

## The Argument for a Narrow Conception of 'Religious Autonomy'

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*Published in:*  
Oxford Journal of Law and Religion

*DOI:*  
[10.1093/ojlr/rwv009](https://doi.org/10.1093/ojlr/rwv009)

*Publication date:*  
2015

*Document Version*  
Early version, also known as pre-print

*Citation for published version (APA):*  
Christoffersen, L. (2015). The Argument for a Narrow Conception of 'Religious Autonomy'. *Oxford Journal of Law and Religion*, 4(2), 278-302. [6]. <https://doi.org/10.1093/ojlr/rwv009>

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Special Issue Article

**The Argument for a Narrow Conception of ‘Religious  
Autonomy’**

Abstract:

Canon Law has not been valid law in the Nordic countries since the 16<sup>th</sup> Century Reformation, and ecclesiastical law has been understood as a branch of public administrative law. The legal regulation of freedom of religion or belief has not basically changed this. However, recent changes in religious establishment law combined with changes in theoretical approaches to what is covered by freedom of religion and belief might introduce such changes. What is at stake is the concept of law, and not only parallel legal orders, but also legal pluralism: is the inclusion of religious legal systems such as Canon Law and Shari'a through a widened recognition of 'religious autonomy' really the best way forward, or should some connections between these religious laws and the law of the land be upheld? This article suggests the latter approach through the recognition of long-standing and basic concepts such as the division of powers and overlapping legal norms.

## I. 500 YEARS OF REJECTION OF RELIGIOUS LAW AS VALID LAW IN THE NORDIC COUNTRIES<sup>1</sup>

A common characteristic for the five Nordic countries – Denmark, Sweden, Norway, Finland and Iceland – is that the vast majority of their populations are Lutheran, being members of majority churches with special links to the national states. Currently, in 2015, the Lutheran

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<sup>1</sup> This introduction mostly builds on the articles in Lisbet Christoffersen, Kjell Å. Modéer and Svend Andersen (eds), *Law & Religion in the 21<sup>st</sup> Century – Nordic Perspectives* (DJØF Publishing 2010).

churches still have more than 65% of their respective populations as members.<sup>2</sup> It could even be argued that for some of these countries, Lutheranism has contributed to the development or upkeep of local languages, due to the idea of translating the Bible and organizing the church services in the national language. This applies not only to spoken, but also to written languages in use for peasants and state institutions alike. Thus, the humanist dimensions of Lutheranism have contributed to state building in some of the countries.

**A. Historical Rejection of Canon Law as Parallel Legal System in the North**

In all the Nordic countries, the Lutheran reformation contributed to state building in a central way by its unanimous rejection of Canon Law. The Danish reformation took place in 1536. Since Norway and Iceland (as well as the Faroe Islands and Greenland) were under the rule of the Danish king, the Reformation also – against the protest of local noblemen and bishops – included those countries. The rejection of Canon Law very soon became an integral dimension of the Reformation: already in 1537 the new church order was given by the King.

In these West Nordic countries, under the rule of Denmark, absolutism was introduced in 1660, including rule over the church, as evident under the Danish Law of 1683 and the Norwegian law of 1685. With the adoption of these laws, no separate church existed anymore, only the King's obligation to guide and maintain all his citizens in a clear and right understanding of religion (that is: Lutheran Christianity), providing priests in all parts of the kingdom in order to preach and teach. Freedom of religion was admitted to foreigners, who

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<sup>2</sup> Church of Sweden 65%; The Finnish Evangelical-Lutheran Church 73%; The Norwegian Church 77%; The Danish Folkekirke 78%; The Icelandic Church 79%.

could settle in the Kingdom if allowed by the King, but no citizens of the Kingdom were allowed to change their religion. The pietist movements in Halle and Herrnhut also influenced the state-church, as seen, for example, in the introduction of confirmation as an obligation on all citizens in 1536.

The reformation also led to a break with Canon Law in the East Nordic countries, Sweden and Finland. This break, however, was not as clear with regards to the internal church hierarchy as such. In the East Nordic countries, Canon Law was dissolved as early as 1536, but by a church meeting and not by the King alone. A new church meeting in 1572 decided on a Lutheran church order, but this was challenged by the then Catholic (Polish) kings ruling in Sweden. In 1593 a group of noblemen called for the Church to extend the Protestant church order and rituals to the royal family. The Swedish Queen Christina, who converted to Catholicism, tried in the first half of the 17<sup>th</sup> century to organize another counter reformation; she failed and had to leave the country. The end result was that even though Canon Law was dissolved also in the East Nordic countries, Sweden and Finland kept the idea of the Church as one, identifiable structure, internally organized under an archbishop and with chapters making internal administrative decisions, whereas the very idea of a Church as something different from the state structures disappeared in the West Nordic countries.

## **B. Nordic Monolithic Understanding of Law**

In combination with the introduction of absolutism, the fact that the validity of Canon Law was discontinued in the Nordic countries paved the way for a monolithic understanding of law in these countries. The first reaction to the Reformation was to introduce religious normative

understandings into the law of the land; however, during the Enlightenment, these religious natural law elements were combined with secular law. On the assumption that God's existence was not a necessary precondition for there to be valid law, ~~did not exist~~<sup>3</sup> the Nordic universities derived their arguments from normative systems based on common European standards, infused by Roman law.<sup>4</sup> Thus, at the beginning of the 19<sup>th</sup> century and with the revolutions of the Post-Napoleonic area, most of these countries were already under the rule of a monolithic law of the land, including legislation for the churches.

**Kommentar [lic1]:** Is that really the correct formulation in English? The original Natural Law thinkers did not assume anything about Gods existence; they simply pushed the matter aside. See my proposed new footnote. I kindly ask you, Pamela and Julian, to re-consider the correct translation

**Kommentar [P2]:** Simply a suggestion of how to capture the idea of the theorists of that time.

### C. Consequences for Internal Regulation of Established Churches

The 19<sup>th</sup> century widened the differences between the East Nordic and the West Nordic countries concerning the idea of a Church as a separate, identifiable entity. In the East, both the Finnish Evangelical Lutheran Church and the Church of Sweden were provided with a synod during the 1860s. Finland had been annexed by Russia after the Napoleonic wars, and the 1869 synod in the Finnish Evangelical Lutheran Church was introduced as a dimension of tolerance towards a minority church. After that time, the synod was granted the right to develop internal norms for church governance under the (Russian) law on the church; this internal autonomy was upheld after Finnish independence in 1917. Even though the synod

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<sup>3</sup> *Etsi Deus non daretur*, as Hugo Grotius formulated it.

<sup>4</sup> Samuel von Pufendorf, who in 1668 was called to Sweden as the first professor of law at University of Lund after its establishment in 1666, was in the European elite of natural law; also Ludvig Holberg, a Norwegian/Danish Poet (who is more famous for his plays, but who was a professor of Law at the University of Copenhagen) built on this way of thinking in his legal manuscripts in the beginning of the 18<sup>th</sup> century in order to change the legal understanding in the West-Nordic countries.

also had the right to propose the content of state law on the church – and the government could not propose any changes to this law without the consent of the synod – the system was still considered from a jurisprudential perspective as a delegation of state powers under the parliamentary law on the Finnish Evangelical Lutheran Church and as such part of Finnish public administrative law. This was the general understanding until the end of the 20<sup>th</sup> century.

The same was the case with the Church of Sweden, which even though it had also been given a synod as a leading body at the national level was also still understood as a branch of the state until the constitutional changes of the 1970s and the legislative changes in the year 2000. The Finnish Orthodox Church was also established as a state church in 1923 after independence. The Church is organized under the patriarchate of Constantinople.<sup>5</sup>

Norway was the first West Nordic country to get a civic 19<sup>th</sup> century constitution, as early as 1814.<sup>6</sup> This constitution still obliged the King to keep all inhabitants within Evangelical Lutheran Christendom. At first, Jews and Catholics (Jesuits) were not allowed into the Norwegian kingdom, because they were seen as introducing parallel legal systems and not willing to abide by the law of the land. In Norway, full freedom of religion was only introduced after WWII following the ratification of the ECHR, still, however, keeping the Church of Norway as state church. But there was no jurisprudential recognition of the validity

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<sup>5</sup> <<https://www.ort.fi/en>> accessed 13 February 2015.

<sup>6</sup> The Eidsvoll constitution of 17 May 1814 was formulated as part of an attempt to gain independence for Norway after the Napoleon wars. Instead, a Union with Sweden became the result, the constitution however still valid. Full independence was established in 1905.

of Canon Law in Norway. Even though the Church of Norway had claimed institutional independence during WWII, it was still treated as an administrative branch of the state. This remained the case after the introduction of a synod as governing body in the 1980s.

Theoretically, the introduction of the synod was seen as based on the delegation of state authority, and the Church of Norway as such gained neither legal personality nor legal autonomy during the 20<sup>th</sup> century.

Iceland remained a part of Denmark after the Napoleonic wars. A constitution for Iceland was formulated in 1874 and the country gained full independence in 1944. The Icelandic constitution established Evangelical-Lutheran Christianity as a *Folkchurch*, supported by the state, following the Danish model from 1849. This remained the structure until a major change of church laws in 1998.

