

**RELIGION AND NON-DISCRIMINATION LAW IN  
THE NETHERLANDS**

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**RELIGION AND NON-DISCRIMINATION LAW IN  
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### **1. Introduction**

The relationship between the right to freedom of religion and the rights to non-discrimination and equal treatment is a hotly debated topic in the Netherlands. Views and positions on the relationship between religious liberty on the one hand and the right to equal treatment and non-discrimination on the other differ widely. Concrete issues arise both in ‘vertical relationships’, i.e., in relationships between public authorities and private individuals and groups or organisations, and in ‘horizontal relationships’, i.e., in relationships between private individuals and groups or organisations. Issues may arise under civil law (for instance, in employment relationships, in the provision of goods and services), criminal law (for instance, defamatory expressions), or administrative law (for instance, subsidy issues).

This essay deals with the discrimination law in the Netherlands relating to religion as it has developed over the last decades. Following a discussion of the historical, cultural, and social background to anti-discrimination law in so far it relates to religion (Section 2), the duty not to discriminate and the right to differentiate will be discussed in as far as they relate to religion, with a focus on the current Equal Treatment Act and its system of enforcement (Section 3). Subsequently, some other areas of the law will be dealt with, with a focus on criminal law (Section 4). The essay concludes with a brief evaluation (Section 5).

### **2. Historical, Cultural, and Social Background**

The modern debate on the relationship between religion and discrimination goes back to the last quarter of the last century. In 1983, the Constitution was thoroughly revised. A general guarantee of equal treatment and non-discrimination (Article 1) was introduced into the Constitution; the chapter On Religion was replaced by a newly formulated Article on the freedom of religion. In the same Article, freedom of non-religious belief was explicitly guaranteed for the first time as well. The first legislative proposals for the general revision of the Constitution were introduced in the parliamentary year 1976-1977.

In 1994, the Equal Treatment Act (*Algemene wet gelijke behandeling*) entered into force after a long legislative process. A first consultative draft was published in the year 1981 (before the revised Constitution entered into force, but at a time when that process was in an advanced stage). It was a time in which fundamental rights and their doctrinal dimensions received much attention, both in the political process of revising the Constitution and in the academic world. Current doctrines of fundamental rights date from those years, such as that of the horizontal dimension of fundamental rights, thus giving many concrete issues in the relationship between private individuals a fundamental rights' dimension. It was also established that the Constitution contained no hierarchy of fundamental rights. The concepts of religion or belief were not defined in the process of the constitutional revision; nor have those concepts been defined by ordinary legislation or court rulings. Prior to the revision of the Constitution and the process leading up to it and the enactment of the Equal Treatment Act, issues concerning the relationship between religion on the one hand and non-discrimination and equal treatment on the other did arise. However, generally speaking, these seemed to be dealt with in a more pragmatic way. It was not yet common to formulate those issues as clashes between fundamental rights.

In the course of the second half of the 19<sup>th</sup> century, a way of dealing with religious diversity had developed in society and law that became characteristic for the Netherlands. This is often referred to as the system of pillarisation. Society was organised along confessional and political lines: schools, hospitals, welfare organisations, newspapers, broadcasting companies, employers' and employees' organisations, sport clubs, and so on were established, each serving their own specific group. Diversity, therefore, was primarily managed on a level of civil society organisations. This system was in place until well into the 1960s. It still is, but the general societal context has changed radically since then and the function and place of such organisations has changed as well. Furthermore, trends of depillarisation, secularisation, and individualisation have transformed its original significance. At the same time, gay rights movements, women's rights, and changes in dominant public opinion on a range of moral issues put pressure on and challenged institutional liberty for confessional organisations in terms of personnel policies, acceptance policies, and their policies on substantive issues.<sup>1</sup>

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<sup>1</sup> For a more specific analysis on the ambiguous relationship between religion and non-discrimination and between religion and freedom of speech in Dutch law, see Sophie van Bijsterveld, *Overheid en*

As the relationship between national and international law in the Netherlands is monistic,<sup>2</sup> the ECHR is part and parcel of Dutch law. It takes precedence over Dutch law (even over the Constitution) and can be directly invoked in Dutch court procedures. Incidentally, the ECHR and its substantive Protocols have played a role in court cases. An example is a ruling by the Netherlands Supreme Court (*Hoge Raad*) ruling in which Article 2, Protocol I, ECHR (right to education) was regarded to provide the private individual with rights vis-à-vis the state, but not vis-à-vis private institutions (confessional schools). On the basis of this conclusion as well as the applicable Dutch law, an orthodox Jewish secondary school was not obliged to admit a pupil who was not Jewish according to the strict (Halacha) criteria of the school.<sup>3</sup>

Article 14 ECHR does not contain an independent right to equal treatment but guarantees equal treatment with respect to the (other) fundamental rights contained in the ECHR. Therefore, its independent significance is limited. Currently, a highly controversial Dutch case is pending for the ECtHR, concerning the right of an orthodox reformed political party (SGP) not to allow women to be elected through their party list (see Section 4).

The number of Dutch cases concerning religion and non-discrimination or equality brought before the ECHR is not high, but they raise fundamental questions. In deciding the latter case, the Netherlands Supreme Court and the Council of State (in separate proceedings) came to contrary conclusions. The interpretation of the UN Convention on the Eradication of Discrimination of Women played a crucial role in these proceedings. UN instruments have also affected national legislation, especially criminal defamation law. In order to give effect to the UN International Convention on the Elimination of All Forms of Racial Discrimination (1965; entry into force 1969), a number of speech crimes were included in the Dutch Criminal Code (the Articles 137c - 137e). They were subsequently extended and the penalties for them have been increased. Currently, criminal defamation law as a restriction of 'free speech' has become controversial, especially in relationship to religion.

