Religion and the Secular State

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1. 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 at the work floor. 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 its slipstream, what is often referred to as the ‘re-emergence’ of religion in general.

However, the notion ‘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 those 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 that 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 has been defeated. Once again, it is realized that religion is not an isolated area of life, but that it is intrinsically connected with views of the human being, society, and the state, and, therefore, with values and cultural patterns. Furthermore, religion has become entwined with a huge societal and political issue like integration, and cannot be ignored in any debate on pluralism or social cohesion. As far as the state itself is concerned, the classic social welfare state is in a process of transformation, a process which directly affects the relationship between state and society and, therefore, also religion.

Though these developments do not always lead to changes in laws relating to religion as such, they have re-introduced religion to the realm of politics, they influence the practice of church and state relationships, they have an impact on popular perceptions, and they certainly
trigger 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, one characteristic of Dutch society is that of the traditional ‘pillarization’. Traditionally, churches or church-affiliated organizations in the Netherlands have been active in the social and cultural domain, for instance, in schooling, in youth activities, in health care institutions, in social support, and in mass media. With the expansion of the state in these domains from the 19th century onwards and typically in the 20th century, the state has accommodated these initiatives. This has resulted in a system of, on the one hand, state facilities in these domains, i.e., neutral from the point of view of religion and belief, and, on the other hand, the existence of similar facilities, but provided by faith-based organizations. Quality requirements and financing are usually the same. After the Second World War, in the development towards the social welfare state, pillarization diminished; in many existing organizations, the religious identity became less pronounced, with the exception maybe of those that had a strong educational character and were involved with (young) children, such as elementary schools.

A second characteristic of Dutch society is that political activities are organized, among other things, along confessional lines. A strong Christian Democratic Party (CDA) exists. This party resulted when the former Roman Catholic Party merged with two Reformed Parties. Apart from two government periods in the 1980s, this party or 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. This means that the variety of political opinions is reflected in Parliament. Because a large variety of political parties are represented in Parliament, the larger parties always need to build coalitions. 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 Lower House of Parliament. Opinion polls predict a strong growth of its number of seats.

Each church has its own criteria for membership and these may differ widely from one church to another. These, in turn, may differ from affiliation or (non-)affiliation as experienced by believers or non-believers themselves. There is no census, 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 figures may also differ quite significantly from one to another. According to a recent statistical survey, 58% of the population regards itself as having a religious affiliation. For 29% this is Catholic; for 19%, this is one of the larger protestant denominations, which have been united since 2004 in the Protestant Church in the Netherlands (two large reformed churches and the Lutheran Church in the Netherlands); 5% is Muslim; and 6% are affiliated with another religion or belief.¹

2. **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). The principle of neutrality can be read in Article 6 in conjunction with Article 1. The latter 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 system in which the Dutch Reformed Church was the established church. Nevertheless, it can be said that it is implicitly embodied in a combination of constitutional guarantees, notably those of Articles 6 and 1. That these principles form the core of the constitutional context of church and state relationships is uncontested.

The formulation of these articles dates from the general constitutional revision of 1983. This Constitution abolished the former chapter ‘On Religion’, that was introduced in 1814 and was amended in 1815, 1848, and 1972. Most of the remaining articles of the chapter ‘On Religion’ had become obsolete. Perhaps the most relevant change that the 1983 Constitution entailed in this respect was the fact that ‘churches’ were no longer mentioned as such. As the fundamental rights in the Constitution not only protect individuals, but also groups and organizations (as far as applicable), churches as organizations also enjoy religious freedom and are treated equally.

That these principles form the core of the constitutional context of church and state relationships is uncontested. 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 an equal footing, was not altered.

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, also where horizontal relationships are concerned, 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 the constitutionality of parliamentary legislation. The courts do, however, apply and interpret the law in individual cases. They also have the power to assess the compatibility of such legislation with directly binding provisions of international treaties or decisions of public international organizations.

The Constitution has no preamble and does not contain any reference to the source of authority in the state or to particular values; it contains no invocatio dei. A State Committee has been established to advise on a variety of constitutional issues, including the desirability of a preamble and, if desired, its possible content.

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2 Art. 6 Netherlands 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’.

3 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’.

4 In conjunction with these two articles, Art. 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 publicly-run schools and privately-run (usually denominational) schools which receive the same (government) funding as publicly-run schools.

