SPECIAL WORKSHOP TITLE: “What should religious freedom entail?”

CHAIR: Sohail Wahedi

ABSTRACTS

1. Paul Cliteur
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What should religious freedom entail?

Should a liberal democracy provide room for groups that undermine the rule of law by their deeply held beliefs? And, what if these undermining convictions are of a ‘religious' nature? The idea that liberal democracies should not give podium to speakers with so-called undemocratic opinions is more topical than ever.

‘Berkeley cancels speech by extreme right commentator Ann Coulter’, the Volkskrant wrote on April 20. Coulter had been invited by Republican students to come to Berkeley on April 27 to talk about her take on immigration. Swayed by a storm of protest, the famously left-leaning university decided the safety of students and staff would be compromised and the event was cancelled. ‘We were unable to find a secure and suitable location,’ the university said in a statement.

It’s starting to become a trend. Controversial speaker. Protests. Authorities: ‘Sorry, the event has to be cancelled for safety reasons.

Ayaan Hirsi Ali couldn’t go to Australia because her safety couldn’t be guaranteed. A meeting by the Forum voor Democratie with Thierry Baudet in Dordrecht also generated protest. Action group ‘Dordt Discriminatievrij’ (No discrimination in Dordrecht) went to the owners of the Event Center venue and registered a complaint.

But are Hirsi Ali and Baudet really the persons who undermine democracy or are they engaged in a protracted battle to save this institution? From Hirsi Ali’s perspective she is the one who warns us for one of the most threatening ideologies of our time: Islamism.

2. Saeed A. Khan
Wayne State University

Globalization, and its catalysis of a shift of focus toward the trans-national and post-national, poses significant challenges to the architecture of the nation-state, the foundational socio-political unit of modern society. Conventional intersections and engagements of law are now being contested and recontested as new commercial and geo-political relationships emerge and their concomitant legal accommodations. While the question of the intersectionality between religion and state vis-à-vis religious law is a complex phenomenon, in situ, the rise of supra-national nodes of engagement will augur a reassessment of how religious law interacts beyond the state-“church” nexus. In so-called secular, liberal societies, the inclusion of religious agency within the discursive and deliberative spaces is often a contested issue, as religious groups face the presumption of a perceived arcane, incompatible, even hostile and pernicious force to such societies.

The philosophy of John Rawls forms a critical cornerstone in modern liberalism, especially with its two concomitant and defining components: the existence of a society that will easily reach a consensus, as a collection of reasonable people, on political matters, as distinguished from religious and other similarly broad social constructs; and that reasonable peoples will organically privilege and prioritize the political over the religious when the two are in conflict with one another. These tenets also inform Rawls’s ideas on justice and those who have agency in its definition. Yet, implicit within these tenets is an exclusion of religiously oriented peoples for whom faith systems supersede the political, particularly a political model of which they had no participatory role to develop. The exclusion of Muslims from this process and model, for example, facilitates the emergence of anti-religious bigotry in societies that perceive themselves as imbued with Rawlsian liberalism and without contradiction.

This paper explores Rawlsian liberalism and the central role it plays in modern, western philosophy. It will offer a critique of his beliefs and delineate the internal flaws within Rawlsian liberalism, especially as it serves as an impediment to the expression of religious freedom in so-called liberal societies. In addition, this paper will demonstrate how such constructions of liberalism
exclude Muslims, and other religious communities, from agency within a Rawlsian liberal society and contribute to the development and institutionalization of anti-religious bigotry in such societies. This paper also examines the architecture of Islamic law and its potential for adapting to the new realities created by globalization and as a rejoinder to the Rawlsian architecture of liberal societies in matters political and cultural.

3. Stefan Philipsen

Erasmus School of Law

**In Defence of Religious Freedom: a methodological approach**

Over the past two decades the constitutional protection of religious freedom has been subjected to severe criticism. This paper will try to refute that criticism. It will start with a description of the application of the freedom of religion within the Dutch context. This description will involve an explanation of approaches like the subjective interpretation of constitutional rights. Furthermore it will be argued that this contextual starting point is the only fruitful way to think about the justification, scope and application of the freedom of religion as a constitutional right. From the methodological description of the Dutch case generalizations are made that will serve as a counterargument to the main criticism on the constitutional protection of the freedom of religion.

