Introduction

Slotte, Pamela; Gregersen, Niels Henrik; Årsheim, Helge

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1. Introduction: Internationalization and Re-Confessionalization: Law and Religion in the Nordic Realm 1945–2017

Pamela Slotte, Niels Henrik Gregersen, and Helge Årsheim

This volume explores the interaction between law and religion in the Nordic region in the post-World War II period up to by and large 2017, when five hundred years of the Protestant Reformation was publicly commemorated in the Lutheran countries. Across a broad range of empirical and historical settings, and applying different theories and methods, the contributors to this volume trace the interactions between law and religion in a comparative perspective that focuses on overarching, cross-regional perspectives. We offer case studies from different Nordic countries as well as Germany that explore how religion has been conceptualized and managed within "secular" law in this period, we examine the growing influence of international law on the regulation of religion in the region, and we discuss more recent renegotiations of theological positions with regard to the law of the land, including turns towards a revitalization of natural law and religious law in the Nordic and German region in conceptualizing collective religious rights.

The Nordic realm in the post-World War II period is generally characterized by a secular mentality, and this volume emphasizes the relationship between conceptions of secularity within law and theology, both with regard to the law of the land and the interaction between Nordic and international perspectives on this interrelationship. There is indeed a long prehistory for concepts of "the law of the land" in the Lutheran tradition that has shaped Nordic law and religion significantly. "Secular law" here means a law instituted by secular rulers (from kings to democratic governments). However, as several contributors point out in this volume, this organizational perspective does not rule out continuous interactions between religious and legal developments within the broader context of cultural and political developments. From a historical perspective, religion constitutes one source among others of legal teachings (say, against bigamy), and legislation and jurisprudence are henceforth created and exercised with the awareness that churches and religious communities and their doctrines continue to play major roles in the societies that the law aims to regulate.

In this chapter, we first clarify the specific historical conditions affecting the development of Lutheranism in the different parts of the Nordic realm, with a particular emphasis on the emergence of the Lutheran national churches that have developed across the region. Based on this "Nordic case", we present a more fine-grained analysis of three

different dimensions of "secularization" in the Nordic realm: (1) the re-confessionalization of law, (2) the secularity of law, and (3) the internationalization of law. We argue that these aspects taken together provide a fertile ground for the formulation of a multidimensional perspective on the many entanglements between law and religion in the Nordic region.

A Longitudinal Perspective on Nordic Lutheranism

Nordic Lutheranisms share a number of common characteristics, not least due to the long history of Lutheran majority churches in the five Nordic countries. However, there are also notable differences between the countries, and particularly between the "West Nordic" (Iceland, Denmark and Norway) and the "East Nordic" (Sweden and Finland) realms.[1]

Comparatively speaking, the West Nordic realm has the longest and most continuous Lutheran history. In 1536, King Christian III declared Denmark-Norway to be a unified kingdom with a Lutheran faith, and in 1537 Martin Luther's (1483–1546) close collaborator, Johannes Bugenhagen (1485–1558), drafted the new Church Ordinance. Bugenhagen also installed the evangelical "superintendents" in place of the Catholic bishops that were now incarcerated, and he crowned King Christian III and his wife as king and queen of Denmark-Norway, and did so "as a true bishop" (as Luther proudly wrote).[2] At that time, Skåne, Halland and Blekinge in today's southern Sweden alongside Iceland and the Faroe Islands were also part of the kingdom, in addition to Schleswig-Holstein which were dukedoms under the Danish king and adopted a Lutheran Church Ordinance in 1542, also drafted by Bugenhagen.

Thus, Denmark-Norway was the first kingdom to break with Rome and adopt Lutheranism, and Denmark-Norway also shows the strongest continuity of Lutheran faith and social order compared with other Lutheran countries. Luther's own Saxony, by comparison,

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[1] For more detail, see the two other volumes of the ProNoLa project, covering earlier periods of the relations between law and religion in the Nordic realm: Tarald Rasmussen and Jørn Sunde, eds., *Protestant Legacies of Nordic Law: The Early Modern Period* (Paderborn: Brill-Schönningh, *forthcoming*), and Anna-Sara Lind and Victoria Enkvist, eds., *Constitutionalisation and Hegemonisation: Exploring the Boundaries of Law and Religion 1800-1950* (Odense: University Press of Southern Denmark, *forthcoming*).

[2] Luther's Letter to Martin Bucer in Strasburg (December 6, 1537): "Pomeranus [Bugenhagen] is still in Denmark, and all things flourish which the Lord does through him. He has crowned the king and the queen as a true bishop, and restored the University." Luther, *WA Briefe* vol. 8, 158: "Pomeranus adhuc in Dania, & prosperantur omnia, quae facit Dominus per eum. Regem coronauit & reginam quasi verum Episcopus, Scholam instituit, etc."

periodically became Catholic in alignment with Poland. Later, it was partly Reformed, partly Lutheran, and after World War II the region was part of the DDR and under communist rule between 1945 and 1991. Today, approximately 15% of the population of Sachsen-Anhalt are members of the Evangelical-Lutheran Church.

Among the West Nordic countries, Lutheranism was established in Denmark in a fast and a practically comprehensive way already by 1537. In Norway and Iceland, by contrast, there were only scattered reformation movements from below among the citizens, so initially there was both a Catholic resistance against Lutheranism, and a national resistance against the supremacy of the Danish king. Norway and Iceland, located as they were far away from the Danish capital region around Copenhagen and Malmö, were not Lutheranized at a societal level until the end of the 16th century, and in more remote regions probably even later.

Let us now look at the eastern part of the Nordic region. In Sweden and Finland, we find an early official embrace of Lutheranism by King Gustav Vasa at the Västerås Meeting in 1527. However, similar to the reformation process in England, we also find periods of a return to Catholicism among later 16th century Swedish kings. Not until 1593 did Sweden formally adopt-the Book of Concord of 1580. Already at that time, the reformation of Sweden was a *fait accompli* and the Catholic-minded King Sigismund, also King of Poland and Lithuania, had to accept the Lutheran state church when he was crowned in Sweden. Accordingly, it was not until 1598, when Sigismund was expelled from the throne, that Lutheranism was firmly established in Sweden and Finland.

