

Transnational Religious Law

Exemplified by the United Methodist Church

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Since there is no remedy to pressure courts who do not utilise the method of the uniform interpretation clause, the UN assumes that courts are willingly persuaded by well-reasoned foreign court decisions. Why the Courts are reticent in advancing the goals of UN uniform instruments in a transparent way is not possible to say. Whether the Courts assess the legitimacy of foreign decisions based on an analysis of the rational persuasive character or rely on other criteria is unknown as no study exists in this regard. Thus, it is confirmed that there is a need for empirical study.⁵²

14 Transnational religious law – Exemplified by the United Methodist Church

Lisbet Christoffersen

Introduction

Religion law,¹ including religious law, is one of the favourite examples in the literature analysing the development of transnational law as a perspective or a methodology.² It is a central argument in this contribution that religious law as an example of transnational law is neither new nor related solely to the impact of Islam while of course the new immanence of Islam in Northern Europe has made the societal challenge more obvious.

In this chapter, transnational law is understood as a methodological framework,³ allowing for analysis of local and transnational actors and norms, connected through 'networks' and 'migrating standards', however, not as entirely detached from national political and legal orders, but as emerging out of and reaching beyond them. Transnational law in this chapter is further understood as an approach to analyse the frustration with possible lack of accountability,

1 I thank Reverend Jørgen Thaarup and Bishop Christian Alsted, the Danish Methodist Church, for good and informative comments to the factual content of earlier versions of this chapter. The chapter, including all evaluations, is of course my responsibility. The collection of material for this chapter ended mid November 2018. Further update on the events discussed in the article are mentioned in footnote '37'.

2 Larry Catá Backer, 'On the Tension between Public and Private Governance in the Emerging Transnational Legal Order: State Ideology and Corporation in Polycentric Asymmetric Global Orders' (2012) Consortium for Peace and Ethics <http://ssrn.com/abstract=2038103> accessed 12 November 2018; Roger Cotterrell, 'What is Transnational Law?' (2012) Queen Mary University of London, School of Law. Legal Studies Research Paper No. 103/2012, p. 9. See also King's LLM: Transnational Law modules descriptions for prospective students, Full Year Module on Contesting Globalisation: New Theories on Transnational Law and Global Governance, where 'religious relations' is highlighted as 'one of the perspectives, placing enormous pressure on established theories of democracy, the rule of law and social order'. The transnational perspective on religious law is analysed in Anne Hellum, Shaheen Sardar Ali and Anne Griffiths, *From Transnational Relations to Transnational Laws. Northern European Laws at the Crossroads* (Routledge 2016, reprint from Ashgate 2011). They do, however, only analyse the case of Muslims in the European Diaspora.

3 Peer Zumbansen, 'Defining the Space of Transnational Law: Legal Theory, Global Governance & Legal Pluralism', Osgoode Hall Law School Comparative Research in Law & Political Economy, research paper no. 21/2011, p. 30 ff.

access to justice and democratic legitimacy of such regulatory frameworks. The chapter will also draw on contributions from H. Patrick Glenn⁴ on the 'margin-of-appreciation-doctrine' and from Kaarlo Tuori⁵ on perspectivism with a focus on interlegality instead of a radical pluralism.

The governance system in transnational religious communities, that keeps the internal coherence and order in such communities, is and has always been a central example of a 'parallel' legal structure, challenging the nation state's sole capacity to regulate the legal conflicts among their citizens. Religious law, such as the Canon law of the Catholic or the Orthodox churches,⁶ is the main examples of what in German theory is named 'Internes Recht der Religionen'.⁷ These systems are transnational in nature as far as the churches or religious communities they are governing are transnational.

Transnational elements also influence the legal analysis of purely national churches or religions, such as the German or Scandinavian Lutheran churches. The Scandinavian state churches are just about to develop internal legal governance structures, independent from state laws, since church autonomy did not exist for these churches from the Reformation in 1529/1536 and until the changed relations with the states around 2000,⁸ e.g. in Norway where the Church of Norway gained legal personality (2017), but also opened up for a transnational legal analysis of the extent to which the Church of Norway on the basis of international and European human rights norms and the Norwegian Constitution and Norwegian legislation has acquired or is about to acquire church autonomy. An additional question is to which extent this 'autonomy' also includes the existence of parallel religious legal orders in the country, or whether the autonomy is based on delegation from and within state law, or, as a third possibility, is based

on an understanding of collective freedom of religion and belief with autonomy as legitimised through constitutional law/human rights law.⁹

The question of the existence of 'parallel religious legal orders' is currently discussed all over Europe. For some the answer is easy: Religious law is a social system of its own with its own legitimacy and its own legality.¹⁰ Religious pluralism is a legal principle leading to the acknowledgement of parallel religious legal orders;¹¹ and the acknowledgement of these parallel legal orders is based on an understanding of freedom of religion and belief as not only covering individual rights, but also group rights.¹² The Reformation, in these perspectives, did not change the understanding of churches having a right to internal governance systems of a legal nature.¹³

In the Nordic context, the question of parallel religious legal orders is a burning issue.¹⁴ The entire legal order is established as a monolithic system on the basis of the Reformation and the 19th century constitutions, establishing legislative powers through parliament. Freedom of religion and belief in the constitutions, from 1814 and onwards, does not in these countries seem to change the picture.¹⁵ Freedom of religion and belief gives individual rights and freedoms. It also gives rights and freedoms to religious groups. However, the question to which groups such rights and freedoms can exist as a parallel legal order or in contrast to existing legislation is in these countries at best not settled; for most scholars the answer would be a simple and clear 'no' since it is the parliament which interprets the content of the basic rights to freedom of religion

9 Lisbet Christoffersen, 'Towards Re-Sacralisation of Nordic Law' in Marius Mjaaland (ed.), *Formulating Religion* (Routledge, forthcoming).

