

## Summary

The position of the church in the law of the Netherlands is explored in this study by means of three research questions. These questions address:

1. the constitutional frameworks in which churches in the Netherlands function,
2. a number of limitations on the institutional freedoms of churches, and
3. the financial support of churches by the government.

### **Part 1: Constitutional frameworks: from the separation of church and state to the state's neutrality**

The constitutional frameworks in which churches in the Netherlands function are described in part 1.

### **2 Separation of church and state in the Netherlands: historical outline and contents**

In *Chapter 2*, the historical development of the principle of the separation of church and state in the Netherlands is considered. The connection between the previously dominant (Dutch Reformed) church and the state began to unravel with the Batavian Revolution, when the state gave up its authority to interfere with the organisation and governance of some churches. The process was accompanied with the recognition of the equality of other religious affiliations, important steps in which were the Constitution of the Batavian Republic [Bataafse Staatsregeling] of 1798 and the Constitution of 1848. These steps placed the state above the churches, which only have a status under private law. The churches did not possess any authority under public law anymore. In 1972 financial links that had been set down in the Constitution were also broken. This cutting of the 'silver cord' arose out of the principle of the separation of church and state. The concept '*kerkgemeenschap*' - church including its fellowship or community - was also introduced with this revision of the constitution, but no definition was given. What is apparent from the various constitutional provisions is that the government has a positive attitude towards religion as such.

### **3 Freedom of religion in article 9 of the European Convention on Human Rights**

*Chapter 3* addresses the collective aspect of the right to religious freedom as stated in article 9 of the European Convention on Human Rights (ECHR). It is discussed in respect of Strasbourg case law in particular. The European Court of Human Rights has established a number of boundaries with regards to the exercise of this right in various rulings. These rulings further elaborate the obligations of states under the Convention with regards to religious communities. A religious community has, for example, an independent claim - therefore not dependent on any of its members - to the rights and freedoms that are guaranteed by the ECHR and the right to freedom of religion in particular. This is also accompanied, by extension of article 11 of the ECHR, by the right to freedom to organise one's own community.

An important element of the freedom to organise is that the religious community is autonomous and can become a legal entity. The religious community must be able to do this without the obligation to make use of auxiliary legal entities. The state is obliged to safeguard pluralism and tolerance and to achieve that, it must be impartial and neutral and it must create the conditions in which various religious communities can co-exist in peace. This includes on the one hand the obligation of governments to abstain from interfering in the organisation of religious communities and on the other hand, the obligation to intervene if religious minorities are hindered by others in the exercise and realisation of their right to religious freedom.

In some circumstances, however, states may limit the right to religious freedom. Article 9(2) of the ECHR lists three cumulative main conditions that a limitation of the right to religious freedom has to satisfy. The first main condition is that the limitation must be provided for by law. This also includes unwritten law as well as legislation of a general nature however. It is important that the limitation is sufficiently precise so that the party subject to the law can adjust its, his or her behaviour and has sufficient time to do that. The second main condition is that the limitation must have a legitimate purpose. The only legitimate purposes permitted are listed in article 9(2) of the ECHR. An important point to note is that the convention signatories have a certain amount of freedom in deciding such purposes. The third main condition is that the limitation is necessary in a democratic society. The European Court of Human Rights has developed two sub-conditions for this. Firstly, there must be an urgent social necessity: the mere usefulness or desirability of such a limitation is insufficient. Exceptions to the freedom to organise religious communities must be narrowly construed. Secondly, the limitation must be proportional and sufficiently and objectively justified. This requirement is related to the freedom of judgement that the state has in respect of the objective. The state must also be able to provide sufficient and objective justification for the necessity of the limitation in a democratic society. Sometimes there can be a conflict with the fundamental rights of members or officials of a religious community. In such situations, the principle is that the standards applicable within the religious community are binding; the rights and freedoms of its members and officials are subordinate in principle to those of the community. The religious community cannot demand loyalty in all circumstances, however. The interests and fundamental rights of the church member concerned, such as the rights protected by article 8 of the ECHR, will also be considered in a court judgment.

