

# Constitutionalism in Rough Seas: Balancing Religious Accommodation and Human Rights in, through, and despite, the Law

American Behavioral Scientist  
2016, Vol. 60(8) 911–918  
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DOI: 10.1177/002764216643806  
abs.sagepub.com



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The place of religion in public life is intrinsically related to the fundamental question of human rights protections, particularly for women and vulnerable minorities, which constitution drafters, legislators, and judges must address. Scholarship is paying increasing attention to the central role played by constitutional law and adjudication in determining the relationship between (aspirationally neutral) state law on the one hand and demands by religious groups to increase the role of religion in public life on the other.<sup>1</sup> As constitution-drafting and judicial review have become major tools for political reform, scholars of comparative law and comparative politics have searched for constitutional solutions that can reconcile the protection of human rights with the demands for religious accommodation in contemporary democratic and democratizing states.<sup>2</sup> A close look at the way religion–state relations have been designed and reformed over the years in societies experiencing religious conflict reveals, however, that formal constitutional law alone (constitutional documents and jurisprudence) tells only part of the story. Similar legal provisions used in different political settings may yield different policy outcomes in areas such as family law, religious education, and conversion. In many cases, formal law may be understood, applied, perceived, and received in different ways depending on additional factors such as the cultural and social context, and the vision of key actors in the political and legal system.

The goal of this special issue is to highlight these cultural, social, and political contexts and how they have affected the balance struck between rights protection and religious accommodation. In particular, the contributions accentuate the influence of domestic actors—key elites, courts, political parties, and civil society groups—in shaping the boundaries between the domains of religion and the state in constitutions,

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laws, and their interpretations, and the consequences of this boundary-drawing for religious polarization and rapprochement. The five articles featured here demonstrate that conflicts about religious practices and religious identity, which are often highly affected by legal instruments, are often not only about religion but also other political, ideational, or ideological concerns that divide the polity. Through an empirical investigation of the interplay between formal law, social structure, and the actions and preferences of political and legal actors, the articles aim to advance our understanding of the complex sociopolitical–legal dynamics involved in attempts to harmonize the demands for a prominent place of religion in public life with human rights.

While the literature on constitutionalism and religion has in the past focused by and large on North American and West European experiences, recent scholarship has expanded the comparative scope, especially in light of ongoing constitutional projects in emerging democracies in Asia, Africa, and the Middle East.<sup>3</sup> Some of the comparative analyses of constitutional law and religion have challenged conventional theories of liberal–democratic constitutionalism and religious freedom.<sup>4</sup> There are, however, fewer attempts to advance theory-building and (re)construct more comprehensive theories that go beyond descriptions of a given country’s religion–state arrangements.<sup>5</sup> Taken together, the five articles included in this issue aim at contributing to this recent endeavor. They do so by investigating how the constitution and subsequent laws construct the relationship between religious autonomy and human rights. More specifically, the articles focus on the social and political contestations surrounding the creation of laws that attempt to balance different sets of rights, during the constitution-writing stage and its subsequent interpretation by lawyers, politicians, judges, and social movements. All authors are united by their conviction that law reflects the outcomes of a process that is fundamentally political in nature.<sup>6</sup>

## **Methodology and Comparative Framework**

Theorizing the interaction between formal law, social structure, and the actions and preferences of political and legal actors is a task of great complexity. It requires detailed and nuanced knowledge of the political, historical, social, and legal background of the case under review. This special issue brings together an interdisciplinary group of country experts working with primary texts in the primary languages, who collaborated in the framework of a 6-month-long research group at the Center for Interdisciplinary Research (ZiF) at Bielefeld University, Germany, tackling the question of balancing and accommodating religious demands with human rights in constitutional frameworks in a comparative setting.<sup>7</sup>

The articles draw on case studies from the “West” and the “East,” featuring such processes in Egypt, India, Indonesia, Ireland, Malaysia, Norway, Pakistan, Sri Lanka, and Tunisia. Concretely, they analyze the implications of the migration of constitutional models and judicial interpretations of religion–state relations, contestations of constitutional boundaries drawn between or among religious groups, and the impact of choices made regarding religious personal law and religious education on the balance between religious demands and the protection of human rights.

