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TOWARDS RE-SACRALIZATION OF NORDIC LAW?

Lisbet Christoffersen

Introduction: the question to be analyzed and its historical background[1]

On January 30, 2017, the general assembly of the Church of Norway, by 83 votes out of 112, decided to introduce a new liturgy for same-sex-marriages. The new liturgy, which is in operation from February 1, 2017, is an appendix to the already existing rituals for marriage, dating from 2003.

The decision is historic in many ways. In this chapter I do not focus on the question of same-sex-marriage or religious blessing of these. It is thus not my intention to get involved in the discussions concerning theological legitimacy of the decision, that is, the discussion which is hidden behind the numbers of votes. Instead, my focus is on legality, the question of competences: What made the General Assembly of the Church of Norway competent to decide on this liturgy? That is: What made the decision legal?

Such questions about legality might seem odd to readers outside the west Nordic countries.[2] For most readers in Europe and in the United States it seems obvious that the legal basis for a decision concerning rituals is made internally in the Church. For them, a church is defined, among others, through its right to self-governance, at least when it comes to liturgy and rituals. Thus, for external readers, the question of legality and that of theological legitimacy are intimately linked to each other.

In the west Nordic countries, however, the Reformation also led to royal legislative competences over not only ecclesiastical law, or *jus circa sacra*, but also internal affairs in the Lutheran churches, such as rituals, etc., *jus in sacra*. With the absolutist legislation (Norwegian Law of 1687) the concept of 'church' even disappeared, and the law only spoke of how the king and the state organized the religious dimensions of civil service. In Norway, the royal competence was from 1814 regarded as a prerogative for the king, even though the gradual introduction of parliamentary government after the political crisis in 1884 to some extent developed into a situation of

for the church as church? Alternatively, is the competence derived from the statutory law, which (dis)-established the Church of Norway with certain competences?[8] In that case, is the Church of Norway still, in all its dimensions including rituals, etc., a 'by law established' Church, or is it only the organization of the Church (the 'ordering'), which is by law established – or even less?

Such questions are, of course, mostly of theoretical interest.[9] No one imagines that the Norwegian Parliament in a foreseeable time would pass a law, aimed at withdrawing the competence regarding rituals from the Church Assembly and returning the competence to the king or to the Parliament. One can, however, imagine a future where the General Assembly of the Church of Norway wanted to exclude baptized Norwegians from being members of the Church on grounds established in internal ruling. Or one could imagine a future where the newly established rituals were made redundant (here the number of votes in the first decision appears relevant). Would it then be possible for the Norwegian Parliament by law to re-establish the situation? Or is it no longer possible to withdraw the competence given to the Church of Norway, because the Church is now covered by constitutional or international legal norms on freedom of religion and belief that give the Church a legislative power of its own, independent of the law of the land?

If the latter is the case, then gateways are open for a re-sacralization of (parts of) Norwegian law. One could of course argue that internal regulations made by the Church of Norway are not 'law', but 'governance'. However, that does not change anything. Naming internal regulations of the Church 'governance regulations' does not change their effect. The crucial question is: Would it be possible for a future Church Assembly to change or strengthen the norms in order to establish a more rigorous church discipline over its members, or to withdraw membership rights, without any possibility for the Parliament, the government or the Norwegian courts to take any legal steps? If that is the case, then a re-sacralization of a legal order has taken place. Secular Norwegian administrative law on ecclesiastical affairs has changed identity into canon law of the Church of Norway. Another question is whether this is a new situation; I come back to that in the discussion in the end of this chapter.

Theoretical basis: Norwegian constitutional theory

In order to establish a theoretical basis for answering the question regarding re-sacralization of parts of Norwegian law, it appears relevant to identify basic norms in Norwegian constitutional law. Which legislative, executive

According to Norwegian constitutional law theory, Parliament thus has the legislative competences, unless constitutional human rights establish a material framework, against which legislation is not possible. Delegation of the Parliament's legislative competences is possible by law only and within the possible purpose formulated in the constitution. A delegation of legislative power can be withdrawn again or even supplemented by parliamentary law at any time.

