

Religion and the Secular State in the Netherlands

I. INTRODUCTION: THE CURRENT SOCIAL CONTEXT

The relationship between religion and the secular state has again become a hotly debated topic, not only in academia, but also in politics, in the mass media, on the Internet, and in the workplace. An obvious reason for the renewed interest in the relationship between religion and the secular state in the Netherlands is the strongly perceived presence of Islam, and, in the slipstream thereof, what is often referred to as the ‘re-emergence’ of religion in general.

However, the notion of “re-emergence” ignores the fact that religion has never been away. Perhaps taken for granted by many, the presence of Christian and Jewish denominations has always been a strong undercurrent in Dutch society. Also, the presence of Islam in the Netherlands dates back some forty years, and its entry into the Netherlands did not go unnoticed. In the early days, the interest in Islam manifested itself mainly through concern for issues such as the availability of houses of worship, possibilities for taking a day off on religious holidays, or enabling Islamic burial rites.

No doubt, important changes have taken place in the domain of religion. However, the revival of interest in religion and the relationship between religion and the secular state is the result of a combination of changes, rather than just the presence of Islam or the increased visibility of religion in general. Apart from developments in the religious domain, such as Islam and a renewed self-consciousness and vitality in the Christian world – including those of immigrant churches, and the sprawl of new forms of religious consciousness and practice, which are not linked to a church – other factors are as relevant.

In the domains of society and the state changes are taking place as well. For one, the belief that Dutch society was on a linear track of secularization is defeated. Once again, it is realized that religion is not an isolated area of life, but that it is intrinsically connected with views on the human being, on society, and on the state, and, therefore, with values and cultural patterns. Furthermore, religion has become entwined with huge societal and political issues such as integration and cannot be ignored in any debate on pluralism or social cohesion. The classic social welfare state itself is in a process of transformation, a process which directly affects the relationship between state and society, and, by extension, religion.

Though these developments do not always lead to changes in laws relating directly to religion, they have re-introduced religion to the political realm, influenced the practice of church and state relationships, impacted popular perceptions, and given rise to public debate. This essay deals with the constitutional and legal expression of religion and the secular state against the background of these broader developments.

Two specific characteristics of the organization of Dutch societal and political life deserve to be mentioned. First, a characteristic of Dutch society is “pillarization.”¹

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1. This term is a translation of the Dutch word *Verzulling*, first used by the political scientist J. P. Kruyt to describe the peculiar nature of the social structure and political institutions in the Netherlands, although it has since been applied elsewhere (for example with reference to Belgium). For much of the twentieth century, Dutch society was divided by cross-cutting class-based and religious cleavages into four dominant interest groups or blocs—Catholics, Protestants, Socialists, and Liberals—around which formed ‘virtually all politically and socially relevant organizations and group affiliations’ (A. Lijphart, *The Politics of Accommodation*, 1968.) <http://www.encyclopedia.com/doc/1O88-pillarization.html> [consulted 6 July 2010].

Traditionally, churches or church affiliated organizations in the Netherlands have been active in the social and cultural domain, e.g., schooling, youth activities, health care institutions, social support, and mass media. With the expansion of the state in these domains from the 19th century and particularly in the 20th century, the state accommodated these initiatives. This resulted in a system of state facilities in these domains, i.e., religiously neutral entities, and confessional facilities. Quality requirements and the financing system are usually the same for these religious and non-religious facilities.

A second characteristic of Dutch society is the organization of political activities along confessional lines. A strong Christian Democratic Party (CDA) exists as a result of the fusion of the former Roman Catholic Party and two Reformed Parties. Apart from two government periods in the 1980s, this party and its predecessors have been part of government coalition ever since the establishment of the modern party system. Apart from the Christian Democratic Party, two other Christian parties are represented in both Houses of Parliament. Dutch electoral laws are based on the model of proportional representation which results in a variety of political parties and opinions in parliament. Because of this variety, there is always a need to build coalitions between the larger parties. A fairly new party, the Party for Freedom (PVV), has a strong anti-Islam profile. At the national level, it is currently only represented in the directly elected House of Parliament. Opinion polls predict a strong growth of its number of seats. A uniform and well-defined notion of church membership does not exist. Each church has its own criteria for membership, and these may differ widely from one church to another. These criteria, in turn, may differ from affiliation or non-affiliation as experienced by believers or non-believers. Also, there is no census in the Netherlands, so figures on religious affiliation as presented in statistical surveys tend to be quite rough. Depending on the way statistical surveys are set up, these may also differ quite significantly from one to another. A recent statistical survey mentioned figures of 58 percent of the population regarding itself as having a religious affiliation, 29 percent Catholic; 19 percent larger protestant denominations, which are united since 2004 in the Protestant Church in the Netherlands (two large reformed churches and the Lutheran Church in the Netherlands); 5 percent Islamic; and 6 percent affiliated with another religion or belief.²

II. CONSTITUTIONAL CONTEXT

Keywords in any description of the constitutional context of the relationship between religion and the state in the Netherlands are: separation of church and state, neutrality of the state with regard to religion and belief, and freedom of religion and belief. The latter is explicitly guaranteed in the Constitution (Article 6).³ The principle of neutrality can be read in Article 6 in conjunction with Article 1,⁴ which guarantees equal treatment on the basis of religion and belief. Separation of church and state is not explicitly mentioned in the Constitution or in any other legislation, nor has it ever been since it was first proclaimed in 1796, the year which definitely ended the Dutch Reformed Church as the established church. Nevertheless, one can say that it is implicitly embodied in a combination of Constitutional guarantees, notably those of Articles 6 and 1.⁵ It is

2. See Centraal Bureau voor de Statistiek, *Religie aan het begin van de 21ste eeuw*, Heerlen 2009, 14 and 7.

3. Art. 6 Constitution: "1. Everyone shall have the right to profess freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law. 2. Rules concerning the exercise of this right other than in buildings and enclosed places may be laid down by Act of Parliament for the protection of health, in the interest of traffic and to combat or prevent disorders."

