

RELIGIOUS LIBERTY AND CHURCH AUTONOMY IN THE NETHERLANDS

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1. Introduction

Freedom of religion is the oldest explicit fundamental rights guarantee in the Netherlands. 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. This provision was unique in its time. Its purport, however, was restricted to the inner sphere of belief. Public worship was not protected by this guarantee.

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. The general atmosphere towards other religious denominations was one of tolerance and indeed a variety of religious denominations existed.¹ At the time of the fall of the Republic in 1795 the 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 structured along the newly adopted principles of separation of church and state and equal treatment of the various religious denominations; - a process which took well into the last century. The Constitution of 1814 which founded the decentralized unitary state, provided the starting point for this process, though not altogether unequivocally. As in 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 to be in force until 1983.

The general revision of the Constitution in 1983 brought substantial change in the formulation of religious freedom as well as in the system of protection of fundamental rights in general.² The former chapter "On religion" was replaced by one newly formulated article guaranteeing freedom of religious and, for the first time, non-religious belief.³ The revision of the Constitution provided an impetus for legislative adaptations and changes in fields relating to religion and non-religious belief.

Over the years wide-ranging developments have taken place in the legal sphere as well as in society, which are relevant to church and state relationships and which have originated outside the scope of the Constitution. The transformation of the classic liberal state into a modern welfare state and the increasing diversification of Christian denominations from the early 19th century onwards, altered the setting in which freedom of religion and church and state relationships are embedded.

¹ As early as the 17th century Protestant denominations of Lutheran, Mennonite and other belief were present in the Netherlands. See for the religious chart of the Netherlands and its development since the Reformation, H. Knippenberg, De Religieuze Kaart van Nederland, Assen/Maastricht 1992.

² Fundamental freedoms were reformulated, new freedoms were adopted. Together with social and economic rights they are included in the first chapter of the Constitution. A new (strict) system of restricting fundamental rights was adopted as well. See S.C. van Bijsterveld, Godsdienstvrijheid in Europees perspectief, Deventer 1998.

³ In the following, mention of freedom of religion is meant to include freedom of non-religious belief, unless apparently unintended or otherwise stated.

More recently, shifts can be seen in the religious spectrum due to the secularization 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. Legal developments, though perhaps not directly aimed at church or religion itself, may nevertheless affect them and raise questions as to the way how their 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.

Out of a total population of 15 million people, the Roman Catholic Church in the Netherlands has about 5 million members. The protestant denominations⁴ together have about the same number of members. Of the non-christian religions, Islam is the largest. There is also an organized Humanist movement.

2. The Constitution and international treaties

In the present Constitution, the church as an organization 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. Article 6 of the Constitution states that everyone shall have the right to manifest freely his religion or belief, either individually or in community with others, without prejudice to his responsibility under the law. The second section 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.

The guarantee of freedom of religion and belief in the Constitution has an "open" structure. It does not specify in detail various ways of exercising religious freedom. Nevertheless, the freedom to be guaranteed is meant to be wide-ranging. At the time of the revision it was stated that the right to manifest freely one's religion or belief, not only entailed the freedom to have a religious opinion and to express this opinion, but also comprised acting according to this opinion.⁵ The precise range and limits are to be specified by legislation and court decisions.

Some specific elements can be found in Article 6 of the Constitution. It is specified that the exercise of religion can be pursued individually or in community with others. Although contrary to earlier committee proposals, churches as organizations do not feature in the Constitution, they do enjoy the constitutional freedoms. It is generally accepted that not only individuals, but also groups and organizations are guaranteed freedom of fundamental rights. The freedom the church enjoys as an organization includes the freedom to freely organize and structure itself. It also includes the freedom to train, appoint, or dismiss church ministers, to obtain buildings suitable for worship, and more generally speaking, to have the capacity to operate in society.

⁴ The Nederlandse Hervormde Kerk and the Gereformeerde Kerken in Nederland. These, together with the Evangelical-Lutheran Church in the Kingdom of the Netherlands, are currently engaged in a process of unification.

⁵ Kamerstukken II, 1975-1976, 13 872, n.3, p.29.

Another area specifically dealt with is the exercise of religion or belief "other than in buildings and enclosed places". The particular phrase reaches back to 1848 and reminds of the former restrictive regime on such forms of exercise of religion; - 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, and allows restrictions to this freedom only under specified conditions.

