Book Review


This latest volume in the Veröffentlichungen des Max-Planck-Instituts für ausländisches öffentliches Recht und Völkerrecht-series contains a selection of chapters that result from a symposium which was held in Heidelberg in July 2005, organised by the Law Faculty of the University of Heidelberg and the Minerva Center for Human Rights, Hebrew University of Jerusalem. The fourteen chapters explore the important and ever controversial issue of state–religion identification, i.e. the degree and type of interaction between the state and religion. Koenig, in his socio-historical introductory article, strikingly determines the need for scholarly debate on this issue: “It is indeed hard to find a country which is not witnessing public debates over religious symbols (headscarves, crucifixes etc.), constitutional conflicts over Church-State relations and political controversies over the accommodation of religious minorities” (p. 3). The underlying research questions of this volume are: “Just exactly how closely (or distantly) correlated should the church and the state be? May a state recognize or dignify the role and meaning of religion at all?… Or should the state treat and support all religions the same? Or, maybe the state should even grant special consideration and support to minority religions so as to achieve a more real equality?” (p. v).

There are at least as many perceptions of ‘the adequate relationship’ between the state and religion as there are states in the world; as the subtitle of the book indicates, the authors have chosen to focus on questions of state–religion identification in Germany, Israel, the USA and, to a lesser extent, France. While Frowein’s account enquires into the applicable European and international legal standards, it becomes evident very soon that international law does not provide clear-cut answers to questions of state–religion identification. This fact is exactly what makes this field of study so fascinating: due to this lacuna in international law there is ample scope for scholarly debate on the (il)legitimacy of different forms of state–religion identification—as manifested by the vast amount of publications in this field. The meagre international benchmarks available are the ones provided by the UN Human Rights Committee postulating that “[t]he fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not
result in any impairment of the enjoyment of any of the rights under the [International Covenant for Civil and Political Rights]…” (General Comment no. 22, para. 9). This statement has several weaknesses: (1) it does not condemn established religions per se (which is indeed debatable; see for instance the discussion on the prerogatives exercised by the Church of England or by the Orthodox Church in Greece, pp. 40–43); (2) it provides no guidelines whatsoever as how to assess practices under strictly secular states (which is precisely where the discourse on the right to freedom of religion or belief comes in); (3) it provides no guidelines whatsoever as how to assess any form of state–religion identification in between or beyond these two extremes (establishment and secularity). The contributions to this volume attempt in different ways to provide conceptual tools, rules of thumb and critical guidelines to deal with this immensely topical but nonetheless rather grey area.

Brugger’s and Shetreet’s contributions provide the necessary preliminaries as they draw a spectrum of state–religion relationships. The distinctions in Brugger’s six-piece model between strict separation in theory and practice (pp. 33–35) and strict separation in theory and accommodation in practice (pp. 35–37) on the one hand and between formal unification (pp. 40–46) and material unification of church and religion (pp. 46–48) on the other are sound as they demonstrate that, in order to do justice to important nuances, the analysis should go beyond a comparative constitutional outlook to the assessment of actual state practice. Well elucidated is also the point that a non-establishment clause does not equal strict separation per se: though the US Supreme Court clearly built its separationist jurisprudence on the non-establishment clause, the German example manifests that non-establishmentarianism can perfectly be accompanied by accommodation of -or even state support for- religion (pp. 28–30). Brugger’s model, moreover, extensively reflects on the contemporary relevance and merits of the infamous ‘Lemon Test’, as formulated in 1971 by the US Supreme Court, which substantially shaped the discourse on the requirement of state neutrality (particularly pp. 36–38 and 55–58), while the concluding contributions by Weiner and Eberle extensively reflect on the merits and possibility of state neutrality. Shetreet’s somewhat differing five-part model makes a very important addition by offering a plausible critique of the imposition of religious norms/restrictions with a special focus on Israel. Karayanni also touches on the (il)legitimacy of enforcing religious laws, while focussing on Arab minorities in Israel (pp. 338–345). Shetreet contends: “To determine whether the enforcement of a norm of religious origin infringes on freedom of conscience and religion, a distinction must be drawn between a norm of religious origin which is not generally recognized and adopted by society and one which is. The enforcement of the first type (such as the application of religious law in marriage and divorce) involves a violation of religious liberty; the enforcement of a norm of the second type—such as the prescription of a day of rest—does not. In this second case, the enforced norm is treated like