Religion and the Secular State / La religion et l'Etat laïque

General Rapporteurs

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Recent years have seen religion assume an increasingly visible place in public life,[1] with mixed results that have been aptly described in terms of the "ambivalence of the sacred."[2] Every State adopts some posture toward the religious life existing among its citizens. That posture is typically contested, leading to constant adjustments at the level of constitutional and statutory law, as well as constantly evolving judicial and administrative decisions. While some States continue to maintain a particular religious (i.e., non-secular) orientation, most have adopted some type of secular system. Among secular States, there are a range of possible positions with respect to secularity, ranging from regimes with a very high commitment to secularism to more accommodationist regimes to regimes that remain committed to neutrality of the State but allow high levels of cooperation with religions.[3] The attitude toward secularity has significant implications for implementation of international and constitutional norms protecting freedom of religion or belief, and more generally for the co-existence of different communities of religion and belief within society. Not surprisingly, comparative examination of the secularity of contemporary States yields significant insights into the nature of pluralism, the role of religion in modern society, the relationship between religion and democracy, and more generally, into fundamental questions about the relationship of religion and the State.

The general rapporteurs understand the topic "Religion and the secular State" to be aimed at exploring the foregoing and related issues. If construed too broadly, the topic could conceivably cover virtually every subject relating to law and religion. For that reason, the national reporters were requested to focus on a number of recurring tension points in the relationship of religion and the state: (1) the general social context; (2) the constitutional and legal setting; (3) religious autonomy (and autonomy of the state from religion); (4) legal regulation of religion as a social phenomenon; (5) state financial support for religion; (6) civil effects of religious acts; (7) religion and education; (8) religious symbols in public places; and (9) tensions involving freedom of expression and offenses against religion. It was understood that in certain countries, certain of these issues may have attracted greater attention, and of course, other issues altogether might deserve attention in painting the broad picture of the relationship between religion and modern secular states. With this in mind, the aim has been to obtain a picture of the solutions provided by different countries to basically the same overarching problem: how the secular State deals with religion or belief in a way that preserves the reciprocal autonomy of State and religious structures and guarantees the human right to freedom of religion and belief.

1. Peter L. Berger, ed., *The Desecularization of the World. Resurgent Religion and World Politics* (Washington, D.C.: Ethics and Public Policy Center, 1999); José Casanova, *Public Religions in the Modern World* (Chicago: University of Chicago Press, 1994).

2. R. Scott Appleby, *The Ambivalence of the Sacred: Religion, Violence, and Reconciliation* (New York: Rowman and Littlefield, 2000).

3. For more extensive analysis of types of religion-state configurations, see W. Cole Durham, Jr. and Brett G. Scharffs, *Religion and the Law: National, International and Comparative Perspectives* (Austin, Boston, Chicago, New York and the Netherlands: Wolters Kluwer Law and Business, 2010): 114-122.

The underlying issues are as old as history. In his now classic work, Sir Henry Maine described the relationship between law and religion as an evolving one, starting with fusion of religion and law and moving toward separation. In his words, "there is no system of recorded law, literally from China to Peru, which, when it first emerges into notice, is not seen to be entangled with religious ritual and observance."[4] The path of progress, according to Maine, moved from the primitive blurring of law and religion toward more sophisticated systems in which the realms of law and religion are more clearly delineated. This view could easily be squared with the secularization thesis, that goes beyond the claim of progressive separation to assert that history ultimately moves toward the "withering away" of religion altogether. A still more radical position is that suggested by the views of A.S. Diamond, who subjected Maine's account to a withering attack,[5] contending that law was not even religious in the first place. Countering Maine's picture of a fusion of law and religion in early cultures, Diamond argued that law was secular *ab initio.* The mere juxtaposition of religious and secular provisions in ancient codes was not sufficient warrant to conclude that the secular offenses were infused with a religious aura. Diamond acknowledged that the frontiers of law and religion touch at two points: in the area of sacral crimes and in the administration of oaths or ordeals in litigation.[6] For the most part, however, he contended that the separation of law and religion was quite evident from early periods and at virtually all stages of social development.[7] In fact, he argued, given that scribes tended to be clerics in virtually all early cultures, it is actually remarkable how little of the extant codes are religious.[8]

The point in raising the Maine/Diamond debate here is to highlight a deeper methodological point. While Maine and Diamond are at odds on many points, they are at one in taking an essentially "either-or" attitude toward the relation of law, religion and the secular order. Either law is infused with religiosity, or it is secular, or it is at some transition point in between. The reality is that law may be both religious and secular at the same time. It may have religious meaning for some and only secular meaning for others. Moreover, particular individuals within a culture may see it, at alternating moments in their lives, as secular, then religious, then secular (or religious) again. In the same way, the relationship of religion and the secular state is always deeply complex, reflecting the relationship of the state not only to individual differences across plural societies, but also to the rich variation over time and space within individual lives and communities as a result of the freedom that lies at the core of human dignity. As noted in the Canadian report,"[b]ecause the notion of religiosity is so complex, several dimensions of *human* religious participation need to be considered."[9]

In part for this reason, it is as difficult to define what is secular as it is to define what is religious.[10] The terms describe adjacent but opposite areas of social space, each being the negation of the other, and yet each being intertwined with the other in vital ways. In what follows, our aim is to be provide perspective on the wealth of ways that modern states interact with religion. Comparative analysis identifies a range of types of secular states, and recognizes that the idea of the secular state is a flexible one that is capable of accommodating the every-increasing pluralism that is the hallmark of modern life. As the Canadian Report suggests, there are "four key principles constituting any model of

4. H. Maine, *Dissertations on Early Law and Custom* (London, 1891), 5.

5. Most notably A. S. Diamond, *Primitive Law Past and Present* (London, 1971; first published in 1935). (Citations in this article are to the 1971 edition.)

6. Id. at 47.

7. Id. at 48. Ethelbehrt's Code, e.g., which emerged in a society exhibiting primitive characteristics, was entirely secular and contained no religious rules or sanctions. Id. at 58-59.

8. Id. 47.

9. Canada III, citing Mebs Kanji and Ron Kuipers, "A Complicated Story: Exploring the contours of Secularization and Persisting Religiosity in Canada," in *Faith in Democracy?: Religion and Politics in Canada*, eds. John Young and Boris DeWiel (Newcastle: Cambridge Scholars, 2009), 18.

10. See W. Cole Durham, Jr. and Elizabeth A. Sewell, "Definition of Religion," in James A. Serritella, et al, eds., *Religious Organizations in the United States: A Study of Legal Identity, Religious Freedom and the Law* (Durham: Carolina Academic Press, 2006).

secularism. . . ."[11] These are "the moral equality of persons; freedom of conscience and religion; State neutrality towards religion; and the separation of Church and State."[12] It is clear, however, that these features can be blended in many ways. The nature of the secular state can vary considerably, depending on which of these elements is given most prominence and how each is interpreted.

As a general matter we discern two broad patterns. The first can be described as secularism, in which secularization is sought as an end itself. Secularism in this sense is an ideology or system of belief. In its harshest forms, it goes to the extreme of persecuting and repressing religion, as was all too often the case when communism was in power in former socialist bloc countries. More typically it takes the form of what the Canadian report refers to as a "'strict' or 'rigid' conception of secularism [that] would accord more importance to the principle of neutrality than to freedom of conscience, attempting to relegate the practice of religion to the private and communal sphere, leaving the public sphere free from any expression of religion."[13]

The alternative approach, which we refer to as "secularity," is a more flexible or open arrangement that places greater emphasis on protecting freedom of conscience. [14] Secularity favors substantive over formal conceptions of equality and neutrality, taking claims of conscience seriously as grounds for accommodating religiously-motivated difference. Separation in this model is clearly recognized as an institutional means for facilitating protection of freedom of religion or belief, rather than as an ideal endstate in itself. The secular state is understood as a framework for accommodating pluralism, including individuals and groups with profoundly differing belief systems who are nonetheless willing to live together in a shard social order.

The question running through this General Report and through many of the National Reports is which of these two archetypes – secularism or secularity – best describes particular legal systems and whether one or the other of these better describes broader patterns of historical convergence across legal systems. There is a tendency to see French *laïcité* and its spin-offs in Turkey and some former French colonies as an example of the former, and the approach in many common law jurisdictions (U.S., U.K., Australia, New Zealand, etc.) as an example of the latter. It is important in reflecting on this question, however, to remember that no system is static. Even confessional statutes cannot escape internal and international dialogue concerning optimal ways to configure the relationship between religion and the state. The features exhibited by specific legal systems at particular moments in their history typically reflect a political equilibrium that takes into account a variety of historical, sociological, and philosophical factors, to say nothing of current political debates and shifts in political power. Thus, it is better to think of particular systems (even those that would normally be thought of as confessional or religiously aligned states) not so much as instances of particular configurations of state and religion, but as living systems tending toward or away from other possible models. For modern secular states, the question is whether they tend more toward secularism or more toward secularity.

I. THE GLOBAL SOCIAL SETTING

The individual National Reports provide a wealth of data about the religious demography of their respective countries which provides the context for understanding the nature of their particular religion-state systems. It is not possible to replicate that information in any detail here. However, it is possible to note a number of significant global trends and patterns.

The first point is that religion is here to stay. Even staunch advocates of the secularization thesis have conceded in light of the data that religion is not withering away.

11. Canada II.
12. Id.
13. Id.
14. Id.

To the contrary, we are witnessing the desecularization of the world[15] and the resurgence of religion. In particular, religion is reasserting itself in the public sector.[16] We are witnessing a new "Great Awakening" to religion in Latin American[17] and in Africa[18] and throughout the Muslim world.[19] Similar if weaker trends are evident in the west. To the extent that the secularization thesis has any residual explanatory power, it seems to apply primarily with respect to "European exceptionalism."[20] Even in China, which has particularly strong governmental constraints on religion, religiosity appears to be on the rise among many sectors of the population, and Chinese leaders are rethinking how religion fits into and contributes to the building of a "harmonious society."[21]

Second, the trend is toward greater religious pluralization virtually everywhere. At the global level, no religion has a majority position; all are minorities. Even in countries that at one point had relative religious homogeneity, the percentage of adherents to the dominant religion is declining. In part this reflects purely secular trends: the realities of labor force movement, refugee flight, trade, education, and countless other factors. The result is that the number of religious minorities is proliferating in every country. Muslim populations are becoming substantial throughout Europe, the United States, Canada and elsewhere. The growth of other groups is less visible, but is also significant. In addition to demographic shifts associated with migration, significant shifts are occurring because of conversion (e.g., the growth of Protestantism in Latin American) and deconversion (growing numbers of non-believers in many societies). Moreover, while ethnicity and religion are often linked, the correlation is becoming less automatic. Many minority religions are not ethnically based. At a minimum, these trends mean that the realities of religious difference need to be taken into account in addressing countless legal issues.

Third, while pluralization is increasing, traditional religions continue to hold a very significant place in many societies. They typically have deep roots,[22] and have generally played a significant role in molding a country's history and shaping and preserving national identity.[23] Because of their centrality in culture, traditional religions can easily become a significant factor in nation building. More generally, politicians often cater to religious groups to garner support. Despite their dominant position, however, prevailing religions often feel threatened and motivated to find ways to strengthen their position in society. As a result, reactions to issues of religious rights are often colored by identity politics, fear of immigrants, and security concerns. Depending on the circumstances, playing to majority sensitivities can exacerbate tensions with other religious groups. Moreover, concern for minority rights sometimes generates a backlash among those in majority positions, who may feel that their position is at risk or under-appreciated. For example, in India in recent years, there has been ongoing political tension between the advocates of Hindutva (an ideology of Hindu cultural nationalism) and who had advocated equality in principle of all religions.[24]

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15. Peter Berger, ed. *The Desecularization of the World. Resurgent Religion and World Politics.* Washington, D.C.: Ethics and Public Policy Center, 1999.

16. José Casanova, *Public Religions in the Modern World* (Chicago: Univ. of Chicago Press, 1994).

17. David Martin, *Tongues of Fire: The Explosion of Protestantism in Latin America* (Oxford: Blackwell, 1990). "[M]ost writers place the number of Protestants in Latin America at between 12 and 15 percent of the population – a dramatic increase from an estimated 1 percent in 1930 and 4 percent in 1960. The largest percentages are in Guatemala, Brazil, Chile, El Salvador, and Nicaragua, but the expansion is continent-wide." Paul E. Sigmund, ed., "Introduction," in *Religious Freedom and Evangelization in Latin America: The Challenge of Religious Pluralism* (Maryknoll, New York: Orbis Books, 1999), 1, 2.

18. See, e.g., M. Christian Green and John D. van der Vyver, "Law, Religion and Human Rights in Africa: Introduction, *African Human Rights Law Journal* 8 (2008): 337-356.

19. See, e.g., Paul Marshall, ed., *Radical Islam's Rules: The Worldwide Spread of Extreme* Shari'a *Law* (Lanham, Boulder, New York, Toronto and Oxford: Rowman & Littlefield Publishers, Inc., 2005.

20. Peter Berger, Grace Davie, and Effie Fokas, *Religious America, Secular Europe?: A Theme and Variations* (2008).

21. See, e.g., Zhuo Xinping, "Religion and Rule of Law in China Today," 2009 *BYU L. Rev.* 519.

22. See, e.g., Armenia II (noting 1700 years of Christianity in the country); Malta I (tracing history of Christianity to shipwreck of the Apostle Paul on the island).

23. See, e.g., Armenia II; Greece I; Ireland II; Israel I-II; Latvia II; Nepal II-III; Peru I; Ukraine I.

24. India II.

A fourth point has to do with the status of religious freedom protection around the world. As described in more detail below,[25] most countries on earth have affirmed their commitment to freedom of religion or belief, either by ratifying the applicable international instruments, or by including appropriate provisions in their constitutions, or (in most cases) both. In the last few years, very interesting empirical work has begun to emerge that assesses implementation of religious liberty norms worldwide. Probably the most comprehensive of these studies (and one that integrates results from fifteen other global sources) is the report on *Global Restrictions on Religion* published by the Pew Forum on Religion and Public Life in December, 2009.[26] This study assesses the religious freedom setting by focusing on restrictions on religion, recognizing that it is easier to get a grip on restrictions than on the more abstract quality of freedom.

It is not possible to recapitulate the details of that report here, but the bottom line is striking. While 48 percent of the 198 countries and territories covered by the study had low restrictions on religion, 20 percent had moderate restrictions, and 32 percent had high or very high restrictions. Since some of the most populous countries on earth were among those with the highest restrictions, it turns out that only 15 percent of global population lives in countries with low levels of restrictions; 16 percent lives in countries with moderate levels of restriction, and 70 percent lives in countries with high or very high levels of restrictions.

The study distinguishes between governmental restrictions and social restrictions (e.g., hostile acts by individuals) on religion. Both India and China are countries listed as having very high restrictions on religion. Interestingly, however, China has high governmental restrictions but its level of social restrictions is not much higher than that in the United States, Japan or Italy. On the other hand, India has substantially lower levels of government restrictions (moderate to high – somewhat higher than France and Mexico, but lower than Turkey and Russia), but has very high levels of social restrictions. In the study, countries were ranked according to their "government restrictions index" – a score that sought to measure the levels of restrictions in each country.

The countries designated as having "very high government restrictions" were the top 5 percent of countries with the highest government restrictions index. Those with "high restrictions" consisted of the next 15 percent of countries with the next highest indexes; moderate were the next 20 percent of countries with the next highest indexes; and low were the bottom 60 percent.[27] The social restrictions are broken down in parallel percentiles with respect to a "social hostilities index" according to which very high includes the top 5 percent of countries on the social hostilities index; high includes the next 15 percent; moderate includes the next 2 percent; and low includes the bottom 60 percent.[28]

The full significance of these numbers cannot be explained without going to a level of detail beyond the scope of this General Report. Suffice it to say that despite wide and near universal lip service to the ideal of religious freedom, most people on earth live in countries where high or very high levels of restriction are in place. This is a concern not only because the statistics suggest systematic shortfalls in achieving fundamental human rights protection but also because related empirical work shows that there is very strong statistical data showing that low levels of governmental and social restrictions on religion are correlated with and appear to be causal factors accounting for the presence of numerous other social goods. For example, low levels of restrictions on religion are correlated with high levels of protection of other human rights, with higher per capita income (for men and women), better health and education, lower degrees of conflict in

25. See n. 36 and accompanying text.

26. Pew Forum on Religion and Public Life, Global Restrictions on Religion (17 December 2010), available at http://pewforum.org/Government/Global-Restrictions-on-Religion.aspx.

27. Id. at 6 (explanation of Government Restriction Index).

28. Id. at 17 (explanation of Social Hostilities Index).

society, higher literacy rates, and so forth.[29] Religious freedom correlates with greater religious engagement, which in turn generates social capital that benefits society in many ways. In contrast, and perhaps somewhat surprisingly, high levels of governmental restriction are not only correlated with but appear to be a causal factor of heightened religious violence in society.[30] In short, there appears to be significant empirical evidence that a secular state can best advance a wide variety of secular objectives by protecting the fundamental right to freedom of religion or belief. Secularism is more likely to impose restraints on religion than secularity; to that extent secularity may prove to be more socially beneficial.

II. CONSTITUTIONAL AND LEGAL CONTEXT[31]

A. Constitutional Overview

By the middle of the twentieth century, freedom of religion or belief came to be recognized as a fundamental human right – at least in theory, if not always in practice. By the time that international human rights were being codified in the aftermath of World War II, freedom of religion or belief emerged as an axiomatic feature of the international human rights regime, memorialized in Article 18 of the Universal Declaration of Human Rights,[32] Article 18 of the International Covenant on Civil and Political Rights (ICCPR),[33] in the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,[34] and in a variety of other international instruments.[35]

Most modern constitutions have provisions affirming the right to freedom of religion or belief. This right is recognized in the overwhelming majority of the world's constitutions,[36] including virtually every European constitution and the constitution of

29. Brian J. Grim, "Religious Freedom: Good for What Ails Us," *Review of Faith and Int'l Affairs* (Summer 2008): 3, 4.

30. Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the 21st Century* (New York: Cambridge University Press, 2010).

31. The survey sent to national reporters suggesting the outline of their reports included a section regarding the "theoretical and scholarly context" within each country. The resulting contributions provide a rich account of the differing philosophical and theoretical contexts within which debates about religion and the state unfold in different countries. In many ways, "comparative theory" is often one of the most fruitful areas of the comparative enterprise, because the differing historical, theological, and philosophical debates that grow up in different cultural settings often provide different angles of vision and highlight different assumptions about the nature of religion-state interaction. It is thus with regret that limitations of space cause us to pass over these discussions here. Some of the more salient contributions are mentioned in the course of discussions of the constitutional context.

32. G.A. Res. 217 (A(III), December 10, 1948, U.N. Doc. A/810, at 71 (1948)).

33. G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. no. 16, at 52, 55, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171 (1976) (Art. 18).

34. Adopted 18 Jan. 1982, G.A. Res 55, 36 U.N. GAOR Supp. (No. 51), U.N. Doc. A/RES/36/55 (1982).

35. *American Declaration of the Rights and Duties of Man*, art. III, O.A.S.res. XXX, adopted by the Ninth International Conference of American States, Bogota (1948): *Novena Conferencia Internacional Americana, 6 Actas y Documentos* (1953), 297-302.

36. See, e.g., Afghanistan Const. art. 2; Albania Const. art. 24; Algeria Const. art. 36; Andorra Const. art. 11; Angola Const. art. 45; Antigua and Barbuda Const. arts 3,. 11; Argentina Const. § 14, § 20; Armenia Const. art. 26; Australia Const. Act §116; Austria Const. art. 7; Azerbaijan Const. art. 48; Bahamas Const. arts. 15 cl. 2, 22; Bahrain Const. art. 22; Bangladesh Const. arts. 39, 41; Barbados Const. arts. 11, 19; Belarus Const. art. 31; Belgium Const. art. 19; Belize Const. arts. 3 cl. 2, 11; Benin Const. art. 23, Bhutan Const.. art. 7 cl. 4; Bolivia Const. arts. 4, 21, Bosnia and Herzegovina Const. art. 2 cl. 3g; Botswana Const. arts. 3, 11; Brazil Const. art. 5; Brunei Darussalam Const. art. 3 cl.1; Bulgaria Const. arts. 13 cl. 1, 37; Burkina Faso Const. art. 7; Burundi Const. art. 31; Cambodia Const. art. 43; Cameroon Const. pmbl.; Canada Const. Act, Part 1, § 2a; Cape Verde Const. arts. 28; Central African Republic Const. art. 8; Chad Const. art. 27; Chile Const. art. 19 cl. 6; People's Republic of China Const. art. 36; Republic of China Const. art. 13; Colombia Const. art. 2; Congo Const. art. 18; Democratic Republic of Congo art. 22; Cook Islands Const. arts. 64 cl. 1d; Costa Rica Const. art. 75; Cote d'Ivoire art. 9; Croatia Const. art. 40; Cuba Const. arts. 8, 55; Cyprus Const. art. 18; Czech Republic Charter of Fundamental Rights and Basic Freedoms, arts. 15 cl. 1, 16 cl. 1; Denmark Const. §§ 70, 71 cl. 1; Dijbouti Const. art. 11; Dominica Const. art. 9; Dominican Republic Const. art. 45; East Timor Const. art. 45; Ecuador Const. art. 66; Egypt Const. art. 46; El Salvador Const. art. 25; Equatorial Guinea Const. art. 13; Eritrea Const. art. 19;

every independent country in the Western Hemisphere. All the national reports we received addressed countries with religious freedom provisions. While there are of course disputes about the universality of human rights norms, freedom of religion or belief has come to be recognized by most nations of the world (and by most religions) as a principle that has universal validity.[37] Constitutions and laws should be construed in ways that

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Estonia Const. arts. 40, 41; Ethiopia Const. art. 27; Fiji Const. art. 35; Finland Const. § 11; France Const. art. 1; Gabon Const. art. 1, cl. 2; Gambia Const., §§ 25, 32 Georgia Const. art. 9, 19; Germany Basic Law arts. 4, 140; Ghana Const. art. 21 cl. 1; Greece Const. art. 13; Grenada Const. Order arts. 1 cl. 1, 9; Guatemala Const. art. 36; Guinea Const. arts. 7, 14; Guinea-Bissau Const. art. 6 cl. 2; Guyana Const. arts. 40 cl. 1, 145; Haiti Const. art. 30; Honduras Const. art. 77; Hong Kong Basic Law arts. 11, 32; Hong Kong Bill of Rights art. 15; Hungary Const. Art. 60; Iceland Const. art. 63; India Const. art. 25; Indonesia Const. arts 28E, 29, 281 cl. 1; Iraq Const. arts. 2 cl. 2, 39, 40; Ireland Const. art. 44; Israel Palestine Order in Council art. 83; Italy Const. art. 19; Jamaica Const. arts. 13, 21; Japan Const. art. 20; Jordan Const. art. 14; Kazakhstan Const. art. 22 cl. 1; Kenya Const. arts. 70, 78; Kiribati Const. Art. 11; North Korea Const. art. 68; South Korea Const. arts. 19, 20, cl. 1; Kuwait Const. art. 35; Kyrgyzstan Const. art. 14, cl. 5; Laos Const. art. 30; Latvia Const. art. 99; Lebanon Const. art. 9; Lesotho Const. arts. 4 cl.1, 13, Liberia Const. art. 14; Libya Const. art. 2; Liechtenstein Const. art. 37; Lithuania art. 26; Luxembourg Const. art. 19; Macedonia Const. arts. 16, 19; Madagascar Const. art. 10; Malawi Const. art. 33; Malaysia Const. art. 11; Mali Const. art. 4; Malta Const. § 32b, § 40 cl. 1; Marshall Islands Const. art. 2, §1; Mauritius Const. arts. 3, 11 cl.1; Mexico Const. art. 24; Micronesia Const. art. 4, § 2; Moldova Const. art. 31; Monaco Const. art. 23; Mongolia Const. arts. 16 cl. 15; Montenegro Const. art. 46; Morocco Const. art. 6; Mozambique Const. art. 54; Myanmar Const. arts. 34, 354; Namibia Const. art. 21; Nauru Const. art. 11; Nepal Const. arts. 3, 23 cl. 1; Netherlands Const. arts. 6; New Zealand Bill of Rights Act § 13; Nicaragua Const. art. 29; Niger Const., art. 26; Nigeria Const. art. 38, cl. 1; Norway Const. art. 2; Oman Basic Law art. 28; Pakistan Const. art. 20; Palau Const. art. 4 § 1; Panama Const. art. 35; Papua New Guinea Const. art. 45; Paraguay Const. art. 24; Peru Const. art. 2; Philippines Const. art. 3 § 5; Poland Const. art. 53; Portugal Const. art. 41; Qatar Const. art. 50; Romania Const. art. 29; Russia Const. art. 28; Rwanda Const. art. 33; St. Kitts and Nevis Const. art. 11; St. Lucia Const. art. 9; St. Vincent and the Grenadines Const. art. 9; Western Samoa Const. art. 11; San Marino Const. art. 6; Sao Tome and Principe Const. art. 27; Senegal Const. art. 8; Serbia Const. art. 43; Seychelles Const. art. 21; Sierra Leone Const. arts. 15, 24, cl. 1; Singapore Const. art. 15; Slovakia Const. art. 24; Slovenia Const. art. 41; Solomon Islands Const. art. 11; Somalia Const. art. 31; South Africa Const. arts. 15 cl.1, 31; Spain Const. art. 16; Sri Lanka Const. arts. 10, 14 cl. 1, 15; Sudan Const. art. 38; Suriname Const. art. 18; Swaziland Const. arts. 14, 23; Sweden Instrument of Government ch. 2 art. 1 cl. 6; Switzerland Const. art. 15; Syria Const. art. 35; Taiwan Const. art. 13; Tajikistan Const. art. 26; Tanzania Const. art. 19 cl.1; Thailand Const. §37,Tibet Const. art. 10; Togo Const. art. 25; Tonga Const. art. 5; Trinidad and Tobago Const. §4h; Tunisia Const. art. 5; Turkey Const. art. 24; Turkmenistan Const. art. 12; Tuvalu Const. arts. 11, 23, 29; Uganda Const. arts. 29, 37; Ukraine Const. art. 35; United Arab Emirates Const. art. 32; United Kingdom Human Rights Act art. 13; United States Const. amend. 1; Uruguay Const. art. 5; Uzbekistan Const. art. 31; Vanuatu Const. art. 5 cl. 1f; Venezuela Const. art. 59; Vietnam Const. art. 70; Zambia Const. pmbl., art. 19; Zimbabwe Const. arts. 11, 19. For reliable access to the texts of these constitutions Selected Bibliography, supra p.826, especially see http://oceanalaw.com/ and http://heinonline.org/. Unfortunately these databases are by subscription only; however, these services provide the most up to date copies of the world's constitutions.

