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State and religion, a multidimensional relationship: Some comparative law remarks

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Comparative law research regarding the relationship between state and religion often uses models. These models normally run from more to less separation between state and religion. In this article it will be argued that this approach is too simple. The relationship between state and religion has various dimensions. A fragmentary overview of current issues in a number of countries shows that religion's role may differ widely in different domains.

1. Introduction

For ages, the relationship between state and religion, more particularly between state and church, has been studied. Nevertheless, thoughts about this relationship have changed. During the Middle Ages, in Europe, the Christian religion determined the position of the state as well as the position of the Church. Religion gave state authorities and state power its legitimacy, and the government was the protector of the Christian faith. Nowadays, religion is no longer that fundamental; the starting points are democracy and the rule of law.

Therefore, freedom of religion and the principle of equality play important roles, when answering questions about the meaning of religion in a state. This development shows the secularization of the state¹ and constitutional theory. The position and meaning attributed to religion in several European states may differ,² but, in general, constitutional discourse no longer has a religious basis.

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¹ E.W. BÖCKENFÖRDE, STAAT, GESELLSCHAFT, FREIHEIT [STATE, SOCIETY, LIBERTY] 42 (1976); see also I. VON MÜNCH, GRUNDGESETZ-KOMMENTAR [BASIC LAW COMMENTARY] 303 (2000).

² Cf. European Court of Human Rights (ECHR) 10 November 2005 (GC), *Leyla Sahin v. Turkey*: "questions concerning the relationship between State and religions (. . .), on which opinion in a democratic society may reasonably differ widely." The European Convention on Human Rights, therefore, leaves room for a variety of regulations. On the one hand, a ban on wearing headscarves at a university is not incompatible with the right to freedom of religion in the European Convention (*Leyla Sahin v. Turkey*). On the other hand, the same holds true for an obligation to display a crucifix in primary school classrooms (ECHR 18 March 2011, *Lautsi v. Italy*).

The implication is not that the relationship between state and religion can do without attention. The twentieth century may have seen the idea come into being that, as a result of modernization and rationalization, religion's role would fade away or would, at least, be limited to the private sphere. Today's reality, however, presents another picture.³ First, the secularization of society never has been a "global" phenomenon. Outside of Europe, New Zealand and Uruguay might be the only countries with a similar development;⁴ within Europe, there exist huge differences as well. Second, the decrease in the number of members of religious communities need not correspond to a similar decrease in the number of believers.⁵ Third, religion remains an important factor in the social, cultural, and political domains. It turns out that religion cannot be reduced to a personal conviction, which has no meaning outside the private sphere, to some kind of a near hobby.

1.1. Renewed interest

In Europe, one of the most important reasons for the renewed interest in the relationship between state and religion has been the large increase in the number of Muslims, whose religion sometimes appears to put a stamp on their entire life and whose religious communities seem to play an important social and cultural role.⁶ Simultaneously, there may exist a reinforced interest in the position of strict Christian groups.

Another, separate reason for this renewed interest is the emergence of religiously inspired terrorism. Even if that is not considered an overture to a clash of civilizations, the question has to be answered regarding what a government's position should be facing radical religious groups. Other reasons for the renewed interest in the relationship between state and religion may also be mentioned such as a growing need for providing meaning to life and to society as a whole.⁷ In the Netherlands, in any case, there is an additional reason. The secularization and the simultaneous decline of the pillarization of society after World War II⁸ lead to specific questions about government's role in connection with societal organizations with religious backgrounds.

1.2. Outline and terminology

This article deals with the relationship between state and religion in a comparative law approach. As regards the term "religion," the term can be defined as a coherent whole of doctrine and practice with belief in a supreme being as a central idea.

³ See for a further discussion of this theory of secularization and the shortcomings thereof, W. VAN DEN DONK & R. PLUM, *Begripsverkenning [Exploration of concepts]*, in GELOVEN IN HET PUBLIEKE DOMEIN [BELIEF IN THE PUBLIC DOMAIN] 27 (2006).

⁴ José Casanova, *Religion, European Secular Identities and European Integration*, in RELIGION IN AN EXPANDING EUROPE 63 (Timothy Byrnes & Peter Katzenstein eds., 2006).

⁵ *Id.* at 65.

⁶ In the United States, by contrast, Muslims account for only 10 percent of the immigrants, *id.* at 76.

⁷ BÖCKENFÖRDE, *supra* note 1, at 60.

⁸ Pillarization is the segmentation of society along religious lines; in a pillarized society religiously based organizations play an all-important role in education, media, health care and so on. For a discussion of the phenomenon of pillarization: AREND LIJPHART, *THE POLITICS OF ACCOMMODATION: PLURALISM AND DEMOCRACY IN THE NETHERLANDS* (1968).

Many states are actually struggling with similar problems, although their points of departure differ widely. Comparative law studies often take for granted the existence of a spectrum of models running from an antagonistic relationship to a very close relationship between state and religion. Such a one-dimensional perspective, however, will be found to be too simple (section 2). One can distinguish at least three dimensions: religion's role in state matters (section 3); government's role in the religious domain (section 4); and the relationship between state and religion in several other domains, such as the formation of political opinion (section 5), the social service sector (section 6), and the field of education (section 7).

As a consequence, the term "public domain" is explicitly avoided. It is rather confusing to throw together state matters, public places, public opinion, publicly financed social services, public education, and so on.⁹ Religious expression in public, for that matter, falls outside the scope of this article. One remark, however, has to be made. Freedom of religion, even in a secular state such as France, not only protects religious expression in the private sphere. The French judiciary has blown the whistle on some overenthusiastic mayors who banned religious processions because of the public nature thereof.¹⁰

2. Comparative law and a spectrum of models

The relationship between state and religion differs from country to country. Different approaches often appear in the constitutions. Article 1 of the French Constitution determines the laic nature of the French state. The establishment clause in the First Amendment of the Constitution of the United States prohibits not only the existence of an established church but has a wider meaning, as well, as will appear later. Article 140 of the German Constitution refers to some provisions of the constitution of the Weimar Republic that, on the one hand, prohibit the existence of an established church but, on the other hand, lay down that religious denominations may be recognized by the state. In England, of course, the Anglican Church is the established church.¹¹ In the Netherlands, the separation of church and state is assumed to be an unwritten principle of constitutional law, as the Basic Law keeps silent on this issue.¹²

Legislation and case law elaborate the relationship between state and religion in the different countries. As a result, a very complicated picture arises. Therefore, comparative law studies often use models. Winfried Brugger, for example, uses six different

⁹ VGL. E. POULAT, *NOTRE LAÏCITÉ PUBLIQUE: LA FRANCE EST UNE RÉPUBLIQUE LAÏQUE* [OUR PUBLIC LAÏCITÉ: FRANCE IS A SECULAR REPUBLIC] 366 (2003).

¹⁰ JEAN BAUBEROT, *HISTOIRE DE LA LAÏCITÉ EN FRANCE* [HISTORY OF LAÏCITÉ IN FRANCE] 96 (2004).

¹¹ In Scotland, the Presbyterian Church is the established church; Wales and Northern Ireland do not have established churches.