Other articles of the Constitution are also relevant in this respect. Some of these mention religion explicitly. Article 1 of the Constitution states that: "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 the article at the time of the general revision of the Constitution in 1983 did not succeed. Subsequent attempts to alter the provision were likewise unsuccessful.⁶ Article 23 of the Constitution, among other things, safeguards freedom of (denominational) education and prescribes equal treatment and respect to everyone's religion or belief in the field of public-authority education.

Other fundamental rights supplement the freedoms already mentioned, such as the freedom of assembly, freedom of association, freedom of opinion, and freedom of the press. The newly adopted right to privacy as well as the right to property are other examples. Uncertainties may occur in the demarcation of the various rights, with their (slightly) varying degrees of guarantee of legal protection. Freedom of conscience is not generally guaranteed in the Constitution.⁷

With regard to the financial relationships between church and state, Article 6 plays a role, as do Articles 1 and 23. Whereas Article 23 provides the basis for government funding of private (denominational) education,⁸ and Article 1 requires equal treatment also in the field of finances, the meaning 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.⁹ 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 provisions in the Constitution.

⁶ 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.

⁷ In various areas of the law conscience is taken into account. See below. 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 Act of Parliament.

⁸ Prescribed for general elementary education, and through further legislation extended to other forms of education as well.

⁹ See *Kamerstukken II, 1976-1977, 13 873, p.8-9.*

Over the past decade profound interest has developed concerning the application of fundamental freedoms in relations between citizens. At the time of the revision of the Constitution, the government, as a principle, acknowledged that fundamental freedoms may play a role in civil law relationships, albeit in varying degrees. Developments in legislation as well as numerous court decisions have made clear the importance as well as the sensitivities of the issue. Freedom of religion within family relations, vis à vis an employer, vis à vis the school or one's church, or more generally speaking other (groups of) individuals, would be relevant in this respect. As a counterpart, conditions of loyalty which denominational institutions may require of their employees or other persons they deal with, are at stake.

The Constitution takes precedence over other national legislation, including Acts of Parliament. The courts, however, do not have the power to review the constitutionality of an Act of Parliament. Since 1953 the Constitution does grant the right to review any piece of legislation, including Acts of Parliament and even the Constitution itself, on its compatibility with provisions of treaties that are binding on all persons or of resolutions by international institutions.¹⁰ As a consequence, such international provisions may be invoked in domestic court procedures.

It is in this respect too, 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) are invoked in domestic legal procedures. To date, the Supreme Court has proven to be reluctant to strike down parliamentary legislation.¹¹

3. Restrictions of religious freedom

Freedom of religion is subject to restriction. At the time of the revision of the Constitution specific attention was given to the issue of permissible restrictions. In order to safeguard the fundamental liberties optimally, a strict system of restrictions to fundamental rights has been adopted. The 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. Also significant is the acceptance that regulations which are not aimed at restricting fundamental rights, but which do so as a side effect are to be considered as restrictions to these rights which must meet the constitutional requirements.

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,¹² expresses 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 not, or enacted in the exercise of autonomous

¹⁰ Art.120 Constitution; resp. Art.94 Constitution.

¹¹ The (former) Afdeling Rechtspraak van de Raad van State (ARRvS), an administrative court, tended 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 styles of approach. It must be noted that in recent years, the Supreme Court has been remarkably willing to take an active stand in reviewing national legislation, in areas other than religion.

¹² It must be accepted, with the exception of the purely internal sphere of conscience or thought.

powers or on the basis of a specific delegation, may not restrict this freedom. This clause gives no precise clue as to the material criteria to be met. This is a matter of interpretation for the Legislature. It is acknowledged, however, that the freedom guaranteed should be respected as much as possible.

The second section of Article 6 allows for restrictions which exceed those allowed under the first section, at least as far as religion outside buildings and enclosed places is concerned. In that instance, an Act of Parliament may delegate the power to restrict the freedom to other public authorities. This power of delegation can only be exercised for purposes mentioned in section 2, namely "for the protection of health, in the interest of traffic and to combat or prevent disorders". Public authorities other than the national Legislature are not allowed to restrict this right in the exercise of their autonomous powers. The system thus has a centralizing effect.