37. A sign of its universality is that the right to freedom of religion or belief has been broadly recognized along with other key human rights as having acquired the status of customary international law. See, e.g., Philip Alston, "The Universal Declaration at 35: Western and Passé or Alive and Universal," *The Review of the International Commission of Jurists* 30 (1983): 69 (arguing that the Universal Declaration is customary law); Richard Bilder, "The Status of International Human Rights Law: An Overview," in: James Tuttle (ed.), *International Human Rights Law and Practice* (Chicago: American Bar Association, 1978): 8 (arguing that the Universal Declaration is customary law); Derek Davis, "The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief," *BYU Law Review* (2002): 230 (arguing that the 1981 Declaration is customary law); Louis Henkin, *The Age of Rights*, (New York: Columbia University Press, 1990): 19 (arguing that the Universal Declaration is customary law); John Humphrey, *No Distant Millennium: The International Law of Human Rights* (Paris: UNESCO, 1989): 155 (arguing that the Universal Declaration is customary law); John Humphrey, "The International Bill of Rights: Scope and Implementation," *William and Mary Law Review* 17 (1976): 529 (arguing that the Universal Declaration is customary law); Richard B, Lillich, "Civil Rights," in: *Human Rights in International Law: Legal and Policy Issues*, ed. Theodor Meron (Oxford: Clarendon Press, 1984): 116 (arguing that the Universal Declaration is customary law); A.H. Robertson and J.G. Merrills, *Human Rights in the World*, 3d ed., (Manchester: Manchester University Press, 1989): 96 (arguing that the Universal Declaration is customary law); Louis B, Sohn,"The Human Rights Law of the Charter," *Texas International Law Journal* 12 (1977): 133 (arguing that the Universal Declaration is customary law); Bahiyyih G.Tahzib, *Freedom of Religion or Belief: Ensuring Effective International Legal Protection* (Boston: Martinus Nijhoff, 1996): 184-85 (arguing that the 1981 Declaration is customary law); Patrick Thornberry, *International Law and the Rights of Minorities* (Oxford: Clarendon Press, 1991): 237-38 (arguing that the Universal Declaration is customary law); Humphrey Waldcock, "Human Rights in Contemporary International Law and

respect this fundamental principle, recognizing that although it is universal, it can and should be implemented in diverse ways in different cultural and historical settings. Comparative constitutional analysis can expand horizons, but in itself, it has no intrinsic authority, except to the extent it yields insights that are genuinely persuasive to those charged with interpreting their own legal system, i.e., except to the judges and other officials responsible for interpreting constitutional norms, and to the people (the individuals and the communities) who ultimately judge the judges, constitute the constitutions, and choose their own freedom by deciding how they will rule and be ruled.

B. Comparative Perspectives: The Religion-State Identification Continuum

To grasp the full range of possible religion-state configurations, it is useful to think of them being spread out along a continuum stretching from positive identification of the state with religion (e.g., theocracies, established churches) through a posture of state neutrality and extending to negative identification (e.g., state persecution or banning of religion). It turns out that if this continuum is curved, with the two endpoints at one end and the middle at the other, as in the accompanying diagram, there is a rough correlation between the position on the identification continuum with the degree of religious freedom experience in the relevant country.[38]

The various positions along this "loop" need to be understood as Weberian ideal types; no state structure corresponds exactly with any of the described positions. Indeed, it is probably best to think of the various positions along the loop as contested equilibrium points reached in different societies at different times. In this sense, the loop structure can be used to map not only the current positions of various states, but also the range of discourse arguing for alternative positions at a given time in a particular country. For example, the major constitutional debates in the United States are focused in the range between separation and accommodation. In other countries, the range of debate is often much wider. Most of the reporting countries are positioned toward the "non-identification" middle position on the loop, but even so, the various configurations vary widely.[39] The loop structure provides a way of suggesting how the various systems covered by the reports compare with each other.

Thus, none of the countries covered by our national reporters are at the extreme positive or negative ends of the identification continuum. A Taliban state, or the era of Mahdiyyah in 19th century Sudan[40] might provide an example of the former, and Albania at the height of its atheistic period would exemplify the latter. The 1999 constitution of Sudan may come close to this type of regime, in that it seeks to subordinate the state to divine supremacy,[41] but it is somewhat more open, speaking of Sudan as an "embracing homeland" and recognizing that Christianity and other traditional faiths have a considerable following, while noting that Islam is the religion of most of the population.[42] In that sense, Sudan has affinities with the "endorsed religion" model, which is less exclusive.

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the Significance of the European Convention," *The European Convention of Human Rights*, Series No. 5 (London: British Institute of International & Comparative Law, 1965): 15 (arguing that the Universal Declaration is customary law). See also Hannum Hurst, "The Emerging Pattern of Church and State in Western Europe: The Italian Model," 1995 *BYU L. Rev.* 317-352 (summarizing statements of constituents of several states and international bodies as well as influential authors holding that the Universal Declaration of Human Rights is customary law).

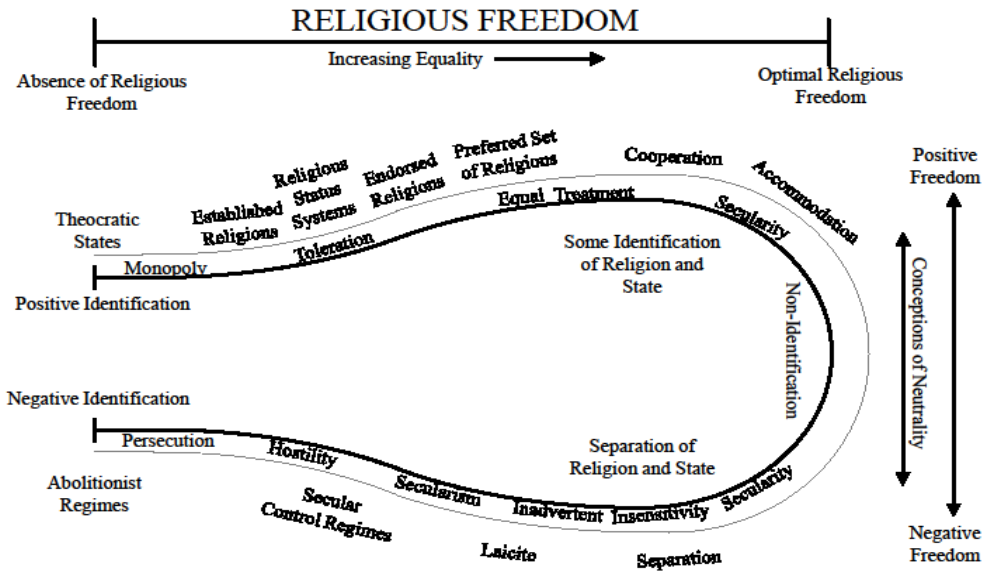
38. The accompanying diagram is taken from W. Cole Durham, Jr. and Brett G. Scharffs, *Law and Religion: National, International and Comparative Perspectives* (New York: Aspen Publishers, 2010): 117. See discussion there for a fuller analysis of the varying religion-state configurations that it represents.

39. To our regret, and despite energetic efforts to identify national reporters from predominantly Muslim countries, this is an area seriously under-represented in the national reports we received. For a valuable overview of the constitutions in this part of the world, see Tad Stahnke and Robert C. Blitt, "The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim Countries," 2005 *Georgetown J. Int'l L.* 36: 947-1078.

40. Sudan II.

41. Sudan III.A.

42. Id.



Moving along the loop, a number of the reporting countries have established churches, though most at this point fit comfortably in the "tolerant" rather than "monopoly" mode. The notion of an established church is linked to the notion of a confessional state. Greece is one of the regimes most closely linked in fact to a dominant religion, but the fact that Article 3, paragraph 1 of the current constitution provides that the Orthodox faith constitutes the *prevailing* religion is slightly different than making it the *official* religion. The reference to "prevailing" helps leave constitutional space open for other religions, although they will clearly lack many of the privileges of the Orthodox faith.[43] Other arguably established religions include Nepal was officially a Hindu Kingdom until its latest interim constitution was adopted in 2007.[44]

The United Kingdom provides the interesting example of a country with two established churches: the Church of Scotland and the Church of England.[45] The Church of England has various privileges and relations with the state. For example, the legal manner in which the church holds property is unique. Standing advisory councils in the educational system must have representatives from the Church of England. There are also downsides: as noted by the UK reporter, the state has a role in the Church of England that it doesn't have in other religious traditions. The state is also involved in appointment of bishops. Further, while Parliament has given the Church of England the "power to pass Measures, legislative acts of the Church, this is subject both to the fact that Parliament could revoke that power and the necessity for any individual Measure passed by the Church to receive the approval of Parliament."[46] While the establishment is formally intact, some point to a "'creeping disestablishment' with a distancing between Church and state."[47] The national reporter on Scotland provides a useful account of the Church of

43. Greece II.B.

44. Nepal V.

45. United Kingdom III. The UK Reporter notes that "[t]e Welsh Church Act 1914 disestablished the Church of England in Wales. For a more detailed analysis of the current state of establishment in the UK, see Anthony Bradney, *Law and Faith in a Skeptical Age* (London: Routledge, 2009) Chapter 3.

46. Id.

47. Id.,citing E. Norman, *Church and Society in England 1770-1970: A Historical Study* (Oxford: Clarendon Press, 1991).

Scotland has a separate existence, with independent jurisdiction over its belief system, governance, and discipline.[48] Other churches in Scotland remain in law private unincorporated associations, with their property held by trustees. In general, the established churches in the UK have learned how to coexist with other religious communities in ways that are consistent with high levels of religious freedom.

Sweden, which had long had an established church, decided at the initiative of the church to disestablish, effective 1 January 2000. The question whether the Church should remain a part of the State organization had been debated for many years, and was ultimately resolved by the "separation" in 2000. Since separation, the "Folk Church of Sweden" has been placed on what is formally a more equal footing with other religious communities, although the Church has in fact retained a number of its privileges. The result is a "compromise between the necessity to pay regard to the Church's position in the history of Sweden and the goal of treating religious denominations equally in Sweden."[49]

In some countries, what was once an established church has evolved into a people's church (folk church). For example, in Finland, the Evangelical Lutheran Church "is clearly a separate institution from the State, with its own legal status." The Church still has a variety of official links with the state, although many of these are gradually being abrogated, and it is clear that in general, "[t]he Finnish State is neutral in matters of religion, and the Church is legally and administratively very independent in relation to the State."[50] Over several decades, however, the Church came to emphasize its role as a folk church – as a religious institution "which serves the whole people."[51] As described by the Finnish reporter, "the concept of the state church is mainly to do with ecclesiastical law, while the concept of folk church has more to do with sociology." The evolution of major churches toward folk churches in this sense can be seen in a number of countries. Armenia, for example, may follow this model. The constitution clearly separates religion from the state, but there is a powerful ethnic identification with the Armenian Apostolic Church, and the majority of Armenians (ironically including even atheists) are steadfast supporters of the Church. Serbian identification with the Orthodox Church may be another example.[52]

The category of "religious status systems" was developed to address systems that recognize multiple religious legal systems, typically in matters of family and personal law. The impulse behind such systems is tolerant, in that they aim at respecting the differing religious norms of different communities. However, they often lead to complications in fact. Thus, in Israel, different laws govern marriage of Jews, Muslims, the Druze.[53] But if a Jewish couple is not sufficiently orthodox, they may not be able to be granted a Jewish marriage. In India, a provision of the constitution as originally adopted following partition called for "endeavors . . . [to] secure for the citizens a uniform civil code throughout the territory of India."[54] In fact, however, a dual system of marriage laws remains "under which individuals can make a choice between the secular and the religious matrimonial laws."[55] For several major religious communities there are "codified community-specific laws": the Christian Marriage Act 1872, Parsi Marriage and Divorce Act 1936 and the Hindu Marriage Act 1955.[56] These can create challenges in mixed-marriage and a variety of other situations. The Lausanne Treaty originally contemplated establishment of such a system to protect the rights of various minorities in Turkey, but the Jewish community renounced its claim for such rights and the "chain reaction generated by this initiative forced both the Armenian and Greek communities in Turkey to

48. Scotland II.A.
49. Sweden II.B.
50. Finland II.B.
51. Id.
52. See Serbia Report.
53. Israel VIII.
54. India VIII.
55. Id.
56. Id., n. 74.

put a stop to their own works on the elaboration of special provisions."[57]

The Canadian system flirted with allowing a version of the religious status system approach to operate through the mediation and arbitration system. Specifically, the Ontario government considered a proposal that would allow creation of a "Shari'a Court" to operate on consent of the parties using arbitration provisions of Ontario's laws. A government study of the proposal "concluded that Ontario should allow individuals to choose religious arbitration as a reflection of Canada's multicultural society as long as minimal safeguards, concerning such things as the legitimacy of consent and judicial review procedures, were put into place."[58] Ultimately, the Ontario government rejected the proposal, and amended the province's arbitration act to require that all family arbitrations . . . be conducted exclusively in accordance with Ontario or Canadian law.[59] The effect of the ruling was not to preclude settling "family matters according to religious norms, or before religious authority," but merely to hold that such actions "will not be automatically legally binding or enforceable before a state court of law."[60]

"Endorsed systems" are often a first step away from an official or established church. Instead of declaring that there is an official religion in the state, a constitution acknowledges the special role of a particular religion, but then goes on to affirm the religious freedom of other groups. Sometimes the recognition of religion is placed in a preamble; other times it is located in the body of a constitution. The Greek constitution actually has this structure. That is, it recognizes that the Orthodox Church is the "prevailing religion" but also protects religious freedom for others.[61] In Armenia, for example, Article 8.1 of the Constitution provides that "The church shall be separate from the State in the Republic of Armenia" but in the next sentence states, "The Republic of Armenia recognizes the exclusive historical mission of the Armenian Apostolic Holy Church as a national church, in the spiritual life, development of the national culture and preservation of the national identity of the people of Armenia."[62] Similarly, the Bulgarian constitution separates religion and state and has fairly typical language affirming freedom of religion, but "both the Constitution and the relevant legislation suggest a special role and often a special place for the [Bulgarian Orthodox Church] within what is a social and political context."[63] In Andorra, Italy and Spain, the unique place of the Catholic Church in national history is recognized, but strong protections for religious freedom are provided as well.[64] Similar patterns are apparent in the constitutional structures of several of the Latin American countries as well.[65]

The "preferred religions" model refers to countries that do not establish or endorse any particular religion, but single out a number of religions for favored treatment or recognition. This is sometimes done by distinguishing traditional religions and giving them special status or privilege. Alternatively, this may be done by establishing "multi-tier" regimes that give different groups different levels of recognition. In theory, the distinctions should be based on objective factors, but typically the effect is to favor traditional groups. Sometimes the distinctions are evident at the level of the constitution; in other systems the distinctions are adopted as part of legislation dealing with religious matters. In Slovakia, for example, only 18 churches have been registered, and the requirement that new groups can be registered only with the support of 20,000 adult members effectively precludes registration of any other communities in the country. The Russian Law on Freedom of Conscience and on Religious Organizations is nowhere near as restrictive, but its preamble mentions the "special contribution" of Orthodoxy to the

57. Turkey IX.
58. Canada VII.B.
59. Id.
60. Id.
61. Greece II.A.
62. Armenia II.
63. Bulgaria III.A.
64. Andorra III; Italy III; Spain III.
65. See, e.g., Argentina IV; Peru III.

culture and history of Russia,[66] and gives special mention to Islam, Judaism and Buddhism as well.

Probably the most common arrangement among the national reports is the cooperation model. Most European systems are evolving in this direction. Even separationist France in fact provides significant levels of cooperation in supporting religious schools and in helping with the maintenance of pre-1905 religious buildings.[67] India's "positive conception of equal treatment" and secularism without a wall of separation also appears to fit into this model.[68] Neutrality is the hallmark of this constitutional model. No particular religions are singled out for benefits or unfavorable treatment. But neutrality on this model is not hostile but friendly and cooperative. Most significantly, this type of religion-state configuration is not averse to state funding of religious activities. In part grows out of a belief that freedom of religion is not only a defensive right against state interference, but a positive right to state action enabling exercise of religious freedom.[69] Often this reflects long-standing patterns of support that are difficult to unwind. Sometimes it reflects ongoing payments that represent compensation for past appropriation of religious property.[70] Sometimes no direct transfers from the state budget to a religious community are involved, but the state facilitates funding which supports religious communities, either through assisting with the collection of contributions[71] or through tax "check-off" systems that allow taxpayers to allocate funds to religions of their choice.[72]

There are in fact countless ways that cooperation is structured. The fundamental point is that cooperation systems respect fundamental baselines of protecting individual religious freedom for all, and the fundamental commitment to neutrality and equality in religious affairs, but understanding these notions in a way that allows the state flexibility to cooperate in a variety of ways with religious communities. The larger point to make here is that the cooperation model is one of the major ways to structure the relationship between religion and the secular state. The willingness to cooperate with religion distinguishes this approach from secularism. Its willingness to help the support of a variety of communities inclines it toward secularity. Major areas of cooperation occur in the domains of finance of religious organizations and education, which are treated in subsequent sessions of this general report. The practical manifestations of this type of secularity are adequately addressed in those sections.

Accommodationist systems are similar in many ways to cooperationist systems, except that they impose tighter constraints on direct funding of religious activity. In the financial area, they are comfortable with tax exemption schemes, because these reflect private choice in the allocation of resources. An accommodationist tends to be more comfortable than a strict separationist with religion as part of national culture. There is thus more willingness to accommodate religious symbols in public settings, to allow tax, dietary, holiday, Sabbath and other kinds of religion-based exemptions and so forth. Interpretations of the United States Constitution that support the foregoing positions are probably the classic example of accommodationist positions. As noted earlier, the major debates in U.S. religion-state theory are between accommodationists and stricter separationists.[73] Like cooperationists, accommodationists apply substantive conceptions of neutrality and equality that allow religious differences to be taken into account in interpreting general laws. For example, conscientious objection to military service is taken as a difference that otherwise general laws can take into account.

Moving further around the "loop," one encounters several constitutional approaches that take a more strictly secular approach to religion-state relations. Many of the states

66. Russia IV.
67. France VIII.
68. India III.
69. See, e.g., Hungary IX.
70. See, e.g., Germany VIII; Hungary IX.
71. See, e.g., Germany VIII.
72. Italy V; Spain III(I).
73. See generally United States Report (1) - (McCauliff).

covered by national reports specifically declare themselves to be secular or *laic* in their constitutions.[74] Some prohibit the creation, recognition or establishment of any religion.[75] Others mandate the "separation" of religion and the state.[76] Still others declare the state to be secular, or in French," *laïque*.[77] Stress on formal versions of neutrality and equality can lead to similar results.Not surprisingly, some constitutions include two or more of these types of provisions. For example, Article 14 of the Constitution of the Russian Federation reads as follows: "The Russian Federation is a secular state. No religion may be established as a state or obligatory one. Religious associations shall be separated from the State.and shall be equal before the law." Particularly when one recalls that Article 28 of the Russian Constitution also includes a provision on freedom of conscience, it seems clear that the Russian constitution has covered all the secular bases. That is, it has affirmed that the state is secular as opposed to confessional. It has proscribed the creation of an official or "established" church. It specifically mandates separation of religious and state institutions. It affirms that religious *associations* shall be equal before the law, which would appear to require state neutrality. Additionally, there are the individual rights to freedom of conscience. Note that it is often hard to tell how these arguably distinct versions of the secular will play out in reality. Despite the strong assertions of secularity on each of these fronts, influence of the Russian Orthodox in particular has been growing in recent years. Favored treatment is evident in areas such as state finance of construction of religious buildings and monuments, support for chaplains in the military, instruction on basic Orthodox culture in some regions of the country, and the prevalence of religious symbols in a variety of public settings.[78]

74. India III, India Const., preamble; Italy III; Nepal VI, Nepal Const., art.4, Serbia IV; Turkey III, Turkey Const., art. 10.

