervention seems to have arisen, which does not even spare private education *sensu stricto*. The right of children to education, and to education of a certain quality, seems to have become a justification for government intervention on its own. In the last ten years, the Constitutional Court has accepted a limitation of the freedom of education in this regard in four different judgements on home school education[19]. The Court accepted that the legislator can impose conditions, among which the obliged participation in a centrally organized exam, to be able to fulfil the obligations of compulsory education outside of the financed (state schools) or subsidized educational system[20].

Recourse is thereby made to certain international human rights instruments, such as articles 28 and 29 of the Convention on the Rights of the Child, which guarantee the right of the child to education that allows it to develop its personality and talents to its fullest potential and that prepares the child for responsible life in a free society[21].

A second paradox arises: while active educational freedom consists of the right to teach in conformity with one's own religious, philosophical or pedagogical convictions – which requires a certain restraint

12 Constitutional Court, March 1 2005, n° 48/2005, B.9.
13 Constitutional Court May 5 2004, n° 67/2004, B.8.2 (own translation)
14 Constitutional Court, December 18 1996, n° 76/96, B.9-B.10 and Constitutional Court, February 18 1998, n° 19/98, B.8.4.
15 Constitutional Court, February 23 2005, n° 44/2005, B.20.2.
16 Constitutional Court, March 1 2005, n° 48/2005, B.9.
17 Constitutional Court, February 17 1999, n° 19/99, B.4.4 and Constitutional Court, October 17 2007, n° 132/2007, B.6.2.
18 Constitutional Court, October 8 2003, n° 131/2003, B.5.4.
19 Flemish Decree of July 19 2013, *MB* August 27, 2013. See further with regard to the specific impact of this regulation in Jewish education.
20 Constitutional Court, May 8 2014, n° 80/2014 and Constitutional Court, May 21 2015, n° 60/2015.
21 Constitutional Court, May 8 2014, n° 80/2014, B.42.2 and Constitutional Court, May 21 2015, n° 60/2015, B.41.3.

from the government – that same government is required to guarantee the quality of the provided education.

3. The case of Jewish education

Although government intervention has consequences for all private schools, the curtailing effects of this educational policy is most intensely felt in methodological and (ultra-Orthodox) Jewish schools. In what follows the focus will be laid on Jewish schools. Three arguments underpin that choice. Firstly, Jewish education initiatives represent only a smart pie of the education chart. Contrary to the network of Catholic schools, Jewish educational initiatives therefore have no guaranteed 'seat at the table' of policy initiatives. This is for instance felt in the absence of Jewish institutions in the Flemish Education Council (VLOR), which played an important role in the creation of specific common standards for education (see further). Secondly, the Jewish community is particularly dense, even strongly segregated, in comparison to other religious groups. This is also felt in education: a very high number of Jewish children is being educated in Jewish schools, whether subsidized or private *sensu stricto*[22], and the particularity of Jewish education is stronger than that of e.g. Catholic schools. Lastly, I believe the case of Jewish education to show best how government intervention can hamper educational freedom, because of the specific impact government initiatives have had upon it.

The scope of this article is further limited to compulsory education, leaving initiatives of higher education and the potential infringement upon them aside. Within that category three governmental initiatives with a strong impact on schools' autonomy are highlighted: the introduction of common standards for school curricula (A.); the Decree on Equal Education Opportunities of 2002 which provided a principal right of enrolment in the school of one's choice (B.); and the 2013 decree in which home school education was regulated more strictly (C.).

3.1 Common standards for school curricula

The Flemish legislator introduced a concept of common standards for school curricula ("eindtermen") as part of the reform of the government supervision on and inspection of schools[23]. Belgium has a system in which recognized schools can award diplomas directly to their pupils. This leaves a need to guarantee schooling quality in another way than through centralized exams. Earlier a meticulous inspection of diplomas was conducted by a homologation commission. By setting out the minimum goals pupils had to achieve, and by conferring control over the translation of those goals into school curricula to the school inspection, common standards for school curricula were introduced to replace the earlier system.

Although the imposition of learning goals on schools can be seen as hampering educational freedom, some measures have been taken to limit their detrimental effect (1.). The case of Baïs Rachel, a Jewish Orthodox primary school, shows how those might not suffice to protect schools' autonomy (2.). In 2018 the legal framework surrounding the common standards was intensely altered.[24] This however did not result in an increase of school's autonomy (on the contrary). As the relevant case law is based on the original legislation, our focus will be on that legal framework.

22 Less than 3% of religious Jewish children is going to state schools (Interpretation of cyphers from the "Statistisch Jaarboek" for the scholastic year 2013-2014 in A. Overbeeke, "De keuze voor levensbeschouwelijk onderricht in officiële scholen in de Franse Gemeenschap beoordeeld door het Grondwettelijk Hof", *TORB* 2014-2015, p. 20).

