iUS PUBLICUM NETWORK REVIEW
www.ius-publicum.com

FREEDOM OF RELIGION AND FREEDOM OF DEMONSTRATION DURING THE COVID-19 PANDEMIC: A COMPARATIVE ANALYSIS OF ADMINISTRATIVE CASE LAW IN FRANCE AND BELGIUM

Romain MERTENS[1]

INDEX

[1] Ph.D. researcher and teaching assistant at the Faculty of law of the University of Namur (Belgium).

1. INTRODUCTION

During the pandemic caused by the COVID-19, States have adopted several measures to curb the propagation of the virus. In Western Europe, the considerable number of cases and hospitalisations recorded in March triggered the enactment of rules intended to reduce physical contacts and break transmission chains. Many of these measures involved limitations of fundamental rights, namely the right to privacy and family life, the right to education, freedom of enterprise or freedom of movement[2]. This paper focuses on freedom of religion and freedom of demonstration. International and national provisions protect them.

In Belgium and France, public authorities adopted two similar measures. First, they decided to prohibit demonstrations, since gatherings were forbidden. Second, religious ceremonies were cancelled, except for weddings and funerals. As the paper shows, these injunctions were not (successfully) judicially challenged during the early stages of the pandemic. However, the progressive easing of the first lockdown changed the

[2] For a non-exhaustive list regarding Belgium, see: F. Bouhon et. al., 'L'État belge face à la pandémie de Covid-19 : esquisse d'un régime d'exception', *Courrier hebdomadaire du CRISP*, 2020/1, pp. 35-36.

circumstances. In France and Belgium, associations and individuals decided to contest these measures in front of the Council of State during the *'déconfinement'*. The Council of State is the supreme administrative court in each jurisdictional system. The review of acts adopted by administrative authorities is one of its essential prerogatives.

In France, the Council of State ruled in both cases that the restrictions to freedom of religion and freedom of demonstration were unconstitutional. The Belgian Council of State took a different stance: it rejected both claims and thus refused to suspend the prohibitions. This paper aims at analysing this contrasted jurisprudence during the COVID-19 pandemic. On the one hand, it compares the jurisprudence of the two high administrative courts to present their differences and similarities. On the other hand, it attempts to provide explanations for the different patterns of the jurisprudence. This requires studying the legal context in which the decisions are respectively pronounced. Besides, the paper scrutinises specific differences between the cases and the management of the pandemic in France and Belgium. Decisions pronounced during the second lockdown, at the end of 2020, are also briefly evoked.

This paper is structured as follows. First, the paper summarises the timing, facts, rules of procedures and decisions of the Council of State in both countries (2). Second, it compares the French and Belgian legal systems of fundamental rights protection (3). Third, it explores the case law of each Council of State and the characteristics of the cases to attempt to explain the different results reached by the two administrative courts (4). Final remarks close the paper and recapitulate the results of the analysis (5). In short, the paper underlines that no single factor can be isolated to explain the differences of case law between the two Councils of State. It is a combination of several elements, including the test of proportionality, factual differences or specific features of the system of protection of fundamental rights.

2. TIMING, FACTS, PROCEDURES AND DECISIONS

The first two sections introduce the timing of adoption of the contested measures (2.1.) and the specific facts of the cases (2.2.). The third section presents the rules of

procedure applicable in each country (2.3.). Then, the last section analyses the reasoning of the Council of State in France and Belgium, respectively (2.4.).

2.1. Timing

Before analysing these decisions, it is useful to provide a short overview of legal events that led to the adoption of the contested measures in each country. The paper will analyse further the legal bases of the measures adopted to fight the pandemic. This section recounts the succession of decrees adopted in France and Belgium to limit the propagation of the virus.

In France, the legal interventions of public authorities began on 4 March 2020. It is first the Minister of health who implemented several measures[3], namely about mass gatherings. They were completed on 14 March 2020[4]. Then, the Prime Minister got involved with a decree on 16 March 2020[5] enacting the lockdown. Following the adoption of the state of health emergency (see further), he enacted a new decree on 23 March 2020[6], with a comprehensive scope. The text changed on multiple occasions.

[3] Arrêté portant diverses mesures relatives à la lutte contre la propagation du virus covid-19, 4 March 2020.

[4] Arrêté du 14 mars 2020 portant diverses mesures relatives à la lutte contre la propagation du virus covid-19, 14 March 2020.

[5] Décret n° 2020-260 portant réglementation des déplacements dans le cadre de la lutte contre la propagation du virus covid-19, 26 March 2020.

[6] Décret n° 2020-293 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, 23 March 2020.

The Parliament extended the state of emergency on 11 May until 10 July[7]. Then, a new decree replaced the decree of 23 March 2020[8]. The procedure about religious ceremonies targeted this decree. On 31 May, the Prime Minister abrogated this decree and replaced it by a new one[9]. The decision concerning freedom of demonstration concerned this last decree. Other evolutions continued during the pandemic.

In Belgium, the ministerial decree (*arrêté ministériel*) of 13 March 2020 activated the 'federal phase'[10], which meant that the federal level managed the crisis. Consequently, the Minister of Interior had the competence to adopt measures at the national level to contain the crisis. He took the first decisions on the same day[11]. A new ministerial decree replaced them on 18 March 2020[12], which initiated the lockdown. Then, a new ministerial decree

[7]Loi n° 2020-546 prorogeant l'état d'urgence sanitaire et complétant ses dispositions, 11 May 2020.

[8] Décret n° 2020-548 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, 11 May 2020.

[9] Décret n° 2020-663 prescrivant les mesures générales nécessaires pour faire face à l'épidémie de covid-19 dans le cadre de l'état d'urgence sanitaire, 31 May 2020.

[10] Arrêté ministériel portant le déclenchement de la phase fédérale concernant la coordination et la gestion de la crise coronavirus COVID-19, 13 March 2020.

[11] Arrêté ministériel portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 13 March 2020.

[12] Arrêté ministériel portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 18 March 2020.

was adopted on 23 March 2020[13], which clarified the rules. The Minister of Interior amended the decree on several occasions, namely on 30 April 2020, when the Government announced a strategy of *'déconfinement'*[14]. The decision about freedom of religion concerned this decree, as modified by a decree of 15 May 2020[15]. The Minister finally abrogated this decree at the end of June[16]. He enacted other ministerial decrees throughout the pandemic. In particular, it is worth underlining that French and Belgian authorities adopted several measures at the end of 2020 to curb a second epidemic wave.

2.2. Facts

After this short presentation of the legal context presiding to the health emergency, this section introduces the facts of the cases judged by the two Councils of State. The facts are similar in France and Belgium. The section exposes first the facts of the French cases, then the circumstances surrounding the Belgian decisions.

Based on the state of emergency above-mentioned, the French Prime Minister adopted a decree, stating that any public gathering or activity involving more than ten people for

[13] Arrêté ministériel portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 23 March 2020.

[14] Arrêté ministériel modifiant l'arrêté ministériel du 23 mars 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 30 April 2020.

[15] Arrêté ministériel modifiant l'arrêté ministériel du 23 mars 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 15 May 2020.

[16] Arrêté ministériel portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 30 June 2020.

non-professional reasons was forbidden[17]. The decree provided an exception for the gatherings and activities that were 'essential to the continuity of the nation's life'. Several unions and a human rights association asked the Council of State to suspend this decree because it did not provide an exception for 'demonstrations and gatherings aiming at the collective expression of ideas and opinions'[18]. At the time the Council of State decided on this legal challenge, several demonstrations were taking place against police violence and racism[19].

Concerning the prohibition of religious ceremonies, many individuals and Christian associations launched the procedure. The decree adopted on 11 May, replacing the decree from 23 March, provided that churches and other religious buildings might remain open, but that any gathering or meeting was forbidden, except for funerals[20].

In Belgium, a claimant who was part of a group called '*La santé en luttes'* composed of medical and administrative workers from health institutions initiated the proceedings against the prohibition of demonstrations. The group wished to organise on Sunday 14 June a demonstration of about 200-250 people in front of the federal ministry of health[21].

[17] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, § 4.

[18] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, § 5.

[19] Le Monde avec AFP, 'Le Conseil d'Etat rétablit la liberté de manifester, dans le respect des mesures barrières', *Le Monde*, 13 June 2020, https://www.lemonde.fr/societe/article/2020/06/13/le-conseil-d-etat-retablit-la-liberte-de-manifester-dans-le-respect-des-mesures-barrieres_6042766_3224.html, (accessed 29 October 2020).

[20] Council of State (France), nr. 440366 and others, 18 May 2020, § 22.

[21] Council of State (Belgium), nr. 247.790, 14 June 2020, § 3.

However, the police informed the claimant on Friday 12 June that the demonstration could not take place due to the measures adopted by the municipal authorities[22]. Following the guidelines of the federal Minister of Interior, the city of Brussels had decided not to allow the demonstration. At that time, the ministerial decree provided that no gathering involving more than twenty people was allowed. Demonstrations were thus forbidden in Belgium.

Concerning the cancellation of religious ceremonies, the Belgian claimants wanted to suspend (and cancel) article 3 of the ministerial decree of 23 March, as amended by the ministerial decree dating from 15 May[23]. This article forbade religious ceremonies and provided three exceptions: funerals, weddings and broadcasted ceremonies. In the first two situations, thirty people might attend the ceremony. In the latter, ten people were allowed, including the ones responsible for broadcasting. The prohibition was applicable from 18 May until 7 June. This article replaced article 5 of the ministerial decree of 23 March, which also prohibited religious ceremonies[24].

2.3. Two Councils of State, two sets of procedural rules

This section examines the procedural rules applicable to the legal challenges. In Belgium, the Council of State has the power to suspend the execution of an administrative act if two conditions are satisfied[25]. First, at least one argument must be serious enough to justify, at first sight, the annulment of the administrative act. This condition implies that the

[22] Council of State (Belgium), nr. 247.790, 14 June 2020, § 4.

[23] Arrêté ministériel modifiant l'arrêté ministériel du 23 mars 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 15 May 2020.

[24] Council of State (Belgium), nr. 247.674, 28 May 2020, § 3.

[25] Lois coordonnées sur le Conseil d'Etat, 12 January 1973, art. 17, § 1.

argument must seem admissible and display illegality that could lead to the cancellation of the act[26]. Second, there must be an emergency that is incompatible with the cancellation procedure. Two elements compose this condition[27]. On the one hand, the execution of the administrative act would cause the claimant damage of some gravity. On the other hand, the standard procedure would not prevent this damage from happening.

