Comparative Constitutional Law

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23. Comparative constitutional law and religion

Ran Hirschl

1 INTRODUCTION

The rule of law and the rule of God – two of the most powerful ideas of all time, an ‘odd couple’ of sorts, diametrically opposed in many respects, yet at the same time sharing strikingly similar characteristics, each with its own sacred texts, interpretive practices, and communities of reference – seem destined to collide. Their charged encounters are further accentuated by the intersection of two broad trends: the return of religion to the forefront of world politics and global convergence to constitutionalism. Religion and the belief in God have made a major comeback. From the fundamentalist turn in predominantly Islamic polities to the spread of Catholicism and Pentecostalism in the global south, and from the increase in religiously devout immigrants in Europe to the rise of the Christian right in the United States, it is hard to overstate the significance of the religious revival in late twentieth and early twenty-first century politics. At the same time, the world has witnessed the rapid spread of constitutionalism and judicial review. Constitutional supremacy – a concept that has long been a major pillar of the American political order – is now shared, in one form or another, by over 150 countries and several supra-national entities across the globe.

In this chapter, I delineate two key aspects of the tense intersection of constitutional law and religion worldwide: (i) the range of constitutional models – from atheism or strict separation to full enshrinement – for arranging ‘religion and state’ relations; and (ii) the main types of religion and state constitutional controversies as they have manifested themselves under each of these models over the last few decades. Because the constitutional status of religion varies considerably across constitutional models, there appears to be more cross-country divergence in the comparative constitutional jurisprudence of religious freedom than with respect to most other freedoms. In the following pages, I identify the main existing constitutional models for arranging the relationship between state and religion, and, where applicable, illustrate each model’s unique features by reference to landmark court rulings that define the rules of engagement between state and religion in each setting.

2 EIGHT MODELS OF STATE AND RELIGION RELATIONS

A taxonomy of contemporary approaches to govern religion and state relations suggests eight archetypical models may be identified, ranging from atheism or strict separation to weak establishment, and from models of jurisdictional enclaves to strong establishment or parallel governance of constitutionalism and religion.

2.1 The Atheist State

At least at the declarative level, communist regimes stand at the most anti-religious end of the contemporary continuum of models of state and religion. Following Marx's famous maxim, communist regimes view religion as the 'opiate to the masses', and hold an atheist position that associates religion in both the public and the private spheres with backwardness, colonialism, and false consciousness. The establishment of the People's Republic of China in 1949, for example, was accompanied by a campaign to eradicate religion from Chinese life and culture. China's attitude toward religion was relaxed considerably in the late 1970s, with the 1978 Constitution's formal guarantee of freedom of religion. In Ethiopia, the Ethiopian Orthodox Church was disestablished as the state church in 1974, and its Patriarch was executed by the Marxist Derg military junta in 1979. The introduction of strict anti-religious laws followed a military junta's ferocious overthrow of Emperor Haile Selassie, a sacred figure for the Rastafarian movement in Jamaica, believed to be the descendant of King Solomon and Queen Sheba who negotiated the autonomous status of the Ethiopian Orthodox Church. A move in the opposite direction may be seen in the Russian state of the post-communist era, which unlike the days of the Soviet Union, is no longer anti-religious and has become passively secularist, effectively resulting in the Orthodox Church's return to prominence (see Kuru 2009, 11). At any rate, because the communist-atheist vision of state and religion includes a concentrated effort by the state to eradicate religion, there is virtually no meaningful constitutional jurisprudence in communist states pertaining to religion *per se*.

2.2 Assertive Secularism

This model establishes a form of assertive, even militant, secularism that goes beyond neutrality towards religion or a declared a-religiosity, to advance an explicitly secular civic religion that resents manifestations of religion in public life and views secularism as a core element of the modern nation and its members' collective identity. The longstanding French policy of *laïcité* is arguably the clearest manifestation of such a desire to restrict clerical and religious influence over the state and to establish a uniform, religion-free citizenship and nationhood (Ahdar and Leigh 2005, 73). Pertinent French jurisprudence reflects that notion. A recent example is the *Faiza M.* case. Faiza Silmi ('Mme M') was born in Morocco. She married a French citizen of Moroccan origin and in 2000 moved to France, where she had three French-born children. In 2004, she applied for French citizenship, as French law allowed for non-citizen spouses of French citizens to apply for citizenship after two years of marriage. In May 2005, the French government denied her application, reasoning that her religious beliefs were 'incompatible with the fundamental values of the French community, and particularly with the principle of equality of the sexes'. She appealed. The Conseil d'État, France's highest court for matters of administrative law, confirmed that the government's apprehension of the incompatibility of an applicant's religious beliefs and insufficient assimilation into French society was a legitimate basis for rejecting her application for citizenship. The Conseil d'État relied on reasons provided by the government according to which Silmi only began wearing the niq'ab (a veil worn by some Muslim women that covers the face) when she arrived in France, refused to remove her headscarf and niq'ab in public, rarely left her home without her husband, and had been living in 'submission' to men. The government viewed this interpretation of the facts as indicative of Silmi's insufficient assimilation into French society.

Turkey provides another example of such assertive secularism. Following the demise of the Ottoman Empire, the Kemalist secular-nationalist elite rejected Islamic culture and laws in favor of secularism and modernism. Accordingly, the words ‘the religion of the Turkish State is Islam’ were removed from the constitution in 1928. In 1937, the words ‘republican, popular, atheist, secular, and reformist’ were inserted into the constitution to better reflect modern Turkey’s adherence to a strict separation of state and religion. Both the 1961 and the 1982 constitutions established an official state policy of secularism.

