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Maussen, M.; Vermeulen, F.

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Liberal equality and toleration for conservative religious minorities. Decreasing opportunities for religious schools in the Netherlands?

Marcel Maussen* and Floris Vermeulen

Department of Political Science, University of Amsterdam, Amsterdam, The Netherlands

Liberal democratic states face new challenges in balancing between principles of religious freedom and non-discrimination and in balancing these constitutional principles with other concerns, including social cohesion, good education, and immigrant-integration. In a context of increased prominence of secular and anti-Islamic voices in political debate, there are demands to reduce legal ‘exceptions’ for (conservative) religious groups in the Netherlands. This article focuses in particular on public debate and jurisprudence with regard to education and explores discussions of associational freedoms that are of importance to religious schools, including the right to select and refuse pupils (the debate on the so-called duty to enrol (*acceptatieplicht*)), the possibilities for schools to refuse hiring staff who do not support the school’s philosophy (for example in relation to sexual orientation), and teaching on sexuality and sexual diversity. The article concludes by arguing that the Netherlands is undergoing a shift in the conceptualisation of religious freedom in relation to liberal equality, which in the longer run may destabilise a tradition of toleration and substantial collective freedoms for conservative religious groups.

Introduction

Education of children and young adults is deemed important to parents, communities, and the state, all having their own motives and ideas with regard to raising and socialising new generations. In this context, there are different and sometimes conflicting views about the appropriate role of religion in public schools, and about whether there should be faith-based primary and secondary schools. All states with liberal-democratic constitutions leave room for religion in education, but the modalities and degrees in which they do vary, for example when it comes to religious instruction and teaching in schools (Pépin 2009), expressions of religion and religious identity in the school context (prayer, rituals, religious feasts, wearing symbols, and dress), and opportunities for faith-based educational institutions (including primary and secondary schools) (Bader and Maussen 2012). Space for religion in schools is based on two basic rights. First, the *freedom of religion*, which entails, amongst other things, the right to manifest one’s religion ‘in public and in private’ and ‘in worship, teaching, practice and observance’ (article 9 European Convention on Human Rights [ECHR]). Second, there is the constitutional protection of the *freedom of education*. This

*Corresponding author. Email: m.j.m.maussen@uva.nl

freedom involves a ‘right to teach’ that is granted to individuals (as citizens, parents, or professionals) and to collectives (including families, denominational communities, and ‘like-minded’ groups), and a ‘right to learn’, which is primarily a right of individuals (including children) but also entails the right of parents to ensure that the teaching of ideas, attitudes and skills that they value is being provided to their children (De Groof and Noorlander 2012, 60–61). The freedom of education thereby also protects the right of groups or individuals to ‘establish and operate state-independent primary and secondary schools according to their own religious, philosophical, or pedagogical principles’, and the freedom of parents ‘to choose the school they want their children to attend’ (Vermeulen 2004, 31).

In this article, we explore debates about the position of religious schools in the Dutch educational system. Our focus is on schools that are ‘out of the mainstream’ for different, sometimes overlapping, reasons, for example because they are (perceived as) ‘conservative’ or ‘strict’, because their religious identity is relatively unfamiliar to Dutch society (as is the case for Islamic, Hindu, and, to a lesser extent, Evangelical schools), because they mostly cater to children belonging to ethnic and cultural minorities, or because doubts are voiced concerning the wider social consequences of the relatively homogeneous composition of the school population, particular teaching styles, or internal school rules (such as gender segregation in class).¹ For some of these schools, the discussion about their religious identity intersects with concerns about their performance² and management. We study the extent to which the position of religious schools in the Netherlands has changed, or is changing, because of new legislation and/or new legal interpretations of the associational freedoms of religious schools.

To some it may come as a surprise to hear that there are discussions about reducing the opportunities for religious schools in the Netherlands. After all, the Dutch approach to governance of religious pluralism has often been applauded, and labels such as ‘pragmatism’, ‘tolerance’, and ‘pillarization’ are sometimes used to argue that the Netherlands illustrates how in a modern society deep moral and cultural differences can be recognised and institutionalised without undermining opportunities for social peace, welfare, and political stability. The domain of education certainly has been viewed as exemplary in this respect, and in their comparative discussion of religious governance and state neutrality, Monsma and Soper concluded: ‘There is much to learn from the Dutch experience’ (2009, 85). However, over the past two decades this superlative image of the Netherlands has changed quite dramatically. The Dutch are said to have distanced themselves from ‘multiculturalism’ and the ‘model of pillarization’, not only in political discourse but also, and more importantly for the purposes of this article, in terms of the legal-institutional opportunities and freedoms granted to religious minorities, especially those minorities that are (perceived to be) ‘pervasively religious’ (i.e. orthodox, conservative, strict, and fundamentalist) or ‘religiously different’ (notably Muslims) (Maussen and Bogers 2012). This institutional re-orientation is said to be illustrated by a series of legal-constitutional changes that ended long-standing privileges held by dominant Christian religious groups, such as direct financing of church building and clergy (which ended in 1975 and 1983, respectively) or the criminalisation of blasphemy (which only ended in 2013). Also the passing of legislation that for long was resisted by confessional parties – on abortion (in 1984), euthanasia (in 2001), and same-sex marriage (in 2001) – is taken to illustrate an institutional turn towards more strict ‘state secularism’. Perhaps most striking has been the sharp turn away from multicultural policies over the past 20 years.³ Our goal is to explore whether we witness major institutional changes that,

when taken together, are changing the Dutch regime of governance of cultural and religious pluralism in fundamental ways.