75. See, e.g., Australia Const. art. 116; Brazil Const. art. 19; Czech Republic Charter of Fundamental Rights and Basic Freedoms art. 2, cl. 1 ("it may not be bound either by an exclusive ideology or by a particular religious faith); Ethiopia Const. art. 11 cl. 2; Gambia Const. art. 200 cl. 2; Germany Basic Law art. 140, incorporating Weimar Const. art. 137 cl. 1; Ireland Const. art. 44 cl. 2 (no "endowment" of any religion); South Korea Const. art. 20 cl. 2; Kyrgyzstan Const. art. 8 cl.1; Liberia Const. art. 14; Lithuania Const. art. 43 cl. 7; Micronesia Const. art. 4 §2; Nicaragua Const. art. 14; Nigeria Const. art. 10; Palau Const. art. 4 § 1; Paraguay Const. art. 24; Philippines Const. art. 3 § 5; Russia Const. art. 14 cl. 1; Serbia Const. art. 11; Seychelles Const. art. 11 cl. 6; Spain Const. art. 16 cl. 3; Tajikistan Const. art. 8; Uganda Const. art. 7; Ukraine Const. art. 35; United States Const. amend. 1; Uruguay Const. art. 5.

76. Angola Const. art. 8; Armenia Const. art. 8.1; Azerbaijan Const. art. 18 cl. 1; Bhutan Const. art. 3 cl. 3; Bolivia Const. art. 4 ("The state is independent of religion"); Bulgaria Const. art. 13 cl. 2; Cameroon Const. pmbl. ¶ 5 cl. 14 ("neutrality and independence of the State"); Cape Verde Const. arts. 2 cl. 2, 48 cl. 3, 102 cl. 3; Chad Const. art. 1; Croatia Const. art. 41 cl. 1; Cuba Const. art. 8; Ethiopia Const. art. 11; Gabon Const. arts. 2, 6 cl. 1; Guinea-Bissau Const. art. 6 cl. 1; Hungary Const. art. 60 cl. 3; Kyrgyzstan Const. art. art. 8 cl. 3; Hungary Const. art. 60 cl. 3; Italy Const. art. 7 ("The state and the Catholic Church are independent and sovereign, each within its own sphere); Japan Const. art. 20 cl.1 ("No religious organization shall receive any privileges from the State, nor exercise any political authority;"); South Korea Const. art. 20 cl. 2; Latvia Const. art. 99; Liberia Const. art. 14; Macedonia Const. art. 19 cl. 3; Mexico Const. art. 130; Mongolia Const. art. 9 cl. 2; Montenegro Const. art. 14; Mozambique Const. arts. 12, 292; Niger Const. arts. 4, 152; Peru Const. art. 50 ("framework of independence and autonomy"; Philippines Const. art. 2 cl. 6; Portugal Const. art. 41 cl. 4; Russia Const. art. 14, cl. 2; Serbia Const. art. 11; Slovenia Const. art. 7 cl. 1; Tajikistan Const. art. 8; Turkmenistan Const. art. 12; Ukraine Const. art. 25; Uzbekistan Const. art. 61.

77. Angola Const. art. 8, cl. 1, Azerbaijan Const. pmbl.,, art. 7 cl. 1; Benin Const. arts. 2, 23; Burkina Faso Const. art. 31; Burundi Const. arts. 1, 61, 299; Cameroon Const. pmbl. ¶ 5, art. 1 cl. 2; Central African Republic Const. arts. 18, 20; Chad Const. arts. 1, 128. 225; Congo Const. arts. 1, 189; Democratic Republic of Congo Const. art. 1; Cote d'Ivoire arts. 30, 127; Ecuador Const. arts. 1, 3; France Const. art. 1; Gabon Const. art. 2, 7; Guinea Const. art. 1, 91; Guinea-Bissau Const. arts. 1, 130; India Const. pmbl.; Kazakhstan Const. art. 1, cl. 1; Kyrgyzstan Const. art. 1, cl. 1; Lithuania Const. art. 40; Madagascar art. 1 cl. 1; Mali Const. pmbl., arts. 25, 118; Mexico Const. art. 3 cl. 1; Mozambique Const. art. 12 cl. 1; Namibia Const. pmbl., art. 1 cl. 1; Nepal Const. art. 4 cl. 1; Nicaragua Const. art. 124; Russia Const. art. 14 cl. 1; Rwanda Const. art. 1; Senegal Const. art. 1; Serbia Const. art. 11; Tajikistan Const. arts. 1, 100; Tanzania Const. pmbl., art. 3 cl. 1; Togo Const. arts. 1, 25, 144; Turkey Const. pmbl., arts. 2, 4, 13, 14, 81, 103, 174; Turkmenistan Const. art. 1. Cf. Czech Republic Charter of Human Rights and Freedoms art. 2(1) ("The State ... must not be tied either to an exclusive ideology or to a particular religion"); Slovak Republic Const. art. 1 ("The Slovak Republic . . . is not bound by any ideology or religion").

78. Russia VIII-XI.

The contrast between the full range of secularist constitutional provisions in Russia on the one hand and the various forms of state cooperation and accommodation on the other is a reminder of how difficult it is in general to assess the actual nature of religion-state relations on the basis of constitutional provisions alone. The combination of traditional practice and custom, acknowledgement of historical and cultural realities, reactions aimed at curing or reversing prior abuses, constitutional and legal interpretation, religious bias and prejudice, and outright non-compliance with constitutional norms all contribute to painting the full picture of actual religion-state relationships.

One of the major models of the secular state is that suggested by the French experience, and the French notion of laïcité. As is the case with other positions on the identification continuum, this is really better thought of as a range of positions, signified by various debates going on in French society, and within a number of other countries where the role of religion in the public sphere is an issue (e.g., secular Turkey). There are no doubt versions of *laïcité* that are compatible with the more open notion of secularity. For example, the Italian Constitution declares its own form of laicism, in which the state guarantees safeguards for religious freedom. Further, although churches are seen as separate from the state sphere in Italy the state enters pacts with the Catholic Church and agreements with other denominations to promote coordination.

Similarly, while Chile uses concepts of *laïcité*, it reaches results quite different and more religion friendly than classic French *laïcité*. But a central current in this view of religion and the secular state is that religion is a source of intolerance, superstition, social tension and violence – that it unleashes forces that run counter to reason, enlightenment and progress – and thus that it needs to be countered by a secular state. This version of *laïcité* is linked with the secular side of the Enlightenment and with the experience of the French Revolution as a revolt against the *ancien régime*, including the religious *ancien régime*. It is often as much about freedom *from* religion as it is about freedom *of* religion. It sees intolerance as a peculiar vice of religion, not recognizing that secularism itself can be as guilty of intolerance as its religious counterparts. At a minimum, it is about confining religion to the private sphere, where it poses no threat to dominance in politics or to capture of state institutions. Any return of religion to public space is viewed as threatening the Enlightenment project as a whole. In countries with a predominantly Catholic background, ideas and strategies concerning secularism were forged in the confrontation with Catholicism, and often took (and continue to take) an anti-clerical cast.[79] In such settings, it is not surprising that discourse about the secular state becomes a highly charged confrontation between religious and secular "isms" rather than a dialogue about how those holding the different world views can best live together. A similar dynamic often characterizes the relationship of secularist forces and more traditional religious groups in settings where Islam is a dominant social factor and fears of Islamist elements in society are strong.

It is a short step from extreme forms of secularism/*laïcité* to regimes that are more affirmatively hostile religion state relationships. What starts as neutrality and formal equality hardens into a view of law that views itself as compromised if relevant religious differences are taken into account. Allowing flexibility for believers to act according to conscience comes to be viewed as a form of discrimination in favor of religion. State action that intentionally discriminates against religion continues to be seen as wrongful (violating neutrality and equality values), but "neutral and general laws" that have incidental effects imposing heavy burdens on believers are taken to be a normal feature of life in democracy. Equal treatment thus passes over into unintentional disadvantaging. Legislators become better at crafting neutral-seeming laws, and in the end, constraints against overt hostility disappear.

Secular control regimes constitute a secular counterpart to established religions. Two versions can be imagined. In the first, secular rulers exploit religion for political gain. Examples would include political leaders catering to religious groups in an effort to contribute to nation building, or simply to attract political support. In this sense, the

79. See, e.g., Mexico II.

Ukrainian national report notes the way that Russian rulers used its "Department of Orthodox matters" as part of the machinery for ruling Ukraine.[80] Here the parallel with control by established religions is clear; indeed, it is not merely a parallel but an identity. The second type of secular control regime emphasizes freedom from religion, either for ideological reasons, or to prevent religious communities from becoming a competing source of legitimacy within society. Stalin's anti-religious terror was prompted both by ideological concerns (anti-religious Marxism) and by fears of counterrevolutionary forces in society. Describing this phenomenon, the Ukrainian national report notes that the "Soviet regime was by no means religiously neutral nor even tolerant toward religion; rather, it thrust upon the Ukrainian people its communist ideology with religious eagerness.[81] Contemporary China would constitute another example.

Besides helping to map different types of relationships between religion and the state (including secular states), the schematization described above helps to bring out several other features of religion-state relations.[82] First, there are a range of different types of relationship which correlate with high degrees of religious freedom. Indeed, what the static diagram cannot make clear is that in fact, different points along the identity continuum may be optimal in different social settings. For example, in countries where religious communities have experienced decades of persecution, as was the case in countries that lived under Soviet hegemony, a cooperation model might be not only optimal but necessary for religious institutions to be revitalized. On the other hand, where religious institutions have been strong and controlling, a position such as French *laïcité* may be vital to carve out space for broader freedom of religion. A significant "margin of appreciation" is necessary not only because different configurations will have different practical effects; they may also have different social meanings. Forbidding religious exercises in schools may have one meaning in a setting such as the United States, where such exercises had been hotly contested and made emergence of public school systems virtually impossible when that system was first being founded. It likely would have had a very different meaning in post-World War II Germany, where the country was recovering from Hitler's *Kirchenkampf* and had clear memories of Bismarck's *Kulturkampf*, both of which attacked religious liberty in no small part by attacking religion in the schools.

Second, while freedom and equality norms can sometimes be in tension with each other, for the most part, increasing protection of equality in religion-state relations and increasing freedom go together.

Third, in the optimal "middle range" of the continuum, differing conceptions of freedom may be at work behind different religion-state configurations. Cooperationist regimes (and cooperationist models of the secular state) reflect positive conceptions of freedom, in that they assume that the state should help actualize the conditions of freedom. Separationist regimes (and separationist conceptions of the secular state), by contrast, assume a negative conception of freedom according to which religious freedom is maximized by minimizing state intervention in the religious sphere (and religious intervention in the public sphere).

Fourth, in a similar vein, the different types of configurations reflect different assumptions about what state neutrality means. One model of neutrality is state inaction. A state that gives that is totally separate and gives no aid to religion could be seen as being neutral among all religions. A second model is neutrality as impartiality (e.g., the impartiality of an unbiased umpire). This model calls for the state to act in formally neutral and religion blind ways. This corresponds to a strict version of separation that does not allow religious factors to be taken into account in assessing legal policies and state implementation schemes. A third model views the state of the monitor of an open forum. This is like the model of neutrality as impartiality, except that it allows imposition

80. Ukraine III.

81. Id.

82. This section of the General Report follows Durham and Scharffs, *Law and Religion: National, International and Comparative Perspectives* (New York: Aspen Publishers, 2010): 121-122.

of time, place and manner restrictions that set the boundaries within which religious debate and competition occur, but does not allow the state to be involved in shaping the substance of religious value systems. The first three models of neutrality correspond to differing versions of separationist or strictly secular states. A fourth model calls for substantive equal treatment and corresponds to accommodations positions that allow conscientious beliefs to be taken into account in shaping and interpreting public policies. A fifth model is a "second generation rights version" of the fourth, which views affirmative actualization of substantive rights as an affirmative or positive obligation of the state, and thus corresponds to the cooperationist position.

C. Other Constitutional Issues Involving Religion

An array of constitutional issues that govern religion-state relations in various details fit into this larger framework, and are affected by where a regime seeks to position itself along the identification continuum. Thus, as indicated earlier, most countries have ratified the key international instruments governing freedom of religion or belief. Many have constitutional provisions indicating that international treaties override ordinary legislation.83 But the international instruments tend to be read in ways that are consonant with the applicable type of religion-state system. One of the issues that has been explicit in international instruments since the 1960s is that the right to freedom of religion or belief protects not only religious believers, but atheists, humanists and other forms of conscientious secular beliefs. Not surprisingly these notions are taken more seriously among the more laicist states, including former communist states that have particularly high numbers of non-believers.84 This right to non-belief is also finding footing in more accommodationist states such as Canada and Australia, which do not expressly mention the right not to believe in their constitutions, but have found ways to protect it through caselaw.85 On the other hand, states in the more religious range of the identification continuum (established to preferred religions) are less likely to be sympathetic to unbelief. Thus, Colombia specifically notes that the state is not atheistic or agnostic,[86] and Ireland mandates that the state refrain from atheistic propaganda or any measure hostile to religion.[87] Similarly, the Indonesian constitution insists on belief in one God,[88] and that this does not permit atheism.

The scope of permissible limitations on freedom of religion also tends to vary depending on the type of religion-state configuration. All but about ten of the world's currently operational constitutions have been adopted since the end of World War II, and not surprisingly, most have been significantly influenced by the structure of international human rights instruments, including limitation clauses. Accordingly, most identify the protection of public safety, order, health, morals, or the fundamental rights and freedoms of others[89] as legitimating grounds for imposing limitations on manifestations of religion. Some, but not all, of these are clear that in order to override religious freedom claims, it must be possible to demonstrate that even limitations based on these legitimating grounds must be "necessary" in the sense of being narrowly tailored to the end being pursued and proportionate to the seriousness of the right being limited, as required by the international instruments.[90] Secularist countries are somewhat more likely to determine that religious freedom claims are outweighed by other secular interests. Accommodationist regimes are

83. See, e.g., Armenia IV; Chile,

84. See, e.g., Bulgaria IV.B, Bulgaria Const., art 37.

85. Australia IV.A; Canada III.D.

86. Colombia III, Colombia Const., art. 2.

87. Ireland III, Ireland Const., art. 44-1..

88. Indonesian Const., Preamble, indent IV and art. 29(1).

89. Similar to the European Convention on Human Rights, See Andorra III, Bulgaria IV.B, Bulgaria Const. art. 37, cl.2; Czech Republic III.B, Czech Const. art. 3, cl.4, Estonia III.B, Estonia Constitution, art. 40; Greece VI, Greece Const., art. 13, cl.2; India III, India Const., art. 25. See also Kazakhstan III.B, Kazakhstan Const., art.39, cl.1 ; Malta II, Malta Const., art. 32; Slovakia III, Slovakia Const., art. 24; Sweden IV; Switzerland IV; Turkey III, Turkey Const., art. 14, Ukraine III, Ukraine Const., Art. 35.

90. See, e.g., International Covenant on Civil and Political Rights, art. 18(3).

more likely to construe permissible limitations narrowly, thus expanding the extent to which freedom of religion or belief is protected.

Most constitutions have provisions prohibiting discrimination based on religion. In some states this takes the form of a broad provision stating that all citizens are equal before the law, which the state then interprets to protect against all forms of discrimination, including discrimination which is religiously based.[91] Other states specifically prohibit discrimination based on religion, belief, opinion, or creed.[92] In addition to protecting individuals, some constitutions also have a provision that declare that churches and religious organizations are equal before the law and require equal treatment.[93] The Italian constitution further specifies that no legal limitation or tax burden may be imposed on an organization because of its religious beliefs. In other constitutions the equality of churches is not mentioned specifically but the provision protecting against discrimination on religious beliefs for individuals has been extended to religious communities in case law, creating an obligation to treat all religions equally.[94] The equality provisions represent a fundamental commitment of most legal systems these days, but there can be substantial flexibility in the way these norms are interpreted and applied.

D. The Legal Setting

In addition to constitutional provisions, virtually all states have laws designed to implement general commitments to religious freedom. These include laws that specify how religious communities can acquire legal entity status, through registration, incorporation, or other legal means. One of the significant developments in this area over the past decade has been the emergence of a series of cases, most notably in the European Court of Human Rights, affirming the right to acquire entity status if a religious community so desires,[95] and the right to operate without such status if it does not.[96] This right embraces the right for a group to acquire legal personality authorizing it to carry out the full range of religious and belief activities.[97] Commitments made by participating States of the Organization for Security and Cooperation in Europe are to the same effect.[98] While these laws often look superficially similar, the way they are administered can make a huge practical difference for religious communities. If they are administered with the aim of facilitating the activities of religious groups and communities, they operate to enhance freedom of religion. On the other hand, if they are applied as control mechanisms, often designed to make it difficult for smaller groups to acquire entity status, they can constitute a major interference with freedom of religion or belief. In most of the reported countries, registration or incorporation procedures operated to facilitate religious freedom in a manner consistent with the openness of secularity. Many of the key

91. See Greece X.6; Switzerland IV, Switzerland Const., art. 8.

92. Colombia III, Colombia Const., art. 13; Estonia III.B, Estonia Constitution, art. 12; Finland III.B, Finland Const. s. 6; Hungary IV.B, Hungary Const., s.60; India III, India Const., arts. 15, 16, Ireland III, Ireland Const., art. 44; Japan III, Japan Const., art. 14, cl.1; Kazakhstan III.B, Kazakhstan Const., art. 14, cl.2, Korea III, Korean Const., s.1.11; Malta II, Malta Const., art. 45; Mexico III.B, Mexico Const. art. 24; Netherlands II, Netherlands Const., art. 1; Philippines III, Philippines const., art. 3, cl. 5; Spain III.B, Spain Constitution, art. 14, Turkey III, Turkey Const., art. 10; Ukraine III, Ukraine Const., art. 25.; Uruguay IV.B, Uruguay Const. art. 8.

93. Columbia III, Colombia Const, art 3; Mexico III.B, Mexico Const., art. 29; Russia III, Russia Const., art. 14; Serbia IV, Serbia Const., art. 18l.

94. Estonia III.B; Finland III.B; Spain III.B, Spain Const., art. 14.

95. See, e.g., Canea Catholic Church v. Greece, 27 EHRR 521 (1999) (ECtHR, App. No. 25528/94, 16 December 1997); Hasan and Chaush v. Bulgaria (ECtHR, App. No. 30985/96, 26 October 2000); Metropolitan Church of Bessarabia v. Moldova (ECtHR, App. No. 45701/99, 13 December 2001); Moscow Branch of the Salvation Army v. Russia (ECtHR, App. No. 72881/01, Oct. 5, 2006); Church of Scientology Moscow v. Russia (ECtHR, App. No. 18147/02, 5 April 2007); Svyato-Mykhaylivska Parafiya v. Ukraine (ECtHR, App. No. 77703/01, 14 September 2007); Kimlya v. Russia, ECtHR, App. Nos. 76836/01, 32782/03 (1 October 2009).

96. Masaev v. Moldova, ECt HR , App. No. 6303/05 (12 May 2009), § 26.

97. The Moscow Branch of the Salvation Army, ECtHR, App. No. 72881/01 (5 Oct. 2006), §74.

98. OSCE, Vienna Concluding Document, Principle 16.3.

European Court cases have involved defects in the legal structure and administrative processes under the Russian Law on Freedom of Conscience and on Religious Organizations and with other countries in the former Soviet sphere of influence, although some improvement is occurring at the prodding of the European Court of Human Rights.

In general, states that facilitate access to legal entity status are acting in a manner consistent with the ideal of secularity. States that incline toward secular control, either out of continuation of earlier patterns of restriction or because of present desires to control religious groups, comport at best with secularism and more typically with secular control orientations. Generally, cooperation rights – including access to public funding – are keyed not to registration rules governing access to base-level legal entity status but to some higher-level qualifications. Thus, cooperation regimes are generally fairly open to flexible registration rules, and in that sense, are consistent with secularity. Pressure for tightened control frequently increases as one moves toward preferred, endorsed and established religions – here not because of secularism, but because of increased religious control authorized by the religion-state regime.

Where cooperation is allowed, the need to manage the flow of funds and other aspects of cooperation often leads to the emergence of a multi-tiered religion state system.[99] At the base level of the structure is a registration system that allows religious communities to receive basic legal entity status, and in some cases qualification for indirect support through tax exemptions and the deductibility of contributions. A number of states, such as Austria and Romania, have an intermediate status for smaller religious communities that gives them some heightened status vis-à-vis ordinary non-profit organizations, but not the benefits of full financial and other benefits of the highest level of recommendation. In a number of countries, particularly those with a significant Catholic population, there is a pattern of bilateral agreements between the state and various religious communities.[100] For the Catholic Church, these take the form of concordats; for others they are agreements designed to be similar in principle to the Catholic Concordats, but without the full attributes of transnational agreements with another sovereign state.[101] The Italian national report characterizes Italy's arrangement as a four tier system where non-recognized associations receive no benefits but have complete freedom, recognized churches receive tax benefits, denominations with agreements have additional privileges, and the Catholic Church has special status at the highest tier.[102] Spain has developed a variation on the agreement system whereby for religions other than Roman Catholicism, agreements are entered into not with a single denomination, but with a federation of denominations.[103] Depending on the nature of the cooperation that is being managed, the number of "tiers" in any national structure may vary. In Serbia there is only a two-tier system which differentiates between recognized and unrecognized churches. Traditional churches are recognized and given religious instruction rights.[104]

The difficulties with the multi-tiered systems are three-fold. While the intention behind the agreement systems was good (the aim is to equalize denominations by bringing them up to the level of the Roman Catholic Church), the implementation typically falls short of the aim. In the first place, full equalization with the Catholic Church is not possible, because no other Church controls its own country, enabling it to enter into formal treaties with other states. Even leaving that aside, there is a tendency, particularly where the Catholic Church is overwhelmingly dominant, for the Catholic Church to receive more extensive benefits than other groups. Second, there is a flaw in the structure of the agreement system that is only partially rectified by Spain's federation model. Once the state has entered into a certain number of agreements, it is very difficult for smaller

99. The Serbian national report gives a useful overview of several neighboring multi-tier systems. Serbia IV.

100. See, e.g., Andorra IV; Colombia IV.B; Czech Republic IV; Hungary IV; Italy IV; Malta II; Slovakia IV.C; Spain III.E.

101. See, e.g., Hungary V.

102. Italy IV.

103. Spain III.E.

104. Serbia IV.

groups not yet covered to mobilize the political will with the state to form further agreements. Third, while the differential benefits associated with the various tiers are supposedly based on objective factors, there is a substantial risk that some level of impermissible religion-based discrimination may occur in administering these systems.

III. RELIGIOUS AUTONOMY

A. Autonomy of Religion from the State

International human rights instruments and many constitutions generally take individual freedom of religion or belief as the starting point. But in most traditions, religion is very much a communal matter, involving joint practices, shared belief, a common ritual life, and a shared common life. With that in mind, it is particularly important that the individual right includes the "freedom, either individually or in *community* with others and in *public* or private, to manifest his religion or belief . . . ."[105] The freedom of individual belief cannot be fully realized without the prior freedom of communal belief. To the extent belief systems are subjected to coercion or manipulation from external sources, they are not fully and authentically themselves. It is for this reason that protection of the religious autonomy or independence of the religious community is such a vital element of freedom of religion or belief.[106] Whether conceptualized as deriving from individual freedom, or being grounded directly in the rights of the community, freedom of religion without institutional autonomy cannot be full religious freedom.

Significantly, the notion of religious autonomy antedates contemporary conceptions of rights. It is a key aspect of the idea that the religious and secular orders are qualitatively separate if socially overlapping spheres. The basic idea is implicit in the New Testament teaching of Jesus, that human beings should "Render unto Caesar the things which are Caesar's, and unto God the things that are God's."[107] The idea of autonomy is implicit in the struggle for an independent papacy in the Roman Catholic tradition, with the idea of a Protestant nonconformist church, and with the modern constitutional notion of separation of religious and state institutions.[108] In general, it is linked to the idea – particularly prominent in the Christian tradition, but evident in other traditions as well – that spiritual and temporal matters are subject to separate jurisdictions.

