

Competing Orders? The Challenge of Religion to Modern Constitutionalism

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Religion and constitutionalism often collide on both substantive values and policy preferences. Moving beyond the familiar angle of divergent value sets, this Essay critically highlights the structural, “clash of orders” features that make religion a credible rival and a serious challenger to modern constitutionalism. We identify three additional dimensions of the potential clash between religion and constitutionalism in a world of resurgent populist nationalism: (1) the structural logic of competing orders; (2) the strategic reliance on religious identity markers to generate unequal civic standings among formally equal citizens; and (3) the transnational nature of religious solidarity and affiliation, which permits escape from, and may destabilize, the project of the territorially bounded constitutional state. Comparative examples reveal how the confluence of these factors has played out in various settings—north and south, national and international—to present a serious threat to the constitutional domain. Taken together, the conjunction of these ideational and structural sources of friction positions religion as one of today’s main challenges to the constitutional order as a whole, but especially to its liberal iterations.

INTRODUCTION

The rule of law and the rule of God appear to be on a collision course. These two of the most powerful ideas of all time are 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. The potential conflict between them is intensified by preliminary skirmishes at the intersection of two broad trends: the global reach of constitutionalism and religion’s return to the forefront of world politics. Consequently, the constitutional domain has become a main stage on which the return of religion and religiosity is played out.

Much has been written about the global convergence on constitutional supremacy and judicial review, perhaps even the

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emergence of a global constitutional order, most visible in the context of rights.¹ At the same time, religion has taken the center stage of public debate worldwide, and it is frequently identified as the cause of large-scale global conflict and as a main source of transnational solidarities.

From the surge in Christian fundamentalism to revivalist Islam to the spread of Catholicism and Pentecostalism in the Global South, and from the rise of Hindu and Buddhist nationalisms in Asia to heated debates about religion-infused morality, cultural heritage, and boundaries of membership in the Americas and in Europe, it is hard to overstate the significance of the religious revival in early twenty-first century politics. In contrast with the predictions of secularization theory, religion is back with a vengeance.

Virtually every major religious tradition has produced its own forms of extremism and growing disregard for the rights of “others.”² In an increasing number of countries, the alignment between religious identity and populist-nationalist politics seems stronger than ever. At the same time, religious communities have been thriving at the level of civil society, oftentimes offering forms of belonging that undercut territorial borders and forge transnational allegiances. The constitutional domain has been a means for and the target of much of this religious revival. Consequently, religion’s challenge to constitutionalism has once again come to the fore.

Religion and constitutionalism often collide on substantive values and policy preferences. Increasingly, these value conflicts manifest themselves through high-profile legal clashes and court cases in which the stakes for the competing parties and the social groups they represent are both high and visible. Protection of gender equality, reproductive freedoms, LGBTQ rights, and the right to die with dignity are considered some of the hallmarks of the current liberal constitutional-rights jurisprudence. Not all religious circles resist this emerging canon, yet many of them do, and

¹ See, for example, Colin J. Beck, et al, *Constitutions in World Society: A New Measure of Human Rights* *4–5 (unpublished manuscript, Feb 2, 2017), archived at <http://perma.cc/6HMY-M2V8>; Kai Möller, *The Global Model of Constitutional Rights* 1–5, 15–16 (Oxford 2012); David S. Law and Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 Cal L Rev 1163, 1171–73 (2011); David S. Law, *Generic Constitutional Law*, 89 Minn L Rev 652, 687–94 (2005).

² Religion may also be a catalyst for evoking justice and equality claims for political and legal reform; certain strands of the abolitionist movement and the civil rights movement are examples of this pattern at work, which is beyond the scope of this Essay.

some quite vehemently. The stance of the traditional Catholic Church, conservative Evangelical movements, Wahhabist Islam, or ultraorthodox Judaism on these issues is well known: it is diametrically opposed to the liberal constitutional view. In polities with a history of religion-infused law and morality, issues such as blasphemy, proselytism, inheritance, and personal status often collide with constitutional provisions regarding equality, freedom of expression, and freedom of religion. Religious sectors' fierce reactions to landmark court rulings, such as the *Obergefell v Hodges*³ decision in the United States, the UK Supreme Court (UKSC) ruling in *R(E) v Governing Body of JFS*,⁴ the European Court of Human Rights' (ECtHR) judgment in *S.A.S. v France*,⁵ or most recently the European Court of Justice's (ECJ) ruling in *Achbita v G4S Secure Solutions NV*,⁶ are merely a few recent examples.

The jurisprudential and scholarly writing on the ideational friction between religion and constitutional rights is abundant. So is the literature that proposes legal techniques to mitigate such tensions.⁷ In this Essay, however, we wish to move beyond the divergent value-sets angle. Instead, we aim to highlight a vital yet underappreciated dimension of the fraught relationship between constitutionalism and religion: the structural, "clash of orders" (not "clash of values") features that make religion a credible competitor of and a serious challenger to modern constitutionalism. Our focus is on the *systemic* aspect of religion, with its

³ 135 S Ct 2584, 2602–05 (2015) (holding that marriage is a fundamental right guaranteed to all couples, including same-sex couples, by the Equal Protection Clause of the Fourteenth Amendment).

⁴ [2010] 2 AC 728, 745 at ¶¶ 10–12, 751–52 at ¶ 35 (UKSC) (subjecting admission criteria in a North London Jewish day school to general administrative-law and constitutional-law provisions).

⁵ [2014] 3 ECtHR 341, 376–81 at ¶¶ 137–59 (holding that, in the context of France's "burqa ban," state autonomy and regulatory powers over attire in public spaces trump considerations of faith-based freedoms). In 2017, the ECtHR ruled that Belgium's laws banning full-face covering did not breach the Convention, affirming the earlier *S.A.S.* decision. See generally *Dakir v Belgium*, App No 4619/12 (ECtHR July 11, 2017); *Belkacemi and Oussar v Belgium*, App No 37798/13 (ECtHR July 11, 2017).

⁶ [2017] 3 CMLR 673, 707–09 at ¶¶ 32–44 (ECJ) (holding that, under certain conditions, employers may dismiss employees who refuse to comply with company policies concerning religious attire).

⁷ We ourselves have contributed to such attempts. See generally, for example, Ayelet Shachar, *Multicultural Jurisdictions: Cultural Differences and Women's Rights* (Cambridge 2001); Ayelet Shachar, *Squaring the Circle of Multiculturalism: Religious Freedom and Gender Equality in Canada*, 10 L & Ethics Hum Rts 31 (2016). For a comparative exploration of the relationship between law and religion in the nonliberal world, see generally Ran Hirschl, *Constitutional Theocracy* (Harvard 2010).

own symbolic appeal and interpretive hierarchy, separate constitutive narratives, different jurisdictional concepts and conflict resolution norms, cross-border affiliations, and transnational mobilization capacity. Comparative examples reveal how the confluence of these factors has played itself out in various settings—north and south, national and international—to present a serious threat to the constitutional domain. As the challenge posed by religion is a complex, multifaceted one, we limit our discussion to three main axes: (1) the “clash of orders” challenge; (2) the affinity between (majoritarian) religion-based affiliations and populist variants of nationalism, and the threat they pose to more inclusive definitions of “who belongs” within the domain of constitutional democracy; and (3) the transnational nature of religious solidarity and affiliation, and the challenge it poses for the statist constitutionalist project. We address each in turn.

I. WHO REIGNS SUPREME? CONSTITUTIONALISM AND RELIGION AS TWO SOVEREIGN KINGDOMS

Today’s iteration of the rivalry between throne and altar is one flare-up of an ongoing entanglement in a millennia-long struggle for power and authority. The canon of the Western tradition is filled with references to these “two kingdoms” and their unstable relationship, political and theological. These include the distinction between the eternal city of God and temporal earthly city of man, the deliberation over how to “[r]ender to Caesar the things that are Caesar’s, and to God the things that are God’s,” or the distinction between the sacred authority of the priests and the royal power.⁸ With a few exceptions, religion, law, and politics were closely intertwined, perhaps even unified throughout much of premodern history. The modern era eventually saw the emergence of the doctrine of separation of church and state, advocated by Enlightenment thinkers as a means of confining religious passions, which they characterized as dangerous and irrational, to the nonpolitical realm. In this familiar narration of the advent of secularism, the public sphere was portrayed as the realm of reason, whereas the private sphere began to be regarded as the realm of faith. In creating this characteristic (though never finalized) division between secular public space and religious private space,

⁸ Mark 12:17 (New American Standard Version); Matthew 22:21 (New American Standard Version); Luke 20:25 (New American Standard Version).

European secularism sought to hustle religious ritual and discipline into a confined realm, devoid of direct political influence in the affairs of the modern state.⁹ Even a cursory look at the world around us reveals that this vision never fully materialized. In almost every country, religion plays a role, whether formal or informal, in public life. This distinction, however reductionist and otherwise problematic, has nevertheless come to be identified as a legal and cultural marker of the sovereign and newly emerging secular state ideal.

