

FREEDOM OF RELIGION IN THE NETHERLANDS

Dr. Sophie C. van Bijsterveld

I. INTRODUCTION

Freedom of religion is the oldest explicit fundamental rights guarantee in the Netherlands. Over the years, however, the precise nature of religious freedom in the Netherlands, as well as church-state relations, has changed. Wide-ranging legal and social developments have taken place which are relevant to religious freedom and church-state relationships and which originated outside the scope of the Constitution. The setting in which freedom of religion and church-state relationships are embedded has been altered by the transformation of the classic liberal state into a modern welfare state and the increasing diversification of Christian denominations from the early nineteenth century onwards. More recently, the religious spectrum has shifted due to the secularisation process Christian churches are experiencing, as well as the advent and permanent settlement in the Netherlands of increasing numbers of adherents of non-Christian religions. Out of a total population of fifteen million people, the Roman Catholic Church in the Netherlands has about five million members. The Protestant denominations [1] together have about the same number of members. Of the non-Christian religions, Islam is the largest. There is also an organised Humanist movement.

Furthermore, legal developments, though perhaps not directly aimed at church or religion itself, may nevertheless affect them and raise questions as to how religious interests should be taken into account. Thus, even though basic principles governing church and religion have not been altered, the development of law and society makes continuous explication and interpretation of these principles necessary.

This report analyses the current state of religious freedom and church-state relations in the Netherlands. Part II sets forth a brief historical description of developments in religious freedom and church-state relations in the Netherlands. Part III then provides an overview of religious freedom in the Netherlands. Part IV analyses freedom of religion as it is implemented in various areas of the law in the Netherlands, and also describes major developments in these areas.

II. HISTORICAL BACKGROUND

The Union of Utrecht of 1579, the treaty on which the confederate Republic of the United Netherlands was based, guaranteed the freedom to cherish a religious belief as well as freedom from inquisition. While this provision was unique in its time, its purport was restricted to the inner sphere of belief. Public worship was not protected by this guarantee [2]. In the days of the Republic, the Reformed Church was the established church. Its adherents enjoyed a privileged status, and public offices could only be filled by members of the Reformed Church. Still, the general atmosphere towards other religious denominations was one of tolerance, and a variety of religious denominations

existed [3]. At the time of the fall of the Republic in 1795, this established church and state system had by far outlived itself.

Though the old principles of church and state relationships were abandoned following the Batavian Revolution, the actual church and state relationships had yet to be restructured in accordance with the newly adopted principles of separation of church and state and equal treatment of the various religious denominations--a process which continued well into the last century. The Constitution of 1814, which founded the decentralised unitary state, provided the starting point for this process, though not altogether unequivocally. As with other fields of law, the chapter on religion also contained traces of compromise between old and new ideas. This chapter, amended in 1815, 1848, and 1972, continued In force until 1983.

The general revision of the Constitution in 1983, brought substantial change in the formulation of religious freedoms as well as in the general system for protecting fundamental rights [4]. The former constitutional chapter "On religion" was replaced by one article guaranteeing freedom of religious and, for the first time, non-religious beliefs [5]. This constitutional revision provided the impetus for legislative adaptations and changes in fields relating to religion and non-religious belief.

III. OVERVIEW OF RELIGIOUS FREEDOM IN THE NETHERLANDS

A. Protections of Religious Freedom Under the Constitution and International Treaties

1. The Constitution

In the present Constitution, the church as an organisation has faded into the background, it is no longer mentioned. Furthermore, financial relationships between church and state no longer have a specific basis in the Constitution.

The guarantee of freedom of religion and belief in the Constitution has an "open" structure in that it does not specify in detail the various protected ways of exercising religious freedom. Nevertheless, the freedom to be guaranteed is meant to be wide-ranging. At the time of the constitutional revision it was stated that the right to manifest freely one's religion or belief entailed not only the freedom to have and express religious opinions, but also the freedom to act according to that opinion [6]. The precise range and limits of this wide-ranging religious freedom are to be specified by legislation and court decisions.

a. Article 6. Article 6 of the Constitution states that everyone shall have the right to freely manifest his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law. The second section of Article 6 adds that 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. Though religious freedom in the Netherlands has an open structure, some specific elements of that freedom can be found in Article 6 of the Constitution. Article 6 specifies that the exercise of religion

can be pursued individually or in community with others. Although churches as organisations are not featured in the Constitution, as was suggested in earlier committee proposals, they do enjoy constitutional freedoms because it is generally accepted that groups and organisations, as well as individuals, are guaranteed fundamental rights. The freedoms that churches as organisations enjoy include the freedom to freely organise and structure themselves. They also include the freedom to train, appoint, or dismiss church ministers, to obtain buildings suitable for worship, and to generally have the capacity to operate in society.

Another area specifically dealt with by Article 6 is the exercise of religion or belief "other than in buildings and enclosed places." This particular phrase harks back to 1848 and the former restrictive regime limiting such forms of religious exercise, that regime was, in practice, a prohibition of religious processions. It is clear that the present regime gives priority to the freedom of exercise of religion other than in buildings and enclosed places [7], allowing restrictions to this freedom only under specified conditions.

b. Other Constitutional provisions. Other articles of the Constitution are also relevant to the range of protection given religious activity, some of these - namely. Articles 1 and 23 - mention religion explicitly. Article 1 of the Constitution 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."

Freedom of education is guaranteed by Article 23, the most elaborate article in the Constitution. The subject-matter of education is so sensitive that propositions to alter this article during the general constitutional revision in 1983 did not succeed, and subsequent attempts to alter it were likewise unsuccessful [8]. Article 23 of the Constitution safeguards, among other things, freedom of education. Including denominational education [9], and prescribes equal treatment and respect to everyone's religion or belief in public-authority education.

Other provisions protecting fundamental rights, although not mentioning religion specifically, supplement the freedoms already mentioned. The freedoms of assembly, association, opinion, and the press all affect the scope of religious freedom, as well as the newly adopted right to privacy and the right to property. Uncertainties, however, may occur in the demarcation of the various rights, with their slightly varying degrees of guarantee of legal protection, and the Constitution contains no general freedom of conscience guarantee [10].

Although there is no longer a specific constitutional basis for financial relationships between church and state, Article 6 still plays a role in this area, as do Articles I and 23. Article 23 provides a direct basis for government funding of private education [11], and Article I requires equal treatment in the field of finances. However, the effect of Article 6 in this respect is of a more indirect nature. In fundamental rights doctrine, it is accepted that classic liberties under certain circumstances may oblige public authorities to become actively involved in order to enable the exercise of fundamental rights [12]. This holds true for church and religion as well.

In conclusion, it can be said that although Article 6 of the Constitution is not very specific in the subject matters of its guarantees, it covers a wide range of aspects of church life and exercise of religion and is supported by other constitutional provisions [13].

Over the past decade, profound interest has developed concerning the application of fundamental freedoms to relations between citizens. At the time of the constitutional revision, the government, as principal, acknowledged that fundamental freedoms may play a role in civil law relationships, albeit to varying degrees. Legislative developments and numerous court decisions have made clear the importance and sensitivities of this issue. Freedom of religion within family relations, vis-a-vis an employer, vis-a-vis the school or one's church, or, more generally speaking, vis-a-vis other individuals or groups of individuals, would be relevant in this respect. Also relevant, as a corollary to individual freedom in this respect, are the conditions of loyalty which denominational institutions may require of employees or other persons with whom they deal.