#### **D. Civic Constitutional Basis for Freedom of Religion and Belief**

Thus, all Nordic countries rejected Canon Law as part of the big schism in the 16<sup>th</sup> century; they have all by different legal mechanisms (since the 19<sup>th</sup> century by constitution) established Lutheran churches, and they have all introduced freedom of religion alongside a state church. Many of the Nordic countries have introduced changes to their understanding of the role of the majority churches in new legislation and/or constitutional amendments around 2000. Whether this generally creates new understandings of the role of ecclesiastical law and/or canon law will be discussed further in detail under section III.



## II. FREEDOM OF RELIGION DID NOT CHANGE THE APPROACH TO CANON LAW - A MORE DETAILED VIEW OF DANISH LAW

### A. Constitutional Law

The Danish constitution of 1849<sup>7</sup> established the Evangelical-Lutheran church as the *Folkchurch* and obliged the state to support this church, of which also the monarch is obliged to be a member. Parliament has the right and obligation to decide the governance structure of the church.<sup>8</sup> Citizens are also 'entitled to associate in communities to worship God in accordance to their convictions'. However, nothing may be taught or done which contravenes decency or public order.<sup>9</sup>

Based on this article, the constitution of 1849 thus introduced freedom of religion, along with freedom of association in Danish society. No further legislation, regulation or administrative practice is needed for anyone to organize a religious community and perform rituals.

According to the semi-official Danish commentary on the constitution, freedom of religious

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<sup>7</sup> Constitutional Act of 1849 which is still in force art 4 and 6. All world religions are present in the Danish society, and especially the last generation has seen a rising plurality of religion with the national church now covering 78% of the population, 15% without any religious denomination and ca 8 % of other religions, Muslim communities covering ca 5% and the Catholic church and other Christian churches and world religions up til 3%. I will come back to a comparison between the Nordic countries in the end of this article.

<sup>8</sup> *ibid* art 66. The rule is interpreted as a general right for the legislative powers to rule in all matters concerning the majority church.

<sup>9</sup> *ibid* art 67 and 70. English version according to <[http://www.eu-oplysningen.dk/upload/application/pdf/0172b719/Min\\_Grundlov\\_eng.pdf%3Fdownload%3D1](http://www.eu-oplysningen.dk/upload/application/pdf/0172b719/Min_Grundlov_eng.pdf%3Fdownload%3D1)> accessed 14 January 2015.

association covers the doctrine and the organizational structure necessary for this doctrine,<sup>10</sup> whereas, for example, religious schools are not covered by the freedom-of-religion clause. The Danish concept of ‘religious association’ is thus horizontally more limited than the concept of ‘religious autonomy’ in both European and American legal practice.

Religious associations in Denmark have the same legal status as other associations or organizations without any registration or acknowledgement from state authorities.<sup>11</sup> The Danish constitution maintains that religious doctrine or organizational structure must not contravene ‘decency’ or ‘public order’. According to leading scholars, this is understood to mean that if religious doctrine or organizational structure contravenes parliamentary law it is prohibited. No further legal test seems to be relevant, including no testing of the necessity or the proportionality of the contravening law.<sup>12</sup> In the same way, legislative powers can, according to this understanding, limit both doctrine and organizational structure if a majority in parliament decides so, which means that doctrinal freedom is also vertically limited. Normally, the question of conflict between a religious community and society as a whole would focus on actual practice, yet at the same time it is also clear that the (actual) doctrine could function as contextual background, for example, in disbanding a religious community.

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<sup>10</sup> Hans Gammeltoft-Hansen, ‘kommentar til GrL § 67’ in Henrik Zahle (ed), *Danmarks Riges Grundlov med kommentarer* (2nd edition, Jurist- og Økonomforbundets forlag 2006) 414-18.

<sup>11</sup> Ditlev Tamm, ‘Religious Entities as Legal Persons – Denmark’ in Lars Friedner (ed), *Churches and other Religious Organisations as Legal Persons* (Peeters 2007) 61-66.

<sup>12</sup> Gammeltoft-Hansen (n 10) 416, with contradictory reference to Lisbet Christoffersen ‘Church Autonomy – en religionsretlig udfordring til Norden’ (2004) 27 *Retfærd* 87.

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In some parts of Danish legal scholarship, it is further argued that not only conflicts with other constitutional rights or with the criminal law, but also conflicts with, for example, equality rights could form the basis for limiting the rights of a religious community. Moreover, the Danish semi-official commentary to the ECHR article 9 does not use the concept of ‘religious autonomy’.<sup>13</sup> Instead, it discusses the relevant cases under the headline ‘in community with others’<sup>14</sup> or as examples of either the protected areas or limitations. The leading Danish handbooks in the field do not make it clear whether religious organizations have rights as such. Collective freedom of religion is certainly not recognized as a concept which could be the basis for rights contrary to the law of the land, and especially not for establishing an understanding of religious autonomy.

This narrow understanding of freedom of religion and belief as not including any legal system parallel to, or contravening, the law of the land was already formulated at the constitutional assembly in 1849. The constitution establishes equality regarding all public offices (now art. 70). This article was controversial at the constitutional assembly, on the grounds that it would allow Jews to serve as members of the Supreme Court and thus risk the re-introduction of religious laws in Denmark. The answer of the constitutional assembly was that as members of the Supreme Court. Jews also would judge according to Danish secular law, in the same way as secular Danish judges. Freedom of religion was not intended to reintroduce religious laws -

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<sup>13</sup> Sten Schaumburg-Müller, ‘art 9’ in Peer Lorenzen and others, *Den Europæiske Menneskerettighedskonvention art. 1-9 – Kommenteret udgave* (3rd ed., Jurist- og Økonomforbundets Forlag 2011) 769-98.

<sup>14</sup> ‘Sammen med andre’, *ibid* 782.

in regard to the Jewish community this was already established in 1814, when this community was offered citizenship on the clear condition that they followed the law of the land, and changed family laws from religious Jewish norms into what were assumed to be secular, Danish laws.

**B. Case Law Concerning Pastors and Other Employees in the *Folkchurch***

Legal cases on law and religion are mostly related to the majority church, the Danish *Folkchurch*, which is not seen as covered by the concept of freedom of religion.<sup>15</sup> Moreover, there are various tribunal cases related to other religious organizations such as DanChurchSocial, which are not argued on grounds of freedom of religion or religious autonomy, but according to laws on freedom of association.

The cases related to the *Folkchurch* are complicated due to the special role of the state in regard to this church. Danish academic literature has argued that the *Folkchurch* is not a state church and thus to a certain extent should be protected by ECHR article 9. It follows that the state is obligated to satisfy necessity and proportionality tests in relation to one of the causes in ECHR article 9(2) if it wishes to qualify legal regulations of the Church, especially as regards ecclesiastical doctrine. A minority position in a recent government report argued that it is no longer legitimate for the state to regulate the doctrine of even a majority church

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<sup>15</sup> There is much literature on the special role of the *Folkekirke* in the Danish society, including discussion on whether or not it is to be understood as a State church; see e.g. Lisbet Christoffersen, 'State, Church and Religion in Denmark' in Christoffersen, Modéer and Andersen (eds) (n 1).

against the voice of the church itself.<sup>16</sup> Nevertheless, due to lack of regulatory institutions within the church, a doctrinal regulation in accordance with the vast majority of different groups within and among church members would be acceptable.<sup>17</sup> In cases where a regulation on doctrinal matters against the will of the church was seen as necessary, this minority thus advocated a solution where parliament should make the regulation through parliamentary legislation, meeting the conditions in ECHR article 9(2), proving necessity and proportionality in a democratic society in pursuit of a legitimate aim. However, the majority of the government committee, including representatives from the ministry of justice, argued that Parliament has full power to regulate the doctrine of the *Folkchurch*. The government and the parliament scrutinized the governmental report in order to devise a possible legal structure for the future regulation of, among others, doctrinal questions; yet there was no majority in parliament backing such a structure. Against this background, all legal observers now acknowledge the majority position as valid law and the status quo remains.

Due to the organizational structure of the *Folkchurch* most of the relevant case law concerns administrative decisions to dismiss employees in the church. Priests or church ministers are

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<sup>16</sup> Betænkning 1544/2014 Folkekirkens styre; Betænkning fra Udvalget om en mere sammenhængende og moderne styringsstruktur for folkekirken, Kirkeministeriet – April 2014, 233-34.

<sup>17</sup> That is, a vast majority of bishops, of organizations within the church, including the organizations of pastors, of congregation councils etc., such as was the case with the ritual concerning the marriage of same-sex-couples in June 2012.

employed as civil servants under the government ministry of ecclesiastical affairs.<sup>18</sup> They are employed under the general law of employment of civil servants, which also includes a general norm regarding observance of the rules of propriety.<sup>19</sup> The law on civil servants further includes a specific rule on how to dismiss a priest in situations where the local congregation and the priest have long tried to establish cooperation without any success. A priest can also be dismissed due to health problems, lack of personal conduct or lack of collaboration with colleagues. These cases follow the general principles for dismissal of civil servants. However, local bishops act as primary representatives for the government ministry as ‘employer’, empowering bishops to propose the dismissal of priests. When a church minister (a pastor) is ordained, he or she promises to follow special norms and rules, including theological norms, concerning his or her work. Consequently they can be accused of transgressing the theological grounds of the *Folkchurch* in their conduct of pastoral work. In such situations, the bishop will carry out a detailed investigation. If the bishop finds grounds for a dismissal based on theological grounds, the governmental ministry of ecclesiastical affairs must refer the case to a special court, composed of the local court, or judge supplemented by theological experts who also function as judges.<sup>20</sup>

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<sup>18</sup> Since the *Folkchurch* does not have any synod or another leading body at national level, the ministry of ecclesiastical affairs has a central position in regulating the church. The minister also decides over a central part of the national budget for the church.