With the American and French revolutions of the late eighteenth century, absolute monarchies granting feudal privileges for the aristocracy and clergy underwent a radical change grounded in novel principles of constituent power, secularist nationalism, nondenominational citizenship, inalienable rights, and the strict separation of church and state. These foundational changes reflected new ways of organizing social life and claiming authority—on the basis of popular sovereignty (“We the People”) rather than a divine order. With the rise of nationalism and modern state formation throughout the nineteenth and twentieth centuries, the ideal of formal separation of religion and state—often established through a constitutional structure—became prevalent in the legal imagination.¹⁰

In practice, however, the dichotomous view of separation 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 creed and as a main source of legislation. Even within the range of countries that adhere to the separationist model, considerable variance exists among secularism as a form of state “religion” (for example, France), state neutrality toward religion (for example, the United States), weak establishment (for example, Germany), and accommodation, or even celebration, of religious difference (for example, Canada). In other settings, the relationship between state and religion is even more complex, with constitutional provisions and

⁹ For a famous articulation, see Talal Asad, *Genealogies of Religion: Discipline and Reasons of Power in Christianity and Islam* 27–29 (Johns Hopkins 1993). In practice, as philosopher Charles Taylor notes, secularism never completely banished religion. See Charles Taylor, *A Secular Age* 2 (Belknap 2007) (describing “vestigial” public references to religion in the public spaces of Western Europe).

¹⁰ For an overview, see John Witte Jr, *Law and Religion in the Western Legal Tradition*, in Silvio Ferrari, ed, *Routledge Handbook of Law and Religion* 29, 38–41 (Routledge 2015). See also José Casanova, *Public Religions in the Modern World* 40–41 (Chicago 1994) (describing the “privatized” role that religion performs in some constitutional regimes).

jurisprudence dealing with either a legacy of religion-infused morality (for example, Ireland), enclaves of religion-based jurisdictional autonomy (for example, India), preferential treatment of a single state-endorsed religion alongside protection for religious minorities' rights (for example, Israel, Malaysia, and Sri Lanka), or strong establishment of religion (for example, so-called Islamic constitutionalism, ranging from moderate versions in Morocco or Bangladesh to much more rigid ones in Iran or Saudi Arabia). Obviously, there is considerable variation within, let alone among, these prototypical, or ideal-type, models. Each comes in different shapes, forms, and sizes; local nuances and idiosyncrasies abound. This variance is often rooted in distinctive political legacies, differences in constitutional structures and aspirations, and dissimilarities in historical inheritances and formative experiences, as well as significant differences in value systems and foundational national metanarratives. Such differences often feed and shape the specific ways in which the tension between religion and constitutional governance manifests itself.

No less significant, unlike the conventional image of a clash of civilizations, there is actually a strong echo of religion in each and all of these models. All constitutions—every single one—directly address the issue of religion head on.¹¹ Some constitutions despise it, others embrace or even defer to it, and yet others are agnostic but willing to accommodate certain aspects of it. But “not a single constitution abstains from, overlooks, or remains otherwise silent with respect to religion. With the exception of the concrete organizing principles and prerogatives of [a] polity’s governing institutions, the only substantive domain addressed by all modern constitutions is religion.”¹² What could be a more telling illustration of religion’s omnipresence in today’s world, or a stronger testament to constitutionalism’s entanglement with, if not existential fear of, religion?

What is the source of this deep trepidation? An obvious reason is that religion is an all-encompassing belief and behavior-guiding system that *preceded* constitutionalism. It still enjoys a first-mover advantage. It is also highly resilient. Sustained and even violent attempts to eradicate religion have globally failed. Another is the massive and continuous popular appeal of religion.

¹¹ See Hirschl, *Constitutional Theocracy* at 17 (cited in note 7).

¹² *Id.*

The numbers speak for themselves: 62 percent of the global population defines itself as religious; it is estimated that 91 percent of sub-Saharan Africa's population, 80 percent of Latin America's population, and 70 percent of the Middle East and North Africa's population identify as religious, with North America (a whopping 47 percent) and EU Europe (44 percent) as the least religious regions.¹³ In other words, even in the least religious parts of the world, one in two identifies as a believer. The on-the-ground outreach of religion is considerably better than that of constitutionalism. In fact, it would be safe to assume that even today, let alone in premodern times, many more people worldwide have been in a church, have read the Bible, celebrate religious holidays, or quietly implore God's help than the number of people who have set foot in a constitutional court or can recite full verses from their respective countries' constitutions and bills of rights. Strikingly, the two largest democracies in the world, India and the United States—both of which adhere to a constitutional separation of religion and state—are frequently mentioned as the two most religious societies in the world, as measured by how significant religion is in public discourse and in private lives. Succinctly put, religion is more popular and widespread than constitutionalism.

Another main reason for constitutionalism's anxiety with religion is that ultimately, contrary to conventional wisdom, the two domains have much more in common than meets the eye. Both domains are revered symbolic systems that reflect ideals, aspirations, and principles larger than ordinary life. Both domains present themselves as autonomous, apolitical, and morality driven. Both feature core constitutive texts and rituals, alongside hierarchical interpretive structures aimed at translating the core texts into guidelines for everyday life. In both domains, a trade-off between interpretation and amendment is apparent, whereby the harder it is to alter the text, the greater the likelihood of interpretive wars over the text's true meaning. Support for originalist, purposive, and living-tree interpretive schools is evident in both spheres. As often is the case in other contexts, the most uncompromising positions vis-à-vis one another are held by parties with

¹³ *Religion Data from End of Year Survey 2016 *25* (WIN/Gallup, Apr 10, 2017), archived at <http://perma.cc/JDK2-WH29>. Similar statistics from 2015 are available at *Losing Our Religion? Two Thirds of People Still Claim to Be Religious* (WIN/Gallup, Apr 13, 2015), archived at <http://perma.cc/9CWX-BGLP>.

closely related interests and affinities, be they divorcées untangling property¹⁴ or ethnic communities sharing the same territory.¹⁵

The underappreciated resemblance between constitutionalism and religion, alongside religion's well-developed spiritual, moral, and institutional authority, and its continuous appeal to billions of people worldwide, suggest that religion is one of the few symbolic metasystems that offer a holistic, full-board alternative to constitutionalism. Even a single facet of a religious belief system—religious law—offers a substantive alternative to the statist basis of modern constitutionalism. Canon law, Jewish law, Sharia law, and Hindu law predate state law and the constitutional domain. The ideas and doctrines developed by these prestatist, preconstitutional legal traditions continue to impact a wide range of legal areas, from commerce law to family law.

In contemporary secularized nations, the role formerly granted to religion is conspicuously supplanted; a polity's constitutional framework is often its "supreme law" and, as such, tends to infiltrate many facets of public and private life, just as religion has been traditionally wont to do.¹⁶ In some settings—the United States immediately comes to mind—the Constitution may itself acquire near-numinous status; much like holy scripture, it is enshrined.¹⁷ As Aharon Barak, former president of the Supreme Court of Israel, once suggested, "Nothing falls beyond the purview of judicial review. The world is filled with law; anything and everything is justiciable."¹⁸ Under such an all-encompassing outlook, the law systemically conceives of religion in terms cognizable within the legal or constitutional framework.¹⁹ It thus "formats," or reconstructs, religion in a way that subjects it to the constitutional order.²⁰

¹⁴ See notes 35–44 and accompanying text.

¹⁵ See notes 45–46 and accompanying text.

¹⁶ Constitutions typically include a supremacy clause, defining them as the "the supreme law of the land" (in the United States) or simply the "supreme law" (in Canada). See US Const Art VI, cl 2; Canada Constitution Act Part VII, § 52(1) (1982).

¹⁷ See, for example, Sanford Levinson, *Constitutional Faith* 10–14 (Princeton 1988).

¹⁸ Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* 169 (Harvard 2004).

¹⁹ See, for example, Benjamin L. Berger, *Law's Religion: Religious Difference and the Claims of Constitutionalism* 24–28 (Toronto 2015).

²⁰ See, for example, Ran Hirschl, *Constitutional Courts as Bulwarks of Secularism*, in Diana Kapiszewski, Gordon Silverstein, and Robert A. Kagan, eds, *Consequential Courts: Judicial Roles in Global Perspective* 311, 312–13 (Cambridge 2013).

Although secular constitutionalism enjoys a widespread reach and a structural advantage in defining the boundary between the public and the private, and between the sacred and the profane, it still lags behind religion's omnipresence in people's lives. As Professor Benjamin Berger astutely observes, "The religious conscience ascribes to life a divine dimension that infuses all aspects of being. The authority of the divine extends to all decisions, actions, times, and places in the life of the devout."²¹ Precisely because of its wholeness, ubiquitous nature, and embedded authority, religion addresses the human need for "belonging," "meaning," or "guidance" in a manner that is often more wholesome and effective (from the perspective of the believer and the faith community) than a given polity's constitutional framework. In its abstract fulsomeness, spiritual power, and supraterritoriality, religion is a kingdom without end; sovereign in the eyes of its followers, past, present, and future; here, there, and everywhere. Religion therefore presents a challenge to the state's monopolist power in the Weberian sense²² or to the "seeing like a state" logic formulated by Professor James Scott.²³ It further blurs expectations concerning functional differentiation, moral authority, and legal hierarchy, in line with Professor Niklas Luhmann's social systems theory.²⁴ With such an omnipotent and experienced rival enterprise—a true "kingdom without end" with the master of the universe at its apex, as the biblical prophecy goes²⁵—the constitutional domain must feel threatened and constantly on the watch to maintain its symbolic hegemony and legal authority.

