Karen B. Brown · David V. Snyder
Editors

General Reports of the XVIIIth Congress of the International Academy of Comparative Law

Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé

Springer

Karen B. Brown • David V. Snyder
Editors

General Reports of the XVIIIth Congress of the International Academy of Comparative Law/ Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé

Springer

Editors
Karen B. Brown
George Washington University Law School
2000 H Street
Washington, DC 20052
USA
karenbrown@law.gwu.edu

David V. Snyder
American University
Washington College of Law
4801 Massachusetts Ave. NW
Washington, DC 20016
USA
dsnyder@wcl.american.edu

ISBN 978-94-007-2353-5 e-ISBN 978-94-007-2354-2
DOI 10.1007/978-94-007-2354-2
Springer Dordrecht Heidelberg London New York

Library of Congress Control Number: 2011942913

Preface

In the international and comparative law worlds, the quadrennial congress of the International Academy of Comparative Law (IACL) presents the opportunity to tackle the captivating legal issues of our times. The 18th World Congress of the IACL was held in Washington, DC in July 2010, featuring sessions and plenary meetings that considered more than 30 issues of extraordinary import to legal thinkers. These included topics covering a spectrum of modern themes, such as Religion and the Secular State, the Role of Practice in Legal Education, Complexity of Transnational Sources, Catastrophic Damages, Class Actions, Climate Change and the Law, Corporate Governance, Surrogate Motherhood, Same Sex Marriage, Jurisdiction in Intellectual Property Matters, Age Discrimination, Protection of Foreign Investment, Public-Private Partnerships, The Exclusionary Rule in Evidence, Corporate Criminal Responsibility, Regulation of Corporate Tax Avoidance, and the Regulation of Private Equity, Hedge Funds, and State Funds. The congress was co-sponsored by the IACL and the American Society for Comparative Law (ASCL) and was hosted by American University Washington College of Law, Georgetown University Law Center, and George Washington University Law School.

The IACL chose the topics for the congress in conjunction with the organizing committee, which consisted of faculty from the law schools listed above and members of the ASCL. General reporters and national reporters were selected by the IACL and the national committees. All of the reports were made available on the congress website in advance of the congress. Many of the topics have been published in a volume containing all of the topic reports relating to one nation. A vertical volume containing the general report and all of the national reports will be also be published for many of the topics. The publication of all of the general reports in this single volume is an invaluable resource for academics, researchers, practitioners, students, and all others wishing to be informed about the current trends and future developments in pivotal areas of the law.

We would like to thank the host law schools, the IACL, and the ACSL for financial and moral support for the congress. We would also like to express our gratitude for the devoted efforts of all members of the organizing committee, particularly Ms. Jennifer Dabson, Director of Continuing Legal Education at American University Washington College of Law. Professor Dr. J. H. M. van Erp, a member of the organizing committee of the 17th Congress and President of the Netherlands Comparative Law Association, provided much-needed advice and assistance, for which we are especially grateful. Finally, we want to express our deep appreciation

to the IACL leadership, especially the secretary-general, Prof. Dr. h.c. Jürgen Basedow; the president, Professor George Bermann; and the deputy secretary-general, Dr. Katrin Deckert.

Professor Karen B. Brown
George Washington University Law School
Washington, DC
(Member of the Steering Committee)

Professor David V. Snyder
American University
Washington College of Law
Washington, DC
(Chair of the Steering Committee)

Steering Committee, 18th International Congress of Comparative Law, Washington, DC, July 2010

David V. Snyder, Professor of Law and Director, Business Law Program, American University Washington College of Law (Chair)

Susan L. Karamanian, Associate Dean for International and Comparative Legal Studies, The George Washington University Law School (Vice Chair)

George A. Bermann, Gellhorn Professor of Law & Jean Monnet Professor of European Union Law, Columbia Law School and President, International Academy of Comparative Law

Karen B. Brown, Donald Phillip Rothschild Research Professor of Law, The George Washington University Law School

Jennifer Dabson, Director, Office of Continuing Legal Education, American University Washington College of Law

James V. Feinerman, James M. Morita Professor of Asian Legal Studies and Co-Director, Georgetown Law – Asia, Georgetown University Law Center

Fernanda G. Nicola, Associate Professor, American University Washington College of Law

Mathias Reimann, Hessel E. Yntema Professor of Law, University of Michigan

Franz Werro, Professor of Law, Georgetown University Law Center and Faculté de droit, University of Fribourg (Switzerland)