This official policy has become a linchpin of Turkish constitutional identity, but has been challenged repeatedly over the last two decades by the rise of political Islam in Turkey. In response to these challenges, the Turkish Constitutional Court (TCC) has become a main guardian of secularist interests. On several occasions it disbanded Islamist political parties, most notably the Welfare (*Refah*) Party (1998) and the Virtue (*Fazilet*) Party (2001). In half a dozen landmark rulings, the TCC disallowed wearing of religious attire, most notably the Islamic headscarf, in the public education system. Arguably, one of the pinnacles of this line of jurisprudence is the TCC’s ruling in 2008 that declared unconstitutional an amendment introduced by the moderately religious Justice and Development Party (AKP)-led government that effectively lifted the ban on wearing the Islamic headscarf in the public education system. The Court viewed strict secularism as a basic norm of Turkish constitutionalism that may not be overridden even by a properly adopted constitutional amendment. In two important decisions over the last few years the European Court of Human Rights (ECtHR) sided with the TCC’s avid protection of secularism in that country at the expense of individual and political freedoms. In 2003, the ECtHR dismissed an appeal against the TCC’s ruling in the *Refah* dissolution case and concurred with the TCC’s view of Shari’a norms as incompatible with core principles of democracy. In the *Leyla Sahin v Turkey* case (2005), the ECtHR deferred to Turkish authorities’ discretion, thereby approving a decision to deny enrollment in Istanbul University from a female medical student who wore an Islamic headscarf while attending school. The AKP-led government held a national referendum in 2010 on a package of constitutional amendments; it was approved by a majority of approximately 58% of those casting ballots. Among the new provisions are changes to party closure procedures, judicial appointment processes and to the composition of and access to the Constitutional Court (a long-time stronghold of statist-secularist views). It remains to be seen what will be the effect of the amendments on the notion of assertive secularism in Turkish constitutional law.

2.3 Separation as State Neutrality toward Religion

Arguably the most common model among separationist states is the separation-as-neutrality mode. It emphasizes the state’s impartial, neutral stance toward religious creeds rather than active advancement of secularism per se. Whereas religion has always been a core element of American society and culture, the First Amendment to the US Constitution provides that: ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof’. The ‘Establishment Clause’ prohibits the state from adopting, preferring or endorsing a religion as well as from preferring religion over non-religion (the ‘non-establishment’ principle); the ‘Free Exercise Clause’ enjoins the state from interfering with the religious freedom of its citizens (the freedom of religious expression principle). There is a ‘natural antagonism between a command not to establish religion and a command not to inhibit its practice’ (Rotunda and Nowak 2008, § 21.1(a)). There is, however, at least one

commonality to both clauses: each advances neutrality toward religion by preventing the government from singling out specific religious sects for special benefits or burdens unless the action is necessary to promote a compelling interest (*id.*).

Whereas neutrality toward religion is the motto here, this model is often accompanied by an 'assimilationist' or 'melting pot' approach to national identity. At the same time, comparative polls often suggest that Americans are among the most likely in the West to refer to God or draw upon religious morality or principles in their everyday lives. 'In God We Trust' is on all American currency; each Supreme Court session begins with the invocation 'God save the United States and this Honorable Court' (see Kuru 2009). Given such a disharmony, to borrow Gary Jacobsohn's (2010) phrase, it is hardly surprising that over its many years of existence, the US Supreme Court has issued hundreds of landmark rulings on the scope and nature of each of the two clauses, as well as on their intersection with each other, and with other constitutional provisions.¹

With respect to the non-establishment principle – the essence of the state neutrality concept in the United States – the commonly accepted view is that the Establishment Clause prohibits the sponsorship of any religion, as well as the preference for religion over non-religion (Rotunda and Nowak, 2008, § 21.3(a)). According to the so-called 'Lemon test' (introduced by the US Supreme Court in *Lemon v Kurtzman*, 1971), the prohibition on the establishment of religion requires that statutes have a secular purpose, a principal or primary effect that does not advance or inhibit religion, and does not promote excessive entanglement between government and religion. In 1997 (*Agostini v Felton*; see also *Zelman v Simmons-Harris*, 2002), the Court modified this analysis, holding that the question of 'excessive entanglement' was really part of the inquiry into whether the impugned legislation or activity aided or inhibited religion. The Court further listed three factors for evaluating whether a law that aids religious organizations has a non-religious primary effect: (1) whether the aid was used in or resulted in governmental 'indoctrination', (2) whether the aid program defined recipients by some reference to religion, and (3) whether there was an excessive entanglement between government and religion as a result of the aid program. Any denominational preference granted by legislation will obviate the need for the three-part *Lemon* test as the government will automatically have the burden of showing that the law is necessary to promote a compelling interest.

One of the hotly contested issues with respect to the Establishment Clause has been the place of religion in the public education system. In principle, mandatory prayers may not be part of the curriculum in public schools. In *Lee v Weisman* (1992), the Court held (5:4) that a policy permitting invocation and benediction prayers at a public middle school graduation ceremony violated the Establishment Clause. Similarly, in *Santa Fe Independent School District v Doe* (2000), the Court struck down a policy that allowed for a 'non-sectarian, non-proselytizing prayer' before football games.

More challenging questions arise in relation to the funding of religious schools. In *Board of Education of Kiryas Joel Village School District v Grumet* (1994), the US Supreme Court invalidated a law that created a separate school district for a village populated exclusively by Jewish Satmar Hasidim. The goal of the law was to provide accommodation for Satmar children with special needs. The majority of the Court struck down the law on the basis that it violated the neutrality principle. Three judges (Scalia, Rehnquist and Thomas JJ) dissented, holding that the Court's precedent of prohibiting religious accommodation was improper. Later, in *Agostini v Felton* (1997), the Court held that a public school board could provide

educational assistance (e.g. providing staff to run remedial programs) to students of a religious school. The Court found the purpose of such a program was to aid all students in a jurisdiction rather than to give preference to students at the religious school. Similarly, the Supreme Court has also held that allowing a religious organization to use a public forum for religiously oriented speech does not violate the Establishment Clause provided that no religious groups are given preferential treatment. Accordingly, a school board could not deny a religious organization the right to conduct a meeting in the school building after hours when the same right had been granted to non-religious organizations (*Lamb's Chapel v Center Moriches Union Free School District*, 1993; *Good News Club v Milford Central School*, 2001).

With respect to the free religious exercise principle, the Court has held that a law passed for the main purpose of burdening or providing a benefit to a group on the basis of its members' substantive religious beliefs is unconstitutional. Thus, in *Church of Lukumi Babalu Aye, Inc. v Hialeah* (1993), a city ordinance that prohibited animal slaughter as part of a sacramental practice was held unconstitutional as the Court unanimously found that the law was passed in order to encourage a religious sect to leave the city. In the same vein, the Supreme Court struck down a state constitutional provision that required a declaration of a belief in God before a person could assume public office (*Torasco v Watkins*, 1961).

The Court's jurisprudence is mixed in cases involving Free Exercise Clause-based claims for exemption from government laws. The Court has held that some laws of general application require exemptions for religious reasons. In a landmark 'expansive accommodation' ruling in *Wisconsin v Yoder* (1972), the Court held that the state could not compel members of the Amish church to send their children to school beyond the eighth grade. Members of the Old Amish community who reached the age of fourteen were thus exempted from two additional years of schooling that would have otherwise been mandated by the state's compulsory education law.