At the time of the revision of the Constitution certain allowances were made for developments going beyond the strict conditions of the Constitution; generally these allowances are referred to as "escape-hatches". Sceptics of the ambitious system of protection of fundamental rights recognized in these allowances an undermining of the system. In reality, the courts have tended to moderate the strict system. The way in which this is done, however, is acceptable.

It must be realized that the possibilities the abovementioned treaty provisions provide for restricting of religious freedom exceed those of the Constitution in that the 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 reviewing legislation on its compatibility with treaty provisions may be the application of a proportionality test, a development which can be seen in other areas of fundamental rights review.¹³

Just as religious freedom is further explicated and concretized in legislation, administration and court decisions, likewise the restrictions to religious freedom are also visualized. Obviously, with the explication of the freedom its limitations are also defined. The actual purport of freedom of religion cannot be expressed in abstract terms. In the following, various aspects of freedom of religion will be analysed, as well as the main developments in this area.

Freedom of religion in specific areas of the law

4. Freedom of church organization

Behind the constitutional guarantee of freedom of religion lies a whole system of relationships between church and state. The system of church and state relationships in the Netherlands is qualified throughout as one of separation of church and state. This principle is neither mentioned nor defined in the Constitution or even other legislation. As a principle, however, it is considered to be implied in the relevant constitutional provisions. The separation is not to be understood as a complete separation. It does not mean that no connections whatsoever are allowed between church and state.

As we have seen, the church no longer features in the Constitution. Its status as an organization, however, is firmly entrenched in the Civil Code. Churches as well as independent units of churches and structures in which they are united are legal entities *sui generis*, to be governed by their own statutes in so far as

¹³ See e.g. B.P. Vermeulen, Artikel 7, in: Akkermans/Koekkoek, *De Grondwet*, Zwolle 1992, p.174.

this does not conflict with the law.¹⁴ Unlike the situation for other legal entities such as associations and foundations, no specific regulations for the church as a legal entity have been enacted. Its position is further determined by the provision that the Civil Code section on general principles of legal entities does not apply to churches. Analogous application of these provisions is allowed in so far as this does not conflict with church statutes or the nature of the internal relations.¹⁵ In this manner, the law takes freedom of church organization into account and does justice to the various church structures varying from hierarchical concepts to more decentralized church models.

With these basic rules, the law has moved far away from the early 19th century situation in which the Crown still enacted church statutes¹⁶ and its unaccustomedness to allowing freedom of organization to the then newly separated branches of the Reformed Church and respecting the restoration of Catholic hierarchy in the Netherlands. The central government church register,¹⁷ which continued to exist even after it was recognized that no legal consequences were attached to this registration, is history, as well.

Thus, the Legislature does not require registration of churches. Moreover, it does not provide a definition of a church and it does not formulate criteria. As the need arises, the administration or the courts will have to decide in concrete cases whether an organization which presents itself as a church can be considered as such. Courts are careful not to get entangled in theological issues. In a somewhat spectacular case, the Supreme Court agreed on the minimal requirements of a "structured organization" and that "religion must be involved".¹⁸

Freedom of church organization is a relevant notion outside the field of the Civil Code. Legislative projects which are not pertinent to or aimed at church or religion, may affect or even curtail freedom of church organization. In all these instances, the relationship between church and state should be guarded and the element of freedom of church organization should be taken into account. The Labour 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 Act which, among other things forbids to make distinctions on the basis of religion or gender, is not applicable to the church and to religious office.¹⁹

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

¹⁴ Article 2:2 Civil Code [Burgerlijk Wetboek]. The addition mentioned hereafter is contained in the second section of this article.

¹⁵ Prior to the coming into force of this provision, the Supreme Court already acknowledged this principle. In the case concerned - a case of 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". HR 15 maart 1985, NJ 1986, 191.

¹⁶ Not only of the formerly established Reformed Church, but also of the Lutheran church and the Jewish community.

¹⁷ Based on the Act on religious bodies [Wet op de kerkgenootschappen] of 1853. The Act was formally repealed in 1988.

¹⁸ HR 31 oktober 1986, NJ 1987, 173.

¹⁹ See also below.

distinction between the religious and the labour organization.²⁰ Privacy legislation, too, may be mentioned as an area of concern in this respect. The question arises what rights of registration the churches have with regard to their members.

