Religious Symbols in Public Functions: Unveiling State Neutrality

A Comparative Analysis of Dutch, English and French Justifications for Limiting the Freedom of Public Officials to Display Religious Symbols
The titles published in this series are listed at the end of this volume.
Religious Symbols in Public Functions:  
Unveiling State Neutrality 
A Comparative Analysis of Dutch, English and French Justifications for Limiting the Freedom of Public Officials to Display Religious Symbols 
Hana M.A.E. van Ooijen
Hana M.A.E. van Ooijen
Religious Symbols in Public Functions: Unveiling State Neutrality
A Comparative Analysis of Dutch, English and French Justifications for Limiting the Freedom of Public Officials to Display Religious Symbols

ISBN 978-1-78068-119-1
D/2012/7849/100
NUR 828

Cover image © Suze M. de Wit

Typesetting: G.J. Wiarda Institute for Legal Research, Utrecht University

© 2012 Intersentia
www.intersentia.com | www.intersentia.co.uk


No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.
The book which cannot be improved by (erasing) another word has probably not yet been written. This devilish ‘opus magnum thought’ lured me to protract this Ph.D. project eternally, but it was offered counterweight by the wisdom that ‘the best dissertation is a done dissertation’. The main text being ‘done’, no word paying due credit to those having helped me in this research could be a word too many. Their large number does not allow me to mention them all by name and makes it likely that my memory will prove deficient, which has nothing to do with the actual value someone has had.

I am greatly indebted to the two people who guided me in carrying out this research: my supervisors Titia Loenen and Ben Vermeulen. I have much appreciated the extent to which they have offered that valuable asset of these days: time. Moreover, their willingness to engage intensively in my research, to help me clarify the strangling lines of thought and yet to give me room to find my own ways to tackle certain problems has been extremely valuable. I am grateful to my reading committee, Wibren van der Burg, Paul Cliteur, Jenny Goldschmidt, Remco Nehmelman and Lucy Vickers, for spending precious summer days reading my manuscript and providing suggestions for improving the final text.

I have been fortunate to carry out the ultimately solitary undertaking of a Ph.D. in a place full of human rights experts: the Netherlands Institute of Human Rights (SIM). Thanks to my colleagues for enriching the daily life of work whether during meetings and presentations or during lunches and dinners. I am thanking the Ph.D. lot for sharing and brightening my lot. In particular, I am grateful to have shared my office – though not at the same time – with the most pleasant roommates who enlivened my working day with discussions, chats and litres of tea: Antoine Buyse, Katharine Fortin and Marthe Lot Vermeulen. Thanks to Hanneke van Denderen, Esther Heldenbergh-Bode and Marcella Kiel for helping out on practical things and more. Thanks to Saskia Bal and Maaike Hogenkamp from our Documentation Centre for being willing to help out with research-related questions or to point out interesting publications. Thanks to Ida Lintel for helping with loose ends. My thanks go out to my colleagues of Comparative Human Rights which I have (co-)lectured with so much pleasure. In particular I would like to mention Marjolein van den Brink to whom I owe additional thanks for her spirited energy in keeping me abreast of interesting publications or activities and in commenting on my work. I am grateful for the insightful and unintentionally (too?) enjoyable meetings I have had with Kim Hermans, Merel Jonker, Reile Meyers, Marloes van Noorloos and Rianka Rijnhout.
I am indebted to many in academia and beyond for their dedicating time and efforts which enriches the solitude of academic research with encouragement, enthusiasm and partnership. In particular I would like to thank the group of experts who have commented on a preliminary draft of my conclusions: Matthijs de Blois, Antoine Buyse, Marjolein van den Brink, Jenny Goldschmidt, Sarah Haverkort-Speekenbrink, Esther Janssen, Wibo van Rossum and Channa Samkalden. I would specifically like to express my gratitude to Janneke Gerards who as a commentator has given me some pivotal suggestions to improve my conclusions.

The academic engagement has also been helpful across boundaries. My gratitude extends to Peter Edge for his generous welcome and help, in organizing a place for me to work, introducing me to other people and in clarifying my research in relation to the English context. In addition, I would like to thank Javad Gohari for kindly and humorously helping me with the more practical side of things and for acquainting me with (the coffee of) one of the finest bookstores in England. I would also like to mention Lucy Vickers for the stimulating discussions and comments on my work.

