INTERTWINEMENT: A NEW CONCEPT FOR UNDERSTANDING RELIGION-LAW RELATIONS

Abstract

Opening with a presentation of law & religion discourses this article discusses whether relations between these two normative systems can still best be understood within the concept of separation, or whether empirical arguments taken from the discourse of Church Autonomy and from empirical realities of a negotiated secular-religious identity for many European Church members make the concept of intertwinement more relevant. The normative implications and the relevance also for religion-society relations and religion-politics relations are touched on and the article argues for the need for further investigation.

Key words: Law & religion. Secularism. Church-State-Relations. Intertwinement.

Law & Religion

In recent legal theory it has become common to allow the concept Law & Religion to cover a very wide range of studies, focussing on possible relations between the two concepts seen from legal as well as religious perspectives (see e.g. Witte Jr. et al. 1996; Witte Jr. 2002; Witte Jr. et al. 2006; Lindholm et al. 2004; Modéer 2001; Modéer 2004; Christoffersen et al. 2005).

In German and the Scandinavian languages there are several concepts for the field covered by Law & Religion studies. One would be Religionsrecht, covering all legal regulations by society of religious affairs, typically seen from outside the religious institutions involved (Kalb/Potz/Schinkele 2003). Freedom of religion for the individual, relations between religious organisations and the public as well as general regulations which have an impact on the way religious norms are treated in a given society would be covered by this concept. The German concept of Staatskirchenrecht (Campenhausen 1996) was its predecessor, but was left behind because of its obvious relation to a structure with states relating only to Christian churches. Kirchenrecht or Ecclesiastical Law, that is: a legal analysis of the internal structure of a given religious
organisation, covers questions that could also be analysed within a context of Law & Religion, at least to the extent that there is a common understanding of divisions between the legal structure of societies and the different legal structures of the relevant religious institutions or organisations.

To focus on these more dogmatic discussions I have previously chosen the term Law on Religions in English as comparable to Religionsrecht (Christoffersen 2005a; Note 1) in German and Danish. However, in a recent book Peter W. Edge (Edge 2006) gives another solution by simply changing the words around. Under the concept Religion and Law he discusses all the issues in the religious dimensions of a society from a legal-dogmatic point of view. However, the problem seems to be that he does not allow any religious dimension to the argumentation. Here he is in formulated opposition to, for instance, Anthony Bradney, who earlier (Bradney 2001) suggested that the same legal-dogmatic problems should be discussed from a multi-disciplinary viewpoint by also drawing on political and religious studies under the concept Law and Religion. Bradney thus accepts that religious norms have an impact on legal solutions within the field of legal regulation of religious institutions.

Law & Religion can also contain broader discussions, covering theoretical relations between law and religion (comparable to the old discussion of possible relations between law and morality within Ethics, Naturrecht etc). In a Nordic context these issues have experienced a renaissance from broad cross-disciplinary and explorative analyses with the participation of Theology, Ethics and Law within e.g. the NordForsk-funded research network Law, Religion and Ethics in the Nordic countries (www.teol.ku.dk/ast/norfa; Christoffersen 2001a; Kurtén & Molander 2005). Also here the question is and has been whether and, if so, how religious norms influence legal norms and vice versa.

Which concept to use is thus not only a question of terminology – the terminology covers a century-long tradition of struggle over the possibility of establishing a wall of separation in western societies. This wall, the argument runs, should be established and upheld between legal and religious values (possibly meeting within ethical and natural law arguments as well as constitutional law); legal and religious sources (attempted to be strictly separated within western legal thinking); legal and religious norms or rules (the latter to a certain extent regulated by the former, but for normative reasons precisely not vice versa within western theory); legal and religious institutions and structures (the religious however containing a fundamentally legal dimension); and legal and religious argumentation. Basically, the battle continues to separate the legitimacy of the legal from the legitimacy of the religious: SUUM Cuique (Ketscher 2005, see also Blume et al. 1993).

A slightly different division between the legal branch containing the structures of the societies and the religious branch containing also the (legal!) structures of the religious institutions is taken very much for granted within western legal theory, not least within a ‘freedom-of-religion’ discourse (Lindholm et al. 2004). Others would argue that the separation thesis should go further, that religious freedom should contain no inherent legal system and the law of the land should have no – or as few as possible – restrictions based on religious arguments (Palmer Olsen 2005a). For if a division
between the law of the land and a legal structure of religious organisations is accepted, this raises a new debate on where the borderlines should be placed and whether these borderlines establish parallel legal systems or only a freedom of religion covered by the single, secular legal structure of the land. Thus, currently, a number of religious groups also in the Nordic societies are openly arguing for their own norms as concurring legal norms establishing concurring legal systems. Not just this reality but also analyses of the deep normative structures of the imagined religiously neutral Nordic legislation make it obvious to observers of different normative standpoints that religion at least has had the possibility of affecting the legal norms (Modéer 2004; Modéer 2005; Palmer Olsen 2005b).