Transformations of Dutch institutional arrangements result not only from broader social and institutional changes, but also from political contestations (see Maussen and Bader 2015). In this article, our aim is also to analyse changes in terms of shifts in underlying ideas and principles, which legitimise particular ways of doing as normatively appropriate. In recent literature on governance of citizenship and cultural pluralism, there has been much interest for particular understandings of ‘national models’ that play a role in justifying particular approaches and policy programmes, whilst discrediting others (see Bowen et al. 2014). In this light our hypothesis is that we are witnessing a reorientation of Dutch institutional arrangements (i.e. of ‘the Dutch model’) *away from* a model grounded in a paradigm of toleration and an understanding of religious freedoms in terms of rights of communities. In that model groups and minorities enjoyed substantial rights of non-interference and had effective opportunities to shape the conditions of their collective lives. We hypothesise that this model is shifting *towards* a model based upon a liberal-egalitarian understanding of religious freedom, in which individual rights and non-discrimination are firmly protected, but where there is less room for far-going associational and collective freedoms for minority groups, especially for those groups that are believed not to share liberal values.⁴ In order to analyse whether such a shift is occurring in the field of education, we need a precise understanding of how to understand the associational freedoms of religious schools.

We use the terms ‘associational autonomy’ and ‘associational freedoms’ to refer to the effective opportunities of schools to express their religious identity. Associational freedoms include the liberty to decide on membership, to have internal rules and procedures, to decide on the policy of an association, and so on (Bader 2007, 141 ff.). In the case of schools we can think of the right not only to select and recruit staff, admit certain pupils, and decide on curriculum and teaching styles and methods, but also to decide on priorities in the budget, the organisation and use of space, activities (within and outside the curriculum), and so on (Maussen and Bader 2015).

In the remainder of this article, we will focus on three core elements of the associational freedoms of Dutch religious schools and analyse whether fundamental legal changes are being prepared or have been implemented, and/or whether prevailing understandings and interpretations of guiding principles have been significantly changing. We begin by providing the necessary context information.

Religious schools in the Netherlands: institutional context, associational freedoms, and political contestation

The majority of Dutch schools continue to be religious, at least in name. In 2011–2012, 61.5% of all primary schools were religious, and of all secondary schools this was 56.1%. However, the vast majority of these are relatively ‘nominally’ religious,⁵ meaning for example that they are open to pupils and staff belonging to other groups and that they tend to teach in an open or ecumenical fashion (emphasizing the importance of different religious and secular worldviews), and they do not have internal rules that directly follow from their religious identity, for example with regard to dress. A small percentage of religious schools (less than 5%) still has a quite ‘strong’ religious identity and cater predominantly to specific Christian communities. Amongst these are Reformed and Evangelical schools. There are about 274 primary Reformed schools

(4.1% of the total number) and 12 secondary schools (1.9% of the total number).⁶ These schools cater to children belonging to orthodox Calvinist communities mostly living in the so-called Bible Belt stretching from the South West Province of Zeeland to the North East part of the country (see Versteegt and Maussen 2011, 13–14). Further, since 1997 ‘evangelical schools’ have been recognised as a separate denomination, and their number has steadily been growing to about 18 primary schools and 4 secondary schools.⁷ However, in the summer of 2014, six evangelical schools were closed simultaneously, following a critical report by the Inspectorate of Education about the functioning of the platform organisation to which these schools belonged, the Foundation for Evangelical Schools (Inspectorate of Education 2014). Besides these Christian examples, there are Islamic and Hindu schools that also cater to distinctive communities. Most of these schools do not tend to be ‘strongly religious’; they are set up as religious schools because this is the type of school identity that the Dutch constitution facilitates, but they basically cater to children of distinctive cultural-religious and ethnic communities, mainly of immigrant origin (Merry and Driessen 2012, 638). At present there are 43 primary Islamic schools, but the 2 secondary Islamic schools that also existed have been closed down (in 2010 and 2013 respectively) because of structural underperformance and problems with their management (Merry and Driessen, forthcoming). It is important to mention that only 10% of the total population of children with a Muslim background attend an Islamic school and that most Islamic schools have a ‘native Dutch’ management and staff, most of whom are non-Muslims. This stands in contrast to the situation of the more conservative Christian schools and Jewish schools, which tend to have a staff that exclusively belongs to and identifies with the religious denomination of the school. There are three Jewish schools in the Netherlands, all in Amsterdam, including a more ‘liberal’ primary school, and a primary and secondary school that are administrated by a more orthodox association.

Article 23 of the Dutch constitution guarantees freedom of education and ‘statutory equality’ of governmental or public (*openbare*) and non-governmental⁸ or denominational (*bijzondere* lit. ‘special’) schools. Both are funded according to identical and equivalent criteria (Vermeulen 2004, 34). The freedom of education guarantees (1) the freedom to found a school (*vrijheid van stichting*) which is entitled to be financed *if* the founders of a school can demonstrate that the school represents a ‘philosophy’ (lit. ‘direction’ (*richting*)) corresponding to a particular religious or ideological worldview *that also is of relevance in other societal domains*,⁹ that the school will be able to attract a sufficient number of pupils, and that there is no similar school within five kilometres of the proposed area. (2) The freedom of direction (*vrijheid van richting*) entails the freedom to express the fundamental orientation of the school, related to its particular philosophy, for example in selecting staff and pupils, in choosing how to teach on specific (sensitive) topics, and in deciding on specific behaviours or dress codes in the school. (3) Finally, the freedom of ‘internal organization’ (*vrijheid van inrichting*) protects pedagogical and organisational autonomy, allowing both governmental and non-governmental schools to select a specific pedagogical approach (Montessori, Dalton) and allowing schools to make decisions on teaching materials, buildings, and how to set up their own internal administration. In the case of non-governmental schools, there is often a division of authority between the school board that usually includes representatives of denominational organisations and parents, and the school management (director and teaching staff).