This vying for supremacy is manifested clearly in the ways in which courts and judges wrestle with the task of articulating the conceptual boundaries of constitutional accommodation of religion-based arguments. From Canada to India and Britain to

²¹ Benjamin Berger, *The Limits of Belief: Freedom of Religion, Secularism, and the Liberal State*, 17 *Can J L & Society* 39, 47 (Apr 2002).

²² Max Weber defined the state as a "human community that (successfully) lays claim to the *monopoly of legitimate physical violence* within a particular territory." Max Weber, *Politics as a Vocation*, in David Owen and Tracy B. Strong, eds, *The Vocation Lectures* 32, 33 (Hackett 2004) (Rodney Livingstone, trans). He continues, "If the state is to survive, those who are ruled over must always *acquiesce* in the authority that is claimed by the rulers of the day." *Id.* at 34.

²³ See James C. Scott, *Seeing Like a State: How Certain Schemes to Improve the Human Condition Have Failed* 88–95 (Yale 1998).

²⁴ See Niklas Luhmann, *Social Systems* 236–38 (Stanford 1995) (John Bednarz Jr and Dirk Baecker, trans) (defining morality in terms of social esteem and noting that such a definition "does not presuppose a consensus").

²⁵ Luke 1:32–33; 1 Chronicles 17:11–14 (New American Standard Version).

South Africa, the specter of litigants turning to religious or customary sources of law as authoritative guides for regulating their behavior, alongside or in lieu of other norms, has risen to the forefront of public debate and constitutional battle. At stake is not merely the question whether a particular individual or group may seek exemption from a general rule, but rather *which type of institution*—a public court enforcing democratically enacted laws and regulations, or a faith-based tribunal applying religious-based norms and practices—will have the authority to make a final, binding decision.

That courts in expressly “separationist” state-and-religion regimes (for example, France) take an overall religion-limiting stance is not surprising. This trend has been witnessed in recent years at the national level as well as the supranational (European) context. A classic example of this pattern is *S.A.S.*, in which the ECtHR—typically, the apex of individual-rights protections—ruled that the countervailing *societal* interest of “living together” must prevail.²⁶ Based on this rationale, the ECtHR upheld France’s ban against face covering in public spaces.²⁷

A notably more difficult setting for probing into how courts deal with claims of religion is that of countries that pride themselves on advancing an official multicultural agenda (for example, Canada and South Africa). In these pro-diversity jurisdictions, two different categories of constitutional responses to religious-based claims for recognition may be identified: (1) religious or cultural claims that can reasonably be construed as accepting the ultimate authority and supremacy of the constitutional order, which may be referred to, for the purposes of simplicity and analytical clarity, as “diversity as inclusion”; and (2) “claims for insulation, if not outright immunization, from the purview of the state’s secular ordering and its centrifugal force, claims that are based on adherence to sacred or customary sources of authority and identity. This latter pattern [may be labeled] ‘non-state law as competition.’”²⁸

When viewed through this prism, it is evident that as long as legal claims for accommodation are not seen as challenging the lexical superiority of the constitutional order itself, they stand a

²⁶ *S.A.S.*, [2014] 3 ECtHR at 381 at ¶ 157.

²⁷ *Id.*

²⁸ Ran Hirschl and Ayelet Shachar, *The New Wall of Separation: Permitting Diversity, Restricting Competition*, 30 *Cardozo L Rev* 2535, 2536 (2009) (emphasis omitted).

fair chance of success. Contrast that with the unyielding reluctance of legislatures and judiciaries to accept as binding or even cognizable any potentially competing legal order that originates in sacred or customary sources of identity and authority. This pattern of clamping down and refusing to accept any alternative sources of regulation or hierarchies of authority becomes particularly visible when the legal challenge at issue is interpreted as raising doubts about which set of norms and institutions, or what set of high priests, should have the final word in authoritatively resolving disputes within a given polity. This is a challenge that no constitutional order, no matter how tolerant and otherwise open to exemptions and accommodations for religious believers, can accept with indifference.

Granted, the constitutional accommodation of religion may be extensive at times. Examples range from the Supreme Court of India's decision in *Bijoe Emmanuel v State of Kerala*,²⁹ to the Supreme Court of Canada's ruling in *Multani v Commission Scolaire Marguerite-Bourgeoys*;³⁰ and from the US Supreme Court rulings in *Hosanna-Tabor Evangelical Lutheran Church and School v Equal Employment Opportunity Commission*³¹ or *Burwell v Hobby Lobby Stores, Inc.*,³² to the German Constitutional Court judgment in the 2015 *Headscarf Case*.³³ But such accommodation seldom, if ever, amounts to replacing the ultimate supremacy of the constitutional order with a religious order. When faced with more-radical calls for replacing the constitutional authority with religion's authority, "even the most generous and even-handed officials of the civil religion are structurally not in a position to rule from a 'point of view from nowhere.'"³⁴ Instead, as stakeholders in

²⁹ [1986] 3 SCR 518, 531–33, 539 (India) (holding that Jehovah's Witnesses may refrain from reciting the Indian national anthem for religious reasons).

³⁰ [2006] 1 SCR 256, 297–98 at ¶ 79 (Can) (holding that a Sikh boy may bring a *kirpan*, a dagger-like metal object, to school in accordance with his religious practice).

³¹ 565 US 171, 188–89 (2012) (holding that an instructor of religion at a Lutheran school fell under the "ministerial exemption," requiring the dismissal of her employment discrimination suit).

³² 134 S Ct 2751, 2774–75, 2785 (2014) (holding that closely held private corporations may be exempt from regulations to which their owners object on religious grounds).

³³ 138 BVerfG 296, 342–43 at ¶¶ 115–16 (2015) (holding that Muslim educators in interdenominational state schools may wear headscarves).

³⁴ Ran Hirschl and Ayelet Shachar, *The Constitutional Boundaries of Religious Accommodation*, in Susanna Mancini and Michel Rosenfeld, eds, *Constitutional Secularism in an Age of Religious Revival* 175, 176 (Oxford 2014).

This is a narrower claim than stating that *any* type of engagement between law and religion is inevitably "tainted" by the cultural dominance of liberalism and

and enforcers of the state's rule of law, they may feel obligated to reaffirm the superiority of *its* sources of legitimacy, procedures of engagement, methods of interpretation, and styles of reasoning that are state driven and entrenched in the secular constitution precisely when the very foundations of the legal and social order they protect and adhere to are (or are perceived to be) at stake.

An illustration of the renewed emphasis on the state's authority to enforce general constitutional provisions against expressions of pious resistance to the constitutional ground rules is found in the landmark Supreme Court of Canada decision of *Bruker v Marcovitz*;³⁵ here, the court rejected the claim that when religious freedom is the basis for noncompliance with a contractual obligation, such noncompliance is immunized from judicial review or intervention.³⁶ In the *Bruker* case, a Jewish husband made a contractual commitment to remove barriers to religious remarriage in a negotiated settlement reached with the consent of the parties and after consultation with independent legal counsel.³⁷ That agreement was incorporated as a binding condition for the final divorce decree between the parties (*decree nisi*); indeed, its provisions became part of the terms that enabled the civil divorce to be finalized by the relevant state authority.³⁸ Once the husband had obtained the secular divorce, however, he failed to honor the agreement, claiming that he had undertaken a *moral* rather than a legal obligation.³⁹ Mr. Marcovitz claimed that his faith commitments are nonjusticiable before a general court of law.⁴⁰

The Supreme Court of Canada, in a majority opinion penned by Justice Rosalie Abella, rejected this claim. It held, instead, that it was fully within the court's jurisdiction to "[r]ecogniz[e] the enforceability by *civil* courts of agreements to discourage *religious* barriers to remarriage, address[] the gender discrimination those barriers may represent and alleviate[] the effects

secularism, given that, in many parts of the world, religion has a strong claim for governance and might be officially recognized by the state.

Id at 176 n 2, citing generally Hirschl, *Constitutional Theocracy* (cited in note 7).

³⁵ [2007] 3 SCR 607 (Can).

³⁶ See id at 630–31 at ¶ 47.

³⁷ Id at 623 at ¶ 23.

³⁸ Canada's Divorce Act requires parties to remove religious barriers to remarriage. See Divorce Act § 21.1(2), RSC 1985 ch 3 (2d Supp) (Can).

³⁹ See *Bruker*, [2007] 3 SCR at 620 at ¶ 11.

⁴⁰ See id.

they may have on extracting unfair concessions in a civil divorce.”⁴¹ The court dismissed the nonjusticiability claim and stated unequivocally that the ultimate authority to determine the delicate balance of accommodation is in its exclusive hands.⁴² The final decision, it stated, is not reserved for those seeking exemption or immunity from general laws by raising the claim that religion is nonjusticiable.⁴³ Instead, the state’s high constitutional priests retain the crucial designation as the ultimate arbiters in conflicts between the constitutional sphere and its competitors.⁴⁴ This is a textbook example of how the clash of orders is contained as a threshold structural matter. Once a faith-based claim is brought before a court of law, it not only gets translated to the language of legalese, but the constitution also gains an upper hand over religion in the struggle over determining who, or which entity, defines the boundaries between the spheres, or the lexical priority of state and altar. Once the constitution is defined as the supreme law of the land (as it is in Canada), it has the authority to clarify the confines and validity of claims for noncompliance made in religion’s name in cases of direct confrontation or competition between them.