Thus, there are notable differences in the early 16th century development of Lutheranism between the eastern and western parts of the Nordic region. Nonetheless, the common net result was the long-term establishment of Lutheran majority churches, including a cultural program for school and education, and a social program for taking care of the sick and the poor. At the time of World War II, 98% of all Danes were baptized members of the Evangelical Lutheran Church in Denmark, and similar numbers apply to the other Nordic countries. Today, despite a considerably diminishing membership across the region, some notable differences can be detected between the Danish “People’s Church” (January 2017: 76 %); and the Norwegian and Icelandic churches (Norway, December 2017: 71 %; Iceland, 2017: 70 %).

Subtler differences apply between Sweden and Finland. The Church of Sweden was a state church until 1952, but since 2000 the church and the state have been formally separated. In 2017, 59,3 % of the population were members of the Church of Sweden, but it should be added that minority churches in Sweden are estimated to make up 5-7 % of the population,

comprising mainly a substantial number of Protestant free churches outside the Swedish church, in addition to the Roman Catholic church. Finland was part of Sweden until 1809 and was a Grand Duchy under Russia from 1809 to 1917, when it finally won its independence. The Evangelical Lutheran Church of Finland is the majority church (2017: 69,89 %). To this should be added the cultural and historical significance of the Orthodox Church of Finland (2017: 1,1 %, under the Patriarch of Constantinople) and other Protestant free churches (many of whom are not registered in the official statistics; they appear as non-affiliated).

From Confessionalization to Re-Confessionalization

The process of "confessionalism" has traditionally been used about the development towards inner dogmatic specificity in Lutheran, Reformed, and Catholic theology in the period between the 1555 Peace of Augsburg (with the principle *cuius regio ejus religio*) up to the conclusion of the Thirty Years' War in 1648. The age of confessionalism, in this sense, is a rather limited epoch in the history of theology. Since the 1970s, however, the German historians Wolfgang Reinhard and Heinz Schilling developed the concept of a governmental process of "confessionalization" with long-term impact on early modern state building and social control.

This research paradigm has been fruitful, and the subsequent codifications of law in Nordic legislation such as the *Danish Code* (*Danske Lov*) of 1683, the amended *Norwegian Code* (*Norske Lov*) of 1687, and the *Swedish Code* (*Sveriges Rikes Lag)* of 1734 seem to fit well with the paradigm of a comprehensive state centralization. The confessionalization thesis, however, has also been criticized for taking a top-down approach to historical developments, which is not sufficiently attentive to parallel scientific developments, the decentralized revivalist movements in religion, and local practices of jurisdiction in the legal realm.[3] Legal scholars, in particular, have pointed out that central aspects of Roman Law were continued from the age of the Reformation, and that Lutheran teachings on marriage were henceforth influenced by canon law while also locally adjusted to circumstances.[4]

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[3] See overview (with literature) in Ute Lotz-Heumann, "The Concept of 'Confessionalization': A Historiographical Paradigm in Dispute," *Memoria y Civilización* 4 (2001): 93–114. For Scandinavian material, see Kaja Brilkman, "Confessionalisation, Confessional Conflict, and Confessional Culture in Early Modern Scandinavia," *Scandia* 82, no. 1 (2016): 93–106.

[4] On marriage law, see John Witte Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge: Cambridge University Press, 2002), 199–255. On the difference between legal norms and jurisdictional practices on divorce, see Mia Korpiola, "Lutheran Marriage Norms in Action: The Example of

Similarly, the emergence of natural law tradition may suggest a root of early modern state building that was more secular rather than only religious.[5] In Scandinavia, the natural law tradition was formulated by Samuel von Pufendorf (1632–1694) in *De iure naturae et gentium* (1672) when he was professor of law at Lund University, and later adapted by the Norwegian-Danish historian and jurist Ludvig Holberg (1684–1754) in his *Introduction til Naturens och Folkerettens Kundskab* (1716). Interestingly, both combined natural law tradition with the obligation of citizens towards their Creator, thus combining secular natural law with religious mindsets.

Schilling has been receptive to the critiques of the paradigm of confessionalization but has maintained the thesis that processes of confessionalization have laid the groundwork for early modern state building. In this process, he has been particularly attentive to the comparatively special case of the religiously more homogeneous Nordic countries even into the 1700s:

> The 'nations' in the center of Europe – the Netherlands, Germany, Switzerland – were not able to create similarly clear and monolithic confessional identities, but developed fragmented or multi-confessional identities. This was different in the North, where the Scandinavian societies developed close Lutheran confessional cultures and identities.[6]

The church historian Thomas Kauffman has developed a parallel notion of "confessional cultures," aiming to be more attentive to the particular confessional cultures beginning already in the 1520s. While being skeptical about the macrohistorical thesis of a European-wide confessionalization process with more or less the same functions and results, Kauffman underlines the specifically theological character of distinct confessional cultures. He has thus offered a set of microhistorical analyses of the networks between different agents that

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Post-Reformation Sweden, 1520-1600," in *Lutheran Reformation and the Law*, ed. Virpi Mäkinen (Leiden-Boston: Brill, 2006), 131–70.

[5] Michael Stolleis, "'Konfessionalisierung' oder 'Säkularisierung' bei der Entstehung des frühmodernen Staates," *Ius Commune* 20 (1993): 1–23.

[6] Heinz Schilling, "The Confessionalization of European Churches and Societies – an engine for Modernizing and for Social and Cultural Change," *Norsk Teologisk Tidsskrift* 110, no. 1 (2009): 10.

together make up a confessional culture—from princes and professors at the universities to mayors, burghers, and local pastors, working in cities or on the countryside.[7]

As regards the general relation between law and Protestantism in the period up to the 17th century, we have available comprehensive studies by John Witte, Jr., Harold J. Berman (1918–2007), and Martin Heckel.[8] All of them underline the role of the Lutheran doctrine of the two regiments, which affirmed the legal framework of a secular government (*Obrigkeit*) with natural law as expressed in the Decalogue. While Witte and Heckel focus on the German context, Berman brings in English developments as well as glances at other European contexts, including Denmark. The perspectives of Heckel and Witte differ insofar as Heckel in his magnum opus barely mentions the Lutheran doctrine of the three estates (politics, church, and family life). Witte, by contrast, understands the legal program of the early Reformation as entailing a multifaceted social program, in which family life and educational programs play a central role.

