

# FREEDOM OF RELIGION IN THE CONSTITUTION OF THE NETHERLANDS

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**Konstantinos MARGARITIS<sup>1</sup>**

## Abstract

*Freedom of religion is a fundamental right of significant importance. Religion or any other belief of similar nature is an integral part to the personality of every person. This being the case, freedom of religion has been aptly described by the European Court of Human Rights as one of the foundations of a democratic society. The impact of religion is a matter of the state-church relations model adopted in each case; a model largely based on social and historical factors. In this paper, the case of the Netherlands will be presented with reference to its constitutional system of protection of religious freedom.*

**Keywords:** *Freedom of religion; Constitution; the Netherlands*

## 1. Introduction

The 21<sup>st</sup> century is widely perceived as being the era of globalization. In an attempt to briefly describe the concept, globalization “pertains to the increasing ease with which somebody on one side of the world can interact, to mutual benefit, with somebody on the other side of the world”<sup>2</sup>. More and more people choose, or are even forced by the circumstances, to live in another country, willing to participate in all aspects within society. In the above-described social environment, the protection of fundamental rights faces new challenges. The increasing number of people residing in another state generally represents a different cultural background and as individuals, different perceptions and beliefs, all of which are elements that compose the notion of personality.

One of the most significant elements, integral to the human personality, is the approach towards religion and the subsequent rights to express and manifest religious (or atheistic, sceptic, agnostic) beliefs. This explains the characterization of the right to religious freedom as fundamental and its insertion in all legal texts of constitutional nature

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<sup>1</sup> Postdoctoral Researcher, Department of Political Science, University of Crete; Adjunct Academic, Hellenic Open University; Member of the Board of Directors, Greek Public Law Association; Attorney at Law.

<sup>2</sup> T. Larsson (2001), *The Race to the Top: The Real Story of Globalization*, CATO Institute, p. 9.

in Europe and the US even from the 16<sup>th</sup> century<sup>3</sup>. For example, Part XIII of the Union of Utrecht (1579) explicitly stated that “each person shall remain free in his religion and that no one shall be investigated or persecuted because of his religion”.

Accordingly, freedom of religion has been included to all international human rights treaties, the UN Universal Declaration of Human Rights (article 18) and the European Convention on Human Rights (article 9), as well as to the legally binding EU Charter of Fundamental Rights (article 10). The importance of religious freedom has been consistently underlined by the ECtHR that referred to religious freedom as “one of the foundations of a ‘democratic society’... It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it”<sup>4</sup>. Therefore, the State shall provide an adequate level of protection.

In an attempt to systemically approach the church and state relations, one may identify three models based on Soper, den Dulk and Monsma; the strict church-state separation model, the established church model and the pluralist or structural pluralist model<sup>5</sup>. The framework of church and state relations has been formulated on the ground of several historical, political and social events within a country. In that sense, the Netherlands have historically adopted a more pluralistic model. The Protestant Reformation of the 16<sup>th</sup> century, the large immigration waves mainly of the 18<sup>th</sup> century and the social phenomenon called “pillarisation” affected the concept of church and state relations in the country. The aim of this paper is to examine the constitutional provisions on religious freedom in the Netherlands and reflect on major social aspects that affect the position of the state towards religion.

## 2. Models of church-state relations

Based on policies introduced towards the church in several states, Soper, den Dulk and Monsma resulted in three basic models regarding church and state relations.

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<sup>3</sup> However, the first attempt of guaranteeing religious freedom was much earlier. Roman Emperors St. Constantine and Licinius declared in the Decree of Milan, in 313, that “we might grant to the Christians and others full authority to observe that religion which each preferred”. See, on the matter, D.C. Munro, E. Bramhall (1898), *Decree of Milan*, in D.C. Munro, E. Bramhall, E.K. Mitchell, E.P. Cheyney, A.C. Howland and M. Whitcomb (eds), *Translations and Reprints from the Original Sources of European History*, University of Pennsylvania, Department of History, p. 29.