Under the procedure of *extreme* emergency, the law further requires that the claimant demonstrates that the emergency is such that it is incompatible with the processing time of a suspension procedure[28]. As underlined by Michel Leroy, 'the administrative referee constitutes a substantial progression of the rule of law'[29]. Thanks to this procedure, the Council of State can adopt decisions that have a practical impact in a short time.

Regarding the emergency, this condition replaced in 2014 the previous requirement of severe damage that is difficult to repair[30]. The emergency still implies the risk of damage, but it is not clear whether it should be severe enough or irreparable[31]. Additionally, the

[26] J. Jaumotte and E. Thibaut, *Le Conseil d'Etat de Belgique*, t. 2, Bruxelles, Bruylant, 2012, p. 1536.

[27] See for example: Council of State (Belgium), nr. 247.585, 19 May 2005.

[28] Lois coordonnées sur le Conseil d'Etat, 12 January 1973, art. 17, § 4.

[29] M. Leroy, *Contentieux administratif*, 5fth ed., Limal, Anthémis, 2011, p. 165.

[30] Loi portant réforme de la compétence, de la procédure et de l'organisation du Conseil d'État, 20 January 2014, art. 6.

[31] M. Vanderstraeten and F. Tulkens, 'Urgence, extrême urgence, mesures provisoires et balance des intérêts devant le Conseil d'Etat', in F. Viseur and J. Philippart (eds.), *La justice administrative*, Bruxelles, Larcier, 2015, pp. 138-139.

emergency condition is not fulfilled by the sole circumstance that the cancellation decision will intervene too late[32].

If the case meets these conditions, the suspension of the administrative act is not automatic. If the adverse party requests it, the Council of State must balance all competing interests to decide if the suspension would not cause more significant damage[33]. When the procedure is that of extreme emergency, the claimant must also demonstrate that he has acted diligently to prevent the damage from happening and to initiate the proceedings[34].

The organisation of administrative justice is different in France. In contrast to Belgium, there is a coherent hierarchical set of administrative jurisdictions, spearheaded by the Council of State. The Council of State judges only 20% of the cases in first instance, including the procedures against a decree[35]. It makes sense that the Council of State is competent and not a local administrative court of first instance with a limited territorial jurisdiction, considering the national scope of a decree[36]. Such text is also particularly critical since it emanates from the highest administrative authorities of the State.

[32] See for example: Council of State (Belgium), nr. 229.477, 8 December 2014; Council of State (Belgium), nr. 227.963, 2 July 2014.

[33] M. Leroy, *Contentieux administratif*, 5th ed., Limal, Anthémis, 2011, pp. 772-773.

[34] M. Leroy, *Contentieux administratif*, 5th ed., Limal, Anthémis, 2011, p. 791.

[35] J. Waline, *Droit administratif*, 22nd ed., Paris, Dalloz, 2008, p. 575. See also: Code de justice administrative, art. R. 311-1.

[36] P. Gonod, F. Melleray and P. Yolka, *Traité de droit administratif*, t. 2, Paris, Dalloz, 2011, p. 456.

Concerning the decisions analysed, the procedure used in front of the French Council of State is the '*référé liberté*'[37]. This procedure is available on three conditions: first, emergency justifies the action; second, a fundamental freedom is violated by a public legal person or by a private person in charge of a public service; third, the infringement is serious and illegal[38].

Therefore, the conditions governing the legal actions in France and Belgium are broadly similar. They share the requirement of emergency. The criterium of illegality seems stricter in France since the illegality must be manifest, while the Belgian procedure only requires illegality susceptible to lead a cancellation. Finally, the French administrative justice code requires a severe infringement of a fundamental right. In Belgium, any damage of enough gravity suffices.

2.4. The prohibition of demonstrations

Based on the facts and procedures described hereabove, this section exposes the reasoning of the French and Belgian Councils of State concerning freedom of demonstration. The section begins with the French case and follows with the Belgium one. While the French institution relies heavily on the proportionality test, the Belgian Council of State focuses on the emergency condition.

2.4.a. In France

As a foundation of its reasoning, the Council of State mentions that freedom of expression is a human right guaranteed by the Constitution and the European Convention of Human Rights. However, the State must conciliate it with the public order and the

[37] J. Waline, *Droit administratif*, 22nd ed., Paris, Dalloz, 2008, p. 631.

[38] Code de justice administrative, art. L. 521-2.

protection of health[39]. The Government brings forward two arguments to justify the prohibition of demonstrations. First, it would be complicated to enforce the physical distancing (*mesures barrières*) during demonstrations. Second, since the ban applies only to demonstrations involving more than ten people, and that the prefect (state representative at the local level) can provide derogations, the measure is not general or disproportionate[40].

The Council of State acknowledges that it may be more challenging to enforce the *mesures barrières* during demonstrations. However, it considers that nothing shows that a demonstration would be impossible everywhere in France, whichever form the demonstration may take[41]. Furthermore, the possibility of derogation has not been used, notwithstanding the numerous demonstrations held after the enactment of the ban[42]. Finally, demonstrations are in any case subject to a declaration system. The administrative authorities have the power to prohibit any demonstration that could disturb public order, which includes public health. According to the criminal code, any person participating in a

[39] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, § 10. According to the Constitutional Council, the state of health emergency is linked to the objective of protection of health inscribed in the preamble to the Constitution of 1946. See: P. Rrapi, 'Le Préambule de la Constitution de 1946, fondement constitutionnel de l'état d'urgence', *La Revue des Droits de l'Homme*, 2020, http://journals.openedition.org/revdh/9466 (accessed 9 November 2020).

[40] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, § 12.

[41] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, §§ 13-14.

[42] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, § 15.

forbidden demonstration can be fined (art. R-644-4). The Council of State considers thus that the ban is not necessary, not adequate and not proportionate[43].

As for the emergency requirement, the Council of State deems it fulfilled since several demonstrations were to occur in the days following the procedure[44].

2.4.b. In Belgium

As a reminder, the coordinated laws on the Council of State (*lois coordonnées sur le Conseil d'État)* require two elements to suspend the execution of an administrative decision under the emergency procedure. On the one hand, an emergency that is incompatible with the treatment of the case under the cancellation procedure. On the other hand, the claim must display at least one serious argument[45]. In the case at hand, the Council of State says that the claimant must show that the execution of the administrative act would cause inconveniences of such gravity that their consequences would be irreversible[46]. Besides, the emergency depends on the interests invoked by the claimant[47].

Furthermore, under the *extreme* emergency procedure, the claimant must demonstrate that the ordinary emergency procedure would be incompatible with the resolution of the case and that he has acted diligently to launch the procedure. In any case, the extreme emergency procedure must remain exceptional, since it severely diminishes the procedural

[43] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, § 17.

[44] Council of State (France), nr. 440846, 440856 and 441015, 13 June 2020, § 18.

[45] Council of State (Belgium), nr. 247.790, 14 June 2020, § 10.

[46] Council of State (Belgium), nr. 247.790, 14 June 2020, § 11.

[47] Council of State (Belgium), nr. 247.790, 14 June 2020, § 11.

rights of the parties[48]. In the case at hand, the Council of State observes that the claimant introduced his action on 13 June. The claimant received the decision on 12 June, and the demonstration was supposed to occur on 14 June. It is therefore clear that the ordinary suspension procedure would not have intervened in due time[49].

Even if the inconveniences concern fundamental rights, the Council of State does not automatically consider them severe[50] , which is in line with its previous case law. Indeed, the claimant does not argue that the date chosen for the manifestation is of particular significance[51]. Moreover, the Council observes that the measures provided by the ministerial decree are applicable until 30 June, unless the Minister extends them[52]. They are thus evolutive. Therefore, the Council considers that the prohibition does not durably, severely and irreversibly harm the fundamental right to gathering and demonstration, since other ways of expression exist[53]. According to the Council of State, the inconvenience is not severe enough.

The reasoning of the Council of State raises several criticisms. First, the prohibition of the demonstration is not isolated. It has an impact on the whole territory of Belgium and not only in Brussels, where the claimant intended to manifest. Indeed, it is the inevitable consequence of the ministerial decree, which forbade all gatherings of more than twenty

[48] Council of State (Belgium), nr. 247.790, 14 June 2020, § 12.

[49] Council of State (Belgium), nr. 247.790, 14 June 2020, § 10.

[50] Council of State (Belgium), nr. 247.790, 14 June 2020, § 12.

[51] Council of State (Belgium), nr. 247.790, 14 June 2020, § 13.

[52] Council of State (Belgium), nr. 247.790, 14 June 2020, § 13.

[53] Council of State (Belgium), nr. 247.790, 14 June 2020, § 13.

people. Nevertheless, the Belgian case pertained formally to one demonstration, while the French one directly concerned the general prohibition established by the decree. Second, the effects of the decision last for several weeks and cannot be limited to a single event. Third, there is no derogatory procedure to allow demonstrations. Fourth, the demonstration concerned a central public debate, especially during the COVID-19 crisis. Indeed, the demonstration aimed at defending the interests of healthcare workers. Furthermore, the demonstration was even more critical because political negotiations to form a federal government had resumed. Finally, a proportionality test could have shown, as in the French case, that other measures infringed less freedom of demonstration. These elements could have weighed more heavily in the balance.

2.5. The cancellation of religious ceremonies

Having compared the reasoning of the Councils of State regarding freedom of demonstration, this section engages with freedom of religion. It presents first how the French Council of State dealt with the ban on religious ceremonies. The analysis of the Belgian case follows. As underlined hereafter, timing is important in these cases. Indeed, both Councils of State have pronounced different decisions on the same question during the second lockdown at the end of 2020.

2.5.a. In France[54]

While the Belgian Council of State decides that the emergency condition was not satisfied, the French Council of State deems if fulfilled. The French Council of State observes indeed that no religious ceremony has occurred since 23 March, which bears severe consequences. Believers have not been able to practise their religion collectively for several weeks. Besides, the main religions present in France hold essential celebrations during the spring. For these reasons, the Council of State declares that 'considering the improvement of the sanitary situation which has justified the *déconfinement*, the condition of characterised emergency (…) must be deemed fulfilled'[55]. In an earlier decision dating from 24 March 2020, the Council of State had judged otherwise that there was no emergency[56]. However, this decision was pronounced at the worst stage of the pandemic, when a complete lockdown was applicable.

