The Inexorability of Religion in the Public Sphere – Replacing Neutrality with Objectivity

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Abstract

State sovereignty and the freedom of religious choice are closely linked, especially in contemporary constitutional states where the freedom of religion is constitutionally entrenched. Balancing state interests with religious demands is a perpetual problem. The state is founded upon the notion of sovereign coercive power, while religions lay claim to their version of transcendental truth. However, the state ignores religious considerations at the peril of committing injustice.

This paper surveys the implications of the inextricable historical and contemporary links between religion and the authority of the state. Maintaining public order while honouring the constitutional demands of religious freedom inevitably requires limiting religious expression, but how this is to be achieved justly is, ironically, complicated by the liberal foundations of constitutionalism. This is because, although constitutionalism is not a religion, its tenets express specific, religion-like views of the world.

In many liberal democracies, the courts and other organs of state justify the manner in which they deal with difficult religious matters by claiming to be religiously neutral. Neutrality in matters bearing profound ontological positions, such as the source of state authority and religious views that do not coincide with liberal democracy, is impossible, and therefore the claim of state neutrality is nothing other than an illusion.

Nevertheless, it is possible for a constitutional state to protect and defend religious freedom by approaching matters of religion objectively, as opposed to relying on illusory neutrality. How this can be achieved is suggested in this paper.

Keywords

Sovereignty; religious freedom; public order; constitutionalism; constitutional state; liberal democracy; neutrality; objectivity; reciprocity.

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1 Introduction

The notion of the modern constitutional state emerged from a power struggle in Central Europe between religious and governmental authorities some four centuries ago. Earlier, when the Frankish warrior king Karl I (better known as *Charlemagne*) was crowned in the year 800 AD by Pope Leo III as the first emperor of the Holy Roman Empire, it was generally assumed that the pope represented the highest divine authority on earth, as such performing a significant role in politics, including the power to anoint worldly European rulers into power. This relationship between the emperor and pontiff, however, became an enduring contest for ultimate sovereignty.

The Holy Roman Empire formally survived for ten centuries. However, a shift of power from the ecclesiastical (spiritual) to the secular (temporal) occurred at the end of the eighty-year war between Spain and the United Provinces of the Netherlands. The Peace Treaty of Westphalia of 1648 ended that war and established a range of sovereign territories, thereby elevating the power of statehood above that of the Roman church.

Religion was, in fact, a significant underlying cause of the perpetual wars of the sixteenth and seventeenth centuries involving rulers across Western Europe. Towards the end of hostilities, the contest became a battle between Catholicism and Calvinism.

Religious freedom, which was first granted to Lutherans at the Peace of Augsburg in 1555 (although rescinded later by the Holy Roman emperor), was at stake. At Westphalia, where participation stretched across Europe (including the Nordic countries), governmental sovereignty and religious freedom became entrenched in the phrase *cuius regio, eius religio* (intended to convey the right of every ruler to determine whether the religion of his subjects must be Catholic or Reformed). It may therefore be said that the first universal right to be acknowledged by state sovereigns was religious freedom.[1]

Since Westphalia, and until today, the freedom of the religious choice of citizens has been linked, often controversially, to the sovereignty of the state. Most particularly in contemporary constitutional states where the freedom of religion is constitutionally entrenched as a fundamental human right, the governmental authorities struggle with the balancing of state

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1 See e.g. Aguilera-Barchet *History of Western Public Law* 103-142.

interests and religious challenges, while also balancing competing religious claims among the citizenry. The state dominates with coercive power in the public sphere, while religions lay claim to their own version of transcendental truth. In the exercise of its authority, the state is therefore unavoidably confronted with religion and religious considerations, which it ignores at the peril of committing injustice.

This paper offers a survey of the implications of the inextricable historical and contemporary links between religion and the authority of the state, beginning in the first section with the phenomenon that the state cannot avoid dealing with divergent religious notions of the truth. The second section deals with the relationship between constitutionalism and religion, and section three addresses the untenable claim of liberal democracies to be religiously neutral. In section four, a possible solution to the dilemma of impossible state neutrality in religious matters is proposed and demonstrated using a hypothetical case.

2 Linking state sovereignty and religion

The gravitation of power towards an apex seems to be characteristic of humanity. Politically, this is evident from the long history of chieftainships, monarchies, empires and dictatorships – and more recently of tendencies towards presidential imperialism.[2] Ecclesiastically, the (sometimes unquestioned) religious and social influence of popes, ayatollahs and Dalai Lamas in history is well known. What is also remarkable is how often in history the exercise of governmental and religious power has gone hand in hand. Frequently, high, sometimes even the highest, religious functions were vested in or usurped by the bearers of supreme governmental power.[3] Ecclesiastic authority is often construed on the strength of particular modes of interpretation of Scripture.[4] Similarly, the claim that governmental authority is rooted in divine dispensation has been made for many centuries. Benjamin Kaplan, for instance, wrote:

> A kingdom such as England was not, in Christian teaching, merely an arrangement of convenience, fashioned by humans for purposes of dominance or defense. Rather, it was part of the divinely appointed order of this world. As all human affairs were directed by divine providence, so were the formation and fate of states. 'Ordained' in their office by God, acting as his 'vicars' and 'lieutenants,' their rulers preserved the peace and dispensed divine justice—or, if they were wicked, inflicted divine retribution. They, as

2 See e.g. Gebeye *Distorting Lens of Convergent Constitutional Theory* 138-148.

3 Thus e.g. Julius Caesar found it useful to claim the office of *pontifex maximus* (a title associated in the 15th Century with the Roman Catholic pope) in his quest for supreme dictatorial power. See e.g. Livius.org 2019 https://www.livius.org/articles/concept/pontifex-maximus/.

4 Thus, in the Roman Catholic Church the Pope is deemed to be the vicar of Christ and successor of the apostle Peter. See e.g. Mirus date unknown https://www.catholicculture.org/culture/library/view.cfm?id=4319.

> heads of state, and their subjects, as 'members' of the state, formed a single 'body politic.' Mystically united, head and members formed a Christian community that would prosper or suffer, depending on whether it earned God's blessing or wrath. In that recurrent encounter with divine justice, the fate of the realm hinged on the piety and virtue of its ruler and all its people. In short, like a town or village, a Christian state was a corpus Christianum.[5]

Effective challenges to the centralisation of power are a relatively recent phenomenon. Since the Byzantine Empire was established in the fourth century AD, state and church existed as separate but interlinked spheres in Europe, in what was referred to as the *Corpus Christianum.*[6] Interestingly, the challenges to the autocratic power of both the Church and civil sovereigns coincided in Europe's 16th Century, leading to the rise of democratic government and ecclesiastical decentralisation.[7]

Nevertheless, even today, and despite the niceties of constitutional checks and balances, also in constitutional orders where democracy is most thoroughly entrenched, governmental power is routinely associated primarily with an individual holding an apex office of government such as a president (USA and France), a chancellor (Germany and Austria), or a prime minister (UK, Australia, Canada). In most cases, most of the final decisional authority is (perhaps inevitably?) concentrated at the pinnacle.