¹² SOPHIE C. VAN BIJSTERVELD, *SCHEIDING VAN KERK EN STAAT: EEN KLASSIEKE NORM IN EEN MODERNE TIJD* [SEPARATION BETWEEN CHURCH AND STATE: A CLASSICAL NORM IN MODERN TIMES] 228 (2006).

models.¹³ In the first one, the state is completely opposed to religion. Albania, where in the seventies and eighties of the last century religion was officially banned, might have been an example. The second model is characterized by a “wall of separation” taken seriously not only in theory but in practice as well. Barring all religious signs from public education belongs here. The third model is less drastic: “separation” and “allowing for” are linked. Government may neither advance nor obstruct religion. The fourth model combines separation with some kind of cooperation. Germany, where the government, for example, takes care of the ‘church tax’ collection for recognized religious denominations, may serve as an example.¹⁴ This model can be distinguished from the fifth, which is characterized by a more formal unity of state and church in the form of an established church. State and church still have different aims, however; respectively, the citizen’s welfare and his salvation. In the last model that difference has disappeared, state and church actually converge in a theocracy.

It stands out—according to Brugger, as well—that the first and the last model do not agree with democracy and the rule of law. The fifth model causes some concern, at least, because an established church may have all kinds of advantages in comparison with other denominations.

In the literature, a similar classification is often used, a spectrum running from theocracies, where Vatican City might be one of the few examples, to states that are more or less hostile to religion.¹⁵ Another possibility is to drop, from the outset, the models that are contrary to democracy and the rule of law. Chris Soper and Stephen Monsma, for example, use only three models in their comparative law study of the situation in the United States, the Netherlands, Australia, Germany and the United Kingdom: a strict separation model, an established church model, and a so-called structural pluralistic model, wherein government recognizes that religion may play a part in all sorts of domains.¹⁶

2.1. More dimensions

All these models have an ideal character. Therefore, it is not a strong argument that the real situation in a country differs from a certain model. There is, however, a more fundamental objection. The models are set out along what we may call a one-dimensional line running from more to less separation between state and religion. A number of reasons make such a conception too simplistic, as examples will show.

¹³ Winfried Brugger, *Von Feindschaft über Anerkennung zur Identifikation. Staat-Kirche-Modelle und ihr Verhältnis zur Religionsfreiheit [From antagonism via recognition to identification]*, in *SÄKULARISIERUNG UND DIE WELTRELIGIONEN [SECULARIZATION AND WORLDRELIGIONS]* 257 (Hans Joas & Klaus Wiegand eds., 2007).

¹⁴ The German system may be described as “hinkender Trennung” (separation with a limp), MICHAEL SACHS, *GRUNDGESETZKOMMENTAR [BASIC LAW COMMENTARY]* 2458 (2003).

¹⁵ Theodore S. Orlin, *Religious Pluralism and Freedom of Religion: Its Protection in Light of Church/State Relationships*, in *THE STRENGTH OF DIVERSITY* (Allan Ross & Jan Helgesen eds., 1992).

¹⁶ STEPHEN MONSMA & CHRISTOPHER SOPER, *THE CHALLENGE OF PLURALISM, CHURCH AND STATE IN FIVE DEMOCRACIES* 11 (2009). Cf. B. P. Vermeulen, *Een schets en evaluatie van de kritiek op de overheidsfinanciering van het bijzonder onderwijs [Outline and evaluation of criticism against state subsidies for private schools]*, in *GELOVEN IN HET PUBLIEKE DOMEIN [BELIEF IN THE PUBLIC DOMAIN]* 354 (2006).

Apart from France, Turkey is (or was) considered a good example of a laic state, a state with a strict separation between state and religion. That holds true as far as we see for regulation regarding religious expression in the state machinery; however, we receive a different impression if we look into the government's involvement in religious affairs. In Turkey, the government strongly influences the appointment of imams. From this point of view, it would be odd if France and Turkey were to fall under the same model. Another example: England and Greece are both countries with established churches, but they differ widely as far as the government's position toward other denominations is concerned. The difference could be seen as greater than between England and certain states without an established church.¹⁷ The existence of an established church, in other words, does not have that much impact in this respect.

The classification becomes even more problematic if we take into account the fact that state and religion meet in social and cultural domains. Soper and Monsma's third model regards, preeminently, the relationship in those domains.¹⁸ However, their findings—that the existence of an established church does not rule out the possibility that government might be well-disposed toward social and cultural organizations of all denominations—imply that there are different and relatively independent dimensions in the relationship between state and religion.

A one-dimensional line suggests, mistakenly, that only the choice of one of the models presented may lead to a consistent set of answers to all kinds of completely different issues: civil servants' dress regulations, financing denominational education, penalization of blasphemy, monitoring radical religious movements, and so on. This article distinguishes more dimensions in the relationship between state and religion to avoid that very suggestion.¹⁹ A distinction is made between religion's position in state matters, government's position in religious matters, and their relationship in other domains: political opinion formation, social services, and education.²⁰ It is not inconceivable that one may defend a strict separation on the one point whereas, on another, a closer relationship might be acceptable. The result of a comparative law approach may be that arguments for separation or alliance will differ by dimension. To achieve a multifaceted impression, attention will be paid in particular to France, the United States, England, Germany, and the Netherlands.

3. Religion in the state domain

Two current questions have to be answered here. The first one is: Should the government be allowed to use religious symbols and religious references? The second

¹⁷ Sophie C. van Bijsterveld, *Overheid en godsdienst in een post-geseculariseerde samenleving* [Government and religion in a post-secularized society], in *RELIGIE ALS BRON VAN SOCIALE COHESIE IN DE DEMOCRATISCHE RECHTSSTAAT?* [RELIGION AS SOURCE OF SOCIAL COHESION IN A DEMOCRATIC STATE UNDER THE RULE OF LAW] 9 (B. C. Labuschagne ed., 2004).

¹⁸ MONSMA & SOPER, *supra* note 17, at 11.

¹⁹ Cf. VEIT BADER, *SECULARISM OR DEMOCRACY?: ASSOCIATIONAL GOVERNANCE OF RELIGIOUS DIVERSITY* 52, 202 (2007).

²⁰ In this way, Soper and Monsma's three basic questions are at least partly treated; see MONSMA & SOPER, *supra* note 17.

question is: Should civil servants be allowed to display their religious conviction at work? Before answering these questions we have to deal briefly with the legitimization of government authority and the justification of government policy.

Constitutions of democratic states often legitimize government authority by referring to the sovereignty of the people (Sweden, South Africa, Germany) or to the sovereignty of the nation (France, Belgium, Poland).²¹ Government authority does not have a religious or religiously inspired foundation.²² If a constitution points out the state's purpose or highest value, these are described in rather general and abstract terms. Examples are the “common good” (United States, Poland) and “human dignity” (Germany). Such concepts may, in one way or another, be influenced by Christian culture; they are not in themselves of a religious nature.

Every citizen should be able to accept government authority and every citizen should be able to agree with the general aims of the state.²³ In a pluralistic society, where a lot of people do not believe in a supreme being and all sorts of religions coexist, a religious foundation is, from the outset, out of the question.

The counterargument, that religious people cannot accept government authority if religion does not play a part in the official grounding thereof, does not hold true. This argument fails to appreciate that the individual is not completely tied to the state, and that the state has no authority in spiritual or religious matters whatsoever. From a religious point of view, linking the will of the supreme being with ever-failing government policies is not self-evident either.²⁴

A similar argument is possible regarding the justification of specific regulations, policies, and other decisions. Church dignitaries should not *ex officio* have any power of political decision making,²⁵ and government may not enforce religious rules or apply religious criteria. Even if the government takes into account the wishes of certain religious communities, the reason cannot be that the supreme being prescribes a certain measure. The reason may only be that freedom of religion has a certain importance.

3.1. Governments using religious discourse?

The question of whether government may use religious discourse raises controversies in many countries. The case law of the Supreme Court of the U.S. on this issue seems to be a rather diffuse compromise between the recognition of certain traditions, on the one hand, and stricter ideas about the separation of state and religion, based on the establishment clause, on the other. A good example of the first approach is the Supreme Court's judgment on the practice of beginning the legislative session of the

²¹ The Dutch Constitution keeps silent in this respect.