As to the EU, Article 19 TFEU (ex Article 13 EU), originating from the Treaty of Amsterdam, must be mentioned. On the basis of this Article, EU Directive 2000/78/EC was enacted, which contains a special provision (Article 4(2)) concerning occupational

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*godsdiens. Herijking van een onderlinge relatie*, 2<sup>nd</sup> edn., Nijmegen: Wolf Legal Publishers 2009, notably Chapters 6 and 8.

<sup>2</sup> Articles 93 and 94 of the Constitution, see Annex III.

<sup>3</sup> HR 22 januari 1988, AB 1988, 96 (Maimonides).

requirements within churches and other public or private organisations the ethos of which is based on religion or belief.<sup>4</sup> The Dutch government favoured the incorporation of this clause. It is generally in line with the provisions of the Dutch Equal Treatment Act. Currently, a Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age, or sexual orientation is pending which may have implications for national legislation concerning religion and non-discrimination.<sup>5</sup> Unfortunately, the Proposal suffers from lack of clarity.

Currently, a parliamentary initiative Bill is pending in the Lower House of the Dutch Parliament, which is aimed to change the delicate balance that the 1994 Equal Treatment Act carved out with regard to confessional organisations between religion on the one hand, and non-discrimination or equal treatment on the other.

### 3. The Duty not to Discriminate: The Equal Treatment Act and its Enforcement Mechanism<sup>6</sup>

#### *The General Structure of the Act*

The Equal Treatment Act plays a key role in the law relating to religion and non-discrimination. It was first enacted in 1994 after a period of preparation and debate taking over ten years. Public, academic, and parliamentary debates on this topic were marked by strong controversy. The Act has been amended various times afterwards, notably in order to implement subsequent EU legislation in this area.

<sup>4</sup> See Annex IV. The provision thus gave effect to Declaration 11 on the Status of Churches and non-Confessional Organisations contained in the Final Act to the Treaty of Amsterdam (1998). The provision is now incorporated in the Lisbon Treaty.

<sup>5</sup> COM (2008)/0426 final. See, <<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52008PC0426:EN:NOT>> (last accessed on August 15, 2011).

<sup>6</sup> For a presentation of the Act and the work of the Equal Treatment Commission by the Commission itself, see 'Equality law and the work of the Dutch Equal Treatment Commission', at <<http://www.cgb.nl/english/publications/brochures>> (last accessed on August 15, 2011). See also <<http://www.non-discrimination.net/>> (last accessed on August 15, 2011), the site of the European Network of Experts in the Non-Discrimination Field. For the section on the Netherlands, see <<http://www.non-discrimination.net/countries/netherlands>> (last accessed on August 15, 2011). The site includes annual country reports, the latest currently being a report over the year 2009, <[http://www.non-discrimination.net/content/media/2009-NL-Country%20Report%20LN\\_final.pdf](http://www.non-discrimination.net/content/media/2009-NL-Country%20Report%20LN_final.pdf)> (last accessed on August 15, 2011); see pp. 21ff for a brief overview of cases on religion and non-discrimination in the reported year.

Unlike European Union regulations or other international instruments, the Dutch wording of the Equal Treatment Act does not command ‘equal treatment’ or prohibit ‘discrimination’, but rather prohibits ‘distinction’.<sup>7</sup> The relevant grounds are ‘religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status’ (Section 1(b)) of the Act. Sections 1 and 1a define the key concepts of the Act, and introduce the distinction between ‘direct’ and ‘indirect’ distinction, the latter of which may be justified under conditions. Indirect distinction is distinction on other than the specified grounds, but resulting in distinction on such grounds. Harassment is included in the prohibition of making distinctions.<sup>8</sup> It is defined as ‘conduct related to the characteristics or behaviour’ related to the above mentioned grounds ‘which has the purpose or effect of undermining the dignity of a person and creating a threatening, hostile, degrading, humiliating or offensive environment.’

It is important to note the overall structure of the Act. In a wide variety of socially relevant areas, making distinctions – broadly defined - by both private and public entities and persons is prohibited. The balance with other fundamental values and interests is achieved only through delimitation of the scope of application of the Act and through specifically formulated exceptions. Therefore, if the making of a distinction falls within the scope of application, and no specific exception is provided, the action is unlawful. This creates a preference toward equal treatment. This preference is underlined by Article 10, which deals with the burden of proof: once there is a presumption of discrimination based on the facts of the case, the other party carries the burden of proof.

In terms of protection, Article 9 declares that ‘[a]ll contractual provisions which conflict with this Act are null and void.’ Furthermore, persons who invoke the Act or employees whose contract of employment is terminated in contravention of the relevant provisions of the Act are given special protection (see Articles 8, 8a, and 9).

Articles 2 and 3 contain general exceptions to the Act (see the following subsection). Articles 4 – 7a contain the actual prohibition to make distinctions and define the fields in which this prohibition is operative.<sup>9</sup> Thus, they form the core of the Act. In various instances,

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<sup>7</sup> In the official English translation, the word ‘discrimination’ is used in its neutral sense of ‘discrimination’. However, the word ‘discrimination’ sounds more pejorative than ‘distinction’.

<sup>8</sup> But not with respect to all areas covered by the Act. See Article 1a(4).

<sup>9</sup> These are contained in Articles 5(1); 6; 6a(1); 7(1); 7a (see Annex I).

their scope is narrowed down by specific exceptions to the general rule (see the following subsection).

*The Prohibition to Discriminate and the Right to Distinguish or Differentiate*

Given the structure of the Equal Treatment Act, allowances made with respect to religious freedom need to take the shape of delimitation of the scope of application of the Act or of exceptions. Article 3 delimits the scope and specifies that the Act does not apply to:

- a. legal relations within religious communities, independent sections or associations thereof and within other associations of a spiritual nature;
- b. the office of minister of religion.

Fundamental norms of reasonableness must be complied with even if they fall outside the scope of the Act. Whether religious institutions are more ‘liberal’ in their policies or more ‘orthodox’, it is necessary that they have a policy to be able to relate this to the confessional status of the institution, and to be able to apply the policy consistently.