Freedom of religion and belief does, however, establish a significant limitation of state powers [trossamfunnsvern]. Smith develops the discussion further by referring to the concept of *relative constitutional protection*, introduced into the Norwegian constitutional debate by other scholars (Smith 2015a, p. 357 ff). In a conflict between legislative interpretation of the constitution and the interpretation of a citizen in a case against the state from a private individual or private organization regarding the interpretation of a piece of legislation against the constitutional basis, this concept implies that the parliamentary interpretation of the constitution should be given higher weight. The argument behind this position is that the courts should not overturn democracy in its legislative powers. Parliamentary democracy, contrary to the non-elected judges, gives legislation legitimacy.

Smith's position is clear: He does not accept a better position for Parliament in the interpretation of relations between legislation and the constitution, especially not if the conflict regards material protection of individuals or groups, as is the case in relation to FROB. The consequence would be that any protection of constitutional rights would vanish (Smith 2015a, p. 360). Apart from that, the argument is also that the constitution itself does not establish such a power for the Parliament. If the Parliament wanted to change material rights and legislate against them, then Parliament must first change the constitution. So goes the argument. As long as the constitution establishes material protection for, for example, FROB rights, these material rights must also be respected by the legislative powers.

It is interesting against this background to see how Smith analyses FROB. And his position is as clear as that of Andenæs/Fiflet: FROB is a wall against legislation into the religious communities. Smith names this wall *ordre public*, meaning that some (but not all!) criminal law violations are prohibited for everyone, no matter which religious conviction might be behind the breaking of the law. Among these crimes, Smith mentions murder, manslaughter, bodily harm and offence against the person. The point is that for Smith, *ordre public* is not an argument for any legislative intervention into internal affairs in religious communities or any intervention into practices of freedom of religion or belief for the individual.

now or later, then it would have to build upon an argument, which was clearly based on constitutional orders that again could be accepted in international courts.

In the following parts of this chapter, I will discuss how the legislative powers have understood their competences regarding rituals for the Church of Norway (and other similar matters) in relation to the process of changing the constitution, the legislation established alongside and the legislative process establishing Church of Norway as an independent legal entity. The question is whether there are any elements left of a theory of 'by law delegated' competences for the Church of Norway, or whether the theoretical standpoint, leading to a *sui generis* competence for the Church of Norway, based on freedom of religion and belief, has fully taken over. In what follows, I will first discuss the constitutional change of 2013 alongside the parallel legislation and afterwards the legislation of 2016 (in force January 1, 2017) concerning establishing the Church of Norway as an independent, legal body.

Constitutional change of 2013 and parallel legislation

The religion clauses of the Norwegian Constitution were changed on May 21, 2012, by a decision in the Parliament.[13] The proposal (constitutional proposal no 10, 2007–2008)[14] was based on an agreement of April 10, 2008, between all the political parties represented in Parliament. This political agreement is included in the constitutional proposal and is thus relevant for the interpretation of the new text. The political agreement was however only binding for the parliamentary period 2009–13, which means that a changed political landscape within the norms in the amended constitution could change the ideas behind it. Most of the political agreement was thus not constitutionalized and does not bind the interpretative analysis of the constitution.

The political agreement consisted of seven items:[15]

- The Church of Norway shall have an independent basis in the constitution.
- The Church must still be regulated through one law on the Church, however, without being an independent legal subject.
- Priests, bishops, etc., should still be regarded and salaried as civil servants of the state.
- The regional and central administration of the Church should still be part of the state administration.
- General public law on insight in decisions are still binding for the Church.
- The municipal involvement in Church administration and decision making should be kept.

> *material limit for legislative competences within FROB* implies, that parliament cannot go too far into internal affairs of the Church of Norway and that 'ordering' concerns the organization of the church, not the internal affairs.[20]

This time, the department clearly stated that a wall of separation between legislative competences of the state and normative regulatory competences of the Church exists on basis of freedom of religion and belief norms.

Even this position did obviously not clarify the ground sufficiently. There was still a legal possibility that the constitution opened not only for legislation concerning the structure and competences of the Church but also for legislation concerning the content of internal affairs, such as rituals.