In a recent publication offering policy advice on the future of article 23, the National Council of Education discusses important trends that affect the understanding of freedom of education (Huisman et al. 2011; Onderwijsraad 2012a, see also the official reaction of the government, Ministry of Education, Culture and Science 2013a).¹⁰ First, in an increasingly globalised and competitive economy and knowledge-society, parents, especially higher educated parents, are very conscious of the importance of good schools for their children. They are also increasingly sensitive to variation between schools in terms of pedagogical approach and school performance, and many parents are not, or are no longer, primarily interested in the denominational identity of the school (for example they will send their children to a Catholic school because it has a good reputation and uses Montessori as a pedagogical approach). Parents are also less inclined themselves to participate in school boards, further strengthening a trend in which schools have become larger, professionalised, and bureaucratic organisations and school boards are increasingly governed by ‘professionals’. In such a context, a logic of ‘offer and demand’ will shape freedom of education with regard to the selection of a school, and parents will be more inclined to ‘vote with their feet’ (i.e. leave a school and move the children to another school) than to be founders of new schools or demand a say in school policy.

Against the background of these structural trends the Council of Education discusses two important possibilities to adjust the Dutch interpretation of the freedom of education to modern times. First, it should be more clear who the main ‘carrier’ (*drager*) is of the freedoms to found and operate religious schools: the actors who *de facto* run the school or the parents (in the interest of children)? Historically and in its phrasing, article 23 was mostly interpreted as protecting the ‘interests of institutions, notably of non-governmental (*bijzondere*) schools’ (Onderwijsraad 2012a, 85). In the new context, the balance may shift towards the need for schools to respond to demands of parents (and children) who are seen as carriers of a ‘right to education’. As the Council of Education observes, such an interpretation of the freedom of education is also visible in the ECHR that is more ‘individual oriented’ and that stresses that children and parents have a right to education that corresponds to their religious and philosophical convictions (article 2) (Onderwijsraad 2012a, 80).

Second, the Council argues that there may be good reasons to re-consider the concept of ‘philosophy of life’ (*levensovertuiging*) or ‘direction’ (*richting*) in the context of education. The fact that in order to qualify as a ‘direction’ that can form the basis for the right to found a school, an ideology or doctrine should be ‘comprehensive’ and should be visible, if not institutionalised, in different societal spheres, creates a bias in favour of religious worldviews (especially those of more established religious communities) and in favour of some secular ‘worldviews’ that are more comprehensive in their expression (such as Humanism). In upholding this understanding of what constitutes a ‘worldview’, so the Council argues, the state is insufficiently neutral, given the new meanings identity and ideology have for different groups in present-day Dutch society. In our times, the state should more even-handedly accommodate all kinds of ‘viable and socially articulated views’ (Onderwijsraad 2012a, 45). Furthermore, the pedagogical philosophy of schools may matter more for parents than the broader (religious) ‘worldview’. It seems, therefore, reasonable to make it more easy to found a school on the basis of a recognisable *educational* identity. At present the choice for a particular method and pedagogy (e.g. Jenaplan, Montessori, or Dalton) does not in itself, according to the legal-constitutional texts, constitute sufficient ground to found a new school (Huisman et al. 2011). Yet, in jurisprudence often the category

‘general special’ (*Algemeen Bijzonder*) has been used to grant the right to found a school also to schools that were mainly based on a specific pedagogy (such as Montessori).¹¹ The Council advised to allow for the creation of new schools that correspond to demands and wishes of parents, and that in a plausible way add to the diversity of schools on offer in a specific region, without making denominational ‘direction’ the leading criterion to grant recognition and financing.¹² Interpretations of the ways in which ‘school identity’ and ‘associational freedoms’ should be balanced with other legal or constitutional requirements (such as non-discrimination) could then be diversified. For example it should not be possible for a denominational school to discriminate against pupils on the basis of its ‘pedagogical identity’, whereas this should remain possible for schools founded on the basis of a religious identity (e.g. for a Jewish school to select only Jewish pupils) (Onderwijsraad 2012a, 51).

Against the backdrop of the discussion initiated by the Council of Education, we focus in the next section on three core elements of the associational freedom of religious schools in the Netherlands: the extent to which religious schools based on the school’s religious identity have the right to (1) select and admit pupils, (2) recruit and select staff, and (3) decide on important parts of the curriculum. For each element we briefly describe important political discussions, as well as new legislation and/or new interpretations by courts. Further, we include the reactions of school directors of religious schools in our analysis. We conducted qualitative interviews with two principals of Reformed schools, four principals of Islamic schools, and one principal of a Jewish school.¹³ The goal of these interviews was to gain a deeper understanding of the significance of associational freedoms in practice and ‘on the ground’, to explore the particular justifications of associational freedoms and their boundaries as they were articulated by the directors, and finally to learn about the ways school directors experience changes in public opinion with regard to their schools. We also use data from other interviews that were conducted with representatives of the main religious and secular umbrella organisations.¹⁴

Institutional change? Public and political debate and (proposals for) legal amendments with regard to three core elements of associational freedom of religious schools, 2008–2014