2. International treaties

The Constitution takes precedence over other national legislation, including Acts of Parliament; however, the courts do not have the power to review the constitutionality of an Act of Parliament. Since 1953 the Constitution has granted courts the right to review any piece of legislation, including an Act of Parliament and even the Constitution itself, for its compatibility with provisions of treaties that are binding on all persons or with provisions of the resolutions of international institutions [14]. As a consequence, such international provisions may be invoked in domestic court procedures.

It is in this way that Article 9 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and Article 18 of the Covenant on Civil and Political Rights (CCPR) can be invoked in domestic legal procedures. However, the Supreme Court has to date proven reluctant to strike down parliamentary legislation [15].

Compared to Article 6 of the Constitution, these treaty provisions give more elaborate and specific indications of the various protected elements of exercise of religion or beliefs. Mentioned are "thought, conscience, and religion, this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance [16] and "freedom to have or to adopt a religion or belief of his choice and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching [17]. According to the second section of CCPR Article 18, "[n]o one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice."

Article 6 of the UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief [18] states:

In accordance with article 1 of the present Declaration, and subject to the provisions of article 1, paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:

a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;

- b) To establish and maintain appropriate charitable or humanitarian institutions;
- c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
- d) To write, issue and disseminate relevant publications in these areas;
- e) To teach a religion or belief in places suitable for these purposes;
- f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
- g) To train, appoint, elect or designate by successions appropriate leaders called for by the requirements and standards of any religion or belief,
- h) To observe days of rest and to celebrate holidays and ceremonies In accordance with the precepts of one's religion or belief;
- i) To establish and maintain communications with individuals and communities in matters of religion or belief at the national and international levels.

Although the then-draft Declaration did not play a role in the constitutional revision process [19], none of the above mentioned elements can a priori be considered to be excluded from Its guarantee, since the Netherlands played an active role In the process leading to the adoption of the Declaration [20].

B. Restrictions of Religious Freedom

Freedom of religion is subject to restriction. During the constitutional revision, specific attention was given to the issue of permissible restrictions, and a strict system of restrictions to fundamental rights was adopted to optimally safeguard the fundamental liberties. This system's primary focus is the designation of the authority competent to formulate restrictions, if necessary, combined with an indication of the purposes to be served by the restriction or a prescribed procedure to be followed in imposing restrictions. Also significant is the recognition that regulations which have the unintended effect of restricting fundamental rights are nevertheless restrictions of those rights and must meet the constitutional requirements.

I. Restrictions under Article 6

Article 6, section 1 of the Constitution contains the clause "without prejudice to his responsibility under the law." This clause, which is pertinent to all aspects covered by freedom of religion [21], expresses the principle that valid restrictions may only be enacted by Act of Parliament - in other words, by the national Legislature. Other legislation, whether enacted at the central government level, or in the exercise of autonomous powers, or on the basis of a specific delegation, may not restrict religious freedom. However, this clause gives no precise indication as to the material criteria to be met; that is a matter for parliamentary interpretation. It Is acknowledged, however, that the freedom guaranteed should be respected as much as possible.

The second section of Article 6 allows for greater restrictions than those allowed under the first section, at least where public religious exercise is concerned. In that instance, an Act of Parliament may delegate to other public authorities the power to restrict religious freedom. However, this delegation may only be made for purposes mentioned in section 2, namely, "the protection of health, in the interest of traffic and to combat or prevent disorders." Because public authorities other than the national Legislature are not allowed to restrict this right in the exercise of their autonomous powers, this system has a centralising effect.

2. Restrictions from other sources

During the constitutional revision, certain allowances were made for developments going beyond the strict conditions of the Constitution, these allowances are generally referred to as "escape-hatches." Skeptics of the ambitious system of fundamental rights protection recognised that these allowances undermined the strictness of the system, and the courts have in fact tended to moderate the strict system by accepting that, notwithstanding the prohibition of delegation, delegated legislation or autonomous legislation by bodies other than the central government should not be automatically disregarded or declared unconstitutional. Instead, the courts carefully scrutinise the regulations and the decisions based on those regulations, recognising that there is a fundamental right at stake. At a bare minimum, the regulations should not make it altogether impossible to exercise the fundamental right. The courts' phrasing of the test varies. In general, the result of this analysis is quite acceptable in protecting religious freedom [22].

It must be realised that the ECHR and the CCPR are more lenient toward restrictions of religious freedom than the Constitution in that, unlike the Constitution, the treaties' requirement of a restriction by "law" is not reserved to the national Legislature. The purposes to be served are likewise wide-ranging. A promising development in the area of judicial review of legislation for compatibility with treaty provisions is the proportionality test applied to review restrictions on other fundamental rights [23]; this test may also be extended to the realm of religious freedom.

IV. FREEDOM OF RELIGION IN SPECIFIC AREAS OF THE LAW

Just as legislation, administration and court decisions, make religious freedom explicit and concrete, they also actualise the restrictions to religious freedom. Obviously, the act of explicating a freedom also defines its limitations. The actual purport of freedom of religion cannot be expressed in abstract terms; it is only completely understood as it is applied to specific problems and concerns. This part analyses freedom of religion as it is implemented in various areas of the law in the Netherlands, and also describes major developments in these areas.

A. Church Organisation

1. Legal framework

Behind the constitutional guarantee of religious freedom lies an entire system of church-state relationships. In the Netherlands, that system is qualified throughout by the principle of separation of church and state. While this principle is neither mentioned nor defined in the Constitution or other legislation, it is considered to be implied in the relevant constitutional provisions. The separation is not to be understood as a complete separation, in that it does not mean that no connections whatsoever are allowed between church and state.

a. Civil Code. Though the church no longer features in the Constitution, as we have seen, its status as an organisation is firmly entrenched in the Civil Code. Churches, independent units of churches, and structures in which they are united are legal entities *sui generis*, to be governed by their own statutes insofar as those statutes do not conflict with the law [24]. Unlike for other legal entities, such as associations and foundations, no specific regulations for churches as legal entities have been enacted. The Civil Code further determines the legal status of churches, in that the code section outlining the general principles of legal entities does not apply to churches [25]. However, analogous application of the Civil Code provisions is allowed insofar as this does not conflict with church statutes or the nature of the internal relations [26]. In this manner, the law takes freedom of church organisation into account and does justice to a spectrum of church structures which ranges from hierarchical concepts to more decentralised models.

With these basic rules, the law has moved far away from the early nineteenth century, when the Crown still enacted church statutes [27] and was not yet accustomed to allowing freedom of organisation to the then newly separated branches of the Reformed Church, or to respecting the restoration of Catholic hierarchy in the Netherlands. The central government church register [28], which continued to exist even after it was recognised that no legal consequences were attached to this registration, is (now) also only a thing of the past.

Not only does the Legislature not require registration of churches, it does not define "church," nor does it formulate criteria for church status. As the need arises, the administration or the courts will have to decide in concrete cases whether an organisation which presents itself as a church may be considered as such. In making such decisions, courts are careful not to get entangled in theological issues. In a somewhat spectacular case, the Supreme Court agreed that at a minimum, "religion must be involved" and that there must be a "structured organisation" [29].

b. Outside the Civil Code. Freedom of church organisation is a relevant concept outside the field of the Civil Code as well. Legislative projects which are not directly pertinent to or expressly aimed at churches or religion may nonetheless affect or even curtail freedom of church organisation. In all these instances, the relationship between church and state should be guarded and the element of freedom of church organisation should be taken into account. The Labor Relations Act, for example, makes an exception to its general rules in that church dismissals of ministers are not subject to prior public authority review. The General Equal Treatment Bill, which among other things forbids distinctions on the basis of religion or gender, is not applicable to churches or to religious office [30].