At the same time, a religion-based free-exercise claim seldom exempts a person from the application of a religiously neutral criminal law. In *Employment Division, Dept. of Human Resources v Smith* (1990), the Supreme Court held that a law banning the use of peyote was constitutional, despite a claim that the Native American Church used peyote for sacramental purposes. The political backlash against this ruling was significant. In 1993, Congress adopted the Religious Freedom Restoration Act (commonly known as RFRA), in an attempt to reinstate the supremacy of the Free Exercise Clause and prevent laws from substantially burdening free exercise of religion. However, in 1997, the Supreme Court struck down parts of RFRA as it overstepped Congress' power to enforce the Fourteenth Amendment (*City of Boerne v Flores*, 1997). However, parts of RFRA continue to stand. In 2006 (*Gonzales v O Centro Espirita Beneficente Uniao do Vegetal*), the Supreme Court invoked the free exercise clause to dismiss charges against a church that during a religious ceremony it used a sacramental tea that included an otherwise (federally) illegal substance. The Court decisively stated that the federal government must show a compelling state interest in restricting religious freedom. The Court also disagreed with the government's central argument that the uniform application of the Controlled Substances Act does not allow for exceptions.

The struggle over free exercise-based exemptions extends to other areas, such as military service or tax exemptions. In *United States v Seeger* (1965), for example, the Supreme Court evaluated a law that granted an exemption from conscription to persons who by 'religious training and belief in relation to a Supreme Being' were opposed to war in any form. The law

also stated that the objection could not be based on ‘essentially political, sociological or philosophical views or a merely personal moral code’. The Court interpreted this exemption as applying to persons whose non-theistic beliefs occupied the place of religion in their lives (Rotunda and Nowak 2008, § 21.9(a)). In response to the ruling, the Military Service Act of 1967 was rephrased to remove the reference to the Supreme Being. This Act was challenged in *Gillette v United States* (1971) on the basis that some religiously based views are opposed to unjust wars, not all wars. The majority of the Court upheld the Act, holding that it had a secular purpose in creating a fair and uncomplicated exemption. And in *Goldman v Weinberger* (1986), the Court held that the free exercise clause did not require the Air Force to allow a serviceman to wear a *yarmulke* while on duty and in uniform. The Air Force’s regulations prohibited personnel from wearing non-regulation clothing; the Court held that the free exercise clause neither invalidated the regulation nor mandated an exemption.

With respect to tax exemptions, the Court held in *Swaggart Ministries v Board of Equalization* (1990) that religious organizations cannot refuse to pay sales and use taxes that apply to all tangible personal property. Because it was facially neutral, the tax was not subject to the compelling interest test. In *Bob Jones University v United States* (1983), the Court upheld the decision of the Internal Revenue Service to deny a tax exemption to Bob Jones University. The university had a racially discriminatory admissions policy that it said stemmed from religious doctrine. The Court held that while the denial of tax benefits would affect the school, it would not prevent the school from observing its religious tenets. Further, the Court held that the government had an overriding interest in eradicating racial discrimination. At the same time, Title VII of the Civil Rights Act of 1964 exempts religious organizations from the prohibition against religious discrimination in employment. The Supreme Court upheld the validity of this exemption in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Amos* (1987), where an employee of an organization affiliated with the Church was fired because he was not a member of the Church. The Court unanimously found that the employee could not seek the benefit of the Civil Rights Act because of the exemption, which was deemed constitutional because it was related to a legitimate interest.

The United States’ constitutional experience of the last two centuries provides an interesting illustration of how a constitutional order itself can acquire a near-pious status. As Sanford Levinson astutely observes, the American Constitution is the nation’s most revered text, and has evolved into a pillar of American ‘civil religion’ (Levinson 1988). In fact, ‘for the past two hundred years’, notes another incisive observer, ‘the Constitution has been as central to American political culture as the New Testament was to medieval Europe. Just as Milton believed that “all wisdom is enfolded” within the pages of the Bible, all good Americans, from the National Rifle Association to the ACLU, have believed no less of this singular document’ (Lazare 1988, 21). And noted scholar of Christian thought Jaroslav Pelikan suggests that ‘with the reduction in the private authority of the Christian Scripture, and especially in its public authority, American Scripture has been called upon to fill some of the gap’ (Pelikan 2004).

2.4 Weak Religious Establishment

Here there is a formal, mainly ceremonial, designation of a certain religion as ‘state religion’, but this designation has few or no implications for public life. Several European countries

illustrate this model. A case in point is the designation of the Evangelical Lutheran Church as the 'state church' in Norway, Denmark, Finland and Iceland – arguably some of Europe's most liberal and progressive polities. Norway's head of state, for example, is also the leader of the church. Article 2 of the Norwegian Constitution guarantees freedom of religion, but also states that Evangelical Lutheranism is the official state religion. Article 12 requires more than half of the members of the Norwegian Council of State to be members of the state church. Similarly, Greece and Cyprus formally designate the Greek Orthodox Church as their state church. In England, the monarch is 'Supreme Governor' of the Church of England and 'Defender of the Faith'. The Crown has a role in senior ecclesiastical matters and, by the same token, the church is involved in the coronation of a new monarch, and senior bishops are represented in the House of Lords. A diluted version of this model is at work in Germany, where the institutional apparatus of the Evangelical, Catholic and Jewish religious communities are designated as public corporations and therefore qualify for state support pursuant to the German church tax.

While the institutional features of the weak religious establishment accommodation differ from the state neutrality model, the constitutional jurisprudence of religion under the two models is quite similar. In the landmark *Classroom Crucifix* case (1995), the German Federal Constitutional Court ruled that the placing of a cross or crucifix in the classrooms of a State (in this case Bavaria) school that is formally designated as non-denominational infringes Article 4(1) of the German Basic Law (*Grundgesetz*). Section I of that Article states that 'Freedom of faith and conscience, and freedom of religious or ideological creed, are inviolable'. Section II adds that 'The undisturbed practice of religion is guaranteed'. Though these guarantees appear absolute, the Constitutional Court held in the *Classroom Crucifix* case that limits on these religious freedoms that flow from the Basic Law and are constitutionally grounded may be justified. The Court stated that: 'The basic right to religious freedom is guaranteed without reservation. This does not however mean that it might not be subject to some sort of restrictions. These would, however, have to follow from the constitution itself. The setting up of limits not already laid out in the constitution is not something the legislature can do. Constitutional grounds that might have justified intervention are not however present here.' 'To this day', added the Court, 'the presence of a cross in a home or room is understood as an expression of the dwellers' Christian faith ... because of the significance Christianity attributes to the cross, non-Christians and atheists perceive it to be the symbolic expression of certain faith convictions and a symbol of missionary zeal. To see the cross as nothing more than a cultural artifact of the Western tradition without any particular religious meaning would amount to profanation contrary to the self-understanding of Christians and the Christian church' (*id.*, cited in Kommers 1997, 475). So the classroom crucifixes had to be removed from non-denominational schools in Bavaria.