5 Art. 120 of the Constitution.

6 Art. 94 of the Constitution.
3. Theoretical and Scholarly Interpretations

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

The analysis of the way in which the principle of separation of church and state has been interpreted in the policy domain, in politics, or in scholarly writings shows a variety of interpretations. This has largely been so ever since the principle was formulated. The principle is sometimes interpreted as requiring a ‘strict’ interpretation or – in line with the actual historical development as well as the current reality – as refer allowing a more ‘lenient’ interpretation. At the same time, the principle of separation of church and state is sometimes used both normatively and descriptively: ‘The norm is separation of church and state and the Dutch situation is that of separation of church and state’; but also as: ‘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 mentioned above, these differences of interpretation have a long history. In the last few decades, discussions regarding the interpretation of the principle of separation of church and state 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. Ongoing debates on political issues were supported by an underlying consensus on basic values and norms in society.

In recent years, the situation has changed. 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 into the limelight; the interpretation of the principle of separation of church and state is hotly debated yet again. In these debates, two widely differing views on this principle re-emerge: the one promotes a strict interpretation and the other favors the current system, based on the traditional Dutch way of accommodating religion in society and state. However, 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).7

In the meantime, public authorities regularly face concrete questions concerning their relationship towards religion or religious communities which pose dilemmas, for example, restoring specific church buildings which are not ancient monuments and are actively used as places of worship; providing subsidies for homework assistance in mosques; or supporting integration programs in which male and female participants are taught separately as a matter

7 A representative of the former, for instance, Cliteur 2006, p. 252-266; a representative of the latter, for instance, Van der Burg 2009.
of principle. 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 often hardly seem to be the ‘right’ labels for discussing these questions. First of all, 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 not only dealing with these dilemmas but also with finding the right words and concepts to do so.

However, there is a way forward. This is to circumvent discussions about ‘strict’ or ‘lenient’ interpretations of separation of church and state and to reduce the meaning of the label to its two-fold core: on the one hand, autonomy (institutional freedom) of the church from the state; and, on the other hand, a ban on any formal role for churches in the public decision-making process. Thus limiting the scope of the principle of separation of church and state 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 in the 21st century should deal with religion, not only as a private issue, but also in its societal and public dimensions.8

4. Legal Context

Law Relating to Religion and Churches: General Characteristics

The legislator observes the freedom of religion. 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 other things, grants broadcasting time to churches and religious organizations. Labor law and equal treatment law take religion into account in various ways. Ancient monument law also covers church buildings. In tax law, there is a special regime for charitable organizations, including churches. The Dutch Civil Code recognizes the legal personality of churches. In privacy law, ‘religion’ is classified amongst the ‘sensitive’ data. In penitentiary institutions and in the armed forces, chaplaincy services are available, 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 to religion or churches. Legislation which favors Sunday as a weekly day of rest and the designation of certain Christian religious days as public holidays find their origin in respect for religion; obviously, they have also become part of a more general social and cultural pattern.

No specific ‘law on churches’ or ‘law on religion’ exists. Until 1988, the Religious Denominations Act (Wet op de kerkgenootschappen) was in force. This law dated from 1853. Already at the time of its enactment, it did not have a much 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 Dutch Civil Code in the provision dealing with the church as a legal entity. This principle is concretized in other areas of the law as well.

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

Interlocutors on the Part of the State

There is no body, agency, or minister in the state that deals exclusively with religion. All government ministers have to take religion into account in the area of their competence. If parliamentary legislation is concerned, the same is true mutatis mutandis for both Houses of Parliament. Therefore, for churches and other religious communities, in principle, every Ministry is relevant.

Having said that, two government Ministries 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 Ministry of Justice is the legal successor to the (former) Ministry 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 1871.

The special involvement of the Ministry of Home Affairs is due to the fact that this is the ‘guardian’ of the Constitution; issues of religion have a constitutional dimension. Apart from that, issues of radicalization or polarization fall within the scope of this Ministry. The Ministry takes an interest in regional and local dynamics concerning religion.

On a different plane, the Ministry that deals with Integration should be mentioned. 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 this Ministry in religion has made a similar turnaround. The change gradually emerged at the end of the 1990s. As religion is now coming more to the fore, Ministries have become 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 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 place of religion in law and in the public domain. Therefore, 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, by and large the traditional way of respecting religious liberty and of accommodating religion in legislation is upheld.