#### **4 Equal treatment of churches**

The permissibility and impermissibility of the equal or unequal treatment of church communities under international law is addressed *in chapter 4* which focuses on article 14 of the ECHR. The European Court of Human Rights applies a number of criteria when deciding if there has been a breach of article 14 of the ECHR. A convention state has a certain leeway when it comes to setting policy. This means that when deciding whether there has been prohibited discrimination, the European Court of Human Rights is restrained in respect of the policy pursued by a convention state.

Based on the case law discussed in this chapter, it appears that the unequal treatment of churches is permitted in principle if there is an objective and reasonable justification. The state must be neutral and impartial in the exercise of its regulatory powers, however. For example, the state cannot in principle apply a waiting time to one church to become a legal entity and not to another. A church must also be able to acquire a legal form so that it can defend itself before the law. How the church can become a legal entity is a question for the state. The state may attach conditions to becoming a legal entity if those conditions are necessary and proportional in respect of the legitimate objective. The state must also handle the procedure for recognising a church as a legal entity with care. This doesn't just relate to how long the process takes, for example, but the content. The state must be clear about the requirements. The criterion of subsidiarity also plays a role: the state must make it clear that the problems it wants to address cannot be solved with less drastic measures than the (withholding of) recognition. In respect of fiscal measures, a measure must in general be neutral. It must therefore be applicable in principle to all religious communities. That some conditions may affect certain religious communities in particular may be permissible however. It partially depends on the objective of the condition in question, an objective in which the convention state also has a great deal of freedom in which to apply its judgment.

## **5 Freedom of religion in article 6 of the Constitution**

*Chapter 5* addresses the national constitutional framework, in which the church also has a place, and article 6 of the Constitution in particular. As well as churches, the article also addresses other communities in respect of professions of faith or belief in fellowship with others, irrespective of whether those communities are legal entities or not. The first subsection of article 6 of the Constitution provides for the expression of the freedom of religion or belief. This includes behaviour that, by objective standards, gives direct expression of a religion or belief. The behaviour must therefore be something that can be assessed objectively. Furthermore, a subjective interpretation would be difficult to apply: anyone could otherwise interpret the right as they see fit which would mean that it would in fact be unlimited. This does not mean, however, that personal views do not play a role: based on the principle of interpretative restraint, the opinion of the person who makes a claim on this fundamental right still counts even if it is not evident that the behaviour in question is not an expression of a religion or belief. In these situations, the person who makes a claim under this fundamental right, is given the benefit of the doubt.

A restriction to the fundamental right as described in the first subsection demands legislation. Limitations for specific expressions outside of buildings or private places can be established by subordinate legislation. The Public Assemblies Act [Wet openbare manifestaties or WOM] offers a formally legislative basis for local government to establish restrictions.

The importance of article 6 of the Constitution seems limited because of the far-reaching protection that article 9 of the ECHR and Strasbourg case law offer in respect of the freedom of religion and belief. Furthermore, while in my opinion the distinction between expressions in, and outside of, buildings and private places referred to in article 6 of the Constitution can be explained in a historical context, it currently has less importance given the doctrine of the reasonable interpretation of fundamental rights as well as the increasing importance of

article 9 of the ECHR. Within a religious community, the fundamental right of a member to freedom of religion is limited to the right to joining or leaving that community. A member accepts the rules that that religious community has established by virtue of their membership. That member is always free to leave whenever he or she wishes.

## **6 Separation of church and state in the Netherlands and the neutrality of the state in Germany**

*Chapter 6* addresses the principle of the separation of church and state. This principle entails a prohibition and obligation, namely the prohibition on the exercise of institutional power of church and state over each other, as well as the obligation of the state to maintain a neutral position towards church communities so that those communities are in principle treated equally.

The principle is closely related to opinions about the religious neutrality of the state. These express, after all, views about the intervention of the state in the church and the intervention of the church in the state. Some of these views in the legal literature are described in this chapter.

Van der Burg points out the freedom in the public domain that the state may or may not allow religion and even, in the models of inclusive and compensatory neutrality, how it may support religious denominations. He considers inclusive neutrality the best model for the situation in the Netherlands: religion gains access to the public domain and the government can support religious denominations financially on the principle of proportionality.

Vermeulen outlines five church-state models. He characterises the church-state model in the Netherlands as pluralistic co-operation, thereby placing the emphasis on the collaboration between the various church communities and the state. Religion is allowed every freedom in the public domain. The government treats the various denominations the same.