4. Art. 1 Constitution: "All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted."

5. In conjunction with these two articles, Article 23 of the Constitution should be mentioned. This article deals with education; it guarantees freedom of education and establishes the dual system of education with public schools and private (usually denominational) schools which are funded on an equal footing as public schools.

uncontested that these principles form the core of the constitutional context of church and state relationships.

The formulation of these articles dates from the general constitutional revision of 1983. This Constitution abolished the former chapter "On Religion," that found its origin in 1814 and was amended in 1815, 1848, and 1972. Most of the remaining articles, however, had become obsolete. Perhaps the most relevant change that the 1983 Constitution was the fact that "churches" are no longer mentioned. As the fundamental rights in the Constitution protect individuals and organizations (as far as applicable), churches as organizations enjoy religious freedom and are treated equally. The 1983 revision brought important changes in the formulation of religious freedom. It also introduced a new system of limitation of fundamental rights in general, which was meant to increase the liberties of the individual. Due to the sensitivity of the subject, the formulation of Article 23, which guarantees freedom of education and introduces the dual system of public education alongside private (confessional) education funded by the state on equal footing, was not altered.

The system of education is exemplary of the Dutch way of dealing with organizations based on a religion or belief. A traditional feature of Dutch society is the strong presence of the voluntary sector, which are often organizations based on a religious denomination. In the field of health care, housing, education, welfare (poor relief), many voluntary, non-profit organizations traditionally existed on a denominational basis. With the expansion of public activity in these fields during the 1970s peak of the social welfare state, the state took the policy of accommodating these non-profit organizations into the system, often subsidizing or supporting them on the same footing as the public alternatives.

The faith-based activities and faith-based organizations carrying out these activities were also subject to the same heavy regulation as their non-faith based equivalents. The law did respect the religious identity; nevertheless, a large number of organizations in core fields of education, health care, "moved closer" towards the state in the course of time. Organization on the basis of religion traditionally is a strong feature of Dutch society.

For some denominations, this societal self-organization was also a way to "emancipate" themselves socio-economically. As we just mentioned, this broader societal pattern of organization along denominational lines has become known as the Dutch "pillarization." It included newspapers, mass media associations, youth clubs, employer and employee organizations, and leisure organizations, such as football clubs. After the Second World War, in the spurt towards the social welfare state, pillarization diminished; in many existing organizations, the religious identity became less pronounced, with the exception perhaps of those establishments that have a strong educational character and deal with younger children, such as elementary schools.

The Dutch Constitution does not create a hierarchy of rights; all fundamental rights are guaranteed on an equal footing. In and through legislation, the balance between these liberties must be established for the particular issue at hand and where it concerns horizontal relationships, i.e., relationships in the private sector. This is predominantly a task of the parliamentary legislature, as the courts do not have the right to review parliamentary legislature on its constitutionality.⁶ Courts do, however, apply and interpret the law in individual cases. They also have the power to assess such legislation on its compatibility with directly binding provisions of international treaties or decisions of public international organizations.⁷ The Constitution has no preamble and does not contain any reference to the source of authority in the state, or reference to particular values; it contains no *invocatio dei*. At present, a State Committee is established to advise on a variety of constitutional issues, including the desirability of a preamble and, if desired, its possible content.

6. Art. 120 of the Constitution.

7. Art. 94 of the Constitution.

III. THEORETICAL AND SCHOLARLY INTERPRETATIONS

As a result of the fact that the Dutch characteristics of church and state relationships are not explicitly mentioned in the Constitution combined with the fact that courts do not review parliamentary legislation on its compatibility with the Constitution, the principles of separation of church and state and of state neutrality with regard to religion and belief hardly feature in court rulings. As far as they appear in official documents, it is usually in the legislative process or, as in the last few years, in parliamentary debates.

Analysis of the way in which the principle of separation of church and state is interpreted in the policy domain, in politics, or in scholarly writings, shows a whole array of interpretations. This has largely been since the principle of church and state separation was formulated. This principle is sometimes interpreted as requiring a “strict” interpretation or – in line with the actual historical development as well as the current reality – to refer to a more “lenient” interpretation. At the same time, the principle of separation of church and state is sometimes used in a combination of a normative and descriptive ways: “The norm is separation of church and state and the Dutch situation *is* that of separation of church and state.” However, the principle is also referred to in the following way: “We are on our way to a separation of church and state, but *we are not there yet.*” Sometimes, strict and lenient interpretations and normative and descriptive perspectives are used in an implicit way, thus creating confusion.

As we have mentioned, difference of interpretation with regard to the interpretation has a long history. In the course of the last decades, discussions regarding the interpretation of the principle of separation of church and state had lost their sharp edges. In the classic Dutch social welfare state, the state covered all the basic needs of the citizens. Secularization (which also seemed to affect many societal organizations originally based on a religion or belief) combined with the idea that this process would further continue was the predominant mood as regards religion. Behind ongoing debates on political issues, an underlying consensus on basic values and norms existed in society.