In countries that do not adhere to the strict separation model but instead grant religious or customary communities some degree of jurisdictional autonomy (for example, in the realms of family law, conversion, denominational education, or inheritance), struggles over supremacy between general courts and religious tribunals are even more pronounced. In such circumstances, when the “two kingdoms” are not metaphysical but rather find institutional manifestation as competing jurisdictional systems operating within the same space, clashes over the scope of authority and the “chain of command” between constitutional courts and religious tribunals seem inevitable.

Such tensions have become pronounced in the Israeli legal system. In a landmark ruling, *Bavli v The Grand Rabbinical Court*,⁴⁵ the Supreme Court of Israel considerably expanded its

⁴¹ Id at 608 (emphasis added).

⁴² See id at 630–31 at ¶ 47.

⁴³ *Bruker*, [2007] 3 SCR at 615–16 at ¶ 2, 620–23 at ¶¶ 13–20.

⁴⁴ Drawing on a similar logic (and citing *Bruker*), the UK Supreme Court determined in its recent watershed decision in *Shergill v Khaira*, [2015] 1 AC 359, 378–79 at ¶¶ 44–45 (UKSC 2015), that religious disputes are justiciable before the secular courts. The case involved an internal dispute concerning succession procedures and control of religious trust moneys in a Sikh congregation.

⁴⁵ HC 1000/92, 48(2) PD 6 (Isr 1995).

overarching review of religious tribunals' jurisprudence by holding that all religious tribunals, including the Grand Rabbinical Court, are statutory bodies established by law and funded by the state; in principle, all aspects of their judgments are thus subject to review by the supreme court.⁴⁶ Although 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 on their exercise of authority.

Concern with defining who, or which entity, holds the ultimate authority in a system that officially recognizes competing normative and legal orders has also manifested itself in the South African Constitutional Court's landmark decisions dealing with customary law—a main feature of South Africa's legal pluralism model. In *Bhe v Khayelitsha*,⁴⁷ *Gumede v President of the Republic of South Africa*,⁴⁸ and *Shilubana v Nwamitwa*,⁴⁹ the court subjected customary law and tribunals to the general equality provisions of the constitution. The court stated that customary law is at the same time “protected by and subject to the Constitution.”⁵⁰ It is a living legal tradition that will “inevitably be interpreted, applied and, when necessary, amended or developed by the community itself or by the courts. This will be done in view of existing customs and traditions . . . and of course the demands of the Constitution as the supreme law.”⁵¹

In *AI v MT*⁵²—the first case in English legal history in which an English High Court referred the resolution of a contested Jewish divorce to nonbinding religious arbitration—the overarching monitoring authority of the general court system was preserved.⁵³ Here, a UK court permitted the parties, upon their request, to turn to the Jewish Beth Din in New York to deal with personal-status and family-law issues, including child custody arrangements, under the clear stipulation that the UK civil court

⁴⁶ See *id.* For information on Sharia court jurisdiction, see *Plonit v Ploni*, CA 3077/90, 49(2) PD 578 (Isr 1995). For further discussion, see Hirschl, *Constitutional Theocracy* at 143–44 (cited in note 7).

⁴⁷ [2005] 1 S Afr 580, 606 at ¶ 44 (CC).

⁴⁸ [2009] 3 S Afr 152, 167–68 at ¶¶ 33–36 (CC).

⁴⁹ [2009] 2 S Afr 66, 80 at ¶¶ 42–43 (CC).

⁵⁰ *Bhe*, [2005] 1 S Afr at 604–05 at ¶ 41.

⁵¹ *Shilubana*, [2009] 2 SA at 90 at ¶ 81 (emphasis added).

⁵² [2013] EWHC 100 (Fam).

⁵³ See *id.* at ¶ 37.

would retain the authority to accept or reject the Beth Din's ruling, thus allowing for greater diversity but also preserving the authority and juridical superiority of the civil court system.

It remains an open question, however, whether courts in deeply diverse societies can, over time and under changed political circumstances, continue to tame religious-based conflicts and intercommunal tensions. The oft-cited Shah Bano saga in India is a good illustration. Shah Bano, an elderly Muslim woman, was divorced by her husband of forty-three years through the Muslim practice of *talaq*, which allows a husband to invoke a unilateral, immediate divorce. In its famous ruling in *Mohammed Ahmad Khan v Shah Bano Begum*⁵⁴ ("Shah Bano"), the Supreme Court of India held that a neglected wife's state-defined statutory right to maintenance should stand regardless of the personal law (in this case Islamic Sharia law) applicable to the parties.⁵⁵ Traditionalist representatives of India's large Muslim community considered this decision, which sided with the woman and validated the secular mandate over a religious-based counterclaim, proof that homogenizing trends toward Hinduism threatened to weaken Muslim minority identity. India's Parliament, then led by Rajiv Gandhi's Congress Party, eventually bowed to massive political pressure by conservative Muslims and overruled the Indian Supreme Court's decision in *Shah Bano* by passing the Muslim Women (Protection of Rights of Divorce) Act.⁵⁶ Despite its reassuring title, this new bill undid the court's ruling by eliminating Muslim women's recourse to state courts in appealing for post-divorce maintenance payments. It also exempted Muslim ex-husbands from other postdivorce obligations.⁵⁷ So harsh was the Muslim dissenting reaction to *Shah Bano* that it is named by notable commentators among the catalysts for the subsequent ascent of right-wing Hindu politicians who accused the then-ruling Congress Party of compromising constitutional principles in order to appease Islamic fundamentalists and appeal to Muslim votes.⁵⁸

A new iteration of the constitutional battle over Muslim divorce law was recently deliberated before the Supreme Court of

⁵⁴ [1985] 3 SCR 844 (India).

⁵⁵ *Id.* at 846–47 at ¶ 2.3.

⁵⁶ Act No 25 of 1986 (India).

⁵⁷ See, for example, *Danial Latifi v Union of India*, [2001] 7 SCC 740, 751–52 (India).

⁵⁸ See S.P. Sathe, *Judicial Activism in India: Transgressing Borders and Enforcing Limits* 192 (Oxford 2002); Gary Jeffrey Jacobsohn, *The Wheel of Law: India's Secularism in Comparative Constitutional Context* 106 (Princeton 2003).

India—*Shayara Bano v Union of India*.⁵⁹ Following the court’s landmark ruling (3–2) in August 2017 that declared the *talaq* instant-divorce law unconstitutional on gender equality grounds, Muslim leaders and legal activists have pointed to the split-decision factor and suggested that practices like the triple *talaq* ought to be reviewed by the community itself.⁶⁰ It remains to be seen how matters will unfold, in particular in light of the current Hindu-nationalist undertone of Indian politics under the reign of Prime Minister Narendra Modi and his Bharatiya Janata Party–led (BJP) government.

II. WHO BELONGS? THE AFFINITY BETWEEN RELIGIOUS AFFILIATION AND REVIVALIST NATIONALISM

After emerging as a “default design choice,” liberal constitutionalism is under siege in many parts of the world.⁶¹ One of the main characteristics of the current populist, or illiberal, trend in world politics is the increasing reliance on religious rhetoric and the heightened demarcation of “us against them.” Religion-based boundaries (real or imagined) are reintroduced into politics or strategically deployed to advance exclusionary or nativist platforms. Much has been written about President Donald Trump’s persistent recourse to playing the anti-Muslim card, his portrayal of the United States as a Christian nation under siege, his repeated association of Islam with evil, and his countless innuendoes to Christian scripture and prophecy.⁶² Indian Prime Minister Modi has referred to Hinduism and Hindu nationalism (what is commonly known as *Hindutva*—the official ideology of the BJP since 1989) to galvanize support for his party.⁶³ In Russia, observers note, the relations between the Kremlin under President

⁵⁹ *Shayara Bano v Union of India*, Writ Petition (C) No 118 of 2016, slip op at 267–72 at ¶¶ 198–200 (India Aug 22, 2017), archived at <http://perma.cc/EQS7-PYF7> (striking down the practice of *talaq-el-biddat*, or instant unilateral divorce, for being arbitrary and discriminatory).

⁶⁰ See Suchitra Mohanty and Rupam Jain, *Muslim Divorce Law ‘Unconstitutional,’ Rules India’s Top Court* (Reuters, Aug 22, 2017), archived at <http://perma.cc/5LRD-XNTU>.

⁶¹ Tom Ginsburg, Aziz Z. Huq, and Mila Versteeg, *The Coming Demise of Liberal Constitutionalism*, 85 U Chi L Rev 239, 239 (2018).

⁶² See, for example, Michelle Goldberg, *Donald Trump, the Religious Right’s Trojan Horse* (NY Times, Jan 27, 2017), online at <http://www.nytimes.com/2017/01/27/opinion/sunday/donald-trump-the-religious-rights-trojan-horse.html> (visited Dec 15, 2017) (Perma archive unavailable); Emma Green, *Donald Trump Declares a Vision of Religious Nationalism* (The Atlantic, Feb 2, 2017), archived at <http://perma.cc/RD4R-7E5L>.

⁶³ The official BJP platform begins with these words:

Vladimir Putin and the Russian Orthodox Church have not been this close in over a century. The Russian parliament adopted a series of laws that set out to protect majoritarian “religious feelings” and “traditional values,” thereby explicitly targeting core tenets of liberal constitutionalism.⁶⁴ Meanwhile, in Turkey, President Recep Tayyip Erdoğan and the Justice and Development Party (AKP) have been advancing an illiberal constitutional agenda that, among other things, brings back faith-based values into the national collective-identity discourse after over eighty years of militant secularism guided by the Kemalist vision.⁶⁵ In virtually all of these settings, the wave of religion-infused political rhetoric has translated into the quest for greater political control of apex courts’ composition and the accompanying appointment of conservative judges that are sympathetic to the religio-nationalist line; nationalist legislation on matters like sovereignty, citizenship, and immigration; and rapidly diminishing respect for pluralism, minority rights, and civil liberties. These tendencies are often complemented, if not fueled, by an “us first” attitude and steadfast positions against global constitutionalist values viewed as an elitist, liberal project.