²² The preamble of the Irish Constitution has a different approach: the Most Holy Trinity is the source of all authority. Article 6 of the Irish Constitution, however, states that all powers of government derive—under God—from the people.

²³ GER GROOT, HET KREDIET VAN HET CREDO: GODSDIENST, ONGELOOF, KATHOLICISME [CREEDS CREDIT, BELIEF, DISBELIEF, CATHOLICISM] 133 (2006).

²⁴ The same holds true for invoking the supreme being on coins.

²⁵ Van Bijsterveld, *supra* note 13, at 248.

House of Representatives of Nebraska with a prayer by a publicly funded chaplain. The Supreme Court judged this tradition not to be contrary to the First Amendment.²⁶ Actually, the Supreme Court's own sessions begin with the formula "God save the United States and this honorable Court." In other cases, the Supreme Court has given the separation of state and religion more impact. The Court banned the setting up of a nativity scene on public property,²⁷ and the Court banned, as well, a picture of the Ten Commandments from a court room.²⁸

In other countries we see similar phenomena. Shortly after the French Revolution, crucifixes disappeared from the French courtrooms.²⁹ One hundred and fifty years later, in Germany, a conflict arose over the presence of a crucifix in a courtroom. The German Federal Constitutional Court (Bundesverfassungsgericht) judged the complaint, based on the right to freedom of religion, justified. If the crucifix is not removed, the individual concerned would be wrongfully forced to conduct an action "under the cross."³⁰ In the Netherlands, no crucifixes are to be found in courtrooms. Other traditional religious references do exist, however. The formula "Wij Beatrix, bij de gratie Gods" (We Beatrix, by the Grace of God) in the preamble of every act may serve as an example. Compulsory regulation and the supreme being are bound together in a manner that does not belong in a pluralistic society. If this formula was absent, there would probably not be much enthusiasm for introducing it now.

3.2. Civil servants and religious symbols

In the old days, the relationship between government and religion gave members of nondominant denominations a smaller chance of obtaining a government job.³¹ As a reaction, several constitutions lay down an equal right to government office.³² Therefore, religion, as such, may not be the reason not to appoint someone. The question whether a civil servant may show his religion is a different one. In answering this question, we have to balance two interests: the importance of an appearance of government neutrality and the importance of freedom of religion. These interests turn out to be balanced very differently in different countries.³³

In France, a strict state neutrality is seen as a necessary condition for freedom of religion outside the state domain. Therefore, freedom of religion has no substantial weight for a civil servant at work. Wearing religious symbols by civil servants is

²⁶ *Marsh v. Chambers*, 463 US 783 (1983).

²⁷ *Allegheny Co. v. ACLU*, 492 US 573 (1989).

²⁸ *McCreary County v. ACLU*, 545 US 844 (2005). A monument with the Ten Commandments on the square in front of Texas's State Capitol, however, was acceptable; it was one monument out of a series of seventeen. *Orden v. Perry*, 545 US 677 (2005).

²⁹ POULAT, *supra* note 10, at 89.

³⁰ Bundesverfassungsgericht (Federal Constitutional Court) 17 July 1973, E 35, 366.

³¹ In the Netherlands, not until 1937, was a Catholic appointed secretary general at a ministry.

³² F.e. Art. 6 Clause 3 Constitution of the U.S.A. prohibits any "religious test" to qualify for "any Office or public Trust"; cf. art. 3 Dutch Constitution.

³³ In Germany, all states have their own rules. Hessen, for example, has chosen the French system.

completely banned by law. The kind of work is not relevant; nor does it matter if a civil servant has contact with the public or not.³⁴ The situation in England differs widely. For years, Sikhs wearing turbans have been working on the London Metropolitan Police Force. Headscarves matching the style of the uniforms have been designed, as well. That police officers should be allowed to wear a headscarf is not completely uncontroversial, however.

To a certain extent, the United States presents a similar picture. In 1986, the Supreme Court accepted a ban on a Jewish Air Force officer's wearing a yarmulke, even though he was wearing it under his Air Force cap outside the officers' premises. One of the arguments was the separation of church and state. Congress reacted, however, by introducing a law establishing the right to wear such religious signs.³⁵

A ban on police officers' wearing beards, permitting exceptions on medical grounds but not on religious grounds, was judged to be contrary to the First Amendment because government had failed to advance "compelling reasons." Nowadays, some police forces are permitting officers to wear a headscarf. A prison guard who was told by the prison board that he was not allowed to wear his kufi anymore brought his case successfully to court.³⁶

In my view, the importance of outward neutrality is rather small regarding civil servants working, for example, at the public gardens or civil servants who do not have contact with the public at all. In these cases, freedom of religion—even during working hours—outweighs neutrality arguments. The French general ban, therefore, is too harsh.

On the other hand, the importance of outward neutrality is considerable as regards civil servants exercising authority. In this respect, one may think, in the first place, of the judiciary, whose appearance of neutrality can even be justified by the fundamental right to a fair trial. In the second place, one may think of the police. Their uniforms are also meant to stress the impersonal and public character of their position.³⁷ These civil servants' interest in manifesting their religion is less important than the state's interest in exercising authority without any appearance of religious preference. The constitutional principle of separation between state authority and religion takes precedence; otherwise, this same authority would be undermined in a partly multireligious and partly nonreligious society. Moreover, in specific cases, religious symbols may cause opposition to or mistrust of government actions. The counterargument—that government authority is reinforced when the public sees expressions of "pluriformity"³⁸—has a rather ambiguous nature, especially if it is stressed, at the

³⁴ Rémy Schwartz, *La jurisprudence de la loi de 1905 [Case law under the Act of 1905]*, in *POLITIQUES DE LA LAÏCITE AU XXE SIECLE [POLITICS OF LAÏCITE IN THE TWENTIETH CENTURY]* 147 (Patrick Weil ed., 2007).

³⁵ 10 USC par. 774 (a)-(b).

³⁶ Zie www.nyclu.org. A "kufi" is a headgear out of West Africa. In the United States wearing a kufi may express pride because of one's origin or belief.

³⁷ GROOT, *supra* note 26, at 143–144.

³⁸ TITIA LOENEN, GELOOF IN HET GEDING. JURIDISCHE GRENZEN AAN RELIGIEUS PLURALISME IN HET PERSPECTIEF VAN DE MENSENRECHTEN, [BELIEF IN DISCUSSION: LEGAL RESTRICTIONS TO RELIGIOUS PLURALISM IN A HUMAN RIGHTS PERSPECTIVE] 83, 85 (2006).

same time, that the symbols concerned can be made to harmonize with the uniform in such a way that they are no longer conspicuous.

The objection that, for example, a judge wearing a religious symbol may be doing his job excellently ignores the issue that not expressing oneself religiously is an inherent part of the job. That is even truer for a civil servant who, by reason of religion, does not want to conclude civil marriages between homosexuals. He refuses to do a part of the job and, therefore, is not a likely person for his position.³⁹

The argument to the effect that certain groups in society are being excluded from certain government jobs is not convincing. That exclusion, after all, is not motivated by pointing at religious conviction, as such, but by pointing at religiously inspired behavior.⁴⁰

4. Government in the religious domain

A second dimension of the relationship between state and religion concerns the state's tasks as far as religious matters are concerned. Attention must be paid to two interrelated issues. What part should government play regarding religion, substantively and should the government support religious communities financially?