In recent years, the situation has changed on all three fronts. Since the 1980s, the classic welfare state has been in a process of profound change. Religious issues feature more prominently in society and the strong presence of Islam is undeniable. Value pluralism is more apparent and seems to be more fundamental than before. This brings issues of church and state, state and religion, and religion and politics back in the limelight, and with this, the debate over the interpretation of the principle of separation of church and state. In these debates, the two widely differing views on this principle emerge: 1) a principle that promotes a strict interpretation and 2) a principle that favors the current system, based on the traditional Dutch way of accommodating religion in society and state.

These two different interpretations mostly follow the traditional splits. But among those who used to favor a mild interpretation, the question has arisen whether or not a model that worked favorably in the past can continue to work under the current changed circumstances. The interpretation of state “neutrality” with regard to religion and belief also moves along these two different lines, the one favoring a neutrality void of religion (in line with the French “*laïcité*”), the other including expressions of religion on an equal footing (the traditional Dutch way).⁸

In the meantime, public authorities are regularly facing concrete questions concerning

8. A representative of the former, for instance, Paul Cliteur, ‘Onbegrip en misverstand over de ‘laïcité’. Juist in deze tijd moet religie onzichtbaar zijn in het staatsdomein’, in Marcel ten Hooven, Theo de Wit (ed.), *Ongewenste Goden. De publieke rol van religie in Nederland*, Amsterdam: SUN 2006, 252 - 266; of the latter, for instance, Wibren van der Burg, *Het ideaal van de neutrale staat. Inclusieve, exclusieve en compenserende visies op godsdienst en cultuur*, Den Haag: Boom Juridische Uitgevers 2009.

their relationship towards religion or religious communities which pose themselves as dilemmas (such as the restoration of specific church buildings which are not ancient monuments and are actively used as places of worship; or providing subsidies for homework assistance in mosques; or for supporting integration programs in which male and female participants as a matter of principle are taught separately).

Often questions like these, and many others, are debated in terms of separation of church and state (or sometimes, neutrality). At the same time, these principles hardly seem to be the “right” labels for discussing these questions. First, predetermined interpretations of these principles linearly predict the answers to the question, and, thus, simply perpetuate already pre-existing differences of opinion. Second, they limit our ability to think and speak about these issues in other ways. This is all the more apparent, as over the last decades of relative “quiet,” society has grown unused to dealing with these dilemmas and finding the right words and concepts to do so.

However, there is a way forward, which is to circumvent discussions about “strict” or “lenient” interpretations of separation of church and state and reduce the meaning of the label to its two-fold core. So, on one side, there is autonomy (institutional freedom) of the church from the state and, on the other side, there is a ban of any formal role for (the) church(es) in the public decision-making process. By thus limiting the scope of the principle of separation of church and state, one leaves room for a debate on the whole range of other issues, which do not need to be discussed in either a “strict” or “lenient” interpretation. Rather, this approach enables the development of a nuanced and differentiated perspective on how a modern liberal democracy anno 2009 should deal with religion not only as a private issue, but also in its societal and public dimensions.⁹

IV. LEGAL CONTEXT

A. *General System of Law Relating to Religion and Churches*

Religion and religious freedom are taken into account by the legislature. At the national level, this is done in and through specific legislation. For instance, educational law gives shape to the dual system of education outlined in the Constitution. Mass media law, amongst others, grants broadcasting time for churches and religious organizations. Labor law and equal treatment law take religion into account in various ways. Ancient monument law includes church buildings. Tax law creates a special regime for charitable organizations, which include churches. The Civil Code acknowledges legal personality of churches. In privacy law, “religion” is defined amongst the “sensitive” data. In penitentiary institutions and the armed forces, chaplaincy services are established, which find their basis in the law. There are laws relating to religious processions and church bell ringing. These are a few examples of legislation directly relating religion or churches. Legislation which favors Sunday as a weekly day of rest and the designation of certain Christian religious days as holidays find their origin in respect for religion; obviously, they have also become part of a general social and cultural pattern.

No *specific* “law on churches” or “law on religion” exists. Until 1988, a “Law on the churches” was in force. This law dated from 1853. At the time of its enactment it did not have a broader significance than appeasing tensions between Protestants and Catholics which surfaced after the restoration of the Roman Catholic hierarchy in the Netherlands in 1853. It only dealt with a few elements of the vast array of church and state issues. Its main importance at the time was the unequivocal acknowledgement of church autonomy; at present, this principle is expressed in the Civil Code in the provision dealing with the church as a legal person. This principle is concretized in other areas of the law as well.

9. See Sophie van Bijsterveld, ‘Scheiding van kerk en staat: terug naar de bron voor een visie op de toekomst’, in F.T. Oldenhuis (ed.), *Een neutrale staat: kreet of credo?*, Heerenveen: Protestantse Pers (Jongbloed) 2009, 13 - 26; and id., *Overheid en godsdienst. Herijking van een onderlinge relatie*, 2nd ed., Nijmegen: Wolff Legal Publishers 2009.

Other examples of law which takes religion into account are those concerning certain forms of conscientious objection, and law relating to burial, or ritual slaughtering.

B. *Interlocutors on the Side of the State*

There is no body, agency, or department in the state that deals with religion with the exclusion of others. Every government minister and his department will need to take religion into account in the area of its competence. When it concerns parliamentary legislation, the same is true *mutatis mutandis* for both Houses of Parliament. Therefore, for churches and other religious communities every department is, in principle, relevant.