In France, I have had the privilege to be based at two reputable human rights centres: the PRISME centre in Strasbourg and the CREDOF in Paris. I would like to thank Elisabeth Lambert Abdelgawad for hosting me in the SDRE group of the PRISME centre. In particular, I would like to thank Anne Fornerod for being tirelessly helpful in getting me acquainted with the French situation both substantially and practically, even after my stay and for her indispensable comments on my work. I would also like to thank Françoise Curtit for offering me some valuable leads and helping me out with all kinds of questions. My thanks go out to Victor Canales who gave me advice in finding ways within the Council of Europe. As regards my stay in Paris, I would like to thank Eric Millard for connecting me to the CREDOF. My gratitude extends to Véronique Champel-Desplats for receiving me, giving helpful comments and organizing a debate on my topic.

I have twice had the honour to participate in the International Summer School on Religion and Public Life which with its mix of reflection, candour and depth offers a unique programme. My gratitude extends especially to Adam Seligman, Rahel Wasserfall and David Montgomery for generously allowing me to take part in this exceptional experience. Thanks for enriching my Dutch bicycle which I hope to ride more often in the future.

One of the things I greatly enjoyed in carrying out research as a ‘linguaphile’ and as a lawyer is to work with words and with language. Unfortunately, what you love is not necessarily something what you are flawless at, and so I am grateful to all those who have been willing to help me in getting my dissertation not only done, but also in rendering it comprehensible, whether by helping me out with language-related questions or by correcting entire pieces of work. My thanks go to two of our native speakers at SIM, Katharine Fortin and Brianne McGonigle Leyh, for being available for language-related questions. Audrey Déleris and Jayshree Mangubhai have proven
that physical distance has not precluded them from delivering outstanding work at a distance. I am grateful to them for enabling me to get it just right. I am obliged to the Wiarda Institute which showed itself to be so professional in being able to work together with the whimsical flows of a Ph.D. project. In particular I would like to mention Klaartje Hoeberechts, Titia Kloos and Peter Morris. Thanks also to Alison Morley for going through my texts with so much scrutiny as well as delicacy; your suggestions have again taught me some more about writing ‘true’ English. But even in my native language I still have enough to learn. Thanks to José Verouden for offering invaluable suggestions for my Dutch summary. Needless to say that all errors, whether in the English, French or Dutch text are entirely mine.

If my ‘seconds’ would still have to fulfil the ancient task of physical protection I am not sure whether they would have been very thrilled to fulfil that task but still even then I would at least have felt confident in having these two wonderful and experienced persons by my side. Judith Raven and Marthe Lot Vermeulen, I feel privileged to have already walked so many paths of life together with you and I can only hope to continue to do so after I have followed in both your footsteps. I thank you for bringing warmth, humour and wisdom to my life over tea, coffee or wine. Separating work/private life is less applicable today than it once was and even less so for a PhD research. Accordingly, I am also grateful to all those who played a valuable role in my private life. My gratitude extends to my parents for having equipped me with tools which can serve me throughout my life. I thank my friends, family and in-laws for being involved in my life and for caring. I would like to mention my brother and sisters in particular for being that which seems so self-evident but really is not. I would also like to thank Shiko Boxman and Suze de Wit for making the juggle of various tasks so much easier. Additionally, I would like to thank the latter for sparing me to use more than a thousand words (although twenty-eight words is still a lot). Suze, if only I had the same visual power you possess in that little pencil of yours to draw my gratitude for having you around in my life. Thank you for using that extraordinary gift of yours for the benefit of my book and for adding beauty to my life. Finally, I suspect that my life, whether private or professional, would just not have looked quite the same if I had not shared an important part of it with Caspar. Perhaps surprisingly, but I feel enormously rich and privileged by your persistence in urging me not to settle and to look outside the box, whether it is by you letting me write on a window or by imagining the unimaginable. May such exercises continue to fill our lives and that of Illion.

Amsterdam, 19 September 2012

The information contained in this book reflects, as far as possible, the state of affairs on 1 June 2012.
# Table of Contents

Preface v

## Chapter 1  Introduction

1.1 Religious symbols … once more 1
1.2 The main research question 2
  1.2.1 Two pillars 3
  1.2.2 The Dutch debate 5
  1.2.3 Three functions 6
  1.2.4 Symbols manifesting religion or belief 8
1.3 Purpose of the study 10
  1.3.1 Threefold objective 10
  1.3.2 Limitations and reservations 11
1.4 Set-up of the study 12
  1.4.1 ‘Argumentative’ approach 12
  1.4.2 Sources and methods 13
  1.4.3 Outline 15
1.5 Conclusion 17