Van Bijsterveld states that the principle is the result of a historical development. In this sense, the final point has not yet been reached and that the relationship between church and state is not immovable. Developments continue and so the principle does not dominate every terrain on which the government has to deal with the church anymore. Church communities therefore have to be treated more like social organisations which, just like non-religious communities, participate in society and maintain contact with, for example, the government.

The three views above do not contradict each other but illustrate different aspects of the religious neutrality of the state. It is clear that religion and religious denominations are allowed to occupy a place in the public domain but that freedom is nevertheless under pressure. The freedom also includes the ability to receive support from the government. The principle therefore says something about the position of the state in respect of religion. It also means in the Dutch situation that the state does not identify with any one particular denomination. The state does, however, have a positive attitude towards religious organisations in principle as long as they also contribute to the objectives of government policy. In this respect, religious organisations are no different than other agents in civil society like political or cultural organisations. It is why it is possible to grant church

communities funding, or a non-profit status for fiscal purposes, albeit under the conditions arising out of the principle of the separation of church and state. Vermeulen calls this pluralistic co-operation; Van der Burg, inclusive neutrality.

The situation in Germany is also considered. An important aspect in the relationship between church and state there, is the *Stufenparität*, a staggered degree of equality. This distinction is generally not as hard in the Netherlands, although in practice, churches are treated differently, despite the maxim of equality. Such differences in the treatment of churches can be objectively justified; the categorization of different sorts of faith community can also be useful in clarifying issues in this area in the Netherlands. There can also be good grounds in my opinion to justify treating churches differently in the Netherlands. These might be objectively measurable details and activities like the number of members and socially beneficial activities like welfare work that churches organise.

## **Part 2: Restrictions on institutional freedom**

The second part addresses a number of restrictions in specific regulations on the institutional freedom of churches. These include the requirement that churches register themselves and the question whether they can be dissolved, but also the effect of employment law and the principle of equality in internal relationships within church communities.

## **7 Restrictions on the institutional freedom of churches**

*Chapter 7* addresses the relationship on the one hand between the fundamental right to equal treatment and the prohibition of discrimination as set out in article 1 of the Constitution and as elaborated in the Equal Treatment Act [Algemene wet gelijke behandeling or AWGB], and on the other hand, the fundamental right to freedom of religion insofar as it relates to churches. The focus in this chapter is on article 3 of the Equal Treatment Act, precisely because this article is very important for churches. After a discussion of the creation and structure of the Equal Treatment Act, the Framework Directive is addressed. The European Commission found the Netherlands in breach of this directive because it had not been implemented properly. It concerned in particular the 'sole grounds formulation' and the degree of freedom that organisations have in respect of their policy towards staff on religious grounds. This led to different reactions and recommendations in the Netherlands, from, in particular, the Council of State [Raad van State] and the Equality Commission [Commissie gelijke behandeling of CGB]. Steps are then described that led to the abolition of the sole grounds formulation. Articles 5 and 7 of the Equal Treatment Act were amended so that the construction was replaced by criteria, derived from article 4 of the Framework Directive, which have to be fulfilled if an organisation with a philosophical, political or religious basis wishes to make a distinction in its policies on staff, clients or membership. The consequences for the balance of fundamental rights are also considered, in particular, the relationship between the principle of equality and the fundamental right to freedom of religion.

The Equality Commission has interpreted article 3 of the Equal Treatment Act in more detail

in a number of important judgements, in particular in respect of two key questions, when an organisation can be regarded as a legal entity in the sense of article 2(2) of the Civil Code or an association with a spiritual basis, and when there are legal relationships within or outside of this category of legal entity. These judgements are also provided with commentary, which describes, among other things, that the Equality Commission applies a limited interpretation to article 3 of the Equal Treatment Act so that religious organisations have less freedom in society to maintain their basic principles. The chapter concludes by addressing the consequences of this interpretation for clerical office.