Two government departments play a special role, those of Justice and of Home Affairs. The special involvement of the minister of Justice is not only a consequence of the fact that he deals with a variety of issues that are relevant to churches and religious communities, such as criminal law (non-discrimination, blasphemy, immigration also of clergy, including imams). It also has a historic background. The Justice Department is the legal successor to the (former) department for the “Dutch Reformed Religion, and other religions except the Roman Catholic Religion” and that of the “Roman Catholic Religion.” These were both abolished in the second part of the 19th century. Prior to their abolishment, they were temporarily “re-located” when the former was assigned to the department of Foreign Affairs.

The special involvement of the department of Home Affairs is due to the fact that this department is the “guardian” of the Constitution and issues of religion have a constitutional dimension. Additionally, issues of radicalization or polarization fall within the scope of this department as do the relationship with provinces and municipalities. The department takes an interest in regional and local dynamics concerning religion.

In integration issues, religion has turned from a “blind spot” into a dominant pre-occupation over the last few years. With this change, the interest of the department in religion has made a similar turnaround. The change slowly became visible at the end of the 1990s.

These government departments do not involve specific external councils or experts. Within the departments, those involved with religion in the sense just mentioned, various internal divisions within the department may be involved, depending on the subject matter at hand. As religion is now becoming more to the fore, one can see that these departments are more aware of the “religious dimension” in policy issues.

Over the last five to ten years, religion and issues of religion in the public domain have become such a widely debated topic and the focus of the debate has changed from “refinements” to fundamental dilemmas. Opinions in academia, society, and politics differ as to the role of religion in law and in the public domain. Assessments as to whether developments are “satisfactory” in practice and policy also differ. Nevertheless, it is fair to say that at the level of the national legislature, the traditional way of respecting religious liberty and of accommodating religion in legislation is upheld.

C. *Dialogue*

Pluralism and informality are characteristics of the structure between religious organizations and public authorities. On the side the Dutch Churches, two main bodies exist at the national level that serve as interface for dialogue with parliament and government. The first is the “Interchurch Contact in Government Affairs.”¹⁰ This organization, created after the Second World War, is a co-operative structure set up by Dutch Churches to monitor developments concerning legislation and administration that is of concern to churches and to jointly act on behalf of the member organizations vis-à-vis government and Parliament in these areas. It is not an ecumenical organization. Parallel to the re-emergence of the debate on religion in the public domain, its membership has

10. The Interkerkelijk Contact in Overheidszaken (CIO). It has a strong overlap in membership with the Council of Churches, though membership of these organizations is not identical.

expanded considerably. The other is the Council of Churches, which has an ecumenical focus and aims at presenting a “prophetic” voice of the joint churches in the Netherlands. As far as policy issues are concerned, they are involved in issues such as poverty or the environment. The Council of Churches maintains relationship with government and parliament as well. Apart from this, churches can and do have contacts on their own with public authorities, on an informal (quasi-)regular basis or with respect to particular issues. A tentative and preliminary observation may be that such contacts have become more appreciated and valued on the side of the state over the last few years.

Muslim organizations are not included in either of the two organizations mentioned above. They have their own relationships with public authorities. As in many Western European countries, the process of self-organization of Muslims required time. For a long time, public authorities took a passive attitude towards this process. In part, this had practical purposes; in part, it was also seen as the appropriate attitude in the light of the principle of separation of church and state.

In the course of time, the desirability of interlocutors for the Muslim communities became more clearly envisaged on the side of the state. In the unrest after the terrorist attacks in Washington and New York on 11 September 2001, public authorities concretely experienced the need to reach the Muslim population in the Netherlands and to speak with their representatives. Other incidents, such as the murder of a filmmaker, public indignation over statements by radical imams, and the tense climate at the time of the riots abroad over “the Danish cartoons” in 2006, and the feared consequences of the release of an “anti-Islam” film by the leader of the Dutch Party for Freedom in 2008, only reaffirmed this. The policy of “wait-and-see” changed to a policy that actively stimulated the establishment of interlocutors and the practice of entering into dialogue. Likewise, the initial position of standoffishness on the side of the state with respect to the establishment of an imam education in the Netherlands (as this required a representative and authoritative interface) also changed. For the establishment of full-fledged chaplaincy services in, for instance, penitentiary institutions, such interfaces are necessary as well.

In the meantime, various organizations have been “recognized” by the state as interlocutors on the side of Islamic communities. Hindu and Buddhist organizations have been recognized too. These developments illustrate that contacts between religious organizations and public authorities work two ways.

D. Local and Regional Dynamics

In recent years, a whole new dynamic is developing at provincial and notably local levels. Local “interreligious platforms” have been created spontaneously or are being created. These often fulfill a variety of functions, such as organizing their joint members and making them acquainted with each other (integration), offering/providing practical mutual assistance, and especially serving as an interlocutor with the authorities to the mutual benefit of their constituent organizations (and believers) and of public authorities themselves.

V. THE STATE AND RELIGIOUS AUTONOMY

Although the definition and meaning of the principle of separation of church and state is contested in the public and scientific debate, the core meaning is that the state respects the internal organization of the church and that the churches have no formal say in public decision-making. These are two sides of the same coin.

As we have seen before, the church as an organization is no longer mentioned in the Constitution. However, Article 6, Section 1, of the Constitution, guarantees everyone the free exercise of religion or belief, without prejudice to his responsibility for the law. Article 1, states: “All persons in the Netherlands shall be treated equally in equal circumstances. Discrimination on the grounds of religion, belief, political opinion, race or sex or on any other grounds whatsoever shall not be permitted.”