In the contemporary world of religion, also, a peak authority often holds sway as the final instance in matters of faith, e.g. the leadership of episcopal conferences,[8] moderamina of the synods of reformed denominations that follow a collegial form of governance,[9] *Qadhis* and *Ulema* in Islamic judicial systems,[10] and such.

The usually undeclared contest between the political and religious spheres for primacy in society is unavoidable. This tension can not be absent from the lives of citizens. The state exercises governmental authority as the means for the establishment and maintenance of civil order, but at the same time, no conscious human individual who is subject to the authority of the state is without some form of belief, most frequently, but not consistently

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5 Kaplan *Divided by Faith* 100. Since the 16th Century the holder of the British Crown has been known as the "Supreme Governor" of the Church of England and "Defender of the Faith". Church of England 2023 https://www.churchofengland.org/media-and-news/stories-blogs-and-features/why-king-known-defender-faith. Also see Cooper *Breaking of Nations* 18-21.

6 See e.g. Dooyeweerd "Struggle for a Christian Politics" 19-35.

7 See e.g. Gillispie "Inevitable Entanglement of Religion and Politics" 57-73; Venter *Language of Constitutional Comparison* 79-85 and the sources cited there.

8 See e.g. Mirus date unknown https://www.catholicculture.org/culture/library/view.cfm?id=4319.

9 See e.g. Oosterbroek 2025 https://cgk.nl/en/synod/of-the-moderates-of-the-general-synod/.

10 See e.g. Judiciaries Worldwide date unknown https://judiciariesworldwide.fjc.gov/islamic-legal-systems.

expressed as religion. Believers of all stripes are therefore subject to the sovereign legal authority of the state and also bound to the tenets of their comprehensive faith, which determines their understanding of the world. John Witte, e.g. wrote:

> My first argument is that law and religion are two interrelated dimensions of human living, two interlocking sources and systems of value and vision that exist in all human communities, regardless of time, place, and culture.[11]
>
> [A] religion can be traditional or very new, closely confining or loosely structured, world-avertive or world-affirmative, atheistic, nontheistic, polytheistic, or monotheistic. What is critical to see is that religion consists of both beliefs and the social articulation, implementation, and elaboration of those beliefs.[12]

2.1 State sovereignty as the ultimate claim to power

An essential element of the state is that it exerts compelling authority. The state's unique claim to authoritative control is seldom challenged in principle. This claim to governmental power is justified or legitimised in various ways, currently mostly based on some conception of "the people" as the original repository of sovereignty being represented by the governing institutions.[13]

However motivated, in our era the state is expected to maintain public order, to propound and promulgate binding legislation, to adjudicate over and administer the law bindingly, to employ physical – even deadly – force to enforce compliance, to engage in international relations and even war in the name of "the people" or "the nation", to regulate money, public health and education, and more. The sum total of such competences and responsibilities constitutes the sovereignty of the state.

Why the citizenry is obliged to submit to state sovereignty is a topic of perennial theoretical debate. Responses to the question depend on the speaker's perception of authority, which in turn is determined by his or her worldview. The underpinnings of liberal democracy have never been quite stable, and the notion is under constant attack[14] by the likes of post-modern

11 Witte 1996 *Colum Hum Rts L Rev* 3.
12 Witte 1996 *Colum Hum Rts L Rev* 5.
13 Cf e.g. Venter *Language of Constitutional Comparison* 83-84 and the sources cited there.
14 Cf Venter *Language of Constitutional Comparison* 139-169.

critics,[15] Marxist socialists,[16] Islamic legalists,[17] African communalists,[18] and by the proponents of populism.[19] Nevertheless, the contractarian foundations of liberal democracy do not allow for much compromise regarding the predominant powers of the state. Hobbes' conception of a society which cannot function without placing ultimate protective authority in the hands of a sovereign power actually continues to serve as the justificatory principle of modern statehood, and as a presumably rational standard for the achievement of justice.[20]

Inseparably built into the range of notions of sovereignty are presuppositions, assumptions and beliefs regarding the modality of human life and the justification of power. Constitutional texts around the world are replete with value-laden concepts such as "democracy", "justice", "equality", "accountability", "nationality" and the like, all requiring historical and cultural interpretation in the specific context of the state concerned. A mechanical, anaemic understanding of governmental authority, separated from the applicable ontological and epistemological precepts, is therefore unachievable.

To allow for a fair assessment of a particular approach to state sovereignty, proponents should honestly reveal the underlying premises by which they justify their preferred approach. Presenting an approach to questions concerning the source(s) of the state's claim to enforceable power as a "neutral" view would be dishonest because neutrality seeks to conceal subjective beliefs, not reveal them.

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15 Cf e.g. Frankenberg *Comparative Constitutional Studies* 95, stating that liberal constitutionalists deceitfully dress "the Leviathan in a cashmere overcoat".

16 According to Schonfeld 1971 *Review of Politics* 360-376 Marx and Engels considered democracy as a vehicle for socialism to be used to realise communism.

17 Islamic legalism can hardly accommodate democratic thinking. See e.g. Hallaq 2003 *Hastings LJ* 1707-1708: "If Islamic civilization, culture, or state ever constituted a regime of any kind, it was one of nomocracy. There has never been a culture in human society so legally oriented as Islam. … we have come to realize – more than ever – that Islamic law was not merely a legal system that resolved conflicts and negotiated social and economic relationships (the role normally assigned to law in the West), but that it was in addition a theological system, an applied religious ritual, an intellectual enterprise of the first order, a cultural pillar of far-reaching dimensions and, in short, a world-view that defined both Muslim identity and even Islam itself."

18 See e.g. Oduor 2019 *South African Journal of Philosophy* 108-122.

19 See e.g. Tushnet 2016 *German Law Journal* 382-389.

20 Venter *Language of Constitutional Comparison* 23-28. Rawls 1958 *The Philosophical Review* 192-193 famously remarked: "[H]owever mistaken the notion of the social contract may be as history, and however far it may overreach itself as a general theory of social and political obligation, it does express, suitably interpreted, an essential part of the concept of justice."

2.2 Religion as ultimate understanding of truth

"Religion" is by no means an uncontested notion. It is surrounded by associated concepts such as "belief", "faith", "creed", "denomination", "cult", "worship", "attitude", "doctrine", "dogma", "worldview", "sectarian" etc., and by antonyms or competing notions such as "agnosticism", "atheism", "secularism", "denialism", "evolutionism", "scientism" etc.

Various courts around the world have, on occasion, attempted to define religion,[21] but neither in the domain of jurisprudence, nor among theologians and clerics[22] has a generally accepted definition emerged. No doubt this shows that an understanding of what it means to be religious is irredeemably subjective. Put differently, at its root, religion primarily rests on a person's unique, individual perception of the world. This is also true of institutionalised and ritualised religious practices and institutions developed to serve as vehicles of religious expression.