<sup>19</sup> Anders Jørgensen, *Decorumkravet for præster* (Jurist- og Økonomforbundets Forlag 2011).

<sup>20</sup> Peter Garde, ‘Retfærdig rettergang og præsteretten’ (1997) *EU-ret og Menneskeret* 33-45.

Other employees of the *Folkchurch* are employed under the local congregation council within the church. Common labour law is applied, including a general norm regarding observance of the rules of propriety, but with no special requirements regarding their own personal faith. Space does not allow the examination of all the relevant case law, and I will therefore just give some examples explaining the legal arguments in these cases in regard to the concept of ‘religious autonomy’.

The *Snedsted* case was a question about a metaphysical fact,<sup>21</sup> which is central to the concept of a ‘ministerial exception’ from generally applicable law. According to the law on the special courts in these cases, the case was decided by a high court, which included theological members of court.<sup>22</sup> The conflict concerned the format of the baptism ritual: the pastor himself re-formulated the ritual by introducing a ‘Baptist’ understanding of the christening of the child. As such, the baptism was not intended to be given any effect, until the child as a grown up decided on his or her personal faith. The local congregation<sup>23</sup> saw this as problematic, and members of the congregation started to look for other churches where their children could be christened. Consequently, the bishop recommended dismissing the pastor

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<sup>21</sup> Vestre Landsrets dom af 19. januar 1999, see Bent Feldbæk Nielsen, *Dåb og Tro i Landsretten* (DOXA Forlaget 1999), and Kristine Garde, *To Læresager i Folkekirken* (Jurist- og Økonomforbundets forlag 2006), chapter 4.

<sup>22</sup> Vestre Landsrets dom 19 January 1999.

<sup>23</sup> Congregations within the *Folkekirke* are normally geographically organized, but it is possible due to theological reasons to change to another pastor and thus another congregation.

on theological grounds. The recommendation was supported by the court, which dismissed the pastor.

The use of both (secular) judges and theological experts to judge such cases was introduced by law in 1992. The new system was an improvement from the old absolutist system where the state administratively made the decision. However, many academic observers saw the above case as the beginning of what became a very heated debate in which one side argued that pastors should not be dismissed on theological grounds at all, whereas the other side argued that a body internally within the church ought to be established to decide such cases. In other words a discussion ensued about a possible ‘religious autonomy’ for doctrinal matters within the majority church. The debate led to procedural changes, but not to any changes in the competence of the secular courts.

In the *Villekjær* case,<sup>24</sup> a pastor wanted to demonstrate against free abortion in his pastoral gown. In order not to signal any church resistance to the law on free abortion, the local bishop told the pastor not to wear his gown. Nevertheless, the pastor decided to wear his gown at the demonstration. The case was judged by the regular Supreme Court, not the special courts including theological experts, since the case was seen as a regular example of a subordinate not following the discretionary powers of his superior. The case is thus an example of a quite narrow, functional vertical limitation of what could be seen as ‘internal affairs’ within the *Folkchurch*.

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<sup>24</sup> UfR 1998.849H



A recent case decided by the Board of Equality Affairs is also of interest in this context. Both the *Folkchurch* and other religious communities have been granted legal exemptions from the general laws on equality and the prohibition of discrimination on grounds of gender and sexuality.<sup>25</sup> Hence, they are allowed to discriminate between genders on theological grounds when employing church ministers. In the case, a local congregation council posted an advertisement for the position of second church minister, specifying that they wanted to employ a male pastor. A complaint was filed before the Board of Equality Affairs as a regular case within the competences of the board with the argument that such gender based preferences were not acceptable in a public institution.<sup>26</sup> The board found the advertisement for a male minister to be illegal, since it was not based on any theological grounds.<sup>27</sup> The decision acknowledged that churches and religious communities are entitled to exemptions from the law on equal treatment and prohibition of discrimination. However, the board underlined that this is not a blank exemption, but only relevant if a congregation preferred one gender, usually men, on theological grounds. The case is an example of a rather narrow, functional vertical conceptualization of a possible religious autonomy.

A series of cases regarding DanChurchSocial have shown that this narrow, functional conceptualization of a possible religious autonomy also applies to non-governmental religious

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<sup>25</sup> See, for more detailed explanation, Lisbet Christoffersen, 'Denmark' in Mark Hill (ed), *Religion and Discrimination Law in the European Union* (European Consortium for Church and State Research 2012).

<sup>26</sup> Ligebehandlingsnævnet J.nr. 2014-6810-D6223

<sup>27</sup> The church already had a female pastor as the first pastor and it became clear that the church was simply 'old fashioned' in its approach to women; they did not have any theological foundation for their preference of men.

organizations.<sup>28</sup> In these cases, the narrow conceptualisation is horizontal: a clear occupational requirement is required because not all positions in religious organizations can be exempted from the law; consequently not all employees in ethos-based organizations are automatically exempt.<sup>29</sup>

### **C. One Legal System**

Even though the Danish constitution offers a wide concept of freedom of religion and belief based directly on the 1849-constitution, this does not allow for parallel legal systems based on religious norms. Religious communities are expected to follow the law of the land; on the other hand, Danish legislative authorities have kept the legislation wide enough to accommodate ritual practices within religious communities, including male circumcision and some kinds of ritual slaughter.

None of the Nordic countries have entered into a concordat with the Holy See. Thus, an argument for acknowledging Roman Catholic Canon Law – or any other canon law, for that matter – cannot be based on the relationship between international law and national law, the ‘dualism vs monism’-discussion.<sup>30</sup> Based on freedom of religion, all Nordic countries

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<sup>28</sup> The cases have been presented in detail in Lisbet Christoffersen and Niels Valdemar Vinding, ‘Challenged Pragmatism: Conflicts of Religion and law in the Danish labour market’ (2013) *International Journal of Discrimination and the Law* 140.

<sup>29</sup> See also Emma Svensson’s contribution to this special issue.

<sup>30</sup> This is a general discussion in international law and constitutional law and it has become an even more central discussion in regard to understanding supremacy of EU-law in monist countries. In the Danish legal literature,

acknowledge that religious communities outside the established churches have internal freedom to decide on doctrines and to establish their organization according to their own self-understanding. In some situations of clear conflict, such as the situation with same-sex-marriages, national legislative authorities have not obliged the churches or religious communities to follow the law of the land. In other situations, the concept of 'religion' is understood quite narrowly in order to allow for limitations of the religious practice in question.

One example of a conflict regarding what religious communities understand as freedom of religion and belief is religious slaughter, which is prohibited in several of the Nordic countries. In Sweden the argument behind the quite old prohibition<sup>31</sup> is not seen as based on a conflict between the internal law of the religious communities and the law of the land. Instead, it has been argued throughout the 20<sup>th</sup> century that freedom of religion according to constitutional law is absolute in Sweden, but also very limited in scope. The argument concerning religious slaughter in Sweden is that freedom of religion does not require the state to recognize specific rules on meat, such as religious slaughter.<sup>32</sup>

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the most recent and most developed discussion can be found in Henrik Zahle, *Dansk Forfatningsret* (DJØF forlag 1992-6).

<sup>31</sup> Stemming back from the 1930s, see Victoria Enkvist, *Religionsfrihetens rättsliga ramar* (Iustus Förlag 2013).

<sup>32</sup> Cf. the argument above that freedom of religion in Denmark does not cover religious schools and their rights. When Denmark in 2014 limited the access to religious slaughter under protest from Jewish and Muslim communities, the freedom of religion argument at first stance was the same: this is not about religion; it is about protection of animals. Later the relevant ministry promised that if religious communities would encounter

Another example is the requirement from parliaments, state administrations and the public that cases on possible child abuse should not be seen as protected within the church under canon law, but should be reported to state authorities in order to be prosecuted under the law of the land. None of the Roman Catholic Churches in the Nordic countries has upheld an argument based on Canon Law on these matters; on the contrary, they have formulated internal guidelines on child abuse combining Canon Law instruments with legal and administrative instruments from national law in order to evade any conflict.