It is acknowledged that not only individuals and groups of persons, but also

organizations, are protected under the Constitution and by fundamental rights other than those directly relating to religion. As the history of its enactment makes clear, Article 6 of the Constitution does not only guarantee the liberty to hold an opinion but also the liberty to manifest one's religion in practice. Thus, church autonomy in the sense of freedom of church organization is protected by Article 6.

The Civil Code concretizes this. Churches are legal categories *sui generis* and they enjoy legal personality as such. Article 2:2 of the Civil Code simply states: "Churches, their independent units, and bodies in which they are united have legal personality. They are governed by their own statute in so far as this does not conflict with the law (...)."

This Article serves both hierarchically organized churches, such as the Roman Catholic Church, and decentralized organized churches. No prior recognition of any kind is required. Most other articles in the Civil Code generally applicable to all legal persons are not applicable to churches, albeit that analogous interpretation is not excluded. Church autonomy also finds concretization in other laws. No prior dismissal permit from public authorities, for instance, is necessary for firing clergy. The Equal Treatment Act, which, shortly put, forbids distinction on the basis of *inter alia* religion in a wide field of societal activities, is not applicable to churches or relationships within churches. This, however, does not mean that churches can act at will. Fairness, acting in good faith, following fair procedure are elements that courts can and will use in reviewing church decisions.¹¹

Islamic bodies are usually organized as a foundation (or less usual: associations) for the employment of an imam or the management of a building of worship. In such case, the usual rules for foundations (or associations) apply. However, within this framework organizational freedom of religion is relevant as well.

Issues of the autonomy of religious organizations not only manifest themselves where the enactment of (national) legislation is concerned. Often more subtle processes of interaction are taking place in the context of subsidy requirements or contractual agreements or simply dialogue.

As to individual liberty, this is not only relevant in relation to the state. To a certain extent, it is also relevant vis-à-vis a church or non-Christian equivalent. As far as the state is concerned, this includes the responsibility to guarantee a realistic right to leave a church or to change one's religion. This has recently become an issue with respect to Islam. In the Christian domain, remarks that a clergy man made in a prayer during a church service with regard to a former member of his church for quitting the church was regarded unlawful in court.¹²

No specific legislation exists regarding peaceful coexistence and respect between religious communities. The former "Law on the churches" (see above, Section 4) contained a ban on erecting places of worship within a certain distance of another. The constitutional ban on processions, which formally existed until 1983, was another example, as was the ban on wearing clerical garb outside buildings and enclosed places. Currently, provisions do exist that simultaneously shape religious liberty and contain limitations, such as the power of local authorities to regulate church bell ringing and its Islamic equivalents. They are not primarily or predominantly enacted to facilitate peaceful coexistence and respect between religious communities, but they may also fulfill this function to a certain extent. The same is true with the law regarding public manifestations and hostile audiences.

Tensions are present in society over issues relating to religion, which tensions find an outlet (sometimes as indignation) in public debate and commentaries over judicial and quasi-judicial decisions. They are also canalized through dialogue and contact with religious organizations and public authorities, and efforts on the side of public authorities

11. S.C. van Bijsterveld, 'Church Autonomy in the Netherlands. The Distinctiveness of the Church. The Interplay between Legal, Popular, and Ecclesiastical Perspectives. Church Autonomy as a "Test Case," in Hildegard Warnink (ed.), *Legal Position of Churches and Church Autonomy*, Leuven: Peeters 2001, 147-163; see also A.H. Santing-Wubs, Kerken in geding: burgerlijke rechter en kerkelijke geschillen, Den Haag: BJu, 2002.

12. Vz. Rb. Arnhem 22 februari 1989, *KB* 1989, 114.

or spokespersons on the side of religious organizations, whether publicly or diplomatically.

VI. RELIGION AND THE AUTONOMY OF THE STATE

Religious communities do not have any role in the secular governance of the country. This would conflict with the separation of church and state. There are no representative bodies in which churches have a seat *qualitate qua*, or which are reserved to representatives of certain religious denominations. Generally, speaking however, in the Dutch pluralistic society, care is taken with composing membership of advisory bodies or appointments in the public sphere (such as for burgomasters), that no obvious unbalances exist in relevant backgrounds, particularly political backgrounds. Religious preferences may play a role implicitly. It must be stressed, however, that such appointments are not a matter of *representation* of various denominational or other backgrounds as such. The relevant personal qualities should be decisive.

Between 1848 and 1887, the Constitution contained a ban for clergy to be a member of Parliament. For municipal councils, the Municipality Act contained a similar provision until 1931.

No religions have power to control other religious communities under the law.

VII. LEGAL REGULATION OF RELIGION AS A SOCIAL PHENOMENON

The law contains specific arrangements for religious organizations. A number of these are already indicated above. The special status of a church as a legal person, the non-applicability of the Equal Treatment Act, are just a few examples of regulations that are either specifically created for churches or which exempt churches from generally applicable legislation. Usually such legislation is an expression of respect of religious freedom. Other examples include respect in the Criminal Code for religious worship or regulations meant to respect certain religious burial rites. For individuals, conscientious objection is recognized in specific areas, such as conscription for military service; another example is legislation which respects conscientious objection for religious reasons against all forms of insurance. Occasionally, the legislature deliberately decided not to enact legislation because of the expected conscientious objections, as was the case with inoculations. Only rarely specific restrictions occur. A well-known example is the ban on conducting religious ceremonies with respect to marriage before a civil marriage has taken place (see below).