10 See Russel Sandberg, 'Religious Law as a Social System' in Russel Sandberg (ed.), *Religion and Legal Pluralism* (Ashgate 2015), Ch. 15.

11 See Dorota A. Gozdecka, 'Religious Pluralism as a Legal Principle' in Russel Sandberg (ed.), *Religion and Legal Pluralism* (Ashgate 2015), Ch. 11.

12 See e.g. Ch. 11: 'Religious Group Autonomy' in Rex Adhar and Ian Leigh, *Religious Freedom in the Liberal State* (Oxford University Press 2005).

13 John Witte, Jr., *Law and Protestantism. The Legal Teachings of the Lutheran Reformation* (Cambridge University Press 2020); Wim Decock et al. (ed.), *Law and Religion. The Legal Teachings of the Protestant and Catholic Reformations* (Vandenhoeck & Ruprecht 2014). See, however, also Virpi Mäkinen (ed.), *Lutheran Reformation and the Law* (Brill 2005).

14 See, as an example, the qualitative analysis of the existence of private religious law in Denmark in Anika Liversage and Tina Gudrun Jensen, *Parallele retsopfattelser i Danmark. Et kvalitativt studie af privatretlige praksiser* (SFI – Det Nationale Forskningscenter for Velfærd 11-37). The analysis leads to legislative initiatives aimed at stopping the development of such practices. See also Rubya Mehdi et al., *Law and Religion in Multicultural Societies* (Jurist- og Økonomiforbundets Forlag 2008) and Lisbet Christoffersen, 'Is Shari'a Law, Religion or a Combination?' in Jørgen S. Nielsen and Lisbet Christoffersen (eds), *Shari'a as Discourse. Legal Traditions and the Encounter with Europe* (Ashgate 2010) 57.

15 Christoffersen et al., *Law & Religion in the 21st Century. Nordic Perspectives* (n. 8). See also the HERA-funded research project (2016–2019) *Protestant Legacies in Nordic Law: Uses of the Past in the Construction of the Secularity of Law* <https://teol.ku.dk/pronola/> accessed

4 H. Patrick Glenn, 'Transnational Legal Thought: Plato, Europe and Beyond' in Miguel Maduro, Kaarlo Tuori and Sivi Sankari (eds), *Transnational Law. Rethinking European Law and Legal Thinking* (Cambridge University Press 2014) 61.

5 Kaarlo Tuori, 'Transnational Law: On Legal Hybrids and Legal Perspectivism', in Miguel Maduro, Kaarlo Tuori and Sivi Sankari (eds), *Transnational Law. Rethinking European Law and Legal Thinking* (Cambridge University Press 2014) 11.

6 See e.g. Richard Potz and Eva Synek (unter Mitarbeit von Spyros Troianos), *Orthodoxes Kirchenrecht. Eine Einführung* (Verlag Pöchl 2007).

7 Josef Berkmann Buckhard, *Internes Recht der Religionen. Einführung in eine vergleichende Disziplin* (Verlag Kohlhammer 2018). For other examples, see e.g. Francis Lyall, *Of Presbyters & Kings. Church & State in the Law of Scotland* (Aberdeen University Press 1980); Mark Hill, *Ecclesiastical Law* (4th edn, Oxford University Press 2018).

8 See, for this concept, Gerhard Robbers, *Church Autonomy. A Comparative Survey* (Peeters 2001). For a discussion of the developing autonomy in the Scandinavian, previously established churches, see Lisbet Christoffersen, Kjell A. Modder and Svend Andersen (eds), *Law & Religion in the 21st Century. Nordic Perspectives* (Jurist- og Økonomiforbundets Forlag 2010) and Lisbet Christoffersen, 'The Argument for a Narrow Conception of "Religious

and belief.¹⁶ Therefore, an acknowledgement of religious law on the basis of a transnational law analysis could be regarded as a challenge to the entire legal system.

This question of the existence of a legal right to organise transnational religious law and the obligation for national legal orders to accept such legal norms is in this chapter seen as the question of the existence of a transnational religion law. The analysis in this chapter takes its point of departure in the empirical fact that religious governance systems of a legal nature actually exist, also in the Nordic countries, and that many of these religious laws are transnational.

The example analysed in this chapter is the internal legal system of the United Methodist Church. The material for the analysis is the regulatory levels, actors and norms within the 'hard' law of the United Methodist Church. The United Methodist Church was created on 23 April 1968 by a unification of different Methodist and Brethren churches worldwide, including the Danish Methodist Church. The churches trace their historical roots back to the Wesleyan awakening, starting in America in March 1736.¹⁷ After World War II, the Methodist churches were active in developing worldwide organisations of Methodists as well as supporting the development of the World Council of Churches as a parallel to the United Nations. Three elements were central for the uniting of the Methodist churches: the concern for further church ecumenicity; a growing uneasiness with the problem of racism in both the nation and the church; and the full clergy rights for women established in 1956 in the Methodist Church. Since the establishment in 1968, the United Methodist Church has included more member churches all over the world, and since 1980 it has included female bishops. The Methodist Church sees itself as 'a community in which all persons, regardless of racial or ethnic background, can participate in every level of its connective life and ministry'.¹⁸

Methodism includes a central statement¹⁹ on the relation to the laws of the land:

It is the duty of all Christians, and especially of all Christian ministers, to observe and obey the laws and commands of the governing or supreme authority of the country of which they are citizens or subjects or in which they reside, and to use all laudable means to encourage and enjoin obedience to the powers that be.²⁰

16 Jens Peter Christensen, Jørgen Albæk Jensen og Michael Hansen Jensen, *Dansk Statsret* (Jurist- og Økonomiforbundets Forlag 2012) 371.