The alliance between religious-infused markers of identity and the current populist assault on constitutional democracy is also evident in less commonly traversed settings. In Poland, President Andrzej Duda and the right-wing national conservative Law and Justice Party (PiS) rediscovered religion as a voter magnet in that country, and now PiS stresses the close

In the history of the world, the Hindu awakening of the late twentieth century will go down as one of the most monumental events in the history of the world. Never before has such demand for change come from so many people. Never before has Bharat, the ancient word for the motherland of Hindus—India, been confronted with such an impulse for change. This movement, *Hindutva*, is changing the very foundations of Bharat and Hindu society the world over.

Hindutva: The Great Nationalist Ideology (BJP), archived at <http://perma.cc/YM99-UFNA>.

⁶⁴ See Mikhail Antonov, *Religion, Sexual Minorities and the Rule of Law in Russia: Mutual Challenges* *11–13 (St. Petersburg National Research University, Higher School of Economics Research Paper WP BRP 45/PS/2017, Mar 9, 2017), archived at <http://perma.cc/426D-TRMR>; Alicja Curanović, *The Guardians of Traditional Values: Russia and the Russian Orthodox Church in the Quest for Status* *5–7 (Transatlantic Academy Paper Series, Feb 2015), archived at <http://perma.cc/D928-LTHU>.

⁶⁵ See Elliot Ackerman, *Atatürk versus Erdoğan: Turkey’s Long Struggle* (New Yorker, July 16, 2016), online at <http://www.newyorker.com/news/news-desk/ataturk-versus-erdogan-turkeys-long-struggle> (visited Oct 4, 2017) (Perma archive unavailable).

ties between Roman Catholicism and Polish national identity.⁶⁶ As in other places, women's rights were among the first casualties. One of the new government's initial actions was to support a proposed citizens' bill, known as the "Stop Abortion" legislation, which would have tightened an already-restrictive law, making abortion punishable with a five-year prison term. Widespread protests and rallies around the country, most of them organized and led by women, have eventually led to a withdrawal of the government's support for the proposed bill, but not from its broader agenda. The European Commission recently took the extraordinary step of issuing a rule-of-law recommendation on the situation in Poland, in which it recommended that "Polish authorities take appropriate action to address th[e] systematic threat to the rule of law" created by the actions of the Polish government.⁶⁷ This recommendation was issued on account of findings that, among other concerns, Poland's apex court, the Constitutional Tribunal, was prevented by the Polish government from carrying out its mandate to deliver effective constitutional review.⁶⁸

Meanwhile, in Hungary, a direct confrontation between the nationalist government—led by Prime Minister Viktor Orbán—and the EU regarding centralized migrant-relocation policies has been brewing since the 2015 refugee crisis. Religious talk has been invoked by Orbán to defy EU policies on the matter. Orbán went on record stating:

Those arriving have been raised in another religion, and represent a radically different culture. Most of them are not Christians, but Muslims This is an important question, because Europe and European identity is rooted in Christianity.

⁶⁶ See James Traub, *The Party That Wants to Make Poland Great Again* (NY Times Mag, Nov 2, 2016), online at <http://www.nytimes.com/2016/11/06/magazine/the-party-that-wants-to-make-poland-great-again.html> (visited Dec 15, 2017) (Perma archive unavailable).

⁶⁷ European Commission, *Commission Recommendation of 27.7.2016 regarding the Rule of Law in Poland* *21 at ¶ 74 (July 27, 2016), archived at <http://perma.cc/F7HM-64CS>. See also *Rule of Law: Commission Issues Recommendation to Poland* (European Commission, July 27, 2016), archived at <http://perma.cc/3C29-ZMCC>.

⁶⁸ See *Commission Recommendation of 27.7.2016 regarding the Rule of Law in Poland* *10–11 at ¶¶ 18–24, 20 at ¶ 72 (cited in note 67). For a further description of the Polish government's attack on the judiciary, see Kim Lane Scheppele, *Autocratic Legalism*, 85 U Chi L Rev 545, 552–53 (2018). See also David Landau, *Populist Constitutions*, 85 U Chi L Rev 521, 534 (2018).

Is it not worrying in itself that European Christianity is now barely able to keep Europe Christian? There is no alternative, and we have no option but to defend our borders.⁶⁹

In Israel, the right-wing nationalist coalition government led by Prime Minister Benjamin Netanyahu—and, in particular, the coalition party *Ha'Bait Ha'Yehudi* (“the Jewish Home”)—are forcefully advancing the “Israel is a Jewish state” ticket, thereby threatening to alter the foundational two-tenet character of Israel as a Jewish *and* democratic state.⁷⁰ Since 2014, it has promoted the adoption of a new Basic Law: Israel as the Nation State of the Jewish People, dubbed the “nation-state bill,” aimed at bolstering the country’s Jewish-national character while limiting its democratic character. The proposed bill would instruct the Supreme Court to favor, in case of a conflict, or lacuna, the “Jewish” (however difficult this term remains to define) over the “democratic” character of the state.⁷¹ It is also aimed at bolstering the status of Jewish law as an interpretive source. The draft law proposes to prescribe Jewish law in the absence of legal precedent and to instruct courts to interpret laws in the spirit of Israel as the homeland of the Jewish people.⁷² These legislative attempts are backed by strong political rhetoric. In August 2017, to pick one example, the minister of justice (of the *Ha'Bait Ha'Yehudi* Party) publicly declared in reaction to a moderately liberalizing ruling of the Supreme Court of Israel in the context of asylum-seeker rights that matters of demography and the Jewish majority have become a legal blind spot for the court inasmuch as they carry no decisive weight in comparison to questions of individual rights. “Zionism should not continue, and I say here, it will not continue,” the minister added, “to bow down to the system of individual rights interpreted in a universal way that divorces them from the

⁶⁹ Ian Traynor, *Migration Crisis: Hungary PM Says Europe in Grip of Madness* (The Guardian, Sept 3, 2015), archived at <http://perma.cc/Y9N7-L985>. Note that in September 2017, the ECJ upheld the EU migrant-relocation scheme and dismissed an appeal filed by Hungary and Slovakia, reaffirming the European Union’s prerogative to order individual member states to take in refugees. See generally *Slovakia and Hungary v Council of the European Union*, Case Nos C-643/15 & C-647/15, slip op (ECJ Sept 6, 2017), archived at <http://perma.cc/98J5-XG4A>.

⁷⁰ See Jonathan Lis, *Bill Would Force High Court Rulings to Favor Israel’s Jewish Character over Democracy* (Haaretz, July 11, 2017), online at <http://www.haaretz.com/israel-news/.premium-1.800834> (visited Oct 4 2017) (Perma archive unavailable).

⁷¹ See *id.*

⁷² See Jonathan Lis, *Israeli Bill Prescribes Jewish Law in Absence of Legal Precedent* (Haaretz, Sept 17, 2017), online at <http://www.haaretz.com/israel-news/.premium-1.812648> (visited Oct 4, 2017) (Perma archive unavailable).

history of the Knesset and the history of legislation that we all know.”⁷³

In Malaysia, the political sphere has undergone substantial Islamization over the last four decades.⁷⁴ The Islamic *dakwah* (religious revival) movement emerged in the mid-1970s.⁷⁵ The Pan-Malaysian Islamic Party (Parti Islam Se-Malaysia, or PAS) has been gaining political support and clout since the 1980s.⁷⁶ In the hotly contested 2013 general elections, a coalition of PAS and its allies (the Pakatan Rakyat coalition, or PKR) received the majority of the popular vote.⁷⁷ Nonetheless, as a result of Malaysia’s rather peculiar electoral system, the mainstream Barisan Nasional (BN) coalition has still managed to secure the majority of seats in the parliament.⁷⁸ The rise of political Islam has affected the mainstream moderate establishment. Even politicians affiliated with the BN must now resort to religious talk in their appeal to the Islamic vote.⁷⁹ The former prime minister of Malaysia, Mahathir bin Mohamad, speaking as a representative of United Malays National Organization (“the largest political party in Malaysia and the pillar of the BN coalition”), “declared in [] 2001 that the country was an Islamic State (*negara Islam*), not merely a country that had endorsed Islam as its official religion.”⁸⁰

⁷³ Revital Hovel, *Justice Minister Slams Israel’s Top Court, Says It Disregards Zionism and Upholding Jewish Majority* (Haaretz, Aug 29, 2017), online at <http://www.haaretz.com/israel-news/1.809617> (visited Dec 15, 2017) (Perma archive unavailable).

⁷⁴ See generally Joseph Chinyong Liow, *Piety and Politics: Islamism in Contemporary Malaysia* (Oxford 2009).

⁷⁵ See Ahmad F. Yousif, *Islamic Revivalism in Malaysia: An Islamic Response to Non-Muslim Concerns*, 21 *Am J Islamic Soc Sci* 30, 31 (Fall 2004).