Problems concerning the church-state relationship do occur, as with the application of Works Councils Legislation to churches. For the purpose of application to churches, the court made a

distinction between the religious and the labor organisation [31]. Privacy legislation may also be mentioned as an area of concern in this respect, in the context of churches' right to register their members.

2. Evolution of church-state relations

Over the course of time, government involvement in church and religion has taken on a new character. The evolution of church-state relationships made it already clear in the course of the last century that the then-existing government departments solely concerned with religion [32] were becoming obsolete. Government involvement with church and religion is even now inevitable, if only because government actions must take religious freedom into account. Currently, various government departments are occupied with topics touching on religion. A special interest in church-state relationships is taken by the Department of Justice, as the legal successor of the former religious departments, and the Department of the Interior because of its specific concern with constitutional affairs. There are no formal structures for consulting churches about legal issues which may affect them; churches themselves must be alert to developments of concern to them. In order to monitor and react to such developments, churches work together in the interchurch Contact in Government Affairs [33]. This body also maintains an ongoing dialogue with the government. The national Council of Churches - almost identical in composition with the interchurch Contact - is focused on broader societal issues. Churches, of course, can and do act on their own as well.

In recent years, various rights traditionally enjoyed by churches have been abolished. Though not required by the Constitution as such, these changes must be recognised as related to the constitutional revision. In 1987, churches' right to access members' income tax records was cancelled, a change justified under principles of equal treatment [34] and separation of church and state. The same is true for the abolition of church membership registration by municipal authorities. In the course of setting up a new system of automated personal registration, a complex modus was found for indulging the needs of the churches which rolled on this system. The then-existing information concerning church membership has been transferred by the municipal authorities to an interchurch foundation (the "SILA"). Persons concerned have been notified of the transfer and that they are entitled to withdraw themselves from the registration system. Under the new automated personal registration system, the municipal authority, with consent of the church member, attaches a code to the member's "chart." The SILA is then informed of any changes, and passes that information on to the member's church [35]. In this way, the municipal authorities no longer have information on individuals' denominational affiliation.

B. Financial Relationships Between Church and State

In the Netherlands, there is no general financial support of churches by public authorities [36]. Such support would generally be regarded as violating the principle of separation of church and state. However, this does not mean that absolutely no financial relations exist.

I. Indirect subsidies

Various types of support - though modest - exist at present, and their justification varies. In the first place, support may be granted as a way of discharging general government obligations not initially aimed at churches or religion. This may be the case in the area of ancient monument care. Church monuments are mentioned as part of the government's responsibility for the nation's cultural and historic heritage, as ancient monuments. It is obvious that only churches with ancient monuments benefit from this, although it must be realised that government subsidies will never completely cover the costs of monument maintenance. Not only the central government, but also local and provincial government agencies may be involved in subsidising ancient church monuments.

Subsidies are also granted by public authorities for a wide range of social activities, ranging from small local initiatives to activities of vital public interest such as health care. Although these activities may be engaged in by churches themselves, they usually are not. It is common, however, for such activities to be carried out by associations or foundations which are based on a particular religion or belief and consequently affiliated to a greater or lesser extent with a certain church. Public authorities may not exclude organisations on the grounds of their denominational background [37]. Such a denominational background, however, may give rise to objective differences in the work performed by the organisation, and those differences may be taken into account. These associations may also receive indirect financial benefits through the tax deductions which are granted for donations to religious and other social causes.

2. Direct subsidies

Direct subsidies to churches and for religious purposes are a more delicate issue. In the present as in past times, such subsidies are granted, though in recent years these subsidies have been the subject of intense discussion. Recently, the government submitted its standpoint on the issue to the Second Chamber of Parliament for debate [38]. The subsidy debate has focused on government subsidies in two areas: church building construction and specialised church ministries.

a. Building subsidies. With respect to church building subsidies, a marked change has recently occurred. In the past, in addition to incidental payments [39], church construction had been subsidised on a structural basis. In 1962, a temporary Church Construction Premium Act [40] was enacted in reaction to discussions on the desirability and propriety of local government subsidy practices in this area. The Act centralised building subsidies, eliminating all building subsidies other than those explicitly authorised by the Act. Under the regime of this Act, many church buildings were built, including buildings for Islamic worship and for non-religious beliefs. Following the expiration of the Act in 1975, two successive temporary ministerial subsidy regulations were set up to support the building of Islamic mosques [41]. By the time the latter regulation expired, it was the subject of severe criticism, both because of objections to public support of buildings of worship and because of the selective scope of the regulations. In a series of votes, the Second Chamber of Parliament rejected public support of buildings [42], and no further subsidy regulations have followed.

Although the Cabinet, in a recent standpoint on church-state financial relationships, accepted the general principle of subsidising some church building-leaving open the possibility of religious building subsidies under specific, designated circumstances - it has made it clear that in its view no such circumstances presently exist. Parliament, however, objects to religious building subsidies on a more basic level, finding such subsidies inappropriate as a matter of principle.

b. Specialised ministries. Another area where direct support has been permitted is in specialised ministries, or chaplaincies, in institutions such as the armed forces and prisons. This support, a long-standing tradition, is at present regarded as a fulfilment of the government responsibility to ensure the free exercise of religion in special circumstances. These ministries are filled by church ministers from the various denominations who are appointed by the responsible government minister on the recommendation of the churches. A lengthy discussion on the allocation of posts between the various denominations has recently taken place following increased demands by the Humanist League.

Specialised ministries also exist in institutions such as hospitals and homes for the elderly. The financing structures of these institutions is complex. These specialised ministries are financed with general funds. In 1994, a bill was introduced [43] to safeguard this form of spiritual care in view of forthcoming fundamental changes in financing structures which may threaten its continued existence. The responsibility which the government is fulfilling in this context is not to finance the spiritual care, but to guarantee the existence of these forms of religious exercise.

C. Education

Education is closely linked with views of religion and beliefs. The law recognises that religious belief does play a role in education. In the early nineteenth century, an educational system took shape which consisted of public-authority education and free private education [44]. In the second part of that century, a system developed which resulted in the acceptance of full public funding for private education which met certain financing conditions and educational standards [45]. The distinctive features of this system - the genesis of which constituted one of the most lively chapters of constitutional history - were embedded in the Constitution of 1917 and have since remained practically unaltered [46].

As it is currently understood, freedom of education entails freedom to establish schools, freedom of school denomination, and freedom to administer schools [47]. Legislation specifies the numerical criteria for founding a school; however, in regulating education, the Legislature has to respect the freedoms of denomination and the freedom to administer schools. The precise contents of these freedoms and the parameters of the Legislature's power to restrict them are a continuous point of discussion, and the constitutional provisions play an important role in that discussion. No clear lines mark the precise boundaries of schools' freedoms of "stichting, richting, en inrichting". As a result, interpretation is needed again and again to determine whether educational legislation infringes on these freedoms [48].

The freedom of denomination of a school in relation to the state has consequences for its relation to teaching and non-teaching staff as well as to pupils, prospective pupils, and their parents. With regard to prospective pupils, a school has the right, in principle, to deny admission on denominational grounds [49]. Furthermore, parents are not entitled to withhold their pupils from religious education. In that school, even if in their view the school is not complying with the religious teachings of their own - and the school's - denomination. Once a pupil of another denomination is admitted, he or she may not abstain on religious grounds from, for example, gymnastic lessons [50].