The law in general has developed against the background of a Western culture based on a morality influenced by Christianity. Many arrangements which respect religious practices are part of the general culture, such as the calendar, the religious holidays and festivities and designation of Sunday as a day of rest. To accommodate those believers with another "religious calendar," the law or collective employment agreements create alternative facilities.

Some legal provisions create facilities which are not exclusively aimed at religious organizations, religious believers, or religion, but include these organizations implicitly. Examples are tax benefits for charitable purposes or grants for the maintenance or restoration of ancient monuments (including church buildings). In data protection law, "religion" belongs to the category of "sensitive data," but along with other data, such as health records or criminal records. Anti-discrimination legislation works with a variety of "suspect" criteria for making distinctions, such as on the basis of other criteria. The same is true for restrictions to the freedom of speech in criminal law.

Also opt-out facilities exist in the law, which started as exemptions exclusively related to religion, but which have been extended in the course of time. An example is the possibility of conscientious objection against military service, which is not only possible for religious reasons.

In a pluralistic society, such as the Netherlands in which dominant values have

changed considerably over the last few decades, the frame of reference for dealing with issues of religion also changes. What was perhaps until recently a dominant view may have become a minority view. When such views have a religious dimension, issues of religious liberty and religious conscientious objection are at stake. With the introduction of same-sex marriages, for instance, the issue-conscientious objection to performing such marriages may be raised by civil registrars against performing such a marriage.

The state no longer obligatorily keeps records of the religious affiliation. Censuses are also no longer performed. However, with the recent rediscovery that religion is more than just a private matter, the state is increasingly interested in religious affiliation and beliefs, as well as in social consequences of religion. Religious sociology is undergoing a revival in the Netherlands, due in part to the interest that public authorities take in the results.

VIII. STATE FINANCIAL SUPPORT TO RELIGION

E. *Financial Relationships between Church and State in General*

The basic situation is that churches are funded by the believers themselves. The system of church and state relations as it is in the Netherlands does not allow for general state funding of religious activities as such. However, there is a variety of ways in which funding of religious activities takes place. It is not very well possible to give a precise indication of the actual amount of support. Nevertheless, the following analysis probably provides an insight into the financial significance of the support.

F. *Societal Activities Provided by Churches*

As we have seen already, prior to the development of the welfare state churches, church-linked organizations were active in the fields of education and health, as well as in other fields of social life, such as care for the elderly. With the development of the welfare state, the state started to organize and provide more activities in these fields as well. Thus, a system developed of parallel activities: those offered on a private, often denominational basis, and those offered by public authorities on a neutral, non-religious basis.¹³ This continues to the present day. The growth of regulation and financial intervention of the state in these domains also stretched to the private providers. As a result, these activities are usually regulated by the same body of law and share in the same financial system (which is often quite complex). The denominational background and inspiration of the activities provided on a confessional basis is respected by law.

IX. OTHER SOCIO-CULTURAL ACTIVITIES

The Dutch state traditionally has a significant role in the redistribution of financial resources through the tax system. It has developed a well-organized and complex system of facilities for the well-being of its citizens. Traditionally, and certainly at the height of the welfare state, the state (including, notably local authorities) funded many activities in the socio-cultural sector. This was often done on a voluntary basis (not required by the Constitution or parliamentary legislation) and could include cultural activities, sports activities, or youth activities. These were often carried out by the private sector but funded through public subsidies. If these activities were also offered on a denominational basis, and fell within the objective criteria under which these subsidies were offered, they could not be excluded on the basis of the fact that they had a denominational background. Although these subsidies have decreased in the last few decades due to the overall necessity of public budget cuts, the general idea is still valid.

13. See also Section II and *supra* n 4.

X. CHAPLAINCY SERVICES

Public institutions like the armed forces or penitentiary institutions have chaplaincy services. These are funded by the state. The justification for these concerns freedom of religion for the individuals. For instance, individuals in the armed forces or in penitentiary institutions live under extraordinary circumstances by which they cannot take part in ordinary religious life. Since, the state has some responsibility for people living in these circumstances, the state has a positive obligation to provide for their religious needs. The chaplains are appointed by the Ministers of Defense and Justice respectively. The religious denominations involved propose the chaplain to be nominated (whether Christian, Jewish, or other). The Protestant Churches co-operate together for this purpose. Of course, the numerical situation must be such that the employment of a chaplain of a certain denomination makes sense. Where this is not the case (certainly in the beginning for the Islamic belief), the practice of contracting chaplain services developed.

As hospitals are organized, run and funded in a different way, the organization of the chaplaincy service is slightly different. Hospital boards employ chaplains or involve them on a contractual basis. They are funded through the general hospital funds. An Act of Parliament guarantees the availability of such spiritual care as part of the overall care that the institution provides.

XI. CHURCH BUILDINGS

The general rule is that church buildings are financed by the churches themselves. Many church buildings, notably Christian church buildings, are designated as monumental buildings. For such buildings, possibilities for public funds for maintenance and restoration exist. Such funds also exist for other monuments that form part of the cultural heritage of the country, such as castles, windmills, farms, and city houses. These funds only cover part of the costs. It is becoming increasingly difficult for churches to find the financial resources for the upkeep and restoration of their buildings, both the monumental buildings as well as non-monumental buildings. With regard to church buildings, some specific arrangements exist in the fiscal sphere; their purpose is to prevent the creation of undue burdens on the owners of church buildings. In the past, temporary arrangements have existed to support church communities in the establishment of new church buildings. This was the case, for instance, where land was reclaimed from the inland sea and where new villages and cities were erected. To support Muslims in the establishment of mosques, temporary subsidies regulations were enacted but have now expired.