### III. CHANGES IN RECENT NORDIC LAW

In the Nordic countries, religious norms are thus in general subordinate to secular law, which on the other hand to some extent allows freedom for religious practices contrary to common standards in society. This approach also governs the position and function of a priest. Thus, even in the Nordic context, an employment relation between a member of clergy and his or her church is considered to be more extensive than a general employment relation. This is also the case for medical doctors, schoolteachers or university scholars, who are all expected to show a level of personal engagement beyond their regular labour contracts. The ‘special calling’ of a priest, therefore, is not more or less special than the calling within other disciplines, at least not in a Lutheran context, which recognizes not only the priesthood of all believers, but also status and calling in all other functions, or, as John Witte Jr. puts it, ‘offices

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problems with regard to the access to meat slaughtered according to religious norms, then the ministry would review the case again in order to support them; that is: a balancing of two different protected norms, one of which being freedom of religion.

of authority in the earthly orders of household, church and state'.<sup>33</sup> It is against this background that one should understand that the function of a priest also contains a worldly dimension which is regulated by secular law. All Nordic countries have labour unions, organizing church pastors and other professional theologians, with the purpose of working for the best conditions for their members vis-à-vis both their employers and the councils of their congregations.

**A. A recent Norwegian Case concerning Ministerial Exception for a Catholic Priest**

When it comes to clergy in religious communities outside the Evangelical-Lutheran majority churches, the picture is somewhat different. There are not many cases on this topic, but one recent case from Norway is of interest. In 2009, the Norwegian courts reviewed a case concerning a Catholic priest.<sup>34</sup> There had been troubles in the congregation, not on theological

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<sup>33</sup> John Witte, Jr., 'The Lutheran Two-Kingdoms Theory' in Rosemarie van den Breemer, José Casanova, Trygve Wyller (eds), *Secular and Sacred? The Scandinavian Case of Religion in Human Rights, Law and Public Space* (Vandenhoeck & Ruprecht 2014), 56-84, quotation at 68.

<sup>34</sup> Borgarting lagmannsretts dom 8. June 2009 (LB-2008-142425). An official comment to the judgment can be found in (2009) *Nytt i privatretten* 3, 4-5. See also <<http://www.katolsk.no/nyheter/2009/06/10-0003>> accessed 19 January 2015, on the position of the Catholic Church in Norway, and a commentary from the Danish Catholic Church in <[http://www.katolsk.dk/579/?tx\\_ttnews%5Btt\\_news%5D=4767&cHash=48c76f427bffc7ebd6a9c3634feb3b74](http://www.katolsk.dk/579/?tx_ttnews%5Btt_news%5D=4767&cHash=48c76f427bffc7ebd6a9c3634feb3b74)> accessed 19 January 2015. I thank professor Ulla Schmidt, University of Aarhus, who reminded me of this case and professor Tore Lindholm, Norwegian Centre for Human Rights, University of Oslo, who provided me with the relevant information regarding the case.

grounds, but congregation and priest could not work together. The Catholic diocese had asked for support from the secular authorities to mediate the dispute. Nothing helped, and in the end, the pastor was called back home to his Order in Poland. However, he did not want to return to Poland and sued the Catholic diocese. The lower court decided in favour of the priest, finding that he was protected against relocation to Poland by Norwegian labour law. The high court, however, argued in favour of the Church. The argument was, first, based on an understanding of the labour relation between the Order in Poland and his job function in Norway as an international labour law contract – even though there was no contract. In making this move, the court was simply following Norwegian law. The decisive argument was, however, that the Church, due to an international human rights understanding of religious autonomy, had a right to decide itself whom it wanted to function as a priest. Secondly, the argument was that according to Roman Catholic Canon Law the priest no longer had a ‘calling’ in Norway, and could thus not demand to remain with his former congregation there.

The Norwegian court thereby used the step via Norwegian labour law in order to reach its real argument: freedom of religion and belief, religious autonomy and the use of Roman Catholic Canon Law. This shows that the earlier mentioned argument concerning the use of secular labour law might be related mostly to the (Lutheran) majority churches, not to minority religious groups.

The decision of the European Court of Human Rights (ECtHR) in the *Sindicatul “Păstorul cel bun” v Romania* case, discussed at length in the introduction to this special issue, raised the question whether or not the relation between a pastor and a church could be seen as governed

by secular legal norms.<sup>35</sup> The judgment made an interesting observation, arguing that only in a minority of the member states is this relation governed by applicable labour law.

Surprisingly, not all member states are mentioned; for example Norway, Iceland and Denmark are not mentioned. It would have been of interest to see the Norwegian case reflected in this context, as it was influenced by and in the end governed by Roman Catholic Canon Law.

## **B. Changes in Establishment Around 2000 – Independence of Ecclesiastical Law?**

The reason the Nordic countries have not had many cases of conflict between religious norms, understood as religious law, i.e. Canon Law or Islamic Shari'a, and secular law, is partly due to the specific common context of these countries, which all construe freedom of religion in the light of established religious communities.

### *1. Recent changes in East Nordic Countries*

As mentioned earlier, one of the Nordic countries, Finland, includes an Orthodox Church as one of the established or national churches for historical reasons. Since independence, the Orthodox Church has been organized under Finnish law. The most recent legislation on this church is from 2006.<sup>36</sup> This law allows the internal organization of the church to be decided by internal bodies, within the limits of the law. According to the Church homepage, its legislative body is the Church Assembly and the Council of Bishops.

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<sup>35</sup> *Sindicatul "Păstorul cel bun" v. Romania*, (App no 2330/09), Grand Chamber, 9 July 2013, para 61.

<sup>36</sup> Finnish law nr 985 of 17 November 2006 on the Orthodox Church.

The Canon Law of the Orthodox Church of Finland is not exempt from the law of the land.<sup>37</sup>

The Canons have until now more been seen as an internal, administrative regulations of the Church. In the current system, the role of the Orthodox Church of Finland is based on the Constitutional Act of 1999, which still upholds the special status of both the Orthodox Church of Finland and the Evangelical Lutheran Church of Finland as established churches.<sup>38</sup>

Based on recent changes in the Church Acts, both churches now enjoy the highest administrative authority over their own affairs. However, both Church Acts are accepted by the Parliament on a proposal from the Church (regarding the Evangelical Lutheran Church) or based on hearings with the Church (the Orthodox Church). It could thus still be argued that this highest authority is ultimately delegated by Parliament.

Until the new Church Act of 1994, the Finnish Church Act, governing the Evangelical Lutheran Church of Finland, underlined that, even though the Church had had a synod since 1869, responsible for internal affairs and internal ruling, the ‘final authority’ over the Church belonged to the state. This formulation was removed in 1994 and several administrative changes were adopted, including a change in the employer relation, from state to church. The

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<sup>37</sup> This has not been discussed in recent legal theory and there has – until now – not been any legal conflict, leading to case law. According to Finnish scholars, a case is, however, under scrutiny. It concerns an elder, orthodox priest, who wants to retire formally and establish a family, which he has not been allowed to do. Oral information at an internal seminar at the Faculty of Theology, Helsinki University, 4 February 2015 with participation of professor Jyrki Knuutila, university lecturer Johan Bastubacka, docent Pamela Slotte and Lisbet Christoffersen.

<sup>38</sup> Juha Seppo, ‘Finlands Policy on Church and Religion’ in Christoffersen, Modéer and Andersen (n 1).



Evangelical Lutheran Church of Finland is still ‘established’ on the basis of a law adopted by state authorities, but proposed by the church authorities. State authorities can only change this law based on a proposal from church authorities. Church authorities can, however, not change the law as such independently. Thus, the state authorities and church authorities depend on each other to be able to change the law on the Evangelical Lutheran Church.

In both Finnish and Swedish ‘establishments’,<sup>39</sup> the recent Church Acts are now very short, and they only establish the main foundation of the two churches, as is also the case with the law concerning the Orthodox Church in Finland. Within the framework of the Church Acts, both churches are now administratively independent and have set up their own internally binding governance norms in the form of regulations that are decided by the synods in the two churches. However, these regulations cannot contravene the norms regulating establishment in the Church Acts.

A parallel change concerns the authority over employment. As previously mentioned, the Swedish and Finnish churches upheld their local chapters after the Reformation, deciding employment relations internally through administrative decisions. After the changes in the church laws around 2000, both churches have also established internal tribunals responsible for adjudication in cases of conflict. In Finland, some actions by the Evangelical Lutheran Church in Finland, including decisions at the chapter level, can be appealed to the

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<sup>39</sup> Changed by law in 2000.

Administrative Courts of the Finnish state.<sup>40</sup> Both in Sweden and in Finland, ordinary labour law is applicable, also internally within the two churches.

## 2. *Recent changes in West Nordic Countries*

During WWII and later in the 20<sup>th</sup> century, a synod was established within the Norwegian church at the national level. Recently, the appointment of not only common clergy, but also bishops has been moved by parliamentary law from the government to internal bodies in the church. The Norwegian constitutional provisions on the relation of Church and state were changed in 2014<sup>41</sup> and are now similar to the wording of the Danish 1849 Constitution, however probably not with similar legal consequences, which are yet to be finally decided. The Norwegian constitutional amendments stated that the Evangelical-Lutheran church is a *Folkchurch* supported by the state. The constitutional change does not as such provide the Norwegian church with legal personality, hence, a basic element of establishment remains. A 2013 white paper on changes in religious policy<sup>42</sup> recommended more equality between the Norwegian church and other religious communities in Norway, and the current government administration has now proposed to create a clearer administrative distinction between

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<sup>40</sup> Johannes Heikkonen and Pamela Slotte, 'Finland' in Hill (ed) (n 25) 139.