Dialogue

Characteristics of the way relationships between religious organizations and public authorities are structured are pluralism and informality. On the part of 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’. It is a co-operative organization set up after the Second World War by the 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

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9 The Interkerkelijk Contact in Overheidszaken (CIO). It has a strong overlap in membership with the Council of Churches.
religion in the public domain, its membership has expanded considerably. The other national body that serves as an interface for dialogue with Parliament and government 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 involved issues such as poverty or the environment. Apart from this, member churches can and do have contacts with public authorities, on an informal, more or less 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 part of the state over the last few of years.

Muslim organizations are not included in either of the two organizations mentioned above. They have their own communication channels with the public authorities. Just as in many Western European countries, the process of self-organization of Muslims required time. For a long time, the public authorities took a passive attitude towards this process. In part, this had a practical reason; 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, it became clear to the state that it was desirable to also have interlocutors for the Muslim communities. The unrest after the terrorist attacks in Washington and New York on September 9, 2001, showed the public authorities that it was necessary 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 dreaded consequences of the release of an ‘anti-Islam’ film by the leader of the Dutch Party for Freedom (PVV) in 2008 only reaffirmed this. The policy of wait and see changed to one in which the establishment of interlocutors and the practice of entering into dialogue were actively stimulated. Likewise, the initial position of standoffishness on the part of the state also changed with respect to the establishment of an imam training programme in the Netherlands (as this required a representative and authoritative interface). For the establishment of fully 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 part 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.

Local and Regional Dynamics

In recent years, a whole new dynamic has been 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), practical mutual assistance, and especially serving as an interlocutor with the authorities, to the mutual benefit of their constituent organizations (and believers) and of the public authorities.

5. 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 academic 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 was shown above, the church as an organization is no longer mentioned in the Constitution. However, Article 6, paragraph 1, of the Constitution guarantees everyone the free exercise of the liberty of religion or belief, without prejudice to his responsibility under 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, also 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 to manifest one’s religion in practice. Thus, church autonomy in the sense of freedom of church organization is protected by Article 6.

This idea is borne out by the Dutch Civil Code. Churches are legal categories *sui generis* and they enjoy legal personality as such. Article 2:2 of the Dutch Civil Code simply states:

‘Churches, their independent units, and bodies in which they are united have legal personality. They are governed by their own constitution 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 Dutch Civil Code generally applicable to all legal entities are not applicable to churches, albeit that analogous interpretation is not excluded. Church autonomy is also respected by other laws. For instance, no prior dismissal permit from the public authorities is necessary for firing clergy. The Equal Treatment Act, which, in brief, forbids distinction on the basis *inter alia* of religion in a wide field of societal activities, is not applicable to churches or relationships within churches. However, this does not mean that churches can act at will. Fairness, good faith, a fair procedure are elements that courts can and will use in reviewing church decisions.\(^\text{10}\)

Islamic bodies are usually organized as a foundation (or less usually: association) for the employment of an imam or the management of a place 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 a non-Christian equivalent. As far as the state is concerned, this includes the responsibility to guarantee a (realistic) right of persons to discontinue their membership of a church or to change their religion. This has recently become an issue with respect to Islam. In the Christian domain, remarks that a clergyman

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\(^{10}\) Van Bijsterveld 2001, p. 147-163; see also Santing-Wubs 2002.
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.\textsuperscript{11}

No specific legislation exists regarding peaceful coexistence and respect among religious communities. The former ‘Religious Denominations Act’ (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 which at the same time shape religious liberty and contain limitations, such as the power of local authorities to regulate church bell ringing and the Muslim call to prayer. They are not primarily or predominantly enacted to facilitate peaceful coexistence and respect among religious communities, but they may also fulfill this function to a certain extent. The same is true for the general law with respect to public manifestations and hostile audiences.

Tensions are present in society over issues relating to religion. They find an outlet in public debate and commentaries, sometimes with indignation, over judicial and other decisions. They are also channeled through dialogue and contact with religious organizations and public authorities, and efforts on the part of the public authorities or spokespersons on the part of the religious organizations.