Both Kauffman and Witte's perspective combines the Lutheran doctrine of the two regiments with the likewise important doctrine of the three estates (*ecclesia*, *politia,* and *oeconomia*). While the church is concerned with eternal salvation based on the gospel, the political realm focuses on the secular worldly order with the task of preventing disorder from taking over society. The estate of family life, by contrast, is as old as creation. Prior to the Fall as well as after the Fall, *oeconomia* is related to the goodness of ordinary life in the world of creation. While family life up to the mid-1800s encompassed larger households of workers and servants and others, family life was also connected to the schooling of children. The field of education has a special role since it relates to all three estates. Organized by the state, education was carried out by the church but paid for by the parents. The idea of *oeconomia* as

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[7] Thomas Kaufmann, *Konfession und Kultur: Lutherischer Protestantismus in der zweiten Hälfte des Reformationsjahrhunderts* (Tübingen: Mohr-Siebeck 2006); see also Kaufmann' overview of earlier discussions in "Die Konfessionalisierung von Kirche und Gesellschaft: Sammelbericht über eine Forschungsdebatte," *Theologische Literaturzeitung* 121 (1996): 1112–21.

[8] Witte, *Law and Protestantism*; Harold J. Berman, *Law and Revolution*, Vol. 2: *The Impact of the Protestant Reformations* (Cambridge, MA: The Belknap Press of the Harvard University Press, 2003); Martin Heckel, *Martin Luthers Reformation und das Recht: Die Entwicklung der Theologie Luthers und ihre Auswirkung auf das Recht unter den Rahmenbedingungen der Reichsreform und der Territorialstaatsbildung im Kampf mit Rom und den 'Schwärmern'* (Tübingen: Mohr-Siebeck, 2016). See also Heikki Pihlajamäki and Risto Saarinen, "Lutheran Reformation and the Law in Recent Scholarship," in *Lutheran Reformation and the Law*, ed. Virpi Mäkinen (Leiden: Brill, 2006), 1–20.

"the plant-school of love" (Niels Hemmingsen) may thus have advanced the idea of a "third-zone" Lutheranism, in which a society is to be guided by the ideals of ordinary communal life that underlies the more official institutions of state and church.

Kaufman's content-specific approach of "confessional cultures" has been particularly helpful for the "Lutheran Mentality" research project at Aarhus University. A group around Bo Kristian Holm and Nina J. Koefoed has analyzed how social imaginaries regarding the family household (*oeconomia*) continued to shape Danish-Norwegian culture up to around 1800. Obviously, this was still a stratified society, in which parents (particularly fathers) ruled over children, and kings and magistrates over those who were subordinate to them. Yet at the same time, the model of the household spoke of networks of mutual obligations, thereby also shaping the ideals regarding a good and fair government, in legislation as well.[9] With the introduction of democracy during the 1800s, kings and queens finally came to be ruled by parliaments elected by popular vote. Even so, to some extent Nordic democracies are still shaped by the view of society as a sort of "home" (in Swedish: *folkhemmet*), when the Nordic countries after World War II developed "welfare societies" upheld by the will of the people.[10]

Of course, we do not presume a religious homogeneity in the post-World War II setting of the Nordic countries. Confessional identities now operate in non-homogeneous and ever-shifting cultural climates. Already in the 19th century we find considerable groups of secularist movements of freethinkers in all the Nordic countries, as well as, for example, a continuing historical presence of the Orthodox Church in the Grand Duchy of Finland. Nevertheless, after World War II, political lawmakers may still refer to what is perceived as socially shared "national" or "Nordic" values of partly secular, partly religious origin.

In the decades following the liberation from the German occupation of Norway and Denmark in 1945, and the settlement of a hard-won peace with Russia after the Finnish Winter War (1939–40) and the Continuation War (1941–1944), there was still a high level of national homogeneity in the Nordic countries. This may be seen as an echo of an earlier religious homogeneity, but now a homogeneity drawing on a combination of secular and Christian values. Secularity became part of the religious mindset, but religious allegiance was

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[9] This is the thesis of Bo Kristian Holm and Nina J. Koefoed, eds., *Lutheran Theology and the Shaping of Society: The Danish Monarchy as Example* (Göttingen: Vandenhoeck and Ruprecht, 2018). See in particular Bo Kristian Holm, "Dynamic Tensions in the Social Imaginaries of the Lutheran Reformation," 85–106, and Nina Javette Koefoed, "The Lutheran Household as Part of Danish Confessional Culture," 321–40.

[10] Niels Henrik Gregersen, "From *oeconomia* to Nordic Welfare Societies: The Idea of a Third-Zone Lutheranism," *Theology Today* 76, no. 3 (2019): 234–41.

the option still favored by a majority of the Nordic populations, though ordinarily without too much controversy. Rather than establishing a principal divide between religion and *laïcité*, we see a secularization pattern that involves zones of interaction between secular and religious realms.

The constellation of a secular law in Nordic countries–still relatively homogenous, though acknowledging differing worldviews among citizens—was shaped in this post-World War II cultural climate. However, due to a further secularization process at the individual level, especially since the 1970s, and due to immigration from non-Western countries, this cultural consensus increasingly came under challenge. Particularly after the year 2000, lawmakers came to acknowledge the fact that the world of religious communities in modern Nordic societies comprises not only the national majority churches of Lutheran origin (and in Finland also the Orthodox Church of Finland that holds the status as a 'national church' alongside the Evangelical Lutheran Church of Finland) but also other Christian communities as well as an increasing number of non-Christian religions, not least Muslim communities.

In this volume, we propose "re-confessionalization" as a theoretical concept to capture (1) the growing legal independence of the national churches and other religious communities from direct state involvement (Finland 1996, Sweden 2000, and Norway 2014), (2) the fact that legal thinking and national legislation has to deal with a considerable number of religious communities as part of a pluralistic society, and (3) the fact that religious communities begin to act as collectives based on specific confessional identities, Christian or non-Christian. In Finland, for example, the number of recognized religious communities grew from 49 to 110 in the period from 2000 to 2015. This new situation raises the question as to the scope and limits of a re-confessionalization through law—both in terms of internal religious legislation and in terms of the secular recognition of internal religious legislation, in the 'law of the land' as well as in international law.