Notwithstanding the finding of an emergency, it does not follow automatically that the prohibition is illegal. According to the French Council of State, the risk of contamination is higher during religious ceremonies since they are held inside, involve numerous people, and imply songs, prayers and ritual movements[57]. It results that it is necessary to regulate

[54] On this case, see: M. Nihoul, S. Wattier and F. Xavier, 'L'art de la juste mesure dans la lutte contre le coronavirus face à la dimension collective de la liberté de culte', *Rev. trim. D.H.*, 2020, pp. 1029-1063 ; J. Fialaire, 'Liberté de culte et urgence sanitaire : les leçons de la jurisprudence', *La semaine juridique*, nr. 21-22, pp. 38-43.

[55] Council of State (France), nr. 440366 and others, 18 May 2020, § 24.

[56] Council of State (France), nr. 439694, 24 March 2020.

[57] Council of State (France), nr. 440366 and others, 18 May 2020, § 27.

the access to religious ceremonies which 'cannot be considered similar to securing the access to basic goods and services'[58].

The judge underlines that the rules applicable to several other activities are less rigid. However, they do not necessarily involve a risk equivalent to the one existing during religious ceremonies[59]. Public transports, libraries, shopping malls, schools and shops are allowed to open during the *déconfinement*. Decidedly, the fundamental rights involved in these places are not the same[60]. The Council of State does not indicate, however, if it judges that religious activities are more important than commercial or educational ones. Finally, the French Council observes that the prohibition has been adopted only to avoid risky activities, but without regard to the potential difficulty to adopt measures ensuring distancing or to the ability of the religious authorities to enforce them[61].

The French Council of State concludes that the prohibition of religious ceremonies is not proportionate and constitutes a severe and manifest violation of the freedom of religion[62]. The Council of State carried out a true test of proportionality, weighing the interests at stake and the concrete possibility to enforce physical distancing.

[58] Council of State (France), nr. 440366 and others, 18 May 2020, § 29.

[59] Council of State (France), nr. 440366 and others, 18 May 2020, § 31.

[60] Council of State (France), nr. 440366 and others, 18 May 2020, § 32.

[61] Council of State (France), nr. 440366 and others, 18 May 2020, § 33.

[62] Council of State (France), nr. 440366 and others, 18 May 2020, § 34.

However, at the end of its reasoning, the Council of State seems to indicate that places of worship[63] and private or public places dedicated to religious activities do not enjoy the same protection[64]. Even if the decision of the French Council of State accepts the demand of the claimants, the impact of the decision was probably small because it arrived late[65]. At best, believers gained a few days[66].

2.5.b. In Belgium

The analysis now shifts towards the Belgian case. The Council of State mentions first that it can grant a suspension based on the extreme emergency on two conditions: a serious argument and an emergency such that the Council cannot rule the case under the habitual

[63] Such as churches, synagogues and mosques.

[64] B. Mérand, 'Liberté des cultes : la décision ambivalente du Conseil d'État du 18 mai 2020', *Actu juridique*, 6 August 2020, https://www.actu-juridique.fr/administratif/liberte-des-cultes-la-decision-ambivalente-du-conseil-detat-du-18-mai-2020/, (accessed 28 October 2020).

[65] R. Letteron, 'Covid-19 : Le Conseil d'Etat arrive en retard', *Liberté, Libertés chéries*, 19 May 2020, http://libertescheries.blogspot.com/2020/05/covid-19-le-conseil-detat-arrive-en.html (accessed 29 October 2020).

[66] The opportunity of this claim was not unanimously shared by the religious communities. It seems that only the catholic cult, especially its radical branch, wished to hold religious ceremonies before the 2 June, which was the date announced by the Government. See: B. Sauvaget, 'Les cultes accueillent avec prudence la décision du Conseil d'Etat', *Libération*, 19 May 2020, https://www.liberation.fr/france/2020/05/19/les-cultes-accueillent-avec-prudence-la-decision-du-conseil-d-etat_1788833 (accessed 4 November 2020).

procedure of emergency[67]. In this regard, in the Belgian case like in the French one, the claimants have not immediately protested against the prohibition of religious ceremonies. The procedure targets the ministerial decree of the 15 May, which confirms the prohibition, while other activities are allowed.

The Council of State also adds that the extreme emergency procedure must remain exceptional[68]. For this reason, the claimant cannot successfully invoke the extreme emergency procedure if he has waited passively before the introduction of his claim[69]. The Council of State considers that the claimants should have acted earlier. Following its analysis, it should have been clear from the 24 April, date of the announcement of the '*déconfinement*', that religious ceremonies would not be allowed before June[70]. However, this reasoning would lead to the consequence that a claimant must immediately attack a measure, even though it may be proportionate in the first place[71].

Then, the Council of State holds reasoning similar to the one followed in the case pertaining to freedom of demonstration. According to the administrative court, a violation of freedom of religion does not automatically constitute 'an urgent matter of public

[67] Council of State (Belgium), nr. 247.674, 28 May 2020, § 5.

[68] Council of State (Belgium), nr. 247.674, 28 May 2020, § 7.

[69] Council of State (Belgium), nr. 247.674, 28 May 2020, § 7.

[70] Council of State (Belgium), nr. 247.674, 28 May 2020, § 9.

[71] F. Judo, 'De Geest is niet gehaast', *Juristenkrant*, 10 Juni 2020, p. 13.

interest'[72]. The violation of freedom of religion does not concern the emergency condition but the requirement of a serious argument[73].

In addition, the Council of State pays attention to an argument of the Government. According to it, even if a decision allowing religious ceremonies was adopted, there would not be enough time to take measures sufficient enough to ensure the protection of the public[74]. This argument is quite noteworthy since it underlines that it is possible to organise religious ceremonies with proper distancing measures. By comparison, the French Council of State referred to official scientific guidelines to determine that distancing measures were possible during religious ceremonies.

The Council of State also refers to the fact that the bishops of Belgium have agreed that baptisms should take place when the general *déconfinement* happens[75]. Finally, the Council relies on the dialogue maintained by the Government with the representatives of the different religions to dismiss the argument saying that the Government neglects the rights of believers[76]. In particular, the Government announced that it would discuss the question of religious ceremonies on 3 June[77].

[72] Council of State (Belgium), nr. 247.674, 28 May 2020, § 8.

[73] Council of State (Belgium), nr. 247.674, 28 May 2020, § 8.

[74] Council of State (Belgium), nr. 247.674, 28 May 2020, § 10.

[75] Council of State (Belgium), nr. 247.674, 28 May 2020, § 12.

[76] Council of State (Belgium), nr. 247.674, 28 May 2020, § 12.

[77] Council of State (Belgium), nr. 247.674, 28 May 2020, § 12.

The assessment of the Council of State entails several criticisms. First, one can wonder whether the proportionality test required was robust enough. Indeed, the Council of State could have judged that appropriate distancing measures, such as the wearing of a mask, physical distance between people attending the ceremonies and the prohibition of certain ritual aspects (for instance the Eucharist) were sufficient to attain the legitimate goal of impeding the propagation of the COVID-19. Retrospectively, the ministerial decree of 18 October seems to confirm this thesis. Indeed, while this decree is adopted in a context characterised by a rapid increase of the contaminations and admissions to the hospital of people infected by the COVID-19, the decree maintains the churches open on the conditions that no more than forty people attend the ceremony and that a facial mask is worn[78]. Ten days later, the ministerial decree of 28 October reiterates the same rules[79]. It is only on 1 November that religious ceremonies are again prohibited[80].

Second, should a violation of a fundamental right not be an urgent matter? Especially as, in this case, it is a right which is at the core of freedom of religion that is restricted (see further). As the paper explains further, the Belgian Council of State does not depart from its previous case law here. On this matter, the French Council of State took a completely different position than the Belgian Council of State.

[78] Arrêté ministériel portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 18 October 2020, art. 20.

[79] Arrêté ministériel portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 28 October 2020, art. 17.

[80] Arrêté ministériel modifiant l'arrêté ministériel du 28 octobre 2020 portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 1st November 2020, art. 10.

Third, the argument of the evolutive nature of the decisions works both ways. The Council of State used this argument to dismiss the emergency. However, it could also have considered that the evolutive nature of the measures does not offer any guarantee nor predictability about the possibility to hold religious ceremonies shortly.

Fourth, while the lockdown was general and targeted every activity, economic or not, the *déconfinement* led to differentiated measures, that the principle of equality and of non-discrimination can question. Understandably, they generate a feeling of injustice in the mind of the people whose demands (or hopes) are ignored[81]. The balance also requires weighing the importance of freedom of religion against other fundamental rights, such as freedom of enterprise, which is guaranteed by international conventions[82] and by national provisions[83]. In this respect, one can wonder whether freedom of religion and freedom of enterprise received equal treatment.

[81] M. Nihoul, S. Wattier and F. Xavier, 'L'art de la juste mesure dans la lutte contre le coronavirus face à la dimension collective de la liberté de culte', *Rev. trim. D.H.*, 2020, pp. 1058-1059.

[82] The European Convention on Human Rights does not explicitly protect freedom of enterprise. However, companies enjoy several human rights. On this subject, see: P. Oliver, 'Companies and their fundamental rights: a comparative perspective', *I.C.L.Q.*, vol. 64, 2015, pp. 661-696; M. Teller, 'Les droits de l'homme de l'entreprise', in L. Boy, J.-B. Racine and F. Siiriainen (coord.), *Droit économique et droits de l'homme*, Bruxelles, Larcier, 2009, pp. 257-268. In European Union law, the freedom of enterprise is protected by article 16 of the Charter of fundamental rights, which states that: 'the freedom to conduct a business in accordance with Community law and national laws and practices is recognised'.

[83] In Belgium, freedom of enterprise is protected by articles II.3 and II.3 of the Economic Code (*Code de droit économique*) and the Constitutional Court recognises its existence. In

3. LEGAL CONTEXT

As underlined before, the reasoning of the two Councils of State examined whether the restriction of a fundamental right constituted an emergency and was illegal. This first section presents the international provisions applying in Belgium and France to understand the scope and limits of freedom of religion and freedom of demonstration. The second section analyses national constitutional provisions. Subsequently, the third section carries out a brief comparison of the two Councils of State to highlight the differences between the institutions.