These observations justify the inquiry as to how religion might be visible within law, and whether this visibility also opens up for an impact from religion into the Law rather than just the opposite way around. It is for these reflections that the concept of intertwinemement might be of relevance, to see religion as neither totally separated from nor fused together with law, but interrelated with it – and not only with law, but also with society and politics. When something is intertwined it is not separated, yet nor is it fused into a common order where nothing can be differentiated anymore. There is the possibility of distinguishing but not of separating the two, since that would mean pressing the single individual as well as the systems into a choice between either secular or religious legitimacy – where the reality might be both at once in any sort of combination.

Intertwinement seems to be a useful tool for cross-disciplinary investigations into law-religion relations, but also more broadly. Religion related to politics as well as society as such has been visible for centuries. In the Danish language, the Lutheran understanding of The Two Kingdoms is understood in terms of skelne, ikke adskille, ikke sammenblande [to distinguish, not to separate nor confuse]. This terminology was used as the conclusion to the first cross-disciplinary investigation into law/politics/ethics and religion in recent time (Christoffersen 2001a, see also Christoffersen 2005a and Note 1 to this article; see also Andersen 2001, 2004 and Jørgensen 2004). In spring 2006 I led two major applications for European funding of cross-disciplinary investigations which focus broader than a merely Lutheran context and we realised that the concept we sought had to cover the historical fact that this discussion is related to not only Lutheranism but (at least) Christianity as such, to European history as such and to western legal (and political) theory as such. We have therefore chosen the word intertwinemement as the possible common concept.3

However, the choice of concept is not simply a matter of personal taste or of fitting into empirical realities or theoretical assumptions alone. Concepts in this field also have a normative impact, for which reason it is not possible to find neutral solutions on relevant concepts without becoming a part of the wider discussions under the separation thesis.
The separation thesis

For what is at stake here is the wishful pre-eminence of legal values, legal sources, legal norms, legal institutions and legal argumentation; keeping the law in power as the final argument in all conflict resolution – even if the conflict has a religious dimension – and simultaneously keeping the law clear of any religious dimension, and also here, according to most observers, even if the conflict has a religious dimension.

The common interpretation of the European legal order is based on a separation argument. H. Patrick Glenn (2004), for example, understands the legal traditions of the world as being based on religion – except for the Western legal system, which in his view has no religious roots or has at least left those roots behind. His position assumes the separation of law and religion during the Reformation and Enlightenment. In so arguing he reflects a common understanding, without taking into account the fact that religious institutions also have a legal structure, or that many of the legal norms in Europe have religious roots. It is the same normative narrative which the Danish historian, Tyge Krogh, reflects in his doctoral thesis from 2000 arguing that the criminal laws in Denmark were to be understood as marked by religious normative influence until the mid-18th century, but that religious influence then waned through the stopping of the call for responses from the theological faculties in crime cases (Krogh 2000). However, as the legal historian, Henrik Stevnsborg (Stevnsborg 2000) has made clear, Krogh here confuses institutional and normative influence and does not take the concept of civil religion into account (see also Warburg 2005). Debating the same thesis, the legal historian, Ditlev Tamm (2000:534), points out that the Danish-Norwegian early enlightenment discussion was not so much on institutional influence (or on a concept of magic, such as suggested by Krogh) as on a common legal and theological argumentation in a Lutheran context about the extent to which religious norms (such as the Mosaic law) are legally binding with a higher hierarchical status than the law of the land. But the fact that religious norms were no longer seen as having a higher status as legal sources than the law of the land is not the same as arguing that religious values are without any normative influence on that law. That these discussions are presently recurring on the theoretical and practical agenda of also the Nordic countries – but now with Islamic norms at the centre of the discussion – is a new phenomenon, witness among others the introductions to Sharia (Hjärpe 2005) and the valuable translation into Danish of Zubaida (2006). Not only in American (see for an introduction Modéer 2004) but also in British legal discourses (e.g. Beaumont 2001) the question of whether also Christian norms should and can have a renaissance within legal theory, legal practice and legislation is however also being debated. These discourses are trying to penetrate the wall.