The Secularity of Law and the Re-Confessionalization of Law and Religion

Recognizing the many meanings of "secularity" as a cross-cultural and cross-temporal concept, including numerous scholarly approaches,[11] the contributions to this volume

[11] For the Nordic situation, see Inger Furseth, ed., *Religious Complexity in the Public Sphere: Comparing Nordic Countries* (London: Palgrave-MacMillan 2018). The international research literature on secularity, secularization and secularism is substantial, and space only allows for a small selection of the many published surveys and works on this topic. For a selection of publications that touch upon the themes of this volume, see Philip S. Gorski and Ateş Altınordu, "After Secularization?" *Annual Review of Sociology* 34, no. 1 (2008): 55–85; Philip

approach the secularity of law in the Nordic region pragmatically, distinguishing mainly between its organizational, structural and personal levels, and offering a slight adaptation of the tripartition of secularity suggested by Charles Taylor.[12] While a shift away from a "religious" orientation can be detected in some of the analytical levels, the ensuing understanding of what secularity means for lawmaking, jurisprudence and legal theory differs substantially. For the *organizational level* (secularity^{meaning1}), the secularity of law denotes a move away from the duality of the medieval legal system, which saw all forms of secularity as a delegated power from Canon law under the authority of the one Church led by the Pope.[13] This notion of delegated power was transformed during the Protestant reformations, which laid out a new conceptual framework of law as a comprehensive system for both religious and secular life, but issued by earthly rulers rather than the Pope.[14]

For the level of *contents and structure* (secularity^{meaning2}), on the other hand, the secular nature of law is less clear-cut. Even if the creation and management of legislation is organized within the secular realm, it may still be highly religious in content, as seen in the comprehensive *Danish Code* of 1683 and the corresponding *Norwegian Code* of 1687. Here, the first three of a total of six books follow the structure of the Lutheran doctrine of the three

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S. Gorski, "Historicizing the Secularization Debate: Church, State, and Society in Late Medieval and Early Modern Europe ca. 1300 to 1700," *American Sociological Review* 65, no. 1 (2000): 138–67; Mirjam Künkler and Yüksel Sezgin, "Diversity in Democracy: Accommodating Religious Particularity in Largely Secular Legal Systems," *Journal of Law and Religion* 28, no. 2 (2013): 337–40; Maia Carter Hallward, "Situating the 'Secular': Negotiating the Boundary between Religion and Politics," *International Political Sociology* 2, no. 1 (2008): 1–16; and Talal Asad, *Formations of the Secular: Christianity, Islam, Modernity* (Stanford, CA: Stanford University Press, 2003).

[12] Taylor distinguishes between secularity 1 as the expulsion of religion from sphere after sphere of public life, secularity 2 as the decline of religious belief and practice, and secularity 3, as "the conditions of experience of and search for the spiritual" that make it possible to speak of ours as a "secular age". See Charles Taylor, *A Secular Age* (London: The Belknap Press, 2007).

[13] On the shape of this doctrine, see Lester L. Field, *Liberty, Dominion, and the Two Swords: On the Origins of Western Political Theology* (Notre Dame, IN: Notre Dame University Press, 1998). On Danish material, Agnes S. Arnórsdóttier, Per Ingesman and Bjørn Poulsen, eds., *Konge, kirke og samfund: De to øvrighedsmagter i dansk senmiddelalder* (Aarhus: Aarhus Universitetsforlag, 2007) point to the reality of ongoing negotiations between different centers of power in late Medieval epochs.

[14] For a discussion of 'secularity' in relation to Martin Luther's thoughts about law, secular authority and political power, see Stefan Heuser, "The Contribution of Law to the Secularization of Politics: Impulses from Luther's Doctrine of the two Regimes," in *Lutheran Theology and Secular Law: The Work of the Modern State,* ed. Marie A. Fallinger and Roland W. Duty (Abingdon: Routledge, 2018), 3–13.

estates: Book I relates to the laws of the worldly regiment ("On Law and the Persons of Law"), Book II to the spiritual realm of the church ("On Religion and Clergy"), while Book III concerns the realm of the household and school ("On the temporal and domestic estates").[15] In terms of content, central parts of these "secular" laws, even if organized by the secular realm, address religious life. This characteristic blend is not limited to 17th century laws, but reappears in new forms in contemporary state legislation regarding church laws and laws for other religious organizations, either by securing a freedom of religion through non-interference, or by allowing religious communities to fulfill particular tasks, such as the right to conduct marriages. In such cases, we have a mixed case of something being "secular", insofar as it falls under the secular law of the land, while recognizing "lived religion" as a fact of life of people, communities and individuals. In addition, purely "secular" law, for example with regard to taxation, buildings, building safety and employment, regulates aspects of religious life.

The concrete sense of secularity$^{meaning1\text{-}2}$ can be even further specified by paying attention, as several authors do in this volume, to what Kaarlo Tuori has identified as different levels of law: a *surface level* (consisting of particular statutes and other legal regulations, court decisions, and statements of legal science); a *legal culture* (professional culture, general doctrines of different legal subfields, and the doctrine of the sources of law); and law's *deep structure* or "the *longue durée* of the law" (made up of basic categories, fundamental principles, as well as "a fundamental type of rationality").[16]

At the *personal level* (secularity^{meaning3}), "having religion" has become optional. Particularly since the 19th century, and increasingly during the 20th century, having religion and being religious has become a personal matter largely outside the confines of legislation; being religious, or not being religious, has no effect on the formal status of legal subjects in society. This form of secularity represents a mixed pattern, sometimes referred as a "post-secular" situation where wide-ranging secularization has taken place at both organizational and structural levels (secularity$^{meaning1\text{-}2}$) while at the same time agents and communities generate new religious commitments. Sometimes such commitment takes a more heated and

[15] See Nina Javette Koefoed, "Authorities Who Care: The Lutheran Doctrine of the Three Estates in Danish Legal Development from the Reformation to Absolutism," *Scandinavian Journal of History* 44, no. 4 (2019): 430–53.

[16] Kaarlo Tuori, *Critical Legal Positivism* (Aldershot: Ashgate 2002), 147, 150, 154–55, 157, 165–66, 169, 173–74, 177, 183–84, 186–88, 191–92.

radicalized form, sometimes a softer form, referred to as "cultural Christianity" or even "cultural Islam".

The contributions to this volume attest to the differences among these levels of secularity. However, the chapters often point to their mutual and sometimes conflictual interrelationship, too. Thus, the radical decoupling of law and jurisprudence from the management of personal religiosity (secularity^{meaning3}) has proven to be a fertile ground for controversies and public debates over the management of the religion-secular divide in the organizational and structural dimensions of social life (secularity$^{meaning1\text{-}2}$).