<sup>41</sup> To a large extent under influence by the judgment in the *Folgerø-case*, *Case of Folgerø and others v Norway*, (App no 15472/02), Grand Chamber, 29 June 2007, where Norway 9:8 was seen as having limited the rights of individuals to be taught religion according to their own conviction. Part of the argument in the case was that the Norwegian 1814-constitutional obligation for the King to teach all inhabitants Lutheran religion was against the ECHR.

<sup>42</sup> Stålssett-utvalgets report, NOU 7 January 2013

government administration and church administration.<sup>43</sup> The proposal still makes it a condition that a separate Church Act governs the Norwegian church. In the longer term, however, the current Government intends to provide the Church of Norway with legal personality of its own.<sup>44</sup> The proposal also includes the suggestion that the employees of the Church of Norway from now on will be employed by the Church – and not by the State or the municipalities. Finally, the idea is to frame both the Church of Norway and all other religious communities under one common law. These proposals were put out for public consultation in September 2014. It remains to be seen how far the Parliament wants to take this proposal. If the changes are followed through, then the result will be that internal governance guidelines and regulations within the Norwegian church would be seen as having its legal basis in the law on the Church of Norway, a model equal to those in Finland and Sweden.

This is also the Icelandic model, established by the national church law in 1997, and still under discussion for leaving too much discretion to national bodies within the church and too little influence for common church members through parliament.<sup>45</sup>

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<sup>43</sup> Høringsnotat 2 September 2014. Staten og den norske kirke – et tydelig skille;

<[https://www.regjeringen.no/globalassets/upload/kud/kirke/hoeringssaker/v-0971b\\_hoeringsnotat\\_webversjon.pdf](https://www.regjeringen.no/globalassets/upload/kud/kirke/hoeringssaker/v-0971b_hoeringsnotat_webversjon.pdf) > accessed 16 February 2015.

<sup>44</sup> <[www.regjeringen.no/nb/tema/religion-og-livssyn/den-norske-kirke/id1217/](http://www.regjeringen.no/nb/tema/religion-og-livssyn/den-norske-kirke/id1217/)> accessed 17 January 2015.

<sup>45</sup> Hjalti Hugason, 'A Case Study of the Evolution of a Nordic Majority Church' in Christoffersen, Modéer and Andersen (n 1).

### 3. *No Changes in Denmark*

In Denmark, a recent attempt to change the organizational structure of the *Folkchurch* at national level failed because negotiations based on a public report<sup>46</sup> among the political parties in Parliament could not reach common ground. There were thus no changes in legislation. Political parties in the Danish parliament had different arguments for not wanting to provide the church either with a body with competence to decide on its budget at the national level, which is now decided by the government ministers of ecclesiastical affairs, even though the money is paid by church members only, or with a body to take decisions regarding 'internal affairs', such as the formulation of rituals and hymnbooks. Most of the arguments concerned equality within the church, the need to follow the law of the land even within the church, and the actual experience of Danish society. The parliament, it was argued, seems to be better at modernizing the Church and securing members' rights than the internal bodies within the church. Decisions concerning ritual and doctrine are now taken by the Queen on a proposal from the government minister of ecclesiastical affairs. Even though there is a political practice of involving different groups in the church, the proposals revealed clearly that this practice is not legally binding. From a legal perspective, neither bishops nor other clergy nor church members have any right to a hearing or to influence future changes in the liturgy of the church. This situation is in sharp contradiction to the idea of 'religious autonomy'. The *Folkchurch* thus appears as *more* than an established church, i.e. as a state church. Moreover, Parliament did not want to give up the final powers of the church, neither legislative nor administrative, since parliamentary powers over the Church through legislation

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<sup>46</sup> Betænkning 1544/2014 (n 16).

as well as executive powers are seen as providing the people with full access to the Church as well as full equality before the law.<sup>47</sup>

#### 4. *Impact of Establishment on Other Religious Communities*

The degree of establishment also impacts on the Nordic states' approach to other religious communities. In Norway, a driving force behind attempts at disestablishment, at least administratively, is the fact that the Norwegian church and other religious communities are already publicly funded on equal footing; the lack of economic difference aims at diminishing also the legal difference. In Finland, the two different national churches make it possible for the secular state to create a more equal approach and thus allow for more internal governance structures. In Iceland, the internal independence of the administrative bodies of the church is seen as an attempt to place the majority church and minority churches on an equal footing. In Denmark, the (failed) attempt to organize internal bodies at a national level within the *Folkchurch* has been followed by a new committee, set up by the Government in 2014, with the task of identifying possible legislative measures to regulate the conditions for other

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<sup>47</sup> Marco Ventura has captured this prevailing understanding in his headline in the article 'States and Churches in Northern Europe: Achieving Freedom and Equality through Establishment' in Silvio Ferrari and Rinaldo Cristofori (eds), *Law and Religion in the 21<sup>st</sup> Century: Relations between States and Religious Communities* (Ashgate 2010); whereas, on the contrary, Dorota A. Gozdecka argues against this approach in her 'Religions and Legal Boundaries of Democracy in Europe: European Commitment to Democratic Principles' (Doctor of Laws thesis, University of Helsinki, 2009) 100-9.

religious communities in Denmark.<sup>48</sup> The point of departure is respect for the right of the religious communities to organize and develop their doctrines according to the freedom of religion. However, the idea behind the committee is also to investigate the extent to which the state can regulate religious communities more than it does today. Importantly, the committee must ensure that proposals are formulated within the framework outlined in the constitution, the ECHR and other international obligations.

### **C. How to Characterize Nordic Ecclesiastical Law?**

Whether or not these recent changes in the legal basis for the majority churches in conjunction with a possibly more appreciative understanding of (collective) freedom of religion and belief will lead to a changed understanding in the legal theory and practice of internal normative structures in churches and religious communities in the Nordic countries is, as previously mentioned, a question that is currently theoretically under-analysed. Despite these changes, the traditional view, which rejects canon law as an independent, parallel legal system and only allows for internal ecclesiastical decisions as long as they are not in conflict with the law of the land, could still be upheld.

## **IV. THE CONCEPT OF LAW IN USE**

This possible upholding of a monolithic understanding of law does not, however, change the fact that a Norwegian court, somewhat surprisingly, based a judgment in 2009 on a

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<sup>48</sup> Kommissorium for et lovforberedende udvalg om en sammenhængende lovregulering af forholdene for andre trossamfund end folkekirken (Trossamfundsudvalget), 13 September 2014. Members of the committee were made public in December 2014 and the committee began its work in February 2015.

combination of Roman Catholic Canon Law and the concept of ‘religious autonomy’, as mentioned earlier. This decision seems to recognize a much broader concept than collective freedom of religion as it has traditionally been understood in a Nordic context, which includes the right to decide on internal affairs, but which may be limited according to the law of the land. Religious autonomy, however, is seen as a concept that can only be limited by other fundamental rights, which gives it a much broader scope. I will go into this discussion about the concept of law in use by first considering this dimension of the two relevant ECtHR cases.

#### **A. The Concept of Law in the two recent ECtHR-cases**

A limitation of fundamental rights – such as the right to family and private life in *Fernández Martínez v Spain* (2014) or the right to form unions in *Sindicatul* (2013) – must, according to ECHR article 9(2), be based on valid law. Both cases deal with the scope of ecclesiastical law or canon law, Roman Catholic Canon Law in *Fernández* and Orthodox Canon Law in *Sindicatul*, in order to identify the valid law in use. Thus in both cases, the state and ECtHR apply law originating beyond the monolithic, hierarchical secular law.

It is worth highlighting that the ECtHR in both cases established a link to state law, as a basis for its application of canon law. In *Sindicatul*, the Court observed that: ‘The current statute of the Romanian Orthodox Church was adopted by the Holy Synod on 28 November 2007 and approved by a governance ordinance’<sup>49</sup>, enabling the ECtHR to accept and use canon law as basis for accepting lawfulness.<sup>50</sup> Likewise in the *Fernández* case, a reference was made to

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<sup>49</sup> *Sindicatul* (n 35) para 40.

<sup>50</sup> *ibid* paras 157, 163.

‘the relevant canons of the Code of Canon Law, promulgated 1983’ as part of the legal basis for the decision.<sup>51</sup> The ECtHR further:

notes that the ministry of education acted in accordance with the provisions of Article III of the 1979 agreement between Spain and the Holy See, supplemented by the Ministerial order of 11 October 1982, pursuant to which an appointment is not renewed if an opinion to the contrary is given by the bishop. ... [sic] This Agreement is an international treaty, integrated as such in Spanish law in conformity with the Spanish Constitution.<sup>52</sup>

In regard to the legal certainty of the applicant, and thus the foreseeability of the law, the court refers to ‘applicable provisions of canon law’ as the legal basis.<sup>53</sup>

The minorities, in both cases, accept the decisions as being based on existing law. In the Spanish case, the argument for this is the existence of a concordat between the Catholic Church (the Holy See), acknowledged as a legal person in international law, and the Spanish state. In the Romanian case, the argument for relying on canon law to satisfy the legality requirement is based on governmental approval.