Most of the national reports indicate strong support for the idea of religious or institutional[109] autonomy. What is at issue here is not the freedom of individual or personal autonomy, but "the right of religious communities (hierarchical, connectional, and congregational) to decide upon and administer their own internal religious affairs without interference by the institutions of government."[110] A variety of different metaphors are used to describe the notion. Some of the reports refer to implementation of a model of "separate spheres"[111] that is linked to notions of lack of state competence in religious matters and to state neutrality. The German national report speaks in a similar vein of maintaining equidistance of the state from various religious communities, and of withdrawing from religious issues.[112] Others focus on a "prohibited intervention" model,

105. International Covenant on Civil and Political Rights, art. 18(1) (emphasis added).

106. For an extensive collection of comparative studies of this theme, see Gerhard Robbers, ed., *Church Autonomy: A Comparative Survey*, (Frankfurt: Peter Lang, 2002).

107. Matthew 22:21.

108. Roland Minnerath, "The Right to Autonomy in Religious Affairs," in Tore Lindholm, W. Cole Durham, Jr., and Bahia Tahzib-Lie, *Facilitating Freedom of Religion or Belief: A Deskbook* (Leiden: Martinus Nijhoof, 2004): 293.

109. Italy III.B.2.

110. Mark E. Chopko, "Constitutional Protection for Church Autonomy: A Practitioner's View," in Robbers, *supra* note 106, at 96.

111. Canada IV; and Uruguay III.

112. Germany IV.

which underscores the freedom of the religious community. [113]

In some constitutions, the right to religious autonomy is addressed directly.[114] In others, constitutional provisions address only individual rights, but collective rights to autonomy and self-determination are addressed at the level of civil codes or other statutes.[115] Still others address the issue primarily in case law[116] or in agreements with major denominations.[117] In any event, religious autonomy entails broad protection for religious communities to govern themselves.[118] This includes both the right to specify doctrine[119] (which includes beliefs about structuring of the religious community) and the right to self-determination[120] and self-management in internal affairs.[121] Prominent among the self-determination rights are rights to autonomy in religious ritual practice,[122] the right to establish places of worship,[123] the ability to establish the group's own organization and hierarchy,[124] the right to create other legal persons pursuant to statute or canon law,[125] the right to select, manage and terminate personnel,[126] the right to communicate with religious personnel and the faithful,[127] including the right to confidential communications;[128] the right to establish educational and charitable organizations; the right to receive, produce and distribute information through the media; the right to own and sell property;[129] the right to solicit and expend funds;[130] and so forth. The right also extends to procedural issues such as having standing to sue to protect legal rights. The Turkish report noted how this had emerged as a very significant issue in *Fener Rume Patrikiligi v. Turkey*,[131] a recent case before the European Court of Human Rights. In that case, the Court admitted a request lodged by the Greek Patriarch whose lack of standing had prevented brining an action regarding the confiscation of an orphanage. The case goes beyond recovery of the orphanage itself, because Turkish policy has been not to recognize the ecumenical status of the Greek Orthodox Patriarch, considering him instead to be merely the leader of the Greek Orthodox community. The European Court, in contrast, "affirmed the judgment that the Ecumenical Patriarchate is an orthodox church established in Istanbul, enjoying an honorary primacy and a role of initiative and coordination over the entire orthodox world."[132]

Autonomy notions are often implicit in other legal norms involved in structuring religion state relations. For example, as pointed out by the Chilean report, registration systems should be understood as *recognizing* religious communities, not *constituting*

113. Czech Republic V; Japan V.

114. See, e.g., German Basic Law, art. 140, incorporating Weimar Constitution, art. 137(3).

115. See, e.g., Netherlands V, citing Article 2.2 of the Dutch Civil Code.

116. The United States is a case in point here. See, e.g., Watson v. Jones, 80 U.S.(13 Wall.) 679 (1871); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952); Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969); Jones v. Wolf, 443 U.S. 595 (1979); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).

117. In Andorra, a 2008 concordat grants "the Holy See or its designated authority the right to create, modify or suppress orders, religious congregations, and other ecclesiastical institutions or bodies, the right to communicate freely with these bodies and their congregations, and to publish and broadcast any disposition relative to the running of the Church,"

118. Czech Republic V; Israel VI.

119. Canada IV; Germany V; Japan V.

120. Armenia V (religious organizations have the right "to operate independently, . . . the right to obtain and dispose of property, the right to organize religious education, the right to train clergy, the right to publish and disseminate religious literature, the right to purchase religiously significant objects and materials, the right to accept donations, the right to have charity activities, and other miscellaneous rights . . . ."); Germany V;

121. Ireland V; Russia VI.

122. Chile III.B.

123. Colombia V.

124. Canada IV; Chile III.B.

125. Chile III.B.

126. See, e.g., Colombia V.

127. See, e.g.,Chile III.B; Colombia V.

128. Uruguay VI.

129. See, e.g., Colombia V.

130. See, e.g., Colombia V.

131. App. No. 14340/05 (ECtHR, 2008).

132. Turkey V.

them.[133] Autonomy is grounded in this independent status of religious communities. Similarly, the fact that states enter into concordats or agreements with religions is a recognition of the dignity and independence of religions and their communities.

Autonomy issues often arise in contexts where involving property or other disputes. In Japan, the law is very clear that courts can't intervene in disputes that are "dependent on doctrine."[134] United States Courts have taken the same position. For example, they have held that courts may not use a "departure from doctrine test" to assess which of two rival groups is entitled to church property because they are doctrinally closer to the original donors of the property.[135] On the other hand, the U.S. Supreme Court has recognized the legitimacy of two slightly different approaches in such cases. The first, the "deference to ecclesiastical polity" approach, defers to the acknowledged adjudicatories of a denomination to settle disputed questions. This means deferring to hierarchical decisions in a hierarchical church, or deferring to other decision-making bodies or procedures in religious bodies with other forms of governance (congregational, connectional, representational, etc.).[136] The second is referred to as the "neutral principles" approach. The name can be a little misleading. The reference is not to non-discriminatory general laws, but to routine principles of legal interpretation. The idea is that if a religious group express its autonomous view of how certain disputes should be resolved in clear secular language, courts can resolve the dispute using "neutral principles" of interpretation, without getting into any underlying religious dispute.[137]

The Canadian report analyzes a recent Canadian Supreme Court case that addressed whether a clause in a divorce settlement clause which obligated the husband to appear before a rabbinic tribunal for purposes of obtaining a Jewish divorce or *get*, thereby making it possible for his wife to legitimately remarry under Jewish law. The husband had refused to do this for fifteen years when the wife finally brought suit in secular courts. A unanimous court of appeal and the dissent in the Supreme Court held that such disputes are not justiciable before secular courts. The judges taking this view reasoned that secular law has no effect in matters of religion and that it is not the responsibility of the state to reinforce or otherwise a secular norm." The majority of the Supreme Court, in contrast, held that by entering into the contract, the husband had transformed his religious obligation into one that could be understood and applied by a secular court. The result appears to be similar to the neutral principles approach in the United States. The issue raised by this case is similar to a range of cases about the extent to which secular courts should give civil effects to religious norms that are discussed in Section VI below.

The notion that the state should not intervene in doctrinal matters lies at the core of the autonomy doctrine. The national reporters noted areas, however, where autonomy is threatened, infringed, or at least steered. In Kazakhstan, the national reporter indicated that the activities of religious communities with foreign ties may be compromised because of the expectation that these activities, as well as the appointment of the heads of religious associations shall be carried out "in coordination with" state institutions.[138] This type of intervention spills over into state interaction with domestic religious organizations as well.[139] This can lead not only to significant direct interference with autonomy, but also to the chilling and deterrence of other legitimate activities.

The national report from India indicates that interference in religious autonomy there is much more routine. The version of equality and secularism that is interpreted to allow cooperative relations with religion apparently has a cost that the state feels comfortable

133. Chile III.A.

134. Japan V.

135. Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969)

136. See Watson v. Jones, 80 U.S.(13 Wall.) 679 (1871); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

137. See Jones v. Wolf, 443 U.S. 595 (1979)

138. Kazakhstan V.

139. Id.

addressing and intervening in various religious matters. Thus, the state has not hesitated to take a stand on whether certain major religions of India (Sikhism, Buddhism and Jainism) are variations of Hinduism or constitute separate religions. Despite the fact that the religions themselves view themselves as being separate, state institutions have decided to treat them for practical purposes as Hindus.[140] In the sphere of organizational autonomy, the government has appointed "non-Buddhists on the management board of the most prominent Buddhist shrine in India . . . ."[141] Restrictions on places of worship prevent such institutions from being used for a variety of reasons. Some of these are reasonable enough. Thus, places of worship may not be used for harboring criminals, storing arms and ammunition, storing contraband goods, and carrying out unlawful or subversive acts. One might raise issues of rights of sanctuary in this context, but leave that aside. The restrictions apparently also proscribe use of religious institutions for political purposes and or for promoting disharmony or feelings of enmity between various religious groups. That would appear to be significantly over-restrictive in the absence of extreme circumstance.

The Swedish reporter noted that financial subsidies to registered religious denominations are granted "only upon the condition that the denomination contributes to the maintenance and development of fundamental values of the society."[142] In general, a denomination "is expected to contribute to equality between men and women. Its members and staff are to be guided by ethical principles which correspond with the fundamental democratic values of the society. These requirements do not, however, mean the confession of the denomination should in itself be 'democratic' or that the denomination's staff must be elected in a democratic procedure. These issues are considered to remain outside the scope of secular law."[143] Such financial strings come as no surprise; it is quite reasonable for the state to condition access to its funds on furtherance of state policy. The religious community continues to have autonomy to decide whether or not to accept such funding. But over time, there is little doubt that these strings have a "steering" effect on religious communities – one that may be salutary on balance, but one that nonetheless redirects religious autonomy at least to some extent.

This leads to questions about the outer limits of religious autonomy rights. Not surprisingly, there is a range of views on such issues. One limitation is that established churches and churches that have particularly close ties to the state often have less autonomy than non-established churches in their countries.[144] This is part of the reason that Sweden opted for disestablishment in 2000.

A more sensitive and disputed area has to do with the implication of religious autonomy rights for employment disputes involving religious personnel. A set of cases on this topic is currently pending before the European Court of Human Rights. The general rule in this area is that religious communities have broad discretion in determining the terms on which they hire, retain, and terminate religious personnel. Religious employers are typically exempted from rules that proscribe discrimination on the basis of religion for the same reason that other expressive organizations (e.g., political parties, advocacy groups, and the like) are not required to hire individuals with opposed views). These rules are particularly clear when a religious body itself is hiring someone who fulfills a pastoral or teaching type role. The question gets somewhat more difficult when the employer is a religiously affiliated entity (a school, a broadcasting station, a newspaper, a hospital, a hostel or housing for the elderly, etc.) or where the employee has a less clearly religious role (a pastor or other minister, a religion teacher, a history teacher, a math teacher, a secretary to a religious leader, a news broadcaster, an individual who makes religious clothing, a truck driver at the warehouse of a religious charity, a janitor at a church-owned gymnasium).

140. India V.A.
141. Id.
142. Sweden V.A.
143. Id.
144. See, e.g., United Kingdom V.

The question is how strong religious autonomy protections are in such situations. From a secular perspective, it is all too easy to say that normal anti-discrimination rules should apply unless both the employer and the employee are engaged in religious conduct that makes religious qualifications vital to the job. But that is far too simple, and fails to understand what a serious issue this is for a religious community. From the religious perspective, it may well be that the religious status of all the employees may be extremely significant. The religious employer cannot know in advance which of its employees will have the type of spiritual impact it hopes to foster. It can be very concerned about unspoken messages that are communicated by someone who is not loyal to the religious institution. Non-adherents of the faith may substantially alter the ambience of the workplace. Misconduct by such personnel may disrupt trust relations in the workplace, and could affect the religious communities sense of whether the individual is qualified or worthy to carry out a particular task. It is for that reason that appropriate exemptions for religious employers are appearing in various jurisdictions.[145]

Even assuming that a particular case involves a dispute between a type of employer and a type of employee whose relationship would be appropriately covered by religious autonomy protections, are there other constraints that should set limits on the scope of religious autonomy rights? A leading U.S. case involved the suspension and ultimate defrocking of the bishop who had led the Serbian Orthodox Church in the United States and Canada for many years.[146] The claim was that the leaders of the Serbian Orthodox Church who had taken this action had not followed their own rules for such cases and had acted arbitrarily. Earlier dicta had suggested that while in general, courts are required to defer to hierarchical authority in resolving religious disputes, they might review arbitrary action by such tribunals. The U.S. Supreme Court rejected this reasoning on the ground that "it is the essence of religious faith that ecclesiastical decisions are reached and are to be accepted as matters of faith whether or not rational or measurable. Constitutional concepts of due process, involving secular notions of "fundamental fairness" or impermissible objectives, are therefore hardly relevant to such matters of ecclesiastical cognizance."[147] The national report from Netherlands, in contrast, suggests that while religious communities should be given broad autonomy in the employment dispute context, "this does not mean that churches can act at will. Fairness, acting in good faith, [and] following fair procedure[s] are elements that courts can and will use in reviewing church decisions."

Religious autonomy is an area that will no doubt test the perceptions of justice in various types of secular states in coming years. Protecting strong autonomy norms sends powerful signals that religious communities will be genuinely welcome in a community, and that they will be protected in living their communal life authentically, as they understand that it should be lived. Undue narrowing of autonomy is likely to send an opposite message of secular intolerance. There are difficult issues that need to be assessed, and not all autonomy claims will or should prevail. However, great sensitivity needs to be shown for what is paradoxically both the fragility and vitality of religious communities, and for the fact that they operate more effectively and more authentically if their autonomy can be respected.

B. Autonomy of the State from Religion

In general, the national reports devoted less attention to the issue of whether the state had autonomy from religion. To the extent that there were responses, they focused on constitutional or institutional structures that set limits on the extent to which religions can engage in political activity that can ultimately capture or influence the state. Colombia noted that clerics cannot be officials or judges. In the Netherlands, the church has no

145. See, e.g. Netherlands V.
146. Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976).
147. Id. at 714-15.

formal say in public decisionmaking.[148] Armenia's rule against religious organizations performing state functions no doubt has a similar effect.[149] The Russian report raised concerns about clericalization of the state.[150] In Ukraine, religious organizations are restricted from taking part in political parties, and they do not nominate candidates or finance campaigns.[151] The German national report chose to discuss the distinctive nature of "corporations under public law" under this rubric. This is a distinctive type of legal entity that is not formally part of the state order, but that has greater status than ordinary non-profit organizations. A substantial number of churches, including smaller churches, have been granted this status.

IV. Legal Regulation of Religion as a Social Phenomenon

Religious communities and their individual members live in modern societies that are governed by laws. Because laws have generally developed against the background of the local culture, often including religious culture, there are many ways in which religious norms and legal norms automatically align.[152] Obvious examples include the calendar, religious holidays, days of rest, and so forth. Core criminal law notions such as murder, theft, kidnaping, and the like also overlap with religious teachings. But in contemporary pluralistic states, it is not at all uncommon for religious communities to develop beliefs that are in tension with at least some legal norms. The theologian H. Richard Niebuhr, in his class text, *Christ and Culture*,[153] has identified five types of relationships between religious communities and the larger culture. As summarized by Professor Angela Carmella,[154] these range along a continuum from countercultural to acculturated responses.

"[A]t one end, he places those manifestations of religion most separate and distinct from the dominant culture, and at the other end, those manifestations most engaged in, and most similar to, surrounding culture. . . . In between . . . Niebuhr places three other responses. One, which Niebuhr calls the dualist response, considers faith to be in tension with culture, yet accepts that life is lived in and through culture, not separate from it; another, the synthesis response, places faith above culture, and acknowledges that although the culture may have virtues, faith inspires its adherents to go beyond them toward perfection; finally, the conversionist response sees faith transforming culture through love."[155]

Because many of the classic cases involving freedom of religion or belief are asserted by countercultural groups, the importance of freedom of religion for other types of interaction with culture are often overlooked. Professor Carmella gives the example of a counseling center affiliated with a Protestant seminary. All of the counselors were theologically trained and were members of the clergy. The center applied for a building permit to construct offices in a local church. Under the applicable law, religious uses were exempt from the land use law, so the counselors assumed they would have no trouble obtaining the building permit. In fact, the zoning board denied the permit on the ground that the counseling center was not a religious activity.[156] Had the center been seeking a building permit for pastoral counseling, the exemption probably would have applied. But because the center was acculturated, it no longer looked like it deserved or needed special freedom of religion protection. Similar issues can arise for each of the

148. Netherlands V.

149. Armenia V.

150. Russia III.

151. Ukraine VI.

152. See Netherlands VII (noting that "[t]he law in general has developed against the background of a Western culture based on a morality influenced by Christianity.") The same point can be made about law with different background cultures. See, e.g., national reports of India, Japan and Sudan.

153. H. Richard Niebuhr, *Christ and Culture* (1951).

154. Angela C. Carmella, "A Theological Critique of Free Exercise Jurisprudence," *George Washington Law Review* 60 (1992): 782-808,

155. Id. at 786-87.

156. Id. at 788-89.

various types of religious relationship to culture.

Note that in many ways, this continuum is the flip side of the religion-state identification continuum described above. That continuum focuses on various attitudes that state institutions may adopt toward religion (establishment, endorsement, privileging, cooperation, accommodation, separation, hostility, persecution). The Niebuhr continuum, in contrast, focuses on the attitudes that religious communities may have toward the culture in which they find themselves, including that culture's legal norms and institutions. The complexities of the interactions are compounded because of the great range of religions in every society.

Further complexity emanates from the vast set of legal norms that religious communities are expected to obey in modern administrative and regulatory states. These norms may target specific religious groups, either to grant certain privileges or to discriminate against them. More typically, in systems operating in good faith, legal or regulatory norms may be adopted that happen to run counter to specific beliefs of the community. For example, legislators desiring to encourage humane treatment of animals may publish regulations concerning animal slaughter which make preparation of kosher or halal food for Jews and Muslims illegal.

The national reports grapple with these complexities, and specify different ways that states regulate religious phenomena. It is not possible in this general report to address this range of phenomena in detail. In part, analysis of the religion-state identification continuum above goes a considerable distance toward providing comparative analysis of the types of state approaches to regulating religious phenomena that exist. In this section, we focus on a different set of issues: what are the major approaches that states take toward determining whether laws, regulations and other state actions that affect religion are permissible. Of course, some states and officials operate in lawless, arbitrary and discriminatory ways that are inconsistent with the rule of law (and typically with the requirements of the constitutions under which they operate. These are problematic cases, but our focus here is on systems that are seeking to operate legally, subject to the rule of law. What deserve attention as a matter of comparative law are the different standards that are applied as a matter of international and constitutional law in determining the breadth or narrowness of religious freedom protections.

The key question in this domain is whether religious freedom protections are sufficiently strong to generate exemptions from ordinary legislation. A number of jurisdictions hold that constitutional protections of the right to freedom of religion or belief require the judiciary to read ordinary legislation so as not to conflict with the constitutional religious freedom norm. This has the effect of creating an exemption for the conscientious claimant. Germany's freedom of religion provisions are read in this way,[157] as are Hungary's.[158] Japan's courts also appear to interpret the Japanese constitution in this manner.[159] This approach typically involves proportionality analysis to determine if the state interests involved are of a kind and with sufficient weight to outweigh the religious freedom claim. Prior to 1990, the United States Supreme Court applied a functionally similar "strict scrutiny" test according to which state action that burdened religion was impermissible unless justified by a compelling state interest that could not be advanced by less restrictive means.[160]

Canada has one of the more sensitive constitutional tests in this area. Under the Canadian test, the government must "prove that, on a balance of probabilities, the infringement is reasonable and can be demonstrably justified in a free and democratic society. To this end, two requirements must be met. First, the legislative objective being pursued must be sufficiently important to warrant limiting a constitutional right. Next, the means chosen by the state authority must be proportional to the objective in question . . . .

157. Germany VII.
158. Hungary VIII.
159. Japan VII.
160. Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972).

The first stage of the proportionality analysis consists in determining whether [there is] a rational connection with the objective [of the action] . . . . The second stage of the proportionality analysis is often central to the debate as to whether the infringement of a right protected by the *Canadian Charter* can be justified. The limit, which must minimally impair the right or freedom that has been infringed, need not necessarily be the least intrusive solution."[161] This test seems more precise than the United States' compelling state interest test; it is likely to provide very strong protection for religious freedom. The Canadian report describes a recent case in which a private party was able to invoke a religious freedom claim in order to override a contractual obligation.[162]

At the other end of the spectrum are regimes that hold that any legislation that is formally adopted and complies qualitatively with the rule of law (i.e., is not unduly vague, is not open to arbitrary enforcement, is not retroactive, and so forth) will override religious freedom claims. Australia appears to have this type of system, there being in that country "no general or constitutional exemption from ordinary laws for religions."[163] Sweden also disallows conscientious objection exemptions from military service or contractual clauses.[164] The U.S. Supreme Court moved to a similar position in 1990, in *Employment Division, Department of Human Resources of Oregon v. Smith.*[165] In that case, the Supreme Court jettisoned the standard "compelling state interest" test, and held instead that any neutral law of general applicability sufficed to override free exercise claims. [166]

To be sure, the revised standard was qualified in certain important respects. First, the Court made it clear that "the First Amendment obviously excludes all "governmental regulation of religious *beliefs* as such."[167] In particular, "government may not compel affirmation of religious belief;"[168] it may not "punish the expression of religious doctrines it believes to be false;"[169] and it may not "impose special disabilities on the basis of religious views or religious status."[170] Thus, the classic bar to state interference with inner beliefs (as opposed to outer conduct) was not abandoned. Second, the Court expressly reaffirmed its line of religious autonomy cases, emphasizing that "government may not . . . lend its power to one or the other side in controversies over religious authority or dogma."[171] Third, the Court indicated that in a number of prior cases involving "hybrid situations," free exercise claims, when coupled with other constitutional protections such as freedom of expression or parental rights, were sufficient to bar application of neutral and general laws.[172] Fourth, the Court did not overrule use of the compelling state interest analysis in unemployment compensation cases following the earlier *Sherbert* precedent, where the loss of employment was not linked to criminal activity. The Court rationalized retention of strict scrutiny analysis in this context because it involved "individualized governmental assessment of the reasons for the relevant conduct,"[173] noting that "where the State has in place a system of individual exemptions, it may not refuse to extend that

161. Multani v. Commission Scolaire Marguerite-Bourgeoys and Attorney General of Quebec, 1 S.C.R. 256, 2006 SCC 6 (2006) (Supreme Court of Canada), paras. 42-43, 49-50.

162. Canada V.A.

163. Australia VI.

164. Sweden VII.

165. 494 U.S. 872 (1990).

166. Id. at 879-81, 884.

167. Id. at 877 (citing *Sherbert*, 374 U.S. at 402).

168. *Id*. (citing Torcaso v. Watkins, 367 U.S. 488 (1961).

169. Id. (citing United States v. Ballard, 322 U.S. 78, 86-88 (1944).

170. Id. (citing McDaniel v. Paty, 435 U.S. 618 (1978); Fowler v. Rhode Island, 345 U.S. 67, 69 (1953).

171. Id. (citing Presbyterian Church in U.S. v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440, 445-452 (1969); Kedroff v. St. Nicholas Cathedral, 344 U.S. 94, 95-119 (1952); Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696, 708-725 (1976)).