Préface

Tous les quatre ans le Congrès de l'Académie Internationale du Droit Comparé (AIDC) rassemble des participants du monde entier pour discuter de thèmes moderns relatifs à toutes les disciplines du droit. Le XVIIIème Congrès a eu lieu à Washington, D.C. en juillet 2010 où les membres ont traité de plus de 30 séances qui s'occupaient des sujets très importants. L'éventail de ces thèmes était très grand: la religion et l'état laïque, le rôle de la pratique dans la formation des juristes, la complexité des sources transnationales, les dommages catastrophiques, les actions collectives, changement climatique et la loi, le gouvernement d'entreprises, la gestation pour autrui, la compétence et la loi applicable en matière de la propriété intellectuelle, l'interdiction de la discrimination à cause de l'âge dans les relations du travail, la protection des investissements étrangers, les partenariats publiques privés, l'exclusion de certains moyens de preuve, la responsabilité pénale des personnes morales, la réglementation des fonds spéculatifs, et l'évasion fiscale. Le Congrès s'est tenu sous les auspices de l'AIDC et la Société Américaine de Droit Comparé (SADC) et était subventionné par les facultés de droit American University Washington College of Law, Georgetown University Law Center, and George Washington University Law School.

Les thèmes du congrès sont choisis par l'AIDC, en collaboration avec les organisateurs dont les facultés de droit ci-dessus et les membres de SADC faisaient partis. Les rapporteurs généraux et nationaux étaient sélectionnés. Tous les rapports étaient accessibles sur le site internet du congrès. La plupart des rapports sont publiés en volumes dits volumes verticaux de rapports – le rapport général et les rapports nationaux sur un thème particulier. La publication de tous les rapports généraux dans un seul volume donne une ressource inestimable.

Nous remercions les facultés de droit accueillants, l'AIDC et le SADC qui sont nos principaux soutiens financiers. Nous remercions aussi de tous leurs efforts les membres du comité d'accueil, surtout Madame Jennifer Dabson, le chef du Continuing Legal Education à l'American University Washington College of Law. Prof. Dr. J.H.M. van Erp, membre du comité accueillant du XVIIème Congrès et le Président de l'Association néerlandaise de droit comparé nous a beaucoup aidé et nous le remercions infiniment. Finalement, remerciements profonds aux dirigeants de l'AIDC, surtout le Secrétaire-Général, Prof. Dr. Dr. h.c. Jürgen Basedow, le Président, Prof. George Bermann, et le Député Secrétaire-Général, Dr. Katrin Deckert.

Professor Karen B. Brown
George Washington University Law School
Washington, DC
(Member of the Steering Committee)

Professor David V. Snyder
American University
Washington College of Law
Washington, DC
(Chair of the Steering Committee)

Contents

1 **Religion and the Secular State** 1
Javier Martínez-Torrón and W. Cole Durham

2 **Complexity of Transnational Sources** 29
Silvia Ferreri

3 **The Role of Practice in Legal Education** 57
Richard J. Wilson

4 **Catastrophic Damages: Liability and Insurance** 85
Pablo Salvador Coderch, Sonia Ramos González, and Rosa Milá Rafel

5 **La gestation pour autrui** 105
Françoise Monéger

6 **Same Sex Marriage** 115
Macarena Sáez

7 **Consumer Protection in Private International Relationships** 143
Diego P. Fernández Arroyo

8 **Codification and Flexibility in Private International Law** 167
Symeon C. Symeonides

9 **Class Actions** 191
Diego Corapi

10 **Cost and Fee Allocation in Civil Procedure** 197
Mathias Reimann

11 **Climate Change and the Law** 229
Erkki J. Hollo

12 **The Regulation of Private Equity, Hedge Funds and State Funds** 273
Eddy Wymeersch

13 **Corporate Governance** 295
Klaus J. Hopt

14 **Financial Leasing and Its Unification by UNIDROIT** 321
Herbert Kronke

15 **Insurance Contract Law Between Business Law and Consumer Protection** 335
Helmut Heiss

16 **The Balance of Copyright** 355
Reto M. Hilty and Sylvie Nérisson

17 **Jurisdiction and Applicable Law in Matters of Intellectual Property** 393
Toshiyuki Kono

18 **The Prohibition of Age Discrimination in Labor Relations** 423
Monika Schlachter

19 **The Law Applicable on the Continental Shelf and in the Exclusive Economic Zone** 453
Moira L. McConnell

20 **The Protection of Foreign Investment** 467
Wenhua Shan

21 **International Law in Domestic Systems** 509
Dinah Shelton

22 **Les Électeurs Étrangers** 541
Jacques Robert

23 **Constitutional Courts as Positive Legislators** 549
Allan R. Brewer-Carías

24 **Plurality of Political Opinion and the Concentration of the Media** 571
Allen P. Grunes and Maurice E. Stucke

25 **Are Human Rights Universal and Binding?** 581
Rainer Arnold

26 **Les Partenariats Publics Privés** 589
François Lichère

27 **Regulation of Corporate Tax Avoidance** 609
Karen B. Brown

28 **Corporate Criminal Liability** 625
Mark Pieth and Radha Ivory

29 **The Exclusionary Rule** 657
Stephen C. Thaman

Religion and the Secular State[1]

1

Javier Martínez-Torrón and W. Cole Durham, Jr.