More recently, the question of crucifixes in the European classroom reached the ECtHR. In 2009, a seven-judge Chamber decided unanimously in *Lautsi v Italy* that the presence of crucifixes in Italian classrooms contravenes Article 9 (freedom of thought, conscience and religion) of the European Convention of Human Rights, as well as Protocol 1, Article 2, which provides that 'the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions'. A request by a Finnish-born, atheist Italian mother whose children attended an Italian school to remove the crucifixes from her children's classrooms was dismissed by Italy's *Consiglio di Stato*, on the ground that the cross had become one of the secular values of the Italian Constitution and

represented the values of civil life. In accepting the mother's appeal, the ECtHR advanced a clear 'neutrality' or 'disestablishment' reasoning. In 2011, upon appeal by Italy (and following intervention by eight other European countries), the Grand Chamber of the ECtHR reversed the decision and upheld, 15:2 the right of Italy to display the crucifix in public school classrooms. It ruled that 'the decision whether crucifixes should be present in State-school classrooms is, in principle, a matter falling within the margin of appreciation of the respondent State' (para. 69–70). The Court went on to suggest that the fact that there is no European consensus on the question of the presence of religious symbols in State schools speaks in favour of such a deferential approach. The Grand Chamber ruling also engages in a discussion of the crucifix in the classroom as a 'passive' (and thus supposedly less intrusive) religious symbol, as opposed to active speech or mandatory curricular religious teachings.

A related issue is the limits on wearing religious attire by teachers. Fereshta Ludin, a German citizen born in Afghanistan, applied to teach at a state school in the state of Baden-Württemberg in southwestern Germany. When she informed the school board that she would wear a headscarf while teaching, the board rejected her application. Ludin protested, saying that the wearing of the veil was both a personal and a religious expression, and that she did not wear it as a symbol or to provoke or influence any students. The school board argued that it was not merely a private symbol but an explicitly political symbol that subjected students to undue religious influence. State authorities backed the school board by arguing that wearing the headscarf under the circumstances of the case could not be squared with the constitutional requirement of state neutrality in questions of religion. Ludin appealed the school board's decision, and her case eventually proceeded to Germany's Federal Constitutional Court.

Ludin argued that her freedom of religion, protected by Article 4, Sections I and II of the Basic Law, had been violated by the ban on the headscarf in the classroom. Following the ruling in the *Classroom Crucifix* case, the core legal question in Ludin became whether limits on freedom of religion in this context flow from or may be justified under the German constitution. In a 3:2 decision (2003), the Federal Constitutional Court allowed Ludin's appeal. However, this was based on the primarily technical grounds that the laws of the state of Baden-Württemberg (where the school board in question was based) did not, at the time, include an explicit ban on wearing the headscarf in the public school system. Had such a law been in effect, the board's decision to reject Ludin's application would have withstood judicial scrutiny. The State was held to have a legitimate interest in protecting religious and ideological neutrality in the classroom to ensure separation of church and state and the encouragement of pluralism and diversity (*Ludin*, 2003, para. 43). Parents of the children in school were also held to have a natural right, guaranteed by Article 6 of the Basic Law, to educate and bring up their child free from religious influences that did not accord with the parents' wishes. The students also had a right to be free from the exercise of freedom of religion by others where they might be held captive to the influence of one person's religion. In other words, there were several constitutional grounds for upholding limits to religious expression in this context.

The Court also refused to reject the idea that the scarf was a 'danger'. It maintained that the abstract danger posed by the scarf could only justify the school board's rejection of Ludin's application if the board had been authorized by statute to employ such a policy against religious dress. States were free, according to the Federal Constitutional Court, to enact statutes identifying the appropriate level of religious dress to be displayed in classrooms after taking into account local context and religious and cultural rights. The court held it was conceivable that a legislature could require strict secularism and neutrality in some contexts

in order to address an increasingly diverse religious community. Because no such statute existed in Ludin's case, there was no justification for the school board's decision.

The minority opinion held that because freedom of religion is an explicitly individual or private matter, one's freedom of religion is not engaged when one seeks employment in the public sector. Rights guaranteed by the Basic Law are held against the state, and where someone has sought employment as a state official they cannot assert those rights against the body of which they are a part, except in very limited circumstances. These government employees are differently situated than the students at the school and their parents, who retain legitimate interests protected under the Basic Law. Further, the majority's apprehension of an 'abstract danger' was held by the minority to constitute reason enough for the school board to reject Ludin's application. The mere possibility of the creation of tension or undue influence should be enough to justify the school board's decision, and the minority held that this danger would not have to materialize into real damage before it could be prevented by the board. In the larger European context, this ruling was relatively favorable to the headscarf claim. Nonetheless, and consistently with the Court's ruling, a majority of German states have passed laws prohibiting teachers from wearing certain religious attire. The state of Baden-Württemberg itself passed such a law in 2004.