Allowances are also made for relationships with a more private character, for example, an employment relationship, or, with regard to political opinion, appointments to administrative or advisory bodies or to confidential posts. Although religion is not mentioned with regard to public posts, it can play an indirect role through the exception with regard to political opinion.

Furthermore, the Act contains three similarly formulated but not identical specific exceptions which are particularly relevant to institutions founded on religious or ideological principles. The formulation of these exceptions has been and still forms the most contested part of the Act in as far as the relationship between religion and equality is concerned. At this moment, they are subject of a debate between the Dutch government and the European Commission. A controversial Bill aims at restricting the existing room to manoeuvre for religious institutions.<sup>10</sup>

The form these exceptions take is to allow an institution founded on religious or ideological principles the liberty under certain conditions to make distinctions within the meaning of the

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<sup>10</sup> *Kamerstukken II*, 32 476 (initiatiefvoorstel tot wijziging van de Algemene wet gelijke behandeling in verband met het annuleren van de enkele-feitconstructie in artikel 5, tweede lid, artikel 6a, tweede lid, en artikel 7, tweede lid, van de Algemene wet gelijke behandeling).

Act, at the same time, narrowing down this liberty. For example, Article 5(1), under a states that the prohibition to make distinctions in the relevant social fields does not apply to

the freedom of an institution founded on religious or ideological principles to impose requirements which, having regard to the institution's purpose, are necessary for the fulfilment of the duties attached to a post; such requirements may not lead to discrimination on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status.

The formulation under c deals with educational establishments and is formulated slightly differently in order to guarantee a slightly higher degree of liberty for the establishment. Article 6a(1) deals with distinctions 'with regard to membership of or involvement in an employers' organisation or trade union, or a professional association, or with regard to the benefits which arise from such membership involvement'. In view of this formulation, the exception in paragraph 2, is, again, formulated in a slightly different manner.

The construct of the exceptions, generally known as the 'sole grounds' construct, was a comprise between opposing views on the extent to which institutions founded on principles of religion or belief should be granted the liberty to shape their institutional identity, also in terms of their personnel policy.

#### *Enforcement: The Equal Treatment Commission*

The Equal Treatment Commission is the specialised enforcement body set up under the Equal Treatment Act (Article 11). It is an independent body, whose members are appointed by the Minister of Justice, in consultation with the Ministers of Socials Affairs and Employment, of Education and Science, and of Welfare, Health and Cultural Affairs (Article 16(3)), for a maximum renewable period of six years. The Commission is composed of nine members; alternate members may be appointed. Its chair and assistant chairs must fulfil the requirements of eligibility for appointment as officers of the court (Article 16(2)).

Its statutory role is threefold. First, it may 'in response to a request in writing, conduct an investigation to determine whether discrimination as referred to in this Act [and some other specified Acts] has taken or is taking place, and may publish its findings' (Article 12(1)). Second, it may 'conduct an investigation on its own imitative to determine whether such discrimination is systematically taking place and publish its findings' (Article 12(1)). Third, it



‘may bring a legal action with a view to obtaining a ruling that conduct contrary to this Act [and some other specified Acts] is unlawful, requesting that such conduct be prohibited or that the court order the consequences of such conduct to be rectified’ (Article 15).

From this it follows that the ‘findings’ of the Commission are not legally binding, in contrast, to a court ruling. However, these findings (‘Opinions’ in the wording of the Commission) have some authority although they are regularly contested. A complainant may choose not to address the Commission but may opt for a court procedure instead. Another possibility is that the court is addressed by one of the parties following the delivery of an opinion by the Commission. Article 15 provides that the Commission itself may address the court. Article 12(2), specifies who may address the Commission for an opinion and under what circumstances this may happen. The low-threshold procedure makes it easy to address the Commission. The findings of the Commission result in a decision on the lawfulness or unlawfulness of a given act under the Equal Treatment Act. Only courts can award damages.

It is worthwhile mentioning, that it is the right of the Commission and its staff to ‘demand all the information and documents which may reasonably be considered necessary for the performance of its duties’ and the corollary duty of ‘everyone’ to provide such information, unless under the obligation of official or professional confidentiality or under risk of self-incrimination or incrimination of specified relatives of ‘conviction for a serious offence’ (Article 19). The commission issues an annual report of its activities; and every five years it reports on ‘its findings on the operation of this Act ... [and some other specified Acts]’ (Article 20). A Bill which aims at restructuring the Equal Treatment Commission to also function as a National Institute on Human Rights is currently pending before the Upper House of Parliament.<sup>11</sup>

### *Cases*

At the ideological level, but not so much in practice, the tension between religion and non-discrimination concerned especially the issue of homosexuality in religious educational establishments. The current debate on the pending Bill also focuses on this issue.<sup>12</sup> Again, in practice, this is not as pressing as the debate would suggest. In terms of interpretation of the

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<sup>11</sup> *Kamerstukken II and I, 32 467* (Wetsvoorstel College rechten van de mens).

<sup>12</sup> See footnote 10.

‘sole grounds’ construct, questions have arisen of whether distinctions on the grounds of the practice of homosexuality or cohabitation are or can be seen as falling within this construct.

In terms of practice, issues of wearing headscarves, burkas, or niqabs or the refusal of personnel to shake hands with a person of the other sex in *public (non-religious)* schools and other workplaces have led to much case law. The distinctions often take the shape of indirect distinctions, thereby, raising the question of whether there was a justification for the distinction. This requires a weighing of interests on both sides where the circumstances of the case play a dominant role. This process of weighing is not at all value-neutral. It is fascinating to see that, once in a while, the exact same case leads to a different result in the Equal Treatment Commission as compared to the court.<sup>13</sup>

The Equal Treatment Commission uses a three-pronged test to determine whether an indirect distinction can be justified. In standard wordings, this is thus elaborated that the

aim must be legitimated, in the sense of sufficiently important or meeting a real need. A legitimate aim further requires that there is no discriminatory purpose. The means of achieving that aim must be appropriate and necessary. A means is appropriate if it is fit to achieve the goal. A means is necessary if the goal cannot be reached with a means that does not lead to discrimination, at least is less problematic, and the means is in appropriate relationship to the aim.<sup>14</sup>

All these criteria must be met for the distinction to be lawful.