## **8 The church, its independent parts and bodies**

*Chapter 8* focuses on the church as a legal entity. An important question is what a church [church fellowship, community or congregation, etc.] is. There have been various attempts to define the concept. Duynstee's definition is considered first. This definition is the stock onto which later definitions have been grafted. Duynstee seems to have made a theological choice in his characterisation of the church as an association of people. The literature since has mostly chosen, in my opinion, correctly, to use the term 'organisation'. Duynstee also formulates an objective and a basis in his definition. One may ask oneself if this isn't superfluous and belongs sooner on the terrain of the theology and the believers concerned. The legal expert may perhaps limit his or herself to the description of the actual organisation and activities of the church. The search for a definition may be less useful. Legal experts may restrict themselves to the description of a number of characteristics. In my opinion, a legal entity has to be found that offers religious and philosophical communities an equal degree of protection and freedom in how they organise themselves precisely because of the equality of religion and philosophy in both article 6 of the Constitution and article 9 of the ECHR. A change in the law would be necessary however. The concept 'church' could then be replaced by, for example, the concept 'religious institution'.

The independent part is then described. Three categories of criteria can be distilled from the law, literature and case law for this. The first category concerns criteria which can be used to ascertain whether the entity in question is a part of a church despite being an independent part; the second category concerns the criteria for determining the legal entity; and the third category concerns the criteria for answering the question of whether the part is a part of the church. In this respect, the question is important whether the field of activity of the independent part is limited to that which is related to the service of worship or whether it can be interpreted in a wider sense so that, for instance, education or care for the elderly are included. In my opinion, a broad interpretation is appropriate. This avoids the court or government bodies having to involve themselves in the interpretation of doctrine and how the church understands itself.

Bodies in the sense of article 2:2 of the Civil Code are subsequently addressed. The introduction of the statutory legal form 'bodies in which churches are united' concerns in particular the codification of case law in respect of churches of a Reformed character. A characteristic of the body is that a participating church can leave the body. This does not mean that there is a loose association: a body consists of churches that are closely related to each other under ecclesiastical law and present themselves in that body as one organic unit.

The trio of independent part, church and body are sources of discussion in my opinion. It is evidence of certain theological assumptions and limits the organisational structure of faith communities so that discussion can arise about whether a body can itself establish an independent part or body and whether in turn an independent part of a church can establish another independent part.

The reasoning of article 2:2 of the Civil Code is that faith communities and their relationships are legal entities if the latter satisfy the criteria applied in literature and case law. This emphasizes the desirability, in my opinion, of the replacement of this trio with the concept 'religious institution'.

## **9 Clerical office**

*Chapter 9* considers the legal position of people who serve in a clerical office who are paid for their work.

First, the separation of church and state is considered in respect of employment law. In respect of those who serve in a clerical office, how far can churches go in applying rules that deviate from secular employment law? And vice versa: how far can the government go in setting rules which limit the autonomy of churches in, for example, the area of employment and social law? The chapter then concentrates on the legal position of clerical officeholders and its assessment by a civil court. Partly depending on whether an ecclesiastical legal procedure is covered by sufficient safeguards and the clerical officeholder is subject to them, the ecclesiastical legal regulations and the related decision-making related to them can be tested by a civil court. This does not prevent someone who serves in a clerical office from seeking compensation from a civil court, however, but ecclesiastical relationships will be significant when deciding such a claim.

The chapter then addresses the question of the classification of the commitment between the clerical officeholder and the faith community to which he or she is attached. The conditions under which this commitment falls is considered: as an employment contract in the sense of Book 7.10 of the Civil Code, as purely a commitment under ecclesiastical law, as a unique (*sui generis*) commitment or as a double legal relationship, namely a contract of employment as well as a commitment of its own kind. Finally, attention is paid to the position of the clerical officeholder in respect of social security. Irrespective of the classification of the commitment of the paid clerical officeholder under civil law, it must be possible to regard these commitments as notional or other employment for the purposes of the law on social security. This would allow even small churches to offer a sufficient level of social security to their clerical officeholders who are not employees.

## **10 Permissibility of the registration of churches**

*Chapter 10* addresses whether the registration of churches is permissible in the light of the right to freedom of religion.

First is described that the requirement for faith communities to register is not in itself in conflict with international or national law. However, the *legal consequences* of registration may well be in conflict with international and national law. Where the government acts as a neutral organiser of social legal matters, registration of churches is permissible in my

opinion. The government may also demand from churches that they even register details of their name, address and representatives with the aim of providing legal certainty and to protect other parties with legal rights. Such a form of registration leaves the churches' freedom to organise and manage themselves intact.