## Chapter 2  The Dutch Context

2.1 Introduction 19
2.2 Religion in the Netherlands 20
  2.2.1 Religious freedom 20
  2.2.2 The position of religion in the public sphere 23
  2.2.3 State neutrality 25
2.3 Public officials’ freedom to display religious symbols 28
  2.3.1 Judges’ freedom to display religious symbols 31
  2.3.2 Police officers’ freedom to display religious symbols 34
  2.3.3 State schoolteachers’ freedom to display religious symbols 35
2.4 The initial indications of a challenge 36
  2.4.1 Increasing debate on religion 36
  2.4.2 The particularity of the central issue 38
  2.4.3 The decision scheme of the Equal Treatment Commission 42
# Table of Contents

2.4.4 The deputy court clerk 43  
2.4.5 The non-uniformed police officers 45  
2.4.6 The state school intern 48  
2.5 Conclusion 50  

## Chapter 3  The Dutch Debate

3.1 Introduction 53  
3.2 The debate on the judiciary 54  
  3.2.1 Direct or indirect discrimination 54  
  3.2.2 Judicial impartiality and independence 55  
  3.2.3 Role of the Regulation 60  
  3.2.4 Court clerk in relation to the judge 61  
  3.2.5 Separation of church and state 62  
3.3 The debate on the police 63  
  3.3.1 Direct or indirect discrimination 63  
  3.3.2 Lifestyle neutrality and uniformity 64  
  3.3.3 Uniformed and non-uniformed service 66  
  3.3.4 Contact with the public 67  
  3.3.5 Separation of church and state 67  
3.4 The debate on public education 68  
  3.4.1 Direct or indirect discrimination 68  
  3.4.2 Denominational neutrality 69  
  3.4.3 Teachers and their exemplary role 70  
  3.4.4 Parents’ and pupils’ rights 70  
  3.4.5 Separation of church and state 71  
3.5 The relevant points of contention 71  
  3.5.1 Relation between the state and the public official 72  
  3.5.2 Rights and freedoms of others 73  
  3.5.3 State and society 74  
  3.5.4 Overview 75  
3.6 Conclusion 77  

## Chapter 4  Conceptual Framework

4.1 Introduction 79  
4.2 Exploring state neutrality 81  
  4.2.1 Definition 81  
  4.2.2 Rationale 84  
  4.2.3 Implementation 87  

x
4.2.4 Secularism 91
4.2.5 Separation of church and state 93
4.3 Exploring religious freedom 96
  4.3.1 Definition 96
  4.3.2 Rationale 99
  4.3.3 Implementation 101
4.4 Building a model 101
  4.4.1 Basic concepts 102
  4.4.2 Dynamics 106
  4.4.3 Implications 107
4.5 Applying the model to the points of contention 108
  4.5.1 Neutrality of the state towards the public official 109
  4.5.2 Neutrality of the public official towards the citizen 110
  4.5.3 Neutrality of the state towards the citizen 111
  4.5.4 Factors to evaluate the points of contention 113
4.6 Conclusion 115

CHAPTER 5  EUROPEAN CONVENTION ON HUMAN RIGHTS
5.1 Introduction 117
5.2 The application of Article 9 119
  5.2.1 Everyone 120
  5.2.2 Religion or belief 121
  5.2.3 Manifestation of religion or belief 122
  5.2.4 Limitation clause 122
  5.2.5 Margin of appreciation 123
5.3 State neutrality 125
  5.3.1 General principle 125
  5.3.2 Civil servants’ neutrality 127
  5.3.3 Judicial impartiality 130
  5.3.4 Educational neutrality 132
    5.3.4.1 Educational staff’s neutrality 132
    5.3.4.2 Students’ neutrality 136
    5.3.4.3 Neutrality of the educational curriculum and environment 141
5.4 Other values 146
  5.4.1 Loyalty 146
  5.4.2 Authority 149
5.5 Voluntary obligations 150
  5.5.1 Contractual arrangements 150
  5.5.2 Particular regime 152
Table of Contents

5.6 Application of the conceptual model 154
  5.6.1 Dynamics of neutrality 155
  5.6.2 Neutrality of the state towards the public official 155
  5.6.3 Neutrality of the public official towards the citizen 157
  5.6.4 Neutrality of the state towards the citizen 159
5.7 Conclusion 160