Returning to another currently controversial issue, the liberty of confessional educational establishments to adopt an admission policy on grounds of religion is under attack. Again, in practice, this is not an important issue, but from an ideological perspective it is. It is ideologically speaking. The issue has surfaced in the context of a broader discussion on ‘white’ and ‘black’ schools. The presumption is that confessional schools can maintain ‘white’ schools through their admission policy on religious grounds. This is an issue in the broader context of integration. In practice, however, there are only few schools who have a strict admission policy and they usually have a rather outspoken religious confession. In practice, many confessional schools are attractive for Muslim pupils as their parents favour

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<sup>13</sup> Compare, for instance, CGB Opinion 2006-202; and Rb. Rotterdam, 6 augustus 2008, *LJN* BD9643.

<sup>14</sup> CGB Opinion 2011-88, recital 3.10 (unofficial translation). The case concerned the Academic Medical Centre in Amsterdam, which refused to allow a Muslim doctor’s assistant to wear a long skirt in the outpatients’ clinic.

them above secular public schools. However, this debate comes at a moment when the positions of the dual school system, with public schools and publicly financed private (= confessional) schools is occasionally attacked, and at a moment when incidents are in the news about Muslim confessional schools. The fact that a number of different threads of debates come together makes this debate rather complex and heated at the same time.

A current topic of controversy is the right of (candidate) civil registrars to refuse to perform same sex marriages. The Equal Treatment Commission is of the view that the Equal Treatment Act is not violated if municipal authorities reject a candidate civil registrar who conscientiously objects to performing such marriages.<sup>15</sup>

#### **4. Other Relevant Legislation and Current Issues Concerning Religion and Non-Discrimination**

Although the Equal Treatment Act plays a dominant role in theory and practice in the relationship between religion and non-discrimination, other legislation deserves mention as well. First of all, the general provision in the Netherlands Civil Code can play a role in the absence of specific legislation, for instance, in cases of defamation. As the threshold for defamation in civil law is lower than it is in criminal law, civil law plays a complementary role. An example of the use of civil law can be found in a case in which a former church member sued the church minister for the words he used in a prayer during a church service in which he expressed his opinion on the fact that the complainant had left the church.<sup>16</sup>

The Criminal Code contains a number of provisions with respect to defamation.<sup>17</sup> Over the last few years, a number of high-profile cases have been ruled upon. In their final stages, none of these cases have, so far, led to convictions. The scope of this essay does not allow a detailed analysis of these cases. To give an impression of the issues that have recently arisen,

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<sup>15</sup> See e.g. CGB Opinion 2008-40 (the candidate applied only for the job of civil registrar). In an advisory report, the Commission came to a general conclusion that no room for conscientious objections against performing same sex marriages should be allowed for persons solely employed for the purpose of performing marriages; limited room could be allowed if such persons were employed by municipal authorities for other purposes as well, Equal Treatment Commission, 2008/04: Advies inzake gewetensbezwaarde ambtenaren van de burgerlijke stand: "Trouwen? Geen bezwaar!" ([http://www.cgb.nl/publicaties/publicatie/221135/2008\\_04\\_advies\\_inzake\\_gewetensbezwaarde\\_ambtenaren\\_van\\_de\\_burgerlijke\\_stand\\_trouwen\\_geen\\_bezwaar](http://www.cgb.nl/publicaties/publicatie/221135/2008_04_advies_inzake_gewetensbezwaarde_ambtenaren_van_de_burgerlijke_stand_trouwen_geen_bezwaar) ).

<sup>16</sup> Rb. Arnhem 24 februari 1989, *KG* 1989, 114 (Unlawful prayer).

<sup>17</sup> See Annex II.

the cases may be mentioned of a former parliamentarian who was prosecuted for an interview in which he expressed his moral objection to homosexuality; of an imam who did the same (obviously in other words); and of a current politician for his objection of Islam.<sup>18</sup>

Questions have been raised for some time about the religious conviction and actual practice of the Dutch political party (the *Staatkundig Gereformeerde Partij (SGP)*) not to allow women to be elected on its list.<sup>19</sup> Until June 2006, it did not admit women as members of the party. In 2005, a claim was brought against the Dutch state by, among others, a women's interest organisation for breach of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) by allowing the SGP to exclude women. The Court in first instance, the Court of Appeal, and the Supreme Court came to the conclusion that the Dutch state was in violation of the Convention.<sup>20</sup> In its ruling, the Court in first instance made the observation that

it is not unimaginable that in the (near) future also other parties stand up that – for religious reasons – attribute women another political and/or societal role than men, as a result of which the danger of discrimination creeps in. In this respect, the State can exercise a steering role.<sup>21</sup>

In order to give effect to the ruling of the Court in first instance, the State refused the party subsidy based on the Political Party Subsidy Act (*Wet Subsidiëring Politieke Partijen*), a decision against which the SGP lodged an administrative appeal. The highest administrative court, a special division of the Council of State, ruled that subsidy could not be withheld as the grounds on which the State had done so were not those that the Act allowed. The Council

<sup>18</sup> Hof 's-Gravenhage, 9 juni 1999, *AB* 1999, 328 (Van Dijke); Hof 's-Gravenhage, 18 november 2002 (see [www.rechtspraak.nl](http://www.rechtspraak.nl)) (El Moumni); and Rb. Amsterdam, 23 juni 2011 (see [www.rechtspraak.nl](http://www.rechtspraak.nl)) (Geert Wilders). For an English briefing on the case, see <http://www.non-discrimination.net/content/media/NL-49-Flash%20Report%20NL%202011-11%20Acquittal%20in%20Wilders%27%20case.pdf> (website of the European Network of Experts in the Non-Discrimination Field).