172. Id. at 881. This so-called hybrid rights exception has been criticized by a number of courts. *See, e.g.*, Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring) (calling the hybrid rights rationale "untenable"); Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001) (for the hybrids rights rationale to prevail one must conclude that "the combination of two untenable claims equals a tenable one").

173. Id. at 884.

system to cases of 'religious hardship' without compelling reason."[174] Finally, implicit in the idea of "neutral and general laws" is the notion that non-neutral and non-general laws that intentionally target and discriminate against religious groups or religious activities remain subject to strict scrutiny.[175] In each of these situations, First Amendment protections remained what they had been prior to the *Smith* decision. Despite these exceptions, *Smith* held that in the main, "neutral law[s] of general applicability" would suffice to overrule free exercise claims.

It is important to note, however, that the United States in fact remains closer to being a "strict scrutiny" jurisdiction than the Supreme Court decisions might lead one to believe. First, Congress passed the Religious Freedom Restoration Act of 1993[176] ("RFRA"). This restored the compelling state interest test as a matter of ordinary legislation. While this measure was held unconstitutional as applied to the states in 1997,[177] it has remained intact in the federal setting.[178] Various other pieces of federal legislation have reasserted the compelling state interest test in areas where there is specific federal authority to act.[179] Even more significantly, twenty-five of the fifty states have expressly retained a heightened scrutiny approach, either by passing a state RFRA, or as a result of judicial interpretations of religious freedom provisions of state constitutions.[180] Moreover, only a handful of states have expressly followed the *Smith* decision. All in all, this means that the United States remains closer to being a country that requires exemptions than might be thought.

Another possible position on the exemption issue is that exemptions may be permissible if granted by the legislative branch. Australia appears to allow this possibility,[181] as does the Czech Republic.[182] Legislative tax exemption schemes are common,[183] as are schemes that exempt ritual slaughter from normal rules applied to slaughter of animals.[184] Still another prominent example is provisions involving conscientious objection to military service.[185] Newer sets of statutory exemptions are emerging with respect to health care,[186] insurance,[187] and discrimination issues.[188]

V. STATE FINANCIAL SUPPORT FOR RELIGION

State financial support of religion is one of the most significant issues when examining the relations between religion and the secular state. Assuming that in Western societies there is a dividing line between the legitimate competences of state and religion, it seems logical that public money should be used for secular purposes. The issue, then, consists in analyzing to what extent contemporary states perceive that funding of religion can be fit into their secular purposes.

174. Id. (quoting Bowen v. Roy, 476 U.S. 693, 708 (1986)).

175. This was confirmed in *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993).

176. The Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb et seq. (2007).

177. City of Boerne v. Flores, 521 U.S. 507 (1997).

178. Gonzales v. O Centro Espirito Beneficente Uniao Do Vegetal, 546 U.S. 418 (2006).

179. Religious Liberty and Charitable Donation Protection Act of 1998, Pub. L. No. 105-183, 112 Stat. 517 (1998) (amending 11 U.S.C. 544, 546, 548, 707, 1325 (1994)); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc et seq.; American Indian Religious Freedom Act Amendment of 1994, Pub. L. No. 103-344, 108 Stat. 3125 (1994) (codified at 42 U.S.C. § 1996a (2007)).

180. For further details, see W. Cole Durham, Jr. and Robert T. Smith, "Religion and the State in the United States at the Turn of the Twenty-First Century," in *Law and Justice, The Christian Law Review* (United Kingdom: The Edmund Plowden Trust, Number 162, 2009. The total count of states opting for heightened scrutiny reached 25 when Tennessee passed a state RFRA in early 2010.

181. Australia VI.

182. Czech Republic VII.

183. See, e.g., id.; Ireland VI.

184. See, e.g., Czech Republic VII.

185. Australia VI; Bulgaria XIV; Netherlands VII; Sweden VII; Ukraine VII.

186. Philippines IV.B.

187. Netherlands VII.

188. See, e.g., Australia VI; Netherlands VII.

There is a first important fact: virtually all States analyzed in the national rapports grant some type of financial support to religion – or, more precisely, to religious denominations or communities – either directly or indirectly, whatever their constitutional principles are with regard to religion. Even in countries with a remarkably anti-clerical history or with a specific prohibition of funding religion, the state provides indirect forms of financing, such as tax benefits or subsidies for welfare activities run by religious groups on equal conditions to other non-profit organizations, chaplaincies in public institutions, support of religious schools or funding for the preservation or restoration of worship places of historic or cultural value (e.g. Armenia, France, Ireland, Japan, Kazakhstan, Mexico, Philippines, Uruguay, Ukraine, Ireland, USA).[189]

State financing of religion is not always dependent on the constitutional or legal context that defines the State's general attitude towards religion and religious freedom. Logical internal coherence of State financing systems is not necessarily the rule. Very often, financial support is determined by historical circumstances, by social pressure or political negotiation. Thus, some States that in theory are separatist, such as France or the US, provide indirect financial support for religion more generously than states that define themselves as cooperationist (e.g. Spain). Another separationist state in theory, Turkey, pays for the salaries of the imams of Sunni Islam but not for the clergy of other religions.[190]

What this universal support of religion reveals is that states do not find any contradiction between their secular character and some sort of public funding of religion – not even those states that adopt a strict principle of separation or secularism as a constitutional sign of identity. At the same time, while the fundamental State's attitude towards religion does not necessarily determine whether there is or is not financial support for religion, or even whether the amount of financial support is greater or less, it may have an impact on the theoretical justification of funding of religion, on the criteria used to select the beneficiaries of State funding, and on the ways the State chooses to fund religion.

A. Justification of State Funding of Religion

The theoretical justification of state funding of religion in nations with an established church or with a specially protected church (e.g. England, Scotland, Finland, Greece) does not face particular problems with respect to the established churches. As these privileged churches are closely linked to the history, the sociological structure and sometimes the political organization of those nations, their public funding does not call for a particular justification but is assumed as something "natural", even when it is achieved through the general state budget. The challenge that these states have faced lately is rather how to reconcile their traditional ways of supporting national churches with the respect for the rights of people that are not members of those churches. Even if there is an established church, those who are not members should not be required to pay taxes for the support of a church that is not their own. More sophisticated jurisdictions have methods for channeling support so that tax payments do not flow from an adherent of one religion to support for a different religion, except where there is a normal, secular justification for the support in question.[191] Moreover, there are concerns with the implications of the principle of equality, which is gaining more and more momentum in constitutional and international law. In this context, a key issue is the extent to which other legally recognized religious denominations should be granted the same or at least similar benefits to those given to the national church.

In other states that adopt a constitutional or legal perspective that combines the principles of neutrality towards religions and cooperation with religion (e.g. Germany, Spain, Italy), the theoretical justification of financial support of religion turns on the idea

189. See, respectively, Armenia I & IV, France IV & VIII , Ireland VII, Japan VII, Kazakhstan VII, Mexico VII.B, Philippines IV.C, Uruguay IX, Ukraine VIII, Ireland IX.

190. See Turkey VIII.

191. See, e.g., Germany VIII.

that religion is a positive social factor and therefore deserves public funding as well as other social factors deemed positive, such as cultural, educational, humanitarian or health initiatives and activities (see, e.g., Colombia)[192]. The understanding of religion as a positive social factor, on the other hand, is not derived only from the fact that institutionalized religion is an expression of the exercise of a constitutional right but also from the fact that religious denominations actually make positive contributions to society, for instance through constituting source of morals for citizens or taking care of social services that otherwise should be provided by the state (thus saving public effort and resources). This does not mean that non-religious institutions or initiatives must be considered negative social factors or viewed as having an inferior status, for religion and other types of belief are normally put on the same level from the perspective of constitutional freedoms. Perhaps as a consequence of this balanced approach, the trend is to apply some of the typical methods of funding religion, especially tax benefits, to other non-profit activities or institutions. German Constitution, in particular, foresees that religious denominations and other organizations promoting a certain philosophy of life (*Weltanschauung*) can acquire the same legal and economic status in comparable circumstances.[193]

This justification of public financing of religion is applicable also to separationist states. Here the basic idea is that the secularity of the state does not require discrimination against religion where the support of secular objectives may have the incidental effect of benefiting religion. After all, the state has competence to address all sorts of social factors within its territory, and religion is, no doubt, another social factor – and indeed a very significant one. In addition, it is important to note that historical circumstances have played in some states a determining role in the structuring of economic aid to religion, particularly when confiscation of church property took place in the past. Thus, the 1905 law in France determined that churches built before that date would pass to be the property of the state – and the state would take care of them – but would be operated by the Catholic Church, which is a peculiar but efficient way to support the maintenance of many Catholic places of worship in that country.[194] In Eastern Europe, the massive confiscation of ecclesiastical property under communist regimes has led to a complex, and unfinished, process of restitution of property and economic compensation to the relevant churches.[195] In other countries, as Germany, Belgium, Spain or Colombia,[196] compensation for confiscation of ecclesiastical property in the 19th century played a role in granting economic aid to the major church in the past, and still plays a role in maintaining some forms of public funding for those churches.

B. Criteria Used to Grant Financial Support

The nature of the justification of state funding of religion influences the criteria used to select the beneficiaries and to distribute funding. Among these criteria, we can mention historical roots or social acceptance – which may be applied together with certain registration procedures or the negotiation of specific cooperation agreements with the state – and the promotion or compliance with certain moral or civic values. These criteria have been applied in various ways in different countries and sometimes have led to the recognition of different tiers of cooperation with religious denominations.

Thus, within Europe, some countries grant special "upper-tier" levels of state economic cooperation to those religions that demonstrate that they have deep roots in the territory. Germany, for instance, grants the status of public law corporation to those religious denominations, and organizations promoting philosophical views of life, that provide a guarantee of permanence; this status implies, among other things, the possibility

192. See Colombia VII.
193. See Germany III.
194. See France VIII.
195. See, for example, Serbia I, II & IV.
196. See Germany VIII, Belgium II.5.A, Spain VIII, Colombia VIII.

– upon request of the relevant religion – that the state authorities collect ecclesiastical taxes from their members on behalf of the church.[197] Switzerland, inspired by German law, has a system of recognition of churches under public law, at the cantonal level, that entails the possibility of levying taxes and of receiving state subsidies.[198] Portugal, also inspired by German law, recognizes the status of "rooted religion" to those religions that can give a "guarantee of durability", with the effect that they should in principle be granted the right to enter into a negotiation process that would conclude with the adoption of a specific cooperation agreement with the state.[199] In Spain, almost all expressions of state economic cooperation are reserved to those religions that have been recognized as having "well-known roots" (*notorio arraigo*) and have subsequently signed a cooperation agreement with the state authorities.[200] Something similar occurs in Italian law.[201] Belgium has a remarkable degree of economic cooperation with "recognized religions", a category that requires, among other criteria, a relatively high number of members and settlement in the country for a long period. Since 1993, also organizations providing "moral non-confessional assistance" can enjoy the same cooperation.[202] The Czech Republic has a specific category of registered religious communities, those "with special rights."This status is granted by the Ministry of Culture and entails a privileged position in different areas, including economic cooperation in the form of state subsidies for ministers' salaries.[203] Two different tiers of registered religions exist also in Serbia, with tax exemptions being reserved for those religions in the upper tier.[204]

On the other hand, a number of European countries (e.g. Czech Republic, Slovakia, Estonia, Latvia, Portugal[205]) and other countries outside of Europe (e.g. Mexico, Peru, Colombia[206]) link eligibility for certain tax benefits to ordinary registration of religious communities, but requirements for registration may vary considerably from one country to another.[207] Portugal is an example of easy registration[208] while the Slovak Republic, with a requirement of proving membership of 20,000 Slovak citizens, is the opposite. (It should be noted, however, that Slovakian law grants a religion, immediately after registration, the same rights and privileges enjoyed by the so-called "historical churches." The restrictiveness of Slovakian law means that it in effect has only an "upper tier" when it comes to recognizing religious organizations. This presents obvious problems for new or smaller groups).[209]

In a number of jurisdictions, the process of determining eligibility for financial or tax benefits is separated from the process of granting basic legal entity status to religious communities and groups. This makes it possible to have more relaxed criteria for granting legal entity status, while maintaining adequate controls to assure that financial benefits are not abused. Thus, in the United States, religious organizations can generally acquire legal entity status without difficulty. Legal entity status is granted at the state level, and while there are differences in the types of entities available in different states, the underlying principle is flexibility and respect for religious autonomy. A variety of forms are available, affording religious groups latitude in the types of legal structures they elect to use. Tax exempt status is determined separately by tax authorities. Even then, religious groups face less burdensome filing, reporting and auditing requirements out of

197. See Germany VIII.
198. See Switzerland VI.
199. See the Portuguese *Lei da Liberdade Religiosa* of 2001, art. 37.
200. See Spain VIII.
201. See Italy V.
202. See Belgium II.5.A.
203. See Czech Republic VIII.
204. See Serbia IV.B.
205. See Czech Republic VIII, Slovakia VII, Estonia VI, Latvia IV &VII, and the Portuguese *Lei da Liberdade Religiosa* of 2001, art. 32.
206. See Mexico IV, Peru VIII, Colombia VIII.
207. See supra Section II.D.
208. See the Portuguese *Lei da Liberdade Religiosa* of 2001, arts. 32-36.
209. See Slovakia VI.

respect for the religious freedom rights of religious organizations.[210] In Australia, any institution that fulfills the constitutional definition of religion is entitled to tax benefits.[211] In England and Wales,[212] as in Canada,[213] all religious groups that register as charities are entitled to some tax benefits, and the same rule applies to other groups pursuing "the promotion of religious or racial harmony or equality and diversity". However, while advancement of religion is a charitable purpose, in England and Wales it is necessary for a charity to show that it is for the public benefit to be registered and there is no longer an automatic presumption that a religion is for the public benefit. This has led, for example, to the rejection of the Church of Scientology's application for charitable status.[214] Disclosure of the assets of a charity and their use, and independent certification of accounts, may be requirements to be granted charitable status (Scotland[215]).

Compliance with certain principles or standards set by secular law is sometimes required as a condition to obtain public funding either of a religion in general or for particular activities – especially those aimed at providing social services – run by religious institutions. In Australia, for example, agencies that receive funding for the provision of some forms of welfare are contractually bound to comply fully with discrimination laws and religious schools must reach certain educational standards.[216] In Sweden, since 1998, the State may provide financial subsidies to a registered religious denomination only upon condition that the denomination contributes to the maintenance and development of fundamental values of the society; this includes the fight against all forms of racism and other discrimination, as well as against violence and brutality, contribution to equality between men and women, and the requirement that its members and staff are guided by ethical principles which correspond with the fundamental democratic values of the society.[217]

By and large, we can affirm that full implementation of equality is the main challenge in the application of criteria for the selection of state funding of religion in most countries. Greater equality, both between religious and non-religious institutions and between different religious institutions or communities, seems to be the prevailing trend even among states with an official or privileged church. When applied to religious institutions, equality means that the beneficiaries of public funding must be determined according to objective and non-discriminatory criteria, and not according to a state judgment on the doctrines or moral value or religious communities as such. In fact, equality is often duly implemented with respect to a large percentage of religious denominations – especially those accepted as historical or traditional in the country – and most states analyzed in national rapports do not have a discriminatory approach to public financing of religion. The real problem is rather a lack of sensitivity towards the situation and needs of residual minority groups, particularly when they lack historical roots or appear as "new" or "atypical" in the country. This situation tends to be even more frequent when direct funding is involved (Spain, Estonia[218]).

In addition, it is interesting to note that, with different profiles, major churches often enjoy privileged state funding over other religious communities in a number of countries, especially in those with state churches (e.g. Finland, Norway[219]), with especially recognized churches (e.g. Greece[220]) or with concordats with the Catholic Church (e.g.

210. For more background on the U.S. system, see Durham and Scharffs, supra n. 82 at 420-23, 472-73.
211. See Australia VIII.
212. See United Kingdom VII.
213. See Canada VI.
214. See United Kingdom VII.
215. See Scotland V.
216. Australia VIII.
217. See Sweden VIII.
218. See Spain VIII, Estonia VI.
219. See Finland VIII.
220. See Greece IV.D.

Spain, Italy, Portugal, Argentina, Colombia[221]). This fact has often been justified by reference to the historical role or social predominance of those churches and to the rule that unequal situations call for unequal treatment. In practice, the privileged status of major churches has often been positive for religious minorities, for the recognition of their "untouchable" status, together with contemporary concerns about the consequences of the equality principle, has contributed to raising the level of state economic cooperation with minority religions. This is true especially with respect to countries with major Christian churches (Spain, Italy, Portugal, Colombia, Sweden, Finland[222]); in predominantly Islamic countries the trend towards equality is not so visible or not existing at all (Sudan, Turkey[223]).

C. Methods for Providing State Financial Support of Religion

Typically the methods of state funding of religion have been divided into two categories: direct and indirect economic aid.

1. Direct Economic Aid

The first category comprises different channels through which states may provide directly economic resources to religious communities.

One of them consists in budgetary provisions in favor of one or several religions for the payment of clergy's salaries, for the construction and maintenance of places of worship or institutions for the education of the clergy or the formation of other religious structures etc. Separationist countries, such as the US, Kazakhstan, Ireland, Philippines or Uruguay,[224] usually prohibit this type of economic cooperation, but not all separationist countries do the same. Turkey, for instance, pays for the salaries of Sunni imams[225]; and France pays for the preservation of Catholic churches existing when the Law of 1905 was enacted. These structures are state property but most often are operated by the Catholic Church and destined for Catholic worship.[226] Countries with a close connection between the state and a national church use this system (Sweden, Finland, Greece[227]), as do some countries (e.g., Germany, Switzerland, Belgium[228]) that abide by the principle of neutrality but construe it to allow a high degree of cooperation with traditional churches. .

Some of these latter countries use in addition another form of economic aid to religion, which is granted to some religious communities with qualified legal status: the possibility of levying taxes or fees on their members and utilizing the assistance of state structures for collection of the resulting revenues (Germany, Switzerland, Sweden, Finland[229]).

In some Latin-American countries, budgetary provisions in favor of the Catholic Church have been kept (Colombia, Argentina, Peru; also, in Europe, and as a consequence of its peculiar constitutional system, Andorra[230]). In Europe there is an interesting tendency in some predominantly Catholic countries that have drawn on state budgets in the past to move towards a third method of direct financing of religion: the so-called "tax-assignment" or "tax check-off" system (Spain, Italy, Slovak Republic, Portugal, Hungary[231]). This system allows taxpayers to donate a percentage of their income tax to

221. See Spain VIII, Italy V, Argentina III, Colombia VIII. The same applies to other countries, as Andorra, in which the preferential treatment of the Catholic Church derives from the Constitution rather than from a Concordat (see Andorra VIII).

222. See Spain VIII, Italy V, Colombia VIII, Sweden VIII, Finland VIII.

223. See Sudan VIII and Turkey V & VIII.

224. See Kazakhstan VIII, Ireland VII, Uruguay IX, Philippines IV.C.

225. See Turkey VIII.

226. See France VIII.

227. See Sweden VIII, Greece IV.D, Finland VIII.

228. See Germany VIII, Switzerland VI, Belgium II.5.A.

229. See Germany VIII, Switzerland VI, Sweden VIII, Finland VIII.

230. See Colombia VIII, Argentina III, Peru VIII, Andorra VIII.

231. See Spain VIII, Italy V, Slovakia VII, Hungary VIII, Portuguese *Lei da Liberdade Religiosa* of 2001, art. 32.

the religious community of their choice among a list of religious communities that have been recognized a qualified legal status. The percentage of income tax that is at the disposal of taxpayers varies depending on the countries (from 0.5% in Portugal to 2% in Slovakia); the resulting amount of taxpayers' choices is given directly by the state, every year, to the relevant religious representatives. Note that both the tax levying systems and the tax assignment systems channel funds from believers to their own religious denomination, and that in both cases, the channeling is voluntary – taxpayers can opt in (tax assignment) or out (tax levying) of the respective systems.

2. Indirect Economic Aid

The most frequent channel to provide indirect economic aid to religious communities is through tax benefits, in particular the exemption from paying certain taxes that is granted to religious institutions and the privileged tax treatment that is recognized to donations made by individuals or corporations to religious institutions. Virtually every state provides one or both of these two varieties of tax benefits, although the system does not work identically in all countries. For instance, in some countries the control and record of eligible institutions for tax benefits is in the hands of tax authorities and religious communities are subject to essentially the same rules as other charities (this is frequent in common law countries, as England and Wales, USA or Australia[232]), while in other countries there is a specific registry of religious communities, normally run by the Ministry of Justice, Culture or Interior, that determines their eligibility for legal entity status, and tax benefits are linked to acquisition of that status.

In the latter countries, the legal requirements to register as a religious entity and qualify for tax benefits are diverse. For example, Portugal has a very flexible system but Slovakia has a very rigid system, as mentioned above; in Spain, registration of religious entities is very easy but does not give access to tax benefits, which are reserved for those religious denominations which have signed a formal cooperation agreement with the State (at the moment, only the Catholic Church, as well as three federations of Protestant, Jewish and Islamic communities).[233] In countries that keep a specific registry for religious groups there is a tendency to grant them the same tax benefits – no more, no less – recognized to other non-profit organizations involved in providing different social services.

In addition to tax benefits, there are a variety of channels that are widespread throughout the world and are normally considered as indirect public financing of religion. Among these we can mention state funding of religious schools or religious instruction in public schools (this is frequently the case in European and some Latin-American countries); state funding of religious hospitals or eldercare facilities; and payment of chaplaincies in military centers, hospitals or penitentiaries (this is the only public funding that the state may grant to religious denominations in Philippines[234]). Although the public money invested in these activities goes, no doubt, to religious institutions, it is doubtful that these channels of indirect cooperation can be put on the same level as tax benefits, for their main purpose is not to finance religion but rather to fund public services and to facilitate citizens' exercise of religious freedom, which is not the same thing.

Thus, when some states pay for the expenses of religious schools or hospitals, or the expenses generated by religious denominational instruction in public schools, they are not strictly financing religious denominations as such but rather paying for a public service run by non-state institutions and, in the case of religious instruction, responding to the legitimate choices of parents with respect to the religious or moral orientation of their children's education. Similarly, the purpose of chaplaincies in hospitals, military centers or penitentiaries is to make religious assistance possible in difficult circumstances in

232. See United Kingdom VII, Australia VIII.
233. See Spain VIII.
234. See Philippines IV.C.

which citizens do not have free access to the worship places or ministers of their choice. In other words, it is an active way of removing the barriers to the exercise of a fundamental freedom. We can add analogous observations with respect to subsidies sometimes granted in India for pilgrimages or public religious celebrations.[235] The same can be said with respect to the public money that is often invested in the preservation or restoration of religious places that are part of the historical heritage of a country – the financing of religion that it can produce is but a side effect of what is directly intended, i.e. the protection of cultural heritage, which is no doubt a legitimate competence, and a duty, of contemporary secular states.

D. Benefits and Problematic Aspects of State Financial Support of Religion

The comparative analysis of funding of religion in different countries shows a diversified panorama of systems. As in other aspects of the relation between state and religion, there is no uniformity; nor are there pronounced trends toward convergence, apart from efforts to respect choice, to avoid using coercive tax mechanisms to urge adherents of one tradition to support others, and to have some secular justification (sometimes in addition to religious justifications) for the support given. There is, however, a common element: virtually all the contemporary states understand the need to use public funds (or to waive public funds that would be raised but for exemptions) to assist with the financing of religion in one way or other. A variety or reasons move states to reach this conclusion. Among them: (1) the affirmation of broad (though not unlimited) state authority to address matters of social relevance, including many manifestations of religion; (2) an argument of comparative treatment with other non-profit activities and institutions(funding the latter and not funding religion would seem blatantly discriminatory; and (3) the conviction that financing religious institutions is a way of facilitating the exercise of a fundamental right, freedom of religion or belief, which constitutes a legitimate secular interest.