23 See also: C. Glenn and J. De Groof, *Balancing Freedom, Autonomy and Accauntability in Education Volume 2*, Nijmegen, Wolf Legal Publishers, 2005, p.59-67.

24 See: Flemish Decree of 26 January 2018 amending the Decree on Elementary Education and the Code on Secondary Education, concerning learning objectives, and amending the Decrees on the legal position of educational staff, *MB* 9 March 2018.

3.1.1. Common standards: an attenuated threat to educational freedom?

Although the idea was to provide only a set of *minimum* goals pupils had to achieve at the different levels of education – which would leave the freedom of education intact – the elaboration of those goals by the administration and the Flemish Education Council (VLOR) led to an extensive and detailed list of common standards[25]. As the final sanction of schools not implementing that extensive list of common standards is rather force – they risk to lose their recognition and their subsidies – the suggestion was made that common standards took away all freedom of education with regard to the provided content, limiting the concept of educational freedom to a freedom of methods[26].

The legislator seemed aware of the potential threat common standards could become to the freedom of education. A number of measures was therefore taken to limit the detrimental effects of the newly created concept. A first measure is the strong involvement of the VLOR in the development of the common standards. As the VLOR is composed of representatives of both official and private schools[27], and its advice is only formulated after a broad consultation, involvement of the educational field is guaranteed, which might limit the extent to which the proposed standards contradict their pedagogical projects. Both Steiner schools (that filed an action for annulment against the common standard legislation) and Jewish schools are nevertheless not (directly) represented in the VLOR[28].

Secondly, in 1993 the legal basis of common standards was amended a first time to exclude courses of religion and philosophy from having common standards[29], leaving decisions on the content of those courses open to the schools and/or responsible religious communities. This decision was perfectly in line with the specific status of religion in the Belgian education system. As a third measure to be mentioned, in 1995 the concept of "development goals" ("ontwikkelingsdoelen") was introduced to (partly) replace the concept of "common standards" for nursery school, and for special education (for children with disabilities)[30]. Contrary to common standards, that have to be *obtained*, schools are only obliged to *pursue* development goals, thereby reducing the concrete impact of the set goals[31].

These measures were taken before a list of common standards had even seen the light. A last amendment was made afterwards, after the Constitutional Court annulled the decree that ratified the list of common standards and development goals that had been adopted for nursery school and primary education[32]. The case was initiated, among others, by the Federation of Rudolf Steiner schools that claimed the common standards did not leave room to its own pedagogical ideas and that they were irreconcilable

25 The legislator delegated the elaboration of common standards to an administrative service (Originally the Service for Educational Development, "Dienst onderwijsontwikkeling"; later the Entity Curriculum, "Entiteit Curriculum" and the Department Curriculum, "Afdeling Curriculum"; now the Department for Projects Recognition of Acquired Competences – Curriculum – Qualifications, "Afdeling Projecten EVC – Curriculum – Kwalificaties"). Based on their work, the VLOR is to give a binding advice to the government, which then proposes the list of common standards to the parliament for ratification. This procedure was created to respect the legality principle of article 24, §5 Belgian Constitution, which requires all essential aspects of education to be dealt with by the legislator itself.

26 L. Lenaerts, "Eindtermen en vrijheid van onderwijs", *TORB* 1994-1995, p. 317.

27 Decision of the Flemish Government of October 21 2005 concerning the composition of the Flemish Education Council, MB November 25 2005.

28 Steiner schools are only indirectly represented in the Education Council by OKO, the "Organization for Deliberation of Smaller Providers of Education" (Overleg Kleine Onderwijsverstrekkers), which defends the interest of different smaller providers of subsidized education. Jewish schools have no representation in the Education Council at all. The new legal framework, adopted in 2018, provides a more direct involvement of school networks in the development procedure of common standards. However, the smallest educational providers are still excluded from the procedure.

29 Article 29 Flemish Decree of 1 December 1993, *MB* 21 December 1993.

30 Article 44, §2, 1° and 3° Decree on Elementary Education; articles 141 and 263, §1 Code on Secondary Education.

31 The same goes for common standards with regard to attitudes (as opposed to common standards with regard to knowledge, insight and skills) and for common standards that transcend the area of a specific course ("leergebiedoverschrijdende eidtermen" and "vakoverschrijdende eindtermen"): those common standards only had to be *pursued* too (art. 44, §2, 2° Decree on Elementary Education; art. 140, §§2-3 Code on Secondary Education).