In his particularly astute book[23] sociologist Christian Smith suggests convincingly that all humans are essentially "believers": "We are all necessarily trusting, believing animals, creatures who must and do place our faith in belief that *cannot themselves be verified except by means established by the presumed beliefs themselves*."[24] Against the background of the age-old debate over what "religion" as an inherent human trait actually means, Smith extracts from a more elaborate description the essential meaning of religion as "an ordinarily unseen reality that tells us what truly is and how we therefore ought to be".[25] Following Niebuhr,[26] Smith states, "the tension and paradox of finite yet self-conscious humanity … leads humans naturally … toward nonempirical orders of religion as transcendent interpretive principles of significance for humans searching to understand the meaning of themselves, life, history, the world, and the cosmos".[27]

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21 A peerless example is Lord Toulson's 2013 "description" of religion in *R (on Application of Hodkin) v Registrar General of Births, Deaths and* Marriages [2013] UKSC 77 para 57: "as a spiritual or non-secular belief system, held by a group of adherents, which claims to explain mankind's place in the universe and relationship with the infinite, and to teach its adherents how they are to live their lives in conformity with the spiritual understanding associated with the belief system. By spiritual or non-secular I mean a belief system which goes beyond that which can be perceived by the senses or ascertained by the application of science".

22 Inevitably the definition of "religion" preferred by adherents, and especially by representatives of institutionalised religious institutions, will be determined by their particular doctrine and their rejection of other religions as being less true or false.

23 Smith *Moral, Believing Animals*.

24 Smith *Moral, Believing Animals* 54 (italics original).

25 Smith *Moral, Believing Animals* 98. In a slightly extended description, he holds that "religions are sets of beliefs, symbols, and practices about the reality of superempirical orders that make claims to organize and guide human life".

26 Niebuhr *Nature and Destiny of Man*.

27 Smith *Moral, Believing Animals* 122.

The sincerity of one person's religious belief cannot be measured exactly by another, simply because belief (as distinct from communally practised religion) is exclusively personal, and mind-reading is impossible. It is only the believer who can achieve a relatively accurate grasp of the sincerity with which the tenets of one's religion are being adhered to.

The ability of people to reason and to communicate in complex languages is often presented as a key trait that distinguishes humans from non-humans. However, being human is more than being rational and able to speak, because our reasoning goes far beyond mere cybernetic processing and communication of information: it is impossible to completely filter out emotion, previous experience, predilection, fear, hope, ambition, prejudice, upbringing, worldview and more from our reasoning and communication. Rationalists tend to deify human reason as a superior force of brute logic.[28] Nevertheless, in the "rational" rejection of the notion of extra- or superhuman transcendent creation and direction of the world, one can discern a profoundly religious belief in the ability of the human mind to filter out all that is subjectively deemed not to be relevant. Given the obvious limitations of the human mind, this belief is at least as internally inconsistent as the beliefs associated with any conventional religion.[29]

Regardless of the expressed tenets or presupposed premises of one's religion as a worldview, we live in accordance with what we deem, i.e. *believe*, to be true. Our convictions of what is true and not true develop under the influence of many experiences, but we find our ultimate and essential truth in religion, be it in a belief in the power of one's own mind, or a theistic or deistic faith concerning the transcendent origins and direction of the world, facilitated by a dogmatic and institutionalised system, or not.

Denial of the relevance of religion is a widespread attitude in contemporary Western culture.[30] Such denials take various forms, including the refutation of or apathy towards divinity. Ironically, an attitude of denial is essentially religious in nature because it is rooted in a particular explanation of being, be it serendipity, scientistic rationality, intellectual condescension or a similar ontology. The religious nature of a-religious and anti-religious

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28 In his quest to rationally prove the existence of God, René Descartes famously concluded that the one thing that we as humans cannot doubt is that we think – *cogito ergo sum*. See e.g. Stanford Encyclopedia of Philosophy 2001 https://plato.stanford.edu/entries/descartes-ontological/.

29 In her critique of Ronald Dworkin's teachings on religion and the state, Laborde "Liberal Neutrality" 108 convincingly finds that "Dworkin's state is not so much a neutral state as a state that is substantively *liberal* – a state committed to liberal justice and the generalization of the principle of personal ethical independence – and structurally *secular* – a state that delimits the contours of the public good, in ways that directly cut across the political and normative claims of organized churches." (Italics original).

30 Cf e.g. Speight and Zank *Politics, Religion and Political Theology* 1.

stances can be discerned from the predispositions reflected therein regarding confessional religions. Non-religion entails a particular *belief* about the world, one that is different from other convictions. Whether confessional or an unstructured ontological stance, religion is a characteristic attribute of the human condition.

2.3 The tension between governmental power and religious truths

When it comes to explaining the sources of authority, both a-religious and confessional believers may support or reject the constitutionalist notion of popular sovereignty, but would justify it in different ways. One may, for instance, find the explanation in human reason, the other in divine dispensation, and a third in communitarianism.

Constitutionalism is hailed as the desired goal for the ideal modern state. What it entails is not cast in stone, but its broad outlines are closely related to its roots in Western liberalism. Among the most prominent doctrines of constitutionalism are the rule of law, popular sovereignty, democracy, human rights and constitutional supremacy. The precise meaning of each of these is also not fixed, however, and therefore prone to subjective interpretation and application. They are themselves rooted in profound ontological assumptions.[31]

Being human, bearers of state authority cannot isolate themselves from their personal religious beliefs. However, in the constitutional state, the worldviews of those in power cannot excuse them from subjecting themselves to the demands of constitutionalism. They are bound thereby due to the nature of constitutionalism as the founding framework for the sovereignty of the constitutional state. The constitution is the supreme law.

Most world views, especially confessional religions, strive to explain transcendental power. Constitutionalism allows the power of "the people" to be entrusted to the state. Constitutionalism's justification of the power of the state is therefore expressly *not* rooted in a confession of divine sovereignty, but is a secular construct based on assumed collective human consensus. On the other hand, confessional religions mostly attribute the source of power to a deity or deities. Justification of the exercise of the authority of the state with reference to popular sovereignty, therefore, holds the potential of direct conflict with religious persons and institutions. A concrete example would be an expressly secular constitution based on the notion of freedom *from* religion, because it implies the rejection of divine authority in any form.

The varying approaches of European courts clearly demonstrate this tension concerning the source of authority. Stijn Smet for instance, aptly

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31 A detailed consideration of the nature of the constitutional state and constitutionalism is to be found in Venter *Constitutionalism and Religion* 46-83.

identified three secular state-and-religion models, namely militant secularism (as in France and Turkey) where all religious manifestations are banned from public institutions, "pluralistic models" where an established church is incorporated in the constitutional system (as in the United Kingdom and Greece), and those that "fall in between" (Spain and Switzerland).[32] He summarised the situation as follows:

> Against a secular backdrop that has traditionally emphasised a strict division between public and private life, several States have resorted to measures that – quite literally – focus on hiding the problem from sight. Think, for instance, of the ban on face-covering veils in France and Belgium, the Swiss ban on the construction of minarets, or legislation in several countries prohibiting the wearing of the Islamic headscarf in public institutions. It is no coincidence that these measures almost invariably target Muslims, since it is primarily their demands to be able to manifest their religious beliefs in public that challenge the dominant, secular understanding of the public space in many European States.[33]

Whereas the state lays claim to the sovereign power to exercise public authority, everyone's religion inevitably represents their personal perception of truth. History has proven this modality of human existence to be a recipe for perpetual contention on the one hand between governors and the governed, and on the other hand among and between believers or their religious institutions. From this arises the recurrent question: given the precepts upon which state sovereignty is founded, how should the state exercise its power in order to deal with the reality of religious pluralism?