Therefore, the department in 2007–08 in the first proposals regarding legislation alongside with the changed constitution proposed a 'just-in-case' piece of legislation.[21] According to the proposal, the Law on the Church of Norway should clearly in § 24 state that "the Church Assembly as the leading representative body in the Church of Norway decides on the liturgy, rituals, etc., to be used in the Church".[22]

In the Parliament, the question of how to interpret the proposed legislation was also discussed. The parliamentary committee thus added that

> the intention of the constitutional change was to clarify the free position of the Church of Norway as a religious community. This implies that the religious practice in the church will no longer be the task of the state. The state must however support the church as a religious community as well as support other religious communities equally. The parliamentary committee approved of the understanding that these changes represent a new fundament for the development of the Church of Norway as an independent religious community. The committee equally underlined how central it is to ensure that the changes contribute to the purpose for the Church of Norway to remain an open, inclusive and democratic people's church.[23]

The changed constitution made it impossible to proceed with the royal decrees concerning the internal affairs (rituals, etc.) of the Church of Norway. The 'ordering' of the Church was still the competence of the Parliament. Thus, the Church of Norway, through its Church Assembly, received its competences regarding the rituals from the state by law. And most of the arguments presented from both the department (the government) and the Parliament were arguments underlining that this was a just-in-case piece of

law on marriage and made same-sex-couples equal with couples of opposite sex in the law (in force from 1st January 2009). In the Nordic countries, pastors in the churches have traditionally had powers to perform marriages with civil validity. The Norwegian law of 2009 underlined, that this could only be done in Church of Norway (and any other religious community) on basis of a ritual that – for Church of Norway – was approved by the King (according to the constitutional system before 2012).

This development already in May 2009 forced the Church Assembly to reconsider the question of a ritual concerning same-sex-marriages. A committee to consider the matter was organized, but did not deliver any results, until 11 February 2013, that is: well after the changed constitution as well as relevant legislation, confirming the competences of Church of Norway in ritual matters, was in force. – however, again the report of February 2013 did not lead to any decision in the competent bodies of the Church of Norway, neither at the general assembly in 2014 or 2015.

By decision at the general assembly, a principled acceptance of a ritual for same-sex-marriages won majority, but the ritual should still be formulated, discussed and approved of. This happened in the course of summer 2016, after which the church assembly consequently could accept and acknowledge the ritual at its meeting 25–31 January 2017. The new liturgy is in force from 1st February 2017.[25]

The question of whether people, living in same-sex-couples could be ordained for services in the Church of Norway, was indirectly solved by the non-decision in 2007, where the former rejecting decisions were dissolved. The question regarding rituals for same-sex-marriage was, however, pending and still so after the change of the constitution. One could reflect on, whether this delay came by accident – or whether it had to do with what still could be interpreted as unclear competences in core internal matters, such as decision-competences regarding rituals etc.

The point of departure in constitutional theory was, as mentioned,[26] that churches, and even the Church of Norway before the changed constitution, have FROB rights when it comes to competences for the state to decide on, especially rituals. If the state should have competence in such matters, constitutional theory would thus require that the competence be clearly backed by the constitution. The wording of the 2012 constitution (regulation of the ordering of the Church) did, however, leave sufficiently clear interpretative room for a position arguing that the state still had the competence. Thus, the need for the 'just-in-case' legislation placing the competence with the Church Assembly.

Some would, however, argue that this was still not enough. If the formulation in the church law, § 24, on competences for General Assembly

When the new Parliament and the next government took seats, those who had hoped to see the problems solved for the next long period had to realize the weakness they already knew regarding this part of the 2008 political agreement. The Solberg government, which took seats in October 2013 and remained in office after the public elections in 2017, stated in its governmental program (2013), that it would establish

> "a clear distinction between church and state", and "lead a politic which makes it possible for the church to uphold the status as an open church for everyone". – "The government will formulate one law for all faith and life-stance communities"; and the government will "ensure that internal self-decision-powers is a reality in all faith- and life-stance communities".[28]

The Solberg government was renewed and widened after the public elections in 2017. The governmental programme (2018) states that the government will "complete the distinction between state and church".[29]

With the 2012 reform as 'the constitutional reform', this new reform was less intruding and therefore called 'administrative' [forvaltningsreformen]. There is, however, no doubt that with these latter changes, the real changes in the status of the Church of Norway were to be implemented. From previously having been part of the Norwegian state to becoming nearly almost, although not fully, a private entity in line with other religious communities (that would require further constitutional changes), but at least an entity barely part of the state anymore.

