

Reflections on Religion & Education in The Netherlands and Flanders

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Reflections on Religion & Education

We urge consideration of different ways of dealing with religious and philosophical differences in educational systems. In the first section we present some general and fundamental considerations related to the nature and development of religion in modern society and the relationship between religion and the public domain. In the second section, we present considerations which more directly affect the structure and functioning of the Dutch and Flemish educational systems. In the third section, we give an outline of the contours of an alternative, appropriate to the future, to the way in which religious and philosophical differences have traditionally been dealt with in The Netherlands and Flanders.

§ 1 General considerations Religion & Public Domain

Our call for reconsideration of dealing with religion in the education system is driven by considerations of:

- the ambivalent nature of religion;
- the changing nature of religion;
- the individualization of religion;
- the changed context of religion;
- the de-territorialization of religion;
- the dialogical nature of religious identity;
- the importance of equal and mutual recognition of religious identity;
- and the post-secular character of the public domain.

The ambivalent nature of religion

Religion is a source of mischief, but also a source of values

Negative images of the intolerant and discordant nature of religion are widespread. Often - at least from a historical perspective - people refer to the religious wars in early modern Europe, particularly the Thirty Years War (1618-1648). The secularization of the state would be, from this perspective, the successful response to the horrific experience of the religious conflicts and would also be a sufficient or necessary condition for processes of democratization. Casanova (2009), however, shows that the religious wars cannot be considered to be the foundations of the secular state. This is a historical myth, they rather introduced the principle of *cuius regio eius religio*. This principle stands for the confessionalisation of the state and a territorialization of religion. The secularization of European states came much later and did not necessarily contribute to a democratization of these states (cf. the secular Soviet regime).

Unarguably, religion has often been a source of injustice in the past, although the recent history of the twentieth century gives little empirical evidence for this. The 'Short Century of Europe' (1914-1989) was certainly one of the most violent in the history of mankind, but Holocaust and Gulag were not the product of religious fanaticism. They were brought about by modern, secular ideologies. In contrast,

the fall of the Berlin Wall and the end of the Cold War were to a considerable extent attributable to a Catholic Pope and his fellow-countrymen. The revolution in South Africa and the abolition of the apartheid regime would not have taken place without the active role of the churches. The terrorist attacks of September 11, 2001 gave a new impetus to the focus on the 'problematic' nature of religion and enhanced the fear of religion in secular democratic states. Militant atheists like Dawkins, Harris, and Hitchens point to "9/11" as evidence of the anachronistic and pathological nature of religion, and maintain that religion and democracy are incompatible.

Certainly, not only secular ideologies, but also the highest spiritual ideals can be extremely destructive. In human history they have been 'poisoned chalices' (Taylor), the cause of untold misery and cruelty. Yet, besides all obscurantism and oppression religion is also a powerful source of high moral standards. The widespread negativity about religion - and by extension its banishment to a protected private sphere beyond the secular public domain - ignores religion as a source of private and public morality and therefore pays a high price. Religious beliefs have a specific power of articulation of moral intuitions, with an - at least potentially - enriching significance for the public domain (Habermas, 2009).

It is noteworthy that many critics of religion fire their arrows against intolerant and violent forms of religion and treat them as if they are equivalent to other forms of religion. To the extent that contemporary religions are enthralled with 'logos' - certainly the case for the fundamentalist versions of the great monotheistic religions which hold their holy books (Bible, Tanach, Koran) to be literally true - they are an easy prey for the scientific arguments of the anti-religious camp. But today religion - as in pre-modern times - for many believers is more 'mythos' with an opaque core, 'ein Bewusstsein von dem, was fehlt' (Habermas, 2008), a deeply felt sense of a transcendental Being which cannot be put into words. The understandable attention for religious sectarianism and the

intertwining of religion with politics as a means of power in various regions of the world should not make us forget that in all great religions, compassion for fellow man (the Golden Rule of Confucius and of the Bible) is central (Armstrong, 2009).

We should not unilaterally put emphasis on the shadow side of religion. It does not make sense either to only have an eye for the good things of the naturalistic enlightenment thinking and to ignore the 'malaise' of modernity (the extreme individualism in a disenchanted world without sense, the 'iron cage' of instrumental rationality and the demise of substantive goals, the alienation of political life and the erosion of citizenship and political freedom, Taylor, 1994). In short, we must avoid one-sided and caricatured images of religion and modernity (Van de Donk, 2007).

The changing nature of religion

Changing religion transforms social imagination

Religions are dynamic phenomena. They are entangled in a permanent process of adaptation or reply to new challenges (both from 'inside' and 'outside'), they combine with various socio-cultural contexts and undergo their influence (it is just the variety which is a result of this which makes it almost impossible to draw a substantial definition of religion, one that tries to capture the 'essence' of religion).

A very rough sketch of cultural and religious transformations may suffice here to sketch the changeable nature of religion. Taylor goes much deeper into this in *A secular age*.

When we go far back in human history and turn our attention to 'early' or 'archaic' religion we become aware of great religious transformations and - in their wake - the revolution which has taken place in our 'social imagination', the way in which people in the western world conceive their social life. In ancient societies, religion was 'everywhere', intertwined with everything else, and it was in no sense a separate, private area. The religious life was inextricably linked to social life. In these societies, the social group was the primary authority at religious acts. Individuals

could not imagine themselves outside of given social contexts (besides this 'embedding' in society, ancient religion, according to Taylor, is characterized by its embedding in the cosmos and an embedding in the form of a focus on 'normal' human prosperity, people ask for good health, fertility and the like when they invoke religious powers or try to placate them).

If we go back to the period during the last millennium BC we see in the "axial time" various "higher" forms of religion occurring in different societies. These post-axial religions introduce what Taylor refers to as the great uprooting ('disembedding'). It is in many respects a break with the old religion, although ancient practices would still determine the religious life for centuries. Non-embedded religion sets free the individual from the social sacred (as well as the cosmic sacred and the 'normal' notion of human prosperity: it creates a 'higher' concept of human welfare). The principles of axial spirituality give rise to a social imagination that produces the modern individual, a conception of the social world as composed of individuals. In pre-modern times the individual was given meaning by the whole to which he belonged, but the perspective gradually shifted from the collective to the subjective. Religious beliefs - the medieval man was expected to obtain a godly inner self - played a key role (Augustine was the first to speak of a religious 'self,' 'in the inner man lives the truth'). .

The great uprooting from wider social and cosmic orders, introduced and yet more or less implicit in the axial revolution, achieves its logical conclusion with progressive disenchantment, the reform movement which culminated in the Protestant Reformation (which also changed the Catholic Church), and religious individualism. Modern people have developed a sense of self-consciousness which is not comparable to the self-understanding of medieval or ancient man. Since the late Middle Ages, in a period of half a millennium, in Western Christianity a power line evolved towards a more personal religion. More than ever, individuals are now responsible for their own religious projects.

However, within the Western world there is not a single pattern of modernization (cf. Berger, Davie & Fokas, 2008). Modernization is a multiple phenomenon with more than one specific line of development (e.g. the relationship between modernity and religion is not necessarily a zero sum game). As far as we can speak about a Western pattern of modernization, it is by no means the traditional pattern on which other modernizing cultures have to focus. Eisenstadt (2002) aptly refers in this context to 'multiple modernities' (2002).

The individualization of religion

Religion individualizes, but does not disappear

One of the major social transformations in Western culture is individualization (other keywords with which this change is expressed are 'reflexive modernization' or 'post-traditional society'). The modern 'focus on the self' - whose origins are located in religious thought, to the extent that modernity has religious roots (Hellemans, 2007) - makes individuals responsible for their own fulfillment. For this reason, the traditional values and norms or assigned identities and roles come to have less importance as sources of identity.

This de-traditionalization makes individuals more than ever before responsible for their own religious projects. Thus individuals are less guided by handed-down revelations and explanations as they self-consciously and autonomously seek their own religious identities. As Wade Clark Roof (1994) puts it: "religious identity becomes less ascribed, and more of a voluntary, subjective, and achieved phenomenon."

Taylor characterizes the contemporary religious conditions in the North-Atlantic civilization as 'the era of authenticity'. Characteristics are a focus on individual self-expression and a rejection of authority imposed from outside. Davie (1994) speaks in this context of 'nominal' Christianity. She refers to the rise of 'believing without belonging', or at most in a distant way in the form of 'vicarious religion', an alternate religion with which people move away from institutionalized religion, but nevertheless do not

want to break the bond completely. It is a seeking form of religion, often referred to with the term 'spirituality,' which consists of an eclectic patchwork ('bricolage' or 'Mischreligiosität').

In the transformed but persistent presence of religion in modernity, the modern (religious) culture is permeated by rational enlightenment naturalism that tends to regard man as an atomized, context-free, detached and 'punctuated' subject, that objectifies and controls itself and its surrounding world. The subject is in this 'Cartesian' thinking master of his world, decides itself on what is valuable or not, and does not need God anymore. Yet this modernity is also steeped with a romantic expressivism, with its consciousness that the 'self' is situated and has linguistic, social and moral sources. Romanticism assumes that the self is part of a greater whole and is committed to a reunification of the spheres separated by the Enlightenment (individual – community; body – spirit; reason – feeling; human – nature). In other words, the Enlightenment is not the only source of modernity, Romanticism is also indispensable. In a similar way to Taylor, Habermas also notes that in our culture the naturalistic *Weltanschauung* – which studies reality in a scientific way and manipulates it in an instrumental way – conflicts, but is also closely linked with (revived) religion.

Enlightenment and Romanticism are therefore both - in a contradictory way - united in the identity of modern man. The price of exile in an enlightened, god-forsaken world calls for opposition to the enlightenment ideal and a longing for a reunion with the transcendental. In modernity, the distinction between these mental attitudes started to run more or less parallel with the distinction between public and private. The public areas of the state, politics, law and science became gradually more secularized by Enlightenment thinking, while the romantic ideal of authentic self-realization is designated as a private matter. Thus we encounter the term 'secularism'. Let us consider what the rise of secularity in the modern Western world means.

The changing context of religion

Modalities of secularity

In 1500 it was virtually impossible to have an attitude of disbelief - because the faith was so entwined with the social life that one without the other was barely conceivable. Today the situation has radically changed and it has become normal to state that 'we live in a secular age'. But what is this secularism?

Secularism can be interpreted in terms of public spaces. The obvious conclusion is that religion has disappeared from many isolated public domains (state, politics, economy, culture). These areas are nowadays largely devoid of references to God or a transcendent reality, as seen in the 'separation of church and state', although there is a wide range of 'models' in which the relations between these areas are shaped quite differently, with sometimes even very 'unsecular' connections between these two (the first meaning of secularism thus refers to secular public domains).

The removal of religion out of public domains does not mean that in such a society the majority of the population doesn't have a religious belief or practice. The second meaning of secularism refers to whether people are estranged from religious belief and practice. In this sense, many Western European countries are substantially secularized (in contrast with much of the United States).

In a third sense, closely connected with the second and slightly with the first, according to Taylor, secularism points towards new religious circumstances. The term refers to the fundamental change of circumstances in which religion manifests itself. Modernity does not lead to a world where religion has been marginalized or has disappeared. Religion in modernity remains an important source of motivation. Yet, secularism involves a social transition: from a society where religion is not in question towards a society in which religion is regarded as one option among others. The available option of an independent, exclusive humanism which doesn't accept transcendental goals, is the crucial change which is the core of modern secularism. This was a precondition for the rise of

disbelief and the actual beginning of what Taylor calls the 'nova effect', the steady expanding of forms of belief and disbelief. The former naïve framework in which belief for most people was the automatic option has given way to a reflective framework. Belief is one option among many others, it is moreover a controversial option because for many people a certain naïve atheism is the most plausible option at first sight. This dramatic shift in the overall context, the disruption of the old natural background and the emergence of a situation where everyone realizes that there are several options (on which people disagree, and often even disagree within themselves), is a central characteristic of modern Western society.

Therefore we must *learn* to navigate between the different perspectives: our 'own' point of view and a 'detached' perspective, because our own point of view is only one of the possible points of view and we have to coexist with all the other points of view. So, we are doomed to live our belief (or disbelief) in a permanent state of doubt or uncertainty, because if we just look backwards or sideways we meet people with a different perspective. Indeed, a virtuous use of doubt allows us to deal with the inevitable tensions between the many 'gods' who battle for attention from and support of people in modernity (Berger & Zijderveld, 2009).

The de-territorialization of religion

Media and virtual polytheism

Global media reinforce the experience of living in a polytheistic universe. Ulrich Beck notes in 'Der eigene Gott' the importance of the media for the de-territorialization of religion. What is new in the religious 'conditio humana' at the beginning of the 21st century is the connection of everyone with everyone: the 'cosmopolitan constellation'. Therefore, all religions and 'kulturell-spirituellen Symbolwelten' are set free from their historical and spatial context and are simultaneously present and available. The territorially fixed isolation of religions comes to an end. Through migration processes, but mainly by old and new media, the world has turned into a global village where the religious or non-religious 'other' is more than ever present in the consciousness of

everyone. Thanks to modern communication media, worldwide encounters or clashes between religions are not only considerably easier but also inevitable.

New media act as a catalyst for de-institutionalization and individualization of religion. User-generated media such as YouTube undermine traditional religious authority, which can no longer monopolize the access to the media. Everyone can spread religious messages or claim religious authority by means of these new media. Self-aware, reflective individuals find in an extensive media landscape the symbolic inventory with which they give meaning to their religious self. Less than before do they rely on family, school or church for their spiritual experiences. Individualization, though, does not exclude collective, 'metatopic', non place-bounded forms of 'gathering' where many people simultaneously 'take part' in events and experience powerful emotions which can be considered as new forms of religion.

This state of universal neighborhood recalls the play *Huis clos* by Jean-Paul Sartre. A number of people are together behind closed doors and cannot avoid the gaze of the others (Brandsma, 2006). More than ever, the words of Yeats are relevant in the 21st century: 'What do we know but that we face, one another in this place'. Religion in cyberspace has already been described as the virtual version of polytheism in ancient Greece, on grounds of the volatile and fragmentary nature of the Internet, which with its tremendous variety of religious places greatly stimulates the nova effect of Taylor (De Mul, 2002).