Admission of pupils

Religious schools have the right to select and admit pupils based on the school’s religious identity (Onderwijsraad 2010). Schools can require that pupils and their parents support the mission of the school. In 2005 an initiative bill was issued by the Social-Democrat Party (PvdA), the Socialist Party (SP), the Green Party (GroenLinks), and the Liberal Democrats (D66) that proposed the introduction of a so-called duty to enrol (*acceptatieplicht*) for non-governmental schools.¹⁵ Whereas at present schools may demand that parents ‘endorse’ (*onderschrijven*) the philosophy of the school, meaning they can justify not accepting a pupil by arguing that by their behaviour or statements parents demonstrate they do not (truly) subscribe to the philosophy or direction of the school (e.g. by being member of another church or by being divorced), in the new situation only if parents explicitly *refuse to declare they agree to respect this philosophy*, there will be the possibility to refuse a pupil. One of the motives behind this proposal was to strengthen the freedom of parents to have their child accepted in a particular school, whilst another was to reduce inequalities between governmental and

non-governmental schools with regard to opportunities to select pupils. An important underlying motive, according to the MPs who submitted the initiative bill, was to prevent denominational schools from making strategic or disingenuous use of their admission rules to refuse 'weaker' pupils. Some religious schools with good educational performance were said to refuse pupils with an immigrant background in order to remain middle-class, 'white' schools. In the subsequent advisory reports it became clear that as a matter of fact this concern was ill-founded because there were few proven cases of this 'disingenuous use' of the right to select on the basis of the denominational identity of the school. Also the possibility only existed for schools that had an explicit policy in this regard, and which had consistently applied this policy over many years. Effectively these were the more conservative religious schools, such as the Reformed schools. They did not, however, appear to use the principle to refuse weaker pupils with an immigrant background (Onderwijsraad 2010, 17–18; van den Berg and van Egmond 2010).¹⁶

A few legal cases have set the tone for the debate on the so-called duty to enrol. Actually the cases that ended up in courts and received media attention show how difficult it is to detect explicit refusal of a pupil because parents do not subscribe to the philosophy of the school, which also make it difficult to assess how widespread this phenomenon is. Moreover, what is sometimes at stake is that a specific internal school regulation, for example with regard to dress, will constitute an obstacle for children belonging to a different religious group, and will subsequently become a tool for the school to refuse pupils 'unwilling to respect the rules'. In 2003, the Equal Treatment Commission ruled for example that a Catholic secondary school was entitled to demand that a female student did not wear the headscarf in school (Equal Treatment Commission, Judgement 112, 2003). In 2007, the Court in Arnhem decided against a Reformed secondary school, the Hoornbeek College in Amersfoort, that had refused a student because (in the words of the court) 'his parents have a TV and open internet access, they use different translations of the Bible and their daughter wears trousers occasionally' (Reformatorisch Dagblad 2007). Another, more recent, case involved the Don Bosco College in Volendam, a Catholic secondary school. Confronted with four female Muslim pupils who indicated they wanted to begin wearing the headscarf, the school decided to change the article in its internal regulation on forms of dress that were not allowed (which included caps, hats, and so on) to now also include 'headscarves'. On the basis of this rule that was implemented the following school year, the school denied their Muslim pupils the right to wear the headscarf, saying this was also considered as 'an infraction upon the Catholic identity of the school'. Strictly speaking, and in the legal procedures that followed, this was not a case of refusing to admit a pupil, but about an internal rule with regard to religious expression that, according to the school, was related to its religious identity. As a matter of fact, the pupil remained in the school pending the legal procedures, and was first allowed to work in a separate room (with her headscarf on) and then decided not to wear it awaiting the outcome of the legal procedures (which lasted until 2011). In the media and in parliamentary debate the case was represented as paradigmatic for the need to have a 'duty to enrol' and as yet another illustration of the ways in which religious schools used their denomination 'to keep pupils [from] wanting to express another religion [than that] of the school'.¹⁷

As is often the case, the incidents and cases that result in legal proceedings may shed light on fundamental issues with regard to constitutional arrangements, but they do not necessarily clarify the importance of the matter: How many similar cases are

there? How important is the right to select on the basis of denomination for schools and parents? We draw on our interviews with directors of a number of Reformed, Jewish, and Islamic schools to get an idea of the reasons they have to value the right to select pupils on the basis of their religious identity, to what extent it is an issue in day-to-day school management, and why they may be opposed to the initiative bill.

The platform organisations of Reformed schools have been very concerned with the political debate on the ‘duty to enrol’ (*acceptatieplicht*) (VGS 2013). For these schools it would mean they would have to accept children as long as parents say they respect the identity of the school, whilst they may have different religious views and may not follow the strict rules of the Reformed religion in their personal life. A principal of a Reformed school explains why the school does not have any Muslim pupils, and why he feels there should remain a right to refuse children with other religious backgrounds:

the crucial difference between Muslims and Christians is of course the work of the Lord Jesus Christ, I will not ignore that or change that because of a number of Muslim children that I should respect ... So, that won't work. And so in reality, those Muslim parents, they simply don't enrol their children here. (Interview 1)

According to this director, then, the relatively ‘pervasive’ religious identity of the school has a self-selecting effect, and non-Christian parents will be disinclined to try and enrol their children in these schools. Interestingly, an important additional motive for Reformed schools to want to hold on to the constitutional right to refuse pupils was a fear of a growing influence of evangelicals. Parents and children with an evangelical interpretation of Protestantism tend to diverge from the strict rules of the Reformed, and there is a fear that they will undermine the Reformed community ‘from within’.¹⁸ The need to uphold the orthodox norms in the school may also arise when a child’s family is less strict. An example given in one of the interviews was that the role of the teacher was to point out that Sunday is meant for Church attendance and to be critical if children would mention they had been on an outing during the weekend. The teacher and the school should instruct children about what kind of behaviour is intolerable for Reformed Christians. However, even these internal rules also hardly become reasons to ‘expel’ children from the school and schools tend to pursue a strategy of dialogue with parents.