6. 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 public bodies in which churches have a seat \textit{qualitate qua}, or which are reserved to representatives of certain religious denominations. Generally, speaking however, in the Dutch pluralistic society, care is taken when composing the membership of advisory bodies or deciding on appointments in the public sphere for example of burgomasters that no obvious unbalances exist in relevant backgrounds, notably political backgrounds. In this very general way, religious preferences may also play a role implicitly. It must be stressed, however, that such appointments are not made on the basis of representation of various denominational or other backgrounds. The relevant personal qualities are 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 religion has the power to control other religious communities under the law.

7. 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 entity and the non-applicability of the Equal Treatment Act are just a few examples of regulations that were 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. There are only a few

specific legal restrictions. 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 to religious practices are part of the general culture, such as the calendar, the religious holidays and festivities and Sunday as a day of rest. To accommodate believers with a different ‘religious calendar’, alternative facilities are set out in the law or collective employment agreements.

Religious organizations and religious believers may benefit from legal facilities not specifically aimed at them. 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’ along with other data as health records or criminal records. Anti-discrimination legislation works with a variety of ‘suspect’ criteria for making distinctions, including religion. The same is true for restrictions to the freedom of speech in criminal law.

Opt-out facilities also 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 also possible for reasons other than religious ones.

In a pluralistic society like 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 until recently perhaps was 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 of conscientious objection to performing such marriages may be raised by registrars.

The state no longer keeps mandatory records of religious affiliation. Censuses are no longer carried out either. 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 the social effects of religion. Religious sociology is undergoing a revival in the Netherlands, in part due to the interest that public authorities take in research results.

8. **State Financial Support to Religion**

*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 exists in the Netherlands does not allow 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 possible to give a precise indication of the actual amount of financial support. Nevertheless, the following analysis will probably provide some insight into its scope.

*Societal Activities Provided by Churches*

As was shown above, prior to the development of the welfare state, churches and church linked organizations were active in the fields of education and health, and 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. This situation continues to the present day. The increase of regulation and financial intervention of the state in these domains also affected the private providers. As a result, these activities are usually regulated by the same body of law and share in the same financial system. The denominational background and inspiration of the activities provided on a confessional basis is respected by law.

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 (notably, local authorities) has funded many activities in the socio-cultural sector. This is often done on a voluntary basis (not required by the Constitution or parliamentary legislation) and includes cultural activities, sports activities, or youth activities. They are often carried out by the private sector but are funded through public subsidies. If these activities are also offered on a denominational basis, and fall within the objective criteria under which these subsidies are offered, they cannot be excluded on the basis of the fact that they have a denominational background. Only if denominational activities result in objective differences that are relevant in terms of the subsidy regulation, this is different. Although these subsidies have decreased in the last decades due to the overall necessity of public budget cuts, the general idea is still valid.

Chaplaincy Services

Public institutions like the armed forces or penitentiary institutions have chaplaincy services, funded by the state. The justification is freedom of religion for the individuals concerned: they live under extraordinary circumstances as a result which they cannot take part in ordinary religious life; the state has some responsibility for people living in these circumstances so the state has a positive obligation to meet for their religious needs. The chaplains are appointed by the Ministers of Defense and Justice, respectively. The religious denominations involved nominate the chaplain to be appointed (whether Christian, Jewish or other). The Protestant Churches co-operate 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 developed of hiring a chaplain on a contractual basis for the services delivered.

Hospital boards employ chaplains or hire 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.

Church Buildings

The general rule is that church buildings are financed by the churches themselves. Many church buildings, especially Christian church buildings, are listed as historic monuments. For such buildings, there are public funds for maintenance and restoration. 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

12 See also Section 1 and nt. 4.
restoration of their buildings, listed as well as the non-listed ones. With regard to church buildings, specific arrangements exist in the fiscal sphere; their purpose is to prevent 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 new villages and cities were erected. For the purpose of supporting Muslims in the establishment of mosques, temporary subsidies regulations have been enacted, which have now expired.

**Tax Facilities**

The final category of public support for religions is that of 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 religious causes in particular and to churches in general. These facilities are not exclusively available for the religious sector but to all sorts of charities.

