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Church and State in Western Europe and the United States: Principles and Perspectives

*Dr. Sophie C. van Bijsterveld**

I. INTRODUCTION

In transatlantic debates about the relationship between church and state and about the relationship between religion and the law, references to a difference in understanding of religious liberty are common. Western Europeans and Americans generally agree on the need for religious liberty, but this does not mean that their understanding of the term “religious liberty” is the same. Indeed, western European ideas about religious liberty often clash with American ideas—especially in the area of public accommodation of religion. In this area, western Europeans have been much more willing to forge a cooperative, even facilitative, relationship between church and state.

By presenting a brief analysis of western European experiences and by offering some ideas on the nature of western European and American approaches toward freedom of religion, I hope to explain this disjunction. The ideas that I would like to propose can be summarized in three points. First, models and structures of religion and law are—and to a certain extent should be—context dependent. In evaluating the variety of western European systems, one needs to pay attention to legal traditions, social reality, history, and the political context. Second, to a greater or lesser extent, western European systems take the public dimension of religion into account. Religion is not traditionally seen as solely a private matter. The recognition of the public dimension of religion can raise questions with respect to state neutrality and equal treatment of religions (especially in the case of a strong majority-minority situation), but such questions need to be dealt with in a creative way. Third, the American perspective embodied in the phrase “Wall of Separation” is more a hindrance than a help in explaining the western European/American approaches in their actual legal reality.

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II. THE WESTERN EUROPEAN HISTORICAL AND LEGAL TRADITION
WITH RESPECT TO CHURCH-STATE RELATIONS

In its most institutional form, the relationship between religion and law is expressed in the legal relationship between church and state. In western European countries, these relationships take the shape of separation between church and state, cooperation between church and state, or established church systems.¹ These systems are often deeply rooted in legal and historical traditions. Additionally, in pluralistic and individualized societies, these characterizations, to a large extent, shape the “constitutional identity” of a country.²

The characterizations of France as a *république laïque* and the position of the Church of England as an established church are examples of how the relationship between church and state can shape the constitutional identity of a country. In general terms, these characterizations tell us something about the balances that exist between the spiritual-religious and the legal-political organization of the state.

The western European constitutions, each in their own way, create a balance in the relationship between church and state and between religion and law. For example, the Irish system of organizational and financial separation of church and state compensates for the strong position of the church in society. In addition, the financial relationships in Belgium and Luxembourg (countries in which the state provides for the wages and the pensions of the clergy) and Germany (with a state supported system of church tax collection) go hand in hand with guarantees of organizational independence and church autonomy. Finally, Italy and Spain combine guarantees for minority churches with the guarantees granted the majority Church in the constitution as an expression of social reality.

The western European systems are, as noted earlier, deeply rooted in historic traditions. However, they are *not static*. In the western European arena, we could speak of a certain “erosion of extremes.”³ In Finland and Sweden,⁴ for example, certain develop-

1. For an analysis of religious freedom in Western Europe, see generally, SOPHIE C. VAN BIJSTERVELD, *GODSDIENSTVRIJHEID IN EUROPEES PERSPECTIEF* (1998).

2. For examples of church and state systems in various western European countries, see *STATE AND CHURCH IN THE EUROPEAN UNION* (Gerhard Robbers ed., 1996). See also STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, *THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES* (1997).

3. This is an expression used by the German scholar Marré with respect to financial relationships between church and state. In my view, this expression is more generally applica-

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ments have placed the various churches on an equal footing. A similar move towards this kind of equality took place in the 1970s in the southern countries of Italy, Portugal, and Spain.

In Denmark and England, the constitutional positions of the established churches seem to be quite firm. The "sharp edges," however, are largely softened by secondary legislation. In a country like France, where the idea of separation of church and state was quite rigorously introduced in the early twentieth century and where the idea of separation of church and state still has a strong ideological charge, church and state increasingly intersect in various areas of the law.