<sup>19</sup> This orthodox reformed party is represented in both Houses of Parliament. It is the only party that has uninterruptedly held seats in the directly elected House since 1922 (currently two out of 150). Officially, the SGP is a theocratic party, but it is without any doubt that it works within the context of Dutch parliamentary democracy. On this issue, see R.J.B. Schutgens and J.J.J. Sillen, 'De SGP, het rechterlijk bevel en het kiesrecht', in *NJB* 2010, pp. 1114-1117; Matthijs de Blois, 'Een mijlpaal op weg naar maatschappelijke uitsluiting. Over het SGP-arrest van de Hoge Raad van 9 april 2010', in *Tijdschrift voor Religie, Recht en Beleid*, 2010(3), pp. 61-69.

<sup>20</sup> HR 9 april 2010, *LJN* BK4549; ABRvS 5 december 2007, *AB* 2008, 35 (Administrative proceedings). The violation concerned Article 7, sub a and c, of the Convention.

<sup>21</sup> Rb. 's-Gravenhage, 7 september 2005, *LJN*: AU2088 (unofficial translation).

of State also made it clear that, in its view, the State had not acted unlawfully by allowing the SGP to exclude women. This ruling was published prior to the ruling by the Court of Appeal in the series of civil cases, which ruling was upheld by the Dutch Supreme Court. The Dutch government has stated that it will take no action to comply with the ruling of the Supreme Court until the ECtHR has ruled on the case. It is clear that this case touches on fundamental issues of democracy and the relationship between fundamental rights.

## 5. Evaluation

This essay only covers the main pieces of legislation relating to religion and non-discrimination. It can only point out a few of the cases and areas in which the issue of non-discrimination and religion plays a role. It is clear that these issues will be more pressing in a highly pluralist society in religious and ethical terms.<sup>22</sup> One of the pressing questions is how pluralism is to be protected: on the level of each individual or also at the level of (confessional) organisations, giving these organisations room to manoeuvre in areas such as personnel policy? It is clear that such questions cannot be answered solely within the framework of fundamental rights as such; they require a broader argumentation and perspective. Another question is in how far public authorities themselves can accommodate conscientious objection on grounds of religion and belief. Finally, it will be important to decide what role the legislature must play and what role remains for the courts, in other words, will a more general, doctrinal approach be dominant or will there be room for a step-by-step development based on individual cases?

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<sup>22</sup> On this topic, see Sophie van Bijsterveld, *The Empty Throne: Democracy and the Rule of Law in Transition*, Utrecht: Lemma 2002, notably Chapter 6: 'The Normative Frame: The Return of Natural Law'.

## ANNEX I

### THE EQUAL TREATMENT ACT

(as presented on the site of the Equal Treatment Commission, [http://www.cgb.nl/english/legislation/equal\\_treatment\\_act](http://www.cgb.nl/english/legislation/equal_treatment_act))

#### Equal Treatment Act

Act of 2 March 1994 containing general rules to provide protection against discrimination on the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status (as amended on 9 September 2004)

We Beatrix, by the grace of God Queen of the Netherlands, Princess of Orange-Nassau, etc., etc., etc.

Greetings to all who see or hear these presents! Be it known:

Whereas We have considered that, having regard inter alia to article 1 of the Constitution, it is desirable to provide protection against discrimination on the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status, in order to promote equal participation in society, and that it is therefore desirable to prohibit discrimination on these grounds except in such cases as provided for by law, and that to enforce this prohibition it is desirable that an Equal Treatment Commission be established;

We, therefore, having heard the Council of State, and in consultation with the States General, have approved and decreed as We hereby approve and decree:

Chapter I Equal treatment of persons irrespective of their religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status

#### **§ 1. General provisions**

##### **Section 1**

1. For the purposes of this Act and the provisions based upon it the following definitions apply:

a. discrimination: direct and indirect discrimination;

b. direct discrimination: discrimination between persons on the grounds of religion, belief, political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status;

c. indirect discrimination: discrimination on the grounds of characteristics or behaviour other than those referred to under (b), resulting in direct discrimination.

2. Direct discrimination on the grounds of sex includes discrimination on the grounds of pregnancy, childbirth and maternity.

##### **Section 1a**

1. The prohibition on discrimination laid down in this Act includes a prohibition on harassment.

2. Harassment as referred to in subsection 1 means conduct related to the characteristics or behaviour referred to in section 1 (b) which has the purpose or effect of undermining the dignity of a person and creating a threatening, hostile, degrading, humiliating or offensive environment.

3. Section 2, section 5, subsections 2 to 6, section 6a, subsection 2 and section 7, subsections 2 and 3 do not apply to the prohibition of harassment contained in this Act.

## **§ 2. General exceptions**

### **Section 2**

1. The prohibition on discrimination contained in this Act does not apply to indirect discrimination which is objectively justified by a legitimate aim and where the means to achieve that aim are appropriate and necessary.

2. The prohibition on discrimination on grounds of sex contained in this Act does not apply:

- a. in cases in which sex is a determining factor and

- b. in cases concerning the protection of women, notably in relation to pregnancy and maternity.

3. The prohibition on discrimination contained in this Act does not apply if the aim of the discriminatory measure is to place women or persons belonging to a particular ethnic or cultural minority group in a privileged position in order to eliminate or reduce existing inequalities connected with race or sex and the discrimination is in reasonable proportion to that aim.

4. The prohibition on discrimination on the grounds of race contained in this Act does not apply:

- a. in cases where a person's racial appearance is a genuine and determining requirement, provided that the aim is legitimate and provided that the requirement is proportionate to that aim;

- b. if the discrimination concerns a person's racial appearance and constitutes, by reason of the nature of the particular occupational activity in question or of the context in which it is carried out, a genuine and determining occupational requirement, provided that the aim is legitimate and the requirement is proportionate to that aim.