In his widely influential book Glenn also reflects normative arguments such as those of Hans Kelsen, who as a secularised Jew at the University of Vienna in the 1930s established the basis of the positivist legal argumentation in order to escape religious demands on lawyers as well as on other citizens. In the aftermath of the Second World War Scandinavian legal theory, with for instance Alf Ross (Ross 1966/1999), followed the same line in order to reach the same position: namely, that all citizens shall be equal
before the law with no reference to their religious background or identity and in order to escape the newly-born German Naturrecht as the relevant answer to WWII. That equal treatment with no reference to religion should be the law of the land in a pluralistic religious situation was already made clear when the Danish constitution was signed in 1849. Grundtvig, a famous Danish pastor, schoolmaster and poet, as well as a member of the committee that formulated the constitution, argued that there should be equal freedom for everyone with no reference to their religious background (see the comments for § 70 in the constitution in Kofod-Olsen 2006).

A specific part of the separation thesis is the argument that religious systems should be seen as precisely religious – and therefore not legal. Thus Edge (Edge 2006:37) comments on an edited collection on Islam in Europe (by Ferrari and Bradney 2000) as an example of legal topics being defined by the religious community in question. As I read it, Edge understands Islam as (solely) a religious community and a religious set of norms involved in external legal topics. His book therefore omits to discuss the tensions between different legal systems (British vs. Islamic Law, for example) in a multi-religious situation, but concentrates on various religious topics related to Islam from the outside, from his purely legal perspective. As Hart Hansen (2005) has recently shown, this treatment would not be compatible with the self-understanding of Islam; and «according to the self-understanding of each religion» is a basic code of central European law of religion with much success (Kalb/Potz/Schinkele 2003).

The separation thesis has two sides. One is that religion and law should be understood as two different spheres in society. The other is that these spheres are, and must be, separated institutionally – and, normatively, should be prohibited from being confused (Berg-Sørensen 2006). From this point of view, neither should religious ideas or arguments or reflections or needs or analyses find their way into legal discourses, nor should legal sources or arguments or institutions be drawn on or have an impact on or competence within the religious sphere, where only theological arguments and institutions (no matter which religion is involved) should be dominant.

This understanding of the Legal Discourses and the Law as a distinct, institutionalised system separate from any other system in society is not only related to religion (see Henrichsen 2001 as a modern Scandinavian example of this argumentation). The discussion of whether it is possible and also appropriate in a society of the 21st century to uphold legal argumentation in such a sphere of its own is discussed in general (see Sand 2005 as a recent example on the opposite position). Yet it is as though the normative discussion is going on more closely related to religious norms, of course because of European history, which could be covered under the terms Giveth unto God – giveth unto the Emperor.

Visibility of religion in law: intertwinement?

Based on the separation thesis as part of the ongoing secularisation, religion – understood as religious problems, religious institutions and religious arguments – has barely been visible in 20th century Scandinavian societies, and especially not within any legal
context. Since the Nordic societies underwent widespread secularisation leading to a huge decline in church attendance, the general opinion has been that there is no relation between religion and law, not only theoretically but also in the practical legal realm – understood as no religious dimensions to practical legal problems.

It may be that Christian (or Judaic-Christian) norms behind the legislation could be seen as the common unconscious. As an example, Christian norms within the actual penal code have a historical derivation, since the penal codes of Danske Lov (Danish Law) and Norske Lov (Norwegian Law) from 1683/85 were constructed over the Decalogue, but this has been understood as being without any actual influence. However, these common unconscious norms or ideas lying behind the actual legislation could now be seen as disintegrating or revealing entities because of at least two influential factors. One is that a whole generation of politicians no longer draws on the previously common but non-formulated norms from a Judaic-Christian tradition, since – with no common obligatory knowledge of Christian narratives through hymns and story-telling in schools – they do not know these norms, and especially not as unconscious knowledge. The growing national awareness of this ignorance has brought the Christian narrative as common norms back to the surface of the value debate in the Nordic societies in an attempt to combat the disintegration of the common norms. The other disintegrating factor is the recent multi-religious development in Scandinavia, with not only an increasing minority of Muslims but also many different Christian denominations from abroad drawing on other types of Christianity than the home-knitted ones.

What is revealed by this disintegration are the deep structures of modern legal systems, which seem to have (had) a great impact from Christianity (Modéer 2005), meaning that it would be correct to speak of a Christian normative contribution to the legal foundation of the Nordic countries.

The disintegration is taking the shape of a rupture in this foundation, which was understood as being secure and with no overtly religious dimensions. It reveals precisely that the positivist attempt to see the law as without religious dimensions has been based on a common religious understanding within society.

In this situation not only the incomers but also religious-religious as well as religious-secular Danes are arguing via religious norms in a new way, for instance in relation to private schooling, to labour law, to family laws, to the rhythm of societies based on Christian holidays, and also in relation to penal laws such as the concept of honour killing. The disintegration of the old religious norms is thus opening up for a new visibility of religion in law. The question is, whether intertwinement is a better concept to understand existing, former and maybe also coming relations between religion and law than the concept of separation. In the rest of this article, which precedes further investigations, this question will be discussed in relation to the concepts of Church Autonomy, of Non-Separation of Churches and of the negotiated normative structures of the religious-secular majorities of the Nordic (and other European?) populations.
Church Autonomy – Law & Religion intertwined?