The denominational school may require loyalty of its staff with regard to its denominational views, but the extent to which it may do so is a delicate issue, governed largely by case law until quite recently. Courts deciding cases in this area tended to balance the conflicting interests, thus qualifying schools' otherwise extensive freedom of denomination. Under the newly enacted General Equal Treatment Act [51], the courts' power of review has been extended, and schools' freedom of denomination in this area has been restricted. The staff loyalty issue has been particularly controversial.

As we have seen before, public-authority education is provided with "respect to everyone's freedom of religion or belief". This is more specifically regulated in the various education acts. Education acts also provide for religious teaching in public-authority schools. Non-religious belief instruction should be offered on an equal basis [52]. Taking religious education in public-authority schools is not obligatory.

Education for church offices should be mentioned in this respect as well. As of 1876, education for the ministry in the majority Reformed Church was separated from state theological education. The state, however, continued to finance the church's education as well as that of other Protestant churches, which often based their schools of theology at state universities. This system still exists. In the late 1960s, various other churches joined the system.

Another development, the foundation of private denominational universities, started at the end of the last century. These universities are financed by the state under the condition that they meet certain financing and educational standards. This condition also holds for their theological faculties, which educate students for the office of church ministers. A similar structure applies to academic colleges - also universities. In the present terminology which consist solely of a theological faculty [53]. Apart from academic education, there exists a whole range of colleges and educational centers focusing on various church offices. These may or may not be financed by the state.

D. Marriage and Family Relations

I. Marriage

The Civil Code regards marriage only in its civil dimension [54]. To be legally valid, marriage must be performed by the designated public authority and according to the procedure enacted by law. Religious proceedings related to marriage have no legally binding effect. In order to ensure the primacy of civil marriage, the Civil Code states that no religious ceremonies concerning

marriage may take place unless the parties involved have provided proof of legal marriage to the church minister [55]. A church minister who conducts a marriage ceremony without this condition being fulfilled is subject to criminal prosecution [56]. In 1971, the Supreme Court upheld these provisions, holding them to be justified restrictions of religious freedom which meet the criteria of Article 9, section 2, ECHR [57].

Developments in recent years have called this system into question. Patterns of personal relations have changed, with marriage no longer enjoying a legal or religious monopoly. With regard to non-marital relationships, religious ceremonies may take place, and churches in fact perform such ceremonies. The law is also responding to these changing patterns. A bill is to be proposed which would enable registration of relations which fall outside the traditional concept of marriage (single-sex relations, close family relations) in a way that practically equals that of marriage, both in formal characteristics and in legal consequences. Although suggestions have been made in connection with these developments to abolish the existing system, so far no actual proposals have been made.

2. Family relations

Religion may play a role in family relations. Confronted with situations of conflict, courts acknowledge the religious factor without showing preference for a specific religious persuasion. Differences in opinion on religion may, for example, lead to such an estrangement between spouses that the court may conclude that dissolution of the marriage is justified. As in other cases involving fundamental rights and relations between citizens, the actual appreciation of the interests concerned depends largely on the concrete issues at hand. In one specific example, the fact that the law regards marriage only in its civil dimension does not prevent a court from demanding that a former spouse comply with religious divorce proceedings [58].

This balancing of interests by the court also takes place in parent-child conflicts involving religion. The court has rejected the refusal of parental marriage consent on the basis that the prospective spouse did not share the parents' religious convictions [59]. On the other hand, where it went against the parents' religious feelings, an eighteen-year-old girl could be denied consent to obtain a passport for a holiday abroad with a boy-friend [60].

One conflict which directly concerns the state is that of adoption by parents who for religious reasons will refuse medical treatment for the adopted children. The courts have accepted the exclusion of such parents from consideration as adoptive parents [61]. In the case of natural children, the authorities may resort to temporary measures, such as making the child a ward of the state.

E. Mass Media

In the early development of the broadcasting system, churches, as well as organisations founded on a religious or philosophical basis, took part in broadcasting. Early legislation incorporated this original pattern of broadcasting, and subsequent legislation, including the present Mass Media Act, continues to adhere to this system.

The idea of representation is entrenched in the Dutch broadcasting system. A characteristic feature of that system is the allocation of broadcasting time to broadcasting associations, which, under the Mass Media Act, must aim to represent a certain societal, cultural, religious, or spiritual tendency and to fulfil the corresponding cultural, religious, or spiritual need in their programming. Broadcasting time for each association is allotted according to the number of members - the more members an association has, the more time it is allotted. Currently, there are Protestant, Catholic, Evangelical, socialist, liberal and "neutral" broadcasting organisations.

Broadcasting time is not only allocated to the broadcasting companies, but also to individual organisations such as political parties and educational organisations. Churches and their non-religious counterparts are likewise taken into account in this manner, and for the purpose of broadcasting, a number of churches may work together. Currently, eight church denominations work together to broadcast as part of a joint broadcasting association, one church (the Roman Catholic Church) cooperates with the broadcasting association of its denomination (the Catholic Broadcasting Company), and five other churches broadcast in their own name in the Broadcasting Time for Churches. In total, fourteen Christian churches enjoy broadcasting time on television. Recently, an Islamic and a Hindu organisation succeeded in obtaining broadcasting time. Broadcasting time had previously been allotted to the Humanist Broadcasting Organisation. The Mass Media Act requires churches and non-religious spiritual organisations to use their broadcasting time for religious or spiritual programs.

The advent of commercial television and radio has given rise to a fundamental debate on the future position of public-sector broadcasting. It has become clear that in order to survive competition from commercial broadcasting, the public broadcasting sector must be thoroughly restructured. However, initial suggestions for restructuring proved to be detrimental to the system and structure of religious broadcasting, and the suggestions were rejected after strong protests [62]. It is impossible to say at present just what the future will be.

F. Equal Rights

Equal treatment and non-discrimination where religion and belief are concerned are principles firmly embedded in the Constitution. Besides the express provision of Article 1 that discrimination on the grounds of religion or belief is prohibited, Article 3 gives an even more specific protection: "All Dutch nationals shall be equally eligible for appointment to public service". Furthermore, equal treatment is presupposed by every other constitutional guarantee of fundamental rights, and these provisions have their counterparts in treaty provisions on fundamental rights.

In their purest form, these equal treatment and non-discrimination clauses apply to public authorities in their relations to citizens: public authorities are not allowed to make distinctions on the basis of religion or beliefs. Nevertheless, it would appear that distinctions on the basis of religious criteria are not altogether forbidden. Religion and belief, as well as characteristics such as political preference, do play a certain role in public appointments of, for example, municipal mayors by the Crown. These preferences may also play a role in the selection of public boards and government

advisory committees, in the sense that a balanced composition based on proportionate representation is desired. The General Equal Treatment Act [63], which applies to both the private and the public sectors, makes explicit exceptions for these distinctions.

A more controversial issue is the extent to which distinctions may be made in the private sector, especially when denominational institutions are involved [64]. The Act and its more unfortunate predecessors have prompted debate on the extent to which the Legislature is entitled to prescribe equal treatment in civil relations and how this relates to the fundamental freedoms of assembly, association, education, and religion and belief.

The Act forbids unequal treatment (direct as well as indirect) on grounds of religion, belief, political persuasion, race, gender, nationality, sexual persuasion, or civil status. Churches themselves, their independent units and other corporations of belief are exempt from the prescriptions of the Act, but denominational institutions are not.

