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EXEMPLARY CHURCH POLITY IN APPEAL PROCEEDINGS

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Introduction

Some time ago a few members of the Protestant Church in the Netherlands (PCN) asked me for advice. They belong to a congregation in a village in the eastern part of the country. The council of their congregation had decided to close and sell one of the churches. The aforementioned members brought proceedings before an ecclesiastical court of law. After a procedure of more than half a year, the regional court pronounced its judgment. In most cases these courts rule in favor of the ecclesiastical body which made the decision. In this case, however, the court partly ruled in favor of the objectors, for the church council had not exercised due care in the last phase of its procedure to close the church. Although the objectors had partly won their case, they were deeply disappointed, sad and angry. They did not recognize themselves in the way the court described the substance of their case, let alone in its verdict. One of them seriously considered leaving the church.

This case illustrates the way in which appeals against decisions of ecclesiastical bodies are dealt with in the PCN, and the estrangement it often causes. In these particular proceedings only three complainants were involved. During the six years I worked as a part-time employee for a law firm which regularly dealt with ecclesiastical proceedings, I was confronted with a few cases in which larger parties formed and the unity of the congregation was seriously threatened. However, besides the unity of the church its credibility and its mission are also at stake. Events like these may lead to severe criticism both inside and outside the church. The theme of the conference, “Mission, Church Polity, and the (Dis)Unity of the Church”, therefore encouraged me to reconsider the existing procedure. In this article, I will start by providing a brief overview of this procedure and its underlying principles, and then I will evaluate it. Furthermore, I will look for theological keynotes in similar fields of the existing church order of the PCN. Finally, I will propose a few alternative procedures, which in my opinion are preferable in the light of both the evaluation and the presented theological keynotes. In my line of

thought I will confine myself to the ground level of the church, the local congregation.

1. The existing procedure and its underlying principles – description and evaluation

The basic rule in the church order of the PCN (PCO) regarding the procedure to file an appeal reads as follows: if someone who is entered in one of the registers of a PCN congregation objects to a decision of an ecclesiastical body, and if this decision directly affects him (or her), he (or she) is entitled to file an appeal with the appropriate ecclesiastical court (see ORD. 12–3-1). Apart from individuals, ecclesiastical bodies are also entitled to this two-stage procedure.

According to the PCN's church order, the aim of the existing procedure is to maintain justice with due observance of righteousness and love in the community of the church (see ORD. 12–1-1). In a concept of the ordinances it reads: to protect justice, righteousness and love in the community of the church (see ONTWERP, 131, at ORD. 12–1-1). In this wording justice, righteousness and love are of the same level. Unfortunately, we do not know why the wording changed (cf. Van den Heuvel 1991, 329). Strikingly, the underlying constitutional articles of the church order only mention the existence of the appeal proceedings, and no goal is given.

An ecclesiastical court may rule the appeal well-founded if it meets at least one of the following criteria (see GRKR, art. 23–1): (a) the decision has been made contrary to the church order or to legal stipulations; (b) the decision-making ecclesiastical body has not observed due care; (c) the decision-making ecclesiastical body has misused its discretionary power for a purpose other than for which it was granted; (d) the decision-making ecclesiastical body could reasonably not have made the contested decision.

These criteria are derived from the main principles of administrative law as laid down in the General Administrative Law Act. The first criterion expresses the principle of legality. The second is rooted in one of the basic provisions: "When preparing an order an administrative authority shall gather the necessary information concerning the relevant facts and the interests to be weighed" (art. 3:2 AWB). The third criterion, also known as 'détournement de pouvoir', can be found in the next provision of the same act: "An administrative authority shall not use the power to make an order for a purpose other than that for which it was conferred" (art. 3:3 AWB). Finally, the fourth criterion is linked to two related obligations: "1. When making an order the administrative authority shall weigh the interests directly involved in so far as no limitation on this duty derives from a statutory regulation or the nature of the power being exercised. 2. The adverse consequences of an order for one or more interested parties may not be disproportionate to the

purposes to be served by the order" (art. 3:4 AWB). It can be noted that the order of the criteria in ecclesiastical law is the same as in secular, administrative law.