3.1. The same international protections

France and Belgium have two similar systems of protection of fundamental rights. Both countries have signed the European Convention on Human Rights and are subject to the jurisdiction of the European Court of Human Rights. However, the European Convention on Human Rights is part of the *'bloc de constitutionnalité'* in France, but not in

France, the jurisprudence of the Constitutional Council bases freedom of enterprise on articles 2 and 17 of the *Déclaration des droits de l'homme et du citoyen*. On this subject, see: T. Léonard (coord.), *La liberté d'entreprendre ou le retour en force d'un fondamental du droit économique*, Bruxelles, Bruylant, 2015; V. Audubert, 'La liberté d'entreprendre et le Conseil constitutionnel : un principe réellement tout puissant ?', *Revue des droits de l'homme*, nr. 18, 2020, http://journals.openedition.org/revdh/9921 (accessed 29 October 2020); R. Ergec, 'La liberté de commerce et d'industrie à l'aune de la jurisprudence constitutionnelle', in *Libertés, (l)égalité, humanité*, Bruxelles, Bruylant, 2018, pp. 417-431.

Belgium. The Constitutional Court has thus developed a method to interpret articles of the Belgian Constitution in light of the European Convention on Human Rights[84].

Regarding freedom of religion, article 9 provides that:

'1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others'.

Contrarily to the Constitutions of France and Belgium, the European Convention explicitly allows the limitation of religious freedom for health reasons. Article 9 provides three guarantees: 'the freedom of thought, conscience, and religion as such; the freedom to change one's religion or belief; and the freedom to manifest religion or belief'[85]. Freedom of religion is 'one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the

[84] On this question, see: S. Wattier, 'The « Added Value » of the European Convention on Human Rights in the Ambit of Religious Freedom and Religious Autonomy in Belgian Constitutional Case Law', *R.I.E.J.*, 2016/2, pp. 297-317.

[85] W.A. Schabas, *The European Convention of Human Rights. A Commentary*, Oxford University Press, 2015, p. 420.

unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it'[86].

The most relevant case judged by the European Court of Human Rights about an interference based on health reasons concerns the wearing of religious symbols[87]. Ms Chaplin was a Christian nurse who wished to wear a cross on a chain during her work. The hospital asked her to remove it for safety reasons, but she refused. A discrimination trial followed, which she lost, and Ms Chaplin decided to appeal to the European Court of Human Rights. In this case, the Court considered that there was no violation of article 9, since 'the protection of health and safety on a hospital ward, was inherently of a greater magnitude'[88] than her right to manifest her religious beliefs. The Court judged that the measures were proportionate. In particular, the hospital had offered two possibilities to manifest her belief: wearing a cross in the form of a brooch or a necklace covered by a high-necked top under her uniform[89].

The European Court has recognised that freedom of religion includes the right to assemble and pray in community: an interference in this freedom implies an interference in article 11 interpreted in the light of article 9[90]. More specifically, the Court has judged that

[86] ECHR, Kokkinakis v. Greece, 25 May 1993, § 31.

[87] ECHR, Eweida and others v. The United Kingdom, 15 January 2013.

[88] ECHR, Eweida and others v. The United Kingdom, 15 January 2013, § 99.

[89] ECHR, Eweida and others v. The United Kingdom, 15 January 2013, § 98. However, the second option did not really allow Ms Chaplin to manifest her beliefs to other people, but only to herself.

[90] ECHR, Barankevich v. Russia, 26 July 2007, § 20.

if a religious community has no place to practise its faith, freedom of religion loses all its substance[91].

While freedom of religion can be exercised individually, like Ms Chaplin, or collectively, freedom of demonstration is only collective. Regarding the protection of freedom of demonstration, article 11 states that:

'1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others (…)'.

Article 11 is intimately linked to articles 9 and 10 of the Convention. Indeed, 'although its scope extends well beyond the exercise of the freedoms of assembly and association in the exercise of freedom of religion and expression, the visceral connection is undeniable'[92]. According to the jurisprudence of the European Court of Human Rights, 'any measures interfering with the freedom of assembly and expression other than in cases of incitement to violence or rejection of democratic principles – however shocking and unacceptable certain views or words used may appear to the authorities – do a disservice to democracy'[93].

[91] ECHR, Affaire association de solidarité avec les témoins de Jéhovah c. Turquie, 24 May 2016, § 90.

[92] W.A. Schabas, *The European Convention of Human Rights. A Commentary*, Oxford University Press, 2015, p. 491.

[93] ECHR, Sergey Kuznetsov v. Russia, 23 October 2008, § 45.

However, the Court accepts that a State uses an authorisation system or a notification procedure when people want to exercise their right to demonstration[94]. As underlined hereafter, these systems apply in Belgium and France. The Court also judges that the exceptions to freedom of gathering must be strictly interpreted and that States must justify them convincingly[95]. The proportionality analysis is paramount and requires that there are no 'effective, less intrusive measures available to attain the said aims in a proportionate manner'[96].

The situations leading to the decisions of the Councils of State are conflicts of rights. Indeed, freedom of religion and freedom of demonstration can be opposed to the right to life, guaranteed by article 2 of the European Convention on Human Rights. This right compels the State to take appropriate measures to avoid predictable deaths[97]. However,

[94] ECHR, Güneri and others v. Turkey, 12 July 2005, § 79; ECHR, Balçik and others v. Turkey, 29 November 2007, § 49.

[95] ECHR, Kudrevicius and others v. Latvia, 15 October 2015, § 142.

[96] ECHR, Schwabe and M.G. v. Germany, 1 December 2011, § 118.

[97] For the ECHR, 'bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising' (ECHR, Olewnik-Cieplińska and Olewnik v. Poland, 5 September 2019, § 119). See also: F. Bouhon et. al., 'L'État belge face à la pandémie de Covid-19 : esquisse d'un régime d'exception', *Courrier hebdomadaire du CRISP*, 2020/1, p. 7.

States must tailor the measures to the level of risk[98]. There are lots of circumstances or human activities that entail a risk of death, but they do not mean that the State is free to adopt any measure to prevent them. The test of proportionality limits the measures that the authorities can adopt.

In this regard, the President of the Parliamentary Assembly of the Council of Europe has insisted on the proportionality test in the fight against the coronavirus: 'I should like to stress that the overarching principle of proportionality limits the action that may be taken, via the stringent test of what is "strictly required by the exigencies of the situation"'[99]. As underlined previously, this principle appears in the jurisprudence of the French Council of State, but not in the reasoning of the Belgian Council of State.

Finally, neither Belgium nor France has invoked article 15 of the European Convention of Human Rights. According to article 15, States can derogate from particular articles of the Convention, including articles 9 and 11, in a situation of war or other danger to the life of the nation[100]. The rights concerned are 'derogable'[101]. The Court described the danger to the

[98] ECHR, Öneryildiz v. Turkey, 30 November 2004, § 90.

[99] Parliamentary Assembly of the Council of Europe, *COVID-19: President urges states to abide by the ECHR when responding to the crisis*, 24 March 2020, https://pace.coe.int/en/news/7825 (accessed 27 October 2020).

[100] Article 15, § 1, of the European Convention on Human Rights states that: 'in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law'. See: C. Nivard, 'Le respect de la Convention européenne des droits de l'homme en temps de crise sanitaire mondiale', *La Revue des Droits de l'Homme*, 2020, http://journals.openedition.org/revdh/8989 (accessed 9 November 2020); C. Le Bris, 'Du

life of the nation as 'an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the State is composed'[102]. It seems that article 15 had never been used previously in the context of a pandemic[103]. For Belgium and France, usual rules remain fully applicable.

3.2. Constitutional guarantees that differ slightly

After the international protections, the paper compares the constitutional provisions applicable in France and Belgium. The Belgian Constitution protects freedom of religion through three articles. Article 19 addresses the positive aspect of freedom of religion: people have the right to adhere to a religion and to manifest their belief[104]. Article 20 protects the 'negative side' of the freedom of religion: people cannot be forced to believe or

juste équilibre : les limitations aux droits de l'homme en période de crise sanitaire (Première partie)', *La Revue des Droits de l'Homme*, 2020, http://journals.openedition.org/revdh/10551 (accessed 9 November 2020).

[101] On this question, see: A. Greene, *Emergency Powers in a Time of Pandemic*, Bristol University Press, 2020, pp. 61-92.

[102] ECHR, Lawless v. Ireland, 1st July 1961, § 28.

[103] M. Nihoul, S. Wattier and F. Xavier, 'L'art de la juste mesure dans la lutte contre le coronavirus face à la dimension collective de la liberté de culte', *Rev. trim. D.H.*, 2020, p. 1052.

[104] Article 19 states that: 'freedom of religion, freedom to practise it in public, as well as the freedom to express one's opinions in all matters, are guaranteed, except for the repression of offences committed in the use of these freedoms'.

to participate in religious activities if they do not wish to[105]. Article 21 forbids the State to intervene in the nomination of ministers of religion, which courts and doctrine equate to the protection of the organisational autonomy of religions[106].

As for France, the Constitution of 1958 contains no bill of rights. However, the preamble refers to the human rights proclaimed by the *Déclaration des droits de l'homme et du citoyen* of 1789 and by the preamble of the 1946 Constitution. The article 10 of the 1789 Declaration protects freedom of religion in such terms that its only limit is public order[107].

Thus, France and Belgium protect freedom of religion broadly, even if they do not share the same conception of 'secularism'. The French system is famous for its principle of '*laïcité*'[108]. Under this understanding, the 1905 law about the separation of Church and State

[105] Article 20 provides that: 'no one can be compelled in any way to take part to the acts and ceremonies of a cult, nor to observe its days of rest'.

[106] Article 21, § 1, reads as follows: 'the State has no right to interfere in the appointment or installation of ministers of any religion, nor to forbid them to correspond with their superiors, and to publish their acts, except, in the latter case, the ordinary liability for the press and publication'. See: S. Wattier, *Le financement public des cultes et des organisations philosophiques non confessionnelles : analyse de constitutionnalité et de conventionnalité*, Bruxelles, Larcier, 2016, pp. 188-198.

[107] Article 10 of the 1789 Declaration proclaims that: 'no one should be worried about his opinions, even religious, as long as their manifestation does not disturb the public order established by the law'.