Deference to local authorities is also evident in several other landmark European court rulings on religious attire in the classroom. A notable illustration is the *Shabina Begum* case (2006), where the British House of Lords upheld a school's decision not to allow a student to wear a jilbab (a traditional dress which was said to conceal to a greater extent the contours of the female body), mainly on the grounds that the school had consulted with local religious authorities and took advice from community leaders regarding the conformity of its dress code with Islamic dress requirements. The House of Lords also noted that as there were other schools that permitted the jilbab that Ms Begum could have attended, there was no interference with Begum's right to manifest her belief in practice or observance. One of the Law Lords wrote that '“freedom to manifest one's religion” does not mean that one has the right to manifest one's religion at any time and in any place and in any manner that accords with one's beliefs'.²

2.5 Formal Separation with *De Facto* Pre-eminence of One Denomination

This model is featured in countries where formal separation of church and state and religious freedoms more generally are constitutionally guaranteed, but where longstanding patterns of politically systematized church hegemony and church-centric morality continue to loom large over the constitutional arena. Many Latin American countries, where the vast majority of the population is Roman Catholic and where the history of Catholic Church dominance dates back to the pre-independence era, fall in this category. Despite the considerable variance in the legacy of Church pre-eminence among these countries, there is a strong echo of such Catholic morality in the constitutional jurisprudence of all of these countries, as well as in that of other predominantly Catholic polities such as the Philippines, Poland or Ireland, and to a lesser degree in Spain or Italy. The special status of Catholicism was removed from the Irish Constitution in 1973. But Article 41 of the Constitution 'recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law'. Prior to the fifteenth amendment (1995) that provided for the dissolution of marriage in certain specified

circumstances, the Constitution essentially banned divorce and remarriage, and in effect subjected Irish Catholics to concurrent jurisdiction of the Church and the State in such matters. Article 44, which continues to be in effect today, reads ‘The State acknowledges that the homage of public worship is due to Almighty God. It shall hold His Name in reverence, and shall respect and honour religion.’ And the influence of Catholic morality, formal separation of church and state notwithstanding, does not end there. The Eighth amendment (1983) – the ‘Pro-Life Amendment’ passed by referendum – asserts that the fetus has an explicit right to life equal to that of the pregnant woman, and that the Irish State guarantees to vindicate that right. However, exceptions are made in cases where there is a threat to the life of the mother, and it may not be used to limit the right to travel to other countries to procure an abortion (see *AG v X*, 1992).

Several other predominantly Catholic countries in Europe, most notably Malta and Poland, and to a considerably lesser degree Slovakia, Spain and Italy, continue to grapple with similar tensions. The gradual convergence toward judicial review, constitutional rights and liberties, gender equality amid a history of church dominance and legalized religion-centered morality, have characterized the constitutional jurisprudence of many predominantly Catholic countries in the global ‘south’. Courts in the Philippines, Chile and Ecuador, to pick three examples, have been quite adamant in their refusal to liberalize various aspects of women’s reproductive freedoms. The Chilean Constitutional Court – long known for its deference to the government and conservative standing – ruled in a recent 5:4 decision that the free distribution by the government of the so-called ‘morning-after pill’ amounted to abortive medicine. In other countries – Colombia, Mexico or Argentina, for example – constitutional courts have been notably more receptive to challenges against systematized religion-centric morality. In 2008, the Colombian high court held that emergency contraception is not abortive and does not infringe the right to life. Colombia’s Constitutional Court ruled in the same year that conscientious objection to providing certain medical services is a human right, not an institutional right. As a matter of principle, conscientious objection cannot be invoked by institutions such as hospitals with the effect of violating women’s fundamental rights to lawful healthcare.

2.6 Separation Alongside Multicultural Accommodation

This model combines formal separation of religion and state with an ‘accommodationist’ approach to diversity and religious difference. This model, quite common in ‘immigrant’ societies, most notably Canada, reflects a true commitment to multiculturalism and diversity – a ‘mosaic’ or ‘accommodationist’ approach to difference rather than ‘melting pot’ or ‘assimilationist’ approach. State and religion are separated, but the conception of citizenship is not tied to strict secularism or neutrality. The true sense of citizenship in this model, indeed of liberalism more generally, is respecting the common aspects of statehood and nationality while celebrating the difference in citizens’ cultural and religious traditions. Section 2(a) of the Canadian Charter of Rights and Freedoms protects freedom of religion; Sections 16–23 of the Charter establish the constitutional status of (French/English) bilingualism in Canada; Section 27 of the Charter complements these principles by enshrining multiculturalism and diversity as one of the linchpins of Canadian constitutional identity (Ryder 2008; Kymlicka 1995).

Over the years, the Supreme Court of Canada has developed a rich jurisprudence in support of state-endorsed multiculturalism and generous accommodation of cultural and religious

difference in the public sphere. It issued landmark free exercise rulings concerning Sunday closing (e.g. *R v Big M Drug Mart*, 1985; *R v Edwards Books and Art Ltd.*, 1986), alongside controversial rulings concerning continuation of public funding for Roman Catholic schools in Ontario (e.g. *Adler v Ontario*, 1996). In two rulings over the last few years, for example, the Court went out of its way to generously address faith-based claims falling squarely within the parameters of multicultural citizenship as advancing a vision of ‘diversity as inclusion’. In *Syndicat Northcrest v Amselem* (2004) – a case involving Orthodox Montreal Jews who erected *sukkahs* on their balconies in a residential condominium partly in contravention of a boilerplate tenancy contract – the majority advocated tolerating a practice where the individual sincerely believes it is connected to religion, regardless of whether the practice is required by a religious authority. In *Multani v Commission scolaire Marguerite-Bourgeoys* (2006), the Court drew on a proportionality test (so-called ‘Section 1’ analysis) to overturn a Quebec school board decision not to allow a Sikh student to carry the *kirpan* (a ceremonial dagger) due to potential safety hazards and an apparent conflict with the school’s prohibition on weapons and dangerous objects. Indeed, the very categorization of the *kirpan* – as either a prohibited weapon in a schoolyard (as the school board claimed) or as an important religious symbol (the position of the student, his parents and the interveners on behalf of the Sikh community) – was at the heart of this legal dispute. A decision to universally ban the *kirpan*, the Court ruled, was not the least drastic means to address the rather limited harm potential, especially when weighing the sincerity of the student’s religious beliefs and the fact that the interference (the ban on the *kirpan*) was not trivial. The Court thus held in favor of Multani, providing a resounding statement of the ‘diversity-as-inclusion’ theme of differentiated citizenship: ‘The argument that the wearing of kirpans should be prohibited because the kirpan is a symbol of violence and because it sends the message that using force is necessary to assert rights and resolve conflict must fail. Not only is this assertion contradicted by the evidence regarding the symbolic nature of the kirpan, it is also disrespectful to believers in the Sikh religion and does not take into account Canadian values based on multiculturalism’ (*ibid.*, para. 71).