Societies have become increasingly porous. Mass media globalization makes us all neighbors in the global village. This can reinforce the eclecticism which is characteristic of seeking spirituality. Virtual polytheism may therefore contribute to a tolerant multi-religious society, but it may also inspire to religion as a hyper-identity, 'sacred fire' and fear of the (dis)believing other (Sloterdijk, 2008). Virtual polytheism can be a blessing or a curse; religion retains its ambivalent character.

The dialogical nature of religious identity

The illusion of a single identity as destiny

Many modern people define themselves apart from traditional, common frameworks. According to Taylor, this might turn into a perversion of the romantic ideal to be true to themselves. People then become blind for the 'sources' of their self and regard themselves as the measure of all things. The corresponding (existential) portrayal of man is that of a subject who, thanks to his cogito, in a sense creates itself, and is only accountable to that cogito. The detached ratio of a narcissistic ego rejects all external patronizing demands and assumes to be independent of any linguistic, social or moral horizons. Sen (2006) calls this 'identity disregard.' It is a sense of reductionism which ignores the fact that our identity largely derives from frames of reference which we didn't constitute ourselves.

Taylor has a different vision of human identity. He starts from the idea that man is 'situated' in a linguistic and social sense. Man interprets himself - man is a self-interpreting animal - against the backdrop of an already existing and transcendent horizon of value judgments. To that extent he is not master of his own values. He is born and socialized into a social world, a space of intersubjective meanings which precedes his own subjectivity. We cannot suppress or deny the horizons through which things gain significance for us. We orient ourselves on this moral map. We always define our identity in dialogue with, sometimes in conflict with, other identities. We need dialogic relationships to define ourselves. We do this by means of 'strong' values, motivated by moral evaluations. To define yourself as being religious means, in other words, to figure out on what grounds you significantly differ from other (un)religious persons. The formation of a religious identity is a dialogical process.

It is a popular form of reductionism to present human identity as a unitary phenomenon (Sen, 2006). The assumption is that a person is pre-eminently connected with one collective and that his personal identity is completely determined by that collective. Human identity however is complex in nature,

composed of a large number of identifications. The relative weight of those reference points within our overall sense of identity can vary due to context and time. In particular, sectarian movements elevate the religious identity of their supporters into a dominant identity and incite them to ignore all the other identities people have and appreciate (class, gender, occupation, language, science, politics, lifestyle). For the vast majority of believers, their religious identity, however, is one among many others.

We do not create our identity out of nothing (ex nihilo), we are set in contexts which transcend us, but that is not to say that our identity is a fate (Sen calls this 'the illusion of destiny'). It is not true that our identity is already there and is only waiting for us to discover it. The creation of an identity, also a religious one, involves reflection and choice. A highly self-conscious person reflects on his religious identity, wondering what other identities are relevant and weighs the relative importance of different identities. The creation of a religious identity is therefore a dialogical process with room for personal creativity (Appiah, 2005).

The importance of equal and mutual recognition of religious identity

Beyond social autism

Our identity essentially depends on dialogic relationships with others. Still, the nature of our dependence on other people changed significantly in the course of time. In earlier, hierarchical societies, identity was assigned and largely determined by a stable social division of roles. Today - in the era of authenticity - we define our identity, our image of ourselves, our essential characteristics, much more from the inside, in an overt or internal dialogue with what George Herbert Mead described as 'significant others' (Taylor, 1995).

This change intensifies the need for *recognition* of our identity. This is an essential human need that goes beyond a kind of courtesy we owe our fellow human beings. In the case of socially derived identities recognition is a priori given by a social 'script' and therefore hardly problematic. In contrast inner-

derived identities have to gain recognition in a process of exchange.

Recognition (Kant's principle of '*die Anerkennung*') adds an intimate dimension to the personal relationships we maintain with our significant others who provide or withhold recognition. Recognition also has a social dimension in the public domain. Also in the public domain, our - more and more individualized - identity may or may not be recognized.

In a decent society, the government recognizes the unique religious identity of every individual and every religious group in the same way. This policy of equal recognition is blind to the differences between secular and religious 'truth claims.' Both can count on an equal package of rights and obligations. When, under the guise of neutrality of the public domain, secular beliefs are prioritized, this can be regarded as a more or less oppressive or humiliating denial of the equal status of religious beliefs.

However, sometimes a policy of equal recognition requires taking into account the differences between people. Precisely because of the equal recognition one is not blind to those differences and they form the basis of a differential approach. In laws and regulations, in a careless and almost unnoticed way, the sensitivities of religious minorities are often not taken into account. Nussbaum describes this subtle violence as 'soul rape.' A truly equal recognition of the religious other is not asking for a blind equal treatment, but for a generous dispensation for believers with moral conflicts. Only then the government is 'fully respectful' and 'fully fair' to the religious out-group and its policy is no longer the hallmark of the in-group (Nussbaum, 2008).

The 'subjective turn' in Western culture puts into perspective the importance of strictly organized collective identities, which is not to say that the need for recognition of specific cultural and religious groups is always illegitimate. Compared to the past, however, for many people their personal identity derived from many dimensions has become much more important than a collective identity derived from a group (Schuyt, 2009). But there is no "I" without a "we,"

no personal identity without membership in a group. Communities with a collective identity are entitled to equal recognition, as long as we look out for hyper-collective identities which offer no exit-possibility to their members.

A decent society requires *equal* recognition of secular and religious beliefs and forms of *mutual* recognition that go beyond passive tolerance. Precisely because the importance of recognition in our culture has intensified - and denied recognition may or may not evoke suppressed feelings of wounded pride, shame and anger - recognition must be mutual and go beyond living alongside each other like autistics (as in a sense was the case during 'pillarization'). More is needed than dimming the headlights or lowering the eyes in a meeting with the (un)believing other (cf. Pels, 2008). Nobody needs to give up his own truth, but a mutual willingness to listen and learn is a prerequisite for peaceful coexistence and social cohesion.

The post-secular character of the public domain

Inclusive and equal neutrality towards secular and religious beliefs

In many democratic political systems, the public domains of the state, science, and economics have been separated from religion. However, the range of 'models' for relations between secular and religious spheres is extremely varied. Within the framework of religious freedom and mutual autonomy of religious and political institutions (twin tolerations - Stepan, 2000) the spectrum varies from French *laïcité* to the Anglican church in the United Kingdom. The Dutch government has maintained 'unsecular' relationships with religion in the form of denominational pillars that were 'masters in their own houses' in fields such as education, media and health care, while the house was financed with public funds. In Belgium as well, similar arrangements testify to a prudent, pragmatic approach to the 'separation' of church and state (De Groof, 1988).

The separation or mutual independence of church and state - in the literal sense of mutual recognition of institutional autonomy - does not mean that

in another sense there is no legitimate space for religion in the public domain of the state. Or that this institutional differentiation requires a complete watershed between religion and other public domains. The institutional separation of church and state does not imply, for example, that religious arguments should be excluded from the common space of the public debate (or need translation into a secular language, see Rawls, 1993).

The persistent presence and indeed resurgence of religion allows us to characterize our society as a *post-secular* society in which secular and religious beliefs are entitled to equal access to the public domain. The public domain is indeed secular in the sense of an institutional separation between church and state, but should, we believe, be post-secular in the sense of a neutral attitude towards secular and religious truth claims. It should keep an equal distance to both religious and secular beliefs. It is not acceptable, under the guise of 'neutrality', to take seriously only secularized Reason.

The principle of institutional separation of church and state - we do not want to open the debate on this topic - may not act as a 'conversation stopper' which enforces a form of exclusive neutrality whereby the government keeps a far distance from religion. The institutional separation of church and state combines very well with an inclusive neutrality which gives generous place to religion in the public domain (Van Bijsterveld, 2009, Van der Burg, 2009).

This inclusive conception of neutrality was also the supporting idea of the Dutch and Belgian tradition of religious segregation which in many public domains offered room to faith-based organizations. Especially now that we retract from our understanding of modernization as a process which reduces religion to a pre-modern, anachronistic phenomenon that at best has marginal significance as a kind of psychological immune system in the private sphere - and 'public' religions do not wish to 'deprivatise' either (Casanova, 1994) - there is no reason not to give a legitimate place to religion in the public domain at the beginning of the 21st century.

In comparison to the heyday of pillarization, the pattern of cultural-religious pluralism is drastically 'depillarised'. Consider the rise of Islam in more and less conservative variants; the emergence of diffuse 'seeking' spirituality, expressed in both superficial and serious forms; the increase of the number of people who consider themselves to be atheist or agnostic, with a number of high-profile spokespersons who radically but unilaterally emphasize modernization and secularization as liberating forces and put aside religion as an irrational and anachronistic phenomenon which should be entirely banned from the public domain; the reduced importance of traditional centers of religious authority, although smaller, religiously-conservative centers of disciplined submission to an external religious authority persist; and finally the growth of ecumenical awareness within *mainstream* Catholicism and Protestantism, so the old fault line between Rome and Reformation is still hardly active. All of this means that little remains of the former steadiness and clarity. From a stable and institutionalized pluralism (*semper idem*) we move towards a more individually based and more fluid pluralism (*panta rhei*). Religion became an elusive, 'liquid' (Roof, 1994, Bauman, 2005) phenomenon, so in many areas the traditional pillarized arrangement with publicly supported confessional organizations stands under great pressure, also in the educational field.

This public domain needs a new arrangement, a new prudent and pragmatic compromise (Margalit, 2009) that - if possible in a way that will stand up in the future - do justice to the outlined transformations of religion, and guarantees the fundamental right of religious freedom in the context of an institutional separation of church and state, and also contributes to a peaceful and respectful treatment of religious pluralism. Now that we have outlined our considerations in this section in a more general and fundamental way, we will have a closer look at considerations that directly affect structure and functioning of the Dutch educational system.

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§ 2 Considerations religion and education

§ 2.1 The Dutch history of denominationalism and depillarisation

The typical Dutch tradition of the so-called 'particularism' begins with the - Dutch - Revolt (1568 - 1648) and the birth of the Republic of the Seven United Netherlands (1588-1795). The historical term 'particularism' refers to the resistance of the bourgeoisie in the Dutch provinces against the authority of the German Emperors Maximilian I (1459 - 1519) and Charles V (1500 - 1558) or the Spanish King Philip II (1527 - 1598): an opposition that stemmed from the desire of the bourgeoisie to largely independently defend its interests, through its own organization.² The Dutch provinces were the legacy that Charles V in 1506 as the sovereign had received from his grandmother, Mary of Burgundy (1457-1482). Charles V was besides the ruler of the Dutch provinces since 1516 also King of Spain and from 1519 on the emperor of the Holy Roman Empire (1519-1806). He inherited the Spanish kingdom from his mother Joanna of Castile (1479 - 1555) and the authority over the Holy Roman Empire was transferred to him by his grandfather Maximilian I. From the moment Maximilian I, through his marriage to Mary of Burgundy, acquired custody of the Dutch territories and the Spanish throne of Philip II, the only son of Charles V, the Dutch provinces put their special or private interests above the public interest of the Holy Roman Empire or the Spanish kingdom. Therefore since then we speak of the particularism of the Dutch provinces. This particularism finally degenerated in 1568 in the so-called 'Dutch Revolt': a term used in modern history to refer to the 'Eighty Years War'.³ In 1648 the Peace of Westphalia ended the uprising. Spain recognized the sovereignty of the confederation of

Dutch provinces and their formal relationship with the Holy Roman Empire got broken: the Republic of the Seven United Netherlands, by the States-General since 1588 became a fact.⁴ In 1795 the Republic of Seven United Provinces came to an end, one year after a invasion of the republic of France, installed in 1792. The Republic of the Seven United Netherlands was a vassal of the French First Republic (1792 - 1804), and as such renamed Batavian Republic (1795-1801). Since 1801, the Dutch provinces were called 'Batavian Commonwealth (1801-1806) after a constitutional amendment by the First Consul of the First French Republic, Napoleon Bonaparte. But when Napoleon Bonaparte lost his confidence in the compliance of the Netherlands, he renamed it the Kingdom of Holland (1806 - 1810), crowning his brother Louis Napoleon Bonaparte king. In 1810 the Kingdom of Holland was annexed by the First French Empire (1804-1815), liberated in 1813 by the Prussians and the Russians. The French occupation was a serious breach of the particularistic nature of Dutch society and strengthened the forces of some upper middle class who favored the creation of a modern, centralized state.⁵ Next Willem Frederik of Orange-Nassau as Willem I (1813 to 1815) was the sovereign Prince of the Principality of the Netherlands from 1815 to 1840 and king of the United Kingdom of the Netherlands. Finally, his son Willem Frederik George Lodewijk as Willem II 1840-1849 was the king of the Kingdom of the Netherlands (1839 - present). Under the authority of Willem I and Willem II the Netherlands developed into a modern unitary state.

In society, particularism remained, albeit in modernized form, however, very lively.⁶ Particularism managed to revive by expressing itself in the so-called 'denominationalism' of Dutch society: the organization of society in vertical structures based on religious or philosophical principles. The Dutch

2 Erven Fortuyn, W.S.P. [cop. 2002], *De verweesde samenleving. Een religieus-sociologisch traktaat*. Uithoorn, Karakter Uitgevers B.V./Rotterdam, Speakers Academy Uitgeverij B.V. [cop. 2002], p. 93.

3 Van Oudheusden, J.L.G. [cop. 2005], *De wereldgeschiedenis in een notendop*. Amsterdam, Uitgeverij Bert Bakker [cop. 2005], p. 62.