XII. TAX FACILITIES

The final category of public support for religions is tax facilities. A variety of mechanisms exist in this field. Exemptions or reduced tariffs are available in the context of inheritance tax and donations by groups and individuals to churches. Thus, they encourage private financial donations to churches (and, more general, to religious causes). These facilities are not exclusively available for the religious sector. They are available for all sorts of charitable institutions and charitable purposes.

XIII. CURRENT ISSUES

From the above, it is clear that the state does not allocate funds to support particular religious organizations or activities such as clergy salaries or worship services; in the past (until the 1950s), however, support for clergy salaries, or other particular religious activities did take place here and there at the local level. Currently, the question of funding religious activities has gained a new topicality, especially at the local level. This may occur, for example, in the context of creating favorable financial arrangements for

the building of one particular place of worship, or the restoration of one particular religious building. It also occurs with new forms of co-operation between state and religious organizations in the socio-cultural sphere.

Issues are raised in the public debate about the proper relationship between state and religious organizations particularly in a time when the state “contracts out” activities which, until recently, were in its own domain (such as the provision of particular youth work) and when the state is contracting out to *one* organization only. In the first case, apart from financing as outlined, issues about subtle influencing of the religious organizations are debated. In the second case, issues of undue influencing of the public domain by religious organizations are raised. Leaving aside technicalities and the more subtle conditions of such arrangements, from a constitutional point of view, nothing speaks against such arrangements as such. It must also be borne in mind that the reasons for entering into such arrangements by the state are not promoting a particular religion, but fulfilling public policy goals which coincide with aims of the religious organizations involved.

XIV. CIVIL EFFECTS OF RELIGIOUS ACTS

As legal entities, churches can enter into legal relationships under civil law, like any individual person or any legal person. Buying and selling property, renting and letting property, hiring and firing of personnel are common activities of legal persons, and churches and religious communities can engage in such activities as well. Obviously, these legal acts need to be valid internally, that is, the persons or bodies acting on behalf of the church must be authorized to do so according to their own statutes.

Churches have their own mechanisms for internal conflict resolution. These mechanisms and the decisions they produce do not have any status under public law; they are decisions made by legal persons under civil law and their status is accordingly. Where “purely” religious issues are at stake – that is, issues which do not have any civil law dimension – secular courts have no jurisdiction; secular courts do not take sides in theological questions. However, where civil law aspects are at stake, secular courts have competence too. Article 17 of the Constitution states: “No one may be prevented against his will from being heard by the courts to which he is entitled to apply under the law.”

In cases in which a competence of a secular court exists, such court, when approached, may step back temporarily pending an ecclesiastical procedure or when an ecclesiastical procedure is still an option. Afterwards, they may look at the case marginally. The subtleties of the relationship between secular courts and ecclesiastical procedures are not fully crystallized, in part due to a lack of cases. It is clear, however, that ecclesiastical decisions as well as decisions of ecclesiastical conflict resolution procedures must comply with fundamental rules of fairness, such as *audi et alteram partem* or acting in good faith.

A special issue is the relationship between civil marriage and religious ceremonies relating to marriage. The only legally valid marriage in the Netherlands is civil marriage conducted by a civil registrar. The Civil Code (Article 1:68) is clear that religious ceremonies with regard to marriage cannot take place prior to the performance of a legally valid marriage. The church minister who performs a religious ceremony with regard to marriage without having verified the existence of a legally binding marriage is liable to prosecution (Art. 449 Criminal Code). Discussions in the 1990s about the abolition of the requirement of a prior civil marriage before a religious ceremony with respect to the marriage have not led to any change in the law. This arrangement has been challenged under Article 9 of the European Convention on Human Rights. In 1971, the Dutch Supreme Court upheld this system as a justified restriction of religious freedom.¹⁴

XV. RELIGIOUS EDUCATION OF THE YOUTH

14. HR 22 June 1971, NJ 1972, 31

As we have mentioned already, the Constitution outlines the main elements of a dual system of education. Freedom of education allows confessional education to exist alongside public authority schools. Freedom of education entails freedom to found a school, to administer a school, and to determine the confessional identity of the school and its education. According to the Constitution, elementary confessional schools are financed by the state on the same footing as public schools. For secondary education and higher education, including universities, this system is adopted through ordinary legislation (as we have mentioned above). Currently, also Islamic schools are established and funded through this system, both at the elementary and secondary levels. Confessional schools are quite popular in the Netherlands; about two thirds of the schools are based on a religious confession.

The confessional school authorities determine the confessional character of the school. This can range from strict to quite liberal. Generally speaking, school authorities may also determine whether they have an open admission policy for pupils and require loyalty to the religious denomination for specific staff only, or for both. However, in determining this, they need to keep within the margins of the law, notably the General Equal Treatment Act. This means at least that they cannot act at will, but must carry out their policy in a consistent manner.

Public authority schools teach religion. This is done on a neutral, non-confessional basis. One could better call this teaching “religions.” Public authorities (elementary) schools may offer on a voluntary basis, outside of the normal curriculum, the option for religious education on a confessional basis. If they do so, this education is funded by the public authorities themselves. Another requirement is that they must offer not only this education in one denomination but treat the various denominations on an equal basis. This also includes non-religious humanist education. Of course, there are practical limits to this. The school authorities appoint these teachers that represent a specific denomination. The school authorities do not interfere with the religious doctrines.