17 *The Book of Discipline of the United Methodist Church*, 2012 and 2016, Historical Statement.

18 *The Book of Discipline of the United Methodist Church*, 2012, 22. *The United Northern Europe and Eurasia Central Conference 2012 supplement to the Book of Discipline*, 2012, explains how the European, Nordic and Baltic churches as well as the Russian Methodist churches became affiliated with the United Methodist Church; see 'Addition to the Historical Statement', pp. 7–14.

19 In one of the 25 foundational norms in the Book of Discipline.

20 *The Book of Discipline of the United Methodist Church*, 2012, p. 70, quoted in full length.

At the same time, Methodism expects from governments and legislators that they ensure civil rights and take responsibility for developing just societies.²¹

It is, among other things, against this background that the current (Danish born) bishop of the Nordic and Baltic area of the United Methodist Church Northern Europe and Eurasia Central Conference claims: 'Methodism is moderate and not fundamentalist'.²² It could, seen in that light, at least for a scholar from the Nordic countries, appear surprising that the United Methodist Church is legally organised with its own internal constitution, with by-laws and with a Judicial Court (Judicial Council) on both a global and regional level, delivering rulings on the constitutionality of legislative changes to the Book of Discipline and declaratory decisions on interpretation or constitutionality of existing paragraphs.²³ This transnational, legally based organisation with a division of powers between legislative, executive and judiciary, including a right to judiciary review, is a key to the understanding of the Methodist Church, e.g. the Danish Methodist Church has thus also been bound by the internal transnational regulation of the church since its establishment in 1859.

The choice of the legal structure of the United Methodist Church as the empirical example of this analysis of religious law as transnational law is taken exactly on the background of such a (possible) surprise; thus, it is not only 'bad religions'²⁴ that set up their own transnational legal structure, parallel to the legal structures of the home countries. As mentioned earlier, even 'good religions', such as the Methodist Church, do so, and even in our countries.

The first level analysis in this article then explains how the hard law of the United Methodist Church identifies the different legal actors, norms and procedures in the internal, religious law.²⁵ The second level analysis discusses this legal system seen in relation to the 2017 Danish *law on religious communities*²⁶ and the presumptions in that law regarding collective freedom of religion and belief. This analysis has been performed in order to identify possible areas of conflict between the religious law and the religion law of Denmark. The third part of the analysis

21 This position also opens up for the possibility of non-violent civil disobedience, and the individual must be prepared to accept the costs of disobedience; see Social Principles, *Book of Discipline* 164 F.

22 Christian Alsted, 'Overvejelser om styreform i en mindretalskirke i lyset af de nordiske flertals kirkemodeller'. Paper given at a conference at Roskilde University, 25 August 2015 (can be required by the author of this chapter).

23 About the Judicial Council and the Central Conference, see: www.umc.org/who-we-are/nce/boards-and-committees accessed 12 November 2018, www.umc-ne.org/central-conference accessed 12 November 2018.

24 As it is formulated in a research project at the Faculty of Theology, University of Oslo: bad religions – good religions.

25 The material for the analysis of the Methodist Church law is *The Book of Discipline of the United Methodist Church*, 2012, *The Book of Discipline 2012 Supplement*, adapted by the Northern Europe and Eurasia Central Conference, 17–21 October 2012; and *The Book of Resolutions of the United Methodist Church*, 2012.

26 Lov nr. 1533 af 19.12.2017 om trossamfund udenfor folkekirken www.retsinformation.dk/Forms/R0710.aspx?id=196402 accessed 12 November 2018.

discusses questions of legitimacy and legality concerning transnational religious law in a system of religion law, the main question being how citizens, who are both religious and secular in their life style, can give legitimacy to a religious law such as the Book of Discipline of the United Methodist Church.

The Book of Discipline and the Book of Resolutions of the United Methodist Church: a transnational legal order of religious law

It is central in Methodism that faith and order are congruent.²⁷ It is equally central that the churches are independent from any state regulation. That the members are expected to abide by the law of the land, as mentioned earlier, is not the same as to accept state regulation of church affairs. The United Methodist Church has grown in American law and religion structures with a constitutional wall of separation between church and state; that is also what is expected around the world.²⁸

The churches are organised in a synodal structure. The first level is the local congregation where all eligible members have a voice and vote in the church conference and elect delegates to the annual conference in the area (i.e. in Denmark). Eligibility is obtained by being baptised and additionally having publicly declared to be prepared to support the church through active membership, payment, etc. Of course, it is also a condition that no declaration of lack of eligibility is formulated by a decision of the Court due to, e.g. lack of moral. The annual conferences elect delegates to the General Conference for all churches within the United Methodist Church (the denomination's highest legislative body) and to the Central Conference (which has the authority to make adaptations to the Book of Discipline for the area). The Central Conference has the authority to elect and appoint bishops. The Central Conference, to which the Danish Methodist Church belongs, is the Central Conference for Northern Europe, and Eurasia. Decisions by bishops on law are mandatory referred for judicial review to the Judicial Council, which assembles on a regular basis four times a year with a fixed calendar, also for bringing in petitions.²⁹ Members of the Judicial Council cannot be elected as members of the legislative body, the conferences. Likewise, as further dimension of distinction of powers, the bishops do not have the power to propose legislation in the conferences, and they do not have voting rights in the councils.