4.1. Government and religious doctrine

In the past, tensions between state and church were a regular phenomenon. As a result, governments were often inclined to interfere with the organization of religious communities and with religious doctrine. In England, the king as head of state, formally is still the supreme governor of the Church of England.⁴¹ The Crown has the power to appoint the bishops of the Church of England and the power to approve certain church regulations. In this connection, it should be mentioned that the Catholic bishops in the Alsace are appointed by the French president, a rather bizarre arrangement in a laical state.

In Turkey, the Diyanet, the Directorate General for Religious Matters, not only appoints imams⁴² but decides, as well, that respect for the state authorities and the army have to be represented as a religious duty. The power of the directorate to appoint imams is also relevant in other countries. The majority of the Dutch mosques for Muslims with a Turkish background fall under the powers of this directorate.⁴³

³⁹ Cf. the answer of the Dutch minister of the interior to questions of members of parliament d.d 29 May 2008, available at www.minbzk.nl.

⁴⁰ Therefore, there is no simple parallel with race or gender.

⁴¹ The Act of Settlement (1701) requires the head of state to be a protestant clergy. He engages himself on oath to protect the Church of England and not to marry a Catholic. The clergy of the Church of England recognizes the supreme authority of the sovereign.

⁴² Cf. Hakan Yavuz, *Islam and Europeanization in Turkish-Muslim socio-political movements*, in RELIGION IN AN EXPANDING EUROPE 225 (Timothy A. Brynes & Peter J. Katzenstein eds., 2006); cf. Erik-Jan Zürcher, *De Turkse paradox. Religie in dienst van de seculiere staat [The Turkish paradox. Religion in service of the secular state]*, in ONGEWENSTE GODEN; DE PUBLIEKE ROL VAN RELIGIE IN NEDERLAND [UNWANTED GODS: RELIGION'S PUBLIC ROLE IN THE NETHERLANDS] 168 (Marcel ten Hooven & Theo de Wit eds., 2006).

⁴³ 151 out of 245; see BELIEF IN THE PUBLIC DOMAIN, *supra* note 4, at 118.

Opportunistically, one might applaud this system, because the Turkish government prevents—up till now—the appointment of possibly radical imams.

Nevertheless, in a democracy under the rule of law, such forms of governmental influence should be rejected. The government should not prescribe which religious doctrine is right or true. Government has another vocation, and such entanglement often leads to advantages for certain denominations or certain currents of belief. From a religious point of view, it is also undesirable that the substance of a religion be dependent on political institutions and political decisions.

Preachers who teach that the supreme being rejects Western materialistic and degenerate societies may raise concern. The same holds true for the preaching of a rigid and archaic morality. There is no reason, however, for government intervention. Fundamental freedoms do exist for strongly dissenting convictions. For example, the opinion that heretics and apostates, after they are dead, will burn in hell, is a rather common fundamentalist starting point and does not amount to advocacy of lawless action. If preaching or teaching switches to coercion or incitement to criminal acts, of course, grounds for government intervention exist.

Up till now, in particular, government restrictions have been discussed. Governmental restraint in criminalizing dissenting opinions, however, leaves open the possibility that government itself defends and propagates liberal values.

4.2. State aid for religious communities

Another aspect of government involvement with churches and religious communities might be in backing them financially.

In a lot of countries, there exist various forms of government aid to religious communities. In France, the government is the owner of many church buildings and puts these buildings at the disposal of religious communities.⁴⁴ It happens, as well, that governments back the construction of a church or a mosque.⁴⁵ In Germany, the tax department collects the so-called church tax from the members of the denominations recognized under public law. Normal tax law sanctions apply. This church tax is an 8 percent surcharge above the tax on wages. This regulation results in the national religious communities in Germany being among the richest religious communities in Europe.⁴⁶

In Belgium, since 1830, government not only pays the maintenance of church buildings but priests, reverends, and rabbis receive a state salary as well. This regulation pertains to only the recognized denominations. The main criteria for recognition is whether a denomination supplies a need for a segment of the population. By now, also imams receive a state salary.

⁴⁴ POULAT, *supra* note 10, at 134.

⁴⁵ MARCEL MAUSSEN, *CONSTRUCTING MOSQUES: THE GOVERNANCE OF ISLAM IN FRANCE AND THE NETHERLANDS 181* (2009).

⁴⁶ This centralized tax collection might reinforce the church hierarchy. The church tax amounted to 7.6 billion Euro in 2006; see SOPER & MONSMA, *supra* note 17, at 184.

Religious communities in England, including the established Church of England, do not receive direct state subsidies, nor do the religious communities in the United States.⁴⁷ As far back as 1785, in Virginia, a tax plan meant to back religious communities was voted down. Jefferson was among the opponents.⁴⁸ Nowadays, the establishment clause prohibits every form of state aid. The well-known Lemon test includes the strong criteria that “direct advancement of religion” is not allowed. Even the briefest of all interpretations of the establishment clause—“no coercion, no money”—makes clear that subsidies are completely out of the question.⁴⁹

Arguments for state aid in European countries differ. In France, supporting religious communities is seen against the background of the “nationalization” of church property after the French Revolution. In other countries, the supposed utility of religion is a point for attention as well.⁵⁰ Sometimes, the argument seems to be that government has a part to play in guaranteeing the supply of basic spiritual needs, similar to government’s role in the health service. A counterargument could be that a lot of citizens do not really show a spiritual or religious need. Attributing such a need to every citizen is based on a unproven portrayal of mankind. An additional, tricky question is whether government should be allowed to control—as in the health service—the quality of the spiritual and religious services.

Speaking of religion’s value may mean, as well, that religion and religious communities play an important and useful role in society, providing a foundation for a common morality. However, religion’s role concerning morals is more and more controversial. In this respect, arguments against state aid are advanced as well. First, a citizen should not be forced to pay taxes for backing the preaching of convictions contrary to his own deeply felt convictions. This argument carries a certain weight in the U.S. doctrine of separation of church and state.⁵¹ In Europe, however, this argument is less forceful. The European Commission of Human Rights, for example, judged the support of religious communities with general public resources not contrary to freedom of religion, as laid down in article 9 ECHR.⁵²

The above-mentioned U.S. doctrine may become stronger if one points to the fact that some denominations are presently teaching ideas that do not contribute to the well-being of homosexuals, unhappily married couples, or unmarried happy couples. In this respect, churches cannot be compared, for example, with museums or sports associations, which are often receive state aid. A government call to play sports more regularly, or to visit museums is not very controversial; a government call to visit churches or mosques more regularly, would be a horse of a different color.

⁴⁷ The need to attract a large following could be a factor in explaining the lively church attendance, A. Wolfe, *An Introduction to American Religious Practice*, in GELOVEN IN HET PUBLIEK DOMEIN [BELIEF IN THE PUBLIC DOMAIN], (2006).

⁴⁸ MONSMA & SOPER, *supra* note 17, at 19.

⁴⁹ Abroad, the United States does support relatively moderate currents of Islam, Jessica Powley Hayden, *Mullahs on a Bus: The Establishment Clause and U.S. Foreign Aid*, 95 GEO. L.J. 171 (2006).

⁵⁰ SACHS, *supra* note 15, at 2475.

⁵¹ SOPER & MONSMA, *supra* note 17, at 29.

⁵² European Commission of Human Rights 1983, C. v. UK, 37 D&R 142.