Intertwined with the potential decoupling of personal belief from organizational and structural constrictions, the majority churches in the Nordic region have attained an increasing autonomy and independence from state management.[17] Simultaneously, the organizations and communities representing religious minorities have gained additional recognition, attaining the status of "registered communities" across the Nordic region, securing so-called legal personality and access to state funding in the name of religious freedom and equality. These changes in the religious landscape can be grouped together under various monikers, from the "formatting" of Islam in Europe observed by Olivier Roy, to the "religion-making from above" identified by Markus Dressler and Arvind Pal-Mandair.[18] For this volume, however, we have selected the term "re-confessionalization", as it evokes the family resemblances between our present moment and the turbulent centuries of religio-political reorientations to come out of the Protestant Reformations. The structural difference, however, is that the tendency towards re-confessionalization is spread across a broad set of different religious communities.

Internationalization of Law in the Nordic Region

From the time of their emergence as middle-range European powers in the wake of the Napoleonic wars in the early 19th century, the countries of the Nordic region have been active proponents of strong international order. Nordic churches contributed to international

[17] We here refer to the helpful volume by Lisbeth Christoffersen, Kjell Å Modéer and Svend Andersen, eds., *Law & Religion in the 21st Century – Nordic Perspectives* (Copenhagen: DJØF Publishing, 2010). See also Lisbet Christoffersen, "Towards Re-sacralization of Nordic Law?," in *Formatting Religion: Across Politics, Education, Media, and Law*, ed. by Marius Timmann Mjaaland (London: Routledge, 2019), 175–204.

[18] Oliver Roy, *Secularism Confronts Islam*, transl. by George Holoch (New York: Columbia University Press, 2009); Markus Dressler and Arvind-Pal S. Mandair, eds., *Secularism and Religion-Making* (Oxford: Oxford University Press, 2011).

ecumenical work for peace, justice and the promotion of international law and international institutions from the early 20th century onwards. Moreover, all of the countries of the region were among the founding members of the League of Nations and the United Nations, and Nordic statesmen like Dag Hammarskjöld (1905–1961) and Trygve Lie (1896–1968) were among the first Secretaries General of the United Nations. Despite minor differences in foreign policy orientation (Norway, Iceland and Denmark are members of NATO, Sweden and Finland are not) and European policy (Norway and Iceland are outside of the European Union (EU), the rest of the region holds membership), the region has frequently acted in concert at the international level, promoting and supporting international order politically, materially and economically. The ties and shared interests within the Nordic region are not limited to the political arena, but extend well into the cultural and social sphere. Especially in the second half of the 19th century, significant numbers of migrants from the region have settled abroad (especially in the USA), seeking better fortunes in times of famine and poverty, in the process creating significant diasporic communities across the world that maintain active and vital links with the region of their forebears.

The strong propensity for international engagement and the maintenance of robust international order have been a significant influence on the development of the secularity of law in the Nordic region. In the early post-World War II era, the countries of the region were still strongly monoreligious, maintaining exceptionally high rates of membership in the national churches, promoting the Lutheran faith through the school system in Sweden until 1969, in Denmark until 1975, in Norway until 1998. As a result of a comprehensive renewal of Finnish legislation on religious freedom at the turn of the 21st century, public schools provide for parallel non-confessional instruction "in the pupil's own religion."[19] At this time, the Nordic countries provided very little to no recognition of religious minorities, apart from protecting religious groups through dormant, albeit still culturally significant, prohibitions against "defamation" and "blasphemy" (in Sweden until 1970, in Norway until 2015, in Denmark until 2017, while the current Finnish Criminal Code, Chapter 17, Section 10 still

[19] See further, Pamela Slotte, "Waving the 'Freedom of Religion or Belief' Card, or Playing it Safe: Religious Instruction in the Cases of Norway and Finland," *Religion and Human Rights* 3, no. 1 (2008): 33–69; Pamela Slotte, "'A Little Church, a Little State, and a Little Commonwealth at Once': Towards a Nordic Model of Religious Instruction in Public Schools?," in *Law and Religion in the 21st Century – Nordic Perspectives,* ed. Lisbet Christoffersen, Svend Andersen, and Kjell Å. Modéer (Copenhagen: Djøf Publishing, 2010), 239–73.

prohibits "the breach of the sanctity of religion"[20]). As the countries of the region gradually engaged with international efforts to codify and implement human rights as a new "standard of civilization" through international treaties, the political and legal privileges afforded to the majority churches gradually became more controversial, prompting gradual legal reform.

Although reforms of the political and legal management of religion have differed across the countries of the region, the importance of the legal categories and taxonomies developed internationally has been notable. In particular, the legal frameworks of the Council of Europe and the EU have proven decisive for the management of religion in the Nordic region. The European Convention on Human Rights (ECHR, 1950), the main instrument created by the Council of Europe to protect human rights, entered into force on September 3, 1953. Today, acceptance of the ECHR is a prerequisite for membership in the Council of Europe. Since the establishment of the European Commission of Human Rights (1956) and the European Court of Human Rights (ECtHR, 1958) by the Council of Europe, member states of the Council of Europe have been obliged to abide by the judgments set by these monitoring bodies in cases brought against them. Over time, judgments that are binding in the case of a particular member state have also to come to acquire more direct importance as interpretative precedents in relation to other member states. Norway, Denmark and Sweden were among the founding members of the Council of Europe of 1949. Iceland became a member in 1950, but Finland only in 1989. However, in the early-post World War II decades very few cases were brought before the Commission and the ECtHR. The first judgment finding a violation of Article 9 of the ECHR on the freedom of thought, conscience and religion was handed down only in 1993 (*Kokkinakis* v. *Greece*). Thus, in the early post-World War II decades the obligation as member states to abide by the ECHR could be seen in practice as mainly political and moral. Still, member states were obliged to incorporate the ECHR into their domestic law, something which can take place automatically upon ratification or by enacting legislation that turns the provisions of the ECHR into binding domestic law, while also

[20] Criminal Code of Finland (39/1889), Chapter 17, Section 10 – *Breach of the sanctity of religion* (563/1998): "A person who (1) publicly blasphemes against God or, for the purpose of offending, publicly defames or desecrates what is otherwise held to be sacred by a church or religious community, as referred to in the Act on the Freedom of Religion (267/1922), or (2) by making noise, acting threateningly or otherwise, disturbs worship, ecclesiastical proceedings, other similar religious proceedings or a funeral, shall be sentenced for a *breach of the sanctity of religion* to a fine or to imprisonment for at most six months." Unofficial translation, Ministry of Justice, accessed June 29, 2020, https://www.finlex.fi/en/laki/kaannokset/1889/en18890039_20150766.pdf.