4 See endnote 2, p. 64.

5 See endnote 1, p. 94.

6 See endnote 4.

society, as such, was during the first half of the twentieth century divided into a Protestant-Christian pillar, a Roman Catholic pillar, a social-democratic pillar and a liberal-neutral column: vertical structures, each with its own broadcasting, newspaper, trade unions, political parties, housing associations, youth organizations, educational institutions, healthcare facilities, sports clubs, etc. The (regionally rooted) interests of the various pillars were institutionally reconciled at state level.⁷ *Morally* speaking, the different pillars were united by their common petty-bourgeois understanding of the bourgeois lifestyle.⁸ The dominance of this interpretation of the bourgeois values was broken by the cultural revolution which took place from the beginning of the second half of the twentieth century. Fortuyn calls this change even a revolution, as it totally changed the Dutch society, opened discussion upon the collective system of values, and damaged not to say completely destroyed the transfer, training and enforcement mechanisms of this system.⁹

Most of the aforementioned institutions within the pillars which were responsible for the transfer, training and enforcement mechanisms for collective norms and values their cultural and moral influence, but not their objective existence despite the ‘depillarization’. Some organizations, however, had cease to exist. The decoupling of the institutions on the one hand and their traditional supporters on the other had two consequences. The institutions were able to focus on their professionalism independent of any worldview motivation or aspiration to cultural and moral formation of their ‘supporters’. The traditional ‘supporters’ were disintegrated and individualized, which allowed individuals to define their own norms and value patterns.¹⁰ Both developments as a result of the process of depillarization started in the sixties of the twentieth century maintained in all spheres of

society, so as well in the Dutch educational system. The emancipation of the education stakeholders - especially the authorities, the teaching staff, pupils and students, and parents - drastically changed the way in which freedom of education currently is achieved. The freedom of education during the pillarization was achieved by a strict distinction between public (accessible to everyone) and private (secular - primary and secondary) education, this freedom since the depillarization is realized through a small number of homogeneous ‘remnants’ of the aforementioned pillarized distinctions on the one hand and a large number of educational institutions with a very heterogeneous composition on the other hand. In this section we will discuss this transformation in the Dutch educational system. In subsection 2.2 we show how the abovementioned prescription of fundamental rights and law and legislation and case law allow an expression of the blurring distinction between public and private schools.

§ 2.2 Article 23 of the Dutch Constitution: freedom of education

The act

Article 23 of the Constitution articulates the fundamental right to freedom of education. The text of the Constitution reads as follows:¹¹

1. Education shall be the constant concern of the Government.
2. Providing education is free, subject to state control and to regulate by law, for the forms of education designated by law, the research of the ability and morality of those who teach.
3. Public education is designated by law with respect to everyone’s religion or belief.
4. In each municipality government sufficiently general public primary education is provided in a sufficient number of public schools. Under rules set by law notwithstanding this provision may be admitted provided to receive such

⁷ See endnote 4.

⁸ See endnote 1, p. 99.

⁹ See endnote 1, p. 100.

¹⁰ Barth, M.A.M. [cop. 2001], ‘Opvoeden tot burgerschap: vrijheid, geen vrijblijvendheid.’, in: Vuijsje, H. (red.), *Mores leren. De overdracht van normen en waarden in het onderwijs*. Assen, Koninklijke Van Gorcum [cop. 2001], p. 68.

¹¹ See: http://wetten.overheid.nl/BWBR0001840/geldigheidsdatum_21-01-2010, visited on Thursday, January 21, 2010.

education is opportunity, whether in a public school.

5. The requirements of reliability, in whole or in part from public funds to finance education to be regulated by the law, taking account, as far as special education, of the freedom of conviction.
6. These requirements are for general primary education shall be such that the validity of all the publicly funded private schools and public schools are fully guaranteed. That arrangement is particularly the freedom of private schools to choose their teaching aids and to appoint teachers respected.
7. The Private primary schools that satisfy the statutory conditions to be inadequate, to the same standards as public education financed from public funds. The law lays down the conditions which apply to private general secondary and pre-higher education contributions from public funds are granted.
8. The Government shall submit annual State of Education report to the States-General.

The 'school conflict' and an equal financial footing

The constitutional article owes its current wording largely to the constitutional revision of 1917 and an amendment to Article 23 paragraph 4 of the Constitution which came into force in 2006. The constitutional amendment of 1917 was the culmination of the so-called 'school conflict' between secular liberals and social democrats on the one hand and the confessional Protestant-Christians and Roman Catholics on the other hand on the *overall* equal funding of private schools and public education and on the constitutional codification of this equation. Public and private schools were *partially* financially assimilated by the review of the Act on primary education of Jan Kappeyne van de Coppello in 1878, in 1889 by the same law of Mackay. The Law on elementary education of Mackay arranged that private schools received the same government subsidy as the municipalities received to finance the teachers of public schools. The private schools however had themselves to take care of the financing of their equipment and buildings, while public schools could benefit from the help of the municipalities. In 1917

there finally came an end to the 'school fight', which lasted more than a century, by a Constitutional amendment which provided full equal funding of private and public education (Article 23 paragraph 7 of the Constitution). The amendment of Article 23 paragraph 4 of the Constitution will be discussed below.

By this equal funding of public and private schools the Dutch educational system is characterized as a dual system. In this system, characterized as a unique and multifaceted education system¹² public and private schools are given the opportunity to offer their education - in compliance with legal requirements¹³ such as requirements of reliability with respect to *the freedom of direction* of the private schools (Article 23 paragraph 5 of the Constitution). Public schools should do this on an ideologically neutral way, with respect to everyone's religion or belief (Article 23 paragraph 3 of the Constitution) must be respected. By contrast, private schools have the freedom to determine their own worldview conviction. In literature there is not a single definition of this freedom of conviction. Mentink calls it 'the freedom to express own thoughts on how to raise children in

12 Glenn, Ch. L. & De Groof, J. [cop. 2005], *Balancing Freedom, Autonomy and Accountability in Education*, Volume 2. Nijmegen, Wolf Legal Publishers [cop. 2005], p. 291: "The Dutch can justly claim to have the most pluralistic school system in the world".

13 The Dutch education system consists of four sectors: (1) primary education (PO), (2) secondary education (VO), which consists of secondary education (lower secondary professional education), senior general secondary education (HAVO), and pre-university education (VWO), (3) the (secondary) vocational education (MBO) and adult education (BVE) and (4) higher education (HE) which consists of higher professional education (HBO) and university education (WO). The PO is covered by the Act (WPO). Schools in the PO that special education services are covered by the Expertise Centres Act (WEC). The VO is regulated by the Law on Secondary Education Act (WVO). The Education Act (Web) regulates ESO, while the Law on Higher Education and Scientific Research (WHW) regulates the HO.

private schools'.¹⁴ Vermeulen¹⁵ and Zoontjens¹⁶ talk about the "freedom to express an own religious or philosophical view on man and society in education". Nevertheless it is clear that we can distinguish three levels in the freedom of education, namely the freedom of establishment or foundation, freedom of organization and the freedom of conviction.

The freedom of establishment or foundation

The freedom to found an education institution is contained in Article 23 paragraph 2 of the Constitution. The word 'teaching' in the saying "the teaching is free [...]" indicates that the fundamental right does not accord to those who purchase education (students and their parents), but only to those who - on their own initiative - provide education. Those who - on their own initiative - offer education are those who establish and maintain a private school. The right to freedom of education is thus a right at the 'offer' side and not the 'demand' side. It is a right of producers, not consumers.¹⁷ The organization and decision making process of private schools is governed by private law. Educational institutions which provide private education are maintained by a 'a legal body with full legal capacity who according to the statutes or regulations provide education without a profit-making motive'.¹⁸ Educational institutions of public education, by contrast, are established by the government under a general provision under Article 23 paragraph 4 of the Constitution, first sentence.

The authority of the public school lies with the board of the municipality (mayor and aldermen) where it is established¹⁹, with a by the council established governance committee²⁰, a public entity and a private legal body²¹, namely the Foundation.²² We will refer to this later when discussing the amendment of Article 23 paragraph 4 of the Constitution in 2006.

The freedom to organize

The freedom of establishment means the freedom to determine according to own's one view an educational institution of private education, the related organization, the management and governance.²³ Some parts of the freedom to organize are mentioned in a non-restrictive phrase in the Constitution in Article 23 paragraph 6, second sentence. The words 'in particular' indicate that the freedom of establishment in principle is more than just the choice of learning materials and the recruitment of teaching staff.²⁴ Experience shows that educational institutions of private education perceive the selection of students as part of their freedom of establishment.²⁵ This practice has its legal basis in Article 7 paragraph 2 Equal Treatment Act:

"The first paragraph, section c, does not affect the freedom of an institution of special education, when regarding the admission and participation in education requirements, which considering the aims of the institutions necessary to achieve its basis, where

14 Mentink, D. [cop. 1996], Artikel 23 van de Grondwet: de vrijheid van richting en de dragers van de vrijheid van onderwijs, in: Preadviezen bij het advies 'Richtingvrij en richtingbepalend'. 's-Gravenhage, Onderwijsraad [cop. 1996], p. 12.

15 Vermeulen, B.P. [cop. 1999], Constitutioneel onderwijsrecht. 's-Gravenhage, Elsevier [cop. 1999], p. 51.

16 Zoontjens, P.J.J. [cop. 2003], Bijzonder en openbaar onderwijs, in: Ton Bertens e.a. (red.), Recht en religie, bijzonder nummer Ars Aequi, Nijmegen [cop. 2003], pp. 59-68.

17 Mentink, D. & Vermeulen, B.P. [cop. 2007], Artikel 23 Grondwet. Toelichting op het grondwetsartikel over onderwijs mede aan de hand van ontwikkelingen in wetgeving, internationaal recht en jurisprudentie. 's-Gravenhage, Reed Business [cop. 2007], p. 73.

18 See: Article 55 Law on Primary Education. See also: Article 49 paragraph 1 Law on Secondary Education, Article 9.1.1 Education Act and Article 9.51 paragraph 1 Law on Higher Education and Research.

19 See: Article 23 paragraph 4 of the Constitution, first sentence: "[...] government [...]".

20 See: Article 83 Municipalities.

21 See: Article 47 Law on Primary Education. And further: Article 42a Secondary Education Act.

22 See: Article 17 and Article 48 Act on primary education. And more: Article Article 42b and 53c to the Secondary Education.

23 See endnote 16, p.69. And further: Article 5 paragraph 2c Equal Treatment Act: "The first paragraph shall affect the freedom of an institution of special education to make demands on the performance of a function that, given the purpose of the institution, are necessary for the achievement of their principles, such requirements may not lead to discrimination on the mere fact of political opinion, race, sex, nationality, heterosexual or homosexual orientation or marital status.

24 See endnote 16, pp. 61 & 69.

25 See endnote 16, p. 71.

such requirements may not lead to discrimination on the mere fact of political opinion, race, sex, nationality, heterosexual or homosexual orientation or marital status. Discrimination on grounds of sex is only permitted if the nature of the institution and demands for students of both sexes have equivalent facilities”.

With regard to the first sentence of the said subsection it is important to say that it expressly states that the requirements that private schools maintain for the selection of teachers and pupils are not allowed if they lead to discrimination on grounds of the *mere fact* of political opinion, race, sex, nationality, heterosexual or homosexual orientation or marital status, that is based on any of the above facts alone. It may also be clear that freedom of establishment is closely linked to the freedom of conviction to be discussed below.

In contrast with private schools, educational institutions of public education are accessible to all under Article 23 paragraph 3 Constitution, and teachers and students may therefore not be refused because of their religion or belief.

The freedom of conviction

As mentioned in the literature, there is no agreement on the definition of freedom of conviction. The Administrative Court of the State Council in 1997 determined a set of generally accepted criteria to determine the freedom of conviction. Required for such an autonomous conviction to be recognized: (I) an objective contained in statutes which is clearly distinguishable from that of other schools, (II) this objective is supported by a ‘discernible movement’ in Dutch society, and (III) the ‘measured significance’ of this objective meets the legal norm for foundations.²⁶ Pedagogical convictions are explicitly not convictions within the meaning of the abovementioned legal criteria, although the so-called general-private schools - schools with a particular pedagogical basis

– are state funded. The concept of conviction has in this sense a religious and philosophical nature. There are both public and private schools based on a particular pedagogical convictions. Based on freedom of conviction, private schools are allowed to select the learning materials and maintain a selective policy for the recruitment of teaching staff and admission of students.

The extension of this freedom is demonstrated by the famous so-called Maimonides judgement of the Supreme Court in 1988.²⁷ In this case, the question arose whether the board of the Maimonides Lyceum, an Orthodox Jewish school, had the right to refuse a child, Aram Brucker, from a liberal Jewish family who didn’t have a Jewish mother while the educational institution only allowed and allows children with a Jewish mother. The father of the child, was allowed to attend the school in his youth as a pupil. Nevertheless, the Supreme Court judged the management of the school to be within its rights by refusing the child as a pupil:

The “freedom of conviction” protected by Article 23 of the Constitution has so much weight, taking into account Article 6 of the Constitution and Article 9 EVRM, that those who (as in this case the Foundation) maintain a private education institution, in principle – setting aside special circumstances of which there is no question here – in relation to parents of a child who, according to admission policies with a religious basis, is not eligible for admission, are free to deny the request of these parents for admission, even though the parents (as in the case of the Bruckers) have a strong and reasonably-founded preference for the education provided at the said institution, and even though the said institution is the only one that provides education of this religious character.

In this judgment the Supreme Court indicates, though restrainedly, that rights based on convictions are not unlimited. When there are “special circumstances” - circumstances referred to in Article 7 paragraph 2

26 Afdeling Bestuursrechtspraak Raad van State 11 februari 1997, Administratiefrechtelijke Beslissingen 1998, 28, met noot van Vermeulen, B.P., en Kortmann, C.A.J.M.; Ars Aequi 1998, pp. 607-612.

27 Hoge Raad 22 januari 1988, Administratiefrechtelijke Beslissingen 1988, 96, Nederlandse Jurisprudentie 1998, 981 (Maimonides).

