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Oversight of religious associations

The starting point in this article is a special national feature, the fact that in Finland the Ombudsman oversees the activities of also religious associations. The intention is, on the one hand, to tell what oversight of the legality of actions by religious associations means in practice and, on the other, to describe the three alternatives with different degrees of oversight that are in use in Finland. The examination will be done by using three Christian denominations – the Evangelical-Lutheran, Orthodox and Catholic churches – as an example case and comparing the oversight of legality focused on them by the Ombudsman.

When oversight of the legality of actions by religious associations is discussed in Finland, this primarily means the Evangelical-Lutheran state church. The breadth and depth of oversight of this church is exceptional in an international comparison. The follow-up question that this poses is: does such a close relationship between church and state cause problems from the perspective of reconciling the practice of religion with public tasks? The examination is confined to central questions of oversight of legality and the intention is not to make a comprehensive presentation of church-state relations.

A key factual question that has been addressed in oversight of legality is ordination of women to the ministry. Women began to be ordained following a decision made independently by the Evangelical-Lutheran Church in the 1980s. Decisions made since then by the supreme overseers of legality and courts have significantly promoted implementation of ordination of women. Here, too, the question returns to the relationship between church and state. In other words, how is it possible that state bodies can promote ordination of women within the Evangelical-Lutheran Church, but not in other religious associations, such as the Orthodox or Catholic Church?

The foundation for oversight of legality of the actions of religious associations

The Ombudsman is tasked with exercising oversight to ensue that authorities, officials and others who perform public tasks comply with the law and fulfil their duties. Where religious associations are involved, oversight of legality has three different legislative bases. The Freedom of Religion Act (453/2003) applies to all registered religious associations. In addition to this Act, the Orthodox Church in Finland is regulated by a separate item of legislation, the Act on the Orthodox Church. The Evangelical-Lutheran Church has a special status in legislation, because both the Constitution and the Ecclesiastical and Freedom of Religion Acts regulate it.

The Freedom of Religion Act is general legislation regulating a special form of community formed for the purpose of arranging the practice of a religion, a registered religious association. The Act contains provisions on inter alia the establishment and registration of a religious association, its membership, articles of association and the procedure for becoming a member and relinquishing membership. A membership of at least 20 is a prerequisite for registering an association. There are currently 50–60 of them on the register. They include, for example, the Catholic Church, the legal status of which is determined in Finland solely on the basis of the Freedom of Religion Act.

Registration of a religious association does not as such bring it within the scope of the Ombudsman's oversight. The Ombudsman has powers with respect to a private body only if it performs public tasks. In the case of religious associations, this condition is typically met. Their public tasks stem from above all their right to perform functions associated with marriages and funerals. Nowadays, however, about 40 religious associations have the right to perform marriages, in which respect they are subject to oversight by the Ombudsman.

The concept of public task is the point of departure in the Ombudsman's powers; it defines the scope of oversight. However, it does not reveal the depth of oversight, the variety of means that are available for use. The hard core of the law governing public servants is their accountability under criminal law for their official actions. This can happen in certain situations also in oversight of religious associations. The key concept in evaluating criminal accountability is not the holding of a public task, but rather the exercise of public power (HE 77/2001 vp).

Something that has been seen as a fundamental prerequisite for a function being deemed an exercise of public power is that it affects the legal status of individual persons or communities to at least some degree. For example, performing marriages has this dimension.

Marriage is a civil law function in character and carrying it out involves a contribution by the person performing the ceremony. In addition to this, marriage also has implications for property rights and other rights and obligations of the parties. Because of the legal effects that are linked with marriage, the person performing the ceremony is in doing so also exercising public power. Further, a marriage ceremony includes tasks that can be categorised as administrative, such as verifying that impediments to marriage have been investigated, a marriage certificate has been issued and a notification made to the population information system.

The fact that the powers of the Ombudsman and accountability under criminal law extend to the performance of a marriage ceremony is the result of the solution model embraced in Finland. Here, as in the Nordic countries in general, there is a choice of marriage modes. A marriage can be either civil or performed by a religious association. In those countries where legislation makes civil marriage the mode that is as a general rule obligatory (such as Italy, France, Germany and Switzerland), the legal effects associated with marriage result from official actions (HE 14/2008 vp).

When the exercise of public power is involved, the misconduct-in-office provisions of Chapter 40 of the Criminal Code apply also when an action takes place outside the machinery of administration. In the misconduct-in-office regulations, persons who hold a public position of trust and exercise public power are equated with public servants. Thus a person who performs a marriage in a religious association can be prosecuted for, e.g., breach of official duty. By contrast, the concept of a public task does not constitute a ground for accountability under criminal law. If only a public task is involved, it is not possible to prosecute for misconduct in office. Also then, other oversight-of-legality measures are available to the Ombudsman.