putting in place administrative procedures that secure the follow-up and assessment of the jurisprudence of the ECtHR.[21]

The EU has also developed a fundamental rights framework of growing importance. A signpost of this development is the Charter of Fundamental Rights of the European Union (2000) that entered into force and became binding on all member states when the Treaty of Lisbon entered into force (December 1, 2009). The charter includes both a prohibition of discrimination on the basis of religion and an article protecting the right to freedom of thought, conscience and religion. Article 17 of the Treaty of Lisbon also addresses matters of religion, where it recognizes national "religion-state" arrangements and reaffirms a dialogue between EU institutions and religious, philosophical and nonconfessional actors that has been ongoing since the early 1990s:[22]

> 1) The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
> 2) The Union equally respects the status under national law of philosophical and nonconfessional organisations.
> 3) Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

As member states of the EU, Finland, Sweden and Denmark are immediately bound by its laws, directives and regulations, and by the rulings of the European Court of Justice. The hands-on effects of international rules and monitoring bodies are hard to trace, especially beyond the concrete binding rulings, for example, of the ECtHR. However, the *lingua franca*

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[21] For an in-depth comparative analysis of how the different Nordic countries have incorporated international human rights norms, including the ECHR, into their domestic legal orders – and differences are detectable – see Tuomas Ojanen, "Human Rights in Nordic Constitutions and the Impact of International Obligations," in *The Nordic Constitutions: A Comparative and Contextual Study,* ed. Helle Krunke and Björg Thorarensen (Oxford: Hart, 2018), 133–66. It should also not be forgotten that internationalization also earlier has affected Nordic law, and enhanced Nordic legal collaboration. Pia Letto-Vanamo and Ditlev Tamm, "Nordic Legal Mind," in *Nordic Law in European Context,* ed. Pia Letto-Vanamo, Ditlev Tamm, and Bent Ole Gram Mortensen (Cham: Springer, 2019), 2–3.

[22] See, e.g., Knox Thames, "Old Is New: Europe and Freedom of Religion or Belief," in *The Changing Nature of Religious Rights under International Law,* ed. Malcolm D. Evans, Peter Petkoff, and Julian Rivers (Oxford: Oxford University Press, 2015), 156–57.

status of human rights norms, not only as 'hard' law but as an enabling vocabulary for the discussion and criticism of social and cultural conditions, can be detected across all major legal and political changes in the Nordic region in the post-World War II era. The complex and multi-layered roles of state entities as overseers in managing and supporting majority churches have increasingly come to be discussed using the language and procedures offered by human rights norms. Importantly, in itself the preponderance of human rights language infusing these discussions does not amount to a fixed resolution or unidirectional criticism of existing arrangements. Rather, the hegemony of human rights as a shared language has been effectively utilized by proponents and critics alike. Hence, religion-state arrangements have been discussed using terms and categories like non-discrimination, the right to freedom of religion or belief, the distinctive rights of minorities, the right to education and, ultimately, the sovereign right to self-determination both on behalf of the nation-state and on behalf of subnational entities.

The introduction of human rights language, while not offering any single solutions or recommendations to religion-state arrangements in the countries of the Nordic region, has done much to alter the interrelationship between secularity^{meaning1} (organization), secularity^{meaning2} (content and structure) and secularity^{meaning3} (personal belief). In particular, the radical individualism offered by the freedom of religion or belief articulated in Article 9 of the ECHR offers a strong bulwark of protection for the individual to choose his or her belief freely, bolstering the effects of secularity^{meaning3}. Simultaneously, the same right offers protection for the free and unimpeded organization of communities of believers, further entrenching the division between religious and secular authority secured by secularity^{meaning1}. However, at the level of structure and content (secularity^{meaning2}) the infusion of human rights language into the countries of the Nordic region would appear to offer a fairly broad degree of autonomy. Each state can choose whether to regulate religion specifically or as a subset of more general provisions, as long as it stays within the boundaries offered by the ECHR. As seen above, EU Law also pays heed to national arrangements on part of its member states, but not unreservedly so. Given the above, it is safe to say that the studies in this volume of the various Nordic countries and Germany make visible both divergences and common themes, when it comes to regulating religion as part of the law of the land.[23]

[23] This is in line with how Nordic law more generally and Nordic legal thinking both share common characteristics and differ internally, displaying distinct national features. While history plays an important role here, "only in the 19th century did the idea of a specific 'Nordic Law' become a current notion to substitute the

Law and Religion in the Nordic Realm, 1945–2017

The contributions to this volume address a broad range of thematic and disciplinary specialties, and approach the question of the relationship between law and religion in the Nordic region from different angles. The contributors have been given ample opportunity to explore different aspects of the re-confessionalization, secularity and internationalization of law, resulting in a set of chapters grouped in three distinctive sections.

Section I: The Early Post-World War II Period

The first section is dedicated to the period during and immediately after World War II. The chapters assembled in this section show how actors in the field of theology, law and politics felt a need to "locate" themselves as countries, as churches, and as legal professionals. *Niels Henrik Gregersen* shows how the Danish creation theologians K.E. Løgstrup (1905–1981) and Regin Prenter (1907–1990) viewed a nation ruled by secular law as a precondition for a proper rule of law. Seeing the violation of law as the basis for their theological resistance to the German occupation power, they referred to statutory Danish law alongside international law, while appealing to the moral sense of people living under occupation while striving for Denmark as an independent nation in its own right. While Løgstrup and Prenter did not appeal to the early modern idea of *lex naturalis* at the legal level, they related a Lutheran concept of natural law to the pre-political level of social ethics as the only basis from which to criticize unjust laws.

Tine Reeh discusses the interesting collaboration between the Danish theologian Hal Koch (1904–1963) and the Danish proponent of legal realism, Alf Ross (1899–1979). Both argued for a Nordic model of democracy, rooted in a long legal culture of negotiation and conversation. While Koch argued that the spirit of Nordic democracy lies in the democratic "lifeforms" underlying democracy as a system, Ross was interested in shaping democracy as a political system with a clear legal structure. Nonetheless, both of them appealed to deep-seated legal cultures—some Hellenic, some Christian—that converge in the model of Nordic democracy.