One might put forward that only religious communities that feel very strongly about democratic values and the rule of law deserve state aid. Such an appraisal of religious doctrine, however, is neither possible nor desirable.⁵³ Secular standards are not really proper or useful to assess the nature of spiritual and transcendental convictions. In this respect, one may point to former local Dutch government plans to bring more liberal forms of Islam into action to minimize radicalization.⁵⁴ Such a policy is at odds with the principle of government neutrality, apart from the issue whether such a policy is effective at all. Such a policy might actually damage the credibility of more liberal religious communities.⁵⁵

If a government financially backs certain religious communities, then the right of freedom of religion and the principle of equal treatment are rather strong arguments for possible aid to all denominations.⁵⁶ If the government does not contribute financially to any denomination at all, neither freedom of religion nor the equality principle make it mandatory that a government should take care that every religious community has a similar quality building for their gatherings.⁵⁷

The starting point, namely, that freedom of religion, in general, gives no grounds for facilitating religious communities, does not apply when government itself is responsible for hindering the exercise of the right to freedom of religion. Therefore, in most countries governments take care, for example, to supply the spiritual needs in the military.

5. State, religion and the forming of political opinion

In the United States, political candidates often use or have to use religious references to attract voters; in other countries, such as Germany and the Netherlands, this is less obvious, even though, at the same time, political parties with religious backgrounds do exist.

In this section, we will deal with several interrelated issues. First, the meaning and relevance of religious arguments in political debate; second, the question of whether a democracy under the rule of law should limit religiously inspired political ambitions. The answer to the question as to whether religiously inspired political parties have a special position follows naturally from this argument.

⁵³ A religiously based argument against state subsidies for religious communities might be that these subsidies contradict the importance of the communities' spirit of sacrifice, *cf.* S. C. DEN DEKKER-VAN BIJSTERVELD, DE VERHOUDING TUSSEN KERK EN STAAT IN HET LICHT VAN DE GRONDRECHTEN [THE RELATIONSHIP BETWEEN CHURCH AND STATE IN A FUNDAMENTAL RIGHTS PERSPECTIVE] 120 (1988).

⁵⁴ NOTA KERK EN STAAT [MEMORANDUM CHURCH AND STATE] (2008).

⁵⁵ *Cf.* MARCEL MAUSSEN, RUIMTE VOOR DE ISLAM? [ROOM FOR ISLAM?] 50 (2006).

⁵⁶ The German Federal Constitutional Court has ruled that the right to freedom of religion as such does not cover a right to financial support. However, if support is given, the principle of equality plays an important part, Bundesverfassungsgericht 12 May 2009, E 123, 148.

⁵⁷ This starting point does not exclude completely that government may take measures in certain distressing circumstances, for example, if denominations with a lot of illegal immigrants meet in underground parking garages.

5.1. Religiously inspired political arguments⁵⁸

It would be strange if diversity in a religiously pluralistic society would not show itself in the process of political opinion formation. Believers are religiously motivated, which does not always change when they enter the political arena. Moreover, religious communities may have special interests that they want to have represented in political debate. In a democracy, political rights like freedom of speech and association guarantee that everybody is entitled to participate in political discussions. In view of these fundamental rights, religiously inspired contributions have the same status as other contributions.⁵⁹

All the same, we have seen that in a pluralistic society government had better not base its decisions on a religious foundation. From this point of view, religious arguments in the political debate might be considered less relevant.⁶⁰ Some distinctions, however, may be useful here. Religious points of view may enrich discussions with arguments that otherwise would be without a voice.⁶¹ One may point to the idea that humans are imperfect beings. Such an idea casts doubt on all political movements wishing to build a perfect society.⁶² If, in this manner, political ideas are criticized by means of religious concepts, politicians, naturally, must be allowed to criticize these religious concepts for their part.

Another possibility could be that religiously inspired participants in the political debate translate their views and arguments into arguments with which anybody—believer or nonbeliever—might agree. Years ago, the main argument of a Dutch Reformed political party against the liberalization of pornography laws was that pornography should be considered a gross offense against God.⁶³ On the other hand, a larger Christian political party wondered whether certain kinds of pornography were not contrary to human dignity.⁶⁴ This latter argument may have a religious background, it still might appeal to everyone.

The assumption that religious arguments need some sort of translation is also important because compromises play a rather important part in democratic political opinion formation and decision making. A religious argument that is tantamount to an appeal to the inalterable will of the supreme being probably prevents concluding political compromises.

⁵⁸ This subsection is in no way meant to be an overview of the discussions about the relationship between religion and public reason.

⁵⁹ In France, the Catholic daily *La Croix* has to a large extent profited from regulation concerning state aid to the press. In the United States, the Supreme Court ruled the exclusion of religiously inspired student journals from subsidies for student journals contrary to the First Amendment, *Rosenberger v. University of Virginia* (1995), 515 US 819.

⁶⁰ MICHAEL J. PERRY, *UNDER GOD? RELIGIOUS FAITH AND LIBERAL DEMOCRACY* 32 (2003).

⁶¹ Cf. Jürgen Habermas, *Religion in the public sphere*, 14 *EUR. J. PHIL.* 1-25 (2006).

⁶² Such doubt is not exclusively of a religious nature, however. See BADER, *supra* note 20, at 124 (2007).

⁶³ *Handelingen TK [Proceedings Second Chamber]*, 1984/85, 550, 17 October 1984.

⁶⁴ *TK [Second Chamber]* 1979/80, 15836, 5, p. 4–5.

5.2. Limits to political opinion formation

Up till now, the argument in this section has focused mainly on the desirability of a well-functioning political debate. So far, the need for juridical norms limiting political rights has not been discussed. The situation might be different if religiously inspired political movements strive to establish a theocratic political system, wish to abolish equality between men and women, or want to classify nonbelievers as second-rate citizens.⁶⁵

In countries such as the United States, a more formal concept of democracy prevails. Political freedoms are indivisible in the sense that they protect views and aspirations completely contrary to the starting points of a democracy under the rule of law. As long as political opinions are not considered incitement to imminent lawlessness, they are protected, no matter if they are, for example, of a racist or dictatorial nature. In other countries, a more substantive concept of democracy prevails. That appears clearly if a constitution—as in Germany, for example—includes unchangeable provisions, and a so-called abuse-of-fundamental-rights provision, which lays down that someone using his political freedoms to attack the liberal democratic “basic order” cannot appeal to fundamental political rights. As a result, the Constitution presents a framework for acceptable political opinion formation.

The Dutch Constitution does not explicitly lay down such a substantive framework; no abuse-of-fundamental-rights provision is included. Nevertheless, it is still possible that unwritten supraconstitutional starting points exist.⁶⁶ While banning the political party CP86, the District Court argued that the activities of this party violated the generally accepted foundations of our state order, such as freedom and human dignity.⁶⁷

Further research into such possible foundations falls beyond the scope of this article. Nevertheless, the position of religiously inspired political parties is clear enough. These parties have, in principle, the same position as other political parties.⁶⁸ If religiously inspired parties strive for aims contrary to the starting points of a democracy under the rule of law, in Europe, they may be treated differently. Political parties which are convicted for discrimination may lose their state subsidies.⁶⁹ In 2010, the Dutch Supreme Court ruled that political parties may not exclude women when drawing up lists of candidates for parliamentary elections.⁷⁰ The party concerned is the SGP, an orthodox Christian political party, which, on the basis of biblical interpretation, assumes women to have a vocation outside the political sphere.

⁶⁵ ECHR13 February 2003 (GC) *Refah Partisi v. Turkey*.

⁶⁶ G.F.M. VAN DER TANG, *GRONDWETSBEGRIP EN GRONDWETSIDEE* [CONSTITUTIONS CONCEPT AND IDEA] 345 (1998). See also AERNOUT J. NIEUWENHUIS, *Partijverbod en supraconstitutionalisme*, in *OP HET SNIJVLAK VAN RECHT EN POLITIEK* (PRAKKE-BUNDEL) 210–211 (2003).