The question of autonomy for churches and other faith communities is pushing its way onto the agenda, also in a Danish and Nordic context. Churches and faith communities want to decide for themselves what could be seen as the essential core of their exercise of religion (Durham, Jr. 2001 p. 683–714; Durham, Jr. 2004). This will be increasingly true of the (former) established national churches in Scandinavia (Christoffersen 2004b), with the non-establishment in Finland and Sweden (Ahrén 2001), the changed relations in Iceland (Hugason 2004) and the suggestions on separation in Norway (Plesner 2006).

Such a development will raise the question of the limits of what is inherent in the concept of exercising religion and thus in the content of religious freedom, since what is called religious freedom will be the area over which churches attempt to be the primary rulers. What is involved is a sort of institutionalised collective religious freedom, covered by the European Convention of Human Rights (ECHR) Article 9. Accepting an institutionalised religious freedom for the leadership of the churches – a Church Autonomy – means that legal affairs related to the areas covered by this autonomy will be protected as religious freedom in ECHR Article 9, Section 1. Consequently, if a society as such wants the legal problems raised by Church Autonomy to be regulated as common legal rulings (Die für Alle geltende Recht (Campenhausen 1996, Campenhausen 2001:77–85; see also Christoffersen 2001b), the lawmaker has to meet the demands of ECHR Article 9 (2) and show that the regulation is necessary in a democratic society because of one of the three following direct demands: the interest of public safety, the protection of public order, health or morals, or the protection of the rights and freedoms of others (Christoffersen 2006a; 2006b). This necessity-test must be prescribed by law and is seen as a limitation on the religious freedom of the Church – and the Church here is understood as its institutionalised leadership.

The European Court of Human Rights has not yet directly accepted the concept of Church Autonomy. But in the Bessarabia Case (Appl. No. 45 701/99, 13 December 2001, see Christoffersen 2004b) the court found that a lack of legal personality as a result of non-recognition by the state constituted interference with the right of the applicant church to freedom of religion as guaranteed by Article 9 § 1 of the Convention (§ 105). And in the general principles which form the background for the interpretation of the concept legal personality in this context the court found that, «Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection which Article 9 affords» (§ 118). With this judgement the court thus opens the door to a development where Church Autonomy is seen as part of religious freedom in a European context.

On the other hand the court also underlines as part of the general principles that Article 9 of the Convention does not protect every act motivated or inspired by a religion or belief (Bessarabia Case § 114). The Refah Partisi Case (ECRH Appl nos 41 430/98, 41 343/98 and 41 344/98, 13 February 2003), which is famous for many reasons, can be seen as contributing precisely to this discussion. Starting from the principle that the Convention «does not protect every act motivated or influenced by a reli-
The European Court argues that «Refah’s policy was to apply some of sharia’s private-law rules to a large part of the population in Turkey (namely the Muslims), within the framework of a plurality of legal systems. Such a policy goes beyond the freedom of individuals to observe the precepts of their religion, for example by organising religious wedding ceremonies before or after a civil marriage … and according to religious marriage the effect of a civil marriage…. This Refah policy falls outside the private sphere to which Turkish law confines religion and suffers from… contradictions with the Convention system…» (§127). The Court «stresses that the sphere of individual conscience is quite different from the field of private law, which concerns the organisation and functioning of society as a whole. … Turkey, like any other Contracting Party, may legitimately prevent the application within its jurisdiction of private-law rules of religious inspiration prejudicial to public order and the values of democracy for Convention purposes» (§ 128).

With this judgment the Court makes it clear that the scope of the concept *freedom of religion* in a European context has an unmistakable limit. Its intended impact is that freedom of religion should have nothing to do with the concepts and concrete understanding of family laws, penal laws etc (Christoffersen 2004a). On the other hand this understanding of the judgement as well as the limits of the law of religions as such within a European context is very much under debate (Lindholm et al. 2004). In American theory the question is being discussed as one of original competence to regulate the life of the citizens, and the starting-point of regulatory competence will often be seen as being placed within the religious community on all religious topics understood in a very broad sense and covering also for example family laws (Durham and Clark 2005; see also Durham 2005).