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old division between Danish-Norwegian law on the one hand and Swedish law (including Finland) on the other, and then especially as a tool to promote cooperation in the field of law". Letto-Vanamo and Tamm, "Nordic Legal Mind," 1–2, 5–6, as well as 14–18 for a more general overview of developments in the field of Nordic cooperation in the area of law.

Kjell Å. Modéer analyzes how particular "secular" and "rational" ways of thinking about law were resisted in the post-World War II era in the context of Swedish discussions on law and religion. As Modéer notes, beyond the surface level of the law, we encounter "a deep structure of Christian culture defending its declining position".[24] In his chapter, Modéer presents the jurist Göran Göransson (1925–1997) as an example of legal actors who during this period of critical rational modernity upheld the Church law as an autonomous discipline with its theological roots was.

Analyzing the theological situation immediately after World War II, *Georg Kalinna*, in contrast, points to the need to offer new narratives for a democratic society in West Germany. The immediate past was to be built around – not least – an idea of "never again", but also to sort out what had happened and what could justifiably be learnt from the events in retrospect. These interpretations shaped ethics and helped actors make sense of their present. It led them to think anew about governance, democracy, and law, and the positive role of the churches in the new Constitution of 1949 is to be seen as part of this new theological narrative that relates to the well-being of democratic society as a whole.[25]

Section II: Negotiations of the Secularity of Law

The chapters assembled in the second section of the book discuss the question of the secularity of law and the relationship between theological norms and the law of the land in a range of different thematic and historical settings across the Nordic region and Germany. *Hans Michael Heinig* analyses in particular 20th century German legal theological reflection on the nature, scope, role and foundations of ecclesiastical law. This thought was shaped by

[24] Kjell Å. Modéer, "Christian Torchbearers in the Dark of Positivism: Survivors and Catalysts within Nordic Law and Religion 1950–2000," in this volume.

[25] For comparison, in his contribution to the recent volume *Lutheran Theology and Secular Law: The Work of the Modern State*, the American theologian Paul Hinlicky maintains that "Lutheranism is a conflicted tradition about the law," while the Swedish theologian Carl-Henrik Grenholm, in turn, explores different strands of legal thought—legal positivism as well as natural law—that both feature in a Lutheran social ethics. As Grenholm also argues, while Lutheran tradition never imagined that positive laws could be deduced from natural law, ethical considerations may play a role in the legislative process, and statutory laws may be criticized from an ethical point of view. Marie A. Failinger and Ronald W. Duty, "Preface," in *Lutheran Theology and Secular Law: The Work of the Modern State,* ed. Marie A. Failinger and Roland W. Duty (Abingdon: Routledge, 2018), xiii. See, in particular, Carl-Henric Grenholm, "Legal Positivism in Lutheran ethics," 17–28, and Paul Hinlicky, "Antinomianism–the 'Lutheran' Heresy," 28–38.

and responded to contemporary trends in society and general legal thought, including legal positivism. Legal validity was seen as more or less detached from possible theological legitimations, ecclesiastical law as more or less dissimilar to strictly 'secular' positive law. Not surprisingly, the experiences of World War II affected reflection on the criteria for judging whether positive law – including ecclesiastical law as "human law" – was "right".

Aud Tønnessen deals with the issue of democracy, by turning to the theme of the inner dominium of the church in relation to the worldly legal order and rule of law. The immediate context of Tønnessen's discussion forms the topic of female clergy, and the chapter traces shifts in vocabulary at a time where the frame of reference for worldly authorities decreasingly includes the notion of being governed by God. In parliamentary debates, self-confident theological reasoning on all sides is replaced by other, more secular vocabularies.

Where Tønnessen traces the tension between religious law and the law of the land to the legislative assembly, *Johan Bastubacka's* contribution approaches the boundaries between Orthodox canon law, Finnish secular law and European human rights law through the deposition of an Orthodox priest ("Father X") who remarried after becoming a widower. Pointing to the intertwined secular and religious legal orders governing the Orthodox Church of Finland, Bastubacka observes how the many-layered legal regulations concerning marriage challenges modernist distinctions by their entanglement of individuality and communality, thus mixing its faith-based and legal character.

Adding further perspectives, *Niels Valdemar Vinding's* chapter showcases the different strategies employed by Muslims seeking to find ways in which to locate themselves in Denmark by balancing out the strictures of religious law with the boundaries set by the secular legal order. *Lisbet Christoffersen*, in turn, shows how the Nordic Lutheran churches, despite their gradually diminishing numbers, have gained increased autonomy and self-rule, thus exemplifying processes of re-confessionalization. As the Swedish and Norwegian churches have been separated from the state, they have been granted privileges and entitlements that clearly set them apart from the organizations of minority religions, whose organization and recognition have become subject to increasing measures of control. Just as the Lutheran majority churches were once "established by law," in the 21st century they are also "re-established" by secular law, when they become autonomous legal subjects.

Hence, what we encounter in the Nordic countries at the present moment is a time of introspection, which today takes place in a transition from modernity with its emphasis on "reason" to late modernity with an emphasis, among other things, on "identity" and "recognition" as well – key themes of the chapter by *Risto Saarinen* and *Heikki Koskinen* to

this volume. We may call this a moment of introspection as far as the law of the land goes, a moment when in important ways this law is influenced by and reacts to the international and European legal regimes.

Section III: Internationalization

The chapters in the third section of the book all turn the gaze outwards, exploring how the countries in the Nordic region have been affected by the ever-increasing internationalization and Europeanization of law. As observed above, this volume investigates practices and patterns of thought concerning law and religion in a time when in Europe the general conditions for "having religion" have become optional and at a personal level (secularization^{meaning3}), without affecting one's formal legal status in society. For example, religious belonging does not affect whether someone is considered fit to hold public office or not, with the exception of the Nordic ruling monarchs. The principle of freedom of religion was already part of Nordic constitutions since the 1800s and, as shown by Christoffersen in her chapter, where it was not a part, it was remedied during the 1900s. However, *Helle Krunke's* chapter on Nordic constitutions in the postwar period shows that religion does not play the same role in the constitutional identities of the five Nordic countries, and if the countries want religion to play a role in relation to international law, it should be explicated at the constitutional level.[26]

Importantly, the secularity^{meaning3} has been rearticulated during the second half of the 20th century, concurrently with an increasing internationalization and Europeanisation of Nordic law. Observing the effects of this rearticulation, *Helge Årsheim's* contribution examines how a wide selection of different, partly overlapping international legal frames have become available to minorities in the Nordic region seeking to gain legal recognition. This situation invites a "strategic litigation" in which minorities can gain recognition by reinterpreting their religiosity according to the dictates of the legal framework that offers the most robust protections. While the availability of different legal frames may be viewed as indicative of secularity^{meaning3}, it can also be read as a sign of the dominance of state power, which sets clear boundaries to which forms of religiosity are eligible for protection.