⁶⁷ The party’s activities were aimed at advocacy of, incitement to, and promotion of discrimination of immigrants, *Rechtbank* [District Court] Amsterdam 18 November 1998, NJ 1999, 377. The political party concerned was already convicted as a criminal organization guilty of incitement to hate, discrimination, and violence, *Hoge Raad* [Supreme Court] 30 July 1997, NJ 1998, 118.

⁶⁸ Vgl. ECHR13 February 2003 (GC), *Refah Partisi v. Turkey*.

⁶⁹ Art. 16 *Wet subsidiëring politieke partijen* [Political parties’ subsidies Act].

⁷⁰ *Hoge Raad* 9 April 2010, LJN BK 4549.

In certain circumstances, a political party striving for the establishment of a theocracy or the introduction of Shari'a may even be banned altogether.⁷¹

6. State, religion, and social services

State and religion meet in society in the social and cultural domain. Of old, churches and religious communities have been involved in physical and mental health care and have supported the poor. Religious organizations in these fields were and still are assisted by a relatively large number of volunteers.⁷²

During the last two centuries, the part played by religious organizations in these areas has decreased, however. First, the above-mentioned services have been professionalized. As a result, the link with religion has become weaker, and the room for voluntary work has diminished. Second, the state has claimed a greater role for itself. Government's task in this field is often affirmed by fundamental social rights provisions in constitutions or treaties, although these rights do not imply that there has to be a public sector supplying all the necessary services. So the question arises, what might be the role of private organizations with a religious background and, more particularly, whether and under what conditions government may or should subsidize such organizations?

Looking at different countries, a varied picture may be seen. In France, after the Revolution, the health care system was secularized, while, at the same time, illnesses were treated on a more medical-scientific basis. The present strong stress on laicism does not mean, however, that organizations such as the Catholic Juvenile Assistance Organization are excluded from financial support by the government.⁷³ In the United Kingdom, a whole range of such organizations is backed by the government.⁷⁴ In Germany, freedom of religion by itself obliges the government to create enough space for this kind of organizations.⁷⁵

Under positive Dutch law, the government has no strict obligation to give those tasks to private organizations. Policy considerations of a financial nature, for example, could point in another direction.⁷⁶ If the government supports private organizations, however, the government may not exclude organizations just because they have a religious background.⁷⁷ Neither may the government favor special religious denominations or "philosophy of life" movements.⁷⁸

⁷¹ ECHR 13 February 2003 (GC), *Refah Partisi v. Turkey*.

⁷² *Cf. Trouw* 18 July 2008.

⁷³ POULAT, *supra* note 10, at 128.

⁷⁴ MONSMA & SOPER, *supra* note 17, at 155.

⁷⁵ *Id.* at 198.

⁷⁶ *Vz ARRvS [Council of State]* 18 February 1988, AB 1988, 312; *cf. ARRvS* 12 March 1987, AB 1987, 287.

⁷⁷ That would be contrary to article 1 (equality principle) juncto article 6 (freedom of religion) of the Constitution. *ARRvS* 18 December 1986, AB 1987, 260.

⁷⁸ *ARRvS* 1 August 1983, AB 1984, 532; *cf. ARRvS* 21 March 1985, AB 1986, 16.

In the United States, the situation is rather ambiguous.⁷⁹ On the one hand, the idea exists that government may not further religion. On the other, organizations with a religious background, active in the child welfare, for example, or care for the elderly, do receive state support.⁸⁰ This kind of funding is not, by definition, contrary to the Constitution's establishment clause.⁸¹ The so called Lemon test still seems to present a rather accurate picture of the criteria, with which such public funding has to be judged.⁸² First, organizations that want to qualify for public funding should have a secular purpose. Second, the primary effect of the funding measure may not advance or obstruct religion. And third, the measure should not lead to an excessive entanglement between state and religion.⁸³

In my opinion, there are two interrelated justifications for supporting organizations with a religious or philosophy-of-life background. People might prefer the social, cultural, or health services offered by such organizations. In any case, the existence thereof increases people's choices. At the same time these organizations can be considered a form of desirable civic "self-rule"; citizens take certain responsibilities, with the result that the government itself does not have to fulfill certain tasks.

Still, it must be stressed that those organizations are supported because and only insofar as they meet professional standards and, therefore, their activities can be considered to be in the public interest. That implies that government may and should lay down quality requirements. These requirements, however, do not regard the religious background of these organizations but their professional activities.

7. State, religion, and education

For ages, churches and religious organizations have played a central role in the field of education. In the nineteenth century, however, in a lot of Western countries a system of public education was developed with, originally, some kind of Christian character.⁸⁴ Further developments in western countries differ widely.

In countries such as Germany—at least in certain states (*Länder*)⁸⁵—Christian values, in some respects, have maintained a position in public education. Lessons in religion, the substance of which is decided by the churches, are a normal part of the curriculum in a lot of public schools. Pupils, however, may obtain an exemption. Case law of the Constitutional Court shows that voluntary "überkonfessionnel"

⁷⁹ More generally, state subsidies play a lesser role in the United States, S. van Bijsterveld o.c. 2006, p. 239.

⁸⁰ MONSMA & SOPER, *supra* note 17, at 39.

⁸¹ In *Bowen v. Kendrick* (1988), 487 US 589, the Supreme Court accepted the backing of a religiously inspired organization giving sex education to youngsters.

⁸² *Lemon v. Kurtzman* (1971) 403 US 602; more recently applied in a.o. *Santa Fe Independent School District v. Doe*, 530 US 290 (2000).

⁸³ In view of the Lemon test, it is to be expected that support for certain forms of religiously inspired relief for drug addicts has invited criticism.

⁸⁴ Kevin Pybas, *Two concepts of liberalism in establishment clause jurisprudence*, 36 CUMB. L. REV 205 (2005–6).

⁸⁵ In Germany, every state has its own system. In Bremen, for example, public schools do not have a Christian character at all.

(supradenominational) school prayers are allowed.⁸⁶ The whole education may also be colored by Christian culture (“christlich-abendländische Kultur”).⁸⁷ Moreover, the government, in certain circumstances, is obliged to support private schools with a religious background, if their quality is similar to the quality of public schools.⁸⁸

There is a world of difference between the situation in Germany and the situation in France. In France, primary and secondary schools in the public education sector are obliged to ban all religious influences. That is thought to be the only way a child is able to develop into a free citizen of the French Republic. In this approach, subsidies for private schools with a religious background are not really acceptable.⁸⁹ Nevertheless, the law permits supporting private schools by paying their teachers’ wages, if the curriculum is comparable to the curriculum in the public education system, and lessons in religion are not mandatory.

In the United States, the “wall of separation doctrine” puts up a barrier for subsidies for private primary and secondary schools.⁹⁰ It has to be added, however, that this wall has become lower.⁹¹ The Supreme Court accepted a system of vouchers that channels government money to private schools by way of the children’s parents.⁹² One may mention, as well, that a lot of private colleges and universities receive state aid, even if they have a religious background. Only if an institution is “pervasively religious” is state support out of the question.⁹³ As far as public education is concerned, Christian influences are, from time to time, judged contrary to the establishment clause.⁹⁴

In the middle of the nineteenth century, the Netherlands had a system of public education imparting general Christian morals. Some stricter Protestant groups found this form of public education neither flesh nor fowl; Catholics were not satisfied, either. So these denominations started their own schools. In 1917, religious parties had achieved such influence in parliament they managed to insert a provision in the Constitution to the effect that private schools have a right to state funding on an equal level with schools in the public education sector. That is the main reason why in the Netherlands the private education sector has an enormous size. Nowadays, however,

⁸⁶ Bundesverfassungsgericht [Federal Constitutional Court] 16 October 1979, E 52, 223.

⁸⁷ Bundesverfassungsgericht [Federal Constitutional Court] 17 December 1975, E 41, 29.