⁷⁶ See generally Farish A. Noor, *Blood, Sweat and Jihad: The Radicalization of the Political Discourse of the Pan-Malaysian Islamic Party (PAS) from 1982 Onwards*, 25 *Contemp SE Asia* 200 (2003).

⁷⁷ Stéphanie Giry, *Malaysian Rivals’ Reunion Highlights Shifting Political Alliances* (NY Times, Sept 6, 2016), online at <http://www.nytimes.com/2016/09/07/world/asia/malaysian-rivals-reunion-highlights-shifting-political-alliances.html> (visited Dec 15, 2017) (Perma archive unavailable).

⁷⁸ See Ambiga Sreenevasan, *Malaysia’s Many Scandals* (NY Times, Aug 20, 2015), online at <http://www.nytimes.com/2015/08/21/opinion/among-malaysias-many-scandals.html> (visited Dec 15, 2017) (Perma archive unavailable).

⁷⁹ See Anisah Shukry and Jason Koutsoukis, *How Najib Plans to Embrace Malaysia’s Islamic Heartland* (Bloomberg, July 30, 2017), online at <http://www.bloomberg.com/news/articles/2017-07-30/old-enemies-unite-in-malaysia-as-najib-woos-islamic-heartland> (visited Dec 15, 2017) (Perma archive unavailable) (describing attempts by the United Malays National Organization, the leading party in the BN coalition, to court Muslim voters).

⁸⁰ Hirschl, *Constitutional Theocracy* at 130 (cited in note 7). The impact on popular culture in Malaysia is evident. In 2017, Malaysia’s film board gave the Disney film *The*

The effect of the Islamization of political discourse on Malaysia's constitutional jurisprudence has been profound. To provide but one example, a Catholic newspaper in Malaysia used the word "Allah" to refer to God in its Malay-language edition.⁸¹ A controversy arose regarding who may use the word "Allah": whether it is an exclusively Muslim word (as some Muslim leaders in Malaysia suggest) or a neutral term referring to One God that may be used by all regardless of religion, as the newspaper argued.⁸² In the 1980s, the Malaysian government issued a directive prohibiting Christian publications from using the word "Allah,"⁸³ but this prohibition had seldom been enforced prior to 2007. In 2009, the High Court in Kuala Lumpur ruled that the restriction on non-Muslims' use of the word "Allah" to refer to God was unconstitutional as it infringed on freedom of expression and freedom of religion, specifically in the context of directives issued against Christian newspapers.⁸⁴ The court went on to state that the word "Allah" is the correct word for "God" in various Malay translations of the Bible and that it has been used for centuries by Christians and Muslims alike in Arabic-speaking countries.⁸⁵ This ruling was viewed by radical Islamists as a legitimization of insidious attempts to convert Muslims to Christianity. Riots and church burning followed. The government appealed the High Court ruling (lest we forget, this is the government of a country that purports to be a polity of all of its members). In October 2013, Malaysia's Court of Appeal (in a three-judge, all-Muslim bench) reinstated the ban on the use of the term "Allah" in reference to

Beauty and the Beast a thirteen-plus age rating for its inclusion of a short homosexual scene; it had initially sought the removal of the scene. Gwilym Mumford, *Beauty and the Beast: Malaysian Film Censors Back Down in 'Gay Moment' Row* (The Guardian, Mar 21, 2017), archived at <http://perma.cc/RZ5C-T8GX>. In 2008, the National Fatwa Council, Malaysia's top clerical Islamic body, issued a decree according to which the practice of Yoga could corrupt Muslims because it involves not just physical exercise but also Hindu spiritual elements, chanting, and worship. See Robin Brant, *Malaysia Clerics Issue Yoga Fatwa* (BBC, Nov 22, 2008), archived at <http://perma.cc/HW9R-MDA3>.

⁸¹ *Malaysia's Highest Court Backs a Ban on Allah in Christian Bibles* (The Guardian, June 23, 2014), online at <http://www.theguardian.com/world/2014/jun/23/malaysia-highest-court-allah-bible-ban> (visited Oct 8, 2017) (Perma archive unavailable).

⁸² See id.

⁸³ See *Negeri v Titular Roman Catholic Archbishop of Kuala Lumpur*, [2013] 8 CLJ 890, 914–19 at ¶¶ 9–13 (Malaysia App).

⁸⁴ *Titular Roman Catholic Archbishop of Kuala Lumpur v Negeri*, [2010] 2 CLJ 208, 236–38 (Malaysia).

⁸⁵ See id at 236.

God by non-Muslim publications.⁸⁶ Supporting the government's position, the court stated that it

could not find any plausible reason as to why the respondent is adamant on using the word "Allah" in its weekly newsletter, particularly in its Malay version. Since "Allah" is never an integral part of the faith of the respondent [Catholic Church], it is reasonable to conclude that the intended usage will cause unnecessary confusion.⁸⁷

The newspaper appealed. But in June 2014, the Federal Court of Malaysia made the final call on the matter. It drew on technical judicial review grounds to uphold (4–3) the ban on the use of "Allah" when referring to God by non-Muslims.⁸⁸ And so, in a multiethnic polity in which "Islam is the religion of the Federation[,] but other religions may be practiced in peace and harmony in any part of the Federation,"⁸⁹ "[e]very person has the right to profess and practise his religion and . . . to propagate it,"⁹⁰ and "every religious group has the right to manage its own religious affairs,"⁹¹ the word "Allah" in reference to God may be invoked, at least under certain circumstances, only by Muslims.

Close affinity between religion and the construction of ethno-nationalism is evident in other Asian countries in which there has been preferential constitutional treatment of a particular religion or group of religions, but without exclusive establishment of a single faith as a "state religion" or a mandatory source of legislation (for example, Thailand, Cambodia, Sri Lanka, and other predominantly Buddhist countries). Thai state-building selectively picked elements of Buddhism, transformed *Śāsana* (Buddhist teaching) to mean "religion" in order "to ensure that the Thai state would have religion as the foundation of its national identity."⁹² Buddhism remains a key element of national ideology and constitutional identity in contemporary Thailand;⁹³ the support of

⁸⁶ See *Negeri*, [2013] 8 CLJ at 929–30 at ¶¶ 42–43.

⁸⁷ *Id.* at 933 at ¶ 53.

⁸⁸ See *Titular Roman Catholic Archbishop of Kuala Lumpur v Negeri*, [2014] 6 CLJ 541, 570–85 at ¶¶ 19–46 (Malaysia).

⁸⁹ Malaysia Const Pt I, Art 3, cl 1.

⁹⁰ Malaysia Const Pt II, Art 11, cl 1.

⁹¹ Malaysia Const Pt II, Art 11, cl 3.

⁹² See Winnifred Fallers Sullivan, et al, *Introduction*, in Winnifred Fallers Sullivan, et al, eds, *Politics of Religious Freedom* 1, 8 (Chicago 2015).

⁹³ See Andrew Harding and Peter Leyland, *The Constitutional System of Thailand: A Contextual Analysis* 3, 178–79 (Hart 2011).

Buddhist monkhood is essential to maintaining the regime's political legitimacy. Theravada Buddhism receives significant government support, and the constitution retains the requirement that the monarch be Buddhist.⁹⁴ Tellingly, the 2007 constitution is officially marked as signed in year 2550 of the Buddhist Era. Section 79 of the constitution specifies that the state shall

protect Buddhism as the religion observed by most Thais for a long period of time and other religions, promote good understanding and harmony among followers of all religions as well as encourage the application of religious principles to create virtue and develop the quality of life.⁹⁵

While freedom of speech is constitutionally protected, laws prohibit the defamation of or insult to Buddhism and Buddhist clergy.⁹⁶

Similar processes for religious establishment and co-optation have aided nation-building processes in Sri Lanka.⁹⁷ Article 9 of the 1978 constitution states: "The Republic of Sri Lanka shall give to Buddhism the foremost place and accordingly it shall be the duty of the State to protect and foster the Buddha *Śāsana*, while assuring to all religions the rights granted by Articles 10 and 14(1)(e)."⁹⁸ The Constitution of Bhutan (2008) states that Buddhism is the "spiritual heritage" of the country, and that the Buddhist Drupka Lineage is practically the state religion of Bhutan.⁹⁹ Buddhism enjoys a de facto preferential status in other countries in the region, most notably Burma and Cambodia, where Theravada Buddhism has long been a pillar of collective identity and the faith of an overwhelming majority of the population.

Despite these examples of the marriage between religion and nationalism, inflaming the affinity between religion and collective identity is a dangerous strategy because, even if initially promoted by the political establishment, it may easily get out of hand. Consider the constitutional implications of the rise of political Islam in Egypt. Article 2 of the Egyptian constitution, to pick

⁹⁴ Section 9 reads: "The King is a Buddhist and Upholder of religions." Thai Const Ch II, § 9.

⁹⁵ Thai Const Ch V, Pt 4, § 79.

⁹⁶ See *International Religious Freedom Report 2007: Thailand* (US Department of State), archived at <http://perma.cc/HCE5-Y4ZX>.

⁹⁷ See Benjamin Schonthal, *Buddhism, Politics and the Limits of Law: The Pyrrhic Constitutionalism of Sri Lanka* 7–11 (Cambridge 2016).

⁹⁸ Sri Lanka Const Ch II, Art 9.