4. Sohail Wahedi

Erasmus School of Law

**Should liberal democracies care about religion because it is religion?**

Should liberal democracies care about religion simply because it is religion? This question opens the floor to reflect on two intertwined aspects of the law and religion debate in jurisprudence that require normative positioning. First, how should liberal democracies understand and accordingly interpret religious freedom? Second, how should non-theocracies outline the contours of the normative relationship between law and religion? Thus, how should liberal democracies understand and deal with religion in law? Over the past years, legal
scholars and philosophers have contributed to these two interpretative concerns of the law and religion debate via the question what the legal definition of religion and religious freedom should be. The focus of this essay is on the liberal theories of religious freedom and their main contribution to the debate on law and religion in jurisprudence. Based hereon, this essay introduces a conceptual framework that consists of normative positions, each theorising a particular approach towards religion and religious claims for exemptions from general laws. This conceptual framework of normative positions involves argumentation patterns that are helpful in theorising the outcome of the question whether liberal democracies should care about religion because it is religion. Therefore, this essay starts by juxtaposing the most influential liberal and apparently non-religious positions present in the religious freedom theories. These normative positions are classified as rejection; substitution; generalisation; equation and representation. This classification of positions is the first step in answering the covering question whether religion qua religion requires special legal protection in liberal democracies. The answer to this question is threefold, and the synthesis of this threefold answer is abstraction from the religious dimension, which refers to the very distinctly religious dimension. Thus, abstraction is the binding element of the various normative positions discussed in this essay. Abstraction dismisses the special legal protection of religion qua religion. In other words, it renounces arguments that justify religious freedom with an appeal to the distinct value of religion. Subsequently, abstraction proposes a more general framework to justify free exercise, and it rethinks religious claims for exemptions from general laws, from that particular framework of general values. Consequently, abstraction involves arguments that stand for the adoption of a non-sectarian and religion-empty understanding of religious freedom. That is to say, free from distinctly religious values, though certainly not hostile to religion.

5. Ashley G. Barnett

Emory University School of Law

Gray is the New Black: Illuminating the Challenges of Religious Establishment in Countries with Religious Culture
Religious Establishment conflicts have recently been at the forefront of many nations. Religious history, in combination with the popularity of syncretism by religious and “non-religious” persons, creates an inherent problem between society and the law: the conflict of defining where religion ends and where culture begins. This struggle within society is derived from the increasingly intertwined relationship between religion and culture. Common religious activities not only serve as religious exercises, but also function as rich, historical traditions with cultural significance and secular purposes to society. This relationship requires the constant balancing of societal interests – weighing the importance of maintaining robust traditions and preserving cultural and societal norms and customs against the risk of violating the legitimate scope of the establishment of religion.

“Religious Culture” can and should serve to ignite a public conversation and teach a pluralistic world a lesson in how to view things in shades of gray to better understand religious liberty issues in countries where religious practices and social customs are one and the same. The idea of “religious culture” establishes a new category of respect for religious norms, which is neither completely religious nor secular. It is my contention that this new category of respect for “religious culture” creates a tripartite model in which countries should be classified and analyzed. It is my assertion that when countries fall within this third category and it is nearly impossible to draw the line of where religion ends and culture begins we do a disservice by trying, and that a new category of respect for religious norms should be established.

Overall, this project involves unraveling the contradictory web of religious establishment by exploring the intertwined relationship between religious culture and the law. This paper will discuss three topics in depth:

(1) It will look at the historical and modern attitudes of the separation of church and state;

(2) It will suggest rather than viewing the application of the religious Establishment Clause through an American lens, alternatively the United States should be compared to countries infused with “religious culture”;

(3) It will explicate the idea of a quadripartite of Religious Culture by highlighting the gray area of the societal perception of religious cultural identity in the public eye and the law;
And, it will suggest that new legislative or constitutional framework must be drafted to account for the uniqueness of Religious Culture, while also protecting the rights of both the majority and minorities.