With this political programme, the Department of Cultural Affairs (with the section on Church Affairs) developed a paper sent out for public remarks called 'The State and the Church of Norway – A Clear Distinction'.[30] Based on the comments on this paper, a revised paper was formulated by the Department of Cultural Affairs in March 2015 to be discussed at the General Assembly in the Church in the spring of 2015.[31] Based on the reactions from the church assembly, a final proposal was sent to Parliament,[32] and discussed in the committee on church, education and research affairs in its recommendation.[33] The law on the Church of Norway as an independent legal subject has been in force since January 2017. At this same time an administrative reform took place: All previous civil servants, among them all priests, bishops, etc., are servants of the Church with the General Assembly as the ultimate employer.

The idea from the department was originally, comparable to the forms of regulation in Denmark and Iceland, that the Church of Norway should

> individual freedom of religion and belief also must include a collective dimension, and that such religious communities must have freedom to perform their religious beliefs according to their rituals, symbols and traditions of common values and norms. The religious community, including the Church of Norway, on basis of the individual members' freedom of religion and belief must have a right on independent basis to decide on the frames for the ritual life and development of faith within the religious community.[41]

The church assembly did however succeed in changing the Church of Norway into a hierarchical organization. There were still political forces in Norway who wanted to keep a more traditional church, especially with respect to local independence. Parts of both political forces and Norway's broader population are hesitating to move to a too hierarchical church – whereas others want one common church under the regulation of the church assembly. Here the Swedish and Finnish models are present as 'shadow-models', mentioned even by some congregation councils as something not fully received in this proposal.[42]

The department found it too early to implement models that would lead to further central governance of the Church. In its proposal to the Parliament, the department thus underlines that the local congregations are still legal subjects. The Church is, as it is underlined in the legislative proposal to the Parliament, no hierarchical entity. The local congregations are independent legal subjects, and the church assembly can only regulate local matters, if they have a clear competence in law to do so.[43]

The sustained independence for the local congregation councils seems to have been a central point in the reform politically. This point is thus also underlined in the recommendations from the parliamentary committee.[44] The question is burning: The parliamentary members from the social-democratic party underline in their recommendations that they do not necessarily support a further development where the local congregations might be hierarchical elements into one, unified church organization.[45]

Also the question about a guarantee in the future to be able to have access to local priestly services seems to have played a central part. The new church law therefore states that the Church of Norway must still provide priestly service in all congregations (which here seems to be part of the concept of 'popular' or 'peoples' church),[46] and the independence of the vicars and those who function as bishops are upheld by law. On the other

nearly nobody in the preparatory works have used the references to Danish religion politics or constitutional understanding, which does not stand out in a Scandinavian context as modern.

The wording *folkekirke* could, however, still be constitutionally relevant, even though a Danish parallel does not seem to be the most attractive. For both Smith and myself, the most striking thing is the coupling of *folkekirke* with an idea of openness and inclusiveness, both theologically, geographically and in practical terms (that is, openness for people's wish to use the church in their ordinary life). Smith rightly points to the attempts from the legislative authorities to ensure this openness and inclusiveness through a strong, internal democracy, but, as he also rightly states, a church with strengthened identity as religious community (faith community) invites its members to strengthen those dimensions of the identity that are not necessarily comfortable for everyone (Smith 2015b, p. 66).[53]

But this is precisely the argument for, why I think – contrary to what Smith suggests – that one must interpret the Norwegian constitutional use of the term *folkekirke* as legally relevant. And with the same general argument concerning constitutions that Smith already uses as the general argument on relations between the constitution and legislation:[54] If the Norwegian Parliament does not want to have its legislation bound by the wording in the constitution (here the wording *folkekirke*), then the Parliament must change the constitution first.

The point is that one must interpret the wording *folkekirke* in the constitution as a constitutional limitation against how far legislators and the leadership in the Church of Norway can change that specific Church from having been a Church whose internal structure was decided by all Norwegians through parliamentary democracy into a Church based on religious premises only. The question is whether a requirement regarding 'democratic' organization of the Church internally is enough to meet this constitutional requirement.

It is hard for Smith to imagine that the wording *folkekirke* could appear as a central parameter in a future court case concerning employment or other legally relevant decisions from the church bodies, not because he necessarily sees the concept as irrelevant, but because he thinks it is too unclear and does not see when it could become relevant.

I do not have problems in foreseeing exactly that case. Collective freedom of religion and belief and the rights acquired through that concept are said to rely on the freedom of belief of individual church members, and that dimension is, as already mentioned, underlined in the preparatory works in the legislation on the Church of Norway. One could, however, easily anticipate that conflicts arise in the future between Church members

Church of Norway by law. But it does not ensure *sui generis* rights for the Church if the Church uses these rights to restrict the rights for ordinary members. One could therefore argue that the law on the Church of Norway ought to ensure rights for the Church members in such possible conflict situations, as well as ensuring access to bodies to get such rights clarified.