For Islamic schools the issue of refusing certain students hardly arises. Most directors we interviewed emphasised that all pupils are welcome. When asked about whether the school would refuse students on the basis of religion, one of the Islamic directors said that pupils ‘should not be refused on the basis of religion’. At this school a Catholic child would be admitted, but, so the principal added, it should ‘abide with the rules of the school’ (Interview 5). However, it became clear that the issue of refusing pupils because they do not respect the identity of the school remained basically hypothetical for these schools. There were interesting exceptions though. One school principal mentioned the example of Salafist parents who wanted the school to be stricter in its religious teachings and dress rules. The school would not accept that these parents would take their children out of the religious classes and suggested that they ought to look for another school (Interview 6). As a matter of fact, this type of decision by the school would still be protected under the new law.

As this article goes to press, the proposed bill for a general ‘duty to enrol’ has not (yet) been voted on in parliament. In a reply to the advice on the future of article 23, the

Secretary of Education has indicated that the trend was that ‘equal treatment legislation would be applied more consistently to schools, both with regard to the selection of students and the hiring of staff’ (see below) (Ministry of Education, Culture and Science 2013a, 14). Importantly also, the government intends to give more weight to parents when deciding whether a school might want to ‘change’ or ‘redirect’ its denominational identity. This might imply that the power balance may shift in favour of parents who want the school identity to correspond to what they want for their children, and that the school board will have less power to refuse pupils and impose rules in an attempt to protect the identity of the school the board supports. Also there is less political support for public subsidies to cover the transportation costs of children whose parents want them to attend a religious school that is outside of their region (‘bussing’), even though a decision on this issue is not imminent (Ministry of Education, Culture and Science 2013a, 11). According to many members of the orthodox Reformed community, however, all these measures point in one direction, namely that the dominant groups in society and the government intend to give priority to equal treatment and non-discrimination over freedom of education and toleration for religious groups.

Selection of staff

The Constitution requires the government to respect the freedom of non-governmental schools to appoint teachers. Teachers in non-governmental schools are employees of the foundations or associations that own or direct the school. The board of the organisation can use the purpose of the school, if it is clearly stated in the school’s mission statement, as a selection criterion when selecting or assessing teachers (Zoontjens and Glenn 2012, 354). Board members of religious schools find the selection of staff to be the most important element of protecting the identity of their school, often more important than selection of pupils or issues concerning curriculum. Wim Kuiper, president of the Dutch organisation for Protestant schools, explains how the selection of staff is central to the Dutch system of religious education:

See, the heart of the freedom of education really is one’s own personnel policy and not the freedom of choice of parents (although that of course is an important aspect as well), nor is it the acceptance policy of the children. The heart [of the matter] really is the policy of selecting personnel. That this is free, that you can ask the question about someone’s philosophy of life (*levensovertuiging*), while normally of course you can’t do this as an organisation.

There are definite limits, however, upon the freedom of a school board to make direct distinctions on the basis of gender, sexual orientation, and marital status when selecting personnel. Article 5 of the General Law on Equal Treatment (1994) indeed makes an exception for non-governmental schools allowing them to set conditions for employment related to the religious mission of school, *but* it then states that different treatment cannot be based exclusively on race, gender, marital status, sexual orientation, or religion (Zoontjens and Glenn 2012, 355). This so-called ‘the sole fact construction’ (*enkele feit constructie*) makes it illegal for non-government schools to discriminate on the basis of ‘the sole fact’ of gender, sexual orientation, or civil status. Still, a school may refuse to hire staff if it has ‘additional reasons’ justifying why it expects or finds the person unfit to work under the school’s mission.¹⁹ These additional reasons are, however, not specified and remain rather vague. Very few cases concerning

the ‘sole fact’ construction have been brought forward to either the Equal Treatment Commission or courts.²⁰ An example of such case is a teacher of a Reformed school, who was no longer allowed to teach at his school after he told the school principal in the year 2009 that he was in a homosexual relationship (Oomen et al. 2009). Despite the fact that the teacher did not press charges against the school and came to a personal agreement about the situation, there was an appeal at the Commission for Equal Treatment, which was initiated by the COC, an advocacy organisation defending the rights of lesbian women, gay men, bisexuals, and transgenders. Another example concerned a female teacher who was not hired at an evangelical school because she lived together with a man but was not married to him.²¹ In this case, the school did provide ‘additional reasons’ for making this distinction, namely the fact that the person did not belong to a church and had a different religious conviction from the one mentioned in the mission statement of the school. The Commission of Equal Treatment still decided that the school had made a direct distinction on the basis of the ‘sole fact’ of marital status, which is not allowed. Legal scholars reacted to this verdict by stating that in practice it was impossible for schools to provide plausible ‘additional reasons’ that would justify not selecting gay or divorced people.²²

Legally the chances of courts supporting schools that supposedly make use of the ‘sole fact’ construction thus have been quite small. Nonetheless, there has been increasing societal and political opposition to this exemption from the Equal Treatment Act. Also the Council of Europe and the European Commission have been extremely critical in this regard and have argued that the Netherlands has not adequately implemented European guidelines regarding the protection of rights of homosexual employees (Oomen et al. 2009, 26; Platform Artikel 2009; European Union Agency for Fundamental Rights 2010, 26). Already in the discussions following the critique of the European Commission, politicians of the Green Left party suggested to abolish the ‘sole fact’ construction. The proposal gained momentum when the new coalition government of Liberal Party (VVD) and Social Democrats (PvdA) included it in their official government agreement under the heading ‘emancipation and equal treatment’: ‘Schools are not allowed to fire teachers who are gay, nor may they refuse pupils who are homosexual or send them away because of their sexual orientation. In schools there will be education about sexual diversity’ (Government Agreement 2012, 19). In May 2014, a large majority of Parliament, including almost all members of the Christen Democratic Party (CDA), voted in favour of a motion to abolish the ‘sole fact’ construction. Now it will be decided by the Senate before it can be enacted formally.