All in all, the Finnish solution model can perhaps be criticised on the ground that it links together the activities of religious associations and oversight by the Ombudsman. If, for example, the exercise of public power and public tasks included in a marriage ceremony were performed as official functions, a situation of this kind would not arise. On the other hand, the situation is that a registered religious association can itself decide whether or not to apply for the right to perform marriages. If an association does not apply for this right, it means that the marriage is performed as a civil ceremony and a religious ceremony can be performed separately without official authorisation to perform marriages. Then, naturally, the Ombudsman has no power of oversight.

Status of the Orthodox Church

There are two state churches in Finland, the Evangelical-Lutheran and the Orthodox. According to a dictionary published by the Language Office of the Research Institute for the Languages of Finland, "state church" means a denomination that is administratively and financially dependent on the State. The definition includes several dimensions. First of all, it reveals that the primus motor, the wellspring of the relationship of power is the state. The relationship runs from the state to the church, not from the church to the state. Second, the area of application of the definition is fairly open. How far the state's administrative and financial clout extends can vary even a great deal over time, locally and from one religious association to the other. Third, the close relationship that the definition describes indicates that a state church has a special status vis-à-vis the state compared with that of other religious associations.

The Orthodox Church and its parishes are public bodies, whose status and form of organisation are based primarily on the Act on the Orthodox Church. On the other hand, the Orthodox Church in Finland is in the religious sense an autonomous archbishopric in canonical union with the Ecumenical Patriarchate of Constantinople. Thus the church is at the same time both a Finnish public body and a part of the worldwide Orthodox Church, which gives this denomination a special status in Finnish legislation.

The status of the Orthodox Church vis-à-vis the state has changed rapidly over the past decade. Although it is still a state church, the Orthodox Church has moved and/or been moved to a greater distance from the state. The first step was the new Constitution that came into force in 2000. Until then, the President of the Republic appointed the archbishops and bishops of the state churches. Thus it was the President who ultimately decided who served in leading positions in them. Under the new Constitution, however, the choice of their archbishop and bishops was transferred to the state churches themselves (HE 1/1998 vp).

From the point of view of the Orthodox Church, however, the most important turning point was the new Act on the Orthodox Church (985/2006) that entered into force at the beginning of 2007. The situation under the law had earlier been that the supreme administration of the denomination resided with the Government of the country, and many matters belonging to the internal functions of the church were regulated by an Act or Decree. The Orthodox Church's close ties to the state revealed themselves also in practical administration. A representative designated by the Government participated in the Synod. Confirmation of the parishes division, oversight districts as well as the numbers of travelling priests and cantors, their places of residence and areas of operation was effected through a decision of a state

authority. The close link with the state was still reflected by the fact that priests, deacons and cantors hold official posts and legislation on public servants is applied to service relationships. The costs of the Church Administrative Board and diocesan administration were covered directly from exchequer funds and the status of the Administrative Board was often equated in many respects with that of state offices. The Ministry of Education and the Church Administrative Board also made an agreement in which the latter's results goals were set.

A key objective of the 2007 legislative amendment was to strengthen the Orthodox Church's autonomy and reduce the role that the state plays in its internal decision making. Power to issue norms was transferred to the church's own bodies insofar as matters that require regulation on the level of an Act are not involved. The status of the church's central and diocesan administration became more independent than it had earlier been. The financial position of the church was likewise detached from the state in that operational expenses are no longer paid direct from exchequer funds, but instead the church receives financial support in the form of a grant from the state (HE 59/2006 vp).

When the Act was being deliberated in the Eduskunta, different views on the status of the church's personnel and how it should be arranged were presented. In the view of the Administration Committee, it would have been natural for a service relationship in the Orthodox Church to have remained, in accordance with the tradition of administration by civil servants, that of an official. The Committee supported its stance with the argument that the Orthodox Church and its parishes are public bodies (HaVM 20/2006 vp). However, the Constitutional Law Committee took the view that the status of the church does not require that its officials continue to be public servants. In the view of this committee, the tasks of the church and its parishes involve exercise of public power to only a minor degree, mainly in connection with marriage ceremonies. However, the Committee noted that also other religious associations have the right to perform marriages, although their employees do not have civil servant status (PeVL 28/2006 vp).

It is interesting to reflect the change that has taken place in the Orthodox Church onto accountability under criminal law for official actions. In the starting situation, officials of the church were included in a sphere that in itself is clearly accountable under criminal law for its actions. Section 118 of the Constitution contains a general provision to the effect that officials are accountable for the lawfulness of their official actions. This means, among other things, that the provisions of Chapter 40 of the Penal Code on misconduct in office are applied to officials (HE 1/1998 vp).