In countries with concordats, the role of canon law in regard to the Roman Catholic Church is thus understood in line with, for example, European Human Rights law and its role in the member states. The role of canon law in regard to the Orthodox Churches is based on state approval of ecclesiastical law as a legal system, parallel not only to state administrative law, but capable of functioning as a basis for limiting the rights and freedoms of Romanian citizens on the basis of conflicting rights for the Church within the sphere of its autonomous

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<sup>51</sup> *Fernández Martínez v Spain*, (App no 56030/07), Grand Chamber, 12 June 2014, para 58.

<sup>52</sup> *ibid* para 118.

<sup>53</sup> *ibid* para 119.



decisions. The major dissenting minority in the two cases does not as such dispute the use of canon law as a relevant legislative basis for evaluating the legality of the state decisions.

The Hungarian judge in the *Fernández* case is, however, quite sharp on this point. The judge is a member of the dissenting minority of eight, but in his own supplementing dissenting opinion he underlines the point that ‘the autonomy of religious organizations is not absolute.’ Referring back to previous case law, he further underlines the fact that ‘the Court has thus set certain limits on church autonomy. It cannot undermine the legal order that safeguards fundamental rights’ (and here the Hungarian judge refers to *Refah Partisi*). ‘Unfortunately’, he adds:

that important consideration is omitted from the judgment. ... Church autonomy does not mean the public recognition of a sovereign religious legal regime. ... In *Refah Partisi*, it was held that the autonomy of a religious community was a matter to be respected but that it did not entail legal pluralism and did not require domestic courts to become the enforcers of autonomous religious decisions which fell short of their requirements of adequate justification.

‘Courts do often consider semi-autonomous and “alien” legal regimes;’ but, as the judge points out, there is a difference between semi-autonomous legal regimes and what is here acknowledged as valid law for autonomous religious communities. Also, he adds as a precondition that ‘the Convention guarantees still apply and arbitrariness cannot be tolerated in case it results in the restriction of rights.’ The basic opinion from the Hungarian judge’s perspective is that:

not even internal relations and acts within the religious organisation or community are exempt from State obligations to protect Convention rights. Where the State intervenes to punish incitement to imminent violence advocated by an office holder of a religious organisation and stemming from a religious precept, that intervention will not be barred by considerations of church autonomy.

Nevertheless, it is obvious that the judge could persuade neither the majority of nine in the *Fernández* case, nor the other members of the minority of eight to include references to these

limits to religious autonomy. Judge Sajó therefore concludes: ‘The Court shies away from considering the implications of limited autonomy.’<sup>54</sup>

Neither the majority nor the minority of eight in the *Fernández* case have included these observations from Judge Sajó (and thus also not the discussions in the *Refah-Partisi* case) regarding limitations to religious autonomy in relation to any discussion of the concept of law. Interestingly, this could be interpreted as if the ECtHR is either changing its understanding from the *Refah Partisi* case, or that it argues differently on religious law, depending on whether the religious law in focus is Christian (Orthodox or Roman Catholic) or non-Christian (which is the case in *Refah Partisi*: Shari’a).

The minority of eight in *Fernández* evades this conflict by following another line of reasoning. Here, the minority upholds the obligation of the state authorities to use the proportionality test and the necessity test, furthermore in cases where the obligation follows from an obligation vis-à-vis a non-state-body, such as the diocese or bishop of the church. Consequently, the minority underlines the Spanish State’s inability to delegate its obligations under the Convention to a non-state-body. Even though there was an obligation in the

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<sup>54</sup> All quotations are from argument number 4 in dissenting opinion of Judge Sajó. It should be noted that also the Russian Judge Dedov in *Fernández*, after having joined the minority of eight in the case, adds a single dissenting opinion, arguing that ‘the State cannot abstain from protecting the fundamental right to family life which prevails over any kind of organizational autonomy.’ He thus obviously tried to persuade the minority of eight to change the line from *Obst v Germany* (App no 425/03, 23 September 2010) and *Schiith v Germany* (App no 1620/03, 23 September 2010) that the right to family life must be balanced with the right to religious autonomy; an argument that also in a Nordic context would gain much support.

Concordat to follow the decision from the diocese, this was not an absolute obligation. Therefore the Spanish ministry was obligated to analyse the proportionality and necessity tests.<sup>55</sup> Read in concordance with the Norwegian case, referred to above, it is interesting to see that the Norwegian high court followed exactly this line of argumentation; the court thus did balance the canon law in use with both human rights norms and norms from Norwegian labour law, including the fundamental right to religious autonomy in the argument on the side of canon law.

On the basis of this argument, it becomes possible for the dissenting minority to accept the use of the Canons.<sup>56</sup> In *Sindicatul* this position becomes even more clear in the concurring opinion of the Polish judge, who argues that ‘such legitimate autonomy may be reflected, for example, in self-regulation by means of extra-legal rules of conduct, produced or accepted by different social groups’.<sup>57</sup>

## **B. Acknowledgement of Canon Law as Law in Europe**

The argument that canon law is not theology but law, merely deriving from sources other than state law, is obvious not only in these cases from the ECtHR. It is a general argument that has become quite common. One way of establishing general validity for canon law is through international agreement between a state and the Holy See. Another way is through the acceptance from a state party. These two routes are followed in the two cases. By following

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<sup>55</sup> Dissenting opinion by eight judges in *Fernández* (n 51) argument B, 5-8.

<sup>56</sup> *ibid* argument 15.

<sup>57</sup> *Sindicatul* (n 35) para 2.

these routes, the state's responsibility for the validity of the law is upheld. In the current European context, these lines of argument mean that Roman Catholic Canon Law is valid law in countries with concordats, but not in other countries, and Orthodox Canon Law is canon law if so acknowledged by the particular country through direct acceptance by state authorities.<sup>58</sup>

The main questions arising from these cases is whether canon law is also valid law in states without a system of concordats and agreements by the state, and whether canon law in such situations, based on the 'religious autonomy'-argument, can function as a legislative basis for limiting the fundamental rights of the employees in the church in question, for example, whether a pastor's rights in accordance with the law of the land could be limited, based on canon law. That is how canon law is used in the Norwegian case, mentioned above.<sup>59</sup>

It is possible within current law on religion discourses to find different ways of arguing that canon law is valid law also outside countries with a concordat. One approach is to argue that law in modern societies is not only state-based, but originates from many different sources at many different levels. Following this argument, the obligation to include and balance canon

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<sup>58</sup> Cf. Norman Doe, 'when the agreement is ratified by law', in Norman Doe, *Law and Religion in Europe: A Comparative Introduction* (Oxford University Press 2011) 17. In footnote 2, page 15, Norman Doe with a reference to his, Mark Hill's and Robert Ombres' edition of *English Canon Law* (University of Wales Press 1998) adds that '[w]e shall also see that States increasingly use quasi-legislation – informal rules to supplement formal laws on religion (such as circulars or guidance)'; this is however still a reference to the monist hierarchy of law legitimated by the constitutional function of state institutions.

<sup>59</sup> Neither Norway nor any other Nordic country does, as mentioned, have a concordat with the Holy See.

law with the law of the land is left to the institution that applies these different sources of law to the facts in concrete cases.

This line of argument was originally related to post-imperialistic studies of law based on a law-and-anthropology approach, which has influenced European approaches to the existence of parallel or partly overlapping legal normative orders to be taken into account.<sup>60</sup> Building on concepts of law related to pluralism in space and time,<sup>61</sup> such approaches seem to fit well with the above mentioned parallel development in European legal theory. More precisely, it fits an understanding of law as inherent to a multi-level order in Europe, based not only on different official institutions with basically a reference to the orders of the state, but also on changed relations between public and private law, including legal normative developments among global private actors.<sup>62</sup>

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<sup>60</sup> See e.g. Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (3rd ed., Cambridge University Press 2006); Prakash Shah and Werner Menski, *Migration, Diasporas and Legal Systems in Europe* (Routledge 2006); Rubya Mehdi and others (eds), *Law and Religion in Multicultural Societies* (DJØF Publishing 2008). See also Margaret Davies, 'Pluralism in Law and Religion' in Peter Cane, Carolyn Evans, and Zoë Robinson (eds), *Law and Religion in a Theoretical and Historical Context* (Cambridge University Press 2008).

<sup>61</sup> *ibid* 92-99.

<sup>62</sup> See in general for this line of argumentation e.g. Inger Johanne Sand, Christian Joerges and Günther Teubner (eds), *Transnational Governance and Constitutionalism* (Hart 2004) as well as the three volumes, edited by Ruth Nielsen and Ulla Neergaard (eds), *European Legal Method* (DJØF Publishing 2011, 2012 and 2013).