By law established and *sui generis*

The questions discussed in this chapter are whether the Church of Norway still is to be regarded as a church established by law, whose legal powers are based on delegation by law of state powers. The other possibility is that this church established by law at least in some elements, namely regarding powers to decide on rituals, relies *sui generis* on legal competences derived from its members' freedom of religion and belief. The question is legally relevant in order to identify to which extent the Church of Norway also as a *folkekirke* is legally limited in its decisions or whether it – precisely as *folkekirke* – can decide through its own bodies what it takes to be a *folkekirke* in the 21st-century religiously pluralistic Norway. The Parliament could of course re-organize the church order, based on the constitutional Article 16. It is also my understanding that the wording of Article 16 – both *folkekirke* and Evangelical-Lutheran – includes some limitations to the possible change of the normative function of the Church of Norway by its own internal bodies. The Parliament must thus have some competence to be 'co-interpreter' of these two central concepts in a possible conflict with church bodies. On the other hand, as long as the Church of Norway is by law established with legal personality, this implies that the Church could sue the state/the legislative powers in such a situation and argue that the state, contrary to FROB rights of the Church, had legislated against the Church's collective freedom of religion and belief.

There is no doubt that the legislative powers in close concertation with the church assembly of the Church of Norway has tried to come as far as possible to a new, legally independent body with *sui generis* rights to not only decide on rituals and other matters closely linked to *jus in sacra*. The route followed is also driven as far as possible regarding internal rights to decide on internal organization, *jus circa sacra*, even though the constitution undoubtedly confirms the Parliament with that right.

The constitution, on the other hand, is clear: The Church of Norway is an *established* church. The Parliament has the competence to establish it as evangelical-Lutheran and as *folkekirke*. This competence is not limited with constitutional references to collective freedom of religion and belief.

least half of the members of the Norwegian government had to be members of the state church so that these members could take part in decision making regarding internal affairs of the church. The argument goes[59] that this made the king's governance of the church an internal affair – the king was (and maybe still is?) simply seen as the first among equals or the first in the priesthood of all believers, implying that the king had religious legitimacy to take these decisions.

This argument is a perfect example of how we use the past in the legitimation of the present.[60] That the king's competence once was based on a theological idea of the priesthood of all believers does not necessarily imply state powers presently are bound to the same line of argumentation.

It is tempting in this area to rely on an equality argument: The state cannot legislate further into the rituals of the Church of Norway than into other religious communities (which is the other side of the coin, called collective freedom of religion and belief, based on individual freedom of religion and belief). This is also the most often used argument in the preparatory works. I do, however, think that, even though it is very vague and unprecise, there still is some sort of protection of the members of the Church of Norway against decisions that are clearly in conflict with equity, when compared to the previous situation.

I also think this is the background for why the Church of Norway General Assembly did not decide on a ritual for same-sex marriage until after the 2017 legislation giving the Church legal personality was in force. On the one hand, the Church wanted to underline that the legitimacy in these matters generally are with decisions taken in church bodies. On the other hand, the church bodies wanted to acknowledge that they as a *folkekirke* building on traditions from the state church were (morally? politically?) obliged to take the entire group of members into account when deciding on church rituals.

The Church of Norway decided on a new ritual allowing for the marriage of same-sex couples and thereby including broad groups of society into the Church, just after the Church had acquired legal personality, in order to show that theological legitimacy, subsequent *sui generis* legality and by-law–established legality could be the same in the Church of Norway after 2017.

Re-sacralization?

There is a general tendency in international law on religions to peel off conflicts in and with religious communities from (secular) law. Court

Notes

1 I am thankful to Professor Eivind Smith, Faculty of Law, University of Oslo, to professor (mso) of practical theology, ph.d. Ulla Schmidt, Aarhus University, to professor of sociology of law, ph.d. Bettina Lemann Kristiansen and to docent em., dr. theol, Anna Marie Aagaard, Aarhus, for extremely relevant comments to previous drafts of this article. All interpretations and possible mistakes of course remain on my shoulders.