Religion as a largely unseen conviction cannot effectively be proscribed, nor imposed by law. What can be regulated is the observable manifestation of belief. In mono-religious states, the public exercise of other religions is sometimes prohibited and punished,[34] and not infrequently "secular" states with religiously diverse populations impose limitations on some religious rituals or usages.[35] Believers whose public expression of their religious convictions is prohibited or limited by law may be confronted by a moral choice between contravening the law or acting against their beliefs.

3 Constitutionalism and religion

The state is ever-present in human society. One may, in fact, be justified in considering the ubiquitous state to be humanity's most conspicuous cultural artefact. It is difficult to imagine any place on the planet where the authority

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32 Smet "Freedom of Religion v Freedom from Religion" 117.

33 Smet "Freedom of Religion v Freedom from Religion" 113.

34 Prohibitions of various degrees on proselytising are to be found in several countries. See e.g. US Department of State 2016 https://www.brigada.org/wp-content/uploads/2018/02/OSAC-Proselytizing-Report-Country-List.pdf.

35 See e.g. Open Society Justice Initiative 2022 https://www.justiceinitiative.org/uploads/0b300685-1b89-46e2-bcf6-7ae5a77cb62c/policy-brief-restrictions-on-muslim-women%27s-dress-03252022.pdf.

of a state or of a combination of states is absent. Although this presence may not always be visible or tangible, human conduct is constantly subject to authoritative state regulation. The law is the means by which the state regulates society. The full cycle of a person's life is attended by legal considerations and regulations, many of which concern interaction with others and individual and communal behaviour within society.

The question why this is so may evoke various responses on a continuum ranging from divine dispensation, the *volonté générale*, to notions of common ownership of the means of production characteristic of totalitarian regimes rooted in socialism. However justified and implemented, the universal effects and purposes of legal regulation of society are the establishment and maintenance of order, an indispensable condition for social and economic stability and peace. Being an intangible construct of the mind, the state can perform its ordering functions only through human agency, i.e. through the actions of the various organs of the state.

Whether the conduct of the organs of the state and the legal framework within which they function are good, fair, just and desirable – or otherwise – is a moral question. Social order may be maintained by means of consensual cooperation, but also through cruel authoritarian repression. Liberal constitutionalism was developed to counter the historical tendency of power-bearers to act arbitrarily and selfishly. The necessity for limiting people's ability to abuse power is a matter of historical record, which makes constitutionalism a desirable system, even if it is more often than not poorly or insincerely implemented.

The degree of success with which the ideals of the constitutional state have been – and can in fact be – used as a panacea for injustice in all jurisdictions is a matter for debate. It must, however, be acknowledged that better alternatives for constitutionalism and its attendant more or less vague elements (democracy, the rule of law, the separation of powers, etc.) have not yet been devised.

Despite the ubiquity in society of legal regulation, the law is not capable of dominating all aspects of human existence. The scope of legal fiat has its limits. The law cannot ignore the laws of nature, nor can legal norms transform immorality into morality, or impose or proscribe belief. And yet through the centuries, as in present times, the law operates in close association, be it in harmony or in conflict, with the beliefs of legal subjects. In the mind of a citizen, the legitimacy of a legal norm depends on the citizen's subjective beliefs, which cannot be changed by law.

The seventeenth-century Treaty of Westphalia in effect acknowledged the limits of the law by legally recognising that human belief cannot be prescribed by the state, and that the freedom of citizens to practice their

diverse religions should be allowed instead of imposed. However, the state as upholder of public order cannot be expected to dispense with its primary responsibility by allowing disruptive conduct in the name of religious freedom. Religious behaviour that threatens or disturbs the public order cannot be endorsed by the law of a constitutional state.

Before the rise of democracy and constitutionalism, mono-religious states were mostly the norm rather than the exception. Currently, constitutional states tend to dissociate themselves from specific religions, except nominally in the form of "ceremonial deism". Examples such as "[c]onscious of their responsibility before God and humankind",[36] "in God we trust"[37] and "[m]ay God protect our people"[38] abound in constitutional preambles, and invoking God in oaths of office is widely practised.[39] Ceremonial deism implies religious insincerity.

Beyond constitutionalism, several mono-religious states do exist currently, in particular the Islamic republics, but also the Roman Catholic Vatican and Buddhist Cambodia.[40] It stands to reason that an objective approach to other religions by the authorities of mono-religious states is unlikely, despite constitutional provisions purporting to protect religious freedom.[41]

Constitutional states professing to be secular,[42] or where the supremacy of the constitution is emphasised to such a degree that the text serves the purpose of a scripture underpinning a "civil religion",[43] should actually also

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36 The first sentence of the *German Basic Law* (*Grundgesetz*) of 1949 reads "*Im Bewußtsein seiner Verantwortung vor Gott und den Menschen*".

37 Which is the official motto of the USA, also reflected on its currency.

38 Which is the closing phrase of the preamble of the *Constitution of the Republic of South Africa*, 1996 repeated in seven languages.

39 The expression "so help me God" appears in constitutionally prescribed oaths in e.g. Australia, Kenya and Norway, in some cases allowing for solemn affirmation instead of the oath.

40 Cf. e.g. Pew Research Center 2017 https://www.pewresearch.org/religion/2017/10/03/many-countries-favor-specific-religions-officially-or-unofficially/.

41 As an interesting example, Art 43 of the *Constitution of the Kingdom of Cambodia*, 1993 reads: "Freedom of religious belief and worship shall be guaranteed by the State on the condition that such freedom does not affect other religious beliefs or violate public order and security." The overwhelming majority of the Cambodian population practice Buddhism and proselytising is prohibited: see e.g. US Department of State https://www.state.gov/reports/2022-report-on-international-religious-freedom/cambodia/.

42 Article 1 of the *French Constitution* of 4 October 1958, e.g. opens with the phrase "France shall be an indivisible, secular, democratic and social Republic."

43 The USA is the prime example. Davis 2011 *Hastings Int'l & Comp L Rev* 97 e.g. wrote: "The Pledge of Allegiance is our creed, the Constitution is our scripture, and our founding fathers are our patriarchs. We are devoted to democracy, we pray for our progress, and we are committed capitalists. Our prisons are our civil religion's purgatory, where we hope the criminal perpetrators prove penitent. We celebrate our saintly soldiers on Memorial Day, and we praise our political prophets such as Martin Luther King, Jr."

be considered to be mono-religious. Secularism and the strict separation of church and state may not be religions as such, but as profoundly subjective stances specifically towards religion, they place the state in a position of rivalry with all other religions present in the public sphere. Most European and North American constitutional orders are in this category.

The essential elements of constitutionalism represent a particular people-centred understanding of the world and the place of humanity therein. Confessional religions typically provide a particular understanding of the world expressed in terms of divine power: at least for Christians, Muslims and Jews, God (Allah, Jehovah) as sovereign Creator is the source of all power, including power in the hands of people.