27 Alsted (n. 22) 1. This paper serves in the following as an easy access to the explanation of legal actors, norms and procedures.

28 See e.g. Cole W. Durham, Jr., 'Facilitating Freedom of Religion and Belief through Religious Association Laws' in Tore Lindholm et al. (eds), *Facilitating Freedom of Religion and Belief: A Deskbook* (Martinus Nijhoff 2004) Ch. 15.

29 See the Calendar for the Judicial Council www.umc.org/who-we-are/calendar-for-judicial-council accessed 12 November 2018.

In the following, I will explain the actors, the norms and the procedures in regard to one single case which might enforce the United Methodist Church to split up – or to change its faith and order.

On 16 July 2016, an openly lesbian female priest, Karen Phyllis Oliveto, living in registered partnership, was elected, consecrated and assigned to an episcopal area as a bishop in the Western Jurisdiction of the Methodist Church in the United States.³⁰ The immediate response from the neighbouring district, the South Central Jurisdictional Conference, was to petition a motion to the Judicial Council of the United Methodist Church. They asked the council to explain whether the nomination, election, consecration and/or assignment as bishop of a person who claims to be a 'self-avowed practicing homosexual' or is a spouse in a same-sex marriage or civil union could really be in accordance with the Book of Discipline.

In order to petition a case before the Judicial Council, the council must have jurisdiction. That became clear in another decision from the council, related to the same conflict. The UMC Denmark Annual Conference had petitioned the Judicial Council for a declaratory decision on the legality of the sentence added to the Book of Discipline (161.G), '[...]and considers this practice incompatible with Christian teaching'. The General Conference in 2016 had thus strengthened its disciplinary ordering regarding homosexual marriage by saying not only that the church does not condone the practice of homosexuality, but also that the church considers this practice incompatible with Christian teaching. As a reaction to this strengthened wording in the doctrine came, first, the consecration of an openly lesbian female bishop – and next, a petition from Denmark that the strengthened wording was against the doctrine of the Methodist Church.

However, the Danish petition was deemed outside the jurisdiction of the Judicial Council.³¹ The Judicial Council can answer questions from the General Conference and from parallel jurisdictions, but only from the local, annual conferences (the local national churches) if the wording is directly relevant for the work in that church. So, if the Danish church should have received an answer, then they should have shown directly that the changed wording would order them to dismiss a loyal worker or the like. Or the Danish church should have persuaded the entire Northern Europe Central Conference to petition with them.

That was what the South Central Jurisdictional Conference did. At the moment the female lesbian bishop was consecrated, they declared the entire process illegal and against the order and faith of the Methodist Church. This petition

30 See Kathy L. Gilbert, 'Married lesbian consecrated United Methodist bishop' (16 July 2016) www.umnews.org/en/news/married-lesbian-consecrated-united-methodist-bishop accessed 12 November 2018.

31 The Book of Discipline uses a reference system, equally to paragraphs, which is also used in this sentence.

32 Memorandum no. 1347 from the Judicial Council of the United Methodist Church http://s3.amazonaws.com/Website_Properties/who-we-are/judicial-council/decisions/pdf/Memorandum_1347_final.pdf accessed 12 November 2018.

was – partly – deemed within the jurisdiction of the Judicial Council.³³ The majority of the council voted that the consecration of the bishop was against the Book of Discipline; a minority found that not only the consecration, but also the nomination, the election and the placement of the bishop and thus the entire process was to be evaluated within the jurisdiction of the Court and seen as illegal, whereas another minority found that the Court had no jurisdiction at all in the case. The consecration of a bishop is, according to the majority in this case, a question for the entire United Methodist Church. Therefore, the Judicial Council ordered the Western Jurisdiction to raise a case against Karen Oliveto in order to analyse whether she can remain in office.

The norms in play concerning the procedure, the jurisdictional questions and the norm on whether a bishop can live in a same-sex relationship are all to be found in the Book of Discipline, which is a full law book.

Facing a threatening schism based on different positions to homosexual practice, the 2016 General Conference asked the Council of Bishops to organise a commission to analyse a possible ‘Way Forward’³⁴ for the church and eventually call an extraordinary General Conference, focusing on this thematic. Such a Special Session of the General Conference is called to be held in St Louis 23–26 February 2019. The three different solutions are 1) the One Church Plan, allowing for individual churches and conferences to decide on these questions locally, while the United Church remains as one church – this is a plan which includes a series of changes to the Book of Discipline, leaving questions of same sex marriage and ordination to a local and annual conference decision; 2) the Connectional Conference Plan, which basically divides the United Methodist Church into two or three different sub-churches and includes several amendments to the constitution of the Church; and 3) the Traditionalist Plan, which leaves the Book of Discipline as it is while it strengthens accountability of pastors, annual conferences and bishops with strict judicial enforcement and leaves it to local churches if they do not want to continue their membership. But plans 2 and 3 involve questions of payment for the pension of bishops and priests as well as questions of ownership of churches. Making it easier for local churches to leave the denomination with all their property and assets is a separate set of petitions. Currently, local churches are able to leave the denomination only with the approval of the annual conference as all property and all assets by law belong to the annual conference. The Judicial Council has now been asked by the Council of Bishops to make a declaratory decision regarding the constitutional-ity of all three plans. The decision was taken at the Judicial Council meeting of