A reasonable interpretation of the right to freedom of religion means, in my opinion, that churches cannot evade registration in its current form. The registration is after all partly intended to create certainty in legal matters and not to restrict religious freedom. Registration is therefore in principle permissible as long as international and national restrictive criteria are observed.

The chapter then addresses the introduction of compulsory registration for churches with the Commercial Registers Act [Handelsregisterwet] which came into force in 2008.

It is described in the chapter how the original bill took little account of the special position of churches and proposed a more extensive form of registration. This was substantially amended during the parliamentary treatment of the bill. Compulsory registration for churches was finally elaborated in the Commercial Registers Decree [Handelsbesluit]. This established the basic principle that only the name and address of churches at the highest incorporated level of legal entity have to be registered. In the absence of such an umbrella organisation, the church in itself is sufficient.

This chapter also contains a number of critical comments on this form of registration. They arise in particular out of the circumstances that compulsory registration has not been elaborated in legislation. This is, in my opinion, a missed opportunity.

A preferably voluntary option of registering more extensive details of churches could have contributed to facilitating legal matters. It is conceivable that a facility for ecclesiastical representation could be included in the commercial registers. People could also be registered who have the authority to represent the church. This would not have to be an obligatory form of registration; the registration of such details could be optional.

## **11 Dissolution of churches: options and limitations**

Chapter 11 first describes how churches can be dissolved. Whether churches can decide to dissolve themselves is addressed as is whether a church can be dissolved because of bankruptcy.

The chapter then addresses whether the government can dissolve a church via the court. The fact that this is in principle possible is discussed: the Constitution and the ECHR do not pose any obstacle. In principle, the legislator has the authority to establish a means of dissolution as long as it satisfies the requirements of the Constitution and the ECHR. The chapter does however state that that means to dissolve a church is currently lacking. Current legislation is not adequate in my opinion because an analogical application of article 2:20 of the Civil Code does not appear to be possible.

Various solutions to this problem are conceivable however. A special dissolution procedure could be applied that is specific for churches.

A court would have to order the dissolution of a church and it would, in my opinion, only be able to do that by applying comparable criteria as when disbanding a political association, for example. If there was any doubt, the court would have to reject any application for dissolution.

In my view, articles 2:2(2) and 2:20 of the Civil Code should be amended to create a legal basis for the dissolution of a specific church.

### **Part 3: Financial support**

The financial support of churches by the government, by means of, for example, subsidies and tax advantages, is treated in the third part.

## **12 Subsidy for churches**

Chapter 12 focuses on the granting of subsidies to churches.

The general framework in which churches can be subsidised or not is considered first. There is a description of the fact that subsidy to churches can be reconciled with the current model of the separation of church and state in the country. A distinction by the government between institutions of a philosophical or religious nature and other legal entities is not permitted. It is also important that no distinction is made between different churches unless that distinction can be justified objectively. It is true that churches are generally eligible for subsidy but it is also possible that the activities of some churches will not be eligible because they are aimed at religious education.

The literature makes it clear that the administrative body is itself obliged to maintain the general principles of good governance when imposing conditions for receiving subsidy. The administrative body must abide by a number of procedural requirements described in article 4:39 of the General Administrative Law Act [Algemene wet bestuursrecht] if it wants to set conditions for the receiver of subsidy that are not connected with objectives.

The chapter also addresses the limits to conditions on subsidies to churches, seeking a general framework in order to address an area of tension. Parallels are drawn with contracts that limit fundamental rights, the German model of subsidising churches and the funding of political parties in the Netherlands. In Germany, churches and other organisations with a particular identity or tradition are exempted from requirements with respect to the structure and organisation of, for example, other subsidised institutions. Participation legislation is in principle not applicable, for instance. Churches are told for what objectives they can spend the subsidies however.