In the course of time government involvement in church and religion has taken on a new character. The development of church and state relationships made it clear already in the course of the last century that the then existing government departments solely concerned with religion²¹ were becoming obsolete. Involvement with church and religion is even now inevitable, if only for the reason that government actions must take religious freedom into account. Currently, various government departments are occupied with subject matter which touches on religion. Special interest in church and state relationships is taken by the Department of Justice as the formal legal successor of the former religious departments, as well as the department of the Interior with a view to its specific interests in constitutional affairs. There are no formal structures of consultation of churches in legal affairs which may affect their position. Churches themselves must be alert to developments which may concern them. In order to monitor and react to such developments, churches work together in the Interchurch Contact in Government Affairs.²² This body also acts as a conversation partner for the government. The national Council of Churches - almost identical in composition - is focused on wider issues of developments in society. Churches, of course, can and do act on their own as well.

In recent years, various traditional rights of churches have been abolished. Though not required by the Constitution as such, these changes cannot but be seen in connection with the revision of the Constitution. In 1987 the right to an access to income tax records of church members was canceled. Justification was sought in principles of equal treatment²³ and separation of church and state. The same is true for the abolition of church membership registration by the municipal authorities. In the course of setting up a new system of automatized personal registration, a complex modus was found for indulging the needs of the churches which relied on this system. The state of affairs is currently transitory.

5. Financial relationships between church and state

In the Netherlands, no general financial support of the church through public authorities takes place. In general, this would be regarded as conflicting with the principle of separation of church and state. This does not mean that no financial relations exist at all.

A major change was the buying off in 1983 of the traditional government obligations concerning salaries and pensions of church ministers, following the revision of the Constitution in 1972 which enabled this.

²⁰ ARRvS 26 mei 1978, AB 1978, 430.

²¹ One for the Protestant churches and one for the Roman Catholic church.

²² As to the appointment of church ministers in specialized ministries such as the armed forces and penal institutions, the Interchurch Contact plays an important role in advising the government minister in charge of the appointment.

²³ What was meant was equal treatment between churches and other organizations. One element taken into consideration in this respect was the implied applicability to new religious movements and organizations.

These financial obligations were originally compensations for the annexation of church goods and property during the 18th century. The arrangements made then, were basically incorporated in 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, which undermined their importance in the course of time. In practice the subsidies were hardly ever extended to churches other than those originally benefiting from them in 1814.

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

Subsidies are 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 the possibility remains, these activities are usually not carried out by churches themselves. Moreoften they will be carried out by associations or foundations which may be based on a religion or belief, in which case they will to a greater or lesser extent be affiliated with a certain church. Exclusion of organizations by public authorities on the grounds of their denominational background is not allowed.²⁴ The denominational background, however, may give rise to objective differences in the work performed, which may be taken into account on that basis. In an indirect way, financial benefits are awarded through tax deductions, which are granted for donations to, amongst others, religious causes.

Direct subsidies to churches and for religious purposes are a more delicate issue. In past as in present times, such subsidies are granted. In recent years, these subsidies have been a subject of intense discussion. Recently, the government submitted its standpoint to (the Second Chamber of) Parliament and the issue was debated.²⁵ The subsidy debate relates to church buildings and specialized church ministeries.

A marked development has occurred with respect to church buildings. Apart from incidental payments,²⁶ church construction has been subsidized on a structural basis. In 1962, a temporary Church Construction Premium Act was enacted.²⁷ This Act was a reaction to discussions on the desirability and propriety of local government subsidy practices in this area. The Act centralized the subsidies and excluded

²⁴ ARRvS 18 december 1986, AB 1987, 260.

²⁵ Cabinet standpoints: 21 maart 1991, Kamerstukken II, 1990-1991, 20 868, nr.3; standpoint of previous Cabinet: 1 november 1989, Kamerstukken II, 1989-1990, 20 868, nr.2. Committee report: Overheid, godsdienst en levensovertuiging, eindrapport van de Commissie van advies inzake de criteria voor steunverlening door de overheid aan kerkgenootschappen en andere genootschappen op geestelijke grondslag, 's-Gravenhage 1988.

²⁶ Subsidies for church buildings have been granted in exceptional circumstances, such as natural disasters and land reclamation.

²⁷ Wet Premie Kerkenbouw, wet van 29 november 1962, Stb.538.

other forms of subsidy. Under the regime of this Act many churches have been built, including buildings for non-religious belief and buildings for Islamic worship. Following the expiration of the Act in 1975, two subsequent temporary ministerial subsidy regulations were set up to support the building of Islamic mosques.²⁸ By the time the latter regulation expired, severe criticism was being levelled on it for both the issue of public support for buildings of worship as the selective scope of the regulations. In a series of votes, the Second Chamber of Parliament rejected such support.²⁹ No further subsidy regulations followed.