⁸⁸ See Bundesverfassungsgericht [Federal Constitutional Court] 9 March 1994, E 90, 107.

⁸⁹ Ninety percent of the private schools have a Catholic character. J.-M. Piret, *De verhouding van godsdienst en staat (in het onderwijs): historisch-nationale verschillen en Europese convergentie [The relationship between religion and state (in the field of education): historic-national differences and European convergence]*, in SCHEIDING VAN KERK EN STAAT OF ACTIEF PLURALISME? [CHURCH-STATE SEPARATION OR ACTIVE PLURALISM] 136 (P. de Hert & K. Meerschaut ed., 2007).

⁹⁰ A coalition of Protestants and liberals strived for public education; see Pybas, *supra* note 85, at 82. For a comparison between the United States and Germany, see Edward J. Eberle, *Religion in the Classroom in Germany and the United States*, 81 TUL. L. REV. 67 (2006).

⁹¹ *Mitchel v. Helms* (2000) 530 US 793.

⁹² PERRY, *supra* note 61, at 4.

⁹³ Eberle, *supra* note 91, at 67.

⁹⁴ Government may not require schools in the public education sector to hang the Ten Commandments on the wall, *Stone v. Graham* 449 US 39 (1980). A lower court ruled the use of the Pledge of Allegiance (“under God”) in schools in the public education sector contrary to the Constitution, *Frazier v. Alexandre* (S.D. Fla. 31 May 2006).

only in a small percentage of these private schools, religion plays an all-important role.

As far as public education is concerned, teaching of Christian morals as such has disappeared, to be replaced by a certain openness to different religions and philosophies of life.⁹⁵

7.1. Various interests

Churches and religious parents consider education at school one of the means of conveying to children valuable religious ideas.⁹⁶ That very interest has expressed itself in the right to freedom of education.⁹⁷ The government, as well, is not only interested in imparting knowledge and competences. It, too, wants to convey certain common values to all future citizens.⁹⁸

Against this background, some current questions have to be answered. The first question is: Should the government support private schools with religious backgrounds and, if so, under what conditions? The second question is: To what extent should there be room for religious expression in the public education sector?

7.2. State subsidies to private schools

Given the great national differences in Europe, it is self-evident that freedom of education, laid down in article 2 of the First Protocol of the ECHR, does not oblige states to support private schools.⁹⁹ State subsidies, however, have certain advantages. State support leads to diversity in the supply of education. Citizens take responsibility in governing these schools.¹⁰⁰ As a result, government may remain aloof. These advantages are similar to those in the social service sector. An important difference with the social service sector is that private education with a religious background really does convey “religious truths.” In my opinion, that is not, as such, an argument

⁹⁵ See art. 8 lid 3a Wet op het primair onderwijs: “Het onderwijs gaat er mede van uit dat leerlingen opgroeien in een pluriforme samenleving.” Deze norm geldt ook voor het bijzonder onderwijs.

Meer in het bijzonder is van belang art. 46 lid 1 Wet op het primair onderwijs: “Het openbaar onderwijs draagt bij aan de ontwikkeling van de leerlingen met aandacht voor de godsdienstige, levensbeschouwelijke en maatschappelijke waarden zoals die leven in de Nederlandse samenleving en met onderkenning van de betekenis van de verscheidenheid van die waarden.” Apart from that, optional religious education may be facilitated in schools in the public education sector.

⁹⁶ JOSEPH P. VITERITTI, *THE LAST FREEDOM: RELIGION FROM THE PUBLIC SCHOOL TO THE PUBLIC SQUARE* 226 (2007).

⁹⁷ Freedom of education implies the freedom to set up schools with a religious background, cf. ECHR 7 December 1976, Kjeld, Busk Madsen & Pedersen v. Denmark.

⁹⁸ Cf. *Ambach v. Norwick*, 441 U.S. 68 (1979): “The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions.” See also BADER, *supra* note 20, at 155.

⁹⁹ See Van de La Notte, II, 2 2004 for relevant reports of the European Commission of Human Rights. Yet the European Court of Human Rights deems a pluralistic education system essential for maintaining a democratic society, ECHR 7 December 1976, Kjeld, Busk Madsen & Pedersen v. Denmark.

¹⁰⁰ In practice, parents’ influence is rather modest, one reason being the increase in scale of school organizations.

of overriding importance against state support, given the existence of compulsory education and the fact that educating children in schools is, in some respects, a continuation of education at home.¹⁰¹

Still, the conditions to establish for private schools are of the utmost importance. Again, the starting point is that the government will back private schools because and only so far as the education meets quality standards and the teachers are professionals. That implies that disciplines have to be taught thoroughly. Pupils must learn about evolution theory. That does not hamper private schools from teaching, as well, that, according to the Bible, man is—in a higher sense—God's creation.¹⁰²

Quality education has to prepare pupils for active citizenship,¹⁰³ for participation in a democracy under the rule of law. Therefore, some knowledge of the presuppositions thereof, such as freedom of religion,¹⁰⁴ freedom of speech, and equality between citizens, is mandatory. These presuppositions are rather neutral and do not push forward any particular portrayal of mankind. If the religious background of a school prevents fulfillment of these conditions, state support should be out of the question. In other words, one may expect from private schools a certain openness to democracy under the rule of law.

A counterargument might be that these conditions aim too high, given the social and cultural background of some pupils.¹⁰⁵ The teaching of notions like democracy and the rule of law at schools might simply be too demanding at those schools where even keeping the everyday order in class is a quite a job. The argument, however, is not convincing if it is meant that a lot of pupils have a background where democratic values are missing altogether. That would be all the more reason to pay attention to these values at school.¹⁰⁶

Another counterargument might be that private schools may be contributing to the existence of communities that distance themselves from the rest of society.¹⁰⁷ Children, living in these communities and being educated at home and at school both with the same outlook, risk missing a good preparation for active citizenship in a pluralistic society, goes the argument. On the other hand, support for private schools under certain conditions may also lead to understanding democratic values, both through the curriculum itself as well as by the fact that government supports diversity, and citizens and government together are responsible for education. In the Netherlands,

¹⁰¹ Otherwise see PAUL CLITEUR, *DE NEUTR LE STAAT, HET BIJZONDER ONDERWIJS EN DE MULTICULTURELE SAMENLEVING* [THE SECULAR STATE, PRIVATE SCHOOLS AND THE MULTICULTURAL SOCIETY] (2004).

¹⁰² Cf. POPE BENEDICT XVI's ideas in *SCHÖPFUNG UND EVOLUTION*, CONFERENCE PROCEEDINGS (2007).

¹⁰³ Art. 8 lid 3 b Wet op het primair onderwijs [Primary Education Act].

¹⁰⁴ That does not imply that pupils have to be offered a choice between several religions and philosophies of life; pupils must learn, however, that freedom exists for all kinds of ideas.

¹⁰⁵ B. P. VERMEULEN, *ISLAMITISCHE SCHOLEN; FEITEN, KRITIEK, UITDAGINGEN* [MUSLIM SCHOOLS, FACTS, CRITICISM, CHALLENGES] *JUSTITIËLE VERKENNINGEN* [JUDICIAL STUDIES] 44 (2007).

¹⁰⁶ Constitutional law classes are not mandatory; attention for countries or situations where such freedoms and rights do not exist may be a better option.

¹⁰⁷ Cf. Bassam Tibi, *Europeanizing Islam or the Islamization of Europe: political democracy vs. cultural difference*, in *RELIGION IN AN EXPANDING EUROPE* 212 (2006). ECHR 11 September 2006, Konrad v. Germany, recognizes such a risk as far as home education instead of attending school is concerned.

there is no proof that schools with an Islamic background, as such, cannot prepare pupils for citizenship¹⁰⁸ or that they contribute to the radicalization of Islamic youngsters.¹⁰⁹ Nevertheless, news reports exposing abuses in this respect at some schools, may give reason for extra attention by the State School Inspection agency.