23–26 October 2018 in Zürich.³⁵ The decision was unanimous. The Judicial Council found that the One Church Plan (no. 1) with few exceptions is constitutional while the Traditionalist Plan (no. 3) contains several problems with the constitution, mainly in separating out one chargeable offence and moral issue over others. Since the Connectional Conference Plan (no. 2) contains constitutional changes required for implementation, the Judicial Council ruled that it had no authority to scrutinise the plan at this time.³⁶

Seen through the lenses of *transnational law as a methodological approach*, it is thus possible to identify all the common elements of a legal order in the internal religious law of the United Methodist Church. We can identify legal norms in the Book of Discipline, consisting of Part I, the constitution, which sets up the different institutions, here explained, including a distinction between legislative, executive and judiciary powers. Parts II–III explain the doctrinal standards; Part IV, the ministry and the requirements for a person who wishes to join the ministry; and Part V, the Social Principles. It is in Part V that the rulings regarding the understanding of ‘the Social Principles’, including norms regarding the family, marriage, divorce, single persons, women and men and human sexuality, are described, and it is these norms, which of course also apply to the ministers, that are currently under discussion. Part VI then regulates organisation and administration, including the organisation of the local church, the ministry of the ordained, the bishops, the conferences, the administrative order, the church property and the judicial administration, as explained earlier. All of these regulations are in play in the proposed three different solutions to be discussed in February 2019.³⁷

Chapter seven of Part VI regulates in further detail the judicial administration. It sets up the Judicial Council and regulates investigations, trials and appeals. Procedures are set up for referral and investigation of a judicial complaint, for trials and for appeals. Even a list of chargeable offences for bishops, clergy members of an annual conference, local pastors, clergy on honourable or administrative

35 Linda Bloom, Kathy L. Gilbert and Vicki Brown, ‘Court docket details proposed plans for UMC’ (18 July 2018) www.umnews.org/cn/news/court-docket-details-proposed-plans-for-umc accessed 12 November 2018. See also Docket no. 1018-12 www.umc.org/who-we-are/judicial-council-october-2018 docket accessed 12 November 2018.

36 The decision will be published at the home page of the Court.
37 The 2019 special session General Conference in the United Methodist Church took place in St Louis 23–26 February 2019, see <http://www.umc.org/topics/general-conference-2019-special-session>, accessed 1 April 2019. Apart from the three plans, previously mentioned, there was also a fourth plan, called The Simple Plan proposed, <http://www.umc.org/who-we-are/general-conference-2019-legislation>, accessed 1 April 2019. The conference ended by passing the Traditionalist Plan (438 for, 384 against). Added to this was a Disaffiliation plan (or exit plan). The result is thus a strengthening of the overview and check on the anti-homosexual dimensions of the book of discipline, especially against practicing pastors. Before the 2019 Special Session of General Conference closed, a motion was passed (405-395) to request a decision from the Judicial Council on the constitutionality of the Traditional Plan’s legislative petitions. The bishops have requested a ruling on the constitutionality of the disaffiliation plan also. These issues will be addressed by the Judicial Council when they gather in Evanston, Illinois, 23–25 April 2019.

33 Decision no. 1341 from the Judicial Council of the United Methodist Church http://s3.amazonaws.com/Website_Properties/who-we-are/judicial-council/decisions/pdf/decion_1341.pdf accessed 12 November 2018. Decisions and memoranda can be found at www.umc.org/decisions/search, accessed 28 March 2019.

34 Commission on a Way Forward’s Report to the General Conference, July 2018; for an explanation in the Danish Methodist church about the conflict, see www.metodistkirken.dk/2017/06/08/kirke-med-alle-mennesker/ accessed 12 November 2018.

location or diaconal ministers (Art. 2702) is made. The list includes immorality, including but not limited to not being celibate in singleness or not faithful in a heterosexual marriage, practices declared by the United Methodist Church to be incompatible with Christian teachings, including but not limited to being a self-avowed practicing homosexual, etc. The formulations concerning homosexuality (including but not limited to [...]) were added in the 2004 Book of Discipline, which entered into force from 1 January 2005. The list further includes, among other things, crime and disobedience to the order and discipline of the United Methodist Church. The list proceeds and includes also child abuse (listed from 1996). The list ends with racial or gender discrimination.

Thus, it is possible to conclude that the Book of Discipline of the United Methodist Church establishes a legal order with actors, norms and procedures. The legal order is transnational. It is not bound to any national legal order. Neither is it international, being constituted by relations between national states. It is a legal order which establishes norms that are binding for private individuals, living in diverse countries, following the institutional and judicial commands on the basis of them being part of the church. The Book of Discipline includes all the elements that we on a methodological basis³⁸ (cf. the Introduction to this chapter) normally require of a transnational legal order.