2 The West Nordic Countries are Denmark, Norway and Iceland that share some of the legal consequences of the reformation of 1536/7 onwards, jf Christoffersen, Andersen and Modéer (eds.) (2010).

3 For a good overview over the development, however, underlining what he saw as the problematic dimensions of state involvement in church affairs, see Aarflot (2016). See also further articles, published together with Schmidt (2014).

4 The process towards church independence was much longer, but the events during WWII are highlighted in several contributions, see e.g. Morland (2018). For an overview, see also Schmidt (2006).

5 Delegation from Royal Prerogative was the undisputed legal basis for these powers before the 21st-century change of constitution, see among others St. Meld. nr 17 (2007–2008) on the State and the Church, p. 24.

6 See e.g. St.Meld. 17 (2007–2008), part 3.5.3.

7 https://kirken.no/nb-NO/om-kirken/aktuelt/2017-et-kirkehistorisk-merkear/

8 Ulla Schmidt (2014, p. 106) poses partly the same question by asking, whether the legislative powers on basis of the revised constitution of 2012 can only organize the external organization of the Church of Norway, or whether there is also a constitutional basis for the legislative powers to decide on internal matters.

9 Andreas Aarflot in his recent article raises the same type of questions by underlining, that "(der) savnes en tydeligere markering av den normgivningskompetanse som dette innebærer". [a clarification of the legislative competences, based on the legal subjectivity of the Church of Norway, is necessary] (Aarflot 2017, p. 211).

10 The 10. vol is as mentioned from 2006. The book is thus published a couple of years before the proposal, that lead to the reformulated constitution.

11 Which in itself is remarkable. In a recent public report on the legal status of the Danish national church [Betænkning 1544/2014 Folkekirkens styre] this author took the same position, but was overthrown by the majority, including representatives of the Ministry of Justice and the Chairperson, Hans Gammeltoft-Hansen, former Ombudsman, former professor, dr.jur., and co-founder of the Association of Ecclesiastical law. See the mentioned public report, chapter 9.4.3., p 235.

12 "Dersom man skulle ønske å gjøre unntak fra dette utgangspunkt gjennom lov, er det vanskelig å se noe annet enn at det vil måtte kreves særskilt hjemmel i grunnloven selv. . . . Men om det i forhold til Norges konvensjonsbestemte forpliktelser om religionsfrihet vil være tilstrekkelig å hjemle lovbestemmelser av en slik karakter i den nasjonale grunnloven, er i beste fall et åpent spørsmål"

20 "antar departementet at forslaget til ny § 16 og prinsippet om tros- og livssynsfrihet vil innebære en tilstrekkelig skranke mot for inngripende lovgivning om indrekirkelige forhold. Ordlyden i forslaget til ny § 16 i Grunnloven vil markere Den norske kirke som folkekirke og kirkens særlige stilling 'som saadan' overfor staten. – Den tydeliggjør også at Stortinget fortsatt kan og skal gi særskilt lovgivning om Den norske kirke, og den uttrykker at lovgiveren fortsatt kan gå lenger i å regulere Den norske kirke enn andre tros- og livssynssamfunn. Den typen lovgivning som særlig nevnes, er lovgivning om Den norske kirkes 'Ordning'. Dette omfatter bestemmelser om kirkens ytre organisering". (2011, Kirkeforliket – konsekvenser av eventuelle endringer i Grunnlovens bestemmelser om statskirkeordningen i stortingsperioden 2009–2013. Høringsnotat 1. februar 2011, s. 18–19)

21 Prop. 71 L (2011–2012) Proposisjon til Stortinget (forslag til Lovvedtak) Endringer i kirkeloven m.m. s. 34: "I og for sig kunne en tenke sig at Kirkemøtet, også uten eksplisitt lovhjemmel, ville ha myndighet til å fastsette liturgier og det tilhørende regelverket. Departementet ga likevel i høringsnotatet uttrykk for at de beste grunnene taler for å tydeliggjøre i en ny lovbestemmelse at Kirkemøtet har myndighet til å vedta liturgier mv. til bruk i Den norske kirke. Departementet lægger til grunn at en ny lovbestemmelse om gudstjenstlig myndighet i princippet ikke trenger å bety at det er Stortinget som utstyrer Kirkemøtet med denne myndigheten. Lovbestemmelsen sikter mot å tydeliggjøre og bekrefte at Kirkemøtet besitter denne myndigheten i kraft av sin rolle som trossamfunnet Den norske kirkes øverste representative organ. Den eksplisitt rettslige virkningen av den foreslåtte bestemmelsen er at den begrenser regjeringens ansvar og myndighet på dette området. Når lovgivningen bekræfter at det ligger til Kirkemøtet å fastsette kirkens gudstjenstlige bøker, avgrenser den regjeringens instruktionsmyndighet vedrørende dette. Dermed avgrenses også regjeringens ansvar for saksområdet".