Interestingly some of the school directors we interviewed stated that the new legal situation will not have great impact on choices they make in appointing teachers. During one of our interviews the director of an orthodox Jewish high school stated:

Regarding Jewish teachers, we [...] expect them to identify with the religious viewpoint of the school, in mind and in practice. We can only hire a Jewish teacher if he or she lives his or her life in line with the school’s religious identity, so in line with orthodox Judaism. We demand this freedom and we get it. If the government tries to interfere in this, we will not let it happen.

Most other schools, especially the Islamic, Hindu, and Protestant schools, tend to be more careful in expressing themselves in relation to these sensitive issues. A director of a Reformed school explained that he believed that schools were justified in discriminating against homosexuals when selecting teachers, as long as they would follow the

right procedure. In his view, the issue did not arise so often, but the media always created a hype and therefore schools had to choose their words in an extremely careful manner (Interview 1). When we asked the director of an Islamic school whether they would tolerate that a staff member was homosexual, he gave a more ambiguous answer. During the application procedure the rules of the schools would be mentioned and candidates should understand this meant they could not 'propagate' that they were gay (Interview 6). It remains to be seen in what ways these ideas and practices will change when the legal amendment has entered into force.

Interestingly, the interviews also brought to light in what ways directors of religious schools have concerns about their right to select (and refuse) staff on the basis of their religious identity. Teachers at Reformed schools must be members of one of the orthodox Protestant churches. However, sometimes teachers who are already working at the school may change their perspective on religion, for example because they become evangelicals. This is regarded as problematic, because, as one school principal explained, there is a fear that the teacher may communicate his changed views on religion to the pupils and then 'the school could be used as some sort of institute for evangelization'. He believed teachers should not actively talk about their alternative religious views (Interview 1). Again the fear of a growing influence of evangelicals motivated Reformed schools to make use of their associational freedoms to refuse non-Reformed staff, and a general obligation to abide by religious non-discrimination guidelines was seen as a threat to their attempts to defend the mission and identity of the school. Another issue that sometimes arises in these schools concerns discrepancies between the strict religious rules that the schools uphold (for example with regard to school attire) and the choices staff members make in their private life.

Islamic schools have problems finding enough certified teachers, which seems to influence their position in the earlier discussion on selecting staff members. The staff in Islamic schools can have another religion, or no religion, but they are asked not to (actively) try to communicate their own views to the pupils. Actually only a minority of the teachers in Islamic schools is Muslim and in this particular school, only one-third of the staff members had a Muslim background (Interview 3).

In sum, the political debate on the 'sole fact' construction has been primarily concerned with combating discrimination on the basis of gender and sexual orientation, whereas it remains to be seen whether it will be possible for the state to demand that religious schools cannot recruit and select staff on the basis of their religious identity.

Curriculum

The Dutch constitution provides the State with the competence to set quality standards in schools. During the last decades, government policies aiming to enhance educational quality in governmental and non-governmental schools have gained top priority, which resulted in the formulation and implementation of several new requirements and guidelines. Most importantly, in 1993, Parliament established a series of national outcome standards, so-called 'core goals' (*kerndoelen*), to which schools are to be held accountable. The Act on Educational Supervision of 2002 gave the Inspectorate new powers to judge school education. Inspectors visit schools periodically, observe classes, make recommendations, and report to the minister in cases where there is a violation of one of the requirements. Since 2010, there is also the legal obligation for schools to reach minimum learning results in the areas of language and mathematics. The funding for

non-government schools that have serious and lasting shortcomings will be ended (Zoontjens and Glenn 2012, 355–358).

There can be tensions between some of these requirements and the freedom of non-governmental schools to organise teaching as they see fit. In 2010, two members of Parliament, Mr Pechtold and Mr Van der Ham, both representatives of the Liberal Democrat party (D66), successfully filed a parliamentary motion demanding a change of the formulation of the ‘core goals’ (*kerndoelen*) concerning the teaching about pluralism in Dutch society, both in primary schools (article 38) and in secondary schools (article 43). These articles specify that pupils learn about the diversity of ‘life convictions’, about ‘differences in culture and philosophies of life’, and to see the importance of ‘respecting one another’s views and life styles’. Both articles should be changed to include the phrase: ‘with attention to sexuality and sexual diversity’.

One of the reasons for the MPs to demand this change was the assumption that in some schools (read: especially in religious schools) there was hardly any attention to ‘sexual diversity’ and/or homosexuality was being represented as wrong and sinful. Indeed, an important study conducted by the Netherlands Institute for Social Research showed how widespread the lack of acceptance of sexual diversity was in schools (especially in vocational schools), and underlined that in specific communities (such as Reformed, Muslim, and Evangelical communities, as well as in certain ethnic communities) anti-gay prejudice was particularly widespread (SCP 2010).

In an advice on the matter, issued in 2012, the National Council for Education questioned whether this motion would be effective, given the goal pursued, namely, creating more respect and a safer environment for homosexual, bisexual, and transgender pupils and staff in schools. Violence and discrimination for reasons of sexual orientation are important facts of life in many schools in the Netherlands, and the Council argued that changing the (cognitive) core goals was not a plausible strategy to create a ‘safer climate’ within schools (Onderwijsraad 2012b, 4). The Council also pointed to the more principled issue that by changing ‘core goals’ the freedom of schools to give more precise content to these goals was at stake. The existing texts of articles 38 and 43 mention the need to teach about, and make pupils aware of, pluralism and differences of background and culture, or more generally a diversity of ‘opinions, philosophies of life and ways-of-being’ (Onderwijsraad 2012b, 5). In the law, this is a *general* goal and there is no mention of the need to teach about cultural or religious or linguistic diversity in specific. Therefore, demanding that all schools specifically teach about sexuality would demand a more fundamental change of the law, going against the more basic idea that this type of ‘core goals’ should remain relatively unspecified to allow for autonomy of schools. Despite these reservations of the Council of Education, the government has decided to implement the motion, and since 1 December 2012 teaching on sexuality and sexual diversity is amongst the core goals in primary and secondary education. In addition, the Inspectorate of Education will monitor whether and how schools take measures to implement the new goals in their teaching programme, with special focus on ‘risk groups’ (Ministry of Education, Culture and Science 2013b).