In terms of constitutionalism's core tenets, specifically popular sovereignty, individual liberty and democracy, the power of the state and its organs is derived from the general will of individual persons collectively referred to as "the people". This belief, rooted in the abstract and idealised concept of the social contract, is as incapable of proof as any religious belief in deity. To conceive of constitutionalism as the manifestation of a worldview analogous to religion is, therefore, compelling, especially in a quest to comprehend the place of religion in general in the functioning of the constitutional state.[44]

4 Constitutional observance of religious neutrality is an illusion

When a state is called upon to ensure public order in the face of competing claims of religious freedom, some burning questions arise: what, from the perspective of constitutionalism, represents a religious threat to public order? What is the principled framework that the power-bearers of the state may use legitimately when religious conduct and public order must be balanced?

The unavoidability of these questions deprives the constitutional state of any claim to religious neutrality. The point of departure of liberal democracy is individual freedom, specifically to make one's choices autonomously regarding opinion, belief, worldview and self-fulfilment. It has been established in practice, however, that the liberty of the individual cannot be acknowledged as an absolute claim, because the actions of one person affect others in society, and it is incumbent on the state to impose limitations on people's conduct in the interests of social order.

When it comes to the legal acknowledgement of freedom of belief, no government, court or law is capable of changing or dictating one's personal convictions. Belief as an essential human attribute, therefore, exists beyond

44 See Venter *Language of Constitutionalism* 78-85 and 98-100.

the reach of the state, which is limited to the regulation of the practicalities of the exercise of believers' impregnable freedom to believe what they believe. The distinction between the *forum internum* and the *forum externum* has been embedded in Western theological and constitutional thinking for centuries and still crops up from time to time in contemporary discourse. Alin Fumurescu's distinction rings true: "by *forum internum* I understand the forum in which the individual is characterised by authenticity and autonomy (in the etymological sense of giving one's laws—*auto-nomos*), while by *forum externum* I understand the individuality that was ensured by membership in some *universitas*—not just the Church, but the village, city, province, or even the *populus*".[45] Balancing the individual's internal and the external fora continues to be a challenge, especially for European courts, when dealing with religious freedom.[46] Be that as it may, in the performance of its function to maintain social order, the state cannot claim neutrality if it favours one set of religious beliefs – including those underpinning constitutionalism – over others.

Expressly taking a secular stance, or raising a constitutional wall in an attempt to purge religion from state conduct while prominently offering constitutional protection for all who do not wish to be secular or to isolate their citizenship from their religion creates a real legal dilemma: how can a state which maintains constitutional foundations embedded in specific ontological notions of the source of its authority allow religious conduct based on different understandings of the world? This dilemma has given rise to the escapist notion of state neutrality.

As is the case with those in authority, the citizenry's obligation to conform to legal prescripts may and often does clash with personal convictions about right and wrong, fair and unfair, just and unjust. Where anyone is required to submit to a law which conflicts with their religious convictions, the constitutional state cannot resolve such a conflict neutrally, because it would require a choice between the negation of the precepts of and subjectively preferring constitutionalist beliefs over other religious convictions.

Although constitutional states invariably recognise religious freedom prominently, governors and judges continue to struggle greatly to harmonise their exercise of constitutionally granted authority with the demands of religious fairness. Scholarship on the matter is similarly confused.

I have previously written comparatively on the manner in which courts utilise neutrality in religion-related cases.[47] Claims of neutrality in law (not only in

45 Fumurescu 2011 *The European Legacy* 721.
46 See e.g. Giles "Theological Justification for Freedom of Belief" 126-127.
47 See Venter *Constitutionalism and Religion* 129-178 and 237-240.

matters concerning religion) lack consistency and show ambiguity in most leading constitutionalist jurisdictions. A few examples will suffice here.

In a leading judgment of 2012, the Canadian Supreme Court stated ex cathedra that

> [t]he place of religion in civil society has been a source of public debate since the dawn of civilization. The gradual separation of church and state in Canada has been part of a broad movement to secularize public institutions in the Western World ... Religious neutrality is now seen by many Western states as a legitimate means of creating a free space in which citizens of various beliefs can exercise their individual rights.[48]

It is remarkable how the Court assumed without further justification that secularism is a neutral attitude. Being secular may mean many things, but neutral it is not.

In a case before the highest constitutional court of Germany in 2008 concerning the doctrinal propriety of theological teaching to prospective pastors at a state university, the *Bundesverfassungsgericht* explained:

> If the state decides to teach theology at its universities as the scholarly study of faith related to a particular religious denomination, then truths of faith become the subject of (state) university teaching. Thinking about the content of religious belief and further developing religious doctrines then takes place to a large extent within such faculties, which thus assume a central importance for ecclesiastical life, including the proclamation of dogmatics as its core. But it cannot and may not be *the concern of the state, which is neutral in religious and ideological matters*,[49] to make the decision as to whether theological teaching is appropriate to a religious denomination. Instead, this is a right of the religious community whose theology is involved itself. … The right to determine itself what, for example, is (still) part of Catholic or Protestant theology and remains within the scope of the faith therefore touches the core of the church's right of self-determination with regard to teaching at theology faculties.[50]

In the context of German constitutional law and the facts of the case, the outcome of the judgment cannot be faulted on its merits, but it is logically impossible to accept the Court's statement that the German state is neutral in ontological and epistemological matters. The profoundly liberal constitutional ideology within which the *Basic Law* of 1949 is framed, namely

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48 *SL and DJ v Commission scolaire des Chênes and Attorney General of Quebec* 2012 SCC 7, [2012] 1 SCR 235 para 10.

49 The italicised phrase is the somewhat inaccurate translation of the original German "nicht Sache des religiös-weltanschaulich neutralen Staates". "Weltanschaulich" means more than "ideology" because it signifies world view, i.e. a person's comprehensive understanding of the world. No doubt the Court had art 4(1) of the *Grundgesetz* in mind, which entrenches the freedom of belief, conscience and creed, both religious and ontological.

50 BVerfG 1 BvR 462/06 vom 28.10.2008, e.g. para 61 (italics added).

the inviolability of human dignity, is propounded prominently in its very first provision, which is also rendered perpetually irrevocable.[51]

In 1983, Robert Cover published a deeply philosophical "foreword" to a review of the United States Supreme Court's term of 1982.[52] Cover's profound piece continues to intrigue constitutional scholars,[53] and although it has been cited in some judgments, it does not seem to have penetrated American (or any other jurisdiction's) judicial thinking significantly. Cover ascribed the task of keeping the peace to the judiciary,[54] and introduced the notion of "redemptive constitutionalism", suggesting an approach whereby religious stances influence the application of the law.[55] Keeping the peace in the context of redemptive constitutionalism, he wrote, refutes neutrality:

> Keeping the peace is no simple or neutral task. For in the normative worlds created around us, not all interpretive trajectories are insular. The worlds of law we create are all, in part, redemptive. With respect to a world of redemptive constitutionalism, the Court must either deny the redemptionists the power of the state (and thereby either truncate the growth of their law or force them into resistance) or share their interpretation. The court will often employ the secondary hermeneutic of jurisdiction to deny the redemptionist vision. Ultimately, however, it is precisely the structure of jurisdiction that locates responsibility for constitutional vision with the courts. The courts may well rely upon the jurisdictional screen and rules of toleration to avoid killing the law of the insular communities that dot our normative landscape. But they cannot avoid responsibility for applying or refusing to apply power to fulfill a redemptionist vision.[56]

Nevertheless, recent cases before the US Supreme Court have revealed persistent cleavages between various understandings of neutrality, not only regarding religion, but also on interpretative matters involving history.[57] Serena Mayeri, for instance, made no bones about her disgust for the manner in which the majority of the Court approached history to assist the justification of its findings: "But the Dobbs approach to history and tradition cannot go unanswered. Rather, it must be challenged at every turn—to expose and correct the majority's flawed historical analysis and spurious

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51 Articles 1(1) and 79(3) of the *Grundgesetz*.