32 Flemish Decree of February 22 1995 ratifying the development goals and common standards for nursery school and primary education, MB May 19 1995.

with the pedagogical methods of Steiner (Waldorf) education[33]. The Constitutional Court ruled that the concept of common standards was not as such in violation of the freedom of education, as the government was justified to make its subsidies dependent on the compliance with certain conditions aimed at guaranteeing the quality of the provided education[34] (see the higher mentioned justification for government intervention). The Court considered the concept of common standards *in abstracto* to be an adequate way to guarantee the equal value of diplomas and of the provided education[35]. Nevertheless, *in concreto* the common standards and development goals were considered so extensive and detailed that they could not be considered mere minimum goals[36]. Schools were not left enough space to realize their own pedagogical project. The Court therefore ruled the freedom of education had been violated[37] and it annulled the ratification decree.

In its judgment, the Constitutional Court suggested the creation of a deviation procedure for schools inspired by a specific pedagogical conception[38]. Obliged by the annulment of the earlier decree, and inspired by this suggestion the Flemish legislator created a deviation procedure that allows schools to propose differing standards[39]. The approval of these differing standards is delegated to the Flemish government. Differing standards have to respect fundamental rights, and a list of course categories that have to be present in the educational project of a school[40].

3.1.2. Baïs Rachel

The mere existence of this deviation procedure, and the other measures taken to attenuate the potential detrimental effect of common standards on educational freedom have not been able to prevent conflicts between private education initiatives and the government. An interesting case is that of Baïs Rachel, a subsidized Jewish primary school for girls in Antwerp that was found to not implement the common standards the required way.

During a screening of the school in 2001-2002 the inspection found a certain amount of deficits related, among other elements[41], to the vision of Baïs Rachel on common standards and development goals. Annual follow-up controls in 2002, 2003 and 2004 did not show the required progression, resulting in a negative inspection advice as to the continued recognition and financing of the school. As provided in the Governmental decree a college of inspectors was then constituted to advice on the matter. Their report, dated November 8 2004, contained a negative advice with regard to the future recognition of the primary school[42]. That conclusion was rooted in shortcomings with regard to the common standards for "world orientation with regard to reproduction and related physical changes", "Dutch (listening)", "world orientation, musical education and social skills, with regard to the selection of offered information and the communication with other cultures", and "world orientation, musical

33 Constitutional Court 18 December 1996, n° 76/96, B.6.
34 Constitutional Court 18 December 1996, n° 76/96, B.4.1-B.8.
35 Constitutional Court 18 December 1996, n° 76/96, B.8.3.
36 This is not only contrary to the definition of common standards (now in article 44, §2 Decree on Elementary Education and article 140, §§1 and 3 Code for Secondary Education), but also exceeds the limits of article 13.3 and 13.4 of the International Covenant on Economic, Social and Cultural Rights that only allows States to lay down or approve "*minimum* educational standards".
37 Constitutional Court 18 December 1996, n° 76/96, B.9.
38 Constitutional Court 18 December 1996, n° 76/96, B.10. The Constitutional Court reached an identical conclusion when ruling on the "*socles de compétences*", a set of minimum standards introduced by the French Community for schools located in the French speaking part of Belgium (Constitutional Court 18 April 2001, n° 49/2001).
39 After the deviation procedure was introduced the Constitutional Court rejected the action for annulment against the decree that ratified the development goals and common standards for secondary education (Constitutional Court, February 18 1998, n° 19/98).
40 Article 44*bis*, §2 of the Decree on Elementary Education and article 147 of the Code on Secondary Education.
41 The school was also considered to be falling short with regard to school leadership, participation rights, freeness of the provided education, course schedules and school regulations (Conseil d'Etat July 12 2005, n° 147.579, p. 2)
42 The recognition of the nursery school of Baïs Rachel was preserved.

education, and learning how to study with regard to access to information sources"[43]. The minister of education thereafter decided to withdraw the recognition of the primary school[44].

The mentioned shortcomings can be summarized as a refusal to provide sexual education on the one hand and to bring pupils in touch with a diverse set of media on the other. With regard to sexual education, Baïs Rachel argued that no important physical changes take place at the age of primary education, and that questions about reproduction were answered when asked. Its refusal was based on the religious conviction that sexuality is primarily situated in the private atmosphere of Jewish families, and that it is within that family context that sexual education should be taking place. The refusal to bring pupils in touch with diverse media had a religious foundation as well. Baïs Rachel argued that it is rooted in an Orthodox Jewish tradition that is very averse towards moving images. Dutch listening exercises with television fragments were therefore replaced with PowerPoint presentations. The school denied the accusation of censoring information, and explained that although televisions, radios, videos and internet were absent at the school, a worthy alternative was provided with PowerPoint, a media class, books, computers, papers, magazines and tape recorders[45].