The Danish law on religious communities versus the religious law of the Methodist Church

Full freedom of religion and belief is ensured in the Danish Constitution and has been so since 1849, also without any formal recognition from the side of the state.³⁹ However, a system of royal acknowledgements was established during Absolutism. The Catholic Church, the Reformed Churches and the Jewish Community were acknowledged already in the constitution. The religious communities understood this system of acknowledgement as a formal approval of their existence from the side of the public authorities. It was a condition for performing marriages with civil authority, and later on it became a condition for indirect economic support.⁴⁰ Thus, as the first example after the constitution, the Methodist Church was also granted acknowledgement by a royal decree in 1865.

38 Cf. Zumbansen (n. 3).

39 'Citizens shall be at liberty to form congregations for the worship of God in a manner which is in accordance with their convictions, provided that nothing contrary to good morals or public order shall be taught or done', My Constitutional Act with Explanations, section 67, published by the Parliament, see www.ft.dk/-/media/pdf/publikationer/english/my_constitutional_act_with_explanations.aspx accessed 12 November 2018. The translation of the wording is at the same time an interpretation of the text. See also Lisbet Christoffersen, 'State, Church and Religion in Denmark at the Beginning of the 21st Century' in Lisbet Christoffersen, Kjell Å. Modéer and Svend Andersen (eds), *Law & Religion in the 21st Century: Nordic Perspectives* (Jurist- og Økonomiforbundets Forlag 2010) 145–161.

40 See Lisbet Christoffersen, 'A Long Historical Path Towards Transparency, Accountability and Good Governance: On Financing Religions in Denmark' in Francis Messner (eds), *Public Funding of Religions in Europe* (Ashgate 2015) 125–149.

The system behind the public acknowledgement and not least the system of royal decrees have been changed a number of times during the second half of the 20th century. The conditions laid down by a committee analysing the applications from different religious communities were, however, evaluated as increasingly illegitimate without firm basis in public legislation. Especially conditions concerning equal treatment of men and women in the organisational structure (not in the ministry) were seen as requiring a legislative basis. Therefore, a committee suggested a new Danish law regulating the formal conditions for being a religious community in Denmark.⁴¹ The committee suggested that it should still be possible to exist as a religious community without any public consent, approval or acknowledgement. However, if a religious community wanted to obtain indirect economic support or to perform marriages with civil authority, an acknowledgement would be a condition. The majority of the committee further proposed that a condition for such an approval should be that religious communities live up to principles of equality (between men and women, non-discrimination on grounds of race or sexuality, etc.). A minority recommended, on the basis of a tradition for free organisational rights in Denmark, that such a condition should not be set up and thus suggested that previous practice be changed. It should be added that Denmark, in 2012, by law introduced marriage for same sex partners and at the same time introduced such marriages both at the civil authorities and in the national church. The possibility for other religious communities and in marriages with civil authorisation was upheld, and this possibility is open also for other religious communities. In order to receive authorisation to perform marriages, the religious communities must live up to the regulations in the new law on religious communities. However, it is worth underlining that no religious community is forced to perform marriages of partners of the same sex. In this regard, the Danish Methodist Church follows the regulations of the United Methodist Church – even though there are voices arguing for other solutions.⁴²

Thus, Danish law does not jeopardise the current practice and interpretation of the Book of Discipline within the Danish Methodist Church. Depending, however, on the developments in the Danish Methodist Church, as explained earlier, the question could become of relevance. The Council of Danish Churches, of which the Danish Methodist Church is a member, in their comments to the committee report, therefore, also stressed the necessity that no Danish legislative initiatives would interfere with the internal affairs of religious communities.⁴³

41 Kirkeministeriet, *En samlet lovregering om andre trossamfund end folkekirken*. Betænkning 1564/2017.

42 Claus Vincent, 'Det siger trossamfundene om homoseksuelle vielser', *Kristeligt Dagblad* (14 December 2011) www.kristeligt-dagblad.dk/kirke-tro/det-siger-trossamfundene-om-homoseksuelle-vielser accessed 12 November 2018.

43 See https://frikirkenet.dk/sites/default/files/pdf-upload/170425_dkr_hoeringsvar_til_betaenkning_fra_trossamfundsudvalget.pdf accessed 12 November 2018.

The subsequent law on religious communities outside the national church,⁴⁴ approved by Parliament in December 2017, did not include requirements concerning equal treatment in the religious organisations. Neither did the law include equal treatment regarding members and their rights nor equal treatment regarding eligibility in internal elections to organisational posts or access to religious rituals. Already, when the commission report was published, the government informed the public that the minority would be supported, and no majority in Parliament wished to follow previous practice. The responsible minister stated in Parliament that she would not propose a law requiring equal treatment of men and women in the organisational framework of religious communities (however, *outside* ministry). Her argument was that such a proposal would affect the Catholic Church. The effect on the Catholic Church is, however, not legal, and no legal conflict between such a requirement in Danish law and Canon law would have been established.

One could, of course, have expected that the argument behind this position would be an argument formulating respect for transnational religion law, including the 'no-interference-into-internal-affairs' argument or the 'church autonomy' argument. The argument could have run as follows: The European Convention on Human Rights includes a right to freedom of religion and belief. That right is understood, in a series of Strasbourg cases, as also securing collective and organisational freedom of religion and belief, including to some extent a 'ministerial exemption' from the general law, however, balanced against other human rights.⁴⁵ Thus, *church autonomy* seems to be an acknowledged right, at least in American jurisprudence and at least to a certain extent in European jurisprudence.⁴⁶

However, the Danish legislators did not argue their case on the basis of respect for transnational religious law. It is still debated among Danish legal scholars on religion to which extent church autonomy is a legal requirement binding the Danish legislative authorities, and it is especially debated when it comes to legislation giving the religious communities rights on the basis of public authorisation.