52 Cover 1983 *Harv L Rev*.

53 See e.g. Alder 2006 *Issues in Legal Scholarship*; Levinson and Graber 2022 *Touro L Rev*.

54 E.g. Cover 1983 *Harv L Rev* 53.

55 He uses the expression "redemptive constitutionalism" "as a label for the positions of associations whose sharply different visions of the social order require a transformational politics that cannot be contained within the autonomous insularity of the association itself": Cover 1983 *Harv L Rev* 34-35.

56 Cover 1983 *Harv L Rev* 60.

57 See e.g. Ziegler 2023 *Yale Law Journal Forum*; Mayeri 2024 *Journal of American Constitutional History*.

claims to neutrality; to provide critical accounts of the past and its relevance to constitutional interpretation; and to mobilise political resistance."[58]

As far as coercive capability in society is concerned, there is no contest between the law and religion: the law must be obeyed at the peril of retribution, whereas in a constitutional state, religious imperatives mostly have persuasive force, or may at most activate a degree of ostracism or censure by an offender's religious peers. In the public sphere, religion must no doubt be practised within the framework of the law, but it has over the centuries become quite clear that the law cannot replace religion, or attempt to replace it without injustice, nor can the state hope to promote justice by avoiding religion.

Regulating the public expression of religion may be unavoidable for the sake of the maintenance of public order, but doing so may of necessity lead to incursions upon religious freedom. For instance, insofar as dress codes and food preparation may be expressions of sincerely held personal belief, the imposition of limitations thereupon obviously sets boundaries to the expression of religious freedom.

The validity and enforceability in a constitutional state of legal norms and legally relevant conduct depend on whether the norms and conduct concerned are compatible with the constitution and the legal order. To determine whether religious conduct is lawful, therefore, requires firstly assessing its constitutional compatibility, and secondly, whether it offends against other legal norms. A religiously motivated public act may be constitutionally permissible but unlawful for other reasons. An example would be the lighting of a ritual bonfire without regard to causing nuisance or anxiety to others. The laws dealing with public nuisance may not directly concern religion, but legitimately be intended to uphold public order.

Determining the justification for limiting or prohibiting a religious act requires interpretive construction of the scope of the constitutional protection of religious freedom in order to decide whether it should trump other legal rules or the rights of others. The result should serve to fairly balance the religious interests of all while also justly maintaining public order.

At the heart of the difficulty is the need to determine the criteria for sovereign action that impacts on religious freedom without disproportionally impinging upon the rights of believers.

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58 Mayeri 2024 *Journal of American Constitutional History* 176. "Dobbs" in this quotation refers to the judgment in *Dobbs v Jackson Women's Health Organization* 597 US 215 (2022).

Stijn Smet recently described neutrality in matters of religion in the context of European jurisprudence as an "essentially contested concept",[59] and concluded that "when neutrality is used as a sword to strike religious claims down, courts can respond in one of three ways: through deference, through substantive interpretation, or through circumvention," and finally suggested:

> [T]hat the neutrality argument should perhaps play a less central role in courts' reasoning in cases on religious dress than it currently does. … [T]here is arguably no reason for courts to either provide their own substantive interpretation of neutrality or to defer entirely to the understanding of other actors, when they can sidestep the neutrality argument altogether and examine the evidence instead.[60]

Speaking semantically, being neutral denotes not taking sides in a contest in which one is not a party,[61] but not even the ideal constitutional state, which guarantees religious freedom optimally, can be conceived of as existing in a value-free vacuum. The powerful and essentially dogmatic conceptions upon which constitutionalism rests may not constitute religion as such according to most definitions, but are as compellingly value-laden as the tenets of most religions. Constitutionalism's principles provide the state and believers in those principles with a distinct understanding of an important component of human understanding of the world – that of the justification for the most powerful institution in society (the state) to exert coercive power. In short, the state cannot escape religion by purporting to function in a sphere of non-religion.

What this means is that neither secularity nor non-establishment can be claimed to be free from belief. Asserting neutrality in the exercise of the authority of the state is in itself an act of belief – belief in a particular mode of construction of the foundations of constitutionalism. Since those foundations are nothing if imbued with discernible fundamentals of a describable worldview, claiming neutrality in their name is misleading.

Allowing the demands of public order to limit the constitutional protection of religious freedom requires explanation and justification. The courts (and other state organs of authority) that utilise state neutrality as their justification when dealing with religion mostly do so defensively. Feigning the absence of subjective motives, either institutional or personal, is a convenient shield against accusations of prejudice.

For those arguing for the intervention of the state against specific religious attitudes or actions, neutrality can also be used as an offensive weapon to

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59 Smet 2022 *OJLR* 51.

60 Smet 2022 *OJLR* 73.

61 At least, that is what the notion entails in international law. Cf e.g. Anon 2024 *International Law Studies* 7-6: "The law of neutrality seeks to preserve friendly relations between belligerent and neutral States by permitting States to avoid taking sides in an armed conflict."

limit or eliminate concessions to those who hold different beliefs. This is often done by believers in non-belief or a-religion.

Whether used defensively or offensively, the purported religious neutrality of the state is a mechanism for evasion or disavowal of the reality of the core role of religion and ontological belief concerning the nature of state authority and in the personal and social lives of all citizens.

Putting it bluntly: state neutrality in religious matters can be no more than an illusion, a pretence.

5 Protecting and defending religious freedom objectively is possible in a constitutional state

If not pragmatic neutrality, then what should guide the constitutional state in its function of ensuring public peace and order when dealing with religious questions? In finding an answer to this question, the tenets and premises underlying the constitutional and legal order concerned, however interpreted, cannot be avoided, but being in competition with other worldviews, they cannot provide a full answer.

Doctrinally, it would be outrageous for a government, legislature or court of a constitutional state, propounding the principle of religious freedom and equality, to favour one religion above another. Upholding constitutionalism demands the imposition of its founding beliefs, including when they clash with other religious considerations. Preferring constitutionalism to a belief system which is not in harmony with it can therefore not be understood to be neutral, but it may have the effect of neutralising a dissonant belief through the exercise of state power.

Consider a hypothetical case before a judge who lives by the tenets of Judaism and serves in the judiciary of a constitutional state. Before the court, a Muslim organisation challenges the constitutionality of the award of a literary prize to an author practising Confucianism. The court's jurisdiction is based on the fact that the awarding institution receives a government grant. The acclaimed novel describes Islam as a faith based on ahistorical narratives, and the author also denounces all other confessional religions as naïve delusions.

