Schriften zum Religionsrecht 4

Christian Walter/Antje von Ungern-Sternberg (eds.)

Transformation of Church and State Relations in Great Britain and Germany

Nomos

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Vol. 4

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Die Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data is available in the Internet at http://dnb.d-nb.de.

ISBN 978-3-8329-7862-4

1. Edition 2013

Transformation of Church and State Relations in Great Britain and Germany – Introduction

Christian Walter and *Antje von Ungern-Sternberg*

Western societies face the challenge of religious diversity. Religion has not disappeared from the public sphere as the secularisation thesis predicted. Instead, the immigration of non-Christian religions to Europe, in particular, but also the growing religious diversification within Christian denominations and an increasing number of atheists, agnostics and unconcerned change the religious setup of Western societies and raise the question whether traditional church and state relations will remain unaffected. These relations have developed within Christian societies and legal orders based on Christian culture. Thus, even if traditional church and state relations cover a variety of different models ranging from strict separation to cooperation or establishment, all are influenced by a Christian perspective and by Christian forms of organisation. Are these church and state relations suitable for non-Christian communities? In this regard, namely Muslim immigrants introduce previously unknown forms of organisations and religious practices into Western societies which might challenge the traditional forms of church and state relations.

How do different legal orders respond to the challenge of religious diversification? In Germany, for instance, many of the ensuing questions are dealt with by the right to freedom of religion and the principle of non-discrimination. Which answer fits for an established church like the Church of England? Religious tolerance possesses a well-established tradition in Great Britain; but how can a state with an established church remain strictly neutral in questions of religion? The Scandinavian countries which look back at a similar tradition of state churches and which, unlike Great Britain, have at least partly begun a process of disestablishment might be able to add answers of their own to these questions. Furthermore, the analysis of church and state relations in a narrow institutional sense does not exhaust the topic. In fact, this institutional perspective must be complemented by an individual perspective of the religious adherent who is confronted with (possibly conflicting) demands of his or her religious community and those of the secular legal order. Besides, conflicts may equally arise between the adherent and his or her religious community. Is freedom of religion, in this context, the principal and most apt legal instrument for reconciling conflicting interests or do other legal or non-legal approaches play a role, too?

The articles in this book try to respond to the above-mentioned questions by comparing the transformation of church and state relations in Great Britain and Germany. Both countries have developed special forms of cooperation with the Christian churches and are now confronted with religious diversification in general and growing Muslim and other immigrant minorities in particular. Furthermore, both states are obliged to respect legal requirements regarding freedom of religion, non-discrimination and religious neutrality. Some of those requirements constitute a common European standard based on the European Convention on Human Rights or European Union Law; others flow from national law and may vary accordingly. The comparative analysis of church and state relations presented in this volume, intends to reveal different legal instruments which accommodate religious diversity and to define the limits of particular forms of cooperation.

At the outset, two articles look at the experience that can be gathered from the historical development in Great Britain and in Scandinavia. *Augur Pearce* (Cardiff) explains, how the development of church and state Relations in England has been dominated by two questions. The first concerns the treatment of alternative religions – should be repressed, tolerated or valued – and was answered by a gradual progression from imposed uniformity to politically-prized diversity. The second concerns the explanation of public religion. Current answers still differ and refer either to the identity of church and society or to recognition and privilege. The Scandinavian experience is reflected by *Lars Friedner* (Uppsala) who shows that this region provides three models for legal systems of establishment: an earnest attempt at disestablishment (Sweden), a reform which nevertheless leaves intact the formal status of an established church (Norway), and the status quo ante (Denmark).

The following articles examine the legal protection of individuals in religious and secular courts. *Mark Hill* (Cardiff) and *Michael Germann* (Halle-Wittenberg) deal with legal protection in ecclesiastical and other religious courts. *Mark Hill* presents the British system which comprises ecclesiastical courts as well as Islamic (Shariah) Councils as a model which accommodates religious diversity and which also takes account of religious pluralism. *Michael Germann* shows that the German religious courts are founded on the constitutional guarantee of religious autonomy or self-determination of religious communities, but also points out that this form of religious autonomy might conflict with the right of an individual member of a religious community whose access to a secular court is denied.

The question of religious disputes in state courts is dealt with in more detail by *Lucy Vickers* (Oxford) and *Hinnerk Wißmann* (Bayreuth). Both articles focus on employment law, i.e. an area of law which clearly illustrates how the interests

of a religious community and one of its members and employees might get into conflict, for example because the beliefs held or the life lead by the individual does no longer conform to the community's teachings. *Lucy Vickers* proposes to accommodate both interests by applying the flexible principle of proportionality. But she also stresses that religious freedom does not include the right to a job, which implies resolving some disputes in favour of the community's religious integrity. According to *Hinnerk Wißmann,* the German solution differs from the British situation by its material (rather than procedural) approach and by its larger protection of the religious community to the disadvantage of the individual employee. He therefore suggests that zones of jurisdictional immunity should be abolished and that religious communities should have to justify where, why, and to what extent religion requires special protection or support.