⁹⁹ See Bhutan Const Art III.

one example, was amended in 1980 so as to establish principles of Islamic jurisprudence (Sharia) as the only primary (rather than one possible) source of legislation in Egypt.¹⁰⁰ This significant change was preceded, however, by state patronage of religion, including nationalization of *waqf* assets and later of al-Azhar University, the great institution of higher Islamic learning in Cairo, and the imposition of state control over al-Azhar's curriculum and faculty positions, including the appointment of Shaykh al-Azhar (head of al-Azhar University)—a major spiritual leader and Sharia interpretive authority.¹⁰¹ Meanwhile, the Egyptian Supreme Constitutional Court (whose members are appointed by the government) developed an innovative interpretive matrix of religious directives—the first of its kind by a nonreligious tribunal—so as to interpret the aforementioned Article 2 in a moderate way, all while political powerholders repeatedly outlawed the increasingly popular Muslim Brotherhood movement.¹⁰²

As often happens, religion's appeal cannot be fully tamed by government control, constitutional or otherwise. The Egyptian revolution of 2012 followed. The constitution introduced in December 2012 by then-President Mohamed Morsi (of the Freedom and Justice Party founded by the Muslim Brotherhood) not only reproduced Article 2 (stating that principles of Islamic Sharia are *the* source of legislation), but also introduced Article 219, which uses technical terms from the Islamic legal tradition to define what is actually meant by "the principles of Islamic Shari'a" as stated in Article 2.¹⁰³ That constitution also guaranteed that al-Azhar would be consulted on matters of Islamic law;¹⁰⁴ Article 11 stated that the state is to "safeguard ethics, public morality and public order";¹⁰⁵ and Article 44 prohibited the defamation of

¹⁰⁰ See Egypt Const Pt I, Art II (1980).

¹⁰¹ See Declan Walsh, *Egypt's President Turns to Religion to Bolster His Authority* (NY Times, Jan 9, 2016), online at <http://www.nytimes.com/2016/01/10/world/middleeast/egypt-abdel-fattah-el-sisi-islam.html> (visited Dec 15, 2017) (Perma archive unavailable) (referring to al-Azhar as "Egypt's premier authority on Islam").

¹⁰² In 2007, for example, then-President Hosni Mubarak introduced a set of constitutional amendments (approved in a referendum) that imposed a ban on the establishment of religious parties (a blatant anti-Muslim Brotherhood move), and loosened controls over security forces in its "war on terror." Nathalie Bernard-Maugiron, *The 2007 Constitutional Amendments in Egypt, and Their Implications on the Balance of Power*, 22 Arab L Q 397, 410–11 (2008).

¹⁰³ Egypt Const Pt I, Ch 1, Art 2 (2012); Egypt Const Pt V, Ch 2, Art 219 (2012) (defining the ambit of Sharia law to extend to the rules of evidence and jurisprudence, among other domains).

¹⁰⁴ Egypt Const Pt I, Ch 1, Art 4 (2012).

¹⁰⁵ Egypt Const Pt I, Ch 2, Art 11 (2012).

prophets and religious messengers, such that it may be interpreted as prohibiting blasphemy.¹⁰⁶ This new constitution clearly veered to the side of religion at the expense of dissolving the previous balance of power between state and mosque. In a volatile political environment, in which constitution drafting and redrafting become a symbol and instrument of expressing different conceptions of the relation between law and religion, virtually all of these pro-religion changes were blatantly eliminated by the 2014 counterrevolution and its new constitution, which essentially returned Egypt's constitutional recognition of religion to its pre-2012 state.¹⁰⁷ Egypt's recent turmoil offers a cautionary tale of the deep risks associated with setting fire to the identity-religiosity flame in the constitutional context.

III. SOLIDARITY BEYOND BORDERS: THE TRANSNATIONAL NATURE OF RELIGIOUS SOLIDARITY AND ADVOCACY

Religion knows no borders, metaphysical or territorial. Its ambit of authority and influence is distinctly supranational. Its global spread and worldwide leadership (the Holy See is an obvious example)—aided by an intricate multinational institutional apparatus of congregations, ministers, and missionaries, and by new information and communication technology—position religion as a powerful force in world politics. In particular, Christianity, Islam, and Buddhism have followed patterns of migration and diasporic settlement to become truly world religions. The Protestant Pentecostal and Evangelical movements have acquired significant influence among the local populations in Latin America, Africa, and Asia. These processes are perfectly aligned with globalization processes and what has been termed “the network society.”¹⁰⁸ Taken as a whole, the challenge posed by religion to the current international order—one that, despite the forces of globalization, still manifests many of the hallmarks of “Westphalian” constitutionalism, with its constitutive nation-building and “we the people” narrative—is obvious. The global reach of religion—with its crossborder, transnational, solidarity

¹⁰⁶ Egypt Const Pt II, Ch 2, Art 44 (2012).

¹⁰⁷ See *Comparing Egypt's Constitutions* (Carnegie Endowment, Dec 2013), archived at <http://perma.cc/VKS4-4YJX>.

¹⁰⁸ See Peter van der Veer, *Religion after 1750*, in J.R. McNeill and Kenneth Pomeranz, eds, *7 The Cambridge World History: Production, Destruction and Connection, 1750–Present, Part 2: Shared Transformations?* 160, 178 (Cambridge 2015).

basis—offers a viable alternative to the territory-, nation-, or polity-based constitutional framework.

In some respects, the global religion challenge to constitutionalism resembles the challenge posed by global economic conglomerates to state regulatory powers. Interests and resources may be managed on a global scale that evades the grip of any single state-based constitutional order. In other important respects, the challenge of religion is mightier, as few corporate leaders (let alone constitutional thinkers) enjoy the visibility, clout, and popular following of a Catholic Pope, Shia Grand Ayatollah, Mahayana Buddhist leaders, or even various star televangelists. The influence of such religious leaders in support of a certain cause or policy is likely to far outweigh the words or actions of any other nonreligious leaders or stakeholders.

An important aspect of religion's transnational nature and alternative basis for solidarity is its tremendous mobilization capacity. The effect on religious litigation has been considerable. Christian and other faith-based civil society organizations in the United States have developed a "protecting religious liberty" agenda with legal aid, litigation-oriented strategies, case-based grassroots activism, cause lawyering, and amicus briefs directed to advancing religious interests in various countries across the globe.¹⁰⁹ In recent years, the American experience alongside the more general take-home message of Professor Charles Epp's "support structure for legal mobilization" thesis have reached world religions.¹¹⁰ Increasingly, international religious groups have appropriated rights discourse and have harnessed its power to advance their causes in a way characterized as "framejacking."¹¹¹ The zeitgeist of this phenomenon is captured by the words of a former director of the Center for Law and Religious Freedom (CLRF):

If my wife had a brain tumor and I said all we are doing is praying because my God is a mighty God and he can save and heal and he can take care of that tumor, you would say to us,

¹⁰⁹ The Center for Family and Human Rights (C-Fam) and the Christian Legal Society are merely two examples. For descriptions of these two organizations, see *About C-Fam* (C-Fam), archived at <http://perma.cc/F8HG-WGPH>; *About Us* (Christian Legal Society), archived at <http://perma.cc/H6TK-FYNR>.

¹¹⁰ Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspective* 3 (Chicago 1998).

¹¹¹ See, for example, Clifford Bob, *The Global Right Wing and the Clash of World Politics* 29–30 (Cambridge 2012); Clifford Bob, *The Global Right Wing and Theories of Transnational Advocacy*, 48 *Intl Spectator* 71, 82 (Dec 2013).

“We admire your faith, but go to the doctor.” So when it comes to religious liberty this idea of just praying without going to a lawyer is inadequate, superficial, and unbiblical.¹¹²

In the developing world, internationally funded religious-freedom litigation focuses on the rights of religious minorities (notably Christian communities in non-Christian settings like China, India, Vietnam, or Egypt), or fuels litigation-oriented campaigns against expansion of reproductive freedoms (for example, in Latin America or the Philippines) or against protection of LGBTQ rights (for example, in Africa). Recent studies reveal how American evangelists, once isolated in Africa for pro-apartheid politics, have successfully reinvented themselves as promoters of antigay policies in that continent. Through their extensive communications networks in Africa, social welfare projects, Bible schools, and educational materials, US religious conservatives repeatedly warn of the dangers of homosexuals and homosexual conduct.¹¹³ (The Uganda Anti-Homosexuality Act drew international attention in 2014; same-sex relations remain illegal in most African countries.)¹¹⁴

International litigation-oriented religious mobilization is also evident in the European context, in which the ECtHR and (to a lesser degree) the ECJ have been the main centers of transnational religious activism, evident in the areas of reproductive freedoms, the right to die, denominational education, the wearing (or banning) of religious attire, and exhibition of religious symbols in various settings.¹¹⁵ Religious grassroots international networks have been heavily involved (through fundraising, media aware-

¹¹² Kevin R. den Dulk, *In Legal Culture, but Not of It: The Role of Cause Lawyers in Evangelical Legal Mobilization*, in Austin Sarat and Stuart A. Scheingold, eds, *Cause Lawyers and Social Movements* 197, 210–11 (Stanford 2006) (quotation marks omitted) (quoting Samuel Ericsson, formerly with CLRF).

¹¹³ See generally Kapyra Kaoma, *Globalizing the Culture Wars: U.S. Conservatives, African Churches, & Homophobia* (Political Research Associates 2009); Kapyra Kaoma, *American Culture Warriors in Africa: A Guide to the Exporters of Homophobia and Sexism* (Political Research Associates 2014).