Transferring officials of the Orthodox Church to the sphere of employment contracts directly affects application of the misconduct-in-office provisions of the Penal Code. According to Section 11 of Chapter 40 of the Penal Code, an official means inter alia a person holding an official post or in an equivalent employment relationship with the Orthodox Church. Employees of public bodies, i.e. persons in employment relationships with these bodies, are regulated later in the same Section. Because all service relationships have become employment relationships under the new Act on the Orthodox Church, the regulations on civil servants apply only with respect to employees of public bodies. It follows from this that the misconduct-in-office provisions concerning, for example, abuse of an official position, gross abuse of an official position, breach of official duty and gross negligence no longer apply to the personnel of the Orthodox Church. Accountability under criminal law for official actions has been preserved to the earlier extent only in situations where public power is exercised, for example in performing a marriage. The application provision of Section 12 of Chapter 40 of the Penal Code states that the misconduct-in-office regulations apply to all who exercise public power (HE 77/2001 vp).

Because Section 110 of the Constitution gives the Ombudsman the power to bring prosecutions in matters within the scope of her oversight, the revised legislation on the Orthodox Church also means a narrowing of the Ombudsman's power to prosecute in instances of misconduct in official positions. A priori, the Ombudsman's right to prosecute has not been limited to misconduct in office; instead, this right is determined solely according to the subject of the Ombudsman's oversight of legality (HE 1/1998 vp). In other words, if a public task comes under the scope of the Ombudsman's powers, the person performing this task can be prosecuted also for offences other than misconduct in office.

Where the Orthodox Church is concerned, however, the right to prosecute has been narrowed with respect to misconduct in office and also factually. Although the employees of a public body have been taken separately into consideration in the Penal Code regulations on misconduct in office, their accountability under criminal law is determined more narrowly than applies to civil servants and those who perform public tasks. Because all of the transgressions that are included, for example, negligent breach of official duty are not otherwise criminalised, it is not then possible to prosecute for another offence. If, for example, the legal provision concerning breaches of official duty does not apply, no crime in accordance with the Penal Code's general criminalisations has necessarily occurred. Thus replacing the status of official with that of a person in an employment relationship affects, through limitation of the right to prosecute, the depth of the Ombudsman's power of oversight.

The new legislation on the Orthodox Church contains one blemish relating to legislative technique. Section 11 of Chapter 40 of the Penal Code (604/2002) still mentions persons who serve in an office or in a comparable position in the Orthodox Church. Since the legislative revision, these no longer exist. That legal provision has either remained unamended through an oversight or perhaps the thinking was that after the abolition of the offices, the provision is in actuality meaningless even unaltered. In any case, only the provision on employees of public bodies, as defined later in the same Section, becomes applicable.

The changing shape of accountability for actions in office has been outlined in the foregoing. By contrast, the Ombudsman's power of oversight with respect to the Orthodox Church's official tasks has remained unchanged in scope. The starting point in practising oversight has generally been that the power of overseers of legislation cannot be narrowed by means of organisational changes or by outsourcing tasks earlier performed solely by the public sector. Thus the change that had taken place in the Orthodox Church with respect to the type of service relationship had not altered the scope of the Ombudsman's power. Her present power with respect to administration of the Orthodox Church manifests itself in, among other things, the fact that the Act on the Orthodox Church requires it to comply in its activities with the general laws on administration, i.e. the Administrative Procedure Act, the Act on the Openness of Government Activities, the Language Act and the Archives Act. On the other hand, the power of the Ombudsman has as an established fact been limited so as to categorically exclude religious practice and doctrinal questions.

Oversight of the legality of actions by the Evangelical-Lutheran Church

The foundation for oversight by the Ombudsman with respect to persons holding offices in the Evangelical-Lutheran Church is clear. When an authority or public servant is involved, the a priori assumption is that the action falls within the scope of the Ombudsman's power and the regulations on misconduct in office. When the matter involves a public servant, it would be better to say that it must be separately reasoned and shown that the official's action is for some or other reason not subject to the Ombudsman's oversight and that the regulations on misconduct in office would not apply.

The established view with respect to the Evangelical-Lutheran Church of Finland has been that the power of overseers of legality does not extend to religious practice or doctrinal matters. What is meant by religious practice and doctrinal questions is not of significance solely from the perspective of the Ombudsman's power. Also the other supreme overseer of legality,

the Chancellor of Justice, oversees the state churches with the same powers. The highest judicial instances – the Supreme Court and the Supreme Administrative Court – have, as courts of final instance, continued to issue numerous decisions concerning the Evangelical-Lutheran Church. The decisions have applied above all to the ordination of women, i.e. have contributed to demarcating whether this is a doctrinal question or not.