General Equal Treatment Act, the first sentence - then a private school can not rely on Article 23 paragraph 5 of the Constitution. Furthermore, according to the opinion of the Supreme Court in this case there need to be a refusal of a student or students “based on a consistent policy resting on religious grounds”. The Supreme Court thus requires that the admission policy of private schools comply with a requirement of consistency. It is not permitted to use any criteria for admission at random. The Equal Treatment Commission maintains the same requirement for private schools in terms of their policies for the recruitment of teaching staff.²⁸ The number of private schools in accordance with the criteria of the Maimonides judgment and the Equal Treatment Act who have a selective policy for the recruitment of teaching staff and admission of pupils are only 5 percent of the total, according to Zoontjens.²⁹ The remaining 95 percent of the total number of private schools maintain an open admission policy. They require teachers and students to respect the religion or conviction of the school rather than to endorse it.

As mentioned above, public schools have to offer education in a ideologically neutral manner. Nevertheless, the legislator has stated the neutrality requirement in a formal sense regarding educational institutions of public education, which means that everyone’s religion or belief has to be respected. So in Article 46 paragraph 1 Law on Primary Education the aforementioned educational institutions are mandated to give attention to the worldview and social values of Dutch society:

“Public education contributes to the development of pupils with attention to the religious, philosophical and social values of Dutch society with acknowledgement of the significance of the diversity of these values”.

The legislator has formally stipulated in article 50 of the Law on Primary Education that public schools

can provide religious education and / or worldview training:

“The responsible authority allows students to obtain religious education or worldview training at school. The time spend on this education can go up to maximum 120 hours according Article 8, the seventh paragraph, heading b. For students who do not attend this teaching, the authority provides other educational activities at school”.

The distinction between public educational institutions on the one hand and private educational institutions on the other hand, so specifically emphasized in the Constitution, has been weakened by legislation in a formal sense, particularly in response to changes in views on the role of religion and belief current within Dutch society. The passive or negative educational neutrality of public educational institutions has as such given way to the active pluralism or positive neutrality of these educational institutions.³⁰

Moreover, legislation has formally established that the responsible authority of a public school may be exercised by a foundation.³¹ The municipality where the public school is located may, pursuant to Article 48 of the Law on Primary Education, entrust the management of the school to a foundation. This foundation performs all duties and responsibilities of the authority with the exception of decisions on the abolition of public schools.³² Under Article 17 of the Law on Primary Education public schools may merge *administratively* with private schools by uniting their responsible authority – that of local government - with the responsible authority of private schools.³³ The Board resulting from an administrative merger of public and private schools is called a ‘joint management’. In exceptional cases, the public and private schools are also allowed to *physically* merge by establishing so-called ‘mixed schools’. The constitutional basis for the physical merger of

28 Commissie gelijke behandeling 4 december 2001 (oordeel 2001-116) en Commissie gelijke behandeling 26 juni 2006 (oordeel 2006-128).

29 See endnote 15.

30 See endnote 16, p. 90.

31 See endnote 21.

32 See: Article 48 paragraph 5 of the Act on primary education.

33 See: Article 17 paragraph 1 Law on primary education.

public and private schools is a amendment to Article 23 paragraph 4 of the Constitution in 2006. The following italicized elements were then added to the said subsection:

“In every municipality sufficient public general primary education is provided by the government in a sufficient number of *public* schools. Exceptions to this law may be allowed under rules established by law, provided there is opportunity to receive such education, whether or not in a public school. “.

By adding these elements to the subsection, the constitutional legislator expressed in principle that primary education should be available from public schools. The constitutional legislator however allowed the legislator in a formal sense to make an exception to that principle. To date, the legislature has not drawn up legislation to establish the mixed schools in a formal sense. It is expected that, when the fundamental provision on the freedom of education is submitted to a review, the conditions under which mixed schools may be established will be under discussion, partly because the Dutch parliamentary history has shown that there are both supporters and opponents of mixed schools, partly because foundation and organization of these schools is a legally complex and highly technical matter. It is complex because it is not clear in advance whether a mixed school should be considered to be a public or private school and how the government can fulfill its role as authority over the - merged - public school. As long as Article 23 of the Constitution stipulates a strict distinction between public and private schools, the mixed school has to be one or the other. Another category is simply not possible at this moment. And as long as the legislature in a formal sense doesn't provide rules regarding the role of government - which undoubtedly will be a party in the physical merger of a mixed school and take part in the governing of this mixed school – the risk remains that the municipal authority will end up in a juridical and administrative mine field in case of a merger. Moreover, it seems probable that the legislator in a formal sense - when legislation will be created which affects the foundation of mixed schools - will make sure that this educational institution can only be the

result of a merger between a public school or more public schools on the one hand and a private school or several private schools on the other hand, and not be a foundation *ex nihilo*.³⁴

Freedom of education and the right to education in international law and European law

Finally, we note that freedom of education is not only guaranteed by Article 23 of the Constitution, but also by a number of human rights provisions. We call the most important:

1. Article 2 Protocol 1 European Convention for the Protection of Human Rights and fundamental freedom;

“No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religions and philosophical Convictions. “.

Concerning this article it should be noted that this provision presumably does not enforce a claim on public funding of private schools, as far as the Dutch court denied the horizontal application - between citizens and between citizens and *private legal* persons - to this provision.³⁵ But as far as private schools are fully financed by public funds and - taking into account all the aspects related to freedom of conviction and organization – it might be possible that the Dutch court will draw the conclusion that every Dutch fully funded educational institution, and thus also the publicly funded private schools, has to be called a ‘public’ institution. The State would have the positive obligation by virtue of Article 2 in conjunction with Article 14 (prohibition of discrimination) Protocol 1 European Convention for

34 See note following Report, Parliamentary Papers II 2001/02, 28 081, No. 5, p. 3. And further: endnote 15.

35 Vermeulen, B.P. [cop. 2007], *Vrijheid, gelijkheid, burgerschap. Over verschuivende fundamente van het Nederlandse minderhedenrecht en –beleid: immigratie, integratie, onderwijs en religie*. Den Haag, Sdu Uitgevers [cop. 2007], p. 28: voetnoten 45 en 46.

the Protection of Human Rights and Fundamental Freedoms) to guarantee equal access for individual citizens.³⁶

Furthermore, it is not unimportant to point out the fact that Article 2 Protocol 1 European Convention for the Protection of Human Rights and Fundamental Freedoms expressly states that *parents* have the right to secure education which corresponds to their religious beliefs. The article is in contrast with Article 23 of the Constitution which primarily focusses on the rights of suppliers of education, in principle the right of consumers of education. This fact immediately raises the question if and how the right to education and the right of parents to exercise this right by founding schools is guaranteed by Article 23 of the Constitution. The answer to this question needs to be an affirmative one; Article 23 of the Constitution guarantees the right to education, whether by the right of parents to exploit this right by founding a school and make a school choice, to discount the freedom of establishment or foundation, a freedom which over time was used more by schools operating independently from parents than by parents themselves. As a result, suppliers of education are usually schoolboards, which does not necessarily mean that parents basically cannot provide education. Indeed it is obvious that parents are free to independently organize and provide education, either in the form of home education under Article 5a and / or Article 5b of the Compulsory Education Law, either in the form of a government-recognized educational institution.

And further:

2. Article 14 Charter of Fundamental Rights of the European Union;
3. Article 13 International Covenant on Economic, Social and Cultural Rights;
4. Articles 149 and 150 Treaty establishing the

European Community;

5. Articles 1, 2 and 5 International Convention on the Elimination of All Forms of Racial Discrimination;
6. Articles 1 to 5 Convention on the Fight against Discrimination in Education;
7. Article 23 paragraph 3, 28 and 29 Convention on the Rights of the Child, Articles 1 to 8 of Directive 2000/43/EC on the basis of Article 13 Treaty establishing the European Community.³⁷

The blurring of the distinction between public and private schools

In this subsection we attempted to broadly indicate the extent to which Article 23 of the Constitution and adjacent regulatory and case law offered room for and are the expression of the blurring of the distinction between public and private schools. In short, in particular the legislation on the ability of public schools to offer religious education and worldview training, the possibility for municipalities to privatize the governance of public schools, and the cautious steps toward the legislation of mixed schools are a clear indication of the *legal* blurring of the distinction between public and private education. This is certainly not the whole story. The distinction between the two forms of education also blurs *in fact*, public education gets increasingly a special character and private education is becoming more public and general by nature. The identity of public schools is increasingly the result of a compromise between different religious and philosophical views about life in and outside the schools, while many private schools, whether consciously or not, allow their identity to be watered down. Earlier we noted that only a small share of the private schools select teachers and students by employing religion or belief as a selection requirement: a requirement which was previously seen by private schools as an

³⁶ Onderwijsraad [cop. 2002], Vaste grond onder de voeten. Een verkenning inzake artikel 23 Grondwet. Den Haag, Onderwijsraad [cop. 2002], p. 37.

³⁷ Zie: eindnoot 35, bijlage 3.

important tool for the maintenance of their identity. For a considerable number of schools in primary education, the abandonment of the pupil admission requirement is opportunistic, if these schools cannot otherwise maintain their enrollment about the level for school closing, as prescribed by Article 154 of the Law on Primary Education.³⁸

38 “For each municipality, based on student density in that municipality, a waiver standard established by the formula: Lifting Standard = $0.6 \times (\text{student density} (0.15 + 0.0027 \times \text{pupil density}))$. The result of the calculation is completed, the decimals are ignored if the first decimal place is less than 5 and the decimal place are neglected and the number increased by 1 if the first decimal place is equal to or greater than 5. The waiver standard is at least 23 and 200. The student density is the result of the population of 4 to 11 years in the municipality divided by km² land area of that municipality. If the number of km² of the municipality is less than 10 km², is to calculate the density based on 10 student km². The pupil density shall not exceed 500. “.

§ 3 The modified relation between denominationalism and depillarisation in Flanders

§ 3.1 The Belgian and later the Flemish ‘school issue’ as a reflection on the changed relation between denominationalism and depillarisation (summary)

It is well known that the educational policy of Willem I during the ‘Dutch Regime’ caused and also triggered the ‘Belgian Revolution’. Article 226 of the fundamental law of August 24, 1815 required that public education is ‘an ongoing subject of concern’ of the government. The politics of Willem was interpreted as a commitment to a monopoly of the State. In the Empire there needed to be a unit concerning education and upbringing, according to the principles of state building, and the church ought to be useful to the state. Gradually the freedom of education was hindered and the authorization requirement of the government for any private initiative was a thorn in the side of the church. “Freedom of education was, for the Catholic Church, the price of the support which it gave to the revolutionary movement which resulted, in 1830, in the separation of Belgium from Holland.”

One of the first acts of the ‘Provisional Government’ was the creation of a committee which had to design the principle of freedom of education. The decrees of October 12 and October 16, 1830 ordered the freedom of association, expression and education, par excellence : ‘ dans un but religieux ou philosophique quel qu’il soit, de professer leurs opinions comme il l’entendent, et de les répandre par tous les moyens possibles de persuasion et de conviction.’

On December 17, 1830 the letter of Archbishop de Mean was read in the National Congress. More than the brochure ‘*Considérations sur la liberté religieuse*’ - which was published at the same time as the committee’s draft constitution and was entitled to be the manifesto of the so-called school of Mechelen -, this letter speaks about the freedom of education.³⁹

39 Simon A., *Le Cardinal STERCKX et son temps (1792-1867)*, dl. I, L’Église et L’État, Wetteren, 1950, blz.

The letter stated that religion and education are intertwined in such way that religion is no longer free, when education is not. The Archbishop asked the National Congress to guarantee a full and complete constitutional freedom of education and to make to this end any measures preventing the exercise of this freedom impossible.

The original Article 17 of the Constitution stipulated: *‘Education is free; any preventive measure is prohibited; the punishment of crimes is only set through the law. Public, state funded education, is also governed by law.’*

Compulsory education, a fortiori nursery and primary education, had long been steeped in the Catholic religion, under the authority of the church hierarchy. The Belgian system of ‘recognition of worship’ also insured to the Catholic religion a privileged status. The autonomy of public education, especially the schools organized by the municipalities and the provinces on the one hand, and the individual freedom of choice to worldview education on the other hand, were committed to school and therefore political conflicts.

The course of education policy 1830-1958, however, turned out to be a long effort to bring *peace* to other controversial subjects: recognition and funding of Catholic education, the role of government and the development of state education, the scope of pedagogical freedom and the impact of inspection and surveillance, the choice of denominational and non-denominational education, ...⁴⁰ Finally, the balance was achieved through the school pact and the unfolding law, as subsequently revised many times.⁴¹

The *free choice of school* is the core of the school pact and the entire legislation derives from it, - e.g. the

142; Huytens E., *Discussion du Congrès Nationale de Belgique, 1830-1831*, Brussel, 1844, dl. IV, blz. 42.

40 Witte E., De Groof J. en Tyssens J., *Het schoolpact van 1958: ontstaan, grondlijnen en toepassing van een Belgisch compromis*, Leuven, 1999, p. 895.

41 De Groof J. m.m.v. Fiers J., *De Schoolpactwetgeving: coördinatie en annotatie*, Antwerpen, 1996, p. 192.

rational planning of education, school transport, health surveillance and counseling, social benefits, and – not for its quantitative but for its fundamental implications - the rules in favor of parents to choose schools according to their conviction within a certain distance.⁴²

After thirty years this school pact became outdated.⁴³ The constitutionalization of the common fundamental rights, due to the ‘federalization’ of education, then led to the present Article 24 of the Constitution which reads as follows:

“§ 1. Education is free; any preventive measure is forbidden; the punishment of offenses is only governed by law or decree.

The community offers parents a free choice.

The community organizes neutral education. Neutrality implies notably the respect of the philosophical, worldview or religious beliefs of parents and pupils.

Schools run by the public authorities offer, until the end of compulsory education, the choice between the teaching of one of the recognized religions and non-denominational ethics.

§ 2. If a community as a organizing body wishes to delegate powers to one or several autonomous bodies, it can only be done by decree adopted by a majority of two thirds of the votes cast.

§ 3. Everyone has the right to education with respect for fundamental rights and freedoms. Access to education is free of charge until the end of compulsory education.