<sup>4</sup> See, amongst others, ECtHR cases: *Kokkinakis v. Greece*, app. no. 14307/88, para. 31; *Buscarini and Others v. San Marino*, app. no. 24645/94, para. 34; *Dimitras and Others v. Greece*, app. nos. 42837/06, 3237/07, 3269/07, 35793/07 and 6099/08, para. 76.

<sup>5</sup> J.C. Soper, K.R. den Dulk and S.V. Monsma (2017), *The Challenge of Pluralism: Church and State in Six Democracies*, London: Rowman & Littlefield, 3<sup>rd</sup> edition.

One model is the strict church-state separation model<sup>6</sup>. Supporters of this model understand religion as something personal, without the state having any right to interfere. On the other hand, religion shall not interfere in any way with public policy. The state should be neutral on matters of religion and this neutrality is assumed to be achieved best by keeping religion and politics separate. France is a very good example of this model where this model is highlighted in article 1 of the Constitution with the term *laïcité*.

Another model is the established church model<sup>7</sup>. Under this model, the state and the church are interrelated. The state recognizes the role of the church historically and socially, usually by the term of state religion and together represent the fundamental principles of the nation. In this modern form, the advantages of the state religion are mostly symbolic, without violating freedom of religion. One very good example of this model is Greece where article 3 of the Constitution states that “The prevailing religion in Greece is that of the Eastern Orthodox Church of Christ”.

The third church-state model is the pluralist or structural pluralist model<sup>8</sup>. In contrast to the strict separation model, the pluralist model sees religion not as a separate sphere with only limited relevance to the other spheres, but as having an impact on every aspect of life. Pluralists also stress the existence of secular perspectives that play a similar role to religion in society. The role of the State is to equally approach all religious and other philosophical beliefs within society. A very significant example of this model is the Netherlands, which will be exemplified in the following sections.

### 3. A brief on constitutional history

Since the beginning of the Protestant Reformation in the 16<sup>th</sup> century, Catholicism was challenged in the Netherlands, with a religious war leaving a tremendous negative impact on the country. During the end of 17<sup>th</sup> and 18<sup>th</sup> centuries, the Netherlands embraced a policy of religious tolerance. As a result, a considerable number of immigrants moved to the country for reasons related to religious freedom. Therefore, from the establishment of the Kingdom, the level of protection for freedom of religion was regarded to be at a high level.

In its modern form, the Constitution of the Netherlands was introduced in 1814, following independence from France and the establishment of the Kingdom of the Netherlands. It was amended one year later because of the expansion of the Kingdom’s territory to the present state of Belgium, under the Final Act of the

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<sup>6</sup> *Ibidem*, pp. 10-11.

<sup>7</sup> *Ibidem*, p. 11.

<sup>8</sup> *Ibidem*, pp. 11-12.

Congress of Vienna in 1815<sup>9</sup>. From the very beginning, the idea of distinct roles between the state and church prevailed<sup>10</sup>, mainly on the ground of the Protestant Reformation of the 16<sup>th</sup> century that highly challenged the predominant, at the time, Catholic Church.

From the 1815 amendment, freedom of religion seemed to have a considerable position within the Constitution. The 6<sup>th</sup> chapter (articles 190-196) was dedicated to religion. The general concept of this chapter reflects an “equal absence” of the state regarding religious affairs<sup>11</sup>. This argument is supported by the prohibition of religious education in public schools. For that purpose, the state introduced the Sunday school system, where students could follow classes on the Bible. However, the fact the Sunday school system was related to Christian dogmas reflect the predominance of Christianity in the Netherlands<sup>12</sup>. Moreover, article 190 explicitly stated that “complete freedom of religious beliefs is guaranteed to every person”. Plus, the Constitution took a step further by granting equal protection to all religious organizations and to confessors of all religions, the same civil and political rights<sup>13</sup>. An absolute recognition of religious freedom from the establishment of the Kingdom demonstrates the liberal spirit of the Constitution from the very beginning. On the other hand, the co-existence of people with different religious beliefs, mainly Catholics and Protestants, reflected a necessity that could not be overlooked.