Another observation must be made with respect to these typologies. Although these typologies can be very useful in analyzing, examining, and evaluating the legal relationships between church and state, they do not always give a clear insight into the more refined developments that are taking place in the legal relationships between church and state. In other words, we *must not overrate these typologies*. This is so for two reasons. First, legal similarities and differences in law relating to church and religion often run crosswise through all of these typologies. At the subconstitutional level, the picture may seem somewhat different than what the typologies suggest. Second, the interactions between church and state in current western European times seem less focused on the institutional positions that are expressed in these typologies. Contemporary developments are more concerned with social aspects of religion, especially with value discussions and ethical approaches. However, with these two relativizations, the importance of the churches' institutional positions is not challenged. On the contrary, an adequate institutional legal position is seen in western Europe as the basis for the presence of religion in society.

III. THE PUBLIC DIMENSION OF RELIGION

Religion is more than adherence to a set of intellectual beliefs and the manifestation of these beliefs through certain rituals. Religion is a complex social reality. It is linked to thought, to action;

ble. See HEINER MARRÉ, DIE KIRCHENFINANZIERUNG IN KIRCHE UND STAAT DER GEGENWART 30 (1991).

4. For recent developments in Sweden, see generally, E. Kenneth Stegeby, *An Analysis of the Impending Disestablishment of the Church of Sweden*, 1999 BYU L. REV. 703.

it influences our view on humanity and on the world; it influences culture and our concept of freedom itself. It is clear that religion as a social phenomenon is thus not restricted to the "private sphere." This is realized in most western European countries and demonstrated in the creation of certain legal mechanisms, in enabling participation in public systems of mass media, in education systems, in incorporation in public services, in chaplaincy services, in the system of public holidays, and in building facilities and ancient monument care.

Obviously, and inevitably, church and state meet in the implementation of such facilities.⁵ Criteria must be defined, and sometimes specific or general systems of "recognition" must be established. A solution for avoiding these "encounters" between church and state, and for coping with religious pluralism, is "privatizing" religion, i.e., guaranteeing liberty for the exercise of religion in the private sphere and barring it from the public sphere. Such privatization of religion is sometimes also advocated from an equal treatment perspective. Complete neutrality and the absence of any kind of differentiation can only be realized in a system in which church and state are so separate that no connection whatsoever exists between churches and the state or between religion and the law. The moment such connections are established a certain differentiation occurs, especially in cases where there is a marked numerical disparity between the adherents of the various religions. It is clear that in western Europe such strict neutrality does not exist and furthermore that it is not desirable from the point of view of religious freedom.

Accepting this lack of neutrality almost inevitably leads to a certain differentiation between religions. Total neutrality would certainly mean (formal) identical treatment of religions but would ignore social reality and in the end might be detrimental to religious institutions participating in society, as compared to secular institutions.⁶ The point is to achieve equal treatment of religions in the sense of fair and adequate treatment, not of strict identical treatment. This means creating a balance in the law, which, on the

5. See Sophie C. van Bijsterveld, *Religion and the Law: Legal Structures in an International and Comparative Context*, in CONFERENCE OF EUROPEAN CHURCHES: CHURCH AND STATE CONSULTATION 22-36 (1998).

6. For a discussion on the meaning of equality in the German context, see Martin Heckel, *Gleichheit oder Privilegien?: Der Allgemeine und der Besondere Gleichheitssatz im Staatskirchenrecht* (1993).

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one hand, does not conflict with social reality but, on the other hand, provides access, on appropriate footing, to minority religions. The state should take specific care to provide a viable religious freedom to minorities when it seeks to create this balance. It is also clear that existing structures should be subjected to a critical test from time to time when circumstances change.

The Netherlands provide an example of how existing structures can change with changing circumstances. Traditionally, Christianity was predominant, and a variety of denominations existed. Today there is also a large number of Islamic adherents. In the field of spiritual care in public institutions, such as penitentiary institutions, the number of adherents do not justify identical facilities for providing spiritual care. The consequence should not be that the persons concerned are excluded and have no access whatsoever to the provision of spiritual care, but neither should the consequence be that the chaplaincy is altogether abolished for the other religions. Thus, tailor-made solutions need to be found. For instance, services can be provided on an individual basis or by setting up a central service station in the country that can provide for care throughout the institutions in the whole country. Should the numerical balance change, an "ordinary" provision would then be accepted. For instance, smaller Protestant churches often do not qualify on their own, but they have a tradition of cooperating and taking joint initiatives on the basis of a rotation system. An atmosphere of open-mindedness and tolerance is essential if such goals are to be achieved. Examples of such tailor-made, creative approaches can be found in other western European countries as well.