5. The prohibition on discrimination on the grounds of nationality contained in this Act does not apply:

- a. if the discrimination is based on generally binding regulations or on written or unwritten rules of international law, or

- b. in cases where nationality is a determining factor.

6. The cases referred to in subsections 2, 4 and 5 (b) are to be defined in more detail by Order in Council.

### **Section 3**

This Act does not apply to:

- a. legal relations within religious communities, independent sections or associations thereof and within other associations of a spiritual nature;

- b. the office of minister of religion.

## **§ 3. Provisions in the field of employment and the professions**

### **Section 4**

This Act is without prejudice to:

- a. the Equal Treatment (Men and Women) Act;

b. articles 646, 647, 667 and 670 of Book 7 of the Civil Code.

## **Section 5**

1. It is unlawful to discriminate in or with regard to:

- a. advertisements for job vacancies and procedures leading to the filling of vacancies;
- b. job placement;
- c. the commencement or termination of an employment relationship;
- d. the appointment and dismissal of civil servants;
- e. terms and conditions of employment;
- f. permitting staff to receive education or training during or prior to employment;
- g. promotion;
- h. working conditions.

2. Subsection 1 does not apply to:

a. the freedom of an institution founded on religious or ideological principles to impose requirements which, having regard to the institution's purpose, are necessary for the fulfilment of the duties attached to a post; such requirements may not lead to discrimination on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status;

b. the freedom of an institution founded on political principles to impose requirements which, having regard to the institution's purpose, are necessary for the fulfilment of the duties attached to a post; such requirements may not lead to discrimination on the sole grounds of race, sex, nationality, heterosexual or homosexual orientation or civil status, or

c. the freedom of an educational establishment founded on religious or ideological principles to impose requirements on the occupancy of a post which, in view of the institution's purpose, are necessary for it to live up to its founding principles; such requirements may not lead to discrimination on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status.

3. Subsection 1 does not apply to requirements which, in view of the private nature of the employment relationship, may reasonably be imposed on the employment relationship.

4. Subsection 1 does not apply to requirements governing political opinion which may reasonably be imposed in connection with appointments to administrative or advisory bodies.

5. Subsection 1 does not apply to requirements governing political opinion which may reasonably be imposed in connection with appointments to confidential posts.

6. Subsection 1 (e) does not apply to discrimination on grounds of civil status in relation to surviving dependants' pension schemes and pension entitlements accrued before the entry into force of section 1 (B) of the Act of 21 December 2000 amending the Pensions and Savings Funds Act and a number of other Acts in connection with the right to opt for old age pension instead of surviving dependants' pension and equal treatment for men and women (Bulletin of Acts and Decrees 625).

## **Section 6**

It is unlawful to discriminate with regard to the conditions for and access to the professions and opportunities to pursue such professions or for development within them.

### **Section 6a**



1. It is unlawful to discriminate with regard to membership of or involvement in an employers' organisation or trade union, or a professional association, or with regard to the benefits which arise from such membership or involvement.

2. Subsection 1 does not affect:

a. the freedom of an organisation or association founded on religious or ideological principles to impose requirements which, having regard to its purpose, are necessary to meet its founding principles; such requirements may not lead to discrimination on the sole ground of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status or

b. the freedom of an organisation or association founded on political principles to impose requirements which, having regard to its purpose, are necessary to meet its founding principles; such requirements may not lead to discrimination on the sole ground of race, sex, nationality, heterosexual or homosexual orientation or civil status.

#### **§ 4. Other provisions in the socioeconomic field**

##### **Section 7**

1. It is unlawful to discriminate in offering goods or services, in concluding, implementing or terminating agreements thereon, and in providing educational or careers guidance if such acts of discrimination are committed:

a. in the course of carrying on a business or practising a profession;

b. by the public sector;

c. by institutions which are active in the fields of housing, social services, health care, cultural affairs or education, or

d. by private persons not engaged in carrying on a business or practising a profession, insofar as the offer is made publicly.

2. Subsection 1 (c) does not affect the freedom of an educational establishment founded on religious or ideological principles to impose requirements governing admission to or participation in the education it provides which, having regard to the establishment's purpose, are necessary for the fulfilment of its principles; such requirements may not lead to discrimination on the sole grounds of political opinion, race, sex, nationality, heterosexual or homosexual orientation or civil status. Discrimination on the grounds of sex is permitted solely if the distinctive nature of the establishment so requires and if equivalent facilities are available for pupils or students of both sexes.

Subsection 1 (a) and (d) does not apply to requirements which may reasonably be imposed in view of the private nature of the circumstances to which the legal relationship applies.

##### **Section 7a**

1. Without prejudice to section 7, it is unlawful to discriminate on the ground of race in the field of social protection, including social security and access to social advantages.

2. The concepts of social protection, social security and social advantages referred to in subsection 1 may be defined by Order in Council. A recommendation for an Order in Council pursuant to the first sentence will not be made earlier than four weeks after the Bill has been submitted to both Houses of the States General.

#### **§ 5. Protection and enforcement**

##### **Section 8**

1. If an employer terminates an employee's contract of employment in contravention of section 5 or on the grounds that the employee has invoked section 5, either at law or otherwise, such termination is voidable.
2. Without prejudice to chapter 8 of the General Administrative Law Act, the right of an employee to invoke subsection 1 to void the termination of employment lapses two months after the termination of the employment relationship. The invocation of grounds for voidance takes place by means of notification to the employer. Article 55, Book 3 of the Civil Code does not apply.
3. The right to institute legal proceedings in connection with voidance lapses six months after the date on which the employment relationship was terminated.
4. The termination referred to in subsection 1 does not make the employer liable to pay compensation.