In its recent standpoint on financial relationships between church and state, based on a government committee report on the subject, the Cabinet did leave open the possibility of subsidizing buildings under specific designated circumstances. At present, however, the Cabinet has made it clear that in its view no such circumstances exist. The objections of Parliament are still of a more principled nature.

Another area of direct support is that of the specialized ministries in institutions such as the armed forces and penal institutions. This support, a long standing tradition, is at present regarded as a fulfilment of government responsibility in ensuring the free exercise of religion in special circumstances. The church ministers of the various denominations are appointed by the responsible government minister on the recommendation of the church(es). A lengthy discussion has taken place on the allocation of posts between the various denominations, following increased demands by the Humanist League.

Specialized ministries also exist in institutions such as hospitals and homes for the elderly. The financing structures of these institutions is complex. The pastoral care is financed using general funds. At present, a Bill is being prepared to safeguard this pastoral care in view of forthcoming fundamental changes in financing structures, which may threaten the continued existence of this form of spiritual care. The responsibility of the government in this instance is not found in the act of financing itself, but in guaranteeing the existence of these forms of exercise of religion.

²⁸ Globale Regeling inzake subsidiëring gebedsruimten (1976-1981), and Tijdelijke regeling gebedsruimten voor Moslims (1981-1984); in: *Rapport* tevens beleidsadvies van de niet-ambtelijke werkgroep ad hoc Religieuze voorzieningen voor etnische minderheden in Nederland, Rijswijk 1983.

²⁹ *Kamerstukken II*, 1984-1985, 16 102, nr.99; *Kamerstukken II*, 1986-1987, 16 635, nr.11.

6. Education

Education is closely linked with views of religion and belief. In the structure of the law on education, it is recognized that religion and belief do play a role. In the early 19th century an educational system took shape which consisted of public-authority education and free private (denominational) education. A development in the second part of that century resulted in the acceptance of full public funding for private education which met certain financing conditions and educational standards. The distinctive features of this system, the genesis of which constituted one of the main - and lively - chapters of constitutional history, were embedded in the Constitution of 1917 and have since been practically unaltered.³⁰

Freedom of education, as it is currently understood, entails freedom to found schools, freedom of denomination, and freedom to administer schools.³¹ Legislation specifies the numerical criteria for founding a school and 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 Legislature's parameters are a continuous point of discussion, and in the process of enacting educational legislation, the constitutional provisions play a distinguished role.

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 (prospective) pupils and their parents. As regards the latter category, a school, in principal, has the right to deny admission to a pupil on denominational grounds.³² 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 schools' - denomination. Once a pupil of another denomination is admitted, he or she may not abstain from, for example, gymnastic lessons, on religious grounds.³³

The denominational school may require loyalty of its staff with regard to its denominational views. The extent to which these requirements may be demanded is a delicate issue. The General Equal Treatment Act applies to this issue. The process of its enactment has not been without controversy.

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. Teaching in non-religious belief should be offered on an equal basis.³⁴ Taking religious education in public-authority schools is not obligatory.

Education for the office of church minister should be mentioned in this respect as well. As of 1876, the education for the ministry in the main 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

³⁰ See A.K. Koekkoek, op.cit.

³¹ The difficult to translate freedoms of "stichting, richting, inrichting".

³² Pr.rb.Alkmaar 22 januari 1982, NJCM-Bulletin, 1982, 134; HR 22 januari 1988, AB 1988, 96.

³³ Hof Den Bosch 5 september 1989, RV 1989, 96.

³⁴ E.g. ARRvS 18 maart 1988, AB 342; ARRvS 20 augustus 1990, AB 1991, 102.

often based their schools of theology at state universities. This system still exists. In the late 1960's 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 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.³⁵ Apart from academic education, a whole range of colleges and educational centres exist, which focus on various church offices. These may or may not be financed by the state.

7. Equal rights

Equal treatment and non-discrimination also where religion and belief are concerned are notions which are firmly embedded in the Constitution. Not only does Article 1 Constitution contain an express statement, Article 3 specifies this as follows: "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. These provisions have their counterparts in treaty provisions on fundamental rights.