### C. Shari'a as Law in Europe?

This discussion is relevant, not only in regard to canon law, but equally in regard to Shari'a as law in Europe. In his work, Mathias Rohe establishes links between Shari'a and state law through international private law, but he also underlines the fact that the private international law argument does not fulfil the actual needs in regard to citizens of European countries who wish to follow Islamic legal practice.<sup>63</sup>

Following the decision in the *Refah Partisi* case, the academic discourse, to a large extent, accused the ECtHR for dubious blindness towards the legal identity of Muslim groups, for a false construction of Islam and for being militant in its attempt to 'save' democracy from legal pluralism.<sup>64</sup> Others have argued that it is problematic to accept Shari'a as a legal system in Europe due to its lack of compatibility with European legal standards.<sup>65</sup> In line with this argument, a distinction in regard to Shari'a might be necessary between the fully acceptable

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<sup>63</sup> See e.g. Mathias Rohe, *Muslim Minorities and the Law in Europe. Chances and Challenges* (Global Media Publications 2007); Mathias Rohe, *Islamic Law in Past and Present* (Brill, forthcoming 2015); and Mathias Rohe, 'Family and the Law in Europe: Bringing Together Secular Legal Orders and Religious Norms and Needs' in Prakash Shah, Marie-Claire Foblets and Mathias Rohe (eds), *Family, Religion and Law - Cultural Encounters in Europe* (Ashgate 2014).

<sup>64</sup> W. Cole Durham, Jr and others (eds), *Islam, Europe and Emerging Legal Issues* (Ashgate 2012) 209-90.

<sup>65</sup> Silvio Ferrari, 'Law and Religion in Europe' in Lisbet Christoffersen and others (eds), *Religion in the 21<sup>st</sup> Century: Challenges and Transformations* (Ashgate 2010).

religious elements and the legal elements, which need to be in line with fundamental European legal norms, including human rights.<sup>66</sup>

Muslim groups in Europe have collective freedom of religion according to both national constitutional law and ECHR law. The concept of ‘religious autonomy’ as developed by ECtHR must thus also apply to Muslim groups in Europe. The question in regard to both Muslim groups and others is, however, whether it is really worthwhile establishing a sphere of legal autonomy for religious groups within which state administration is not allowed to operate, in order to ensure the rights of its own citizens and from whose dogmatic and organizational structures secular courts are effectively barred to such an extent as is established horizontally and vertically in the combination of the three cases in focus in this special issue: *Sindicatul, Fernández* and *Hosanna-Tabor*.<sup>67</sup>

#### **D. Nordic Developments Regarding Acknowledgement of Ecclesiastical Law, Canon Law and Shari’a as Law**

As mentioned, mainstream Scandinavian legal theory builds on the idea of law as monolithic and to a large extent also hierarchical. This approach, which is seen as representing realism

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<sup>66</sup> Lisbet Christoffersen, ‘Is Shari’a Law, Religion or a Combination? European Legal Discourses on Shari’a’ in Jørgen S. Nielsen and Lisbet Christoffersen (eds), *Shari’a as Discourse: Legal Traditions and the Encounter with Europe* (Ashgate 2010).

<sup>67</sup> *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission*, 132 Sup. Ct. 694 (2012).

but also positivism, includes a dualist approach to international law. It also includes European Union law based on a conferral of powers.<sup>68</sup>

The 'realist' dimension in Scandinavian legal theory is predominately an approach which distances itself from any immaterial legitimacy of the law. Valid law is law applied by courts. References to natural law arguments, and especially references to theological arguments in law or to religious law, is most often seen as suspicious, due to the lack of parliamentary basis, and thereby without grounding in Scandinavian legal theory. On the other hand, Scandinavian legal theory acknowledges theological historical inputs to legal culture.<sup>69</sup>

The main and defining challenge in Nordic law on religion is the extent to which openness towards religious dimensions in the law or towards overlapping normative systems includes openness towards law maintained by religious institutions on grounds of their theological or normative framework.<sup>70</sup> The question is whether there is an available pragmatic route between a principled secularism of the law and the courts, and a principled religious legal autonomy. Another question is whether the Nordic countries are allowed to find such a possible route

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<sup>68</sup> For introductions to Scandinavian Legal Theory, see e.g. Kaarlo Tuori, *Critical Legal Positivism* (Ashgate 2002).

<sup>69</sup> Kjell A. Modéer, 'Internal Convergence – External Divergence: Religion in Nordic Legal Culture and Tradition at the Threshold of the Third Millennium', in Christoffersen, Modéer and Andersen (eds) (n 1); Kjell A. Modéer, 'Shari'a and Nordic Legal Contexts' in Nielsen and Christoffersen (n 66) 89-96. Kaarlo Tuori in his main work on Critical Legal Positivism also leaves room for a deep level of legal thinking, influenced by moral and religious norms.

<sup>70</sup> Lisbet Christoffersen, 'Church Autonomy in Nordic Law' in Christoffersen, Modéer and Andersen (n 1).



independently. This question has to do with how the concept of the ‘margin of appreciation’, which has been developed in the jurisprudence of the ECtHR, is applied.

#### V. TURNING THE MARGIN OF APPRECIATION AROUND

It is thus not clear to what extent the Nordic countries that have changed the legal foundation for establishment and are about to give their majority churches legal subjectivity are also ready to accept the concept of ‘religious autonomy’, including the superiority of internal ecclesiastical laws – as well as canon law and Shari’a - over the law of the land. What is clear, however, is that some Nordic countries might not be happy following ‘religious autonomy’ to its logical conclusion, independently of whether they might wish to keep their state churches, and whether or not they wish to impose more control of other religious organizations than in other regions of Europe.

Whether this is possible is the concern of the ‘margin of appreciation’ argument in the two relevant cases. The *Fernández*, case, depriving a priest of family life (or of a job, if he wants to pursue family life), and the *Sindicatul* case, depriving a group of priests of their human right to organize a labour union, are both at odds with common Nordic standards. Here a ‘margin of appreciation’ argument was used, which implies that these two cases took place in countries where respect for ‘religious autonomy’ overrules respect for freedom of association

or protection of family life and other private affairs.<sup>71</sup> The argument would imply that the Nordic countries do not need to feel obligated by the judgments in the two cases.

The validity of the argument can be checked by counterfactually reflecting on the same type of case in a Nordic context. For example, how would the state respond to a group of priests within one of the Orthodox churches in one of the Nordic countries, who were dismissed because of their wish to organize themselves in one of the existing labour unions or by creating a new labour union? In Denmark, their job function would be seen as a job within a religious organization with both doctrinal and organizational freedom of religion. On the other hand, all job functions in Denmark are under common labour law, including laws on the prohibition of discrimination, and the freedom to form organizations in the labour market is total. The question would be which of these fundamental rights would weigh the more? The argument supporting the religious community is not based on the stronger concept of ‘religious autonomy’, because religious communities are bound by the law of the land and cannot deprive their employees of their rights, unless it is necessary in order for the employees to perform their religious duties. The case would have to be solved by ordinary courts and would most likely go against the church unless the court already at this stage used case law from the ECtHR. The next stage would be for the relevant church to refer the case to the ECtHR. Why should a global church be negatively affected by labour unions in one member state of the Council of Europe and not in another? [As far as I can see, ECtHR would](#)

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<sup>71</sup> See e.g. *Fernández* (n 51) para 152: ‘In conclusion, having regard to the State’s margin of appreciation in the present case, the Court is of the view that the interference with the applicant’s right to respect for his private life was not disproportionate’.

also in such cases have to acknowledge ‘religious autonomy’, since that concept in itself is not only based on whether or not the state acknowledges canon law. Consequently the only difference would be the extent to which the member states’ legal systems have acknowledged the canon law of the religious community and thereby which route of argumentation is followed: the indirect via the acknowledgement of canon law, as in *Fernández and Sindicatul* or the more direct, used in the Norwegian case.

Contrary to the Spanish case with a school teacher of religion in a state school, none of the Nordic countries would dismiss the teacher from a public school, since religion in the Nordic countries is taught as a normal school subject, not as a confessional topic. Moreover there is no legal basis in the anti-discrimination clauses for requiring special religious standards of religion teachers in state schools. What is required from the teachers is pedagogical competence and competence regarding the school topic ‘religion’. No requirements regarding personal faith or conduct are legal.<sup>72</sup>

A much more relevant situation would be a case where the teacher was working at a religious private school, in Denmark a so-called ‘free school’. This case would fall under the anti-discrimination clauses.<sup>73</sup> Firstly, the school would not have a right to dismiss the teacher for not living a religious life. A decision in these matters would have to be taken by the Board of Equal Treatment and, in the end, by the secular courts. Secondly, the school would have to

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<sup>72</sup> Pamela Slotte, ‘A Little Church, A Little State, and a Little Commonwealth at Once’ in Christoffersen, Modéer and Andersen (n 1) 251-52.

<sup>73</sup> As explained in Emma Svensson’s contribution to this special issue.

pass the regular test, which in this case would be that a requirement imposed on a teacher to live a more conventional family life or, more likely, not to be in a same-sex-partnership, was based on a crucial requirement related to the specific job function and that it was also proportional and necessary.

If it were as a mathematics teacher, then his private and family life would have no bearing on his function as a school teacher, even in a private, confessional school. If he was the leader of the school, requirements concerning his private life, related to central dimensions of the doctrine of the religion, would be accepted. However, the case of teachers of religion is not straightforward. Until recently, the understanding has been that the question is not a case of freedom of religion – and certainly not a matter of ‘religious autonomy’ – and that requirements related to peoples’ privacy are not acceptable. Only requirements related to their loyalty towards the theoretical ethos of the school are acceptable. It should be mentioned, however, that a group of Danish evangelical Christian private schools require all their teachers to sign a contract declaring that they will be dismissed if they get an abortion or divorce or live in a same-sex partnership, whilst being employed by the school. By signing the contract before taking up the position at the school, it can be argued that the teacher knows the working conditions before he accepts the job. This would make the dismissal more acceptable, also for the society overall. These contracts have not yet been examined by the Board of Equality.