But even Canada’s multicultural policy, arguably one of the most accommodating constitutional regime presently on offer (South Africa, described as the ‘rainbow nation’, may also be classified in this category), has been obliged to set its boundaries. When it comes to clashes of religion and culture, arguments that move beyond requests for accommodation (or specific exemption from general laws) to attempts to advance alternative, extrajudicial moral or adjudicative orders appear to fall beyond the limits of tolerance (Hirschl and Shachar 2009). This is the dividing line where ‘diversity as inclusion’ ends and ‘non-state law as competition’ emerges, the latter often bringing with it the wrath of the state. Unlike the many diversity-as-inclusion cases requesting reasonable accommodation under the rule of law (as these terms are interpreted by the courts or legislatures of the secular state), arguments that pursue the claim that faith-based sources of authority and obligation are, or ought to be, completely unregulated and parallel or superior to the general rule of law are typically answered with ironclad resistance. This is evident in several Supreme Court of Canada’s rulings such as *R v Jones* (1986) or *Bruker v Marcovitz* (2007), as well as in the Province of Ontario’s decision, following an acrimonious public controversy, not to allow autonomous religious arbitration in matters of personal status law in the province.

2.7 Religious Jurisdictional Enclaves

This model is based on the selective accommodation of religion in certain areas of the law. The general law is secular, yet a degree of jurisdictional autonomy is granted to religious communities, primarily in matters of personal status and education. Core features of this arrangement originated from the Ottoman *millet* system of semi-autonomous jurisdictional enclaves for religious minorities. The concept was later adjusted to local circumstances by colonial empires, and then inherited by the post-colonial world. It is now prevalent in dozens of countries in Africa and Asia. Countries such as Kenya, India and Israel grant recognized religious or customary communities the jurisdictional autonomy to pursue their own traditions in several areas of law, most notably family law. Kenya, for example, has enacted a set of statutes to recognize the diversity of personal laws pertaining to different groups of citizens. India has long been entangled in a bitter debate concerning the scope and status of Muslim and Hindu religious personal laws, versus the individual rights and liberties protected by the Indian Constitution. Each religious community in Israel, including the Jewish community, has autonomous religious courts that hold jurisdiction over its respective members' marriage and divorce affairs. Religious affiliation, conversion and the provision of religious services are controlled by statutory religious bodies, whose decisions must comply with general principles of administrative and constitutional law.

The *religious jurisdictional enclaves* model may be based on spatial/regional boundaries (e.g. federalism), as is the case in Nigeria. The Constitution of Nigeria (1999) establishes it as a secular state with constitutionally enshrined freedom of religion. At the same time, the constitution allows sub-national units to grant additional jurisdiction to their local courts. This has been drawn upon by twelve predominantly Muslim northern states to expand the substantive jurisdictional boundaries of their Shari'a tribunals. Unlike their counterparts in the liberal-democratic world that tend to deal with matters of free expression or establishment of religion, constitutional courts operating under this model (e.g. the Supreme Court of India, the Supreme Court of Israel or Malaysia's Federal Court) are often preoccupied with determining the scope of substantive jurisdictional autonomy granted to religious tribunals. One of the perennial bones of contention in the Indian context, to pick one example, is the struggle between advocates of universal secularism (and by extension, the adoption of a uniform civil code) and proponents of the status quo, in which religious minorities, most notably Muslims, enjoy certain jurisdictional autonomy in matters of personal status, primarily marriage and divorce. Section 44 of the Indian constitution states that, 'The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India'. However, for a host of political reasons, not least the pressure to preserve the status quo of religious jurisdictional enclaves, little has been done in practice to enact such a uniform law. At the more abstract level, the tension between these competing visions of secularism has taken the form of a clash between group rights and the individual rights of potentially vulnerable group members, for example, women.

The *Shah Bano* saga is a good illustration. It involved an elderly Muslim woman who was divorced by her husband of forty-three years through the Muslim practice of *talaq*, which allows a husband to effect a unilateral, immediate divorce. However, lacking the resources to support herself and her five children, Shah Bano sought maintenance payments in the courts. Under Muslim personal law, Shah Bano's ex-husband was only obligated to pay her a small sum of maintenance money during the three months after the divorce, known as the period of

iddat. Section 125 of the Code of Criminal Procedure stipulates that a husband may be ordered to pay maintenance to his wife or ex-wife if she is unable to maintain herself. However, according to Section 127 of the same law, these maintenance payments are to be reassessed by the court where the woman has received the sum due to her under the personal law.

In its famous ruling in *Mohammed Ahmad Khan v Shah Bano Begum*, the Supreme Court of India held that the state-defined statutory right of a neglected wife to maintenance stood regardless of the personal law applicable to the parties. In other words, individual rights and gender equality norms are more fundamental than India's longstanding practice of Muslim self-jurisdiction in personal status matters. The Court held that the right to maintenance under Section 125 was a secular legal right that could be 'exercised irrespective of the personal law of the parties', and that 'section 125 overrides the personal law, if there is any conflict between the two'. It also rejected the husband's argument that Section 127 was automatically satisfied by his payment of a dowry (*mahr*).

Traditionalist representatives of the Muslim community considered this to be proof of Hindu homogenizing trends that threatened to weaken Muslim identity. India's Parliament, led by Rajiv Gandhi's Congress Party, bowed to massive political pressure by conservative Muslims and overruled the Indian Supreme Court's decision in *Shah Bano* by passing the Muslim Women's (Protection of Rights of Divorce) Act. Despite its reassuring title, this new bill undid the court's ruling by removing the rights of Muslim women to appeal to state courts for post-divorce maintenance payments. It also exempted Muslim ex-husbands from other post-divorce obligations. So harsh was the Muslim reaction to *Shah Bano* that notable commentators see it as one of the reasons for the subsequent ascent of right-wing Hindu politicians. The Muslim Women's Act served to agitate many Hindus and galvanize support for the Hindu right-wing, which accused the Congress Party of compromising the principles of secularism in order to appease Islamic fundamentalists and get Muslim votes (Sathe 2003, 192). Some commentators also tie the ruling to the volatile public atmosphere that led to the notorious destruction of the historic Babri mosque by Hindu militants at a disputed religious site in the city of Ayodhya in 1992, and the spate of sectarian violence that followed (see Jacobsohn 2003, 106). Thus, whereas the Court has been effective at stoking significant public controversy concerning personal laws, its secularist jurisprudence on the matter has been quite counterproductive in achieving its declared goals of a uniform civil code and national integration.