### **Section 8a**

It is unlawful to disadvantage persons because they have invoked this Act, either in or out of court, or have assisted others in this connection.

### **Section 9**

All contractual provisions which conflict with this Act are null and void.

### **Section 10**

1. If a person who considers that he is a victim of discrimination within the meaning of this Act adduces before a court facts from which it may be presumed that such discrimination has taken place, the other party is required to prove that the action in question was not in breach of this Act.
2. Subsection 1 applies mutatis mutandis to legal actions as referred to in section 305a of Book 3 of the Civil Code and to review or appeal proceedings under administrative law instituted by interested parties within the meaning of section 1:2, subsection 3 of the General Administrative Law Act.

## **Chapter 2 The Equal Treatment Commission**

### **Section 11**

1. There is an Equal Treatment Commission, hereafter referred to as the Commission.
2. The Commission may establish subcommittees from among its members for the performance of its duties.

### **Section 12**

1. The Commission may, in response to a request in writing, conduct an investigation to determine whether discrimination as referred to in this Act, the Equal Treatment (Men and Women) Act or article 646, Book 7 of the Civil Code has taken or is taking place, and may publish its findings. The Commission may also conduct an investigation on its own initiative to determine whether such discrimination is systematically taking place and publish its findings.
2. A request in writing as referred to in subsection 1 may be submitted by:
  - a. a person who believes that he/she is a victim of discrimination as referred to in this Act, the Equal Treatment (Men and Women) Act or article 646, Book 7 of the Civil Code;
  - b. a natural or legal person or competent authority wishing to know whether they have

discriminated within the meaning of this Act, the Equal Treatment (Men and Women) Act or article 646, Book 7 of the Civil Code;

c. a person responsible for deciding on disputes concerning discrimination as referred to in this Act, the Equal Treatment (Men and Women) Act or article 646, Book 7 of the Civil Code;

d. a works council or comparable employee participation body which believes that discrimination as referred to in this Act, the Equal Treatment (Men and Women) Act or article 646, Book 7 of the Civil Code is taking place in the organisation for which it was appointed;

e. an association with full legal powers or a foundation which, in accordance with its constitution or statutes, represents the interests of those whose protection is the objective of this Act, the Equal Treatment (Men and Women) Act or article 646, Book 7 of the Civil Code.

3. If a request in writing as referred to in subsection 2 (d) and (e) names persons who are said to have been disadvantaged, or if an investigation conducted on the Commission's own initiative relates to such persons, the Commission must inform the persons concerned of the planned investigation. The Commission is not empowered to involve persons as referred to in the previous sentence in the investigation or the evaluation if they have stated in writing that they have reservations about such involvement.

### **Section 13**

1. The Commission institutes an investigation and forwards its findings, in writing and with reasons, to the petitioner, the person said to have discriminated and, if relevant, the victim of discrimination.

2. The Commission may make recommendations when forwarding its findings to a person said to have discriminated.

3. The Commission may forward its findings to such of Our Ministers as may be concerned, and to such organisations of employers, employees, professionals, public servants, consumers of goods and services and relevant consultative bodies as it believes appropriate.

### **Section 14**

1. The Commission may not institute an investigation if:

- a. the request referred to in section 12, subsection 2 is manifestly unfounded;
- b. the interest of the petitioner or the seriousness of the behaviour concerned is manifestly insufficient;

c. the period of time which has elapsed since the discrimination referred to in section 12 took place is such that an investigation can no longer reasonably be conducted.

2. In cases as referred to in subsection 1, the Commission notifies the petitioner in writing, giving reasons.

### **Section 15**

1. The Commission may bring a legal action with a view to obtaining a ruling that conduct contrary to this Act, the Equal Treatment (Men and Women) Act or article 646, Book 7 of the Civil Code is unlawful, requesting that such conduct be prohibited or that the court order the consequences of such conduct to be rectified.

2. No conduct may form the subject of an action as referred to in subsection 1 if the person affected by that conduct has reservations.

## **Section 16**

1. The Commission is composed of nine members – including a chair and two assistant chairs. Alternate members may be appointed.
2. The chair and the assistant chairs must fulfil the requirements laid down in section 48, subsection 1 of the Judicial Officers (Legal Status) Act governing eligibility for appointment as officers of the court.
3. The members and alternate members are appointed by Our Minister of Justice, in consultation with Our Minister of the Interior, Our Minister of Social Affairs & Employment, Our Minister of Education & Science and Our Minister of Welfare, Health & Cultural Affairs.
4. Sections 46c, 46d, subsection 2, 46f, 46g, 46i, with the exception of subsection 1 (c), 46j, 46l, subsection 1, with the exception of (c), and subsection 3, 46m, 46n, 46o and 46p of the Judicial Officers (Legal Status) Act apply mutatis mutandis on the understanding that:
  - a. with respect to the members of the Commission, the disciplinary measure referred to in section 46c, subsection 1 is to be imposed by the chair;
  - b. the prohibition laid down in section 46c, subsection 1 (b) on engaging in talk or conversation with the parties or their advocates, attorneys of record or representatives or accepting from them specific information or documents does not apply to members of the Commission.
5. The members and alternate members are appointed for a maximum of six years. They may be reappointed immediately. The Minister of Justice may accept their resignation, if tendered.

## **Section 17**

1. An office is to be set up to assist the Commission in the performance of its duties.
2. On the recommendation of the Commission Our Minister of Justice appoints, promotes, suspends and dismisses the staff of the office. Our Minister of Justice decides in what cases they are to be appointed, promoted, suspended and dismissed.

## **Section 18**

1. The Commission may, in the performance of its duties, call on the assistance of civil servants designated by such of Our Ministers as it may concern.
2. The Commission may, in the performance of its duties, seek assistance from one or more persons who are able to supply the information required by the Commission for that purpose.