Behind these other arguments is a more basic practical intuition, that facilitating the financial operation of religious organizations is justifiable because on balance, organizations that foster religions and beliefs are a beneficial force in society. This idea, on the other hand, can be understood in a material sense – religious institutions provide social services that save much state activity, effort and money – or in a more spiritual sense – religions are a significant source of morals and the moral dimension of citizens is indispensable for a strong and well structured society.

It is then logical that secular states do not feel threatened in their secularity by the use of public money to finance religion, especially in a political landscape characterized globally by interventionist states, which control a large parte of individual lives and are accustomed to financing a variety of activities deemed to be part of welfare societies. Public funding of religion constitutes a challenge rather than a threat to the secular state – the challenge of finding the appropriate criteria for funding.

This leads us to the problematic aspects of public financing of religion, which co-exist with its indubitable benefits. Two aspects are particularly important and therefore need special attention, for they constitute a deviation from the use of public money for secular purposes. First, public financing can be used by the state to try to control religion and therefore can threaten the autonomy of religious communities, which is a substantial part of religious freedom. And second, state economic support of religion can be used in a discriminatory way, i.e. to favor some religions at the expense of others – which is, after all, another way to try to control religious life in society in addition to being an affront to the dignity of those that suffer the discrimination. In this respect, it is perhaps acceptable that historical or sociological considerations be acknowledged as social realities and be taken into account in justifying proportionate differences in state economic cooperation with different religious communities at least where such considerations are linked to objective considerations calling for differential treatment. Such justifications are often

235. See India VIII.

asserted in Europe and Latin America, noting that unequal situations call for unequal measures. But it is unacceptable to use the history of a country or the social influence of some major religions as justification in itself for denying access to exemptions or funding to other minority or less traditional groups as a method of control that impairs their ability to exercise the full range of their right to freedom of religion or belief on equal terms with other members of society.

VI. Civil Effects of Religious Acts

Assuming, again, that there is a dividing frontier between the legitimate competences of state and religion, it seems natural that, as in any frontier, there are blurred or overlapping areas. Thus,just as some measures legitimately adopted by state authorities are bound to have an impact on the life of some religious communities, there are some acts performed within religious communities that claim recognition by civil law. The way states approach this issue may be expressive of the extent to which they try to reach a balance between respect for religious pluralism and its consequences, on the one hand, and maintenance of the autonomy of state criteria and institutions that secularity demands, on the other hand. In the national rapports submitted, most issues concerning the effects of religious acts in state law are related to marriage and family, in particular the religious celebration of marriage and the decisions on the nullity or dissolution of marriages adopted by religious courts.

A. Religious Celebration of Marriage

Comparative law shows that there are essentially two types of systems: those who recognize some civil effects to the religious celebration of marriage and those who do not.

1. Monist systems

Some systems are normally labeled as "obligatory civil marriage jurisdictions", for state law accepts as valid only those marriages that are celebrated according to a civil ceremony, in the presence of a state official. These systems, with different profiles, are more or less widespread in Europe and Latin America. This is the situation, for example, of Germany, France, Belgium, Ireland, the Netherlands, Switzerland, Hungary, Bulgaria, Kazakhstan, Ukraine, Turkey, Mexico, Argentina and Uruguay[236]. Chile followed this system for many years but changed in 2004 to a peculiar pluralistic system that accepts now the possibility of celebrating a religious marriage with civil effects in the case of religions recognized as legal persons under public law; however, the law requires that the parties ratify their matrimonial consent at the time they register their marriage in the civil registry. This has discouraged the application of the new system and the practice continues to be the celebration of a civil marriage first and then a subsequent religious ceremony for those who wish it.

In their origin, many of the systems of obligatory civil marriage were introduced by states eager to affirm their power in the face of religion, often accompanied by an anti-religious nuance. But things have changed. With the passage of time these systems have come to be understood not as an attack to the social influence of religion, or more often of a particular major church, but rather as a practical way of keeping separate the respective competences of state and religions with respect to marriage, thus avoiding the possibility of jurisdictional conflicts. The original secularist orientation of these systems, however, can still be found in some countries that prohibit the celebration of a religious ceremony prior to the civil ceremony of marriage, and sometimes even make it a criminal offense, especially for the religious minister in charge (e.g. France, the Netherlands, Switzerland,

236. See Germany IX, France IV & IX, Belgium II.2.C, Ireland VIII, the Netherlands IX, Switzerland VIII, Hungary IX, Bulgaria XXIV, Kazakhstan IX, Ukraine IX, Turkey IX, Mexico III.A, Argentina IX and Uruguay X.

Bulgaria, Belgium, Uruguay; Germany abolished the prohibition of a previous religious marriage only in 2008[237]). The alleged justification of those prohibitions at the time they were imposed was the need to prevent that the parties, living in a social culture in which religious marriage had been the rule for centuries, could think that the religious ceremony was sufficient to be married with effects under civil law, for their mistake could lead to difficult legal issues derived both from family and succession law.[238] In any event, the maintenance of these prohibitions has been criticized in the contemporary context, when – at least in many Western countries – the substantive content of marriage under civil law has been notably reduced and there is a tendency to treat equally matrimonial unions and other forms of living together.

2. Pluralistic Systems

With respect to the systems that recognize civil effects of religious celebration of marriages, sometimes they were established in Western countries as a consequence of the initial open attitude of the state towards religious freedom and religious pluralism. The United States of America and Australia are archetypal examples[239] (this is also the case of Canada, although its evolution towards pluralism is more recent[240]). The state retains full jurisdiction over marriage but understands that it is not contrary to state secularity to permit citizens to get married through a religious ceremony instead of through a civil ceremony, so long as the state law keeps a certain control over the legal requirements that the parties must fulfill and over the licenses granted to religious ministers performing the ceremony. In reality, these states recognize only the validity of a civil marriage but allow for a plurality of ceremonies and give the parties the choice to get married in the presence of a religious, instead of a civil, official.

Other times civil recognition of religious marriages in the West came as a side effect of the privileged position enjoyed by major churches after states evolved towards a higher degree of protection of religious freedom and religious pluralism – the traditional (and sometimes exclusive) recognition of the marriages of major churches was extended later to other religious marriages, in application of the equality principle, with more or less openness. Many of these states have followed the system of the US, which is often called "Anglo-Saxon pluralistic system", for instance Sweden, Finland, England, Czech Republic, Slovakia, Philippines, Brazil;[241] also Estonia, where it is particularly clear that the civil law does not strictly recognize the validity of a religious marriage but just may authorize religious ministers to perform civil marriages.[242] In some predominantly Catholic countries the recognition of a plurality of religious marriages has been made compatible with a privileged recognition of marriages celebrated according to the rules of Catholic canon law (e.g. Italy, Spain, Colombia, Portugal[243]. Malta followed a system of exclusively religious – Catholic – marriage until 1975, then changed to obligatory civil marriage until 1993, when it adopted a pluralistic system with the prevalence of Roman Catholic marriage[244]). Some states have a dual system and only recognize the validity of the civil marriage and the religious marriage of the major church – which often was in earlier times the only valid marriage under the civil law (e.g. Greece, Armenia, Andorra[245]).

In some non-Western countries, pluralistic matrimonial systems are the consequence

237. See France IV, the Netherlands IX, Switzerland VIII, Bulgaria XXIV, Belgium II.2.C, Uruguay X, Germany IX.

238. See Belgium II.2.C.

239. See Australia VIII.

240. See Canada VII.

241. See Sweden IX, Finland IX, United Kingdom VIII, Czech Republic IX, Slovakia VIII, Philippines IV.D, Brazil VIII.

242. See Estonia VII.

243. See Italy VI, Spain IX, Colombia IX; Portuguese *Lei da Liberdade Religiosa* of 2001, art. 19 and Concordat between the Holy See and the Portuguese State, 18 May 2004, arts. 13-16.

244. See Malta IV.

245. See Greece IV.F, Armenia IV, Andorra IX.

of a diverse notion of marriage deeply embedded in their societies – and also a diverse notion of the role of religion in public life. In its dimension of a bond between persons, marriage is seen as essentially a religious, and not a secular, institution – as it was conceived in Europe throughout the Middle Ages. This is the case, among the national rapports submitted, of India, Israel and Sudan.[246] Civil marriage has been introduced in these countries as an alternative for people that do not wish to celebrate a religious marriage. Indeed, in Israel there is not yet civil marriage, and civil courts take care specially of the economic aspects or marriage – irrespective of its form of celebration – and issues related to custody of children. In India, respect for the religious rules of marriage extend to acceptance of polygamy for Muslim marriages but not for the rest; and some religious rules concerning economic or inheritance rights of spouses are also recognized by civil law, especially in the case of Hindus and Muslims. In Sudan, the influence of *sharia* has determined that all state family law is tailored to fit the needs and perspective of Muslims.

B. Nullity and Dissolution of Marriages

States that have adopted an obligatory civil marriage system and the so-called Anglo-Saxon pluralistic system affirm the exclusive jurisdiction of state courts on the nullity or dissolution of all marriages. The parties are normally free to go to their respective religious courts, out of scruples of conscience, to dissolve their marriages or to have them declared null and void, but these decisions are not recognized by civil law. However, in the United Kingdom – in addition to the residual jurisdiction still recognized to the courts of the Church of England and the Church of Scotland by virtue of their status as established churches[247] – state courts will sometimes acknowledge the existence of religious legal systems and jurisdictions as an aspect of the facts of the case; moreover, the Beth Din, whilst deciding cases before it on the basis of Jewish law, has for some time ensured that its hearings comply with the Arbitration Act 1996 to guarantee that its decisions are enforceable within the state courts.[248]

In Canada there is also an interesting interplay between state law and Jewish law. The Divorce Act prevents a spouse from exercising his right to divorce for so long as he refuses to remove a barrier to the religious dissolution of marriage. This is for the protection of women's rights, for a wife is not free to remarry under Jewish law if she does not receive the *get* (religious certificate of dissolution of marriage) from her husband. This provision was introduced after consultation with the Jewish community. The Supreme Court has held that promises made by the husband to consent to a *get* are enforceable contractual obligations.[249] Also in Canada, in 2003 there were attempts to introduce *sharia* courts in the province of Ontario to settle personal disputes involving Muslims related to inheritance and family matters, which would work as arbitration courts and whose decisions would be binding and enforceable in Ontario. Many voices expressed concerns about the consequences of these courts for women and children and about possible pressures on individuals on the part or religious communities. The initiative did not succeed. The parties can of course go voluntarily to religious courts but their decisions are not binding on Canadian law.[250]

The Canadian experiences perhaps reveal some hesitations of Western legal systems about how to deal, in the realm of family law, with the recognition of religious pluralism and its limits, and about how to define the dividing line between religious autonomy and state competence. This is especially true when it comes to non-Christian religions, for a number of Western countries have a long standing practice of recognition of ecclesiastical

246. See India VIII, Israel V & VIII, and Sudan VIII.

247. See United Kingdom VIII.

248. According to the United Kingdom national rapport (see VIII), "the Muslim Arbitration Tribunal has recently announced that it will do the same thing. Very little is known about the practices of either body."

249. See Canada IV & VII.A.

250. See Canada VII.B.

decisions on the termination of marriages by state law. With different nuances, the civil law of Italy, Spain, Portugal, Malta and Andorra, in Europe, as well as Colombia in Latin America, grant full effects and enforceability to the decisions of Roman Catholic courts on the nullity or dissolution of canonical marriages.[251] Sometimes, recognition of their effects is subject to an *exequatur* process in which civil courts verify that these decisions are compatible with state law (Italy, Spain, Portugal).

Among the non-Western countries studied by national rapports, and as a consequence of their conception of the interaction between religious marriage and civil law, India, Israel and Sudan recognize not only full effects but also full autonomy to religious jurisdictions with regard to disputes about termination of marriages, and civil courts have a residual character or take care of children's custody and the economic aspects of the disputes.[252] In India, religious laws may have a remarkable negative impact on the civil rights of the spouses, especially when one of them converts to another religion.[253]

C. Perspectives for the Future

In some Eastern countries marriage continues to be an essentially religious institution that tends to function with autonomy from the State; this is especially true in those countries in which the majority of the population belong to religions that have their own legal rules and have a more or less well defined structure of courts to apply them. State laws tend to respect and not to interfere with the status quo of religious marriage unless it is deemed necessary for the protection of the rights of the parties in the marriage or the rights of their children.

On the contrary, in Europe and America there seems to be a tendency towards the reaffirmation of the state competence on marriage and family issues. State law may accept the validity of a religious ceremony of marriage or may not accept it at all. The latter cases seem more and more difficult to understand, in a context often dominated by an increasing religious pluralism in society and by a civil notion of marriage that have undergone profound changes since the times that civil marriage was created as a mirror image of religious marriage (indeed, the change is so pronounced that some scholars even tend to take one more step forward in the same direction and propose an "à la carte marriage" as the ideal in civil law). On the other hand, the opposite model, the recognition of religious ceremonies as valid forms of celebrating a marriage, is after all not so opposite, for religious ceremonies of marriage tend to be conceived precisely and exclusively as rites that can be chosen as alternative paths of access to a civil marriage, i.e. to a marriage that is otherwise governed by the civil law and the state courts.

Certainly, there are systems like those of Italy, Spain or Colombia, in which Catholic marriage is accepted by the civil law not only as a ceremony but as a complex religious institution with its own law and courts. (Note, however, that in most of those systems civil marriage is conceived as the prevailing model from a legal perspective, and hence there is the degree of control exercised by state courts over the decisions of ecclesiastical courts). But these systems – which are the consequence of concordats between some states and the Holy See – seem to be, at present, the exceptions that confirm the rule. Whether they have any future or not is still to be seen. These systems were supposed to be in frank retrocession or at least were not likely to proliferate, not even among Catholic countries.

However, experiences like the attempt to establish arbitration *sharia* courts in Ontario, mentioned above, and similar initiatives launched to the public arena in the United Kingdom, reveal that some Western countries may understand that a broader recognition of religious marriage could be a way of enhancing and protecting religious pluralism, without lessening the secular character of the state. These new developments seem to assume that it is important to afford better satisfaction of some religious communities that have an increasing presence in the West – in particular Muslim

251. See Italy VI, Spain IX, Malta IV, Andorra IX, Colombia IX, and Concordat between the Holy See and the Portuguese State, 18 May 2004, art. 16.

252. See India VIII, Israel V & VIII, and Sudan VIII.

253. See India VIII.

communities – and have a different notion of the role of religion in public life. If this happens, the consequence would be a predictable diversification of matrimonial laws and statuses in a given country. The advantages of this from the perspective of religious pluralism are evident. But also evident are its disadvantages from the perspective of the protection of rights of individuals, which could suffer strong pressures from their respective religious communities. The case of India is very illustrative of the risks of a pluralistic matrimonial system when religious laws are allowed to regulate aspects of the lives of the spouses that – at least from a Western perspective – form part of their civil rights and therefore of the competences of the secular state. Because of this, the adoption of measures that can erode the line of separation between the respective competences of the state and the religious communities with regard to marriage constitute a serious step that should not be taken trivially, for it could entail in practice that secular states partly renounce their role as guarantors of rights.

VII. Religious Education of The Youth

The school system may be – and often is – a significant instrument for the religious education of the youth and therefore constitutes an important subject for analysis from the perspective of the relation between religion and the secular state. There are two main topics that we should face here. One is the functioning and legal status of private schools with a religious ethos, for they are an effective way for religious communities to disseminate their doctrines and educate their younger members in their moral and religious values; indeed some religious denominations, such as the Catholic Church, have traditionally showed a strong interest in ensuring the freedom of religious institutions to operate their own schools. The other topic is whether religious instruction should be provided in public schools, and if so, whether this should be conducted as denominational or non-denominational religious instruction. The diverse approaches of states to these two areas reveal more generally their attitude towards the role of religion in society vis-à-vis the state – and also towards who is ultimately responsible for the education of the youth: the society itself or state authorities.

A. Private Schools

Private schools, including those with a religious ethos and run by religious institutions, are permitted to operate in almost all states, although their actual significance within the educational landscape varies considerably depending on the countries. In some countries the presence of religious schools is very important (e.g. the Netherlands, where approximately two-thirds of the schools are in private hands, almost always with a religious ethos[254]). Indeed, the religious presence can be even overwhelming, as is the case in Ireland, where the vast majority of schools are Catholic, controlled by ecclesiastical institutions, and integrated within the state system.[255] In other countries the percentage of private schools is substantial (e.g. Australia or Spain, where they cover approximately one-third of schools[256]), and in some others it is insignificant – e.g., Finland or Switzerland, where almost all schools are public and private schools are looked at with a certain distrust by many people, considering that they are not as effective for the social integration of students.[257] Some former communist countries have a predominantly public conception of the school system. Thus, Ukraine permits "spiritual educational centers" – which in practice are run by churches – and grants them some tax benefits, but studies in these centers are not officially approved by the state.[258] In Kazakhstan, there is the theoretical possibility of establishing private schools but the government's

254. See Netherlands X.
255. See Ireland IX.
256. See Australia X, Spain X.
257. See Finland X, Switzerland III & IV.
258. See Ukraine X.

administrative restrictions determine that, in practice, all schools are public and state controlled.[259] The opposite occurs in Turkey, where the system should be in theory almost entirely secular and state controlled, but in practice many schools are run by Muslim groups (religious minorities find doing so much more difficult).[260]

Very often the state recognition – and funding – of private schools is subject to compliance with some minimum educational standards aimed at guaranteeing that education received in private and public schools have a comparable quality.[261] Sometimes these standards include also respect for or promotion of certain civic values that are considered particularly important (Sweden[262]). In any event, the big question with regard to private education – especially religious schools – is the funding granted by the state.

In some countries, funding of private schools has been typically understood as incompatible with the separation of State and religion (e.g. USA, Kazakhstan[263]). The assumption is that because such institutions tend to be pervasively sectarian in practice, any substantial support would inevitably support the religious instruction that they often provide to their students. In the USA, however, the Supreme Court has allowed state funding for other expenses, such as transportation of students to parochial schools (*Everson*, 1947[264]) and even state vouchers given by local authorities to parents to cover the tuition of their children in public or private schools, when the public funding is open to all and is not aimed at supporting a particular sectarian type of school (*Zelman*, 2002[265]). In some countries, such as Australia, the state has traditionally granted generous funding for private religious schools. However, this issue has recently become contentious, and there is an ongoing debate about whether it is compatible with state neutrality and about which criteria should be used to assure that public funding does not discriminate against minorities.[266]

In contrast, many European countries, whatever their constitutional system of church-state relations is, do not find that public funding of private schools is at all incompatible with the secular nature of the state. This attitude is grounded, on the one hand, on the right of parents to have their children educated in accordance with their religious or philosophical convictions; and, on the other hand, on the understanding that education is a public service that the state must control but can be performed by state institutions or by private institutions (religious or not). The result has been a widespread system of state funding of private schools in Europe, normally generous and sometimes on an equal footing with public schools (e.g. the Netherlands, Belgium, Sweden, Slovakia, and also Czech Republic in the case of church schools[267]). In some cases, private religious schools have been integrated within the state system and largely funded with public money, as in Ireland or the United Kingdom,[268] but churches have been allowed to keep a relatively high degree of control over the operation of these schools.

In large parts of Europe, the real issue under discussion often has been not whether private religious schools should be publicly funded or not – this is taken for granted – but rather what the conditions for eligibility for public funding should be. The focus in these debates has been on guaranteeing minimum quality standards, on preventing private schools from becoming in practice ghettos that isolate certain students from the rest of society, and on prohibiting discriminatory policies by school authorities on the ground of religion or belief. These issues have also been discussed outside of Europe, with a variety of solutions. Thus, for instance, with respect to student admission policies, France and

259. See Kazakhstan X.

260. See Turkey X.

261. See, for instance, Germany X and Australia X. In Japan, the issue of the educational quality of private schools does not seem to be an issue, for some religious schools enjoy a predominant prestige in the country (see Japan X).

262. See Sweden X.

263. See Kazakhstan X, and USA (McCauliff), Introduction.

264. See USA (McCauliff), Introduction.

265. See USA (McCauliff), Shifting attitudes.

266. See Australia X.

267. See Netherlands X, Belgium II.5.B, Sweden X, Slovakia IX and Czech Republic X.

268. See Ireland IX and United Kingdom IX.

India forbid schools funded with public money from rejecting students on the ground of religion.[269] In New Zealand private schools funded by the state must reserve 5% of their admissions for students not adhering to the school's religious ethos.[270] The Netherlands have adopted a solution more favorable to the school ethos, and religious schools can choose their own policies of admission as far as they are applied in a consistent manner.[271] In Ireland, this issue is controversial, and the traditional respect for the policies followed by Catholic schools in the admission of students and the hiring of teachers is under revision, for many consider it to be discriminatory in practice.[272]

By and large, we can affirm that, with a few exceptions, the trend is to see private schools – including those with a religious ethos – as a "normal" part of the educational landscape of the country. Whether they should be funded with public money or not, it is a different question, whose answer sometimes depends on two coordinates: on the one hand, the understanding of state neutrality in religious matters; and on the other hand, the notion of which is the state role in education and also the very notion of public service. In general, an inclusive concept of state neutrality, together with a reliance on spontaneous societal channels to intervene in the management of education and other public services, tends to favor liberal funding of private schools, but there are significant exceptions. For instance, France does not have particular problems with the funding of secular aspects of education in religious schools,[273] while the United States does. In both cases, their attitude is probably linked to their respective political histories: church-state relations in France along the 19th century and the 20th century interpretation of the establishment clause by the Supreme Court in the US. Once again, history proves to be crucial to understand many of the solutions – and apparent inconsistencies – adopted by different states in their relations with religion.

B. Religious Instruction in Public School

1. Denominational Religious Instruction

In many European countries there is denominational religious instruction in public schools. France is one of the few exceptions.[274] This is seen as a natural cooperation of the state with churches and, even more important, as a guarantee of the parents' rights to determine the religious and moral education of their children (Finland stresses also that it is a right of the students[275]). For these reasons, the state recognizes the autonomy of the relevant churches to select the teachers that are qualified for this type of education and often pays for the expenses this generates. Significant is the example of Ireland, where the government and the courts have found public funding of religious education – and of Catholic chaplaincies in schools – to be fully compatible with the constitutional prohibition of endowment of religion.[276] Another common element is that denominational religious instruction is normally understood as voluntary, and must be requested by the students or their parents. Some countries, such as Latvia, specifically require a written application.[277] Ireland, where most schools are in the hands of Catholic institutions, has clearly affirmed the students' right to refuse religious instruction, although it does not seem easy to be put into practice.[278] Exceptions to the voluntary character of

269. See France X and India X.
270. See New Zealand IV.
271. See Netherlands X.
272. See Ireland IX.
273. See France VIII.
274. See France X. However, there is religious confessional instruction organized by public authorities in the region of Alsace-Moselle, which did not join the separation system after it was returned to France in 1918. See France VI.
275. See Finland X.
276. See Ireland IX.
277. See Latvia VIII.
278. See Ireland IX.

denominational religion courses in Europe are Greece, where Orthodox religious instruction is provided as a compulsory subject, although non-Orthodox students are exempted;[279] and Russia, where this matter is decentralized but many regions have imposed mandatory Orthodox religious instruction in public schools (according to the Russian national rapport, approximately 70% of students in public schools receive Orthodox religious instruction).[280]

Out of these common features, there are a variety of systems in Europe. For instance, some countries, such as Hungary, do not include religious instruction as part of the school curriculum,[281] and in others, such as the Netherlands, its inclusion in the curriculum or not depends on local authorities.[282] Finland, although including these courses in the curriculum, emphasizes the need to distinguish religious instruction from religious practices or observance.[283] Some countries not only include confessional religious instruction in school curricula but also make it mandatory for all schools to offer some kind of religious instruction, although the students – or their parents – are free to choose it or to take alternative courses on secular ethics, civil education or alike (e.g. Germany, Belgium, Slovakia, Serbia[284]). In some countries that have a concordat with the Holy See, schools are obliged to provide Catholic instruction, though students are always free to take it or not. The offering of similar courses for other qualified religions is not mandated but only possible, upon request of a minimum number of students (e.g. Italy, Spain, Czech Republic, Malta[285]).