The freedom of denominational institutions to formulate requirements in order to uphold their denominational identity is granted in the form of a specific exception allowing denominational organisations to formulate such requirements. While there has been occasional litigation in areas to which the present Act applies, and the courts generally have reached fair decisions in balancing the conflicting interests, the Act will undoubtedly lead to farther scrutiny by the courts in such matters because it is pertinent to a wide range of societal relations.

G. Blasphemy, Expressions Hateful to Religious Feelings, and Other Unjustifiable Expressions

The Criminal Code contains various provisions on blasphemy, as well as on expressions detrimental to religious feelings. Article 147 Criminal Code penalizes various specified forms of public blasphemy as felonies, and Article 147a makes it a felony to disseminate blasphemous materials or to have them on hand for dissemination. However, convictions are highly unlikely. Another article, Article 429b, penalizes as a misdemeanor public blasphemy in a slightly different formulation.

A different role is reserved for Articles 137c-e of the Criminal Code. These articles recognize as felonies public oral expressions or expressions in writing which are offensive to people on grounds of their religion, belief or race, or which mate to hatred against or discrimination of people. In contrast to the public blasphemy provisions, convictions on the basis of these articles do take place.

Although these statutes provide some regulation in this area, it is in fact dominated by case law arising out of civil lawsuits. Courts generally attempt to balance the interests of those concerned, taking into account the fundamental principles involved. They usually reach satisfactory conclusions [65]. It must be noted that in civil lawsuits expressions may be acknowledged as wrongful vis-a-vis another even if no criminal conviction results.

H. Conscientious Objection

Freedom of conscience is not specifically guaranteed by the Constitution. Only insofar as it is understood as the freedom to have a religious or philosophical conscientious opinion or manifestation of freedom of religion can it be regarded as protected by the Constitution. There is no general protection of acting according to one's conscience.

Nevertheless, the Legislature has taken conscience into account in various areas of the law. In several instances, for example, provisions are made for conscientious objection, the most distinct example being conscientious objection to military service. The right to conscientious objection against this obligation was grounded in the Constitution from 1922 on and is further regulated by and according to an Act of Parliament. In its initial form, the right was aimed at religious objections, but it has been extended to include non-religious conscientious objection as well [66].

Other traditional areas of conscientious objection in the Netherlands have concerned objections to prescribed formulas for taking legal oaths and objections to obligatory insurances. In both of these areas, the Legislature has provided exceptions. As the Supreme Court made clear in one particular insurance case, it is not willing to extend the right of conscientious objection beyond the scope of the Legislature's intent [67]. The Legislature may also make allowance for conscientious objections by refraining from introducing an obligation, such as it did in the case of vaccination.

An act concerning conscientious objections in labor relations deserves mentioning. The aim of the act is to forbid dismissal on grounds of conscientious objection. To give substance to this provision, a code of conduct has been formulated which prescribes how to act in cases of foreseeable conscientious objection [68].

In cases involving religious conscience, ECHR Article 9 and CCPR Article 18 are often invoked, just as they are in cases involving the individual exercise of religious freedom. However, the Supreme Court has determined that its power of review in these cases is very limited. Furthermore, it tends to be very restrictive in deciding these cases, both by narrowly interpreting the guaranteed rights and by broadly interpreting the restrictive clauses. In recent cases pleaded before an administrative court, the court attached a more substantial significance to these treaty provisions [69].

I. Exercise of Religion in Community with Others

Of the various legal aspects of exercise of religion in community with others, two aspects will be mentioned, namely, the public free exercise of religion guaranteed by Article 6, section 2, of the Constitution, and recent developments concerning days of rest.

Until the completion of the constitutional revision of 1983, the so-called ban on religious processions was in force, a ban which the Supreme Court had upheld in 1963. A constitutional right to the exercise of religion and belief outdoors only came into force in 1988. Later that same year, the Act that served to implement and regulate this right, the Public Manifestations Act, was implemented. This Act is pertinent to demonstrations and assemblies as well. It had been delayed by

discussions on the precise rules which would govern manifestations of religion and beliefs. In the course of its enactment, the rules relating to manifestations in general were made more liberal.

The Act empowers municipal councils to regulate the right to outdoor religious exercise, but only "for the protection of health, in the interest of traffic and to combat or prevent disorders." It specifies elements to be regulated. No permission is needed for a manifestation; notice to the competent authority suffices. This authority, the mayor, is empowered to give directions or to forbid or dismiss a manifestation, albeit only on the grounds mentioned in Article 6, section 2, of the Constitution. A single notification suffices for recurrent manifestations of religion or beliefs.

In connection with the constitutional revision and the enactment of the Public Manifestations Act, changes have also been made by the Sunday Act. The purport of these changes was to restrict the discretionary powers of local authorities according to the Constitution, as well as to relax the rules relating to manifestations allowed on Sunday based on non-religious belief. It was made clear that although the weekly days of rest of non-Christian religions enjoy protection as well, they cannot be completely put on a level with the Christian Sunday.

Nevertheless, where work is concerned, provisions were included in the 1919 Labor Law for weekly days of rest other than Sunday. A tendency to take other weekly religious days into account can also be discerned in collective labor agreements [70]. On the other hand, a movement to incorporate Sunday as a regular day of work is developing. Alterations in shop closing legislation and, again, collective labor agreements leave no doubt as to this trend [71]. The new Working Hours Bill [72] facilitates the introduction of Sunday as a day of work. In the fall of 1994, a nationwide discussion took place on shop opening on Sunday, and a proposal for legislative change is expected to be issued soon.

J. Minority Churches and Religious Minorities

In the strict sense of the word, a wide variety of minority churches and minority denominations exist in the Netherlands. Many of those minority churches have a long-standing historic tradition or have emerged since the nineteenth century as separate branches of the main Reformed Church. These minority churches and their members often share the basic cultural and societal views of the majority. Furthermore, the "open" structure of the law pertinent to church and religion makes it easy to take religious minorities into account. More specific action has been taken with regard to non-Christian religions, although here, too, existing provisions will be applicable by interpretation. As a result of the constitutional revision, various legal provisions pertinent to religion have been extended to non-religious beliefs.

As we have seen before, the notion of a church as a legal entity leaves open all of the possibilities for minority religions to organize themselves as such. Non-Christian and non-religious organizations, however, may prefer other forms of organization, notably associations or foundations. Equally, the notion of "church minister" is open to interpretation, and this notion has, in fact, been extended to offices in non-Christian religions.

In various instances, church minorities and religious minorities have been specifically taken into account [73]. One example of this is the trend, discussed above, toward recognizing religious days of rest other than Sunday. However, even in early times, allowances were made for the rest days of religious minorities, with the Jewish faith as one example. As mentioned, there is a development towards taking other religious days of rest or holidays into account. Collective labor agreements as well as jurisprudence [74] have also contributed to this trend.

In various areas of law, non-Christian minorities have gradually become able to take advantage of existing possibilities in the law to gain inclusion under provisions relating to financial relationships between church and state and mass media law. The relatively small numbers of some minorities impedes them from realizing equal rights in exactly the same way as majorities do. For instance, in specialized ministries in the armed forces, penitentiary institutions, hospitals, and the like, the number of members of a particular minority often does not justify the appointments or contracts of employment provided for other groups [75]. Nevertheless, provision is made for their presence in these institutions. In the field of education, these problems arise as well. A complicating factor is the internal conflicts and differences as well as diversities of national backgrounds between adherents of non-Christian religions. It must be noted that some religious practices of minorities are not easily integrated in the law, such as those concerning burial rites or non-Christian analogs to church tolling.