All pupils of school age have the right to moral or religious upbringing at the expense of the state.

§ 4. All pupils or students, parents, staff and educational institutions are equal according to the law or decree. The law and decree take into account objective differences, notably the characteristics of each organizing authority, which justifies appropriate treatment.

§ 5. The establishment, recognition, and subsidizing of education by the community is governed by law or decree.”

Worldview character was considered to be the crucial standard for the organization of the Belgian education system⁴⁴ and the Flemish legislation was derived from it. However, there are some differences in emphasis. Two examples: the choice between denominational and non-denominational schools has changed into the choice between government and free education; municipal and provincial (officially subsidized) education can only be considered as a free school choice if its neutral character is formalized. The denominational or secular character of quite a number of schools in this pillar would just be less pronounced or even fade away.

The status of philosophical teaching, including the inspection and supervision, the legal status of staff in denominational education, the organization of non-denominational ethics, and the regime of private institutions challenged the concept of the philosophical nature of the private and public schools and thus the concept of a free choice.

The unequivocal worldview character of education belongs to the past. Several times, Catholic education was asked - with mixed results – to make room for an explicit recognition of non-catholic dispositions through the organization of non-catholic philosophical education or through exemptions, through the recruitment of Muslim teachers, or by dismantling the responsibility of the school authorities by a far-reaching right to participation.

The tendency to regulate and the extensive involvement of the state in almost all aspects of policy, governance and management put a mortgage on the remaining ‘free space’ within the freedom of education. It can be expected that a public debate will go into the heart of this freedom. Maybe a new

42 De Groof J., *De overheid en het gesubsidieerd onderwijs*, Brussel, 1985, 280 p.

43 De Groof J., *De Grondwetsherziening van 1988 en het onderwijs: de schoolvrede en zijn toepassing*, Brussel, 1989, 233 p.

44 De Groof J., *Het levensbeschouwelijk karakter van de onderwijsinstellingen*, Administratief lexicon, Brugge, 1985, p. 135.

‘school pact’ can be expected.⁴⁵ The place of religion in education is under pressure.⁴⁶ The first theme is the creation of a new general course on ideology and philosophy.⁴⁷

§ 3.2 Case study: religion and the secularization process in education in Flanders and in a European context

Introduction

The ‘Religionsfriede’ mentioned in the Treaty of Augsburg of 1555 introduced the principle ‘cuius regio, eius religio’. Europe was Christian, but divided into a Protestant north and a Catholic south. The fracture line went right through the Low Countries.

Under the motto ‘Give to Caesar, what belongs to Caesar, give to God what belongs to God’⁴⁸ the States, when they introduced compulsory education in the 19th century, allowed parents to ensure the fulfillment through schools or home education. Although education in the 19th century was mainly provided

by Catholic institutions, though without adequate funding, the Belgian State gradually claimed a more prominent place in education and the freedom to choose non-denominational education was put on the agenda. Several conflicts due to the imbalance in funding at the expense of private education and the role of governments in general, have repeatedly led to dramatic political crises. Mostly - as already stated - a “school war” ended with a compromise. Thus, the Belgian history experienced several pacts - in principle on the subsidized status of private schools and staff, the development of state education, the choice between religious and secular education,... The school Pact of November 20, 1958 and the School Pact Law of May 29 1959 anchored the former worldview compromise – a characteristic pacification model of that period. The constitutional amendment of July 15, 1988 constitutionalized the leading school pact principles.

Throughout Belgian history and even after the federalisation of education the French model with a strict separation between church and state in education was consciously not chosen. Religion in Flemish education is regarded as a prominent criterion for the organization of courses; the freedom for parents to choose a school set up according to their own religious (and secular) belief has a constitutional character (Article 24). It is no coincidence that the Documents of Vatican Council II, *Gravissimum Educationis* (October 28, 1965)⁴⁹ and *Dignitatis Humanae* (7 December 1965), had an unmistakable Belgian mark.⁵⁰

The Belgian ‘model’ reflects a partnership between church and state, par excellence in education, including public schools in which a place was reserved for religion. Recognized religions traditionally had the right to provide religious education within public education and this worldview right was also

45 Zie bijzonder nummer ‘50 jaar schoolpactwet’, Tijdschrift voor Onderwijsrecht en Onderwijsbeleid, 2009-2010, nr. 1-2.

46 Zie o.m. Overbeeke A., Geloven in Straatsburg. Levensbeschouwelijk onderricht en onderricht over levensbeschouwingen in het officieel onderwijs in het licht van recente EVRM-jurisprudentie, Tijdschrift voor onderwijsrecht en onderwijsbeleid, 2008-2009, p. 145-171; Overbeeke A., Maakt het Arbitragehof school met een eigen religie-concept? Grasduinen in de jurisprudentie over levensbeschouwelijke kwesties, Tijdschrift voor onderwijsrecht en onderwijsbeleid, 2006-2007, p. 168-187; Overbeeke A., Segregatie, desegregatie, integratie? Het recht op schoolkeuze en -stichting, schoolkeuzegedrag en de gevolgen ervan voor de schoolsamenstelling, Tijdschrift voor onderwijsrecht en onderwijsbeleid, 2003-2004, p. 303-317; Overbeeke A., Levensbeschouwelijk onderricht: keuzepalet en keuzevrijheid in Vlaanderen anno 2002, Tijdschrift voor onderwijsrecht en onderwijsbeleid, 2002-2003, p. 115-157.

47 Loobuyck P. en Franken L., Het schoolpactcompromis in vraag gesteld: pleidooi voor een nieuw vak over levensbeschouwingen en filosofie in het Vlaams onderwijs, Tijdschrift voor Onderwijsrecht en Onderwijsbeleid, 2009-2010, nr. 1, p. 44-64.

48 Matthew 22:21. So for example, has, unlike Christianity, Judaism no such distinction. Therefore it is difficult to separation of church and state by pulling in Israel in a way that this has happened in the West (cfr. Aharon Barak - President Supreme Court Israel 1995 – 2006).

49 http://www.vatican.va/archive/hist_councils/ii_vatican_council/documents/vat-ii_decl_19651028_gravissimum-educationis_en.html

50 De Groof J., De kerkelijke leer inzake onderwijs en opvoeding, in Witte E., De Groof J. en Tyssens J., Het schoolpact van 1958: ontstaan, grondlijnen en toepassing van een Belgisch compromis, Leuven, 1999, p. 361-431.

sanctioned in the Constitution.⁵¹

The heightened regulation and related government intervention, through the imposition of recognition and funding conditions, monitoring mechanisms and quality standards - later mentioned as development objectives and attainment targets – didn't ignore the subsidized private education. Modern educational policy raised questions as to the core substance of freedom of establishment, conviction and organization. The - albeit not absolute - right of everyone to gain access to a school of subsidized private education regardless of religious belief gets a greater weight than the 'active' freedom of education.

Does the 'neutralization' of the entire education system and the partial overshadowing of the denominational label of Catholic schools get in the way of religious-based education? The recent evolution in the school system does at least not mean that most Europeans would call themselves strictly secular. The report by Romano Prodi in October 2004⁵² further stated that Europe sees itself as Christian, and that religion is a political matter. Overall in Europe there is no strict separation of church and state. Even in France, '*l'état le plus laïque au monde*', there is mutual cooperation and financial support. Most European regimes subsidize, although not in a uniform scale, schools based on a particular religious concept - as in other public domains active state support of churches and religious communities is recognized. In Belgium and Flanders the non-denominational pillar also acquired a prominent place in the organization of schooling and the confessional but not Christian religious groups also asked for recognition of their right to education informed by their convictions. But the majority view is still reflected in percentages of educational institutions and of parents who send their children to Catholic schools. Although hardly the majority of Europeans can be called 'active Christians', a large population seems to generally be

'passive' Christians.⁵³

It is highly debatable how relevant this is for the identity of the denominational school. The secularization goes on more in public education. The choice of education in any of the recognized religions and ethics, was expanded with a choice of an opt-out from both religion and ethics. In an emphatic manner, the replacement of this option by a general philosophical course is advocated.⁵⁴

Since time immemorial active religious minorities have lived in Flanders - now in large numbers with a Muslim identity. Although the number of Muslim students overall remains limited, they are unevenly distributed. Their number in some urban schools goes up to more than 80% of the enrollment. In Belgium, 16.4% of the residents are of foreign origin (of which 7.8% non-European).⁵⁵ In the Brussels Region, 56.5% of the residents are of foreign origin (33.1% non-European), in the Walloon Region 16.6% of the inhabitants (5.2% non-European) and in Flanders, 9.7% of the population (5.1% non-European). A significant number of these residents live in cities: 29.7% in Antwerp (22.2% non-European), 20.2% in Mechelen (17.4% non-European), 65.3% in Brussels (42.6% non-European), 80.8% St. Gilles (42.2% non-European), 98.3% Saint-Josse-ten-North (81.8% non-European), 74.5% Schaerbeek (54.8% non-European), Ghent 20.3% (16.3% non-European)). The largest group of people of non-European descent are Muslim.

With regard to integration the political discourse in the European countries seems to have moved from multicultural supporting integration of Muslims into a rather assimilationistic rhetoric. But is a common national identity which does not allow or promote ethnic loyalty and the development of subgroups, but regards ethnic origin as irrelevant for full membership

51 Artikel 24 §1 GW

52 The Spiritual and Cultural Dimension of Europe' (2004)
<http://cordis.europa.eu/documents/documentlibrary/104214451EN6.pdf>

53 Eurobarometer Survey, Gallup International Millennium Survey.

54 For discussions between politicians and academics see also: H. Warnink, *Godsdienst en Levensbeschouwing in Het Onderwijs*, Uitgeverij Peeters (Leuven), 2003.

55 <http://www.npdata.be/Data/Vreemdelingen/NIS/2005/NIS-Nat-2005-vreemdeling-afkomst.htm>

of society realistic? Anti-discriminatory measures are to a limited extent helpful for educated Muslims on the labor market. Numerous socio-economic problems persist, such as the dramatic problem of the equality of women in the Muslim community. The creation of minority institutions does not seem to facilitate integration.

Most Muslims consider Islam as a guide for daily life. One distinguishes liberal Muslims where the individual is central, and another group of Muslims who consider the group identity to be central. In addition, there are militant Muslims. The distinction between these different groups of Muslims is not clear-cut, and certainly not in the headscarf debate (see Begun case below). Especially the development of a militant Islamism conflicts with the process of linear of secularization of society.

Denominational education subsidized by the State

The subsidizing of private denominational education raises a number of philosophical questions, other than the questions which arose in the homogeneous Belgium and Flanders before and just after the School Pact. What importance will the community still give to subsidized private education if the majority of these educational institutions in reality would call themselves more 'pluralistic' if the school board doesn't seem to manage and offer a credible, distinguished ('own') educational project? Will those responsible be able to reflect about the relevance of ideology and the particular educational concepts in curriculum, courses and timetable, in the methodology, the governing of staff, school rules and work plans and the overall educational project? Do parents assign a high importance to a free choice of school based on religious principles? How often is relied upon specific inconsistencies in making decisions about teachers or directors? Which restrictions can the State impose on the foundation and establishment of private education who have to fulfill the the relevance and proportionality requirement? Must subsidized private education be accessible to everyone regardless of the religious belief of the parents?

The school occupies the central place in the

classification of the relationship between churches and the government. Europeans are generally reluctant to a strict separation of church and state (Wall of Separation) and thus subsidize schools founded by religious congregations and social agencies or organizations with a religious, worldview or philosophical basis. On the other hand, secularists put questions about the "recommunitarisation" and disintegration of the secular society - due to the religious affirmation of Muslims. Unlike Christianity, Muslims and Orthodox Jews hold much more onto prescribed rituals.⁵⁶ Because Islam is to a greater extent exposed in ritual acts and regulations, the risk for evangelism and conversion as a result of the outward manifestation by educational staff is higher.

There is no uniformity in Europe regarding the place of religion in society.

Under the Belgian Constitution of 1830, the state is neutral with regard to ideology, but explicitly recognizes the moral and social utility of worship. Outside 'the temporary character of worship', and the recognition of cults we record multiple domains of mutual understanding, cooperation and support. The government finances the salaries of more or less 100 imams. In January 2002 the Flemish Government paid grants for the construction of mosques.

On January 1, 2000 Sweden ended the status of the Swedish Lutheran church as state church. The church retains the responsibility for the management of cemeteries. The law on religious communities came into force on 1 January 2000 and gives public subsidies to religions. The state remains responsible for the maintenance of church property as part of the Swedish national heritage. In addition, four mosques were recently built with state funding.

56 Western Islamic scholars believe that there is a possibility for *ijtihad*, the ability of the individual believer to the scriptures to read and interpret the purpose of introducing the basic concepts to redefine a balance between religious rules and individual spiritualism. It follows that the ahistorical Sharia is rejected, and that the focus is on textual reinterpretation of the Qur'an, eg. the slaughter of animals on Eid-al-Kabir clears space for symbolic offerings of such funds to foundations (No. 56 p. 159).

Norway and Denmark, approved the Evangelical Lutheran church as their state church. The state collects a church tax which is only granted to the Lutheran church. There is an exceptional procedure if a certificate is submitted.

The Constitution of 1949 states that Germany is neutral in religious matters without excluding cooperation between church and state. The taxpayer chooses between one of the recognized religions or identified him/herself as a non-believer. The Protestant church, the Catholic Church and Judaism receive federal taxes and the state subsidizes social services provided by religious congregations. Organizations founded by approved churches founded get state subsidies for providing those services. This does not apply to Islam.

The Anglican Church in England is a state religion but doesn't obtain direct subsidies, with the exception of 70% for maintenance of the churches.