[26] For another recent comparative analysis of Nordic constitutions and "constitutional mentaility" , including the effects of internationalization, see Jaakko Husa, "Constitutional Mentality," in *Nordic Law in European Context,* ed. Pia Letto-Vanamo, Ditlev Tamm, and Bent Ole Gram Mortensen (Cham: Springer, 2019), 41-60.

Another effect of internationalization and Europeanisation is the widening of the gaze of Nordic religion law. For example, as *Pamela Slotte* points out in her contribution on the case of Finland, this internationalization and Europeanisation has led to a broadening of the constitutional protective framework of freedom of religion. An effect of this broadening has been, for example, that the constitution now explicitly mentions the freedom to hold non-religious "convictions" alongside religious beliefs. It has also had the effect of strengthening the *positive* freedom of religion and conviction, including for collectives, something we identify earlier in this introduction as a facet of a legal "re-confessionalization".

Thus, a focus on the individual as a religious being *and* recognition of diversity in the area of religion and belief is discernable in Nordic law of the land (albeit with variations) at the turn of the 21st century. However, the focus is also not solely about individuals. It is also about a politics of recognition of collectivities, including religious minorities, as well as to some limited extent the "identity politics" discussed by Saarinen and Koskinen. An identity politics can spill over into law when certain particular interests are allowed to dominate legislative practices and outcomes. In fact, Stephan Heuser proposes a Lutheran "re-secularization" of the law as a counterweight to the dangers of identity politics and a politization of law.[27]

It can be discussed whether such dangers are immanent in the case of the Nordic countries, and if so what kinds of emphases on collectives and identity politics through the medium of law need to be critically analyzed in the Nordic case. What is clear, as the contributors to this volume emphasize throughout, is that the relations between law and religion cannot be considered apart from the larger cultural, political and institutional context with its values and ideas. For example, as *Anna Sara Lind* points out in her contribution on Sweden, a strengthening of the constitutional protection of positive freedom of religion for individuals has not been supplanted by equal recognition of positive collective religious freedom. This situation is due to a narrow reading of the scope of the freedom and of "state neutrality", and a related limited understanding of the positive duties of the Swedish state in relation to human rights. In this context, Lind points to the influence of Scandinavian Legal Realism and the so-called Uppsala School of legal philosophy.

Adding to this diagnosis, *Victoria Enkvist* makes clear in her discussion of construction permits for religious buildings that the Swedish legal framework, due to its narrow focus with

[27] Heuser, "The Contribution of Law to the Secularization of Politics: Impulses from Luther's Doctrine of the Two Regimes," 4.

regard to religious freedom, provides few concrete tools for public officials and decision-makers in identifying matters as not solely "secular" in character, but rather as concerning matters of religious freedom, albeit perhaps only in an indirect sense. Lind and Enkvist note the resulting adverse impact of "neutral" Swedish legislation, its interpretation and application at multiple governance levels, on the possibilities for religious minorities to exercise their freedom of religion.

This points at an aspect worth highlighting as far as a simultaneous emphasis on collectives alongside a focus on individuals goes. Human rights law and -thought rest on the idea that all humans have something in common, including certain basic needs. Human rights law simultaneously maintains that most of these rights (for example, the right to freedom of religion or belief) can be limited precisely on the basis of recognized joint needs. This is expressed in international law, for example, via limitation clauses acknowledging that a right to freedom of religion or belief can be circumscribed for purposes of protecting other persons' rights and freedoms, public order, safety and health. At least in the case of Finland, such international articulations of justified limits are normative when it comes to the legal interpretation of constitutionally enshrined fundamental rights.[28]

Here, at least in some sense, we are dealing with flexible concepts with changing content. For example, as Hussein Ali Agrama has noted with regard to the concept of "public order," such order conveys "the principles and sensibilities of particularist narratives, putatively rooted in majority sentiments, but that are also deemed foundational to the state."[29] Accordingly, the legal notion of public order "blurs division between legal equality and majority values".[30] Thus, formal equality before the law, an obviously key principle of all present-day Nordic constitutions, also in regard to matters of religion and boundaries of freedom of religion or belief, concretely assumes shapes influenced by majoritarian values and perceptions. What we end up with is an individualism/individualisation, including that of religion, and indeed also a recognition of collective religious identities that still may be circumscribed by majoritarian religious notions or what could be called an "implicit

[28] See the chapter by Pamela Slotte, "Moving Frontiers: Configuring Religion Law and Religious Law, and Law-Religion Relations" to this volume.

[29] Hussein Ali Agrama, *Questioning Secularism: Islam, Sovereignty, and the Rule of Law in Modern Egypt* (Chicago: University of Chicago Press, 2012), 38.

[30] Agrama, *Questioning Secularism*, 98.

theology". This is the case, despite the "declared" secularity of Nordic religion law. Is "common sense" really necessarily common to all citizens?

No wonder that religious minorities feel a need to negotiate with and partly perhaps outright resist parts of the Nordic law of the land, including that law in its Europeanized and internationalized form. The contours of this resistance can be seen throughout the volume, from the negotiations between religious and secular power in the management of the Orthodox church in Finland as displayed in Bastubacka's chapter, and to the discussions among Muslims in Denmark, discussed by Vinding, on how to reconcile the demands of religious and secular law.

How are we to live with legal institutions that – while important for purposes of worldly order and peace – are imperfect, being located as they are in what Luther called the "*saeculum*". In Heuser's reading of Luther, "secularity is not the result of a history of decay, but is an intended and at the same time highly contested mode of politics".[31] The chapters of this volume offer examples of how this co-existence with the law of the land has been and is interpreted and negotiated in the Nordic realm from a theological perspective, and from the perspective of religious agents beyond the majority churches as well.

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[31] Heuser, "The Contribution of Law to the Secularization of Politics," 9.

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