As Baïs Rachel considered the withdrawal of its recognition based on these arguments to be a violation of its educational freedom, an action for suspension and annulment was filed with the Conseil d'Etat. Although the freedom of education is linked to the freedom of religion, and Baïs Rachel's arguments were based upon religious grounds, the Conseil d'Etat did not follow the reasoning of the school. The Conseil pointed out that the school should have relied on the deviation procedure of article 44*bis* of the Decree on Elementary Education to 'escape' the specific common standards that were in contradiction with their religiously inspired pedagogical project. In reality the school had tried to do so, but its request was ruled inadmissible because of a "lack of motivation". That denial by the ruling commission does not seem to have led to an appeal procedure. Baïs Rachel thus lost its chance to apply for a deviation. The Conseil d'Etat rejected the action for suspension, and later, in 2009, also confirmed that the school was no longer pursuing the litigation and classified the case, thereby making the withdrawal of the recognition final[46].

The Conseil d'Etat thus made clear that, next to the general deviation procedure, there is no space for pragmatic flexibility, allowing educators to amend the common standards on their own, without an intervention or control by public authorities. To reconcile a specific pedagogical project with the demands of the common standards, the legally provided procedure has to be followed.

We can only guess whether the Flemish government would have allowed deviating standards if the request of Baïs Rachel would have been considered admissible, but it does not seem impossible that the deviations asked for would have been deemed to be not "as a whole equivalent to the content of the common standards and development goals established conform article 44"[47], the condition established by the Decree on Elementary Education. Politically speaking it does not seem unreasonable to expect an unwillingness of the government to allow for a deviation related to sexual education and modern media.

Against a (hypothetical) negative decision concerning deviating common standards a separate appeal in front of the Conseil d'Etat would have been possible. The legal chances of success of such a procedure are difficult to evaluate. On the one arguments can be raised to plead against such a negative decision. As the Constitutional Court has ruled that only *minimum* standards can be imposed, one could argue that the mandatory use of television and modern technology goes beyond that minimum level.[48] Given

43 Conseil d'Etat July 12 2005, n° 147.579, p. 3 (own translation).
44 Ministerial Decision of December 23 2004.
45 Conseil d'Etat July 12 2005, n° 147.579, p. 5-6.
46 Conseil d'Etat June 9 2009, n° 194.013. It appears that the school gave up its judicial proceedings after the Conseil d'Etat rejected its action for suspension. Looking at the reasoning of the Conseil in that judgment, it seems likely the ruling on the action for annulment wouldn't have been in the favor of Baïs Rachel either.
47 Article 44bis, §2, 2°, last phrase Decree on Elementary Education (own translation).
48 Compare also with the requirements of article 29 of the Convention on the Rights of the Child.

the connection between the approach of sexuality and religion, a certain restraint from the government could be asked when creating learning objectives in the field of sexuality, given the religious rights of the concerned students and parents. The concern raised by the Constitutional Court in relation to common standards about values and attitudes could be copied here.

On the other hand, no clear image however appears from an inquiry into the case law of the Constitutional Court. The case law of the European Court of Human Rights is of no additional value for the applicants as the Strasbourg Court allows Member States a broad margin in these matters. Thus the Court has confirmed the possibility for Member States to include sexual education in the mandatory curriculum. The ECtHR made clear that "*the second sentence of Article 2 of Protocol No. 1 does not prevent the States from disseminating in State schools, by means of the teaching given, objective information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable. In fact, it seems very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications*".[49] The cited case concerned the curriculum of Danish public schools. In its ruling the Court also referred to the possibility for Danish parents to enroll their children in a (strongly subsidized) private school or to provide them with home schooling to avoid them being subjected to the common curriculum, including sexual education.[50]

Although in Belgium the common standards also apply to the curriculum in subsidized private schools, the same reasoning could be applied: parents having trouble with the common standards, retain the possibility to provide their children with home schooling. This is exactly what happened to Baïs Rachel. It continued to exist as a private school *sensu stricto* without governmental financial support, only to be struck again by government intervention in 2013 … (see further)

3.2 Right of enrolment

A second setback of the active freedom of education can be found in the 2002 Decree on Equal Education Opportunities[51]. This decree is sometimes suggested to have fortified the so called passive freedom of education[52]. This is the freedom of parents and children to choose a school (and to choose the religious classes within that school) that matches their religious and pedagogical convictions. Although this freedom was already present "in spirit" in 1830[53], it was only expressly recognized in the 1988 constitution and the following jurisprudence of the Constitutional Court[54]. The Decree on Equal Education Opportunities introduced a "right of enrolment". In the past subsidized private schools had the right to refuse the enrolment of certain pupils, e.g. a Catholic school could rely on its catholic identity to decline enrolment of Muslim pupils; schools could stick to boys or girls only policies, etc.[55] The Decree on Equal Education Opportunities made an end to this: as long as there is place, schools have to accept (in chronological order of application) every child whose parents are willing to sign the pedagogical project and the school regulations[56]. Thus, no priority can be given to certain children