International treaty provisions such as Article 27 CCBP may play a role in questions concerning religious minorities. The provision is invoked from time to time in domestic legal procedures. As far as structural developments are concerned, the constitutional provisions, notably those protecting freedom of religion and equal rights, play a pronounced role which at least equals treaty guarantees.

V. CONCLUSION

Freedom of religion is entrenched in the Constitution of the Netherlands. In addition, international guarantees such as Article 9 ECHR and Article 18 CCPR reinforce the constitutional guarantee and may be invoked in domestic legal procedures. Thus, a wide range of aspects of church life and the exercise of religion are protected. Freedom of non-religious belief is equally protected.

In addition, church and religion are taken into account in many other areas of the law. An individual's religious perception, rather than the more formal criterion of membership in a church, has increasingly become the relevant criterion for framing legislative exceptions. Courts, however, have been reluctant to acknowledge appeals on religious freedom which reach beyond the legislative provisions.

As to the exercise of religion in community with others, the revision of the Constitution in 1983 brought substantial change. In 1988, the liberal Public Manifestations Act was enacted on the basis of the Constitution and replaced the former oppressive regime, which was long out of date but still formally upheld by the Supreme Court. Many other pieces of legislation have been revised in recent years and have been adapted to the new constitutional standards.

The church as an organization is no longer mentioned in the Constitution, nor are financial relationships between church and state. Nevertheless, church organizations enjoy the same fundamental freedoms as private individuals. Separation of church and state as it is understood in the Netherlands does not stand in the way of financial relationships between church and state; the specific scope and purport of these relations are largely a matter of interpretation. On a theoretical level, there is now a broad consensus that a realistic guarantee of religious freedom may under certain circumstances require active steps by public authorities, including financial steps [76].

In contemporary society, it is rare for freedom of religion to be restricted by measures intentionally aimed at religious freedom. It is more likely that such restrictions are instead a by-product of measures which themselves are not directed at religion at all. Nevertheless, it is important to realize that in the latter situations the principle of religious freedom requires that religion be taken into account in the decision-making process.

Moreover, modern legal doctrine acknowledges that freedom of religion and other fundamental rights guarantee public authorities to create an atmosphere in which these rights can be freely exercised. Not only does this encompass the responsibility to refrain from actions which may infringe on these rights, but ensuring these liberties may also require positive steps. This principle applies to freedom of religion as well as the other fundamental rights.

ENDNOTES

1. The Nederlandse Hervormde Kerk and the Gereformeerde Kerken in Nederland. Together with the Evangelical-Lutheran Church in the Kingdom of the Netherlands, these churches are currently engaged in a process of unification.

2. For the development of church and state relationships in the Netherlands up to the present time, see S.C. den Dekker-van Bijsterveld, *De verhouding tussen kerk en staat in het licht van de grondwet* Zwolle 1988.

3. As early as the seventeenth century, Protestant denominations of Lutheran, Mennonite and other beliefs were present in the Netherlands. For a religious map of the Netherlands and its development since the Reformation, see H. Knippenberg, *De Religieuze Kaart van Nederland*, Assen/Maastricht 1992.

4. Traditional fundamental freedoms were reformulated and new freedoms were adopted. Together with social and economic rights, they are included in the first chapter of the Constitution. A strict new system regulating restrictions of fundamental rights was adopted as well.

5. Throughout this report, "freedom of religion" is meant to also include freedom of non-religious belief unless clearly unintended or otherwise stated.

6. Kamerstukken 11, 1975-1976, 13 872, n.3, p. 29.

7. This paper will hereafter refer to this concept as "public free exercise of religion" or "public free exercise."

8. On education. See A.K. Koekkoek, *State Control of Education in the Netherlands*, in: E.H. Hondius, G.J.W. Steenhoff (ed.), *Netherlands reports to the thirteenth international congress of comparative law* (Montreal 1990), The Hague 1990, p. 391.

9. "Denominational education" is private education which is based on a certain religion or beliefs. The denominational school may formally or in fact have strong ties with a certain church or church denomination. While "neutral" private education does exist in the Netherlands, the overwhelming majority of private education is religiously sponsored and based. Therefore,

"denominational education" is for practical purposes synonymous with "private education" in the Netherlands.

10. In various areas of the law, conscience is taken into account. See *infra* Part III.H. Article 99 of the Constitution prescribes that the conditions on which exemption is granted from military service because of serious conscientious objections shall be specified by an Act of Parliament.

11. Article 23 provides for funding of general elementary education, and this has been extended by further legislation to other forms of education as well.

12. See Kamerstukken II, 1976-1977, 13 873, nr. 7, p. 8-9, *infra* Part III.5.

13. For explications of Article 6, see S.C. den Dekker-van Bijsterveld, *supra* note, 2; M.M. den Boer, Artikel 6 Grondwet: Vrijheid van godsdienst en levensovertuiging, NJCM-Bulletin 1987, p. 110-127; B.P. Vermeulen, Artikel 6, in: Akkermans/Koekkoek, *De Grondwet*, Zwolle 1992, p. 106-145.

14. Art. 120 Constitution, resp. Art. 94 Constitution.

15. The Afdeling Rechtspraak van de Raad van State (ARRvS), an administrative court, tends to be more liberal in this respect. The nature of the subject-matter as well as the type of legislation involved, however, may play a role in explaining the different approaches. It must be noted that in recent years, the Supreme Court has been remarkably willing to take an active role in reviewing national legislation in areas other than religion.

16. Article 9, section 1, ECHR.

17. Article 18, section 1, CCPR.

18. G.A. Res. 36/55 U.N. GAOR [session number] [supplement reference] [part] [UN document, number] (1981.).

19. E.g., as a means of interpreting the constitutional guarantees.

20. See M.C. Castermans-Holleman, *Het Nederlandse mensenrechtenbeleid in de Verenigde Naties* 's-Gravenhage 1992.

21. With the exception, of course, of the purely internal sphere of conscience and thought, which is by its nature not subject to restriction. (Though this clause does not make any express exception for that internal realm.)

22. For a detailed analysis of the courts' approach, see S.C. den Dekker-van Bijsterveld, *Algemene beperkingen van grondrechten en jurisprudentiele belangenafwegingen*, in: *Tijdschrift voor Openbaar Bestuur* 1990, p. 270-273 and S.C. den Dekker-van Bijsterveld, *Gemeenten en algemene beperkingen van klassieke grondrechten*, in: *Gemeentestem* 6925 (1991), p. 382-286.

23. See, e.g. B.P. Vermeulen, Artikel 7, in: Akkermans/Koekkoek, *De Grondwet*, Zwolle 1992, p. 174.

24. Burgerlijk Wetboek [Civil Code] art. 2:2. The addition mentioned hereafter is contained in the second section of this article.

25. Civil Code art. 2:2.

26. The Supreme Court had already acknowledged this principle prior to the effective date of this provision. In the case concerned - which involved the dismissal of a church minister - the court argued that it had the power, principally speaking, to annul a church decision which conflicted with "good faith." Judgment of March 15, 1985, HR, 1986 NJ 191.

27. These statutes not only governed the formerly state-established Reformed Church, but also the Lutheran church and the Jewish community.