The understanding of the limits between the law applicable to all and the legal regulation within the autonomous church thus differ in various national contexts. The variability depends on different sets of correlated factors: on the one hand the theological (normative-religious) context, on the other the legal ordering of the relations between state and churches (religious denominations) in the concrete national constitutional system. A third parameter will be the basic constitutional values, often formulated in preambles or the like, and a fourth the common European legal norms, as they are understood and used in the concrete national context. This means that the convergence which could be sensed within the European law of religions takes its starting-point in constitutional models which at least at this point are part of a legal cultural context with also religious or theological dimensions (Christoffersen 2002a, 2002b, 2006b, 2006c; see also Beaumont et al. 2002 and Minnerath 2001).

This possible relationship between constitutional values, constitutional models for the law of religions, theological dimensions and general European legislation as the starting-point for a European convergence on limits to the law of religions has so far not been analysed in depth specifically in relation to European comparative law. The analyses can however be strengthened by utilizing the idea of «deep level comparative law» (van Hoecke 2004).

Church Autonomy thus both offends and upholds the separation thesis. It offends the thesis simply by establishing a legal order within the religious sphere, which means
that at least the religious sphere also contains legal argumentation. This legal order is maintained and limited by freedom of religion within the single state or based on a supranational structure of the church or religion involved (Christoffersen 2004; 2006). Thus the existence of these legal orders on the other hand upholds the separation thesis by arguing that they in fact are religious. Much European legal theory argues that the state courts should not interfere in cases within the realm of a church’s legal system, since interference would be tantamount to an involvement in a religious language or a religious sphere (Adhar 2000; O’Dair and Lewis 2001) whereas others contend that parallel legal orders based on religious structures should be fought against and defeated (Cohen 2004; see also Hellum 2004). At least most observers will agree that the existence of these complementary legal systems establishes relations between legal and theological norms or between legal and religious argumentation within the separate realm of Church Autonomy.

The Nordic countries, however, are only on their way to Church Autonomy for the national churches. I will therefore now look at how non-separation influences the thesis of separation between law and religion.

Non-Separation – Law & Religion intertwined?

First the East Nordic context (Finland and Sweden): Due to historical reasons (in Finland the relations to the Tsar, who inherited another, though Christian, confession and in Sweden the fact that the church structures were not totally demolished after the reformation), the starting-point is that the national churches over centuries already had some sort of Church Autonomy, and the dis-establishment changes here at the new millennium are thus less dramatic than they seem, seen from West Nordic as well as foreign perspectives.

In the West Nordic context (Denmark, Norway and Iceland) the starting-point is that the national churches have been regulated through public law as part of public administration (Christoffersen 2005). To a very large extent they have been without legal personality as such, though parts of them (the individual congregation, for example) have legal personality. The concept of Church Autonomy does not therefore cover their situation. Within the Icelandic and Norwegian churches there is in these years an increasing independence from the national executives (Gullaksen 2000; Hugason 2004), but on an international scale they will still be seen as established churches, precisely because of their lack of legal personality (Plesner 2001). Their internal regulation thus rests on enabling acts.

Legally speaking the situation in Denmark is quite extraordinary, since the constitution itself presupposes a non-established, but state-related church by enacting the church with an institutionalised leadership enabled with some sort of regulatory power (Christoffersen 2001b). In spite of the clear voice of the constitution, no single act on institutionalising the church has ever been passed and it is difficult to speak of the ‘People’s Church’ (in Danish Folkekirken) without referring to the Minister for Ecclesiastical Affairs, a party politician who is an appointed member of the government.
There are increasing demands from Danish politicians and researchers to hear opinions, especially perhaps different opinions, from the church on various matters. Especially in controversial questions, such as same-sex marriages in the church, everybody including Parliament is asking for the opinion of the church itself, meaning either a form of leadership or the members of the church. Such cases also raise the question of the limits of ecclesiastical law. Issues such as religiously-based regulation for church marriages, re-marriage after divorce, female ministry, abortion, and religious education in schools are of the same type – controversial and part of a varying regulation from Parliament since the Danish constitution was enacted in 1849. The trend, thus, has been towards secular regulation over, and thereby within, the church – towards a broader and more open-minded church with room for all areas of the population, which might form some of the background for a church which has 83% of the entire Danish population as its members.

In a situation with Church Autonomy one could ask what the result would have been in controversial areas such as the above-mentioned. Nordic scholars often do not hesitate: the Scandinavian national churches would never have been so open without the regulatory power of parliament (Stendahl 2003). The consequence of this opinion should mean that the Finnish Lutheran church, for instance, will now, where the parliament has less influence and the Church Autonomy is increasing, become more narrow-minded. But are they right? Or is it a central element of Scandinavian Lutheranism to be open-minded? Or perhaps simply part of being a national church – notwithstanding which confession – in the European context of today?