49 ECtHR 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, n° 5095/71, 5920/72, 9526/72, §53.
50 ECtHR 7 December 1976, *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, n° 5095/71, 5920/72, 9526/72, §54.
51 *MB* September 14, 2002.
52 This can be questioned. As an equalization of chances to enrol at a certain school also implies an equalization of chances to be refused, those parents that choose a school based on their pedagogical, philosophical or religious convictions (a choice protected by the passive freedom of education) might be bypassed by parents who have no pedagogical, philosophical or religious connection with the concerned school.
53 See e.g. the intervention of Abbot Van Crombrugghe in the Constituent Assembly in E. Huyttens, *Discussions du Congrès national de Belgique (1830-1831)*, Brussel, Société typographique belge, 1844, Title 1, p. 634.
54 E.g. Constitutional Court November 4 1998, n° 110/98, B.3.2.
55 See e.g. CC November 4, 1998, n° 110/98, B.5.3.
56 Article 37duodecies, §1 Decree on Elementary Education and 110/12, §1 Code on Secondary Education. An incorrect refusal of enrolment is sanctioned with a budget cut of maximum 10% (art. 37sedecies Decree on Elementary Education; 110/16 Code on Secondary Education).

over others[57]. The passive freedom of education (of parents) is said to prevail over the active freedom of education (of schools)[58].

An action for annulment against the Decree on Equal Education Opportunities with the Constitutional Court was unsuccessful. The Court ruled that "the freedom of education does not preclude the competent legislator, who aims to guarantee the quality and the equivalence of state funded education, from taking measures that are generally applicable to all educational institutions, irrespective of the identity of the provided education."[59]

Currently, the only condition that can be imposed on parents is therefore the signing of the pedagogical project and the school regulations. In theory, the right of enrolment is therefore not absolute, and schools can hold on to their convictions as long as they are laid out in their pedagogical project (which has to respect human rights[60]). This vision, that has found support in the ruling of the Constitutional Court[61], is somewhat paradoxical: the introduction of a right of enrolment that aims to end the existence of concentration schools might lead to an encouragement of segregation, as only those schools that have a specific pedagogical project will be able to justify the refusal of certain pupils[62].

Next to this paradox two other problems can be mentioned. On the one hand, defining a specific pedagogical project might be easier said than done given the intrusion of governmental education policy in other fields. The imposition of common standards, participation structures, regulation with regards to school staff, etc. might make the construction of a sufficiently unique pedagogical project challenging. On the other hand, even if a specific pedagogical project can be construed, it might lack enforceability as schools have no means to control whether parents are really respectful for their pedagogical project. Parents' signatures (might) appear as no more than a formality. The Constitutional Court stated that in case parents or children would not respect the signed pedagogical projects and school regulations, the enrolment contract could be terminated because of an article 1184 Civil Code breach of contract[63]. However, the cabinet of the minister of education has declared recourse by schools to article 1184 Civil Code to terminate an enrolment inacceptable and announced to sanction it by a budget cut, thereby equalizing contract termination with an unjust enrolment refusal[64].

The presumption can be made that because of the more segregated position of the (ultra-Orthodox) Jewish community (in Antwerp) and of (ultra-Orthodox) Jewish schools the interest of parents and pupils not fitting in the pedagogical project in enrolling is rather limited. The regulation of the right of enrolment might have had therefore less impact on Jewish education than the regulation of common standards and of home education have. That presumption asks for two nuances. On the one hand, it should be noted that the higher mentioned action for annulment against the Decree on Equal Education Opportunities was initiated, among others, by an ultra-Orthodox father who feared that the school he wanted his children to attend would lose its identity under the new regulation, which shows at least a certain awareness from the side of the ultra-Orthodox community towards the potential impact of the right of enrollment[65]. Secondly, research shows how ultra-Orthodox schools have adapted their school policy to the new legal framework, for instance by sharpening their rules of conduct[66]. It is clear that

57 Exceptions are provided for brothers and sisters of already enrolled pupils, for children of school staff, for children from Dutch speaking families in Brussels, and for children with certain social-economic features (article 37quater-37septies Decree on Elementary Education; article 110/3-110/7 Code on Secondary Education).