CHAPTER 6 FRANCE

6.1 Introduction 163
6.2 Religion in France 164
  6.2.1 Religious freedom 164
  6.2.2 State–citizen relation 169
  6.2.3 The position of religion in the public sphere 172
  6.2.4 State neutrality 175
6.3 Public officials' freedom to display religious symbols 179
  6.3.1 Judicial officers’ freedom to display religious symbols 182
  6.3.2 Police officers’ freedom to display religious symbols 184
  6.3.3 State school teachers’ freedom to display religious symbols 186
6.4 Debate in France 188
  6.4.1 State neutrality in public service 188
  6.4.2 Conspicuous religious symbols at state schools 192
  6.4.3 Face veils in public 198
6.5 Application of the conceptual model 200
  6.5.1 Dynamics of neutrality 200
  6.5.2 Neutrality of the state towards the public official 201
  6.5.3 Neutrality of the public official towards the citizen 203
  6.5.4 Neutrality of the state towards the citizen 204
6.6 Conclusion 205

CHAPTER 7 ENGLAND

7.1 Introduction 209
7.2 Religion in England 210
  7.2.1 Religious freedom 210
  7.2.2 State–citizen relation 215
  7.2.3 The position of religion in the public sphere 217
  7.2.4 State neutrality 219
7.3 Public officials’ freedom to display religious symbols 220
  7.3.1 Judicial officers’ freedom to display religious symbols 221
Table of Contents

7.3.2 Police officers’ freedom to display religious symbols 228
7.3.3 State school teachers’ freedom to display religious symbols 230
7.4 Debate in England 233
7.4.1 Public officials and religious manifestations 234
7.4.2 Employees and religious manifestations 237
7.4.3 Pupils and religious symbols 240
7.5 Application of the conceptual model 245
7.5.1 Dynamics of neutrality 245
7.5.2 Neutrality of the state towards the public official 246
7.5.3 Neutrality of the public official towards the citizen 247
7.5.4 Neutrality of the state towards the citizen 249
7.6 Conclusion 251

CHAPTER 8 CONCLUSION

8.1 Introduction 255
8.2 The multiple layers of Dutch debate 257
  8.2.1 Pluralism, pragmatism and change 257
  8.2.2 Several points of contention 258
  8.2.3 Concluding remarks 260
8.3 The triangular model 261
  8.3.1 All roads lead to neutrality 261
  8.3.2 Three obligations and three actors 262
  8.3.3 Correspondence with points of contention 263
  8.3.4 Concluding remarks 265
8.4 Minimum ECHR standards 265
  8.4.1 Neutrality as a pluralist and a secular principle 266
  8.4.2 State towards the public official: rights can be limited or waived 267
  8.4.3 Public official towards the citizen: a religious symbol can jeopardize rights 267
  8.4.4 State towards citizens: a neutral and impartial organizer 268
  8.4.5 Concluding remarks 268
8.5 Divergent approaches in France and England 270
  8.5.1 Neutrality in two opposite interpretations 270
  8.5.2 State towards the public official: absorption or individuality 270
  8.5.3 Public official towards the citizen: appearance or conduct 272
  8.5.4 State towards citizens: authority or representation 273
  8.5.5 Concluding remarks 274
8.6 Questioning limitations in the Dutch context 274
  8.6.1 An implicit concept of state neutrality 276
  8.6.2 Public visibility and accommodation of religion 277
### Table of Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>8.6.3 A differentiated conception of the state</td>
<td>277</td>
</tr>
<tr>
<td>8.6.4 State towards the public official: substantive neutrality</td>
<td>279</td>
</tr>
<tr>
<td>8.6.4.1 Drawbacks of a formal dress policy for Dutch public officials</td>
<td>279</td>
</tr>
<tr>
<td>8.6.4.2 Putting personification into perspective</td>
<td>282</td>
</tr>
<tr>
<td>8.6.5 Public official towards the citizen: ‘keeping up appearances’</td>
<td>283</td>
</tr>
<tr>
<td>8.6.5.1 Presumed bias is not equal to bias</td>
<td>284</td>
</tr>
<tr>
<td>8.6.5.2 Symbolic proselytism is not equal to proselytism</td>
<td>289</td>
</tr>
<tr>
<td>8.6.6 State towards the citizen: recognizable state</td>
<td>290</td>
</tr>
<tr>
<td>8.6.7 Concluding remarks</td>
<td>292</td>
</tr>
<tr>
<td>8.7 Concluding observations</td>
<td>293</td>
</tr>
</tbody>
</table>

Samenvatting                                                                 | 297  |
Résumé                                                                     | 307  |
Bibliography                                                               | 317  |
Table of Cases                                                             | 331  |
Curriculum Vitae                                                           | 335  |