A major novelty through the constitutional history of the Netherlands may be seen in the 1848 amendment. That refers to the concrete recognition, not only of the religious beliefs, but also of the profession of every religion. According to the new article 164, the manifest of religion was entirely free; an important step towards the complete protection of religious freedom. The only restriction in professing religion, included in the same article, pertained to the protection of society against criminal law violations. Furthermore, article 167 referred to the exercise of religion, which was allowed in public buildings and private places, for the first time, inside or outside, as long as public order was ensured in accordance with the law.

The constitutional amendment that took place in 1917 was at the same line as far as the provisions on freedom of religion were concerned. The major contribution of the amendment refers to religious education. As stated in article 192 of the 1917

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<sup>9</sup> Y. Klerk, E.J. de Jonge (1997), *The Netherlands*, in C.A. Gearty (ed.), *European Civil Liberties and the European Convention on Human Rights. A Comparative Study*, Martinus Nijhoff Publishers.

<sup>10</sup> B. Vermeulen (1998), *The Historical Development of Religious Freedom*, International Academy for Freedom of Religion and Belief, International Coalition for Religious Freedom Conference on Religious Freedom and the New Millennium, Berlin, Germany, May 28-31, 1998.

<sup>11</sup> D.B. Barrett, G.T. Kurian and T.M. Johnson (2001), *World Christian Encyclopedia: A Comparative Survey of Churches and Religions in the Modern World*, OUP, 2<sup>nd</sup> edition, pp. 530-535.

<sup>12</sup> P. van Rooden (2003), *Protestantism in the Netherlands to the Present Day*, in A.E. McGrath, D.C. Marks (eds), *The Blackwell Companion to Protestantism*, Blackwell.

<sup>13</sup> H. Knippenberg (2006), *The Changing Relationship between Church and State/Religion in the Netherlands*, *GeoJournal*, Vol. 67, Issue 4.

Constitution, religious schools were allowed and were also state funded. For the first time in the Netherlands, religious education had been totally funded by state authorities in the sense that all public and private religious schools were receiving equal funding<sup>14</sup>. This was an agreement included in the Constitution as the outcome of the consensus reached among the different religious and liberal expressions existed by that time.

One shall mention another historical factor of significant importance to the formulation of church-state relations in the Netherlands. In the late 19<sup>th</sup> century, a neo-Calvinist movement led by Abraham Kuyper made a huge impact in society. In order to establish itself, the movement published newspapers and magazines and founded special schools<sup>15</sup>. At the same time, Catholics, who had a better organizational structure, liberals and socialists, both neutral on religious affairs, were organizing their own communities. This socio-political phenomenon that led to social segregation for around a century is called “pillarization”<sup>16</sup>. Under those circumstances, the equal protection of all religions and their unhindered worship became necessary in the Dutch legal order.

Arguably, the most important constitutional amendment in the history of the Netherlands took place in 1983. The Constitution was completely re-structured and its provisions were re-organized getting the form they presently have. As far as fundamental rights are concerned, this revision was of highly importance since the new Constitution formulated existing rights in a more modern way and, at the same time, expanded the list of rights, adding a number of social rights and third generation rights, such as the right to legal aid (art. 18, para. 2), the right to work (art. 19), protection of the environment (art. 21) and the right to health and cultural development (art. 22).

#### 4. Religious freedom in the Constitution of the Netherlands

The latest constitutional amendment was concluded in 2018. Regarding freedom of religion, article 6 of the Constitution reads:

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

<sup>14</sup> S.C. van Bijsterveld (2005), *The Permissible Scope of Legal Limitations on the Freedom of Religion or Belief in the Netherlands*, *Emory International Law Review*, Vol. 14, Issue 2.

<sup>15</sup> P. van Rooden (2003), *supra*, no. 12; M.J. Wintle (1997), *Pillars of Piety: Religion in the Netherlands in the Nineteenth Century, 1813-1901*, Hull University Press.