6. Tom Herrenberg
Leiden University

**Religious Freedom as a Limit on Freedom of Expression**

What should religious freedom entail? For the European Court of Human Rights, in contrast to other international regulations concerning human rights,* it entails the freedom from certain “gratuitously offensive” blasphemous expressions. In its decision in *Otto-Preminger-Institut v. Austria*, the Court argued that “The respect for the religious feelings of believers as guaranteed in Article 9 (of the European Convention on Human Rights, which protects freedom of thought, conscience and religion, added) can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society.” And while the Court argued in *İ.A. v. Turkey* that religious believers “cannot reasonably expect to be exempt from all criticism” and “must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith”, it held that a blasphemous passage was not only offensive or shocking, but contained “an abusive attack on the Prophet of Islam” the Turkish authorities could act against. It is also noteworthy that the Court grants a rather large margin of appreciation to states with regard to speech that offends religious sensitivities. In *Wingrove v. United Kingdom* the Court “underlined that whereas there is little scope for restrictions on political speech or on debate of questions of public interest, a wider margin of appreciation is

*For example, according to the Human Rights Committee in General Comment no. 34, the sole fact that an expression is blasphemous is insufficient to violate the norms stipulated in the International Covenant on Civil and Political Rights: “Prohibitions of displays of lack of respect for a religion or other belief system, including blasphemy laws, are incompatible with the Covenant […]” Along the same lines, the former Special Rapporteur on freedom of religion or belief, Heiner Bielefeldt, has argued that “the idea of protecting the honor of religions is clearly at variance with the human rights approach, which institutionalizes due respect for the dignity and freedom of human beings rather than protecting religions as such.” He also stated that “In the human rights framework, respect always relates to human beings […].”*
available to the national authorities restricting freedom of expression in relation to matters within the sphere of morals or especially, religion.”

This paper seeks to critically examine the Court’s approach to blasphemy. First, this paper will outline the Court’s general approach to freedom of expression and blasphemous expression. Next, it seeks to examine the usage of “religious tolerance” as an argument to limit freedom of expression.

7. Wibren van der Burg
Erasmus School of Law

The Diminishing Support for Accommodation of Religious Minorities in the Netherlands, and the Implications for Human Rights

Until recently, the Netherlands were internationally famous for its liberal tradition, and especially its broad toleration and accommodation of religious diversity. However, this tolerant Dutch tradition is rapidly changing. It may seem as if the Netherlands, known for centuries as a haven of religious tolerance, are now dominated by discrimination, intolerance and even outright hatred towards Muslims and immigrants. Of course, this new image of the intolerant Netherlands can be empirically criticized and nuanced as much as the older image of the haven of tolerance. Even so, it is clear that there are substantive changes.

In this paper, I want to analyze three dimensions of modern Dutch society that may be important for understanding these changes, because they present specific challenges to the legal system and the liberal political culture:

A. The Netherlands is no longer a country of minorities, but a country with a dominant or majority ideology which can be characterized as partly liberal and partly republican (in the French tradition of republicanism).

B. The dominance of a typically Protestant view of religion.

C. The process of hybridization and fragmentation of identities, and at the same time a process in which new—often virtual—light communities emerge.
A. The Dominant Ideology

The dominant ideology contains a number of typically liberal elements, but also a number of elements which should be characterized as French-republican and intolerant. Especially in the field of cultural and religious differences, the French-republican tendencies seem strong. I suggest that the following six ideas are characteristic for this ideology.

1. A strong emphasis on liberty in the private sphere.
2. A voluntaristic understanding of identities.
3. A privatization of identities.
4. An understanding of equality as conformity with the average or standard citizen.
5. A French republican view on citizenship.
6. Rising moral expectations.