A general conclusion is that state neutrality towards religion does not mean that church and religion should be ignored but that they should have a place in the framework of law. Religious pluralism is no reason to altogether ignore religion in the law. Appropriate solutions are demanded to deal with majority-minority situations.

IV. WESTERN EUROPE AND THE UNITED STATES

How does western Europe compare to the United States in this field? It is clear that the Jeffersonian expression of the "Wall of Separation" has no real equivalent in western Europe, even in countries with a separation of church and state. The Netherlands, France, Ireland, and Portugal could not be qualified in such rigorous terms. Even if the actual situation may be more complex and

differentiated, in the United States the phrase “Wall of Separation” seems to have a strong and positive ideological charge.

Just as western European systems of church and state are influenced by historic and social realities, the introduction of the system of separation of church and state in the United States can also be explained in terms of historical and functional reasons. Within western Europe, legal similarities and differences in the law relating to church and religion often cross the boundaries of the typologies of establishment, cooperation, or separation.

In order to compare the United States and western Europe at the subconstitutional level, let us take a closer look at some common features in western Europe.⁷ Some common features of the church-state systems⁸ in western Europe are:

- Freedom of worship, individually and collectively;
- A degree of church autonomy (in systems with established churches, at least for the non-established churches);
- State facilitated (financed) chaplaincy services in public institutions;
- Financial relief in the form of direct support and/or tax reliefs;
- Participation and/or representation in mass media and school systems;
- Support on an equal treatment basis in the cultural and social realm, such as in the case of ancient church monuments and social care.

Some of these features can also be found in the United States. State funded chaplaincies are not altogether unknown in the United States. Tax relief systems and perhaps even ancient church monument care also exist. It is precisely for these reasons that western European countries, even if they have a system of separation of church and state, do not regard themselves as having a system of *strict* separation of church and state. This results in a difference of perspective.

7. For an examination of these features, see Silvio Ferrari, *Church and State in Europe: Common Pattern and Challenges*, in WHICH RELATIONSHIPS BETWEEN CHURCHES AND THE EUROPEAN UNION? THOUGHTS FOR THE FUTURE 33-43 (Hans-Joachim Kiderlen et al., eds., 1995).

8. These features vary in detail and in their precise legal concretization.

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Real differences between the United States and western Europe exist as well. In the representation of religion in the public sphere and the social and the cultural area (public mass media, schooling, charitable institutions), the United States' system provides a different outlook than that of the western European systems. It is clear that in these areas the American doctrine of the "Wall of Separation" comes to the fore; the differences we are dealing with here seem to have a principled background. However, there may be another more general socio-legal circumstance that plays a role. Generally speaking, far-reaching financial redistribution mechanisms⁹ are operated by the state through the tax system in western Europe. In the Netherlands, for instance, income tax can run up to 70%, and that level is reached fairly quickly; property taxes are also substantial.

With the growth of the welfare state, state intervention has developed to a considerable scale. Thus, the state has a large facilitating role in the educational, social, and communicative sphere.¹⁰ In such a system, in which the state is the apex of redistribution of goods, it would easily conflict with the principle of neutrality to exclude denominational activities from the sphere of facilitating and finance just because they take place on a denominational basis.

It is my understanding that the private sector in the United States is still very much a private sector, and the role of the state in the redistribution of goods is modest compared to that of western Europe. If this is the case, doesn't that mean that the "Wall of Separation" should be seen in a different light?

9. For a discussion on financial relationships between church and state, see R. Torfs, *Sollten Kirchen Subventioniert Werden? Modelle und Perspektiven*, in *GEWISSEN UND FREIHEIT* 90-103 (1997).

10. Even where purely private initiatives existed historically—sometimes alongside public initiatives or mixed initiatives—the state has "incorporated" these in the overall regulation and budget systems in these areas, such as in the sphere of health care.

