

provides an expert and learned guide to these sources and the possibilities that they offer.

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## **Church and State in Western Society: Established Church, Cooperation and Separation**

EDWARD J EBERLE

Ashgate, Farnham, 2011, xix + 197 pp (hardback £65) ISBN: 978-1-4094-0792-8

## **Religion–State Relations in the United States and Germany: The Quest for Neutrality**

CLAUDIA E HAUPT

Cambridge University Press, Cambridge and New York, 2012, x + 210 pp (hardback £60) ISBN: 978-1-107-01582-1

As the titles suggest, these are comparative works. For his comparison, Edward Eberle, Professor at the Roger Williams University School of Law, chooses the UK, Germany and the US to represent the established Church, the co-operative and the separationist models of his title respectively. The two areas of exploration are personal religious freedoms and Church–state relations in each of the countries. Claudia Haupt, a Professorial Lecturer in Law at the George Washington University Law School, explores how the US Supreme Court and the German Constitutional Court have deployed the notoriously polyvalent concept of neutrality in their constitutional law. Haupt traces the concept of neutrality through cases on religion in the classroom and religion in the public square.

Eberle chooses to begin his exposition by exploring the history of each country, thus providing necessary context for the subsequent chapters. This historical beginning neatly condenses the relevant history of each country into short form, including everything from the establishment of the Church of England by Henry VIII through to the recent repeal of blasphemy laws and new anti-discrimination legislation in the UK. It covers Luther's posting of his 95 theses in Germany in 1517, through to the post-Second World War framing of the new constitutional order. And it outlines the American founding through to modern Supreme Court jurisprudence.

Throughout the book Eberle homes in on those things unique to each of the comparator countries and those things that they share. Though each chapter

focuses on one of the two legal questions in one of the three countries, it also builds on the previous chapter: comparing and contrasting. This process culminates in the final chapter, where Eberle neatly draws together his ‘Comparative observations’ into what might actually make an excellent introduction to this topic.

The author essentially positions each country, by reference to historical and modern jurisprudence, on a scale that ranges from the established Church at one end, through to a co-operative model and ending up at total separation. Beginning with personal religious freedoms in the UK, Eberle deals with the increasingly pluralistic composition of British society, focusing, for example, on cases where school uniform policies have been challenged by Muslim students seeking to wear religious dress. Curiously, the outcome of these cases leads him to conclude that ‘the UK is making progress towards religious freedom’ (p 57). Such a view may not be shared by all practitioners in the UK, especially in the light of the four religious liberty cases currently being brought against the UK at the European Court of Human Rights, as well as the growing list of domestic cases where religious freedom arguments have not been successful before the courts. There is a more aggressive comparison between Germany and the US when Eberle confronts the US Supreme Court’s pivotal decision in *Smith* – which is seen as favouring majoritarian control through general laws, resulting in constraints on minorities’ religious practices – with the wide appreciation afforded to personal religious freedoms by the German Constitutional Court.

As Eberle moves onto his second topic – Church–state relations – again the first country to be studied is the UK and it is suggested that, while it has an established Church, it does not have an ‘established religion’ and is increasingly open to alternative religions to Christianity. Germany, Eberle states, models the co-operationist model with emphasis placed on the way in which the German government collects taxes on behalf of the Church while noting the voluntary nature of making such a contribution. The section concludes by considering the US and asks the question of whether Americans are on the verge of ‘losing the unique traits that [have] characterised the American “livlie experiment” – separationism – and if so, at what cost and what benefit?’ (p 191).

A theme that permeates the book is Eberle’s firm belief that a study of comparative law can helpfully illuminate both the successes and the shortcomings of the legal system that any given lawyer calls home (p 39). Whether one agrees with the power of comparative jurisprudence or not, this book does provide a helpful comparison of three very different countries. For the purist, the early references to Wikipedia may be slightly irksome and, of the three countries studied, the UK analysis is perhaps the weakest, no doubt owing to the fact that the book relied upon four previous essays by Eberle, all dealing with Germany and the US. However, this should not detract from what is overall a

worthwhile read for anyone interested in the study of religious liberty law, the relationship between Church and state or comparative constitutional law.