1.1 Introduction

Every state adopts some posture toward the religious life existing among its citizens. 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.[2] 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.

To impose manageable limits on the general topic, 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.[3] The aim has been to obtain a picture of the solutions provided by different countries to the overarching problem of 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 fundamental human right involved.

It is as difficult to define what is secular as it is to define what is religious.[4] 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 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

[1] I.B., La religion et l'état laïque. The current essay is a shortened version of the original General Report, which is available at http://www.iclrs.org/index.php?blurb_id=975&page_id=3. The full version contains more detailed footnoting to the various country reports that could not be included here.

[2] 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/Netherlands: Wolters Kluwer Law and Business, 2010), 114–122.

J. Martínez-Torrón
Department of Law and Religion, Complutense University School of Law, Madrid, Spain
e-mail: jmtorron@der.ucm.es

W.C. Durham, Jr. (✉)
J. Reuben Clark Law School, Brigham Young University, Provo, UT, USA
e-mail: durhamc@lawgate.byu.edu

[3] The discussion of the sixth of these topics (civil effects of religious acts) has been dropped from the current version of this General Report, but is available in the full version as indicated in note 1 above.

[4] 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).

K.B. Brown and D.V. Snyder (eds.), *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé*,
DOI 10.1007/978-94-007-2354-2_1,

that is capable of accommodating the ever-increasing pluralism that is the hallmark of modern life.

As the Canadian Report suggests, there are "four key principles constituting any model of secularism..."[5] These are "the moral equality of persons; freedom of conscience and religion; State neutrality towards religion; and the separation of Church and State."[6] 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."[7]

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.[8] 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 shared 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 states 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.

1.2 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. 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. Third, while pluralization is increasing, traditional religions continue to hold a very significant place in many soci-

[5] Canada II.

[6] *Id.*

[7] *Id.*

[8] *Id.*

eties. They typically have deep roots, and have generally played a significant role in molding a country's history and shaping and preserving national identity. 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.

A fourth point has to do with the status of religious freedom protection around the world. Most countries 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. However, there are substantial deviations in the extent to which these norms are respected in practice. In the last few years, valuable empirical work has begun to emerge that assesses implementation of religious liberty norms worldwide.[9] This research indicates that while 48% of 198 countries and territories have low restrictions on religion, 20% have moderate restrictions, and 32% have 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% of global population lives in countries with low levels of restrictions; 16% lives in countries with moderate levels of restriction, and 70% lives in countries with high or very high levels of restrictions.

The research 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), yet has very high levels of social restrictions.

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 society, higher literacy rates, and so forth.[10] 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.[11] 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.

1.3 Constitutional and Legal Context

1.3.1 Constitutional Overview

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

[9] See, e.g., 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; Brian J. Grim and Roger Finke, *The Price of Freedom Denied: Religious Persecution and Conflict in the Twenty-First Century* (Cambridge: Cambridge University Press, 2011).

[10] Grim and Finke, *supra* note 9, at 205–206.

[11] *Id.* at 202–222.

Rights,[12] Article 18 of the International Covenant on Civil and Political Rights (ICCPR),[13] in the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,[14] and in a variety of other international instruments.[15]

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, including virtually every European constitution and the constitution of 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.

1.3.2 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.[16]

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. Most of the reporting countries are positioned toward the "non-identification" middle position on the loop, but even so, the various configurations vary widely. The loop structure provides a way of suggesting how the various systems covered by the reports compare with each other.

Moving along the loop, a number of the reporting countries have "established religions," though most at this point fit comfortably in the "tolerant" rather than "monopoly" mode. The United Kingdom provides the interesting example of a country with two established churches: the Church of Scotland and the Church of England.[17] Sweden, which had long had an established church, decided at the initiative of the church to disestablish, effective 1 January 2000. 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 now an institution separate from the state, with its own legal status. 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.