In the changing situation of institutional non-separation it is impossible to speak of a total separation of religious and legal arguments. For example, when discussing the legal situation of church ministers within the Lutheran church of Denmark, the law of the land has to be combined with theological arguments in order to reach a result at the court. Thus, concrete cases on the theological arguments for dismissing a church minister (for not believing in God or for using the sacraments in a theological illegitimate way) is by law seen as a case for the common courts, which in such situations are supplied with theological judges in order to reach a result which is legitimate from both a theological and a legal point of view.

Moreover, a number of Scandinavian academics have shown that these relations between law and religion cover the situation not only for adherents of the majority religions but also – at least in practice – for adherents of minority religions. Storhaug (2004:31–45) thus told the story of the Pope phoning the Norwegian Prime Minister when the Norwegian Parliament was debating whether a right to divorce should be written into the marriage contract before the marriages could be legally binding. The law was aimed at Muslim marriages, but seen from the perspective of Canon Law Catholics have no right to divorce either, at least not without acceptance from the courts within the Catholic Church. The Pope wanted this theologically-based difference respected within the Norwegian legal system – despite the fact that in European legal systems in general Catholics can always obtain a divorce by going through the common legal system.
In such a case the relation between law and religion appears to involve two different institutionalised legal systems. If the perspective is changed, however, and the individual religious person is put at the centre of the argumentation instead of the legal system of a church, it becomes clear that the argumentation is not so simple. As shown by Mehdi (2006) the reality is that Muslim women in the Nordic countries see themselves as obliged to choose between and to negotiate different religious and legal norms in an attempt at coherence, and the same goes for Catholics. When the first Jews became inhabitants in Denmark (1682) it was accepted that they continued to apply their own laws of legacy – but when the Jewish community received recognition from the King in 1814, they were obliged to give up their own rulings. Nowadays, however, it is again possible partly to follow religious rules simply by using them as the normative idea behind the formulation of one’s last will and testament. Danish private law is a combination of declaratory and non-declaratory rules and within the latter it is possible to follow religious norms.

So even though the constitution in Denmark demands a separation of state norms and church norms not only for minority churches, but also for the Folkekirken, the reality is that Parliament and the Government are legislators, and this legislation is bound to be a normative boundary because the constitution demands that the Folkekirke be Lutheran (Gammeltoft-Hansen 2006). And even though the other religions are free to establish their own internal normative structure, they are bound to follow the law of the land so far, that it is not any more possible to talk of two separated systems. Intertwinement seems to be a more appropriate concept – at least in Denmark, but further research might show that the same is the case also in the other Nordic countries, no matter whether there is establishment or non-establishment of the national churches.

Secular-religious citizens intertwining Law & Religion?

When analysing the questions of Church Autonomy and non-separation, the focus is on institutionalised relations between religious organisations and the state. In this part of the article I will go a step further by focussing not on the structures but on the people inherent in the structures, and here especially the members of the majority churches in the Nordic countries. Much of my commentary may well be of relevance also for church members within the minority churches in the Nordic countries as well as for many non-secular people in Europe as such.

My assertion is that more than half of the population in at least the Nordic countries (maybe also other European countries (Davie 2002; Lehmann 2004)) could be called religious-secular or secular-religious. Even though it is well-known that religious practice on a regular basis is becoming increasingly rare, still 75% of the populations in the Nordic countries are Lutherans; that is, are baptised within the Lutheran national church. This gives the Lutheran churches a special role as national churches (Christoffersen 2002b) – and at the same time it shows that the people wish to have some sort of a relation to the national churches. The same has been said of Presbyterians in Scotland (Munro 1997, even though baptized people will not automatically be seen as
members of the Presbyterian churches in Scotland, since church membership also requires some sort of public confession within the church); of Catholics in Poland; of Orthodox Christians in Greece and of Muslims in Turkey. These countries seem to be marked by a national religion (see for a broad discussion Lehmann and Geyer 2004), notwithstanding the constitutional system in the respective countries, but only because the populations of these countries still uphold their relation – maybe more or less formal and at least to a large extent secularized – to the specific national religions in their own way.

The relevant characteristic of the majority of these Nordic and European people is not how much they believe in God or how regularly they attend church – and since many of them do neither, it could even be said that there are as many atheists as strong believers. The relevant characteristic for the broad groups in between strong believers and atheists is that of affiliation, of belonging even without believing in belonging (Iversen 2005). Some of them come from a more religious background, but over time have become less active and from outside they will not be evaluated as religious. Others come from a maybe totally secular background, but are still using the church for baptism and confirmation, maybe for a marriage and at least for a funeral and nobody will know how religious they really are – but they are church members. Others again in this group of not fully religious people might be regular churchgoers and may wish to live a religious life according to broadly religious-based norms, but without necessarily accepting that this position should deliver regulatory power over most of or parts of their life to the religiously institutionalised leadership. They are unhappy with the idea of Church Autonomy – in contrast to both a very actively religious group arguing for and accepting it also for themselves and to a group of non-members, the secular atheists who see the Church as a club to which they do not wish to belong but which must be allowed to regulate the lives of its members as far as the leadership might wish to. But even though these majority groups in between may be unhappy with the idea of a church ruling, they are not necessarily unhappy with the idea of being inspired by religious norms in their everyday life, also within a legal context.