In 2001, the court returned to the issue of personal status laws in *Danial Latifi v Union of India*. Here, the abovementioned Muslim Women's Act was challenged on various constitutional grounds, including the violation of Article 14 (equality) and Article 15 (non-discrimination) of the Constitution, as well as violating the basic constitutional feature of secularism. The court upheld the constitutionality of the Act, but did so through a broad, liberal construction of the Act's requirement that the husband make a 'reasonable and fair provision and maintenance within the period of *iddat*'. The Court commented that if the statute only authorized maintenance for three months, this would appear to violate the constitutional rights provisions on equality and discrimination. However, applying the constitutional avoidance canon (an interpretive device of reading legislation such that it complies with the Constitution), the Court construed the statute to authorize maintenance orders for 'reasonable and fair' sums that may provide support for the divorced wife for much longer than just the three-month period of *iddat*, so long as the payment itself is made during the period of *iddat*.

This ruling, although contrary to the common understanding of the Act's purpose, followed the actions of lower courts at the state level, which had already been interpreting the statute in this fashion and awarding relatively generous lump-sum maintenance payments to divorced Muslim women. Thus, the *Latifi* ruling used creative statutory interpretation to dodge constitutional controversy, while still preserving judicial discretion in determining the size of maintenance awards based on the facts of each case. This strategy suggests that the Court understood the not-so-subtle message sent by the public outcry and legislative response in the wake of *Shah Bano*. Its ruling in *Danial Latifi* was less ambitious and notably more moderate and diplomatic than its original ruling in *Shah Bano*.

Similar tensions between a quest for uniformity, equality and modernization on the one hand, and accommodation of group-based religious difference and jurisdictional autonomy on the other, is evident in virtually all countries where the religious jurisdictional enclaves model is in place. In Israel, to pick another example, no unified civil law applies to all citizens in matters of marriage and divorce. Instead, for various political and historical reasons (the roots of contemporary Israeli family law go back as far as the Ottoman Empire's pre-modern *millet* system), the courts of the different religious communities hold exclusive jurisdiction over marriage, divorce and directly associated personal status matters (see generally Scolnicov 2006). A number of other personal status matters may be adjudicated through the rabbinical court system (controlled by Orthodox Judaism), if the involved parties consent to such extended jurisdiction. Muslim, Christian and Druze courts also have exclusive jurisdiction over the personal status affairs of their respective communities.

Since the mid-1990s, the Supreme Court of Israel has gradually been attempting to limit the authority exercised by religious courts. The most important judgment regarding these matters was rendered in 1995 in the *Bavli* case. In this ruling, the Supreme Court held that *all* religious tribunals, including the Great Rabbinical Court, are statutory bodies established by law and funded by the state; in principle, their judgments are thus subject to review by the Supreme Court. While the Court recognized the special jurisdictional mandate awarded to Jewish, Muslim, Christian and Druze courts by the legislature, it nevertheless asserted its power to impose constitutional norms upon their exercise of authority. Rabbinical court officials have responded by publicly asserting their resistance to the idea that the Supreme Court, as a secular entity, possesses the authority to review their adjudication, which rests on religious law. Some have gone so far as to declare their intention to ignore the Court's ruling in *Bavli*, which they perceive as an illegitimate intrusion into their exclusive jurisdictional sphere. The Supreme Court was not impressed. Based on its landmark decision in *Bavli*, the Court went on to overturn at least two dozen other Rabbinical Court and Shari'a Court rulings for not conforming with general principles of Israel's constitutional and administrative law, including gender equality, reasonableness, proportionality, natural justice and procedural fairness.³

2.8 Strong Establishment – Religion as a Constitutionally Enshrined Source of Legislation

Here, the entire legal and constitutional system is based on an inherently dual commitment to religious fundamentals and constitutional principles, or a bi-polar system of constitutional *and* sacred texts and authority. This model comes close to what I have termed elsewhere *constitutional theocracy* (Hirschl 2010). The 'ideal' version of this model can be summarized

by outlining four main cumulative elements: (1) the presence of a single religion or religious denomination that is formally endorsed by the state, akin to a 'state religion'; (2) the constitutional enshrining of the religion, its texts, directives and interpretations as *a* or *the* main source of legislation and judicial interpretation of laws – essentially, laws may not infringe upon injunctions of the state-endorsed religion; (3) a nexus of religious bodies and tribunals that often not only carry tremendous symbolic weight, but are also granted official jurisdictional status on either regional or substantive bases, and which operate in lieu of, or in an uneasy tandem with, a civil court system; and (4) adherence to some or all core elements of modern constitutionalism, including the formal distinction between political authority and religious authority, qualified protection of religious freedoms for minorities, and the existence of some form of active judicial review. Most importantly, their jurisdictional autonomy notwithstanding, some key aspects of religious tribunals' jurisprudence are subject to constitutional review by apex courts, often state-created and staffed.

The 1979 Islamic revolution in Iran established a paradigmatic example of constitutional theocracy. The preamble of the 1979 Islamic Republic of Iran's Constitution enshrines the Shari'a as the supreme law – superior even to the Constitution itself. Articles 2 and 3 declare that authority for sovereignty and legislation has a divine provenance (from the Shari'a) and that the leadership of the clergy is a principle of faith. According to Article 6, the administration of the state is to be conducted by the wider population: the general public participates in the election of the President, the Majlis representatives (members of parliament) and municipality councils. Article 8 further entrenches principles of popular participation in deciding political, economic and social issues. Most notably, Iran has seen the emergence of the Guardian Council – a *de facto* constitutional court armed with mandatory constitutional preview powers and composed of six mullahs appointed by the Supreme Leader – and six jurists proposed by the head of the judicial system of Iran and voted in by the Majlis. The Supreme Leader has the power to dismiss the religious members of the Guardian Council, but not its jurist members (Article 91). At the same time, Iran's constitutional regime combines religious supremacy, pragmatist institutional innovations (e.g. Ayatollah Khomeini's 1989 introduction of the Regime's Discernment Expediency Council to serve as the final arbiter between the generally more progressive Consultative Assembly and the distinctly more conservative Guardian Council), alongside carried-over legacies of the 1906 Imperial Constitution, primarily with respect to the notion of popular sovereignty, elected parliament and some separation of powers principles.