The five articles apply a variety of methodologies in approaching the question. These include a single case study (Böckenförde on Tunisia), small-*N* comparisons

(Brown, Kissane, and Madeley on Egypt, Ireland, and Norway; and Schonthal, Moustafa, Nelson, and Shankar on Sri Lanka, Malaysia, Pakistan, and India), in-depth analysis of two cases against the background of a large-*N* study (Künkler and Sezgin on Indonesia and India), and methods of conceptual history (Shankar).

The articles also illustrate the variety of areas of life that may be affected by demands or expectations of a religious nature, including issues of family law (Künkler and Sezgin), education (Brown, Kissane and Madeley), conversion (Schonthal, Moustafa, Nelson, and Shankar), public practices of religious groups (Shankar), constitutional rights and constitutional identity (Böckenförde).

One of the challenges often faced by a comparative approach such as the one taken by this collection of authors is the difficulty of agreeing on what “religion” or “secular” mean in different contexts.<sup>8</sup> Here, we refrain from seeking an agreeable definition of “religion” or “religious conflicts” and instead accept the way these terms have been understood by the actors and groups under study. In other words, if a political leader, judge, or bureaucrat in question has viewed a conflict as pertaining to religion, we have taken the assertion at face value.

On a further methodological note, the literature on the political contestation of religion tends to be characterized by strict dichotomies between the different phases of constitutional development (e.g., between constitutional drafting and post-drafting legal adjudication). By contrast, this special issue challenges the dichotomy and highlights the diverse and less mutually exclusive ways through which political actors and interests have influenced the capacity of the state to regulate religion, through either constitution-writing, ordinary legislation and judicial adjudication, or through civil society activism.

## Law, Society, and Domestic Actors

Three particular questions are addressed by the articles. The first question pertains to the role of formal interpreters, the courts, in striking a balance between rights protection and religious accommodation. Constitutional law scholars tend to view courts as a central vehicle of conflict resolution in the area of religion. When state laws conflict with religious practices or religious beliefs of individuals or groups in society, or when constitutions are ambiguous with regard to the application of particular provisions, courts are often required to address, and resolve, these tensions. Yet to what extent should courts be viewed as the most appropriate state organ to resolve normative conflicts and clarify constitutional ambiguities related to religion?

*Markus Böckenförde* holds an optimistic view with regard to the Tunisian constitutional court’s role in mitigating tensions over religion-state relations in the emerging democracy. The newly established court was intentionally designed by the constitutional drafters as a powerful player, he argues, expected to clarify the ambiguities related to the religious character of the state that emerge from the 2014 constitution. He holds that the court is equipped with the appropriate legal tools (some of them provided by the constitutional text itself) to allow for a coherent interpretation of the religion-related constitutional provisions, which were aimed at accommodating contrasting views within Tunisian society. The article examines the interplay between

formal law, social structure, and the preferences of political and legal actors at the moment of a “new beginning”. Through a detailed analysis of four different drafts discussed by the constituent assembly, the article traces how negotiations conducted between 2011 and 2014 on the religious identity of the state created a balance not only through direct and explicit references to religion in the constitutional text but also indirectly through the design of state institutions, and by favoring abstract wording. In contrast to the critics of the Tunisian constitution who point to its “schizophrenic” nature and its internal contradictions around religion-related issues, *Böckenförde* argues that a careful study of these debates reveals a much more coherent picture of Tunisian constitutional identity. The final constitutional text, he concludes, can be interpreted in a reconcilable manner without significant legal contradictions by a court that applies common theories of constitutional interpretation. Whether the court will indeed fulfil these high expectations is, of course, yet to be tested.

In contrast to *Böckenförde*'s optimism, the article by *Ben Schonthal*, *Tamir Moustafa*, *Matthew Nelson*, and *Shylashri Shankar* highlights the problematic role of courts in accentuating polarization. Under conditions of deep societal disagreement, the binary framework of legal language and the type of clear-cut decision-making offered by the court may entrench or even further polarize existing religious conflicts. The judicialization of disputes related to religion, often perceived as a tool for moderating religious tensions<sup>9</sup> may lead to counterproductive dynamics, as illustrated by critical reappraisal of how law works in four former British colonies - Sri Lanka, India, Malaysia and Pakistan. The article provides an alternative account of the link between legal processes and religious tensions: one that questions the roles played by constitutional law and legal procedure in perpetuating and deepening conflict. It proposes an alternate view of the role courts and law play in sustaining, reshaping, and advancing social strife. The legal language (used either by litigators or in court decisions) is often more binary and rigid compared to the fluid and flexible traditions and beliefs held by religious communities. Rather than mounting a general critique of liberal legalism, the article points to four specific mechanisms through which law has been complicit: the procedural requirements and choreography of litigation itself (Sri Lanka), the strategic use of legal language and court judgments by political and socioreligious groups (India), the activities of partisan activists who mobilize around litigation (Malaysia), and the exploitation of “public order” laws in contexts framed by antagonism targeting religious minorities (Pakistan).