## **Section 19**

1. The Commission and the persons referred to in section 17 who are designated by the Commission may demand all the information and documents which may reasonably be considered necessary for the performance of its duties.
2. Everyone is obliged, unless they are exempt on the grounds of official or professional confidentiality, to provide the information and documents required pursuant to subsection 1 in full and in accordance with the truth, in the manner and within the time limit laid down by or on behalf of the Commission. This obligation does not apply if, in doing so, a person would expose themselves or a relative by blood or marriage, in the direct or indirect line to the second or third degree, or their spouse or former spouse, or their registered partner or former registered partner, to the risk of conviction for a serious offence.

## **Section 20**

1. The Commission is required to issue an annual report of its activities, which will be published. It must forward this report in any event to such of Our Ministers as it may concern and to the advisory bodies concerned.
2. Every five years, calculated from the entry into force of this Act, the Commission is required to draw up a report of its findings on the operation of this Act, the Equal Treatment (Men and Women) Act and article 646, Book 7 of the Civil Code. It must forward this report to the Minister of the Interior.

### **Section 21**

1. Further rules concerning the working methods of the Commission are to be laid down by Order in Council, including in any event rules governing:
  - a. the manner in which cases are to be dealt with;
  - b. hearing both parties;
  - c. the public conduct of hearings;
  - d. the publication of its findings as referred to in section 13, subsection 3.
2. The members of the Commission receive a fee for their activities. Further rules concerning their legal status are to be laid down by Order in Council. These rules will in any event relate to their appointment and career development, fees, allowances, supplements, expenses, rights and duties in the event of reorganisations, disciplinary penalties, suspension and termination of the appointment.
3. The alternate members receive a fee for their activities for each hearing, as well as travel and accommodation expenses.

## **CHAPTER 3 Concluding provisions**

[Sections 22 , 23 and 24 have been deleted.]

### **Section 25**

[Contains amendments to other legislation]

[Sections 26 to 29 have been deleted.]

### **Section 30**

[Contains amendments to the National Ombudsman Act]

[Sections 31 and 32 have been deleted.]

### **Section 33**

In consultation with Our Minister of Justice, Our Minister for Social Affairs & Employment, Our Minister of Education & Science and Our Minister of Welfare, Health & Cultural Affairs, Our Minister of the Interior forwards to the States General a report on the operation of this Act, the Equal Treatment (Men and Women) Act and article 646, Book 7 of the Civil Code as soon as possible after receipt of the report referred to in section 20, subsection 2.

### **Section 34**

This Act enters into force with effect from the first day of the sixth calendar month after the date of publication of the Bulletin of Acts and Decrees (Staatsblad) in which it appears. An earlier date of entry into force may be laid down by Royal Decree.

### **Section 35**

This Act may be cited as the Equal Treatment Act.

**ANNEX II**

**SELECTED ARTICLES FROM THE DUTCH CRIMINAL CODE**

p.m. – no official translation available

**ANNEX III****ARTICLE 93 OF THE CONSTITUTION**

Provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published.

**ARTICLE 94 OF THE CONSTITUTION**

Statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons.

(see <http://www.rijksoverheid.nl/documenten-en-publicaties/brochures/2008/10/20/the-constitution-of-the-kingdom-of-the-netherlands-2008.html>)



**ANNEX IV****11. DECLARATION ON THE STATUS OF CHURCHES AND NON- CONFSSIONAL ORGANISATIONS**

(FINAL ACT TREATY OF AMSTERDAM, 1998)

The European Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.

The European Union equally respects the status of philosophical and non-confessional organisations.

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**ARTICLE 17 TFEU**

(CONSOLIDATED VERSION; AFTER ENTRY INTO FORCE OF THE LISBON TREATY)

1. The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
2. The Union equally respects the status under national law of philosophical and non-confessional organisations.
3. Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

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EU DIRECTIVE 2000/78/EC OF 27 NOVEMBER 2000, ESTABLISHING A GENERAL FRAMEWORK FOR EQUAL TREATMENT IN EMPLOYMENT AND OCCUPATION  
ARTICLES 1 – 4

CHAPTER I

GENERAL PROVISIONS

Article 1 ; Purpose

The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment.

Article 2; Concept of discrimination

1. For the purposes of this Directive, the "principle of equal treatment" shall mean that there shall be no direct or indirect discrimination whatsoever on any of the grounds referred to in Article 1.

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief, a particular disability, a particular age, or a particular sexual orientation at a particular disadvantage compared with other persons unless:

(i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or

(ii) as regards persons with a particular disability, the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

4. An instruction to discriminate against persons on any of the grounds referred to in Article 1 shall be deemed to be discrimination within the meaning of paragraph 1.

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

### Article 3; Scope

1. Within the limits of the areas of competence conferred on the Community, this Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;

(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;

(c) employment and working conditions, including dismissals and pay;

(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

2. This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons in the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.

3. This Directive does not apply to payments of any kind made by state schemes or similar, including state social security or social protection schemes.

4. Member States may provide that this Directive, in so far as it relates to discrimination on the grounds of disability and age, shall not apply to the armed forces.

### Article 4; Occupational requirements

1. Notwithstanding Article 2(1) and (2), Member States may provide that a difference of treatment which is based on a characteristic related to any of the grounds referred to in Article 1 shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that the objective is legitimate and the requirement is proportionate.

2. Member States may maintain national legislation in force at the date of adoption of this Directive or provide for future legislation incorporating national practices existing at the date of adoption of this Directive pursuant to which, in the case of occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief, a difference of treatment based on a person's religion or belief shall not constitute discrimination where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. This difference of treatment shall be implemented taking account of Member States' constitutional provisions and principles, as well as the general principles of Community law, and should not justify discrimination on another ground.

Provided that its provisions are otherwise complied with, this Directive shall thus not prejudice the right of churches and other public or private organisations, the ethos of which is based on religion or belief, acting in conformity with national constitutions and laws, to require individuals working for them to act in good faith and with loyalty to the organisation's ethos.