Teaching on sexuality is one of the main issues where (some) religious schools may experience tensions between the legal output requirements and their own school mission statement, another issue concerns teaching about evolution. Teaching about the theory of evolution actually is one of the core goals of schools, but it is possible for religious schools to critically engage with the theory. The Foundation for the

Bible and Education for example suggested that Christian schools might also seek to teach ‘pupils to obtain knowledge of both theories of creation and of evolution, and learn to distinguish between facts and opinions’ (B&O 2008). This suggested that reformulation or reinterpretation of the core goals has no formal legal standing, but it demonstrates what opportunities may exist in practice for schools to decide on the way they want to teach these issues, and still attain required goals set by the state. Still, a director of a Reformed school mentioned the teaching of evolution theory as a domain in which associational autonomy increasingly was threatened. According to him ‘evolution is in fact a belief as well ... because of a lot of things are not clear and not proven’ (Interview 2). The principal of the Jewish school was even more explicit about the refusal of his school to teach evolution theory as defined in the attainment targets by the Dutch state. He explains how his school, in discussion with the inspection, is until now still allowed to ignore one of the 58 targets:

A [non-governmental] school has to justify to the Inspectorate why they do not teach evolution theory. I find it ridiculous that we have to do this. The state should just accept the fact that non-government schools decide to do this. [...] I must admit that the Inspectorate is willing to help us [after negotiations and explanations the school is allowed to not teach evolutionary theory]. (Interview 4)

The directors of Islamic schools whom we interviewed mentioned sexual education as a ‘sensitive issue’. Teachers would teach about sexuality and procreation in the biology lessons using a general textbook; ‘we just follow the method, what is in there we simply must present, one way or the other’ (Interview 3). During religious classes these issues would also be discussed, and more emphasis was put on Islamic norms with regard to sexuality. In practice in all religious schools decisions on issues related to curriculum and activities are negotiated between school boards, school management, and parents, within the constraints set by the Ministry of Education. It seems that at Islamic schools the school-management (director and teacher), who are often non-Muslims, believe that considerations concerning educational goals should take priority and that they often stand for a more liberal course than some of the school board members or parents would like to see. One director spoke of a shift in the school’s policy upon his arrival as manager. The more conservative members of the school board had been removed and the new policy was that the focus should no longer be on everything that should, for religious reasons, potentially be seen as forbidden (*haram*) but on what should be allowed (*halal*) (Interview 6).

Concluding observations

There are major concerns in the Dutch public debate about the ways Reformed, orthodox Jewish, and Islamic schools use their associational freedoms. In the media and political debate the tone is often set by a small number of controversial legal cases and incidents, and over the past 10 years the proposals for legal amendments concerning the ‘duty to enrol’, rescinding the ‘sole fact’ construction, and obliging all schools to ‘teach on sexual diversity’ have constituted a kind of agenda for thinking about a different balance between non-discrimination and associational autonomy in the domain of primary and secondary education. We have explored not only the legal framework and the possible consequences of legal amendments, but also how these associational freedoms play a role in practice in Reformed, Jewish, and Islamic schools. In our view,

there is clearly a trend to give priority by the Dutch State to non-discrimination. Two proposals to reduce the scope for exemptions for religious schools from equal treatment legislation have already been accepted (with regard to hiring of staff and teaching on sexual diversity), whereas the government intends to also follow up on the motion for a 'duty to enrol' for pupils. It remains to be seen, however, what the impact will be of the legal amendments and the normative pressure surrounding the interpretation of associational freedoms of schools. The legal opportunities granted to religious schools to make distinctions on the basis of religion, sexual orientation, or marital status have become more restricted, but they may find alternative ways to defend what they see as their core identity. This may involve both their constitutional rights and opportunities that exist in practice when teachers are recruited or decisions are made about how to teach about certain topics. At the same time, we have also shown how school policies and practices change in reaction to societal pressures, and exemplified for example by attempts to be more open and self-critical with regard to gender discrimination and acceptance of sexual diversity.

In our view it is accurate to speak of a regime shift occurring in the Netherlands with respect to understandings of religious and educational freedoms, and especially with regard to the balancing of associational freedoms and non-discrimination. We witness increased unwillingness of the government to defend legal and constitutional arrangements that allow for discrimination on the basis of religion, gender, sexual orientation, and marital status. In that context, the government is responding both to domestic and European pressures. However, in the field of education this broader trend intersects with two other important developments. First, because of a series of structural changes in the education system, the understanding of 'school autonomy' has changed. To a significant extent schools have become *more* 'autonomous' because they operate under a regime of governance based on 'steering at-a-distance' and 'privatization' (admittedly subject to strict monitoring and control by the state), and have professionalised further over the past decades. Nowadays school managements are less keen on listening to institutional actors that used to have an important say in the day-to-day management of religious schools, such as religious leaders and representatives of religious organisations. In addition, most religious schools in the Netherlands no longer function as one amongst several institutions constituting the 'organizational infrastructure of a subculture', which was exactly what the tradition of 'pillarisation' was about. In some cases, there also exists a substantial cultural gap between the school board and the management of the school (director and teachers), notably in Islamic schools. Only those religious schools that cater to communities that are still in a sense 'pillarised' (such as orthodox Jewish groups and Reformed groups) can still pursue a school policy based on consensual views that are shared by the school board, the management and staff, religious elites, and the parents. Second, the reorientation of fundamental freedoms and principles in the education system is also greatly affected by a 'diversification of cultural pluralism', which in this field has destabilised the idea that 'denominational direction' should be leading in understanding freedom of education. New forms of religious diversity have become more important, in part because of immigration, but simultaneously also all kinds of other 'views', 'life convictions', and 'value differences' have become more salient for parents and children. These structural changes, in interaction with a principled political choice in favour of non-discrimination, will make it more difficult for conservative religious groups in the Netherlands to organise education for their children in ways they were used to.