**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 church services; in the past (until approximately, 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 a particular place of worship or the restoration of a particular religious building. It also occurs with new forms of co-operation between state and religious organizations in the socio-cultural sphere. Especially in a time when the state ‘contracts out’ activities which, until recently, belonged to its own domain, such as the provision of particular youth work, and all the more when it is contracting out to one organization only, issues are raised in the public debate about the proper relationship between the state and religious organizations. In the first case, apart from financing, 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. It must also be borne in mind that the reasons of the state for entering into such arrangements are not promoting a particular religion as such, but fulfilling public policy goals which coincide with the aims of the religious organizations involved.

9. **Legal Effects of Religious Acts**

As legal persons, churches can enter into legal relationships under civil law, like any natural person. Buying and selling property, renting and letting property, hiring and firing 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 constitutions.

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 entities under civil law. Where ‘purely’ religious issues are at stake – that is,
issues which do not have any civil law dimension – secular courts have no jurisdiction. However, if civil law aspects are stake, secular courts do have competence. 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 secular court is competent, this court when approached may step back temporarily pending an ecclesiastical procedure or if an ecclesiastical procedure is still an option. Afterwards, the court may test the case for reasonableness. 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 and 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 a civil marriage conducted by a registrar. The Civil Code (Article 1:68) states 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. The existing 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.13

10. Religious Education of the Young

As mentioned above, the Constitution outlines the main elements of a dual system of education. Freedom of education allows confessional education to exist alongside public non-denominational education. Freedom of education entails freedom to found a school, to administer a school, and to determine the confessional identity of the school and its teaching. According to the Constitution, elementary confessional schools are financed by the state on the same footing as non-denominational schools. For secondary and higher education, including universities, this system is adopted through ordinary legislation (as mentioned above). Currently, also Islamic schools are established and funded through this system, both at 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, which may 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, e.g., 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.

Non-denominational schools teach religion as a subject on a neutral, non-confessional basis. Non-denominational elementary schools may, on a voluntary basis, outside the normal curriculum, offer the option for religious education on a confessional basis. If they do so, this education is funded by the state. Another requirement is that they do not only teach one denomination only but treat the various denominations on an equal basis. This also includes teaching non-religious philosophies like humanism. Of course, there are practical limits to this. The school authorities appoint teachers that represent a specific denomination.

11. Religious Symbols in Public Places

Dutch neutrality in the public domain does not entail that the public domain must be void of all 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, paragraph 3).

Practically, this means that there is room for religious expression by teachers and pupils (such as wearing headscarves or crucifixes); however, teachers must be committed to working in a ‘neutral’ environment, that is, to providing public 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 completely cover the female pupil’s face, the Equal Treatment Committee set up under the Equal Treatment Act has accepted justification grounds in pedagogical and communicational situations.

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 admission 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.

As regards public buildings 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. A (non obligatory) prayer may take place preceding the meeting of a town council.  

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).
12. 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.\(^{15}\) Although they are the subject of discussion from time to time, until recently they have mostly been 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.\(^{16}\) Over the last few years, some of these provisions have been extended in terms of the grounds of defamation as well as the circumstances in which it 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 disability. This is includes statements made on the basis of religious conviction (notably relevant with respect to homosexual orientation). The criterion is that the statements were made ‘publicly’ and ‘intentionally’; they include oral and written statements and images.

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 a statement ‘for any reason other than that of giving factual information’, which the perpetrator ‘knows or should reasonably suspect to be offensive to a group of persons’ 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 prohibited as well.

Blasphemy is also covered by the Criminal Code: Article 147 Criminal Code penalizes, among other things, ‘a person who publicly, either orally or in writing or by image, offends religious sensibilities by malign blasphemies’ as a serious offence against public order.\(^{17}\) Article 429bis Criminal Code penalizes, as a lesser offense, exhibiting writings or images with such content in a place visible from a public road. 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.

13. In Conclusion

This essay started with the observation that the relationship between religion and the secular state has again become a hotly debated topic in a variety of forums. Also for the state itself, the controversies that characterize these debates present real dilemmas. 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 the traditional way of respecting religious liberty and of accommodating religion in legislation as the basic pattern of Dutch law. It is a worthwhile challenge.

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15 The Criminal Code Articles referred to are formulated in quite a 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 Arts. 147, 147a, and 429bis; Arts. 137c-137e and 137f; and 429quater.

16 See Van Bijsterveld 2009.

17 See also Art. 147a. Recently, a parliamentary initiative has been introduced to remove blasphemy from the Criminal Code.
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