The law states that a religious community can freely organise itself within the limits of the law as well as freely organise and perform rituals on the condition that these are within the limits of the law. The formulation could be understood as a possibility for the legislative authorities to limit freedom of religion and belief further than stated in international conventions. That is, however, not the purpose – the by-law (para. 2.2.2) underlines that any legislative proposal must live

up to the general (transnational religion law) standards, requiring proportionality, among other things, for a law to be seen as constitutional.

The government's decision not to go further into the legal requirements to the religious communities must instead be evaluated as an attempt to escape a *legal* transnational conflict within religion law concerning the proportionality of a central point in religious laws among the oldest 'minority' religions in Denmark. The transnational legal order of religion law is not directly approved of – but it is also not directly confronted.

Legitimacy behind a transnational religion law allowing discrimination on the basis of sexuality

The transnational dimension of hybrid regulatory actors and newly emerging forms of norms radicalizes the semi-autonomous nature (of hybrid legal spaces, my insertion) and we begin to conceive of regulatory spaces as being marked by a dynamic tension between formal and informal norm-making processes.

This is a quotation from Peer Zumbansen,⁴⁷ who proceeds by illustrating 'the frustration with the lack of accountability, access to justice and democratic legitimacy of the evolving regulatory frameworks'.

In his recent contribution on transnational legal thought, H. Patrick Glenn underlines the 'multivalent logic' in existing European legal practice.⁴⁸ In order to unpack that concept, he especially refers to the *margin of appreciation* of the European courts. The idea is that European courts, especially when it comes to the interpretation of fundamental freedoms and rights such as protection of family life, freedom of religion and speech, freedom of association, etc., have to some extent a tendency to interpret these rights in accordance with the national cultural understanding. The margin of appreciation is especially in use if the national authorities at the highest possible, legislative level have themselves balanced these rights against each other and have included the basic conditions concerning necessity and proportionality regarding regulation in a democratic society.⁴⁹ The idea is that the national parliaments are the first interpreters of international conventions, and they must (also) abide by international law. Such compliance can take many shapes – among them not making a legal conflict and just refer to cultural norms, keeping freedoms and rights for religious minorities, as in the mentioned Danish example. In this regard it is a central point that legitimacy and accountability are upheld in the understanding of both sides: the Danish parliamentary understanding of representative democracy as the sole law-maker is kept,

44 Lov nr. 1533 af 19/12 2017 om trossamfund uden for folkekirken (n 26).

45 See, for a discussion of some of the latest cases, Emma Stensson, 'Religious Ethos, Bond of Loyalty, and Proportionality – Translating the "Ministerial Exemption" into "European"' (2015) 4 *Oxford Journal of Law and Religion. Special Issue on Ministerial Exemption 22A–2A3*.

46 See the Special Issue 2015 of *Oxford Journal of Law and Religion on Ministerial Exemption*, discussing exactly to which extent ministerial exemption from the law of the land is part of an international law understanding of freedom of religion and belief.

47 Zumbansen (n. 3) 31 ff.

48 Glenn (n. 4) 69.

49 See also the Copenhagen Declaration of April 2018 on the reform process of the European Court of Human Rights, www.justitsministeriet.dk/sites/default/files/media/Forsidebilledder_2018/copenhagen_declaration.pdf.

and at the same time the religious communities are free to keep their internal understanding of (lack of) equal treatment. Left behind is a general concept of equal treatment in 21st century society.

Kaarlo Tuori discusses transnational law as an example of legal perspectivism. He identifies transnational law as a deficiency of the black box model not least in regard to legal orders that have emerged from autonomous operation of denationalised social subsystems.⁵⁰ Religious law, as I have analysed it earlier, is such an example. He then analyses the fundamental conflict of authority established by the existence of such systems where 'rival legal orders, with diversely defined jurisdictions and enforced and ensured by at least partly different institutions, are competing for authority in the same territorial and social space'.⁵¹ Conflicts of authority, according to Tuori, are almost bound to arise in areas where 'the substantively limited claims of transnational law confront the universal and exclusive pretensions of national law'.⁵²

Tuori, against this background, identifies three versions of radical pluralism: (1) the Kelsenian position, which is behind Nordic legal positivism, as represented also behind the legislation presented above, (2) a critical legal version of legal pluralism and (3) as well as a Luhmannian version of legal pluralism. Both versions of legal pluralism (2 and 3, mentioned here) are represented by different versions of the American argument in favour of a *wall of separation* between secular law and religious law. Recent representatives of these critical or Luhmannian versions of legal pluralism within the field of religion law are, e.g. Levey and Modood arguing for a multiculturalist version of religious law's right to exist parallel to secular law in society.⁵³ Another example is a Swedish legal scholar who argues that Muslims want to follow Islamic law, also when living in Sweden, and that they have a cultural, legitimate right to do so.⁵⁴ More Luhmannian in his approach (without directly quoting him) is perhaps Rivers claiming the legal freedom of the Anglican Church in England, based on the concepts of legal secularism.⁵⁵ Also, the publications from the RELIGARE project build on the idea that societal law is secular and as such does not have any legitimacy in regulating (internal) religious affairs.⁵⁶

50 Tuori (n. 5) 23.

51 Tuori (n. 5) 27.

52 Tuori (n. 5) 31.

53 Tariq Modood, 'Muslims, Religious Equality and Secularism' in Geoffrey B. Levey and Tariq Modood (eds), *Secularism, Religion and Multicultural Citizenship* (Cambridge University Press 2009) Ch. 7.