It stands to reason that such a dispute cannot be adjudicated justly by the subjective application of the hypothetical judge's rabbinic convictions. The judge would, while acknowledging unavoidable subjective religious instincts, have to find a way to deal with the matter fairly and objectively, while also being bound to satisfy constitutional demands, specifically in this case, the protection of religious freedom and the freedom of expression, which are to be justly balanced against other legitimate interests.

The protection of religious freedom as a foundational constitutional right cannot be achieved one-dimensionally, for instance, by simply prohibiting state involvement in religious affairs. Religion is a multi-dimensional human trait harbouring a complex of beliefs, practices, cultural usages, expectations, motivations and attitudes. Legal regulation of the variety of modalities of religious expression is bound to constrain religious freedom, especially since it unavoidably involves the competing interests of the state, society and often also a range of alternate beliefs.

This confronts the constitutional state as a product of liberal democracy with a potential dilemma: how to deal justly with religion in its varied manifestations while maintaining its own subjective, constitutionally expressed self-conception as the product of a very specific, religion-like understanding of the world: individual liberty, which is the point of departure for the justification of constitutionalism on the basis of popular sovereignty, the social contract, democracy and the entrenchment of human rights.[62]

If it should be possible at all to transform this potentially irresolvable dilemma into a solvable problem, an objective moral standard is required, one that is above and beyond the range of competing religious views, and at least palatable, if not acceptable, to most religious attitudes.

5.1 Substituting neutrality with objectivity

Instead of pursuing an unachievable attitude of detached neutrality, the just resolution of religious disputes demands objectivity. Objectivity is fundamentally distinguishable from neutrality. Neutrality purports to exclude an association with any worldview, religious or otherwise, whereas a truly impartial approach becomes possible only if any subjective preference is first recognised and then dealt with cogently.

Aulis Arnio aptly described the need to distinguish between neutrality and objectivity as follows:

> As is well-known, the goddess of justice is usually described with her eyes covered with a bandage. Her impartiality is a kind of neutrality that does not glance around. The symbol is, however, simultaneously a sign of danger. The goddess of justice can never see the course of her sword. Her dispensing justice is blind. And to blind action is always connected, whether we want it or not, the danger of sporadicality, ultimately of despotism. Only the kind of dispensation of justice that with an open look – fearing no justification – takes into consideration all circumstances, produces simultaneously both justice and reasonableness. For this reason one should, considering the challenges of modern society, presumably take off the bandage covering the eyes of the goddess of justice.[63]

62 See e.g. Venter *Language of Constitutionalism* 26-28 and 141-160.
63 Aarnio *Reason and Authority* 16-17.

Decision-makers are therefore specifically called upon also to make a conscious effort to acquire an understanding of their personal beliefs, meaning comprehension of the premises that drive their subjective attitudes. This is not to say that decision-makers must be philosophers, but that they should have clarity about the reasons for their personal inclinations and preferences.

Neither neutrality nor objectivity comes naturally, especially where one's worldview is at stake. Whereas religious neutrality demands impossible detachment, a decision not to get involved, objectivity calls for a conscious decision to be fair, despite one's personal proclivities. Objectivity in a particular instance of authoritative decision-making requires clarity about one's innate preferences regarding the matter at hand, firstly, followed by the express resolve not to impose one's subjective predilections on others by not taking their beliefs and spiritual needs into consideration.

Is this achievable? The decision-maker's subjective instincts alone should not determine the outcome, nor the belief system of any one of the parties involved in a religious dispute, whether their argument is with the state or with one another. Despite the state's claim to coercive power, merely imposing the liberal thinking underlying constitutionalism, which may be objectionable to some of the parties, cannot reasonably be expected to result in objective justice for those with different thinking.

What must be accepted by those entrusted with the powers of the constitutional state, acting as they must in the name of the state, is the inexorable relevance of religion, the decision-maker's and that of the parties concerned, and the worldview upon which the constitutional order is founded. Attempting to harmonise divergent worldviews neutrally is impossible. A quasi-neutral option might be a sincere effort to cause the least harm to all interests concerned.

Such is the approach in German constitutional law, where the notion of *praktische Konkordanz* (practical concordance) was developed. In 1995, the *Bundesverfassungsgericht* dealt with the need to balance the unqualified constitutional right to religious freedom with the state's constitutional obligation to provide public education. The Court famously found that:

> This conflict between different bearers of a fundamental right which is guaranteed without qualification, and also between such right and other constitutionally guaranteed concerns, must be resolved according to the principle of practical concordance, which requires that none of the opposing legal positions is preferred and realised maximally, but that all should experience the most beneficial settlement possible.[64]

[64] *BVerfGE* 1 BvR 1087/91 16.05.1995, 51 (author's translation).

How can our hypothetical case, posed above of the Jewish judge having to adjudicate the awarding of a state-sponsored prize to an anti-religion author, be adjudicated in a manner most beneficial to all the parties by applying practical concordance? The primary parties would be the complainant and the awarding institution, with the state and the recipient of the award both interested parties, but not necessarily participants in the litigation before the court. The Islamic complainant is repelled by the idea that the state should condone the anti-religion and anti-Muslim stance of the author, but the author's constitutional right to freedom of expression may not be limited excessively, and the rules governing the award sponsored by the state must not violate the constitution. These are considerations that the judge is bound to account for.

The application of practical concordance in such a case might play out as follows: the court orders the withdrawal of the government's grant to the awarding institution pending the revision of its rules to the effect that works that unduly cause offence to others are excluded from future consideration. Such an order might strike a balance between the opposing legal positions: the complainants would be vindicated to a degree, the recipient of the award would by implication experience judicial censure of his attitude while retaining the award, and the awarding institution would not be required to withdraw prizes awarded in the past, but will have to take steps to avoid similar embarrassments in future.

Practical concordance does represent a step away from artificial neutrality and seems to be a method to engage with opposing subjective preferences, which would require understanding those preferences without benefiting one over the other. This appears at first sight to be a form of *engaged* neutrality, which, however, is a contradiction in terms, because neutrality requires *dis*engagement. Practical concordance does not provide a clear measure for determining optimal benefit to each of the competing parties. Unavoidably, however, relative benefit must be construed within the framework of the dogmatic tenets of constitutionalism.

5.2 An objective moral standard

A mere pragmatic, value-free calculation of least harm to the contesting parties cannot be said to guarantee real justice perceived as such by those concerned. To serve justice optimally would, in fact, require an objective moral standard of justice accepted by all, and also a recognition of the reality that all are inescapably prone to predilection. Neutrality is a subjective attitude of disinterestedness and therefore cannot serve objectivity.

It must be accepted that where the exercise of the authority of the state affects religious interests, an outcome that would please or displease some more than others is inevitable. To those who are affected negatively by fair

state action, it should be evident that the outcome is just in the circumstances, however disappointing. Seeking a just outcome by balancing legitimate but divergent interests in a manner that causes the least harm to everyone, specifically in terms of the demands of constitutionalism, might be perceived to be a fair option to some, but constitutionalism, with its deep ontological roots, is not an objective standard against which relative harm can be measured to ensure justice.