The first two of these 6 characteristics, the emphasis on liberty and choice, are really liberal. Three other characteristics, the privatization of identities, the idea of equality as conformity with the standard citizen and the republican view on citizenship, fit better in the French republican tradition. The sixth characteristic, if anything, is rather illiberal than liberal; it leaves little room for deviant minorities. We may conclude that there is an unresolved tension in the dominant ideology between the liberal strand and the French-republican strand, a tension that is reinforced by the decreased tolerance.

B. A Protestant Understanding of Religion

In public debates and legal discourse, there is a very specific frame, shared by both extremes in the spectrum, on the one hand by militant atheists and on the other hand by orthodox Muslims and Christians. It regards religion as a phenomenon in terms of religious contents or dogmas which are based on sacred texts such as the Bible or the Quran. The resulting moral and political norms are categorical (rather than, e.g., based on a virtue ethics like in Catholic theology), and these norms can be authoritatively interpreted by authoritative institutions such as popes, synods, and imams. This frame may be characterized
as Protestant, because the first two of the classic sola’s are central. It may be summarized in five assumptions.

1. Religious texts are central (sola scriptura)
2. The doctrinal contents of religious beliefs are central (sola fide)
3. Religious norms must be regarded as categorical rules
4. Religious norms in other religions have the same foundation as in Christianity
5. Every religion has hierarchical, strongly institutionalized organizations

These five characteristics of a Protestant approach to religions are, of course, an ideal typical sketch. This frame certainly fits well with traditional orthodox Calvinist groups, which nowadays only consists of a few percent of the Dutch population. It fits relatively well with some radical Muslims – although certainly not fully. Most importantly, this Protestant frame is also very useful for modern opponents of religion, because it enables them to frame religion negatively. A religion understood in this way is almost by definition irrational and backward. This Protestant frame leaves no room for more liberal praxis-oriented religions, or for dynamics and pluralism in interpretations, let alone for postmodern bricolages. As a result, it leads to a reduction and fixation of religious identities to the extreme versions, defended only by small minorities.

_C. Hybridization, fragmentation and light virtual communities_

So far, I have discussed the dominant ideologies and political and legal discourses in Dutch society. Interestingly enough, social trends diverge significantly from the dominant ideological frames. I will focus on two processes, first, that of fragmentation and hybridization of identities and, second, that of the emergence and re-emergence of light communities and networks, increasingly of a transnational character.

_The Consequences for Democratic Culture_

My central question is what the implications of these three characteristics are for political and legal practices in the Netherlands. The combination of these three characteristics presents major challenges to liberal constitutional principles and rights.
I suggest that the rise of the new moral majority leads to a diminishing understanding of religion and a diminishing empathy for religion. If you cannot understand why someone is acting strangely, it is difficult to come to terms with her behavior and find ways to accommodate her. This will be even more true, if the behavior seems irrational and premodern. Therefore, the diminishing understanding and empathy for religious minorities leads to a diminishing support not merely for the Dutch liberal tradition of mutual accommodation of religious minorities, but also for democratic rights for religious minorities.

The increasing fragmentization and hybridization also suggest a problem of a more technical nature. Legislation works with general categories; law always has a generalizing tendency. However, if citizens no longer identify exclusively with one specific group and acquire hybrid identities and defend highly individualized religious views, it becomes more difficult to devise legal instruments to accommodate them.

Apart from this technical problem, there are also substantive problems. Especially the combination of the rise of a liberal-republican majority ideology and fragmentisation of society presents major challenges both to the democratic culture and to liberal rights. The support for some rights may be weakened, and we may need to rethink the settled interpretation and implementation of the right at stake. These rights that are threatened are freedom of education, freedom of religion and the right to non-discrimination and the constitutional principle of state neutrality. On the other hand, for free speech, the popular interpretation of the right may become more extensive, challenging the more restrictive interpretations.

**Conclusion: Revisiting Consociationalism?**

I cannot offer easy solutions to those tensions. However, it seems to me that a successful strategy might be to revisit the tradition of consociationalism. I suggest that in the end it can be reconstructed as a distinctively liberal approach. Although consociationalism has gotten a bad name, the basic principles of inclusiveness, proportionality and accommodation may still be used as guidance for practical purposes.