[108] On this subject, see: F. Messner, P.-H. Prélot and J.-M. Woehrling (eds.), *Droit français des religions*, 2nd edn, Paris, LexisNexis, 2013; D. Koussens, *L'épreuve de la neutralité*, Bruxelles, Bruylant, 2015; E. Daly, 'The Ambiguous Reach of Constitutional Secularism in Republican France: Revisiting the Idea of Laïcité and Political Liberalism as Alternatives',

proclaims that the French Republic does not recognise nor subsidise any religion[109]. By contrast, 'Belgium has a resolutely active conception of the principle of pluralism'[110]. One of the main differences between the two regimes is the fact that Belgium has a system of recognition and funding of some religions[111]. Article 181 of the Constitution establishes this regime, which is as old as the Belgian State[112]. For this reason, it would be incorrect to say that Belgium lives under a strict separation regime. Authors use terms such as the

Oxford Journal of Legal Studies, 2012, pp. 583-608; C. Kintzler, 'Construire philosophiquement le concept de laïcité. Quelques réflexions sur la constitution et le statut d'une théorie', *Cités*, 2012, pp. 51-68, M. Barthélémy and G. Michelat, 'Dimensions de la laïcité dans la France d'aujourd'hui', *Revue française de science politique*, 2007, pp. 649-698 ; N. Baillargeon, Deux concepts de laïcité et leurs enjeux, in *Laïcité et humanisme*, Ottawa, University of Ottawa Press, 2015.

[109] Loi concernant la séparation des Eglises et de l'État, 9 December 1905, art. 2.

[110] H. Dumont, 'Conclusions', in C. Romainville et. al. (dir.), *État et religions*, Limal, Anthémis, 2016, p. 245.

[111] On this subject, see S. Wattier, *Le financement public des cultes et des organisations philosophiques non confessionnelles : analyse de constitutionnalité et de conventionnalité*, Bruxelles, Larcier, 2016.

[112] Article 181, § 1, of the Constitution provides that: 'the salaries and pensions of ministers of religion are paid by the State; the sums needed to cover them are charged annually to the budget'. The second paragraph gives the same guarantees to philosophical non-confessional organisations.

'independence'[113], 'mutual independence'[114] or 'benevolent separation'[115] between Church and State.

However, the differences between the two systems remain limited[116]. Indeed, even if the French political and legal discourse puts a great emphasis on the principle of *laïcité*, several elements lead to the conclusion that the separation is not as strict as it seems. For instance, due to the *concordat* signed by Napoleon, religions are funded in Alsace-oselle[117].

[113] F. Delpérée, *Le droit constitutionnel de la Belgique*, Bruxelles and Paris, Bruylant and LGDJ, 2000, p. 231.

[114] H. Wagnon,'La condition juridique de l'Église catholique en Belgique', *Ann. dr. sc. pol*., 1964, p. 72.

[115] S. Wattier, 'Le financement des cultes au XXIe siècle : Faut-il réviser l'article 181 de constitution ?', *R.B.D.C.*, 2011/1, p. 25 ; L.-L. Christians, 'Le financement des cultes en droit belge : bilan et perspectives', *Quaderna di diritto e politica ecclesiastica*, 2006, p. 83; S. Wattier, 'Inscrire le principe de laïcité dans la Constitution belge ? Quelques pistes pour une réflexion juridique', *Cahiers du CIRC*, nr. 4, 2020, p. 80; X. Delgrange, 'Faut-il enchâsser la laïcité politique dans la Constitution belge ?', *Cahiers du CIRC*, nr. 4, 2020, p. 12.

[116] S. Wattier, 'Entre sécularisation et retour du religieux : repenser les relations entre État et religions dans une Belgique paradoxale', in C. Romainville et. al. (dir.), *État et religions*, Limal, Anthémis, 2016, pp. 27-30.

[117] On this subject, see: F. Messner, 'Le droit local des cultes alsacien-mosellan au défi du pluralisme religieux', *Recht, Religie and Samenleving*, 2017/2, pp. 45-78.

The principle of *laïcité* is not opposed to freedom of religion. On the contrary, it is 'devised as a means to ensure the free exercise of religion by all citizens'[118].

Nevertheless, the absence of a strict separation had an incidence in the Belgium case about freedom of religion. The Council of State referred to the dialogue between the State and the religious authorities to dismiss the claim[119]. Such dialogue is contrary to the French principle of *laïcité*. Still, the reference to the press release of the bishops of Belgium, stating that baptism could wait until the end of the lockdown, is questionable. As underlined by Frank Judo, this argument seems contrary to the principle that courts should not evaluate the content of the belief but only examine if the claimant has an opinion that is cogent and serious[120]. People are not required to follow the religious authorities of their faith strictly.

Concerning freedom of demonstration, it is subject to police laws in both countries. According to article 26 of the Belgian Constitution, open-air gatherings are fully subject to the police laws[121]. Similarly, the French *Déclaration des droits de l'homme et du citoyen*

[118] M. Hunter-Henin, 'Why the French don't like the burqa: laïcité, national identity and religious freedom', *The International and Comparative Law Quarterly*, 2012, p. 617.

[119] This dialogue is however not constant. Besides, no legal framework provides its existence and conditions in Belgian law. The situation is different in European Union law. See: S. Wattier, 'Quel dialogue entre l'Union européenne et les organisations religieuses et non confessionnelles. Réflexions au départ de la décision du Médiateur européen du 25 janvier 2013', *Cahiers de droit européen*, 2015, pp. 535-556.

[120] F. Judo, 'De Geest is niet gehaast', *Juristenkrant*, 10 Juni 2020, p. 13.

[121] Article 26 of the Constitution states that: 'Belgians have the right to assemble peacefully and unarmed, in compliance with the laws that may regulate the exercise of this right

states that the manifestation of one's opinions cannot disturb public order. The French Constitutional Council has stated that freedom of demonstration and freedom of expression, guaranteed by article 11 of the *Déclaration*, are intertwined[122]. Freedom of demonstration can be distinguished from freedom of assembly by the fact that there is an intent to manifest one's opinions or ideas[123].

However, the two countries differ sharply in one respect. In principle, French law applies a system of prior notification. The organiser of a demonstration must notify the administrative authorities, which can prohibit it on legitimate grounds. By comparison, most Belgian cities have enacted regulations that subject any demonstration to prior authorisation. Even if a regime of authorisation is constitutionally valid in Belgium, 'the State has a positive obligation to allow the effective exercise of this right'[124]. The difference of system displays apparently broader protection of freedom of demonstration in France, which can explain why the French Council of State judged the prohibition disproportionate.

The proportionality test is critical to determine whether a restriction to the freedom of demonstration is constitutionally valid. A higher interest can justify a prohibition if it is

without, however, being subject to prior authorisation. This provision does not apply to open-air gatherings, which remain entirely subject to police laws'.

[122] Constitutional Council, nr. 2019-780, 4 April 2019, § 11.

[123] P. Nihoul, 'Le droit de se réunir librement', in M. Verdussen and N. Bonbled (eds.), *Les droits constitutionnels de Belgique*, Bruxelles, Bruylant, 2011, p. 1071.

[124] P. Nihoul, 'Le droit de se réunir librement', in M. Verdussen and N. Bonbled (eds.), *Les droits constitutionnels de Belgique*, Bruxelles, Bruylant, 2011, p. 1071.

adapted to the circumstances of time and place[125]. In front of the Council of State, the control of proportionality amounts to control 'the manifest error of appreciation, in other words, the error that would not be committed by any administrative authority placed in the same situation'[126].

3.3 The Belgian Council of State, a copy of its French homologue?

After the comparison of legal norms applicable at the international and national levels, the paper points out some essential characteristics of the two institutions. Although they are similar in their organisation, their powers differ slightly.

The French Council of State is an old institution, dating back to Napoleonic times. Comparatively, the Belgian Council of State is relatively recent, since it was created after the Second World War. The law of 23 December 1946 set it up, and the institution was effectively born in 1948[127]. The legislative and doctrinal debates preceding the adoption of the law about the Council of State show that the 'French model' was very much influencing the idea of having a judge for controlling the administration[128].

[125] P. Nihoul, 'Le droit de se réunir librement', in M. Verdussen and N. Bonbled (eds.), *Les droits constitutionnels de Belgique*, Bruxelles, Bruylant, 2011, p. 1076.

[126] Council of State (Belgium), nr. 232.012, 30 July 2015.

[127] M. Leroy, *Contentieux administratif*, 5th ed., Limal, Anthémis, 2011, p. 59.

[128] See P. Bouvier, *La naissance du Conseil d'État de Belgique : une histoire française ?*, Bruxelles, Bruylant, 2012, pp. 107-152.

In both countries, the Council plays a role as a jurisdiction and a counsellor. In France, six sections compose the Council of State, five of which have an advisory competence and the last having a jurisdictional competence[129]. For organisational reasons, this last section includes several subsections. In order for the Council of State to remain impartial, a counsellor must recuse himself if a case involves a question on which he has given an opinion during the advisory phase[130]. During the pandemic, a debate concerned the impartiality of the Council of State in France. The Council of State sometimes had to judge the legality of a decision on which he had given its opinion only a few hours before the claim[131]. In Belgium, the Council of State includes two sections: one is advisory, and the other is jurisdictional. The advisory section has the competence to provide advice about a project of legislative or executive text emanating from a parliament or a government before its adoption[132]. Its competence is similar in France, but more limited regarding executive norms[133].

[129] J. Waline, *Droit administratif*, 22nd ed., Paris, Dalloz, 2008, pp. 570-571.

[130] J. Waline, *Droit administratif*, 22nd ed., Paris, Dalloz, 2008, pp. 572. This requirement is a consequence of the jurisprudence of the European Court of Human Rights. See: ECHR, *Procola v. Luxembourg*, 28 September 1995, § 45.

[131] P. Cassia, 'Le Conseil d'Etat et l'état d'urgence sanitaire: bas les masques!', *Mediapart*, 11 April 2020, https://blogs.mediapart.fr/paul-cassia/blog/100420/le-conseil-d-etat-et-l-etat-d-urgence-sanitaire-bas-les-masques (accessed 5 November 2020).

[132] If the text emanates from a Government, the advice is mandatory. If the text emanates from a Parliament, the advice is optional. See: Lois coordonnées sur le Conseil d'Etat, 12 January 1973, art. 2 to 6*bis*.