The legal starting point in the question of ordination of women is the Act on Equality between Women and Men that entered into force at the beginning of 1987. Section 2 of the Act states that it does not apply to functions associated with religious practice in the Evangelical-Lutheran Church, the Orthodox Church or other religious associations. About this, the Government proposal introducing the legislation contained the express statement that "the Act would therefore not be applied to ecclesiastical functions, such as ordination to the ministry. Thus the proposal would not constitute an intervention in the question of ordaining women". (HE 57/1985 vp).

The Synod of the Evangelical-Lutheran Church approved the ordination of women in 1986 and the first women were ordained in 1988. Complaints concerning the ordination of women were very soon referred to the supreme overseers of legality. One of the questions that arose then was whether a bishop, invoking his conviction, could refuse to ordain a woman to the ministry. The Chancellor of Justice found that the Bishop of Oulu was acting contrary to the law and his official duties, because he refused to ordain women. As a result of this refusal, women had had to request ordination in other dioceses (561/89).

The Supreme Court has dealt with the equality of a female applicant in a situation of applying for an office (2001:9). In an opinion given by a Diocesan Chapter to a parish, a female applicant had been ranked first in an assessment of the ability and skill of candidates to perform the office in question. However, the parish chose a man, who had been ranked fifth, i.e. last, for the office. The female applicant had asked the Ombudsman for Equality for an opinion on whether she had been discriminated against in a manner contrary to the Equality Act when the office was being filled. The Ombudsman for Equality had taken the view that the Act applied to the case and concluded that the female applicant must be regarded as meriting the office more than the man who had been chosen for it. For this reason, the assumption of discrimination in the meaning of the Act had arisen. The Supreme Court, in turn, found:

> Freedom of religion is the freedom to practise a religion. The right of a parish freely to choose its pastor follows from this. However, the church must when practicing religion comply with constitutional law and respect gender equality. Gender equality is a principle that also the church accepts. Therefore the limitation of the Equality Act now in

question can, without violating freedom of religion, be interpreted in such a way that it does not mean choosing a curate in the present manner.

A parish is in the position of an employer when it chooses a curate. Whether the choice of a curate is among the church functions that are intended in the Government proposal to be excluded from application of the Act is open to interpretation. Section 2.1.1 of the Equality Act requires the limitation to be interpreted in the way that best promotes equality between women and men in especially working life. For this reason, the expression "functions associated with the practice of religion" in the relevant Section of the Act must be interpreted narrowly rather than expansively. Thus there are no grounds to regard the choice of a curate as being included in functions associated with the practice of religion.

Thus the parish was not able to demonstrate in the manner required under the Equality Act that owing to the nature of the office there was a weighty or acceptable ground for its action or that its action had been for an acceptable reason other than gender. Accordingly, the Supreme Court ordered the parish to compensate the female applicant in accordance with the Equality Act.

Applications for offices have been dealt with also in the Supreme Administrative Court. One decision by the Court, (2008:8) concerned a situation in which a male pastor applying for an office had announced that he would not perform a service of worship together with a female pastor. In the view of the Court, accepting this would lead to discriminatory arrangements contrary to the Equality Act. When the male pastor who was the applicant said that he would refuse to perform a service of worship together with a female pastor, he should have been regarded as having announced in advance that he would not take care of all of the tasks and duties that the Vicar assigned to him.

The Supreme Administrative Court based its decision on the Ecclesiastical Act and the Church Rules of Procedure. The latter states that a person eligible to stand for election to the office of Vicar is not an applicant who obviously lacks the prerequisites for discharging the office. In the view of the Court, the Ecclesiastical Act and the Church Rules of Procedure do not contain provisions under which an employee who has accepted a church office would have the right, based on religious or conscientious conviction, to neglect to perform tasks or obligations belonging to his or her office. Performing a service of worship is a Vicar's official duty, and the practice of religion that the Constitution guarantees did not arise in this context. The application for the office of Vicar who had announced that he would not perform a service of worship together with a female pastor was, in the assessment of the Court, unsuitable as a candidate for election.

Courts have adopted a comparable view of situations in which a serving male pastor refuses to work with a female pastor. For example, the Turku Administrative Court (08/0328/1) has concluded that work arrangements based on gender already in and of themselves constitute the discriminatory measures that the Equality Act prohibits. According to the Court, the starting point when the Equality Act was being enacted was that a priest's gender is included in the content of practice of religion if the doctrine of the church so presupposes. Because the Evangelical-Lutheran Church of Finland has approved the ordination of women, the regulations of the Equality Act accordingly become applicable also when drafting duty roster lists for performing services of worship. Performing a service of worship is an essential task associated with a curate's office and in this connection practice of religion as safeguarded in the Constitution does not arise (an appeal against the decision was lodged with the Supreme Court on 10.11.2008 and the case is pending there).