There are many compelling arguments for this approach of ecclesiastical proceedings. As a matter of principle, in a church with a presbyterial-synodical system, the assemblies of the church make the decisions. For example, in the above-described case, it is the church council which makes the decision, not the members of the congregation. Subsequently, the ecclesiastical courts restrain from any interference in the substantive considerations of an assembly. There is a practical reason for doing so. The PCN is a plural church. Although there is a common ground, the religious convictions and views of its members and congregations differ substantially. Finally, the procedure (and thus the underlying legislation) has proven itself to be legally sound; the civil courts in the Netherlands acknowledge the verdicts of the ecclesiastical courts to a very high extent (cf. Santing-Wubs 2014, Van der Ploeg 2014). In this way, the PCN can settle its own disputes, bearing in mind Paul's advice in 1 Cor. 6: 1 and 6.

Another argument for this approach can be found in the Reformed tradition. One of the founding Reformed church orders, the church order of Dordrecht (1618–19), states in article 31: "If anyone complains that he has been wronged by a decision of a minor assembly, he may appeal to a major ecclesiastical assembly" (DeRidder 1987, 550). However, there are three huge, partly related differences between the procedure described in this article and the appeal proceedings in the current church order of the PCN. According to article 31, (a) an appeal has to be submitted to a major assembly (b) which is authorized to deal with the full substance of a case, especially when points of belief and confession are at stake. Like the minor assembly, the major assembly exclusively consists of office bearers. By contrast, in the PCN (a) an appeal has to be brought before an ecclesiastical court, (b) which assesses the case minimally. An assembly appoints the members of the court, some of whom must be office bearers (see ORD. 12–2), out of the confessing members of the PCN. The third difference concerns the body that makes a decision: according to article 31, only the decision of an assembly can be subject to an appeal, whereas in the PCN the proceedings involve decisions of all ecclesial bodies of the PCN.

The creation of the independent ecclesiastical courts dates back to 1951. One of the predecessors of the PCN, the Netherlands Reformed Church, introduced a completely renewed church order in that year (see Oostenbrink-Evers 2000). The introduction of an independent juridical system was motivated by the separation of powers (cf. the *trias politica*). It was made clear in the synod that the courts should restrain from policy decisions, let alone belief statements. In practice they did restrain most of the time. Although no criteria were given in the church order of 1951, a vast majority of the cases was assessed for legitimacy, not for efficiency

(see Van den Heuvel 1991, 329; Van den Heuvel 2001a, 424f; cf. also Van den Heuvel 2001, 258ff.). It seems to me that since the introduction of the church order of the PCN, probably as a result of the criteria set out in it, a minimal assessment has become common practice.

The above-mentioned differences lead me to the objections to the procedure in the PCN. I must admit that the existing procedure is a legally sound settlement of a dispute. However, in my opinion it lacks a solid theological basis. The main aim of the procedure is to maintain justice. Indubitably, justice is a biblical notion, but even as such it is a very broad concept (cf. Patte 2010, 668–675 (s.v. justice), 1078 (s.v. righteousness)). It needs focus. I presume Karl Barth can help us out here. In his *Church Dogmatics*, he speaks about church polity in the context of the doctrine of reconciliation, more specifically of the upbuilding of the Christian community. For him, church polity is principally a 'law of service'; it serves the Lord and the community (see Barth 1959, 690; cf. 695). Therefore, in my opinion, the maintenance of justice cannot be an aim in itself. In this respect, one could point at church polity as a whole, for it serves, or at least should serve, the Lord and the community. The appeal proceedings of the PCN are meant to ensure its church polity functions from a legal point of view. However, in this way justice becomes easily separated from the Lord and the community it should serve. The current church order of the PCN and the way it is interpreted and applied underline my fear of this separation. The maintenance of justice is applied narrowly. As I showed above the criteria are directly derived from secular administrative law. Hence, it is no coincidence that these criteria are laid down in the more practical general regulations of the church order instead of in the more principal-phrased ordinances of the church order. In this respect the church polity of the PCN has become far removed from the challenge Barth faced when he quoted Erik Wolf: "What might it not mean for the world if Church order and law were not merely spiritual adaptations of worldly constitutions and codes, but genuine and original witnesses to the brotherly fellowship of Jesus Christ!" (Barth 1959, 719). Barth argued for a living church law, "willing and ready for new answers (. . .) which have legal form and precision, although without unnecessary refinement" (Barth 1959, 711).