Conditions attached to objectives are in principle permissible insofar as they are obligations aimed at achieving those objectives and ensuring legitimacy. Conditions attached to objectives that extend further, that assert control, are only permissible if churches have the freedom to satisfy such conditions in a way determined by themselves. Conditions attached to objectives must always be *necessary* in order to promote the interests that the granting of subsidy is intended to achieve. Conditions that are not attached to objectives are not permitted in relation to churches in principle although article 4:39 of the General Administrative Law Act does allow space for them.

With regard to the *way* the intended objectives are achieved, it must, in my opinion, be left to the church itself. It is therefore conceivable that if there is a subsidy condition that there must be staff participation in decision-making, for example, the church can draw up a participation scheme that corresponds with its own constitution. In this way, the fundamental right of freedom of organisation and governance of the church, arising out of the freedom of religion, is respected while the subsidy provider's objective of strengthening participation is also respected. A church then has the freedom to achieve the objectives subject to subsidy conditions in a way that is easiest for it.

### **13 Funding of education and training for clerical office or other spiritual position**

*Chapter 13* focuses on the funding of education and training for clerical office. In the past, only the Dutch Reformed Church received funding for this but other denominations began to receive funding later as well. They were added to the list of churches which received funding for education and training for clerical office. Whether the separation of church and state means that the government gradually undoes the financial ties and thus reduces the privileged position of one or more churches in this case, has hardly been addressed. Whether the principle of the equal treatment of churches means that other new or not yet subsidised churches could be eligible for funding has similarly been ignored. Clear criteria which an education or training for clerical office must satisfy in order to be eligible for funding are lacking as a consequence.

There was consideration of the consequences for the funding of education or training for clerical office when the relevant provisions of the old University Education Act [Wet op het wetenschappelijk onderwijs] were amended. The government wanted to make the treatment of the various churches equal and to introduce an adequate funding system. It was in that context that the Dutch Reformed Church was gradually removed from its special position. When the Higher Education and Research Act [Wet op het hoger onderwijs en wetenschappelijk onderzoek] was introduced, however, there was hardly any consideration of whether the government should subsidise ecclesiastical education.

A clear policy on this therefore deserves to be formulated in my view. The basic principle should be that the funding of ecclesiastical education or training is possible. Ecclesiastical training and education generally lead, after all, to a socially useful profession and the government usually funds that. Besides, the government already subsidises various forms of ecclesiastical education and training.

Since the turn of the last century, the government has approached the funding of education and training for clerical office from another perspective, partly as a consequence of the debate about integration that has flared up. The focus was partly on the possibility of starting training and education for imams and, to a lesser degree, pandits, in the Netherlands. The main reason for this was the desire to promote the integration of ethnic minorities in Dutch society. The government later justified the funding of education and training for a clerical office like that of an imam with the argument that there is a need for a tertiary educated Islamic executive that can also bridge the gap between Islam and Dutch culture. The emphasis is not so much on education and training to hold a clerical office that is allied to a faith community anymore.

It is remarkable that the courses concerned are offered by institutions of higher education without any explicit recognition by, or responsibility of, the Islamic faith communities.

In 2010 the State Secretary made an attempt to divide ecclesiastical education and training into categories that would or would not be eligible for funding. However, the granting of subsidy was placed entirely in the hands of the Minister of Education and is subject to various arbitrary criteria.

I can imagine that a system is being worked on in which a category of churches will or will not be eligible for funding or only to a limited degree. The distinctions would have to be objectively justifiable in that case. The government could apply a number of simple, objective criteria. A comparison with the funding of political parties, where, after all, the exercise of fundamental rights is also a priority, can be helpful.

A church would then have to satisfy a number of cumulative criteria. The amount of the subsidy could partly be dependent on the number of people who belong to the church, for instance, and the number of students who pursue the course.

With regard to the means of checking whether the conditions are satisfied, the government could not do better in my opinion than to apply a system where checks are made as to whether public money is spent legitimately while preserving the church's freedom of organisation.

These conditions must be set down in legislation. This would offer legal certainty to the various faith communities who might consider an application for subsidy. The minister would then be able to decide on these applications based on criteria set down in law.

## **14 Fiscal support of churches**

*Chapter 14* addresses the support of churches by means of tax advantages.

The current regulation of non-profit organisations for public benefit [algemeen nut beogende instellingen or ANBIs] is addressed first. An organisation which wants to acquire this status first has to satisfy a series of conditions.