In 2006 the Bishops' Conference sent parishes and church administrative bodies, for their information, a copy of the report "Directing work, developing the work community and occupational safety", which it had adopted and in which a position is taken on the tensions that ordination of women had caused in the church's work communities. The report underscores the importance of equality between women and men. It points out that an employer must assign pastors' work tasks equitably irrespective of gender. An employee, in turn, must perform all tasks that his or her office includes. A man who objects to the ordination of women has the right to be ordained to the ministry, but a willingness to work in cooperation with female pastors is required of him. Thus he can not refuse to perform tasks that have been legally assigned to him together with a female colleague.

In August 2009 the Ombudsman issued a decision on a complaint (3189/07) concerning the Bishops' Conference report in question. The complaint came from a person who believed that the report was in conflict with freedom of religion and conscience, because persons opposed to the ordination of women could be obliged through work orders to practise religion contrary to their conscience. The core question in the complaint was what kind of interpretation should be accorded freedom of religion and conscience when practicing religion as a work task is involved. In other words, does freedom of religion and conscience make it possible to refuse work tasks?

The Ombudsman pointed out that the position adopted by the Bishops' Conference is in accordance with the established interpretation of freedom of religion and conscience. In her view, the precursor documents of the Constitution do not support the idea that it would be possible for a pastor to refuse the tasks of his office on the ground of his conviction. This question has also come up in interpretations of the European Convention on Human Rights.

The interpretation is likewise supported by a 1989 decision of the Chancellor of Justice on the ordination of women and by domestic case law. The view adopted in domestic case law has been that a pastor can not discharge the tasks that go with his office on the terms of his own religious practice, but rather in the way that his official duties require. A pastor has exercised his freedom of religion and conscience in committing himself to his clerical office, and his own theological or other views must not be an obstacle to performing his official duties. The Ombudsman points out that equal status, gender equality and non-discrimination hold a key position in the legal system and the public authorities must promote their implementation. Therefore it is not possible by invoking freedom of conscience to engage in activities that violate the fundamental rights of others or are contrary to the legal order.

All in all, the stances that the supreme overseers of legality and the highest courts have adopted on the question of the ordination of women are unambiguous. The same regulations apply to the Evangelical-Lutheran Church as to public servants in general. The legal starting point is the provision in Section 76 of the Constitution to the effect that the Ecclesiastical Act shall regulate the organisational form and administration of the Evangelical-Lutheran Church. The church has the exclusive right to propose inclusion in the Act of everything that concerns solely its own affairs. Amendments to the Act are proposed by the Synod. The Eduskunta and the President only have the power to ratify or reject the proposed amendment. From the time that the church itself approved the ordination of women, the equality regulations have been applicable in the same way as in other professions. When one thinks of a professional group, it is in generally not acceptable, for example, for a male person to refuse to work with a woman colleague or announce in advance when applying for a position that he will not work with women colleagues. It would be no less unacceptable for a superior to refuse to accept female subordinates or for women to be discriminated against on the ground of gender when appointments are being made. Because the church itself has approved the ordination of women, that is a factor that also in decisions by the supreme overseers of legality is not seen as belonging to the sphere of practice of religion and doctrinal question.

The principle of good administration

The organisational form and administration of the Evangelical-Lutheran Church are regulated in the Ecclesiastical Act. This states that the Administrative Procedure Act applies to the activities of the church. Through this, also the general administrative principles that apply to public servants become applicable to it.

Both the Chancellor of Justice and the Ombudsman recently adopted a position on the application of the Administrative Procedure Act in the activities of the church. The Chancellor of Justice dealt with a complaint (69/06) concerning a situation in which a Helsinki man had orally requested permission to have his mother's funeral service conducted in Espoo Cathedral. The Espoo Cathedral Parish and its Swedish-speaking counterpart Esbo svenska församling refused the request, because non-parishioners did not have access to the cathedral. The mother of the man who made the request did not belong to either of the two Espoo congregations, but the family plot was in the church-run cemetery in Espoo.

After this, the man had sent an e-mail requesting information on the possibility of a policy decision and instructions for appealing against the refusal. The reply supplied by the parishes did not contain the decision requested, nor set out the reasons for failing to furnish it. It had been stated in the reply that there was no possibility of an appeal. The Finnish- and Swedish-speaking Diocesan Chapters investigated the matter, but did not see anything to reproach in the actions of officials in the parishes.

The Chancellor of Justice found that three officials in the Espoo parishes had through their actions obstructed implementation of the constitutionally guaranteed right to good administration. First, they had neglected their obligation under the Administrative Procedure Act to provide advice and had also acted contrary to the principle of proportionality and the service principle when they did not tell the enquirer what the appropriate procedure was. Then they had denied him the right to have a matter dealt with by a competent authority, the right to receive a reasoned decision and the right to appeal. The officials should have forwarded his e-mail enquiry to one or other of the parish councils for them to deal with it, but they had not referred in any way to this decision-making procedure in the reply they sent him. The Diocesan Chapters ignored the aforementioned errors in the actions of the parish officials and did not pay attention to the fact that the complainant was being denied his constitutionally guaranteed fundamental right to good administration. For this reason the Chancellor of Justice issued reprimands to two Diocesan Chapter officials and three parish officials.