In France, the Law of 1905 enacted the separation between church and state and ended the privileges of the Catholic Church. The Law on Associations of 1901 guarantees freedom of association and allows religious groups to conduct activities not related to worship and to be exempted from taxation. Muslim associations receive grants for the creation of cultural centers and cultural activities. While the law prohibits public funding for each religion, the state in practice is the owner of the places of worship, and in consequence is responsible for the maintenance and free use by the clergy. Since 1959, the State pays the salaries of teachers in private religious schools. Approximately 20% of French students go to schools that are founded on the basis of a particular religious belief, mainly Catholic schools. The schools with a 'contract d'association' get a percentage of the cost of the student in a public school. The state currently does not finance a Muslim school. There is an independent Muslim school in Lyon on the premises of the mosque, for girls who were suspended from public schools for wearing a headscarf. Specific rules exist in the Alsace-Moselle region which falls outside the scope of the Act of 1905. The Catholic, Lutheran and Calvinist Church and the Jewish community

receive grants from the state there and the clergy are paid by the state. The ban on wearing the headscarf is also to be respected in the Alsace-Moselle region.⁵⁷

Freedom of subsidized private schools

The traditional school conflict in Belgium / Flanders had much to do with how much autonomy 'free' schools possessed and/or the extent of government subsidization of schools based on a religious ethos, as well as the worldview nature of public education. In the absence of equal government funding, parents who send their children to schools with a religious character would have to have sufficient resources. When neutrality outweighs the parents' freedom of choice, this choice is only possible choice for those who are financially well-off.

After the new generation of educational legislation and as the constitutionalization of the School Pact became enforceable, we can ask different and more profound questions. It is no longer sufficient to refer to the continued substantial involvement of religious communities in providing education or to the international legal standards with whom the choice of school by the parents may be inspired by the (religious) ethos of the school.⁵⁸

The discourse of the 'secularists', who consider government subsidies as the use of public funds for purely private purposes, seems too narrow. It denies the historical reality and the dynamic activity of responsible groups and citizens, the right to participation, the need for pluralism. A completely secular education system would be in basic conflict with the principles of democracy and of freedom, even if it were practical to achieve.

In addition to the 'credibility' of denominational

57 Klausen, J., *The Islamic Challenge: Politics and Religion in Western Europe*, Oxford, 2005, p. 142-148.

58 Art. 13 (3) UNCESCR of 1966, Art. 5 (a) (b) of the Convention against Discrimination in Education, Art. 24 (2) Children's Convention, Art. 2 of Protocol 1 ECHR recognized the freedom to establish private education. This is based on minimum standards for registration, inspection, certain knowledge and skills to be taught.

education and the scope of government action, the question is raised what attitude the State and the community must adopt with respect to religious communities which should in principle be treated strictly equal. Do parents need to be able to opt for a subsidized private school which offers education according to their own religious beliefs and prepares students for a life in their own community (but will be educationally disadvantaged) or to opt for a school which provides education informed by the secular conception of good citizenship, or for example the prohibition of corporal punishment? Is there a conflict between the rights of parents and the child to equal opportunities to develop?

The Equal Educational Opportunities Act of 2002

The dividing line between preference and racism is sometimes difficult to define. When a public school has primarily pupils from a predominantly Muslim country, and the language on the playground is no longer Dutch, the Flemings refuse to send their children. This can be the result of a different philosophical preference, or of doubts about the quality of education in the school, or - in extreme cases - of racial considerations. The result is a *de facto* religious segregation in public schools because parents are exercising their free choice of school.

Also to meet this requirement, the Decree on equal educational opportunities, better known as the GOK⁵⁹, was issued. Subsidized private schools receive their funding from the state, and are independent of the state in terms of educational content and management but can no longer exercise an admission policy that selects pupils in order to guarantee the specific religious character of the school by refusing children with different religious backgrounds.

This creates a shortage of schools or a risk of exclusion of those parents who for religious reasons want to raise or put their children together in a school with children of like-minded parents. Is a difference in access to subsidized private schools still allowed and

what can provide objective and reasonable grounds for this?

The equal treatment decree of 2008

The EU treaty includes the *prohibition of discrimination* in Article 13 (8) and gives the European Commission the power to take action and to issue directives (cf. Article 14 ECHR). I.e. anti-discrimination rules are – in contrast with international law - directly applicable community law. Community law must be transposed into national law and policy. In terms of anti-discrimination directives, this was the case with the ‘Equal Treatment Decree’ of 2008⁶⁰, which applies to subsidized private schools. The decree introduces a ban on discrimination that has a pass-through to the choice of school of parents based on their own preferences.

The (equal treatment) Decree of 2008 applies to Flemish education and prohibits discrimination based on religion. But is the blind application of non-discrimination provisions in education not a mean to seek for cultural and secular homogeneity rather than diversity? If Muslims demand equal rights in education on the grounds that all citizens are equal regardless of religion or other cultural, demographic or social characteristics, does this mean that they also have to recognize equality for homosexuals? Equality is not a relative concept with a different meaning for social, cultural, religious or sexual groups. Equality necessarily implies that changes must be made in the ideas of conservative Christians, Jews and Muslims and their traditional views on society. For Orthodox Jews and Muslims this means a radical project in which religious practices and theological considerations will be adapted to the changed social and legal conditions in which they live in Europe.⁶¹

59 Concerning equal educational-I, June 28, 2002, BS 14 September 2002.

60 Under a decree for the Flemish equal opportunities and equal treatment policy, July 10, 2008, BS 23 September 2008.

61 Raad van State, Afdeling Administratie, nr. 147.579 van 12 juli 2005 in de zaak A. 160.192/XII-4396, inzake VZW Baïs Rachel tegen de Vlaamse Gemeenschap.

Perception and manifestation of religion by students and teachers

Does neutrality mean a ban for pupils and teachers to express their beliefs in education? Secularists oppose the introduction of religious expressions into the public sphere which they consider as exclusively belonging to the private sphere. The neutrality of public space must be secured.

If this is not the implicit message that religion is a controversial phenomenon which in Flanders can only be tolerated outside the school? Indeed, if religion can have a positive value in the education of children, why is it then excluded from Flemish schools? As a result religious pupils and staff are 'undressing' themselves outside the school gates before entering the school. Instead of developing their identity, they are asked to ignore their personality and belief in the public educational system. However, in the name of tolerance everyone should give high importance to personal freedom of opinion and therefore enable the expression of religious belief in the public sphere.⁶²

Do people who get offended by expressions of religion have the right to prohibit such statements in the name of tolerance and good citizenship?⁶³ Is it not a requirement of a secular democracy to be tolerant towards the religious tendencies with which one disagrees? Is the manifestation of religion not a means to train students in good citizenship and tolerance? Which are the less restrictive alternatives for this ban? Which social interests are relevant and justify a restriction on the right to manifest a religion? Does a student voluntarily waive the right to manifest his religion when he voluntarily enrolls in a public school?

Where equality in the name of tolerance is elevated as an absolute value within public education, as a result genuinely believing children lose the opportunity to express themselves in a religious way. As a consequence,

there is a demand for the establishment of private schools. However, unlike in the Netherlands, access to subsidized private education is no longer solely based on the faith of the parents. This increases the demand for purely private schools. Because these schools are not subsidized by the state, these schools set up on religious grounds are only accessible to those who have the financial resources to pay the enrollment in such schools.

The wearing of religious symbols: the scarf

The *hijab* or head scarf has led to controversial legal decisions over all Europe. The basis for this is Article 9 of the ECHR that only applies a religious rule if it is formulated in a non-ambiguous way. Wearing the headscarf on the basis of the Koran is optional and therefore in many countries it is seen more as a political statement than a religious requirement.⁶⁴ In Europe, there is no unanimity on the right to wear the headscarf. Governments and courts have in several cases used a reasonable control and prescribed the extent to which restrictive dress codes may be imposed.

The judgment of the ECHR shows that the national government has a very broad discretionary competence in the application of Article 9 (2). Restrictions on religion can be imposed because the public order is threatened, provided that the restrictions are contained in a decree or law, not by administrative regulations, and that the restrictions are necessary and proportionate to the intended objective. The national courts in Europe have judged that a ban on headscarves is legally acceptable. Article 9 (1) of the Convention only allows restrictions on freedom of religion to the extent that this is required for the protection of social and legal order. Article 9 (2) allows states to limit by law expressions of religion or belief to the extent that they are necessary in a democratic society in the interests of public safety,

62 According to Johannes Rau to ban the headscarf the first step towards the creation of a secular state which Bandt religious signs and symbols from public life.

63 Grant tegen Canada, 1995 – 125 DLR (4th) 556

64 There are in the public debate also questioned the argument that it cover to preserve the purity and virginity is a restriction of sexual freedom. Covering the female body because it distracts the man would have the connotation of female inferiority.

the protection of public order, health, morals or the protection of the rights and freedoms of others.

In *Ludin*, the German Constitutional Court judged upon the restrictions of the wearing of headscarfs by teachers which can be directed to religious freedom under the German Constitution.⁶⁵ In Germany, the ban on wearing the veil is a matter for the *Länder*. In Berlin, the law prohibits, crosses, yarmulkes, and headscarves. In other *Länder*, only the headscarf is banned. In Bavaria the headscarf is banned and the hanging of crucifixes in schools is compulsory. The argument is that women who wear headscarves openly express proselytism in the classroom. In July 1998 a school in Stuttgart refused to recruit a German-Afghan female teacher because she wore the headscarf. In September 2003 the German Constitutional Court made a judgment. Women's rights were violated because there was no legal ban on the wearing of the headscarf, but local authorities have the power to legally ban the wearing of the headscarf.⁶⁶ The *Länder* have the power to regulate 'neutrality', but the federal government does not. In 1995 the Constitutional Court declared the law which obliged schools in Bavaria to hang crucifixes in every classroom unconstitutional.⁶⁷ Then a new law was enacted in Bavaria on the crucifix as a cultural heritage⁶⁸, the constitutional problem was circumvented by providing a complaints procedure. Students and parents may request that the crucifix be removed from the classroom if they have clear reasons for this. The director shall consider the complaint, taking into account the interests of the religious majority. On April 1, 2004 Baden-Württemberg issued the law which forbids teachers to wear a headscarf as a threat to Western values. The crucifix however was not banned under the argument that

universal human rights and democracy stem from Christian values. State neutrality does not mean that the State has to be neutral with regard to fundamental values. The *Länder* are responsible for cultural policy. Freedom of religion, however, is a federal matter. The question may be raised whether such widespread standardization does not go far beyond the interpretation of the *margin of appreciation*.

In *Sahin v. Turkey*⁶⁹ Sahin claimed that she was forced to choose between education and religion and that this was a discrimination between believers and unbelievers. She argued that the headscarf is no danger to public order and therefore a ban is illegal under Article 2. The Turkish government argued that the headscarf is a symbol that goes against the principles of the republic and is contrary to the principle of secular education.

In *Dahlab v. Switzerland*⁷⁰ the ban on the headscarf ban was considered valid because the obligation not to promote conversion in a public school.

In October 1989 the first suspension of a pupil because the wearing of a headscarf occurred in France. According to the State Council the wearing of the headscarf did not infringe on the principle of laïcité. Lionel Jospin, former prime minister, then issued a series of regulations that gave principals the power to take decisions on whether or not to permit the headscarf. According to the French Council of State in 1999, the directors have the authority to promulgate rules for clothing on behalf of functioning of the school or classroom. In 2003, President Jacques Chirac declared that the wearing of headscarves in schools was a violation of the separation of church and state. The committee headed by Bernard Stasi, made a report which was presented on December 11, 2003. It advised the Commission to introduce a ban on the wearing of conspicuous religious symbols.⁷¹

65 Article 3.2 states that all persons are equal before the law, the Article 3.3 provides that no person will be an advantage or disadvantage on religious grounds, the Article 4.1 guarantees the right to religion and belief and argues that freedom of religion and belief is inviolable.

66 Bverfg, BvR 1436/02, 24 september 2003
http://www.bverfg.de/entscheidungen/rs20030924_2bvr143602.html?Suchbegriff=1436%2F02

67 BverfGe 93,1, 16 mei 1995

68 The claim that the value would be free crucifix and the headscarf a symbol of the crucifix as a zeal inherited from Western nations and the headscarf is not, however, seems difficult to defend.

69 Sahin v. Turkije Nr. 44774/98 (19/11/2002)

70 Dahlab v. Zwitterland Nr. 42393/98 (15/02/2001)

71 Assemblée Nationale, Rapport fait sur la question du port des signes religieux à l'école. Tome II, 1ère partie. Audition (juin 11, 2003), 26; Jean-Pierre Raffarin, Project de loi relatif à l'application du principe de laïcité dans les écoles, collèges et lycées publics, Assemblée Nationale, (février

Such a ban would be necessary to protect public order and to protect freedom of conscience of others.⁷²

In Great Britain, the right to religiously dress by the student in a school was recognized by the case *Shabina Begun*.⁷³ In September 2002 the director suspended Begun for wearing the Jilbab. Since 2002, Begun attended the same school without ever challenging the dress code. Begun stated that the Koran gave her the insight that a Muslim woman should cover the entire body except the face and hands. The director stated 'that some girls in the school' expect the school to help resist the pressure of more extreme tendencies. They would feel abandoned by those to whom they should rely on for the support of their freedom and their own interpretation of Islam. The school did allow Muslim women to wear the shalwar kameez. Moreover, local Muslim leaders and imams and the parents approved the school dress code. 80% of pupils in the school was a Muslim. The court of first instance agreed with the director and stipulated that the school can impose a dress code taking into account the presence of religious students. On March 2, 2005, the Court of Appeal approved with the pupil Sabina Begun and broke the ruling of the court of first instance. In court Begun was assisted by her brother, who spoke on her behalf with the school and the court. Afterwards the brother appeared to be a member of the extreme Islamic group.⁷⁴

Concerning Belgium and Flanders proceedings in courts have been initiated with non-uniform results until now. For public education we have to wait for the ruling of the Constitutional Court in response to the request for advice by the Council of State.⁷⁵ One

of the remaining questions is the tension between the school's autonomous discretion versus the need to resolve the headscarf issue by decree. It cannot be excluded that a general ban on wearing headscarves in education will lead to the establishment of Muslim schools, although in time, while Flanders precisely wants the integration of Muslims in the existing educational system.