A similar skeptical view concerning the role of the court as a coherent constitutional interpreter is presented in *Shylashri Shankar*'s article, which focuses on the manner in which interpretations by judges differ based on the institutional, social, political and historical moorings of the interpreter(s). The issues and conflicts within the new context transform the meaning of the concept when it travels from one legal system to another. Shankar's article follows the voyage of the concept of “essential practices of religion” from the apex court of India to the higher judiciary in Pakistan and Malaysia. The concepts of state, religion, and rights are the three axes around which the debates on religion–state relations pivot in these countries. The article assesses how judges invoke and use these concepts to produce a particular result in a clash between religious freedom and other human rights. Judges are, after all,

individuals who are influenced by the particular political, cultural and social setting within which they live and work, concludes Shankar.

The second question looks for interactions between law, social structure and the preferences of legal and political actors that occur outside the framework of formal constitutional law. Sometimes conflicts about the appropriate place of religion in public life are waged outside the arena of constitutional law, or even in defiance of agreed-upon constitutional solutions. Two examples for such extra-constitutional dynamics are highlighted in the article by *Nathan Brown*, *Bill Kissane* and *John Madeley* on conflicts around religious education, and the article by *Mirjam Künkler* and *Yüksel Sezgin* on conflicts around family law. Both articles direct our attention to the fact that in some areas, constitutions and constitutional law have limited effect on the regulation of religion.

*Brown*, *Kissane* and *Madeley* demonstrate how the politics of religious education in Muslim-majority Egypt, Protestant-majority Norway and Catholic-majority Ireland operate outside the constitutional reach. In all three cases, the drafting of new constitutions had little effect on existing religious institutions, particularly those related to education. The persistence of constitutional provisions guaranteeing religious education in state schools, even when new ruling coalitions no longer support such provisions, is the puzzle posed in that article. The authors suggest that such provisions are largely resistant to the vagaries of political life: first, when written, they tend to formalize existing arrangements rather than revolutionize them; and second, when changes in the legal status of religious education do occur, this happens primarily through processes that are not reflected in the constitutional text. Instead, it is legislation, jurisprudence, and social change that make for changed implementation of extant regulations. In Egypt, Ireland, and Norway, the resilience and path-dependency of religious education in state schools is attributable to the state's awareness of its limitations in the field of education, and its ceding of an unenumerated constitutional right to parental choice over their children's education. Subsequent changes in these arrangements, so the authors suggest, have not been fought on the constitutional turf: constitutional amendments are by-products of developments in the social and political realm rather than their drivers.

Another area where conflict about the proper place of religion in public life is often not waged in the constitutional forum, but outside of it, is the area of personal status law. *Künkler* and *Sezgin* draw attention to cases where reforms to family law are undertaken that fundamentally change the relationship between religion and state without this being reflected in constitutional law. Family law may require citizens to identify with a particular religion, to marry only certain members of the demos, to accept unequal regulations in inheritance, without any of this – fundamental violations of religious freedom – being reflected in constitutional change. Given this dynamic, the authors conclude that from a methodological perspective, looking at constitutions to ascertain the nature of religion-state relations in a given country may only take one so far. Substantively, the authors take a diachronic view from the 1950s till today and note that many post-colonial state leaders harbored monist aspirations at the constitution-drafting stage (one law for all, no discrimination based on ethnicity, religion, race). Subsequent governments, however, distanced themselves from such ambitions and instituted or formalized pluri-legal family law

systems. The authors attribute this change less to the ideological re-orientations among the ruling elite than considerations of regime stability (ceding authority to societal elites, usually religious leaders) and electoral politics.