The Ombudsman has adopted a position from the perspective of good administration on the distribution of Evangelical-Lutheran parish newspapers (3531/06). She has investigated several dozen complaints concerning parish newspapers being delivered to people's mailboxes. These papers are distributed in two different ways. In most parishes they are delivered as unaddressed mail. This means that a copy of the paper is delivered to every household in the same way as advertising and free sheets are distributed. Here, the parish newspaper is not delivered to those households that have a sign on their mailbox refusing advertising and free sheets. The other distribution alternative is as addressed mail, which means that the newspa-

per goes only to members of the congregation. The parish newspaper with the biggest circulation, Kirkko JA kaupunki ("Church and City"), published by the Helsinki Group of Parishes, is delivered as addressed mail. No complaints were made about addressed distribution.

What the complaints generally involved was that persons to whom unaddressed mail was delivered did not want to receive a parish newspaper, but welcomed other advertising publications and free sheets. However, the only way they could stop the parish newspaper being delivered was to refuse all advertising and free publications. Conversely, it had also happened that the complainant would have wanted to receive the parish newspaper, but did not, because he refused other advertising items and free sheets. Under the terms of a contract, a parish newspaper is not delivered to a household that refuses advertising or free sheets.

In the assessment of the Ombudsman, two principles tending in different directions clashed in the matter. What is involved in the distribution of parish newspapers is, on the one hand, the fact that the Evangelical-Lutheran Church has on its own initiative embraced the Administrative Procedure Act and its general principles. The principles of good administration that the Act requires include inter alia the service principle and consideration of the client perspective. Applied to the distribution of parish newspapers, this means that a parish should ensure as simply and flexibly as possible that clients can choose whether or not they want and receive a copy delivered to their home. The Ombudsman took the view that a person becomes a client of administration in the sense of the Administrative Procedure Act not later than when he or she contacts a parish to terminate delivery of a parish newspaper.

On the other hand, the Evangelical-Lutheran Church enjoys freedom of religious communications in the manner outlined in a Constitutional Law Committee report (PeVM 17/2006 vp). In distribution of parish newspapers these two perspectives led to different results. The Ombudsman pointed out that, in accordance with a Government proposal concerning the Constitution, the Ombudsman must oversee implementation of good administration. This must be overseen also with respect to parish newspapers, because the church has adopted the Administrative Procedure Act on its own initiative. In her view, the operational practices employed in distributing advertising and free sheets do not seem to present a solution to the problems that have arisen. Therefore she concluded that delivery of parish newspapers as mail items addressed to the members of the congregation seems to be the best of the alternative distribution models. It is the one that best takes account of the customer perspective that belongs to good administration. For that reason it can be regarded as recommendable.

The relationship between religious associations and the State

The European conception of the state has traditionally been built on a way of thinking that emphasises a societal dualism. According to it, public administration is a sphere of public activities and the opposite is the sphere of private activities founded on principles of individual autonomy. The influence of the dualistic model in the arrangement of church-state relations is especially pronounced in France. There, these relations are founded on legislation, enacted in the early 20th century, under which church and state are strictly separated from each other. The starting point is equality between all religious associations. There is no state church, official religion or recognised churches. Nor do religious associations have the status of bodies constituted under public law. Practising religion is emphatically a private matter, and a religious association is subject in its actions to the rules and principles of private law (HE 59/2006 vp).

Also in Finland, religion can be practised according to a dualistic model entirely without any state intervention in it. It is stated in the precursor documents to the revision of the fundamental rights provisions in the Constitution that freedom to profess and practise a religion includes inter alia the opportunity for each religious community to decide on its own religious rituals (HE 309/1993 vp). Correspondingly, religious activities can be engaged in without any legal arrangement whatsoever.

When a religious association is registered, it is entered in a register maintained by the National Board of Patents and Registration. The intention when the Act on Religious Freedom was being enacted was to underscore the autonomy of registered religious associations, so also registration is above all an act of recording the form of organisation (HE 170/2002 vp). However, registering an association can be a prerequisite for the application of other legislative provisions. For example, instruction in pupils' own religion is arranged, upon request, in schools if at least three children entitled to this education live in the area of the same municipality. A registered religious association can also apply for the right to perform marriages and funeral services dealt with in the foregoing.

The registration referred to in the Act on Freedom of Religion can, if the association itself so decides, be a basis for the latter rights, which also has further implications with regard to the oversight associated with them. In both respects, the state's influence in the field of practice of religion is quite marginal. The mutual dependence of a registered religious association and the state corresponds largely to the dualistic model, in which the spheres of operation of the state and a religious community functioning in civil society do not significantly impinge on each other.