Subsequently, this very restricted approach probably contributes to a feeling of alienation from church and faith: a feeling of powerlessness, meaninglessness, normlessness and value isolation (see Seeman 1959). Especially the objectors can easily get the impression that they are not being taken seriously and may probably leave the community. When the media publish about the case, the public opinion will usually tend to agree with them.

Another concern is of a different nature. Most if not all disputes in appeal proceedings can be classified as conflicts between individuals and/or groups. Man-

aging church conflict is a subject in itself. In this paper, I just refer to Hugh F. Halverstadt. In his book *Managing Church Conflict* he offers an approach to settle disputes based on the biblical term of 'shalom', peace (see Halverstadt 1991; cf. Brubaker 2009). It may be viewed as an elaboration of the aim to build up the Christian community. Halverstadt states that win/win solutions should be pursued and win/lose outcomes have to be avoided, for in the latter differences are not resolved properly. In my opinion, most rulings of ecclesiastical courts can only be described as win/lose outcomes. The underlying conflicts are only superficially dealt with. Further, any development is likely to become problematic. However, I cannot deny that in some cases a ruling puts an end to a lengthy discussion where the stakeholders themselves would never have reached a clear outcome.

2. Alternatives within the current church order

The current church order of the PCN provides suitable alternatives at different levels. The first level I want to elaborate on briefly is the aim of the proceedings before ecclesiastical courts. Next, I present the alternatives the current church order offers to the procedure itself.

2.1. The aim

The church order contains separate proceedings to manage a special category of conflicts: a set of rules for supervision and discipline. According to the ordinances in the church order, supervision and discipline have a fourfold aim, partly derived from the Reformed tradition: to build up a congregation spiritually, to preserve those going astray, to reconcile them with the congregation and their neighbors, and to maintain order in the life of congregation and church (see ORD. 10–6-1). In the underlying constitutional articles of the church order, we find the Reformed-Calvinistic threefold purpose: supervision and discipline serve the glory of God, the preservation of the congregation and the salvation of those who go astray (see PCO, art. XII-1, cf. Bouwman 1912, 172–177). The concrete criteria, however, are rather vague: an unchristian confession or way of life or another kind of disturbance of the order in life and work of the church (see ORD. 10–9-6, cf. Koffeman 2014, 76f). It will not be possible to directly apply the fourfold aim of the supervision and discipline proceedings to the appeal proceedings. Still, following the principles of Karl Barth, I am convinced that aims such as 'building up the congregation' and 'reconciliation' should be at the heart of every ecclesiastical procedure.

2.2. The procedure

At the moment, the church order offers four alternatives to the procedure. Strictly speaking, they are extra options. The first alternative is a request to the ecclesiastical body that made the decision to reconsider it (cf. PCO, art. XIV-2; ORD. 12–12; AWB, art. 7:1; Nauta 1971, 144–146). It is in churches of the Reformed tradition, especially in those which follow the Dortian church order in any form, common practice. Sometimes it is even mandatory before one is allowed to file an appeal. The ecclesiastical body is not obliged to take the request into consideration, unless an element is brought into question which was not or not sufficiently considered yet. This revision has several advantages. Filing an appeal almost always causes further estrangement. Revision can prevent the conflict from moving to the next stage where a win/lose solution becomes almost inevitable. In principle, the full substance of the case can be dealt with. It is an *ex nunc* assessment; new facts and developments can thus be taken into account too. On the other hand, one of the main disadvantages is the fact that in many cases the two parties have already ended up in a stalemate, especially when a long procedure preceded. If this is the case, both parties may lack the courage and the energy to begin a real dialogue again. In the case I presented in the introduction, the objectors had asked for such a revision. Unfortunately for them, the church council rejected the request without even considering it seriously. Perhaps a solution for this problem can be found in the introduction of a compulsory external supervisor. In that case, the procedure starts to resemble mediation. However, in the revision procedure it is the ecclesiastical body which makes the final decision.