My point is that this unhappiness with Church Autonomy and a widespread regulatory power for church leaders is shared by a very large group of church members (the majority?). They are religious-secular, secular-religious or almost only-secular Danes (Nordic? European?), who are nevertheless church members. I have previously given these groups a double-barrelled name, calling them religious-secular or secular-religious (Christoffersen 2005a), simply to make the point totally clear, but realistically we should narrow the concepts somewhat, and I am therefore using the term secular-religious to describe this large group of church members.

Of course it is interesting to learn how far such a position is merely Lutheran, but either way it is also personal. It is far too simplistic for either totally secular or fundamentally active religious people nowadays to say that the secular-religious who do not wish to obey the codes of their religious institutions must either live with them or disappear; that is, they should use their right to exit. Such a solution fails to accept that a religious dimension to an otherwise secular life can be central to a person’s identity (Cohen 2004) and not easy to abandon. I prefer to concentrate on the possibilities for
these people to draw on religious sources in their lives while still remaining part of a secular society. The focus on this group raises the question of the limits of the law of religions.

The question of primary regulatory competence will become increasingly part of the Nordic and European agenda with relation to precisely this group – the secular-religious – because more and more European countries in spite of their national churches will have to find legal solutions to a religious pluralism, but also because an increasing debate stemming from different churches (not least the Catholic Church), who argue, that at least members of (their) religious communities should not be allowed to follow other, non-religious, legal norms.

Taylor (1998:38) has already suggested that the way forward might be to realise Rawls’ idea of overlapping consensus, but at the same time he has opened up for the possibility of giving both individuals and also, or maybe only, groups a voice in the democratic debate to take this consensus forward. This idea has been followed up by many suggestions of returning to the old structure from the Osmannic period, the well-proven Millet System, which is also the system in use in Israel nowadays. In this system, religious institutions have a regulatory competence over family laws, laws of personality etc, for their members. Several articles in O’Dair et al 2001, for example, are positive towards this solution, letting the internal institutions of the confession in question regulate family laws and so on, though it must be said that a number of scholars looking at the question from a female point of view are hesitant or negative. They are closer to a secular position, limiting the realm of religious regulation.

Also within Nordic jurisprudence there seems to be an increasing open-mindedness towards some sort of religious-based regulation of the ethical foundation on which members of the confession are expected to live (Scheinin 2004:219–239). Certain conditions are laid down, the most central of which is the right of exit from the congregation. This is essential to secure religious minorities within the community with respect to the regulatory power of their leadership. But I do not consider this condition sufficient for the group in focus here. I fear it leads out into the wilderness for the secular-religious who wish to uphold their religious rooting without being bound to a religiously legitimated legal order.

There are several problems in trying to bring about solutions through reintroducing the Millet-system, of which the Church Autonomy problem weighs heaviest. As mentioned before, the majority of church members are not interested in having a leadership within the churches that also decide on legal matters, be they personal laws, economic affairs or other things. On the other hand there is a growing demand for theological advice. Here we should perhaps bear in mind the sole prediction for religion that a highly experienced group of sociologists of religion dared to bring up (Davie et al. 2003), namely that religion is becoming individualised. This might even become the case when looking at the intertwinement of law and religion.

What seems to be happening is that that individual people who wish their lives to be marked by religious norms but without following an institutionalised leadership of their church, *negotiate* the relations between legal and religious norms in their personal lives. This negotiation takes place on the interface between individuals, for example
between generations, between partners of different religious beliefs and practice, and particularly at moments of life-crisis. Negotiation also takes place on the interface between individuals and institutions, for example negotiating individual ways around society’s institutions such as laws on marriage, educational systems etc. And finally negotiation takes place on the interface between and within institutions, for example the legal system and the system of social values, public discourse and political culture.

This negotiated reality by the secular-religious people of religious and secular norms and institutions is in itself the best argument for speaking not of separation but of intertwinement.

Intertwinement of Law & Religion

In a European context it must be an overriding concern to ensure that people are able to live with the religious identity they in fact have – to the degree that they have it. In an American context, the right of exit might be enough to ensure the balance of actual experiences between religious and secular norms, but in a European context the existence of national churches has presented law & religion studies with different challenges from the USA, where it might be easier to change to a church you can live with and within.