¹¹⁴ See Johanna Kalb, *Human Rights Proxy Wars*, 13 *Stan J CR & CL* 53, 53–54 (2017); Aengus Carroll and Lucas Ramón Mendos, *State-Sponsored Homophobia: A World Survey of Sexual Orientation Laws: Criminalisation, Protection and Recognition* *148–49 (ILGA 12th ed, May 2017), archived at <http://perma.cc/J93J-GPXT>.

¹¹⁵ See Christopher McCrudden, *Transnational Culture Wars*, 13 *Intl J Const L* 434, 442–43, 449–52 (2015); Effie Fokas, *Comparative Susceptibility and Differential Effects on the Two European Courts: A Study of Grassroots Mobilizations around Religion*, 5 *Oxford J L & Religion* 541, 541–44, 550–51 (2016).

ness campaigns, and intervenor briefs) in virtually all recent major decisions on freedom of religion by the ECtHR and by the ECJ, most notably in *Eweida v United Kingdom*¹¹⁶ and *Fernández Martínez v Spain*,¹¹⁷ and most recently in the ECJ ruling in *Achbita*.¹¹⁸ The ECJ ruling prompted outcry from various religious groups, citing assault on religious freedom, with effects on “Muslim women being discriminated in the workplace, but also Jewish men who wear kippas, Sikh men who wear turbans, people who wear crosses.”¹¹⁹ “The Conference of European Rabbis, which comprises seven hundred Jewish leaders across Europe,” suggested that “Europe was sending a clear message that its faith communities were no longer welcome.”¹²⁰

*Lautsi v Italy*¹²¹ (“Lautsi II”)—one of the most significant ECtHR judgments on religious matters to date—offers a textbook example. The case involved the human-rights claim of a Finnish-born mother residing in Italy who objected to the display of religious symbols (crucifixes) in her sons’ public school. From a fairly straightforward freedom-from-religion complaint, the case rapidly evolved into an existential contemplation of the place of religious symbols in a given polity’s national identity and the role of the court in mediating tensions between national preferences and the emerging pan-European rights regime. In the process, it brought together strange bedfellows like American Conservative Evangelicals, the Russian Orthodox Church, and the Vatican, all united by their advocacy of Christian symbols in the European public sphere.¹²²

¹¹⁶ [2013] 1 ECtHR 215, 218–19 (holding that Article 9 of the European Convention on Human Rights was violated when a British Airways flight attendant was prohibited from wearing a visible cross at work).

¹¹⁷ [2014] 2 ECtHR 449, 454 (holding that a religious organization’s claim to religious autonomy was sufficient to trump the claimant’s right to respect for his private life).

¹¹⁸ *Achbita*, [2017] 3 CMLR at 707–09 at ¶¶ 32–44 (holding that, under certain conditions, employers may dismiss employees who refuse to comply with company policies concerning religious attire).

¹¹⁹ Jennifer Rankin and Philip Oltermann, *Europe’s Right Hails EU Court’s Workplace Headscarf Ban Ruling* (The Guardian, Mar 14, 2017), archived at <http://perma.cc/DAL7-8PSJ>.

¹²⁰ *Id.*

¹²¹ [2011] 3 ECtHR 61 (Grand Chamber).

¹²² See Pasquale Annicchino, *Winning the Battle by Losing the War: The Lautsi Case and the Holy Alliance between American Conservative Evangelicals, the Russian Orthodox Church and the Vatican to Reshape European Identity*, 6 Religion & Hum Rts 213, 215–18 (2011).

An earlier decision of the ECtHR's seven-judge Chamber, *Lautsi v Italy*¹²³ (“Lautsi I”), held that the mandatory display of the crucifix in Italian public school classrooms breached Italy’s obligations under the European Convention on Human Rights.¹²⁴ The potential impact on countless public schools throughout Europe was immense. Even for passive supporters of Europe’s Christian identity, *Lautsi I*—construed as judicial secularization of the European public sphere—was perceived as an encroachment on religion and religious freedom. In preparation for *Lautsi II*, an international coalition was formed, led by the Catholic Church and its own network of NGOs and following states, to “rescue” Italy’s (and Europe’s) Christian heritage.¹²⁵ Ten European countries (the Russian Federation, Armenia, Bulgaria, Greece, Cyprus, Malta, Monaco, Romania, San Marino, and Lithuania) intervened as third parties to argue that religious symbols have gained core national identity status and thus are inseparable from school settings and curricula.¹²⁶ That coalition built on the arguments advanced by the Italian government to frame the crucifix in the classroom as a symbol of national culture, not of religion.¹²⁷ In *Lautsi II*, the ECtHR’s seventeen-member Grand Chamber overturned (15–2) the Chamber’s ruling in *Lautsi I*.¹²⁸ Rather than requiring state schools to observe confessional neutrality, *Lautsi II* upheld Italy’s right to display the crucifix, an identity-laden symbol of the country’s *majority* community, in the classrooms of public schools.¹²⁹ The crucifix was taken to be so central to Italian collective identity that it was up to Italians themselves to decide on its status.¹³⁰ Using the margin-of-appreciation concept, Europe’s highest human-rights court held that it is up to each signatory state to determine whether to perpetuate this (majoritarian) tradition.¹³¹ In this case, with the active support of an extensive transnational network of churches and a record number of amicus briefs filed (the majority of them favoring the display of the crucifix in the classroom), the margin

¹²³ [2010] 50 Eur Hum Rts 1051 (ECtHR).

¹²⁴ See *id.* at 1063–64 at ¶¶ 53–58.

¹²⁵ See Annicchino, 6 Religion & Hum Rts at 215–18 (cited in note 122).

¹²⁶ See *id.* at 215 n 5.

¹²⁷ See *Lautsi II*, [2011] 3 ECtHR at 81–82 at ¶¶ 36–37.

¹²⁸ See *id.* at 94 at ¶¶ 68–70.

¹²⁹ See *id.*

¹³⁰ See *id.* at 103 at ¶ 1.1 (Bonello concurring).

¹³¹ See *Lautsi II*, [2011] 3 ECtHR at 92 at ¶¶ 68–70.

of appreciation gave preference to Italy's Christian identity as expressed in its national constitutional self-perception.

This unprecedented third-party pro-religious intervener activism at the supranational level affirms the newly found power of transnational religious organizations and their "cause-lawyering" strategy. Non-Christian religious minorities have also become increasingly active in religious-freedom litigation in different parts of the globe. The diasporic Sikh community, for example, has deployed NGOs, such as United Sikhs and the World Sikh Organization, to represent litigants or to intervene in landmark religious-freedom proceedings from Canada to Italy to the UN Human Rights Committee.¹³²

Such activism on behalf of religious causes at the transitional level is not limited to domestic and supranational tribunals. It is also visible in the role played by international religious experts in constitution drafting in the former Soviet bloc countries and in countries as diverse as Nepal, Thailand, or Iraq. Another dimension of the transnational reach of religion is found in the provision of expert advice before various legislative committees in countries where coreligionists reside, and participation in interfaith advocacy efforts to promote religious freedom through specialized regional and international bodies. Here, again, the transnational and boundless characteristics of religion, along with the growing influence of diasporic communities, permit effective mobilization across borders. This multiscalar quality of religion presents a structural advantage vis-à-vis the territorially bounded constitutional state in the early twenty-first century.

CONCLUSION

In contrast with the once-influential secularization theory that predicted the decline of religion as a meaningful social and political force in the public sphere as a result of processes inherent in modernization, religion is experiencing a resurgence worldwide as a major spiritual, cultural, and political force. Considering the current global convergence on constitutionalism and the fundamental ideational differences between liberal constitutional-rights discourse and most forms of religious doctrine, a "clash of values" has erupted in many parts of the world. However, the

¹³² For a description of the World Sikh Organization's legal advocacy in Canada, see *Legal* (World Sikh Organization), archived at <http://perma.cc/27YG-H5XZ>.

challenge of religion to modern constitutionalism extends well beyond their ideational disagreements.

In this Essay, we have sought to emphasize the complementary “clash of orders” dimension, which often goes unnoticed, highlighting several structural features that help explain the return of religion as a powerful challenger to constitutionalism’s supreme or higher law standing. First, we focused on the question of sovereignty and supremacy. Given the holistic nature of religious belief systems, with their different sources of authority, separate constitutive narratives, and ordained high priests, religion offers a credible threat to the liberal constitutional narrative and to its exclusive position at the apex of the legal order.

Second, we highlighted the manifold national contexts in which religious-based affiliation is utilized, if not outright manipulated, to construct stark “us versus them” collective-identity narratives. In the same vein, religious pretexts are deployed to promote conservative value-laden policies, such as preventing abortion, limiting nontraditional gender roles and sexual identities, or restricting freedom of expression to protect the holy scripture, thus countering much of the agenda that has become associated with individual-rights-centered liberal constitutionalism.

Third, we showed the structural advantage that the transnational nature of religion provides to its adherents. Religious affiliation often defies statist, territory-based boundaries. It provides a transnational basis for affiliation and solidarity, which, aided by global migration patterns, new means of communication, and strategic legal mobilization and litigation, poses an increasingly serious challenge to the conventional constitutional order. In these important respects, the challenge of religion is akin to that posed by global economic forces that undercut state authority and undermine its self-governance constitutive narratives.