These conditions apply to things like the organisational structure of the institution, its governance and administration, payment of trustees and the requirement to account to the Tax and Customs Administration. These rules also apply to churches which want to obtain the status of non-profit organisation for public benefit.

The agreement is also addressed that a number of churches have entered into with the Tax and Customs Administration whereby they are then subject a less stringent regime.

What the fiscal legislator means by non-profit organisation for public benefit is then considered and in particular, why churches are considered to be of public benefit. This partially elaborates on chapter 6 in which the position of the government in respect of religion was addressed and its neutrality with regards to the various faith communities. An important question in this consideration is whether churches are intrinsically of public benefit. Religion has now been adopted in law as a non-profit organisation of public benefit under article 5b of the State Taxes Act [Algemene wet inzake rijksbelastingen] which seems to have settled the matter for the time being.

The chapter then goes into what is called the 'actual work' of non-profit organisations for public benefit, more specifically, the case law on churches that wish to be recognised as non-profit organisations for public benefit. Based on the case law concerning the Church of Scientology, it would appear that ninety percent or more of the actual work must contribute to public benefit. Those activities do not contribute to public benefit if the church creates a surplus for itself by carrying out those activities in return for payment at commercial rates.

Also considered is the exemption from property tax linked to the use of property for public worship and contemplative meetings of a philosophical nature, also known as the service of worship exemption [eredienstvrijstelling]. The conditions for this exemption, such as the condition that such worship is public, is discussed in relation to case law.

The conclusion at the end of this chapter is that this privileged fiscal treatment of churches can be reconciled in principle with the separation of church and state as that is expressed in the Netherlands.

The new non-profit organisation for public benefit scheme introduced in 2008 may, however, present a threat to the organisational freedom of churches. The increasingly stricter non-profit organisation for public benefit scheme forces churches to adapt their organisation to the scheme's requirements.

In my view, an alternative must be found where more justice is done to the meaning of the principle of the separation of church and state as expressed in the Netherlands. Such an alternative following the example of Germany could consist of a form of 'Tendenzschutz'. The non-profit organisation for public benefit scheme would then have to be adapted in the sense that it provides for a less stringent regime of exemption provisions for institutions that are pre-eminently fit as mediums for certain fundamental rights, such as political organisations, broadcast associations and churches.

The special position of these institutions in which fundamental rights such as the freedom of religion, association and expression are in the foreground, would then be better protected. The non-profit organisation of public benefit scheme conditions applicable to these institutions would then have to be the result of an explicit consideration by the government of honouring fundamental rights of those institutions on the one hand and the necessity of effectively ensuring that the non-profit organisation for public benefit scheme rules are observed.

## **15 Conclusions and recommendations**

*Chapter 15* closes with a number of conclusions and recommendations.

The Dutch model of the separation of church and state has a historical foundation. It means that churches and the state have no institutional authority in each other's internal affairs. They do not, however, stand with their backs to each other: the state may well be neutral in respect of religious communities but that means that it treats religious communities equally unless there are objectively justifiable grounds to do otherwise. The

attitude of the state towards religion is generally positive, which is demonstrated by the fact that churches can be eligible for fiscal benefits if they satisfy a series of conditions.

Within the Dutch legislation on legal entities, the church is the most appropriate legal form for faith communities. In the form of a church, faith communities have a great deal of freedom to structure their organisation and governance as they see fit and to establish, for example, unique legal entities. This freedom is not unlimited, however: the legislator can restrict it. Such restrictions must satisfy the requirements demanded by the ECHR, the Constitution and other legislation, however. Churches are also confronted with obstacles in their role as social organisations. These obstacles can lie in, for example, a restriction on earning rent if the church wants to act in accordance with its own religious standards. That restriction arises out of the legislation on equality. Another obstacle is that paid clerical officeholders cannot make use of the system of social security if, for example, a church cannot enter into an employment contract for reasons of principle. Churches are also hindered in their operation in respect of the registration of details in the commercial registers.

It would be advisable for the government to develop a series of objective criteria with which they can assess whether churches or their education or training for clerical office are eligible for funding. The government should also weigh interests and fundamental rights against each other so that justice is done to the organisational freedom and autonomy of churches but also the obligation to account for subsidies that are granted.