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Notes

1. See Merry (2013), chapter 5 for a thoughtful discussion of these issues.
2. Two main indicators for primary school quality are commonly used in the Dutch context: the outcome of the assessment of the inspection of education (which is published online) and the three-year school average SAT score based on student achievement scores (CITO scores). Dutch Reformed schools and Islamic schools are often perceived as performing relatively poorly in this respect. However, this relative underperformance can be explained largely by controlling for factors such as the composition of the school population in terms of immigrant background, social class, and educational background of parents. Religious schools often perform slightly better than public schools. For a brief comparative overview of schools, see Inspectorate of Education (2013). See also Dronkers and Avram (2015). See Merry and Driessen (forthcoming) on the performance of Islamic schools.
3. There is some debate on the significance of these shifts in public and in political discourse, and especially about whether or not they illustrate the end of a 'Dutch model' of immigrant integration policies. See recently Duyvendak et al. (2013).
4. For the normative discussion on the limits of tolerance and liberalism, see Maussen (2012, 2014), Dobbernack and Modood (2013), and Calder, Bessone, and Zuolo (2014).
5. We borrow the term 'nominally' religious from Monsma and Soper (2009).
6. This number includes both Reformed (*Reformatoische*) and Reformed Liberated (*Gereformeerd vrijgemaakt*) schools. See <http://www.stamos.nl/index.rfx?verb=showitem&item=5.24.5&view=table> (retrieved July 1 2014).
7. In 2014, the main umbrella organisation, the Platform for Evangelical Education (PEON), counted 11 primary schools and 4 secondary schools. See www.peon.nl.
8. We use the terminology governmental and non-governmental schools for reasons explained in the introduction to his special issue (Maussen and Bader 2015).
9. As the National Council for Education (Onderwijsraad 2012a, 19) explains the freedom to found schools also includes the freedom to create private schools, so the key issue is whether there is an obligation for (equal) funding of these schools. Not all (sub-)cultural identities or worldviews can be drawn upon to demand respect for this constitutional right, which is reserved to more established collective, denominational identities that are 'comprehensive' and institutionally present in different societal spheres. Hence, this understanding of what a 'direction' (*richting*) is said to be biased in favour of more established, religious denominations (see below).
10. The advice was prepared in response to the question by the Minister in 2011 for an 'authoritative interpretation' of article 23 of the Constitution.
11. The case of the Free Schools (*Vrije Scholen*) is different, because they correspond to a 'philosophy of life' (*levensovertuiging*), namely Rudolf Steiner's philosophy.

12. In the reply to the advice, the Secretary of State indicated she intended to follow up on this advice in favour of ‘planning irrespective of direction’ (*richtingsvrije planning*) (Ministry of Education, Culture and Science 2013a).
13. As mentioned in the acknowledgements, these interviews were conducted in 2010–2011 as part of two European Research Projects. The interviews with directors of Reformed and Islamic schools were conducted by Inge Versteegt. The interview with the director of a Jewish school was conducted by Floris Vermeulen.
14. In this article, we only refer to the interview by the number in our own files in order to guarantee confidentiality to our interviewees. The interviews with representatives of platform organizations and scientific bureaus of political parties were conducted by Floris Vermeulen. These interviewees have consented to being cited and named. For a full list of the respondents, see Vermeulen and El Morabet Belhaj (2013, 137).
15. Initiative Bill Hamer, Vergeer, Jungbluth, and Lambrechts, TK 2005–2006, 30417. Because of the formation of a new government and election, a new Initiative Bill with similar demands was issued in 2006.
16. Still, one could argue that the general pattern shows there is clearly a disproportionately small number of children from ‘disadvantaged social classes’ or ‘with an immigration background’ in Christian schools, which shows that there is evidence of structural discrimination or that ‘something is skewing the results’, to use Anne Phillips phrase (2004, 8). See also Merry (2015).
17. See the response of the Minister of Education, Culture and Science, 12 April 2011. See also Merry (2015) for a further discussion on mechanisms of exclusion in the Dutch school system.
18. As we mentioned earlier in the article, Evangelical schools have been founded since 1997 and their number has been growing. Opportunities for parents to demand that a school changes its ‘denominational identity’ further strengthen the concerns of the boards and directors of Reformed schools. They think there is a need to have a large majority of children and parents who firmly adhere to the denominational views of the school.
19. These discussions are, therefore, about the ‘right’ of religious schools to ‘discriminate’ on the basis of their religious identity and not about the issue of how religious people are protected from discrimination, for example when working in public schools. On the latter issue (in the UK), see Vickers (2011) and Sandberg (2011).
20. Many people expected a lot of cases concerning the hiring and firing of teachers by the boards of non-governmental religious schools; however, only a few cases did come to the Commission of Equal Treatment or Courts. Most cases concerning teachers and non-governmental religious schools have been about equal payment, salary problems, and legal positions, but not related to identity issues (Zoontjens and Glenn 2012, 355).
21. CGB Oordeel 2011-102.
22. Overbeeke Annotaties bij Oordelen CGB 2011-102, 471–472.

Notes on contributors

Marcel Maussen is assistant professor at the Department of Political Science of the University of Amsterdam.

Floris Vermeulen is associate professor at the Department of Political Science of the University of Amsterdam.

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