Happily, a universal moral standard for justice does exist, although it is not institutionalised nor articulated in detail. This norm does not offend against constitutionalism, nor against any of the established religions or most forms of irreligion. It is to be found under the rubric of *reciprocity*: do to others as you would wish them to do to you, also referred to as "the golden rule".

This canon is truly universal. Although the Christian Bible has made reciprocity famous, its promotion as a universal norm predates Christianity by far. Harry Gensler for instance, shows how reciprocity is ordained by Judaism, Christianity, Islam, some other Abrahamic religions, Hinduism, Buddhism, Confucianism, Taoism, Zoroastrianism, ancient Greek and Roman polytheism, and more, and that atheists and agnostics "can accept [the Golden Rule], but 'without the supernatural justifications'".[65] He also deals with many possible objections that may be and are raised against the Golden Rule, but ends his book with his concise summary: "Treat others only as you consent to being treated in the same situation".[66]

I believe that, like the universal acceptance that murder, theft and dishonesty are socially repugnant, reciprocity is ingrained in the human mind as an instinctively shared standard of objective justice. Reciprocity is logical, but it is much more: it represents a foundational human instinct sustaining the essential notion of fairness, regardless of one's worldview.[67]

The Golden Rule, or reciprocity, is, in essence, not complicated, but scholarly writings have often introduced analytical elements into the concept, thereby obscuring its simplicity. Inevitably, however, the simplicity of the rule does not prevent the need in some concrete cases for complex argumentation, but overthinking the matter may dilute its salutary effects.[68]

Determining the demands of reciprocity in a particular situation may require the persons or institutions bearing the state's power to decide the outcome of a specific matter to rise above not only their own preferences, but also

65 Gensler *Ethics and the Golden Rule* 47-70.
66 Gensler *Ethics and the Golden Rule* 236-301.
67 Cf. e.g. Green "Wired for Reciprocity " 170-172.
68 Gensler *Ethics and the Golden Rule* demonstrates this well in his second chapter at 21-45. Consider also works such as Binmore *Crooked Thinking or Straight Talk*; Neuser and Chilton *Golden Rule*; Apressyan 2020 *Russian Studies in Philosophy*; Wattles *Golden Rule*.

above the preferences of all those who would be affected by the exercise of the power. The decision-makers should also make an honest attempt to obtain relevant information concerning the beliefs and preferences of all involved, including the premises underpinning constitutionalism. Feigning impossible religious detachment in exercising the power of the state in religious matters and presenting oneself as neutral are unlikely to serve real justice.

How might the golden rule be applied to our hypothetical case? In the first place, it would require the judge to strive to do to the parties in the dispute, being the Muslim complainant and the awarding institution, as he would wish them to do to him if their places were reversed. The prize-winning author and the government are not parties in the litigation, but they also have interests in the outcome of the case.[69]

The judge would have to acknowledge (at least to himself in his personal consideration of the case) that his rabbinic instincts would be averse to the anti-religious attitude of the author and then resolve to approach the matter objectively, despite his natural prejudices. This would not require him to distance himself from his personal convictions, but he would have to be aware that his religiosity and subjective belief in Jewish law or morals must not divert him from considering the case objectively. In his ruling, he is bound to the applicable legal norms, as are the parties. Although the law is not a value-free set of inflexible norms, it must be interpreted and applied as objectively as possible. The judge would therefore have to say to himself: "I am not presiding over this case as a believer in rabbinic justice, but as a judge exercising the coercive authority of the constitutional state in the interests of objective justice to all parties concerned and of the maintenance of peaceful social order."

Reciprocity would require the judge to apply this thought process also to the Islamic complainant's stance. This means that he would conceptually have to project himself into the place of the complainant and endeavour to understand the underlying motives for lodging the complaint. He would have to ask himself: "If I were a Muslim, how would I have responded to the granting of the prize to the author?"

The judge would also have to assess the actions of the respondent institution objectively by considering whether the award of the prize conformed to the requirements of its own rules and procedures, whether those complied with the applicable law, and whether the effects of the award on others (such as the complainant) should have been taken into account.

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69 Although the attitude of the recipient of the prize reflected in the impeached work is the *ratio causa*, he is a mere spectator, except if the court's decision impacts directly on the award of his prize.

His question should be: "If I were to decide on behalf of the institution whether the prize should be awarded, would I have been justified in doing so in accordance with the nature of the institution as a recipient of government funding?"

Perhaps the most complex act of reciprocity that the judge would have to undertake would be to consider whether the applicable law, which may or may not favour support for an award of this nature, conforms to the requirements of the constitution and the state's mission to maintain order and justice in this religiously plural society. He would ask himself: "If I were the lawgiver, would I have complied with the demands of justice and public order by making the law which may or may not support institutions that conduct their affairs as this one does?"

Compounded, the judge would have to respond to the question of how he, as a Jew, would have acted if he were respectively the complainant, the awarding institution and the state. The actual judgment conforming to the golden rule will depend on more facts and evidence than those provided in the hypothetical example, such as proof of the actual effects of the awarding of the prize on the complainant, the specific constitutional and legal framework within which the awarding institution operates, and the conditions under which the institution receives government grants.

What that outcome should not be is a bland rejection of the complaint on the grounds of unrestricted freedom of expression based on the imagined "neutrality" of the state, a declaration of invalidity of the award on the grounds that religious expression which is offensive because it is not neutral is unconstitutional, or a finding that the complaint is unfounded because the majority of the population is agnostic and neutral towards religious disputes.

The golden rule, therefore, allows for the replacement of prejudice and partiality disguised as "neutrality" with objective fairness by honestly facing up to the difficulties of being fair and objective, thereby empowering the actor to discover and apply the norm of reciprocity.

6 Conclusion

All people are religious, at least in the sense that they have personal understandings of and assumptions regarding the modalities of their existence, their destiny and morality. Billions identify as adherents of one or more religious denominations, movements, or dogmas. Those who do not have beliefs equatable to religion.

None of us can escape the jurisdiction of at least one state as the bearer of authority over our conduct and many aspects of our public and private lives.

No state can avoid dealing with the religious conduct of its citizens and religious institutions in the interest of maintaining public order and peace. For any state to attempt to do so in a neutral vacuum of disengagement or isolation from the ubiquity of religion would be futile.

Claims by constitutional states that they are religiously neutral while promoting and defending the religion-like foundations of constitutionalism are illusory because the notion of constitutionalism is itself deeply rooted in specific epistemological and ontological explanations of the nature of the state and the justification of its enforceable powers.

Dealing with religious and religion-like tensions between the state and those under its authority and among citizens adhering to the tenets of their divergent religious stances requires subscription to an objective and universally accepted moral standard. Such a paradigm is to be found in reciprocity.

The constitutional state must accommodate religious diversity, but while it is impossible to do so neutrally, the standard of reciprocity can make possible the adoption of an objective approach for dealing with the inexorability of religion.

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List of Abbreviations

Colum Hum Rts L Rev	Columbia Human Rights Law Review
Harv L Rev	Harvard Law Review
Hastings Int'l & Comp L Rev	Hastings International and Comparative Law Review
Hastings LJ	Hastings Law Journal
OJLR	Oxford Journal of Law and Religion
Touro L Rev	Touro Law Review
UK	United Kingdom
USA	United States of America