[133] Articles 38 and 39 of the Constitution.

Perhaps the main difference in terms of organisation concerns the training of counsellors. In Belgium, the law requires a law degree to access the position of counsellor[134]. In France, this requirement does not apply, and the National School of Administration (*Ecole Nationale d'Administration*) trained many counsellors. This difference of cognitive mindsets might have an impact on the control over administrative action[135].

Pertaining to the jurisdictional competences, the Belgian Constitution provides that the protection of civil and political rights is the mission of the judiciary power, even if the law can provide some exceptions for political rights and if the Council of State has the power to adjudicate on the civil effects of its decisions[136]. Thus, in principle, when a citizen argues that a royal or ministerial decree has violated one of his rights and seeks compensation, the judiciary power will judge the claim. The conditions for the Council of State to be competent is that the procedure constitutes objective litigation (*'contentieux objectif'*). In other words, the claimant pursues the cancellation and, in some instances, the suspension of an administrative act because it is illegal[137]. The real subject matter of the procedure is not the right of the claimant but the act of the administration.

On the contrary, in France, the Council of State and the administrative jurisdictions are supposed to judge any litigation involving the administration. Their competence is not limited to the annulment of administrative decisions: they also have full jurisdiction,

[134] Lois coordonnées sur le Conseil d'Etat, 12 January 1973, art. 70.

[135] On this question: B. Latour, *La Fabrique du droit, une ethnologie du Conseil d'Etat*, Paris, La Découverte, 2002.

[136] Articles 144 and 145 of the Belgian Constitution.

[137] D. Renders and B. Gors, *Le Conseil d'Etat*, Bruxelles, Larcier, 2020, p. 10.

namely for administrative sanctions and public contracts. Besides, the Belgian institution does not have a procedure equivalent to the *'référé-liberté'* allowing the Council of State to pronounce injunctions against the administrative authorities. The Belgian Council of State can only suspend or cancel an administrative act[138]. As the analysis underlines further, this element had an impact on several claims against the measures adopted against the coronavirus.

4. SPECIFIC CIRCUMSTANCES THAT EXPLAIN THE DIFFERENCES

While the previous chapter focused on general features of the human rights protection systems in France and Belgium, this last chapter deepens the analysis about the specific cases and situations at hand. To begin with, the first section explores the different grounds of the emergency measures adopted. The second section analyses the past jurisprudence of both Councils of State to compare how the decisions follow it. Finally, the last section

[138] The situation is slightly different in the case of a *référé* introduced in front of the ordinary judge. The judge can decide provisional measures on the condition that a subjective right is violated by an administrative act. The criterium is, however, not straightforward (D. Mougenot, 'Principes de droit judiciaire privé', in *Rép. not.*, t. XIII, Bruxelles, Larcier, 2019, n° 222). An action introduced by almost 200 people against the COVID-19 measures has been rejected by the court of first instance of Brussels in July. The judge considered that no subjective right could be identified and that the Council of State was competent for such action. See: Belga, 'Coronavirus en Belgique : l'action en référé afin d'obtenir la levée d'une série de mesures liées au Covid rejetée', *RTBF.be*, 03 July 2020, https://www.rtbf.be/info/belgique/detail_coronavirus-en-belgique-l-action-en-refere-afin-d-obtenir-la-levee-d-une-serie-de-mesures-liees-au-covid-rejetee?id=10535960 (accessed on 5 November 2020).

discusses the specific differences between the cases and the case law of the two administrative courts through the pandemic, including decisions pronounced during the second lockdown.

4.1. Different foundations for emergency measures

Crises often imply the activation of specific mechanisms to accelerate and centralise decision-making[139]. In Belgium, the Parliament granted the 'special powers' to the Government[140]. They give the executive branch the power to amend, adopt and even cancel legislative rules. The Parliament indicates the means and limits of this power. All the decisions adopted by the Government must be validated in due time by the Parliament[141]. However, the situation was somewhat peculiar in Belgium when the crisis of coronavirus started since the Government was in caretaker mode ('*en affaires courantes*'). In this context, the Government does not have a majority in Parliament and has not its confidence. Its competences are thus limited to dealing with urgent or day-to-day matters. In theory, nothing prevents the Parliament from granting special powers to a Government in caretaker mode. However, a majority of political parties decided to vote the confidence[142].

[139] On this question, see: F. Ní Aoláin and O. Gross, *Law in Times of Crisis. Emergency Powers in Theory and Practise*, Cambridge University Press, 2006.

[140] These powers are based on article 105 of the Constitution, which provide that: 'the King has no powers other than those formally assigned to him by the Constitution and by the special laws enacted by virtue of the Constitution itself'.

[141] For more details about the special powers in Belgian law, see: M. Leroy, 'Les pouvoirs spéciaux en Belgique', *A.P.T.*, 2014, pp. 483-504.

[142] For more details about the course of events at the time, see: J. Faniel and C. Sagesser, 'La Belgique entre crise politique et crise sanitaire (mars-mai 2020)', *Courrier*

Nevertheless, the basis of the measures fought in front of the Council of State was not these special powers. The measures relied on the law of 31 December 1963 on civil protection, the law of 15 May 2007 on civil security and the law on the police function[143]. The law on civil protection provides that the Minister of Interior is competent to take the necessary measures to ensure civil protection. Civil protection encompasses 'the set of measures and means dedicated to ensuring the protection and survival of the population'[144]. As for the law on civil security, it allows the Minister to forbid the population to move or to attend certain places or regions[145]. The Belgian Constitution sets one crucial limit to the measures that can be adopted: according to article 187, 'the Constitution cannot be suspended'.

In France, the decrees judged by the Council of State depended upon the activation of the 'state of health emergency'[146]. The law of 23 March 2020 had newly created this state of emergency. However, the opportunity of creating this new exceptional regime is questionable, since other legislative provisions of French law could have worked in this

hebdomadaire du CRISP, 2020/2; N. Bernard, 'Les pouvoirs du gouvernement fédéral en période de crise : le gouvernement Wilmès face à l'épidémie de Covid-19', *J.T.*, 2020, pp. 372-375.

[143] Arrêté ministériel portant des mesures d'urgence pour limiter la propagation du coronavirus COVID-19, 23 March 2020.

[144] Loi sur la protection civile, 31 December 1963, art. 1 and 4.

[145] Loi sur la sécurité civile, 15 May 2007, art. 182.

[146] On this subject, see: V. Sizaire, 'Un colosse aux pieds d'argile. Les fondements juridiques fragiles de l'urgence sanitaire', *La Revue des Droits de l'Homme*, 2020, http://journals.openedition.org/revdh/8976 (accessed 9 November 2020).

context[147]. However, the new state of emergency provides that the Prime Minister can decide to temporarily close certain places of meeting and limit or forbid public gatherings[148]. The provisions explicitly indicate that the measures must remain proportionate to the sanitary risk and that they must disappear as soon as they are no longer required. The Council of State can judge any dispute arising from these measures pursuant to the procedure of the *référé-liberté*.

France is familiar with the state of emergency. The terror attacks of 2015 and 2016 already led to its activation[149]. During this period, several religious places were closed on the motive that discourses propagated extremist ideas inside[150]. The Council of State

[147] M. Nihoul, S. Wattier and F. Xavier, 'L'art de la juste mesure dans la lutte contre le coronavirus face à la dimension collective de la liberté de culte', *Rev. trim. D.H.*, 2020, pp. 1040-1041; A. Gelblat and L. Marguet, 'État d'urgence sanitaire : la doctrine dans tous ses états ?', *La Revue des Droits de l'Homme*, 20 April 2020, http://journals.openedition.org/revdh/9066 (accessed 5 November 2020), pp. 2-3.

[148] Loi n° 2020-290 d'urgence pour faire face à l'épidémie de covid-19, 23 March 2020, article 3.

[149] On this subject: S. Hennette Vauchez, 'The State of Emergency in France: Days Without End?', *European Constitutional Law Review*, vol. 14, 2018, pp. 700-720; O. Pluen, 'Le(s) rôle(s) de contrôle du Conseil constitutionnel et de la juridiction administrative pendant la période d'état d'urgence 2015-2017 : entre progression et limites d'une spécificité française', *Droits*, 2019/1, pp. 219-241.

[150] Nineteen religious places had been closed during the state of emergency. See: Senate (France), *Rapport d'information fait au nom de la commission des lois constitutionnelles, de législation, du suffrage universel, du Règlement et d'administration générale (1) par la mission de contrôle et de suivi de la loi du 30 octobre 2017 renforçant la sécurité intérieure et la lutte contre le terrorisme (2)*, 19 December 2018, p. 21.

generally refused to cancel the administrative decisions. However, one weighty argument was the fact that other religious places were available around the closed places (see further)[151].

Thus, while Belgian measures relied on ordinary laws, French ones were adopted in a derogatory set of rules. In this context, it is even more paramount that the jurisdictions protect the rights of individuals. In France, the principle of proportionality receives emphasis from the law instigating the state of health emergency.

4.2. Decisions embedded in the established respective case law of each Council of State

The previous section has shown that an unusual legal context led to the adoption of the measures. As underlined hereafter, it does not mean that the decisions depart from the classical line of the jurisprudence of each Council[152].

However questionable they may be, the decisions rendered by the Belgian Council of State are in line with its past case law. The Council of State regularly considers that 'when the alleged damage harms fundamental rights, it does not result *ipso facto* that this damage

[151] Council of State (France), nr. 405476, 6 December 2016 ; Council of State (France), nr. 406618, 20 January 2017; Council of State (France), nr. 416398, 11 January 2018. See also: M. Nihoul, S. Wattier and F. Xavier, 'L'art de la juste mesure dans la lutte contre le coronavirus face à la dimension collective de la liberté de culte', *Rev. trim. D.H.*, 2020, pp. 1049-1050.

[152] Neither the Belgian Council of State, nor the French Council or State is bound by the rule of precedent.

should be considered as serious and difficult to repair'[153]. Besides, the Council of State stresses that it cannot substitute its opinion to one of the administrative authorities: it is only in case of manifestly disproportionate measure that the Council of State can act[154]. It does not decide on the merits of an administrative decision. In both countries, the judge gives 'a wide margin of appreciation as to the degree of seriousness of the factual circumstances likely to undermine public order, the extent of the means to be employed to maintain and, where necessary, restore public order and the choice of the most appropriate and least restrictive measure possible in the specific circumstances of the case'[155].