28. Based on the Act on Religious Bodies [Wet op de kerkgenootschappen] of 1853, which was formally repealed in 1988.

29. Judgment of October 31, 1986, HR, 1987 NJ 173.

30. See also *infra* Part III.F.

31. Judgment of May 26, 1978, ARRvS, 1978 AB 430.

32. One for the Protestant churches and one for the Roman Catholic Church.

33. The Interchurch Contact also plays an important role in advising the government minister in charge of the appointment of church ministers in specialized ministries in the armed forces and penal institutions. See *infra* Part III.B.

34. This change dealt specifically with equal treatment between churches and other organizations. One element taken into consideration in this respect was the implied right of access by new religious movements and organizations. Equal treatment would have meant giving newer organizations the same access to income tax registers which older organizations had enjoyed, and this was considered undesirable.

35. Note that not all churches participate in this system. For example, the Roman Catholic Church has not joined the SILA.

36. The revision of the Constitution in 1972, enabled a major change in the prior church-state relations by authorizing the buying off in 1983, of traditional government obligations concerning salaries and pensions of church ministers. These financial obligations originated as compensation for the annexation of church goods and property during the eighteenth century. The compensation arrangements had been incorporated into the Constitution in 1814. It must be noted that unlike in Belgium, for example, these financial obligations were kept at the nominal level of 1814, a fact that in the course of time has diminished their importance. In practice, the subsidies were hardly ever extended to churches other than those originally benefiting from them in 1814.

37. Judgment of December 18, 1986, ARRvS, 1987 AB 260.

38. Cabinet standpoints: 21 maart 1991, Kamerstukken II, 1990-1991, 20 868, nr.3; standpoint of previous Cabinet: I november 1989, Kamerstukken II 1989-1990, 20 868, nr.2. Committee report: Overheid, godsdienst en lewewovertuiging, eindrapport van de Commissie van advies inzake de criteria voor steunverlening door de overheid en kerkgenootschappen en andere genootschappen op geestelijke grondslag, 's-Gravenhage 1988.

39. Subsidies for church buildings have been granted in exceptional circumstances such as natural disasters and land reclamation.

40. Wet Premie Kelkenbouw, wet van 29 november 1962, Stb.538.

41. Globale regeling inzake subsidiering gebedsruimten (1976-1981), and Tijdelijke regeling gebedsruimten voor Moslims (1981-1984) in: Rapport tevens beleidsadvies van de niet-ambtelijke werkgroep ad hoe religieuze voorzieningen voor etnische minderheden in Nederland, Rijswijk 1982.

42. Kamerstukken II, 1984-1985, 16 102, nr.99, Kamerstukken II, 1986-1987, 16 635, nr.II.

43. General Pastoral Care Bill [voorstel van Wet geestelijke verzorging zorginstellingen en justitiele inrichtingen], Kamerstukken II, 1993-1994, 23 720, nrs. 1-3.

44. Note that in the Netherlands, private education is effectively synonymous with denominational education. For discussion of the development of this system, see S.C. den Dekker-van Bijsterteld, Het juiste onderscheid. De interpretatie van het grondwettelijk begrip "openbaar onderwijs" in de eerste helft van de 19e eeuw (I), in: School en wet 1988, p.11-15, S.C. den Dekker-van Bijsterveld, Het juiste onderscheid. De interpretatie van het grondwettelijk begrip "openbaar onderwijs" in de eerste helft van de 19e eeuw (II), in: School en wet 1988, p.36-40; A.A. de Bruin, Het ontstaan van de schoolrijdt Leiden 1985.

45. Note that denominational schools are fully funded by public monies if they fulfill the conditions mentioned, which in practice is always the case.

46. See Koekkoek, supra note 8.

47. The difficult-to-translate freedoms of "stichting, richting, inrichting."

48. Since courts in the Netherlands lack the power to decide upon the constitutionality of an Act of Parliament, the Legislature itself may have to form an opinion on the constitutionality of its intended legislation.

49. Judgment of January 22, 1982, Pr. Rb. Alkmaar, 1982 NJCM-Bulletin 134, Judgment of January 22, 1988, HR, 1988 AB 96.

50. Judgment of September 5, 1989, Hof Den Bosch, 1989 RV 96.

51. See infra Part III.F.

52. E.g., Judgment of March 18, 1988, ARRvS, 1988 AB 342, Judgment of August 20, 1990, ARRvS, 1991 AB 102.

53. Under their own policies, these colleges will only accept partial government subsidy. There is also a Humanist University.

54. Civil Code art. 1:30.
55. Civil Code art. 1:68.
56. Wetboek van Strafrecht [Criminal Code] art. 449.
57. Judgment of June 22, 1971, HR, 1972 NJ 31.
58. Judgment of January 22, 1982, HR, 1982 NJ 489.
59. Judgment of June 4, 1982, HR, 1983 NJ 32.
60. Judgment of May 30, 1986, Pr. Rb. Zwolle, 1986 KG 269.
61. Judgment of June 22, 1981, ARRvS, 1983 AS 210, Judgment of January 20, 1983, ARRvS, 1983 AB 389.

62. Kamerstukken II, 1991-1992, 22 147, nr.22, p. 17 et seq.
63. General Equal Treatment Act [Algemene Wet gelijke behandeling], Wet van 2 maart 1994, Stb. 230.
64. While numerous provisions have previously been enacted to prescribe equal treatment in civil relations, these have not been very controversial.
65. Judgment of June 5, 1987, HR, 1988 AB 276.
66. For a detailed explication, see B. Schumacher, Militaire dienstweigeren en vredesmoraal, Tilburg 1986, B.P. Vermeulen, De vrijheid van geweten en een fundamenteel rechtsprobleem, Arnhem 1989.
67. Judgment of April 13, 1960, HR, 1960.NJ 436.
68. Conscientious Objection in Labor Relations Act [Wet gewetensbezwaren in dienstbetreking], Wet van [] Stb. 134. The Act is incorporated in the Civil Code, Art. 7A:1639s, section 2. See also Gewetensbezwaren in dienstbetreking, advies van de Sociaal Economische Raad, s'-Gravenhage 1990; Nota over gewetensbezwaren in arbeidsrelaties; een leidraad voor ondernemingen, Stichting van de Arbeid, s'-Gravenhage 1990.
69. See S.C. den Dekker-van Bqsterteld, supra note 2, at 165-73, 192-98. Note also that in recent cases in other areas of the law (family law) the Supreme Court has taken a more active approach to review.
70. For treatment of non-Christian religious holidays in labor relations, see Judgment of March 30, 1984, HR, 1985 NJ 350.
71. On this issue, see S.C. van Bijsterveld & J.P.M. Zegen, Met het weekend voor de door ... De toekomst van de vrije zondag, in Nederlands Tijdschrift voor Sociaal Recht 1994, p. 254-58.
72. Kamerstukken II, 1993-1994, 23 646, nrs. 1-2 ("voorstel for een nieuwe Arbeidstijdenwet").
73. See the discussion of conscientious objection supra Part III.H.
74. Notably, Judgment of March 30, 1984, HR, 1985 NJ 350.
75. The minority and majority Protestant churches work in close cooperation with the Roman Catholic Church in addition to working together as joint Protestant churches in these fields.
76. See supra note 12 and accompanying text; supra Part III.B.

СВОБОДА РЕЛИГИИ В НИДЕРЛАНДАХ

Софи ван Бийсбервельд

Из 15 млн. населения Нидерландов примерно треть составляют члены Римско-Католической церкви; примерно столько же членов во всех протестантских церквях вместе взятых. Две главных реформационных насчитывают 2,5 млн. и 800 тыс. членов соответственно. Приверженцев ислама различного этнического происхождения более 700

тыс., буддистов и индуистов свыше 80 тыс. Существует также относительно немногочисленное, но институализированное гуманистическое движение.