<sup>16</sup> P. van Rooden (2002), *Long-term Religious Developments in the Netherlands, 1750-2000*, in H. McLeod, W. Ustorff (eds), *The Decline of Christendom in Western Europe 1750-2000*, CUP.

The first paragraph protects the free profession of religion. Religious freedom is guaranteed through professing one's religion, a term that presupposes the development of religious consciousness. In that sense, the latter is also protected under article 6. Moreover, except from religion, the provision includes the term "belief", which expands the scope of protection to all philosophical ideas, either irrelevant to or even challenging religion. Similarly to the text of the ECHR and the EU Charter, the Constitution does not make any distinction between religious and non-religious beliefs, with no advantages granted to any religions or religious organizations<sup>17</sup>. This constitutional position of explicit equal protection is strongly related to the variety of religious and non-religious preferences within the Dutch society. In a survey published in 2016 by CBS – Statistics Netherlands, referring to the period of 2010-2015, 50,1% of the population over 18 years of age did not have any affiliation with any religion, 23,7% defined themselves as Roman Catholics, 6,5% belonged to the Dutch Reformed Church, 5,7% to the Protestant Church of the Netherlands, 3,3% to Reformed Churches in the Netherlands and 4,9% embraced Islam<sup>18</sup>. As a result, it can be aptly argued that the approach of the 1983 amendment reflects the idea of disestablishment in the Netherlands<sup>19</sup>. Finally, this provision protects not only the "inner freedom of an individual to maintain his religion or belief, but also his freedom to belong or not to belong in an organized religion or belief"<sup>20</sup>.

Paragraph 1 also sets the limit to religious freedom, which is related to someone's responsibility under the law, in other words every person enjoys the freedom to profess religion as long as his/her actions do not violate the laws of the State. Of course the application of the law as a limiting factor to religious freedom must respect the principle of proportionality and must not in any way violate the core of the right at stake. On the other hand, public order as described in law shall be preserved. Any form of religious exercise cannot be used as an excuse to violate the laws of the State or fundamental rights of others.

Paragraph 2 sets specific rules on the exercise of religious freedom. Buildings and enclosed places that are dedicated to religious exercise (e.g.: Church, Mosque) are fundamental for this purpose. Nevertheless, certain religions tend to celebrate spiritual ceremonies in private houses or even outside buildings. In those specific cases the freedom of religion can be practiced in places other than those operated for this purpose, if certain prerequisites are fulfilled. Those prerequisites relate to the "protection of

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<sup>17</sup> L. Boothby (1998), *Models of Religious Freedom*, International Academy for Freedom of Religion and Belief, International Coalition for Religious Freedom Conference on Religious Freedom in the New Millennium, Berlin, Germany, May 28-31, 1998; C. Bruenner (1998), *Religious Freedom in Europe*, International Academy for Freedom of Religion and Belief, International Coalition for Religious Freedom Conference on Religious Freedom and the New Millennium, Washington DC, April 17-19, 1998.

<sup>18</sup> H. Schmeets (2016), *De Religieuze Kaart van Nederland, 2010-2015*, CBS, p. 5.

<sup>19</sup> E.A. Alkema (2006), *Constitutional Law*, in J. Chorus, P.-H. Gerver, E. Hondius (eds), *Introduction to Dutch Law*, Kluwer Law International, 4<sup>th</sup> edition.

<sup>20</sup> A. Saeed and H. Saeed (2004), *Freedom of Religion, Apostasy and Islam*, Ashgate Publishing.

health, in the interest of traffic and to combat or prevent disorders”. An Act of Parliament sets the details under which the practice of religion or belief other than in buildings and enclosed places shall be exercised. Especially today with the COVID-19 pandemic and its consequences still active, the limitation set in article 6(2) of the Constitution on public health establishes the legal basis for the relevant measures adopted.