XVI. RELIGIOUS SYMBOLS IN PUBLIC PLACES

Dutch neutrality in the public domain is not interpreted such that the public domain should be void of any religious expression. On the contrary, the plurality of religious expressions is respected. Where education is concerned, the Constitution states: “Education provided by public authorities shall be regulated by Act of Parliament, paying due respect to everyone’s religion or belief” (Article 23, Section 3). Practically, this means that there is room for religious expressions of teachers and pupils (such as the wearing of headscarves, crucifixes); however, teachers must be committed to work in a “neutral” environment, that is, to provide public authority education. The Equal Treatment Act which forbids making distinctions – in this case, by the authorities of the public school - on the basis of religion; other requirements may constitute an indirect distinction on the basis of religion, which is not allowed in principle, but for which justification grounds may exist. Where garments are concerned which cover the (female pupil’s) face completely, the Equal Treatment Committee set up under the Equal Treatment Act accepted justification grounds in pedagogical and communicational arguments.

The Equal Treatment Act is also applicable to the private sector. Obviously, it grants organizations based on a religion or belief room to require loyalty of its personnel to its religious identity (albeit not unqualified); in the case of schools, it also allows them to follow their own admittance policy in this respect (again, not unqualified). Although private organizations operate in the societal sphere and often provide important social services, they are, legally speaking, not “public.”

This system – with the Equal Treatment Act as a legal framework which covers many cases in the area of religious symbols in public places – is also applicable to domains other than education. The weighing of justification grounds is obviously not a completely technical or (value) neutral operation. This may lead to the fact that similar cases are assessed differently. It also necessitates critical analysis and debate on the arguments and

outcomes of specific cases, both as such as in connection with other cases.

As regards public facilities themselves, there is no specific law covering the use of religious symbols. Occasionally, a religious symbol, such as a crucifix, may be found in a town hall. Also, a (non obligatory) prayer may take place preceding the meeting of a town council.¹⁵

XVII. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

Dutch criminal law contains a variety of explicit references to religion. These relate to expressions, gatherings, and religious rituals.¹⁶ Although they are subject of discussion from time to time, until recently they were for the most part taken for granted. The last few years, however, an intense public debate has emerged over both the legal provisions and their application in concrete situations.¹⁷ Over the last number of years, some of these provisions have been extended in terms of the grounds of defamation as well as the circumstances in which the defamation takes place and in terms of the maximum penalty.

Article 137c of the Dutch Criminal Code penalizes as “serious offenses against public order” defamatory statements about a group of persons on the grounds of inter alia their religion or personal beliefs. It also penalizes defamatory statements on other grounds: race, hetero- or homosexual orientation, and physical, psychological, or mental handicap. This is includes statements made on the basis of religious conviction (notably relevant with respect to homosexual orientation). The criterion is that that the statements must be made “publicly” and “intentionally”; they include statements orally, in writing, or by image.

Similarly, the incitement of hatred of or discrimination against persons or violence against their person or property is penalized as a serious offense against public order (137d). Article 137e Criminal Code penalizes making an offensive statement “for any other reason than that of giving factual information,” where a person “know or should reasonably suspect this is the case or “incites hatred of or discrimination against people or violence against their person or property.” The grounds are those mentioned above. The dissemination of an object or having it in stock for that purpose is covered as well.

Blasphemy is also covered by the Criminal Code: Article 147 Criminal Code penalizes, among other things, making public statements offensive to religious feelings through “scornful blasphemy,” orally, in writing, or by image as a serious offence against public order.¹⁸ Article 429bis Criminal Code, penalizes exhibiting writings or images with such content in a way that is visible from a public road as a misdemeanour.

In a civil lawsuit, an expression may be regarded as wrongful vis-à-vis another party, even if that same expression would not lead to a criminal conviction.

XVIII. CONCLUSION

We started this essay with the observation that the relationship between religion and the secular state has again become a hotly debated topic in a variety of fora. Also for the state itself, the controversies that characterize these debates present real dilemmas.

15. In this context, mention must be made of a ruling of the European Court of Human Rights in an Italian case concerning a crucifix in a public school (ECHR 3 November 2009, *Lautsi v. Italy* (application no. 30814/06)). Following the initial judgment against Italy in November 2009, the Court agreed to hear the case in the Grand Chamber on 30 June 2010. Decision in the case is pending. See case and related documents at http://www.strasbourgconsortium.org/cases.php?page_id=10#portal.case.table.php.

16. The Criminal Code Articles referred to are formulated in a quite detailed manner, as can be expected for such Articles. In the brief reference we make to these Articles it is unavoidable that some of the nuance gets lost. The relevant provisions are the Art. 147, 147a and 429bis; Art. 137c-137e, and 137f and 137f; and 429 quater.

17. See Sophie van Bijsterveld, *Overheid en godsdienst. Herijking van een onderlinge relatie*, 2nd ed., Nijmegen: Wolff Legal Publishers 2009.

18. See also Art. 147a. Recently, a parliamentary initiative has been introduced to abolish blasphemy in the Criminal Code.

Although there is more to it, the integration of Islam into Dutch society is an important element in the debate. Current trends and developments in the legal and political spheres are not always mutually consistent. It will be a challenge to uphold traditional way of respecting religious liberty and of accommodating religion in legislation the basic pattern of Dutch law. It is a challenge worthwhile to undertake.