Prayer Rooms

Groups of religious students cannot demand for a place to worship liturgy within the public education. In Flanders there is no legal obligation to provide such a space or to release time this release in the curriculum.

Halal and kosher food

Can / should schools with many Islamic students (exclusively) offer halal food? If a public school exclusively offers halal or kosher meals, can other parent consider this as a form of indoctrination because through school life, namely the meal inside the school, one aspect of a particular religion or culture is imposed on all children?⁷⁶

Teaching Religion

Classic is the question of the purpose of religious education. Is it purely educational or is it also meant to develop the experience of Christian faith? Is there a distinction between teaching a particular religion on the one hand and 'indoctrination' on the other hand?

If religious instruction is completed as a course about different religions, can parents then oppose their children being exposed to a variety of religious beliefs? Believing that mutual tolerance must be taught, the secularist position would not provide an opt-out from a course on the characteristics of different religions.

3, 2004), http://www.diplomatie.gouv.fr/actu/print_bul.asp?liste=20040204.html; <http://www.assemblee-nationale.fr/12/cra/2003-2004/153.asp>;

72 Patrick Weil, *Lifting the veil of ignorance*, *Progressive Politics*, 17/3/04, p.16-24, <http://www.policy-network.net/uploadedFiles/Publications/Publications/ProgressivePolitics3.1FINAL.pdf>. Jean-Paul Costa, a vice-president of the ECHR would advise the Stasi Commission, given in a closed session.

73 *The Queen v. Headteacher and Governors of Denbigh High School* 2004, EWHC 1389 (Admin)

74 Klausen, J., *The Islamic Challenge: Politics and Religion in Western Europe*, Oxford, 2005, p. 172-179.

75 Raad van State bij arrest nr. 202.039 van 18 maart 2010

76 Cfr. the incident following the Halal Christmas dinner at a Catholic school in Weert (Netherlands) in December 2009, and the incident in 2007 for outdoor classes in schools where only halal Antwerp would be served. A day later the ship after strong protests teaching everything back.

There is no doubt that religious teaching in schools is limited to an objective factual knowledge of religions, it contributes to citizenship, at least in the sense that religion historically played an important role in the development of contemporary culture. Education on religion can be justified because it familiarizes students with the existence of different social groups and their historical and cultural interest in the multicultural society. Is knowledge on other religions required to live as good citizens? Can fundamentalist tendencies of parents oppose teaching about another religion, that is the religion of the majority, and prevent their children from gaining knowledge on the diversity of worldviews as well as the non-denominational tradition?

When religious education however is filled in as the experience of a particular religion, the secularist interpretation will bump against an occasional incompatibility between the religious education perspective and the predominant secular character of society. According to secularists, the transmission of faith is a violation of the neutrality of education. Religious education in Flanders is taught according to a curriculum approved by the competent religious authority and taught by qualified teachers appointed by the competent religious authority, that is in most cases the Catholic Church.

There is another possibility: a general theoretical course, introducing the world religions and secularism, can be coupled with the option to obtain education on one of the options with a religious or secular nature. One argument against such an option is motivated by the argument that the budgetary cost of preserving the right to choose is too high.

Compulsory courses without exemption

Creationism vs. evolutionism in science classes

In Flanders parents and children who perceive such education as an infringement on their religious freedoms have no legal opt-out from such science lessons. What is the extent to which the State must accommodate the religious concerns of parents on these competing worldviews? What will happen with

the teaching material and the worldview they portray? What is the impact of the (the lack of) instruction of one of these worldviews on the religious freedom of students, parents and teachers?

There seems to be no reason to doubt the option to permanently maintain an objective scientific approach of the final attainment levels.

Sexual education and homosexuality

In Flanders sexual education is a compulsory course and parents have no right to opt out. In this course both biological and non-biological topics are taught such as contraception, HIV and AIDS, sexually transmittable diseases, equality based on sexual orientation. Such sexual education is too far-reaching to religious parents who look upon sexual acts in conjunction with the moral restrictions around sexual activity. However, in Flanders it is a compulsory teaching matter on which the school can lose funding if it is not taught, unless alternative final attainment levels have been approved.⁷⁷

In *Kjeldsen, Busk Madsen and Pedersen v Denmark*⁷⁸ and subsequent case law, the European Court of Human Rights (ECHR) judged that information must be provided in an objective, critical and pluralistic manner. According to the ECHR the objective informing of children about sexually transmitted diseases was no breach of treaty provisions. But what about the teaching of homosexuality as family relationships?⁷⁹ If heterosexuality is presented as the norm, there may be a discriminatory treatment of the gay lifestyle. If the school simply ignores the issue, this can be seen as implicit criticism of homosexual way of living or as a refusal to end sexual prejudice?

When information on heterosexuality and homosexuality is provided in the same way, this is

⁷⁷ Raad van State, Afdeling Administratie, nr. 147.579 van 12 juli 2005 in de zaak A. 160.192/XII-4396, inzake VZW Baïs Rachel tegen de Vlaamse Gemeenschap. By contrast, the method of Steiner schools or derogate from the attainment and development of sex education received.

⁷⁸ *Kjeldsen, Busk, Madsen en Pedersen tegen Denemarken*, 1979

⁷⁹ *Chamberlain v. Surrey School District No 36*, 2002, SCC 86

hardly neutral for religious parents given the implicit message that both ways of living are acceptable. According to their religious beliefs however, homosexuality is an immoral behavior, and they consider sexual education as a breach of their right to an education according to their own ideas for their children.

It is expected that such questions will arise in schools.

Opt out of swimming lessons⁸⁰

Is swimming a compulsory course, or can girls request for an opt-out for swimming lessons because of cultural and / or religious principles? Can swimming in Burqini be admitted?⁸¹ Throughout Europe there are different answers to these questions as well.

Towards a further secularization or alternative forms of education in Flanders?

In Flanders public educational institutions with their own religious ethos do not exist (anymore). Public education in Flanders, is considered to be neutral and there are no public schools with a religious basis. However, recently it became possible to start a method school like the Freinet school. Whether educational concepts with an worldview basis, such as Steiner schools, are acceptable can give rise to dispute. In this way can the public schools meet the demand of predominantly Muslim parents, for a wider choice based on their religious beliefs? This question needs to be answered as well as the question of the formal refusal to wear religious symbols.

It cannot be denied that private education based on religious foundations (whether or not as a school of free choice thanks to the School Pact Law) enjoys a privileged position in Flemish education. However,

subsidized private education has clearly lost a significant part of the freedom of its governing bodies and has had to make numerous concessions in terms of autonomy and educational freedom.⁸² A recent initiative against the far-reaching secularization in the subsidized private education comes from religious congregations. Brother René Stockman, superior general of the Brothers of Charity, developed in 2009 at the request of a group of parents the idea to establish profiled Catholic schools. Catholic schools continue to develop educational activities from a Christian inspiration, but at the same time adapt to the target audience: young people growing up in a secular world where religion has become rather marginal. The more distinctive Catholic school would have a more religious atmosphere with room for prayer and liturgy. These schools would develop the spiritual potential of children from a young age the same way as the schools who develop the musical and sporting potential of children.

A less controlled form of parental choice is that for home schooling, whether or not in a group of like-minded. This development is not uncomplicated in all countries, as shown by the ban on home schooling in Germany. In the Netherlands there was a strong debate on the legality of home schooling.

According to the European Court of Human Rights the ban on homeschooling may be justified: 'Schools represented society, and it was in the children's interest to become part of that society. The parents' right to education did not go as far as to deprive their children of that experience. (...) Not only the acquisition of knowledge, but also integration into and first experience with society are important goals in primary school education. The German courts found that those objectives cannot be equally met by home education even if it allowed children to acquire the same standard of knowledge as provided for by primary school education. The [European] Court

80 <http://www.deutschlandwoche.de/2009/05/21/oberverwaltungsgericht-munster-muslimische-madchen-mussen-am-schwimmunterricht-teilnehmen/>

81 refer the question to the Flemish Minister of Education and Training, the participation of ethnic minority pupils in physical education classes and swimming lessons from the Commission for Education, Training and Science Policy Meeting 10/01/2002 <http://jsp.vlaamsparlement.be/website/htm-vrg/311951.html>

82 However, there remain fundamental differences legally. Thus legally subsidized private education, with the exception of exam dispute is not considered a public authority. The provisions of the open government decree of March 26, 2004 shall not apply to subsidized private education.

[of Human Rights] considers this presumption as not being erroneous [...] The [German] Federal Constitutional Court stressed the general interest of society to avoid the emergence of parallel societies based on separate philosophical convictions and the importance of integrating minorities into society. The Court regards this as being in accordance with its own case-law on the importance of pluralism for democracy.⁸³ In Germany, 40 families are involved in a legal dispute about homeschooling⁸⁴ because they want to raise their children in a parallel Christian society without exposing them to secular values, especially sex education. One of these German families asked for and received asylum in the United States, on the basis of the ban on home education in Germany (District Court on December 16, 2009).⁸⁵

Reflections

Both the unilateral 'secularist' and 'fundamentalist' reading of the freedom and right to education have limits.

Officially, the goal of a secular education is to fully develop the maximum potential of a child and to form a good citizen. But what does this potential include? Is this only intellectual potential or also spiritual? Does the child in school need to be mainly taught personal autonomy and critical rationality, should cultural and religious values only be taught in the family, outside the school? Should children mainly be prepared for autonomous rational action? Is there a need for religious education which raises a child in a particular religious belief?

These questions will have a new relevance when the balance between law and freedom does not acquire adequate interpretation.

When the child's development occurs within a public educational system, the state should ensure that the family values of the child are respected rather than

only questioned critically. Yet for some parents the compulsory reading on different religious beliefs (without an expressed preference of the State) will already be perceived as an infringement on their religious freedom⁸⁶, while another view suggests that it is in the interest of the community to teach children tolerance and to familiarize children with a wide range of lifestyles.⁸⁷

The State benefits by training citizens in good citizenship by ensuring that everyone reaches a minimum level of education and gets familiarized with the principles of a constitutional State with constitutional rights and freedoms which are essential for a democracy.⁸⁸ As a result there is no room for fundamentalist views, such as expressed by anti-Semitic statements of teachers.

What is the relationship between an occasional 'homogenization' in the public law school and the desire of religious groups to maintain diversity within the public educational system?

Or, to take yet another example of confrontation which is by no means 'new': is the development of the rational autonomy of the child more important than the spiritual worldview of the parents in the educational context? Such 'conflict' also refers to the public interest being handled by private education and the complementary achieved by private schools which are supervised by civilian authorities and authorities with a same point of view.

Does a democracy approach a doctrine which in the name of citizens' equality marginalized religion in the 20th century among all peoples of the world?

83 Fritz Konrad en anderen tegen Duitsland, 35504/03, 2006

84 Zie Home School Legal Defense Association

85 <http://www.hslda.org/hs/international/Germany/RomeikeBrief.pdf>

86 USA, *Mozert v. Hawkins County Board of Education*, 827 F 2d 1058 (6th Cir 1987), 484, VS 1066, 1988.

87 According to Stolzenberg is a feature of religious fundamentalism not to be exposed to a different ideology than the fundamentalist faith. When the curriculum encourages rational analysis and a recognition of dissent and diversity as positive values, this (according to Stolzenberg) already in conflict with the view of the same fundamentalist believers. Stolzenberg, *Harvard Law Review* 581.1993, 106, 612-613.

88 *Board of Education, Island Trees Union Free School District, No 26 v. Pico*, 457 VS 853, 876 (1982).

A democracy based on the level of homogenization which doesn't provide space for religious groups in the public sphere to express their religious identity in the name of social inclusion and by which a Flemish public educational system free of religion is deemed to be necessary to obtain a tolerant society and good citizenry?

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§ 4 Towards another relationship between religion & education

Every era has its concerns, as do current times as well. The financial crisis is leading to a decrease in our material wealth but pales in comparison to the increase in wealth over the past decades to the detriment of both ecological and social values. We therefore see the crisis more as a moral and cultural crisis: the deeper explanations for what is happening to us these days can be found in *these dimensions*. Whoever considers profits and markets as an end in themselves substantially overlooks that an economy must serve people, instead of vice versa. Anyone who thinks that rich people are only rich because they have a lot of money and happiness only derives from money ignores that one's happiness occurs only in relationship with others (for some people there is a decisive presence of God; *Ubi Caritas et Amor, Deus ibi est!*).

Some observers have already explicitly pointed out that the deep roots of the crisis lie in an increasingly absent moral and social education. Curricula which do not explicitly provide space for ethical and social education are breeding grounds of citizens, workers and entrepreneurs who can hardly be blamed for only thinking in terms of individual bonuses rather than in terms of the *bonum commune*. They do not know better. They didn't learn otherwise.

Now we are on the eve of a development of our economy in a direction in which mutual trust and ability to adequately communicate with people (who in many more aspects are becoming more different) are increasingly important, it is essential in our view and more important than ever to lay the foundations in our educational system for a society that provides sufficient confidence and capability.

In our view such confidence and ability starts with an adequate knowledge of and a systematic confrontation with those differences. The knowledge of these differences includes the knowledge of different religious and philosophical traditions.

In Flanders and the Netherlands, we keep these

traditions alive in such a setup of the educational system that they are mostly developed separately because they develop in quite separate domains, apart from the others. The differences are tolerated.

Especially when it comes to the design of the system of primary and secondary education, we can ask important questions about the extent to which traditional conflict-averse systems are still sufficient. Does it still meet the initial goal to enable different religious and worldview groups to organize their own education? And, even more important, is this goal still relevant in the society we now live in?

Abraham Kuyper, among others, preferred the pillarized structure rather than a monopoly system of public schools that take the portrayal of mankind by liberal enlightenment as their basis under the guise of neutrality. He was a fiery critic of this kind of structure.

Of course the attention for religion in public schools is a possible option and in Catholic circles, there were opponents of private schools as well, on the grounds that they would only limit the chances to integrate into Dutch society.