Where the Evangelical-Lutheran and Orthodox churches are concerned, however, a different situation obtains; their linkage to the State is strong. However, there are differences in this. In recent decades the Orthodox Church has to some degree put a greater distance between itself and the State, whereas changes in the relationship between the Evangelical-Lutheran Church and the State have been minor.

Looked at from the perspective of oversight of legality, the most essential change is that Orthodox priests, deacons and cantors no longer hold the post of public servant. The solution was a natural part of the 2007 legislative amendment, which underscores the autonomy of the church throughout. With the future in mind, it can also be said that the church's taking a greater distance from the State avoided certain problems that could arise. The established point of departure in applying the Equality Act has been that the autonomy of religious associations is respected, i.e. they can independently decide whether to approve the ordination of women or not. On the other hand, if the priests of the Orthodox Church had continued to be public servants, the State would have been their direct employer and paymaster. A question that could have eventually arisen was why in every other state body – including the Evangelical-Lutheran Church – the gender equality that the Equality Act demands is respected, why not in the Orthodox Church? How could such categorical discrimination against women on the basis of gender be possible in one professional group? It may be that the factual power relations in society may well have weighed in the scales then as well. The Evangelical-Lutheran Church that represents the mainstream counts about 81% of the population within its flock, compared with about 1% for the Orthodox Church. Now that the revised legislation has accentuated the separation between church and state, the discussion and conflict described will hardly arise.

Nevertheless, both state churches – the Evangelical-Lutheran and the Orthodox – still have numerous public tasks. Although the maintenance of population registers has been transferred from parishes to the State, the former are still responsible for so-called old church books and supply data to the population information system. Congregations maintain a considerable number of stately church buildings of cultural and historical value and which are listed as protected. In addition, for example, the diaconal and other services that parishes provide as well as their work with children and adolescents include activities that support and complement the services that municipalities take care of. Pastors of the Evangelical-Lutheran Church serving as chaplains in the Defence Forces are public servants; in the Orthodox Church, this work is done by Orthodox priests on a part-time basis. Evangelical-Lutheran pastors work as chaplains in prisons, but one Orthodox priest has also worked in them. The salaries of these public servants are paid by the State out of the appropriation for the administration sector.

The status of the Evangelical-Lutheran state church differs clearly from that of the Orthodox in that the tasks that Lutheran parishes are statutorily required to perform include the maintenance of public cemeteries. Everyone has the right to a grave in the cemetery belonging to the Evangelical-Lutheran parish in his or her home municipality. A grave can also be obtained in a separate non-denominational burial plot. A non-denominational burial plot is intended as a religiously neutral alternative for those who for religious or confessional reasons do not want to be buried in an Evangelical-Lutheran cemetery. With respect to a non-denominational burial plot, the only function that the parish performs is technical maintenance.

The different status of the state churches and other religious associations reveals itself also in their funding. Members of the Evangelical-Lutheran and Orthodox churches pay church tax to their parishes. The rate of tax is set by the Evangelical Parish Council or the Orthodox Parish Council and tax is levied on the same income as municipal tax. In addition, parishes receive a share of the proceeds of corporation tax. Other religious associations do not have the right to levy tax. Registered religious associations finance their activities mainly through donations, membership dues and their own fundraising efforts. State financial support is granted to religious associations on calculation principles according to the size of their membership. This aid is of hardly any significance in practice; for example, the Catholic Church currently receives €40,000–50,000 per year.

Prospects for the future

The starting point in the Council of Europe is that state and church should be kept separated. According to one of its recommendations (Council Recommendation 1804/2007), this is a generally accepted point of departure in democratic states, although national differences can be observed in it. The European Human Rights Convention also adopts as its initial premise that practising religions does not belong to the basic functions of the state. The European Court of Human Rights has underscored the neutral and impartial role of the state in relation to arranging the practice of different religions. With respect to the role of a state church, the Human Rights Committee of the Council found in the case Darby v. Sweden that a system founded on a state church could not in itself be deemed to violate Article 9 of the Convention, which concerns freedom of religion. The Committee points out that a system of this kind is in use in many countries that are party to the Human Rights Convention and existed in them before the Convention was drafted and the states acceded to it. However, special protective measures are a prerequisite for a system founded on a state church meeting the requirements of Article 9. (Human Rights Committee report 9.5.1989).

Also in Finland, the status of the state churches is in a state of flux. The Orthodox Church and the state have moved further apart from each other in recent years. Where the Evangelical-Lutheran Church is concerned, in contrast, the development is not clear in the same way. It is interesting in this connection to note that in the other Nordic countries, especially Sweden and Denmark, also the Evangelical-Lutheran Church and the state have grown further apart.