Some scholars (Shachar 2001; Torfs 2001; Scheinin 2004; Christoffersen 2005b) have recently pointed to public law models as solutions to the conflict between religious and secular regulatory power. There might be inspiration from drawing on actual contributions from the borderland between public law and private law. My conjecture is that such solutions owe a great deal to theological concepts of church structures, of religion and thus the content of religion with relation to societal questions. Recent research within the field of Rechtstheologie (Selander 2003) must be included here – and that concept too opens up for the idea that the arguments to draw on are intertwined (even though the word is not used).

So the concept of intertwinement arises based on the contention that although religion and law may be two different normative and institutional systems, most individual citizens as well as the regulations of the church structures and the legal regulations outside the Religion & Law sphere at least in a Nordic context cannot be seen as either religious or secular, since religious and secular norms seem to be relating to each other in an ever-shifting and ever-negotiated balance.

Empirically the concept of intertwinement seems to be useful. Normatively the question is immediately raised whether I am suggesting this concept because I want to re-introduce a religiously institutionalised normative regulatory power into western societies. As I have argued in this article, this is not the case. But I do believe that the religion which is out there, not only in law, but also in politics and in society as such, is best analysed by being openly discussed and understood.

There is a need for more investigation into the interfaces of this negotiated balance of personal lives, of institutions and of legal regulation. The concept of intertwinement might serve such an investigation.
Notes

1 Small parts of this article have been published in Christoffersen 2005. The book was a Festschrift for Dr. Anna Marie Aagaard, who when she read my rather personally formulated article, filled with ideas and pictures of gardening, urged me to pursue these metaphors. This has resulted in the concept intertwinement discussed in this article but also used in two funding applications in spring 2006. I am grateful to among others Joseph Ruane, University College Cork and to my Danish colleagues Jeppe Sinding-Jensen, Århus University, Anders Berg-Sørensen, Manni Crone, Hans Raun Iversen, Margit Warburg and Ole Wæver, University of Copenhagen, for discussions on the concept. I also thank referees and the editorial board for useful comments on drafts of this article.

2 In the referee process I have been asked which concept of religion I use in this article. I could as easily have been asked which concept of law I am using, but thankfully this was not the case. My concept of religion might be legal and based on the European Convention of Human Rights, art. 9: internal conviction; external manifestation: worship; teaching; practice; observance. I might require a theological system, but not that the individual persons follow this in detail – that is part of the discussion. Often there will be rituals and institutionalised structures, but again – that is part of the discussion, not of the definition. I do know that there are plenty of topics to analyse (are all convictions of religious dimension? – is scientology a religion?), but these discussions are not in focus in this article.

3 Interestingly, The Hedgehog Review. Critical Reflections on Contemporary Culture in its editorial for the special issue Spring & Summer 2006:6 on After Secularization uses the concept mutually intertwined to understand relations between empirical and normative dimensions of analyses of religion in society and to argue that both the empirical reality of religion and the normative understandings of religion must be taken into account when analysing the secularisation-thesis: «Arguably the most important realization that came out of the secularization debate was that the questions of what religion is and what it ought to be are mutually intertwined in our contemporary thinking of religion. The disentanglement of these two questions is vital if we are to see that what is at stake in the secularization debate is not just the destiny of the social sciences, but, much more importantly, our appreciation of the place of religion in the contemporary world». The volume was published after our use of the concept intertwinement. Maybe more contemporary academics realise that analysing religion requires an understanding of intertwinement?

4 For the sake of simplicity I use the concept «churches» to include all denominations and religious groups – Christian as well as non-Christian. See also Church Autonomy. A Comparative Survey, ed. Gerhard Robbers, 2001. Also there the word church is used for all faith communities. In a theological context one should here maybe choose the word confession. The problem is, however, that a legal analysis must focus on structural and institutional questions not inherent in the word confession.
Material
Case of Refah Partisi (the Welfare Party) and Others versus Turkey, Appl. No 41 430/98, 41 343/98 and 41 344/98, 13 February 2003


References
Blume, Peter, Ditlev Tamm and Vibeke Vindeløv 1993 (eds.): Suum Cuique – retsvidenskabelige afhandlinger fra Københavns Universitets Juridiske Fakultet [legal studies from the University of Copenhagen Law Faculty].København: Jurist- og økonomforbundets forlag.
Christoffersen, Lisbet 2001a (ed.). Samfundsvidenskabelige syn på det religiøse. [The religious field viewed from the perspective of the social sciences.] København: Jurist- og Økonomforbundets forlag.
Lisbet Christoffersen: Intertwinement: A New Concept for Understanding Religion-Law


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