Kuyper didn't agree, mainly because he suspected that would soon lead to anti-religious or anti-clerical state education according the laïcist French model that he was contesting alert and antithetical. Warned by the French legislation of 1905 which banned any form of religion to the private domain, he didn't want a school that was organized along the lines of a 'central station where all directions meet'. We quote: "The so-called sampling of all the systems nourishes only superficiality, devastates thought, spoils character, and makes brains ill-equipped for hard work. (...) Believe me, it is not through going up and down the steps of many buildings to peer at their front halls but through coming to know thoroughly a single well-build house all the way to the attic that your knowledge of how to build becomes solid." From the same range of ideas another idea to clearly distinguish

private and public education arose.

The Belgian approach is not so fundamentally different. In our country the fight on principles long raged about the 'primacy' of private education above the 'supplemental character' of public education. Government initiative was only justified, some claimed, when the free initiative was lacking or insufficiently responded to the convictions of families. Although there were ardent supporters of the public schools, it was only with the School Pact Law and finally the constitutional revision in 1988 that the rights of public schooling were firmly established.

Does the sharp distinction between private and public education still persist? The architecture recommended by Kuyper probably was adequate for a society that consisted of only a few, clearly distinguishable, almost industrial-organized religious groups. That society was divided into worldview compartments, according to the overall design of pillarization. This gave the society an organized structure, and formed the basis of a stability which featured the social relations in the Netherlands and Flanders for many years.

There are considerable changes: society is no longer clearly segmented into religious groups. What remained of those pillars can be criticized. Nowadays, these pillars soar as a mainly administrative reality at high altitude above the floor of individual schools. Pillars are shriveled to governing bodies which melted into large conglomerates, provoked by the government. These administrative conglomerates often control schools, sometimes hundreds at a time, in which the common and clearly articulated religious identity carried out by pupils and staff is hardly recognizable. The private Flemish education is different in this regard. The governing bodies / school boards each have a large autonomy - albeit that the role of the V.S.K.O. can't be underestimated. Some of these 'governing bodies' are big players. The analysis however is identical: not depillarization is the main problem, but the devitalization.

In most schools the religious identity seems to be so diluted that everything can dissolve in it. The vast majority of private schools employ all candidates

without further and certainly not too difficult questions about their religious background, as public education is supposed to do.

If parents ask about it, they are often reassured that they will not be affected by the school's identity. Sometimes there is an explicit reference to the importance the school attaches to respect for all beliefs. But in most cases this respect indicates an indifferent attitude and a silent attention.

Furthermore, it is not difficult to notice that, in spite of the continued mutual differentiation between identity and quality, the differences *between* the schools in recent decades have become rapidly smaller than the differences *within* schools. We should further investigate the number of schools to which it applies, and there will certainly be exceptions. But it is an undeniable fact that secularization deeply marked the Dutch and Flemish educational system.

But this does not do justice to the many existing initiatives to (re)unite religion and education in schools. This is so in the more religiously-conservative part of the private education and in schools who only appeal to a small group of teachers and pupils. We also need to express appreciation for the various initiatives taken by for instance the leadership of Catholic education in Flanders to articulate the specificity of the Christian school.

But the common picture is different: parents and students no longer primarily choose a school on the basis of confession, but on the basis of criteria such as quality or closeness. Sometimes still referred to as 'culture'. Especially in the Flemish education this was already so since the seventies, but the social trends reinforced this trend drastically. The once tight connection between school, church and family is only for a limited number of schools a living reality. We suspect that in addition to secularization the great increase in school size in recent years also has its part. Many boards by which parents could be involved in the school of their children through a locally organized faith community were cut out of the educational system. Led by professional directors, many schools these days have the profile of business

enterprises: thus it no surprise that parents start to behave as consumers.

It is not surprising: the school is in many ways a mirror of our society. Our public domain has changed, especially because the people in our society have changed, not only by increases in communities of reference but also due to an increasing differentiation and pluralization of lifestyles.

A person's identity, including religion, is today less formed by coherent tradition than was the case in the past. Our society has become multi-religious and multicultural, quite apart from the rise of Islam in Europe. The former clearly segmented pluralism has given way to a society that increasingly looks like a mosaic. The dynamics are sometimes staggering: leading sociologists and philosophers speak of foam (Sloterdijk) and a fluid society (Bauman).

It is not possible here to give a complete diagnosis. But in the context of our discussion we dwell a little longer on the work of Charles Taylor. Taylor analyzes all these developments with an interesting discussion of the concept of secularization. We now point out the already mentioned three meanings of that term (see paragraph 1) in connection with the debate on religion and education.⁸⁹

According to Taylor, that term refers *primarily* to the phenomenon of the privatization of religion and a strict separation of church and state: religion was, whether or not encouraged by the laws, banished from the public domain. In the wake of the separation of church and state a distinction between religion and public domain has been advocated, both as a normative understanding and as an empirically observable phenomenon. In the Netherlands, this conception of secularization has been the basis for a plea for the separation between public and private education, with a challenge (which has always existed in liberal circles) to the financing of the latter from public funds. This formed the basis of the first phase of the debate on Article 23 of the Constitution.

Secondly, secularization refers to the phenomenon of abandonment of religious practice, and the so-called secularization thesis was long regarded as uncontroversial by sociologists. According to this thesis, modernization leads to a diminished role of religion, perhaps even to its disappearance. Here as well wishful thinking and empirical observations were confused, and recently it has been penetratingly pointed out that the thesis is less convincing than previously thought (see, for example, the work of such sociologists as Berger, Martin, Casanova, and Putnam). This has been discussed in detail in the WRR-Exploring 'Believing in the public domain' (2006). Also from this perspective on secularization there was a regular attack on Article 23 of the Constitution, asking why private schools with a religious character should be subsidized any longer, especially since in so many cases they are not so distinctive anymore?

In *A Secular Age* Taylor adds a third conception of secularization. He suggests that the term now mainly refers to the fact that believing is more and more an option and not an automatism. In later lectures, he stressed that secularization must be understood as an indication of an increasing pluralism, of the condition of increasing differences, in which the option to believe or not can be filled in completely different ways. In the new context of religious conditions we can hardly speak of a binary opposition between faith and disbelief, but rather of a 'profusion' of many (non-) religious positions and possibilities among which people are reflexively (ie on a non-obvious or naive way) moving, searching, doubting (partly inspired by the ethics of authenticity). In the secular age people continue to seek a form of transcendence. They do this in the continued presence of other religious and nonreligious others. Doubt and uncertainty thus belong to belief. In the WRR-Exploring this was described as the transformation of religion: the phenomenon religion is changing shape, becomes less institutional and traditional, and obtains a more individual and dynamic character. Identities, also religious ones, are in this view increasingly less clear and stable, we can speak of '*liquid religion*'.

We might have to refer yet again to the earlier

⁸⁹ Taylor, Charles (2007). *A Secular Age*. Cambridge: Belknap Press of Harvard University Press, p. 19-20.

statement that secularization left deep traces in the Dutch and Flemish primary and secondary schools. What that means depends thus also on the perspective of secularization one adopts. It's like measuring the political engagement of citizens. If that is measured in terms of numbers of people who are active members of a political party, the involvement is not substantial. When other indicators are taken into account, the engagement is not too bad (cf. Rosanvallon, 2008).

It is more or less the same with religion. If one would measure in a way that also portrays other non-institutional forms of religious identity and commitment, there is a significantly different picture than on the basis of measuring attendance. There is, indeed, a different attitude towards traditional religions: Grace Davie (1994) speaks of '*vicarious religion*' and '*believing without belonging*': it is good that religion exists, but I do not take part myself. Others emphasize the individualization and de-traditionalization of religion: 'something-ism' to orthodoxy, one seeks the meaning increasingly on their own, often aided by new media. In this sense, the WRR spoke of a remarkable return of religion, but in the context of that transformation.

Our point is that the assumption that secularization necessarily gives rise to a further retreat of religion from the public domain and a reduction in numbers of believers gives a limited perspective on what's going on. We note that the debate on the usefulness and necessity of private/denominational education by both supporters and opponents until now has mainly been conducted from the first two mentioned views of secularization. The diagnosis directed towards the solution. Modernization leads to secularization in the first two mentioned meanings, and must be translated into a reduction or even elimination of publicly funded denominational education and sometimes even of all private schools. Education about religion might be part of history education, preferably by lecturing on pre-modernity.

Taylor's third definition of secularization and also the empirical situation of our educational system (Section 2) actually call for shaping the debate in a more intelligent and productive way. Taylor urges us

for the next phase of the debate. He did the same as Government Commissioner for the Canadian government, by drawing a report on the public role and significance of religion in a multicultural and secular society (a pioneer in our point of view).⁹⁰ It led to an interesting debate on the relationship between religion and education. Such a debate is also necessary in the Netherlands and Flanders.

The (in our point of view) fundamental freedom of religion and belief and the consequent right of parents to start a school for their children, in close association with their affiliated denomination, should not be affected. That would be contrary to the passive tolerance of pluralism that traditionally characterizes our society. Particularly in religiously-conservative environments, but not only in that community, there also exists today a need to shape the connection between religion and education in this classic way. Although there is discussion here as well, both Christians and Muslims discuss the dilemmas connected to the functioning in a society as a relatively closed group.

But no freedom without responsibility, no freedom is absolute. In our point of view, such schools - often in relatively homogeneous communities - may be required to pay attention to other forms of religion and belief than those that form the basis of their own school. This is in the interest of their own students, who after leaving the school or through new media get in contact with other religious identities. We prefer that this classic form of denominational education will be durable protected, but that doesn't end our story. Such a situation is only valid nowadays for a small number of schools and only a small part of the parents.

Therefore, we would like to plead, in the context of Article 23 of the Dutch Constitution, to develop multiple variations in order to shape the connection between religion and education. This article should

90 G. Bouchard en Ch. Taylor (2008) *Fonder l'avenir. Le temps de reconciliation*. Commission de consultation sur les pratiques d'accommodement reliées aux différences culturelles.

not to be abolished, but further developed to make it suitable for the other options for the relationship between religion and education. The Belgian Constitution contains the already partially explored provision: “All pupils of school age have the right to moral or religious education provided by the state”. This provision is in addition to the option of parents to education of the recognized religions and non-denominational ethics (art. 24 § 1, § 4 GW) in the public schools.

This means that in addition to a mono-religious model (learning in religion) there must also be room for a multi-religious (learning about religion) or even an inter-religious model (learning from religion) (Roebben, 2009).

Especially now as it is no longer so for many parents that people are guided by a tradition in his religious preferences, and that the children get educated in schools where there exists several religious traditions, there must be given a careful thought to the possibility that pluralism mainly leads to lukewarm and negligence of the attention paid to religion. And as theological and educational thought on the formation of religious identities in a multi-religious society offers new insight (Miedema & Vroom, 2004; Miedema, 2006), the application of those insights should not be hindered by the current governance structure of the educational system. Taylor states that one's (religious) identity depends on and develops in dialogic relationships with others. To define yourself means to find out what is the significant difference with others. Identity, in other words only emerges in a social space or horizon. Only among other 'selves' is man a 'self' (intersubjectivity precedes subjectivity). Man is not a detached, atomistic or point-like entity (the buffered self), but is situated in a social, linguistic, historical, etc. horizon. Only at such an horizon can you decide case by case what is good or valuable (see also the work of Buber and Levinas). It also calls to do justice for this horizon, and to bring it inside education.

Precisely because education is a mirror of society, we have to think on how we can give room to the use of and shape mono-, multi-and inter-religious learning.

First of all, we are convinced that the differences between public and private education are no longer adequate to with the demands of our time: in administrative terms, each school should be a private one, preferably with its own governing board, which might also be multi-religiously composed if suitable to the situation. In our point of view, in spite of the ‘Enlightenment fundamentalists,’ who sometimes want to prohibit any form of religious education in publicly funded education, at least in every school and for every pupil a thorough program on *education about religion* should be presented in a more mandatory form than at present.

The public interest requires that any student, especially with growing religious diversity in society, can develop an adequate and comprehensive picture of religious and philosophical traditions. This may be expected of education in *all* schools, including public schools and more religiously-conservative ones.

It may also be expected that these schools offer education which transcends the strictly cognitive aspects of teaching on religion, and for instance also provides room for *education into religion*, whether or not provided by a religious body or any other so-called sponsoring agency.

In the light of the development of European legislation, the possibility to make a choice to withdraw or to take part at an alternative form of active involvement must be respected for parents and pupils. In England there are experiments with these different forms, and the religiously diverse parent committees that are contributing appear to be a successful way to allow the school to become an entryway to the multi-religious society in which children will live together. Respect is not a dead letter or a cover for tepid indifference, but an active task that comes with genuine mutual acquaintance. A recent European study on the challenges religion faces in primary and secondary education (Luce Pépin, *Teaching about Religions in European School Systems*), shows that there are three central tasks. First: improving the quality of teaching about religions (the status of that education in schools, the quality of the supply and quality of teachers). Secondly, it is necessary to embed teaching

about religion in a more general framework with a focus on intercultural education, human rights and civic education. Thirdly our type of society requires a specific focus on how to deal in a civilized way with important differences that have their basis in religious and philosophical beliefs.

The philosophical situation in the Netherlands and Flanders at the beginning of the 21st century requires an active management of religious diversity that goes beyond the 'leave in peace' of the (un)believing other (Stevaert, 2005; Sacks, 2005, Brandsma & Kalsky, 2009). Although passive tolerance and mutual ignorance may have been a step forward after the brutal religious wars, they do not reflect the social and religious developments of recent decades any longer. Now that we can leave this period behind, in which the debate on private education was mostly conducted on the basis of misplaced notions of secularization, there are chances to focus that debate on an active pluralistic (Vanheeswijck, 2008), 'non-conservative strategy' (Taylor, 2007) which is not afraid of the confrontation with the religious stranger, but approaches people with a different belief with respect and genuine interest. In our time, the (dis)believing other has become routine, the 'Normalfall' (Sundermeier, 1996). Let us therefore not feel threatened, but make over the education for our children!

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