The third question pertains to the changing meaning of concepts in different legal and constitutional frameworks. To what extent do laws themselves create different meanings of the same concept? Can one construct a more systematic way of comparing the meaning assigned to concepts such as religious freedom within and across contexts? In her article, *Shankar* uses the methodological tools of conceptual history, in particular onomasiology (to find the words that express a concept), to analyze the process of a judge's reasoning and the network of concepts he/she uses in constructing an argument within a legal judgment. Employing this methodology highlights the tendency of agents (in this case judges and the litigants) to insert their own historical experiences in the way they comprehend and use a given concept. Shankar's analysis demonstrates that it is possible to transcend the problem of translatability by asking not whether "essential practices" (or any other concept) had the same meaning in all contexts (it does not), but whether a judge who wants to privilege a particular constitutional identity over others uses the concept in a particular way within a network of concepts. This approach treats judges not as persons always privileging the secular position, or as simply opportunistic actors, but as interpreters—authors—readers who are embedded within specific social, historical, and political contexts, and who strategically use foreign case-law to impose their vision of the nation's constitutional identity. Religion, like other concepts, carries potentially varying meanings across political, historical and geographical contexts.

## Conclusions

A comparative analysis of the cases studied, which at first glance may seem dissimilar, highlights unanticipated similarities in the way states deal with issues of religious identity or religious practice. For example, on questions of religious education, a surprising similarity was revealed in how neither Protestant-majority Norway, nor Catholic-majority Ireland, or Muslim-majority Egypt adhere to the principle of separation between religion and state. In all three countries mutually accommodative relationships between religion and state (e.g. the constitutional protection of religious education) have survived for a long period of time. Another similarity is evident between India, Malaysia, Sri Lanka and Pakistan, where religious groups and movements used law in similar ways to polarize the political and social arenas rather than search for common ground, or in India and Indonesia where state elites sought to first unify and later pluralize personal status law for similar reasons and in similar time periods.

Overall, this special issue demonstrates the interplay between the constitutionalization of religion on the one hand and societal tensions over issues of religious identity or religious practice on the other. Taken as a whole, the articles discuss the intended as well as the unintended consequences of the legal treatment, or even constitutionalization, of religion. They show how the balance between religious accommodation and human rights protection is sometimes achieved by or through the law, and sometimes

despite it. Under certain conditions, constitutional and broader legal means facilitate the mitigation of conflicts over religious issues, while under others recourse to the law may deepen and sharpen the very conflict over religion that the legal action (particularly the turn to courts) purports to resolve. And in some cases, rather than producing social, political or religious change, constitutions merely reflect compromises that have been achieved prior to the constitutionalization of religion, while the de-facto changes in particular regulations or practices related to religion may be determined outside the arena of constitutional law, for example by ordinary legislation or bureaucratic regulations. Further empirical and conceptual research is needed to advance our understanding of the various factors and dynamics at play in the interface between law and political contestation over religious issues.

## Notes

1. See, for example, Cohen and Laborde (2015), Venter (2015), Mancini and Rosenfeld (2014), and Cole Durham, Ferrari, Cianitto, and Thayer (2013).
2. See, for example, Hirschl (2010) and Zucca (2012).
3. See, for example, Horowitz (2013), Sultany (forthcoming, 2017), al-Ali (2014), and Bali and Lerner (in press-b). In addition, recent large-*N* studies have focused on the relations between constitutionalism and Islam. See, for example, Ahmed and Ginsburg (2014), Ahmed and Gouda (2015), and Gutmann and Voigt (2015).
4. See Bali and Lerner (in press-a) and Schonthal (in press).
5. This point was made by sociologist Matthias Koenig at the closing symposium of the research group “Balancing Religious Accommodations and Human Rights in Constitutional Frameworks” July 16 and 17, 2015, ZIF, University of Bielefeld.
6. See Hirschl (2013).
7. The research group was convened at the Centre for Interdisciplinary Research, Bielefeld University, Germany, in 2014, and involved various meetings, workshops, conferences, and joint publication projects. For more information, see <https://www.uni-bielefeld.de/ZIF/FG/2014Balancing/>.
8. On these challenges, see also Bhargava (1998), Bowen (2010), Casanova (2006), Taylor (2007), Katznelson and Jones (2010), and Künkler, Madeley, and Shankar (2016).
9. As proposed by Hirschl (2010).

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