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

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

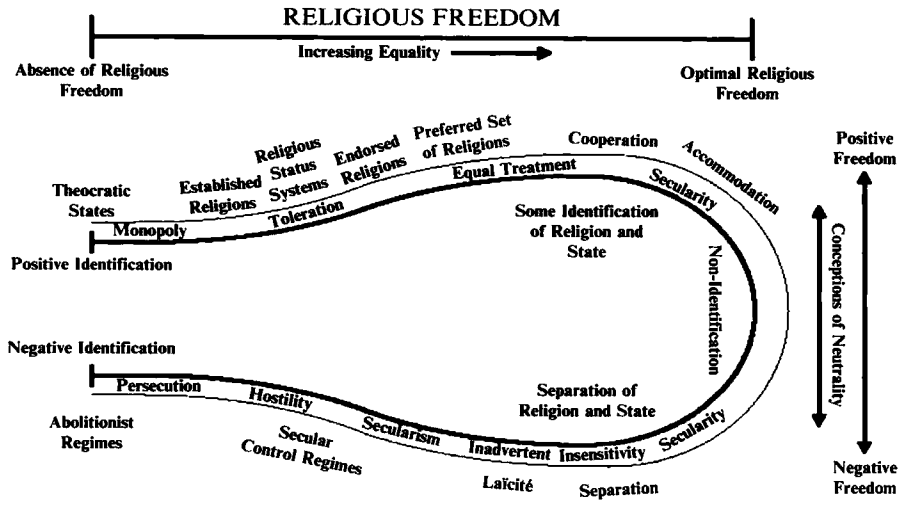
[13] G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. no. 16, at 52, 55, U.N. Doc A/6316 (1966), 999 U.N.T.S. 171 (1976) (Art. 18).

[14] Adopted 18 January 1982, G.A. Res 55, 36 U.N. GAOR Supp. (No. 51), U.N. Doc. A/RES/36/55 (1982).

[15] *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.

[16] The accompanying diagram is taken from Durham and Scharffs, *supra* note 2, at 117. See discussion there for a fuller analysis of the varying religion-state configurations that it represents.

[17] 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.



religious norms of different communities. However, they often lead to complications in fact. Thus, in Israel, different laws govern marriage of Jews, Muslims, Druze, and others. 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."[18] 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."[19]

The Canadian system flirted with allowing a version of the religious status system approach to operate through Canada's 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."[20] 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.[21] 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."[22]

"Endorsed religions" 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. This pattern is evident in many predominantly Roman Catholic or Eastern Orthodox countries.

The "preferred religions" model refers to countries that do not establish or endorse any particular religion, but single out one or 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 varying 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.

[18] India VIII.

[19] *Id.*

[20] Canada VIIB.

[21] *Id.*

[22] *Id.*

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. India's "positive conception of equal treatment" and secularism without a wall of separation also appears to fit into this model. Under this model, the state maintains a posture of neutrality toward religion, but no particular religions are singled out for benefits or unfavorable treatment and the state has friendly and cooperative relations with religious communities. Most significantly, this type of religion-state configuration is not averse to state funding of religious activities. In part this 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.

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 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.

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.

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 covered by national reports specifically declare themselves to be secular or *laic* in their constitutions. Some prohibit the creation, recognition or establishment of any religion. Others mandate the "separation" of religion and the state. Still others declare the state to be secular, or in French, *laïque*. 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. 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.

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.

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.

It is a short step from extreme forms of secularism/*laïcité* to regimes that have more affirmatively hostile religion-state relationships. What starts as neutrality and formal equality hardens into a view of law that sees 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. 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. 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. 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.

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 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 a the monitor of an open forum. This is like the model of neutrality as impartiality, except that it allows imposition 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.

1.3.3 Other Constitutional Issues Involving Religion

An number 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. 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.

The scope of permissible limitations on freedom of religion also tends to vary depending on the type of religion-state configuration. Most identify the protection of public safety, order, health, morals, or the fundamental rights and freedoms of others 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.

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.

1.3.4 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, and the right to operate without such status if it does not. 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.

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. 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. 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. 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. 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. 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.

The difficulties with the multi-tiered systems are three-fold. While the intention behind the agreement systems is 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 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.

1.4 Religious Autonomy

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 . . . ."[23] 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.[24] 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.

Most of the national reports indicate strong support for the idea of religious or institutional autonomy. What is at issue here is not the freedom of individual or personal autonomy, but "the right of religious communities (hierarchical, connectional, congregational, etc.) to decide upon and administer their own internal religious affairs without interference by the institutions of government."[25] A variety of different metaphors are used to describe the notion. Some of the reports refer to implementation of a model of "separate spheres" 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. Others focus on a "prohibited intervention" model, which underscores the freedom of the religious community.

In some constitutions, the right to religious autonomy is addressed directly. 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. Still others address the issue primarily in case law or in agreements with major denominations. In any event,

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

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

[25] Mark E. Chopko, "Constitutional Protection for Church Autonomy: A Practitioner's View," in Robbers, *supra* note 24, at 96.