Concerning demonstrations in Belgium, previous decisions from the Council of State mentioned several elements. For instance, a decision about the prohibition of demonstrations justifies the absence of serious damage on the following grounds: the fact that the prohibition applies only in specific neighbourhoods, that the claimants can manifest their opinions in other places and that the prohibition applies to gatherings of more than ten people only[156]. This last element is interesting since gatherings involving less than twenty people were allowed during the *déconfinement*. In another case, the Council of State takes into account three facts to determine that the damage is severe enough to justify the

[153] Council of State (Belgium), nr. 217.060, 23 December 2011; Council of State (Belgium), nr. 242.017, 29 June 2018; Council of State (Belgium), nr. 221.934, 4 January 2013. According to the Council of State, this argument has even more importance due to the fact that demonstrations are subject to police laws, as provided by article 26 of the Constitution.

[154] Council of State (Belgium), nr. 87.974, 51 June 2000.

[155] R. Andersen, 'Liberté de manifester et ordre public' in *Liber amicorum Anne Mie Draye*, Anvers, Intersentia, 2015, p. 218.

[156] Council of State (Belgium), nr. 217.060, 23 December 2011.

emergency procedure: the prohibition applies to the entirety of the territory of Brussels, it forbids static as well as moving demonstrations, and the decision amounts to a 'decision of principle' for any similar demand emanating from the claimant[157]. In another case, the possibility to hold a static demonstration combined to the fact that there is generally a demonstration organised per month shows that there was no infringement of the freedom of demonstration of the claimant[158]. The past jurisprudence is thus not unequivocal. Indeed, in the case at hand, a static demonstration was forbidden. Moreover, although the decision formally pertained to one demonstration, its scope was broader since the prohibition ensued from the ministerial decree and was thus the application of a general rule.

In France, the control of proportionality is enshrined in the jurisprudence of the Council of State even if the expression is absent[159]. It is first in the Benjamin case, in 1933, that the Council of State judged that the objective of maintaining the public order must be conciliated with the freedom of assembly[160]. Furthermore, the French Council of State has for long considered that a police measure cannot enact a general authorisation system unless there is no other mean available[161].

Regarding the specific question of demonstrations, the French Council of State normally has no competence about them. The questions arising from their prohibition are dealt with by local administrative tribunals. However, appeals are possible against these

[157] Council of State (Belgium), nr. 242.017, 29 June 2018.

[158] Council of State (Belgium), nr. 221.934, 4 January 2013.

[159] X. Lamprini, *Les principes généraux du droit de l'Union européenne et la jurisprudence administrative française*, Bruxelles, Bruylant, 2017, pp. 347-348.

[160] Council of State (France), nr. 17413 and 17520, 19 May 1933.

[161] Council of State (France), nr. 00590.02551, 22 June 1951.

decisions. For instance, the Council of State judged that a prohibition motivated by past violence and damage to goods from the demonstrators was valid[162].

As for religious ceremonies, the closing of religious places has led to some case law in Belgium and France. Apart from isolated decisions, most of them concern the closing of a place by the local authorities ('*bourgmestres*') on the motive of terrorism offences[163]. The Council of State generally considers that the claimants do not fulfil the emergency condition, since they do not show that they cannot practise their religion in another place, especially when the closing is temporary[164]. As underlined hereabove, French jurisprudence follows the same line on this question.

However, the critical difference in the cases deferred to the two Councils of State is the fact that every religious ceremony was forbidden and the only alternative was to attend the religious services online. One can wonder whether the possibility of online religious ceremonies is sufficient enough to judge that the prohibition of physical ones is proportionate. There may be a symbolic and social dimension consubstantial to a religious ceremony that differs from other activities. Attending a religious ceremony could be considered as a crucial moment of social bonding, incorporated by the belonging to a 'religious community' which is not adequately replaced by an online alternative, especially during several months.

[162] Council of State (France), nr. 383091, 26 July 2014.

[163] On this question, see: F. Xavier, 'La fermeture par le bourgmestre des établissements suspectés d'abriter des activités terroristes', *C.D.P.K.*, 2018, pp. 22-50.

[164] See Council of State (Belgium), 203.428, 29 April 2010; Council of State (Belgium), 192.404, 18 April 2009.

Besides, this reasoning could apply demonstrations as well. As underlined previously, they are a crucial mean to express opinions. They also create social links and diffuse messages as to the identity, needs and vulnerabilities of people who attend them. Public authorities should not underestimate the symbolic dimensions of freedom of religion and freedom of manifestation.

4.3. Timing, factual differences or a different willingness to use its powers?

The preceding section has put the cases at hand in the context of the previous case law of the two administrative courts. Subsequently, this section examines some of the other decisions pronounced during the COVID-19 pandemic[165]. In general, the tendency followed by the two Councils of State is to protect the decisions adopted by the public authorities.

Even if the Council of State of France has accepted the two claims analysed in this paper, it is not true for all the actions it received during the first lockdown (March-June 2020). For instance, the prohibition of open or inside markets was considered proportionate by the Council of State[166]. Nevertheless, 'in both cases, the Council of State of France has been careful to ensure that the measures maintained in the context of deconfinement do not disproportionately infringe fundamental freedoms'[167].

[165] At the time of writing this paper, the pandemic is still ongoing. The Belgian and French Councils of State continue to pronounce decisions about the measures adopted in this context.

[166] Council of State (France), nr. 439762, 1st April 2020.

[167] M. Nihoul, S. Wattier and F. Xavier, 'L'art de la juste mesure dans la lutte contre le coronavirus face à la dimension collective de la liberté de culte', *Rev. trim. D.H.*, 2020, p. 1047.

Still, the French Council of State has accepted, at least partially, several demands[168]. For instance, it has rejected the request to enforce a total lockdown but has ordered the Government to detail the scope of certain measures and to evaluate the risks of specific situations[169]. It has also considered that administrative authorities could not generally impose the wearing of a facial mask[170]. The Council of State has also given the authorities an injunction to distribute facial masks to prisoners[171]. It also judged that the obligation to wear a mask should be limited to coherent zones characterised by a high density of population[172]. The Council of State has considered that thermic cameras were contrary to

[168] But only a 'tiny proportion of the demands' (L. Vatna, 'Le juge administratif et la crise de la covid-19. Entre protection de la santé et respect des libertés : le juge administratif à l'épreuve de la covid-19', *La Revue des Droits de l'Homme*, 2020, http://journals.openedition.org/revdh/10542 (accessed 9 November 2020)).

[169] Council of State (France), nr. 439674, 22 March 2020. See: J. de Gliniasty, 'La gestion de la pandémie par la puissance publique devant le Conseil d'État à l'aune de l'ordonnance de référé du 22 mars 2020', *La Revue des Droits de l'Homme*, 2020, http://journals.openedition.org/revdh/9447 (accessed 9 November 2020).

[170] Council of State (France), nr. 440057, 17 April 2020;Council of State (France), nr. 443.750, 6 September 2020. About the first decision, see: J. Mattiussi, 'La liberté vestimentaire démasquée ? À propos de l'ordonnance du Conseil d'État en date du 17 avril 2020', *La Revue des Droits de l'Homme*, 2020, http://journals.openedition.org/revdh/9116 (accessed 9 November 2020).

[171] Council of State (France), nr. 440151, 7 May 2020. As such, this decision does not disturb the lockdown. It provides rather a humanitarian measure.

[172] Council of State (France), nr. 443750, 6 September 2020.

the GDPR[173] as well as the use of drones[174]. Besides, it has estimated that the generalisation of a procedure involving one judge for asylum procedures was disproportionate[175]. Perhaps more anecdotal, the Council of State has enjoined the authorities to adapt the regulation to make unambiguous that the bicycle was a perfectly valid mean of transport during the lockdown[176]. Far more actions have nonetheless been dismissed[177], including some challenging directly the state of health emergency[178]. One critical element is the fact that the Council of State accepted the actions either before the full lockdown or after the easing.

On the contrary, during the crisis triggered by the pandemic, the Belgian Council of State has been reluctant to suspend the measures adopted by the authorities. It rejected some actions on purely procedural grounds[179]. Other demands were denied because the

[173] Council of State (France), nr. 441065, 26 June 2020.

[174] Council of State (France), nr. 440442 and 440445, 18 May 2020.

[175] Council of State (France), nr. 440717, 440812 and 440867, 8 June 2020.

[176] Council of State (France), nr. 440179, 30 April 2020.

[177] See for instance: Council of State (France), nr. 439693, 28 March 2020; Council of State (France), nr. 439726, 28 March 2020; Council of State (France), nr. 440321, 22 May 2020; Council of State (France), nr. 440701, 8 June 2020; Council of State (France), nr. 444741, 8 October 2020. These arrests pertain to alleged violation arising from insufficient measures of the State, namely regarding the equipment of healthcare workers or the distribution of facial masks. See also: Council of State (France), nr. 441449, 441552 and 441771, 13 July 2020; Council of State (France), nr. 439762, 1st April 2020.

[178] See: Council of State (France), nr. 445367, 29 October 2020.

[179] See for instance: Council of State (Belgium), nr. 247.710, 4 June 2020; Council of State (Belgium), nr. 247.714, 4 June 2020; Council of State (Belgium), nr. 248.213, 4 September

damage sustained by the claimant was financial and, thus, reparable[180], not severe enough[181] or insufficiently substantiated[182]. While most decisions rejected the claim on the motive that there was no emergency, recent decisions have dismissed demands because the argument was not serious[183]. Interestingly, the analysis was more thorough in these decisions than in the previous ones, as if the need for justification was greater now.

2020. These arrests dismiss the actions on the motive that the claimants ask the Council of State to partially suspend a ministerial decree, which is not one of its prerogatives. See also: Council of State (Belgium), nr. 248.108, 3 August 2020; Council of State (Belgium), nr. 248.109, 3 August 2020. These arrests reject the actions because the suspension of the acts would have no effect on the situation of the claimants. See as well: Council of State (Belgium), nr. 247.472, 29 April 2020; Council of State (Belgium), nr. 248.189, 28 August 2020; Council of State (Belgium), nr. 248.231, 8 September 2020. The applications were dismissed because the claimants have delayed the introduction of their claims, which is incompatible with the notion of emergency. See then: Council of State (Belgium), nr. 247.919, 26 June 2020. The action of the claimant is rejected because the act attacked has been withdrawn.