The other alternatives can be found in one of the General Regulations of the church order, the one for appeal proceedings. In the preliminary chapter with general provisions, the regulation emphasizes that the parties involved may agree to settle their dispute through arbitration, binding advice or mediation. If they agree to do so, a court may suspend proceedings until the outcome of the alternative litigation has become clear (see GRKR, art. 1a; cf. HANDELINGEN 2012, 81–84, 88f, 91f, 125ff, 131f, 134f, 341–346). Those who introduced mediation as a suitable alternative for appeal proceedings in the PCN had an idealistic motive: they observed it as a biblical way of dealing with conflicts (see HANDELINGEN 2012, 83).

Binding advice means that a third party or one of the parties involved settles the dispute. There are a limited number of statutory provisions in Dutch law (see art. 7:900–910 BW). Therefore, it may take different forms. From the point of view of Dutch civil law, the present procedure in the PCN to deal with appeals against decisions can be considered as a form of binding advice (see Santing-Wubs 2002, 121, 176–182; cf. Santing-Wubs 2014, 178). The legal provisions for settling a

dispute, though, do not affect churches. They are allowed to choose their own procedures, whether they match legal provisions or not.

Arbitration is set by Dutch civil law too (see art. 1020–1077 RV; cf. Santing-Wubs 2002, 116–121 and 126–128). Mediation is not (yet) (cf. Santing-Wubs 2002, 128–131). In all three approaches, in principle, all aspects of the disagreement can be incorporated into the handling of the case. To make use of mediation, the parties involved have to approve both the exercise of the remedy and the choice of the mediator. With respect to arbitration and binding advice, as alternatives to settle a dispute in the PCN the situation will usually be similar. Subject to certain conditions, in arbitration as a fixed procedure a church may also force an objector to challenge a decision before a council of arbitrators (as is in principle the case in the Organization of Jewish Communities in the Netherlands; cf. Santing-Wubs 2014, 172f). The church can appoint arbitrators itself, but it also can give parties the right to nominate one or more arbitrators, for example people who share their views and convictions.

3. Conclusions and suggestions

After I wrote the initial version of this paper a new development occurred. In 2016, the PCN started a thorough reorganization, called 'Church 2025' (see KERK2025A). The most recent proposals suggest combining the varying procedures of appeal and discipline, at least to some degree (cf. KERK2025B, esp. 38–43). One court should be established with two chambers, one for appeal proceedings and one for disciplinary cases. The foundation for this change is practical. Increasingly, discipline proceedings have the characteristics of a lawsuit. Parties often call in professional lawyers. Especially in cases of sexual abuse, the church is under serious scrutiny. Moreover, the current structure of varying procedures is complex. Because the supply of informed volunteers is expected to decrease, it is important that the presented alternative be more efficient. Strikingly, the underlying aim of the appeal proceedings is not in dispute. In my opinion, the PCN should now take the opportunity to repair the flaw in its church order. All proceedings should serve the upbuilding of the Christian community. The maintenance of law should be transformed into the maintenance of the 'law of service' and as such be subordinated to this main purpose.

Then, in procedures such as appeal proceedings, it makes sense to compel an objector to request a revision of the decision he opposes before he starts proceedings. In such a case, it is advisable to seek the help of a supervisor. Invoking professional help should perhaps be made compulsory.

Alternatives to ecclesiastical litigation should be promoted more widely, especially arbitration, since a compulsory request for revision makes mediation almost

superfluous. It is unlikely an ecclesiastical body is willing to agree to mediation then. In mediation both parties are equal; therefore, its starting position becomes worse than in the revision procedure in which it is up to the ecclesiastical body to make the final decision.