Claudia Haupt's work explores how the US Supreme Court and the German Federal Constitutional Court have understood the concept of 'neutrality': a notion that has long been the buzzword of religion–state relations in both countries. While courts and scholars have often relied on 'neutrality' as an interpretive and normative principle, the application of this principle has led to opposing results: more co-operation in the United States and more separation in Germany.

In her first three chapters, Haupt justifies her comparative approach by reviewing the legal and academic debates over comparative constitutional law, dismissing the problem of American exceptionalism and outlining her methodology. While these chapters are well researched and informative, they are not designed to persuade ardent opponents of comparative constitutionalism but rather to contextualize Haupt's comparative analysis of religion–state relations. Sadly, she does not make full use of this context as the book progresses, leaving the reader to wonder how these opening chapters relate to the heart of her analysis.

Haupt selects two issues within which to trace the development of the neutrality principle: religion in the classroom and religion in the public square. This chapter is only a small part of the book, but she quickly covers the relevant doctrinal ground, culling the key language from the courts' opinions and highlighting how neutrality shapes the courts' reasoning. This section could have been expanded to cover issues such as public forum doctrine in the United States but, given that developments in these issues do not contradict her convergence thesis, such an inclusion would have been interesting, but not essential.

Haupt also notes the special place of history in religion–state jurisprudence. Because of the rise of the legal interpretative method of originalism, the role of history in constitutional interpretation is considerably more controversial in the United States than in Germany. She reviews the originalism debate, drawing examples of the Supreme Court's use of history from 'Establishment Clause' cases, and concludes that the indeterminacy of the historical record on religion–state relations precludes courts from finding clear answers to modern questions.

Haupt then delves into the history, covering American establishments in the colonial period and the early republic, and German establishments from the Holy Roman Empire to the drafting of the Basic Law, before turning to twentieth-century political and social developments in both countries. The United States has gone from an ambiguity at the founding, through strict separationism, toward neutrality, while Germany has moved from church–state unity to co-operation, towards neutrality. The discussion of twentieth-century American developments focuses on the courts and omits society, but Haupt

provides a useful sociological primer on the secularisation and religious pluralisation of German society over the past few decades. In her view, these social and political factors, rather than the legal factors, have been determinative in the emergence of neutrality as the dominant principle of religion–state relations.

In the culminating chapter, Haupt seeks to clarify competing conceptions of neutrality. She elaborates on the distinction between formal and substantive neutrality, highlighting the tension between neutrality, separation and equality. She fails to make a case for any particular definition of neutrality and never fully rebuts the charge that the term is an empty shell. While she makes the pragmatic assertion that neutrality ‘prevent[s] the state from taking sides’ (p 201), this argument overlooks how differing conceptions of neutrality lead to radically different religion–state relations. Nevertheless, Haupt’s work is a helpful guidepost on the quest for neutrality, whatever the concept may mean.

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## Islamic Law in Europe? Legal Pluralism and its Limits in European Family Laws

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In this book, the author questions the impact of migration from countries with a predominantly Muslim population on European family law codes. She not only maps out the problems of a multicultural society but also proffers solutions to such perceived tensions, in particular solutions to the threat that Islamic family law may become entrenched in the legal systems of European countries. While she does accept that a possible shortcoming in the solutions proffered are that they are biased towards theory rather than practice, the book itself is aimed at academics rather than practitioners and therefore serves its readership well. These solutions appear in the final chapter of the book and are titled: ‘Seven theses to sum up and conclude’, one being ‘Inclusion or exclusion of alien family law’, in which it is argued that Islamic law has a part to play in the application of the law in European countries because private international law refers to it.

There is a useful summary of classical Islamic law (p 10) that encompasses the salient aspects of a broad topic. It would have been further helpful to readers to understand the relationship between religious and cultural identity, albeit in