Out of Europe the panorama is more diverse and, as one could expect, the states' attitudes towards religious instruction are heavily influenced by their respective political or judicial history. For instance, the United States is well known for excluding confessional religious education from public schools, considering it incompatible with the judicial interpretation of the constitutional establishment clause – although this does not preclude the possibility of controversies with respect to mandatory subjects with a potential doctrinal dimension, as the debate about creationism and evolutionism in public schools demonstrates.[286] In Latin America religious denominational education is excluded from public schools in those countries that experienced anti-clerical political shifts at certain points in their histories. This is the case in Mexico, Uruguay or Argentina.[287] In the latter country, religious instruction was eliminated long ago by General Peron at the national level, but it has been later reintroduced by some provinces. In other countries where institutional relations with the Catholic Church have a stronger basis, a system similar to that of Germany or Spain is followed (e.g. Colombia, Chile or Peru[288]). In Africa, Muslim education is mandatory in Northern Sudan, even in Christian schools.[289] In Asia, Japan and South Korea[290] exclude confessional education from public schools. In South Korea, where students are not free to choose their school but are assigned one by draw, the courts have declared unconstitutional the expulsion of a student from a Christian school who openly criticized religious instruction.[291] India prohibits denominational religious education when schools are totally funded by the state but not when they are partly or not funded at all, so long as the free consent of students to this type of education is guaranteed.[292] New Zealand permits religious instruction in the school premises but out

279. See Greece IV.B.
280. See Russia X.
281. See Hungry XI.
282. See Netherlands X.
283. See Finland X.
284. See Germany X, Belgium II.5.B.d, Slovakia IX, Serbia II & IV.A.
285. See Italy VII, Spain X, Czech Republic X, Malta III.
286. See United States 2 (Shreve).
287. See Mexico II, Uruguay XI and Argentina X.
288. See Colombia X, Chile IV.4 and Peru X.
289. See Sudan X.
290. See Japan X and South Korea III.
291. See South Korea IV.
292. See India X.

of the school curriculum and teaching hours, without economic aid from the state.[293] In some other countries, as diverse as Switzerland, Brazil, Australia and Canada, this matter has long been decentralized and depends on the decision of regional or local authorities, although the tendency is to allow some kind of religious instruction upon request of the parents.[294]

2. Non-Denominational Religious Education

In the last decades a different type of religious education has been gaining momentum in various countries: a neutral, non-denominational teaching that is normally conceived as an instrument to foster respect for and understanding of religious pluralism – a need that is increasingly felt in many contemporary societies.

A number of countries have introduced, or are in the process of introducing this type of non-confessional teaching about religions with different profiles and often not in competition, but in parallel, with confessional religious instruction. This is the case of Sweden and the Netherlands, for example, where this teaching is mandatory and the law provides that great care should be taken to ensure its real neutrality and objectivity.[295] In Switzerland and Australia[296] the tendency is the same, although the decision corresponds to the regional authorities and not always the subject has been imposed as compulsory for students. In some provinces of Canada[297] this education has been introduced as a mandatory subject and has been declared constitutional by the courts as far as it meets certain specific requirements that guarantee its neutrality. In Estonia the subject has been included in the school curricula as an elective. There have been attempts to make it mandatory but there is the fear that it could lead in practice to the imposition of predominantly Christian views.[298] This is the situation in Ukraine, where there is religious teaching that is neither strictly sectarian nor entirely neutral, for it is focused on the basics of Christian values; however, students are entitled to opt out.[299] Kazakhstan is currently studying the way to introduce this teaching in an appropriate way.[300] Japan and South Korea,[301] strongly opposed to sectarian religious instruction in public schools, find neutral teaching about religion not objectionable. Turkey imposes this subject as compulsory in all public schools, and opt-outs are possible only for non-Muslim students (Muslims constituting the vast majority).[302] In practice, however, the teaching is not neutral and there is a strong emphasis on the doctrines of Sunni Islam to the detriment of other religions. For this reason, the European Court of Human Rights declared this teaching contrary to religious freedom since opt-outs on religious grounds are not permitted.[303]

3. Practical Problems in the Implementation of Religious Education

The main problems of non-denominational religious education are quite clear: it requires a high degree of academic and moral qualification in teachers; and in addition, objectively, neutrality is very difficult to achieve in this particularly sensitive area. An obvious risk is that teaching about religion that in theory is non-confessional becomes in practice indoctrination in a certain religion or non-religious worldview, or is used by governments for that purpose. This explains why international organizations are

293. See New Zealand VI.
294. See Switzerland IV, Brazil V, Australia X and Canada VIII.b.
295. See Sweden X and Netherlands X.
296. See Switzerland IV and Australia X.
297. See Canada 8.b.
298. See Estonia VIII. This possibility was examined by the European Court of Human Rights in *Folgerø et al. v. Norway*, 29 June 2007.
299. See Ukraine X.
300. See Kazakhstan X.
301. See Japan X and South Korea III.
302. See Turkey X.
303. *Zengin v. Turkey*, 9 October 2007.

promoting different initiatives that serve as orientation to states interested in this type of education.[304]

Denominational religious education, from the perspective of the secular state, has generated controversies around three particular points.

One is derived from the fact that, in some countries, schools must offer confessional religion courses but, as the acceptance of this teaching is voluntary for students, those who decide not to take the courses are bound to choose alternative subjects such as secular ethics, civic education, comparative and neutral study of religions, or the like. This approach has been criticized from different angles. Some have argued that including sectarian religious teaching in the school curriculum forces unnecessarily non-religious students to take some alternative courses that otherwise they would not need. Other times the reasoning has gone in the opposite direction: secular ethics or non-confessional study of religions are important school subjects that should not be just an alternative to confessional religious instruction. On the contrary, they should be mandatory for all students and sectarian religious course should not be a cause for exemption. It has also been argued that the need to opt out may imply in practice a certain stigmatization of students not attending religion courses (this is the reason why Canadian courts have declared Christian instruction in public schools unconstitutional in Ontario, despite the fact that parents were given the possibility of opting out[305]). One way or other, the aim of these arguments seems to be the same: to take denominational religious education out of school curricula (and out of state funding), which would certainly be contrary to the long established tradition of many countries.

A second controversial point is the guarantee of equal rights to religious minorities. Usually, the organization of religion courses is attentive to the students that are members of major or at least traditional religions, while minority religions are often neglected. This is, no doubt, an important issue, as is everything related to the implementation of the principle of equality in the area of fundamental rights. However, the predictable difficulties to extend this system of religious instruction to religious minorities have been sometimes used to undermine the legitimacy of the system as applied to religious majorities and to propose its elimination. This is perhaps more difficult to understand, especially considering that, as indicated above, religion courses are designed not only to satisfy the wishes of religious communities but also to ensure the fundamental right of parents to decide on the religious education of their children. The proportionate extension to minorities of the benefits that many states grant to major religions is one of the challenges that secular state must face, and the solution does not seem to be their elimination for all. There are of course practical or even technical difficulties in the implementation of equality, but often it is just a matter of political will.

The third controversial point generated by denominational religious instruction has been the selection of the persons that are qualified to teach religion courses, especially in those countries where teachers are hired and paid by the state. Typically the relevant religious communities are recognized as having the competence to assess the qualification of teachers. Normally the religious authorities grant permits to a number of persons, according to specific and well-described academic criteria, and then schools may choose among them. In Spain some problems have been raised when teachers have had their ecclesiastical permit withdrawn not because of lack of academic qualification but because they engaged in public behavior contrary to the moral principles of the Catholic Church. The Constitutional Court has supported the position of the Catholic bishops, holding that only they are competent to say who can teach religion on behalf of the Catholic Church and recognizing that publicly known immoral conduct may have a negative educational impact on students, which only the ecclesiastical authorities are in a position to

304. See, for instance, the *Toledo Guiding Principles on Teaching about Religions and Beliefs*, prepared by the OSCE/ODIHR Advisory Council of Experts on Freedom of Religion or Belief, Warsaw 2007, where the difficulties of this type of religious education, together with detailed recommendations to make it efficient and actually neutral, are well explained. The text is available in http://www.osce.org/publications/odihr/2007/11/28314_993_en.pdf

305. See Canada VIII B..

evaluate.[306] Certainly, it seems difficult to see how to take a different stance without impairing religious autonomy, particularly in the case of churches with a clear hierarchical structure.

VIII. Religious Symbols in Public Places

One of the major areas where the difference between secularity and secularism has been evident in various legal systems around the world is in attitudes toward religious symbols in public space. Key debates have focused on the wearing of attire that has religious significance, the display of religious symbols such as the crucifix in schools and other public buildings, and the permissibility of symbolic displays and monuments in public settings.

A. Religious Attire

Probably the most controversial of these issues has centered on the right to wear Islamic head coverings. A challenge to Turkish regulations banning headscarves in public universities ultimately reached the European Court of Human Rights, where a grand chamber in a controversial decision held that the ban did not violate the right to freedom of religion or belief.[307] A subsequent case sustained expulsion of a Muslim girl from a French public school for failing to participate in physical education classes without a headscarf.[308] The Court's judgments in these cases determined that the relevant states had not exceeded their margin of appreciation, in part because of the importance of secularism (*laïcité*) in the legal systems of Turkey and France. Earlier, in an inadmissibility decision, the European Court of Human Rights rejected a claim by a Muslim kindergarten teacher that a rule prohibiting her from wearing a headscarf on the job violated her freedom of religion. There the Court held that Switzerland enjoyed a margin of appreciation that allowed a state to set restrictions on the way a public school teacher represented the neutral state.

While this issue was significant in some of the countries covered by national reports,[309] it was not a major issue for most. Several indicated that their citizens were free to wear religious symbols if they so desired.[310] A number of countries noted that both students and teachers may wear religious garb.[311] A number noted that restrictions in this area would be viewed as measures inconsistent with religious freedom.[312] The Czech reporter mentioned that in fact, Muslim headscarves were no different than head coverings routinely worn by Czech women in the countryside.[313] The Israel report indicated that his country had no restrictions in this area, and that religious head coverings were a "normal part of the landscape."[314] The Japanese report indicated there were no major controversies in this area, and that while some issues could arise since many schools require uniforms, most experts thought it would not violate Japanese constitutional principles calling for separation of religion and state to allow exceptions to uniform policy that could accommodate religious attire issues.[315] The Netherlands reporter

306. See Spain X. See also the Constitutional Court decisions 38/2007, of 15 February 2007; and 80/2007, of 19 April 2007.

307. Şahin v. Turkey (ECtHR, App. No. 44774/98 (Grand Chamber, 10 November 2005).

308. Dogru v. France (ECtHR, App No. 27058//05 4 December 2008).

309. Not surprisingly, this was a significant issue covered by the French and Turkish reports. France X; Turkey XI. It was also a concern in some other countries. See, e.g., Belgium IV.

310. Andorra XI; Chile IV.C; Colombia XI; Estonia IX; Peru X; Philippines XI; Russia XI; Ukraine XI; Uruguay XII. The same would be true in the United States today, although there have been cases striking down older laws targeting Catholic nuns and priests that imposed constraints on the wearing of religious garb in school settings.

311. Australia X; Italy VIII; Netherlands XVI.

312. Czech Republic XI; Sweden XI.

313. Czech Republic XI.

314. Israel X.

315. Japan XI.

commented that "Dutch neutrality in the public domain is not interpreted such that the public domain should be void of any religious expression. On the contrary, the plurality of religious expressions is respected."[316] In a similar vein, the Italian report indicated that *laicità* as understood in Italy allows wearing of religious symbols in schools, hospitals, public offices and by public employees, and that Italy respects the signs and symbols of all religions.[317]

In the United Kingdom there is no general legislation on the issue, but schools and others may self-regulate. This may take the form of requiring students to wear a uniform. In one case a student's challenge to a uniform policy that forbade her wearing a hijab was rejected on the grounds that she could have chosen a school that would have allowed this clothing and that the school's uniform policy was proportionate to achieving its educational purposes.[318] In another, a uniform requirement that did not allow a pupil to wear a "purity ring" was sustained on the grounds that there were other ways she could manifest her religious beliefs and the uniform fostered school identity.[319] These cases reflect a pattern of deference to local governing bodies in dealing with school clothing issues.

A number of other countries respect the right of individuals to wear religious symbols, but emphasize that there are limits. Thus, the Finnish national report indicated that individuals are free to wear religious symbols except where doing so might constitute a hazard to safety or might injure the religious feelings of others.[320] Similarly, Sweden has no rules against wearing religious garb in public, and indeed, doing so would be protected by religious freedom norms under Swedish law. However, in educational settings, restrictions may be imposed where necessary to avert threats to the order and security of the school, or where allowing the clothing would impair the pedagogic mission of the school.[321] In some countries, such limitations are imposed without any clear authorizing legislation. In Kazakhstan, for example, there is no law authorizing limits on wearing of religious symbols and attire, but the Minister of Education and Science has declared that wearing religious clothing violates the principles of school system secularity.[322]

The view that there need to be some limits on permissible religious attire would no doubt be conceded by those who did not mention limitations. The question is how tightly or narrowly such restrictions should be drawn. The difficult issue raised in many of the reports is the burqa – the total body covering with at most eye-slots for visibility. The Italian report asserts that banning the burqa from all public spaces, as some Italian legislation has proposed, would be inconsistent with human rights. It recognizes, however, that there could be limitations on religious attire if it is not freely chosen or is detrimental to human dignity.[323] The report indicates that the only limit would involve symbols that cover the face, because this would impede the person's recognition and would make it difficult to establish relations with others.[324] The Chilean report states that identity regulations may restrict headcoverings, except if they are part of ethnic or religious requirements.[325] But the report does not specify whether religious requirements as total as the burqa would be exempted. The Estonian report indicates that a person may wear a head covering for identity documents. However, the face from the mandible to the upper forehead must be uncovered. This applies both to Muslims and to Catholic nuns.

316. Netherlands XVI.

317. Italy VIII.

318. R (on the application of Begum) v. Head Teacher and Governors of Denbigh High School, [2007] 1 A.C. 100.

319. R (on the application of Playfoot) v. Millais School Governing Body [2007] HRLR 34.

320. Finland IX.

321. Sweden XI.

322. Kazakhstan XI. This is problematic from the standpoint of international human rights norms, which insist that limitations on freedom of religion or belief be "prescribed by law." See, e.g., International Covenant on Civil and Political Rights, art. 18(3); European Convention of Human Rights, art. 9(2). Interestingly, the Turkish report notes that there was no formal legislation authorizing the headscarf ban there. Turkey III.A.3.

323. Italy VIII.

324. Italy VIII.

325. Chile IV.C.

A number of other national reports suggest that there may be objective concerns that would justify regulation of wearing the burqa.[326]

There a number of countries that have had very restrictive and frankly anti-clerical rules on wearing religious attire. To appreciate the background of these constraints in Mexico, it is important to see these in the broader context of Mexican history, as outlined in the Mexican national report.[327] Mexico adopted very harsh rules in the years following establishment of a secular state under its 1857 constitution. Laws elected within the following years nationalized church property (1859), secularized hospitals and charitable institutions (1863), abolished women's religious communities and gave nuns a matter of days to leave convents (1863), passed a "Religious Freedom Act" which forbade celebration of "solemn acts of worship without permission granted by the authority in each case" (1860), substituted civil for religious marriage (1859), and passed a series of Reform Laws which consolidated the separation of church and state(1873).[328] These Reform Laws included prohibition of the use of cassocks, habits and religious badges in the streets. The 1917 constitution, which is still in force, was anticlerical and anti-religious, and continued enforcement of the Reform Laws. Constraints on religion continued to multiply, leading to a decision of the Mexican Episcopate on July 31, 1926 to suspend worship throughout the Republic. Subsequent refusal of the national Congress to repeal anti-religious laws led to armed resistance known as the *Cristiada.*[329] This conflict came to an end with "agreements" between church and state reached outside the law which resulted in a "*modus vivende*" including the relative non-application of many of the anti-clerical rules.[330] Constitutional reform of many of the anti-clerical laws was not formalized until 1992, when constitutional and legal changes were made that maintained state secularism and the separation of church and state, but strengthened religious freedom and equality of churches before the law.[331] It is against this highly polarized background that one needs to understand the Mexican national report's brief statement on religious attire: "To this day, due to a custom inherited from the [1873] *Reform Laws*, the use of religious clothes is limited to inside the temples or houses inhabited by religious ministers."[332]

The history in Turkey is similar. Ataturk's reforms following the end of the Ottoman Empire included Law No. 671 on the Wearing of Hats, which prohibited "the use of traditional and religious headwear such as the *fez* and *turban* by individuals."[333] This was adopted in 1925 "in order to modernize the society and to breach the relation with the past."[334] Subsequently, in 1934, Law No. 2596 was adopted on the Prohibition on the Wearing of Certain Garments.[335] Both are protected and made effectively unamendable by Article 174 of the constitution, which protects the reform laws that defined the essence of Turkish secularism. While the Law on Hats has ceased to have operational significance,[336] the Law on the Prohibition on Wearing of Certain Garments is still in force and is followed in practice. It provides that clergy of any denomination cannot wear religious clothing outside of places of worship and rituals.[337] This law was recently found to violate the religious freedom provision of the European Convention on Human Rights as applied to a religious group known as the *Aczimendi tarikatÿ.*[338] The European Court held that while it was understood how the clothing laws furthered Turkish secularism, as applied to

326. See, e.g., Netherlands XVI.
327. Mexico III.A.
328. Id.
329. Id.
330. Id.
331. Mexico III.B.
332. Mexico V.
333. Turkey XI.A.1.
334. Id.
335. Id.
336. Id.
337. Id.
338. Ahmet Arslan v. Turkey (ECtHR, App. No. 41135/98, 23 February 2010).

the applicants in a public setting open to all, the wearing of traditional clothing in the streets following a religious ceremony was at most a curiosity that posed no threat to public order or the rights of others. The Court distinguished this case from the earlier case involving a public university ban on headscarves on the ground that the latter involved the regulation of religious symbols in public establishments, "where religious neutrality might take precedence over the right to manifest one's religion."[339]

The Turkish national report provides a fairly detailed picture of the differential headscarf bans in primary and secondary schools (where detailed descriptions are given of uniforms for pupils and where the wearing or use of any religious symbol during educational process is banned).[340] It also provides useful background on the Turkish ban of Islamic head coverings in the university setting. It highlights the fact that the ban was a response to proliferating use of religious symbols by students that "were not only perceived as the exercise of the freedom of religion but also were deemed to represent the depening organization of political Islam."[341] The national report also describes the 2008 effort to propose legislation repealing the ban and the ultimate rejection of this attempt by the Turkish Constitutional Court.[342] The Turkish report also catalogs constraints on wearing of religious symbols by those who are in public employment.

In Sudan, not surprisingly, there is no ban on wearing religious garb, particularly in the northern part of the country that is predominantly Muslim. However, this apparent liberty is linked to significant legal restraints. Article 152 of the national penal code criminalizes "obscene and indecent acts," providing that "[w]hoever does in a public place an indecent act or an act contrary to public morals or wears an obscene outfit contrary to public morals or causing an annoyance to public feelings shall be punished with flogging which may not exceed forty lashes or with fine or both." An act is deemed to be contrary to public morals "if it is regarded as such according to the standard of the person's religion or the custom of the country where the act takes place." The practical result is that there are frequently arrests and subsequent conviction and flogging of women for failure to wear "appropriate" attire, for example by wearing trousers.[343]

In short, there is an array of responses to the issues of wearing religious symbols. Of course, many of the countries that see no difficulty in accommodating Muslim headgear do not face concerns with the rise of political Islam that have triggered concerns elsewhere. Moreover, some are countries with strong identification with prevailing religions that might be sympathetic to the use of religious symbols in their own traditions. Nonetheless, the fact that wearing of religious headgear is so easily accommodated in many countries raises questions about the necessity of bans, even in the public settings where such bans typically apply. It is not clear that wearing the headscarf would be as likely to become a political statement if secularism's bans would be replaced by secularity's accommodations.

B. Display of Religious Symbols in Public Settings

As noted by Malta's national report, many European countries where display of crucifixes or other religious symbols is common are "awaiting the grand chamber decision in *Lautsi*"[344] – the pending proceeding before the European Court of Human Rights which will either accept or reject the ruling by the chamber of the European Court that initially heard the case and held that requiring the display of crucifixes in Italian public schools violated the rights of Italian pupils and their parents to freedom of religion or belief.[345] The Italian national report indicated that the crucifix case has become the center of "a

339. Press release on Ahmet Arslan v. Turkey, 23 February 2010, available at http://www. strasbourgconsortium. org/ document.php? DocumentID=4732.

340. Turkey XI.A.2.

341. Id. XI.A.3.

342. Id.

343. Sudan XI.

344. Malta VI.

345. Lautsi v. Italy (ECtHR, App. No. 30814/06, 3 November 2009).

lively debate around the preservation of Italian identity."[346] The validity and constitutional legitimacy of the decrees mandating crucifixes in classroom, which date back to the fascist era, are disputed. Some argue that the display of crucifixes is inconsistent with the notion of *laicità* and its commitment to cultural and religious pluralism.[347] But this is reported to be a minority view, both among legal scholars and the Italian populace.[348] The majority holds that *laicità* should be able to acknowledge and give "constitutional relevance to the Catholic cultural tradition of the country."[349] In addressing this issue, some Italian courts reasoned that "the crucifix represents a sign of national identity and cannot be considered a threat to freedom of conscience: on the contrary, it allows all children, and especially the extra-communitarian ones, to perceive the values of tolerance written into the constitution."[350] While one can easily doubt that the "extra-communitarian" parents and children would sense a message of inclusion emanating from state backing of these cultural symbols, there is a certain logic to the majoritarian position. The question is whether a system of *laicità* can be something other than secularism prevailing over religious outlooks, which appears to be the result if majoritarian symbols are required to be excluded from public settings. Can it be interpreted as secularity? If *laicità* is to be understood as a framework welcoming to all outlooks, why should the institutionalization of this ideal require exclusion of religious symbols of the majority? No doubt the majority needs to learn to be sensitive to the religious feelings of minorities, but shouldn't this be a two-way street? Why is the only way of sending a message of inclusion to minorities a requirement that the public cannot acknowledge majoritarian sensitivities as well. Further, does interpreting *laicità* as secularity require emptying religious symbols of their authentic content in order to generate a more inclusive cultural symbol? These are the types of questions posed by *Lautsi*.