[180] See for instance: Council of State (Belgium), nr. 247.856, 22 June 2020.

[181] See for instance: Council of State (Belgium), nr. 247.939, 26 June 2020.

[182] See for instance: Council of State (Belgium), nr. 248.270, 15 September 2020; Council of State (Belgium), nr. 248.130, 7 August 2020.

[183] See for instance: Council of State (Belgium), nr. 248.780, 28 October 2020; Council of State (Belgium), nr. 248.818, 30 October 2020; Council of State (Belgium), nr. 248.819, 30 October 2020. These arrests concern the closing of restaurants and the curfew.

In a decision pronounced in chamber and not by a single counsellor[184], the Belgian Council of State insisted that it is competent 'to examine whether the Minister relied on genuinely existing and relevant elements of fact, which have been ascertained with all necessary rigour, whether he correctly assessed and rigorously weighed up all the interests involved and whether, on this basis, he was able to make his decision within the limits of reasonableness'[185]. This formulation shows the broad margin of appreciation that the State enjoys. It indicates that the control of proportionality is marginal and does not replace the appreciation of the administrative authorities.

Concerning freedom of religion, the Council of State relied on the Belgian episcopal conference to decide that the inconvenience of wearing the mask during religious ceremonies was not sufficiently severe[186]. There are thus two decisions in which the Council of State refers to the official position of the religious authorities. Such reference is questionable since believers can have convictions that do not precisely follow the official position of their religious authorities, and they should be respected.

Regarding the two questions analysed in this commentary, authors have also underlined the importance of the timing to explain the diverging decisions of the French Council of State and its Belgian homologue[187]. It seems complicated to be 'on time' in front of the Belgian Council of State…

[184] Which is usually the rule for an extreme emergency procedure.

[185] Council of State (Belgium), nr. 248.781, 28 October 2020.

[186] Council of State (Belgium), nr. 248.124, 5 August 2020.

[187] M. Nihoul, S. Wattier and F. Xavier, 'L'art de la juste mesure dans la lutte contre le coronavirus face à la dimension collective de la liberté de culte', *Rev. trim. D.H.*, 2020, pp. 1061.

Another difference in the decision about freedom of demonstration is numerical. While Belgium authorised gatherings of twenty people, they were limited to ten in France. Since the numerical limit was lower in France, the infringement seemed more severe. This is an element weighing in favour of the annulment in the proportionality test.

Besides, in French affairs, the Council of State judged that the restrictions to fundamental freedoms had an absolute and general scope[188]. On the contrary, the Belgian Council considered only an isolated demonstration and decided that the prohibition of religious ceremonies was not general since an evaluation was coming.

In addition, the French Council of State relied on official scientific arguments, which is not at all the case of the Belgian Council of State[189]. The French Council of State also took into account the lack of effectivity of the prohibition of demonstrations to decide that the decree was unconstitutional[190]. The Belgian Council of State largely ignored the fact that

[188] S. Degirmenci, 'Liberté de manifester en état d'urgence sanitaire: le Conseil d'État desserre enfin la nasse !', *Goutal, Alibert et Associés*, 16 June 2020, http://www.goutal-alibert.net/liberte-de-manifester-en-etat-durgence-sanitaire-le-conseil-detat-desserre-enfin-la-nasse-ce-13-juin-2020-req-n-440846-decret-n-2020-724-du-14-juin-2020/ (accessed 28 October 2020).

[189] On this subject, see the *Revue française d'administration publique*, nr. 173, 2020, whose theme is 'L'action publique, l'expertise et le juge'.

[190] S. Degirmenci, 'Liberté de manifester en état d'urgence sanitaire: le Conseil d'État desserre enfin la nasse !', *Goutal, Alibert et Associés*, 16 June 2020, http://www.goutal-alibert.net/liberte-de-manifester-en-etat-durgence-sanitaire-le-conseil-detat-desserre-enfin-la-nasse-ce-13-juin-2020-req-n-440846-decret-n-2020-724-du-14-juin-2020/ (accessed 28 October 2020). About effectiveness, see: M. de Benedetto, 'Effective Law from a Regulatory and Administrative Law Perspective', *European Journal of Risk Regulation*, nr. 9, 2018, pp. 391-415.

several demonstrations took place despite the prohibition established by the ministerial decree[191].

As for demonstrations, the French Council of State pronounced another decision on 6 July 2020[192]. The Prime Minister had indeed enacted a new decree after the first decision: the prefect should authorise any demonstration, and no demonstration could take place with more than five thousand people. The Council considered that such a regime was contrary to the fundamental freedoms since it added an authorisation mechanism to the system of declaration. Indeed, any demonstration was forbidden, except if the prefect gave its authorisation. This second decision shows the importance that the French Council of State gave to certain fundamental rights during the pandemic, namely the right to express one's ideas in a context marked by the necessity of debate[193]. The extent of powers given to the prefect, who is a non-elected state representative, might also have justified the annulment.

[191] For instance, some demonstrations were not authorised but tolerated, namely in Brussels. See: Belga, 'La Ville de Bruxelles tolère la manifestation du mouvement Black Lives Matter', *Le Soir*, 5 June 2020, https://www.lesoir.be/305282/article/2020-06-05/la-ville-de-bruxelles-tolere-la-manifestation-du-mouvement-black-lives-matter (accessed 5 November 2020).

[192] Council of State (France), nr. 441257, 441263 and 441384, 6 July 2020.

[193] The existence of a public debate is a criterion used by the ECHR in its case law, especially in cases involving freedom of expression. See for instance: ECHR, Giesbert and others v. France, 1 June 2017, §§ 92-94; ECHR, Von Hannover v. Germany, 19 September 2013, § 46, ECHR, Editions Plon v. France, 18 May 2004, § 44.

Finally, it is worth mentioning the decisions pronounced by the two Councils of State about freedom of religion during the second lockdown. In France, the Council of State judged on 7 November 2020 that the prohibition of religious ceremonies, except for weddings and funerals, was proportionate[194]. A few weeks later, the government eased the restrictions and allowed religious ceremonies up to thirty people. However, the Council of State considered that this numerical limit was not proportionate, namely because it was not adapted to the size of the religious places[195]. It seems thus that the French Council of State has a stricter appreciation when an easing of the lockdown is decided, which is understandable.

As for the Belgian Council of State, it decided for the first time during the pandemic that a restriction on fundamental rights was disproportionate[196]. In particular, the numerical limit imposed on weddings and funerals was not adequately justified. While fourteen people could attend funerals, only five were allowed at weddings. This limit was particularly strict in the case of Jewish weddings, which require the presence of ten men. The decision of the Council of State remains surprising, since it takes a completely different perspective compared to the decision pronounced during the first *déconfinement*.

5. CONCLUSIONS

To conclude, it seems that no unique explanation can be persuasively singled out for the difference of case law between the two Councils of State. However, the importance of proportionality percolates through French law and the jurisprudence of the Council of State.

[194] Council of State (France), nr. 445825 and others, 7 November 2020.

[195] Council of State (France), nr. 446930 and others, 29 November 2020.

[196] Council of State (Belgium), nr. 249.177, 8 December 2020.

In Belgium, the principle barely appears in the COVID-19 case law at hand. Besides proportionality, the paper has emphasised several elements that could explain the divergence between the jurisprudence of the two Councils of State.

On the one hand, the Belgian Council of State remains in a procedural approach of the cases brought to it[197]. On the other hand, the French Council of State relied on scientific arguments and perhaps on 'pragmatism'[198] to strike down the decrees adopted by the Prime Minister. Thus, it is likely that the difference of approach between the two administrative courts depends on the degree of emphasis on the procedural rules. It seems in particular that the condition of emergency is appreciated far more severely in Belgium than in France.

Furthermore, the variations in the system of protection of fundamental rights bring an explanation as well. Indeed, demonstrations are under a system of notification in France. Shifting the paradigm towards a system of prohibition, unless authorisation, is thus a greater move than in Belgium where any demonstration must be authorised. As for religious ceremonies, the dialogue maintained by the Belgian State with religious authorities during these exceptional circumstances seems to have worked against the short term interests of the believers.

[197] Such legalistic approach is (understandably) a characteristic of the case law of the Belgian Council of State. It is one of the reasons that explain the reform of 2014. See: B. Cuvelier, M. Joassart and R. Born, 'La genèse de la réforme du Conseil d'Etat', *A.P.T.*, 2016/3, pp. 213-234.

[198] R. Matta-Duvignau, 'Le Conseil d'État garant de la liberté de manifester dans le contexte d'état d'urgence sanitaire', *Le blog des juristes*, 24 June 2020, https://www.leclubdesjuristes.com/blog-du-coronavirus/que-dit-le-droit/le-conseil-detat-garant-de-la-liberte-de-manifester-dans-le-contexte-detat-durgence-sanitaire/ (accessed 28 October 2020).

Besides, despite the close similarities of the cases analysed, factual differences remain central. Numerical limits bear a substantial effect. The timing of the decisions is also not identical. Little details can sometimes have a decisive impact.

In general, the Belgian Council of State has been less keen than its French homologue to suspend the measures adopted during the coronavirus pandemic[199]. Nonetheless, the number of French decisions that lead to a suspension remains scarce compared to the ones rejecting the claim[200]. Besides, the analysis does not take into account the fact that certain decisions, especially at the local level, could have been negotiated with the civil society, which diminishes the probability of a legal challenge.

To sum up, while there are differences between the jurisprudence of the two Councils of State, they should not be exaggerated. The French Council of State has visibly attached greater importance on some issues than the Belgian Council of State. Whether this is a general trend of administrative jurisprudence remains to be studied.

[199] See however: Council of State (Belgium), nr. 248.541, 9 October 2020.

[200] The President of the contentious section of the Council of State wrote an opinion in the press to remind the public that it was not the mission of the judge to replace the administration (J.-D. Combrexelle, 'Les juges administratifs du Conseil d'Etat se situent loin des polémiques', *Le Monde*, 12.04.2020, https://www.lemonde.fr/idees/article/2020/04/12/jean-denis-combrexelle-les-juges-administratifs-du-conseil-d-etat-se-situent-loin-des-polemiques_6036387_3232.html (accessed 5 November 2020)).