22 "Som øverste representative organ i Den norske kirke fastsetter Kirkemøtet alle gudstjenstlige bøker i Kirken".

23 Innst. 202 L (2011–2012) Innstilling til Stortinget fra kirke-, utdannings- og forskningskomiteen, s. 3: "Komiteen viser til at grunnlovsendringene som følger av kirkeforliket har som intensjon å klargjøre Den norske kirkes frie stilling som trossamfunn. Dette innebærer at den religiøse virksomheten i Kirken ikke lenger vil være statens oppgave. Det er imidlertid statens oppgave å understøtte Kirken som trossamfunn, og å understøtte andre tros- og livssynssamfunn på lik linje. Komi t e e n slutter seg til forståelsen av at endringene representerer et nytt grunnlag for utvikling av Den norske kirke som selvstendig trossamfunn. K omi t e e n vil samtidig understreke viktigheten av å etablere sikkerhet for at endringene bidrar til å bevare Den norske kirkes mål om å være en åpen, inkluderende og demokratisk folkekirke".

24 I do not go further into this – for a detailed analysis, see the papers in Askeland and Schmidt (2016).

25 https://kirken.no/nb-NO/om-kirken/samfunnsansvar/homofilisaken-1992-2015/

26 See Eivind Smith (2015a, p. 390 ff).

27 Smith (2015a, a.st.).

medlemmenes individuelle trosfrihet må trossamfunnet – også Den norske kirke – på selvstendig grunnlag kunne fastsette bl.a. rammene for trosfellesskapets rituelle liv og trosopplæring". Kulturdepartementet Forslag til endringer i kirkeloven for behandling i Kirkemøtet, 3. mars 2015, s 17. My translation. The formulation is repeated in the proposal to the parliament, pkt. 2.1.5, s. 9.

42 Kulturdepartementet, mars 2015, s. 44. Aarflot (2017) is a discussion of this idea of local independence within Church of Norway.

43 Prop. 55 L (2015–2016) pkt.

44 Innst. 256 L (2015–2016) Innstilling til stortinget fra Kirke-, utdannings- o gforskningskomiteen, s. 1.

45 Komieteens medlemmer fra Arbeiderpartiet og Senterpartiet, Innst. 256 L, s. 4, 2. spalte.

46 Innst 256 L – 2015–2016, s. 2, 1. sp.

47 Jf. the political platform for the current government, presented in footnote 29.

48 Den norske Kirke, en evangelisk-luthersk Kirke, forbliver Norges Folkekirke og understottes som saadan af Staten. Nærmere Bestemmelser om dens Ordning fastsættes ved Lov. https://lovdata.no/dokument/HIST/lov/1814-05-17-20120521 is translated into: The Church of Norway, an Evangelical-Lutheran church, will remain the Established Church of Norway and will as such be supported by the State. Detailed provisions as to its system will be laid down by law. www.stortinget.no/en/In-English/About-the-Storting/The-Constitution/

49 See for a discussion of the (many) different possible translations of the concept into English, among others Lisbet Christoffersen, Svend Andersen & Kjell A. Modéer (eds): *Law & Religion in the 21st Century – Nordic Perspectives*, DJØF Pbl, 2010, p. 145 ff. This author has also in the Danish context suggested that folkekirke should imply people's church or popular church, and that the 'ordering' of the church structure should not imply a competence to organize the internal matters.

50 See e.g. Gammeltoft-Hansen (2006).

51 Tønnessen (2006)

52 Moxness (2006)

53 "Den innebygde spenningen i dette synet som ligger i muligheten – eller faren – for at kirken kan komme til å opptre som et trossamfunn i den forstand at den rendyrke en egenart som *ikke* passer til alle, bliver sjelden eller aldri tatt opp". Smith (2015b), s. 66. See also p. 68: Spenningen mellom åpenhet og tanken om en kirke som et fellesskap rundt læresetninger som medlemmene selv oppfatter som sentrale, er i sig selv tilstrekkelig til å begrunne at det resultat som så mange i den politiske prosessen har ønsket seg, ikke uten videre er gitt. [the possible conflict between openness and the idea of the church as a community around traditions that the members themselves regard as central, is in itself an argument for realizing the the result so many in the political process has wanted does not automatically appear].