In its 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 and belief. Nevertheless, it would appear, that distinction on the basis of criteria such as religion or belief is not altogether forbidden. During the parliamentary debates on the general revision of the Constitution certain margins became apparent. Religion and belief, as well as other characteristics such as political preference, do play a certain role in public appointments of, for example, municipal mayors by the Crown. In the composition of public boards and government advisory committees these preferences may also play a role in the sense that a balanced composition based on the idea of representation is desired. The General Equal Treatment Act which applies to the private and public sector alike, makes explicit exceptions for the abovementioned distinctions made by public authorities.

A more controversial issue is the extent to which distinctions may be made in the private sector, especially when denominational institutions are involved.³⁶ The Act as well as its more unfortunate predecessor legislative proposals have prompted the debate on the extent to which the Legislature is entitled to prescribe equal treatment in civil relations and how this relates to other fundamental freedoms such as freedom of assembly, association, education, and religion and belief.

The Act forbids (direct as well as indirect) unequal treatment 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, as well as the spiritual office are exempt from the prescriptions of the Act.

³⁵ These colleges may, on their own, only accept partial subsidy. There is also a Humanistic University.

³⁶ Previously already, numerous provisions have been enacted to prescribe equal treatment in civil relations. These have not been very controversial.

Denominational institutions are not.

The freedom of denominational institutions to formulate requirements in order to uphold their denominational identity is granted on the basis of exception. Prior to the coming into force of the Act there was occasional litigation in areas to which the Act applies. Generally speaking, courts reached fair decisions in balancing the conflicting interests.

8. 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 19th century as separate branches of the main Reformed Church. These minority churches and their members often share the basic general cultural and societal views. 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 religion, although here, too, already existing provisions will be applicable by interpretation as well. As a result of the revision of the Constitution, various legal provisions which were pertinent to religion have been extended to non-religious belief.

As we have seen before, the notion of a church as a legal entity leaves all 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 in fact has been extended to other than the Christian ones.

In various instances, church minorities and religious minorities have specifically been taken into account. Even in early times, allowances were made with respect to, amongst others, the Jewish faith for weekly days of rest. There is a development towards taking other religious days of rest or holidays into account. Collective Labour Agreements as well as jurisprudence may be mentioned in this respect.³⁷

In various areas of law, non-Christian minorities have gradually realized potentials such as those relating to financial relationships between church and state and mass media law. In some instances, the numerical situation of minorities impedes the actual realization of 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 numbers do not justify appointments or contracts of employment as others have.³⁸ 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 practises of minorities are not easily integrated in the law such as those concerning burial rites or non-Christian equivalents of church tolling.

International treaty provisions such as Article 27 CCBP may play a role in questions concerning

³⁷ Notably HR 30 maart 1984, NJ 1985, 350.

³⁸ Protestant churches (minority and majority) work together as joint Protestant churches in these fields, and in close cooperation with the Roman Catholic Church.

religious minorities. In domestic legal procedures the provision is invoked from time to time. As far as structural developments are concerned, the constitutional provisions, notably on freedom of religion and equal rights, play a pronounced role which at least equals treaty guarantees.

9. Conclusion

Freedom of religion is entrenched in the Constitution. 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 many areas of the law, church and religion are taken into account. The individual's religious perception rather than the more formal criterion of membership of a church has increasingly become the relevant criterion in framing legislative exceptions. Courts, however, are reluctant to acknowledge appeals on religious freedom which reach beyond the legislative provisions.

The church as an organization is no longer mentioned in the Constitution. Neither are the financial relationships between church and state. Nevertheless, the church as an organization enjoys 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 scope and purport of these relations are largely a matter of interpretation. On a theoretical level, a broad consensus on this issue has been reached.

In contemporary society, restrictions to freedom of religion are not so much to be found in measures which are actually aimed at restricting this freedom. It is more likely that restrictions are produced as a by-product of measures which themselves are not pertinent to religion at all. It is important to realize that in the latter situations the principle of freedom of religion requires taking religion into account in the decision making process.

Moreover, modern legal doctrine acknowledges that fundamental rights guarantees oblige public authorities to create an atmosphere in which these rights can be freely exercised. In order to do so, public authorities have the responsibility to refrain from actions which may infringe on these rights. Ensuring these liberties may also require positive steps. This applies to freedom of religion as well.