54 Mosa Sayed, *Islam och arvrit i det mångkulturella Sverige. En internationellt privatrettslig och jämförande studie* [Islam and Law on Inheritance in the Multicultural Sweden. A Private International Law and Comparative Law Analysis] (Justus Förlag 2009) Ch. 1.

55 Julian Rivers, *The Law of Organized Religions. Between Establishment and Secularism* (Oxford University Press 2010) Ch. 11. See also Sandberg (n. 10).

56 Marie-Claire Foblets et al. (eds), *Belief, Law and Politics. What Future for a Secular Europe?* (Ashgate 2014).

Tuori puts his hopes in *legal dialogists*.⁵⁷ They realise that perspectivism does not necessarily condemn legal orders, but may imply resources for dialogue and cooperation. Tuori refers to the development of a new *ius commune* with *ius gentium* norms prevailing over the different *iura propria* conflicts and norms. The idea is the existence of an emerging *non-state constitutionalism* to which such transnational legal orders relate.

Thus, transnational law on religion points to two different strands of legitimacy: either the clear-cut idea of parallel legal orders – a secular order for the state and religious legal orders for the religious communities. This type of legitimacy builds on the idea that citizens are either religious (thus supporting religious legal orders with legitimacy) or secular (thus providing states with legitimacy). Tuori's own suggestion is legitimacy gained for the entire legal order, including transnational legal religious norms in the churches, based on a dialogue format, including all citizens in the state. According to that idea, legitimacy builds on citizens, no matter how religious or non-religious they are. That is, of course, a type of legitimacy which has a much better empirical foundation since there is no doubt that people are both religious and secular at the same time. It is, on the other hand, a type of legitimacy which does not establish a clear power foundation for the internal forces in religious communities.

Conclusion

I want to listen optimistically to Tuori's ideas of a developing legal dialogism, keeping legal order with developing transnational legal orders, attached to a common *ius commune* based on *non-state constitutionalism*. My empirical example for this chapter, the United Methodist Church, is relevant in that context. The church was leading, in the United States, in Europe and elsewhere, in fighting against discrimination of women and of black people. Should we therefore ever expect to find an organisation within the increasing transnational religion law, which in its religious law would also include homosexuals on an equal human basis; it would be expected from the United Methodist Church.

However, the United Methodist Church is becoming global. The increasing identification of homosexuality as against the church order during the last 20 years has led to a confrontation which comes before the board at the extraordinary global meeting in February 2019 as well as in the Judicial Council late October 2018. The church builds on transnational law. The understanding until now has been that the religious law of the church is never in conflict with secular law. However, the religious law of the church now faces a conflict where an increasing radical pluralist transnational legal understanding in the church confronts a tradition of transnational law, based on legal dialogue. A conflict between internal legitimacy solely versus internal legitimacy, confronting and leading society on the basis of its identity as a liberal, Christian church.

Transnationalisation and Legal Actors

Transnational tendencies have led to a pluralistic legal environment in which emerging and established legal actors, regulatory levels and types of legal norms co-exist, compete and interact in complex ways. This challenges and changes not only how legal norms are created, applied and enforced but also when these actors, norms and processes are considered legitimate. The book investigates how states and non-state actors interact in transnational settings and pays attention to the understudied question of what effect transnational tendencies have on the legitimacy of legal actors, norms and processes. It seeks to confront three fundamental questions: Has legitimacy significantly changed? Who creates norms and with which consequences for legal procedures and norms? The book considers the question of legitimacy from a broad range of legal perspectives, including environmental law, human rights law and commercial law. It maps out the contours of legitimacy today with an emphasis on the reactions of central actors like states and courts to transnational tendencies. The book thereby provides a conceptually powerful structure within which to further debate the complexity of transnational tendencies in law and proposes innovative approaches to problem solving while designing pathways for further reflection on the development of law in a transnational context.

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Transnationalisation and Legal Actors Legitimacy in Question

Edited by
**Bettina Lemann Kristiansen,
Kateřina Mitkidis, Louise Munkholm,
Lauren Neumann and Cécile Pelaudeix**

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Preface

The core idea for this volume emerged at a workshop for researchers from the INTRALaw Research Centre at Aarhus University in June 2015. INTRALaw is a cross-disciplinary research centre with a focus on research in a broad range of transnational, primarily legal fields. From the presentations and discussions at a series of workshops in the period 2015–2017, it became clear that some topical, crosscutting issues were emerging, namely the changing roles of actors in transnational law development and law enforcement and the question of legitimacy in transnational law.

The contributors to this volume include a significant number of the INTRALaw Research Centre's internal affiliates as well as invited scholars, who have participated in various INTRALaw events over the past three years. We would like to thank the contributors for their significant efforts to ensure theoretical consistency in this volume and also for their patience with the length of the process of adequately defining the topics and the theme of this book.

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The editors are listed alphabetically. This is due to the fact that this volume is the result of a close collaboration where all editors contributed equally, yet in different functions and in different phases of the work.

This volume reflects the law as it stood, to the best of the authors' knowledge, in November 2018. These areas of law are, however, by their nature still developing. Readers are advised to stay abreast of more recent legislation and case law.

Aarhus University, December 2018.
Bertina Lemann Kristiansen, Kateřina Mitkidis,
Louise Munkholm, Lauren Neumann and
Cécile Pelaudéix