With reference to the subjects of the right to religious freedom, the Constitution does not make any distinction between Dutch and other citizens, providing the right to “everyone”, according to the wording of article 6. Moreover, the provision acquires horizontal effect with reference to employment. This interpretation is in line with the Council Directive 2000/78. Hence, in a discriminatory behavior at work on the basis of religion, even in the private sector, may be led to a violation of article 6 of the Constitution<sup>21</sup>.

Besides article 6 which strictly refers to religious freedom, protection of aspects of the exercise of religion can be found in other constitutional provisions. First of all, religion and belief are explicitly mentioned as grounds for non-discrimination in article 1 of the Constitution. Since religion has been a discriminatory factor throughout the centuries, the Dutch Constitution complied with international standards in that aspect. Plus, in that respect, religion is indirectly protected by article 11, which guarantees the right to inviolability of everyone’s person, since religion or any belief is inextricable to everyone’s personality.

As article 6(1) mentions, the right to profess religion may also be exercised in community with others. Therefore, the establishment of associations for purposes of religion or other belief may fall under the scope of article 8 of the Constitution that guarantees the right of association. The right to establish religious or other associations of similar purpose is a special right compared to the generic right of association<sup>22</sup>. This aspect of the right of association contains the right to establish a religious community, the right to participate in an existing one and the right to leave at will<sup>23</sup>.

What is more important is the framework for providing religious education in the Netherlands. The right to education is included in article 23 of the Constitution. Para. 3 underlines that education provided by public authorities shall respect everyone’s religion or belief. The wording of the Constitution resembles to that of the ECHR, where article 2 of Protocol No. 1 states that in providing education, “...the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions”. From the aforementioned, the State applies a system of pluralism in public schools, since all possible beliefs are objectively taught, whilst courses on religion can be included as electives. The outcome is twofold: on

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<sup>21</sup> A. Seifert (2003), *Federal Labor Court Strengthens Religious Freedom at the Workplace*, in *German Law Journal*, Vol. 4, No. 6.

<sup>22</sup> L. Boothby, *supra*, n. 17.

<sup>23</sup> L. Swidler (1986), *Religious Liberty and Human Rights in Nations and in Religions*, Ecumenical Press.

one hand, the State equally treats religions as far as education is concerned; on the other hand, it provides students with the opportunity to possibly develop their religious consciousness through education. For that reason, the educational system in the Netherlands has been described as “genuinely neutral”<sup>24</sup>.

Private schools are allowed in the Netherlands under article 23 of the Constitution and, more importantly, they can be state-funded under the conditions of paragraph 5. According to that provision, private schools are free to provide education according to religious or other belief. This freedom allows private schools to develop their own respective curricula, including specific religious classes. Hence, the majority of private schools are related to a specific religion on dogma and therefore focus on religious education<sup>25</sup>. Religious schools cover a respectable number of schools in the Netherlands. For the academic year 2020-2021, 2.010 primary schools and 146 secondary schools are Roman Catholic, while 1.936 primary schools and 129 secondary schools are Protestant. At the same time, the respective number for public schools is 2.051 and 184<sup>26</sup>.

## 5. Concluding remarks

Several historical factors led the Netherlands to embrace a pluralist model in the church-state relations. The country was always involved in large religious upheavals, which inevitably affected society. This continuous societal situation impacted the formulation of the Constitution. For this reason, the Constitution of the Netherlands from the very beginning acknowledged equal protection to all religions. Of course, the relevant provisions were modernized and after the amendment of 1983, the Constitution protects the freedom of religion in a way totally compatible with international, ECHR and EU standards. This being the case, the Netherlands’ policies towards religion have been barely questioned before the European Court of Human Rights. Regarding religious education, the Constitution provides the means for religions to establish their own schools and develop their curricula in accordance with the respective beliefs. This approach also demonstrates the pluralist character of the state towards religion.

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<sup>24</sup> J.C. Soper *et al.*, *supra*, n. 5.

<sup>25</sup> W. Alberts (2007), *Integrative Religious Education in Europe: A Study-of-Religions Approach*, de Gruyter.

<sup>26</sup> All data are taken from the CBS website at <https://opendata.cbs.nl/statline/#/CBS/en>.