58 See: L. Veny, *Onderwijsrecht I. Dragende beginselen*, Brugge, Die Keure, 2010, p. 26-28.

59 Constitutional Court, October 8 2003, n° 131/2003, B.5.4 (own translation).

60 Article 62, §1, 11° Decree on Elementary Education and 15, §1, 11° Code on Secondary Education.

61 Constitutional Court, October 8 2003, n° 131/2003, B.5.6 first paragraph.

62 See also A. Overbeeke, "Segregatie, desegregatie, integratie? Het recht op schoolkeuze en –stichting, schoolkeuzegedrag en de gevolgen ervan voor de schoolsamenstelling", *TORB* 2003-2004, p. 313.

63 Constitutional Court, October 8 2003, n° 131/2003, B5.6 last paragraph.

64 G. Maes, Lecture on Education Law, KU Leuven, April 30 2013.

65 L. Perry-Hazan, "Court-led educational reforms in political third rails: lessons from the litigation over ultra-religious Jewish schools in Israel", *Journal of Education Policy*, 2015, Vol. 30, No. 5, 734.

66 L. Perry-Hazan, "From the Constitution to the Classroom: Educational Freedom in Antwerp's ultra-Orthodox Jewish Schools", *Journal of School Choice*, forthcoming, p. 492.

the right of enrolment equals a limitation of schools' autonomy that might (at least in theory) also affect Jewish schools.

Thirdly, (at least) one specific case has already arisen in which the refusal of enrolment in an Orthodox Jewish school was challenged legally. It concerned the case of a family belonging itself to the Orthodox community, be it with specific, anti-Zionistic views. In 2012-2013 the family filed a lawsuit against the Jewish Orthodox Jesoda Hatora-Beth Jacob schools because the enrolment of one of their children had been declined. The school argued that the convictions of the (anti-Zionistic) family father were in contradiction with the pedagogical project of the schools and that the signing of it was not in line with reality. The Antwerp Court of Appeals ruled that a school has the right to verify the truthfulness of the formal agreement with the pedagogical projects and the school regulations, but that in can only conclude that there is an untruthful signature if severe and consistent indications can be identified.[67]39

The consent of the father with the pedagogical project in this case was ruled not to appear untruthful, according to the Court, as the anti-Zionistic views of the father did not seem to contradict the Jewish educational project of the school and because children should not be made the victim of the political convictions of their parents. Certain media coverage also indicated a gender element: the family would have consciously tried to enroll one of its sons into the girls' department of the school. The same aspects – religious convictions and gender – have also arisen in procedures in front of the Commission on Pupils' Rights (Commissie Leerlingenrechten), the government body responsible for complaints related to the right of enrolment. The Commission also confirmed the limitation of schools' autonomy in favor of parental rights, regarding both the question of enrolment of a child coming from a different religious background as the one underlying the school project[68], and the matter of parents wanting to enroll their son in a girls-only institution.[69]

Thus, the right of enrolment appears as a second case in which the autonomy of (Orthodox) Jewish schools has come under pressure.

4. Compulsory exams for home school education

A third, and some fear 'final', attack on the educational freedom of Jewish schools was launched in 2013 when the Flemish legislator introduced new regulations for home school education.

The Flemish Decree of July 19 2013[70] introduced a new, twofold system of quality control for home schooling (including unsubsidized private schools). On the one hand the general inspection was made competent to control the quality of education provided to individual home schooled children. Providers of home schooling have to welcome the inspection at home and communicate their educational goals, methods, and used materials. On the other hand an obligation was introduced for home schooled children to participate in exams of the official Exam Commission of the Flemish Community to obtain a certificate of primary education and, at least, a certificate of the first degree of secondary education. Children that would fail to obtain the certificate of primary education before the end of the scholastic year in which they would turn 13 before the first of January, and children that would fail to obtain any certificate or diploma of secondary education before the end of the scholastic year in which they turn 15 before the first of January are obliged to enroll in a regular school. For both certificates two attempts to pass the exam can be made. The same sanction – enrollment in a regular school – is imposed after two subsequent negative inspection control visits.[71]

67 Antwerp (3rd chamber), n° 2012/AR/2910, 18 June 2013.
68 Commission on Pupils' Rights, n° 2012/77ter-81ter and 2012/119-124 (annual report 2011-2012, p. 18).
69 Commission on Pupils' Rights, n° nr. 2012/147-bis and 2012/148-bis (annual report 2011-2012, p. 18-19).
70 MB August 27, 2013.
71 Article 26*bis*/2, §1, 2nd paragraph Decree on Elementary Education and article 110/30, §1, 2nd paragraph Code on Secondary Education.