The issue of public display of religious symbols is arguably more difficult because the choice to make a public display is by definition a public choice, whereas clothing decisions always have an individual choice element. Thus the display decisions inevitably send a message of endorsement, and can easily be read as sending a message of exclusion. At the same time, however, a decision not to display or to discontinue a display that has been customary risks offending majority groups in the population. It may be the case (and indeed is likely) that every possible public decision will appear non-neutral to some portion of the citizenry. As is the case with religious attire, the national reports exhibit a range of responses. Andorra reports no complaints about crucifixes in public settings.[351] Argentina has no restrictions, and in fact, icons of the holy virgin are often put in public places.[352] In Colombia, religious symbols are common, reflecting Catholic heritage.[353] Hungary reports no restrictions.[354] On the other hand, even countries such as Chile, where there are no particular conflicts over display of crucifixes in public settings, there are latent issues that could easily surface.[355] At the other end of the spectrum are countries such as Mexico, where display of religious images in public would violate church-state separation.[356] Similarly, in the United States, posting of a copy of the Ten Commandments in schools, although financed with private funds, was held to violate the non-establishment clause of the federal constitution.[357] This precedent presumably applies to religious symbols more generally.

346. Italy VIII.
347. Id.
348. Id.
349. Id.
350. Id.
351. Andorra XI.
352. Argentina XI.
353. Colombia XI.
354. Hungary XII.
355. See Chile IV.C.
356. Mexico V.
357. Stone v. Graham, 449 U.S. 39 (1980).

In Spain, in contrast to Italy, there is no legislation calling for crucifixes in classrooms. In fact, new public schools usually don't have them. They are clearly permitted in private schools. The more controversial cases involve older schools. Where controversies have arisen, courts have generally deferred to local school councils – whether they decided to keep crucifixes or not. In Andalusia, crucifixes were removed from all rooms except those where religious instruction was given.[358] Another interesting compromise is that applied in Slovakia: if the majority of parents in a classroom wish to have a cross, the school director may allow them to do so.[359] It is not clear why majority rule should apply in this setting; after all, it is typically minority rights that are at stake. But the notion that there could be a class-by-class solution at lest deserves mention. One of the more famous decisions in this area is a similar crucifix case from Bavaria, in which the German Constitutional Court held that it is unacceptable to force students to learn 'under the cross,' as the cross display should be understood not only as a cultural, but as a genuinely religious and even 'missionary' symbol.[360] That case would not necessarily require taking down crucifixes if there were unanimity among parents and students consenting to display of the symbol.

In many jurisdictions, symbols simply are not a major issue, at least not until the question becomes politicized. The Czech Republic reports that religious symbols have not been used for so long that nobody would want to reintroduce them now. The only exceptions are crucifixes in Catholic theology faculties, in church schools, and in a reserved way, in church hospitals.[361] In Australia, pervasive secular attitudes among the population result in a practice that crucifixes are not routinely displayed. The Netherlands have no specific legislation dealing with crucifixes or other symbols in public facilities, but "[o]ccasionally, a religious symbol, such as a crucifix, may be found in a town hall.[362] In secular Uruguay, schools, hospitals, courtrooms, and public offices are devoid of crucifixes.[363]

In part because of Russia's distinctive history over the past century, and its importance both as a center of Christian Orthodoxy and as a center of atheism, the Russian experience has some unique features. Apparently, there is no law governing the use of institutional symbols.[364] There are in fact a large number of religious symbols in public space, but this is not necessarily the sign of a confessional state.[365] Constitutional guarantees of the separation of church and state in Russia do not need to be understood as requiring a separation in social life. At the same time, there is a concern in Russia about the increasing clericalization of public institutions. But this is not so much an issue of symbols in public space as clerics assuming governmental posts or advisory positions. A distinctive issue noted by the Russian report is a concern with fraudulent use of religious symbols; there are a number of accounts of people dressed as priests who fraudulently solicit funds. Still another issue noted by the Russian report has to do with a tension between cultural and religious control of objects with symbolic value. "The beautiful icon 'Trinity' by Andrey Rublev is considered widely to be a national treasure.It has been displayed in the Tretjakov Gallery for the last 100 years. Its age and importance would seem adequate reasons to leave the icon untouched, but [the Russian Orthodox Church] asked permission to exhibit it for [three] days in a famous monastery during an Orthodox holiday."[366] This conflict reflects a deeper conflict regarding religious symbols: do they belong to religion or to secular culture, or if to both, how is control to be managed?

358. Spain III.N.
359. Slovakia VIII.
360. Germany XI. An earlier German case held that a crucifix in a courtroom infringed religious freedom rights because it showed excessive identification with a religious symbol. Id.
361. Czech Republic XI.
362. Netherlands XVI.
363. Uruguay XII.
364. Russia XI.
365. Id.
366. Id.

C. Monuments and Temporary Displays

Regulation of monuments is challenging because of the interface of history – acknowledging and memorializing particularly significant moments, persons and ideas – and religious life. Erection of a monument can be simultaneously a reminder of secular history and values and assertion of religious values as well. Installing a new monument may stir political sensitivities, but once one has been in place for a substantial period of time, the controversy may fade. Thus, as noted by the Spanish report, total suppression of religious monuments seems impossible without squandering a good portion of the country's cultural legacy.[367] Because such symbols are part of the landscape in most countries, there are often fewer restrictions in this field, particularly when the monuments are erected on private space. Thus, whereas Mexico has had fairly strict controls on clothing, there have been virtually no restrictions on the general use of images and religious symbols.[368] While there is some ambivalence in Chile as to exactly what monuments should be approved and what not, five temples had been declared to be national monuments in the past year.[369]

Many if not most countries maintain landmark registers, and not surprisingly, churches are often designated as protected landmarks. Armenia, for example, noted that there are many monuments and historic buildings which are under state protection.[370] One of the challenges in this area is that historic preservationists typically want to maintain structures exactly as they have always been, but religious usage may change. Alters may need to be repositioned to correspond to new forms of worship; the population center of a church may change, so that the church may wish to move to a new location; and so forth. As important as the state's interest in protecting history is, it is hard to say that it overrides the value of protecting the religious freedom of the community that gave rise to the history in the first place.

Over the past few years, the United States has seen recurrent controversies over monuments inscribed with the Ten Commandments. The United States report draws attention to two cases about such monuments that were decided in opposite ways.[371] In *Van Orden v. Perry*,[372] the Supreme Court rejected an establishment clause challenge to the retention of a Ten Commandment monument that had been donated by a private group and had been located on the state capitol grounds for over 40 years. The Court acknowledged that the Ten Commandments were undoubtedly religious, but they also had a significant historical meaning.

On the other hand, in *McCreary County v. American Civil Liberties Union of Kentucky*,[373] the Court held that recent posting of the Ten Commandments at Court buildings had a primarily religious purpose. Both cases were decided by 5-4 votes, with the difference in outcome resulting primarily from the fact that Justice Breyer voted against finding an establishment clause violation in *Van Orden* and for finding of violation in *McCreary*. Without going into the details of American doctrine, the distinction was whether there was a "religiously intended or a passive presentation of the monument that includes the Ten Commandments."[374] Stated differently, a key difference lies in whether a monument is merely acknowledging and memorializing history, or whether there is a subtext aimed at imposing a particular religious point of view. If the latter is the case, the monument lacks a secular purpose and cannot withstand establishment clause scrutiny. One of the dilemmas is that the effort to show that the monument is primarily secular may lead those defending the monument to water down the

367. Spain III.N.
368. Mexico V.
369. Chile IV.C.
370. Armenia VI.
371. United States (2).
372. 545 U.S. 677 (2005).
373. 545 U.S.844 (2005).
374. United States (2).

religious values that they wish to memorialize. As with the other symbol cases, the deeper question is whether notions of state neutrality and separation of church and state can be read in a way that leaves more room to accept authentic religiosity without empowering it to impose itself on others.

IX. FREEDOM OF EXPRESSION AND OFFENSES AGAINST RELIGION

One of the most sensitive issues in the relationship between religion and secular states concerns treatment of offensive expression targeting religion and religious sensitivities. The Danish cartoons controversy in 2005 helped sensitize the rest of the world to the fact that for a variety of reasons, including religiously grounded taboos on pictorial depictions of the Prophet Mohammed, Muslims have much higher sensitivities regarding offensive speech and insults concerning their religion.[375] But of course, Muslims are not alone in having sensitivities in this area.

Beginning in 1999, and in every year since, the Organization of the Islamic Conference ("OIC") has drafted and secured passage of resolutions addressing "defamation of religion" in United Nations settings. These resolutions were first passed in the U.N. Human Rights Commission,[376] and subsequently in the U.N. Human Rights Council.[377] In large part because of the visibility given the issue by the Danish cartoons controversy, the General Assembly began considering the issue in, and has passed a resolution entitled "Combating Defamation of Religions" in each year since[378] – albeit with declining majorities in most years.[379]

Broad defamation laws, particularly criminal ones, have come under extreme criticism in recent years from a very broad array of U.N. and regional human rights leaders. For example, in December 2008, the four freedom of expression rapporteurs of the U.N., the Organization for Security and Cooperation in Europe (OSCE), the Organization of the American States (OAS), and the African Commission on Human and Peoples' Rights (ACHPR) issued a joint statement urging international organizations to stop supporting the idea of defamation of religions because "it does not accord with international standards accepted by pluralistic and free societies. . . Restrictions on freedom of expression to prevent intolerance should be limited in scope to advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence."[380]

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375. For an excellent analysis of this controversy, see Jytte Klausen, *The Cartoons That Shook theWorld* (New Haven: Yale University Press, 2009).

376. CHR Res 1999.82, at 280, U.N. ESCOR 55th Sess., Supp. No. 3, U.N. Doc. E/CN.4/1999/167 (Apr. 30, 1999) (passed without a vote); CHR Res. 2000/84 at 336, U.N. ESCOR, 56th Sess. Supp. No. 3, U.N. Doc. E/CN.4/2000/167 (April 26, 2000) (passed without a voted); CHR Res. 2001/4, at 47, U.N. ESCOR, 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2001/167 (April 18, 2001) (28 in favor, 15 opposed, 9 abstentions); CHR Res. 2002/9, at 56, U.N. ESCOR, 58th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2002/200 (April 15, 2002); CHR Res. 2003/4, at 34, U.N. ESCOR, 59th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2003/135 (April 14, 2003); CHR Res. 2004/6, at 28, U.N. ESCOR, 60th Sess., Supp. No. 3, U.N. Doc. E/CN.4/2004/127 (April 13, 2004); CHR Res. 2005/3, at 21, U.N. ESCOR, 61st Sess., Supp. No. 3 (April 12, 2005).

377. U.N. Doc. A/HRC/4/L.12 (Mar. 26, 2007); U.N. Doc. A/HRC/7/L.15 (Mar. 20, 2008); U.N. Doc. A/HRC/10/L.2/Rev.1 (Mar. 26, 2009).

378. G.A. Res. 60/150, U.N. Doc. A/RES/60/150 (Dec. 16, 2005); G.A. Res. 61/164, U.N. Doc.

A/RES/61/164 (Dec. 19, 2006); G.A. Res. 62/154, U.N. Doc. A/RES/62/154 (Dec. 18, 2007); G.A. Res

63/171, U.N. Doc. A/RES/63/171 (Dec. 18, 2008). In 2009, the now annual resolution was passed on December 18. The official version of the resolution has not yet been posted on the U.N. site, but it was substantially the same as the draft adopted by the General Assembly's Third Committee (which deals with social, cultural, and humanitarian matters) on October 29, 2009. G.A. Third Committee Resolution, A/C.3/64/L.27 (29 Oct. 2009). (This is the document circulated in advance of the Karamah's January 18, 2010 roundtable.)

379. In 2005, the resolution passed by a vote of 101 in favor to 53 opposed, with 20 abstaining. In 2010, the support had dropped, with 80 in favor, 61 opposed, and 42 abstentions. The combination of those opposed and abstaining now exceeds the number of those voting in favor of the religion. The decline reflects growing recognition of the problematic character of the defamation of religion resolutions.

380. Joint Declaration on Defamation of Religions and Anti-Terrorism and Anti-Extremism Legislation, Frank La Rue, UN Special Rapporteur on Freedom of Opinion and Expression, Miklos Haraszti, OSCE Representative on Freedom of the Media, Catalina Botero, OAS Special Rapporteur on Freedom of Expression,

The U.N. Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression have also made several joint declarations, noting that the abuse of restrictive defamation and libel laws had reached "crisis proportions in many parts of the world."[381] They recommended minimum standards that should be followed in the development of defamation laws, including: (a) the repeal of criminal defamation laws in favour of civil laws should be considered, in accordance with relevant international standards; (b) no one should be liable under defamation law for the expression of an opinion; and (c) civil sanctions for defamation should not be so heavy as to exert a chilling effect on freedom of expression, and should be designed to restore the reputation harmed, not to compensate the plaintiff or to punish the defendant. These recommendations have been repeated and endorsed by the U.N. High Commissioner for Human Rights.[382]

These recommendations have been echoed by an exhaustive report on the relationship between freedom of expression and freedom of religion in the 47 countries of the Council of Europe. The Council of Europe's Commission for Democracy Through Law ("Venice Commission") recommended that "it is neither necessary nor desirable to create an offense of religious insult (that is, insult to religious feelings) simpliciter, without the element of incitement to hatred as an essential component"[383] It recommended that religious hatred offenses (1) require incitement to religious hatred and (2) introduce an explicit requirement of intention or recklessness."[384] "In the Commission's view . . ., in a true democracy imposing limitations on freedom of expression should not be used as a means of preserving society from dissenting views, even if they are extreme. . . . It is only the publication or utterance of those ideas which are fundamentally incompatible with a democratic regime because they incite to hatred that should be prohibited."[385]

Many countries continue to have blasphemy, heresy and apostasy legislation on the books.[386] As recently as April 2010, the Indonesian Constitutional Court rejected challenges to Indonesia's blasphemy and heresy law, although the Court did recognize that the legislation in question needed reform.[387] In many countries, however, while such legislation is still extant, it is seldom applied.[388]

In Canada, in a 1990 case involving holocaust denial, the Supreme Court upheld, by a narrow majority of 4 to 3, the constitutionality of Section 319(2) of Canada's criminal code, which aimed at suppressing the willful promotion of hatred against identifiable groups.[389]

Many countries no longer have blasphemy legislation.[390] Hungary repealed this

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and Faith Pansy Tlakula, ACHPR Special Rapporteur on Freedom of Expression, page 2 (December 10, 2008), available online at http://www.osce.org/documents/rfm/2008/12/35705_en.pdf.

381. http://www.cidh.org/Relatoria/showarticle.asp?artID=142&lID=1.

382. U.N. Document A/HRC/9/25 para. 42-44.

383. European Commission for Democracy through Law, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, Council of Europe study no. 406/2006, CDL-AD(2008)026 (23 October 2008), para. 64 and 89(b).

384. European Commission for Democracy through Law, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, Council of Europe study no. 406/2006, CDL-AD(2008)026 (23 October 2008), para. 89(a).

385. European Commission for Democracy through Law, Report on the relationship between freedom of expression and freedom of religion: the issue of regulation and prosecution of blasphemy, religious insult and incitement to religious hatred, Council of Europe study no. 406/2006, CDL-AD(2008)026 (23 October 2008), para. 46.

386. See, e.g., Netherlands XVII; Germany XII.

387. Decision of the Indonesian Constitutional Court (No. 140/PUU-VII/2009, April 2009) (translation of key portion of decision on file with the General Rapporteurs).

388. See, e.g., Canada X.A.

389. R. v. Keegstra, [1990] 3 S.C.R. 697, 114 A.R. 81.

390. Australia XI; Czech Republic XII; Estonia X; Peru XI; Philippines XII; Sweden XII.

legislation during its communist era.[391] The United Kingdom abrogated the common law crime of blasphemy in 2008.[392] Legislation proposing repeal of provisions on blasphemy against God have been proposed in Finland, but not adopted.[393]

The trend is clearly toward replacing blasphemy legislation, which typically protects injury only to the dominant religion in a country, with hate speech legislation that covers insults to any religion, ethnic, or racial group, but is narrowly crafted to minimize adverse impacts on freedom of speech.[394] In Ireland, a constitutional provision called for sanctions against blasphemy, so the offense could not be repealed without constitutional amendment. New legislation was drafted which broadened the coverage, so the range of blasphemy protection extended beyond offenses against Judaism and Christianity, and the offense was more narrowly focused on outrageous offense.[395] A referendum has been called to consider repeal of the constitutional provision on blasphemy, which will make possible the total repeal of blasphemy legislation. Usually, such legislation is drafted with the idea of complying with Article 20(2) of the International Covenant on Civil and Political Rights, which calls for legal prohibition of "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence . . . ."

For those who have shifted from blasphemy-type legislation to hate speech, a number of techniques are evident to minimize adverse impacts on freedom of expression. Thus, the Czech legislation qualifies the notion of hate speech by stressing that the speech in question must be extreme.[396] In Canada, the fact that statements were made in the course of private conversations or that statements were made in good faith to advance an opinion on a religious subject has been recognized as a defense.[397] Also, hatred convictions can be obtained only if the state can prove beyond a reasonable doubt that the accused willfully promoted hatred against a group identifiable by colour, race, religion or ethnic origin, where the promotion of hatred means that individuals are to be "despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation."[398] Stringent standards of mens rea, requiring intent, are necessary.[399] Strict intent requirements are necessary under many hate speech provisions.[400] In Estonia, hate speech legislation imposes criminal sanctions for "activities which publicly incite to hatred, violence, or discrimination on the basis of religion, among other grounds, 'if this results in danger to the life, health or property of a person . . . .'"[401] In the Philippines, mere criticisms of other religions could not be regulated by a board charged with regulating television content.[402]

Several countries report other forms of legislation aimed at protecting religious sensitivities. Thus, a number have laws proscribing interference with or disturbance of religious ceremonies.[403] Several have laws on desecration of cemeteries or interference with funerals.[404] There is also a considerable body of legislation dealing with desecration of objects or places of worship.[405] The Czech Republic mentions genocide and apartheid, and also has offenses for expression of affection for a movement aiming at oppression of

391. Hungary XIII.

392. United Kingdom XI.

393. Finland X.

394. See, e.g., Hungary XIII; India XI; Mexico VII; Sweden XII; Switzerland IX; Uruguay XIII. Scholars have recommended reform in this direction in Latvia. Latvia XI.

395. Ireland XI.

396. Czech Republic, XII.

397. Canada X.A. Australia also recognizes special protections where there is a genuine purpose to engage in religious persuasion. Australia XI.

398. Id.

399. Id.

400. See, e.g., Finland X (dolus); Latvia XI; Netherlands XVII (offender should "know or have reason to suspect" that a statement is offensive); Uruguay XIII (offensive consequences foreseeable).

401. Estonia X.

402. Philippines XII.

403. Chile XII; Estonia X; Germany XII; Ghana XII; Japan XII; Latvia XI; Malta VII; Slovakia VIII; Sweden XII; Switzerland IX.

404. Chile XII; India XI; Israel XI; Switzerland IX.

405. Chile XII, India XI; Israel XI; Mexico VII; Switzerland IX; Ukraine XII.

human rights and for protection of human dignity.[406] Estonia recognizes an offense of compelling others to be a member of a religious association.[407]

The European Court of Human Rights has decided cases that affirm the permissibility of state action designed to protect of religious sensibilities. In its controversial decision in *Otto-Preminger-Institut v. Austria*,[408] the court held that state actions in impounding and preventing showing of a film that offended Roman Catholic sensitivities did not violate freedom of expression rights. More recently, the European Court held that a conviction under a Turkish law punishing profanation of Islam violated freedom of expression rights when the work in question was a scholarly work,[409] but allowed a similar conviction to stand in connection with publication of a novel which made references to the imaginary nature of God, to the irrationality of Muslim beliefs and to the inability of Imams to think properly. The book also included expressions that could be considered blasphemous against Mohammed.[410] The manner of making the expression and intent to gratuitously offend may help explain the difference in outcomes.

A number of jurisdictions have statutes that impose sanctions for offense to religious sensibilities.[411] Thus, Finland has provisions for publicly defaming or desecrating what is held to be sacred by a church or religious community.[412] Latvian provisions protect atheist sensibilities as well.[413] India allows proscribing a newspaper, book or document if it promotes religious enmity, disharmony or offends religious feelings of any community.[414] Kazakhstan has a provision that punishes the provoking of religious hostility.[415]

In general, one can discern a shift toward both secularity and secularism in the trends evident in this field. On the one hand, there is a clear shift, in line with secularism, away from older blasphemy legislation. On the other hand, continued protection of hate speech against religious targets, the broadening of such legislation to cover all and not just dominant groups, and the efforts to draw the balance of such legislation more carefully to protect freedom of expression (including religious expression), all signal efforts to communicate that efforts will be made to protect the religious (and belief) sensitivities of all members of society.

X. CONCLUSION

In general, the national reports suggest that there is remarkable diversity in the configuration of religion-state relations around the world, even within regional blocs. This appears to be the natural consequence of the fact that religion, religious pluralism, and experience at the religion-state interface is embedded in the distinctive history of each country. Every country faces tensions in this area, and each has reached its own equilibrium position – a position which tends to shift over time in response to particular incidents, argumentation within the country, concerns about identity politics, and efforts to more effectively protect human rights.

If we accept that religious pluralism is a positive reality, or at least a reality that is unavoidably present in every country that we know, it seems reasonable to propose that constitutional and legal provisions ought should guarantee certain minimum standards of protection of freedom of religion or belief, in line with existing standards that most countries have accepted.

There is a tendency to speak of the idea of a "secular state" as though this term has a

406. Czech Republic XII.
407. Estonia X.
408. ECtHR, App. No. 13470/87, 20 September 1994.
409. Aydin Tatlav v. Turkey, ECtHR, App. No. 50692/99 , 2 May 2006.
410. I.A. v. Turkey, ECtHR, App. No. 42571/98 , 13 September 2005.
411. See, e.g., Netherlands XVIII; Spain III.D;Turkey XII; Ukraine XII.
412. Finland X.
413. Latvia XI.
414. India XI.
415. Kazakhstan XII.

univocal meaning. In fact, however, practice tends to be the result of historical circumstances that are different in different countries. In many cases, secular states were born in the course of rebellion against the hold that major religions had on society, and these historical experiences have shaped their view of the secular state and the need to protect it against dominant religions in the past, just as the effort to implement human rights norms has affected more recent history. This has often led to systems characterized by what we have termed secularism or *laïcité*. On the other hand, experience in other countries has taken the need to deal with existing pluralism as the starting point. This has been more likely to generate systems we have described in terms of secularity. Because of differences of historical experience, we can hardly expect logical internal coherence when we apply the notion of the secular state in different areas. States that may appear the same from the perspective of the great constitutional principles may adopt rather different interpretations of their constitutional ideas as they apply them in concrete areas. This is not necessarily a negative, but confirms the famous saying from Justice Oliver Wendell Holmes, that the life of the law has not been logic but experience.

It is worth noting, however, that sociological shifts evident around the world indicate that pluralism is growing everywhere. This may suggest that there is a need to shift focus from defending the secular state against religion to finding ways to secure peaceful coexistence of the many religions that are found in every society. Protection of freedom of religion or belief has long been a powerful tool to that end. This needs to be taken into account in dealing with pressing contemporary issues about how to handle the influx of immigrants in various parts of the world. Sensitivity to accompanying religious differences can substantially reduce tensions in this area.

There is also a need to recognize that idea of the secular state should not be thought of as an end in itself, but as an instrumental means toward creations of states that can help different worldviews – even deeply divided ones – to find peaceful ways to live together. In an often quoted phrase from the European Court of Human Rights' decision in *Serif v. Greece,*[416] although it is true "that tension is created in situations where a religious any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other . . . ." In achieving this objective, there is much to be said for reinterpreting the ideal of the secular state in terms of secularity, rather than secularism.

416. ECtHR, App. No. 38178/97, 14 December 1999), § 53.