54 See Smith (2015b, p. 360 ff) on the constitutional limitation regarding legislation into material human rights.

55 This is a possible conflict, which Smith has not discussed in his works.

56 In a Danish case from the 1970s a church minister required that the parents appeared for church services 12 times a year as a condition for baptizing

the Lawa 1901–2017], in Niels Henrik Gregersen and Carsten Bach Nielsen (eds.): *Reformationen* [The Reformation], vol. 3, pp. 195–228, Odense: Syddansk Universitetsforlag.

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FORMATTING RELIGION

To talk about religion is to talk about politics, identity, terrorism, migration, gender and a host of other aspects of society. This volume examines and engages with larger debates around religion and proposes a new approach that moves beyond the usual binaries to analyse its role in our societies at large.

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The volume will be of great interest to scholars and researchers of religious studies, politics, media and culture studies, and sociology.

Marius Timmann Mjaaland is Professor of Philosophy of Religion at the Faculty of Theology, University of Oslo, Norway. He is president of the Nordic Society for Philosophy of Religion and served as Academic Director of Oslo University's inter-facultary research program PluRel (Religion in Pluralist Societies) 2013–17. He is also the author and editor of several books, including *Autopsia* (2008) and *The Hidden God: Luther, Philosophy and Political Theology* (2016).

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PREFACE

The debates on how to understand religion in its relation to secularism and to secularization have dominated the first two decades of the 21st century. This volume is a contribution to this debate, but the authors have deliberately chosen a new approach that avoids some of the deadlocks connected to the religion/secular binary. The approach is called *formatting religion* and focuses on how religion is shaped and perceived in contemporary society due to substantial changes in other realms of society (e.g. in politics, law, education, and media). Religion is not merely a passive receptor of such societal changes, though. On the contrary, religion has become a driving force in political and cultural transformations in various parts of the world. Hence, formatting should be read in the passive as well as the active sense: Religion is formatted, but it is also formatting the society of today and the world of tomorrow.

Understanding religion from the perspective of 'formatting' presupposes an interdisciplinary endeavor. In order to understand how religion is formatted and formatting, we have included scholars of sociology and philosophy, of law and religious studies, of theology and education. The present volume is the fruit of ten years of interdisciplinary cooperation at the University of Oslo under the headline 'Religion in Pluralist Societies' (PluRel). The program included scholars from the Faculties of Law and Humanities, Theology and Social Sciences, Medicine, and Education. I want to express my gratitude to the University of Oslo for generous funding of the program, but also to the numerous researchers who contributed to PluRel in the period 2008–2018. I will also say a word of thanks to the board members, the former PluRel Directors Terje Stordalen and Oddbjorn Leirvik, and former Dean Trygve Wyller. The perspective of 'formatting religion' was developed by two research projects under the direction of Prof. Tarald Rasmussen: *Memory* (2014–18) and *Good Protestant, Bad Religion?* (2015–19), both funded by the Norwegian Research Council

(NRC). The approach of 'formatting religion' was developed in a joint effort by Prof. Rasmussen, Dr. Helge Årsheim, and myself and will be applied for new research projects in the future.

The chapters in this volume were first presented at the conference *Conflict, Media, and Formatting of Religion* at the University of Oslo on April 21–22, 2016. The conference gathered an interdisciplinary group of scholars from sociology, law, theology, education, media studies, philosophy, psychiatry, anthropology, and religious studies. A short presentation of each contribution is given towards the end of Chapter 1, where I have given a more detailed description of the approach, with emphasis on three formatting processes: juridification, politicization, and mediatization.

There is hardly any sign that religion will become less controversial or less influential on political and cultural conflicts during the rest of the 21st century. The modest contribution given by this book is therefore to suggest a shift of focus and a broader perspective that includes other disciplines and other realms of society in order to better understand the deep structural and political meanings and forms of religious life. The approach is hereby recommended, and, on behalf of the authors, I explicitly invite objections and further discussions concerning its fruitfulness and consequences, and in particular, further investigations on the critical question raised by our emphasis on *formatting religion*.