Against this regulation a number of cases was brought in front of the Constitutional Court, both by providers of individual home schooling and by organizers of private schools, among which certain of Jewish ultra-Orthodox orientation, the higher mentioned Baïs Rachel School included[72]. The petitioners argued, among other things, that the obliged participation in exams of the exam commission would lead *de facto* to the imposition of learning content based on the common standards. This would violate the freedom of education. Furthermore, the prohibition for those who would fail the exams to continue home school education was considered not proportionate. This sanction would even constitute a discrimination, as those who fail in regular education exams are not additionally sanctioned by an obligation to switch schooling systems. The petitioners also pointed out that the new regulations did not take into account the differences between collective home school education (offered in private schools) and classical home school education (of pupils studying at home). Finally, the missing of an adequate transition period was denounced, which would allow to prepare the concerned children better for the exams of the exam commission.

That transition period was introduced in 2014[73], after the Constitutional Court annulled in a first case the original provisions with regard to the entrance into force of the regulation, be it only those with regard to secondary education.[74] The Court was of the opinion that insufficient time was left to children of the secondary level to prepare for the exams of the exam commission.

The rest of the claim was less successful. For primary education the Court did not consider a transition period to be necessary[75]. Further, the Court ruled that "it is not unreasonable to consider the failure of a home schooled child [for the exams of the exam commission] an indication of gaps in the provided education"[76] It continued by stating that the individual freedom of choice of the parents (the passive freedom of education) is only limited by the exam obligation "to the extent that their choice leads to an education that turned out to be deficient, which runs against the right to education of the child"[77]. The Court did not see how the new regulations would oblige the providers of home school education to give up their ideological, philosophical or religious convictions.[78] According to the Court the obligatory participation in exams does not constitute, as such, an obligation to offer a certain content, identical to the content offered in subsidized schools.[79] The specific features of home school education and of the freedom of education, the Court emphasized, imply inevitably that the judgment of the reached level of education by an exam commission *has to* take pedagogical methods into account, as well as ideological, philosophical or religious convictions of parents and teachers.[80]

With this last observation the Court seems to have left a certain margin to home school educators to not bend for the exams of the exam commission, to the extent that these would merely reproduce the curriculum of regular schools. Nevertheless, the precise scope of this reservation of the Court is unclear.

That the Court has ruled with the same vagueness on the second case, initiated by, among others, two Sudbury schools does however not stem hopeful. Sudbury schools are based on a specific pedagogical method. They protest against the imposition of exams as the obligated evaluation method because exams are radically contradicting their pedagogical concept. Sudbury education starts from the fundamental

72 Constitutional Court, May 8 2014, n° 80/2014 and Constitutional Court, May 21 2015, n° 60/2015.
73 Article 110/30, §1, last phrase Code on Secondary Education.
74 Constitutional Court, February 27 2014, n° 37/2014, B.11.3 (suspension) and Constitutional Court, May 8 2014, n° 80/2014, B.28.3.1-B.28.3.5 (annulment).
75 Constitutional Court, May 8 2014, n° 80/2014, B.28.2 and Constitutional Court, May 21 2015, n° 60/2015, B.39.2.
76 Constitutional Court, May 8 2014, n° 80/2014, B.14.4 and Constitutional Court, May 21 2015, n° 60/2015, B.17.4 (own translation), almost literally rephrasing the motivation of the government added to the original decree.
77 Constitutional Court, May 8 2014, n° 80/2014, B.14.4 and Constitutional Court, May 21 2015, n° 60/2015, B.17.4 (own translation).
78 Constitutional Court, May 8 2014, n° 80/2014, B.34.2.
79 Constitutional Court, May 8 2014, n° 80/2014, B.14.3; Constitutional Court, May 21 2015, n° 60/2015, B.17.3.
80 At the condition that those methods and convictions do not go against the right of the child to education with respect for fundamental freedoms and rights, and do not detract from the quality of the education, nor from the education level that has to be reached (Constitutional Court, May 8 2014, n° 80/2014, B.14.3; Constitutional Court, May 21 2015, n° 60/2015, B.17.4).

freedom of pupils to create their own curriculum and to process materials at their own speed. How can a pedagogical conviction that is averse towards exams as an evaluation method be reconciled with the examination by the exam commission? How can the latter take pedagogical (and religious) convictions of home school educators into account when they go against the very existence of the institution?