7.3. Religion in the public education sector

A different question concerns the position of religion in the public education system. The issue of wearing head scarves has received a lot of attention. However, the curriculum's content is relevant as well. At schools, attention must be paid to freedom of religion and to the diversity of religious denominations and philosophies of life. It is self-evident that teachers may not propagate or attack certain religions.¹¹⁰ When dealing with the issue of religious expression in the public education sector, a distinction must be made between religious symbols installed by the school, religious symbols worn by teachers, and religious symbols worn by pupils.

In Germany, the Constitutional Court judged the regulation in Bavaria, which made it mandatory for schools to install a crucifix, contrary to freedom of religion. This judgment has led to much commotion, which is to be understood against the background that in certain *Länder* public education is informed by Christian values.¹¹¹ In the Netherlands, on the other hand, there seems to be a consensus that pupils at state schools should not learn “under the cross” or under any other religious sign installed by the school.

If a teacher wears a religious symbol, we have a different situation. A teacher may appeal to the right of freedom of religion. Under French law that right carries no real weight for civil servants at work. As has been pointed out, no civil servant is allowed to wear religious symbols. In other countries, such as Germany, freedom of religion carries some more weight for teachers at state schools.¹¹² Nevertheless, state legislators may ban teachers from wearing religious symbols such as headscarves.¹¹³

In my opinion, it is important to understand that teachers do not exercise public authority in the actual sense of this term. The fact that teachers at private schools

¹⁰⁸ VERMEULEN, *supra* note 106, at 43.

¹⁰⁹ BADER, *supra* note 20, at 257.

¹¹⁰ ECHR 7 December 1976, Kjeldsen, Busk Madsen and Pedersen v. Denmark; ECHR 29 June 2007 (GC), Folgerø a.o. v. Norway. Cf. in the Netherlands art. 46 lid 3 Wet op het primair onderwijs [Primary Education Act] reads: “Openbaar onderwijs wordt gegeven met eerbiediging van ieders godsdienst of levensbeschouwing” [Public education respects everyone's religion or philosophy of life].

¹¹¹ Bundesverfassungsgericht [Federal Constitutional Court] 16 May 1995, E 93, 1 (Kruzifix-urteil, Crucifix-decision). The Constitutional Court of Poland did not object to the presence of a crucifix at a school in the public education sector; see RENÁTA ÚITZ, FREEDOM OF RELIGION: IN EUROPEAN CONSTITUTIONAL AND INTERNATIONAL CASE LAW 124 (2007).

¹¹² Bundesverfassungsgericht [Federal Constitutional Court] 24 September 2003, E 108, 282, referred the question to the states' legislators; see, as well, C. Langenfeld & S. Mohsen, *The teacher head scarf case*, ICLR 86 (2004).

¹¹³ A variety of regulations exists; see ARNE TRÄGER, DISCRIMINATION IN THE NAME OF NEUTRALITY? ZUM STAATLICHE UMGANG MIT DER RELIGIONSFREIHEIT 41 (2010).

have similar authority shows this in perfect clarity. Still, the relationship between a teacher and a pupil is longer lasting than the relationship between, for example, a police officer and a citizen. Therefore, the teacher's open attitude is important, more important than the symbol. Yet a comment must be made. A teacher wearing a head scarf should forestall the suggestion this is the right thing to do, especially in a situation where a controversy exists in this respect. If it were established that such kinds of problems regularly occur, reconsideration would be necessary.¹¹⁴

The question whether pupils should be allowed to wear religious symbols is also answered differently in various European countries. Tolerance reigns in England, although not all religious dress rules are acceptable in the public education sector.¹¹⁵ France wants to shield public education, as far as possible, against religious influences and symbols. French pupils seem to be able to become citizens of the French Republic only insofar as they leave their religion at home. In my opinion, pupils are thus erroneously being considered civil servants.

The French law prohibiting pupils from wearing religious symbols has other rationales as well, for that matter. Research has demonstrated that a lot of girls wear a head scarf under pressure from parents or peer groups. I am not sure, however, that the complicated relationship between free choice, education, and pressure can be solved by the government compelling pupils to be free.¹¹⁶ So far, in the Netherlands it has not been convincingly demonstrated that prohibiting pupils from wearing religious symbols would be an adequate or desirable measure. Another reason for the French law was that head scarves were considered Islamic propaganda or a symbol of repression of women.¹¹⁷ Such an interpretation may be considered one-sided.¹¹⁸

8. Conclusion

If religion, in general, is seen as a panacea for many or even all social problems, advocacy of a strong bond between state and religion in every domain goes without saying. The contrary holds true if religion is considered harmful.

If, however, the main point is freedom of religion, the individual citizen should assess the value of a religion. In that case, the issue of the relationship between state and religion falls apart in three dimensions: religion's place in the state domain, government's role in the religious domain, and state and religion meeting together in intermediate domains. These dimensions will be reviewed again briefly.

In a pluralistic society, the state should not commit itself to a certain religion or philosophy of life. That would suggest that a supreme being legitimizes government authority. A neutral exercise of authority regarding religion, in substance and

¹¹⁴ An additional argument might be that teachers wearing a head scarf still could be teaching, namely, in Muslim schools.

¹¹⁵ Gareth Davies, *Banning the Jilbab*, 1 EUR. CONST. L. REV. 511 (2005).

¹¹⁶ OLIVIER ROY, *LA LAÏCITE FACE A L'ISLAM* [LAÏCITE FACING ISLAM] 61 (2005).

¹¹⁷ Cf. ECHR 10 November 2005 (GC). *Leyla Sahin v. Turkey*.

¹¹⁸ Bundesverfassungsgericht [Federal Constitutional Court] 24 September 2003, E 108, 282.

appearance, on the other hand, does not exclude citizens. The counterargument that government, by behaving so, chooses for an atheistic state, is not correct. A state has no conviction and is not comparable to an individual holding a conviction.

Conversely, the government has no prominent role to play in the religious domain. Spiritual welfare is ultimately a personal or institutional affair. That citizens might be offended by the religious doctrines of others is the price to be paid for fundamental freedoms. Only if preaching switches to intimidation or incitement to violence or if religion inspires criminal offenses is government intervention mandatory. As a result of government restraint, there may exist a diversity of denominations, neither supported nor evaluated by the government.

It would be strange, indeed, if religious and philosophy-of-life diversity were not recognizable, to a certain extent, in political opinion formation. Still, it is desirable that arguments in political discussions are able to appeal to every citizen. Government, however, has no steering role, here, even while supporting political parties financially. In Europe, it would be different if a party were to attack the premises of a democracy under the rule of law.

In the social service sector all kinds of private organizations, often with religious backgrounds, may fulfill tasks that otherwise would be the state's responsibility. Such forms of "self-governance" increase diversity and freedom of choice. Backing by the government, on an equal level with public institutions, therefore, is justified. A precondition for receiving support is meeting professional standards.

In principle, this holds true for the educational sector as well. Even if private schools convey religious dogmas, subsidies can be justified, given compulsory education and the parents' freedom to bring up their children according to their values. Yet, the curriculum has to meet professional standards, not leaving out important scientific doctrines. Moreover, an added condition would be a certain openness to democracy under the rule of law.

Distinguishing several dimensions makes it possible to give a subtle and balanced answer to the question of state–religion relationships: separation where necessary, "allowing for" where acceptable, and supporting diversity where justifiable.