Furthermore, I suggest two changes in the procedure as it is now. The first change relates to the application of the assessment criteria; they should be modified. According to the church order of the PCN, when certain subjects are at stake a church council has to inform and hear the congregation's opinion about its intended decision. At the moment, it is sufficient that the council has informed the congregation and offered it the opportunity to give its opinion as such (cf. ORD. 4–8-7). Piet van den Heuvel, a Dutch expert in church polity, stresses that the opinions of the members of the congregation should be given their proper weight in the decision of the church council (see Van den Heuvel 2013, 181). I would even go a little step further. Observing due care means, in my view, that the church council has to take the views and remarks of the congregation verifiably to heart (cf. De Jong 2016, 116–118). Therefore, the courts should be able to use their discretion to assess a case more substantively than they do now. This leads me to the second suggestion, which is derived from arbitration arrangements. I propose giving the parties involved a say in the composition of a part of the court; they may select one or more members of the court from a list of qualified candidates. For a sound judgment, it is necessary that at least one member of the court is able to sense the atmosphere and spirituality in which a decision has been made and has had its effect.

I am convinced these adaptations will not only strengthen the theological base of the rulings of ecclesiastical courts, but also have other advantages. They strengthen the credibility of the church, because they enable her to put her own principles of justice, righteousness and peace into effect. Subsequently, the adaptions provide the church with the opportunity to show in her own practice of appeal proceedings what her mission is about. Her church polity may become exemplary, as Karl Barth once envisioned (cf. Barth 1959, 719–726). Finally, the changes I would propose increase unity within the PCN. I am aware of the fact that these changes would subtly shift the focus of the organization from the church council to the meeting of the members of the congregation, as well as from the church council to the ecclesiastical court. For the well-being of a congregation, that does not seem to me too high a cost.

Abbreviations and bibliography

AWB: Algemene Wet Bestuursrecht (General Administrative Law Act). Texts from the AWB are cited from a translation, which can be found on an official site of the Dutch government. Accessed February, 18, 2017. https://www.rijksoverheid.nl/documenten/

besluiten/2006/06/21/engelse-tekst-awb. It seems, however, that the document from which the quotes are taken itself is not an official one.

BW: Burgerlijk wetboek (Dutch Civil Code).

GRKR: Generale Regeling Kerkelijke Rechtspraak (Provisions for Ecclesiastical Proceedings). In: PCO, 401–421.

HANDELINGEN: Handelingen [Generale Synode] Protestantse Kerk 2012. Utrecht: Protestantse Kerk in Nederland.

KERK2025A: Kerk 2025: Waar een Woord is, is een weg. January 2016. Utrecht: Protestantse Kerk in Nederland. Accessed February 18, 2017. https://www.protestantsekerk.nl.

KERK2025B: Kerk 2025: Een stap verder. April 2016. Utrecht: Protestantse Kerk in Nederland. Accessed February 18, 2017. https://www.protestantsekerk.nl.

ONTWERP: Ontwerp-ordinanties behorende bij de ontwerp-kerkorde van de Verenigde Protestantse Kerk in Nederland. 1997. Zoetermeer: Boekencentrum.

ORD: Ordinantie (ordinance). Explanatary note. The church order of the PCN, PCO, dates back to 2004 and consists of four parts. The first section ("Kerkorde", 9–24), numbered with Roman numbers, forms the foundation. It can be considered as the Constitution of the church. The second part ("Ordinanties", 27–200) contains the ordinances. The ordinances form an elaboration of the founding articles. They in particular play a major role in everyday church life. The third section ("Overgangsbepalingen", 203–267) contains a set of transitional provisions. In the fourth and most extensive part ("Generale regelingen", 203–471) a large number of practical regulations can be found, such as the GRKR.

PCN: Protestantse Kerk in Nederland (Protestant Church in the Netherlands).

PCO: Kerkorde van de Protestantse Kerk in Nederland inclusief de ordinanties, overgangsbepalingen en generale regelingen. 2013. Zoetermeer: Boekencentrum. The most recent version of the church order can be found online at www.protestantsekerk.nl.

RV: Wetboek van Burgerlijke Rechtsvordering (Code of Civil Procedure).

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