However, if the case was brought before the Danish courts and then before the ECtHR, there is no reason to expect that, for example, the Roman Catholic Church should accept that they were afforded less ‘religious autonomy’ in the Nordic countries than elsewhere in Europe. A central dimension in this context is that the rules on prohibition of religious discrimination in the labour market, including the religious labour market, with only very narrow exemptions

for religious communities, aim to protect employees from the will of their employers. Such a set of rules is based on the idea of protection of the weaker part. And the weaker parts tend to be those who in general are protected from discrimination: disabled people (as in *Hosanna-Tabor*); women (as also in *Hosanna-Tabor*); for gender- and sexuality-related reasons (which indirectly is the case in *Fernández*); all of whom trying to keep their rights against religious communities which want to uphold their own standards against those of modern European societies. If such groups, as is the case in *Sindicatul*, are even deprived of the right to react jointly through an association, then that shows everything about why the European Parliament found it necessary to underline that the right to get exemptions on religious grounds is not a right to discriminate on other grounds.<sup>74</sup> Thus, ‘religious autonomy’ seems an odd concept in this context, unless ‘autonomy’ is seen as ‘semi-autonomy’, as mentioned by Judge Sajó in his dissenting opinion, referred to above.

## VI. GOVERNANCE VS GOVERNMENT VS LEGISLATIVE AUTONOMY?

As has been shown, it is not unproblematic too easily to adopt concepts such as ‘religious autonomy’, and especially not when these concepts include the application of canon law as contrary to the law of the land. Then again, it has also been shown that there is a certain development towards such an understanding, also in the Nordic countries.

Before accepting the concept ‘religious autonomy’ in all its dimensions as it has been applied not only by the ECtHR, but also by the high court in Norway, it might, however, be useful to

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<sup>74</sup> Cf. Council Directive 2000/78/EC, art 4(2)(1), last sentence, which states that: ‘This difference of treatment ... should not justify discrimination on another ground’.

discuss other approaches to how faith communities could take responsibility for their internal governance structures. They do need to take responsibility for their common formulations of faith as well as for their organizational structure. They also must have a right to argue that such theologically-based doctrines and structures are protected by freedom of religion against not only administrative decisions, but also against the law of the land, unless the legislation can fulfil the necessity and proportionality tests in regard to protection of other rights and interests, as mentioned in ECHR article 9 (2).

The argument that I here formulate is, that this right to self-governance is not necessarily a fundamental right on the same level as other dimensions of human rights. I also argue that such a right does not automatically overturn individual rights protected in ordinary law; ordinary parliamentary law can establish a proportionate and necessary limitation of religious norms and regulations. I further argue that religious communities must accept that it is for the ordinary, secular courts and administrative tribunals to evaluate the necessity- and proportionality tests, including by reviewing the theological grounds for the required exemption. That is what the Norwegian high court did in the Catholic case, referred to above. Were the courts not to do so, the consequence would be lack of effectiveness of judicial review; which is also what we have seen in many cases.

On the other hand it seems to be time for the Nordic countries to acknowledge the right of religious communities to set up their own internal structure and their own internal regulations without any interference from the state, as long as these rules do not interfere with the rights of others, including their own employees. It could thus be argued that we need to focus on 'semi-autonomous religious governance structures' under possible review of the courts of the country, because the concept of autonomous law in religious communities seems to be too far-fetched.

In this respect, the European Centre for Law and Justice, intervening as a third-party in *Fernández*, was correct to argue that ‘the crucial point for the third party was the possibility of review by the ordinary courts.’<sup>75</sup> I could not agree more, but for the fact that the ECLJ almost certainly regards such a review as deeply problematic, whereas I see such review as the crucial point for safeguarding the rights of the weaker parties in such cases and therefore want such review to be upheld.

For the concept of a ‘ministerial exception’, this approach means that a ministerial exception cannot be established solely on grounds of a human right to ‘religious autonomy’. A ministerial exception is natural as part of collective freedom of religion, but only within the requirements established through EU law with its directive 2000/78.<sup>76</sup> Neither the EU nor the member States of the Council of Europe should thus be seen as bound, in addition, indirectly by canon law or directly by ECtHR practice establishing ministerial exceptions for all but the individuals’ possible human rights. The individual citizens of Europe must keep their rights, also against religious employers, to organize in unions, to live a family life and to freedom of speech, even when upholding their job functions, unless the requirements related to specific job functions are fulfilled.

## VII. SECULAR AND SACRED

My argument is purely secular, but it is not secularist. Its secularity is of Lutheran origin: the secularity of the law and of the courts in upholding the law, especially, and not least, for the

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<sup>75</sup> *Fernández* (n 51) para 98.

<sup>76</sup> This is discussed in detail in Emma Svensson’s contribution to this special issue.

weaker parties, is a central dimension of the Lutheran Reformation, which in the West Nordic countries included a dissolution of religious courts, and in all of the Nordic countries included an absolute break with religious law of the Catholic Canon Law applied for and prevailing over national rights for citizens of the lands.<sup>77</sup>

Lutheranism today however includes different understandings of the law. It is worth mentioning that the Missouri synod, of which the school in *Hosanna-Tabor* is a member, also understands itself as Lutheran, however based on the Book of Concordia (1580)<sup>78</sup> establishing a strong orthodoxy concerning norms based on the Scriptures (*sola scriptura*). According to this understanding, all legal norms from the Bible must be obeyed among Christians; and thus also the norm, which was relevant in *Hosanna-Tabor*, that a Christian should not sue a Christian at secular courts. It is not surprising that the Missouri synod holds this opinion. What is surprising in *Hosanna-Tabor* is that the Evangelical Lutheran Church in America (ELCA)<sup>79</sup> supported the Missouri synod in the case. However, the position of the ELCA may be comparable with, for example, how the Evangelical Church in Germany (EKD) or possibly even the United Evangelical Lutheran Church of Germany (VELKD) understand relations

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<sup>77</sup> See for further development of what Lutheran reformation and Lutheranism means for the concept of law, 'Introduction' and 'Conclusion' in van den Breemer, Casanova and Wyller (eds) (n 33), as well as Helge Årsheim, 'Legal Secularism? – Differing Notions of Religion in International and Norwegian Law', in van den Breemer, Casanova and Wyller (eds) (n 33).

<sup>78</sup> Which never became part of official Lutheranism in Scandinavia.

<sup>79</sup> Formed in 1988 on basis of three former organisations of which the original Scandinavian Lutheran migrant churches were forming members.



between the law of the land and ecclesiastical law. Lutheran understanding of the secularity of the law has developed differently in different countries and contexts and is very much related to the situation in the surrounding society.<sup>80</sup>

Seen from a Nordic perspective, based on a traditional understanding of law as secular, arguments concerning the re-introduction of canon law as well as concepts like ‘religious autonomy’, with no ‘semi’ attached to it, are however like observing a counter Reformation, now not only from the perspective of the Roman Catholic Church, but followed up by Anglicans, Calvinists, Orthodox, and all American religions, arguing ‘the Wall of Separation’, as well as Muslim groups in diaspora looking for a way of introducing Shari’a in Europe.

For a Nordic scholar, this seems to be rather problematic. Be that as it may, the concepts of ‘religious autonomy’ and canon law are now both part of national human rights law, and we need to find a way to deal with these developments in Nordic law. We also need to find ways to govern the national majority churches in the future and in this context to decide whether or not we also want to introduce ‘religious autonomy’ and independent ‘ecclesiastical law’ for the Nordic majority churches.

Thus a central question for the future is the content as well as the legal role of ecclesiastical law for the majority churches. This also raises questions about the conceptual understanding of internal regulations of doctrine and governance structures in other religious communities in

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<sup>80</sup> It could be interesting to look into the confessional background of the group of American law & religion-professors who supported the schoolteacher in the *Hosanna-Tabor* case. See also Marie Ashe’s contribution to this special issue.

our countries. I propose to take our point of departure in a distinction between legislative power and the judiciary on the one hand, still remaining within the official state structures, and on the other hand internal administrative regulations and structures within the religious communities, including internal administrative bodies, functioning within the framework of the law of the land and with possible review by secular courts.<sup>81</sup> Our focus in future research should be on keeping the question of ‘religious autonomy’ out of a heated debate, and instead concentrating on how best to ensure the rights for minorities and weak parties in the future, given developments such as the one mentioned here. The administrative reforms in the majority churches in Finland, Iceland, Sweden and Norway might here pave the way for a common understanding in the future, across the Nordic legal culture.

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<sup>81</sup> The case *Ahtinen v Finland*, (App no 48907/99), 23 September 2008, is an example of this distinction, as mentioned in the end of par 17: ‘It follows from these provisions that the administration of the Church is autonomous.’ The ECtHR however takes the argument further by concluding that the applicant has no ‘right’ according to ECHR art 6. This was the understanding of neither the Finnish Administrative Court nor the Finnish state in the case.