While Iran features what is arguably one of the strictest manifestations of strong establishment, several softer versions of this model have emerged, primarily in the Islamic world. From the early 1970s to 2000 alone, at least two dozen predominantly Muslim countries, from Egypt to Pakistan, declared the Shari'a 'a' or 'the' source of legislation (Arjomand 2007, 123). These countries evince to principles of human rights, constitutional law and popular sovereignty. The more recent constitutions of Afghanistan (2004) and Iraq (2005) reflect this softer version of the *strong establishment* model. In Egypt, for example, the criminal penal code is largely non-religious, as are numerous economic, property and investment rules. The 1971 constitution preserved Egypt's socialist legacy and, at the same time, stated that Shari'a was *a* primary source of legislation in Egypt. Judicial review was introduced in 1979. In 1980, Article 2 of the Egyptian Constitution was amended so as to establish principles of Islamic jurisprudence (the Shari'a) as *the* (not *a*) primary source of legislation in Egypt. For nearly thirty years now, the Egyptian political and constitutional

order, and consequently Egypt's courts, most notably Egypt's Supreme Constitutional Court, have been grappling with the contested status and role of Shari'a as a potentially determinative source of authority in an otherwise 'strong state' with a historically powerful executive branch. To address this question in a moderate way, the Court developed a complex, innovative interpretive matrix of religious directives – the first of its kind by a non-religious tribunal. It departed from the ancient traditions of the *fiqh* (Islamic jurisprudence or the cumulative knowledge/science of studying the Shari'a) schools, and has instead developed a flexible, modernist approach to interpretation that distinguishes between 'unalterable and universally binding principles, and malleable applications of those principles' (see Brown 1999). Legislation that contravenes a strict, unalterable principle recognized as such by all interpretive schools is declared unconstitutional and void, while at the same time, *ijtihad* (contemplation or external interpretation) is permitted in cases of textual lacunae, where the pertinent rules are vague, open-ended, or where no consensus exists even within religious jurisprudence. Furthermore, the government has been given broad legislative discretion in policy areas where the Shari'a is found to provide unclear or multiple answers, provided that the legislative outcome does not contravene the general spirit of the Shari'a (Brown 1999).

Another variation on the *strong establishment model* is essentially a mirror image of the religious jurisdictional enclaves discussed earlier. Here, most of the law is religious; however, certain areas of the law, such as economic law or certain aspects of gender equality, are 'carved out' and insulated from influence by religious law. An interesting case in point is Saudi Arabia, arguably one of the countries whose legal system comes the closest to being fully based on *fiqh* (Islamic jurisprudence). Article 1 of the Saudi Basic Law (1993) reads: 'The Kingdom of Saudi Arabia is a sovereign Arab Islamic state with Islam as its religion; God's Book and the Sunnah of His Prophet, God's prayers and peace be upon him, are its constitution'. Article 23 establishes the state's duty to advance Islam: 'The state protects Islam; it implements its Shari'a; it orders people to do right and shun evil; it fulfills the duty regarding God's call'. At the same time, Chapter 4 of the Basic Law (titled: Economic Principles) protects private property, provides a guarantee against the confiscation of assets, and suggests that 'economic and social development is to be achieved according to a just and scientific plan'. Moreover, whereas Saudi courts apply Shari'a in all matters of civil, criminal or personal status, Article 232 of a 1965 Royal Decree provides for the establishment of a commission for the settlement of all commercial disputes. Although judges of the ordinary courts are usually appointed by the Ministry of Justice from among graduates of recognized Shari'a law colleges, members of the commission for the settlement of disputes are appointed by the Ministry of Trade. In other words, Saudi Arabia has effectively exempted the entire finance, banking and corporate capital sectors from application of Shari'a rules. Softer examples of this model are common in the Islamic world, from Qatar or the United Arab Emirates to exotic destinations such as the Maldives or Comoros in the Indian Ocean. In short, religion has made a major comeback over the last few decades, and is now a *de facto* and often *de jure* pillar of collective identity, national meta-narratives and constitutional law in numerous predominantly Muslim countries in Asia, Africa and the Middle East. The strong establishment model is back in vogue in these places, albeit subject to various constitutional and jurisprudential ingenuity aimed at mitigating the tensions between religious directives and modern-life necessities, worldviews and interests.

3 CONCLUSION

Expanding our horizons comparatively reveals more diversity than often meets the eye with respect to constitutional models for arranging religion and state relations worldwide. The dichotomous view of separation in the West versus entanglement of religion and state elsewhere is rather unrefined. In reality, several prototypical models exist, ranging from atheism or assertive forms of secularism to constitutional enshrinement of religion as a state religion and as a main source of legislation. Even within the separationist model – arguably the most common worldwide – considerable variance exists between secularism as a form of state ‘religion’ (e.g. France), state neutrality toward religion (e.g. the United States), weak establishment (e.g. Germany), and accommodation, or even celebration, of religious difference (e.g. Canada or South Africa). In other settings, the relationship between state and religion is even more complex, with constitutional jurisprudence dealing with either a legacy of religion-infused morality (e.g. Ireland), enclaves of religion-based jurisdictional autonomy (e.g. India, Israel) or strong establishment of religion (e.g. so-called ‘Islamic constitutionalism’).

Obviously, there is considerable variance within, let alone among, these prototypical or ‘ideal’ models; each comes in different shapes, forms and sizes, with local nuances and idiosyncrasies abounding. This variance is often rooted in distinctive political legacies, differences in constitutional structures and aspirations, dissimilarities in historical inheritances and formative experiences, as well as non-trivial differences in value systems and foundational national meta-narratives. These differences often feed and shape the specific ways in which the tension between religion and constitutional governance manifests itself. But these differences notwithstanding, a common motif in today’s post-secularist age seems to be the increasing reliance worldwide on constitutional law and courts to contain, tame and limit the spread and impact of religion-induced policies. Consequently, constitutional courts operating under each and all of these models have become key mediators between the calls of faith and the interests of the modern state.

Unlike the conventional image of a ‘clash of civilizations’ or the ‘west’ and the ‘rest’, there is actually a strong echo of religion in each and all of these models. In fact, all constitutions, every single one of them – from France to Iran and anywhere in between – address the issue of religion head on. Some constitutions despise it, others embrace or even defer to it, and yet others are agnostic but are willing to accommodate certain aspects of it. But not a single constitution abstains, overlooks or remains otherwise silent with respect to religion. With the exception of the concrete organizing principles and prerogatives of the polity’s governing institutions, the only substantive domain addressed by all modern constitutions is religion. What could be a more telling illustration of religion’s omnipresence in today’s world, or a stronger testament to constitutionalism’s existential fear of religion?

NOTES

1. Comprehensive and resourceful analyses of these cases is provided in Kent Greenawalt (2009a; 2009b).
2. Para. 86.
3. A similar logic served as a basis for the newly established UKSC’s ruling in *R (E) v Governing Body of JFS School* [2009] UKSC 15 [UK].

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