В стране нет формальной конституционной структуры для консультации церковей относительно законодательных положений, которые их касаются, церкви самостоятельно должны следить за этим. Христианские и иудейские религиозные организации работают вместе в Межцерковном органе по связям с государством (СЮ). Национальный совет церковей составляют только христианские церкви, он почти идентичен СЮ, но в отличие от него его деятельность направлена на более широкий социальный контекст. Церкви, естественно, могут и действуют самостоятельно.

В Нидерландах достаточно много социальных и культурных институтов в сфере образования, средств массовой коммуникации, охраны здоровья и др., базирующихся на религии. Правительство чувствует себя ответственным за стимулирование деятельности этих учреждений и их соответствие поставленным целям и интересам общества.

Система государственно-церковных отношений в Нидерландах характеризуется отделением церкви и государства. Хотя этот термин определенно не упоминается в Конституции страны, он присутствует в законодательном процессе, административных и судебных решениях.

Отделение церкви и государства не является "строгим отделением", когда субъекты этих отношений не имеют между собой ничего общего. Отделение церкви и государства выглядит на практике как свобода религии и вероисповеданий и нейтральность государства по отношению к ним.

Правительственные чиновники не имеют права принимать какую-либо сторону в религиозных диспутах; правительство не имеет права относиться к организациям, базирующимся на религии, менее благоприятно, чем к "нейтральным" организациям в деле, скажем, общественных субсидий и др.

По Конституции 1983 г. гарантируется свобода исповедовать религию, равно как и не исповедовать религию. Свобода религии может быть ограничена лишь специальным парламентским актом для защиты здоровья граждан, предотвращения массовых беспорядков и т.п.

Конституция гарантирует не только свободу религии, но и свободу действовать в соответствии со своими убеждениями без риска быть ответственными перед законом. Последнее означает, что только национальный законодательный орган компетентен определять конкретные границы выражения религиозной свободы.

Конституция Нидерландов также запрещает дискриминацию на религиозной, мирооззренческой, расовой и другой почве. Она, кроме того, гарантирует свободу религиозного образования.

Правовой статус церковей как юридических лиц отличен от статуса других юридических лиц, таких как ассоциации или фонды. Тогда как гражданский кодекс определяет структуру различных типов юридических лиц, для церковей делается исключение: кодекс лишь указывает, что церкви руководствуются своими собственными уставами

постольку, поскольку это не противоречит закону. Уважая автономию церквей и их организацию, гражданский кодекс также исключает церкви из общих положений, применяемых ко всем типам юридических лиц.

Ни гражданский кодекс, ни другие законодательные документы не дают определения, что такое "церковь". Суды в конкретных случаях формулируют минимальные требования к организациям, претендующим на статус церкви. Системы предварительного признания церкви, системы регистрации церквей не существует. Церкви также могут свободно избирать духовенство без правительственного вмешательства.

Религиозные общины могут организовываться отлично от церкви -- как ассоциации, руководствующиеся гражданским правом, чья деятельность регулируется обычным образом. Нехристианские религии избирают довольно часто именно этот путь.

Закон не делает отличий между религиозными институтами, базирующимися на централизованном, иерархическом организационном принципе и являющимся децентрализованными.

Голландская Конституция гарантирует свободу образования (ст.23). При этом публичное образование предполагает уважение к любой религии; различные образовательные документы обеспечивают уважение к ценностям и традициям разных религий. Целая серия судебных решений в то же время устанавливает, что обучение, носящее нерелигиозный (гуманистический) характер, представляется и субсидируется на тех же условиях, что и религиозное.

Частные школы финансируются государством при условии их соответствия определенным образовательным стандартам. Около 60% начальных школ в стране -- это частные (принадлежащие деноминациям) школы. С конца прошлого века существуют также деноминационные университеты - их создание также обусловлено определенными условиями, а деятельность финансируется государством.

Религия выступает заметным фактором в сфере средств массовой коммуникации. Церкви представлены в теле- и радиозфире. Иногда они работают в этой области вместе с другими церквями, или с телерадиокомпаниями определенной религиозной направленности либо от своего собственного имени. Законодательство определяет, среди прочего, объём вещания и порядок финансирования.

Общей прямой финансовой поддержки церквям со стороны государства не существует. Но различными путями и в различных случаях она предоставляется. Эта поддержка касается специальных форм церковного служения - например в армии или исправительных учреждениях, больницах, домах престарелых. При этом духовное служение рассматривается как неотъемлемая часть всей подобной деятельности.

Непрямая финансовая поддержка предоставляется и в виде освобождения от налогообложения. Пожертвования в пользу церкви, как и в различные благотворительные фонды, исключаются из сумм подлежащих налогообложению.

Следует отметить, что политические, экономические, социальные обстоятельства меняются даже в относительно стабильных обществах, таких как западноевропейские,

меняется и религиозный ландшафт. И даже базовые принципы свободы религии, отделения церкви и государства, нейтральности государства не означают, что их конкретное воплощение на практике застыло в раз и навсегда данных правовых документах - оно может и должно развиваться.

STATE AND CHURCH IN GERMANY

Gerhard Robbers

1. Within Germany there are two Churches which are nearly equal in size and importance. Of the German population of about 80 million, the Catholic Church has about 28.2 million members, while the Evangelical Church has 29.2 million members. The Evangelical Church consists of numerous separate territorially based Landeskirchen, each of these Churches being an independent unit. Together they form the Evangelical Church of Germany. There is also a number of smaller Evangelical Churches that have chosen to stay outside this federation. The Evangelical Churches are either Lutheran or Reformed Churches, some follow a unified confession, shaped in various ways from these two creeds. Islam in Germany has approximately 2.5 million members, mostly foreign workers and their families, but also about 100,000 German nationals. The Jewish communities consist of about 60,000 members. There are also many smaller religions in Germany, some having a long-established tradition in Germany, others having been in Germany for only a short while. Their membership is estimated at about 2 million persons. There is also an estimated 16 million inhabitants of Germany who profess themselves to be without any confession [1]. This stems in part, although not entirely, from the reunification of Germany, as the political system of the former East Germany took a hostile stance towards the Churches.

2. The Basic Law guarantees the freedom of religion in Art. 4. Freedom of faith, of conscience, and freedom of creed, religion or ideology, shall be inviolable. The undisturbed practice of religion is guaranteed. These individual rights guaranteeing the free existence of religion are complemented by and laid out in Art. 140 GG. These norms incorporate Art. 136-139 and 141 of the Weimar Constitution of 11 August 1919 into the Basic Law, so that they are fully ledged constitutional rights. More-over, Art. 7 paras. 2 and 3 of the Basic Law guarantee religious education in the public schools. Numerous other regulations, such as the existence of theological faculties at State universities, are contained within the Constitutions and other laws of the Bundeslander (federal states). Large parts of Church-State relations in Germany are assigned to the competence of the Bundeslander.

The Federal Republic of Germany and its Bundeslander have established many concordats and Church-State treaties with the Churches in Germany [2]. In relation to the Catholic Church, the Reichskonkordat of 1933 is an essential basis which is recognised as a treaty under international law. Church-State treaties with the Evangelical Church and those made with Catholic dioceses are sui generis but are treated as being in a category similar to that of international treaties. Treaties or