The Flemish Government seemed aware of the existing vagueness and the need for legal certainty for (collective) home school educators. Thus, the Policy Memorandum of the Flemish Government for 2014-2019 announced a dialogue with the organizers of collective home school education "to optimize the success rate at the exams of the exam commission"[81]. When additions or adjustments to the curriculum that have to be made to make sure pupils can pass the exams of the exam commission would limit the pedagogical project – in the light of the constitutional freedom of education – the home school educator should indicate, so the Policy Memorandum goes, which alternative will be provided. Although the Flemish Government showed a will to leave some flexibility to collective home school education to retain its individuality, the Minister of Education declared more recently that no measures had been taken so far to adopt the central exams to the specific needs or convictions of "home schoolers" (in the broad sense).[82]

As is the case with common standards, Strasbourg jurisprudence doesn't offer any clear support for unsubsidized private/home school education. A broad margin is left to the Member States, including the possibility to even completely ban home schooling.[83]

5. Conclusion

That the freedom of education and the role of the government in education are being discussed is not new. It took Catholic and Christian-democratic politicians on the one hand, and liberals and socialists on the other, more than 120 years and two School Wars to come to an agreement about how the educational landscape based on their original compromise of educational freedom could look like. This first period of intense debate resulted, through the conclusion of a School Pact, in a dual educational system consisting of both official schools and a broad system of equivalently financed private schools.

The school peace that has ruled since the end of the 1950s has started to crumble after the competence for education was transferred from the federal level to the communities. The active educational policy of the Flemish Government seems to have opened a new period in which the role of the government is (or should be) questioned, taking the constitutional freedom of education into account. Recent policy seems to be all the more threatening towards the smaller educational initiatives, like schools based on a specific pedagogical methodology or ultra-Orthodox Jewish schools. The focus of this article was on the latter.

The introduction of common standards for school curricula resulted in certain Orthodox Jewish schools losing their government subsidies after their persisted refusal to provide sex education[84]. Turning into unsubsidized private schools, they from that moment on fell under the legal framework of home schooling. By introducing an obligatory state exam for all home schooled children to control the quality of their education, the Flemish government tends to impose the same standards on home schooling, confronting the ultra-Orthodox Jewish community with an unsurmountable dilemma curtailing its religious identity: should they start lecturing in conformity with the common standards

81 Policy Memorandum of the Flemish Government 2014-2019, http://ebl.vlaanderen.be/publications/documents/60797, 97 (own translation, consulted on May 21 2015).

82 Parliamentary Questions and Answers, Flemish Parliament, Question 327.1, 6 March 2018 (question C. Gennez, answer Minister H. Crevits).

83 See: ECtHR 11 September 2006, *Konrad v. Germany* (admissibility), n° 35504/03.

84 *Conseil D'Etat*, *VZW Baïs Rachel v. Flemish Community*, July 12 2005, n° 147.579.

curriculum, or should they hold on to their religious foundations, taking the risk that some pupils will be obliged to enroll in a subsidized school after failing the state exam[85]?

If accepting common standards is the only way to survive, they should have never let go of their subsidies in the first place; but in that case, as goes for those Jewish schools that are still subsidized, the right of enrolment might (have) pose(d) another treat to their identity.

Will the constitutional freedom of education be able to preserve Jewish education? It would be wrong to conclude from the foregoing that there is only one type of Jewish school. As diverse as the Jewish community is itself, so diverse is its education. At this moment, Jewish pupils are (still) being educated in private subsidized schools, in private schools *sensu stricto*, and a small minority is even going to state schools. It is clear that the pressure of government intervention is more intense on Orthodox Jewish schools like Baïs Rachel that have evolved from subsidized to *sensu stricto* private schools than it is on more 'moderate' Jewish schools that have been able to preserve their subsidies. It is nevertheless my claim that the loss of educational freedom for the different types of Jewish schools, whether subsidized or not, is bigger than for the (catholic) majority of private schools. On the one hand, the network of Catholic schools is more closely involved in the development of governmental policy, e.g. through their involvement in the development of common standards through the Flemish Education Council (VLOR), where no Jewish educational institution is represented. On the other hand no Catholic equivalent to the most Orthodox Jewish educational institutions exists. The more specific and deepened one's identity, the more there is too loose from an equalization. The identity of Catholic education has become more vague over the years, and is also opening up to other cultures[86], bringing it closer to the active pluralistic ideal of official schools and of potential government intervention. Both elements make the intrusion of governmental policy less severe for Catholic education than they are for Jewish education: certain private schools appear freer than others …

85 This dilemma is comparable to the dichotomic choice between absolute freedom and subsidies under strict state control that Perry-Hazan signals (L. Perry-Hazan, "From the Constitution to the Classroom: Educational Freedom in Antwerp's ultra-Orthodox Jewish Schools", *Journal of School Choice*, 2014, No. 8, p. 495).

86 This can for instance be seen in the point of view of the Director-General of VSKO (the Flemish Secretariat of Catholic Education), that Catholic schools and state schools should annul their ban on headscarves for pupils.