In Sweden, church-state relations were rearranged through a legislative amendment that entered into force at the beginning of 2000. As a result of this, religious authorities no longer exist (RP 1997/98:116). Associated with this is the fact that also the Ombudsman has no general power, based on oversight of official activities, with respect to the Evangelical-Lutheran Church. The church comes under the Ombudsman's oversight only when the Act specifically defined its functions as official actions. Examples of these include funerals and tasks relating to archiving public documents (e.g. decisions 4890/2005 and 556/2006 by the Swedish Ombudsman). Correspondingly, under the Danish Ombudsman Act (473/1996), the Ombudsman's powers extend to the Evangelical-Lutheran Church. However, these powers exclude matters that are directly or indirectly connected with the tenets or doctrines of the church.

In Finland, a problem from the point of view of supreme oversight of legality is that the position of the Evangelical-Lutheran Church as an object of oversight differs so significantly from that of the orthodox and Catholic churches. The differences in oversight are great when one considers how much they have in common, such as the Christian principles that the communities share, their present task and, for example, the role of clergy as spiritual caregivers. At the moment, the task of the Evangelical-Lutheran and Orthodox churches is set out in the law. The Ecclesiastical Act states that the task of the Evangelical-Lutheran Church is to proclaim, in accordance with its confession, the Word of God and distribute the sacraments as well as otherwise to work to spread the Christian message and put love of one's neighbour into practice. According to the Act on the Orthodox Church, the church serves people through sacred rites, Orthodox teaching and education, diaconal and charity work as well as other activities founded on the tradition of the Orthodox Church. The tasks of the Catholic Church operating in Finland are not, naturally, regulated in legislation, but those that the church has itself announced that it performs do not differ essentially from what is outlined in the foregoing.

Tasks associated with the practice of religion form the core of the work that, for example, clergy perform. Although there are differences between the Evangelical-Lutheran, Orthodox and Catholic churches in doctrinal questions, it can be asked whether the work that clergy belonging to the three denominations do differs essentially from one church to another. The

question could be carried further as well: is the difference between the church communities so big that the tasks that Evangelical-Lutheran clergy perform absolutely need to be taken care of as an official task.

When the Act on the Orthodox Church was going through the Eduskunta, the Constitutional Law Committee observed in 2006 that there was no need to retain the employment status of an official, because a priest exercises only little public power. Since nothing equivalent had been done in the recent comprehensive revision of the legislation on the Evangelical-Lutheran church, it remains open to what extent the same argumentation would be valid for this church. Although in such matters as, for example, the burial function, the Evangelical-Lutheran Church has significantly more public power and public tasks than the Orthodox Church, it would seem that the emphasis in the everyday work that clergy do in both denominations lies in the practice of religion.

When the supreme overseers of legality draw a line between the practice of religion and official functions, it is problematic that an Evangelical-Lutheran pastor as an official and the church as an authority must separately argue that it has acted in the role of a practitioner of religion, not that of an official. A discussion has been prompted in Finland by the fact that the supreme overseers of legality have been considered to have intervened excessively in the activities of the Evangelical-Lutheran Church (PeVM 17/2006 vp). An aspect that has attracted less attention is that the Lutheran Church's role as, on the one hand, a religious association and as an authority, on the other, has been defined clearly only through separate items of legislation enacted in recent years. By contrast, the central provision, the Ecclesiastical Act, dates from 1993 (1054/1993); in other words, it pre-dates the revision of the fundamental rights provisions of the Constitution in 1995 and the revised Constitution that entered into force in 2000. Thus the Ecclesiastical Act does not define exercise of public power and public tasks, and perhaps the definition could not be articulated in the same way as was done a few years ago when legislation on the Orthodox Church was being enacted.

From the perspective of the supreme overseers of legality and domestic administration of law in general, it would be essential to define the sphere of the Evangelical-Lutheran Church's exercise of public power and its tasks clearly in the way that has been done in, for example, Sweden. What should then be specifically expressed in the Acts and their precursor documents is in what respects the church performs official tasks that the supreme overseers of legality are responsible for overseeing.

Definitions are important, and indeed even essential, also on the international level. If, for example, a case concerning the Evangelical-Lutheran Church comes before a body like the European Court of Human Rights, the Court will, of course, respect national premises. On the other hand, it is obvious that the perception of the status of the Evangelical-Lutheran Church of Finland would bring problems, because it deviates very strongly from the principles that the Court has embraced. If a system is not known or it is difficult to form a grasp of how its mechanisms operate, a so-called process risk comes into being. In this case, the process risk is a dual one: the Finnish system is at a distance from the basic European solutions and the principles underpinning it are not spelled out in domestic legislation, either. Also this risk would be lessened by clearly enshrining in legislation the national points of departure on the Evangelical-Lutheran Church.

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Sources and case law have been followed until September 30, 2009.

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