This national perspective is complemented by an analysis of international guarantees of the European Convention on Human Rights in the area of religious disputes provided by *Ian Leigh* (Durham) and *Katharina Pabel* (Linz). *Ian Leigh* shows how the growing collective dimension of religious liberty, gradually recognised by the European Court of Human Rights, increases the potential for conflict between it and individual human rights. He approves of the more recent balancing approach of the ECHR which allows taking into account the individual's right as well as Church autonomy. *Katharina Pabel* who also looks at the new case law by the European Court of Human Rights in *Obst*, *Schüth* and *Siebenhaar* is more critical of the Court's balancing exercise. She argues that the Court seems to weigh just one part of the two-part relationship, that is to say the individual applicant – thereby disregarding church autonomy but also the due reasoning of four national courts, including the constitutional court.

The question of Church autonomy and establishment in England is treated by *Peter Edge* (Oxford). He explains the current legal implications of establishment, i.e. formal involvement of the Church of England with key organs of the state which, however, should not be overstated, and State involvement in Church of England doctrine which has markedly declined. According to *Edge*, asymmetrical establishment may be possible in future, i.e. a one-sided state involvement in doctrinal disputes within religious communities in order to mould them more closely into conformity with state values. One example for this is the UK counter-terrorism strategy which also relies on the use of soft power to promote a form of Islam compatible with State goals.

In a final section, four articles are dedicated to aspects of status and organisation concerning religious communities. *Peter Cumper* (Leicester) and *Antje von Ungern-Sternberg* (Munich) analyse how religious communities participate in public life. *Peter Cumper*, after describing the privileges accorded to religious communities in Great Britain in the area of education, raises the

question, whether they are still justified in an increasingly secular setting. He claims, furthermore, that there is no automatic correlation between faith and public morality and that philosophic convictions (environmentalism, pacifists, human rights activism) are worthy and legally entitled to enjoy similar privileges. *Antje von Ungern-Sternberg* compares the British and the German model of state-religion relations in schools and universities. She argues that both models have to correspond to the principle of non-discrimination and to neutrality which does not exclude, however, that pragmatic solutions accommodate the special needs of Muslim communities.

Julian Rivers (Bristol) and *Gernot Sydow* (Limburg/Freiburg) take a closer look at organisational questions of religious communities. *Julian Rivers* demonstrates that the British legal system solves many religious issues on a very specific basis as opposed to the German system which often links them to the (public) status of the religious community – a notion unknown in Great Britain. Furthermore, he draws our attention to a gain in formal recognition and collaboration between organized religions and the state on the one hand and a loss of autonomy on the part of organized religions on the other hand. The German model of a public legal status bundling several rights ("Körperschaft des öffentlichen Rechts") and its implications for the Muslim communities are highlighted by *Gernot Sydow*. He argues that Islamic communities will have to organise themselves according to the model of the Christian churches in order to obtain the status of a public religious community which, according to his analysis, might be problematic with regard to religious freedom.

What conclusions can be drawn from the book's comparative exercise? First of all, religious establishment, at least in western legal systems like Great Britain or Scandinavia, while still bearing witness to history and culture, seems to lose many practical implications and, in any event, is no obstacle to the accommodation of religious minorities. Second, one can perceive two overall tendencies in Great Britain and Germany alike: First, the increasing religious diversity is accommodated by the acknowledgement of rights and privileges, but also by various forms of cooperation. Second, the legal orders attempt to align, to a certain degree, secular and religious values by means of hard law, i.e. to impose certain minimum standards upon religious organisations, for example, in employment law, and by means of soft incentives aimed at the integration of Muslim communities, for example. Both developments seem to be a logical consequence of the process of religious diversification. Establishing exclusive relations with a religious community and granting a large degree of religious autonomy presuppose, after all, that state and church affiliation are more or less congruent and that the values embodied in both orders are more or less homogenous. Third, it is interesting to see that the relevant minimum

requirements imposed upon religious communities and those to be respected by the state in favour of religious communities and adherents are based not only in national law, but increasingly on the European Convention and on European Union Law. Finally, some of the articles have also pointed at factual and legal impediments to religious accommodation. It is the lawyers' task to highlight these problems and to try to find feasible solutions.

The topics of this volume were presented and discussed at a conference held at the Westfälische Wilhelms University, Münster (Germany), on 1st – 2nd July 2010. We would like to express our gratitude to the Cluster of Excellence »Religion and Politics« of the University of Münster which provided the necessary financial and organisational means to host this conference. Special thanks also go to *Barbara Rox* (Münster) and the staff of the Chair of Public Law including International and European Law, Münster, for their help in organising the conference. We are very grateful that *Markus Vordermayer* as well as *Philip Nedelcu, Josef Schmid* and *Anna Perin* (München) assisted in preparing this edited volume.

München, October 2012

Christian Walter

Antje von Ungern-Sternberg

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